



1986

## Transcript of Proceedings of the Eighty-Fourth Annual Meeting of the North Dakota State Bar Association

North Dakota State Bar Association

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In volume 62, issue 1 of the North Dakota Law Review the title page of the Transcript of Proceedings of the Eighty-fifth Annual Meeting of the North Dakota State Bar Association contained incorrect information. The correct title page should read as follows:

**TRANSCRIPT OF PROCEEDINGS  
Of The  
EIGHTY-FIFTH ANNUAL MEETING  
Of The  
NORTH DAKOTA STATE BAR ASSOCIATION**

**Fargo, North Dakota  
June 20-21, 1985**

**OFFICERS**

Orlin W. Backes .....	President
David L. Peterson, .....	President Elect
Kermit E. Bye .....	Immediate Past President
Constance L. Triplett .....	Secretary-Treasurer
Les Torgerson .....	Executive Director

The Board of Editors apologizes for any confusion our error may have caused.

**TRANSCRIPT OF PROCEEDINGS  
Of The  
EIGHTY-SIXTH ANNUAL MEETING  
Of The  
NORTH DAKOTA STATE BAR ASSOCIATION**

**Winnipeg, Manitoba  
June 12-13, 1986**

**OFFICERS**

DAVID PETERSON .....	President
JOHN WIDDEL, JR. ....	President Elect
ORLIN W. BACKES .....	Immediate Past President
CONSTANCE TRIPLETT .....	Secretary-Treasurer
LES TORGERSON .....	Executive Director

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Thursday, June 12, 1986

(Whereupon, the proceedings commenced at 9:50 a.m. as follows:)

PRESIDENT PETERSON: May I have your attention, please. I would like to call the General Assembly of the State Bar Association for 1986 to order at this time. A couple of preliminary matters before we get going through the agenda, is if any of you are going to be speaking from the floor, would you please identify yourself and where you are from so that the court reporter can get that down. I would like to also point out that I have appointed Orlin Backes as the parliamentarian for the duration of the General Assembly. And in the event we have any hotly contested votes, I have been told that Pat Fisher is able to count, so I'm going to appoint Pat as one of the proctors. And Bob Feder just smiled a little bit, so he gets to help Pat count. So if you two gentlemen would be available to count in the event we need that kind of service, I would appreciate it.

At this time I would ask you all to stand, and we will have the playing of the National Anthem.

Please be seated. Thank you very much. We indeed have been fortunate in the assistance that we have received from our colleagues in the Province of Manitoba in putting together this meeting and various functions. Sherry and Les have called on our colleagues up here on a number of occasions and have received nothing but good words and assistance from them in every respect. We are fortunate today to have a couple of representatives from the Manitoba and Winnipeg legal community with us. I would first call on Rocky Pollack, who is the President Elect of the Manitoba Bar Association. Rocky?

MR. ROCKY POLLACK: Thank you, Mr. President, Chief Justice, members of the State Bar Association of North Dakota, and guests. Good morning. *Bonjour, mes amis*. It is not surprising that this is not the first meeting of the State Bar Association of North Dakota in Manitoba. Nor is it surprising that Manitoba lawyers are not strangers to your state. I have the honor of representing the Manitoba Bar Association here, the Manitoba branch of the Canadian Bar Association. And among its goals is that of stimulating dialogue and information exchanges with other jurisdictions on matters of interest to lawyers. We have had several meetings in Fargo and Grand Forks. Our law schools have held joint educational programs. Most importantly, however, we are neighbors. We share a common border, geography, and climate. As neighbors, I think we should get to know each other. So if you are sitting beside, eating beside, jogging beside, or drinking beside a Manitoban at this convention, I think it won't take long for you to make a new friend. My wife Sharon and I look forward to meeting as many of you as we can in the next few days. The Manitoba Bar Association members enthusiastically say welcome back. To those who are here for the first time, thank you for coming. Play as hard here as you work at home, and remember how easy it is to come visit again. Thanks again.

PRESIDENT PETERSON: Thank you very much. The next welcome that we will have is from Dan Baizley, who is the President of the Law Society of Manitoba. Don?

MR. DON BAIZLEY: At the outset, I can't help but remark on the size of the turnout this morning, which is by Manitoba standards, and particularly in terms of the opening morning of a convention, very large. I'm not sure whether that — this turnout reflects a compliment to the program ahead or an insult to our night life. But welcome to you all.

You will note from the program that we in Manitoba function with two organizations representing the interests of the profession. I can assure you that the purpose in the two functions is not to burden visiting bar associations with two welcomes. We have two very separate and distinct roles. Rocky will tell you at times we are adversarial, but we think we are parallel. The Bar Association is part of a nationwide organization that devotes its energies to promoting the interests of the profession, advocating law reform and providing legal services to the community as a whole. The Law Society, on the other hand, is the governing body of the profession. Its responsibilities are in the areas of admission of members to practice, standards of practice, and discipline of members. Put simplistically, the Law Society's responsibility is to protect the public, whereas the Bar Association's responsibility is to protect the lawyers. Now you can see where the adversarial aspect of our relationship creeps in from time to time. I do wish to say, though, on behalf of the membership — and I should add one to this — I do practice law here in Winnipeg — that is a bone of contention in this community.

The bulk of my practice is involved in representing professional hockey players. Some would say I'm a professional agent. About two years ago we developed a concept, a little push from the government in developing it. But we have lay benchers sitting on our disciplinary committee and that sort of thing. There is a membership that says the Society has gone too far in having a league president. I'm going to preface my remarks I make on behalf of the Law Society so the appropriate disclaimer can exist for any who have any concern.

We at the Law Society are pleased that you are here again, and we are particularly pleased that we have been able to be of some assistance both in terms of support staff and the use of the facility. We are proud of the fact that in the last year we have moved into a building of our own which serves as a permanent headquarters for the profession here in Manitoba. The building is called the Law Society Building. It is situated within a few blocks from here. And I invite any of you here who are so inclined and in the area to drop in and view the premises. I have been assured that you would be most welcome, and we would be happy to show you about, such as it is. I know there is a heavy program ahead. I won't lengthen these proceedings further. And say welcome, and we hope you enjoy your stay in Winnipeg and enjoy a successful convention. Thank you.

PRESIDENT PETERSON: Thank you very much. On behalf of the North Dakota Bar, Rocky, I would like to present you with this card of appreciation and a framed picture of the outside of our brochure, and thank you very much for coming here today and welcoming us.

MR. ROCKY POLLACK: Oh, thank you very much.

PRESIDENT PETERSON: Don, I would also like to present you with a card of appreciation and one of the same type of award.

MR. DON BAIZLEY: Thank you.

PRESIDENT PETERSON: I haven't been up here over ten minutes, and I have screwed up already. I should have called on Phil Johnson prior to the welcoming remarks for the invocation. Would you please rise for the invocation at this time.

MR. PHILIP JOHNSON: It is a little different than church, but sort of like church in that nobody wants to sit in the front rows. Let us pray. It is fitting, Lord, that we should ask your blessing upon our gathering to recognize the common roots of American and Canadian jurisprudence, beyond the English common law, beyond the tenets of court, beyond the Magna Carta lay the roots of our morality in a shared religious mission. More than statutes and cases, we share works of great stature, such as the King James Bible, among the finest examples of literature in the English language. Help us, Lord, as fellow preachers of your shrinking world, to recognize, to celebrate, to elevate the most humane, the most wise, the most just of the great traditions of the English speaking peoples of this earth. In your name and for your cause of justice we pray. Amen.

PRESIDENT PETERSON: Thank you very much, Phil. The next item on the agenda has traditionally been the president's address to the Assembly. And in keeping with that tradition, I present the following. At the outset, I would like to take this opportunity to thank the members of this Association for affording me the privilege and honor to serve as the president of this Association. I would also like to thank the lawyers in our law firm for their willingness to cover my schedule whenever it was necessary for me to be absent on Association business.

In these remarks I hope to highlight what I see as the more significant events that have occurred during the past year, to briefly discuss some important issues which this General Assembly will need to address, and finally, make some personal observations and recommendations.

A short time before I assumed the presidency we hired a new executive director, Les Torgerson, and any successes we might have had during this past year are largely attributable to Les and his fine staff. They have worked cohesively and have established internal procedures, including computer programming, which have allowed us to do a much better job with the Association finances and other business. Because of that, we have recently added a communication specialist to our staff, which will allow a redesign of our publications and allow better dissemination of information to our membership, the press, and most importantly, the public.

We now have the new Pattern Civil Jury Instructions completed, thanks to some particularly hard work by Judge Burdick and Judge Schmalenberger and Chairman Mitchell Mahoney and his Pattern Jury Instruction Committee. You may place your orders for these newly drafted instructions with the staff here at the annual meeting, and they will be sent to your office upon your return.

Over sixty lawyers in our Association have volunteered to be on the farm panel to provide no cost or reduced cost effective legal assistance to farmers facing financial problems. And other lawyers, nonlawyers, and organizations have donated money to cover costs incurred in some of those farm panel cases.

Under the direction of Sherry King we have sponsored a three day basics course on civil and criminal litigation as a type of bridge-the-gap program for new lawyers and other lawyers who desire to review these particular areas of the law. We have also sponsored many other excellent CLE programs throughout the year.

In order to determine if there may be some alternatives available for our members in the area of legal malpractice insurance, we have had a survey conducted, and the demographic data will be analyzed by the Minnesota Lawyers Mutual Captive and Missouri River Underwriters to determine the feasibility of participating

in the Minnesota Captive or creating our own state or regional captive or provide professional malpractice insurance coverage some other way for our membership. Surveys representing 756 lawyers have been returned as of May 30, 1986. Of those responding, 77% favored the formation of a captive company, and the largest group (43.3%), favored an assessment of a thousand dollars per lawyer as initial capitalization of that company. The current average premium of those insured who responded to the survey was \$1,382 per lawyer per year, and most often the coverage that was in place was for amounts between \$200,000 and \$600,000. Information received regarding claims indicates that since 1980, those responding to the survey had claims involving settlements of approximately \$328,505.71, with estimated defense costs of \$111,291.33. And comparing that to the average premium base of \$1,382 per year times 756 respondents, equals a current annual premium outlay of approximately \$1,044,792. It certainly appears from that information, at least, that writing legal malpractice insurance in North Dakota is not a losing proposition.

Representatives of Missouri River Underwriters are here at the convention. And if some of you have questionnaires that you have received that you have not returned, please do so, because the larger return we have of the questionnaires, the more accurate the data and the better able we will be to choose some alternatives in this area.

Turning now to some important issues which must be voted on during this General Assembly, the first of which is the adoption of the new North Dakota Model Rules of Professional Conduct. Many members of this Association have labored for several years over the ABA Model Rules and have completed their work, and in my opinion, have made appropriate changes in the ABA Model to accommodate our practice in North Dakota. The Board of Governors has had an opportunity to review their work and has unanimously endorsed the adoption of the new rules. And if you have not yet reviewed them, do so before you are asked to vote on them. And I strongly urge your favorable vote on the Model Rules which will be presented to you.

The matter of establishing an interest on lawyer's trust accounts plan, commonly referred to as IOLTA, will also be before you at this General Assembly meeting. North Dakota is one of the last states to bring this issue to its membership. This money, if the plan is adopted, is used by various states for such matters as providing legal services to indigents and educating the public about our justice system. Bar leaders in those states that have experience with IOLTA that I have discussed it with are unanimous in their support of the IOLTA concept, and I strongly recommend that we adopt an IOLTA plan at this general meeting.

There has been discussion of the supreme court case load for several years, and I felt that the Bar Association should conduct an independent study of that issue. Accordingly, I appointed a committee including Duane Breitting as chairman, Patrick Durick, Dwight Kautzmann, George Dynes, Fred Whisenand, LeRoy Loder, Robert Heinley, Earl Meyers, Jr., and Robert McConn to conduct that study. They have done so, and there is available for your review and inspection a written report, which I should add should have been given to you at the time that you picked up registration material. If you do not have it, check with the desk out there. I request that you stay and listen to the presentation of that at the annual meeting here this morning, and I request that you review the written report and that you participate in the discussion. It would further be my recommendation that the Association pass a resolution regarding this important issue after you have heard the committee report and completed the discussion. And it is my further recommendation that the resolution be one of this Association supporting the committee's recommendations.

Now, this is a personal observation. As I have traveled around the country this past year and participated in meetings with bar leaders and had an opportunity to view court proceedings in other jurisdictions, it is my considered opinion that North Dakota lawyers are equal to or superior to lawyers anywhere in the country. Unfortunately we are seeing some undesirable tactics being introduced into our practice which may have been borrowed from lawyers coming to North Dakota from other jurisdictions. North Dakota lawyers have historically been able to vigorously represent their clients and at the same time be cordial to opposing counsel and the court, and I hope we can continue that type of professionalism rather than engage in the petty antics that are sometimes written about and that I have sometimes viewed in my travels in this past year when viewing other court proceedings.

As I travel around the state and talk with lawyers whose practice brings them into more than one judicial district, a disturbing trend is reappearing, which is the appearance of a variety of unwritten rules or operational procedures from one district to the other. Several years ago all local rules, written or unwritten, were supposed to have been abolished in favor of the newly enacted Rules of Court so that counsel could practice in all jurisdictions of the state and would know what rules and procedures were to be used. I would suggest that the Board of Governors of this Association have formal meetings once or twice a year with the Presiding Judges Association and their administrators to discuss ways to minimize, to the extent possible, variance in procedures from one district to the other.

I would also suggest that the Board of Governors formally meet at least once a year with the members of the supreme court and the supreme court administrators so the court and its administrator can be kept apprised of what the concerns of the practitioners are on a statewide basis in a formal setting. I would hope that such a meeting could be a free-wheeling discussion, and one which would allow the supreme court to be more aware of the Bar's perception of the judicial system.

I would also suggest that the Board of Governors meet at least annually with the federal court judges and magistrates for a full and complete discussion of the federal rules and procedures and the possible need for revision. I am well aware of the fact that the Federal Practice Committee is being reconstituted, but I still believe it would be worthwhile to have a meeting between the federal judges and the magistrates and the Board of Governors.

The reason for suggesting these meetings with the Board of Governors is because the Board of Governors has representation on it from throughout the state, and thus is a group that can bring to such meetings the concern and suggestions of our statewide membership and thus allow the courts to be continually aware of the ongoing day-to-day concerns of the practitioners, rather than simply relying on their recollection of how it was when they were a practitioner. After all, the practitioners represent the public for whom the system is operating, and the public's perception is entitled to consideration not only by the lawyers, but also the judiciary. That perception, as I have derived it over the last year or so, is one wherein the public that has been involved in disputes is less than enamored with the operation of the system.

Finally, I come to an area which has had massive publicity over the last year, which is so-called tort reform. As I have met with bar leaders throughout the country, it is clear that there is a massively coordinated and well financed effort to massively overhaul our tort system. I make these remarks not as a plaintiff's lawyer (as I often am so identified), and not as a defense lawyer (which I sometimes function as), but as a lawyer who is cognizant of

the oath which we each took upon our admission to the Bar which says, in pertinent part, that "I will never reject from any consideration personal to myself the cause of the defenseless or oppressed." We have all heard the charges that our tort system is out of control, that our citizens are litigation crazy, that courts have gone overboard and greatly expanded litigant rights, that jurors are returning unconscionable verdicts, and because of this, insurance companies are going broke and various businesses and citizens and governmental entities cannot secure insurance or cannot secure it at a reasonable price.

No lesser person than our current President stands before a tort reform group, with a dozen Boy Scouts behind him in full dress uniform, and recites as examples two cases which he claims demonstrate that our system and its jurors are out of control, when with a little checking he or his speech writers would have found the facts which he recited were grossly distorted. The public relations and Madison Avenue advertising sales approach promoting tort reform being conducted throughout the county is awesome. And make no mistake about it, it is also very effective, as nearly every legislature that has met within the last year has had presented to it a host of bills to "reform" our tort system. They should more accurately be labeled as bills to destroy our tort system.

The rest of the story does not capture many headlines, but nevertheless the National Center for State Courts has just released a report saying the claimed litigation explosion is a myth. The National Association of Attorneys General has conducted a study which will be presented to their convention this June, which report says, among other things, that "the facts do not bear out the allegations of an explosion in litigation or in claim size, nor do they bear out the allegations of a financial disaster suffered by property casualty insurers today." In their report they state that "the emphasis for a need for change in the civil justice system to rescue the insurance industry from financial problems is therefore entirely misplaced." Furthermore, they cite recent rises in insurance stock prices as evidence of insurance industry profitability.

Will the "tort reform" legislation bring level or lower rates, or insure availability? No promises have been received from the insurance industry, and now we see why. The Washington State Legislature gave the insurance industry and tort reformers all they wanted — caps on damages for pain and suffering, elimination of joint and several liability, and more stringent time limits on malpractice suits, among others. As reported in the May 16, 1986, edition of *The National Underwriter*, the national newspaper of property and casualty insurance, the Washington State Insurance Commissioner rejected all liability rate increases filed since mid-March because they did not take into account the reform measures that the legislature had adopted. The industry responded to his action by saying they can't change the rates now because they claim they don't know the effect of the reform measures, so they get what they want and continue to raise their premiums anyway.

There are strident calls for caps on pain and suffering awards, and on punitive damages — or their total elimination, and interference with contractual rights through mandatory caps on contingent fees, and to allow the injury causer the benefits of collateral source payments paid for by the injured party to offset the injury causer's responsibility. Isn't it interesting that they are less interested in putting caps on awards for some economic loss, such as for medical care. Apparently they are concerned that those who provide services or products for the injured party can get their full measure, but they are more than willing to arbitrarily tell a severely injured man, woman, or child that twenty-four hour per day suffering for years or a lifetime is of no value or limited value. Further, they tell that person that even if the wrongdoer caused the injury in a willful, wanton, or malicious manner, that the injury causer need not worry about paying a punitive award. We as lawyers, plaintiff or defense, have an obligation to be an advocate for the average person, a voice for the voiceless, a partisan for the powerless, and a source of strength for those who suffer and are weak. Even if we do not represent those persons, we as lawyers must work to preserve the system that allows them to be represented in full measure.

The North Dakota Legislature is already having bills drafted similar to those that other legislatures have received and considered, and in some cases adopted. Some of them have been passed, some of them have been killed. And these bills will obviously be presented to the 1987 legislature. I would hope that this Association, and the individual members of this Association, have the guts to say to these legislators that they need not tamper with our system in North Dakota, because it is not out of control, and anyone who claims it is out of control simply does not have, or chooses to ignore, the facts. Those who are calling for tort reform in North Dakota have apparently never considered gathering the jury statistics in North Dakota. Wouldn't you think that would be the first thing they would want to have before them?

Several months ago we launched a project to gather all of the actual civil jury trial statistics from every county throughout the State of North Dakota covering the last ten years. At this time, I have all of those returns for forty-six counties. We are waiting for the other seven, and I expect to have those by the end of this month. These statistics indicate that there are counties where there have been no jury verdicts, and in other counties, rural and urban, the statistics indicate that jurors of North Dakota have exercised reasonable judgment, and the statistics show that there is no need for caps or elimination of pain and suffering awards and punitive damage awards in North Dakota.

I would hope, as I said, to have this information available for dissemination to the membership within the next month. As lawyers we have an obligation to keep access to the courthouse possible for all citizens, to preserve the function of juries, and to allow all who come to the bar of justice to receive it. I would hope that when the debate starts and continues through the legislative session that each of you will take time to study the issues and make known your view to your respective legislators and others. And I would hope that this Association will be a strong voice for the retention of our system in North Dakota, which is working.

I said in Dickinson several years ago when I was elected as your president elect that I would do the best job I could for the Association. I have tried. And I thank you very much for the opportunity.

(Applause.)

**PRESIDENT PETERSON:** The Association has traditionally over the years invited the Chief Justice to give a report on the state of the judiciary, and we are pleased to continue that tradition. And at this time I would ask Chief Justice Erickstad, who needs no introduction to this group, to come forward and present us with the state of the judiciary address. Chief Justice Erickstad?

**CHIEF JUSTICE ERICKSTAD:** Good morning. I thank you, President David Peterson, ABA delegate Phil Johnson, ABA delegate Kermit Bye, President Don Baizley of the Law Society of Manitoba, President Rocky Pollack of the Manitoba Bar Association. Incidentally, I have subscribed for the last few years to the *McLean's* magazine, which you all know is a weekly Canadian magazine, so that I might be better informed on our neighbors to the north, and I really enjoy reading that each week.

President Elect John Widdell, Jr., Secretary-Treasurer Constance Triplett, members of the Board of Governors, Executive Director Less Torgerson, and especially you, the members of, and the participants in, this

1986 Annual Meeting of the State Bar Association of North Dakota, friends all. The friendly manner by which we have all been received by the judges and lawyers of this city, province, and nation have made us all feel very welcome. Don't you agree?  
(Applause.)

CHIEF JUSTICE ERICKSTAD: I'm pleased that you, the North Dakota State Bar Association, have invited me again to speak to you on the state of the judiciary. The members of our court are especially appreciative of your friendship which has been demonstrated over the years through your services to the judicial system of our state.

Incidentally, I understand that perhaps about a hundred of you did not receive copies of my written message. And it would help me, if there are any of you in the room who do not have copies, if you would raise your hand and I will have Arnie Fleck and probably someone else who would help in distributing copies of the message at this time. Would you raise your hands, those of you who do not have a copy or would like to look at a copy if you don't have it with you. While you are doing that, I will just continue with my remarks.

When I spoke to you last year, I selected four topics from many topics affecting the judiciary that I thought most merited your consideration. Incidentally, after reading the Breitting report last night from 12 to 1:30, and revising my oral remarks this morning, I wondered whether I ought to just ask you if you would like to join me in calisthenics or listen to my remarks. I know we had a great time last night, and we probably could use calisthenics more than my speech today. But raising some courage which I may be lacking, I will proceed with my remarks as I have revised them.

The four subjects that I spoke to you — spoke about to you last year, I plan to cover in greater detail today, trying to develop what has taken place in the interim. The first one is the need for improvement in appellate court services; second is the need for resolution of jurisdictional problems within the exterior boundaries of Indian reservations; and the third is the need for improvement of our municipal courts; and the fourth is the need for greater participation in and consideration of the future of *pro bono* lawyer services in North Dakota. Today I will discuss developments that have taken place in conjunction with those four topics. In my printed remarks, which you should now have before you, I very briefly highlighted six other subjects which I think should especially merit your attention.

First, the need for improvement in appellate court services. As you know, the Future Appellate Court Services Study Subcommittee, chaired by Representative William Kretschmar of the Court Services Administration Committee — you may see that at Appendix A of my remarks for the list of the members. This committee prepared a report, a proposed bill draft and a proposed administrative rule to implement a court of appeals as a proposed solution to the serious workload problem of the supreme court. Parenthetically, in reading the Breitting report last night — and I maybe missed it — but I cannot recall where the Breitting report considered the recommendations of the Kretschmar report or the proposed bill or the proposed court rule. They may have done so, but it does not seem to appear to have been a significant part of their study by their report.

Now, if you will please see Appendix A-2 for a copy of the proposed rule. Now, this rule was not prepared by our court. It was prepared by the Breitting committee. And I think it would be interesting for you to examine that at your first opportunity. You may secure a copy of the report of the committee from Mr. Torgerson. I think we have only about forty copies of these earlier reports, because you did receive copies of the Kretschmar report at the last meeting. You president, David Peterson, has appointed a committee, as he indicated, of your Association chaired by Duane Breitting to study the issues of the supreme court workload capacity and proposed solutions. And I note this morning that the president has urged you not only to hear the report, but to support it and make it your official position. I humbly would oppose that as an approach today and tomorrow at this conference. Please see Appendix A-3 for a list of the committee members. A subcommittee of that committee, chaired by Dewey Kautzmann, has interviewed each of the justices of our court; our clerk of court, Luella Dunn; and our court administrator, William Bohn; in connection with its study. I think they were very conscientious in their efforts. I'm disappointed at the results.

From reading the president's column in the April issue of *The Gavel*, I was led to believe that Chairman Breitting would have a report ready for presentation to the General Assembly at this annual meeting. Last night when I — or when we arrived in Winnipeg, I discovered the report in the conference material. That was the first time I had seen the report. In light of the careful study of the Kretschmar committee over two or three years, I must admit that I was disappointed in the recommendations of the Breitting committee and its complete failure to recognize the work of the Kretschmar committee. If time permitted today, I would attempt to discuss each of the nine chapters of the Breitting committee report with you. As that is not possible, I would like to suggest that you postpone acting on the report until at least the members of the Kretschmar committee have had an opportunity to study it and come in with their new or renewed views.

One of the objections to the creation of a court of appeals has surfaced quite recently, and that is that the creation of such a court in North Dakota will not have a long term and substantial affect on the case load of our supreme court. This thought is expressed in the hypothesis — and I quote — “that the case load of the court of last resort will decrease in the years immediately following the establishment of an intermediate court of appeals, but that it will increase thereafter nearly to the point it would have reached had no intermediate appeals court been established.” Now, this quote is attributed to a report written by V. Flango and N. F. Blair entitled “Creating an Intermediate Appellate Court: Does it Reduce the Caseload of a State's Highest Court,” which was printed in 64 *Judicature* 74 in 1980.

Incidentally, after my printed message had gone to the press I received a letter from Victor E. Flango, who is V. Flango of the report, one of the two writers who expounded that hypothesis, who in his closing paragraph said, and I quote,

[s]tates that have a single appellate court with mandatory jurisdiction have few options when faced in an increase in case volume. The Supreme Court cannot accept fewer appeals and cannot share the workload with another court. The only options left are to increase processing time, spending less time on each case, rely more on the research of attorneys, restrict oral argument, or write more per curiam opinions. In this situation the public would be better served by the creation of an intermediate appellate court.

Now, those who are interested may secure a copy of the entire letter from Les Torgerson.

In my view, the error in the hypothesis earlier stated is the failure to realize that it takes much less time for the court of last resort to decide whether or not it will refer a case to the court of appeals or thereafter take an appeal

from the court of appeals than it does to decide the case on its merits. In defining "case load," the writers who expound this hypothesis treat those different things as being the same. This is clearly erroneous.

Deciding a case on its merits involves, at a bare minimum, a reading of the briefs, a hearing of the oral arguments, a reading of the pertinent parts of the transcript of the trial court or administrative proceedings if facts are at issue, and examination of the judgment roll, including the exhibits, a reading of the cases cited in the briefs, other research, a preparation of the opinion by one of the justices, a study of that opinion by each justice, a conference or conferences on that opinion, a signing of that opinion, and subsequent consideration of a petition for rehearing, if such a petition is filed.

Determining what cases should be referred to the court of appeals initially can be done expeditiously after preliminary review of each case, as is indicated in section 9 of the proposed rule for adoption by our court to implement the proposed bill establishing the court of appeals as recommended by the Kretschmar committee.

Now, I may have missed it, but I do not recall seeing any consideration of this proposed rule or the proposed bill submitted by the Kretschmar committee in the Breitting report. Incidentally, Representative John T. Schneider of Fargo and Senator Wayne Stenehjem of Grand Forks have been appointed chairman and vice chairman respectively of the Court Services Committee of the Legislative Council — please see Appendix A-4 for a list of the committee members to this committee — to which has been referred the Kretschmar study of appellate court services in our state.

I should point out that notwithstanding that the case load of our court has been gradually growing, the new filings have fortunately dropped off somewhat from a high of 370 in 1984 to 338 in 1985. This may indicate we have reached a plateau. I hope so. It is interesting, however, to note that the case filings thus far in 1986 total 164 compared to 158 cases filed for this same period in 1984, which was the high period, and 152 cases for this same period in 1985. Even at the lower 1985 figure, our justices are writing more full fledged opinions than most of the justices of the highest courts of our country. Last year we each wrote approximately 44 majority opinions and eight special concurrences or dissenting opinions, whereas we should not be expected, according to some experts, to write more than 35 majority opinions each in any one year.

In light of the economic circumstances in which we find our state, I expect that it would be difficult to convince the legislature that we should create a court of appeals in 1987, notwithstanding the justification which we believe exists for such a court. Prior to the Breitting committee report I was hopeful that legislation, however, establishing the mechanics of the court could be approved with a later effective date for implementation when funds in the general fund are sufficient. There are sound precedents for that type of appropriating funds in public building legislation.

Now, with the Breitting report and the Kretschmar committee report recommending different solutions, I suspect we will need to do some more homework. Hopefully, you will not approve the recommendations of the Breitting committee report at this time. They should be commended for their study, but I do hope you will not adopt their recommendations. Further, almost all the things the Breitting committee recommends be done prior to establishing an intermediate appellate court, which they should say is the last resort, were done in Minnesota to no avail. Minnesota increased its supreme court from seven to nine. Now it has acted to go back to seven. In fact, they had added also a commissioner who sat with the court. The Minnesota Supreme Court divided into panels. Now it sits en banc. Most of the things the Minnesota court adopted, as suggested by the Breitting committee, the Minnesota Supreme Court has now abandoned. I would hope we could learn something from their experiences and not be forced to go through the same experiments.

Let me now move on to another subject. The need for resolution of jurisdictional problems within the exterior boundaries of Indian reservations. At the time of your meeting last June the tribes in the case of *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, had secured a stay of the mandate in our court pending certiorari review again in the United States Supreme Court. On March 24, 1986, the United States Supreme Court heard oral arguments on the merits. But as of this date, to my knowledge, no decision has been rendered in this case.

You will recall that our court in *Three Affiliated Tribes II*, on remand from the United States Supreme Court, concluded that an Indian tribe may sue a non-Indian in state court in a case arising within the exterior boundaries of a reservation, providing the tribe accept state jurisdiction in compliance with state law.

Actually, the United States Supreme Court decision, when rendered, will likely only determine the narrow issue of whether or not a tribe may have access to state courts without submitting to counterclaims in state courts in a suit against non-Indians. This is so because federal law, namely Public Law 280, as amended in 1968 by the enactment of the Indian Civil Rights Act, Pub.L. 90-284, and particularly section 402(a), in effect provides — I say in effect provides — that no state may assume jurisdiction of civil causes of action in which Indians have sued Indians, or non-Indians have sued Indians in cases arising within the exterior boundaries of an Indian reservation unless the tribe occupying that reservation has consented.

To resolve those broader issues and even the issue in *Three Affiliated Tribes II*, depending upon how you view that issue, we must look to Congress. However, appropriate action, appropriate congressional action would be difficult at best, if not impossible, without agreement between the tribes and the states.

The State of Maine has been eminently successful in this approach. Negotiations between certain Indian tribes in the State of Maine resulted in the passage of the Maine Indian Claims Settlement, which is contained in 25 U.S.C. sections 1721 through 1735. The jurisdictional agreements are spelled out with more specificity in the statutes of Maine. You may see my printed remarks for a summary of the legislation at pages 4 to 5. This solution in Maine is comprehensive and practical and apparently has served the Indians and non-Indians well in that state.

Since I last talked to you the Legislative Council has appointed an interim study committee, chaired by Senator Stanley Wright of Stanley, with Representative Julie Hill of Rosegen as vice chairman. Please see Appendix B-1 for a list of the committee members and Appendix B-2 and B-3 for copies of the current resolutions. That committee has held a number of meetings and likely will be considering soon the possibility of borrowing some ideas from other states, such as Maine, Kentucky, Washington, Colorado, and others where cooperative efforts to resolve these issues have apparently been successful.

At its annual meeting last summer in Lexington, Kentucky, the Conference of Chief Justices adopted a resolution calling for a study by the Congress of the United States, the Conference of Chief Justices, and the Judicial Conference of the United States of the issue of civil jurisdiction within the exterior boundaries of Indian reservations. Please see Appendix B-4 for a copy of that resolution. The president of the conference, Chief Justice Edward Hennessey of Massachusetts, appointed me to chair that committee, with the assistance of Chief Justice Joseph Branch of North Carolina. Please see Appendix B-5 for a list of committee members. We have been assigned staff assistance by the National Center for State Courts. And although we are proceeding slowly, we



ultimately hope to come up with some suggestions for legislative solutions for these problems. Your advice would be appreciated, I am certain, by Senator Wright's committee and by my committee.

Item three: the need for improvement of our municipal courts. The Municipal Court Study Committee, chaired by Calvin Rolfsen of the Judicial Planning Committee, chaired by Justice Beryl Levine, has now produced a proposed bill. Please see Appendix C for a list of the committee members. Incidentally, you may secure a report of the subcommittee on which the bill is based by contacting Les Torgerson. The committee has prepared draft legislation to provide flexibility to municipalities in providing municipal ordinance violation services by transferring these services to county court. This decision would be at the option of each city. Please see Les Torgerson for a copy of this proposed legislation.

The specter of liability for municipalities and lay municipal judges and the increasingly complexity of municipal court services, particularly DUI cases, have prompted the committee's study and recommendations. As a result of Representative Kretschmar's sponsoring of HCR 3104 in the 1985 Legislature, the Legislative Council has asked its Interim Court Services Committee, chaired by John Schneider and vice chaired by Wayne Stenehjem, to study the problems of our municipalities as they relate to municipal courts. Please see Appendix A-4 for a list of the committee members. That Legislative Council committee has initiated its review of the subcommittee's proposal.

Your support in the legislative districts and in the legislature will be essential if this remedial legislation is to be forthcoming and if the necessary funds for otherwise improving municipal court services for continuing judicial education and other means are to be secured.

Item four: the need for greater participation in and consideration of the future of *pro bono* lawyer services in North Dakota. This Association, through your Board of Governors, has taken the lead in the area of civil legal services for indigents in our state. And for that, you are to be highly congratulated. You are, through your participation in the Lawyer Referral Service, including the Fee Generating Panel, the Reduced Fee Panel, the *Pro Bono* Panel, and the Farm Panel, making a very worthwhile contribution to assuring the availability of necessary legal services. You are much more informed than I of the wide range of additional *pro bono* work you do or provide weekly in your communities. Those of you who are individually or as firms taking part in this effort, I'm sure, have a deep sense of satisfaction for the services you are rendering. I know that this service is given at personal sacrifice.

You will recall that I asked you as an Association to indicate if you were interested in participating in a study to determine the future direction and appropriate mechanisms for providing civil legal services to indigent persons in our state. You responded by adopting a resolution to do just that. And your President, David Peterson, communicated that to me, along with his request that the Association, through the Board of Governors, select some of the membership of that committee. He also suggested that we invite the North Dakota Trial Lawyers Association to participate in the same way. On receipt of that communication our court acted to appoint a nine member committee, which we denominated the Special Committee on Services to Indigent Persons in Civil Cases. Three of those members were appointed by your association, two by the Trial Lawyers Association, and four by our court. Please see Appendix D for a list of the members and the indication of appointing authority.

District Judge Joel Medd was appointed chairman. And I'm pleased to note that by May 9 of this year the committee had met four times with very interesting agenda and great interest on the part of the committee members and those who appeared before the committee. The Medd committee is facing a major issue for the North Dakota judicial system. It is also an issue in most other states. Federal funding for civil legal services through the Legal Services Corporation is expected to decrease further. Our system, great as it is, is an adversary system which works better when all sides are represented by competent counsel. This is true whether the issue is civil or criminal in nature. We have provided quite well, I think, for the defense of indigents in criminal cases, but we have not done so well for those indigents in civil cases.

Other states have looked at redefining the *pro bono* obligation of lawyers, various forms of state funding, alternative funding of civil legal services through IOLTA programs and voluntary programs like those initiated by your Association. The solution to this problem is recognized as important by the public. In a 1986 poll of public opinion prepared by the Bureau of Governmental Affairs of the University of North Dakota for the Judicial Planning Committee, seventy-five percent of the public answered this question in the affirmative. And I will quote the question: "Citizens get to have legal assistance regardless of ability to pay if they are charged with a crime. Should the citizens of North Dakota be able to obtain necessary legal services for noncriminal problems if they are unable to afford it?" Remember, I said seventy-five percent of the public answered that in the affirmative. Seventy-four percent of a cross section of the judges and the judicial system employees agreed.

This is a problem, the solution of which the public looks to the Bar and the judicial system for leadership. A sound solution to this problem could open a new day for public acceptance of the importance of legal services in our society to the benefit of all.

I fully expect the Medd committee to produce a very thoughtful report prior to the commencement of the next legislative session, and hopefully in time for your Board of Governors, the Executive Committee of the North Dakota Trial Lawyers Association, and our court to carefully consider the report and determine appropriate action. I believe it is on the agenda this morning or sometime today. At its next meeting the Medd committee will be considering a proposal for mandatory *pro bono* services on the part of every member of the Bar. That should produce a lively discussion.

Incidentally, I think it is noteworthy that Judge Medd, in a letter of March 13 of this year to Vern Neff, the chairman of the IOLTA Subcommittee of the Attorney Standards Committee, said that his committee unanimously passed a motion recommending that the IOLTA Subcommittee place the highest priority for IOLTA funding, of not less than eighty percent of the funds, for the utilization in the delivery of civil legal services to indigents.

This brings us to the study being conducted by our IOLTA Subcommittee, IOLTA meaning interest on lawyer trust accounts, chaired by Vern Neff. This is a subcommittee of the Attorney Standards Committee. Please see Appendix E for a list of subcommittee members. Your Board of Governors has approved the Neff report, and you no doubt will be asked to consider it at this meeting. Please see Part 5, IOLTA Subcommittee of the Attorney Standards Committee at page 9 of my printed remarks for my comment relative to this important subject.

Because of my recognition of the shortage of time this morning, I will not orally address you on Part 6, North Dakota Legal Counsel for Indigents Commission; Part 7, Proposed North Dakota Rules of Professional Conduct; Part 8, Lawyer Disciplinary System Study Committee of the Attorney Standards Committee and Disciplinary Board; Part 9, the new Judicial Conference; and Part 10, the Constitution Celebration Committee. Please see my printed remarks for those subjects.

In conclusion, looking back upon a history of progress for the North Dakota judicial system, we look forward with optimism. When the issue was whether or not the new judicial article creating a unified court should be approved, you shared the leadership. When the issue was whether or not the Bar Association dues should be increased to support the employment of staff for the Disciplinary Board and the Judicial Qualifications Committee, now the Judicial Conduct Commission, you led the way. When the issue was whether or not the county court with increased jurisdiction, the court without increased jurisdiction, and the county justice court should all be combined into one court with greater jurisdiction and with full time, well trained judges, you were in the vanguard. Because of your support, all of those things and more became realities. With your continued support, our current challenges will also be met.

It has been a pleasure speaking to you today, as always. I thank you again for your great contributions to the improvement of justice in our state.

**PRESIDENT PETERSON:** Thank you very much, Chief Justice Erickstad, for your remarks.

A couple of announcements. We have three items, as has been mentioned, that could conceivably take time the rest of this morning. And under the bylaws of the Association, resolutions which are to be acted upon by the General Assembly need to be brought up today for discussion and then laid over until tomorrow afternoon, at which time they will be voted upon.

We have in your packet of materials reports from various committees. Some of the committees have indicated that they will simply rely upon the written reports that are in your materials. There are, however, other committees who wish to make some brief reports. I think, in looking at the hour, what I would intend to do is take up the three reports which may take a bit of time, because with respect to the other committee reports, if we can't get to them this morning we can perhaps just have them reported on tomorrow afternoon. I would also point out to you that Wes Argue and Connie Triplett and Randy Lee are on the Resolutions Committee. Wes is the chairman. So if any of you have any resolutions that you want to have considered, we will be receiving a report from Wes before we recess this morning for lunch. In keeping with what I have just said, I'm going to throw the first bone out for contention and I'm going to call on Chris Hogan, as chairman of the Professional Conduct Subcommittee of the Attorneys Standards Committee on the Code of Professional Responsibility to discuss with you the report on the Model Rules. Chris?

**MS. CHRISTINE HOGAN:** Thank you. Good morning. Our special Committee on Professional Conduct has a rather lengthy report. And due to that fact, we had it published early on in *The Gavel* rather than taking your time now to go through all of the report or the rules. We have had the report put in *The Gavel* so you would have an opportunity to read it in advance. And I'm sure all of you did. And the black letter rules do appear in that April issue of *The Gavel*. We also have complete sets of the rules in two forms here in the room, for those of you who would like to read the full text of the rules. In *The Gavel* all you will find is the black letter. And the rules do contain two things: The black letter and the explanatory comments. The explanatory comments are included in the complete drafts, which are in the back of the room, available for all of you to read. And we have them in two formats, for your convenience. For those of you who would just like to read them without interruption, we have what we call the clean copy. And for those of you who would like to see the changes that were made from the ABA version, which we worked from, we have what is called the legislative format. And both of those are available for you. The legislative format, of course, has the strike overs and the underlining showing the changes from the ABA version.

Our committee does recommend that this Assembly adopt the North Dakota Rules of Professional Conduct or the proposed North Dakota Rules of Professional Conduct as the rules governing the lawyers of this state. And we believe that you should vote for the rules tomorrow. And I will just give you a few reasons why I think that and why we are recommending that.

First of all, today we are going to have just the resolution. The resolution is brought on behalf of many leaders of this Bar Association. And then we will be having a short debate and questions and answers, and Randy Lee will be coordinating our questions and answers. We have a little tag team here in the front row that is going to try and answer any questions that you might have. And then tomorrow you will be asked to vote.

This committee was started in 1983. And this resolution today is the culmination of a three year study of the ABA Model Rules. When we first started the project I can tell you that we were quite overwhelmed by it and really wondered at that point whether we would be able to complete it and do it justice in the manner that we intended, because we did intend to study each and every rule. Luckily, as the project went forward it did acquire a life force of its own and developed its own rhythm and momentum and eventually got to the point where nothing would stop it. I think we are all very proud of it. And the reason that we did is that we had a committee — it sounds like puffing, but I think it's true — we had a committee that I think has got to be one of the best in the history of this Association. It was a joint committee of the supreme court and this Bar Association. And I'm going to read you their names, because I think that if any of you have a moment, you might want to speak to each of them individually and let them know you appreciate the tremendous personal commitment each one of them made, because they really did. Every member of this committee contributed substantially of their time to this project. We didn't have any dead wood on this committee. And the members were: Karen Braaten of Grand Forks, Linda Catalano of Bismarck, Paul Ebeltoft of Dickinson, Jerry Evenson of Bismarck, Judge Benny Graff of Bismarck, Richard Gross of Bismarck, Michael Hinman of Bismarck, Carol Kapsner of Bismarck, Judge John Kerian of Minot, Randy Lee of Grand Forks, Judge William McLess, Jr. of Watford City, Robert Snyder of Bismarck, and Barry Vickrey of Grand Forks. We also had an excellent staff, without whom we would still be struggling with Rule 1, I'm sure. This staff produced tirelessly, drafts upon drafts upon drafts. And some of our rules went through a dozen drafts before we were fully satisfied and had finished our draft, because we did go back and reconsider and reconsider. Our staff was Larry Spears of the North Dakota Supreme Court, court administrator's office, Les Torgerson of this Association, and Sherry King of this Association. I definitely want you to thank them too. They certainly deserve credit.

The study culminated in a presentation to the Board of Governors in April, which I am happy to report resulted a month later in their unanimous vote to recommend to this Assembly that you adopt the work product of the committee. They did not recommend any changes or any modifications to the product. I do want to thank all of you who have taken the time to come up and express your feelings to me and to the other members of the committee about the rules. We certainly appreciate that kind of feedback. In fact, many of you have taken the time to write letters. And I just can't tell you how much we appreciate that. We were of course worried about the fact that this is a controversial subject matter. And it is. And I don't know how we have managed to get by without a lot of criticism, but we have. And everytime I would receive a letter, honestly it just brought tears to my eyes, because I

did not realize that people would appreciate it the way they have, the work that the committee did. And it really has been a very gratifying process. I want to thank you all for that, and I hope you will talk to the members of the committee. They certainly have put in the super human efforts on this project. And I do hope you will vote tomorrow and that you will vote in favor. We thank you very much. And the chair will now recognize a motion, I hope.

**PRESIDENT PETERSON:** Mr. Backes, do you have a motion you would like to present?

**MR. ORLIN BACKES:** Yes. President Peterson, Members of the North Dakota Bar Association, for myself, and on behalf of Kermit Bye of Fargo, Phil Johnson of Fargo, Judge John Kerian of Minot, Vern Neff of Williston, Dick McGee of Minot, Paul Kloster of Williston and Robert Dahl of Grafton, I move that this Association adopt as its rules governing the conduct of the members of our profession the proposed draft North Dakota Rules of Professional Conduct as produced by the Joint Committee of the State Bar Association of North Dakota and Attorney Standards Committee, as reviewed by the State Bar Association's Special Committee to study the Model Rules of Professional Conduct, and as unanimously recommended for approval and adoption by the Board of Governors of this Association. In light of the fact that the proposed draft is long and might well require technical and conforming corrections before final printing, I also move that this Association delegate to the Board of Governors its authority to make nonsubstantive changes subsequent to our adoption. Finally, I move that upon adoption by this Association the Board of Governors proceed with such action as is necessary to cause these rules to be the governing rules of professional conduct in this state. Thank you.

**PRESIDENT PETERSON:** Thank you, Orlin. Is there a second to that motion? Kermit Bye from Fargo seconded. Thank you, Kermit. The motion has been seconded by Kermit Bye of Fargo, and the floor is now open for discussion on the proposed rules. I remind you, as Christine did, that the rules have been published in the various editions of *The Gazette*. They have been made available for your review for several months in full text upon request to Les Torgerson, the Executive Director, and they have been available here during the annual meeting. So at this time I throw the floor open to discuss the proposed Model Rules. And if you want to be heard, would you please state your name again so the court reporter can get it, and the city that you are from, and let's go at it. Dan, you look real nervous. Dan Chapman of Bismarck.

**MR. DANIEL CHAPMAN:** Just a point of order. Dan Chapman of Bismarck. Didn't the second also make the motion, and wouldn't it be appropriate that someone else second the motion?

**MR. CHARLES A. FESTE:** Charles Feste from Fargo. I second the motion.

**PRESIDENT PETERSON:** Point well taken, Dan. Kermit likes to double up. Now that the motion is properly before the body, are there any questions we have? Randy and all of these staff people; Barry's just waiting to answer every question you have. So if you have any, let's hear them. Dave Bossart.

**MR. DAVID R. BOSSART:** Dave Bossart, Fargo, North Dakota. I am a recent new appointee to the Attorney Standards Committee. And first of all, I want to say this committee and Christine obviously worked very hard on these proposed rules, and I endorse their effort. I just have one observation to make and would be curious if I stand alone in this observation. I would like to hear from other members of our Association. As I understand the proposed rules, they would allow direct solicitation by mail of lawyers to injured victims, et cetera. I know that the committee debated that particular provision very hard and very long, and the conclusion was, as I understand it, that because constitutionally the committee felt that it would be an infringement on a lawyer's constitutional rights to not allow direct solicitation by mail, that the committee went along with that proposal. I also understand that that is now allowed and was not part of the proposed ABA draft.

I can tell you, as a member of the Association of Trial Lawyers of America, that that organization specifically condemns that practice of direct solicitation by mail. I'm also aware of a Minneapolis law firm that apparently has sent out letters to North Dakota residents or owners of three-wheel devices saying "we have just won a big verdict, or something like that, in this case and we understand you have a three-wheeler, and if you have been injured, call us."

I think the attitude of the public at the present time is against that type of solicitation, again, even though it is constitutionally protected probably. And I also understand that North Dakota would be maybe one of two states in the nation that would allow — and I may be wrong — that would allow direct solicitation by mail. Personally, I'm opposed to it simply because of the appearance of it at this time. And I think that the public image of attorneys is bad enough the way it is. This would, as I understand it, not prohibit anybody, prohibit me from writing a letter or reading the obituaries and writing a letter to the bereaved widow saying "I see your husband was killed, call me." To me, I can't think of anything more distasteful. And I would be interested to hear what — what, if anything, other members of our Association think about that. Thank you.

**PRESIDENT PETERSON:** Thank you, David. May I ask someone from the committee to respond to the point made by Mr. Bossart and what discussion was had in the committee.

**MR. RANDY LEE:** I would like, Mr. President, to allow Barry Vickrey to respond.

**MR. BARRY VICKREY:** Randy says he is our advertising manager. I cannot speak to the specific number of states that permit mail solicitation as it was referred to. I would comment that the terms "advertising" and "solicitation" are sometimes confusing and confused in this area, and some might refer to this as mailed advertising as well as mailed solicitation. It seems to me, as one person who reads the Supreme Court case law, that it is clear that direct mail solicitation or advertising is permitted if it is not false or misleading. And it is constitutionally protected. It may be distasteful. And I would suggest to you that the public can respond to solicitations, advertisements, anything that if finds distasteful by refusing to respond positively to it.

The clear intent or thrust of the case law at this time is to recognize the constitutional rights of lawyers in the commercial speech area. I would not suggest to you that there is a definitive holding by the United States Supreme Court in this area. There is not. I would simply say to you that the cases that have been decided that deal with similar situations, that involve some mailing of materials, most notably the RMJ case, have stricken restrictive rules in that area. You as a body could choose to adopt a restrictive rule because it would be more tasteful, because it would seem to uphold the image of lawyers. What you would do, I believe, is subject the rules to constitutional challenge, and I personally believe successful constitutional challenge. Whether anyone would ever choose to challenge them is another question, so you might in fact have a rule that would stand up because no one would take it to court. The only problem is you would also make it very difficult on your disciplinary staff to make decisions about whether to enforce that rule that is constitutionally infirm. Seems to me that those are your choices. It is an

area where I think it is a bit frustrating for lawyers and bar associations to try to make decisions, because the United States Supreme Court is making the decisions for you. But they are, and that is the facts. And that is why we drafted the rules as we have. Thank you.

PRESIDENT PETERSON: Thank you, Barry. Any member of the General Assembly wish to comment on Mr. Bossart's point or any other point regarding the rules? Just like — Mr. Nilles?

MR. GERALD NILLES: Gerald Nilles, Mr. Chairman, I raise the question as to whether or not this Association or the committee ought to anticipate the constitutional issue. Seems to me that if there has been no definitive ruling on something like what is proposed to be adopted here, maybe we just ought to leave that matter to the courts. That would be my view on it, and that is what I would encourage the group to do.

PRESIDENT PETERSON: Thank you, Mr. Nilles. Judge Burdick of Williston.

JUDGE EUGENE A. BURDICK: This is kind of tall for me.

PRESIDENT PETERSON: We will give you a chair, Judge Burdick.

JUDGE EUGENE A. BURDICK: I have the same concern that Attorney Nilles has about this. And I'm just wondering if there isn't another position to take on it, and that would be to make no rule on it. And if — so if someone did want to engage in solicitation, he might have to ask for a ruling from the committee or something. But why have a rule that favors this if we really don't believe in it? Seems to me we could just be sitting on it, and if the problem ever comes up, well, they could say that it is protected constitutionally. But why do we have to endorse it that way?

PRESIDENT PETERSON: Randy, who would you like to respond to that? All right.

MR. RANDY H. LEE: Randy Lee of Grand Forks. I will say that the rule in question, if you happen to have your black letter in front of you, is 7.1. Silence is essentially what we have. The rule does not prohibit direct mail solicitation. Therefore it is permitted. The present state of the rule essentially is silence. Now, there is a portion of the rule, the rule is broken down into its subparts in terms of in person contact and — contact in person or through a representative. You will see in about the third subpart, I think, of the 7.1 rule that it does provide that a lawyer shall not in person or through a representative contact for the purpose of seeking employment a client where the lawyer knows or should know that the client does not want to be contacted for that purpose, or the potential client.

It is possible through that language to build some law with respect to harassment or bothering a person whom the lawyer should know. And it may be that the bad case they have painted this morning, of the bereaved person, would be a prime candidate for such a situation. Of course that does then envision the possibility that the mail system would be viewed as the representative, which would certainly have to be done in order to use that rule to combat that situation. And it also — you should also note that in the rule, although not in the part dealing with contacts with representatives, but in the part of the rule that deals with in-person contact, that it does prohibit approaching people in the ambulance chasing kind of a situation, a situation where you know the client is not in a situation or not in a state of mind to make decisions like "who do I want for my lawyer." That section also, although it doesn't — it only deals with in-person contact, is susceptible to an interpretation through the Disciplinary Board and then backed up by the courts. If that is the way those decision making bodies thought it should go, to indicate that it — that the direct mail or that a mailing is a personal communication, now, that is iffy. And for the first few years of litigation on the constitutional issues of direct mail solicitation, that is where the battle was fought. Is it solicitation or is it advertising? If you put something in the mail that you could have put in the newspaper, does it become solicitation. Those are the questions which we thought we would not address.

There is an interesting anecdote about the committee consideration of the subject, which I'm sure those of you especially who agree with Dave Bossart would like to know about. And it doesn't hurt us, so I might as well tell you. This particular part of the committee's deliberations and discussion occurred totally in the dark. But that doesn't mean that we were uninformed. The lights had gone out. We were meeting in Bismarck at one of the local motels. We reached the point on our agenda where we were going to discuss the advertising and solicitation, and a power failure occurred. And we went through the entire discussion of advertising and solicitation in the dark. So, Dave, there is your — there is your argument. If the rules remain as they presently are and you appear before the Honorable Ralph Erickstad and the court, you can use that against us.

PRESIDENT PETERSON: Thank you, Randy. Are there other comments to be made at this time?

MR. NICHOLAS VOGEL: Nick Vogel from Fargo. I guess I'm also a new member on the committee. And I have had a chance to go over the rules in great detail. It seems to me that if there are people who are against some language in this rule that permits to them direct mail advertising, why don't they say what portion of the rule they would like to have eliminated, rather than run the risk that the whole thing gets voted down because of what appears to me to be a minor problem.

PRESIDENT PETERSON: I think unless we have some kind of a motion made by someone . . . We have a motion that is on the floor for discussion, and if someone wishes to make a motion to amend or substitute or whatever, that is available at this time. Phil Johnson of Fargo.

MR. J. PHILLIP JOHNSON: The motion to amend can be made tomorrow also, right?

PRESIDENT PETERSON: Mr. Parliamentarian? Mr. Backes?

MR. ORLIN BACKES: I would have to check it.

PRESIDENT PETERSON: Typical lawyer's answer. How long will it take you to check it? Jack, the caveat from that latest discussion is that when you appoint your parliamentarian, check first to see if he has a copy of Robert's Rules available to him. I think that is correct, that amendments could be considered tomorrow. David?

MR. DAVID R. BOSSART: Well, I purposely didn't make an amendment to the rules because I understood that basically what was taking place was that the committee was interpreting the rule saying that if this came up, it would be permitted. And so I kind of adopt Randy Lee's observation, that in fact the way it sits, the rules are silent on it. What I was concerned about is a situation where we are in fact endorsing as a State Bar Association direct solicitation by mail. I just think we should be in a position where we are not endorsing that. And if it takes a resolution or whatever. Maybe I should talk to Wes Argue on the Resolution Committee. But I just wanted to find out if I was the only person that thought that way or what. I just don't believe, frankly, that we should be endorsing it. There is a part of me also that says, you know, if insurance companies and banks and all of the rest can have lawyers, what is wrong with letting Joe Doe in Enderlin know that his legal rights are one way or the other. But I

just wanted to hear what other people thought about it. And so I won't make any amendment to the report. But I would prefer that we be silent on it, and maybe we can pass some kind of resolution on it and get that issue before the group that way. Thank you.

**PRESIDENT PETERSON:** Thank you, David. In the interest of discussion of the other two major items that we have — keep in mind that tomorrow there will be opportunity for further discussion of this resolution. The possibility of amending the resolution remains, I believe. And so unless someone has something further right now that they would like to present with respect to the Model Rules, I'm going to move on to the next major item on our agenda. Seeing none, we will now move to a discussion of the IOLTA program.

Before I do that, Carla Smith asked me to announce that there will be a Young Lawyers luncheon at noon tomorrow. The Young Lawyers group is attempting to become more active. All lawyers under the age of 35 are considered to be potential members of that section. Sorry, Ted Kessel, you don't fit that anymore. And also all lawyers who have had less than five years of practice are eligible for membership. If you have any questions about where the luncheon will be, talk to Sherry King or Carla Smith. We will now move to the IOLTA concept, and at this time I would recognize Vern Neff of Williston, who is chairman of the Attorney Standards Committee. Vern?

**MR. VERN NEFF:** Thank you. Thank you, Mr. President. Mr. President and members of the Association, for myself and on behalf of the IOLTA Subcommittee of the Attorney Standards Committee and also as chairman of the joint SBAND IOLTA Committee, I present and move adoption of the following resolution, with the request that upon the motion for adoption being seconded and properly before the assembly for discussion, and acted on at tomorrow's general session, that I may speak further in support of the resolution or be available for answering questions. The resolution reads as follows: Resolution endorsing concept of establishment of a mandatory Interest On Lawyer's Trust Account program in North Dakota.

**BE IT RESOLVED** that the State Bar Association of North Dakota endorses and approves of the establishment and implementation of a mandatory interest on lawyers trust account program in North Dakota;

**BE IT FURTHER RESOLVED** that the General Assembly of this Association authorizes the Board of Governors to act on behalf of the general membership of this Association in adopting the necessary amendments to the Code of Professional Responsibility and any succeeding rules governing lawyer conduct to establish a mandatory IOLTA program in North Dakota.

**BE IT FURTHER RESOLVED** that that Association recommends that the North Dakota State Bar Foundation be designated as the recipient and administrator of the funds raised from a mandatory IOLTA program in North Dakota. Mr. President, I move adoption of the foregoing resolution.

**PRESIDENT PETERSON:** Thank you, Vern. Is there a second to the motion made by Mr. Neff? Phil Johnson of Fargo seconds the motion. At this time the floor will be opened for discussion. And I would remind you again that a copy of the preliminary report of the IOLTA Subcommittee of the Attorney Standards Committee dated September 13, 1985 is enclosed in your packet of program material and that additionally this is an item of business in your program and in the publication of the *Note Pad*. Vern and several members of this group are available for questions on the IOLTA thing. I would simply point out in advance of discussion that North Dakota is nearly one of the last states to consider the adoption of an IOLTA program. Now with that, I will throw the floor open for discussion and questions. Anyone have a question of Vern or any member of his committee about the IOLTA resolution?

**MR. LOWELL LUNDBERG:** Lowell Lundberg from Fargo. I have a question that I relate to page 9 of the Chief Justice's report, which states that forty-one states and the District of Columbia have adopted a rule requiring this be done; thirty-five states have adopted either by rule or statute a program permitting lawyers to do so on a voluntary basis. I find myself confused by that. Possibly Vern could clarify it.

**MR. VERN NEFF:** I assume that all of you have heard the question. As of April 15, 1986, the information that I have — and there is a national IOLTA clearinghouse that maintains these statistics and distributes these statistics to the various states that either have programs implemented or are considering them — as of April 15, 1986, the national IOLTA income, the income to all IOLTA programs, exceeded fifty million dollars. As of April 15, 1986, there were apparently forty-two jurisdictions which had approved programs. Forty-one of those are states, and the District of Columbia. Of those programs, seven are mandatory, five are opt out programs, and thirty are voluntary. If you desire those to be explained, I will. But those are the latest statistics that are available to us. Does that answer the question? I'm giving you these statistics rather than discussions of those of the Chief Justice.

**PRESIDENT PETERSON:** Are there any other questions regarding the resolution which is on the floor? And again, as with the previous one, we will be actually voting on it tomorrow. But we would certainly consider more discussion at this time. Bob?

**MR. ROBERT FEDER:** Robert Feder, Fargo.

**PRESIDENT PETERSON:** Thank you, Bob.

**MR. ROBERT FEDER:** Basically a housekeeping question. But what do you do about the tax consequences of giving an I.D. number and Social Security number on the account?

**MR. VERN NEFF:** The establishment of a mandatory IOLTA program will essentially involve the lawyer or law firm sending a letter to his financial institution. Essentially there is no change whatsoever in how a lawyer or a law firm now handles client trust funds. You will handle them exactly as you do now. If you have a trust account, you would make no change. You would still have the discretionary right and power, and certainly the obligation to establish a separate trust account for those funds that are substantial in amount that will be on the deposit for a sufficient length of time so that the interest earned by that money will exceed the cost of setting up that account. If the mandatory program is adopted in North Dakota, there would simply be a notice that the lawyer or the law firm would sign and send to his financial institution. It would be addressed to the bank, and it would say the undersigned has elected to participate in the interest on lawyer's trust account program. Under this program interest on the trust account described below will be paid directly by you to the North Dakota State Bar Foundation, rather than being credited to the undersigned. The following information is provided for your records. It gives the account title, the account number. You then indicate whether this is a new NOW account, which you would then do, which you are in effect converting it to a NOW account, and then you would indicate that interest would be payable at least quarterly to the North Dakota State Bar Foundation, giving the address, giving the tax identification number, the name of the contact person, and the telephone number. The foundation is a tax exempt 501C3 organization. Appropriate federal agencies have approved NOW account eligibility for this program. No

withholding its required. No separate 1099 is required. W-9s should show the North Dakota State Bar Foundation tax I.D. number as such. The foundation will supply you with a form for remitting interest. It is then signed by the lawyer or law firm. And from that point on, the account functions exactly as it now does for you. If there are any charges for the maintenance of that account by the financial institution, the agreements we will work out will be that it will be deducted from interest. Does that answer the question?

MR. ROBERT FEDER: Yes, it does. Thank you.

PRESIDENT PETERSON: Are there any other questions or matters of discussion with respect to the resolution that Mr. Neff has proposed?

MR. HARRIS P. KENNER: Harris Kenner, Minot. Why is it mandatory if you have the option of putting the funds in a separate account for your client?

MR. VERN NEFF: It is mandatory in the sense that the lawyer would be required to maintain a separate trust account for pooled — pool clients' funds. You now have that obligation under the Disciplinary Rules, as I understand it. You also have the obligation, as I mentioned before, of setting up a separate account for large amounts, as that will be on deposit for a long period of time. And that is a matter of economics between you and the client. We would function exactly as we are now. Exactly. The lawyer has the complete discretion. The only requirement is that you must maintain a lawyer trust account for pooled client funds. If you do not now have one, the rule would require it. Does that answer the question?

MR. HARRIS P. KENNER: Well, I think so. In other words, any trust accounts now that are pooled funds, you must place it in this type and interest bearing account?

MR. VERN NEFF: Right. That is where you are putting it now. You are putting it in there now and it is earning no interest. And if you did put it into a NOW account you could not get the interest, because the lawyer cannot. Also as a practical matter it would be impossible to allocate that interest out to the various client owners of those funds, because the amounts are too small and also because we would have to prepare the 1099s and various other documentation in order to flow that interest through to those individuals. As a result, lawyers have established trust accounts. And we have not required the payment of interest on those because we cannot, and secondly because it is impractical. All that that does is it requires, or at least by visitation with the financial institutions is they agree because of rulings which other states have obtained from the Department of the Treasury and council of FDIC and the council for FSLIC, that the financial institutions can treat a lawyer's trust account as a NOW account. That is the net effect of establishment of the program.

MR. GERALD NILLES: I missed the point as to whose taxpayer I.D. number goes on this account.

MR. VERN NEFF: The North Dakota State Bar Foundation tax I.D. number. Right, that is the only thing that goes in.

MR. WES ARGUE: I have a question, Vern. What happens to the service charges against the account? Do they come out of the interest or out of the —

MR. VERN NEFF: If there are service charges, then the agreements will be that the service charges would be charged against the interest in the account and the net would be returned to the — to the State Bar Foundation. Right, there would be no charge for service charges to the lawyer or the law firm. The second item is that historically there have been no interest charges, and the financial institutions have agreed to handle those. Having in mind, too, that this is — that the interest rate on the NOW account basically is halfway between the earning capacity of those funds by the financial institution and rent on the money for the individual who puts it in. So it is basically a compromise between those two amounts. Any other questions?

MR. HOWARD D. SWANSON: Howard Swanson of Grand Forks. The State of Minnesota has a program currently, in fact. To enforce that, upon registration or licensing, the attorney must register and certify they are complying with the requirements. I note from your materials that you have made contact with adjoining states. What is the position of various states as to separate accounts for funds from attorneys practicing in alternative states?

MR. VERN NEFF: We have made contact with the adjoining states. Montana, South Dakota, and Minnesota all have IOLTA programs. Arnie Fleck, who has been helpful to the committee and staff attorney for the Attorney Standards Committee, has made some contacts. Arnie is here. I don't know if you have had any responses that I'm not aware of, Arnie.

MR. ARNIE FLECK: We received one response from the State of Minnesota. They currently don't have a policy that specifically addresses those attorneys who practice both in North Dakota and Minnesota, but they have agreed to work out one. And the subcommittee that is discussing it here in North Dakota has decided that the rule that should govern this situation would be the location of the bank that would maintain your trust account. So if you practice in both North Dakota and Minnesota and you retain your trust account in North Dakota, you acquire your interest to the bar foundation here in North Dakota. Or if your bank is in Minnesota you submit your interest to theirs. And we are working on developing that policy for all the surrounding states.

MR. VERN NEFF: Did you all hear the answer? Thank you, Arnie.

PRESIDENT PETERSON: This, as with the previous matter, will still be open for discussion tomorrow and in the final vote. I would like to move to the next major item on the agenda, and the consideration of the report of the Supreme Court Workload Study Committee. And I request Dewey Breitling to come forward on that committee, please.

MR. DUANE BREITLING: Thank you, President Dave. By now I'm assuming that there is no need to reintroduce myself. I also want you to rest assured that I have no intention of reading the report to you. First of all, we don't have the time. Secondly, it consists of a lot of statistical data and graphs and charts, and I'm not sure that reading any particular portion of it would be meaningful here this morning.

Your committee undertook its task with the idea in mind that reasonable people could come up with different reasonable solutions to the same problem. If it is your intention to have this committee continue to function, I am certain that that will be the outline by which they will be guided in the future. I do want to quickly bring your attention to one error in the written report. On the top of page thirty there is part of a sentence dropped. An accurate copy will be filed with the State Bar Association office. If you are so inclined, I am certain they will

provide you with a corrected page thirty of that report. Since that sentence has no footnote to it, I'm assuming that you can call it victim anyway.

I think first of all it is important to acknowledge what I consider to be outstanding cooperation from every group that we dealt with in attempting to assemble material to digest and to influence our thought process in coming up with a report for you. The first group that should be given a large round of applause, in my opinion, is the supreme court and its staff. They freely gave of their time to submit to interviews by members of the committee. They freely authorized their staff to disseminate information to us, and in fact provided us with all information requested and did in fact cooperate with us to the fullest extent possible. And we appreciate that response.

We also took the time to deal with, in either written form or interview, all former supreme court justices of the State of North Dakota who are still in the area. I also want to take this opportunity to extend my personal thanks to the members of the committee, who gave a great deal of their time and who put forth substantial effort in working in this regard. We all know how busy all of our schedules are, and we all know how difficult it is to really carve out the time necessary to address problems of this nature. But these people did just an outstanding job. I am not going to review their names with you because they have already been given to you today, and also they appear on the cover page of the reports.

A few comments about the composition of the committee. I believe it is appropriate to say that they are scattered geographically throughout the state to give us some representation in that regard. Secondly, those people also come from different size communities. For example, Bismarck, Minot and Grand Forks on the larger edge, and then smaller towns such as Carrington, Wahpeton and West Fargo.

There is no question but that there is a growth problem with the case load that needs to be addressed on an appellate basis in North Dakota. Neither our committee nor any member of the Kretschmar committee disputes that fact. There are, however, obviously differences of opinion as to how best to address those problems. One of the interesting things that was recently discovered — and obviously this information was not available to the Kretschmar committee, because their report came down sometime before the statistical data for the 1985 reporting year was available — was that there was indeed almost a ten percent decrease in the filings with our Supreme Court in 1985 as compared to 1984. Now, standing alone, that might not be a significant factor. However, when you compare that with the surrounding states and their history in the last two years, it becomes something which must be considered when attempting to put forth appropriate solutions. The surrounding states without exception have also — excuse me — I want to qualify that. I can't speak dramatically to the State of Minnesota right now. But the surrounding states, with the exception of the State of Minnesota, without exception, have shown a decrease in case load starting in some instances a year before we did. In all instances in that two year period at least a decrease and/or level effect in the second year or a continued decrease.

There is some reason to believe from that statistical data that the one year situation that has occurred, notwithstanding the filing data to date for this calendar year, that it may continue to happen in North Dakota and/or it may signal a level effect of the filings. I am hopeful that that is the case. Only time will tell. Until we have had an appropriate time period to judge whether or not that is a single year anomaly or something that has a more lasting impact, at least in a leveling effect, is something which must be measured, in my opinion and in your committee's opinion, before the types of conduct that are addressed in the Kretschmar report can be logically implemented.

I would also caution each and every one of you in reading the report to keep in mind that it appears that no two states keep statistics in the same fashion or manner. They are not always the same apple or same orange. And it is difficult for those who are addressing that data to intelligently and logically come to some ultimate conclusions because of those facts. In many cases, many states simply report their case data in largely different manners. And it does make the comparison much more difficult.

I know that this was also a problem for the Kretschmar committee. Speaking to the Kretschmar committee since the inception of your Bar Association Committee, I and/or others in addition to myself have attended each and every one of their meetings. And we want to extend a thank you to that committee, as well, for providing us with all of the data that they were able to generate and that we found necessary to digest before this report was prepared. We have suggested that prior to taking what many consider to be a drastic step, to wit, the placement of yet another level of appellate court system in the State of North Dakota, that several other alternatives be thoroughly considered, and to the extent possible, implemented in the state of North Dakota so as to make the task of our appellate court judges more reasonable in its demands. We feel that relief in that area is needed. We simply differ in how we address the problem and what solutions are implemented in what order.

I do not intend today to elaborate on each and every one of those methods that are discussed within the report. I would invite you to spend some time reading it, to challenge us with any questions that you might have, and to further help us address this difficult problem by any input that you feel appropriate. There is one of the items that is in fact discussed in the report which has in fact been implemented, and that is the summary affirmation rule. That rule, though adopted in 1985, was not effective until January 1, 1986. Your committee is of the opinion that the time lapse to date is not sufficient enough to allow us a track record to determine what help that is going to give your supreme court. When compared with other jurisdictions, a substantial number of cases historically have been handled in that fashion. And certainly a meaningful percentage in North Dakota, at least in your committee's opinion, could also be processed in that same fashion. Your committee is of the opinion that it serves no useful purpose to reiterate existing case law. And in those cases where that is in fact the approach, perhaps the application of the summary affirmation rule is more appropriate.

There is also a good argument to be made that the Supreme Court should be given much more control over its own docket. When originally meeting and visiting with members of the Kretschmar committee, it was clear that they were of the opinion that limiting the appellate process would be a very unfavorable type of approach to take. More recently, however, at the commission, as I understand it, of one of the Supreme Court committees a study was in fact conducted by a bureau at the University of North Dakota which suggests quite dramatically that that does not reflect public opinion in North Dakota.

Now, we are not suggesting that all cases appealed to our supreme court, should be heard only through the certiorari process. We are suggesting, however, that there are certain types of cases which should be handled in that fashion. One of those is the appeal of decisions by administrative agencies. We now have a duplicative appeal process at the district and supreme court level in that regard. Your committee could see no good reason why the district court should not be charged with hearing that appeal thoroughly and that appeals to the supreme court shouldn't be handled but on a certiorari process. That is one of the items of consideration that we have suggested. There are a substantial, in my opinion, percentage of the cases heard by our supreme court which fall in that

category. I am not about to suggest to you a percentage of that percentage which could be appropriately handled in that fashion. Indeed, that is in fact the obligation and responsibility of the supreme court justices if in fact that type of approach is taken to help assist them in meeting a very cumbersome and difficult workload.

One other item that I wish to speak to — and there are other members of the committee who are here present today. And if I in any way have misspoken as far as the committee's posture or omitted something that they feel is deserving of specific attention by you today, I would ask them to so comment. We have in our review process heard from many sources of the practitioner in the field. Some have suggested that the supreme court staff has grown dramatically, and that that in and of itself should be sufficient to address any additional case load. The information that we were — would be able to develop, and particularly in comparison, would suggest that that simply isn't true. The case load of our supreme court has in fact grown more dramatically on a percentage basis than its staff. That may be an additional area of help that can be given to our supreme court. Again, that is an item, in my opinion, that has to be finally determined by the justices of our supreme court themselves, and not by some outside group. They are, in the final analysis, the people who can best judge what additional staff they might be able to utilize to make their job more manageable. It certainly is something that I believe that your committee would be favorably inclined to support.

The conclusions of your committee are contained on the last two — two-plus pages. Again, I believe they are straightforward. There is no attempt to beat around the bush. And I suspect that most of you have turned to those pages and simply read the conclusions, and not paid as much attention as we would have hoped you would have to the contents of the report itself. We realize and understand that it was simply not available to you at an early date. The constraints of time were very demanding on your committee. Indeed, the materials were not back from the publisher and in my office until almost Monday noon. We apologize for not being able to provide them to you with some time in advance prior to this meeting. It simply was not possible with the work that we had to do and the time limits that we had to work within.

Again, I want to thank you, the committee members who so faithfully served with me. And in closing, we have one other acknowledgement that must be made. I cannot take full credit for the final report, nor can any committee member. Without the assistance of a young law student from the University of North Dakota, Steven McCullough, who also happens to clerk for our firm, you would not have had the report today. Steve was of great assistance. I understand that he is one of the shining lights of his class up there, and we are very proud in our firm, and particularly at the committee level that was working here with Steve, of the assistance and help that he gave us in bringing these materials together in the report that was provided you. It is my intention at this time, and I so move that the report be received and filed by the Association.

**PRESIDENT PETERSON:** The motion is that the report be received and filed. We will then have a second motion by Mr. Breitling with respect to the — whatever the recommendations of that body will be on the report. Given the time, it looks like we will have to delay the significant discussion of that until tomorrow. Is there a second to the motion for the Association to receive and file the report of the Breitling committee? Robert Feder of Fargo. Is there any discussion on that motion? Hearing none, all in favor say "aye." Opposed? The motion is carried and the report will be received and filed. Duane?

**MR. DUANE BREITLING:** Mr. President, I now move that this be adopted as the posture of the State Bar Association of the State of North Dakota.

**PRESIDENT PETERSON:** You have heard the resolution and a motion. Is there a second?

**MR. GERALD NILLES:** Jerry Nilles seconds the motion.

**PRESIDENT PETERSON:** Gerald Nilles of Fargo, North Dakota seconds the motion. Again, as I have indicated, it is nearly noon and we have a couple of more motions that we have to hear from Wes. And we have one other one that will take just a moment or two. The discussion of that resolution and the discussion on the other two very important items will be continued into the session tomorrow afternoon. I appreciate the good attendance here today, and I hope you will all come back tomorrow for that.

**MR. DUANE BREITLING:** Under the circumstances I feel compelled to make one additional announcement. My committee has known and your President has known for some months that I will not be here tomorrow. That is not because of the tenor of the exchanges that have taken place here today. I want you to know that. I want you to know that my two brothers and two sisters and I will be celebrating my father's eighty-fifth birthday in Lodi, California on Sunday, and it is necessary for me to leave early. We are also combining that with a little Father's Day party. And since we have come from coast to coast and north and south, I'm going to go there, and I'm not going to be at the debate tomorrow.

**PRESIDENT PETERSON:** Thank you, Duane. I would also like to extend my appreciation to Duane's committee and to Chris Hogan's committee and Vern Ness' committee for all the work they have done on these three major proposals. Jim Hill, are you in the room? Jim has a resolution regarding the reporting dates for your CLE. He is going to propose a resolution, and we will delay all of the discussion on it until tomorrow and the final vote on it. And then, Wes, if you start to work your way up here for your committee, Resolutions Committee, I would appreciate it.

**MR. JAMES HILL:** I think the thing that I will do at this point is read the resolution that I have prepared and has been proposed to you, as President of the Association, reserving my own comments as to the reasons why this commission came up with this resolution.

**BE IT HEREBY RESOLVED** by the members of the State Bar Association of North Dakota that the rules of the State Bar Association of North Dakota for the continuing professional education of the members of the Bar adopted July 27, 1977, be amended to change the date of compliance for meeting the continuing legal education requirement from December 31 of each year to June 30 of each year;

**BE IT FURTHER RESOLVED** that the Board of Governors be empowered to facilitate any rule change necessary within the rules of the State Bar Association of North Dakota for the continuing professional education of the members of the bar to facilitate the change of the compliance date and further to eliminate reference to an inactive status of this Association;

**BE IT FURTHER RESOLVED** that the Board of Governors, through its representatives, report to the Supreme Court of the State of North Dakota and the North Dakota Star Bar Board as to the proposed changes within the rules of the State Bar Association of North Dakota for Continuing Professional Education of the members of the Bar and of any necessary changes to the admission to practice rules of the North Dakota Supreme Court and of the North Dakota State Bar Board as a result of this action;



BE IT FURTHER RESOLVED that this resolution shall become effective on July 1, 1986, and that the change of the date be interpreted as granting an additional six months to each attorney within their specified reporting period to comply with continuing legal education throughout the period of implementing the change in this date.

I would comment only that in your packet there is some reference in our committee report to the reasons for the change. I will simply present the resolution of President Peterson and will comment tomorrow when we have an opportunity to explain the reasons why we are proposing the resolution as a commission, as an entity.

**PRESIDENT PETERSON:** You have heard the resolution. Is there a second to this resolution? Dwight Kautzmann of Mandan seconds the resolution. We will delay the discussion on this resolution until tomorrow because of the time constraints. Wes Argue, would you please tell us what other resolutions there might be?

**MR. WES ARGUE:** We have several resolutions and some comments that we have had. We did receive several resolutions that we decided not to present. One from Neil Fleming commending the Holiday Inn for giving us Ronald Reagan jelly beans. The first resolution that was presented to us as a prefiled resolution was one regarding the directory of lawyers and judges reads as follows:

WHEREAS the Directory of Lawyers and Judges is of great benefit to the members of the Bar, especially with its new binding, and whereas it would be of greater benefit if indexed alphabetically as well as by city and provided in duplicate to each member of the Bar; now therefore be it resolved that the Board of Governors recommend to the State Bar Board that an alphabetical listing be added to the Directory of Lawyers and Judges, and that each attorney be provided with two copies of that directory. Resolution was presented by Mr. Neil Fleming of Cavalier, and I move for the adoption of the resolution. Is there a second to the resolution? You made the motion, Neil. I'm sorry.

**PRESIDENT PETERSON:** Is there a second?

**JACK McDONALD:** Jack McDonald, Bismarck. Seconded.

**MR. WES ARGUE:** The other resolutions I had are basically in the nature of housekeeping resolutions. I will read them and have the committee move the adoption of them. There will be one additional resolution presented tomorrow. Dave Bossart has informed me that he will be presenting an amendment to the Attorney Standards Committee resolution tomorrow. Resolution No. 1.

WHEREAS David Peterson has dedicated over two years to the development and improvement of the State Bar Association and whereas David and his wife Diane have made many personal sacrifices and significant contributions to the legal profession, and whereas Dave graciously and gratuitously charted the course of the Bar Association years into the future, hereby be it resolved by the General Assembly of the State Bar Association of North Dakota that the gratitude of the association and its members be extended to Dave and Diane Peterson.

**Resolution 2. WHEREAS** there are many organizations and individuals that have graciously and gratuitously provided goods and services to the Bar Association and its members, now therefore be it resolved the State Bar Association publicly extends its thanks to the following organizations who have helped to make this convention a success: First Trust Company of North Dakota, Harold Diers Company, Norman E. Mark Court Reporter Service, Michie Company, United Printing Company, and Missouri River Underwriters.

Last resolution. WHEREAS the annual meeting of the State Bar Association provided an opportunity for the members of the Bar to discuss the professional concerns with friends and colleagues, and whereas the City of Winnipeg, Manitoba provides a congenial atmosphere conducive to the creation of partnership and friendship between Manitoba and North Dakota legal professions; and whereas the time and energy donated by Allan Rouse, the Magistrate to the Court of Queens Bench and Special Assistant to the Attorney General, and Graeme Garson, the Executive Director of Manitoba Law Society has influenced the success of the annual meeting, hereby be it resolved by the General Assembly of the State Bar Association that the gratitude of the Association and its members be extended to Allan Rouse and Graeme Garson for their invaluable contributions to the 1986 Annual Meeting. The committee moves the adoption of the last three resolutions.

**PRESIDENT PETERSON:** Dwight Kalash of Grand Forks seconds. We will take final action on all resolutions tomorrow afternoon. We are recessed for the luncheon. Barry Reed will be our speaker at the luncheon.

(Whereupon, the proceedings were adjourned at 12:07 p.m.)

Friday, June 13, 1986

(Whereupon, the proceedings recommenced at 1:45 p.m. as follows:)

**PRESIDENT DAVID L. PETERSON:** The procedure we are going to use this afternoon is we have several of the committees that have indicated they want to give a brief report. And I emphasize the word brief. Now, I will be calling on those initially, and then I will be bringing back before the body the three major reports that we took yesterday for further discussion, if there is any on those — the proposals. So the first report I'm going to ask for is the memorials from the Information and Service Committee relating to the members of the Bar who have passed away in this last year. And I'm going to ask Jack McDonald to do that.

**MR. JACK McDONALD:** Thank you, Dave. The memorials this year are printed in your convention booklet. They are in the last part of the General Assembly Agenda and Material section. And we will not cover all the biographical material about each member, but only mention the members who have died since the last convention: Judge Ralph Bekken, John L. Burgum, Joseph Dietzman, William W. Eichhorst, the Honorable Martin C. Fredricks, William A. Kunkel, Paul K. Pancratz, Roy A. Ployhar, George Esterly Sorlie, Judge Lyle G. Stuart, and Robert D. Birdzell. Perhaps we could stand and give 15 minutes of silence.

Thank you very much. The full information about them will be printed in the proceedings of the Bar and Law Journal.

**PRESIDENT PETERSON:** I also add that there is no biographical data for Robert Birdzell, and that will be completed and published in the Law Review.

The next report is from the Lawyer Referral Service Committee. And I believe Larry Spain is in the audience. And if he is here, would he come forward to give the report. Larry? I think, Larry, you are also intending to say a few things about the committee on delivery of legal services, is that correct?

**MR. LARRY SPAIN:** Right.

PRESIDENT PETERSON: All right. Well, why don't we handle both of them at the same time.

MR. LARRY SPAIN: I wasn't aware that I was supposed to make a report for the Lawyer Referral Service Committee, but I'm on that committee also. We have met several times during the year and are continuing to evaluate the referral panels that the State Bar Association has set up. They all seem to be working fairly well. I know there is always active encouragement for more attorneys to sign up on the various panels that have been established by the State Bar; not only the Fee Generating Panel, Divorce Panel, *Pro Bono*, and Farm Panels. As far as the Civil Legal Services Committee, Judge Medd who was unable to be here today, asked that I report very briefly on their committee. Chief Justice, I think yesterday highlighted some of the matters related to the study of that committee. Since we are really in the midst of that study at this time there is not a great deal that I can report. We have looked at the present structure of civil legal services to indigents in the State of North Dakota, looked at the funding levels, and are currently considering a number of options that may be able to be recommended not only to the court, but also to the legislature in order to increase the availability of legal services to the poor, and hope to complete our study by this fall and make those recommendations. Thank you.

PRESIDENT PETERSON: Thank you very much, Larry. I'm going to do a little advertising now. I don't know how many of you have picked up SBAND visors. The staff tells me that there are still some available. There have been some who have suggested a football helmet would be better for me this afternoon. Anyway, you got lots of these for sale for four and a half bucks. There are sweat bands out there for all of you heavy exercisers, and they are available at the desk. Take some home for your kids or yourself. The other thing I want to plug is the desk book is out there and available, and orders can be taken here. The civil jury instructions are on display out there, and you can order them here and you get a twenty percent discount. So you get a seventy-five dollar set of instructions for sixty bucks.

The other thing I want to plug is the entertainment this evening after the annual banquet. If you are giving consideration to leaving early or whatever, the entertainment this evening is a group called the Christmas Spirits. What they are, it is a group of frustrated lawyers from the Chicago Bar Association who prefer to sing and dance and act. And I have seen them several times, and I think there are several other members of the Association who have seen them. And they are truly entertaining, and I think you will enjoy them. And I would encourage your attendance.

The next item on our agenda will be a brief report from Wes Argue. And maybe I stole some of your thunder about a desk book. Wes, but why don't you stand up and give your report, please.

MR. WES ARGUE: This is a report from the Legal Economics Section of the Bar Association. Jerry Engelman couldn't be here to make the report, so I'm here in his place. The prefilled report is at page thirty of your SBAND booklet. It is available. I urge each of you to look at the lawyer's desk book. It is primarily designed for the younger attorneys not only just starting practice; has a lot of items that are also applicable to you who have been in practice for a number of years, as well. Take a look at it. We intend to expand it and update it. And I want to get the feeling of the group as to how far I should go with an expansion regarding fee survey. If you remember our old lawyer's desk book, it had an advisory fee schedule. Of course we can't publish an advisory fee schedule. But I have talked to Bill Wilson at the law school, and he has agreed to do the research to determine how far we can go to determine how much of a survey can be published for the desk book. We are interested, as the Legal Economics Section, in trying to show you how to make more money practicing law. I know that most of us like to know what the other fellow is charging and whether we are in the market or not. But is there enough interest to go ahead with a project, to do a survey of the fees of attorneys across the state? Those who are interested, raise your right hand. Providing of course that it is legal. All right. Being no objection, I think we will probably go ahead with that and add a fee survey portion to the desk manual. If any of you have any suggestions for additions to the desk book, if any of you have any forms or procedures or system that you would like to add to the desk book, we will be happy to look at them. Get them to either Gordy Schnell or to me, or we will try to put them together so they will be published. Thank you.

PRESIDENT PETERSON: Thank you, Wes. The next report I will call for is from Jim Hill. Jim, would you please come forward? This is relating to the Continuing Legal Education Committee and the resolution that Jim talked about yesterday.

MR. JAMES HILL: Yesterday I placed before the assembly a resolution regarding the reporting time for continuing legal education. I read it rather quickly, only because I wanted to make sure that we all had a chance to eat. We had a long morning. But that should not downplay the significance of what we are attempting to do in this commission. I have just completed my third year on the commission and my first year as the chairman of this commission. And one of the things that we have been doing in the last two or three years is getting the process of discipline within the commission in order.

Within the last two years we computerized the system completely. And I would inform you that as of right now we are talking approximately a ninety-eight percent completion or compliance rate with your Association. We have perhaps two percent of our membership that report in a given time frame that we have some problems with, be it an extension of time or an all-out failure to report. What has happened is that the commission operates, of course, on the rules this Association had adopted and then requested for approval by the Supreme Court of North Dakota. Rule 4 of those rules tells us that within sixty days after there has been a failure of compliance, we shall—the word is “shall”—refer the names to the Disciplinary Board of the State Bar Association. We do not have any discretion. So in effect we are sending a group of names every year to the Disciplinary Board. They in turn are referring those names to each of the Inquiry Committees, and we are having disciplinary procedures against attorneys.

It occurred to those of us on the commission that we may not of intended that as an Association when we adopted this mandatory continuing legal education nine years ago. We may not want to have lawyers suspended or disbarred simply because they did not comply with continuing legal education. We made it as if it were one more requirement in obtaining a license. You pay \$200 and you do a certain number of hours of CLE, but we don't disbar you for that. You always get that certificate of admission. It is just that you are not going to get a license.

We talked with the State Board and asked them if they had an explanation of why we were doing that, and was there any reason why the rule could not be changed. We met with them, and they indicated the same to us. They were not real thrilled about the process of receiving our complaints. They were receiving complaints from attorneys. We went to the Disciplinary Board and asked them what they felt. The Inquiry Committees were not excited about it. So we sent it to Luella Dunn, the definitive source. She didn't know why we are doing it this way either. We went back and looked at rule 4 and decided that there has to be a better way to do what we are doing.

What we did is — obviously had a lot of input from attorneys practicing in Fargo and Grand Forks that have dual licenses. Everyone knows that Minnesota reports in June of each year. We looked at a way of moving the reporting period, streamlining the enforcement process. That is the product of the resolution.

In effect what we are proposing to do is move the reporting period from December 31 to June 30. What that would mean is the member who must report in a three year period would have thirty days from June 30 of that year to report. That would bring you to August 1. The person who still failed to comply is in a position now with a computer to get a sixty day letter out. Within seven days of that letter we send a sixty day letter, giving another sixty days for a person to comply. If there is failure, they are near the first of October. If the person still has failed, we are then in a position to send to the State Bar Board, to the secretary-treasurer of the State Bar Board a list of those people who have simply not complied. The State Bar Board looks at that list of people and looks at the \$200 coming in. They look, have they given me \$200, and number two, are they on this list. If he is not on list, you are going to get a license. If on it, you are not going to get a license. We are not going to be referring names to the Disciplinary Board. We are not going to refer names to the Inquiry Committee. There are not going to be files set up on those attorneys, on those attorneys who have failed to comply. It will simply be a process of not getting a license.

The situation we have now is that we are conducting investigations on people, or the Disciplinary Board is, as to whether they should have a license nine months after they have received a license. There is no enforcement process in that at all. The State Bar Board has endorsed, at least in my conversations with members of that board, what we are attempting to do, the Disciplinary Board has agreed — at least through conversations with Luella Dunn, I am led to believe that the supreme court knows what we are doing and has given some approval as to what we are attempting to do. That is the reason for the motion or the resolution. And what in fact the resolution does is allows us to move that day and then go to the Board of Governors to work out the mechanism to change rule 4, which will be necessary to implement it, and then we will ask the supreme court for approval of rule 4, the changes that we are proposing.

**PRESIDENT PETERSON:** Are there any questions of Jim regarding the explanation that he has given regarding the resolution? Is there any discussion on the resolution? Hearing no discussion, I will ask as many as are in favor of the resolution signify by saying "aye." Opposed, "nay." Motion carried. Thank you, Jim. The next report that I will ask for is on the Bar Foundation. Joel?

**MR. JOEL W. GILBERTSON:** Joel Gilbertson from Bismarck. Thank you, Dave. The North Dakota Bar Foundation is a nonprofit charitable foundation. It has been approved by the IRS under 501C3. We have been going for about four years now, and I think we are kind of off and running. I won't give a lengthy report this afternoon. We are anticipating passage of IOLTA and are beginning our preparations to submit that, assist in submitting it to the Supreme Court and in setting up a structure whereby we can disburse those funds in a depository. That is all I have at this time, except I would like to thank Paul Kloster, who has been the chairman for four years of the Bar Foundation. Thank you.

**PRESIDENT PETERSON:** Thank you, Joel. I think we should probably thank the Bar Foundation for the effort last evening over in the Law Courts Building and our Canadian colleagues. I don't know how many of you had the opportunity to take the tour of the courts, but it was a fine place and a fine cocktail hour. And I thank you very much, Joel, and your committee.

The next item that we will take up is the IOLTA resolution. And Vern Neff explained the resolution and what the concept is all about. And the motion must now be acted upon. Does anyone want me to reread or want Vern to reread the resolution regarding IOLTA? No hands. All right. Is there any further discussion on the IOLTA provision that was presented to the General Assembly yesterday? There are none. All right. As many as are in favor of passage of the resolution relating in the IOLTA plan, please say "aye." As many as are opposed, say "nay." I declare the motion passed.

**MR. LOWELL LUNDBERG:** Are you going to send us a copy of that letter that we are supposed to send to the bank?

**PRESIDENT PETERSON:** The answer from Mr. Neff is yes. You will receive the copy of the letters and the forms, and you will be hearing from the committee, I presume. Is that correct, Vern?

**MR. VERN NEFF:** Yes. And the foundation.

**PRESIDENT PETERSON:** The next item is the proposed Model Rules. And we have Chris Hogan here again, and Randy Lee. And there are others on the committee that are here. Are there any members of the association that desire that the motion which was made yesterday regarding the proposed Model Rules and the adoption of them be reread?

**MR. WES ARGUE:** Mr. Chairman, there has been an amendment made, or resolution. Dave Bossart was considering an amendment of the rules that should be presented at this time.

**PRESIDENT PETERSON:** Is that in the form of an amendment to the rules or simply a resolution of intent?

**MR. WES ARGUE:** It is in the form of an amendment, an addition to the resolution.

**PRESIDENT PETERSON:** Dave Bossart is looking real nervous. I think he wants to say something. Dave, do you have —

**MR. DAVID BOSSART:** The first thing I want to say is that I want it very clear the record should show that what I'm about to say, that that motion has nothing to do with the Breitling report. I would move to amend the resolution to adopt the new rules of professional conduct to add the following. And before I do this, I will say that I have shown this to Christine Hogan and Barry Vickrey and Randy Lee, and there was no violent objection. They can speak for themselves.

**BE IT RESOLVED** that while the State Bar Association has adopted new rules of professional conduct, and while the Association recognizes that rule 7.1 would, under certain conditions, allow direct solicitation by advertising or advertising by mail, and while the State Bar Association of North Dakota recognizes that such solicitation or advertising may be allowed by the Federal and State Constitutions, nevertheless, the State Bar Association of North Dakota resolves that it does not endorse, support, or favor direct solicitation or advertising by mail of potential clients by attorneys practicing law in North Dakota.

I would move that amendment to the resolution to adopt new rules.

**PRESIDENT PETERSON:** Is there a second?

MR. JOHN HJELLUM: I second.

PRESIDENT PETERSON: John Hjellum of Jamestown seconded.

MR. ROBERT A. FEDER: I wish to second that motion. Counselors, we probably see in our practices more often than not for every moral wrong there is not a legal remedy. But the corollary is that just because something is constitutionally permissible, it doesn't make it right and it doesn't make it something that we should endorse or be proud of. Something comes to mind here for me. In my field I feel uncomfortable for the fact that bigotry and racism is legal in North Dakota. We have a threshold of ten employees in our Civil Rights Act, to put up a sign, I only employ nine people, and I will not give equal pay to women, and I will not employ Blacks and Indians and Jews or whatever. Those of us that feel extremely about the Right to Life issue likewise take exception to it.

I think it is very important that when we adopt these rules, as we are about to do, that at least part of the rules say that just because something is constitutionally permissible we don't feel it is right. We should not have the public stand up and say "you folks endorse going over to Jones' house right after the funeral and telling Mrs. Jones that poor Timmy was run over by the Budweiser truck and let's sue the bastards." I hope this amendment would be amended to the resolution adopting the rules, that the rules would reflect, the form of the amendment, that we do not condone or endorse or encourage direct solicitation. Thank you.

PRESIDENT PETERSON: Thank you, Robert. All right. The amendment has been seconded twice. We have a comment in the back.

MR. DWIGHT KALASH: Point of order.

PRESIDENT PETERSON: Excuse me.

MR. DWIGHT KALASH: I'm Dwight Kalash of Grand Forks. The point of order, is it proper procedure to vote on the amendment and then vote on the total resolution?

PRESIDENT PETERSON: Yes. Are there any discussions regarding the proposed amendment? Does any member of the committee wish to make any comment about the proposed amendment? As many as are in favor —

MR. ROBERT DAHL: Bob Dahl. I just have a question on it. Does this — it comes as a form of resolution, but it sounds to me as if it is an amendment to the model rule. Do you understand that as such?

MR. ROBERT A. FEDER: Yes.

MR. RANDY LEE: We do not so understand. We understand it as an amendment to the adopting resolution.

MR. ROBERT DAHL: Where is this thought that is going to be adopted, how is it going to be phrased insofar as the rules are going to be concerned? And in the future where is it going to be contained in the rules? I would like to have some comment.

MR. RANDY LEE: We talked about we are presently of the mind to add to the comments a paragraph which would describe that after the adoption of these rules — the Bar Association include in the resolution adopting the rules — and put it right in print.

PRESIDENT PETERSON: Thank you, Randy. Bob, so the record is complete, do you wish to be shown as from Grafton or someplace in Florida?

MR. ROBERT DAHL: You can show me as a licensed attorney not practicing in North Dakota.

PRESIDENT PETERSON: Any further discussion on the motion which is before the house? Hearing none, as many as are in favor of the adoption of the language that Mr. Bossart and Wes Argue have read, say "aye." As many as are opposed, say "nay."

PRESIDENT PETERSON: I declare the motion carried. We now have the main motion back before the body with respect to the adoption of the Model Rules. And Mr. Wilking from Fargo.

MR. LEO WILKING: Would a further amendment to the rules be in order at this point?

PRESIDENT PETERSON: Amendments are in order today.

MR. WILKING: I would like to state an amendment then.

PRESIDENT PETERSON: Would you please approach the microphone?

MR. WILKING: Mr. Chairman — Leo Wilking, Fargo. I realize that this report has been worked on very carefully and at length by the committee members, and I do think they have done an excellent job. I have one reservation, which is perhaps more technical than substantive. But I think it is important enough for us to consider briefly. In reviewing this report since I got a copy of it yesterday, I find that there is a rather disturbing amount of ambiguity in the terms of references to reasonable, reasonably, unreasonable, and unreasonably. I know that as lawyers we are often called upon to interrupt gray areas of the law. However, I don't think it serves us well to propose and enact standards of conduct which we would conform to, which are so vague and ambiguous that they really don't mean much. And I notice there are — I actually counted them up. There are forty-nine references to the word reasonable or reasonably and unreasonable or unreasonably. And I guess I think that verbiage is unnecessary and could be handled with a simple amendment. As an example, just directing your attention to rule 1.4, that states in subsection (a), "a lawyer shall make reasonable efforts to keep a client reasonably informed about the status of a matter. A lawyer shall promptly comply with a client's reasonable requests for information."

I really don't think — I think a layman looking at that would think it gobbledygook. And I think that as lawyers, if we were trying to enforce a legal document with that language we would think it fairly impossible. I don't think we would hold ourselves to too high a standard if we modified that to "shall make all necessary efforts to keep a client informed about the status of a matter. A lawyer shall promptly comply with a client's request for information." I really don't think that is asking too much of ourselves. And therefore Mr. Chairman, I would propose an amendment to the rules. Because we have terms like reasonably diligent, reasonably possible, reasonable diligence, reasonable assurance, reasonable time, et cetera, I would suggest that instead of — and one reference which is particularly popular is reasonable efforts. Reasonably believes is thirteen references. I propose we define at the beginning of the Code the terms "lawyer knows" or "lawyer believes" to include and to incorporate reasonably believes and reasonably should know, and also substitute the term "all necessary efforts" for the term "reasonable efforts" wherever it appears, and that following that we delete every reference to the

term reasonable, reasonably, unreasonable or unreasonably, with the exception of one rule, that is 1.5, which I think the terms are appropriate.

I have not had time to check this with Mrs. Hogan, and I apologize for bringing it up at this late date. But I don't think this type of grayness really benefits our organization. I think it would be handled with the definitions at the beginning. They should not be scattered throughout the body of the work. And I really think we should hold ourselves to as high a standard as possible. It only makes sense that the Inquiry Committee or Review Committee would use a reasonable standard of practice in interpreting whether a lawyer has met his obligations or not. I think it would appear to us too often that, "well, I think that's reasonable and the Code says it is reasonable, so it must be reasonable." And I invite any response to that that the committee members wish to make.

PRESIDENT PETERSON: Are you making that in the form of a motion, Mr. Wilking?

MR. WILKING: I do make that in a form of a motion.

MR. MARK LARSON: Second. Mark Larson of Minot.

PRESIDENT PETERSON: We have a motion and a second. Would any member of the committee care to respond to the comment, or the motion, rather? Randy Lee.

MR. JOHN HJELLUM: It sounds like a reasonable motion.

PRESIDENT PETERSON: John Hjellum of Jamestown in fine form.

MR. RANDY LEE: I will try to be brief. Substituting the words "all necessary efforts" for "reasonable efforts" simply raises the standard substantially that would be imposed upon lawyers. I think that is one thing you should be aware of. Second, reasonable and reasonably believes, those terms are defined in the terminology section. If you — if you have it before you, you will find reasonable or reasonably defined, and you will find reasonable belief or reasonably believes defined. I will read those to you. I would suggest that if I understood, the intent was to add the concept of reasonableness to the definitions of know and believe. It seems to me that if the concern is to make the black letter clearer, to take terms like know and believe, leave them in the black letter and then put reasonable into the definition of those words makes it harder for the average reader, because they then must go to the definitions to find out that know and believe includes reasonableness. Thank you.

PRESIDENT PETERSON: Are there any other comments, commentators on the motion which is before the body? Seeing none, does everybody understand the motion that has been made? As many as are in favor of the motion say "aye." As many as are opposed, say "nay." I declare the motion lost. We now have before us again the main adoption motion. Judge Burdick of Williston.

JUDGE EUGENE A. BURDICK: I don't have a copy — I'm sorry — of the written proposed rules. But what is the name of the proposed rules after they are adopted? Are you going to use the word "model," or call them the Rules of Professional Conduct of North Dakota?

MR. RANDY LEE: What is proposed is North Dakota Rules of Professional Conduct.

JUDGE BURDICK: So the word "model" isn't going to appear. Thank you.

PRESIDENT PETERSON: They well may be a model, but we can't call them that, yes.

JUDGE BURDICK: That is fine. I don't want the word "model" in there.

PRESIDENT PETERSON: Are there any other comments to be made on the adoption of the proposed rules?

MR. JOHN J. PETRIK: I'm John Petrik from Minot. I don't have a motion, but I wanted to bring something before the meeting for discussion. In rule 1.8(e)(1), there is a change from the present rule. The new rule says "a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter." And I guess my concern in this instance is: is every lawyer going to be forced to absorb the cost? Because one lawyer is going to take a look at this and they are going to promise their client we can absorb the costs, that that is going to make everybody forced to absorb the costs because one guy does it just to bring the cases in the door?

PRESIDENT PETERSON: Would one of the committee members care to respond to the comment?

MR. RANDY LEE: The question is really a complex one, because it goes to all 1.8 as proposed — 1.8(e), as proposed. I was prepared to give a half hour peroration of what is going on, but I think we can all do without it. It is a legitimate question. But if you look at 1.8(e) as a whole, I think you can sense what has been done. The profession has for many years been ambiguous in the extreme about the extent and the kind of help that the lawyer will give to a client, and made and honored for several years, and very clearly so, an exception for the work done on behalf of indigents. It has in fact taken advantage of an ambiguous situation in consideration to permit various kinds of financial expenses to be borne in the interim, again with always the qualification that the client remain ultimately and primarily liable for other kind of expenses.

The American Bar Association, when it sat down to do its work in this respect of the old bugaboo of acquiring a subject matter interest in litigation, decided it was time for a change. And in the process, admitted were several paragraphs of citations that the old rule in fact had been rendered ambiguous by decisions. So it moved that position to admitting that this was going on and recognizes that there were circumstances in which it was necessary, circumstances in which clients could not afford to exercise their right to litigate without assistance, and it therefore proposed the change which we have proposed to you. The change which the gentleman had mentioned and had read is from the American Bar Association Model Rules and proposed to us. And we agree that the profession has moved to the point now where we have to recognize that as true. And the point that the gentleman made was the one of competition. It is possible that it will become an item of lawyer selection on clients' behalf; which lawyers are willing to extend which types of assistance. So that we would suggest since this has been going on in the profession at large anyway, that it probably doesn't add a new dimension to that, and that in the long run the best change is the change that makes legal services available; not provision of an attorney. That is important, too. But the ultimate legal service is the dispensation of justice in the end. And that is what we attempt in the rules to permit the lawyers to provide.

PRESIDENT PETERSON: Thank you, Randy. Is there any further discussion on the rules? Mr. Petrik, you did not make that in the form of a motion, correct?

MR. JOHN PETRIK: No, I did not.

PRESIDENT PETERSON: Any other discussion on the rules? With some trepidation, I call on my partner, Al Wolf.

MR. ALBERT A. WOLF: Al Wolf from Bismarck. The resolution that was proposed by Dave Bossart and Wes Argue has a flaw in it which I just discovered. And I would like to propose an amendment to the major resolution now as amended which would correct that. The language, as you can recall, perhaps, ended up with the term the North Dakota State Bar Association resolves that it does not endorse, support or favor direct solicitation or advertising by mail of potential clients by attorneys practicing law in North Dakota. I did not like the inclusion of "by attorneys practicing law in North Dakota," because it does sort of open invitation to lawyers practicing across the river from Fargo and Grand Forks to violate that rule. And we are kind of absolving that practice. I propose that we amend that resolution by excluding the four words "by attorneys practicing law," and then it would read "soliciting or advertising by mail of potential clients in North Dakota." I make that motion to amend.

PRESIDENT PETERSON: You hear the motion. Is there a second?

MR. BOSSART: If it is legal for me to second it, I will second it.

JUDGE BURDICK: Second.

PRESIDENT PETERSON: Judge Burdick seconded, from Williston. You certainly don't want to engage in any illegality here, Dave. Is there any discussion on the amendment? Hearing none, all in favor say "aye." All opposed, say "nay." Motion carried. We are now back on the main motion. Is there any further discussion?

A VOICE: Question.

PRESIDENT PETERSON: Question has been called. As many as are in favor of the adoption of the North Dakota Rules of Professional Conduct, say "aye." As many as are opposed, say "nay." That is unbelievable, gentlemen and ladies. Thank you very much. The motion is carried.  
(Applause.)

PRESIDENT PETERSON: No "nays" at all. I think the official record of the Association should note that the motion to adopt the rules was unanimous.

The next item on the agenda that we will take up for consideration is the motion with respect to the adoption of the study of — or the Bar Association's Court Study that was presented yesterday by chairman Duane Breitling. As Duane explained, because of family commitments he had to leave for California this morning. And for that reason we have now before the body the motion which is to adopt as the position of this Association the recommendations of the Court Study Committee of the Bar Association. Those recommendations you will find on pages thirty-two and thirty-three of the report which you should have received in your materials at the registration desk. We now have on the floor discussion of that motion that was proposed by Duane Breitling. Phil Johnson.

MR. J. PHILLIP JOHNSON: Mr. President, I am proposing a substitute motion. And the substitute motion would read as follows: Move that the Breitling Committee be commended for its dedicated efforts and informed report; that the committee be requested to continue its efforts to deal with the serious problem of the supreme court case load; that the committee report be provided to the Kretschmar committee for its further response from the Board of Governors and the State Bar Association of North Dakota.

PRESIDENT PETERSON: Is there a second to the motion? Malcolm Brown of Mandan. Is there discussion on the motion?

MR. PHILLIP JOHNSON: I won't get into extensive discussion except to state that I think that the motion is intended to commend the committee for its efforts, but not to block or set out any specific solutions to the supreme court case load as the official position of the State Bar Association.

PRESIDENT PETERSON: Is there any further discussion on the motion that is before the body? Judge Burdick.

JUDGE BURDICK: Well, I'm just — I realize that passage of this motion will more or less finesse the heat of the moment here, but there are some things in that report that are deserving of consideration. The findings of the committee are the need for some reform, but unfortunately the report does not suggest even that an intermediate court of appeals be considered as one of the options. And I'm disappointed in the report on that score. And if that were added as one of the alternatives, I think we could possibly adopt the report and let the legislature decide how this should be handled. But to have the report adopted without any reference at all to the use of an intermediate court of appeals as an alternative, as one of the possible solutions, I think would be a grave mistake. I would like to see some action taken, but certainly with the addition that they have an intermediate court as one of the legislative options.

PRESIDENT PETERSON: Thank you, Judge Burdick. With all due respect, I would refer you to page thirty-three of the report which reads — and I quote — "these changes should be implemented and tested for effectiveness before an intermediate court of appeals is created in North Dakota." So I don't think the report excludes the possible creation.

JUDGE BURDICK: Well, it is very left handed on that score. And the final listing of the things, it lists everything except a court of appeals in the final summation. That is the way I read the report. And it is to that extent that I disagree with it. But I think we could probably take the position here that would recognize the court of appeals is just as viable an option as any of the others that have been suggested. I agree that we should not take a final position on what route to follow. I think that would be a mistake at this time. But we ought to recognize the need for reform. Some sort of remedial action has to be taken to alleviate the problems of excessive case load.

PRESIDENT PETERSON: All right. Thank you, Judge Burdick.

MR. JOHN HJELUM: John Hjellum of Jamestown. I support the motion, and I'm hoping the committee will come back by deleting the addition of the recommendation for the addition of additional members. This has been proven, as I understand it, both in the State of Minnesota and in the State of Wisconsin, and in each case it required a constitutional amendment to increase the number. And later on when they found out that that didn't help, then they had to have an additional constitutional amendment putting it back to the former number. I therefore support the motion and hope that the next report will delete that reference.

PRESIDENT PETERSON: Paul Kloster? Paul Kloster of Dickinson.

MR. PAUL G. KLOSTER: Yes, not Williston. I'm a member of the Kretschmar committee. Mr. President and members of the Bar, I think that I would like to endorse some of the comments just made. The Kretschmar committee had studied this matter for more than two years. A large number of alternatives and options were considered in detail before the report was ultimately submitted to the Bar. You received it and various portions through *The Gavel*. Regretably, I don't think it is possible for everyone here to have a memory of the entire rationale of the Kretschmar report, nor to have had the ability to really dig into what is in the Bar report.

Bothersome to me with the proposed Bar report, prior to the amendment of Mr. Johnson, which I support, is that it does entail and advocate various items, most notably the screening committee; the settlement conference; the potential which was mentioned yesterday that the justices themselves should determine what additional staff might be needed in order to create efficiencies; to go to panel, presumably three judges, whether that be of the present five member court or an additional two. And they did advocate consideration, implementing, and trying seven members prior to even anticipating the possibility of an intermediate court. That of course entails a constitutional change. It would be highly unworkable to utilize that kind of a test.

Personally, I feel very strongly that our court, that our supreme court as the appellate court in our jurisdiction, must remain inviolate in addressing the new issues, the new directions of the law. When we have panels we are going to open grave possibilities that one panel will have a different view than that of another; there may be several alternative compositions of the panel. There could be conflicting decisions.

As we get into that we must also address whether it is any more efficient. How many of these members of the court are going to be able to escape devoting attention to other cases even though not assigned to their panel. I question the efficiency of it. But I question that it is going to work detrimentally to the philosophy of what I believe our appellate court should be really addressing. Staff and administrative involvement is identical. We then have the danger of having a greater administrative input and of the ultimate decisions that carry the great weight of precedents for the future.

I do not stand here saying that there cannot be honest differences of opinion. I believe that the report of the Bar committee should serve whatever usefulness that those ultimately deciding might feel that it deserves, and similarly they should review the Kretschmar report. Yesterday there was a motion which did adopt a position that the Bar committee report be received and be filed. And it should then be available to those in the legislature who will have to look at this or to this Association later on, and it will serve a good purpose. There is room for honorable difference of opinion on the matter. I do not believe that it would be wise that a resolution such as proposed and now before the floor would become the mandate of us as an Association. And I believe that for that reason we should support the proposed amendment offered by Phil Johnson. Thank you, Mr. Chairman.

PRESIDENT PETERSON: Lynn Boughey of Bismarck.

MR. LYNN BOUGHEY: Thank you, Mr. President. I was just wondering, first of all, are we following rules of order or some other form here?

PRESIDENT PETERSON: As closely as I can interpret.

MR. BOUGHEY: I'm confused, because the amendment that is before the board right now is in the form of a substitution, and would seem antithetical to the motion itself. And I'm confused because partly to make a motion that is — to change the initial motion, you must have consent of the person who made the motion and the person who seconded it. Otherwise the amendment is antithetical. It cannot be taken into account because it flip-flops. And the reason I'm asking this is not necessarily to be a stickler, but I'm confused what is before the floor. Is it a request to table or defeat the initial motion?

PRESIDENT PETERSON: The issue before the floor is the motion that was before Phil Johnson.

MR. BOUGHEY: Which was to substitute?

PRESIDENT PETERSON: Phil, would you restate the motion, please?

MR. PHIL JOHNSON: I won't restate the whole substance of the motion. But this is a substitute for the existing motion which is on the floor. It is amended in total.

MR. BOUGHEY: Which I understand is out of order.

A VOICE: Point of order.

MR. BOUGHEY: The result of the amendment is the defeat of the initial motion, which I understand under our rules cannot be had. Also as far as earlier someone had a question. It is also my understanding that when you make a question, you raise a question, you vote on whether to vote. That way you don't have the one person who has the ability of preventing all further discussion.

MR. DWIGHT C.H. KAUTZMANN: Mr. President, I don't propose to be a great parliamentarian, but I see Mr. Boughey's point. Without getting into a parliamentary argument — Dewey is gone. I served on the committee. Somebody should stand here and respond or take the heat, or whatever. This wasn't something that was put together in two weeks. Members of the Kretschmar committee pointed out that they did it in two years. We had the benefit of their work. It took us approximately six to eight months. I think as an Association, we do ourselves and the public an injustice by passing the alternative motion. I think the Bar Association should take a stance. If you are against the Breitling report, then tell everybody you are against it. If you support it, then support it. If the alternative motion, the substitute motion should pass — if you recall what it said, it said this report will be sent to the Kretschmar committee; it is not going to the legislature. The argument has come before the legislature. Whether you agree with Kretschmar or you agree with this report, the answer is going to be the North Dakota Bar Association took a new position. They had a study committee. This is what the study committee said, but the Bar Association took no position. I disagree with Judge Burdick. I also point out to you the last page of our document. It says, "These changes should be implemented and tested for effectiveness before an intermediate court of appeals in North Dakota." I do not think that language precludes an intermediate appellate court. I think that changes the requirement here. All we are saying is one, there is a problem. Two, let's try these things first. If they don't work, then let's go to the intermediate appellate court. That is what this report says.

I want to point out one other thing. When Dewey was here yesterday he said we had one advantage that the Kretschmar committee did not have. We were able to show statistically that within the last year the appeals filed have gone down ten percent. That is true. Our neighboring states show a history, a track record of more than one year, that their appeals are going down. That is a fact. I disagree with my friend Paul Kloster when he talks to you about panels. If what he says is true, then the system as it works in Montana would have crumbled two years ago.

It works in Montana. Why can't it work in North Dakota? Beyond that, I have faith in our justices, if they break into panels, that they will still talk to each other and they will read their own opinions.

My last comment is this, that goes back to my first: We have to take a stand. Either kill this thing and kill it like men and women and lawyers, or pass it like men and women and lawyers. But let's not skirt the issue. I leave you with a quote from Dante. And the quote of Dante is this: "The worst place in hell is reserved for those who remain neutral in times of great moral adversity." Thank you.

(Applause.)

PRESIDENT PETERSON: Judge Conmy.

JUDGE PATRICK A. CONMY: Mr. President, members of the Bar. Damned as I am to the seventh circle of Dante's Inferno, I would like to make some comments. I was also a member of the Kretschmar committee. We had a delightful time. We took our gloves off. We counter punched. We pointed out the prevailing attitudes in the North Dakota Bar Association towards the Supreme Court. We pointed out the inevitability of resentment felt by every lawyer on the losing side of an opinion, and we would cry "which idiot would possibly have come up with such an unjust law!" And we multiplied that by the number of cases and members of this Association who knew that our highest court was obviously bereft of reason, at least in this case. We looked at the personalities of the people on the court. We analyzed the strong points, minor though they were; the vices, numerous as they were; and we concluded that this was a highly emotional issue where every one of us would know what the problem behind the court was: It is obviously the reversal rate. It is obviously the failure to adopt a correction standard of rule 52, abuse of discretion matters. It is obviously a necessity of reinventing the wheel and citing forty pages of that to that which was perfectly obvious. And we worked our way through these personalities. We worked our way through our resentments. And we came out with a situation where we basically concluded that we want an appellate court which has time to be philosophical; which has time to lead the legislature in terms of changing law, changing in social needs, trends. I have spent some time trying to sell old legislators on constitutional changes or writing a statutory basis for allocation of fault in comparative negligence. I have despaired of doing that. I doubt we can get it through the legislature. Economically there is no way any legislature is going to fund an intermediate appellate court. Next session, perhaps the session after that, maybe five, six years from now before it will be reality.

Dewey says stand up like ladies and gentlemen lawyers and take a stand. I'm going to say to you I think that is a mistake. I don't think it is necessary to draw battle lines. I don't think it is necessary to have this Association go on record as adopting the necessity for a constitutional change to increase the size of the court before the legislature can have the blessing from this group to consider an intermediate appellate court. It is fun to flex our muscle. I would love to do it. I would love to say to the Chief Justice, "To hell with you, Chief Justice." I don't think it serves the Association well. I don't think it serves the judiciary well. I think it will create a legislative problem that may come back and bite all of us. And with all deference to my good friend Dewey — or both Deweys, both of whom are big enough to stomp on me and squash me for my affrontary — I say forego the luxury of flexing your muscles and taking a position. Why not finesse it and let time, history, and the financial disaster the state faces take its course and take a position two or four years from now when the matter is ready for decision.

PRESIDENT PETERSON: Orlin Backes of Minot?

MR. ORLIN BACKES: I was also a member of the Kretschmar committee. I went on that committee with the firm belief that an appellate — intermediate appellate court was not the proper way to go. Over two years of interviewing each judge, interviewing the district judges, meeting with representatives of other states, the National Center for Courts, I came away convinced that we should take a position that we need an intermediate court. I am very concerned about this report. I think it is the exact thing our president said, Mr. Reed said. Limit the rights of the citizens. They say let's have a summary disposition of cases. Let's have discretionary appeal. What are you doing? The same thing as a court reform: taking away the rights of the people to be heard on appeal. I do not believe that is a proper way us lawyers should take. We should be looking out for the citizens so that they have their day in court, their appeal. And certainly I agree with Dewey, I think we should take a position. But it should be for an intermediate court. I don't think that report understands the situation. Because it says not only is appeal taken to an intermediate court; if you study it, every appeal in this came directly to the supreme court, and they put it off to a panel of intermediate court. There is no extra court in-between that you appeal to. They talk about it will cause delay. The intermediate court will move delay away and you will have the decision sooner. I can go through this report, and they are wrong. And I hope we pass a resolution supporting an intermediate court and get the matter taken care of. Thank you.

PRESIDENT PETERSON: Dan Chapman, Bismarck.

MR. DANIEL CHAPMAN: Mr. President and members of the Bar, it has been suggested by one of my friends that the extra load on the supreme court could be relieved if, for three years, they would not take any more appeals. And I want to tell you that I'm going to appeal that idea. But seriously, I rise in support of what Mr. Backes just said. And I would go even further than the Johnson amendment. I would support the position of the Kretschmar committee. If I thought it was politically prudent I would make a substitute motion for the adoption and support of the Kretschmar committee. But I think that probably the most that we can do and what probably should be tried here is what is being done by the proposal from Phil Johnson. And so I just rise to support what Phil Johnson has moved.

PRESIDENT PETERSON: Dan, I'm not sure that it — you know, you want to have this on the record, but I saw at least three judges of the supreme court nodding affirmatively.

PRESIDENT PETERSON: Justice VandeWalle?

JUSTICE VANDEWALLE: Mr. Chairman, members of the state Bar, I too was a member of the Kretschmar committee, and I think I was the one that Pat was talking about when he talked about punching, because I took some punches from the lawyers on the committee. And they were good, honest questions. I do compliment Dewey Kautzmann and Bud Myers, they were the ones who interviewed the justices. They were sincere. Their questions were penetrating and they were sincere. I have no problem with that particular point. Duane said yesterday that reasonable people can differ, and I think he is right. This is a question of what are the differences.

Let me caution you on a couple of things though. The statistics, when we started the study two years ago, things were leveling out. And I said the case load is bigger than I would personally like, but if it stays at this level we can handle it; we really don't need to do anything. Unknown to me at that time, the case load shot up and we got



thirty to forty more cases the next year than we had had. Last year it leveled off. I talked to Joe Roth, the deputy, a few days ago, and the filings are up again the last few months. If you are thinking there is going to be a decrease in appeals as a solution, I would not rely on that. I question whether that is going to happen.

I'm concerned about the insidious creeping. We are handling two or three cases per judge per year if you just look at one year. But if you look five years and there has been an increase of two or three per judge, that is fifteen cases per judge in a period of five years. It is easy to deal with a dramatic increase. Everybody knows something has to be done. We should learn from the mistakes of others. I don't know that we do. I don't have any children, but my parents tell me that they can't keep their children from making the same mistakes. But it appears to me that the report really says go ahead and do these things that the other states have done and haven't worked. But go ahead and do it, because they might work here. Maybe they will. I don't know. But the Minnesota experience has been the opposite.

I also don't know what the report means when it talks about *per curiam* opinions, because that word means different things to different people. If it means that *per curiam* are cases that are turned over to the staff, either central staff or law clerks, for decision and then looked at by the judges and signed off, we can do that. I don't know if that is what you want. But that may be what will come if we can't handle the case load. I personally am extremely uncomfortable with that. I don't know that I will be able to handle that when it comes. But that is what *per curiam* means to some people.

Summary disposition is another thing that is relied upon. Summary disposition does not mean that we haven't put the work into the case; we haven't had to write the opinion. But I have yet to be able to put my hand on that blue covered brief. And it is by some process to find that this will be the case that will be right for summary disposition or not. There is a lot of work that goes into those cases before we ever start writing them. It is true that it will save some of the writing time, but it is not going to save the time in studying the case. Or at least it shouldn't. And one of the things that happens — and we talked about it among ourselves on the court — we see a case that looks really simple. Ah-ha! We got an easy one. And it has happened — and it has happened before and it will happen again: Those are the cases that somehow in the process, something comes up and you spend more time on them than one of the "harder" cases that you get.

So these are some of the things that are in the report that look like easy fixes. I don't think there are any easy fixes. And I would be cautious about adopting some of those easy fixes as a solution to the case load problem. Thank you.

PRESIDENT PETERSON: Thanks Justice VandeWalle.

MR. ORELL SCHMITZ: I hesitate to speak a little bit, because there were a number of my colleagues in the back of the room that suggested that the insidious creep that Justice VandeWalle was talking about was either me or Reichert.

I rise in opposition to the substitute motion. I must agree with Mr. Kautzmann that I think this Association should take a position. I agree with Justice VandeWalle from the standpoint that he suggests that we should not look at easy solutions because there may not be any. I suggest that the substitute motion that is before the floor right now is just an attempt to make this decision easy, and it is not an easy one. I think we must make a decision based on supporting the report or not supporting the report. Thank you.

PRESIDENT PETERSON: Dwight Kalash, Grand Forks.

MR. DWIGHT KALASH: These guys are a lot bigger than me. I want to say, first of all, that I am not opposed to the idea of an appellate court or intermediate appellate court. I am concerned that the substitute motion has the effect of putting us in an unfortunate position with the legislature when we ultimately get there. The resolution of the problem will be a matter that has to go to the legislature. And I'm concerned that we, the attorneys of the state, will find ourselves in a position where we won't be able to answer the question, "What did you do to solve the problem?" It appears to me that if we put the problem under the table, as Mr. Johnson's resolution proposes, we won't be able to answer that question.

Mr. Breiting's committee suggests to us that what we ought to do is look at all the problems and all the possible solutions, and then if they don't work, we can at least tell the legislature we tried everything, now we need an intermediate appellate court.

PRESIDENT PETERSON: Thank you.

MR. MICHAEL McINTEE: Mike McIntee from Towner. I would like the chair to make a decision on the procedural action. Are we going to be able to vote on a substitute motion, or is it, as some of us believe, out of order? All we would like is a decision.

PRESIDENT PETERSON: Well, the decision I have made obviously by allowing the people to talk is I would prefer to have this motion dispensed with by full discussion rather than procedurally. If I'm wrong, the body can parliamentarily overrule me. I'm going to ask for any further discussion on the motion made by Mr. Johnson.

MR. LeROY LODER: Mr. President, my name is LeRoy Loder, from Minot. And I'm a member of the Breiting committee. And I felt that I had to speak because there are not many of our committee here. When Dave Peterson called me eight, nine months ago to serve on this committee I did not have an opinion as to whether I favored or did not favor the Kretschmar report. I think it is unfortunate this battle has gotten down to — I don't agree wholeheartedly with Dewey Kautzmann. If you have ever served on a committee with him you know you have to take some deep breaths to stay in the same room with him. That goes for the rest of us in here, too. I think this has degenerated into a — it is not a "is Breiting right or is Kretschmar right."

I came into this, looked at this with what I thought was an open mind. I think there are a lot of statistics that people in the Kretschmar committee discussed and were presented to them that are not valid today. We have two members of the new term of the supreme court that are different than when the Kretschmar report was made up. I personally would like to see what the two new members would do to the completion of the supreme court.

I think it is academic for us to talk about whether or not this is going to go through the next legislature. I don't know why this Bar Association has to take a stand at this point, do or die. I signed the Breiting report because that was the composition, as are most committees in the United States, of a compromise agreement. And people are picking out the words of it today and saying this is wrong, and how are you going to phrase it. I do agree with you. We are not here to say Kretschmar is all right. Because if you read the Kretschmar report and you read this report, you come and make up your own mind. This Bar Association really hasn't had enough study of this report. I don't think we should decide on motions. I don't know what you stated, Phil, your entire words there. Have you got

the words? I'm not against this committee continuing to work. I'm not against continuing to have a committee that looks into it. But I think it is wrong to say we need an intermediate appellate court at this time. I think it is wrong to say we have to have the Breitting report or nothing else. I don't think it is black or white. I would like the chair, too, to have us determine what the motion is precisely so that there isn't a bunch of sleight of hand going on, so that it goes back to the legislature and says this is the position of the Bar Association. I think that we should be open to suggestion. I think this is the best thing that happened to the Bar Association for a long period of time in getting these things out and discussing it. And I think we should continue to discuss it.

(Applause.)

PRESIDENT PETERSON: Phil, you were reading from something when you made your motion. Would you restate it again, please?

MR. PHILLIP JOHNSON: The motion reads as follows: Move that the Breitting committee be commended for its dedicated efforts and informed report; that the committee be requested to continue its efforts to deal with the serious problem of the supreme court case load; that the committee report be provided to the Kretschmar committee for its further response from the Board of Governors and the State Bar Association of North Dakota.

MR. ROBERT A. FEDER: Robert Feder of Fargo. I suggest the motion is out of order. I suggest that the motion that is before the body now is the recommendation of the Breitting committee. Those of us that want to do whatever, ignore, finesse, duck, cower, grumble about what Phil's offering to do should vote in opposition to Mr. Breitting's committee's reports adoption. If it fares, Mr. Johnson would be entitled to make his motion. If the Breitting committee report passes, which is the motion before the floor, then you can have something else to water it down or do whatever. But properly I think the motion before the floor is the Breitting committee's resolution to be adopted or not adopted by this body.

PRESIDENT PETERSON: Orlin, you were appointed parliamentarian. Now is your time to go to work.

MR. ORLIN BACKES: I don't know. It seems the consensus of most of the lawyers here is that it probably is out of order and should be taken on the original first and then —.

PRESIDENT PETERSON: We have had fairly full discussion, and we have determined that the motion is out of order. We will take up the motion, which is Mr. Breitting's motion to adopt the committee report.

JUDGE BURDICK: Mr. President.

PRESIDENT PETERSON: Judge Burdick?

JUDGE BURDICK: I wonder if it would still be possible to maybe offer an amendment to the Breitting report that would list the court of appeals from the intermediate court as an option without saying that it is necessary to try all these other things first. Now, all these things were tried in Wisconsin, and I personally talked with Chief Justice Callow of the Supreme Court of Wisconsin, who takes a very dim view of the addition of additional judges to their court. He said they tried it, it failed, and they certainly would not support this. And I think Minnesota had that same experience, contrary to your written report here. It said that this is the situation in Minnesota, I believe. And I understand Minnesota has changed their position on this.

It is the using of these other alternatives first and then finally coming back to a possible court of appeals that I take exception to. And I would like to move to amend the report to list the possibility of the court of appeals as a possibility, along with all the others that are stated, without indicating what our preference is. And I so move.

PRESIDENT PETERSON: There is a motion. Is there a second? John Hjellum of Jamestown seconds the motion. Mr. Parliamentarian, is the motion in order?

MR. ORLIN BACKES: It is proper.

PRESIDENT PETERSON: As many as are in favor of the motion made by Judge Burdick, say "aye." Those opposed, say "nay." I declare the motion lost. We are now back on the main motion, which is the motion as contained in the motion made by Mr. Breitting yesterday.

MR. HARRIS KENNER: Harris Kenner, Minot. I believe — you know, I haven't had a lot of time to study the matter, and so on. And of course I'm a Norwegian from Ward County. But our president came from Ward County, too, but he is a little faster.

PRESIDENT PETERSON: Faster or fatter, did you say?

MR. KENNER: Faster. Anyway, I believe it would be proper, according to parliamentary procedure, if I move that we laid this matter on the table for one year so we might have further time to study it. And I so move.

PRESIDENT PETERSON: It is my understanding that a motion to table is not debatable. The motion is seconded. As much as are in favor of the motion to table, say "aye." As many as are opposed, say "nay." I declare the motion lost. I should simply say here in response to your comment, I am from Ward County. And just to maybe lighten up things here a little bit, Carpio is not a very big town. It is so small that we have the city limit signs on the same post. The school that I graduated from is kind of poor, so we got our driver's ed and sex ed in the same car.

MR. DAVID R. BOSSART: I move the previous question.

MR. MARK GREENWOOD: Second the motion.

PRESIDENT PETERSON: Mr. Parliamentarian? The previous question has been moved. Chief Justice Erickstad was rising. May we have order, please.

MR. MARK GREENWOOD: I move to withdraw my second.

PRESIDENT PETERSON: Mark Greenwood of Dickinson made the motion to now withdraw the consent of his second. We now recognize Chief Justice Erickstad. Thank you very much.

CHIEF JUSTICE ERICKSTAD: I thank you very much, Mr. President and ladies and gentlemen. I have an impression that — maybe wrong — it has been a long time since I have judged the votes in the legislature where I first started — but I think, and I'm not speaking for myself, because I'm on the other side of the hill and I'm — in a few years I will be retired from our court, but the court's problems will not retire. I think our court has attempted to look ahead and meet the problems prior to the calamity stage. If that is in error, then I hope you will forgive us. I think it would be a mistake if you adopt the Breitting report. I said it yesterday in different terms. I think it would postpone the possibility of actually working out our problems before the legislature possibly ten to fifteen years.

maybe longer. Because once you take those necessary prerequisite steps, one of which is to add members to the court by constitutional amendment, you have locked yourself in to unlocking yourself by another constitutional amendment. Or unless you are going to have the seven person court and an intermediate appellate court, which might be more costly than what we are looking at today. I realize that there is a great difference of opinions here. And I hope that in the course of my twenty-three years on the court and thirteen years as your chief justice that I have always encouraged discussion. By my remarks I hope that they never have intended to discourage discussion. But if I may make a personal plea, I do hope that you will not lock us into a program which doesn't permit us flexibility. Thank you very much.

(Applause.)

PRESIDENT PETERSON: At this time, as many as are in favor of the adoption of the motion made by Mr. Breitting yesterday, say "aye." As many are opposed, say "nay." I declare the motion lost.

A VOICE: Call for a division of the house.

PRESIDENT PETERSON: Division has been called for. Les, in view of the number — I think we will have Les Torgerson pass out ballots and we will do it that way. Would — Arnie, would you help distribute the ballots and collect them. Pat Fisher and Bob Feder, I appointed the two of you marble counters yesterday. Please be available to count marbles. I think what we will do while the counting is being done, we will move on to other business while the counting is being done.

I understand there are some people who are asking — it is my understanding that a yes vote would be to adopt the Breitting report and a no vote would be to defeat the motion.

May I have your attention, please. Has everybody had an opportunity — received a ballot and had an opportunity to vote and turn it in? All right. We are going to — Wes Argue, are you in the room?

MR. WES ARGUE: Yes, I am.

PRESIDENT PETERSON: Wes, at this point do you have the final action on other resolutions to present?

MR. WES ARGUE: Yeah.

PRESIDENT PETERSON: Would you do that now?

MR. WES ARGUE: Would you like me to read the resolutions in total, or just paraphrase them?

PRESIDENT PETERSON: Paraphrase them.

MR. WES ARGUE: First resolution presented was to provide two copies of the Directory of Lawyers and Judges to each member of the Bar Association, and also add an alphabetical index to the directory.

PRESIDENT PETERSON: As many as are in favor that resolution, say "aye."

MR. JOHN D. KELLY: I would like to speak on this.

PRESIDENT PETERSON: All right. Good. Thank you. John Kelly of Fargo.

MR. JOHN D. KELLY: I'm John Kelly from Fargo, and I'm just here as the rank and file member of the Association, not as president of our board. The publication we are talking about is a publication of the Bar Board. And the motion before you would have us, in addition to listing the lawyers by cities, also having an alphabetical listing. And then each of you would get two copies. Originally when I heard this I thought it was entirely a bad idea. And then I thought about it, and I decided it may have some redeeming social value. I don't know about what you do with it in the rest of the state, but in Fargo and Cass County, one of the things that the lawyers do with the directory on a quiet day, they start counting up the lawyers in Fargo, and then they count up the lawyers in Bismarck, and we see how well we are doing. And then we might even check with Minot and Grand Forks. I guess Neil Fleming, he doesn't get to do that very often, because he maybe can figure out how many lawyers there are in Cavalier compared to Carrington or something like that. This would add a dimension, to be fair about it. Because whether you lived in Fargo or Bisbee, if you are — depending what letter it was, you could count out how many lawyers, their names started with an A and how many started with a J. So you could enhance the entertainment use of the directory substantially, dramatically.

But the only other point I want to make is that the Association, we are kind of like a remittance man. The remittance man — for some of you that don't know — in the old days, in the fine families in New York and Philadelphia, if they had a young son that was an embarrassment to them, they would ship him out to North Dakota to Bismarck or Minot or Grand Forks or some other remote part of North Dakota and they would say, "Now, you have to stay there and we will send you money each month. And as long as you stay out there, you will get your money. But if you leave, no more money."

Actually the Bar Association is kind of like a remittance man. You see, we collect all the money, all the license fees. And then we — and I say "we," I'm talking about the Bar Board, and then we remit, I think it is eighty percent, to the Association. Now, if you pass this resolution, that is fine. But it is going to cost somebody some money for the additional expense, and it is going to cost money just for fancy new bindings that will probably double the size of this little document we publish. And since we are kind of in the position now of the family back in Philadelphia or New York, it is the question of how much we are going to remit to you. Besides which I know you are all fiscally responsible and you would not want to vote to spend the Bar Board's money. So I'm just assuming that if you vote yes on this, you will be telling us that is fine. But the extra expense, that comes out of the Association's share of the license fees. So if that is what you want to do, that is fine. We will do just exactly what you like. That is if I'm sure Malcolm would agree to that and I could speak for Jerry. The only other warning I put in is when you get down to it, Luella Dunn is going to decide this. And I think that Mr. Fleming brought this motion here after, not before, he discussed this with Luella. Thank you.

PRESIDENT PETERSON: Thank you, John. Any further comment on that resolution?

MR. ROBERT DAHL: I would like to correct Mr. Kelly a little bit. I think he got it backwards. Figuratively the Bar Association is the remitter and the Bar Board is the remittance man. Everytime we want to raise our dues we have to pay them twenty percent of whatever we raise. So it would seem to me on the raise we had here a couple of years ago that they could well afford to put up with it.

PRESIDENT PETERSON: Thank you. As many as are in favor, say "aye." Opposed, "nay." Declare the resolution passed. Next resolution? Paraphrase, please, Wes.

MR. WES ARGUE: I don't know whether this should be paraphrased. A resolution commending David Peterson and his lovely wife for their dedication.

PRESIDENT PETERSON: It certainly should be paraphrased.

MR. WES ARGUE: BE IT RESOLVED by the general assembly that the gratitude of the Association and its members be extended to Dave and Diane Peterson. I would move its unanimous adoption.

PRESIDENT PETERSON: And many as are in favor say "aye." Opposed? Motion carried.

PRESIDENT PETERSON: Next one?

MR. WES ARGUE: The next resolution is — we conditionally referred to it as thanks for the booze resolution. That is to First Trust Company of North Dakota, Harold Diers Company, Norman E. Mark Court Reporter Service, The Michie Company, United Printing Company. Thank you on behalf of the Bar Association. As many as are in favor, say "aye." Opposed, "nay." Okay. Carried.

MR. WES ARGUE: The next and last resolution is a resolution to commend Chris Hogan, and to her committee and her members for the fine work they have done on the Professional Conduct Committee.

PRESIDENT PETERSON: As many as are in favor, say "aye." As many as are opposed, say "nay." Motion carried unanimously.

Our proctors are still counting. At this time are there any other committee chairmen who have significant need to stand up and make a report? And if they do, they may get their wish granted. Seeing no one venturing to the microphone, we have another item of business. And that is before we get into the election of officers and whatever happens on the vote count, and that is Jack Widdel, the President Elect, will briefly present the budget for the next year. Jack?

MR. JOHN E. WIDDEL: Mr. President and members of the Association, with the able assistance of Les Torgerson and Pat Nagel, we have a computerized budget. And a few details on that for you. You will notice that the budget is considerably higher than last year, and that is because this year the CLE program in 1985-86 exceeded the budget allocations through the efforts and hard work of Sherry King, and also the expenses are up. So that is one reason why the 1987 budget is higher.

A second item in the 1987 budget is the fact that the annual meeting expense and income is included. And this was not done in previous years. And we have reviewed the practice and felt that that should reflect the total activities of the Association. So that is why Les and Pat have included those figures within the budget figures for 1986-87. With those two points of explanation, I would — is there any particular questions on the budget? Hearing no questions, I would move the adoption of the budget as proposed for 1986-87.

MR. PAUL KLOSTER: I will second the motion, Mr. President.

PRESIDENT PETERSON: The motion is made and seconded on the budget. As many as are in favor of the adoption of the budget, say "aye." As many as are opposed, say "nay." Motion carried, and the budget is adopted. Thank you, Jack. Let's just stand at ease for a couple minutes and we will be ready to roll. Would those persons who are going to be making the nomination speeches for the offices please come up near the microphone so you can be called upon easily.

May I have your attention, please. Will you please come to order? May we please come to order? The counting has been done by Pat Fisher and Rober Feder. The ballot totals are 74 ayes, 61 nays, one abstention. I declare the motion passed. Is there anything further to come before the body with respect to any other items other than election of officers? I call on Wes Argue. He has one further resolution.

MR. WES ARGUE: I apologize. I neglected to read one of the resolutions that was presented yesterday. And the resolution is that the State Bar Association commend Allen Rouse, the Magistrate of the Court of Queens Bench and a Special Assistant to the Attorney General, and Graeme Garson, Executive Director of the Manitoba Law Society, for helping to insure that this meeting was a success. And I would move unanimous passage of that resolution, as well, Mr. Chairman.

PRESIDENT PETERSON: All in favor say "aye." Motion carried. With respect to the ballots, I'm going to give them to Les Torgerson the Executive Director, and he will have some in these motions, should anyone want to review the ballot counting.

The next item on the agenda is the selection of the officers for the upcoming terms. And at this point in time do we have any nominations for the office of the ABA delegate? Joel Gilbertson of Bismarck is recognized.

MR. JOEL W. GILBERTSON: I would like to nominate Phil Johnson for the office of ABA delegate. Phil, I think Yogi Berra says that you can see a lot by watching, and Phil is a good watcher. He is a good listener, and I think an observer. And that is what his role is for the Association as the ABA delegates meet. And he performs it well. He was elected two years ago, and I would like to see him reelected so he can continue the excellent job he has done. I nominate Phil Johnson.

PRESIDENT PETERSON: Is there a second to the nomination?

JUSTICE H.F. "SPARKY" GIERKE: Second.

MR. PHILLIP JOHNSON: No.

PRESIDENT PETERSON: Spark Gjerke seconds the nomination. Are there any — no further — aren't going to give a speech, Sparky?

JUSTICE GIERKE: I don't want him to lose.

PRESIDENT PETERSON: Are there any other nominations? Are there any other motions to be made?

MR. KERMIT E. BYE: I think we have had some outstanding rules by our parliamentarian, and one that ought to be defined more closely is whether or not that motion really needs a second. It foregoes the possibility he can't get one.

PRESIDENT PETERSON: Is someone going to move the roller in motion?

MR. PAUL KLOSTER: I will move the steamroller.

PRESIDENT PETERSON: Al Wolf from Bismarck. As many as are in favor, say "aye." Phil Johnson is our ABA delegate. Phil, do you want to say a few words?

MR. PHILLIP JOHNSON: No.

PRESIDENT PETERSON: Thank you, Phil. The next item on the agenda will be the taking of nominations for the position of Secretary-Treasurer. Are there any nominations in — Connie Triplett of Grand Forks.

MS. CONSTANCE L. TRIPLETT: I'm not going to nominate my son. I'm just going to try and keep him out of trouble. I would like you all to meet Nicholas. I'm here to nominate Carla Kaluzniak Smith for the next Secretary-Treasurer of the State Bar Association. Carla is an energetic and enthusiastic young attorney, a native of Langdon, North Dakota, graduate of the University of North Dakota Law School in 1983. And she has agreed to work energetically at reactivating the Young Lawyers section of the North Dakota Bar, which has been inactive for quite some time. I have been the Secretary-Treasurer of the Bar Association for the last two years. And the prior secretary, Dave Bailly, nominated me. He suggested that it might be an appropriate thing if I would reactivate the Young Lawyers section. Some of you may notice that I didn't. But I did convince someone else to do it. I just never found the time. But Carla seems to have found both the energy and the time to start working on it. And we had a meeting of the Young Lawyers section this noon, in opposition to the dean's lunch, and it was very well attended. And I think there is a fair amount of enthusiasm for the project.

One other benefit that Carla has in her present state is that she is pregnant — you may or may not have noticed. And someone suggested that maybe we should start a new tradition here in addition to the association between Young Lawyers and the Secretary-Treasurer's position: That the young lawyer be pregnant or agree to get pregnant shortly after being nominated. The reason I suggest this is I think that one of the functions of women being more visible on the Board of Governors and at all levels of the Bar Association is to help raise the consciousness of men in the bar to the fact that even though a number of us who are women and parents have wonderful husbands whom we love a lot, they don't yet take an equal portion in parenting. My husband is in Winnipeg today and he is out shopping. So life is not always as easy as it is for men who have wives who don't work or who at least if they do work, keep the kids at home during the bar convention. Anyway, without further adieu, I would like to nominate Carla Smith for the next Secretary-Treasurer of the Bar Association.

PRESIDENT PETERSON: Thank you, Connie. Is there a second?

MR. KIRK SMITH: Kirk Smith from Grand Forks. Second.

PRESIDENT PETERSON: Are there any other nominations?

MR. DANIEL CHAPMAN: Dan Chapman. I was going to nominate somebody else, but he is not pregnant.

PRESIDENT PETERSON: Is he willing to get pregnant?

MR. DAN CHAPMAN: But I move the nomination cease, that the secretary be instructed to cast a unanimous ballot for the nominee.

MS. DAWN BREWSTER: I second. Dawn Brewster from Williston.

PRESIDENT PETERSON: As many as are in favor, say "aye." Opposed? Motion carried. Carla?

MS. CARLA SMITH: I'm not pregnant. I would just like to thank you all; to have your support. I think that I can add some perspective to the board as a young lawyer, as an attorney who represents the State of North Dakota, as a woman, and lastly as a mother. And I do look forward to serving you all in the next year.

PRESIDENT PETERSON: Thank you, Carla. The next item on the agenda is the selection of a President Elect. And I would call on Wally Hankla. Wally?

MR. WALFRID B. HANKLA: Thank you, Mr. President. A year ago I placed before this group the name of Charles Feste for President Elect. I did that because I thought he would be an excellent leader for our Association. And I am delighted today to again appear before you and again place before you the name of Charles Feste for President Elect. Now, I know that the hour is late, but I know Charlie is — but Charlie is so old that many of you may not know anything about him. So before I ask you to solicit your vote for him, I want to tell you something about him.

He is a man of ability, indicated by the fact he graduated from UND in 1956. He has been, during that time, a member of the Conmy, Feste Firm in Fargo, which is now known as Conmy, Feste, Bossart, Hubbard and Corwin, Limited. And he is a senior partner with that firm now. He has — his ability is further attested to by the fact that he has been elected a Fellow of American College of Probate Counsel, a State Chairman and National Board of Regents of that organization. Charlie is a leader, as indicated by the activities in community service. He is a past chairman of the Board of Trustees of St. Luke's Hospitals, is a past president of Family Services Association of Fargo-Moohread, past commissioner of the Park Board, vice president of the First Lutheran Church, and has served as an advisory member of the Church Council of the American Lutheran Church. We have ability, leadership. He also has shown an interest in the North Dakota State Bar Association, as indicated by the fact that he is a past chairman of two of its committees, a past secretary treasurer, on the Real Property and Trust Committee, served on the Board of Governors, on the Supreme Court Attorney Standards Committee, and has been a member of the Bar since 1956. So again ability, leadership and interest add up to a man who I think will serve this Association well. And I therefore am pleased to nominate Charles Feste for President Elect. Thank you.

(Applause.)

PRESIDENT PETERSON: Thank you, Wally. Chris Hogan?

MS. CHRISTINE A. HOGAN: Thank you. I'm still pinching myself after that unanimous show of support from before. Thank you very much. I think you are probably experiencing *deja vu*. When you were here last year, like last year, I second the nomination of Charlie Reste as President Elect. And like last year, I still believe this group is very fortunate that a man of Charlie Feste's caliber is willing to dedicate a year of his life and his wife's life to service of this Association. And Mr. Feste, as you have heard, has demonstrated a track record of service to his community and this association on your Board of Governors and various committees of this Association and ABA. Like last year, I am very proud and privileged to second the nomination of Mr. Charles Feste as President Elect of this Association.

(Applause.)

PRESIDENT PETERSON: Thank you, Christine. Are there any other nominations? Are there any other nominations? Robert Feder of Fargo?

MR. ROBERT FEDER: I move that nominations cease; the secretary be instructed to cast a unanimous ballot in favor of Charles A. Feste of Fargo of the State Bar Association of North Dakota.

PRESIDENT PETERSON: Is there a second? Paul Kloster of Dickinson. As many as are in favor of the motion, say "aye." Opposed? Motion carried. Chuck, congratulations. Want to come forward?  
(Applause.)

MR. CHARLES FESTE: Thank you very much. I would only say that I will pledge to do the best job I can in the coming years. Thank you for your support.

PRESIDENT PETERSON: I am to remind those Judicial District Bar Associations that have not met that need to elect a president for the upcoming two years, whom will serve on the Board of Governors, to please meet and make that selection before tomorrow morning, because we will have a Board of Governors meeting tomorrow morning and the new board members should be present.

This brings us to the end of a long and I think perhaps the most lively General Assembly session that I have attended in the eighteen years that I have been a member of the Bar. It again points out that North Dakota lawyers have an opportunity and the ability to disagree with one another, but not be disagreeable in doing so. I wish to thank all of you for all of the work you have done for the Association in the past year. It has been an extreme pleasure being President of this group, and I thank you very much for it. And we will now — excuse me, Bob.

MR. ROBERT DAHL: In a hour and a quarter there is going to be a Red Mass across the street. We Catholics invite the rest of you to come over and thank God there wasn't a fight here.

PRESIDENT PETERSON: With that *caveat* from our Florida member, we are in adjournment.  
(Whereupon, the proceedings were adjourned at 3:45 p.m., and reconvened at 8 p.m. as follows:)

PRESIDENT PETERSON: There are a couple of preliminary things. First of all, have any of you had a good time in Winnipeg?  
(Applause.)

PRESIDENT PETERSON: A few housekeeping rules this evening. I have been advised by the fine staff that each table will receive a couple of bottles of complimentary wine. Any more than that will be available for purchase back here. After we conclude the awards ceremony we are going to have the Christmas Spirits from Chicago. We are not going to take an intermission at that time, so you are all on your own as far as bathroom call.

I want to welcome all of you again to the 86th annual meeting and banquet of the State Bar Association. I'm going to introduce the head table. And I will start my introductions to my left, your right. We have Chief Justice and Louise Erickstad. We have President Elect Charles Feste and his wife Carol Feste. We have Marcia Torgerson. And you may wonder why we have Marcia on one side and Les on the other. The reason is that neither one of them could get under the limbo stick last night, and they are fighting with one another.

We then have next to Marcia, Paul Kloster and his wife Gaye. Paul is the immediate past President of the Bar Foundation. Starting on the right, I would like to introduce President Elect and soon to be President Jack Widell and his wife Yvonne. Next to Yvonne is our very capable and greatly appreciated Executive Director, Les Torgerson. Next to Les is one of our speakers at the CLE seminar today. And we are extremely honored to have Dean John Wade and his lovely wife Mary at our head table. We then have Joel and Jan Gilbertson. Joel is the incoming or newly elected president of the North Dakota Bar Foundation. We then have Carla — and I'm not going to try and pronounce Carla's last, middle name or her maiden name, because I cannot pronounce it. Carla was elected the Secretary-Treasurer of this association. And at her side is her lovely husband Sheldon. Is there one more at the head table that I wish to introduce. And I told you yesterday that I hadn't gotten her trained still. She still is refusing to call me her excellency. Only has about an hour to go. Introduce my wife, Diane. One further introduction that I'm going to make is kind of a group and as presidential prerogative, I guess. I'm pleased to have with us tonight as our guest my wife's parents, Percy and Amy Oakes of Pembina, North Dakota. Diane's brother Richard and his wife Cathy; her sister Susan and her husband Don, and my daughter Lorelei, and an exchange student, Teresa Cook, from Bonn, Germany, that has been staying with us for the past four or five months. Enjoy your meal.

How many times is Dave going to forget the invocation prayer. Phil, will you please come forward for the invocation?

MR. PHILLIP JOHNSON: If I may have your attention, please. I really must offer my apologies, first of all, to the clergy of the city of Winnipeg. I know I have put three of them out of business during these past several days. But if you will just join with me for a moment. Let us offer a word of prayer.

Lord God, we are gathered in this great metropolis of the Northern Plains as lawyers, judges, and persons concerned with the law as the framework and pattern for the fabric of our society. It is a frayed and erratic pattern at times. Help us to better recognize its deficiencies. Help us to better mend its rents and tears. Help us to seek more understanding and less antagonism. Help us to show greater patience and less anger. Help us to find in the human exchanges of life the satisfaction we do not find in our acquisitions and purchases. Help us to be advocates not only for clients, but for justice, for peace, and for generations yet unborn. In your name, for your people, and for your world we pray. Amen.

First of all, there are several members of the Canadian Bar in our midst here this evening, and I would ask all the Canadian lawyers and judges that are here to please stand, and I would like the North Dakota contingent to give them a loud round of applause.

(Applause.)

MR. PHILLIP JOHNSON: We have another Bar President, and I would like you to know that Fred Delane, the President of the Illinois Bar Association, is here this evening. And Fred is going to be entertaining you later. And Fred, would you please stand?

(Applause.)

PRESIDENT PETERSON: I don't think that it would be appropriate for this convention to end without us giving some acknowledgements to Sherry King, Sandy, Jerry and Penny, and the other staff people of the Bar Association. They have done a magnificent job, and without their assistance it would have been impossible. I would also like to express my appreciation to the North Dakota Bar Association for the fine service that we have had from the staff of the Holiday Inn.

(Applause.)

PRESIDENT PETERSON: The first award, by group, that we have on our program is the 50-Year Awards. We have listed in the program a number of lawyers who have been members of this Bar Association for fifty years. We have one of those lawyers in attendance tonight, and I would like to have Ted Kessel of LaMoure, North Dakota

please come forward. With Ted is his wife, Bea; his son, Ted, Jr., also a lawyer, and his wife, Barb; and his grandchildren. Ted, could you come forward? For he's a jolly good fellow.

MR. THEODORE F. KESSEL: Thank you. I owe it all to a very good lawyer son in the office and a lovely wife in the home.

PRESIDENT PETERSON: As I indicated, there were other members of the Association who have had fifty years of service, and their names are listed in the program. They were unable to attend the ceremony. Their awards will be sent to them. I would ask at this time Orlin Backes, Dean Lenaburg, Wally Goulet, Jr., Mark Greenwood and Constance Triplett to come forward. These five individuals will be leaving our Board of Governors this year. On behalf of the other members of the Board of Governors and for myself, I want to thank these five individuals for their hard work. And we have an award for them. Would you please give them your sign of appreciation?

(Applause.)

PRESIDENT PETERSON: May I have your attention, please. We would like to continue on. We have in North Dakota, in our disciplinary process, several years back, the start of the program where we have had lay members on the disciplinary board of the supreme court, and also on the Judicial Qualifications Commission or on the judicial side of the issue. I have had opportunities to serve on the Disciplinary Board for six years, and during that period of time saw the extreme assistance and help that lay persons had on that board. We are — have started a process where over the last several years we have invited to our convention the lay members who serve on this board — and they get no compensation for it. And it is an extremely good service for the Bar Association. Tonight I'm pleased to announce that Maynard Sandburg, one of those members, is here with us. And I would ask Maynard to come forward to be recognized with a plaque. And I would ask you to thank him for the work that he does for our Disciplinary Board. Maynard?

(Applause.)

PRESIDENT PETERSON: At this time I'm going to stray from the program just a bit. I have been told by Judge Kirk Smith that he has a special award that he would like to present on behalf of the Judiciary Society. And I'm asking Judge Smith to come forward at this time. And believe it or not, there is a time clock on this podium, and I have told Judge Smith that because he is a judge that we are going to set the time clock or else the trap door opens and he falls away. Judge Smith?

JUDGE KIRK SMITH: I'm used to those kind of time constraints. I rise to make an award on behalf of the American Judicature Society. The society is a national organization of lawyers, judges, and other persons interested in the improvement of the administration of justice in the United States. If any of you are members of the society — during the past several years I have had the privilege of representing North Dakota as a director of A.J.S. One of the society's projects is the recognition of individuals or institutions that have exhibited marked leadership among their peers in the improvement of the means of justice.

The award to be presented tonight is the Special Merit Citation. It is the first award of this kind ever presented to a North Dakota group by the American Judicature Society. The recipient of this award is the North Dakota Supreme Court. Amid the inevitable contention that arises in the pursuit of the improvement of the administration of justice, it is easy to overlook to see how far we have really already come. Those of us who have had the privilege of serving the bar and on the bench for ten, fifteen or more years, can readily recall the delays and unaccountability of our Courts in earlier times. It is largely from the leadership of our supreme court and its Chief Justice, Honorable Ralph Erickstad, since 1973, that we have been able to cope with the public's rising demand for our services.

Therefore I ask Chief Justice Erickstad to step forward to accept the award. I also ask the associate justices who are present here tonight, Justice VanderWalle, Justice Gierke and Justice Meschke to stand in their places while I read the citation. Justice Beryl Levine could not be here with us tonight. She is a native of Winnipeg and is an adopted daughter of our state. The American Judicature Society honors each of you as it honors the Supreme Court of North Dakota. The citation reads: American Judicature Society is proud to present its special Merit Citation Award to the Supreme Court of North Dakota for its leadership in adopting rules of criminal procedure and rules of evidence and instituting judicial planning procedures, a judicial information system, in setting the court docket currently standard. Under your outstanding guidance the Supreme Court of North Dakota has acted as a beacon for other states in the area of judicial reorganization and unification, judicial administration and judicial services plan. We salute the North Dakota Supreme Court for the influence it has exerted enabling our state trial and appellate courts to cope with the increasing case loads, while greatly improving the certainty, reliability and timeliness of the administration of justice in North Dakota. Very sincerely yours, Stanley Chauvin, President of American Judicature Society. Chief Justice? Chief Justice Erickstad, it gives us great pleasure to represent all of us here, as well as the American Judicature Society, in handing you this professional citation.

CHIEF JUSTICE ERICKSTAD: I will take a moment in light of the time constraints to thank you, Judge Smith, and the American Judicature Society on behalf of our — the members of our court. It is a court team. I only regret that you did not present this to us about 3 o'clock this afternoon. You anticipated what I was going to say, but I needed to complete the sentence — It might have garnered another seven votes.

PRESIDENT PETERSON: One of the other awards that is mentioned in the program is the Outstanding Chairman Award. What that is the President has the privilege of picking one of his chairmen of one of the committees who has performed an outstanding job during the past year. It is a difficult job for a President to do, particularly with this Association, because there are so many outstanding members and so many outstanding chairmen. It was my privilege and pleasure to present that award to Randy Lee, one of the faculty members of the University of North Dakota Law School at a function Thursday morning. If Randy is in the audience, I would ask Randy to stand and be recognized.

(Applause.)

PRESIDENT PETERSON: The next award in the program is the Liberty Bell Award. The Liberty Bell Award is given each year to a non lawyer who has contributed significantly to improving our legal system of government. The purpose of the program is to recognize community service that strengthens the system of American freedom. The criteria are: promote understanding for our form of government, encourage greater respect for law in the courts, stimulate a deeper sense of responsibility on the part of the citizens regarding their duties as well as their rights.

This award was given by this Association for the first time in 1972. It is particularly a pleasure for me this year to present the award to this particular recipient, the reason being that 18 years ago I graduated from law school,

and my first employment as a lawyer was as a clerk of the North Dakota Supreme Court. One of the first people I met as I walked in the door of that Court was Luella Dunn. And Luella took all of us into — she just was an immense amount of help to a young clerk at that time. And in speaking to the clerks over the years, that help has continued.

I would like to read just a few things that Luella has contributed to her state and to her particular — her family and also her job. On the first day of September of 1947, Luella, at the age of twenty-five, began her employment with the supreme court as a secretary to Chief Justice A. M. Christianson as Deputy Clerk. She became clerk of our court on October 30, 1968. Her service with the court encompasses an uninterrupted thirty-nine years. During most of the time that she has served as the clerk of our court, she has also served as the secretary of the Disciplinary Board of the supreme court, secretary of the Judicial Qualifications Commission, now known as the Judicial Conduct Commission, and secretary-treasurer of the State Bar Board.

While secretary of the State Bar Board she supervised the examination of approximately 1450 candidates for admission to the Bar of the state. Partially through her efforts, the rules for admission to practice law, especially the review procedures following a negative recommendation for admission to the Bar, have been greatly improved. She has been recognized nationally by her colleagues in the National Conference of Appellate Court Clerks by being elected President of that association in 1982 and 1983. She served on the Executive Committee of that organization in 1973 and 1974. She has also been a member of the Executive Committee and treasurer of the Bar Admissions Administrators of the National Conference of Bar Examiners during 1978.

In 1981 she received a commendation from the State Bar Association, and in 1983 was selected as outstanding woman in the law by the Law Women's Caucus at the University of North Dakota. She was nominated by the supreme court for the 1983 National Public Service Award. And Governor Allen Olson presented her on September 1, 1982, the occasion of her 35th anniversary with the supreme court, the North Dakota Heritage Award.

Luella served on the Board of Directors of the Fund for Rural Justice, a national organization founded to promote justice in the rural community. She also serves as a board member of the North Dakota Rural Rehabilitation Corporation, and as secretary-treasurer of that board. During her tenure as clerk many changes have taken place in the system that would not have been made without her support and understanding.

I could go on for several more pages of the accomplishments and contributions that Lu has made to our Association. Besides that, she is a fine, fine lady. And I ask her to come forward at this time.

(Applause.)

MS. LUELLA DUNN: Thank you very much. I note that I join a select group in accepting this special distinction and prestigious award. I am truly honored. I want to express my deep gratitude to each of you. You are special. My personal thanks also to the members of the supreme court and to Chief Justice Erickstad. Over the years they have been my mentors, and I thank them for their patience and kindness. It is a special privilege for me to receive this from Dave, since he was one of our law clerks. Thank you very much.

(Applause.)

PRESIDENT PETERSON: I should also add that Luella's son Woodrow is with her tonight, and we welcome him, as well. We thank you for being able to be present.

The last award that we have to talk about this evening is the Distinguished Service Award. The Distinguished Service Award was created in 1980 by the Board of Governors of the State Bar Association of North Dakota. This is the most prestigious award given by the state Bar. The award which is not given every year, honors a member of the profession that outstandingly served the state and community over an extended career. The Board of Governors chooses the recipients and the President presents the award at the annual Bar meeting in June. Usually that is done. The Distinguished Service Award is intended to permanently honor recipients and remind us of their dedication and work. In this particular year, we are varying the procedure just a bit. It says that we generally make the presentation of the award at the annual meeting. We are going to introduce to you the recipient of the award. But his community is honoring him in July, and the Board of Governors, in voting for the presentation of the Distinguished Service Award, felt that it would be appropriate for the actual plaque itself to be presented to the recipient at the award ceremony in his home community in July. The recipient of this year's award is the Honorable Douglas Heen of Devils Lake, North Dakota. As Judge Heen is coming to the podium, I would like to just make a couple of comments as to some of the significant contributions that he has made. Many of you are well aware of them. Some of you may not be.

Judge Heen has served his fellow lawyers, judges, community, and his state faithfully and diligently since his appointment to the old Second Judicial District, in 1959, by Governor John Davis. He previously served as Ramsey County States Attorney, and also held the position of Ramsey County Veterans Service Officer for a period of time. He is active in his church and community. Since his appointment to district judge in 1959, he has been extremely active not only as a trial judge, but as an active member of the North Dakota Bench. He served as presiding judge of the Northeast Judicial District of North Dakota from 1974 to the present. He also served as Chief Presiding Judge of the Council of Presiding Judges since 1980 to the present time, pursuant to an appointment from Chief Justice Ralph Erickstad. He also served on a number of other committees: Judicial Planning Committee, Judicial Training Committee, Pattern Jury Instructions Committee of the State Bar Association.

As Presiding Judge of the Council of Presiding Judges, he was instrumental in the transition from the old judicial system to the unified court system. He has been the chairman of a number of other committees. And I could go on for a long time. If any of you have had the privilege, as I have, of appearing in Judge Heen's court, you can also attest to the fact that whenever you took your client into Judge Heen's court you expected justice and you received it. Judge Heen, it is my privilege to call you to the podium. And you will receive the actual plaque at the ceremony in your own town in July. I should also point out that with Judge Heen is his wife, Helen, and his daughter, Ellen. And I would ask them to rise also at this time.

(Applause.)

JUDGE HEEN: I should say that I must have had some powerful and persuasive speakers on my behalf on the Board of Governors to receive this prestigious award. Seriously, on behalf of myself and my wife and my family — of course my daughter is here tonight, my wife. And in my enthusiasm I introduced my daughter as my wife. I got in trouble, as judges do. But I want to express my very deep appreciation for this award. I truly treasure it. Going into retirement now, I feel that this distinguished accolade that you have given me is certainly a milestone, a climax of my career. And I wish to thank all of you for your consideration, who appeared in my court. And again speaking very seriously, if I'm going to go out and party, I can think of no one I would rather be with than lawyers. Excluding judges, sometimes. Thank you very much.

PRESIDENT PETERSON: We are fast approaching the end of the program. And all of you will breathe a sigh



of relief, and we can get onto our entertainment. At this point in time it is my pleasure to present the gavel, symbolic of the office of the presidency to an old friend of mind, Jack Widdel. Jack and I go back a long time. I was telling him here this evening that I was going to remind him of the fact that he was responsible for my early rising. My wife complains about the fact that I get up too early usually in the morning and I disturb her sleep. She thinks that the sun shouldn't come up until noon.

The reason for that is Jack, because twenty-four years ago Jack and I were in the Army in Fort Riley, Kansas. Unfortunately, Jack was a sergeant, a mess sergeant, and I was a private. Those of you who have been in the Army know what privates do. They do KP. But Jack had a program that the first guy that reported for KP got to be the outside man. And that means you get to scrub the garbage cans and clean the trays outside. And I far preferred that to being inside where it was hot and sticky. So that is why I get up early in the morning. And I have never gotten out of the habit. Jack is a leader, in my experience of knowing him for twenty some years, is someone who will lead this Association well. And it is indeed my pleasure to turn the gavel over to Jack at this time.

(Applause.)

PRESIDENT ELECT JOHN E. WIDDEL, JR.: I don't know how I should address him. Mr. President, Private Short Timer. He is a short timer. Or Reverend Peterson. I just heard him say the amen. But congratulations, Dave, or Diane's Your Excellency. And Dave has a year to be proud of, talking about excellence in his accomplishments and a year of excellence, and concluding with an excellent annual meeting, such as we have here tonight. And on behalf of Dave and myself, we sincerely wish to express our appreciation to all of you for coming to make this event possible.

The next item on the program is the Christmas Spirits. And they are here by special arrangement. And their leader is Leonard Brudin. Leonard?

I must give one more award on behalf of the Association. And in appreciation of the year that Dave has completed, we present this plaque to him.

(Applause.)

PRESIDENT ELECT JACK WIDDEL: Atta Boy, Dave!

PRESIDENT PETERSON: Thank you very much. And let's watch the entertainment.  
(Whereupon, the proceedings were concluded at 11:50 p.m.)

