STATE OF MICHIGAN
STATE BAR OF MICHIGAN

MEETING of the REPRESENTATIVE
ASSEMBLY of the STATE BAR OF
MICHIGAN

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

AT HEADTABLE:

   DANIEL D. QUICK, Chairperson
   FRED K. HERRMANN, Vice-Chairperson
   JOSEPH P. MCGILL, Clerk
   JANET WELCH, Executive Director
   HON. JOHN CHMURA, Parliamentarian
   CARRIE SHARLOW, Staff Member
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Nomination and Election of Assembly Clerk

Presentation of Recognition to Assembly members completing their terms of service and committee chairs

Introduction of Hon. John M. Chmura

Swearing in of Fred K. Herrmann as 2016-2017 Chairperson of the Representative Assembly

Presentation of Recognition to the Immediate Past Assembly Chair

Adjournment
Chairperson Quick: Ladies and gentlemen, please take your seats. We are going to proceed. I would like to officially call to order the meeting of the State Bar of Michigan Representative Assembly. We will ask our Assembly clerk, Joe McGill, to confirm we have a quorum.

Clerk McGill: We have a quorum.

Chairperson Quick: He has confirmed we have a quorum. You may proceed. Call Mr. Ray Littleton, Chair of the Rules & Calendar Committee, to the microphone or the stage, either one.

Mr. Littleton: Thank you. Good morning everyone. I would like to move for the adoption of the revised calendar, which you should have gotten emailed to you over the past two weeks.

Voice: Support.

Chairperson Quick: I heard support. There is a copy of the revised calendar at each of your seats, so everyone should have that. Any discussion?

All in favor say aye.

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

VOICE: SUPPORT.

CHAIRPERSON QUICK: Heard a motion. Is there support?

VOICE: Support.

CHAIRPERSON QUICK: Any discussion?

All in favor.

Any opposed?

Excellent. We are already back on schedule.

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

MS. ZIMNY: Good morning. As Dan said, I am Erica Zimny, chair of the Awards & Nominating Committee. Over the last several months my committee has performed a lot of hard work to find the talented individuals that are contained in the memorandum before you dated September 22nd, 2016. We are looking forward to working with those many individuals in the
Representative Assembly. What I am going to do is ask for a motion to approve the memorandum as submitted.

VOICE: So move.

MS. ZIMNY: Motion. Second?

VOICE: Second.

MS. ZIMNY: Any discussion?

All in favor?

Any opposed?

Thank you.

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

(Applause.)

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

MS. ZIMNY: The first award that we will be presenting this morning is the Unsung Hero Award. We do have two recipients of the Unsung Hero Award this
year. The presenter for the first recipient is
Ms. Erin D. Toburen, who I would welcome to the stage.

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

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

In 2013, in my humble opinion, all of us in
Michigan were lucky that she and her husband, Josh,
also a captain in the JAG Corps, chose to call
Michigan home. In 2013, she began working at the
U.S. Attorney's Office where, as a primary
responsibility, she prosecutes human trafficking and
crimes again children involving pornography and heinous crimes.

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

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

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

(Applause.)

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

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

Thank you to all the members of the U.S.
Attorney's Office who showed up today to support me and continue to pursue justice every day in their jobs. Thank you so much.

(Applause.)

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

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

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

Besides being utterly charming and humanizing, Jerry's affinity for the half Vulcan Mr. Spock makes perfect sense to me. If ever it
turned out that Vulcans were real, it would not
surprise me in the least to find out that Jerry has
been their perhaps half-human ambassador living among
us for years to study us and make us better people.

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

Jerry is the only attorney I have ever met
who has a permanent mental rolodex of every major
criminal case to come out since his law school
graduation in 1981 until today, just sitting at the
ready in his brain. Even aside from his impressive
legal knowledge, Jerry is regarded as a foremost elder
statesman of our county. His opinion carries enormous
weight. Both prosecutors and defense attorneys
regularly turn to him for advice, and, as Ms. Lamp
wrote in her recommendation letter, it is not at all
uncommon to hear a judge pause after a legal argument
and then ask, "What does Jerry think?"

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

   Like Mr. Spock, however, Jerry is not just a
bright logician. He has an enormous and very human
heart. Jerry has made it his mission to take legal
professionals of every stripe -- attorneys, law
clerks, paralegals, legal staff -- under his wing. He
routinely takes time out of his immensely busy
schedule to mentor new attorneys and place his years
of wisdom at our feet. Every law clerk I know has a
Jerry story of a time when he dropped everything to
come and teach us, talk with us, answer our questions,
of a time he went out of his way to share himself with
us. It might be an entirely legal discussion or one
about his world travels or eclectic taste in music or
politics. It rarely lasted less than an hour. I have been smarter at the end of every one.

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

Jerry, you see, is not just a brilliant legal mind or a caring coworker and mentor. He is a generally good person who strives every day to make the profession better by showing us what we could be -- ambassadors for justice and righteousness --
regardless of the titles we hold or the positions we advance.

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

(Applause.)

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

(Applause.)

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

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

MR. KIRKEY: Good morning, everyone. I want to thank you for voting to present the 2016 Michael Franck Award to my boss, Lynn Chard. You are
a brilliant group of people.

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

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

Lynn is a brilliant businesswoman. As famous people go, I like to think of Lynn as similar to Mike Krzyzewski, the head basketball coach at Duke University, who just so happens to be the winningest basketball coach in history and a three-time Olympic Gold Medal winner. It sounds odd, the comparison, but hear me out for a second. The two of them both have a single focus on success. They
both are determined to make the most of what they have, and they both believe deeply in the team and making the most out of each individual's talents. They both ooze leadership.

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

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

Lynn is well known for thinking beyond today. She looks out the window and sees trends in the law, in technology, and in education, and she moves an entire organization to respond. She has moved ICLE from a seller of books and seminars to really a
service business providing lawyers with confidence, assurance, reliable resources every time they log in. She has worked closely with the State Bar and many sections on collaborations that benefit Bar members. I am confident that if Lynn had chosen to she could be jet setting around the world as a CEO of a Fortune 500 company, but she cared too much about the lawyers in the state, about her wonderful family, and about a little nonprofit in Ann Arbor to ever consider leaving. Thank goodness.

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

(Appause.)

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

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

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

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

So it's with great, heart-felt thanks that I thank you, and I would be remiss if I didn't also
thank my family and friends. I have a whole group of
them in the back there, including -- I have two
wonderful sons, Brendan and Devin. Devin is a police
officer out in Las Vegas and couldn't be here, but
Brendan is here with his little son. That's my
grandson. He made his entrance right on cue I guess.
So with retirement, I will be able to spend more time
with them, and then just, you know, I have such a
wonderful group of friends, many of whom are in the
back, as well as colleagues, the colleagues at work,
and I will be spending more time with all of them.
But thank you very much.

(Applause.)

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

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

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

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

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

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

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

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

Along those lines, you will note that our agenda has no breaks in it up until lunch and then after lunch until adjournment, so obviously there is
coffee and food in the back and folks can float in and out as they like, but we are going to try to power directly through.

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

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

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

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

That's the long and the short of it on this one. The rule changes to 7.3 that go along with this are merely nomenclature changes. If 1.18 is adopted, then the use of the term prospective client in 7.3
needs to be changed, but there is no suggestion for substantive change in that rule. So that's where we are at on this one.

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

VOICE: So moved.

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

VOICE: Second.

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

MR. FALKENSTEIN: Peter Falkenstein, 22nd circuit. My only question relates to one of the comments which states, Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client." I think we all understand the intent behind that rule. Anybody who watched The Sopranos back in the '90s understands if you are going through a divorce, communicate with every divorce lawyer in town, that prevents your spouse from doing the same. However, the question is does this open up a can of
worms, because how do you determine the intent in contacting, communicating with various lawyers. If you're in a small town, there are only two real estate lawyers, and you are contemplating a real estate title issue, you are probably going to communicate with both of them, then when you file suit the other party is going to say, Well, you tried to disqualify the only other competent attorney.

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

MR. MOGILL: Thank you. This is an issue that does come up. In fact, I happen to teach P.R. at Wayne, and in talking about this issue in class two weeks ago, there was an example of a divorce attorney from Chicago who did the same thing very blatantly. I was quite surprised, frankly, that she didn't get in trouble. But the short answer to your question is, yes, this is a real problem from time to time. Two, I
don't think it changes one way or the other in terms of this rule being adopted or not. This kind of an unsavory tactic will be around, and I don't think this rule affects it one way or the other.

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

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

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

CHAIRPERSON QUICK: Name and circuit.

MR. LITTLETON: Ray Littleton, 6th circuit.

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

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

MR. LITTLETON: No, that makes sense.

MR. MOGILL: The one that's screening, it's not a disqualification of the entire firm, and, two, what generates the potential for disqualification is when you received information that was potentially harmful for the client, and one thing that lawyers, again with or without this rule, sometimes do is in that initial consultation you talk generalities. You get to know each other a little bit, and you
intentionally avoid receiving sufficiently detailed information to trigger the potential disqualification, and then as things move forward, then you have a more in-depth conversation. But to your specific question, this rule would permit screening, avoid the entire firm being disqualified.

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

CLERK MCGILL: Voting is open.

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

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

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

Mr. Mogill.

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

So our second proposal is with respect to Rule 4.4, and this is a proposal that has been a little bit vexing, the proposal is not vexing, but the
issue that the proposal intends to deal with is one that is increasingly vexing as technology results in more oops situations when you hit send and inadvertently send information to the other side that you didn't mean to.

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

There is another reason for the rule not to go beyond creating an obligation of notice, and that is because, well, there are going to be so many different fact variations and different situations that it would be pretty much impossible to set all this out in a particular rule, plus the fact that in some respects the issues become issues of law rather than ethics, but by way of example, depending on the circumstances, maybe it was or wasn't sent to you
inadvertently. Maybe it was or wasn't information that was confidential. Maybe there was or was not a waiver, and all these can be played out and litigated as you move forward, but only if you have notified the other side that you have received the information and given the other side an opportunity to do whatever they choose to do or not based on the fact that the information has been provided to you.

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

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

VOICE: So moved.

CHAIRPERSON QUICK: Second?

VOICE: Second.

CHAIRPERSON QUICK: Thank you. Any discussion on this proposed item, or is it so immensely logical that no further discussion is needed? It seems to be the latter. Oh, Mr. Garnell. Mr. Gobbo, sorry.
MR. GOBBO: It's okay. Steve Gobbo from the 30th circuit. One question in terms of the text in the first paragraph that is added. It talks about was it inadvertently sent. Sent to whom, because it could be sent to somebody else other than the lawyer, so I would perhaps make a friendly amendment in the sense of just adding in sent to the lawyer as opposed to the lawyer's client or sent to somebody else.

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

MR. HUBBARD: John Hubbard from the 3rd circuit. There was an instance though where an attorney contacted the client inadvertently. He thought he was sending it to his own client and sent
it to my client instead. I then got a phone call from
that attorney that said it was inadvertently sent and
it did have certain information within it, please
destroy it. So I am not sure that we would actually
want to limit to the lawyer, because my client
immediately sent it to me. I received it. It wasn't
sent to me, but I received it, so I am not sure
whether we should change it to received by the lawyer.
Because if your client is getting the information --

MR. MOGILL: A lawyer receives it.

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

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

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

MR. MOGILL: Thank you.

MS. FOX: Jessica Fox, 56th circuit. I have
a question. Were listservs considered when this was conceived, because my thought is, if you have two attorneys who happen to be on the same listserv. One of the attorneys sends a message to the listserv asking a general question but they give enough factual information that the other attorney could tell that it's about their case or about the matter that they are involved with, and that matter I would see that the attorney was not technically sending it inadvertently, so did you consider the idea of rival attorneys being on the same listservs and information coming out that way?

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

MS. FOX: Thank you.

MR. FALKENSTEIN: Peter Falkenstein, 22nd circuit. Given the fact that we are trying to put more of a burden or the onus on the attorney receiving the communication and once the attorney sending it is notified the burden shifts back to them, I would suggest a friendly amendment that somewhat broadens the scope of documents to which one is
required to notify the sender, which would be the lawyer's client and knows or should reasonably suspect. It's very easy to argue that I should not have reasonably known that a document I received that has no identifying features on it but appears to be some sort of outline of a factual scenario may have been inadvertently sent. It may be attorney work product, but there is no way I should reasonably know that, because there is nothing identifying it, and unless I actually communicate to the attorney sending it, I can always argue that unless I had notified him that I have this document that's not identified I really have no burden to make that communication because I should not have reasonably known it, it doesn't have any identifying features, but as an attorney I would have reason to suspect that it might have been inadvertently sent to me. So it simply puts a little broader burden on the attorney receiving the document to make that communication and say I got this document, I don't know what it is, was it inadvertently sent to me?

MR. MOGILL: Thank you. I don't want to give short shrift to your very thoughtful suggestion. My off-the-cuff reaction is I don't think that the difference between know or suspect is going to be that
great, and one of the points that we are interested in
is consistency of nomenclature and then relating back
to the definitions of the terms in the introduction to
the rules, and for that reason I would respectfully
ask that we keep it the way we have got it. I think,
frankly, this rule has been around enough now in other
jurisdictions and is working that we can be
comfortable that your concern, which is absolutely a
very significant concern, is adequately addressed by
the wording the way it is.

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

MR. MOGILL: Yeah, promptly, and promptly is
going to be different things in different
circumstances. And this is also on purpose, because
different circumstances are going to -- what is prompt
in one circumstance is going to be -- you could have a
lot more wiggle room in another circumstance where
there is not a deadline or the use of the information
is going to create a particular subsequent problem.
It's a reasonable -- what would a reasonable person
consider to be prompt under the similar circumstances,
and, again, I think the experience has been throughout
the rules where there is an obligation to do something promptly rather than in X number of days over time has come to be found to be workable.

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

As a professional courtesy, if I had that realization, I would take it upon myself to notify the person anyway, but this is different. This is then
putting an onus of discipline intention on the person who doesn't promptly notify and not more judging what was prompt, whether it was known or reasonably should have been known to be inadvertent. There is a lot of risk there. As you know, I sit as a hearing panelist on the discipline hearings, so I see these things, and I am sensitive to when lawyers become subject to sanctions for this type of thing and, you know, what thoughts did the committee have in recommending this about those types of issues?

MR. MOGILL: Great question, Jeff. Thank you. From my standpoint, the caveat that you have to have reasonably, you know, reasonably should know that it was sent inadvertently makes it very clear that if you had a significant question as to whether it was sent inadvertently or not, then that doesn't get you to that threshold and does not put you in a jeopardy. And, again, so I think that it assesses the allocation of responsibilities in a way that does not impose an unreasonable burden on the recipient. Unless you reasonably should have known that it was inadvertent, you have no duty. The totality of the circumstances, assessment in any given case, I have not seen lawyers that I believe have been unfairly gone after when there is a good faith basis for determining that there
was no duty. I don't think it's been the -- I don't think it's been an issue, but it is absolutely a great concern to raise.

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

MR. MOGILL: Thank you, Victoria.

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

I just wish to make an observation just to echo what Ken has already pointed out, but the fact that if we don't have this rule we are leaving this up to a case-by-case issue with different courts. This has come up that I know of at least twice, once at the state level in a court of litigation and another time in the Western District. Now, having the rule at least puts us on, you know -- when you are concerned
about notice, I would be more concerned about the iffiness of whether this is going to get applied in the middle of a courtroom setting as opposed to having a written, hard-and-fast rule which I think gives us better guidance, so that's my only comment.

MR. MOGILL: Thank you. I agree.

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

CLERK MCGILL: Yes, voting is open.

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

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

CHAIRPERSON QUICK: 79 to 12, motion passes.

Thank you very much, ladies and gentlemen.

(Applause.)

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

CHAIRPERSON QUICK: I would like to invite
Bob Ebersole to the microphone to present agenda item number 9 and, while he is coming forward, thank Professor Mogill, Bob, and other presenters here today for taking time out of their busy schedules to work with us in presenting these very important issues.

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

The Bar is faced with declining revenue. Since 2014, there has been approximately a nine percent decline in its revenue in Character & Fitness fees each year. This is because nationally enrollments in law schools went down. We don't get as many people wanting to be lawyers, so as the applications go down, so do the fees, and the
collection of those fees is important to our process. The current $225 was last set in 2001, and there has been no increase since. And even at that time the fee did not cover the full cost of the Character & Fitness process. The staff has researched where Michigan stands in relationship to other comparable plans, and they obtained data from the National Conference of Bar Examiners. The rough national average for comparable states for Character & Fitness fees, $350. And for Bar exams, it's $525. You will note that the Character & Fitness fee is usually lower than the Bar exam fee in most jurisdictions.

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

Will the proposed fee increase cover the full cost of Character & Fitness? No, but it will keep us closer, first, to national averages, and it will help
defray the expenses. It's going to reduce the shortfall.

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

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

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

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

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

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

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

And then the graphic depiction for the next slide of the shortfall, which is currently $356,000, and the next slide says, if the fee increases improve, that shortfall falls. It goes down by $135,000. And
the final slide has the conclusory statements.

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

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

VOICE: So moved.

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

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

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

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

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

MR. TEICHER: Well, I would ask that you do a
friendly amendment to make that 375 400.

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

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

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

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

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

MR. MASON: I am sorry. Gerrow Mason from the 31st circuit. It would seem to me that we should not be running at a deficit. If you know it costs more to do something, then we need to be realistic and try to deal with that figure. It also looks like the Character & Fitness Committee is trying to look at
tradition, what other jurisdictions do, and strike
some kind of a balance. If I understand what the
gentleman said, it sounds like there may be potential
for costs to come down as they use more technology to
influence the process. If I understand that
correctly, and I don't know if the movant could
clarify that, but it seems to me they are indicating
we have to raise fees because we are running a
deficit, we are not charging nearly enough, but at the
same time it's implied that there may be some cost
savings down the road. If that's the case, the motion
makes sense as presented. If that's not the case,
then we are not addressing the issue, and we need to
deal with it and get it done and try to run with a
balanced budget.

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

CHAIRPERSON QUICK: Thank you.

MR. CRANDELL: Patrick Crandell, 6th circuit.
I guess I am questioning does -- my comment does go to
the amount, so I guess it's relevant to the amendment. My question is whether there was any consideration, whether any analysis as to new graduate lawyers to the extent they actually have employment coming out of law school and what extra burden this increased cost has on them. I have been a practicing lawyer for a number of years, so I don't know what the new job market economy is, and my question is is an increase in the cost of Character & Fitness putting an undue burden on new lawyer applicants?

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

CHAIRPERSON QUICK: Discussion on the
impending amendment, please.

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

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

All against say nay.

Abstain.

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

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

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

I just don't see the necessity of increasing. If you want to add a percentage utilizing a credit card, fine. If you use a credit card to pay various bills, they have a percentage on the bottom of that, two percent, one percent, three percent, whatever, I have no problem with that. If you want to use a card and that's what it cost the State Bar, I don't have a
problem with that. And if you want to increase the
late fees, hey guys, if you are going to be a lawyer,
you can't be late. I mean, I have noticed that when I
have been late to court a few times.

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

CHAIRPERSON QUICK: Thank you.

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

When I graduated law school years ago, I
borrowed $120,000. It's not as easy -- even if it is easy today or more easy, why is that justification for raising the price up? So they can add even more debt? That doesn't seem fair.

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

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

Now, in the future, if the electronic improvements were to bear fruit and result in less need for staff, I am sure the State Bar would adjust that in the Character & Fitness department. Already staff members in the Character & Fitness department have ancillary responsibilities from time to time to
cover for other units. With that, I turn it back over to Mr. Quick.

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

    CHAIRPERSON QUICK: Thank you.

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

    MR. EBERSOLE: I am not in the position to talk about dues, because I don't have much to do with them except paying them, so I am not in a position to answer that question, and I would have to consult with staff and get back with you. I really don't know.

    Cost-saving measures, eventually the electronic stuff
is going to give us some cost savings, there is no question about it. But it costs money to get the software.

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

MR. DIMENT: Morley Diment, 47th circuit. I think I might be the youngest member here, at least in practice. I haven't even practiced for a year yet. I had to pay these fees. I had to pay for my own law school, as has been described. Initially when I started reading this in my hotel room last night, I was not in support of it because it was going to be more money that people like me who recently exited law school with large amounts of debt would have to pay. When I started looking into the electronic measures that are being offered and looking at the national averages and things of those nature, I can't help but support it, because realistically we are running at a deficit right now. It's obviously a problem. I will echo -- I am sorry, I didn't catch your name, but I agree with her, that it is a drop in the bucket
compared to what we are facing as people who are entering the practice of law. We realize that we are taking on large amounts of debt for the purpose of hopefully becoming great attorneys who can then, you know, throw down $375 as someone described.

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

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

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

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

(Applause.)

CHAIRPERSON QUICK: The discussion so far
this morning reminds me and perhaps reminds you of the
beauty of this institution, to hear points of view
from practitioners of all aspects of our demographics
in this Bar. This is a unique body where those
viewpoints can be expressed. I am not aware of
anywhere else in the State Bar of Michigan that you
can do that. It really is a great thing, and I hope
you take a moment to appreciate it.

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

(Applause.)

EXECUTIVE DIRECTOR WELCH: Good morning.
Thank you, Dan. I am glad Dan referenced this body as
an institution, because I am a student of the history
of the State Bar and this institution, and, at the
risk of sounding slightly ridiculous, whenever I stand
up here, I feel to myself like a fresh face before the
State Bar of Michigan and the history of the State Bar
of Michigan, but, much to my amazement, I calculated
last night that this is the 32nd session of the
Representative Assembly that I have attended as an
employee of the State Bar, and it's the 20th time I
have had the privilege of addressing you as the
Executive Director. That's just the truth, but it
does not feel that way to me at all. It feels very
fresh.

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

The proposals on today's agenda implicate
some of the toughest questions facing the legal
profession today. I hope you welcome them and relish their difficulty, because more and even more difficult questions are on the horizon. These are exactly the questions the final policy-making body of the State Bar should be taking on.

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

Together the work of the task force added up to almost 4,000 volunteer hours. When we organized the town hall on the task force issues last January to spread the word about the work and to gather feedback,
we feared that maybe the indetectable Tom Rombach had
already managed to find at a point every lawyer in
Michigan who was interested in the future of the legal
profession, but happily we found that the audience and
the appetite for these issues is much bigger than the
160 task force participants. We got feedback from
throughout the state, and I hope you have gotten
feedback as well. We got feedback from across the
country, and indeed across the world.

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

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

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

   So let me be explicit. Limited scope representation can be done badly if the rules are not clear and the support system for practitioners is not in place. Specialty certification can be a bureaucratic waste of time in the wrong hands, but your many, many colleagues who worked intensively for
a year on these issues, some of whom will be speaking
to you shortly, came to the conclusion that Michigan
can, must, and will do these things well.

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

(Applause.)

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

(Applause.)

MR. PAPPAS: Thank you. For those of you who
don't know me or remember me, the last time I spoke to
this august group was when I was State Bar President
in 2008, and I am back today to speak to you because I
believe that limited scope representation is vitally important to clients, attorneys, and the Michigan courts.

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

Linda will be followed by Erika Davis, who has a thriving solo practice in the city of Detroit, served on the Practice Committee of the State Bar's 21st Century Practice Task Force, and is co-chair of the State Bar's Committee on Justice Initiatives. Erika will report on the LSR Summit, which was held in
Michigan this year with a national expert to explore the benefits of LSR to clients, lawyers, and the courts.

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

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

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

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

LSR is vitally important to our justice system because it provides access to legal representation to many low and moderate income individuals who otherwise would not have such access and who need limited assistance. And although a key
beneficiary of LSR is the self-represented client, LSR also benefits the courts and our justice system by allowing self-represented litigants to utilize an attorney's expertise on essential legal matters, thereby helping the judges better manage self-represented cases and also increasing fair results.

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

Even coming from a large law firm like my firm, Dickinson Wright, I have had numerous inquiries over the years from clients asking if I could assist them on limited matters, such as drafting a mediation statement, negotiating a settlement, or advising them on ongoing litigation, but I did not assist the client because I did not want to be drawn into litigation with a client who could not afford to pay me for full
representation, and I did not want to run afoul of any ethical rules. With these proposed amendments, however, I would have no hesitation to provide LSR to a client in need.

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

MS. REXER: Thanks, Ed. My job is just to take a few minutes to talk about how the 30-some states that have these special rules run effective, high quality, ethical LSR programs, and they do that by providing additional support, and, whereas these kinds of additional supports are not up before the Assembly here for adoption, they are not part of the rules, I want to take just two or three minutes to tell you that of the groups that have vetted this in Michigan and studied it for a couple of years, and the 21st Century Task Force is one of them saying that we need a comprehensive program, the rules are essential, essential for guidance and direction for lawyers, for the protection for lawyers and clients that Ed talked about and the benefits for courts, but where it's really been successful and the ethical practice
promoted, those states have developed additional tools, and because of the in-depth research by our groups in Michigan, the State Bar of Michigan is well positioned to move forward and provide additional support for lawyers who begin to practice limited scope representation, and I will just tell you briefly what some of those supports would be.

Forms, for example, for attorneys and for courts, educational resources training of lawyers, and information to the public about what limited scope representation is, referral systems so that qualified limited scope attorneys can be found by clients, and evaluation. And we are fortunate to be able to look to some other states that have had a great system to watch how they can continue to improve it as they go forward and these groups that we have worked with in Michigan to really come up with the approach here of a comprehensive system. We put in some comments from the Committee on Justice Initiatives that the Assembly members received this week, so I don't need to read them, but I just want to tell you that training, for example, would be on subjects like the rules, like the forms, like the referral systems, even business models for successful limited scope practice, and we heard from a number of people around the country who have
had a great, profitable practice doing that. Tips and best practices, grievances, that sort of thing. Even some sample forms have been drafted.

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

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

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

On the access side, if adopted, these limited scope rules will provide the ability for people to receive legal services who may not otherwise receive
legal representation, because they don't necessarily
meet the income guidelines for free civil legal aid,
but they still need some assistance.

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

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

VOICE: So moved.

CHAIRPERSON QUICK: Motion, and is there a
second?

VOICE: Second.

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

MR. MASON: Good morning. Gerrow Mason from
the 31st circuit. I stand in opposition to this
proposal. I think it cheapens our profession. It
turns us into a glorified LegalZoom. It will
encourage unethical lawyers. I think it will make our
profession irrelevant, and I also think that in the
end more people will go unrepresented, because
ultimately there is going to be less lawyers. You are already seeing law school applications decline because it's hard enough in this profession without taking it and cheapening it even more.

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

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

MR. BURRELL: Aaron Burrell, 6th circuit. I am also a member of the Committee on Justice
Initiative. I rise to support this motion. Limited scope representation marks a significant advancement in the delivery of legal services and ultimately represents the future of the legal profession. I feel that LSR will put high quality legal assistance within the reach of many low and moderate income individuals who have been denied assistance before, would allow attorneys to benefit from an increase in paying clients, and would allow courts to benefit greatly from an increased efficiency derived from an attorney's experience and input in what would otherwise be an unrepresented litigant's case. I feel that LSR, the unbundling of legal services, is the future for practitioners. Michigan should join other states in the nation, over 30 states in the nation, who have already made this important transition, and with that I support the motion.

CHAIRPERSON QUICK: Mr. Burrell's comments remind me that in our supplemental materials, which should have been at your seats, there was a memo to the members of the Representative Assembly from the Committee on Justice Initiatives which was in support of this proposal. So I wanted to make sure that you were mindful of those supplemental materials in front of you.
MS. VULETICH: Good morning. Victoria Vuletich, 17th circuit. I am a professor at Western Michigan University Cooley Law School. For ten years I was staff ethics counsel at the State Bar of Michigan where I prosecuted people in companies that were engaged in the unauthorized practice of law, and I am also a member of the 21st Century Practice Task Force, and I come at this issue from three different perspectives. Eighteen years ago when I started out in the State Bar of Michigan prosecuting unauthorized practice of law violation, I was horrified to learn of the harm that involved people because they are so desperate for legal representation and they will search for easy and quick and affordable options and often fall victim to unscrupulous predators in the marketplace.

I have also seen our colleagues, you have all seen them too, struggling to redefine their practices in a highly restructuring, very rapidly restructuring legal services marketplace. But I have spent the last 18 years with my career devoted to lawyers and helping lawyers be better lawyers, be ethical lawyers and be the profession that people want the profession to be. And I think -- I know. I am confident that this proposal in front of you today crafts an exquisite
balance between all of the three of these dynamics, and I can say that as the chairperson of a subcommittee on the 21st Century Task Force, I was the junior member on the task force, or our subcommittee, which was populated with seasoned, veteran lawyers, and the limited scope representation, civil representation, civil matters flew through without opposition. There was very strong support, so I strongly urge your adoption today. Thank you.

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

So, as a legal aid attorney, you know that I can only represent people who qualify for our services. Many people don't qualify. They may have more assets, they may have a higher income, they may be conflicted out, and so we can't represent them. So where do they turn? They turn to our legal self-help
center in Berrien County. It's one of the best. They are fantastic people there, but we are talking about folks who are not educated in the law. For them, often it's a challenge to merely fill out the SCAO forms for them to, say, get a divorce, so then what becomes of these people? They go in front of the judge who then is tasked with educating them on what they need. They are sent back to fill out the proper forms. They go back to the legal self-help center. They then make another court date, and it goes on and on, and in many of these cases we are seeing those cases dismissed because they have timed out under SCAO deadlines. I have three clients currently whose cases were dismissed years ago who are seeking divorces because they don't have the savvy to fill out those forms. So this will help, frankly, not just members of the Bar, but it will also help the courts to move quickly and promptly in resolving these issues.

And here is the thing, folks. It's already happening. I don't know if it's happening in your area, but it's happening in mine, and the reason why I know that is because sometimes I will have a pro se litigant on the other side who will present me with a prepared judgment of divorce. There is no attorney signature on it, but you bet your bottom dollar that
was prepared by an attorney, because, frankly, I recognize the style of that judgment, and the courts do the same. So we can identify the lawyers who are, you know, in secret and in the dark preparing these to assist these clients, to assist the courts, yet we can't bring them to the light of day. We can't encourage them to do this to help the court system move quickly. Bottom line, you know, bottom line, this is an access to justice issue, right? And that's what we are about.

Now, I get it, from a private practice perspective, which has to be respected, this may not always look like the best option, but the reality is that we need to come up with additional options that will branch off of this. For example, one of the things that I have talked with our chief justice about is making a lawyer list of attorneys who are willing to do low cost legal services and to do unbundled services, but we have no one willing to do it without the protections that this rule affords. They are worried, they are concerned, and rightfully so. We need this to protect ourselves. We need this to protect those lawyers who are willing, maybe on a pro bono basis sometimes, and I certainly support additional funding for legal aid, but at the same time
we also need this tool to deal with the pro se
litigant that is not going to stop, is only going to
increase as we move forward.

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

MS. PARKER: Alisa Parker, 37th circuit. I
am rising to support this proposal for all the reasons
that my colleague, Mary, just stated. I can only
go -- legal services attorney, so I won't even go into
the litany that she just provided in terms of the
things that we see and the people that we have to turn
away for all the reasons she stated. But I did want
to bring also another perspective. As a younger
attorney, in talking to our colleagues, we just looked
at statistics about law school, entrances declining,
people who are not looking to go into this field, and
one of the things that I recognize in being involved
with community and other types of organizations is
that other industries are changing with the times, and their generation, especially the millennial generation, that is looking to do things in a very different way. So when you are looking at attracting people to practice law and how are they going to do that successfully in this economy, and especially when they know they are going to have to take on an incredible amount of debt to do it, I think these rules provide a source to be able to move in a direction that provides 21st century practice that makes sense and that also lines up with trends in other industries.

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

MR. ROMANO: Vince Romano from the 3rd circuit. I rise to speak in favor of the proposal. I
think it's really critically necessary to the advancement of the profession. I specifically want to address the assertion that was made that this somehow diminishes the lawyer's role and perhaps it diminishes business income. I come at that from a little different perspective. I have been a legal marketing professional, a legal marketing consultant for 25 years, and I fervently believe that this proposal represents great opportunity for lawyers to develop and expand their practice, and on both those bases, the need to do it and the great benefit to individual lawyers practicing, I support it. I hope the Assembly will support this motion too. Thank you.

MS. BREITMEYER: Kim Breitmeyer from the 30th circuit, and I also rise in support of this proposition. I had the opportunity to attend a workshop a few months ago on the issue of limited service, and I was thoroughly convinced after being a participant in that that this is an access to justice issue, that it is a win, win, win for courts, for litigants, for the public, and I believe it is an excellent companion to the Michigan Legal help website, which, if you haven't checked it out, is an amazing source, and I point people to it all the time. And I pose this question to you, who hasn't provided
limited services to friends, family members when they have asked? And I do see in the packet that we had that the legal services and legal aid organizations attributing large percentages of people who don't qualify for those services. I have watched those in my professional life working for the State try to represent themselves in administrative hearings, and they struggle with basic forms, with trying to figure out how to appeal a decision that's not in their favor, and I feel that this could only benefit everyone. Thank you.

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

PRESIDENT BUITEWEG: Thank you, Chairman Quick.

CHAIRPERSON QUICK: Current. Oh, minus one hour.

PRESIDENT BUITEWEG: Still have 60 minutes. Lori Buiteweg, 22nd circuit. I can't think of anything more important that I would want to address this body on before passing the gavel over to Larry Nolan in just an hour. Limited scope representation, or unbundling as many call it, or right sizing as I like to call it, is something that I
shared my beliefs about in my Bar Journal column last month, and, because I suspect that some of you may be too busy to read my columns, I will quote myself to you.

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

Some of you are already engaging in limited scope representation -- I know I have done it -- but there is a tug of war going on between Michigan Court Rules and the Michigan Rules of Professional Conduct, and these proposed rule amendments that you have before you today are intended to fix this. Without good rules that clearly authorize limited scope representation and give lawyers guidance on what ethical LSR is, lawyers may be reluctant to try it, and that would be a shame. LSR will help more self-represented persons get help with some part of their case, make hiring lawyers for discrete tasks affordable, and help the courts by having a lawyer involved when the person would otherwise have no legal help. Of course making it a lawyer's duty to
determine whether LSR is appropriate for given clients
is a part of every effective LSR program in our
country.

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

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

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

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

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

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

(Applause.)

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

CHAIRPERSON QUICK: Ladies and gentlemen, the model of efficiency that is the Representative Assembly places us ahead in our calendar. I would like to entertain a motion to move current agenda items number 15 and 16 up for immediate consideration. This is the two proposals dealing with medical
marihuana in the state of Michigan, the aspects of that portion and related subject matter, and our proponent is available and willing to move forward.

VOICE: So moved.

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

Any opposed?

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

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

In 2008, Michigan voters approved the Michigan Medical Marihuana Act. While patients, caregivers, and physicians who comply with the MMMA requirements are protected from state criminal
prosecution for production, possession, or delivery of marihuana, the MMMA does not protect individuals from federal prosecution under the Federal Controlled Substances Act or related federal statutes. Federal law provides it is illegal to possess, manufacturer, distribute or dispense marihuana, or conspire to do so. In other words, while the client's conduct may be legal under state law, it remains illegal under the federal law. Consequently, lawyers who assist these clients risk being accused of conspiring to violate federal law and MRPC 1.2(c) as written.

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

A substantial number of states which have authorized some sort of marihuana legalization have also addressed the issue of Rule 1.2(c). There is a general agreement within these states that a lawyer may advise a client on the meaning of state marihuana
laws, and may assist a client engaged in state legal
marihuana-related activity, if the lawyer also advises
the client of the illegality of such activity under
federal law.

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

Interestingly enough, there are two house
bills, actually three of them, that have just been
signed, ratified yesterday. The ink has not even
dried on these bills yet. That's House Bills 4209,
4210, and 4827. And actually a person that's on the
Marihuana Law Section Council, Robert Hendricks, we
had this discussion last night, and it kind of brought
into this big quandary, because this is something that
I had seen, many others had seen for the last couple
of years since we have been really getting involved in
this, since 2009, and now that we have these three
pieces of legislation that are an immediate effect,
not 90 days from now, but they are an immediate
effect, except for you are not going to be able to get
a license for what would be a provisioning center for
approximately a year, but they take immediate effect,
so it leaves with this question as to who is going to
represent these people? Who is going to represent
them? If we cannot as lawyers, regardless of where
anyone stands on the issue, whether you are a
prosecutor, whether you are a defense attorney, and,
more importantly, if you are involved in the cannabis
industry, which obviously we have one right now that's
going to be regulated with administrative rules to be
knocked out within the next several months, actually
probably weeks, and something needs to be done about
that.

Right now there has been -- obviously, this
issue is a huge gray area. There are some
dispensaries or provisioning centers in Michigan and
local ordinances that protect them. Right now it's a
gray area for attorneys in Michigan to be representing
these people. And now this is even expanded more
specifically to a three-tier growing system, whether
it be 500 plants, a thousand plants, 1500 plants, or
if you are going to open a provisioning center, also
commonly known as a dispensary, if you are going to be
transporting cannabis, if you are going to be an inspector. These are all things that people need representation for, and this process, it's going to happen pretty quick, and just so everyone knows that since 2008, actually 2009, there have been nine cases that have went up to the Michigan State Supreme Court in various different aspects of the law. Most of them are criminal related. However, there are several other issues. I know that there are many attorneys in the room that have knowledge of some of the civil aspects and other aspects as well.

I thought about this, you know, this morning again, and, as attorneys or whatever it is that we do, whatever is important to us in progressing with justice, and I was thinking of some of these things from the awards dinner last night, which was great, if anyone had an opportunity to go, these things that we do, they are important, and right now the way that 1.2(c) under the Michigan Rules of Professional Conduct are, that kind of leaves us at half-mast at best, and as things are going to be happening relatively quickly, I think we need to be under full sail for this big wind that's going to be kicking up here in the next few months. So with that in mind, I guess I am leaving this open for the Assembly debate.
My apologies. I will try this again. Is there anyone on the floor that has a motion to please consider this amendment to Michigan Rule of Professional Conduct 1.2(c)?

VOICE: So moved.

CHAIRPERSON QUICK: Is there a second?

VOICE: Support.

CHAIRPERSON QUICK: Second.

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

MR. JOCUNS: Thank you for sharing that. I appreciate that. However, there was great research put into this matter and language went back and forth,
and I understand your concern about the ambiguities, but that's just kind of -- I am not comfortable with that. I believe that in the present form that it is in that that would be the appropriate amendment. I don't think that that ambiguity exists that you actually had mentioned. I don't think it's that technical.

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

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

MR. JOCUNS: No, we are actually filling in the gap. The federal law, cannabis, marihuana is a Schedule 1 controlled substance, so regardless, at the end of the day, you know, whether we are in Colorado, Washington state, District of Columbia or some of these other new states that have legalized, regulated
adult use of cannabis, they still have the federal government, and so I will refer you to the actual Cole memorandum, which in 2013 Mr. Cole's Department of Justice had a whole list of things pertaining to marihuana and how the feds, or excuse me, how the federal government was going to be acting in regards to them. So --

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

MR. JOCUNS: Absolutely.

MR. OHANIAN: Thank you.

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

Now, nobody is going to disagree that there is a conflict between federal and state law. However, when you get admitted to the Bar, you get admitted to all the courts, including the federal courts essentially if you decide to apply in the state of
Michigan, so I am just trying to understand how this particular language, when you compare to physicians, who do not take that same oath, and others in the example in the narrative, how you believe this language is going to protect an attorney from possibly being criminally charged for conspiring with someone if you are committing illegal activity at the federal level. Thank you.

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

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

CHAIRPERSON QUICK: Seeing no other speakers --

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

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

Seeing no other comments or discussion, we will open the item for voting. Voting is now open. One for yes, two for no, three for abstain.
Last call. We are hand editing in one vote in favor from our proponent, who is also a member of the R.A. yet without a clicker, so with that modification, our vote tally?

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

CHAIRPERSON QUICK: 80, 16. Thank you.

(Applause.)

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

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

In 2008, the Michigan voters again approved the Michigan Medical Marihuana Act. The law was premised on findings which included modern medical research has discovered beneficial uses for marihuana
in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions, and that's Michigan Compiled Law 333.26422(a). While patients, caregivers, and physicians who comply with the MMMA requirements are protected from state criminal prosecution for production, possession, or delivery of marihuana, the Federal Controlled Substances Act and related federal statutes continue to outlaw almost all use and possession of marihuana. Federal law provides that it is illegal to possess, manufacture, distribute, or dispense marihuana, or conspire to do so.

Lawyers are potentially subject to the types of debilitating medical conditions noted in the MMMA, and are not precluded from activity authorized by that law. However, Michigan Rule of Professional Conduct 8.4(b) specifically states that it is professional misconduct for a lawyer to engage in conduct that is a violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. The comments to this section make clear that while some kinds of illegal conduct reflect adversely on fitness to practice law, other kinds of offenses carry no such implication.
Traditionally, the distinction was drawn in terms of offenses involving moral turpitude. Any Michigan citizen's use of marihuana under the MMMA is a violation of the federal criminal law. But in Michigan the people have adopted the MMMA to authorize and approve of the medical use of medical marihuana as an activity appropriate to treat certain medical conditions and not constituting criminal activity. Under a fair reading of this law and its purposes -- please see the MCL that I just referred -- the authorized use of medical marihuana under the MMMA cannot be seen as involving moral turpitude.

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

This has kind of been a quandary from day one when the act was passed and really implemented in 2009 how professional doctors, accountants, attorneys, how they would be able to actually be a patient and be protected under the act, and, you know, you have immunity statewide, and you have 8.4 that definitely conflicts with that, and with all that in mind, a person shouldn't be a criminal because, you know, he
or she may have a cannabis card.

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

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

CHAIRPERSON QUICK: And a second?

VOICE: Second.

CHAIRPERSON QUICK: Second. Thank you.

Anybody like to address this proposal?

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

MR. JOCUNS: Thank you for sharing that.

MR. GOBBO: Steve Gobbo from the 30th circuit. I am going to reiterate the comments I made on the last proposal unless somebody wants me to repeat it in terms of the foundation for that. I notice this is just going into the Comment, but I take
exception to the phrase right after Michigan law, comma, even if that conduct might violate federal law, comma. If you take that out, I would probably stay neutral on it, but otherwise I would oppose it, because I think it gets into the concerns that I explained earlier. Thank you.

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

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

MR. JOCUNS: Thank you for sharing that.

MR. ABEL: Matthew Abel from the 3rd circuit. The Michigan Medical Marihuana Act specifically says that professional licenses are protected, so this is consistent with that, and I believe that it's appropriate and that this body should pass it. I know a great number of lawyers who have Michigan Medical Marihuana cards, and none of them have I ever seen
practice stoned or in an incompetent manner, and so
whether someone has a card or not should not affect
their ability to practice law, as long as they are
competent in practicing law, just as with any other
substance. Thank you.

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

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

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

Prepare to vote. Voting is open. One for
yes, two for no, three for abstaining.

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

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

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

(Appause.)

MR. ABEL: Thank you, Bernie.

MR. JOCUNS: Thank you very much, everyone.

This is important. This is important.

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

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

CHAIRPERSON QUICK: Ladies and gentlemen, please take your seats. We would like to start up again. Hopefully nobody lost their voting clicker during the lunch break. You may want to see if you can lay hands on that.
MR. FALKENSTEIN: Mine is stolen. Oh, I am sorry. There it is.

CHAIRPERSON QUICK: Likely excuse.

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

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

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

This rule that we are proposing today came out of the Task Force Committee. There was perceived a notion similar to what our newly sworn-in president said, which is our first and foremost job is to serve the public, and, in light of that, the committee felt that the public would appreciate their lawyers more and benefit more if they had access to whether their
attorney that they are hiring had malpractice insurance or not and could make a more informed decision in that regard. It was also thought that if this information was publicly available that it might encourage those attorneys that do not have insurance to perhaps purchase insurance in that regard and to protect themselves from any particular malpractice that might be pursued against them.

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

Each year when each of us sign up to renew our Bar license we have to fill out a form regarding malpractice insurance, and these are the four questions that are asked, and then you fill it out accordingly. So the information that would be readily available to the public the attorneys are already providing to the Bar, and that's already in the database on an annual basis, so there is no extra added burden for an attorney to have to add or do something special to provide that information to the Bar, and then the Bar would make it readily accessible to the public. If I could see the next one.
This is the breakdown of those that have member malpractice insurance, and, as you can see, some people don't need it, they have no exposure. Some people have exposure and maintain malpractice insurance. Some people have exposure, no insurance at all, and then those with no exposure and then don't carry insurance whatsoever. And, as we see, there is about 12.3 percent of the lawyer population that does not carry insurance but has exposure. So those would be the people that would be answering no to that questionnaire, and then if the public is given access to that information, the answer would be no for those attorneys. This is another breakdown, just another Bar chart of what we just saw.

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

This proposal is for the State Bar, to direct the State Bar to come up with a program that would make your responses to the renewal of your license available to the public. It's information that's not private to you. It's information that if your client or prospective client asked you about you would have
to tell them ethically, so there is no significant issue in our opinion in adopting this proposal. You kind of have to trust your State Bar to come up with a safe and efficient and noninvasive method of providing this to the public, which would probably be done through their website.

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

There are any number of ways it could be implemented, but it seems, as John was suggesting, a very straightforward one would be to take the
information the Bar already gathers and make it
available on a website that the public could access or
not. And, again, it was the feeling of the folks who
studied this that this poses no burden on you, because
it improves the accessibility of relevant information
to the public, and, therefore, it furthers our mission
of serving the public. Thank you.

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

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

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

VOICE: Second.

CHAIRPERSON QUICK: And a second. Would
anybody like to address the audience regarding this
proposal? Please move to the microphone, reminder to state your name and circuit.

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

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

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

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

Second of all, or on top of that, there is a privacy issue as to the nature of our contract as business people between third parties. Does anybody
really -- with that, people are comparing, shopping and saying who is insured and who is not insured and looking for it that way. Maybe they are actually looking for what happens when it doesn't work and that perhaps they would find themselves as a defendant in a lawsuit. If it's not privileged, you lose, but even if it is privileged, they are a pain in the neck to deal with.

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

I'm not saying that we shouldn't be able to protect our clients, but I really don't think that the presence or absence of insurance is anybody's business unless the client themselves ask for it, and at this point, in almost 20 years of practice, nobody has ever raised that question to me, ever. And that's all I
have to say. I would be opposed to this. I don't oppose disclosing it to the Bar itself, but I do not believe that that should be a matter of public record, and that's all I have to say. Thank you.

MR. FALKENSTEIN: Peter Falkenstein, 22nd circuit.

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

Experience shows that if a client wants to sue you for malpractice, they are going to sue you for malpractice whether they know you have insurance or not. They assume you do have insurance. What we are trying to show with this and this transparency is go online, look and see if your attorney has insurance. That will help you shop. That's exactly what it's
for, for you to shop for your attorney. That's what clients should be able to do. If you are afraid that you are going to lose business because you are not going to buy insurance and you might lose some clients for that, then buy insurance. But that's not the basis of why you should be choosing your client. It's why your client should be choosing you, and that's what we are here for, our clients.

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

MR. HUBBARD: That's correct.

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

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

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

MR. MOGILL: Oregon.

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

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

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

The Litigation Section believes that this proposal has as its stated purpose public disclosure of whether or not an attorney maintains malpractice insurance, but the proposal contains no details regarding the method, manner, or type of disclosure required by an attorney. The Litigation Section further believes that there is a serious concern whether the impact of the proposal on members of the Bar, what type of impact this would have on members of
the Bar and whether or not this proposal will achieve
its stated purpose or have unintended consequences.

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

Thank you.

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

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

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

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

PARLIAMENTARIAN CHMURA: No, technically
Robert's Rules doesn't allow debate. You make a
motion, there is debate on the motion, and then the
next person is called to speak for or against the
motion.

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

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

MR. LARKY: My name is Sheldon Larky. I am
from the 6th circuit. I am in opposition to this
motion. We have a duty to the public, but I am
thinking the last few weeks I saw an internist, a
dentist, pharmacist, architect, accountant, an
insurance representative, professional engineer, real
estate broker, all of them licensed by the State, as
we are licensed by the State, the State Bar of
Michigan. None of those professions ever require any
form of disclosure. There is no transparency
necessary, and we accept those people for what they
are.
I spent ten years representing insurance carriers for insurance in legal malpractice defense. I think this opens, tends to open a floodgate. It also, as the Litigation Section has indicated, I don't see any purpose. I am directly opposed to it because I don't see why we have to provide that information, and I don't believe that it enhances our profession. This idea being that it will be more transparent, that's BS. It's not transparent. People come to us, not asking if we have insurance coverage, by the way, then you can represent us. Whether we have insurance coverage or not, it should be of no consequence to the public. If, in fact, we are sued and we have no insurance coverage, that's the individual attorney's problem. So I am directly in opposition to this, and I would ask the Assembly to vote this down.

MR. MOGILL: Thanks, Sheldon.

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

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

MR. JOCUNS: There is purposes for malpractice insurance. There are attorneys out there
that don't have it. I am not necessarily speaking about an economic impact. My question is, in this proposal, resolution, have you considered the fact that if this information is to be made super transparent that you can end up causing vexatious litigation, people subsequently going after and encouraging attorneys to be prosecuted civilly, and I think that might have a chilling effect. Just something that was considered.

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

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

MS. JOLLIFFE: Elizabeth Jolliffe from the 22nd circuit. I am curious. I am kind of in alignment with the Litigation Council in terms of is there data establishing the clients are suffering because we don't have this kind of information readily available to the public now. In the synopsis it says, This proposal is intended to address concerns that legal consumers are not making fully informed decisions. How do we know that? Is that some group of us as lawyers saying we are concerned that our potential consumers, that the public out there is not making a fully informed decision, or have we actually...
heard from the public, the potential clients, that, boy, I wish I knew that my lawyer didn't have insurance; that would have made a difference with me.

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

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

If it is important to the client when they are shopping, then that information is successful. He doesn't have to call up the Bar, you know, I don't
know if my attorney has malpractice and I am trying to shop around, or I got to call the attorney and ask about whether they have malpractice insurance and what level, because I want to make sure that I am covered in case he screws up because I am very nervous about my legal matter.

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

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

MR. MOGILL: I am not aware of additional data. To answer your other question in terms of Michigan, the anecdotal question you asked, I don't think we have that. I think the question was what can
we do to provide full information to the clients.

MS. CHINONIS: Thank you.

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

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

MR. MOGILL: Yes.

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

Two, I echo my colleagues' concerns, it may be without the data. When you are forwarding frontally information about coverage for actionable error, it raises questions that don't necessarily get raised without that being on the forefront. If we
already have an ethical duty to disclose whether we are carrying malpractice coverage if we are asked, then how are we advancing the public service by publishing the information in some way to give them access? They have access. We are ethically required to do it. Presumably if they say, Mr. Linden, do you carry malpractice insurance, and I say, Well, I don't feel like telling you that, then they can grieve me, and there is a penalty if it's an ethical obligation to do that. So the comment about it serving public information and disclosure and transparency seems not well targeted given the obligations that we have ethically already.

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

MR. MOGILL: Thank you.

MS. HOPCROFT: Vicki Hopcroft, 23rd circuit. I stand in opposition to the proposal. I would like
to amplify Mr. Larky's comments. I feel that it sends
the wrong message to the public. As Mr. Larky said,
we are licensed. That's what we present to the
public. I feel that's a personal matter, and it's a
housekeeping matter, and if we cross that out to be
available or a selling point to the public, I feel
that it cheapens the profession and it sends the wrong
image. I don't think that's the image that we want to
project. I do feel that it's the type of question
that a client can ask and should ask, an attorney
should be forthright about it, but I think it's a
private discussion. It's not something that should be
available as a matter of shopping.

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

MR. MOGILL: And whether the client needs to
go through the process in the course of shopping for a lawyer and da-da-da-da-da-da, do you carry malpractice as opposed to sorting before getting there, but obviously there are some very significant concerns, as you and others are expressing.

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

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

The clients shopping around can go to the Attorney Discipline Board website, and they can punch in the somebody name, and everything shows up. Details about any suspensions or whatever by the Attorney Discipline Board are readily apparent. So
there are other ways to shop around based on the merits of the lawyer as opposed to whether the lawyer has malpractice insurance or not.

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

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

MR. MOGILL: Thanks, Mark.

MR. MASON: Good afternoon. Gerrow Mason from the 31st circuit. I recognize that we are a community service. We are all expected to do that to better our communities. It comes with the territory when you take an oath to the Constitution. I also recognize that this body that stands here or serves here this afternoon made up of lawyers representing
lawyers. We are not here on behalf of my service.

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

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

MR. MOGILL: Kind of heard that.

CHAIRPERSON QUICK: If anybody else has comments, we are going to try to bring this to a vote.
MR. EAGLES: Good afternoon. David Eagles, 6th circuit. The issue that I see with this is that one set of data is released to the public, third-party agencies, places where your profile is, that may or may not update their information on an annual basis, so it puts the onus on the attorneys to have to go to every single profile and make sure, if that information is disclosed, whether or not it's accurate, so I am in opposition.

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

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

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

MR. MOGILL: The Bar staff.

MR. PERKINS: The Bar what?

MR. MOGILL: Staff.

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

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

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

MR. FALKENSTEIN: Best you are going to get.

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

MR. PERKINS: Well, the State Bar --

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

CHAIRPERSON QUICK: The answer is yes.

MR. PERKINS: All right. And minutes of this meeting are being taken now for purposes of this
MR. MOGILL: I don't think you have to worry about somebody doing something behind your back.

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

It doesn't say that in the second paragraph of the resolution, and so my concern is that if it doesn't say and we are being told that that's what it really means, I am not seeing anything to the contrary that it would. Those are my concerns. I am opposed to this, and those are my concerns with the language that you have got. Frankly, with all due respect, I would like to table it until next spring so that we can get a little bit more developed factually as far as what is the efficient and effective process that
you have, you know, that you are looking at right now. Actually I would make a motion to table.

MR. ABEL: Support.

VOICE: Support.

VOICE: I call the question.

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

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

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

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

PARLIAMENTARIAN CHMURA: That requires a second.

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

PARLIAMENTARIAN CHMURA: Is it supported?

CHAIRPERSON QUICK: Yes.
PARLIAMENTARIAN CHMURA: You treat like any other motion.

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

Mr. Larky.

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

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

MR. ROTENBERG: Steven Rotenberg, 6th circuit, and I agree with the two previous speakers. I would object also to postponing this. I
think we should deal with it today, seeings we are already concentrating and discussing it.

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

All opposed.

The motion fails.

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

The results, Mr. Clerk.

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

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

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

(Appause.)

CHAIRPERSON QUICK: Mr. Hubbard, feeling
courageous, moves to our next item.

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

MR. ABEL: It was the marihuana.

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

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

This is simply for the State Bar to set up a standing committee to create a program that then would be brought back here to be voted on and refined. It's a completely voluntary program, as the title suggests. It is not a peer review, as some of the Super Lawyers or DBusiness, you know, Top Lawyer or Best Lawyers in America seem to be more peer review. What we discussed in committee was it would be more like a super advanced course in a particular area or specialty, somewhat like a college course, where you have quizzes and a final, and this would be sanctioned
by the State Bar, so it would be certified by the
State Bar of Michigan as opposed to some private
corporation, and it would be in control of the
State Bar to monitor the courses and to set out the
courses.

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

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

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

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

CHAIRPERSON QUICK: Again in your materials there is a history to subject proposals in this
general area, and the history is set forth in your materials in terms of past actions by the Representative Assembly, frankly both one way and the other, depending on the specific proposals. So with that, do we have a motion to open up discussion?

VOICE: Support.

CHAIRPERSON QUICK: Motion. Is there a second?

VOICE: Support.

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

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

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

MR. DIMENT: Morley Diment, 47th circuit. I am a new attorney. I think this is a great idea in
general. I am a little concerned because I keep hearing reassuring the public that they know what they are talking about. That's what the Bar is supposed to be for, so I would be cautious about addressing this program in that way, but as an aside, having some sort of certification as a young attorney that you can tell your client, listen, I have got a certification from the State Bar that says I went above and beyond my continuing legal education I think would be a benefit for marketing, I agree with that. I am a little on the fence about how it's going to be implemented, but since this is just for the standing committee, I would be in support of that.

CHAIRPERSON QUICK: Thank you.

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

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

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

MR. JOCUNS: Bernard Jocuns.

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

MR. JOCUNS: Bernard Jocuns, 40th circuit for the County of Lapeer. The committee idea itself I like, but I had a couple questions and concerns, if someone can respond. There is already volunteer certification programs, like certified criminal defense lawyers. I believe that they still have that in mid-Boston, and, you know, that's a nationwide and which may or may not do something for you in the state of Michigan. There is many areas that have subgenres or subareas, you know, as well, like transactional work or marihuana law. It has little factions inside there, and also, geographically speaking, you know,
what goes on in, you know, the thumb and the trends
there or here are a little bit different than what
would be going on in the west side of the state or in
the southeastern part of the state, so what would the
committee be doing to make sure there is some
diversity in regards to the geographic area and some
of these subspecialties within areas?

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

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

The other thing, in listening to the
proponent, where you also three times have said, well,
this is to help attorneys with ICLE with continuing
education. I would think then that perhaps we should,
the proponent could stress rules that maybe we should
have mandatory continuing legal education, which we don't have. So if, in fact, this is just to help attorneys continue in their legal education post law school, that would be a better way to go than to have specialty certification.

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

MS. JOLLIFFE: Elizabeth Jolliffe, again on behalf of the 22nd circuit. It strikes me, it reminds me of when I work with young lawyers and even nonlawyers who have gone through the certification process, the 40-hour mediation process. They get that
training and then they are going to hold themselves out as a certified mediator, and they think that this is a marketing device, this is going to help them get at least more cash flow in their practice, because they will have a practice, they will build a practice, a newer lawyer, and then they will also be able to market themselves as a mediator, but we all know in this room, most of us at least, 99 percent of us, actually more of the people who get hired as mediators or facilitators are the people who have been around a while who have experience in that area. So when I see these younger or newer lawyers who are going out and spending the money, very good programs, you can learn great skills in those mediator training programs, you do, but it doesn't really help them build a successful mediation practice. They are going to get that, if at all, by having an established reputation as a lawyer and being able to mediate and have clients and collaborate and all those good things and have great communication skills.

So this, I know it's well intentioned, or it reminds me of that, that we are going to be able to say to a newer lawyers, You can now hold yourself out as having this specialty certification, and I agree with all of our colleagues here who have spoken
previously about, you know, you can hold yourself out as having experience in this area once you get it, and you develop more experience and you're given, the more you talk about it, the more work you know or go and shadow more people and that kind of thing, but just having a specialty certification, it might bring you one or two unsophisticated clients, but I don't think, and as many of you know, I do a lot of marketing with lawyers, and it's not going to be that golden ticket. It takes time. We all know it takes time to develop that kind of practice. Thank you.

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

MR. FALKENSTEIN: Peter Falkenstein, 22nd circuit. I agree with Elizabeth on this. There should not be shortcuts to success as a lawyer, and this to me seems primarily as a way for young lawyers to shortcut the hard, grueling business of learning
your trade, networking, gaining clients through exposure that way, through successes in court or through transactional work, and taking an online quiz -- I know I am minimizing it -- but essentially taking an online quiz, and then hanging up a shingle, call yourself an expert in a particular field of law when you may be a first-year graduate, having taken the online course and quiz, you are not.

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

MR. GARRISON: Scot Garrison, 6th circuit, Oakland County. I disagree. I mean, I will certainly defer to your expertise, but I disagree that it's a lost leader. The pharmaceutical companies don't develop medicine at a loss and then sell it at a loss, right? They make money off of it. That's what
everybody does. So the cost is typically passed on to
the first round of people, the first class, so that
they recover the cost, and then they don't lower it
for the subsequent groups.

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

CHAIRPERSON QUICK: Not on a friendly
amendment.

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

CHAIRPERSON QUICK: The friendly amendment
has been accepted. Thank you.
MR. GARRISON: Thank you.

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

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

MR. COURTADE: Bruce Courtade from the 17th circuit. I ask for permission to address the Assembly on this issue.
CHAIRPERSON QUICK: Please proceed.

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

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

The other thing I would like to point out is we have already got specialty certification programs
in the state of Michigan, and, Elizabeth, you
mentioned it with the mediators. Mediators are
required to take advanced education courses. They
start out with the 40-hour training but then
periodically have to go back and take refresher
courses in order to maintain their standing on the
trial court lists. If you don't do it, you can't be
court certified. So this is not something that we are
creating whole cloth.

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

This is not something to advance young
lawyers and to give them a marketing tool. This is
something to protect the public so that the public can
look and see this person has at least had to take the
extra training to get the testing requirements so that
they can hold themselves out as specialty certified,
and if they have done that, then whether they are a
two-year attorney or a ten-year attorney or a 50-year attorney, the public at least can look at it and say they met some threshold, and that threshold is not to be determined by the Representative Assembly. It's to be determined by the standing committee.

CHAIRPERSON QUICK: Thank you, Mr. Courtade.

Mr. Gobbo.

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

MR. HUBBARD: The word "voluntary"?

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

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

MR. GOBBO: Yep.

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

MR. GOBBO: As it is right now?

CHAIRPERSON QUICK: Correct.

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

CHAIRPERSON QUICK: That's a good point.

MR. GOBBO: In case this motion fails.

CHAIRPERSON QUICK: Mr. Larky.
MR. LARKY: Sheldon Larky, 6th circuit.

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

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

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

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

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

CHAIRPERSON QUICK: Seeing no further speakers, we will call the question, and, given the issue that was raised by Mr. Gobbo, I will read it into the record. Should the State Bar of Michigan
create a standing committee on specialty certification to support specialty practice in the 21st century?
One for yes, two for no, three for abstain. Is the voting open? Voting is open.

VOICE: Voting on the amendment, right?

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

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

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

CHAIRPERSON QUICK: 37, 57 to two.

Unfortunately, the motion fails. We thank Mr. Hubbard for his time and energy presenting this.

(Appplause.)

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

Ah, Mr. Cunningham. Mr. Cunningham has presented his materials in accordance with the rules of the Representative Assembly to put his nomination
in for clerk. Are there other nominations for others from the floor?

VOICE: Move to close nominations.

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

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

Any opposed?
Any who may want to abstain?

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

(Applause.)

CHAIRPERSON QUICK: Just wanted to take a few moments to thank some folks before we moved to the next item of substance. First is that we have a number of Assembly members who are completing their terms. Of course, as many of you know, there is a fine tradition of completing your term, taking a one-year hiatus and returning for further service, and we hope that many of these fine folks who have made significant, meaningful contributions to this body
return as well. There are certificates for these folks, and I would ask them to pick them up in the back on the way out, but a round of applause please for these individuals.

(Applause.)

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

(Applause.)

CHAIRPERSON QUICK: On the issue of committees, you will soon be asked to express your preference for committee service in the next Bar year,
and we would urge you to get those in and think seriously about rolling up your sleeves and becoming more involved in the Representative Assembly.

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

(Applause.)

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

As to Fred Herrmann, let me just say this before turning over the microphone. Fred has an eagle eye and keen mind. He has, let me term it a nuanced sense of humor, but the important thing about senses of humor is not particularly the adjective but it's that you have one, and it's been a great benefit to
all of us. Most importantly, Fred is and has been incredibly committed to this institution, to the State Bar, and mindful of his obligations as a shepherd to all of you and to the State Bar members at large in his capacity as an officer. I am proud to call him a friend, and I think he will provide great service to all of you. So with that, turn it over to Judge Chmura.

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

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

I do solemnly swear --

MR. HERRMANN: I do solemnly swear --

JUDGE CHMURA: -- that I will support the Constitution --
MR. HERRMANN: -- that I will support the Constitution --

JUDGE CHMURA: -- of the United States --

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

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

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

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

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

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

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

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

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

JUDGE CHMURA: -- the duties of Chair --

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

JUDGE CHMURA: -- of the Representative Assembly --

MR. HERRMANN: -- of the Representative
JUDGE CHMURA: -- and the State Bar of Michigan --

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

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

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

JUDGE CHMURA: Congratulations. Welcome aboard.

(Applause.)

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

(Applause.)

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

Yesterday at the Board of Commissioners meeting I had the pleasure of presenting a resolution in honor of Dan Quick's service on both the Board of
Commissioners and this body. In the interest of brevity, and I know Dan would want this from his comments this morning, I won't recite that same resolution here today, but it's a matter of record, and if you would like to read it, I have a copy. Please let me know. It does great service to Dan as he has done great service for us.

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

(Applause.)

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

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

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

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

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

VOICE: So moved.

PAST CHAIRPERSON QUICK: And a second.

VOICE: Second.

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

(Proceedings concluded at 3:24 p.m.)
STATE OF MICHIGAN  
COUNTY OF CLINTON  

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

October 14, 2016  
Connie S. Coon, CSR-2709