

1 RE-EVALUATING LOUISIANA'S
2 LAWYER ADVERTISING RULES

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5 PUBLIC HEARING
6 NOVEMBER 16, 2006

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9 FEDERAL COURTHOUSE
10 SHREVEPORT, LOUISIANA

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19 REPORTED BY: Christina M. Wallace, CCR

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1 P R O C E E D I N G S

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3 MR. SHEA: We're here today for a public
4 hearing concerning proposed rules with respect to
5 Louisiana's Rules of Professional Conduct concerning
6 attorney advertising, and I've been asked to address just
7 a little brief background before we go through the
8 proposed changes.

9 Just so you know, we had an ethics 2000
10 committee several years ago that came out of an ABA
11 ethics 2000, and there were rule changes proposed with
12 respect to all of the rules including some rule changes
13 that were proposed with respect to advertising. The
14 ethics 2000 committee in Louisiana addressed all of the
15 rules except the advertising rules and referred those off
16 to the advertising committee.

17 I eventually became a part of the
18 advertising committee, as head of the ethics advisory
19 service committee, which now includes advertising, and so
20 we formed a subcommittee that began looking into possible
21 changes in the Louisiana rules with respect to attorney
22 advertising. That process was delayed due to the
23 hurricane, and so when we came back to start again with
24 our work on those rules, some activity occurred at the
25 legislative level.

1 In March of 2006 -- we had already had
2 some meetings in our subcommittee, but in March of 2006 a
3 bill regulating advertising and solicitation by Louisiana
4 lawyers was introduced in the state Senate and it passed.
5 We contacted those legislators who were associated with
6 the bill and indicating that we felt that this might run
7 into the Supreme Court's jurisdiction to oversee the
8 practice of law, and I think being cognizant of that and
9 wanting to give the lawyers an opportunity to regulate
10 themselves, the bill was not enacted, as it was not
11 passed in the House, and instead there was a concurrent
12 resolution passed by the House and the Senate requesting
13 that the Louisiana Supreme Court set up a committee to
14 review the rules concerning attorney advertising. And in
15 furtherance of that resolution, the Supreme Court
16 appointed a committee to study attorney advertising of
17 which I am a member, Sam is a member, Mr. Plattsmier is a
18 member, and we went to those meetings with the Supreme
19 Court that's being headed up by Justice Kimball.

20 From there the Supreme Court met, and when
21 they were advised that a subcommittee of the Rules of
22 Professional Conduct was already looking at this and had
23 proposals, the Supreme Court committee allowed the rules
24 committee of the Bar to proceed or complete its
25 evaluation of the rules and submit those to the Supreme

1 Court committee. Without going through all of the
2 details of what the rules committee does, this is one of
3 its functions, and it performed that function and
4 submitted a draft set of rules to the Supreme Court's
5 committee.

6 So that happened, and the committee has
7 proposed advertising rule changes to the Supreme Court
8 committee, and the Supreme Court committee has basically
9 approved putting these proposals out to the public and to
10 the Bar for review through these public hearings with --
11 it is anticipated that we will go from these public
12 hearings back into meetings of the rules committee and
13 meetings of the Supreme Court's committee on advertising,
14 take into account everyone's comments, suggestions and
15 revise the rules accordingly for purposes of submitting
16 those rules to the House of Delegates in January and then
17 proceeding from there to submit the rules as adopted, if
18 adopted, to the Supreme Court for review and adoption of
19 rule changes in this area.

20 And I think with that, that generally
21 summarizes how we got where we are and why we're here.
22 Yes? When you are commenting upon the rules or have
23 something to state on the record, we encourage you to
24 make those comments, but please state your name, your
25 occupation and speak clearly so that the court reporter

1 can take down all of the comments. We're going to take
2 all of these comments and take these transcripts and
3 review them very closely, very similar to the process we
4 went through on ethics 2000, and we're going to take
5 those comments and incorporate those which we feel have
6 merit into modifications of the proposals we have now.

7 And with that I guess we move forward, and
8 Richard was going to take over with the Bar Association.
9 Mr. Lemmler is the counsel for the ethics advisory
10 service committee and has been instrumental in putting
11 together these rules and keeping up with the changes, and
12 he is kind of the reporter for the group, and he is going
13 to go through the changes so that everybody will have a
14 chance to see where we are.

15 MR. LEMMLER: Thanks, Larry. As Larry
16 said, we've been doing this around the state. This is
17 the fourth and final of the public hearings that we've
18 done so far. We started out in Baton Rouge. We went to
19 Lafayette, and last week we were in New Orleans and today
20 we're in Shreveport. We're getting lots of good
21 comments. And as Larry said, at the next rules committee
22 meeting, which is going to be on the 29th of this month,
23 all of these comments will be compiled and reviewed and
24 considered. And you know, there are good things coming
25 out of these comments, things that are going to go

1 probably into the proposal that you're looking at right
2 now.

3 I want to start with what my coworker has
4 described as the Florida State Bar experience and
5 effectively why the proposals that you have, that we
6 have, look the way they do. When the subcommittee of the
7 State Bar's ethics advisory service committee started
8 looking at these advertising rules, and we had basically
9 a task -- we were given a task to look at them and
10 evaluate what we have right now, we started looking at
11 Florida's rules first because they are very
12 comprehensive. They have been tested pretty well. And
13 one of the other things that I think is really a key
14 component of their rules is that they also have a
15 handbook. They have about an 82 page handbook that they
16 give to all of their members that they put out that
17 pretty much describes and gives detailed information
18 about all of the rules, about how to apply the rules,
19 about what you need to put in your ads, what you don't
20 need to put in your ads. They give examples. It's very,
21 very helpful, it's a very, very detailed product, and I
22 think the rules committee fully envisions providing, if
23 these proposals are adopted in some form similar to what
24 they are right now, also providing a handbook at one
25 point. The logistics of right now trying to compile an

1 82 handbook with rules and rule numbers that are not yet
2 set in stone is a monumental task, and I've already tried
3 to do it one time and it's pretty hard. So that's
4 probably at least in the forecast if the proposal goes
5 through the way it is.

6 But essentially what you're looking at are
7 the framework of Florida's rules with our rules, in many
8 instances, injected into them. It's our rules on
9 steroids, if you will. The language, a side by side
10 comparison that is part of the materials that we have in
11 the back that I prepared, pretty much shows that our
12 existing rules on the right have not been -- none of the
13 language -- virtually none of the language of our
14 existing rules has been deleted or removed. It fits very
15 nicely, dovetails very nicely into what the proposal is.
16 So it's, again, Florida's rules modified for our
17 purposes.

18 I will tell you as well though that on
19 November 2nd Florida, through its Supreme Court, modified
20 their rules again and that those modifications are not
21 yet incorporated into this proposal. As I go through our
22 proposal today I'll try to point out what I've gleaned
23 thus far looking at the new Florida rules as to where
24 they are different from our proposal and where the rules
25 committee may be looking at perhaps yet further modifying

1 the proposal you see before you. It actually addresses
2 some of the issues we've encountered at the public
3 hearings. People's comments have been made about certain
4 points, and you know, my response or what I try to tell
5 them is, well, Florida has already actually addressed
6 that or taken it out or changed it in some fashion. And
7 so where I can recognize that, if the comments come up
8 today, I'll also try to mention that to you. But that's
9 essentially what we're talking about with Florida Bar
10 experience.

11 We've broken this down really into two
12 parts, and at some point it will take the rules out of
13 order, but really there's a substantive component of the
14 rules which you can and cannot do, and then there's a
15 procedural aspect which deals with a filing requirement
16 and a review aspect. So we'll do the procedural part --
17 I'm sorry, the substantive part first and then the
18 procedural component. As I go through this, I'm just
19 going to go rule by rule, and really the rules are not --
20 on the power point show verbatim. We've kind of tried to
21 summarize where it was appropriate, where we thought it
22 was appropriate to try to streamline this so we don't
23 have to spend all day doing this. But at any point just,
24 you know, raise your hand, identify yourself and make
25 your comment and I'll recognize you one at a time,

1 please. And I don't think that will be a problem here.
2 When we were in New Orleans there was about 50 people and
3 it was a little more of an issue, but we're a much
4 smaller group here. So let's proceed.

5 Just to give you an idea comparatively,
6 the current Louisiana rules on the left and the proposed
7 rules on the right, you can see just size wise we've got
8 five rules now and we're going to be proposing ten. But
9 many of the rules on the left, the current rules, as I
10 said, fit into the proposed rules almost verbatim in many
11 places.

12 All right. Rule 7.1, proposed rule 7.1,
13 which is effectively just a definitional rule, pointing
14 out permissible forms of advertising, advertising in the
15 public media, which would include print media such as
16 telephone directories, legal directories, newspapers and
17 other periodicals, outdoor advertising such as billboards
18 and other signs, the more publicly recognized forms of
19 lawyer advertising, radio and television,
20 computer-accessed communications, web sites and so forth,
21 recorded messages the public may access by dialing a
22 telephone number -- I'm not sure how current that still
23 is anymore, but it's still in there -- and written
24 communications sent in accordance with Rule 7.4. That's
25 effectively direct mail, targeted written solicitations.

1 Any comment about 7.1, any suggestions?

2 Okay. Moving forward. 7.2. 7.2 is a
3 very large rule. This is just an overview of the rule.
4 It's broken down into required information, prohibited
5 statements and information and then general regulations
6 governing the content of advertisements which also would
7 include what we're calling the safe harbor provisions,
8 things that you can do that are presumptively approved
9 and presumptively okay. I'll mention and note for you
10 that in Florida's policy recent revision they have
11 effectively flipped B and C. They have put now the more
12 permissible forms of advertising first, perhaps as a
13 psychological effect just to say, look, we're going to
14 tell you what you can do first rather than what you can't
15 do, but they have just really flipped those things, and
16 so we'll be looking at that, I suppose, in the rules
17 committee on the 29th, and the Court will probably be
18 considering that as well.

19 Getting into the heart of 7.2, 7.2(a)
20 contains a description of what is required in all
21 advertising, the name of the lawyer responsible for the
22 content of the communication, as well as an office
23 location, the location of the practice, a bona fide
24 office location of the lawyer or lawyers who will
25 actually perform the service as advertised.

1 7.2(b). This again lists the prohibited
2 statements and information.

3 MR. GREGORIO: Richard, I think we might
4 have a question back here on seven.

5 MR. LEMMLER: Sure.

6 MR. WELCH: It may have been --

7 MR. LEMMLER: I'm sorry, your name?

8 MR. WELCH: I'm sorry, Keith Welch. I'm
9 with Simon, Fitzgerald, Cooke, Reed & Welch. It
10 probably was in the previous rules, but the 7.2(a)(1)
11 says shall include the name of at least one lawyer
12 responsible for the content. I think our television ads
13 effectively do that; however, they don't say this person
14 is responsible for its content. They simply identify a
15 lawyer that is appearing on screen. But I'm wondering is
16 that required? Our firm name is clearly identified
17 throughout the commercial. Do we have to pick out one
18 lawyer and say one lawyer is responsible for the content
19 when the firm is so clearly known and is the one
20 responsible for the -- it is a partnership, it is
21 responsible for that advertisement?

22 MR. LEMMLER: I'll let the committee
23 members present try and answer that first.

24 MR. SHEA: I think it has to include the
25 name of a lawyer, all right, a licensed lawyer who is in

1 the ad who will stand responsible for having put the ad
2 on. I'll give you an example. I actually saw an
3 advertisement on television, and I think it was last
4 night. Last night must have been the night of the ads.
5 Y'all tell me if that is a good night for advertising,
6 but it was. And this advertisement, you didn't know who
7 the lawyer was, you didn't know where they were from, you
8 didn't know where their offices were, you didn't know if
9 they were from Louisiana, and all it did was say call
10 1-800-LAWSUIT, and that was it. And that ad came across
11 the screen, and you know, I mean, it said a lot of things
12 they were going to do for you, but you had no idea who
13 anybody was, and it came and it went, and who would have
14 known -- who would ever know who was associated with that
15 ad.

16 MR. D'ANNA: It was a referral system.

17 MR. SHEA: It was probably a referral
18 system, and if it's a referral system it's probably not
19 legitimate because there are only certain referral system
20 services that are permitted in Louisiana, and this one
21 probably was not, because I would not have expected those
22 public referral services that we do permit to have
23 engaged in that.

24 So I think that you have to have the name
25 of the lawyer responsible for the content of the

1 communication, but when you give a lawyer's name, it's
2 not a specific sentence. You'll see where this rule
3 requires a specific declaration. It seems to me you just
4 need to give the lawyer.

5 MR. GREGORIO: I think that was my
6 understanding of the committee also, not that we have to
7 make that statement.

8 MR. D'ANNA: Right. John D'Anna. I had
9 in the past gotten mailers from outfits like the injury
10 help line, the injury hotline or something like that, and
11 the way those things work is you pay X dollars, and for X
12 dollars -- and they show an 800 number -- say they get
13 in call -- if I pay \$500, I'm guaranteed maybe 20 calls,
14 I will get the fifth call. The fifth call is routed from
15 them to the attorney. But when you see the ad on TV, it
16 doesn't say anything about John D'Anna or whoever. It
17 just says injury help line. It's basically a telephone
18 rotator service. And so are those going to be prohibited
19 by this ad? The telephone systems are outside of
20 Louisiana.

21 MR. SHEA: In my view, those these are not
22 only permitted by this ad --

23 MR. D'ANNA: I mean by the rule.

24 MR. SHEA: -- by this rule, that ad would
25 be, and the service has already prohibited by the

1 existing rules.

2 MR. D'ANNA: Okay.

3 MR. SHEA: Because what you're doing there
4 -- and Mr. Plattsmier is here, so he might be able to
5 address it -- I think what you're doing is that they
6 are running you. They are basically runners, and you're
7 paying them, compensating them for that service. I would
8 think there would be a problem with that type of referral
9 system altogether.

10 MR. D'ANNA: Those systems are out there,
11 and I don't know --

12 MR. BAILEY: I just recently got solicited
13 by one.

14 MR. MALLOY: I'm Kevin Malloy. Getting
15 back to Mr. Welch's question, I just want to clarify it a
16 little bit. With regard to the name of a lawyer, yeah,
17 obviously, when you do a commercial, the Law Office of
18 Jack Bailey, Jack is identifying his name. Our firm --
19 I'm with Simon, Fitzgerald, Cooke, Reed & Welch -- we
20 very clearly have the name of lawyers in the law firm.
21 Mr. Welch, you know. It seems obvious that you can say,
22 okay, Mr. Welch is a lawyer who is doing this, if
23 Mr. Welch is still practicing law.

24 I mean, what's the major different between
25 putting a first name and the law firm's name when you

1 have that consideration? Why do we have to also say,
2 okay, Mr. Keith Welch endorses this or put Keith Welch in
3 there as a full name? Do you see a distinction?

4 MR. SHEA: Yes. We don't -- the attorney
5 disciplinary system does not regulate law firms, it
6 regulates individual lawyers, and so consequently, if
7 there is not someone responsible for the advertisement,
8 everybody would say I didn't do it. Do you see what I'm
9 saying is that -- Mr. Plattsmier can speak to that, but I
10 believe that that's the reason why the rule is written is
11 that there is someone responsible for the ad.

12 MR. PLATTSMIER: My name is Chuck
13 Plattsmier, and I have to agree. I think the purpose
14 behind the identifier is twofold. Number one, there have
15 been ads that have provided information to the public
16 without identifying an attorney by name, and certainly
17 that rule or that requirement hopes to address that
18 concern to make sure that there is a name and an
19 identifiable individual attached to the advertisement.
20 The second is I think the point that Mr. Shea has made,
21 and I think it's an accurate one, and that is at least in
22 Louisiana, and in most states, although not all, law
23 firms cannot be the subject of a complaint as a firm, but
24 can be the subject -- but individual members of the firm
25 can be the subject of a complaint or an investigation.

1 By requiring that one member of the firm, whether it be a
2 managing partner or someone with the firm who is
3 identifiable take responsibility for the ad, it allows
4 for the consumer or the regulatory agency to look to a
5 specific individual who may be knowledgeable about the
6 purpose, the intent and the information conveyed in the
7 ad.

8 MR. GREGORIO: Let me -- Sam Gregorio.
9 As far as complying with the rules, for example, with the
10 specific question for a law firm, the handbook I suspect
11 will be helpful, and number two is there will be a
12 preapproval process so that the law firm can know that
13 they are following the rules, and we'll get to that later
14 in the rules.

15 MR. LEMMLER: I think just to add perhaps
16 just a little bit to that, one admittedly supreme example
17 I can think of is firms are not required to have the
18 names necessarily of living lawyers in the name of a law
19 firm. I mean, an older firm you could have a whole list
20 of partners who are no longer alive. I guess conceivably
21 you could have a firm with all deceased partners in the
22 firm name and, you know, everyone else is practicing, so
23 no one in that firm name would be perhaps responsible for
24 its content any further. So, you know, that's extreme,
25 but --

1 MR. MALLOY: Kevin Malloy again. That was
2 the distinction I was making though. I understand that,
3 and that's one of the statements made, but if you have a
4 firm that does, you know, I'm just saying you might want
5 to consider changing that a little bit because you
6 already do have a name there on the firm.

7 Another possible suggestion though would
8 be rather than putting that name on the ad, is
9 registering it with the committee that this is the person
10 responsible for this ad, because, you know, sometimes it
11 becomes unwieldy that if you do have a law firm name,
12 to say a specific individual is responsible for its
13 content to the public.

14 MR. LEMMLER: A very good comment, a very
15 good comment. Thank you. Anyone else on this point
16 before we go on forward a little bit?

17 Back to the 7.2(b) prohibited statements,
18 just to summarize a little bit, it provides a list of
19 statements about legal services, what would be considered
20 misleading or deceptive factual statements, it talks
21 about descriptive statements, prohibited visual and
22 verbal portrayals, advertising areas of practice and
23 stating or implying LSBA approval. And let's get into
24 the heart of that now.

25 7.2(b). Prohibited statements about legal

1 services. "A lawyer shall not make or permit to be made
2 a false, misleading, deceptive, or unfair communication
3 about the lawyer, the lawyer's services or the law firm's
4 services." I would note for you that in Florida's newest
5 revision on November 2nd they removed the word unfair.
6 So they are more in keeping with what the ABA model rules
7 say and what our current rules say, false, misleading or
8 deceptive, and that's pretty much the foundational rule
9 for all of this in 7.2. And you see there, same as our
10 current Louisiana rule 7.1.

11 7.2(b), moving forward, "A communication
12 violates this rule if it contains a material
13 misrepresentation of fact or law or omits a fact
14 necessary to make the statement considered as a whole not
15 materially misleading." I will note for you as well that
16 Florida has now removed the last clause of that regarding
17 omits a fact necessary to make the statement considered
18 as a whole not materially misleading. I suppose the
19 committee will be looking at that, and I'm not sure what
20 Florida's motivation is, but I'm just mentioning to you
21 that that's what they have done in Florida.

22 "Contains any reference to past successes
23 or results obtained or is otherwise likely to create an
24 unjustified expectation about results the lawyer can
25 achieve; states or implies that the lawyer can achieve

1 results by means that violate the Rules of Professional
2 Conduct or other law," all in our current rule right now.
3 Further examples, "Compares the lawyer's services with
4 other lawyers' service, unless the comparison can be
5 factually substantiated; contains a testimonial; includes
6 a portrayal of a client by a non-client or the
7 reenactment of any events or scenes or pictures that are
8 not actual or authentic." Yes, sir?

9 MR. WELCH: I have a question on that.
10 Keith Welch. We generally think of clients being someone
11 who has retained us, someone who has come in and agreed
12 to hire us. People that walk in the door as prospective
13 clients, I don't think of as clients.

14 Our current TV ad -- we have an older TV
15 ad we're not running that shows people walking into our
16 office, just opening up the door and the receptionist
17 greeting them. And those people were not clients. They
18 were people making reference to themselves as prospective
19 clients, but they haven't been hired and don't look like
20 they have been hired yet -- we've been hired yet. They
21 look like they are walking into our office.

22 I need to know whether that is a problem.
23 And then the current ad has people sitting at a table
24 talking to us, and one of them is a client -- one of them
25 was a client and one of them was not a client because we

1 wanted a wife to sit with him, and so we asked somebody
2 to sit with the client. And I say he's a client. In
3 that case he was representing someone who was not yet a
4 client, representing someone who had come in and we had
5 had a discussion with.

6 We're not saying -- we don't make any
7 audio representations about this. This is just
8 background video of somebody either sitting down and
9 talking to us or walking into our office. Do you see
10 that as a problem with (F)?

11 MR. LEMMLER: Again, I'll let the
12 committee members address that if they wish. Let me just
13 state before we get too far into this, we're not really
14 going to try to debate or provide advisory opinions, if
15 you will, on proposed rules that are not really rules
16 yet, but I think they could give you some insight as to
17 what the committee may have thought about it, and more
18 importantly, the comments are going to go going down. So
19 we're going to be considering these.

20 So we want your comments, just -- if we
21 don't know the answer, it's not -- it's because they are
22 good comments probably.

23 MR. WELCH: I can understand what (F) is
24 maybe trying to get at, and I can understand where you've
25 made someone look like they're a client, and they are

1 standing up there -- and particularly if it goes along
2 with a testimonial or something where it says I got a
3 million dollars, so and so got me a million dollars,
4 something like that and that person is not a client. I
5 understand that's way off base. I just don't know if
6 y'all have any guidance or any thoughts about the idea of
7 somebody who appears to be somebody who might become a
8 client. That's what we think of the people that we show
9 in our video.

10 MR. PLATTSMIER: Chuck Plattsmier. Keith,
11 I think that's an excellent point that you make, and my
12 thought is that Louisiana is likely to create the
13 handbook that Richard was speaking to earlier, and it may
14 well be that the handbook will be able to give some
15 additional guidance for the purpose of the intent behind
16 the rule and give examples of the sorts of things that
17 the subpart that you're referring to was designed to
18 address.

19 I probably shouldn't make this kind of a
20 comment, but I will, on the public record. I can't
21 imagine that the reach of the rule was designed to
22 address the sort of scene that you're talking about,
23 having someone sitting around a table without any audio
24 or comments being offered, but just to portray a scene of
25 prospective clients sitting at a table, talking to

1 lawyers of the firm about being hired. I don't believe
2 that that is the intent behind the prohibition of the
3 rule. And so my guess is that you'd see that sort of
4 comment perhaps in this handbook.

5 MR. WELCH: That would be great if I saw
6 that comment.

7 MR. SHEA: Let me just add in the comment
8 this does not prohibit reenactments, and I'm sure there
9 have been occasions where you've sat with people who were
10 clients or weren't clients and talked with them at a
11 table. So it would not be something that was not actual
12 or authentic, and so consequently I do not believe that
13 -- there is no bar to reenactments, and consequently, a
14 reenactment of an event such as sitting with a table with
15 both a client or a non-client, you haven't represented
16 what they are, you haven't indicated it's a portrayal of
17 a client, and sitting at a table I can't -- I don't see
18 where, as written, that that would be prohibiting that
19 kind of scene.

20 Now, of course, if you start having the
21 conversations or the advice and you start talking about
22 what's going on, then it might get into other problems,
23 but just of that having happened I don't -- I'm like Mr.
24 Plattsmier. I don't see that -- you know, I think that
25 the comments would suggest that that's not a problem in

1 my view.

2 MR. GREGORIO: Let me add one thing. Sam
3 Gregorio. Another distinction may well be a general
4 background scene versus a specific.

5 MR. SHEA: That's correct.

6 MR. LEMMLER: We have another comment.

7 MR. BAILEY: This is Jack Bailey,
8 Shreveport, Louisiana. I'd like to go back and ask a
9 question about (B), about create an unjustified
10 expectation about results the lawyer can achieve.

11 I do personal injury work. I'm currently
12 an advertising lawyer. A horrible thing that I think
13 goes on is the scene of the happy client that doesn't
14 look like they are hurt, and they say they got me
15 \$600,000. It's easy to do when the person had a three
16 million dollar case to begin with. And my concern is is
17 whether or not rule (B) will go far enough to prohibit
18 lawyers in the personal injury field from putting numbers
19 up on the screen in advertising, because I can tell you
20 those are inherently misleading, and personally I think
21 that, and I speak as a lawyer that advertises. And I
22 think it is the worst thing in the personal injury
23 advertising field, and I'm really concerned about it, and
24 I think that it's one of the things that has led to a
25 great deal of disrepute for the civil justice system in

1 our society.

2 And so it doesn't say that specifically,
3 and so I'm asking is there any chance the rule is going
4 to specifically forbid lawyers to use numbers in ads?

5 MR. LEMMLER: Larry?

6 MR. SHEA: This is Larry Shea. It
7 definitely prohibits what you described which is a client
8 or an actor standing there and saying they got me
9 \$450,000 because it prohibits testimonials, and that's a
10 testimonial. That is absolutely prohibited by the rule
11 as proposed. So that's out.

12 Now, I don't know that it necessarily
13 completely bars the use of a number somewhere in there,
14 but that would -- in order to make that number not be an
15 implied result might be very difficult.

16 MR. GREGORIO: This is Sam Gregorio. I
17 want to tell you my thoughts on that. This (B) prohibits
18 any reference, and I think the words any reference is
19 broad enough to include the use of numbers that then of
20 course fits the rest of the definition.

21 Jack, what I'm hearing is a comment that
22 you'd like -- so that we can consider it later, you would
23 like to have it specifically stated. Am I hearing that
24 right?

25 MR. BAILEY: You're hearing that right,

1 and let me -- I had some comments I was going to save for
2 last, but let me make them now. I have both advertised
3 and not advertised, and I am currently advertising. And
4 I do legal malpractice cases. I have also been involved
5 in the representation of two law firms that advertised
6 heavily and became intimately familiar with their inner
7 workings, and I represented one of the firms in front of
8 Mr. Plattsmier's organization in disciplinary matters and
9 another one having to do with problems within the firm
10 and a breakup.

11 And I know that advertising, as it has
12 been practiced in this state in the personal injury
13 field, from my personal experience advertising, not
14 advertising, trying jury cases and being involved with
15 firms that advertised, that advertising in the personal
16 injury field has been inherently misleading to the
17 public, and it is inherently misleading to the
18 prospective clients.

19 It also has given rise to lawyers who have
20 become businessmen who happen to have a law license
21 instead of professionals. And as a lawyer that does
22 legal malpractice work, I am constantly seeing cases from
23 the advertising lawyer mills in which cases either not
24 only went unrecognized as causes of action or cases that
25 were handled incompetently or not even even touched by a

1 lawyer's hands. And when you talk to the clients, why
2 did you go there, what made you think that they were
3 going to be successful with this type of case, invariably
4 the comments is, well, I saw this person on TV, and they
5 got that guy X amount of money, so I just knew they would
6 be able to get me that amount of money.

7 So advertising in the personal injury
8 field in which numbers are allowed to be used is
9 inherently misleading. And the problem that I see is I'm
10 an advertising lawyer who actually tries cases, so maybe
11 I don't say it's an unjustified expectation, and I don't
12 have the testimonial, I just scroll at the bottom of the
13 screen the names of all of the cases that I've tried to
14 conclusion in front of juries with the number.

15 Now, I know I did a good job in those
16 cases, but I also know to the public it is going to be
17 inherently misleading because in 60 seconds on a TV
18 screen you cannot discuss issues such as liability,
19 causation, insurance coverage, whether or not the law has
20 changed since then. I had cases from years ago that I
21 could list that no longer would even be a tort case in
22 Louisiana because of tort reform.

23 And so my comment is, as a lawyer that has
24 done this, it is inherently misleading, and I don't think
25 that that rule is strong enough to keep advertising in

1 the personal injury field from not being inherently
2 misleading to the public.

3 And I have one more comment in this area,
4 and I know that any lawyer in this room that has tried a
5 case to a jury in Louisiana in the past 15 years knows
6 this. When you're in a personal injury case and you're
7 in voir dire with the jury and the subject of advertising
8 comes up, the laughter, the venom that comes spewing out
9 of that jury box is absolutely unbelievable. Personal
10 injury advertising, as it has been allowed in this state
11 and is currently allowed, especially with these happy
12 people with these huge verdicts where you don't talk
13 about how badly they were injured, the medical care they
14 had to go through, you know, the facts of the case, it is
15 a giant skunk that's in the jury box. And what has
16 happened is even if you're not an advertising lawyer, if
17 you're Sam Gregorio that has never had a single TV ad in
18 his life, doesn't even have a yellow pages ad, when he
19 goes to the courtroom with his client, he cannot get the
20 stink from that skunk off his client.

21 And I can tell you in every single jury
22 voir dire that I have been involved in since 1986 -- I
23 don't know why that was the year of the great lawsuit
24 crises, and in Shreveport the first lawyer that started
25 advertising started advertising in the fall of 1983, and

1 by the fall of 1986, from there on, every time I picked a
2 jury, whether I was advertising or not, I mean, they
3 laugh, they don't take it serious, they don't think it's
4 a solemn thing anymore. They come to the jury box, and
5 they really believe in this thing about the lawsuit
6 lottery. They really believe that the parties are just
7 there only about money. They don't think it's about
8 justice. They don't take it with the seriousness that
9 they did when I was a young lawyer.

10 I just got through with a jury trial here
11 in this courthouse, and the judge allowed us basically
12 what I would call unlimited voir dire, and the subject of
13 advertising came up, and you could just tell that the
14 people weren't taking the case serious. They were
15 laughing about it. And this was a catastrophically
16 injured person, serious issues on both sides of the
17 table, and when I was a young lawyer and would try jury
18 cases, my perception of the juries were that they came in
19 there and it was a very solemn experience. It was --
20 they acted like the people act when I go to church.
21 They acted like this was something very important, and it
22 was an obligation. And now they act like, well, they are
23 sort of the referee on the football field and all of the
24 gamblers have their money on the different lines.
25 So -- I'm venting partially here also, but

1 I really believe that the worst thing that has happened
2 in the practice of law since I started practicing law in
3 1977 was personal injury lawyer advertising. And I think
4 there's a direct correlation with the amount of
5 advertising that has occurred and the disrepute with
6 which the civil justice system is now held by a lot of
7 the public. And I really believe that the primary
8 culprit is the personal injury advertising in which
9 numbers are allowed to be used where it creates this
10 horrible misperception of what actually happens in the
11 civil justice system.

12 And so my comment is I don't think, in the
13 personal injury field, this rule goes nearly far enough,
14 and I think -- and I would hope that the disciplinary
15 counsel would also be involved in this because it has
16 also created a problem with competency in the
17 representation of clients. And I think that the rule
18 should have a specific rule in any case involving a
19 personal injury case that you cannot discuss numbers in
20 any way, and you can't depict a person on the screen that
21 looks like they are not injured and talk about any amount
22 of money that they got because anything else is going to
23 be inherently misleading.

24 So that's -- I can tell you I started
25 making a list yesterday afternoon on the competency issue

1 of just some of the legal malpractice cases I've handled
2 in just the past three to four years that came to me from
3 advertising law firms where they advertise, they bring in
4 all of these cases, they have young inexperienced lawyers
5 or paralegals handling them, and the quality of
6 representation suffers terribly, and I just want to tell
7 y'all just a few of them I've handled in the past few
8 years: A case in which the lawyer in a road defect case
9 didn't know that the DOT in the state didn't own all of
10 the roads and they sued the DOTD instead of parish.
11 I've handled two cases in which they didn't know that
12 there was federal law under the Federal Motor Carrier
13 Safety Administration regulations that violated trucking
14 and the cases went totally unrecognized. I've had a
15 series of cases where people were injured on the job, and
16 because it wasn't a personal injury case, the people were
17 told you don't have a case, not you don't have a personal
18 injury case, you have a workers' comp case, you just
19 don't have a case. And by the time somebody said
20 something to them in the community and they came to see
21 me their comp case had prescribed. I've had a case where
22 a catastrophically injured person, because the
23 advertising law firms never handle workers' comp, and
24 they said the comp case will handle itself, they ended up
25 with a stipulation in the office of workers' comp that

1 the culprit in the case was a statutory employer, and
2 they didn't realize that that would cause immunity in the
3 personal injury case.

4 And so when I was a young lawyer and being
5 brought up in the system, when somebody came in and I
6 didn't know enough to know whether I really knew what was
7 going on in the case I was schooled that you call the
8 more experienced lawyer. And there's a long list of
9 lawyers in Shreveport that spent hours and hours with me
10 educating me about how to practice law. I was taught
11 that if you were not competent to handle a case that you
12 either referred it or associated somebody.

13 Personal injury advertising in the
14 personal injury field has totally destroyed that culture.
15 Now, with the lawyers that advertise in the personal
16 injury field, because you've got to fund all of this
17 money to advertise, you have to build this machine.
18 They are on a treadmill. They don't associate generally
19 lawyers, they don't handcraft the cases, they don't
20 analyze the cases, and the quality of representation that
21 the people are receiving is really dismal in a lot of
22 these cases. And they are going there not because of
23 reputation and referral which is the way that people
24 found their way to good lawyers. Now people that are
25 hurt are getting sent to lawyers on the basis of the

1 number of advertising dollars that have been spent in the
2 market, not what lawyer is good for their case.

3 And the other thing that I know from my
4 personal experience as both an advertising lawyer and a
5 non-advertising lawyer is the people in the public that
6 are most susceptible to being misled are the people that
7 are not educated and not sophisticated and therefore need
8 the most protection, and the most vulnerable part of our
9 population is the part of our population that is being
10 misled by this advertising.

11 So a lot of other reasons go into this,
12 but I just -- I can't tell y'all how strongly I feel that
13 there needs to be a specific rule directed to personal
14 injury advertising and the competency. And I also think
15 that we ought to have some sort of rule that when people
16 have combination cases of personal injury and workers'
17 comp there needs to be a disciplinary rule that you can't
18 just tell a person that you're representing that the comp
19 case is going to take care of itself and you're just
20 going to handle the personal injury case. I think that
21 is inherently a violation of several of the disciplinary
22 rules, but it's not the standard of practice. And all of
23 the advertising lawyers in Shreveport, except me, that's
24 the way they do it.

25 And they tell people, oh, well, the comp

1 carrier is going to get their money out of the PI case,
2 and they are going to be paying you, and we're going to
3 handle the personal injury case, and there won't be a
4 problem with the workers' comp. Well, untrue, because
5 when the defendants in the comp case go and get their
6 independent medical exam, and they create a false
7 controversy, and they get the independent medical exam by
8 the OWC, the client's case is ruined in the personal
9 injury case, and the advertising lawyer suddenly is
10 sitting there with all of these medical reports and a
11 vocational rehab expert that says their guy is not hurt
12 and an FCE that said that he's not hurt and suddenly
13 both cases are destroyed.

14 And so you have all of these people out
15 there that are being sucked in by this advertising
16 because they are the most vulnerable in the public. They
17 are unsophisticated, they are working class, they don't
18 have college educations. They are the people that as
19 professionals we are supposed to be protecting, and they
20 are being harmed the most by this type of advertising.
21 So that's about as short as I can make it. I have a lot
22 more to say, and I'd be happy to answer questions about
23 it, but thank you for listening to me.

24 MR. LEMMLER: Well, thank you for your
25 comments. Not to stifle any further comments, but you

1 can always send your comments in in writing, if you wish
2 to, as well.

3 MR. BAILEY: I'm going to do that.

4 MR. LEMMLER: And feel free to do that. I
5 encourage you to do that. Yes, sir? You had a comment?

6 MR. D'ANNA: I'm John D'Anna. I also
7 practice personal injury law, and I mirror what Jack
8 said. I advertise. I started advertising about a year
9 and a half or two years ago out of necessity because I
10 saw my market share in what I would call plain vanilla
11 smaller soft tissue cases and whatnot basically dried up
12 around the same time that the advertising mills came into
13 play and really started spending a lot of money.

14 So I started doing some ads. I don't
15 mention money in my ads. I think it's absolutely
16 horrible to allow ads to mention money. And as an
17 advertising lawyer I'm strongly in favor of these
18 proposed rules. And I agree with Jack. I would like to
19 have any mention of money eliminated. And I'm not going
20 to -- I'll adopt most of what he said, but I do have a
21 few points I'd like to make.

22 I think the current ads that we see now
23 are, first of all, damaging to us as a profession. Like
24 it or not, people don't like lawyers. They just don't
25 like us anymore. And when you see the ads on TV with

1 people holding up the checks, the \$500,000 checks, and
2 these people look like they could run a marathon, they
3 are not injured, people see that as a joke, and it makes
4 us look like we're basically just charlatans.

5 It does great damage to our profession,
6 not just personal injury lawyers but lawyers as a whole.
7 They are also incredibly misleading. When someone says
8 they got \$300,000, who knows what the case was worth, who
9 knows how much time they spent on it, who knows if it was
10 settled in ten days. All personal injury cases are
11 different. And when you throw numbers out there, you are
12 making people believe they are entitled to big numbers as
13 well.

14 I can give an example of that. I've had
15 clients come to my office on not huge cases, cases that
16 may be worth ten to twenty-five thousand dollars, and the
17 first thing they want to do is say, well, how much am I
18 going to get. And that's a cardinal sin. You don't tell
19 them what they are going to get because it never works
20 out that way. So what I do is I try to talk about the
21 nature of their case and give them a range of damages
22 that courts have awarded in the past if this is what your
23 case develops to be.

24 Well, when they hear that they may not get
25 more than \$25,000 as the most likely scenario I've had

1 them say, well, I'm going to go to the man on TV. He got
2 so and so half a million dollars, and the guy on TV, he
3 wasn't hurt as bad as I am. So I have lost numerous
4 people as clients because of that. I've also lost
5 clients where they would say, well, how long is it going
6 to take for you to settle my case, and you say, well, it
7 depends on how long it takes to you recover. And they
8 go, well, I have a friend who went to the man on TV, and
9 he got them his money in ten days. He really scared that
10 insurance company. He beat them down. He scared them to
11 where they paid him in ten days. So that gets to the
12 competency issue.

13 It's just terribly misleading, and it
14 makes it very difficult, you know, to try to do your job
15 the way it ought to be done. I have seen people come to
16 my office that were represented by the advertising mills
17 and the cases were so botched up, and then you have to
18 talk about splitting fees with these guys. Don't take
19 them. So you have people that end up, you know, with no
20 one to represent them and they lose their cases.

21 Another point is the insurance adjusters.
22 If you can get them to talk to you will tell that you
23 these advertising mills are the insurance company's best
24 friends because they settle cases for pennies on the
25 dollar. They are not going to cooperate with passing

1 these rules because the industry doesn't want to see it
2 changed. You will also find out, if you get them to talk
3 to you, that when they negotiate cases with these
4 advertising mills, they are negotiating with secretaries
5 and non-lawyers. Can we prove that? I don't know.

6 That's basically my comments. I mirror
7 what Jack says about mentioning of money. I don't know
8 if that would hold up. It would be great if it would
9 because every case is different. I think if these
10 proposed rules are adopted it would go a long way to
11 doing away with the misleading and also help repair the
12 image that lawyers, especially personal injury lawyers
13 have because right now it's not very good.

14 MR. BAILEY: I'd like to make one comment.
15 This is Jack Bailey again, and I want to follow up on
16 something that John said. I have several friends that
17 are insurance adjusters, and in my church one of the
18 deacons is the head of the fraud section for State Farm,
19 and I've talked to him about this many times, and I've
20 talked to many other adjusters about this, and I'll tell
21 you what it's caused. What has happened is there has
22 been the creation of an unspoken conspiracy between the
23 insurance companies and the advertising mills, and let me
24 tell you what the unspoken conspiracy is.

25 The unspoken conspiracy is the insurance

1 company knows that if they take a hard line on the case
2 that that client is going to leave, and he's going to go
3 to somebody like Sam Gregorio, John D'Anna or a competent
4 lawyer, and they are going to end up paying a lot on the
5 money on the case then. They know that they have got to
6 pay just enough money so that the advertising lawyer can
7 talk the client into taking it.

8 The unspoken part of the conspiracy on
9 behalf of the advertising mill is that they know they are
10 not going to try a case, and they know that the insurance
11 company knows that they are not going to try that case.
12 And so they know that when the insurance company makes an
13 offer they have got to talk their client into taking it,
14 and it has created this conspiracy that is unspoken that
15 goes on between the insurance companies.

16 And I can tell you a lot of these
17 insurance companies settle cases based on their
18 experience, and I'll tell you the conversation that I
19 have every week with some adjuster. Jack, I know you
20 have the case, and I know you're going to try it, and I
21 know we're going to have to end up paying you more money,
22 but we're settling cases every day for \$1,700, \$2,000 a
23 month, and under our adjusting rules, for that same type
24 of case, I can't pay you three or four times that amount
25 of money.

1 So in my firm we end up trying a much
2 higher percentage of smaller personal injury cases than
3 we used to because of the problem it's created with the
4 insurance companies. And I'll just tell y'all we have
5 not been able to settle a case with Allstate in about ten
6 years. We have tried every single case we have had with
7 Allstate. Why? Because when I talk to their lawyer and
8 talk to their adjuster they say because, Jack, we've got
9 this computer program, and we're paying the majority of
10 the lawyers in your city \$2,000 for that case. Yeah, and
11 I know you're going to get a \$10,000 verdict, but we
12 can't do it. And let me tell you the defense lawyer
13 doesn't hardly put any effort into the defense of the
14 case because he knows what's going to happen. He knows
15 what the case is worth, and Allstate doesn't spend that
16 much money defending it, but I still have to try it
17 because of the effect of this unspoken conspiracy. So
18 what does the client think? The client thinks that I'm
19 the bad lawyer because I can't get his case settled. And
20 I try to tell clients you can always settle a case if
21 you're willing to settle it cheap enough. But they don't
22 see that. They see the misleading advertising.

23 And then one final point I meant to make a
24 while ago. When lawyers started advertising and then, at
25 the firm I was then with at that time, my firm started

1 advertising. I've been on TV three different times, 1987
2 to late '89, '96 to '99, and then I started advertising
3 again in 2003. One of the most surprising things to me
4 was most of the people in the general public think that
5 you have to be something special to be on TV as a lawyer.
6 They don't know who it is that screens you to be on TV,
7 they don't know what process you have to go through to be
8 on TV, but they don't think that every lawyer could be on
9 TV. They don't understand that any lawyer that wants to
10 go down there and spend a couple of thousand dollars can
11 be on TV.

12 So they think that if I see this guy on TV
13 he must really be something special, and that's another
14 part of the inherently misleading part of the personal
15 injury advertisements. And so when you combine their
16 idea that you're already something special because you're
17 on TV, and then you combine that with these people that
18 don't look like they are really hurt and with a big smile
19 on their face that got all of this money, these people
20 are totally misled in the public. And again, it is the
21 most vulnerable part of the public that are the ones that
22 are being the most misled and misserved, and they are
23 the ones that we have the greatest obligation as a
24 profession to be protecting.

25 So again I plead with the disciplinary

1 counsel to take up this cause on behalf of our
2 profession. Thank y'all.

3 MR. LEMMLER: Thank you. Thank you.

4 Yes, sir?

5 MR. MOUTON: I'm not sure whether --

6 MR. LEMMLER: I'm sorry, can we get your
7 name?

8 MR. MOUTON: Edward Mouton, Shreveport,
9 Louisiana. For instance, if the lawyer should come on
10 the market advertising that he accepts a lesser fee than
11 other lawyers and giving a percentage fee making it look
12 like other lawyers charge too much I guess, and not
13 including the fact that that fee -- that percentage may
14 not include expenses and other things that may easily
15 equal or exceed the amount of contingency fee that other
16 lawyers collect, would that be potentially misleading
17 under (A) of a fact? I'm not sure that that's broad
18 enough, and I'm not sure whether I understand -- I think
19 another lawyer was mentioning this here -- about the use
20 of portrayals, like a person coming in and speaking to
21 his firm being an actor, not necessarily a client, and
22 this rule (H) that would depict the use of a courtroom,
23 considering the general business that we're in, why that
24 would be considered in any way unprofessional or
25 misleading in any way if it's clear that it's just a

1 portrayal and not an actual -- I mean, cameras are
2 prohibited in Louisiana courtrooms, so that couldn't be.
3 It would have to be a reenactment or just a portrayal.
4 Why is that considered to be unprofessional in this
5 venue?

6 MR. LEMMLER: I think with respect to your
7 question about the fees, Larry, do you want to try to
8 answer it?

9 MR. SHEA: This is Larry Shea. The fee
10 part, you certainly are entitled to advertise what you
11 charge as a fee. And if you charge a percentage fee and
12 you put that percentage out there, you're entitled to do
13 that. Now, you have to watch comparisons with others
14 because that's the problematic, but in terms of simply
15 stating a percentage, as long as you add with it what
16 costs are being taken out. You have to be clear as to
17 how the fee is calculated. If you're going to state the
18 fee out there you've got to give an accurate description
19 of that process, which means if you're going to take out
20 the expenses before you calculate your percentage or
21 whether you're going to take them out after, those kind
22 of things have to be stated when you start talking about
23 fees.

24 If you give free consultation, you can say
25 that. You can tell people that you do that as long as

1 there's no charge associated and you describe what you
2 give it for or first visit or whatever. Those are
3 permitted in other parts of the rule, specifically
4 permitted. And in fact, I think they are in the --
5 you're going to find them in the area of the -- the safe
6 harbor area. You can actually do it without going to
7 anyone. In a published ad you can give that information.

8 MR. MOUTON: Would that have to be a
9 consultation with the attorney or just with the firm?

10 MR. SHEA: Now you're talking about having
11 a conversation in front of the screen?

12 MR. MOUTON: No, I'm talking about if
13 you're advertising free consultations.

14 MR. SHEA: You just have to be truthful,
15 okay? You have to be truthful about what it is, and you
16 have to fully disclose it. Once you go into the subject
17 you have to give all of the pertinent information, but I
18 believe the tombstone describes exactly how to do that
19 under these proposed rules and says this is permissible
20 advertising.

21 Now, the reason why the courtroom scene is
22 prohibited, at least as I understand it under the Florida
23 rules and as I perceived it and our group perceived it in
24 putting these rules together, is it kind of suggests some
25 sort of endorsement of the Court system. You are

1 endorsed as the lawyer in the courtroom, here you are,
2 and you're there, and you know that you can't film in a
3 courtroom --

4 MR. MOUTON: Right.

5 MR. SHEA: -- but the public doesn't. And
6 so consequently it is a -- that's the reason why. The
7 whole point is to present advertising that is not
8 misleading in any way, shape or form, but simply let's
9 you get the message out, because the first rule here is
10 you may advertise. Please remember that. The first rule
11 is you may. The rest of it is to describe what you may
12 do, but we recognize that attorneys may advertise, but we
13 don't want to, in any way, mislead the public as a part
14 of that advertising process. Now, that's my view on
15 that, and I think that's the view that gave rise to those
16 rules.

17 MR. MOUTON: Can you repair -- Edward
18 Mouton, Shreveport -- repair that -- any kind of a
19 misunderstanding that anybody viewing it might have a
20 disclaimer that say, you know, not actual court scene,
21 not actual -- I mean, I have a commercial, for instance,
22 in my criminal practice that we filmed in the Shreveport
23 city court. We don't have a real judge. We have
24 somebody wearing my graduation gown from college that
25 looks like a judge, but he's not judging or endorsing in

1 any way what we're doing, and it's -- you know, it's

2 just -- it's not real.

3 MR. SHEA: Well, that would not be

4 permissible under this set of rules. That would not be

5 permissible. But I will tell you in terms of what is

6 permissible, and Sam Gregorio has mentioned this already

7 and Richard has described it. There will be a process by

8 which before you ever spend money on an advertising and

9 what it is going to show, if you want to show what it's

10 going to be and submit it to the Bar Association for an

11 advisory opinion as to whether or not it will pass muster

12 under the rules you can get one so you will never go and

13 make an ad, all right, you don't have to ever go and make

14 an ad that would not be in compliance with the rules

15 because once you get a that's okay from the ethics

16 advisory committee on that, once you get that recognition

17 from them and they give you the opinion as to what's good

18 and bad, and you structure the advertisement in

19 accordance with that, then that is an approval of the ad.

20 And so you don't ever have the problem of putting ads out

21 or putting them together or paying for them without first

22 being able to get them approved.

23 MR. PLATTSMIER: This is Chuck Plattsmier.

24 The only limitation on that is that the rule states

25 pretty specifically that an approval by the ethics

1 advisory service doesn't grant you an immunity from a
2 complaint that might be filed against you and a
3 subsequent determination that perhaps it does violate the
4 rule, but it is introduced as mitigation. And as a
5 matter of policy what we're hoping to do is to encourage
6 people to make use of the screening process.

7 So I will tell you as the chief
8 disciplinary counsel, that sort of evidence that Richard
9 and Billy and Sherry and the folks -- and Eric, the
10 folks at the LSBA who go through this process of review
11 and who bless it is going to be very powerful and very
12 persuasive evidence of good faith on the part of the
13 lawyer to do the right thing. And it is difficult to
14 envision a set of circumstances where we would feel
15 compelled to prosecute a lawyer for a discipline
16 violation if they have gone through the effort and tried
17 to do it right. So subject to that.

18 MR. SHEA: No, and I should have put that
19 caveat on there.

20 MR. LEMMLER: Let's try to move a little
21 forward. I think you'll see in a minute that the safe
22 harbor provision do provide for some of the aspects of
23 what you're asking about, maybe not all of them but some
24 of them.

25 The further examples you discussed depicts

1 the use of a courtroom. I think the distinction to be
2 made there is it says the use of a courtroom. I don't
3 know that anyone -- the question we got at the other
4 hearings is whether you could show a courtroom at all or
5 a courthouse at all in your ad. I think as long as
6 you're showing just the courtroom or the courthouse
7 itself, as opposed to the use of it, perhaps that's a way
8 to at least get, you know, that -- if it's a beautiful
9 setting and you just want to show that courthouse in your
10 ad, I don't think there's a problem with that
11 necessarily.

12 MR. MOUTON: Edward Mouton. So not an
13 actual courtroom would then -- if it wasn't an actual
14 courtroom, it wouldn't violate that rule.

15 MR. LEMMLER: Well, again, the use of the
16 courtroom I think is the specific there, that you're
17 showing -- and, again, I'm not trying to give an advisory
18 opinion on the fly here, but my understanding and my view
19 of what the language says in there is that, you know,
20 basically a courtroom in action, somebody in a courtroom
21 in a setting with a judge and a jury and so forth, I
22 think that's the use of the courtroom as opposed to the
23 building itself, the structure. I think that's the
24 distinction that I see here. I don't know that --
25 falling back to the false, deceptive or misleading

1 aspects of it, if it's just the courthouse itself, I
2 don't know how that would necessarily be false, deceptive
3 or misleading, but I don't want to argue that point.

4 "Resembles a legal pleading, notice,
5 contract or other legal document." That's already in our
6 rules right now. "Utilizes a nickname, moniker, motto or
7 trade name that states or implies an ability to obtain
8 results in a matter." And I'll note for you again the
9 key portion of this is that it states or implies an
10 ability to obtain results in a matter, not necessarily
11 that we're against all nicknames or all mottos or
12 monikers but that you're implying an ability to obtain
13 results.

14 "Fails to comply with Rule 1.8(e)(4)(iii)
15 out of Rules on Financial Assistance," which right now
16 state that you cannot advertise in advance that you would
17 be providing loan guarantees or other payment of expenses
18 without any compensation and so forth trying to get
19 clients in advance of actually having clients and
20 promising them some sort of financial assistance.

21 "Misleading or deceptive factual
22 statements." I'll note for you that Florida has
23 effectively removed this entire section from its newest
24 provision. I'm not sure necessarily why. There are some
25 aspects of this I suppose that are a little more

1 subjective than would be comfortable to some people. I'm
2 sure that the committee will be looking at it as far as
3 whether they are going to remove this from our proposal,
4 but it's in our proposal right now.

5 "Any factual statement contained in any
6 advertisement or written communication or any information
7 furnished to a prospective client under this rule shall
8 not be directly or impliedly false or misleading; fail to
9 disclose material information necessary to prevent the
10 information supplied from being actually or potentially
11 false or misleading; be unsubstantiated in fact; or be
12 unfair or deceptive."

13 Moving forward. Descriptive statements.
14 7.2(b)(3). "A lawyer shall not make statements
15 describing or characterizing the quality of the lawyer's
16 service in advertisements and written communications;
17 provided that this provision shall not apply to
18 information furnished to a prospective client at that
19 person's request or to information supplied to existing
20 clients." So you can tell your existing clients or even
21 prospective clients who ask for it, you know, tell me
22 something about yourself, what kind of lawyer are you,
23 what kind of success rate have you had. You just can't
24 put that in your advertisement. But if they ask or if
25 it's somebody that you're already representing, obviously

1 that is something they probably want to know and want to
2 talk to you about.

3 7.2(b)(4). Prohibited visual and verbal
4 portrayals. "Visual or verbal descriptions, depictions,
5 or portrayals of persons, things, or events shall not be
6 deceptive, misleading, or manipulative." Building on
7 that basic rule. 7.2(b)(5). Advertising areas of
8 practice. "A lawyer or law firm shall not state or imply
9 in advertisements in advertisements or communications
10 that the lawyer or law firm currently practices in an
11 area of practice when that is not the case. Again, not
12 false, deceptive or misleading. If you don't do personal
13 injury work, you really shouldn't be saying that I'm
14 doing personal injury work or I specialize in personal
15 injury work which you probably shouldn't say for other
16 reasons. 7.2(b)(6). Stating or implying Louisiana State
17 Bar Association approval. "A lawyer or law firm shall
18 not make any statement that directly or impliedly
19 indicates that the communication has received any kind of
20 approval from the Louisiana State Bar." The distinction
21 between that and the advisory opinion process again is
22 what Mr. Plattsmier was referring to. We're not giving
23 you a quote, unquote get out of jail free card with this.
24 We're just giving you our best advice, our best guess as
25 to how your ad would comply with the rules, and it's a

1 very educated, very well thought out advice, if you
2 would, but it is not any sort of final approval, binding
3 approval on anything on the disciplinary counsel or the
4 Supreme Court even.

5 General regulations governing the content
6 of advertisements. 7.2(c). And this has a huge laundry
7 list of things, part of which includes the safe harbor
8 provisions which we'll get to. I'm going to skip over
9 this slide and just get right into it.

10 7.2(c). Use of illustrations.

11 "Illustrations, including photographs, used in
12 advertisements shall contain no features that are likely
13 to deceive, mislead or confuse the viewer." Again,
14 nothing false, misleading or deceptive.

15 7.2(c)(3). Communication of fields of
16 practice. "A lawyer may communicate the fact that the
17 lawyer does or does not practice in particular fields of
18 law. A lawyer shall not state or imply, however, that
19 the lawyer is certified, board certified, an expert or a
20 specialist except as follows:" And there are essentially
21 three tiers of that sort of process. You can say that
22 you are certified by the Louisiana Board of Legal
23 Specialization which you can do right now. Lawyers
24 certified by organizations other than the Louisiana Board
25 of Legal Specialization or another state Bar, you know,

1 for instance, if you're certified by the National Trial
2 Lawyer's Association, the process envisioned in these
3 proposals would be that you would state that that is a
4 certifying agency and indicate that perhaps that is not
5 certified by the Louisiana Board of Legal Specialization
6 or recognized by the Louisiana Board of Legal
7 Specialization. And then certification by other state
8 bars up here also, a licensed member of another state bar
9 and they certify you, you can disclose that, again
10 indicating that you're certified by the State of
11 Mississippi as whatever, whatever their specialty might
12 be.

13 7.2(c).

14 MR. MALLOY: Excuse me.

15 MR. LEMMLER: Yes, sir.

16 MR. MALLOY: I would just like to make a
17 comment --

18 MR. LEMMLER: Sure.

19 MR. MALLOY: -- with regard to the
20 certification by other states. I don't think that that
21 ought to be allowed. It's Kevin Malloy. Louisiana has a
22 procedure for certification, especially when you consider
23 that certain types of certification have been attempted
24 to be passed at the House of Delegates through the Bar
25 association already that have been rejected.

1 I think basically you're defeating the
2 purpose of the Louisiana Board of Specialization to
3 decide these are the things that we are certifying and
4 that we are going to allow the public to think our --
5 allow -- you know, you can advertise as a specialist in.
6 I won't go so far as to say with regard to other
7 organizations, but if you're talking about other states,
8 I don't think that ought to be allowed. I would like you
9 just to consider that.

10 MR. LEMMLER: That's a good comment.
11 Thank you, sir. And as it says, advertising lawyers must
12 disclose whether the client -- okay, I'm sorry, I moved
13 forward. We're skipping a little forward in here.
14 "Advertising lawyers must disclose whether the client
15 will be liable for costs and/or other expenses in
16 addition to the fee when providing information about
17 fees." This would go to your question before. You can
18 state your fees, but you also need to disclose any
19 information about other costs and so forth that they
20 would be liable for.

21 And you need to honor the fee that's
22 quoted in the advertisement for a certain period of time.
23 That's in our current rule right now. You must pay for
24 the advertisement yourself. The advertising lawyer must
25 pay for his own ad. You must disclose if the matter will

1 be referred to another lawyer, if indeed that is the
2 case.

3 MR. D'ANNA: Question?

4 MR. LEMMLER: Yes, sir.

5 MR. D'ANNA: The discussion about the fees
6 and the expenses, does that apply only as the lawyer
7 advertises a specific fee or percentage fee in his ad, or
8 if you do an ad do you have to address expenses and fees?

9 MR. SHEA: The last clause.

10 MR. GREGORIO: The language reads a lawyer
11 who advertises a specific fee or range of fees for a
12 particular service.

13 MR. LEMMLER: As was pointed out, if you
14 look at the last clause of number one, when providing
15 information about fees.

16 MR. SHEA: If you don't provide it, you
17 don't have to go through all of that.

18 MR. LEMMLER: Exactly. Okay. Moving
19 forward. Permissible content of advertisements. This is
20 what we're calling the safe harbor provisions. These are
21 things that if you do them it's presumed not to violate
22 the rules, if you do only these things. Subject to the
23 requirements of this rule and rule 7.10 which deals with
24 letterhead and firm names and so forth, you can list the
25 name of the lawyer or the law firm. You can have a

1 listing of the lawyers who are associated with the firm,
2 office locations, parking arrangements, disability
3 accommodations, telephone numbers, your web site address,
4 your e-mail addresses, office and telephone service hours
5 and designation such as attorney, lawyer or law firm, et
6 cetera. Plain vanilla stuff. This is presumptively in
7 compliance with the rules.

8 Further things. Date of admission to the
9 Louisiana State Bar Association and any other bars,
10 current membership or positions held in the Louisiana
11 State Bar Association, its sections or committees, former
12 membership or positions held in the Louisiana State Bar,
13 its sections or committees, together with the dates of
14 those memberships, former positions of employment held in
15 the legal profession together with the dates of the
16 positions that you've held, years of experience
17 practicing law, the number of lawyers in the advertising
18 law firm and listing of federal courts and jurisdictions
19 other than Louisiana where the lawyer is licensed to
20 practice. If you have multiple licenses, you can list
21 that truthfully.

22 Information also presumed not to violate
23 the rules. Technical and professional licenses granted
24 by the state or other recognized licensing authorities or
25 educational degrees. Foreign language ability. I would

1 note for you that Florida has enhanced this list by
2 including things such as military service and dates of
3 military service. You can also now include the
4 recognized basic punctuation marks and typographical
5 things that would normally be in your ad that just were
6 never enumerated in this list. Fields of law in which
7 the lawyer practices, including official certification
8 logos, subject to the requirements of subdivisions (c)(2)
9 and (c)(3), what we've just talked about with
10 specializations. Prepaid or group legal service plans in
11 which the lawyer participates. Your fee for your initial
12 consultation and fee schedule subject to the requirements
13 of (c)(4) and (c)(5) of this rule, again listing costs
14 and so forth that they might be required to pay.

15 Further information that you can include:
16 Name and geographic location of the lawyer or law firm as
17 a sponsor of a public service announcement or charitable,
18 civic, or community program or event. I note for you
19 that Florida has actually expanded this and now it has a
20 separate section of the rule that lists even more
21 information you can supply in connection with a public
22 service type of announcement that's kinds of a
23 presumptive approval. You can include all of the safe
24 harbor information in your public service announcement
25 and comply with the rule.

1 Common salutary language such as best
2 wishes, good luck, happy holidays, or pleased to
3 announce, basic greetings. And this is a list of
4 presumptively approved illustrations, and I'm going to
5 note for you that Florida has expanded this list as well.
6 Illustration of the scales of justice not deceptively
7 similar similar to official certification logos or
8 Louisiana State Bar Association logo, a gavel, or
9 traditional renditions of Lady Justice. Florida has
10 expanded that to say the Statue of Liberty, the American
11 eagle, the Florida state flag, so on and so forth, things
12 of that nature.

13 A photograph of the head and shoulders of
14 the lawyer or lawyers who are members or employed by the
15 firm against a plain background consisting of a single
16 solid color or a plain unadorned set of law books.
17 Florida has expanded that and now you can show the whole
18 lawyer. They have recognized that lawyers have bodies.

19 MR. SHEA: I don't know why that was
20 shoulders and above before.

21 MR. D'ANNA: To protect the public.

22 MR. LEMMLER: 7.3. Was there a comment?

23 MR. SHEA: Not from me. No comment.

24 MR. LEMMLER: 7.3, advertisements in the
25 public print media. I notice for you that Florida has

1 pretty much gutted this rule in its rules. Now it only
2 says that these type of advertisements are subject to the
3 requirements of Rule 7.2. They have actually lost part
4 (b) which will require in our proposal the lawyer to
5 include a disclosure statement saying that the hiring of
6 a lawyer is an important decision that should not be
7 based solely upon advertisements. That's in our proposal
8 right now. This disclosure, however, would not be
9 required under the proposal in ads that would contain no
10 illustrations or information other than that listed in
11 the safe harbor provisions or in written communications
12 sent in compliance of 7.4, the targeted direct mail.
13 There are certain restrictions that you have to comply
14 with in there that would I guess be more enhanced than
15 what's in here for other public print media.

16 7.4. Direct contact with prospective
17 clients. Two forms recognized in our rules right now,
18 solicitation and written communications, direct mail.
19 Solicitation is essentially the same rule as we have now;
20 however, the notable changes that the committee is
21 proposing changing the phrase prior professional
22 relationship to prior lawyer-client relationship. That
23 is further defined lower in the rule -- in the proposed
24 rule to exclude relationships in which the client was an
25 unnamed member of a class action, in a cast of thousands,

1 someone who you have never met before.

2 7.4. Written communications contains the
3 same prohibitions as the current rule 7.3(b), and you'll
4 see that in your side by side comparison. Notable
5 additional conditions or prohibitions. Communication
6 must abide by 7.2. You have to include required
7 information. Copy must be file with the LSBA under that
8 filing process which we'll get to in a minute in 7.7. No
9 written communications can be sent to someone unlikely to
10 exercise reasonable judgment in employing a lawyer.

11 If you're contacting a prospective client
12 about a specific occurrence, the targeted written
13 solicitation must also contain the phrase if you have
14 already retained a lawyer for this matter, please
15 disregard this letter, a statement that the signing
16 lawyer will not handle the matter if that is the case,
17 and no revelation of the underlying legal matter on the
18 envelope or the outside of the communication, nothing
19 saying open if you want to talk to us about your serious
20 personal injury case that you had last week. Privacy
21 concerns. They don't want to you disclose or at least
22 tip someone off that you are contacting them about
23 whatever the matter might be. Kevin?

24 MR. MALLOY: I've got a question --

25 MR. LEMMLER: Yes, sir.

1 MR. MALLOY: -- or a comment. The
2 requirement that a copy of the written communication --
3 this is Kevin Malloy, by the way -- that a sample of --
4 excuse me, it says a copy of each written communication
5 and a sample of the envelopes would be sent to the State
6 Bar. I presume you actually want a sample of each
7 written communication rather than the actual
8 communication of every one sent?

9 MR. LEMMLER: Yes, sir, I think that's
10 correct. It's a representative sample of what you would
11 be using.

12 MR. MALLOY: Because that's not the way
13 it's written.

14 MR. LEMMLER: Okay, good point. Good
15 point. No, I don't think we want everything that you
16 would be sending out, just a sample of what it would be.

17 MR. D'ANNA: I have a question.

18 MR. LEMMLER: Yes, sir.

19 MR. D'ANNA: On the written communication
20 -- this is John D'Anna -- (b)(1)(a), talking about the
21 written communication to someone who has been involved in
22 an accident, you can't do that until more than 30 days
23 has passed. Has there been any concern or comments on
24 that particular section of this rule raised because I
25 think that's just a horrible occurrence.

1 I know what happened up here a while past
2 was lawyers would send a runner to the police department
3 and just get all of the accident reports that happened,
4 you know, for wrecks that happened that week, and then
5 they would send them out, and, you know, letters were
6 going to folks who had had someone die, or it would go to
7 the wrong people and things like that. I would just like
8 to lodge a comment that I think even allowing a lawyer to
9 contact someone out of the blue for an accident that
10 occurred is just -- I don't see any difference between
11 that and my going to the door and saying I'm not
12 soliciting your case, but I'm John D'Anna, and I just
13 want to let you know I handle these kind of cases and
14 this is an advertisement. I just think that is really
15 inappropriate.

16 MR. LEMMLER: I note for you that that
17 portion of this rule is already in our rules right now.

18 MR. D'ANNA: I know that.

19 MR. LEMMLER: I know you're aware of that.
20 For the record, I'd note that.

21 MR. MOUTON: Edward Mouton, Shreveport.
22 I'd like to join Mr. D'Anna's position there. I mean,
23 people that get these lawyers from the lawyers just
24 because they are connected with the family who has died
25 or they have been arrested for some offense, I know

1 somebody that got three letters from law firms about a
2 DWI because they were a member of the public. You know,
3 that's a matter of public record but I think that it
4 sullies our image just in general to have this type of
5 practice going on.

6 Is there nothing in here that would -- I
7 mean, some of the rules seem very broad, and, you know, I
8 don't personally think that that's good for our
9 profession. I'm not sure whether, you know, it rises to
10 the level of violation of any particularly stated rule.

11 MR. SHEA: This is Larry Shea. And Mr.
12 Plattsmier may be able to speak more to this, but what
13 they are asking about, Chuck, is they are talking about
14 the 30 day delay that we currently have in our rules.

15 MR. PLATTSMIER: Yes, sir.

16 MR. SHEA: Where this comes from is two
17 things. One, I think there is a case at the Supreme
18 Court level which permits direct mail type of
19 solicitation. Florida then developed a rule that put a
20 time frame where you could not send it, where you had to
21 wait 30 days before you sent it, and that got approved at
22 the Supreme Court level.

23 So actually we're doing all that the
24 United States Supreme Court has said we can do. You
25 cannot specifically prohibit direct mail solicitation

1 based upon the United States Supreme Court decisions to
2 this point. They allow that kind of communication. So I
3 think I've accurately described it, and we've done all we
4 can do with the rule that we have.

5 MR. PLATTSMIER: That's correct. Thus far
6 we are within the bounds of what the U.S. Supreme Court
7 has described as the parameters of permissible
8 regulation. Florida Bar versus Went for It decision
9 was a case that actually upheld the Florida Bar's efforts
10 to ban direct mail solicitation during the first 30 days
11 and reaffirmed the U.S. Supreme Court's earlier decision
12 that allowed lawyers to engage in direct mail
13 solicitation.

14 MR. LEMMLER: I'll note for you as well in
15 our current rule and in this proposal there is still the
16 condition that the lawyer who is sending a written
17 communication that is prompted by a specific occurrence
18 has to disclose how the lawyer obtained the information
19 that was prompting the communication. So if you're going
20 down to the sheriff's office and getting a list of recent
21 arrestees, you have to include something saying I got
22 your name off of the list of recent arrestees and that's
23 why I'm sending you this communication. It doesn't
24 prevent it, but at least it discloses a little more
25 information to the person as to how they happened to know

1 this.

2 MR. MOUTON: And Mr. D'Anna was mentioning
3 a runner from the city to get accident reports. So if
4 you had somebody working in an emergency room and they
5 tipped you, anybody that would operate that way, you
6 could potentially just say that that's how you got the
7 information and that would save you under the rule?

8 MR. PLATTSMIER: Well, you might run
9 afoul on a different concern there at that point.

10 MR. MOUTON: I understand, but wait 30
11 days and --

12 MR. PLATTSMIER: It's a felony for someone
13 to run cases.

14 MR. MOUTON: You know, I know that there's
15 all kinds of practices that go on, not that -- you know,
16 I don't do that sort of area of law anyway.

17 MR. LEMMLER: The specific facts are
18 always going to control and the devil is always in the
19 details, but generally I think that's what's allowed in
20 the rules, and your situation, as Mr. Plattsmier said, I
21 think there could be other concerns. But let's try to
22 move forward.

23 Rule 7.5. Basically what we're talking
24 about here is TV and radio. Advertisements in the
25 electronic media other than computer accessed

1 communications. There's a separate rule 7.6 that deals
2 with web sites and e-mail and so forth. And as it says,
3 computer-based ads subject to 7.6, including but not
4 limited to television and radio, are subject to the
5 requirements of Rule 7.2. The permissible and -- I'm
6 sorry, prohibited conduct, the general stuff, false,
7 deceptive or misleading that we've talked about already.

8 Essentially appearance on TV and radio
9 prohibited content. Section one. Television and radio
10 advertisements shall not contain any feature that is
11 deceptive, misleading, manipulative, or that is likely to
12 confuse the viewer or listener. I think in Florida's
13 revision again they have actually adopted the false,
14 deceptive or misleading language again and modified this
15 slightly.

16 Any spokesperson's voice or image that is
17 recognizable to the public and the community where the
18 advertisement appears. Lawyers who are not members of
19 the advertising law firm speaking on behalf of the
20 advertising lawyer or a law firm. These things are
21 prohibited from your TV or radio ads. Any background
22 sound other than instrumental music.

23 Permissible content. Things you can put
24 in your TV and radio ads that are presumptively approved.
25 Images that otherwise conform to the requirement of these

1 rules. A lawyer who is a member of the advertising firm
2 personally appearing to speak regarding the legal
3 services of a lawyer or law firm that they are available
4 to perform, the fees to be charged for such services and
5 the background and experience of the lawyer or law firm.
6 Things that are truthful, facts, or you can have a
7 non-lawyer spokesperson speaking on behalf of the lawyer
8 or law firm as long as the spokesperson's voice or image
9 is not recognizable to the public in the community where
10 the advertisement appears. And that spokesman shall
11 provide a spoken disclosure identifying the spokesperson
12 as a spokesperson and disclosing that the spokesperson is
13 not a lawyer.

14 I note for you in Florida the Florida Bar
15 was proposing to modify this and somewhat liberalize it
16 and said that you only have to identify non-lawyer
17 spokespersons when it is not obvious from the
18 advertisement that they are indeed non-lawyer
19 spokespersons. The Florida Supreme Court said, no, we
20 like it the way it is. We believe it is very clear.
21 It's an unequivocal statement of what you can or cannot
22 do and we're not going to change it. So that was
23 rejected by the Florida Supreme Court. The proposal that
24 you see here is very much in keeping with what they have
25 right now.

1 Rule 7.6. Computer-accessed
2 communications. This is essentially, as I said, the
3 Internet presence your web site or your e-mail, not TV or
4 radio. All of these things are also subject to the
5 location requirements of 7.2 indicating a bona fide
6 office address telling them where you are.

7 Skipping ahead a bit. And I note for you
8 that -- before I go back to 7.6, that the distinction
9 made in the proposal is that Internet web sites are
10 considered much like information that's provided to a
11 client upon request. You can indicate a lot more
12 information on your web site than you could in an
13 unsolicited e-mail. An unsolicited e-mail would be
14 treated much like a targeted direct written solicitation,
15 and you have to disclose a lot more information, put in
16 advertisement and so forth in the subject line.

17 Moving forward again. Skipping a few
18 rules to get to the balance of the substantive rules,
19 information provided upon request in Rule 7.9. I will
20 note for you that Florida in its newest revision has
21 basically removed this entire rule and moved it forward
22 into a general exception in the beginning of all of the
23 rules in 7.1. They recognize it as a per se exception
24 and no need to have a special rule to delineate what
25 those conditions might be. We'll, I'm sure, be looking

1 at that in our review of the comments and the Florida
2 revisions. Under the proposal though it's information
3 provided upon request must still comply with 7.2 unless
4 it is otherwise provided. You can provide information as
5 deemed valuable to assist your client if you provide an
6 engagement letter -- I'm sorry, you can provide an
7 engagement letter, but if you provide a contingency fee
8 contract it has to indicate that it's a sample and have
9 the words do not sign displayed on it so they are not
10 confusing it with an actual contract.

11 It may contain factually verifiable
12 statements concerning your past results. This is where
13 you can tell people about what you've done and your
14 successes and so forth if they ask for that information.
15 Must disclose intent to refer to another lawyer or law
16 firm if that's the case.

17 And then Rule 7.10 which Florida again has
18 moved up into its Rule 7.9 since they have moved 7.9 up
19 into the general exceptions. 7.10 is essentially what we
20 have right now in our own Rule 7.5 which tells you what
21 you can put in your firm name and letterhead and so forth
22 and the trade names you can use and so forth.

23 That's the bulk of substantive rules.
24 The proposed procedural rules now would provide for two
25 options. Effectively you can get an advanced written

1 advisory opinion which you can actually get right now on
2 your advertising. Nothing new really. We do that all
3 the time, or whether you get the advanced written
4 advisory opinion or not, whenever you file an ad, unless
5 it falls under the safe harbor provisions and is exempt
6 from the filing requirements you would be required to
7 file it with the Bar.

8 Under 7.7(b), the advance written advisory
9 opinion, the details, I won't go into all of them, but
10 effectively at least 30 days before you're going to run
11 the ad you can send it to us at the Bar. We'll review
12 it, we'll work with you, we'll make recommendations and
13 suggestions. If you don't understand something or you
14 disagree with it we'll work with you on that and try to
15 figure out something that we believe can be useful as
16 well as work under the rules, and again before you spend
17 any real money on your advertisement. That would be the
18 point of this process, and we would hope that lawyers
19 would be wanting to take advantage of that. We
20 understand that the lawyers in Florida actually welcomed
21 that process.

22 MR. MOUTON: And what would be the
23 proposed fee for that advisory service?

24 MR. LEMMLER: The fee right now has not
25 been set. Under the proposal it's left to the Supreme

1 Court to set. To give you just as example, Florida right
2 now, their fee for filing is \$150. Texas I think is \$75.
3 And that's per filing. Again, for doing the advanced
4 written advisory leg of this as opposed to just filing
5 it. And let me explain that, if I can. You can do
6 either track. You can do the advanced written advisory
7 opinion. Once that filing is approved or once you get to
8 the point where you say I like the ad and we say it's a
9 good ad, you don't have to refile it. It suffices as the
10 actual filing. The advantage though is that you get to
11 work with us all along and get it right and feel
12 comfortable with it and we feel comfortable with it.

13 However, if you don't like that process
14 and you feel comfortable about your advertising you can
15 simply file it at the time that you want to use it or
16 prior to that time without getting the advisory opinion.
17 It's still the same fee. Mr. Plattsmier?

18 MR. PLATTSMIER: Chuck Plattsmier for the
19 record. And this is a question I can probably ask you
20 off the public record, but I think the information that
21 I'm asking you might be useful to be placed in the public
22 record.

23 At least as I've been told, many lawyers
24 who advertise today, particularly in the public media of
25 radio and television of course do not obviously draft

1 their own advertisements. They have used professionals
2 designed to do that for them. Will the ethics advisory
3 service interact with representatives of the lawyer who
4 are media consultants or those who write or draft or sell
5 advertising packages for lawyers? Is that what is
6 contemplated?

7 MR. LEMMLER: I don't think that is what
8 is envisioned, at least not that direct form of
9 interaction. I'm just speaking from what I understand.
10 I'm not speaking for the committee or the Bar or the
11 Supreme Court, but the way I understand the proposal it
12 would function the same essentially as the ethics
13 advisory service for the Bar functions rights now. We
14 deal with the lawyers. We deal with lawyers and their
15 own prospective conduct.

16 Right now someone who is in advertising, a
17 third party who the lawyer is dealing with to produce a
18 commercial calls, we say, well, have the lawyer call it
19 us, or have the lawyer work up the copy and have the
20 lawyer send it to us and we'll work with the lawyer. And
21 of course that person is probably talking to a lawyer at
22 the same time, but, you know, our policy is essentially
23 to deal with the lawyer, the member of the Bar
24 Association because this is a service provided by the Bar
25 association.

1 Now, I do understand in speaking to the
2 folks in Texas, and I suppose they probably do this in
3 Florida as well, they try, in order to encourage lawyers
4 to comply with the process and understand the process,
5 they do a number of continuing legal education programs.
6 In Texas, according to the guy in Texas, they actually do
7 CLEs, if you will, for members of the advertising
8 community to try to help them help the lawyers to do
9 better ads and ads that are more in compliance with the
10 rules.

11 So again, just from my own perspective, I
12 can foresee that as being something beneficial to our
13 members by helping the people who help them understand
14 what they need to do to comply with the rules, but I
15 don't think that's the direct contact between me or my
16 office or the Bar and the members of the advertising
17 community is contemplated under the rules the way they
18 are right now.

19 Okay. In either instance, whether you do
20 the advanced written advisory opinion or whether you file
21 your ad without getting the advisory opinion the
22 submission requirements would effectively be the same.
23 You would be submitting a fee, and again the fee would be
24 set under the proposal by the Supreme Court. A copy of
25 the advertisement and a sample envelope that you would

1 intend to use, a typewritten copy of a transcript. I'd
2 note for you that Florida has also now included the need
3 to have that transcript in English if the ad is in
4 another language. Presumably the people who are going to
5 be reviewing this are English speaking and so they want
6 to have that in the rule. Statement concerning the type
7 of media, frequency and duration of the advertisement.

8 Any questions about this? Then there's a
9 list in Rule 7.8 of things that are considered except
10 from the filing requirement, things that you don't have
11 to submit to the Bar, things that you don't have to pay a
12 fee to use in your ads or to use as ads. The basic one
13 is if you follow the safe harbor content of what's in
14 7.2(c)12, the plain vanilla stuff. If that's all that's
15 in your ad and that's how you're doing it, then you're
16 exempt from the filing requirement.

17 Brief announcements identifying the lawyer
18 as a sponsor for charitable events provided that no
19 information is given with the name and location of the
20 sponsoring law firm. Again I note for you that Florida
21 has expanded that and said that if you include in your
22 sponsoring announcement any of the safe harbor content or
23 only the safe harbor content, rather, that that is
24 presumed to be exempt from the filing requirement. You
25 are not precluded from putting these other things. You

1 are not restricted to just putting the name and location
2 of the sponsoring law firm.

3 Listing or entry in a law list or bar
4 publication. I think that the common example there is
5 like the Martindale-Hubbell, something of that nature.
6 That's presumed to be exempt from the filing requirement.
7 A communication mailed only to existing clients, former
8 clients or other lawyers. I'd note for you that Florida
9 has made had presumptive exemption for communications
10 mailed to the family members of the lawyer. That's
11 exempt from filing and that's exempt probably from most
12 of those rules if you're mailing communications to your
13 own family members. I think that's probably understood
14 and accepted right now, but they felt it necessary to put
15 that in the rule to let everybody know.

16 Any written communications requested by a
17 prospective client. Florida has again now, in its newest
18 provisions, moved this up to 7.1 or 7.2 saying that this
19 is a presumptive exemption. You don't have to comply
20 with a lot of this stuff if you're providing it to
21 prospective clients. Professional announcement cards
22 mailed to other lawyers, relatives, former or current
23 clients, and close friends. You know, pleased to
24 announce that the new law firm of so and so is being
25 formed, something of that nature.

1 Computer-accessed communications is
2 described in subsection (b) of Rule 7.6. Again, web
3 sites. That's exempt from filing. If you're changing
4 your web site on a daily basis that's exempt from a
5 filing requirement. Obviously, we wouldn't want to try
6 to keep up with you and that and you wouldn't want to be
7 constrained by that. So what's on your web site,
8 whatever the public is going to is considered to be like
9 the information that is provided to people upon request.
10 So if they want to see it, it's their active need to see
11 it. So we're not going to make you file that.

12 And that's pretty much the rules. That's
13 the proposed rules that we have in this packet. I think
14 the committee has envisioned a phase-in period for this.
15 Obviously, if the court would adopt it, and we're
16 recommending to the Court that they consider that, that
17 it would be very difficult, if not impossible for lawyers
18 overnight to change many of their ads and most of their
19 ads, particularly those that are published on only an
20 annual basis like a telephone directory and so forth.
21 You can't be expected to change that when you have no
22 control over that except on an annual basis perhaps. So
23 those types of things would perhaps be grandfathered in.
24 Otherwise, we envision at least a 90 day phase-in period
25 for ads that are currently in use. That's what our

1 recommendation would be to the Court.

2 Future work plan. This is the last of the
3 four public hearings that we've had. We've gotten great
4 comments from all of them. Just to note for you, because
5 I don't think I mentioned it earlier, we also have on the
6 bar's web site an online comment form where we encourage
7 people to go in and log in and put in their comments, and
8 we're keeping track of those and will be considering
9 those as well. So that's available to you whether you've
10 made it to a public hearing or not, and we're getting
11 quite a number of comments on that.

12 Special rules of debate.

13 MR. PLATTSMIER: There's a question back
14 here.

15 MR. LEMMLER: I'm sorry, ma'am. I wasn't
16 looking.

17 THE WITNESS: Jacqueline Scott. I just
18 have a question. I advertise -- and I got here late -- I
19 apologize -- but in the phone book, and one of the things
20 I've advertised is they have a magazine here that the
21 lawyers vote for lawyers, and one of things is like they
22 select a top ten. I use it to my advantage, and I was
23 just trying to see if that -- you know, how does that
24 affect -- you know, is it going to be affected with the
25 laws, with the new proposal?

1 MR. LEMMLER: Larry?

2 MS. SCOTT: And there are certain things
3 that I advertise, you know, in this advertisement, but of
4 course I only handle certain cases. So which means it's
5 not like I'm -- you know, I don't mean to just distract,
6 you know, being in the top ten, but it was -- you know,
7 it happened, you know, in Shreveport, an advantage, and
8 I'll call it an edge, to be honest, and so I just wanted
9 to know if -- you know, with this proposal how is that
10 affected or would that be affected in the way I
11 advertise?

12 MR. SHEA: This is Larry Shea. I think
13 there are certain aspects of this proposal that would
14 affect that.

15 MR. GREGORIO: This is Sam Gregorio. I
16 actually think you would be prohibited. And if I'm
17 reading my numbers right, 7.2(b)(1)(d) which compares
18 lawyer's services with another's services. There may be
19 another provision also, but I just noticed that at the
20 moment.

21 MR. SHEA: There is a provision that
22 pertains to references to where you have been listed with
23 respect to certain entities that you are allowed to
24 reference, but I'm not sure that what you're referring
25 to, the SB magazine, I'm not sure that that's one that

1 would necessarily comply with the list of groups that you
2 are permitted to reference, okay? That's my comment on
3 it, and it has a lot to do with the processes that are
4 utilized by the group in terms of selection and things of
5 that nature.

6 MS. SCOTT: Would the same thing -- and
7 like say, for instance, you have TV and we have lawyer
8 advertisements, well, he got me a million dollars and --

9 MR. SHEA: These rules would specifically
10 prohibit that.

11 MR. GREGORIO: Can I add one thing? I'm
12 sorry. And I'm responding to Larry's comments since we
13 have the public record here. This is Sam Gregorio. The
14 committee specifically had some nice long discussions
15 about those types of listings, and my personal feeling
16 and the committee's feeling is that they would be
17 prohibited by these rules more than just -- in other
18 words, I'm saying it stronger than you stated it.

19 MR. SHEA: Right. But it was not all
20 listings. And it does reference those that -- I think it
21 accurately describes what the committee determined would
22 be listings that would be permissible. And Mr.
23 Plattsmier you may recall. I think it does.

24 MR. PLATTSMIER: I think it does as well.

25 MR. GREGORIO: And just to make sure that

1 we're all together. I think we're all saying the same
2 thing, that, for example, we discussed specifically the
3 SB magazine listing and we all thought that that would
4 probably not be permitted. There are some others such as
5 Martindale-Hubbell that would be permitted, and I think
6 we're all saying that same thing as I understand you
7 guys.

8 MR. PLATTSMIER: Yes.

9 MR. SHEA: Yes.

10 MR. D'ANNA: This is John D'Anna. That
11 was my question, following up on the SB magazine thing
12 because what they do, as you know, they just send out
13 forms, and then you're allowed to pick somebody. It
14 could even be somebody in your own firm or you get
15 somebody to nominate you and you nominate somebody else,
16 and lo and behold you're one of the top ten lawyers in
17 that area, and if you pay an additional thousand dollars
18 you get to have a picture ad right behind it which really
19 is somewhat misleading.

20 MR. GREGORIO: Whether you are selected or
21 not.

22 MR. D'ANNA: Right. If you're not
23 selected you're there -- you can buy a whole page and you
24 can be first in line behind the top best lawyers in the
25 area. So what I'm hearing is that under these rules

1 participation in that program would be a violation.

2 MR. GREGORIO: That is my understanding

3 and that was the committee group thought.

4 MR. SCOTT: To participate or to

5 advertise?

6 MR. D'ANNA: To participate in the top

7 best lawyer survey under that scenario.

8 MR. GREGORIO: You mean advertise? Is

9 that what you mean?

10 MR. D'ANNA: Well, they send everybody who

11 was in it the year before a form.

12 MR. GREGORIO: But I don't think it's

13 impermissible to participate. I do think it would be

14 impermissible under these rules to advertise.

15 MR. D'ANNA: So you could still -- Okay.

16 I was hoping it would prohibit that participation because

17 I think that's a very misleading publication.

18 MR. PLATTSMIER: There may be a

19 distinction between whether or not folks within your

20 community in theory have voted you one of the top lawyers

21 in your committee over which you have no control versus

22 then the use of that information in an advertising format

23 which I believe the rules would probably prohibit. But

24 this is a fact driven inquiry that you've raised, and I'm

25 not prepared to tell you on a blanket statement that all

1 events such as the one that you're describing here that
2 may have taken place in the past in Shreveport would
3 necessarily in every event implicate misconduct by the
4 lawyer, nor am I suggesting that it would exempt a lawyer
5 from scrutiny if it were found that they took an active
6 role in perpetuating this sort of program when it wasn't
7 factually based on rational information.

8 MR. SHEA: And this is Larry SHEA. I
9 would add that there was much discussion not so much of
10 SB magazine, but of programs like it that have been the
11 subject of quite a bit of controversy in other states
12 where they have actually had disciplinary proceedings
13 that have related to things like the SB magazine such as
14 super lawyers. There's a group called super lawyers.
15 They have been the subject of some ethics proceedings,
16 disciplinary proceedings in other states. They have
17 raised questions concerning Best's, and in one state in
18 discussing super lawyers it even raised questions
19 concerning Martindale-Hubbell. And so all of this has
20 been a subject of a lot of litigation.

21 MR. PLATTSMIER: My colleagues across the
22 country have been hotly debating many of these same
23 issues, particularly, for example, the reference to so
24 called super lawyer listings and other publications of
25 the same kind, and I will tell you it's a topic that is

1 as fresh as last week when the lists or comments were
2 still flying across the country. It is an area that is
3 troublesome to many discipline agencies across the
4 country.

5 MR. LEMMLER: Okay. To note for you
6 before we wrap it up -- I think we're down to the end of
7 this -- that there were special rules of debate adopted
8 by the Louisiana State Bar House of delegates that have
9 already been adopted that would deal with this proposal.
10 The proposal is intended to be presented at the next
11 House meeting which is in January. Resolutions that
12 would address amendments to this proposal that you see
13 before you or any subsequent form of the proposal that's
14 going to go to the House in January, those resolutions
15 need to be submitted in writing 30 days in advance of
16 that House of Delegates meeting, and there is a form in
17 the back with the rules of debate for the House meeting
18 on there, if you're interested in that.

19 The Supreme Court committee to study
20 attorney advertising, the Court's own committee, of which
21 some of the members of the Rules of Professional Conduct,
22 the Bar committee are members of as well, the Court
23 committee is presumably going to be looking at this
24 proposal and our comments and everything that the
25 committee puts into it after their meeting on the 29th,

1 and then we'll do whatever the Court wants to do I
2 suppose with respect to these rules. So that's the
3 process. That's pretty much where we are. Understand
4 that this is a process that the Court is looking for
5 input from the Bar right now. We're giving them input,
6 your comments, our proposal, and the Court is going to do
7 what it wants to do at that point. Yes, sir?

8 MR. BAILEY: Jack Bailey. If we had an
9 amendment that we would like to see proposed, what form
10 should I put that in and send it to you in? Just type it
11 up in general or --

12 MR. PLATTSMIER: I'd like to respond to
13 that, if I might. Two things that I think are available
14 to you, Jack. One, if you have a specific change in
15 language, I think that both the Supreme Court committee,
16 as well as the rules committee and its subcommittee would
17 be delighted to receive any suggested language change or
18 rule change that you think they should consider.
19 Secondly, I'm going to have to answer your question by
20 asking a question. Are you a member of the House of
21 Delegates?

22 MR. BAILEY: No.

23 MR. PLATTSMIER: All right. If you have
24 someone that you know who is a member of the House of
25 Delegates, with whom you have a good rapport, and to the

1 extent that your written proposal to the Supreme Court
2 committee or that the rules committee of the LSBA is not
3 perhaps incorporated, under the rules of debate, if you
4 have a specific provision that you would like to have
5 debated on the House floor, then it needs to be part of
6 the package that is turned in by a date certain 30 days
7 in advance, I believe, of the House of Delegates meeting
8 which is held at the end of January under the rules of
9 debate.

10 MR. GREGORIO: Held in the middle of
11 January.

12 MR. LEMMLER: It's in the middle of
13 January.

14 MR. PLATTSMIER: Excuse me, middle of
15 January. And Mr. Shea, for example, is a member of the
16 House of Delegates, and there may be others from your
17 area who are members. You may ask them to -- that's
18 right, Kevin Malloy, Sam Gregorio and number of folks who
19 are here today could offer on your behalf that sort of
20 proposed changes if it had the not been previously
21 incorporated by the committee into the final work
22 product. So there are at least two avenues available to
23 you.

24 MR. LEMMLER: Just building on what Mr.
25 Plattsmier said, I think submitting your comments and

1 suggestions at least for amendment of specific provisions
2 of the rules, the most effective way might be right now
3 to submit them to the committee, to the rules committee
4 and court's committee and they can make that change as
5 part of the package.

6 MR. SHEA: And we actually have a place to
7 do that on the LSBA site so you don't even have to
8 prepare a letter or anything. You can just go to that
9 site and submit it, give your name and submit here's the
10 language change I would propose be made and that's
11 LSBA.org.

12 MR. LEMMLER: There's a link on the home
13 page that will take you to a separate page to do that.

14 MR. SHEA: Yeah, and you just go right
15 there and you give it everything that comes in there. It
16 is going to be considered by the rules committee, and if
17 we, as a group, think it's something that needs to be
18 done, we will incorporate it.

19 MR. LEMMLER: But any way you want to get
20 it to us. I mean, you can call me up, you can fax it to
21 me, you can e-mail it to me, you can mail it in, if
22 there's time to mail it in. Any way you want to get it
23 to us, we welcome that, and that would be encouraged as
24 probably the easiest way to get some specific language
25 changes at least considered in the proposal rather than

1 waiting to go to the House meeting. You can certainly do
2 that as well, but I'm just telling you that this is
3 probably a more perhaps efficient way to handle it.
4 Yes, sir?

5 MR. MALLOY: I just have a question I
6 should have probably raised earlier, but with regard to
7 fees, and it's kind of off the wall, but has there ever
8 been any discussion in the committee of constitutionality
9 of having a fee required to comply with these ethical
10 rules to make free speech -- you know, to take advantage
11 of free speech rights that we have?

12 MR. SHEA: Yes, there have been -- and
13 this is Larry SHEA again -- that you can construct an ad
14 which doesn't require a filing if you stay in the safe
15 harbor. So it's -- we're not prohibiting you from
16 advertising within the safe harbor. What it does is if
17 you're not going to stay right within the safe harbor,
18 though, it does require the filing, and I believe that's
19 already been addressed in some prior cases and that's
20 acceptable.

21 MR. GREGORIO: This is Sam Gregorio. I
22 also just want to respond to Kevin. This area is not a
23 free speech area. It's a commercial free speech area --

24 MR. MALLOY: I understand.

25 MR. GREGORIO: -- which has a distinction

1 and different rules and different tests, and I just
2 wanted to -- when you talk about free speech, I want to
3 make sure that the record is clear that it's commercial
4 free speech.

5 MR. LEMMLER: And I would also note for
6 you that with respect to the constitutional issue of
7 charging the fee, Florida has been doing this already for
8 about 12 years. Texas has been doing it I think for ten.
9 So it's already been in place in other states and
10 presumably passed constitutional muster there. So the
11 distinction that Sam has made, plus that, I think that
12 issue has been addressed or at least viewed anyway.

13 MR. D'ANNA: One quick question. John
14 D'Anna. And this is just a general question. How do our
15 rules affect lawyers from other states whose ads are run
16 in Louisiana say on cable TV, and you see the law office
17 of so and so and so and so in New York, or do our rules
18 even effect those guys? You see class action
19 advertisements, you see serious personal injury
20 advertisements by the law office of so and so. I mean --

21 MR. PLATTSMIER: Our Rules -- this is
22 Chuck Plattsmier. Our Rules of Professional Conduct
23 under Rule 8.5 and Supreme Court Rule 19, Section 6,
24 expands our jurisdictional base to both lawyers who are
25 licensed to practice law in Louisiana and who are

1 physically present here and those who are outside of the
2 State of Louisiana but who offer to provide services here
3 or seek representation here or seek to advertise by
4 perception. Is that constitutional? There may not be a
5 mechanism by which we can prohibit an out of state firm
6 from providing informational advertising opportunities
7 within this state, but if they choose to do so they fall,
8 within my judgment, within the same parameters that we
9 are proposing for lawyers who are here advertising and
10 practicing. So they would have to take cognizance of and
11 imply with the very same rules that you and I will be
12 obliged to follow shall we advertise.

13 MR. SHEA: This is Larry Shea. Just to
14 let you know, I believe it is the committee's intent by
15 way of these rules to cover by these rules any
16 advertisement, any advertising that is directed at
17 Louisiana residents. So if it is in any way directed to
18 obtain Louisiana residents as clients, we would consider
19 it to be within the purview of our rules to say that that
20 doesn't comply, and the lawyer or lawyers responsible for
21 it could be subject to whatever could be done to those
22 lawyers by way of our disciplinary system.

23 MR. LEMMLER: I'd also note for you, with
24 respect to your comment, that in Florida's latest
25 provision of their rules in their Rule 7.1 they have now

1 added an additional section which again would be -- I
2 didn't discuss yet or get to, but they have added an
3 additional section which says that these rules will apply
4 to advertisements by out of state lawyers admitted to
5 practice in other jurisdictions who have established a
6 regular or permanent presence in Florida for the practice
7 of law as authorized by other law and who solicit or
8 advertise for legal employment in Florida or who target
9 solicitation or advertisements for legal employment at
10 Florida residents. So presumably the committee will be
11 looking at this part of Florida's revision as well and
12 that may address what you're talking about.

13 I think that wraps it up. One more slide.
14 Online comments, and then CLE credit. You actually get
15 an hour of ethics CLE for enduring my presentation.

16 MR. BAILEY: This is Jack Bailey again. I
17 know that we have constitutional issues on commercial
18 free speech, and of course, as y'all already know, I am a
19 proponent of the strictest possible regulation of
20 personal injury advertising that we can have. And I'll
21 comment I see the bankruptcy advertisements, and I have
22 to tell you I find absolutely nothing misleading about
23 them, but I always -- and I have to tell you, even in my
24 own ads I think that they are probably inherently
25 misleading to the public.

1 So my question is, as a proponent of the
2 strictest regulations we can possibly have, has the
3 committee tried to draw these as close to the
4 constitutional boundaries as we think we can, or are they
5 backed away from what we think the constitutional
6 boundaries are? I mean, are we right up to the line we
7 think we can have?

8 MR. PLATTSMIER: Jack, I'll speak to it.
9 As a member of both committees, as each particular
10 proposed rule was analyzed, my view was always to draft
11 this on top of the line or as near within its parameters
12 as is possible for two reasons. I echo your concerns
13 about lawyer advertising in general and that pertain to
14 the personal injury field in particular. Second, my view
15 is that the Florida rules were designed to be an
16 aggressive -- an attempt at aggressive regulation as
17 opposed to the perception that the ABA model rules were
18 less so historically. And third, we are responding in
19 some measure to a legislative concern expressed within
20 the Senate hearings and as supported by an overwhelming,
21 if I'm not mistaken, resounding majority of the Senate
22 that voted on the bill that something aggressive and
23 extensive needed to be done to address the public
24 perception and the legislative perception that lawyer
25 advertising had heretofore been improperly or

1 inadequately regulated.

2 So all of those things affected my view
3 and affected my comment and input at that stage. My
4 perception was that my colleagues around the table shared
5 much of that concern, and so in the drafting of the rules
6 the premise was to be as aggressive in the regulation of
7 lawyer advertising as is constitutionally permitted by
8 reviewing all of the prior case law. I hope that's a
9 fair characterization.

10 MR. GREGORIO: This is Sam Gregorio. I
11 think that's a fair characterization.

12 MR. SHEA: I also agree as a member of
13 both committees. I agree that we have done that, and I
14 believe that's what was dictated to us by the legislature
15 as to what their desire was, but I want to reiterate and
16 make sure it's clear but we at the same time have not
17 tried to do anything that we perceived in any way would
18 be a violation of the commercial free speech rights of
19 the attorneys to advertise, it being our intention that
20 they have every bit of the constitutional rights that
21 they are permitted but for us to regulate to that extent.

22 MR. GREGORIO: I agree with that also.

23 MR. PLATTSMIER: Okay.

24 MR. LEMMLER: All right. I think, unless
25 there are any other comments, we're concluded. Thank you

1 for coming.

2 (End of hearing.)

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