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LOUISIANA STATE BAR ASSOCIATION

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IN RE:

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RE-EVALUATING LOUISIANA'S LAWYER

8

ADVERTISING RULES

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PUBLIC HEARING

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The Public Hearing Concerning the above
captioned matter, at Louisiana State University,
Law Center, Highland Road, Room 106, Baton
Rouge, Louisiana, beginning at 5:00 p.m., on
November 2, 2006.

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BEFORE: Lori B. Overland
Certified Court Reporter
In and For the State of
Louisiana

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A P P E A R A N C E S

Richard Lemmler, Jr., Esq.
Ethics Counsel

Charles Plattsmier, Esq.
Chief Disciplinary Counsel

Marta-Ann Schabel, Esq.
President of the Louisiana
State Bar Association

Ed Walters, Esq.

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I N D E X

EXAMINATION: PAGE(S):

None

EXHIBITS:

None

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2 MS. SCHABEL:

3 Good afternoon, everybody. Can
4 everyone hear me; I don't need to use a
5 microphone, do I?

6 MS. ALSTON:

7 No.

8 MS. SCHABEL:

9 I'm Marta Schabel, and I'm the
10 president of the Louisiana State Bar
11 Association. Thank you for coming. This is
12 our first public meeting and hearing with
13 regard to the proposed changes to lawyer
14 advertising rules. Those of you who have
15 been around for awhile know that we did
16 this, and have done this, with any changes
17 that are proposed or in the opting for the
18 Rules of Professional Conduct, and we find
19 it to be a very valuable exercise because we
20 get to hear from you guys about what you
21 think about these changes. In order to be
22 sure that we know what's -- we can properly

23 reflect the opinions that we hear, this lady
24 is here. She's a court reporter and she's
25 taking down what we're all saying so that,

1 if you have a question or a comment, I'd ask
2 you to speak loudly, maybe even come up
3 front, so that she can hear you and get the
4 question down. That's not to put you on the
5 spot, that's so that we really do have a
6 record of where the comments lie and what's
7 going on with the commentary. I'm going to
8 introduce you to Richard Lemmler, who is a
9 lawyer on the LSBA staff. Tell me your
10 title with them.

11 MR. LEMMLER:

12 Ethics counsel.

13 MS. SCHABEL:

14 He is the ethics counsel for the LSBA,
15 and we also have with us today, Chuck
16 Plattsmier, from the Office of Disciplinary
17 Counsel. He's the chief disciplinary
18 officer in the State, but Richard is going
19 to run us through the basics of the proposed
20 rule changes. How many here in the room
21 have some familiarity with the proposed
22 changes; have ya'll looked at them. Well,

23 good, because Richard has a 42-slide
24 presentation, and I was suggesting to him
25 that perhaps we could go through some of it

1 fairly quickly if people in the room were
2 familiar with it.

3 I'm going to turn this over to Richard
4 and do you want them to wait until you're
5 finished to ask questions or comment?

6 MR. LEMMLER:

7 No. I think it might be better -- my
8 proposal to you, since most of you appear to
9 have already gone through the rules and
10 looked at the rules, thankfully, we're just
11 going to kind of click through the slides
12 and bring up the language to focus on any
13 issues that you might have, or anything you
14 want to say. Our function, I believe,
15 primarily, today is just to get your
16 comments, not so much to try to necessarily
17 explain or distinguish the rules but,
18 really, to get your comments as to what you
19 like and don't like. We can go into them
20 but I'm just going to go through the slides
21 and, you know, stop me when you see
22 something you don't like, or something you

23 do like, and we'll put it on the record.

24 MS. SCHABEL:

25 Or something that you don't understand

1 and want clarification about, which we'll
2 try to do.

3 MS. ALSTON:

4 Move to waive the power point.

5 MR. PLATTSMIER:

6 Move to waive the power point?

7 MS. SCHABEL:

8 Oh, come on. We spent a lot of time
9 doing --

10 MS. ALSTON:

11 I know. I'm sure it's wonderful but,
12 you know, I could be in the minority.

13 MS. SCHABEL:

14 Well, let's get started and --

15 MR. LEMMLER:

16 Let's get started that way and, if it
17 looks like a problem, we'll try to switch
18 gears. We've entitled it, "Re-evaluating
19 Louisiana's Lawyer Advertising Rules." This
20 is one of four public hearings that are
21 going to take place around the State, and
22 we'll get to that in just a second.

23 Essentially, the catalyst for this, in
24 some way, was that in March of 2006, a bill
25 regulating lawyer advertising and

1 solicitation was introduced into the
2 Louisiana State Senate. That bill was,
3 however, not enacted into law. The issue of
4 lawyer advertising was actually referred to
5 the Louisiana Supreme Court for review,
6 since they have exclusive jurisdiction
7 regarding the practice of law. As a bit of
8 background -- well, I'll get to that in a
9 second.

10 In keeping with the legislature's
11 actions, the Supreme Court appointed its own
12 committee to study attorney advertising.
13 Chuck Plattsmier is actually on that
14 committee. There are several folks from the
15 State Bar's Rules of Professional Conduct
16 Committee also on the Court's committee and
17 a few others. The Rules of Professional
18 Conduct Committee, through the Bar, our
19 component of this process -- this is the
20 mission statement, essentially. It looks at
21 the Rules of Professional Conduct, makes
22 recommendations regarding changes or

23 amendments or, you know, just interfaces
24 with the Court with respect to anything
25 related to the rules. This would obviously

1 be one of those things.

2 With respect to this process, the
3 Rules Committee and -- and this is where I
4 want to give you a little bit of extra
5 background. The State Bar -- the Rules
6 Committee for the Louisiana State Bar
7 Association actually had a subcommittee that
8 was appointed and formed, I believe, in
9 early 2005. They were actually looking at
10 rules -- examining our rules long before the
11 legislature made any public statement with
12 respect to their bills. We were in the
13 process of looking at, primarily, the
14 Florida rules and, when all of these other
15 things happened, the Supreme Court's
16 Committee decided that the work that the
17 Rules Committee had already done was
18 beneficial and they were going to continue
19 to look at that and, basically, you know,
20 put a blessing and said, "Go forward." The
21 Committee submitted its proposed advertising
22 rule changes to the Court's Committee. That

23 Committee, in turn, said, "Go forward with
24 the public hearings and see what the people
25 think" so here we are.

1 These are the public hearings, today
2 in Baton Rouge. The next week, Lafayette on
3 the 8th. New Orleans on the 9th and we'll be
4 in Shreveport on the 16th. So if you just
5 can't get enough, we'll see you in
6 Lafayette, New Orleans and Shreveport.

7 The Florida State Bar experience,
8 unlike the Jimmy Hendrix experience, this is
9 essentially a note to prompt a little bit of
10 historical background with respect to why we
11 focused on Florida's rules. As I said, the
12 subcommittee for the Rules of Professional
13 Conduct Committee that was looking at
14 advertising rules way back in early 2005,
15 maybe even late 2004, decided initially that
16 it would focus on Florida's Rules since;
17 one, they were quite comprehensive; two,
18 Florida has about an 82-page handbook on
19 lawyer advertising and solicitation that it
20 provides to all of the Florida Bar members
21 to help them understand the rules. It
22 contains lots of examples of good ads, bad

23 ads, lots of interpretations of the rules,
24 lots of tips and guidelines, so that seemed
25 like something we could use and perhaps

1 adopt to our own use and Florida's rules
2 have been in effect for quite awhile. The
3 process has been bedded through both the
4 Courts and the Bar and it seemed like a good
5 starting place. Rather than us reinventing
6 the wheel, we just started with those rules
7 and it seemed like a good match.

8 In actuality, more coincidentally I
9 suppose than anything, when all was said and
10 done, the legislature, the State Legislature
11 of Louisiana, their bill actually focused on
12 the Florida rules. As I said, it was never
13 actually enacted into law but, since the
14 legislature was going in that direction and
15 we had already started that way, the Court,
16 again, felt that it was a good start for us,
17 and here we are trying to see what people
18 think about it.

19 All right. To the rules. We've tried
20 to break the slide down into two components,
21 basically -- the slide show down into two
22 components. Basically, the substantive

23 changes to the rules and, then, there is a
24 procedural component to the rules. We'll go
25 through them in just a second.

1 Quantitatively --

2 MS. SCHABEL:

3 Beth, you have to read all that.

4 MS. ALSTON:

5 I already have.

6 MS. SCHABEL:

7 No, no, aloud, to us.

8 MR. LEMMLER:

9 Just --

10 MS. ALSTON:

11 Oh, yes, right.

12 MR. LEMMLER:

13 -- just to give you a quick glance at

14 what's happening here, our current rules is

15 -- you know, right now we have five rules.

16 When this is said and done, under the

17 proposal, we would have ten so, you know,

18 you can see that we're just really

19 augmenting what's already there and, as part

20 of the materials that were available to you

21 and that are available in the back of the

22 room, and on line, there is a side-by-side

23 comparison that we did of the current
24 Louisiana rules. Actually, it's on this
25 side (indicating), and the proposed Florida

1 -- I'm sorry -- the proposed Louisiana
2 rules, our current proposals, and you can
3 see, if you look at it pretty closely, or
4 even loosely, the language in our current
5 rules has not really been removed at all.
6 It's all there. All we've done, really, is
7 augmented what's already there by using some
8 of what Florida has done in both these
9 substantive and procedural aspects.

10 Okay. Rule 7.1. "Permissible Forms
11 of Advertising."

12 (Mr. Ed Walters entered the hearing.)

13 MR. PLATTSMIER:

14 Mr. Walters, good afternoon.

15 MS. SCHABEL:

16 We're saying hello to Ed Walters --

17 MR. LEMMLER:

18 Ed Walters.

19 MS. SCHABEL:

20 -- who is actually on our Rules of
21 Professional Conduct Committee and had been
22 slated to give this presentation but found

23 himself delayed a bit so we asked Mr.

24 Lemmler to go forward.

25 MR. WALTERS:

1 Thanks.

2 MS. SCHABEL:

3 Do you want to take over or --

4 MR. WALTERS:

5 No. Go ahead.

6 MR. LEMMLER:

7 Anytime you can't stand me anymore,
8 just come up here and take this away and
9 they'll be happy to listen to you.

10 All right. Rule 7.1. This is the
11 general rule, basically, explaining the
12 permissible forms of advertising. I don't
13 know that there is anything really
14 controversial in here but does anyone have
15 anything they want to raise for our
16 consideration and for the record?

17 (No response.)

18 MR. LEMMLER:

19 Very good. Rule 7.2. This is a large
20 rule, basically, listing required
21 information, prohibited statements and
22 information and general regulations

23 governing content of advertisements. That
24 is broken down, then, into the required
25 information. Basically, the name of the

1 lawyer responsible for the content of the
2 communication and a bonafide office location
3 of the lawyer or lawyers who actually
4 perform the services advertised. Anyone
5 want to say anything with respect to that?

6 (No response.)

7 MR. LEMMLER:

8 Rule 7.2(b), "Prohibited Statements
9 and Information" overview. This is
10 basically a listing of things that -- and
11 information that you can provide, broken
12 down into, "Statements About Legal
13 Services", "Misleading or Deceptive Factual
14 Statements", "Descriptive Statements" and so
15 on.

16 "A lawyer shall not make or permit to
17 be made a false, misleading, deceptive or
18 unfair communication about the lawyer, the
19 lawyer's services or the law firm's
20 services." As the slide says, this is
21 essentially the rule that we have now.

22 Nothing has really changed. Right now, you

23 cannot make statements about yourself, your
24 law firm, or your services that are false,
25 misleading or deceptive, so nothing really

1 is changed there. "A communication violates
2 this Rule", and then there are a list of
3 prohibited statements. "If it contains a
4 material misrepresentation of fact or law or
5 omits a fact necessary", again, basically,
6 the rule we have now.

7 It may be even more beneficial just to
8 look at the side-by-side comparison as I'm
9 going through here, and you can see that the
10 language is roughly the same.

11 "(B) contains any reference to past
12 successes or results obtained", right now
13 our rule says, "Statement or implication
14 that the outcome of any particular legal
15 matter was not or will not be related to its
16 facts or merits", substantially similar.

17 Any comments? Yes, sir?

18 MR. NOBLE:

19 Yes. Would it --

20 MS. SCHABEL:

21 Can you --

22 MR. LEMMLER:

23 Would you state your name for the

24 record?

25 MR. NOBLE:

1 Sure. My name is John Noble, and it
2 does appear that it is substantially
3 similar, but it is different in that it
4 shows that, "Any reference to past successes
5 or results." Would that prohibit an
6 attorney from advertising that he has 20
7 years in debt collection experience? That
8 would -- it seems like that would
9 potentially be prohibited as talking about
10 past successes or results.

11 MS. SCHABEL:

12 Beth?

13 MS. ALSTON:

14 Wouldn't you -- wouldn't this make,
15 per se, violative of the rules for law firms
16 to have in their bio sections, lists of
17 cases they've won, cases -- you know,
18 reporting cases that they've won; is there
19 any law firm, over ten lawyers, that doesn't
20 have that on their web page?

21 MR. LEMMLER:

22 Ed?

23 MS. ALSTON:

24 Well, I thought you might know.

25 MR. WALTERS:

1 No. I think you're right, Beth.

2 MS. ALSTON:

3 That's crazy.

4 MR. LEMMLER:

5 I think the key part of this portion
6 of the rule is that the last phrase says,
7 "As allowed in the Rule regulating
8 information about a lawyer's services
9 provided upon request". If the client asks
10 you, or someone asks you, "How many cases
11 have you won" --

12 MS. ALSTON:

13 Okay.

14 MR. LEMMLER:

15 -- "How much money did you get for
16 your last client", there is nothing that
17 prohibits you from saying that.

18 MS. ALSTON:

19 Well, voluntarily accessing a firm's
20 website, is that asking to know that
21 information?

22 MR. LEMMLER:

23 That's a good question.

24 MS. ALSTON:

25 It's a rhetorical question.

1 MS. SCHABEL:

2 Are there any other comments on --

3 MR. LEMMLER:

4 You've stated it for the record.

5 "(C) states or implies that the lawyer
6 can achieve results by means that violate
7 the Rules of Professional Conduct or other
8 law". Again, something that is essentially
9 in our rules right now. You cannot violate
10 the Rules of Professional Conduct or other
11 law.

12 "Compares the lawyer's services with
13 other lawyers' services, unless the
14 comparison can be factually substantiated".
15 Again, what we already have in our rules.

16 "Contains a testimonial". Yes, ma'am,
17 Ms. Alston?

18 MS. ALSTON:

19 Does this mean that Adams & Reese
20 can't use Boise/Bollinger ads anymore?

21 MS. SCHABEL:

22 (Indicated a positive response.)

23 MS. ALSTON:

24 Yes.

25 MR. LEMMLER:

1 Any other comments?

2 MS. ALSTON:

3 On my web page, I have client
4 comments. Are those testimonials?

5 MS. SCHABEL:

6 (Indicated a positive response.)

7 MR. LEMMLER:

8 Anyone else?

9 (No response.)

10 MR. LEMMLER:

11 "Includes a portrayal of a client by a
12 non-client or the reenactment of any events
13 or scenes or pictures that are not actual or
14 authentic". Again, the basic rule, nothing
15 false, misleading or deceptive.

16 "(G) includes" -- yes, sir?

17 MR. RAY:

18 My name is Charles Ray. We skipped
19 over testimonials?

20 MR. LEMMLER:

21 No, sir. I think we actually
22 discussed --

23 MS. SCHABEL:

24 We just discussed it, but please give

25 us your comment on testimonial. Can you

1 come forward a little bit so this lady can
2 take down what you're saying.

3 MR. RAY:

4 I think I can speak loud enough from
5 here. I just wanted to know who's going to
6 say what a testimonial is and what is not?

7 MR. LEMMLER:

8 I suppose, ultimately, the Supreme
9 Court would decide that.

10 MS. ALSTON:

11 There is no definitional phrase
12 considered?

13 MR. WALTERS:

14 Not for that.

15 MS. SCHABEL:

16 Not for that, no.

17 MR. LEMMLER:

18 Now, the Florida handbook, if we come
19 up with a handbook similar to Florida, does
20 have examples, does have language that would
21 explain that, but we have not gotten that
22 far within the process.

23 MR. PLATTSMIER:

24 It might be helpful if you explain our

25 historical lack of comments to our rules --

1 MR. WALTERS:

2 Yes.

3 MR. PLATTSMIER:

4 -- and how, perhaps, a handbook would
5 help.

6 MR. LEMMLER:

7 Yes. As Mr. Plattsmier is attempting
8 to point out, given his local limitations at
9 the moment, our Supreme Court, historically,
10 has taken the position that what it puts in
11 the rules serve as the rules, that they do
12 not add comments, they do not publish
13 comments in conjunction with the rules. If
14 it's important enough, it should be in the
15 rule, rather than a comment. However, the
16 Florida rules do contain comments, much like
17 the ABA model rules, and they also have that
18 82-page handbook that I've referenced a
19 couple of times.

20 MS. ALSTON:

21 But we do --

22 MR. LEMMLER:

23 I think our goal with this,
24 eventually, once we get a working body of
25 rules, or at least proposed rules, is to

1 also focus on trying to come up with a
2 handbook that would perhaps contain non-
3 binding but very useful comments.

4 MS. ALSTON:

5 Well, we do have a terminology
6 section.

7 MR. LEMMLER:

8 We do. I don't think we've actually
9 focused on that portion of the Rules of
10 Professional Conduct but there is nothing to
11 say that the Court couldn't decide to
12 include something in that, as well.

13 MR. BATEMAN:

14 David Bateman. Will the Bar
15 Association have any mechanism for -- to
16 have potential advertising material reviewed
17 to determine whether it is in compliance
18 with the rule like you have on --

19 MR. LEMMLER:

20 Yes, sir. That's actually Rule 7.7,
21 if I remember correctly, the proposed rule,
22 and I'm going to get to that in a second

23 but, yes, that's part of the process. Oops,
24 what did I do Billy? Technical assistance,
25 please.

1 MR. PLATTSMIER:

2 It might help alleviate some concerns
3 as we go through the rules, maybe to chat
4 briefly with them now about the possibility
5 of submitting them for --

6 MR. LEMMLER:

7 Sure.

8 MR. PLATTSMIER:

9 -- advisory review and assistance and
10 repair.

11 MS. SCHABEL:

12 Especially, since we're having
13 technical difficulties.

14 MR. LEMMLER:

15 Yes. All right. This is the time
16 killer. Rule 7.7 and, then, 7.8, which
17 contains exceptions to a filing requirement,
18 part of 7.7 is that there will be the
19 availability of, essentially, optional
20 written advisory opinions on any advertising
21 that you wish to use. You can submit it to
22 the Bar.

23 MS. ALSTON:

24 Optional to who?

25 MR. LEMMLER:

1 To anyone who wants to use it.

2 MS. ALSTON:

3 Oh, okay, so --

4 MR. LEMMLER:

5 Any member of the Bar.

6 MS. ALSTON:

7 -- so if you ask for an opinion,
8 advisory opinion, on an ad, you will get
9 one?

10 MR. LEMMLER:

11 Yes. It's essentially the same as the
12 ethics advisory service now provides on all
13 ethics issues. This will be focused
14 particularly on advertising, proposed
15 advertising.

16 MS. ALSTON:

17 What's the turnaround time on that?

18 MR. LEMMLER:

19 Thirty days, minimum.

20 MS. ALSTON:

21 Minimum?

22 MR. LEMMLER:

23 I'm sorry.

24 MS. SCHABEL:

25 Maximum.

1 MS. ALSTON:

2 Maximum?

3 MR. LEMMLER:

4 There is a 30-day window.

5 MS. ALSTON:

6 Okay. Thank you.

7 MR. LEMMLER:

8 A 30-day window.

9 MS. SCHABEL:

10 Wait. Richard, this gentleman had a
11 question.

12 MR. LEMMLER:

13 Yes?

14 MR. PITTENGER:

15 Tommy Pittenger. Back to
16 testimonials. I -- and I don't mean to jump
17 in front of you before you start on all that
18 but --

19 MR. LEMMLER:

20 Go ahead.

21 MR. PITTENGER:

22 -- I'm not sure I understand why, you

23 know, to use the testimonials is a negative
24 thing, and maybe this isn't the right area
25 for that -- for that question but it seems

1 to me that, if you are a former client of a
2 lawyer, who better to ask, whether it's, you
3 know, face-to-face or on a TV ad or a radio
4 spot, or even in a -- in a direct mail
5 piece, I don't understand why testimonials
6 are a bad thing.

7 MR. LEMMLER:

8 I don't know that I'm here to debate
9 any of this with any of you, and I don't
10 wish to. I think that the function of this
11 hearing is basically to get your concerns
12 for the record so that the Rules Committee
13 and the Court can look at them during the
14 process.

15 MR. WALTERS:

16 Can I address this?

17 MR. LEMMLER:

18 Yes, sure.

19 MR. WALTERS:

20 Tommy, I think the rationale behind it
21 was that it may be misleading if you have
22 someone go on TV and say, "My lawyer got me

23 \$400,000 for my back injury." You know,
24 every case is different than every other
25 case, liability is different, causation is

1 different, the accident is different and I
2 believe that's why that's in there because
3 it's different in every other case.

4 UNIDENTIFIED SPEAKER:

5 But if it were a case where's he
6 talking about, where it's just, "Hi, I am
7 satisfied with my attorney and I'd like you
8 to know about it" and he's not making any
9 claims about what, you know, kind of
10 personal injury it is, then, what --

11 MR. PITTENGER:

12 You still have to be truthful in your
13 advertising.

14 UNIDENTIFIED SPEAKER:

15 If you're truthful, could that be
16 passed in front of the review committee and
17 approved?

18 MR. WALTERS:

19 Well, that's why we're here.

20 MS. ALSTON:

21 Well, why doesn't this violate the
22 First Amendment?

23 MS. SCHABEL:

24 Much of this has already been

25 litigated on the First Amendment issues,

1 which is the reason why we've chosen to copy
2 that language, because there is a body of
3 case law on this.

4 MS. ALSTON:

5 All the way up to the U. S. Supreme
6 Court?

7 MS. SCHABEL:

8 Some of them have been, yes, ma'am.
9 You know, I think one of the other things
10 that I've heard said about the testimonial
11 issue is the concern about the genuineness
12 of it, the coercion issue, those sorts of
13 things. Now, those are just some of the
14 things that have been said about it but so
15 you know that there -- it didn't come
16 arbitrarily, there have been discussions on
17 those issues, particularly, the background
18 in Florida.

19 MR. BATEMAN:

20 It just -- you know, it just seems
21 like there is -- David Bateman. It seems
22 like there has been this blanket rule, no --

23 you know, perhaps someone saying, "I got
24 \$400,000 for a back injury" could be
25 potentially misleading but, you know, so we

1 pass this blanket rule saying, "No
2 testimonials," then we may be throwing the
3 baby out with the bath water when, in fact,
4 what we want are good things said about
5 lawyers, like people saying, "Hey, I went
6 to" -- you know Boise/Bollinger saying, "I
7 like Adams & Reese. They did a great job"
8 or, "The lawyers in this firm helped me
9 tremendously." I mean, that seems to me to
10 generate positive information about the
11 practice of law and good information for the
12 client, a potential client, to make a
13 decision about which lawyer they wish to
14 retain.

15 MS. SCHABEL:

16 With regard to the celebrity, or
17 famous person endorsement, there is a
18 separate concern in these rules and I think
19 that the concern that has been expressed
20 about that is trying to get the public to
21 make a decision based on the celebrity or
22 famous person endorsement, might not be an

23 appropriate thing. But I think your point
24 is well taken with regard to testimonial and
25 it's something that will go back and be

1 considered.

2 MR. LEMMLER:

3 Okay. Let's proceed.

4 MS. ALSTON:

5 I'm sorry to beat the horse that's not
6 quite dead yet but the testimonial phrase,
7 has that gone up to the U. S. Supreme Court?

8 MS. SCHABEL:

9 Beth, I don't know each and every
10 case, whether it was --

11 MS. ALSTON:

12 Right. Well, it seems to me that
13 that's very similar to the political speech
14 issues with Judges that the Supreme Court
15 has spoken on recently and found that Judges
16 weren't -- that the code of judicial conduct
17 in certain respects was unconstitutional
18 because it infringed on judicial/political
19 speech.

20 MS. SCHABEL:

21 Any other comments on testimonials?

22 (No response.)

23 MS. SCHABEL:

24 Good.

25 MR. LEMMLER:

1 Rule 7.2.(b)(G), "Includes the
2 portrayal of a judge, the portrayal of a
3 lawyer by a non-lawyer, the portrayal of a
4 law firm as a fictionalized entity, the use
5 of a fictitious name to refer to lawyers not
6 associated together in a law firm, or
7 otherwise implies that lawyers are
8 associated in a law firm if that is not the
9 case". Again, I think the basis, primarily,
10 on the principle portion of the rule,
11 nothing false, misleading or deceptive.

12 "(H) depicts the use of a courtroom".

13 MS. ALSTON:

14 What is that about? That's where we
15 work.

16 MS. SCHABEL:

17 There are certainly folks that put
18 themselves in courtrooms in advertisements,
19 who don't actually appear in courtrooms, and
20 I think that's one of the issues. I think
21 the other issue, from the perspective of
22 Judges and the judiciary is that you're

23 taking the respect for the courtroom out and
24 making it less important. That's certainly
25 one of the things that I've heard. Ed?

1 MR. WALTERS:

2 Just basically, too, I guess the
3 thought was, if somebody is seen in a
4 courtroom, it implies that they go to a
5 courtroom and a lot of people don't.

6 MS. SCHABEL:

7 Yes, sir?

8 MR. BORGHARDT:

9 Franz Borghardt. Might it be a better
10 way of handling that? Instead of
11 disallowing all attorneys who might go to
12 Court from advertising that, from weeding
13 out those that don't go to Court, than
14 disallowing all lawyers that do go to Court
15 from advertising that. It's not false.
16 It's not misleading. It's seems like a
17 very, very hefty rule that's going to punish
18 a lot of otherwise lawyers who do go to
19 courtrooms.

20 MR. PLATTSMIER:

21 You may not be able to hear much of
22 what I'm saying, that's why I've kept my

23 mouth shut. I'll try to rely on my best
24 memory of some of the comments in some of
25 the research I thought that was discussed on

1 this rule because this was the subject of a
2 good bit of debate within the Committee. I
3 seem to recall there being a justification,
4 perhaps, or -- that said that, when you
5 bring in the judiciary as a sort of stamp of
6 approval, it lends the honor and the
7 integrity of the judicial side of things,
8 the adjudicative side of things, as standing
9 in your corner and giving you a favorable
10 blessing, which is probably an inappropriate
11 use of the judiciary, and that may well have
12 also been the reason for not permitting --
13 or the proposal did not permit the use of
14 someone who's dressed like a Judge, or to
15 portray a Judge.

16 MS. ALSTON:

17 Well, I don't have a problem with
18 that.

19 MR. PLATTSMIER:

20 Well, and I'm just suggesting to you,
21 it may have been part of the discussion,
22 Beth, about why that ought to have been

23 there.

24 MS. ALSTON:

25 But an empty courtroom, you know --

1 MR. PLATTSMIER:

2 I'm here to get your comments and
3 observations.

4 MR. LEMMLER:

5 Anyone else on that point?

6 (No response.)

7 MR. LEMMLER:

8 "Resembles a legal pleading, notice,
9 contract or other legal document". This
10 portion actually -- this language actually
11 appears in a couple of places within the
12 rules. It actually already appears within
13 our current rules, as well.

14 "Utilizes a nickname, moniker, motto
15 or trade name that states or implies an
16 ability to obtain results in a matter".

17 "Fails to comply with Rule 1.8(e)(4)(iii)."

18 Basically, the rule now that we have dealing
19 with advertising financial assistance.

20 MR. PITTENGER:

21 Sorry to interrupt you again, Richard,
22 but back to the -- the nickname. Obviously,

23 our concern would be the -- that the -- we -

24 - we advertise using a nickname. That --

25 would that prohibit us from advertising or -

1 - or even using letterhead that says, "E.

2 Eric Guirard"?

3 MR. LEMMLER:

4 I think under the rule, it perhaps

5 would.

6 MS. SCHABEL:

7 It wouldn't prohibit you from using

8 the name, it would just prohibit you from

9 using the nickname.

10 MS. ALSTON:

11 Well, but -- are you talking about the

12 "E. Guarantee" thing? That's not a

13 nickname. That's a -- that's a --

14 MR. PLATTSMIER:

15 A slogan.

16 MS. ALSTON:

17 -- slogan.

18 MS. SCHABEL:

19 A slogan and slogans are also not

20 allowed.

21 MR. PITTENGER:

22 All right, so Skip Phillips would have

23 to change his name back to --

24 MR. PHILLIPS:

25 So it would become anonymous because

1 nobody knows me by my real name. That's my
2 alias.

3 MR. PLATTSMIER:

4 I know who you are, Mr. Phillips.

5 MR. PHILLIPS:

6 I'm afraid that you do.

7 MR. LEMMLER:

8 No. I think -- I think if you
9 reexamine -- let me differ with you on that
10 one point and this is not meant to be
11 debated as much as for absolute or a
12 clarification as to what I think the
13 language might be, "Utilizes a nickname that
14 states or implies an ability to obtain
15 results" --

16 MR. PHILLIPS:

17 I think that's the way they --

18 MR. LEMMLER:

19 -- if you have a -- you know, a
20 nickname you've been using since you were a
21 child, assuming that it doesn't say, you
22 know, "Win all cases," you know, then, I

23 suppose it's okay.

24 MR. PHILLIPS:

25 You've got to read the whole phrase

1 together.

2 MR. LEMMLER:

3 Yes, sir?

4 MR. PITTENGER:

5 I think Skip can fly --

6 MR. PHILLIPS:

7 You do?

8 MR. PITTENGER:

9 -- and you're going to win.

10 (An off-the-record discussion followed.)

11 MR. LEMMLER:

12 Okay. Moving forward. Rule

13 7.2.(b)(2), "Misleading or Deceptive Factual

14 Statements. Any factual statement contained

15 in any advertisement or written

16 communication or any information furnished

17 to a prospective client under this Rule

18 shall not:

19 (A) be directly or impliedly false or

20 misleading;

21 (B) be potentially false or

22 misleading;

23 (C) fail to disclose material
24 information necessary to prevent the
25 information supplied from being actually or

1 potentially false or misleading;

2 (D) be unsubstantiated in fact; or

3 (E) be unfair or deceptive."

4 Again, all based on the primary rule

5 that nothing should be false, deceptive or

6 misleading when talking about yourself or

7 your firm.

8 Rule 7.2(b)(3) "Descriptive

9 Statements. A lawyer shall not make

10 statements describing or characterizing the

11 quality of the lawyer's services in

12 advertisements or written communications;

13 provided that this provision shall not apply

14 to information furnished to a prospective

15 client at that person's request or to

16 information supplied to existing clients"

17 so, again, the big exception here is that

18 you can tell your existing clients or

19 prospective clients who ask, whatever,

20 pretty much, they want to know, as long as

21 it, again, is not false, misleading or

22 deceptive.

23 "Prohibited Visual and Verbal
24 Portrayals" in 7.2(b)(4). "Visual or verbal
25 descriptions, depictions or portrayals of

1 persons, things, or events shall not be
2 deceptive, misleading or manipulative."

3 All, again, based on the basic premise.

4 Rule 7.2(b)(5), "Advertising Areas of
5 Practice. A lawyer or law firm shall not
6 state or imply in advertisements or
7 communications that the lawyer or law firm
8 currently practices in an areas of practice
9 when that is not the case." Basically, you
10 can't lie about what you do.

11 "Stating or Implying Louisiana State
12 Bar Association Approval" in 7.2(b)(6). "A
13 lawyer or law firm shall not make any
14 statement that directly or impliedly
15 indicate that the communication has received
16 any kind of approval from The Louisiana
17 State Bar Association." We're not endorsing
18 anyone's ads.

19 Rule 7.2(C), "General Regulations
20 Governing Content of Advertisements." We'll
21 just skip the overview and go right to the
22 rules themselves. "Use of Illustrations.

23 Illustrations, including photographs, used
24 in advertisements shall contain no features
25 that are likely to deceive, mislead or

1 confuse the viewer." Nothing false,
2 misleading or deceptive.

3 "A lawyer may communicate the fact" --
4 in 7.2(C)(3) -- "That the lawyer does or
5 does not practice in particular fields of
6 law. A lawyer shall not state or imply that
7 the lawyer is 'certified,' 'board
8 certified,' an 'expert' or a 'specialist'
9 except as follows:" and, again, this is
10 pretty much mirroring what is already in our
11 current rules. It's just augmented a bit.

12 Lawyers certified by the Louisiana
13 Board of Legal Specialization, those may
14 state that they are certified. Lawyers
15 certified by organizations other than the
16 Louisiana Board of Legal Specialization or
17 another state Bar, also, may proclaim that
18 they are experts or specialists.

19 In keeping with that, "Certification
20 by Other State Bars" --

21 MS. HARVEY:

22 I have a question.

23 MR. LEMMLER:

24 Yes, ma'am?

25 MS. HARVEY:

1 My name is Brenda Harvey. Where
2 you're talking about the particular fields
3 of law, that would be all right to
4 communicate the particular field of law.
5 Could you give us an example?

6 MR. LEMMLER:

7 Essentially, it's the same as the rule
8 right now. You can say that, "I concentrate
9 my practice in personal injury", "I am
10 focused on family law matters", I limit my
11 practice exclusively to intellectual
12 property." You can't use the buzz words,
13 that, "I am certified", "I am an expert or
14 specialist", unless you fall under those
15 categories and have been indeed certified as
16 having a specialty under the Louisiana Plan
17 of Legal Specialization.

18 Advertising lawyers, under 7.2(C),
19 must, "Disclose whether" -- did I skip
20 something here?

21 MR. PLATTSMIER:

22 No.

23 MS. SCHABEL:

24 No.

25 MR. LEMMLER:

1 Okay. Sorry. "Disclose whether the
2 client will be liable for any costs and/or
3 expenses in addition to the fee", when
4 providing information about fees. Again,
5 essentially, I think what is probably in our
6 rules right now. You have to tell them
7 whether they're going to be responsible for
8 anything other than the fees.

9 You must honor the fee quoted in the
10 advertisement for a certain period of time.
11 You must pay -- again, what's in our rules,
12 pay for the advertisements themselves.
13 This, I think, is a little something added
14 but -- any comments?

15 (No response.)

16 MR. LEMMLER:

17 Okay. Disclose that the matter will
18 be referred to another lawyer, if that is
19 the case. Nothing false, misleading or
20 deceptive.

21 "Permissible Content of
22 Advertisements." These are the safe harbor

23 provisions, information that is, on its
24 face, presumed not to violate these rules.
25 "Subject to the requirements of this

1 rule and Rule 7.10," which deals with firm
2 letterhead and so forth, you can state the
3 name of the lawyer or the law firm, a
4 listing of lawyers that are associated with
5 the firm, office locations, parking
6 arrangements, disability accommodations,
7 telephone numbers, web site addresses,
8 electronic mail addresses, office and
9 telephone service hours and designate
10 yourself as an, "Attorney" or a, "Lawyer" or
11 a, "Law firm". Basic information. Nothing
12 wrong with telling clients in your
13 advertisements basic information, again, as
14 long as it's presumably not false,
15 misleading or deceptive.

16 You can state the date that you were
17 admitted to the State Bar, and any other
18 Bars, your current membership or positions,
19 or your former membership or positions held
20 with the Louisiana State Bar, sections or
21 committees, together with the dates of those
22 positions. Former positions of employment

23 held in the legal profession, together with
24 dates those positions were held, years of
25 experience practicing law, number of lawyers

1 in the advertising firm and a listing of the
2 federal Courts and jurisdictions other than
3 Louisiana where you're licensed to practice.
4 Again, all information that clients would
5 probably want to know, all basic stuff about
6 yourself.

7 You can provide technical and
8 professional licenses, information on that,
9 granted by the state or other recognized
10 licensing authorities.

11 If you can speak or have someone that
12 can speak a foreign language.

13 Fields of law in which you practice --
14 to answer your question from before --
15 including official certification logos,
16 subject to the requirements of subdivisions
17 (C)(2) and (C)(3), what we've already
18 alluded to.

19 Prepaid or group legal service plans
20 in which you participate.

21 Your fee for your initial
22 consultation, if there is one, a fee

23 schedule. Again, subject to the provisions
24 of Section (C)(4) and (C)(5) of this Rule.
25 List the name and geographic location

1 of yourself or your firm, "As a sponsor of a
2 public service announcement or charitable,
3 civic or community program or event."

4 "Common salutary language such as
5 "best wishes," "good luck," "happy
6 holidays," and the like.

7 "Illustration of the scales of justice
8 not deceptively similar to official
9 certification logos" of the Bar Association
10 logo. "A gavel or traditional renditions of
11 Lady Justice, or a photograph of the head
12 and shoulders of a lawyer or lawyers who are
13 members of or employed by the firm against a
14 plain background consisting of a single
15 solid color or a plain unadorned set of law
16 books," --

17 MS. ALSTON:

18 So what is it --

19 MR. LEMMLER:

20 -- plain, vanilla.

21 MS. ALSTON:

22 You can't have a waist-up shot?

23 MS. SCHABEL:

24 I'm sorry?

25 MS. ALSTON:

1 You can only have head and shoulders,
2 you can't have a full body shot in your ad?

3 MR. PLATTSMIER:

4 That may be the Chuck Plattsmier rule.
5 They just don't want anything but my head.

6 MS. ALSTON:

7 Yes. Well, I could understand that
8 but you're not going to be --

9 MR. PLATTSMIER:

10 That's true.

11 MS. ALSTON:

12 -- advertising, are you?

13 MR. PLATTSMIER:

14 Thank you, Beth.

15 MR. LEMMLER:

16 These are the presumptively approved
17 forms of advertising. No one has said,
18 necessarily, that you cannot show from the
19 waist up. It just says, if you do this,
20 you're presumptively approved.

21 MS. ALSTON:

22 Chilling effect.

23 MR. LEMMLER:
24 "Rule 7.3, Advertisements in the
25 Public Print Media." Also, subject,

1 generally, to the requirements of the
2 previous Rule 7.2 that we've just discussed.

3 "Disclosure Statement." "Shall
4 contain the following disclosure:" -- this
5 is the highlighted 7.3. Your,
6 "Advertisement in the public print media
7 shall" state that, 'The hiring of a lawyer
8 is an important decision that should not be
9 based solely upon advertisements.'

10 Disclosure is not required when the ad
11 contains no illustrations and no information
12 other than that listed in subdivision
13 (C)(12) of 7.2, what we've been calling the
14 safe harbor exceptions, the things that I've
15 just discussed. All of those head and
16 shoulder shots and the plain, vanilla stuff.

17 "Written communication sent in compliance
18 with 7.4.", targeting direct mail,
19 essentially, what you can do now, as well.

20 "Rule 7.4 Direct contact with
21 Prospective Clients." This is broken down
22 into essentially two parts, solicitation in

23 person, or other forms, and written

24 communications.

25 I'm just going to keep rolling.

1 Somebody stop me when you have a point to
2 make.

3 The solicitation rule in the proposed
4 7.4 is essentially what we have right now in
5 our current Rule 7.3. Notable changes on
6 that, the phrase, "Prior professional
7 relationship" has been changed to, "Prior
8 lawyer-client relationship".

9 MS. ALSTON:

10 Why?

11 MR. LEMMLER:

12 Ms. Alston?

13 MS. ALSTON:

14 Why?

15 MR. LEMMLER:

16 That's one for the Committee. They
17 would have to answer that.

18 MS. SCHABEL:

19 It was felt to be more directly
20 descriptive, I think it was.

21 MS. ALSTON:

22 Okay, so you can't have direct contact

23 with your doctor; if you have a professional
24 -- prior professional relationship with your
25 doctor, you can't say, "Doc, your HIPAA form

1 is not in compliance. Let me fix it for
2 you"? I think --

3 MR. PLATTSMIER:

4 I think that was discussed in the
5 Committee meetings --

6 MS. ALSTON:

7 I think --

8 MR. PLATTSMIER:

9 -- specifically.

10 MS. ALSTON:

11 I think that's a narrowing of the
12 rule.

13 MR. PLATTSMIER:

14 It may well be, Beth. It certainly is
15 a change. I think the notion was that, if
16 you had a prior -- you know, the ABA -- I
17 believe this is right. The ABA model
18 includes even a prior significant social
19 relationship --

20 MS. ALSTON:

21 Right.

22 MR. PLATTSMIER:

23 -- gives you the entree.

24 MS. ALSTON:

25 Right.

1 MR. PLATTSMIER:

2 The Florida rule did not incorporate
3 that, but incorporated what is referred to
4 as, "The prior professional relationship,"
5 which, I think many people interpreted,
6 certainly, to include an attorney-client
7 relationship. That may well have been
8 interpreted by some as including individuals
9 with whom you've had a prior professional
10 relationship, such as you described, your
11 doctor, a CPA, a tax preparer, whatever the
12 case may be. The question arose in debates
13 whether or not those individuals who are not
14 part of a prior attorney-client relationship
15 necessarily want to be included within the
16 scope of a rule that allows you to make an
17 in-person, face-to-face solicitation of
18 their legal business or not, and the
19 Committee's decision at that point was
20 perhaps it ought to be narrowed to the
21 attorney-client relationship. As I remember
22 the discussion, that's what was said but

23 that's why we're having this meeting, again,
24 to get comments from folks who may have a
25 different perspective.

1 MS. ALSTON:

2 Well, if it -- you know, as I see the
3 intent of some of these rules, is to narrow
4 what is perceived to be distasteful and
5 over-the-top advertising for unsophisticated
6 clients. If you have a prior professional
7 relationship with someone who's a
8 professional, I would think that, that type
9 of person would not necessarily need
10 protection of this rule change.

11 MS. SCHABEL:

12 Are there any other comments with
13 regard to this?

14 (No response.)

15 MR. LEMMLER:

16 Okay. Another notable exception or
17 change, with respect to the same phrase, is
18 that, "Prior lawyer-client relationship" has
19 been defined, within the proposed rules, to
20 exclude, "Relationships in which the client
21 was an unnamed member of a class action",
22 essentially, one of thousands, a cast of

23 thousands that you truly have never had

24 contact with.

25 MS. ALSTON:

1 Isn't that a matter of law, wasn't
2 that -- I mean, in the -- there is a lot of
3 different ramifications of class action law,
4 whether a member -- unnamed member of a
5 class is your client or not. I mean, isn't
6 that an issue of state and federal law?

7 MR. LEMMLER:

8 That's a good point.

9 MR. BURNS:

10 Ms. Alston, some people in the back
11 are saying they can't hear you.

12 MS. ALSTON:

13 Oh, I'm sorry. I said, isn't that a
14 matter of law, whether an unnamed member of
15 the class is a client or not? I think that
16 there are cases both ways, and it depends on
17 the jurisdiction. Different federal
18 jurisdictions, state jurisdictions, vary on
19 whether an unnamed member of a class is a
20 client, and at what point they become a
21 member of the class, and a client, or not.

22 MR. WALTERS:

23 Beth, I think this is broader than
24 that. I think what this says is that, if a
25 person is an unnamed member of the class,

1 but not named on a thousand --

2 MS. ALSTON:

3 They fall within the class?

4 MR. WALTERS:

5 Yes.

6 MS. ALSTON:

7 That has been certified?

8 MR. WALTERS:

9 Right, but what this is designed to do
10 is to prohibit people from having a list of
11 a gazillion people and just contacting a
12 gazillion people. Every time something
13 happens, you all of a sudden have a
14 relationship with all these people in this
15 class --

16 MS. ALSTON:

17 Well --

18 MR. WALTERS:

19 -- whose clients are they, whose
20 clients aren't they, but this is pretty
21 narrow as to unnamed persons in the class.

22 MS. ALSTON:

1 with potential class members is closely
2 regulated by the Court and sanctioned by the
3 Court, and am I wrong?

4 MR. WALTERS:

5 Well, I don't know, Beth. I've never
6 had a Federal Court class action so -- but
7 I'm not sure that State Court class action
8 contact is very regulated.

9 MS. ALSTON:

10 Well, the point is, and -- and we're
11 wrestling with this issue on the ABA
12 Standing Committee on Ethics and
13 Professional Responsibility, of which I'm a
14 member, and we're talking -- we're studying
15 this issue and one of the things we
16 discussed is that, you know, when can
17 counsel for the defendants contact unnamed
18 members of the class and when can the
19 counsel for plaintiffs contact them and, you
20 know, we haven't reached a conclusion but
21 what we're looking at is an even playing
22 field and, if -- because, you know, I don't

23 think you can restrict plaintiffs' lawyers
24 from doing this when defense lawyers are
25 doing it all the time. You know, Kleenex

1 sends out investigators to interview people
2 who might be part of a class action of an
3 allergy claim against Kleenex, to find out
4 if there really is enough numerosity to
5 become a class. I just -- in this way, I
6 think it's obviously slanted against the
7 plaintiffs' lawyers.

8 MR. LEMMLER:

9 Any other comments?

10 (No response.)

11 MR. LEMMLER:

12 Okay. Let's move forward. "Rule 7.4
13 Direct Contact with Prospective Clients."
14 Written communications, again, the same
15 prohibitions as are currently contained in
16 Rule 7.3(b). The notable additional
17 conditions on prohibitions, the
18 communication must abide by 7.2, containing
19 the required information, "The hiring of a
20 lawyer is an important decision" and so
21 forth.

22 A copy must be filed with the LSBA, as

23 provided by Rule 7.7 --

24 MS. ALSTON:

25 Well --

1 MR. LEMMLER:

2 -- which we've already alluded to and
3 we will get to in a moment.

4 MS. ALSTON:

5 I'm sorry, Richard. What is the LSBA
6 going to do with it; are you going to look
7 at all of them?

8 MR. LEMMLER:

9 I think so.

10 MS. SCHABEL:

11 And we're going to be the keeper of
12 them.

13 MS. ALSTON:

14 Right, and, then, if you think they
15 violated the rule, then, you're sending them
16 to Chuck?

17 MR. LEMMLER:

18 Then we will give them advice with
19 respect to the rules.

20 MS. ALSTON:

21 Oh, okay.

22 MR. LEMMLER:

23 Question, I think?

24 MS. ALSTON:

25 Wait. There is a question.

1 MS. MARTIN:

2 Margaret Martin. So e-communications
3 that we send out thousands of a week, we
4 need to file with you each time?

5 MR. LEMMLER:

6 E-communications, emails?

7 MS. MARTIN:

8 No, e-communications.

9 MR. LEMMLER:

10 There is a distinction in the rules, I
11 think, and we'll get to that in a moment,
12 and I don't know which one this would fall
13 into, given their definition.

14 MS. MARTIN:

15 All right, so any -- let's say --
16 newsletters that you -- that you have been
17 mailing on an ongoing basis to an existing
18 mailing list, do we have to file every
19 newsletter before it's sent?

20 MS. ALSTON:

21 I think that's a good question
22 because, you know, under our current rules,

23 newsletters are not advertisements. For our

24 newsletters and thing -- and web sites and

25 stuff are not advertisements, and these

1 rules make them advertisements.

2 MS. SCHABEL:

3 I think it would depend on the
4 contents of the newsletters. What you put
5 in the newsletter could fall within the
6 stuff that's essentially a safe harbor.

7 MS. MARTIN:

8 And so is it a 30-day waiting period
9 to find out whether or not we can send out a
10 newsletter?

11 MS. SCHABEL:

12 What I'm telling you is that, if your
13 newsletter contains only the safe harbor
14 information, if, it doesn't --

15 MR. LEMMLER:

16 Let me see if I can try to address
17 your question. We've jumped ahead but I
18 don't want to miss your question. Rule 7.8,
19 the proposed 7.8, contains a list of
20 exceptions to the filing requirement. One
21 of those exceptions is, "A communication
22 mailed only to existing clients, former

23 clients, or other lawyers" so, if these
24 folks are already your clients and you're
25 sending them a newsletter every week or

1 every month, there is no reason to file it,
2 much as you would with people who are
3 requesting information, the contact has
4 already been established, essentially. Any
5 other questions on this point?

6 (No response.)

7 MR. LEMMLER:

8 No written communications to someone
9 unlikely to, "Exercise reasonable judgment
10 in employing a lawyer."

11 MS. ALSTON:

12 That includes insurance companies,
13 doesn't it?

14 MR. LEMMLER:

15 If contacting a prospective client
16 about a specific occurrence, you must -- the
17 communication must contain the phrase that,
18 "If you have already retained a lawyer for
19 this matter, please disregard this letter."

20 A statement that the signing lawyer
21 will not handle the matter, if that is
22 indeed the case.

23 No revelation of the underlying legal
24 matter on the envelope. Nothing saying "I'm
25 contacting you about your serious personal

1 injury case that occurred last week."

2 You're respecting those privacies.

3 General computer -- I'm sorry. "Rule

4 7.5 Advertisements in the Electronic Media

5 Other Than Computer-Accessed

6 Communications." We're effectively talking

7 here about TV and radio.

8 In general, computer-based ads are

9 subject to 7.6. All other ads in the

10 electronic media, including but not limited

11 to TV, radio, are subject to the

12 requirements of 7.2, nothing false,

13 misleading or deceptive.

14 "Appearance on Television or Radio.

15 "Prohibited Content. Television and

16 radio advertisements shall not contain:

17 (A) any feature that is deceptive,

18 misleading, manipulative, or that is

19 likely to confuse the viewer or

20 listener;

21 (B) any spokesperson's voice or image

22 that is recognizable to the public in

23 the community where the advertisement
24 appears;
25 (C) lawyers who are not members of the

1 firm or the advertising law firm
2 speaking on behalf of the advertising
3 lawyer or law firm; or
4 (D) an background sound --

5 UNIDENTIFIED SPEAKER:

6 Wait. A question on that, if you --
7 if you have a voice-over, a professional
8 voice-over, saying that they know the
9 attorney, they -- they can't do this, like a
10 talent if the --

11 MR. LEMMLER:

12 I think that this -- the rule says,
13 "Recognizable to the public in the community
14 where the advertisement appears" so you're
15 not prohibited from having spokespersons or
16 voice-overs, it's just someone who is
17 recognizable to the public and the community
18 where the advertisement appears.

19 UNIDENTIFIED SPEAKER:

20 So this would apply to just that?

21 MR. LEMMLER:

22 Yes, ma'am.

1 contain:

2 (A) images that otherwise conform to
3 the requirements of these Rules;

4 (B) a lawyer who is a member of the
5 advertising firm personally appearing
6 to speak regarding the legal services
7 the lawyer or law firm is available to
8 perform, the fees to be charged for
9 such services, and the background
10 experience of the lawyer or law firm;
11 or" -- as we just discussed --

12 (C) a non-lawyer spokesperson speaking
13 on behalf of the lawyer or law firm,
14 as long as the spokesperson's voice or
15 image is not recognizable to the
16 public in the community where the
17 advertisement appears, and that
18 spokesperson shall provide a spoken
19 disclosure identifying the
20 spokesperson" as such and, "Disclosing
21 that the spokesperson is not a
22 lawyer."

23 MR. PITTENGER:

24 Richard, I'm sorry, again. Can we go

25 back to 7.4, the last element contained in

1 7.4?

2 MR. LEMMLER:

3 If I can figure out how to do this.

4 Do you want me to -- let's see if I can

5 scroll through it. Rule 7.4?

6 MR. PITTENGER:

7 Yes.

8 MR. LEMMLER:

9 Okay.

10 MR. PITTENGER:

11 One of them said something about a --

12 background music.

13 MR. PLATTSMIER:

14 Rule 7.5, Tommy.

15 MR. PITTENGER:

16 I'm sorry.

17 MR. PLATTSMIER:

18 Rule 7.5(1)(d).

19 MS. SCHABEL:

20 At the bottom there.

21 MR. PITTENGER:

22 Yes. I'm just curious about why,

23 other than instrumental music.

24 MS. SCHABEL:

25 The discussions were about things like

1 the sounds of car crashes and stuff; isn't
2 that right?

3 MR. WALTERS:

4 Car crashes and jingles, that kind of
5 stuff.

6 MS. SCHABEL:

7 Yes. It was quite an ambient
8 discussion about jingles, I might add. It
9 went on a long-time, the discussion about
10 jingles.

11 MS. ALSTON:

12 Anybody who thinks that this rule is
13 not susceptible to a valid First Amendment
14 challenge, then, they must have skipped the
15 Bill of Rights classes, like George W. Bush
16 apparently did.

17 MR. PLATTSMIER:

18 Okay.

19 MS. SCHABEL:

20 All right, Beth, that was on the
21 record.

22 MR. LEMMLER:

23 Moving forward -- and anything else

24 about this point?

25 (No response.)

1 MR. LEMMLER:

2 Permissible content. I think we've
3 already covered that.

4 "Rule 7.6 Computer-Accessed
5 Communications." Basically, electronic
6 communications not on TV or radio. Two
7 distinct forms, the -- as I said, the
8 Internet presence, or web site, versus
9 email. All of these are subject to the
10 location requirements of 7.2. You must
11 indicate where your office is located, that
12 you have a bonafide office in a certain
13 location. Must comply with 7.2 unless
14 otherwise provided. May provide information
15 deemed valuable to assist potential clients.
16 Oops, wait a minute. Yes. We skipped ahead
17 to 7.9. This is part of the substantive --
18 this is substantive versus procedural, so we
19 skipped 7.7 and 7.8, and we're saving that
20 for the procedural part, even though we
21 talked about it already.

22 Rule 7.9, if your clients are asking

23 you for information, you still must comply
24 with 7.2, unless otherwise provided. You
25 may provide information that is deemed

1 valuable to assist a potential client.

2 You may provide an engagement letter,
3 but any contingency fee contract shall have,
4 "SAMPLE" and, "DO NOT SIGN" written on it so
5 that they know it is a sample.

6 "May contain factually verifiable
7 statements concerning past results." Must
8 disclose the intent to refer the matter to
9 another lawyer or law firm, if indeed that
10 is the intent.

11 "Rule 7.10 Firm Names and Letterhead".
12 It's substantially what we have right now,
13 discussing what you can put on your
14 letterhead, what you can call your firm,
15 whether or not you can state that you are in
16 a partnership and so forth.

17 Proposed procedural rules, the second
18 component. "Advance Written Advisory
19 Opinions, that we've already talked about
20 briefly. Then there is a regular required
21 filing component and, then, there are
22 exceptions to that filing requirement.

23 Procedural rules for advertising, 7.7,
24 for filing requirements. Rule 7.7(b)
25 provides for the, "Advance Written Advisory

1 Opinion". Rule 7.7(C) provides the filing
2 requirement for most advertisements. You
3 can either do 7.7(b) in seeking advance
4 written advisory opinion and have that
5 basically served, at some point, as the
6 filing, or you can just submit it for filing
7 and skip the advisory opinion. It's up to
8 you.

9 Submission requirements, in either
10 case, there will be a fee to be set by the
11 Supreme Court under this proposed --

12 MS. ALSTON:

13 Payable to the Bar?

14 MR. LEMMLER:

15 Payable to the Bar, assuming the
16 Supreme Court wants it that way, to
17 basically underwrite this process.

18 MS. SCHABEL:

19 Wait one second.

20 MR. LEMMLER:

21 Yes. Yes, sir?

22 MR. COLLINS:

23 What sort of fee, I mean, what's --

24 what's done in Florida?

25 MR. LEMMLER:

1 Would you state your name, please.

2 MR. COLLINS:

3 Sean Collins.

4 MR. LEMMLER:

5 Okay. What sort of fee?

6 MR. COLLINS:

7 Yes. How large would --

8 MR. LEMMLER:

9 Florida -- I'm sorry.

10 MS. SCHABEL:

11 It's \$150.

12 MR. LEMMLER:

13 Florida, right now, is \$150 per --

14 MR. COLLINS:

15 Per ad?

16 MR. LEMMLER:

17 -- per ad. However, under the
18 advisory opinion process, and as is proposed
19 under this process, if you opt to seek a
20 written advisory opinion, until you get that
21 right, there is no additional fee. If you
22 decide to file it on your own, without

23 seeking an advisory opinion, you take your
24 chances, and you may have to pay another fee
25 if it's deemed not in compliance.

1 MS. SCHABEL:

2 Beth?

3 MS. ALSTON:

4 In 2008, we will be celebrating 100
5 years of lawyer self-regulation, the
6 anniversary date of the canons of
7 professional responsibility, and scholars
8 who have been reviewing the motives behind
9 the initial drafters of those canons have --
10 are pretty much in agreement that the anti-
11 solicitation rules were designed to protect
12 the status quo, people with the societal and
13 business contacts, and to prevent people who
14 wanted to represent immigrants, or tell
15 immigrants that they had legal rights that
16 could be protected. Additionally, this
17 anti-competitive effect of the rules has
18 been safe from anti-trust regulation by the
19 state action exception but our -- the
20 Louisiana State Bar Association status, as a
21 mandatory state Bar, is quite imperiled at
22 this point because none of the traditional

- 23 justifications for a mandatory Bar exist.
- 24 The Supreme Court has taken away Bar
- 25 admissions, Bar discipline, MCLE. What

1 else, Marta? Something else.

2 MS. SCHABEL:

3 This is your statement, not mine.

4 MS. ALSTON:

5 And so those traditional functions of
6 the mandatory Bar are no longer with our
7 Bar. I know that other states are
8 considering roles like this. For example,
9 New York, and in New York, they're already
10 preparing -- gathering money to mount First
11 Amendment challenges to rules like this. If
12 the -- if the Louisiana State Bar
13 Association recommends these rules for
14 adoption to the Supreme Court and ends up
15 being sued in those First Amendment
16 challenges, if there are any filed here, the
17 Bar Association may not have the state
18 action exception to the anti-competitive
19 effect of these rules and I, for one, would
20 hate to see our Bar dues going to pay for
21 expensive First Amendment fights, which are
22 going to be well-funded on the other side.

23 MS. SCHABEL:

24 Anybody else have any comment in that

25 regard?

1 (No response.)

2 MR. LEMMLER:

3 Okay. Part of the submission
4 requirements, again, a fee to be composed
5 and perhaps set by the Supreme Court. A
6 copy of the advertisement and a sample of
7 your envelope.

8 Let me just say before I go any
9 further, that you get an hour of CLE credit
10 for your attendance here today. We'll give
11 out the forms when we're done so those of
12 you who might need it who consider leaving
13 at this point, you're free to leave but know
14 that your CLE credit is available.

15 Let's see.

16 MS. SCHABEL:

17 We're almost done, though.

18 MR. LEMMLER:

19 Yes. We're moving pretty well.

20 MS. SCHABEL:

21 We're on slide 38 of 41, so we're
22 almost there.

23 MR. LEMMLER:

24 I'm surprised that we've made it that

25 far so quickly.

1 A copy of the advertisement and a
2 sample of the envelope.

3 A typewritten copy of a transcript
4 that, presumably, it's a TV or radio ad,
5 something that is not already in printed
6 form.

7 A statement concerning the type of
8 media frequency and duration of the
9 advertisement, where you intend to run it,
10 how long you intend to run it, how many
11 times you intend to run it and so forth.

12 Exemptions from the filing
13 requirement. Again, 7.8. It contains --
14 one of the exemptions is that your
15 materials, your advertising, contains only
16 the safe harbor content as enumerated in
17 7.2(C)(12), all of those plain, vanilla
18 things.

19 If your advertisement is a brief
20 announcement identifying the lawyer as a
21 sponsor for a charity event, provided that
22 no information is given but the name and the

23 location of the sponsoring law firm, that is
24 presumptively exempt from the filing
25 requirements.

1 "A listing or entry in a law list or
2 bar publication."

3 "A communication mailed only to
4 existing clients, former clients or other
5 lawyers."

6 "Any written communications requested
7 by a prospective client."

8 Yes, sir?

9 MR. PITTENGER:

10 Richard, if a client calls and asks
11 about being represented in an automobile
12 accident, can you, then, send them -- I
13 mean, do they have to specifically request,
14 you know, "Send me a track record of what
15 you have done in the past" or, "Tell me what
16 you can do for me", that sort of thing?

17 MR. LEMMLER:

18 Well --

19 MR. PITTENGER:

20 If they call and ask for
21 representation, can we then send them a
22 packet of information?

23 MR. LEMMLER:

24 I guess the devils in the details. If

25 they say, "I want more information" or, "Can

1 you send me something", sure. If they say,
2 "I don't want to use you," then, I think
3 you'd have a hard time proving that they
4 asked for that information.

5 Any other questions or comments?

6 (No response.)

7 MR. LEMMLER:

8 As we said, any written communications
9 that are requested by the prospective
10 client.

11 Professional announcement cards mailed
12 to other lawyers, relatives, former or
13 current clients and close friends. "Richard
14 Lemmler is opening his new practice for the
15 practice of law."

16 "Computer-accessed communications as
17 described in subdivision (b) of Rule 7.6."
18 Essentially, your web sites.

19 The proposal -- I think we're now
20 through the body of the proposed rules.
21 This is what we are proposing to the Court
22 Committee and to the Court, is that there

23 should probably be some sort of phase-in, if
24 the Court adopts some form of these rules.
25 We're proposing that there should be at

1 least, perhaps, a 90-day period to modify
2 ads that are currently in use. The printed
3 advertisements with an annual or other
4 limited periodic publication schedule,
5 obviously, recognizing that you can't change
6 a Yellow Pages ad but once a year.
7 Grandfather -- as I said, grandfathered
8 annual advertisements must be submitted
9 thereafter.

10 Future work plan. We're conducting
11 the public hearings, as we talked about
12 already, three more to take place. Special
13 rules of debate were adopted by the
14 Louisiana State Bar House of Delegates.
15 They've already been adopted. Presumably,
16 once the proposal has gone through the
17 public hearing process and assuming that the
18 Supreme Court Committee believes that we
19 should go forward, then, I suppose we'll go
20 through the House and be debated before the
21 House of Delegates.

22 Resolutions addressing amendments must

23 be submitted in writing 30 days in advance
24 of the House of Delegates' meeting. I think
25 the deadline for that is --

1 MS. SCHABEL:

2 December 15th.

3 MR. LEMMLER:

4 -- December 15th or 13th?

5 MS. SCHABEL:

6 Better to be safe and --

7 MR. LEMMLER:

8 Right around the 13th or 15th, but you

9 can find that on the Bar website, LSBA.org.

10 The Supreme Court Committee to study

11 attorney advertising will review our

12 proposal, so all of your comments that are

13 being recorded here today will be reviewed

14 by the Rules of Professional Conduct

15 Committee and then, again, reviewed, I'm

16 assuming and assured, probably that they

17 will be reviewed by the Supreme Court

18 Committee and, perhaps, more than likely, by

19 the Supreme Court themselves.

20 That's it. Yes, ma'am?

21 MS. HARVEY:

22 Will the slide show be on the web

23 site?

24 MR. LEMMLER:

25 I suppose we can put it up there. I

1 don't see why not.

2 MS. SCHABEL:

3 We'd be delighted to; although, we
4 hadn't thought of that.

5 MR. LEMMLER:

6 Right now, in case you're not aware
7 that, on the web site, we do have a basic
8 set of the rules, as proposed. There is
9 also, as I've been alluding to and as you'll
10 find in the back of the room, a side-by-side
11 comparison of our current versus the
12 proposed rules.

13 Yes, sir?

14 MR. COLLINS:

15 So what's the -- the earliest date for
16 the new rules to take effect?

17 MS. SCHABEL:

18 Well, let me just address the process
19 so that everybody is clear on this. The Bar
20 Association operates essentially in an
21 advisory capacity to the Supreme Court. The
22 Court is the only entity that can make a

23 decision about what rule will actually be
24 implemented, and I don't know that there is
25 any way to predict what their schedule would

1 be, but the issue of whether we will
2 recommend these rules, and what content our
3 recommendation will take, will be heard in
4 the House of Delegates on January 20th, at
5 which point, whatever our decision is will
6 be transmitted to the Court, which will then
7 take action in the Court. Historically, the
8 Court has moved fairly slowly. In this
9 particular circumstance, the Court has been
10 requested by the legislature to move forward
11 on this issue, and there is a sense of a
12 little bit more urgency about it. I would
13 anticipate March 1.

14 UNIDENTIFIED SPEAKER:

15 For the rules to be in effect, or for
16 the Supreme Court --

17 MS. SCHABEL:

18 For them to be adopted and with an
19 effective date in -- shortly thereafter,
20 would be our thought, which also means, you
21 know, from the Bar Association's
22 perspective, if it moves forward as

23 proposed, that we've got to change a lot of
24 what we're doing to be able to accommodate
25 people's needs.

1 UNIDENTIFIED SPEAKER:

2 And I have a question, as -- as you go
3 to Lafayette, Shreveport and New Orleans and
4 you hear the same questions being asked on
5 the same three or four issues that brought
6 me here, are -- is that -- is it likely that
7 the rule -- what you recommend would be
8 changed?

9 MS. SCHABEL:

10 The answer to that is, that,
11 historically, when we did the ethics 2000
12 trip around the state, very much like this,
13 we thought the comments were invaluable and
14 they were indeed incorporated. The
15 thoughtful ones were very -- were indeed
16 incorporated into what we ultimately came up
17 with and I haven't heard anything here today
18 that I didn't think was thoughtful, with
19 certain possible exceptions, but -- Beth and
20 I are friends. I apologize.

21 MS. ALSTON:

22 I did that on purpose.

23 MS. SCHABEL:

24 I know, so, yes, I think that the more

25 you say, and I think you should encourage

1 people. It's -- you know, you can comment
2 on the web site. The idea is to get input,
3 not to just push something through. We are
4 on a short time frame but that is largely
5 dictated by forces other than us so, you
6 know, stepping up to the plate and making
7 your comments is really important.

8 Yes?

9 MR. PITTENGER:

10 Not -- not to drag this out, Richard,
11 any longer, my wife actually has a
12 babysitter tonight, so she's going to be
13 disappointed if I sit around here all night,
14 but I read -- in reviewing the materials
15 before tonight's meeting, I remember seeing
16 something that -- that said you submit your
17 ads and if -- if the LSBA says that the ads
18 pass muster, and you run them, that they
19 could still run afoul at the ODC; is that my
20 understanding?

21 MR. LEMMLER:

22 I think that's correct. I think it --

23 as in any instance currently, if you seek an
24 advisory opinion from the LSBA, that is not
25 binding on anyone. It's our advice. It's

1 our best interpretation of the rules and our
2 best counsel to you as to what we believe
3 the rules mean, and I think that, perhaps,
4 has some mitigating value and I know it
5 would for a hearing committee and the board
6 and perhaps even the Court, but it is not
7 binding on the Disciplinary Counsel or the
8 board or the Court.

9 MR. PITTENGER:

10 Yes, but up -- up to this date, your -
11 - your suggestions or your -- your answers
12 to my routinely stupid questions over the
13 telephone are not admissible in the -- in a
14 --

15 MS. SCHABEL:

16 That's a change.

17 MR. PITTENGER:

18 -- at a hearing or --

19 MR. LEMMLER:

20 That's correct.

21 MS. SCHABEL:

22 In this situation --

23 MR. PLATTSMIER:

24 This would be admissible, Tommy.

25 MS. SCHABEL:

1 -- this would be admissible.

2 MR. PLATTSMIER:

3 If you've got something in writing, an
4 approval from Richard and the LSBA screening
5 folks, acted in good faith, tried to comply,
6 modified the advertisement, if that had been
7 suggested, whatever, and, then, you ran it
8 and we get a complaint from somebody that
9 says, "It's obviously deceptive or wrong
10 because of 'A', 'B' or 'C'," and we look at
11 it and we say, "Well, you know, they've got
12 a point. Maybe it is" and you come back and
13 say, "But I did it exactly in accordance
14 with the recommendations of the good folks
15 there", that has got to be taken into
16 consideration and it is admissible if we
17 would be perhaps foolish enough to go
18 forward with the disciplinary prosecution --

19 MR. PITTENGER:

20 Thank you.

21 MR. PLATTSMIER:

22 -- and it's provided for.

23 MR. PITTENGER:

24 Thank you.

25 MR. LEMMLER:

1 Yes, it's essentially what we have
2 now, modified, and I have to admit that,
3 certainly, I guess we were discussing this
4 earlier, a couple of the staff attorneys and
5 myself, that, you know, it's a process, at
6 least, that's available to you. It's
7 someone to give you a second opinion on your
8 ad before you run it, you know. It's better
9 than not getting it, I guess, in my view so,
10 you know, we're trying to help the lawyers,
11 I guess is the real goal here.

12 MR. PLATTSMIER:

13 Let me make a statement for the
14 record. The information that we have kind
15 of gotten feedback from, from other states,
16 who have a similar process, such as Florida,
17 is that, over the years, their perception
18 has been that lawyers who wish to engage in
19 some form of advertisement, routinely do
20 make use of that service because they
21 genuinely want it to be in compliance with
22 the rules. That is not to say that there

23 might not be some folks who would like to

24 push the envelope and see if they can't

25 intentionally, perhaps, present

1 constitutional issues. That may well
2 happen, as well, but that could probably
3 happen with just about any set of rules or
4 restrictions on advertising.

5 UNIDENTIFIED SPEAKER:

6 I have another question, is there --
7 is there a process that, before you invest
8 your money in producing a TV spot, that you
9 have a video description and a -- and a
10 script that you say, "This is what I intend
11 to do", before I do it, so that you don't
12 have to incur the production costs twice?

13 MR. LEMMLER:

14 Essentially, if you do the written
15 advisory opinion process the first
16 component, that first process, you do have
17 to pay a fee, but it's before you incur all
18 your production costs and so forth and, you
19 know, there is no real time limit on that
20 and we'll work with you until you get it
21 right, under the proposal. We do that now.

22 Anyone else?

23 (No response.)

24 MR. LEMMLER:

25 Okay. Well, I guess that's it.

1 Thanks to everyone for coming.

2 MR. KING:

3 The number?

4 MR. LEMMLER:

5 Oh, yes. On the CLE, I'm sure you
6 need that.

7 MR. KING:

8 Write this down, 0250061102.

9 MR. PHILLIPS:

10 Do it again.

11 MR. KING:

12 It's 0250061102.

13 MR. PHILLIP:

14 And what's the name?

15 MR. KING:

16 Reevaluating Louisiana's Lawyer
17 Advertising Rules, and I'll bring -- I'll
18 leave it right up here if anybody needs to
19 see it.

20 MR. LEMMLER:

21 You get one hour of ethics for this.

22 MR. KING:

23 One hour of ethics.

24 MR. GUIRARD:

25 One last question. I'm sorry. E --

1 E. Eric Guirard. Has there been any effort,
2 I'm just wondering, on the part of the
3 Committee, to -- to poll or study attorneys
4 in other jurisdictions that have had to toil
5 under similar rules? There are a number of
6 other states that have that.

7 MR. LEMMLER:

8 Florida. Florida has this right now.
9 Texas has it right now.

10 MR. GUIRARD:

11 Florida, yes.

12 MR. LEMMLER:

13 New York is proposing it.

14 MR. GUIRARD:

15 It seems to be -- it seems to me it
16 would be really valuable to -- to at least
17 talk to lawyers who have had to be subject
18 to these rules to see their -- their
19 experiences or their problems.

20 MS. SCHABEL:

21 We are told, and we are regularly in
22 contact with people active in the Texas and

23 Florida Bar --

24 MR. GUIRARD:

25 That's the Bar Association.

1 MS. SCHABEL:

2 -- we are told that they are -- that
3 they are regularly -- you know, that there
4 has been positive --

5 MR. GUIRARD:

6 Well, you were told that. That's the
7 Bar. I just wonder about the actual
8 lawyers.

9 MR. LEMMLER:

10 Well, I don't know how we could
11 identify and target those folks.

12 MR. GUIRARD:

13 They have ads.

14 MR. LEMMLER:

15 They have an opportunity to come
16 forward. Well, they can come forward now.
17 We have a public comment --

18 MR. GUIRARD:

19 Would it be okay, I mean, if some of
20 those attorneys contacted and commented?

21 MR. LEMMLER:

22 It's public comment. Anyone can

23 comment.

24 MS. SCHABEL:

25 Anyone can comment. It's on the web

1 site.

2 MR. LEMMLER:

3 They're more than welcome, I'm sure,
4 anyone's comments --

5 MR. GUIRARD:

6 Okay.

7 MR. LEMMLER:

8 -- so there is no restriction. You
9 don't have to be a member of the Bar to
10 comment.

11 Anything else?

12 (No response.)

13 MR. LEMMLER:

14 There is refreshments, food outside.
15 Please help yourself. There is plenty.

16 MS. SCHABEL:

17 Take some home.

18 MR. LEMMLER:

19 Thank you for coming. Thank you very
20 much for your comments.

21 MR. PLATTSMIER:

22 Thank you for coming.

23

THE HEARING WAS CONCLUDED AT 6:12 P.M.

24

* * * * *

25

1 R E P O R T E R ' S P A G E

2 I, Lori B. Overland, Certified Court
3 Reporter, in and for the State of Louisiana, the
4 officer, as defined in Rule 28 of the Federal
5 Rules of Civil Procedure and/or Article 1434(b)
6 of the Louisiana code of Civil Procedure, before
7 whom this sworn testimony was taken, do hereby
8 state on the Record

9 That due to the interaction in the
10 spontaneous discourse of this proceeding, dashes
11 (--) have been used to indicate pauses, changes
12 in thought, and/or talk overs; that same is the
13 proper method for a Court Reporters's
14 transcription of proceeding, and that the dashes
15 (--) do not indicated that words or phrases have
16 been left out of this transcript;

17 That any words and/or names which could not
18 be verified through reference material have been
19 denoted with the phrase "(inaudible)."

20

21

Lori Overland, C.C.R.

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