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 Thomas M. Cooley Law School, 217 South Capitol, Sixth Floor, Lansing, Michigan, on Friday, November 14, 2003, at the hour of 10:00 a.m.

AT HEADTABLE:

DANIEL M. LEVY, Chairperson
ELIZABETH A. JAMIESON, Vice-Chairperson
LORI A. BUITEWEG, Clerk
JOHN T. BERRY, Executive Director
HON. ARCHIE C. BROWN, Parliamentarian
GLENNA PETERS, Staff Member

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Motion to adjourn
CHAIRPERSON LEVY: Thank you all for coming.
I would call this meeting, this special meeting of the
Representative Assembly, to order.
Madam Clerk, do we have a quorum present?
CLERK BUITEWEG: Yes, we do.
CHAIRPERSON LEVY: You have a proposed
calendar before you. Is there a member of the Rules
and Calendar Committee who would like to move that
calendar?
VOICE: We can't hear you.
CHAIRPERSON LEVY: A member of the Rules and
Calendar Committee to move the proposed calendar.
MR. LARKY: Mr. Chairman, Sheldon Larky from
the 6th Circuit. I move that we adopt the calendar.
CHAIRPERSON LEVY: Second?
VOICE: Support.
CHAIRPERSON LEVY: Any opposed?
Calendar is approved.
No objection having been received to the
summary of proceedings to the September 12th meeting,
although there is a missing page in the summary that
was printed, I am told that the corrected edition is
before you, but no objection having been received, the
summary is deemed approved.

Before we enter into the formal agenda with item two, I just wanted to take a moment to introduce Dean John LeDuc, I am sorry, Don Leduc, Dean of the law school, who has been gracious enough to host us today, and allow him to make a brief welcoming remark.

DEAN LEDUC: Good morning, everybody, and welcome to Cooley. I walked into the place and I thought this is a perfect setup for the Assembly. It looks like you belong here.

Most of you are now aware that Cooley is the neighbor of the State Bar, and over the several months of transition that occurred in the remodeling of the building across the street from us we served as at least temporary headquarters for a lot of the committees, and we really liked the relationship and think that the State Bar has been a great neighbor to us, particularly so since John Berry became the executive director, because John and I have worked together on a lot of projects, and we think we have a great relationship, and part of that is because our law school is so committed to the functions of the State Bar, mainly to produce lawyers who are competent and ethical, and we think we share that as a common endeavor.

And we hope that the Bar will continue to
think of Cooley when it is looking for a facility to use. It makes a lot of sense, and this would be sitting here empty if you weren't in it. So we are glad to have you here.

And just a couple of things that I want to say in passing, because that's the end of the official welcome, but I have been meeting some old friends who are graduates, so if they appear to have their hands sweating when you speak with them, I want you to know that many of them took examinations in this room, and it's sort of a sympathetic reaction to that.

And then I wanted to point out also that I am one of the few people who went to law school back in the '60s who sat between two women, and Susan Haroutunian is here, she was Sue Licata then, and we sat beside each other because alphabetical, so Sue and I knew each other better than any two people on the face of the earth at the end of that, having shared many anxious moments over that time. So I would especially like to welcome Sue and Tom and Mike Zagaroli that I see, and all the others of you from Cooley, welcome back. I hope you have a helpful and productive session working on this important agenda that you have today, and, once again, welcome.

(Appplause.)
CHAIRPERSON LEVY: And thank you, Dean. It's interesting, because I thought the sweaty palms weren't test anxiety, it was fear that they were going to be asked for alumni contributions.

Tom, chair of the Nomination Committee.

MR. ROMBACH: Tom Rombach from the 16th Circuit. I rise to move for the immediate seating of several vacancies in my position as chair of the Nominating Committee. In the 22nd judicial circuit, for Charlotte Johnson and John Reiser, III to be seated. In the 41st judicial circuit, for Henry (Hank) Robert of Iron River.

CHAIRPERSON LEVY: Thank you. Do I hear a second?

MS. CAHILL: Support.

CHAIRPERSON LEVY: Are any of those three individuals in the room so you could rise and say hello.

VOICE: Hello.

CHAIRPERSON LEVY: All in favor.

Any opposed.

Welcome to the Assembly.
becoming known as the Bartamaus speech, and I guess the good news is that you are not going to get that today. The bad news is there is still a first meeting again come January, and I reserve that right. But I did want to address the agenda that's before us specifically today.

There are only two items on the agenda that are substantive items. One is the Attorney Sanction Standards, the other the Rules of Professional Conduct, and I guess as I am pointing to them and to the agenda I just want to start with some special thanks.

Determining how to present this to the Assembly, how to present this in a fashion that would allow a large body, a representative body, to address the issues and take positions on behalf of the Bar in a format and in a way that would allow the Bar's opinion to become known to the Supreme Court to be helpful to them, at the same time do it in a roomful of lawyers who all had opinions and all had ideas on how things should be drafted was a relatively lengthy process. I think the product that you now have before you is a very good one. That is thanks to a whole large number of people who had input into the process.

I wanted just to thank in particular the
Special Committee on Grievance and the Professional and Judicial Ethics Committees. Their input to the Bar leadership and to the Assembly leadership in particular was very helpful in structuring this.

Also, my thanks to the members of the Special Issues Committee and to the Assembly committee chairs. These are the people who got together and actually drafted the synopses that we are calling them, the two pages that are before you on each of the rule positions that we are going to be talking about and came to a consensus as to how to word things, and because it took so long to figure out exactly how we were going to approach this we left them with very little, if any, amount of time in which to prepare the actual documents, and they came through for us.

And then, speaking of lack of time, I just wanted to thank Tom Byerley, Glenna Peter, and Janie Cripe of our staff in particular for their assistance in getting the calendar together for us at the last minute. Is Janie here? Janie, can you stand up just a second. Janie is Glenna's new assistant. I don't know that she has been introduced to the Assembly before. But if you have something to be done on behalf of the Assembly and you are calling the Bar, ask for Janie and you will get friendly, helpful, quick service.
I said be careful what you wish for, and I guess maybe a little of that is the notion of my having run for chairperson in the first place. But really what I was thinking of when I said be careful what you wish for is our agenda and what is before us, the Rules of Professional Conduct in particular.

Three, four, five years ago when the Bar was going through its strategic plan process and beginning that process, there was talk about whether or not there was really any need for the Assembly, whether or not we as a body really had any relevance, and whether or not we should continue to exist as an Assembly within the State Bar governance.

And our response was that there are certain issues that need to be decided by as large a representative body as possible, and simply submitting it to Bar membership by vote at a meeting or by some sort of internet vote would not allow for the type of informed and reasonable and respectful debate that's really necessary before we can make decisions on where our Bar policy should be, and that it was necessary to have a Representative Assembly in order to do those things.

And when we were successful in persuading people that we were a necessary body, the next step
was whether or not we could actually perform the task, whether a group of lawyers could really come together on important issues and in very short periods of time debate them, voice the concerns, voice opposing points of view, and actually then address the issues and set policy.

And I guess the main response to that question was, well, try us, test us out. We think we can do it, but we won't know if you don't trust us with those issues in the first place.

And the decision was made by Bar leadership to trust us and to continue the Assembly but with one eye out to the question of whether or not we could really do our job, and certainly the Supreme Court has said, yes, we want to hear from you, we will wait from our original publication date on the rules when we intended to publish them, because we do want your input, but we will give you just that one meeting, because we too want to see if you can actually address them, if you can actually do it.

So be careful what you wish for. We, in fact, got what we wished for. We proved ourselves previously, we proved ourselves thanks largely to Tom's leadership. We proved ourself on the dues issue, reasonable debate, sought the input of membership, and we came to a resolution on that, but
the volume that's before us here makes that even more
difficult.

The Rules of Professional Conduct were
debated for years by the ABA, they were debated for
years by the Assembly last time there was a full code
adopted, and we have essentially today's meeting. And
for that reason what you will see before you are not
for vote today the actual rules which are going to be
proposed by the court in the near future and will be
available for debate and we can talk about them at
future meetings.

What we have done to allow us to be able to
actually try and address so many things in so short a
period of time is to present those underlying issues
on which Bar membership has told us there is
disagreement among the Bar, things on which people
have differences of opinion, present those in such a
way that we can address just the underlying position
without getting caught up too much on language and

And I think that when you look through the
materials you will notice that's really what's
happened, and we have done it in a very set and very
determined way, the same for each rule to provide some consistency and ability to speed along the debate today.

Because of time constraints set on us by the court, I want to make an advanced plea that if anybody is tempted to rise to move to table one or more of these rules that you consider what you are really doing. I am not going to argue that it's inappropriate. What I am going to say is that you recognize that it's not really a motion to table at all, it's a motion to say that the Bar doesn't have a position on this, that we are not going to take a position on this, we are just going to remain silent on it and tell the court you are on your own, this is not something for Bar membership and consider the motion that way.

If you still think that that's the appropriate motion, please make that motion. If it's a motion simply that we not take a position, make that
to get together and look at what we submit to them and make decisions as to what to publish and then proceed.

If we have issues that do go to those technical aspects, to the language, those sorts of things, for the most part those can be addressed better by sections and committees who are dealing with specific areas of law in any event, but to the extent that the Assembly wants to take them up, once the court has published, consistent with our policies, we can certainly then go back and address those rules on which we have major language problems in our January meeting, January 10th, write it down. But that's not what we are going to try to do today.

If you look at, pick any one of them, (a) through (o), if you look at any of those you will see that each rule, each proposed policy has been broken down in the same way. In each one there is a brief statement of the issue present, what is the question,
some attorney organizations. You will see those positions laid out.

The positions are attached if they are referenced in the agenda. There are a couple more that were submitted after the agenda was printed, and those are on your desk. All that additional correspondence is included. Then there is just a brief synopsis of the issue itself and the resolution, sometimes several resolutions.

I think it's important to stress that in terms of what the Assembly is adopting, in terms of what we will be communicating to the Court, it is only that resolution, only the part that begins by vote of the Representative Assembly on November 14th and what follows with the (a) or (b) is going to be the position that the Assembly and that the State Bar are taking.

And that necessitates today that we pass an additional special rule in addition to the ones that we passed in September. You will have at your seat an orange sheet in front of you. One side of the orange sheet is a strike-through version, the other is a clean version. The strike-through version is what has already been passed in terms of special rules for the Assembly and how it changes to allow us to address these as positions rather than rules, and then the addition at the bottom of an additional paragraph that
allows us to take votes in the alternative. We can adopt that special rule that would allow us to take votes where it's either (a) or (b) so we can avoid the situation where we present (a), it fails, and the Bar has no position, then we have to start the whole debate over again to propose (b).

In this case we felt it was appropriate to vote on many of these rules as an (a) or (b) choice, either the Bar takes this position or it takes the other position and an abstention would be a vote that the Bar should not be taking a position.

And those proposed rules, therefore, are before us today. They would be adopted like the special rule that's already adopted and is being amended. They would be adopted for today only, and I believe -- I am looking for Ed Haroutunian -- the Special Issues Committee is proposing that these -- well, Ed stepped out.

I believe the Special Issues Committee is proposing, is moving that the special rules be adopted.

MR. HAROUTUNIAN: I am so moving, Mr. Chairman.

CHAIRPERSON LEVY: Do I have a second?

VOICE: Support.
CHAIRPERSON LEVY: Is there any debate on the special rules? Those special rules are adopted, hearing no dissent, and essentially that concludes my remarks portion, which brings us to agenda item number four, which is, in fact, the Standards for Lawyer Sanctions.

Before we get into the substance of that, I would note that the administrative order itself of the court is in the separate gray book that was sent to you. Like the book with the proposed rules themselves, this is a book we think we may have need for in future meetings. We ask you to hold onto it. It's for that reason it was bound separately. In that book you will find the Supreme Court's order. You will also find the Michigan Attorney Discipline Board's version, Donald Campbell's prepared version, who is with the Attorney Discipline Board. You will see an attached, the second package in that book is a side-by-side comparison of the three different proposals. And, in addition, at the end is a memo from the Attorney Discipline Board outlining their thoughts and positions. Because that was a broader based document, we wanted to include it there, but that document is something you should be considering as we address the actual proposal before us.

The actual proposal is in obviously our
calendar book from today's meeting, the white book, 
under tab 4. You will also see the letter of the 
Special Committee on Grievance there adopting or 
recommending our proposal, and I believe Special 
Issues Committee will at this time move the resolution 
as it appears.

MR. HAROUTUNIAN: Thanks, Mr. Chairman.
Ed Haroutunian, chair of the Special Issues Committee.

I want to just make a couple of prefatory 
remarks. The Special Issues Committee met, as well as 
the chairs of the various committees of this 
Representative Assembly, as well as the officers. Let 
me just very briefly indicate to you the folks who are 
on the committee. Richard Bahls, JoAnne Barron, 
Robert Buchanan, Jim Hanson, Cynthia Lane, Mike 
Riordan, Marcia Ross, associate members Kim Cahill,
That proposal essentially indicates that the Representative Assembly urges the Supreme Court not to adopt the standards for lawyer sanctions until such time as the subject of the comment and the public hearing side concerning the rules can also be dealt with. In other words, not to deal with the sanction side until the rule side has been dealt with.

Further, that the State Bar advocates that the Michigan Rules of Professional Conduct and the sanction side provide that action, other than public discipline, in certain isolated instances where attorney negligence occurs when it's in the interest of the Bar and the public.

Finally, the resolution goes on to say, look, and really -- it's addressed to the Supreme Court --

and really to say, look, if, in fact, you decide to go forward and to address the sanctions side before addressing the Rules of Professional Conduct, then in that circumstance what we would like you to do is to take a careful look at the comments and views that have been expressed by the committees and sections of the State Bar of Michigan and the report of the Professional and Judicial Ethics Committee and the Special Committee on Grievance.

So the first position is don't deal with
sanctions until you deal with the rules, and then kind
of deal with them contemporaneously together.

Secondly, the notion of, look, don't turn
around and -- there may be instances where isolated
occurrences of attorney negligence could create a
problem, but public discipline may not be the answer.
Something short of that may be the answer.

Finally, the position of, look, if, in fact,
you do go forward, Supreme Court, and you do take a
look at the sanctions side first without dealing with
the rules side, then in that circumstance then the
thing to do is to please take into consideration the
work of these two committees who have -- the
Professional and Judicial Ethics Committee and the
Special Committee on Grievance, and they have

So that would be the position and,
Mr. Chairman, I would so move its adoption.

VOICE: Support.

CHAIRPERSON LEVY: I will open it for debate,
but just before I do that it's been brought to my
attention that in adopting the special rules and in
trying to hurry so we could get to the meat of the
issues, I forgot to actually adopt them. I gave time
for comment, but I didn't say yea or nay. I also
didn't point out in Rule (e) one of the additions is to
permit non-Assembly members who are representing a Bar
entity or an attorney group entity to have the floor
privileges so that we can do that once in blanket at
the beginning of this meeting rather than to in each
case acknowledge and make that a separate motion.
So there having been no discussion, I would
just say all in favor of adopting the special rules
please say aye.
And now opposed.
Now they are adopted without dissent.
I believe the Attorney Discipline Board
indicated that they were going to have a

MR. VANBOLT: I am John VanBolt from the
Attorney Discipline Board. I am here. I do not wish
to address the Assembly.

CHAIRPERSON LEVY: My mistake. Are there Bar
entities or Bar sections that would like to address?

MR. ALLEN: Good morning, Dan. Is this on?

Everybody hear?

My name is John Allen, interloper, trouble
maker and having the privilege and honor of being the
chair of your Special Committee on Grievance, and I
rise to thank you for your courage in this particular
resolution.

All of us take part in organizations other
than this one. Most of us take part in organizations
other than the State Bar of Michigan that have to do
with the regulation of our profession. We go to those
meetings sometimes in far away places or sometimes in
nearby locations, and we are spoken to by our
colleagues and friends, by people who we have great
respect for, sometimes by elected officials and people
in great power, and many times those people look at us
and say, what are you doing about this, and talk about
a problem.

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Usually we have the ability to say, yes, we
want to help you and, yes, we want to do that and,
yes, we want to be part of the same solution.

Sometimes we have to have the courage to
stand up and say, no, we don't think your solution is
exactly the right one, at least in the form you have
proposed it. And that is what this organization is
doing with this resolution, and it is a courageous
act.

You are saying to the members of the Supreme
Court, respectfully and with courtesy, that the
The proposal you have made is not exactly the right one or there are parts of it that we think need to be looked at in greater detail, that it is very serious and interlinked with another proposal that you were not considering, and the people who made that other proposal, namely the amendments to the Rules of Professional Conduct, did not have your proposal about sanctions in front of them when they made theirs and that some coordination between those two is a good idea.

For those of you that went to law school back around the invention of the electric bulb like me, you remember the Code of Professional Responsibility and some of the reasons we changed the rules, the two principal ones cited most often.

Number one, the code had a lot of wishy-washy, mushy type of terms in it like appearance of impropriety that weren't well defined and had become abused over a period of time.

Secondly, many times the code, and particularly its ethical considerations, had been applied in civil proceedings outside of the disciplinary context where they were intended. The same problem obtains with these proposals for sanctions, and I think those are two of the areas that need some further study.
In fact, as John VanBolt would tell you, very few of the rules are actually used for discipline. If you look at their disciplinary proceedings, most of them concern a handful or so. The rest of the rules are used for other purposes, in civil liability proceedings as defenses, sometimes very hypertechnical defenses when lawyers attempt to collect fees, sometimes for public relations for the Bar, sometimes as tactical weapons by opponents, and all of those --

CLERK BUITEWEG: 30 seconds.

MR. ALLEN: Thank you very much. I really do support the proposal, and I hope all of you will too.

CHAIRPERSON LEVY: Any additional comments from sections, committees, or other attorney entities?

Comments from the membership.

MR. MILLER: Ronald Miller, 6th circuit.

While I strongly support what is in this document, there is one word that I do have trouble with, and that is the word "negligence," because when we talk about isolated occurrences of attorney negligence, it does in and of itself imply a potential cause of action.

I am concerned at how this may ultimately be used, and we talked about civil liability just a minute ago with Mr. Allen. I am concerned at how that
could potentially be interpreted, so I would make a
friendly amendment to remove the word "negligence" and
replace it with the phrase "errors and/or omissions."

CHAIRPERSON LEVY: I guess the procedure we
have by having it all introduced by a committee really
doesn't allow for any one person to act on friendly
versus unfriendly amendments. So I think I will just
take the sense of the house. Is there debate on the
amendment itself?

JUDGE BROWN: You need support.

CHAIRPERSON LEVY: I am sorry, does somebody
support the amendment?

VOICE: Support.

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CHIEF ASSEMBLY: Is there debate on the
amendment itself?

All in favor.

All opposed.

The amendment is adopted. We will be now
back to debating the resolution itself in its entirety
with the change of words, striking "negligence," and I
believe that should be on the wall behind me.

VOICE: Errors and omissions.

CHAIRPERSON LEVY: Errors and omissions, no
moral.

Other Assembly members, comments, debate on
the proposal?
Seeing none, all in favor.

Any opposed.

Again, without opposition each item passes, as suspected. I won't say that for a little while.

We will now move on to the rules portion.

Again, we divided these up, broken them down. I would remind people of these time limits. As we go through this debate, we will be enforcing them.

I would also point out that the rules are in an order that combines a number of factors. It was the amount of correspondence and comment that the Bar heard combined with whether or not those sections or people got proposals to us before the September meeting and were, therefore, told that we would give them priority, combined with those issues we thought affected the most attorneys, and that's where the order itself came from for these proposals.

It should not indicate any preference for the way we want votes to come out, although I do expect that the length of debate will shorten as the agenda moves on. But first do we have a motion?

MR. HAROUTUNIAN:  Mr. Chairman,

Ed Haroutunian, chair of the Special Issues Committee.

With regard to the proposed resolutions regarding the Rules of Professional Conduct, let me
just make one quick statement that Dan has already indicated but I think it's important to reiterate.

This body is the final policy-making body of the State Bar of Michigan, and sometimes we all get tied up in the comments and the semicolons and some specific kinds of words as opposed to setting forward the policy that ought to be implemented and to let other folks put the words together, but at least to convey the notion as to what the policy should be.

That's the -- and I will tell you that when the process started that was not the way it was being addressed, but in the course of many people talking about it and trying to get a handle on it, in fact, that's the way it evolved, and I have to tell you I think it's an absolutely outstanding direction to go for purposes of these rules.

So having said that, beginning at Section 5, 5(a), we will take each of these, and as the chair of the committee, I will act as the proponent, but obviously Dan will conduct the rest of the matter, and that is with regard to Rule 6.1, the voluntary pro bono publico service and the issues presented therein and as set forth on page 22 of your booklet, and I would make that, move for the discussion of it.

Well, here, maybe to make it a little easier, to move all of that which is here all at one time and
then the chair will take it up. So on behalf of the
committee I would move (a) through (o) as set forth in the
booklet, and that goes through page 140, from page 22
to 140.

CHAIRPERSON LEVY: What I will do is I will
treat it as a complicated motion and ask first is
there anybody who seconds the motion as made?

VOICE: Second.

CHAIRPERSON LEVY: I hear seconds. I will
treat it as a complicated motion and immediately take
a motion to divide the question so that we can take

them individually rather than having to adopt the
motion all as a whole.

VOICE: So moved.

CHAIRPERSON LEVY: First, is there any --
second on the move to divide? Okay. A vote on the
motion or discussion on the motion to divide so we can
take it (a) through (o) individually.

No discussion, all in favor.

All opposed.

That is also passed, so what that leaves
before us on the table at the moment is item (a),
Rule 6.1, voluntary pro bono rule. Is there somebody
here representing the pro bono community?

MS. CROWLEY: Good morning. I am Candace
Crowley. I am a staff attorney at the State Bar of Michigan, and I am speaking for the committee in lieu of Bob Gillett, the chair of the Pro Bono Involvement Committee.

CHAIRPERSON LEVY: I am sorry, Candace, you have to speak up. These mikes require you to get pretty close.

MS. CROWLEY: So what I am really saying to you is that I was not prepared to speak, but in the absence of our representative I will do my best to state our position and encourage you to adopt the change that the Pro Bono Involvement Committee, the Legal Aid Committee, the Access to Justice Task Force, the former task force, and the former Open Justice Commission all support.

I should let you know that I came into the Bar about five years and have worked with the Access to Justice Development Campaign, and I am hoping that you can easily understand the correlation between the campaign and the $300 donation toward legal aid and the volunteer service part of the pro bono rule.

In the last few years I have worked more closely with staff trying to encourage lawyers around the state to contribute service under the pro bono standard to people of low income through their legal aid programs, and I have worked with Gregory Connors

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who is sitting with us here, another staff person at
the Bar who works very hard to encourage volunteer
position and the delivery of volunteer services to
poor.

Our community of four Bar entities and people
we work with and lawyers we work with around the state
would like you to change the Rule 6.1 on pro bono
service. We have outlined our three main reasons in
the materials, and I would summarize them this way.
The first one is really structural. Our

current code provides a very brief statement, a few
sentences about a lawyer having a general need to
provide volunteer services to low income people.

The real guts of the standard are in a
freestanding document that this body passed or adopted
in 1990, and that's the three cases, 30 hours, or $300
per year contribution. And just as a staff we find it
very difficult to work with two separate documents to
educate lawyers about what Michigan lawyers should do
in fulfilling pro bono.

Most lawyers will look to the Rules of
Professional Conduct and see that brief statement and
not understand that there are very specific standards
that we want lawyers to follow, to take three cases
for low income people, to contribute 30 hours of
service, or to make that $300 contribution.

So just as an administration and management matter, we feel it would be much better if the two documents were combined and the flesh on it, that the standards were included in the same place. That's the structural issues.

The second issue goes to the content. Michigan's current rule is really fairly normal and limits the lawyer's work towards supporting low income people, legal aid people, or clients of legal aid.

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And while some legal aid advocates feel that that's, you know, really how it should be, that our system doesn't have much meaning unless that group of people gets the volunteer services and only that group of people gets the volunteer services.

But there are lots of lawyers in the state who are doing wonderful volunteer work for other groups of people, and when they contact Bar staff for support in their work we have to essentially say to them, That's nice work, you should be proud of that, but that doesn't fit our definition of pro bono, so you are not included in the work that we will support here.

And the new rule proposes that the definition be expanded to include many of the other wonderful things that lawyers do in their volunteer time, and
the rule does say that when a lawyer does pro bono,
the bulk of it should be directed to low income people
and the services they need, but it welcomes into the
community lawyers who are doing other really good
work.

The third thing is that the way the rule is
proposed by our community it would make it very clear
that financial donations are an appropriate way to
discharge a pro bono obligation and make reference to

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the campaign so that we can show lawyers that the
Access to Justice campaign and a contribution to that
will support your pro bono obligation. We do make it
clear and support the ABA position that this is not a
mandatory obligation that would be enforced through
the discipline process in any way.

So our community of groups in pro bono urge
you to adopt the changes and move us closer to the ABA
rule. Thank you.

CHAIRPERSON LEVY: Candace, just so I make it
clear, and for future speakers, if you could just
point out your positions on the specific items. If I
understood your comments, you rise to support on the
first of the two resolutions, including a standard,
although you have not specified the 30-, 40-, 50-hour
standard, is that correct?
MS. CROWLEY: Our community supports the standard of 30 hours. We considered and rejected the ABA position of 50 hours. We have worked very hard and have many, many lawyers in law firms who are meeting the 30-hour standard. We want to keep it at 30 hours. We want to include a standard of 30 hours.

CHAIRPERSON LEVY: And on the second of the two resolutions, you would favor (b), the more broad definition?

MS. CROWLEY: That's correct.

CHAIRPERSON LEVY: Thank you. Is there a representative of the ACES Section? Animal Law Section?

MS. FRIEDLANDER: Good morning, my name is Bea Friedlander, and I am the chair of the Animal Law Section, and I appreciate the opportunity to --

CHAIRPERSON LEVY: Ask you to get closer to the microphone.

MS. FRIEDLANDER: I appreciate the opportunity to speak this morning. I just arrived, and could I ask whether the Pro Bono Involvement Committee representative has spoken before?

CHAIRPERSON LEVY: Candace is speaking in behalf of the community. They were included.

MS. FRIEDLANDER: Has Bob Gillett spoken yet?

CHAIRPERSON LEVY: No.
MS. FRIEDLANDER: He will give more of an overall view of proposed changes.

What I am going to talk about is how it would affect the Animal Law Section.

Our comment was in support of that comment that was submitted by the Pro Bono Involvement Committee, et al, number one. Number two, our comment only addresses 6.1 as to the definition of pro bono.

It does not address the other related rules that the PBIC does, nor do we take a position as to whether the hours should be mandatory or the number of hours. So what I will be addressing is whether the rule should be expanded, the definition should be, and the Animal Law Section counsel has voted in favor of that.

The Animal Law Section bylaws include as their goals development and modification of existing law as it relates to animals and to promote animal protection and animal rights in Michigan through use of the legal system.

As it stands now, the attorneys in the Animal Law Section, numbering about 150, and any other attorneys interested in that are often stymied, because, as it now stands, the pro bono program concentrates on direct legal assistance --
MS. FRIEDLANDER: -- to the poor. What I would say is that by expanding it it will allow representation of nonprofits. As an example, there are probably about 200 organizations, small organizations, in Michigan who are shelters or provide companion animal rescue, and that is an example of the services that can be provided should the expanded definition be put into place because it will allow --
MS. JAMIESON: Mr. Chairperson, Elizabeth Jamieson from the 17th circuit. My question is really a point of clarification and a question. I don't know if it's directed to Ed Haroutunian or if it would be directed to Candace Crowley.

My question is under (1) option (d), which is what you said your committees or groups recommended,

including a standard of 30 hours per year. Under the commentary it notes that the Representative Assembly previously adopted a pro bono standard that addressed three cases, 30 hours, or $30, and I was curious as to whether or not we are eliminating the alternative three cases, 30 hours for just the 30 hours or if we are -- if it's the same. Do you understand my question?

MS. CROWLEY: Yes. It is not our intention at all to eliminate the three cases or 30 hours or $300.

CHAIRPERSON LEVY: Because I don't think everybody could hear, the response was that it is not the intention to change the alternatives to those 30 hours, the three cases, or $300. That would be maintained the same. The question between (b), (c) and (d) is just really whether that becomes 40 or 50 hours and four cases or $400.
MS. JAMIESON: For point of clarification then, I would make a motion to amend (1)(d) so that it says, Include a standard of 30 hours per year, three cases -- or actually it would be 30 hours, three cases, or $300 per year, so that it's consistent with the prior Assembly activity.

MR. ROMBACH: Support.

CHAIRPERSON LEVY: Does that motion likewise modify (b) and (c) to be four cases and 400 and five cases and $500?

MS. JAMIESON: That's up to Ed. I am not making that motion.

CHAIRPERSON LEVY: Is somebody making that motion that we do it across the board?

MS. JAMIESON: Ed said no.

CHAIRPERSON LEVY: I guess then we are amending just (d).

I heard a second.

MR. ROMBACH: Support.

CHAIRPERSON LEVY: Any comments on the motion?

No comments, all in favor.

Any opposed.

MS. JAMIESON: Thank you.

CHAIRPERSON LEVY: The amendment is accepted.

Any other comments on the, on either of the
two questions we put before the Assembly?

MR. ROMBACH: Tom Rombach from the 16th circuit.

At this time, Mr. Chair, I don't see everyone running to the microphone, so I would move specifically that we choose (1)(d), include a standard
MS. JAMIESON: Second.

CHAIRPERSON LEVY: Okay.

MR. ROMBACH: At some point you are going to have to have a vote on all options. You want a majority, you want 50 percent, and I am moving (1)(d) for a vote now.

CHAIRPERSON LEVY: Rather than voting the alternatives?

MR. ROMBACH: Right, I want (1)(d) for a vote.

CHAIRPERSON LEVY: I guess the motion then --

MS. JAMIESON: He is calling the question.

CHAIRPERSON LEVY: Calling the question on (1)(d) but only on (1)(d).

MR. ROMBACH: I will do (1)(d) at a time rather than move them as a package. I will do just (1)(d). I would like to move that for a vote.

CHAIRPERSON LEVY: Is there comment on the motion, on the amendment?

MR. LARKY: Since it's been supported, is there discussion on the motion now?

CHAIRPERSON LEVY: Yes. No, there is no discussion --

HON. ARCHIE BROWN: Not on call the question. Requires a two-thirds vote to call the question.
CHAIRPERSON LEVY: All in favor of calling the question for two-thirds vote then. All in favor say aye.

Opposed.

I guess we would have to do a quick standing count.

MS. JAMIESON: I think it passes.

CHAIRPERSON LEVY: You think that was two thirds? Two thirds it is.

We will call the question then. All those in favor of the Assembly adopting (1)(a) so that it would read MRPC 6.1 should include the standard of 30 hours, three cases or $300 per year. I am sorry, (1)(d).

All in favor.

Any opposed.

Because we are counting minority positions of 25 percent, I am going to ask for a standing count on that.

All in favor, please rise.

Thank you. And all opposed.

Thank you. And those not voting.

That is not 25 percent, and, again, I apologize. We will be having to do more such counts today than normal because we are reporting minority positions if they receive 25 percent, and it's a
little hard to hear 25 percent of the members voting. That is, however, adopted and --

MR. HAROUTUNIAN: Ed Haroutunian from the 6th judicial circuit. I think Tom's comment in terms of going through and attempting to expedite where, in fact, there may be a sense from the Assembly that certain positions should be adopted or will be adopted, I think that, given the fact that part of our rule indicates if there is a 25 percent minority position, it would seem to me that each of the items, each of the subparts of all of the proposals that are being made have to be voted upon, and if, in fact, it requires in a determination that, you know, it might be close to 25 percent on a given one, then I suspect the chair would turn around and have people who rise and have the vote count. If it's not, then in effect that doesn't mean anything.

But I think it's important, given the fact that we have advertised that that's the way the program will proceed, I think it's important that every item be voted upon so that everyone has an opportunity to literally have their say and have their vote.

MR. ROMBACH: Tom Rombach from the 16th circuit. I rise in support of Mr. Haroutunian's
point.

Just so the Assembly understands that it is an attempt to get some votes in before we start going to lunch, and there was a sense of the body. That I do concur with him, because the minority position, as he points out, could be as much as 25 percent. I just want to keep the Assembly focused. So if we can vote one by one, I do want to make sure that we get through the entire docket and not give short shrift to other issues that people may be wanting to discuss later in the packet.

CHAIRPERSON LEVY: Understood. In terms of the vote we just took, it was less than 25 percent of all other positions combined, so I don't think we have a problem in terms of that vote, not having broken it down.

MS. JAMIESON: Elizabeth Jamieson, 17th circuit. I agree that each of the options should be voted on so that if we have a minority opinion we can report that to the Supreme Court.

The only thing that I want to remind everybody is for purposes of expediency if there is a consensus with regard to one rule where we can get a majority right off the bat, then we ought to do that as Tom did with regard to the first.
So if there appears to be consensus with regard to an option that is second or third in line, then we ought to take that first, then go ahead and vote on the others to get minority opinions.

CHAIRPERSON LEVY: Returning to the issues before us, that leaves the second item under (5)(a). I don't know if there has been a formal motion to call the question, but are there additional comments?

MR. DUNN: I am Bill Dunn, a member of the Ethics Committee, and I would like to simply have you reflect on one fact as you consider (a) and (b) in item (2), and that is that the Model Rule adopted by the American Bar Association is itself quite limited to the support of providing legal services to those unable to pay, and the purpose of the pro bono rule is not to simply encourage lawyers to serve community charities and Bar and chalk that off to good service but to be sure that the needs of those unable to afford them are met, and that was the purpose of the ABA rule, and I am wondering whether 30 hours for all, the entire breadth of activities the professional may well get involved in during a year should be limited to 30 hours total, because we often know too that the needs of those unable to afford services get forgotten.

CHAIRPERSON LEVY: I think the 30-hour
question is resolved by the Assembly for now. Was that a statement though in support of (a) or (b) in the second, on the definition itself?

HON. ELWOOD BROWN: It's a statement in favor of (a). It's not the 30 hours that's the issue. What we are addressing basically is that if you spread 30 hours over to charitable organizations as opposed to the needy, then 30 hours doesn't mean much, and so you have got your 30 hours, but the proposal of (a) is what the Ethics Committee is in support of.

MR. LARKY: Sheldon Larky, 6th circuit. I support (b). I will tell you why I support (b). The idea of charity may be those who are less in need. By definition, if it's a charitable organization, it means less in need.

For those of us who sit on our church or synagogue board of trustees, for those us of who sit in community organizations, for those of us who sit on community boards, we are doing it as a public service, and we are doing it as members of the Bar.

I don't believe that we should be solely limited to people of limited means, because if the expanded definition it is those people that are in fact sometimes of limited means also, and I am all in favor of (b). I am not in favor of (a).
With all due respect to Mr. Dunn and Judge Brown, I need look no further than the proponents effectively of (b), and their position was very effectively stated by Candace Crowley. 

The folks that comprise those various committees are very, very aware of the need of the poor. Just note the Access to Justice group is well represented. I am one of the chairs of the campaign this year. Obviously the object of that is to get contributions and funds certainly in time for the needy and those who can't afford it, but given who stands behind these groups that are proposing that we have a more expanded definition, I am very satisfied and would concur and join in in support for (b).

CHAIRPERSON LEVY: Thank you.

MS. NOLL SMITH: Sharon Noll Smith, 6th circuit. I am also a member of the Ethics Committee. I am also a member of the Animal Law Section of the State Bar.

I rise to speak in support of the position articulated by the Animal Law Section Chair, Beatrice Friedlander, with regard to expanding the definition
of pro bono.

The Michigan Rule states direct delivery of legal services to the poor. I would point out that an expansion of this rule enabling attorneys interested in doing animal law, to serve charitable organizations, animal welfare organizations, such as those which provide, for example, low cost or no cost veterinary services to the poor and to indigent people to care for their companion animals, they provide low cost spay and neutering, that kind of pro bono service by an attorney to those types of organizations is most assuredly, though it might be indirect, it is most assuredly serving the poor, if only indirectly.

I think that's about all I have to say. Again, I do support that expansion of the rule to charitable and civic, religious organizations. Thank you.

CHAIRPERSON LEVY: Thank you. Tom.

MR. ROMBACH: Tom Rombach from the 16th circuit. I decided to switch microphones. I am speaking on behalf of option (b).

The Pro Bono Committee had worked with the Assembly through my tenure very closely, and I believe that they know best what's going to achieve our objects of serving the poor and those people of
limited means, and by representing the Legal Aid Committee, by representing Pro Bono Services, by representing Open Justice, all those folks approve the idea of a broader definition to pull in more people, to pull in more attorneys to serve the public matter, and, quite frankly, this is a voluntary standard. So the more people we have out there, the more we can promote the image of a lawyer, the better it is for everyone, and, as Ms. Smith has pointed out, and the Law Section and a whole group of others, that I think we are all on the same page here. We are really arguing about what our approach is.

I would say the broader approach would be better, because we may be able to bring in more folks and say, Look, now that you are doing community service as part of your church group or as part of a civic service organization, it's also important that perhaps you answer your phone for our pro bono legal services or other areas and broaden the pool of those people that are willing to contribute their services directly.

So, again, the emphasis is still going to be on the folks that need the help financially that can't afford to pay for legal services. It's just the definition is a broader area, and I think we should shoot for a broader target, because this is a
standards within the profession. So I advocate (b) here. Thank you.

MR. LOOMIS: Daniel Loomis from the 35th circuit. I guess I am confused. If (b) is for an expansion, why does it eliminate services and activities for improving the law, the legal system, or the legal profession? I don't think we should eliminate that kind of service, and I don't know if you accept amendments, but I would say that it should not read "but not" but instead read "including."

VOICE: Support.

CHAIRPERSON LEVY: I guess we will treat that as a motion to amend, and there was support, so we will begin discussion on the motion to amend, and just I would note initially that, based upon the discussions leading up to today, I think to answer part of that question, it was just the notion that this is not pro bono work, what we are doing here today, whatever you want to call it, and it is in the name of the legal profession, and while there was a sense that the definition needed to be broadened by some people, there was also a sense it needed to be limited in some way. But there is a motion and a second to make the amendment. Is there any further
On the question of whether or not to amend the proposal in part (b) to delete the "but not" and -- "but not by" and substitute "and to include," or "including," I am sorry.

All in favor of the amendment?

All opposed.

It's a majority vote.

We are going to make you rise again. All in favor of the amendment.

Thank you. All opposed to the amendment.

Thank you. Any not voting?

The amendment passes. We'll have to determine at some point whether or not we have minority positions on the amendment. But is there further discussion on the now amended proposal? Why don't we call for a vote. All in -- I am sorry.

All in favor of the option (a) MRPC 6.1, should use the narrow definition, the narrowly defined, please rise.

MS. JAMIESON: Didn't Tom bring (2)(b) for vote?

CHAIRPERSON LEVY: The question was whether you had a motion that I am supposed to be taking a yes or no on (2)(b) or if I am still taking the options. I guess then we are voting yea or nay on
(2)(b), the more broad definition, as amended.

So all in favor of adopting (2)(b), the more broad definition, please rise.

VOICE: Point of order, so we are not all confused, could we have our kind secretary highlight the one we are actually voting on.

VOICE: We are voting on the amendment to (b).

CHAIRPERSON LEVY: The vote would be on all of paragraph (b), as amended.

As highlighted there, all of paragraph (b), as amended. All in favor, please rise.

We are beyond 75 percent. Thank you.

Call a voice vote on the nays just so we have it on the record. All opposed.

Which brings us to item (5)(b), which addressed the scope of the rules as stated in the preamble. I would call first upon the Grievance Committee. Did the Grievance Committee wish to address this?

MR. ALLEN: Good morning again. The Grievance Committee position, we did not have your briefing book in front of us when we met, but I believe it would most closely resemble subparagraph (b) on page 44 of the briefing book.
The reasoning for that would be this: The current version of the rule is stated in our report on page 45 of your briefing book as part of the Rule 1.0(b), asserting that the rules do not give rise to a cause of action for enforceable damages or for failure to comply.

The ABA model version, which has been adopted and proposed by the Ethics Committee, would reduce that from a statement in the rule, it would also dilute the words from "do not" to "should" and would demote it from the rule to comment.

As cited on page 45, the rules are used in civil actions either as presumptions or as evidence of breaches of the standard of care. As cited on Rule 45, the Supreme Court holds that only the rules are authority, the comments are not authoritative statements, and, in fact, in the proposed rules Comment 21 as proposed by the Ethics Committees says essentially the same thing, that the preamble and the note on scope are intended to provide general orientation and not to be interpreted as rules. The text of each rule is authoritative.

Therefore, it is our position that the statement should remain in the strength that it is in the current rule, it should remain part of the rule.
and not be demoted to a comment.

CHAIRPERSON LEVY: And just because I think the record needs to be complete, was this a formal position adopted by the majority of the council?

MR. ALLEN: Yeah, by a majority of the Grievance Committee then voting as stated in the report.

CHAIRPERSON LEVY: But there was no quorum present at that meeting?

MR. ALLEN: I would say that at the beginning of the meeting there was, at various parts that there were not.

CHAIRPERSON LEVY: I just wanted to make sure that we are clear on whether or not a formal majority position was adopted.

MR. ALLEN: It was adopted by those who were there and voting that day, both in person and by phone. I would say that at times there might have been a quorum, at times there were certainly not, certainly towards the end.

CHAIRPERSON LEVY: Thank you.

MR. LARKY: Just as a point of clarification, Mr. Chairman. Sheldon Larky, 6th circuit.

On the bottom of page 43, does the Grievance Committee recommend that we, in fact, adopt the language
of the last three lines that is even more dynamic,
more definite?

MR. ALLEN: May I have a point of personal
privilege in response?

CHAIRPERSON LEVY: I think you can respond
briefly to the question, yes.

MR. ALLEN: Sheldon, as I mentioned before,
we did not have the language of (b) in front of us at
the time of our meeting, so we did not have the
opportunity to consider it. I think it would be
unfair of me personally to try to interpret what the
views of the committee might be about the particular
wording. I think the emphasis we had was that it
should be at least as strong as it is in the current
rule and most importantly part of the rule, not part
of the comment.

MR. LARKY: Mr. Chair, I would move for an
amendment to the proposed rule. I agree that we
should, in fact, contain this language, and I would --
if it requires a writing, I have a writing, but I am
moving that our Representative Assembly adopt the last
three lines on page 43, and if you need me to put it
in writing, I will. I have it in front of me, because
it's more than five words, but I want to adopt that we
stand for violation of a rule does not itself give
rise to a cause of action against a lawyer nor does it
create any presumption in such a case that a legal
duty has been breached, and I would so move.

VOICE:  Support.

CHAIRPERSON LEVY:  I do hear a second.  I
don't think we need it in writing because you are
pointing to it in writing in the book.

My understanding then, that would be in place
of (b).

MR. LARKY:  It would be in place of (b), and
could I speak as in favor of the motion now?

CHAIRPERSON LEVY:  Yes.

MR. LARKY:  I stopped counting representing
attorneys in about 200 legal malpractice cases, and I
stopped counting when I represented about a hundred
plaintiffs in various legal malpractice cases, and my
concern was, as John Allen indicated a few minutes
ago, that the rules are being used against attorneys,
and that was not the intent.  That wasn't the intent
of the civil cases before us, and for those of us who
have ever sat as a defendant in a legal malpractice
case, for those of us who ever prosecuted on behalf of
a client in a legal malpractice case have had these
Rules of Professional Conduct thrown in the courtroom
situation.
My personal feeling is the rule doesn't go far enough. I would like it to say even one more thing, anybody who uses any reference to these rules in a civil matter shall itself have an act of misconduct.

But it doesn't go far enough. I think we have to protect ourselves. I don't think we should allow a set of rules to be used in a civil court for use in a disciplinary process and vice versa, and I am concerned having these rules thrown at me when I have defended -- frankly, when I was plaintiff's attorney on a few cases I used the rules, because sometimes the defense counsel didn't know how to get them out.

And I don't think to protect our brothers and sisters, those of us, the roughly 20,000 to 30,000 that practice law, I think we have to protect our brothers and sisters. Ladies and gentleman, we are members of a union, this is our union, and I want to protect our union membership, and I want to protect them to the fullest hilt.

I don't want Rules of Professional Conduct to be used in a way as a presumption, I don't want them used in any way as a grounds for legal malpractice, and I encourage you to adopt this resolution.

MR. MORGAN: Mr. Chair, point of order. I
think the sense of the motion made by the proponent
was to keep in the words "reject Model language" and
suggesting the addition of that language as being the
language that would appear in Rule 1. It's not to
strike the word "reject the Model language."

CHAIRPERSON LEVY: I think to reject the
Model language and to state that included above.

MR. LARKY: That's correct.

CHAIRPERSON LEVY: So (b) would be begin
"reject the Model language," and then strike the
remainder of their -- and that would be, and state,
with the quote following.

Any other discussion on the amendment? It's
not a capital "a" on the and.

MR. ELLMANN: Douglas Ellmann, 22nd circuit.

Picking up on something Mr. Larky mentioned
in his comments, and I know he can't talk again, but I
want to make sure I get the language right. I liked
his idea, and I guess I would offer this as a possible
amendment if the Assembly, if someone else thinks it's
appropriate to indicate that a reference to these
rules as a basis of an impropriety by an attorney in a
civil action will in itself be an ethical violation.
I would ask Mr. Larky's help with respect to the
language.
CHAIRPERSON LEVY: I do want to remind the body that we were going to attempt to stick to general, overall principles and try not to get lost in language questions, but does that -- is that a friendly amendment? It would have to be in writing.

MR. LARKY: I think it has to be in writing, but I agree to that position wholeheartedly.

CHAIRPERSON LEVY: While it's being put in writing, is there a comment on the amendment to the amendment, and the Ethics Committee needs to respond to both.

MS. FELDMAN: Is this mike on? I guess it is.

First of all, addressing the question of whether, whatever the text is, should be in the preamble or in a rule, these are rules pertaining to conduct. This is not conduct. This is the scope of the rules, the purpose of the rules, what the rule is for, so we submit it's properly in the preamble and scope. It has nothing to do with conduct. That's what the rules apply to.

And the case law decides as an evidentiary matter what should come in, what should stay out, what's a presumption. That's not the purpose of these rules, to start making case law as to what is the
proper evidence in a case of malpractice.

It's our understanding, or it is, the ABA has
in its Model Rules for the past umpteen years, this
isn't anything new, had this in the scope section, not
as a rule. We are not aware of any problem where
someone, where a judge has ruled because it's in the
scope and not in the rule it doesn't have any meaning.
That's where it belongs, because it doesn't pertain to
conduct.

CHAIRPERSON LEVY: And specifically as to the
amendment to include the language, any attempt to use
these rules as a basis for civil liability shall in
itself be an act of misconduct under these rules?

MS. FELDMAN: Well, I would certainly hate to
have that be misconduct and have the Grievance
Commission start citing people for misconduct for
attempting to use law or attempting to advocate a
legal position and then have hearings on whether that
is misconduct. I mean, talk about creating a
quagmire.

CHAIRPERSON LEVY: I am sorry. It was
accepted as a friendly amendment. I am corrected
then -- this was accepted as a friendly amendment?

MR. LARKY: Mr. Levy, I accepted it as a
friendly amendment, but I am going to vote against it.
CHAIRPERSON LEVY: If you accept it as a friendly amendment, you can't vote against it. It's part of your proposal.

MR. LARKY: Pardon me, I reject it.

CHAIRPERSON LEVY: It was not accepted as a friendly amendment.

MR. ELLMANN: Let me simplify this. I will withdraw the amendment.

CHAIRPERSON LEVY: So we are back to the question as originally stated.

VOICE: Well, with the amendment.

CHAIRPERSON LEVY: So we are back to this as it appears now. Any further discussion on this then?

VOICE: Call the question.

CHAIRPERSON LEVY: Question has been called.

CLERK BUITEWEG: Point of order, Mr. Chair, the special rules that we adopted for this meeting indicate that alternatives to a proposed rule or position shall be presented in writing and in sufficient quantity to be circulated to all Assembly members present and include et cetera, et cetera. I am not sure that Mr. Larky's proposal falls within the rules that we have set for our meeting today. That's just a point of order.

MR. ROMBACH: It's in the book.
CHAIRPERSON LEVY: I think in this case it really is an amendment of (b) to be more specific rather than it is a complete new proposal, but I do appreciate the caution that we need to be careful not to substitute new proposals, but I do think in this case it is a more specific version of what was already presented.

So the question has been called. We are voting MRPC 1.0 and the preamble should. All in favor of option (a), adopt the Model language, please rise.

MR. ROMBACH: We have to amend (b) first.

CHAIRPERSON LEVY: I thought the amendment was done. I am sorry, my mistake.

All those in favor of amending (b) to read as now presented on the board, please indicate by saying aye.

Any opposed.

(b) is amended.

Any additional comments on whether to choose between (a) and (b)? Seeing no comments, I will call the question. I am sorry, yes.

MR. DUNN: The lead-in statement on page 44 indicates MRPC 1.0 and the preamble should. Is it still intended that this language, whatever is adopted, be in both the preamble and in the rule? The
recommendation from the Ethics Committee is it would be in the preamble only.

CHAIRPERSON LEVY: My understanding was that the intent was not to be specific as to where it goes because we are not addressing the language of the rules of the preamble and that it was just it should express this point of view.

MR. MORGAN: Point of order, if you look behind you, sir, you will see that it says MRPC 1.0 and the preamble. That's what I thought we were following throughout the course of this.

CHAIRPERSON LEVY: Name and circuit, please.

MR. MORGAN: Don Morgan, 3rd circuit.

CHAIRPERSON LEVY: My understanding of the intent was that that was more an and/or, that the rules combine and that the rules and the preamble would express the point of view that this may not be used. It was not specific language to instruct the court as to where it must put it. I guess we need to clarify that.

MR. LARKY: Mr. Chairman, my motion was that MPRC 1.0 and the preamble both contained that.

CHAIRPERSON LEVY: I think what we need then is a specific --.

MS. JAMIESON: MRPC 1.0 and the preamble
should --

    CHAIRPERSON LEVY: Meaning that it's going to
    say it twice?

    MS. JAMIESON: Meaning that this policy
    statement affects MRPC 1.0 and the preamble.

    CHAIRPERSON LEVY: So I guess -- I think we
    are going to have to split the vote.

    MR. BYERLEY: I think to clarify, one
    proposal, the proposal is to keep it in the rule,
    which would be 1.0. That's proposal (b).

    The Ethics Committee proposal is to put it in
    the preamble, so I think the introduction just means
    if you take, basically if you take option (b), you
    want to amend MRPC 1.0, which, of course, doesn't track
    with the new Model Rules that you have in front of
    you because that's terminology. It's not going to fit
    there anyway.

    But I think proposal (b) would be to keep the
    current MRPC 1.0. Proposal (a) would be to put it in
    the preamble, so the introduction there says,
    depending which way you go with it, it's either in 1.0
    or it's in the preamble.

    CHAIRPERSON LEVY: Except that (b) is now a
    statement that's in neither, so it's not the key.

    MR. BYERLEY: Right, but I mean the intent is
to keep it like the current 1.0, which won't fit into
the new format.

MS. FELDMAN:  1.0 is terminology.
CHAIRPERSON LEVY: I am thinking what we are
going to have to do is take two votes, one as to
whether or not the language should be included and
then secondly, if it is included, whether it needs to
be a rule --

MS. FELDMAN: That's correct.
CHAIRPERSON LEVY: -- or part of the
preamble.
MR. DUNN: Yes.
CHAIRPERSON LEVY: So if that is clear, the
question is being divided in a sense. The first
question will be whether or not the language that is
in (b) as it appears on the board, whether or not that
language should be adopted, and then there will be a
second vote if the language is adopted as to whether
or not it should be made part of the preamble or part
of the rules. Is that, first off, clear to people?
MR. LARKY: Mr. Chairman, I think -- Sheldon
Larky, 6th circuit.
I think the sense of this body is we want to
send a message to the Supreme Court that we want them
to adopt a specific rule that as we just adopted a
but as a specific rule.

MS. JAMIESON: Elizabeth Jamieson 17th circuit. Friendly amendment. With regard to option (b), can we change it so that it says "reject the Model language and," then insert "in the rules state." Does that satisfy the issue at hand?

MR. LARKY: Yes.

MS. JAMIESON: So you accept the friendly amendment?

MR. LARKY: Yes.

MS. JOHNSON: Point of order. There is no amendment on the floor right now. We just voted on it.

CHAIRPERSON LEVY: That would be a new amendment because --

MS. JAMIESON: Do you want me to make a separate amendment?

CHAIRPERSON LEVY: It would have to be a separate amendment.

MS. JAMIESON: So I am making a new amendment to the language. Do you accept that?

MR. LARKY: Yes.

MS. JAMIESON: He has accepted. Now do you have to bring it to a vote? I don't think you do. He has accepted it.
Except it was already passed. It wasn't on the floor so you can't amend.

So now it's a new amendment. He can't accept it. It has to be a vote.

So have a vote.

Second.

It is on the floor, and all in favor of amending it to indicate that it be in the rules as it now appears.

Any opposed.

There was opposition, but it passes.

To make this a little bit simpler then --

Can I call the question?

Do I have a motion to take a yea or nay vote on (b) as it appears?

Yes.

Call the question (1)(b).

This is as opposed to (a)?

This would just be a yes or no vote directly on the language now in (b), so that the vote would be yes or no MRPC 1.0 --

You would be recommending (b) instead of (a)?

Correct.

For point of clarification, if
we vote on (b) first and it's greater than 75 percent, then we know there is no chance for a minority vote. If we have a majority vote but it's not 75 percent, we will go to (a) and see whether or not we have a minority vote on (a). If we don't, then we are done.

MS. DIEHL: Point of order. Nancy Diehl from the 3rd circuit. What ever happened to whether we wanted it in the preamble or in the rules? As it reads now it's in the rules, period. I am not agreeing with what was just stated.

Are you taking back what you previously told us we were going to do, Mr. Chair?

CHAIRPERSON LEVY: In terms of two separate votes? There seemed to be a sense that I should be combining it into one vote, so that, yes, it was one vote to say that it should be done in the rules.

MS. JAMIESON: For point of clarification, this is my recommendation, that right now what we have that has been approved from the language for (b), that goes for a vote. If it is not approved, you can make an amend -- you can offer the amendment that it be in the preamble and see if that passes.

So the first vote is going to be for the
to the preamble.

CHAIRPERSON LEVY: And I believe for the purposes of what's on the board, the words "and the preamble" would have to be -- have been crossed out. So that it would read MRPC 1 should reject the Model language and would put it in the rules.

MR. ROMANO: Vince Romano, 3rd circuit. It strikes me that when we start talking about the substantive issue involved, the substantive issue here needs to be clarified. Do we want this language in the preamble or do we want it in a rule? I think we need to make that clarification first and then decide some of the specifics about the language. But it seems to me that that's the underlying decision here, is this a preamble matter, is this a rule matter? I happen to think it's a preamble matter. I would like to have a sense of this body on that.

MR. LARKY: 6th circuit, Sheldon Larky. I think it should be in both places. I think we have to send a message. That message is -- because the preamble is just prefatory language, and we have to watch the top paragraph of page 46 about these are not to be interpreted as rules, the scope, and if the

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1 scope says should not, I think we have to make sure very definitive both in the scope section as well as the proposed rule.
So the language as it sits on the board right now in red is the language that I asked for that the body had voted upon already.

CHAIRPERSON LEVY: My apologies. The words "and the preamble" were not stricken.

PRESIDENT BRINKMEYER: Scott Brinkmeyer from the 17th circuit. If I understand correctly what is about to be voted on, it would be that at the very least Rule 1.0, which, as Tom pointed out, has to do with terminology, would contain that language, and if I am correct, and I would stand in opposition, because I don't think that language has any place in the terminology section. That doesn't mean what I would speak to if it was placed elsewhere as a rule, but if what we are about to vote upon is that the terminology section of the proposed new rules would contain that language, I think it's in the wrong place and, therefore, I would be opposed to it in that context.

CHAIRPERSON LEVY: I guess --

MS. JOHNSON: We voted on this matter 15 minutes ago.

CHAIRPERSON LEVY: I guess the answer is that then vote against it, because that is what it says and it's been called, so that the vote is on whether or not --
MS. JOHNSON: We voted to include --

CHAIRPERSON LEVY: -- it should be included in that specific rule and in the preamble as written, and that's the question that's been called, so the specific language that's on the board, should it say in 1.0 and the preamble using the specific language is the question.

All in favor of that proposal, please rise.

VOICE: What are we voting on?

CHAIRPERSON LEVY: We are voting on the language in (b), whether or not it should say in both the preamble and in Rule 1.0, that specific language should be included.

And all opposed. Thank you. All opposed, please rise.

This is just to not adopt as proposed. It would not necessarily mean (a). This is just whether or not to adopt it and put it in both places, that specific language.

Thank you. And any not voting.

There was no majority on that vote so that has not passed. The question has not been resolved.

MR. LARKY: Mr. Chairman, in light of that I move that we strike the words "and the preamble" in the first line, and that's my motion. Sheldon Larky, 6th circuit.
CHAIRPERSON LEVY: So that it states only in the 1.0 definition of terms?

VOICE: Second.

VOICE: Support.

VOICE: Point of order. Don't we have a vote coming on (a)?

CHAIRPERSON LEVY: The motion is to include the language, but to include it only in 1.0, the definition of terms. Is there comment on that motion? There was support, was there not? Is there support?

VOICE: Support.

MR. LOOMIS: Mr. Chairman, Dan Loomis, 35th circuit. I believe that we would be better served by striking the words "MRPC 1.0 and" so that we could say that the preamble should have this language, "and in the rules," wherever the rules appropriately place them, rather than striking "and the preamble," because I think the language in the rules will let us put that wherever we want to. It doesn't fit in terminology as the president has said. So I know we have an amendment on the floor. As long as that's on the floor, I think we should vote that down, and then I would make a motion as stated.

CHAIRPERSON LEVY: I see a head nodding. Maybe friendly substitution.
MR. LARKY: I accept the substitution, because I think he is absolutely right.

CHAIRPERSON LEVY: So the motion would then -- because the language is contradictory we can't accept it as a friendly amendment. Is the original motion withdrawn?

MR. LARKY: Yes.

CHAIRPERSON LEVY: And will that be made as a new motion?

MR. LOOMIS: It would be.

CHAIRPERSON LEVY: Is there a second?

VOICE: Second.

CHAIRPERSON LEVY: So that the proposal currently being debated is whether "the preamble and rules should."

MS. JAMIESON: No, just the preamble. The preamble should, and then reject the Model Rules, and in the rules state --

CHAIRPERSON LEVY: So it's preamble should and then -- okay. The preamble should reject the Model Rules and in the rules state. Okay.

It is on the board is the language, at least so it is clear to people this is what we are voting, discussing. Not whether you agree or not, but people understand this is what we are discussing.

MR. BARTON: Point of order. I understood
the motion to be that the preamble and rules should.

In other words --

CHAIRPERSON LEVY: Right, which is what it now says.

MS. JAMIESON: The prior amendment was withdrawn and now its before -- the amendment that we are discussing and we'll have up for a vote is the preamble should reject the Model language.

MS. MCQUADE: But does the preamble also adopt the new language is the question I think. So, in other words, and in the rules and the preamble state, will the preamble include the new violation language? As it's currently written it will not. The preamble simply rejects and rules will include. If you want to say it in both places you need to add the words "and in both places."

CHAIRPERSON LEVY: We need you to identify yourself for the record.

MS. MCQUADE: I am sorry, Barb McQuade from the 3rd circuit.

Point of order. I am just trying to clarify what we are doing. I am not advocating any position or the other. I am just trying to clarify. As it's currently written what it says is that the preamble will reject the Model language and that the rules will
include the new language. It does not state that the preamble will also include the new language. Is that the way you want it to be?

MR. BARTON: Bruce Barton, 4th circuit. I don't want to nitpick, but if nothing else, you have got to get that (b) out of there and the "or" out of there which is up on the board. In other words, the proposal is "the preamble should reject," and it reads right through is what you are saying is the way I understand it.

CHAIRPERSON LEVY: So that it would be to strike all the language in (a), just so that it's clear that it --

MR. BARTON: I think the point of all of this is it doesn't belong in Rule 1.0, because that's terminology, and in order to put it in 1.0 you would have to say exactly what you are defining, and there is nothing up there that says what we are defining.

MS. POHLY: Mr. Chairman, Linda Pohly from the 7th circuit. Point of order. I believe the motion as it is now, as I understand it, before this Assembly is in violation of the rule adopted for this Assembly regarding alternative proposals. It has not been submitted in writing and circulated ahead of time as required by paragraph (a). There are many, many other issues to consider. If we continue this
methodology of approaching these issues, we will not
address half of the issues we need to approach today.

MR. ORDWAY: Mr. Chairman, Dustin Ordway, 17th circuit. I would also like to refer to the rules. My understanding is that we adopted (7)(c), which says if we vote on a provision, it doesn't get 50 percent, it's been rejected, so I would simply ask for clarification why we are still discussing (b).

CHAIRPERSON LEVY: It was presented as a different motion, placing the rule differently, so it was a different interpretation of the same proposal that was there.

It strikes me that the motion on the floor is still not, is still that the preamble reject and only the preamble reject and only the rules state.

It's being pointed out that I have already ruled on the clarification question, that this is a modification of a proposal that was already presented, it is not new, and that even the specific language is included in the written materials, so it's not a surprise, which was the intent of that rule, that things be presented in writing and in sufficient numbers so that it is properly before the body.

MR. LOOMIS: Daniel Loomis, 35th circuit. Perhaps to maybe clarify the comments that have been
made. (b) should read, instead of reject the Model language, that the preamble and the rules state, so that what we have is that if you are in favor of (a) you are going to adopt in the preamble only the should language, and if you adopt (b), the preamble and a rule, whatever appropriate placement it is, would say that it does not.

CHAIRPERSON LEVY: So that would be striking and for (b) it would also be striking the beginning. It's striking that sentence entirely.

MR. ROMANO: Point of order, Mr. Chair. Don't we have a motion on the floor?

MS. JAMIESON: No, what we have on the floor is an amendment.

MR. ROMBACH: It hasn't been supported, so you might as well ask for support first.

CHAIRPERSON LEVY: We have a proposal, but the language has not been adopted or supported. They are still determining the language.

MS. JAMIESON: Just for point of clarification, the language that is up there right now is the amended language that has been proposed. It hasn't been seconded yet. We are just trying to provide it to you so you can see what the proponent of that had said.

MR. ROMANO: I heard a motion and second
severely changed the first line to eliminate the
reference to the rule and have it read the preamble.

CHAIRPERSON LEVY: There was --

MR. ROMANO: That was a motion and second.

CHAIRPERSON LEVY: But it was also agreed the
motion's intent was not for it to do what that would
result in it saying because it was not to reject it in
the preamble and then have a totally different
statement in the rules. It was to state it in both
places so that we were trying to clarify the language
of the motion that was being made.

MR. BERRY: I would just like to make one
comment as somebody who has probably been working with
these rules most of my life. One lady has already
mentioned the issue, and the Ethics Committee has as
well, maybe a quick lunch break and getting to the
point, whatever, but we are basically -- I am sitting
here listening to everyone here, and I think everybody

wants to reach the same conclusion, as it's not to be
used as evidence. That's what the ABA wanted, that's
what the Ethics Committee and everyone else.

We are close to now leaving only three and a
half hours for a ton of very important issues, and,
just as your executive director, I beg you to find a
way not to spend another half hour on the procedural
issue here, because, frankly, as somebody who has had
to work with these for years and years it isn't going
to make a squat bit of difference in the
interpretation whether or not it's in the preamble or
whether it's somewhere else. It's ultimately going to
be interpreted the same way by the court and by the
regulatory authorities as well.

So that is not an answer to your problem, but
it is a plea to try to get to that solution, because I
am not hearing anybody argue on the opposite side. I
just hear a bunch of good lawyers working through the
procedural quagmire to get to that point. So good
luck, folks.

CHAIRPERSON LEVY: If we unstrike the word
should -- no, go back. You had it right with just
that one word. And then strike it again from the text
below, should, everything up to state, the preamble
and the rules. What we are then left with is the
MS. DIEHL: Nancy Diehl, 3rd circuit. Could we go back, based on what has been said here, so that we don't get bogged down on where we want it. If we go back to the original language and put and/or, if we want -- we want the language somewhere, we don't know where, and I don't know where we are at in motions, but it's a friendly amendment, and/or, and we will let someone decide later where it belongs.

MS. JAMIESON: So specifically identify, read it how it should read.

MS. DIEHL: MRPC 1.0 and/or the preamble should -- how did we have before, should read.

CHAIRPERSON LEVY: Should state.

MS. DIEHL: Should state a violation of a rule does not itself give rise to a cause of action against a lawyer nor does it create any presumption in such case a legal duty has been breached.

CHAIRPERSON LEVY: Is that accepted?

MR. LOOMIS: It is not.

CHAIRPERSON LEVY: It is not accepted. Is there a second to the original motion? Second to the motion made by Nancy, by Ms. Diehl.

MS. JAMIESON: Was there a second to Nancy?

VOICE: I will second the motion.

MS. JAMIESON: There is a second to it.
CHAIRPERSON LEVY: So we are addressing Nancy's motion.

MR. ORDWAY: Mr. Chairman, Dustin Ordway. I would like to follow up on my earlier request for clarification and look to the last sentence of the rules we adopted, which also speaks to my confusion as to what we are doing. It says, Assembly members shall vote for not more than one alternative. We had two alternatives in front of us. We are now creating a third alternative. I still don't understand how we are remassaging (b) when we haven't voted on (a).

CHAIRPERSON LEVY: It was --

MR. ORDWAY: Anyone who has already voted can't vote in favor of anything else.

CHAIRPERSON LEVY: I believe the intent of the special rules is do not vote for more than one alternative when (a), (b), and (c) were being presented simultaneously, not that it closed off options for future votes.

MR. ROMBACH: Tom Rombach, 16th circuit. In light of the impasse, I would suggest that we get together over a brief recess for lunch. So I move --

CHAIRPERSON LEVY: I have a motion to recess for lunch. Do I have a second?

VOICE: Second.

CHAIRPERSON LEVY: Any opposed? We are in
recess for lunch.

(Lunch break, 12:15 p.m. to 1:07 p.m.)

CHAIRPERSON LEVY: We will return to session. I think it's probably best if I start with something of an apology. I have a new respect for the term, I was telling somebody, a new respect for the term slippery slope.

The initial motion to substitute a phrase for the term negligent seemed like such a good idea and so clear that that seemed fine, and then let's put the specific language in instead of the general seemed like a good idea, and then it was all of a sudden now that we have specific language and it says where it's supposed to go doesn't work quite so well so we have to start making changes, and I think it just proves the need for the initial rules that we have, which I will now endeavor to strictly enforce.

If, in fact, you wanted to do something that's more than just change a word to clarify, and even that so-so, but if it's more than that it's going to have to be in writing and for everybody and submitted in time to be considered. In other words, if the rules are unacceptable, if their policies are unacceptable as drafted, vote against them. We will end up with no position on that issue, but we can keep
on moving rather than we are not going to get into the
heavy drafting of the rules or specifically not get
into where things need to go.

In that spirit, though, a formal alternate
proposal has been provided or is being provided, and
it is before you in writing, as required, to deal with
the issue that is still currently in front of us, the
scope of rules, and I think Tom is going to offer
that.

MR. ROMBACH: Tom Rombach from the 16th
circuit. I rise to amend section (b) of the proposal.
It essentially wipes out the first part of it. I have
spoken over the recess to people that have addressed
this at the microphone, and we are trying to reach a
compromise, noting that it's a legislative process and
noting that never makes everyone totally happy.

That we haven't been able to do that in the
past and we won't be able to do it in the future, but
that I am suggesting, in fact I am moving in writing
that we substitute in for (b) the language before you
on the screen, I believe that's been handed out to
everybody. It says Section 21 on the paper in front
of you. I am actually amending that to Section 20.

If you go back to the booklet that we kept
from past meetings, the Standing Committee on
Professionalism and Judicial Ethics, that book has in
it what the preamble and scope is. This is actually going to go specifically under scope to Section 20.

    Now, obviously as a legislative body we ought not to be in the policy of drafting, but, again, in this one specific instance, since the language invited us to use language on here, and I hope that this is going to be the exception to the rule and not the rule, that this language that had previously been proposed could both go under Section 20, I believe the Ethics Committee will endeavor to do that, and also a similar rule would be added that would hopefully reach 75 percent consensus so we could move on to more weighty policy matters.

    So at this time I am moving that, but, again, I wouldn't ask that anybody else start drafting. This

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    is just for one specific instance I am trying to get myself extricated from.

    VOICE:  Support.

    CHAIRPERSON LEVY:  There is a motion, there is support. Is there any discussion? Seeing no discussion -- it is pointed out to me that this is probably alternative (c) because there is a position (b) that was voted down without -- with minority positions that may need to get noted, so this is position (c), but we will now take a vote. Section
We will now take a vote, we are on (a), and then on this alternate proposal, which is now (c), and then no position if you feel neither position is acceptable and proceed with the remainder of the rules as they are presented and written.

So all in favor of the original proposal, option (a), adopting the model language, please rise.

I think we can probably proceed with a voice vote then. All in favor of the proposal, proposal (c), say aye.

That passed.

Which brings us to the 5 (c), the writing requirement.

This rule goes to a number of different sections. I think that's pretty clearly stated. Is there a representative here from the Grievance Committee who wishes to address?

And this was a minority opinion?

MR. ALLEN: It was. As your proposal is written, and, again, we did not have these in front of us, it appears to be one that speaks towards written consent. I don't know whether that's intended to mean that the client has to sign and indicate that consent. I think what the proposal of the Ethics Committee the Model Rules talk of is written confirmation of
consent. I don't believe they are intending to require a signed consent by the client necessarily, and in the current rules as they stand, I believe there are two instances where signed consent is required. Those are retained. One has to do with business transaction of the client, and the other is certain contingent fee agreements.

What is being suggested, I believe, by the ABA Model Rules is that in the seven instances that were denominated on page 50 of the briefing book there would be a necessity to have a writing confirming a consent given by the client or of the parties, not always a client who is consenting, a written confirmation of consent of that person or entity,

whomever it may be, in those various instances. That would be a change from the present rules.

There was a minority of our committee who -- first of all, the smallest minority thought there ought to be signatures by clients, the client or other person ought to be required to sign. There was a lesser minority of the committee who thought that this proposed rule and written confirmation presented certain potentials for danger in that it is essentially an evidence requirement. It is not required to be sent before the consent is given. It
may be sent afterwards, and, therefore, the principal purpose of it appears to be to create a piece of evidence that substantiates that the informed consent disclosure was given and that the consent by the client came forth.

There would be a potential, we believe, for persons to use that evidentiary requirement as a reason why the rules have been violated and, therefore, the consent is not valid and to do that after the fact, after the lawyer had already relied upon an actual consent being given at least orally by the client and, therefore, that could be used once the consent is voided to make out a violation of the rules which would be usable in a civil action to oppose, for instance, a collection of a fee or to assert a civil liability.

It is not that we do not recommend that written confirmation might not be a good idea or a fine practice but rather that it should not be required. A majority of the committee agreed with the Ethics Committee and the ABA Model Rules and believed that it should be adopted as the Ethics Committee has proposed. Thank you.

CHAIRPERSON LEVY: And having just been noted that their majority agreed with you, does the Ethics Committee wish to respond?
HON. ELWOOD BROWN: No.

CHAIRPERSON LEVY: Any comments from sections or committees?

Any comments from members of the Assembly?

MR. LARKY: Sheldon Larky, 6th circuit. On page 51 we have to pick one or the other. I vote we should have written consent. I particularly ask the members of the Assembly to look at the handout that was written by George Kemsley, and in there, the second page near the bottom, both the Chicago Bar Association and the Illinois State Bar formed a Joint Task Committee and their opposition to having confirmed in writing is found in the last couple sentences.

I want you to imagine for a moment that you are sitting with a client during a heated conversation and you give your client certain advice. If you do, then you need confirmation in writing, you are going to -- these negotiations are going on, and I can foresee a situation where you can be involved with multiple parties and have to pull your client out on a regular basis and have to get something confirmed in writing.

This is good for us, but it's also bad. I think what's written in the bottom here where it says,
on the second page of the letter, Although written conflict waivers are clearly desirable in many situations, requiring written consent in every situation as a matter of discipline is both unnecessary and inappropriate. Often, the conflict issues are clear, the affected clients understand the issues, and the matter is uncomplicated. The need for consent may arise unexpectedly and without notice in the midst of a transaction or other matter. In such cases, requiring a writing merely adds unnecessary delay and expense, and elevates technicality over the substantive question of whether consent was given. Moreover, subjecting a lawyer to potential discipline, disqualification, and malpractice liability for want of a writing -- when it may be entirely clear that the consent was in fact given -- is not reasonable.

I would urge that we as members of the Assembly adopt the section (a). Thank you.

CHAIRPERSON LEVY: Thank you.

MS. JAMIESON: Mr. Chairperson, Elizabeth Jamieson on behalf of the 17th circuit. I speak in favor of proposal (a), which is not requiring written consent or notice. For clarification, this is not the position set forth in the ABA Model Rules or that proposed by the Ethics Committee. This is a position of the current Michigan Rules.
The synopsis states that Ethics Committee queries who would file a grievance if the client provided consent. The Ethics Committee assumes that if a client consents, regardless of the writing requirement, the client would not file a grievance for the failure to put the consent in writing.

First of all, this should not be the basis for making a requirement, the violation of which subjects a lawyer to potential sanctions. Second, I believe that a minor isolated violation can and has resulted in the filing of a grievance and potential sanctions.

Any time a client wants a concession from a lawyer regarding anything -- discounted fees, additional legal services, et cetera -- a client could use the writing requirement as a threat to obtain a desired result. It is the unharmed, vindictive client who will threaten a grievance as a tactical move regardless of whether consent was provided merely on the basis that the lawyer did not obtain that consent in writing.

We have had situations here in Michigan involving a minor isolated violation. The Attorney Grievance Commission has filed a grievance, hearing panel and Attorney Discipline Board indicated no
discipline was warranted and no sanctions were recommended, yet the Supreme Court held that the mere violation of a rule regardless of harm constitutes misconduct.

The rule should not become a bargaining chip for unharmed clients and I, therefore, recommend that the Assembly vote in favor of proposal (a), which does not require written consent.

MR. ROTENBERG: Steven Rotenberg, 6th circuit. I recommend voting for proposal (a) because, as a practical matter, there are a lot of attorneys who just don't have a lot of backup staff, and if we were to be required to give written consent for everything I think a lot of my clients and maybe some of your clients could no longer afford you because I would be spending a lot more time drafting the writings for the file than actually doing something substantive or useful for them, and I see this as a liability if we would actually require that. That's my opinion.

HON. ELWOOD BROWN: Mr. Chair, can I point something out? And it may just be semantics, but from what I have heard so far, and John Allen pointed out when he talked about his minority position that the Grievance Committee had, this doesn't require written consent. It requires consent to be confirmed in
writing, which means it doesn't have to be contemporaneous, it can be after the point, and I have heard people use the words written consent before you act. It's not necessarily so. I just wanted to point that out.

MS. FELDMAN: And it does not have to be signed by the client.

MR. ROMBACH: Tom Rombach from the 16th circuit. Noting that, I still have some serious concerns, and I think that Judge Brown, particularly having been prosecuting attorney up in St. Clair County, would share those. I am still for (a), practicing in a criminal environment, whether it's subsequent or not.

A lot of the grievances come through folks that are incarcerated, and they don't have anything else to do, so they are going to grieve their attorney. Lo and behold, we are building in the fact that we have to confirm in writing that they chose to plead guilty even though that the judge went through each right that they may have. Some judges, I understand, do use written plea statements and then have the client and their attorney sign off on them. A lot of the district court level don't.

If you are representing somebody in a
probation violation in which they may get sent to
prison, lo and behold, it comes back that my attorney
did this without my written consent or should I send
something up to the U.P. and say, hey, did you consent
indeed to do this, and they are saying no way. Oh,
now that they have sent you a letter that reminds me
that clown did a particularly bad job when he was
appointed on the spot, given five minutes he saw with
me, and sent me to prison for three years.

So I agree the highest intent of the law
would be to do these things in writing, but this is

not going to be applied just to the nice environment
of civil law where I get to run a Dun & Bradstreet on
the person's background to see if they are worthy of
my representation. The judge literally could pick me
out of being in the front row and say you are stuck
with this clown and if you get a grievance, here is
the 75 bucks, fight about that for the next year.

So to me that alone, if you give me option
(a) or option (b), I have to, so as not to put an onus
on the lawyers that I represent, that I have to say I
can't do this written thing, because it may be good in
most environments of covering my butt, but a lot of
the times it's going to be flapping in the breeze
anyways. Because you are going to require it, it's
going to be flapping in the breeze.
I really appreciate the effort, the time, and thought the Ethics Committee has put into it, but the environment in which I practice, this is totally impractical and I don't want to put myself in a sling for future grievances, because that's what we are doing with each and every one of these quasi criminal rules that John Allen pointed out, so I speak vehemently against (b) and I want to not require lawyers written consent or provide written consent. If they can't take my word on it, then I suffer the consequences. Thank you.

MR. DUNN: I would like to note, however, that this rule does not apply to Rule 1.4, which is communication with clients, which is the source of the concern you are expressing. This rule applies to conflicts matters principally and virtually exclusively. So the issues you raise are valid issues, but this rule of confirmed in writing does not have any impact on your issue.

VICE CHAIRPERSON JAMIESON: I acknowledge the speaker in the back of the room.

MR. BARTON: Bruce Barton, 4th circuit. I guess I have to back up to what Tom Rombach just said. Regardless of intent, a blanket rule of any kind that speaks to the idea that you have to have written
confirmation of this type can be used against lawyers, and I speak particularly to our handout materials and to the first item here. It says, The lawyer is to have in writing consent to a person's agreement to a proposed course of conduct after the lawyer has communicated information and explanation reasonably adequate under the circumstances about the material risks of and reasonably available alternatives to the proposed course of conduct.

That doesn't say anything about conflict of interest, and I would suggest that going one step further to what's inferred, what do I do in a criminal trial when it's down to the time of the defense and the defendant insists on taking the stand and I know that's a bad move and he insists. What do I do? Say, Stop it, Judge, I want this in writing? I don't think so.

MS. JAMIESON: Thank you.

MR. LEVY: Dan Levy, 3rd circuit. I just wanted to share an experience with you. I have been dealing with these rules a little longer than some of you, most of you, in preparing for this meeting and sat through a lot of other meetings.

I would have risen in support of not requiring writing when this process began. I want to tell you why I would rise now, and it applies to a
bunch of the rules we are going to be considering. I promise not to get up each and every time.

These are the Rules of Professional Conduct. They are designed to protect us. They are designed to protect the public. We are a self-regulating industry. We would like to -- or profession. We would like to stay that way. That requires that we actually regulate ourselves.

If there are going to be rules, there are going to be rules. The question is whether if you have a potential conflict of interest you should get something in writing from your client or at least confirm it in writing with them after you have discussed it. Simply it's not professional conduct not to. And if we are really concerned about the aggravated, unhappy, disgruntled client later coming back at us for not getting it in writing, that's not what they are going to come back at you for. They are not going to come back at you for not getting it in writing. They are going to come back at you because you didn't get it writing and, therefore, they can come after you for something real.

We have already indicated, we have already talked about the fact that we don't want these rules to create independent causes of action. Potentially
if you take the client with a serious conflict and
don't get it in writing they could bring a cause of
action. This writing protects you.

We have already indicated that we don't think
a simple act of negligence, a simple omission once in
a while should be disciplinable. The question is now
whether it's professional conduct to protect ourselves
and to protect the public to get such things in
writing, and I submit that we need to remember who it

is that we are trying to protect. It's not just
lawyers, it's not just a matter of we never want to be
grieved for anything, it's a matter of what
professional conduct is, and I would just ask
everybody to take this into account as they consider
this rule.

VICE CHAIRPERSON JAMIESON: Ethics Committee.

MR. DUNN: Yes, one more comment. The prior
speaker was reading from apparently a definition of
informed consent in Mr. Kemsley's letter, but, again,
I want to point out that the requirement of confirmed
in writing appears only in the rules that pertain to
conflicts. It doesn't appear anywhere else,
regardless of what the definition is.

I would also like to note that in the
alternatives in front of the Assembly item (b), which
would be in favor of the rule as proposed, really is
somewhat misleading in that it states that it requires lawyers to obtain written consent and to provide notice. The rule does not require written consent. It only requires providing written notice, and when this proposal is considered it ought to be considered fairly that the words "written consent and" be stricken from (b) and, in fairness, (a) as well.

MR. BERRY: Just for your information as you are considering this, I think Tom's comment as it extended to some other areas, probably very strong comments, I think in reference to the conflict areas, in the areas that I have particularly spent an enormous amount of time, if you really look at these rules where it's going to apply, they are very important limited areas of utmost importance that there not be miscommunication and that it be made clearly what's going on.

I think interestingly both the discipline counsel in this country and respondent's counsel, surprisingly, the respondent's counsel is very much in favor of this rule. In fact I have talked to a number of them here and at national. The reasons that were enunciated by Dan, that it clarifies rather than hurts those kinds of complaints coming in. That is not to
minimize the fact that there can be times where it
would be abused by some people, but the overall
balance in the conflict area is an area which would be
more clarification than it would be --

CHAIRPERSON LEVY: Additional discussion.

MS. LIEM: Veronique Liem, 22nd circuit. I
just have a question. If we don't have written
consent we would still have the requirement of
which you all are aware of where writings are necessary even if parties agree to something. Statute of Frauds, for example, why would we have a Statute of Frauds when the parties could just agree to anything and we could just have a swearing contest every single time there is a sale of real estate, et cetera, et cetera.

So there are policy reasons for having a written statement, and all this is is a written confirmation.

MS. JAMIESON: Elizabeth Jamieson, 17th circuit. Speaking to the Statute of Frauds, I see the difference between our rules and the Statute of Frauds is that the Statute of Frauds provides that if the party admits that there is an agreement in writing, then it's presumed. In our rules it doesn't matter whether or not the party admits that something has been -- whether or not there is consent. If it's not in writing it is a violation of the rule, and that's the difference between the proposed rule and the writing requirement and the Statute of Frauds. We have no protection in our rules.

VOICE: Call the question.

CHAIRPERSON LEVY: I hear a motion to call the question. The question before us is whether the
rules should require it be in writing, (a), or not require it be in writing. I would offer that the key is as set forth in the rules, so that as the rules would say written notice versus written consent, it is what the rule says. This position here does not purport to change any of that. The question is whether or not in conflict areas there should be a

I would ask that all in favor of position (a) requiring that written consent be obtained --

MS. FELDMAN: It's not written consent.

CHAIRPERSON LEVY: I am sorry. Not require that it be in writing, position (a), please rise.

I think we can probably do this by voice vote. All those in favor of position (a) not requiring, please say aye.

All opposed.

The (a)'s have it.

I am sorry. All in favor of (b), please say aye.

The (a)'s have it.

MR. ROMANO: Do we have 25 percent minorities?

CHAIRPERSON LEVY: It was the opinion of the chair that we were not close to 25 percent, so I didn't call for a headcount. If somebody wants to
move we can, but I don’t think we were.
Which brings us to informed consent, (5)(d) on the agenda. I am thinking maybe it makes most sense if we start with the Ethics Committee to explain why it is that they propose requiring informed consent.

HON. ELWOOD BROWN: I think -- I apologize because I was day dreaming here as you were asking the question, but as I understand, your question is what is the reason to have informed consent?
I think from a practical standpoint the definition of informed consent is nothing more than what is the definition or the manner in which the word consent would be interpreted in a proceeding as to whether or not consent was actually given, because consent means nothing unless it's informed consent. And the current rule from the practical standpoint, consent after consultation.
The definition that we have presented is nothing more than what has been used in many legal contexts anyway. I believe that from a professional disciplinary position that if you get into an issue of failure to give consent it's really going to be an issue of failure to give informed consent, because, as I indicated before, simply to say my client or whoever
consented to this means nothing unless he or she were
given the full explanation of what they were
consenting to and, therefore, it's the recommendation
that informed consent be the benchmark as defined.

MS. FELDMAN: I just want to add real
quickly. This is the ABA's proposal that we basically
have gone along with. That was debated and decided
and in the spirit of trying to keep as much as we
thought appropriate from the ABA Models. We thought
this was not a real substantive change to what we
already had, consent after consultation, and
considering that this verbiage, informed consent, is
in a variety of rules and to keep it consistent with
the ABA and so that we could look to ABA ethics
opinions and other opinions throughout the country
that have the same language, this to us was a better
approach, not substantively changing what we already
have, otherwise it is going to require changing a
variety of rules and will make it appear that we are
different when in fact we don't believe there is a
real difference.

CHAIRPERSON LEVY: I am sorry, are there
positions from the sections, committees, and Bar
entities?

MR. ALLEN: John Allen, chair of the Special
Committee on Grievance. A minority of our committee
expressed concern about certain aspects of the application of the informed consent rule. Informed consent sounds nice. It's very gentle, it's warm, it's fuzzy. When we look at the comments which are on page 61 of your briefing book, the commentary to the rules say that this informed consent must be reasonably adequate, it must include an explanation about the material risks and reasonably available alternatives.

It also says, if you look down at the bottom of that page, nevertheless, a lawyer who does not personally inform the client, and this refers to even facts of which the client might already be aware, nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client is inadequately informed and the consent is invalid.

That is a blueprint for attacking consents that are plainly given. Even in crowds someone can stand on a stage in an auditorium and give consent and yet come back afterwards and say the degree of information they had, the number of material risks, the number of available alternatives was not complete. There is no cookbook method to doing this. There is no form that has been preapproved as a safe
It can be participants in ADR when you are the mediator or arbitrator. It can be a prospective client under 1.16, and yet it is your duty in those circumstances to give that person advice, in effect, that these are the material risks, these are the various alternatives available to you.

I received an additional piece, Mr. Chairman, that had two other alternatives on it -- Elizabeth is going to bring that up -- and I think that is important also to consider a distinction between giving informed consent to persons who are clients and whether the same rules should apply in giving informed consent advice to people who are not clients.

CHAIRPERSON LEVY: I will put it bluntly, what did the majority of your committee respond?

MR. ALLEN: Again, we did not have these alternatives before us when we spoke. The majority of the committee responded that they would agree with the proposal by the Ethics Committee in the form it was made.

HON. ELWOOD BROWN: Mr. Chair, if I could
point out one thing.

CHAIRPERSON LEVY: Please.

HON. ELWOOD BROWN: Many of the concerns stated by Mr. Allen, I think, are addressed in the

phrase reasonably adequate under the circumstances. As the circumstances change, of course, that changes the meaning of things. I think the reasonably adequate under the circumstances accounts for the concern that not every possibility was covered before consent was given. Every possibility, it may not be reasonably accurate under the circumstances. Only that which is necessary.

MR. ALLEN: I would grant, Mr. Chair, that many people will find comfort in the terms reasonably adequate, but other persons will not.

CHAIRPERSON LEVY: But the majority of your committee did. I guess my point is that the privileges of the floor are granted to committee's representatives to speak on behalf of the committee and section. I would just ask that the majority be given as much attention as the minority report.

MR. ALLEN: It was not my intent to slight that. I thought that it would be well covered by other representatives here, including those from the Ethics Committee, but I will be glad to do both.
CHAIRPERSON LEVY: Thank you. Other committees or sections?

MS. JAMIESON: I bet none of you thought you would hear from me this much today. I don't think I have ever spoken to the Assembly as much as I have today, but I feel very strongly about the importance of these rules, and I spent a lot of time reviewing the language as proposed in the rules from the Ethics Committee, and I have submitted an alternate proposal with regard to informed consent.

Nancy, do you have (c) and (d) up?

All of you have at your seats the written alternate proposal with a clarification of the issue which I think is very, very important. John Allen just mentioned it, and the real issue here is whether or not a lawyer should be required to obtain informed consent, and, if so, from a person who is not at that time a client of the lawyer.

Informed consent appears in a lot of different rules, and under the synopsis I point out the fact that informed consent would apply to three different types of people, to someone who is not a client of the lawyer at the time consent would be required, from someone who is a client but not represented by the lawyer in the matter for which consent would be required, and third, from someone who
is a client represented by the lawyer in the matter for which consent would be required. I believe that informed consent is appropriate for those rules where you are obtaining it from someone who is a client represented by the lawyer in the matter for which consent would be required.

Proposed Rules 1.4, 1.6, 1.7, 1.8, 1.10 and 2.3 all deal with someone who is a client. Rules 1.9 deals with former clients, 1.11 deals with former or current government officers, 1.12 deals with former judges, mediators, and 1.18 deals with prospective clients that aren't even yours.

Therefore, my alternate proposal further defines where informed consent would be required, and proposal (c) talks about using informed consent only from someone who is a client represented by the lawyer in the matter for which consent would be required and in all other situations disclosure and consent would be required.

The next option is (d), which is define the term informed consent and requiring it only from someone who is a client of the lawyer at the time consent would be required.

I believe that either (c) or (d) are better options than (a) or (b) and, therefore, I propose
those as alternate positions of the State Bar.

CHAIRPERSON LEVY: And the alternate position

would be treated as a motion to amend to add option...

(c) or (d), so is there a second?

VOICE: Support.

CHAIRPERSON LEVY: Does the committee want to
respond to the --

HON. ELWOOD BROWN: I am not certain that I
understand the difference between informed consent and
disclosure and consent. It seems to me that if you
are disclosing all of the facts necessary or
reasonably adequate under the circumstances that you
have given informed consent, you are getting informed
concept. So unless there is some definitional
distinction between those two, I am not certain it
does.

MS. JAMIESON: In response, my understanding
of informed consent is pretty much giving advice, and
so what some of these rules would require attorneys to
do is pretty much give advice to people who are not
their clients, and in those situations I am saying I
don't think it's appropriate. I don't think lawyers
should be obligated to give advice to a prospective
client, to somebody who is a client on a totally
different, unrelated matter. I don't think they
should have to get informed consent with regard to
those individuals.

CHAIRPERSON LEVY: The proposals are not intended to redefine or to adjust the definition of informed consent, only to who it's required?

MS. JAMIESON: Exactly, and these proposal specifically say that it's either required from a person who is a client represented by the lawyer in the matter for which consent would be required or from someone who is a client of the lawyer at the time consent would be required, which is a little bit broader. So either it's real specific -- I think (c) is better, but I am okay with either (c) or (d).

HON. ELWOOD BROWN: I would simply point out that some of these rules, for example 1.9 which you are dealing with a former client, it's with confidentiality, conflicts of interest, and even though that person is not a client now, you may have come, because of your representation, you may have come into possession of some information which would require, before you are able to use that, the consent of the client who used to be your client even though not now your client and, therefore, that should be, in my view should be an informed consent, not just saying, not just a disclosure and consent, if there is some distinction between the two, and that's just one
rule in which you are not currently representing the
individual, but because you had represented the

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individual and on the basis of that representation
acquired certain information which is now in potential
conflict in your current representation, you still owe
a duty to that former client not to disclose that
information, and that creates a problem if you don't
have informed consent.

MS. FELDMAN: I would also caution the
Assembly that if you are going to have a rule that
says disclosure and consent, you are then going to
have to have some definition so that someone could
distinguish between the two, and I think that's going
to be tough to do.

CHAIRPERSON LEVY: Comments as to the
proposed amendment to add options (c) and (d) to our
list of choices.

MS. JAMIESON: It's been accepted. They can
vote on (a), (b), (c), or (d) pursuant to our rule, so
call the question.

CHAIRPERSON LEVY: So the question, I guess,
is called on (a), (b), (c), and (d). I am told that
the rules provide for it being accepted if it's
informed.

All those in favor of option (a), define the
term informed consent required by client's consent is
informed consent, please rise.

MS. FELDMAN: Is that the Ethics Committee?

CHAIRPERSON LEVY: This would be the Ethics Committee proposal.

VOICE: Could they highlight the one we are voting on.

CHAIRPERSON LEVY: Highlight the one we are voting on. Option (a) is the one recommended by the Ethics Committee.

Thank you. All those in favor of option (b) which is deleting the informed consent requirement entirely, please rise.

Thank you. All in favor of what is option (c), define only as where represented by the lawyer in the matter, please rise.

MR. HAROUTUNIAN: Point of order. Ed Haroutunian from the 6th circuit. Can you only vote on one?

CHAIRPERSON LEVY: You can only vote on one, correct.

Thank you. And option (d).

Thank you very much. There is no majority, but several minority positions that will be reported out. (A) received 31 votes, (b) received 27 votes.
both of which are over 25 percent (c) received 13 votes and (d) received four votes.

MS. JAMIESON: So the Assembly has two minority votes.

CHAIRPERSON LEVY: Agenda item 5(e).

MR. ROMBACH: Mr. Chair, if I may ask, since we added a (c) and (d), in all the other votes we have had an opportunity to go yes or no or something in the alternative, and this time what happened -- this goes to Mr. Haroutunian's point I believe -- that if they knew their option was going to get gunned down from the beginning that they would rather express a more stronger position towards one of the ones that were catching votes. So, again, you didn't -- in all the other ones we have had kind of a yes or no alternative. This time you gave us four different options. If I knew mine was in a distinct minority I would rather throw my weight behind something that I like amongst the other two.

Perhaps, I would suggest, particularly for the one that only had one vote raised, perhaps he would want to select another one. So, again, I don't know how you logistically do that, but in fairness to the people that have distinct minority positions, perhaps they would want to speak to that, perhaps we could address that concern.
MS. JAMIESON: Tom, we had 13 for (c) and four for (d).

MR. ROMBACH: Well, what I am saying is that if you have (c) or (d) perhaps if somebody could formulate some concern that we could throw those votes into something else if they wanted a second alternative for those people voting on (c) or (d).

CHAIRPERSON LEVY: I am going to have to -- the rules were proposed and adopted. They didn't provide for that. I don't think we can change at this late date. I don't want to start opening doors again.

MR. ROMBACH: When the rules were formulated they didn't anticipate either a yes or no in the other matters. Now we have added a (c) or (d) in writing from the floor. I am just throwing it out there.

CHAIRPERSON LEVY: I think we will report all four positions and the court will have to read between the lines.

MR. ROMBACH: Thank you very much.

MR. CHADWICK: Tom Chadwick from the 8th circuit. I move we reconsider the vote on informed consent.

MR. ROMBACH: If he is voting a minority, you have to take a vote on that.
CHAIRPERSON LEVY: Is there a second?

VOICE: Support.

CHAIRPERSON LEVY: There is a second. There is no debate. It is a majority vote.

All in favor of reconsidering the last vote on informed consent -- I am sorry, there is debate? There is debate.

VOICE: Call the question.

CHAIRPERSON LEVY: And the question has been called. Debate is closed.

All in favor of --

MR. ROMBACH: I object to the question being called. Unless that's unanimous, then you have got to let people speak. Thank you.

Again, this is goes to my alternative.

Again, I wanted the chair to --

VOICE: Use the mike.

MR. ROMBACH: This goes to my alternative.

Basically, by definition, to have a motion for reconsideration you have to vote in the minority, and we didn't really have a distinct minority, so if the gentleman stood up voting in one of the, like the (c) or (d) sections, again, I would say that if we could consider throwing out (c) or (d) and having the first (a) or (b), and that's no insult to Elizabeth's
position, but at least we send a signal that generally we favor informed consent or generally we don't favor informed consent and leave it to the greater minds of the Supreme Court to determine how they are going to look at it anyway. We can only specifically go back and revisit that once we get a determination made by them and suggested to this body.

So, again, I would move at this point -- again, I am just urging -- I can urge what to vote on, and I am urging to vote on either (a) or (b) in the motion to reconsider and basically shell (c) and (d). I can do that.

CHAIRPERSON LEVY: My parliamentarian is instructing me that the motion has to be, the initial motion to reconsider has to be made by somebody who, in fact, voted in the majority the first time, and there was no majority.

MR. ROMBACH: Normally, under the typical rules of parliamentary procedure, you have to have a majority for an action to pass, so if you are saying nothing passed, nothing gets moved on, then I agree with that.

CHAIRPERSON LEVY: We had no majority, it was only minority reports.

MR. ROMBACH: I understand. But we are still
moving an action forward by our rules, so I would suggest by moving an action forward that is --

CHAIRPERSON LEVY: The Bar has no position. The Bar currently has no position. It has two minority reports.

MR. ROMBACH: Okay. So we basically can't recast this vote. Again I defer. I am the one that pointed out that he has to be in the majority. That's why I asked before for my definition. So if that's the ruling of the Chair, I respect the Chair's prerogative. Thank you.

MR. ROMANO: Is there or is there not a motion to reconsider?

CHAIRPERSON LEVY: There is no motion to reconsider on the floor because it's not a proper motion.

MR. NEUMARK: Fred Neumark, 6th circuit. I am going to need clarification of this, because I don't understand why we can't reconsider something that we voted on where there was no majority because two of the four proposals were presented to create a situation where there wouldn't have been a majority simply because you had four things to vote on and a majority might not have been obtained.

I think here, and I want to back up
Mr. Rombach's position, we need to present a solid front to the Supreme Court. I think to come up with a wishy-washy idea, well, there was no majority, but where in actuality there probably is a majority, and we can speak stronger, and to say that it can't be done because the rule says that a majority where a majority cannot be obtained has to be obtained for reconsideration. I would ask that we reconsider the prior vote.

CHAIRPERSON LEVY: Would you call that a motion to suspend the rules to allow for reconsideration?

MR. NEUMARK: Okay. Let's call it a motion to suspend the rules.

VOICE: Second.

CHAIRPERSON LEVY: No discussion. That does take a two-thirds majority. A motion to suspend the rules is on the floor. All in favor.

Any opposed.

That was two thirds.

We are reconsidering the motion. If I understand correctly, there is now, somebody is making a motion to reconsider it or reconsider it with only items (a) and (b) present?

MR. NEUMARK: Since I am at the mike, I will
make that motion.

VOICE: Second.

VOICE: Call the question.

CHAIRPERSON LEVY: We are now calling the question on the matter as it originally appeared with options (a) and (b).

And all in favor of voting for item, for (a), which requires that wherever consent is required it be informed consent, please rise.

Thank you. All in favor of item (b), please rise.

Thank you. Anybody not voting? Anybody not voting, please stand.

So there is a majority for (a).

MR. BARTON: Mr. Chairman.

CHAIRPERSON LEVY: There will be a minority report, but there is a majority.

MR. BARTON: I am one of those who didn't vote, and my reason simply is this, I do not like the definition of informed consent and really neither one of those proposed rules addressed that. I believe there should be informed consent, but I think the definition is too stringent, and that's why I didn't vote on any of the proposals. It simply does not fit what I think should be in the rules.
CHAIRPERSON LEVY: Thank you.

Moving on to item 5(e) dealing with Rule 4.2. We received a letter from the U.S. Attorney --

MR. ABEL: Mr. Chair, can you tell us what the vote total was on that last vote, please.

VICE CHAIRPERSON JAMIESON: Forty-four is majority opinion for (a), 35 in favor of (b), and that qualifies for a minority opinion. So the Assembly's position will be majority (a), minority (b).

CHAIRPERSON LEVY: You will just do anything to keep us from getting to 4.2.

Rule 4.2, communications with represented persons. We did receive communications from the U.S. Attorney's Office. Is there anybody here representing them? Would you like to speak?

MS. MCQUADE: Yes, I would. Barbara McQuade from the 3rd circuit. I am asking that you support proposal (a), that the rule not be amended to change represented party to represented person, or in the alternative if that is approved then that instead a law enforcement exception be recognized to the extent that civil practitioners think this is an important change, and let me explain why.

As stated in the letter from Jeff Collins, it would have a significant impact on law enforcement and
on the way cases are investigated.

At the U.S. Attorney's Office we investigate criminal enterprises. We investigate environmental crimes, organized crime, civil rights violations and public corruption by using Grand Juries. We issue Grand Jury subpoenas to witnesses and for documents. And oftentimes what happens is the person who receives that tips off the target, so I just want to let you know I got a federal Grand Jury subpoena asking me about this. So suddenly you get a phone call from the lawyer who says I just want to let you know I represent the target, Al Capone, chief of police, whoever it is, and just want to let you know that. Although no charges have yet been filed, now that he is a represented person instead of a represented party, we can't have any contact with him.

I as a lawyer don't want contact with him, but because the rules say that my agents act for me I can't use an undercover agent or an informant, I can't get wire taps, I can't use concentual monitoring, and these are all law enforcement tools that have long been recognized and supported by the U.S. Supreme Court.

So making this change from law enforcement will eliminate those investigative tools for
enterprise investigations and it will have a
significant impact on the way we work.

Now, there is an exception you see in the
rule. In an attempt to address this issue, they have
included a number of exceptions, one by contacting the
other lawyer and asking for permission. Obviously
that wouldn't work in this situation. One is for a
court order, which sounds good, you know, if the court
says it's okay you can do it, but, of course, as we
all know, courts can only decide matters when there is
a case or controversy, so before charges are filed
there is no case or controversy, so as a practical
matter you could never get that court order.

The final exception is where otherwise
authorized by law, but because in the state of
Michigan this has not ever been the law, it's never
been litigated, so it's not authorized by law within
the state of Michigan.

So the efforts to achieve this exception from
law enforcement aren't going to work in practice.

CLERK BUITEWEG: 30 seconds.

MS. MCQUADE: So I urge you to either vote in
favor of (a), that the change not be made to parties
and instead, or if it is, to adopt (a) with the law
enforcement exception. Let me just say the Michigan
and U.S. Constitutions would prohibit any contact with
a represented party after charges are filed. So once
someone is indicted you couldn't conduct even these
undercover activities. So, therefore, I urge you to
vote in that way. Thank you.

CHAIRPERSON LEVY: Ethics was the only
written comment. Did they want to respond at this
point?

MS. FELDMAN: The only thing I would point
out is there was an additional written comment, I
believe, that was passed out from Miriam Siefer from
the Federal Defender's Office in support of the
proposed rule.

CHAIRPERSON LEVY: That is correct, I forgot
about the additional one. Is somebody here
representing the Federal Defender's Office? But I
would encourage people to consult with that and to
look that over.

Opinions from the membership.

MR. LARKY: Mr. Chairman, Sheldon Larky, 6th
circuit.

I think we should adopt (b). When you read
Miriam Siefer's comments, I think the second page
where she says government lawyers and law enforcement
officials should be held to ethical standards at least
as high as those which all other lawyers are subject. Lessening the responsibility of prosecutors, at a time when law enforcement resources are rapidly growing by rewriting the rules for their convenience and placing the core values preserved by the rule is not necessary.

I believe that (b) gives the protection to all the individuals within our community, within our country, within our state. I believe that by changing this from parties to persons we protect every individual right, and I believe we should adopt (b).

VICE CHAIRPERSON JAMIESON: Thank you, Mr. Larky.

MR. ELKINS: Michael Elkins, 6th circuit. For those of us who do any criminal law I think realize that, once again, the U.S. Attorney's Office is being disingenuous. I strongly support (b). The U.S. Attorney, as all law enforcement offices, controls when an indictment is filed or sought but when a charging document is brought. In other words, they say when you are a party. They know the people are represented by counsel. As (a) would be, they could go and hold their indictment or hold their charge and take that person without counsel and have a discussion. Simply to do it that pesky old
Sixth Amendment. I think it's absurd to suggest we should be a part of this situation where we allow one of the parties in the litigation to go against the Sixth amendment.

To say that you can't get a court order to speak to someone because there is not a case in controversy I think precludes the concept of taking a warrant when there is no case in controversy. Quite simply, the courts can authorize a contact if they wish to do that. There is not a burden upon the prosecution. Accordingly, to protect our rights I recommend strongly that we support (b).

VICE CHAIRPERSON JAMIESON: Thank you.

Mr. Chairman.

CHAIRPERSON LEVY: Dan Levy, 3rd circuit. I promise this is the last time I will be today at a microphone other than upfront, but this rule, as a former county prosecutor and as a current assistant attorney general, is enormously important to me, and I think that if you at all favor the change that's contemplated in the first of these two proposals, that is changing the definition in civil cases from persons to parties, that it is imperative that we create a law enforcement exception or we will lose the whole thing.

The notion that we are somehow repealing the
Sixth Amendment or repealing the Fifth Amendment by
passing a rule of ethical confines is simply silly.
The prosecutors are and will continue to be bound by
the constitutional provisions.

Two things though come, two instances, two
everyday occurrences come to my mind though that I
just think are extremely striking. One, I currently
work at a tax unit. It is constituted normally with
detectives from the State Police who are new to
detective work. This is their first assignment out of
uniform as a detective. They come to us for advice.
Unlike the U.S. Attorney's Office, there is no way
that anybody could win an argument that they work for
us otherwise. So as long as they don't come to us for
advice they are free to go and talk to people without
respect to this rule.

The only question is whether we want them to
go to counsel and consult and make decisions that
conform to the constitutional provisions, that conform
to common sense, that put those brakes on and make
them think twice before they do things, and that can
only happen if they are permitted to get our opinions
without us being mandated to tell them that they are
not allowed to do it.

The other one is I used to prosecute gang
drug cases. I was talking to somebody before --

CLERK BUITEWEG: 30 seconds.

CHAIRPERSON LEVY: -- about young boys. But

think about vice lords. They arrest somebody on a
street corner selling crack cocaine. The vice lord
had, the person we were targeting had an attorney that
represented the organization. Are we really going to
tell law enforcement, are we really going to tell the
prosecutors that they can't allow the person on the
street corner until they get an attorney appointed by
the court to cooperate in the investigation, that they
don't have that right, they have to get the attorney
that the head of vice lords is paying for to represent
them. That's what this rule requires.

VICE CHAIRPERSON JAMIESON: Thank you.

MR. AMECHE: Brian Ameche, 29th circuit. I
also prosecute for a living, and I do it at the local
level, which means that most of our police officers
don't work for me and aren't answerable to me, and if
anyone is a prosecutor at the local level knows what
the State Police can be like, that can be a little
difficult. They will do what they want to do.

I am reminded about Tom Rombach's statements
about grievances. We get grieved fairly regularly,
and I can see grievances coming out of the woodwork
consulting attorneys but are writing the grievances on their own, filing them that an officer talked to them.

The other problem I have with this is that it was originally designed for the civil world. I think it's a very useful tool, but in the criminal world what it will do is prevent officers from talking to someone who, for instance, is already charged in another incident, already has an attorney, is out on bond, and is found at a crime scene or involved in a crime scene. They know he is represented. In a small county like ours they probably arrested him to begin with, but now they can't deal with him because he is a represented person, and they know that.

The other issue I have is that generally ABA Model Rules are written in a vacuum. There is no physical jurisdiction where the ABA has control, no real people's lives are affected by this, and the question that I have of the committee is we know two states that have passed this law enforcement exceptions. What states have passed this without those exceptions? What states have passed the ABA rules as written?

CHAIRPERSON LEVY: I don't have that information. Does the Ethics Committee?
MR. AMECHE: I think the current make-up of
the Supreme Court being what it is, this is very
unlikely that it would come about the way that it's
being proposed. I think we run the risk of looking
fairly foolish by passing this one.

CHAIRPERSON LEVY: President-Elect.

MS. DIEHL: Nancy Diehl, 3rd circuit. I am a
prosecutor too, though sometimes people wonder if I am
a real prosecutor, and I say that because oftentimes
I stand apart from my colleagues on a number of bills,
legislation, and other things that are put forward.

I will say this, I am on the record, I am a
proud member of the ACLU. However, today I stand with
my colleagues. This is a bad rule change. It is not
needed. It would cause law enforcement way too many
problems.

We always have to judge what kind of
intrusion, what are we doing to people's individual
rights versus public safety, and this is one of those
situations. This is just a bad rule. It works fine
as it is. We are not going to talk to someone if they
are a party, if they are represented, but law
enforcement needs to talk to witnesses. We need to do
that.
picked up we cannot speak to them. It is not right for a lawyer to call the station when we are talking to some witness to say I represent him so we no longer can speak to him or give that person an opportunity to work with us that in the long run would be to their benefit.

We cannot allow the drug king pin to insulate all of his underlings, his mules, his dealers, and everyone else. This rule would be a big mistake. I urge you not to amend the rule.

MR. BARTON: Bruce Barton, 4th circuit. I speak as a former prosecutor and now a defense attorney. I am speaking in favor of item (b). However, we are here, I am afraid, and this is why I abstained from a previous matter, what we have in front of us is not what I understood we were going to vote on. I understood from previous materials that it was to be an amendment which would not allow law enforcement or not allow prosecutors or attorneys to speak to persons represented in that particular matter.

I just heard one of the prosecutors talk about not being able to talk to somebody because they are represented in another matter. This rule we have in front of us is not what I thought we were going to
I speak in favor of, however, the amendment that says that lawyers and their representatives cannot speak to persons who are represented, and I have to say in that matter, you may remember, and I don't remember from the case law whether he was actually charged yet or not, I don't think he was, but I don't remember, but you may have heard of somebody named Danny Escobedo, Escobedo versus the United States, the original case relative to interrogation, and, by the way, that's what we are talking about. We are not talking about questioning. The case law, the college professors, the people who teach criminal justice call it interrogation, and we are talking about interrogation of a defense lawyer's clients, and I thought in the matter in which he, that attorney represents him. That's not here.

CLERK BUITEWEG: 30 seconds.

MR. BARTON: Okay. I go the one step further then, I speak in favor of proposal (b). My understanding is that it was in matters in which the attorney represents him, and I suggest that pulling somebody off the street, he asks for his lawyer, he doesn't have to get his lawyer because he is not, he is not yet charged, I suggest that that should not happen.
CHAIRPERSON LEVY: I just want to ask the Ethics Committee if the rule is so restrictive.

MR. DUNN: The words "in the matter" do appear in the rule, so the rule is restrictive.

CHAIRPERSON LEVY: The words "in the matter" do appear? Would that, in the drug gang, apply to drug dealing then? I mean, is in the matter defined?

HON. ELWOOD BROWN: Yes. In the example that you gave from your statements, Mr. Chairman, if the person is, if you are investigating that matter for which the person has representation you must not talk, speak to that individual as it relates to that investigation, because that's for which you have been notified they represent them.

CHAIRPERSON LEVY: And that would apply to any member of an organization?

HON. ELWOOD BROWN: No, you are talking about individuals, not organizations. If you had a situation where an organization had a lawyer and he indicated to you as a law enforcement individual or prosecutor that he was representing this person in that matter, then that applies, not that he was representing the organization, unless you are going after an organization.

MR. ROTENBERG: Steven Rotenberg, 6th
circuit. I am in favor of proposal (b) because I would take the reading of it to be transactional. If you find somebody at another crime scene I think it would be up to them to show that there was some relationship back to the original representation with that, if there was an objection to it being approached. At the same time I also sometimes wonder when the prosecutors, law enforcement get up and say that they need this tool or that tool that it's really a matter of lazy prosecutors who want an unbalanced field.

MR. SPADA: Robert Spada, 3rd circuit. I am a Wayne County prosecutor. I am a prosecutor. I am urging you to vote (a). I personally right now run a drug forfeiture unit, and I have had the situation where attorneys have come in and filed appearances on investigations where we have been looking at seizing assets and drug cartels and that type of situation. They come in and say I am representing everybody. At that point if we would adopt this as it is, we would not be able to talk to anybody nor find out what is going on.

Also, the use of investigative subpoenas at a state level, at a county level. We have had situations where at a crime scene a witness we want to put under investigative subpoena because we think he
is going to flip once we talk to the defendant. At that point we will have defense attorneys coming in and saying, Listen, I am representing him also, so we will not get locked in testimony from individuals that are witnesses if we adopt it as it is now, as it is proposed. So I urge you to vote down (a).

MR. BROOKS: I am J. Dee Brooks from the 42nd circuit, and I am one of those lazy prosecutors here speaking in support of proposal (a) or the alternative (a).

I agree that prosecutors and government attorneys and officials should be held to the highest standard of ethics, and I believe that we are and will continue to be so. We have the full protections of all the Bill of Rights. Those are all good, those are all known for good reasons, and they will remain in place.

What you are proposing here is an unnecessary and complicated burdens that will complicate numerous other cases and legitimate law enforcement investigation with prosecutions. There are all kinds of protections in place, and, again, those are good protections. No one is proposing that we do away with any of those in any respect, but this is unnecessary, it's overly cumbersome and complicated, and I urge you
to vote against the proposals.

MR. BUCHANAN: My name is Rob Buchanan. I am from the 17th circuit. I am responding to this as it applies to civil practice. Most of my practice is larger personal injury cases, but I am supporting proposal (b), a broader definition of persons.

Sometimes we see that there are less scrupulous lawyers out there who try to solicit our clients away from us in larger cases, and I think that the protection that the ABA proposes is it prevents that or at least dissuades lawyers from doing that. They try to apply the current 4.2 to say only if I am a lawyer in that litigation am I precluded from talking to your client, but if I am an outsider not yet involved I can talk to your client. So it's for that reason that I think the broader definition the ABA proposes is a better rule.

MS. JAMIESON: Mr. Chairman, I call the question.

CHAIRPERSON LEVY: There are people in line. Call only from the microphone if there are people in line.

MR. HAROUTUNIAN: Ed Haroutunian from the 6th judicial district. I hadn't heard or at least I hadn't seen what it is that the problem has existed that has caused the thought process to bring about
this proposed change in our rules, and I am just wondering whether or not the Ethics Committee or anyone else who might know what the problem is or was that causes this particular rule to come before us.

I have heard some good arguments on both sides of this one, but I would like to know why is it even in front of us? What's the thing that's pushing, what problem exists that has caused this to be the solution?

HON. ELWOOD BROWN: I can't specifically identify a problem except for to say that part of the process the Ethics Committee was asked to do was to review the Model Rules of the ABA and to decide upon a recommendation to this body.

This particular rule was hotly debated, my understanding is, at the ABA level for many years. It was hotly debated at our level, and all I can tell you at this point is that the result of that debate is before you as our proposal.

MR. CHADWICK: Thank you, Mr. Chairman, Tom Chadwick from the 8th --

MS. FELDMAN: Can I just further elaborate on that? If you would just look at page 65 under synopsis, I think it gives you some explanation.

MR. CHADWICK: Tom Chadwick from the 8th
I just have a point of clarification or a question to the Ethics Committee. In cases involving abuse and neglect, child protective proceedings, the FIA case worker is under continuing court order to follow and administer the case service plan for those children and the parents, which requires communication with the children and parents. Would this rule affect child protective proceedings and require that a case worker contact the represented attorneys instead of the represented parties?

HON. ELWOOD BROWN: This rule only applies to lawyers, not to case workers.

MR. CHADWICK: The argument can be made that the FIA case worker is an agent of the prosecuting attorney who is often representing the petitioner. The case worker would be the petitioner in the case and would be represented by the prosecuting attorney. Is there any -- was that even discussed, or was there any direction from the committee?

HON. ELWOOD BROWN: There was no discussion with regard to that that I recall.

MR. CHADWICK: Thank you.

MS. JAMIESON: Mr. Chairperson, I call this to question and I urge everyone to be brief with regard to their comments with regard to future positions. We have 14 in total to go through. We
have an hour and a half, and this is the fourth.

VOICE: Support.

CHAIRPERSON LEVY: Thank you. Let me take
the prerogative of the chair though, and I am going to
ask that we consider these in reverse order, the
prosecutor's exception first. If, in fact, the rule is
adopted, I sense that the --

VOICES: No, that makes no sense.

CHAIRPERSON LEVY: I just sense that we are
going to defeat (a) and (b), even though we don't want
to. We will take them in the order they are
presented.

The motion is MRPC 4.2 should. All those in
favor of not be amended to apply to represented
persons rather than parties, please rise.

MR. ABEL: I think the prosecutors ought to
be disqualified.

(Laughter.)

CHAIRPERSON LEVY: Thank you. And all those

in favor of proposal (b), should be amended.

Thank you. All those not voting.

And then that was 55 to 26. There will be a
minority report. Option (a) has the majority of 55.
The option (b) will be reported as a minority
position, having received 26 votes.
On to the second item under the same number, instructions still to the court if it amends, if it goes ahead and amends anyway.

I will go with the obvious majority on that and continue on to item (f).

MS. JAMIESON: I think that these are before us. We have to vote on 4.2 (a) or (b) the second part.

CHAIRPERSON LEVY: We will vote on the second part, the second part being the rules should, if amended, apply to represented persons, they then should still include a law enforcement exception.

(a), the prosecutor's argument, all those in favor, please rise. This would be the second of the two (a)/(b)'s, whether or not there should be a law enforcement exception. This is in favor of a law enforcement exception.

Thank you. All those in favor of item (b), that there should be no law enforcement exception.

The majority is position (a) with 58. If my math is right that's not a minority position, but we will double check it for (b) and move on to item (f).

VICE CHAIRPERSON JAMIESON: (a) is a majority opinion with 58 votes, (b) is not passed with 17 and it's not enough to qualify for a minority.

CHAIRPERSON LEVY: Moving on to truthfulness
in statements to others, number 4.1. I guess we will
go straight to reports from committees and sections.
Positions of the general membership. I am sorry.

MR. ALLEN: Not fast enough. John Allen,
chair of the Special Committee on Grievance.

By a majority report our committee expresses
concern about that portion of 4.1 (b) which seeks to
assert a new duty upon the lawyer that would involve
failing to disclose a material fact which might assist
a client's fraud or a criminal act. I emphasize that
there is no quarrel with 4.1 (a) and the prohibition
which is now in the current rules that a lawyer may
not make affirmatively a false statement of material
fact to assist the client in an illegal or fraudulent
act.

The difficulties we see are these. 4.1 and
its policy in 4.1 (b) is inconsistent with the rule of
confidentiality in 1.6 in this respect, under 4.1 (b)
doesn't speak in terms of prohibitions. It speaks in terms of may. It is an authority to disclose, a discretion to disclose. And, therefore, in every instance in which the lawyer discovered conduct by a client which was fraudulent or illegal there could give rise to a duty under this proposed 4.1 (b) to make a disclosure, and the failure to do so would render the lawyer liable for discipline and, more importantly, I think, liable in a civil action.

Let me give you an example, if I may, and that is the lawyer represents someone who sells a business. In the course of that there is a lot of records supplied to the other buyer in the course of it, and after -- it closes just fine. After the closing, however, the buyer claims things aren't working out too well and there has been a fraud, something that wasn't fully disclosed. He sues both the seller and the seller's lawyer and law firm on the basis that there was a failure to disclose a fraud.

Under the present rule without 4.1 (b) the Grievance Committee believes there would be a substantial possibility of having a lawsuit at least against the lawyer and the law firm dismissed and dismissed quickly, because there is no duty owing to that third party, and, in fact, once dismissed the lawyer in the law firm who did the deal for the client
could continue to defend the fraud action.

With 4.1 (a) proposed existing, there would be at least an argument, an arguable position that there is a legal duty regarding that failure to disclose. It might go away some day, but probably only after there is a summary disposition motion.

In the meantime --

CLERK BUITEWEG: 30 seconds.

MR. ALLEN: -- the lawyer and the law firm that represented the client in the deal would not be permitted to represent them in the lawsuit, a substantial tactical advantage to the buyer alone.

We believe that these are the reasons why these things were deleted from 4.1 when it was adopted as part of all the rules earlier.

Finally, I understand the Ethics Committee in its most recent report in your briefing book says that it might be preferable to delete the term fraud from 4.1 (b) and refer only to proof of a client's criminal act. While that probably is progress, a further difficulty I would observe is that practically everything these days is a crime, and I would think of few things alleged as a fraud that couldn't be lodged under some criminal statute. Thank you.

MR. DUNN: Thank you. Bill Dunn for the
Ethics Committee.

Clearly our Rule 1.6 would permit disclosure, and Rule 4.1 would then require disclosure, but I think it's important to look at the whole rule and understand what all the words in it may mean.

First of all, a lawyer shall not knowingly fail to disclose and shall not knowingly fail to disclose when necessary to avoid assisting.

Knowingly is defined in that Section 1.0 that we talked so much about earlier that says denotes actual knowledge of the fact in question. So it's a pretty high standard to begin with if the lawyer was to actually know that there is a crime or fraud involved in the lawyer's representation of the client.

Secondly, the concept of necessary is a very important one in this rule. Comment three to the rule points out the necessity to make the disclosure has to

be weighed against all the other acts that the lawyer can take to disassociate him or herself from the representation, such as withdrawal, quiet withdrawal, and even a very noisy withdrawal, according to the comment.

So the necessity of making a disclosure as the comment points out is really a last resort in disassociating one's self from the crime of fraud.

As far as liability in a civil action, I
think you all have made it very clear that you don't want these rules to be evidence of the basis of the civil action.

So I think that the rule when looked at in its entirety may be much more palatable than the --

MS. FELDMAN: We did in our last Ethics Committee meeting delete fraud from our proposal.

MR. LOOMIS: Dan Loomis from the 35th circuit. Mr. Dunn's explanation of all of the important terms there, knowingly and material and necessary and avoid assisting I really think narrowly confines this duty, but my comment is if we don't pass this what do we say to the public? The State Bar of Michigan isn't going to require its attorneys to avoid a criminal act in this way. I think we have narrowly defined it. I think we need to go on record that we would do this.

MS. JAMIESON: Mr. Chairperson, I call the question.

CHAIRPERSON LEVY: Question has been called.

MR. ROMBACH: I object, without unanimity. I do want to say something to this rule.

CHAIRPERSON LEVY: Call the question is two-thirds vote without debate.

MR. ROMBACH: Is she calling the question?
CHAIRPERSON LEVY: Yes, so it's two-thirds vote without debate. Question has been called. All in favor, please say aye. All opposed. I don't think we have two thirds. Motion fails and we are still open.

MR. ROMBACH: Thank you, Mr. Chair. I speak right now, having considered --

VOICE: Please use the microphone.

MR. ROMBACH: I am sorry. I lost my notes. I am going to speak basically for the -- let's see, I don't want an affirmative duty on a lawyer to disclose a material fact to a third person, and again let me put this in a criminal context, because I know the committee considers this generally in a civil context. The problem you have, if you are standing up next to your client during a hearing and he says something or she says something incredibly arcane, it's going to be putting a criminal defense attorney in an incredibly difficult situation. For instance, a probation report comes back, or anything else, you are going to have to act as a guarantor in all instances if this information is picture perfect or perhaps you have to narc out your client. You are going to have to say, Well, Your Honor, he said that he hasn't had a drink since...
completing his probation report, and I would like to
tell you for a fact that when he was in my office the
other day I smelled the odors associated to
intoxicants. That's going to be a very difficult
situation. Literally that's what you are doing with
this rule. And now you say, well, maybe that's not a
crime, maybe that's just fraud.

But, for instance, if you are talking a
federal law enforcement official and the same
misstatement comes up, then that lawyer can be charged
with a federal crime, because it's a federal crime to
make a misstatement to a federal law enforcement
official investigating a federal crime. So, (a), that
brings in crime and not fraud.

The second point that I would make is the
same thing. Anybody can come up there and just say
this isn't picture perfect but I don't want to act in
any situation that I could be associated with a
grievance or an actual complaint that I have to
guarantee that every piece of information or prove
later that I didn't have knowledge, and that's
essentially the trick bag we are being put into here,
and I don't think in the criminal involvement that
that should be the case, and I don't think in the
civil involvement it should be the case either. It's
just too high a standard for any lawyer to achieve.

It's not that we shouldn't aspire to achieve it, but I do believe that we shouldn't be required to achieve that standard. Thank you.

VOICE: So you are for (a)?

MR. ROMBACH: Not include affirmative duty, yes. Again, I don't have my notes. I lost track of those. I am speaking for (a). Thank you.

CHAIRPERSON LEVY: Response.

MR. DUNN: We have the Ethics Committee.

The first point made by Mr. Rombach, I refer you to Rule 3.3 (b) court or a tribunal which says a lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, and Rule 1.6 has nothing to do with it and can't protect the nondisclosure.

So in the instance that you cite, this is not governed by Rule 4.1. It's governed by 3.3 and mandates disclosure whether you, quote, know it or not. So that's covered by a different rule.

And as far as knowingly is concerned, my suggestion was that this is a high degree of protection for the lawyer. Obviously it's always a
factual question, but the standard does not have
reason to believe, it is know.

MS. JAMIESON: Call the question again,
Elizabeth Jamieson, 17th circuit.

CHAIRPERSON LEVY: Question has been called.
All in favor.
Any opposed.
We will vote on the proposals before us.

Michigan Rules of Professional Conduct should
not include an affirmative duty, option (a), all
people in favor, please rise.

I am going to say that's over 75 percent.
Thank you. There is no minority.

On to -- everybody wake up. On to client

sex. Rule 1.8, attorney/client sexual relations. Do
we have comments from sections, committees, or Bar
tentities?

MS. LINCOLN: Mr. Chair, my name is Judy
Lincoln from the 10th circuit. Terri Stangl, my
10th circuit colleague, is the chair on the
Standing Committee on Legal Aid. Terri could not be
with us today so she asked me to read some very brief
comments.

The Legal Aid Committee recommends that the
Bar Assembly vote to add Rule 1.8 (j) from the ABA
Model Rules to the Michigan Rules of Professional Conduct. This rule is located on page 24 of the red-lined edition and addresses conflicts of interest with current clients. We also recommended optional paragraph 17 from the ABA commentary on Rule 1.8 which helps to explain the scope and intention of the rule. This could be found at pages 27 and 28 of the red-lined edition.

ABA Rule 1.8 prohibits sexual conduct between an attorney and a current client unless they had a concentual sexual relationship that preexisted the lawyer/client relationship. The ABA commentary makes it clear that the rule does not prohibit a firm from keeping a case as long as the attorney who was having a relationship with a client transfers the case to another member of the firm.

The ABA comment also explains that if an attorney is representing a corporation or other organization the rule would ban sexual conduct only with those representatives of the corporation or organization who are dealing directly with the attorney on legal matters. The attorney is not prohibited from having a relationship with any other employees or agents of the corporation or organization.

The Legal Aid Committee believes that the ABA
Model Rule should be adopted in order to minimize conflicts of interest or protect attorneys who may have relationships with persons other than those specified by the proposed rule and to prevent potential misunderstandings from clients and attorneys about how their sexual relationship may affect their professional obligations to one another.

The Legal Aid Committee is especially worried about misunderstandings by low income clients who may be more vulnerable to suggestions, whether actual or perceived, that they can obtain free or reduced fee legal services if they engage in sexual relations with their attorney.

The committee then hopes the Representative Assembly's position will be to adopt the ABA Model Rule 1.8 (j) and the related comments, and I realize that the written proposal and, therefore, what we have in our booklets from May does not include an addition to the comments, so I think that it will stand as presented.

But I also want to point out it's my understanding that this body took the position that is it reflected in the Model Rule the last time this issue came before it. While it did not become a part of the ethics rules, this body's position was to
discourage or prohibit sexual relationships between lawyers and clients.

CHAIRPERSON LEVY: I think it's an important point that I probably should recognize that from the chair. This body is on record in support of what would be option (a) here. Supporting option (b) or not taking a position at all would, in fact, be a change of policy for this body. We are already on record on this issue as is indicated by the materials.

Any other comment? No other comments. I believe the motion is on the floor.

MRPC 1.8 should, all those in favor of, and I think we can do this by voice vote probably, option (a), which is, in fact, to prohibit sexual relationships under the conditions outlined, please say aye.

All opposed.

In the opinion of the chair it does pass and there is not sufficient support for a minority position.

You can go back to sleep now. Item (h), fee sharing referral fees. We have received written reports from City of Detroit Law Department, chief assistant. Is anybody here representing him?

MS. FELDMAN: Are you speak of Mr. Quinn?

CHAIRPERSON LEVY: Yes.

MS. FELDMAN: He was writing as an
individual, not as any representative.

CHAIRPERSON LEVY: Mr. Quinn wrote as an individual. He is not present.

So then positions of sections or Bar entities. Positions of members.

MR. ALLEN: Mr. Chairman, John Allen, Chair of the Special Committee on Grievance. Our materials are with you already. I think they are very clear in what they say. The hour is late, and I don't think you will need to hear from me again. Thank you all very much for your indulgence. I will stick around in case there are any questions.

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MR. MILLER: Randy Miller, 6th circuit. This proposal really puts lawyers in a position where they are going to be taking work that they are not qualified to handle where they have an opportunity to make some profit off the file.

For example, complicated medical malpractice case comes into an office, somebody takes a look, there is substantial damages, but you are not completely qualified or prepared to handle the file. What are you going to do? Are you going to take it because you are not entitled to a referral fee under this rule or a very limited referral fee? Or are you going to do the work on the file which you really
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can't handle and probably going to end up screwing it
up and harming the individual who has been harmed. It
doesn't make any sense.

    I absolutely support sub (b) in this rule.
It's an agreement between attorneys. We are all
adults, we all know what we are doing. If you want to
take a file from somebody else and you are willing to
pay them the referral fee, then you should do it. I
strongly support (b). Thank you.

MS. JAMIESON: Elizabeth Jamieson, 17th
circuit. I submitted an alternate position.
Everybody should have it underneath the first one,
nonrefundable retainers are not, per se, unethical, which means they are allowed, but there are circumstances where they may require a refund, such as when the retainer is not earned or is unreasonable, and, therefore, I submit that we expressly permit reasonable and earned nonrefundable retainers and specifically say that in our rules so that it is clear and we are providing clear guidance to lawyers in the state of Michigan.

Again, this is not an alternative. This is just an additional, so the vote is either yes or no.
should be improper for a lawyer to double a fax charge or double some charge to supplement their billing. However, I submit to you that this could create another quagmire for a lawyer in dealing with very expensive out-of-state expert witnesses where these are directly billed to the law firm and now the client after the fact may want to raise the issue of something that is an unreasonable fee and perhaps the lawyer had no choice but to handle the matter because they had to have this particular expert in the case.

I think that creates great concern for the lawyer or the law firm, and I would submit to you that a change could be made to that -- I would offer a friendly amendment -- that or unreasonable amount for expenses not charged by third parties. Because I think the concern is that a lawyer could use expenses to run up the fees unfairly to the client, but when these expenses are what the lawyer has incurred by outside third parties, there shouldn't be the same concern.

CHAIRPERSON LEVY: It needs to be in writing, but I am confused as to where it even -- I am not quite sure I understand what the request is.

MR. BIRD: I am in favor of 1.5 (b) in general, but I was looking at the materials, the red-lining materials that were sent to us before, and
there is a discussion in there about red lining the current Michigan rules, and, as I read it, the unreasonable amount for fees, and I thought we were talking about fees, and I thought all of this is subsumed in this discussion. Maybe this is for a later discussion, but I have a concern about including unreasonable expenses within the concept of fees, and I thought this discussion was subsumed within that. If it's not, that's fine.

CHAIRPERSON LEVY: I don't believe it is. I think definitions would go to drafting or finer points to another day. I don't think it's a motion to amend anything here.

Any further discussion, any committee response?

VOICE: Call the question.

MR. DUNN: The rule does cover both fees and expenses.

CHAIRPERSON LEVY: Right.

The question has been called. All in favor of calling the question.

MR. MORGAN: Point of order. Could I ask our staff if it's supposed to read as it does on the screen. I know that's what is in the printed materials, but I think in the first line it makes a
lot more sense if the word is be, b-e, rather than b-y.

CHAIRPERSON LEVY: The first instance. I am looking at the second instance and getting really confused. The first "by" should be "be".

VICE CHAIRPERSON JAMIESON: Nancy, a typo, first "by" is "be."

CHAIRPERSON LEVY: All in favor of calling the question.

All opposed.

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please say aye.

On the third one, 1.5, should (a), prohibit fees that are illegal or clearly excessive, all in favor say aye.

Or (b), it should prohibit fees that are unreasonable, all in favor say aye.

We are going to call that one a count. All in favor of (a), prohibit fees, illegal or clearly excessive, please rise.

Thank you. All in favor of (b), prohibit fees that are unreasonable, please rise.

Position (a) carries. There was not support for, sufficient support to report a minority position.

And then on the last, the additional proposal, yes or no vote on whether or not 1.5 should expressly permit reasonable and earned refund -- nonrefundable retainers. All in favor of that language, please indicate by saying aye.

All opposed.

And that will be passed.

Item 5 (i), the safekeeping of advances of fees and expenses. Any comments from committees or sections of the Bar entities, lawyer entities? Opinions or discussions from the members?

MS. JAMIESON: Elizabeth Jamieson, 17th
circuit. With regard to Rule 1.15, I have an alternate rule that's been distributed to everybody, and you have that in front of you. Again, this is an additional issue that is not raised in your materials, and this deals with how you should deal with nonrefundable retainers.

This is real important, because what we don't want is to have a commingling of funds allegation against lawyers, and so specifically the issue is should lawyers be allowed to place nonrefundable retainers in the lawyer's account even though a refund may later be determined to be necessary, at which time the refundable portion of the retainer shall be treated as client funds.

The reason for this is that neither the current nor the proposed rules provide guidance regarding where to place nonrefundable retainers. Michigan Ethics Opinions indicate, again, that they are not, per se, unethical, which means they are allowed, and the dilemma is that a supposedly nonrefundable retainer may become at least partially refundable, and then what are you supposed to do with that.

If a nonrefundable retainer is considered the lawyer's funds, then the retainer must not be placed in a client trust account. Placing those funds in a
client trust account would be commingling funds and would subject the lawyer to discipline. On the other hand, if the potentially refundable portion were to be considered a mere advance of fees, then it must be placed in a client trust account.

Clarifying how lawyers must handle nonrefundable retainers will prevent claims of unavoidable commingling of funds while safekeeping those funds in the event of a refund.

So the proposal again is either a yes or no vote, separate with regard to this issue, and the vote is whether or not the rules should provide that nonrefundable retainers may be placed in a nonclient trust account unless a refund is determined to be necessary, at which time that retainer then would be treated as client funds.

CHAIRPERSON LEVY: Thank you. Does the Ethics Committee have response to either the initial --

MS. FELDMAN: I guess I am not sure what a nonclient trust account is.

MS. JAMIESON: The lawyer's account.

MS. FELDMAN: I think that verbiage is confusing, because it implies it is a trust account for somebody, and there is no beneficiary of that
trust, so my only comment is that that's confusing.

MS. JAMIESON: Just for purposes of
clarification, it's fine if it reads the Michigan
Rules of Professional Conduct should provide that
nonrefundable retainers may be placed in the lawyer's
account unless a refund is determined to be necessary,
at which time the retainer shall be treated as client
funds, and I think that addresses the concern.

CHAIRPERSON LEVY: I think it clarifies. I
am not sure it addresses the concern. I think it
creates the concern but it addresses the issue. Did
the committee want to respond?

MR. DUNN: There was an issue of
refundability, then that is the reason that it should
be put in the trust account, the client trust account,
if it has to be refunded. I mean, the implication
that it's a nonrefundable retainer is it's fully
earned and, therefore, the lawyer's property, and
that's fine. But if you raise the issue of
refundability of a so-called nonrefundable retainer,
then it ought to be in the client's trust account. If
it actually could be refundable, then it doesn't
belong to the lawyer.

MR. DYER: James Dyer from the 7th circuit.
I agree with the comment just made. In fact, I am
personally aware of one instance where a grievance is
pending.

CHAIRPERSON LEVY: Can you get a little closer to the mike.

MR. DYER: Yes. I am personally aware of at least one instance where a grievance is pending where a client has requested a refund of a portion of a nonrefundable fee that was in a written agreement and

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complied with all provisions regarding excessive fees, at least in my opinion. Certainly there could be a difference of opinion regarding that.

Either it is nonrefundable or it's -- and if it's nonrefundable, it's fully earned at that point, and I think we need to -- that needs to be the position to be retained.

MR. LARKY: Sheldon Larky, 6th circuit. I am going to vote no on (c). The idea is great, but let's take the reality. Client comes in -- person comes into you and says, I want you to represent me in a divorce case, breach of contract case, a criminal case. I have a $1,500 nonrefundable retainer. Okay. Go spend the money and you handle the case or you don't handle the case. A year later you get a request for investigation from the Attorney Grievance Commission. The money is long gone. It's long gone. By the time refund is determined to be necessary you
have already spent it, you probably forgot about the client, and now all of a sudden you have to worry about where you are going to get the money back.

This, in essence, leads you, when you read this, it, in essence, leads you to have to put all the money into the account and let it sit there, hope and pray no one is going to ask you for the money back.

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So I am going to vote no for (c), because it really doesn't make sense.

MR. GARRISON: Scott Garrison, 6th circuit. I am going to vote no on (c) too, but my question regarding (c) is this, the reason why. The last part says, At which time the retainer shall be treated as client funds. What that implies to me is, what that means to me is that we are disputing the fee which we agreed was not refundable but now somehow it's refundable, now I have to give it back to them, and I have to treat it as client funds. Therefore, I have to take it out of my lawyer's account, put it in my IOLTA account, wait for the bank to process that two days, then cut them a check out of the IOLTA account.

Why can't I just cut them a check out of my account and be done with it? Why do I have to play games with it, because that says at the minimum there is a dispute or I determine it should be refunded, I have to treat it as client funds and I can't leave it
in my lawyer account any more. I now have to put it in my IOLTA account, unless I am misunderstanding what's there.

MR. ROTENBERG: Steve Rotenberg, 6th circuit. I thought nonrefundable was self-explanatory, and I am not sure why we are saying nonrefundable does not always mean nonrefundable if you and your client both agree to it.

The other problem that I have with it is it amplifies the person up here previous statement. Let's say I do have funds that I believe were earned, suddenly they are discovered to not be earned because there is some sort of a dispute. Does this mean I can't take funds out of my own bank account to pay myself or do I have to maintain a float for a period of time?

I think this is -- I think it's redefining a clearly understandable word such as nonrefundable, which I have always taken to be that, nonrefundable. Thank you.

CHAIRPERSON LEVY: Additional comments?

MS. JAMIESON: Just for point of clarification, I was going to call the order, but I will --

CHAIRPERSON LEVY: I think this becomes the
last word of the proponent.

MS. JAMIESON: The point here is that when a lawyer receives a nonrefundable retainer, they expect that it's not refundable, they expect that it's their money, and the lawyer should be able to place it in the lawyer's account. That's the point of this. And we don't have any direction saying that it's okay to put it in the lawyer's account.

If, for whatever reason, that nonrefundable retainer is deemed to be later unreasonable or unearned, and that has happened, it's only at that point that it should be placed in the client trust account or refunded to the client, and that way the lawyers have clear direction as to where the money can and can't go and they avoid the potential commingling.

If it's supposed to be their money, we want to say they can put it in their account and it stays in their account and it stays their money until it's deemed the client's or refundable, and at that point it would go into a client trust account or be refunded to the client. That's the purpose, just to give direction, and with that I call the question.

CHAIRPERSON LEVY: You can't argue and call the question, but there is no --

VOICE: Call the question.

CHAIRPERSON LEVY: But there is no further --
MR. BARTON: Point of information. I understand, and I think I clarified this, we are talking about putting this money in the lawyer's operating account, not some sort of separate trust account?

CHAIRPERSON LEVY: Correct. But there being no further discussion, I will put the question first as to the items in the original printed calendar, the (a) and (b).

All those in favor of the Rule of Professional Conduct 1.15, should require lawyers to deposit into a client trust account legal fees and expenses, which is the difference here, and expenses, please rise for proposal (a).

Thank you. And all who support (b), that the trust account should contain fees but not expenses, please rise.

Thank you. And then just so we can determine the percentages necessary, anybody not voting, please stand so we determine the percentages on the other.

This has no relevance to (c), just not voting on the (a)/(b) issue.

With 78 members present, 38 supported (a), 27 (b), so there is no majority position. No majority of the body, and the Bar will not -- it will report the
minority positions but will not take an official position on the issue.

As to the item (c), a yes or no vote. The rules should provide that nonrefundable retainers be placed in the lawyer's account. All in favor of that,

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please rise.

Thank you. All opposed to the provision, please rise.

And those not voting on whether or not to accept (c).

Thank you. There is a majority for the yes position.

MR. GIGUERE: Point of clarification, Gary Giguere, 9th circuit. Is it not true that Ms. Jamieson amended (c) to read lawyer accounts or some language such as that rather than nonclient trust account for clarification but was not made?

CHAIRPERSON LEVY: Yes, which is the way I read it. Anybody who didn't understand?

MS. JAMIESON: The lawyer's, Nancy.

CHAIRPERSON LEVY: But thank you for the clarification.

Item 5 (j), sale of law practice or area of practice. There were no written reports. Are there sections or committees that wish to address this issue? Did the Ethics Committee wish to comment?
MR. DUNN: We stand on our position.

CHAIRPERSON LEVY: Your position would be in terms of the (a)/(b)'s, just so it's clear to everybody?

MR. DUNN: (a).

CHAIRPERSON LEVY: It's clear on the first one it's (a), but I am not sure if the Ethics Committee had a position on the second. So there is no official position on the second one.

Any discussion on these?

MS. FELDMAN: Is it an or? Is (b) an or?

CHAIRPERSON LEVY: Yes, one is allow, one is not allow.

MS. FELDMAN: Why is it even in here? Where did you get this from?

CHAIRPERSON LEVY: If I understand it, the question in the second proposal is when purchasing a practice or part of a practice the purchasing lawyer would then have the ability to refuse to undertake a particular client's representation.

MR. DUNN: Probably support (a).

CHAIRPERSON LEVY: There being no discussion, all those in favor of the Rule 1.17, providing that lawyers be allowed to sell or purchase an area of law
practice in addition to the entire practice, please say aye.

All those in favor of (b), requiring only the entire practice be sold if any is sold, please say aye.

I think the (a)'s have that one without a question. And then on the second item, all in favor of allowing the lawyer to refuse to undertake representation of a particular client who doesn't consent to that lawyer's fee schedule, please signify by saying aye. And any opposed to that. Again, the (a)'s have it.

Item 5 (k) under political contributions, Ed Haroutunian.

MR. HAROUTUNIAN: Mr. Chairman, Ed Haroutunian from the 6th judicial district. I suggested that and proposed this rule be deleted in its entirety, and the reason why it should be deleted in its entirety is, one, no prior rule on this subject matter exists in Michigan history. Secondly, this rule suggests that if one make a financial contribution to a political party, political or public office holder or judicial office holder, make a financial contribution, that that's not
allowed if, in fact, that lawyer or law firm receive
an appointment back of some kind.
In the letter that I submitted to the

In addition, the criteria used, and it's true
that the rule itself doesn't set this out
specifically, but the comments to the rule do. The
comments indicate that the analysis has to be made as
to what other lawyers, law firms have made in terms of
contributions to a particular judicial candidate,
political party, or public office holder in order to
determine whether the instant contribution by the
lawyer is good or not good or bad or not bad under the
rule. I felt that that was --

MR. HAROUTUNIAN: -- simply improper and
overly broad. The mitigating factors are also
interesting in that they indicate that financial
contributions can be made to further political,
social, or economic interests or because of an existing personal family or professional relationship with a candidate. So if you have a personal relationship with a candidate you can give them a gazillion dollars, get an appointment back, not a problem. If you are a stranger, do not do that, because that becomes bad. If on the other hand you are tempted to promote a political position or a social position, that's okay.

CLERK BUITEWEG: Time.

MR. HAROUTUNIAN: So I would urge that the Assembly take the position of voting on this, making it (a), to delete it in its entirety. Thank you.

MR. ROMBACH: Tom Rombach, 16th circuit. I share my politically active colleague's concern about this rule. I think it should be deleted in its entirety. We really need a reality check on this one. It mean, it aspires to achieve as great a standard as everything we have been discussing here, but it's not practical at all.

Here you have an ethical standard that would become a sword in the hands of political opponents. Everyone has to say, well, so-and-so was appointed and I wonder how much he or she gave to the governor for that judgeship, or so-and-so was appointed as a case evaluator and then how much did they give to judge
so-and-so who may have spoken on their behalf.
Everything then becomes suspect as far as raising
funds for your friends, raising funds for my former
law partner that just happened to be a judge. I never
appear in front of him, but then again, if for some
reason I was raising some money, then somehow I am
barred forever talking to the guy. I would have a
real problem with that.
Again, there is no other prohibition or any
standard for that matter for politically active
members of any other job, any other application, or
any other profession, so we are hamstringing ourselves
as far as having influence with our legislators,
having influence with the governor's office, having
influence with the judiciary, and as a lawyer and
as essentially a laborer or trade association leader
in the past, I simply don't want to flyspeck every
amount of money that I may give to somebody that was a
personal friend, and I don't want to advocate that
position, so I urge strongly that we vote against
this, euthanize this proposal.

MR. ROTENBERG: Steven Rotenberg, 6th
circuit. I politely disagree with Mr. Rombach. I
have a number of concerns about political
contributions. First of all, only U.S. Citizens can
Second of all, oftentimes there is a presumption, if not an a presumption, an appearance of a conflict of interest where attorneys give campaign contributions to judges. What happens if it, if the question at issue could be done on a coin toss? Does the judge favor his buddy who has been giving him money, or does he favor the other guy to be fair?.

If anything, I would be in favor of anything that dissuades attorneys from giving contributions, especially for judicial campaigns. So I would be in favor of accepting it in its entirety.

MR. GARRISON: Scott Garrison, 6th circuit. I agree with the first two highly esteemed members of the Assembly and politely disagree with the third.

All this rule is going to do is make me stand outside of the polls and make my wife write the check. That's all it's going to do. Nothing says that your spouse can't, your mom can't, your grandparents, your brother, your sister, anybody else that you know, and that's what's going to happen.

There was a similar proposal, I believe, to amend the Judicial Canon of Ethics to prohibit the appointment of anyone who had made a campaign
25 contribution in the preceding two years. That was

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soundly defeated.

There is currently a Supreme Court order that
goes into effect, I believe, January 1 that all
appointments must be done on a rotation basis, so I
also believe that not only is this abysmally and
abhorrently wrong, it's moot, because if all the
appointments must be done on a rotation basis in two
months, we shouldn't even be wasting our time. Thank
you.

MR. ABEL: I am Matthew Abel from the 3rd
judicial circuit, and I can't let this go by without a
comment, obviously.

CHAIRPERSON LEVY: I was really worried while
you were sitting here.

MR. ABEL: Well, I showed up late today, and
I am really sorry. I had to go to court. That's the
only reason I wore this suit. I really apologize for
that. There is a rule at the office where I work that
you can wear a suit on Friday even if you don't have
to go to court.

I think this rule, it covers itself, because
this only applies to contributions made for the
purpose of obtaining or being considered for those
types of appointments, and clearly there are
contributions that are made for that purpose, and they shouldn't be made at all. If we cannot eliminate contributions to judges, and we really should sooner or later take that larger step through public financing of judicial elections, which this body has supported, and if we can't remove the appointment power from judges, which we also really should do, then let's at least cut the tie between the contributions and the work. It really needs to end, and this body should go on record as supporting this.

I agree that this could perhaps be stronger. There are other things that are needed as well, but I think that this rule is appropriate, and I support it. Thank you.

MS. MCQUADE: Barbara McQuade, 3rd circuit. I hate to ever speak against campaign finance reform, because I agree that the system is broken, but -- so is the microphone -- but I don't think this is the way to fix it.

My concern is this, under 1.0 we define law firm to include all the lawyers of the law firm, so I think as this is written it's overly broad, because if I work for a big law firm and some associate gives 25 bucks to a candidate, now I am precluded from ever accepting any kind of engagement as it's drafted. So I think this is probably not the way to fix it, but I
do agree with the spirit. So I guess I would urge the rejection.

MR. BERRY: I had the opportunity to debate this issue at the House of Delegates of the American Bar Association. I share with you two things.

First of all, for two meetings in a row it was voted down. There was a lot of opposition to this particular rule. It wasn't that it wasn't a beautiful, feel-good rule and look-good rule, but just as presented by a number of people here, the reality is this rule is more dangerous than it is helpful, and I do want to relate that unanimously the National Organization Bar Council, the people that would enforce this rule, voted against it. They were very concerned about the fact that it would be maliciously used.

To give you an example, near elections of judges amazingly you suddenly get already an enormous amount of complaints filed about what's going on, some of which are legitimate, but many of which are not legitimate complaints.

When it says here that it's for the purpose of obtaining or being considered for that type of legal engagement, quite candidly the proof element in that would be almost impossible. If it's a bribery
case, we have got rules that deal with it, but this particular case is rife with abuse and political misuse. It was voted down by the House twice and barely made it the third time. As I understand it, very few states have approved this up to this point in time.

I also understand from the Ethics Committee that there wasn't a whole lot of debate on this particular issue, so I would urge very strongly that this be rejected.

PRESIDENT BRINKMEYER: I don't need to say anything. I call the question.

CHAIRPERSON LEVY: I was just going to say, I want to get the Ethics Committee response, because I don't think it's in the book.

HON. ELWOOD BROWN: I think John is right. There wasn't a whole lot of position one way or the other in the Ethics Committee. We looked at the last few words of the rule and felt that that handled the issue.

MS. JAMIESON: I second the call the question.

MS. FELDMAN: I think the Ethics Committee put it before this committee because it was the ABA proposal and because it had the language for the
purpose of, but there wasn’t any strong feeling on it.

CHAIRPERSON LEVY: Then putting the question to the floor, Rule 7.6 should, first selection is -- the (a)'s and (1)'s are different, are backwards -- for item (a)(1), be deleted in its entirety. All those if favor of deleting the rule in its entirety, please rise.

I think we are well past the 75 percent. Thank you.

PRESIDENT BRINKMEYER: Mr. Chair?

CHAIRPERSON LEVY: I would ask the proponent whether that renders the rest of these moot?

MR. HAROUTUNIAN: Yes.

PRESIDENT BRINKMEYER: I have a point of order, and it's a question to the committee. When you return to deliberate all of this and formulate whatever final proposals you may have, I am wondering will you anticipate making commentary to the court, and one reason I ask that question on this particular rule and a couple of the others we have dealt with here today, we are in a time right now where we are dealing with some issues here today that could be terribly misconstrued by members of the public as being promoted from a self-interest point of view, I think that's pretty clear, and this one in particular
and for the reasons pointed out, the language would
almost make proof impossible, and so from a practical
point of view I think John was absolutely correct, it
could only be abused, but I think it's important that
the court know the reason why we are doing that and
not because we think graft is okay and not because we
think it's all right to buy your way into the
judiciary or to buy your way into appointments but
because we think that it's poorly drafted, it's ill
worded, and it could lead to abuse, and I think it's
very important that we convey that to the court in the
process of letting them know we voted it down.

MS. FELDMAN: Maybe I am speaking out of
turn. My position is that our committee has submitted
recommendations. We will take your amendments to
those recommendations and incorporate them in our word
processing, but it then becomes your product, it's not
our product, and that's what's submitted to the court
is the recommendation of the Representative Assembly,
it's not the Representative Assembly -- we don't speak
for you.

CHAIRPERSON LEVY: The Bar position will be
separate from their committee position which in the
future would be bound by what we said in terms of
their position. In terms of the report that we will
be submitting to the court from the Assembly as to
the Bar's position, absent some very strong objection,
I will specifically indicate on this rule that it was
based on the way the rule was worded and that the vote
should not be interpreted as an opposition to the
concept of not buying appointments.

Which takes us on to the next item on the
agenda, which is 5 (1). This was submitted to us by
the Probate and Estate Planning Commission. I believe
they were going to have a person present to explain
their concern. Fortunately their liaison is present.

MS. CAHILL: Kimberly M. Cahill from the 16th
circuit. I also happen to be the commissioner liaison
to the Probate and Estate Planning Committee, and what
they are requesting here, they have laid out their
concerns in a letter which is in your materials, they
are asking for specific commentary to be attached to
the rule that discusses a situation that affects most
of their practitioners who occasionally will represent
a bank who is acting as a successor trustee or
corporate fiduciary, but they have very little actual
knowledge of that bank or that corporate fiduciary's
undertaking, and over a number of months of discussion
at the Probate and Estate Planning Council, it's
become very clear that the banking and the trust
community are very interested in the passage of this rule in an effort to eliminate large numbers of attorneys, once they have accepted this successor/trustee role for the corporate fiduciary, from then ever appearing and representing any entity against the bank. And I think that if you look at their proposal, what they are asking for is just some language in the commentary that would talk about the difference between actual knowledge and actual representation of that client and acting as a successor fiduciary or trustee, and I would ask that you support their position at this time.

CHAIRPERSON LEVY: Any other committees or sections wish to address the Assembly? Member comments.

MS. JAMIESON: Elizabeth Jamieson, 17th circuit. I also would urge you to vote in favor of (a), although I would just add the comment that I think that commentary isn't binding, and I think it would be even stronger if it were actually in the rule. That's not before us, but that's just all the more reason we should at least vote in favor of (a).

CHAIRPERSON LEVY: Other comments.

Put the question then. All those in favor of Rule 1.7 under item (a), providing commentary.
indicating that in this specific situation be permitted, please indicate by saying aye.

Any opposed.

That is passed, item (a).

Next is item 5 (m), duties to prospective clients. Comments were received from the Pro Bono Community. They were here this morning. They do not remain apparently.

MR. DUNN: Comments were in support.

CHAIRPERSON LEVY: Comments were in support, as is the Ethics Committee report.

Is there any member -- well, any Bar entities, committees, or sections wish to address the Assembly? Any members wish to address this question?

Hearing none, I would put the question. All those in favor of option (a), the rules should include a rule governing the period during which a lawyer and prospective client are considering whether to form client/lawyer relationship, say aye.

All those opposed.

The not include a rule governing passes.

MS. JAMIESON: Is there enough for a --

CHAIRPERSON LEVY: We will have to take a count.

All those in favor of having a rule which
governs the prospective lawyer/client relationship,
please rise. This is (a).

MS. JAMIESON: We are trying to see if there
is enough for a minority opinion. There is not?
Okay. Thank you.

CHAIRPERSON LEVY: Item, agenda item 5 (n),
regulation of out-of-state attorneys practicing in
Michigan. Written reports were received from Probate
and Estates, UPL, and the Ethics. Any comments from
those groups?

MS. FELDMAN: On what?

CHAIRPERSON LEVY: On rule 5.5.

MR. BYERLEY: If I can just try to explain, I
think what the comments are on these rules is that we
need more to implement the recommendations on 5.5 and
8.5, which are the multi-jurisdictional practice
rules, and the Ethics Committee acknowledges that
there is something more that's needed. Those things
are being worked on and will be presented also in
another package, but in order to implement these rules
you also need to amend the Board of Law Examiner's
Rules, you need to amend the Court Rules, you need to
amend the Discipline Rules, all that to give other
entities jurisdiction over lawyers who are practicing
in our state.
So the comments that have been received are not in opposition to either 5.5 or 8.5. They just say we need more, and we know we need more, and that's in the works.

CHAIRPERSON LEVY: Which means that they, if I am characterizing correctly, would support (a), which is that we should have rules that govern out-of-state attorneys, as opposed to leaving it silent on the question.

VOICE: Call the question.

MR. LARKY: Sheldon Larky, the 6th circuit. This is just a heads up. We have to vote yes for this, and I will tell you why, because there is a thing called the general agreement for trades and services, which means that the United States at the current time who signed that agreement is in violation of international law preventing professionals from being able to practice in the United States and in particular states, so what's happening is we are finally going to become global as individuals and our practices are going to become global and we are going to be competing against a person with an office in Paris, France with the same work we are doing, potentially.

But the bottom line is we have to adopt these
rules in order to protect those people who are going
to be coming into the state practicing law, appearing
before arbitrators, appearing before judicial panels.
This is one we definitely have to vote yes on.

VOICE: Call the question.

CHAIRPERSON LEVY: Seeing no further comment,
I would put the question to the floor. Question is
Michigan Rules of Professional Conduct should, (a),
include a rule that governs an out-of-state lawyers'
professional activities. All in favor, please say
aye.

All those in favor of (b), not include a
rule, please say aye.

(a) passes.

The last item on the agenda is 5 (o). It's
three rules that all Bar entities that have reviewed
it are in favor of retaining the current Michigan
rule, because that is contrary to the ABA position.
It was felt to be important that the Assembly also
take a position. So the question is on Rules 3.8,
6.3, and 6.6 should we retain the Michigan rules. It
will be a yes or no question.

Any comments from Bar committees, sections,
or entities? Any members wish to comment?

Seeing none, I will put the question. All in
favor of those, retaining the Michigan rule in those
three instances, please say aye.

Any opposed.

Passes.

Do I hear a motion to adjourn?

MS. CAHILL: So moved.

CHAIRPERSON LEVY: No objection, we are

adjourned. Thank you very much.

(Proceedings concluded at 3:45 p.m.)
I certify that this transcript, consisting of 186 pages, is a complete, true, and correct transcript of the proceedings and testimony taken in this case on Friday, November 14, 2003.

December 11, 2003

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