

Hearing transcript in the matter of

Case: STUDY COMMITTEE ON LAWYERS ADVERTISING

Date: March 1, 2006

Pages: 116

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STATE BAR OF NEVADA

STUDY COMMITTEE ON LAWYER)
ADVERTISING)
_____)

PUBLIC HEARING

Taken on Wednesday, March 1, 2006

At 10:11 a.m.

At 555 East Washington Avenue, Room 4500

Las Vegas, Nevada

Reported by: Ellen A. Goldstein, CCR 829

3/1/2006

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| <p>1 APPEARANCES</p> <p>2 STUDY COMMITTEE COMMISSION MEMBERS:</p> <p>3 WILLIAM C. TURNER, ESQ., Chairman</p> <p>4 EDWARD M. BERNSTEIN, ESQ.</p> <p>5 DIANNA HEGEDUIS, ESQ.</p> <p>6 HON. MICHAEL A. CHERRY</p> <p>7 TRACY A. EGLET, ESQ.</p> <p>8 REW R. GOODENOW, ESQ. (By teleconference)</p> <p>9 HON. JAMES WILLIAM HARDESTY</p> <p>10 TRACY L. ITTS, ESQ.</p> <p>11 RICHARD J. MORGAN, Dean</p> <p>12 BRYAN K. SCOTT, ESQ.</p> <p>13 RICHARD W. MYERS, ESQ.</p> <p>14 PATRICE D. PEREZ, ESQ.</p> <p>15 BRADLEY L. KENNY, ESQ.</p> <p>16 TERRY MC CONNELL, public member</p> <p>17</p> <p>18 ALSO PRESENT:</p> <p>19 ROB BARE, ESQ., STATE BAR OF NEVADA</p> <p>20 ALLEN W. KIMBROUGH, CAE, Executive Director</p> <p>21 KRISTINA MARZEC, CLA, paralegal</p> <p>22 ADAM STOKES, ESQ., public speaker</p> <p>23 VINCENT KOSTIW, ESQ., public speaker</p> <p>24</p> <p>25</p> | <p>1 lawyer advertising.</p> <p>2 We've had an Internet subcommittee look at Internet</p> <p>3 and how it is affecting their advertising, and I must tell you</p> <p>4 that lawyer advertising through the Internet is becoming a</p> <p>5 major source of both business for lawyers but also a major</p> <p>6 source of concern that it is done appropriately.</p> <p>7 And we've also had the concurrent review committee</p> <p>8 where we've looked at and heard testimony from the Texas</p> <p>9 administrator of the State Bar with regard to how they handle</p> <p>10 their lawyer advertising.</p> <p>11 What I must say as chair is that the consensus of</p> <p>12 this commission is that the purpose of lawyer advertising</p> <p>13 obviously is, one, that lawyers should be allowed to advertise</p> <p>14 because it is a business and it does in fact by their</p> <p>15 advertising protect the public, but this commission must also</p> <p>16 exercise its right to make sure that the public is protected</p> <p>17 and that the representations are fair and truthful and do not</p> <p>18 create unreasonable expectations.</p> <p>19 I must say also as the chair that it's a balance</p> <p>20 between the right of free speech under the Constitution, the</p> <p>21 right to practice as a business person and as a lawyer, and</p> <p>22 the right of the public to have full disclosure; and the</p> <p>23 purpose of this commission, if we had to look at one single</p> <p>24 purpose, is to protect the public with regards to the legal</p> <p>25 advertisements that we as a Bar place.</p> |
| Page 3 | Page 5 |
| <p>1 WEDNESDAY MARCH 1, 2006 - LAS VEGAS, NEVADA</p> <p>2 10:11 A.M.</p> <p>3 MR. TURNER: I'm Bill Turner. I'm the chairman of the</p> <p>4 Study Committee on Lawyer Advertising. This particular</p> <p>5 commission was appointed by the Supreme Court in December of</p> <p>6 2005 to look at lawyer advertising and consider necessary</p> <p>7 changes.</p> <p>8 MS. HEGEDUIS: Mr. Turner?</p> <p>9 MR. TURNER: Yes.</p> <p>10 MS. HEGEDUIS: Do you want to tell the court reporter to</p> <p>11 start. She was just asking.</p> <p>12 MR. TURNER: Yes, go ahead and start.</p> <p>13 I'm the chairman of the lawyer advertising commission</p> <p>14 which was appointed by the Supreme Court. The purpose of this</p> <p>15 commission is to look at and consider rule changes with</p> <p>16 regards to lawyer advertising. This particular commission has</p> <p>17 met a number of times and had full discussions concerning the</p> <p>18 same.</p> <p>19 We've had a Constitutional subcommittee that</p> <p>20 concerns, in a study, the implications of our rules with</p> <p>21 regards to the Constitution and how it affects freedom of</p> <p>22 speech under the Freedom of Commercial Speech process that the</p> <p>23 United States Supreme Court has talked about.</p> <p>24 We've had an empirical study to look at other states</p> <p>25 and how they handle -- or how the Bars in other states look at</p> | <p>1 I would like everyone on the commission to introduce</p> <p>2 themselves now going -- starting with my right hand.</p> <p>3 MS. HEGEDUIS: Dianna Hegeduis, chief deputy attorney</p> <p>4 general.</p> <p>5 MR. BARE: Good morning, Mr. Chairman, members of the</p> <p>6 committee. I'm Rob Bare, Bar counsel for State Bar.</p> <p>7 MS. EGLET: I'm Tracy Eglet, partner in Mainor, Eglet,</p> <p>8 Cottle.</p> <p>9 MS. PEREZ: Patrice Perez, sole practitioner.</p> <p>10 MR. SCOTT: Bryan Scott, assistant city attorney for city</p> <p>11 of Las Vegas.</p> <p>12 MR. MORGAN: Dick Morgan, dean of the Boyd School of Law</p> <p>13 at UNLV.</p> <p>14 MR. MYERS: Richard Myers with Crockett & Myers law firm</p> <p>15 here in Las Vegas.</p> <p>16 MR. KENNY: Bradley Kenny with my brother Craig Kenny &</p> <p>17 Associates.</p> <p>18 MR. TURNER: I'm Bill Turner.</p> <p>19 MR. MC CONNELL: Terry McConnell, Valley Bank, public</p> <p>20 member.</p> <p>21 MR. HARDESTY: Jim Hardesty, Supreme Court Justice.</p> <p>22 MR. CHERRY: Michael Cherry, district judge, Department</p> <p>23 17, Eighth Judicial District.</p> <p>24 MR. BERNSTEIN: Ed Bernstein, attorney with Bernstein &</p> <p>25 Associates.</p> |

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1 MR. TURNER: Do we have everybody?

2 MR. GOODENOW: Mr. Turner, in Reno this is Rew Goodenow
3 representing the State Bar and I'm a lawyer in private
4 practice in Reno.

5 MR. TURNER: Thank you.

6 As you can see from the people that have introduced
7 themselves on this commission, we have a wide variety of
8 individuals and lawyers. We have plaintiffs' lawyers who
9 advertise. We have Ed Bernstein, who is probably the lead
10 lawyer who began advertising and the use of advertising in
11 this state. We have a number of defense counsel or people
12 with defense experience. We have the AG's office involved.
13 We have the dean of the law school. We have two Supreme Court
14 justices. We took this commission and imposed, we thought, a
15 fair balance of individuals from the legal community and also
16 from the community as a whole to make sure that we understood
17 what the needs of the community were.

18 We have placed over there I think copies of all the
19 information concerning this commission and we have the draft
20 report, which is a draft report, the history of this
21 commission and various other materials that might be useful to
22 you.

23 This particular commission needs to meet today to
24 discuss the entire draft of the report. There will be a
25 seven-day period for this commission then to review and make

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1 final comments. At that point there will be also a 30-day
2 comment by the public, including yourselves. This will also
3 go to the Board of Governors. The Board of Governors must
4 approve this and then the Supreme Court must review this.
5 Once that's done, if the changes are approved and the
6 recommendations are approved, then it will become a matter of
7 regulations that the State Bar can enforce.

8 This is a public hearing so we'll entertain either
9 statements or questions at the present time. If you do,
10 please identify yourselves and I'd like to hear your comments
11 on this.

12 Comments? Any comments? Okay, that's fine. Any
13 questions or comments? All right. In Reno I think we have --
14 do we have someone in Reno who would like to address this
15 commission?

16 MS. HEGEDUIS: Carson City.

17 MR. TURNER: Carson City, I'm sorry.

18 MR. GOODENOW: Mr. Turner, David Bolnick with Kendall
19 Kapitz & Bolnick is present here and I don't know whether he
20 wants to make any comments or not. He's certainly welcome to
21 though.

22 MR. TURNER: All right. David, do you want to make any
23 comments?

24 MR. BOLNICK: Well, at this point in time I have no
25 comments to make, but I'd certainly like to reserve that right

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1 depending upon how this hearing proceeds.

2 MR. TURNER: That's fine.

3 MR. STOKES: I'm attorney Adam Stokes.

4 MS. HEGEDUIS: Could you come down.

5 MR. STOKES: Sure.

6 MS. HEGEDUIS: Without tripping.

7 Just have a seat.

8 MR. STOKES: I just wanted to take a moment to raise two
9 issues that we see in our practice, and not having had the
10 opportunity to be present with the committee in its previous
11 meetings we are not sure if this has already been addressed;
12 but the first has to do with -- and this is mostly limited to
13 advertising by -- advertising for personal injury cases.

14 We see a huge problem and what I believe are very
15 misleading for the public by attorneys who advertise
16 contingency fees on TV or billboards like, for example,
17 15 percent or 22 percent, only later for the clients to find
18 out that, you know, after they've already gone and signed up
19 with the attorney whom they're trusting to look out for their
20 interest, that that percentage contingency fee would only
21 apply for like 7 days, after which time -- or after 14 days --
22 after which time the contingency fee is raised; and you might
23 still see it in the fee agreement of course, but it might go
24 up to 30 or 40 or 50 percent.

25 I believe personally that this is misleading. It is

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1 enticing clients away from attorneys who are advertising
2 honestly and fairly and to the offices of attorneys who are
3 not acting that way.

4 And it's also my experience that when clients go into
5 these law offices where the attorneys are advertising
6 15 percent or 10 percent or whatever the case may be but --
7 they're not actually meeting with lawyers because, as we know,
8 when the attorneys began reducing their fees in this matter
9 below what has become the standard in our community for
10 charging in cases, it becomes more difficult to afford legal
11 counsel to meet with each of these clients. You end up having
12 a secretary or a case manager that come and meet with these
13 clients. So therefore it really disadvantages the client, who
14 might also not even be able to meet with a lawyer, which is a
15 whole separate issue. But I believe it really degrades the
16 standard of the practice in the community by misleading
17 advertising only to the detriment of the attorneys who are
18 attempting to advertise fairly and to fully disclose.

19 So on this note our opinion is that -- and I'm going
20 to say "our." I've spoken to a couple dozen attorneys on my
21 own just informally about this issue. When an attorney is
22 advertising a contingency fee -- for example, 15 percent or
23 whatever the case may be -- and there are other details
24 involved, I believe that the -- that all details of the
25 advertisement need also be stated and given the same -- if

3 (Pages 6 to 9)

1 it's printed, if the contingency fee presented is printed on
 2 an advertisement, then all other terms must also be printed on
 3 that advertisement with the same font, same size. If it's
 4 stated on the radio or a TV advertisement, then it needs to be
 5 stated in the exact same way, not really fast at the end with
 6 one of these guys that speaks like a hundred words every ten
 7 seconds or something like that, but all the details must be
 8 laid out as to make it not misleading. That was my first
 9 point.

10 MR. TURNER: Can we respond to that? And I'm certain
 11 anyone on the commission is free to respond, but I think that
 12 the history of our research has indicated that throughout the
 13 states and federal courts your concern has been absolutely
 14 brought out and has been a major concern by the Courts.

15 To protect the public there should be full
 16 disclosure; and if there's one trend in lawyer advertising we
 17 see through the court system in the United States, that is
 18 full disclosure. I think that's true in the Securities and
 19 Exchange Commission. I think it's true throughout the
 20 business community, full disclosure. We've seen the Enron
 21 problem. We've seen all these other business problems. So
 22 what you're basically saying is if someone is going to put an
 23 ad in, it shouldn't be bait and switch, and I think
 24 Mr. Bernstein has already very aptly said that and I think
 25 that we do have a recommendation that if a lawyer advertises

1 specifically a range of fees, he shall include all possible
 2 terms and fees and the duration that the fees are in effect.
 3 Such a disclosure shall be presented with the full promise.
 4 We had a very full discussion of what you're talking about and
 5 your point is so well taken.

6 MR. STOKES: I don't want to interrupt, but do they
 7 disclose the fact that it is nearly impossible to settle your
 8 personal injury case within 7 days? It's not part of the
 9 terms, but it is an absolutely necessary disclosure that if --
 10 after the 7 days or 14 days the rate is going to change. They
 11 don't tell you that.

12 (Ms. Itts entered the proceedings.)

13 MR. STOKES: That's something else that needs to be
 14 included because as most of us know who are practicing
 15 reasonably, that is a possibility, especially considering the
 16 time it takes to even make contact with some of these
 17 adjusters at the insurance companies, to correspond back and
 18 forth. There are more disclosures required beyond the mere
 19 terms themselves.

20 MR. TURNER: What you're basically saying I think in
 21 effect is that they need to disclose it and put it so that
 22 it's accepted; is that correct?

23 MR. STOKES: Right. Even if lawyers are forced to just
 24 disclose the terms themselves completely, it's still not
 25 completely -- all the details have not been disclosed because

1 if the clients don't understand how long it takes to settle
 2 these cases or to work on the cases, they don't understand the
 3 dynamics. That's why they hire a lawyer in the first place.

4 MR. HARDESTY: Mr. Chairman, I think -- let me ask the
 5 question, but I believe that the amendments that were
 6 discussed at the last meeting in rule 7.2(g) addresses
 7 Mr. Stokes' concerns. The rule was modified by the committee
 8 or proposed to be modified by the committee in the following
 9 manner: "A lawyer who advertises a specific range of fees" --
 10 and this was the addition -- "shall include all possible terms
 11 and fees and the duration said fees are in effect. Such
 12 disclosures shall be presented with equal prominence."

13 Does that modification address your concern or it
 14 doesn't?

15 MR. STOKES: No, sir, because the clients do not
 16 understand the typical duration for which these -- typical
 17 duration of the handling of these types of cases. They need
 18 to disclose that, for example -- and I don't know what the
 19 statistics are, but for example, 90 percent of this type of
 20 case will not settle in less than 60 days, for example. I
 21 don't know what the statistics are, but I'm just throwing out
 22 hypothetical numbers, because without complete disclosure of
 23 what the typical duration is for the handling of a case, how
 24 can the disclosure of when the fees will change be a truthful
 25 disclosure if the client doesn't understand how long it should

1 take to handle that case?

2 I also think that that leads -- these types of fee
 3 agreements lead to attorneys dragging their feet; and so the 7
 4 days pass, the 14 days pass which, you know, I'm not trying to
 5 say anything bad about any specific attorneys, but I think
 6 that these types of agreements and just basically attorneys
 7 being able to advertise their percentage contingency fees
 8 leads to a wide variety of abuse.

9 MR. TURNER: What you're really saying, if I gather your
 10 two issues here, one is the fee agreement itself where it has
 11 the seven days because you're really saying that's deceptive.

12 MR. STOKES: Right.

13 MR. TURNER: That's not really part of lawyer advertising
 14 so much as another form of "Can that agreement be deceptive
 15 because it's used," what you're saying, "in order to bring
 16 someone in and deceive them."

17 MR. STOKES: Well, the fee agreement doesn't bring someone
 18 in. It's the advertising that's deceptive.

19 MR. TURNER: Sure. That's your second part. What you
 20 really would like to see, I think if I could address that, is
 21 just do away with that seven day or anything which was meant
 22 to deceive or failed to disclose the real fee agreement.

23 MR. STOKES: I think my personal opinion is they need to
 24 do away with advertising contingency fees -- I'm sorry,
 25 advertising percentage contingency fee. Of course we all

1 agree that contingency fees allow access to legal services.

2 MR. HARDESTY: I want to comment about a couple things you
3 said so there isn't some misconception.

4 While it may be a criticism that in some cases
5 lawyers would -- some lawyers might delay the resolution of a
6 case so that the contingency fee goes up, but the fact of the
7 matter is in a great many cases discovery is necessary to
8 learn about the case to properly evaluate the case and that's
9 not a product of the lawyer improperly delaying the
10 disposition. That's a product of doing the correct service
11 for the client and learning about the case the way you should.

12 I think it would be greater criticism, frankly, for a
13 lawyer to take a case, resolve it in a relatively short period
14 of time and then discover that that client has medical
15 problems that are far more severe than the basis of the
16 settlement. So -- and I'm concerned about this commission or
17 any commission suggesting that all cases are the same, that
18 all cases get resolved in the same period of time. I don't
19 think that's true. At least that was never my experience in
20 private practice and I would be surprised if that's changed.
21 Is that true in your practice?

22 MR. STOKES: Well, sir, if we can agree that --

23 MR. HARDESTY: Is that true in your practice in all cases?

24 MR. STOKES: No, of course not, but if we can agree that
25 an attorney must act diligently and reasonably investigate the

1 facts surrounding the basis of a personal injury --

2 MR. HARDESTY: Absolutely.

3 MR. STOKES: How can there be a meaningful disclosure to
4 the client before it goes up without telling them that "The
5 sort of investigation that I'm ethically obligated to provide
6 in your case will take a duration longer than that amount of
7 time"? Is my point being made?

8 MR. HARDESTY: It is on me. I don't know what the other
9 commission members maybe want to comment, but how do you
10 suggest that that information be communicated? Part of lawyer
11 advertising isn't just the First Amendment right of a lawyer
12 to advertise. Part of it is to educate the public on fees, on
13 lawyers. How would you suggest that education be communicated
14 in advertising at this time?

15 MR. STOKES: Well, I've never really stopped to consider
16 how advertising a 15 or 20 percent contingency fee educates,
17 but I think that the whole practice of advertising a certain
18 percentage contingency fee should be done away with. I do not
19 see how it can be done in a nonmisleading manner and it does
20 not seem that there's any practical way to responsibly manage
21 this sort of practice.

22 MR. HARDESTY: Mr. Chairman, Mr. Stokes has hit on a major
23 concern with this committee and he has just now been provided
24 with our proposed changes in the rules that presently exist.
25 Since we're going to be here for a number of hours, perhaps he

1 would care to propose some further language that might beef up
2 this change for our consideration as we proceed with this
3 morning and this afternoon.

4 MR. STOKES: Sure.

5 MR. TURNER: Would everybody, just for the court
6 reporter's benefit, please identify yourself as you speak.

7 Tracy, did you have a comment?

8 MS. EGLET: Sure.

9 Mr. Stokes, if the number of cases that they actually
10 settle within 30 days -- let's say for the year that they're
11 advertising, you know, they state, "We've settled two cases
12 within 30 days," would that be something that might address
13 your issue, having to give the number they actually settled in
14 that time frame for a certain amount of time?

15 MR. STOKES: Well, I appreciate your offering some
16 suggestions that address my concerns.

17 I don't think that would be any less misleading
18 because there are ways to manipulate numbers and statistics
19 and a client might not understand that. If, for example, the
20 attorney said, "I settled two cases in that time period," they
21 might not understand that that attorney handled 600 cases in
22 that time period. Numbers and statistics are tools of
23 manipulation and argument in advertising and persuasion, and
24 that's why I think that attorneys should not be able to
25 advertise a certain percentage.

1 There's nothing wrong with advertising a contingency
2 fee arrangement. That certainly makes the services available,
3 but it's when you advertise a specific percentage that you
4 start getting into problems, especially when different
5 attorneys package the percentages in different ways. If it's
6 before cost or after cost, there's no meaningful comparison
7 between attorneys when one is saying, "I charge you
8 15 percent" and "I charge you one-third," when they're
9 calculating the percentage in a different manner.

10 MR. TURNER: By the way, Miss Court Reporter, that was
11 Tracy Eglet.

12 MS. EGLET: Tracy Eglet. Sorry about that.

13 MR. BARE: Mr. Stokes, this is Rob Bare. I want to tell
14 you that as I sit here and listen to you I couldn't agree more
15 with some of your ethical concerns about the way that these
16 discount contingency fees may have been structured, because
17 after all, the key issue having to do with these contingency
18 fee arrangements is when does the triggering mechanism kick in
19 which essentially takes us from the 15 or the 22 or the 27
20 percent to some other fee such as a 40 percent fee, let's just
21 say, and is that reasonable? If it's not reasonable I think
22 there's a good argument that it would be misleading.

23 I will tell you I think there's certainly an
24 enforcement component to everything that you're talking about.
25 You probably haven't had a chance to take a look at a document

1 that's available here which describes everything that the
2 office of Bar counsel has done over the last year or so to
3 enforce the advertising rules in this state, and on page 3 of
4 that document I do want to let you know -- please take a look
5 at it. Let us know your thoughts. On page 3 of that document
6 you'll see that over the last year, as Bar counsel I've either
7 subpoenaed or requested the current copies of each and every
8 contingency fee arrangement for every discount lawyer that we
9 knew about in this state. I will tell you that they all
10 provided those contingency fee arrangements to me.

11 I had counsel for every one of these lawyers, except
12 for the 27 percent lawyer, in my office and we went through
13 the agreements. I will tell you that initially a few of the
14 agreements in my opinion needed to be specifically amended to
15 make it so it was reasonable.

16 I will tell you, though, that the Bar is not aware
17 currently of any contingency fee arrangement for a discounted
18 fee where there's a seven-day period where if you don't settle
19 within the seven days, then we kick up to a 33 or 40 percent.
20 If you know about that, what I'd ask you to do -- or any of
21 the lawyers you talk to -- please call me. We'd like to know
22 about that, but we're not aware of that currently being the
23 situation. In fact I will tell you now that the 15 percent
24 and 22 percent, the 27 percent, all those agreements have been
25 modified if they needed to be modified to be, in my opinion,

1 in compliance with the rules.

2 These lawyers I think now are trying to do something
3 to compete in a market that's highly competitive and that
4 they're trying to be discount lawyers. I'm not saying that on
5 other legal bases we might not be interested in some of these
6 people, but just as far as the written document is concerned,
7 I wanted you to know that I have reviewed them all and I would
8 encourage you or any of your contemporaries that you've talked
9 to to let us know if there's other ones that you have concerns
10 with.

11 MR. STOKES: I appreciate what you're saying. I was just
12 using the seven days as an example. It's not just the fact of
13 the fee agreements when they say the percentage will change
14 over time. There's all types of other ways this happens where
15 I charge you, for example, one-third of your personal injury
16 settlement or somebody else might charge you 25 percent of
17 your personal injury settlement plus 25 percent of your
18 property -- of the amount that we collect on your property
19 repairs, like we'll charge you 25 percent of everything
20 instead of one-third on your personal injury.

21 And I appreciate the efforts to review the
22 contingency fees in your office, the agreements themselves. I
23 think that the problem starts before that point. It's how
24 that attorney is getting that client into his or her office in
25 the first place, and that is the product of inadequate

1 disclosures to these people, to the clients, who because the
2 terms of the offers aren't being made completely and because
3 even if they were being made completely, the clients are not
4 in a position to adequately understand how much -- the
5 circumstances surrounding these details like how long it would
6 typically take to settle a case.

7 MR. TURNER: He'd like to address this and then the chair
8 will address it.

9 MR. MORGAN: Dick Morgan, dean of the Boyd law school.

10 First of all I doubt that banning any advertisement
11 of a contingency fee -- 15 percent, 30 percent, 40 percent or
12 whatever -- would withstand Constitutional challenge. I don't
13 think you can categorically say that advertising a contingency
14 fee is misleading. It may be in some circumstances, but in
15 those circumstances where it's misleading, in addition to the
16 rule that the Justice Hardesty and Chairman Turner referred to
17 dealing with the disclosure of all of the terms and fees in
18 equal prominence and all that, we also have on page 19 a more
19 general rule. This is subparagraph (g) which says, "Any
20 factual statement contained in any advertisement or written
21 communication or any information furnished to a prospective
22 client under this rule shall not," and then it says, "fail to
23 disclose material information necessary to prevent the
24 information supplied from being actually or potentially false
25 and misleading."

1 If a person advertises a 15 percent contingency fee
2 and has never actually charged the client 15 percent -- in
3 fact the charges have all been 30 percent or 35 percent -- I
4 would think that that would be a fact that would have to be
5 disclosed. If it weren't disclosed, that it would be
6 actionable by Rob Bare under that rule.

7 MR. TURNER: If you look at the rules that we've tailored
8 here, we're trying to specifically address your problem
9 without crossing over the bounds of free speech. I agree with
10 the dean wholeheartedly. That's the second prong he's
11 addressing that you've already addressed.

12 Then the third one that Rob has addressed is that we
13 have a Bar disciplinary general counsel and some fine lawyers
14 there that do an excellent job of taking action as he's just
15 pointed out and this comes to their attention.

16 We also have put into effect in our recommendations
17 here a third prong, which is to review -- as Texas does but in
18 a different way -- lawyer advertising concurrently with its
19 being placed into the public's hands. That is, we intend to
20 establish or recommend establishing a committee, an advisory
21 committee of lawyers and laypeople as well as one person in
22 the State Bar, to review all lawyer advertising of certain
23 types such as Yellow Pages or billboards that are significant
24 for drawing the public into this particular lawyer so as to
25 make sure that it conforms with these rules so that we can

1 prevent those as going out and bring them in first.
 2 I agree with you and I think we all agree that
 3 there's a concern that once the horse is out of the barn, so
 4 to speak, it's too late. That's what this recommendation is
 5 intended for, is to review almost all major lawyer advertising
 6 before the horse gets out of the barn and to approve it and to
 7 charge a fee or a penalty if in fact that lawyer does not send
 8 his advertising in; and if he refuses to do so, there will be
 9 penalties attached and there will be discipline attached.
 10 That's different than we've ever had before.

11 We take it very seriously and we take the protection
 12 of the public, as you say. I think all of this commission --
 13 plaintiffs, defense attorneys, everyone -- has been concerned
 14 about your issue, but we also have to be very careful that we
 15 don't become so bureaucratic and create so many rules that
 16 it's impossible to conduct advertising which in and of itself
 17 can be very educational for the public.

18 Lawyer advertising can be a good thing because it
 19 brings people to good lawyers who can give them good
 20 representation. If there wasn't lawyer advertising, how would
 21 a person know where to go and how would they know how to
 22 select their lawyers? So it's a balance.

23 Any other comments?

24 MR. BOLNICK: Dave Bolnick, Carson City.

25 MR. TURNER: Yes, Dave.

1 MR. BOLNICK: I'm with the law firm Kendall, Kapitz &
 2 Bolnick in Reno and we advertise on television 25 percent
 3 contingency rate for personal injury cases. There are no
 4 provisos or contingencies or fine print involved in our
 5 25 percent contingency fee. The 25 percent applies at all
 6 stages of the litigation whether the case is settled, whether
 7 suit has to be filed, whether an appeal has to be filed.

8 Now, I agree with the gentleman speaker who says that
 9 there might be problems when lawyers don't disclose all of the
 10 information. For example, there might be a fine-print item in
 11 the fee agreement that says only the case that is not
 12 settled -- or, I'm sorry, only if the case settles, then
 13 there's a low contingency fee and the client is unaware from
 14 the TV advertising that the fee goes up.

15 However, I think the issue here is simply a matter of
 16 disclosure. As long as the lawyer discloses all contingencies
 17 and provisos concerning that contingency fee agreement, I
 18 think it's perfectly legitimate and conforms to the ethical
 19 rules in this state.

20 The gentleman speaker also mentioned that aside from
 21 the misleading advertising portion, which I think we're in
 22 agreement that disclosure needs to be made fully and
 23 comprehensively, he says that he would be against contingency
 24 fees even if full disclosure is made, and I have to strongly
 25 disagree with that.

1 These lower contingency rates that are being made
 2 available to the public serve a great public interest. As we
 3 all know, across this country there is political winds that
 4 are stating now that attorneys are receiving too much money in
 5 contingency fees; we're getting more money than the clients.
 6 Legislation wants to be passed to cap lawyers' fees, and I
 7 think by advertising these lower fees we're doing what
 8 everyone wants and the consumer is entitled to know that we're
 9 doing this.

10 And I also want to point out that not only does the
 11 client benefit by more money in his pocket from these lower
 12 fees and therefore should be informed about these lower fees,
 13 but I think we're saving the court system a lot of time and
 14 resources and we're saving the taxpayers money by offering
 15 these fees, and by that I mean this: By using a 25 percent
 16 contingency fee we are able in our firm to settle cases -- a
 17 lot more cases before we have to file suit because the
 18 insurance companies these days are pretty tough and they're
 19 not offering a lot of money. When we reduce our fees, that
 20 means more money in the client's pocket and the client doesn't
 21 insist on filing a lawsuit. So these cases don't get filed;
 22 they get settled.

23 So it's in the interest of the court systems and the
 24 taxpayers as well that we get this information out to the
 25 public. I think that the market would control what fees

1 ultimately are charged by lawyers, competitive market, and I
 2 think that we're protected by our rights to free speech and to
 3 actively participate in the market to advertise these
 4 contingency fees.

5 Thank you.

6 MR. TURNER: Thank you.

7 MR. STOKES: In the case of this type of advertisement, I
 8 don't see any harm whatsoever in this gentleman fully
 9 disclosing the complete details of the offer on TV. "We
 10 advertise a 25 percent contingency fee whether we settle your
 11 case or whether we go to trial." What's wrong with that?
 12 There's nothing wrong with saying that.

13 MR. TURNER: That's section (g).

14 MR. STOKES: But the benefits of the complete disclosure
 15 of all the terms outweigh the potential abuses that seem to
 16 happen pretty frequently.

17 MR. TURNER: Thank you. Did you have a second point?

18 MR. STOKES: Yeah. The second point and hopefully a point
 19 that won't take as much of your time as the first point --

20 MR. TURNER: We welcome your comments and appreciate them.

21 MR. STOKES: I appreciate your listening to them.

22 We see a huge problem with nonlawyers who are
 23 advertising for legal services with impunity. It seems -- and
 24 I don't know if this is true or not, but it seems like the

25 State Bar does not always vigorously pursue these people and I

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1 don't know if it's because they don't fall under the
2 regulation of the Bar, but it seems to me that if a nonlawyer
3 is advertising for legal services, the advertising rules need
4 to state that the State Bar shall or must immediately file a
5 lawsuit and seek an injunction against that activity. It must
6 happen.

7 It happens -- I think it's damaging to the public if
8 people believe they're dealing with lawyers and they're not.
9 They're dealing with notarios or with these secretary legal
10 services or with -- I don't know if it's true, but I hear of a
11 place called Ticket Terminators that's owned by a nonlawyer.

12 You know, I'll just disclose that I own Ticket
13 Busters for the record when I make what statement.

14 But nonlawyers are competing with lawyers for legal
15 services, signing up clients. The Bar is -- it seems like the
16 Bar is not doing enough and it seems to me that the rules --
17 there is no reason why the rules should not be changed to say
18 that the Bar must act as soon as they know about it. The Bar
19 must file suit and they must seek injunction to have these
20 businesses shut down.

21 MR. TURNER: Did I understand one thing you said? Did you
22 say that you own Ticket Busters?

23 MR. STOKES: Yes, sir.

24 MR. TURNER: Rob, do you want to address this?

25 MR. BARE: I'd be happy to. Again this is Rob Bare.

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1 I guess it was about four or six years ago now that I
2 testified in front of the state assembly and in front of the
3 senate and, you know, the way the legislative process works,
4 there came a point in time where I was able to sit in the
5 lobby of the legislative building and propose some language
6 which did get enacted, which if you look at NRS 7.285 it does
7 give the State Bar of Nevada authority to get an injunction in
8 a civil court concerning these businesses that are wholly
9 engaged in the unauthorized practice of law wholly owned by
10 nonlawyers.

11 MR. STOKES: I think subsection (e) of that provision
12 states that the State Bar may.

13 MR. BARE: Correct.

14 MR. STOKES: My point is that it should say the State Bar
15 must pursue these people. There's no reason the State Bar
16 should have flexibility in deciding whether or not to go after
17 a nonlawyer who is practicing law. What's the point of having
18 flexibility?

19 MR. BARE: There's got to be some sort of prosecutorial
20 discretion in the Bar to do that.

21 I want to let you know that over the last few years
22 we have gotten about ten injunctions in civil court. We've
23 fully shut down some businesses. I think it's really a
24 compliment to the Bar, respectfully. I'm not talking about my
25 office individually or me.

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1 But it's interesting. You know, when members of the
2 public go to these entities that you're talking about, you
3 know, they go into an immigration place and they pay twice as
4 much as they would pay an immigration lawyer for a nonlawyer
5 to supposedly handle an immigration matter and their relative
6 ends up on a boat. Do you know where they come when they have
7 that relative deported? They come into our lobby. They come
8 into our office. We encourage that. We want that to happen.

9 I took a bunch of these people up to the legislature
10 and I put them in front of the assembly and senate and I had
11 to bring a translator because I didn't speak Spanish. So we
12 did that.

13 In addition to that, when people go to these divorce
14 entities that do family law and they get harmed by nonlawyers,
15 they're the same people that show up in our lobby.

16 What I'll tell you is we're committed to doing this.
17 I have a lawyer in my office David Clark. About half of his
18 time is spent wholly enforcing and dealing with "unauthorized
19 practice of law" issues. Kristina Marzec, who is sitting
20 right over here, she is a CLA, one of the CLAs I'm lucky to
21 have in my office. She's also responsible for all these
22 pieces of paper floating around here today. She is -- when
23 she can she spends as much time as she can dealing with
24 "unauthorized practice of law" issues with David Clark.

25 What I'll tell you is if you see some things -- one

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1 thing about the State Bar is we want people to tell us about
2 things so that we can deal with it just like when we talked
3 about the earlier comments regarding the lawyers who were
4 saying if the case didn't settle within seven days, then the
5 contingency fee would go up. I now understand that was just a
6 hypothetical and you don't really know. Same way with this
7 issue: If you know about nonlawyer businesses occurring,
8 please come into the office, meet with me, meet with David.
9 We'll walk you through it and we'll look at it.

10 I just want to let you know I honestly -- to react to
11 the proposed language that you have, I would just say that
12 some sort of a prosecutorial discretion I think just makes
13 sense. We'd be in an untenable situation practically speaking
14 if the Bar was made to have to file a case every time -- you
15 wouldn't want me to say, for example, that every complaint we
16 received against lawyers I have to file some sort of a
17 pleading.

18 MR. STOKES: Of course not and nobody is -- I'm certainly
19 not complaining about the efforts of the Bar to control the
20 unauthorized practice of law, but since there is no private
21 right of action and since in my experience a police department
22 will do nothing to prosecute somebody for -- my understanding
23 after seven counts of specific classic felony, since the
24 police will do nothing about it and since there's no private
25 right of action, I believe it would not put an unfair burden

8 (Pages 26 to 29)

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1 on the Bar to say that they must go after these cases, because
2 the Bar is not deciding what happens. That's why there's a
3 judge. That's why the judge is going to decide if what these
4 people are doing warrants an injunction.

5 Since there's no other mechanism for controlling what
6 I believe really to be an out-of-control situation,
7 unauthorized practice of law, and on so many levels and so
8 many different levels of law and all over the valley it
9 must -- I just don't understand any reason whatsoever why the
10 language should not be changed that "the Bar must."

11 MR. MORGAN: Dick Morgan, dean of the Boyd law school.

12 One of our recommendations I'm sure is going to be
13 that the Bar beef up its enforcement staff and efforts so that
14 there can be more enforcement effort in the advertising area
15 and in the "unauthorized practice of law" area. I agree with
16 Rob that I think it's unworkable to mandate the Bar counsel to
17 go after every situation. You have to have discretion, but at
18 the moment there is limited resources and choices have to be
19 made as to how the resources are going to be deployed.

20 What you ought to be doing among other things is
21 lobbying the Board of Governors of the State Bar to either
22 reallocate Bar resources or to generate more resources; for
23 example, by raising lawyer fees in the State Bar so there can
24 be more resources in Rob's office to be used at his discretion
25 in these kind of cases.

1 MR. STOKES: But why not create maybe a private right of
2 action so that lawyers -- we don't create (inaudible) --

3 MR. MORGAN: That or you can try an appropriate court
4 case.

5 MR. STOKES: I understand, but I thought this was a panel
6 for people's input used toward the drafting of laws and court
7 rules in the future.

8 MR. MORGAN: But what you're suggesting in mandating that
9 the Bar office pursue every alleged miscreant is not a private
10 right of action. That's something different.

11 MR. STOKES: But -- not pursue every alleged miscreant,
12 but if a case is handed to the Bar, they must pursue it.

13 MR. TURNER: If we could, I think we have a comment from
14 Tracey.

15 MS. ITTS: Tracey Itts. And my concern is -- I'm a family
16 law practitioner and was asked to sit on the committee from
17 the family law practice standpoint. I have a concern from
18 that because the family court is so bogged down with pro per
19 litigants that if we go into a "must," we get into a situation
20 where we have a pro bono office down there and we have members
21 of UNLV providing classes to the public and that if we're
22 going to put them in a "must" situation, we're asking them to
23 potentially prosecute individuals who are out there educating
24 the public, helping the public complete forms and some of
25 those things.

1 I'd hate to see Rob and the Bar put in that situation
2 where we're closing down the self-help center at family court,
3 where we can't allow the UNLV students to help fill out the
4 forms because they in essence are assisting in the
5 unauthorized practice of law if you go to that extreme.

6 So again just in an observation from in-the-trenches
7 practical standpoint of doing that, I think we're going to
8 have even more of a backlog in family court and
9 landlord/tenant and all of the issues that I know UNLV
10 self-help centers and some of those are working, so just food
11 for thought as to a practitioner's standpoint who is in these
12 courts.

13 MR. MORGAN: Morgan. Just a comment on UNLV students and
14 their activities: We have to try to tailor their activities
15 to not include the practice of law. They are doing things in
16 connection with lawyers that we believe to be fully within
17 their ability and their authority to do, and I would object to
18 any suggestion that our students are engaged in the
19 unauthorized practice of law. If they are we need to know
20 about it and we need to stop it.

21 MS. ITTS: I apologize and that's my point. There's a
22 fine example. Who is going to consider that? I don't. The
23 self-help center certainly doesn't, but --

24 MR. STOKES: But aren't the clinical programs permitted --
25 that wouldn't be unauthorized. That's authorized. So why

1 would we go shut down a law school clinic that's providing a
2 community resource to people? Of course that's not the
3 unauthorized practice of law. We're talking about people that
4 set up law offices that aren't lawyers. That's what I'm
5 talking about.

6 MR. SCOTT: I think that Rob had made the suggestion that
7 if you do know of these type of operations that are taking
8 place, that the Bar counsel is more than willing to accept a
9 complaint from any lawyer or any citizen who knows of any
10 unauthorized practice of law, and we've already set up the
11 system to accommodate that. He's already got the legislature
12 to write something in there. So I think the system is already
13 there. It's just a matter of people actually utilizing the
14 system.

15 It's just like in the other issue: We can't be every
16 place at every time, so it's important and incumbent upon the
17 citizens to make those complaints to us and then we'll take
18 care of it from there. So I think the system is there. It's
19 just a matter of the lawyers and citizens utilizing the Bar
20 counsel.

21 MR. TURNER: All right. I think we've covered this area
22 pretty exhaustively.

23 Yes?

24 MS. MARZEC: Since we're on the public record I just want
25 to say something about the attorney general's office and

1 unauthorized practice. As Rob said, I'm one of the
 2 investigators at the State Bar and one of the things I do
 3 primarily is unauthorized practice; and David Clark and I, who
 4 is the assistant Bar counsel, in the past two years have
 5 created a liaison with the AG's office. They have an
 6 independent authority to enforce, and in the past two years
 7 they've been aggressively doing that. In fact Kathleen
 8 Delaney at the office of the attorney general has reported
 9 over 20 or 30 cases. So I just wanted to go on the record,
 10 since this is in public, that the attorney general's office
 11 division of consumer affairs will also entertain these
 12 complaints.

13 MR. TURNER: Thank you very much.

14 MR. BARE: Rob Bare. I personally met with the district
 15 attorneys in both Washoe County and in Clark County talking
 16 about the fact that we will have these cases and that we
 17 forward them for criminal prosecution, because after all, this
 18 is a crime. Unauthorized practice of law is a crime, and they
 19 have been receptive. In fact because this is a public record,
 20 I should tell you that Bernie Zadrowski and I have had these
 21 conversations. So I think that they stand ready to prosecute
 22 the right cases as well.

23 MS. HEGEDUIS: If I may -- Dianna Hegeduis from the AG's
 24 office -- we recently sent out an E-mail to some of our
 25 clients that we do have some investigators that would be

1 willing to help the state agencies in their investigation,
 2 because a lot of these small boards do not have an
 3 investigator on staff.

4 So if resources is a problem, which coming from a
 5 governmental lawyer resources is always a problem, we do have
 6 some investigators that, if you want me to look into that, I
 7 can check into that to see if we have some investigators that
 8 could be assigned, not just through the Bureau of Consumer
 9 Protection but perhaps through another division like the
 10 criminal division or something.

11 MR. TURNER: Thank you very much.

12 Do we have any other comments from either Carson City
 13 or here? All right. If we have no other comments I think we
 14 can let the court reporter go in Carson City if there's no one
 15 in Carson City that wants to make a public comment on the
 16 record.

17 MR. GOODENOW: Mr. Turner, this is Rew Goodenow speaking
 18 to you from Carson City. There are just two of us here and no
 19 other attendees who are present, so -- and I believe we've
 20 already heard comments from the other attendee and so I don't
 21 think there's anything else from up here.

22 MR. TURNER: Thank you very much.

23 MR. CHERRY: Bill, before you let them go I'd like to make
 24 a comment on specialization.

25 MS. MARZEC: Just the court reporter, Judge.

1 MR. CHERRY: Oh, just the court reporter?

2 MS. MARZEC: Just the court reporter.

3 MR. CHERRY: That's fine.

4 This is District Judge Michael Cherry and I've been
 5 contacted by Bob Grossman who is a tax attorney here in town.

6 THE CARSON CITY REPORTER: I'm sorry, excuse me. Did
 7 you --

8 MR. TURNER: I want Mr. Cherry's comments to go on the
 9 record with you first and then we'll let you go, all right?

10 THE CARSON CITY REPORTER: Okay.

11 MR. CHERRY: You want me to start over?

12 MR. TURNER: Judge Cherry.

13 MR. CHERRY: The main thing is I've been contacted by a
 14 tax attorney named Bob Grossman who has been in practice here
 15 a number of years, and his feeling is that he's tried to talk
 16 to the State Bar about specialization of tax attorneys; and
 17 what he's found -- and that's what he specializes in is tax
 18 law only -- is that with the change of the bankruptcy laws,
 19 the vast change in bankruptcy laws, that many of the
 20 bankruptcy attorneys are misadvising the clients on tax
 21 ramifications with bankruptcy law and then they're coming to
 22 him because they're stuck with penalties and interest and
 23 large tax assessments. What he'd like to know is -- I said
 24 I'd bring the message. He's unfortunately unable to come here
 25 today -- as to why there isn't specialization in taxation.

1 MR. KIMBROUGH: Let me respond to that.

2 MR. CHERRY: I know he's been in contact with you.

3 MR. KIMBROUGH: I'm Allen Kimbrough. I'm executive
 4 director of the State Bar of Nevada and the specialization
 5 program operates under my specific control.

6 In Nevada to become a specialist, Nevada recognizes
 7 all of the certifying authorities that are recognized by the
 8 American Bar Association. We do not have the staff or the
 9 resource to give our own examination; however, there is -- and
 10 there is no national specialization authority for tax lawyers.
 11 So that's where his problem starts. There is, however, in our
 12 rules a provision that an entity, either a section of the
 13 State Bar or some other entity, can prepare a specialization
 14 exam and process and pay a fee and have that approved by the
 15 State Bar Board of Governors and thereafter offer that exam
 16 and allow those who pass it to become specialists.

17 For example, the family law section is in the process
 18 of developing their own specialization exam and process
 19 because again there is no national family law -- other than
 20 trial part, there's no family law specialization offered
 21 nationally.

22 I have spoken as recently as last Friday with the
 23 chair of the tax law section of the State Bar who understands
 24 Mr. Grossman's dilemma. I don't believe at this point that
 25 section has the resources or the people power, if you will, to

1 get that done, but that's where that issue comes from. There
2 has to be an exam. There has to be standards that the Board
3 of Governors would adopt before that process can happen. So
4 that's the issue here.

5 Until that point he can advertise -- I'm getting into
6 Rob's territory. It's my understanding he can advertise an
7 interest in that area of the law. He simply cannot call
8 himself a specialist.

9 MR. CHERRY: Maybe we should advise him to become a
10 bankruptcy attorney.

11 But you have been in contact with Mr. Grossman?

12 MR. KIMBROUGH: I have.

13 MR. CHERRY: Thank you.

14 MR. TURNER: I think at this point if we have no further
15 comments for the record we'll take a 10-minute break and then
16 we will come back -- 10, 15 minutes and then we'll come back
17 and we'll have a full discussion of the recommendations of the
18 concurrent committee and the full committee, all right? Let's
19 take that break and then we'll come back.

20 (Brief recess taken.)

21 MR. TURNER: We need to review I think at this point the
22 concurrent committee's recommendations and discuss them, vote
23 up or down on them, any discussion, any changes. So from that
24 point of view I'll just preface it by saying we had two
25 meetings of the concurrent committee that we came to what I

1 feel is unanimous agreement on the changes that we made, and
2 certainly our committee members are welcome and should make
3 comments where they feel it necessary so that we can explain
4 this if anybody on the commission asks questions as to these
5 changes. They are in front of you today.

6 Kristina, maybe you can summarize sort of the history
7 of the meetings and then we can address them.

8 MS. MARZEC: Yes. By way of reminder -- Kristina
9 Marzec -- please remember to identify yourself for the court
10 reporter when you speak today.

11 The history of this rule revision is there were
12 several concurrent review reports. We started off with the
13 idea in general and said if we were to take the Texas rule and
14 convert it exactly to a Nevada rule, this is what it would
15 look like. The committee had some discussions and then we
16 created a subcommittee, which then went back and took a look
17 at Nevada-specific concerns and came out with a revised rule.

18 That revised rule was discussed at our last meeting
19 and there was a great deal of input back and forth about the
20 various issues and limiting the scope, perhaps whether or not
21 we do or do not want to create an advisory committee, how the
22 staff member would work, how it would be funded.

23 Then we went back again and had a new reconstituted
24 concurrent review subcommittee that has been working
25 diligently since the last full meeting we had and, Mr. Turner,

1 I hope I don't forget anybody. You might have the list here,
2 but I believe it was Mr. Bernstein, Ms. Itts, Bryan Scott,
3 Mr. Myers, Mr. Burris and Rob, Bill, and I was there to take
4 the notes and whatnot.

5 We eventually had two conference calls where we went
6 back and forth and this rule has been in a number of different
7 forms. I gave you a packet, the cover page of which is
8 RPC 7.0. That's the most current version. As you go through
9 the packet you'll see the prior versions and the genesis of
10 the rule as it got to this particular point today.

11 The last time we met what we did is we went from a
12 very limited scope of review and what would be required to be
13 filed to a little bit more broad requirement for filing, and
14 the committee members can discuss that with more detail as to
15 why.

16 We implemented -- I believe it started with
17 Mr. Bernstein and Ms. Eglet -- the idea that we don't want to
18 punish people that are doing things properly and the idea of
19 escalating sanctions for people who fail to file. So there's
20 a whole section in here on sanctions for people who fail to
21 correct noncompliant ads after a final adjudication of
22 noncompliance. You've got increased nonfiling fees and you've
23 got an increased filing fee.

24 So we also have the issue of whether or not we wanted
25 to have an advertising committee. We went back and forth on

1 it. We started off with the possibility of a committee, and
2 the last time we had a conference call the subcommittee felt
3 very strongly that we should create a "shall" provision that
4 we are going to have an advertising committee. We tried to
5 put forth some minimum standards for that similar to what we
6 did with specialization.

7 I'll turn it over to Mr. Turner.

8 MR. TURNER: I think that the discussions -- and I don't
9 want to summarize the committee. I would like committee
10 members to chime in, but we had some very strong feelings that
11 we needed to have teeth in this particular section, and the
12 teeth come where there's a failure to comply with the rule.
13 If you look at those sections you'll see that we have
14 increasing fine for failure to comply. We also have filing
15 fees that should take care of any concerns with regards to
16 funding this program, though I think the Supreme Court and
17 this commission feels that this is such an important program,
18 that funding should not be an issue. But certainly as a
19 practical matter, by raising these fees we have created a
20 self-disciplining format and a self-funding format for this
21 program.

22 It was felt very strongly that -- in our hearings
23 over the last year, one of the things at least this chair has
24 noticed is that lawyers feel that the playing field is not
25 level and that lawyers often are the most vocal persons with

1 grievances against the way these rules have been written or
2 how they're being effectively able to be enforced, not that
3 they aren't being enforced, but there's a lack -- or
4 perception -- of credibility.

5 So we decided that it's extremely important that we
6 have an advisory group, a group of lawyers and laypeople -- at
7 least one layperson -- on this committee who will review these
8 advertisements with an individual with the State Bar so that
9 the lawyers participate themselves in this review and that
10 they see that there is something being done.

11 Rob has done a tremendous job with regards to
12 enforcement, but we need to beef up our enforcement as well.
13 So these rules were written with that in mind, to give legal
14 input, legal review of these advertisements, and a series of
15 methods by which if the lawyer does not agree with what the
16 advisory committee says about the rules or about the
17 advertisement, he can appeal. He can go to the disciplinary
18 committee. He can go to the State Bar. He can go up levels.
19 But the point of this rule is to establish what appears to be
20 a review -- a fair review of these advertisements before the
21 horse is out of the barn.

22 The problem in the past has been raised is if the
23 advertisements happen and there's no way of reviewing them
24 first, then the public suffers, but the lawyer may also
25 suffer. The example that Rob gave was the lawyer in Reno, I

1 think it was, who had a billboard up that had to take it down
2 that cost him \$100,000 and he wasn't a very happy lawyer.
3 This is a method by which lawyers can be advised, as they are
4 in Texas, as to what ads conform and what ads -- or what they
5 need to do in order to conform to good business practice but
6 also to the protection of the public and the State Bar.

7 MR. KIMBROUGH: May I ask a technical question of either
8 you or the committee? I guess as the one who is going to help
9 Rob administer this from a practical standpoint, on page 8
10 under subsection 3, "Fees," I'm happy to have the fees be as
11 high as they possibly can; however, in the section sub (ii)
12 the last sentence says, "Appeal of this penalty must be made
13 in writing within 30 days of receipt of a billing from the
14 State Bar along with the reason for the requested waiver."
15 However, it does not specify where that appeal is to be taken
16 and I think that needs to be set forth expressly. I know
17 there are other appeals discussed later in the rule, but not
18 this particular one.

19 MR. TURNER: No, I agree with you.

20 MR. KIMBROUGH: It can't be appealed to the State Bar
21 because we're the one doing it. I would say it has to be the
22 Board of Governors, or do you want --

23 MS. MARZEC: I think our thought, Allen -- you're right.
24 It should say a lawyer can contest an opinion finding under
25 subsection 3(ii) looking at it there and, yeah, then they

1 would have the option of appealing to Bar counsel or to the
2 advisory committee, and here's why -- I know you weren't able
3 to participate in that conference call, but what we thought is
4 there may be an occasion where it was an honest mistake.
5 Someone faxed it, we didn't get it or they were in the
6 hospital or something. We didn't want it to be an automatic
7 \$500 in all cases. We wanted there to be an ability for
8 someone to come back and say, "Hey, there's good cause to set
9 aside this fee."

10 MR. KIMBROUGH: We do things like that with Bar dues and
11 other stuff, but it's really not set out in the rules. I
12 don't have a problem with that, but --

13 MR. TURNER: You just want to make it a little clearer.

14 MR. KIMBROUGH: Yeah, I think you need to make it a little
15 clearer as to where the appeals goes.

16 MR. TURNER: That's a good idea. Let's do that.

17 MR. KIMBROUGH: On the other hand it seems like it's
18 pretty automatic. If you run an ad, you get a letter from Rob
19 or from me with an invoice. Isn't that the way we're going?

20 MR. TURNER: Yes. We're not going to mess with this.
21 Certainly it's going to be instructive that the lawyers need
22 to pay attention. This is going to be a wake-up call that we
23 need these ads to conform and we need a consistency in the
24 protocol of advertising. Right now, without going into any
25 specific ads, you see all forms of ads all over the place. We

1 need a consistency of enforcement and a method by which
2 lawyers can be educated. This is going to educate them. This
3 mandatory requirement that they submit their ads for review is
4 going to educate them and be helpful to them as well and save
5 them in the long run grief and also protect the public.

6 MR. HARDESTY: Mr. Chairman, I'm not sure I read the rule
7 quite that way. I understand the rule to require a lawyer to
8 submit their ads, but it appears as though if they want an
9 opinion regarding that ad, that aspect of the rule is
10 discretionary.

11 MR. TURNER: That's true. That's very true.

12 MR. HARDESTY: I think it will make a difference in
13 enforcement if I know I have to turn my ad in but I might not
14 necessarily need an opinion or request form.

15 MR. TURNER: That's correct.

16 MR. HARDESTY: Now, on the other hand, the flip side of
17 that is I think I infer from this -- but maybe the rule needs
18 to say it explicitly -- that Bar counsel or someone within the
19 Bar has an affirmative obligation to look at the ads. I mean
20 I don't want just a file drawer full of ads.

21 MR. TURNER: No. I think that's very specific.

22 MR. HARDESTY: So my expectation was that they would be
23 required to tender them and that we would do something with
24 them when we got them.

25 MR. TURNER: No. I think --

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1 MR. HARDESTY: I'm sure it's implicit as long as Rob is
2 here, but maybe if somebody else were here they wouldn't look
3 at them or review them, and I want that reviewed.

4 MR. TURNER: And I absolutely agree and I think the
5 commission and the committee point was that the advisory group
6 of lawyers and this one person, this one individual that's
7 hired by the State Bar, would have to look at all these ads
8 and I think that's written into the rule.

9 MS. MARZEC: Justice Hardesty, perhaps if it's not clear,
10 we could add a sentence under perhaps "Filing Requirements"
11 that says the State Bar or advisory committee shall issue a
12 written finding or opinion within 30 days or two weeks or
13 whatever, make it clearer.

14 MR. TURNER: Do we need a finding or just they shall
15 review it?

16 MS. MARZEC: I think we should send out an opinion saying,
17 "Your ad has been reviewed. It's fine." That's what we
18 intended to do and I agree with the Justice. It's probably
19 not clear.

20 MR. TURNER: So your suggestion would be, even if the ad
21 is fine, send out the statement anyway?

22 MS. MARZEC: Absolutely. I think that's the whole point.
23 A lawyer wants to have a compliant opinion in their hands.
24 That's part of the application process.

25 MR. SCOTT: Bryan Scott. That's required because can't

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1 you use that opinion as a shield to --

2 MS. MARZEC: Exactly.

3 MR. SCOTT: -- any disciplinary procedures you may
4 encounter as a result of your ad?

5 MR. HARDESTY: The application is discretionary. If I
6 submit the ad --

7 MR. SCOTT: In advance.

8 MR. HARDESTY: -- and I don't necessarily request the
9 opinion be provided, that's one side of the coin. The other
10 side of the coin is, from the regulatory point of view I think
11 the Bar counsel for the committee needs to affirmatively
12 review all the ads submitted to them.

13 MR. TURNER: Absolutely.

14 MR. HARDESTY: And to initiate appropriate disciplinary
15 action that they deem appropriate as a result of their review.
16 That's different than issuing a bunch of opinions.

17 MR. KIMBROUGH: Again from a financial standpoint, under
18 3 sub (1), not just submitting the application. I mean if all
19 you're doing is submitting, you still got to have a fee, not
20 just if they want an opinion. You got to have a fee
21 regardless because we can't pay for this any other way.

22 MR. MORGAN: Dick Morgan. I understand that, but I think
23 if you want an opinion you ask for an opinion and Rob and his
24 staff will provide an opinion and the opinion will provide you
25 some comfort in future disciplinary proceedings, but if you

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1 don't ask for an opinion, you don't get an opinion. You're
2 going -- the ad will get reviewed and if disciplinary
3 proceedings are appropriate they will be taken, but why do we
4 want to send an opinion to somebody who didn't ask for it?
5 Why do we want to mandate that every ad will be reviewed
6 within 30 days and some opinion rendered when the person
7 hasn't asked for it?

8 This goes back to Mr. Stokes' point about why don't
9 we mandate Rob Bare take on all the unauthorized practitioners
10 in town. We don't want to mandate. We want to leave
11 discretion because there are limited resources. Why we would
12 want to mandate an opinion for somebody who hasn't asked for
13 an opinion is beyond me and I don't think the rule says that.
14 I think the rule says if you want an opinion you can ask for
15 it and you'll get it; otherwise Rob will read the ad and he'll
16 do what he thinks is appropriate.

17 MR. TURNER: It seems to me that we had two different
18 prongs here. One was mandatory review of all lawyer
19 advertising set out in the subsections of this rule. Those
20 have to be reviewed and that they'll be reviewed monthly by the
21 advisory committee and that individual hired by the State Bar
22 will review them. That's mandatory.

23 But this section here was only if someone wanted an
24 advance opinion and applied for it, asking "Is this billboard
25 okay" ahead of time, six months ahead of time when he wants to

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1 see if this ad is going to fly and he submits it to the
2 appropriate individual or authorities under this provision.
3 That was a separate prong.

4 MR. HARDESTY: I think there's an important Constitutional
5 issue too. If the opinion is tied to the requirement of the
6 submission of the ad, you're going to run into a breach of a
7 Constitutional issue I think if you infer that you are
8 (inaudible) --

9 THE REPORTER: I'm sorry, I can't hear you.

10 MR. HARDESTY: You are running the risk of prior restraint
11 interpretation if you tie the opinion to every ad submitted.

12 The purpose or what I envisioned supporting this rule
13 was a finding by the commission that it's easier for the Bar
14 to require ads to be submitted to us that are going to be run
15 so that we can test the ads against our rules than it is for
16 us to go chasing ads that we don't know about and can't find,
17 or even the Yellow Pages that we looked at at last committee
18 meeting. That's different though than a lawyer seeking solace
19 from an opinion.

20 MR. TURNER: Right.

21 MR. MORGAN: There's an issue of providing proper
22 incentives here. We want to give people incentives to come in
23 in advance and seek an advisory opinion which will give them
24 some comfort in future disciplinary proceedings. If we're
25 going to send an opinion to everybody that files, what

13 (Pages 46 to 49)

1 incentive is there to come in if you're going to get an
2 opinion anyway? So I think we ought to do what the rule says,
3 which is if you ask for an opinion, get your stuff in in
4 advance, you'll get an opinion. If you file concurrently, it
5 will get reviewed but you get no opinion.

6 MR. TURNER: And that was my -- as chair that was my
7 opinion. We weren't going to issue a statement in the
8 mandatory filing requirements -- so we don't have prior
9 restraint we weren't going to issue an opinion to all those
10 advertisements. We were simply going to make a determination
11 if they violated or didn't violate the rule. If they
12 violated, then they have to give them notice of that effect.
13 This, as you said, is a separate section designed to give
14 people that comfort level ahead of time for doing that and
15 that certainly if we keep those two separate, clearly it
16 doesn't violate the Constitutional mandate. We need to spell
17 that out.

18 MR. HARDESTY: I like the way it's drafted. I just wanted
19 a separate rule that says we're going to look at these ads and
20 Bar counsel is obligated to initiate appropriate disciplinary
21 action based on any ads that are not in compliance.

22 MR. TURNER: That the advisory committee would look at
23 them and recommend to Bar counsel.

24 MR. HARDESTY: However you want to structure it.

25 MR. TURNER: If that's not clear enough, let's add that so

1 it's very clear that that's what's going to happen, that all
2 these particular ads that come in concurrent are going to be
3 mandatory review by the committee and the person at the State
4 Bar and then they have a series of appeals to take.

5 MS. MARZEC: Can we take a specific look at sub (f),
6 "Appeals Review"?

7 MR. TURNER: Sure.

8 MS. MARZEC: On page 3 of 5 that's where we have the
9 "Advance Opinion" subsection and separate and distinct appeals
10 where we have the first level of appeal that can be done to
11 the standing advisory committee or directly to Bar counsel,
12 and then the last sentence, "If the lawyer fails to amend or
13 appeal within the prescribed ten-day period, the matter will
14 be referred to Bar counsel and proceed in accordance with
15 Rule 105 and the fines set forth in subsection (f)(2) sub
16 (ii)."

17 Do we want to beef that up a little bit? Do we think
18 it's not sufficiently clear that any noncompliant ads will end
19 up with Bar counsel?

20 MR. TURNER: It's pretty clear. I think what Justice
21 Hardesty is trying to say --

22 MS. MARZEC: I want to understand what I'm amending.

23 MR. TURNER: I think that we just want to make very clear
24 that all ads that come in concurrently are to be reviewed by
25 this advisory committee and the clerk or the person

1 responsible to the State Bar and then there's a series of
2 appeals, but that's separate from this advisory opinion,
3 totally separate. So we distinguish these two. I think
4 that's what Justice Hardesty is saying.

5 MR. HARDESTY: That's correct.

6 MS. MARZEC: So we're going to have a separate subsection
7 under "Filing" that says the ad shall be reviewed?

8 MR. MORGAN: Why don't you just add the words, where it
9 says it will be submitted, "for review by the State Bar."

10 MR. TURNER: I think that takes care of it.

11 MR. KIMBROUGH: So can I ask another question?

12 So if the application will accompany everything
13 that's filed, we'll ask you -- and you'll send \$200 with
14 that -- we'll ask if you (A) want an advisory opinion and (B)
15 whether you want that advisory opinion to be issued by the
16 office of Bar counsel or the committee. Is that essentially
17 what we're talking about?

18 MR. TURNER: Or for the advance advisory committee, yes.
19 That's advance advisory now. That's where somebody just says,
20 "I've got something I want to do a year from now and I want
21 your opinion on this," and they can ask either Bar counsel or
22 the advisory committee.

23 MR. KIMBROUGH: But they could submit that ad to be run in
24 the future without having to wait for an advisory opinion and
25 then they take their chances.

1 MR. TURNER: Then they take their chances.

2 MR. KIMBROUGH: But you still have to fill out an
3 application and it still costs you.

4 MR. MYERS: Perhaps it's as simple as rule 7(a) that's on
5 the very first page of this document: "(a) Types of
6 advertisement subject to filing requirement. All attorney
7 advertisements disseminated in or directed to Nevada in the
8 following forms shall be filed and reviewed with the State Bar
9 of Nevada in accordance with this rule," "filed and reviewed."

10 MR. KIMBROUGH: "Filed with and reviewed by State Bar of
11 Nevada," and of course you could put "State Bar of Nevada and
12 the advisory committee." I would put "and the advisory
13 committee."

14 MR. MYERS: We need that sentence, not only "shall be
15 filed" but "shall be reviewed."

16 MR. MORGAN: "Filed with and reviewed by."

17 MS. MARZEC: Mr. Chair, the reason why I didn't put "the
18 advisory committee" on this part, I wanted it to be clear that
19 the State Bar is the clearinghouse. I didn't want people to
20 be sending their money and their packets to different members
21 of the committee.

22 MR. KIMBROUGH: Well, the committee is part of the State
23 Bar.

24 MS. MARZEC: I wanted it to be clear that it's filed at
25 the offices of the State Bar.

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1 MR. TURNER: That's fine, "shall be filed with the offices
2 of the State Bar and shall be reviewed."

3 MS. MARZEC: Later in the sentence?

4 MR. TURNER: We'll change that to do that.

5 I think we resolved that issue.

6 MR. KOSTIW: I had a question. I was talking to Allen
7 about it during the break. I guess I missed the public
8 comment, but he thought I should raise it. I'm Vincent
9 Kostiw. I'm an attorney and I'm also in the entertainment
10 field.

11 The one thing about the tombstone exceptions, I found
12 since I went out on my own practice a couple years ago that I
13 meet a lot of lawyers and get their business cards. It just
14 says their name and they're a lawyer. Six months later I need
15 somebody that does tax law. I can't tell from business cards
16 what kind of law they practice.

17 Another thing that I would like to put on is I don't
18 have my own business card. I know we're not talking about web
19 sites here because they're more dynamic, but I practice
20 entertainment law and I have a background in entertainment and
21 I'm a member of the recording cabinet, which anybody can be a
22 member of the recording cabinet, but from my practice I find
23 that's very useful for me. It kind of helps me stand out from
24 the other people in town that are saying they're entertainment
25 lawyers.

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1 So I barely advertise at all. I have a little
2 one-inch thing in the Yellow Pages there and it says, "Grammy
3 voting member." Under these tombstone rules I guess I would
4 be subject to the \$200 fee to review this. I'm just thinking
5 maybe there can be one more exception if you're affiliated
6 with a professional organization or something like that where
7 it's not misleading. That's what Allen brought up too, that
8 maybe that would fall under the tombstone exception also.

9 MR. TURNER: Rob is sort of an expert on tombstones. The
10 problem is -- I understand your concern and I want the
11 committee and the subcommittee to address that, but when you
12 start making exceptions and you start trying to define what
13 those exceptions are, you get into a can of worms. It's
14 really hard to say your concern in your business is this and
15 somebody else's concern is that and then you start having huge
16 amounts of different definitions.

17 Rob, would you like to address that.

18 MR. BARE: You got it covered.

19 MR. KOSTIW: I did notice in the model rules there is an
20 exception (i) in the model rules back in this packet that
21 there is an exception for sponsorship of a charitable
22 organization or something like that and doesn't look like it's
23 going to be part of our (inaudible).

24 MR. TURNER: I think you're going to have to be reviewed,
25 it seems to me; otherwise we're opening up Pandora's box.

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1 It's \$200. It's a very effective business thing that you do,
2 but --

3 MR. BERNSTEIN: Go ahead and finish.

4 MR. KOSTIW: No. I just had a second thing I wanted to
5 bring up, but the second thing I just also noticed it's either
6 limiting your practice to practicing within the ABA rules
7 or --

8 THE REPORTER: I'm sorry, I can't hear you.

9 MR. KOSTIW: Oh, sorry.

10 This whole area of practice rules I never followed
11 because of the entertainment things that I do. I found the
12 general public, if you say, "I do intellectual property," they
13 have no idea what you're talking about. So I'm going to say
14 "copyright," this whole laundry list. So there's my three
15 right there. So I'm wondering if we can address that. If
16 things are related, can you have more than three?

17 MR. TURNER: That's your bailiwick, Rob, but I would say
18 you got to follow the rules as they're written now and I don't
19 know how you can get around that exception. Do you?

20 MR. BARE: Well, I mean practically speaking what we try
21 to do is make certain comments just as you've indicated. If
22 you limit yourself to three areas within the context of what
23 you talked about -- maybe you talk about something that's
24 related to these three as you've indicated -- we've never
25 really said that you can't do that as long as it's reasonably

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1 related to one of the three areas.

2 MR. TURNER: I think the purpose of this advisory
3 committee and Rob's review of all this is common sense. We're
4 trying to exercise some degree of common sense. We're not
5 going to be, you know, enforcement police just narrow-minded,
6 but we want to have some control of consistency. So I'm sure
7 those concerns can be addressed.

8 MR. KOSTIW: Just one point. I'm sure we've all filled
9 out the application for lawyers.com or Martindale-Hubbell and
10 that's kind of advertising, plus if you're a business lawyer,
11 if you're a corporation, you're checking all these boxes. It
12 expands your practice area out and it looks like a violation
13 of this rule.

14 MR. TURNER: They never called me.

15 MR. BERNSTEIN: But -- Ed Bernstein -- it's not a
16 violation of that rule. That rule only applies to saying
17 "practice limited to." You're filling out those forms on
18 lawyers.com, it's any type of case you'll handle, two
19 different standards.

20 MR. TURNER: Absolutely.

21 MR. STOKES: Can I change the topic?

22 MR. TURNER: Sure. I think we had one more topic.

23 MR. MORGAN: Why don't you come down here again.

24 MR. STOKES: Adam Stokes, attorney. My question is, once
25 you have an advertisement approved, can you use the same ad in

15 (Pages 54 to 57)

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1 a different form, like different format? Like, for example,
2 this is one of my business cards. I don't know if everybody
3 has seen it.

4 MR. TURNER: Is that Traffic Busters?

5 MR. STOKES: Ticket Busters. I also have the same -- I
6 use the same advertisements on the side of the freeway, on
7 A-frames. I use the same advertisement on my web site. I use
8 the same advertisement on billboards up in the air. I use the
9 same advertisement on mailings. I use the same advertising on
10 a brochure that's in an insurance agent's office. Do I need
11 to have every single one approved even though it's the same
12 content?

13 It just seems to me that this \$200 fee application is
14 awfully burdensome and slow for a small firm to be able to
15 react. We need to wait so long and pay so much. Can we feel
16 free that once we get -- out of these proposed rules, once we
17 have one format approved, that we can adopt this to anything
18 else? I mean it's the same artwork, but it's a 14-by-48
19 billboard.

20 MS. MARZEC: Subsection 9.

21 MR. TURNER: Subsection 9 I think addresses that,
22 "Post-Review Exemptions: Once an advertisement or written
23 solicitation is approved, the following need not be refiled:

24 Derivatives of the approved advertisement, provided
25 they are taken verbatim from the approved version and

1 nonsubstantive changes such as new address, practice areas,
2 new colors or new music."

3 I will tell you though from the chair's point of
4 view -- maybe no one else's concern -- it bothers me that you
5 have "in most cases" in very small print at the bottom of the
6 card. That's just my own personal opinion. Doesn't reflect
7 the opinion of the commission.

8 MR. STOKES: Does not guarantee a result.

9 MR. TURNER: So that should answer your question.
10 Ed?

11 MR. BERNSTEIN: Segueing into the concept of results, we
12 had quite a bit of discussion about unjustified expectations
13 and we left -- on 7.1, page 13 of 29 we left the old rule in.
14 Now, I thought it was the feeling of the committee --

15 MR. TURNER: What page is it?

16 MR. BERNSTEIN: 7.1. It's page 13 of 29.

17 MS. MARZEC: Page 13 on the big packet.

18 MR. TURNER: Oh, sorry.

19 MR. BERNSTEIN: Subsection (b).

20 As I look through the Yellow Pages and see all of
21 these verdicts, settlements, judgments -- 5 million,
22 3 million, 8 million, 22 million -- two thoughts occur to me.
23 Well, one thought is a lot of these judgments are never
24 collected. These are default judgments that I go in to get.
25 These judgments that are uncollectible, there's no insurance.

1 Somebody's bankrupt. They get this by filing an affidavit in
2 district court and now they're advertising 10 million dollar
3 judgments and it's misleading. I think by nature any time
4 you're going to mention a specific case, a specific dollar
5 amount, it is inherently misleading because there is no other
6 case like that.

7 I thought that we were going to have a resulting rule
8 that would indicate that although you can do testimonial and
9 you can talk about those type of areas of your practice, you
10 could not specifically mention a 10 million dollar fee or
11 something that is -- blank space, which I think is misleading.

12 MR. TURNER: Wouldn't section (b) take care of that? It
13 is a general statement of increase in expectations.

14 MR. BERNSTEIN: Maybe we need to clarify by examples,
15 specifying an amount by judgment, various settlements or
16 whatever that you obtain for a specific client.

17 MR. TURNER: We did in fact at one point have that in
18 there. It became somewhat unwieldy to try and figure out what
19 language you would use. I understand exactly what you're
20 saying because your point is very well taken. I just don't
21 know how to get that language in there. Perhaps it's better
22 left to the discretion of the committee or Bar counsel. I
23 don't know. Does anybody on this commission have a suggestion
24 as to language we could put in there? Because I know that
25 some of these ads do suggest they will get you millions of

1 dollars. "Just hang on. We'll almost guarantee we'll get you
2 hundreds of millions." Vioxx they've had a huge reward,
3 failing to mention two cases they've lost. People think that
4 they'll get something without any difficulty sometimes, so I
5 know what you're saying. Trial results which guarantee
6 another trial result of the same magnitude can be very
7 misleading.

8 MR. BERNSTEIN: Appeal may change the trial result.

9 MR. TURNER: Absolutely. So how do you do this?

10 MS. EGLET: It's also giving information to the client
11 that if you have a bigger case or more severely injured, you
12 can get a firm that actually handles those kind of cases. I
13 had a case where the law firm that had it first made an offer
14 to settle for \$2500 and then that person got fired because
15 they didn't talk to her about it. Then she came over to our
16 firm and two years later I settled it for 2 million.

17 So I mean what you're saying is it's misleading the
18 public, but if you have -- I mean if you keep it where you
19 show the public what the types of verdicts are, they're not
20 saying that you're going to get them. Somehow the language
21 can read -- you know, the public understands attorneys' fees.
22 They understand the percentages. They understand that stuff.
23 I don't know, but I think that you're misleading the public if
24 you don't allow people to say what they've done and what their
25 successes are.

1 MR. TURNER: Well, and that balances free speech. You've
2 got commercial free speech and how do you regulate that? You
3 certainly can't create unreasonable expectations.

4 MS. EGLET: Sure.

5 MR. TURNER: So that's why I think we left the language
6 the way it was, simply to allow the advisory committee and the
7 State Bar to make a determination as to whether this is
8 inherently misleading, deceptive or creates false
9 expectations; but I agree with Ed. There is a problem.

10 MR. BERNSTEIN: There's a lot of firms that are putting
11 down verdicts and judgments that are uncollectible.

12 MR. TURNER: I've seen some cases in certain states that
13 say you can't do this.

14 MS. EGLET: I would agree with that. You shouldn't be
15 able to do that.

16 MR. HARDESTY: Maybe we ought to see if there are states
17 with other rules that touch on this, but perhaps a separate
18 subparagraph could be inserted that says it's likely to
19 create --

20 MR. TURNER: We've got that on section (b).

21 MR. HARDESTY: I'm expanding on that.

22 "It is likely to create an unjustified expectation
23 about results the lawyer can achieve based upon the results
24 the lawyer claims to have already achieved or achieved in the
25 past," or something along those lines.

1 MS. EGLET: And make him specify -- this is Tracy Eglet by
2 the way -- "We're not saying you're going to get this."
3 Somehow maybe have a stamp, you know, a form or language that
4 says, "That is not saying you're going to get this, but this
5 is the results that the firm has gotten or members of the firm
6 have gotten."

7 I understand what the issues are, but when you're
8 getting into different types of cases, I don't think it's fair
9 to preclude a firm that routinely gets certain verdicts from
10 telling people that's what they get.

11 MR. HARDESTY: Or another part of the rule may be, "Any
12 representation with respect to prior achievement has to be
13 made with full disclosures."

14 I think I mentioned a firm that advertises in Reno
15 about verdicts that they have obtained in their advertising,
16 but that's a verdict. If you're talking about someone who got
17 a 10 million dollar default judgment, that's not -- that is a
18 material misrepresentation.

19 MS. EGLET: And along those lines, there are -- the
20 attorneys that get up and say that "You will receive more
21 money because of the 22 percent," well, you know, 80 -- or
22 78 percent of \$10,000 is a lot less than 60 percent of
23 \$100,000. So it is so misleading that someone is going in and
24 settling a case that maybe in another firm's hands might be
25 worth more. There is one particular law firm that says that

1 with a reduced rate. That is so misleading because the case
2 in his hands may be different than in someone else's. So is
3 there some way to address that issue?

4 MR. TURNER: I think the rules really will address that.

5 I want to take the time to address -- there's several
6 state courts, including Texas, which have said exactly what
7 you said. I think Louisiana has said, "If you're going to
8 list your successes, you have to list your failures"; in other
9 words, full disclosure, and they require that. So I don't
10 know that you shouldn't put something in like that.

11 MR. HARDESTY: I would like to see what those rules look
12 like.

13 MR. TURNER: Let me see if I can go back. I read those
14 about six months ago and I thought, well, the whole point of
15 that was -- and we've summarized it -- full disclosure.

16 Maybe we can just put language in there to say
17 something like you said where if you have results lawyers have
18 achieved in the past, you have to put in their failures too.
19 I mean that general language would constitute the area of the
20 unjustified expectation about results a lawyer can achieve; or
21 if the lawyer lists his successful verdicts, he also lists any
22 unsuccessful verdicts in the same area of practice, something
23 like that, something along that line, because frankly, if you
24 have a million dollar verdict in that area and you have five
25 cases where you've gotten zero verdicts in that area, is that

1 really effectively telling the public?

2 MR. CHERRY: Is a car accident different than slip and
3 fall?

4 MR. BERNSTEIN: I think another consequence of all this is
5 not really does it create unjustified expectations with the
6 client; it also damages the profession.

7 In other states that allow this what I see is you
8 have law firms. Everybody is topping everybody else with
9 dollar amounts, and the net result is that our reputation as
10 greedy ambulance-chasing lawyers is damaged and it plays right
11 into the insurance companies' hands, which then results in
12 tort-reform legislation and their ads against lawyers. It's a
13 vicious circle once you open up that can of worms and it
14 backfires against the profession and against tort-reform
15 issues.

16 MR. TURNER: Here is the rule that we discussed and this
17 is what stuck in my mind -- thank you very much, Kristina --
18 that I read. It's the Texas rule. 7.02 in the Texas rule,
19 which is the revisions they passed, says, "Unless lawyer was
20 lead counsel or primarily responsible for the verdict or
21 settlement, amount used was actually received by the client,
22 case and damage information is provided, attorneys' fees and
23 litigation expenses need to be outlined in using the
24 settlement amount or gross settlement amount."

25 To me that's a pretty good rule and maybe we should

1 just put that paragraph in there just like that.
 2 MS. ITTS: Tracey Itts. If you recall, we had a lengthy
 3 discussion about getting permission from the client because of
 4 client confidentiality. That's why I thought we decided not
 5 to go with that model as written, because there was concern
 6 that we needed to go ask our clients and people might accept
 7 less money for having clients basically give them a
 8 testimonial. I don't know if anybody else recalls that, but
 9 we spent some time talking about getting client permission.
 10 MR. TURNER: That may be a concern and I'm just rethinking
 11 this. Again it's up to the commission here, but it seems to
 12 me if you can't get that permission, then don't use that ad.
 13 I mean it just seems to me only fair to the public. I know
 14 it's a business, but the public needs to be informed. If
 15 you're going to use an ad and you are using it, you should
 16 fully disclose the information; or if you can't, you shouldn't
 17 use it. That's just my opinion.
 18 MR. HARDESTY: I remember that discussion. The more I
 19 thought about that actually, it's the client's case and you
 20 ought to get the client's consent.
 21 MS. EGLET: Any advertising you got to have the client's
 22 consent.
 23 MR. HARDESTY: If you have a great result in the case and
 24 you're going to use that case to promote yourself without at
 25 least talking to the client about that, I have a problem with

1 that.
 2 MS. ITTS: Tracey Itts. Are the clients going to be
 3 compensated? Are they going to get reduced fees as a result
 4 of that? Again I don't know. I just know that we had
 5 discussed that in our -- in one of our last meetings about
 6 concerns at the time that the general committee had. So if we
 7 use it, maybe make it clear that clients don't get any benefit
 8 or whatever it is.
 9 MR. CHERRY: This is Judge Michael Cherry.
 10 What I worry about is the direction when you're
 11 trying to fix things that aren't broken. What we're going to
 12 do is I think we're going to be pushing some of these lawyers
 13 into Infomercials where the information has -- if you take
 14 Adam Stokes' position on what they have to disclose on the
 15 contingency fees, they could be on for about ten minutes on
 16 that. Then if they -- I'm familiar with some of the Mainor,
 17 Eglet verdicts. They've been very large and then things
 18 happen afterwards with verdicts as far as Supreme Court
 19 settlements and stuff. We're going to get to the point where
 20 Ed and the rest of them are going to be on TV for a half-hour
 21 trying to justify something. I worry about trying to fix
 22 things that aren't broken. Rob has got his hands full with
 23 this Bar. To add to that is going to be an atrocious burden
 24 to his function.
 25 MR. MORGAN: Dick Morgan, Boyd school of law.

1 Again I come back to my favorite rule, which is on
 2 page 19, (g): "Any factual statement contained in any
 3 advertisement or written communication or any information
 4 furnished to a prospective client under this rule shall not:
 5 Fail to disclose material information necessary to prevent the
 6 information supplied from being actually or potentially false
 7 and misleading."
 8 If you say that "I got a 2 million dollar judgment,"
 9 but you fail to disclose that it was reversed on appeal or you
 10 fail to disclose that it was an uncontested default proceeding
 11 or you fail to disclose that you never collected on it, then I
 12 think there's a basis for action by Rob.
 13 MR. CHERRY: When do you advertise? The shooting case was
 14 a 7-and-some-change million dollar verdict for Bob Maddox with
 15 the entitlements that went up to 14 million and then three
 16 years later it was reversed. For three years he could have
 17 advertised, "I got a 14 million dollar verdict," then the
 18 Hardesty Court decided to reverse it.
 19 MR. MORGAN: But at that point it's accurate.
 20 MR. CHERRY: Do we really want Infomercials, Rob?
 21 MR. MORGAN: I'm arguing for sticking with the current
 22 language.
 23 MR. BARE: My humble opinion on this is it would be a big
 24 mistake to open up the door and let lawyers start getting into
 25 the business practice of advertising. I think this area is so

1 wrought with pitfalls, I think we've talked about a lot of
 2 them, but there's something even more than all the pitfalls:
 3 The technical requirements and such that we're going to run
 4 into. I get calls all the time on this.
 5 The problem is it makes the profession look like it's
 6 all about money. It's just all about money. It's not just
 7 about justice, it's not about the cases, it's all about money.
 8 I think it demeans the profession. They always use the Larry
 9 Parker type of comparison. I think he's a lawyer from another
 10 state. He says, "Well, Larry Parker got me 7 million
 11 dollars."
 12 MR. TURNER: Texas.
 13 MS. MARZEC: California.
 14 MR. BARE: People watching the TV have to see enough.
 15 This is all about money. That's all these lawyers are about.
 16 You go to them. They're just trying to get you millions of
 17 dollars when really isn't it supposed to be about something
 18 different than just the bottom-line million?
 19 MR. TURNER: Then wouldn't it be good to just have the 7.2
 20 guidelines for the reviewing group to have specifically what a
 21 lawyer can't do, making it less likely you're going to put the
 22 money issue in? This is somewhat of a refining statement
 23 saying basically, "If you want to put money in there, pal, you
 24 better be very clear. You better allude to just these
 25 definitions." I know that in general we covered this, like

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1 Dean said, in this general language, but since there's not a
2 very specific teeth to it, we may have individuals reviewing
3 this that say, "Well, that's fine." I think we ought to have
4 a little more specific language. I know we have differences
5 of opinion on that, but we ought to have some form of vote on
6 it.

7 MS. EGLET: I want to make a comment about just what Rob
8 said.

9 We go in there and say that, you know, we can't give
10 Mr. Smith his arm back. I mean the only compensation you have
11 in this judicial system is money unfortunately. I mean that's
12 what it is about unfortunately. So I mean I understand what
13 you're saying about the profession, but unfortunately that's
14 what the profession is about, when it comes to people who are
15 injured in our profession, is getting them full compensation.
16 So I just disagree.

17 MR. TURNER: By the way, did Justice Hardesty leave?

18 MR. CHERRY: Yeah. He had to go to the university.

19 MR. BERNSTEIN: He's indicated he wanted to support 7.02.

20 Once again it may be just clearer not to allow these
21 results of cases to be advertised because once again there are
22 no two cases that are alike.

23 MR. TURNER: Would that be in a sense, if you put that in
24 there, a Constitutional issue? Would that be something that
25 you could put in there without having a Constitutional

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1 question?

2 MR. CHERRY: Are you asking me?

3 MR. TURNER: Yes, or Justice Hardesty.

4 MR. CHERRY: My decision doesn't matter.

5 MR. TURNER: It seems to me you're allowing for some
6 indication of what your firm does without being deceptive. If
7 you put 7.02 in, there's a very specific set of requirements.
8 I personally would prefer not to have any, but I'm just
9 concerned about Constitutional requirements. So my own
10 opinion is it's probably safer to do it this way.

11 Rob, do you have any feelings on the
12 Constitutionality of just saying no more ads with regards to
13 verdicts?

14 MR. BARE: I am comfortable with the idea that it is
15 Constitutionally allowable for a State Bar to simply say
16 results are inherently misleading, because they are.

17 MS. ITTS: Tracey Itts again, and again it goes back to
18 the long conversation we had before. I know that some of the
19 concern expressed by committee members was if you have an
20 article -- I know that Tracy's firm has had articles. I know
21 that in domestic cases you have articles that are written
22 about specific cases. If we use those articles on our web
23 sites for information and it talks about verdicts or outcomes,
24 that would be precluding it when the attorney had nothing to
25 do with the newspaper article and the free press that they

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1 got. I know that that was again another area that we had a
2 lengthy discussion, that as attorneys on our web sites or in
3 the information packet we provide, if there's newspaper
4 articles, we wanted to be able to use that in our promotions;
5 and if there's an article that talks about this great verdict,
6 we would be precluded from doing that.

7 MR. TURNER: I'm not so sure you would, but I think we
8 talked about billboards, radio, television, Yellow Pages.
9 Those are the things we're concerned about. I don't know how
10 we could possibly restrain the press from putting an article
11 in about some type of verdict and you not using it in your own
12 promotional materials if it again doesn't create unreasonable
13 expectations as covered by all these other rules; but I think
14 we really -- if you're going to put them in ads and you're
15 using them in a certain way as we've defined, you really can't
16 mislead the public by just suggesting that you hit a 1 million
17 dollar verdict and that you're going to get it all the time.

18 MR. KIMBROUGH: But the problem I would say, if you use it
19 in your advertisement and in the example that Ed was giving
20 where somebody gets a huge verdict and there's no recovery,
21 wouldn't you then be obligated to say underneath the article
22 that's taken verbatim, "However, in this particular case the
23 other side recovered zero"?

24 MR. TURNER: I think you should.

25 MR. KIMBROUGH: But who is going to do it?

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1 MR. TURNER: I don't know who is going to do it.

2 MR. KIMBROUGH: I agree with the press exception that you
3 can't control what the newspaper writes, but you can control
4 what the lawyer does with that article and therefore that
5 should probably be outlawed too if you really want to be
6 careful.

7 MR. TURNER: And you're right. The more I think about it,
8 you're right.

9 MS. EGLET: So what can I say or do again?

10 MR. BERNSTEIN: I would draw up a proposed stipulation
11 that we amend these rules to prohibit any results --

12 MR. TURNER: All right. There's --

13 MR. BERNSTEIN: -- in any specific case.

14 MR. TURNER: There's a motion and is there a second to
15 that motion? The motion is -- let me repeat it. The motion
16 is to preclude advertising any results. Is there a second?

17 MR. BERNSTEIN: On a specific case.

18 MR. TURNER: On any specific case.

19 MR. BERNSTEIN: Specific results.

20 MR. TURNER: Rob, you felt pretty strongly. Are you
21 seconding that motion?

22 MR. BARE: I don't think I'm a voting member actually.

23 MR. TURNER: That's true.

24 Is there any second? I'll second it, but I suspect
25 if we don't have another second, that we may not have a

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1 majority. I'll second the motion. Let's call for a vote.
2 All those in favor? All those opposed? We have
3 probably five to four. Did you count that?
4 MR. CHERRY: It was pretty quick.
5 MR. MORGAN: Let's not guess. Let's vote again.
6 MR. TURNER: All those in favor raise your hands, please.
7 One, two, three, four, five.
8 All those opposed? One, two, three, four -- one, two
9 three, four, five.
10 MR. CHERRY: It's five to five.
11 MS. HEGEDUIS: Wasn't it one, two, three, four, five, six?
12 MR. TURNER: Yes, six to five. It passes. That's a done
13 deal then.
14 MS. MARZEC: Bill, I apologize. I had to run out. What
15 just passed?
16 MR. BERNSTEIN: We voted for you to stay here for the next
17 three days.
18 MR. TURNER: We just passed --
19 MR. MORGAN: We disbanded the committee.
20 MR. TURNER: We just voted and we probably should come up
21 with some -- we voted to prohibit advertisement of results.
22 MS. MARZEC: But no specific language was agreed on?
23 MR. TURNER: No specific results will be given in a
24 specific case. Rather than imposing 7.02 of Texas, we're just
25 going to be very specific, and that was a six to five vote

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1 with chair voting. I think probably Justice Hardesty would
2 have voted for that too, but he wasn't here, but we can't say
3 that. Do we have any other comments?
4 MS. ITTS: It's Bill's Rules of Order instead of Robert's
5 Rules.
6 MR. TURNER: Probably, because I don't know Robert.
7 MR. BERNSTEIN: One cleanup matter: On the tombstone
8 exceptions we should add web site, attorney web site
9 addresses.
10 MR. TURNER: Okay.
11 MR. BERNSTEIN: Just that you can list your web site as
12 part of your ad. That original rule is ten years old.
13 MR. TURNER: You're right.
14 MR. MORGAN: Dick Morgan again. If a lawyer can't
15 advertise his or her results, can he or she talk about them?
16 MR. TURNER: In what sense?
17 MR. MORGAN: If it's false and misleading to put your
18 results out there by advertising, it must also be false and
19 misleading to stand at a cocktail party and say, "I got a
20 7 million dollar verdict last week."
21 MR. TURNER: I don't think -- that's a different form of
22 advertising, and I will have to say that's not advertising
23 unless you're promoting -- you can promote yourself.
24 MR. MORGAN: I was looking forward to the Constitutional
25 challenge.

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1 MR. TURNER: You know, that's my concern, the
2 Constitutionality.
3 MS. EGLET: You should be concerned.
4 MR. TURNER: Rob is comfortable with it.
5 MR. BARE: Did I just get threatened with a lawsuit?
6 MS. EGLET: You did.
7 MR. KIMBROUGH: With apologies for not having participated
8 in the concurrent review committee, Rob brings up a good
9 point. That is becoming the major way that people advertise
10 and I think web sites need to be reviewed.
11 MR. TURNER: How do you review web sites?
12 MR. KIMBROUGH: You submit the web site, send it in.
13 MS. MARZEC: Texas does it with the main page. You have
14 to submit your home page.
15 MR. CHERRY: Aren't they updated on sometimes a daily
16 basis?
17 MS. MARZEC: It's a tremendous volume.
18 MR. KIMBROUGH: I think it's legitimate. That is a main
19 form of advertising.
20 MR. TURNER: It's a main form.
21 Does anybody have a problem with adding that, if it's
22 reviewable?
23 MR. CHERRY: Is it reviewable?
24 MR. KIMBROUGH: It allows you to change any ad without
25 having to change parameters.

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1 MR. TURNER: Not what the specific ad says if you don't
2 change it, but if you change it substantively saying, "I'm the
3 greatest lawyer that ever lived."
4 MR. CHERRY: What if you get a major new partner, when a
5 major partner comes into a firm? It has a good meaning in the
6 rule, but try it when you're a judge. I kind of touched on
7 when you were talking about the horse being out of the gate
8 and you can't go back and fix it. Yellow Pages it's going to
9 sit in somebody's house for two years. I think a web page
10 should be under scrutiny, but whereas Yellow Pages is very
11 static.
12 MR. KIMBROUGH: At personal cost to the lawyer.
13 MR. KOSTIW: I do my own web site. It complies to the
14 rule, but I can change something in a heartbeat. I think it
15 should be subject to all these rules, but I think an up-front
16 review may not be necessary. I think it's more of just kind
17 of if somebody brings it to your attention or something like
18 that. I think it's more of that kind of situation. It's not
19 static, it's dynamic. It will quickly change.
20 MR. KIMBROUGH: It's a major piece of advertising.
21 MR. TURNER: The biggest problem is Yellow Pages are going
22 to go out and web Yellow Pages are going to be more and more
23 common. I think we probably should include it.
24 MR. KOSTIW: I think it probably should be -- web pages
25 should be under the same review and scrutiny, but the \$200

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1 fee, that seems excessive.
 2 MR. KIMBROUGH: There are specific exceptions in the rules
 3 to new partners, new rules.
 4 MR. TURNER: I think the only -- "substantive" means so
 5 many things to so many people. I think what we're talking
 6 about "substantive" is deceptive, that lead to deception.
 7 MR. KOSTIW: I'm just trying to bring the static versus
 8 dynamic (inaudible) -- Vincent Kostiw again.
 9 MR. MORGAN: Dick Morgan again. I've been meaning to
 10 clarify all morning, I am listed at least one point here as a
 11 member of the concurrent review committee and I am not. I
 12 have never participated in that committee.
 13 MR. TURNER: And you deny any association.
 14 MR. MORGAN: As we move forward, that's becoming more
 15 true.
 16 MR. KIMBROUGH: Are you trying to avoid a deposition?
 17 MS. MARZEC: I believe you were an ex officio member. You
 18 agreed to chair, but everything was kind of given to --
 19 MR. MORGAN: I was not functionally a member of the
 20 committee. I have not been notified of meetings. I have not
 21 attended. I'm just telling you a fact. I have not
 22 participated in that. I chaired the Constitutional
 23 limitations committee. I had nothing to do with the other
 24 things.
 25 MS. MARZEC: I apologize. You're right. The concurrent

1 review committee is -- I apologize. I heard "Constitutional
 2 concerns" when you said "concurrent review."
 3 MR. TURNER: That's right.
 4 MS. MARZEC: You were on it briefly, then we took you off
 5 it.
 6 MR. TURNER: Do we want to have a vote or do we all agree
 7 that web sites should be on there? Does anybody have a
 8 problem with web sites being on there? Then let's add that.
 9 MR. BARE: The question is, is a web site an
 10 advertisement?
 11 MR. TURNER: Let's talk about it then.
 12 MR. BARE: That's the legitimate legal question here. If
 13 I have a web site, you know, you've got to seek me out as
 14 opposed to the way a conventional advertisement is. A
 15 conventional advertisement is putting it out to the public.
 16 You've taken the effort to put it in front of people's faces.
 17 A web site, people, they've got to search it out. They've got
 18 to find it. That's an important distinction here. Web sites
 19 have to be sought out.
 20 MR. TURNER: It is and it isn't. The Courts have all
 21 defined the difference, the empirical studies. I went through
 22 there. There's something called an "active web site" and a
 23 "passive web site." Active web sites are considered to be
 24 advertising because the lawyer pushes this web site: "This is
 25 my web site. See my information." That should be -- at least

1 active web sites should be reviewed. Passive should not.
 2 MR. BARE: Respectfully, do you want to get into that? I
 3 just want to bring that to your attention.
 4 MR. TURNER: At least some of the State Bars have gotten
 5 into it, but Allen's point, which I thought was well taken, it
 6 is becoming a major force of the way you express what you do
 7 as a lawyer to the public, and publics are looking at
 8 computers and looking at these types of advertisement and most
 9 of them aren't looking at Yellow Pages.
 10 MR. BARE: I don't mean to belabor on this point, but if I
 11 have a web site, as a law firm I could do a lot of things on
 12 that web site that could be precluded by the advertising
 13 rules. I could have testimonials on the web site, but on my
 14 web site -- you could go deep into my web site. Maybe there's
 15 a link that says, "All cases that we've had in the last year."
 16 I mean you could do that, but you couldn't do that as an
 17 active advertisement.
 18 MR. TURNER: Would you say that if this law firm
 19 specifically --
 20 MR. BARE: It's a problematic area.
 21 MR. TURNER: Let's just consider this hypothetically: If
 22 a law firm says in an advertisement, "Visit our web site to
 23 find out more about it," you go to the web site and it says
 24 that, isn't that an active advertisement and isn't that the
 25 danger to the public --

1 MR. BARE: Yeah.
 2 MR. TURNER: -- that you're trying to prevent?
 3 MR. BERNSTEIN: Ed Bernstein. I don't think the test is
 4 active versus passive. It's not different. You're visiting a
 5 web site. If I'm trying to drive somebody to my web site,
 6 it's no different than driving somebody to my office. I want
 7 you to come visit me.
 8 The reality of web sites today is that nobody is
 9 going to find anybody's web site unless you're advertising
 10 your web site. If you're on Google, if you're looking up my
 11 web site, you've got me placing an ad. You have to know
 12 somebody's name today in Google search or Yahoo search to
 13 really find a specific person the same way you have to go to
 14 their office address and go into their office to find them.
 15 So I think even though -- if you're advertising, "Hey, visit
 16 my web site," it's no different than saying, "Come visit me at
 17 the office or call me," and then once you call an attorney or
 18 visit their office, they're free to say essentially whatever
 19 they want to say.
 20 MS. EGLET: Are they though?
 21 MR. BERNSTEIN: Well, you can say, "I've handled lots of
 22 these kinds of cases" when you're sitting in front of a
 23 client.
 24 MS. EGLET: Then I'd like that in the rule. I think you
 25 need to explain that because I don't think it's clear. I

1 think what you're doing could be construed as an
 2 advertisement. I can have a client in there and be telling
 3 them things where you could consider me advertising. That was
 4 I think Dick's comment. His concern is that how far do you
 5 go? I mean, you know, "Okay, we've gotten this verdict. I'm
 6 not saying your verdict, but these are our verdicts." I don't
 7 understand the difference between your saying it and, for
 8 example, putting it on a web site. I don't see a difference
 9 at all. I see that slippery slope. "Yeah, I'm in the
 10 courtroom, but no, I can't give you any of our verdicts. I
 11 can't tell you my results." So within this I mean you're
 12 basically tying the hands of people and I think it's prior
 13 restraint.

14 MR. TURNER: The one thing that I would just remind us as
 15 a commission is obviously the Board of Governors and the
 16 Supreme Court has to consider these rules, and if they decide
 17 in their wisdom that this particular section with regards to a
 18 lawyer advertising verdicts is not Constitutional, they can
 19 certainly put 7.02 back in.

20 MS. EGLET: But I would like in there -- I would put
 21 before the committee where it says that when you're talking to
 22 someone and you're speaking to your client, that this is
 23 somehow -- that that is not what we're deeming as advertising
 24 and you can talk about your verdicts.

25 MR. TURNER: Didn't we put "written" in here? Isn't it

1 "in writing"?

2 MS. EGLET: I don't know.

3 MR. TURNER: I think writing.

4 MS. EGLET: So then I can't hand out a pamphlet to my
 5 clients who come in?

6 MR. BERNSTEIN: Once somebody is in your office, it's not
 7 advertising anymore.

8 MS. EGLET: It's not advertising?

9 MR. BERNSTEIN: In my opinion it's not.

10 MS. EGLET: That's what I want to make clear. We have a
 11 big pamphlet. It talks about our firm. It talks about our
 12 lawyers. If I hand that to someone in my office, is that
 13 advertising?

14 MR. TURNER: I don't see how -- it seems to me now we're
 15 really going into -- that's way overregulation.

16 MS. EGLET: That's an exception.

17 MS. MARZEC: We do say pamphlets in our rule.

18 MR. TURNER: We did add pamphlet, but I don't think we
 19 were talking about pamphlets in the lawyer's office.

20 MR. KENNY: Subsection 7(a)(5).

21 MS. EGLET: What page are you on?

22 MR. KENNY: Page 1 of 5.

23 MR. TURNER: At the time they're in your office are they
 24 being solicited?

25 MR. BERNSTEIN: No.

1 MR. KENNY: It says, "including but not limited."

2 MR. TURNER: To solicit people to come in to become a
 3 client.

4 MS. EGLET: It doesn't say that and if you haven't signed
 5 up, Bill, then they aren't your client yet. So you need to be
 6 more specific. You're tying the hands of lawyers.

7 MR. CHERRY: I bet Rob gets complaints from people who
 8 have gone to lawyers who have made representations about
 9 verdicts.

10 MR. TURNER: Well, it's a sticky wicket, but it seems to
 11 me that I would not at this point -- do we have a
 12 recommendation then to change this? Do you want to change
 13 this as a commission, this language, and somehow to cover -- I
 14 think we're just getting into the same problem we were getting
 15 in before. When we start making exceptions, we run into
 16 problems.

17 MS. EGLET: I think if we don't you run into problems. I
 18 think I would make a motion that you're not talking about when
 19 you're in your office and you take out the pamphlets. I think
 20 that's a big -- that's really important. You're saying you
 21 can't.

22 MR. KENNY: We're talking about web sites.

23 MR. TURNER: I think we better come back to this after we
 24 get done with web sites. I think we need to have a vote as to
 25 whether or not to include the web sites. So all those in

1 favor? I think -- is there a motion to include web sites as
 2 part of this section? Is there a motion and a second to that?
 3 Do we have a motion to include web sites as part of the
 4 regulation? If we don't, then --

5 MS. EGLET: Not by me.

6 MR. TURNER: No motion? No second? Then that's a done
 7 deal. Tracy, do you have a motion?

8 MS. EGLET: I'd like to change that section that says --
 9 at least to clarify that that is not talking about meetings
 10 with clients in your office when you're going over what your
 11 successes are or whatever and what your firm has done while
 12 they're in your office. I understand that, Ed, you don't
 13 think that's problematic, but it doesn't say that.

14 MR. TURNER: Let's address that.

15 MR. BERNSTEIN: I don't think any of these rules would
 16 apply to a situation once the client has contacted you.

17 MR. CHERRY: I agree.

18 MS. EGLET: Can we put that in there?

19 MR. TURNER: Does anybody have a problem with that?

20 MS. MARZEC: Could "unsolicited" -- "including but not
 21 limited to unsolicited pamphlets and postcards"? Then if
 22 someone were in your office and they ask for it or they're
 23 already your client, it wouldn't be considered the same thing.

24 MR. TURNER: Maybe if we define -- you start getting into
 25 this language, "unsolicited" is kind of vague. Do you have

1 any suggestion how we can do that?

2 MR. MYERS: Your point is well taken, Tracy. We don't get
3 into regulating law firms trying to internally work with
4 people who are already there.

5 MS. HEGEDUIS: Could I ask a question? The section you're
6 talking about says, "including but not limited to," so when
7 you're talking to a client, it's not a written solicitation.

8 MS. EGLET: I'm talking about handing out a pamphlet. Our
9 firm has many materials. It has a whole pamphlet of
10 information that talks about our attorneys.

11 MS. HEGEDUIS: That's before they've seen a retainer
12 agreement?

13 MS. EGLET: They just see who you are. They don't usually
14 sign up with you right now.

15 MR. BERNSTEIN: Maybe we just need to define "solicited."

16 MR. KOSTIW: My recollection of the ABA model rules --
17 attorneys are trained in the art of persuasion. They don't
18 want attorneys going out there and tricking people at the
19 bedside of a hospital, things like that. That's why we're
20 supposed to put this big red stamp; but if somebody has a need
21 and they seek you out, like you said, once they come to you
22 that's not a solicitation anymore. They're seeking you.
23 You're not soliciting them. That's really where the line
24 changes I think.

25 MS. EGLET: As long as it's defined.

1 MR. CHERRY: Do you really believe it's not a
2 solicitation? I can't believe you would say that.

3 MS. EGLET: They're already in the office.

4 MR. CHERRY: But they haven't signed up yet. They're
5 going to go to Stokes and maybe a few others. People shop.
6 They don't just come in and sign up when you are doing
7 big-time criminal or big-time civil for that matter.

8 MR. TURNER: Let me ask you a question just as a basic
9 concept.

10 I understand talking to people. You can't regulate
11 talk, but in your package I assume there's a full disclosure
12 there. There's a certain honesty there that you would want
13 your client to be aware of.

14 MS. EGLET: There is always an honesty, but it's not
15 reflected in here. It says I can't be honest. So that's what
16 I wanted to be defined.

17 MR. TURNER: I don't understand. If your packages are
18 fully disclosing the information required, wouldn't that be
19 sufficient?

20 MS. EGLET: No.

21 MR. MORGAN: She wants to be able to put verdicts in and
22 judgments in; and if that's advertising, she can't do that.

23 MR. TURNER: I understand.

24 MS. EGLET: We've all said it's not. It just needs to be
25 defined in here.

1 MS. ITTS: Tracey Itts. The other thing that I'm

2 concerned about for the family Bar is many of us have gone
3 beyond just doing general family practice and are doing
4 mediation and collaborative practice, those type of things.

5 We actually purchase pamphlets and handouts and put our
6 business cards and put our information about these other areas
7 from International Collaborative Professionals. We are now
8 going to have to change that and create our own pamphlets and
9 everything else if we want to hand out that information to
10 educate people when they come through the door that there is a
11 different way. There's this way, this way and this way.

12 MR. TURNER: So you would take out pamphlets? Would you
13 guys take out pamphlets?

14 MS. EGLET: I would just say define "solicitation."

15 MR. TURNER: That's a tricky wicket.

16 MR. BERNSTEIN: How is somebody going to get a pamphlet
17 any other way than if they come into the office? Once you
18 mail them out you're subject to the mailing laws, right, of
19 advertising. So the only way -- and I guess if you go to a
20 seminar and hand them out, then that would be -- take
21 pamphlets -- that wouldn't fall under the advertising laws.

22 Once again I think that "solicitation" word kind of
23 speaks for itself. I mean you're soliciting people you don't
24 have a relationship with in the general public. That's
25 advertising. If you're having some clients in your office

1 where you have a relationship with somebody, that is not
2 solicitation.

3 MS. EGLET: How about if we can -- this is Tracy Eglet --
4 "all attorney advertisements disseminated in or directed to
5 Nevada except as done in the attorney's office" --

6 MR. TURNER: Where are we?

7 MS. EGLET: Right at the top on 7(a).

8 "Except as handed" -- or "except as done in the
9 attorney's office in the following forms shall be filed with
10 the State Bar of Nevada in accordance with this rule."

11 MS. ITTS: "Except as provided."

12 MS. EGLET: "As provided by the attorney in person."

13 MR. TURNER: "Provided by the attorney in person" might
14 work.

15 MS. ITTS: Unless they're at a hospital or in the
16 attorney's office as part of the consultation.

17 MR. TURNER: Does anyone have a problem with that
18 language? Though that of course opens the door to another
19 issue, but --

20 MR. CHERRY: You go to Craig Kenny's party, you get a
21 pamphlet, you start handing them out all over. You're opening
22 Pandora's box here.

23 MR. TURNER: How would you change it?

24 MR. CHERRY: I don't know what you do with the First
25 Amendment. I don't know.

1 MR. TURNER: I want to keep Pandora's box closed, Judge.
 2 MR. CHERRY: They may be able to get through the Supreme
 3 Court, but how about the federal judges in the Ninth Circuit?
 4 MS. EGLET: In a consultation.
 5 MR. TURNER: It's not a -- you're not soliciting people
 6 right then at that point in one sense. They're there. You're
 7 not out handing out this stuff all over town. You have an
 8 individual you're talking to.
 9 MS. EGLET: "Except in a consultation."
 10 MR. TURNER: What language would you add?
 11 MS. EGLET: "Except" -- "all attorney advertisements
 12 disseminated in or directed to Nevada except in a
 13 consultation."
 14 MS. MARZEC: Can I ask you something? Could we possibly
 15 put it in sub (5), the exceptions?
 16 MS. EGLET: Yeah, that's fine.
 17 MR. TURNER: What page?
 18 MS. MARZEC: 7.0(a) sub (5), because we're talking about
 19 all written solicitation in RPC 7.3, including these
 20 pamphlets.
 21 MS. EGLET: Except for those given during --
 22 MR. BARE: In a lawyer's office during consultation.
 23 MR. TURNER: I'm afraid by doing that you can give them
 24 false and misleading (inaudible).
 25 MR. MORGAN: First of all I'm going to have to leave in

1 about two minutes. I just wanted to get a couple comments in.
 2 This whole discussion I think raises the need for
 3 somebody to look carefully at all these rules, to see how this
 4 discussion started with outlawing judgments and verdicts
 5 categorically, but somebody needs to go through here and see
 6 how all this stuff plays.
 7 For example, there is already a definition of
 8 "solicit" in rule 7.3(a) which is now different from the
 9 definition of "solicit" that we're just working on. So I
 10 think somebody has to give some thought to this.
 11 I haven't read through all of it, but I do note that
 12 it all started with this idea that we should outlaw all
 13 reference to judges -- judgments and verdicts and I come back
 14 to my point, which is there's already a general prohibition on
 15 false and misleading statements and failing to provide
 16 information necessary to make the provided information not
 17 misleading, and I would have left it at that, but anyway I'm
 18 leaving.
 19 MR. TURNER: Your point is well taken, but you do start
 20 opening up all these exceptions to the exceptions.
 21 MR. MORGAN: Somebody needs to look at the whole set.
 22 MR. TURNER: Did you say the definition?
 23 MR. MORGAN: 7.3(a) has a definition of "solicit" in it
 24 which is now inconsistent with the definition you're about to
 25 approve.

1 MS. ITTS: It says "in person" in there.
 2 MR. TURNER: Direct contact.
 3 MR. BERNSTEIN: We're not changing the definition of
 4 "solicit." We're just adding the solicitation part.
 5 MR. TURNER: Which is a carved-out exception, it seems to
 6 me.
 7 MS. EGLET: We have to look at this stuff, right?
 8 MR. TURNER: It seems to me that with that -- there are
 9 two ways to go about this. Either get rid of the "no verdicts
 10 at all" and just go -- or at least carve out your exception,
 11 Tracy. I think otherwise we really are getting into a huge
 12 amount of almost impossible problems.
 13 MS. ITTS: You know what, Bill? You could probably add at
 14 the end of (a) in doing so, "unless information is provided in
 15 a consultation setting." Again under 7.3(a) add "in a
 16 consultation setting" and that alleviates any problem and that
 17 way the two rules match.
 18 MR. BERNSTEIN: But it doesn't work because it doesn't
 19 stop. You still go out and you solicit the clients.
 20 MS. ITTS: I wasn't thinking about from a personal injury
 21 standpoint.
 22 MR. TURNER: But at least we have the language that you
 23 want and I think everybody is agreeable to that language.
 24 Does anybody oppose Tracy's language being added to that as an
 25 exception under I think 5?

1 MS. MARZEC: (a)(5).
 2 MR. TURNER: Unless anybody is opposed to that, let's add
 3 that section in there. So that will deal with that.
 4 Do we have any other issues with this concurrent
 5 group? Then with that done, we need to vote on this
 6 particular concurrent draft with these changes.
 7 MS. MARZEC: Correct.
 8 MR. MYERS: I think we ought to review the changes.
 9 MS. MARZEC: Here's the thing. What I'd like to do is
 10 just make sure I understand what you asked of staff today.
 11 Then you have the existing draft to review in the next week,
 12 because we want to try to get this to the Board. I will do
 13 this tonight. I promise I'll do it tonight and E-mail it to
 14 you all tomorrow.
 15 MR. KIMBROUGH: But it really has to be finalized by the
 16 end of the day on Tuesday.
 17 MR. TURNER: The only issue as a procedural matter, if we
 18 don't vote on this today with these changes --
 19 MS. MARZEC: We have to file it without the concurrent
 20 review.
 21 MR. KIMBROUGH: Or you wait till May.
 22 MR. TURNER: I'd like to vote on this as a package today,
 23 if we could, with those changes because I think we've all
 24 looked at this.
 25 MR. MYERS: Before we vote, we need to know what the

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1 changes are.
2 MR. TURNER: Kristina is going to make those changes.
3 MR. MYERS: We can't vote as a group?
4 MS. ITTS: Why can't we do it on line.
5 MR. MYERS: If we all -- in each other's presence if we
6 recite the changes that we've already voted on and then vote
7 on the whole package.
8 MS. MARZEC: Then I'll make the changes and E-mail it to
9 you. Assuming I don't flub it all, you've already voted.
10 MS. HEGEDUIS: When are we going to vote?
11 MS. MARZEC: Now Dianna. There aren't that many changes
12 anyway.
13 MR. MYERS: After we recite in everybody's presence what
14 changes we've already voted on.
15 MS. MARZEC: Do you want me to go through the whole thing?
16 So we began with, in Rule of Professional Conduct 7.0
17 sub (a) we're going to add in language that "All attorney
18 advertisements disseminated in or directed to Nevada in the
19 following form shall be filed with the State Bar of Nevada" --
20 "filed with and reviewed by the State Bar of Nevada or the
21 standing advisory committee."
22 MR. TURNER: "And the advisory committee."
23 MS. MARZEC: Every single ad is going to be reviewed? We
24 didn't contemplate that.
25 MR. TURNER: The monthly meeting is going to review those

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1 ads it wishes to review.
2 MR. MYERS: And there will be a stamp person there
3 representing State Bar of Nevada and whatever requisite number
4 of the standing Bar (inaudible).
5 MS. MARZEC: We decided that's only television.
6 And so the first part should say, "All attorney
7 advertisements disseminated in or directed to Nevada in the
8 following forms shall be filed with and received by the State
9 Bar of Nevada" -- or "reviewed by the State Bar in accordance
10 with this rule."
11 MR. MYERS: Then down below.
12 MS. MARZEC: "Which the State Bar shall also concurrently
13 submit to the standing advisory committee" -- "television,
14 which the State Bar shall also submit to the standing advisory
15 committee."
16 We didn't want -- if we're going to have two people
17 reviewing, why have a staff member? So our thought was the
18 staff member was going to weed out the things that are clearly
19 compliant, with the exception of a lawyer who asks to go to
20 the advisory committee for television and Yellow Pages, 'cause
21 we thought those were big enough and important enough that
22 they should be reviewed by the committee.
23 MR. KIMBROUGH: We have to have some efficiencies because
24 this is going to overwhelm, but I think the language that we
25 agreed on is "shall be filed with and reviewed by the State

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1 Bar of Nevada in accordance with this rule."
2 MR. TURNER: You just want to make sure.
3 MR. KIMBROUGH: That's the simplist change because the
4 State Bar encompasses the committee.
5 MR. BERNSTEIN: Is it your opinion if you use the word
6 "disseminated" in there, does that include these cable
7 advertisers?
8 MR. KIMBROUGH: Yes.
9 MS. MARZEC: We generally look at, if it's exclusively
10 federal and not run on local cable channels, Rob will do an
11 analysis; and if it does, then we proceed from there. I
12 probably shouldn't speak on behalf of Rob. So they are as a
13 threshold issue subject to review. Whether or not we assert
14 jurisdiction is going to depend on the content and the venue
15 and the channel.
16 MR. MYERS: That's one of the things we've agreed to today
17 that we'll vote on, right?
18 MS. MARZEC: So we're going to go with, "All attorney
19 advertisements disseminated in or directed to Nevada in the
20 following forms shall be filed with and reviewed by the State
21 Bar of Nevada in accordance with this rule." You want to vote
22 on that?
23 MR. TURNER: Yes. All those in favor? All those opposed?
24 It's unanimous.
25 MS. EGLET: I say no.

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1 MR. TURNER: Then there is -- Tracy Eglet is the opposing
2 vote.
3 The second one?
4 MS. MARZEC: So the next change that we made was to
5 subsection (5). That was just for the first part of (a).
6 That wasn't for the whole rule. That was just (a) we voted
7 on. I was just doing 7.0(a). (1), (2), (3) and (4) we didn't
8 make any changes.
9 Subsection (5) was changed to read as follows: "All
10 written solicitation as described in RPC 7.3, including but
11 not limited to flyers, inserts, newspapers, pamphlets and
12 postcards." For the purposes of this section the following
13 exceptions shall apply. We'll have a sub (i), "business cards
14 that have information beyond the tombstone exceptions shall be
15 considered a written solicitation which must be filed." Then
16 we'll have sub (b) which says, "materials that are
17 disseminated during a consultation in a lawyer's office shall
18 be exempt from filing under this rule."
19 MR. BERNSTEIN: It doesn't have to be in a lawyer's
20 office.
21 MS. MARZEC: Do you just want "during a consultation" to
22 allow for people to go out?
23 MS. EGLET: Yeah. There are people who can't actually get
24 to our office.
25 MR. TURNER: That's true.

25 (Pages 94 to 97)

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1 MS. MARZEC: This language obviously will be cleaned up
2 tonight and then you'll have a chance to comment on it.
3 MR. TURNER: It will be interesting, though, seeing
4 lawyers standing on a corner.
5 MS. MARZEC: This is only what has to be filed.
6 MR. TURNER: Let's go.
7 MS. MARZEC: Can we get a vote, Mr. Chairman?
8 MR. TURNER: Yes. All those in favor? Any opposed?
9 MS. EGLET: I'm saying the reason I voted "nay" before was
10 because I don't agree with this new advertisement -- or with
11 the whole --
12 MR. TURNER: The whole process?
13 MS. EGLET: With the language.
14 MS. MARZEC: That's an important distinction. Maybe we
15 should -- the rule overall we have one "nay," but if we're
16 going to have the rule, now we're going to have to work on the
17 language to clarify the vote.
18 MR. TURNER: I think the rule overall I think everyone
19 else --
20 MS. MARZEC: Okay.
21 MR. TURNER: What's the next one, Kristina?
22 MS. MARZEC: We went against the web site addition;
23 correct?
24 MR. TURNER: Correct. That was voted down.
25 MS. MARZEC: We were to make clear in the rule that the

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1 fine -- to whom the fine could be appealed. So I have to make
2 a change to the section where it says, "Non-Filing Penalty
3 Fee." "Appeal of this penalty must be made in writing within
4 30 days of receipt of a billing from the State Bar of Nevada
5 along with the requested waiver. Appeal should be processed
6 in accordance with subsection (f)." That will lead you to the
7 subsection on appeals.
8 MR. KIMBROUGH: That goes to the advisory committee.
9 MS. MARZEC: They have the choice of going to the standing
10 advisory committee or directly to Bar counsel.
11 MR. TURNER: That's in that section.
12 MR. KIMBROUGH: That seems odd because Bar counsel is the
13 (inaudible).
14 MR. TURNER: Are we still on this rule or are we changing
15 something else? All those in favor of this change? Any
16 opposed? Okay. Allen?
17 MR. KIMBROUGH: Yeah. On page 5 of 5 in capital (B),
18 "Appointments," that should be "appointed by the Board of
19 Governors" and you should say "Board of Governors" again.
20 That's the way they draft the rules. It always spells it out.
21 MS. MARZEC: So throughout subsection (h), "Oversight,"
22 "The Board of Governors shall oversee the implementation of
23 this rule as follows." Everywhere I say "board" in those
24 subsections will now say "Board of Governors."
25 MR. KIMBROUGH: And you do it most places.

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1 MR. TURNER: I don't even think we need to vote on that.
2 Is there any opposed to that? Okay, that's fine.
3 Are there any other significant comments or changes?
4 MS. EGLET: I have one. In (d) on page 2 -- page 3 under
5 "Advance Opinion," (d), is everybody there? Okay. It doesn't
6 give a time frame in which the committee has to respond to the
7 application for an advance opinion.
8 MR. BERNSTEIN: I thought we agreed 30 days.
9 MS. EGLET: Can we add that in? It says that the
10 application is not less than 30 days, but when do they
11 respond? They have to say.
12 MR. KIMBROUGH: You're going to have to give more than 30
13 days because they're only going to meet every 30 days.
14 MR. TURNER: Would everybody agree they should have 60
15 days?
16 MR. BERNSTEIN: We're creating an ad, going in for an
17 advanced opinion. To wait 60 days is a real long time when
18 you're waiting just for an approval and holding all your
19 advertising back.
20 MS. MARZEC: You have the choice of going to Bar counsel,
21 but how about 45 days?
22 MR. TURNER: It can be submitted in 45 days.
23 MR. KIMBROUGH: I'm just trying to think, Ed. Say you
24 submitted on the day of a meeting of advisory committee. Then
25 they're not going to meet again for 30 days. So it would be

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1 hard to issue the opinion within the 30-day time frame.
2 That's why I'm saying 45, but Bar counsel could do it.
3 MS. MARZEC: What about the next scheduled meeting of the
4 advisory committee?
5 MR. KIMBROUGH: What if they apply the day before? You
6 can't get it prepared and get it to the advisory committee by
7 the next day. That's not practical. So I think it's 45 days
8 for the committee or 30 days for Bar counsel.
9 MS. ITTS: We need then to change the time from when they
10 need to submit it. They have to submit it 30 days prior to
11 the date of dissemination. So we would need to up the time
12 where they have to give it to us, then we have a 30- or 45-day
13 turnaround.
14 MR. TURNER: I think that's actually a great idea because
15 that gives everybody time to look at it. It can't hurt to
16 have 60 days.
17 MS. ITTS: Is that practical, if you're running ads and
18 working with an advertising company, to ask for 60 days before
19 it's going to go to print?
20 MR. BERNSTEIN: What would be the purpose of having 60
21 days before if you have 45 days after?
22 MR. TURNER: You can make it 30 days. If you did it 60
23 days before, you got a 30-day review time.
24 MR. KIMBROUGH: That won't work though.
25 MS. MARZEC: Remember how Texas did this in the 30-day

26 (Pages 98 to 101)

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1 period? It was, "If you want the opinion in 30 days, you have
2 to give it to us within 30 days." Now we're going to change
3 that and say, "You have to give it to us 45 days in advance,
4 but we're not going to get back to you for 60 days." I think
5 the two periods of time should be the same. They should be
6 the same.
7 MR. KIMBROUGH: I think you could shorten it by saying,
8 "If you want it to be reviewed only by Bar counsel."
9 MS. MARZEC: Or sooner if submitted to Bar counsel. So,
10 "All requests shall be submitted within 45 days of the
11 required date," why don't we say.
12 MR. KIMBROUGH: You may have to have emergency meetings of
13 the committee.
14 MS. MARZEC: I think most people would probably just opt
15 to go to Bar counsel first. Then if they got a contrary
16 opinion -- because an opinion of Bar counsel is binding, so
17 why not just say "45 days or sooner if submitted to Bar
18 counsel."
19 MR. TURNER: Why don't we just say "45 days or sooner."
20 MS. MARZEC: Okay.
21 MR. TURNER: That way they have a choice and that's
22 discretionary. Bar counsel for some reason may not be
23 available.
24 MR. BARE: That's a long amount of time for my office. I
25 usually do them in a day or two days.

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1 MR. KIMBROUGH: This is going to be a whole new world.
2 MR. TURNER: Just say 45 days.
3 MS. MARZEC: "Not less than 45 days prior to the date of
4 first dissemination."
5 MR. TURNER: "And shall be reviewed" --
6 MS. MARZEC: Then we should probably add a sentence to the
7 end, "Request for advance opinion shall be reviewed within 45
8 days or sooner."
9 MR. TURNER: "Or sooner," period.
10 MR. BERNSTEIN: I think it's very few law firms that are
11 going to be able to submit an ad in 45 days or more before
12 you're ready to run the ad and sit there and wait for an
13 opinion. These things happen quickly. You may as well just
14 go ahead and run your ad and take your chance. You do want to
15 encourage people to get advance opinions.
16 MR. TURNER: How would you run that, Ed, if you got a
17 committee that's only meeting every 30 days and if you hit
18 them the day after they met?
19 MR. BERNSTEIN: But if Bar counsel can give an opinion,
20 why don't you give something more reasonable if you want to
21 encourage people to do this. If you're going to require me to
22 do 45, I'm just going to do the ad.
23 MR. TURNER: We said 45?
24 MS. MARZEC: Within 45 days if submitted to the standing
25 advisory committee or within 10 days if submitted to Bar

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1 counsel, because they have the option.
2 MR. TURNER: If that's acceptable.
3 MR. KIMBROUGH: We won't know until this thing gets under
4 way.
5 MR. BARE: Ten days is fine.
6 MR. KIMBROUGH: Ten business days. There's less --
7 MS. MARZEC: We'll say ten business days.
8 MR. KIMBROUGH: There's some assumption that if it's less
9 than so many days --
10 MR. MYERS: It's less than seven days.
11 MR. TURNER: All right. Do we have an agreement on that?
12 Is there anyone opposed to that change? That change will be
13 45 days before it will be submitted and shall be reviewed by
14 Bar counsel.
15 MS. MARZEC: Shall be reviewed within 45 days if submitted
16 to the advertising committee or 10 days if submitted to Bar
17 counsel.
18 MR. TURNER: That's putting a mandatory requirement on
19 you, Rob.
20 MR. BARE: One thing: Can I go to a new subject, though
21 having to do with the rule? Before Bryan Scott left -- he had
22 to leave in a hurry -- he asked me to present a proposed
23 change to the committee, so I have it here. Specifically it's
24 on page 4 of 5 and it's section (g) about three-quarters down
25 the page which is entitled "Requests for Information." Do you

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1 see that there?
2 Here's his thought. Again this is Rob Bare. This is
3 a thought of Bryan Scott that he wanted me to relay: "If
4 requested by the State Bar of Nevada or the standing advisory
5 committee on lawyer advertising as set forth in subsection
6 (h)(2), a lawyer shall promptly submit information to
7 substantiate statements or representations made or implied in
8 any advertisement submitted under this rule." Bryan's thought
9 was that the word "promptly" is too vague and should be better
10 defined and he's proposing a ten-day requirement.
11 MR. TURNER: Well, yeah, "promptly" is a vague word. That
12 could mean a year.
13 MR. BARE: That's his thought.
14 MR. BERNSTEIN: Ten business days.
15 MR. TURNER: All right. Does anybody oppose the ten days?
16 No, that's a great idea. Do we have any other suggestions?
17 Changes? All these have been very good changes.
18 MR. MYERS: Well, we haven't voted a second time on the
19 rule change, which I voted against, about prohibiting
20 advertising results.
21 MS. MARZEC: We're still on concurrent review; right?
22 MR. TURNER: Yes.
23 MR. KIMBROUGH: With the cosmetic changes that we just
24 voted on separately. So we're done with that; right?
25 MS. MARZEC: So we can move on to 7.1, which is on Bates

27 (Pages 102 to 105)

1 13 in the big packet.
 2 MS. EGLET: Before we move on, I just was a little
 3 concerned about where we were going to get volunteers. Maybe
 4 if we were able to -- I don't know if we can do this but
 5 provide CLE credits for these volunteers, because it's kind of
 6 a big duty. I don't know if that's something --
 7 MR. KIMBROUGH: You can't give CLE credit. They can count
 8 it toward the pro bono credit because it's improving the law.
 9 MS. EGLET: You won't have to put that in there.
 10 MR. TURNER: No. That's a given.
 11 So we're on 7.1. What is it --
 12 MS. MARZEC: The change to 7.1 had to do with the
 13 prohibition of specific results.
 14 MR. TURNER: And I thought we voted on that six to five.
 15 MR. BERNSTEIN: We did.
 16 MS. MARZEC: So we're going over the changes again.
 17 MR. TURNER: I'm sorry. Go ahead.
 18 MS. MARZEC: That was when I left the room. All I have is
 19 that we're supposed to come up with language, but you didn't
 20 have any so you need to add it.
 21 MR. MYERS: As (e) I think.
 22 MR. BARE: We're on page 13 of the big packet?
 23 MR. TURNER: Page 13 of 29 of the big packet. We're
 24 putting a subsection in there.
 25 MS. MARZEC: "A communication is false or misleading if

1 it," sub (e), "contains specific results that the lawyer has
 2 issued."
 3 MR. BERNSTEIN: On a specific case.
 4 MS. EGLET: You're going to call it false or misleading?
 5 MS. HEGEDUIS: That's what 7.1 states.
 6 MR. MYERS: "Are false and misleading if" -- (e).
 7 MS. MARZEC: "It contains a specific result that the
 8 lawyer has achieved on a specific case."
 9 MR. TURNER: Well, you can put this in as extra language.
 10 MR. KENNY: They're saying it's misleading. It's not
 11 false. It's inherently misleading.
 12 MS. EGLET: I would take out "false."
 13 MR. TURNER: You got to have "false" in there. What about
 14 "create some unreasonable expectations" after "misleading
 15 communication"; "false, misleading or create unreasonable
 16 expectations about the lawyer or the lawyer's services"?
 17 That's part of our general rule anyway. Can we not add that
 18 and then basically provide with section (e) "unreasonable
 19 expectations" as well?
 20 MS. MARZEC: Can we just say, "A communication is
 21 misleading if it contains" to be absolutely clear even if it's
 22 not false?
 23 MR. TURNER: I don't think we need to do that. It's
 24 pretty clear that it's either false or it's misleading or it
 25 creates unreasonable expectation. I do think we ought to have

1 "create unreasonable expectations" in there.
 2 MS. MARZEC: That's in (b) already. Do you want to
 3 restate it? I'm sorry, I lost you.
 4 MR. TURNER: (b) is the definition of what's unreasonable
 5 expectations. We have "false and misleading" or "unreasonable
 6 expectations." It doesn't matter to me. It just seems to me
 7 I'm trying to avoid Tracy's concerns. If the verdicts create
 8 unreasonable expectations, then they're not false necessarily
 9 but create unreasonable expectations.
 10 MR. BERNSTEIN: Looking at the rule, "unjustified
 11 expectation," is "unreasonable" different than "unjustified"?
 12 MR. TURNER: Well, I've always heard it used as
 13 "unreasonable."
 14 MR. BERNSTEIN: Maybe we should change that word.
 15 MR. TURNER: Where is that?
 16 MR. BERNSTEIN: It's on 7.1 subsection (b).
 17 MR. TURNER: I think "unreasonable" rather than
 18 "unjustified." "Unreasonable" has been defined by the Courts.
 19 MS. MARZEC: I don't know.
 20 MR. BARE: That is right from our own rule.
 21 MR. BERNSTEIN: Why don't we use "unreasonable" for
 22 "unjustified."
 23 MR. TURNER: That's fine with me.
 24 MS. MARZEC: That's in (b). What did we do to (e) again?
 25 MR. TURNER: We're going to put language in (e)

1 prohibiting specific results for a specific case.
 2 MS. MARZEC: Tracy, is there any language that we could
 3 add to that that would address your concern, or is it just as
 4 a principle the tenet of it is something that is going to be a
 5 "no" vote for you?
 6 MR. MYERS: It should say the language.
 7 MS. EGLET: There was the one that -- the one who
 8 advertises a specific fee, on page 15, shall include possible
 9 terms. Obviously I think that would be the better language,
 10 the better finding, but that's not what is being put forth.
 11 MS. MARZEC: Could you read us sub (e) as we have it.
 12 MR. BERNSTEIN: Okay. Well, we added the word
 13 "unreasonable" for "unjustified"; so "is likely to create an
 14 unreasonable expectation about results the lawyer can or has
 15 achieved," and maybe we just put in parentheses an example:
 16 "For example, advertising a specific result on a specific
 17 case" or "a specific result."
 18 MS. EGLET: This again needs to address the fact when
 19 they're in the office.
 20 MR. TURNER: I think we have already.
 21 MS. EGLET: We did in a previous section.
 22 MR. TURNER: That's a definition.
 23 MS. EGLET: This is communications. This is not
 24 solicitation. I disagree with you.
 25 MS. MARZEC: So are we adding it to (b) now instead of a

1 new sub (e)? Are we putting the language up in (b) now?
 2 MR. BERNSTEIN: I think really it belongs in (b).
 3 You're really defining what an unreasonable expectation may
 4 be.
 5 MR. TURNER: Actually I like it there because that is --
 6 yeah, I think that works well.
 7 MR. KIMBROUGH: My problem with the wordsmithing is as
 8 Tracy said. It's not false.
 9 MS. EGLET: It's not false.
 10 MR. KIMBROUGH: We are determining what is inherently
 11 misleading. I think that's what you need to say somehow. "It
 12 shall be deemed inherently misleading to advertise specific --
 13 a specific result from a specific case," or something like
 14 that.
 15 MS. EGLET: "To advertise" so that it takes it out of
 16 communications when I talk to my client in my office. It
 17 shoves it back in there. This would prevent me from saying
 18 anything about any prior verdict.
 19 MR. BERNSTEIN: I'm happy with that. Where do you
 20 specifically want to put it, No. (e?)
 21 MR. KIMBROUGH: It almost has to be in --
 22 MR. BARE: 7.1(a).
 23 MR. KIMBROUGH: Yeah. Well, I guess what you could do,
 24 you could actually start where it says, "A communication is
 25 false or misleading if it," and then you could make that an

1 (A), a capital (A) let's say. You're going to have to change
 2 the outline form and then you'd have a sub (B) that says --
 3 MS. MARZEC: The Court did this already, these lettering
 4 from (e) to (d), just so you know.
 5 MR. KIMBROUGH: We're changing a whole concept here.
 6 MS. MARZEC: It's separate rules.
 7 MR. KIMBROUGH: Not a separate rule. I'm saying that at
 8 the end of that paragraph you would have an (A) or a (1) or
 9 whatever is appropriate under the way they note the rules that
 10 would have "false or misleading" and its four things that are
 11 in "false or misleading." Then there would be (B), "It shall
 12 be deemed inherently misleading," et cetera, et cetera.
 13 MS. EGLET: May I make a suggestion? When we say -- why
 14 don't we just take "false or misleading" out and say, "A
 15 lawyer shall not make communication about the lawyer's
 16 services if it," and then (a), and (b), "contains a material
 17 misrepresentation" instead of label it all false and
 18 misleading.
 19 MR. KIMBROUGH: Rob has to prosecute it on the basis of
 20 being false or misleading.
 21 MR. TURNER: It doesn't say "false or misleading" and I
 22 thought we added "or unreasonable expectation." It is one of
 23 those three things. It doesn't have to be all of them.
 24 MR. KIMBROUGH: Maybe add "for example."
 25 MR. BERNSTEIN: That's why I put it in paragraph (b). It

1 just talks about unreasonable or unjustified expectation.
 2 MR. TURNER: That's right, but I would put under 7.1
 3 "creates an unreasonable expectation." That way you're not
 4 saying it's false necessarily. You're saying "or it could be
 5 just creates an unreasonable expectation" and you don't have
 6 to change all this around. Then I agree with Ed. You've got
 7 it down here at (b), just communication concerning a lawyer's
 8 services that is false or misleading or creates unreasonable
 9 expectations, and then we know that this particular type of
 10 advertisement where there's a verdict involved is creating an
 11 unreasonable expectation. It also may be misleading.
 12 MS. MARZEC: If we're going to get away from the ABA
 13 model, why not have one section that's false or one that's
 14 misleading.
 15 MR. TURNER: No.
 16 MR. KIMBROUGH: I don't think that solves the problem. I
 17 still think it's not clear.
 18 MR. TURNER: Better not start defining what's false and
 19 what's misleading as separate issues. Some are false and
 20 create unreasonable expectations and some are misleading.
 21 MS. MARZEC: Which is exactly why we didn't have it
 22 separated out. That's why you put it up in the top.
 23 MR. KIMBROUGH: I know the Court doesn't like them, but
 24 shall we put it in a comment?
 25 MS. MARZEC: We can ask the Court to do a comment.

1 MR. KIMBROUGH: Ed, would that work for you?
 2 MR. BERNSTEIN: No. I think we're making a lot to do
 3 about nothing here. We just add it in section (b) with "for
 4 example, stating a specific result in a specific case does
 5 de facto create an unjustified expectation."
 6 MR. TURNER: Inherently.
 7 MR. BERNSTEIN: Inherently in an advertisement.
 8 MR. TURNER: That works.
 9 MS. MARZEC: Can we just do a sentence for the purpose of
 10 this section?
 11 MR. TURNER: We're in section (b); correct?
 12 MS. MARZEC: So there would be a sentence that would say,
 13 "For the purposes of this subsection, statements regarding a
 14 lawyer's past results on a specific case shall be considered
 15 inherently misleading?"
 16 MR. TURNER: And we also want to put in section (b) "is
 17 likely to create an unjustified" -- or "unreasonable
 18 expectation."
 19 MR. KIMBROUGH: You're going to have to say actually about
 20 the results the lawyer can achieve -- or has achieved, past
 21 tense, to follow Ed's language.
 22 MR. TURNER: You're right.
 23 MR. KIMBROUGH: Sorry.
 24 MR. TURNER: That's all right. That's good. With that
 25 language do we have an acceptance of that language?

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1 MR. MYERS: I think that fairly states what we voted on
2 before six to five.
3 MR. TURNER: All right. It doesn't change anything
4 substantively. It's just trying to define it.
5 With that in mind do we have any other comments? Are
6 we ready to vote on this package as a whole?
7 MR. BERNSTEIN: Kristina, did you add web site to
8 tombstone-admissible things on your business card and on your
9 stationery?
10 MS. MARZEC: Yes, E-mails and web addresses on your
11 business cards.
12 MR. BERNSTEIN: Under the tombstone exception.
13 MS. MARZEC: Yes.
14 MR. TURNER: Is there a motion to adopt these rules as
15 we've changed them?
16 MR. MYERS: So moved.
17 MR. KENNY: Second.
18 MR. TURNER: All those in favor? It's unanimous. It's
19 done.
20 MS. MARZEC: I'll make these changes tonight. I'll E-mail
21 it to you and then I'll work with the reporter on getting an
22 additional version of this.
23 MR. TURNER: May I say, Kristina, for helping us with the
24 concurrent committee, thank you, thank you and thank you so
25 much. Without your help and your assistance this couldn't be

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1 done. You deserve special thanks.
2 (Proceedings concluded at 1:17 p.m.)
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REPORTER'S CERTIFICATE

1
2
3 STATE OF NEVADA)
4) ss
5 COUNTY OF CLARK)

6 I, Ellen A. Goldstein, a duly commissioned Notary
7 Public, Clark County, State of Nevada, do hereby certify:
8 That I reported the taking of the above-captioned
9 proceedings at the time and place aforesaid;

10 That I thereafter transcribed my said shorthand notes
11 into typewriting and that the typewritten transcript of said
12 proceedings is a complete, true and accurate transcription of
13 my said shorthand notes taken down at said time.

14 I further certify that I am not a relative or
15 employee of an attorney or counsel of any of the parties, nor
16 a relative or employee of any attorney or counsel involved in
17 said action, nor a person financially interested in the
18 action.

19 IN WITNESS THEREOF, I have hereunto set my hand in
20 the County of Clark, State of Nevada, this 12th day of March
21 2005.
22
23

24
25
Ellen A. Goldstein, CCR No. 829

30 (Pages 114 to 116)