STATE OF MICHIGAN

STATE BAR OF MICHIGAN

MEETING of the REPRESENTATIVE ASSEMBLY of the STATE BAR OF MICHIGAN

COPY

Proceedings had by the Representative Assembly of the State Bar of Michigan at Lansing Community College - M-TEC Center, 5708 Cornerstone Lansing, Michigan, on Saturday, April 16, 2005, at the hour of 10:00 a.m.

AT HEADTABLE:
ELIZABETH A. JAMIESON, Chairperson
LORI A. BUITEWEG, Vice-Chairperson
EDWARD HAROUTUNIAN, Clerk
JOHN T. BERRY, Executive Director
HON. GENE SCHNELZ, Parliamentarian
GLENNA PETERS, Staff Member

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1 Lansing, Michigan
2 Saturday, April 16, 2005
3 10:16 a.m.
4 RECORD
5 CHAIRPERSON JAMIESON: Welcome everybody to
6 our, I would like to say second, but it's kind of like
7 our first meeting of the year.
8 First up is certification that a quorum is
9 present. Clerk Haroutunian, can you certify that we
10 have a quorum present?
11 CLERK HAROUTUNIAN: Madam Chair, a quorum is
12 present, and the number is in excess of 50.
13 CHAIRPERSON JAMIESON: Thank you very much.
14 With regard to the proposed calendar, I would remind
15 everybody that we have special debate rules for the
16 debate of the Michigan Rules of Professional Conduct
17 and the Michigan Standards for Imposing Lawyer
18 Sanctions that are included in your agenda packet.
19 I would also like to -- you have a paper
20 rainbow in front of you, and I would like to draw your
21 attention to 1.5, MRPC 1.5, which is pink and green,
22 you have two copies. That was inadvertently not
23 included in your agenda packet but was referenced on
24 your agenda, and MSILS 5.2, that's the purple paper.
25 That also was referenced on your agenda but not

1 included in your packets.
2 And then I would entertain a motion a to
3 insert MRPC 1.15, that's the lavender paper under item
4 Number 7. It's linked with MRPC 1.5. Also the yellow
5 piece of paper, which is ADM File No. 2003-62, again
6 inserted under item Number 7, for a Michigan Rules of
7 Professional Conduct proposal.
8 The beige paper, which is rules concerning
9 the State Bar of Michigan, which would be inserted
10 under item Number 6, and I will entertain a motion
11 with regard to inserting those into the agenda.
12 VOICE: So moved.
13 CHAIRPERSON JAMIESON: Second?
14 VOICE: Second.
15 CHAIRPERSON JAMIESON: All in favor?
16 VOICE: Aye.
17 CHAIRPERSON JAMIESON: No discussion.
18 Additionally, I would like to introduce our
19 panelists who are here to speak with regard to the
20 rules and the standards. We have Don Campbell, Robert
21 Agacinski with the Attorney Grievance Commission,
22 Mark Armitage with the Attorney Discipline Board, John
23 VanBolt with the Attorney Discipline Board, and John
24 Allen with the Grievance Committee for the State Bar
25 of Michigan.

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1 With that I would entertain a motion to adopt
2 the proposed calendar and debate rules as noted.
3 VOICE: So moved.
4 VOICE: Second.
5 CHAIRPERSON JAMIESON: Any discussion?
6 All in favor.
7 Any opposed.
8 We will move to item number two, which is
9 filling vacancies. Bob Gardella, our chair, if you
10 could come to the podium.
11 MR GARDELLA: Good morning. I will be quick.
12 The Nominating Awards Committee had a lot of work to
13 do this year. We had quite a bit of vacancies all
14 over the state. We worked hard, and we were able to
15 fill 15 of those vacancies, many or most of those
16 people who have agreed to be involved are here, and
17 what I would like to do is introduce each person, have
18 you stand, and then what we are going to do is
19 nominate by motion all of you and hopefully get
20 approval today.
21 In the 1st circuit, Valerie White of
22 Hillsdale, if you could stand.
23 For the 20th circuit Ron Foster of Jenison.
24 That's Ottawa County.
25 The 23rd circuit, Duane Hadley of Standish.

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1 28th circuit, Julie Benson Valice of Cadillac. Okay,
2 right over there.
3 36th circuit, Linda Pioch, Paw Paw. 38th
4 circuit, Christian Horkey of Monroe. 39th circuit
5 Anna Marie Anzalone of Adrian. 39th circuit, Adrienne
6 Iddings of Adrian. 42nd circuit, Wendy Davis Kanar of
7 Midland. She is here. Okay.
8 42nd circuit, Tina VanDam of Midland. She is
9 not here today.
10 53rd circuit, David Barton of Cheboygan, and
11 the 54th circuit, Judge Wallace Kent, Jr. of Caro.
12 There's Judge Kent.
13 Again, thank you for coming here. I think
14 you will find that the officers have put a lot of time
15 into the various proposals and issues that we will be
16 voting on, and we encourage you to take an active
17 role, as active as you can based on your schedules,
18 because we do have a very active group here, people
19 who are concerned about the Bar and our profession, so
20 we would compliment you for getting involved.
21 Normally we have limited time. I would move
22 all of the, all of the people that I have mentioned
23 here previously that they be nominated and approved to
24 fill the various vacancies in their circuits.
25 VOICE: Support.

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1 CHAIRPERSON JAMIESON: Any discussion?
2 Hearing none, all in favor.
3 Any opposed.
4 Welcome to the Assembly.
5 (Applause.)
6 CHAIRPERSON JAMIESON: And I would like to
7 thank Bob for a tremendous effort. I don't know if we
8 have ever in the history of the Assembly had such a
9 high number of membership. We only have five
10 vacancies in the entire Assembly. That's out of 150
11 seats. I think that's pretty amazing, so I would like
12 to say thank you to Bob for his hard work this year.
13 (Applause.).
14 CHAIRPERSON JAMIESON: This is my opportunity
15 to talk to you. I have a small confession to make,
16 and don't take this the wrong way, but I was kind of
17 hoping for bad weather today, because I thought in
18 January when we had the snowstorm no one wanted to be
19 here, and then the weather that was predicted for
20 today is supposed to be sunny and 70s, and I am
21 thinking no one is going to want to be here either,
22 and I thought if we could just have it kind of cold
23 and gloomy no one would mind being here.
24 But you are all here, and I thank you very
25 much for being here, and I think we have a wonderful

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1 day ahead of us.
2 So a couple of housekeeping matters. I
3 already recognized the panelists before you who are
4 here as resources for all of us. Also, I want to
5 remind those people whose first term is ending with
6 the September meeting or for those people who have
7 been appointed to fill a vacancy, all of you need to
8 make sure that you fill out your petitions and have
9 them to the State Bar by April 30th.
10 You had a little sticker, little sticky note
11 on your name tag when you arrived. We are trying to
12 make sure that you remember that you need to get that
13 petition in on time. We also have additional
14 petitions here if you need them.
15 You have a lot of colored handouts. I call
16 it your paper rainbow, and I would like to just make
17 sure that everybody is very comfortable with what all
18 of these papers are, and the reason why we did it in
19 different colors was it's probably a lot easier than
20 sorting through these and trying to fine MRPC 1.5,
21 where is that, instead of just saying the green one.
22 Let me tell you the green or pink, because
23 you have two copies, is MRPC 1.5. That deals with
24 fees and will be again under item Number 7, so if you
25 want to take that and put it into your agenda book

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1 under Number 7 that would be when it's going to come
2 up.
3 The second is the beige one, which is rules
4 with regard to confidentiality policies for the State
5 Bar programs. That will go under item Number 6, so
6 the beige paper should go under tab Number 6.
7 The purple piece of paper is MSILS 5.2, and
8 that should go under item Number 9 with regard to the
9 standards.
10 You have a green document that is MCR2.403.
11 It's the same thing you have in your packet except for
12 that there were just two minor edits removing the
13 words "and disputed" and we wanted to make sure you had
14 the actual document in front of you, and also the
15 letters in support that we received after the agenda
16 packet went out, so that would go under item Number 5,
17 the green one.
18 Then you have a yellow piece of paper which
19 is ADM File Number 2003-62. That goes under tab
20 Number 7.
21 You have a lavender piece of paper, MRPC
22 1.15, safekeeping property. That also goes under
23 Number 7 linked to MRPC 1.5.
24 You have a white document that says, on State
25 Bar letterhead that says received from the State Bar

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1 of Michigan Sections and Committees. This is
2 commentary that we received after the packet went out,
3 but we wanted to make sure that everybody was aware of
4 the comments that were submitted to us in writing, so
5 you have those in front of you.
6 The thick orange packet are comments that
7 were most on the RA discussion board after the text
8 was mailed out. Again, we wanted to make sure that
9 everybody had an opportunity to take a look at those.
10 So those are all there for you.
11 You have a blue document, which is a letter
12 from our Executive Director to the Supreme Court with
13 regard to Court Rules MCR 5.104, 5.402 and 5.403.
14 That is purely informational only. You can put it in
15 the back of you book if you want. What we are telling
16 you is that this is the finished product of what
17 happened at our October 2004 meeting where we approved
18 that this go to the Supreme Court, but there were
19 drafting things that needed to be completed, and this
20 is the finished product that is going to the Supreme
21 Court pursuant to the Representative Assembly activity
22 and action in October.
23 And then you have a salmon piece of paper.
24 Again, this can go in the back of your packet, but
25 this is an updated member list by circuit, including

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1 all of the new members that just joined us today so
2 that you have that resource.
3 You should also have a photo directly. I
4 would like to thank Nancy Brown for putting that
5 together. It was a huge effort, and it's a wonderful
6 resource to get to know your fellow Assembly members.
7 You have that at your seat as well.
8 I have two important messages for you. I
9 know that you do not want lectures. We heard that at
10 the annual meeting last year in our small group
11 discussions, so instead, what I am going to do is give
12 you facts. So these are the facts that I think are
13 very significant for you.
14 What you see before you today is a full
15 agenda. You see the clock ticking away, and you are
16 thinking about how long is it going to take us to get
17 through all of this, and are we going to be able to
18 beat the agenda and maybe get out before 4:30.
19 Let me tell you what I have seen. I have
20 seen hundreds of lawyers who are very, very interested
21 in these issues and the rules and the standards.
22 You see before you a rainbow of papers, all
23 these documents to review. What I see is that Jim and
24 Anne, State Bar staff, were here at 7:00 in the
25 morning to make sure that all of those papers were

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1 there for you.
2 We have Glenna, who has been available for me
3 on cell phone way past working hours. We have six
4 RA committees who have been very active this year who
5 helped with all of the proposals that are before you
6 in the packet with regard to the rules and the
7 standards.
8 And you have 1 a.m. e-mails that you didn't
9 see that Lori and I -- Lori can attest to -- to make
10 sure that the product that you have here today is the
11 best for debate before the Assembly and for our
12 members.
13 What you see here is a distinguished judge as
14 our parliamentarian who is our former representative
15 parliamentarian. What I see is a parliamentarian
16 expert who gave up his entire Saturday with his family
17 for the second time, because he was here in January.
18 What you see in front of you are panelists.
19 What I see are experts on the rules and the standards
20 that we have brought to you today as a tremendous
21 resource that we have taken around the state for all
22 of the members of the Bar association to hear more
23 about the rules and the standards, who have selflessly
24 traveled over the past four months of these panel
25 discussions taking time out of their busy lives and

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1 practices to support the Assembly and the members of
2 the Bar association with regard to these rules.
3 What the Assembly said they wanted at the
4 annual meeting was substantive issues. You said you
5 want more substance before you, and what I see is 24
6 substantive proposals for you to deal with today
7 regarding the Rules of Conduct, the Standards for
8 Imposing Lawyer Sanctions, Michigan Court Rules, and
9 the State Bar Rules.
10 I recognize that today is a really long
11 meeting, and I thank you all for being prepared and
12 looking at your materials today, and I hope you are as
13 excited as I am about the opportunity to deal with
14 these issues and shape the legal profession for the
15 lawyers in the state of Michigan. Wow, what a huge
16 task and undertaking that is.
17 So I encourage all of you to make the right
18 decisions for the right reasons, not just from your
19 personal perspective but on behalf of all
20 practitioners in the state of Michigan and in light of
21 the consumers of legal services in the state of
22 Michigan, and I welcome the panelists and all of the
23 speakers and proponents that we have with regard to
24 the rules, and with that I say let's get started, and
25 for the benefit of our court reporter, if you have

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1 anything to say, I strongly encourage you to speak
2 loudly into the microphone and clearly and not too
3 fast.
4 With that, the next item on our agenda is
5 question-and-answer opportunity with regard to the
6 Representative Assembly Liaison Report with regard to
7 the Standing Committee on Libraries, Legal Research
8 and Legal Publications. Is Randy Davidson here? Does
9 anybody have any discussion or anything that they
10 would like to put on the record with regard to the
11 report? Again, we included that for you information.
12 It was only an opportunity to allow for questions and
13 answers.
14 I move on to item Number 5, which is
15 consideration of the proposed amendment to MCR 2.403
16 and MCR 3.602. That's under tab number five. Again,
17 you have one of your colored papers dealing with the
18 amended language and the letters in support MCR 2.403,
19 and I will introduce to you Wayne Miller, Si Orlowski
20 and Janet Brandon with regard to these proposals.
21 MS. BRANDON: Hi, I am Jan Brandon. I am
22 with the Civil Procedures and Courts Committee, and I
23 am addressing this morning the topic --
24 VOICE: The sound system is not working.
25 MS. BRANDON: Oh, sorry. Is this better?

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1 VOICE: Yes.
2 MS. BRANDON: I will start again. I
3 apologize.
4 My name is Jan Brandon. I am with the Civil
5 Courts and Procedures Committee. We are here this
6 morning with two rules. I will be addressing
7 MCR 2.403.
8 Basically this is an amendment to the case
9 evaluation process rule, and it addresses specifically
10 the no-fault issues. The design of it is to limit the
11 scope of case evaluation, issues that can be submitted
12 to case evaluation in no-fault cases. This has been
13 necessitated based upon the several recent Supreme
14 Court, excuse me, recent Appellate Court cases, which
15 casts some doubt on the ability of plaintiffs to
16 accept no-fault case evaluation awards.
17 The purpose of this is to restore meaning to
18 the case evaluation process and fairness to the
19 process.
20 Now, we have had long discussions in the
21 committee over this rule, and we have gathered
22 tremendous support from the legal community on this
23 proposal. We have attached in your packet the support
24 of the Negligence Section for the State Bar, which is
25 equally comprised of plaintiffs and defendants. We

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1 have the support of the Michigan Defense Trial
2 Council, and we have the support of Michigan Trial
3 Lawyers Association.
4 We also have the benefit of the foremost
5 prominent names in this area of law supporting us,
6 Wayne Miller, adjunct professor from Wayne State
7 University in the area of no-fault. A plaintiffs
8 practitioner is here with me to answer technical
9 questions. Simeon Orlowski is here from the defense
10 Bar to answer technical questions. We also have
11 support of two names that I know most of you in the
12 field that practice in this area know, George Sinas
13 and Jim Boron (sp).
14 This is a -- compromised language has been
15 adopted. Everyone is pleased with it. Everyone
16 believes there is a necessity for this to be passed.
17 And I do have Wayne and Si here with me to answer any
18 of your technical questions that you may have and we
19 ask your support on this amendment.
20 MR. MILLER: Good morning everyone. I would
21 like to thank this Assembly for your attention to this
22 issue, because it is a big problem for us. The best
23 way to demonstrate the need for change is just to give
24 you a quick example of how had work for us. I have a
25 client who has been terribly injured in a motor

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1 vehicle accident. I file suit because the no-fault
2 insurer has denied coverage. They don't want to pay
3 for anything. I file suit seeking two things, damages
4 for benefits incurred to date and a declaration for
5 benefits that are going to be incurred throughout time
6 and into the future.
7 We go to case evaluation. We include in our
8 claim the benefits to date because we know what they
9 are, we do not include the benefits not yet incurred
10 for several reasons. We don't know what they are
11 going to be, and the no-fault insurer cannot be made
12 to pay them until they have been incurred. Also, the
13 case evaluators cannot award in this case what would
14 be equitable relief.
15 We get an award, and we are faced with the
16 decision to accept or reject. However, we cannot
17 accept the award. Even if the award is ample, many
18 times the value of our case, the best possible dream
19 case evaluation award, we cannot accept, because
20 acceptance, a mutual acceptance, will result in a
21 settlement of the case, including the claim for
22 declaratory relief, unincurred benefits.
23 So if we accept our case, the case is
24 dismissed under the rule as it currently reads and we
25 never get to the declaratory issue. We have to refile

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1 repeatedly in a serial fashion and we never get
2 resolution of the issue.
3 An even worse danger that we see happening
4 sometimes in a mutual acceptance situation is the
5 prospect that an insurer will claim that a mutual
6 acceptance acts as a redemption, acts as a settlement,
7 not just of the matters to date, but of the entirety
8 of the entitlement to no-fault insurance. Therefore,
9 we cannot accept these awards.
10 ICLE commentators, including myself and many
11 others, have been advising plaintiffs counsel for some
12 years now that they must reject these case evaluation
13 awards, and so case evaluation in no-fault declaratory
14 cases are routinely rejected, and the case evaluation
15 process has little meaning and a lot of expense. For
16 this reason then we have drafted this proposal that
17 has the support of both sides, because both sides in
18 good faith want to have a process that will work to
19 settle cases but not penalize plaintiffs in the event
20 of acceptance.
21 So we have on a bipartisan, so to speak, type
22 basis have agreed to support revision and we hope that
23 it meets with your approval as well. Thank you.
24 MR. ORLOWSKI: Good morning. I will be
25 brief. Before these Court of Appeals decisions came

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1 down approximately four years ago that suggested that
2 a mutual acceptance of a case evaluation award in a
3 no-fault case operated as a full and final release,
4 before that happened, when both sides would come into
5 case evaluation in a PIP case and both sides would
6 accept the award, we as defense attorneys knew what to
7 do. We would go back to the office, we would draft a
8 release that would release claims incurred through the
9 date of the case evaluation hearing. There would be a
10 stipulation and order without prejudice entered, the
11 case would be settled. Plaintiffs attorneys would
12 then be able to file another lawsuit if there was a
13 dispute about benefits incurred after the date of the
14 case evaluation hearing.
15 For the last four years or so this system,
16 the case evaluation system has broken down and has
17 failed with respect to no-fault cases. As a defense
18 attorney when I go down to case evaluation what I am
19 often confronted with is the plaintiffs attorney
20 asking do you mind if we make this a nonunanimous
21 award? And we as defense attorneys routinely, I think
22 I speak for the defense Bar, we agree, because we know
23 the position the plaintiffs attorneys have been put in
24 now. Many of them feel that they cannot accept a case
25 evaluation award because it can operate as a full and

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1 final release, including futures.
2 That's not the way the system was designed to
3 operate. That's not the way it did operate until a
4 few years ago. A couple of rouge cases came down that
5 ruined this system. We have to fix it. We believe
6 that this proposed rule does fix it, and we urge that
7 you adopt it. Thank you.
8 CHAIRPERSON JAMIESON: Any discussions?
9 VOICE: Call the question.
10 JUDGE SCHNELZ: That's not a motion.
11 CHAIRPERSON JAMIESON: All in favor.
12 Any opposed.
13 The motions passes unanimously with regard to
14 MCR 2.403.
15 Now we have MCR 3.602.
16 VOICE: Point of order. There was not a
17 motion made on that.
18 VOICE: Someone called the question.
19 JUDGE SCHNELZ: I ruled it was not a motion.
20 He just said call the question. She has a right to
21 call the question. She did.
22 (Applause.)
23 MS. VALENTINE: My name is Victoria
24 Valentine. I am here before you with regard to
25 MCR 3.602, the arbitration rule. I am a member of the

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1 Civil Procedure and Court Committee. I am not the
2 proponent of this rule, so I hope you are not going to
3 have questions for me. I believe it's pretty
4 self-explanatory. I just wanted to present it to the
5 Assembly and see if there is any questions or
6 anything.
7 CHAIRPERSON JAMIESON: Any questions at all
8 with regard to the second proposal with regard to
9 Michigan Court Rules?
10 MS. VALENTINE: I will say basically it is a
11 procedural amendment and not a substantive.
12 CHAIRPERSON JAMIESON: Our parliamentarian
13 had advised us that we now take a vote with regard to
14 MCR 3.602, that proposal.
15 All in favor.
16 Any opposed.
17 That motion passes as well.
18 The next item up is item Number 6, which is
19 consideration of the proposed amendments to the Rules
20 concerning the State Bar of Michigan. There are two
21 proposals before you, one is with regard to the
22 pro hac vice rule, which is in your packet, and the
23 second is with regard to the confidentiality component
24 to State Bar programs. Speaking on behalf of this
25 proposal is Josh Ard and John Anding.

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1 MR. ANDING: Good morning. I am here on
2 behalf of the Unauthorized Practice of Law Committee,
3 and we are presenting to the Assembly for adoption two
4 rules, the first of which deals with the pro hac vice
5 rules for the state of Michigan. This particular rule
6 is being proposed in an effort to implement the policy
7 of a rule adopted last November, Michigan Rule of
8 Professional Conduct 5.5 dealing with multiple
9 jurisdictional practice.
10 There are four components to this rule, as
11 the materials reflect. From the Unauthorized Practice
12 of Law Committee's perspective, we are most interested
13 in those elements, of the four that are listed here,
14 that provide essentially the ability to regulate
15 out-of-state practitioners who practice in the state
16 of Michigan. For purposes of this rule, practicing
17 within the state is appearing in litigation, judicial
18 proceedings in the state.
19 The three elements, the first, third, and
20 fourth deal essentially with granting jurisdiction
21 over out-of-state lawyers to the Grievance Commission
22 and the Disciplinary Board so that there can be
23 monitoring of activities, processing of complaints,
24 and discipline if necessary.
25 The third item deals with the defining of

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1 temporary practices. Essentially three pieces of
2 litigation in any year would entitle an out-of-state
3 lawyer to still qualify as someone who is temporarily
4 practicing within the state.
5 And then finally, the fourth element of the
6 rule is an assessment of a fee, which of course is
7 necessary to fund the regulatory activities.
8 The second element of this proposal is
9 perhaps the one, not to foreclose discussion of the
10 other elements, but the second element is perhaps the
11 one on which there might be need for some debate and
12 discussion, and that has to do with the requirement
13 that there be an affiliation of out-of-state counsel
14 with local counsel here in the state of Michigan.
15 This is consistent with the ABA Model Rule,
16 that is this particular requirement, but it does
17 implicate questions about multiple jurisdictional
18 practice, MJP, in this respect: It suggests, of
19 course, that a requirement of local counsel or local
20 counsel affiliation by an out-of-state lawyer who may
21 be regular counsel for an out-of-state company who may
22 have a relationship with that lawyer that obviously is
23 the result of many years of working with that lawyer.
24 By requiring out-of-state or instate affiliation, we
25 are, of course, increasing costs to that client. In

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1 some respects we may even be stamping on the toes of
2 the client in terms of their selection of counsel.
3 The flip side of the issue in terms of a
4 local counsel affiliation is local counsel may find
5 themselves in a situation where, not taking an active
6 role, they are not terribly familiar with the case and
7 the nuances of the case and then may be stuck in a
8 situation where out-of-state counsel either abandons
9 the case or improperly prosecutes the case. So there
10 is that potential that the local counsel who is
11 affiliating may find themselves in a bit of a dilemma.
12 So these are the three or four components of
13 the rule. I would offer questions, comments. I have
14 Josh Ard here as well. So if there are any questions
15 or comments.
16 MR. WILSON: Scott Wilson from the
17 3rd circuit.
18 MR. ANDING: Hi, Scott.
19 MR. WILSON: Hi. I have a question. If this
20 rule is, or if this pro hac temporary practice rule is
21 put into place, will there be an adoption of the Draft
22 Rule 18? Is that what's contemplated?
23 MR. ANDING: That's a point of reference.
24 It's a point of reference. In other words, this is
25 essentially a rule that incorporates many of the

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1 elements of the four areas that are delineated for
2 consideration by the Assembly.
3 That rule, however, as is reflected here, has
4 had comments received from various practice groups
5 within the State Bar. It has been put out for
6 comment.
7 MR. WILSON: So my question is would we have
8 a chance to further comment on that rule before it was
9 adopted by the State Bar?
10 MR. ANDING: Yes. Yes.
11 CHAIRPERSON JAMIESON: Let me clarify. If
12 the Assembly votes in favor of any of these proposals,
13 the portions of the proposal, then the State Bar would
14 act pursuant to that submitting rule to the Supreme
15 Court, and then the Supreme Court would typically
16 publish that for comment. You would have an
17 opportunity to go before the Supreme Court, but this
18 is our opportunity to speak on behalf of the State
19 Bar, with regard to the specific proposals that are
20 before you.
21 MS. KAKISH: Katherine Kakish, 3rd circuit.
22 It also relates to the Draft Rule 18. I do not have a
23 question, but I do have a comment. I notice an
24 ambiguity or a conflict. If you look to I(A)(2)(c) --
25 MR. ANDING: Are you looking at the rule

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1 itself now?.
2 MS. KAKISH: The rule itself of Draft Rule
3 18. Number 2 says that, and I read, An out-of-state
4 lawyer is eligible to appear, et cetera, et cetera, if
5 that lawyer (c) resides in this state, and then you
6 have some exceptions.
7 Then we flip the page, go to the next page,
8 to number 5, and 5 states, No lawyer, No lawyer is
9 authorized to appear pursuant to this rule if the
10 lawyer is a Michigan resident.
11 I see a conflict right there with the
12 residency, so I just wanted to bring that to the
13 Representative Assembly's attention.
14 CHAIRPERSON JAMIESON: Thank you. Just for
15 point of clarification, the actual draft rule is not
16 something that the Assembly would be involved in to
17 the extent that we are not really a drafting body, so
18 all we are doing is voting on the concepts that would
19 be put into a rule and then that would go to the State
20 Bar staff to draft consistent with the positions that
21 are taken by the Assembly.
22 MR. GILLARY: Randy Gillary from the 6th
23 circuit. Regarding the second provision requiring the
24 out-of-state attorney to relate with a local Michigan
25 attorney. I speak in opposition to that. I think the

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1 problem that it creates is that by requiring the local
2 Michigan attorney, it establishes some burdens and
3 responsibility on that local attorney who has really
4 no control over the case.
5 Typically what happens, the pro hac vice
6 attorney does everything, the local attorney does not
7 know what's going on, and if the client pays him to
8 know what's going on, it doubles the cost of the case.
9 And you have potential malpractice where the local
10 attorney now is almost responsible for whatever that
11 out-of-state attorney does, and I think it puts a
12 burden on Michigan attorneys.
13 I refuse regularly to act as local counsel
14 because I don't know the case, I don't know what's
15 going on, and I would hate to see us have a
16 requirement that would obligate a client to have a
17 local counsel at double the cost and create
18 significant malpractice problems.
19 MR. WILSON: Hi, Scott Wilson again from the
20 3rd circuit. I want to address that same point. I am
21 in favor of the local affiliation, but I think in the
22 drafting there has to be a clarification of what duty
23 is imposed on a Michigan lawyer, because I think, as
24 it's drafted in Rule 18(C), it talks about
25 contemplated actions. I think it should be made

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1 clear -- it's not clear who is contemplating those
2 actions. Maybe it should be specified to be proposed
3 actions of which the Michigan lawyer has been
4 informed. That would take care of the concerns that
5 the prior gentleman spoke to to make sure that if the
6 Michigan lawyer is out of the loop and isn't kept in
7 the loop, there won't be a duty imposed on that lawyer
8 through this kind of drafting.
9 MR. GREEN: Good morning. I am Roderick
10 Green from the 3rd circuit. I rise and speak in
11 opposition to the rule. I don't do a lot of
12 out-of-state work, but I have in the past, I have gone
13 to Ohio. I know that if I had been required to
14 affiliate with a local attorney, it would have made
15 the cost almost prohibitive for my client. So I am
16 really thinking in terms of cost for my client. Also,
17 probably maybe some loss of control over the case.
18 That's my main reason for speaking in opposition.
19 MS. STANGL: Terri Stangl from the 10th
20 circuit. I have three questions. On is do we have an
21 idea of the volume of attorneys that are doing more
22 than three cases per year? How did we arrive at the
23 number of three cases? And, finally, has there been any
24 assessment among staff requiring the Bar to administer
25 this in a timely way so any objection would be raised

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1 early in a case?
2 MR. ANDING: The answer to the first question
3 is that, no, we don't know the volume. I think that's
4 fair. Because up till now we have had no way to
5 really monitor the amount of out-of-state activity.
6 The third question is how much staffing will
7 be required. Again, I think that's an offshoot of the
8 first question, and, again, we don't know yet. We
9 don't know how these fees will need to be allocated.
10 We don't know what sort of staffing will be required/.
11 And your second question was?.
12 MS. STANGL: How do we come up with three?
13 MR. ANDING: We came up with three as
14 essentially a number that was arrived at based on
15 comments given by various sections of the Bar, that
16 three seemed to be a number that was indicative of
17 someone who is practicing temporarily within the state
18 as opposed to someone who was not temporarily
19 practicing within the state.
20 MR. ARD: I should mention that that number
21 is used in certain other states too. I read a
22 discussion of the rule in Florida, and three was the
23 number that they were using.
24 MR. ABEL: Matthew Abel 3rd circuit. I think
25 it is helpful to have some clarification of pro hac

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1 vice rules. I have had out-of-state lawyers ask me if
2 I would help them, and they have commented to me about
3 how little direction there is for them as to how to go
4 about seeking pro hac vice status being an
5 out-of-state lawyer, so I think it's good to clarify
6 this.
7 I don't think it's necessarily helpful to
8 have to affiliate with a Michigan lawyer in that the
9 lawyer has to be competent in order to do the case,
10 the out-of-state lawyer should be competent in the
11 first place, competent enough also that if they need
12 help they will ask for it, and I think that it does
13 add a lot of burden and expense, and generally, even
14 if there is such a rule, that it's going to be honored
15 more in the breach that the lawyer, the local lawyer
16 is not going to be the main lawyer on the case, and so
17 we are just going to go through the motions of having
18 a local lawyer who is supposedly keeping a watchdog on
19 this case, but in truth that's really not what's
20 likely to happen anyway.
21 So I think that if they are required to
22 notify the Bar that they are practicing out-of-state
23 on a significant basis, we will be able to track that,
24 and the local requirement should not be there.
25 And as far as costs, I think we ought to wait

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1 and see. I would like to see that we not add cost
2 here, because as I seek to practice out-of-state in
3 other jurisdictions, they tend to reciprocate what we
4 do in Michigan. And if it's really not an expense to
5 the Bar, I think we ought not charge for it, because
6 we are just going to see additional costs in other
7 jurisdictions, and we shouldn't be the beginning of
8 that.
9 Now, if, in fact, we track it and it does end
10 up costing money for Attorney Grievance procedures and
11 things like that, then maybe we'll have to charge for
12 it, but I think it ought to be on an as-needed basis.
13 Thank you.
14 MR. ANDING: If I might, just respond to the
15 last comment. This program is envisioned to be
16 self-supporting in the sense that the fees would
17 essentially cover the cost of the additional
18 administration associated with the out-of-state
19 practitioners. Obviously the fees that are paid by
20 each of us as we practice within this state are in
21 part utilized to fund the activities of these
22 commissions.
23 And so the idea here is to create an
24 environment where we are not further burdening the Bar
25 with activities that are not being funded. Obviously

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1 if there is going to be additional need for additional
2 staff, then we are going to have to fund that activity.
3 So I suppose we could argue about what the
4 number is, but at this point it's the number that we
5 are not -- by the way, the Assembly is not passing on
6 what that dollar amount is here today. We are passing
7 on the concept of assessing a fee that would
8 essentially fund these activities, and I would like to
9 think there is very little argument about that.
10 Go ahead.
11 MR. ANDREE: Thank you. Gerard Andree from
12 the 6th circuit. I speak in favor of the pro hac vice
13 proposed amendment, and I also speak as someone who
14 has had rather, in my opinion, considerable experience
15 acting as local counsel for out-of-state attorneys.
16 I think what we are missing in this issue is
17 what we are dealing with here is the orderly
18 administration of justice. Usually national clients
19 will want someone, will -- in essence they want to
20 save money. They don't want to send something to me
21 and have me plow the fields that have already been
22 plowed and reinvent the wheels and all those nice
23 metaphors.
24 They have got someone who already knows the
25 substantive law, and they are going to come in and

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1 take care of the matter. They are looking for a local
2 counsel who knows the local court rules, knows how
3 things should be filed, in what manner they should be
4 filed, et cetera. All they are really doing is asking,
5 you know, we will send someone in who can handle the
6 case, and we want you to make sure it's done in an
7 orderly fashion.
8 And I think to allow out-of-state attorneys
9 to come into the state, and I have no problem if they
10 want to practice on a limited basis and address the
11 issues of the case, but I think for orderly
12 administration of justice you ought to have a local
13 attorney who knows how things are filed, when things
14 are filed, how things are gone about and, in essence,
15 not allow someone to come in here and gum up the works
16 because they don't know the legal practice, and that's
17 really what the local attorney is for.
18 MR. HAROUTUNIAN: Ed Haroutunian from the 6th
19 judicial circuit. I had a couple of questions really
20 in part prompted by some of the other prior speakers,
21 and that is, are there any rules of a like nature that
22 have taken place in other states around us?
23 MR. ARD: Certainly. I know that there was a
24 discussion in Florida. I don't know how common -- we
25 can't speak on that exactly, but certainly this is not

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1 novel at all. As far as the breakdown, I am not sure,
2 but many states do have much more explicit rules on
3 how many appearances you can make.
4 MR. HAROUTUNIAN: I will tell you
5 specifically on the idea of the necessity of
6 affiliating with a member of the local Bar, is
7 there --
8 MR. ANDING: We actually have a survey that
9 we have conducted of the states around the country,
10 and the vast majority of those states require local
11 affiliation. The ABA Model Rule also, while not
12 entirely clear on its face, its commentary makes clear
13 that they are also envisioning local affiliation.
14 MR. HAROUTUNIAN: Just another comment, and I
15 can understand the comment made by one of the folks
16 that said that the local lawyer being placed in the
17 position of knowing everything about the case when in
18 fact the out-of-state lawyer is really the person who
19 is calling the shots on it, and I would certainly
20 think, although it's not in the proposal for comment,
21 I would think that if the rule passes that, in fact, it
22 should be clear that either the local lawyer either
23 has no responsibility or that that responsibility
24 should be set forth in a written retainer agreement so
25 that it's clear what the responsibility of local

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1 counsel is as opposed to suggesting that the local
2 counsel and the out-of-state counsel have the same
3 responsibility, because in many instances that just is
4 not the case.
5 MR. ANDING: Let me just respond to that last
6 point. As a governing body, sometimes we get a little
7 filled up with ourselves in terms of what we need to
8 say and not say in a rule. I think the last point
9 that you made, which deals with the question of
10 whether or not you contractually limit the extent to
11 which you have responsibility under your fee
12 agreement, is probably the most prudent and most
13 practical way to limit the sort of ethical issues and
14 difficulties that a local counsel finds themselves in.
15 I am sure many of you in this room can echo
16 that experience. I certainly from my own experience
17 have found that to be a way of clearly defining what
18 the local lawyer's responsibilities are and striking
19 the appropriate balance between having a local lawyer
20 familiar with local procedures involved in the case
21 and on the other hand limiting your exposure to
22 potential malpractice or otherwise, other complaints
23 from the client if things don't go quite as
24 envisioned.
25 Other comments?

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1 MS. STANGL: Terri Stangl again from the 10th
2 circuit. Related to that local counsel issue, my
3 concern is that if the out-of-state counsel's ability
4 to represent the person is partly potentially in the
5 hands of the court and the State Bar, where the State
6 Bar can come in, and depending on the timeliness of
7 that process, whether local counsel will be able to
8 get out of the case if the court or the State Bar
9 successfully challenge the out-of-state attorney.
10 How long is that going to take, and you may
11 contractually say you can get out, but the fact is you
12 would be counsel of record as local counsel, even if
13 the out-of-state counsel was disqualified for too many
14 representations.
15 MR. ANDING: So I understand your comment,
16 not just for my own benefit, but for everyone. Are
17 you envisioning a situation where an application is
18 made for out-of-state approval to practice in a
19 particular case, the State Bar files an objection.
20 MS. STANGL: Correct.
21 MR. ANDING: The State Bar would file an
22 objection to that pro hac vice appearance, and then at
23 that point it would be the judiciary who would make
24 the decision as to whether or not to admit or not
25 admit the person into that case.

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1 MS. STANGL: Correct, but the case would
2 already be filed, and there would be local counsel
3 filed on that case in that court, so there would have
4 to be a separate decision if the case was dismissed
5 or what is the role of local counsel, which may or may
6 not be in local counsel's hands. It's in the court's
7 hand.
8 MR. ANDING: It always is in the court's
9 hands, but the question there is, and this gets back
10 to the observation earlier made about formulating a
11 fee agreement in a manner that would permit you to
12 exit your relationship if it was your desire where the
13 pro hac vice counsel was not admitted. Of course
14 there may be a situation where that's, in that
15 circumstance where the client would decide to retain
16 local counsel, and it seems to me in that situation
17 you have not triggered the concern of having a local
18 lawyer involved in the case that they don't know
19 anything about, because now you have got a local
20 lawyer who may be the only lawyer in the case.
21 So those are just some observations
22 MR. LABRE: Bill LaBre from Cass County, 43rd
23 circuit. Two questions. First, as I read the rule,
24 it appears that local counsel is optional, not
25 mandatory, at least I didn't see any eligibility for

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1 admission requirements insisting upon, like the
2 present rule, that we retain local counsel. Is that
3 correct? That's question one.
4 MR. ANDING: I don't believe that's true.
5 The rule is intended to and does envision in effect
6 what's before this Assembly is a motion that in fact
7 that requirement would be incorporated in the rule
8 when adopted by the Supreme Court.
9 MR. LABRE: And the second question is,
10 Parliamentarian, since I don't want you bored today, I
11 think the young lady from the 3rd circuit was correct
12 that there is a conflict in the proposed rule, so is
13 it appropriate for an amendment that would make our
14 approval contingent upon the removal of the conflict
15 in the rule that the young lady from the 3rd circuit
16 mentioned
17 CHAIRPERSON JAMIESON: With regard to the
18 point of order, the only positions that the
19 Representative Assembly is being asked to take right
20 now are with regard to the questions that are going to
21 be put to vote as to a yes or no. We are not talking
22 about the specific language of an ultimate proposal
23 that's left to the State Bar staff to draft. To the
24 extent you have commentary on that language, you would
25 submit it to, I would suspect, Victoria Kremski,

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1 Regulation Counsel for the State Bar of Michigan.
2 MS. KAKISH: I have a question related to the
3 fourth item that we are supposed to vote on concerning
4 this issue, and that is the question of should the new
5 rule require a fee to be paid out by the out-of-state
6 attorneys to cover the administrative costs incurred
7 by the state to monitor the compliance? Now is that
8 part of the application fee or is that independent of
9 the application fee?
10 MR. ANDING: I believe it's envisioned as
11 part of the application fee so that essentially you
12 have someone who is, although I can't speak to that
13 definitively, because, as I am looking at what's
14 before this Assembly, we are talking about a fee.
15 Whether or not ultimately it's incorporated as an
16 application fee or as a fee once approved for practice
17 in the state I suppose is an open question.
18 A:MS. KAKISH: I think my confusion arises is
19 because the application fee itself is equal to the
20 dues paid by an active member of the state of
21 Michigan, and those are relatively high for somebody
22 to practice one time here in Michigan.
23 CHAIRPERSON JAMIESON: Again, only because I
24 have some background into why this came to the
25 Assembly, but my understanding is that this fee is

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1 something that would be charged to the applicant, and
2 the purpose of the fee is merely to cover the expenses
3 of the State Bar administering the program of
4 monitoring, that the person is only practicing for
5 three matters in front of the state. So this is not
6 the equivalent of our State Bar dues. It's purely
7 what the State Bar would assess is the cost it will
8 take us to monitor this program.
9 MR. BERRY: I might add to this as well.
10 John Berry, Executive Director. And, again, the first
11 page of what you are voting on is about a fee. The
12 discussions about how much the fee would be, candidly
13 this Rep Assembly as a policy you can give sort of
14 thoughts about that, but one of the considerations
15 that was given to this is, number one, it should cover
16 the cost or potential cost. Any lawyer, even if they
17 are just out there for one case, potentially could
18 lead to certain costs.
19 One of the considerations also if you recall
20 when we had senior lawyers and we were considering the
21 impact of senior lawyers and whether or not they
22 wanted to practice even one or two cases, the decision
23 was made that active lawyers are active lawyers
24 whether you practice one case or whether you practice
25 a thousand cases to be an active lawyer.

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1 I know it's not exactly the same thing, but
2 what we are saying is if you come in from out of the
3 state, you come into the state, it's the equivalent of
4 you are practicing a case, and that one case may be a
5 large case, that you are here for a long period of
6 time.
7 So it's clearly a policy decision, but it was
8 the combination of the issue of the administrative
9 cost and potential administrative cost, as well as a
10 fairness issue for all lawyers practicing, whether it
11 be one case or a lot of cases.
12 Various states have various fees, some less,
13 some the same as this amount. So sort of the issue is
14 there. Thank you.
15 CHAIRPERSON JAMIESON: Is there any further
16 discussion? Seeing none --
17 MR. ROMBACH: Excuse me, I have some further
18 discussion. Tom Rombach from the 16th circuit.
19 I understand that we are here to pass
20 judgment on the five proposals before the Assembly,
21 but for my own personal comfort level with this
22 particular proposal I would like to move that we
23 require the proposed rule to be approved by the State
24 Bar Representative Assembly before being proposed
25 for adoption to the Michigan Supreme Court. In other

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1 words, that rule should come back to us, because I see
2 that there is a lot of similar discomfort with this
3 proposal as far as the devil being the details. I am
4 just asking for clarification if we need that.
5 Typically when we propose these types of
6 items before the Assembly we have an impact, for
7 instance, on our budget, we have an impact on staffing
8 levels, we have a lot of other things before this
9 comes back and is approved by the Assembly. I don't
10 see any of those requirements technically being made
11 in this proposal.
12 CHAIRPERSON JAMIESON: Our parliamentarian
13 has identified that the rule, the language itself will
14 automatically come back to us. When it's submitted to
15 the Supreme Court they will publish for comment and
16 the Assembly would have another opportunity to address
17 it at that time, or the State Bar would have another
18 opportunity to address it at that time.
19 MR. ROMBACH: Again, I seek clarification
20 that there is one thing to go to the Supreme Court and
21 ask for commentary for us or proposed commentary, but
22 this is our own internal proposal, and I don't
23 understand why this body --
24 JUDGE SCHNELZ: This is not our own internal
25 proposal.

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1 MR. ROMBACH: -- of the State Bar of Michigan
2 wouldn't be passing on our own proposals to the
3 Supreme Court for adoption before it went to them. I
4 am not willing to accede our authority to staff and
5 then sight unseen go back to the Supreme Court and
6 then comment on our own proposal. It doesn't make any
7 sense.
8 All the other internal matters for State Bar
9 consideration that come in front of us have a
10 different proposed form. It's different than we
11 typically see. I know in drafting these things in the
12 past that we say what's the proposed impact on staff?
13 What's the proposed fiscal implications. I always
14 required that. This proposal doesn't have any of
15 that, and some of the concerns within the Assembly say
16 that we need to consider these ramifications before we
17 pass judgment on this matter.
18 JUDGE SCHNELZ: I will give a response. I
19 spent 23 years as parliamentarian for this body, and
20 as I with a driving up here today I was thinking that
21 some of the happiest moments of my life have been
22 sitting at the Representative Assembly acting as
23 parliamentarian. This will give you an idea of the
24 crummy life I actually lead.
25 You are not being asked to vote on a rule

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1 today. You are being asked to vote on four specific
2 questions for the concept of a proposed amendment.
3 Someone will ultimately draft that amendment. It's
4 already been pointed out that there are, in fact,
5 problems with it.
6 The Supreme Court in its wisdom will
7 ultimately decide exactly what's going to happen, but
8 the rules provide that if they decide to develop a
9 rule, they will then publish it and will call for
10 comment. At that time it is customary, and I assume
11 it will be in the future, I don't know of any reason
12 not to, they will send it to the Representative
13 Assembly for comment, and at that time you don't like
14 it.
15 So this isn't your rule going to them. This
16 is a particular core questions that you ask do I want
17 a new rule added, do I assert the rule incorporated
18 provision, should it incorporate another provision,
19 should it require fee? Those are the four questions
20 you are answering. That's the only imprint you are
21 putting on it from the standpoint of the
22 Representative Assembly.
23 I would suggest if you want to get on to the
24 debate to the more interesting questions that are
25 actually before you on proposed rules, you might want

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1 to move on.
2 MR. ROMBACH: If I am being ruled out of
3 order on my motion to amend, then at this time I move
4 to table this.
5 VOICE: Support.
6 CHAIRPERSON JAMIESON: A motion has been made
7 and seconded. There is no discussion on it. So it
8 calls for vote.
9 All in favor.
10 Any opposed.
11 A two-thirds majority is required. A
12 majority is required, and there were a lot of nays, so
13 I don't think that that passed. So as chair I am
14 saying that did not pass.
15 VOICE: Let's stand.
16 CHAIRPERSON JAMIESON: Executive Director.
17 MR. BERRY: Just for the general information
18 again on this issue of cost, I think it was already
19 mentioned by Mr. Anding that in general the cost, one
20 of the major reasons a rule like this is important to
21 have and as soon as you can have it is that you have
22 got things floating around this state, you don't have
23 a clue what's happening, and so from an initial
24 standpoint, just based upon other states and general
25 feelings, I don't think this is going to have a major

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1 impact on staffing, but we can't say that for sure
2 until we get at it, nor will we be able to do it
3 before we propose the rule, because we won't have the
4 information as to the exact impact.
5 So we won't be able to come back with you
6 with any more information about cost impact other than
7 the best effort I can tell you is that it would not be
8 a significant impact on cost.
9 I also understand what you are saying in
10 reference to the issue about how much detail before it
11 gets to the court. From the Executive Director's
12 standpoint, I think these are listed the main issues
13 that are involved. It really isn't -- in my opinion
14 it's not a matter of the technical drafting of this
15 one way or the other. If you instruct us on these
16 major issues, I think that's pretty well going to give
17 us a direction where to go, but I do understand what
18 you are saying, you want more detail before we go
19 there, but I would suggest this would cover the main
20 issues.
21 MR. ANDING: If I could speak on behalf of
22 the UPL Committee, as it's termed, and I have been
23 chairman of this committee for too long, because I
24 don't remember how long. It's probably been five
25 years.

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1 Obviously the practice of law is changing,
2 and with MJP and with the introduction of out-of-state
3 counsel in this jurisdiction, the face of UPL is
4 changing, we need the ability to reach and regulate
5 lawyers that are coming in from the out-of-state,
6 that's a given, and that's one of the issues before
7 you.
8 And the question is then is how do you pay
9 for it? And what seems fairer than having the lawyers
10 who are benefiting from practicing in this state
11 funding the cost of the regulatory activity necessary
12 to monitor their activities? Very little unfairness
13 there and no one talking about a particular fee amount
14 here; we are talking about the concept.
15 And so I only want to encourage you to
16 understand the implications of taking a back seat on
17 an issue where you have charged the UPL Committee of
18 the State Bar with monitoring unauthorized practice of
19 law activities and by walking away from this rule you
20 are eliminating one of the tools necessary to do our
21 job.
22 I move for the -- I would move, first of all,
23 that we vote on the first proposal, which is should a
24 new rule be added to the rules concerning the State
25 Bar of Michigan governing pro hac vice practice and

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1 granting jurisdiction of out-of-state lawyers to the
2 Attorney Grievance Commission and Attorney
3 Disciplinary Board.
4 VOICE: Second.
5 CHAIRPERSON JAMIESON: I heard support. Any
6 discussion?
7 Hearing no discussion, all in favor.
8 Any opposed?
9 That motion passes
10 MR. ANDING: Secondly, I would move for the
11 second element of the proposal here, which is a rule,
12 a new rule specifically incorporating a provision
13 requiring the out-of-state lawyers to affiliate with
14 active members of the State Bar who appear in record
15 of proceedings in which the out-of-state lawyer is
16 seeking pro hac vice permission to appear.
17 CHAIRPERSON JAMIESON: Do I hear a second?
18 VOICE: Support.
19 CHAIRPERSON JAMIESON: Any discussion?
20 Hearing none, all in --.
21 MR. WILSON: Is there a motion to table this
22 portion? Scott Wilson from the 3rd circuit. I move
23 to table this particular motion.
24 CHAIRPERSON JAMIESON: Parliamentarian has
25 said that you are out of order. Just a second, you

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1 are not out of order yet. Parliamentarian has advised
2 it requires a second, it's not debatable, so go to the
3 mike and stated your name and circuit.
4 MR. WILSON: Scott Wilson from the
5 3rd circuit moving to table the current motion.
6 CHAIRPERSON JAMIESON: Do I hear a second?
7 VOICE: Second.
8 CHAIRPERSON JAMIESON: There is no
9 discussion. All in favor.
10 Any opposed.
11 I don't believe that passed.
12 So now seeing no other discussion, I will
13 bring the second part of this second motion. All in
14 favor say aye, please.
15 Any opposed.
16 I am going to ask for a standing vote because
17 I can't tell the difference. All in favor, please
18 stand, and I have some tellers that have been
19 identified. I ask the tellers to please come forward
20 Marcia Ross Barbara Weintraub, Bill Ogden, Stephen
21 Gobbo, Victoria Radke, and John Reiser. If you could
22 please come forward. Two, two, and two, and just
23 double checks yours numbers.
24 (Standing count being taken.)
25 CHAIRPERSON JAMIESON: All the people who are

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1 in favor can sit down. Anybody opposed to the second
2 motion please rise.
3 (Standing vote being taken.)
4 CHAIRPERSON JAMIESON: Parliamentarian has
5 said the motion fails.
6 Thank you. We had 60 in favor and 43 against
7 So majority rules and the second part passes.
8 MR. ANDING: Now move on, the third element
9 of the proposal, should the new rule specifically
10 incorporate a provision defining temporary practice
11 for out-of-state attorney as no more than three
12 separate representations within a 365 day period.
13 VOICE: Support.
14 CHAIRPERSON JAMIESON: Any discussion?
15 MS. SCHRAND: I am Jennifer Schrand from the
16 37th district, and I was wondering if you are were
17 foreseeing any exceptions to this rule? For example,
18 I manage a legal aid office, and if we have a member
19 in good standing from another state that starts in our
20 organization, the judges in our county permit them to
21 practice pro hac vice while they are waiting for
22 reciprocal admission from the State Bar of Michigan,
23 and they do more than three cases while they await.
24 MR. ANDING: So is your question whether this
25 envisions that.

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1 MS. SCHRAND: Whether in the drafted rules,
2 since we are just voting on these in particular
3 questions, whether the drafted rule would have any
4 exceptions to that three.
5 MR. ANDING: Again, we are not here to talk
6 about what the drafted rule will reflect. I think
7 that's an issue that could be addressed with comment
8 when the rule is put out for distribution. I mean,
9 you are making a point that obviously is one that
10 needs to be dealt with, and whether -- Victoria
11 Kremski would be a good resource for you to raise that
12 issue with, because she will be active in --.
13 MS. SCHRAND: But I think whether I vote yes
14 or no or maybe whether other people vote yes or no on
15 this would depend on whether there are going to be
16 exceptions considered.
17 MR. ANDING: But that's not the question
18 before the Assembly right now. There is the old
19 saying, you know, drafting by committee with a group of
20 lawyers is the world's worst nightmare. That's really
21 what we are talking about here. We are talking about
22 policy questions that ultimately will be incorporated
23 into a rule which would then be commented on and
24 implemented based on that.
25 MS. SCHRAND: Okay.

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1 MR. ANDREE: Gerard Andree from the 6th
2 circuit. The very exhibit we have received in support
3 of this on page two, Exhibit A, indicates that the
4 State Bar is not aware of any court that keeps the
5 statistics regarding the number of pro hac vice
6 applications received and approved, that it is
7 impossible to know how many out-of-state lawyers are
8 appearing in Michigan courts at any given time, et
9 cetera.
10 That being the case, I wonder why we are, why
11 a new rule should specifically incorporate a provision
12 for which it is not known if there is a problem, and
13 until I know that there is a problem with attorneys
14 abusing or there is a problem we need to address, I am
15 not in favor of putting a limitation in.
16 MR. ANDING: Thank you. I think you have put
17 your finger on the problem, and the problem is, and
18 it's so often the case given our nature, is the things
19 that we can't see, we don't understand, we can
20 speculate about whether there is or isn't a problem.
21 We in the UPL Committee believe there is a
22 problem. We are the people who are fielding the
23 complaints about practitioners coming in across the
24 border engaging in activities in this state. We know
25 that's happening.

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1 This is a methodology, a mechanism, so to
2 speak, that will allow us to get our arms around the
3 very question you say is now an uncertain one in terms
4 of its answer. We want to know how much of a problem
5 it is, and that's why we are seeking to implement a
6 procedure that will allow us to monitor the
7 activities of out-of-state lawyers here in Michigan.
8 MR. ANDREE: I have no problem with a
9 provision in the rule that will allow you the means to
10 determine the problem, but to put a solution into the
11 rule when you don't know what the problem is first I
12 think is not appropriate.
13 MR. ANDING: Thank you. And just to respond
14 to that, the three-day or excuse me, the three
15 appearances or three cases per year is a rule that has
16 been utilized in other jurisdictions, so we are not
17 carving ourselves out new ground on this particular
18 element of the proposal.
19 MR. ARD: I think we all agree there is going
20 to be a number. I mean, a hundred a year, you are
21 not -- you are a Michigan lawyer, something like that.
22 The question I would think would be is three the right
23 number.
24 MR. ROGNESS: Proposal has been moved and
25 seconded. May we call the question?

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1 CHAIRPERSON JAMIESON: Now call the question.
2 Do I hear support?
3 VOICE: Support.
4 CHAIRPERSON JAMIESON: All in favor.
5 Any opposed.
6 Parliamentarian says that it passes, and,
7 therefore, it is -- I still have -- is debate closed
8 now? Debate is closed. We bring that to a vote then,
9 and I apologize.
10 With regard to the third motion, all in
11 favor, please say yea.
12 Any opposed, please say --
13 I am sorry, but I can't tell the difference
14 between the yeses and the noes, so all those in favor
15 have to stand. We are just going to see whether we
16 can tell by a view before counting.
17 VOICE: This is for number 3, correct?
18 CHAIRPERSON JAMIESON: This is for number 3.
19 Now sit down. All those who are opposed,
20 please stand.
21 Okay. It's close enough. People who said
22 no, please stay standing, and I am going to have the
23 tellers count the noes first, then we'll have the
24 yeses.
25 (Standing count being taken.)

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1 CHAIRPERSON JAMIESON: The noes can sit down.
2 All those in favor of the third motion, please stand.
3 (Standing count being taken.)
4 CHAIRPERSON JAMIESON: Everybody can be
5 seated while we are waiting for the tally.
6 The numbers were 59 in favor, 47 against.
7 That passes by a majority.
8 MR. ANDING: I would like to move on --
9 excuse me. I would like to move on to the fourth
10 element of the proposed new rule requiring a fee to be
11 paid by out-of-state lawyers to cover the
12 administrative costs incurred by the State Bar of
13 Michigan to monitor compliance.
14 VOICE: Support.
15 CHAIRPERSON JAMIESON: Any discussion?
16 VOICE: Question.
17 MR. HAROUTUNIAN: Ed Haroutunian from the 6th
18 judicial district. I am going to presume that after
19 these votes that the Unauthorized Practice of Law
20 Committee will, in effect, then go back to the drawing
21 board, as they say, and ultimately put the final
22 proposal together. I would think certainly that with
23 regard to the comments that have been made, although
24 we are not voting on it, understood, but I would think
25 that thought should be given to some of the comments

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1 that we made so that the proposal by the committee
2 when it's made ultimately incorporates some of those
3 thoughts and certainly if additional comments are
4 needed or input required, I am sure that the members
5 of this Representative Assembly would be pleased to
6 assist in that effort.
7 MR. ANDING: Thank you for that comment, and
8 that goes without saying. One of the benefits of
9 being here and making this proposal here today and
10 listening to the discussion is that it does give us
11 some insights that ordinarily, quite frankly, we don't
12 have when we sit down as a group. So we certainly
13 will take what's being said here into account as we
14 sit down and reformulate this rule.
15 CHAIRPERSON JAMIESON: Any other discussion?
16 Seeing none, all in favor.
17 Any opposed.
18 Ayes have it.
19 Next on the agenda is another proposal with
20 regard to the rules concerning the State Bar of
21 Michigan regarding confidentiality of State Bar
22 programs.
23 MR. ANDING: This one I don't think will be
24 nearly as noteworthy. This particular proposal has to
25 do with confidentiality. It's the beige handout you

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1 received today. I am told by the parliamentarian it's
2 taupe, not beige.
3 This particular proposal has to do with
4 implementing a rule that essentially will confer,
5 ratify what is already in practice, and that is that
6 communications with various State Bar committees,
7 ethics hotline, ethics committee, law office
8 management, unauthorized practice of law, child
9 protection, and lawyers and judges assistance program,
10 that those conversations would be confidential and not
11 subject to subpoena power.
12 Let me give you a concrete example. In the
13 UPL context we often have individuals come to us,
14 complain of a particular activity of an individual
15 within their community. Needless to say, that
16 individual who is otherwise taking remuneration for
17 his or her activities is not very happy about the fact
18 that they have been called on the carpet and may seek
19 to have disclosed the identity of the complaining
20 party.
21 Now, whether ultimately that person's
22 identity would have to come out over the course of the
23 investigation or prosecution is another question, but
24 in the first instance we like to avoid the
25 intimidation that can often occur early in an

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1 investigation by protecting the identity of the person
2 who has made the complaint.
3 I am sure that for those of you who are
4 involved in some of the other activities of the State
5 Bar in the ethics area, in the child protection area
6 and others, that similar issues come up which would
7 prompt the same sort of concerns. And so what we are
8 simply asking for is this body recommend
9 essentially ratifying an informal practice currently
10 that we have in place to put a rule in place that
11 allows us to preserve the confidential communications.
12 It will be something more that we can point to when we
13 attempt to resist efforts to get this information
14 disclosed.
15 Comments, questions? No comments or
16 questions. I will move for the adoption of the
17 proposal, essentially new Rule 20, that would creat
18 confidentiality for communications.
19 VOICE: Support.
20 CHAIRPERSON JAMIESON: Hearing support, any
21 discussion?
22 MR. GARRISON: Scott Garrison, 6th circuit.
23 You just said something that I think conflicts with
24 the rule, because as I read what's proposed it's
25 should there be a rule proposed, and you said that you

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1 make a motion that we add the rule. I am kind of
2 confused, because what it seems like we are doing --
3 MR. ANDING: Maybe I wasn't clear.
4 MR. GARRISON: It seems like you are asking
5 us do you want us to do the work to propose a new rule
6 to you and then we will come back with a proposal.
7 MR. ANDING: No, what we are asking for is,
8 to answer the question, should a new rule be added
9 that preserves confidentiality and communications.
10 MR. GARRISON: Then why aren't we voting on a
11 proposed new rule?
12 MR. ANDING: We don't. That's not our job I
13 am told. Our job is to make the policy determination.
14 MR. GARRISON: But we just did for two court
15 rules, right?
16 JUDGE SCHNELZ: Scott, look at the paper.
17 There is no rule.
18 MR. GARRISON: I know that, and that's why I
19 am confused. I am wondering what we are doing.
20 CHAIRPERSON JAMIESON: What the Assembly is
21 being asked to do is to take a policy position with
22 regard to whether or not the State Bar of Michigan
23 rules should be amended to have a confidentiality.
24 The exact drafting of what that rule would be is not
25 before the Assembly. It's just the policy of whether

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1 or not one should be.
2 MR. GARRISON: Who is responsible for
3 drafting the rule then?
4 CHAIRPERSON JAMIESON: The State Bar of
5 Michigan staff.
6 MR. GARRISON: And it never comes back to us
7 again.
8 CHAIRPERSON JAMIESON: That's exactly what
9 happened -- this is what happened with regard to the
10 positions that were taken on the Court Rules in
11 October that you have as a handout. We took the
12 policy positions, and we left it to the staff for
13 drafting, and then when the drafting was done the
14 Executive Director sent that off to the Supreme Court.
15 MR. GARRISON: Okay. All right.
16 MR. ROMBACH: Tom Rombach from the 6th
17 circuit. We have dealt with this matter on the
18 Commission before. My concern has been that we don't
19 empower any of these committees, the Ethics Committee,
20 the Unauthorized Practice of Law Committee, the State
21 Courts Committee to go directly to the Supreme Court
22 without either Representative Assembly approval or
23 without approval of the Board of Commissioners in the
24 interim, and I am not quite sure when, the commentary
25 that I heard from the discussion, that this was going

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1 to go back to the UPL Committee on the things we were
2 voting for before, now all of a sudden to staff and
3 then that's going to be submitted to the Supreme
4 Court.
5 Again, I am not sure that's been done in the
6 past. Perhaps I stand corrected about other things,
7 but typically every committee is required to come here
8 for final approval of the rule before its submitted to
9 the Supreme Court, and that's all I am asking is for
10 clarification, I guess, if this is proposed to come
11 back before us, because I don't know of any other
12 committee that has that prerogative, whether it's the
13 Grievance Committee, which is a special committee. I
14 mean, all of these folks have been shot down in the
15 past when I sat in the Board of Commissioners, got
16 shot done every time, that it has to go to the
17 Assembly first, and I am told once we vote on policy
18 we don't get to see the official rule, and I don't
19 understand how that happens.
20 MR. ANDING: I can't speak to the procedural
21 elements because I am not sure I can answer your
22 question. I can only tell you as a matter of policy
23 my committee is asking for this Assembly to approve as
24 a matter of policy and allow the State Bar to move
25 forward with the drafting of the rule that preserves

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1 confidentiality.
2 MR ROMBACH: Is it the intent to bring this
3 rule back before the State Bar Representative
4 Assembly?
5 MR. ANDING: We will do whatever we are told
6 to do. We obviously are not an autonomous body. We
7 will take this charge, we will go back, we will draft
8 a rule, and we will submit it for approval. Obviously
9 we don't just --
10 MR. ROMBACH: Again, perhaps through the
11 chair I could direct the question to John Berry, since
12 he is in charge of the staff, and I would like to know
13 what the clarification is.
14 MR. BERRY: Let me try to add my perspective
15 as I listen to both sides of this. I think it's been,
16 first of all, done both ways in my experience four and
17 a half years here, and you have seen that. You may
18 have a rule, and you sit here and you work on it, or
19 you may have a policy, and then that policy is
20 approved, and that's happened in reference to some of
21 the rules recently. It goes to the court, the court
22 puts out what it does, and you react. My personal
23 understanding is you could do that any way you want to
24 do it.
25 One of the problems we have concerning this

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1 rule, as a practical one, is that I think that the
2 implementation of that rule is probably going to be
3 fairly technical, the policies vitally important. We
4 have a law office management program that's just
5 getting started and some other issues. So from a
6 timing standpoint, while we are waiting for that time
7 of that technicality, we are going to have these
8 things potentially being open that we don't want them
9 to be open.
10 But your point, my understanding of what your
11 point would be, that would be a decision of this body,
12 you will either approve it by policy and then we will
13 go forward and you react to it, or you could instruct
14 the staff to say you don't do that, you bring the bill
15 in front of you.
16 Now, if I am wrong on that, I would be glad
17 to hear from the parliamentarian or from the chair,
18 but I have seen it both ways and I think it's this
19 body's prerogative to go whichever way you want. I
20 will follow whatever.
21 MR. ROMBACH: At this time I would like to
22 move to require the proposed rule to be approved by
23 the State Bar Representative Assembly before being
24 proposed for adoption by the Michigan Supreme Court
25 Court.

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1 VOICE: Support.
2 CHAIRPERSON JAMIESON: Thank you. Any
3 comment?
4 MR. ANDREE: I suppose maybe I will comment
5 on that as an adjunct.
6 CHAIRPERSON JAMIESON: That's what the
7 comment is for. It's the comment to Mr. Rombach's
8 motion.
9 MR. ANDREE: Gerard Andree from the 6th
10 circuit. Yesterday I received by e-mail this rules
11 concerning the State Bar of Michigan with the new
12 proposal, should a new rule be added, et cetera, and
13 attached to that was the rule. I mean, it's already
14 drafted. It was sent out to everybody. I have got it
15 in my hand so what is the idea that we are going to
16 give you a policy and you are going to go back and
17 write a rule? It's already written, it's already been
18 sent to us. What are we doing here if we can't look
19 at rule and say whether we agree with it or not?
20 (Applause.).
21 CHAIRPERSON JAMIESON: Any more discussion?
22 Seeing none, then I will call that to vote. All in
23 favor of Mr. Rombach's motion for the Assembly to
24 review the rule before it goes to the Supreme Court,
25 please say aye.

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1 Any opposed.
2 That passes.
3 VOICE: Can we now call the question?
4 CHAIRPERSON JAMIESON: Now having taken that
5 motion we go back to the discussion with regard to the
6 fourth motion that is on the table, which is the
7 fourth motion, should the new rule require a fee to be
8 paid by out-of-state attorneys to cover the
9 administrative costs.
10 VOICES: No.
11 CHAIRPERSON JAMIESON: I am so sorry, we are
12 on the confidentiality, and we are done. So sorry.
13 Now we vote in favor of the confidentiality,
14 thank you, policy.
15 All in favor of the confidentiality, the
16 policy that is before the Representative Assembly --
17 Okay. So does everybody have what we are
18 talking about that's on the beige or taupe piece of
19 paper. It's on the screen. Thank you very much
20 Mr. Romano.
21 All in favor please say aye.
22 Any opposed, please say no.
23 That's passed. Thank you very much.
24 Next item on the agenda is item number 7 with
25 regard to the Rules of Professional Conduct. First up

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1 is MRPC 1.0.2. I am going to call on our panelists to
2 the extent that they have insight as our resources
3 here today for this debate, beginning with John Allen.
4 MR. ALLEN: Thank you, Elizabeth. As
5 currently proposed, the Supreme Court has not provided
6 for any transition from the current rules to the new
7 proposed rules despite the fact that there are many
8 very material changes requiring both compliance and in
9 some cases communication to clients.
10 This proposal would ask the addition of a
11 transition provision which would say that the
12 engagements existing as of the effective date of the
13 amendment would essentially be controlled by whatever
14 the rules were at the inception of that engagement
15 unless the client and the lawyer agreed otherwise.
16 There may be some things in the new rules that we
17 would defer. You can blame me for this one. I
18 drafted it and gave it to Elizabeth.
19 My purpose was thinking about, first of all,
20 those who may be intermediary. Under present Rule
21 2.2, you are being abaolished, and it doesn't really
22 say what you are supposed to do, so I think there
23 ought to be a way to continue the engagements that
24 are in effect without any concern. If you complied
25 with the rule, then in effect when you began that

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1 engagement you are okay.
2 And, secondly, I see a potential problem for
3 the confirmed in writing requirement if adopted could
4 require many, many notices being sent out and
5 continuing engagements. The example I like to think
6 of is the estate planner who might have hundreds of
7 joint estate plans or other files that they consider
8 to be continuing client relationships that would
9 require written confirmations of any conflict waiver
10 as of the date of the rules become effective.
11 CHAIRPERSON JAMIESON: Thank you. Do any of
12 the other panelists have any comment on this.
13 Seeing none, then I will entertain a motion
14 with regard to the proposal addressing MRPC 1.0.2.
15 VOICE: So move.
16 CHAIRPERSON JAMIESON: A second, please.
17 VOICE: Second.
18 CHAIRPERSON JAMIESON: Any discussion?
19 Seeing none, all in favor of the MRPC 1.0.2
20 proposal say aye.
21 Any opposed.
22 That proposal passes.
23 Next on the agenda is MRPC 1.4(c). Again I
24 will defer to John Allen with regard to clarification
25 with regard to the proposal.

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1 MR. ALLEN: Thank you, Elizabeth. This one
2 gets blamed on me too. As the chair of the Special
3 Committee on Grievance, we look at the issues which
4 are most commonly placed before the Attorney Grievance
5 Commission and the Attorney Discipline Board, what do
6 they spend their time on. Aside from fee disputes and
7 maybe not returning phone calls, who is entitled to
8 the file is a very common complaint for which there is
9 not much clarified guidance in the law, at least as
10 applied to lawyers' files.
11 When one looks at the law of the state of
12 Michigan as to accountant' files or health provider'
13 files, there is quite a bit of guidance, and it
14 basically is that the client or patient, as the case
15 may be, is not entitled to the file itself, they do
16 not own the file, rather they are entitled to access
17 to the information which is in the file.
18 There are some unfortunate informal Ethics
19 Committee opinions from years past that say clients
20 own files of lawyers. In an electronic age that could
21 be especially problematic in that you for a file that
22 is entirely electronic the client may have a
23 proprietary interest in your C drive. We need to
24 bring that up to date.
25 To protect the client we have continued the

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1 requirement of formal opinion R-5 that there should be
2 in place by every lawyer a client plan or procedure
3 governing safekeeping of property, including the
4 information that is in the file. As written, that is
5 not necessarily required to be in writing nor is it
6 required to be in writing under the formal ethics
7 opinion, although that might be a very nice idea, and
8 it also, again, in permissive terms in the final
9 submission suggests that the engagement or the terms
10 of engagement may be a good time to inform the client
11 about what your rules are and to remind them that they
12 do not own the file.
13 It also gives the client an absolute right to
14 portions of the file they may need, for instance,
15 property they gave you or an original that might be
16 necessary for a handwriting analysis, something like
17 that for nondestructive use. It also clarifies that
18 there is no interest even in the information as a
19 proprietary right of the client of your internal
20 records, that is time logs, drafted statements, things
21 of that nature. Of course you can agree to give up
22 those things or by a court order or subpoena you might
23 be required to.
24 CHAIRPERSON JAMIESON: Thank you. Another
25 expert has joined our panel, Judge Brown, who is on

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1 the Ethics Committee for the State Bar of Michigan,
2 and I would defer to him for comment as well.
3 JUDGE ELWOOD BROWN: My concern with the
4 proposal here is whether or it not it belongs it in an
5 ethics rule. What you are doing is I think addressing
6 an area of substantive law. The retaining is a common
7 law, is in the common law. There is a lot of case law
8 on it. What we are dealing with here is ethics as
9 opposed to who owns the file, and I think it's very, I
10 think we have to be cautious not putting in an ethics
11 rule something involving substantive law as to who
12 owns this file.
13 If you look at Ethics Rule 1.16, it
14 specifically requires that you not harm the client
15 essentially when you terminate your representation of
16 them. So if you for some reason had a dispute with a
17 client and you no longer representing that person and
18 that person hires another lawyer to represent them in
19 an ongoing case, ethically you cannot harm that client
20 by continuing to hang on to the information that he
21 needs in order to prosecute or to defend the case that
22 he is involved in, and that's made clear in 1.16.
23 And I think to put a rule in like this is
24 going, or adopt a rule as being proposed, is asking
25 for difficulty in weighing, balancing those two

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1 concepts.
2 This to me is a substantive issue, it's not
3 an ethics issue. So I just point that out.
4 CHAIRPERSON JAMIESON: Thank you. Don
5 Campbell.
6 MR. CAMPBELL: Thank you. I am Don Campbell
7 with Collins, Einhorn, a firm in Southfield, Michigan.
8 My concern is elevating R-5 to the status of
9 a rule or a requirement. R-5 is an ethics opinion.
10 It's a formal ethics opinion. But even within the --
11 nobody ever gets the book, everybody goes online, but
12 if you look at the scope of the ethics opinions, it
13 says that they are not law and they are not binding,
14 but to the extent that they are well reasoned they
15 can be relied upon by Michigan practitioners.
16 Frankly, R-5 is one of the better opinions.
17 It should be, and I believe is, generally relied on by
18 most practitioners. It's a great rule to have in
19 place as a rule, but not as R-5, and so I want to be
20 careful. I think if you just strike the language that
21 says that in accordance with R-5, if you are going to
22 adopt a rule you have as good a rule as you are going
23 to have. But I want to caution you or express my
24 concern that in elevating an ethics rule to the,
25 excuse me, an ethics opinion to the status of rule is

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1 dangerous and may have some unforeseen consequences
2 relative to the 20 or so formal ethics opinions that
3 are out there, and I think we are up to 300-some
4 informal ethics opinions.
5 CHAIRPERSON JAMIESON: Thank you. I will
6 entertain a motion with regard to the proposal
7 MRPC 1.4(c). I will entertaining a motion with regard
8 to the proposal MRPC 1.4(c).
9 VOICE: So move.
10 CHAIRPERSON JAMIESON: Thank you. Can I hear
11 a second.
12 VOICE: Second.
13 CHAIRPERSON JAMIESON: Any discussion?
14 MR. GILLARY: Randy Gillary from the 6th
15 circuit. I would like to echo the judge's comments.
16 Typically this is going to come up when a client wants
17 to change lawyers. You don't want to be in the
18 situation where the old lawyer is holding the file
19 hostage, and usually it's because there is a problem
20 with the existing representation, and I think it hurts
21 the client to make it unnecessarily burdensome to move
22 that file. Especially when there is original
23 documents, when they are going to be better than the
24 copies. I don't think the old lawyer should be
25 retaining originals that are needed to prosecute the

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1 case, so I have a problem with that aspect of the
2 rule.
3 CHAIRPERSON JAMIESON: Thank you.
4 MS. POHLY: Linda Pohly from the 7th circuit.
5 I rise in support of the motion. This rule also
6 governs cases where a lawyer has died, become
7 disabled, or disappeared. There is very little
8 guidance under those circumstances for people coming
9 in to assist in the process of returning files to the
10 clients. This gives us more guidance than we
11 currently have, gives us a place to start. Thank you.
12 CHAIRPERSON JAMIESON: Thank you.
13 John, can you clarify with regard to being
14 our expert resource here.
15 MR. ALLEN: Yes, the reference to 1.16 and
16 the need of the client with a succeeding counsel
17 relationship to obtain the file, I really don't
18 envision this as changing that at all. The only
19 difference is what the client is entitled to is the
20 information in the file rather than the actual file.
21 In other words, you don't have to turn the C drive
22 over to the next lawyer anymore than you have to turn
23 the original document. It must be a legible copy. It
24 must be one that's every bit as accurate as the
25 original and every bit as usable.

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1 I also don't think it changes anything about
2 the common law of retaining liens or charging liens.
3 If there is a lien, then it's a lien against the
4 information too, and that's a separate question to be
5 resolved.
6 CHAIRPERSON JAMIESON: Thank you.
7 MR. LARKY: Madam Chair, my name is Sheldon
8 Larky from the 6th circuit.
9 First just a question to John Allen. John,
10 would you mind if we struck out in accordance with
11 formal opinion R-5 from this proposed text?
12 MR. ALLEN: Not at all. Mr. Campbell's
13 recommendation is probably a good one. That was in
14 there just to explain to people what I was thinking
15 about in terms of a policy.
16 MR. LARKY: If that was accepted as a
17 friendly amendment to this motion, I believe that we
18 should adopt this motion.
19 CHAIRPERSON JAMIESON: Does anybody object to
20 the friendly amendment? All in favor of the friendly
21 amendment.
22 Any opposed.
23 Further discussion with regard to this
24 proposal.
25 MS. LIEM: Veronique Liem, 22nd circuit. I

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1 just have a question. What happens to the lawyer's
2 notes about the case, handwritten notes or whatever,
3 under this proposal? Who owns them? Is it the client
4 or is it the lawyer?
5 MR. ALLEN: We did not try to distinguish in
6 drafting the rule between what was handwritten or
7 typewritten or created by the lawyer. I think that
8 depends on the materiality of the information that's
9 in the file. If it's a note, I think, that's
10 something completely internal to your law firm to whom
11 you are assigning the work, an accounting ledger,
12 something like that, I think the rule would come down
13 in favor of that being yours and not the clients. And
14 if you had a vote, be it handwritten, typewritten, or
15 electronic that was necessary and material to the
16 client's use of the file, that's information in the
17 file to which they are entitled.
18 CHAIRPERSON JAMIESON: Thank you.
19 MR. BUCHANAN: Robert Buchanan from the 17th
20 circuit. Part of my practice is medical malpractice
21 plaintiff's work, and we deal with, you know, getting
22 medical records is a big part of what we do in
23 evaluating a case. I guess a concern I have with 15
24 is, not that I am against the proposal, but maybe
25 there should be more specificity about what are the,

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1 you know, is it reasonable costs that the client is
2 responsible for.
3 In the medical context there is a statute now
4 that has given us clarification so it says what is the
5 per page cost for the, you know, first 20 pages, then
6 it goes down on a graduated rate so that you don't
7 have a controversy what it is that should be charged
8 to the client or to the patient for those records, and
9 I would say five is a little broad and my concern with
10 that is it's not modified by reasonable or there is no
11 direction as to what the cost is. That's my comment.
12 MR. ALLEN: The reason why it's not specified
13 is that information these days is kept in so many
14 different formats and so many different ways that we
15 thought it was impossible. I think reasonable as a
16 requirement is certainly implied, if not there
17 already, as part of the law. If you have to make one
18 page of one photocopy and that's the entire file,
19 that's one thing. If you have to translate an old
20 Wang program that no one has seen in the last 20
21 years, it might be a lot more expensive.
22 MR. BUCHANAN: I guess my proposal then would
23 be to change and put a reasonable modification in
24 paragraph five to address that concern.
25 CHAIRPERSON JAMIESON: Is that a motion to

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1 amend?
2 MR. BUCHANAN: I am sorry, motion to amend.
3 CHAIRPERSON JAMIESON: And the language is
4 what?.
5 MR. BUCHANAN: I will just say that the
6 client is responsible to pay the reasonable cost of a
7 copying of the file records.
8 CHAIRPERSON JAMIESON: Do I hear a second
9 with regard to that motion?
10 VOICE: Support.
11 CHAIRPERSON JAMIESON: Any discussion?
12 Seeing no discussion, all in favor of that
13 friendly amendment.
14 Any opposed.
15 Ayes have it.
16 Any further discussion with regard to the
17 MRPC 1.4(c) discussion? Judge Brown, did you want to
18 make a comment as resource?
19 JUDGE ELWOOD BROWN: Just for thought.
20 Before I came here I happened to pull up an Illinois
21 Bar Journal article talking about attorneys, liens,
22 and when you can retain clients' files. If you look
23 around the country in any resource that you can find
24 it talks in terms of the clients' files.
25 1.16 implies a client's file. What you are

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1 doing, what the proposal is doing is trying to change
2 that, and I think the ethics rule is not the place to
3 change that. We are dealing with ethics only, not the
4 issue of whether or not you should own the file.
5 Until you have either a statute or some type of court
6 adopted law that says you own the file, you can't
7 change it in an ethics rule.
8 CHAIRPERSON JAMIESON: Any further questions?
9 MR. HAROUTUNIAN: Madam Chair, Ed Haroutunian
10 from the 6th district. Item Number 6, the last clause
11 says, Dealing with the plan of procedure, including
12 those parts of the representation file which belong to
13 the client or for which the client has a need.
14 The comment that was made earlier with regard
15 to attorney notes in the file, I have always looked at
16 that as the thought process. Conceivably some would
17 say that that's probably or perhaps the most valuable
18 part of the file. Why? Because a lawyer thought
19 about all of the objective facts and the circumstances
20 and then went forward and put those thoughts together
21 and put those thoughts either in handwritten notes,
22 typed notes, memos.
23 The question is would that language or for
24 which the client has a need be, would it include or
25 encompass those kinds of notes dealing with the

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1 attorney thought process concerning the file?
2 CHAIRPERSON JAMIESON: John Allen, I would
3 ask you to answer this.
4 MR. ALLEN: Neither this or any other rule is
5 going to resolve every last one of these questions
6 because they are all new uniquely fact determinative
7 in each instance.
8 I go back to the answer I gave before, and I
9 think it also happens to be the current law of this
10 and most other jurisdictions, and that is if it is
11 information in the file for which the client has a
12 legitimate and material need to represent their own
13 interests, then the client should have access to the
14 information that is in that. It may not be the
15 handwritten note, it might not even be the whole page
16 of notes, but it should be that portion of it for
17 which the client has a need. The information in that
18 could be, for instance, transcribed or otherwise made
19 available to the client so that they have what they
20 need to go forward with the representation of that or
21 another matter.
22 MR. GILLARY: Randy Gillary, again from the
23 6th circuit. Again I agree with Judge Brown. I think
24 what we are trying to do is change a file from
25 belonging to our client to belonging to us with this

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1 rule, which I don't think we have the authority to do
2 that, and the first, in number one, it says a lawyer's
3 file is owned by the lawyer, but then in number two it
4 says a lawyer is entitled to the original, physical
5 material in the file. It doesn't say the lawyer's
6 file.
7 So it seems like we are lumping clients
8 material and lawyers material into the same file, and
9 I oppose the rule.
10 CHAIRPERSON JAMIESON: Any further
11 discussion? Seeing none, I will entertain a motion
12 with regard to MRPC -- oh, sorry, call to order, or I
13 mean we will take it to a vote.
14 All in favor of the proposal regarding
15 MRPC 1.4(c) please say aye.
16 All opposed, please say nay.
17 We are going to do a count. All those in
18 favor, please stand. Tellers would you please count.
19 (Standing count being taken.)
20 You may be seated. All those saying nay to
21 this proposal, please stand.
22 (Standing count being taken.)
23 You may be seated. And the tellers have
24 asked me to remind you that when we are taking this
25 vote that you can't be walking around, so while we are

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1 doing the vote you need to either be standing or
2 sitting in your position. Thanks.
3 And the results on that are 46 yes, 57 no,
4 which means the majority opinion is no, but we will
5 report a minority opinion on this because it's more
6 than 25 percent.
7 The next proposal that's before the Assembly
8 is MRPC 4.2 with regard to communication. I will
9 entertain a motion with regard to --
10 VOICE: So move.
11 CHAIRPERSON JAMIESON: Thank you. A second.
12 Do I hear a second with regard to the proposal.
13 VOICE: Second.
14 CHAIRPERSON JAMIESON: Thank you. Now for
15 discussion. Again I will refer to John Allen as our
16 expert resource.
17 Okay. Sorry. Let me explain to you how 4.2
18 came before us. In November of 2003 the
19 Representative Assembly debated the proposed language
20 by the Ethics Committee that was going to be submitted
21 to the Supreme Court, and in that regard the
22 Representative Assembly position was, because the
23 language proposed by the Ethics Committee to the
24 Supreme Court was to change language within the rule
25 from party to person. The Assembly took a position

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1 that they were opposed to that.
2 However, if the court decided to change the
3 language from party to person, then the Assembly took
4 a position requesting the court to add a comment to
5 the rule with regard to a law enforcement exception,
6 which is referenced in this proposal.
7 Ultimately the Supreme Court followed the
8 Representative Assembly recommendation not to change
9 the language from party to person, so the language
10 remains party. However, the Supreme Court listened to
11 our second recommendation, which isn't relevant
12 because they listened to our first one because they
13 didn't change the language, and they posted the law
14 enforcement exception as an option in the comment.
15 What's before you now is an opportunity to
16 make a statement with regard to that law enforcement
17 exception and whether or not it should, in fact, be in
18 the rule or in the comment, and if you vote no to
19 either then that's the position that we are saying to
20 the court, because they have that alternative language
21 posted there as a result of the Representative
22 Assembly position, again only because we had said if
23 you change the language from party to person the
24 Assembly is recommending that commentary.
25 So, with that background, motion being on the

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1 table and discussion -- actually I apologize, because
2 during the panel discussions on this John VanBolt has
3 stood up and talked about that, so I will have him as
4 our expert resource.
5 MR. VANBOLT: I think expert resource may be
6 overstating it a little bit. I have watched this rule
7 in action on the sidelines and nationally at the
8 National Organization of Bar Counsel, because it is
9 true that using literally the phrase law enforcement
10 there has certainly been attention for a long time,
11 two decades at least between the U.S. Department of
12 Justice and state ethics and disciplinary enforcement
13 on whether or not the rule that says that a lawyer
14 shall not communicate with a represented party,
15 current rule, shall not communicate with a represented
16 party without the permission of that party's lawyer.
17 And the Department of Justice for a long time has
18 said, but we are different, we are on the front line
19 against crime, and we need to be able to do that.
20 The Supreme Court, the National Council of
21 Supreme Court Justices, and various federal courts
22 have all rejected that argument, and, in fact, there
23 is an amendment in the United States Statutes called
24 McDaid amendment that says federal law enforcement
25 officers do have to follow state ethics guidelines.

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1 This particular rule, my only comment is as
2 Elizabeth said, that the law enforcement exception in
3 Proposal B that's been published by the court is in
4 large part, I will say, not necessary but certainly
5 not in keeping with what this body's original intent
6 was. It was an either/or, either keep party rather
7 than person, but if you don't take our advice and
8 change it to person, which is the ABA recommendation,
9 then give us a law enforcement exception.
10 My comment is that while we refer to this as
11 a law enforcement exception, I think it's worthy of
12 noting that it, as written, says that this is a rule
13 which will not apply to government lawyers
14 investigating civil and criminal matters. That's a
15 big exception, and that is one of the ultimate issues
16 is should a rule which applies to most lawyers in
17 Michigan carve out an exception that says but this
18 group doesn't have to follow this rule.
19 But there is this drafting port which is
20 really the reason that it's back here before you.
21 PRESIDENT DIEHL: Nancy Diehl, 3rd circuit.
22 It is confusing what the Supreme Court did. Some of
23 you who were here back when we debated this, I got up
24 and argued against the then proposed rule change from
25 represented party to represented person, and as has

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1 been stated, the worry was if the court changed it to
2 represented person we would want it to be clear that
3 there was a law enforcement exception.
4 The court has not proposed that change.
5 Proposal A is the rule as presently written, and as a
6 prosecutor I have absolutely no problem with that.
7 Law enforcement, as far as I am concerned, speaking
8 for the Wayne County Prosecutor's Office, we followed
9 that rule for years and are happy to continue to
10 follow it, and I agree, we always have to be careful
11 when we start --
12 VOICE: Chipping away.
13 PRESIDENT DIEHL: -- chipping away, I guess.
14 Who is that? Is that Matt Abel who said that? So I
15 spoke, as you recall, requested that you go against it
16 before, and I appreciated what the Representative
17 Assembly did, and I will tell you today, I am going to
18 be voting for Proposal A.
19 CHAIRPERSON JAMIESON: Any further
20 discussion? Seeing none.
21 MR. ABEL: Wait, wait. I am Matthew Abel
22 from the 3rd circuit, and, no, that wasn't me who
23 spoke up before. But, first of all, and I am half
24 serious, how many people in this room are law
25 enforcement prosecutors or investigators or people

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1 who do that? Because I think there is a serious
2 conflict of interest to allow prosecutors to vote on
3 this issue, and I am not kidding. People are
4 laughing, but this is exactly what they do for a
5 living, make no mistake, and I think it's unfair to
6 allow the prosecutors to have two bites of the apple,
7 if you will, doing this.
8 The Supreme Court has already messed this up.
9 I don't think we should endorse it, help them,
10 whatever. It's unconstitutional, ladies and
11 gentlemen. Whether the Michigan Supreme Court agrees
12 or not, the federal courts do, so whatever we do in
13 this regard is probably not going to make any
14 difference. Thanks.
15 MS. MCQUADE: Barbara McQuade from the 3rd
16 circuit. I am speaking in support of alternative B,
17 because I think it's important that the exception not
18 be buried in the comment but that it be specifically
19 stated in the rule. I think the effect of A and B are
20 the same; however, B makes it explicit in the rule
21 what we are talking about, and to suggest it's
22 unconstitutional is just contrary to the language of
23 the rule, which says this rule does not apply to
24 otherwise lawful investigations.
25 To be lawful it must comply with the

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1 Constitution, and lawful investigation requires
2 compliance with the Sixth Amendment, which prohibits
3 contact with represented parties after they have been
4 charged.
5 The whole purpose of this is to get around
6 the situation where a lawyer contacts -- I am a
7 prosecutor -- our office and says, I am just calling
8 to tell you I know my client is under investigation
9 and I represent him; therefore, at that point all
10 undercover activity has to stop, all use of electronic
11 monitoring, consensual monitoring must stop, because
12 that would be a contact with a represented person.
13 Therefore, because it includes the words
14 otherwise lawful, alternative B is both lawful and
15 constitutional and enables us to do our jobs, so I ask
16 for your support.
17 CHAIRPERSON JAMIESON: Thank you.
18 MR. HAROUTUNIAN: Madam Chair, Ed Haroutunian
19 from 6th circuit. I think it's important to note that
20 alternative A is, in effect, a confirmation of what the
21 Representative Assembly approved the last time this
22 issue came before it. And, as Nancy Diehl points out
23 and I concur with, that it in effect adopts the
24 current rule but puts the exception, because the
25 exception in effect, because the primary rule was not

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1 changed, the exception in effect didn't mean anything.
2 So the idea is to leave alternative A, put
3 the, quote-unquote, exception in the comments, leave it
4 alone. So I would certainly urge folks to vote for
5 alternative A and not alternative B.
6 With regard to the comment that the
7 prosecutors should not be allowed to vote, almost
8 everything that the Representative Assembly does deals
9 with lawyers and deals with how we practice, and it
10 seems to me that that would mean that where we deal
11 with certain rules, the criminal defense Bar should be
12 prohibited from voting, the plaintiff's Bar should be
13 prohibited from voting, or the defense side, or family
14 law lawyers should not be able to vote on certain
15 issues that come before the Representative Assembly.
16 So I don't believe that that's appropriate
17 here. I think everybody ought to be allowed to vote.
18 CHAIRPERSON JAMIESON: Thank you.
19 JUDGE KENT: Wally Kent, 54th circuit. I
20 rise in opposition to alternative B. It seems to me
21 that it's actually substantive law rather than
22 procedural law and perhaps goes beyond the scope of
23 the responsibility of this body, but to the extent
24 that it is part of the responsibility of this body to
25 act, it still seems like a not very subtle erosion of

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1 constitutional rights that once counsel has been
2 retained, that we should not interfere with the
3 privacy of the relationship between counsel and
4 client.
5 CHAIRPERSON JAMIESON: Thank you. Any
6 further discussion?
7 MS. WIDENER: Linda Widener, 30th circuit. I
8 want to point out I think the lady from the
9 3rd circuit made a point about this would interfere
10 with contacts that law enforcement has and
11 surveillance, and that's not what it says. It
12 specifically says communication. Communication is
13 direct communication with that party who is
14 represented, so I don't think that it would impede
15 whatever law enforcement has to do. I think they have
16 enough resources, and I don't think that it's
17 necessary.
18 VOICE: Call the question.
19 CHAIRPERSON JAMIESON: It's been called, the
20 question.
21 JUDGE SCHNELZ: They have to go to the mike.
22 CHAIRPERSON JAMIESON: I am sorry, you have
23 to go to the mike to be recognized.
24 MR. HERRINGTON: David Herrington, 52nd
25 circuit. As a follow-up to that, what the prosecutor

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1 also said I disagree with in terms of all contact and
2 monitoring ceasing. That would only apply if that
3 person is a party. If they are a person, that's
4 different, and it still allows law enforcement to do
5 their thing so long as that suspect doesn't become a
6 party. I support Proposal A.
7 CHAIRPERSON JAMIESON: Any further
8 discussion?
9 MR. CRAMPTON: Jeff Crampton from the 17th
10 circuit. I simply want to point out that those who
11 are pointing out the problems with the prosecution
12 arguments, both Proposal A and Proposal B effectively
13 do the same thing, and you are allowed to vote against
14 both of those. I agree with the comments that my
15 colleague from the 30th circuit made that it applies
16 only to communications and that it wouldn't stop all
17 of these other electronic eavesdropping, things like
18 that, so long as they have got the appropriate
19 permissions. I will be voting against both A and B.
20 CHAIRPERSON JAMIESON: Thank you.
21 MR. HORKEY: Christian Horkey from the 38th
22 circuit. I think we are getting confused that we are
23 talking about a Rule of Professional Conduct which
24 only applies to us, it doesn't apply to law
25 enforcement, unless they happen to be lawyers. So

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1 these police officers I don't think, you know, whatever
2 they are doing is going to be impacted much by
3 whatever we do today.
4 MS. MCQUADE: I need to respond. Barbara
5 McQuade from the 3rd circuit. It absolutely applies
6 to law enforcement officers. They are our agents.
7 CHAIRPERSON JAMIESON: I am sorry, but I have
8 to stop you because according to the rules you are
9 allowed to speak only once as to an issue.
10 MS. MCQUADE: Can I do point of order?
11 JUDGE SCHNELZ: Yes.
12 MS. MCQUADE: What you said was wrong.
13 MR. REISING: Bill Reising, 7th circuit. I
14 call the question.
15 CHAIRPERSON JAMIESON: It's been called the
16 question. Do I heard a second?
17 VOICE: Second.
18 CHAIRPERSON JAMIESON: All in favor.
19 All opposed.
20 It passed. So it's call the question. So we
21 have motion with regard to proposal MRPC 4.2 before
22 you.
23 All in favor of option A, please say aye.
24 All opposed.
25 We are going to have to do a count. All

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1 those in favor, please stand.
2 The people who should be standing are those
3 in favor of A. If you are in favor of including the
4 law enforcement exception in only the comments, then
5 you stand in favor of that.
6 MS. MCQUADE: You are going to take a
7 separate vote on B?
8 CHAIRPERSON JAMIESON: If you voted yes on
9 A,you can't vote yes on B.
10 Let me explain why. Can I have your
11 attention, please. The reason why you would be able
12 to vote no on both if you wanted to vote no on both is
13 that you don't think that this law enforcement
14 exception should be in the comment or the rule.
15 MS. MCQUADE: I think it should be one or the
16 other.
17 CHAIRPERSON JAMIESON: It is not one or the
18 other, and that's the point of our reporting to the
19 Supreme Court. You have the ability to vote in favor
20 of the comment, and we will report a majority or
21 minority opinion, and you have the ability to vote in
22 favor of having it in the rules, majority/minority.
23 MS. MCQUADE: But you can split people who
24 support the concept in camps A and B.
25 CHAIRPERSON JAMIESON: The point is whether

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1 or not it should be in the comments, the rules, or
2 nowhere.
3 VOICE: Nowhere.
4 CHAIRPERSON JAMIESON: If you think it should
5 be nowhere, then you vote no to A, you vote no to
6 B, and both of them fail.
7 Now that you understand that, everybody sit
8 down.
9 MS. MCQUADE: The noes get two bites of the
10 apple and the yeses only get one bite, so you can have
11 people for A and for B but neither prevails.
12 CHAIRPERSON JAMIESON: You can vote yes on
13 both. We are going to take them separately.
14 MS. ROSS: Point of order. Marcia Ross, 6th
15 circuit. Can we vote then to defeat both A and B
16 first and then otherwise on A and B? I move to if we
17 are going to vote against both that we call the
18 question on both at the same time.
19 Can I amend my motion?
20 CHAIRPERSON JAMIESON: It's my understanding
21 you're making a motion.
22 JUDGE SCHNELZ: With all due respect, I
23 already said a long time ago, back in January, you are
24 going to have trouble when you go to vote on this. If
25 someone wants to make it a motion at this point in

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1 time, although debate has been closed, if nobody
2 objects to it, you could, in fact, move to have a vote
3 that indicates no on both of them. In other words,
4 you are concluding both of them on a yes or no vote.
5 In other words, if the manner in which we
6 want to vote on this is either yes on both of them or
7 no on both of them, and let's start with that. In
8 other words, if a motion would be made to defeat both,
9 that would be the motion, to defeat both A and B, if
10 that's what you want to do. If somebody wants to
11 object because technically we have already closed
12 debate, they could do so.
13 I am suggesting if you want to move this
14 along, that is a suggestion. Technically since you
15 made a point of order, Marcia, you cannot make a
16 motion, but it was a good point of order.
17 MS. ROSS: Thank you.
18 MR. GILLARY: Could I make a motion that we
19 vote first as to whether or not the law enforcement
20 exception should be included either in the comments or
21 in the rule, and then if that's passed, then we vote
22 as to whether A gets adopted or B gets adopted.
23 JUDGE SCHNELZ: That's reasonable.
24 CHAIRPERSON JAMIESON: Okay.
25 MS. MCQUADE: That's not what the Supreme

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1 Court wants to hear for us though.
2 CHAIRPERSON JAMIESON: So we open up for
3 discussion. Anybody who wants to discuss that?
4 MS. MCQUADE: Barbara McQuade from the
5 3rd circuit. I think the Supreme Court has framed the
6 issue as we are going with A or B. If we want to
7 weigh in on the issue that the Supreme Court is going
8 to be deciding, we need to choose A or B. If we say
9 nothing, then that's not the issue that's before the
10 Supreme Court. They will say thanks and good day. We
11 either want to make our opinion known or we don't.
12 CHAIRPERSON JAMIESON: That's not true. I
13 have to clarify. They didn't even suggest that it
14 should be in the rule. They just suggested that it be
15 in the comment. They didn't say anything about it
16 being in the rule. It's been published.
17 What happened was the Representative Assembly
18 took a position, and our position was don't change the
19 language from represented party to represented person,
20 but if you do, put this exception into the comment.
21 That was our position. We never talked about putting
22 it into the rule or anything, okay.
23 The Supreme Court did not change the
24 language. They listened to us. But what they did is,
25 in addition to that, even though we didn't ask for

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1 them to put it in the comment if they didn't change
2 it, they went ahead and posted this out there for
3 comment, even though they didn't change the language
4 from represented party to person should we still have
5 this in the comment.
6 And so this body has the ability now to voice
7 its position with regard to whether or not it should
8 be anywhere in the rules. Should it be in the rules,
9 should it be in the comment, or should it be in the
10 rules or the comment, and that's what's before the
11 Assembly.
12 So what's before us right now is to vote on
13 the fact, on not having this exception in either the
14 comment or the rules, that's the motion that's been
15 placed before. Do you understand the motion?
16 MR. GILLARY: That's framed in the negative.
17 I think it's in the positive whether or not either A or
18 B should be adopted either yes or no, and then if it's
19 yes, then we vote on whether it's A or B.
20 JUDGE SCHNELZ: Excuse me, that was not your
21 motion.
22 MR. GILLARY: I believe that was my motion.
23 JUDGE SCHNELZ: No, your motion was that we
24 remove it from both A and B. Now, that's what I
25 heard. If that's not your motion, I apologize.

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1 MR. GILLARY: My motion was that we first
2 vote on whether or not we will include the exception
3 either in the comments or in the rule itself.
4 JUDGE SCHNELZ: That's what I said.
5 MR. GILLARY: First yes or no.
6 JUDGE SCHNELZ: I would rephrase it. I would
7 suggest your motion is to either exclude or include,
8 make your mind up, one or the other. What do you
9 want, exclude or include?
10 MR. GILLARY: I would say include. I would
11 rather do it in the positive, whether it's going to be
12 included, yes or no, and, if so, if it's A or B.
13 JUDGE SCHNELZ: So if you are against it you
14 vote no.
15 PRESIDENT DIEHL: Nancy Diehl from the
16 3rd circuit. Now I am completely confused. I think
17 we would have been done with our voting if we had just
18 proceeded.
19 JUDGE SCHNELZ: That's understandable, Nancy.
20 PRESIDENT DIEHL: And the judge speaks as
21 someone who has known me for a long time, so we have
22 to take that opinion into great consideration.
23 I will tell you that the court has given us
24 two alternatives, and Elizabeth is correct, it's not
25 exactly what we put to them, but there you go. We

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1 give them information, it comes out in a different
2 format.
3 They are telling you where they are at on
4 this. They actually listened to us loud and clearly
5 on taking out represented person. They have
6 represented party back in, and they are even talking
7 about going further. This is where the court is. And
8 that's alternative B, putting that law enforcement
9 exception right in the rule. The comment is not part
10 of the rule. I will go back to the court has said
11 these are the options. Sure, they could do something
12 different, but they have made it pretty clear.
13 I am voting, I think, against your motion,
14 Randy, because, I am not quite sure where we are at.
15 I think we should go back to voting do we want
16 alternative A, which is the rule as it is now only
17 they have added some additional comments that are not,
18 in fact, a part of the rule. Do you want to go
19 further with alternative B.
20 CHAIRPERSON JAMIESON: Any further discussion
21 on the motion with regard to whether or not to include
22 the exception in the comments or rule.
23 MR. CRAMPTON: I guess I need to understand
24 what I am voting on. Are we essentially saying that
25 this vote now is whether or not we want law

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1 enforcement exception? If you want a law enforcement
2 exception you vote yes, if you don't want a law
3 enforcement exception you vote no?
4 CHAIRPERSON JAMIESON: Correct, and if you
5 vote yes, then we will go A or B whether or not it
6 should be in the rule or the comment.
7 Any further discussion on that motion?
8 JUDGE KENT: Wally Kent, 54th circuit. I
9 rise in defense of the Supreme Court, and I am
10 surprised to hear myself say it, but I have on many
11 occasions seen them submit issues such as this for
12 comment and find after hearing the comment that they
13 don't want to do anything. So just because it's being
14 presented to us, if we go back with an answer, said
15 leave it alone, they are entirely likely or it's at
16 least strongly possible they will leave it alone even
17 though they have asked us whether we favor it or not.
18 So please don't think that they have got
19 their mind made up on this issue.
20 MS. WEINTRAUB: Barbara Weintraub, 9th
21 circuit. On the motion that's pending at this moment,
22 I would ask that if the body votes in favor of, or I
23 should say again the law enforcement exception, either
24 alternative, that that somehow be communicated to the
25 Supreme Court that the vote went that way.

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1 CHAIRPERSON JAMIESON: Exactly, yes.
2 MS. WEINTRAUB: As opposed to just not doing
3 anything, not choosing A or B.
4 CHAIRPERSON JAMIESON: Absolutely.
5 Seeing no further discussion -- so this is
6 the motion that is before you now, whether or not, oh,
7 sorry, whether to include the law enforcement
8 exception in either the comment or the rule. If you
9 want the law enforcement exception in the rule or the
10 comment, please stand.
11 The reason why I am counting, there is 37
12 that are in favor of that. That would become a
13 minority opinion that we could report to the Supreme
14 Court.
15 All those opposed to including the law
16 enforcement exception in either the comment or the
17 rule, please stand.
18 I have 64 who are against, so majority rules.
19 It's past lunchtime. We have two more
20 proposals with regard to the rules. I am going to
21 leave it up to you, just by, tell me yes or no, would
22 you like to stop for lunch?
23 VOICES: No.
24 VOICE: Work through it.
25 CHAIRPERSON JAMIESON: So are you saying you

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1 want to go on and move to the next rule proposal?
2 VOICES: Yes.
3 CHAIRPERSON JAMIESON: I will just tell you
4 that the food is up there, so we will start at 1.5.
5 When we are done with 1.5 we will see where you are,
6 and if you want to go up to lunch and break at that
7 time, we can.
8 Moving forward with Rule 1.5, proposal, I
9 will entertain a motion with regard to the proposal
10 regarding MRPC 1.5 dealing with fees.
11 VOICE: So moved.
12 CHAIRPERSON JAMIESON: Thank you. A second?
13 VOICE: Support.
14 CHAIRPERSON JAMIESON: Thank you. Any
15 discussion with regard to the proposal dealing with
16 1.5? Pink, although you also have it in green for
17 those color blind. They are the exact same thing.
18 MR. ALLEN: The proposal before you on the
19 pink and green sheets is actually in two parts, the
20 first part, sub A, relates to nonrefundable retainers
21 or whatever term one wants to use to describe that
22 arrangement, and asks that they be defined as
23 published in the court's proposal 1.5(f), first of all
24 that they be permitted. This particular sheet says so
25 long as the conditions set for the in one through four

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1 are fulfilled.
2 There is an interesting comment on the
3 discussion board package, the orange package that you
4 have from, I believe, the Family Law Section. It's
5 the very first one, at least in mine, pages one and
6 two that says that we might save a lot of time and
7 trouble just by deleting conditions one through four
8 and requiring that the retainer agreement in these
9 instances be in writing. That would be be, I think,
10 another way to handle this and, in fact, a way in
11 which other jurisdictions have done that.
12 The second part B adds two new sub parts to
13 the rule on fees. I mentioned earlier that the
14 Grievance Commission receives its largest categories
15 of inquiries, aside from unreturned phone calls, about
16 fee disputes and files. This would be an attempt to
17 get some clarification in fee disputes, and this is
18 not original or new. It's taken from the Florida
19 Rules of Professional Conduct where it's worked well
20 for years and was adopted for the same reasons, to say
21 that all the factors in 1.5 may go to justify a fee,
22 merely time and rate factors alone are not those which
23 are exclusively considered, unless, of course, they
24 are those that are designated in the fee agreement.
25 It also reinforces the fact that fee

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1 agreements are generally enforceable and should be the
2 guideline for determining the fee so long as they
3 otherwise comply with the rules and are not found to
4 be illegal.
5 Again, Florida has used that version of the
6 rule in order to help resolve many, many items of fee
7 disputes that come before it's grievance committees.
8 MR. CAMPBELL: If I can make one more comment
9 on that. With regard to those provisions one through
10 four as cited by the Supreme Court in its commentary
11 through it's proposed Rule 1.5 addressing
12 nonrefundable retainers, those four conditions come
13 from another informal ethics opinion called RI-10.
14 That has subsequently been cited in some formal ethics
15 opinions as well.
16 So it's in the category of R-5 type of
17 declaration concerning files; however, unlike the R-5
18 declaration that came from a question from a
19 practitioner that said what do I have to do in order
20 to set up a policy, RI-10 began with an inquiry from a
21 lawyer that said here is what I have done and is this
22 enough to claim the fees upon payment, and it laid out
23 four things, and those are provisions one through
24 four.
25 However, what the committee said or the panel

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1 of the committee said in the informal opinion was,
2 yeah, that's enough if you do that. What we don't
3 know is do you have to do all of those, could you do
4 other things instead, could there be any combination
5 of other factors along with these factors that might
6 satisfy the requirements that would be necessary in
7 the minds of the Ethics Committee to establish a
8 nonrefundable retainer.
9 Since that informal opinion RI-10 came out in
10 the early '90s it has been interpreted as being a rule
11 of sorts, at times by the Grievance Commission where I
12 worked at for a period of time, and sometimes also by
13 hearing panels of the Attorney Discipline Board.
14 However, before it is adopted you really
15 ought to look long and hard at that. It was never
16 intended in RI-10 to be the only occasions upon which
17 you could charge a nonrefundable fee. It hasn't been
18 treated as the only occasions where a fee can be
19 earned upon receipt by the Attorney Discipline Board
20 in its case law following RI-10 and its interpretation
21 of RI-10.
22 And so this would be a C change or sorts
23 regarding nonrefundable retainers in Michigan, and it
24 would be a giant step backwards in my opinion from
25 where we are currently based on the case law that's

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1 developed by the Attorney Discipline Board and based
2 on the interpretations of RI-10.
3 I think the court was right to include the
4 discussion of nonrefundable retainers, and hopefully
5 it was a good starting off point, but this rule, if
6 it's based on this idea that you can only have these
7 four factors and must have all four of these factors,
8 is not a wisely written rule for adoption, but it's a
9 great place to begin that discussion.
10 MR. AGACINSKI: The Grievance Commission --
11 Bob Agacinski with the Grievance Commission. The
12 Grievance Commission already accepts the concept of
13 nonrefundable retainers. The board has used that
14 language, the courts have used that language. We
15 understand that it does indeed exist, and most of the
16 concepts in this proposed rule are accepted by the
17 commission, but it needs to be understood that just
18 because it's called a nonrefundable retainer will not
19 preclude review by the Commission. We still look at
20 whether it excessive and we still look at whether it's
21 actually earned.
22 Many attorneys will call it nonrefundable and
23 then take their hourly fee from the so-called
24 nonrefundable retainer. It's not earned when that
25 happens. So this language is being sanctioned, but it

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1 does cause a lot of confusion and has caused a lot of
2 confusion when I talk about it to different Bar
3 associations, but, again, that's a matter of perhaps
4 enforcement not a matter of the principle itself being
5 acceptable.
6 MR. ARMITAGE: Thank you, Bob. I want to
7 applaud John Allen's committee for attacking this
8 tough issue. I agree with some things that have
9 already been said.
10 I am with the Board. I am Mark Armitage,
11 Deputy Director, and I want to start out by saying
12 that the ADB hasn't taken a formal position on this
13 yet, but have written opinions, as Mr. Agacinski just
14 mentioned, and I want to clarify one thing Bob said,
15 the use of the word -- and the problem with both of
16 these proposals that I see, I am not favoring one or
17 another, but A is a little more so than B, they both
18 use the term nonrefundable retainer, and I am just
19 here to report that the term has fallen out of usage.
20 There is a national trend for disapproving, and even
21 in some states disciplining lawyers who use that term,
22 and the reason for it is because no such thing exists.
23 You may have in mind -- I see a lot nods, so
24 I am glad the message is getting out. There may be
25 something else in mind, like an engagement fee,

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1 general retainer, or some way -- and really what this
2 tends to be about is lawyers who trying to comply with
3 the rules, take a retainer, and they want to know
4 where to put it. In some instances it would be
5 reasonable to put it in the business account because
6 you are starting up your case, then it becomes how
7 much.
8 These are big, big questions, and I am here
9 maybe to gum up the works. Unfortunately I don't
10 have -- I started to tinker with this language, and
11 then I realized it's not my role, and sometimes not
12 maybe it's not your role from what I hear today.
13 So we all understand that clients can
14 discharge us, we must return unearned fees, and every
15 fee must be reasonable or not clearly excessive.
16 So that's when it becomes difficult is at the end of
17 the representation, wherever that is, and sometimes
18 it's earlier than we want, we have to look back and
19 say is it reasonable.
20 So, unfortunately, taking a simple position
21 by using magic words like nonrefundable retainer
22 doesn't necessarily work. And that's as far as I can
23 go. The board doesn't have a proposal right now, but
24 is keeping working on this issue. We have issued an
25 opinion that says some engagement fees are reasonable,

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1 and that's what I was talking about. We have held one
2 but disapproved the terminology nonrefundable.
3 MS. WEINTRAUB: Barbara Weintraub, 9th
4 circuit. I am also a current member of the Family Law
5 Council, State Bar. I want to say that I agree with
6 the comments of John Allen and Don Campbell. I think
7 that the concept of a nonrefundable minimum engagement
8 fee, which is what I call it, is a good one and is
9 important to practitioners, but I think that the
10 language of the proposed rule creates a problem.
11 Just to give a quick example, if a
12 disgruntled client wants to complain about an
13 attorney, how do you prove that the client was of
14 sufficient intelligence, maturity, and sophistication?
15 The client is going to say I wasn't sophisticated
16 enough, I didn't understand.
17 Another problem of proof is how do you prove
18 that you have turned down other cases for a specific
19 case, and I also want to clarify, I am not here as a
20 spokesperson for the Family Law Council. I am just
21 stating my own opinions, but I can see this creating a
22 lot of problems for attorneys, particularly solo
23 practitioners, people in small law firms who rely on
24 these fees, and I would suggest that the language
25 proposed by the Family Law Council, which is very

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1 simple and which John Allen also mentioned is --
2 obviously that can be interpreted by the Grievance
3 Commission or anyone else examining a fee, but I think
4 that that would be the way to go, and I would -- I am
5 not sure of the procedural point, but I would ask for
6 an amendment that the language, and this can be
7 found -- well, to read it, the retainer agreement is
8 in writing, signed by the client, and clearly
9 articulates that the retainer is nonrefundable.
10 JUDGE SCHNELZ: If more than six words, write
11 it out.
12 MS. WEINTRAUB: In any event, I will write
13 that out, but I would ask -- and also there are some
14 very good comments in this orange packet.
15 CHAIRPERSON JAMIESON: At this point I am
16 going to do a point of order. We are going to break
17 for lunch. We will give you an opportunity if you
18 would like to put that in writing and submit it to the
19 Assembly for consideration today, and everybody can go
20 up to lunch.
21 We were supposed to have lunch until 1:00.
22 Let's break until 1:15 and try to kind of keep it
23 moving.
24 (Lunch break from 12:50 p.m. to 1:44 p.m.)
25 CHAIRPERSON JAMIESON: I am going to call us

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1 back into session now, if everybody could please be
2 seated. I believe before we broke we had a potential
3 motion of the Assembly, and if we could resume there.
4 MS. WEINTRAUB: Barbara Weintraub, 9th
5 circuit, and this is the motion I am proposing. It's
6 on the screens. Do you want me to read the motion?
7 CHAIRPERSON JAMIESON: Yes, please.
8 MS. WEINTRAUB: I am proposing this for Rule
9 1.5(f), a lawyer and a client may agree to a lump sum
10 or nonrefundable fee arrangement that is earned by the
11 lawyer at the time of engagement or at the time of the
12 agreement provided that the retainer agreement is in
13 writing, signed by the client, and states that the
14 retainer is nonrefundable.
15 CHAIRPERSON JAMIESON: Do I hear a second?
16 VOICE: Support.
17 CHAIRPERSON JAMIESON: Any discussion?
18 Seeing none -- oh, go ahead.
19 JUDGE ELWOOD BROWN: Just a point that I
20 would like to bring to your attention, and that is the
21 concern, actually it's recognized in some of the
22 comments made in this green paper. Whatever you do,
23 whether you adopt this or you agree to nonrefundable
24 fee at all, if you agree to a nonrefundable fee, I
25 think the rule should clearly state that one of the

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1 provisions either add Number 5 provision or add as a
2 caveat to this proposal, proposed language here, that
3 the fee is not freely accessible. Because I think, I
4 am afraid what might happen is if the language is left
5 the way it is that then you are going to get into a
6 situation that, well, it's not excessive if my client
7 agreed to it, and I really didn't do all the work I
8 needed to do that was anticipated when we got, when we
9 agreed to this nonrefundable fee.
10 So just to make it clear that you are still
11 bound by the language that it's not clearly excessive.
12 I think that should be one of the provisions dealing
13 with nonrefundable fees. If you don't do that, I
14 think you are asking for some difficulty in
15 interpretation of this rule.
16 CHAIRPERSON JAMIESON: Thank you.
17 MS. KAKISH: Katherine Kakish, 3rd circuit.
18 I have a comment in support of the recommendation made
19 by Barbara, and this support actually comes from the
20 Wayne County Family Law Bar Association. This Bar
21 association actually met on March 17th of this year to
22 specifically discuss this rule, and they opposed as it
23 was proposed. Actually they said that they
24 unanimously oppose the proposed language of 1.5(f).
25 They did submit a recommendation in replace of what we

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1 were to vote today, and it almost matches what Barbara
2 wrote here, except that Barbara gave it more details,
3 which I am sure that the Wayne County Family Law Bar
4 Association would agree would serve their interests.
5 They provided a very lengthy e-mail letter to
6 members of the 3rd circuit, which is Wayne County, and
7 they gave all the reasons why the proposal that
8 Barbara now wrote and is recommending should be
9 adopted. Thank you.
10 CHAIRPERSON JAMIESON: And just for
11 information, their commentary is actually included, it
12 was posted on the RA discussion board, and it's on
13 page three of six under MRPC 1.5.
14 Any other discussion?
15 MR. PIATT: Paul Piatt, 16th circuit. Just
16 in response to Judge Brown's indication of the word
17 excessive. I found, as I have been doing this for 35
18 years, one person's excessiveness is another person's
19 shortfall, so the inclusion of the word excessive I
20 don't think would be really much use.
21 JUDGE ELWOOD BROWN: In the Rule 1.5(a) it
22 defines, gives you some indication of excessive. So
23 if you have in (a) that you can't charge a fee that's
24 clearly excessive, I am concerned that in (f) that you
25 are going to say, well, unless it's a nonrefundable fee.

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1 MR. CAMPBELL: If I could just follow up on
2 that for a moment. In the context of the one-third
3 contingencies or other contingencies, the rules don't
4 have a caveat there about excessiveness, and yet
5 presumably the same rules would apply, so I understand
6 the judge's concerns, and it may be something you want
7 to take action on, but putting it into context with
8 other fee related rules, that caveat doesn't exist,
9 and you would have to ask why it's necessary here, and
10 maybe you are compelled, maybe you are not.
11 CHAIRPERSON JAMIESON: Any further
12 discussions?
13 MR. HOGAN: James Hogan, 16th circuit, just
14 as a point of --
15 CHAIRPERSON JAMIESON: You have to move the
16 microphone so that you are speaking right into it for
17 our court reporter.
18 MR. HOGAN: I would like to request as a
19 friendly amendment the parenthetical phrase "or at the
20 time of the agreement" be deleted, only because after
21 that comes "provided that the retainer agreement is in
22 writing, signed by the client." It should be just at
23 the time of the engagement provided that the retainer
24 agreement is in writing.
25 CHAIRPERSON JAMIESON: Are you making a

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1 motion for a friendly amendment?
2 MR. HOGAN: That's correct.
3 CHAIRPERSON JAMIESON: Do you accept?
4 MS. WEINTRAUB: I wouldn't accept, but I
5 would suggest something else that might clear up the
6 problem. The word "retainer" could be taken out and
7 just provided that the agreement is in writing.
8 The reason I added the language "or at the
9 time of the agreement" is that sometimes when a client
10 retains an attorney that may be based on an hourly
11 rate. Later the case may develop into something or
12 scope that wasn't anticipated and an additional fee is
13 required and an agreement was entered into after the
14 fact, and that's why I added the language that's in
15 parentheses. Would that solve the problem?
16 MR. HOGAN: No objection.
17 CHAIRPERSON JAMIESON: Okay. No objection.
18 Does the body have any objection?
19 Any further discussion with regard to the
20 substituted motion, and hold on one second. John
21 Berry, Executive Director.
22 MR. BERRY: As someone who spent about 15
23 years enforcing this rule, I am a little confused
24 about what aspect -- if it was the intent of this
25 amendment that there not be any consideration of

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1 reasonableness or not, that basically if it's an
2 agreement between the two parties, that agreement
3 lasts no matter what. If that's the intent of it, I
4 would suggest that is going to be a very serious
5 problem, because this is, of all the fee areas, this
6 is one of the ones that's, first of all, the most
7 difficult for people to understand, most subject to
8 major abuses.
9 I mean, for instance, somebody could come up
10 for a traffic ticket and get somebody to sign an
11 absolutely ridiculous amount for what was going on.
12 Every other fee in the subject -- Don's comment about
13 one-third contingency fee agreements, those agreements
14 I think it's pretty well clear they are going to be
15 subject to reasonableness or not, whereas in this area
16 if you put a rule like this, it would be pretty clear
17 that people are going to look at it and say, you know,
18 it's what it says. That fee is there.
19 So I would be very concerned with this kind
20 of adoption of this rule.
21 MR. ROMANO: Vince Romano from the
22 3rd circuit. It strikes me, isn't there a substantive
23 difference between a fee and a retainer, and, if so,
24 shouldn't it be consistent? In other words, in the
25 first few words we talk about a nonrefundable fee

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1 agreement and conclude with the reference that the
2 retainer is nonrefundable.
3 I am just putting that question, isn't there
4 a difference between a fee and a retainer, and if
5 there is, then shouldn't this rule be consistent?
6 CHAIRPERSON JAMIESON: Are you making a
7 motion for a friendly amendment?
8 MR. ROMANO: I would suggest that the word
9 "retainer" be replaced with the word "fee" as a friendly
10 amendment.
11 VOICE: Second.
12 CHAIRPERSON JAMIESON: Do you accept.
13 MS. WEINTRAUB: I accept that, and I think
14 it's a good suggestion. Thank you.
15 CHAIRPERSON JAMIESON: Any further
16 discussion? Seeing none, I want to make it perfectly
17 clear what's before the Assembly. What's before the
18 Assembly is whether or not we substitute the proposal
19 and make it this rather than what you have on your
20 pink or your green sheet. That's what's before you.
21 You are not voting necessarily on this substantively
22 yet. We are asking you whether or not you want to
23 substitute this language for the proposal rather than
24 what we had.
25 All in favor please say aye.

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1 Any opposed?
2 That carries. Now we will vote on the
3 substantive proposal that's before us, the substitute
4 proposal. Is there any discussion on the substance of
5 this proposal?
6 MR. ALLEN: Just one to form and not
7 substance. The Supreme Court, and now the
8 Representative Assembly, has suggested a 1.5(f) that
9 was not in there at the time that the part (b) of this
10 proposal was drafted on your pink and green sheets,
11 and so I believe the sub letters on those paragraphs
12 should be changed respectively to (g) and (h) as part of
13 1.5 on your pink and green sheets.
14 If you look up on the screen --
15 CHAIRPERSON JAMIESON: John, it literally
16 changes to this. This becomes the proposal, 1.5(f),
17 and there is no -- that becomes (f). Everything that
18 you did is gone.
19 MR. ALLEN: Okay. Thank you.
20 CHAIRPERSON JAMIESON: Any other discussion?
21 Seeing none, all in favor of this language,
22 which is the substitute motion for proposal 1.5(f),
23 say aye.
24 Any opposed.
25 It passes.

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1 Now the issue becomes with regard to the
2 proposal regarding 1.15. 1.15 is the safe keeping of
3 property. That was intended to track whatever our
4 decision was with 1.5 as opposed to what is proposed
5 by the Supreme Court. So basically you would take out
6 namely (f), (g) and comment, and it would just become
7 should MRPC 1.15(c) require that nonrefundable fees
8 comply with the factors set forth in the Assembly's
9 recommendation regarding MRPC 1.5, period, and then
10 the answer is yes or no.
11 I will entertain a motion with regard to that
12 proposal.
13 VOICE: So moved.
14 CHAIRPERSON JAMIESON: Second.
15 VOICE: Support.
16 CHAIRPERSON JAMIESON: Any discussion?
17 Seeing none, we will bring it to vote.
18 All in favor of proposal MRPC 1.15 say yea.
19 Any opposed say no.
20 And that passes.
21 Now we move on to the standards, and I would
22 like to also acknowledge that we have a visitor with
23 us today, and that's Mark Gates, who is Supreme Court
24 Deputy Counsel. Mark, if you could stand up. Just to
25 say thank you to Mark for being with us today

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1 listening to this Assembly discussion on all of these
2 issues.
3 First on the agenda with regard to the
4 standards is 1.3 regarding purpose of these standards.
5 I will entertain a motion with regard to this
6 proposal.
7 VOICE: Motion.
8 CHAIRPERSON JAMIESON: Support?
9 VOICE: Support.
10 CHAIRPERSON JAMIESON: Any discussion?
11 Do any of the panelists want to speak to 1.3?
12 No. Seeing none, then there is no discussion, then we
13 will bring it to vote.
14 All in favor, aye.
15 Any opposed? 1.3 passes.
16 If we can keep up with this pace, I think we
17 are going to get done really fast.
18 Next up is Michigan Standards for Imposing
19 Lawyer Sanctions definitions regarding knowledge. I
20 will entertain a motion with regard to that proposal.
21 VOICE: So moved.
22 CHAIRPERSON JAMIESON: Support?
23 VOICE: Support.
24 CHAIRPERSON JAMIESON: Any discussion?
25 MR. ANDREE: Gerard Andree from 6th circuit.

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1 With respect to and in light of the Michigan Supreme
2 Court's decision this past week which dealt with the
3 definitions of knowledge, actual knowledge,
4 constructive knowledge, and knowledge supported by
5 circumstantial evidence, I would make I guess it would
6 be a request, if not a friendly amendment, that
7 "knowledge" be, everywhere you make reference to
8 "knowledge" that it specifically indicate "actual
9 knowledge."
10 VOICE: Second.
11 CHAIRPERSON JAMIESON: So did you make a
12 motion to.
13 MR. ANDREE: I guess that would be what I
14 would be doing to avoid any problems, that the term
15 "knowledge" should be changed wherever it appears to
16 "actual knowledge."
17 CHAIRPERSON JAMIESON: Just I want to make
18 sure that everybody is clear. That really then would
19 be an adjustment to the first position, which would be
20 (a) which is incorporate the language proposed by the
21 Attorney Discipline Board defining knowledge, but
22 changing it to actual knowledge.
23 MR. ANDREE: It should be defining knowledge
24 as actual knowledge.
25 MR. CAMPBELL: So you know, in my

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1 recommendation I tracked the ABA's definition of
2 knowledge in the Model Rules of Professional Conduct,
3 which require actual knowledge, and you are saying
4 make it even more clear.
5 MR. ANDREE: My understanding of what you
6 were saying was that it has always been interpreted
7 that way.
8 MR. CAMPBELL: No, that is the definition, in
9 fact, which I think is more than just interpretation.
10 MR. ANDREE: For our purposes I would like it
11 to be our definition.
12 MR. CAMPBELL: For whatever it's worth, I
13 don't think there is any inconsistency with the
14 version currently published to make the recommendation
15 that it be called actual knowledge. The ABA's
16 definition that I stole and put it into my version
17 says that actual knowledge may be inferred from the
18 circumstances. I don't know if you want to treat that
19 definition any differently in light of that recent
20 Supreme Court case that I am not, I am not versed in
21 at all, but to the extent that they agree with me I
22 stole from them, that's cool.
23 CHAIRPERSON JAMIESON: What we need to have
24 is a specific language that you want to bring before
25 the Assembly. If you are saying that you are speaking

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1 in favor of (b) but changing the terminology to "actual
2 knowledge," or are you coming up with an alternative (c).
3 MR. ANDREE: I suppose it would be an
4 alternative (c) then.
5 CHAIRPERSON JAMIESON: And your alternative
6 (c) is that wherever the Supreme Court rule as it's
7 been published states the word "knowledge," that
8 instead of "knowledge" it should be "actual knowledge."
9 MR. ANDREE: Correct.
10 CHAIRPERSON JAMIESON: Is that your motion?
11 MR. ANDREE: That is my motion.
12 CHAIRPERSON JAMIESON: Do I hear a second?
13 VOICE: Second.
14 CHAIRPERSON JAMIESON: Any discussion on that
15 motion?
16 MR. VANBOLT: John VanBolt from the Attorney
17 Discipline Board. I need to make a clarification here
18 I think.
19 There has been references from the floor to
20 the rules, and Mr. Campbell refers to the ABA
21 definition. Let me back up just one second.
22 The Attorney Discipline Board was ordered in
23 2000 to review the status of use of standards in
24 Michigan and within two years to report to the court
25 on whether or not Michigan should have its own

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1 Michigan standards. At the time, that is 2000, the
2 Board was directed to use the ABA Standards for
3 Imposing Lawyer Sanctions.
4 In fact, the Board had been using them in one
5 form or another since 1986. Since their adoption, but
6 in 2000, so that means in about two months should be
7 with the fifth anniversary of the Discipline Board's
8 consistent use of the ABA standards.
9 When the Board was given this direction to
10 come up with the question of Michigan standards,
11 obviously the first question before the Board was
12 should Michigan essentially throw out the ABA
13 standards and start from scratch or should Michigan
14 take advantage of standards which had been in use
15 since 1986 in Michigan and other jurisdictions and
16 which are now cited with some degree of regularity in
17 at least 30 jurisdictions?
18 The Board elected to build on the ABA
19 standards. The language that you are being asked to
20 consider when it says incorporate the language
21 proposed by the ADB is not entirely new by the Board.
22 The Board, that was one example of where the Attorney
23 Discipline Board looked at the ABA-approved language
24 in the standards, and in that instance that definition
25 is knowledge is the conscious awareness of the nature

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1 or intended circumstances of the conduct but without
2 the conscious objective or purpose to accomplish a
3 particular result.
4 In its further comments to the court the
5 Board has actually refined that slightly so that the
6 Board's proposal to the court is that knowledge is the
7 conscious awareness of the nature or attendant
8 circumstances of the conduct but need not include the
9 conscious objective of purpose or purpose to
10 accomplish a particular result.
11 I actually, I am aware of the case that was
12 cited, the Michigan Supreme Court case on the
13 definition of knowledge, and I am also aware of the
14 ABA's definition of knowledge in terms of the rules.
15 It is critically important, however, for everybody, as
16 we discuss all of these, as you discuss these
17 standards, that the rules, the Rules of Professional
18 Conduct, which form the basis for liability, for
19 disciplinary infractions, are not the standards. The
20 standards are what you look at after and only after
21 professional misconduct has been established.
22 And it is quite possible that there are and
23 may be situations where the way a certain term --
24 knowledge, injury, neglect -- is looked at in terms of
25 deciding what level of discipline to impose after

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1 misconduct has been established, which may or may not
2 be exactly the same as the way that term is used when
3 you are looking at was there misconduct or was there
4 not misconduct.
5 I can't go through and enumerate every single
6 example of that other than to say that in this
7 particular case the definition of knowledge proposed
8 by the Board is based on the knowledge as determined
9 and used by other jurisdictions in connection with the
10 standards, not the definition of knowledge in a
11 particular state by a particular court under a
12 particular fact situation in a particular case
13 referring to parties in a civil litigation.
14 MR. CAMPBELL: What you have to keep in mind
15 also though is the ABA when they adopted the
16 standards, at the time they were adopted the only
17 definition of knowledge was actual knowledge and that
18 the ADB's definition that John read at length is not
19 a definition that the ABA has ever said is a
20 definition that we apply to the standards. Maybe one
21 when you wish to apply, you may wish to say actual
22 knowledge, but I think that gives you a fuller context
23 on the word "knowledge."
24 MR. ARMITAGE: If I could just follow up. I
25 am not sure what Don meant, but, in fact, the ABA did,

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1 in fact, adopt the definition of knowledge that
2 Mr. VanBolt just read to you, and it works together
3 with intent and negligence, it's three levels of
4 mental state. To pull in a different definition will
5 just throw it out of whack and not accomplish
6 anything. You need actual knowledge to be found
7 guilty of misconduct, and you don't get to the
8 standards until that happens. This helps you sort out
9 the state of mind once you are in a disciplinary
10 phase and it was adopted by the ABA in 1986. That's
11 their definition.
12 CHAIRPERSON JAMIESON: Just as a point of
13 clarification, our rules say that if an amendment is
14 greater than six words it has to be in writing, and so
15 we have crafted some language. Mr. Andree, if you
16 would agree for (c) that instead of those words, it
17 says always define "knowledge" as, quote, actual
18 knowledge, end quote, that I think meets your needs,
19 then we can actually entertain this.
20 MR. ANDREE: That will be fine.
21 CHAIRPERSON JAMIESON: Thanks. Any further
22 discussion with regard to adding (c)? Seeing no further
23 discussion, then what's before us is whether or not to
24 add (c) as an option in this proposal.
25 All those in favor of adding (c) as an option

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1 in this proposal, please say aye.
2 Any opposed.
3 Ayes have it.
4 Now, going back to discussion on this actual
5 proposal with regard to (a), (b) and (c), is there any
6 further discussion? Seeing none, then we will vote
7 for (a) first.
8 All those in favor of (a) please say aye.
9 Any opposed.
10 I need all those in favor to stand to see
11 whether or not we have a minority opinion. Can I have
12 my tellers. Well, maybe we can do it without tellers.
13 All those in favor of (a) stand. People
14 continue to stand up. Are you all up now? Thank you.
15 Now I want to know all those who are in favor
16 of (b). Again, this is just if you voted for (a), you
17 can't vote for (b), so if you are in favor of (b),
18 please stand, or actually I shouldn't say please
19 stand. Those in favor of (b) please say yea.
20 What we have is a majority opinion. Oh, I am
21 sorry. Now we have got to go for (c). All those in
22 favor of (c) please say aye.
23 All those opposed. Can those in favor of (c)
24 please stand so we can take a vote on those as well.
25 VOICE: Point of order. I believe some

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1 people voted more than once. You told us on (b) we
2 couldn't vote for it if we already voted on (a). You
3 did not give the same instruction on (c) and some
4 people voted twice.
5 CHAIRPERSON JAMIESON: If you voted yes on
6 (a) you cannot vote yes for (c).
7 MR. ANDREE: (c) is going to apply whether it's
8 (a) or (b).
9 CHAIRPERSON JAMIESON: (a), go ahead and sit
10 down. We are really struggling with this, because we
11 have adopted some special rules so that we can report
12 accurately to the Supreme Court, which is very
13 different than what our normal rules would be, so I
14 apologize for trying to make sure that what we report
15 to the Supreme Court is quite accurate and that we are
16 very clear about minority and majority opinions.
17 Right now we have 57 in favor of (a), and
18 that's a majority opinion, and we did not have enough
19 for a minority opinion, and now (c) is, as it would
20 apply to (a), and so that's my understanding of how
21 it's been presented, is that correct?
22 All those in favor of (c), it doesn't matter
23 how you voted on (a) or (b), if you are in favor of
24 (c),please stand. That's majority. You can sit down.
25 Any oppose?

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1 (c) passes as well.
2 Going on now to MSILS definition injury,
3 potential injury, MSILS 2.3 suspension, and MRPC 1.01
4 terminology, I will entertain a motion with regard to
5 that.
6 VOICE: So moved.
7 CHAIRPERSON JAMIESON: Support?
8 VOICE: Support.
9 CHAIRPERSON JAMIESON: Any discussion? Open
10 it up to John or Mark.
11 MR. ARMITAGE: I will be brief. The proposal
12 before you would, (a) would be the version of the
13 Supreme Court -- (a) is the version that the ADB
14 proposed. It is in line with the ABA version and
15 potential injury, just a little bit, again, this is just
16 with national case law and with the states that apply
17 both the Model Rules and the standards together, and
18 unless there are any questions, I will just press with
19 that.
20 CHAIRPERSON JAMIESON: Don.
21 MR. CAMPBELL: The issue I want to comment on
22 briefly is the question of how you define suspension
23 and why that's an issue here. If you have a copy, as
24 I am sure you all do regularly refer to them, the ABA
25 Standards for Imposing Lawyer Sanctions, there is a

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1 commentary to that, and in the commentary under every
2 suspension category they list the cases, at least the
3 principal cases that they reviewed between 1970 and
4 1982 or whatever it was that led them to come up with
5 this category of a sanction under that particular
6 standard.
7 In every single case where they cite a case
8 in the level of suspension, it is a suspension from
9 the jurisdiction in which the conduct occurred that
10 required reinstatement. So where the ABA uses the
11 word suspension, and they define it within the
12 standards, they define suspension to mean a suspension
13 that requires reinstatement proceedings.
14 In Michigan, that level happens to be in 180
15 days. It used to be in 120 days. In other
16 jurisdictions, in Florida -- John can correct me if I
17 am wrong -- it's 90 days, or has been at least for a
18 period of time.
19 So that level changes, and they captured the
20 idea of fitness, because that's what reinstatement
21 questions, is whether you are fit to practice, when
22 you go in front of a panel of judges, lawyers who tell
23 us whether you have met the standard of fitness.
24 That's what the word was intended to mean within the
25 standards.

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1 Michigan defines a suspension or a suspension
2 that can be given in discipline cases as anything
3 over -- the minimum can be 30 days. In other words,
4 you can't have a 29-day suspension, and there is a
5 category of cases that fall between 30 days and 180
6 which are suspensions that don't question the fitness
7 of the lawyer.
8 In other documents, and I think it's
9 paraphrased some in the ABA standards, those are
10 treated by the ABA as being really cost sanctions.
11 That's the equivalent, because all they are doing is
12 saying you have to stay out of the practice of law for
13 a period of time. Not that we think you are unfit,
14 because if we thought you were unfit we would have
15 suspended you for longer and we would have made you go
16 through this process.
17 Instead, what they say is, hey, we are going to
18 punish your practice by disallowing you to collect
19 fees during the period of time you practice law.
20 It's a difficult issue to cover in the two
21 minutes I am given here, but I hope you have had an
22 opportunity to review it a little and understand the
23 issue here is broader than just how we are going to
24 treat suspensions. Under 2.3 is whether or not in
25 Michigan those cases that are 30, 60, 90-day

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1 suspensions are appropriate or whether, in fact, that's
2 an abuse, if you will, of power in sanctioning lawyers
3 in a way that really just hits them economically and
4 doesn't really have anything to do with fitness.
5 And the proposal as it was intended would say
6 that unless it's a serious violation for which
7 mitigation would not apply under the suspension
8 category, then those are the folks who should be
9 subject to this idea of the suspension level within
10 the standards. That was the intention, that those
11 lawyers who may engage in conduct that falls initially
12 in that suspension category but for whom there is
13 mitigation sufficient to write below them, where do
14 you take them? To do you take them to 180 days, to
15 179, or do you take them from 180 days down to
16 reprimand, and that's the issue addressed in 2.3.
17 I apologize if I haven't done a good job to
18 explain it in 2 minutes.
19 MR. VANBOLT: Let me clarify something here.
20 You will see that this particular issue which is now
21 up for discussion actually has two parts which are not
22 clearly related. The first which was discussed was a
23 definition of injury where that appears in the
24 standards, and that's something that appears all the
25 way through the standards.

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1 As you will seeing in the ABA standards, and
2 we will get to injury in another context in a minute,
3 all the standards do is sort out after misconduct has
4 been established where the sanction should generally
5 fall in rough categories and then you tweak it with
6 aggravating/mitigating factors and case law and all
7 sorts of things like that.
8 The three categories obviously are
9 disbarment, suspension, and reprimand, and generally
10 the ABA looks to two mechanisms to get to those
11 levels. First there is state of mind, so intentional
12 generally results in a higher discipline than knowing,
13 and knowing in higher discipline than negligence.
14 So those are the three categories there, but
15 the ABA standards then also look to the degree of
16 harm, the degree of injury. So serious injury
17 generally results in higher discipline than simple
18 injury, and that's higher discipline than little or no
19 injury. So that's the basic scheme.
20 So the question of injury, that question
21 really that was put before you has to do with do you
22 adopt a clearly stated definition of injury, which is
23 the one used by the ABA, or do you just let every
24 panel make up their definition of injury as they go
25 along. That's a separate and discrete question.

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1 What Mr. Campbell is talking about is if a
2 panel decides that there should be suspension of some
3 kind, should the minimum level be 180 days, i.e.,
4 requiring reinstatement.
5 I have to had slightly quibble with one thing
6 that Mr. Campbell says when he says that the ABA
7 standards define suspension as more than 180 days.
8 MR. CAMPBELL: It defines it as that
9 requiring fitness proceedings following that we would
10 call reinstatement proceedings. I said Florida, for
11 example, has 90 days.
12 MR. VANBOLT: I am still not quite sure
13 that -- what the ABA says is suspension is the removal
14 of a lawyer from the practice of law for a specified
15 minimum period of time, period. And then it says,
16 Generally suspension should be for a time equal to or
17 greater than six months, generally.
18 If the issue is literally should this body
19 recommend eliminating the possibility of suspensions
20 for six months -- I mean, is that the proposal? Is
21 that what people understand the proposal to be? Less
22 than six months, if that is the proposal. The fact is
23 that the Michigan Court Rule allows a suspension to be
24 any fixed period of time over 30 days.
25 So this proposed standard language would

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1 effectively invalidate an existing Court Rule.
2 Let me just give you some context on
3 suspensions currently. In Michigan in 2004 there were
4 120 public orders of discipline. Of those there were
5 49 suspensions, there were 41 reprimands, and there
6 were 28 disbarments. Of the 49 suspensions, 23 were
7 for 180 days or more, 26 were for 179 days or less.
8 So about 50/50.
9 Of the suspensions less than 179 days, more
10 than half of those were submitted to panels under the
11 consent discipline procedure, which is essentially a
12 plea bargain. So short suspensions, i.e., suspensions
13 under 180 days, are something that are recognized
14 currently in Michigan and are utilized by panels, the
15 Board, the Supreme Court, Grievance Commission. To
16 eliminate that would be to, or to curtail the use of
17 those suspensions would be to put panels, the Board,
18 and the Grievance Commission essentially in the
19 posture of saying, okay, the case that would have been
20 a 30-day suspension or a 60-day suspension, now we are
21 really going to look at a longer suspension or a
22 reprimand. We are curtailing that middle ground where
23 we believe that a shorter suspension may be
24 appropriate.
25 CHAIRPERSON JAMIESON: Any further

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1 discussion?
2 Seeing none, all those in favor -- and we are
3 going to vote on the first one first. Remember that
4 there are two parts to this. With regard to the
5 first, all in favor of option (a), please say aye.
6 All opposed?
7 I need all those in favor to stand up so that
8 we can take a count.
9 Tellers, I need the tellers up here to count.
10 Go ahead and be seated.
11 All those in favor of (b) would you please
12 stand. You cannot vote on both. We don't have enough
13 for a minority opinion, so thank you very much.
14 Now what we do is we take the second part of
15 that proposal, which deals with suspension, (a) and
16 (b).
17 All those in favor of (a), please stand. I
18 think we have a majority. Okay. You can be seated.
19 All those in favor of (b), please stand.
20 Again, you can't vote for both.
21 We do not have enough for a minority opinion.
22 Thank you.
23 Next up is use of injury within the
24 standards. I will entertain a motion with regard to
25 that proposal.

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1 VOICE: So moved.
2 CHAIRPERSON JAMIESON: Thank you. Second?
3 VOICE: Support.
4 CHAIRPERSON JAMIESON: Any discussion?
5 MR. VANBOLT: I will be real brief on injury,
6 other than let me just say that in the Board's
7 comments to the court, it's most recent comments,
8 there is an accompanying letter of 11 or so pages, the
9 Board saw this as really its most fundamental problem
10 with the standards as published.
11 A minute ago I said that in the ABA standards
12 the sorting process depends on gradations of mental
13 state and also gradations of injury, and that's how
14 you get into the general categories.
15 The proposed standards which have been
16 published for comment take injury out at this initial
17 sorting process. I hope some of you have had a chance
18 to read the Board's comments. It's too late now I
19 guess if you haven't, but I think that the point to
20 make here, and I think the Board's point, is that by
21 taking it out at this level what you can get are, if
22 you look at some of the individual standards, you get
23 what appear to be anomalous results.
24 So, for instance, it is misconduct to abandon
25 the practice of law. That's under the rules, not

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1 under the standards. So then the standards, you look
2 at the standards, what is the appropriate sanction?
3 Under the traditional ABA version, the
4 traditional approach, you look at whether the conduct
5 was intentional, was it knowing, was it negligent, and
6 then you look at what kind of harm was caused. If you
7 take harm out here, what you end up with is that a
8 lawyer who knowingly abandons the practice of law
9 consisting of 500 cases causing massive damage to 500
10 people should generally come out a disbarment, no
11 surprise there.
12 But if you take out injury, there is the
13 possibility that that initial sorting process results
14 in the lawyer who abandons the practice consisting of
15 one probate file that needs a letter and there is no
16 injury to anybody, then the presumptive level is
17 disbarment.
18 Now, the so-called fix for that is that level
19 of discipline or level of injury is then in the
20 mitigating factors. Well, then you look at was it a
21 lot of injury or very little injury. But I would call
22 your attention in all of these standards where this
23 comes up that in the mitigating factors, as published,
24 mitigating effect for lack of injury is defined as a
25 lack of any level of injury or something along that

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1 lines. But it's essentially if there was not one
2 scintilla of injury, then you get credit, otherwise
3 forget about it.
4 Now, I could go through a number of other
5 rules, but I think you get the point. Again, it goes
6 back to a fundamental, philosophical issue of whether
7 or not to, having made the he decision to propose
8 standards based roughly on the ABA standards, do you
9 follow through with that or do you abandon one basic
10 precept of the ABA standards and try something else?
11 MR. CAMPBELL: Let me follow that up, if I
12 may. The particular standard that John referred to
13 involving client abandonment, it's one where the court
14 took a long look at the ADB's version, took a look at
15 my version, presumably, and then came up with their
16 own, and, frankly, the errors, to the extent they
17 could be described as such that occur within that
18 standard are really just, I think, some mistake in
19 drafting by the court.
20 I don't think that's a good rule to use in
21 terms of how injury works. The reality is that you --
22 I don't believe it makes that much of a difference
23 whether the injury is in at that stage or whether
24 injury is in at the mitigation/aggravation stage. It
25 does take away the chance that somebody might confuse

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1 injury as an actual element in the offense, and I know
2 it happens at the stage where sanctions are being
3 imposed, but I have been before hearing panels, and I
4 think it is possible to be misdirected even
5 interpreting the violation.
6 That was one of the things that motivated me
7 to move, as a suggestion, to the
8 mitigation/aggravation area. The court adopted that
9 for their own reasons. The Board itself had taken
10 injury out of a number of provisions, just not all of
11 them, and so I think as you look at it, it's a cleaner
12 way of looking at it without considering injury until
13 the aggravation/mitigation stage rather than an
14 element of the offense, and I think that relative to
15 whether it's in some or in others, again, I think the
16 court is going to end up cleaning a lot of that
17 language up out of the standards where injury can be
18 used as an example the way John did anyway, but I
19 think you ought to vote more on the grounds of sort of
20 the philosophy of where injury is going to be looked
21 at.
22 CHAIRPERSON JAMIESON: Thank you. Executive
23 Director.
24 MR. BERRY: Having spent a lot of years in
25 looking at the cases and how these things work, I

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1 think from a factual standpoint to help you out you
2 can make a philosophic decision based on impact this
3 is going to have. I agree with Mr. Campbell that in
4 some respects we are only talking about where it
5 applies, whether it's at the front end of the
6 definition or later on in mitigation. Why I fall on
7 the side of Mr. VanBolt is from my observations of the
8 cases, if you believe harm both by being very serious
9 should raise the level of potential discipline or
10 because it's very minimal to reduce it, then the
11 impact of it is going to be much more important from
12 my observations at the front end than at the other
13 end.
14 Mitigation and aggravating factors many times
15 brace discipline up and down some but not quite as
16 much on the front end. You are starting with a
17 presumption at the front end, bang, it's this. If you
18 believe harm is a vital component of the whole
19 component of where you are going to start out with
20 discipline, I would think you would want it on the
21 front end. I think the facts have borne that out.
22 JUDGE KENT: Wally Kent, 54th circuit. I
23 would agree with those comments, otherwise I find that
24 it appears to be almost favoring mandatory sentencing,
25 and as a judge I oppose mandatory sentencing. Thank

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1 you.
2 CHAIRPERSON JAMIESON: Any further
3 discussion?
4 Seeing none, we will put it to vote.
5 All those in favor of option (a) say aye
6 Any opposed.
7 Anybody who voted for (a) cannot vote for
8 (b). All I want to know is whether or not we have
9 enough for a minority opinion.
10 Anybody in favor of (b), I need you to stand
11 up so I can see if we have 25. Thank you.
12 Next up is use of reprimand within the
13 standards dealing with 4.6, 6.1 and 8.0. I will
14 entertain a motion.
15 VOICE: So moved.
16 CHAIRPERSON JAMIESON: Thank you. Second?
17 VOICE: Support.
18 CHAIRPERSON JAMIESON: Any discussion?
19 MR. ARMITAGE: Just briefly. The ADB
20 proposal would be consistent with option (a), which
21 would put reprimand as an option, a disciplinary
22 option, in three different kinds of misconduct.
23 Tenure for the Board, all I know is that
24 truth is stranger than fiction, and even if that's a
25 general proposition, reprimand should not be

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1 available, for example, dishonest conduct or whatever.
2 Sometimes there are circumstances that arise that make
3 it appropriate, so the Board determined to leave that
4 in as an option, perhaps circumscribe, but just make
5 it an option that's what the intent was.
6 CHAIRPERSON JAMIESON: Don.
7 MR. CAMPBELL: My proposal is the proposal
8 the court adopted. It adopted, and I hope for the
9 reasons I proposed it, because in Michigan one cannot
10 be subject to sanctions for negligently doing
11 something that is fraudulent. In other words, they
12 create a category of crimes or offenses here and
13 punishments for it that don't exist in Michigan.
14 So to say that you cannot be reprimanded for
15 negligently, fraudulently doing something is really
16 just -- it should be obvious. I think it was obvious
17 to the court, I hope it's obvious to you. It doesn't
18 mean people can't be reprimanded for this offense,
19 because if suspension turns out to be the category
20 they fall into, and most of us, I think, would agree
21 if you do something with actual knowledge that is
22 fraudulent and meets all the other conditions for
23 a violation of the rules, presumably you should get at
24 least 30 days off and upwards of that, that you can
25 still mitigate that down under the mitigation factors,

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1 but it would be ridiculous to define an offense that
2 cannot occur.
3 The ABA does that in their standards. The
4 Michigan's proposed rules by the ADB does that. The
5 court doesn't do that. I recommend that they not. I
6 hope that you follow that lead and say we are not
7 going to make offenses, we are not going to make
8 sanctions for offenses that cannot occur.
9 MR. ARMITAGE: Just have to rebut that, if I
10 may. There is no such negligent, fraudulent merger in
11 the ABA proposal. In fact, it distinguishes
12 between negligent misrepresentation and fraudulent
13 misrepresentation.
14 I would agree that if there is a fictitious
15 form of misconduct, the standards shouldn't address
16 that, but that hasn't hand. In all three of these
17 they are based on actual forms of misconduct that are
18 recognized by the Rules of Professional Conduct.
19 Thank you.
20 CHAIRPERSON JAMIESON: Any further
21 discussion?
22 Seeing none, all in favor of (a) please say
23 aye.
24 Any opposed.
25 I need the nays to stand so I can see if we

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1 have 25.
2 Anybody who voted yes on (a) cannot vote upon
3 (b). Is there anybody, and I need you to stand to
4 determine whether or not we have 25 percent minority,
5 so is there anybody in favor of (a), please stand, or
6 sorry, (b), I stand corrected, (b) please stand and,
7 again, you did not vote in favor of (a), which means
8 you can stand for (b).
9 Okay. We don't have enough for a minority
10 opinion. Thank you.
11 Next in your booklet is MSILS the standards
12 consent orders and judgments of misconduct. There is
13 actually two copies in there, and I would say you
14 should pass over the first copy, because it's like a
15 laugh line version of it, and that was just a drafting
16 version. The next version in there is the final
17 version.
18 I will entertain a motion with regard to the
19 standards of consent orders/judgments of misconduct.
20 VOICE: So moved.
21 CHAIRPERSON JAMIESON: Second?
22 VOICE: Second.
23 CHAIRPERSON JAMIESON: Any discussion?
24 MR. AGACINSKI: Now it's probably pretty
25 obvious, I was mostly asked to sit here between the

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1 two parties, and I agreed because they gave me a great
2 view. On this one topic, though, I did have some
3 insight, and I even have my name in the book.
4 Drawing upon my experience as a Wayne County
5 prosecutor for 27 years, it seems to me when you deal
6 with plea bargains or consent judgment you may not
7 want to be bound by the guidelines. Many times you
8 agree to a plea as a prosecutor or grievance
9 commissioner because your case is falling apart, your
10 witness shows up drunk, or you're concerned about a
11 flaky fact finding, so you would rather take your bird
12 in the hand rather than go for the hearing.
13 I know in criminal cases at least five years
14 ago the courts had ruled that a plea bargain is the
15 reason for the DBA and the sentencing guideline
16 statutes, because there are those factors that you
17 can't go on the record and say I don't trust you and
18 to judge the fact of this case when you try to explain
19 your reasoning for accepting a consent judgment or a
20 plea bargain.
21 And so my proposal, my recommendation, was
22 simply to withdraw or strike consent judgments as
23 being governed by the guidelines, which and I think is
24 the way it still work in the criminal law for plea
25 bargains.

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1 CHAIRPERSON JAMIESON: Thank you. Mark or
2 John.
3 MR. VANBOLT: The opposing way of looking at
4 that, I suppose you would start with looking again at
5 statistically in Michigan, last year 44 percent of the
6 publicly disciplines in Michigan were the result of
7 consent discipline proposals which, under the rules,
8 have to be agreed to by the Grievance Administrator
9 and Respondent, they then have to be presented to the
10 Attorney Grievance Commission, which approves them or
11 doesn't approve them. If approved, then goes to a
12 hearing panel, which approves or does not approve, and
13 at that point the order becomes a public order just
14 like any other order of suspension.
15 And in Michigan last year, just as in every
16 year, people consent to reprimands, suspensions,
17 disbarments, not surprisingly more people consent to
18 reprimands than disbarments, but they cover the whole
19 range.
20 I think that's -- the point is that when
21 those public disciplines are recorded in the Bar
22 Journal, the page you look at first when you get your
23 Bar Journal, or reported in the newspaper, the public
24 the, profession, the courts do not necessarily make
25 that distinction between the disciplines which were

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1 decide under the standards by a panel or the
2 disciplines which were agreed to by the Grievance
3 Commission as part of a plea bargain process.
4 And I think really the point of this
5 particular vote begs the question really, is the
6 rationale for proclaiming to the public that we are
7 imposing discipline in Michigan under a set of
8 standards, except it's only 56 percent that it applies
9 to. The other 44 percent are factors that are known
10 only to the prosecutor and the party and the
11 commission, and then the panel pretty much needs to
12 take it on faith that that's a good deal, because once
13 it's reported it has the same force and effect as any
14 other form of discipline.
15 So, again, I think that's really the
16 philosophical difference is do the standards apply to
17 a hundred percent of the disciplines or only 60
18 percent of the disciplines.
19 MR. CAMPBELL: I note here that it says that
20 I agreed with the ADB and the court. My recollection
21 is I didn't take a position. I see the merits of both
22 sides, and as a practitioner I would love to be able
23 to do a consent for my client without having to go
24 through the standards. By the same token, I would
25 love to be able to cite consents in other cases when

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1 other clients aren't lucky enough to be able to
2 consent, and say, hey, that's what they did to this
3 guy, you ought do the same to mine, give him a break.
4 I don't know that there is a right or a wrong
5 there, but there should be a consistency, and I guess
6 one version or another should be elected to give us
7 practitioners an idea how we ought to proceed.
8 MR. VANBOLT: Could I just say -- actually I
9 have done my own sort of informal surveys among other
10 states. Not every state actually has a procedure of
11 consent discipline, much to their chagrin, because
12 they waste an awful lot of time dealing with cases
13 that should be disposed of officially.
14 Consent discipline process works. I am not
15 criticizing it in any way. Bob and his staff and the
16 commission do a terrific job of working with
17 respondents to reach the right result in those cases
18 that need to be disposed of, whether it's resulting in
19 a reprimand or a disbarment.
20 But other states that do have these
21 procedures, typically there is disclosure or some kind
22 of analysis under the standards. It is certainly not
23 unusual. There are some states that have lengthy
24 forms, 10 or 11 pages, where everything has to be
25 spelled out. There are other states where it is

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1 nothing more than a simple declaration in the plea
2 agreement, in the consent discipline stipulation that
3 the parties hereby stipulate that the proposed
4 discipline falls within standard 4.2 and the parties
5 have considered the following aggravating and
6 mitigating circumstances.
7 As a matter of fact some stipulations
8 currently submitted by the Grievance Commission use
9 that language and often to quite great effect,
10 especially in cases where the initial look at the
11 stipulation suggests that there is something odd about
12 this, and the best example I can give you is a case
13 about a year ago.
14 The Board has declared in its case law that
15 one of the capital offenses of lawyer discipline,
16 along with embezzling your client's money, is forging
17 a judge's signature. There is language in the cases
18 that say we just cannot imagine a worst offense.
19 There is, however, a consent case in which
20 the stipulation was to a suspension of three years for
21 a lawyer who was convicted by a federal court of
22 forging a judge's signature.
23 Now, that stipulation presented without
24 anything further would never have been passed, but
25 because it was a much, much longer than normal

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1 stipulation, that stipulation said this would normally
2 be disbarment under the standards; however, here is
3 three pages every mitigating circumstances, extreme
4 supervision under a probation department for a lawyer
5 who has some serious substance abuse and emotional
6 problems which have now been dealt with, this is an
7 unusual case, and this is why it should be three
8 years.
9 There is now a reported case in Michigan that
10 says that a lawyer who committed the capital crime got
11 three years, but it was only because of the use of the
12 analysis under the standards. So it's not unheard of
13 in Michigan and certainly not unheard of anywhere
14 else.
15 CHAIRPERSON JAMIESON: Bob.
16 MR. AGACINSKI: The only practical difficulty
17 why I am even taking a stand is that the worst you can
18 do by going to hearing is getting the exact same thing
19 you can consent to, there is no reason to consent
20 judgment then. You might as well go to hearing and
21 hope for flaky fact finding and that the case falls
22 apart. So what you will do is eliminate the basis for
23 consents, which is again half of our dispositions.
24 MR. ALLEN: I want to point out the
25 underlying assumption of this entire exercise is we

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1 ought to have these standards, and the court is
2 correct in adopting them. And we are not at that
3 level of debate, so I won't start it, but I would
4 point out for purposes of that analysis that the
5 Attorney Grievance Commission has just explained to
6 you why in 50 percent of the cases that they have they
7 don't want to use these standards, because they need
8 the discretion that is necessary to speak to the
9 particular facts and circumstances in each case, but
10 in the other 50 percent they don't want the hearing
11 panel to have that discretion. Instead they want them
12 to be essentially bound by what I call the sentencing
13 guidelines and get in trouble for it when I do that.
14 And I would submit to you that I think the
15 arguments you have just heard, all which are very
16 cogent, I think, and very valid, equally apply to the
17 other 50 percent of the cases, except it ought to be
18 the hearing panel that's exercising that same
19 discretion.
20 MR. LARKY: What do you recommend?
21 MR. ARMITAGE: I think John recommends no
22 anomaly.
23 MR. ALLEN: I don't have any counter proposal
24 in writing, and that's not my purpose here today, but
25 I do think the entire concept of the standards that

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1 are drafted out of the mid-1980s based on the Code of
2 Professional Responsibility and not the Rules of
3 Professional Conduct and the reason they have never
4 been updated by the ABA is the ABA has since taken a
5 stance against sentencing guidelines in the criminal
6 context, and it's not about to say we are against them
7 in the criminal context but we want them in the lawyer
8 discipline context for all the same reasons.
9 MR. BERRY: I viewed this rule from the
10 context, and I think you probably do as well, from a
11 practical, pragmatic thing. As you are thinking
12 through this you are probably thinking a couple
13 things. One is you want to make sure justice is done
14 and the public is protected, and you also want to make
15 sure a lawyer gets a fair deal out of this process.
16 And what's the most likely way that's going to occur
17 in this process, and if I go one way or the other,
18 what's the most likely event that it won't occur.
19 From my experiences, and if you try cases,
20 whether criminally or civilly, you understand there is
21 a difference between what might end up at the end
22 versus the negotiation. Considerations are different,
23 the result may be different, and I think you are
24 mixing apples and/oranges when you expect to have all
25 of the same considerations from a tried case and the

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1 nontried case. That's just the real world.
2 One of the things you are concerned about is
3 accountability or transparency, and I think that's a
4 separate issue. I come from two states where I
5 prosecuted these cases where, in essence, we had a
6 rule that said you consider, the standards are
7 considered along with other appropriate considerations
8 for an ultimate resolution and a consent judgment, and
9 then we had a process by which you articulate in some
10 way what those are.
11 That's a separate process that you have
12 in front of you, but I would argue that to protect
13 both the public and an attorney who very well may want
14 to do this and it's the appropriate thing to do, if
15 you hold him to these standards, you are ultimately
16 going to force, you are going to force end results
17 that I don't think necessarily are going to be
18 appropriate end results.
19 Looks like Mark is ready to take me on.
20 MR. ARMITAGE: You really gave me a good
21 entree there. Holding to the standards is not -- that
22 reminds me to rebut something Bob said, that it's a
23 reason to deviate in the state and federal courts,
24 and, yes, it is. No one is saying that there is no
25 distinction.

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1 But a hearing panel -- I will give you the
2 practical application. A hearing panel has an
3 obligation and a duty imposed by the Court Rules to
4 approve the stipulations before them. Are they to be
5 blindfolded and just told to sign and shut up and
6 approve this. I don't see what function they serve.
7 These people volunteer lots of time. They
8 are familiar with the case law. The case law actually
9 dovetails with the standards. It's not quite as bad
10 as the sentencing guideline.
11 I was not initially a fan of the standards,
12 because I thought they were so general, but as we have
13 been ordered to use them and have been using them, you
14 find that the generality has some value in that it
15 let's our common law fit within it in cases that are
16 based on individual factors within it.
17 So you have got a hearing panel deciding to
18 approve or not approve a stipulated disposition, a
19 consent judgment, and one of the legitimate factors is
20 that this is consent and that the person is
21 cooperating and coming forward.
22 I don't know how, as a practical matter, you
23 are going to erase the panel's memory and make them
24 disregard the standards and other case law, and they
25 are going to look at it and say why is this out of

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1 whack, and it's going to have to be explained to them
2 anyway.
3 I think the most important thing is that it
4 really would be anomalous to have the smallest sliver
5 that gets the most scrutiny, argument to three peers
6 and tried by professionals, have that held accountable
7 by some rigorous standards and then everything else is
8 subject only to the Grievance Administrator's
9 discretion whether it's probation, admonition, and
10 then now consent judgment, which are initiated by a
11 formal public proceeding. It's by formal complaint,
12 so I am confused about what the role of the panel
13 would be if they didn't apply some sort of guidelines
14 to start with and then deviate as appropriate.
15 CHAIRPERSON JAMIESON: Any further
16 discussion?
17 MR. ROMANO: Vince Romano, 3rd circuit. Can
18 a hearing panel reject a finding?
19 MR. ARMITAGE: Yes.
20 MR. VANBOLT: Yes.
21 MR. ROMANO: So if it's a consent judgment,
22 can the hearing panel still reject it?
23 MR. VANBOLT: Yes. It must be accepted or
24 rejected by the panel. If the panel rejects, then it
25 goes to a new panel for a new hearing, there is no

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1 mention of the agreement, it just starts from scratch.
2 Typically what happens before that, and I
3 will say that probably 90, 95 percent of the
4 stipulations are, in fact, approved, maybe higher than
5 that, and I think it would be disingenuous to say that
6 the attitude is not if it's good enough for the
7 prosecutor, it must be good enough for us, and they
8 are approved.
9 Before panels just outright reject, what
10 generally happens is the panel expresses to the
11 parties where their concern lies. We need a little
12 more information about this, what really happened, was
13 anybody hurt, has there been restitution made, what
14 does the client think, those kinds of questions, and
15 in most cases, 99 percent of the time, the question is
16 answered, the panel says, okay, we understand now, and
17 then it's approved. But, yes, it can be rejected.
18 MR. ROMANO: Second question, is the hearing
19 panel able to question the Grievance Commission staff
20 as to a possible deviation from a standard?
21 MR. AGACINSKI: Yes, yes, and if we don't
22 want to give the answer, this is one of those answers,
23 then they are free to reject our consent judgment.
24 MR. ROMANO: Thank you.
25 MR. VANBOLT: It's actually consent

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1 stipulation, not a judgment. It doesn't become a
2 judgment until the panel says it's a judgment.
3 MR. ROMANO: Thank you.
4 JUDGE KENT: Wally Kent, 54th circuit. Very
5 simply put, so that there is no question, which of the
6 alternatives allows the hearing panel more discretion?
7 MR. AGACINSKI: Neither. One gives the
8 Grievance Administrator more discretion, but it does
9 not affect the hearing panel.
10 MR. VANBOLT: Arguably, including consent
11 disciplines within the standards gives the panel more
12 information, but it doesn't affect their discretion.
13 JUDGE KENT: Which one would affect the
14 Grievance Administrator's discretion then, in what
15 fashion? Which one gives the administrator more
16 discretion?
17 MR. AGACINSKI: (b).
18 CHAIRPERSON JAMIESON: Any further
19 discussion? Seeing none, we will call the vote.
20 All those in favor of (a), please say aye.
21 All those opposed.
22 I need the ayes to stand to see whether or
23 not we have enough for a minority opinion.
24 We don't have enough. Thank you very much.
25 JUDGE SCHNELZ: He was shocked by the result.

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1 MR. BERRY: I don't know if it's good news or
2 bad, but I am fine. Thank you.
3 CHAIRPERSON JAMIESON: All those in favor of
4 (b), please say aye.
5 And opposed.
6 I think we have to -- we are going to have to
7 do a count. I assume you did not vote for both.
8 All those who said aye to (a), please stand.
9 I don't know the number. I think it's a
10 split. Then you are saying for (b) just have them
11 stand in favor of (b). I stand corrected, no
12 minority, okay.
13 So (b) passes.
14 Next up is standards 2.6, admonition. I will
15 entertain a motion with regard to standard 2.6.
16 VOICE: So moved.
17 CHAIRPERSON JAMIESON: Do I hear a second?
18 VOICE: Second.
19 CHAIRPERSON JAMIESON: Thank you. Any
20 discussion? Bob.
21 MR. AGACINSKI: I recommend a no vote on this
22 because it is not relevant to the state of Michigan.
23 Other states -- and our Judicial Tenure Commission has
24 a unified process where you prosecute and you try the
25 case all in private, and so you can have private

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1 admonishments. In Michigan you can't have a private
2 admonishment unless -- you just can't have it, because
3 once you issue a formal complaint it's a public
4 matter, it's on the record and everybody can learn
5 about the fact there was a prosecution. So it's not
6 an option that's available to hearing panels.
7 Also, this makes an admonishment a
8 discipline, whereas in Michigan admonishments are not
9 considered discipline. They are considered a warning
10 or an agreement between the parties to close the case
11 with an understanding that if you are in trouble again
12 it can be used in aggravating your punishment the next
13 time.
14 So this really does have relevance in some
15 states, and I think the Supreme Court saw a lot of
16 states had it, but I don't think it can work in
17 Michigan where we have the separate systems and a
18 public hearing process.
19 MR. VANBOLT: This is an easy one, the
20 Attorney Discipline Board agrees a hundred percent
21 with that. Michigan does not recognize public
22 disciplines; therefore, that language was stricken --
23 private disciplines, by including admonition;
24 therefore, the Boards's proposal to the court just
25 struck that language defining admonition.

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1 For some reason or another it reappeared in
2 the version published by the court to the extent that
3 it suggests a change in the rules allowing panels or
4 the Board to admonish people. We don't believe that
5 that is the case.
6 MR. CAMPBELL: Ditto.
7 MR. LABRE: Bill LaBre, 43rd circuit, Cass
8 County. Our county is a border county, and I practice
9 in both Michigan and Indiana, about a third in Indiana
10 and two-thirds here.
11 Indiana has private reprimands or
12 admonitions. You have, if you are going to have a
13 disciplinary proceeding, you are going to have a
14 hearing before a hearing officer, it's going to be on
15 the record, but this becomes a level of discipline,
16 whether by consent or whether by an actual
17 recommendation of the hearing officer.
18 I think it is an excellent quiver to have in
19 the arrows when you have very minor cases, and I think
20 we ought to formalize it, and if we formalize it in
21 this backward way, better to formalize it
22 somehow than not have the arrow at all. So I
23 recommend we approve it.
24 CHAIRPERSON JAMIESON: So you spoke in
25 support of (a)?

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1 MR. LABRE: Correct.
2 CHAIRPERSON JAMIESON: Thank you. Any
3 further discussion? Seeing none, we will vote on (a).
4 All those if favor of (a), say aye.
5 All those opposed.
6 I need the ayes to stand just up to see if we
7 have a minority. We don't have enough. Thank you.
8 And then with regard to (b), all those in
9 favor.
10 There is our majority.
11 Next is use of interference or potential
12 interference with the legal proceeding or the outcome
13 of the legal proceeding within the standards, which is
14 6.2 and 6.3.
15 I will entertain a motion with regard to
16 these proposals.
17 VOICE: So moved.
18 CHAIRPERSON JAMIESON: Thank you. Second?
19 VOICE: Support.
20 CHAIRPERSON JAMIESON: Thank you. Any
21 discussion?
22 MR. CAMPBELL: My only comment is that after
23 reading the court proposed rule, I went in and tweaked
24 a little bit from what I had originally proposed.
25 It's on pages, I think, 11, 12 and 13 of what is your

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1 attachment to your agenda today, attachment 14,
2 supplemental report. When you actually get into the
3 report itself I identify some additional language
4 changes. I don't know that there is much of a
5 distinction that amounts to a difference when you got
6 done comparing that to the ADB. Maybe it's different
7 routes to the same result. I do think they are
8 proposals that need a little bit more tweaking than
9 what has been done already.
10 MR. ARMITAGE: Well, this kind of relates
11 back to the injury issue. The verbal formula for
12 injury in these particular offenses is potentially
13 serious or significant interference with a legal
14 proceeding or the outcome of a legal proceeding.
15 Again, we did follow the ABA here, thought it was
16 relevant consideration to be considered in the initial
17 pass at setting the ranges of discipline, and so I
18 believe the (a)'s are the ADB positions.
19 CHAIRPERSON JAMIESON: Any further
20 discussion? Seeing none, then we will take the first
21 portion of this proposal for vote.
22 All those in favor of (a), please say aye.
23 All those opposed.
24 Stand up for ayes, please. Ayes sit down.
25 Now I need the noes. Okay. Thank you.

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1 Now is the second proposal. It has to do
2 with -- the result was yes (a), that was the majority.
3 No minority.
4 Next is with regard to suspending, and all
5 those in favor of (a), please say aye.
6 All those opposed.
7 MR. VANBOLT: In this general section under
8 6.2 and 3 there is three choices, one for disbarment,
9 one for reprimand, one for suspension.
10 CHAIRPERSON JAMIESON: Actually three
11 different proposals. Not three choices, three
12 proposals.
13 MR. VANBOLT: Three proposals, and each one
14 there is an (a) and a (b). In each one the (a)
15 version is the Board/ABA version for the reasons that
16 Mark stated dealing with considering certain level of
17 harm to the proceeding before imposing that level of
18 discipline, so it's essentially the same question
19 repeated for three levels of discipline.
20 CHAIRPERSON JAMIESON: The first one deals
21 with disbarment, the second one deals with suspension,
22 and the third deals with reprimand.
23 MR. CAMPBELL: The only thing that I would
24 add is, again, under 6.1 and 6.3 you have a case where
25 the ADB, following the ABA, defines a section for

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1 something that is not a violation in Michigan, and
2 Michigan only punishes lawyers for a knowing violation
3 of the Court Rule, they have a sanction for a
4 negligent violation of the Court Rule. Can't happen
5 in Michigan, so why have a standard.
6 CHAIRPERSON JAMIESON: Any further
7 discussion? Now we will put to vote.
8 All those in favor of (a), say sye.
9 Though opposed.
10 I just need the nays to stand up to make sure
11 we don't have enough for minority. Thank you.
12 We need all those who said yea to option (a)
13 for the second portion to stand. We need numbers,
14 because those people who didn't vote in favor of (a)
15 could vote in favor of (b), and you could end up with
16 a minority opinion that way.
17 So could you please stand up if you voted in
18 favor of (a). We need the tellers. And, again, you
19 can't vote for both, so if you are voting for (a) now,
20 then when we vote for (b), you can't vote for (b).
21 Okay. You can be seated.
22 All those in favor of (b), please stand. Is
23 everybody in favor of (b) standing?
24 We don't have enough for a minority opinion.
25 Thank you.

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1 And then the third portion of this proposal
2 is (a) or (b), yes or no with regard to the reprimand
3 portion of this.
4 All those in favor of the language that is
5 before you right here say aye.
6 Any opposed.
7 Yes has it.
8 And now we move on -- oh, actually at this
9 point we would move on to 4.1. I think everybody
10 needs a break just for maybe ten minutes. We have
11 snacks out there if you want to get them. You want to
12 keep going? You know what, we have got recorders here
13 who have to be able to take just a rest break for a
14 comfort break, so we are just going to take it for
15 five minutes, so 3:15 we resume. You don't want to go
16 anywhere, you don't have to.
17 (Break was taken.)
18 CHAIRPERSON JAMIESON: If we can reconvene.
19 I understand that there was some confusion with regard
20 to the last proposal.
21 VOICE: Not the last one.
22 CHAIRPERSON JAMIESON: If someone could come
23 to the mike and we can address this.
24 MS. HAROUTUNIAN: Susan Licata Haroutunian,
25 3rd circuit. The use of the reprimand --

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1 CHAIRPERSON JAMIESON: Can you refer to the
2 specific standard that you are talking about.
3 MS. HAROUTUNIAN: I believe it is --
4 CHAIRPERSON JAMIESON: The 6.2, 6.3?
5 MS. LICATA: No, it 4.6, 6.1 and 8.0.
6 CHAIRPERSON JAMIESON: Use of reprimand within
7 the standards.
8 MS. LICATA: Yes. I voted with the majority.
9 There is some confusion among some of us who voted for
10 the majority as to exactly why it is we are
11 reprimanding for negligence, and if we could have an
12 explanation and reconsideration is appropriate.
13 CHAIRPERSON JAMIESON: You have to move for
14 reconsideration.
15 MS. LICATA: I would move for
16 reconsideration.
17 CHAIRPERSON JAMIESON: It requires a second.
18 VOICE: Second.
19 CHAIRPERSON JAMIESON: It is debatable, so I
20 ask for discussion.
21 Seeing none, then all in favor of the
22 reconsideration say aye.
23 Those opposed.
24 Thank you, Susan.
25 I believe that we left off at standard 4.1,

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1 failure to preserve property held in trust. I will
2 entertain a motion with regard to that.
3 VOICE: So moved.
4 CHAIRPERSON JAMIESON: Thank you. Second.
5 VOICE: Support.
6 CHAIRPERSON JAMIESON: Any discussion?
7 MR. ARMITAGE: This is a central type of
8 misconduct dealing with misappropriation. The ADB has
9 proposed a draft that is represented in your options
10 as (b) under both choices, not both choices but both
11 proposals before you. It helps immeasurably to
12 distinguish the various types of misappropriation.
13 The published proposal uses one term
14 throughout, and that is failure to preserve property
15 held in trust. This gets back to the distinction
16 between the rules and the standards and the fact that
17 the language doesn't always match. It shouldn't
18 match, because you are at a second a stage here, and
19 once you pass the floor of misconduct, you want to
20 help sort out really, really bad to understandably,
21 you know, you crossed the line. You want the least
22 egregious to the worst, so -- that was not well
23 stated. But the point is this helps sort out the
24 different levels of misconduct, and we urge (b) be
25 adopted, the ADB proposal.

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1 MR. CAMPBELL: The effect of what my language
2 proposal does is under the ABA version they divided
3 how you treated property, whether it was client
4 property or somebody else's. Client property was
5 treated under 4.1, and somebody else's property was
6 treated under 5.1, a different standard.
7 There was significance to that, because in
8 the ABA standards a certain level of mitigation needed
9 to be present for bringing down a presumptive
10 disbarment for taking client funds that was not there
11 for taking other people's money. In other words, it
12 was less mitigation at least in the commentary that
13 seemed to be required.
14 My proposal is consistent with 1.15 in the
15 Michigan Rules of Professional Conduct. Michigan Rule
16 1.15 covers both the property of clients and third
17 persons. It makes no distinction.
18 My proposal under 4.1, likewise, makes no
19 distinction in the level of mitigation. The
20 substantial litigation that needs to be present to
21 decrease the presumed level of sanction is likewise
22 for taking somebody else's money, the same as it would
23 be for taking the client's money.
24 That's really what, in voting in favor of (a)
25 what you are saying is just as the rule combines this

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1 misconduct so too the sanctions should combine and
2 address this misconduct. If you vote in favor of (b),
3 you are voting for a bifurcation of that consistent
4 with what it was under the old code but not consistent
5 with what it is under the rule.
6 MR. VANBOLT: I can't tell you exactly how
7 many angels dance on the head of this pin, but the
8 reason that the ABA standards and the modification
9 proposed by the ADB putting these two types of
10 misappropriation in two different places is for
11 nothing, it's no more complicated than the fact that
12 under the ABA standards there are big categories
13 dealing with violations. So duties to a client are in
14 one section, duties to third persons are in another
15 section.
16 That is in a nutshell the reason that
17 misappropriation of client funds is under the section
18 called violations of duties to clients, and
19 misappropriation of other people's money is under the
20 5.0 series, which deals with personal integrity.
21 I can tell you that certainly neither the
22 panels, the commission, the board, the Supreme Court,
23 as far as I know, has ever said anywhere that it is
24 less egregious to steel somebody else's money than
25 your client's money. Stealing is stealing, and I

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1 think the system treats it that way. This really is
2 not a big deal in terms of where the misappropriation
3 is put. It really is no more complicated than client
4 money misappropriation comes under duties to client
5 section. The offenses should essentially be the same.
6 There is the other issue, though, that the ABA
7 standards and, thus, the ADB proposal refers to one
8 particular phrase, which is the knowing conversion of
9 property, client property or client funds, knowing
10 conversion as opposed to failure to hold in trust.
11 Failure to hold in trust is not a phrase which appears
12 either in our rules or, for the most part, in our case
13 law, which is one of the reasons that the Board is not
14 a big fan of jumping over that cliff and using new
15 language that they have into the used before.
16 CHAIRPERSON JAMIESON: Any further
17 discussion?
18 MS. POHLY: Linda Pohly from the 7th circuit,
19 Genesee County.
20 Mr. Campbell, I do not know whether a failure
21 to make payroll tax deposits by an employing lawyer
22 would be regarded as a failure to preserve property
23 and trust resulting in disbarment. Would it be a
24 failure to hold property in trust resulting in a
25 suspension, or would it be neither?

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1 MR. CAMPBELL: You are indicating this is
2 money that belongs to the law firm that they are
3 paying --
4 MS. POHLY: Money that is withheld from
5 employee paychecks which should be deposited into the
6 payroll tax deposit system and it's not so deposited.
7 MR. CAMPBELL: So that would be money
8 belonging either to the government or --
9 MS. POHLY: Correct, or the employee.
10 MR. CAMPBELL: Then to a third person?
11 MS. POHLY: Yes.
12 MR. CAMPBELL: I would have to look at Rule
13 1.15 to see how it treats monies. I think it's monies
14 that a lawyer comes into possession concerning
15 representation. If that limitation isn't there, then
16 the scenario you have described may apply. Otherwise
17 it seems to me that it wouldn't necessarily be monies
18 held in trust as identified here.
19 In terms of the ADB's version it wouldn't be
20 treated under 4.1. It would be treated under 5.1,
21 which talks about criminal activity, taking
22 essentially an embezzlement kind of a theory, and if
23 that's what you have, it may be treated under there.
24 MS. POHLY: So as I understand your answer,
25 if 1.15 relates solely to representation, then your

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1 proposal would not govern a failure to make payroll
2 tax deposits?
3 MR. CAMPBELL: Within my proposal I identify
4 the rules, and the court also within their proposal
5 identify the rules that apply within each section. If
6 what you have described is not a violation of 1.15, it
7 would not be treated under 4.1.
8 MR. VANBOLT: Can I just say, take a look at
9 Grievance Administrator versus Nichols. In my former
10 life when I sat at that end of the table as a
11 discipline prosecutor, I tried that case. The Supreme
12 Court declined to increase discipline to a disbarment,
13 maintained the level of suspension, but Justice
14 Cavanagh actually in oral arguments asked me that
15 question, why is this not like stealing client's
16 money, and I agreed with him that it was.
17 CHAIRPERSON JAMIESON: Any further
18 discussion?
19 MR. VANBOLT: That was when I was
20 prosecuting.
21 CHAIRPERSON JAMIESON: Any further
22 discussion?
23 Seeing none, then this has two parts. The
24 first part is whether standard 4.1 should provide that
25 disbarment is generally appropriate when a lawyer

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1 knowingly, and then you have option (a) and option
2 (b).
3 All those in favor of option (a) please say
4 aye.
5 All those opposed.
6 All those in favor of (a), can you please
7 stand just to see if we have enough for a minority.
8 No. Thank you very much.
9 All those in favor of (b), please say aye.
10 All those opposed.
11 Okay. (b) passes as the majority. No
12 minority.
13 The next proposal, the next part is standard
14 4.1 should provide that suspension is generally
15 appropriate when a lawyer.
16 All those in favor of (a), please say aye.
17 All those opposed.
18 VOICE: Can we have discussion?
19 CHAIRPERSON JAMIESON: I am sorry, we already
20 had discussion. We could open it up for discussion
21 with regard to that second portion of the proposal.
22 We are still under standard 4.1. We just
23 dealt with the first portion regarding disbarment, and
24 now we are talking about suspension.
25 MS. DIEHL: Nancy Diehl, 3rd circuit. Could

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1 someone address the issue of knowingly or negligently,
2 and we have had that negligent issue on a number of
3 other proposals about why in the same, whether you
4 would be given the same discipline, suspension,
5 whether you were negligent or whether you knowingly
6 did something.
7 MR. VANBOLT: This rule is actually somewhat
8 different than the other ones, and that is because the
9 system in general, and I think most systems do look at
10 money offenses differently, embezzlement, knowing
11 conversion, intentional conversion, whatever you want
12 to call it, is seen as sort of the capital offense.
13 You will notice that in this particular rule,
14 rather than following exactly the same hierarchy of
15 intentional generally means disbarment, knowing
16 generally means reprimand, or a suspension, negligent
17 conduct generally means reprimand, in this particular
18 type of misconduct everything is ratcheted up just a
19 little bit so that the knowing conversion is
20 disbarment, the -- I am sorry, the intentional
21 conversion or knowing conversion is disbarment, the
22 knowing or negligent dealing with client property is
23 suspension, and then that's one which does say that
24 reprimand is generally appropriate really only when
25 there is an isolated incidence of simple neglect.

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1 This is not one of the cases that Don
2 mentioned, Mr. Campbell mentioned, where there is this
3 question of are we somehow sanctioning negligent
4 conduct, which really isn't misconduct, because when
5 you deal improperly with client funds that's a per se
6 offense under the Michigan case law.
7 If you negligently allow your trust account
8 to be short by $5 for a day that's misappropriation.
9 It may not result in suspension or disbarment but it's
10 still misappropriation.
11 So that's why this rule is calibrated just a
12 little bit different, so either knowing or negligent
13 mishandling of your client money is more likely than
14 not to result in your suspension.
15 MR. CAMPBELL: I agree with John and the
16 reason for the language that I propose today is
17 because it takes out any question as stated by. It
18 just says if you fail to do it. It is a strict
19 liability offense in dealing with money, and that's
20 why the wording was phrased. I think the wording
21 knowingly or negligently is a little bit cumbersome
22 and directs folks to a state of mind that isn't at all
23 an issue or an element of any offense with regard to
24 the money.
25 You see the ADB's proposal here does actually

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1 differ slightly from the original ABA proposal and had
2 a different sort of take on it, but I think the
3 difference is as John has described.
4 CHAIRPERSON JAMIESON: Any further
5 discussion? Then we are going to vote on the second
6 portion of 4.1, whether or not 4.1 should provide that
7 suspension is generally appropriate when a lawyer.
8 All those in favor of (a) please say aye.
9 All those opposed.
10 Could I just have the ayes stand up to see if
11 we have enough for a minority. Thank you. That's
12 enough for a minority opinion.
13 All those in favor of (b), please say aye.
14 Those opposed.
15 And can I get a count on the ayes for the
16 (b), please, just so we have a number. All those in
17 favor of (b), if you could please stand. We need the
18 tellers, please.
19 I think we are okay with just saying it's a
20 majority. Go ahead and sit down.
21 Moving on to standard 4.3 with regard to
22 failure to avoid conflicts of interest. I will
23 entertain a motion with regard to this proposal.
24 VOICE: So moved.
25 CHAIRPERSON JAMIESON: Thank you. Second?

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1 VOICE: Second.
2 CHAIRPERSON JAMIESON: Any discussion?
3 MR. VANBOLT: I just want to make one comment
4 here. The two questions that you have in front of you
5 on the suspension and reprimand, the (a) is generally
6 the proposal published for comment by the court and
7 the (b) is almost the Discipline Board's proposal.
8 The critical language that's missing from the material
9 in front of you is that what the Board proposed, which
10 is actually identical to the ABA standard, is
11 additional language that says, in the case of a
12 suspension, and causes injury or potential injury to a
13 client. In the case of reprimand it will adversely
14 affect another client and causes injury or potential
15 injury to a client.
16 This is consistent with what we have
17 discussed before, which is the Board's approach is
18 that degree of injury is part of the initial sorting
19 out process.
20 So in the language that appears in your
21 material, that language dealing with injury is left
22 out, so I can't say to you that (b) is the Board, the
23 Board's proposal. The Board's proposal is (b) plus
24 injury.
25 MR. CAMPBELL: I don't have the court's

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1 proposal in front of me, but I see at page six under
2 Section 14 that my original proposal for suspension
3 under 4.32, which is where this language is taken
4 from, has an (a) and a (b) to it, so what you are
5 voting on is really just one portion of what I
6 proposed, and my recollection is that both my (a) and (b)
7 appear as an alternative proposal in the court's
8 proposed language. So you can take a look there.
9 My (a) reads, A lawyer, a suspension is
10 generally appropriate when a lawyer knows of a
11 conflict of interest and fails to obtain consent from
12 the present or former client after consultation. And
13 so that was in addition to the information that was in
14 the (a), so it wouldn't stand by its own even by my
15 own version, if you will.
16 CHAIRPERSON JAMIESON: Thank you. Just so
17 that we can have option (b) accurately reflect the
18 Attorney Discipline Board position, John, could you
19 please give us the specific language that would be
20 added to the end of that.
21 MR. VANBOLT: Yes. In the ABA standards on
22 the board's proposal to the court the additional
23 language after --
24 CHAIRPERSON JAMIESON: The word effect?
25 MR. VANBOLT: Yeah. (B) is actually, it's

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1 almost like a paraphrase, because the actual rule, the
2 actual standard is effect of that conflict, comma, and
3 causes injury or potential injury to a client. The
4 key language though that's missing in both is the
5 phrase "and causes injury or potential injury to a
6 client."
7 CHAIRPERSON JAMIESON: I will entertain a
8 motion to adjust the language in (b) so that it
9 accurately reflects the Attorney Discipline Board.
10 THE WITNESS: So moved.
11 CHAIRPERSON JAMIESON: Second?
12 VOICE: Support.
13 CHAIRPERSON JAMIESON: Any discussion?
14 MR. VANBOLT: And that's not just pointing
15 out that there is some missing language. I think you
16 will see that if that language is put in there that
17 there then does become potentially a striking
18 difference between (a) and (b), because, of course, (a)
19 results in suspension regardless of any degree of harm
20 or injury, whereas (b) does require that.
21 MR. CAMPBELL: If I may follow that up. It
22 also displays some of the problems with both the ABA
23 and the ADB approach. If you put that language in and
24 you have a case come before you, what happens where
25 you have all of the elements under when what is here

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1 as proposal (b) and you have no injury.
2 And if you take your eyes down to the next
3 (b) provision, it tells you what to do where there is
4 a negligent problem with an injury, but it doesn't
5 tell you what to do when you have knowledge but no
6 injury, and there really is no direction to the
7 hearing panel, there is no anticipation for the
8 parties, and there is no basis for review for an
9 appellate body.
10 And that's one of the reasons why the court
11 on this provision and others put injury into the
12 aggravation/mitigation section, because when it comes
13 to a conflict of interest, the issue isn't injury.
14 The issue is whether you had the conflict. The
15 presence or absence of the injury is important in
16 calculating what the ultimate sanction will be, but it
17 isn't for determining which chute you fall into or
18 fall out of on the standards.
19 So John is right, it does change the rule,
20 but it doesn't necessarily change it favorably for a
21 practitioner trying to understand and counsel the
22 client for a lawyer who faces the prospect of having
23 to figure out what the sanction is for a hearing panel
24 that has to interpret these sanctions or for a
25 reviewing appellate body, whether it be the Board or

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1 the court deciding whether the initial decisions on
2 these standards were correct.
3 In fact, what it means is most of these
4 decisions will be made outside the standards because
5 it's yet another factor that isn't factored in in
6 terms of all of its various forms that may come
7 forward.
8 CHAIRPERSON JAMIESON: I have been corrected
9 that we didn't need a motion. We have just amended
10 the language here, edited it so that it accurately
11 reflects.
12 MR. LESPERANCE: Kevin Lesperance from the
13 17th. I may have some concerns with some of these
14 proposals, and I am not even sure if I am on the right
15 rule, so I think I am going to have to request
16 Mr. Allen's assistance.
17 But a number of the attorneys in my firm went
18 to local Bar meetings, and they were given a copy of
19 your article, Perfect Storm, and I do primarily
20 medical malpractice defense, I represent a lot of
21 hospitals and doctors, and I believe that this may be
22 the rule that we are talking about, but in your
23 article you mention that consents must be signed and
24 confirmed in writing, and I don't see that that's up
25 on the agenda today. Today is my first meeting, so I

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1 don't know if that's something that's been decided.
2 But the problem that we saw is that we
3 represent a lot of hospitals and then we represent a
4 lot of doctors and some cases we will represent one,
5 some cases we will represent the other. It would seem
6 to be pretty burdensome to us to have to not only
7 disclose a potential minor conflict, and they were
8 also worried from some of the materials that we have
9 reviewed that there was strict liability even if there
10 is no injury, and I don't see that in this rule, so
11 maybe it's not even on the table today, but we were
12 very concerned, because obviously in some cases we get
13 the doctor and the hospital is the co-defendant.
14 There may technically be a conflict there, even though
15 it's never going to hurt them, and that's where my
16 concern is. So, John, I don't know if I am off base
17 or what.
18 MR. ALLEN: Not at all, and the confusion is
19 understandable. First of all, understand there is a
20 difference between the standards for sanctions and the
21 Rules of Professional Conduct. They are aren't the
22 same thing. And it is true that if adopted as
23 proposed by the Supreme Court a waiver or consent to a
24 conflict would have to be confirmed in writing. Not
25 signed, but confirmed in writing, and if it was not

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1 confirmed in writing, and the way I read the rule,
2 even if there was actual consent, even if there was no
3 damage, it would then be an invalid waiver and consent
4 and, therefore, it would be a conflict.
5 At that point standard 4.3 would apply, and I
6 think to understand how it works, if you turn in your
7 song books to Chapter 13, which is the beautiful ADB
8 report that John VanBolt takes credit for, but I think
9 Mark Armitage did. If you look at it on the computer
10 it's technicolor and cinemascope, it's in color.
11 But if you look at that in the first page of
12 4.3 you will see that the columns for both the Supreme
13 Court proposal in the left-hand column and the
14 alternative proposal, that's Mr. Campbell's proposal
15 on the right, start off with a paragraph that cites a
16 number of MRPC numbers. Those are the rules for which
17 this standard would apply.
18 So I think if I can take the context of your
19 question, though I am not implying anything about you
20 or your firm, if you were to do, if all the rules are
21 adopted the way they are proposed, including the
22 confirmed in writing requirement, and if you were to
23 represent both the doctor and a hospital who might be
24 potentially adverse, you disclose to them, they
25 consented there was no damage, but when it was all

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1 said and done you had not confirmed it in writing,
2 then I think you would be under this standard, because
3 you would not have the informed consent that's
4 required by the initial paragraph of 4.31, and I think
5 you, actually I think when you read through it if you
6 knew you hadn't confirmed it in writing, then you
7 would be under 4.31(b) which means you would be
8 eligible at your first offense for disbarment.
9 CHAIRPERSON JAMIESON: For further
10 clarification, being a fairly new Assembly member,
11 back in November of 2003 the Assembly debated the
12 rules, and I am recalling, and we believe that the
13 Assembly took a position already with regard to the
14 informed consent and in writing requirements, and we
15 were opposed to those and communicated that to the
16 Supreme Court, and what the Supreme Court has said
17 with regard to those two aspects of the rule, the
18 informed consent and in writing requirement, is they
19 would like to have more commentary from lawyers across
20 the state on that because they haven't necessarily
21 made their mind up on that.
22 So I would encourage you with regard to any
23 concerns about those aspects of the rule, the Supreme
24 Court has asked for commentary, that people who are
25 interested submit commentary directly to the Supreme

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1 Court.
2 Any further discussion with regard to 4.3?
3 MR. ARMITAGE: Just one critical point, that
4 a vote for (a) here would, I think, because it doesn't
5 reference injury, be inconsistent with your earlier
6 vote to endorse the consideration of injury in the
7 initial sorting process. That's why the Board put it
8 in (b). That's all.
9 CHAIRPERSON JAMIESON: Any further
10 discussion?
11 MR. CAMPBELL: Well, that's cured by just
12 throwing that on the end of (a), pursuant to that
13 vote.
14 CHAIRPERSON JAMIESON: Don, I didn't hear
15 you. I am sorry.
16 MR. CAMPBELL: Actually another way to look
17 at that is that John's addition of the language here
18 is superfluous in light of the earlier vote, that
19 everything here you must presume is subject to that
20 earlier vote, so (a) would just simply put at the end
21 of it and according to injury, or whatever the
22 phraseology is.
23 As I understood Mark, he was saying you would
24 be inconsistent in voting for 4.3 (a) because it
25 didn't have the injury language. That would be

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1 inaccurate. You would just add the injury language,
2 which doesn't change 4.3 (a). You would just add
3 that to -- take in out of the mitigation/aggravation.
4 MR. ARMITAGE: If you add it it won't be
5 inconsistent, but then you will have the problem that
6 John Allen talked about focusing on actual violation
7 of the rule, which is like failure to get the
8 confirmation in writing and so forth.
9 The ADB approach focuses on the disclosures
10 you actually make.
11 CHAIRPERSON JAMIESON: Any further
12 discussion? Then we are going to vote on the first
13 portion of the 4.3, which is standard 4.3 should
14 provide for suspension when.
15 All those in favor of (a), please say aye.
16 All those opposed.
17 All those in favor of (b), say aye.
18 All those opposed.
19 I didn't hear enough ayes to (a) for a
20 minority, so we have a majority opinion with regard to
21 (b).
22 The second portion of this proposal is
23 standard 4.3 should provide for reprimand when.
24 All those if favor of (a), please say aye.
25 Those opposed.

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1 To be perfectly clear, we had discussion for
2 both of these. Does anybody want discussion with
3 regard to the second portion of this? I don't want to
4 cut anybody off.
5 So we had not a majority in favor of (a).
6 MR. CRAMPTON: Jeff Crampton from the 17th
7 circuit. Are we adding the same language on the
8 bottom of (b) on this one?
9 CHAIRPERSON JAMIESON: Thank you. John, can
10 you advise us what the language would be at the end of
11 (b) for the second part of this that would make it
12 accurately reflect the ADB position with regard to a
13 lawyer is negligent in determining whether the
14 representation of a client may adversely affect
15 another client or be materially affected by the
16 lawyer's own interests, and is there any injury
17 language that's supposed to be at the end of that.
18 MR. VANBOLT: I am not sure I can answer
19 that. What I understood, the point of the choice was,
20 one was the Supreme Court's versions and one was the
21 Board's version. I spoke to the Board's version.
22 If Mr. Campbell is correct, if the previous
23 vote to add injury is part of the process, then I
24 guess you would add identical language to both
25 proposals.

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1 CHAIRPERSON JAMIESON: So then it's kind of
2 incorporated by our position taken earlier today with
3 regard to injury. So all those in favor of --
4 VOICE: Point of order.
5 MR. MORGAN: Can I bear your indulgence for a
6 second. Don Morgan, 3rd circuit. John, if you are
7 saying that we should do it under the first action we
8 took on this page, add that and causes injury and
9 potential injury to a client, are we also saying we
10 should do it for (b), because that's what I heard, and
11 when I started coming up here it wasn't there on the
12 board.
13 So now is this a friendly amendment so that
14 it is on the board and that's what we are voting on?
15 CHAIRPERSON JAMIESON: It's actually not an
16 amendment; it would be a correction.
17 MR. MORGAN: I understand. It's a
18 supplement --
19 CHAIRPERSON JAMIESON: Absolutely.
20 MR. MORGAN: -- to what was the prior action.
21 Thank you.
22 CHAIRPERSON JAMIESON: Thank you.
23 MS. STANGL: Terri Stangl from the 10th
24 circuit. A related correction. In the draft I am
25 looking at, which says 4.33 under the ADB, there is

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1 another phrase which is or whether the representation
2 will adversely affect another client. So if we are
3 going to be looking at the entire ADB proposal, I
4 think that language needs to be added as well, if
5 that's the intention of what we are correcting.
6 MR. VANBOLT: She is correct. My point was
7 just, rather than paraphrase, that is the actual
8 language.
9 CHAIRPERSON JAMIESON: Let's just type it up
10 there for you so everybody can see it.
11 John, is that the exact language there?
12 MR. VANBOLT: Correct.
13 CHAIRPERSON JAMIESON: Nancy, you would take
14 out reprimand is generally appropriate when, so that
15 after option (b) would be "a lawyer is negligent."
16 Then that's the actual language.
17 MR. BUCHANAN: Rob Buchanan from the 17th
18 circuit. I think part of the problem of taking that
19 out is if you look at the paragraph that defines (a)
20 and (b), it doesn't say generally appropriate. It's
21 more -- if you go up and you look at it, it doesn't
22 say generally appropriate. Like in the first one it
23 says, I think it says disbarment is generally
24 appropriate. Here it just says should provide for
25 reprimand, but the language that you just had her take

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1 out talks about is generally appropriate. Maybe I am
2 mistaken about that.
3 But this is now a mandatory, a mandatory --
4 if you vote on (b) it's now mandatory that there be
5 reprimand. I think the language as John noted was
6 generally.
7 CHAIRPERSON JAMIESON: Thank you. Then let's
8 stick that in there. Nancy, insert before "a lawyer is
9 negligent" "reprimand is generally appropriate when."
10 I think that's the better place to put it.
11 Do we have it correct now?
12 MR. VANBOLT: Your point is well taken.
13 Actually, every single standard, as far as I know,
14 starts with disbarment, reprimand, or suspension is
15 generally appropriate, because the whole point of this
16 is it's not exact until you apply the aggravating and
17 mitigating factors. So you can almost -- actually you
18 can read generally in every single standard, but the
19 only problem we are having here is the difference
20 between a paraphrase and the exact language.
21 CHAIRPERSON JAMIESON: Okay. Any more
22 discussion? This is with regard to the reprimand. We
23 will change the language so it says generally for the
24 first portion regarding suspension so that it's
25 consistent with ADB position.

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1 All those if favor of (a), again, with regard
2 to reprimand.
3 MR. BIEBERICH: Ken Bieberich, 37th circuit.
4 I think to be consistent, we have got to go
5 back to the first one, because that doesn't provide
6 for generally.
7 CHAIRPERSON JAMIESON: We just said that we
8 are going to change that. We will edit it so it
9 accurately reflects the ADB proposal.
10 So with regard to 4.3, should provide for
11 reprimand when.
12 VOICE: Is this (a) or (b)?
13 CHAIRPERSON JAMIESON: (a). Did we vote for
14 (a) already? It went down now. Now we are voting for
15 (b).
16 All those in favor of (b), say aye.
17 All opposed
18 That passes.
19 Next is standard 4.5. There are two
20 different alternatives, lack of competence and
21 charging illegal or clearly excessive fees.
22 I will entertain a motion with regard to this
23 proposal.
24 VOICE: So moved.
25 CHAIRPERSON JAMIESON: Support?

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1 VOICE: Support.
2 CHAIRPERSON JAMIESON: Thank you. Any
3 discussion? Don.
4 MR. CAMPBELL: To be honest, I don't even
5 understand the motion, and I wrote one of the
6 proposals.
7 Essentially what you have here is the -- one
8 of the criticisms of the ABA standards is that it's
9 time bound by those cases that they looked at in
10 establishing them, and one area that was not well
11 covered apparently during the decade or so worth of
12 cases they looked at was illegal or clearly excessive
13 fees, and, in fact, is what the ADB came to define as
14 unreasonable fees under their format of 1.5. And
15 so -- because 1.5 didn't exist, it was, again, under
16 the old code, which was not all that scrupulous as far
17 as fees.
18 Now you have a rule in place addressing fees.
19 How did the folks deal with it when they put together
20 the standards? They stuck it under I think the
21 general standard of 8.0, which is duties to the public
22 or something like that, and what I have done in my
23 version is I created a separate standard for fees,
24 because that's one of the things that have developed
25 under the new ABA rules adopted in Michigan as the

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1 Michigan Rules of Professional Conduct, felt it was
2 important enough, significant enough, and we have
3 already had some comment here about most of the, or
4 many of the complaints to the Grievance Commission
5 have to do with fees, that it is worth its own
6 standard.
7 And so I put together the competency --
8 diligence, competence and communication in one
9 standard, which if you ever have seen, been lucky
10 enough to see an Attorney Grievance Commission
11 complaint, obviously as a member of a hearing panel,
12 not as a respondent, then what you will see is they
13 always join those charges together, so it makes sense
14 to put them all under one standard and then I carved
15 out of that a separate standard of fees, and I
16 renumbered them a little bit.
17 With the court then, when it took a look at
18 it, felt that the issue of competency was not
19 highlighted enough, and if you look at my Section 14
20 here in your materials, I have a discussion under
21 Section 3 of my memorandum, which opens the materials,
22 where I describe my approach to 4.4, 4.5 and why I did
23 what I did and what proposed change, which really only
24 goes to the name of the rule, to highlight the fact
25 that competency is actually covered under 4.5.

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1 The other point to make is that the ABA in
2 Michigan diverged with regard to their rules
3 concerning competency under 1.1. They are very
4 different rules. Again, Michigan took a different
5 approach relative to the treatment of competency.
6 It's not covered at all by the ADB's provision because
7 the ADB follows the ABA standards which talks about
8 ABA language and ABA concerns, and it's different. So
9 that's one of the reasons why I think it needs some
10 adjustments.
11 MR. VANBOLT: I agree entirely with
12 Mr. Campbell about the ABA standards adopted in 1986
13 looking at prior case law, not a lot of cases then on
14 fees. The problem is that in 2005, if we go back and
15 look at 20 years of case law in Michigan, you are
16 still going to find not a lot of cases on fees. There
17 just is not a developed set of cases.
18 I have mentioned in some of the road show
19 presentations, as we have called them, where we have
20 gone to local Bars, that you might want to keep in
21 mind that in Michigan and most states year after year
22 50 percent of the public disciplines are for people
23 who display some sort of neglect, lack of diligence,
24 look of competence. Those three categories combine
25 into a general competence, diligence problem.

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1 Failure to return phone calls will certainly
2 bring you to the attention of the Grievance
3 Commission, but it really has to be pretty much
4 flagrant neglect, abandonment of your caseload before
5 you are brought before the Discipline Board.
6 But that's 50 percent. Fifteen percent are
7 criminal convictions of lawyers, 15 percent are money
8 offenses. That only leaves 20 percent for everything
9 else. The fact is that the Discipline Board system,
10 or the Discipline Board in Michigan does not deal with
11 a lot of competence, or I am sorry, conference cases.
12 We try to deal with competence of ourselves and other
13 lawyers. Conflicts we don't see, money offenses we
14 don't see, confidences and secrets we don't see. So,
15 frankly, no, the Board did not carve out a new
16 standard for fees because there is no more case law
17 available to us now than there was to the ABA in 1986.
18 Mr. Campbell, I don't fault him for that. I
19 think there should be, as the case law develops, there
20 clearly should be more guidelines in terms of fees.
21 One problem that resulted, however, was that in
22 order to find a place to plug in a new standard on
23 fees he took a look at diligence and competence and
24 said, well, they are pretty much the same thing let's
25 ditch competence. He didn't really. He is correct

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1 that he did combine the two offenses in one standard.
2 The problem was then that the court looked at that and
3 jumped on both of our agencies actually and said, oh, my
4 God, you forgot about competence, you are not taking
5 this seriously, and we had to point out that, indeed,
6 we do take competence seriously, but that actually is
7 the second part of the Board's position, which is that
8 competence is different than diligence, it does
9 deserve its own standards by any measure in terms of
10 harm to the public and just recognizing the reality of
11 what it is that we deal with. Competence is a big
12 part of what we do.
13 So in effect the Board's position then is
14 keep fees where it is and keep competence where it is.
15 CHAIRPERSON JAMIESON: Which would be (b)?
16 MR. ARMITAGE: As (b).
17 CHAIRPERSON JAMIESON: Any further
18 discussion?
19 Then all those if favor of (a), say aye.
20 All those in favor of (b), say aye.
21 Passes with majority. I suppose we should
22 see whether or not we have a minority for (a). We
23 don't need to worry about that. We are all set.
24 Never mind. It's getting late, isn't it?
25 Standard 5.1, failure to maintain personal

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1 integrity. I will entertain a motion with regard to
2 5.1.
3 VOICE: So moved.
4 CHAIRPERSON JAMIESON: Second?
5 VOICE: Second.
6 CHAIRPERSON JAMIESON: Any discussion?
7 MR. CAMPBELL: 5.13, again, I address it in
8 more detail in my memorandum, and I point out that if
9 you adopt 5.13 as the Board has proposed, it actually
10 requires you to go in and change, or at least address,
11 the fact that under 4.13 and 4.12 you have already
12 taken up some of this, some of these issues.
13 With regard to -- and that's my footnote 4,
14 again, in my memorandum if you go through it and take
15 a look under Section 2.
16 The central issue here is, and this has been
17 a low grade war between the Board and the court as far
18 as background.
19 The attorney discipline system began to
20 approach drunk driving as an offense for which there
21 would be a sanction under the ethics rules in the late
22 1990s. Prior to that I am not aware of a drunk
23 driving case having been the subject of a discipline,
24 and when those cases went before the Attorney
25 Discipline Board, the argument was, well, when you read

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1 8.4(b) of the Rules of Professional Conduct it says
2 that only the violation of a law that reflects
3 adversely on a lawyer's fitness to practice should be
4 the subject of discipline.
5 There is also a Court Rule 9.104 (5) at the
6 time, and I think it's now (a)(5), that says the
7 violation of any law of the United States or of a
8 state of the United States is misconduct and the
9 grounds for discipline.
10 Those two rules, it was argued, were in
11 conflict and that the Rule of Professional Conduct
12 ought to prevail, meaning that there is a fitness
13 requirement when it comes to violations.
14 The Board agreed with that argument and went
15 up to the court. The court said, no, you are wrong,
16 they are not in conflict, it's obvious,and it was at
17 least to the court, these two rules aren't in
18 conflict, so we are going to impose, we are going to
19 say it's okay to impose discipline for a violation of
20 drunk driving that had nothing to do with driving a
21 client around or on firm time or anything like that.
22 So Board's version, as I read it, does not
23 allow for that ruling to really have full effect
24 within the proposal.
25 Mine just takes notice of that and says we

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1 recognize that, in fact, under 1.13 where you are
2 engaged in criminal conduct that does not meet the
3 requirements of 8.4(b), that is not defined under 5.13
4 or 5.12 or 5.11 above, that, yes, there is a category
5 of offenses for which a lawyer can be disciplined, and
6 I think it's the Nichols case, correct me if I am
7 wrong, John, that said you are a lawyer 24 hours a
8 day, 7 days a week, and that's essentially the
9 attitude or the position the court took in late 1990s
10 when it decided the drunk driving cases in the
11 disciplinary field, and it just takes recognition of
12 that and it's a recognition, I think, that's not
13 present in the Board's original version of 5.13 as
14 they proposed it. That's all.
15 I don't expect, by the way, given my record
16 here, that that position is very popular, but it's
17 just recognition of what the rules are.
18 MR. ARMITAGE: I just want to take issue with
19 the comment that the Board is at war with the court,
20 because we are not. The Court Rules are at war with
21 themselves. He pointed out 9.104(5) says any violation
22 of the criminal law is misconduct. 8.4(c) says those
23 violations of the criminal law which reflect adversely
24 on your fitness is misconduct, and that's the way it
25 is in every other state in the country.

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1 MR. CAMPBELL: For (b)?
2 MR. ARMITAGE: (b), good point. I am sorry.
3 So he is right, the case came before us and
4 the Board and it dealt with it. When it went up, in
5 the Deutsch (sp) case went up, the court in fact split
6 3/3 on the issue of whether of fitness should be
7 required.
8 So that issue is probably still out there.
9 The Board took the position that Michigan should, that
10 8.4(b) is still there in the rules and that fitness,
11 application on fitness, adverse reflection on fitness
12 is usually required. It's certainly the practice.
13 Under 9.120 we are all required to report
14 convictions of ourselves, so Bob, the Commission, and
15 the Board get things like the person who was ticketed,
16 I think it's a criminal offense, DNR ticketed them for
17 not having some sort of label on his fishing shanty,
18 his ice shanty. Now, I have long thought that the
19 profession needs to crack down on anonymous ice
20 fishing, but apparently Bob disagrees. That is
21 sarcasm for the court reporter.
22 The Commission does not pursue cases that
23 don't reflect adversely on a lawyer's fitness to
24 practice law, and the Board believed that the
25 standards ought to reflect the actual practices, so

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1 that's why that's there.
2 This is also, again, I don't want to get in
3 trouble with Mr. Campbell, but I think he just did say
4 that, given your vote on 4.1, which puts client
5 misappropriation into 4.1 and sort of sends
6 misappropriation from nonclients to 5.1, this (b),
7 which is the Board position, is consistent with your
8 earlier vote in that regard too. Thank you.
9 CHAIRPERSON JAMIESON: Any further
10 discussion? Okay. With regard to standard 5.1, the
11 question is whether or not it should contain the same
12 provisions outlined in the, and then all in favor of
13 option (a), please say aye.
14 All opposed.
15 All those in favor of (b), say aye
16 That's the majority.
17 There is another copy of 5.1 that was
18 mistakenly in the agenda packet, so you can disregard
19 that.
20 And then the next standard is 3.2 regarding
21 isolated acts of negligence. I will entertain a
22 motion with regard to this proposal.
23 VOICE: So moved.
24 CHAIRPERSON JAMIESON: Do I have a second?
25 VOICE: Second.

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1 CHAIRPERSON JAMIESON: Thank you. Any
2 discussion? John Allen. Oh, hold on.
3 MR. ALLEN: The purpose of the proposal is to
4 clarify that isolated acts of negligence are not
5 intended to be the subject of discipline at all, really,
6 and that except in very limited circumstances where
7 they are part of a course of conduct or negligence
8 combined with other factors when taken in the
9 aggregate that provide a basis for discipline. In
10 other words, an error, isolated, even a serious error,
11 maybe taken care of through and in other cases so
12 when the disciplinary system is approached with that,
13 because of the wording of some of the rules,
14 particularly as proposed, one could find an isolated
15 act of negligence without any causation of injury as
16 authorizing discipline.
17 The purpose of this proposal was to say that
18 if it is, indeed, isolated and unaccompanied by a course
19 of conduct or other factors in the aggregate which
20 authorize discipline, that it should not be commenced
21 to begin with.
22 MR. AGACINSKI: I don't think I disagree with
23 most of what John said. I don't you think really
24 prosecute many times for isolated acts of negligence
25 except intense misconduct. That is a standard of

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1 discipline, and I am not sure this statement belongs
2 in the sentencing aspect. It should maybe be a MRPC
3 amendment, if that's where the body wants to go. I
4 don't think it belongs where it's at, because it's
5 after finding of misconduct that we first approach
6 3.2.
7 Also, I think you should never say never, so
8 to make a salute rule like that I think is also
9 philosophically something I would oppose, but, more
10 importantly, I don't think it belongs under the
11 sentencing standards.
12 MR. VANBOLT: I think the Board would agree a
13 hundred percent with that. This rule that purports to
14 say when somebody should be found or committed
15 misconduct has no place in guidelines for sanctions.
16 They are just two entirely different things.
17 I also agree that generally when you talk
18 about the possible hypothetical, what if type of
19 sanction, the words "always" and "never" should probably
20 be avoided.
21 CHAIRPERSON JAMIESON: Any further
22 discussion?
23 MR. LARKY: Madam Chair. In light of the
24 comments by our panel, I would move that the State Bar
25 of Michigan recommend a modification to the Rules of

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1 Professional Conduct by adding the language here.
2 VOICE: Second.
3 CHAIRPERSON JAMIESON: So the motion is to
4 make this a Model Rule of Professional Conduct
5 proposal?
6 MR. LARKY: Correct.
7 CHAIRPERSON JAMIESON: To add this language
8 to the Model Rules?
9 MR. LARKY: Yes.
10 CHAIRPERSON JAMIESON: We have second. Any
11 discussion on that?
12 Hearing none, all in favor of making this
13 proposal, rather than something for the standards,
14 something for the rules, all those in favor, say aye.
15 Opposed.
16 Okay, now we are going to vote on actually
17 this as being -- we are going to vote on whether or
18 not this should actually be proposed in the rules.
19 Any discussion?
20 VOICE: Standards.
21 CHAIRPERSON JAMIESON: No, we just said that
22 it's not going to be in the standards, it would be in
23 the rules.
24 Mr. Larky, your motion was just that this be
25 a part of the Model Rules as opposed to the standards,

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1 correct?
2 MR. LARKY: That's correct.
3 CHAIRPERSON JAMIESON: It's been changed
4 now, rather than a standard, it's a rule, not
5 necessarily 3.2, but just something that should be
6 incorporated into the rules, the Model Rules of
7 Professional Standards, and that is what's before you
8 now, whether or not this language that disciplinary
9 proceedings -- how much of this?
10 MR. ROMANO: Point of order. I understand
11 the motion to move this provision to the Rules of
12 Professional Conduct, but don't we have to dispose of
13 it somehow as it is proposed to be a part of the
14 standards?
15 You are asking the parliamentarian. I am in
16 trouble.
17 CHAIRPERSON JAMIESON: This is what my
18 understanding is, and I believe I have this
19 accurately, please correct me if I am wrong. The
20 motion before us was whether or not we change this
21 proposal that said a new standard should be
22 established to a new rule should be established within
23 the Michigan Rules of Professional Conduct, and that
24 is the motion that passed.
25 Now what we would vote on is, or discuss, is

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1 the proposal that would be a rule, a Michigan Rule of
2 Professional Conduct should be established to provide,
3 and that's should be before there.
4 MR. ROMANO: So in effect the yes vote on the
5 motion removed it from it's consideration as a
6 standard. I can ride with that.
7 CHAIRPERSON JAMIESON: So is there any
8 discussion with regard to the new proposal now, which
9 is a Michigan Rule of Professional Conduct should be
10 established, dot, dot, dot?
11 Seeing none, all those in --
12 MR. VANBOLT: I guess those of us from the
13 discipline agencies are kind of sitting here in
14 stunned disbelief, I guess. If requested, I
15 personally will do everything in my power not to serve
16 on the committee that would have to go through every
17 single Rule of Professional Conduct and determine
18 which one would appropriately be subject to this rule.
19 I mentioned one rule now that is a per se rule,
20 mishandling of client funds.
21 It doesn't matter under the case law in
22 Michigan, it doesn't matter under the rules what your
23 state of mind was when you misplaced your client's
24 thousand dollars or $10 for that matter.
25 Now, it may or may not be prosecuted and you

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1 may or may not be publicly disciplined, but it's a
2 violation and there is nothing -- my mind boggles. I
3 can't get the words out to say how you would
4 incorporate this rule into basically a rewrite of
5 every other Rule of Professional Conduct in the United
6 States and Michigan.
7 MR. CAMPBELL: Also given my record, I have a
8 sense you guys are in favor of this, so I am going to
9 support it.
10 MR. ALLEN: I have a question for John
11 VanBolt and maybe Bob Agacinski too, and that is, I
12 think the intent is obvious, and it was really stated
13 probably more forthrightly the first time around that
14 we weren't trying to change every rule, we were trying
15 to make it clear that disciplinary proceedings would
16 not be commenced for that purpose. If the standards
17 is not the right place and the Rules of Professional
18 Conduct are not the right place, where is the right
19 place?
20 CHAIRPERSON JAMIESON: Any further discussion
21 with regard to --
22 MR. GIGUERE: Yes, Gary Giguere from the 9th
23 circuit. I would move to table the discussion since
24 we changed it to the Model Rules of Conduct from the
25 standards, which is what we came to discuss, so we can

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1 have appropriate input from those around the state who
2 would be impacted by such a change, so I would move to
3 table.
4 VOICE: Support.
5 CHAIRPERSON JAMIESON: No debate on that.
6 All in favor, say aye.
7 Any opposed.
8 There you go.
9 Now hold on one second because we missed one.
10 I am so sorry, but we have your yellow piece of paper
11 in front of you which is ADM File Number that was
12 supposed to go under the rules. Sorry, that's been
13 withdrawn. It was duplicative. Thank you.
14 So ADM File Number 2003-62, which is the
15 proposed adoption of the new rules, I will entertain a
16 motion with regard to this proposal.
17 VOICE: So moved.
18 CHAIRPERSON JAMIESON: Thank you. And a
19 second?
20 VOICE: Support.
21 CHAIRPERSON JAMIESON: Yep. Any discussion?
22 Hearing none, all in favor of (a), please say
23 aye.
24 Any opposed.
25 That would be the majority.

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1 I have one point of order and that is --
2 actually I have two points of order. Mr. Hogan came
3 shortly after we had passed on the Committee on the
4 Libraries Legal Research and Legal Publications. He
5 just wanted to make sure to the extent anybody had any
6 questions with regard to the report he was here to
7 answer them, and so, because he has been waiting the
8 entire day, I thought it would be important for us to
9 give him that opportunity, so if we can just hold off
10 for a couple of minutes.
11 MR. HOGAN: Thank you very much. I promise I
12 will be very quick. The Law Libraries Committee,
13 which is a standing committee of the Bar, did a survey
14 of the various law libraries of the state. We
15 established certain needs and from those needs we
16 adopted the Michigan online self help site that now
17 appears in conjunction with the State Bar's web site.
18 It's where people can go, not just people off the
19 street, but also attorneys that have identified needs
20 for certain forms, certain data bases, certain free
21 materials that might be available on the internet, as
22 well as references to legal aid programs that are out
23 there. That appears as item number four in your
24 materials.
25 The Law Library Committee has formed a

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1 subcommittee in order to maintain the web site and
2 maintain the documents, make sure everything is up to
3 date. We are having a meeting this coming Saturday,
4 so a week from today, and I have got two Saturdays
5 tied up. If anyone has any feedback of any sort, if
6 you could let me know, e-mail would be fine, and I am
7 published in the directory and any questions anyone
8 has here or concerns. Okay. That works.
9 (Applause.)
10 CHAIRPERSON JAMIESON: I believe that covers
11 everything on your agenda. Your Vice Chair has asked
12 for a moment to speak with you. Oh, and Bob Gardella
13 pointed out that we missed one individual who was on
14 our list of appointments that wasn't named officially
15 on the record, so we should add that person officially
16 on the record so that we can get that individual a
17 member of the Assembly.
18 MR GARDELLA: Bob Gardella from the 44th
19 circuit and chair of the Nominating Awards Committee.
20 When we were nominating to fill vacancies earlier we
21 forgot to put in there to fill the vacancy of the 4th
22 judicial circuit, Lineas Baze of Jackson, so I would
23 move that Lineas Baze of Jackson be allowed to serve
24 the vacancy in the 4th judicial circuit.
25 CHAIRPERSON JAMIESON: Thank you. Any

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1 second.
2 VOICE: Second.
3 CHAIRPERSON JAMIESON: Any discussion? All
4 in favor.
5 Thank you very much. Your Vice Chair has
6 asked for a moment to speak with you before we
7 adjourn.
8 VICE CHAIR BUITEWEG: Good afternoon. I have
9 heard all of you loud and clear say recently that you
10 don't want to hear thank you speeches, but it would be
11 wrong not to acknowledge Elizabeth's efforts in
12 getting us to where we are today, and I am not going
13 to let that wrong happen. I am going to stand here
14 and try to do Elizabeth some justice for the amount of
15 work and effort that she has put into this endeavor.
16 She has almost single handedly taken it under
17 her wing to -- it was about two years ago when Special
18 Issues met and talked about whether or not this was
19 something that Rep Assembly could even possibly bite
20 off and chew, and the majority of the Special Issues
21 Committee back then said no way, we can't even
22 possibly get our arms around this thing, we would have
23 to be all octopuses to manage that, and we just can't
24 do it.
25 But Elizabeth said there is no way we can't,

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1 we have to. As a matter of fact we have got to take
2 this on. This is so important to the profession, and
3 she has taken the ball and she has run with it ever
4 since then.
5 Now I am going to get all choked up about it.
6 CHAIRPERSON JAMIESON: That's because she is
7 up until 1:00 in the morning with me working on this,
8 so it's not just me alone.
9 (Standing applause.)
10 CHAIRPERSON JAMIESON: Thank you, all. I
11 will entertain a motion to adjourn.
12 VOICE: So moved.
13 CHAIRPERSON JAMIESON: Thank you, and I just
14 want for the record, although we have to approve that,
15 all in favor say aye.
16 We are early. I said 4:30, and it's not
17 4:30.
18 (Proceedings concluded at 4:27 p.m.)
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1 STATE OF MICHIGAN)
)
2 COUNTY OF CLINTON)
3 I certify that this transcript, consisting
4 of 213 pages, is a complete, true, and correct transcript
5 of the proceedings and testimony taken in this case on
6 Saturday, April 16, 2005.
7
April 28, 2005 ______________________
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