STATE OF MICHIGAN

STATE BAR OF MICHIGAN

MEETING of the REPRESENTATIVE ASSEMBLY of the STATE BAR OF MICHIGAN
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Proceedings had by the Representative Assembly of the State Bar of Michigan at Lansing Community College, MTEC Center, West Campus, Lansing, Michigan, on Saturday, April 21, 2018, at the hour of 9:30 a.m.

AT HEADTABLE:

JOSEPH P. MCGILL, Chairperson

RICHARD L. CUNNINGHAM, Vice-Chairperson

AARON BURRELL, Clerk

JANET WELCH, Executive Director

HON. JOHN CHMURA, Parliamentarian

Lansing, Michigan

Saturday, April 21, 2018

8:35 a.m.

R E C O R D

CHAIRPERSON MCGILL: It's 8:35. Good morning. Call this meeting to order. My name is Joseph McGill. I am your Representative Assembly Chair for the 2017-2018 term.

Can everybody hear me okay?

VOICE: Barely.

CHAIRPERSON MCGILL: Where's our IT guy? I will try and speak loud.

I would like to extend a warm welcome to everybody this morning. Welcome to all the R.A. members. Thank you for your service. I would like to welcome all of the R.A. nominees and potential appointees. Welcome. I hope you will find this meeting to be informative and more than what you expected.

I would like to also welcome our distinguished guests, Thomas Howlett from the Googasian firm, Robert Gillett from the Michigan Advocacy Project, and Dan Quick, Board of Commissioners. I don't see Dan here just yet.

Also like to welcome State Bar of Michigan

President, Don Rockwell -- good to see you, Don -- and State Bar of Michigan Executive Director, Janet Welch.

To my left are the current R.A. officers. Mr. Richard Cunningham is serving as our vice chair, and Mr. Aaron Burrell, who is the clerk of the Representative Assembly this year, and we are looking forward to a productive meeting.

Mr. Clerk, may you verify that a quorum is present.

CLERK BURRELL: Quorum is present, Mr. Chair.

CHAIRPERSON MCGILL: Thank you very much.

I would like to call to the podium our Rules and Calendar Chair, Pam Enslen, from the Warner Norcross firm on adoption of the calendar, please.

MS. ENSLEN: Good morning. I move for the adoption of the proposed calendar found under tab 1(C) of the booklet.

VOICE: Second.

CHAIRPERSON MCGILL: Any discussion?

All in favor.

Any opposed.

Any abstentions.

Motion carries. Thank you.

MS. ENSLEN: Thank you.

CHAIRPERSON MCGILL: You have all been

provided with the summary of proceedings of our September meeting. It's in tab 1(B) of your materials. You have had an opportunity to review those materials in advance. Is there a motion to approve the summary of proceedings?

VOICE: So moved.

CHAIRPERSON MCGILL: Second? Is there a second?

VOICE: Second.

CHAIRPERSON MCGILL: Thank you very much. Any discussion?

Hearing none, all in favor.

Any opposed.

Hearing none, the motion carries.

At this point I would like to call to the podium our Nominations and Awards Chair, Michael C. Brown, from the Monroe County Prosecutor's Office.

MR. BROWN: Good morning, everyone. The first item is filling of the vacancies. You should have received an updated list of vacancies and nominees for them in your packet. I will make a motion to approve the slate of nominees. Is there a second?

VOICE: Second.

MR. BROWN: Any discussion? Seeing none, all

in favor.

Opposed.

Motion passes.

Congratulations to all of our new members.

(Applause.)

MR. BROWN: You can move forward to your seats and begin participating. Thank you.

Our next item is approval of the 2018 award recipients. The Nomination and Awards Committee has nominated Michelle Fuller for the nominee of the Unsung Hero. Make a motion to approve her for that award. Is there support?

VOICE: Support.

MR. BROWN: Any discussion on the motion?

All in favor.

Opposed.

Motion passes.

We have an additional item. The Michael Franck Award. This year there was no one submitted by the deadline. The leadership of this Assembly met and has come up with a nominee. It is not on the calendar. I would make a motion to amend the calendar to create an item 3(A), the Michael Franck Award. Is there a second for the motion?

VOICE: Support.

MR. BROWN: Any discussion?

All in favor.

Opposed.

Motion passes.

There is a letter in your packet from Joe McGill, our chairman, nominating Judge Victoria Roberts of the Eastern District of Michigan as the nominee for the Michael Franck Award. She also was a past president of this Bar association. I will nominate her for this award. The floor is now open if anyone would like to nominate anyone else for consideration.

Seeing none, nominations are closed.

Make a motion to approve Judge Roberts for the position of the Michael Franck Award.

VOICE: So moved.

MR. BROWN: Any discussion?

All in favor.

Opposed.

Motion passes. Thank you.

CHAIRPERSON MCGILL: Thank you very much, Mike.

We are now at the point of the calendar for me to give you a report from the chair for what's occurred since you were kind enough to nominate me as

your chair back in September. Again, welcome, and I want to respect the calendar and I want to respect your time. You have given up your Saturday morning to be here.

All that being stated, it's obligatory for me to thank some of the people in this room for getting us together and all the work they have done. In particular, State Bar staff, Carrie Sharlow, Katie Hennessey, and Peter Cunningham, for everything that they have done. For the Representative Assembly officers, Rick Cunningham and Aaron Burrell, I can tell you that what you will discover later on during the meeting is that R.A. leadership has spent literally hours and hours on some of the items that we are going to discuss that are contained in your materials and other items that are not in the materials as well. So thank you folks for everything that you have done.

Also want to thank our subcommittee chairs, Mike Brown for his efforts and his sidekick, John Clark, for their efforts in nominations and awards. I can tell you that as of late last week I was informed by State Bar staff that we have a total of 145 of our 150 seats filled, which I believe may well be a high watermark for this Assembly. So thank

you Mike for all your efforts there. We just have five seats open. You can see the vacancies in your materials. If you have anyone in mind for those spots, please contact Mike.

I would also like to thank Dan Harris, who is our subcommittee chair for the Drafting subcommittee. Dan and his committee spent, again, literally hours and hours going through primarily the civil discovery rules proposal that Dan Quick is going to present to you later on today.

I attended one of those calls. I had to leave the call an hour and a half into it. I was told later on that the call went for another hour and a half. They got into the nitty-gritty of that proposal and got down to rules of grammar and spot checking everything that was contained in the proposed changes that are contained in the report.

I spoke with Dan Quick yesterday at the Board of Commissioners meeting and indicated to him the number of hours that our members had put into going through that proposal, and he was very grateful, indicating that those are the types of things that his committee didn't have the time or perhaps the wherewithal to get done but are very important later on in the event that a court interprets one of those

rules and there is a problem with grammar or where a comma is placed or how a sentence is structured. That's the type of detail that Dan and his group went into, so if you see Dan, you can either thank him or you can blame him for some of what you are going to go through in a little bit.

I would like to thank Dave Gilbert, who is our Special Issues chair. He was very helpful in compiling the survey results and getting a deliverable back to State Bar of Michigan on the Civil Discovery Rules Project, so that was very helpful, and thanks very much, Dave, for that.

Mike Hanrahan was our Hearings chair, and he was also instrumental in getting feedback back to the State Bar on the Civil Discovery Rules project. Pam Enslen for organizing this. She is our Rules and Calendar chair. John Blakeslee for his willingness to serve and willingness to be here. John, you will see him around. He came all the way down from Traverse City.

And then, of course, Dana Warnez, who is our Special Operations chair for our subcommittee, and thank you for your insight and your willingness to serve, and you had it easy for the last six months. We are going to be putting you to work very soon.

CHAIRPERSON MCGILL: So our mission is we are the last policy-making body of the State Bar of Michigan. What does that mean? I am not going to try and tell you what that means, but I can tell you over the last six months the R.A. leadership, people at this table, have struggled with that issue, and at the request of the R.A. leadership we convened a retreat with the Board of Commissioners, the Board of Commissioners' officers, and the Executive Director of the State Bar of Michigan, Janet Welch, and some of her staff to get into issues with respect to how does the Representative Assembly fulfill its mission as the final policy-making body of the State Bar of Michigan?

We dove down into issues from procedure to governance. We discussed issues of technology, communication, lines of authority and actual composition of this body, who actually sits in these seats and where do they come from. We discussed all of those issues, not only at the retreat that we held, which was a half day event, but after the retreat we all committed to continuing the work and split off into two separate groups, one discussing the issue of procedure, one discussing the issue of governance, and both of those subgroups were chaired by Dan Quick, who is a past chair, as you know, of the R.A., and

Fred Herrmann, and they were instrumental and helpful in guiding the discussion of both of those groups.

I think the conclusion, I think it's fair to say, and Don can throw a pencil at me or a pen, if I am off here, that at least from the R.A. leadership's perspective, in order to fulfill our mission, we believe that we need to reinvigorate, reconstitute, and rebrand the Representative Assembly.

And why is that? In short, the reason is that we are a 21st century governing body based on assumptions from the 1970s, and those assumptions do not include what actually happens in the real world today, like smart phones, like the ability to convene virtual meetings, like the ability to tee up the important issues quickly and get decisions from a body this size.

When this group was formulated in the 1970s, and then it was Greg Ulrich when he was in leadership also helped to refine our Permanent Rules of Procedure. Still we are not as nimble or responsive, not only to ourselves, but to our constituents, as we could be and actually should be. That's the conclusion that we came to. That's why we came to the conclusion. How are we going to achieve that?

We have been working on a work flow document

that Peter and Katie primarily have authored based on concepts that we have put out there that is pretty much in the finishing stages. We just need to assign start dates and due dates for deliverables, and that work flow document is designed to create a deep dive into all of these issues, and the work flow document will be pushed out, so to speak, to our subcommittee chairs. Subcommittee chairs will work with their committees on specific areas of authority contained in that work flow document with respect to the issues that we want them to take a look at.

So, for example, there may be an issue with respect to how our Rules of Permanent Procedure are drafted, how are we responding to them? Do those need to be modified? Do they need to be updated? Do they need to be changed, or do things need to be added to it, all with the overreaching goal of reinventing and rebranding and making this group more responsive and more nimble.

I have been pushing this phrase that I want the Representative Assembly to be more representative. I want it to be all of the things that I have just mentioned. How do we get from that broad concept to actually putting you folks to work? Actually, quite frankly, how do we change this group from a group of

highly qualified professionals that really like to get together twice a year on a Saturday and have a great boxed lunch to the people that are joining teleconferences, on video conferences, responding to surveys, reaching out to other members in their circuit, maybe in another circuit, reaching out to their own constituents, presenting to their local Bar association.

Say, for example, I believe it was Dennis Perkins in Livingston County who I was just informed made a presentation to his local Bar association about this Civil Discovery Rules project, suasponte, on his own initiative, and that's the type of outreach I am really encouraged to hear about. That's the type of outreach I think we all can and should and -- I shouldn't say should, but should want to be doing. You are sitting in these seats for a reason, and I think that may -- that was my assumption when I was sitting in those seats as well, that I was going to be representing people in my district.

So what effect do I think this is going to have over the next five to six months of the work that we are going to do? I expect the leadership and the subcommittee chairs and the subcommittees will be working very hard to get the deliverable done from the

work flow document that's pointed towards these goals, the reinventing, rebranding, and reinvigorating the Representative Assembly.

You will be contacted. You will be asked for input. You will be asked to participate. I will be very disappointed if you don't. That's about as much as I can motivate you. I can't force. I can't disbar, not yet. It might be part of the rule change.

There will be action items that will be decided at the September meeting that we anticipate will lay out a two- to three-year project that will hopefully convert this group into all of those things that I mentioned. Hopefully, in conservative laymen's terms, this will be the group that people will want to be part of. This will be the group that people will see as elite law students.

Coming to a conclusion. We, as the R.A. leadership, want to give you the tools to fulfill, not only the mission of the R.A., but to fulfill your mission, which is to represent your constituents in fulfillment of the mission being the final policy-making body of the State Bar of Michigan. We expect that the work that we are going to be doing over the next five to six months will take giant steps towards that process.

You might ask, Why are we doing this now? The answer to that is we have adopted, we have adopted the new Strategic Plan with the State Bar of Michigan, and this is all consistent with that Strategic Plan. In addition to that, we have guidance from the 21st Century Practice Task Force report that we can look to as well.

You might ask yourself, Why me? The simple answer is, you are the leaders. You are the leaders in the law, and you represent the 45,000-plus other members of the State Bar of Michigan, and I think that both myself and everyone in this room need to let that sink in and take on that charge.

With that, I would move to our next action item on the agenda. We will call for Mr. Thomas Howlett of the Googasian firm to talk about action item or calendar item number 5, payee notification.

MR. HOWLETT: Good morning. I am Tom Howlett. I am a member of the State Bar's Client Protection Fund Committee and its payee notification workgroup. I am a plaintiff attorney who represents people in legal and medical malpractice cases. I am joined by Michael J. Knight, who is Deputy Counsel of the Lawyers' Fund for Client Protection in the state of New York. We may be joined as well by

Robert Roether, a distinguished member of the plaintiff bar from Saline who may be looking at barrels on I-96 as we come up here, and he also is a member of the payee notification workgroup.

We are seeking approval of a resolution that, as an additional client protection measure, would have the State Bar support proposing legislation to enact payee notification when a claim is paid with insurance funds. This is a proposal that the Board of Commissioners has voted to support and that the Client Protection Fund Committee has voted to support. The council of the Negligence Law Section has also approved a motion to support advancing legislation to enact payee notification. So what is payee notification and why should the State Bar support proposing legislation to enact it?

Payee notification requires an insurer to issue notification to both a client and an attorney of record when an ensurer remits settlement proceeds to resolve a liability claim. It's something that has already been implemented in 15 states, and here are three of the main reasons why payee notification makes sense in Michigan. There are additional reasons cited in your materials.

Reason one, it helps address an actual

problem that unfortunately exists in Michigan. Over the last decade, Michigan clients have suffered millions of dollars in lawsuits due to theft by certain attorneys. Most often these thefts occur when an insurance company check is sent to an attorney who then misappropriates the funds. Once misappropriation occurs, it is difficult to make clients whole.

The Client Protection Fund's limited resources require there to be caps on reimbursement claims, and these caps make it impossible to make some claimants whole. In one recent example a series of claimants collectively lost a total of more than $1.5 million in settlement funds due to misappropriations by the same attorney. These claimants had to share prorated amounts of the fund's $375,000 cap it applies to one attorney, leaving a giant shortfall.

Reason two, payee notification will allow the State Bar to fulfill fiduciary duties without increasing the assessments charged to all members of the Bar that provide the funding for the Client Protection Fund. It has been estimated, and this is in your materials, that to allow the Client Protection Fund to fully reimburse claimants today, current annual assessments to members would have to be more

than quadruple.

Reason three, and this is the one most personal to me, payee notification will stand to help people like Ron. Ron is someone who came to me several years ago with a serious concern. Many months earlier he had settled a significant workplace injury claim. His attorney had him sign papers and told him the settlement check would arrive in about 90 days. The 90 days came and went, and Ron could never get a hold of the attorney or get an answer as to what was going on.

Ron came to me, and we learned that the settlement check had actually arrived at the law offices the day after Ron had signed settlement papers. We learned that the attorney had misappropriated his funds, as well as many other clients' funds, and the attorney had been very recently disbarred.

The disbarment stemmed from a years' old grievance from a previous client due to misappropriation that had occurred before Ron's workplace injury case had been settled. Payee notification could have prevented this attorney's misappropriation scheme, and it certainly would have stopped it long before it affected Ron and his

workplace injury case.

With that said, I am now going to turn the floor over to the impeccably-timed Robert Roether.

MR. ROETHER: Sorry about that. I didn't know about the construction coming in from the Detroit area. Thanks, Tom.

Alecia Ruswinckel of the Client Protection Fund asked me to come in and address you, because I sue financial institutions, basically banks, that the attorneys that have stolen money from their clients, almost always on personal injury settlements, the banks that they use to launder and hide that money, and this is a long overdue proposal, very serious problem, and when it gets in the newspapers that attorneys have stolen money from the clients, it taints every one of us, because the public looks at us as being the same.

I want to tell you quickly, because I think I was given three minutes, about three cases that I have worked on that showed the dimensions of the problem, and in each of those three cases the attorney was able to hide from the client that a settlement had been made or the settlement check was in by misleading the client that there has been a holdup, they haven't been able to send your check, we have to wait for this, we

have to wait for that.

In Macomb County there was an attorney named Robert Mazzara. He stole in the million dollar range from clients, and he wasn't satisfied with the one-third contingent fee; he took a hundred percent. And what he would do is one of two things. He would either settle the case without the client's knowledge and then forge the settlement documents and/or when the settlement check came in he would forge the client's name on the check.

One of the people he defrauded that way was his cousin, for a quarter of a million dollars, and for one year he kept giving her excuses, well, the check isn't in, the check isn't in. Meanwhile, he had the check for a year and spent it. He was prosecuted, convicted, committed suicide.

In Oakland County more recently Attorney Brian Benner stole personal injury monies from his clients in the millions-plus range. Same mechanism. He would either forge the settlement documents, but he specifically reports the settlement checks. He'd tell the clients it's not in, it was delayed because of a Medicare lien, just any one of a number of reasons to defer the day of reckoning.

He was prosecuted, convicted, went to prison

last year. He is now out on parole. I think he was in prison for four months, so I am not quite sure what kind of a message that sends, but, again, the same mechanism, the client didn't know the money was in. That allowed the attorney to postpone the day of reckoning.

Finally, in Wayne County Attorney Jason Jonca -- my voice is a little off today. I apologize -- he stole a lot of money, not in the millions range as far as I know, but, you know, 10,000 here, 20,000 there. Same thing, and the clients didn't know in some instances their case had been settled. They didn't know the check had come in, and he finally got prosecuted. Last week he was given probation, and, again, I don't know what kind of a message, but that's the situation we have. This would prevent that.

MR. KNIGHT: Good morning. Again, my name is Mike Knight, and I am Deputy Counsel with the New York State Lawyers Fund, as Tom had said. I am also a charter member and immediate past president of the National Client Protection Organization. I want to thank you all for giving me the opportunity to speak with you today.

Let me begin by congratulating you for your

consideration of payee notification of the law client protection measure for the state of Michigan.

New York is the genesis of the payee notification rules. In 1988, after paying out nearly $890,000 in stolen personal injury settlements, trustees of the New York Lawyers Fund requested the New York superintendent of insurance to adopt a payee notification rule to detect and prevent these losses. Codified as our insurance department Regulation 64, the rule, again, requires liability insurers to provide law clients with written notice of any third-party settlement for $5,000 or more.

The third-party notice letters alert clients that the funds in their behalf have been received and provides a benchmark date and that expectation from a client that they should soon be contacted by their lawyer to endorse the check and receive their proceeds. While the New York rule requires notification, it does not create a cause of action based on an insurer's inability or failure to comply.

After implementing this client protection measure, the New York Lawyers Fund experienced a dramatic reduction in personal injury settlement debts. Settlement losses detected by the rule paid by the Lawyers Fund often involved forged endorsements.

The early detection afforded by the Payee Notification Rule shifts liability for these forgery losses to the banks that improperly honored the forged endorsements. This provides the New York Lawyers Fund with the ability to recoup restitution from liable banking institutions as the subrogee of law client victims who reimburse.

In 1991, the American Bar Association adopted New York's payee notification rule as a Model Rule, and variations of this payee notification rule, as Tom said, have been adopted by 15 states and the Canadian province of New Brunswick.

The National Client Protection Organization is an educational resource for the exchange of information among law client protection funds throughout the Unites States and Canada. In 2006, the NCPO adopted standards for evaluating lawyers' funds for client protection. In 2012, these standards were adopted by the National Conference of Chief Justices. NCPO Standard 2.7 recommends that a fund should seek implementation of appropriate loss prevention mechanisms, and prominent among them is payee notification.

In closing, I just want to highlight that since the inception of Payee Notification Rule in

New York the New York Lawyers' Fund has never received a single complaint that the notification is burdensome to insurance companies, that it had interfered in any way with the attorney-client relationship, or that it harmed the reputation of the legal profession.

The cost for implementing this rule is minuscule. It's a modest administrative add-on cost and the cost of a postage stamp, but the benefit to law clients and the integrity of our legal profession is invaluable.

So I thank you again for the opportunity to address you, and I strongly encourage the Representative Assembly to approve the proposal on payee notification. Certainly happy to answer any questions you might have.

CHAIRPERSON MCGILL: Thank you very much, gentlemen. Quite a presentation. In demonstration of your R.A. leadership at work, we were just analyzing this issue with respect to whether or not we need to conduct a Keller vote on this issue, and we have come to the conclusion among leadership that the Keller vote would be advisable at this point in time. And, as a result, I will make the motion that the R.A., Representative Assembly, consider this proposal as Keller permissible. Is there a second?

VOICE: Second.

CHAIRPERSON MCGILL: Any discussion?

MR. REISER: Point of order. Would you remind the body the limitations of what we are allowed to take up and why based on that Supreme Court decision.

CHAIRPERSON MCGILL: Certainly. In broad strokes, the Keller decision allows this Assembly to consider matters that deal with the regulation of the practice of law and/or access to the courts.

COURT REPORTER: Your name, sir? Your name that spoke.

MR. REISER: John Reiser, R-e-i-s-e-r.

CHAIRPERSON MCGILL: I apologize, and I saw several chairs do this, and I promised myself I was never going to not do this, but I forgot to do it.

If you are going to speak and address the Assembly, please state your name and what circuit you come from. Thank you.

Is there any other discussion? I will call the matter.

MR. KLAASEN: Good morning. I am Terry Klaasen from the 4th circuit, and I just have a question of why is this limited to insurer payors rather than also including self-insured payors?

CHAIRPERSON MCGILL: Terry, thank you very much for your question. We are on the Keller vote at this point. If we could table your question until we get to the substance of the proposal, be happy to do that.

Is there any other discussion on the Keller motion?

Hearing none, call the matter. All in favor.

Any opposed.

Any abstentions. Motion carries.

I will now make a motion that the Representative Assembly consider the proposal with respect to payee notification, which is item number five on the calendar for today's proceedings. Is there a second?

VOICE: Second.

CHAIRPERSON MCGILL: Is there any discussion?

MR. KLAASEN: Should I repeat my question?

CHAIRPERSON MCGILL: Why don't you repeat your question, please.

MR. KLAASEN: My question is why is the proposal limited to insurer payors as opposed to also including self-insured payors?

MR. KNIGHT: I have been asked to take a stab at this as the guy from out of town. That's a great

question.

In New York state, the compromise at the time in 1988 was just to include liability insurers. In New York state, self-insured municipalities are exempted, but I believe they shouldn't be. I believe the payee notification would serve much greater purpose if it was a single broad rule.

The purpose, again, is to have the client alerted to the fact that there money is out, but also I think what's between the lines is that one claimant that doesn't get their money from that complaint can stop the bus from other victims down the road if an attorney is continuing that course of conduct. So I would agree with you. I don't know why there should be a limitation. That's, I guess, in the four corners of the legislation you propose.

MR. HOWLETT: And I will just weigh in on behalf of the Client Protection Fund Committee and workgroup to state that I think that the problem as we have experienced it has been one relating to liability insurers. The contours of the proposal before you, I think, has flexibility with it to allow, you know, that to be worked through the legislative process.

MR. KLAASEN: I would like to move to amend the proposal so that it includes not only insurer

payors but also self-insured municipalities and other payors.

CHAIRPERSON MCGILL: Could you identify yourself again, please, and your circuit.

MR. KLAASEN: Terry Klaasen from the 4th circuit.

CHAIRPERSON MCGILL: Is there specific language or verbiage that you want to add to the proposal?

Member Klaasen has made a motion. Is there a second?

VOICE: Second.

CHAIRPERSON MCGILL: Any discussion?

MR. HOWLETT: I'm just going to note, waiting for any comments, that the resolution before you simply indicates that there would be, as an additional client protection measure, the State Bar supporting legislation to enact payee notification when a claim is paid with insurance funds, and that's how it's phrased. I personally think it covers the concern that the Representative Assembly has, but that's my comment.

CHAIRPERSON MCGILL: Yes, Mark Koroi, 3rd circuit. It's unclear to me. I noticed the -- I read the blur about this proposal in the program. My

question is that it only mentions liability claims. Does this encompass something more than just due to liability claims, such as no-fault, Workers' Comp, other types of similar claims that may be quasi-liability in nature?

MR. HOWLETT: Yes, I think the concept is if there is a remittance coming from an insurer that the payee notification requirement would kick in.

MR. KOROI: So it could be any type of insurance company at all basically?

MR. HOWLETT: Again, we phrased this broadly to allow it to work its way through the legislative process, but yes.

MR. KOROI: Okay. But the way it's said in the quote expressing liability, a lot of the payments that involve this type of fraud include Workers' Comp, no-fault, and similar type of quasi-liability type policies, so I think that it should be made clear.

MR. HOWLETT: I think it's a good clarification for you to make. I apologize. I think we may have focused in our remarks some on the experiences we have had where some of the problems have arisen, but your point is a good one, and the work of the committee certainly was not directed only at liability insurers or only at a particular type of

insurance.

MR. KOROI: I even think it included, to expand his question, whether or not, because I think Mr. Klaasen, the gist of his argument, the thrust of it is self-insured, and there is such a thing as self-insured pools, such as the MMPA, in which they pay monies for, parentheses, liability-type stock cases, and that's also an area where there has been some kind of plaintiff's attorney fraud involved by the clients, and so I think it should be clear in the proposal whether that includes that type of self-insured pool also. I think at least have a little more clarity in it, but I appreciate your answer.

CHAIRPERSON MCGILL: Is there any more discussion on Member Klaasen's proposed amendment to this proposal?

Hearing none, I will call the question. All in favor of amending the proposal as reflected on the screen there to include other payors.

Any opposed.

VOICE: Yes, I am opposed.

VOICE: You are asking for a vote?

VOICE: For the amendment?

CHAIRPERSON MCGILL: Yes. So there has been

a motion to amend the proposal.

VOICE: Ask for a vote.

CHAIRPERSON MCGILL: So my question is, is there a second?

VOICE: Second.

CHAIRPERSON MCGILL: So it's been seconded. Any other discussion? No other discussion.

All in favor.

Any opposed.

Motion passes.

Back to the original motion. I will make a motion that, or renew my motion, that we consider proposal item number five on the calendar. It's been seconded, and is there any other discussion?

Hearing none, we will call the question. All those in favor.

Opposed.

Hearing none, the motion passes.

We will do this the right way this time. Mr. Clerk, can you open the voting, please.

CLERK BURRELL: Take your clickers at this time. It's going to be 1 for yes, 2 for no, and 3 for abstention.

CHAIRPERSON MCGILL: Voting is open. Last chance.

CLERK BURRELL: Voting is closed, Mr. Chair. The results are 92 aye, three nay, one abstention.

CHAIRPERSON MCGILL: Thank you very much. Motion passes.

At this point in time I would like to call Mr. Robert Gillett to the stand on calendar item number 6, which is indigent fee waivers.

MR. GILLETT: Good morning, everyone. My name is Bob Gillett, and my day job is the Executive Director of the Michigan Advocacy Program, regional legal aid program, and I served as the chair of the fee waiver workgroup that developed this proposal. I am here to speak in favor of the proposed amendments to MCR 2.002, which is the court rule regulating the fee waiver process.

In terms of the substance, the rule applies to the waiver of filing fees in civil cases, and the goal to the amendments are to provide guidance to the courts and the litigants, to assure consistency across courts, and to address and hopefully end some very troubling practices that have sprung up in some courts in their current processing of fee waiver requests.

To give two short examples of practices, one is what we would call the arbitrary denial problem. In some courts if a party has an expensive looking

haircut or nice looking fingernails or a cell phone, their fee waivers are denied. Another problem we describe as the excessive documentation problem where parties are required to bring in their tax returns, original verification documents about income and expenses before their fee waiver request will be considered.

I personally filed appeals of fee waiver denials to higher courts and have filed superintending control actions against judges who have practices of denying all or almost all fee waivers.

The proposed rule was developed by a five-person, very active workgroup with support from Bar staff. I think we met a total of eight times. We got a draft rule out relatively quickly and solicited comments from various Bar committees, legal aid organizations, judges associations, court administrators.

We received a lot of comments and had several meetings where we considered and incorporated a lot of the comments that we received. Most of the comments were saying, well, you have addressed some bad practices but not these bad practices, and so they were, the overall comments had a great deal of support for the idea of clarifying this rule.

The proposal is consistent with Bar policy. As noted in the materials, it implements recommendations from the 21st Century Court's report and the Judicial Crossroads Task Force reports.

I guess I would say this is an access to justice issue. The current practices prevent low income people, especially welfare recipients and pro se litigants, from having full and equal access to the court system. It's also a good government issue. Having a transparent fee waiver process that's consistently applied from court to court and from judge to judge is a good thing for the public and the Bar and the court system.

Assuming that this is approved today, it goes to the Court for the Court's consideration, so I hope we don't get -- there has been a lot of comments on this, and there is a lot of judgment calls that go into this rule. I hope we don't get too hung up in fine tuning the language today. We will all get another chance to comment on this and work on this if it goes to the Supreme Court.

So on behalf of the fee waiver workgroup and the committee on the delivery of legal services for all, I am asking you to vote in favor of the resolution, and I am happy to answer any questions.

CHAIRPERSON MCGILL: Thank you very much. I will make the motion that we move to approve.

VOICE: Second.

CHAIRPERSON MCGILL: Is there any discussion?

MS. NYLANDER: Good morning. My name is Jill Nylander, and I am a representative from the 7th circuit. I am also the director of Legal Services of Eastern Michigan, and I just wanted to echo firsthand support for everything that Bob has said on behalf of the committee around this proposal.

For limited-need clients that we serve, the inability to come up with a filing fee or to secure one of these waivers can be one of the foremost obstacles in access to justice.

We serve a 14-county area and for years have been struggling to deal with and define for our clients the nuances around the distinctions in processing these requests throughout the service areas. Even in one of our best service areas clients have to drop off their fee waiver request and then come back in two to three days to see if it's been approved so that they can file. Now, I know for most of us another trip to the courthouse is not that big a deal, but for some of our clients who have to take paid time off of work or arrange or pay for child care

or catch a bus down and back, it can be a big disadvantage.

So I am echoing and would encourage you all to support this proposal today. I am confident that it will improve access to justice, and I also believe that standardizing the process will both increase efficiency in the court for the bench and the bar. Thank you.

MS. SPIEGEL: Good morning. Mary Spiegel from the 2nd circuit. Hi, everybody. It shouldn't surprise you, I am a legal aid lawyer too. Shouldn't surprise you that we are standing up in support of this amendment. But I used to be in private practice for years, and I never really paid attention to fee waivers, because if the client could pay my fee, they could certainly pay the filing fee. And so that's why you are seeing the legal aid attorneys stand up in favor of this amendment.

So in terms of the importance of this amendment and the importance of the fee waiver, it's become the most important tool in my tool box on a day-to-day basis, so I have gone from not giving it a moment's thought to giving it a thought almost everyday.

The problem is, as the rule exists now, it is

applied unevenly. Within my own circuit, depending upon which judge is assigned to review the fee waivers makes a difference in whether or not that fee waiver is approved, and the reality is that these people that are of low income, on the brink of poverty or in poverty still have the same constitutional rights to access to the courts that our fee-paying clients are afforded. So in terms of this amendment, it provides those clear standards for already means-tested individuals to simply file that fee waiver and get it approved.

I stand in support of this. I think it's a constitutional right of our clients, and I don't think that it should make any difference whether that client is in Marquette, Detroit, or my area, Benton Harbor, whether or not that fee waiver is approved. This body should be about fairness and access to the courts for all. That's what we stand for, that's what we are about, and that's why we should support this amendment. Thank you.

MS. PAYNE: Good morning. I am Erica Payne from the 25th circuit, and I was looking at Paragraph U with my colleague, Pat Greeley, and there is the addition of "financial hardship" in that paragraph, and it goes on to say "for the purposes of

this rule, the finding indigency." However, "financial hardship" is not defined, and our question was whether that should be defined as part of this or is it simply an argument that's placed forward, and that is the question that we have.

MR. GILLETT: So we defined indigency at 200 percent of the federal poverty level and included the financial hardship language in there as kind of a judicial discretion beyond the defined indigency standard. That was the committee discussion is that there may be other circumstances -- someone just started a job, someone just lost a job -- where they might not meet the 200 percent level, but they might be unable to pay a filing fee, and the court would kind of consider those on a case-by-case basis.

MS. PAYNE: Do you believe that needs to be specified or noted that it's discretionary, or do you believe it's implied enough?

MR. GILLETT: One of the pushbacks that we got from judges associations was that we were removing judicial discretion, and I think that we felt that we were providing guidance as opposed to removing discretion, and we felt this was a way to reintroduce judicial discretion into the rule.

MS. PAYNE: Thank you.

MR. PHILO: John Philo from the 3rd circuit. I would just not go along some of what she said. I strongly support this. I do think that the attempt to flesh out some of the standards is incredibly important. We see it too much. It is which judge do you get to look at it. It's somewhat arbitrary. I do think, addressing some of what was previously said, is I think the indigency standard gives you clear standards on who should apply, but it leaves room when you say financial hardship. That's secondary for judicial discretion, which is very important, because poverty cannot be determined by a checklist often. The circumstances that our clients, at least my clients, face in unemployment insurance matters, you really have to look at it, and there are going to be cases where they might not fit some strict test of 200 percent of poverty. That's all.

MR. WORTH: Hello. Chris Worth from the 20th circuit. My question is with respect to Paragraph D, representation by a legal services program. Can you give an example of what D is intended to accomplish that's not accomplished in Paragraph C or Paragraph E?

MR. GILLETT: So this was added to the rule because it is already a policy in many courts, and it's already provided by rule in other states, many

other states, fee waiver rules, and I agree that -- I think that where it adds something is really in the other financial hardship area, that it's just, it's another clear line that can be drawn that will make the decision more efficient and clearer in some cases.

MR. WORTH: Could I follow up on that?

MR. GILLETT: Sure.

MR. WORTH: And this is based on my ignorance, not a suspicion. Are there circumstances where one of the legal services programs that's defined in Paragraph D does take on representation of a client where it is not a financial hardship or not a means-tested situation, where maybe it's only an allegation of domestic violence or some other circumstance that would allow them to come into the legal aid firm for representation, but they don't necessarily meet a means-test problem?

MR. GILLETT: That's actually a good question, and that was discussed at the Legal Services Association of Michigan discussion, you know, the program discussion, and our discussion was, yes, there is very few of those cases, but those cases exist, but we are not required to file fee waivers, and I think the consensus in that room was that if the client wasn't entitled to a fee waiver we wouldn't get an

automatic fee waiver for a client that was otherwise able to afford the fees.

MR. WORTH: But does the Paragraph D result in that? I mean, it doesn't require legal aid to file on behalf of the client.

MR. GILLETT: We are not required. It makes it easier for the cases where we file. It doesn't require us to file.

MR. WORTH: As long as I am up here, under Paragraph C, is subpart 5 just missing because it's an artifact, a typo, or is there a proposed 5?

MR. GILLETT: That's an excellent question. When you look at something like 35 times, that's the kind of detail you miss.

CHAIRPERSON MCGILL: Would you like to propose an amendment? We will just fix it.

Any further discussion?

Mr. Clerk, will you open the voting, please.

CLERK BURRELL: Voting is open. A for aye, B or nay, C for abstain.

CHAIRPERSON MCGILL: Last call. And the voting is closed.

CLERK BURRELL: Motion passed. Give me a moment for the tabulation.

CHAIRPERSON MCGILL: Motion has passed.

CLERK BURRELL: Tabulation is coming up.

MR. CUNNINGHAM: Looks like the microphones are not the only technical. May I propose that we do a recount or revote on this. We are having some technology issues here.

CHAIRPERSON MCGILL: So the proposal is to reopen the voting and revote?

MR. CUNNINGHAM: That would be the proposal.

CHAIRPERSON MCGILL: Then we will reopen the voting and vote again.

Don't tell me it passed 300 to none.

CLERK BURRELL: 104 aye, 10 nay, 2 abstain.

CHAIRPERSON MCGILL: Everyone hear that?

VOICE: No.

CHAIRPERSON MCGILL: 104 aye?

CLERK BURRELL: 104 aye, 10 nay and 2 abstain, Mr. Chair.

CHAIRPERSON MCGILL: Thank you very much.

MR. GILLETT: Thank you.

CHAIRPERSON MCGILL: Moving on to calendar item lucky number 7. At this point in time it would be my honor and pleasure to call to the dais past Representative Assembly Chair Dan Quick and his cast of thousands. This will take a moment.

MR. QUICK: Good morning, everybody. Many of

you I know, and a lot of great faces out there. Always a pleasure to be back.

For those of you who don't know me, my name is Dan Quick. I am with Dickinson Wright, and I am here today as the chair of the State Bar Special Committee on Civil Discovery Rules.

Let me briefly introduce the aforementioned cast of thousands who are with me today, and, like you, I very much appreciate them giving their time, both to this venture, and I tell you that's a lot of hours, but specifically to be here today on Saturday to help answer any questions that you folks may have on this proposal.

So going from my left, your right, George Strander, who is the Ingham County Probate Court administrator, and by virtue of these short introductions, I don't mean to short change other people or their other many merits, but just to help orient you. So George, of course, is here primarily as a probate expert, for that portion of the rules, and a heck of a guy.

Joy Gaines is here, Assistant Public Defender with Washtenaw County, and has worked on the juvenile rules.

The Honorable Chris Yates, who is assistant

court judge in Kent county.

Karen Safran, who many of you know, is the current chair of the Civil Procedure and Courts Committee for the State Bar of Michigan and with the Parson Fisher firm in Bloomfield.

Dave Christensen, who has his own firm and, among many other things, specializes in personal injury and auto neg, and Dave also has worked nationally on civil discovery reform issues.

Last but not least is Matt Kabliska, who, among many other talents, is an expert in family law, and there is a portion of the rules dealing with that.

In thanking all of these folks, I need to thank all of you as well. Since we last appeared in front of you, the Representative Assembly, through its several committees, have reviewed the proposals. Many of you individually have provided feedback, which we took into account in revising the rules from the last draft that you saw, and the Drafting Committee, among others, provided a lot of really good feedback on all the fine print, if you will, that helped us put this in a more presentable fashion and in the form you have today. So thank you all very much for your hard work to help advance this work product.

The goal here today, of course, is to have

the Representative Assembly endorse the hand-off, if you will, of this package of rules from the State Bar to the Supreme Court. It has been a four-plus year journey to get from the beginning of this project to today, and, of course, passage out of this body is no guarantee of anything. All it means is that the Bar has endorsed the concept and the advancement of the proposal. It will go to the Supreme Court.

Now, of course, we have been in touch with the Court. Many, if not all, of the justices know that the Bar has been working on this set of proposals, and I think that it will be well received there, and they will give it a relatively prompt consideration. Hopefully they will open an ADM file very quickly. That, of course, means there will be an additional public comment period for the Bar and for the public. I am also certain there may be a hearing associated with it, and then, of course, the Court will do with the proposal what they like.

So I think it's worth stressing, since the last time that I appeared before you, a little bit of the continued evolution of the work product. You all got the first advanced look at the draft, if you will, last time I was here. From that point forward we vetted this thing out with every shareholder group we

could think of. Each of the judge groups from the Michigan Association of Judges to the Michigan District Court Judges, Probate Court Judges, et cetera, all received drafts, and we sought comment from them. All of the significant bar associations, whether local bars, affinity bars, specialty bars, like some of the defense bars or some of the plaintiff's bars, each of them were approached. In many cases presentations were made by some of the folks sitting up here or other members of the committee to help them understand the changes, and, once again, we received valuable feedback from those bodies and changed various things, both small and large, in the proposal with that feedback.

One of the items -- we were just talking about it in the hallway, and I will just use that as an example, is last time we were here the draft had a proposal with a presumptive limit on the number of depositions that would exist in a civil case, of course to be overridden by either the parties' consent or by the judge.

We ended up taking that proposal out, and it does not appear in the set you have with you today. It was not considered to be that important at the end of the day. We are not really sure it really moved

the needle significantly in terms of reforming civil discovery, and there was pushback on it from some corners of the bar, so we took that into consideration, modified the proposal accordingly. Many other issues like that took a turn, sometimes more significantly than others, due to that valuable feedback.

I think the other thing that really came out of that process, and, of course, when you put this kind of effort in, this is what you are hoping to hear, is really almost uniform support behind this effort that the committee took up.

So we are lawyers, and so we can almost barely agree on what day it is, let alone what color the sky is or any of the other details, and so if you all were writing these rules, we might have 150 different versions of it, but it was actually really rewarding to see that all of the bodies that took it up, some were willing to expressly issue resolutions authorizing and endorsing the effort. Many of them informally gave back feedback, and not a single organization or body came out against the rules.

Of course, again, everybody has views, and some people like aspects of it more than others, but universally, with each of the stakeholder groups that

we went to, we received support, and so that helped affirm for us that what we were doing really was necessary. Of course any time you are revising something that last was revised in 1985 you might think it probably needed to be done, but it was good to get that feedback from those bodies, and they were all excited to help move our system forward.

In terms of the changes that are in front of you, I am not going to repeat what I said last time I appeared in front of you, but I do just want to stress a few minor points and then open it up, of course, for discussion by this body.

The first is that in some ways the changes that we have proposed are incremental. We did not start with a blank sheet of paper. We did not endorse the federal rules, and if you look at the efforts in some of the other states, they undertook far more radical efforts to revise their system. So, for example, one of the states actually established tiers, and so based on certain criteria, a case would get put in a track and there would be presumptive limits set differently for each of those tracts, so you might -- I am making this up a little bit, but you might have five interrogatories in the first and 15 in the second and up to 25 in the third, and the same for

depositions, and the same for the amount of time that you would be given for discovery, et cetera.

We didn't endorse that sort of a concept, and that's a pretty radical departure from existing practice. So in a lot of ways the basic structure of civil discovery as you know and love it continues to reside in these proposals, but the changes that we have advanced do really wrap their hands around and endorse a few key principles that are, I think, a big deal when it comes to discovery.

The first is that it really whole-heartedly embraces the concept of right-sizing. Not every case is the same, not every case needs wide open discovery, not every case needs the same level of case management, and we have fully endorsed that concept. First, by letting the attorneys themselves and the parties themselves right-size their case, which I think the vast majority of the time, despite all the discord you might hear about in litigation, actually does take place. Counsel are usually able to come to some type of agreement on that, and if they can't, enhanced tools for the judiciary to put their hands around it and get a case moving forward in a productive, efficient way.

And that's really the second point to stress

and that we stressed in the rules, is that the civil discovery system -- rules are rules. In the end it's going to work if there is cooperation by counsel. We have stressed in the rules, as the federal rules stressed in their changes, that counsel, parties, judges, everybody who is a participant in the system is expected to cooperate towards the goals of our judicial system, which is the efficient resolution of disputes.

And then that really is the third sort of guiding principle for our rule proposal and I think moves in this direction, and the key word there is flexibility. Flexibility for the parties, flexibility for the court. Different courts in our state see tremendously different sorts of cases than another. The things that our Oakland County judges or Kent County judges are going to be different than the things that are seen in Tuscola, but the rules are designed to give that flexibility to the practitioners and to the judges to move things forward.

So in some ways we are changing the rules that exist, but we didn't go through all this time and effort just to tweak a few semi-colons. We really do hope to be moving the needle in terms of our civil discovery system.

So with that brief introduction, the rules proposals are before you. I know that you have all studied them. We have a resolution up somewhere that asks the Representative Assembly to endorse, propose, and support amendments to the Michigan Court Rules to improve the civil discovery process.

Mr. Chair, do I need a motion first or discussion first?

CHAIRPERSON MCGILL: I will make that motion.

VOICE: Second.

CHAIRPERSON MCGILL: Discussion.

MR. LARKY: President Rockwell, members of the Assembly. Dan, I called you shortly after we got our agenda, and I told you privately, and I want to tell you publicly, this is probably one of the best documents I have ever seen as a lawyer. There is so much work in here and so much dedication by all of you that I am totally impressed, and I urge the Assembly not to nickel/dime this, but to pass it as is, and I would encourage that vote today.

MR. QUICK: Thank you, Shel.

MR. PHILO: Good morning. John Philo from the 3rd circuit, Sugar Law Center.

I guess I will be the fly in the ointment. I think there is a lot of good things in here. I cannot

endorse this though. There is a couple areas that I think are a sea change in the discovery rules.

Mandatory disclosures are fine, but we have gone further than just about every other state that I am aware of, and certainly further than the federal rules with the first provision that says, State entire factual basis of your claim. That is a cottage industry of motion practice. Second round, of course, to dismiss, and it has the potential to move from notice to a de facto fact plea.

What happens if the other side who is getting paid an hourly fee decides you don't have enough facts at the outset of your case to sustain it? Now, that's not notice. And what is the factual basis? Is it a recitation of all the facts that can lead to admissible evidence? Well, that's four hours of discovery deposition. How do you list that in a way that is readily apparent that you have complied?

I think the federal rules do a good job. You list your witnesses, you list the documents, you list the amount of your damages, but there is something else going on here that I am concerned about very much as someone who represents plaintiffs in civil cases.

The second one is the imposition of the idea of proportionality. The proportionality rule, which

we have adopted wholesale in this document, by all accounts was a conservative movement in the federal courts. I am not saying that negatively, but that's the source of it. And it is being fought over daily in the federal courts. We have a couple of defendants who we regularly are engaged with, the State of Michigan being one who regularly say to retrieve pretty much any information is going to cost us $70,000 and X amount of man hours. Now, they know there is no way our clients can pay that, none.

We have had some good judges who say, well, if you make your retrievable system that difficult and expensive, that's on you. We have had other judges who don't. And what's the assessment of proportionality? Is it the value of the plaintiff's claim, because many of our claims are constitutional right claims, so we are not even seeking. You can get most judges to realize that a constitutional right has a value, but in our employment cases, what's the value of the discrimination claim? Is it going to be strictly the monetary amount they can get out of that claim?

Those are all questions that are being hashed out in the federal courts that the federal courts haven't had the opportunity to come to a clear

consensus on. I would strongly recommend that we wait on those sort of changes until there is a consensus in federal courts.

Also it's only been three years since the federal courts have had proportionality. Most states do not have. My understanding is there is only about three or four states that have opted out wholesale and another three or four that have incrementally adopted it. I am not sure why we are going out on that limb, and it is not an access to justice issue for our clients. It is the opposite of that. That's all. Thank you.

MR. QUICK: Thank you for those very thoughtful comments, and your comments really touched on two of the more significant aspects, and let me, just by way of background, and not necessarily in terms of rebuttal, touch on both of those, and I will take them in reverse order.

So first, in terms of the concept of proportionality, if you were to have nothing more scintillating to do with your time, you can read up on the revision process of the federal rules, and what that process and that literature will tell you is that in the eyes of the drafters of the rules, proportionality has existed in the rule set for many,

many years and, in fact, exists in the rule set in Michigan now. However, it was buried in the concept of protective order rather in the definition of the scope of discovery. So 2.302(C) always and today provides that discovery which is unduly burdensome, for example, can be protected from discovery.

And so the drafters at the federal level when they adopted the proportionality standard took the position that they, in fact, were not changing anything of substance. They were simply changing the emphasis by moving the proportionality concept into the scope of discovery and out of the protective order provision.

I would also say about proportionality that I think, regardless of the semantics of the existing rules, that it's always been there. I think that both judges and lawyers expressly and implicitly are mindful of proportionality issues as they make decisions about discovery and as the judges rule upon discovery disputes, and so in some sense, at least my personal view is that we are simply bringing to the top that which already exists.

A brief comment on the initial disclosures, and specifically the comment that was made about the factual grounds. I do want to, just for completeness,

point out a few other of the rules on the disclosure issue.

So, first of all, pursuant to Subsection 6 of that rule, which appears at page 28, the basis for the initial disclosure is based upon the information then reasonably available to the parties. It doesn't require you to go out and conduct a bunch of discovery to simply respond to the initial disclosure.

Secondly, in Subrule (E), which appears at page 32 of the rule dealing with supplementation, there is a duty to supplement, but it's only a duty to supplement if the party learns in some material respect that the disclosure is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the parties during the discovery process. So the point here is to do away with burdensome efforts of having to just go through and rotely update and supplement disclosure if you have already, for example, disclosed the information in an interrogatory answer.

And lastly I would point out in 2.313(C), which is the sanctions provision applicable to disclosures, that sanctions are not going to be pursued very often unless there is significant harm, because within that language the concept of harm is

integrated.

So by giving that other context, I mean to respond to suggest that I don't think that there will be, or at least it's our hope there will not be a, the phrase used was a cottage industry of spin-off litigation on this issue. I don't think it has manifested itself at the federal level, and I don't think it's manifested itself in the other states where this has been adopted.

I would like to solicit comments --

MR. YATES: Let me just offer 30 seconds of thought, because we have test driven these concepts in the business court. My business court has been running for more than six years, and I essentially implemented proportionality through my initial case conferences, and we have had initial disclosure for some significant period of time. I can tell you I haven't received a single motion to dismiss based on the initial disclosures, not one. (C)(8) standard is extraordinarily generous to pleadings under Maiden versus Rozwood. That's been around the state for almost 20 years, and I continue to adhere to that view regardless of what the initial disclosures say.

With regard to proportionality, I can tell you that those judges who had been conducting these

sorts of meaningful initial case conferences take very seriously concerns about, for example, constitutional litigation. When I am setting up the schedule in the case and deciding how much discovery to allow, I don't restrict myself to the amount of money in dispute. Lots of the business cases are merely declaratory judgment actions, so there is no money in dispute.

So I think I can tell you based on six years of experience that, although I understand the basis for your concerns, it's not been my experience those concerns manifest themselves in an unfortunate way.

MS. SAFRAN: From a litigation thought on the initial disclosures. I think, and hopefully I am not the only one who has done this. I would assume Dan has also done this. After you get on the defense end, after you receive the complaint, it's fairly standard. There is a boilerplate. Everybody has boilerplate interrogatories they send out. The more experienced I have become as I have moved through my career, the more worthless I find all the standard boilerplate interrogatories, and everybody just argues over them.

Case in point, the standard boilerplate defense set -- and I use them, so I am guilty -- is question, with respect to Paragraph 32 of your complaint, please state the factual basis for the

allegation. And it goes on for every single paragraph quite often in the complaint, and the only thing worse than writing those interrogatories is answering those interrogatories, and invariably you have a fight over those interrogatories.

By moving everything out into the initial disclosure, we are getting away from the time, the burden on the litigants and on the attorneys to have to deal with putting them together and fighting over them and just basically say tell me what you base your claim on. We can kind of cut through all of the noise and we can cut through some of those fights over the sufficiency of answers to interrogatories that are, quite frankly, worthless.

So that's really how I view the initial disclosures. Let's just let everybody get to the point and tell me generally what the case is about, rather than having to fight over needless interrogatories.

MR. QUICK: Yes, sir.

MR. REISER: My name is John Reiser, 22nd circuit, Ann Arbor. I also happen to be an assistant prosecuting attorney, so the question or point I want to raise is the unintended consequences of revising civil rules, which generally apply to

civil, to the criminal law for the defense attorneys out there, as well as prosecutors.

As you know, we are generally covered by MCR 6.001 that says that the civil rules are applicable except as otherwise provided by statute, things of that nature, and I am going to be talking about mostly page 65, if you could pull that up, and then dogear page 29, because it refers you back to that. And there isn't in the criminal law a provision for subpoenas, but yet we all know in criminal cases people and things get subpoenaed, right? So how do you get someone to court or how do you get something to court? You do a subpoena, and 2.506 talks about that. At least in the book. Is it the same on the screen as it is in the book, or is it different?

So on page 65 at the top of the packet it talks about subpoena. So it's under (A). Maybe it's on 64 there. There you go.

So the court in which a matter is pending may by order or subpoena command a party or witness to appear for the purpose of testifying in open court on a date and time, et cetera. And to produce docs, photographs, et cetera, correct?

So are subpoenas used to get people to court or are subpoenas used to get things to court or things

to law office?

Our office takes the position that subpoenas are to be used to get people to court and to bring things, documents, et cetera, with them when they come to court. Should that "and to produce" be an "or to produce"? So can you use a subpoena? Because in the criminal process, we don't have interrogatories, we don't have requests for admission. I like those as a prosecutor, but we don't have them. We don't have depositions, request for documents, all that kind of stuff, so we are kind of limited, but, you know, we are subject to the rules on subpoenas, and in the rules for criminal discovery, not to go in too much afield, is they are a little different for a misdemeanor and they are different for felonies, but with respect to subpoenas there is but one rule.

So as a prosecutor, do I use a subpoena to get somebody to court and to produce, or do I use a subpoena to get datamaster logs, medical records, loss prevention video, other things like that, and if the other defense attorneys kind of know -- I know that I see Matt, I see Shawn, I see other people I practice with on the other side, I know that subpoenas get used by defense attorneys as well. So how does the criminal bar practice in compliance with the court

rule that applies to our practice?

MR. QUICK: So let me first say that you have forgotten more things about criminal law than I know, but the section that you are pointing to on the screen, and the portion on the screen that's blue, that's the existing court rule.

MR. REISER: I know.

MR. QUICK: So we didn't change that.

MR. REISER: I know that.

MR. QUICK: Furthermore, we did run this past, for example, the Criminal Jurisprudence Section of the State Bar which actually, if I recall correctly, openly endorsed it. So neither of those is necessarily answering your question.

MR. REISER: I brought this up with them. I am not the only pain in the butt with you. I talked to those guys too.

MR. QUICK: I would suggest on that issue, if you think there is a problem with the existing rule on that issue, I would suggest that you speak to the Criminal Jurisprudence Committee and let them make a rules proposal, and then Ms. Safran would ultimately, yeah, I guess, would come as the Civil Procedure and Courts Committee. We didn't change that, so whatever that is in existing practice is continuing.

MR. REISER: I guess, if we are going to do a wholesale revision, and I don't know that it's wholesale, but if we are going to revise it, I think if we take "and" and make it to "or," it will reflect what's already being done out there, because I know defense attorneys and I know some prosecutors' offices do a subpoena to get things.

MR. QUICK: We do have some criminal folks here.

MR. YATES: I am not talking as a judge now. I am talking about back when I was a federal prosecutor. We used to issue Grand Jury subpoenas on a regular basis, and they would command appearance and production, so it was a classic subpoena duces tecum. The practical approach to that usually was that if the production of documents occurred we wouldn't require the custodian of documents to appear, and so I think the way that this rule would apply to the criminal practice would be in the same manner that Grand Jury subpoenas were handled.

I suppose you are right that it would provide more flexibility if it said "and/or," but I wouldn't like to change it from "and" to "or," because then it's in the disjunctive, and so you can either direct somebody to appear or to produce documents but not

both.

MR. REISER: But People aren't directing -- I get copies of subpoenas, and that's another point that I want to make. Is there a requirement to give a copy of a subpoena to the other party, and I haven't seen one in my reading of the rule, and maybe there should be so you are not -- it says you can file a motion to object. How do you do that when you don't get a copy?

MR. YATES: Yeah.

MR. REISER: If we are going to clean this up, I think we should clean it up to allow what's already happening out there by defense attorneys, notwithstanding the Criminal Section's acquiescence in the current text.

MR. YATES: Sure. My only suggestion is that if we are going to change this it should be "and/or". I don't know whether that phraseology is anywhere in the rules.

MR. REISER: No, I am good with "and/or".

MR. YATES: You don't want to change it to "or."

MR. REISER: No, I can live with "and/or" unless the defense bar or prosecutors don't want to subpoena nonhumans, you know what I mean, things to court.

MR. YATES: Right. Did you want to add something?

MS. GAINES: Joy Gaines. I guess I agree with the judge here. After you spoke, I don't have too much more to say, and I am not sure I understand all aspects of your question.

MR. REISER: Subpoenas get used all the time in criminal cases to get documents and to get things, and I think it might be technically against the Court Rules, so every time I get a copy of a subpoena that asks for the employment records from Costco where their client subpoenaed the records, should I then send that to the Attorney Grievance Commission, because they are violating 2.506 for not having any interest in getting that person to the court but rather just the documents to their law office? The answer is, no, you don't want me doing that, because everybody does that.

MS. GAINES: I know.

MR. REISER: But they are not allowed to do that, so I think it should be "and/or," so at the appropriate time I will add a motion to add a "and/or," and if it fails, if fails. Thank you.

MS. GAINES: I think that's a good point. Thank you.

MR. REISER: What about copy? Do you have to give a copy of the subpoena to the other side?

MR. QUICK: I believe that the existing rules mandate that you have to serve subpoenas on opposing counsel.

UNIDENTIFIED SPEAKER: Only when filed with the court.

MR. REISER: If the rule is sandbagged, then I will sandbag, but that's a bad rule. I mean that humor, but, you know, I think there should be clarification as to whether or not the opposing party is entitled to a subpoena so they can quash or not quash.

MS. CHINONIS: Is that a motion on the table?

MR. QUICK: Discussion.

Ms. CHINONIS: My name is Nancy Chinonis, 7th circuit. First I want to say that I was one of the many individuals who sat in that three-plus hours telephone call regarding the rules, and I want to thank everyone on the committee for the hard work that they did. That being said, I am here to ask this Assembly to vote no to the proposal for the following reason.

I think while the intention of the committee is good and that certain rules need to be changed and

certain of these proposed amendments are good and practical amendments, I think the way that we are bundling all of these various amendments into one motion with one proposal and one resolution is improper. You know, we are bundling good with bad, and I think we really should be looking at these each individually and on their merits.

As a person who practices employment and labor law, both plaintiff and defense, I have talked to several attorneys in Genesee County and met with the Flint Trial Lawyers Association and various judges. Not one of the people that I have spoken to about these rule changes has been in support of them. The general consensus of everyone that I have talked to is that this is going to increase the cost of litigation by removing very simple and cost-effective ways to conduct discovery, such as sending interrogatories, and thereby causing litigation to be, costs to be increased, because we are going to have to have all these depositions and then motions to have depositions.

While I think that there certainly are certain times when certain law firms or certain attorneys may abuse the interrogatory or certain discovery practices, there are procedures in place

through the rules where we can ask for protective order to limit those abuses, but to have a carte blanche limit on interrogatories and depositions I think is going to serve to really prejudice plaintiffs, especially in my sector of the law where there is a need usually to have several interrogatories and document requests and depositions because the employers tend to have all of the documents and all of the information, and they are not going to voluntarily produce that.

I have that problem all of the time right now when I have to file a case in federal court and we are supposed to have all of these initial disclosures and all the information is supposed to flow, but in practicality that does not happen, and I think that it will be a gross miscarriage and injustice to have a rule where we are limiting parties from engaging in discovery, and so for those reasons I would ask that the Assembly decline the proposal as written. Thank you.

CHAIRPERSON MCGILL: Parliamentarian has informed me and reminded me that there is a pending motion on the floor that has been seconded. Thank you for your comments, but we need to deal with this motion as well, amend to change the language from

"and" to "and/or".

PARLIAMENTARIAN CHMURA: Subsidiary motion can't be debated. Go back to the original one. That's where you are at.

CHAIRPERSON MCGILL: The motion has been made, it's been seconded. Is there any further discussion with respect to this amendment?

VOICE: Call the question.

VOICE: Nobody else heard it.

CHAIRPERSON MCGILL: Member from the prosecutor's office.

MR. REISER: I move to amend to "and/or," and I understand it's been supported.

VOICE: Support.

CHAIRPERSON MCGILL: Could you say your name and circuit.

MR. REISER: John Reiser, 22nd circuit.

CHAIRPERSON MCGILL: The motion has been made and supported. Is there any further discussion?

Hearing none, we are not set up electronically to do this with the clickers, so we'll have to do this by voice vote.

All those in favor.

Any opposed.

Let me try that again. All those in favor.

Opposed.

We will do this by raising hands. All those in favor.

Opposed.

Motion carries.

MR. QUICK: Allow me just briefly to respond to the last speaker. So that the Assembly is clear, there is no limit in these proposals on depositions. There is no limit in these proposals on document requests, presumptive or otherwise, and as to interrogatories, it is a presumptive limit, which both parties can modify and the court can modify, and with regard to -- so I just wanted to make that very clear.

MR. BROWN: Michael Brown from the 38th circuit. I have a concern on page 71. This is criminal delinquency in child protective proceedings, Section (A), Subsection (c). It says here that the names, addresses, and phone numbers of all prospective witnesses would be required to be provided by the parties, even if not asked for.

I am an assistant prosecutor, and I find this quite concerning. This would require us to give the phone numbers and addresses of victims to defendants of often horrific crimes, people that have been raped, people that have almost been murdered. The Victim

Rights Act makes it illegal for us to provide this, and I believe this contradicts it directly, so I would make a motion to strike those changes that are underlined.

CHAIRPERSON MCGILL: Is there a second to the motion?

VOICE: Second.

CHAIRPERSON MCGILL: Go ahead.

MS. GAINES: This is Joy Gaines, and I can address that, because we did specifically talk about this in the subcommittee dealing with this rule. The rule is substantially similar to the criminal discovery rule, which requires the names and addresses. It does not require phone numbers, but it does require the names and addresses of the witnesses, and the intent was to make it similar so that there would be sufficient access to the lawyer guardian at litem, as well as the respondent's attorney, so they could prepare for trial, but also, in particular, because most of the people who are involved in these cases are low income. Certainly when you are representing the child, they don't have money to pay for investigators and things like that, so this was to make it more accessible for the attorneys to do the investigation and to actually prepare for the case. I

can see what my notes are from that.

MR. QUICK: And I know too that specifically the issue with if it was sensitivity with a particular witness, for example, that that was contemplated and discussed, and I think the answer on that is that it falls within just general protective orders, that there is obviously a basis upon which not to provide that specific information.

MS. GAINES: That is correct.

MR. QUICK: And that happens in practice anyway.

MS. GAINES: In terms of prospective witnesses, that was language that was already in the court rule, so we did not change that. We just made the other part more similar to the criminal court rule so there would be more access for the party to prepare and to be more efficient in their litigation and perhaps sometimes even avoid litigation with the additional information that you might not have until trial if you are able to obtain it in advance of trial.

CHAIRPERSON MCGILL: Is there any further discussion on the proposed amendment?

Hearing none, we will call the question. All those if favor.

Opposed.

Show of hands, please. All those in favor.

Opposed.

Any abstentions.

I think the motion carries.

MS. KITCHEN-TROOP: Elizabeth Kitchen-Troop from the 22nd circuit. I want to say thanks for all the man hours. I know this took a lot of time.

I practice exclusively domestic relations work in Ann Arbor, and I want to say thumbs up to the financial disclosure that's going to be required at the start of cases, but my concern is specifically regarding Rule 3.201 with respect to the interrogatories, page 67, for domestic relations case.

I note that the presumptive limit is set at 35. I will say that I think in practice that is far too low for domestic relations cases. In those cases we have issues that range from everything for custody and parenting time to sometimes separate property claims to business interests that can be incredibly complex, and I would not support a limit. I mean, I would support, if there is a limit, something far higher than 35, because I think that's simply inadequate for our needs in the domestic relations realm. My motion would be to strike the limit for the

domestic relations cases.

VOICE: Support.

CHAIRPERSON MCGILL: Is there a second?

VOICE: Second.

VOICE: Support.

CHAIRPERSON MCGILL: Discussion?

MR. KOBLISKA: Thank you, Elizabeth. Matt Kobliska. Domestic relations is somewhat unique because, unlike many other areas of the law, real people pay our bills, and they don't always choose to be there. They don't choose to be defendants, and a divorce case, they don't always choose to be victims of domestic violence, and we have got to find a way to deliver legal services in a more efficient manner, because the current path -- I shouldn't say the current path, but the common practice of sending out 150 rote interrogatories with 500 subparts is unsustainable. As a profession, we are going to be pushing the margins.

The 35 number cap on interrogatories also includes discrete cell parts, and that's a longer definition, but you can ask a number of subpart questions that relate to the initial question. This initial disclosure is going to answer much of what might be needed to be produced in a domestic case, so

including disclosure of any and all assets.

So I think it's going to alleviate much of the need that we have for information at the outset of a case. We still have depositions. We still have requests to produce documents. I think that we will find that 35 with discrete subparts will meet our needs in 99 percent of all cases, and those in which it doesn't, we can still apply to the court for additional discovery.

MR. LARKY: I speak in opposition of this motion. Sheldon Larky of the 6th circuit. When it comes down to divorce law, it took me -- I am now practicing, it will be 48 years. Divorce law only comes down to two words, money and kids. That's what it comes down to. In one question, you could ask one question, what are all your assets, and you could have subparts. One question, what are all your debts and subparts. What are your claims to make this an unequal division.

Thirty-five. I would have to be honest with everybody in this room. If anybody sends me a set of interrogatories in a divorce case and it's one of these boilerplates, I refuse to answer it. I absolutely refuse to answer it, and I say, Take me to court, and I will play the game in court, and I will

get those few questions that really have any substance at all in this case.

I am sick and tired of seeing lawyers who, as Matt says, give 100 to 150 interrogatories, and you sit there and you say it's going to take me and my client a month, two months to get this taken care of. This is stupidity. Thirty-five I think is even liberal. I like the idea here that they wanted to put it to 20, but I will take 35. So I am opposed to this amendment.

CHAIRPERSON MCGILL: Is there any further discussion on the motion to amend this rule to eliminate the 35 number in terms of the limitation?

Hearing no further discussion, we will call the question. All those in favor of the motion to strike that language, please indicate by saying aye.

All those opposed.

The motion fails.

MS. GAINES: May I address something, and it may not make a difference, but in my answer -- this is Joy Gaines again. In my answer to the question about the discovery for the juvenile cases, I had thoughts in my head that maybe you don't know, because the way the question was proposed, it was only from the delinquency perspective, but this court rule is also

for the child welfare cases. To more fully understand, and it may or may not make a difference, but to more fully understand that this court rule also makes, in the child welfare cases, this information available to the children's attorney, the lawyer guardian ad litem, and the children are the victims, and so by doing this, you are actually, by changing it, and the person who is protecting children also doesn't have access, but they still for the delinquency side, the opportunity for protective order.

So I had all those thoughts in my head, but I am not sure that everyone realized this court rule is not only for delinquencies, but it's also for child welfare where the children actually have an attorney and that this provides information for the children's attorney.

MR. QUICK: Thank you.

MR. GOBBO: Steve Gobbo from the 30th circuit. My question is on Rule 2.305 discovery subpoena to a nonparty, beginning on page 37 of the booklet. Skipping Subsection (A)(1), going down to (2), (3), and (4), it appears that those sections, more or less, deal with documents as opposed to an individual deponent. If you go to page 38 and you

look at Subsection (6), it is dealing with a nonparty deposition and an organization, and within that subsection you have, a couple lines down, about the fifth line down where it says, No later than 10 days of being served with the subpoena, the subpoenaed entity may serve objections, et cetera.

Is that 10-day provision for responding to the subpoena with objections or a motion for protective order or otherwise to also apply to an individual deponent that may be under Subsection (2), or are we missing a time frame somewhere, or should the wording in Subsection (6) be worded to include something to the effect after in a subpoena for a nonparty deposition, in addition to an individual, a party may name et cetera, and then build in the 10-day provision for an individual to respond?

MR. QUICK: So Subsection (6) in the federal practice is a Rule 30(b)(6) deposition, and where federal practice is going, and I think you will see the next revision to the federal rules is to include a mechanism to object to the categories in the 30(b)(6) notice. So, as you may know and lawyers here know, oftentimes you will get a 30(b)(6) notice, give me a corporate representative who can address the following 27 topics.

Right now the rules do not have a mechanism to really deal with objections to those categories and resolving them outside of the generic protective order. So the language in Subsection (6) is designed to simply deal with the aspects of that 30(b)(6) notice. The normal process to objecting to a subpoena, a discovery subpoena, either to a person or for documents, is the same as it currently exists, which is you can object before the time for compliance exists, and under the rule set, the objection stands. You are excused from compliance given the objection until you go to court, or if somebody moves to compel.

MR. GOBBO: I understand that, but in one section it's being stated with a time frame, and in the remainder of 2.305, when you are an individual deponent, there is no statement with respect to that and should you provide to an unrepresented party, a nonrepresented third party some more finite time frame, even if it includes you have the ability to object all the way up until the time of the appearance? I am not necessarily calling for any type of language to be added or what have you, but I thought I should just call that to the attention of this body and to the committee. So I will sit down.

MR. QUICK: I see. If you look at Section

(A)(4) of the rule, Steve, so it indicates a subpoena issued under this rule is subject to 2.302(C), and on timely motion by a party or subpoenaed nonparty.

MR. GOBBO: What's the time? If you are a nonparty, how would you know what was timely, and I guess that's the crux of it.

MR. QUICK: It says in the last line, before the time specified in the subpoena for compliance.

MR. GOBBO: Okay. Okay. I get it. I was more concerned because you had a specific time frame in Subsection (6).

MR. QUICK: Yeah, this is designed -- in a 30(b)(6) context, it's designed to give a little bit of advanced notice. If I serve a notice on you for 20 categories and you are going to object to ten of them, I get a little bit of advance notice before the actual date of the deposition as to what you are objecting to, and I can either work to resolve that with you, or I can just decide to proceed as to non-objected categories, or I can go to court. It's a different process because of the nature of the categories included in that sort of a dep notice. That was the intent.

MR. GOBBO: Thank you.

MR. QUICK: Thank you.

MR. BUCHANAN: Good afternoon, this is Rob Buchanan from the 17th circuit. I just want to commend the workgroup for putting this together. The rule has really substantively for civil not been changed much since 1985, and I know thousands of hours of time has gone into putting this together, and I know this has been taken to many committees and sections, as we see on page four. So this has been very thoroughly vetted, and I think it's wonderful that your workgroup has brought it to the Assembly for approval, and I know the reason that it is here is because we are the final policy-making body of the State Bar of Michigan, and I want to caution this body not to use one odd example to try to, I think, destroy what I think has been very good work by this committee. I would recommend that this body adopt this as put together. I know there has been a few adjustments here, but this is a great piece of work, and the sections I have been involved in that have looked at this think this is an improvement in trying to make litigation more efficient.

I do plaintiff personal injury work, and I understand a lot of the comments, but I think this helps all of us. I don't think this is favoring the defense or making it more expensive. If anything,

it's making the process and the court system more efficient, so I would say I strongly support this and I ask you as the body of the Representative Assembly to please recognize the work that has been put into this by very intelligent people who have put thousands of hours into this, and let's make some adjustments that make the system work better so we are on the forefront of civil litigation in the country. Thank you.

MR. QUICK: Thanks, Rob.

MR. REISER: I know the hour is late. John Reiser with the second point, page 65 here and 64 on the screen, and I am wondering if there should be a motion, something like a copy of any subpoena for documents or tangible things shall be contemporaneously provided to opposing party or his or her counsel. In other words, shall we give notice to the other side that we are asking for these things that the rule gives us the right to ask to have quashed?

VOICE: Support.

MR. REISER: I didn't make it yet.

MR. QUICK: Mr. Chair, I don't know what your procedure is for amendments and number of words and all that.

CHAIRPERSON MCGILL: Six, but if the panel would care to address the member's concern that may help him discern whether or not a motion is necessary or if he would like to make a motion. Does that sound appropriate?

MR. REISER: Yes, if a motion is required, then I will sit down because it's moot, but if there is not a rule that says you have got to provide notice in some kind of white ink.

MR. QUICK: Off the top of -- there is a lot of rules here. Off the top of my head, I can't point you to the specific rule. Certainly my belief is in practice that that exists, and it may well be in the rule set.

I guess my other comment is this strikes me as a wonderful additional supplemental comment which can be made to the Supreme Court should this body pass these rules and should the Supreme Court open up an ADM file, and I am sure the Court would take that into consideration, rather than trying to craft something on the spot and figure out what subrule it goes into and exactly what the wording of that is. But it's up to you all.

CHAIRPERSON MCGILL: With that, if you do have a motion, please make it now.

MR. REISER: My motion would be this: At the end of that (A)(1), a copy of any subpoena for documents or tangible things shall be contemporaneously --

CHAIRPERSON MCGILL: That's it. That's six words.

MR. REISER: And then he has got the other six. I was only kidding. A little latitude.

-- be provided to the opposing party or his or her counsel.

VOICE: Support.

MR. REISER: I would ask the Chair's indulgence to go beyond six for the benefit the Bar.

VOICE: Support.

VOICE: Point of information. Couldn't this go under (C) where they address service?

CHAIRPERSON MCGILL: To the issue of the extent of the amendment to exceed the six-word limit, you will need to put it in writing, unfortunately. So if you would like to try and reword that to address that.

MR. LARKY: Sheldon Larky, 6th circuit. For the purpose of this argument, I move that we waive the six-word rule.

VOICE: Support.

CHAIRPERSON MCGILL: So there has been a motion to waive the six-word limitation. It's been seconded. We will need a two-thirds majority to carry that motion. All those in -- is there any discussion on that motion?

All those in favor.

Any opposed.

Any abstentions.

I believe the motion carries.

Now we can vote on this amendment. If there is any further discussion, we'll have that first.

The motion has been made. It's been seconded. There is no further discussion. We will call the question.

All those in favor of the amendment currently displayed on the screen, please indicate by saying aye.

Opposed.

Motion carries.

MR. KOROI: Mark Koroi, 3rd circuit. I just want to point out there was one aspect of the proposed amendments that I want to comment on. It deals with discovery motions. Too often in the practice of law I see issues where, for instance, interrogatories are one day late. You get an e-filed motion to have some

costs and sanctions against you, and it's a sort of a common occurrence. Medical authorizations, another area. On one case I didn't get a medical authorization. They brought it for sanctions on answering it. I called opposing counsel. I said, Send it to me. I never got it. I mean, I will give them an hour.

I think it's important for the court rules to address and critique, because recently there was a court rule amendment that said you have to face and consult opposing counsel and make a reasonable, good faith effort to resolve discovery disputes before you come to file motions in court. That particular rule was implemented. I can use it as a defense to all these silly discoverables to be filed by getting to a client's insurance company who do this on a fee base. Often counsel, defense counsel, were basically calculating to be paid for.

And when I started interposing these defenses, I noticed they were dropping most of those immediately, and the results being we then file them, but this added aspect of having people saying attorney fees can be opposed if this situation happens I think is a core conditional authority, and that gives the court judicial encouragement to, in fact, impose

attorney's fees upon moving parties, let them use a system with constant motions that clog the court's dockets, so in that respect I think it's a good idea that this has been implemented. I would encourage it.

Very often 80 percent of the cases you see filed in like (inaudible) circuit are undiscoverable because half of them don't belong in court. The situation where the parties either give no attempt to resolve beforehand or an alternative, just didn't cooperate with each other another one. So I think if I had any more teeth, I think that this is a good idea, and we should encourage that type of a rule amendment as part of these that are being proposed now.

In addition, I would like to know about one issue regarding discovery depositions. I support we do this, we enumerate a one-day and seven-hour limit to depositions. I had one case recently where there was a 21-hour deposition. We repeatedly went to court to get the deposition limited somehow, because it was going on forever, and there were numerous trips to court over it.

Obviously we can avoid if we have a bright line rule saying that seven hours would be the limit. I don't think there is a case or very few cases that

will require an attorney to depose somebody over a period of two or three days. I think that if that situation does arise, go to court first and get leave from the court for additional hours. I think there needs to be some time limitations. Too often I see certain types of law firms and defendants use this type of practice to harass plaintiffs and so forth, and vice versa. I'm not saying it doesn't go both ways. There has to be limitation of discovery.

Additional thing I have noticed in civil cases is that structure in many cases, because very often you will get a case -- for instance, you have a no-fault case. Most common type of case in the courts today is a no-fault case. Sometimes I put six, seven months into the claims file from the defendant. Now days the judge will put it in their scheduling orders and also the court rule, hopefully, that we are going to have the insurance company within 20 days of receiving the complaint are going to be responding to a claim file. That's going to streamline the process.

In Wayne County we tried to do it by streamlining the scheduling orders in that manner, and it is working. It is working, and the judge is doing a good job, and I think these rules will help streamline the process as well. A lot of it gets

implemented by the judges in Wayne County, for instance, are being put in this rule. I think it's a step in the right direction. Thank you.

MR. QUICK: Thank you for that support, and the one thing that you mentioned that you thought we didn't have, in fact we do, and at page 41 it specifies a deposition may not exceed one day of seven hours as a presumptive limit, of course modifiable.

MR. BULSON: Hello. My name is David Bulson, 50th circuit. I do a considerable amount of litigation, both in federal and state court. The concern I have has to do with 2.305 and the way it's been changed. Currently the Court Rules don't have anything to say that you can issue a subpoena and have that document produced at a law office. And this rule is intended to change that, this proposal, which is saying -- I will give you an example. You can send a subpoena into a bank and say, Give me the records from Mrs. Smith's account, Mrs. Hopkins' account, Mr. Jones' account, but there is nothing in this rule that says that the attorneys, could be one or more on the other side, are going to get a copy of that subpoena at the same time so you know that's happening. Maybe it's your client. And there is nothing in this rule that says that that document

that's being provided by the bank, as my example, has to also be provided to the other side.

So the rule falls short there, and I don't oppose the idea of being able to have the attorney issue the subpoena and have, let's say, the bank send the documents without having to have a records copying deposition, because right now that's the only way by our court rules that you are really allowed to get those documents. I am not saying in practice people aren't doing it differently, but you read the current court rules, the only way you can get those is to have a records copying deposition and issue the subpoena, the things can arrive at your office, then you can cancel the deposition.

So this is an improvement in that sense that we don't have to do that, but there should also be something that says the other attorneys get copies of the subpoenas, just like we were saying with Rule 2.506 with the change at the same time, but they also ought to get, be commanded to, that the person producing the document should be commanded to provide those documents to all parties to the equation, so you are getting those things contemporaneously rather than reacting to them, and that's really important when you start talking about getting 14-days notice or 10-days

notice to the nonparty to object to the subpoena and ask for a court order or whatever. Well, the attorney on the other side of the case might want to do those things too, so you have got to know that these things are moving forward the same time as the nonparty does.

So those are my comments, and so I will leave it to somebody else to phrase a motion. This is my first time here. I am going to let somebody else monkey with all of that. That's all I wanted to say.

MR. QUICK: Thank you, sir. Just briefly, I think the rules already provide for discovery of a service subpoena on all parties. You may have overlooked page 38, Subrule (7), which specifies, Upon written request from another party and payment of reasonable copying costs, the subpoenaing party shall provide copies of documents received pursuant to a subpoena.

So we agree with you on that issue and did try to integrate that into the rule.

MR. BULSON: That rule only relates to 2.305 nonparty, but if you talk about the nonparty being compensated, it doesn't talk about the . . . I see what you are saying. Okay.

So, in other words, so the other party has got to be notified that the subpoena even went out in

order to be smart enough to say I am going to make a request for the documents.

MR. QUICK: That's already the rule. It's already in the rule. It's a discovery mechanism. That's got to be served on every party as far as --

MR. BULSON: I don't know that rule. But thank you.

MR. QUICK: Thank you, sir.

MS. KITCHEN-TROOP: Elizabeth Kitchen-Troop again. Sorry to hassle, but kind of a point of clarification, I guess, on the same rule we were talking about earlier, which was the 3.201. I thought both of the comments that I have heard from Matt Kobliska and the other gentleman who spoke, and I have forgotten his name, for the 35 questions, the subquestions wouldn't count as part of the total tally of questions, but when I look at the rule that it relates back to, 2.309(A)(2), it specifically states that a discrete -- a discrete subpart of the interrogatory counts as a separate interrogatory.

MR. QUICK: So the trick there is the definition of the word "discrete," and it's a little confusing actually, and I just looked this up, because one of the Bar members called me on this the other day. So a discrete subpart means unrelated, totally

independent. It doesn't mean related to. And so a discrete subpart means a subpart that's raising a question about something not related to the core question.

MS. KITCHEN-TROOP: That seems confusing, and if we are trying to revise the rules such that they are accessible to practitioners, maybe we would put a discrete, unrelated subpart or something along those lines.

MR. QUICK: I can only share with you the intent, and, in part, it was to pick up on the same terminology that's been utilized by the federal courts now for several years where there is a body of case law that defines what "discrete" means, and all these words about related and part and connected to the main subject and all of that is sort of fleshed out in the case law and built into the definition of discrete subpart, so rather than try to load the definition or the result of the case law into the court rule, the decision was made just to try to stick with the same phraseology so that there would be some learning benefit from that, but that at least was the thought process.

MS. KITCHEN-TROOP: Okay. Seems like it's going to buy some litigation, but. . .

MR. QUICK: Not seeing any other speakers, I did want to provide, with the luxury of the chair, any last comments from any members of the panel based on what they heard today or with regard to the rules, if anybody is sitting on something.

MR. CHRISTENSEN: If I may, David Christensen. I have practiced in Southfield as a plaintiff's attorney a long time, and what I love about this proposal is that it makes a -- I think it's going to make a measurable difference in the efficiencies of most cases. It doesn't help every case. It doesn't help every subspecialty of law particularly, because many of those special cases and circumstances are going to have to avail themselves of the out provision, and that is defining your own discovery or having the court do it for you that removes it from the changes that are in the court rules.

But what I like is that, first and foremost, the disclosures, I think, for most cases you are going to see a reduction of motions to adjourn scheduling orders. You are going to see months cut off the time to closure of the case in this way, and I practice personal injury, and the typical way things roll is we file the lawsuit, then an answer gets filed. We serve

interrogatories with our lawsuit. Ninety-nine percent of the time defense counsel doesn't end up with them. We don't know that until they are past due, and we make a telephone call, hey, what about. Well, you know, I don't have those. The adjuster didn't give me those interrogatories, and so you are 45 days out, you know, then, if not longer, and then they will send interrogatories over as well.

The motion is going to come up about three to four months into the case. We need an adjournment. We haven't been able to get medical records. The authorizations weren't turned over or, you know, I didn't get them, or whatever the misunderstanding is, but it's the majority of cases I think in my experience that you are really four months out, five months into a case, defense counsel and the insurance company doesn't have the medical records that they need to pay the claimant or to work on the case, and the plaintiff has really, if not turning this information over and answering the questions, stubbed their own toe because they delayed their case from being concluded.

So interrogatories of whatever meaning they have, which in my experience is very little, there is some important information, and we have taken that and

tried to bring it out immediately with the disclosures. You are going to have the witnesses, medical authorizations are going to be provided immediately, two weeks after the answer is filed. You are going to have that claim file two weeks after your disclosures are made, everything that you need. And so, you know, and this is a large portion of the civil litigation docket is going to move faster. It's going to take time, you know, for people to get used to this, but this is what I particularly love.

I am not concerned with proportionality being inserted into these rules. I worked on this kind of project on the national level and on the state level and in both segments, you know, national level, plaintiff attorneys sit on these committees and support this just as well.

I think originally there was, when the term was bantied about, there was great concern, but I think the way that it's been utilized and done in the court system, in the federal court system and in other states, I don't think -- and there are states with very, very different systems being imposed of civil litigation, that sharply curtail discovery, and this, I think, what we are doing here, is something that is incremental. It's mild in comparison. There is no

limit on depositions outside of the one day, and the interrogatories are put in a manageable sense, and I think that's the bulk of what I really love about this and how I feel about it as a plaintiff's attorney.

MR. QUICK: The three last comments, first of all, George Strander hasn't had a chance to speak today and helped lead the revision on the probate rules, which obviously must be the best portion of the rules because nobody commented, so good job, George.

Second of all, I did find the court rule that the gentleman was asking about. 2.302(H)(2) specifies that copies of all discovery materials served under these rules must be served on all parties to the action. So I did find that.

And, lastly, thank you all very much for your time and consideration and your thoughtfulness through this process.

(Applause.)

CHAIRPERSON MCGILL: Thank you very much, Mr. Quick. At this time, we would ask you and your panel to vacate the dais, and we will call the question, assuming you want us to call it.

So is there a motion from the floor to approve these civil discovery rules?

VOICE: So moved.

CHAIRPERSON MCGILL: So it's been motioned and seconded. Discussion is closed. Mr. Clerk, open the question.

CLERK BURRELL: Voting is now open. A for aye, B for nay, C for abstain.

CHAIRPERSON MCGILL: Last call for voting.

CLERK BURRELL: Voting is now closed. Result of the vote is 91 aye, 21 nay, 4 abstain.

CHAIRPERSON MCGILL: Thank you very much, and thank you again, Mr. Quick, for the presentation and, in particular, thank you to all your panel members who have done so much work on this project, not only the folks that attended here today, but also the folks that worked throughout the entire process.

We are near the end. So just a few final announcements. There are box lunches outside, and they will not eat themselves. So please hand in your attendance forms as well. Please make certain to not do what I do and drive home with your clicker, but leave it here, please.

For the new appointees, new appointees, please file your petitions for election by April 30th. Reimbursement forms are at your seats. Please turn those in. It would be best if you turn those in today, but be clear no reimbursements will be issued,

no reimbursements will be issued after 45 days, which is June 5th, 2018.

Nominations for the position of clerk are due on July 25th, and the next Representative Assembly meeting is on September 27th at the DeVos Place in Grand Rapids.

Please watch your e-mails for opportunities to participate, and thank you all again for attending. I salute your service.

(Meeting adjourned 12:01 p.m.)

STATE OF MICHIGAN)
)
COUNTY OF CLINTON)

I certify that this transcript, consisting of 100 pages, is a complete, true, and correct transcript of the proceedings had by the Representative Assembly on Saturday, April 21, 2018.

May 4, 2018

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Connie S. Coon, CSR-2709