

STATE OF MICHIGAN
STATE BAR OF MICHIGAN

MEETING of the REPRESENTATIVE
ASSEMBLY of the STATE BAR OF
MICHIGAN

Proceedings had by the Representative Assembly of
the State Bar of Michigan at DeVos Place Convention Center,
Ballroom A, 303 Monroe Avenue, N.W., Grand Rapids, Michigan,
on Thursday, September 22, 2016, at the hour of 9:00 a.m.

AT HEADTABLE:

DANIEL D. QUICK, Chairperson

FRED K. HERRMANN, Vice-Chairperson

JOSEPH P. MCGILL, Clerk

JANET WELCH, Executive Director

HON. JOHN CHMURA, Parliamentarian

CARRIE SHARLOW, Staff Member

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1 Grand Rapids, Michigan
2 Thursday, September 20, 2012
3 9:06 a.m.

4 R E C O R D

5 CHAIRPERSON QUICK: Ladies and gentlemen,
6 please take your seats. We are going to proceed. I
7 would like to officially call to order the meeting of
8 the State Bar of Michigan Representative Assembly. We
9 will ask our Assembly clerk, Joe McGill, to confirm we
10 have a quorum.

11 CLERK MCGILL: We have a quorum.

12 CHAIRPERSON QUICK: He has confirmed we have
13 a quorum. You may proceed. Call Mr. Ray Littleton,
14 Chair of the Rules & Calendar Committee, to the
15 microphone or the stage, either one.

16 MR. LITTLETON: Thank you. Good morning
17 everyone. I would like to move for the adoption of
18 the revised calendar, which you should have gotten
19 emailed to you over the past two weeks.

20 VOICE: Support.

21 CHAIRPERSON QUICK: I heard support. There
22 is a copy of the revised calendar at each of your
23 seats, so everyone should have that. Any discussion?

24 All in favor say aye.

25 Any opposed? Thank you.

1 Also in your materials is the summary of
2 proceedings from our April 30, 2016 meeting. An eagle
3 eye member of the Assembly has caught a typographical
4 error that we will fix as part of Ms. Safran's
5 presentation, but other than that, may I have a motion
6 to approve the summary of proceedings.

7 VOICE: SUPPORT.

8 CHAIRPERSON QUICK: Heard a motion. Is there
9 support?

10 VOICE: Support.

11 CHAIRPERSON QUICK: Any discussion?

12 All in favor.

13 Any opposed?

14 Excellent. We are already back on schedule.

15 The next order of business is to fill our
16 vacancies on the Representative Assembly. For that
17 subject I will call Ms. Erica Zimny, who is chair of
18 the Nominating and Awards Committee.

19 MS. ZIMNY: Good morning. As Dan said, I am
20 Erica Zimny, chair of the Awards & Nominating
21 Committee. Over the last several months my committee
22 has performed a lot of hard work to find the talented
23 individuals that are contained in the memorandum
24 before you dated September 22nd, 2016. We are looking
25 forward to working with those many individuals in the

1 Representative Assembly. What I am going to do is ask
2 for a motion to approve the memorandum as submitted.

3 VOICE: So move.

4 MS. ZIMNY: Motion. Second?

5 VOICE: Second.

6 MS. ZIMNY: Any discussion?

7 All in favor?

8 Any opposed?

9 Thank you.

10 CHAIRPERSON QUICK: Thank you. May the new
11 members please move forward and take your seats. A
12 round of applause, please.

13 (Applause.)

14 CHAIRPERSON QUICK: Next, ladies and
15 gentlemen, for your attention is a presentation of the
16 Representative Assembly awards, in my mind two of the
17 highest honors that the State Bar of Michigan can
18 bestow upon anybody. They really represent the best
19 aspects of the State Bar of Michigan, as well as this
20 body. To introduce our Unsung Hero Award winners and
21 presenters, whom I would ask to now move to the stage,
22 Ms. Erica Zimny.

23 MS. ZIMNY: The first award that we will be
24 presenting this morning is the Unsung Hero Award. We
25 do have two recipients of the Unsung Hero Award this

1 year. The presenter for the first recipient is
2 Ms. Erin D. Toburen, who I would welcome to the stage.

3 MS. TOBUREN: Good morning. So many of us
4 begin our legal careers with dreams of making the
5 world a better place and helping others in our daily
6 lives. Some of us never achieve that goal, but Tessa,
7 an Assistant U.S. Attorney of the Violent Crime Unit
8 of the U.S. Attorney's Office in the Western District
9 of Michigan here in Grand Rapids, is someone who truly
10 lives that dream on a daily basis.

11 In law school at Georgetown she worked in
12 Eritrea fighting war crimes. After graduating from
13 Georgetown University in 2008, Tessa joined the Army
14 and became a captain in the Army JAG Corps where she
15 served in both South Korea and Fort Leavenworth in
16 Kansas. During her time there, she prosecuted 14
17 court martials and provided legal advice to army
18 command in such areas as human rights and compliance
19 with international law.

20 In 2013, in my humble opinion, all of us in
21 Michigan were lucky that she and her husband, Josh,
22 also a captain in the JAG Corps, chose to call
23 Michigan home. In 2013, she began working at the
24 U.S. Attorney's Office where, as a primary
25 responsibility, she prosecutes human trafficking and

1 crimes again children involving pornography and
2 heinous crimes.

3 Her work over the past few years has involved
4 putting a radio DJ who was involved in an
5 unmentionable crime with children awaiting jail,
6 putting a grandma acting as a john also in jail, and
7 prosecuting other heinous crimes that are not even
8 mentionable here. Most recently Tessa received an
9 award from the director of the FBI for her work in an
10 Ingham County case which she did outstanding work on.

11 For Tessa, protecting victims of human
12 trafficking and fighting child pornography is not just
13 a nine-to-five job or a paycheck. Tessa lives this in
14 her personal life as well. She was a board member and
15 an advocate for the Kent County Children's Assessment
16 Center, which provides counseling and a safe haven for
17 children who are victims of these awful crimes to tell
18 their stories without being retraumatized. Tessa is
19 also the chairperson of the Kent County Human
20 Trafficking Task Force, which is comprised of
21 educational leaders, law enforcement, and other
22 business leaders to come together to fight human
23 trafficking. Tessa's work with this task force has
24 involved educating the community and to educate all of
25 us what signs of human trafficking might be in our

1 daily lives.

2 Tessa does all of this and more without
3 seeking any recognition whatsoever. She helps the
4 most vulnerable in our society, and for that I am
5 truly honored to present the Unsung Hero Award to her
6 today.

7 (Applause.)

8 MS. HESSMILLER: Well, thank you so much,
9 Erin. That was extremely sweet, and thank you to
10 Mike Toburen as well, Erin's husband. They secretly
11 nominated me for this award, and it really means a lot
12 to me coming from two people who have pursued and
13 exemplified service in their own lives as well, and I
14 am so grateful to the Michigan State Bar for choosing
15 me for this award. Thank you so much. It's truly
16 humbling.

17 And, finally, a special thank you to my
18 parents and my brother, who flew in from the east
19 coast last night to be here for today, and my
20 wonderful husband, Josh, another fellow Michigan state
21 attorney, all of whom have supported and encouraged me
22 throughout my whole life to pursue my passion at every
23 turn, which has led to a life and career that have
24 been truly fulfilling at the deepest level so far.

25 Thank you to all the members of the U.S.

1 Attorney's Office who showed up today to support me
2 and continue to pursue justice every day in their
3 jobs. Thank you so much.

4 (Applause.)

5 MS. ZIMNY: Up next to present the other
6 Unsung Hero Award is Ms. Megan Smith.

7 MS. SMITH: Good morning, everyone. I want
8 to thank you for giving me the opportunity to present
9 the second of the Bar's two Unsung Hero Awards this
10 year to my friend and mentor, Jerrold Schrottenboer.

11 I would like to start with an anecdote of
12 Jerry that perfectly encapsulates who this man is.
13 This past July Jerry and his wife, Karen, who is also
14 a brilliant attorney and genuinely kind-hearted woman,
15 invited me to see Star Trek Beyond with them. There
16 is a scene in that movie where Spock, half human/half
17 Vulcan, half emotion/half logic, meets with two Vulcan
18 emissaries. At the end of their meeting, all three
19 Vulcans utter the ceremonial farewell, "Live long and
20 prosper," and make the traditional Vulcan salute. Out
21 of the corner of my eye, I saw Jerry salute the
22 screen.

23 Besides being utterly charming and
24 humanizing, Jerry's affinity for the half Vulcan
25 Mr. Spock makes perfect sense to me. If ever it

1 turned out that Vulcans were real, it would not
2 surprise me in the least to find out that Jerry has
3 been their perhaps half-human ambassador living among
4 us for years to study us and make us better people.

5 The Vulcans, you see, are a race of
6 brilliant, logical creatures. They would make
7 excellent judges, reasoning out perfect, correct legal
8 solutions for every set of facts. Jerry, too, is a
9 brilliant logician, a graduate of UCLA's Boalt Law
10 School, Jackson County's Chief Appellate Prosecutor,
11 Special Assistant Attorney General, licensed to
12 practice before the 6th Circuit, the Supreme Court,
13 the United States District Court for the Eastern and
14 Western Districts of Michigan, and the State of
15 Michigan, and the not-so-secret supreme repository of
16 legal knowledge for our county.

17 Jerry is the only attorney I have ever met
18 who has a permanent mental rolodex of every major
19 criminal case to come out since his law school
20 graduation in 1981 until today, just sitting at the
21 ready in his brain. Even aside from his impressive
22 legal knowledge, Jerry is regarded as a foremost elder
23 statesman of our county. His opinion carries enormous
24 weight. Both prosecutors and defense attorneys
25 regularly turn to him for advice, and, as Ms. Lamp

1 wrote in her recommendation letter, it is not at all
2 uncommon to hear a judge pause after a legal argument
3 and then ask, "What does Jerry think?"

4 Judges seek Jerry out and ask him to please
5 grace us with his wisdom because they know he will
6 provide a well thought-out, reasoned answer, free from
7 bias. If he believes the prosecutor's office is
8 wrong, he says so. If he thinks they are right, he
9 defends them. If Jerry ever decided to move, it is
10 not hyperbole to state that the cumulative knowledge
11 and mental prowess of our county would diminish by
12 half.

13 Like Mr. Spock, however, Jerry is not just a
14 bright logician. He has an enormous and very human
15 heart. Jerry has made it his mission to take legal
16 professionals of every stripe -- attorneys, law
17 clerks, paralegals, legal staff -- under his wing. He
18 routinely takes time out of his immensely busy
19 schedule to mentor new attorneys and place his years
20 of wisdom at our feet. Every law clerk I know has a
21 Jerry story of a time when he dropped everything to
22 come and teach us, talk with us, answer our questions,
23 of a time he went out of his way to share himself with
24 us. It might be an entirely legal discussion or one
25 about his world travels or eclectic taste in music or

1 politics. It rarely lasted less than an hour. I have
2 been smarter at the end of every one.

3 Jerry does not limit his kindnesses to the
4 legal community, however. His innate sense of justice
5 compels him to go out of his way to help those members
6 of the public who come to him, especially former
7 defendants who, having worked hard to have their
8 charges set aside or reduced, find themselves unable
9 to secure homes or jobs due to their charges
10 erroneously appearing in LEIN. Another attorney might
11 wave these people away, saying, not incorrectly, that
12 he had done all he was required to do under the law.
13 Jerry does not wash his hands of people, however. He
14 does all he can to make sure that our court records
15 and website reflect the hard work these individuals
16 have done to change their lives and writes letters on
17 his very impressive letterhead on their behalf,
18 including his direct phone number. He goes out of his
19 way to make the world a better, fairer place for both
20 victims and defendants.

21 Jerry, you see, is not just a brilliant legal
22 mind or a caring coworker and mentor. He is a
23 generally good person who strives every day to make
24 the profession better by showing us what we could
25 be -- ambassadors for justice and righteousness --

1 regardless of the titles we hold or the positions we
2 advance.

3 For all of this, Jerry deserves this award.
4 For the sake of the profession, then, and with all the
5 utmost sincerity, I invite him to the stage to accept
6 it and say may he live long and prosper.

7 (Applause.)

8 MR. SCHROTENBOER: Well, I certainly
9 appreciate that, but the thing is, after listening to
10 all the things that Tessa has done, I am kind of
11 wondering what I am doing here. And I also see people
12 in the audience who kind of deserve it a little more
13 than I do, someone like Tim McMorrow (sp), and I
14 appreciate people that have come up here to be here
15 with me, including a person coming up from Indiana,
16 and thank you very much.

17 (Applause.)

18 CHAIRPERSON QUICK: If we could have our
19 Michael Franck Award winner and presenter please come
20 up to the stage.

21 MS. ZIMNY: Up next to present the Michael
22 Franck Award is Mr. Jeffrey E. Kirkey.

23 MR. KIRKEY: Good morning, everyone. I want
24 to thank you for voting to present the 2016
25 Michael Franck Award to my boss, Lynn Chard. You are

1 a brilliant group of people.

2 For the past 30 years, Lynn has made it her
3 mission to make everyone in this room and throughout
4 Michigan a better lawyer. She has done that with
5 providing unmatched legal resources, education, and
6 the confidence that comes from knowing you have a
7 partner in practice. That was Lynn's personal motto
8 before it every became ICLE's motto.

9 Under her leadership ICLE has developed a
10 national, even international, reputation as the leader
11 among CLE organizations. Lynn meets the awards
12 criteria to a T. In your materials, there are letters
13 of recommendation that were written by many, many
14 legal dignitaries, a who's who of legal luminaries who
15 lined up to recommend her. Described by one
16 recommender as the Steve Jobs of CLE without the
17 difficult personality.

18 Lynn is a brilliant businesswoman. As famous
19 people go, I like to think of Lynn as similar to
20 Mike Krzyzewski, the head basketball coach at
21 Duke University, who just so happens to be the
22 winningest basketball coach in history and a
23 three-time Olympic Gold Medal winner. It sounds odd,
24 the comparison, but hear me out for a second. The two
25 of them both have a single focus on success. They

1 both are determined to make the most of what they
2 have, and they both believe deeply in the team and
3 making the most out of each individual's talents.
4 They both ooze leadership.

5 The last time Lynn had a performance review,
6 ICLE's Executive Committee asked some of the staff for
7 feedback, and so, having said a number of nice things
8 about Lynn, the person ultimately asked me, Do you
9 think Lynn should be retained as ICLE's director? And
10 my response went like this: I am guessing this is
11 similar to what Duke University goes through each time
12 they decide whether or not to renew the contract for
13 Coach K. It's sort of a, Hmm, should we keep the
14 greatest ever or go with somebody new? And Coach K.
15 has managed to stick around a long time, as has Lynn.
16 They're smart people too.

17 Keeping with the sports theme, you may not
18 know, but Lynn is both a Spartan, undergraduate, and a
19 Wolverine, law school, and so she is someone we can
20 all get behind.

21 Lynn is well known for thinking beyond today.
22 She looks out the window and sees trends in the law,
23 in technology, and in education, and she moves an
24 entire organization to respond. She has moved ICLE
25 from a seller of books and seminars to really a

1 service business providing lawyers with confidence,
2 assurance, reliable resources every time they log in.
3 She has worked closely with the State Bar and many
4 sections on collaborations that benefit Bar members.
5 I am confident that if Lynn had chosen to she could be
6 jet setting around the world as a CEO of a Fortune 500
7 company, but she cared too much about the lawyers in
8 the state, about her wonderful family, and about a
9 little nonprofit in Ann Arbor to ever consider
10 leaving. Thank goodness.

11 And now Lynn is just months away from
12 retirement, and she is, upon retiring, she is going to
13 dart off to Hawaii for a well-deserved vacation. I
14 hope she comes back, and I hope she is a frequent
15 visitor to ICLE in the years that come. I know I
16 speak for all ICLE staff members when I say she is
17 going to be dearly missed. Personally, I couldn't
18 have asked for a better boss and mentor, and I can't
19 think of anyone more deserving for this award. Lynn,
20 congratulations.

21 (Applause.)

22 MS. CHARD: Have to bring the microphone down
23 here.

24 Well, thank you. Thank you to Jeff. Thank
25 you to the Representative Assembly. I am just very

1 honored and grateful for this award, and it's
2 especially great because it comes from this Assembly,
3 the Representative Assembly that represents all those
4 thousands of lawyers that are out there working to do
5 the best by their clients. So it's been a -- I have
6 been a lucky person to have a job that matches my
7 interests and talents so well and that every day I get
8 up and just try to do the best to help you do the best
9 for your clients.

10 It's been very rewarding, very much so, and
11 this award is really representative, not just of an
12 award for me, but for the incredible team that we have
13 at ICLE. Jeff is a terrific person to work with. We
14 have a whole team that is just pretty amazing. One of
15 my management standards is hire smarter and better
16 people than yourself, surround yourself with them and
17 you will have a wonderful, wonderful organization.

18 And then there are, that still doesn't get to
19 the over a thousand lawyers, practicing lawyers, who
20 give back of their time, speakers and authors, every
21 year to ICLE. We really, what we have been able to do
22 is simply indicative of what people can do when they
23 pull together, work together for a common cause.

24 So it's with great, heart-felt thanks that I
25 thank you, and I would be remiss if I didn't also

1 thank my family and friends. I have a whole group of
2 them in the back there, including -- I have two
3 wonderful sons, Brendan and Devin. Devin is a police
4 officer out in Las Vegas and couldn't be here, but
5 Brendan is here with his little son. That's my
6 grandson. He made his entrance right on cue I guess.
7 So with retirement, I will be able to spend more time
8 with them, and then just, you know, I have such a
9 wonderful group of friends, many of whom are in the
10 back, as well as colleagues, the colleagues at work,
11 and I will be spending more time with all of them.
12 But thank you very much.

13 (Applause.)

14 CHAIRPERSON QUICK: Erica, thank you very
15 much for obviously selecting individuals who are so
16 well deserving of these honors. They truly are
17 inspirational.

18 Ladies and gentlemen, as we roll forward in
19 our agenda, I am reminded of the old adage that you
20 can't always get what you want, but you sometimes get
21 what you need. We are blessed at this particular
22 meeting with both getting what we wanted and what we
23 need. As the ultimate policy-making body of the
24 State Bar of Michigan, this body deserves to be
25 chewing on items of substance, and boy do we have them

1 in spades today.

2 I would like to thank Lori Buiteweg and Janet
3 for helping facilitate the process which brings to
4 this body these very important policy items for our
5 consideration. They come from multiple avenues
6 throughout different sections and committees and task
7 forces of the State Bar. This is how it is supposed
8 to work, and we are all the beneficiaries of it.

9 We also continue to work on improving our
10 internal operation, our relations with our
11 constituents, with the members of the Bar at large.
12 We are not focusing on that as much today by
13 presentation, but I assure you that committee chairs
14 continue to work hard in those endeavors, and we will
15 continue to seek improvements in those as we move
16 forward.

17 Today is an amazingly full schedule. Most of
18 the items are the product of significant deliberation
19 and consideration by the groups that present them.
20 There are in almost all cases a significant amount of
21 stakeholder contribution and buy-in, so the cake that
22 is arriving here is not half baked, it is more or less
23 fully baked, and the presenters have attempted to
24 bring in a broad number of perspectives as much as
25 possible, and they will address some of that as they

1 present the materials to you.

2 A few reminders as we proceed. First of all,
3 everybody ought to have their official voting clicker.
4 You know them and you love them. The way this works
5 for our new folks or those who need a reminder is that
6 one or A is yes, two or B is no. We will indicate
7 when the voting is open. We will give you a heads up
8 as to when it's about to close, and then we will
9 announce the vote.

10 These are not free, nor are they mementoes of
11 today's proceedings. I would urge you to leave them
12 on your desk during lunch and not take them with you,
13 whereby they become paper weights at the luncheon, and
14 obviously we need to collect them at the end of the
15 meeting.

16 I would also ask you to, given the fullness
17 of our schedule today, to try to restrict your
18 comments to two or maybe three minutes, if you can.
19 By suggesting that, I in no way mean to tamp down the
20 enthusiasm and the contributions of our members, but
21 we do have an agenda to try to stick with, so I urge
22 people to seek brevity.

23 Along those lines, you will note that our
24 agenda has no breaks in it up until lunch and then
25 after lunch until adjournment, so obviously there is

1 coffee and food in the back and folks can float in and
2 out as they like, but we are going to try to power
3 directly through.

4 I would like to thank very much Fred and Joe
5 for their contributions to bringing this meeting to
6 fruition, as well, of course, to Carrie Sharlow,
7 Marge Bossenbery, and all of the other staff members
8 at the State Bar of Michigan. They do a tremendous
9 amount of work behind the scenes to pull all this off.

10 So, with all that being said, I would ask
11 Ken Mogill to come up to the stage to present items
12 number 7 and 8 on our agenda.

13 MR. MOGILL: Thanks, Dan. As you know from
14 our materials, these first two proposals deal with
15 proposed amendments to the Michigan Rules of
16 Professional Conduct. The Professional Ethics
17 Committee of the State Bar has, as one of its
18 responsibilities, to propose rule changes from time to
19 time for its consideration, and what we decided to do
20 this past year was look at rule changes that we hope
21 will be noncontroversial and in the process encourage
22 people to be more interested in taking a look at the
23 rules overall and what might be areas of discussion
24 for future changes that may not necessarily be as
25 noncontroversial, but we wanted to start with a pair

1 of proposals that we believe are pretty
2 straightforward.

3 The ABA Model Rules include Rule 1.18, which
4 deals with prospective clients, and Michigan, for
5 reasons that I don't understand, does not have this
6 rule. It's a rule that is both helpful to the public
7 and to the Bar. It helps the public by making it
8 clear to prospective clients that the communications
9 in contemplation of possibly retaining an attorney are
10 confidential, even though attorney-client
11 relationship, it adds up to be just developing, and
12 they provide clear guidance to us as lawyers by
13 letting us know what our responsibilities and our
14 rights are when we have met with someone who ends up
15 not being our client, and I can tell you as an ethics
16 practitioner that this is something that I get calls
17 on a lot. I know the State Bar staff hotline gets
18 called on this a lot. We believe adopting this rule
19 would help, as I said, clarify for us as practitioners
20 exactly what we can and cannot do in a situation that
21 comes up a lot.

22 That's the long and the short of it on this
23 one. The rule changes to 7.3 that go along with this
24 are merely nomenclature changes. If 1.18 is adopted,
25 then the use of the term prospective client in 7.3

1 needs to be changed, but there is no suggestion for
2 substantive change in that rule. So that's where we
3 are at on this one.

4 CHAIRPERSON QUICK: Do we have a motion so we
5 can open up discussion?

6 VOICE: So moved.

7 CHAIRPERSON QUICK: Heard a motion. Is there
8 a second?

9 VOICE: Second.

10 CHAIRPERSON QUICK: Discussion. Please
11 approach the microphones, which are in either of the
12 aisles, if you wish to make any comments on the
13 regular item. When you approach the microphone, a
14 reminder, please state your name and your circuit.

15 MR. FALKENSTEIN: Peter Falkenstein,
16 22nd circuit. My only question relates to one of the
17 comments which states, Moreover, a person who
18 communicates with a lawyer for the purpose of
19 disqualifying the lawyer is not a "prospective
20 client." I think we all understand the intent behind
21 that rule. Anybody who watched The Sopranos back in
22 the '90s understands if you are going through a
23 divorce, communicate with every divorce lawyer in
24 town, that prevents your spouse from doing the same.
25 However, the question is does this open up a can of

1 worms, because how do you determine the intent in
2 contacting, communicating with various lawyers. If
3 you're in a small town, there are only two real estate
4 lawyers, and you are contemplating a real estate title
5 issue, you are probably going to communicate with both
6 of them, then when you file suit the other party is
7 going to say, Well, you tried to disqualify the only
8 other competent attorney.

9 I think that this also opens up potentiality
10 of bringing attorneys into the dispute to have you
11 opine or testify as to what was the intent of one
12 party in contacting them. Is it a question of how
13 many lawyers you contact? Is it a question of what
14 you said to the potential lawyer, and is that not
15 itself privileged? So I understand the intent, but I
16 am just wondering if this may cause more problems for
17 everybody in the long run.

18 MR. MOGILL: Thank you. This is an issue
19 that does come up. In fact, I happen to teach P.R. at
20 Wayne, and in talking about this issue in class two
21 weeks ago, there was an example of a divorce attorney
22 from Chicago who did the same thing very blatantly. I
23 was quite surprised, frankly, that she didn't get in
24 trouble. But the short answer to your question is,
25 yes, this is a real problem from time to time. Two, I

1 don't think it changes one way or the other in terms
2 of this rule being adopted or not. This kind of an
3 unsavory tactic will be around, and I don't think this
4 rule affects it one way or the other.

5 The question does go to the intent of the
6 attorney who would recommend it. I am talking about
7 an attorney and the prospective client. If an
8 attorney sends a prospective client to generate a
9 disqualification for an improper purpose, the attorney
10 is putting his or her ticket on the line, and, of
11 course, the whole notion of what's a privileged
12 communication, a private communication between a
13 lawyer and a client for the purpose of giving or
14 receiving legal advice, and if the purpose is really
15 to generate a disqualification not to obtain legal
16 advice, then it's not privileged.

17 With or without this rule, I think it's going
18 to come up sometimes, and it's going to have to be
19 litigated, and hopefully it comes up fair for
20 everyone.

21 MR. LITTLETON: I just have one quick comment
22 and question.

23 CHAIRPERSON QUICK: Name and circuit.

24 MR. LITTLETON: Ray Littleton, 6th circuit.
25 The one issue I do see with the rule though, I know

1 everyone doesn't practice in the bigger firms, but
2 sometimes in a bigger firm you could have someone who
3 comes in and it's suddenly, after you speak with them,
4 oh, there is a conflict. We actually have somebody
5 in, you know, an office that is on the other side. If
6 you look at the rule, I think it's letter C, it says
7 you can't all of a sudden represent a client who has
8 an interest that's doomed. It would be a burden on
9 that prospective client. You know, this person came
10 in and starts talking to you, but you suddenly get
11 like a piece of information later in the conversation
12 that, oh, there is a conflict here. I mean, is there
13 some kind of safe harbor or some kind of --

14 MR. MOGILL: Look at sub D. You can screen,
15 so the whole firm is not disqualified. The other
16 tactic -- I didn't mean to cut you off.

17 MR. LITTLETON: No, that makes sense.

18 MR. MOGILL: The one that's screening, it's
19 not a disqualification of the entire firm, and, two,
20 what generates the potential for disqualification is
21 when you received information that was potentially
22 harmful for the client, and one thing that lawyers,
23 again with or without this rule, sometimes do is in
24 that initial consultation you talk generalities. You
25 get to know each other a little bit, and you

1 intentionally avoid receiving sufficiently detailed
2 information to trigger the potential disqualification,
3 and then as things move forward, then you have a more
4 in-depth conversation. But to your specific question,
5 this rule would permit screening, avoid the entire
6 firm being disqualified.

7 CHAIRPERSON QUICK: Any other discussion? We
8 will move to a vote. Is the voting open?

9 CLERK MCGILL: Voting is open.

10 CHAIRPERSON QUICK: Voting is open. Please
11 place your vote. One for yes, two for no. Last call
12 on voting. Mr. McGill.

13 CLERK MCGILL: We have 71 in favor, 16
14 against, and zero abstentions.

15 CHAIRPERSON QUICK: Thank you. The vote was
16 71, 16 and zero abstentions. The motion passes.
17 Thank you very much, ladies and gentlemen.
18 Mr. Mogill.

19 MR. MOGILL: First of all, thank you on
20 behalf of the Ethics Committee, including we have at
21 least one of our members, other members here today.
22 We appreciate the fact that we are on the same page.

23 So our second proposal is with respect to
24 Rule 4.4, and this is a proposal that has been a
25 little bit vexing, the proposal is not vexing, but the

1 issue that the proposal intends to deal with is one
2 that is increasingly vexing as technology results in
3 more oops situations when you hit send and
4 inadvertently send information to the other side that
5 you didn't mean to.

6 Right now there is no guidance in Rule 4.4 in
7 the Michigan version of the rules. The ABA Model
8 Rules, and again what we are proposing is exactly what
9 the ABA Model Rule has been amended to include, is to
10 create a mechanism for how to deal with that situation
11 where you have received information that may have been
12 sent to you inadvertently by opposing counsel, and
13 what the proposed rule change would do is require you
14 as the recipient to promptly notify the other side,
15 period. Then the burden, we believe appropriately, is
16 put on the sender to decide what to do.

17 There is another reason for the rule not to
18 go beyond creating an obligation of notice, and that
19 is because, well, there are going to be so many
20 different fact variations and different situations
21 that it would be pretty much impossible to set all
22 this out in a particular rule, plus the fact that in
23 some respects the issues become issues of law rather
24 than ethics, but by way of example, depending on the
25 circumstances, maybe it was or wasn't sent to you

1 inadvertently. Maybe it was or wasn't information
2 that was confidential. Maybe there was or was not a
3 waiver, and all these can be played out and litigated
4 as you move forward, but only if you have notified the
5 other side that you have received the information and
6 given the other side an opportunity to do whatever
7 they choose to do or not based on the fact that the
8 information has been provided to you.

9 So, again, we believe that the ABA Rule, as
10 amended to include 4.4(b), is a reasonable way to get
11 this issue framed and T'd up in the event of
12 inadvertent disclosures, and we are asking for a
13 similar amendment to the Michigan Rules of
14 Professional Conduct.

15 CHAIRPERSON QUICK: We will entertain a
16 motion at this time on this agenda item. Do I have a
17 motion?

18 VOICE: So moved.

19 CHAIRPERSON QUICK: Second?

20 VOICE: Second.

21 CHAIRPERSON QUICK: Thank you. Any
22 discussion on this proposed item, or is it so
23 immensely logical that no further discussion is
24 needed? It seems to be the latter. Oh, Mr. Garnell.
25 Mr. Gobbo, sorry.

1 MR. GOBBO: It's okay. Steve Gobbo from the
2 30th circuit. One question in terms of the text in
3 the first paragraph that is added. It talks about was
4 it inadvertently sent. Sent to whom, because it could
5 be sent to somebody else other than the lawyer, so I
6 would perhaps make a friendly amendment in the sense
7 of just adding in sent to the lawyer as opposed to the
8 lawyer's client or sent to somebody else.

9 MR. MOGILL: Thank you. My off-the-top
10 reaction is I think it's implicit in the rule that it
11 has to have been sent to the lawyer, otherwise it's
12 not a rule that -- I mean, because this is not a rule
13 that's designed to regulate the conduct of someone
14 other than the lawyer who received information. With
15 that being said, I don't know that it's terribly
16 controversial as a suggestion either. By way of
17 preference, I would lean toward just keeping it the
18 way it is, because I do believe it's clear and our
19 intention was to track the ABA Model Rules. But,
20 again, I don't think that if we were to adopt the
21 amendment it would substantively change anything.

22 MR. HUBBARD: John Hubbard from the 3rd
23 circuit. There was an instance though where an
24 attorney contacted the client inadvertently. He
25 thought he was sending it to his own client and sent

1 it to my client instead. I then got a phone call from
2 that attorney that said it was inadvertently sent and
3 it did have certain information within it, please
4 destroy it. So I am not sure that we would actually
5 want to limit to the lawyer, because my client
6 immediately sent it to me. I received it. It wasn't
7 sent to me, but I received it, so I am not sure
8 whether we should change it to received by the lawyer.
9 Because if your client is getting the information --

10 MR. MOGILL: A lawyer receives it.

11 MR. HUBBARD: Well, it was inadvertently sent
12 to the lawyer in this case. It was inadvertently sent
13 to my client who then sent it to me on purpose.

14 MR. MOGILL: To me this sort of underscores
15 why we should leave it the way it is rather than add
16 to the lawyer, because if you received it, even though
17 you are receiving it secondhand after it was initially
18 sent to the client, your obligation is triggered.
19 And, again, the other side can say, as they did in
20 your case, please destroy it, or take whatever action
21 they want.

22 MR. HUBBARD: I agree, and that's why I
23 didn't want the added --

24 MR. MOGILL: Thank you.

25 MS. FOX: Jessica Fox, 56th circuit. I have

1 a question. Were listservs considered when this was
2 conceived, because my thought is, if you have two
3 attorneys who happen to be on the same listserv. One
4 of the attorneys sends a message to the listserv
5 asking a general question but they give enough factual
6 information that the other attorney could tell that
7 it's about their case or about the matter that they
8 are involved with, and that matter I would see that
9 the attorney was not technically sending it
10 inadvertently, so did you consider the idea of rival
11 attorneys being on the same listservs and information
12 coming out that way?

13 MR. MOGILL: I will say that in our
14 discussions we did not raise that, but I can also say
15 with a good deal of confidence that communication
16 shared on listservs are not, are absolutely outside
17 the scope of this rule.

18 MS. FOX: Thank you.

19 MR. FALKENSTEIN: Peter Falkenstein,
20 22nd circuit. Given the fact that we are trying to
21 put more of a burden or the onus on the attorney
22 receiving the communication and once the attorney
23 sending it is notified the burden shifts back to them,
24 I would suggest a friendly amendment that somewhat
25 broadens the scope of documents to which one is

1 required to notify the sender, which would be the
2 lawyer's client and knows or should reasonably
3 suspect. It's very easy to argue that I should not
4 have reasonably known that a document I received that
5 has no identifying features on it but appears to be
6 some sort of outline of a factual scenario may have
7 been inadvertently sent. It may be attorney work
8 product, but there is no way I should reasonably know
9 that, because there is nothing identifying it, and
10 unless I actually communicate to the attorney sending
11 it, I can always argue that unless I had notified him
12 that I have this document that's not identified I
13 really have no burden to make that communication
14 because I should not have reasonably known it, it
15 doesn't have any identifying features, but as an
16 attorney I would have reason to suspect that it might
17 have been inadvertently sent to me. So it simply puts
18 a little broader burden on the attorney receiving the
19 document to make that communication and say I got this
20 document, I don't know what it is, was it
21 inadvertently sent to me?

22 MR. MOGILL: Thank you. I don't want to give
23 short shrift to your very thoughtful suggestion. My
24 off-the-cuff reaction is I don't think that the
25 difference between know or suspect is going to be that

1 great, and one of the points that we are interested in
2 is consistency of nomenclature and then relating back
3 to the definitions of the terms in the introduction to
4 the rules, and for that reason I would respectfully
5 ask that we keep it the way we have got it. I think,
6 frankly, this rule has been around enough now in other
7 jurisdictions and is working that we can be
8 comfortable that your concern, which is absolutely a
9 very significant concern, is adequately addressed by
10 the wording the way it is.

11 MR. MOILANEN: Phil Moilanen, 4th circuit.
12 Just a question. Is there a deadline or timetable
13 when you are supposed to provide that notice to the
14 disclosing attorney?

15 MR. MOGILL: Yeah, promptly, and promptly is
16 going to be different things in different
17 circumstances. And this is also on purpose, because
18 different circumstances are going to -- what is prompt
19 in one circumstance is going to be -- you could have a
20 lot more wiggle room in another circumstance where
21 there is not a deadline or the use of the information
22 is going to create a particular subsequent problem.
23 It's a reasonable -- what would a reasonable person
24 consider to be prompt under the similar circumstances,
25 and, again, I think the experience has been throughout

1 the rules where there is an obligation to do something
2 promptly rather than in X number of days over time has
3 come to be found to be workable.

4 MR. LINDEN: Good morning. Jeff Linden, 6th
5 circuit. As I have been listening and reading, a
6 concern or caution just comes to mind in that because
7 we are proposing amending a Rule of Professional
8 Responsibility, what you are doing, my concern is that
9 it's creating a risk of the so-called inadvertent
10 recipient of the information is now an insurer for the
11 care and diligence of the person who allegedly made
12 the mistake. I have gotten documents. I participate
13 in lots of commercial litigation where there are
14 thousands and thousands of pages of documents to get
15 through. I am working on a case now where I have got
16 a document that has communication in it between an
17 attorney and their client. I don't think it was
18 inadvertent because of the nature of the background of
19 the case; however, it's putting on me, the recipient,
20 the onus and risk of discipline if I judge wrong based
21 on me having to take care for the other person's lack
22 of diligence in sending the document.

23 As a professional courtesy, if I had that
24 realization, I would take it upon myself to notify the
25 person anyway, but this is different. This is then

1 putting an onus of discipline intention on the person
2 who doesn't promptly notify and not more judging what
3 was prompt, whether it was known or reasonably should
4 have been known to be inadvertent. There is a lot of
5 risk there. As you know, I sit as a hearing panelist
6 on the discipline hearings, so I see these things, and
7 I am sensitive to when lawyers become subject to
8 sanctions for this type of thing and, you know, what
9 thoughts did the committee have in recommending this
10 about those types of issues?

11 MR. MOGILL: Great question, Jeff. Thank
12 you. From my standpoint, the caveat that you have to
13 have reasonably, you know, reasonably should know that
14 it was sent inadvertently makes it very clear that if
15 you had a significant question as to whether it was
16 sent inadvertently or not, then that doesn't get you
17 to that threshold and does not put you in a jeopardy.
18 And, again, so I think that it assesses the allocation
19 of responsibilities in a way that does not impose an
20 unreasonable burden on the recipient. Unless you
21 reasonably should have known that it was inadvertent,
22 you have no duty. The totality of the circumstances,
23 assessment in any given case, I have not seen lawyers
24 that I believe have been unfairly gone after when
25 there is a good faith basis for determining that there

1 was no duty. I don't think it's been the -- I don't
2 think it's been an issue, but it is absolutely a great
3 concern to raise.

4 MS. VULETICH: Victoria Vuletich from the
5 17th circuit. I am a professional responsibility
6 professor at Western Michigan University Thomas M.
7 Cooley Law School, also a professional responsibility
8 lawyer. I would simply like to echo Mr. Mogill's
9 comments that Michigan is one of the few states that
10 has not adopted this rule, and I normally always
11 follow the opinions and discipline sanctions that are
12 coming out in other states, and Mr. Mogill was exactly
13 right when he said that this rule works and it's
14 worked well and has struck an appropriate balance.

15 MR. MOGILL: Thank you, Victoria.

16 MR. OHANESIAN: Nick Ohanesian, 17th judicial
17 circuit.

18 I just wish to make an observation just to
19 echo what Ken has already pointed out, but the fact
20 that if we don't have this rule we are leaving this up
21 to a case-by-case issue with different courts. This
22 has come up that I know of at least twice, once at the
23 state level in a court of litigation and another time
24 in the Western District. Now, having the rule at
25 least puts us on, you know -- when you are concerned

1 about notice, I would be more concerned about the
2 iffiness of whether this is going to get applied in
3 the middle of a courtroom setting as opposed to having
4 a written, hard-and-fast rule which I think gives us
5 better guidance, so that's my only comment.

6 MR. MOGILL: Thank you. I agree.

7 CHAIRPERSON QUICK: Last call for discussion.
8 We can open our voting. I was remiss in pointing out
9 for all of you who like to sit on the fence that you
10 may press three to abstain. But again, one is yes,
11 two is no. Is the voting open?

12 CLERK MCGILL: Yes, voting is open.

13 CHAIRPERSON QUICK: You can now place your
14 votes. Last call. And our results.

15 CLERK MCGILL: 79 in the favor, 12 nay, and
16 zero absences.

17 CHAIRPERSON QUICK: 79 to 12, motion passes.
18 Thank you very much, ladies and gentlemen.

19 (Applause.)

20 MR. MOGILL: The Ethics Committee and the
21 State Bar Professional Standards staff, thank you very
22 much, and thank you all those of you who raised your
23 various points that were all really helpful to the
24 discussion. Thank you very much.

25 CHAIRPERSON QUICK: I would like to invite

1 Bob Ebersole to the microphone to present agenda item
2 number 9 and, while he is coming forward, thank
3 Professor Mogill, Bob, and other presenters here today
4 for taking time out of their busy schedules to work
5 with us in presenting these very important issues.

6 MR. EBERSOLE: Good morning, ladies and
7 gentlemen, and happy first day of fall. That means
8 summer is over. Other distinguished guests and
9 members of the Representative Assembly. Thank you for
10 allowing me to make this presentation this morning,
11 which is a proposal asking for your support of an
12 amendment to State Bar Rule 15. It is specifically an
13 increase in the Character & Fitness fee from \$225 to
14 \$375 and an increase of the late fee from \$100 to
15 \$175. I am going to make a very brief presentation.
16 I am going to ask that we not go through all the
17 slides until I get towards the end, and then I will
18 ask for the slides one at a time.

19 The Bar is faced with declining revenue.
20 Since 2014, there has been approximately a nine
21 percent decline in its revenue in Character & Fitness
22 fees each year. This is because nationally
23 enrollments in law schools went down. We don't get as
24 many people wanting to be lawyers, so as the
25 applications go down, so do the fees, and the

1 collection of those fees is important to our process.

2 The current \$225 was last set in 2001, and
3 there has been no increase since. And even at that
4 time the fee did not cover the full cost of the
5 Character & Fitness process. The staff has researched
6 where Michigan stands in relationship to other
7 comparable plans, and they obtained data from the
8 National Conference of Bar Examiners. The rough
9 national average for comparable states for Character &
10 Fitness fees, \$350. And for Bar exams, it's \$525.
11 You will note that the Character & Fitness fee is
12 usually lower than the Bar exam fee in most
13 jurisdictions.

14 Here in Michigan, the Board of Law Examiners
15 Rule 6, which became effective August 1st, took the
16 fee up to \$400 for the Bar exam, and that's the
17 maximum that the statutory scheme currently allows.
18 The increase was to offset the revenue loss by
19 declining numbers of applicants. According to our
20 staff, the Board apparently is going to seek an
21 amendment to that statute to permit the Board more
22 discretion in future increases and more flexibility.

23 Will the proposed fee increase cover the full
24 cost of Character & Fitness? No, but it will keep us
25 closer, first, to national averages, and it will help

1 defray the expenses. It's going to reduce the
2 shortfall.

3 Particularly the expense side involves
4 automation of the process. Currently it is partially
5 automated, not fully. Staff is working very
6 diligently to get more of the Character & Fitness
7 process accomplished electronically to submit both the
8 application for the Bar exam and the application of
9 personal history, which is the Character & Fitness
10 document, and to pay all the fees online. The new
11 systems will allow outside organizations and parties
12 to send materials electronically and will improve
13 communications with the Board of Law Examiners.

14 Now, our staff reports that our Supreme Court
15 is aware of the decline in revenue and of the cost of
16 the technology improvements that are underway. Staff
17 reports that the Court is likely to be receptive to
18 these increases that are proposed today.

19 Now let's go into the slides. Let's go to
20 slide number two. Here are some figures for you to
21 refresh your memory, and there is one more reason that
22 we will throw out for you, and that's to recover the
23 costs of credit card transactions. These are charged
24 by the companies to the Bar, and the staff would like
25 to recover at least a portion of those costs. Next

1 slide, please.

2 A graphic representation of the decline in
3 revenue. You can see the fiscal year 2013 was the
4 peak, and we are now down to \$204,000. Next, please.

5 The decline of applications is shown here
6 graphically. We went from 1,296 in 2013 to 800 in
7 fiscal year '17. Next slide.

8 This is the revenue pie chart. It tells you
9 where the money comes from. There is a slice in there
10 that says other, and I really didn't find out today
11 what that was. I thought perhaps some of you had
12 canisters on your reception desks for donations or
13 something, but I didn't know.

14 Finally, the next slide says direct expenses.
15 There is another one in there called nonlabor
16 expenses. My committee, the Standing Committee on
17 Character & Fitness for the Bar, consists of people
18 who volunteer, as you volunteer. Sometimes we are fed
19 a lunch, and that's what part of that nonlabor expense
20 is. Our hearings last far into the afternoon usually,
21 and we are given lunch, and that's our compensation.

22 And then the graphic depiction for the next
23 slide of the shortfall, which is currently \$356,000,
24 and the next slide says, if the fee increases improve,
25 that shortfall falls. It goes down by \$135,000. And

1 the final slide has the conclusory statements.

2 So we are asking for your support. Asking
3 for your support in the resolution to amend Rule 15,
4 and I want to thank some people specifically, and that
5 would be Danon Goodrum-Garland, Jim Horsch, and
6 Diane VanAken of the staff who have gathered this
7 information and helped present it to you today. Thank
8 you.

9 CHAIRPERSON QUICK: Thanks, Bob. May I have
10 a motion, please?

11 VOICE: So moved.

12 CHAIRPERSON QUICK: And supported. Thank
13 you. Any discussion on the item before the Assembly,
14 please move to the microphone, announce your name and
15 circuit.

16 MR. TEICHER: Good morning. My name is
17 Mark Teicher with the 6th circuit. The proponent, you
18 stated sounds very vehemently this doesn't come close
19 to what the actual cost is, so I was wondering if you
20 could tell us maybe approximately what the actual cost
21 is, and it seems logical that perhaps that you would
22 accept a friendly amendment that the amount be raised
23 to approximately to what the actual cost is, because
24 otherwise, the way I see it as a member of the Bar, we
25 are then paying for this service for the new lawyers

1 of the Bar, and I think that they should pay the extra
2 cost.

3 MR. EBERSOLE: The actual cost is currently
4 calculated about \$559,000. We are proposing a
5 substantial increase in the fee today. We are
6 proposing something that has not been raised since
7 2001. I can't speak definitively for the staff, but I
8 believe that over time your suggestion is going to be
9 implemented as we can. We don't want to currently
10 make the fee above the fee for the Bar exam. We would
11 like to keep that same thing going where our fee is
12 slightly lower than the Bar exam fee, and when that
13 rises, our fees will rise, and the shortfall will be
14 fine.

15 MR. TEICHER: I beg to differ. I would think
16 that actual costs would be more relevant. I know my
17 son just got admitted to the New York Bar, and their
18 fee for this service is about triple of what you are
19 even asking to be raised to. So what I would ask is
20 if you do a friendly amendment, sounds like I guess I
21 would ask is \$425 closer, maybe not at that number,
22 but closer to what the actual amount would be?

23 MR. EBERSOLE: Well, we don't at all want to
24 go above \$400, which is the fee for the Bar exam.

25 MR. TEICHER: Well, I would ask that you do a

1 friendly amendment to make that 375 400.

2 MR. EBERSOLE: I have to consult with staff
3 on their reaction to that, because I think it's
4 important that they have some input into this, and I
5 can't accept that amendment at this time.

6 MR. TEICHER: Then I make a separate motion,
7 if I can at this point procedurally. Motion is that
8 in place of 375 that be replaced with 400.

9 CHAIRPERSON QUICK: Is there a second for
10 that motion? I see a second. Is there any discussion
11 on the motion, not on the main proposition but on the
12 motion? The amendment, right.

13 MR. MASON: I don't know that it would make
14 any difference whether I commented on the motion or on
15 the main motion that's before this body. The comment
16 would be the same, and it seems to me that --

17 CHAIRPERSON QUICK: Let me just interrupt you
18 for a moment. If you would just state your name and
19 circuit.

20 MR. MASON: I am sorry. Gerrow Mason from
21 the 31st circuit. It would seem to me that we should
22 not be running at a deficit. If you know it costs
23 more to do something, then we need to be realistic and
24 try to deal with that figure. It also looks like the
25 Character & Fitness Committee is trying to look at

1 tradition, what other jurisdictions do, and strike
2 some kind of a balance. If I understand what the
3 gentleman said, it sounds like there may be potential
4 for costs to come down as they use more technology to
5 influence the process. If I understand that
6 correctly, and I don't know if the movant could
7 clarify that, but it seems to me they are indicating
8 we have to raise fees because we are running a
9 deficit, we are not charging nearly enough, but at the
10 same time it's implied that there may be some cost
11 savings down the road. If that's the case, the motion
12 makes sense as presented. If that's not the case,
13 then we are not addressing the issue, and we need to
14 deal with it and get it done and try to run with a
15 balanced budget.

16 The final comment is, with respect to decline
17 of applications to be lawyers, we will be addressing
18 issues today, and we have already addressed some, that
19 deal with how our profession presents itself to the
20 community and how we conduct ourselves, and if we
21 cheapen our profession, we can't expect more people to
22 want to become lawyers.

23 CHAIRPERSON QUICK: Thank you.

24 MR. CRANDELL: Patrick Crandell, 6th circuit.
25 I guess I am questioning does -- my comment does go to

1 the amount, so I guess it's relevant to the amendment.
2 My question is whether there was any consideration,
3 whether any analysis as to new graduate lawyers to the
4 extent they actually have employment coming out of law
5 school and what extra burden this increased cost has
6 on them. I have been a practicing lawyer for a number
7 of years, so I don't know what the new job market
8 economy is, and my question is is an increase in the
9 cost of Character & Fitness putting an undue burden on
10 new lawyer applicants?

11 MR. EBERSOLE: I don't know any official
12 figures that were gathered with respect to that issue.
13 I can recall when I was in law school many decades ago
14 that my ability to borrow money was considerably less
15 than the ability that people have today to borrow
16 money for various expenses and fees, so it's my
17 impression that we will have people able to afford the
18 new fee, which is not outrageous. I saw one number
19 this morning, and that's from California.
20 California's combined fee for Bar exam and Character &
21 Fitness runs approximately \$1,100. That's a lot more
22 than ours. We are low on the national averages for
23 comparable states, and I think that this proposal is
24 reasonable.

25 CHAIRPERSON QUICK: Discussion on the

1 impending amendment, please.

2 MR. ROMANO: Vince Romano, 3rd circuit. As
3 to the amendment, I think we need to be more
4 respectful of the committee's arduous work and the
5 input from staff. I really think we ought to let that
6 ride.

7 CHAIRPERSON QUICK: Any further discussion on
8 the pending motion to amend? Let's take a shot at
9 doing this by voice vote. All in favor say aye.

10 All against say nay.

11 Abstain.

12 The motion fails. Thank you very much for
13 your contribution. Back to discussion on the main
14 motion. Is there any further discussion?

15 MR. RENNER: William Renner, 15th circuit. I
16 guess I am speaking to people that aren't here. Those
17 are those who are going to be applying to the
18 State Bar. Being the father of an attorney and the
19 father of a CPA, I know certain things are accounting
20 and certain things are legal. I would suggest to you
21 that we are asking individuals who -- I think it was
22 \$50 a credit hour when I went to law school, and I
23 think I paid a thousand dollars a credit hour for my
24 son to do it. Now, I think the education is the same.
25 There might have been a couple of more cases, but

1 there is significant increase in the price of going to
2 law school.

3 Now, my son was lucky. He had a father who
4 was told by his mother to pay for it, but there are a
5 whole lot of individuals who don't have those mothers,
6 and they come out of law school, and assuming they
7 have financed their college degree, they come out with
8 \$100,000 plus worth of debt, and the first thing we do
9 is you want to add to that \$375. Now, in this room,
10 probably most of us could lay out \$375 without too
11 much difficulty, but those who are coming out of that
12 debt and having not really worked for a number of
13 years, it's significant. If anything, we might
14 suggest that we at the inception, as far as these
15 applications, that the first year of your Bar dues
16 goes to be applied towards the expense of allowing you
17 to take the Bar exam and gives you the privilege of
18 paying the State Bar dues.

19 I just don't see the necessity of increasing.
20 If you want to add a percentage utilizing a credit
21 card, fine. If you use a credit card to pay various
22 bills, they have a percentage on the bottom of that,
23 two percent, one percent, three percent, whatever, I
24 have no problem with that. If you want to use a card
25 and that's what it cost the State Bar, I don't have a

1 problem with that. And if you want to increase the
2 late fees, hey guys, if you are going to be a lawyer,
3 you can't be late. I mean, I have noticed that when I
4 have been late to court a few times.

5 And I don't want to bring up a bad subject,
6 but if there are fewer applications, and maybe I just
7 wasn't brought up, wouldn't the size of the staff and
8 the expenses decline in proportion with the amount of
9 work that's being done? I mean, if my business
10 increases and I hire employees, if it declines,
11 sometimes have to let people go or cut expenses
12 elsewhere, and I just think we are putting an
13 additional burden on individuals who, really at the
14 time in their life when they can't afford it, you are
15 asking them to pay it. That's my position. Thank
16 you.

17 CHAIRPERSON QUICK: Thank you.

18 MS. COLE: Angela Cole from Midland County.
19 Actually his last point was the point I was going to
20 make. If applicants are going down, then why is the
21 budget more or higher, and why weren't we given more
22 details, because you are asking for a substantial
23 increase here. We should know more about the budget
24 and why the budget is so high.

25 When I graduated law school years ago, I

1 borrowed \$120,000. It's not as easy -- even if it is
2 easy today or more easy, why is that justification for
3 raising the price up? So they can add even more debt?
4 That doesn't seem fair.

5 MR. EBERSOLE: Let me briefly comment from my
6 perspective. The Standing Committee on Character &
7 Fitness runs formal hearings where testimony is taken
8 under oath, often with counsel present. Those
9 hearings are very time consuming and demand a great
10 deal of preparation work by the staff.

11 As the number of applicants has declined, the
12 number of Standing Committee hearings has remained
13 approximately constant. We are doing somewhere in the
14 neighborhood of 40 per year. That's a big workload.
15 It's a lot for volunteers, and that is indicative of
16 the fact that the staff is having to do a lot of work
17 to keep this going. Just because the number of
18 applicants went down did not mean necessarily that the
19 workload for the staff has been reduced.

20 Now, in the future, if the electronic
21 improvements were to bear fruit and result in less
22 need for staff, I am sure the State Bar would adjust
23 that in the Character & Fitness department. Already
24 staff members in the Character & Fitness department
25 have ancillary responsibilities from time to time to

1 cover for other units. With that, I turn it back over
2 to Mr. Quick.

3 MS. KITCHEN-TROOP: Good morning. Elizabeth
4 Kitchen-Troop. I am the girl whose parents didn't say
5 pay for law school, and I came out with a hundred
6 thousand dollars of debt. Yeah, a hundred thousand.
7 Another \$500 is a drop in the bucket. I mean, truly,
8 it's not going to have any impact on the amount you
9 are repaying, and if we are under the national average
10 in running such a significant deficit, this feels like
11 a no brainer to me.

12 CHAIRPERSON QUICK: Thank you.

13 MR. DONDZILA: Nick Dondzila, 17th circuit.
14 two questions. One, if this were not to pass, have
15 there been suggestions or considerations as to raising
16 the cost of current attorneys' Bar dues to help offset
17 this cost? And question number two is have there been
18 any discussions as to ways there could be cost-saving
19 measures to pay for this given the current budget?

20 MR. EBERSOLE: I am not in the position to
21 talk about dues, because I don't have much to do with
22 them except paying them, so I am not in a position to
23 answer that question, and I would have to consult with
24 staff and get back with you. I really don't know.
25 Cost-saving measures, eventually the electronic stuff

1 is going to give us some cost savings, there is no
2 question about it. But it costs money to get the
3 software.

4 CHAIRPERSON QUICK: A reminder to the
5 Assembly, as we discuss these proposals, this one for
6 example, is simply a vote in support. The
7 Supreme Court would still have to take the matter up,
8 and there would be additional periods of public
9 comments and opportunities for people to weigh in.

10 MR. DIMENT: Morley Diment, 47th circuit. I
11 think I might be the youngest member here, at least in
12 practice. I haven't even practiced for a year yet. I
13 had to pay these fees. I had to pay for my own law
14 school, as has been described. Initially when I
15 started reading this in my hotel room last night, I
16 was not in support of it because it was going to be
17 more money that people like me who recently exited law
18 school with large amounts of debt would have to pay.
19 When I started looking into the electronic measures
20 that are being offered and looking at the national
21 averages and things of those nature, I can't help but
22 support it, because realistically we are running at a
23 deficit right now. It's obviously a problem. I will
24 echo -- I am sorry, I didn't catch your name, but I
25 agree with her, that it is a drop in the bucket

1 compared to what we are facing as people who are
2 entering the practice of law. We realize that we are
3 taking on large amounts of debt for the purpose of
4 hopefully becoming great attorneys who can then, you
5 know, throw down \$375 as someone described.

6 It's a gamble that we take when we go into
7 law, we are aware of that, but the Bar itself is a
8 gamble for us, as so many people don't pass. At the
9 end of the day though, we have to be able to support
10 that practice. We have to be able to allow people to
11 do Character & Fitness hearings, and I think that we
12 should support this measure to help support those
13 people. Thank you.

14 CHAIRPERSON QUICK: Any further discussion on
15 the proposal? We can open up our voting. Again, it
16 will be one for yes, two for no, three for abstain.
17 Ready to go. Please proceed and vote. Last call on
18 the voting. Our results?

19 CLERK MCGILL: We have 76 in favor, 17
20 opposed, and one abstention.

21 CHAIRPERSON QUICK: 76, 17, and one, the
22 proposal passes. Ladies and gentlemen, thank you very
23 much.

24 (Applause.)

25 CHAIRPERSON QUICK: The discussion so far

1 this morning reminds me and perhaps reminds you of the
2 beauty of this institution, to hear points of view
3 from practitioners of all aspects of our demographics
4 in this Bar. This is a unique body where those
5 viewpoints can be expressed. I am not aware of
6 anywhere else in the State Bar of Michigan that you
7 can do that. It really is a great thing, and I hope
8 you take a moment to appreciate it.

9 It is now my distinct pleasure to welcome our
10 executive director, Janet Welch, both because any time
11 I can let Janet speak, I do, and, secondly, because
12 the substantive items which follow Janet's
13 presentation are a product of our 21st Century
14 Task Force Initiative that the Bar has undertaken, and
15 Janet is going to set up a little bit of that for you.
16 Janet.

17 (Applause.)

18 EXECUTIVE DIRECTOR WELCH: Good morning.
19 Thank you, Dan. I am glad Dan referenced this body as
20 an institution, because I am a student of the history
21 of the State Bar and this institution, and, at the
22 risk of sounding slightly ridiculous, whenever I stand
23 up here, I feel to myself like a fresh face before the
24 State Bar of Michigan and the history of the State Bar
25 of Michigan, but, much to my amazement, I calculated

1 last night that this is the 32nd session of the
2 Representative Assembly that I have attended as an
3 employee of the State Bar, and it's the 20th time I
4 have had the privilege of addressing you as the
5 Executive Director. That's just the truth, but it
6 does not feel that way to me at all. It feels very
7 fresh.

8 Throughout those years I have seen the
9 Assembly grapple with important topics, and I have
10 also seen the leadership of the R.A. continuously
11 strive to achieve your desire for your work to be ever
12 more relevant to the members of the State Bar of
13 Michigan, and, as I look at the agenda, you are
14 tackling today -- the cliché that springs to mind is
15 be careful what you wish for. This agenda is
16 relevance on steroids. Can the profession provide
17 more effective service to clients by having clients
18 participate in shaping the scope of the
19 representation? Should clients be aware of their
20 attorney's malpractice insurance coverages? How, can,
21 and should the profession manage the demands,
22 expectations, and marketing of increasing
23 specialization within the profession?

24 The proposals on today's agenda implicate
25 some of the toughest questions facing the legal

1 profession today. I hope you welcome them and relish
2 their difficulty, because more and even more difficult
3 questions are on the horizon. These are exactly the
4 questions the final policy-making body of the
5 State Bar should be taking on.

6 I want to say just a few words about the
7 process that brought these questions to you today for
8 approval. The 21st Century Practice Task Force
9 represents the work of over 160 people, including
10 several from this body. Like this body, the Task
11 Force encompasses lawyers from all over the state and
12 every type of practice. It included justices and law
13 students, insiders and outsiders, court administrators
14 and law school deans, grizzled old veterans --
15 Ed Pappas being just one example -- and rising stars
16 within the profession whose names you will come to
17 know in the not too distant future. In total, there
18 were over 130 meetings of the task force committee
19 work groups and subwork groups. That number does not
20 include countless numbers of staff meetings and staff
21 work sessions.

22 Together the work of the task force added up
23 to almost 4,000 volunteer hours. When we organized
24 the town hall on the task force issues last January to
25 spread the word about the work and to gather feedback,

1 we feared that maybe the indetectable Tom Rombach had
2 already managed to find at a point every lawyer in
3 Michigan who was interested in the future of the legal
4 profession, but happily we found that the audience and
5 the appetite for these issues is much bigger than the
6 160 task force participants. We got feedback from
7 throughout the state, and I hope you have gotten
8 feedback as well. We got feedback from across the
9 country, and indeed across the world.

10 In the process of the Task Force's work, the
11 State Bar of Michigan has built an international
12 reputation as a leader among bar associations and law
13 societies on thinking about issues concerning the
14 future of the delivery of legal services.

15 Now it's your turn. It's not my job to
16 advocate for the passage of the proposals before you.
17 You are about to hear from more qualified advocates,
18 but I do want to leave you with two thoughts that kept
19 occurring to me throughout the process of the Task
20 Force and occurred to me as I read the proposals over
21 again last night. I think there are specialties which
22 you'll remember whenever you are asked to pass
23 judgement on proposals dealing with difficult change.
24 First, do not let the perfect be the enemy of the
25 good. Winston Churchill may have gone that adage one

1 better. To improve is to change. To be perfect is to
2 change often.

3 In that spirit, I urge you to focus on the
4 future, not something that lawyers are instinctively
5 trained to do. In my view, the Assembly has been at
6 its best and most effective, not when it proposes a
7 change that has crossed all the I's and dotted all the
8 T's, although many R.A. proposals of that nature have
9 been very useful, but I think the R.A. is at its
10 finest, most valuable, and most relevant when it
11 guides, shapes, and frames the big picture policies
12 for further development, such as the Assembly's
13 approval of the 11 principles of a public defense
14 delivery system, approval that broke a decade's long
15 log jam in improving Michigan's indigent defense
16 system. As you are all well aware, that improvement
17 is still very much a work in progress, but there would
18 not be any progress at all without this Assembly's
19 approval of those principles.

20 So let me be explicit. Limited scope
21 representation can be done badly if the rules are not
22 clear and the support system for practitioners is not
23 in place. Specialty certification can be a
24 bureaucratic waste of time in the wrong hands, but
25 your many, many colleagues who worked intensively for

1 a year on these issues, some of whom will be speaking
2 to you shortly, came to the conclusion that Michigan
3 can, must, and will do these things well.

4 This agenda, in my view, represents a red
5 letter day in the history of the Representative
6 Assembly. I thank the leadership of the Assembly for
7 their courage and energy in bringing these issues
8 before you so quickly, and I feel very grateful to be
9 here with you today as you consider the future. Thank
10 you.

11 (Applause.)

12 CHAIRPERSON QUICK: While the grizzled old
13 veteran and co-presenter make their way to the
14 microphone, this is agenda item number 11 in your
15 books, which were created before the calendar change
16 as item number 16. Let me also take a personal point
17 of privilege in having this body recognize
18 Linda Rexer, who was honored last night with the Bar's
19 highest honor, and I think we all owe her a round of
20 applause for that.

21 (Applause.)

22 MR. PAPPAS: Thank you. For those of you who
23 don't know me or remember me, the last time I spoke to
24 this august group was when I was State Bar President
25 in 2008, and I am back today to speak to you because I

1 believe that limited scope representation is vitally
2 important to clients, attorneys, and the Michigan
3 courts.

4 I will briefly discuss why limited scope
5 representation is so important and why amendments to
6 our Court Rules and our Professional Responsibility
7 Rules are needed. Two other very knowledgeable
8 individuals will also speak briefly on this issue
9 today. Following me will be Linda Rexer, who has been
10 the Executive Director of the Michigan State Bar
11 Foundation for 30 years, is the current co-chair of
12 the State Bar's Committee on Justice Initiatives,
13 co-chair of the Access Committee of the State Bar's
14 21st Century Practice Task Force, and chaired the
15 State Bar's Limited Scope Representation work group.
16 Linda will discuss how we are uniquely positioned to
17 assure both high quality and ethical limited scope
18 representation in Michigan. And for convenience I am
19 going to refer to limited scope representation as LSR.

20 Linda will be followed by Erika Davis, who
21 has a thriving solo practice in the city of Detroit,
22 served on the Practice Committee of the State Bar's
23 21st Century Practice Task Force, and is co-chair of
24 the State Bar's Committee on Justice Initiatives.
25 Erika will report on the LSR Summit, which was held in

1 Michigan this year with a national expert to explore
2 the benefits of LSR to clients, lawyers, and the
3 courts.

4 As you heard Janet Welch say, a broad
5 cross-section of lawyers, judges, and other experts
6 involved with the State Bar's 21st Century Practice
7 Task Force, the State Bar's Committee on Justice
8 Initiatives, and the LSR Summit have actually for the
9 past two years researched and studied best practices
10 based on the experience of more than 30 states which
11 have adopted similar LSR rules that we are
12 recommending and which all have implemented effective
13 LSR programs.

14 I am sure that you have all read the LSR
15 materials submitted to you, but so that we are on the
16 same page, LSR allows attorneys to provide discrete
17 legal services to which the client agrees in advance
18 of the engagement. These services include, but are
19 not limited to, providing legal advice, coaching, or
20 preparing documents for self-represented clients,
21 helping clients mediate or negotiate settlements, and
22 making limited appearances in courts for clients. And
23 although Michigan's Rule of Professional Conduct
24 1.2(b) allows LSR generally, the amendments that we
25 are proposing will provide clear direction and

1 protection for clients and attorneys engaged in LSR in
2 civil cases.

3 Clients are protected, for example, by
4 providing that LSR must be reasonable and based on the
5 informed consent of the client. And with respect to
6 civil actions, attorneys are protected, for example,
7 by rules allowing the attorney to file a limited
8 appearance with the court and to withdraw without a
9 court order by providing notice that the limited
10 representation was completed. This eliminates the
11 risk that a judge might not allow an attorney to
12 withdraw, requiring the attorney to provide full
13 representation without compensation.

14 The proposed rule amendments are
15 self-explanatory, and I don't have enough time to go
16 through each one of them today. Suffice it to say
17 that the proposed amendments are designed to protect
18 attorneys and clients alike and provide assurance that
19 attorneys will only be held accountable for their LSR
20 contracted services.

21 LSR is vitally important to our justice
22 system because it provides access to legal
23 representation to many low and moderate income
24 individuals who otherwise would not have such access
25 and who need limited assistance. And although a key

1 beneficiary of LSR is the self-represented client, LSR
2 also benefits the courts and our justice system by
3 allowing self-represented litigants to utilize an
4 attorney's expertise on essential legal matters,
5 thereby helping the judges better manage
6 self-represented cases and also increasing fair
7 results.

8 Just as importantly, attorneys benefit from
9 having more paying clients because LSR requires a
10 lower level of time commitment from the attorney than
11 full representation resulting in a lower cost and
12 affordable services for clients. The experience of
13 the 30-plus states which have adopted rules similar to
14 those that we are proposing have demonstrated that LSR
15 is profitable and presents an opportunity for those
16 lawyers interested in it to expand and build on their
17 current practices.

18 Even coming from a large law firm like my
19 firm, Dickinson Wright, I have had numerous inquiries
20 over the years from clients asking if I could assist
21 them on limited matters, such as drafting a mediation
22 statement, negotiating a settlement, or advising them
23 on ongoing litigation, but I did not assist the client
24 because I did not want to be drawn into litigation
25 with a client who could not afford to pay me for full

1 representation, and I did not want to run afoul of any
2 ethical rules. With these proposed amendments,
3 however, I would have no hesitation to provide LSR to
4 a client in need.

5 LSR is growing throughout the country, and I
6 urge you to vote yes on our proposal and join the more
7 than 30 states who already enjoy the full benefits of
8 LSR. So I thank you for listening to me, and I will
9 now turn the podium over to Linda Rexer.

10 MS. REXER: Thanks, Ed. My job is just to
11 take a few minutes to talk about how the 30-some
12 states that have these special rules run effective,
13 high quality, ethical LSR programs, and they do that
14 by providing additional support, and, whereas these
15 kinds of additional supports are not up before the
16 Assembly here for adoption, they are not part of the
17 rules, I want to take just two or three minutes to
18 tell you that of the groups that have vetted this in
19 Michigan and studied it for a couple of years, and the
20 21st Century Task Force is one of them saying that we
21 need a comprehensive program, the rules are essential,
22 essential for guidance and direction for lawyers, for
23 the protection for lawyers and clients that Ed talked
24 about and the benefits for courts, but where it's
25 really been successful and the ethical practice

1 promoted, those states have developed additional
2 tools, and because of the in-depth research by our
3 groups in Michigan, the State Bar of Michigan is well
4 positioned to move forward and provide additional
5 support for lawyers who begin to practice limited
6 scope representation, and I will just tell you briefly
7 what some of those supports would be.

8 Forms, for example, for attorneys and for
9 courts, educational resources training of lawyers, and
10 information to the public about what limited scope
11 representation is, referral systems so that qualified
12 limited scope attorneys can be found by clients, and
13 evaluation. And we are fortunate to be able to look
14 to some other states that have had a great system to
15 watch how they can continue to improve it as they go
16 forward and these groups that we have worked with in
17 Michigan to really come up with the approach here of a
18 comprehensive system. We put in some comments from
19 the Committee on Justice Initiatives that the Assembly
20 members received this week, so I don't need to read
21 them, but I just want to tell you that training, for
22 example, would be on subjects like the rules, like the
23 forms, like the referral systems, even business models
24 for successful limited scope practice, and we heard
25 from a number of people around the country who have

1 had a great, profitable practice doing that. Tips and
2 best practices, grievances, that sort of thing. Even
3 some sample forms have been drafted.

4 So we are really ready to support this system
5 in a way that will help practitioners and clients and
6 courts, and that's not before you today, but I thought
7 it was essential background. So thank you for
8 listening.

9 MS. DAVIS: I will be brief. You have the
10 proposed rules in your materials and our past
11 president and our Michigan State Bar Foundation
12 Executive Director I believe have really explained why
13 the rules matter, why we should implement them in
14 Michigan.

15 I did want to share some of the outcomes from
16 the Justice Initiative Summit on limited scope
17 representation in which we had a national expert come
18 speak to us, Kay Atlander (sp), and she helped us to
19 understand that this is being done successfully in
20 more than 30 states, and it served to bolster the work
21 that we had already been doing as volunteer lawyers to
22 develop a comprehensive LSR system.

23 On the access side, if adopted, these limited
24 scope rules will provide the ability for people to
25 receive legal services who may not otherwise receive

1 legal representation, because they don't necessarily
2 meet the income guidelines for free civil legal aid,
3 but they still need some assistance.

4 As Linda has indicated, as well as Ed, we
5 have the rules, and we further contemplate that those
6 rules will be further developed and supported with
7 court forms and educational resources. So I would
8 encourage you to adopt the proposal as it's been
9 presented to you today. Thank you.

10 CHAIRPERSON QUICK: To open discussion, may I
11 please have a motion in support of the proposal.

12 VOICE: So moved.

13 CHAIRPERSON QUICK: Motion, and is there a
14 second?

15 VOICE: Second.

16 CHAIRPERSON QUICK: And a second. As a
17 reminder, please move to the microphone, state your
18 name and circuit.

19 MR. MASON: Good morning. Gerrow Mason from
20 the 31st circuit. I stand in opposition to this
21 proposal. I think it cheapens our profession. It
22 turns us into a glorified LegalZoom. It will
23 encourage unethical lawyers. I think it will make our
24 profession irrelevant, and I also think that in the
25 end more people will go unrepresented, because

1 ultimately there is going to be less lawyers. You are
2 already seeing law school applications decline because
3 it's hard enough in this profession without taking it
4 and cheapening it even more.

5 What are the solutions then? As I stand up
6 here in opposition, what are the solutions? Pro bono
7 work. Attorneys have the opportunity through the
8 State Bar or their local bars to do pro bono work, or
9 also funding for legal aid. This just looks to me
10 like we are watering down our profession and we will
11 be nothing more than scribes or an occasional
12 mouthpiece who goes to court.

13 MR. PAPPAS: Just a quick response. I think
14 that people are self-representing themselves today
15 more than ever before, and I think this is not going
16 to cheapen the profession but basically this will
17 allow lawyers to provide more services to people in
18 need than ever before, and not just to the pro bono
19 people, people who cannot actually meet the
20 qualifications to get legal aid, but people who are
21 moderate income and I have even seen up to middle
22 income who cannot afford legal services and need
23 limited assistance. Thank you.

24 MR. BURRELL: Aaron Burrell, 6th circuit. I
25 am also a member of the Committee on Justice

1 Initiative. I rise to support this motion. Limited
2 scope representation marks a significant advancement
3 in the delivery of legal services and ultimately
4 represents the future of the legal profession. I feel
5 that LSR will put high quality legal assistance within
6 the reach of many low and moderate income individuals
7 who have been denied assistance before, would allow
8 attorneys to benefit from an increase in paying
9 clients, and would allow courts to benefit greatly
10 from an increased efficiency derived from an
11 attorney's experience and input in what would
12 otherwise be an unrepresented litigant's case. I feel
13 that LSR, the unbundling of legal services, is the
14 future for practitioners. Michigan should join other
15 states in the nation, over 30 states in the nation,
16 who have already made this important transition, and
17 with that I support the motion.

18 CHAIRPERSON QUICK: Mr. Burrell's comments
19 remind me that in our supplemental materials, which
20 should have been at your seats, there was a memo to
21 the members of the Representative Assembly from the
22 Committee on Justice Initiatives which was in support
23 of this proposal. So I wanted to make sure that you
24 were mindful of those supplemental materials in front
25 of you.

1 MS. VULETICH: Good morning. Victoria
2 Vuletich, 17th circuit. I am a professor at Western
3 Michigan University Cooley Law School. For ten years
4 I was staff ethics counsel at the State Bar of
5 Michigan where I prosecuted people in companies that
6 were engaged in the unauthorized practice of law, and
7 I am also a member of the 21st Century Practice Task
8 Force, and I come at this issue from three different
9 perspectives. Eighteen years ago when I started out
10 in the State Bar of Michigan prosecuting unauthorized
11 practice of law violation, I was horrified to learn of
12 the harm that involved people because they are so
13 desperate for legal representation and they will
14 search for easy and quick and affordable options and
15 often fall victim to unscrupulous predators in the
16 marketplace.

17 I have also seen our colleagues, you have all
18 seen them too, struggling to redefine their practices
19 in a highly restructuring, very rapidly restructuring
20 legal services marketplace. But I have spent the last
21 18 years with my career devoted to lawyers and helping
22 lawyers be better lawyers, be ethical lawyers and be
23 the profession that people want the profession to be.
24 And I think -- I know. I am confident that this
25 proposal in front of you today crafts an exquisite

1 balance between all of the three of these dynamics,
2 and I can say that as the chairperson of a
3 subcommittee on the 21st Century Task Force, I was the
4 junior member on the task force, or our subcommittee,
5 which was populated with seasoned, veteran lawyers,
6 and the limited scope representation, civil
7 representation, civil matters flew through without
8 opposition. There was very strong support, so I
9 strongly urge your adoption today. Thank you.

10 MS. SPIEGEL: Good morning. My name is
11 Mary Spiegel, and I represent the 2nd circuit. It
12 strikes me, when we think about this, that we each
13 look at it from our own perspective -- private
14 practice, criminal practice, state practice, nonprofit
15 practice. I used to be in private practice for 19
16 years, and I am now a legal aid attorney with Legal
17 Aid of Western Michigan, and I am here to beg you to
18 pass this proposal, beg you, and here is why. Let me
19 share with you my perspective.

20 So, as a legal aid attorney, you know that I
21 can only represent people who qualify for our
22 services. Many people don't qualify. They may have
23 more assets, they may have a higher income, they may
24 be conflicted out, and so we can't represent them. So
25 where do they turn? They turn to our legal self-help

1 center in Berrien County. It's one of the best. They
2 are fantastic people there, but we are talking about
3 folks who are not educated in the law. For them,
4 often it's a challenge to merely fill out the SCAO
5 forms for them to, say, get a divorce, so then what
6 becomes of these people? They go in front of the
7 judge who then is tasked with educating them on what
8 they need. They are sent back to fill out the proper
9 forms. They go back to the legal self-help center.
10 They then make another court date, and it goes on and
11 on, and in many of these cases we are seeing those
12 cases dismissed because they have timed out under SCAO
13 deadlines. I have three clients currently whose cases
14 were dismissed years ago who are seeking divorces
15 because they don't have the savvy to fill out those
16 forms. So this will help, frankly, not just members
17 of the Bar, but it will also help the courts to move
18 quickly and promptly in resolving these issues.

19 And here is the thing, folks. It's already
20 happening. I don't know if it's happening in your
21 area, but it's happening in mine, and the reason why I
22 know that is because sometimes I will have a pro se
23 litigant on the other side who will present me with a
24 prepared judgment of divorce. There is no attorney
25 signature on it, but you bet your bottom dollar that

1 was prepared by an attorney, because, frankly, I
2 recognize the style of that judgment, and the courts
3 do the same. So we can identify the lawyers who are,
4 you know, in secret and in the dark preparing these to
5 assist these clients, to assist the courts, yet we
6 can't bring them to the light of day. We can't
7 encourage them to do this to help the court system
8 move quickly. Bottom line, you know, bottom line,
9 this is an access to justice issue, right? And that's
10 what we are about.

11 Now, I get it, from a private practice
12 perspective, which has to be respected, this may not
13 always look like the best option, but the reality is
14 is that we need to come up with additional options
15 that will branch off of this. For example, one of the
16 things that I have talked with our chief justice about
17 is making a lawyer list of attorneys who are willing
18 to do low cost legal services and to do unbundled
19 services, but we have no one willing to do it without
20 the protections that this rule affords. They are
21 worried, they are concerned, and rightfully so. We
22 need this to protect ourselves. We need this to
23 protect those lawyers who are willing, maybe on a
24 pro bono basis sometimes, and I certainly support
25 additional funding for legal aid, but at the same time

1 we also need this tool to deal with the pro se
2 litigant that is not going to stop, is only going to
3 increase as we move forward.

4 So I would leave you with this, without
5 change, progress is not possible, right? So we are by
6 our very nature a responsive body. If this fails, if
7 for some reason the Bar Association is not able to do
8 what they believe and I believe they can, there is
9 nothing that prevents this body from re-proposing
10 modifications to this program. So let's seriously
11 consider this, and, again, I beg you to support this
12 proposition.

13 MS. PARKER: Alisa Parker, 37th circuit. I
14 am rising to support this proposal for all the reasons
15 that my colleague, Mary, just stated. I can only
16 go -- legal services attorney, so I won't even go into
17 the litany that she just provided in terms of the
18 things that we see and the people that we have to turn
19 away for all the reasons she stated. But I did want
20 to bring also another perspective. As a younger
21 attorney, in talking to our colleagues, we just looked
22 at statistics about law school, entrances declining,
23 people who are not looking to go into this field, and
24 one of the things that I recognize in being involved
25 with community and other types of organizations is

1 that other industries are changing with the times, and
2 their generation, especially the millennial
3 generation, that is looking to do things in a very
4 different way. So when you are looking at attracting
5 people to practice law and how are they going to do
6 that successfully in this economy, and especially when
7 they know they are going to have to take on an
8 incredible amount of debt to do it, I think these
9 rules provide a source to be able to move in a
10 direction that provides 21st century practice that
11 makes sense and that also lines up with trends in
12 other industries.

13 Other people look at ways to unbundle
14 services. The reason why LegalZoom and those type of
15 things exist is that because that's where society is
16 going. So it makes a lot of sense that we as a
17 profession, as those who have been a part of the task
18 force, take a serious look at how we move forward and
19 how do we stay relevant. I don't think this cheapens
20 our profession. I think it makes us relevant and
21 provides opportunities for people to be profitable in
22 ways, keep people where they are at and access the
23 justice system.

24 MR. ROMANO: Vince Romano from the 3rd
25 circuit. I rise to speak in favor of the proposal. I

1 think it's really critically necessary to the
2 advancement of the profession. I specifically want to
3 address the assertion that was made that this somehow
4 diminishes the lawyer's role and perhaps it diminishes
5 business income. I come at that from a little
6 different perspective. I have been a legal marketing
7 professional, a legal marketing consultant for 25
8 years, and I fervently believe that this proposal
9 represents great opportunity for lawyers to develop
10 and expand their practice, and on both those bases,
11 the need to do it and the great benefit to individual
12 lawyers practicing, I support it. I hope the Assembly
13 will support this motion too. Thank you.

14 MS. BREITMEYER: Kim Breitmeyer from the 30th
15 circuit, and I also rise in support of this
16 proposition. I had the opportunity to attend a
17 workshop a few months ago on the issue of limited
18 service, and I was thoroughly convinced after being a
19 participant in that that this is an access to justice
20 issue, that it is a win, win, win for courts, for
21 litigants, for the public, and I believe it is an
22 excellent companion to the Michigan Legal help
23 website, which, if you haven't checked it out, is an
24 amazing source, and I point people to it all the time.
25 And I pose this question to you, who hasn't provided

1 limited services to friends, family members when they
2 have asked? And I do see in the packet that we had
3 that the legal services and legal aid organizations
4 attributing large percentages of people who don't
5 qualify for those services. I have watched those in
6 my professional life working for the State try to
7 represent themselves in administrative hearings, and
8 they struggle with basic forms, with trying to figure
9 out how to appeal a decision that's not in their
10 favor, and I feel that this could only benefit
11 everyone. Thank you.

12 CHAIRPERSON QUICK: Any further discussion
13 from the floor? Former President of the State Bar,
14 Lori Buiteweg.

15 PRESIDENT BUIREWEG: Thank you, Chairman
16 Quick.

17 CHAIRPERSON QUICK: Current. Oh, minus one
18 hour.

19 PRESIDENT BUIREWEG: Still have 60 minutes.
20 Lori Buiteweg, 22nd circuit. I can't think of
21 anything more important that I would want to address
22 this body on before passing the gavel over to
23 Larry Nolan in just an hour. Limited scope
24 representation, or unbundling as many call it, or
25 right sizing as I like to call it, is something that I

1 shared my beliefs about in my Bar Journal column last
2 month, and, because I suspect that some of you may be
3 too busy to read my columns, I will quote myself to
4 you.

5 We need to think of limited scope
6 representation as another tool in the legal services
7 delivery tool box. The expansion of self-help centers
8 and legal services in Michigan is an important
9 development. Self-help assistance can take litigants
10 only so far before an attorney is needed.

11 Some of you are already engaging in limited
12 scope representation -- I know I have done it -- but
13 there is a tug of war going on between Michigan Court
14 Rules and the Michigan Rules of Professional Conduct,
15 and these proposed rule amendments that you have
16 before you today are intended to fix this. Without
17 good rules that clearly authorize limited scope
18 representation and give lawyers guidance on what
19 ethical LSR is, lawyers may be reluctant to try it,
20 and that would be a shame. LSR will help more
21 self-represented persons get help with some part of
22 their case, make hiring lawyers for discrete tasks
23 affordable, and help the courts by having a lawyer
24 involved when the person would otherwise have no legal
25 help. Of course making it a lawyer's duty to

1 determine whether LSR is appropriate for given clients
2 is a part of every effective LSR program in our
3 country.

4 I would ask you to please consider voting in
5 support of these proposals and giving our members
6 another tool in their legal services delivery tool
7 box.

8 MS. LACASSE: Dawn LaCasse, 34th circuit. I
9 recently did a short period of time as a law clerk,
10 and in that position I did a lot of assistance to the
11 judicial secretaries and the court clerks. While this
12 is a wonderful proposal and I am in support of it, the
13 problem that I see behind the scenes is limited
14 representation at court hearings and scheduling orders
15 and court dockets and how things are scheduled and may
16 need to be adjourned and whether or not there is a
17 practical way to do this behind the scenes that the
18 attorney that's representing somebody just for a
19 pre-trial hearing or just for one specific hearing,
20 when things are scheduled in bundles, whether there is
21 something that should be added regarding their
22 responsibility to pass that information on, either to
23 their client or to whomever may step in to replace
24 them.

25 Now the court computer system, at least the

1 one I am familiar with, you can list an attorney who
2 represents someone, but that's for the case, not for
3 just a hearing. So from a docket control issue, I see
4 a problem. I don't think it's something that couldn't
5 be overcome, but I just wanted to mention that behind
6 the scenes it could get very complicated from a court
7 clerk/court staff perspective.

8 CHAIRPERSON QUICK: Ladies and gentlemen, we
9 are going to open up the voting. Voting is open. One
10 for yes, two for no, three for abstain. Last call on
11 the voting. Our results.

12 CLERK MCGILL: We have 78 in favor, 15
13 opposed, and zero abstentions.

14 CHAIRPERSON QUICK: 78 to 15, the proposal
15 passes. Thank you very much.

16 (Applause.)

17 MR. PAPPAS: On behalf of the bench, the bar,
18 and the citizens of the state of Michigan, we all
19 thank you.

20 CHAIRPERSON QUICK: Ladies and gentlemen, the
21 model of efficiency that is the Representative
22 Assembly places us ahead in our calendar. I would
23 like to entertain a motion to move current agenda
24 items number 15 and 16 up for immediate consideration.
25 This is the two proposals dealing with medical

1 marihuana in the state of Michigan, the aspects of
2 that portion and related subject matter, and our
3 proponent is available and willing to move forward.

4 VOICE: So moved.

5 CHAIRPERSON QUICK: The motion needs a
6 two-thirds support. I heard a motion in support. All
7 in favor say aye.

8 Any opposed?

9 Excellent. Well, with that, we ask
10 Mr. Bernard Jocus to come on up, and we will first
11 tackle item number 15, consideration of proposal to
12 amend MRPC 1.2(c). I know that Bernie was here and
13 ready to roll. No pun intended. If you leave me up
14 here much longer, I am going to be singing and
15 dancing. There he is. You wanted a dramatic
16 entrance. I know how you are.

17 MR. JOCUS: Thank you, Chairperson Quick,
18 and my apologies. I had to go. I am over 40 years
19 old, so when I go into a building, I can't leave
20 without going to the bathroom. So anyway, if we could
21 just queue it up to the background.

22 In 2008, Michigan voters approved the
23 Michigan Medical Marihuana Act. While patients,
24 caregivers, and physicians who comply with the MMMA
25 requirements are protected from state criminal

1 prosecution for production, possession, or delivery of
2 marihuana, the MMMA does not protect individuals from
3 federal prosecution under the Federal Controlled
4 Substances Act or related federal statutes. Federal
5 law provides it is illegal to possess, manufacturer,
6 distribute or dispense marihuana, or conspire to do
7 so. In other words, while the client's conduct may be
8 legal under state law, it remains illegal under the
9 federal law. Consequently, lawyers who assist these
10 clients risk being accused of conspiring to violate
11 federal law and MRPC 1.2(c) as written.

12 Since the implementation of the MMMA, lawyers
13 have been asked to assist clients with various legal
14 matters related to the medical marihuana industry,
15 such as real estate transactions when use of the
16 property would involve the cultivation, dispensation,
17 sale, or use of marihuana; entity formation for the
18 purpose of operating a marihuana-related business
19 authorized by the MMMA; and regulatory compliance with
20 the MMMA.

21 A substantial number of states which have
22 authorized some sort of marihuana legalization have
23 also addressed the issue of Rule 1.2(c). There is a
24 general agreement within these states that a lawyer
25 may advise a client on the meaning of state marihuana

1 laws, and may assist a client engaged in state legal
2 marihuana-related activity, if the lawyer also advises
3 the client of the illegality of such activity under
4 federal law.

5 The proposed amendment to the MRPC 1.2(c)
6 would clarify that lawyers may provide legal counsel
7 and assistance to clients engaged in state legal
8 medical marihuana-related activities without running
9 afoul of their professional responsibilities. The
10 proposed amendment would also allow compliant advice
11 and counsel if Michigan law further adopts beyond
12 medical marihuana to increase the scope of lawful
13 marijuana-related activity.

14 Interestingly enough, there are two house
15 bills, actually three of them, that have just been
16 signed, ratified yesterday. The ink has not even
17 dried on these bills yet. That's House Bills 4209,
18 4210, and 4827. And actually a person that's on the
19 Marihuana Law Section Council, Robert Hendricks, we
20 had this discussion last night, and it kind of brought
21 into this big quandary, because this is something that
22 I had seen, many others had seen for the last couple
23 of years since we have been really getting involved in
24 this, since 2009, and now that we have these three
25 pieces of legislation that are an immediate effect,

1 not 90 days from now, but they are an immediate
2 effect, except for you are not going to be able to get
3 a license for what would be a provisioning center for
4 approximately a year, but they take immediate effect,
5 so it leaves with this question as to who is going to
6 represent these people? Who is going to represent
7 them? If we cannot as lawyers, regardless of where
8 anyone stands on the issue, whether you are a
9 prosecutor, whether you are a defense attorney, and,
10 more importantly, if you are involved in the cannabis
11 industry, which obviously we have one right now that's
12 going to be regulated with administrative rules to be
13 knocked out within the next several months, actually
14 probably weeks, and something needs to be done about
15 that.

16 Right now there has been -- obviously, this
17 issue is a huge gray area. There are some
18 dispensaries or provisioning centers in Michigan and
19 local ordinances that protect them. Right now it's a
20 gray area for attorneys in Michigan to be representing
21 these people. And now this is even expanded more
22 specifically to a three-tier growing system, whether
23 it be 500 plants, a thousand plants, 1500 plants, or
24 if you are going to open a provisioning center, also
25 commonly known as a dispensary, if you are going to be

1 transporting cannabis, if you are going to be an
2 inspector. These are all things that people need
3 representation for, and this process, it's going to
4 happen pretty quick, and just so everyone knows that
5 since 2008, actually 2009, there have been nine cases
6 that have went up to the Michigan State Supreme Court
7 in various different aspects of the law. Most of them
8 are criminal related. However, there are several
9 other issues. I know that there are many attorneys in
10 the room that have knowledge of some of the civil
11 aspects and other aspects as well.

12 I thought about this, you know, this morning
13 again, and, as attorneys or whatever it is that we do,
14 whatever is important to us in progressing with
15 justice, and I was thinking of some of these things
16 from the awards dinner last night, which was great, if
17 anyone had an opportunity to go, these things that we
18 do, they are important, and right now the way that
19 1.2(c) under the Michigan Rules of Professional
20 Conduct are, that kind of leaves us at half-mast at
21 best, and as things are going to be happening
22 relatively quickly, I think we need to be under full
23 sail for this big wind that's going to be kicking up
24 here in the next few months. So with that in mind, I
25 guess I am leaving this open for the Assembly debate.

1 My apologies. I will try this again. Is
2 there anyone on the floor that has a motion to please
3 consider this amendment to Michigan Rule of
4 Professional Conduct 1.2(c)?

5 VOICE: So moved.

6 CHAIRPERSON QUICK: Is there a second?

7 VOICE: Support.

8 CHAIRPERSON QUICK: Second.

9 MR. FALKENSTEIN: Peter Falkenstein,
10 22nd circuit. I rise in support of the proposed rule,
11 but I believe there is an ambiguity in the language
12 that might lead to unintended consequences. The
13 curious language is that lawyer may counsel and assist
14 a client in legal matters permitted under Michigan's
15 marihuana-related laws. That might be read to permit
16 representation, say, in setting up a medical marihuana
17 clinic in compliance with the law, but conceivably
18 could be read to prohibit representation of someone
19 accused of violating the law. And so I would just
20 propose that it be changed to assist the client in
21 legal matters arising in relation to Michigan's
22 marihuana-related laws.

23 MR. JOCUNS: Thank you for sharing that. I
24 appreciate that. However, there was great research
25 put into this matter and language went back and forth,

1 and I understand your concern about the ambiguities,
2 but that's just kind of -- I am not comfortable with
3 that. I believe that in the present form that it is
4 in that that would be the appropriate amendment. I
5 don't think that that ambiguity exists that you
6 actually had mentioned. I don't think it's that
7 technical.

8 MR. OHANIAN: Christian Ohanian from the
9 6th circuit. I just have a comment about the language
10 and something that I think might be a hole, but maybe
11 I am missing something. If it's a lawyer -- reading
12 them all together, A lawyer shall not counsel a client
13 to engage, if the lawyer knows it's illegal. If it's
14 permitted under Michigan law, then it would be
15 permitted under Michigan law.

16 The second part says, of the new proposed
17 part, it says, If Michigan law conflicts with federal
18 law, the lawyer shall also advise the client. Isn't
19 there still a hole in here about federal law?

20 MR. JOCUNS: No, we are actually filling in
21 the gap. The federal law, cannabis, marihuana is a
22 Schedule 1 controlled substance, so regardless, at the
23 end of the day, you know, whether we are in Colorado,
24 Washington state, District of Columbia or some of
25 these other new states that have legalized, regulated

1 adult use of cannabis, they still have the federal
2 government, and so I will refer you to the actual Cole
3 memorandum, which in 2013 Mr. Cole's Department of
4 Justice had a whole list of things pertaining to
5 marihuana and how the feds, or excuse me, how the
6 federal government was going to be acting in regards
7 to them. So --

8 MR. OHANIAN: So you are confident that last
9 sentence would protect lawyers with respect to
10 advising clients?

11 MR. JOCUNS: Absolutely.

12 MR. OHANIAN: Thank you.

13 MR. GOBBO: Steve Gobbo in the 30th circuit.
14 I've got to question whether the group that put this
15 together reviewed rules of the State Bar, particularly
16 Rule 15, Section 3, which requires attorneys being
17 admitted to the Bar to provide an oath of office, and
18 it also, as part of that oath, requires following the
19 laws basically of the U.S. Constitution and the State
20 Constitution.

21 Now, nobody is going to disagree that there
22 is a conflict between federal and state law. However,
23 when you get admitted to the Bar, you get admitted to
24 all the courts, including the federal courts
25 essentially if you decide to apply in the state of

1 Michigan, so I am just trying to understand how this
2 particular language, when you compare to physicians,
3 who do not take that same oath, and others in the
4 example in the narrative, how you believe this
5 language is going to protect an attorney from possibly
6 being criminally charged for conspiring with someone
7 if you are committing illegal activity at the federal
8 level. Thank you.

9 MR. JOCUNS: Thank you for sharing that. I
10 appreciate that, but for one, we as lawyers, whatever
11 area we practice in, we are all officers of the court.
12 When I fill out my renewal for my Bar dues and all the
13 sections last night, you know, one of the questions it
14 asks is if you have been convicted of something that
15 hasn't been previously reported. That pertains to
16 that, and, as far as any criminal act, if an attorney
17 commits a criminal act under this or any other
18 Michigan law, that person, you know, should be
19 prosecuted and more than likely will be prosecuted.
20 The language takes all that into consideration, it
21 really does, and the committee with the ethics
22 committee of the Marihuana Law Section of the
23 State Bar of Michigan have been working on this from
24 day one. So thank you.

25 MR. LEVIGNE: Thomas Levigne with the

1 3rd circuit. Yes, I would support this amendment to
2 clarify for lawyers in this field. I think these
3 businesses are going to be entitled to legal
4 representation, and it's important to provide this
5 clarification. I think there is no turning back
6 nationally. We are opening up to a new multi-billion
7 dollar market here, and this natural resource has been
8 discriminated against enough. So as a cancer survivor
9 and a patient myself, I support this, as well as the
10 other proposal in this regard. Thank you.

11 CHAIRPERSON QUICK: Seeing no other
12 speakers --

13 MR. ABEL: Matthew Abel, 3rd circuit. I only
14 just want to know if we could make this retroactive,
15 because I have been doing this for eight years, and
16 our phone is ringing off the hook, and there is no way
17 that we are not going to answer these people's
18 questions. So I think it's essential that we do this.
19 Thank you.

20 CHAIRPERSON QUICK: I was inclined to
21 unofficially term this the Matt Abel Memorial Proposal
22 for recognition of the R.A. Thank you, sir.

23 Seeing no other comments or discussion, we
24 will open the item for voting. Voting is now open.
25 One for yes, two for no, three for abstain.

1 Last call. We are hand editing in one vote
2 in favor from our proponent, who is also a member of
3 the R.A. yet without a clicker, so with that
4 modification, our vote tally?

5 CLERK MCGILL: The vote tally with that
6 modification would be 80 in favor, 16 opposed, and
7 zero abstentions.

8 CHAIRPERSON QUICK: 80, 16. Thank you.
9 (Applause.)

10 CHAIRPERSON QUICK: Mr. Jocuns will also
11 address your next agenda item, which I believe is
12 under tab 11 in your original.

13 MR. JOCUNS: Sorry about that,
14 Chairperson Quick. I want to thank everybody for
15 that. This is important. We are progressing, you
16 have no idea how fast. Things are moving in this
17 industry. And with that in mind, that's going to
18 bring us to the next item, Michigan Rules of
19 Professional Conduct 8.4 in which we are asking for an
20 amendment. I would like to go to the background, if
21 that's okay.

22 In 2008, the Michigan voters again approved
23 the Michigan Medical Marihuana Act. The law was
24 premised on findings which included modern medical
25 research has discovered beneficial uses for marihuana

1 in treating or alleviating the pain, nausea, and other
2 symptoms associated with a variety of debilitating
3 medical conditions, and that's Michigan Compiled Law
4 333.26422(a). While patients, caregivers, and
5 physicians who comply with the MMMA requirements are
6 protected from state criminal prosecution for
7 production, possession, or delivery of marihuana, the
8 Federal Controlled Substances Act and related federal
9 statutes continue to outlaw almost all use and
10 possession of marihuana. Federal law provides that it
11 is illegal to possess, manufacture, distribute, or
12 dispense marihuana, or conspire to do so.

13 Lawyers are potentially subject to the types
14 of debilitating medical conditions noted in the MMMA,
15 and are not precluded from activity authorized by that
16 law. However, Michigan Rule of Professional Conduct
17 8.4(b) specifically states that it is professional
18 misconduct for a lawyer to engage in conduct that is a
19 violation of the criminal law, where such conduct
20 reflects adversely on the lawyer's honesty,
21 trustworthiness, or fitness as a lawyer. The comments
22 to this section make clear that while some kinds of
23 illegal conduct reflect adversely on fitness to
24 practice law, other kinds of offenses carry no such
25 implication.

1 Traditionally, the distinction was drawn in
2 terms of offenses involving moral turpitude. Any
3 Michigan citizen's use of marihuana under the MMMA is
4 a violation of the federal criminal law. But in
5 Michigan the people have adopted the MMMA to authorize
6 and approve of the medical use of medical marihuana as
7 an activity appropriate to treat certain medical
8 conditions and not constituting criminal activity.
9 Under a fair reading of this law and its purposes --
10 please see the MCL that I just referred -- the
11 authorized use of medical marihuana under the MMMA
12 cannot be seen as involving moral turpitude.

13 The proposed amendment to the comment to the
14 Rule makes clear that if a lawyer (or a prospective
15 lawyer) uses marihuana in accordance with applicable
16 Michigan law, such use is not, in and of itself,
17 misconduct under MRPC 8.4(b).

18 This has kind of been a quandary from day one
19 when the act was passed and really implemented in 2009
20 how professional doctors, accountants, attorneys, how
21 they would be able to actually be a patient and be
22 protected under the act, and, you know, you have
23 immunity statewide, and you have 8.4 that definitely
24 conflicts with that, and with all that in mind, a
25 person shouldn't be a criminal because, you know, he

1 or she may have a cannabis card.

2 The Michigan Medical Marihuana Act of 2008
3 has its own vehicle inside that prohibits
4 professionals, and specifically attorneys, from
5 practicing under the influence of marihuana. In
6 addition to that, I was actually reminded by a local
7 judge in my backyard in Lapeer that there is actually
8 a criminal statute practicing under the influence.
9 And that would pertain to marihuana, it could pertain
10 to alcohol, and that's a separate offense that could
11 be prosecuted that way. So under general terms of
12 this, you know, lawyers that have a valid marihuana
13 card under the act should not be criminals, and these
14 lawyers, at the same time, I know that they are not
15 going to be practicing under the influence, as that
16 would be a crime under Michigan Compiled Laws.

17 CHAIRPERSON QUICK: To clarify for the
18 Assembly, because at least I had to read it a couple
19 times. It's a proposed modification to the Comment to
20 the Model Rule of Professional Conduct, not a
21 modification of the Rule itself, and, of course, it
22 would go from here, should it pass this body, to the
23 Supreme Court, and they will do with it what they
24 will. With that, do we have a motion to open
25 discussion?

1 VOICE: So moved.

2 CHAIRPERSON QUICK: And a second?

3 VOICE: Second.

4 CHAIRPERSON QUICK: Second. Thank you.

5 Anybody like to address this proposal?

6 MS. JOLLIFFE: Elizabeth Jolliffe of the 22nd
7 circuit. Do we no longer have any prosecutors in this
8 august body? With all due respect to my legal
9 colleagues in the medical marihuana field, Matt, I am
10 sure a lot of good thought has gone into this, but I
11 feel that -- let me make sure I get this right.
12 Practicing law while stoned is not appropriate nor
13 while someone is on opiates or alcohol, et cetera. I
14 know you have this last sentence in there that nothing
15 in this comment shall allow or excuse the lawyer's use
16 of marihuana in any way that may compromise the
17 lawyer's professional skill or judgment, but I just
18 feel that going as far as you putting it into the
19 Comment is not acceptable.

20 MR. JOCUNS: Thank you for sharing that.

21 MR. GOBBO: Steve Gobbo from the 30th
22 circuit. I am going to reiterate the comments I made
23 on the last proposal unless somebody wants me to
24 repeat it in terms of the foundation for that. I
25 notice this is just going into the Comment, but I take

1 exception to the phrase right after Michigan law,
2 comma, even if that conduct might violate federal law,
3 comma. If you take that out, I would probably stay
4 neutral on it, but otherwise I would oppose it,
5 because I think it gets into the concerns that I
6 explained earlier. Thank you.

7 MR. JOCUNS: I appreciate you sharing that,
8 and, you know, again, there are laws that are on the
9 books for that. A lot of research and time was
10 invested into this proposal, to the actual amending of
11 the notes of 8.4.

12 MR. FALKENSTEIN: Peter Falkenstein,
13 22nd circuit. I was not going to make a comment, but
14 after the two previous comments, I think it would be
15 extremely inequitable to essentially prohibit any
16 Michigan lawyers who have the need to use marihuana
17 for medical purposes from doing their jobs.

18 MR. JOCUNS: Thank you for sharing that.

19 MR. ABEL: Matthew Abel from the 3rd circuit.
20 The Michigan Medical Marihuana Act specifically says
21 that professional licenses are protected, so this is
22 consistent with that, and I believe that it's
23 appropriate and that this body should pass it. I know
24 a great number of lawyers who have Michigan Medical
25 Marihuana cards, and none of them have I ever seen

1 practice stoned or in an incompetent manner, and so
2 whether someone has a card or not should not affect
3 their ability to practice law, as long as they are
4 competent in practicing law, just as with any other
5 substance. Thank you.

6 MS. HOPCROFT: Vicki Hopcroft, 23rd circuit.
7 This is perhaps more a point of information or a
8 technicality, but I wonder if we would need to use the
9 alternate spelling, because the statute says
10 "marihuana" and we say "marijuana" in the items we are
11 referencing today. So the statute uses the "H". We
12 have used the "J" here, you see what I am saying?

13 MR. JOCUNS: Not only do I see what you are
14 saying, I hear what you are saying, and under the
15 Michigan Medical Marihuana Act it is -- I am sure that
16 there is somebody here that could pinpoint it
17 correctly, the official spelling of marihuana is with
18 an "H," as there is other, you know, reasons why the
19 "J" is taken out of there as well, but it is
20 definitely with an "H," and I wouldn't be opposed to
21 such an amendment.

22 CHAIRPERSON QUICK: That is an acceptance of
23 a friendly amendment and we will modify the spelling.
24 Any further speakers?

25 Prepare to vote. Voting is open. One for

1 yes, two for no, three for abstaining.

2 Last call on votes. Voting is closed. Our
3 results.

4 CLERK MCGILL: We have 71 in favor, 27
5 opposed, and one abstention.

6 CHAIRPERSON QUICK: 71, 27 and one. The
7 proposal passes.

8 (Applause.)

9 MR. ABEL: Thank you, Bernie.

10 MR. JOCUNS: Thank you very much, everyone.
11 This is important. This is important.

12 CHAIRPERSON QUICK: Ladies and gentlemen,
13 given the remaining items on our calendar, it does not
14 make sense in our 15 remaining minutes to advance
15 another item, and since I didn't allow anybody to take
16 a bathroom break, we'll have leniency upon the body,
17 at this time we will adjourn for lunch. I would ask
18 you to please be back and ready to role promptly at
19 2:00. Thank you.

20 (Adjourned for lunch 11:35 a.m. - 2:00 p.m.)

21 CHAIRPERSON QUICK: Ladies and gentlemen,
22 please take your seats. We would like to start up
23 again. Hopefully nobody lost their voting clicker
24 during the lunch break. You may want to see if you
25 can lay hands on that.

1 MR. FALKENSTEIN: Mine is stolen. Oh, I am
2 sorry. There it is.

3 CHAIRPERSON QUICK: Likely excuse.

4 If I can ask John Hubbard and Ken Mogill to
5 come to the podium.

6 I want to applaud the Representative Assembly
7 for having taken up the items we have already and we
8 will place in front of the Supreme Court and the Bar
9 for further consideration, really a tremendous
10 accomplishment. We have two more significant
11 proposals yet this afternoon, so grab a cup of coffee
12 and please try to pay attention.

13 MR. HUBBARD: Thanks for coming back after
14 lunch. My name is John Hubbard. I practice business
15 litigation in Detroit, Michigan. I am here with
16 Ken Mogill. I am also a member of the 3rd circuit for
17 the Assembly, and I was on the 21st Century Task Force
18 on the Practice Committee.

19 This rule that we are proposing today came
20 out of the Task Force Committee. There was perceived
21 a notion similar to what our newly sworn-in president
22 said, which is our first and foremost job is to serve
23 the public, and, in light of that, the committee felt
24 that the public would appreciate their lawyers more
25 and benefit more if they had access to whether their

1 attorney that they are hiring had malpractice
2 insurance or not and could make a more informed
3 decision in that regard. It was also thought that if
4 this information was publicly available that it might
5 encourage those attorneys that do not have insurance
6 to perhaps purchase insurance in that regard and to
7 protect themselves from any particular malpractice
8 that might be pursued against them.

9 The first question everybody asks me
10 regarding this is how many people have malpractice
11 insurance, how many people need malpractice insurance,
12 and how many people don't have malpractice insurance?
13 I think we have a slide.

14 Each year when each of us sign up to renew
15 our Bar license we have to fill out a form regarding
16 malpractice insurance, and these are the four
17 questions that are asked, and then you fill it out
18 accordingly. So the information that would be readily
19 available to the public the attorneys are already
20 providing to the Bar, and that's already in the
21 database on an annual basis, so there is no extra
22 added burden for an attorney to have to add or do
23 something special to provide that information to the
24 Bar, and then the Bar would make it readily accessible
25 to the public. If I could see the next one.

1 This is the breakdown of those that have
2 member malpractice insurance, and, as you can see,
3 some people don't need it, they have no exposure.
4 Some people have exposure and maintain malpractice
5 insurance. Some people have exposure, no insurance at
6 all, and then those with no exposure and then don't
7 carry insurance whatsoever. And, as we see, there is
8 about 12.3 percent of the lawyer population that does
9 not carry insurance but has exposure. So those would
10 be the people that would be answering no to that
11 questionnaire, and then if the public is given access
12 to that information, the answer would be no for those
13 attorneys. This is another breakdown, just another
14 Bar chart of what we just saw.

15 So, there is about 12 percent of active and
16 inactive attorneys have no malpractice insurance who
17 serve private clients that have malpractice exposure.
18 So that's how it breaks down, and that's how they
19 would be answering the questionnaire.

20 This proposal is for the State Bar, to direct
21 the State Bar to come up with a program that would
22 make your responses to the renewal of your license
23 available to the public. It's information that's not
24 private to you. It's information that if your client
25 or prospective client asked you about you would have

1 to tell them ethically, so there is no significant
2 issue in our opinion in adopting this proposal. You
3 kind of have to trust your State Bar to come up with a
4 safe and efficient and noninvasive method of providing
5 this to the public, which would probably be done
6 through their website.

7 MR. MOGILL: A couple points. One is the
8 idea of taking information that we already provide to
9 the Bar and, instead of it being private to the Bar,
10 making it accessible to the public. I think it's
11 fully consistent with our obligation to serve the
12 public. And, second, on a practical level, the
13 experience in other states has been that while there
14 is only one state with mandatory malpractice, there is
15 a suggestion requiring coverage results in an upward
16 tick in premiums, whereas just a matter of exposure of
17 whether you have it or not doesn't have an effect on
18 your rates. So from the standpoint of the practical
19 wallet issues, would this affect my insurance rates if
20 we have to disclose the information to the public?
21 The information that's available through the Bar
22 suggests that, no, it would not.

23 There are any number of ways it could be
24 implemented, but it seems, as John was suggesting, a
25 very straightforward one would be to take the

1 information the Bar already gathers and make it
2 available on a website that the public could access or
3 not. And, again, it was the feeling of the folks who
4 studied this that this poses no burden on you, because
5 it improves the accessibility of relevant information
6 to the public, and, therefore, it furthers our mission
7 of serving the public. Thank you.

8 MR. HUBBARD: One last point. There was also
9 a suggestion in the committee that this kind of
10 transparency to the public would enhance the
11 profession in the public's eyes and to help us
12 somewhat improve our impression with the public.

13 CHAIRPERSON QUICK: This is noted in your
14 materials, but since we are an institution, I feel
15 obliged to highlight it. In 1973 this body took up a
16 related subject matter and recommended to the
17 Supreme Court that all lawyers be required to carry
18 minimum malpractice insurance. While we are still
19 waiting 40 years later, one might view this proposal
20 consistent with that earlier position.

21 With those comments, we will entertain a
22 motion to open debate. Motion. Is there a second?

23 VOICE: Second.

24 CHAIRPERSON QUICK: And a second. Would
25 anybody like to address the audience regarding this

1 proposal? Please move to the microphone, reminder to
2 state your name and circuit.

3 MR. ROTENBERG: Steven Rotenberg, 6th
4 circuit. Can you hear me?

5 CHAIRPERSON QUICK: Yeah, but I don't think
6 that mike is on for some reason.

7 MR. ROTENBERG: My name is Steve Rotenberg.
8 I am a solo practitioner from the 6th circuit, and I
9 have got a few concerns about this, that we seem to be
10 dealing a situation where it was addressed a long
11 time, the issues of insurance were addressed a long
12 time ago, and no action was taken over several
13 generations of lawyers. But, if the Bar really wanted
14 us to have mandatory insurance, either the legislature
15 would mandate it or the Bar itself would mandate it.

16 Second of all, if we were to go ahead and
17 make this stuff public, I think that you would put a
18 bull's eye on everybody's back, the minimum amount
19 that we were required to carry. Everybody who wanted
20 to sue a lawyer knew that if they won there was
21 possibly a hundred thousand dollars or whatever the
22 minimum was they could reach.

23 Second of all, or on top of that, there is a
24 privacy issue as to the nature of our contract as
25 business people between third parties. Does anybody

1 really -- with that, people are comparing, shopping
2 and saying who is insured and who is not insured and
3 looking for it that way. Maybe they are actually
4 looking for what happens when it doesn't work and that
5 perhaps they would find themselves as a defendant in a
6 lawsuit. If it's not privileged, you lose, but even
7 if it is privileged, they are a pain in the neck to
8 deal with.

9 Now, I know that in Ontario, I believe that
10 they have similar disclosure requirements, and I
11 believe that they have mandatory insurance through the
12 Upper Canada Law Society. The feedback that I get
13 from colleagues that practice there, it's really
14 expensive insurance to do it. Even if we were to do
15 it through the State Bar, we would just wind up
16 raising costs for small practitioners, increasing the
17 cost of business. If everything is going out the door
18 to insurance carriers, what exactly are we
19 accumulating to protect ourselves from?

20 I'm not saying that we shouldn't be able to
21 protect our clients, but I really don't think that the
22 presence or absence of insurance is anybody's business
23 unless the client themselves ask for it, and at this
24 point, in almost 20 years of practice, nobody has ever
25 raised that question to me, ever. And that's all I

1 have to say. I would be opposed to this. I don't
2 oppose disclosing it to the Bar itself, but I do not
3 believe that that should be a matter of public record,
4 and that's all I have to say. Thank you.

5 MR. FALKENSTEIN: Peter Falkenstein,
6 22nd circuit.

7 MR. HUBBARD: I just wanted to respond to
8 that briefly. This is not mandatory insurance. This
9 is a whole different and separate issue. It doesn't
10 change your conduct whatsoever. It doesn't change
11 what you are going to do with your insurance
12 whatsoever, unless you want to get insurance. What it
13 is is being transparent to the public that you serve.
14 There is no privacy in connection with whether you
15 have malpractice insurance or not. It's a public --
16 you have it because you are protecting yourself from a
17 malpractice suit from your client. Your client should
18 know whether you have malpractice or not.

19 Experience shows that if a client wants to
20 sue you for malpractice, they are going to sue you for
21 malpractice whether they know you have insurance or
22 not. They assume you do have insurance. What we are
23 trying to show with this and this transparency is go
24 online, look and see if your attorney has insurance.
25 That will help you shop. That's exactly what it's

1 for, for you to shop for your attorney. That's what
2 clients should be able to do. If you are afraid that
3 you are going to lose business because you are not
4 going to buy insurance and you might lose some clients
5 for that, then buy insurance. But that's not the
6 basis of why you should be choosing your client. It's
7 why your client should be choosing you, and that's
8 what we are here for, our clients.

9 MR. FALKENSTEIN: A couple of questions.
10 First of all, am I correct that the proposal that we
11 come up with, a process for transparency as to whether
12 a lawyer has or has not got malpractice insurance, we
13 are not required then to provide the information as to
14 how much insurance coverage they have?

15 MR. HUBBARD: That's correct.

16 MR. FALKENSTEIN: So, it's just, yes, I have
17 it; no, I don't?

18 MR. HUBBARD: The answers to the questions
19 that you are already giving to the body.

20 MR. FALKENSTEIN: And just as background, you
21 said that in 1973 the proposal to require insurance
22 was rejected or not acted upon. Certainly 45 years
23 later would not be too soon to revisit it if we wanted
24 to do so. So my question is do you know if there are
25 any and, if so, how many states that do require

1 attorneys to carry malpractice insurance?

2 MR. MOGILL: Oregon.

3 MR. FALKENSTEIN: Oregon, that's the only
4 one?

5 MR. MOGILL: Have been a number of states
6 require disclosure.

7 MR. KOCHIS: Good afternoon. Anthony Kochis,
8 6th circuit. Full disclosure, in addition to serving
9 on the Representative Assembly, I also sit on the
10 Governing Council for the State Bar Litigation
11 Section. They conducted their meeting this morning,
12 and this proposal was on the agenda for discussion.
13 After some spirited discussion, the Litigation Section
14 adopted a unanimous resolution authorizing me to read
15 a very short statement into the record opposing
16 adoption of the proposal.

17 The Litigation Section believes that this
18 proposal has as its stated purpose public disclosure
19 of whether or not an attorney maintains malpractice
20 insurance, but the proposal contains no details
21 regarding the method, manner, or type of disclosure
22 required by an attorney. The Litigation Section
23 further believes that there is a serious concern
24 whether the impact of the proposal on members of the
25 Bar, what type of impact this would have on members of

1 the Bar and whether or not this proposal will achieve
2 its stated purpose or have unintended consequences.

3 And, lastly, the Litigation Section does not
4 believe that there is currently a problem or issue
5 facing legal consumers or that necessitates public
6 disclosure of attorney malpractice insurance. For
7 these reasons, the Litigation Section asked the
8 Representative Assembly to vote no on the proposal.
9 Thank you.

10 MR. MOGILL: Thank you for that. I think the
11 experience of states that have mandatory disclosure
12 requirements --

13 MR. LARKY: Mr. Chairman, I believe that he
14 is out of order. You are taking comments. We are not
15 asking for response.

16 MR. MOGILL: However you want to do it,
17 Sheldon.

18 CHAIRPERSON QUICK: We traditionally permit
19 proponents to respond and provide commentary. It's
20 not a debate, but it is the education and the thinking
21 behind the proposal, and, obviously, there is a
22 background and some context for these, so unless
23 Brother parliamentarian overrules me.

24 PARLIAMENTARIAN CHMURA: No, technically
25 Robert's Rules doesn't allow debate. You make a

1 motion, there is debate on the motion, and then the
2 next person is called to speak for or against the
3 motion.

4 Robert's Rules also says that if there is
5 customary practice that an organization has been
6 following that it's okay to follow that, and since at
7 least I have been around, which is eight years, this
8 is the way we have been handling motions. So because
9 of that tradition that this Assembly has, it's not a
10 violation of Robert's Rules in doing based on that.

11 MR. MOGILL: Thank you, Judge. That being
12 said, I would rather hear from you, Sheldon, than
13 talk.

14 MR. LARKY: My name is Sheldon Larky. I am
15 from the 6th circuit. I am in opposition to this
16 motion. We have a duty to the public, but I am
17 thinking the last few weeks I saw an internist, a
18 dentist, pharmacist, architect, accountant, an
19 insurance representative, professional engineer, real
20 estate broker, all of them licensed by the State, as
21 we are licensed by the State, the State Bar of
22 Michigan. None of those professions ever require any
23 form of disclosure. There is no transparency
24 necessary, and we accept those people for what they
25 are.

1 I spent ten years representing insurance
2 carriers for insurance in legal malpractice defense.
3 I think this opens, tends to open a floodgate. It
4 also, as the Litigation Section has indicated, I don't
5 see any purpose. I am directly opposed to it because
6 I don't see why we have to provide that information,
7 and I don't believe that it enhances our profession.
8 This idea being that it will be more transparent,
9 that's BS. It's not transparent. People come to us,
10 not asking if we have insurance coverage, by the way,
11 then you can represent us. Whether we have insurance
12 coverage or not, it should be of no consequence to the
13 public. If, in fact, we are sued and we have no
14 insurance coverage, that's the individual attorney's
15 problem. So I am directly in opposition to this, and
16 I would ask the Assembly to vote this down.

17 MR. MOGILL: Thanks, Sheldon.

18 MR. JOCUNS: Bernard Jocuns, 40th circuit for
19 the County of Lapeer. I was hoping that Mr. Mogill,
20 or maybe you could respond to this. Malpractice
21 insurance is something that --

22 MR. MOGILL: Can you speak closer to the
23 microphone so everybody can hear you.

24 MR. JOCUNS: There is purposes for
25 malpractice insurance. There are attorneys out there

1 that don't have it. I am not necessarily speaking
2 about an economic impact. My question is, in this
3 proposal, resolution, have you considered the fact
4 that if this information is to be made super
5 transparent that you can end up causing vexatious
6 litigation, people subsequently going after and
7 encouraging attorneys to be prosecuted civilly, and I
8 think that might have a chilling effect. Just
9 something that was considered.

10 MR. MOGILL: Thank you. I think these kind
11 of concerns to me are very important to consider, but
12 I also think that the experience of the states that
13 have adopted the mandatory disclosure requirements
14 should help allay the concerns that there's not going
15 to be vexatious litigation or whatever. I am not
16 concerned about the fact that other professions don't
17 take as high a road as our profession. I think that
18 we should always strive to be leaders in serving the
19 public. I think that with respect to the question
20 from the Litigation Section about the way the proposal
21 was framed, I think that that's a very important
22 question, but I think that all that's being asked is
23 that we take information that's already being gathered
24 and, instead of it remaining confidential within the
25 Bar, that it be accessible to the public, and I don't

1 see how that can harm us.

2 I think it's very important that only 12.3
3 percent of lawyers who would be in the category of
4 those that could need legal malpractice don't have it.
5 Obviously most of us by far who are practicing are
6 taking care to protect ourselves, and in a very real
7 sense our clients, in case we screw up, and so I think
8 that's also relevant to how much of a burden this
9 would actually be imposing and has to be considered.
10 I think that the fears that are being expressed I
11 think are addressed by the experiences of other states
12 that have already adopted this and not had those fears
13 borne out.

14 MS. JOLLIFFE: Elizabeth Jolliffe from the
15 22nd circuit. I am curious. I am kind of in
16 alignment with the Litigation Council in terms of is
17 there data establishing the clients are suffering
18 because we don't have this kind of information readily
19 available to the public now. In the synopsis it says,
20 This proposal is intended to address concerns that
21 legal consumers are not making fully informed
22 decisions. How do we know that? Is that some group
23 of us as lawyers saying we are concerned that our
24 potential consumers, that the public out there is not
25 making a fully informed decision, or have we actually

1 heard from the public, the potential clients, that,
2 boy, I wish I knew that my lawyer didn't have
3 insurance; that would have made a difference with me.

4 And then also I'm kind of curious, I'm sure
5 it's probably beyond the scope of this proposal right
6 now, what people are thinking about now in terms of
7 where will this information be readily available.
8 Will it be on our fully expanded profile on Zeebeek,
9 for instance? Will it be available on the State Bar
10 website? Where would that be? Thank you.

11 MR. HUBBARD: To address your last point, I
12 believe that the way the proposal is written the
13 State Bar itself would create the access, the level of
14 access. It was contemplated and discussed in
15 committee that it would probably just go on a separate
16 database that the public can access. I think that
17 that's also something that's being missed is that this
18 is successful for access. It's not an affirmative,
19 you know, statement by the Bar that this attorney,
20 this particular attorney doesn't have malpractice
21 insurance, this attorney does. You know, we are going
22 to send out a mass mailing, that type of thing.

23 If it is important to the client when they
24 are shopping, then that information is successful. He
25 doesn't have to call up the Bar, you know, I don't

1 know if my attorney has malpractice and I am trying to
2 shop around, or I got to call the attorney and ask
3 about whether they have malpractice insurance and what
4 level, because I want to make sure that I am covered
5 in case he screws up because I am very nervous about
6 my legal matter.

7 So two things. One, you have to trust that
8 the Bar is going to do it appropriately, and I think,
9 you know, having seen the Bar in action over the
10 years, I think we can do that, and the second is, if a
11 client wants to view it, not affirmatively going out
12 there and telling the client what it is.

13 MS. CHINONIS: Good afternoon. Nancy
14 Chinonis from the 7th circuit. I just have a
15 question. I know you already said that Oregon is the
16 only state right now that has mandatory disclosure.
17 Also in the materials it says that Alaska, Ohio, and
18 South Dakota must notify if there is no malpractice
19 insurance. Do we have any other data on any other
20 states, or are there only those three other states
21 that have this disclosure?

22 MR. MOGILL: I am not aware of additional
23 data. To answer your other question in terms of
24 Michigan, the anecdotal question you asked, I don't
25 think we have that. I think the question was what can

1 we do to provide full information to the clients.

2 MS. CHINONIS: Thank you.

3 MR. LINDEN: Jeff Linden from the 6th
4 circuit. Just a couple of comments and some
5 questions, and it's evolved with the discussion that's
6 happened here today, which is usually what happens.

7 According to the data in the handout, if you
8 are saying about -- and Ken used the total of three
9 percent are not carrying coverage, but on your chart
10 it says 12 percent of active and inactive lawyers have
11 no malpractice insurance who serve private clients and
12 have potential exposure. So if you are including
13 inactive, really the percentage of operatively
14 relevant attorneys without insurance coverage is less
15 than 12 percent for the active practice that are out
16 there exposing.

17 MR. MOGILL: Yes.

18 MR. LINDEN: That seems a relatively small
19 percentage to then mandate a rule of disclosure given
20 the bulk of us are carrying malpractice coverage.

21 Two, I echo my colleagues' concerns, it may
22 be without the data. When you are forwarding
23 frontally information about coverage for actionable
24 error, it raises questions that don't necessarily get
25 raised without that being on the forefront. If we

1 already have an ethical duty to disclose whether we
2 are carrying malpractice coverage if we are asked,
3 then how are we advancing the public service by
4 publishing the information in some way to give them
5 access? They have access. We are ethically required
6 to do it. Presumably if they say, Mr. Linden, do you
7 carry malpractice insurance, and I say, Well, I don't
8 feel like telling you that, then they can grieve me,
9 and there is a penalty if it's an ethical obligation
10 to do that. So the comment about it serving public
11 information and disclosure and transparency seems not
12 well targeted given the obligations that we have
13 ethically already.

14 Also, if the source of data that we are
15 relying on that there isn't a lot of issue about the
16 fears expressed here today by the states that do do
17 it, according to the materials only seven states
18 require the public disclosure of this information, I
19 am not so sure that that's enough data of experience
20 to really judge whether or not there is or there isn't
21 an issue related to that. I have hesitation. I am
22 still on the fence, but I wanted to express those.

23 MR. MOGILL: Thank you.

24 MS. HOPCROFT: Vicki Hopcroft, 23rd circuit.
25 I stand in opposition to the proposal. I would like

1 to amplify Mr. Larky's comments. I feel that it sends
2 the wrong message to the public. As Mr. Larky said,
3 we are licensed. That's what we present to the
4 public. I feel that's a personal matter, and it's a
5 housekeeping matter, and if we cross that out to be
6 available or a selling point to the public, I feel
7 that it cheapens the profession and it sends the wrong
8 image. I don't think that's the image that we want to
9 project. I do feel that it's the type of question
10 that a client can ask and should ask, an attorney
11 should be forthright about it, but I think it's a
12 private discussion. It's not something that should be
13 available as a matter of shopping.

14 MR. HUBBARD: If I could just address that
15 briefly. That's the viewpoint from the attorney's
16 perspective, if medical malpractice insurance is for
17 us and for our protection, but on the other hand it's
18 also for the client's protection. If we do mess up,
19 God forbid, then the client is protected because there
20 is going to be compensation there for the client, and
21 that's the purpose of this. It's from the client's
22 viewpoint, the client's transparency, and the client's
23 view of our profession that we are not hiding the
24 ball.

25 MR. MOGILL: And whether the client needs to

1 go through the process in the course of shopping for a
2 lawyer and da-da-da-da-da, do you carry malpractice as
3 opposed to sorting before getting there, but obviously
4 there are some very significant concerns, as you and
5 others are expressing.

6 MR. TEICHER: Mark Teicher. In 32 years of
7 practice I have never been asked by a client or
8 potential client if I have malpractice insurance, so I
9 don't see the need for this.

10 Number two, you talk about how clients shop
11 around. For clients to shop around now, they can go
12 online, and there is a variety of services where you
13 are rated, where clients can put comments, some
14 terrible, some great, some may not even be your
15 clients, but there is a lot of comments out there
16 already. Number two, places like the Better Business
17 Bureau have a list of attorneys that they have
18 complaints against, and they will tell you over the
19 phone the name of the lawyer and how many complaints
20 they have ever had against them.

21 The clients shopping around can go to the
22 Attorney Discipline Board website, and they can punch
23 in the somebody name, and everything shows up.
24 Details about any suspensions or whatever by the
25 Attorney Discipline Board are readily apparent. So

1 there are other ways to shop around based on the
2 merits of the lawyer as opposed to whether the lawyer
3 has malpractice insurance or not.

4 I would hope that my clients would want me
5 based on merit, not based on either if I have
6 malpractice insurance or how much do I have. I
7 certainly wouldn't want to be in the position of, oh,
8 I would love to hire you as my lawyer, but you only
9 have \$300,000 worth of insurance. I talked to someone
10 who has 500.

11 My other fear is the unintended consequence
12 that, in fact, there will be groups that will get this
13 and publish it, whether it happens to be an insurance
14 company, group who says, well, we want to make sure,
15 we want to help the public and make sure that you only
16 go to somebody who has insurance that they buy for.
17 It could happen. So those are my thoughts.

18 MR. MOGILL: Thanks, Mark.

19 MR. MASON: Good afternoon. Gerrow Mason
20 from the 31st circuit. I recognize that we are a
21 community service. We are all expected to do that to
22 better our communities. It comes with the territory
23 when you take an oath to the Constitution. I also
24 recognize that this body that stands here or serves
25 here this afternoon made up of lawyers representing

1 lawyers. We are not here on behalf of my service.

2 A strong, vibrant legal profession will bring
3 the very best and brightest people to that profession,
4 who will then in turn provide the very best
5 representation to their clients, and what concerns me
6 is today in the morning we talked about limited legal
7 representation, which to me is a malpractice trap and
8 creates all sorts of skeletal representation issues.
9 So we dealt with that this morning. We can
10 respectfully agree to disagree. This afternoon we
11 comb back and we talk about disclosing whether or not
12 we have malpractice insurance, and it's like, wow,
13 this is a bad business model.

14 We are cutting our own throats, creating all
15 kinds of malpractice traps and implications, and then
16 going, oh, by the way, here is how much insurance we
17 have got. We have got to get a little bit smarter
18 about what we are doing as a profession or nobody in
19 their right mind is going to want to practice law, and
20 the less competent lawyers we have got, the worse
21 service people are going to get. So, therefore, I am
22 in opposition.

23 MR. MOGILL: Kind of heard that.

24 CHAIRPERSON QUICK: If anybody else has
25 comments, we are going to try to bring this to a vote.

1 MR. EAGLES: Good afternoon. David Eagles,
2 6th circuit. The issue that I see with this is that
3 one set of data is released to the public, third-party
4 agencies, places where your profile is, that may or
5 may not update their information on an annual basis,
6 so it puts the onus on the attorneys to have to go to
7 every single profile and make sure, if that
8 information is disclosed, whether or not it's
9 accurate, so I am in opposition.

10 MR. PERKINS: Good afternoon. Dennis Perkins
11 from the 44th circuit. Just some questions. This is
12 my first time here. I am a first-time Representative
13 Assembly person. I guess the first question I've got
14 is that the first paragraph of the resolution, it
15 says, The State Bar of Michigan supports public
16 disclosure to promote public confidence in the
17 integrity of the legal profession, and then next, The
18 State Bar of Michigan be directed to develop an
19 efficient and effective process. I want to stop
20 there. Will this come back to us?

21 MR. MOGILL: There are a number of ways that
22 can play out, including -- I just checked with the
23 parliamentarian -- there could be an amendment from
24 the floor to be more specific so that it doesn't have
25 to go back, if that even -- I apologize for not

1 knowing the process -- even if that would otherwise
2 need to be the case.

3 MR. PERKINS: Well, I'm really not asking
4 that. It says, The State Bar of Michigan be directed.
5 What entity, what people, what person would come up
6 with this efficient and effective process?

7 MR. MOGILL: The Bar staff.

8 MR. PERKINS: The Bar what?

9 MR. MOGILL: Staff.

10 MR. PERKINS: The Bar staff. And would that
11 then come back to us for review and approval?

12 MR. MOGILL: Well, depends on the will of the
13 body.

14 MR. PERKINS: Okay. Depends on the will of
15 the body.

16 MR. FALKENSTEIN: Best you are going to get.

17 MR. MOGILL: So this is the very important
18 question, the State Bar will develop an efficient and
19 effective process, so --

20 MR. PERKINS: Well, the State Bar --

21 MR. HUBBARD: Once the process is developed,
22 is it going to come back and then be voted on again?

23 CHAIRPERSON QUICK: The answer is yes.

24 MR. PERKINS: All right. And minutes of this
25 meeting are being taken now for purposes of this

1 later?

2 MR. MOGILL: I don't think you have to worry
3 about somebody doing something behind your back.

4 MR. PERKINS: No, no, no, no, no. What I am
5 trying to say here is I am getting mixed messages from
6 my speakers here. The first message that I am getting
7 is that the information that we are giving now on our
8 Bar applications to renew our license says do you have
9 malpractice, don't you have malpractice, you have
10 private clients, and you check mark a box that goes
11 into the State Bar. I am being led to believe from
12 listening to you gentlemen that that same process is
13 going to continue, and that is is that my check marked
14 box, that that box is going to now be publicly
15 disclosed if people want to look at it.

16 It doesn't say that in the second paragraph
17 of the resolution, and so my concern is that if it
18 doesn't say and we are being told that that's what it
19 really means, I am not seeing anything to the contrary
20 that it would. Those are my concerns. I am opposed
21 to this, and those are my concerns with the language
22 that you have got. Frankly, with all due respect, I
23 would like to table it until next spring so that we
24 can get a little bit more developed factually as far
25 as what is the efficient and effective process that

1 you have, you know, that you are looking at right now.
2 Actually I would make a motion to table.

3 MR. ABEL: Support.

4 VOICE: Support.

5 VOICE: I call the question.

6 PARLIAMENTARIAN CHMURA: I think what you
7 want to do is not table the motion but postpone the
8 motion. The motion to table means you are going to
9 take up something later in the meeting. People always
10 confuse that. If you want to consider it at a
11 different time, then the proper motion is motion to
12 postpone.

13 MR. PERKINS: The motion to table is not a
14 debatable motion. The motion to postpone is
15 debatable.

16 PARLIAMENTARIAN CHMURA: If you make a motion
17 to table, you got to bring it up again today.

18 MR. PERKINS: I would amend my motion for a
19 motion to postpone to the next regularly scheduled --

20 PARLIAMENTARIAN CHMURA: That requires a
21 second.

22 MR. PERKINS: I don't think I am going to
23 have a problem getting a second.

24 PARLIAMENTARIAN CHMURA: Is it supported?

25 CHAIRPERSON QUICK: Yes.

1 PARLIAMENTARIAN CHMURA: You treat like any
2 other motion.

3 CHAIRPERSON QUICK: So we'll have discussion,
4 if any, on the motion to postpone consideration of
5 this topic to the next regularly scheduled R.A.
6 meeting. Please limit your comments to this motion.
7 Mr. Larky.

8 MR. LARKY: I am in opposition to postponing
9 it. Let's get it over with today. While there are
10 all these numerous questions, it's really more
11 philosophical, and the philosophical is whether the
12 Bar, potentially philosophical, is whether the Bar
13 staff makes it or we make it. The more important
14 thing is should we be put in the position of having to
15 disclose, and I am going to vote against the motion to
16 postpone.

17 MR. JOCUNS: Bernard Jocuns, 40th circuit,
18 Lapeer County. I am in opposition to adjourning this.
19 I think there have been a lot of people that have
20 expressed feelings on it. I think now is the time to
21 do this, and we should really call the question, in my
22 humble upon.

23 MR. ROTENBERG: Steven Rotenberg,
24 6th circuit, and I agree with the two previous
25 speakers. I would object also to postponing this. I

1 think we should deal with it today, seeings we are
2 already concentrating and discussing it.

3 CHAIRPERSON QUICK: Seeing no further
4 speakers on the motion to postpone, we will try it by
5 voice vote. All in favor of postponing to the next
6 regularly scheduled R.A. meeting say aye.

7 All opposed.

8 The motion fails.

9 Seeing no further speakers on the main
10 proposition, we will open the voting on the proposal
11 as stated, which is whether or not to direct the
12 State Bar to develop exactly what it says in the
13 proposal. The voting is now open. One for yes, two
14 for no, three for abstain. And if you lost your
15 clicker at lunch, you don't get to vote. Last call on
16 voting.

17 The results, Mr. Clerk.

18 CLERK MCGILL: We have 10 in favor, 86
19 opposed, and zero abstentions.

20 CHAIRPERSON QUICK: Ten to 86. The motion
21 does not carry.

22 Moving to our next agenda item. Thank you,
23 Mr. Mogill.

24 (Applause.)

25 CHAIRPERSON QUICK: Mr. Hubbard, feeling

1 courageous, moves to our next item.

2 MR. HUBBARD: You guys were so easy this
3 morning. What happened at lunch?

4 MR. ABEL: It was the marihuana.

5 MR. HUBBARD: Poor Ken. Now he has a loss.

6 So the next proposal for consideration is
7 proposal for a voluntary specialty certification
8 program, and starting off, this again came out of the
9 Task Force. There seemed to be a concern over CLE.
10 There seemed to be a concern over younger and more
11 experienced attorneys continuing in their continuing
12 legal education to a degree where they are out there
13 in the public declaring some sort of expertise that
14 may or may not be true.

15 This is simply for the State Bar to set up a
16 standing committee to create a program that then would
17 be brought back here to be voted on and refined. It's
18 a completely voluntary program, as the title suggests.
19 It is not a peer review, as some of the Super Lawyers
20 or DBusiness, you know, Top Lawyer or Best Lawyers in
21 America seem to be more peer review. What we
22 discussed in committee was it would be more like a
23 super advanced course in a particular area or
24 specialty, somewhat like a college course, where you
25 have quizzes and a final, and this would be sanctioned

1 by the State Bar, so it would be certified by the
2 State Bar of Michigan as opposed to some private
3 corporation, and it would be in control of the
4 State Bar to monitor the courses and to set out the
5 courses.

6 The courses will be provided through a
7 third-party vendor and paid for by the person that
8 wants the specialty certification. It is, regardless
9 of your experience or your perceived experience, you
10 would have to go through the whole course, take the
11 class, pass the quizzes, pass the final, and then
12 apply for your certification. And that would be the
13 basis, the parameters of this particular program, and
14 the details of that would be worked out by the
15 standing committee and then brought back to you.

16 This proposal is simply to set up the
17 standing committee for them to look at this. It's
18 really for younger attorneys that are starting out.
19 It would enhance their marketing ability, and it would
20 give some protection to the public, because people
21 really know what they are talking about as they come
22 out. For a more experienced or seasoned attorney,
23 it's a refresher course, probably won't be that
24 difficult for them, but then they can also market that
25 they have an expertise in this particular area.

1 Again, voluntary.

2 It would be sponsored by third-party vendors
3 or it would be developed, because it's going to be an
4 online course, by third-party vendors like ICLE. I
5 think there are some other providers that do that, but
6 all under the guise of the State Bar and the standing
7 committee, which would review everything and get input
8 from whatever committee that is that particular
9 specialty.

10 There have been some opponents to it that
11 have discussed and said, well, this is just a way for
12 these third-party vendors to make more money.
13 Actually the third-party vendors, as I understand it
14 and in discussing it with Ms. Chard at ICLE, it's very
15 expensive for them to put together this program. It's
16 somewhat of a lost leader for them to put together the
17 program and then have to wait for people to sign up
18 for it and hope that it takes off. So they are
19 picking up the tab for that out of the gate, so it's
20 not driven by the third parties. It's driven by a
21 perceived need that our attorneys are not as -- don't
22 have the ability to market and to encourage them to
23 take more continuing legal education.

24 CHAIRPERSON QUICK: Again in your materials
25 there is a history to subject proposals in this

1 general area, and the history is set forth in your
2 materials in terms of past actions by the
3 Representative Assembly, frankly both one way and the
4 other, depending on the specific proposals. So with
5 that, do we have a motion to open up discussion?

6 VOICE: Support.

7 CHAIRPERSON QUICK: Motion. Is there a
8 second?

9 VOICE: Support.

10 CHAIRPERSON QUICK: And second. If you have
11 comments, please state your name and your circuit.

12 MR. HORNBERGER: Lee Hornberger from the 13th
13 circuit.

14 Around 15 years ago I became a
15 board-certified specialist in labor and employment law
16 with the Ohio State Bar Association that had a
17 vaguely, a similar specialty program, but with what I
18 just heard, in Ohio one had to be a practicing
19 specialist in the field with a small "P" before you
20 became an accredited, Board-certified specialist with
21 a big "S". The way this program was just described,
22 this sounds like a specialty program for attorneys who
23 are not yet specialists. Thank you.

24 MR. DIMENT: Morley Diment, 47th circuit. I
25 am a new attorney. I think this is a great idea in

1 general. I am a little concerned because I keep
2 hearing reassuring the public that they know what they
3 are talking about. That's what the Bar is supposed to
4 be for, so I would be cautious about addressing this
5 program in that way, but as an aside, having some sort
6 of certification as a young attorney that you can tell
7 your client, listen, I have got a certification from
8 the State Bar that says I went above and beyond my
9 continuing legal education I think would be a benefit
10 for marketing, I agree with that. I am a little on
11 the fence about how it's going to be implemented, but
12 since this is just for the standing committee, I would
13 be in support of that.

14 CHAIRPERSON QUICK: Thank you.

15 MR. ROTENBERG: Steven Rotenberg,
16 6th circuit. I am a sole practitioner. I am just
17 thinking back to about 20 years ago when I started
18 out, people would ask what do you specialize in, and I
19 am thinking to myself, first of all, you know, I can
20 practice law, I have a law license and a lot of stuff
21 you would learn on the fly, but that's how you
22 actually learn what you are going to specialize in. I
23 originally thought that I was going to do one thing,
24 and it turned out my practice is totally different.

25 But I am also concerned that if we are

1 holding ourselves out as a specialist in this or in
2 that that we wind up buttonholing ourselves, not
3 necessarily providing the holistic services that our
4 clients might need. They might need a criminal
5 specialist, a family law specialist, and a tax
6 specialist all at once, and do these specialties that
7 you are proposing, are they going to wind up being
8 like Yellow Pages categories and you are going to say,
9 no, you are this or you are that, and it might not
10 actually have any accurate semblance to what's going
11 on. So I am concerned that really this seems not so
12 much as increasing expertise and excellence, because
13 there is LLM programs and there is independent CLE for
14 those who are interested, and I would encourage people
15 to avail themselves of that.

16 This strikes me as being mostly an
17 advertising thing and a marketing thing that does not
18 necessarily provide the services as people would want,
19 like if there is a solo guy that is being a
20 jack-of-all trades. A large firm, they can have a
21 department for this and a department for that, and
22 over time there seem to be more and more solo and
23 small firm practitioners out there, and what are we
24 going to wind up doing to the firm, or not to the firm
25 but to the practice of law by balkanizing and

1 buttonholing people, mainly so they can advertise.

2 Thank you.

3 MR. JOCUNS: Bernard Jocuns.

4 MR. HUBBARD: Can I respond to that a second?
5 I think the purpose of this particular rule is to
6 encourage attorneys to participate in the CLE, and
7 part of what it is is so that they have a goal,
8 because I agree with you, everybody should be taking
9 CLE, but your client doesn't know that you actually
10 took the CLE, you may not have learned a particular
11 advanced technique within that CLE that you might get
12 in this particular certification program, so that's
13 the difference.

14 MR. JOCUNS: Bernard Jocuns, 40th circuit for
15 the County of Lapeer. The committee idea itself I
16 like, but I had a couple questions and concerns, if
17 someone can respond. There is already volunteer
18 certification programs, like certified criminal
19 defense lawyers. I believe that they still have that
20 in mid-Boston, and, you know, that's a nationwide and
21 which may or may not do something for you in the state
22 of Michigan. There is many areas that have subgenres
23 or subareas, you know, as well, like transactional
24 work or marihuana law. It has little factions inside
25 there, and also, geographically speaking, you know,

1 what goes on in, you know, the thumb and the trends
2 there or here are a little bit different than what
3 would be going on in the west side of the state or in
4 the southeastern part of the state, so what would the
5 committee be doing to make sure there is some
6 diversity in regards to the geographic area and some
7 of these subspecialties within areas?

8 MR. HUBBARD: I guess the answer is that it
9 would be up to the standing committee to discuss it
10 with all the stakeholders, potential stakeholders,
11 about the subgroups and that type of thing, come up
12 with a program, and then bring that program back here
13 to see if it works.

14 MR. TEICHER: Mark Teicher, 6th circuit. The
15 proponent has three times said that all this is for is
16 to set up the standing committee, but the words up
17 here say to create a specialty certification program
18 and a standing committee. So, as far as the proponent
19 saying this is just to set up a standing committee, I
20 would beg to differ.

21 The other thing, in listening to the
22 proponent, where you also three times have said, well,
23 this is to help attorneys with ICLE with continuing
24 education. I would think then that perhaps we should,
25 the proponent could stress rules that maybe we should

1 have mandatory continuing legal education, which we
2 don't have. So if, in fact, this is just to help
3 attorneys continue in their legal education post law
4 school, that would be a better way to go than to have
5 specialty certification.

6 MR. MASON: Gerrow Mason, 31st circuit,
7 St. Clair County. This seems like a good idea and an
8 opportunity for us to improve ourselves as a
9 profession. It does give us the chance to maybe have
10 a certificate or have something special that we might
11 want to highlight to our clients. For younger lawyers
12 I think it's great, because you need all the help you
13 can get when you are trying to get going practicing
14 law. For guys like me that have been around a little
15 bit longer, it's nice because it never hurts to get
16 back to the basics. The law changes, new rulings come
17 down, and this just seems like a good opportunity.
18 This actually seems like the kind of thing the
19 State Bar of Michigan should be doing, and it seems to
20 make sense.

21 MS. JOLLIFFE: Elizabeth Jolliffe, again on
22 behalf of the 22nd circuit. It strikes me, it reminds
23 me of when I work with young lawyers and even
24 nonlawyers who have gone through the certification
25 process, the 40-hour mediation process. They get that

1 training and then they are going to hold themselves
2 out as a certified mediator, and they think that this
3 is a marketing device, this is going to help them get
4 at least more cash flow in their practice, because
5 they will have a practice, they will build a practice,
6 a newer lawyer, and then they will also be able to
7 market themselves as a mediator, but we all know in
8 this room, most of us at least, 99 percent of us,
9 actually more of the people who get hired as mediators
10 or facilitators are the people who have been around a
11 while who have experience in that area. So when I see
12 these younger or newer lawyers who are going out and
13 spending the money, very good programs, you can learn
14 great skills in those mediator training programs, you
15 do, but it doesn't really help them build a successful
16 mediation practice. They are going to get that, if at
17 all, by having an established reputation as a lawyer
18 and being able to mediate and have clients and
19 collaborate and all those good things and have great
20 communication skills.

21 So this, I know it's well intentioned, or it
22 reminds me of that, that we are going to be able to
23 say to a newer lawyers, You can now hold yourself out
24 as having this specialty certification, and I agree
25 with all of our colleagues here who have spoken

1 previously about, you know, you can hold yourself out
2 as having experience in this area once you get it, and
3 you develop more experience and you're given, the more
4 you talk about it, the more work you know or go and
5 shadow more people and that kind of thing, but just
6 having a specialty certification, it might bring you
7 one or two unsophisticated clients, but I don't think,
8 and as many of you know, I do a lot of marketing with
9 lawyers, and it's not going to be that golden ticket.
10 It takes time. We all know it takes time to develop
11 that kind of practice. Thank you.

12 MR. HUBBARD: And I don't disagree with any
13 of that if you look at it solely as a marketing tool.
14 If you look at it as a young lawyer has actually
15 learned something like through the mediation process
16 or when I go to a mediation how I should act and how
17 it works and what the mediator is thinking. Same
18 thing with the specialty programs. They would
19 actually learn something and they would become better
20 lawyers, and that's the purpose of it.

21 MR. FALKENSTEIN: Peter Falkenstein,
22 22nd circuit. I agree with Elizabeth on this. There
23 should not be shortcuts to success as a lawyer, and
24 this to me seems primarily as a way for young lawyers
25 to shortcut the hard, grueling business of learning

1 your trade, networking, gaining clients through
2 exposure that way, through successes in court or
3 through transactional work, and taking an online
4 quiz -- I know I am minimizing it -- but essentially
5 taking an online quiz, and then hanging up a shingle,
6 call yourself an expert in a particular field of law
7 when you may be a first-year graduate, having taken
8 the online course and quiz, you are not.

9 My nephew is a fourth-year resident in
10 Chicago. He is going to be a neurologist. He spent
11 one year in general medical residency and now four
12 years in a neurological residency before he can call
13 himself a specialist, and I think the legal profession
14 deserves nothing less. Those of us who have been in
15 business doing this for many years in various fields
16 have worked hard. We have slaved to get our
17 reputations, to get knowledge, to get wisdom, and I
18 don't want to see that diluted when people who did an
19 online course and then hold themselves out as experts.

20 MR. GARRISON: Scot Garrison, 6th circuit,
21 Oakland County. I disagree. I mean, I will certainly
22 defer to your expertise, but I disagree that it's a
23 lost leader. The pharmaceutical companies don't
24 develop medicine at a loss and then sell it at a loss,
25 right? They make money off of it. That's what

1 everybody does. So the cost is typically passed on to
2 the first round of people, the first class, so that
3 they recover the cost, and then they don't lower it
4 for the subsequent groups.

5 Twice now what I have heard is the proposal
6 doesn't require a program; for the proposal to require
7 a program to be committed, developed, and then brought
8 back to the committee, but that's not what the
9 proposal says. I would support this proposal if that
10 is indeed what it says, that all we are going to do is
11 develop a program and bring it back here for review.
12 So I would make a friendly amendment to strike -- is
13 there a limit on the number? I believe there is a
14 limit on the number of words to strike, correct?

15 CHAIRPERSON QUICK: Not on a friendly
16 amendment.

17 MR. GARRISON: Well, I would strike the words
18 "specialty certification program and a," so all we are
19 doing is developing a committee at that point. Let
20 the committee come back and make a report. I mean, I
21 respect the work of the committee that's there that's
22 already been done, but this doesn't say what we were
23 lead to believe it says.

24 CHAIRPERSON QUICK: The friendly amendment
25 has been accepted. Thank you.

1 MR. GARRISON: Thank you.

2 MS. PARKER: Alisa Parker, 37th circuit. I
3 too would stand just to offer my support for this
4 proposal. Looking at the language and what the
5 presentation is proposing to be and then listening to
6 the comments, I would agree with everybody who says
7 you learn the practice in doing the practice, but I
8 don't see this as a shortcut for new lawyers. I see
9 this, again, as an opportunity for them to get
10 started, a specialty certification, but I think it's
11 the development of the specialty standing committee is
12 how you get there, and that committee can decide what
13 that process looks like. And so, even looking at the
14 comparison of how doctors specialize in different
15 fields, we can't get here if we don't have a committee
16 that is taking on the task, that is looking at what
17 that certification process would look like. So for
18 those reasons, I would stand and offer support for
19 this amendment, or for this proposal.

20 CHAIRPERSON QUICK: Someone looking like a
21 general in the South American Navy has approached the
22 microphone.

23 MR. COURTADE: Bruce Courtaide from the 17th
24 circuit. I ask for permission to address the Assembly
25 on this issue.

1 CHAIRPERSON QUICK: Please proceed.

2 MR. COURTADE: As you know, I was one of the
3 co-chairs of the 21st Century Task Force. One thing I
4 want to make abundantly clear, given my history, not
5 only with this proposal but with this body, is that I
6 believe we are delving into details that shouldn't be
7 delved into by this group. This group is the final
8 policy-making body of the State Bar of Michigan. This
9 group is the not the final management committee of the
10 State Bar of Michigan. So that when you look at a
11 proposal like this, you may be justifiably concerned
12 about what are the details of this, how is this going
13 to work out. That's what the standing committee
14 determines. The standing committee studies this,
15 comes with its recommendations, and puts together a
16 program. So the question is should we be having a
17 specialty certification program? That's what this
18 body ought to be concerned about.

19 Now, the devil is in the details, true, but
20 at a certain point you have to rely on the State Bar
21 staff and others who are going to be delving into this
22 in detail that a 150-person group cannot do on the
23 fly. So that's one point.

24 The other thing I would like to point out is
25 we have already got specialty certification programs

1 in the state of Michigan, and, Elizabeth, you
2 mentioned it with the mediators. Mediators are
3 required to take advanced education courses. They
4 start out with the 40-hour training but then
5 periodically have to go back and take refresher
6 courses in order to maintain their standing on the
7 trial court lists. If you don't do it, you can't be
8 court certified. So this is not something that we are
9 creating whole cloth.

10 And another thing I really want to emphasize,
11 there has been a lot of discussion about, well, we
12 can't have these people just taking an online course,
13 it's a shortcut. There has been no specialty
14 certification program that has been proposed yet, and,
15 clearly, if somebody said all you have to do is take
16 an online course that's going to take you a 15-minute
17 quiz, I would be opposed to it, and I think anybody
18 rationally thinking about it would be opposed to that.

19 This is not something to advance young
20 lawyers and to give them a marketing tool. This is
21 something to protect the public so that the public can
22 look and see this person has at least had to take the
23 extra training to get the testing requirements so that
24 they can hold themselves out as specialty certified,
25 and if they have done that, then whether they are a

1 two-year attorney or a ten-year attorney or a 50-year
2 attorney, the public at least can look at it and say
3 they met some threshold, and that threshold is not to
4 be determined by the Representative Assembly. It's to
5 be determined by the standing committee.

6 CHAIRPERSON QUICK: Thank you, Mr. Courtade.
7 Mr. Gobbo.

8 MR. GOBBO: Steve Gobbo from the 30th
9 circuit. Philosophically, I don't have a problem with
10 this, so that makes it kind of easy to some degree,
11 but I do question one question. What you have up
12 there is, under the issue part of the first page of
13 the proposal, what you have is to call the question,
14 at least in what was received by the Representative
15 Assembly. The question then says, Should the
16 State Bar of Michigan create a specialty certification
17 program and a standing committee on specialty
18 certification to support specialty practice in the
19 21st century? If you are going to use that as a call
20 of the question, I was going to suggest adding the
21 word "voluntary" in there somewhere before specialty
22 certification program, because that was lacking that
23 word in the ending, and it takes it completely out of
24 context from what was presented in the background
25 material. So you made a change there. I don't know

1 if any further changes are needed. I would support
2 what's up there at this point.

3 MR. HUBBARD: The word "voluntary"?

4 MR. GOBBO: If you make this change, I don't
5 think you have to add that in at this point in time
6 because you are going to create the committee, and
7 then you can come back with whatever the
8 recommendations are. If this motion fails to amend
9 that, I would recommend putting the word "voluntary,
10 specialty" or something.

11 CHAIRPERSON QUICK: Let me just make sure I
12 understand you so we address the confusion. The
13 language that you see on the screen, and I recognize
14 perhaps the book has different verbiage in different
15 places the way the recommendation is laid out.

16 MR. GOBBO: Yep.

17 CHAIRPERSON QUICK: But the proposal that is
18 on the screen is what we will be voting on.

19 MR. GOBBO: As it is right now?

20 CHAIRPERSON QUICK: Correct.

21 MR. GOBBO: Then I am satisfied, but I
22 thought I should just call --

23 CHAIRPERSON QUICK: That's a good point.

24 MR. GOBBO: In case this motion fails.

25 CHAIRPERSON QUICK: Mr. Larky.

1 MR. LARKY: Sheldon Larky, 6th circuit.

2 Mr. Hornberger, you are going to have to help me on
3 this, and he will help me.

4 Under Michigan Court Rules, a person does not
5 have to be court approved to be a mediator. Anybody
6 in this room and everybody in this room could be a
7 mediator. The only difference is you are going to be
8 on a court-approved list. You are not certified; you
9 are court approved. Then the next question becomes,
10 next question becomes how often are you called from
11 that court-approved list? In the larger counties, you
12 are lucky to get named once every five years, ten
13 years. In the smaller counties you might have that,
14 but in the smaller counties, I know, brother and
15 sister counsel, you are not even court-approved, and
16 you are the mediator, you are selected as the mediator
17 in a case.

18 That aside, I have difficulties with this
19 proposal. I have difficulties, and I am going to vote
20 against it because what it does in small communities,
21 in small communities, it makes one attorney better
22 because he or she is going to be certified, yet maybe
23 the better attorney never went for the certification.
24 That's one.

25 Two, it may then put that attorney in a

1 situation where he or she will never ever get any
2 other business because they will look the idea, well,
3 this is a certified attorney. I don't think -- I have
4 to go back a step. As I said before on the previous
5 proposal, I spent ten years defending attorneys in
6 legal malpractice cases. If you become certified, if
7 you get a specialty practice, you are held to a higher
8 level than you would be in a general, so from that
9 standpoint I am going to vote no on this proposal.

10 MR. LABRE: Rob LaBre, 43rd circuit. This
11 continuing education should be viewed as a trinket to
12 your reputation. It's not a crutch. I would want to
13 be able to show to my client that I continue to learn
14 the law, and this is one way to show it. Now, do my
15 clients come to me because of this? No, they come to
16 me because of my reputation, not because I have a
17 specialty or a certificate, and I don't think it's
18 going to be short cutting it, and if it does, for the
19 older attorneys, if it does short circuit and I am
20 able to take your clients from you, go get your
21 certification.

22 CHAIRPERSON QUICK: Seeing no further
23 speakers, we will call the question, and, given the
24 issue that was raised by Mr. Gobbo, I will read it
25 into the record. Should the State Bar of Michigan

1 create a standing committee on specialty certification
2 to support specialty practice in the 21st century?
3 One for yes, two for no, three for abstain. Is the
4 voting open? Voting is open.

5 VOICE: Voting on the amendment, right?

6 CHAIRPERSON QUICK: This is a vote on the
7 proposal, correct. Yes, this is a vote on the
8 proposal. The language that he struck was by a
9 friendly amendment, so there is no vote on that. This
10 is on the actual proposal.

11 Last call on voting. Voting is closed. Our
12 results.

13 CLERK MCGILL: We have 37 against -- 37 in
14 favor, 57 against, and two abstentions.

15 CHAIRPERSON QUICK: 37, 57 to two.
16 Unfortunately, the motion fails. We thank Mr. Hubbard
17 for his time and energy presenting this.

18 (Applause.)

19 CHAIRPERSON QUICK: We now come to the point
20 of our agenda to nominate and elect the next Assembly
21 clerk. Is there a whipper snapper named
22 Rick Cunningham in the chambers?

23 Ah, Mr. Cunningham. Mr. Cunningham has
24 presented his materials in accordance with the rules
25 of the Representative Assembly to put his nomination

1 in for clerk. Are there other nominations for others
2 from the floor?

3 VOICE: Move to close nominations.

4 CHAIRPERSON QUICK: Well, seeing no speakers,
5 I don't think I need to even entertain that. There
6 are no other nominations from the floor, so we will
7 conduct a vote on Mr. Cunningham.

8 Voting open? Well, let's try a voice vote
9 first. All in favor of accepting the nomination of
10 Mr. Cunningham to become clerk of the Representative
11 Assembly say aye.

12 Any opposed?

13 Any who may want to abstain?

14 Thank you very much, Mr. Cunningham. Welcome
15 aboard.

16 (Applause.)

17 CHAIRPERSON QUICK: Just wanted to take a few
18 moments to thank some folks before we moved to the
19 next item of substance. First is that we have a
20 number of Assembly members who are completing their
21 terms. Of course, as many of you know, there is a
22 fine tradition of completing your term, taking a
23 one-year hiatus and returning for further service, and
24 we hope that many of these fine folks who have made
25 significant, meaningful contributions to this body

1 return as well. There are certificates for these
2 folks, and I would ask them to pick them up in the
3 back on the way out, but a round of applause please
4 for these individuals.

5 (Applause.)

6 CHAIRPERSON QUICK: I also want to take a
7 moment to thank the committee chairs. While at some
8 meetings committee chairs have an opportunity in one
9 way or another to address you, they really are a
10 significant part of the machinery that goes on behind
11 the scenes. Many of you may not be thinking R.A.
12 thoughts in between our meetings, but I assure you
13 that our committee chairs are, and their committee
14 members are, and they are working hard to make this a
15 better body and to bring these items of substance
16 ahead of you. So these are the committee chairs for
17 this past year. They have been invaluable to the
18 officers in advancing these items, and I would ask
19 them after the conclusion of our meeting to come and
20 meet me up here for some free goodies, but please for
21 now a round of applause.

22 (Applause.)

23 CHAIRPERSON QUICK: On the issue of
24 committees, you will soon be asked to express your
25 preference for committee service in the next Bar year,

1 and we would urge you to get those in and think
2 seriously about rolling up your sleeves and becoming
3 more involved in the Representative Assembly.

4 Before ceding the microphone to Judge Chmura,
5 I would like to thank him for his time and his mastery
6 of the rules of procedure in service to this body, and
7 I think he also deserves your appreciation as well.
8 So thank you, Judge.

9 (Applause.)

10 CHAIRPERSON QUICK: Let me also just take a
11 moment to thank Fred Herrmann, Joe McGill, our State
12 Bar liaisons, Carrie Sharlow and Marge Bossenbery, for
13 their incredible support throughout the year. Of
14 course the entire Board of Commissioners, Janet and
15 her staff, Lori Buiteweg, our outgoing president, and
16 Larry Nolan, our brand new, spanking president, have
17 been very supportive of this body behind the scenes
18 and have gone out of their way to make sure that we
19 live up to our mission, and I thank them for that.

20 As to Fred Herrmann, let me just say this
21 before turning over the microphone. Fred has an eagle
22 eye and keen mind. He has, let me term it a nuanced
23 sense of humor, but the important thing about senses
24 of humor is not particularly the adjective but it's
25 that you have one, and it's been a great benefit to

1 all of us. Most importantly, Fred is and has been
2 incredibly committed to this institution, to the
3 State Bar, and mindful of his obligations as a
4 shepherd to all of you and to the State Bar members at
5 large in his capacity as an officer. I am proud to
6 call him a friend, and I think he will provide great
7 service to all of you. So with that, turn it over to
8 Judge Chmura.

9 JUDGE CHMURA: Apparently that tradition of
10 serving out your term on the Representative Assembly
11 and then taking time off doesn't apply to me, since I
12 have been here for eight continuous years, but that's
13 okay.

14 Fred, come on up. I asked Fred earlier if
15 there is anything that he wanted me to say about him
16 before I swore him in. He said, Nope, there is
17 nothing I want you to say, there is nothing about me
18 that's important to say, say nothing, so I won't, but
19 I will give you the oath of office. I will administer
20 the oath at this time, so please raise your right hand
21 and repeat after me.

22 I do solemnly swear --

23 MR. HERRMANN: I do solemnly swear --

24 JUDGE CHMURA: -- that I will support the
25 Constitution --

1 MR. HERRMANN: -- that I will support the
2 Constitution --

3 JUDGE CHMURA: -- of the United States --

4 MR. HERRMANN: -- of the United States --

5 JUDGE CHMURA: -- and the Constitution of
6 this state --

7 MR. HERRMANN: -- and the Constitution of
8 this state --

9 JUDGE CHMURA: -- and the Supreme Court
10 Rules --

11 MR. HERRMANN: -- and the Supreme Court
12 Rules --

13 JUDGE CHMURA: -- concerning the State Bar of
14 Michigan --

15 MR. HERRMANN: -- concerning the State Bar of
16 Michigan --

17 JUDGE CHMURA: -- and that I will faithfully
18 discharge --

19 MR. HERRMANN: And that I will faithfully
20 discharge --

21 JUDGE CHMURA: -- the duties of Chair --

22 MR. HERRMANN: -- the duties of Chair --

23 JUDGE CHMURA: -- of the Representative
24 Assembly --

25 MR. HERRMANN: -- of the Representative

1 Assembly --

2 JUDGE CHMURA: -- and the State Bar of

3 Michigan --

4 MR. HERRMANN: -- and the State Bar of

5 Michigan --

6 JUDGE CHMURA: -- according to the best of my
7 ability --

8 MR. HERRMANN: -- according to the best of my
9 ability.

10 JUDGE CHMURA: Congratulations. Welcome
11 aboard.

12 (Applause.)

13 JUDGE CHMURA: I am supposed to present the
14 gavel, and if you need some lessons on how to use
15 that, you can meet me after the meeting. I will show
16 you how to do it. It's in the wrist though. It's all
17 the wrist.

18 (Applause.)

19 CHAIRPERSON HERRMANN: Thank you all. It's a
20 pleasure. I look forward to an exciting next year. I
21 know we are going to have a lot on our plate that
22 continues the great work we have done so far.

23 Yesterday at the Board of Commissioners
24 meeting I had the pleasure of presenting a resolution
25 in honor of Dan Quick's service on both the Board of

1 Commissioners and this body. In the interest of
2 brevity, and I know Dan would want this from his
3 comments this morning, I won't recite that same
4 resolution here today, but it's a matter of record,
5 and if you would like to read it, I have a copy.
6 Please let me know. It does great service to Dan as
7 he has done great service for us.

8 But I will say this, Dan has participated in
9 and led this body for many years with great care, very
10 careful planning and remarkable leadership, and it's
11 been a pleasure to serve with Dan. He has done
12 wonderful work. You should all be proud of that, as
13 we are proud of Dan, and we wish you the very best
14 going forward, Dan, and thank you very much for your
15 service.

16 (Applause.)

17 PAST CHAIRPERSON QUICK: Thank you, all.
18 It's been a great honor to get to know many of you
19 much better than I knew you before I came into the
20 chair. I look forward to getting to know and
21 continuing to know many of you for many, many years.
22 It is one of the great gifts of Bar service, that
23 aside from everything we think we are contributing to
24 the profession and to perhaps our own careers, that
25 far beyond all of that we make incredible friendships

1 and acquaintances, and it truly is a gift. So thank
2 you for that.

3 Let me close our meeting with a few
4 housekeeping reminders, please. First of all, say it
5 with me, turn in your clickers. Thank you. Please
6 turn in your clickers.

7 If you are parked in the DeVos lot, please
8 see Carrie Sharlow, who will provide you a parking
9 pass -- translation, no money -- or Marge has them in
10 the back.

11 Reimbursement forms for your travel if you
12 are eligible are due by November the 6th, not the 7th,
13 the 6th, and Carrie or Marge have the paperwork for
14 that.

15 So with no other business coming before the
16 Assembly, I will entertain a motion to adjourn.

17 VOICE: So moved.

18 PAST CHAIRPERSON QUICK: And a second.

19 VOICE: Second.

20 CHAIRPERSON QUICK: Ladies and gentlemen,
21 thank you very much. Have a wonderful afternoon.

22 (Proceedings concluded at 3:24 p.m.)

23

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25

1 STATE OF MICHIGAN)
)
2 COUNTY OF CLINTON)

3 I certify that this transcript, consisting
4 of 158 pages, is a complete, true, and correct transcript
5 of the proceedings had by the Representative Assembly on
6 Thursday, September 22, 2016.

7
8 October 14, 2016

Connie S. Coon, CSR-2709

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