

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:

23           Well, as I understand it, all contact  
24           -- most -- in most class action cases,  
25           especially in Federal Court, all contact

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.

23                    Moving forward. Appearance on TV and  
24                    radio, what is presumptively permissible?  
25                    "Television and radio advertisements may

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: