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AMERICAN BAR ASSOCIATION  
STANDING COMMITTEE ON ETHICS AND RESPONSIBILITY

In re:

Association of Professional Responsibility  
Lawyers proposed amendments to ABA Model  
Rules of Professional Conduct  
7.1, 7.2, 7.3, 7.4

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PUBLIC FORUM

Hyatt Regency Miami  
Merrick II Conference Room  
400 Southeast 2nd Avenue  
Miami, Florida  
Friday, 2:00 - 3:37 p.m.  
February 3, 2017

MYLES V. LYNK,  
Moderator

1 (Thereupon, the discussion began at  
2 2:00 p.m.)

3 MR. LYNK: My name is Myles Lynk, and I'm  
4 chair of the Standing Committee on Ethics  
5 and Professional Responsibility.

6 The standing committee is delighted to  
7 host this public forum on the Association of  
8 Professional Responsibility Lawyers'  
9 proposal to amend ABA model rules of  
10 professional conduct and those model rules  
11 7.1 to 7.5 dealing with advertising by  
12 lawyers.

13 This is obviously a topic of great  
14 interest in the profession and also of great  
15 interest to the public, and I think it is a  
16 reflection of how seriously we take this  
17 position that this room is so crowded with  
18 people who want to speak, and I do look  
19 forward to getting all of you on the record.

20 Before I go on, I just want to say I do  
21 have a list of speakers. The list was  
22 prepared by Mary McDermott. Mary, can you  
23 raise your hand?

24 MR. RENDLEMAN: She actually went out to  
25 check on the air handling because it's

1 starting to get a little warm in here.

2 MR. LYNK: Okay. What I would ask is if  
3 you do not -- if you want to speak and you  
4 have reason to believe you are not on this  
5 list, please see Dennis and he can make a  
6 supplemental list which he'll then give to  
7 me, and I will call on you in the order in  
8 which you are listed.

9 We are going to keep the door open, and  
10 we hope to get better air circulation as we  
11 go forward.

12 I would like now to have the chairs of  
13 the Center for Professional Responsibility  
14 and the various center committees who are  
15 present introduce themselves, and I would  
16 like to start with the chair of chairs of  
17 the committee, if you will, Mr. Lucian Pera.

18 MR. PERA: Thank you. Thank you, I'm  
19 just opening the door to get some air in  
20 here. Thank you. I'm not supposed to say  
21 anything.

22 MR. LYNK: No?

23 MR. PERA: Glad to see everybody here.

24 MR. LYNK: Are there any other chairs?

25 MS. REARDON: Hi, I'm Jayne Reardon. I'm

1 the chair of the Standing Committee on  
2 Professionalism.

3 MR. LYNK: John?

4 MR. GLEASON: John Gleason, ABA Center  
5 Policy Implementation Committee.

6 MR. LYNK: Are there any others? I'm  
7 challenged visually. Are there any other  
8 chairs of center committees in the room?

9 UNIDENTIFIED SPEAKER: Paula should be on  
10 her way.

11 MR. LYNK: Okay. That's Paula Frederick  
12 who is chair of the Standing Committee on  
13 Discipline.

14 UNIDENTIFIED SPEAKER: Here she comes.

15 MR. LYNK: Are there any other center  
16 committee chairs in the room? Please  
17 introduce yourself.

18 MR. IRVING: Shontrai Irving, good  
19 afternoon, chair of the Standing Committee  
20 on Specialization.

21 MR. LYNK: Thank you.

22 Now I would like the -- we have a number  
23 of members of the Standing Committee on  
24 Ethics in the room, and I would like to ask  
25 them to introduce themselves starting to

1 my -- after he's finished hugging --  
2 starting to my right.

3 MR. CREAMER: Oh, sorry.

4 MR. LYNK: Well, we have introduced you  
5 in absentia.

6 MR. CREAMER: I always hug when I get a  
7 chance. Bob Creamer from Cambridge, Mass.  
8 Is that what you said?

9 MR. LYNK: Yes, that's all I need.

10 MS. CHANG: Hi. I'm Wendy Chang from  
11 L.A.

12 MR. CROTHERS: Dan Crothers, member of  
13 the committee.

14 MR. LYNK: Justice of the North Dakota  
15 Supreme Court.

16 Are there any other committee members in  
17 the room? Okay.

18 And now we also have Dennis Rendleman who  
19 you know and Mary McDermott. They are the  
20 ethics counsel and the associate ethics  
21 counsel respectively of the ABA.

22 We have the new director of the Center  
23 for Professional Responsibility, and why  
24 don't you introduce yourself? I don't know  
25 that people really know you.

1 MS. KEPLER: Good afternoon, I'm Tracy  
2 Kepler. I am, as Myles said, the new  
3 director of the center. Welcome. Thank you  
4 for being here.

5 MR. LYNK: And we have Ellyn Rosen, the  
6 disciplinary counsel and the counsel to the  
7 Standing Committee on Professional  
8 Discipline.

9 Are there any other center staff here?

10 MR. RENDLEMAN: Martin Whittaker.

11 MR. LYNK: Martin Whittaker. Martin?  
12 There you are. You were hidden. Okay. So,  
13 Martin Whittaker, also one of the senior  
14 counsel in the Center for Professional  
15 Responsibility.

16 Okay. I have now fulfilled my  
17 responsibility, I think, to introduce the  
18 people present in general, but I would now  
19 like to introduce Lynda Shely.

20 Lynda is the president of the Association  
21 of Professional Responsibility Lawyers, and  
22 she will be our first speaker and will  
23 provide a general introduction and overview  
24 of the process.

25 MS. SHELY: Thank you, Myles. Hi,

1           everybody. Does everybody have a chair?  
2           No? Because we can get more chairs.

3           MS. McDERMOTT: We are getting more,  
4           right.

5           MS. SHELY: I'm Lynda Shely from  
6           Scottsdale, Arizona. I am the immediate  
7           past president of the Association of  
8           Professional Responsibility Lawyers.

9           APRL is an organization comprised of a  
10          lot of you in the room so I'm not going to  
11          define what we are. How many of you are not  
12          familiar with APRL's advertising proposal?  
13          Okay, cool. That will shorten my remarks  
14          tremendously.

15          As all of you know, APRL has been working  
16          on this project for a couple of years,  
17          literally, and with much thanks to Art  
18          Lachman who didn't think I was going to  
19          actually call him out who started this whole  
20          project and many members of Art's committee  
21          as well as liaisons Jim Coyle from NOBC and  
22          many other folks in the room.

23          This is supposed to be a comprehensive  
24          project. We very much appreciate the  
25          standing committee's taking this on, the

1 center committees, all of the center  
2 committees being here represented and  
3 interested in advertising issues and client  
4 protection.

5 As you guys know because you are all here  
6 so you read the proposals, it's just a  
7 starting point. It's a starting point for  
8 discussion in the legal community on where  
9 we go from here both to address rules that  
10 will not be challenged under, I don't know,  
11 pesky First Amendment issues or pesky  
12 antitrust issues.

13 How many of you want your bar dues used  
14 to defend those suits? Yeah, okay.

15 So, I'm just going to do the highlights  
16 of the proposal.

17 The proposal is a working draft that the  
18 Standing Committee on Ethics and  
19 Professional Responsibility is taking a lead  
20 on getting input from everybody on where do  
21 we go from here with having advertising  
22 rules that actually regulate false and  
23 misleading advertising which is what, by the  
24 way, our survey of I won't say NOBC members  
25 because some people gave us an input



1           anonymously, but of all the state  
2           regulators, you all know that what is  
3           primarily at issue in most states is whether  
4           advertising is false and misleading. Are  
5           people lying to consumers? That's what is  
6           regulated under the rules of professional  
7           conduct in most jurisdictions.

8           The vast majority and almost all  
9           complaints are from who? Other lawyers.  
10          The reality is the consumers of legal  
11          services do not complain to bar associations  
12          that they were confused.

13          As we have heard many times in  
14          presentations on innovation and changes in  
15          how legal services are being delivered, the  
16          reality is consumers gauge the information  
17          that is out there. They are going to other  
18          resources to learn about what legal services  
19          are available in their communities and,  
20          hopefully, we collectively in this room as  
21          well as all the organizations that you all  
22          represent can work together to update those  
23          rules so that they can continue to regulate  
24          and prohibit people lying to consumers so  
25          that we will continue to have the rules of

1 professional conduct regulate false and  
2 misleading advertising but perhaps not have  
3 me be in violation in Florida because on my  
4 pens I only have my phone number. This is  
5 technically a violation. Come on, that's  
6 silly.

7 So, the rules that we, the redlines that  
8 APRL submitted and that the ethics committee  
9 is taking up the charge in asking for  
10 everybody's input are designed to continue  
11 to prohibit false and misleading  
12 advertising, prohibit misrepresentation.

13 It also has regulations carried over  
14 from, the proposal recommends carrying over  
15 some of the restrictions on direct  
16 solicitation. The direct solicitation,  
17 face-to-face, showing up in somebody's  
18 hospital room, calling them on the  
19 telephone, those are all continued because  
20 that would be considered overreaching, and  
21 there's concern about consumers being under  
22 undue influence when confronted with  
23 somebody standing at their accident scene  
24 asking if they need a lawyer.

25 So, those changes continue in the

1 proposal but we have also heard from many  
2 organizations that suggest why not eliminate  
3 all of it and just go with false and  
4 misleading? If that's really what we are  
5 regulating, and if we are trying to actually  
6 embrace innovation, embrace change and  
7 protect the public, why not just have false  
8 and misleading being the standard? That's  
9 not what the redline is that's before you  
10 today, but I encourage everybody here, this  
11 is a time that we all need to work together.

12 How many of your bar associations have  
13 100 percent full employment for all lawyers?  
14 Yeah, it's really sad out there, and there  
15 are many -- how many of us will go back to  
16 our offices or you are checking your phones  
17 right now---

18 MR. LYNK: Are you trying to wind up?

19 MS. SHELY: One more minute. I'm sorry,  
20 I thought we had 20 minutes to do the  
21 overview since Mark's not here. I was just  
22 giving them the overview.

23 MR. LYNK: We started this a little  
24 early.

25 MS. SHELY: Got it, okay.

1           So, to embrace innovation, to embrace the  
2           changes in technology and to actually  
3           support bar associations giving more work to  
4           lawyers or legal service providers, we need  
5           to get everybody's input on how we update  
6           the rules to continue to protect the public  
7           but also provide accurate information to  
8           consumers.

9           And we have a couple of people here I  
10          know who can talk to what other states are  
11          doing already because we are not alone.  
12          Some states are already out there leading  
13          the charge, and we appreciate everybody's  
14          input in the APRL process, and we very much  
15          appreciate all the standing committees being  
16          here to discuss the topic.

17          MR. LYNK: And, Lynda, since you are the  
18          lead APRL representative here, at the  
19          conclusion of everyone else's remarks I will  
20          give you time to close if you want to make  
21          any closing statements.

22          MS. SHELY: I'm good, thank you.

23          MR. LYNK: You're welcome.

24          I now just want to give you a sense of  
25          the process we followed since we received

1 the proposals from the standing committee --  
2 excuse me, from the Association of  
3 Professional Responsibility Lawyers.

4 I created a working group made up of  
5 representatives from all of the substantive  
6 center committees to review the proposal and  
7 all comments that had been received on it as  
8 of then and continue to be received on the  
9 proposal.

10 The working group will report back to the  
11 ethics committee. The ethics committee will  
12 then review the proposal, the comments and  
13 the working group's product and  
14 recommendations. If the ethics committee  
15 decides to propose amendments to the rules,  
16 it will release a draft for public review.  
17 If the ethics committee decides to propose  
18 amendments to the House, it is likely to  
19 present the amendments to the House at the  
20 February 2018 meeting of the House of  
21 Delegates.

22 We are not -- the recommendation we  
23 received so far from the working group is  
24 that there is work to be done, and so we are  
25 not planning to present the proposals to the

1 House at the annual meeting in August.

2 The chair of the working group is Wendy  
3 Chang, who is sitting to my left. Wendy has  
4 done a fantastic job sort of coordinating  
5 and coalescing and making the working group  
6 function. I would now like Wendy to talk  
7 about the process of the working group to  
8 date and going forward.

9 MS. CHANG: Sure. Thank you, Myles.  
10 Thank you everybody for coming.

11 I want to thank APRL for an incredibly  
12 comprehensive and very helpful proposal.  
13 The working group's task is, our goal is to  
14 be a think tank---

15 UNIDENTIFIED SPEAKER: Could you use the  
16 microphone?

17 MS. CHANG: Our goal is to be a think  
18 tank to try to coalesce and gather all the  
19 information and the viewpoints of everybody  
20 out there to help gather all of this input,  
21 to separate the silly from the necessary,  
22 and in the process of that we are going to  
23 be splitting up the different elements of  
24 the advertising rules as they stand by topic  
25 and will be addressing them individually

1           during -- we are going to be meeting  
2           monthly. We have met twice so far.

3           We have split up into little  
4           subcommittees where each individual member  
5           of the working group has one assigned topic  
6           that they are going to be taking lead on and  
7           the rest of us will be providing our  
8           comments to the lead but everybody has got  
9           their own and everyone is expected to  
10          comment and input on everybody else's.

11          We will be meeting once a month, and we  
12          will be considering them in the months of  
13          February, March and May, and at the end of  
14          May our expectation is we are going to be  
15          finalizing the work product and the  
16          recommendation of the working group who will  
17          then create some type of a writing and  
18          submission with recommendations to APRL -- I  
19          mean, to the Standing Committee on Ethics  
20          and Professional Responsibility for their  
21          handling of our expectations, but at the  
22          start, at the in-person meeting at the  
23          national conference in June. So, the  
24          working group is going to be at it for a few  
25          months, and then the standing committee will

1 have it for a couple of months.

2 The working group is a think tank. We  
3 are not going to be a rules drafting  
4 committee. We will suggest rules language  
5 if that is going to be -- we think that's  
6 helpful to the process but we are not  
7 wedding ourselves to doing that because  
8 that's more in the direct purview of the  
9 standing committee, and we will leave that  
10 to them. We will be using the APRL proposal  
11 as a guidance, but it's not going to be the  
12 only thing we are looking at.

13 So, we are going to be addressing these  
14 issues in evaluating them comprehensively,  
15 so your input here today is critical to the  
16 work that we are doing. We are very  
17 interested in what you are thinking.

18 If you leave here today and you feel, oh,  
19 there's another thing I wanted to say,  
20 please feel free to reach out to any one of  
21 us who are on the working group. We really  
22 do want your thoughts. We are also  
23 accepting written comments, if anyone wants  
24 to submit those.

25 In the room on the working group with me



1 we have -- there's me, there's Jayne,  
2 there's Lynda, Melinda, Shontrai, Tracy,  
3 Ellyn, Dennis, Mary and Martin.

4 So, thank you very much, everybody.  
5 Thank you again for being here. We look  
6 forward to working with you.

7 MR. LYNK: Thank you very much, Wendy.

8 Since we began we have been joined by at  
9 least one other member of the standing  
10 committee, John Barkett. John, could you  
11 raise your hand so people know who you are?

12 I want you to know who the members of the  
13 committee are in case you want to talk to  
14 one or more of us after this formal session  
15 is over.

16 Are there any other members of the  
17 standing committee whom I have not yet  
18 introduced? Okay.

19 Now I'm now going to go over the --  
20 invite the people who have signed up to  
21 speak to come forward. If you are not at a  
22 microphone, please get to a microphone. If  
23 you are sitting against the wall, please  
24 come to the table and, you know, go to a  
25 microphone. I would ask if there's someone

1 sitting at the microphone if they could sort  
2 of trade seats with you during your talk,  
3 and then when you finish you can go back and  
4 they can come back because we don't --  
5 obviously, we don't have enough microphones  
6 for everyone, and we don't have enough seats  
7 for everyone at the table.

8 The first person on my list is Brad  
9 Hendricks, chair of the ethics committee of  
10 the Arkansas Bar Association.

11 Is Mr. Hendricks here? Okay.

12 The second person on my list is  
13 Ms. Alexandra Darraby of the ABA  
14 International Law Section. Is Ms. Darraby  
15 here?

16 The third person on my list is  
17 Mr. Christopher Brown of the Young Lawyers  
18 Division of the ABA. Is Mr. Brown here?

19 Thank you, Mr. Brown.

20 MR. BROWN: All right. I did not expect  
21 to go first today. Awesome.

22 So, I really do appreciate this  
23 opportunity. I am here on behalf of the  
24 Young Lawyers Division. I am our  
25 committee's director. We spoke about this

1                   yesterday at our YLD council meeting.

2                   Before I start, do you have a rough time  
3                   limit? Two minutes, five minutes?

4                   MR. LYNK: I think about five minutes.

5                   MR. BROWN: Okay. And then is it okay  
6                   if -- this is also the chair of our Young  
7                   Lawyers Division Access to Justice  
8                   Committee, Amber Rush, and so I know that  
9                   her and her committee leader have some  
10                  comments as well that may be different than  
11                  mine, and so may I share that five minutes  
12                  with them?

13                  MR. LYNK: Yes.

14                  MR. BROWN: Thank you very much.

15                  MS. RUSH: Eli Marchbanks is also on the  
16                  committee.

17                  MR. BROWN: So, I'm sure that there's  
18                  probably two really clear positions in here;  
19                  that these rules go too far and that they do  
20                  not go far enough. I tend to represent the  
21                  young lawyers who feel that these go too  
22                  far, and with specificity I think that the  
23                  removal of the ban on realtime electronic  
24                  communications is a mistake.

25                  So, as we talk about -- I really

1 appreciate what Lynda said this morning, and  
2 she hit the nail on the head. To me when we  
3 talk about our current soliciting and  
4 solicitation rules, I have always been  
5 taught and I have always felt that attorneys  
6 are practiced in the art of communication;  
7 and, more importantly, the art of  
8 persuasion, and that is why we have these  
9 solicitation rules.

10 The art of persuasion comes into play  
11 when you have got in-person communications,  
12 over-the-telephone communications, and in my  
13 opinion the realtime electronic  
14 communications.

15 When that interplay begins a couple of  
16 things happen. You have a potential for the  
17 release of confidential information; you  
18 have the potential for the formation of a  
19 maybe anticipated on behalf of the lay  
20 person client/attorney relationship; and  
21 then you also provide the attorney the  
22 opportunity to begin to persuade that person  
23 why they should hire him or her as their  
24 attorney.

25 I do think that it's great that we are

1 looking at modernizing and embracing  
2 innovation, absolutely. I think the whole  
3 Young Lawyers Division feels that way. I  
4 personally love technology. I want to  
5 embrace it as much as possible, and I can  
6 tell you that most of the Young Lawyers  
7 Division feels the same way, but I do think  
8 that removing the current ban on realtime  
9 electronic communication is a mistake, and I  
10 would ask the body in power that they put  
11 that back into these proposals.

12 I would now like to pass the microphone  
13 to my other YLD leadership. Thank you very  
14 much.

15 MR. MARCHBANKS: Thank you for calling me  
16 out, Chris. I didn't know I was going to be  
17 giving remarks today. Chris and I talk  
18 about this a lot, so I guess that makes  
19 sense.

20 I appreciate the opportunity because I am  
21 probably extreme on the other viewpoint from  
22 Chris. I am a young lawyer. I'm 28. I  
23 have been practicing for a little over two  
24 years, and I run a law practice with Amber  
25 Rush who I serve on the committee with, and

1 so we are kind of in the trenches of  
2 probably the class of people you were  
3 referencing when you said there's  
4 unemployment out there, there is  
5 underemployment out there.

6 I think it was past bar president James  
7 Silkenat that said lawyers have broken the  
8 law of supply and demand. There's too many  
9 lawyers. There's too many potential  
10 clients, and the studies are showing that  
11 that's to the tune of about 80 percent unmet  
12 need out there, and so I think what we are  
13 talking about, what we need as an industry  
14 is true disruptive innovation.

15 I know that is a relatively broad term,  
16 and it's probably a political loaded handgun  
17 in certain contexts, but I think that that's  
18 what we need, and I think the thing about  
19 disruptive innovation is it's very hard to  
20 predict how it's going to come about.

21 If it were easier to predict then more  
22 people would be doing it, and so there's  
23 only so much that we as lawyers and as the  
24 ABA and as the people who are thinking about  
25 these things can do to predict intended and

1           unintended consequences.

2           I think that the most, the most impactful  
3           thing we can do to really address this  
4           access to justice issue is to tear down some  
5           of these walls, give people some operating  
6           room to get creative and see what happens  
7           and then maybe start putting some of these  
8           walls back up, trying to predict the worst  
9           and best case scenario of some of these  
10          actions.

11          One, I think we are probably going to get  
12          it wrong; and two, I just think we are going  
13          to miss a lot of potential opportunity. I  
14          am much more in favor not only with this  
15          rule but with several rules unleashing the  
16          floodgate, so to speak, and maybe that's a  
17          little too extreme, maybe I don't have  
18          enough experience to have the credibility to  
19          advocate such a position, but I think the  
20          problem is pretty extreme, too.

21          Most of the clients Amber and I work with  
22          were previously in the 80 percent of people  
23          that couldn't afford legal services or  
24          didn't realize that their problem that they  
25          had was something that a lawyer could help

1           them with, and the more opportunity I have  
2           to get creative and to get, I don't know  
3           what the right word is, to get scrappy about  
4           helping them and helping myself, I think  
5           that in the long run the profession will be  
6           better served.

7           MR. LYNK: Thank you.

8           Miss, you heard -- did you want to speak,  
9           as well?

10          MS. RUSH: No. I echo what Eli said.

11          MR. LYNK: Okay. You almost exactly  
12          finished within five minutes, but I actually  
13          think we are ahead of time and so I think  
14          what I'm going to do is expand the time to  
15          10 minutes.

16          Obviously, I want to hear as many people  
17          as possible, we don't want to unduly limit  
18          the comments, and if we have a chance to go  
19          back again that would be terrific. We may  
20          well have that opportunity, but I just want  
21          to make sure we get to everyone who wants to  
22          speak which is why we do have a time limit.

23          Let me just raise one question that's  
24          come up within the committee, and it regards  
25          a question about Rule 4.2 -- excuse me, 7.1.



1           The APRL proposal does not really suggest  
2           amending the black letter of 7.1 but an  
3           argument can be made that if you read 7.1 it  
4           presents a tautology. It defines misleading  
5           as misleading. So, it prohibits false and  
6           misleading advertising but it doesn't define  
7           what misleading is, and I'm wondering, is  
8           that prohibition clear or is that something  
9           we should look at?

10           The FTC has standards about what is  
11           misleading. Should we incorporate those in  
12           a comment? I would be curious if people  
13           have thoughts about that in your remarks.

14           I would now like to recognize Mr. Will  
15           Hornsby of the standing committee on legal  
16           aid and indigent defendants.

17           MR. HORNSBY: Thank you, Professor Lynk.

18           I'm staff counsel to the Standing  
19           Committee on the Delivery of Legal Services.  
20           Bill Hogan was scheduled to speak today but,  
21           unfortunately, his flight was delayed so he  
22           asked me to present in his stead.

23           The mission of the Standing Committee on  
24           Delivery of Legal Services is to expand  
25           access to lawyers and legal services for

1 people of moderate income who have too many  
2 assets to qualify for legal aid or pro bono  
3 legal services but insufficient  
4 discretionary resources for full traditional  
5 representation. So, advertising is  
6 certainly a vehicle that plays into that  
7 mission.

8 The standing committee has not completed  
9 its analysis of the APRL proposal. It will  
10 do so and prepare written remarks by the due  
11 date, but I would like to share two things  
12 that were brought to Ethics 20/20 from the  
13 committee and one other observation.

14 The first thing is: 7.1 originated as a  
15 rule that would govern commercial speech,  
16 and there's nothing in that rule that limits  
17 it in that way, and it can be read to impose  
18 limitations on political discourse, and it  
19 was in 2012 before Ethics 20/20 the  
20 committee's recommendation to qualify 7.1 in  
21 a way that clarifies that it is a rule that  
22 governs commercial speech, and I will be  
23 happy to expand on that.

24 And when we articulated that people said:  
25 Well, are there circumstances in which a

1 lawyer may communicate in a way that's  
2 misleading? And our suggestion is that  
3 there are.

4 A lawyer can communicate -- satire would  
5 be included in that. Passing on client  
6 feedback that may be verbatim presented in a  
7 verbatim fashion but not completely  
8 accurate, puffery on the courthouse stairs  
9 about the success that you will have for the  
10 client under Indictment, those are certainly  
11 examples of things that are not -- are not  
12 designed to generate business but are  
13 communications that would be subject to this  
14 rule.

15 If this rule is designed to include  
16 political discourse, that is redundant with  
17 8.4 and it has no reason to exist. If it is  
18 limited to commercial speech and to impose  
19 limitations beyond those in 8.4, then it  
20 should clearly say that it does that.

21 The second issue has to do with rule  
22 7.2(b) which is the APRL proposal 7.2(f)  
23 that prohibits a lawyer from giving anything  
24 of value for recommendation of the lawyer's  
25 services but for some exceptions, one of

1           which is the usual charges of nonprofit and  
2           state qualified lawyer referral services,  
3           and another is the reasonable costs of  
4           lawyer advertising.

5           Nothing within that rule distinguishes or  
6           defines what a lawyer referral service is or  
7           what an advertisement is. Nothing in the  
8           comment makes that clear, and I think that  
9           the definitions to the model rules could  
10          clarify that.

11          As technology has evolved we have the  
12          capability to scale delivery of legal  
13          services and client development in a way  
14          that is multistate and in a way that draws  
15          no distinction between a lawyer referral  
16          service and a group advertising service, and  
17          so we see things where services say we are a  
18          group advertising service, we are not a  
19          lawyer referral service, we are the  
20          antithesis of a lawyer referral service,  
21          just to be clear, but there's no  
22          distinction.

23          There's nothing in the mechanisms that do  
24          that, and so there have been some ethics  
25          opinions as you probably know that have

1            attempted to draw those definitions. They  
2            are not universally understood among the  
3            states. They are not consistently applied,  
4            and so there's a choice here.

5            One is to define what a lawyer referral  
6            service is because currently a lawyer may  
7            not pay to participate in a for-profit  
8            lawyer referral service, and to define that  
9            in relation to group advertising; and the  
10           other which was the suggestion of the  
11           delivery committee to Ethics 20/20 to  
12           eliminate that rule, to eliminate that  
13           provision because 5.4 says that we can't  
14           divide fees so we can't pay for that which  
15           is prohibited by the fundamental part of  
16           that rule.

17           The only exception is that lawyer  
18           referrals, nonprofit lawyer referral  
19           services, nonprofit and state qualified  
20           lawyer referral services can, in fact,  
21           divide fees because that has become the  
22           usual charges of lawyer referral services.

23           So, if there were an amendment to 5.4  
24           saying that that's an appropriate activity  
25           and the state believes that it is, there

1 would be no justification for 7.2(b).

2 The third point that I would like to make  
3 is that by liberalizing these rules as APRL  
4 has done, if the intent is to have universal  
5 application among the states, there is  
6 nothing historically that would suggest that  
7 that's what would happen because what we do  
8 is we create the model rules and people ask  
9 what are the most liberal states for  
10 advertising?

11 The most liberal states are the ones that  
12 are closest to the model rules because the  
13 states take the model rules and then they  
14 add the garbage to them, right, and then  
15 they impose the limitations that are more  
16 restrictive so then they become  
17 incrementally more restrictive and, of  
18 course, they are the states of Texas and  
19 Louisiana and Florida that have the more  
20 extreme rules.

21 But, what we found was if we could just  
22 get the states to adopt the model rules  
23 verbatim as they are, then we would be in a  
24 much better place regardless of any changes  
25 that were made, and there needs to be

1           efforts made to encourage those states to  
2           drop those additional provisions in the  
3           interest of advancing, of advancing access  
4           to justice, of minimizing the justice gap  
5           for that purpose.

6           So, those are my remarks. Thank you for  
7           the opportunity to bring them up.

8           MS. CHANG: Can I ask you to follow up a  
9           little bit on something you just said?

10          So, as I'm listening to you is what you  
11          are saying is that the current rule usage is  
12          actually an impediment to the client as  
13          opposed to being protective of them and why?

14          MR. HORNSBY: No, I think they are not an  
15          impediment. I think the current model --  
16          are you asking about the model rules or  
17          state iterations?

18          MS. CHANG: I would be interested in your  
19          opinion on both.

20          MR. HORNSBY: Well, the problem with the  
21          model rules is that the states just have not  
22          adopted them verbatim. They just -- they  
23          are compelled, it is compulsive for them to  
24          add additional aspects to them. And  
25          sometimes they are little nonsense things,

1 sometimes there are dramatic limitations.

2 So, I think that the model rules provide  
3 a good opportunity for people, for lawyers  
4 to articulate their services to people in  
5 reasonable ways but for the first two issues  
6 that I presented.

7 But, other states -- but the states and  
8 their adoption and their modification of the  
9 model rules present aggravating aspects, and  
10 the worst part of that aggravation is when  
11 we have the ability to scale that  
12 communication through technology and do it  
13 universally among the states but we have the  
14 burdens of complying with those state rules  
15 so that if a lawyer participates in a group  
16 advertising vehicle, an online group  
17 advertising vehicle but has to file that  
18 advertisement with their state and have it  
19 go under review and so forth and that  
20 vehicle doesn't include all of the  
21 disclaimers of the states and that sort of  
22 thing, then these create the impediments  
23 that are, that are inefficient in our  
24 ability to communicate the availability of  
25 our services.



1 MS. CHANG: Thank you.

2 MR. LYNK: Thank you very much.

3 MR. HORNSBY: And please consider the  
4 delivery committee as a resource. Not a  
5 full partner, I'm glad you are doing the  
6 work, but we are happy to serve as a  
7 resource and provide that perspective of  
8 expanding legal access.

9 MR. LYNK: Appreciate it. Thank you.

10 Mr. Thomas Prol, president of the New  
11 Jersey State Bar Association.

12 MR. PROL: Good afternoon. Can everyone  
13 hear me? Thank you for your time.

14 So, I am Tom Prol. I am president of the  
15 state bar here on behalf of our 18,200  
16 members that we represent. I previously was  
17 on our Board of Governors, the Law Student  
18 Division, and in the House of Delegates as  
19 well by virtue of my position.

20 I start with the backdrop of my deep  
21 appreciation for all the hard work you do,  
22 and I mean that from all of our  
23 organization. You are only paid in  
24 complaints and, you know, I hope that you  
25 understand our comments today are taken in

1           that vein here of appreciation.

2           So, our fundamental concern is that these  
3           rules undermine the ethical delivery of  
4           legal services and leave the public largely  
5           unprotected and concerned the RPCs governing  
6           advertising communication could stand to be  
7           updated to reflect technology and  
8           information delivery. However, these  
9           proposals carefully erode the crafted and  
10          much needed protections that the current  
11          rules provide to the public.

12          The State Bar of New Jersey has concerns  
13          about the proposals but I will highlight  
14          issues with the two most rife for danger,  
15          the first being RPC 7.1.

16          It would permit solicitation of clients  
17          through, quote, organized information  
18          campaigns, end quote. That would include  
19          television, Internet and other forms of  
20          electronic communication about a lawyer's  
21          services with few limitations regarding the  
22          use of false or misleading information.

23          These means of communication offer  
24          important tools in trying to reach people of  
25          low or moderate income and who are in need

1 of legal services. However, it's exactly  
2 these sometimes unsophisticated consumers  
3 that need the protection the current rules  
4 provide to ensure they don't fall prey to  
5 overreaching and overzealous advertising  
6 efforts.

7 These protections are not mere  
8 traditions, and the safeguards are not  
9 curious anachronisms. We believe limits on  
10 a lawyer's active quest, quote unquote, for  
11 clients are not only appropriate but they  
12 are vital as the current rules represent  
13 well-thought balance in terms of protection  
14 to an unwary public. They should not be  
15 reduced in ways this proposal would allow.

16 The amendment would also permit attorneys  
17 to communicate specialties regardless of  
18 whether that person has been certified in  
19 the area of expertise or not. In New  
20 Jersey, much like many jurisdictions, we do  
21 have a special certification from our  
22 Supreme Court which are voluntary  
23 certifications but the Supreme Court allows  
24 for certification, and so we think that  
25 that's a preferable vehicle for dealing with

1           that issue.

2           Without more specific standards this  
3           could result in individuals of vastly  
4           different levels of experience claiming to  
5           be specialists and, as such, amendments to  
6           RPC 7.2 are vague to the point of being  
7           dangerous. The proposal would expand those  
8           individuals to whom in-person, face-to-face  
9           or telephone solicitations could be made to  
10          include, quote, sophisticated users of legal  
11          services, end quote.

12          It is first and foremost unclear to us  
13          who those sophisticated users are, would  
14          allow problematic language that would allow  
15          repeated unsolicited communications which  
16          will leave a negative imprint on a  
17          profession that does nothing to advance the  
18          unmet need for information of services. As  
19          such, this proposal is an invitation to  
20          harass under the guise of help, and our  
21          profession's respect and reputation will  
22          suffer.

23          The amendments would specifically permit  
24          fees to pay the cost of advertising or  
25          communication through online advertising

1 services. These proposals would also permit  
2 payment from marketing client development  
3 services so long as those providing the  
4 services do not direct or regulate the  
5 attorney's judgment.

6 We can't express even more strongly our  
7 great concern about how these proposals will  
8 injure the practice of law. These proposed  
9 changes clearly and unabashedly open the  
10 door to allowing fee sharing and payment of  
11 referral fees to non-lawyers or non-lawyer  
12 companies, including those that may be in  
13 violation of the RPC.

14 Moreover, an attempt to update the  
15 advertising rules through these proposals,  
16 if adopted, would become a slippery slope  
17 toward the end of ethical fees on sharing  
18 and of fee sharing referral fees. Several  
19 states have issued opinions that say  
20 advertising arrangements such as those  
21 contemplated under this proposal are not  
22 permitted. The ethics advertising rules  
23 should not be changed to refute those  
24 opinions under the guise of updating the  
25 rules of promoting legal services to the

1 underserved.

2 The New Jersey State Bar has spoken out  
3 vigorously against proposals in recent years  
4 that seek to expand the type of permissible  
5 fee sharing and referral arrangements  
6 currently covered by the ethics rules. We  
7 view this proposal in the same vein and urge  
8 that if changing those fundamental pillars  
9 of our ethics rule is the real goal, that  
10 goal should be presented and discussed in a  
11 straightforward, forthright manner so that  
12 it can be properly considered and vetted by  
13 all of the stakeholders.

14 Likewise, if improving the delivery of  
15 services for low and moderate income  
16 individuals is the real goal, and it's an  
17 amicable goal, those discussions should be  
18 broad in scope and any proposed rule change  
19 offered in a comprehensive not piecemeal  
20 manner.

21 As stated at the beginning of my remarks,  
22 the RPCs governing advertising could stand  
23 to be updated to reflect technology and  
24 information delivery, but this proposal goes  
25 too far. It has far-reaching ethical

1           implications, and for that reason the state  
2           bar respectfully asks you, urges you to  
3           reject the proposed changes.

4           MR. LYNK: Thank you very much. I have a  
5           question.

6           Your comment about the sophisticated  
7           users of legal services, is part of your  
8           objection there that that would inject into  
9           the model rules a distinction between lawyer  
10          obligations for one set of clients and  
11          lawyer duties and fee sharing  
12          responsibilities to a different set of  
13          clients?

14          MR. PROL: I think that's inherent. I  
15          think at the threshold we have a little  
16          confusion as to what that term even means.  
17          So, we start with that ambiguity that anyone  
18          can come to a different interpretation, but,  
19          yes, I think it tends to lead to some kind  
20          of distinction among clients, and with that  
21          abound different ways of treatment and  
22          different ethical issues that come up as  
23          well.

24          MR. LYNK: Thank you, Mr. Prol.

25          MR. PROL: Thank you.

1 MR. LYNK: Mr. Josh King, the chief legal  
2 officer of Avvo, Inc.

3 MR. KING: Thank you. I appreciate the  
4 opportunity to speak to the group.

5 I'm chief legal officer of Avvo. It's a  
6 role I have been in for almost a decade now,  
7 and I think it's given me a certain  
8 perspective on the impact that the rules  
9 have on the ability of lawyers to provide  
10 consumers with access to information and the  
11 ability of lawyers to participate in  
12 innovative service offerings.

13 And I'll start with the observation that  
14 the first APRL proposal, if you haven't read  
15 it, you shouldn't just read the combined  
16 proposal, you should read the analysis  
17 behind the first proposal because it is  
18 very, very thoughtful. It's very highly  
19 detailed and researched, and it's very  
20 persuasive.

21 And maybe I'm easily persuaded on this  
22 point, but I find that it plays out in my  
23 own experience that, first of all, there's  
24 really -- and I have talked with a lot of  
25 ethics counsel around the country on this



1 and disciplinary counsel, and they have told  
2 me, without exception, that really what they  
3 need is rule 7.1. They need the prohibition  
4 on false and misleading advertising, and the  
5 rest of the stuff, I think Will called it  
6 garbage, I find---

7 MR. HORNSBY: That's not my term.

8 MR. KING: I have probably called it  
9 worse from time to time, really is not  
10 necessary for the enforcement activities.

11 So, they can still -- you could strip  
12 everything away except rule 7.1 and it  
13 really wouldn't change what the disciplinary  
14 counsel are doing today. They can still go  
15 after the bad actors. It changes nothing.

16 There may not be a specific rule on it,  
17 but if you are running a misleading lawyer  
18 referral service or if you are splitting  
19 fees in a way that interferes with your  
20 independent professional judgment or if you  
21 have arranged a recommendation proposal  
22 that's effectively using runners and  
23 cappers, those are all false and misleading  
24 activities and those are all things that  
25 even without specific rules the enforcement

1 people can still go after you and hold you  
2 to account.

3 So, that's sort of the first big take  
4 away from that proposal, and it's absolutely  
5 consistent with all of the conversations  
6 that I have had with disciplinary counsel  
7 over the years.

8 The second piece of it is that even  
9 putting that aside, the fact that you have  
10 all these specific rules in there, it's not  
11 like they are neutral. They are actively  
12 harmful, and there needs to be -- if you  
13 have something that's in there that's  
14 actually causing harm, and there's a lot of  
15 documentation in that APRL proposal about  
16 how these specific rules are actively  
17 causing harm, and I think Eli alluded to it  
18 a little bit with younger lawyers, but I  
19 have seen this consistently over the last  
20 decade in my conversations with lawyers,  
21 good lawyers who are struggling with how do  
22 you go out and market your business? How do  
23 you go out and communicate with potential  
24 clients?

25 And they are looking at the rules and

1           they are looking at all of this garbage, and  
2           they are saying, well, I don't really know  
3           what this means. I mean, I am reading these  
4           rules very expansively. I may be looking at  
5           some ethics opinions that are interpreting  
6           them very expansively. Is this program I'm  
7           going to do a lawyer referral service, am I  
8           being charged a reasonable charge for  
9           advertising, all the way down the line, and  
10          invariably what happens is they pull back.

11                 They aren't going out and actively  
12                 providing the public with information about  
13                 their legal services. They find themselves  
14                 unwilling to try new things out, to engage  
15                 in innovative legal services, getting new  
16                 ways of reaching potential clients, new ways  
17                 of marketing. It's far beyond the scope  
18                 here but there are obviously all sorts of  
19                 access to justice problems with that.

20                 I think rules as they stand today and  
21                 particularly some of these in the seven  
22                 series are what is holding back a lot of  
23                 lawyers from innovating, from doing things  
24                 that would be in the public interest and,  
25                 frankly, in the profession's interest to get

1 more people in the public to start engaging  
2 with lawyers.

3 I have seen it in our own, in our own  
4 Avvo world over the last year, there's been  
5 some allusion to some of these opinions that  
6 have essentially fallen back on the craft in  
7 the rules to find that our new autolegal  
8 services offering would somehow violate some  
9 of the rules as being a lawyer referral  
10 service or not involving a reasonable cost  
11 of advertising. And, again, as I think I  
12 have made clear in all of my speaking and  
13 writing, I fundamentally disagree with those  
14 opinions, and I think they are a great  
15 exhibit of what's wrong with having all of  
16 these specific rules stuck still in the  
17 rules.

18 And I would go a little bit further. I  
19 agree with Will that we would be in a better  
20 place if everyone just adopted the ABA model  
21 rules. I do think that leaving in some of  
22 these specific restrictions remain harmful.

23 And so if I differ with the APRL proposal  
24 on one thing it would be this: The second  
25 APRL proposal brought back in this current

1 rule 7.2(b). In the new proposal it's  
2 7.2(f). If you carefully read the two  
3 proposals there's a very good argument laid  
4 out in the first proposal for why that rule  
5 should be excised, why we should have no  
6 rules about lawyer referral services, no  
7 rules about the reasonable cost of  
8 advertising, no rules about recommendations  
9 because you don't need them. No one is  
10 relying on them and the ethics authorities  
11 can still go after people who are engaging  
12 in false and misleading advertising.

13 MR. LYNK: Mr. King, let me ask you a  
14 question. 7.3 and its prohibition against  
15 direct information solicitation or realtime  
16 solicitation, it's not the same as  
17 misleading or false advertising so it's not  
18 addressed at the content of the  
19 advertisement, it's addressed at the  
20 methodology or means.

21 So, what is your thought on that 7.3  
22 prohibition and will you throw that out when  
23 you throw out everything else?

24 MR. KING: Well, I think one of the  
25 things that's curious to me in reading the

1 proposal is that the second proposal brings  
2 those things back in. It says they are  
3 endemic to solicitation, and so I can't tell  
4 from the proposal if it's simply to limit  
5 those or have a specific rule around those  
6 types of methods only as applicable to  
7 solicitation or whether they are meant to be  
8 applicable more broadly.

9 My fear based on lengthy experience in  
10 this area is that if you put anything in  
11 specific in there you will invariably have  
12 lawyers, good lawyers who will read them and  
13 say, you know what, I'm worried about the  
14 expansive application of this, so I'm not  
15 going to do X, Y and Z.

16 I am firmly convinced that is a real  
17 problem, and it's one of the things that is  
18 actively harming access to justice, and it's  
19 frankly one of the things you can fix most  
20 easily in this profession is to cut out  
21 these artificial barriers to people going  
22 out and doing this stuff.

23 I would offer one final thought that's a  
24 little bit unrelated on the solicitation  
25 question, and this goes to my experience of

1 I have been hiring lawyers for 20-plus years  
2 now. I think I would qualify as the  
3 sophisticated user of legal services, and  
4 this may sound like heresy, but I don't feel  
5 like I get marketed to enough by lawyers.

6 I actually would like -- you know, that's  
7 a weird thing to say, I know, but I would  
8 like to know what people are doing, and I  
9 think it's only one example, it's an odd  
10 one, but I'm not getting access to  
11 information about the legal services that  
12 all the people who might offer services to  
13 me provide, and if that's happening to me as  
14 a sophisticated user of legal services, I  
15 know it's happening across the board to  
16 consumers and potential consumers of legal  
17 services all up and down the economic and  
18 business scale.

19 MR. LYNK: Okay. Thank you very much.

20 MR. KING: Thank you.

21 MR. LYNK: Well, following right up, Chas  
22 Rampenthal from LegalZoom.

23 MR. RAMPENTHAL: Start my clock because I  
24 am the kind of person that has tended to run  
25 over unchecked.

1           First of all, I would like to again --  
2           Chas Rampenthal, LegalZoom's general  
3           counsel. I would like to thank the standing  
4           committee for producing the forum to discuss  
5           this important work that APRL started I  
6           guess, what, nearly like four year ago.

7           I want to start out, I'm not an ethics  
8           expert. Shocker enough. I think there are  
9           a lot more people on the various committees  
10          here that are more familiar with the rules  
11          and their history and their need for  
12          revisions than I ever will be. That's one  
13          of the reasons why I'm here, because I'm  
14          trying to learn, as well.

15          But, I do bring a unique perspective. I  
16          have been the general counsel of LegalZoom  
17          for over 13 years right now, and I have  
18          watched a scrappy start-up of less than 50  
19          people become the most recognized name in  
20          law, mainly through the power of national  
21          advertising.

22          And where are we at right now? In the  
23          time that this forum has started, LegalZoom  
24          has incorporated 15 businesses. That's one  
25          every three minutes 24/7, 365. That's not



1 just during business hours.

2 Wills, we do one every four minutes. We  
3 have helped nearly 4,000,000 customers in  
4 business with their needs.

5 I'm hopeful that you are going to see me  
6 as more than just an ambassador for my  
7 company. I've been a lawyer before I joined  
8 LegalZoom, and I will be one after they kick  
9 me to the curb. I'm hopeful that you are  
10 going to come to see LegalZoom as well as  
11 not a competitor for what lawyers do, and  
12 even though some people have labeled us as a  
13 competitor, I think we are kind of more than  
14 that. I view LegalZoom as going after the  
15 non-consumers. We are not here to take  
16 business from people who are looking for  
17 lawyers.

18 That being said, we have never been  
19 anti-lawyer. I love being able to hook up  
20 consumers with lawyers who need them. The  
21 fact is, though, it's really difficult to do  
22 so.

23 Over the years LegalZoom, if you haven't  
24 noticed, we have moved from being this DIY  
25 service where we do forms and instruction

1 and we have moved to partnering with lawyers  
2 through legal plans in ways that I think  
3 benefit not just the company and our  
4 consumers but the bar and those looking for  
5 legal services and lawyers who are looking  
6 for work.

7 Attorneys licensed in every jurisdiction  
8 across the United States participate in our  
9 plans and have provided more than 300,000  
10 consultations in the past five to six years.  
11 300,000. Just think of that as legal  
12 business that we have helped provide  
13 directly to lawyers and clients for them and  
14 how much better off the client is for having  
15 it.

16 I believe that the future of our  
17 profession hinges on our collective  
18 professional ability to evolve the ways in  
19 which we do business to better address the  
20 needs of the underserved, the middle class,  
21 the small business, the poor.

22 A LegalZoom legal plan which uses  
23 licensed attorneys is a better way for some  
24 markets, and our plan customers are  
25 individuals, they are small businesses.

1           Some might call them unsophisticated users.  
2           They typically don't have a preexisting  
3           lawyer or some sort of a family lawyer that  
4           they use.

5           They buy goods, they buy services,  
6           including legal services that they are not  
7           only just aware of but ones where they can  
8           gather information to assist their purchase  
9           so they can get reviews, ratings and other  
10          information to engender trust in the  
11          process, and whether our profession likes it  
12          or not, things like awareness, information,  
13          trust are conveyed through national brands  
14          and through advertising and solicitation.

15          And getting the word out makes a  
16          difference. We go to see a doctor annually  
17          and a dentist twice a year. We brush twice  
18          a day, and we lie about flossing. We see  
19          the value of a realtor even though we can  
20          deal with it, hopefully, on our own. We  
21          know that milk does a body good and pork is  
22          the white meat and why? Is it because one  
23          individual pig farmer decided to do a  
24          national ad campaign?

25          Absolutely not. Massive groups got

1 together and got the word out. I know that  
2 with respect to the milk campaign every  
3 producer of milk in California donated three  
4 cents off of every gallon of milk into a  
5 massive campaign to fund "Got Milk." Guess  
6 what happened to milk sales? They went up  
7 even though they had been declining.

8 Ask most consumers what lawyers do and  
9 the answer is going to depend on when they  
10 watch TV. At 10:30 a.m. social security  
11 claims, 3:45 a.m. we sue drug companies and  
12 asbestos makers, but in prime time that's  
13 when we shine. We put people in jail and  
14 keep them out, wrestle with ethical  
15 quandaries and go to court every single day  
16 and look phenomenal doing it.

17 But, most average people don't know what  
18 a lawyer actually does. Right? That means  
19 also that they have no concept of the  
20 benefits that we can give them, the advice  
21 that we have. And the cost of acquisition  
22 for a nonconsuming client is super high for  
23 a small lawyer. Vice versa, the ability for  
24 a small client to find the right lawyer is  
25 also very difficult.

1           And when it comes to regulation,  
2           especially regulation that deals with free  
3           speech, I like to think that attorney  
4           advertising, less is more. And, sure, I  
5           think we need to prevent misleading and  
6           false communications and we should protect  
7           vulnerable individuals, people from  
8           unscrupulous and high pressure tactics.

9           And, look, LegalZoom is not directly --  
10          we are not lawyers so we don't have the same  
11          limitation with respect to how we advertise  
12          our services. They do affect our ability to  
13          provide useful information and truthful  
14          advertising to our consumers when they need  
15          a lawyer.

16          And the committee, I hope that it  
17          remembers what it wrote nearly two years  
18          ago, the APRL committee, that a new approach  
19          is long overdue, and as you hear testimony  
20          and review submissions that have already  
21          come and will come, I just want you to  
22          consider more if the ABA expands and  
23          explains and over explains the more likely  
24          that regulators, as Will stated, are just  
25          going to reject it or do whatever they want

1           anyway which defeats the purpose of having  
2           clear and uniform guidelines.

3           The trend of Central Hudson also called  
4           out by APRL has been increasing First  
5           Amendment protections for speech like this  
6           and the rejection and preconceived notions  
7           that certain things are just per se wrong.  
8           The trend is likely to continue toward a  
9           simple, singular Constitutional principle:  
10          If it's factual, accurate and not  
11          misleading, it shouldn't be prohibited. Add  
12          to it the last two years you have to  
13          consider the regulators and their position  
14          in light of the North Carolina Dental Board  
15          case which subject lawyer-controlled bar  
16          associations to antitrust liability. I have  
17          some personal experience with that, so I  
18          know.

19          We can expect restrictive bar regulations  
20          in addition to a constitutional problem.  
21          But, fortunately, both of these cases I  
22          think are entirely consistent with what we  
23          want from a committee and for the  
24          profession, and that's to give people  
25          informed information so they can make their

1 decision when they purchase legal services.

2 Overly proscriptive rules interfere with  
3 this. They diminish trust. When we take  
4 rigid rules and they meet -- and we  
5 introduce the speed of the technology and  
6 communication change, uncertainly ends up  
7 trapping well-intentioned lawyers into  
8 unintentional rule violations or even more  
9 likely cause them to do nothing, and then  
10 there we are, it's 1977 again.

11 I think rules should be simple. They  
12 should be clear. They should be easy to  
13 understand and enforce. They should presume  
14 good faith, not the opposite, and the  
15 comments need to be very careful about  
16 additional proscription and just give  
17 examples of permissible communication. They  
18 shouldn't beg more questions than they  
19 answer.

20 With these principles in mind I would  
21 like to respectfully suggest that the  
22 committee consider outcome-based regulations  
23 in approach toward their goals rather than  
24 proscriptive rule making. That is from the  
25 rule writer's perspective, we take rules

1           that would be written as guides to serve  
2           goals rather than a list of do this, don't  
3           do that which frustrate purposes behind the  
4           rules.

5           I think most of us, the people in this  
6           room who are rule makers, even legislators,  
7           regulators and practitioners, we want three  
8           things when it comes to the rules that guide  
9           what we do; simplicity and ease of  
10          application, clarity and certainty, how do  
11          we comply, and alignment with the purpose  
12          that underlies the rules. The concept is  
13          simple, but it can be troublesome, and I'll  
14          wrap it up.

15          So, I think instead of focusing on  
16          proscribing the processes or actions that  
17          lawyers can take, we should model behavior  
18          we want to see from state regulators.  
19          Outcome-based rules focus on the goal, and  
20          this is exactly the approach that's been  
21          taken in the United Kingdom where the code  
22          of conduct of the SRA is clear.  
23          Consumers are provided with the opportunity  
24          there to waive mandatory 14-day cooling-off  
25          periods, for instance, in lawyer contracts.



1           So, these comments are broad brush  
2           strokes, and I plan to submit more specific  
3           comments in writing on the committee's  
4           proposal that are consistent with  
5           documenting this type of principle.

6           I want to conclude and thank everyone for  
7           the hard work that you have done. I really  
8           appreciate it. I loved reading all the  
9           briefs and whatever I can do, as Will said,  
10          other than being a full partner to help you  
11          or assist your efforts, I would love to do  
12          so.

13          I know that the public deserves to know  
14          more about the amazing things lawyers can  
15          do, and I think right now we can make a  
16          attempt to get them that information.  
17          Thanks.

18          MR. LYNK: Thank you.

19          We had a speaker who we had reserved 3:00  
20          for. I don't know that he is here. Andy?  
21          Okay.

22          MR. RENDLEMAN: Regarding your  
23          outcome-based rule making, how would you  
24          view a structure that would have a basic  
25          rule as we have talked about, you know, a

1 7.1, not misleading or deceptive, and then a  
2 structure that, for example, might go to a  
3 state's professionalism commission that  
4 would provide the education and the resource  
5 for lawyers to learn how to better implement  
6 their advertising strategy but would not be  
7 a disciplinary process?

8 MR. RAMPENTHAL: Yes. So, more like  
9 training someone up front instead of  
10 disciplining them on the back end?

11 MR. RENDLEMAN: Yes, the outcome, an  
12 outcome-based concept.

13 MR. RAMPENTHAL: Again, I'm not going to  
14 consider myself a massive expert in this. I  
15 have looked at it.

16 LegalZoom, we own a law firm in the  
17 United Kingdom, we are subject to those SRA  
18 regulations there. I am relatively familiar  
19 with how they are done, outcome based or  
20 what some people call managed. I think Jim  
21 Coyle talked about it earlier, kind of  
22 management based or whatever.

23 And what you really want to take a look  
24 at is having rules that are very -- like I  
25 said, very minimal and easy kind of to

1 understand this idea is it false, is it  
2 misleading, and then take something like we  
3 have here in the State of Florida where  
4 there's like a 30-day kind of period where  
5 you can't send a written communication to  
6 someone in an accident, the one that was  
7 held up as lawful in Went For It. You know,  
8 I think the way of looking at it is that's a  
9 proscriptive rule: Don't do it, you can't  
10 do it. Right?

11 If you think about it outcome based; what  
12 do we want? We want people who are looking  
13 for lawyers to get them and now including  
14 the two or three out of 100 people that may  
15 be frail and benefit from the rule there are  
16 98 people who are like, wait a minute, so my  
17 insurance adjuster is calling me, other  
18 people are talking to me, they are trying to  
19 get me to settle, and I have zero  
20 information on other lawyers that might be  
21 able to help me.

22 I think that outcome-based regulation  
23 would say we shouldn't have a rule that says  
24 that at all, but maybe what we should have  
25 instead is if someone feels that they were

1 highly pressured, let's say it was  
2 face-to-face, that they have an automatic  
3 rescission right to get out of that  
4 contract.

5 So, therefore, the people who want  
6 information and are happy with it can get  
7 it, but the people who actually are harmed  
8 can get out of it, and maybe that's a little  
9 less but it's an easier way to see how --  
10 and this is just one example of probably  
11 thousands using a real life world example  
12 where you can take a look and see, wow, what  
13 we want to do, the rule actually isn't doing  
14 it. It's stopping a couple of things but  
15 actually stopping the bigger broader version  
16 of the rule which is make sure people have  
17 access to information when they want it.

18 Now, with respect to getting people  
19 training on it, I think we can do it in the  
20 same way that we train people with respect  
21 to things like sexual harassment or  
22 discrimination training in the employment  
23 context. You give them examples, you do  
24 role playing, you have different methods of  
25 which you would show again not dos and

1 don'ts but examples of good, great behavior  
2 that are -- even take instances from outside  
3 of the legal professional and look at how  
4 other people are building brands and making  
5 their services known and saying how can we  
6 bring those in here and where might pitfalls  
7 happen, where might we end up with consumers  
8 that have huge rescission rates versus ones  
9 where they don't.

10 Again, that's right kind of off the top  
11 of my head but, look, if we have done it in  
12 the H.R. context I'm certain we are smart  
13 enough to do it in the legal context.

14 MR. RENDLEMAN: Thank you.

15 MR. LYNK: Any other questions? Thank  
16 you very much.

17 Lisa Taylor, chair of the Ethics and  
18 Professionalism Committee of the ABA Health  
19 Law Section.

20 MS. TAYLOR: Hi, I'm here. Thank you.  
21 Thank you very much. Thank you. Hi. Thank  
22 you, everyone. Thank you for the  
23 opportunity.

24 I guess the first thing I would like to  
25 say on behalf of the section and its

1 committee is that we want to compliment APRL  
2 on its thoughtfulness of its proposal and  
3 also the standing committee for its work and  
4 for having this forum. We appreciate the  
5 opportunity.

6 I guess our comments really are a couple  
7 of concerns that we have with respect to the  
8 proposal and some of the issues. I guess  
9 the first thing is we very, very much  
10 support whatever can be done to try to  
11 encourage greater uniformity in applicable  
12 rules between states because it's really a  
13 problem because so many lawyers are  
14 increasingly part of law firms that have  
15 multi-jurisdictional practices and lawyers  
16 practice in many states.

17 I mean, I see -- personally I have six  
18 licenses including a Florida and New Jersey  
19 where, you know, the rules are very  
20 different from the model rules, and so it's  
21 hard. So, certainly, to the extent that  
22 whatever can be done to create uniformity  
23 and encourage uniformity is something we  
24 support.

25 That being said, we do have some

1 concerns. The inability to control  
2 endorsements such as on Linked In or on Avvo  
3 should be addressed we hope in, you know,  
4 whatever the recommendation is of the  
5 standing committee, you know, and ultimately  
6 what goes forward so that attorneys aren't  
7 subject to disciplinary exposure for  
8 information over which they have no control  
9 over for which there's some sort of a  
10 passive qualification process. So, that's,  
11 you know, the one thing that we ask be  
12 considered.

13 You know, once again, I mean, it's  
14 something that I actually do a fair amount  
15 of work as an arbitrator and mediator, and  
16 it's something that's a very big concern in  
17 the arbitration and mediation community, you  
18 know, in terms of these endorsements  
19 suggesting and creating relationships and  
20 potential conflict over which someone has no  
21 control and concern that then someone could  
22 be subject to discipline for failing to make  
23 disclosures over something they don't know  
24 about or don't have any control over.

25 Then with respect to a specific section,

1 we are concerned about Section 7.2 for a  
2 couple of reasons. Whether or not a  
3 communication can reasonably be understood  
4 as offering to provide legal services is  
5 very subjective, and it's dependent upon a  
6 person's perspective.

7 Common social interaction and  
8 communication could inadvertently give rise  
9 to enforcement action because a lawyer may  
10 not know of a person's need for legal  
11 services or the existence of a particular  
12 matter. Nevertheless, someone could be  
13 deemed to be soliciting simply because of a  
14 coincidental alignment between a particular  
15 matter and his or her area of practice.

16 You know, we are concerned that  
17 subsection (b) could inadvertently create  
18 exposure for a casual communication in a  
19 setting such as a networking event or a  
20 cocktail party. And, in fact, among members  
21 of the committee of the Ethics and  
22 Professionalism Committee in the Health Law  
23 Section there are a number of members who  
24 have been involved in various disciplinary  
25 processes, the disciplinary committees in



1 various states, and there were a number of  
2 us who could point to situations where, you  
3 know, particularly in states where there are  
4 rigorous disciplinary rules and rules that  
5 do not necessarily follow the model rules  
6 where, you know, inadvertent situations give  
7 rise to issues which fortunately the  
8 disciplinary, the people who deal with it at  
9 the first instance in the disciplinary  
10 committee see it for what it is and it  
11 doesn't go too far, but we don't want to be  
12 reliant upon the hope that someone who is  
13 savvy enough to see something for what it is  
14 catches something before it goes too far.

15 The other issue, our concern is with  
16 respect to subsection (c) in section 7.2  
17 because we are concerned, we want to make  
18 sure that whatever ultimately happens we  
19 don't -- we are concerned that subsection  
20 (c) could potentially as drafted now be  
21 construed as requiring materials utilized at  
22 a continuing legal education program and  
23 conferences to be denoted as advertising  
24 materials because marketing is one of the  
25 benefits that is received by an attorney

1 participating as presenters in such a  
2 program, particularly in programs, in  
3 conferences that involve non-lawyers or even  
4 conferences that do involve lawyers who may  
5 be with organizations that are in need of  
6 legal services.

7 We are concerned that this could, this  
8 requirement for considering the materials to  
9 be advertising could have a chilling effect  
10 on attorneys' willingness to share knowledge  
11 of programs because of the implications of  
12 such materials being deemed advertising  
13 under other state or federal laws.  
14 Similarly, comments to Listserv could be  
15 similarly implicated.

16 There's also practical considerations. A  
17 number of states if you have any advertising  
18 materials they have to be submitted to the  
19 state, and I don't know about anybody else  
20 but having coordinated probably 100 CLE  
21 programs in my career the prospect,  
22 particularly when you are trying to deal  
23 with very cutting edge materials and having  
24 the most up-to-date information at your  
25 conferences, the prospect of having to have

1 everyone have their materials prepared and  
2 then be able to be submitted to a state bar  
3 or disciplinary committee for them to have  
4 the 30-day waiting period and then to be  
5 able to get them on a flash drive or publish  
6 them in a book or something like that, it's  
7 just going to be an impractical nightmare.  
8 But, we are very concerned about the  
9 chilling effect.

10 So, those were just our comments. You  
11 know, please, I hope you will find them  
12 useful. You know, we are very, very  
13 supportive of this process and very  
14 appreciative of it. So, I thank you.

15 MR. LYNK: Thank you very much,  
16 Ms. Taylor. Will your committee be  
17 submitting those or similar or any comments  
18 in writing as well?

19 MS. TAYLOR: I believe the plan is to,  
20 yes.

21 MR. LYNK: Okay, good.

22 MS. TAYLOR: Thank you.

23 MR. CROTHERS: Can I ask a question?

24 MR. LYNK: Yes.

25 MR. CROTHERS: We have heard a number of

1           comments that the states, various  
2           jurisdictions around the United States are  
3           inconsistent in their rules and perhaps even  
4           their enforcement.

5           I'm wondering if you or others, if you or  
6           others have any concern that if the model  
7           rules are simplified and are reduced in both  
8           complexity and in breadth that that will be  
9           an encouragement for states to go off on  
10          their own more so now than they are.

11          In other words, are we going to get other  
12          states that say, no, the ABA has been too  
13          narrow, and we need now to write it?

14          MS. TAYLOR: That's certainly a  
15          possibility but I don't have any particular  
16          personal knowledge with respect to that, but  
17          I think it's a fair question. Thank you.

18          MR. LYNK: That exhausts our list of  
19          identified speakers.

20          Is there anyone here representing an  
21          entity or organization or on their own who  
22          would like to speak with respect to the APRL  
23          proposals, having read the proposals?

24          All right. And could you please identify  
25          yourself, and if you are representing an

1           entity, identify the entity, as well.

2           MR. MEHTA: Yes, I'm Cyrus Mehta from New  
3           York, and I represent the Commission on  
4           Immigration of the ABA. I'm also the past  
5           ethics chair of the AILA, the National  
6           Ethics Committee of the American Immigration  
7           Lawyers Association.

8           We have so far not conferred together and  
9           come up with any comments. I'm here on a  
10          fact-finding mission, but I also have the  
11          authority to make my own observations and  
12          comments, but they are not binding.

13          So, the first is that the practice of  
14          immigration law is a federal practice so  
15          immigration lawyers practice and advertise  
16          their services across the country, and so we  
17          do support the proposals because they would  
18          create uniformity for lawyers in federal  
19          practice, and the American Immigration  
20          Lawyers Association has taken the lead in  
21          identifying the future of the practice of  
22          immigration law and how to develop new  
23          innovation and be disruptive. So, in that  
24          sense we do encourage this kind of  
25          innovation even with the rules that are

1           outdated.

2           Our concerns could be quite a few, but I  
3           just wanted to outline a couple of them.  
4           One is because there are lots of vulnerable  
5           clients in the immigration setting, this  
6           concept of solicitation and not having that  
7           in the electronic communication format could  
8           be dangerous. I do echo the comment of the  
9           Young Lawyers Division representatives.

10          Also, the definition of a sophisticated  
11          client in an immigration law setting can be  
12          quite vague because you could be a constant  
13          user of legal services but are you really  
14          sophisticated in that sense as opposed to  
15          somebody who uses corporate legal services?  
16          So, that is, of course, a concern.

17          And the final is with respect to Avvo and  
18          LegalZoom. I know you all have created a  
19          plan for immigration lawyers and to some  
20          extent that has caused some concern because  
21          to some extent it is innovative so there's  
22          no complete objection to it, but the concern  
23          here is that when you advertise a service,  
24          say a family immigration package for 2,999,  
25          immigration law can't be kind of simplified

1           that way because there are so many  
2           complexities in a family-based immigration.

3           So, in some sense it could potentially be  
4           misleading even though the objective is not  
5           to be misleading because given the current  
6           administration right now, you have a family  
7           immigration service package for 2,999, but  
8           then there are so many other complexities in  
9           that case where the fee could just kind of  
10          go up and up and then the consumer says,  
11          well, I just saw 2,999 on Avvo but now you  
12          are charging me twice the price, the amount  
13          because of these complexities that I didn't  
14          know about when the service was packaged  
15          through Avvo. So, this is also a concern  
16          that we have.

17          Again, what I'm saying here is my  
18          personal observation. It may not be binding  
19          but I'm going to take all this back to my  
20          group and then we will want to come up with  
21          a written comment.

22                 MR. LYNK: Thank you very much.

23                 Is there anyone else? Yes, sir?

24                 MR. MILLER: So, I first thank the  
25                 committee for having this hearing. It's

1 nice that we are just talking about it, and  
2 I know the amount of hard work that went  
3 into it.

4 My name is Gabe Miller. I have been an  
5 in-house counsel, a general counsel for  
6 almost 30 years. I have been a buyer of  
7 legal services. I have been on that side of  
8 seeing the marketing or lack of marketing,  
9 believe it or not, by corporate law firms  
10 looking to get my business. But, for the  
11 last 10 years or so though I have also  
12 represented some of the largest legal  
13 advertisers in the country.

14 I don't want to reiterate what's in the  
15 APRL report, I think they do an excellent  
16 job of showing kind of the great kind of  
17 statistics and analytical evidence that show  
18 why the current rules don't protect  
19 consumers and actually do more harm than  
20 good. I just want to share with you for  
21 just a minute or two kind of my personal  
22 experiences with it because I think they  
23 have informed why we need this change.

24 The short answer is -- and, again, this  
25 is just my personal opinion, is that the --



1           that, you know, I am extremely proud of this  
2           profession and extremely proud of the work  
3           we do.

4           I'm not proud of this part of it. I  
5           think it has actually brought out the worst  
6           of some of our profession in terms of  
7           protection and in terms of looking at a rule  
8           and saying it's for one purpose, and then  
9           really even if I give the benefit of the  
10          doubt that there are a large number of  
11          people that believe that they are out there  
12          protecting the public good, unfortunately,  
13          it's been misused. It's been misused to the  
14          detriment of consumers.

15          Again, there's a good reason why  
16          consumers never complain about the  
17          advertising and the only ones who do are our  
18          competitors, and the effect has been that  
19          lawyers willing to push the boundaries, the  
20          very lawyers honestly that probably the  
21          folks who thought of these rules, who  
22          support these rules are most concerned  
23          about, whether they should be or not, you  
24          know, put aside -- I know it's a big thing  
25          to put aside, but put aside the whole First

1           Amendment and we are in America and  
2           capitalism and free market, put all that  
3           aside, but the problem is that all you have  
4           done -- I apologize, all that we have done  
5           because I'm part of the problem, too, by not  
6           fighting hard enough against it is that we  
7           have encouraged the lawyers who push the  
8           envelope in a bad way who do some of the  
9           bait and switch of bringing in clients,  
10          sending them off to someone else are the  
11          only ones willing to take the risks.

12                 Instead, you know, whether it's a  
13          corporate counsel, the ones that are telling  
14          me, who is terrified of whether they can put  
15          their name on a baseball cap and hand it to  
16          me, you know, who worry about whether they  
17          can leave their brochures at a seminar, you  
18          know, who worry about whether -- you know,  
19          arguments I have had, you know, over that  
20          and instead you have got states who have  
21          implemented these rules who have taken the  
22          false and misleading -- and this is where I  
23          want to conclude -- and that is that I  
24          actually think the APRL proposal doesn't go  
25          far enough.

1           I actually think that, truly, you know,  
2           I'm not even sure we need to have a false  
3           and misleading standard. We have someone  
4           who enforces false and misleading. It's  
5           called the FTC, and that's what every other  
6           business deals with because the problem is  
7           that we have false and misleading in plenty  
8           of states who then use that nice broad  
9           category and start to say, well, if you talk  
10          about your prior results, well, that's false  
11          and misleading. You know, you have got the  
12          states who put the specific rule up there,  
13          and you have the other ones who just say  
14          that that's false and misleading or that you  
15          worry about whether it's going to be  
16          considered that way.

17          But, the very things that consumers want  
18          to understand, are you going to do your job,  
19          what's your experience, what are your prior  
20          results, are you better than the person  
21          around the corner are the things that are  
22          very difficult to provide information on,  
23          and so I would actually like to see the  
24          rules -- you know, as I said, I think we  
25          have been chasing the wrong problems here

1 and actually causing the opposite effect of  
2 what we hope for; that if we allow the  
3 lawyers who are really good at their jobs to  
4 get out the fact that they are and that, you  
5 know, who you choose as a lawyer makes a  
6 difference, then I think the lawyers who are  
7 out there, you know, with the only messages  
8 being heard, you know, that they will at  
9 least have some competition that's fair.

10 Thank you very much.

11 MR. LYNK: Thank you. Are there any  
12 other comments?

13 MR. GUGGENHEIM: Yes.

14 MR. LYNK: Yes?

15 MR. GUGGENHEIM: I'm Seth Guggenheim from  
16 the Virginia State Bar, and I work for Jim  
17 McCauley who as most of you know, Jim  
18 couldn't be here. He asked me to come down,  
19 and this is very enlightening. I'm really  
20 grateful to have the opportunity to be here.

21 MR. LYNK: Thank you.

22 MR. GUGGENHEIM: I'm the one in the  
23 Virginia State Bar office that's in charge  
24 of making sure that lawyers are complying  
25 with their advertising when we get

1 complaints, and I will tell you that I am  
2 almost embarrassed to wake up in the morning  
3 and tell someone that the font size of their  
4 disclaimer is not good enough, it's not --  
5 it's not in bold typeface, it's not located  
6 preceding the case results, it's somewhere  
7 else in the page where it shouldn't be.

8 This type of underlying presumption that  
9 the public is naive and lawyers are likely  
10 to engage in some form of deception is an  
11 extreme amount of paternalism and it's  
12 almost embarrassing to have to do all that  
13 stuff.

14 I'm pleased to say that the Virginia  
15 Ethics Committee has adopted, has changed or  
16 is trying to change 7.1 to 7.5 by adopting  
17 the APRL proposal substantially. Maybe we  
18 put in some minor tweaks. I think it's our  
19 7.3, I'm not sure.

20 In late April our ethics committee  
21 proposed amendments will go to the Virginia  
22 State Bar Council, c-o-u-n-c-i-l, and then  
23 if they approve or modify or whatever, it  
24 goes up to our Supreme Court, so we are  
25 hoping to -- we are hoping actually to be

1           doing what a lot of people in this room  
2           would like to do, simplify these rules,  
3           false and misleading standard, pull all of  
4           the stuff that used to be a rule down or  
5           most of it into the comments and have the  
6           comments be guidance as opposed to hard and  
7           fast black letter stuff.

8           So, this is very, very necessary. The  
9           paternalism and the anachronism in these  
10          rules -- we haven't attacked 5.4 or gotten  
11          into fee sharing at this point. There may  
12          be some changes down the road on that, but  
13          this is something that the profession very  
14          much needs, very much needs.

15          So, thank you for the chance to talk.

16          MR. LYNK: Thank you for those remarks.  
17          And although you are not representing NOBC,  
18          you are, I presume, a member of NOBC?

19          MR. GUGGENHEIM: Yes. I'm down here in  
20          another lesser hotel. I took a shuttle over  
21          here to do our thing.

22          MR. LYNK: Well, what I was asking was  
23          sort of it's very good to hear from a front  
24          line regulator, and I was wondering if there  
25          are any other NOBC members in the room who

1 would like to comment?

2 We have heard from APRL, we have heard  
3 from one -- I see Doug Ende has raised his  
4 hand.

5 Doug, would you like come to the table?

6 MR. ENDE: I'm Doug Ende. I'm chief  
7 disciplinary counsel of the Washington State  
8 Bar Association. I thank the working group  
9 and committee for holding this public forum.

10 I didn't sign up to speak today largely  
11 because I was concerned that my thoughts  
12 might be misattributed to one of the  
13 organizations that I might be considered to  
14 represent. I work for the Washington State  
15 Bar Association but I am not authorized to  
16 speak on behalf of the Washington State Bar  
17 Association. I'm an at large director of  
18 the National Organization of Bar Counsel. I  
19 am very much not authorized to speak today  
20 on behalf of the National Organization of  
21 Bar Counsel, so that doesn't leave much of  
22 me to speak today.

23 So, what is left is a member of the  
24 Center for Professionalism and  
25 Responsibility, and please take my remarks

1 from that perspective.

2 I actually have a very narrow and  
3 specific concern that is perhaps symptomatic  
4 of a larger issue, and it relates to the  
5 issue of electronic realtime communication  
6 under the solicitation rule and its clash,  
7 if you will, with voiceover Internet  
8 protocols.

9 The APRL proposal, I believe it was the  
10 supplemental proposal, shifted the category  
11 of the classification of electronic realtime  
12 communication. Currently, if I'm  
13 remembering this correctly, the model rules  
14 treat electronic realtime communication in  
15 the class of live and telephonic  
16 communications, and the APRL proposal has  
17 shifted that to classify it with written  
18 communications which are subject to a lesser  
19 standard of regulation. In other words,  
20 it's only prohibited if there's been made  
21 known a desire not to receive those  
22 communications or where it involves coercion  
23 or duress or harassment, and that's all well  
24 and good.

25 What troubled me about the APRL proposal



1 is, and I don't believe this was set forth  
2 in the black letter or in the commentary,  
3 but in the APRL report that voiceover  
4 Internet protocol, and by that I mean  
5 services such as Skype and Facetime, were  
6 considered telephonic communications and not  
7 electronic realtime communications, and I  
8 believe that approach is destined to confuse  
9 every lawyer that's trying to comply with  
10 that rule.

11 So, my point today is a plea that as the  
12 work group, as the center thinks through the  
13 solicitation rule and its application to  
14 voiceover Internet protocol and electronic  
15 realtime communication, please be clear  
16 about those types of technologies and where  
17 they fall. Explain for the sake of those  
18 trying to comply whether those types of  
19 technologies fall into one category or  
20 another bearing in mind that technology is  
21 going to be changing very rapidly, and those  
22 technologies will probably be replaced by  
23 others that will perhaps be even harder to  
24 classify.

25 The larger symptom, the symptom of the

1 larger problem that I mentioned has to do  
2 with solicitation as a whole. This may be a  
3 radical position which is why I'm going to  
4 reemphasize I'm not speaking for the  
5 Washington State Bar or NOBC, but I would  
6 like the work group to consider the idea  
7 that the solicitation rule itself as applied  
8 to live and technologic communications is  
9 overbroad and unnecessary.

10 So, I disagree with the earlier speaker,  
11 respectfully, from the Young Lawyers  
12 Division. I don't think lawyers have  
13 cornered the market on persuasion,  
14 particularly when it comes to talking to  
15 clients, and those who believe lawyers have  
16 cornered the market on persuasion probably  
17 haven't spoken to a roofer recently.

18 So, bearing that in mind, I think the  
19 better approach to solicitation is the  
20 approach that the ABA has taken with respect  
21 to written solicitation which is that it  
22 should be prohibited when an individual has  
23 made known a desire not to receive those  
24 communications or it involves coercion,  
25 duration or harassment. I think one rule

1 for all solicitation is the better approach.  
2 Thank you.

3 MR. LYNK: Thank you very much. Any  
4 other comments? Yes? Yes, ma'am?

5 Please state your name.

6 MS. RUSH: Sure. So, my name is Amber  
7 Rush, and I am also here not in an official  
8 capacity. I sit on a number of committees  
9 and boards on the national, state and local  
10 level. I'm from Washington State, and I  
11 just wanted to talk as a young lawyer in  
12 general.

13 I'm also 28 years old. I also graduated  
14 law school in 2014, so take this with a  
15 grain of salt from my perspective. But,  
16 young lawyers are coming out of law school  
17 with mortgages for student loan debt on  
18 their back. They can't buy houses, they  
19 can't have kids, they can't do stuff that  
20 older attorneys could do because their debt  
21 is so stifling that they have to concentrate  
22 on that before anything else.

23 The other thing is that they know that  
24 clients don't understand that they have  
25 legal issues. As we all know, right,

1           there's been national and statewide studies  
2           that show it's actually not cost that is the  
3           number one cause of the access to justice  
4           gap, it is that people don't identify that  
5           their life problem equals a legal problem.

6           Young lawyers also know that -- they also  
7           know what modern marketing looks like. They  
8           know that content marketing works. They  
9           know that instant communication -- people  
10          are receiving information via livestream, at  
11          Twitter, Facebook, you name it, just massive  
12          content, and that's how people are  
13          consuming.

14          They want instant videos. They want  
15          instant communication. They don't want  
16          traditional advertising because that's not  
17          how people learn and consume information  
18          these days, and so how can young lawyers  
19          compete in this market? How can they come  
20          out of law school? And we want young  
21          lawyers to enter the marketplace. Right?  
22          We want our law schools to do well. We want  
23          our profession to survive.

24          How can young lawyers come out if they  
25          are being told, number one, they can't be on

1 platforms like Avvo and LegalZoom where they  
2 know, because they know modern marketing,  
3 millions of users are going to these sites  
4 per month.

5 When people are wanting to get legal  
6 help, where is your average consumer going?  
7 They are going to Google. They are not --  
8 they are not even sophisticated to the  
9 extent, most people, that they even know  
10 somebody to get a referral from. They are  
11 not going to be able to ask their mom or  
12 their cousin or whoever to say, hey, who is  
13 a lawyer you know?

14 They are going to go -- all I know is I  
15 have a smart phone because most people no  
16 matter who you are you are going to have a  
17 smart phone, and they are going to go to  
18 their phone, and they are going to be like,  
19 here's my issue, and what is the lawyer that  
20 pops up? Well, you better believe Avvo and  
21 LegalZoom who are sitting in the room right  
22 now are nailing it. I mean, you guys are  
23 reaching the market.

24 Whether lawyers want to admit that or  
25 not, it's making a difference in the 80

1 percent, and so if we are going to sit here  
2 and say that the way that that's being  
3 advertised or whatever is not the answer, I  
4 think the difference is just the numbers  
5 that are showing that.

6 And the problem with that is that what we  
7 are showing with young lawyers by having  
8 these advertising rules and a number of RPCs  
9 in general is that you can't actually engage  
10 in your own marketplace, because we are  
11 afraid to be entrepreneurs.

12 If you don't like Avvo and you don't like  
13 LegalZoom -- we're not trying to offend you  
14 guys here.

15 MR. KING: It's a very high bar.

16 MS. RUSH: So, if you don't like those  
17 companies, do something about it.

18 Just create your own platform. You don't  
19 like what they've got going on, you think  
20 that they assign people profiles  
21 inappropriately, whatever your complaint is,  
22 I have heard them all, do it yourself and  
23 fix the issue. The problem is and why  
24 people say they can't fix the issue is  
25 because of the RPCs. And I'm not saying --

1           RPCs, they are necessary. We need those in  
2           place. We need to protect the public.

3           The other thing that is happening is that  
4           not only are people not being able to find a  
5           lawyer, that's true, but one of the boards  
6           that I sit on is the Washington State  
7           Practice of Law Board which deals with the  
8           unauthorized practice of law, and all of the  
9           time I am reviewing complaints for people  
10          who are making complaints that they received  
11          unauthorized practice of law.

12          Well, what are you expecting people to do  
13          if they cannot find a lawyer in a way that  
14          they are comfortable enough to engage in?  
15          Okay, you can go ahead and Google lawyers.  
16          If you Google a lawyer, you are going to go  
17          probably to some not very great websites.

18          MR. LYNK: One more minute.

19          MS. RUSH: One more minute? 30 seconds.

20          One more not very good website. You are  
21          not going to find any information. So,  
22          you're going to find somebody who is not  
23          actually authorized to practice law, and  
24          you're going to pay them money to help you  
25          out because you are desperate. That is not

1 helpful to the public, and so at the end of  
2 the day -- I'm taking everybody's time --  
3 lawyers are missing out on business.  
4 Consumers are suffering as well.

5 There is the unauthorized practice of  
6 law, there's misleading information out  
7 there all the time, and I think that the  
8 root cause of that is that lawyers are  
9 hurting themselves by not being able to give  
10 the right information in the way that we  
11 need it to be given.

12 MR. LYNK: Thank you very much.

13 MS. RUSH: The end.

14 MR. LYNK: Lynda, do you have any final  
15 comments?

16 MS. SHELY: Thanks, everybody.

17 No. I think we heard today a lot of  
18 great input, and I really appreciate  
19 everybody being here. I know you all are  
20 overscheduled for everything, and I  
21 encourage everybody, please do as Wendy  
22 mentioned.

23 If you think of something after this  
24 meeting, please, please bring it to the  
25 committee because we would rather have this



1 be a team effort to help the profession and  
2 to help consumers rather than have somebody  
3 down the road say, hey, wait a minute, we  
4 don't like this. So, please be part of the  
5 answer.

6 We appreciate the committee and the  
7 center sponsoring this forum and look  
8 forward to everybody's input.

9 MR, MEHTA: What is the deadline for  
10 commenting?

11 MS. SHELY: Now. No, like in the next  
12 couple months.

13 MR. RENDLEMAN: March 1.

14 MR, MEHTA: March 1?

15 MR. RENDLEMAN: March 1 is the deadline,  
16 but we are more than happy if you're not  
17 exactly on March 1 -- it's not a statute of  
18 limitations.

19 There is an address where you can submit  
20 comments. It's on our Center for  
21 Professional Responsibility home page.

22 MS. McDERMOTT: Model rule amend.

23 MR. RENDLEMAN: Model Rule Amend at ABA.

24 MS. McDERMOTT: At America bar dot org.

25 MR. RENDLEMAN: What she said. We'll try

1 and do a better job of advertising that  
2 address.

3 But, if you have got any questions  
4 contact Mary or me, but you can go through  
5 the ABA CPR web page and find it as well or  
6 you can call us, you can carrier pigeon,  
7 anything you can do.

8 MR. LYNK: Dennis Rendleman and Mary  
9 McDermott at the ABA staff, ethics counsel  
10 and associate ethics counsel there, and the  
11 e-mail addresses are available on the ABA  
12 website, and you can track them.

13 I wanted to recognize Lucien Pera, the  
14 chair of the Center for Professional  
15 Responsibility for final comment.

16 MR. PERA: Very quickly. First of all, I  
17 want to comment and thank the ethics  
18 committee and, of course, APRL, but the  
19 ethics committee particularly for this work.

20 I know it says more about me than about  
21 anybody else in the room, I'm sure, but I  
22 think this is actually pretty exciting, this  
23 meeting. This is one of the more exciting  
24 meetings I have been to in a long time  
25 which, again, says more about me than it

1           should.

2           But, everybody in this room knows the ABA  
3           is the center of legal ethics in the world,  
4           right, and the five committees at the center  
5           are at the center of the ABA on these  
6           issues.

7           I think, and I think most people in this  
8           room share this view, that we are at an  
9           inflection point, that we are at a point of  
10          not really change today so much, there has  
11          been a lot change we have seen reflected in  
12          the room, but change is coming our way.

13          I don't have a clue which of the ethics  
14          rules, which regulations need to be changed,  
15          should be changed but, you know, after the  
16          success, what I view as success by the  
17          ethics committee particularly in the 8.4(g)  
18          process last year, the anti-bias rule, I  
19          kind of felt -- I know, again, this is  
20          personally -- that that was catching up,  
21          catching up for years being behind.

22          To me this is moving forward. I expect  
23          everybody in this room has some ideas about  
24          what the ABA can do in terms of regulations,  
25          substantive ethics rules and anything else

1           regarding the practice of law that ought to  
2           happen.

3           Well, ladies and gentlemen, this is the  
4           time, this is the place. The five  
5           committees at the center are ready to hear  
6           your ideas, ready to move forward. I don't  
7           know that any change will come out of that,  
8           and I don't know how that's related to the  
9           changes that these guys and others are  
10          making, but my point is to you it's welcome.  
11          Your ideas are welcome.

12          Please, please, let Tracy Kepler know,  
13          she's our new director, but please let her  
14          know. There's a lot going on. The ABA is  
15          going to stay the center, and we need your  
16          help to do that.

17          So, thank you for being here.

18          MS. CHANG: If I could just add, even  
19          though Dennis said the March deadline was  
20          not a hard deadline, if you could really  
21          shoot for that it would really help the  
22          working group. We are on a schedule, and if  
23          the comments come in piecemeal it's hard to  
24          kind of fit that in so---

25          MR. LYNK: On that note, thank you all

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for coming. We appreciate your comments.

Thank you.

(Thereupon, the forum was concluded at  
3:36 p.m.)

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CERTIFICATE

STATE OF FLORIDA     )  
COUNTY OF MIAMI-DADE)

I, MARY M. TRUDEAU, a Notary Public in and for the State of Florida at Large, do hereby certify that a public forum relating to the Association of Professional Responsibility Lawyers' proposed amendments to ABA Model Rules of Professional Conduct 7.1, 7.2, 7.3, 7.4 was held on the 3rd day of February, 2017; that I was authorized to and did report in shorthand the discussions held in said forum; and that the foregoing pages, numbered from 1 to 93, inclusive, constitute a true and correct transcription of my shorthand report of said discussions.

IN WITNESS WHEREOF, I have hereunto set my hand this 10th day of February, 2017.

\_\_\_\_\_  
MARY M. TRUDEAU