

1 criminal law to agree that we need to have this. I
2 really think it's important, and I would just ask my
3 fellow members to vote yes. Thank you.

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

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

9 Any opposition?

10 Any abstentions?

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

13 (Applause.)

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

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

23 MR. QUICK: Thank you, Madam Chair. Again,
24 on behalf of the Civil Procedure and Courts Committee,
25 the proposal is to modify some language in MCR 2.302

1 primarily dealing with the topic of discovery only
2 depositions.

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

16 Discovery only depositions have particular
17 import as it relates to expert witnesses because of
18 the hearsay rule exception which permits expert
19 witness deposition testimony to be admissible. So in
20 that regard there is some, I would characterize
21 primarily as tweaking of the rule dealing with experts
22 who are expected to testify in 2.302(B)(4)(a),
23 specifying that, again, unless there is a stipulation
24 or an order, the deposition is usable for all
25 purposes.

1 If a deposition is to be discovery only, the
2 court, and the court already has this discretion, but
3 this makes it explicit, would have authority to
4 address and mandate how the fees of the expert are to
5 be handled. There was a lot of debate at the
6 committee level about the pros and cons of discovery
7 only depositions, whether they are fair or unfair.
8 The Court Rule change was brought to you doesn't seek
9 to really change the practice permitting those under
10 certain circumstances but simply trying to make more
11 clear when they are permitted and if they are going to
12 be permitted to make sure the court addresses the
13 court issue which the committee thinks is an important
14 consideration.

15 There are a few other very minor word changes
16 throughout the Court Rule to make it consistent, but I
17 think the intent of the committee in that regard was
18 not to have those be substantive changes, if you will.

19 With that, would be happy to answer any
20 questions or to move the matter for the Assembly. I
21 have to make the motion first?

22 CHAIRPERSON RADKE: You have to make the
23 motion first.

24 MR. QUICK: So I move on behalf of the
25 committee to adopt the proposed changes to MCR 2.302

1 as set forth in the materials of the Representative
2 Assembly.

3 CHAIRPERSON RADKE: Is there support?

4 VOICE: Support.

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

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

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

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

17 MS. COSTELLO: Peggy Costello, commissioner
18 from the 3rd circuit. I just have a question more
19 than a concern. Having practiced in civil litigation
20 for many years, I question the need for the rule,
21 and I am not sure I completely understand the
22 rationale. At least during my practice, if a
23 deposition was noticed for discovery purposes only,
24 unless there was objection, the deposition went
25 forward that way.

1 And I am just concerned about the need for
2 stipulations and whether that's just going to require
3 more arguing between the parties about the wording of
4 the stipulation and whether it just makes things more
5 difficult, but I guess it's more in terms of a
6 question as to the rationale for the rule and the need
7 to lay out who is going to pay who and all of this
8 stuff when it was pretty much, if there was no
9 objection it went forward and the party whose witness
10 it was paid the party.

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

25 And there are some lawyers who believe that a

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

11 CHAIRPERSON RADKE: Any other comments,
12 questions or discussion?

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

15 Opposition.

16 Abstention.

17 It unanimously passes.

18 MR. QUICK: Thank you very much.

19 CHAIRPERSON RADKE: Thank you, Mr. Quick.

20 At this point, as you all may know if you
21 were looking at your phones or your watches, we are
22 way ahead of schedule. What I would like to propose
23 and have your consent for is to move up the clerk's
24 election. Okay, we will keep the announcement until
25 after the last presentation, but we would like to,