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MS. KEPLER: Good afternoon. My name is Tracy Kepler, and I am the director of the Center for Professional Responsibility, and it's my pleasure this afternoon to welcome you here and thank you for your attendance and your comments on this forum on the draft proposed amendments to the Model of Professional -- the Model Rules of Professional Conduct on Information about Legal Services.

As you know, this is an initiative and a project that grew out of something that came from the Association of Professional Responsibility Lawyers, or APRL, back in 2013. It went through forums, revisions, working groups, and now we're here today with some proposed amendments for consideration by all of you. We really look forward to what you have to say, your comments, and they're all going to be taken into consideration by the Standing Committee.

Before I turn over the microphone to the Chair, Professor Barbara Gillers, we are passing around a notepad and if you would please put your name -- list your name so that we can note your presence, and then you can contact us or we can contact you should we have any additional concerns, comments, or questions.
about the proceedings here today.

With that, I will turn it over to the Chair, Barbara Gillers, to get started.

MS. GILLERS: Thank you, Tracy. Thanks very much.

Can everyone hear me? Okay, great. Okay.

Good afternoon. It's a -- it's a real pleasure to host you all and see you all today. I'm delighted that you've come to give us comments on the current working draft of proposed amendments to Rule 7.1 through 7.5 of the Model Rules of Professional Conduct. They are known as the advertising rules.

As Tracy said, I am Barbara Gillers. I'm Chair of the Standing Committee on Ethics and Professional Responsibility. I teach ethics and professional responsibility at the New York University School of Law in a variety of capacities — as a clinic, as a seminar, as a survey course — and have been doing this here and in New York, where I'm vice-chair of the committee that recommends changes to the New York courts as well.

This is a topic of great interest nationally and among lawyers. Clients care deeply about it. The lawyers care deeply about it. And we have been studying these rules collectively for almost -- for two years now. As Tracy said, the impetus came to the
Standing Committee from the Association of Professional Responsibility Lawyers. They produced a very thorough report, which we studied and had forums about and then produced a preliminary draft. We had more comments and produced now this draft. The goal is to present something to the ABA House of Delegates for -- at the August annual meeting, which would contain the rules after we hear comments from you.

I have a list of formal speakers who have asked to speak. There are about ten. And I'll call on you in a few minutes in the order in which you requested to speak. If you did not previously give any one of us your name and state your interest in speaking, as Tracy mentioned — and I wanted to reinforce — please do tell Dennis Rendleman or Mary McDermott. Raise your hands. They're at the back of the room. And we will put you on a line on the list to speak. We want to hear from all of you. You may think of things as we proceed through the afternoon that you want us to discuss.

Very quickly, I'd like to ask the chairs of the ceter committees to stand and just introduce themselves.

If you're here, could Jayne go ahead and just --

MS. REARDON: Hello.
MS. GILLERS: -- introduce yourself.

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

MS. GILLERS: All right. Any other Standing Committee chairs here? All right. I --

MR. GOODENOW: Rew Goodenow.

MS. GILLERS: Oh, I'm sorry.

MR. GOODENOW: Chair of the Joint SOC CCR [phonetic].

MS. GILLERS: Wonderful. Thank you.

Anyone else? Any others? Okay.

I want to extend a deep thanks and introduction to the members of the Standing Committee on Ethics and Professional Responsibility, and I would like each of them to introduce themselves.

Special kudos to the subcommittee of the Standing Committee on Ethics and Professional Responsibility. The subcommittee consists of Lynda Shely, its chair, Elizabeth Tarbert, and Jan Jacobowitz, all three of whom worked extremely hard in order to produce the memo and the current draft that you have in front of you.

I'm going to ask each member of the Standing Committee to introduce themselves very quickly. Let me start at the end. Jan.

MR. JACOBOWITZ: Good afternoon. Jan Jacobowitz. I'm from
University of Miami School of Law, where I direct a professional responsibility and ethics program. And full closure. I'm the secretary of APRL and have been working on these issues for four years.

MS. TARBERT: I'm Elizabeth Tarbert. I'm ethics counsel for the Florida Bar.

MS. SHELY: I'm Lynda Shely. I'm on the Standing Committee. I practice in Arizona in the District of Columbia representing lawyers. And I, too, have had a life sentence to working on the advertising roles since 2013.

MR. CROTHERS: I'm Dan Crothers, a member of the committee. I was not on the subcommittee. I'm on the full committee. I was told to sit here by the Chair.

MS. GILLERS: And for those of you who disobeyed my requests, are there any Standing Committee members -- I think I saw Mike. Yeah.

MR. RUBIN: Mike Rubin. I'm from the civil law state of Louisiana. You've learned that all of the United States — footnote: except for Louisiana — comes [inaudible].

MS. GILLERS: Great. Anyone else from the Standing Committee? Yes.

MS. MYERS: I'm on the -- Cynthia Myers. I'm on the Standing Committee for [inaudible].
MS. GILLERS: Thank you.

And I want to introduce our very, very valuable and dear staff members to the Standing Committee on Ethics: Dennis Rendleman, the ethics counsel; and Mary McDermott, associate ethics counsel. None of this would happen without their diligent and careful and constant work, so we're deeply grateful to them.

You've heard a little bit about the history. I don't want to take too much more time on that. I think Tracy gave you a little bit of an add-on. I mentioned a couple of things. Just to highlight the focus of what we have been trying to do, streamline the rules, we're looking for more national uniformity in the regulation of the advertising rules in these days of technology, competition, cross-border practice income, that -- and technology impact on the profession. It is important, we think, for the professional rules on advertising to be more nationally uniform. We want to target mostly misleading and false advertising, protect clients, without unreasonably burdening lawyers in their practices.

We want to protect first amendment rights and avoid antitrust concerns. Of course, mostly protect the public by ensuring accurate information in the
advertising and delivery of legal services.

Without further ado, I want to proceed to our first speakers, and the first speaker for the day will be George Clark, president of APRL.

MR. CLARK: Thank you, Professor Gillers and members of the committee. I'm pleased to be here.

Let me say how I'm going to organize things as far as I'm concerned. I've been on our advertising committee since the beginning. Mark Tuft, our chairman, will address specifically some of the changes in the draft report, some of the changes which we think maybe would be further improvements on the report, but I want to give just a little background to say how we got here and in that -- is it really five years? Maybe it seems longer. I don't know.

But when we looked at the advertising rules, we had a reaction. We had a reaction, I know in part, was it wasn't appropriate for modern technology. I mean, I know one of the things we talked about. Okay, well, we've got to have a disclosure on Twitter. We have 140 characters. Okay, will there be anything in the tweet? And the answer was "no."

When we were looking at the rules, we thought, about what purpose are they really serving? And we had some ideas on that. We thought that maybe they
really were not serving our clients, our customers, our potential clients, and so we decided let's do a little survey on this. And it wasn't really a little survey. It was a survey that we worked with the national organization of our council on, and we surveyed the 51 jurisdictions on what do they do about advertising, how do they enforce the rules, how many complaints do they get, what kind of a situation do they see in their jurisdictions?

And we didn't get responses from everybody, and we told everybody that we're not going to reveal your individual situation, but we discovered something that maybe is kind of what we thought we would, and there were three or four things: One is that there are very few, if any, complaints from clients and -- about lawyers.

One of my favourites was talking to a regulator about, well -- 'cause, see -- so we did have a complaint. I said, "Well, what happened?" So we got a complaint from somebody who said that she didn't like to see lawyers advertising at two o'clock in the morning. You know, so that didn't quite fit into a false and misleading role, but it showed the absence of the derth of complaints about the advertising itself.
And we also found — and this was from the survey — that most of the complaints came from other lawyers. I don't think my predecessor as -- president is here, Don Campbell, but Don would joke. He said, "Well, if we do away with the advertising rules," he said, "the clients -- my best clients are the ones who do the advertising 'cause they could afford to pay me. So when they get in trouble -- if we do away with the advertising rules, I'll lose all this revenue."

Well, he was kidding, but he had a point. He had a point that advertising properly done could be very effective and get access to justice, which is what one of our principal concern was.

And bar counsel -- and we -- we found really was not enthusiastic about enforcing the advertising rules. They had higher priorities, things that they felt were more important to their mission. And so that that meant that many times advertising rules were there, unenforced. But lawyers, in my experience — and that's all I do is represent lawyers — lawyers basically want to follow the rules. That's what most people want to do. If by having this set of advertising rules it was more restrictive than to our thinking made sense, it meant that people were limiting what information they were getting out to the
public, and that that was an access-to-justice issue.
And so that became kind of our -- our motivating factor.

And then, as I know, we've talked about before, that there are 106 pages of differences in the 51 jurisdictions from the ABA model rules. And I'm glad to see that the changes that we're looking at here today do away with some of the causes for those restrictions. I think that's very important, something we're happy to see.

I was fond of saying do we really want to discipline a lawyer who puts the wrong typeface on a letter? Now, with this proposal I don't think we have to worry about that, and I think that that's a very big improvement.

Now, I come from a place where advertising has not been an issue. As our now-retired former bar counsel Gene Shipp would say in talking about advertising and about solicitation, he would say, "The District of Columbia, as long as it's not false, as long as it's not misleading, and you don't contact somebody in an oxygen tent, you're okay." And he was a very recent Michael Frank award winner. And so Gene had it exactly right.

And let me just conclude by saying this is an
access-to-justice issue. We have changes in the legal marketplace for all kinds of signs. Lawyers are facing different kinds of competition. And we think that the public is entitled to know more about the services that lawyers can provide and they can do that better under the proposals which the Standing Committee has made, and we think maybe a few tweaks would improve that even more.

And so I thank you for the time, and if you have any questions, I'd be happy to answer them.

MS. GILLERS: Thank you, George. Let me say something I had forgotten to say. And we very much appreciate your remarks and your question to the panel. What we agreed that we would do is allow each speaker who had asked in advance to speak ten minutes to talk, and then we would ask -- I would ask the panelists if they had any questions of this speaker. And then we would open up very briefly to the group, if you have any questions; although, we may want to save most of those till the end. But I want the speaker to have ten minutes, the panel to have some time to ask questions, and then we'll move on. So thank you for asking the panel for questions, and let me turn it over to my colleagues here.

Any questions for George Clark? Any questions?
MS. SHELY: I -- if I can ask one.

MS. GILLERS: Please. Of course.

MS. SHELY: George, in your personal capacity, not speaking on behalf of the Association of Professional Responsibility Lawyers, does this go far enough?

MR. CLARK: I think on the subject of solicitation, it could and, in my opinion, should go farther. I do think that ... we talk about lawyers in many ways with the thought that they are such wonderful orators and convincers — and hopefully some of us are in many times excellent in front of certain judges — but the fact of the matter is I don't know if we have that persuasive power that we can immediately overwhelm any potential client with what we can say. And I do think that -- I was also saying that, you know, we all walk around with advertising machines in our purses and our pockets and our wallets, whatever, and people are used to certain things, and I don't think they're as delicate as sometimes we assume.

And one of the things we've talked about in the course of APRL's [inaudible] was should we just do away with the advertising rule completely and say it's an 8.4 issue? Is it false or misleading? And, you know, there may be some sense to that. But that kind of tells you how far I would be willing to go.
And let me say again about D.C., in saying what
Gene would say about it. He would also tell you:
Have we ever had a problem with this rule? The
answer, "no."

MR. CROTHERS: Mr. Clark, you mentioned that APRL suggests
some tweaks. I know that APRL has submitted a
written -- has made a written submission. And the
tweaks are contained in the -- in the writing, I
presume? And if you mentioned that, I'm sorry.

MR. CLARK: No, they are. Yeah, it's Mark Tuft, who is
chair of our advertising committee, will talk about
those tweaks in particular.

MR. CROTHERS: Okay. Thank you.

MS. GILLERS: Thank you. Anyone else? Any other
questions?

Thank you, Mr. Clark.

MR. CLARK: Thank you.

MS. GILLERS: We very much appreciate your time.

SPEAKER FROM THE FLOOR: I have a question.

MS. GILLERS: Yes.

SPEAKER FROM THE FLOOR: My name is Russ Hartigan,
president of the Illinois State Bar. I teach at
DePaul Law School and I also teach at IIT-Kent.
Yesterday, a few days ago, we had a young man who went
out solo to do landlord/tenant and gave a presentation
in the class, and he said -- I said, "Well, how do you get your clients?" He said, "Well, I -- basically it's public record as far as who gets sued for eviction." And I said, "Well, how do you get those sources? How do you know?" He said, "I can't tell you."

And so the class, 35 second-year students say, is that solicitation? Is that ethical to comb the public records, and then to maybe a third party intermediary bring that information to him, then send out letters to these people who are in distress anyway? And they say, is that borderline solicitation, or what do we have?

MR. CLARK: And what did you tell them?

SPEAKER FROM THE FLOOR: I [inaudible].

MR. CLARK: No. But -- but let me say I do think -- I mean, I know lawyers who do exactly this and have done that for their practices. One in the District of Columbia I'm very familiar with is the International Trade Commission, where complaints are filed and then it's a while before the ITC will act on them. If you're an ITC lawyer and you've got somebody down with a provision every day looking to see who filed a complaint, and then you're sending it to a potential client, usually overseas, to try to get them to work
with you. And I do think though in other places where you have public records — and I'm assuming that that's what this student was saying was a public record — but I think that's available for people to see and use and they should be able to do it.

SPEAKER FROM THE FLOOR: But they're doing it also not only to landlord/tenant, but they're doing it for DUIs. As soon as they get public, then they're sending letters out.

MR. CLARK: And I'm -- again, I think this is not a uncommon practice, whether -- this gets to one of the other points I guess that I would make, and that is we have these rules and are they being enforced? Are people doing something to the contrary? Is it harming the public in any way? And getting people representation? That's where I come from.

It's funny you say this because two weeks -- ten days ago I was speaking to a class at GW Law School very briefly because the professor was covering advertising, and so I came in at the end and said, "Well, the good news is that if things go the way I want, by the time August rolls around you won't get to know this stuff." It got a lot of cheers for that.

MS. GILLERS: Thank you. I think -- thank you. I think I'm going to exercise a slight prerogative here,
because I think, in fairness to the people who asked to speak, I'm going to let each person who filed a request to speak do that and let the panel ask questions, and then we'll open it up to the group at the end.

I want to emphasize, however, that if you don't get a chance to speak or say what you have to say, you should directly send an e-mail either through the website that the center has created for comments or you can send it to me directly and I will make sure it goes to the right person. So everyone who has a question or a hypothetical or a concern will be heard, but I think that in fairness to those who had signed up in advance and submitted written comments, we're going to proceed that way.

So I -- the next speaker, if you would please --

Thank you very much.

MR. CLARK: Thank you.

MS. GILLERS: Thank you.

So the next speaker is Mark Tuft. Mark Tuft is chair of the APRL Subcommittee on Advertising; is that correct?

MR. TUFT: In my free time. Thank you very much. It's very good to see all of you.

We submitted a letter which gave you some
overview of our comments to the working draft. I'm going to touch on some of those in my comments, but I want to spend the beginning of my comments talking about something that we consider [inaudible], and that deals with the structure of the rules and how they should appear. I think the existence of the problems, of the -- the adverse consequences, the current regulatory scheme, the need for change, is all well-documented. Our reports — and we're not alone; there are others — of the empirical data that shows the rules are unworkable, do not achieve the same objectives, and are causing problems, mandates, the kind of change we're discussing here today.

The question is: In what form should that change take? There is no question that the ABA has to be in the forefront of that change. To be relevant to the legal profession, it must occur here. States are already talking about the very same issues that we're talking about this afternoon, and some states are taking action.

What the problems is: That states do what states want to do. But the practice of law being globalized, multistate, with technology being what it is, the ABA must be in the front of this solution.

The starter is clear, 7.1. The ABA has done a
very credible workmanlike job in fashioning the overarching standard that governs all forms of communication, 7.1. And you define in that rule what the false and misleading communication is. And then you have comments that helps the practitioner understand what the application of that step is. That's been done. And that is one of the two pillars of how the structure should look. There will be a national structure, a national format that states can sign on to and can easily adopt.

And I'd like the question that was asked -- because when we get to solicitation, which is the other standard -- there's two. You'll know APRL wrote two reports. We did it on purpose because the policy behind false and misleading advertising have to be addressed separate and distinct from the policy considerations behind solicitation.

And so the question is asked: Well, what do you do about someone who is searching for a list of prospective clients and then sending them targeted letters? If you adopt a structure that APRL is suggesting that you adopt, that answer can be readily found in Rule 7.3(b), because it -- because you have a definition of "solicitation," which is badly needed. Our comment to you is it ought not to be in the
terminology section because practitioners are not likely to look there. It should be in the rule, right smack part A of the rule, as definitions are in special rules like the prospective client rule, so it fits. But the definition in the rule is critical to the application.

And then you very well, and following our recommendation, defined narrowly — more narrowly than we did actually — the absolutely prophylactic ban, which has to be more narrow today than it has been in the past. But the practice of law has changed dramatically and the needs of consumers have changed so dramatically that that has to be re-examined and you have taken strong measures to define the prophylactic ban in a very narrow way. That's good.

And then we get to the target communications, which are constituted [inaudible]. Well, what are the restraints? Well, that's in 7.3. So for a class and those that have these questions will not have much difficulty, I don't think, finding answers to your question. There are restrictions.

If someone does not want to be contacted, then you're not permitted to send that person a further target communication. If the target communication is overly intrusive, coercive, or causing undue
persuasion, it ought not to be allowed. So you have guidance there.

That's the structure of the advertising rules in today's very complicated and fast-moving legal requirement. It is not changing. We today cannot imagine what technology is going to be ten years from now in terms of communications.

I know that you had difficulty, as did we, defining what is live communication. You see, one of our comments -- you don't have it quite right because you use the term "realtime communication." We -- we suggest we not do that because that confuses practitioners between chatrooms and other forms of -- of fast-moving electronic communications which are not truly live. So you should use "live direct," as we suggest in our comments. But short of that, we have the pillars of the advertising rule. And that's, frankly, all you need.

Now, the problem is: Well, what about the other issues? Prepaid legal services, lawyer referral services, specialization. They -- they are important. They do need to be addressed. But they're not driving the train. They're not -- our surveys, all of the information we've gathered, all the empirical data that exists tells us that's not what's driving the
problem today. And those -- now, we talked to quite a few that don’t have, for example, some of the restrictions. We did not see an increase in disciplinary activity.

As you will note, APRL has recommended that not only do you have a -- a clear, simplified, understandable, uniform disciplinary standard, but that you also have — such as a protocol for state bars and regulators — to address the other non-disciplinary concerns that consumers may have about advertising. A lot of states do that and they do it very effectively.

So the lawyer who is worried about exercising some new innovative way of communicating with clients is not going to be chilled by the fear of discipline when they embark on something that perhaps is novel or innovative or emerging, because the State Bar in those states that, in my opinion, do it right, if -- if they do receive a -- a client complaint or a certain complaint, which is rare compared to -- our survey shows. But if they do, that person may be contacted, and say, "Listen, there's a concern here."

Our experience is that the vast majority of all lawyers will listen to that warning or -- or letter or signal or something from the State Bar and will take corrective action. Discipline should be reserved for
those types of communications that violate 8.4(c) or violate the absolute ban or the prohibitions of Rule 7.3. That should be the -- that should be the disciplinary standard.

There are many other non-disciplinary measures that State Bars can and do take to correct technical concerns or -- or issues that -- that can be easily remedied without invoking the disciplinary process. That is an [inaudible] for furthering the access to justice, the information has to be conveyed to consumers in this fast-moving electronic age where the little guy is competing with the very large firms of highly sophisticated -- they've got tremendous public relations people and sales forces, huge advertising campaigns. It helps level the playing field and it doesn't compromise public protection.

Now, what about these other -- other features of advertising? You're proposing that we have a -- a third rule, which is in the middle. I believe that rule is similar to 1.8 in the conflict of interest regimen of -- of rules. So it's about special situations. And there's a certain symmetry there. It -- it kind of makes ample sense in one -- in one way. However, our concern is that it invites other special rules, other special situations that states
could pick up along the way. And all of a sudden, this Rule 7.2 now becomes longer than you intend it to be. So that's -- that's a concern.

I don't -- I suggest you consider that. Our suggestion is we don't think you need it. But if it is your determination that you decide that, yes, you want to have it, bear in mind that should not be an open-ended rule where states can just tack on additional special advertising rules to suit their specific situations, 'cause that will defeat the overall objective, in our opinion.

6 -- 7.4, we know, is an -- is a issue of some concern. We think two things: The first one is it's -- it's an application, 7.1. Just like 7.5. It's not deserving of a separate rule.

If, on the other hand, you come to the conclusion that there ought to be a -- a rule for special situations, well, that's where 7.4 would go. It would go under 7.2 as an additional rule to paying for referral fees or -- or [inaudible], things of that nature. It doesn't need to be a separate rule.

And the empirical data that we have been able to gather indicates that those states that don't have a separate rule are not experiencing the kinds of violations that you're concerned about in areas of
specialization. In fact, of all the data we collected, I can't think of any responding state or regulator that said to us we have a real problem in enforcing specialization of rules -- high profiles of enforcement. That's not -- not the case at all.

So we understand the -- the concerns that the ABA has in certain areas about that, but structurally — getting back to my first point — it's the structure -- it is the national structure that we're going to be putting out to the states that allows every single state to sign on, is very important and you don't need tag-along rules that sort of hang out there when they can come under the umbrella at 7.4 and 7.3 -- 7.2.

Let me just finish — 'cause I know my time is about up — let me just finish with a couple other minor -- not minor comments but -- but significant comments. We, again, use some -- some -- we tried not [inaudible] -- those of us who are on state commissions can't help ourselves. We want all [inaudible] rules. We tried not to do that, but we made a few comments about some of the specific rules.

I think I mentioned the one that is most important to me and that is your definition of "live communication." And I think it -- I think it's very important that you not use the words "real-time."
We gave you an example on page 3 of our letter on how we think that -- that that should read, and we commend it to your -- to your attention. I won't take your time to read it here. You have it.

MS. GILLERS: Yes.

MR. TUFT: We think that's important.

MS. GILLERS: Yes.

MR. TUFT: The other one is we -- we suggested you borrow key APRL's proposed comments for December 21 which allows the reader to understand that, in the structure of all the rules, that 8.4(c) is an important consideration in -- in applying 7.1. We think -- we think you should keep that. So take a look at 7.4 -- excuse me, our comment for 7.1. We find that to be useful.

The last one -- and then I'll stop -- is you had a -- you tweaked the definition of "what is a recommendation." By using language that our committee found to be more confusing than the language that exists in the current tongue, the "vouching" or -- or "endorsing," your wording is -- it was more vague. "A phrase that expresses, implies, or suggests a value" didn't translate to something that was clear. So we -- we think you should keep the -- the definition of -- of a "recommendation" that's already in the --
in the model rule.

With that, I think my time is up. I have a lot more I can say, but I'll entertain questions.

MS. GILLERS: Thank you, Mark Tuft. We -- you are welcome to submit any supplemental materials if you'd like. We certainly have your submission.

Let me open it up to the panel and see if you have any questions. Any questions?

MS. TARBERT: I do have a question.

Mark, what would you do with the information [inaudible]? What would -- what would you do with it?

MR. TUFT: Well, first of all, I think -- let's take the first part of it. You don't need the statement that says that -- that lawyers are permitted to advertise. That's point 2(a). Our comment was if you're going to keep that, it should be -- change the word "advertise" to "communicate," because "advertise" is not as [inaudible].

But you already say that in 7.1. You've got a comment that says: "All communications around lawyer services includes advertising." So you don't need it.

We think -- the other provisions — and we understand there's some -- there's some twisting and moving and adjusting here — but that the -- paying for recommendations fits under the specification rule.
The LRS and the prepaid lawyer -- legal services is -- rule would be comments to 7.1. We don't think you need a special disciplinary rule for that. So we would -- if you look at our recommendations, we have put those provisions either in 7.1 as a comment or under 7.3. That's what we would do. We would not have a separate rule.

MS. GILLERS: Thank you very much.

Our next speaker will be Charlie Garcia and Will Hornsby from the ABA Division for Legal Services.

MR. HORNSBY: Can I get the same ten minutes as Mr. Tuft?

MS. SHELY: We're counting now.

MS. GILLERS: Now we're counting. We -- you taught us to --

MR. HORNSBY: Mr. Garcia is my backup, my wingman here, but the committee has asked me to present some thoughts that it has.

The Standing Committee on Delivery of Legal Services has a mission to expand access to lawyers and legal services for people with minor income and do not qualify for legal aid or pro bono but lack the resources for traditional representation. So a lawyer advertising is an integral part of that equation, and -- and something that the Delivery Committee tends to come down on an access perspective as opposed to a
consumer-protection perspective. So our comments are oriented in that direction.

We received the report on, I believe, December 21st, when everybody was leaving for the holidays; and the committee has its business meeting tomorrow, so it has discussed these issues by telephone call but hasn't spent as much time as it needs to and will provide you with specific comments prior to the written comment period.

MS. GILLERS: Mr. Hornsby.

MR. HORNSBY: Yes.

MS. GILLERS: The comment period is extended, is open until March 1st of this --

MR. HORNSBY: That's --

MS. GILLERS: -- of this year.

MR. HORNSBY: Yes. Thank you.

We applaud the efforts that you've undertaken. Clearly uniformity is -- is a very important factor, and streamlining the rules and making false and misleading the fundamental cornerstone as it is now throughout the states, providing that focus is -- is something that's extraordinarily important. However, the committee has discussed a series of predicates that we think are -- are important to examine, and the first of those is streamlining the rules.
Now, we have taken -- your draft has taken actions to streamline many things, but we question whether or not it has gone as far as it should go.

Should we have 7.2(a)? Is it important to the legal profession to articulate constitutional right that we've had for 40 years, a lawyer may advertise? Is that -- should that be part of our -- our Rules of Professional Responsibility, Rules of Professional Conduct? If we're streamlining these rules, the answer would be, no, that's -- that's not part of it.

7.4(a), a lawyer can say that they practice in an area or not practice in an area. That's just inconsistent with the rest of the rules, in terms of providing direction on what we must and must not do. And when we teach these issues, these are -- these are things that, I think, relate to the complexity of the regulatory enforcement and -- and that sort of thing, and we should well consider taking them on.

It's not only the rules, but it's the comments. When we have wholesale transferred 7.5 into the comments of -- of 7.1, it's misleading to hold yourself out as a law firm when, in fact, you are not practicing as a law firm. Do we really need to say that it's misleading? Can -- can there be any other construction of that misrepresentation? It's not
truthful, for one thing. It's beyond misleading. It's not truthful. And so ... and so there are a number of areas where we should re-examine whether or not they are part of this package of rules that we really need to have.

Secondly, we think predicate of consistency is important. And I'm not going to dwell on examples, but I just want to -- I'm not going to dwell on the -- all the changes, but I just want to give a few examples.

So 7.1 says:

"A lawyer shall not make false or misleading communication about the lawyer or the lawyer's services."

And then the first sentence of the comment says:

"This rule governs all communication about a lawyer's services."

Well, those are -- those are two different things. I mean, what about a press release where the publisher adds information? What about somebody having a CV online to get a job where they -- where they couldn't remember what dates they did something or what -- when -- when an article is published or something like that and it's false? Those are communications about the lawyer's services but they're
clearly not commercial speech. They're clearly not predicated -- they're clearly not what is anticipated as being prohibited as part of that rule.

So the first sentence of the comment is overly broad and it's unnecessary and it's inconsistent with the rule itself, and we would suggest that that be struck.

Third, there's need for clarity -- there's a better need for clarity. The states, I think, demand clarity in these rules. Mr. Tuft brought the -- brought forth the example of the redefinition of "recommendation." We're concerned that that -- that creates more confusion than clarity and we think that the changes that are anticipated need to be examined by way of that.

Another example of that is in the -- when you move 7.5 into the comments of 7.1 and retain the provision that said that ... the provision that says ... sorry, I'm losing my thought here. If a lawyer dies, their name may stay in the firm's name; but if that lawyer leaves before he or she dies, that firm name has to change. That doesn't seem like it's a very clear standard and it's one that creates an obstruction to the use of trade names that people put value in, that a law firm brands, and that is not
necessarily consistent with where we should go with that. So that's an example of a -- of a clarity issue.

And the final issue ... let me just stop and compliment Ms. Jacobowitz for her new book, "Ethics and Social Media." It's a very --

MR. JACOBOWITZ: Some paid advertisement.

MR. HORNSBY: It -- no, we have never met before. And I've -- I've read it, and it provides some very valuable direction.

But -- and there's always a "but" -- it's kind of like "with all due respect"; right? I don't think the committee has considered where technology is going to be very soon. It might have considered where technology was ten years ago, regenerations and -- and uniform-- the uniformity necessary for third party advertising and that sort of thing.

We are at a point in time where we used to communicate with machines through text and our friends through voice and we now communicate with our friends through text and our machines through voice. So "Alexis, should I wear a sweater today?" "Siri, how is the traffic on 94 South this morning?" "Alexis, where can I find a good divorce lawyer?" Okay? "Where can I find the best bankruptcy lawyer near me?"
And Alexis is happy to give you the answer. Siri is happy to tell you who that is. And they do that by the algorithms that they use for the data that they have and they use those answers to -- to self-fulfill its subsequent recommendations. So -- I mean, Siri is always on; right? I mean, that little dot thing is always there. And it hears an argument going on or it hears arguments with some frequency. At what point does it not just say, "You know what you need? You need a good divorce lawyer near you. Here's where one is." Right?

MS. SHELY: Wait, is that legal advice?

MR. HORNSBY: Yeah, it's -- you know, I don't know. But it's happening. But it's happening. And -- and the technology is there to have these dramatic changes that we have to -- we have to consider when we draft these rules. We should not be drafting rules for 2009. We should be really drafting rules for 2029.

So we would encourage you, to -- to the extent you don't feel comfortable, that you are -- that you as a committee have expertise in technology, go talk to the people that do have. We'll be happy to give you some names if you'd like them. I don't understand half of what they're saying, but the other half I do understand is very frightening and I think really
important to what we're doing here.

MS. GILLERS: Good.

MR. HORNSBY: So any questions?

MS. GILLERS: Thank you so much.

Questions from the panel?

MR. JACOBOWITZ: Thank you for your endorsement, but I would have had this question either way. I'm curious --

MR. HORNSBY: Is this a softball question?

MR. JACOBOWITZ: No. I'm curious what you — you or you representing your committee — would think about throwing out all the advertising rules and just relying on 8.4(c), which as — I don't know if it was George or Mark — suggested, that APRL did consider and concluded it was a bit radical, but -- and if not, where -- I assume you're going to send us a letter with comments --

MR. HORNSBY: Sure.

MR. JACOBOWITZ: -- but how much more would you strip these rules?

MR. HORNSBY: Well, I -- I would tell you that in the past the committee -- and we'll bring that question into the conversation when we have our business meeting tomorrow. But in the past, when the committee has addressed this issue, it has urged the change to 7.1
being made to clearly indicate that it is focused -- that it is exclusively governing commercial speech. And I don't think 8.4 clearly does that. So if we were to make that change and roll it in, then that should be expanded on. But I don't think there's anything wrong with -- personally I don't think there's any wrong with a rule that prohibits false and misleading communications for commercial speech. I think that is clear -- I think that is good direction to the states and I think that is something the states would -- would feel comfortable enacting as a -- as a, like I said, cornerstone standard. Every state has that as part of their rule. And I -- it seems to me that if you don't identify this governing commercial speech, then it becomes redundant with 8.4; and, therefore, one of those is not necessary.

MR. JACOBOWITZ: And so that's sort of constitutional -- not sort of. That's constitutional jurisprudence. So would you drop most of the rest of the rules? Would you drop the --

MR. HORNSBY: Well --

MR. JACOBOWITZ: -- most of the comments and most of the subparts to the rules?

MR. HORNSBY: I -- I suspect that it would be a matter of -- of combing through them to streamline those.
Does that make sense?

We -- historically the committee has had concern about 8.2(b) -- 7.2(b) because a lawyer does -- an advertisement does not make a recommendation. I mean, you can change the definition of "recommendation" outside of its generic dictionary term to try to do that, but, you know, the fact of the matter is an advertisement is not a recommendation. Somebody is not making a -- you're not paying somebody to make a recommendation for an advertisement, and so that as an exception to that prohibition is -- is nonsense.

And I might say -- we talked a little bit about how there's no enforcement of these sorts of things. The case study is Total Attorneys. Total Attorneys was a national third party entity that sold leads, and it had a disciplinary violation filed against its participating lawyers in every -- in all 47 states in which those lawyers participated and spent well over a million dollars to defend the lawyers to sustain its operations.

So there are disciplinary issues contained within these rules that I think need to be taken into consideration other than saying, well, the disciplinary community is not concerned with them they don't enforce them whatever. And the other part
of that is that it's the chilling effect. I mean, lawyers every day tell us that they don't feel that they can pursue innovative methodologies of outreach of client development because they're concerned whether or not the rules restrict them. Not so much the model rules, but the state rules and the and the lack of conformity among the states.

MR. JACOBOWITZ: Thank you.

MR. HORNSBY: Thank you.

MS. GILLERS: Okay. Thank you very much.

MR. HORNSBY: Thank you.

MS. GILLERS: Our next speaker is Bruce Johnson and Arthur Lachman. Bruce is from Davis Wright & Tremaine. And Arthur Lachman is -- I don't know what your firm is, sorry. [Inaudible] Please.

MR. LACHMAN: Good afternoon. My name is Art Lachman. I practice in Seattle, Washington. And if permitted to do so -- if I were permitted to do so by the RPCs in my state, I would say I specialize in legal ethics and advising lawyers and law firms in risk management and ethical compliance. Since I'm not permitted to say that, I'll just say that my practice focus is on those areas.

I'm also a former president of APRL and a longtime member and former chair -- former chair of
the Conference Planning Committee for the Center.

Bruce and I would like to thank you for the opportunity to present our views about the pending proposal from the Standing Committee to revise and improve the advertising and solicitation rules in the series. I want to stress that although we will be talking about the efforts underway in Washington to consider the APRL proposals and revise our rules there, the views that we'll be expressing today are our own.

We do appreciate the efforts that have been made by the Standing Committee with the proposed changes, but as you're going to hear about, we would like to see the proposal go further.

Now, I'm going to talk briefly about where things stand in consideration of these rules on Washington State. Bruce, who's one of the leading experts on -- in our country -- the one below us — on media law and the first amendment will then weigh in on the constitutional issues implicated in these proposals.

In Washington State, the effort to consider the APRL proposals began with the subcommittee of our State Bar's committee on professional ethics. After detailed study and consideration of the APRL report, and based on our experience in Washington with how the
advertising and solicitation rules function, our subcommittee agreed with the fundamental premise of the APRL report that fundamental change is needed in the way we approach the advertising and marketing of legal services and the regulation of that; that we need to change the way we talk about these issues; that advertising, marketing, and, yes, even solicitation of legal services is a good thing, not a bad thing, if done honestly and in a non-coercive, non-harassing way. This is especially important in light of the fact that the legal needs of a vast portion of the public's -- the vast -- the legal needs are not being met for -- especially for low and middle-income people.

Now, as a result of our study, our subcommittee made recommendations to our Committee on Professional Ethics, which adopted them in full. We presented it at a first reading before our Board of Governors two weeks ago in Bellingham — that's just down the road from you — and will be acted upon hopefully at the BOG's meeting in Olympia in early March. From there, it would go on to the state Supreme Court for consideration.

The reaction was generally positive. We don't know how exactly it's going to go, but generally it
was very positive. Of course, not -- not universal agreement on everything, but we're feeling cautiously optimistic.

Now, the changes being proposed in Washington in significant ways actually go further than the APRL proposal, and I'll explain that. But basically what we propose doing in Washington -- and, again, I want to stress these are proposals only at this point. But we propose essentially leaving three rules in place in the 7 series.

Number 1: Full adoption of the APRL proposals regarding the advertising -- we'll call it "the advertising issue," which basically leaves 7.1 as the rule prohibiting false or misleading communications as the fundamental rule. As Mr. Hornsby said, we found there was no need as we celebrate the 40th anniversary of Bates to have a rule saying that advertising is permitted.

So 7.2 actually goes away, would be removed.

We would delete separate rules on firm names in letterheads and specialization in 7.4 and 7.5. We would add comments to give guidance, consistent mostly with what APRL has proposed. And we -- and we'd need a second rule that -- that we're going to talk about -- we would move the referral fee -- what I'll
call "the referral fee" or giving something a value — which is the second rule that we'd leave in place under the proposal — and move that to the solicitation rule, which I think we're going to hear from somebody from Virginia. That's what Virginia did.

And I don't know what Virginia's reason for doing that was, to be honest, but our reasoning was that the referral fee rule actually, based on some research that we did, came into being as basically a rule about solicitation and mostly dealing with cappers and runners.

Now, it's -- I think it's gone much broader than that, and I think, you know, personally — I'm speaking very personally — I question whether we should rethink having the rule at all. All right? And I think that -- by the way, in Washington I think there is sentiment to go to another step to reconsider those kinds of things, especially that -- that rule particularly. Do we really need it? Beyond the cap and runner contest, which I think everybody agrees we need to deal with.

So we moved -- but basically the second part of our proposal is to move the -- and adopt the APRL version of the giving something a value referral fee rule and put it in a subsection or paragraph of 7.3,
the solicitation rule. All right?

And by the way, consistent with what I've heard a couple times already, we'd leave the definition of "recommendation" the way it is now. And I would just note that it -- whether it's vague, I -- it appears to me to broaden the definition of "recommendation," which I don't -- I just -- I do not -- don't understand why that's being done as part of the -- the Standing Committee's proposal.

The third rule is a significant — it doesn't really go beyond APRL, by the way — a significant simplification of a solicitation rule itself. And we do something I think very radical: We say that generally solicitation is permitted unless — and I'll just tell you what those "unlesses" are right now. And, again, this is proposed — the solicitation is false or misleading. I thought that was repetitive, but it doesn't hurt to say it again.

Number two, the lawyer knows or reasonably should know that the physical, emotional, or mental state of the subject of the solicitation is such that the person could not exercise reasonable judgment in employing the lawyer.

Number three, the subject of the solicitation has made known to the lawyer a desire not to be solicited
by the lawyer.

Or, number four, the solicitation involves coercion, duress, or harassment. And there might be some overlap on that one with some of the other parts.

But we -- we believe that that covers what the solicitation rule should be about, and that is the proposal that we're going to be sending hopefully on to -- hopefully will get -- will be passed by the Board of Governors and then go on to the state Supreme Court.

We -- as you know, that still prohibits conduct and still provide that dishonest harassing and coercive conduct can be the -- and will be the subject of discipline in our state.

I want to make a passing reference here. We -- we're doing one more thing. And I don't know if it's been considered. And I -- I noticed this in going through our rules in kind of the Whac-A-Mole issue. But when we -- I looked at it, at least under Washington law, when we're -- when we were looking at the deletion of the 7.5 rule on multi-jurisdictional firm names, we realized that that's really the only basis in the rules that we know of that justifies that. There's nothing in Rule 5.5 that does that. So we're amending also 5.5 to make sure, make it clear
that Washington lawyers would be able to participate in multi-jurisdictional law firms.

So you might want to think about that as something that [inaudible]. And I'm-- I'm happy to forward that to you, if you're interested.

MS. GILLERS: Two things: I don't recall that you submitted anything in writing yet.

MR. LACHMAN: No.

MS. GILLERS: We hope that you will.

MR. LACHMAN: Okay.

MS. GILLERS: It would be very helpful for you to explain many of the things you've been talking about today.

Second, I really can only give you another minute.

MR. LACHMAN: Well, I'm just -- I'm almost done.

MS. GILLERS: Okay.

MR. LACHMAN: I think these proposed rules in Washington sheathe a proper balance in allowing lawyers to better serve the legal needs of the public while continuing to protect the public from improper lawyer conduct.

A simplified set of rules in this area is what is needed to eventually achieve uniformity of regulation in our rapidly changing and increasingly borderless and competitive technological world. We believe -- I believe —I think Bruce shares it — that the APRL
proposal should be the bare minimum level of reform in this area.

And finally — and I feel very strongly about this — access to justice and delivery of legal services is an ethical prerogative. It's part of what we are about. States like Washington are moving forward on their own on these issues. We think it's time for both action by Standing Committee and the ABA to take a lead on these important issues.

MS. GILLERS: Thank you very much.

Questions for Mr. Lachman?

Yeah, go ahead. We'll -- we're going to take some questions.

MS. SHELY: I just have one quick one. Just to clarify our -- under 7.3, solicitation including live and in-person and targeted direct mail?

MR. LACHMAN: It's -- yes, it's everything. And what we do is have a comment that defines "solicitation" the way it's defined now.

MS. GILLERS: Okay. Any other questions? Thank you.

Mr. -- sorry. Mr. Johnson.

MR. JOHNSON: Good afternoon. My name is Bruce Johnson and I'm a member of the Seattle law firm Davis Wright Tremaine. I'm also, like Art, a member of the Washington State Bar Association. I was also on the
APRL Advertising Committee, and I was in [inaudible] subcommittee with the Washington State Bar Association.

I do want to highlight a couple things dealing with the constitution because I've probably been dealing with first amendment commercial speech cases now for some 30 to 40 years. Our law firm was hired back in 1975 to deal with a Washington statute that prohibited margarine makers from using the word "butter." It was a criminal statute. We got it tossed out on the first amendment; and ever since then, we've been sort of repeatedly involved in these types of overregulations.

I'm also the co-author of a treatise on commercial speech, "Advertising Commercial Speech, a First Amendment Guide," published by PLI.

Every year I look at all the advertising cases coming up from -- the regulators and the lawyers: 1-800-PIT-BULL; the Cahill case out of New York with the alien surfacing to try to deal with insurance agents; SERSE [phonetic], dealing with specialization. Everywhere we see an overregulation at the state level, and I think it would be great if this organization basically looked at the first amendment and said we don't need this level of overregulation.
As Art says, it cuts into the access of justice. It limits the ability of lawyers to communicate with clients who need the valuable information. What harm would it be for me to call myself, after 40 years, a first amendment specialist? Seriously, what consumer harm is there in that -- that level of dialogue? I think we're afraid of these terms unnecessarily.

I want to address two things -- oh, one -- one issue. I'm not sure if Art mentioned it, but Oregon has passed the rule that we're talking about in Washington on solicitation. It went into effect, I think, on January 8th. We can provide a copy of that rule. I think the Court has already issued it. So it's basically the same rule that we got dealing with communication by any means that is unwanted or basically interferes with the psychological well-being of the [inaudible].

Two things: One, as I mentioned, specialization. I think we're overregulating. I think we're -- we're trying to deal with something that no longer exists as a problem among consumers and would benefit from knowing somebody who is willing to go out and use a term like that and can justify it.

Number two, on solicitation. What we're doing with solicitation is really usual as a matter of first
amendment law. The current model rules basically prohibit somebody who doesn't have a lot of friends or a big family or a lot of professional connections from competing with more senior and more professionally advanced lawyers. It's a -- it's a silly regulation and it wouldn't pass muster under the Central Hudson test, which is what the U.S. Supreme Court does to adjudicate regulation of commercial speech.

The other thing about the solicitation rule as it currently exists is a corporate executive is able to make use of that to prevent a lawyer from walking up and saying, "You know, I think you need help. I can be better than your regular outside counsel." Absolutely prohibited under the solicitation rule, and yet absolutely no first amendment justification for it.

So we think that -- or, at least, I think — I want to join what Art's been saying — we think this committee can adopt the APRL proposal with regard to -- with regard to advertising and we think it can adopt the solicitation rule that we're advancing in Washington and has been adopted in Oregon and also Virginia; and, of course, District of Columbia has had it for many years without any serious difficulty.

I'll be glad to answer questions.
MS. GILLERS: Thank you.

Questions from the panel? Justice Crothers?

Okay. Thank you very much.

MR. JOHNSON: Thank you.

MS. GILLERS: Our next speaker is Karen Gould, executive director of the Virginia State Bar.


I am not here to comment on the proposed rule. I was asked to speak on what is going on in Virginia. Virginia is a mandatory regulatory bar. Unfortunately, our ethics counsel, Jim McCauley, is now attending a meeting and that's why I am here today to report to you.

After a long period of study, the Virginia State Bar's Standing Committee on Legal Ethics proposed major changes to the Rules of Professional Conduct on how advertising should be regulated in Virginia. It relied for guidance in large part on the Association of Professional Responsibility Lawyers' 2015 report to the committee on lawyer-advertising regulation. The VSB council, which is our governing body, approved the proposed amendments by a vote of 65 to 1 at its meeting on February 25, 2017. The Supreme Court of Virginia adopted the proposed regulations effective
July 1, 2017 by order dated April 17, 2017. And I might note that that is remarkably quick for the Virginia Supreme Court. They only hold their business meetings every other month. So in other words, the petition was considered at the next business meeting and an order was issued.

In making these changes, the Virginia State Bar focused on four principles: The advertising rules should be focused on the appropriate regulatory purpose protecting the public; the rules must facially, as applied, withstand constitutional scrutiny; the rules must be legally and practically enforceable; and the rules should be practical in an application to an evolving means of communication and promotion of legal services.

Applying these four points, the changes to the advertising rules removed unnecessary restrictions, requirements, and disclaimers, and the rules were changed in following manner: Rule 7.1 was streamlined to a single admonition that communications about a lawyer's services may not be false or misleading. Rule 7.4 and 7.5 were deleted, with certain principles from those rules are addressed in new comments and reinforce appropriate limitations of the solicitation of potential clients.
The claims of specialization and the content of firm names previously addressed by Rule 7.4 and 7.5 respectively are now addressed by comments to Rule 7.1 because they are specific applications of the general obligation not to make false or misleading statements.

The required disclaimer for case results has been removed from Rule 7.1; again, shifting to a general false or misleading standard rather than a mandatory technical requirement.

The required disclaimer for advertising that a lawyer has been awarded a certification in an area of specialization was removed, keeping an admonition the lawyer must be able to substantiate a claim of specialization or expertise in an area of law. Rule 7.3, addressing solicitation of clients, was amended and more explicitly defined the term "solicitation"; and to expand the comments, more clearly explained its application to issues, such as paying for marketing services for -- for regeneration.

This major shift in how the bar regulates lawyer advertising has been evolving. In 2013, the VSB recommended that the Supreme Court of Virginia remove the ban on in-person solicitation in personal injury and wrongful death cases, eliminating Rule 7.2.

Our disciplinary system adopted a policy in March
of 2016 of handling most advertising complaints administratively. Since that time, very few complaints have gone into the disciplinary system. Our prosecutors continue to prosecute advertising cases if the lawyer refuses to remedy non-compliance with the advertising rules or the statements or claims made by the lawyer are patently dishonest.

In the year prior to the new rule being adopted, 12 complaints were opened and later resolved. All have now been closed. There were 34 total requests for ad review. From July 1, 2017, the date of the new rules, to January 20, 2018, there have been six complaints opened and later resolved; all now closed. There have been 23 requests for ad review thus far. These are all pretty much undertaken by our [inaudible] department.

The only area which continues to receive complaints from the public -- and which I agree with the statement earlier made by this gentleman who said, "We never really had many complaints from the public, serious complaints. They were by other lawyers complaining about them." It's with regard to direct solicitation letters — as this gentleman talked about [inaudible] — with regard to traffic and criminal
defendants -- firms which engage aggregators to provide court records of recent arrests, the lawyers are sometimes misdirected due to sloppiness and recipients become enraged because they have not been charged with any crime.

Complaints for lawyers about missing disclaimers have stopped and so have inquiries about disclaimer locations, font size, contrast, et cetera. The advertising changes have not caused an uptick and non-compliance of the rules. Most lawyers want to advertise in compliance with the rules and it is rare that we cannot proactively address a non-compliant lawyer advertising -- advertisement.

I believe our lawyers are grateful that the rules have been greatly simplified.

MS. GILLERS: Thank you.

Questions from the panel? Yes.

MR. CROTHERS: I'll come up with something. Maybe it hasn't been long enough, but is there any indication that with the relaxed rules, there has been a change in the advertising that was occurring in Virginia?

MS. GOULD: I'm not sure I can answer that question for you with my knowledge. I'm sorry. Thank you.

MS. GILLERS: Thank you.

Our next speaker, Robert Hille, who is -- of the
New Jersey State Bar association, has waived his time and offered to submit a written statement, but I wanted to offer Mr. Hille the chance to say a word or two, if he would like. Where are you?

MR. HILLE: I'm over here. And thank you. No, we'll submit.

MS. GILLERS: Okay.

MR. HILLE: I don't want to be redundant with a lot of --

MS. GILLERS: Wonderful. Thank you so much.

And our last speaker that has asked to speak today is Dan Lear, director of industry relations for Avvo. Dan --

MR. LEAR: I will definitely not take my full ten minutes. I think I, too, would be redundant in repeating what's been heard today.

I -- our particular thoughts relate to Rule 7.2. We believe, I think as Mr. [inaudible] said, and others have said, that sort of establishing or re-establishing a constitutional right to advertise was already made clear. I may be one of the only lawyers who has lived his entire lifetime in a post-Bates world and still [inaudible] on Wednesday. And so when I went to law school ten years ago, I -- I get the sense that law schools -- many of these rules are still taught in much the same way they were taught
in a pre-Bates world. We do -- we do not need to re-establish or reaffirm that constitutional right.

More to the point, I thought that all of the comments about the additions to the definition of "recommendation" only create further complications and further confusion about what our foundation is. So we would recommend that that rule be removed entirely.

And that's what I had to say.

MS. GILLERS: Thank you.

Any questions? Okay, good. Thank you --

MR. LEAR: And I would also say our general counsel submitted some comments along these lines and -- and going [inaudible].

MS. GILLERS: Excellent. Thank you.

We have two more speakers who have asked to be put in the queue. One is Matthew Dreggs.

Introduce yourself, please.

MR. DREGGS: My name is Matthew Dreggs and I am a -- in private practice. I'm an owner of a law firm. We practice in three different states and we advertise.

This is very relevant to us, and we appreciate your work.

I would echo what everyone says, and I would love to have the rules go the direction of the Washington State Bar. That would be wonderful, from our
perspective. But in the event that you choose -- you know, that you're going with what you have, we would ask for a clarification of Rule 7.2 comment 3. And -- and really what our issue is: It's involving what is advertising? So the rule basically says, yes, you can advertise; no, you can't pay for a recommendation; yes, you can advertise.

The problem that we're running into with one of the state bars specifically is that they interpret advertisement as air time or the medium. And advertising is actually a medium and a message. And so what has come up in -- in the -- in our jurisdiction -- in one of the jurisdictions is that they are saying that basically the lawyer himself or herself must be the person delivering that message and it would be unethical for anyone else to do it.

And our example is a radio advertisement, for example. If you have an interview on the radio or a radio talent is the voice of the -- of the advertisement, they're saying, you know, you're unethical because you are paying for someone to recommend your legal services. And ... you know, it's one of those vulnerable things for us personally because I -- I do my best to be ethical and yet when
I -- when they're reaching out to you saying that you're unethical because you have a radio station produce your advertisements, it seems frustrating to me.

So what we are asking is that if we go with the rules that you have, our hope would be that we make it clear that advertising includes paying for reasonable costs of the person who is delivering the message.

Specifically — and we have said this — but basically we would add words to comment 3 -- 7.2, comments 3. The way I read that is that the comment talks about this distinction between mediums. So the first sentence is kind of the mediums, the types of advertisements; and the second are the individuals. We would just ask that you add -- and what we said was "television and radio station employees, talent, and of -- or spokespersons," so that it's clear that in -- we can actually use or pay for advertisements that are read by someone other than me personally.

MS. GILLERS: Mr. Dreggs, I'm going to ask if you would submit that in writing to us.

UNIDENTIFIED SPEAKER: He did.

MS. GILLERS: Oh, he did? I -- I apologize.

MR. DREGGS: I just did that just --

MS. GILLERS: I didn't see --
MR. DREGGS: -- just the other day.

MS. GILLERS: Okay.

MR. DREGGS: We came up here -- it's [inaudible] an issue for us on the -- on the practice.

MS. GILLERS: I have one question: If -- what was the state that claimed that you couldn't have a --

SPEAKER FROM THE FLOOR: Utah.


Any questions?

MR. JACOBOWITZ: Well, I'm just curious. You said you're in three states, so I was curious as to the three states.

MR. DREGGS: Utah is where I live. And I've been there for 27 years. Washington State — which I'm loving what's happening there — and Montana.

MS. GILLERS: Thanks. And just -- any other questions from the panel?

Okay. Thank you very much.

MR. DREGGS: Thank you.

MS. GILLERS: And the final person who has so far requested to speak is Elijah Marchbanks. Please introduce yourself.

MR. MARCHBANKS: Good afternoon. Thank you for letting me step up. My name is Eli Marchbanks. I practice in
Washington and Oregon. My areas of focus will be criminal defense and consumer protection. And I also am 25 percent owner in a tech start-up -- a legal tech start-up that I won't use this microphone to plug here today.

I'm going to try not to repeat anything that people have said before me. We talked a lot about access to justice, and I think for -- for pretty obvious reasons. But the way I want to frame that and -- and make sure that it gets into this conversation is when James Silkenat was the ABA president, he talked a lot about when lawyers sort of broke the law of supply and demand. And I think that that's -- that's the root cause of the access-to-justice problem. We have lawyers who do not have enough work and we have consumers that are not getting certified lawyers. And this doesn't make any sense.

And specifically what I want to touch on is -- is 7.3. And it's by no means a silver bullet, but I think that amending 7.3 in the way that has been done in Oregon and is being done in Washington, and is supposed to be done in the ABA rules, helps -- is probably the single biggest thing that we can do as a profession to better connect supply with demand.
And I guess I say that from the standpoint of there's been a lot of talk of the Uberization of everything. There's been Uber. There's been Airbnb. Because Mr. Lear is in the room I'll say there's been Avvo. There's -- there's these things that have built their entire company on this way of sort of cutting out the middleman or -- or more effectively taking this oversupply with this overdemand and connecting those two things.

And we don't have that in law. I'm not saying that this is going to be that, but right now the way that consumers get connected with lawyers is on referral base, whether it's through a colleague or through its -- a family member or a friend or from a Bar Association. And what the effect has been is to -- speaking as a young lawyer, trying to start my practice and bust into this market, the effect is a consolidation of certain types of cases going to very few lawyers and that's not getting spread out very ethically at all.

And if we allow the attorneys to go directly to the consumers and cut out those middlemen, I think we're going -- that is probably the single biggest thing we can do to have this sort of Uberization effect that people have talked about. But we -- we
can't seem to get there. I don't think it's going to come from a tech company. I don't think there's going to be [inaudible] to solve this problem. And I don't think changing 7.3 without changing other things — like 5.4 and probably a household of other ethics rules — is going to get us there, but I -- I think this one has the biggest potential impact.

MS. GILLERS: Thank you.

MR. MARCHBANKS: Thanks.

MS. GILLERS: Wait. Questions from the panel? Yes?

Okay. Thank you very much.

Good. We're going to open it up to anyone in the room who would like to ask a question. Raise your hand and Dennis or Mary will give you a microphone or you can come right up here. Is there anyone who wants to speak?

Good. Come. Come to the microphone, please.

And introduce yourself.

MS. PERRET: Good afternoon. I'm Kim Perret. I'm a past president of Legal Marketing Association, and we've actually been supporting changes to the model rules since 2006 when LMA produced its first position paper in support of the model rules. And I'm here really today to say that we're still supporting and -- and we'd really love to see model rules that were
effective in order to prevent our organization and the members of -- in our organization of dealing with the -- the conflict between state, and state rules, and the national model rules.

So LMA, for those who don't know, it's a not-for-profit organization of over 4,000 members. We are the -- while the ABA and the state bars promulgate the rules, we are the ones behind the scenes who are having to implement the rules. In lawyer -- in the different communications that our lawyers have with their clients, whether it's through thought leadership pieces, or it's advertising, seminars, invitations, parties, we're the ones who are trying to reconcile, you know, 160 pages of differences between all the states, particularly for those firms that are in different locations.

So I'm really here to say that we're supportive of the changes. We're going to be submitting comments. And then we also have a task force on -- on ethics and advertising, and we'd really welcome the opportunity to talk from our perspective in terms of the practical approaches of how we're having to implement these rules.

So we're all for simplification and clarity and really to have a set of rules that states can buy
into, because as long as the states are continuing to make their own rules and enhance, you know, the model rules, it's -- it's going to continue to be a conflict and make our jobs and the lawyers' jobs very difficult.

MS. GILLERS: Thank you.

Specific questions from anyone? Lynda.

MS. SHELY: I have a question. Of the members of LMA, are the firms that you all represent mostly large national firms or --

MS. PERRET: No. It's -- it's really widespread. We have -- we have a number of firms that are a few lawyers to firms that are 2,000 lawyers. So we really run the gamut of small, medium, sole practitioners to the mega firms that are international. So, you know, unfortunately we don't really have -- well, we do have international rules now, because now we're talking about in terms of electronic communications and, you know, the content of information that we're storing. But it's a -- it's a very wide range of representation.

MS. GILLERS: Well, thank you very much. Let me encourage you to submit the written statement --

MS. PERRET: Yes, I will.

MS. GILLERS: -- that you will, and -- and anything that
you can give us that will help us see some of the practical problems that you have identified would be very helpful.

MS. PERRET: Thank you.

MS. GILLERS: Thank you.

Anyone else in the room like to speak? Going once. Going twice.

All right. Yes, please.

MR. CROTHERS: I have a question for the group. I didn't want to single anybody else -- or anybody out with this in particular, but we've heard that a number of states are taking initiatives on their own. We also have heard, both here and in our work-up to getting us here, that there's a huge desire to have some uniformity. And so my question for the group, if you would by a show of hands: If we change the rule dramatically — and I think what we're looking at is dramatic and some of the suggestions here today would make it more dramatic at least from where we are, because we do have a model rule, our seven model rules — do you think the states will follow if we simplify these rules as is, at least, proposed today? By a show of hands, yes, you think they might follow? Are those -- are there those who think they might not follow, they're going to keep going down their errant
ways?

SPEAKER FROM THE FLOOR: A little of both.

MR. GLAVES: I think your question -- I -- just a clarification. I mean, when you say "simplify," are you talking about the way that people have been suggesting in their remarks or the way the proposal is right now?

MR. CROTHERS: No, pick your -- pick your definition. We have what we have now.

MR. GLAVES: I -- yeah, I think your proposal now, I'm going to vote "no," because I think it doesn't go far enough. And I think people have testified to that all day.

If -- if it were simplified more along the lines of a lot of these comments -- I have an outdoor voice permanently, so I thought I was probably going to be fine here. My name is Todd Williams. I'm from the Chicago Bar Foundation.

So we're looking at this purely from an access to justice standpoint, and we are stifling innovation with these overly prescriptive rules right now. That's kind of our general position on it.

And I think people have said this very well today, so I'm not going to repeat what's been said. I think -- if a more simplified version, we really cut
to the chase of what 7.1 is and the modified solicitation things that have been suggested, which are consistent, I think, with what you're doing -- if it goes further, I think there's a lot better chance of seeing uniformity on something like that than the -- THE current proposal.

MR. CROTHERS: If we followed Virginia, would that meet your definition of "simplified"?

MR. GLAVES: I -- I don't know enough about Virginia to say that.

MS. SHELY: Virginia is primarily the APRL proposal.

MR. GLAVES: Yeah, the APRL proposal I think is closer to what would get more states to come onboard, in my opinion. But I think just for clarity and your question — I'm polling the audience — I think that would be a material factor, I'm guessing, by some of the people who have testified today.

MS. GILLERS: Thank you.

MR. CROTHERS: Thank you.

MS. GILLERS: John, come up ...

MR. BERRY: I was going to give you an answer to your -- I'm John Berry. I'm here on a number of different reasons: One is to just observe on behalf of the National Organization of Bar Counsel — I'm a delegate — and also just to listen to what was going
on.

And I was the executive director of the Michigan Bar for a while. Most of my work has been in the regulatory field one way or the other. And we had some major changes going on in our rules, and I got a call from the then-chief justice who — let me put it this way — in very strong terms indicated to me that the rules that we had were not consistent enough with other rules in the States and that she just came back from the Conference of Chief Justices and expected us to give them consistent rules. So we went back and gave consistent rules, and then the Court completely changed them to be inconsistent with the other states.

I think the answer to your question is -- is that from my practical experience from my whole career is -- is that when you get into more emotional areas or more differences of opinion, you’re more likely to get tinkering in this area.

I think it is somewhat true that since states are starting to coalesce on some ideas that need simplification, that there's more likelihood you'll get more states to agree. But my observation from regulation is I don't think because we have a model rule from the ABA that all of a sudden you're going to have all these states come forward and do it. And the
problem is, in my opinion, is that even some of the minor changes you see as differences are major changes in interpretation of areas.

With that said, personally — this is John Berry — personally I applaud your effort for trying to do that and that we really do need to get as consistent rules in those areas that spill over between states or even internationally so that our lawyers can be consistent. If we don't do it, somebody else is going to cause it to be done. So I applaud you for that effort. But we've got a long ways to go to get that simplified.

MS. GILLERS: Thank you, John.

Anyone else?

Yes. Come back to the podium. Thanks.

MS. SHELY: While Will is coming up, I'm going to ask a questions of the audience: How many of you think we -- we need to go further? And you can cover your faces or your name tags [inaudible].

MR. CROTHERS: Before you start, can we ask -- ask the other question that relates to that: How many of you think that we've gone too far with where we're at now? I didn't --

MS. GILLERS: No one. No one in the room

MR. HORNBY: I can't remember what the question was that I came up here to answer. I was once -- I once referred
to bar associations as being schizophrenic and was
criticized for saying it was mentally ill; but in this
context, we have an enormous energy of
bar associations as -- especially at the state level,
to expand access to justice over here and we have some
energy to limit the ability for lawyers to do that by
expanded rules governing advertising and solicitation
over here, and it's -- it's going to be an
incredible -- whatever you come up with, whatever the
House of Delegates adopts, it's going to be an
incredible hard sell because history tells us that
what states do is they take the ABA model rules and
then they embellish them and they add on their --
whether it's tinkering or whether it's very
significant changes, they -- they don't just take it.
You know, maybe they just need to put their imprimatur
on it to, you know, have their own sense of -- of
credibility for what they're doing, their own time,
their own sense of spending their time on something,
rather than, you know, the sense that they're
rubber-stamping it. But it's an incredibly hard sell,
and it's going to take a tremendous amount of energy
from the ABA to create consistency across the States
for any set of rules, whatever you come up with.

MS. GILLERS: Thank you.
Come on up, Mark. I -- while you're coming up, Mark, I have a question for everyone in the room. If we adopt rules that you will support, how many of you will work with the ABA, and some of us, to get them adopted around the country? We're going to need lots of people to lobby for the adoption of these rules. Many.

Yes, Mark.

MR. TUFT: Let me respectfully disagree with the last comment. None of us who worked on this report and this effort — for, what, four years now — thinks for the moment that you adopting the rules you recommend is going to get the job done. It is going to take a concerted effort, and there has already been concerted effort. And I can tell you, personally speaking, that when we started this dialogue and we got the liaison of NOBC, it started discussions and that discussion has led to a report, which has led to your committee, which is going to lead to the House of Delegates, and that will not be [inaudible]. Yes, we're going to have to go to caucus chief justice. We're going to have to educate. We're going to have to go around the country. But the access to justice, they need enormous impact of technology on all the needs of practitioners and consumers. I don't think this wave
is going to just go away.

Now, will we achieve it? Maybe not a hundred percent, but we'll do a darn good job of getting more uniformity that we need.

And by the way, this is just the beginning. Once you have some -- some commonality in advertising, now some of the other issues that have been addressed here today about access to justice will -- will be improved.

So this is a road worth taking, and I don't think we should be deterred in any way, shape, or form.

MS. GILLERS: Good, Mark. Thank you.

I think on that very optimistic and positive note and our -- I want to observe that our time is up. I want to thank everyone in the room especially thank the panelists and the working group.

And I want to invite you, again, please, to submit your comments. You can do it on the website. You can do it to the members individually outside in the hall. You can send us an e-mail. You can send an e-mail to the staff. And you can always reach me at barbara.gillers@nyu.edu. So please let us hear from you, and thank you again for coming, and stay tuned.

--- Whereupon the proceedings adjourned at 3:33 p.m.
REPORTER'S CERTIFICATE

I, Joanna M. Cross, Official Reporter in the Province of British Columbia, Canada, BCSRA No. 448, NCRA No. 57796, do hereby certify:

That the proceedings were taken down by me in shorthand at the time and place therein set forth and thereafter transcribed, and the same is a true and correct and complete transcript of said proceedings to the best of my skill and ability.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 20th day of February, 2018.

[Signature]

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