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

PUBLIC FORUM

Hyatt Regency Miami
Merrick II Conference Room
400 Southeast 2nd Avenue
Miami, Florida
Friday, 2:00 - 3:37 p.m.
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MYLES V. LYNK,
Moderator
(Thereupon, the discussion began at 2:00 p.m.)

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

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

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

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

MR. RENDLEMAN: She actually went out to check on the air handling because it's
starting to get a little warm in here.

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

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

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

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

MR. LYNK: No?

MR. PERA: Glad to see everybody here.

MR. LYNK: Are there any other chairs?

MS. REARDON: Hi, I'm Jayne Reardon. I'm
the chair of the Standing Committee on Professionalism.

MR. LYNK: John?

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

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

UNIDENTIFIED SPEAKER: Paula should be on her way.

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

UNIDENTIFIED SPEAKER: Here she comes.

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

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

MR. LYNK: Thank you.

Now I would like the -- we have a number of members of the Standing Committee on Ethics in the room, and I would like to ask them to introduce themselves starting to
my -- after he's finished hugging --
starting to my right.

MR. CREAMER: Oh, sorry.

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

MR. CREAMER: I always hug when I get a
Is that what you said?

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

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

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

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

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

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

We have the new director of the Center
for Professional Responsibility, and why
don't you introduce yourself? I don't know
that people really know you.
MS. KEPLER: Good afternoon, I'm Tracy Kepler. I am, as Myles said, the new director of the center. Welcome. Thank you for being here.

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

Are there any other center staff here?

MR. RENDLEMAN: Martin Whittaker.

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

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

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

MS. SHELY: Thank you, Myles. Hi,
everybody. Does everybody have a chair?
No? Because we can get more chairs.

MS. McDERMOTT: We are getting more, right.

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

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

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

This is supposed to be a comprehensive project. We very much appreciate the standing committee's taking this on, the
center committees, all of the center committees being here represented and interested in advertising issues and client protection.

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

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

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

The proposal is a working draft that the Standing Committee on Ethics and Professional Responsibility is taking a lead on getting input from everybody on where do we go from here with having advertising rules that actually regulate false and misleading advertising which is what, by the way, our survey of I won't say NOBC members because some people gave us an input
anonymously, but of all the state
regulators, you all know that what is
primarily at issue in most states is whether
advertising is false and misleading. Are
people lying to consumers? That's what is
regulated under the rules of professional
conduct in most jurisdictions.

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

As we have heard many times in
presentations on innovation and changes in
how legal services are being delivered, the
reality is consumers gauge the information
that is out there. They are going to other
resources to learn about what legal services
are available in their communities and,
hopefully, we collectively in this room as
well as all the organizations that you all
represent can work together to update those
rules so that they can continue to regulate
and prohibit people lying to consumers so
that we will continue to have the rules of
professional conduct regulate false and misleading advertising but perhaps not have me be in violation in Florida because on my pens I only have my phone number. This is technically a violation. Come on, that's silly.

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

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

So, those changes continue in the
proposal but we have also heard from many organizations that suggest why not eliminate all of it and just go with false and misleading? If that's really what we are regulating, and if we are trying to actually embrace innovation, embrace change and protect the public, why not just have false and misleading being the standard? That's not what the redline is that's before you today, but I encourage everybody here, this is a time that we all need to work together.

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

MR. LYNK: Are you trying to wind up?

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

MR. LYNK: We started this a little early.

MS. SHELY: Got it, okay.
So, to embrace innovation, to embrace the changes in technology and to actually support bar associations giving more work to lawyers or legal service providers, we need to get everybody's input on how we update the rules to continue to protect the public but also provide accurate information to consumers.

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

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

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

MR. LYNK: You're welcome.

I now just want to give you a sense of the process we followed since we received
the proposals from the standing committee -- excuse me, from the Association of Professional Responsibility Lawyers.

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

The working group will report back to the ethics committee. The ethics committee will then review the proposal, the comments and the working group's product and recommendations. If the ethics committee decides to propose amendments to the rules, it will release a draft for public review. If the ethics committee decides to propose amendments to the House, it is likely to present the amendments to the House at the February 2018 meeting of the House of Delegates.

We are not -- the recommendation we received so far from the working group is that there is work to be done, and so we are not planning to present the proposals to the
House at the annual meeting in August.

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

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

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

UNIDENTIFIED SPEAKER: Could you use the microphone?

MS. CHANG: Our goal is to be a think tank to try to coalesce and gather all the information and the viewpoints of everybody out there to help gather all of this input, to separate the silly from the necessary, and in the process of that we are going to be splitting up the different elements of the advertising rules as they stand by topic and will be addressing them individually.
during -- we are going to be meeting monthly. We have met twice so far.

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

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

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

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

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

In the room on the working group with me
we have -- there's me, there's Jayne, there's Lynda, Melinda, Shontra, Tracy, Ellyn, Dennis, Mary and Martin.

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

MR. LYNK: Thank you very much, Wendy. Since we began we have been joined by at least one other member of the standing committee, John Barkett. John, could you raise your hand so people know who you are?

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

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

Now I'm now going to go over the -- invite the people who have signed up to speak to come forward. If you are not at a microphone, please get to a microphone. If you are sitting against the wall, please come to the table and, you know, go to a microphone. I would ask if there's someone
sitting at the microphone if they could sort of trade seats with you during your talk, and then when you finish you can go back and they can come back because we don't -- obviously, we don't have enough microphones for everyone, and we don't have enough seats for everyone at the table.

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

Is Mr. Hendricks here? Okay.

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

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

Thank you, Mr. Brown.

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

So, I really do appreciate this opportunity. I am here on behalf of the Young Lawyers Division. I am our committee's director. We spoke about this
yesterday at our YLD council meeting.

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

MR. LYNK: I think about five minutes.

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

MR. LYNK: Yes.

MR. BROWN: Thank you very much.

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

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

So, as we talk about -- I really
appreciate what Lynda said this morning, and
she hit the nail on the head. To me when we
talk about our current soliciting and
solicitation rules, I have always been
taught and I have always felt that attorneys
are practiced in the art of communication;
and, more importantly, the art of
persuasion, and that is why we have these
solicitation rules.

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

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

I do think that it's great that we are
looking at modernizing and embracing innovation, absolutely. I think the whole Young Lawyers Division feels that way. I personally love technology. I want to embrace it as much as possible, and I can tell you that most of the Young Lawyers Division feels the same way, but I do think that removing the current ban on realtime electronic communication is a mistake, and I would ask the body in power that they put that back into these proposals.

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

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

I appreciate the opportunity because I am probably extreme on the other viewpoint from Chris. I am a young lawyer. I'm 28. I have been practicing for a little over two years, and I run a law practice with Amber Rush who I serve on the committee with, and
so we are kind of in the trenches of probably the class of people you were referencing when you said there's unemployment out there, there is underemployment out there.

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

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

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

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

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

Most of the clients Amber and I work with were previously in the 80 percent of people that couldn't afford legal services or didn't realize that their problem that they had was something that a lawyer could help
them with, and the more opportunity I have to get creative and to get, I don't know what the right word is, to get scrappy about helping them and helping myself, I think that in the long run the profession will be better served.

MR. LYNK: Thank you.
Miss, you heard -- did you want to speak, as well?

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

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

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

Let me just raise one question that's come up within the committee, and it regards a question about Rule 4.2 -- excuse me, 7.1.
The APRL proposal does not really suggest amending the black letter of 7.1 but an argument can be made that if you read 7.1 it presents a tautology. It defines misleading as misleading. So, it prohibits false and misleading advertising but it doesn't define what misleading is, and I'm wondering, is that prohibition clear or is that something we should look at?

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

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

MR. HORNSBY: Thank you, Professor Lynk. I'm staff counsel to the Standing Committee on the Delivery of Legal Services. Bill Hogan was scheduled to speak today but, unfortunately, his flight was delayed so he asked me to present in his stead.

The mission of the Standing Committee on Delivery of Legal Services is to expand access to lawyers and legal services for
people of moderate income who have too many assets to qualify for legal aid or pro bono legal services but insufficient discretionary resources for full traditional representation. So, advertising is certainly a vehicle that plays into that mission.

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

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

And when we articulated that people said: Well, are there circumstances in which a
lawyer may communicate in a way that's misleading? And our suggestion is that there are.

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

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

The second issue has to do with rule 7.2(b) which is the APRL proposal 7.2(f) that prohibits a lawyer from giving anything of value for recommendation of the lawyer's services but for some exceptions, one of
which is the usual charges of nonprofit and
state qualified lawyer referral services,
and another is the reasonable costs of
lawyer advertising.

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

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

There's nothing in the mechanisms that do
that, and so there have been some ethics
opinions as you probably know that have
attempted to draw those definitions. They are not universally understood among the states. They are not consistently applied, and so there's a choice here.

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

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

So, if there were an amendment to 5.4 saying that that's an appropriate activity and the state believes that it is, there
would be no justification for 7.2(b).

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

The most liberal states are the ones that are closest to the model rules because the states take the model rules and then they add the garbage to them, right, and then they impose the limitations that are more restrictive so then they become incrementally more restrictive and, of course, they are the states of Texas and Louisiana and Florida that have the more extreme rules.

But, what we found was if we could just get the states to adopt the model rules verbatim as they are, then we would be in a much better place regardless of any changes that were made, and there needs to be
efforts made to encourage those states to
drop those additional provisions in the
interest of advancing, of advancing access
to justice, of minimizing the justice gap
for that purpose.

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

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

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

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

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

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

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

But, other states -- but the states and their adoption and their modification of the model rules present aggravating aspects, and the worst part of that aggravation is when we have the ability to scale that communication through technology and do it universally among the states but we have the burdens of complying with those state rules so that if a lawyer participates in a group advertising vehicle, an online group advertising vehicle but has to file that advertisement with their state and have it go under review and so forth and that vehicle doesn't include all of the disclaimers of the states and that sort of thing, then these create the impediments that are, that are inefficient in our ability to communicate the availability of our services.
MS. CHANG: Thank you.

MR. LYNK: Thank you very much.

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

MR. LYNK: Appreciate it. Thank you.

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

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

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

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

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

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

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

These means of communication offer important tools in trying to reach people of low or moderate income and who are in need
of legal services. However, it's exactly these sometimes unsophisticated consumers that need the protection the current rules provide to ensure they don't fall prey to overreaching and overzealous advertising efforts.

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

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

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

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

The amendments would specifically permit fees to pay the cost of advertising or communication through online advertising
services. These proposals would also permit payment from marketing client development services so long as those providing the services do not direct or regulate the attorney's judgment.

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

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

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

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

As stated at the beginning of my remarks, the RPCs governing advertising could stand to be updated to reflect technology and information delivery, but this proposal goes too far. It has far-reaching ethical
implications, and for that reason the state bar respectfully asks you, urges you to reject the proposed changes.

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

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

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

MR. LYNK: Thank you, Mr. Prol.

MR. PROL: Thank you.
MR. LYNK: Mr. Josh King, the chief legal officer of Avvo, Inc.

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

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

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

And maybe I'm easily persuaded on this point, but I find that it plays out in my own experience that, first of all, there's really -- and I have talked with a lot of ethics counsel around the country on this
and disciplinary counsel, and they have told me, without exception, that really what they need is rule 7.1. They need the prohibition on false and misleading advertising, and the rest of the stuff, I think Will called it garbage, I find---

MR. HORNSBY: That's not my term.

MR. KING: I have probably called it worse from time to time, really is not necessary for the enforcement activities. So, they can still -- you could strip everything away except rule 7.1 and it really wouldn't change what the disciplinary counsel are doing today. They can still go after the bad actors. It changes nothing.

There may not be a specific rule on it, but if you are running a misleading lawyer referral service or if you are splitting fees in a way that interferes with your independent professional judgment or if you have arranged a recommendation proposal that's effectively using runners and cappers, those are all false and misleading activities and those are all things that even without specific rules the enforcement
people can still go after you and hold you to account.

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

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

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

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

I think rules as they stand today and particularly some of these in the seven series are what is holding back a lot of lawyers from innovating, from doing things that would be in the public interest and, frankly, in the profession's interest to get
more people in the public to start engaging with lawyers.

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

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

And so if I differ with the APRL proposal on one thing it would be this: The second APRL proposal brought back in this current
rule 7.2(b). In the new proposal it's 7.2(f). If you carefully read the two proposals there's a very good argument laid out in the first proposal for why that rule should be excised, why we should have no rules about lawyer referral services, no rules about the reasonable cost of advertising, no rules about recommendations because you don't need them. No one is relying on them and the ethics authorities can still go after people who are engaging in false and misleading advertising.

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

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

MR. KING: Well, I think one of the things that's curious to me in reading the
proposal is that the second proposal brings those things back in. It says they are endemic to solicitation, and so I can't tell from the proposal if it's simply to limit those or have a specific rule around those types of methods only as applicable to solicitation or whether they are meant to be applicable more broadly.

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

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

I would offer one final thought that's a little bit unrelated on the solicitation question, and this goes to my experience of
I have been hiring lawyers for 20-plus years now. I think I would qualify as the sophisticated user of legal services, and this may sound like heresy, but I don't feel like I get marketed to enough by lawyers.

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

MR. LYNK: Okay. Thank you very much.

MR. KING: Thank you.

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

MR. RAMPENTHAL: Start my clock because I am the kind of person that has tended to run over unchecked.
First of all, I would like to again -- Chas Rampenthal, LegalZoom's general counsel. I would like to thank the standing committee for producing the forum to discuss this important work that APRL started I guess, what, nearly like four year ago.

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

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

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

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

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

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

Over the years LegalZoom, if you haven't noticed, we have moved from being this DIY service where we do forms and instruction
and we have moved to partnering with lawyers through legal plans in ways that I think benefit not just the company and our consumers but the bar and those looking for legal services and lawyers who are looking for work.

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

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

A LegalZoom legal plan which uses licensed attorneys is a better way for some markets, and our plan customers are individuals, they are small businesses.
Some might call them unsophisticated users. They typically don't have a preexisting lawyer or some sort of a family lawyer that they use.

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

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

Absolutely not. Massive groups got
together and got the word out. I know that with respect to the milk campaign every producer of milk in California donated three cents off of every gallon of milk into a massive campaign to fund "Got Milk." Guess what happened to milk sales? They went up even though they had been declining.

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

But, most average people don't know what a lawyer actually does. Right? That means also that they have no concept of the benefits that we can give them, the advice that we have. And the cost of acquisition for a nonconsuming client is super high for a small lawyer. Vice versa, the ability for a small client to find the right lawyer is also very difficult.
And when it comes to regulation, especially regulation that deals with free speech, I like to think that attorney advertising, less is more. And, sure, I think we need to prevent misleading and false communications and we should protect vulnerable individuals, people from unscrupulous and high pressure tactics.

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

And the committee, I hope that it remembers what it wrote nearly two years ago, the APRL committee, that a new approach is long overdue, and as you hear testimony and review submissions that have already come and will come, I just want you to consider more if the ABA expands and explains and over explains the more likely that regulators, as Will stated, are just going to reject it or do whatever they want.
anyway which defeats the purpose of having clear and uniform guidelines.

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

We can expect restrictive bar regulations in addition to a constitutional problem. But, fortunately, both of these cases I think are entirely consistent with what we want from a committee and for the profession, and that's to give people informed information so they can make their
decision when they purchase legal services. Overly proscriptive rules interfere with this. They diminish trust. When we take rigid rules and they meet -- and we introduce the speed of the technology and communication change, uncertainly ends up trapping well-intentioned lawyers into unintentional rule violations or even more likely cause them to do nothing, and then there we are, it's 1977 again.

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

With these principles in mind I would like to respectfully suggest that the committee consider outcome-based regulations in approach toward their goals rather than proscriptive rule making. That is from the rule writer's perspective, we take rules
that would be written as guides to serve goals rather than a list of do this, don't do that which frustrate purposes behind the rules.

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

So, I think instead of focusing on proscribing the processes or actions that lawyers can take, we should model behavior we want to see from state regulators. Outcome-based rules focus on the goal, and this is exactly the approach that's been taken in the United Kingdom where the code of conduct of the SRA is clear.

Consumers are provided with the opportunity there to waive mandatory 14-day cooling-off periods, for instance, in lawyer contracts.
So, these comments are broad brush strokes, and I plan to submit more specific comments in writing on the committee's proposal that are consistent with documenting this type of principle.

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

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

Thanks.

MR. LYNK: Thank you.

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

Okay.

MR. RENDLEMAN: Regarding your outcome-based rule making, how would you view a structure that would have a basic rule as we have talked about, you know, a
7.1, not misleading or deceptive, and then a structure that, for example, might go to a state's professionalism commission that would provide the education and the resource for lawyers to learn how to better implement their advertising strategy but would not be a disciplinary process?

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

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

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

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

   And what you really want to take a look at is having rules that are very -- like I said, very minimal and easy kind of to
understand this idea is it false, is it misleading, and then take something like we have here in the State of Florida where there's like a 30-day kind of period where you can't send a written communication to someone in an accident, the one that was held up as lawful in Went For It. You know, I think the way of looking at it is that's a proscriptive rule: Don't do it, you can't do it. Right?

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

I think that outcome-based regulation would say we shouldn't have a rule that says that at all, but maybe what we should have instead is if someone feels that they were
highly pressured, let's say it was
face-to-face, that they have an automatic
rescission right to get out of that
contract.

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

Now, with respect to getting people
training on it, I think we can do it in the
same way that we train people with respect
to things like sexual harassment or
discrimination training in the employment
context. You give them examples, you do
role playing, you have different methods of
which you would show again not dos and
don'ts but examples of good, great behavior that are -- even take instances from outside of the legal professional and look at how other people are building brands and making their services known and saying how can we bring those in here and where might pitfalls happen, where might we end up with consumers that have huge rescission rates versus ones where they don't.

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

MR. RENDLEMAN: Thank you.

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

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

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

I guess the first thing I would like to say on behalf of the section and its
committee is that we want to compliment APRL on its thoughtfulness of its proposal and also the standing committee for its work and for having this forum. We appreciate the opportunity.

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

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

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

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

Then with respect to a specific section,
we are concerned about Section 7.2 for a couple of reasons. Whether or not a communication can reasonably be understood as offering to provide legal services is very subjective, and it's dependent upon a person's perspective.

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

You know, we are concerned that subsection (b) could inadvertently create exposure for a casual communication in a setting such as a networking event or a cocktail party. And, in fact, among members of the committee of the Ethics and Professionalism Committee in the Health Law Section there are a number of members who have been involved in various disciplinary processes, the disciplinary committees in
various states, and there were a number of us who could point to situations where, you know, particularly in states where there are rigorous disciplinary rules and rules that do not necessarily follow the model rules where, you know, inadvertent situations give rise to issues which fortunately the disciplinary, the people who deal with it at the first instance in the disciplinary committee see it for what it is and it doesn't go too far, but we don't want to be reliant upon the hope that someone who is savvy enough to see something for what it is catches something before it goes too far.

The other issue, our concern is with respect to subsection (c) in section 7.2 because we are concerned, we want to make sure that whatever ultimately happens we don't -- we are concerned that subsection (c) could potentially as drafted now be construed as requiring materials utilized at a continuing legal education program and conferences to be denoted as advertising materials because marketing is one of the benefits that is received by an attorney
participating as presenters in such a program, particularly in programs, in conferences that involve non-lawyers or even conferences that do involve lawyers who may be with organizations that are in need of legal services.

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

There's also practical considerations. A number of states if you have any advertising materials they have to be submitted to the state, and I don't know about anybody else but having coordinated probably 100 CLE programs in my career the prospect, particularly when you are trying to deal with very cutting edge materials and having the most up-to-date information at your conferences, the prospect of having to have
everyone have their materials prepared and then be able to be submitted to a state bar or disciplinary committee for them to have the 30-day waiting period and then to be able to get them on a flash drive or publish them in a book or something like that, it's just going to be an impractical nightmare. But, we are very concerned about the chilling effect.

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

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

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

MR. LYNK: Okay, good.

MS. TAYLOR: Thank you.

MR. CROTHERS: Can I ask a question?

MR. LYNK: Yes.

MR. CROTHERS: We have heard a number of
comments that the states, various
jurisdictions around the United States are
inconsistent in their rules and perhaps even
their enforcement.

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

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

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

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

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

All right. And could you please identify
yourself, and if you are representing an
entity, identify the entity, as well.

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

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

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

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

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

And the final is with respect to Avvo and LegalZoom. I know you all have created a plan for immigration lawyers and to some extent that has caused some concern because to some extent it is innovative so there's no complete objection to it, but the concern here is that when you advertise a service, say a family immigration package for 2,999, immigration law can't be kind of simplified
that way because there are so many complexities in a family-based immigration. So, in some sense it could potentially be misleading even though the objective is not to be misleading because given the current administration right now, you have a family immigration service package for 2,999, but then there are so many other complexities in that case where the fee could just kind of go up and up and then the consumer says, well, I just saw 2,999 on Avvo but now you are charging me twice the price, the amount because of these complexities that I didn't know about when the service was packaged through Avvo. So, this is also a concern that we have.

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

MR. LYNK: Thank you very much.
Is there anyone else? Yes, sir?
MR. MILLER: So, I first thank the committee for having this hearing. It's
nice that we are just talking about it, and I know the amount of hard work that went into it.

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

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

The short answer is -- and, again, this is just my personal opinion, is that the --
that, you know, I am extremely proud of this profession and extremely proud of the work we do.

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

Again, there's a good reason why consumers never complain about the advertising and the only ones who do are our competitors, and the effect has been that lawyers willing to push the boundaries, the very lawyers honestly that probably the folks who thought of these rules, who support these rules are most concerned about, whether they should be or not, you know, put aside -- I know it's a big thing to put aside, but put aside the whole First
Amendment and we are in America and capitalism and free market, put all that aside, but the problem is that all you have done -- I apologize, all that we have done because I'm part of the problem, too, by not fighting hard enough against it is that we have encouraged the lawyers who push the envelope in a bad way who do some of the bait and switch of bringing in clients, sending them off to someone else are the only ones willing to take the risks.

Instead, you know, whether it's a corporate counsel, the ones that are telling me, who is terrified of whether they can put their name on a baseball cap and hand it to me, you know, who worry about whether they can leave their brochures at a seminar, you know, who worry about whether -- you know, arguments I have had, you know, over that and instead you have got states who have implemented these rules who have taken the false and misleading -- and this is where I want to conclude -- and that is that I actually think the APRL proposal doesn't go far enough.
I actually think that, truly, you know, I'm not even sure we need to have a false and misleading standard. We have someone who enforces false and misleading. It's called the FTC, and that's what every other business deals with because the problem is that we have false and misleading in plenty of states who then use that nice broad category and start to say, well, if you talk about your prior results, well, that's false and misleading. You know, you have got the states who put the specific rule up there, and you have the other ones who just say that that's false and misleading or that you worry about whether it's going to be considered that way.

But, the very things that consumers want to understand, are you going to do your job, what's your experience, what are your prior results, are you better than the person around the corner are the things that are very difficult to provide information on, and so I would actually like to see the rules -- you know, as I said, I think we have been chasing the wrong problems here
and actually causing the opposite effect of what we hope for; that if we allow the lawyers who are really good at their jobs to get out the fact that they are and that, you know, who you choose as a lawyer makes a difference, then I think the lawyers who are out there, you know, with the only messages being heard, you know, that they will at least have some competition that's fair.

Thank you very much.

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

MR. GUGGENHEIM: Yes.

MR. LYNK: Yes?

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

MR. LYNK: Thank you.

MR. GUGGENHEIM: I'm the one in the Virginia State Bar office that's in charge of making sure that lawyers are complying with their advertising when we get
complaints, and I will tell you that I am almost embarrassed to wake up in the morning and tell someone that the font size of their disclaimer is not good enough, it's not -- it's not in bold typeface, it's not located preceding the case results, it's somewhere else in the page where it shouldn't be.

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

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

In late April our ethics committee proposed amendments will go to the Virginia State Bar Council, c-o-u-n-c-i-l, and then if they approve or modify or whatever, it goes up to our Supreme Court, so we are hoping to -- we are hoping actually to be
doing what a lot of people in this room would like to do, simplify these rules, false and misleading standard, pull all of the stuff that used to be a rule down or most of it into the comments and have the comments be guidance as opposed to hard and fast black letter stuff.

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

So, thank you for the chance to talk.

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

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

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

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

    Doug, would you like come to the table?

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

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

    So, what is left is a member of the Center for Professionalism and Responsibility, and please take my remarks
from that perspective.

I actually have a very narrow and specific concern that is perhaps symptomatic of a larger issue, and it relates to the issue of electronic real-time communication under the solicitation rule and its clash, if you will, with voiceover Internet protocols.

The APRL proposal, I believe it was the supplemental proposal, shifted the category of the classification of electronic real-time communication. Currently, if I'm remembering this correctly, the model rules treat electronic real-time communication in the class of live and telephonic communications, and the APRL proposal has shifted that to classify it with written communications which are subject to a lesser standard of regulation. In other words, it's only prohibited if there's been made known a desire not to receive those communications or where it involves coercion or duress or harassment, and that's all well and good.

What troubled me about the APRL proposal
is, and I don't believe this was set forth in the black letter or in the commentary, but in the APRL report that voiceover Internet protocol, and by that I mean services such as Skype and Facetime, were considered telephonic communications and not electronic realtime communications, and I believe that approach is destined to confuse every lawyer that's trying to comply with that rule.

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

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

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

So, bearing that in mind, I think the better approach to solicitation is the approach that the ABA has taken with respect to written solicitation which is that it should be prohibited when an individual has made known a desire not to receive those communications or it involves coercion, duration or harassment. I think one rule
for all solicitation is the better approach. Thank you.

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

Please state your name.

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

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

The other thing is that they know that clients don't understand that they have legal issues. As we all know, right,
there's been national and statewide studies that show it's actually not cost that is the number one cause of the access to justice gap, it is that people don't identify that their life problem equals a legal problem.

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

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

How can young lawyers come out if they are being told, number one, they can't be on
platforms like Avvo and LegalZoom where they know, because they know modern marketing, millions of users are going to these sites per month.

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

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

Whether lawyers want to admit that or not, it's making a difference in the 80
percent, and so if we are going to sit here and say that the way that that's being advertised or whatever is not the answer, I think the difference is just the numbers that are showing that.

And the problem with that is that what we are showing with young lawyers by having these advertising rules and a number of RPCs in general is that you can't actually engage in your own marketplace, because we are afraid to be entrepreneurs. If you don't like Avvo and you don't like LegalZoom -- we're not trying to offend you guys here.

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

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

Just create your own platform. You don't like what they've got going on, you think that they assign people profiles inappropriately, whatever your complaint is, I have heard them all, do it yourself and fix the issue. The problem is and why people say they can't fix the issue is because of the RPCs. And I'm not saying --
RPCs, they are necessary. We need those in place. We need to protect the public.

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

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

MR. LYNK: One more minute.

MS. RUSH: One more minute? 30 seconds.

One more not very good website. You are not going to find any information. So, you're going to find somebody who is not actually authorized to practice law, and you're going to pay them money to help you out because you are desperate. That is not
helpful to the public, and so at the end of the day -- I'm taking everybody's time --
lawyers are missing out on business.
Consumers are suffering as well.

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

MR. LYNK: Thank you very much.
MS. RUSH: The end.
MR. LYNK: Lynda, do you have any final comments?
MS. SHELY: Thanks, everybody.

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

If you think of something after this meeting, please, please bring it to the committee because we would rather have this
be a team effort to help the profession and
to help consumers rather than have somebody
down the road say, hey, wait a minute, we
don't like this. So, please be part of the
answer.

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

MR, MEHTA: What is the deadline for
commenting?

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

MR. RENDLEMAN: March 1.

MR, MEHTA: March 1?

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

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

MS. McDERMOTT: Model rule amend.

MR. RENDLEMAN: Model Rule Amend at ABA.

MS. McDERMOTT: At America bar dot org.

MR. RENDLEMAN: What she said. We'll try
and do a better job of advertising that address.

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

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

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

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

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

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

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

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

To me this is moving forward. I expect everybody in this room has some ideas about what the ABA can do in terms of regulations, substantive ethics rules and anything else.
regarding the practice of law that ought to happen.

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

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

So, thank you for being here.

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

MR. LYNK: On that note, thank you all
for coming. We appreciate your comments. Thank you.

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