

STATE OF MICHIGAN

STATE BAR OF MICHIGAN

MEETING of the REPRESENTATIVE
ASSEMBLY of the STATE BAR OF
MICHIGAN

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

AT HEADTABLE:

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

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REPRESENTATIVE ASSEMBLY

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Lansing, Michigan

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Friday, November 14, 2003

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3 10:00 a.m.

4 R E C O R D

5 CHAIRPERSON LEVY: Thank you all for coming.
6 I would call this meeting, this special meeting of the
7 Representative Assembly, to order.

8 Madam Clerk, do we have a quorum present?

9 CLERK BUIREWEG: Yes, we do.

10 CHAIRPERSON LEVY: You have a proposed
11 calendar before you. Is there a member of the Rules
12 and Calendar Committee who would like to move that
13 calendar?

14 VOICE: We can't hear you.

15 CHAIRPERSON LEVY: A member of the Rules and
16 Calendar Committee to move the proposed calendar.

17 MR. LARKY: Mr. Chairman, Sheldon Larky from
18 the 6th Circuit. I move that we adopt the calendar.

19 CHAIRPERSON LEVY: Second?

20 VOICE: Support.

21 CHAIRPERSON LEVY: Any opposed?

22 Calendar is approved.

23 No objection having been received to the
24 summary of proceedings to the September 12th meeting,
25 although there is a missing page in the summary that

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1 was printed, I am told that the corrected edition is
2 before you, but no objection having been received, the

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3 summary is deemed approved.

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

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

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

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1 and ethical, and we think we share that as a common
2 endeavor.

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

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

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

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1 productive session working on this important agenda
2 that you have today, and, once again, welcome.

3 (Applause.)

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

8 Tom, chair of the Nomination Committee.

9 MR. ROMBACH: Tom Rombach from the
10 16th Circuit. I rise to move for the immediate
11 seating of several vacancies in my position as chair
12 of the Nominating Committee. In the 22nd judicial
13 circuit, for Charlotte Johnson and John Reiser, III to
14 be seated. In the 41st judicial circuit, for Henry
15 (Hank) Robert of Iron River.

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

18 MS. CAHILL: Support.

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

22 VOICE: Hello.

23 CHAIRPERSON LEVY: All in favor.

24 Any opposed.

25 welcome to the Assembly.

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1 Next item is Chairperson's remarks. I guess
2 be careful what you wish for. A little more on that
3 in a minute, but normally this first meeting of the
4 year Chairperson's remarks is the time for what's

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

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

17 Determining how to present this to the
18 Assembly, how to present this in a fashion that would
19 allow a large body, a representative body, to address
20 the issues and take positions on behalf of the Bar in
21 a format and in a way that would allow the Bar's
22 opinion to become known to the Supreme Court to be
23 helpful to them, at the same time do it in a roomful
24 of lawyers who all had opinions and all had ideas on
25 how things should be drafted was a relatively lengthy

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1 process. I think the product that you now have before
2 you is a very good one. That is thanks to a whole
3 large number of people who had input into the process.

4 I wanted just to thank in particular the

5 Special Committee on Grievance and the Professional
6 and Judicial Ethics Committees. Their input to the
7 Bar leadership and to the Assembly leadership in
8 particular was very helpful in structuring this.

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

20 And then, speaking of lack of time, I just
21 wanted to thank Tom Byerley, Glenna Peter, and Janie
22 Cripe of our staff in particular for their assistance
23 in getting the calendar together for us at the last
24 minute. Is Janie here? Janie, can you stand up just
25 a second. Janie is Glenna's new assistant. I don't

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1 know that she has been introduced to the Assembly
2 before. But if you have something to be done on
3 behalf of the Assembly and you are calling the Bar,
4 ask for Janie and you will get friendly, helpful,
5 quick service.

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6 I said be careful what you wish for, and I
7 guess maybe a little of that is the notion of my
8 having run for chairperson in the first place. But
9 really what I was thinking of when I said be careful
10 what you wish for is our agenda and what is before us,
11 the Rules of Professional Conduct in particular.

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

19 And our response was that there are certain
20 issues that need to be decided by as large a
21 representative body as possible, and simply
22 submitting it to Bar membership by vote at a meeting
23 or by some sort of internet vote would not allow for
24 the type of informed and reasonable and respectful
25 debate that's really necessary before we can make

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1 decisions on where our Bar policy should be, and that
2 it was necessary to have a Representative Assembly in
3 order to do those things.

4 And when we were successful in persuading
5 people that we were a necessary body, the next step

6 was whether or not we could actually perform the task,
7 whether a group of lawyers could really come together
8 on important issues and in very short periods of time
9 debate them, voice the concerns, voice opposing points
10 of view, and actually then address the issues and set
11 policy.

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

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

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1 So be careful what you wish for. We, in fact,
2 got what we wished for. We proved ourselves
3 previously, we proved ourselves thanks largely to
4 Tom's leadership. We proved ourself on the dues
5 issue, reasonable debate, sought the input of
6 membership, and we came to a resolution on that, but

7 the volume that's before us here makes that even more
8 difficult.

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

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

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1 without getting caught up too much on the technical
2 aspects of the rules and address those major policy
3 concerns.

4 And I think that when you look through the
5 materials you will notice that's really what's
6 happened, and we have done it in a very set and very

7 determined way, the same for each rule to provide some
8 consistency and ability to speed along the debate
9 today.

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

23 If you still think that that's the
24 appropriate motion, please make that motion. If it's
25 a motion simply that we not take a position, make that

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1 position. But don't mistake a motion to table as a
2 thought that we are going to be able to address the
3 issue before the court publishes their proposed rules
4 and begins to tie itself down in terms of the
5 directions it's going to go.

6 The court has made it clear to us that they
7 are waiting for this meeting and then they are going

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8 to get together and look at what we submit to them and
9 make decisions as to what to publish and then proceed.
10 If we have issues that do go to those
11 technical aspects, to the language, those sorts of
12 things, for the most part those can be addressed
13 better by sections and committees who are dealing with
14 specific areas of law in any event, but to the extent
15 that the Assembly wants to take them up, once the
16 court has published, consistent with our policies, we
17 can certainly then go back and address those rules on
18 which we have major language problems in our January
19 meeting, January 10th, write it down. But that's not
20 what we are going to try to do today.
21 If you look at, pick any one of them, (a)
22 through (o), if you look at any of those you will see
23 that each rule, each proposed policy has been broken
24 down in the same way. In each one there is a brief
25 statement of the issue present, what is the question,

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1 what is it upon which there is some disagreement?
2 That's followed by the proposal of the Professional
3 and Judicial Ethics Committee, statement to what the
4 ABA proposal is, statement of the current Michigan
5 rule, and then a summary of additional correspondence
6 that we have heard from Grievance, from different
7 sections, from some individuals within the Bar, from

8 some attorney organizations. You will see those
9 positions laid out.

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

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

24 And that necessitates today that we pass an
25 additional special rule in addition to the ones that

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1 we passed in September. You will have at your seat an
2 orange sheet in front of you. One side of the orange
3 sheet is a strike-through version, the other is a
4 clean version. The strike-through version is what has
5 already been passed in terms of special rules for the
6 Assembly and how it changes to allow us to address
7 these as positions rather than rules, and then the
8 addition at the bottom of an additional paragraph that

9 allows us to take votes in the alternative. We can
10 adopt that special rule that would allow us to take
11 votes where it's either (a) or (b) so we can avoid the
12 situation where we present (a), it fails, and the Bar
13 has no position, then we have to start the whole
14 debate over again to propose (b).

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

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

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1 out.

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

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

7 CHAIRPERSON LEVY: Do I have a second?

8 VOICE: Support.

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

15 Before we get into the substance of that, I
16 would note that the administrative order itself of the
17 court is in the separate gray book that was sent to
18 you. Like the book with the proposed rules
19 themselves, this is a book we think we may have need
20 for in future meetings. We ask you to hold onto it.
21 It's for that reason it was bound separately. In that
22 book you will find the Supreme Court's order. You
23 will also find the Michigan Attorney Discipline
24 Board's version, Donald Campbell's prepared version,
25 who is with the Attorney Discipline Board. You will

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1 see an attached, the second package in that book is a
2 side-by-side comparison of the three different
3 proposals. And, in addition, at the end is a memo
4 from the Attorney Discipline Board outlining their
5 thoughts and positions. Because that was a broader
6 based document, we wanted to include it there, but
7 that document is something you should be considering
8 as we address the actual proposal before us.

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

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

18 I want to just make a couple of prefatory
19 remarks. The Special Issues Committee met, as well as
20 the chairs of the various committees of this
21 Representative Assembly, as well as the officers. Let
22 me just very briefly indicate to you the folks who are
23 on the committee. Richard Bahls, JoAnne Barron,
24 Robert Buchanan, Jim Hanson, Cynthia Lane, Mike
25 Riordan, Marcia Ross, associate members Kim Cahill,

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1 Fred Neumark. Chair of the Rules and Calendar, Lynn
2 Moon; chair of the Nominating Committee, Tom Rombach;
3 Bill Knight, chair of Hearings Committee; Randy
4 Miller, chair of Drafting, Terri Stangl, chair of
5 Assembly Review.

6 These folks got together and ultimately
7 reviewed the sanctions side and came up with the issue
8 that's in sub 4, discipline standards, and that issue
9 sets forth the proposal that's being presented this

10 morning.

11 That proposal essentially indicates that the
12 Representative Assembly urges the Supreme Court not to
13 adopt the standards for lawyer sanctions until such
14 time as the subject of the comment and the public
15 hearing side concerning the rules can also be dealt
16 with. In other words, not to deal with the sanction
17 side until the rule side has been dealt with.

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

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

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

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

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

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

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1 submitted substantial reports with regard to the
2 sanctions side.

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

5 CHAIRPERSON LEVY: And do we have a second?

6 VOICE: Support.

7 CHAIRPERSON LEVY: I will open it for debate,
8 but just before I do that it's been brought to my
9 attention that in adopting the special rules and in
10 trying to hurry so we could get to the meat of the

11 issues, I forgot to actually adopt them. I gave time
12 for comment, but I didn't say yea or nay. I also
13 didn't point out in Rule (e) one of the additions is to
14 permit non-Assembly members who are representing a Bar
15 entity or an attorney group entity to have the floor
16 privileges so that we can do that once in blanket at
17 the beginning of this meeting rather than to in each
18 case acknowledge and make that a separate motion.

19 So there having been no discussion, I would
20 just say all in favor of adopting the special rules
21 please say aye.

22 And now opposed.

23 Now they are adopted without dissent.

24 I believe the Attorney Discipline Board
25 indicated that they were going to have a

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1 representative here who wanted to address this first
2 motion.

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

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

8 MR. ALLEN: Good morning, Dan. Is this on?
9 Everybody hear?

10 My name is John Allen, interloper, trouble
11 maker and having the privilege and honor of being the

12 chair of your Special Committee on Grievance, and I
13 rise to thank you for your courage in this particular
14 resolution.

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

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

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

10 You are saying to the members of the Supreme
11 Court, respectfully and with courtesy, that the

12 proposal you have made is not exactly the right one or
13 there are parts of it that we think need to be looked
14 at in greater detail, that it is very serious and
15 interlinked with another proposal that you were not
16 considering, and the people who made that other
17 proposal, namely the amendments to the Rules of
18 Professional Conduct, did not have your proposal about
19 sanctions in front of them when they made theirs and
20 that some coordination between those two is a good
21 idea.

22 For those of you that went to law school back
23 around the invention of the electric bulb like me, you
24 remember the Code of Professional Responsibility and
25 some of the reasons we changed the rules, the two

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1 principal ones cited most often.

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

6 Secondly, many times the code, and
7 particularly its ethical considerations, had been
8 applied in civil proceedings outside of the
9 disciplinary context where they were intended. The
10 same problem obtains with these proposals for
11 sanctions, and I think those are two of the areas that
12 need some further study.

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13 In fact, as John vanBolt would tell you, very
14 few of the rules are actually used for discipline. If
15 you look at their disciplinary proceedings, most of
16 them concern a handful or so. The rest of the rules
17 are used for other purposes, in civil liability
18 proceedings as defenses, sometimes very hypertechnical
19 defenses when lawyers attempt to collect fees,
20 sometimes for public relations for the Bar, sometimes
21 as tactical weapons by opponents, and all of those --
22 CLERK BUIREWEG: 30 seconds.
23 MR. ALLEN: Thank you very much. I really do
24 support the proposal, and I hope all of you will too.
25 CHAIRPERSON LEVY: Any additional comments

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1 from sections, committees, or other attorney entities?
2 Comments from the membership.
3 MR. MILLER: Ronald Miller, 6th circuit.
4 while I strongly support what is in this document,
5 there is one word that I do have trouble with, and
6 that is the word "negligence," because when we talk
7 about isolated occurrences of attorney negligence, it
8 does in and of itself imply a potential cause of
9 action.
10 I am concerned at how this may ultimately be
11 used, and we talked about civil liability just a
12 minute ago with Mr. Allen. I am concerned at how that

13 could potentially be interpreted, so I would make a
14 friendly amendment to remove the word "negligence" and
15 replace it with the phrase "errors and/or omissions."

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

22 JUDGE BROWN: You need support.

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

25 VOICE: Support.

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1 CHAIRPERSON LEVY: Is there debate on the
2 amendment itself?

3 All in favor.

4 All opposed.

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

9 VOICE: Errors and omissions.

10 CHAIRPERSON LEVY: Errors and omissions, no
11 moral.

12 Other Assembly members, comments, debate on
13 the proposal?

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14 Seeing none, all in favor.
15 Any opposed.
16 Again, without opposition each item passes,
17 as suspected. I won't say that for a little while.
18 We will now move on to the rules portion.
19 Again, we divided these up, broken them down. I would
20 remind people of these time limits. As we go through
21 this debate, we will be enforcing them.
22 I would also point out that the rules are in
23 an order that combines a number of factors. It was
24 the amount of correspondence and comment that the Bar
25 heard combined with whether or not those sections or

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1 people got proposals to us before the September
2 meeting and were, therefore, told that we would give
3 them priority, combined with those issues we thought
4 affected the most attorneys, and that's where the
5 order itself came from for these proposals.

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

10 MR. HAROUTUNIAN: Mr. Chairman,
11 Ed Haroutunian, chair of the Special Issues Committee.
12 with regard to the proposed resolutions
13 regarding the Rules of Professional Conduct, let me

14 just make one quick statement that Dan has already
15 indicated but I think it's important to reiterate.

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

23 That's the -- and I will tell you that when
24 the process started that was not the way it was being
25 addressed, but in the course of many people talking

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1 about it and trying to get a handle on it, in fact,
2 that's the way it evolved, and I have to tell you I
3 think it's an absolutely outstanding direction to go
4 for purposes of these rules.

5 So having said that, beginning at Section 5,
6 5(a), we will take each of these, and as the chair of
7 the committee, I will act as the proponent, but
8 obviously Dan will conduct the rest of the matter, and
9 that is with regard to Rule 6.1, the voluntary
10 pro bono publico service and the issues presented
11 therein and as set forth on page 22 of your booklet,
12 and I would make that, move for the discussion of it.

13 well, here, maybe to make it a little easier,
14 to move all of that which is here all at one time and

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15 then the chair will take it up. So on behalf of the
16 committee I would move (a) through (o) as set forth in the
17 booklet, and that goes through page 140, from page 22
18 to 140.

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

22 VOICE: Second.

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

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

3 VOICE: So moved.

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

8 No discussion, all in favor.

9 All opposed.

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

14 MS. CROWLEY: Good morning. I am Candace

15 Crowley. I am a staff attorney at the State Bar of
16 Michigan, and I am speaking for the committee in lieu
17 of Bob Gillett, the chair of the Pro Bono Involvement
18 Committee.

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

22 MS. CROWLEY: So what I am really saying to
23 you is that I was not prepared to speak, but in the
24 absence of our representative I will do my best to
25 state our position and encourage you to adopt the

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1 change that the Pro Bono Involvement Committee, the
2 Legal Aid Committee, the Access to Justice Task Force,
3 the former task force, and the former Open Justice
4 Commission all support.

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

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

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

20 Our community of four Bar entities and people
21 we work with and lawyers we work with around the state
22 would like you to change the Rule 6.1 on pro bono
23 service. We have outlined our three main reasons in
24 the materials, and I would summarize them this way.

25 The first one is really structural. Our

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

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

11 Most lawyers will look to the Rules of
12 Professional Conduct and see that brief statement and
13 not understand that there are very specific standards
14 that we want lawyers to follow, to take three cases
15 for low income people, to contribute 30 hours of

16 service, or to make that \$300 contribution.

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

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

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

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

14 And the new rule proposes that the definition
15 be expanded to include many of the other wonderful
16 things that lawyers do in their volunteer time, and

17 the rule does say that when a lawyer does pro bono,
18 the bulk of it should be directed to low income people
19 and the services they need, but it welcomes into the
20 community lawyers who are doing other really good
21 work.

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

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

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

10 CHAIRPERSON LEVY: Candace, just so I make it
11 clear, and for future speakers, if you could just
12 point out your positions on the specific items. If I
13 understood your comments, you rise to support on the
14 first of the two resolutions, including a standard,
15 although you have not specified the 30-, 40-, 50-hour
16 standard, is that correct?

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17 MS. CROWLEY: Our community supports the
18 standard of 30 hours. We considered and rejected the
19 ABA position of 50 hours. We have worked very hard
20 and have many, many lawyers in law firms who are
21 meeting the 30-hour standard. We want to keep it at
22 30 hours. We want to include a standard of 30 hours.

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

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1 MS. CROWLEY: That's correct.

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

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

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

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

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

16 MS. FRIEDLANDER: Has Bob Gillett spoken yet?

17 CHAIRPERSON LEVY: No.

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18 MS. FRIEDLANDER: He will give more of an
19 overall view of proposed changes.

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

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

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

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

12 As it stands now, the attorneys in the Animal
13 Law Section, numbering about 150, and any other
14 attorneys interested in that are often stymied,
15 because, as it now stands, the pro bono program
16 concentrates on direct legal assistance --

17 CLERK BUIREWEG: 30 seconds.

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18 MS. FRIEDLANDER: -- to the poor. What I
19 would say is that by expanding it it will allow
20 representation of nonprofits. As an example, there
21 are probably about 200 organizations, small
22 organizations, in Michigan who are shelters or provide
23 companion animal rescue, and that is an example of the
24 services that can be provided should the expanded
25 definition be put into place because it will allow --

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1 CLERK BUITEWEG: Thank you.

2 MS. FRIEDLANDER: -- nonprofits to be
3 represented that don't directly reference the poor.

4 CHAIRPERSON LEVY: Thank you. For those of
5 you who haven't already picked up on it, the clerk
6 will be announcing to the speakers when they have 30
7 seconds remaining so that we do not have to cut them
8 off if at all possible.

9 The other written comments that we had were
10 from the Ethics Committee. Did the Ethics Committee
11 want to address this question?

12 HON. ELWOOD BROWN: Our position is in
13 writing.

14 CHAIRPERSON LEVY: I would open the floor to
15 any other sections or committees that have
16 representatives here and want to address this
17 question. And not seeing anybody, I will open it to
18 the general Assembly members.

19 MS. JAMIESON: Mr. Chairperson, Elizabeth
20 Jamieson from the 17th circuit. My question is really
21 a point of clarification and a question. I don't know
22 if it's directed to Ed Haroutunian or if it would be
23 directed to Candace Crowley.
24 My question is under (1) option (d), which is
25 what you said your committees or groups recommended,

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

9 MS. CROWLEY: Yes. It is not our intention
10 at all to eliminate the three cases or 30 hours or
11 \$300.

12 CHAIRPERSON LEVY: Because I don't think
13 everybody could hear, the response was that it is not
14 the intention to change the alternatives to those 30
15 hours, the three cases, or \$300. That would be
16 maintained the same. The question between (b), (c)
17 and (d) is just really whether that becomes 40 or 50
18 hours and four cases or \$400.

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19 MS. JAMIESON: For point of clarification
20 then, I would make a motion to amend (1)(d) so that it
21 says, Include a standard of 30 hours per year, three
22 cases -- or actually it would be 30 hours, three
23 cases, or \$300 per year, so that it's consistent with
24 the prior Assembly activity.
25 MR. ROMBACH: Support.

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1 CHAIRPERSON LEVY: Does that motion likewise
2 modify (b) and (c) to be four cases and 400 and five
3 cases and \$500?
4 MS. JAMIESON: That's up to Ed. I am not
5 making that motion.
6 CHAIRPERSON LEVY: Is somebody making that
7 motion that we do it across the board?
8 MS. JAMIESON: Ed said no.
9 CHAIRPERSON LEVY: I guess then we are
10 amending just (d).
11 I heard a second.
12 MR. ROMBACH: Support.
13 CHAIRPERSON LEVY: Any comments on the
14 motion?
15 No comments, all in favor.
16 Any opposed.
17 MS. JAMIESON: Thank you.
18 CHAIRPERSON LEVY: The amendment is accepted.
19 Any other comments on the, on either of the
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20 two questions we put before the Assembly?

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

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

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1 of 30 hours as amended by Ms. Jamieson, to three cases
2 or \$300 and then choose, if I may move on to (2)(b) as
3 advocated by the sections before us today.

4 VOICE: Support.

5 MR. ROMBACH: So I would actually move
6 adoption of those two options and further discussion
7 at that point. Can I do that?

8 CHAIRPERSON LEVY: I mean, they have all been
9 moved, and we will take that as support for those two
10 options.

11 MR. ROMBACH: I also say they have all been
12 moved. I am also asking that you vote on this at this
13 moment.

14 MS. JAMIESON: You take (d) out of order, you
15 would rather vote for (d) before (a)?

16 MR. ROMBACH: I will say (1)(d). I mean,
17 right now you have to have a vote in front of the
18 panel, and if people want to further discuss my move
19 to do (1)(d), that's what I would like to do right

20 now.

21 MS. JAMIESON: Second.

22 CHAIRPERSON LEVY: Okay.

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

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1 for a vote now.

2 CHAIRPERSON LEVY: Rather than voting the
3 alternatives?

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

6 CHAIRPERSON LEVY: I guess the motion then --

7 MS. JAMIESON: He is calling the question.

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

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

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

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

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

19 HON. ARCHIE BROWN: Not on call the question.
20 Requires a two-thirds vote to call the question.

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21 CHAIRPERSON LEVY: All in favor of calling
22 the question for two-thirds vote then. All in favor
23 say aye.
24 Opposed.
25 I guess we would have to do a quick standing

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1 count.
2 MS. JAMIESON: I think it passes.
3 CHAIRPERSON LEVY: You think that was two
4 thirds? Two thirds it is.
5 We will call the question then. All those in
6 favor of the Assembly adopting (1)(a) so that it would
7 read MRPC 6.1 should include the standard of 30 hours,
8 three cases or \$300 per year. I am sorry, (1)(d).
9 All in favor.
10 Any opposed.
11 Because we are counting minority positions
12 of 25 percent, I am going to ask for a standing count
13 on that.
14 All in favor, please rise.
15 Thank you. And all opposed.
16 Thank you. And those not voting.
17 That is not 25 percent, and, again, I
18 apologize. We will be having to do more such counts
19 today than normal because we are reporting minority
20 positions if they receive 25 percent, and it's a

21 little hard to hear 25 percent of the members voting.

22 That is, however, adopted and --

23 MR. HAROUTUNIAN: Ed Haroutunian from the 6th
24 judicial circuit.

25 I think Tom's comment in terms of going

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1 through and attempting to expedite where, in fact,
2 there may be a sense from the Assembly that certain
3 positions should be adopted or will be adopted, I
4 think that, given the fact that part of our rule
5 indicates if there is a 25 percent minority position,
6 it would seem to me that each of the items, each of
7 the subparts of all of the proposals that are being
8 made have to be voted upon, and if, in fact, it
9 requires in a determination that, you know, it might
10 be close to 25 percent on a given one, then I suspect
11 the chair would turn around and have people who rise
12 and have the vote count. If it's not, then in effect
13 that doesn't mean anything.

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

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

22 point.

23 Just so the Assembly understands that it is
24 an attempt to get some votes in before we start going
25 to lunch, and there was a sense of the body. That I

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1 do concur with him, because the minority position, as
2 he points out, could be as much as 25 percent. I just
3 want to keep the Assembly focused. So if we can vote
4 one by one, I do want to make sure that we get through
5 the entire docket and not give short shrift to other
6 issues that people may be wanting to discuss later in
7 the packet.

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

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

17 The only thing that I want to remind
18 everybody is for purposes of expediency if there is a
19 consensus with regard to one rule where we can get a
20 majority right off the bat, then we ought to do that
21 as Tom did with regard to the first.

23 question is resolved by the Assembly for now. Was
24 that a statement though in support of (a) or (b) in the
25 second, on the definition itself?

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

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

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

18 I don't believe that we should be solely
19 limited to people of limited means, because if the
20 expanded definition it is those people that are in
21 fact sometimes of limited means also, and I am all in
22 favor of (b). I am not in favor of (a).

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CHAIRPERSON LEVY: Additional comments?
24 Mr. President.
25 PRESIDENT BRINKMEYER: Scott Brinkmeyer from

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1 the 17th circuit.

2 with all due respect to Mr. Dunn and
3 Judge Brown, I need look no further than the
4 proponents effectively of (b), and their position was
5 very effectively stated by Candace Crowley.

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

16 CHAIRPERSON LEVY: Thank you.

17 MS. NOLL SMITH: Sharon Noll Smith,
18 6th circuit. I am also a member of the Ethics
19 Committee. I am also a member of the Animal Law
20 Section of the State Bar.

21 I rise to speak in support of the position
22 articulated by the Animal Law Section Chair, Beatrice
23 Friedlander, with regard to expanding the definition

24 of pro bono.

25 The Michigan Rule states direct delivery of

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

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

16 CHAIRPERSON LEVY: Thank you. Tom.

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

20 The Pro Bono Committee had worked with the
21 Assembly through my tenure very closely, and I believe
22 that they know best what's going to achieve our
23 objects of serving the poor and those people of

24 limited means, and by representing the Legal Aid
25 Committee, by representing Pro Bono Services, by

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1 representing Open Justice, all those folks approve the
2 idea of a broader definition to pull in more people,
3 to pull in more attorneys to serve the public matter,
4 and, quite frankly, this is a voluntary standard. So
5 the more people we have out there, the more we can
6 promote the image of a lawyer, the better it is for
7 everyone, and, as Ms. Smith has pointed out, and the
8 Law Section and a whole group of others, that I think
9 we are all on the same page here. We are really
10 arguing about what our approach is.

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

20 So, again, the emphasis is still going to be on
21 the folks that need the help financially that can't
22 afford to pay for legal services. It's just
23 the definition is a broader area, and I think we
24 should shoot for a broader target, because this is a

25 voluntary standard and aspiration of those for high

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1 standards within the profession. So I advocate (b)
2 here. Thank you.

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

11 VOICE: Support.

12 CHAIRPERSON LEVY: I guess we will treat that
13 as a motion to amend, and there was support, so we
14 will begin discussion on the motion to amend, and just
15 I would note initially that, based upon the
16 discussions leading up to today, I think to answer
17 part of that question, it was just the notion that
18 this is not pro bono work, what we are doing here
19 today, whatever you want to call it, and it is in the
20 name of the legal profession, and while there was a
21 sense that the definition needed to be broadened by
22 some people, there was also a sense it needed to be
23 limited in some way. But there is a motion and a
24 second to make the amendment. Is there any further

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1 On the question of whether or not to amend
2 the proposal in part (b) to delete the "but not" and
3 -- "but not by" and substitute "and to include," or
4 "including," I am sorry.

5 All in favor of the amendment?

6 All opposed.

7 It's a majority vote.

8 we are going to make you rise again. All in
9 favor of the amendment.

10 Thank you. All opposed to the amendment.

11 Thank you. Any not voting?

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

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

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

22 CHAIRPERSON LEVY: The question was whether
23 you had a motion that I am supposed to be taking a yes
24 or no on (2)(b) or if I am still taking the options.

25 I guess then we are voting yea or nay on

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1 (2)(b), the more broad definition, as amended.

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

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

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

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

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

13 we are beyond 75 percent. Thank you.

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

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

21 MR. ALLEN: Good morning again. The
22 Grievance Committee position, we did not have your
23 briefing book in front of us when we met, but I
24 believe it would most closely resemble
25 subparagraph (b) on page 44 of the briefing book.

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1 The reasoning for that would be this: The
2 current version of the rule is stated in our report on
3 page 45 of your briefing book as part of the
4 Rule 1.0(b), asserting that the rules do not give rise
5 to a cause of action for enforceable damages or for
6 failure to comply.

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

12 As cited on page 45, the rules are used in
13 civil actions either as presumptions or as evidence of
14 breaches of the standard of care. As cited on Rule
15 45, the Supreme Court holds that only the rules are
16 authority, the comments are not authoritative
17 statements, and, in fact, in the proposed rules
18 Comment 21 as proposed by the Ethics Committees says
19 essentially the same thing, that the preamble and the
20 note on scope are intended to provide general
21 orientation and not to be interpreted as rules. The
22 text of each rule is authoritative.

23 Therefore, it is our position that the
24 statement should remain in the strength that it is in
25 the current rule, it should remain part of the rule

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1 and not be demoted to a comment.

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

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

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

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

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

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

21 CHAIRPERSON LEVY: Thank you.

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

24 On the bottom of page 43, does the Grievance
25 Committee recommend that we, in fact, adopt the language

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1 of the last three lines that is even more dynamic,
2 more definite?

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

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

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

17 MR. LARKY: Mr. Chair, I would move for an
18 amendment to the proposed rule. I agree that we
19 should, in fact, contain this language, and I would --
20 if it requires a writing, I have a writing, but I am
21 moving that our Representative Assembly adopt the last
22 three lines on page 43, and if you need me to put it
23 in writing, I will. I have it in front of me, because
24 it's more than five words, but I want to adopt that we
25 stand for violation of a rule does not itself give

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1 rise to a cause of action against a lawyer nor does it
2 create any presumption in such a case that a legal
3 duty has been breached, and I would so move.

4 VOICE: Support.

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

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

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

12 CHAIRPERSON LEVY: Yes.

13 MR. LARKY: I stopped counting representing
14 attorneys in about 200 legal malpractice cases, and I
15 stopped counting when I represented about a hundred
16 plaintiffs in various legal malpractice cases, and my
17 concern was, as John Allen indicated a few minutes
18 ago, that the rules are being used against attorneys,
19 and that was not the intent. That wasn't the intent
20 of the civil cases before us, and for those of us who
21 have ever sat as a defendant in a legal malpractice
22 case, for those of us who ever prosecuted on behalf of
23 a client in a legal malpractice case have had these
24 Rules of Professional Conduct thrown in the courtroom
25 situation.

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1 My personal feeling is the rule doesn't go
2 far enough. I would like it to say even one more
3 thing, anybody who uses any reference to these rules
4 in a civil matter shall itself have an act of
5 misconduct.

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

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

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

25 MR. MORGAN: Mr. Chair, point of order. I

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1 think the sense of the motion made by the proponent
2 was to keep in the words "reject Model language" and
3 suggesting the addition of that language as being the
4 language that would appear in Rule 1. It's not to
5 strike the word "reject the Model language."

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

8 MR. LARKY: That's correct.

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

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

15 MR. ELLMANN: Douglas Ellmann, 22nd circuit.

16 Picking up on something Mr. Larky mentioned
17 in his comments, and I know he can't talk again, but I
18 want to make sure I get the language right. I liked
19 his idea, and I guess I would offer this as a possible
20 amendment if the Assembly, if someone else thinks it's
21 appropriate to indicate that a reference to these
22 rules as a basis of an impropriety by an attorney in a
23 civil action will in itself be an ethical violation.
24 I would ask Mr. Larky's help with respect to the
25 language.

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1 CHAIRPERSON LEVY: I do want to remind the
2 body that we were going to attempt to stick to
3 general, overall principles and try not to get lost in
4 language questions, but does that -- is that a
5 friendly amendment? It would have to be in writing.

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

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

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

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

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

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1 proper evidence in a case of malpractice.

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

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

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

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

24 MR. LARKY: Mr. Levy, I accepted it as a
25 friendly amendment, but I am going to vote against it.

1 CHAIRPERSON LEVY: If you accept it as a
2 friendly amendment, you can't vote against it. It's
3 part of your proposal.

4 MR. LARKY: Pardon me, I reject it.

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

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

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

11 VOICE: well, with the amendment.

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

14 VOICE: Call the question.

15 CHAIRPERSON LEVY: Question has been called.

16 CLERK BUIREWEG: Point of order, Mr. Chair,
17 the special rules that we adopted for this meeting
18 indicate that alternatives to a proposed rule or
19 position shall be presented in writing and in
20 sufficient quantity to be circulated to all Assembly
21 members present and include et cetera, et cetera.

22 I am not sure that Mr. Larky's proposal falls
23 within the rules that we have set for our meeting
24 today. That's just a point of order

25 MR. ROMBACH: It's in the book.

1 CHAIRPERSON LEVY: I think in this case it
2 really is an amendment of (b) to be more specific
3 rather than it is a complete new proposal, but I do
4 appreciate the caution that we need to be careful not
5 to substitute new proposals, but I do think in this
6 case it is a more specific version of what was already
7 presented.

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

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

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

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

17 Any opposed.

18 (b) is amended.

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

22 MR. DUNN: The lead-in statement on page 44
23 indicates MRPC 1.0 and the preamble should. Is it
24 still intended that this language, whatever is
25 adopted, be in both the preamble and in the rule? The

1 recommendation from the Ethics Committee is it would
2 be in the preamble only.

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

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

12 CHAIRPERSON LEVY: Name and circuit, please.

13 MR. MORGAN: Don Morgan, 3rd circuit.

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

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

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

25 MS. JAMIESON: MRPC 1.0 and the preamble

1 should --

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

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

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

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

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

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

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

25 MR. BYERLEY: Right, but I mean the intent is

1 to keep it like the current 1.0, which won't fit into
2 the new format.

3 MS. FELDMAN: 1.0 is terminology.

4 CHAIRPERSON LEVY: I am thinking what we are
5 going to have to do is take two votes, one as to
6 whether or not the language should be included and
7 then secondly, if it is included, whether it needs to
8 be a rule --

9 MS. FELDMAN: That's correct.

10 CHAIRPERSON LEVY: -- or part of the
11 preamble.

12 MR. DUNN: Yes.

13 CHAIRPERSON LEVY: So if that is clear, the
14 question is being divided in a sense. The first
15 question will be whether or not the language that is
16 in (b) as it appears on the board, whether or not that
17 language should be adopted, and then there will be a
18 second vote if the language is adopted as to whether
19 or not it should be made part of the preamble or part
20 of the rules. Is that, first off, clear to people?

21 MR. LARKY: Mr. Chairman, I think -- Sheldon
22 Larky, 6th circuit.

23 I think the sense of this body is we want to
24 send a message to the Supreme Court that we want them
25 to adopt a specific rule that as we just adopted a

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2 but as a specific rule.

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

8 MR. LARKY: Yes.

9 MS. JAMIESON: So you accept the friendly
10 amendment?

11 MR. LARKY: Yes.

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

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

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

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

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

23 MR. LARKY: Yes.

24 MS. JAMIESON: He has accepted. Now do you
25 have to bring it to a vote? I don't think you do. He

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1 has accepted it.

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2 CHAIRPERSON LEVY: Except it was already
3 passed. It wasn't on the floor so you can't amend.
4 MS. JAMIESON: So now it's --
5 CHAIRPERSON LEVY: So now it's a new
6 amendment. He can't accept it. It has to be a vote.
7 MS. JAMIESON: So have a vote.
8 VOICE: Second.
9 CHAIRPERSON LEVY: It is on the floor, and
10 all in favor of amending it to indicate that it be in
11 the rules as it now appears.
12 Any opposed.
13 There was opposition, but it passes.
14 To make this a little bit simpler then --
15 MS. JAMIESON: Can I call the question?
16 CHAIRPERSON LEVY: Do I have a motion to take
17 a yea or nay vote on (b) as it appears?
18 VOICE: Yes.
19 MS. JAMIESON: Call the question (1)(b).
20 VOICE: This is as opposed to (a)?
21 CHAIRPERSON LEVY: This would just be a yes
22 or no vote directly on the language now in (b), so
23 that the vote would be yes or no MRPC 1.0 --
24 VOICE: You would be recommending (b) instead
25 of (a)?

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1 CHAIRPERSON LEVY: Correct.
2 MS. JAMIESON: For point of clarification, if
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3 we vote on (b) first and it's greater than 75 percent,
4 then we know there is no chance for a minority vote.
5 If we have a majority vote but it's not 75 percent, we
6 will go to (a) and see whether or not we have a
7 minority vote on (a). If we don't, then we are done.

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

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

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

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

25 So the first vote is going to be for the

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1 rules. If that doesn't pass, then you have the
2 opportunity to make a different amendment with regard

3 to the preamble.

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

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

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

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1 scope says should not, I think we have to make sure
2 very definitive both in the scope section as well as
3 the proposed rule.

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4 So the language as it sits on the board right
5 now in red is the language that I asked for that the
6 body had voted upon already.

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

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

22 CHAIRPERSON LEVY: I guess --

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

25 CHAIRPERSON LEVY: I guess the answer is that

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1 then vote against it, because that is what it says and
2 it's been called, so that the vote is on whether or
3 not --

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4 MS. JOHNSON: We voted to include --

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

11 All in favor of that proposal, please rise.

12 VOICE: What are we voting on?

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

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

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

23 Thank you. And any not voting.

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

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1 MR. LARKY: Mr. Chairman, in light of that I
2 move that we strike the words "and the preamble" in
3 the first line, and that's my motion. Sheldon Larky,
4 6th circuit.

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5 CHAIRPERSON LEVY: So that it states only in
6 the 1.0 definition of terms?
7 VOICE: Second.
8 VOICE: Support.
9 VOICE: Point of order. Don't we have a vote
10 coming on (a)?
11 CHAIRPERSON LEVY: The motion is to include
12 the language, but to include it only in 1.0, the
13 definition of terms. Is there comment on that motion?
14 There was support, was there not? Is there support?
15 VOICE: Support.
16 MR. LOOMIS: Mr. Chairman, Dan Loomis, 35th
17 circuit. I believe that we would be better served by
18 striking the words "MRPC 1.0 and" so that we could say
19 that the preamble should have this language, "and in
20 the rules," wherever the rules appropriately place
21 them, rather than striking "and the preamble," because
22 I think the language in the rules will let us put that
23 wherever we want to. It doesn't fit in terminology as
24 the president has said. So I know we have an
25 amendment on the floor. As long as that's on the

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1 floor, I think we should vote that down, and then I
2 would make a motion as stated.
3 CHAIRPERSON LEVY: I see a head nodding.
4 Maybe friendly substitution.

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5 MR. LARKY: I accept the substitution,
6 because I think he is absolutely right.

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

11 MR. LARKY: Yes.

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

14 MR. LOOMIS: It would be.

15 CHAIRPERSON LEVY: Is there a second?

16 VOICE: Second.

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

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

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

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

5 MR. BARTON: Point of order. I understood
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6 the motion to be that the preamble and rules should.
7 In other words --

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

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

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

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

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

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1 Point of order. I am just trying to clarify
2 what we are doing. I am not advocating any position
3 or the other. I am just trying to clarify. As it's
4 currently written what it says is that the preamble
5 will reject the Model language and that the rules will

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6 include the new language. It does not state that the
7 preamble will also include the new language. Is that
8 the way you want it to be?

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

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

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

24 MS. POHLY: Mr. Chairman, Linda Pohly from
25 the 7th circuit. Point of order. I believe the

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1 motion as it is now, as I understand it, before this
2 Assembly is in violation of the rule adopted for this
3 Assembly regarding alternative proposals. It has not
4 been submitted in writing and circulated ahead of time
5 as required by paragraph (a). There are many, many
6 other issues to consider. If we continue this

7 methodology of approaching these issues, we will not
8 address half of the issues we need to approach today.

9 MR. ORDWAY: Mr. Chairman, Dustin Ordway,
10 17th circuit. I would also like to refer to the
11 rules. My understanding is that we adopted (7)(c),
12 which says if we vote on a provision, it doesn't get
13 50 percent, it's been rejected, so I would simply ask
14 for clarification why we are still discussing (b).

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

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

22 It's being pointed out that I have already
23 ruled on the clarification question, that this is a
24 modification of a proposal that was already presented,
25 it is not new, and that even the specific language is

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1 included in the written materials, so it's not a
2 surprise, which was the intent of that rule, that
3 things be presented in writing and in sufficient
4 numbers so that it is properly before the body.

5 MR. LOOMIS: Daniel Loomis, 35th circuit.
6 Perhaps to maybe clarify the comments that have been

7 made. (b) should read, instead of reject the Model
8 language, that the preamble and the rules state, so
9 that what we have is that if you are in favor of (a)
10 you are going to adopt in the preamble only the should
11 language, and if you adopt (b), the preamble and a
12 rule, whatever appropriate placement it is, would say
13 that it does not.

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

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

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

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

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

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

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

10 CHAIRPERSON LEVY: There was --

11 MR. ROMANO: That was a motion and second.

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

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

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

4 we are close to now leaving only three and a
5 half hours for a ton of very important issues, and,
6 just as your executive director, I beg you to find a
7 way not to spend another half hour on the procedural

8 issue here, because, frankly, as somebody who has had
9 to work with these for years and years it isn't going
10 to make a squat bit of difference in the
11 interpretation whether or not it's in the preamble or
12 whether it's somewhere else. It's ultimately going to
13 be interpreted the same way by the court and by the
14 regulatory authorities as well.

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

21 CHAIRPERSON LEVY: If we unstrike the word
22 should -- no, go back. You had it right with just
23 that one word. And then strike it again from the text
24 below, should, everything up to state, the preamble
25 and the rules. What we are then left with is the

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1 preamble and rules should state. I think that's the
2 language, that was the intent of the language. I
3 forgot who made the original proposal, but is that the
4 intent of what you are trying to say?

5 MR. LOOMIS: No, it isn't. At the very
6 beginning it should say, "the preamble should," and
7 (b) it will state, "the preamble and the rules shall
8 state.

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9 MS. DIEHL: Nancy Diehl, 3rd circuit. Could
10 we go back, based on what has been said here, so that
11 we don't get bogged down on where we want it. If we
12 go back to the original language and put and/or, if we
13 want -- we want the language somewhere, we don't know
14 where, and I don't know where we are at in motions,
15 but it's a friendly amendment, and/or, and we will let
16 someone decide later where it belongs.

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

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

21 CHAIRPERSON LEVY: Should state.

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

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1 CHAIRPERSON LEVY: Is that accepted?

2 MR. LOOMIS: It is not.

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

6 MS. JAMIESON: Was there a second to Nancy?

7 VOICE: I will second the motion.

8 MS. JAMIESON: There is a second to it.

9 CHAIRPERSON LEVY: So we are addressing
10 Nancy's motion.

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

20 CHAIRPERSON LEVY: It was --

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

23 CHAIRPERSON LEVY: I believe the intent of
24 the special rules is do not vote for more than one
25 alternative when (a), (b), and (c) were being

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1 presented simultaneously, not that it closed off
2 options for future votes.

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

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

8 VOICE: Second.

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

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

12 CHAIRPERSON LEVY: We will return to session.

13 I think it's probably best if I start with something

14 of an apology. I have a new respect for the term, I

15 was telling somebody, a new respect for the term

16 slippery slope.

17 The initial motion to substitute a phrase for

18 the term negligent seemed like such a good idea and so

19 clear that that seemed fine, and then let's put the

20 specific language in instead of the general seemed

21 like a good idea, and then it was all of a sudden now

22 that we have specific language and it says where it's

23 supposed to go doesn't work quite so well so we have

24 to start making changes, and I think it just proves

25 the need for the initial rules that we have, which I

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1 will now endeavor to strictly enforce.

2 If, in fact, you wanted to do something

3 that's more than just change a word to clarify, and

4 even that so-so, but if it's more than that it's going

5 to have to be in writing and for everybody and

6 submitted in time to be considered. In other words,

7 if the rules are unacceptable, if their policies are

8 unacceptable as drafted, vote against them. We will

9 end up with no position on that issue, but we can keep

10 on moving rather than we are not going to get into the
11 heavy drafting of the rules or specifically not get
12 into where things need to go.

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

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

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

8 If you go back to the booklet that we kept
9 from past meetings, the Standing Committee on
10 Professionalism and Judicial Ethics, that book has in

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11 it what the preamble and scope is. This is actually
12 going to go specifically under scope to Section 20.

13 Now, obviously as a legislative body we ought
14 not to be in the policy of drafting, but, again, in
15 this one specific instance, since the language invited
16 us to use language on here, and I hope that this is
17 going to be the exception to the rule and not the
18 rule, that this language that had previously been
19 proposed could both go under Section 20, I believe the
20 Ethics Committee will endeavor to do that, and also a
21 similar rule would be added that would hopefully reach
22 75 percent consensus so we could move on to more
23 weighty policy matters.

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

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

3 VOICE: Support.

4 CHAIRPERSON LEVY: There is a motion, there
5 is support. Is there any discussion? Seeing no
6 discussion -- it is pointed out to me that this is
7 probably alternative (c) because there is a position
8 (b) that was voted down without -- with minority
9 positions that may need to get noted, so this is
10 position (c), but we will now take a vote. Section

11 20, Section 20 it should read.

12 We will now take a vote, we are on (a), and
13 then on this alternate proposal, which is now (c), and
14 then no position if you feel neither position is
15 acceptable and proceed with the remainder of the rules
16 as they are presented and written.

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

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

22 That passed.

23 which brings us to the 5 (c), the writing
24 requirement.

25 This rule goes to a number of different

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1 sections. I think that's pretty clearly stated. Is
2 there a representative here from the Grievance
3 Committee who wishes to address?

4 And this was a minority opinion?

5 MR. ALLEN: It was. As your proposal is
6 written, and, again, we did not have these in front of
7 us, it appears to be one that speaks towards written
8 consent. I don't know whether that's intended to mean
9 that the client has to sign and indicate that consent.
10 I think what the proposal of the Ethics Committee the
11 Model Rules talk of is written confirmation of

12 consent. I don't believe they are intending to
13 require a signed consent by the client necessarily,
14 and in the current rules as they stand, I believe
15 there are two instances where signed consent is
16 required. Those are retained. One has to do with
17 business transaction of the client, and the other is
18 certain contingent fee agreements.

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

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

3 There was a minority of our committee who --
4 first of all, the smallest minority thought there
5 ought to be signatures by clients, the client or other
6 person ought to be required to sign. There was a
7 lesser minority of the committee who thought that this
8 proposed rule and written confirmation presented
9 certain potentials for danger in that it is
10 essentially an evidence requirement. It is not
11 required to be sent before the consent is given. It

12 may be sent afterwards, and, therefore, the principal
13 purpose of it appears to be to create a piece of
14 evidence that substantiates that the informed consent
15 disclosure was given and that the consent by the
16 client came forth.

17 There would be a potential, we believe, for
18 persons to use that evidentiary requirement as a
19 reason why the rules have been violated and,
20 therefore, the consent is not valid and to do that
21 after the fact, after the lawyer had already relied
22 upon an actual consent being given at least orally by
23 the client and, therefore, that could be used once the
24 consent is voided to make out a violation of the rules
25 which would be usable in a civil action to oppose, for

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1 instance, a collection of a fee or to assert a civil
2 liability.

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

10 CHAIRPERSON LEVY: And having just been noted
11 that their majority agreed with you, does the Ethics
12 Committee wish to respond?

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13 HON. ELWOOD BROWN: No.
14 CHAIRPERSON LEVY: Any comments from sections
15 or committees?
16 Any comments from members of the Assembly?
17 MR. LARKY: Sheldon Larky, 6th circuit. On
18 page 51 we have to pick one or the other. I vote we
19 should have written consent. I particularly ask the
20 members of the Assembly to look at the handout that
21 was written by George Kemsley, and in there, the
22 second page near the bottom, both the Chicago Bar
23 Association and the Illinois State Bar formed a Joint
24 Task Committee and their opposition to having
25 confirmed in writing is found in the last couple

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1 sentences.
2 I want you to imagine for a moment that you
3 are sitting with a client during a heated conversation
4 and you give your client certain advice. If you do,
5 then you need confirmation in writing, you are going
6 to -- these negotiations are going on, and I can
7 foresee a situation where you can be involved with
8 multiple parties and have to pull your client out on a
9 regular basis and have to get something confirmed in
10 writing.
11 This is good for us, but it's also bad. I
12 think what's written in the bottom here where it says,

13 on the second page of the letter, Although written
14 conflict waivers are clearly desirable in many
15 situations, requiring written consent in every
16 situation as a matter of discipline is both
17 unnecessary and inappropriate. Often, the conflict
18 issues are clear, the affected clients understand the
19 issues, and the matter is uncomplicated. The need for
20 consent may arise unexpectedly and without notice in
21 the midst of a transaction or other matter. In such
22 cases, requiring a writing merely adds unnecessary
23 delay and expense, and elevates technicality over the
24 substantive question of whether consent was given.
25 Moreover, subjecting a lawyer to potential discipline,

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1 disqualification, and malpractice liability for want
2 of a writing -- when it may be entirely clear that the
3 consent was in fact given -- is not reasonable.

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

6 CHAIRPERSON LEVY: Thank you.

7 MS. JAMIESON: Mr. Chairperson, Elizabeth
8 Jamieson on behalf of the 17th circuit. I speak in
9 favor of proposal (a), which is not requiring written
10 consent or notice. For clarification, this is not the
11 position set forth in the ABA Model Rules or that
12 proposed by the Ethics Committee. This is a position
13 of the current Michigan Rules.

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14 The synopsis states that Ethics Committee
15 queries who would file a grievance if the client
16 provided consent. The Ethics Committee assumes that
17 if a client consents, regardless of the writing
18 requirement, the client would not file a grievance for
19 the failure to put the consent in writing.

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

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

10 we have had situations here in Michigan
11 involving a minor isolated violation. The Attorney
12 Grievance Commission has filed a grievance, hearing
13 panel and Attorney Discipline Board indicated no

14 discipline was warranted and no sanctions were
15 recommended, yet the Supreme Court held that the mere
16 violation of a rule regardless of harm constitutes
17 misconduct.

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

22 MR. ROTENBERG: Steven Rotenberg, 6th
23 circuit. I recommend voting for proposal (a) because,
24 as a practical matter, there are a lot of attorneys
25 who just don't have a lot of backup staff, and if we

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1 were to be required to give written consent for
2 everything I think a lot of my clients and maybe some
3 of your clients could no longer afford you because I
4 would be spending a lot more time drafting the
5 writings for the file than actually doing something
6 substantive or useful for them, and I see this as a
7 liability if we would actually require that. That's
8 my opinion.

9 HON. ELWOOD BROWN: Mr. Chair, can I point
10 something out? And it may just be semantics, but from
11 what I have heard so far, and John Allen pointed out
12 when he talked about his minority position that the
13 Grievance Committee had, this doesn't require written
14 consent. It requires consent to be confirmed in

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15 writing, which means it doesn't have to be
16 contemporaneous, it can be after the point, and I have
17 heard people use the words written consent before you
18 act. It's not necessarily so. I just wanted to point
19 that out.

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

22 MR. ROMBACH: Tom Rombach from the 16th
23 circuit. Noting that, I still have some serious
24 concerns, and I think that Judge Brown, particularly
25 having been prosecuting attorney up in St. Clair

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1 County, would share those. I am still for (a),
2 practicing in a criminal environment, whether it's
3 subsequent or not.

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

14 If you are representing somebody in a

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

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

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

8 So to me that alone, if you give me option
9 (a) or option (b), I have to, so as not to put an onus
10 on the lawyers that I represent, that I have to say I
11 can't do this written thing, because it may be good in
12 most environments of covering my butt, but a lot of
13 the times it's going to be flapping in the breeze
14 anyways. Because you are going to require it, it's
15 going to be flapping in the breeze.

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16 I really appreciate the effort, the time, and
17 thought the Ethics Committee has put into it, but the
18 environment in which I practice, this is totally
19 impractical and I don't want to put myself in a sling
20 for future grievances, because that's what we are
21 doing with each and every one of these quasi criminal
22 rules that John Allen pointed out, so I speak
23 vehemently against (b) and I want to not require
24 lawyers written consent or provide written consent.
25 If they can't take my word on it, then I suffer the

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1 consequences. Thank you.

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

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

12 MR. BARTON: Bruce Barton, 4th circuit. I
13 guess I have to back up to what Tom Rombach just said.
14 Regardless of intent, a blanket rule of any kind that
15 speaks to the idea that you have to have written

16 confirmation of this type can be used against lawyers,
17 and I speak particularly to our handout materials and
18 to the first item here. It says, The lawyer is to
19 have in writing consent to a person's agreement to a
20 proposed course of conduct after the lawyer has
21 communicated information and explanation reasonably
22 adequate under the circumstances about the material
23 risks of and reasonably available alternatives to the
24 proposed course of conduct.

25 That doesn't say anything about conflict of

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1 interest, and I would suggest that going one step
2 further to what's inferred, what do I do in a criminal
3 trial when it's down to the time of the defense and
4 the defendant insists on taking the stand and I know
5 that's a bad move and he insists. What do I do? Say,
6 Stop it, Judge, I want this in writing? I don't think
7 so.

8 MS. JAMIESON: Thank you.

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

14 I would have risen in support of not
15 requiring writing when this process began. I want to
16 tell you why I would rise now, and it applies to a

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17 bunch of the rules we are going to be considering. I
18 promise not to get up each and every time.

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

25 If there are going to be rules, there are

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

14 We have already indicated, we have already
15 talked about the fact that we don't want these rules
16 to create independent causes of action. Potentially

17 if you take the client with a serious conflict and
18 don't get it in writing they could bring a cause of
19 action. This writing protects you.

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

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

7 VICE CHAIRPERSON JAMIESON: Ethics Committee.

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

15 I would also like to note that in the
16 alternatives in front of the Assembly item (b), which
17 would be in favor of the rule as proposed, really is

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18 somewhat misleading in that it states that it requires
19 lawyers to obtain written consent and to provide
20 notice.

21 The rule does not require written consent.
22 It only requires providing written notice, and when
23 this proposal is considered it ought to be considered
24 fairly that the words "written consent and" be stricken
25 from (b) and, in fairness, (a) as well.

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

11 I think interestingly both the discipline
12 counsel in this country and respondent's counsel,
13 surprisingly, the respondent's counsel is very much in
14 favor of this rule. In fact I have talked to a number
15 of them here and at national. The reasons that were
16 enunciated by Dan, that it clarifies rather than hurts
17 those kinds of complaints coming in. That is not to

18 minimize the fact that there can be times where it
19 would be abused by some people, but the overall
20 balance in the conflict area is an area which would be
21 more clarification than it would be --

22 CHAIRPERSON LEVY: Additional discussion.

23 MS. LIEM: Veronique Liem, 22nd circuit. I
24 just have a question. If we don't have written
25 consent we would still have the requirement of

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1 informed consent, right? And so -- the answer is yes,
2 right?

3 And so why not leave it to the lawyer to use
4 his or her own judgment knowing that if they don't get
5 written consent there may be consequences because they
6 may not be able to prove they got informed consent,
7 but it shouldn't be a judgment or decision knowing if
8 we don't get it in writing we may be penalized for it
9 ultimately. That's my question.

10 CHAIRPERSON LEVY: I don't know that it needs
11 a response, if it's a question or just argument.

12 HON. ELWOOD BROWN: I don't know if it's
13 really a question as opposed to a statement of
14 position, but I just point out again you don't have to
15 have written consent, you just have to confirm the
16 consent in writing. There is a distinction. It's an
17 important distinction.

18 MS. FELDMAN: There are instances in the law
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19 which you all are aware of where writings are
20 necessary even if parties agree to something. Statute
21 of Frauds, for example, why would we have a Statute of
22 Frauds when the parties could just agree to anything
23 and we could just have a swearing contest every single
24 time there is a sale of real estate, et cetera,
25 et cetera.

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

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

16 VOICE: Call the question.

17 CHAIRPERSON LEVY: I hear a motion to call
18 the question. The question before us is whether the

19 rules should require it be in writing, (a), or not
20 require it be in writing. I would offer that the key
21 is as set forth in the rules, so that as the rules
22 would say written notice versus written consent, it is
23 what the rule says. This position here does not
24 purport to change any of that. The question is
25 whether or not in conflict areas there should be a

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1 writing.

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

4 MS. FELDMAN: It's not written consent.

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

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

10 All opposed.

11 The (a)'s have it.

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

14 The (a)'s have it.

15 MR. ROMANO: Do we have 25 percent
16 minorities?

17 CHAIRPERSON LEVY: It was the opinion of the
18 chair that we were not close to 25 percent, so I
19 didn't call for a headcount. If somebody wants to

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20 move we can, but I don't think we were.
21 which brings us to informed consent, (5)(d)
22 on the agenda. I am thinking maybe it makes most
23 sense if we start with the Ethics Committee to explain
24 why it is that they propose requiring informed
25 consent.

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1 HON. ELWOOD BROWN: I think -- I apologize
2 because I was day dreaming here as you were asking the
3 question, but as I understand, your question is what
4 is the reason to have informed consent?

5 I think from a practical standpoint the
6 definition of informed consent is nothing more than
7 what is the definition or the manner in which the word
8 consent would be interpreted in a proceeding as to
9 whether or not consent was actually given, because
10 consent means nothing unless it's informed consent.
11 And the current rule from the practical standpoint,
12 consent after consultation.

13 The definition that we have presented is
14 nothing more than what has been used in many legal
15 contexts anyway. I believe that from a professional
16 disciplinary position that if you get into an issue of
17 failure to give consent it's really going to be an
18 issue of failure to give informed consent, because, as
19 I indicated before, simply to say my client or whoever

20 consented to this means nothing unless he or she were
21 given the full explanation of what they were
22 consenting to and, therefore, it's the recommendation
23 that informed consent be the benchmark as defined.

24 MS. FELDMAN: I just want to add real
25 quickly. This is the ABA's proposal that we basically

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1 have gone along with. That was debated and decided
2 and in the spirit of trying to keep as much as we
3 thought appropriate from the ABA Models. We thought
4 this was not a real substantive change to what we
5 already had, consent after consultation, and
6 considering that this verbiage, informed consent, is
7 in a variety of rules and to keep it consistent with
8 the ABA and so that we could look to ABA ethics
9 opinions and other opinions throughout the country
10 that have the same language, this to us was a better
11 approach, not substantively changing what we already
12 have, otherwise it is going to require changing a
13 variety of rules and will make it appear that we are
14 different when in fact we don't believe there is a
15 real difference.

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

19 MR. ALLEN: John Allen, chair of the Special
20 Committee on Grievance. A minority of our committee

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21 expressed concern about certain aspects of the
22 application of the informed consent rule. Informed
23 consent sounds nice. It's very gentle, it's warm,
24 it's fuzzy. When we look at the comments which are on
25 page 61 of your briefing book, the commentary to the

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1 rules say that this informed consent must be
2 reasonably adequate, it must include an explanation
3 about the material risks and reasonably available
4 alternatives.

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

13 That is a blueprint for attacking consents
14 that are plainly given. Even in crowds someone can
15 stand on a stage in an auditorium and give consent and
16 yet come back afterwards and say the degree of
17 information they had, the number of material risks,
18 the number of available alternatives was not complete.

19 There is no cookbook method to doing this.
20 There is no form that has been preapproved as a safe

21 harbor. It is something that it must be done in each
22 individual instance, and in at least 5 of the 12
23 instances it must be to a person who is not your
24 client. Sometimes it's a person who will be the
25 opponent, for instance a former client under 1.9.

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1 It can be participants in ADR when you are
2 the mediator or arbitrator. It can be a prospective
3 client under 1.16, and yet it is your duty in those
4 circumstances to give that person advice, in effect,
5 that these are the material risks, these are the
6 various alternatives available to you.

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

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

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

21 HON. ELWOOD BROWN: Mr. Chair, if I could

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22 point out one thing.

23 CHAIRPERSON LEVY: Please.

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

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

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

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

18 MR. ALLEN: It was not my intent to slight
19 that. I thought that it would be well covered by
20 other representatives here, including those from the
21 Ethics Committee, but I will be glad to do both.

22 CHAIRPERSON LEVY: Thank you. Other
23 committees or sections?
24 MS. JAMIESON: I bet none of you thought you
25 would hear from me this much today. I don't think I

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1 have ever spoken to the Assembly as much as I have
2 today, but I feel very strongly about the importance
3 of these rules, and I spent a lot of time reviewing
4 the language as proposed in the rules from the Ethics
5 Committee, and I have submitted an alternate proposal
6 with regard to informed consent.

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

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

15 Informed consent appears in a lot of
16 different rules, and under the synopsis I point out
17 the fact that informed consent would apply to three
18 different types of people, to someone who is not a
19 client of the lawyer at the time consent would be
20 required, from someone who is a client but not
21 represented by the lawyer in the matter for which
22 consent would be required, and third, from someone who

23 is a client represented by the lawyer in the matter
24 for which consent would be required.

25 I believe that informed consent is

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1 appropriate for those rules where you are obtaining it
2 from someone who is a client represented by the lawyer
3 in the matter for which consent would be required.

4 Proposed Rules 1.4, 1.6, 1.7, 1.8, 1.10 and
5 2.3 all deal with someone who is a client. Rules 1.9
6 deals with former clients, 1.11 deals with former or
7 current government officers, 1.12 deals with former
8 judges, mediators, and 1.18 deals with prospective
9 clients that aren't even yours.

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

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

21 I believe that either (c) or (d) are better
22 options than (a) or (b) and, therefore, I propose

23 those as alternate positions of the State Bar.
24 CHAIRPERSON LEVY: And the alternate position
25 would be treated as a motion to amend to add option

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1 (c) or (d), so is there a second?
2 VOICE: Support.
3 CHAIRPERSON LEVY: Does the committee want to
4 respond to the --
5 HON. ELWOOD BROWN: I am not certain that I
6 understand the difference between informed consent and
7 disclosure and consent. It seems to me that if you
8 are disclosing all of the facts necessary or
9 reasonably adequate under the circumstances that you
10 have given informed consent, you are getting informed
11 concept. So unless there is some definitional
12 distinction between those two, I am not certain it
13 does.
14 MS. JAMIESON: In response, my understanding
15 of informed consent is pretty much giving advice, and
16 so what some of these rules would require attorneys to
17 do is pretty much give advice to people who are not
18 their clients, and in those situations I am saying I
19 don't think it's appropriate. I don't think lawyers
20 should be obligated to give advice to a prospective
21 client, to somebody who is a client on a totally
22 different, unrelated matter. I don't think they
23 should have to get informed consent with regard to

24 those individuals.

25 CHAIRPERSON LEVY: The proposals are not

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1 intended to redefine or to adjust the definition of
2 informed consent, only to who it's required?

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

11 HON. ELWOOD BROWN: I would simply point out
12 that some of these rules, for example 1.9 which you
13 are dealing with a former client, it's with
14 confidentiality, conflicts of interest, and even
15 though that person is not a client now, you may have
16 come, because of your representation, you may have
17 come into possession of some information which would
18 require, before you are able to use that, the consent
19 of the client who used to be your client even though
20 not now your client and, therefore, that should be, in
21 my view should be an informed consent, not just
22 saying, not just a disclosure and consent, if there is
23 some distinction between the two, and that's just one

24 rule in which you are not currently representing the
25 individual, but because you had represented the

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

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

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

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

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

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

25 required, that wherever it's required that it be

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1 informed consent, please rise.

2 MS. FELDMAN: Is that the Ethics Committee?

3 CHAIRPERSON LEVY: This would be the Ethics
4 Committee proposal.

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

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

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

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

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

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

21 Thank you. And option (d).

22 Thank you very much. There is no majority,
23 but several minority positions that will be reported
24 out. (A) received 31 votes, (b) received 27 votes

25 both of which are over 25 percent (c) received 13

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1 votes and (d) received four votes.

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

4 CHAIRPERSON LEVY: Agenda item 5(e).

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

19 Perhaps, I would suggest, particularly for
20 the one that only had one vote raised, perhaps he
21 would want to select another one. So, again, I don't
22 know how you logistically do that, but in fairness to
23 the people that have distinct minority positions,
24 perhaps they would want to speak to that, perhaps we
25 could address that concern.

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1 MS. JAMIESON: Tom, we had 13 for (c) and
2 four for (d).

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

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

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

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

20 MR. ROMBACH: Thank you very much.

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

24 MR. ROMBACH: If he is voting a minority, you
25 have to take a vote on that.

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1 CHAIRPERSON LEVY: Is there a second?
2 VOICE: Support.
3 CHAIRPERSON LEVY: There is a second. There
4 is no debate. It is a majority vote.
5 All in favor of reconsidering the last vote
6 on informed consent -- I am sorry, there is debate?
7 There is debate.
8 VOICE: Call the question.
9 CHAIRPERSON LEVY: And the question has been
10 called. Debate is closed.
11 All in favor of --
12 MR. ROMBACH: I object to the question being
13 called. Unless that's unanimous, then you have got to
14 let people speak. Thank you.
15 Again, this is goes to my alternative.
16 Again, I wanted the chair to --
17 VOICE: Use the mike.
18 MR. ROMBACH: This goes to my alternative.
19 Basically, by definition, to have a motion for
20 reconsideration you have to vote in the minority, and
21 we didn't really have a distinct minority, so if the
22 gentleman stood up voting in one of the, like the (c)
23 or (d) sections, again, I would say that if we could
24 consider throwing out (c) or (d) and having the first
25 (a) or (b), and that's no insult to Elizabeth's

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1 position, but at least we send a signal that generally
2 we favor informed consent or generally we don't favor
3 informed consent and leave it to the greater minds of
4 the Supreme Court to determine how they are going to
5 look at it anyway. We can only specifically go back
6 and revisit that once we get a determination made by
7 them and suggested to this body.

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

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

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

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

25 MR. ROMBACH: I understand. But we are still

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1 moving an action forward by our rules, so I would
2 suggest by moving an action forward that is --

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

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

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

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

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

25 I think here, and I want to back up

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

10 CHAIRPERSON LEVY: would you call that a
11 motion to suspend the rules to allow for
12 reconsideration?

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

15 VOICE: Second.

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

19 Any opposed.

20 That was two thirds.

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

25 MR. NEUMARK: Since I am at the mike, I will

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1 make that motion.

2 VOICE: Second.

3 VOICE: Call the question.

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

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

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

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

14 So there is a majority for (a).

15 MR. BARTON: Mr. Chairman.

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

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

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1 CHAIRPERSON LEVY: Thank you.

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

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

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

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

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

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

24 As stated in the letter from Jeff Collins, it
25 would have a significant impact on law enforcement and

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1 on the way cases are investigated.

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

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

24 So making this change from law enforcement
25 will eliminate those investigative tools for

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1 enterprise investigations and it will have a
2 significant impact on the way we work.

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

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

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

21 CLERK BUIREWEG: 30 seconds.

22 MS. MCQUADE: So I urge you to either vote in
23 favor of (a), that the change not be made to parties
24 and instead, or if it is, to adopt (a) with the law
25 enforcement exception. Let me just say the Michigan

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1 and U.S. Constitutions would prohibit any contact with
2 a represented party after charges are filed. So once
3 someone is indicted you couldn't conduct even these
4 undercover activities. So, therefore, I urge you to
5 vote in that way. Thank you.

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

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

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

19 opinions from the membership.

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

22 I think we should adopt (b). When you read
23 Miriam Siefer's comments, I think the second page
24 where she says government lawyers and law enforcement
25 officials should be held to ethical standards at least

1 as high as those which all other lawyers are subject.
2 Lessening the responsibility of prosecutors, at a time
3 when law enforcement resources are rapidly growing by
4 rewriting the rules for their convenience and placing
5 the core values preserved by the rule is not
6 necessary.

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

12 VICE CHAIRPERSON JAMIESON: Thank you,
13 Mr. Larky.

14 MR. ELKINS: Michael Elkins, 6th circuit.
15 For those of us who do any criminal law I think
16 realize that, once again, the U.S. Attorney's Office
17 is being disingenuous. I strongly support (b).

18 The U.S. Attorney, as all law enforcement
19 offices, controls when an indictment is filed or
20 sought but when a charging document is brought. In
21 other words, they say when you are a party. They know
22 the people are represented by counsel. As (a) would
23 be, they could go and hold their indictment or hold
24 their charge and take that person without counsel and
25 have a discussion. Simply to do it that pesky old

1 Sixth Amendment. I think it's absurd to suggest we
2 should be a part of this situation where we allow one
3 of the parties in the litigation to go against the
4 Sixth amendment.

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

13 VICE CHAIRPERSON JAMIESON: Thank you.
14 Mr. Chairman.

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

25 The notion that we are somehow repealing the

1 Sixth Amendment or repealing the Fifth Amendment by
2 passing a rule of ethical confines is simply silly.
3 The prosecutors are and will continue to be bound by
4 the constitutional provisions.

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

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

25 The other one is I used to prosecute gang

1 drug cases. I was talking to somebody before --

2 CLERK BUITEWEG: 30 seconds.

3 CHAIRPERSON LEVY: -- about young boys. But
4 think about vice lords. They arrest somebody on a
5 street corner selling crack cocaine. The vice lord
6 had, the person we were targeting had an attorney that
7 represented the organization. Are we really going to
8 tell law enforcement, are we really going to tell the
9 prosecutors that they can't allow the person on the
10 street corner until they get an attorney appointed by
11 the court to cooperate in the investigation, that they
12 don't have that right, they have to get the attorney
13 that the head of vice lords is paying for to represent
14 them. That's what this rule requires.

15 VICE CHAIRPERSON JAMIESON: Thank you.

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

23 I am reminded about Tom Rombach's statements
24 about grievances. We get grieved fairly regularly,
25 and I can see grievances coming out of the woodwork

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1 for people who have been convicted who aren't
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2 consulting attorneys but are writing the grievances on
3 their own, filing them that an officer talked to them.

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

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

24 CHAIRPERSON LEVY: I don't have that
25 information. Does the Ethics Committee?

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1 HON. ELWOOD BROWN: No.

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2 MR. AMECHE: I think the current make-up of
3 the Supreme Court being what it is, this is very
4 unlikely that it would come about the way that it's
5 being proposed. I think we run the risk of looking
6 fairly foolish by passing this one.

7 CHAIRPERSON LEVY: President-Elect.

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

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

18 We always have to judge what kind of
19 intrusion, what are we doing to people's individual
20 rights versus public safety, and this is one of those
21 situations. This is just a bad rule. It works fine
22 as it is. We are not going to talk to someone if they
23 are a party, if they are represented, but law
24 enforcement needs to talk to witnesses. We need to do
25 that.

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1 We cannot allow the lawyer to leave a list of
2 clients at the police station so that when they are

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3 picked up we cannot speak to them. It is not right
4 for a lawyer to call the station when we are talking
5 to some witness to say I represent him so we no longer
6 can speak to him or give that person an opportunity to
7 work with us that in the long run would be to their
8 benefit.

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

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

24 I just heard one of the prosecutors talk
25 about not being able to talk to somebody because they

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1 are represented in another matter. This rule we have
2 in front of us is not what I thought we were going to

3 vote on.

4 I speak in favor of, however, the amendment
5 that says that lawyers and their representatives
6 cannot speak to persons who are represented, and I
7 have to say in that matter, you may remember, and I
8 don't remember from the case law whether he was
9 actually charged yet or not, I don't think he was, but
10 I don't remember, but you may have heard of somebody
11 named Danny Escobedo, Escobedo versus the United
12 States, the original case relative to interrogation,
13 and, by the way, that's what we are talking about. We
14 are not talking about questioning. The case law, the
15 college professors, the people who teach criminal
16 justice call it interrogation, and we are talking
17 about interrogation of a defense lawyer's clients, and
18 I thought in the matter in which he, that attorney
19 represents him. That's not here.

20 CLERK BUIREWEG: 30 seconds.

21 MR. BARTON: Okay. I go the one step further
22 then, I speak in favor of proposal (b). My
23 understanding is that it was in matters in which the
24 attorney represents him, and I suggest that pulling
25 somebody off the street, he asks for his lawyer, he

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1 doesn't have to get his lawyer because he is not, he
2 is not yet charged, I suggest that that should not
3 happen.

4 CHAIRPERSON LEVY: I just want to ask the
5 Ethics Committee if the rule is so restrictive.

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

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

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

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

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

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1 representing the organization, unless you are going
2 after an organization.

3 MR. ROTENBERG: Steven Rotenberg, 6th

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

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

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

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

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

22 what you are proposing here is an unnecessary
23 and complicated burdens that will complicate numerous
24 other cases and legitimate law enforcement
25 investigation with prosecutions. There are all kinds

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1 of protections in place, and, again, those are good
2 protections. No one is proposing that we do away with
3 any of those in any respect, but this is unnecessary,
4 it's overly cumbersome and complicated, and I urge you

5 to vote against the proposals.

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

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

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

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

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1 line.

2 MR. HAROUTUNIAN: Ed Haroutunian from the
3 6th judicial district. I hadn't heard or at least I
4 hadn't seen what it is that the problem has existed
5 that has caused the thought process to bring about

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6 this proposed change in our rules, and I am just
7 wondering whether or not the Ethics Committee or
8 anyone else who might know what the problem is or was
9 that causes this particular rule to come before us.

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

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

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

25 MR. CHADWICK: Thank you, Mr. Chairman, Tom

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1 Chadwick from the 8th --

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

5 MR. CHADWICK: Tom Chadwick from the 8th

6 circuit. I just have a point of clarification or a
7 question to the Ethics Committee. In cases involving
8 abuse and neglect, child protective proceedings, the
9 FIA case worker is under continuing court order to
10 follow and administer the case service plan for those
11 children and the parents, which requires communication
12 with the children and parents. would this rule affect
13 child protective proceedings and require that a case
14 worker contact the represented attorneys instead of
15 the represented parties?

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

18 MR. CHADWICK: The argument can be made that
19 the FIA case worker is an agent of the prosecuting
20 attorney who is often representing the petitioner.
21 The case worker would be the petitioner in the case
22 and would be represented by the prosecuting attorney.

23 Is there any -- was that even discussed, or
24 was there any direction from the committee?

25 HON. ELWOOD BROWN: There was no discussion

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1 with regard to that that I recall.

2 MR. CHADWICK: Thank you.

3 MS. JAMIESON: Mr. Chairperson, I call this
4 to question and I urge everyone to be brief with
5 regard to their comments with regard to future
6 positions. we have 14 in total to go through. we

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7 have an hour and a half, and this is the fourth.

8 VOICE: Support.

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

14 VOICES: No, that makes no sense.

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

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

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

24 (Laughter.)

25 CHAIRPERSON LEVY: Thank you. And all those

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

2 Thank you. All those not voting.

3 And then that was 55 to 26. There will be a
4 minority report. Option (a) has the majority of 55.
5 The option (b) will be reported as a minority
6 position, having received 26 votes.

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7 On to the second item under the same
8 number, instructions still to the court if it amends,
9 if it goes ahead and amends anyway.

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

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

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

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

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

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

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

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

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

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

23 The difficulties we see are these. 4.1 and
24 its policy in 4.1 (b) is inconsistent with the rule of
25 confidentiality in 1.6 in this respect, under 4.1 (b)

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1 it would be necessary, or there could be, I am sorry,
2 culpability either for discipline or for civil
3 liability if there was a failure to disclose. The
4 only exception would be if the disclosure would be
5 prohibited by 1.6.

6 The difficulty is that when one discovers
7 evidence of a fraud or illegal act by a client, 1.6

8 doesn't speak in terms of prohibitions. It speaks in
9 terms of may. It is an authority to disclose, a
10 discretion to disclose. And, therefore, in every
11 instance in which the lawyer discovered conduct by a
12 client which was fraudulent or illegal there could
13 give rise to a duty under this proposed 4.1 (b) to
14 make a disclosure, and the failure to do so would
15 render the lawyer liable for discipline and, more
16 importantly, I think, liable in a civil action.

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

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1 there was a failure to disclose a fraud.

2 Under the present rule without 4.1 (b) the
3 Grievance Committee believes there would be a
4 substantial possibility of having a lawsuit at least
5 against the lawyer and the law firm dismissed and
6 dismissed quickly, because there is no duty owing to
7 that third party, and, in fact, once dismissed the
8 lawyer in the law firm who did the deal for the client

9 could continue to defend the fraud action.
10 with 4.1 (a) proposed existing, there would
11 be at least an argument, an arguable position that
12 there is a legal duty regarding that failure to
13 disclose. It might go away some day, but probably
14 only after there is a summary disposition motion.
15 In the meantime --
16 CLERK BUIREWEG: 30 seconds.
17 MR. ALLEN: -- the lawyer and the
18 law firm that represented the client in the deal would
19 not be permitted to represent them in the lawsuit, a
20 substantial tactical advantage to the buyer alone.
21 we believe that these are the reasons why
22 these things were deleted from 4.1 when it was adopted
23 as part of all the rules earlier.
24 Finally, I understand the Ethics Committee in
25 its most recent report in your briefing book says that

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1 it might be preferable to delete the term fraud from
2 4.1 (b) and refer only to proof of a client's criminal
3 act. While that probably is progress, a further
4 difficulty I would observe is that practically
5 everything these days is a crime, and I would think of
6 few things alleged as a fraud that couldn't be lodged
7 under some criminal statute. Thank you.

8 MR. DUNN: Thank you. Bill Dunn for the

9 Ethics Committee.

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

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

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

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

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

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

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

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

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

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

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1 would do this.

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

4 CHAIRPERSON LEVY: Question has been called.

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

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

9 MR. ROMBACH: Is she calling the question?

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10 CHAIRPERSON LEVY: Yes, so it's two-thirds
11 vote without debate. Question has been called.
12 All in favor, please say aye.
13 All opposed.
14 I don't think we have two thirds. Motion
15 fails and we are still open.
16 MR. ROMBACH: Thank you, Mr. Chair. I speak
17 right now, having considered --
18 VOICE: Please use the microphone.
19 MR. ROMBACH: I am sorry. I lost my notes.
20 I am going to speak basically for the --
21 let's see, I don't want an affirmative duty on a
22 lawyer to disclose a material fact to a third person,
23 and again let me put this in a criminal context,
24 because I know the committee considers this generally
25 in a civil context. The problem you have, if you are

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1 standing up next to your client during a hearing and
2 he says something or she says something incredibly
3 arcane, it's going to be putting a criminal defense
4 attorney in an incredibly difficult situation.

5 For instance, a probation report comes back,
6 or anything else, you are going to have to act as a
7 guarantor in all instances if this information is
8 picture perfect or perhaps you have to narc out your
9 client. You are going to have to say, well, Your
10 Honor, he said that he hasn't had a drink since

11 completing his probation report, and I would like to
12 tell you for a fact that when he was in my office the
13 other day I smelled the odors associated to
14 intoxicants. That's going to be a very difficult
15 situation. Literally that's what you are doing with
16 this rule. And now you say, well, maybe that's not a
17 crime, maybe that's just fraud.

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

25 The second point that I would make is the

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1 same thing. Anybody can come up there and just say
2 this isn't picture perfect but I don't want to act in
3 any situation that I could be associated with a
4 grievance or an actual complaint that I have to
5 guarantee that every piece of information or prove
6 later that I didn't have knowledge, and that's
7 essentially the trick bag we are being put into here,
8 and I don't think in the criminal involvement that
9 that should be the case, and I don't think in the
10 civil involvement it should be the case either. It's

11 just too high a standard for any lawyer to achieve.

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

15 VOICE: So you are for (a)?

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

19 CHAIRPERSON LEVY: Response.

20 MR. DUNN: We have the Ethics Committee.

21 The first point made by Mr. Rombach, I refer
22 you to Rule 3.3 (b) court or a tribunal which says a
23 lawyer who represents a client in an adjudicative
24 proceeding and who knows that a person intends to
25 engage, is engaging, or has engaged in criminal or

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1 fraudulent conduct related to the proceeding shall take
2 reasonable remedial measures, including, if necessary,
3 disclosure to the tribunal, and Rule 1.6 has nothing
4 to do with it and can't protect the nondisclosure.

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

9 And as far as knowingly is concerned, my
10 suggestion was that this is a high degree of
11 protection for the lawyer. Obviously it's always a

12 factual question, but the standard does not have
13 reason to believe, it is know.

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

16 CHAIRPERSON LEVY: Question has been called.
17 All in favor.

18 Any opposed.

19 we will vote on the proposals before us.

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

23 I am going to say that's over 75 percent.

24 Thank you. There is no minority.

25 On to -- everybody wake up. On to client

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

4 MS. LINCOLN: Mr. Chair, my name is Judy
5 Lincoln from the 10th circuit. Terri Stangl, my
6 10th circuit colleague, is the chair on the
7 Standing Committee on Legal Aid. Terri could not be
8 with us today so she asked me to read some very brief
9 comments.

10 The Legal Aid Committee recommends that the
11 Bar Assembly vote to add Rule 1.8 (j) from the ABA

12 Model Rules to the Michigan Rules of Professional
13 Conduct. This rule is located on page 24 of the
14 red-lined edition and addresses conflicts of interest
15 with current clients. We also recommended optional
16 paragraph 17 from the ABA commentary on Rule 1.8 which
17 helps to explain the scope and intention of the rule.
18 This could be found at pages 27 and 28 of the
19 red-lined edition.

20 ABA Rule 1.8 prohibits sexual conduct between
21 an attorney and a current client unless they had a
22 consensual sexual relationship that preexisted the
23 lawyer/client relationship. The ABA commentary makes
24 it clear that the rule does not prohibit a firm from
25 keeping a case as long as the attorney who was having

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1 a relationship with a client transfers the case to
2 another member of the firm.

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

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

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

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

8 But I also want to point out it's my
9 understanding that this body took the position that is
10 it reflected in the Model Rule the last time this
11 issue came before it. While it did not become a part
12 of the ethics rules, this body's position was to

13 discourage or prohibit sexual relationships between
14 lawyers and clients.

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

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

24 MRPC 1.8 should, all those in favor of, and I
25 think we can do this by voice vote probably, option

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1 (a), which is, in fact, to prohibit sexual relationships
2 under the conditions outlined, please say aye.

3 All opposed.

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

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

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

12 CHAIRPERSON LEVY: Yes.

13 MS. FELDMAN: He was writing as an

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14 individual, not as any representative.

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

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

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

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

6 For example, complicated medical malpractice
7 case comes into an office, somebody takes a look,
8 there is substantial damages, but you are not
9 completely qualified or prepared to handle the file.
10 what are you going to do? Are you going to take it
11 because you are not entitled to a referral fee under
12 this rule or a very limited referral fee? Or are you
13 going to do the work on the file which you really

14 can't handle and probably going to end up screwing it
15 up and harming the individual who has been harmed. It
16 doesn't make any sense.

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

23 MS. JAMIESON: Elizabeth Jamieson, 17th
24 circuit. I submitted an alternate position.
25 Everybody should have it underneath the first one,

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1 1.5. The additional issue that I am raising is
2 something that is not raised in the other positions.
3 This is not an alternative but an additional. Either
4 you vote yes or you vote no. This has nothing to do
5 with the other positions that are before you.

6 The position that I have raised in the
7 alternate rule has to do with whether or not the rules
8 should expressly provide for nonrefundable retainers,
9 and specifically reasonable and earned, and the
10 reasoning behind that is that this concept was
11 originally proposed by the Grievance Committee.
12 Neither the current nor the proposed rules actually
13 address nonrefundable retainers, but people do them.
14 And the Michigan Ethics Opinions state that

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15 nonrefundable retainers are not, per se, unethical,
16 which means they are allowed, but there are
17 circumstances where they may require a refund, such as
18 when the retainer is not earned or is unreasonable,
19 and, therefore, I submit that we expressly permit
20 reasonable and earned nonrefundable retainers and
21 specifically say that in our rules so that it is clear
22 and we are providing clear guidance to lawyers in the
23 state of Michigan.
24 Again, this is not an alternative. This is
25 just an additional, so the vote is either yes or no

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1 with regard to this, irrespective of how you vote on
2 the others.

3 CHAIRPERSON LEVY: The result is that there
4 will be four separate votes dealing with 1.5.

5 VOICE: Second.

6 CHAIRPERSON LEVY: I think as an alternative
7 proposal it is there automatically.

8 MR. BIRD: Joseph Bird, 6th circuit.

9 CHAIRPERSON LEVY: Could you repeat the name,
10 please.

11 MR. BIRD: Joseph Bird, 6th circuit. I rise
12 concerning the conclusion now of unreasonable expenses
13 in addition to what we have traditionally dealt with in
14 terms of unreasonable fees, and I submit that it

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15 should be improper for a lawyer to double a fax charge
16 or double some charge to supplement their billing.
17 However, I submit to you that this could create
18 another quagmire for a lawyer in dealing with very
19 expensive out-of-state expert witnesses where these
20 are directly billed to the law firm and now the client
21 after the fact may want to raise the issue of
22 something that is an unreasonable fee and perhaps the
23 lawyer had no choice but to handle the matter because
24 they had to have this particular expert in the case.
25 I think that creates great concern for the

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

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

13 MR. BIRD: I am in favor of 1.5 (b) in
14 general, but I was looking at the materials, the
15 red-lining materials that were sent to us before, and

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16 there is a discussion in there about red lining the
17 current Michigan rules, and, as I read it, the
18 unreasonable amount for fees, and I thought we were
19 talking about fees, and I thought all of this is
20 subsumed in this discussion. Maybe this is for a
21 later discussion, but I have a concern about including
22 unreasonable expenses within the concept of fees, and
23 I thought this discussion was subsumed within that.
24 If it's not, that's fine.
25 CHAIRPERSON LEVY: I don't believe it is. I

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1 think definitions would go to drafting or finer points
2 to another day. I don't think it's a motion to amend
3 anything here.
4 Any further discussion, any committee
5 response?
6 VOICE: Call the question.
7 MR. DUNN: The rule does cover both fees and
8 expenses.
9 CHAIRPERSON LEVY: Right.
10 The question has been called. All in favor
11 of calling the question.
12 MR. MORGAN: Point of order. Could I ask our
13 staff if it's supposed to read as it does on the
14 screen. I know that's what is in the printed
15 materials, but I think in the first line it makes a

16 lot more sense if the word is be, b-e, rather than
17 b-y.

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

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

23 CHAIRPERSON LEVY: All in favor of calling
24 the question.

25 All opposed.

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1 Question has been called.

2 So on the first alternate proposal, 1.5
3 should, all in favor of (a), require referral fees be
4 proportional to the share of services performed by the
5 lawyer, please say aye.

6 All opposed, or I am sorry, all in favor of
7 (b), indicating that they should not require the fee
8 provisions be proportional.

9 Anybody not voting? I don't think there is a
10 minority position there. (b)'s have it on the first
11 one.

12 On the second, 1.5, should (a), require
13 client's consent to any division of fees by lawyers
14 not of the same firm, all in favor please say aye.

15 All in favor of (b), not require the client's
16 consent by division of fees not in the same firm,

17 please say aye.

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

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

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

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

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

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

10 All opposed.

11 And that will be passed.

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

16 MS. JAMIESON: Elizabeth Jamieson, 17th

17 circuit. With regard to Rule 1.15, I have an
18 alternate rule that's been distributed to everybody,
19 and you have that in front of you. Again, this is an
20 additional issue that is not raised in your materials,
21 and this deals with how you should deal with
22 nonrefundable retainers.

23 This is real important, because what we don't
24 want is to have a commingling of funds allegation
25 against lawyers, and so specifically the issue is

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1 should lawyers be allowed to place nonrefundable
2 retainers in the lawyer's account even though a refund
3 may later be determined to be necessary, at which time
4 the refundable portion of the retainer shall be
5 treated as client funds.

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

15 If a nonrefundable retainer is considered the
16 lawyer's funds, then the retainer must not be placed
17 in a client trust account. Placing those funds in a

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18 client trust account would be commingling funds and
19 would subject the lawyer to discipline. On the other
20 hand, if the potentially refundable portion were to be
21 considered a mere advance of fees, then it must be
22 placed in a client trust account.

23 Clarifying how lawyers must handle
24 nonrefundable retainers will prevent claims of
25 unavoidable commingling of funds while safekeeping

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1 those funds in the event of a refund.

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

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

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

14 MS. JAMIESON: The lawyer's account.

15 MS. FELDMAN: I think that verbiage is
16 confusing, because it implies it is a trust account
17 for somebody, and there is no beneficiary of that

18 trust, so my only comment is that that's confusing.

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

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

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

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

19 pending.

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

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

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

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

8 MR. LARKY: Sheldon Larky, 6th circuit. I am
9 going to vote no on (c). The idea is great, but let's
10 take the reality. Client comes in -- person comes
11 into you and says, I want you to represent me in a
12 divorce case, breach of contract case, a criminal
13 case. I have a \$1,500 nonrefundable retainer. Okay.
14 Go spend the money and you handle the case or you
15 don't handle the case. A year later you get a request
16 for investigation from the Attorney Grievance
17 Commission. The money is long gone. It's long gone.
18 By the time refund is determined to be necessary you

19 have already spent it, you probably forgot about the
20 client, and now all of a sudden you have to worry
21 about where you are going to get the money back.

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

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

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

15 Why can't I just cut them a check out of my
16 account and be done with it? Why do I have to play
17 games with it, because that says at the minimum there
18 is a dispute or I determine it should be refunded, I
19 have to treat it as client funds and I can't leave it

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20 in my lawyer account any more. I now have to put
21 it in my IOLTA account, unless I am misunderstanding
22 what's there.

23 MR. ROTENBERG: Steve Rotenberg, 6th circuit.
24 I thought nonrefundable was self-explanatory, and I am
25 not sure why we are saying nonrefundable does not

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1 always mean nonrefundable if you and your client both
2 agree to it.

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

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

15 CHAIRPERSON LEVY: Additional comments?

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

19 CHAIRPERSON LEVY: I think this becomes the

20 last word of the proponent.

21 MS. JAMIESON: The point here is that when a
22 lawyer receives a nonrefundable retainer, they expect
23 that it's not refundable, they expect that it's their
24 money, and the lawyer should be able to place it in
25 the lawyer's account. That's the point of this. And

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1 we don't have any direction saying that it's okay to
2 put it in the lawyer's account.

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

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

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

19 VOICE: Call the question.

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

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

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

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

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

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

18 with 78 members present, 38 supported (a), 27
19 (b), so there is no majority position. No majority of
20 the body, and the Bar will not -- it will report the

21 minority positions but will not take an official
22 position on the issue.

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

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1 please rise.

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

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

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

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

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

15 MS. JAMIESON: The lawyer's, Nancy.

16 CHAIRPERSON LEVY: But thank you for the
17 clarification.

18 Item 5 (j), sale of law practice or area of
19 practice. There were no written reports. Are there
20 sections or committees that wish to address this
21 issue? Did the Ethics Committee wish to comment?

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22 MR. DUNN: We stand on our position.
23 CHAIRPERSON LEVY: Your position would be in
24 terms of the (a)/(b)'s, just so it's clear to
25 everybody?

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1 MR. DUNN: (a).
2 CHAIRPERSON LEVY: It's clear on the first
3 one it's (a), but I am not sure if the Ethics
4 Committee had a position on the second.
5 So there is no official position on the
6 second one.
7 Any discussion on these?
8 MS. FELDMAN: Is it an or? Is (b) an or?
9 CHAIRPERSON LEVY: Yes, one is allow, one is
10 not allow.
11 MS. FELDMAN: Why is it even in here?
12 Where did you get this from?
13 CHAIRPERSON LEVY: If I understand it, the
14 question in the second proposal is when purchasing a
15 practice or part of a practice the purchasing lawyer
16 would then have the ability to refuse to undertake a
17 particular client's representation.
18 MR. DUNN: Probably support (a).
19 CHAIRPERSON LEVY: There being no discussion,
20 all those in favor of the Rule 1.17, providing that
21 lawyers be allowed to sell or purchase an area of law

22 practice in addition to the entire practice, please
23 say aye.

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

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1 aye.

2 I think the (a)'s have that one without a
3 question.

4 And then on the second item, all in favor of
5 allowing the lawyer to refuse to undertake
6 representation of a particular client who doesn't
7 consent to that lawyer's fee schedule, please signify
8 by saying aye.

9 And any opposed to that.

10 Again, the (a)'s have it.

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

13 MR. HAROUTUNIAN: Mr. Chairman, Ed
14 Haroutunian from the 6th judicial district. I
15 suggested that and proposed this rule be deleted in
16 its entirety, and the reason why it should be deleted
17 in its entirety is, one, no prior rule on this subject
18 matter exists in Michigan history.

19 Secondly, this rule suggests that if one make
20 a financial contribution to a political party,
21 political or public office holder or judicial office
22 holder, make a financial contribution, that that's not

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23 allowed if, in fact, that lawyer or law firm receive
24 an appointment back of some kind.

25 In the letter that I submitted to the

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1 Assembly suggested that, for example, if somebody made
2 \$150 contribution and received back an appointment
3 that that might be suspect. Whereas, if someone spent
4 one, two, three, four days of one's time for that
5 political party, public official, or judicial
6 candidate and received an appointment back, under the
7 rule that would be okay.

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

18 CLERK BUIWEG: 30 seconds.

19 MR. HAROUTUNIAN: -- simply improper and
20 overly broad. The mitigating factors are also
21 interesting in that they indicate that financial
22 contributions can be made to further political,

23 social, or economic interests or because of an
24 existing personal family or professional relationship
25 with a candidate. So if you have a personal

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1 relationship with a candidate you can give them a
2 gazillion dollars, get an appointment back, not a
3 problem. If you are a stranger, do not do that,
4 because that becomes bad. If on the other hand you
5 are tempted to promote a political position or a
6 social position, that's okay.

7 CLERK BUIEWEG: Time.

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

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

18 Here you have an ethical standard that would
19 become a sword in the hands of political opponents.
20 Everyone has to say, well, so-and-so was appointed and I
21 wonder how much he or she gave to the governor for
22 that judgeship, or so-and-so was appointed as a case
23 evaluator and then how much did they give to judge

24 so-and-so who may have spoken on their behalf.
25 Everything then becomes suspect as far as raising

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1 funds for your friends, raising funds for my former
2 law partner that just happened to be a judge. I never
3 appear in front of him, but then again, if for some
4 reason I was raising some money, then somehow I am
5 barred forever talking to the guy. I would have a
6 real problem with that.

7 Again, there is no other prohibition or any
8 standard for that matter for politically active
9 members of any other job, any other application, or
10 any other profession, so we are hamstringing ourselves
11 as far as having influence with our legislators,
12 having influence with the governor's office, having
13 influence with the judiciary, and as a lawyer and
14 as essentially a laborer or trade association leader
15 in the past, I simply don't want to flyspeck every
16 amount of money that I may give to somebody that was a
17 personal friend, and I don't want to advocate that
18 position, so I urge strongly that we vote against
19 this, euthanize this proposal.

20 MR. ROTENBERG: Steven Rotenberg, 6th
21 circuit. I politely disagree with Mr. Rombach. I
22 have a number of concerns about political
23 contributions. First of all, only U.S. Citizens can

24 typically make political contributions, but not every
25 member of the State Bar is a citizen of the United

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1 States.

2 Second of all, oftentimes there is a
3 presumption, if not an a presumption, an appearance of
4 a conflict of interest where attorneys give campaign
5 contributions to judges. What happens if it, if the
6 question at issue could be done on a coin toss? Does
7 the judge favor his buddy who has been giving him
8 money, or does he favor the other guy to be fair?.

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

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

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

22 There was a similar proposal, I believe, to
23 amend the Judicial Canon of Ethics to prohibit the
24 appointment of anyone who had made a campaign

25 contribution in the preceding two years. That was

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1 soundly defeated.

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

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

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

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

21 I think this rule, it covers itself, because
22 this only applies to contributions made for the
23 purpose of obtaining or being considered for those
24 types of appointments, and clearly there are

25 contributions that are made for that purpose, and they

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1 shouldn't be made at all. If we cannot eliminate
2 contributions to judges, and we really should sooner
3 or later take that larger step through public
4 financing of judicial elections, which this body has
5 supported, and if we can't remove the appointment
6 power from judges, which we also really should do,
7 then let's at least cut the tie between the
8 contributions and the work. It really needs to end,
9 and this body should go on record as supporting this.

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

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

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

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1 do agree with the spirit. So I guess I would urge the
2 rejection.

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

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

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

22 when it says here that it's for the purpose
23 of obtaining or being considered for that type of
24 legal engagement, quite candidly the proof element in
25 that would be almost impossible. If it's a bribery

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1 case, we have got rules that deal with it, but this
2 particular case is rife with abuse and political
3 misuse. It was voted down by the House twice and
4 barely made it the third time. As I understand it,
5 very few states have approved this up to this point in
6 time.

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

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

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

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

21 MS. JAMIESON: I second the call the
22 question.

23 MS. FELDMAN: I think the Ethics Committee
24 put it before this committee because it was the ABA
25 proposal and because it had the language for the

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1 purpose of, but there wasn't any strong feeling on it.

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

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

10 PRESIDENT BRINKMEYER: Mr. Chair?

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

13 MR. HAROUTUNIAN: Yes.

14 PRESIDENT BRINKMEYER: I have a point of
15 order, and it's a question to the committee. When you
16 return to deliberate all of this and formulate
17 whatever final proposals you may have, I am wondering
18 will you anticipate making commentary to the court,
19 and one reason I ask that question on this particular
20 rule and a couple of the others we have dealt with
21 here today, we are in a time right now where we are
22 dealing with some issues here today that could be
23 terribly misconstrued by members of the public as
24 being promoted from a self-interest point of view, I
25 think that's pretty clear, and this one in particular

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1 and for the reasons pointed out, the language would
2 almost make proof impossible, and so from a practical
3 point of view I think John was absolutely correct, it
4 could only be abused, but I think it's important that
5 the court know the reason why we are doing that and
6 not because we think graft is okay and not because we
7 think it's all right to buy your way into the
8 judiciary or to buy your way into appointments but
9 because we think that it's poorly drafted, it's ill
10 worded, and it could lead to abuse, and I think it's
11 very important that we convey that to the court in the
12 process of letting them know we voted it down.

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

22 CHAIRPERSON LEVY: The Bar position will be
23 separate from their committee position which in the
24 future would be bound by what we said in terms of
25 their position. In terms of the report that we will

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1 be submitting to the court from the Assembly as to
2 the Bar's position, absent some very strong objection,
3 I will specifically indicate on this rule that it was
4 based on the way the rule was worded and that the vote
5 should not be interpreted as an opposition to the
6 concept of not buying appointments.

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

12 MS. CAHILL: Kimberly M. Cahill from the 16th
13 circuit. I also happen to be the commissioner liaison
14 to the Probate and Estate Planning Committee, and what
15 they are requesting here, they have laid out their
16 concerns in a letter which is in your materials, they
17 are asking for specific commentary to be attached to
18 the rule that discusses a situation that affects most
19 of their practitioners who occasionally will represent
20 a bank who is acting as a successor trustee or
21 corporate fiduciary, but they have very little actual
22 knowledge of that bank or that corporate fiduciary's
23 undertaking, and over a number of months of discussion
24 at the Probate and Estate Planning Council, it's
25 become very clear that the banking and the trust

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1 community are very interested in the passage of this
2 rule in an effort to eliminate large numbers of
3 attorneys, once they have accepted this
4 successor/trustee role for the corporate fiduciary,
5 from then ever appearing and representing any entity
6 against the bank. And I think that if you look at
7 their proposal, what they are asking for is just some
8 language in the commentary that would talk about the
9 difference between actual knowledge and actual
10 representation of that client and acting as a
11 successor fiduciary or trustee, and I would ask that
12 you support their position at this time.

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

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

23 CHAIRPERSON LEVY: Other comments.

24 Put the question then. All those in favor of
25 Rule 1.7 under item (a), providing commentary

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1 indicating that in this specific situation be
2 permitted, please indicate by saying aye.

3 Any opposed.

4 That is passed, item (a).

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

9 MR. DUNN: Comments were in support.

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

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

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

20 All those opposed.

21 The not include a rule governing passes.

22 MS. JAMIESON: Is there enough for a --

23 CHAIRPERSON LEVY: We will have to take a
24 count.

25 All those in favor of having a rule which

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1 governs the prospective lawyer/client relationship,
2 please rise. This is (a).

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

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

11 MS. FELDMAN: On what?

12 CHAIRPERSON LEVY: On rule 5.5.

13 MR. BYERLEY: If I can just try to explain, I
14 think what the comments are on these rules is that we
15 need more to implement the recommendations on 5.5 and
16 8.5, which are the multi-jurisdictional practice
17 rules, and the Ethics Committee acknowledges that
18 there is something more that's needed. Those things
19 are being worked on and will be presented also in
20 another package, but in order to implement these rules
21 you also need to amend the Board of Law Examiner's
22 Rules, you need to amend the Court Rules, you need to
23 amend the Discipline Rules, all that to give other
24 entities jurisdiction over lawyers who are practicing
25 in our state.

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1 So the comments that have been received are
2 not in opposition to either 5.5 or 8.5. They just say
3 we need more, and we know we need more, and that's in
4 the works.

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

10 VOICE: Call the question.

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

25 But the bottom line is we have to adopt these

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1 rules in order to protect those people who are going
2 to be coming into the state practicing law, appearing
3 before arbitrators, appearing before judicial panels.
4 This is one we definitely have to vote yes on.

5 VOICE: Call the question.

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

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

14 (a) passes.

15 The last item on the agenda is 5 (o). It's
16 three rules that all Bar entities that have reviewed
17 it are in favor of retaining the current Michigan
18 rule, because that is contrary to the ABA position.
19 It was felt to be important that the Assembly also
20 take a position. So the question is on Rules 3.8,
21 6.3, and 6.6 should we retain the Michigan rules. It
22 will be a yes or no question.

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

25 Seeing none, I will put the question. All in

1 favor of those, retaining the Michigan rule in those
2 three instances, please say aye.

3 Any opposed.

4 Passes.

5 Do I hear a motion to adjourn?

6 MS. CAHILL: So moved.

7 CHAIRPERSON LEVY: No objection, we are
8 adjourned. Thank you very much.

9 (Proceedings concluded at 3:45 p.m.)

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1 STATE OF MICHIGAN)
2 COUNTY OF CLINTON)

3 I certify that this transcript, consisting
4 of 186 pages, is a complete, true, and correct transcript
5 of the proceedings and testimony taken in this case on
6 Friday, November 14, 2003.

7
8 December 11, 2003

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