Lansing, Michigan  
Saturday, April 16, 2005  
10:16 a.m.  

RECORD  

CHAIRPERSON JAMIESON: Welcome everybody to our, I would like to say second, but it's kind of like our first meeting of the year.  

First up is certification that a quorum is present. Clerk Haroutunian, can you certify that we have a quorum present?  

CLERK HAROUTUNIAN: Madam Chair, a quorum is present, and the number is in excess of 50.  

CHAIRPERSON JAMIESON: Thank you very much.  

With regard to the proposed calendar, I would remind everybody that we have special debate rules for the debate of the Michigan Rules of Professional Conduct and the Michigan Standards for Imposing Lawyer Sanctions that are included in your agenda packet.  

I would also like to -- you have a paper rainbow in front of you, and I would like to draw your attention to 1.5, MRPC 1.5, which is pink and green, you have two copies. That was inadvertently not included in your agenda packet but was referenced on your agenda, and MSILS 5.2, that's the purple paper. That also was referenced on your agenda but not included in your packets.  

And then I would entertain a motion a to insert MRPC 1.15, that's the lavender paper under item Number 7. It's linked with MRPC 1.5. Also the yellow piece of paper, which is ADM File No. 2003-62, again inserted under item Number 7, for a Michigan Rules of Professional Conduct proposal.  

The beige paper, which is rules concerning the State Bar of Michigan, which would be inserted under item Number 6, and I will entertain a motion with regard to inserting those into the agenda.  

VOICE: So moved.  

CHAIRPERSON JAMIESON: Second?  

VOICE: Second.  

CHAIRPERSON JAMIESON: All in favor?  

VOICE: Aye.  

CHAIRPERSON JAMIESON: No discussion.  

Additionally, I would like to introduce our panelists who are here to speak with regard to the rules and the standards. We have Don Campbell, Robert Agacinski with the Attorney Grievance Commission, Mark Armitage with the Attorney Discipline Board, John VanBolt with the Attorney Discipline Board, and John Allen with the Grievance Committee for the State Bar of Michigan.
With that I would entertain a motion to adopt the proposed calendar and debate rules as noted.

VOICE: So moved.

VOICE: Second.

CHAIRPERSON JAMIESON: Any discussion?

All in favor.

Any opposed.

We will move to item number two, which is filling vacancies. Bob Gardella, our chair, if you could come to the podium.

MR GARDELLA: Good morning. I will be quick.

The Nominating Awards Committee had a lot of work to do this year. We had quite a bit of vacancies all over the state. We worked hard, and we were able to fill 15 of those vacancies, many or most of those people who have agreed to be involved are here, and what I would like to do is introduce each person, have you stand, and then what we are going to do is nominate by motion all of you and hopefully get approval today.

In the 1st circuit, Valerie White of Hillsdale, if you could stand.

For the 20th circuit Ron Foster of Jenison.

That's Ottawa County.

The 23rd circuit, Duane Hadley of Standish.

CHAIRPERSON JAMIESON: Any discussion?

Hearing none, all in favor.

Any opposed.

Welcome to the Assembly.

(Applause.)

CHAIRPERSON JAMIESON: And I would like to thank Bob for a tremendous effort. I don't know if we have ever in the history of the Assembly had such a high number of membership. We only have five vacancies in the entire Assembly. That's out of 150 seats. I think that's pretty amazing, so I would like to say thank you to Bob for his hard work this year.

(Applause.)

CHAIRPERSON JAMIESON: This is my opportunity to talk to you. I have a small confession to make, and don't take this the wrong way, but I was kind of hoping for bad weather today, because I thought in January when we had the snowstorm no one wanted to be here, and then the weather that was predicted for today is supposed to be sunny and 70s, and I am thinking no one is going to want to be here either, and I thought if we could just have it kind of cold and gloomy no one would mind being here.

But you are all here, and I thank you very much for being here, and I think we have a wonderful day ahead of us.

So a couple of housekeeping matters. I already recognized the panelists before you who are here as resources for all of us. Also, I want to remind those people whose first term is ending with the September meeting or for those people who have been appointed to fill a vacancy, all of you need to make sure that you fill out your petitions and have them to the State Bar by April 30th.

You had a little sticker, little sticky note on your name tag when you arrived. We are trying to make sure that you remember that you need to get that petition in on time. We also have additional petitions here if you need them.

You have a lot of colored handouts. I call it your paper rainbow, and I would like to just make sure that everybody is very comfortable with what all of these papers are, and the reason why we did it in different colors was it's probably a lot easier than sorting through these and trying to fine MRPC 1.5, where is that, instead of just saying the green one.

Let me tell you the green or pink, because you have two copies, is MRPC 1.5. That deals with fees and will be again under item Number 7, so if you want to take that and put it into your agenda book.
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| 1. under Number 7 that would be when it's going to come up. The second is the beige one, which is rules with regard to confidentiality policies for the State Bar programs. That will go under item Number 6, so the beige paper should go under tab Number 6. The purple piece of paper is MSILS 5.2, and that should go under item Number 9 with regard to the standards. You have a green document that is MCR2.403. It's the same thing you have in your packet except for that there were just two minor edits removing the words "and disputed" and we wanted to make sure you had the actual document in front of you, and also the letters in support that we received after the agenda packet went out, so that would go under item Number 5, the green one. Then you have a yellow piece of paper which is ADM File Number 2003-62. That goes under tab Number 7. You have a lavender piece of paper, MRPC 1.15, safeckeeping property. That also goes under Number 7 linked to MRPC 1.5. You have a white document that says, on State Bar letterhead that says received from the State Bar of Michigan Sections and Committees. This is commentary that we received after the packet went out, but we wanted to make sure that everybody was aware of the comments that were submitted to us in writing, so you have those in front of you. The thick orange packet are comments that were most on the RA discussion board after the text was mailed out. Again, we wanted to make sure that everybody had an opportunity to take a look at those. So those are all there for you. You have a blue document, which is a letter from our Executive Director to the Supreme Court with regard to Court Rules MCR 5.104, 5.402 and 5.403. That is purely informational only. You can put it in the back of your book if you want. What we are telling you is that this is the finished product of what happened at our October 2004 meeting where we approved that this go to the Supreme Court, but there were drafting things that needed to be completed, and this is the finished product that is going to the Supreme Court pursuant to the Representative Assembly activity and action in October. And then you have a salmon piece of paper. Again, this can go in the back of your packet, but this is an updated member list by circuit, including all of the new members that just joined us today so that you have that resource. You should also have a photo directly. I would like to thank Nancy Brown for putting that together. It was a huge effort, and it's a wonderful resource to get to know your fellow Assembly members. You have that at your seat as well. I have two important messages for you. I know that you do not want lectures. We heard that at the annual meeting last year in our small group discussions, so instead, what I am going to do is give you facts. So these are the facts that I think are very significant for you. What you see before you today is a full agenda. You see the clock ticking away, and you are thinking about how long is it going to take us to get through all of this, and are we going to be able to beat the agenda and maybe get out before 4:30. Let me tell you what I have seen. I have seen hundreds of lawyers who are very, very interested in these issues and the rules and the standards. You see before you a rainbow of papers, all these documents to review. What I see is that Jim and Anne, State Bar staff, were here at 7:00 in the morning to make sure that all of those papers were there for you. We have Gienna, who has been available for me on cell phone way past working hours. We have six RA committees who have been very active this year who helped with all of the proposals that are before you in the packet with regard to the rules and the standards. And you have 1 a.m. e-mails that you didn't see that Lori and I -- Lori can attest to -- to make sure that the product that you have here today is the best for debate before the Assembly and for our members. What you see here is a distinguished judge as our parliamentarian who is our former representative parliamentarian. What I see is a parliamentarian expert who gave up his entire Saturday with his family for the second time, because he was here in January. What you see in front of you are panelists. What I see are experts on the rules and the standards that we have brought to you today as a tremendous resource that we have taken around the state for all of the members of the Bar association to hear more about the rules and the standards, who have selflessly traveled over the past four months of these panel discussions taking time out of their busy lives and
practices to support the Assembly and the members of
the Bar association with regard to these rules.

What the Assembly said they wanted at the
annual meeting was substantive issues. You said you
want more substance before you, and what I see is 24
substantive proposals for you to deal with today
regarding the Rules of Conduct, the Standards for
imposing Lawyer Sanctions, Michigan Court Rules, and
the State Bar Rules.

I recognize that today is a really long
meeting, and I thank you all for being prepared and
looking at your materials today, and I hope you are as
excited as I am about the opportunity to deal with
these issues and shape the legal profession for the
lawyers in the state of Michigan. Wow, what a huge
task and undertaking that is.

So I encourage all of you to make the right
decisions for the right reasons, not just from your
personal perspective but on behalf of all
practitioners in the state of Michigan and in light of
the consumers of legal services in the state of
Michigan, and I welcome the panelists and all of the
speakers and proponents that we have with regard to
the rules, and with that I say let's get started, and
for the benefit of our court reporter, if you have

anything to say, I strongly encourage you to speak
louder into the microphone and clearly and not too
fast.

With that, the next item on our agenda is
question-and-answer opportunity with regard to the
Representative Assembly Liaison Report with regard to
the Standing Committee on Libraries, Legal Research
and Legal Publications. Is Randy Davidson here? Does
anybody have any discussion or anything that they
would like to put on the record with regard to the
report? Again, we included that for you information.
It was only an opportunity to allow for questions and
answers.

I move on to item Number 5, which is
consideration of the proposed amendment to MCR 2.403
and MCR 3.602. That's under tab number five. Again,
you have one of your colored papers dealing with the
amended language and the letters in support MCR 2.403,
and I will introduce to you Wayne Miller, Simeon Orlowski
and Janet Brandon with regard to these proposals.

MS. BRANDON: Hi, I am Jan Brandon. I am
with the Civil Procedures and Courts Committee, and I
am addressing this morning the topic --
VOICE: The sound system is not working.
MS. BRANDON: Oh, sorry. Is this better?

VOICE: Yes.
MS. BRANDON: I will start again. I
apologize.

My name is Jan Brandon. I am with the Civil
Courts and Procedures Committee. We are here this
morning with two rules. I will be addressing
MCR 2.403.

Basically this is an amendment to the case
evaluation process rule, and it addresses specifically
the no-fault issues. The design of it is to limit the
scope of case evaluation, issues that can be submitted
to case evaluation in no-fault cases. This has been
necessitated based upon the several recent Supreme
Court, excuse me, recent Appellate Court cases, which
casts some doubt on the ability of plaintiffs to
accept no-fault case evaluation awards.

The purpose of this is to restore meaning to
the case evaluation process and fairness to the
process.

Now, we have had long discussions in the
committee over this rule, and we have gathered
tremendous support from the legal community on this
proposal. We have attached in your packet the support of the Negligence Section for the State Bar, which is
equally comprised of plaintiffs and defendants. We

have the support of the Michigan Defense Trial
Council, and we have the support of Michigan Trial
Lawyers Association.

We also have the benefit of the foremost
prominent names in this area of law supporting us,
Wayne Miller, adjunct professor from Wayne State
University in the area of no-fault. A plaintiffs
practitioner is here with me to answer technical
questions. Simeon Orlowski is here from the defense
Bar to answer technical questions. We also have
support of two names that I know most of you in the
field that practice in this area know, George Sinas
and Jim Boron (sp).

This is a -- compromised language has been
adopted. Everyone is pleased with it. Everyone
believes there is a necessity for this to be passed.
And I do have Wayne and Simeon here with me to answer any
of your technical questions that you may have and we
ask your support on this amendment.

MR. MILLER: Good morning everyone. I would
like to thank this Assembly for your attention to this
issue, because it is a big problem for us. The best
way to demonstrate the need for change is just to give
you a quick example of how bad work for us. I have a
client who has been terribly injured in a motor
vehicle accident. I file suit because the no-fault insurer has denied coverage. They don't want to pay for anything. I file suit seeking two things, damages for benefits incurred to date and a declaration for benefits that are going to be incurred throughout time and into the future.

We go to case evaluation. We include in our claim the benefits to date because we know what they are, we do not include the benefits not yet incurred for several reasons. We don't know what they are going to be, and the no-fault insurer cannot be made to pay them until they have been incurred. Also, the case evaluators cannot award in this case what would be equitable relief.

We get an award, and we are faced with the decision to accept or reject. However, we cannot accept the award. Even if the award is ample, many times the value of our case, the best possible dream case evaluation award, we cannot accept, because acceptance, a mutual acceptance, will result in a settlement of the case, including the claim for declaratory relief, unincurred benefits.

So if we accept our case, the case is dismissed under the rule as it currently reads and we never get to the declaratory issue. We have to refile repeatedly in a serial fashion and we never get resolution of the issue.

An even worse danger that we see happening sometimes in a mutual acceptance situation is the prospect that an insurer will claim that a mutual acceptance acts as a redemption, acts as a settlement, not just of the matters to date, but of the entirety of the entitlement to no-fault insurance. Therefore, we cannot accept these awards.

ICLE commentators, including myself and many others, have been advising plaintiffs counsel for some years now that they must reject these case evaluation awards, and so case evaluation in no-fault declaratory cases are routinely rejected, and the case evaluation process has little meaning and a lot of expense. For this reason then we have drafted this proposal that has the support of both sides, because both sides in good faith want to have a process that will work to settle cases but not penalize plaintiffs in the event of acceptance.

So we have on a bipartisan, so to speak, type basis have agreed to support revision and we hope that it meets with your approval as well. Thank you.

MR. ORLOWSKI: Good morning. I will be brief. Before these Court of Appeals decisions came down approximately four years ago that suggested that a mutual acceptance of a case evaluation award in a no-fault case operated as a full and final release, before that happened, when both sides would come into case evaluation in a PIP case and both sides would accept the award, we as defense attorneys knew what to do. We would go back to the office, we would draft a release that would release claims incurred through the date of the case evaluation hearing. There would be a stipulation and order without prejudice entered, the case would be settled. Plaintiffs attorneys would then be able to file another lawsuit if there was a dispute about benefits incurred after the date of the case evaluation hearing.

For the last four years or so this system, the case evaluation system has broken down and has failed with respect to no-fault cases. As a defense attorney when I go down to case evaluation what I am often confronted with is the plaintiffs attorney asking do you mind if we make this a nonunanimous award? And we as defense attorneys routinely, I think I speak for the defense Bar, we agree, because we know the position the plaintiffs attorneys have been put in now. Many of them feel that they cannot accept a case evaluation award because it can operate as a full and final release, including futures.

That's not the way the system was designed to operate. That's not the way it did operate until a few years ago. A couple of rogue cases came down that ruined this system. We have to fix it. We believe that this proposed rule does fix it, and we urge that you adopt it. Thank you.

CHAIRPERSON JAMIESON: Any discussions?

VOICE: Call the question.

JUDGE SCHNELZ: That's not a motion.

CHAIRPERSON JAMIESON: All in favor.

Any opposed.

The motions pass unanimously with regard to MCR 2.403.

Now we have MCR 3.602.

VOICE: Point of order. There was not a motion made on that.

VOICE: Someone called the question.

JUDGE SCHNELZ: I ruled it was not a motion.

He just said call the question. She has a right to call the question. She did.

(Applause.)

MS. VALENTINE: My name is Victoria Valentine. I am here before you with regard to MCR 3.602, the arbitration rule. I am a member of the
Civil Procedure and Court Committee. I am not the
proponent of this rule, so I hope you are not going to
have questions for me. I believe it's pretty
self-explanatory. I just wanted to present it to the
Assembly and see if there is any questions or
anything.

CHAIRPERSON JAMIESON: Any questions at all
with regard to the second proposal with regard to
Michigan Court Rules?

MS. VALENTINE: I will say basically it is a
procedural amendment and not a substantive.

CHAIRPERSON JAMIESON: Our parliamentarian
had advised us that we now take a vote with regard to
MCR 3.602, that proposal.

All in favor.

Any opposed.

That motion passes as well.

The next item up is item Number 6, which is
consideration of the proposed amendments to the Rules
concerning the State Bar of Michigan. There are two
proposals before you, one is with regard to the
pro hac vice rule, which is in your packet, and the
second is with regard to the confidentiality component
to State Bar programs. Speaking on behalf of this
proposal is Josh Ard and John Anding.

MR. ANDING: Good morning. I am here on
behalf of the Unauthorized Practice of Law Committee,
and we are presenting to the Assembly for adoption two
rules, the first of which deals with the pro hac vice
rules for the state of Michigan. This particular rule
is being proposed in an effort to implement the policy
of a rule adopted last November, Michigan Rule of
Professional Conduct 5.5 dealing with multiple
jurisdictional practice.

There are four components to this rule, as
the materials reflect. From the Unauthorized Practice
of Law Committee's perspective, we are most interested
in those elements, of the four that are listed here,
that provide essentially the ability to regulate
out-of-state practitioners who practice in the state
of Michigan. For purposes of this rule, practicing
within the state is appearing in litigation, judicial
proceedings in the state.

The three elements, the first, third, and
fourth deal essentially with granting jurisdiction
over out-of-state lawyers to the Grievance Commission
and the Disciplinary Board so that there can be
monitoring of activities, processing of complaints,
and discipline if necessary.

The third item deals with the defining of
temporary practices. Essentially three pieces of
litigation in any year would entitle an out-of-state
lawyer to still qualify as someone who is temporarily
practicing within the state.

And then finally, the fourth element of the
rule is an assessment of a fee, which of course is
necessary to fund the regulatory activities.

The second element of this proposal is
perhaps the one, not to foreclose discussion of the
other elements, but the second element is perhaps the
one on which there might be need for some debate and
discussion, and that has to do with the requirement
that there be an affiliation of out-of-state counsel
with local counsel here in the state of Michigan.

This is consistent with the ABA Model Rule,
that is this particular requirement, but it does
implicate questions about multiple jurisdictional
practice, MJP, in this respect: It suggests, of
course, that a requirement of local counsel or local
counsel affiliation by an out-of-state lawyer who may
be regular counsel for an out-of-state company who may
have a relationship with that lawyer that obviously is
the result of many years of working with that lawyer.
By requiring out-of-state or instate affiliation, we
are, of course, increasing costs to that client. In

MR. WILSON: Scott Wilson from the
3rd circuit.

MR. ANDING: Hi, Scott.

MR. WILSON: Hi. I have a question. If this
rule is, or if this pro hac temporary practice rule is
put into place, will there be an adoption of the Draft
Rule 18? Is that what's contemplated?

MR. ANDING: That's a point of reference.
It's a point of reference. In other words, this is
essentially a rule that incorporates many of the...
However, as is reflected here, has been put out for comment.

MR. WILSON: My question is would we have a chance to further comment on that rule before it was adopted by the State Bar?

MR. ANDING: Yes. Yes.

CHAIRPERSON JAMIESON: Let me clarify. If the Assembly votes in favor of any of these proposals, there is an opportunity to go before the Supreme Court, and then the Supreme Court would publish that for comment. You would have an opportunity to speak on behalf of the State Bar, with regard to the specific proposals that are before you.

MS. KAKISH: Katherine Kakish, 3rd circuit. It also relates to the Draft Rule 18. I do not have a question, but I do have a comment. I notice an ambiguity or a conflict. If you look to I(A)(2)(c) --

MR. ANDING: Are you looking at the rule itself now?

MS. KAKISH: The rule itself of Draft Rule 18. Number 2 says that, and I read, An out-of-state lawyer is eligible to appear, et cetera, et cetera, if that lawyer (c) resides in this state, and then you have some exceptions.

Then we flip the page, go to the next page, to number 5, and 5 states, No lawyer, No lawyer is authorized to appear pursuant to this rule if the lawyer is a Michigan resident. I see a conflict right there with the residency, so I just wanted to bring that to the Representative Assembly's attention.

CHAIRPERSON JAMIESON: Thank you. Just for point of clarification, the actual draft rule is not something that the Assembly would be involved in to the extent that we are not really drafting body, so all we are doing is voting on the concepts that would be put into a rule and then that would go to the State Bar staff to draft consistent with the positions that are taken by the Assembly.

MR. GILLARY: Randy Gillary from the 6th circuit. Regarding the second provision requiring the out-of-state attorney to relate with a local Michigan attorney. I speak in opposition to that. I think the problem that it creates is that by requiring the local Michigan attorney, it establishes some burdens and responsibility on that local attorney who has really no control over the case.

Typically what happens, the pro hac vice attorney does everything, the local attorney does not know what's going on, and if the client pays him to know what's going on, it doubles the cost of the case. And you have potential malpractice where the local attorney now is almost responsible for whatever that out-of-state attorney does, and I think it puts a burden on Michigan attorneys.

I refuse regularly to act as local counsel because I don't know the case, I don't know what's going on, and I would hate to see us have a requirement that would obligate a client to have a local counsel at double the cost and create significant malpractice problems.

MR. WILSON: Hi, Scott Wilson again from the 3rd circuit. I want to address that same point. I am in favor of the local affiliation, but I think in the drafting there has to be a clarification of what duty is imposed on a Michigan lawyer, because I think, as it's drafted in Rule 18(C), it talks about contemplated actions. I think it should be made clear -- it's not clear who is contemplating those actions. Maybe it should be specified to be proposed actions of which the Michigan lawyer has been informed. That would take care of the concerns that the prior gentleman spoke to to make sure that if the Michigan lawyer is out of the loop and isn't kept in the loop, there won't be a duty imposed on that lawyer through this kind of drafting.

MR. GREEN: Good morning. I am Roderick Green from the 3rd circuit. I rise and speak in opposition to the rule. I don't do a lot of out-of-state work, but I have in the past, I have gone to Ohio. I know that if I had been required to affiliate with a local attorney, it would have made the cost almost prohibitive for my client. So I am really thinking in terms of cost for my client. Also, probably maybe some loss of control over the case. That's my main reason for speaking in opposition.

MS. STANGL: Terri Stangl from the 10th circuit. I have three questions. On is do we have an idea of the volume of attorneys that are doing more than three cases per year? How did we arrive at the number of three cases? And, finally, has there been any assessment among staff requiring the Bar to administer this in a timely way so any objection would be raised
early in a case?

MR. ANDING: The answer to the first question is that, no, we don't know the volume. I think that's fair. Because up till now we have had no way to really monitor the amount of out-of-state activity.

The third question is how much staffing will be required. Again, I think that's an offshoot of the first question, and again, we don't know yet. We don't know how these fees will need to be allocated.

We don't know what sort of staffing will be required.

And your second question was?

MS. STANGL: How do we come up with three?

MR. ANDING: We came up with three as essentially a number that was arrived at based on comments given by various sections of the Bar, that three seemed to be a number that was indicative of someone who is practicing temporarily within the state as opposed to someone who was not temporarily practicing within the state.

MR. ARD: I should mention that that number is used in certain other states too. I read a discussion of the rule in Florida, and there was the number that they were using.

MR. ABEL: Matthew Abel 3rd circuit. I think it is helpful to have some clarification of pro hac vice. I have had out-of-state lawyers ask me if I would help them, and they have commented to me about how little direction there is for them as to how to go about seeking pro hac vice status being an out-of-state lawyer, so I think it's good to clarify this.

I don't think it's necessarily helpful to have to affiliate with a Michigan lawyer in that the lawyer has to be competent in order to do the case, the out-of-state lawyer should be competent in the first place, competent enough also that if they need help they will ask for it, and I think that it does add a lot of burden and expense, and generally, even if there is such a rule, that it's going to be honored more in the breach that the lawyer, the local lawyer is not going to be the main lawyer on the case, and so we are just going to go through the motions of having a local lawyer who is supposedly keeping a watchdog on this case, but in truth that's really not what's likely to happen anyway.

So I think that if they are required to notify the Bar that they are practicing out-of-state on a significant basis, we will be able to track that, and the local requirement should not be there.

And as far as costs, I think we ought to wait and see. I would like to see that we not add cost here, because as I seek to practice out-of-state in the other jurisdictions, they tend to reciprocate what we do in Michigan. And if it's really not an expense to the Bar, I think we ought not charge for it, because we are just going to see additional costs in other jurisdictions, and we shouldn't be the beginning of that.

Now, if, in fact, we track it and it does end up costing money for Attorney Grievance procedures and things like that, then maybe we'll have to charge for it, but I think it ought to be on an as-needed basis. Thank you.

MR. ANDING: If I might, just respond to the last comment. This program is envisioned to be self-supporting in the sense that the fees would essentially cover the cost of the additional administration associated with the out-of-state practitioners. Obviously the fees that are paid by each of us as we practice within this state are in part utilized to fund the activities of these commissions.

And so the idea here is to create an environment where we are not further burdening the Bar with activities that are not being funded. Obviously if there is going to be additional need for additional staff, then we are going to have to fund that activity.

So I suppose we could argue about what the number is, but at this point it's the number that we are not -- by the way, the Assembly is not passing on what that dollar amount is here today. We are passing on the concept of assessing a fee that would essentially fund these activities, and I would like to think there is very little argument about that.

Go ahead.

MR. ANDREE: Thank you. Gerard Andree from the 6th circuit. I speak in favor of the pro hac vice proposed amendment, and I also speak as someone who has had rather, in my opinion, considerable experience acting as local counsel for out-of-state attorneys.

I think what we are missing in this issue is what we are dealing with here is the orderly administration of justice. Usually national clients will want someone, will -- in essence they want to save money. They don't want to send something to me and have me plow the fields that have already been plowed and reinvent the wheels and all those nice metaphors.

They have got someone who already knows the substantive law, and they are going to come in and
MR. ANDING: Let me just respond to that last point. As a governing body, sometimes we get a little filled up with ourselves in terms of what we need to say and not say in a rule. I think the last point that you made, which deals with the question of whether or not you contractually limit the extent to which you have responsibility under your fee agreement, is probably the most prudent and most practical way to limit the sort of ethical issues and difficulties that a local counsel finds themselves in.

I am sure many of you in this room can echo that experience. I certainly from my own experience have found that to be a way of clearly defining what the local lawyer’s responsibilities are and striking the appropriate balance between having a local lawyer familiar with local procedures involved in the case and on the other hand limiting your exposure to potential malpractice or otherwise, other complaints from the client if things don’t go quite as envisioned.

Other comments?

MS. STANGL: Terri Stangi again from the 10th circuit. Related to that local counsel issue, my concern is that if the out-of-state counsel’s ability to represent the person is partly potentially in the hands of the court and the State Bar, where the State Bar can come in, and depending on the timeliness of that process, whether local counsel will be able to get out of the case if the court or the State Bar successfully challenge the out-of-state attorney.

How long is that going to take, and you may contractually say you can get out, but the fact is you would be counsel of record as local counsel, even if the out-of-state counsel was disqualified for too many representations.

MR. ANDING: So I understand your comment, not just for my own benefit, but for everyone. Are you envisioning a situation where an application is made for out-of-state approval to practice in a particular case, the State Bar files an objection.

MS. STANGL: Correct.

MR. ANDING: The State Bar would file an objection to that pro hac vice appearance, and then at that point it would be the judiciary who would make the decision as to whether or not to admit or not admit the person into that case.
MS. STANGL: Correct, but the case would already be filed, and there would be local counsel filed on that case in that court, so there would have to be a separate decision if the case was dismissed or what is the role of local counsel, which may or may not be in local counsel's hands. It's in the court's hand.

MR. ANDING: It always is in the court's hands, but the question there is, and this gets back to the observation earlier made about formulating a fee agreement in a manner that would permit you to exit your relationship if it was your desire where the pro hac vice counsel was not admitted. Of course there may be a situation where that's in that circumstance where the client would decide to retain local counsel, and it seems to me in that situation you have not triggered the concern of having a local lawyer involved in the case that they don't know anything about, because now you have got a local lawyer who may be the only lawyer in the case. So those are just some observations.

MR. LABRE: Bill LaBre from Cass County, 43rd circuit. Two questions. First, as I read the rule, it appears that local counsel is optional, not mandatory, at least I didn't see any eligibility for admission requirements insisting upon, like the present rule, that we retain local counsel. Is that correct? That's question one.

MR. ANDING: I don't believe that's true. The rule is intended to and does envision in effect what's before this Assembly is a motion that in fact that requirement would be incorporated in the rule when adopted by the Supreme Court.

MR. LABRE: And the second question is, Parliamentarian, since I don't want you bored today, I think the young lady from the 3rd circuit was correct that there is a conflict in the proposed rule, so is it appropriate for an amendment that would make our approval contingent upon the removal of the conflict in the rule that the young lady from the 3rd circuit mentioned.

CHAIRPERSON JAMIESON: With regard to the point of order, the only positions that the Representative Assembly is being asked to take right now are with regard to the questions that are going to be put to vote as to a yes or no. We are not talking about the specific language of an ultimate proposal that's left to the State Bar staff to draft. To the extent you have commentary on that language, you would submit it to, I would suspect, Victoria Kremski.
I know it's not exactly the same thing, but what we are saying is if you come in from out of the state, you come into the state, it's the equivalent of you are practicing a case, and that one case may be a large case, that you are here for a long period of time.

So it's clearly a policy decision, but it was the combination of the issue of the administrative cost and potential administrative cost, as well as a fairness issue for all lawyers practicing, whether it be one case or a lot of cases.

Various states have various fees, some less, some the same as this amount. So sort of the issue is there. Thank you.

CHAIRPERSON JAMIESON: Is there any further discussion? Seeing none --

MR. ROMBACH: Excuse me, I have some further discussion. Tom Rombach from the 16th circuit.

I understand that we are here to pass judgment on the five proposals before the Assembly, but for my own personal comfort level with this particular proposal I would like to move that we require the proposed rule to be approved by the State Bar Representative Assembly before being proposed for adoption to the Michigan Supreme Court. In other words, that rule should come back to us, because I see that there is a lot of similar discomfort with this proposal as far as the devil being the details. I am just asking for clarification if we need that.

Typically when we propose these types of items before the Assembly we have an impact, for instance, on our budget, we have an impact on staffing levels, we have a lot of other things before this comes back and is approved by the Assembly. I don't see any of those requirements technically being made in this proposal.

CHAIRPERSON JAMIESON: Our parliamentarian has identified that the rule, the language itself will automatically come back to us. When it's submitted to the Supreme Court they will publish for comment and the Assembly would have another opportunity to address it at that time, or the State Bar would have another opportunity to address it at that time.

MR. ROMBACH: Again, I seek clarification that there is one thing to go to the Supreme Court and ask for commentary for us or proposed commentary, but this is our own internal proposal, and I don't understand why this body --

JUDGE SCHNELZ: This is not our own internal proposal.

MR. ROMBACH: -- of the State Bar of Michigan wouldn't be passing on our own proposals to the Supreme Court for adoption before it went to them. I am not willing to accede our authority to staff and then sight unseen go back to the Supreme Court and then comment on our own proposal. It doesn't make any sense.

All the other internal matters for State Bar consideration that come in front of us have a different proposed form. It's different than we typically see. I know in drafting these things in the past that we say what's the proposed impact on staff? What's the proposed fiscal implications. I always required that. This proposal doesn't have any of that, and some of the concerns within the Assembly say that we need to consider these ramifications before we pass judgment on this matter.

JUDGE SCHNELZ: I will give a response. I spent 23 years as parliamentarian for this body, and as I with a driving up here today I was thinking that some of the happiest moments of my life have been sitting at the Representative Assembly acting as parliamentarian. This will give you an idea of the crummy life I actually lead.

You are not being asked to vote on a rule today. You are being asked to vote on four specific questions for the concept of a proposed amendment. Someone will ultimately draft that amendment. It's already been pointed out that there are, in fact, problems with it.

The Supreme Court in its wisdom will ultimately decide exactly what's going to happen, but the rules provide that if they decide to develop a rule, they will then publish it and will call for comment. At that time it is customary, and I assume it will be in the future, I don't know of any reason not to, they will send it to the Representative Assembly for comment, and at that time you don't like it.

So this isn't your rule going to them. This is a particular core questions that you ask do I want a new rule added, do I assert the rule incorporated provision, should it incorporate another provision, should it require fee? Those are the four questions you are answering. That's the only imprint you are putting on it from the standpoint of the Representative Assembly.

I would suggest if you want to get on to the debate to the more interesting questions that are actually before you on proposed rules, you might want to...
Obviously the practice of law is changing, and with MJP and with the introduction of out-of-state counsel in this jurisdiction, the face of UPL is changing, we need the ability to reach and regulate lawyers that are coming in from the out-of-state, that's a given, and that's one of the issues before you.

And the question is then is how do you pay for it? And what seems fairer than having the lawyers who are benefiting from practicing in this state funding the cost of the regulatory activity necessary to monitor their activities? Very little unfairness there and no one talking about a particular fee amount here; we are talking about the concept.

And so I only want to encourage you to understand the implications of taking a back seat on an issue where you have charged the UPL Committee of the State Bar with monitoring unauthorized practice of law activities and by walking away from this rule you are eliminating one of the tools necessary to do our job.

I move for the -- I would move, first of all, that we vote on the first proposal, which is should a new rule be added to the rules concerning the State Bar of Michigan governing pro hac vice practice and

granting jurisdiction of out-of-state lawyers to the Attorney Grievance Commission and Attorney Disciplinary Board.

VOICE: Second.

CHAIRPERSON JAMIESON: I heard support. Any discussion?

Hearing no discussion, all in favor.

Any opposed?

That motion passes.

MR. ANDING: Secondly, I would move for the second element of the proposal here, which is a rule, a new rule specifically incorporating a provision requiring the out-of-state lawyers to affiliate with active members of the State Bar who appear in record of proceedings in which the out-of-state lawyer is seeking pro hac vice permission to appear.

CHAIRPERSON JAMIESON: Do I hear a second?

VOICE: Support.

CHAIRPERSON JAMIESON: Any discussion?

Hearing none, all in --

MR. WILSON: Is there a motion to table this portion? Scott Wilson from the 3rd circuit. I move to table this particular motion.

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

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

MR. ANDREE: Gerard Andree from the 6th
1. circuit. The very exhibit we have received in support
2. of this on page two, Exhibit A, indicates that the
3. State Bar is not aware of any court that keeps the
4. statistics regarding the number of pro hac vice
5. applications received and approved, that it is
6. impossible to know how many out-of-state lawyers are
7. appearing in Michigan courts at any given time, et
8. cetera.
9. That being the case, I wonder why we are, why
10. a new rule should specifically incorporate a provision
11. for which it is not known if there is a problem, and
12. until I know that there is a problem with attorneys
13. abusing or there is a problem we need to address, I am
14. not in favor of putting a limitation in.
15. MR. ANDING: Thank you. I think you have put
16. your finger on the problem, and the problem is, and
17. it's so often the case given our nature, is the things
18. that we can't see, we don't understand, we can
19. speculate about whether there is or isn't a problem.
20. We in the UPL Committee believe there is a
21. problem. We are the people who are fielding the
22. complaints about practitioners coming in across the
23. border engaging in activities in this state. We know
24. that's happening.
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<th>Page 53</th>
<th>Page 55</th>
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<td>1 This is a methodology, a mechanism, so to speak, that will allow us to get our arms around the very question you say is now an uncertain one in terms of its answer. We want to know how much of a problem it is, and that's why we are seeking to implement a procedure that will allow us to monitor the activities of out-of-state lawyers here in Michigan.</td>
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<td>1 CHAIRPERSON JAMIESON: The noes can sit down. All those in favor of the third motion, please stand. (Standing count being taken.)</td>
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<td>2 MR. ANDREE: I have no problem with a provision in the rule that will allow you the means to determine the problem, but to put a solution into the rule when you don't know what the problem is first I think is not appropriate.</td>
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<td>3 MR. ANDING: I would like to move on -- excuse me. I would like to move on to the fourth element of the proposed new rule requiring a fee to be paid by out-of-state lawyers to cover the administrative costs incurred by the State Bar of Michigan to monitor compliance.</td>
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<td>4 MR. ANDING: Thank you. And just to respond to that, the three-day or excuse me, the three appearances or three cases per year is a rule that has been utilized in other jurisdictions, so we are not carving ourselves out new ground on this particular element of the proposal.</td>
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<td>5 VOICE: Support.</td>
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<td>6 MR. ARD: I think we all agree there is going to be a number. I mean, a hundred a year, you are not -- you are a Michigan lawyer, something like that. The question I would think would be is there the right number.</td>
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<td>7 MR. HAROUTUNIAN: Ed Haroutunian from the 6th judicial district. I am going to presume that after these votes that the Unauthorized Practice of Law Committee will, in effect, then go back to the drawing board, as they say, and ultimately put the final proposal together. I would think certainly that with regard to the comments that have been made, although we are not voting on it, understood, but I would think that thought should be given to some of the comments that we made so that the proposal by the committee when it's made ultimately incorporates some of those thoughts and certainly if additional comments are needed or input required, I am sure that the members of this Representative Assembly would be pleased to assist in that effort.</td>
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<td>8 MR. ANDING: Thank you for that comment, and that goes without saying. One of the benefits of being here and making this proposal here today and listening to the discussion is that it does give us some insights that ordinarily, quite frankly, we don't have when we sit down as a group. So we certainly will take what's being said here into account as we sit down and reformulate this rule.</td>
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<td>9 MR. ROGNESS: Proposal has been moved and seconded. May we call the question?</td>
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<td>10 CHAIRPERSON JAMIESON: Any discussion?</td>
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<td>11 VOICE: Question.</td>
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<td>12 MR. ROGNESS: Proposal has been moved and seconded. May we call the question?</td>
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<td>13 MR. ROGNESS: Proposal has been moved and seconded. May we call the question?</td>
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<td>14 CHAIRPERSON JAMIESON: Now call the question.</td>
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<td>15 Do I hear support?</td>
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<td>16 VOICE: Support.</td>
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<td>17 CHAIRPERSON JAMIESON: All in favor.</td>
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<td>18 Any opposed.</td>
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<td>19 Parliamenterian says that it passes, and, therefore, it is -- I still have -- is debate closed now? Debate is closed. We bring that to a vote then, and I apologize. With regard to the third motion, all in favor, please say yea.</td>
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<td>20 Any opposed, please say --</td>
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<td>21 I am sorry, but I can't tell the difference between the yeses and the noes, so all those in favor have to stand. We are just going to see whether we can tell by a view before counting.</td>
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<td>22 VOICE: This is for number 3, correct?</td>
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<td>23 CHAIRPERSON JAMIESON: This is for number 3.</td>
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<td>24 Now sit down. All those who are opposed, please stand.</td>
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<td>25 Okay. It's close enough. People who said no, please stay standing, and I am going to have the tellers count the noes first, then we'll have the yeses. (Standing count being taken.)</td>
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14 (Pages 53 to 56)
received today. I am told by the parliamentarian it's
taupe, not beige.

This particular proposal has to do with
implementing a rule that essentially will confer,
ratify what is already in practice, and that is that
communications with various State Bar committees,
ethics hotline, ethics committee, law office
management, unauthorized practice of law, child
protection, and lawyers and judges assistance program,
that those conversations would be confidential and not
subject to subpoena power.

Let me give you a concrete example. In the
UPL context we often have individuals come to us,
complain of a particular activity of an individual
within their community. Needless to say, that
individual who is otherwise taking remuneration for
his or her activities is not very happy about the fact
that they have been called on the carpet and may seek
to have disclosed the identity of the complaining
party.

Now, whether ultimately that person’s
identity would have to come out over the course of the
investigation or prosecution is another question, but
in the first instance we like to avoid the
intimidation that can often occur in an

investigation by protecting the identity of the person
who has made the complaint.

I am sure that for those of you who are
involved in some of the other activities of the State
Bar in the ethics area, in the child protection area
and others, that similar issues come up which would
prompt the same sort of concerns. And so what we are
simply asking for is this body recommend
essentially ratifying an informal practice currently
that we have in place to put a rule in place that
allows us to preserve the confidential communications.
It will be something more that we can point to when we
attempt to resist efforts to get this information
disclosed.

Comments, questions? No comments or
questions. I will move for the adoption of the
proposal, essentially new Rule 20, that would treat
confidentiality for communications.

VOICE: Support.

CHAIRPERSON JAMIESON: Hearing support, any
discussion?

MR. GARRISON: Scott Garrison, 6th circuit.

You just said something that I think conflicts with
the rule, because as I read what’s proposed it’s
should there be a rule proposed, and you said that you

make a motion that we add the rule. I am kind of
confused, because what it seems like we are doing --

MR. ANDING: Maybe I wasn’t clear.

MR. GARRISON: It seems like you are asking
us do you want us to do the work to propose a new rule
to you and then we will come back with a proposal.

MR. ANDING: No, what we are asking for is,
to answer the question, should a new rule be added
that preserves confidentiality and communications.

MR. GARRISON: Then why aren’t we voting on a
proposed new rule?

MR. ANDING: We don’t. That’s not our job I
am told. Our job is to make the policy determination.

MR. GARRISON: But we just did for two court
rules, right?

JUDGE SCHNELZ: Scott, look at the paper.
There is no rule.

MR. GARRISON: I know that, and that’s why I
am confused. I am wondering what we are doing.

CHAIRPERSON JAMIESON: What the Assembly is
being asked to do is to take a policy position with
regard to whether or not the State Bar of Michigan
rules should be amended to have a confidentiality.
The exact drafting of what that rule would be is not
before the Assembly. It’s just the policy of whether

or not one should be.

MR. GARRISON: Who is responsible for
drafting the rule then?

CHAIRPERSON JAMIESON: The State Bar of
Michigan staff.

MR. GARRISON: And it never comes back to us
again.

CHAIRPERSON JAMIESON: That’s exactly what
happened -- this is what happened with regard to the
positions that were taken on the Court Rules in
October that you have as a handout. We took the
policy positions, and we left it to the staff for
drafting, and then when the drafting was done the
Executive Director sent that off to the Supreme Court.

MR. GARRISON: Okay. All right.

MR. ROMBACH: Tom Rombach from the 6th
circuit. We have dealt with this matter on the
Commission before. My concern has been that we don’t
empower any of these committees, the Ethics Committee,
the Unauthorized Practice of Law Committee, the State
Courts Committee to go directly to the Supreme Court
without either Representative Assembly approval or
without approval of the Board of Commissioners in the
interim, and I am not quite sure when, the commentary
that I heard from the discussion, that this was going
to go back to the UPL Committee on the things we were
voting for before, now all of a sudden to staff and
then that's going to be submitted to the Supreme
Court.

Again, I am not sure that's been done in the
past. Perhaps I stand corrected about other things,
but typically every committee is required to come here
for final approval of the rule before its submitted to
the Supreme Court, and that's all I am asking is for
clarification, I guess, if this proposed to come
back before us, because I don't know of any other
committee that has that prerogative, whether it's the
Grievance Committee, which is a special committee. I
mean, all of these folks have been shot down in the
past when I sat in the Board of Commissioners, got
shot down every time, that it has to go to the
Assembly first, and I am told once we vote on policy
we don't get to see the official rule, and I don't
understand how that happens.

MR. ANDING: I can't speak to the procedural
elements because I am not sure I can answer your
question. I can only tell you as a matter of policy
my committee is asking for this Assembly to approve as
a matter of policy and allow the State Bar to move
forward with the drafting of the rule that preserves
confidentiality.

MR. ROMBACH: Is it the intent to bring this
rule back before the State Bar Representative
Assembly?

MR. ANDING: We will do whatever we are told
to do. We obviously are not an autonomous body. We
will take this charge, we will go back, we will draft
a rule, and we will submit it for approval. Obviously
we don't just --

MR. ROMBACH: Again, perhaps through the
chair I could direct the question to John Berry, since
he is in charge of the staff, and I would like to know
what the clarification is.

MR. BERRY: Let me try to add my perspective
as I listen to both sides of this. I think it's been,
first of all, done both ways in my experience four and
a half years here, and you have seen that. You may
have a rule, and you sit here and you work on it, or
you may have a policy, and then that policy is
approved, and that's happened in reference to some of
the rules recently. It goes to the court, the court
puts out what it does, and you react. My personal
understanding is you could do that any way you want to
do it.

One of the problems we have concerning this
rule, as a practical one, is that I think that the
implementation of that rule is probably going to be
fairly technical, the policies vitally important. We
have a law office management program that's just
going started and some other issues. So from a
timing standpoint, while we are waiting for that time
of that technicality, we are going to have these
things potentially being open that we don't want them
to be open.

But your point, my understanding of what your
point would be, that would be a decision of this body,
you will either approve it by policy and then we will
go forward and you react to it, or you could instruct
the staff to say you don't do that, you bring the bill
in front of you.

Now, if I am wrong on that, I would be glad
to hear from the parliamentarian or from the chair,
but I have seen it both ways and I think it's this
body's prerogative to go whichever way you want. I
will follow whatever.

MR. ROMBACH: At this time I would like to
move to require the proposed rule to be approved by
the State Bar Representative Assembly before being
proposed for adoption by the Michigan Supreme Court
Court.

VOICE: Support.

CHAIRPERSON JAMIESON: Thank you. Any
comment?

MR. ANDREE: I suppose maybe I will comment
on that as an adjunct.

CHAIRPERSON JAMIESON: That's what the
comment is for. It's the comment to Mr. Rombach's
motion.

MR. ANDREE: Gerard Andree from the 6th
circuit. Yesterday I received by e-mail this rules
concerning the State Bar of Michigan with the new
proposal, should a new rule be added, et cetera, and
attached to that was the rule. I mean, it's already
drafted. It was sent out to everybody. I have got it
in my hand so what is the idea that we are going to
give you a policy and you are going to go back and
write a rule? It's already written, it's already been
sent to us. What are we doing here if we can't look
at rule and say whether we agree with it or not?

(Applause.).

CHAIRPERSON JAMIESON: Any more discussion?

Seeing none, then I will call that to vote. All in
favor of Mr. Rombach's motion for the Assembly to
review the rule before it goes to the Supreme Court,
please say aye.
Any opposed.
That passes.
VOICE: Can we now call the question?
CHAIRPERSON JAMIESON: Now having taken that
motion we go back to the discussion with regard to the
fourth motion that is on the table, which is the
fourth motion, should the new rule require a fee to be
paid by out-of-state attorneys to cover the
administrative costs.

VOICE: No.

CHAIRPERSON JAMIESON: I am so sorry, we are
on the confidentiality, and we are done. So sorry.

Now we vote in favor of the confidentiality,
thank you, policy.

All in favor of the confidentiality, the
policy that is before the Representative Assembly --
Okay. So does everybody have what we are
talking about that's on the beige or taupe piece of
paper. It's on the screen. Thank you very much
Mr. Romano.

All in favor please say aye.
Any opposed, please say no.
That's passed. Thank you very much.
Next item on the agenda is item number 7 with
regard to the Rules of Professional Conduct. First up

is MRPC 1.0.2. I am going to call on our panelists to
the extent that they have insight as our resources
here today for this debate, beginning with John Allen.

MR. ALLEN: Thank you, Elizabeth. As
currently proposed, the Supreme Court has not provided
for any transition from the current rules to the new
proposed rules despite the fact that there are many
very material changes requiring both compliance and in
some cases communication to clients.

This proposal would ask the addition of a
transition provision which would say that the
engagements existing as of the effective date of the
amendment would essentially be controlled by whatever
the rules were at the inception of that engagement
unless the client and the lawyer agreed otherwise.

There may be some things in the new rules that we
would defer. You can blame me for this one. I
drafted it and gave it to Elizabeth.

My purpose was thinking about, first of all,
those who may be intermediary. Under present Rule
2.2, you are being abolished, and it doesn't really
say what you are supposed to do, so I think there
ought to be a way to continue the engagements that
are in effect without any concern. If you complied
with the rule, then in effect when you began that

engagement you are okay.
And, secondly, I see a potential problem for
the confirmed in writing requirement if adopted could
require many, many notices being sent out and
continuing engagements. The example I like to think
of is the estate planner who might have hundreds of
joint estate plans or other files that they consider
to be continuing client relationships that would
require written confirmations of any conflict waiver
as of the date of the rules become effective.

CHAIRPERSON JAMIESON: Thank you. Do any of
the other panelists have any comment on this.

Seeing none, then I will entertain a motion
with regard to the proposal addressing MRPC 1.0.2.

VOICE: So move.

CHAIRPERSON JAMIESON: A second, please.

VOICE: Second.

CHAIRPERSON JAMIESON: Any discussion?

Seeing none, all in favor of the MRPC 1.0.2
proposal say aye.

Any opposed.

That proposal passes.

Next on the agenda is MRPC 1.4(c). Again I
will defer to John Allen with regard to clarification
with regard to the proposal.

MR. ALLEN: Thank you, Elizabeth. This one
gets blamed on me too. As the chair of the Special
Committee on Grievance, we look at the issues which
are most commonly placed before the Attorney Grievance
Commission and the Attorney Discipline Board, what do
they spend their time on. Aside from fee disputes and
maybe not returning phone calls, who is entitled to
the file is a very common complaint for which there is
not much clarified guidance in the law, at least as
applied to lawyers' files.

When one looks at the law of the state of
Michigan as to accountant' files or health provider'
files, there is quite a bit of guidance, and it
basically is that the client or patient, as the case
may be, is not entitled to the file itself, they do
not own the file, rather they are entitled to access
to the information which is in the file.

There are some unfortunate informal Ethics
Committee opinions from years past that say clients
own files of lawyers. In an electronic age that could
be especially problematic in that you for a file that
is entirely electronic the client may have a
proprietary interest in your C drive. We need to
bring that up to date.

To protect the client we have continued the
requirement of formal opinion R-5 that there should be
in place by every lawyer a client plan or procedure
governing safekeeping of property, including the
information that is in the file. As written, that is
not necessarily required to be in writing nor is it
required to be in writing under the formal ethics
opinion, although that might be a very nice idea, and
it also, again, in permissive terms in the final
submission suggests that the engagement or the terms
of engagement may be a good time to inform the client
about what your rules are and to remind them that they
do not own the file.

It also gives the client an absolute right to
portions of the file they may need, for instance,
property they gave you or an original that might be
necessary for a handwriting analysis, something like
that for nondestructive use. It also clarifies that
there is no interest even in the information as a
proprietary right of the client of your internal
records, that is time logs, drafted statements, things
of that nature. Of course you can agree to give up
those things or by a court order or subpoena you might
be required to.

CHAIRPERSON JAMIESON: Thank you. Another
expert has joined our panel, Judge Brown, who is on

the Ethics Committee for the State Bar of Michigan,
and I would defer to him for comment as well.

JUDGE ELWOOD BROWN: My concern with the
proposal here is whether or it not it belongs it in an
ethics rule. What you are doing is I think addressing
an area of substantive law. The retaining is a common
law, is in the common law. There is a lot of case law
on it. What we are dealing with here is ethics as
opposed to who owns the file, and I think it's very, I
think we have to be cautious not putting in an ethics
rule something involving substantive law as to who
owns this file.

If you look at Ethics Rule 1.16, it
specifically requires that you not harm the client
essentially when you terminate your representation of
them. So if you for some reason had a dispute with a
client and you no longer representing that person and
that person hires another lawyer to represent them in
an ongoing case, ethically you cannot harm that client
by continuing to hang on to the information that he
needs in order to prosecute or to defend the case that
he is involved in, and that's made clear in 1.16.

And I think to put a rule in like this is
going, or adopt a rule as being proposed, is asking
for difficulty in weighing, balancing those two

This to me is a substantive issue, it's not
an ethics issue. So I just point that out.

CHAIRPERSON JAMIESON: Thank you. Don
Campbell.

MR. CAMPBELL: Thank you. I am Don Campbell
with Collins, Einhorn, a firm in Southfield, Michigan.

My concern is elevating R-5 to the status of
a rule or a requirement. R-5 is an ethics opinion.
It's a formal ethics opinion. But even when in the--
nobody ever gets the book, everybody goes online, but
if you look at the scope of the ethics opinions, it
says that they are not law and they are not binding,
but to the extent that they are well reasoned they
can be relied upon by Michigan practitioners.

Frankly, R-5 is one of the better opinions.

It should be, and I believe is, generally relied on by
most practitioners. It's a great rule to have in place as a rule, but not as R-5, and so I want to be
careful. I think if you just strike the language that
says that in accordance with R-5, if you are going to
adopt a rule you have as good a rule as you are going
to have. But I want to caution you or express my
concern that in elevating an ethics rule to the,
excuse me, an ethics opinion to the status of rule is
dangerous and may have some unforeseen consequences
relative to the 20 or so formal ethics opinions that
are out there, and I think we are up to 300-some
informal ethics opinions.

CHAIRPERSON JAMIESON: Thank you. I will
entertain a motion with regard to the proposal
MRPC 1.4(c). I will entertaining a motion with regard
to the proposal MRPC 1.4(c).

VOICE: So move.

CHAIRPERSON JAMIESON: Thank you. Can I hear
a second.

VOICE: Second.

CHAIRPERSON JAMIESON: Any discussion?

MR. GILLARY: Randy Gillary from the 6th
circuit. I would like to echo the judge's comments.

Typically this is going to come up when a client wants
to change lawyers. You don't want to be in the
situation where the old lawyer is holding the file
hostage, and usually it's because there is a problem
with the existing representation, and I think it hurts
the client to make it unnecessarily burdensome to move
that file. Especially when there is original
documents, when they are going to be better than the
copies. I don't think the old lawyer should be
retaining originals that are needed to prosecute the
just have a question. What happens to the lawyer's notes about the case, handwritten notes or whatever, under this proposal? Who owns them? Is it the client or is it the lawyer?

MR. ALLEN: We did not try to distinguish in drafting the rule between what was handwritten or typewritten or created by the lawyer. I think that depends on the materiality of the information that's in the file. If it's a note, I think, that's something completely internal to your law firm to whom you are assigning the work, an accounting ledger, something like that, I think the rule would come down in favor of that being yours and not the clients. And if you had a vote, be it handwritten, typewritten, or electronic that was necessary and material to the client's use of the file, that's information in the file to which they are entitled.

CHAIRPERSON JAMIESON: Thank you.

MR. BUCHANAN: Robert Buchanan from the 17th circuit. Part of my practice is medical malpractice plaintiff's work, and we deal with, you know, getting medical records is a big part of what we do in evaluating a case. I guess a concern I have with 15 is, not that I'm against the proposal, but maybe there should be more specificity about what are the,

you know, is it reasonable costs that the client is responsible for.

In the medical context there is a statute now that has given us clarification so it says what is the per page cost for the, you know, first 20 pages, then it goes down on a graduated rate so that you don't have a controversy what it is that should be charged to the client or to the patient for those records, and I would say five is a little broad and my concern with that is it's not modified by reasonable or there is no direction as to what the cost is. That's my comment.

MR. ALLEN: The reason why it's not specified is that information these days is kept in so many different formats and so many different ways that we thought it was impossible. I think reasonable as a requirement is certainly implied, if not there already, as part of the law. If you have to make one page of one photocopy and that's the entire file, that's one thing. If you have to translate an old Wang program that no one has seen in the last 20 years, it might be a lot more expensive.

MR. BUCHANAN: I guess my proposal then would be to change and put a reasonable modification in paragraph five to address that concern.
MR. BUCHANAN: I am sorry, motion to amend.

CHAIRPERSON JAMIESON: And the language is what?

MR. BUCHANAN: I will just say that the client is responsible to pay the reasonable cost of a copying of the file records.

CHAIRPERSON JAMIESON: Do I hear a second with regard to that motion?

VOICE: Support.

CHAIRPERSON JAMIESON: Any discussion?

Seeing no discussion, all in favor of that friendly amendment.

Any opposed.

Ayes have it.

Any further discussion with regard to the MRPC 1.4(c) discussion? Judge Brown, did you want to make a comment as resource?

JUDGE ELWOOD BROWN: Just for thought.

Before I came here I happened to pull up an Illinois Bar Journal article talking about attorneys, liens, and when you can retain clients' files. If you look around the country in any resource that you can find, it talks in terms of the clients' files.

1.16 implies a client's file. What are you doing, what the proposal is doing is trying to change that, and I think the ethics rule is not the place to change that. We are dealing with ethics only, not the issue of whether or not you should own the file. Until you have either a statute or some type of court adopted law that says you own the file, you can't change it in an ethics rule.

CHAIRPERSON JAMIESON: Any further questions?

MR. HAROUTUNIAN: Madam Chair, Ed Haroutunian from the 6th district. Item Number 6, the last clause says, Dealing with the plan of procedure, including those parts of the representation file which belong to the client or for which the client has a need. The comment that was made earlier with regard to attorney notes in the file, I have always looked at that as the thought process. Conceivably some would say that that's probably or perhaps the most valuable part of the file. Why? Because a lawyer thought about all of the objective facts and the circumstances and then went forward and put those thoughts together and put those thoughts either in handwritten notes, typed notes, memos.

CHAIRPERSON JAMIESON: Any further discussion? Seeing none, I will entertain a motion with regard to MRPC -- oh, sorry, call to order, or I mean we will take it to a vote.

All in favor of the proposal regarding MRPC 1.4(c) please say aye.

All opposed, please say nay.

We are going to do a count. All those in favor, please stand. Tellers would you please count. (Standing count being taken.)

You may be seated. All those saying nay to this proposal, please stand. (Standing count being taken.)

You may be seated. And the tellers have asked me to remind you that when we are taking this vote that you can't be walking around, so while we are...
table and discussion -- actually I apologize, because

during the panel discussions on this John VanBolt has
stood up and talked about that, so I will have him as
our expert resource.

MR. VANBOLT: I think expert resource may be

overstating it a little bit. I have watched this rule

in action on the sidewalks and nationally at the

National Organization of Bar Counsel, because it is
time that -- literally the phrase law enforcement
there has certainly been attention for a long time,
two decades at least between the U.S. Department of
Justice and state ethics and disciplinary enforcement
on whether or not the rule that says that a lawyer
shall not communicate with a represented party,
current rule, shall not communicate with a represented
party without the permission of that party's lawyer.
And the Department of Justice for a long time has
said, but we are different, we are on the front line
against crime, and we need to be able to do that.

The Supreme Court, the National Council of
Supreme Court Justices, and various federal courts
have all rejected that argument, and, in fact, there
is an amendment in the United States Statutes called
McDaid amendment that says federal law enforcement
officers do have to follow state ethics guidelines.

This particular rule, my only comment is as
Elizabeth said, that the law enforcement exception in
Proposal B that's been published by the court is in
large part, I will say, not necessary but certainly
not in keeping with what this body's original intent
was. It was an either/or, either keep party rather
than person, but if you don't take our advice and
change it to person, which is the ABA recommendation,
then give us a law enforcement exception.

My comment is that while we refer to this as
a law enforcement exception, I think it's worthy of
noting that it, as written, says that this is a rule
which will not apply to government lawyers
investigating civil and criminal matters. That's a
big exception, and that is one of the ultimate issues
is should a rule which applies to most lawyers in
Michigan carve out an exception that says but this
group doesn't have to follow this rule.

But there is this drafting port which is
really the reason that it's back here before you.

PRESIDENT DIEHL: Nancy Diehl, 3rd circuit.

It is confusing what the Supreme Court did. Some of
you who were here back when we debated this, I got up
and argued against the then proposed rule change from
represented party to represented person, and as has
been stated, the worry was if the court changed it to a rule that was not clear that there was a law enforcement exception. The court has not proposed that change. Proposal A is the rule as presently written, and as a prosecutor I absolutely have no problem with that. Law enforcement, as far as I am concerned, speaking for the Wayne County Prosecutor's Office, we followed that rule for years and are happy to continue to follow it, and I agree, we always have to be careful when we start --

VOICE: Chipping away.

PRESIDENT DIEHL: -- chipping away, I guess. Who is that? Is that Matt Abel who said that? So I spoke, as you recall, requested that you go against it before, and I appreciated what the Representative Assembly did, and I will tell you today, I am going to be voting for Proposal A.

CHAIRPERSON JAMIESON: Any further discussion? Seen none.

MR. ABEL: Wait, wait. I am Matthew Abel from the 3rd circuit, and, no, that wasn't me who spoke up before. But, first of all, and I am half serious, how many people in this room are law enforcement prosecutors or investigators or people who do that? Because I think there is a serious conflict of interest to allow prosecutors to vote on this issue, and I am not kidding. People are laughing, but this is exactly what they do for a living, make no mistake, and I think it's unfair to allow the prosecutors to have two bites of the apple, if you will, doing this.

The Supreme Court has already messed this up. I don't think we should endorse it, help them, whatever. It's unconstitutional, ladies and gentlemen. Whether the Michigan Supreme Court agrees or not, the federal courts do, so whatever we do in this regard is probably not going to make any difference. Thanks.

MS. MCQUADE: Barbara McQuade from the 3rd circuit. I am speaking in support of alternative B, because I think it's important that the exception not be buried in the comment but that it be specifically stated in the rule. I think the effect of A and B are the same; however, B makes it explicit in the rule what we are talking about, and to suggest it's unconstitutional is just contrary to the language of the rule, which says this rule does not apply to otherwise lawful investigations.

To be lawful it must comply with the Constitution, and lawful investigation requires compliance with the Sixth Amendment, which prohibits contact with represented parties after they have been charged.

The whole purpose of this is to get around the situation where a lawyer contacts -- I am a prosecutor -- our office and says, I am just calling to tell you I know my client is under investigation and I represent him; therefore, at that point all undercover activity has to stop, all use of electronic monitoring, consensual monitoring must stop, because that would be a contact with a represented person.

Therefore, because it includes the words otherwise lawful, alternative B is both lawful and constitutional and enables us to do our jobs, so I ask for your support.

CHAIRPERSON JAMIESON: Thank you.

MR. HAROUTUNIAN: Madam Chair, Ed Haroutunian from 6th circuit. I think it's important to note that alternative A is, in effect, a confirmation of what the Representative Assembly approved the last time this issue came before it. And, as Nancy Diehl points out and I concur with, that it in effect adopts the current rule but puts the exception, because the exception in effect, because the primary rule was not changed, the exception in effect didn't mean anything.

So the idea is to leave alternative A, put the, quote-unquote, exception in the comments, leave it alone. So I would certainly urge folks to vote for alternative A and not alternative B.

With regard to the comment that the prosecutors should not be allowed to vote, almost everything that the Representative Assembly does deals with lawyers and deals with how we practice, and it seems to me that that would mean that where we deal with certain rules, the criminal defense Bar should be prohibited from voting, the plaintiff's Bar should be prohibited from voting, or the defense side, or family law lawyers should not be able to vote on certain issues that come before the Representative Assembly. So I don't believe that that's appropriate here. I think everybody ought to be allowed to vote.

CHAIRPERSON JAMIESON: Thank you.

JUDGE KENT: Wally Kent, 54th circuit. I rise in opposition to alternative B. It seems to me that it's actually substantive law rather than procedural law and perhaps goes beyond the scope of the responsibility of this body, but to the extent that it is part of the responsibility of this body to act, it still seems like a not very subtle erosion of
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<td>constitutional rights that once counsel has been</td>
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<td>CHAIRPERSON JAMIESON: Thank you. Any</td>
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<td>further discussion?</td>
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<td>MS. WIDENER: Linda Widener, 30th circuit. I</td>
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<td>whatever law enforcement has to do. I think they have</td>
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<td>VOICE: Call the question.</td>
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<td>CHAIRPERSON JAMIESON: It’s been called, the</td>
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<td>JUDGE SCHNELZ: They have to go to the mike.</td>
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<td>CHAIRPERSON JAMIESON: I’m sorry, you have</td>
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<td>MR. HERRINGTON: David Herrington, 52nd</td>
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<td>circuit. As a follow-up to that, what the prosecutor</td>
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<td>also said I disagree with in terms of all contact and</td>
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<td>in favor of A. If you are in favor of including the</td>
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<td>their thing so long as that suspect doesn’t become a</td>
<td>you stand in favor of that.</td>
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<td>CHAIRPERSON JAMIESON: Any further</td>
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<td>MR. CRAMPTON: Jeff Crampton from the 17th</td>
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<td>circuit. I simply want to point out that those who</td>
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<td>do the same thing, and you are allowed to vote against</td>
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<td>permissions. I will be voting against both A and B.</td>
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<td>CHAIRPERSON JAMIESON: Thank you.</td>
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<td>MR. HORKEY: Christian Horkey from the 38th</td>
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<td>circuit. I think we are getting confused that we are</td>
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<td>enforcement, unless they happen to be lawyers. So</td>
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or not it should be in the comments, the rules, or
nowhere.

VOICE: Nowhere.

CHAIRPERSON JAMIESON: If you think it should
be nowhere, then you vote no to A, you vote no to
B, and both of them fail.

Now that you understand that, everybody sit
down.

MS. MCGUANE: The noes get two bites of the
apple and the yeses only get one bite, so you can have
people for A and for B but neither prevails.

CHAIRPERSON JAMIESON: You can vote yes on
both. We are going to take them separately.

MS. ROSS: Point of order. Marcia Ross, 6th
circuit. Can we vote then to defeat both A and B
first and then otherwise on A and B? I move to if we
are going to vote against both that we call the
question on both at the same time.

Can I amend my motion?

CHAIRPERSON JAMIESON: It's my understanding
you're making a motion.

JUDGE SCHNELZ: With all due respect, I
already said a long time ago, back in January, you are
going to have trouble when you go to vote on this. If
someone wants to make it a motion at this point in
time, although debate has been closed, if nobody
objects to it, you could, in fact, move to have a vote
that indicates no on both of them. In other words,
you are concluding both of them on a yes or no vote.

In other words, if the manner in which we
want to vote on this is either yes on both of them or
no on both of them, and let's start with that. In
other words, if a motion was made to defeat both,
that would be the motion, to defeat both A and B, if
that's what you want to do. If somebody wants to
object because technically we have already closed
debate, they could do so.

I am suggesting if you want to move this
along, that is a suggestion. Technically since you
made a point of order, Marcia, you cannot make a
motion, but it was a good point of order.

MS. ROSS: Thank you.

MR. GILLARY: Could I make a motion that we
vote first as to whether or not the law enforcement
exception should be included either in the comments or
in the rule, and then if that's passed, then we vote
as to whether A gets adopted or B gets adopted.

JUDGE SCHNELZ: That's reasonable.

CHAIRPERSON JAMIESON: Okay.

MS. MCGUANE: That's not what the Supreme
Court wants to hear for us though.

CHAIRPERSON JAMIESON: So we open up for
discussion. Anybody who wants to discuss that?

MS. MCGUANE: Barbara Mquade from the
3rd circuit. I think the Supreme Court has framed the
issue as we are going with A or B. If we want to
weigh in on the issue that the Supreme Court is going
to be deciding, we need to choose A or B. If we say
nothing, then that's not the issue that's before the
Supreme Court. They will say thanks and good day. We
either want to make our opinion known or we don't.

CHAIRPERSON JAMIESON: That's not true. I
have to clarify. They didn't even suggest that it
should be in the rule. They just suggested that it be
in the comment. They didn't say anything about it
being in the rule. It's been published.

What happened was the Representative Assembly
took a position, and our position was don't change the
language from represented party to represented person,
but if you do, put this exception into the comment.
That was our position. We never talked about putting
it into the rule or anything, okay.

The Supreme Court did not change the
language. They listened to us. But what they did is,
in addition to that, even though we didn't ask for

them to put it in the comment if they didn't change
it, they went ahead and posted this out there for
comment, even though they didn't change the language
from represented party to person should we still have
this in the comment.

And so this body has the ability now to voice
its position with regard to whether or not it should
be anywhere in the rules. Should it be in the rules,
should it be in the comment, or should it be in the
rules or the comment, and that's what's before the
Assembly.

So what's before us right now is to vote on
the fact, on not having this exception in either the
comment or the rules, that's the motion that's been
placed before. Do you understand the motion?

MR. GILLARY: That's framed in the negative.

I think it's in the positive whether or not either A or
B should be adopted either yes or no, and then if it's
yes, then we vote on whether it's A or B.

JUDGE SCHNELZ: Excuse me, that was not your
motion.

MR. GILLARY: I believe that was my motion.

JUDGE SCHNELZ: No, your motion was that we
remove it from both A and B. Now, that's what I
heard. If that's not your motion, I apologize.
MR. GILLARY: My motion was that we first vote on whether or not we will include the exception either in the comments or in the rule itself.

JUDGE SCHNEHLZ: That's what I said.

MR. GILLARY: First yes or no.

JUDGE SCHNEHLZ: I would rephrase it. I would suggest your motion is to either exclude or include, make your mind up, one or the other. What do you want, exclude or include?

MR. GILLARY: I would say include. I would rather do it in the positive, whether it's going to be included, yes or no, and, if so, if it's A or B.

JUDGE SCHNEHLZ: So if you are against it you vote no.

PRESIDENT DIEHL: Nancy Diehl from the 3rd circuit. Now I am completely confused. I think we would have been doing with our voting if we had just proceeded.

JUDGE SCHNEHLZ: That's understandable, Nancy. PRESIDENT DIEHL: And the judge speaks as someone who has known me for a long time, so we have to take that opinion into great consideration.

JUDGE SCHNEHLZ: I will tell you that the court has given us two alternatives, and Elizabeth is correct, it's not exactly what we put to them, but there you go. We give them information, it comes out in a different format. They are telling you where they are at on this. They actually listened to us loud and clearly on taking out represented person. They have represented party back in, and they are even talking about going further. This is where the court is. And that's alternative B, putting that law enforcement exception right in the rule. The comment is not part of the rule. I will go back to the court has said these are the options. Sure, they could do something different, but they have made it pretty clear.

I am voting, I think, against your motion, Randy, because, I am not quite sure where we are at. I think we should go back to voting do we want alternative A, which is the rule as it is now only they have added some additional comments that are not, in fact, a part of the rule. Do you want to go further with alternative B.

CHAIRPERSON JAMIESON: Any further discussion on the motion with regard to whether or not to include the exception in the comments or rule.

MR. CRAMPTON: I guess I need to understand what I am voting on. Are we essentially saying that this vote now is whether or not we want law enforcement exception? If you want a law enforcement exception you vote yes, if you don't want a law enforcement exception you vote no?

CHAIRPERSON JAMIESON: Correct, and if you vote yes, then we will go A or B whether or not it should be in the rule or the comment.

Any further discussion on that motion?

JUDGE KENT: Walt Kent, 54th circuit. I rise in defense of the Supreme Court, and I am surprised to hear myself say it, but I have on many occasions seen them submit issues such as this for comment and find after hearing the comment that they don't want to do anything. So just because it's being presented to us, if we go back with an answer, said leave it alone, they are entirely likely or it's at least strongly possible they will leave it alone even though they have asked us whether we favor it or not. So please don't think that they have got their mind made up on this issue.

MS. WEINTRAUB: Barbara Weintraub, 9th circuit. On the motion that's pending at this moment, I would ask that if the body votes in favor of, or I should say again the law enforcement exception, either alternative, that that somehow be communicated to the Supreme Court that the vote went that way.

CHAIRPERSON JAMIESON: Exactly, yes.

MS. WEINTRAUB: As opposed to just not doing anything, not choosing A or B.

CHAIRPERSON JAMIESON: Absolutely. Seeing no further discussion -- so this is the motion that is before you now, whether or not, oh, sorry, whether to include the law enforcement exception in either the comment or the rule. If you want the law enforcement exception in the rule or the comment, please stand.

The reason why I am counting, there is 37 that are in favor of that. That would become a minority opinion that we could report to the Supreme Court.

All those opposed to including the law enforcement exception in either the comment or the rule, please stand.

I have 64 who are against, so majority rules. It's past lunchtime. We have two more proposals with regard to the rules. I am going to leave it up to you, just by, tell me yes or no, would you like to stop for lunch?

VOICES: No.

VOICE: Work through it.

CHAIRPERSON JAMIESON: So are you saying you
want to go on and move to the next rule proposal?

VOICES: Yes.

CHAIRPERSON JAMIESON: I will just tell you that the food is up there, so we will start at 1.5.

When we are done with 1.5 we will see where you are, and if you want to go up to lunch and break at that time, we can.

Moving forward with Rule 1.5, proposal I will entertain a motion with regard to the proposal regarding MRPC 1.5 dealing with fees.

VOICE: So moved.

CHAIRPERSON JAMIESON: Thank you. A second?

VOICE: Support.

CHAIRPERSON JAMIESON: Thank you. Any discussion with regard to the proposal dealing with 1.5? Pink, although you also have it in green for those color blind. They are the exact same thing.

MR. ALLEN: The proposal before you on the pink and green sheets is actually in two parts, the first part, sub A relates to nonrefundable retainers or whatever term one wants to use to describe that arrangement, and asks that they be defined as published in the court's proposal 1.5(f), first of all that they be permitted. This particular sheet says so long as the conditions set for the in one through four are fulfilled.

There is an interesting comment on the discussion board package, the orange package that you have from me, believe, the Family Law Section. It's the very first one, at least in mine, pages one and two that says that we might save a lot of time and trouble just by deleting conditions one through four and requiring that the retainer agreement in these instances be in writing. That would be be, I think, another way to handle this and, in fact, a way in which other jurisdictions have done that.

The second part B adds two new sub parts to the rule on fees. I mentioned earlier that the Grievance Commission receives its largest categories of inquiries, aside from unreturned phone calls, about fee disputes and files. This would be an attempt to get some clarification in fee disputes, and this is not original or new. It's taken from the Florida Rules of Professional Conduct where it's worked well for years and was adopted for the same reasons, to say that all the factors in 1.5 may go to justify a fee, merely time and rate factors alone are not those which are exclusively considered, unless, of course, they are those that are designated in the fee agreement.

It also reinforces the fact that fee agreements are generally enforceable and should be the guideline for determining the fee so long as they otherwise comply with the rules and are not found to be illegal.

Again, Florida has used that version of the rule in order to help resolve many, many items of fee disputes that come before it's grievance committees.

MR. CAMPBELL: If I can make one more comment on that. With regard to those provisions one through four as cited by the Supreme Court in its commentary through it's proposed Rule 1.5 addressing nonrefundable retainers, those four conditions come from another informal ethics opinion called RI-10.

That has subsequently been cited in some formal ethics opinions as well.

So it's in the category of R-5 type of declaration concerning fees; however, unlike the R-5 declaration that came from a question from a practitioner that said what do I have to do in order to set up a policy, RI-10 began with an inquiry from a lawyer that said here is what I have done and is this enough to claim the fees upon payment, and it laid out four things, and those are provisions one through four.

However, what the committee said or the panel of the committee said in the informal opinion was, yeah, that's enough if you do that. What we don't know is do you have to do all of those, could you do other things instead, could there be any combination of other factors along with these factors that might satisfy the requirements that would be necessary in the minds of the Ethics Committee to establish a nonrefundable retainer.

Since that informal opinion RI-10 came out in the early '90s it has been interpreted as being a rule of sorts, at times by the Grievance Committee where I worked at for a period of time, and sometimes also by hearing panels of the Attorney Discipline Board.

However, before it is adopted you really ought to look long and hard at that. It was never intended in RI-10 to be the only occasions upon which you could charge a nonrefundable fee. It hasn't been treated as the only occasions where a fee can be earned upon receipt by the Attorney Discipline Board in its case law following RI-10 and its interpretation of RI-10.

And so this would be a C change or sorts regarding nonrefundable retainers in Michigan, and it would be a giant step backwards in my opinion from where we are currently based on the case law that's
developed by the Attorney Discipline Board and based on the interpretations of RI-10.

I think the court was right to include the discussion of nonrefundable retainers, and hopefully it was a good starting point, but this rule, if it's based on this idea that you can only have those four factors and must have all four of these factors, is not a wisely written rule for adoption, but it's a great place to begin that discussion.

MR. AGACINSKI: The Grievance Commission -- Bob Agacinski with the Grievance Commission. The Grievance Commission already accepts the concept of nonrefundable retainers. The board has used that language, the courts have used that language. We understand that it does indeed exist, and most of the concepts in this proposed rule are accepted by the commission, but it needs to be understood that just because it's called a nonrefundable retainer will not preclude review by the Commission. We still look at whether it excessive and we still look at whether it's actually earned.

Many attorneys will call it nonrefundable and then take their hourly fee from the so-called nonrefundable retainer. It's not earned when that happens. So this language is being sanctioned, but it
does cause a lot of confusion and has caused a lot of confusion when I talk about it to different Bar associations, but, again, that's a matter of perhaps enforcement not a matter of the principle itself being acceptable.

MR. ARMITAGE: Thank you, Bob. I want to applaud John Allen's committee for attacking this tough issue. I agree with some things that have already been said.

I am with the Board. I am Mark Armitage, Deputy Director, and I want to start out by saying that the ADB hasn't taken a formal position on this yet, but have written opinions, as Mr. Agacinski just mentioned, and I want to clarify one thing Bob said, the use of the word -- and the problem with both of these proposals that I see, I am not favoring one or another, but A is a little more so than B, they both use the term nonrefundable retainer, and I am just here to report that the term has fallen out of usage.

There is a national trend for disapproving, and even in some states disciplining lawyers who use that term, and the reason for it is because no such thing exists.

You may have in mind -- I see a lot nods, so I am glad the message is getting out. There may be something else in mind, like an engagement fee,
general retainer, or some way -- and really what this tends to be about is lawyers who trying to comply with the rules, take a retainer, and they want to know where to put it. In some instances it would be reasonable to put it in the business account because you are starting up your case, then it becomes how much.

These are big, big questions, and I am here maybe to gum up the works. Unfortunately I don't have -- I started to tinker with this language, and then I realized it's not my role, and sometimes not maybe it's not your role from what I hear today.

So we all understand that clients can discharge us, we must return unearned fees, and every fee must be reasonable or not clearly excessive.

So that's when it becomes difficult is at the end of the representation, wherever that is, and sometimes it's earlier than we want, we have to look back and say is it reasonable.

So, unfortunately, taking a simple position by using magic words like nonrefundable retainer doesn't necessarily work. And that's as far as I can go. The board doesn't have a proposal right now, but is keeping working on this issue. We have issued an opinion that says some engagement fees are reasonable,

and that's what I was talking about. We have held one but disapproved the terminology nonrefundable.

MS. WEINTRAUB: Barbara Weintraub, 9th circuit. I am also a current member of the Family Law Council, State Bar. I want to say that I agree with the comments of John Allen and Don Campbell. I think that the concept of a nonrefundable minimum engagement fee, which is what I call it, is a good one and is important to practitioners, but I think that the language of the proposed rule creates a problem.

Just to give a quick example, if a disgruntled client wants to complain about an attorney, how do you prove that the client was of sufficient intelligence, maturity, and sophistication?
The client is going to say I wasn't sophisticated enough, I didn't understand.

Another problem of proof is how do you prove that you have turned down other cases for a specific case, and I also want to clarify, I am not here as a spokesperson for the Family Law Council. I am just stating my own opinions, but I can see this creating a lot of problems for attorneys, particularly solo practitioners, people in small law firms who rely on these fees, and I would suggest that the language proposed by the Family Law Council, which is very
provisions either add Number 5 provision or add as a caveat to this proposal, proposed language here, that the fee is not freely accessible. Because I think, I am afraid what might happen is if the language is left the way it is that then you are going to get into a situation that, well, it's not excessive if my client agreed to it, and I really didn't do all the work I needed to do that was anticipated when we got, when we agreed to this nonrefundable fee.

So just to make it clear that you are still bound by the language that it's not clearly excessive. I think that should be one of the provisions dealing with nonrefundable fees. If you don't do that, I think you are asking for some difficulty in interpretation of this rule.

CHAIRPERSON JAMIESON: Thank you.

MS. KAKISH: Katherine Kakish, 3rd circuit. I have a comment in support of the recommendation made by Barbara, and this support actually comes from the Wayne County Family Law Bar Association. This Bar association actually met on March 17th of this year to specifically discuss this rule, and they opposed as it was proposed. Actually they said that they unanimously oppose the proposed language of 1.5(f).

They did submit a recommendation in replace of what we were to vote today, and it almost matches what Barbara wrote here, except that Barbara gave it more details, which I am sure that the Wayne County Family Law Bar Association would agree would serve their interests.

They provided a very lengthy e-mail letter to members of the 3rd circuit, which is Wayne County, and they gave all the reasons why the proposal that Barbara now wrote and is recommending should be adopted. Thank you.

CHAIRPERSON JAMIESON: And just for information, their commentary is actually included, it was posted on the RA discussion board, and it's on page three of six under MRPC 1.5.

Any other discussion?

MR. PIATT: Paul Platt, 16th circuit. Just in response to Judge Brown's indication of the word excessive. I found, as I have been doing this for 35 years, one person's excessiveness is another person's shortfall, so the inclusion of the word excessive I don't think would be really much use.

JUDGE ELWOOD BROWN: In the Rule 1.5(a) it defines, gives you some indication of excessive. So if you have in (a) that you can't charge a fee that is clearly excessive, I am concerned that in (f) that you are going to say, well, unless it's a nonrefundable fee.
MR. CAMPBELL: If I could just follow up on that for a moment. In the context of the one-third contingencies or other contingencies, the rules don't have a caveat there about excessiveness, and yet presumably the same rules would apply, so I understand the judge's concerns, and it may be something you want to take action on, but putting it into context with other fee related rules, that caveat doesn't exist, and you would have to ask why it's necessary here, and maybe you are compelled, maybe you are not.

CHAIRPERSON JAMIESON: Any further discussions?

MR. HOGAN: James Hogan, 15th circuit, just as a point of --

CHAIRPERSON JAMIESON: You have to move the microphone so that you are speaking right into it for our court reporter.

MR. HOGAN: I would like to request as a friendly amendment the parenthetical phrase "or at the time of the agreement" be deleted, only because after that comes "provided that the retainer agreement is in writing, signed by the client." It should be just at the time of the engagement provided that the retainer agreement is in writing.

CHAIRPERSON JAMIESON: Are you making a motion for a friendly amendment?

MR. HOGAN: That's correct.

CHAIRPERSON JAMIESON: Do you accept?

MS. WEINTRAUB: I wouldn't accept, but I would suggest something else that might clear up the problem. The word "retainer" could be taken out and just provided that the agreement is in writing.

The reason I added the language "or at the time of the agreement" is that sometimes when a client retains an attorney that may be on an hourly rate. Later the case may develop into something or scope that wasn't anticipated and an additional fee is required and an agreement was entered into after the fact, and that's why I added the language that's in parentheses. Would that solve the problem?

MR. HOGAN: No objection.

CHAIRPERSON JAMIESON: Okay. No objection.

Does the body have any objection?

Any further discussion with regard to the substituted motion, and hold on one second. John Berry, Executive Director.

MR. BERRY: As someone who spent about 15 years enforcing this rule, I am a little confused about what aspect -- if it was the intent of this amendment that there not be any consideration of reasonableness or not, that basically if it's an agreement between the two parties, that agreement lasts no matter what. If that's the intent of it, I would suggest that is going to be a very serious problem, because this is, of all the fee areas, this is one of the ones that, first of all, the most difficult for people to understand, most subject to major abuses.

I mean, for instance, somebody could come up for a traffic ticket and get somebody to sign an absolutely ridiculous amount for what was going on. Every other fee in the subject -- Don's comment about one-third contingency fee agreements, those agreements I think it's pretty well clear they are going to be subject to reasonableness or not, whereas in this area if you put a rule like this, it would be pretty clear that people are going to look at it and say, you know, it's what it says. That fee is there.

So I would be very concerned with this kind of adoption of this rule.

MR. ROMANO: Vince Romano from the 3rd circuit. It strikes me, isn't there a substantive difference between a fee and a retainer, and if so, shouldn't it be consistent? In other words, in the first few words we talk about a nonrefundable fee agreement and conclude with the reference that the retainer is nonrefundable.

I am just putting that question, isn't there a difference between a fee and a retainer, and if there is, then shouldn't this rule be consistent?

CHAIRPERSON JAMIESON: Are you making a motion for a friendly amendment?

MR. ROMANO: I would suggest that the word "retainer" be replaced with the word "fee" as a friendly amendment.

VOICE: Second.

CHAIRPERSON JAMIESON: Do you accept.

MS. WEINTRAUB: I accept that, and I think it's a good suggestion. Thank you.

CHAIRPERSON JAMIESON: Any further discussion? Seeing none, I want to make it perfectly clear what's before the Assembly. What's before the Assembly is whether or not we substitute the proposal and make it this rather than what you have on your pink or your green sheet. That's what's before you. You are not voting necessarily on this substantively yet. We are asking you whether or not you want to substitute this language for the proposal rather than what we had.

All in favor please say aye.
Any opposed?

That carries. Now we will vote on the substantive proposal that's before us, the substitute proposal. Is there any discussion on the substance of this proposal?

MR. ALLEN: Just one to form and not substance. The Supreme Court, and now the Representative Assembly, has suggested a 1.5(f) that was not in there at the time that the part (b) of this proposal was drafted on your pink and green sheets, and so I believe the sub letters on those paragraphs should be changed respectively to (g) and (h) as part of 1.5 on your pink and green sheets.

If you look up on the screen --

CHAIRPERSON JAMIESON: John, it literally changes this. This becomes the proposal, 1.5(f), and there is no -- that becomes (f). Everything that you did is gone.

MR. ALLEN: Okay. Thank you.

CHAIRPERSON JAMIESON: Any other discussion?

Seeing none, all in favor of this language, which is the substitute motion for proposal 1.5(f), say aye.

Any opposed.

It passes.

Now the issue becomes with regard to the proposal regarding 1.15. 1.15 is the safe keeping of property. That was intended to track whatever our decision was with 1.5 as opposed to what is proposed by the Supreme Court. So basically you would take out namely (f), (g) and comment, and it would just become should MRPC 1.15(c) require that nonrefundable fees comply with the factors set forth in the Assembly's recommendation regarding MRPC 1.5, period, and then the answer is yes or no.

I will entertain a motion with regard to that proposal.

VOICE: So moved.

CHAIRPERSON JAMIESON: Second.

VOICE: Support.

CHAIRPERSON JAMIESON: Any discussion?

Seeing none, we will bring it to vote.

All in favor of proposal MRPC 1.15 say yea.

Any opposed say no.

And that passes.

Now we move on to the standards, and I would like to also acknowledge that we have a visitor with us today, and that's Mark Gates, who is Supreme Court Deputy Counsel. Mark, if you could stand up. Just to say thank you to Mark for being with us today.

listening to this Assembly discussion on all of these issues.

First on the agenda with regard to the standards is 1.3 regarding purpose of these standards. I will entertain a motion with regard to this proposal.

VOICE: Motion.

CHAIRPERSON JAMIESON: Support?

VOICE: Support.

CHAIRPERSON JAMIESON: Any discussion?

Do any of the panelists want to speak to 1.3?

No. Seeing none, then there is no discussion, then we will bring it to vote.

All in favor, aye.

Any opposed? 1.3 passes.

If we can keep up with this pace, I think we are going to get done really fast.

Next up is Michigan Standards for Imposing Lawyer Sanctions definitions regarding knowledge. I will entertain a motion with regard to that proposal.

VOICE: So moved.

CHAIRPERSON JAMIESON: Support?

VOICE: Support.

CHAIRPERSON JAMIESON: Any discussion?

MR. ANDREE: Gerard Andree from 6th circuit.

With respect to and in light of the Michigan Supreme Court's decision this past week which dealt with the definitions of knowledge, actual knowledge, constructive knowledge, and knowledge supported by circumstantial evidence, I would make I guess it would be a request, if not a friendly amendment, that "knowledge" be, everywhere you make reference to "knowledge" that it specifically indicate "actual knowledge."

VOICE: Second.

CHAIRPERSON JAMIESON: So did you make a motion to.

MR. ANDREE: I guess that would be what I would be doing to avoid any problems, that the term "knowledge" should be changed wherever it appears to "actual knowledge."

CHAIRPERSON JAMIESON: Just I want to make sure that everybody is clear. That really then would be an adjustment to the first position, which would be (a) which is incorporate the language proposed by the Attorney Discipline Board defining knowledge, but changing it to actual knowledge.

MR. ANDREE: It should be defining knowledge as actual knowledge.

MR. CAMPBELL: So you know, in my
recommendation I tracked the ABA's definition of knowledge in the Model Rules of Professional Conduct, which require actual knowledge, and you are saying make it even more clear.

MR. ANDREE: My understanding of what you were saying was that it has always been interpreted that way.

MR. CAMPBELL: No, that is the definition, in fact, which I think is more than just interpretation.

MR. ANDREE: For our purposes I would like it to be our definition.

MR. CAMPBELL: For whatever it's worth, I don't think there is any inconsistency with the version currently in print to make the recommendation that it be called actual knowledge. The ABA's definition that I stole and put it into my version says that actual knowledge may be inferred from the circumstances. I don't know if you want to treat that definition any differently in light of that recent Supreme Court case that I am not, I am not versed in at all, but to the extent that they agree with me I stole from them, that's cool.

CHAIRPERSON JAMIESON: What we need to have is a specific language that you want to bring before the Assembly. If you are saying that you are speaking in favor of (b) but changing the terminology to "actual knowledge," or are you coming up with an alternative (c).

MR. ANDREE: I suppose it would be an alternative (c) then.

CHAIRPERSON JAMIESON: And your alternative (c) is that wherever the Supreme Court rule as it's been published states the word "knowledge," then instead of "knowledge" it should be "actual knowledge."

MR. ANDREE: Correct.

CHAIRPERSON JAMIESON: Is that your motion?

MR. ANDREE: That is my motion.

CHAIRPERSON JAMIESON: Do I hear a second?

VOICE: Second.

CHAIRPERSON JAMIESON: Any discussion on that motion?

MR. VANBOLT: John VanBolt from the Attorney Discipline Board. I need to make a clarification here I think.

There has been references from the floor to the rules, and Mr. Campbell refers to the ABA definition. Let me back up just one second.

The Attorney Discipline Board was ordered in 2000 to review the status of use of standards in Michigan and within two years to report to the court on whether or not Michigan should have its own Michigan standards. At the time, that is 2000, the Board was directed to use the ABA Standards for Imposing Lawyer Sanctions.

In fact, the Board had been using them in one form or another since 1986. Since their adoption, but in 2000, so that means in about two months should be with the fifth anniversary of the Discipline Board's consistent use of the ABA standards.

When the Board was given this direction to come up with the question of Michigan standards, obviously the first question before the Board was should Michigan essentially throw out the ABA standards and start from scratch or should Michigan take advantage of standards which had been in use since 1986 in Michigan and other jurisdictions and which are now cited with some degree of regularity in at least 30 jurisdictions?

The Board elected to build on the ABA standards. The language that you are being asked to consider when it says incorporate the language proposed by the ADB is not entirely new by the Board. The Board, that was one example of where the Attorney Discipline Board looked at the ABA-approved language in the standards, and in that instance that definition is knowledge is the conscious awareness of the nature of intended circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

In its further comments to the court the Board has actually refined that slightly so that the Board's proposal to the court is that knowledge is the conscious awareness of the nature or attendant circumstances of the conduct but need not include the conscious objective of purpose or purpose to accomplish a particular result.

I actually, I am aware of the case that was cited, the Michigan Supreme Court case on the definition of knowledge, and I am also aware of the ABA's definition of knowledge in terms of the rules. It is critically important, however, for everybody, as we discuss all of these, as you discuss these standards, that the rules, the Rules of Professional Conduct, which form the basis for liability, for disciplinary infractions, are not the standards. The standards are what you look at after and only after professional misconduct has been established.

And it is quite possible that there are and may be situations where the way a certain term -- knowledge, injury, neglect -- is looked at in terms of deciding what level of discipline to impose after
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misconduct has been established, which may or may not be exactly the same as the way that term is used when you are looking at was there misconduct or was there not misconduct.

I can't go through and enumerate every single example of that other than to say that in this particular case the definition of knowledge proposed by the Board is based on the knowledge as determined and used by other jurisdictions in connection with the standards, not the definition of knowledge in a particular state by a particular court under a particular fact situation in a particular case referring to parties in a civil litigation.

MR. CAMPBELL: What you have to keep in mind also though is the ABA when they adopted the standards, at the time they were adopted the only definition of knowledge was actual knowledge and that the ADB's definition that John read at length is not a definition that the ABA has ever said is a definition that we apply to the standards. Maybe one when you wish to apply, you may wish to say actual knowledge, but I think that gives you a fuller context on the word "knowledge."

MR. ARMITAGE: If I could just follow up. I am not sure what Don meant, but, in fact, the ABA did, in fact, adopt the definition of knowledge that Mr. VanBolt just read to you, and it works together with intent and negligence, it's three levels of mental state. To pull in a different definition will just throw it out of whack and not accomplish anything. You need actual knowledge to be found guilty of misconduct, and you don't get to the standards until that happens. This helps you sort out the state of mind once you are in a disciplinary phase and it was adopted by the ABA in 1986. That's their definition.

CHAIRPERSON JAMIESON: Just as a point of clarification, our rules say that if an amendment is greater than six words it has to be in writing, and so we have crafted some language. Mr. Andree, if you would agree for (c) that instead of those words, it says always define "knowledge" as, quote, actual knowledge, end quote, that I think meets your needs, then we can actually entertain this.

MR. ANDREE: That will be fine.

CHAIRPERSON JAMIESON: Thanks. Any further discussion with regard to adding (c)? Seeing no further discussion, then what's before us is whether or not to add (c) as an option in this proposal.

All those in favor of adding (c) as an option

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people voted more than once. You told us on (b) we couldn't vote for it if we already voted on (a). You did not give the same instruction on (c) and some people voted twice.

CHAIRPERSON JAMIESON: If you voted yes on (a) you cannot vote yes for (c).

MR. ANDREE: (c) is going to apply whether it's (a) or (b).

CHAIRPERSON JAMIESON: (a), go ahead and sit down. We are really struggling with this, because we have adopted some special rules so that we can report accurately to the Supreme Court, which is very different than what our normal rules would be, so I apologize for trying to make sure that what we report to the Supreme Court is quite accurate and that we are very clear about minority and majority opinions.

Right now we have 57 in favor of (a), and that's a majority opinion, and we did not have enough for a minority opinion, and now (c) is, as it would apply to (a), and so that's my understanding of how it's been presented, is that correct?

All those in favor of (c), it doesn't matter how you voted on (a) or (b), if you are in favor of (c), please stand. That's majority. You can sit down.

Any oppose?

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in this proposal, please say aye.

Any opposed.

Ayes have it.

Now, going back to discussion on this actual proposal with regard to (a), (b) and (c), is there any further discussion? Seeing none, then we will vote for (a) first.

All those in favor of (a) please say aye.

Any opposed.

I need all those in favor to stand to see whether or not we have a minority opinion. Can I have my tellers. Well, maybe we can do it without tellers.

All those in favor of (a) stand. People continue to stand up. Are you all up now? Thank you.

Now I want to know all those who are in favor of (b). Again, this is just if you voted for (a), you can't vote for (b), so if you are in favor of (b), please stand, or actually I shouldn't say please stand. Those in favor of (b) please say yea.

What we have is a majority opinion. Oh, I am sorry. Now we have got to go for (c). All those in favor of (c) please say aye.

All those opposed. Can those in favor of (c) please stand so we can take a vote on those as well.

VOICE: Point of order. I believe some
(c) passes as well.  
Going on now to MSILS definition injury,  
potential injury, MSILS 2.3 suspension, and MRPC 1.01  
terminology, I will entertain a motion with regard to  
that.  

VOICE: So moved.  
CHAIRPERSON JAMIESON: Support?  
VOICE: Support.  
CHAIRPERSON JAMIESON: Any discussion? Open  
it up to John or Mark.  

MR. ARMITAGE: I will be brief. The proposal  
before you would, (a) would be the version of the  
Supreme Court -- (a) is the version that the ADB  
proposed. It is in line with the ABA version and  
potential injury, just a little bit, again, this is just  
with national case law and with the states that apply  
both the Model Rules and the standards together, and  
unless there are any questions, I will just press with  
that.  

CHAIRPERSON JAMIESON: Don.  
MR. CAMPBELL: The issue I want to comment on  
briefly is the question of how you define suspension  
and why that's an issue here. If you have a copy, as  
I am sure you all do regularly refer to them, the ABA  
Standards for Imposing Lawyer Sanctions, there is a  

commentary to that, and in the commentary under every  
suspension category they list the cases, at least the  
principal cases that they reviewed between 1970 and  
1982 or whatever it was that led them to come up with  
this category of a sanction under that particular  
standard.  

In every single case where they cite a case  
in the level of suspension, it is a suspension from  
the jurisdiction in which the conduct occurred that  
required reinstatement. So where the ABA uses the  
word suspension, and they define it within the  
standards, they define suspension to mean a suspension  
that requires reinstatement proceedings.  

In Michigan, that level happens to be in 180  
days. It used to be in 120 days. In other  
jurisdictions, in Florida -- John can correct me if I  
am wrong -- it's 90 days, or has been at least for a  
period of time.  

So that level changes, and they captured the  
idea of fitness, because that's what reinstatement  
questions, is whether you are fit to practice, when  
you go in front of a panel of judges, lawyers who tell  
us whether you have met the standard of fitness.  
That's what the word was intended to mean within the  
standards.  

Michigan defines a suspension or a suspension  
that can be given in discipline cases as anything  
over -- the minimum can be 30 days. In other words,  
you can't have a 29-day suspension, and there is a  
category of cases that fall between 30 days and 180  
which are suspensions that don't question the fitness  
of the lawyer.  

In other documents, and I think it's  
paraphrased some in the ABA standards, those are  
treated by the ABA as being really cost sanctions.  
That's the equivalent, because all they are doing is  
saying you have to stay out of the practice of law for  
a period of time. Not that we think you are unfit,  
because if we thought you were unfit we would have  
suspended you for longer and we would have made you go  
through this process.  

Instead, what they say is, hey, we are going to  
punish your practice by disallowing you to collect  
fees during the period of time you practice law.  

It's a difficult issue to cover in the two  
minutes I am given here, but I hope you have had an  
opportunity to review it a little and understand the  
issue here is broader than just how we are going to  
treat suspensions. Under 2.3 is whether or not in  
Michigan those cases that are 30, 60, 90-day  
suspensions are appropriate or whether, in fact, that's  
an abuse, if you will, of power in sanctioning lawyers  
in a way that really just hits them economically and  
doesn't really have anything to do with fitness.  

And the proposal as it was intended would say  
that unless it's a serious violation for which  
mitigation would not apply under the suspension  
category, then those are the folks who should be  
subject to this idea of the suspension level within  
the standards. That was the intention, that those  
lawyers who may engage in conduct that falls initially  
in that suspension category but for whom there is  
imitigation sufficient to write below them, where do  
you take them? To do you take them to 180 days, to  
179, or do you take them from 180 days down to  
reprimand, and that's the issue addressed in 2.3.  

I apologize if I haven't done a good job to  
explain it in 2 minutes.  

MR. VANBOLT: Let me clarify something here.  
You will see that this particular issue which is now  
up for discussion actually has two parts which are not  
clearly related. The first which was discussed was a  
definition of injury where that appears in the  
standards, and that's something that appears all the  
way through the standards.
As you will seeing in the ABA standards, and
we will get to injury in another context in a minute,
all the standards do is sort out after misconduct has
been established where the sanction should generally
fall in rough categories and then you tweak it with
aggravating/mitigating factors and case law and all
sorts of things like that.

The three categories obviously are
disbarment, suspension, and reprimand, and generally
the ABA looks to two mechanisms to get to those
evels. First there is state of mind, so intentional
generally results in a higher discipline than knowing,
and knowing in higher discipline than negligence.

So those are the three categories there, but
the ABA standards then also look to the degree of
harm, the degree of injury. So serious injury
generally results in higher discipline than simple
injury, and that's higher discipline than little or no
injury. So that's the basic scheme.

So the question of injury, that question
really that was put before you has to do with do you
adopt a clearly stated definition of injury, which is
the one used by the ABA, or do you just let every
panel make up their definition of injury as they go
along. That's a separate and discrete question.

What Mr. Campbell is talking about is if a
panel decides that there should be suspension of some
kind, should the minimum level be 180 days, i.e.,
requiring reinstatement.

I have to had slightly quibble with one thing
that Mr. Campbell says when he says that the ABA
standards define suspension as more than 180 days.
MR. CAMPBELL: It defines it as that
requiring fitness proceedings following that we would
call reinstatement proceedings. I said Florida, for
example, has 90 days.

MR. VANBOLT: I am still not quite sure
that -- what the ABA says is suspension is the removal
of a lawyer from the practice of law for a specified
minimum period of time, period. And then it says,
Generally suspension should be for a time equal to or
greater than six months, generally.

If the issue is literally should this body
recommend eliminating the possibility of suspensions
for six months -- I mean, is that the proposal? Is
that what people understand the proposal to be? Less
than six months, if that is the proposal. The fact is
that the Michigan Court Rule allows a suspension to be
any fixed period of time over 30 days.

So this proposed standard language would
effectively invalidate an existing Court Rule.

Let me just give you some context on
suspensions currently. In Michigan in 2004 there were
120 public orders of discipline. Of those there were
49 suspensions, there were 41 reprimands, and there
were 28 disbarments. Of the 49 suspensions, 23 were
for 180 days or more, 26 were for 179 days or less.
So about 50/50.

Of the suspensions less than 179 days, more
than half of those were submitted to panels under the
consent discipline procedure, which is essentially a
pea bag. So short suspensions, i.e., suspensions
under 180 days, are something that are recognized
currently in Michigan and are utilized by panels, the
Board, the Supreme Court, Grievance Commission. To
eliminate that would be to, or to curtail the use of
those suspensions would be to put panels, the Board,
and the Grievance Commission essentially in the
posture of saying, okay, the case that would have been
a 30-day suspension or a 60-day suspension, now we are
really going to look at a longer suspension or a
reprimand. We are curtailling that middle ground where
we believe that a shorter suspension may be
appropriate.

CHAIRPERSON JAMIESON: Any further
discussion?

Seeing none, all those in favor -- and we are
going to vote on the first one first. Remember that
there are two parts to this. With regard to the
first, all in favor of option (a), please say aye.

All opposed?

I need all those in favor to stand up so that
we can take a count.

Tellers, I need the tellers up here to count.

Go ahead and be seated.

All those in favor of (b) would you please
stand. You cannot vote on both. We don't have enough
for a minority opinion, so thank you very much.

Now what we do is we take the second part of
that proposal, which deals with suspension, (a) and
(b).

All those in favor of (a), please stand. I
think we have a majority. Okay. You can be seated.

All those in favor of (b), please stand.

Again, you can't vote for both.

We do not have enough for a minority opinion.

Thank you.

Next up is use of injury within the
standards. I will entertain a motion with regard to
that proposal.
VOICE: So moved.

CHAIRPERSON JAMIESON: Thank you. Second?

VOICE: Support.

CHAIRPERSON JAMIESON: Any discussion?

MR. VANBOLT: I will be real brief on injury, other than let me just say that in the Board's comments to the court, it's most recent comments, there is an accompanying letter of 11 or so pages, the Board saw this as really its most fundamental problem with the standards as published.

A minute ago I said that in the ABA standards the sorting process depends on gradations of mental state and also gradations of injury, and that's how you get into the general categories.

The proposed standards which have been published for comment take injury out at this initial sorting process. I hope some of you have had a chance to read the Board's comments. It's too late now I guess if you haven't, but I think that the point to make here, and I think the Board's point, is that by taking it out at this level what you can get are, if you look at some of the individual standards, you get what appear to be anomalous results.

So, for instance, it is misconduct to abandon the practice of law. That's under the rules, not lines. But it's essentially if there was not one scintilla of injury, then you get credit, otherwise forget about it.

Now, I could go through a number of other rules, but I think you get the point. Again, it goes back to a fundamental, philosophical issue of whether or not to, having made the decision to propose standards based roughly on the ABA standards, do you follow through with that or do you abandon one basic precept of the ABA standards and try something else?

MR. CAMPBELL: Let me follow that up, if I may. The particular standard that John referred to involving client abandonment, it's one where the court took a long look at the ADB's version, took a look at my version, presumably, and then came up with their own, and, frankly, the errors, to the extent they could be described as such that occur within that standard are really just, I think, some mistake in drafting the court.

I don't think that's a good rule to use in terms of how injury works. The reality is that you -- I don't believe it makes that much of a difference whether the injury is in at that stage or whether injury is in at the mitigation/aggravation stage. It does take away the chance that somebody might confuse.

under the standards. So then the standards, you look at the standards, what is the appropriate sanction?

Under the traditional ABA version, the traditional approach, you look at whether the conduct was intentional, was it knowing, was it negligent, and then you look at what kind of harm was caused. If you take harm out here, what you end up with is that a lawyer who knowingly abandons the practice of law consisting of 500 cases causing massive damage to 500 people should generally come out a disbarment, no surprise there.

But if you take out injury, there is the possibility that that initial sorting process results in the lawyer who abandons the practice consisting of one probate file that needs a letter and there is no injury to anybody, then the presumptive level is disbarment.

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

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

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

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

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

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

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

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

37 (Pages 145 to 148)
other clients aren't lucky enough to be able to consent, and say, hey, that's what they did to this guy, you ought do the same to mine, give him a break.

I don't know that there is a right or a wrong there, but there should be a consistency, and I guess one version or another should be elected to give us practitioners an idea how we ought to proceed.

MR. VANIVOLT: Could I just say -- actually I have done my own sort of informal surveys among other states. Not every state actually has a procedure of consent discipline, much to their chagrin, because they waste an awful lot of time dealing with cases that should be disposed of officially.

Consent discipline process works. I am not criticizing it in any way. Bob and his staff and the commission do a terrific job of working with respondents to reach the real result in those cases that need to be disposed of, whether it's resulting in a reprimand or a disbarment.

But other states that do have these procedures, typically there is disclosure or some kind of analysis under the standards. It is certainly not unusual. There are some states that have lengthy forms, 10 or 11 pages, where everything has to be spelled out. There are other states where it is

nothing more than a simple declaration in the plea agreement, in the consent discipline stipulation that the parties hereby stipulate that the proposed discipline falls within standard 4.2 and the parties have considered the following aggravating and mitigating circumstances.

As a matter of fact some stipulations currently submitted by the Grievance Commission use that language and often to quite great effect, especially in cases where the initial look at the stipulation suggests that there is something odd about this, and the best example I can give you is a case about a year ago.

The Board has declared in its case law that one of the capital offenses of lawyer discipline, along with embezzling your client's money, is forging a judge's signature. There is language in the cases that say we just cannot imagine a worst offense.

There is, however, a consent case in which the stipulation was to a suspension of three years for a lawyer who was convicted by a federal court of forging a judge's signature.

Now, that stipulation presented without anything further would never have been passed, but because it was a much, much longer than normal stipulation, that stipulation said this would normally be disbarment under the standards; however, here is three pages every mitigating circumstances, extreme supervision under a probation department for a lawyer who has some serious substance abuse and emotional problems which have now been dealt with, this is an unusual case, and this is why it should be three years.

There is now a reported case in Michigan that says that a lawyer who committed the capital crime got three years, but it was only because of the use of the analysis under the standards. So it's not unheard of in Michigan and certainly not unheard of anywhere else.

CHAIRPERSON JAMIESON: Bob.

MR. AGACINSKI: The only practical difficulty why I am even taking a stand is that the worst you can do by going to hearing is getting the exact same thing you can consent to, there is no reason to consent judgment then. You might as well go to hearing and hope for flaky fact finding and that the case falls apart. So what you will do is eliminate the basis for consents, which is again half of our dispositions.

MR. ALLEN: I want to point out the underlying assumption of this entire exercise is we ought to have these standards, and the court is correct in adopting them. And we are not at that level of debate, so I won't start it, but I would point out for purposes of that analysis that the Attorney Grievance Commission has just explained to you why in 50 percent of the cases that they have they don't want to use these standards, because they need the discretion that is necessary to speak to the particular facts and circumstances in each case, but in the other 50 percent they don't want the hearing panel to have that discretion. Instead they want them to be essentially bound by what I call the sentencing guidelines and get in trouble for it when I do that.

And I would submit to you that I think the arguments you have just heard, all which are very cogent, I think, and very valid, equally apply to the other 50 percent of the cases, except it ought to be the hearing panel that's exercising that same discretion.

MR. LARKY: What do you recommend?

MR. ARMITAGE: I think John recommends no anomaly.

MR. ALLEN: I don't have any counter proposal in writing, and that's not my purpose here today, but I do think the entire concept of the standards that
are drafted out of the mid-1980s based on the Code of Professional Responsibility and not the Rules of Professional Conduct and the reason they have never been updated by the ABA is the ABA has since taken a stance against sentencing guidelines in the criminal context, and it’s not about to say we are against them in the criminal context but we want them in the lawyer discipline context for all the same reasons.

MR. BERRY: I viewed this rule from the context, and I think you probably do as well, from a practical, pragmatic thing. As you are thinking through this you are probably thinking a couple things. One is you want to make sure justice is done and the public is protected, and you also want to make sure a lawyer gets a fair deal out of this process. And what's the most likely way that's going to occur in this process, and if I go one way or the other, what's the most likely event that it won't occur.

From my experiences, and if you try cases, whether criminally or civilly, you understand there is a difference between what might end up at the end versus the negotiation. Considerations are different, the result may be different, and I think you are mixing apples and/oranges when you expect to have all of the same considerations from a tried case and the

Mr. BERRY: I believe you probably do as well, from a practical, pragmatic thing. As you think through this you are probably thinking a couple things. One is you want to make sure justice is done and the public is protected, and you also want to make sure a lawyer gets a fair deal out of this process. And what’s the most likely way that’s going to occur in this process, and if I go one way or the other, what’s the most likely event that it won't occur.

From my experiences, and if you try cases, whether criminally or civilly, you understand there is a difference between what might end up at the end versus the negotiation. Considerations are different, the result may be different, and I think you are mixing apples and/oranges when you expect to have all of the same considerations from a tried case and the

nontried case. That’s just the real world.

One of the things you are concerned about is accountability or transparency, and I think that’s a separate issue. I come from two states where I prosecuted these cases where, in essence, we had a rule that said you consider, the standards are considered along with other appropriate considerations for an ultimate resolution and a consent judgment, and then we had a process by which you articulate in some way what those are.

That’s a separate process that you have in front of you, but I would argue that to protect both the public and an attorney who very well may want to do this and it’s the appropriate thing to do, if you hold him to these standards, you are ultimately going to force, you are going to force end results that I don’t think necessarily are going to be appropriate end results.

Looks like Mr. is ready to take me on.

MR. ARMITAGE: You really gave me a good entree there. Holding to the standards is not -- that reminds me to rebut something Bob said, that it’s a reason to deviate in the state and federal courts, and yes, it is. No one is saying that there is no distinction.

But a hearing panel -- I will give you the practical application. A hearing panel has an obligation and a duty imposed by the Court Rules to approve the stipulations before them. Are they to be blindfolded and just told to sign and shut up and approve this. I don’t see what function they serve.

These people volunteer lots of time. They are familiar with the case law. The case law actually dovetails with the standards. It’s not quite as bad as the sentencing guideline.

I was not initially a fan of the standards, because I thought they were too general, but as we have been ordered to use them and have been using them, you find that the generally has some value in that it let’s our common law fit within it in cases that are based on individual factors within it.

So you have got a hearing panel deciding to approve or not approve a stipulated disposition, a consent judgment, and one of the legitimate factors is that this is consent and that the person is cooperating and coming forward.

I don’t know how, as a practical matter, you are going to erase the panel’s memory and make them disregard the standards and other case law, and they are going to look at it and say why is this out of

whack, and it’s going to have to be explained to them anyway.

I think the most important thing is that it really would be anomalous to have the smallest sliver that gets the most scrutiny, argument to three peers and tried by professionals, have that held accountable by some rigorous standards and then everything else is subject only to the Grievance Administrator’s discretion whether it’s probation, admonition, and then now consent judgment, which are initiated by a formal public proceeding. It’s by formal complaint, so I am confused about what the role of the panel would be if they didn’t apply some sort of guidelines to start with and then deviate as appropriate.

CHAIRPERSON JAMIESON: Any further discussion?

MR. ROMANO: Vince Romano, 3rd circuit. Can a hearing panel reject a finding?

MR. ARMITAGE: Yes.

MR. VANBOLT: Yes.

MR. ROMANO: So if it’s a consent judgment, can the hearing panel still reject it?

MR. VANBOLT: Yes. It must be accepted or rejected by the panel. If the panel rejects, then it goes to a new panel for a new hearing, there is no
MR. BERRY: I don't know if it's good news or bad, but I am fine. Thank you.

CHAIRPERSON JAMIESON: All those in favor of (b), please say aye.

And opposed.

I think we have to -- we are going to have to do a count. I assume you did not vote for both.

All those who said aye to (a), please stand.

I don't know the number. I think it's a split. Then you are saying for (b) just have them stand in favor of (b). I stand corrected, no minority, okay.

So (b) passes.

Next up is standards 2.6, admonition. I will entertain a motion with regard to standard 2.6.

VOICE: So moved.

CHAIRPERSON JAMIESON: Do I hear a second?

VOICE: Second.


MR. AGACINSKI: I recommend a no vote on this because it is not relevant to the state of Michigan.

Other states -- and our Judicial Tenure Commission has a unified process where you prosecute and you try the case all in private, and so you can have private admonishments. In Michigan you can't have a private admonishment unless -- you just can't have it, because once you issue a formal complaint it's a public matter, it's on the record and everybody can learn about the fact there was a prosecution. So it's not an option that's available to hearing panels.

Also, this makes an admonishment a discipline, whereas in Michigan admonishments are not considered discipline. They are considered a warning or an agreement between the parties to close the case with an understanding that if you are in trouble again it can be used in aggravating your punishment the next time.

So this really does have relevance in some states, and I think the Supreme Court saw a lot of states had it, but I don't think it can work in Michigan where we have the separate systems and a public hearing process.

MR. VANBOLT: This is an easy one, the Attorney Discipline Board agrees a hundred percent with that. Michigan does not recognize public disciplines; therefore, that language was stricken -- private disciplines, by including admonition; therefore, the Board's proposal to the court just struck that language defining admonition.
For some reason or another it reappeared in the version published by the court to the extent that it suggests a change in the rules allowing panels or the Board to admonish people. We don't believe that is the case.

MR. CAMPBELL: Ditto.

MR. LABRE: Bill LaBre, 43rd circuit, Cass County. Our county is a border county, and I practice in both Michigan and Indiana, about a third in Indiana and two-thirds here.

Indiana has private reprimands or admonitions. You have, if you are going to have a disciplinary proceeding, you are going to have a hearing before a hearing officer, it's going to be on the record, but this becomes a level of discipline, whether by consent or whether by an actual recommendation of the hearing officer.

I think it is an excellent quiver to have in the arrows when you have very minor cases, and I think we ought to formalize it, and if we formalize it in this backward way, better to formalize it somehow than not have the arrow at all. So I recommend we approve it.

Chairperson JAMIESON: So you spoke in support of (a)?

Mr. LABRE: Correct.

Chairperson JAMIESON: Thank you. Any further discussion? Seeing none, we will vote on (a).

All those in favor of (a), say aye. All those opposed.

I need the ayes to stand just up to see if we have a minority. We don't have enough. Thank you. And then with regard to (b), all those in favor.

There is our majority.

Next is use of interference or potential interference with the legal proceeding or the outcome of the legal proceeding within the standards, which is 6.2 and 6.3.

I will entertain a motion with regard to these proposals.

Voice: So moved.

Chairperson JAMIESON: Thank you. Second?

Voice: Support.

Chairperson JAMIESON: Thank you. Any discussion?

Mr. CAMPBELL: My only comment is that after reading the court proposed rule, I went in and tweaked a little bit from what I had originally proposed. It's on pages, I think, 11, 12, and 13 of what is your attachment to your agenda today, attachment 14, supplemental report. When you actually get into the report itself I identify some additional language changes. I don't know that there is much of a distinction that amounts to a difference when you got done comparing that to the ADB. Maybe it's different routes to the same result. I do think they are proposals that need a little bit more tweaking than what has been done already.

Mr. ARMITAGE: Well, this kind of relates back to the injury issue. The verbal formula for injury in these particular offenses is potentially serious or significant interference with a legal proceeding or the outcome of a legal proceeding. Again, we did follow the ABA here, thought it was relevant consideration to be considered in the initial pass at setting the ranges of discipline, and so I believe the (a)'s are the ADB positions.

Chairperson JAMIESON: Any further discussion? Seeing none, then we will take the first portion of this proposal for vote.

All those in favor of (a), please say aye. All those opposed.

Stand up for ayes, please. Ayes sit down. Now I need the noes. Okay. Thank you.

Chairperson JAMIESON: Actually three different proposals. Not three choices, three proposals.

Mr. VANBOLT: Three proposals, and each one there is an (a) and a (b). In each one the (a) version is the Board/ABA version for the reasons that Mark stated dealing with considering certain level of harm to the proceeding before imposing that level of discipline, so it's essentially the same question repeated for three levels of discipline.

Chairperson JAMIESON: The first one deals with disbarment, the second one deals with suspension, and the third deals with reprimand.

Mr. CAMPBELL: The only thing that I would add is, again, under 6.1 and 6.3 you have a case where the ADB, following the ABA, defines a section for
somethings that is not a violation in Michigan, and
Michigan only punishes lawyers for a knowing violation
of the Court Rule, they have a sanction for a
negligent violation of the Court Rule. Can't happen
in Michigan, so why have a standard.

CHAIRPERSON JAMIESON: Any further
discussion? Now we will put to vote.

All those in favor of (a), say ye.

Though opposed.

I just need the nays to stand up to make sure
we don't have enough for minority. Thank you.

We need all those who said yea to option (a)
for the second portion to stand. We need numbers,
because those people who didn't vote in favor of (a)
could vote in favor of (b), and you could end up with
a minority opinion that way.

So could you please stand up if you voted in
favor of (a). We need the tellers. And, again, you
can't vote for both, so if you are voting for (a) now,
then when we vote for (b), you can't vote for (b).

Okay. You can be seated.

All those in favor of (b), please stand. Is
everybody in favor of (b) standing?

We don't have enough for a minority opinion.

Thank you.

And then the third portion of this proposal
is (a) or (b), yes or no with regard to the reprimand
portion of this.

All those in favor of the language that is
before you right here say aye.

Any opposed.

Yes has it.

And now we move on -- oh, actually at this
point we would move on to 4.1. I think everybody
needs a break just for maybe ten minutes. We have
snacks out there if you want to get them. You want to
keep going? You know what, we have got recorders here
who have to take just a rest break for a
comfort break, so we are just going to take it for
five minutes, so 3:15 we resume. You don't want to go
anywhere, you don't have to.

(Break was taken.)

CHAIRPERSON JAMIESON: If we can reconvene.

I understand that there was some confusion with regard
to the last proposal.

VOICE: Not the last one.

CHAIRPERSON JAMIESON: If someone could come
to the mike and we can address this.

MS. HAROUTUNIAN: Susan Licata Haroutunian,
3rd circuit. The use of the reprimand --
MR. CAMPBELL: The effect of what my language proposal does is under the ABA version they divided
how you treated property, whether it was client
property or somebody else's. Client property was
treated under 4.1, and somebody else's property was
treated under 5.1, a different standard.

There was significance to that, because in
the ABA standards a certain level of mitigation needed
to be present for bringing down a presumptive
disbarment for taking client funds that was not there
for taking other people's money. In other words, it
was less mitigation at least in the commentary that
seemed to be required.

My proposal is consistent with 1.15 in the
1.15 covers both the property of clients and third
persons. It makes no distinction.

My proposal under 4.1, likewise, makes no
distinction in the level of mitigation. The
substantial litigation that needs to be present to
decrease the presumed level of sanction is likewise
for taking somebody else's money, the same as it would
be for taking the client's money.

That's really what, in voting in favor of (a)
what you are saying is just as the rule combines this
misconduct so too the sanctions should combine and
address this misconduct. If you vote in favor of (b),
you are voting for a bifurcation of that consistent
with what it was under the old code but not consistent
with what it is under the rule.

MR. VANBOLT: I can't tell you exactly how
many angels dance on the head of this pin, but the
reason that the ABA standards and the modification
proposed by the ADB putting these two types of
misappropriation in two different places is for
nothing, it's no more complicated than the fact that
under the ABA standards there are big categories
dealing with violations. So duties to a client are in
one section, duties to third persons are in another
section.

That is in a nutshell the reason that
misappropriation of client funds is under the section
called violations of duties to clients, and
misappropriation of other people's money is under the
5.0 series, which deals with personal integrity.

I can tell you that certainly neither the
panels, the commission, the board, the Supreme Court,
as far as I know, has ever said anywhere that it is
less egregious to steal somebody else's money than
your client's money. Stealing is stealing, and I

think the system treats it that way. This really is
not a big deal in terms of where the misappropriation
is put. It really is no more complicated than client
money misappropriation comes under duties to client
section. The offenses should essentially be the same.

There is the other issue, though, that the ABA
standards and, thus, the ADB proposal refers to one
particular phrase, which is the knowing conversion of
money, client property or client funds, knowing
conversion as opposed to failure to hold in trust.
Failure to hold in trust is not a phrase which appears
either in our rules or, for the most part, in our case
law, which is one of the reasons that the Board is not
a big fan of jumping over that cliff and using new
language that they have into the used before.

CHAIRPERSON JAMIESON: Any further
discussion?

MS. POHLY: Linda Pohly from the 7th circuit,
Genesee County.

Mr. Campbell, I do not know whether a failure
to make payroll tax deposits by an employing lawyer
would be regarded as a failure to preserve property
and trust resulting in disbarment. Would it be a
failure to hold property in trust resulting in a
suspension, or would it be neither?
MR. CAMPBELL: Within my proposal I identify the rules, and the court also within their proposal identify the rules that apply within each section. If what you have described is not a violation of 1.15, it would not be treated under 4.1.

MR. VANBOLT: Can I just say, take a look at Grievance Administrator versus Nichols. In my former life when I sat at that end of the table as a discipline prosecutor, I tried that case. The Supreme Court declined to increase discipline to a disbarment; maintained the level of suspension, but Justice Cavanagh actually in oral arguments asked me that question, why is this not like stealing client's money, and I agreed with him that it was.

CHAIRPERSON JAMIESON: Any further discussion?

MR. VANBOLT: That was when I was prosecuting.

CHAIRPERSON JAMIESON: Any further discussion?

Seeing none, then this has two parts. The first part is whether standard 4.1 should provide that disbarment is generally appropriate when a lawyer knowingly, and then you have option (a) and option (b).

All those in favor of option (a) please say aye.

All those opposed.

All those in favor of (a), can you please stand just to see if we have enough for a minority.

No. Thank you very much.

All those in favor of (b), please say aye.

All those opposed.

Okay. (b) passes as the majority. No minority.

The next proposal, the next part is standard 4.1 should provide that suspension is generally appropriate when a lawyer.

All those in favor of (a), please say aye.

All those opposed.

VOICE: Can we have discussion?

CHAIRPERSON JAMIESON: I am sorry, we already had discussion. We could open it up for discussion with regard to that second portion of the proposal.

We are still under standard 4.1. We just dealt with the first portion regarding disbarment, and now we are talking about suspension.

MS. DIEHL: Nancy Diehl, 3rd circuit. Could someone address the issue of knowingly or negligently, and we have had that negligent issue on a number of other proposals about why in the same, whether you would be given the same discipline, suspension, whether you were negligent or whether you knowingly did something.

MR. VANBOLT: This rule is actually somewhat different than the other ones, and that is because the system in general, and I think most systems do look at money offenses differently, embezzlement, knowing conversion, intentional conversion, whatever you want to call it, is seen as sort of the capital offense.

You will notice that in this particular rule, rather than following exactly the same hierarchy of intentional generally means disbarment, knowing generally means reprimand, or a suspension, negligent conduct generally means reprimand, in this particular type of misconduct everything is ratcheted up just a little bit so that the knowing conversion is disbarment, the -- I am sorry, the intentional conversion or knowing conversion is disbarment, the knowing or negligent dealing with client property is suspension, and then that's one which does say that reprimand is generally appropriate really only when there is an isolated incidence of simple neglect.

This is not one of the cases that Don mentioned, Mr. Campbell mentioned, where there is this question of are we somehow sanctioning negligent conduct, which really isn't misconduct, because when you deal improperly with client funds that's a per se offense under the Michigan case law.

If you negligently allow your trust account to be short by $5 for a day that's misappropriation. It may not result in suspension or disbarment but it's still misappropriation.

So that's why this rule is calibrated just a little bit different, so either knowing or negligent mishandling of your client money is more likely than not to result in your suspension.

MR. CAMPBELL: I agree with John and the reason for the language that I propose today is because it takes out any question as stated by. It just says if you fail to do it. It is a strict liability offense in dealing with money, and that's why the wording was phrased. I think the wording knowingly or negligently is a little bit cumbersome and directs folks to a state of mind that isn't at all an issue or an element of any offense with regard to the money.

You see the ADB's proposal here does actually
differ slightly from the original ABA proposal and had a different sort of take on it, but I think the difference is as John has described.

CHAIRPERSON JAMIESON: Any further discussion? Then we are going to vote on the second portion of 4.1, whether or not 4.1 should provide that suspension is generally appropriate when a lawyer:

All those in favor of (a) please say aye.

All those opposed.

Could I just have the ayes stand up to see if we have enough for a minority. Thank you. That's enough for a minority opinion.

All those in favor of (b), please say aye.

Those opposed.

And can I get a count on the ayes for the (b), please, just so we have a number. All those in favor of (b), if you could please stand. We need the tellers, please.

I think we are okay with just saying it's a majority. Go ahead and sit down.

Moving on to standard 4.3 with regard to failure to avoid conflicts of interest. I will entertain a motion with regard to this proposal.

VOICE: So moved.

CHAIRPERSON JAMIESON: Thank you. Second?

VOICE: Second.

CHAIRPERSON JAMIESON: Any discussion?

MR. VANBOLT: I just want to make one comment here. The two questions that you have in front of you on the suspension and reprimand, the (a) is generally the proposal published for comment by the court and the (b) is almost the Discipline Board's proposal. The critical language that's missing from the material in front of you is that what the Board proposed, which is actually identical to the ABA standard, is additional language that says, in the case of a suspension, and causes injury or potential injury to a client. In the case of reprimand it will adversely affect another client and causes injury or potential injury to a client.

This is consistent with what we have discussed before, which is the Board's approach is that degree of injury is part of the initial sorting out process.

So in the language that appears in your material, that language dealing with injury is left out, so I can't say to you that (b) is the Board, the Board's proposal. The Board's proposal is (b) plus injury.

MR. CAMPBELL: I don't have the court's proposal in front of me, but I see at page six under Section 14 that my original proposal for suspension under 4.32, which is where this language is taken from, has an (a) and a (b) to it, so what you are voting on is really just one portion of what I proposed, and my recollection is that both my (a) and (b) appear as an alternative proposal in the court's proposed language. So you can take a look there.

My (a) reads, A lawyer, a suspension is generally appropriate when a lawyer knows of a conflict of interest and fails to obtain consent from the present or former client after consultation. And so that was in addition to the information that was in the (a), so it wouldn't stand by its own even by my own version, if you will.

CHAIRPERSON JAMIESON: Thank you. Just so that we can have option (b) accurately reflect the Attorney Discipline Board position, John, could you please give us the specific language that would be added to the end of that.

MR. VANBOLT: Yes. In the ABA standards on the board's proposal to the court the additional language after --

CHAIRPERSON JAMIESON: The word effect?

MR. VANBOLT: Yeah. (b) is actually, it's almost like a paraphrase, because the actual rule, the actual standard is effect of that conflict, comma, and causes injury or potential injury to a client. The key language though that's missing in both is the phrase "and causes injury or potential injury to a client."

CHAIRPERSON JAMIESON: I will entertain a motion to adjust the language in (b) so that it accurately reflects the Attorney Discipline Board.

THE WITNESS: So moved.

CHAIRPERSON JAMIESON: Second?

VOICE: Support.

CHAIRPERSON JAMIESON: Any discussion?

MR. VANBOLT: And that's not just pointing out that there is some missing language. I think you will see that if that language is put in there that there then does become potentially a striking difference between (a) and (b), because, of course, (a) results in suspension regardless of any degree of harm or injury, whereas (b) does require that.

MR. CAMPBELL: If I may follow that up. It also displays some of the problems with both the ABA and the ADB approach. If you put that language in and you have a case come before you, what happens where you have all of the elements under when what is here
as proposal (b) and you have no injury.

And if you take your eyes down to the next (b) provision, it tells you what to do where there is a
negligent problem with an injury, but it doesn’t tell you what to do when you have knowledge but no
injury, and there really is no direction to the hearing panel, there is no anticipation for the
debates, and there is no basis for review for an
appellate body.

And that’s one of the reasons why the court
on this provision and others put injury into the aggravation/mitigation section, because when it comes
to a conflict of interest, the issue isn’t injury.
The issue is whether you had the conflict. The presence or absence of the injury is important in
calculating what the ultimate sanction will be, but it isn’t for determining which chute you fall into or
fall out of on the standards.

So John is right, it does change the rule,
but it doesn’t necessarily change it favorably for a practitioner trying to understand and counsel the client for a lawyer who faces the prospect of having
to figure out what the sanction is for a hearing panel that has to interpret these sanctions or for a
reviewing appellate body, whether it be the Board or

the court deciding whether the initial decisions on these standards were correct.

In fact, what it means is that these decisions will be made outside the standards because it’s yet another factor that isn’t factored in in terms of all of its various forms that may come forward.

CHAIRPERSON JAMIESON: I have been corrected that we didn’t need a motion. We have just amended the language here, edited it so that it accurately reflects.

MR. LESPERANCE: Kevin Lesperance from the 17th. I may have some concerns with some of these proposals, and I am not even sure if I am on the right rule, so I think I am going to have to request Mr. Allen’s assistance.

But a number of the attorneys in my firm went to local Bar meetings, and they were given a copy of your article, Perfect Storm, and I do primarily medical malpractice defense, I represent a lot of hospitals and doctors, and I believe that this may be the rule that we are talking about, but in your article you mention that consents must be signed and confirmed in writing, and I don’t see that that’s up on the agenda today. Today is my first meeting, so I don’t know if that’s something that’s been decided.

But the problem that we saw is that we represent a lot of hospitals and then we represent a lot of doctors and some cases we will represent one, some cases we will represent the other. It would seem to be pretty burdensome to us to have to put only disclose a potential minor conflict, and they were also worried from some of the materials that we have reviewed that there was strict liability even if there is no injury, and I don’t see that in this rule, so maybe it’s not even on the table today, but we were very concerned, because obviously in some cases we get the doctor and the hospital is the co-defendant.

There may technically be a conflict there, even though it’s never going to hurt them, and that’s where my concern is. So, John, I don’t know if I am off base or what.

MR. ALLEN: Not at all, and the confusion is understandable. First of all, understand there is a difference between the standards for sanctions and the Rules of Professional Conduct. They aren’t the same thing. And it is true that if adopted as proposed by the Supreme Court a waiver or consent to a conflict would have to be confirmed in writing. Not signed, but confirmed in writing, and if it was not confirmed in writing, and the way I read the rule, even if there was actual consent, even if there was no damage, it would then be an invalid waiver and consent and, therefore, it would be a conflict.

At that point standard 4.3 would apply, and I think to understand how it works, if you turn in your song books to Chapter 13, which is the beautiful ADB report that John VanBolt takes credit for, but I think Mark Armitage did. If you look at it on the computer it’s technicolor and cinemascopic, it’s in color.

But if you look at that in the first page of 4.3 you will see that the columns for both the Supreme Court proposal in the left-hand column and the alternative proposal, that’s Mr. Campbell’s proposal on the right, start off with a paragraph that cites a number of MRPC numbers. Those are the rules for which this standard would apply.

So I think if I can take the context of your question, though I am not implying anything about you or your firm, if you were to do, if all the rules were adopted the way they are proposed, including the confirmed in writing requirement, and if you were to represent both the doctor and a hospital who might be potentially adverse, you disclose to them, they consented there was no damage, but when it was all
said and done you had not confirmed it in writing,
then I think you would be under this standard, because
you would not have the informed consent that's
required by the initial paragraph of 4.31, and I think
you, actually I think when you read through it if you
knew you hadn't confirmed it in writing, then you
would be under 4.31(b) which means you would be
eligible at your first offense for disbarment.

CHAIRPERSON JAMIESON: For further
clarification, being a fairly new Assembly member,
back in November of 2003 the Assembly debated the
rules, and I am recalling, and we believe that the
Assembly took a position already with regard to the
informed consent and in writing requirements, and we
were opposed to those and communicated that to the
Supreme Court, and what the Supreme Court has said
with regard to those two aspects of the rule, the
informed consent and in writing requirement, is they
would like to have more commentary from lawyers across
the state on that because they haven't necessarily
made their mind up on that.

So I would encourage you with regard to any
concerns about those aspects of the rule, the Supreme
Court has asked for commentary, that people who are
interested submit commentary directly to the Supreme
Court.

Any further discussion with regard to 4.3?

MR. ARMITAGE: Just one critical point, that
a vote for (a) here would, I think, because it doesn't
reference injury, be inconsistent with your earlier
to endorse the consideration of injury in the
initial sorting process. That's why the Board put it
in (b). That's all.

CHAIRPERSON JAMIESON: Any further
discussion?

MR. CAMPBELL: Well, that's cured by just
throwing that on the end of (a), pursuant to that
vote.

CHAIRPERSON JAMIESON: Don, I didn't hear
you. I am sorry.

MR. CAMPBELL: Actually another way to look
at that is that John's addition of the language here
is superfluous in light of the earlier vote, that
everything here you must presume is subject to that
earlier vote, so (a) would just simply put at the end
of it and according to injury, or whatever the
phraseology is.

As I understood Mark, he was saying you would
be inconsistent in voting for 4.3 (a) because it
didn't have the injury language. That would be
inaccurate. You would just add the injury language,
which doesn't change 4.3 (a). You would just add
that to -- take out of the mitigation/aggravation.

MR. ARMITAGE: If you add it it won't be
inconsistent, but then you will have the problem that
John Allen talked about focusing on actual violation
of the rule, which is like failure to get the
confirmation in writing and so forth.

The ADB approach focuses on the disclosures
you actually make.

CHAIRPERSON JAMIESON: Any further
discussion? Then we are going to vote on the first
portion of the 4.3, which is standard 4.3 should
provide for suspension when.

All those in favor of (a), please say aye.
All those opposed.
All those in favor of (b), say aye.
All those opposed.
I didn't hear enough ayes to (a) for a
minority, so we have a majority opinion with regard to
(b).

The second portion of this proposal is
standard 4.3 should provide for reprimand when.

All those in favor of (a), please say aye.
Those opposed.

To be perfectly clear, we had discussion for
both of these. Does anybody want discussion with
regard to the second portion of this? I don't want to
cut anybody off.

So we had not a majority in favor of (a).

MR. CROMPTON: Jeff Crampton from the 17th
circuit. Are we adding the same language on the
bottom of (b) on this one?

CHAIRPERSON JAMIESON: Thank you, John, can
you advise us what the language would be at the end of
(b) for the second part of this that would make it
accurately reflect the ADB position with regard to a
lawyer is negligent in determining whether the
representation of a client may adversely affect
another client or be materially affected by the
lawyer's own interests, and is there any injury
language that's supposed to be at the end of that.

MR. VANBOLT: I am not sure I can answer
that. What I understood, the point of the choice was,
one was the Supreme Court's versions and one was the
Board's version. I spoke to the Board's version.
If Mr. Campbell is correct, if the previous
vote to add injury is part of the process, then I
guess you would add identical language to both
proposals.
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<td>CHAIRPERSON JAMIESON: So then it’s kind of incorporated by our position taken earlier today with regard to injury. So all those in favor of --</td>
<td>out talks about is generally appropriate. Maybe I am mistaken about that.</td>
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<td>VOICE: Point of order.</td>
<td>But this is now a mandatory, a mandatory -- if you vote on (b) it’s now mandatory that there be reprimand. I think the language as John noted was generally.</td>
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<td>MR. MORGAN: Can I bear your indulgence for a second. Don Morgan, 3rd circuit. John, if you are saying that we should do it under the first action we took on this page, add that and causes injury and potential injury to a client, are we also saying we should do it for (b), because that’s what I heard, and when I started coming up here it wasn’t there on the board.</td>
<td>CHAIRPERSON JAMIESON: Thank you. Then let’s stick that in there. Nancy, insert before “a lawyer is negligent” ”reprimand is generally appropriate when.” I think that’s the better place to put it. Do we have it correct now?</td>
<td>CHAIRPERSON JAMIESON: Thank you. Then let’s stick that in there. Nancy, insert before “a lawyer is negligent” ”reprimand is generally appropriate when.” I think that’s the better place to put it. Do we have it correct now?</td>
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<td>So now is this a friendly amendment so that it is on the board and that’s what we are voting on?</td>
<td>MR. MORGAN: Your point is well taken. Actually, every single standard, as far as I know, starts with disbarment, reprimand, or suspension is generally appropriate, because the whole point of this is it’s not exact until you apply the aggravating and mitigating factors. So you can almost -- actually you can read generally in every single standard, but the only problem we are having here is the difference between a paraphrase and the exact language.</td>
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<td>CHAIRPERSON JAMIESON: It’s actually not an amendment; it would be a correction.</td>
<td>MR. MORGAN: -- to what was the prior action. Thank you.</td>
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<td>CHAIRPERSON JAMIESON: Absolutely.</td>
<td>MS. STANGL: Terri Stangl from the 10th circuit. A related correction. In the draft I am looking at, which says 4.33 under the ADB, there is</td>
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<td>MR. MORGAN: I understand. It’s a supplement --</td>
<td>another phrase which is or whether the representation will adversely affect another client. So if we are going to be looking at the entire ADB proposal, I think that language needs to be added as well, if that’s the intention of what we are correcting.</td>
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<td>CHAIRPERSON JAMIESON: Thank you.</td>
<td>MR. VANBOLT: She is correct. My point was just, rather than a phrase, that is the actual language.</td>
<td>MR. VANBOLT: She is correct. My point was just, rather than a phrase, that is the actual language.</td>
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<td>MS. STANGL: Terri Stangl from the 10th circuit. A related correction. In the draft I am looking at, which says 4.33 under the ADB, there is</td>
<td>CHAIRPERSON JAMIESON: Let’s just type it up there for you so everybody can see it.</td>
<td>CHAIRPERSON JAMIESON: Let’s just type it up there for you so everybody can see it.</td>
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<td>Thank you.</td>
<td>John, is that the exact language there?</td>
<td>John, is that the exact language there?</td>
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<td>CHAIRPERSON JAMIESON: Thank you.</td>
<td>MR. VANBOLT: Correct.</td>
<td>MR. VANBOLT: Correct.</td>
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<td>CHAIRPERSON JAMIESON: Nancy, you would take out reprimand is generally appropriate when, so that after option (b) would be “a lawyer is negligent.” Then that’s the actual language.</td>
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<td>MR. BUCHANAN: Rob Buchanan from the 17th circuit. I think part of the problem of taking that out is if you look at the paragraph that defines (a) and (b), it doesn’t say generally appropriate. It’s more -- if you go up and you look at it, it doesn’t say generally appropriate. Like in the first one it says, I think it says disbarment is generally appropriate. Here it just says should provide for reprimand, but the language that you just had her take</td>
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<td>At those in favor of (a), again, with regard to reprimand.</td>
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<td>I think to be consistent, we have got to go back to the first one, because that doesn’t provide for generally.</td>
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<td>So with regard to 4.3, should provide for reprimand when.</td>
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<td>CHAIRPERSON JAMIESON: (a). Did we vote for (a) already? It went down now. Now we are voting for (b).</td>
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<td>All those in favor of (b), say aye.</td>
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<td>All opposed</td>
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<td>That passes.</td>
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<td>Next is standard 4.5. There are two different alternatives, lack of competence and charging illegal or clearly excessive fees. I will entertain a motion with regard to this proposal.</td>
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<td>VOICE: So moved.</td>
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The point to make is that the ABA in Michigan diverged with regard to their rules concerning competency under 1.1. They are very different rules. Again, Michigan took a different approach relative to the treatment of competency. It's not covered at all by the ADB's provision because the ADB follows the ABA standards which talks about ABA language and ABA concerns, and it's different. So that's one of the reasons why I think it needs some adjustments.

Mr. Vann: I agree entirely with Mr. Campbell about the ABA standards adopted in 1986 looking at prior case law, not a lot of cases then on fees. The problem is that in 2005, if we go back and look at 20 years of case law in Michigan, you are still going to find not a lot of cases on fees. There just is not a developed set of cases.

I have mentioned in some of the road show presentations, as we have called them, where we have gone to local bars, that you might want to keep in mind that in Michigan and most states year after year 50 percent of the public disciplines are for people who display some sort of negligence, lack of diligence, look of competence. Those three categories combine into a general competence, diligence problem.

Michigan Rules of Professional Conduct, felt it was important enough, significant enough, and we have already had some comment here about most of the or many of the complaints to the Grievance Commission have to do with fees, that it is worth its own standard.

And so I put together the competency -- diligence, competence and communication in one standard, which if you have ever seen, been lucky enough to see an Attorney Grievance Commission complaint, obviously as a member of a hearing panel, not as a respondent, then what you will see is they always join those charges together, so it makes sense to put them all under one standard and then I carved out of that a separate standard of fees, and I renumbered them a little bit.

With the court then, when it took a look at it, felt that the issue of competency was not highlighted enough, and if you look at my Section 14 here in your materials, I have a discussion under Section 3 of my memorandum, which opens the materials, where I describe my approach to 4.4, 4.5 and why I did what I did and what proposed change, which really only goes to the name of the rule, to highlight the fact that competency is actually covered under 4.5.
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<td>1 that he did combine the two offenses in one standard.</td>
<td>1 8.4(b) of the Rules of Professional Conduct it says that only the violation of a law that reflects adversely on a lawyer's fitness to practice should be the subject of discipline.</td>
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<td>2 The problem was then that the court looked at that and jumped on both of our agencies actually and said, oh, my God, you forgot about competence, you are not taking this seriously, and we had to point out that, indeed, we do take competence seriously, but that actually is the second part of the Board's position, which is that competence is different than diligence, it does deserve its own standards by any measure in terms of harm to the public and just recognizing the reality of what it is that we deal with. Competence is a big part of what we do.</td>
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<td>So in effect the Board's position then is keep fees where it is and keep competence where it is.</td>
<td>5 There is also a Court Rule 9.104 (5) at the time, and I think it's now (a)(5), that says the violation of any law of the United States or of a state of the United States is misconduct and the grounds for discipline.</td>
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<td>15 CHAIRPERSON JAMIESON: Which would be (b)?</td>
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<td>16 MR. ARMITAGE: As (b).</td>
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<td>17 CHAIRPERSON JAMIESON: Any further discussion?</td>
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<td>Then all those if favor of (a), say aye. All those in favor of (b), say aye. Passes with majority. I suppose we should see whether or not we have a minority for (a). We don't need to worry about that. We are all set. Never mind. It's getting late, isn't it? Standard 5.1, failure to maintain personal integrity. I will entertain a motion with regard to 5.1.</td>
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<td>1 recognize that, in fact, under 1.13 where you are engaged in criminal conduct that does not meet the requirements of 8.4(b), that is not defined under 5.13 or 5.12 or 5.11 above, that, yes, there is a category of offenses for which a lawyer can be disciplined, and I think it's the Nichols case, correct me if I am wrong, John, that said you are a lawyer 24 hours a day, 7 days a week, and that's essentially the attitude or the position the court took in late 1990s when it decided the drunk driving cases in the disciplinary field, and it just takes recognition of that and it's a recognition, I think, that's not present in the Board's original version of 5.13 as they proposed it. That's all.</td>
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<td>15 I don't expect, by the way, given my record here, that that position is very popular, but it's just recognition of what the rules are.</td>
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<td>16 MR. ARMITAGE: I just want to take issue with the comment that the Board is at war with the court, because we are not. The Court Rules are at war with themselves. He pointed out 9.104(5) says any violation of the criminal law is misconduct. 8.4(c) says those violations of the criminal law which reflect adversely on your fitness is misconduct, and that's the way it is in every other state in the country.</td>
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<td>17 The attorney discipline system began to approach drunk driving as an offense for which there would be a sanction under the ethics rules in the late 1990s. Prior to that I am not aware of a drunk driving case having been the subject of a discipline, and when those cases went before the Attorney Discipline Board, the argument was, well, when you read</td>
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<td>18 a low grade war between the Board and the court as far as background.</td>
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<td>19 The central issue here is, and this has been approach drunk driving as an offense for which there would be a sanction under the ethics rules in the late 1990s. Prior to that I am not aware of a drunk driving case having been the subject of a discipline, and when those cases went before the Attorney Discipline Board, the argument was, well, when you read</td>
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<td>20 again, in my memorandum if you go through it and take a look under Section 2.</td>
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<td>21 The central issue here is, and this has been a low grade war between the Board and the court as far as background.</td>
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MR. CAMPBELL: For (b)?

MR. ARMITAGE: (b), good point. I am sorry.

So he is right, the case came before us and
the Board and it dealt with it. When it went up, in
the Deutsch (sp) case went up, the court in fact split
3/3 on the issue of whether of fitness should be
required.

So that issue is probably still out there.

The Board took the position that Michigan should, that
8.4(b) is still there in the rules and that fitness,
application on fitness, adverse reflection on fitness
is usually required. It's certainly the practice.

Under 9.120 we are all required to report
convictions of ourselves, so Bob, the Commission, and
the Board get things from the person who was ticketed,
I think it's a criminal offense, DNR ticketed them for
not having some sort of label on his fishing shanty,
his ice shanty. Now I have long thought that the
profession needs to crack down on anonymous ice
fishing, but apparently Bob disagrees. That is
sarcasm for the court reporter.

The Commission does not pursue cases that
do not reflect adversely on a lawyer's fitness to
practice law, and the Board believed that the
standards ought to reflect the actual practices, so

that's why that's there.

This is also, again, I don't want to get in
trouble with Mr. Campbell, but I think he just did say
that, given your vote on 4.1, which puts client
misappropriation into 4.1 and sort of sends
misappropriation from nonclients to 5.1, this (b),
which is the Board position, is consistent with your
earlier vote in that regard too. Thank you.

CHAIRPERSON JAMIESON: Any further
discussion? Okay. With regard to standard 5.1, the
question is whether or not it should contain the same
provisions outlined in the, and then all in favor of
option (a), please say aye.

All opposed.

All those in favor of (b), say aye

That's the majority.

There is another copy of 5.1 that was
mistakenly in the agenda packet, so you can disregard
that.

And then the next standard is 3.2 regarding
isolated acts of negligence. I will entertain a
motion with regard to this proposal.

VOICE: So moved.

CHAIRPERSON JAMIESON: Do I have a second?

VOICE: Second.

CHAIRPERSON JAMIESON: Thank you. Any
discussion? John Allen. Oh, hold on.

MR. ALLEN: The purpose of the proposal is to
clarify that isolated acts of negligence are not
intended to be the subject of discipline at all, really,
and that except in very limited circumstances where
they are part of a course of conduct or negligence
combined with other factors when taken in the
aggregate that provide a basis for discipline. In
other words, an error, isolated, even a serious error,
maybe taken care of through and in other cases so
when the disciplinary system is approached with that,
because of the wording of some of the rules,
particularly as proposed, one could find an isolated
act of negligence without any causation of injury as
authorizing discipline.

The purpose of this proposal was to say that
if it is, indeed, isolated and unaccompanied by a course
of conduct or other factors in the aggregate which
authorize discipline, that it should not be commenced
to begin with.

MR. AGACINSKI: I don't think I disagree with
most of what John said. I don't you think really
prosecute many times for isolated acts of negligence
except intense misconduct. That is a standard of

51 (Pages 201 to 204)
Professional Conduct by adding the language here.

VOICE: Second.

CHAIRPERSON JAMIESON: So the motion is to make this a Model Rule of Professional Conduct proposal?

MR. LARKY: Correct.

CHAIRPERSON JAMIESON: To add this language to the Model Rules?

MR. LARKY: Yes.

CHAIRPERSON JAMIESON: We have second. Any discussion on that?

Hearing none, all in favor of making this proposal, rather than something for the standards, something for the rules, all those in favor, say aye.

Opposed.

Okay, now we are going to vote on actually this as being -- we are going to vote on whether or not this should actually be proposed in the rules.

Any discussion?

VOICE: Standards.

CHAIRPERSON JAMIESON: No, we just said that it's not going to be in the standards, it would be in the rules.

Mr. Larky, your motion was just that this be a part of the Model Rules as opposed to the standards.

Correct?

MR. LARKY: That's correct.

CHAIRPERSON JAMIESON: It's been changed now, rather than a standard, it's a rule, not necessarily 3.2, but just something that should be incorporated into the rules, the Model Rules of Professional Standards, and that's what's before you now, whether or not this language that disciplinary proceedings -- how much of this?

MR. ROMANO: Point of order. I understand the motion to move this provision to the Rules of Professional Conduct, but don't we have to dispose of it somehow as it is proposed to be a part of the standards?

You are asking the parliamentarian. I am in trouble.

CHAIRPERSON JAMIESON: This is what my understanding is, and I believe I have this accurately, please correct me if I am wrong. The motion before us was whether or not we change this proposal that said a new standard should be established to a new rule should be established within the Michigan Rules of Professional Conduct, and that is the motion that passed.

Now what we would vote on is, or discuss, is the proposal that would be a rule, a Michigan Rule of Professional Conduct should be established to provide, and that's should be before there.

MR. ROMANO: So in effect the yes vote on the motion removed it from it's consideration as a standard. I can ride with that.

CHAIRPERSON JAMIESON: So is there any discussion with regard to the new proposal now, which is a Michigan Rule of Professional Conduct should be established, dot, dot, dot?

Seeing none, all those in --

MR. VANBOLT: I guess those of us from the discipline agencies are kind of sitting here in stunned disbelief, I guess. If requested, I personally will do everything in my power not to serve on the committee that would have to go through every single Rule of Professional Conduct and determine which one would appropriately be subject to this rule.

I mentioned one rule now that is a per se rule, mishandling of client funds.

It doesn't matter under the case law in Michigan, it doesn't matter under the rules what your state of mind was when you misplaced your client's thousand dollars or $10 for that matter.

Now, it may or may not be prosecuted and you may or may not be publicly disciplined, but it's a violation and there is nothing -- my mind boggles. I can't get the words out to say how you would incorporate this rule into basically a rewrite of every other Rule of Professional Conduct in the United States and Michigan.

MR. CAMPBELL: Also given my record, I have a sense you guys are in favor of this, so I am going to support it.

MR. ALLEN: I have a question for John VanBolt and maybe Bob Agecinski too, and that is, I think the intent is obvious, and it was really stated probably more forthrightly the first time around that we weren't trying to change every rule, we were trying to make it clear that disciplinary proceedings would not be commenced for that purpose. If the standards is not the right place and the Rules of Professional Conduct are not the right place, where is the right place?

CHAIRPERSON JAMIESON: Any further discussion with regard to --

MR. GIGUERE: Yes, Gary Giguere from the 9th circuit. I would move to table the discussion since we changed it to the Model Rules of Conduct from the standards, which is what we came to discuss, so we can
subcommittee in order to maintain the web site and maintain the documents, make sure everything is up to date. We are having a meeting this coming Saturday, so a week from today, and I have got two Saturdays tied up. If anyone has any feedback of any sort, if you could let me know, e-mail would be fine, and I am published in the directory and any questions anyone has here or concerns. Okay. That works.

(Applause.)

CHAIRPERSON JAMIESON: I believe that covers everything on your agenda. Your Vice Chair has asked for a moment to speak with you. Oh, and Bob Gardella pointed out that we missed one individual who was on our list of appointments that wasn't named officially on the record, so we should add that person officially on the record so that we can get that individual a member of the Assembly.

MR. GARDELLA: Bob Gardella from the 44th circuit and chair of the Nominating Awards Committee. When we were nominating to fill vacancies earlier we forgot to put in there to fill the vacancy of the 44th judicial circuit, Linesas Baze of Jackson, so I would move that Linesas Baze of Jackson be allowed to serve the vacancy in the 44th judicial circuit.

CHAIRPERSON JAMIESON: Thank you. Any second.

MR. HOGAN: Thank you very much. I promise I will be very quick. The Law Libraries Committee, which is a standing committee of the Bar, did a survey of the various law libraries of the state. We established certain needs and from those needs we adopted the Michigan online self help site that now appears in conjunction with the State Bar's web site. It's where people can go, not just people off the street, but also attorneys that have identified needs for certain forms, certain data bases, certain free materials that might be available on the internet, as well as references to legal aid programs that are out there. That appears as item number four in your materials.

The Law Library Committee has formed a
we have to. As a matter of fact we have got to take
this on. This is so important to the profession, and
she has taken the ball and she has run with it ever
since then.

Now I am going to get all choked up about it.

CHAIRPERSON JAMIESON: That's because she is
up until 1:00 in the morning with me working on this,
so it's not just me alone.

(Standing applause.)

CHAIRPERSON JAMIESON: Thank you, all. I
will entertain a motion to adjourn.

VOICE: So moved.

CHAIRPERSON JAMIESON: Thank you, and I just
want for the record, although we have to approve that,
all in favor say aye.

We are early. I said 4:30, and it's not
4:30.

(Proceedings concluded at 4:27 p.m.)

STATE OF MICHIGAN

COUNTY OF CLINTON

I certify that this transcript, consisting
of 213 pages, is a complete, true, and correct transcript
of the proceedings and testimony taken in this case on
Saturday, April 16, 2005.

April 28, 2005

Connie S. Coon, CSR-2709
5021 West St. Joseph, Suite 3
Lansing, Michigan 48917