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HEARING OF THE SUPREME COURT
ADVISORY COMMITTEE

COPY

Taken before Anna L. Renken, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 22nd day of August, 2003, between the hours of 1:15 p.m. and 4:51 o'clock p.m. at the Texas Law Center, 1414 Colorado, Austin, Texas 78701.

VOTES TAKEN

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1 (Lunch recess 11:17 to 1:15.)

2 CHAIRMAN BABCOCK: Okay, guys, let's get
3 going.

4 MR. ORSINGER: Okay. The class counsel
01:16 5 provisions are taken from the proposed amendments to the
6 Federal Rule. The Jamail proposal endorsed these in most
7 respects, but altered a little bit of the sequencing or
8 wording and collapsed some of the indent structure. And
9 we elected to go back and follow the Federal Rule
01:16 10 including with its paragraph structure. And as you can
11 see here on page nine, we start out in subdivision (1)
12 with appointing class counsel. Subdivision (2) on the
13 next page is the appointment procedure; and then on the
14 next following page is where we start talking about not
01:17 15 the class appointment process, but the fee determination
16 process.

17 Again, unless you see an overstrike or an underline
18 this is the proposed federal reg -- federal Rule; and
19 there is no existing state rule that has any kind of
01:17 20 equivalent language to compare to it.

21 CHAIRMAN BABCOCK: And just so everybody
22 knows, now that everybody is seated, in order to meet the
23 Court's needs with respect to the various things that are
24 pending, we are going to spend an hour, another hour on
01:17 25 class actions. And then Pam Baron is going to talk to us

1 about fee splitting for the rest of the day up until 11:00
2 o'clock Saturday; and then on Saturday we're going to talk
3 about the ad litem, Rule 173 ad litem. And with regard to
4 that Judge Bland is going to lead that discussion and
01:18 5 would ask that you all take a look at the proposed Rule,
6 all of which has been given to you. The proposed Rule has
7 been given to everybody or should have been. Right?

8 MR. ORSINGER: Right.

9 CHAIRMAN BABCOCK: And look at that
01:18 10 overnight, because we're only going to have an hour to
11 talk about that. Although Judge Bland thinks that it's
12 not controversial; and Justice Hecht has talked to a lot
13 of judges about it, and they don't think it's
14 controversial either; but we'll see. So anyway, just so
01:18 15 you know, we have got to get through class action in the
16 next hour.

17 MR. ORSINGER: Well, these are very self
18 explanatory. I don't know what is to be gained by reading
19 them outloud. But you know, essentially the Court has to
01:18 20 appoint a class counsel unless the statute prohibits it.
21 The attorney has to be able to fairly and adequately
22 represent the interests of the class. The factors that
23 the Court must consider include the amount of work that
24 that lawyer or group of lawyers has done and identifying
01:19 25 claims, investigating them, kind of past experience they

1 have in dealing with this kind of litigation, how
2 knowledgeable are they in the applicable law, are they
3 prepared to commit the resources necessary to see that a
4 good job is done. The Court can also consider anything
01:19 5 else relating to their ability to fairly and adequately
6 represent the interests of the class, and the Court can
7 make the potential counsel provide any information that
8 the Court considers to be pertinent to the appointment
9 including proposals regarding what the attorney's fee and
01:19 10 how the attorney's fee and costs would be determined or
11 calculated or handled; and then they're is a general
12 paragraph there, subdivision (4) on the ability to make
13 further orders in connection with the appointment. Pretty
14 uncontroversial, all established by the federal committee
01:20 15 procedure over a period of years.

16 On page 10, subdivision (2) the concept is
17 interim counsel that could be appointed before the class
18 certification is determined. Before the actual decision
19 is made to certify the Court might appoint an interim
01:20 20 counsel leading up to that hearing. There is a cross
21 reference in here which Frank ties us back to our change
22 to go to at an early practicable time meaning that there
23 may be instances in which we need to have an interim class
24 counsel to develop the issues on whether there should be
01:20 25 class certification or not and that at an earlier

1 practicable time means that there may be a little more
2 time that goes by before we make that class certification
3 decision, but we may have a de facto acting class counsel
4 to be sure that the proper issues are developed from the
01:21 5 plaintiff's standpoint.

6 Subdivision (b) says that where there is
7 competitors the Court can only select people who meet the
8 standards that are set out in (g)(1)(b) and that the
9 Court -- (c) says that if more than one applicant is
01:21 10 seeking appointment, the Court has to pick the applicant
11 or applicants who are best able to represent the interests
12 of the class. So you can't appoint someone that doesn't
13 meet the standards, and you should appoint the one who
14 best meets the standards; but we are adding, and this is
01:21 15 not in the federal rule, after applicant in subdivision
16 (b), we say "applicant or applicants" to make it clear
17 that the Court may appoint more than one lawyer or more
18 than one law firm to serve as class counsel. And the feds
19 don't do that. Although they may anticipate that, we
01:22 20 wanted to make it explicit that a lawyer -- that a judge
21 is not restricted to just one lawyer or one law firm. So
22 we're deviating from the federal norm there with that
23 underlined reference, although it may be they fully
24 anticipate that. They just don't say it as explicitly as
01:22 25 we do. And then (c) says --

1 MR. GILSTRAP: The next one is (d); and
2 that boldfaced (c) is misnumbered. It should be (d).

3 MR. ORSINGER: It is?

4 MR. GILSTRAP: Yes.

01:22 5 MR. ORSINGER: Are you sure?

6 MR. GILSTRAP: Yes.

7 MR. ORSINGER: No. I don't think so.

8 MR. GILSTRAP: Okay.

9 MR. ORSINGER: I think the (c) under (b).

01:22 10 MR. GILSTRAP: Okay. That is correct. The
11 next one, the (c) below that should be (d). I'm sorry.

12 MR. ORSINGER: No. It's a (c). In other
13 words, the (c) that's in the middle of (b) is just a
14 reference to 42(g)(1)(b) and (c).

01:22 15 MR. GILSTRAP: Okay. I see.

16 MR. ORSINGER: So we're okay on that (c).

17 MR. TIPPS: Oh, I see.

18 MR. ORSINGER: You see. That nonbolded (c)
19 is part of the text. It's not a new subsection.

01:23 20 MR. GILSTRAP: You're correct.

21 MR. ORSINGER: Okay. So subsection (c) is
22 that the order appointing counsel could contain provisions
23 about the awarding of fees and nontaxable costs; and
24 that's straight out of the federal rule except for the
01:23 25 cross reference.

1 MR. MUNZINGER: Richard.

2 MR. ORSINGER: Yes.

3 MR. MUNZINGER: Why do you limit it to 42(h)
4 and not have it be 42(h) and (i)?

01:23 5 MR. ORSINGER: Well, you know, we should,
6 because of course (i) is not in the federal rule; and all
7 we did was change from the federal to state, but now we've
8 added a new component to the state practice and it should
9 say (h) and (i). That's a good catch. Thanks. Any
01:23 10 comments on that? I'll just keep rolling, I guess.

11 CHAIRMAN BABCOCK: Keep rolling.

12 MR. ORSINGER: Subdivision (h), Procedure
13 for Determining the Attorney Fee Award, we deviate from
14 the federal rule not by telling the Court to award
01:24 15 reasonable fees, but to award attorney's fees in
16 accordance with subdivision (i) because that obviously
17 contains all our discussion about what constitutes
18 reasonable and how you measure it. And then we take the
19 federal language on nontaxable costs, which is not
01:24 20 mentioned in House Bill 4.

21 Then we move on subdivision (1) for the motion
22 to award, Motion for an Award of Attorney's Fees. And
23 it's again just the Federal Rule without the reference to
24 the subsection. Part two, Objections to the Motion, same
01:24 25 as the Federal Rule. Anybody who is a member of a class

1 or anybody who is a target as having to pay these fees has
2 the right to object to the request for fees. In the
3 Federal Rule in subdivision (c) on Hearings and Findings
4 the Federal Rule, the proposed federal amendment says "The
01:24 5 Court may hold a hearing," and our subcommittee is
6 recommending that we require a hearing. That's so we
7 changed "may" to "must." And we're, like the Feds, we're
8 requiring that the Court make findings and conclusions on
9 the motion. We also are specifying that those findings
01:25 10 and conclusions can either be in writing or orally
11 dictated on the record and in the court reporter's notes.
12 So you see two deviations there from the Federal Rules,
13 either one of which may be worth discussing if anyone
14 objects. But if you don't. There is no objection?

01:25 15 HONORABLE TOM GRAY: Richard, I assume that
16 by holding a hearing you mean an oral hearing on the
17 record?

18 MR. ORSINGER: I think that's what we're
19 anticipating. Not just on written submission without
01:25 20 notice that on a certain day I'm taking this question up,
21 and if you have got something to say about it, be there.
22 Our conception was that if, you know, first of all,
23 federal Courts probably are more inclined to make rulings
24 on written submission than state Courts are. I think many
01:26 25 state Courts are used to having hearings in their

1 courtroom, and that's just more of a state practice. And
2 secondly, you know, the idea that everybody gets together
3 and you have the day to -- you can come in and state your
4 objections just seemed to be to us to be more suited to
01:26 5 Texas practice.

6 HONORABLE TOM GRAY: The only reason I even
7 mention that or raise it is there is some case authority
8 that a hearing does not necessarily require people to come
9 into a courtroom and on the record; and that may need to
01:26 10 be clarified if that is what you contemplate. There is
11 Supreme Court authority about what constitutes a hearing.
12 I certainly understand what you are contemplating there in
13 the context of the Rule; and I just don't know if you
14 would feel more comfortable with a clarification or leave
01:26 15 it like it is. I'm not proposing to change, but with that
16 admonition.

17 MR. ORSINGER: Well, I think it was the
18 subcommittee's conception that there would be a date in
19 time at which if you were there, you would be able to find
01:27 20 out what was going on. So if holding a hearing, if just
21 changing "may" to "must" doesn't result in there being a
22 date in time where you can walk into a courtroom to hear
23 what is going on or even make an objection, then perhaps a
24 different word ought to be used.

01:27 25 HONORABLE TOM GRAY: I think I heard

1 somebody suggest down here "an oral hearing" (indicating).

2 MR. LOW: Yes.

3 CHAIRMAN BABCOCK: "An oral hearing on the
4 record"?

01:27 5 HONORABLE CARLOS LOPEZ: Or "a hearing in
6 open court," because you can definitely have a hearing
7 without a hearing.

8 MR. ORSINGER: What if you said "a hearing
9 in open court"?

01:27 10 HONORABLE CARLOS LOPEZ: Right.

11 MR. GILSTRAP: Is there any other place in
12 the Rules where we draw that kind of distinction? Is this
13 kind of the first time we're doing that?

14 MR. SOULES: I thought *Melwright* said
01:28 15 "hearing" meant notice to all the parties.

16 HONORABLE CARLOS LOPEZ: But it's the
17 typical submission of the MSJ. You tell people. I mean,
18 you have to have dates, deadlines, chances to be heard;
19 but they don't have to be there.

01:28 20 MR. GILSTRAP: Right. I understand there is
21 places where the term "hearing" has been construed to mean
22 you don't necessarily have to have a time to appear in
23 open court. I just wonder if there is a place in the
24 record though where we, in the Rules where we've made this
01:28 25 distinction before.

1 CHAIRMAN BABCOCK: Harvey.

2 MR. GILSTRAP: Maybe this is the first time
3 to do it. Maybe it's worth doing.

4 HONORABLE HARVEY BROWN: Well, I was going
01:28 5 to make the same point. I just wonder why this of all the
6 Rules is the one Rule now all of a sudden that we have to
7 have a mandatory oral hearing. We don't do that with
8 summary judgment. Why do we require it by Rule here? I
9 always grant a hearing. I know most of the judges in
10 Harris County do; but there are some judges across the
11 state that prefer if there is not going to be any evidence
12 and it's just going to be on affidavits, they would rather
13 not face the lawyers and tell them they've cut their fee
14 or question the lawyer. They'd rather just do it by
01:29 15 submission and make the ruling. I don't know that we have
16 to tie the judge's hands necessarily.

17 CHAIRMAN BABCOCK: Justice Hecht.

18 HONORABLE NATHAN HECHT: Rule 76(a)(4) says
19 "A hearing open to the public on a motion to seal court
01:29 20 records shall be held in open court."

21 MR. MUNZINGER: What rule is that?

22 HONORABLE NATHAN HECHT: 76(a)(4).

23 HONORABLE TOM GRAY: So we have made the
24 distinction in the past in the existing Rules.

01:29 25 HONORABLE CARLOS LOPEZ: The Supreme Court

1 has made it clear.

2 MR. ORSINGER: Well, and you were going way
3 out of your way to force them to do it in a building where
4 people could walk in the door and hear what was going on.

01:29 5 HONORABLE NATHAN HECHT: Rule 327 says "The
6 Court shall hear evidence about jury misconduct from the
7 jury or others in open court." That looks like it.

8 CHAIRMAN BABCOCK: These computers are
9 great, aren't they?

01:29 10 MR. GILSTRAP: So are we dealing with, I
11 mean, in saying "oral hearing" are we really dealing with
12 a larger problem, that is, how are judges conducting a
13 hearing and is this the place we address it? Maybe we do.

14 MR. ORSINGER: I don't like the word "oral
01:30 15 hearing" because what if nobody shows up or wants to
16 speak? I mean, I would prefer to use "open court."

17 MR. SOULES: "Hold a hearing in open court."

18 PROFESSOR DORSA NEO: "In open court."

19 MR. ORSINGER: Yes. Are we okay on that?

01:30 20 CHAIRMAN BABCOCK: I think so. Yes.

21 HONORABLE CARLOS LOPEZ: "Nods
22 affirmatively.)

23 CHAIRMAN BABCOCK: All right. What else?

24 MR. ORSINGER: Okay. Now are we okay with
01:30 25 "oral findings" as opposed to "written findings"?

1 MR. SOULES: They're made on the record
2 there at (c).

3 MR. ORSINGER: They're made on the record.
4 We didn't see any reason to go through the cumbersome
01:30 5 process of written submission like this. If the judge is
6 going to say it and it's in the record, it's good enough
7 for appeal, let's do it.

8 MR. GILSTRAP: Just for purposes of the
9 record, I think the subcommittee reasoning was that Rule
01:31 10 52(a) is really not a appropriate. There is nothing that
11 is exactly equivalent to 52(a) in State court and that the
12 rule, the state court Rule involving findings and
13 conclusions, Rule 297, doesn't really apply here. So we
14 had to kind of make our own provision as to what, how
01:31 15 findings and conclusions should be made in this instance.

16 CHAIRMAN BABCOCK: Judge Sullivan has got a
17 question.

18 HONORABLE KENT SULLIVAN: Is it inherently
19 unreasonable to allow the trial judge to say the
01:31 20 objections need to be in writing and to allow the
21 discretion in appropriate cases be done on submission?

22 CHAIRMAN BABCOCK: Did everybody hear that
23 way down there at the other end?

24 HONORABLE KENT SULLIVAN: Is that in effect
01:31 25 what we're saying by this Rule?

1 MR. ORSINGER: No. We are definitely not
2 requiring that the objections be in writing.

3 HONORABLE KENT SULLIVAN: I guess my point
4 is that I could at least conceive of circumstances where I
01:32 5 think it might be appropriate that you ask that they be in
6 writing.

7 MR. LOW: What about a class member or an
8 objection? They might object to it and, you know, and
9 just come to open court and say "Look, that's too much
01:32 10 money." They should not have to submit it in writing.
11 They should be heard.

12 CHAIRMAN BABCOCK: Are you suggesting that
13 this Rule limits the discretion of the Court to require
14 written objections?

01:32 15 HONORABLE KENT SULLIVAN: I'm asking the
16 question.

17 CHAIRMAN BABCOCK: I don't read it that way.
18 It says "A class member or a party from whom payment is
19 sought may object to the motion." If the judge wants to
01:32 20 enter an order saying "You file your written objections by
21 Friday at 5:30," there would be nothing in this Rule to
22 prevent that, I wouldn't think.

23 MR. HAMILTON: The Rule doesn't even say the
24 motion has to be in writing. Would it have to be in
25 writing?

1 CHAIRMAN BABCOCK: Yes. It says it's by
2 motion.

3 MR. ORSINGER: Well, I don't know. How do
4 you serve notice of an oral motion? A town crier, I
5 guess.

6 (LAUGHTER.)

7 CHAIRMAN BABCOCK: Are you talking about the
8 motion for award of attorney's fees? That's subsection
9 (1), isn't it? Yes, Bill.

01:33 10 PROFESSOR DORSANEO: People who are likely
11 to make an objection if it's a hearing held in open court
12 are class members who don't like that. And that's why
13 particularly in this context the hearing should not be
14 just on written submission, but should be an actual
01:33 15 hearing.

16 MR. LOW: Right.

17 PROFESSOR DORSANEO: And it just looks
18 better for this fee award thing to be done out in the open
19 and for it to be required to be done that way.

01:33 20 CHAIRMAN BABCOCK: Anything else? All
21 right. Any other comments about this Rule? Okay.
22 Richard, we're pretty much done, aren't we?

23 MR. ORSINGER: We've covered everything now
24 except for the Jamail concept of inchoate and opting in.

01:34 25 PROFESSOR DORSANEO: Derivative proceedings.

1 MR. ORSINGER: Oh, I'm sorry. Yes.

2 MR. GILSTRAP: Those three items are left:
3 Opt in, opt in, inchoate claims and derivative
4 proceedings.

01:34 5 MR. ORSINGER: We might be able to touch
6 derivative proceedings in here pretty quickly, because
7 Bill, can you explain to us? We have time.

8 CHAIRMAN BABCOCK: Yes.

9 MR. ORSINGER: We may be able to get
10 through.

11 PROFESSOR DORSANEO: Currently there is a
12 paragraph in the beginning of Rule 42 and at the end of
13 subdivision (1) I believe that was added post 1977 because
14 the 1977 amendments to Rule 42 did not take into account
01:35 15 that the federal rules added a specific separate rule for
16 derivative suits. The committee at least, the Committee
17 on the Administration of Justice -- I wasn't on this
18 committee at the time. Luke probably remembers --
19 recommended that there be a separate derivative suit rule.

01:35 20 But the Court decided to put the derivative suit language
21 in Rule 42 at the end of subdivision (a) arguably within
22 subdivision (a) rather than distinct from subdivision (a).

23 That caused people to question over time whether
24 all of the requirements of Rule 42 applied to derivative
01:36 25 suits or whether that paragraph should be read separately

1 from the balance of the Rule. I think it is clear or it
2 has become clear that the balance of the Rule does not
3 apply to the derivative suit part of the Rule. Hence when
4 we did the recodification draft we decided that there
01:36 5 should be a separate Rule for derivative. Was it called a
6 derivative proceeding, Frank, when we put it in this?

7 MR. GILSTRAP: No. The derivative suit,
8 derivative proceeding I think is what you called it in the
9 recodification draft.

10 PROFESSOR DORSANEO: Okay.

11 MR. GILSTRAP: The recodification draft is
12 the last two pages of the handout.

13 PROFESSOR DORSANEO: The number is not the
14 same, I know.

01:37 15 MR. GILSTRAP: That's right.

16 PROFESSOR DORSANEO: I know it wasn't
17 Rule 42 in the recodification.

18 MR. GILSTRAP: It was Rule 38. Look at page
19 23 of the handout. That is the recodification of the
01:37 20 derivative proceeding provision.

21 PROFESSOR DORSANEO: Now the recodification
22 draft was done, this part of it was done, oh, around the
23 period of September through December of 1997; and at that
24 time the legislature had amended Business and Corporation
01:37 25 Act 5.14 substantially. So one or more of us took a look

1 at what now is current Article 5.14 and redrafted the
2 derivative proceedings rule that is in the recodification
3 draft.

4 Frank's notes or the committee notes here reflect
01:38 5 that this legislation was 1998 legislation; but it was
6 1997 legislation, the legislature meeting in odd numbered
7 years.

8 There are two ways to proceed here, as I indicated
9 before: Do something like the recodification draft with
01:38 10 perhaps at least one adjustment replacing the word
11 "complaint" in the second line with the term we still use
12 in our current rules, "petition." The recodification
13 draft replaced the term "petition" with "complaint"
14 throughout, and then embrace this derivative proceedings
01:39 15 rule.

16 I checked, and it is faithful to Article 5.14. The
17 other alternative is faithful and redundant of the
18 provisions of Article 5.14, or we can just refer to
19 Article 5.14, or I suppose we could have no derivative
01:39 20 proceeding Rule at all and people would wonder why we took
21 it out of Rule 42 and ultimately discover that it was
22 taken out of Rule 42 because it was unnecessary because of
23 the substantial revisions of Article 5.14 of the TBCA that
24 were made in 1997. And you would ultimately discover all
01:39 25 of that. But and I don't know whether the committee has

1 an exact recommendation, Richard. But that's the
2 background.

3 MR. ORSINGER: We have a choice to suggest,
4 which is to iterate the standards under 5.14 in the Rules
01:40 5 or to just have a short rule that cross refers to those
6 procedures by saying something like derivative suits shall
7 be brought in accordance with Article 5.14 of the Business
8 and Corporation Act" period, although I think we need to
9 says "as amended" or something. I understand that this
01:40 10 most recent legislature adopted a comprehensive revision
11 of all the business organization statutes --

12 PROFESSOR DORSANEO: They did it again.

13 MR. ORSINGER: -- effective in 2006.
14 They're going to give us a few years to study it before it
01:40 15 goes into effect.

16 (LAUGHTER.)

17 MR. ORSINGER: I believe this is true. Is
18 this not true?

19 MR. GRIESEL: Yes.

01:40 20 MR. ORSINGER: And I'm sure that the Article
21 number will change. I don't know. I haven't had a chance
22 to determine if the standards will change; but I know that
23 Article 5.14 is going to be obsolete in three years. So
24 we probably -- I mean, I'm in favor of not getting
01:41 25 specific in the Rule and then getting out of phase with

1 legislative amendments. I think we ought to cross refer
2 to Article 5.14 and then say "as amended" and then, you
3 know, West can indicate that when it got amended it got
4 put into this mother of at all organizational Acts. So
5 that is the alterenative and what I prefer, frankly.

6 CHAIRMAN BABCOCK: How do people feel about
7 that? Judge Patterson.

8 HONORABLE JAN P. PATTERSON: I second that
9 proposal.

01:41 10 CHAIRMAN BABCOCK: Seconded. Buddy.

11 MR. LOW: I was just going to ask whether
12 you even wanted to do anything other than putting a note,
13 you know, as to why. You said people would wonder why it
14 was left out.

15 CHAIRMAN BABCOCK: Yes.

16 MR. LOW: If it doesn't really belong in the
17 Rule, why not just tell them and refer them to a note
18 instead of even putting it in the Rule.

19 MR. ORSINGER: We could delete it from the
01:42 20 current rule and drop a comment saying this is deleted
21 because it's governed by Article 5.14.

22 MR. LOW: Yes. "As amended" or something,

23 MR. ORSINGER: I'd like to know what. I
24 wish we had some -- Bill, you're our law professor here
25 today. Oh, Alex is here too.

1 CHAIRMAN BABCOCK: Alex is here too.

2 MR. ORSINGER: Is this okay? I mean,
3 you're teaching the Rules. Is it okay to just have a
4 comment without an affirmative rule referring people to
01:42 5 where the law is?

6 PROFESSOR ALBRIGHT: Well, you know, we just
7 kind of started doing some comments in 1999 with the
8 summary judgment and the discovery rules. And I know in
9 the discovery rules there are comments with citations to
01:42 10 cases. Is that what you're talking about?

11 MR. ORSINGER: Well, I am just wondering. I
12 don't know conventionally, if we drop this out, I mean, I
13 can remember a lot of Rules of Procedure that said that
14 certain practices are outlawed. You know, speaking
01:42 15 demurrers are outlawed and no one alive today even knows
16 what a speaking demurrer is except for the law professors.

17 And on the other hand, there is a logic in saying
18 that we recognize derivative suits, they are not class
19 actions, and to figure out how to file them you ought go
01:43 20 see the following statute.

21 PROFESSOR ALBRIGHT: Oh, well, yes. You can
22 have a Rule that says, you know, "The 2003 amendment
23 deleted this section because they're not class actions
24 under this Rule. See statute."

01:43 25 PROFESSOR DORSANEO: There's no reason to

1 have a Rule on derivative proceedings now really.

2 MR. ORSINGER: Would you be comfortable if
3 all we had was a comment to the 2003 amendments to the
4 Rules of Procedures that said the old Rule 42(a)
01:43 5 disappeared because it's covered by Article 5.14 of the
6 Business and Corporation Act?

7 PROFESSOR DORSANEO: Yes. Write in a
8 comment --

9 PROFESSOR ALBRIGHT: Yes.

01:43 10 PROFESSOR DORSANEO: -- "This has been
11 amended, and it's going to be" blah, blah, blah, like
12 Courts do with opinions --

13 MR. ORSINGER: I'm okay with that.

14 PROFESSOR DORSANEO: -- when they talk about
01:43 15 all that.

16 PROFESSOR ALBRIGHT: That would be fine.

17 CHAIRMAN BABCOCK: Is everybody all right
18 with that?

19 Committee MEMBERS: (In unison "yes.")

20 CHAIRMAN BABCOCK: Is everybody okay with
21 that? All right. Let's do that then.

22 MR. ORSINGER: Okay. If we do that, then
23 that leaves only the controversial issues to discuss on
24 another day.

01:44 25 CHAIRMAN BABCOCK: Well, we need all the

1 time we can get for Pam's topic. So thanks for saving us
2 some time. And now we are on Rule 7, which has got a lot
3 of things in it that may provoke discussion. So Pam
4 Baron, why don't you take us through it, please.

01:44 5 MS. BARON: You need to have two pieces of
6 paper in front of you. And it's been a while since we
7 talked about this, so there are extra copies up on the bar
8 if you need them. The first is a one-page recodification
9 draft that shows how Rules 7 and 8 translated when the
01:44 10 recodification draft was done. The second is several
11 pages stapled together; and it showed existing Rules 7 and
12 8 at the top and then the Jamail committee recommendation
13 for an amendment starting about the middle of the page.

14 I think it would help at the beginning, Justice
01:45 15 Hecht, if you're willing just to kind of give us our
16 charge on what you'd like us to get accomplished today.

17 HONORABLE NATHAN HECHT: The Jamail
18 committee wanted to look at referral fees in Texas and to
19 propose changes that would limit those fees to some
01:45 20 extent; and also I think one of their interests was to
21 decommercialize the practice of law at least as it appears
22 in the public media. So they proposed these changes to
23 Rules 7 and 8, and they have sent that report to the
24 Court. And the Court would like to know, as usual, not
01:46 25 only whether you think this is a good idea in general, but

1 assuming that the Court is going to make some alteration
2 in the Rules in this area to do the things that are done
3 by this Rule, is this the kind of rule, does the text
4 accomplish what it should, is it clear and so on?

01:47 5 MS. BARON: I propose we take it in three
6 different pieces looking at the Jamail proposal at the
7 bottom of the larger handout, that we start with Rule 7.1,
8 then take (2), (3) and (4) as a group and then proceed to
9 (5); and hopefully we can dispose of the first four
01:47 10 subdivisions somewhat quickly and then focus our attention
11 on (5) where I feel relatively certain we will bog down.

12 7.1 rewrites current Rule 7; and you have both sets
13 of languages in front of you. What 7.1 does is it kind of
14 changes the presumption where what it says is that
01:48 15 basically you pretty much have to be represented by
16 counsel, while the old rule basically said any person may
17 appear either in person or with an attorney in front of a
18 Court.

19 The recodification draft takes the language from
01:48 20 current Rule 7 exactly verbatim, so there is no change
21 proposed in the recodification draft. So basically what
22 we're doing is preparing existing Rule 7 with the Jamail
23 rewrite; and I would propose that we pick one or the
24 other, and if we're inclined to take the Jamail language,
01:49 25 then to vote on modifications to that proposal. Is that

1 okay, Chip?

2 MR. ORSINGER: Can I ask a question?

3 CHAIRMAN BABCOCK: Certainly.

4 MR. ORSINGER: Is paragraph 7.1 below the
5 line, --

6 MS. BARON: Yes.

7 CHAIRMAN BABCOCK: -- is that the
8 recodification language or the Jamail language?

9 MS. BARON: That's the Jamail language.
10 There is a separate piece of paper that has the
11 recodification language on it, and it has my handwritten
12 recod' draft up in the upper corner.

13 MR. ORSINGER: Okay. I'm not sure that got
14 circulated.

01:49 15 MS. BARON: It should be over there.

16 CHAIRMAN BABCOCK: Yes. And Judge Peeples
17 wanted to talk a little about as a preliminary matter
18 what his view is of the evils we're trying to correct with
19 this Rule.

01:49 20 HONORABLE DAVID PEEPLES: I just would find
21 it very helpful, and I apologize for not knowing this; but
22 it would help me understand the discussion much better if
23 I knew what we were trying to correct. And I just I don't
24 have that information.

01:49 25 MR. YELENOSKY: Well, and I think then you

1 may not have been at the other meeting when this first
2 came up. I think we were unaware of what we were trying
3 to correct, because this came from the Jamail committee
4 without any explanation. And I don't know how to answer
01:50 5 that, and I don't think Pam does either.

6 CHAIRMAN BABCOCK: Bill.

7 PROFESSOR DORSANEO: It looks to me based on
8 our last meeting that there was an effort to modernize our
9 current rules, do something a little differently from the
01:50 10 recodification draft perhaps because that wasn't
11 available, perhaps because of other reasons. And frankly
12 it looks like some of these, the preliminary ones are
13 attempted rewrites of existing rules or recodification
14 draft provisions in order to make them better in some
01:50 15 sense. And then when we get down into the middle of it
16 there is a large substantive issue about -- what does (5)
17 call it -- litigation payments. So I regard these
18 preliminary things as kind of not really necessary to the
19 main issue.

01:51 20 And as of our last meeting our biggest concern
21 was whether these attempted rewrites are legally sound or
22 not.

23 CHAIRMAN BABCOCK: Richard Orsinger.

24 MR. ORSINGER: I may not remember the
01:51 25 debate; but this change to 7.1 makes it seem to me that a

1 corporation or a partnership cannot appear pro se in a
2 court proceeding even through an executive officer or a
3 general partner. And if that's true, I don't like that,
4 and that's we're already forced into that by some court
01:51 5 decision; but it just doesn't seem to me that someone who
6 maybe is out of money and is getting sued on a business
7 transaction that's not legitimate and they can't afford to
8 hire a lawyer, that they have to suffer a default
9 judgment.

01:52 10 CHAIRMAN BABCOCK: Justice Duncan.

11 HONORABLE SARAH B. DUNCAN: There is some
12 question whether that is constitutional to force them to
13 hire a lawyer.

14 CHAIRMAN BABCOCK: Yes. The -- Bill is
01:52 15 right that the first few rules are more recodification
16 kind of issues. 7.5 is the guts of the Jamail committee
17 Rule. And I think that the intention of the Jamail
18 committee, which was ordered by the Court to look into the
19 issue of whether Texas is out of step with how we share
01:52 20 fees among lawyers in cases, I think from our last
21 discussion and certainly in the Jamail committee there was
22 research done that suggested that in most states a
23 plaintiff's lawyer who referred a case to another lawyer
24 was entitled to a portion of the fee, but it was generally
01:52 25 tied to working on the file and putting some effort into

1 the prosecution of the case. And in Texas that is not the
2 approach that we have traditionally taken; and so the
3 Court asked the Jamail committee to look at that issue.
4 The Jamail committee had a number of meetings; but I will
01:53 5 tell you nothing like this. It was not on the record. It
6 was a small group. It was informal. A lot of the work
7 got done in the subcommittee and then funneled up to the
8 full committee.

9 So this is a product of the Jamail committee on
01:53 10 that issue; but it has not been fully vetted in the way
11 that we vet things. And so that's what the Court is
12 asking us to do, to kind of scrub the way we normally do
13 it. Buddy.

14 MR. LOW: I'm like Richard. I have a
01:53 15 problem if one person opens a little corporation, a small
16 corporation and that corporation gets sued, that he can't
17 come to court and represent that corporation he owns all
18 the stock in. I don't care if 49 states are the other
19 way. I think we ought to be right; and I think we are.
01:54 20 And I don't think -- and the other point, the only two
21 things I see are that and referral fees that this does.
22 And I'm against changing that.

23 CHAIRMAN BABCOCK: Okay. Stephen, Carlos
24 and then Ann.

01:54 25 MR. TIPPS: I don't necessarily disagree

1 with Buddy philosophically; but I have always thought, and
2 I can't tell you why I think it; but there was some legal
3 prohibition on a corporation's appearing in court other
4 than through an attorney. Are you saying that may be --
01:54 5 there is a law that may be unconstitutional?

6 HONORABLE SARAH B. DUNCAN: There are some
7 cases that hold that a corporation does not have a right
8 to appear in court through an officer or a shareholder;
9 but there is -- and I had to research this for my dad.
01:55 10 He's the sole shareholder and the sole officer of a Sub
11 Chapter C corporation. And he was told by a judge in Waco
12 to sit down or he was going to have to find that he had
13 committed barristry. And I said "barristry," not
14 "barratry."

15 (LAUGHTER.)

16 HONORABLE SARAH DUNCAN: The research says
17 that there is some question whether it is constitutional
18 to deny a closely held corporation the right to appear
19 pro se. That's all I'm saying.

01:55 20 MR. TIPPS: What is the source of that legal
21 notion? Is it a matter of some law?

22 HONORABLE CARLOS LOPEZ: Rule 7 says that in
23 order to be pro se you have got to be a person, a real
24 person.

01:55 25 CHAIRMAN BABCOCK: Okay. Carlos and then

1 Ann and then Judge Lawrence.

2 HONORABLE CARLOS LOPEZ: So we have to
3 modify Rule 7 or the cases that interpret it. I don't
4 know about constitutionality; but it was clear to me when
01:55 5 I was in county court that Rule 7, you couldn't, to be
6 pro se you had to be a person, a real human person.

7 HONORABLE SARAH B. DUNCAN: All I'm saying
8 is I don't think we should decide that constitutional
9 issue here.

10 (Laughter.)

11 HONORABLE CARLOS LOPEZ: I'm not saying I
12 think it's a good idea.

13 CHAIRMAN BABCOCK: All right. Ann and then
14 Judge Lawrence.

01:56 15 MS. MCNAMARA: Is it my turn now?

16 CHAIRMAN BABCOCK: Yes, Ann McNamara.
17 Sorry.

18 MS. MCNAMARA: I guess I had not focused on
19 Rule 7. But I know that large corporations nationally
01:56 20 send general managers into court on matters of relatively
21 low dollar value pretty routinely without calling on a
22 lawyer. In an airlines case to deal with a lawsuit over a
23 lost bag or something it is quite a frequent practice to
24 use a business person and not a lawyer. And I don't know
01:56 25 if it happens in Texas or not versus other states; but I

1 think it would be a real mistake to the extent Rule 7
2 would read "person" broadly enough to include a corporate
3 entity, to change that. Now whatever "person" means under
4 Rule 7 I'd hate to narrow it.

5 CHAIRMAN BABCOCK: Judge Lawrence.

6 HONORABLE TOM LAWRENCE: I think the case is
7 a *Globe Leasing* case that says corporations have to be
8 represented by attorneys. And there are some Attorney
9 Generals' opinions on this. It comes up in JP courts all
01:57 10 the time; and the AG opinions say that in a justice court
11 suit, which is under the Rules of Procedure and Evidence,
12 that a corporation must be represented by an attorney;
13 however in a small claims court case, that a corporation
14 may appear with a corporate officer and they would not
01:57 15 have to be represented by an attorney.

16 CHAIRMAN BABCOCK: Okay. Bill and then
17 Jeff.

18 PROFESSOR DORSANEO: And beyond that I don't
19 know that these cases deal with partnerships at all; and
01:57 20 partnerships have entity status or aggregate status
21 depending upon what part of the Uniform Partnership Act
22 you're looking at. This may be attempting to make things
23 clear; but I think it's not doing well.

24 CHAIRMAN BABCOCK: Richard.

01:57 25 MR. ORSINGER: I would propose that we

1 reject this suggestion and ask Pam's subcommittee to draft
2 this in such a way that a corporation or partnership or
3 joint venture can appear through its executive officer or
4 owner. And then because we can eliminate the
01:58 5 constitutional problem. And the only authority for it is
6 the current language of Rule 7. So why don't we redo
7 Rule 7 on another day and make everybody happy.

8 MR. SOULES: It's the unauthorized practice
9 of law.

10 CHAIRMAN BABCOCK: Yes. That's the problem.

11 MR. SOULES: UPL problems.

12 HONORABLE KENT SULLIVAN: Your section with
13 this UPL statute it seems to me.

14 CHAIRMAN BABCOCK: Right. Judge Lawrence.

01:58 15 HONORABLE TOM LAWRENCE: This represents a
16 real hardship to small corporations that are appearing
17 particularly in the JP courts, because if they're sued in
18 a justice court suit, then they're required to hire an
19 attorney. And that's a real burden for them. So I'd love
01:58 20 to see that changed so they could represent themselves.

21 CHAIRMAN BABCOCK: Yes. I think we ought to
22 take a vote and see if everybody thinks that this is a bad
23 idea and so we give the Court a sense of our committee.
24 And I think the rewrite, if the Court chooses to rewrite
01:58 25 the Rule, is an easy fix.

1 I think frankly that was not the focus of the
2 Jamail committee at all, and so we're a little off point;
3 but that's okay. So how many people think that the change
4 that is represented here in 7.1 which would require a
01:59 5 nonindividual to have a lawyer represent it in court is a
6 bad thing?

7 MR. TIPPS: While you're on the distinction
8 between district and county court on the one hand and JP
9 court on the other?

01:59 10 CHAIRMAN BABCOCK: No. This rule would be
11 applicable to all three courts.

12 MS. BARON: Chip --

13 MR. SOULES: The Supreme Court by rule
14 allowed corporations to appear in small claims courts
01:59 15 pro se.

16 MR. ORSINGER: Small claims court.

17 CHAIRMAN BABCOCK: Small claims.

18 MR. SOULES: Small claims courts, just by
19 changing the Rules of Civil Procedure about 10 years ago
01:59 20 authorized that.

21 CHAIRMAN BABCOCK: Yes. So I think, Luke,
22 what I'm suggesting is why don't we tell the Court what
23 the sense of this committee is about whether or not they
24 ought to expand that to the other courts, JP, county and
25 district.

1 MR. SOULES: Any corporation, any court?

2 CHAIRMAN BABCOCK: Yes.

3 MS. BARON: Chip.

4 CHAIRMAN BABCOCK: Yes.

02:00 5 MS. BARON: Can we modify that? Can we do
6 it this way: Can we say what Rule we want with, whether
7 we want to start with the existing Rule 7 or the Jamail
8 7.1 and then have the second vote on whether we want to
9 change that language to permit self representation by
02:00 10 corporations or partnerships?

11 CHAIRMAN BABCOCK: I'm not sure I follow
12 what you're asking.

13 MS. BARON: Well, the issue is what is the
14 base Rule we are going to start with? Are we going to
02:00 15 start with Rule 7 as it is now, or are we going to start
16 with the Jamail rewrite which comes at it from a
17 completely different perspective?

18 CHAIRMAN BABCOCK: Well, I'll pitch that to
19 Justice Hecht; but I would have thought that the Court
20 would be more interested in the Jamail issues.

21 HONORABLE NATHAN HECHT: Yes.

22 MS. BARON: I understand that. But I think
23 if we are going to start drafting, we need to know whether
24 we're going to draft from the perspective that any party
02:01 25 can appear in court pro se or if we're going to start with

1 the perspective that any party has to appear through
2 counsel. And those are two different, completely
3 different starting points.

4 HONORABLE NATHAN HECHT: How is that? If
02:01 5 the vote is to let anybody appear by counsel, any
6 corporation, any court, all you have to do is strike that
7 two phrases in Jamail's 7.1, don't you?

8 CHAIRMAN BABCOCK: Yes.

9 HONORABLE NATHAN HECHT: "Except as provided
02:01 10 by statute, an individual, a person" -- you'd have to
11 change it to "person" -- "may be represented in court by
12 an attorney."

13 MR. SOULES: Or rule, statute or rule.

14 CHAIRMAN BABCOCK: "May be." Doesn't have
02:01 15 to be. Richard Munzinger.

16 MR. MUNZINGER: I just wanted to point out
17 that so far the discussion seems to focus on the small
18 corporation, and the discussion has discussed corporations
19 and partnership; and we have of all kind of entities other
02:02 20 than corporations and partnerships. We have limited
21 liability companies. We have limited partnership; and
22 there is a degree of representation of ownership interests
23 different from, say, in the limited partnership you have
24 the managing partner, and then you have limited partner
02:02 25 investors. There are issues that go beyond just simple

1 classification of all corporations. I think we just need
2 to give some thought to what we're doing here before we
3 jump off thinking that we're adopting a Rule that applies
4 only to mom-and-pop corporations. Sub Chapter C, Sub
02:02 5 Chapter S, there is whole heck of a lot more out there
6 than what we've talked about.

7 CHAIRMAN BABCOCK: Paula.

8 MS. SWEENEY: I just reviewed the transcript
9 of the last time we discussed this; and we are repeating
02:02 10 our conversation almost verbatim. And I think the reason
11 is that there is no point or direction to this exercise.
12 Unless there is a question, we cannot give an answer. And
13 there has been no question asked that I know of about
14 Rule 7 unless it's some generic "Take a look at this and
02:03 15 tells us what you think," which is likely to take a very
16 long time, because we're all going to then think of
17 something.

18 I don't see a problem with the existing Rule. We
19 haven't been asked to cure a problem with the existing
02:03 20 rule. We haven't even been asked to look at a problem
21 raised by any member of the Bench or Bar with the
22 application of the existing Rule. What are we doing here?
23 And if we knew what we were doing, we might be able to
24 formulate an answer.

02:03 25 HONORABLE NATHAN HECHT: You have a proposal

1 from the Jamail committee; and the Court would like the
2 committee's view on the proposal.

3 MS. SWEENEY: Thank you.

4 HONORABLE NATHAN HECHT: Just like we get
02:03 5 comments from the Bar, from all kinds of groups; and
6 that's what the Court needs to know.

7 MS. SWEENEY: So we are to start from the
8 Jamail proposal and critique it? In that case I do have a
9 criticism of the Jamail proposal, Mr. Chairman, which is
02:03 10 that we are adding a burden that doesn't exist in current
11 law to entities requiring them to have lawyers when they
12 might not otherwise have to have them. And I don't see a
13 reason to do it. I think it creates more mischief than
14 good.

15 CHAIRMAN BABCOCK: Okay. Alex.

16 PROFESSOR ALBRIGHT: I agree with what Paula
17 said. I think, although I think it's more questionable as
18 to what 7.1 was intended to do, I kind of can see now that
19 it was just supposed to be a redraft. But in any event,
02:04 20 it looks like it makes it require more people to hire
21 lawyers. Whether it really does or not, I don't know.
22 But I can't imagine we would want to get into a situation
23 where we would want to be passing Rules where we're
24 forcing people to hire lawyers and making more business
02:04 25 for lawyers at this point in time.

1 CHAIRMAN BABCOCK: Okay. Harvey.

2 (LAUGHTER.)

3 PROFESSOR ALBRIGHT: Well, look what the
4 legislature just did to lawyers.

5 HONORABLE HARVEY BROWN: People are acting
6 like 7.1 is changing the law to require entities to hire
7 corporations (SIC) lawyers when it's at least certainly in
8 the practice in Harris County that corporations have to
9 have a lawyer. So I don't think this is changing the law.
02:05 10 I think, if anything, it's just making this Rule clearer.
11 Now whether that is good public policy or not, we can
12 debate. But I don't think this is changing the Rules
13 right now. Maybe those Rules aren't constitutional. I
14 never heard that argument when I was a judge and haven't
02:05 15 heard it until today; but I don't think this is a change
16 in the Rule.

17 CHAIRMAN BABCOCK: Yes. My experience has
18 always been and I've had corporate clients complain to me
19 about the fact that they're required to have counsel in
02:05 20 Texas; but be that as it may. Stephen had his hand up.

21 MR. YELENOSKY: Well, it just sounds like
22 people don't mind changing the law. And this may do it in
23 one direction, maybe not; but I certainly don't want to
24 change the law to say that, to open up perhaps more where
02:05 25 somebody who now is required to have a lawyer is not,

1 because I think, as Richard said, we don't know where that
2 all can lead and may advocate the unauthorized practice of
3 law. So I think if we're asked if we want to change the
4 law, our answer to the Jamail committed is we don't want
02:06 5 it like this. We want it more like what it was before,
6 perhaps like the recodification draft.

7 CHAIRMAN BABCOCK: Joe himself I think came
8 up with this draft. And I don't want to speak for him;
9 but I honestly think he was just trying to get to 7.5. I
02:06 10 don't think he was trying to change the world in 7.1
11 through 7.4. And frankly I think if he were here, he
12 would say "You know, whatever you all want to do on that."

13 MR. YELENOSKY: Which is why in the
14 dichotomy and everything that comes before 7.5 and 7.5 I
02:06 15 think the subcommittee's response is "Well," as Bill
16 Dorsaneo said, "this is a recodification issue." And I
17 guess I would posit that it's probably not worth our time
18 parsing through everything before 7.5. Our response is
19 that it is a recodification issue and it should be dealt
02:07 20 with there.

21 CHAIRMAN BABCOCK: Yes. I think that makes
22 some sense. And Justice Jefferson and Justice Hecht can
23 correct me if I'm wrong; but what the Court is most
24 interested in I think is the 7.5 issues. Judge Gray and
25 then Buddy.

1 HONORABLE TOM GRAY: I was just going to
2 pose the possibility I am so convinced that 7.1 is an
3 accurate statement of the case law and the Rule law that I
4 will offer coming back to the committee at a later date
02:07 5 with that case authority; and they've got the benefit of
6 the discussion of 7.1, and let's at least move on to 7.2.

7 MR. LOW: Supreme Court --

8 CHAIRMAN BABCOCK: Buddy has got the case
9 authority cited here.

02:07 10 HONORABLE TOM GRAY: Rule 7. It all stems
11 from the unauthorized practice of law section; and that's
12 what is out there. We know there are some problems with
13 it. I know that Justice Duncan, I can tell by her facial
14 reactions, because they're not reflected on the record,
02:08 15 that she may disagree with some of this; but let's move
16 on. Let's get to 7.2.

17 (LAUGHTER.)

18 HONORABLE SARAH DUNCAN: I mean, either 7.1
19 is the law or it's not; and we either can change it or
02:08 20 not. Obviously there is some concern about whether or not
21 some corporations should be able to represent themselves
22 in some situations; and either they can or they can't now.

23 CHAIRMAN BABCOCK: Got you.

24 MR. LOW: Chip, I would propose we either
02:08 25 vote to leave 7.1 as it is or vote on the Jamail amendment

1 as may be altered, because there is a group that, I mean,
2 you know, the law is what it is; but we don't want to mess
3 with it, and just leave 7.1 like it is.

02:08 4 CHAIRMAN BABCOCK: That's sort of what I was
5 pointing towards a few minutes ago. But Carl.

6 MR. HAMILTON: Just for whatever it's worth,
7 the Government Code points out that it was the legislature
8 and not the Court that changed the law to allow
9 corporations need not be represented by an attorney in
02:09 10 small claims court. And that's a statute.

11 CHAIRMAN BABCOCK: Okay. Good point. Luke,
12 did you want to say something?

13 MR. SOULES: Well, it seems to me like 7.1
14 through 7.4 are already in the Rules. I understand 7.1
02:09 15 may not be clear; but that's probably in the common law.
16 But we've got "attorney in charge," wherever that is.
17 That is Rule 8. We have got motion for the attorney to
18 show authority rather than having all this paperwork and
19 stuff done that is required by 7.3. Unless there is a
02:09 20 challenge, it doesn't have to be done. We have got a
21 Rule, I think, it's 57 or some other Rule that says a
22 lawyer has got to give his name, his address, his phone
23 number, his fax number and his Bar card number; and most
24 of this is already in the Rules.

02:09 25 CHAIRMAN BABCOCK: Right.

1 MR. SOULES: And it just doesn't seem
2 necessary to me to adopt any of 7.1 through 7.4 with, you
3 know, 60 years of history and some of those Rules more
4 recent than that already on the books that pretty well
02:10 5 takes care of this.

6 CHAIRMAN BABCOCK: Yes.

7 MR. SOULES: So I move that we reject 7.1
8 through 7.4 and leave old Rule 7 and 8 in place --

9 MS. SWEENEY: Second

02:10 10 MR. SOULES: -- and proceed with discussing
11 7.5.

12 MS. SWEENEY: Second.

13 CHAIRMAN BABCOCK: Three more comments.
14 Richard, then Judge Benton. Judge Benton because Ann
02:10 15 thinks Benton ought to speak before you.

16 MR. ORSINGER: I support Luke's proposal.
17 But in case it fails, I'm concerned about the introduction
18 of the concept of "entity" without further examination,
19 because partnerships and limited partnerships and limited
02:10 20 liability companies are not corporations. They're
21 probably not controlled by the existing common law; and I
22 think the use of the word "entity" might step through new
23 areas; and I just really if we don't reject (1) through
24 (4), then I'm in favor of moving and rejecting (a).

25 CHAIRMAN BABCOCK: Okay. Judge Benton.

1 HONORABLE LEVI BENTON: In light of what you
2 said about what Jamail might say if he were here, I move
3 that we just let 7.1 through 7.4 go to the Court without
4 any comment from us in support or opposed to it and let's
02:11 5 get to 7.5.

6 CHAIRMAN BABCOCK: I think --

7 HONORABLE LEVI BENTON: He said that he
8 opposed it. I think we just don't comment on it and let's
9 get to the meat.

02:11 10 MR. YELENOSKY: I think that's what we're
11 saying, except there are people concerned about 7.1 going
12 without comment. So my proposal was just that we say 7.1
13 through 7.4 were recodification issues and, you know, the
14 Court obviously can take direction from the Jamail report;
02:11 15 but I imagine some people are concerned about 7.1 going
16 through us without comment.

17 MS. SWEENEY: Vote on Luke's motion.

18 HONORABLE TERRY JENNINGS: May I ask a
19 question?

02:12 20 CHAIRMAN BABCOCK: Yes, sir.

21 HONORABLE TERRY JENNINGS: Is anything in
22 7.5 predicated?

23 MR. YELENOSKY: No.

24 MS. BARON: Well, there's one term.

25 MR. YELENOSKY: "Lead counsel."

1 MS. BARON: "Lead counsel" and "attorney in
2 charge." That's the only predication except (5) on 7.1
3 through 7.4.

02:12 4 MS. MCNAMARA: That's not 7.1. You don't
5 need 7.1 to get to those?

6 CHAIRMAN BABCOCK: Luke's motion has been
7 seconded. But also an amendment has been suggested, which
8 you can either except or reject.

9 MR. SOULES: Reject.

10 CHAIRMAN BABCOCK: He rejects it.

11 MR. BENTON: I'll remember that, Luke.

12 (LAUGHTER.)

13 MR. SOULES: Don't remember it too well
14 though.

02:12 15 CHAIRMAN BABCOCK: All right. So what we're
16 voting on is Luke's motion, which is we send 7.1 through
17 7.4 to the Court with the representation that they not do
18 it. Right? Okay. Everybody in favor of that raise your
19 hand. All opposed? 26 to 4 the motion carries. So let's
02:13 20 go to 7.4. Okay?

21 MS. BARON: Chip, as a matter of
22 clarification, does that mean we recommend staying with
23 the current Rule 7 and 8, or does it suggest that we
24 recommend the recodification draft provisions that replace
02:13 25 those Rules?

1 CHAIRMAN BABCOCK: Luke's motion I believe
2 said to stay with current 7 and 8.

3 MR. SOULES: Right.

4 MS. BARON: Okay. Thank you.

02:13 5 MR. SOULES: We will eventually maybe
6 recodify everything. If so, I'm sure we'll look at the
7 language of every Rule. Bill has done most of it.

8 MS. BARON: Okay. 7.5, I think it will help
9 to divide this into substantive provisions and then
02:13 10 procedural provisions, which means that we would start
11 with sections (a), (d) and (f) which are the substance.
12 And let me just review those for you briefly, because I
13 think some people were not here when we initially
14 discussed this proposal.

02:14 15 7.5(a) starts with defining a new term called
16 "litigation payment." And basically it's payment to non
17 attorneys for either referrals or solicitation or
18 forwarding a case and then certain payments to attorneys
19 who are not hearing or substantively involved in providing
02:14 20 legal services. That's a definition section.

21 Then if you move to section (d), this is really the
22 affect section which says in certain situations when
23 certain types of litigation payments are made there is
24 mandatory disqualification of the attorney who appears as
02:15 25 lead counsel. And we can go through those in more detail

1 in just a minute. And then subsection (f) also imposes
2 additional sanctions and it requires mandatory sanctions
3 as are just and it may include voiding the fee agreement
4 that gave rise to the prohibited payments.

02:15 5 MR. YELENOSKY: Chip, as I understood
6 Justice Hecht he asked us both, as he said, typically to
7 advise the Court whether this is a good idea and then to
8 assume that the Court may want to do this Rule anyway, and
9 if so, should it look like this. So I don't know whether
02:15 10 you -- my question is do you want to take a vote now on
11 the former and then go into the latter? I think the last
12 time we had a long discussion without a vote. But if I
13 could characterize the sentiment, I think it was one that
14 was not real receptive to this as an idea. Can we take a
02:16 15 vote on that based on prior discussion, or can we have
16 that vote at some point, although I understand the Court
17 wants us to nonetheless go through the language and
18 provide our advice on it?

19 CHAIRMAN BABCOCK: Sure. I think you're
02:16 20 right. I think the Court would like both expressions from
21 the full committee, one, whether we think it's a good idea
22 generally, and two, regardless of how we feel about it, go
23 through this Rule and see if there are things about it
24 that we don't think are appropriate.

02:16 25 MR. YELENOSKY: So I guess part of my

1 question was we did have a long discussion on this. You
2 know, Paula can repeat everything she said then, or we can
3 take --

4 MS. BARON: She has got the transcript.

02:16 5 MR. YELENOSKY: -- judicial notice of it.

6 I'm just asking how you want to proceed. There was a long
7 discussion. And you're right. We didn't take a vote.
8 There were some people who are current, who are here today
9 that weren't here then. But does everybody recall the
02:17 10 discussion well enough having reviewed this Rule that they
11 are comfortable in expressing an opinion about whether
12 they think this change in Texas law is something the Court
13 should do or not? Judge Patterson.

14 HONORABLE JAN P. PATTERSON: I'd like for
02:17 15 either the committee or Professor Carlson to speak to the
16 issue of what other jurisdictions do. And I think Elaine
17 may have made reference to what other states do or do not;
18 but I'd like to kind of have a sense of where others are
19 in this issue.

02:17 20 PROFESSOR CARLSON: I'm sorry, Justice
21 Patterson. If I said that, I misrepresented the state of
22 my knowledge.

23 (LAUGHTER.)

24 HONORABLE JAN P. PATTERSON: I called your
25 bluff.

1 HONORABLE SARAH DUNCAN: Which she would not
2 do.

3 CHAIRMAN BABCOCK: Which she would not do.
4 But I did look at that, although I wasn't on the
02:17 5 subcommittee that dealt with this Rule; but I did do some
6 research on it. And I think it is fair to say, and
7 Justice Hecht can correct me if I'm wrong, it is fair to
8 say that the majority of states and by a wide margin
9 require some effort on the part of the referring attorney
02:18 10 in the prosecution of the case before they can share in
11 the fee. Buddy.

12 MR. LOW: The Canons of Ethics, we had that
13 in there; and then that always comes up when we are to
14 amend the Canons whether the fee can be for a quote "work
02:18 15 done" or just plain referral. And that's been the
16 argument every time the Canons have been amended. And
17 we've never talked about litigation payments because you
18 can't make payment for getting a case. I mean, it's a
19 referral fee only.

02:18 20 CHAIRMAN BABCOCK: Yes. Frank and then
21 Richard.

22 MR. GILSTRAP: This isn't an attempt to
23 prohibit it. It's just an attempt to discourage it by
24 requiring it to be disclosed. That's what this is.

02:19 25 MR. LOW: I understand.

1 MS. BARON: Frank, I'm sorry. It's a little
2 bit more than that, because it prohibits certain types of
3 payments. It's more than just disclosure. It's
4 mandatory --

02:19 5 CHAIRMAN BABCOCK: Disqualification.

6 MS. BARON: -- disqualification if certain
7 prohibited payments are made.

8 MR. GILSTRAP: All right.

9 CHAIRMAN BABCOCK: Okay. Richard Orsinger.

02:19 10 MR. ORSINGER: I was in trial and not able
11 to attend the meeting where we discussed this, and excuse
12 me if I'm beating a dead horse; but as Buddy said, the
13 elimination of referral fees or forwarding payments was an
14 issue with the Uniform or Model Code of Professional
02:19 15 Responsibility.

16 MR. LOW: Right.

17 MR. ORSINGER: And it was outlawed in the
18 Model Code; and in Texas we had a vigorous debate about
19 that, and we adopted the Model Code of Professional
02:19 20 Responsibility with the participation of 51 percent of the
21 lawyers, and we through the committee process and a debate
22 and whatnot decided not to make referral fees unethical in
23 Texas. And then when the Rules of Disciplinary Conduct
24 came through they were also a model set of Rules that were
02:20 25 issued initially by the ABA, and I believe that they also

1 would have made it unethical for lawyers to pay a
2 forwarding fee. And in Texas we decided, again 51 percent
3 of the lawyers adopted the governing rules, and we decided
4 not to outlaw referral fees.

02:20 5 And I really feel like what we're proposing to do
6 here is to adopt an abolition or an effective abolition or
7 at least a severe restriction on referral fees in a
8 process that is not as democratic as the only other two
9 times that I think this issue has been brought before the
02:20 10 Bar in Texas.

11 Now it may well be that lawyers vote their self
12 interest and therefore their collective view as reflected
13 in a well publicized and comprehensive election should be
14 discounted. Maybe the lawyers are too self interested to
02:21 15 rely on; but I am a little uncomfortable with a small
16 committee like this, and I might even say I'm even
17 uncomfortable with the elected members of the Texas
18 Supreme Court doing this when the last whenever we've
19 addressed it before we've gone to the whole State Bar and
02:21 20 we've allowed all the lawyers to speak on it.

21 So I fundamentally feel like what is happening is
22 that the effort to ban this practice in Texas has failed
23 when the effort was taken to the lawyers as a group, and
24 now there is an effort, and I don't know if the
02:21 25 legislature has ever been asked to ban it; but they

1 certainly haven't. And now the Supreme Court is being
2 asked to ban it; and I just would really prefer that it be
3 done publicly through the Ethics Codes.

4 CHAIRMAN BABCOCK: Buddy.

02:21 5 MR. LOW: Richard is right. The first time
6 it came up was in 1963. We had a big fight over it in the
7 ethics committee when we amended. And then there was an
8 amendment years later and it came up again. So every time
9 we have amended; and then when we went from the DRs to the
02:22 10 present that was rejected. So the lawyers have voted on
11 this just as Richard said.

12 CHAIRMAN BABCOCK: When was the last time?

13 MR. ORSINGER: Probably in the '90s.

14 MR. SOULES: Late '90s.

02:22 15 MR. LOW: '91.

16 MR. ORSINGER: '91. I think the proposed
17 Model Rules came out in '89 and we adopted it here in '91.

18 MR. LOW: '91. But we had the I think in
19 '76 we want to the DRs, and then we had the conduct we'd
02:22 20 like and then the conduct we wouldn't.

21 MR. ORSINGER: Those were the Ethical
22 Considerations.

23 MR. LOW: Ethical Considerations.

24 MR. ORSINGER: The lawyers adopted the DRs
25 by vote.

1 MR. LOW: Right.

2 MR. ORSINGER: But the board of directors of
3 the State Bar adopted the Ethical Considerations. And the
4 rationale for not submitting that to vote as required by
02:22 5 the governing statute was that you couldn't actually
6 discipline a lawyer and therefore you didn't require a
7 vote for the ethical considerations.

8 MR. LOW: The argument given every time, and
9 I was chairman of the ethics committee for 30 years, and
02:23 10 the argument given every time was that some lawyer gets a
11 case and he doesn't know what to do with it. So he can
12 give it to a lawyer and he'll give it to a good lawyer
13 and the client will be served well. Otherwise he says
14 "Well, I'll just mess it up and get them a dime and take
02:23 15 me three cents out of it" or something. In other words,
16 the idea was to get the client served better. And the
17 argument was that the client is served better by that.
18 Now I'm not taking a position. I'm just telling you what
19 the argument was each time it failed.

20 CHAIRMAN BABCOCK: Okay. Harvey.

21 HONORABLE HARVEY BROWN: I was just going to
22 make sure I was clear on my memory. The lawyers have
23 never been asked this specific question. We've been asked
24 a thumbs up or thumbs down for a long list of ethical
02:23 25 rules. And you might have voted in favor of it because

1 you were basically in favor of the set as a whole even
2 though you were opposed to a few provisions. Is my memory
3 right about that?

4 MR. ORSINGER: That's true.

02:24 5 MR. LOW: You're right. But the fight was
6 in the committee. I mean, there was a big fight where
7 people came and testified in the committee about these
8 various things. And then it came out because it was felt
9 that that was what the voice of the legal community
02:24 10 wanted; but its actually having been submitted and say "Do
11 you vote for or against referral fees," no, it has never
12 been done. No specific provision in the Canons of Ethics
13 have ever been treated that way.

14 And one time, do you remember it, Richard,
02:24 15 they boycotted, some group of lawyers boycotted? They
16 didn't get enough votes because of something that was in
17 the Canons once and we couldn't get them through because
18 they boycotted it for another reason, I believe.

19 MS. SWEENEY: Advertising.

02:24 20 MR. LOW: You're right.

21 CHAIRMAN BABCOCK: Well, this Rule doesn't,
22 as I read it -- I'm sorry. Buddy.

23 MR. LOW: No. I know it doesn't do away.
24 I'm not saying I say that this does away with it. I'm not
02:25 25 taking a position on that. I'm talking about the general

1 concept.

2 CHAIRMAN BABCOCK: Yes. But just what I was
3 going to say is this Rule doesn't abolish it; but it
4 basically says that referral fees are I think capped at
02:25 5 \$50,000 maximum. Right?

6 MR. YELENOSKY: Or 15 percent, whichever is
7 less.

8 CHAIRMAN BABCOCK: Yes. But if it's less
9 than \$50,000, then it would be less than \$50,000. And if
02:25 10 it was more than \$50,000, then the \$50,000 cap would
11 apply. Right? So it's in effect \$50,000 is the most that
12 you can in a referral fee. Right?

13 HONORABLE HARVEY BROWN: Right.

14 MR. YELENOSKY: But in the individual case
02:25 15 the cap could be much lower.

16 CHAIRMAN BABCOCK: It could be lower than
17 that, right.

18 MR. YELENOSKY: Yes.

19 CHAIRMAN BABCOCK: But the maximum, the cap
02:25 20 is \$50,000.

21 HONORABLE CARLOS LOPEZ: In any case.

22 CHAIRMAN BABCOCK: In any case. So that's a
23 pretty drastic change in what is going on, isn't it?

24 HONORABLE CARLOS LOPEZ: Yes.

02:26 25 CHAIRMAN BABCOCK: Okay. And so I guess the

1 issue, and we did discuss this a fair amount; but I think
2 it's important enough that we ought to talk about it a
3 little bit more. The question is whether or not that is a
4 good idea or a bad idea. We're going to continue to talk
02:26 5 about the Rule though whatever, however we feel about
6 that; but I'm sure the Court would like to get the benefit
7 of the wisdom of the people here about that. So Alex.

8 PROFESSOR ALBRIGHT: One issue is whether
9 the idea, the substantive idea is a good idea or a bad
02:26 10 idea. Another issue is whether it's a good idea or a bad
11 idea to have it in the Rules of Procedure, because it
12 could be a very good idea, but maybe not a good idea to
13 have it in the Rules of Procedure.

14 CHAIRMAN BABCOCK: We can talk about about
02:26 15 that. Although I know for a fact, unless I'm contradicted
16 here, that the Court is going to consider whether to put
17 it in the Rules of Procedure.

18 PROFESSOR ALBRIGHT: Right. But I think we
19 can give them our advice as to whether it's a good idea or
02:26 20 a bad idea to put it there.

21 CHAIRMAN BABCOCK: Sure.

22 PROFESSOR ALBRIGHT: But even if it's a good
23 idea to have this Rule in the Disciplinary Rules.

24 CHAIRMAN BABCOCK: Absolutely. Paula and
25 then Judge Jennings.

1 HONORABLE TERRY JENNINGS: You know, this is
2 a rehash. But if we're going to redo the discussion, the
3 purpose of this Rule is to prevent cases from getting to
4 the lawyers who can do the best for the clients. It is
02:27 5 also the effect of this Rule, so it meets its purpose
6 nicely.

7 But I will tell you that in decades of doing the
8 work that will be affected by this Rule I have paid
9 referral fees on a lot, a lot of cases. I've paid million
02:27 10 dollar referral fees to lawyers. That presupposes that
11 there was a very large recovery for the client. And I can
12 tell you that in most of those cases where those kinds of
13 horrific injuries that resulted and those kinds of large
14 results occurred if the referring lawyer had tried to
02:28 15 handle the case in an area that they weren't familiar
16 with, that there wouldn't have been an adequate or even
17 probably any recovery for the client, because they're
18 extremely often complex, difficult, expensive, fiercely
19 fought cases.

02:28 20 I do not believe that we can assume as a
21 committee that the practice now of trying hard to find the
22 best lawyer who will get the best recovery for the client
23 and then getting that case to that lawyer will continue if
24 the financial interest of the referring lawyer or the
02:28 25 lawyer who has the contact with the family at the outset

1 is handled in this way. If I were to tell a lawyer who
2 stands to get a six- or seven-figure referral fee with the
3 consent of the client who is informed and who has agreed
4 to it and to whom it is fully disclosed and who is being
02:29 5 well served by the referral, and if instead I were to say
6 to that lawyer "You know, well, you know, I'm going to be
7 able to pay you \$50,000 if you keep it and take an eight
8 million dollar recovery and get the client a million
9 instead. You're going to get a bigger fee than \$50,000.
02:29 10 So the financial self interest of the lawyer is put
11 directly in an almost insoluble conflict by this proposal.
12 That's number one.

13 And I think the purpose of this proposal when it's
14 been made in the legislature and in other places is in
02:29 15 fact to prevent cases from getting to the people who can
16 do the best for the clients. I think in addition you have
17 got, and if you read this Rule, it codifies in the first
18 paragraph barratry. It codifies if you're going to make a
19 payment to a runner who is not a lawyer, you've got to
02:30 20 disclose it to the Court.

21 Well, why don't you just go and turn yourself into
22 the DA. Say "I just committed a crime. Here I am.
23 Because I'm using runners and I'm paying them money." So
24 we're codifying in the Rule, if I'm understanding it,
02:30 25 because this is a person who solicits cases for you. And

1 if you do that, then you've got to tell the Court "Guess
2 what I just did." That to me is an astounding thing to
3 even think about putting in a Rule.

4 And in addition we have the entire concept here of
02:30 5 invasion of the attorney-client privilege. Why is this
6 one area an area in which we are suddenly requiring
7 disclosure of the relationship between client and lawyer
8 publicly? We already have a requirement of written
9 contingent fee contracts which doesn't exist in any other
02:30 10 area. Already these people who have these kinds of
11 contingent cases are being required to have a written
12 contract which no one else is required to do. Now we're
13 going to require that they have to disclose all the
14 lawyers that are involved in the process; and in many
02:31 15 cases in a small town community it's going to make
16 referral impossible. If you're in a small community and
17 you've got a significant case, the lawyer who might have
18 ordinarily referred and try to take a referral fee won't
19 be able to do it. And I think that's another factor that
02:31 20 should be considered here because it's going to have a
21 chilling effect.

22 But I think there is no human cry for this. I
23 think there are a few lawyers who feel like they might get
24 away with not having to pay referral fees if this were
02:31 25 passed. I think that's part of the incentive for this

1 Rule. I disagree and I think this committee should also.

2 CHAIRMAN BABCOCK: Judge Jennings.

3 HONORABLE TERRY JENNINGS: You asked the
4 question is this a good or bad idea. But I have a more
02:31 5 fundamental question. This is the governing of an
6 economic relationship between lawyers, I guess.

7 CHAIRMAN BABCOCK: Right.

8 HONORABLE TERRY JENNINGS: And I guess my
9 question is under what authority could the Court do this?

02:31 10 I know they have the authority to promulgate rules; but
11 this seems to be -- is there any other precedent for
12 something like this or is there any authority out there
13 that says the Court can actually do this? It does seem to
14 be the governing of an economic deal or relationship.

02:32 15 CHAIRMAN BABCOCK: Yes. I have got a big,
16 fat notebook. Did we bring that?

17 MS. LEE: Which one?

18 CHAIRMAN BABCOCK: The one that's got all
19 the other state Rules on this. And I know that some
02:32 20 states do it by Rule. I've never researched whether under
21 the constitutional rulemaking delegation and under the
22 statute in Texas which delegates rulemaking to the Court
23 whether that has been researched or litigated anywhere
24 else; but obviously that's always an issue with everything
02:32 25 that is done. Carlos and then Buddy. I'm sorry, Buddy.

1 HONORABLE CARLOS LOPEZ: I missed some of
2 the meetings here. So and, you know, Paula would probably
3 be the first to admit she has got a certain viewpoint on
4 this and others have other viewpoints on this.

02:32 5 MS. SWEENEY: I'm objective.

6 (LAUGHTER.)

7 HONORABLE CARLOS LOPEZ: Yes. But when I'm
8 asked to decide if I like something or not I generally
9 start with what are we trying to do here, what was this
02:33 10 designed to fix? And I would like a sort of an objective
11 or perhaps more objective recitation from somebody to
12 please tell me what, why we are looking at this right now.
13 What is it? What is the problem out there that this is
14 supposed to fix? Because I can do it without that
02:33 15 context; but I can do a better job with that context. And
16 I would appreciate it.

17 CHAIRMAN BABCOCK: I'll try. I'll give it a
18 shot in a second. But Buddy first.

19 MR. LOW: Paula, when you take and you pay
02:33 20 your client don't you have to tell in writing every
21 breakdown, every payment you made and everything? You are
22 required by the ethics rules to do that. So this very
23 information they're talking about here is given to your
24 client in your closing statement and it's required to be.

02:33 25 MS. SWEENEY: My client knows from the

1 get-go --

2 MR. LOW: That's right.

3 MS. SWEENEY: -- if there is a referring
4 agreement; and then they know at the end if it is modified
02:33 5 in any way. They know exactly what the payments are.
6 They know the complete disbursement; and that's I'm
7 required.

8 MR. LOW: It tells everybody you pay who and
9 everything; and you're ethically required to do that. So
02:34 10 your client is already getting more than this.

11 MS. SWEENEY: Yes.

12 MR. LOW: I just wanted to make that point.

13 CHAIRMAN BABCOCK: Yes, Carlos.

14 HONORABLE CARLOS LOPEZ: I forgot to add one
02:34 15 of the -- it escaped my mind one of the reasons I was
16 asking it. I remember when on the bench and even now I
17 guess I didn't take disqualifying attorneys very lightly.
18 And I just here, you know, here you're asking the Court to
19 disqualify; and I just would like to know why. What is it
02:34 20 we're trying? What is it we -- what about jurisprudence
21 is better because of this? And I just want to hear it.
22 Then I'll decide whether I agree or not.

23 CHAIRMAN BABCOCK: Well, I may -- I
24 certainly wouldn't be able to do as forceful a job as
02:34 25 Mr. Jamail would were he here. But I think there are

1 perhaps two things that underlie this proposed Rule. One
2 is that there are lawyers who or receiving a windfall, if
3 you will, Paula's example of the million dollar fee when
4 they have nothing but have a client come in and say "I
02:35 5 have got a bad case" and they pick up the phone and call
6 Paula Sweeney and that's it, and all of a sudden they get
7 a million bucks in the bank. And perhaps that money could
8 have been better directed to that client, because Paula's
9 fee agreement is going to be what it is. And either to
02:35 10 Paula who has done all the work or to the client, either
11 way; but not to the person who just picked up the phone.
12 And I think the thought behind this Rule is that the phone
13 call is worth 50,000 bucks.

14 I think there is another -- and by the way, I'm not
02:35 15 saying that I agree or take a position on this. I'm just
16 trying to articulate what I think some of the sentiment
17 is. I think there is also a feeling that, and you'll see
18 that expressed in another subdivision of this Rule, there
19 is a feeling that there are lawyers in this state who are
02:36 20 using the mass media to attract people without ever
21 telling them that if their case is at all serious or
22 complicated, that they are going to, you know, shift it
23 out to somebody else. And there is an inherent deception
24 to that which is unfair to the client.

02:36 25 I think that the people who try to articulate

1 the rationale for this Rule would put it in, would cloak
2 it in protecting the client, that this is an endeavor to
3 make it better, fairer and more equitable for the client,
4 and they support that by some precedent in other states,
02:37 5 because we are almost unique in the way we do it in Texas,
6 which there is not anything bad about that; but that's --
7 we're different. And other states, the majority of them,
8 and I think the large majority of them require some effort
9 on the part of the referring lawyer if they're going to
02:37 10 get paid a lot of money.

11 That's the best I can do. Now perhaps Justice
12 Hecht or Justice Jefferson or others can -- Elaine was on
13 the subcommittee and Tommy Jacks was. And who else? That
14 may be it.

02:37 15 HONORABLE CARLOS LOPEZ: I guess my knee
16 jerk is the second category might achieve that purpose and
17 the first one certainly doesn't. It seems like it
18 achieves the opposite.

19 CHAIRMAN BABCOCK: Well, Paula's argument
02:37 20 presupposes that that referring lawyer knows that he's
21 incompetent; but because he is only going to get \$50,000,
22 will handle the case himself rather than refer it on.

23 MS. SWEENEY: I didn't say "incompetent."
24 But certainly less qualified.

02:38 25 CHAIRMAN BABCOCK: Ranging from totally

1 incompetent to less qualified.

2 (LAUGHTER.)

3 CHAIRMAN BABCOCK: Richard Munzinger.

4 MR. MUNZINGER: I wasn't here in the first
02:38 5 discussion of this. It seems to me that if the Rule were
6 adopted, some lawyer is going to test the validity of the
7 Rule in the state constitution and state laws prompting an
8 answer and a need for this committee to inform the Court
9 whether or not the Court has the legal authority to put an
02:38 10 economic cap on a relationship. Where does the Court
11 purport to get this authority, and where did the Jamail
12 committee tell the Court that the Court had that
13 authority? And I'm not arguing for one answer to the
14 question. I would just like someone to tell me and tell
02:38 15 the Court, because the Court is going to have to answer
16 this question in a year or two, where the heck do you get
17 the authority to tell people "You can't pay Joe Schmo's
18 office more than \$50,000," dad gummit? "You're a free
19 citizen; but you can't do it."

02:38 20 CHAIRMAN BABCOCK: Well, I can -- I am
21 fairly confident the Jamail committee did not study that
22 issue. Elaine, was that a fair statement?

23 PROFESSOR CARLSON: That's a fair statement.

24 CHAIRMAN BABCOCK: So that's not something
02:39 25 the committee addressed. I will tell you that there are

1 two sources of the Court's rulemaking authority. One is
2 found in the constitution, and one is found in a
3 delegation from the legislature, a general delegation from
4 the legislature; and it basically allows the Court to do
02:39 5 what we do all the time. And sometimes we get close to
6 the line. Our recusal Rule which we're going to have to
7 revisit gets very, very close to that line; but it's up to
8 the Court to determine whether they've crossed over or
9 not, and I don't think today we're going to be able to
02:39 10 answer that question with precision.

11 MR. MUNZINGER: Does the Court have the
12 authority to manage the Bar as distinct from set Rules of
13 Procedure?

14 MR. ORSINGER: Yes.

15 CHAIRMAN BABCOCK: Oh, yes.

16 MR. MUNZINGER: Then it may have the
17 authority.

18 CHAIRMAN BABCOCK: Yes, Alistair and then
19 Judge Jennings.

02:40 20 MR. DAWSON: It seems to me in terms of the
21 two objectives that you articulated in support of this
22 Rule, the first one I don't think is going to occur. At
23 least in my experience what happens is the referring
24 lawyer typically signs up the case, gets a contingency fee
02:40 25 agreement and then refers it out and has some financial

1 arrangement with the other lawyer. And I don't think that
2 any more money is going to go into the client's pocket as
3 a result of this Rule than what currently exists. Now the
4 fee is the fee that's being divided up; and if you impose
02:40 5 this, less goes to the referring lawyer and what he would
6 have otherwise, he or she would have otherwise gotten now
7 goes to the lawyer that works the case.

8 CHAIRMAN BABCOCK: There are two places
9 where the money is going to go. It's either going to go
02:40 10 to the client or the lawyer that does the work.

11 MR. ORSINGER: It will never go to the
12 client.

13 MR. SOULES: Or stays in the defendant's
14 pocket.

02:41 15 MR. DAWSON: Currently the cases signed up
16 it's a 40-percent contingency.

17 CHAIRMAN BABCOCK: Right.

18 MR. DAWSON: And they agree 20/20. Well, if
19 it settles for \$10,000,000, the client still gets six
02:41 20 million no matter what. So I don't think -- I think
21 you're kidding yourself if you think that this proposal is
22 going to result in more money going to the client.

23 With respect to advertising it seems to me that
24 that's, if there is some perception about it's deceptive,
02:41 25 then that needs to be handled in the rules governing

1 advertising, not in a Rule of Procedure in my opinion.

2 CHAIRMAN BABCOCK: And I will tell you that
3 the advertising rules do cover this about nine different
4 ways; but I'm sometimes in the minority on that issue.

02:41 5 Richard.

6 MR. ORSINGER: On several of the issues that
7 are floating around, in terms of justification for going
8 to the Supreme Court the Separation of Powers Doctrine has
9 been interpreted by the Supreme Court of Texas that the
02:41 10 Supreme Court governs the practice of law in Texas; but
11 the legislature has exercised its dominion under the State
12 Bar Act by saying we believe that we can legislatively
13 regulate the State Bar of Texas because it's like a
14 government agency. And then the State Bar Act was adopted
02:42 15 last time, not renewed this session; but when it was last
16 adopted the Supreme Court at the time issued an order on
17 the miscellaneous docket saying "Thank you very much. We
18 appreciate the existence of the statute and we hereby
19 exercise our prerogative under the constitution to
02:42 20 regulate the practice of law through this Supreme Court
21 order." So there is a little bit of a lack of clarity
22 there exactly who regulates the practice of law and to
23 what extent.

24 But I don't think that's the reason why this
02:42 25 is in the Rules. I think it's in the Rules for a

1 practical reason or the proposal that it be in the Rules.
2 Because the lawyers won't put it there through self
3 governance and the legislature won't put it there through
4 legislation. And the only other way to put it there is
02:43 5 either through a federal district judge or by the Supreme
6 Court promulgating a Rule of Procedure. And since the
7 other options have not worked, this is the option that is
8 left.

9 And I don't think we should spend too much time
02:43 10 struggling with whether it's proper or right or historical
11 or anything else to have it in the Rules. The reason it's
12 being proposed in the Rule in my opinion is because no one
13 else will do it.

14 The next point I'd like to make is there is a
02:43 15 secondary market out there among lawyers who don't intend
16 to represent people to get them through advertising,
17 through word of mouth or even in some instances through
18 illegal running and then to get the, you know, run of the
19 mill cases, settle them cheap, make a lot of money. And
02:43 20 when you get a good case that requires someone actually go
21 to the courtroom or issue discovery or whatever, then you
22 send that to a good lawyer who will handle it. And it's
23 an unsavory thing that has been created by that *Bates vs.*
24 *Ostein* decision that lawyers could advertise in the first
02:44 25 place. But you know, the U.S. Supreme Court has said we

1 have to live with that unsavory element of lawyers
2 advertising in a crass, commercial manner to get clients.
3 And so this I think operates indirectly to eliminate that
4 secondary market of soliciting clients for purpose of
5 referral.

6 And those people tend to be the most commercial
7 looking and the least professional looking of the lawyer
8 advertising that's going on. And so this would have the
9 effect of damping that market. But I agree with Paula.

02:44 10 It will have a collateral effect that the way the system
11 works now is that the guys who do the advertising and
12 don't intend to try cases I think settle her case too
13 cheap, because they have a mill and they're making a lot
14 of money off of the large volume they pass. And if we'd
02:44 15 eliminate the referral fee, I think the secondary lawyers
16 will still advertise; but they're going to attempt to
17 handle their cases inhouse and they're not going to
18 develop them properly and they're going to settle them too
19 cheap and that if we force this on the market, it's going
02:45 20 to leave the crass commercialism there and it's going to
21 result in people inadvertently hiring lawyers that are not
22 going to get as much for them as a good lawyer could, but
23 they'll never get into the hands of a good lawyer because
24 there is no financial incentive to get them into the hands
02:45 25 of a good lawyer. So at a societal level I think this is

1 actually going to hurt clients, not help them.

2 CHAIRMAN BABCOCK: Judge Jennings and then
3 Buddy and then Harvey and then Judge Benton.

4 HONORABLE TERRY JENNINGS: This may be a
02:45 5 little naive and simplistic; but just referring to Rule 1,
6 "The proper objective of Rules of Civil Procedure is to
7 obtain a just, fair, equitable and impartial adjudication
8 of the rights of litigants under established principles of
9 substantive law." What I'm trying to understand here is
02:45 10 how does this promote or lead to a just, fair and
11 equitable and impartial adjudication of the rights of
12 litigants. It seems more of a policy measure. And there
13 may be very compelling policies to implement the rule, and
14 there may be very compelling policies against it. I'm
02:46 15 open minded about that; but it does seem to be beyond the
16 scope of the rules themselves or at least their objective.
17 Again, that may be naive; but you know, looking to the
18 objective of the Rules how does this fit into the
19 objective of the rules?

02:46 20 CHAIRMAN BABCOCK: Buddy.

21 MR. LOW: That's the point that I'm going to
22 make. I think Alistair is absolutely right that the
23 client is going to get more money this way. Now who are
24 the lawyers to serve? Whose interest should be paramount?
02:46 25 It should be the interest of the client. Not the Bar's

1 interest in punishing or people that advertise and do
2 that. I mean that, as Alistair said, should come within
3 the advertising rules or something else. So our main
4 purpose should be to do what will promote the interest of
02:47 5 the client; and what we have now promotes that interest
6 more.

7 CHAIRMAN BABCOCK: Harvey and then Judge
8 Benton and then Carlos.

9 HONORABLE HARVEY BROWN: Well, I have never
02:47 10 paid a referral fee, so I may be really naive about this;
11 but it seems to me that I would assume lawyers are going
12 to act in their economic self interest. And that to me
13 means the one time that I thought I had a really really
14 good case, but I thought somebody could help me make it an
02:47 15 even better case, I brought them in. It wasn't an all or
16 none proposition for me, because I brought them in and
17 they worked with me. And it seems to me that's what this
18 Rule is trying to maybe accomplish, that the lawyer who
19 gets a case that they're not capable of handling doesn't
02:47 20 just dump it completely to Paula, but at least stays
21 involved. They're a participant. They don't have 200
22 cases that they're referring to 200 lawyers and they never
23 practice law. They actually practice law so they have
24 substantial participation. That's good for the lawyer.
02:48 25 That's good for the Bar ultimately; but maybe I'm

1 misreading the Rule.

2 CHAIRMAN BABCOCK: Your hypothetical would
3 be okay under this Rule.

4 HONORABLE HARVEY BROWN: Huh?

5 CHAIRMAN BABCOCK: Your hypothetical would
6 be okay under this Rule.

7 HONORABLE HARVEY BROWN: Exactly. But even
8 if you're not a strong lawyer, I think they would
9 recognize it's in my best interest to bring Paula in, even
02:48 10 if she's -- if I want that referral fee, what I'm going to
11 do now is I'm not just going to turn it over to you a
12 hundred percent. I'm going to work with you.

13 MS. SWEENEY: You have got an ad on the
14 front of the phonebook.

15 CHAIRMAN BABCOCK: Hold on. Hold on. Judge
16 Benton.

17 HONORABLE LEVI BENTON: Well, until Harvey
18 spoke I was going to say that there has been no one to say
19 anything in support of the Rule. And I therefore move
02:48 20 that we vote by unanimous consent that we send a message
21 to the Court that we're opposed to the Rule and go on to
22 the next issue.

23 MS. SWEENEY: Second.

24 MR. BOYD: Well, let me make that not quite
02:48 25 unanimous.

1 (LAUGHTER.)

2 CHAIRMAN BABCOCK: Yes. I think Harvey
3 was --

02:49 4 HONORABLE HARVEY BROWN: I'm not saying I
5 take that position; but it's an argument.

6 CHAIRMAN BABCOCK: Well, yes. Carlos had
7 his hand up; and then Jeff, you can go.

8 HONORABLE CARLOS LOPEZ: Me?

9 CHAIRMAN BABCOCK: Yes.

02:49 10 HONORABLE CARLOS LOPEZ: Oh, okay. I was
11 just going to give my final two cents and then ask for a
12 vote. It does some good hypothetically. It does more bad
13 hypothetically, and so I would vote against it. But
14 everybody else can vote however they want, but let's vote
15 on it.

16 CHAIRMAN BABCOCK: Okay. Jeff.

17 MR. BOYD: All right. For the record, first
18 I support referral fees. I remember once being sent one
19 when I was in private practice at Thompson & Knight as a
02:49 20 young lawyer and the firm saying "Send it back. You can't
21 keep it." But the practice itself I do think serves a
22 good purpose. I would oppose a cap on it, so that
23 provision of this Rule that would attempt to cap the
24 amount of attorney's fee I would oppose; and I certainly
02:49 25 would oppose codifying violations of the ethics rules or

1 laws. But I support the idea of requiring public
2 disclosure of attorney's fees and of authorizing trial
3 judges to disqualify lawyers who violate the rules that
4 govern referral fees, because whether we like it or not
02:50 5 our profession does not only benefit us and our clients,
6 but it is a public profession and we serve the public
7 generally. And whether we like it or not our profession
8 has a public reputation; and it's not been a very good
9 one.

02:50 10 And the purpose I see behind the public disclosure
11 requirements is if you have a situation with a referral
12 fee that, as Paula has described, makes sense, is right,
13 is beneficial, the client knows everything about it, then
14 sunshine on that is not going to hurt it; but it's the
02:50 15 ones that are hurting our profession that are going to be
16 stopped by the requirement of public disclosure.

17 So I guess if we were voting on whether to support
18 the Rule subject to revisions, I would vote in support of
19 the Rule, but with some significant revisions, getting rid
02:51 20 of the cap, getting rid of these codifications that talk
21 about, that appear to authorize ethical violations. But I
22 think we ought to think long and hard about whether
23 requiring some public disclosure of the practice would be
24 beneficial by discouraging the circumstances when the
02:51 25 practice really shouldn't be happening and gets discovered

1 is what brings the negative reputation to our profession.

2 MS. SWEENEY: Chip, can I ask Jeff a
3 question about that?

4 CHAIRMAN BABCOCK: Can you what?

5 MS. SWEENEY: Can I ask Jeff a question
6 about what he just said? Why is disclosing it to the
7 public in any way helpful? If the client already knows
8 and that's the person that is affected, why is, what is
9 there that is beneficial about publishing this at the
02:52 10 courthouse?

11 MR. BOYD: Because if it's a situation
12 where, for example, an individual, you were talking about
13 the most extreme example of the lawyer who is doing
14 nothing but referring cases got on the front of the
02:52 15 telephone book and doing nothing but referring cases, that
16 person is going to find it harder to make a living that
17 way if they have to publicly disclose or if the people
18 they are referring them to have to publicly disclose.
19 That's what the disclosure requirements are going to
20 discourage.

21 MS. SWEENEY: Well, make them put it in
22 their ad then.

23 MR. BOYD: Not so much when somebody calls
24 me and says, you know, "My mother may have a claim against
02:52 25 her doctor," and sent it to a friend who is a plaintiff's

1 med mal' lawyer and that lawyer wants to give me a
2 referral fee. That's not -- it's not going to have much
3 negative discouraging impact on that practice at all.
4 It's the worst practices that I think it's going to
02:53 5 discourage.

6 MS. SWEENEY: And I'm happy with the
7 requirement that the people who advertise and have no
8 intention of handling the case that they put that in their
9 ad, put the disclosure in that end of the public spectrum,
02:53 10 because that's where we're talking about the great evil
11 being; but don't get between the lawyer and the client and
12 the contract and the agreements that they have with their
13 own clients and make that become public, because there are
14 an awful lot of instances where that is a disservice.

02:53 15 CHAIRMAN BABCOCK: Richard Munzinger.

16 MR. MUNZINGER: Unless I have misunderstood
17 this Rule as it is presently drafted, the "if the
18 referring attorney makes an appearance in the case," it
19 takes the case out of the Rule. So that I don't know
02:53 20 anything about what you do, Paula. But if I send a client
21 to you and make an appearance in the case, I don't think
22 any of these disclosures apply, do they, because in
23 subsection (2) which is the second part of the definition
24 of "litigation payment" it says "to an attorney who (b)
02:54 25 has not appeared in the case or provided substantial

1 services." It would seem to me if I appear, I have
2 satisfied that part of the Rule. Now you've got
3 disclosure of the lawyer and his identity as in the Rule.

4 I question whether the Rule as written cures the
02:54 5 problem it was apparently intending to solve. It doesn't
6 make sense to me. All I have to do is put my name on the
7 the dad-gum piece of paper and I'm home free.

8 MR. BOYD: But it's public then.

9 MR. MUNZINGER: I understand.

02:54 10 MR. BOYD: Your association is public now
11 because it's on a publicly filed document.

12 MR. MUNZINGER: I guess my point, I'm not
13 ready to vote, and I'm not ready to disclose how I feel,
14 although I think I'm about to make a decision in my mind
02:54 15 having listened; but in looking at this dad-gum Rule it
16 seems to me the Rule is kind of silly, because the Rule
17 itself says that you can avoid the whole dad-gum
18 disclosure and problem by making an appearance in the
19 case.

02:54 20 MR. YELENOSKY: But Richard, the people who
21 would support the intent of the Rule then when we got to
22 the language of the Rule would probably fix that if you're
23 right. So I think we are still going to need to take a
24 vote on whether it's a good idea.

02:55 25 And on Jeff's point, even if I agreed with

1 everything you said on disclosure, and I can understand
2 your point there, I have trouble getting to
3 disqualification. Because if the penalty is Paula Sweeney
4 comes into the courtroom and it turns out let's say
02:55 5 unbeknownst to her beforehand somehow the referral fee
6 turned out to be a little more than 15 percent or
7 something, the greatest penalty falls on Paula's client.

8 MR. BOYD: But it's intentionally failing to
9 disclose. That's when you're subject to disqualification,
02:55 10 when a lawyer intentionally fails to disclose.

11 MR. YELENOSKY: Well, or you disclose and --

12 CHAIRMAN BABCOCK: Your.

13 MR. YELENOSKY: Or you exceed the cap.

14 MR. BOYD: I'd throw out the cap. I agree.

02:55 15 MR. YELENOSKY: In any event, this Rule only
16 works if it's never used.

17 (LAUGHTER.)

18 MR. YELENOSKY: And if it ever is used, the
19 greatest penalty falls on the client who, you know, to me
02:55 20 that is not how we should enforce the objective of public
21 policy here.

22 CHAIRMAN BABCOCK: Yes. Bill Dorsaneo had
23 his hand up and then Judge Gray and then Luke and then
24 somebody over there (indicating).

02:56 25 PROFESSOR DORSANEO: Does anybody have any

1 idea what percentage of the types of cases that we're
2 talking about are based on a built-in referral fee to a
3 lawyer who doesn't participate in the handling of the case
4 at all?

02:56 5 MS. SWEENEY: A very large percentage of the
6 significant personal injury cases in complex areas of the
7 law are based on referrals. Not advertising. Referrals.

8 PROFESSOR DORSANEO: Are those -- has the
9 percentage for those kinds of cases of the contingency fee
02:56 10 increased in the last 20 years?

11 HONORABLE KENT SULLIVAN: Let me speak to
12 that, if I could.

13 CHAIRMAN BABCOCK: Judge Sullivan.

14 HONORABLE KENT SULLIVAN: Because this is
02:56 15 what I was going to raise: And I raise this in the form
16 of a question to people who are more knowledgeable than I
17 am on this subject. But I do wonder if what I hear from
18 time to time as the sort of "beauty contest" issue is a
19 potential problem here and it is something we ought think
02:57 20 about. Now this Rule doesn't address it. But it really
21 is the question of you have a lawyer who is perceived to
22 have control over a client, and this is the referring
23 lawyer situation. And I go to, say, Paula and say "I'd
24 like to refer this case to you." And she may say "Well,
02:57 25 that's great. It's a good case. I'll give you a referral

1 fee." It's customary to give you a third or something
2 like that.

3 And then what has happened I think in more recent
4 years is I say "Well, no, Paula. I don't want a third. I
02:57 5 want 40 percent" or "I want 50 percent." And then
6 suddenly you may -- and I may even say "And I've got other
7 people who are bidding on this case, Paula." You know,
8 and that's the sort of interplay that begins to happen.

9 And the only reason I raise it is I think a good
02:57 10 point was made early on, that keeping the interest of the
11 client and the lawyer aligned are important. And I raise
12 the question in terms of I'm not sure referral fees are
13 really effectively regulated at all. Now I'm not talking
14 a dollar cap. I'm talking about I don't know that there
02:58 15 is a percentage cap on a referral fee for someone. And I
16 just raise by way of question would it perhaps be useful
17 to consider something in the way of that sort of
18 regulation and does that perhaps deal with some of the
19 evils that we're concerned about here in a less Draconian
02:58 20 way and maybe even in a helpful way of keeping the
21 interest of the client and the lawyer aligned? Because I
22 think a lot of people agree that getting the case to the
23 best lawyer best serves the client's interest. But
24 suddenly as the referring lawyer, and I'm thinking about
02:58 25 who will, you know, cut me the best deal as a result of

1 some sort of bidding war percentagewise, it may be a
2 different calculus. And maybe the interest of the client
3 and the referring lawyer anyway are no longer aligned or
4 somehow out of wack. I don't know. And I'd be interested
02:59 5 in what Paula thinks about that.

6 MS. SWEENEY: Well, you have the marketplace
7 and the realities of the litigation that govern all of
8 that. I mean, if somebody comes to me and says "I want to
9 refer you this case, but I want a 75-percent referral
02:59 10 fee," I say "You know, I can't afford to do this case and
11 spend what I'm going to have to spend and do all I have to
12 do and then not get a fee. It's just too much risk." So
13 the marketplace is going to regulate the request for
14 exorbitant referral fees that vitiate the concept of the
02:59 15 existing contingent system. I mean, if the normal fee is
16 that in a contingent fee, the normal contingent fee would
17 be a third in a given type of case; and if somebody wants
18 to take 75 percent of that away, you now have -- help me
19 do the math, somebody -- you know, 25 percent of a third.
03:00 20 So that's already I think -- I haven't seen great abuses
21 in that area.

22 Now are there lawyers shopping cases to more than
23 one? You know, in an airplane crash is somebody going to
24 go to two or three or four aviation lawyers and see where
03:00 25 they can get the best deal? Maybe. But if they're all

1 competent lawyers, that is an economic decision that is
2 vetted by the client.

3 And the client, you know, remember the client has
4 to approve all of this. So if we're dissecting an
03:00 5 identical fee in different ways between the lawyers, leave
6 that between the lawyers as long as it doesn't affect the
7 client's recovery. And I see no difference between the
8 marketplace regulating this, which it does effectively
9 now, than an insurance company coming to Thompson & Knight
03:00 10 and saying "You know, John Martin, we really want you to
11 do our work, and you know, we'd like you to do it for \$65
12 an hour, and you know, because you're a great lawyer."

13 MR. MARTIN: That's an easy answer.

14 CHAIRMAN BABCOCK: He gets \$10 an hour.

15 MS. SWEENEY: But it's the same thing. And
16 what he says is: I can't do it for that. And they can go
17 to three or four or five firms and try and find somebody
18 who will do it for that; and you get what you pay for.

19 CHAIRMAN BABCOCK: Frank, there were a
03:01 20 couple of other people with their hands up. Judge
21 Lawrence had it for sure. Luke did. Luke had it and then
22 Judge Lawrence.

23 HONORABLE TOM LAWRENCE: Go ahead.

24 MR. SOULES: Go ahead. You were ahead of
25 me.

1 CHAIRMAN BABCOCK: Bill was ahead.

2 PROFESSOR DORSANEO: My question is is it
3 just simply not the case that this practice has no
4 economic effect on the client's percentage? My perception
03:01 5 is that the percentage has been moving up since I started
6 practicing law in this jurisdiction. And maybe that's
7 just because of other factors; but maybe that has
8 something to do with this.

9 MS. SWEENEY: Contingent fees that are set
03:01 10 up in cases like this have been the same for years -- the
11 client fee, the fee for that client. Now whether there
12 has been a referral fee creep, I can't say. I don't think
13 so; but as far as it affects the client I have not seen
14 contingent fees increasing in the personal injury context
03:02 15 in the cases that I deal with at all. We're using the
16 same contract forms.

17 CHAIRMAN BABCOCK: Luke.

18 MR. SOULES: I just go back a little bit in
19 the history here and then trying to bring this current and
03:02 20 maybe probe into some issues that haven't, some of them
21 may have and some haven't been discussed here. The State
22 Bar of course for some time prohibited advertising; and
23 then the Supreme Court of the United States said that you
24 can do that. The State Bar of Texas today -- I say the
03:02 25 State Bar -- through the whole rule structure of the State

1 Bar of Texas. The State Bar of Texas today I think
2 regulates lawyer advertising to the maximum that it can
3 constitutionally do so. So we're -- and that's one of the
4 problems that we have as lawyers is the public perception,
03:03 5 the fact that there is so much advertising.

6 But that draws people in a direction that it didn't
7 used to exist. Used to people would try to network
8 through lawyers that they knew or whatever and get to the
9 right lawyers either by referral or otherwise to handle
03:03 10 their cases or just never get them handled at all.

11 Now then people, many people tend to go to those
12 who advertise. And there are some great lawyers who
13 advertise. One of the very best personal injury lawyers
14 in San Antonio is on the back side of the white pages; and
03:03 15 the one that is on the back side of the Yellow Pages used
16 to be a real estate developer. So we have got extremes.

17 So we have got advertising. We've got people going
18 to lawyers who can't handle their cases because they're
19 incentivized by advertising to go there; but they need
03:04 20 help and they need different help and they get that
21 through referrals. Of course that tends to generate
22 additional, sometimes additional products liability cases
23 that might not otherwise exist.

24 But you know, it hadn't been that long since we
03:04 25 passed 76(a) which was designed at least in its inception

1 to be a mandatory disclosure of what is going on inside
2 the litigation process to the limits essentially of a
3 private party's Constitutional right to privacy. In other
4 words, many things cannot be sealed because, and I think
03:04 5 at the time the Rule pretty much took that to the limits
6 of the Constitution, what could not be sealed and what
7 could be sealed under Rule 76(a), because injured people,
8 the information that injured people might should know was
9 being boxed up, sealed up and put away at the end of a
03:05 10 case so that other people couldn't find out about it. Or
11 it would make it so extremely expensive to litigate and
12 litigate and litigate that it was unfair for injured
13 people. So 76(a) was born.

14 Now we've got -- so certainly there must be a
03:05 15 policy somewhere in our Rules or somewhere in our
16 jurisprudence; and people are entitled to know that they
17 have access to the courts. And of course we have an open
18 courts constitutional provision in Texas. People have the
19 right to go to court.

03:05 20 MR. ORSINGER: For another two months.

21 (LAUGHTER.)

22 MR. SOULES: Okay. And it will be gone, I
23 guess. Now looking at the specifics here, I mean, this
24 certainly has defense characteristics. We're kind of
03:06 25 caught between this right to advertising, the right for

1 the public to have information. And then if you read some
2 of these penalties that are in this Rule that is being
3 proposed they are Draconian if you make violations.

4 So we're putting lawyers in a squeeze here, and you
03:06 5 wonder why. Well, I wonder why we have to make
6 disclosures of -- great personal injury lawyers, sometimes
7 even great commercial lawyers tend to have networks of
8 people who they do business with and they get referrals.

9 Is this because some group of lawyers who wanted to design
03:06 10 this scheme that is under 7.5, they want to know the
11 network of all of Paula's lawyers? They want to know her
12 referral network and they want to know my referral
13 network, because that way they can get involved in the
14 process and be more competitive. This is forcing the
03:07 15 disclosure of the referral networks that have worked to
16 the best interest of clients in some cases for many years.

17 The caps I question. I remember somewhere early
18 in my career as a lawyer that there was a minimum fee
19 schedule published by the State Bar of Texas; and it
03:07 20 finally got pulled down because I believe it was the State
21 of Virginia's minimum fee schedule that got taken to the
22 Supreme Court of the United States and was held
23 Unconstitutional because it set minimum fees. It set fees
24 in client representation.

03:07 25 So this of course sets a referral fee or a cap to a

1 referral fee in a client representation. I don't know
2 whether the court process of making rules has the same
3 exposures as the antitrust laws that the State Bar making
4 fee schedules has in order to set fees; but perhaps it
03:08 5 might. And it does seem to be at least a question.

6 We have a free market. Lawyers do negotiate
7 referral fees sometimes according to the merits of the
8 case, many times because and particularly in the
9 commercial field, the complexity of a case. Sometimes
03:08 10 they come late. For example, a case doesn't seem to have
11 much value until we find that the summary judgment granted
12 by the trial court is reversed and remanded by the Fifth
13 Circuit; and now you know you have got a good, triable
14 antitrust case that you can refer if you don't know how to
03:09 15 handle it if you want to get somebody who is top-notch to
16 handle it, and they take it over.

17 Our system given it's components, and I
18 probably haven't identified all of them; but the ones that
19 come to my mind and those that are not coming to my mind
03:09 20 seems to be working in a way that helps clients. It tends
21 to maximize. It tends to get them a fair resolution of
22 their claim by lawyers who are competent to get that done.
23 It incentivizes lawyers that are not competent to get that
24 done, to get their clients to places where there is
03:10 25 competence. Surely the Courts want to see clients

1 represented by competent lawyers on both sides so that
2 when everything shakes out it's fair, as fair as our jury
3 and our justice system can make it.

4 I just don't see how disclosure of the
03:10 5 networking, making that public helps, capping the fees so
6 there isn't a free economy out there, it helps. Putting
7 the Draconian sanctions that this Rule has in there is
8 really almost frightening to me.

9 It just for all those reasons I think the
03:10 10 system that we have is working. I don't think that the
11 defendants who may want to stop referral fees because of
12 mass tort litigation are going to accomplish that, because
13 the advertising is going to go on and those cases have got
14 to go somewhere. And if necessary, the lawyers will hold
03:11 15 them and bring lawyers in that will help settle the cases,
16 mediate the cases, do whatever. It just doesn't seem like
17 we really need these changes to our system; and some of
18 them again are so Draconian that they are senseless.

19 CHAIRMAN BABCOCK: First of all, they're not
03:11 20 Draconian. They're Jamailian.

21 (LAUGHTER.)

22 MR. SOULES: Well, Joe is a good friend of
23 mine. And we can -- we often agree and we occasionally
24 disagree. And I am not personalizing this in any way --

03:12 25 CHAIRMAN BABCOCK: I know.

1 MR. SOULES: -- towards Joe or his
2 committee; and I want that to be clear.

3 CHAIRMAN BABCOCK: I was just kidding you.
4 Judge Jennings.

03:12 5 HONORABLE TERRY JENNINGS: I move the
6 question, we have an up or down vote on it.

7 MR. LOW: I second that.

8 CHAIRMAN BABCOCK: That has been seconded.
9 There were a couple of hands that were up. Judge Lawrence
03:12 10 was first and then Frank and then Judge Peeples.

11 HONORABLE TOM LAWRENCE: I have probably a
12 half dozen or more people a day that call my office
13 because they've got some legal problem and they don't know
14 where to go and they don't know lawyers. And if they have
03:12 15 some type of horrific accident or something that requires
16 a special type of lawyer, they don't know where to go; and
17 they tend to probably look in the phone books and look in
18 some of the locations where there is advertising. And
19 nothing is going to change that because they're going to
03:12 20 be able to advertise. And I'm not sure how disclosing
21 that this referral fee has been made and a notice filed in
22 the courthouse is going to affect that practice at all.

23 Generally I think disclosure is a good thing; but I
24 don't know that disclosure is going to modify what happens
03:13 25 to one degree. I think the people that need the attorneys

1 are still going to look in the phone books and are going
2 to seek them out in that way. So I question whether or
3 not this would have any effect.

4 CHAIRMAN BABCOCK: Frank.

03:13 5 MR. GILSTRAP: I've always felt in some
6 litigation that there might be some advantage in knowing
7 how my opponent's attorneys are being paid. This doesn't
8 require complete disclosure, but does require disclosure
9 of some aspects of the fee agreements on the other side.
03:13 10 And I just wonder if maybe in the hands of clever lawyers
11 we might be giving the defendant an advantage he doesn't
12 have now. That's all.

13 CHAIRMAN BABCOCK: Judge Peeples.

14 HONORABLE DAVID PEEPLES: No one has enjoyed
03:13 15 this discussion more than I have. If we vote against
16 this, are we still going to talk about it?

17 HONORABLE NATHAN HECHT: Yes.

18 CHAIRMAN BABCOCK: Yes.

19 (LAUGHTER.)

03:14 20 HONORABLE DAVID PEEPLES: I think we've got
21 it backwards.

22 HONORABLE NATHAN HECHT: That's not just an
23 order. It's a prediction.

24 (LAUGHTER.)

03:14 25 HONORABLE DAVID PEEPLES: For us to take

1 this line by line. And then I think it would be smarter
2 to talk about it and carve it up and then vote on it
3 instead of, you know, right now. I mean, I'm ready to do
4 it; but it seems we have it backwards to vote and then
03:14 5 talk about it, the details of it rather than to go through
6 and analyze it and try to make it better and so forth and
7 then talk about it. I think we'll understand it even
8 better after we've done that.

9 CHAIRMAN BABCOCK: Yes. I think you're
03:14 10 right about that. We've had a motion that has been
11 seconded; but we'll see. Stephen.

12 MR. YELENOSKY: Well, I was going to say I
13 think some people cannot support as a policy matter
14 putting this into the Rules in any version. And if that's
03:14 15 the case, we ought to capture that sentiment and then move
16 on to going through the Rule piece by piece.

17 HONORABLE TOM GRAY: Will all those have to
18 leave the room so that the rest of us can discuss it then?

19 MR. YELENOSKY: Yes.

03:15 20 CHAIRMAN BABCOCK: Then we wouldn't have a
21 quorum.

22 (LAUGHTER.)

23 CHAIRMAN BABCOCK: If we had one, we would
24 start it. That's all that matters. Elaine or Sarah, did
03:15 25 you have your hand up? Okay. Well, we have got a motion

1 that has been seconded. And since the Chair doesn't vote,
2 let me just say if I can, that I think I am in favor of
3 this Rule in some form. And I don't think this Rule does
4 very much, frankly. I think what this Rule does is to get
03:15 5 to the person who has referred the case and has had
6 absolutely no connection to the case, picked up the phone,
7 referred it and that was it. Because as you can see,
8 anything more substantial than that from the simple act of
9 putting your name on pleadings means that you're outside
03:16 10 the Rule. So all of the things that people are worried
11 about I don't think in reality are very worrisome.

12 And I do worry about the practice in this
13 state where we have lawyers who don't do a single thing in
14 the case and are getting millions of dollars in referral
03:16 15 fees. I think that there is an issue. That money is
16 coming from somewhere and it's going to somebody who has
17 not done anything other than know a guy either because
18 it's their next door neighbor or because they've got an ad
19 in the Yellow Pages. And I think there is a public
03:16 20 confidence issue in that. I think that that money is real
21 dollars that either could be going to the lawyer who is
22 putting their blood, sweat and tears into the case or
23 potentially to the client, or some way I don't know where
24 that money could be going; but I just don't think it ought
03:16 25 to be going to the person who doesn't do a single thing.

1 I understand there are countervailing arguments and
2 there are very powerful ones, and I don't mean to diminish
3 them. But since I don't get to vote, I wanted to put my
4 thoughts on the record. Carl.

03:17 5 MR. HAMILTON: Doesn't Rule 1.04 now require
6 the referring lawyer to participate?

7 MS. SWEENEY: No.

8 MR. ORSINGER: That's 103, Grounds to Split
9 a Fee, is participation.

03:17 10 CHAIRMAN BABCOCK: And we are out of step
11 with other states, no question about that; but that
12 doesn't bother me.

13 MS. SWEENEY: We also had our own electric
14 grid, and we're the only state that has got that.

03:17 15 CHAIRMAN BABCOCK: We have what?

16 MR. ORSINGER: Our own electric grid; and it
17 didn't go down last week.

18 CHAIRMAN BABCOCK: That's what I'm saying.
19 It doesn't bother me. Okay. Since we have a motion that
03:17 20 has been seconded -- and people will be free to change
21 their mind at the end of the day after we talk about the
22 details. But who made the motion?

23 HONORABLE TERRY JENNINGS: I did.

24 CHAIRMAN BABCOCK: Judge Jennings, will you
25 state it again?

1 HONORABLE TERRY JENNINGS: Yes. I move the
2 question we vote the rule up or done, whether or not we're
3 going to refer it to the Court.

4 MR. BOYD: As is?

03:18 5 HONORABLE JENNINGS: Without the different
6 reasons for either being for it or against it what I was
7 proposing is just saying --

8 PROFESSOR DORSANEO: Whatever it may be.

9 MR. ORSINGER: Why don't we just say "in
10 principle."

11 HONORABLE TERRY JENNINGS: "The Rule in
12 principle."

13 CHAIRMAN BABCOCK: Because there may be
14 somebody that on that formulation might vote against it;
03:18 15 and then if you change this or that, they might be for it.
16 So in principle if you are against this rule, raise your
17 hand.

18 HONORABLE SARAH B. DUNCAN: As a Rule of
19 Civil Procedure?

03:18 20 CHAIRMAN BABCOCK: Yes. Right.

21 (Five votes nae.)

22 CHAIRMAN BABCOCK: All right. That is fine.
23 Put your hands down. Those in favor in principle raise
24 your hand.

03:18 25 MR. BOYD: One principle.

1 (23 yes votes.)

2 CHAIRMAN BABCOCK: 23 to 5 yes, the Chair
3 not voting; but you know how I feel. This is a good time
4 to take our afternoon break; and we'll come back and talk
03:19 5 about the details.

6 (Afternoon recess 3:19 to 3:41.)

7 CHAIRMAN BABCOCK: Back on the record.
8 Before we take up the specifics of the meeting, anybody
9 want to say anything?

03:41 10 HONORABLE SARAH DUNCAN: Please,
11 Mr. Chairman.

12 CHAIRMAN BABCOCK: Justice Duncan.

13 HONORABLE SARAH B. DUNCAN: With the House
14 Bill 4 stuff we've been working on for the rest of our
03:41 15 time together I was fully understanding and I tried to
16 participate and be cooperate; but we just didn't have a
17 choice on these things. And I defended, for instance, on
18 the coupons that we didn't have a choice, we might as well
19 just do it, and the Court can interpret it later.

03:41 20 I don't see that type of imperative on this. We
21 have resoundingly said what our opinion is that we don't
22 think this should be in the Rules of Procedure. And since
23 I'm not normally quiet and I do normally vote, I just want
24 to explain that I'm not going to participate in this
03:42 25 discussion and I'm not going to vote, because I'm not

1 going to be, as the Supreme Court so eloquently put in the
2 *Hardberger/Angelini* case forced to decide between two
3 unconstitutional interpretations of the statute; and I'm
4 not going to be put in the position of deciding between
03:42 5 which of two Rules is the least bad. That's it.

6 CHAIRMAN BABCOCK: Well, I hope nobody else
7 has that view, Sarah, because this is a process that has
8 gone on since 1938; and the Court is looking for our
9 advice on things, and we've got to try to do that if we're
03:42 10 going to serve on this committee. And so I understand
11 what you're saying and respect your feelings; but let's
12 try to go forward. Jane.

13 HONORABLE JANE BLAND: One option would be,
14 to think about would be some sort of a notice to the Bar
03:42 15 about "The Court is very interested in these issues and
16 the Bar ought to take action on these issues in light of
17 what other jurisdictions are doing, and maybe with some
18 sort of a time line. And if you don't take action." Sort
19 of like the legislature has done to the Court in the past:
03:43 20 "If you don't pass a no evidence summary judgment rule,
21 then we will." If one of the concerns is doing it through
22 the Texas Rules of Civil Procedure and the preferable way
23 would be to have the Bar do it through the Disciplinary
24 Rules, to give them an opportunity to do that; but to know
03:43 25 that the opportunity for input and making and reaching

1 some sort of decision on this is not indeterminate.

2 CHAIRMAN BABCOCK: Yes. And Judge Bland, a
3 number of people on the break said to me that they're
4 concerned about the appropriateness of this being in the
03:43 5 Rules of Civil Procedure as opposed to somewhere else
6 whether the Bar does it or the Court does it or somebody
7 else does it. But and that's a good idea. Maybe at the
8 end of the day when we're done with our discussion maybe
9 we can address that issue about where people think it
03:44 10 ought to go or not got; but the Court has asked for our
11 advice on this Rule that another committee has drafted.
12 And it's just like a subcommittee of our committee
13 drafting something. And so the full committee is going to
14 talk about it; and that's what I propose we do now. And
03:44 15 Stephen or Pam, do you have any plan of attack on this?
16 Start at the beginning and go to the end?

17 MS. BARON: That's what I was thinking. And
18 remember, we're just the messengers.

19 MR. YELENOSKY: And Chip, I think as I told
03:44 20 you, I'm going to have to leave shortly due to a
21 prearranged meeting in my office that I have to attend.
22 But I'm not boycotting. I just have to leave.

23 CHAIRMAN BABCOCK: Okay.

24 MR. YELENOSKY: So I will be back in the
03:44 25 morning; and if we're still on this, I'll be in the

1 discussion in the morning.

2 CHAIRMAN BABCOCK: I think we'll still be on
3 this.

4 MS. BARON: The subcommittee took no
03:45 5 position on this at all. I guess we'll just start with
6 litigation payments defined, start with (a)(1). This
7 defines a litigation payment. And keep in mind that
8 litigation payments once defined are things that will be
9 required to be disclosed in a subsequent section. Paula
03:45 10 had a comment on subsection (1) which defines payments to
11 nonattorneys. I think at the outset (1) would need to be
12 changed to say "to any person other than an attorney," and
13 then let's talk about that section.

14 CHAIRMAN BABCOCK: Okay. So 7.5(a)(1) you
03:45 15 said "to any person other than an attorney"?

16 MS. BARON: Right.

17 MS. SWEENEY: That makes it worse.

18 MR. TIPPS: Where is that change?

19 MS. BARON: Well, I would think we've got
03:45 20 two sections: "To any person and then to an attorney"
21 unless one applies to both. I mean, I don't understand
22 how you can have "to any person" and then "to an
23 attorney."

24 MS. SWEENEY: It's 7.5(A)(1)(a) on page two.

25 CHAIRMAN BABCOCK: Carl.

1 MS. SWEENEY: But no. But that makes my
2 problem worse.

3 MR. HAMILTON: I have a question about the
4 term "litigation payment." Are we just talking about
03:46 5 matters in litigation? There are other matters that might
6 get referred such as contracts, real estate matters that
7 might solicit a referral fee; but this seems to limit it
8 to litigation. Is that what our intent is, or is it any
9 kind of referral fee?

03:46 10 CHAIRMAN BABCOCK: Okay.

11 MR. ORSINGER: I can comment as a practical
12 matter since this is a Rule of Procedure, and all we can
13 do is disqualify them from the lawsuit and sanction them
14 from being involved in the lawsuit. And if there is no
03:46 15 lawsuit, then we are really stretching it to put it in the
16 Rules of Civil Procedure. These sanctions operate against
17 lawyers who are representing clients in court actions. So
18 it doesn't seem to me that there is any enforcement
19 mechanism against the private. What if it's a dispute
03:47 20 that is resolved in private arbitration or something like
21 that where no lawsuit is ever filed?

22 CHAIRMAN BABCOCK: Okay. Back to Pam's
23 point though, is it --

24 MS. BARON: Maybe I'm wrong. I just
03:47 25 understand the parsing of it into two different sections.

1 MS. SWEENEY: That change makes my problem
2 worse.

3 MS. BARON: Right.

4 MS. SWEENEY: Because then we're really
03:47 5 saying if you're going to commit barratry. I mean, why
6 not just start the sentence that way, "If you're going to
7 commit barratry by doing the following things, please post
8 a notice at the courthouse"?

9 MS. BARON: Well, then why isn't all of this
03:47 10 directed only to payments to attorneys?

11 MR. ORSINGER: Because they want to be able
12 to disqualify lawyers who run clients. I mean, that's the
13 one thing about this that I think is justifiable. If you
14 know that this, if you have evidence this lawyer acquired
03:47 15 this client illegally, then you can forfeit his fee.
16 That's what the end of this deal does. And so I agree we
17 should not institutionalize barratry; but if you find that
18 someone committed barratry, you should refer them to the
19 district attorney's office so they can put him in jail.
03:48 20 But it's also a defensible public policy so I'm going to
21 forfeit your fee and that the client has to pay no
22 attorney's fee.

23 CHAIRMAN BABCOCK: Buddy.

24 MR. LOW: I go back to this language, "a
03:48 25 person who is an attorney," like an attorney not a person.

1 I would put it "nonattorney" and "attorneys," because you
2 say, well, "to a person." Now let's go beyond people, and
3 let's talk about "attorneys." I think that would be a bad
4 thing.

03:48 5 (LAUGHTER.)

6 CHAIRMAN BABCOCK: Steve.

7 MR. TIPPS: I think the term, the way the
8 term "litigation payment" is used here is very
9 problematical because we're using the same word to
03:48 10 describe under certain circumstances something that is
11 blatantly illegal and other under other circumstances
12 something that we're saying is perfectly okay, that is to
13 say a referral fee up to \$50,000 or whatever. And so I
14 think the whole concept of here of this sort of
03:49 15 terminology and using a term calling something a
16 "litigation payment" which under some circumstances is
17 perfectly fine and under other circumstances is very bad.
18 So it's a flaw in the way this is put it together in my
19 mind.

03:49 20 CHAIRMAN BABCOCK: If we were to add the
21 language here "to any person other than an attorney,"
22 would that be barratry? I mean, would this just kind of
23 define it?

24 MR. LOW: Okay. Uh-huh (yes).

03:49 25 CHAIRMAN BABCOCK: Or not? Would there be

1 circumstances where it wouldn't be?

2 MR. ORSINGER: A lawyer referral service is
3 an example of where that's not a lawyer that you're paying
4 the referral fee, but there are certain rules where you
03:49 5 can pay. The San Antonio Bar Association takes I think a
6 third of every fee on every case they refer to every
7 lawyer on the list. The statutes permits that. And all
8 the big cities do it, don't they?

9 PROFESSOR DORSANEO: Not Dallas.

03:50 10 MS. SWEENEY: It's 10 bucks in Dallas.

11 PROFESSOR DORSANEO: 10 bucks.

12 MR. ORSINGER: Well, in San Antonio I was on
13 the board of directors for a year. We made a hell of a
14 lot of money off of that.

15 (LAUGHTER.)

16 MR. ORSINGER: Still do. It was probably a
17 violation of this Rule, because it was more than 15
18 percent.

19 CHAIRMAN BABCOCK: Hey, Paula, Dallas does
20 that?

21 MS. SWEENEY: 10 bucks. I believe they
22 either charge the client \$10 or they charge us. \$10 is in
23 there somewhere; but that's it. There it not a referral
24 fee.

03:50 25 HONORABLE CARLOS LOPEZ: They don't make a

1 cent.

2 MS. SWEENEY: No. I think they either the
3 lawyer has to pay the \$10 or they charge the clients \$10
4 for the service. But that's it. There is no referral
5 fee.

6 HONORABLE TOM GRAY: What are the Bar fees
7 versus the Bar fees in San Antonio?

8 (LAUGHTER.)

9 HONORABLE TOM GRAY: They're high in Dallas.

10 CHAIRMAN BABCOCK: Buddy.

11 MR. LOWE: The ethics committee wrote an
12 opinion. There is an ethics opinion on that saying it is
13 ethical, you know, to pay a referral fee to such an
14 association. I don't know. I helped write it; I can't
15 remember what they said.

16 (LAUGHTER.)

17 CHAIRMAN BABCOCK: Paula.

18 MS. SWEENEY: Chip, on this section (a)(1)
19 litigation payment, --

20 CHAIRMAN BABCOCK: Yes.

21 MS. SWEENEY: -- I totally agree with you,
22 Richard. If we can -- you know, we do need to get rid of
23 runners. Great. Wonderful. But this isn't where it
24 goes. This needs to go somewhere in the barratry rules
03:51 25 that a consequence of using a runner includes

1 disqualification of the lawyer.

2 MR. ORSINGER: But you have to get the
3 legislature to do that.

4 MS. SWEENEY: Oh, guess that probably will
03:51 5 be real hard. But this doesn't go here is my point. And
6 this isn't a mechanism. It is an absurdity to draft
7 something that says "If you're using an illegal runner,
8 please notify the Court." I mean, I'm not going to
9 participate in that. That's silly.

03:51 10 CHAIRMAN BABCOCK: The way it reads now you
11 can make a payment to a lawyer assuming a lawyer is a
12 person "with respect to the referral of an attorney," that
13 would be okay, "a client or a case," that would be okay,
14 if it was a lawyer, "the solicitation of a client or a
03:52 15 case by any means that does not include the name of lead
16 counsel or lead counsel's law firm or the forwarding or
17 transmitting a case to an attorney." And there is an "or"
18 between (b) and (c), but not between (a) and (b). Carlos.
19 I'm sorry. Judge Bland.

03:52 20 HONORABLE JANE BLAND: What about starting
21 with provision (a), "Litigation payment includes" I think
22 we should say "is a payment," because includes indicates,
23 as we've discussed before, other kinds of payment, and
24 there's all other kinds of payments --

25 CHAIRMAN BABCOCK: Yes.

1 HONORABLE JANE BLAND: -- we don't want
2 covered by this Rule. And then why don't we just use
3 "to," "includes payment to a attorney who" and use the
4 definitions under (2), take out (1), and have the -- have
03:53 5 as an additional basis for disqualification a litigation
6 payment made to a nonattorney, nonlawyer.

7 CHAIRMAN BABCOCK: So that would be (d)(5)?

8 HONORABLE JANE BLAND: That's (d)(5).

9 HONORABLE TOM LAWRENCE: Is that
10 constitutional?

11 HONORABLE JANE BLAND: Well, I mean, I think
12 we've already noted that there are constitutional and
13 other concerns, lots of concerns with the Rule; but I'm
14 just proceeding on the basis that we need -- there is a
03:53 15 problem and this is the way that we're right now trying to
16 fix it.

17 MR. BOYD: So are you limiting the
18 definition of "litigation payment" to be a payment to a
19 lawyer?

03:54 20 CHAIRMAN BABCOCK: That's what it sounds
21 like.

22 HONORABLE JANE BLAND: Right. Because
23 otherwise we have the problem of paying experts, paying
24 all other kinds of litigation costs and expenses that are
03:54 25 not really what this Rule is about and should not be

1 governed by this Rule.

2 CHAIRMAN BABCOCK: Yes, Richard.

3 MR. MUNZINGER: It seems to me that one
4 reason that (A) is included in the Rule is to make it
03:54 5 incumbent upon the attorney who has knowledge of barratry
6 that he report it. If you're only going to make
7 litigation payments apply to attorneys, you defeat that
8 portion of the proposed Rule, because if I am a lawyer who
9 has received a referral fee or even if I have not received
03:54 10 it maybe, and I am aware of a litigation payment being
11 made to a nonlawyer, I have to report it to the court.
12 That's all this criticism that "Who is going to confess to
13 barratry?"

14 But the point of the matter is that you're
03:55 15 making this there are two ways of disqualifying somebody.
16 One, you get a fee higher than the permitted amount. (B),
17 you knew of a referral paid to a nonlawyer and you didn't
18 report it. So you're kicked out too.

19 HONORABLE TOM GRAY: Well, am I misreading
03:55 20 the disqualification? It just disqualifies you as lead
21 counsel. It doesn't kick you out of the case.

22 CHAIRMAN BABCOCK: Buddy.

23 MR. LOW: I mean, would we want to make it
24 clear that we recognize certain litigation payments may be
03:55 25 legal and permissible as authorized under this Rule while

1 others are unethical or illegal under existing Rule so
2 that we show that we recognize and know that this may
3 include both? In other words, the way it does it looks
4 like it's putting -- it doesn't tell you that. It doesn't
03:56 5 predicate it that way. And if you did that, at least it
6 would recognize that we say some of these may be
7 permissible under the Rules; but some of these are not,
8 and we're not blessing them by just defining them. I just
9 raise the question whether the committee would want to
03:56 10 consider that.

11 CHAIRMAN BABCOCK: Good point, Buddy. Bill.

12 PROFESSOR DORSANEO: It's hard to know why
13 we're calling referral fees made to attorneys "litigation
14 payments" and why if we wanted to suggest that the
03:56 15 referral fees, you know, need to be disclosed and limited,
16 we don't just do that instead of using this jargon that is
17 hard to follow and seems to be mixing one thing with
18 another for whatever reason. At least one byproduct of
19 the mixture is it's hard to follow.

03:57 20 MR. JEFFERSON: I absolutely agree with
21 that. Let's call it a referral fee. If we are going to
22 do it, call it anything instead of a "litigation payment,"
23 because I don't know what that is. And secondly, it's
24 not. A referral fees includes a payment to any person not
03:57 25 "with respect to," but "in consideration of" or "in

1 exchange for."

2 CHAIRMAN BABCOCK: Okay. If you call it
3 "referral fee," does that limit it in a way that calling
4 it "litigation payment" doesn't?

03:58 5 MS. SWEENEY: Yes.

6 CHAIRMAN BABCOCK: Paula.

7 MS. SWEENEY: The way this is written it
8 includes if you hire local counsel on a contingency fee
9 basis and they haven't had a chance to do anything yet;
03:58 10 but they would have. You still have a fee agreement with
11 them. You're still going to pay them actually not even a
12 contingency fee, even an hourly basis. But, you know, if
13 you pay them a retainer, whatever you might do, it would
14 include consulting lawyers. It would include if you got
03:58 15 somebody early on and you put them on hold to be your
16 appellate lawyer later, and they haven't done anything
17 yet, but they are yours and you agreed to pay them. There
18 are whole -- and that both sides of the Bar, plaintiffs or
19 defense side they may not yet have whatever the language
03:58 20 is, "performed any meaningful legal service," but you may
21 still want to compensate them for having been part of the
22 team. And so if all we're aiming at is referral fees,
23 this is hugely overbroad.

24 CHAIRMAN BABCOCK: So your point there,
03:58 25 Paula, would be if just say you have got a big case. You

1 know that it's going to be hotly contested. You're trying
2 to get your team together. Your appellate lawyer is
3 probably not going to appear.

4 MS. SWEENEY: Right.

03:59 5 CHAIRMAN BABCOCK: You've got an agreement
6 with him though you're going to pay him something.

7 MS. SWEENEY: Right.

8 CHAIRMAN BABCOCK: Because he's not going to
9 do it otherwise.

10 MS. SWEENEY: Right.

11 CHAIRMAN BABCOCK: And --

12 MS. SWEENEY: And I don't want to other side
13 to get him first.

14 CHAIRMAN BABCOCK: Yes.

03:59 15 MS. SWEENEY: So I want to lock him up
16 early.

17 CHAIRMAN BABCOCK: Right. You want to get
18 him.

19 HONORABLE TOM GRAY: And in fact that
03:59 20 appellate lawyer may never appear in the case, may never
21 do any work; but yet you pay them a retainer early on and
22 he would have to disclose that under this or be in
23 violation of the rule.

24 MS. SWEENEY: Exactly. Or a defense lawyer
03:59 25 may hire a coverage counsel and not use him; but they may

1 want him, and they may pay him, you know, a fee up front,
2 or I may hire. I mean, you know, there's all kinds of
3 folks you hire that isn't anybody else's business but your
4 own.

03:59 5 CHAIRMAN BABCOCK: Well, the problem is
6 though that you have hired them, they haven't provided
7 substantial professional services and they haven't
8 appeared. So and they're not lead counsel and they're not
9 associated with lead counsel in the same law firm.

03:59 10 MS. SWEENEY: Right. So I would have to
11 disclose them.

12 CHAIRMAN BABCOCK: So they don't get -- so
13 now not only do you have to disclose them. But are you
14 going to get caught by (d)(3),

15 MS. SWEENEY: Yes. And, you know, let's say
16 I don't think that the other side has a coverage issue;
17 but they're not raising it; but I want it iced because I
18 want to be ready if their light bulb ever goes on. And so
19 I've got somebody on retainer. And if I have to disclose
04:00 20 that guy, they're going to say "Well, huh. How come she's
21 got a coverage lawyer on this case?"

22 MR. MUNZINGER: That raises work product
23 problems and disclosure problems and tactical strategic
24 problems obviously.

04:00 25 MS. SWEENEY: Yep.

1 CHAIRMAN BABCOCK: Right. Justice Gray and
2 then Steve.

3 HONORABLE TOM GRAY: It's a valid concern.
4 I would think that you could address it in (2) sub (b), it
04:00 5 would be "has not appeared in a case or provided
6 substantial professional services" simply by saying "is
7 not anticipate to provide substantial professional
8 services." And while it does interject an element of
9 judgment in it, I mean, based upon good faith
04:00 10 consideration, I mean, at the time, you know, you're going
11 to be able to identify those lawyers that you anticipate,
12 like the appellate practitioner, the that counsel is going
13 to provide the coverage issues.

14 CHAIRMAN BABCOCK: Yes. Steve and then
04:01 15 Buddy and then Pam.

16 MR. TIPPS: If the goal or if the Supreme
17 Court believes that it would be a good thing to limit the
18 amount of money that referral, that lawyers can get by way
19 of a referral fee, and it wants to impose a Rule that
04:01 20 effectively prohibits that, it seems to me that some
21 consideration should be given simply to prohibiting a
22 referral fee in excess of whatever and see if that solves
23 the problem before writing a Rule with all this
24 complicated disclosure and disqualification and that kind
04:02 25 of thing.

1 Now I understand that if you want to put it in the
2 Rules of Procedure you then need to tie it to some
3 procedural anchor.

4 CHAIRMAN BABCOCK: You need to put a little
04:02 5 procedure in there.

6 (LAUGHTER.)

7 MR. TIPPS: This just seems to me to be such
8 an elaborate undertaking that may not be necessary to
9 address the problem.

04:02 10 CHAIRMAN BABCOCK: Buddy.

11 MR. LOW: The expert you're talking about
12 could be taken care of. It wouldn't answer a lot of the
13 problems; but we dealt with this on the ethics when we
14 were drawing the ethics it was moved to put "work
04:02 15 performed or responsibility in the case." And then the
16 question responsibility in the case was "Well, I'm
17 responsible for keeping a client happy and drinking coffee
18 with him and keeping him posted on what is going on in the
19 case." So that wouldn't do it. But it would take care of
04:02 20 the situation where lawyer X is responsible for the
21 appellate work and so forth and he could be legitimately
22 paid.

23 But I can tell you no matter how you draw it
24 there are going to be so many ways. You have to draw it
04:03 25 with no loop holes anywhere if you want it, because they

1 can get responsibility, they can get. There are so many
2 ways to collect it.

3 CHAIRMAN BABCOCK: Pam.

4 MS. BARON: I'm having trouble reading
04:03 5 through the section and understanding the drafting of it
6 and making it parallel, because I don't understand why
7 it's divided into two sections. And it strikes me that a
8 lot of the concerns about throwing the net broadly with
9 respect to attorneys would be cured if section one also,
04:03 10 if we're only talking about referral solicitation or
11 forwarding payments and the attorney, I mean, if it's one
12 and two with respect to attorneys, not just they haven't
13 appears. But they haven't appeared and they're getting
14 payment for a referral. I mean, otherwise it is just
04:04 15 casting any payment to any attorney in a case suddenly
16 comes under the disclosure Rule. Right? Pretty much. So
17 I don't understand the drafting of whether one also is
18 supposed to apply to (2).

19 CHAIRMAN BABCOCK: Okay. It says "or." But
20 Judge Patterson.

21 MS. BARON: But it doesn't make sense,
22 because then it's no longer related to referral,
23 solicitation or forwarding fees.

24 CHAIRMAN BABCOCK: Right.

04:04 25 MS. BARON: It's just any payment.

1 CHAIRMAN BABCOCK: Right. Judge Patterson
2 and then Judge Lawrence.

3 HONORABLE JAN P. PATTERSON: Well, as far as
4 we know the trouble period is that initial referral, and
04:04 5 we're not concerned so far as we know about some evil
6 about subsequent appellate lawyers, coverage lawyers, the
7 prosecution of the lawsuit. So if somehow we could add
8 some language such as the initial referral, I recognize
9 that somebody might interpret that as if I'm the second
04:05 10 referral or the third, I mean, obviously somebody can
11 always get around the language; but if you could just
12 address it at the temporal sense to getting to the real
13 lawyer, that you might be able to address the evil.

14 CHAIRMAN BABCOCK: Judge Lawrence, then
04:05 15 Judge Bland and then Richard.

16 HONORABLE TOM LAWRENCE: When you have these
17 arrangements does the lawyer that makes the initial
18 contact always sign the client up?

19 MS. SWEENEY: No.

04:05 20 CHAIRMAN BABCOCK: Judge Bland.

21 HONORABLE JANE BLAND: Picking up on Judge
22 Patterson's comment, could we do it prior to the filing of
23 the lawsuit?

24 CHAIRMAN BABCOCK: Well, you could; but
04:05 25 Paula is going to sign up, before she files her lawsuit

1 she is going to have her appellate guy hooked up and she's
2 going to have her coverage guy hooked up probably or in a
3 lot of cases.

4 HONORABLE JANE BLAND: Okay. So that won't
5 help.

6 CHAIRMAN BABCOCK: So that won't help.
7 Richard.

8 MR. ORSINGER: If I was reading this
9 accurately, and correct me if I'm not, this applies to a
04:06 10 client who makes a payment, a client who is hiring lawyers
11 to work by the hour for retainers and who hires a lawyer
12 who doesn't, is not lead counsel and who hasn't signed on
13 the pleadings. So if a client want to hire somebody and
14 pay them a retainer and then hire somebody else to
04:06 15 actually file the lawsuit, that until substantial
16 professional services are done the lead lawyer has to
17 disclose the existence of the other lawyer, right, even if
18 it's a client that is hired only to work for you by the
19 hour?

20 MS. SWEENEY: Yes.

21 MR. ORSINGER: So what is the public
22 policy there. In other words, I want to go ahead and pay
23 this guy \$25,000 to stand by; but I have another lawyer
24 over here who is fronting my case. But the second he
04:06 25 files the petition he has got to reveal the fact that I've

1 hired this other lawyer, because that guy hasn't done any
2 substantial work yet. And why am I being forced to do
3 that?

04:07 4 CHAIRMAN BABCOCK: We recognize that as a
5 problem, and Justice Gray has got a fix for that.

6 MR. ORSINGER: He does? Okay.

7 CHAIRMAN BABCOCK: Which says "or is not
8 anticipated to provide substantial professional services."
9 So in Paula's example her appellate guy, she anticipates
04:07 10 hes' provide substantial professional services, the
11 coverage she anticipates, so you get out of that problem.

12 MR. ORSINGER: Okay.

13 CHAIRMAN BABCOCK: Somebody else way down
14 there. Judge Lawrence.

04:07 15 HONORABLE TOM LAWRENCE: What would keep her
16 from saying that she anticipates that this other person is
17 also going to provide services? Where is the burden here
18 to disprove that?

19 CHAIRMAN BABCOCK: Well, you know, obviously
04:07 20 I think that the issue is the person who picks up the
21 phone and says, you know, "Paula, you know, here is a
22 client, you know, all wrapped up for you. I want 20
23 percent of your fee." And "See you later. Have a nice
24 later and send me a check." Anything else, you know, you
04:08 25 can get out of the Rule. Anything where you are working

1 on the case you can get out of the Rule. And frankly, if
2 this comes out the way, you know, it probably will, you
3 can get out of the rule pretty easily by being the
4 referring lawyer and saying "Paula, you know, I want to
04:08 5 cut my best, our usual deal; but I guess I'm going to have
6 to be on the pleadings and kind of be a little bit
7 involved. And sorry. I'll try not to get in your hair."
8 Ann.

9 MS. MCNAMARA: Isn't (2) unrelated to
04:08 10 referral fees and really dealing more with cutting your
11 friend in on a lucrative case? Not that your friend
12 brought it to you. But it's after the fact giving someone
13 access to fees who wouldn't otherwise have any interest in
14 that case. And that to me makes more sense with the words
04:09 15 as being the evil that is being attacked here.

16 And I would share Paula's concern about having to
17 disclose a whole bunch of people that you've brought into
18 a case who you hope will never perform any significant
19 services.

04:09 20 CHAIRMAN BABCOCK: Yes. I agree. I think
21 we all think that. I think you fix that if you add
22 Justice Gray's language; but I don't follow your point on
23 cutting your buddy in.

24 MS. MCNAMARA: Because two things: If it's
04:09 25 cutting your buddy in, there is no referral involved.

1 It's not like your buddy brought you the case. You have
2 got the case. You can steer the business, and you want to
3 bring in someone to participate in the fees who is not
4 going to work on the case, who didn't refer it, has never
04:09 5 heard of the case before; but by making that, by putting
6 that person, quote, unquote "on the team" they will share
7 in the fees.

8 And I don't think Tom's words really address the
9 situation or solve the problem for that roster of people
04:10 10 you may have on the big case who you sincerely hope will
11 never do a thing on the case. You don't anticipation they
12 will make a contribution. Only if the case cuts to the
13 left or right is it that they're going to do anything;
14 but you want them in your stable just in case if you get
04:10 15 to a certain size case where it doesn't matter what you
16 pay them. You just want them on your side, not on the
17 other side; but you hope they never do any work.

18 MS. SWEENEY: The cutting your buddy in
19 thing, maybe someone else had had that experience. I
04:10 20 can't imagine why I would want to do that. I want to
21 just give my buddy some of my money? They're not that
22 good a friend.

23 (LAUGHTER.)

24 COMMITTEE MEMBER: Call it the "Dan Morales
25 case."

1 MS. SWEENEY: Yes, the Dan Morales case.

2 (LAUGHTER.)

3 CHAIRMAN BABCOCK: We're not going to write
4 a rule for that.

04:10 5 MS. SWEENEY: But I'm not sure that happens.

6 MS. MCNAMARA: I'm not sure it does that
7 much either; but to me that's the evil that this seems to
8 be pointed at; but I'm not sure it's worth writing a Rule
9 to prevent a bad pattern that doesn't seem all that
04:11 10 realistic to keep, you know, coming up.

11 CHAIRMAN BABCOCK: Richard.

12 MR. ORSINGER: I'm not comfortable with
13 making people who hire lawyers disclose that they have
14 hired them, and the only reason they don't have to is
04:11 15 because of some substantial expectation exception. Are we
16 saying here that if we don't even have a contingent fee
17 case, that a person who makes decisions about hiring
18 lawyers has to file a notice in the record of the lawsuit
19 as to who he has paid money to?

04:11 20 MS. BARON: Yes.

21 MR. ORSINGER: I can't imagine a possible
22 reason under any circumstance that we would ever require
23 that of someone who is not on a contingent fee. I can't
24 imagine any public policy that supports that; and it seems
04:11 25 to me to inappropriately invade the right of the

1 individual to consult with lawyers who they choose the
2 other side not to know. I mean, they do not want the
3 other side to know that they have paid this lawyer a fee.

4 MR. MUNZINGER: He raises as very valid
04:12 5 point. Some years go I was involved in a fraud case, and
6 I needed an insurance specialist who practiced in front of
7 an insurance commission. And if I would have tipped my
8 hand to my adversary, I would have tipped my hand to the
9 motion for summary judgment which I ultimately won. The
04:12 10 other side could have covered its tracks in discovery
11 possibly. It's a very valid criticism.

12 MR. ORSINGER: What if you have a civil
13 dispute and somebody goes and pays a retainer to a
14 criminal lawyer and then they say "You hired the best
04:12 15 criminal lawyer in town." Somebody is going to say "What
16 in the hell did they do that for?"

17 MR. MUNZINGER: You are going to alert your
18 adversary to issues they never dreamed of.

19 MR. ORSINGER: I mean, if the public policy
04:12 20 here is that we don't like referral fees, let's not be
21 passing a Rule that makes people who are not paying
22 referral fees disclose a list of all the lawyers they
23 consult.

24 CHAIRMAN BABCOCK: Carlos.

25 HONORABLE CARLOS LOPEZ: I agree with

1 Richard. I've heard that same sentiment expressed several
2 times here. I think it could be, and I've never met Joe
3 Jamail, and he may not like me after what I have to say.
4 But this particular provision the way it's written is a
04:13 5 car wreck; and we should declare it totaled and start over
6 and just do.

7 (LAUGHTER.)

8 HONORABLE CARLOS LOPEZ: I mean, I think we
9 all know what we're trying to do here. And I used to tell
04:13 10 lawyers when I used to argue, I'd say "What are you trying
11 to say?" "Well, I'm trying to say da, da, da, da, da."
12 Well, then just say it. Why don't we just put in this
13 Rule what we're trying to say.

14 CHAIRMAN BABCOCK: Yes. Pam, did you have
04:13 15 your hand up?

16 MS. BARON: Well, I think this feeds into
17 the point I was making earlier, which I think is the
18 payment has to be (1) and (2), not just (2); but it has to
19 be for this purpose and the attorney doesn't do anything.

20 CHAIRMAN BABCOCK: Okay.

21 MS. BARON: But not just the attorney
22 doesn't do anything.

23 CHAIRMAN BABCOCK: Yes. You have got to --
24 the Rule can't capture the type of people that Richard and
04:13 25 Richard and Paula and others were talking about like the

1 criminal lawyer or the coverage specialist --

2 MS. BARON: Right.

3 PROFESSOR DORSANEO: Or the professor.

04:14 4 CHAIRMAN BABCOCK: No. Professors we have a
5 special rule for professors.

6 (LAUGHTER.)

7 MS. BARON: And it's supposed to be directed
8 at referral type arrangements. Not other type
9 arrangements.

10 CHAIRMAN BABCOCK: Yes.

11 MS. BARON: So you have to say it falls into
12 this bucket or this purpose "and" the attorney doesn't
13 appear or do substantial work. But not just the attorney
14 doesn't appear or do substantial work, because then you do
15 capture --

16 CHAIRMAN BABCOCK: Right.

04:14 17 MS. BARON: -- the criminal lawyer or the
18 Insurance Commission lawyer or people that really are not
19 relevant to the evil that the Rule is allegedly trying to
20 attack.

21 CHAIRMAN BABCOCK: Got you. Frank.

04:14 22 MR. GILSTRAP: Maybe we could do it this
23 way: "A litigation payment includes payment to any person
24 for a referral A, B or C provided that it does not include
25 a payment to a person who is the lead counsel or is

1 associated with the lead counsel or to a person who
2 appears in the case," something like that. And so you
3 create the class of payments, referral payments, and then
4 you carve out the ones that you don't want to disclose.
04:15 5 Maybe that will work.

6 CHAIRMAN BABCOCK: Richard.

7 MR. ORSINGER: It will work better. Can I
8 add on there if we're excepting things out, our current
9 grievance rule 1.04 about fee sharing also excepts out
04:15 10 payments to former partners or associates pursuant to a
11 separation or retirement agreement. And we certainly want
12 to recognize if somebody is entitled to receive part of a
13 fee because they were a partner at the we signed up
14 something, that that doesn't have to be part of the
04:15 15 disclosure process. By the way, that's 1.04 subdivision
16 (g).

17 CHAIRMAN BABCOCK: Stephen.

18 MR. TIPPS: Here is my next effort at
19 simplification. I would propose we consider replacing the
04:15 20 term "litigation payment" with a term like "unearned
21 referral fee," which is what we're talking about. We are
22 not talking about referral fees that are earned because
23 somebody does work; but we're talking about quote
24 "windfalls," and we're willing to allow a \$50,000
04:16 25 windfall, but nothing bigger than that. And the first

1 section, the definition section reads something like "An
2 unearned referral fee is a payment to an attorney who does
3 not and is not expected to provide substantial
4 professional services in consideration of referral of a
04:16 5 client or case." I mean, maybe that doesn't catch
6 everything; but it seems to catch most of what we're
7 talking about and it eliminates all of this irrelevant
8 stuff with regard to lawyers to other lawyers whom we're
9 not concerned about.

04:16 10 MR. GILSTRAP: You carved runners out too.

11 MR. TIPPS: Yes. Because I agree with
12 whoever said it, that we don't need to be dealing with --
13 we're not trying to address the problem of runners I don't
14 thin. We are trying to address the problem of unearned
04:17 15 referral fees.

16 CHAIRMAN BABCOCK: Stephen, would you repeat
17 that again a little slower?

18 MR. TIPPS: "An unearned referral fee is a
19 payment to an attorney who does not, and is not expected
04:17 20 to, provide substantial professional services in
21 consideration of referral of a client or case."

22 MS. BARON: Can you read it one more time?

23 MR. TIPPS: "An unearned referral fee is a
24 payment to an attorney who does not, and is not expected
04:17 25 to, provide substantial professional services in

1 consideration of referral of a client or case."

2 MR. GILSTRAP: You could add "provides
3 substantial professional services or appear in the case."

4 MR. TIPPS: You could add that.

04:18 5 CHAIRMAN BABCOCK: Okay.

6 MS. SWEENEY: Could I suggest a friendly
7 amendment to it?

8 CHAIRMAN BABCOCK: Bill was recognized first
9 and then you can friendly amend it.

04:18 10 PROFESSOR DORSANEO: Would it help to
11 educate who is making the payment even if it's by any
12 person? I doubt that we would say "by any person." I
13 think we would identify maybe lead counsel, maybe the
14 person to whom the case is referred; but it bothers me
04:18 15 that it's just a payment that's not clearly being made by
16 some inappropriate, in some inappropriate context.

17 MR. BOYD: No. It says "in exchange for
18 referral to the case."

19 PROFESSOR DORSANEO: I know it says that.
04:18 20 But who is making the payments?

21 CHAIRMAN BABCOCK: In consideration. Paula,
22 is your friendly amendment going to fix this?

23 MS. SWEENEY: No. It fixes something else.

24 CHAIRMAN BABCOCK: Okay. Let's let Paula
04:19 25 have here friendly amendment.

1 MS. SWEENEY: The only word I hang on is
2 "unearned," because it's I think false to say that. You
3 have done a service to the client by referring them. And
4 really why don't we just call it a referral fee, because
04:19 5 that's what it is. If they're working on the case, it's
6 no longer a referral fee. It's payment for services
7 rendered. So if we just drop that word, I think you have
8 isolated the universe that this is putatively aimed at
9 anyway.

04:19 10 MR. TIPPS: I have no problem with that.

11 PROFESSOR DORSANEO: Okay. Back to Bill's
12 proper.

13 MR. HAMILTON: I think if you put in the
14 "not expected to perform professional services," that's a
04:19 15 pretty big loop hole. You're going to have people saying
16 "Well, I didn't make the disclosure because I expected him
17 to perform some services."

18 CHAIRMAN BABCOCK: We went to trial. He was
19 going to be right, you know, holding my guy's hand.

04:20 20 MR. HAMILTON: Yes. But it never happens;
21 but I thought it might.

22 CHAIRMAN BABCOCK: Judge Bland.

23 HONORABLE JANE BLAND: With respect to that,
24 we have a lot of Rules that have a good faith element
04:20 25 involved, like frivolous pleadings when you sign that you

1 have made a good faith effort; and some of that
2 determination gets made, and you basically start with the
3 proposition that they have an expectation that somebody is
4 going to participate and then somebody will have to come
04:20 5 in and show that that is not the case. But I don't have a
6 problem with putting that in there, because it doesn't
7 seem to me to be any different than somebody having a good
8 faith argument for the extension of law or a good faith
9 belief in the facts, that the facts alleged in a pleading
04:20 10 are true. This is just a good faith expectation that
11 they're going to participate.

12 CHAIRMAN BABCOCK: Judge Gray, Judge
13 Patterson and then Carlos.

14 HONORABLE TOM GRAY: I would like to leave
04:21 15 it where it captures more payments than just payments to
16 lawyers as it is currently drafted. And I thought that
17 Pamela's suggestion of changing the word at the end of
18 subsection (1) "or" to "and" was a fix that cured most of
19 the complaints I've heard, would not then require my
04:21 20 amendment of "anticipated to provide," because all of the
21 lawyers that were discussed, the criminal lawyer, the
22 coverage lawyers, the attorney fee lawyers -- excuse me --
23 the appellate lawyer, none of those lawyers come within
24 subsection (1), because you're not paying those lawyers
04:21 25 for the referral of an attorney or a client or

1 solicitation or the forwarder. And it just seems to fix
2 the complaint that everybody was complaining, because
3 you're hiring a lawyer for a specific reason other than in
4 subsection (a); and so I thought that Pamela Baron's
04:22 5 suggestion of changing the word "or" at the end of (1) to
6 "and" fixed that problem.

7 CHAIRMAN BABCOCK: Judge Patterson, then
8 Carlos, then Bill.

9 HONORABLE JAN P. PATTERSON: I think that
04:22 10 Stephen's draft really captures and addresses the problem.
11 I like the use of the word "referral fee." I think that
12 we don't "unearned," as Paula says. I don't even think we
13 need to define it. And I think that takes care of my
14 concern about the temporal concern or the initial
04:22 15 referral, because you know it when you see it. And one of
16 the things that concerned me about the Rule initially is
17 is this whole notion of no one really knew what the evil
18 was we were trying to address and it suffered from a lack
19 of transparency. What is the real reason for this Rule?
04:22 20 This draft captures the transparent real reason for it;
21 and I think it should be confined in that way. And by
22 confining it to referral fees and making it simple and not
23 an elaborate definition I think it confines it to the Joe
24 Millionaire type of advertisement or O.C. type of
04:23 25 advertisement that we seen on television and captures that

1 moment in time.

2 MR. TIPPS: How did O.C. get into this?

3 MR. SCHENKKAN: Now you're really cutting
4 close.

04:23 5 (LAUGHTER.)

6 HONORABLE JAN P. PATTERSON: But it
7 addresses that point in time. And I used tell my FBI
8 agents that, we had a saying is "The main thing is to keep
9 the main thing the main thing."

10 (LAUGHTER.)

11 HONORABLE JAN P. PATTERSON: And so we're
12 trying to capture this small moment in time and address
13 that, and I think this says it.

14 CHAIRMAN BABCOCK: Okay. Bill, you're next.

04:23 15 PROFESSOR DORSANEO: Back to my other point:
16 I would say "by any person." I don't think the lead
17 attorney. I don't want the lead attorney, if we get that
18 far, to be able to say "I didn't make the payment, so I
19 don't have to do the disclosure.

04:24 20 CHAIRMAN BABCOCK: So if you're using
21 Stephen's model, you would say "referral fee is a payment
22 by any person to an attorney who is not" --

23 PROFESSOR DORSANEO: That may be too broad;
24 but I think it's maybe not too broad.

25 CHAIRMAN BABCOCK: Elaine.

1 PROFESSOR CARLSON: If I could digress for
2 just a minute. Do we know what the experience is in other
3 states, very few having a referral fee? Based on the
4 conversation we had earlier and what Paula was stating I
04:24 5 guess we are to assume that less qualified lawyers handle
6 cases in those states because they have the economic
7 incentive to keep the case and not refer it. I'm
8 wondering if that is really valid. And why do we have
9 such a poor system of referral? Why are people going to
04:25 10 the Texas Hammer and then getting through to Paula? What
11 is wrong with our referral system?

12 MR. TIPPS: If we all chipped in, then Paula
13 can advertise too.

14 PROFESSOR CARLSON: No. I'm serious.
04:25 15 Richard's comment, San Antonio and other places. What has
16 the Bar done to try and improve the information to the
17 public so that they can make the best decision in the
18 marketplace for good lawyers? They're not going through
19 the mass marketing, which is what we're giving them or TV
20 Guide.

21 CHAIRMAN BABCOCK: Justice Hecht.

22 HONORABLE NATHAN HECHT: Well, one of the
23 problems is I'm afraid the Bar does not have much
24 incentive to do that because its members make money on the
04:25 25 current system. So they have had multiple opportunities

1 to confront that; but I think most of the effort, some of
2 the efforts work locally. And the State Bar has a
3 referral system; but they're all pretty anemic --

4 PROFESSOR CARLSON: Well, shame on us.

04:26 5 HONORABLE NATHAN HECHT: -- and
6 underbudgeted.

7 PROFESSOR CARLSON: And what about the first
8 question, Justice Hecht? What happens in other states
9 where they don't allow referral unless you have
04:26 10 significant participation in the case? How does that
11 operate in most other states?

12 HONORABLE CARLOS LOPEZ: Payment in kind.
13 Cross referral, I'm guessing.

14 MS. SWEENEY: No. I've been in some of
04:26 15 those states.

16 HONORABLE CARLOS LOPEZ: I mean, "Remember
17 me."

18 PROFESSOR CARLSON: And?

19 MS. SWEENEY: They follow you around. They
04:26 20 come to everything and sit there.

21 PROFESSOR CARLSON: And we don't require it
22 because we don't want to, you don't want to babysit those
23 lawyers?

24 MR. GILSTRAP: That's how it used to be in
04:26 25 Texas. And they appeared. They just didn't do much; but

1 they were always there.

2 PROFESSOR CARLSON: Maybe they were
3 learning.

4 CHAIRMAN BABCOCK: Get them off the streets
5 anyway. Buddy. CLE.

6 (LAUGHTER.)

7 MR. LOW: One of the problems, just take the
8 advising lawyer, The Hammer.

9 (LAUGHTER.)

04:26 10 MR. LOW: I guess everybody sees The Hammer.
11 And he's got a fine case. And we pass this Rule, and we
12 really do it right like we're working to do right now, and
13 we're trying to do away with somebody getting a referral
14 fee when they really don't earn it. All they've done is
04:27 15 advertise. So what will The Hammer do? He'll say "Put my
16 name on the pleadings."

17 MR. ORSINGER: File a lawsuit.

18 MR. LOW: "I've got this young associate.
19 He graduated yesterday.

20 (LAUGHTER.)

21 MR. LOW: And he's going to come down there
22 and he's going to watch you, and he's coming by. And I'm
23 supervising this thing; and I'm going to see that you do
24 it right, because I don't know anything about it, but I'll
04:27 25 see that you are doing it right." He'll send down there

1 every week to look at a deposition or do something or
2 that. And then he's going to get a fee.

3 So the only way you're really ever going to
4 cure it, and I hate to mention this, would be that if it
04:27 5 had to be up to the Court to see the merits of what they
6 did. Because otherwise, and I don't advocate that; but
7 otherwise they're going to send that associate down there.
8 He's going to do that. They are going to call. They are
9 going to get in the way. They're going to summarize
04:28 10 depositions that Paula can't use and she's got to do them.

11 HONORABLE JAN P. PATTERSON: Of course that
12 never happens on the other side.

13 MR. LOW: What?

14 HONORABLE JAN P. PATTERSON: Of course that
15 never happens on the other side.

16 MR. LOW: I'm on this side right now.

17 (LAUGHTER.)

18 MR. LOW: So But at any rate, it's going to
19 be very difficult. And I'm not trying to --

04:28 20 PROFESSOR CARLSON: But why are we doing
21 something that someone can easily write around?

22 MR. LOW: What?

23 PROFESSOR CARLSON: So what we're doing is
24 something that someone can easily write around?

04:28 25 MS. LOW: No. I'm just saying that they

1 will find a way around it. And so we need to look at how
2 they're going to try to get around it in order to write
3 the Rule. And I don't know that I can do that. But they
4 can by doing all these things. And how can you say,
04:29 5 "Well, this boy's depositions wasn't helpful"? Or they'll
6 say "Okay. I'll communicate with the client." They'll
7 send an associate down at every hearing. Most judges
8 aren't going to mind.

9 MR. GILSTRAP: It doesn't have to be
04:29 10 helpful. It just has to be substantial. That is all that
11 is required.

12 MR. LOW: So all I'm saying is it is going
13 to be extremely difficult to write a Rule to prevent what
14 we want to prevent. And I'll say no more, because I can't
04:29 15 write such a rule.

16 CHAIRMAN BABCOCK: Just to be the devil's
17 advocate about that, there may be some benefit to the
18 client by having that young associate. Maybe he's got a
19 brain and he goes down to the hearing and he sees
04:29 20 something and reports back to this lawyer who has referred
21 the case and something good happens for the client just
22 because there is somebody there.

23 MR. LOW: It could; but accidents do happen.

24 (LAUGHTER.)

04:29 25 CHAIRMAN BABCOCK: Richard.

1 MR. ORSINGER: It seems to me that the
2 (2)(b) exception is going to make the Rule ineffective
3 anyway, because if you appear in the case, apparently this
4 Rule doesn't apply to you. Right? If you make an
04:30 5 appearance in the case?

6 CHAIRMAN BABCOCK: That's what it looks
7 like.

8 MR. ORSINGER: So on anything except what
9 they're afraid to file they'll go ahead and file the
04:30 10 lawsuit and then refer it rather than referring it after
11 they either get a contract referred after their original
12 intake.

13 MS. SWEENEY: And that's a great idea when
14 you've got expert requirements and they dick around with
04:30 15 40 of those days.

16 MR. ORSINGER: If they don't file the
17 lawsuit before they refer it, then there will be an
18 understanding with the referring lawyer that they'll be
19 listed as the third or fourth counsel on the pleading so
04:30 20 that they've made an appearance and then they don't even
21 have to send an associate over.

22 And if we take that out of there, instead of legal
23 assistant handling all these cases, we're going to have
24 baby lawyers handling all these cases. And they'll send
04:30 25 them to do substantial professional services and so forth.

1 And so in other words, I really do think this Rule is not
2 going to accomplish what it wants.

3 MR. MUNZINGER: You could change "or" to
4 "and" in subsection (2)(b) so that you require both an
04:31 5 appearance and substantial professional services. That
6 would put teeth in the Rule.

7 MR. ORSINGER: But then any lawyer in the
8 referring law firm can perform the services. It doesn't
9 just have to be the lawyer that signed the client up
04:31 10 initially. And so how do you avoid what Buddy talked
11 about with them sending a baby lawyer down to all the
12 hearings and then saving up the total time slips and
13 saying "Look. My law firm spent 100 hours on this thing.
14 That's substantial services."

04:31 15 MR. MUNZINGER: One thing about signing your
16 name to pleadings is that you assume certain
17 responsibilities to your client for malpractice and
18 ethics. And the fact that you've signed the pleadings you
19 assume those responsibilities. Now whether or not that
04:31 20 means anything in actual practice, and I'm not stupid
21 either; but at least you have their signature. And don't
22 misunderstand me. I'm not trying to get the Rule passed.
23 I'm addressing the problem. But change the "or" to "and."

24 CHAIRMAN BABCOCK: Paula.

04:32 25 MS. SWEENEY: I think a lot of what is

1 happening with our discussion is because we are back.
2 We're trying to solve the problem as I understand it. And
3 I don't like it any more than you do. But the guy with
4 the loud TV ad has no intention of ever doing anything but
04:32 5 refer the case and then he gets a big referral fee, the
6 problem is we're trying to solve it not by saying you
7 can't take a case you never intend to do anything on, only
8 to get a referral fee. We're trying to solve it by
9 backing into it through the Rules of Civil Procedure with
04:32 10 this backasswards approach that is running us into all
11 these problems.

12 And I think if we really want to solve that
13 problem, we need to write a rule. And if we're making
14 this a Rule of Civil Procedure, we can make that a Rule of
04:33 15 Civil Procedure. And the Court is saying "You can't
16 advertise for business you don't intend to take. If you
17 have an ad that says you're an aviation lawyer, then you
18 by God had better be an aviation lawyer. And otherwise
19 you have got a deceptive ad." I mean, doing this way is
04:33 20 why we keep running into wall after wall after wall
21 because we're trying to put something where it doesn't
22 fit.

23 CHAIRMAN BABCOCK: Carl.

24 MR. HAMILTON: What's wrong with having a
04:33 25 Rule that says "When a lawyer refers a case he's entitled

1 to no more X dollars or some minimum amount for the
2 refusal" period. That's all he's going to get? The
3 lawyer to whom he referred it can either enter into
4 additional agreements to compensate them for actual
04:33 5 services performed by him if he's going to do anything.
6 Otherwise he just gets some minimum fees less than \$50,000
7 or some minimum fee.

8 MR. GILSTRAP: Because that's not
9 procedural.

10 MR. HAMILTON: What?

11 MR. GILSTRAP: That's not procedural.

12 MR. BOYD: Is there anyone in the room that
13 supports the idea of having a codified cap on the amount
14 of the referral fee? I don't think that's what this was
04:34 15 about at all. And we've gotten diverted on talking about
16 the cap. I think it's a simple rule. I think it could be
17 very easily written. And we're not trying to prevent
18 referral fees. We're just saying disclose it if you do.
19 Let some sunshine on the process so people know what is
04:34 20 going on. And I think that is why appearing as counsel of
21 record is an alternative, because then we know. We know
22 this lawyer is at least willing to put their name on the
23 pleadings and it becomes a matter of public record.

24 All we're trying to say is I think, I mean, you
04:35 25 could even start with what is now subsection (d) with "The

1 Court must disqualify an attorney from acting as counsel"
2 I would believe we leave, "from acting as counsel for a
3 party in a case if the Court finds that," and then you
4 list those. And maybe you add a fifth one, get rid of
04:35 5 number three with the cap, add a fifth one having to do
6 with runner fees, you know, violation of the laws and
7 rules against runner fees; and then all you're trying to
8 do and then the rest of our focus and then you can throw
9 in the business about the right to sanction them and the
04:35 10 need for a hearing. And then all the rest of our focus is
11 on subparagraph (d)(1), what kind of disclosure is
12 required. And I think the way it was described earlier
13 about a referral fees as a payment being made by any
14 person to an attorney, you have got to disclose a referral
04:35 15 fees. And onces you have got that out there -- where is
16 it? You take 7.5(a) and call it what you want. You just
17 simply define what is it that has to be disclosed. And
18 all we're talking about is when a lawyer is paid money for
19 referring a case. When that happens you have got to
04:36 20 disclose it; and that's all we're saying.

21 PROFESSOR CARLSON: Jeff, can you articulate
22 why that sunshine is a good thing?

23 MR. BOYD: Because I think it ads some trust
24 to the system and to a profession that is subject to a lot
04:36 25 of distrust right now.

1 MS. SWEENEY: How? Because my client
2 already knows what I'm doing.

3 MR. BOYD: Well, you're client does, yes.
4 It's good for you and it's good for your client and it's
04:36 5 good for the referring lawyer; but it's not necessarily
6 good for the profession.

7 PROFESSOR CARLSON: How does the public get
8 that information and learn or trust?

9 MR. BOYD: In the same way that under 76(a)
04:36 10 you get information. I mean, you're making it public.
11 And it may be that two people find out about it; but the
12 mere fact that you have to make it public makes it
13 available so that people know "Hey, I can't just keep this
14 hidden." And just that is the disincentive to do
04:37 15 something that you're not willing to let your neighbors
16 know you're doing. And I think the nonlawyers out there
17 on the street today would think why are you-all fighting
18 so hard to not let people know you're doing this?

19 MS. SWEENEY: Then I want to know every
04:37 20 lawyer the defense firm consults.

21 HONORABLE LEVI BENTON: 76(a) was founded on
22 the Safety and Welfare of the Public. This has nothing to
23 do with safety and welfare of the public.

24 CHAIRMAN BABCOCK: That's unfiled discovery.
25 But Judge Bland.

1 HONORABLE JANE BLAND: I have a lot of
2 concerns about the disclosure provisions; but I suggest
3 that we go ahead and vote on the first section and then
4 take up disclosure second; and I suggest we go ahead and
04:37 5 vote on Stephen's proposed definition for referral and see
6 what the consensus of the group is with respect to that
7 and then discuss disclosure.

8 CHAIRMAN BABCOCK: That's probably not a bad
9 idea. Carlos and then Buddy.

10 HONORABLE CARLOS LOPEZ: It's kind of ironic
11 talking about sunshine and disclosure, Joe Bob at the
12 water cooler I don't think knows that the Hammer is a
13 referral mill and doesn't work on his own cases. They are
14 only going to know it when we force him to put a
04:38 15 disclaimer that says "I'm a referral mill. I don't work
16 on my cases." I mean, it's a distasteful ad. We want to
17 get rid of him; but this isn't the way to do it. I mean,
18 Joe Bob at the water cooler doesn't know about any of this
19 stuff.

04:38 20 MS. SWEENEY: Why are we only requiring
21 sunshine in this one area. I want to know every authority
22 every defense lawyer has ever consulted and who they put
23 on retainer that hasn't done anything.

24 CHAIRMAN BABCOCK: It's Rule 7.6. You
04:38 25 haven't looked at that. Buddy.

1 (LAUGHTER.)

2 MR. LOW: I mean, there can be an
3 attorney-client privilege just the fact that you hired a
4 lawyer.

04:39 5 MS. SWEENEY: That's right.

6 MR. LOW: And there are many ethics opinions
7 written on that. And you have that duty. And a lawyer
8 can't even short of being ordered to go to jail, he can't
9 even, if the client doesn't give consent, he can't even
04:39 10 tell it, tell about that lawyer. Now I realize that when
11 you get into the legal process then the Court may have
12 some authority to say "Well, I want to know who all is
13 involved in this." But it's going to run afowl of the
14 thing that they want the Hammer, and he and the Hammer
04:39 15 agreed, you know, "I don't want anybody to know. I am
16 ashamed that I went to him; but I didn't know anybody
17 else." And he have a privilege, an attorney-client
18 privilege on that.

19 CHAIRMAN BABCOCK: Privilege?

04:39 20 MR. LOW: Just the fact he hired him.

21 CHAIRMAN BABCOCK: Pete.

22 MR. SHENKKAN: I want TO support Jeff'S line
23 of thinking and suggest that maybe a purpose or at least
24 parts of this rule that might be --

04:40 25 CHAIRMAN BABCOCK: Pete, could you talk up a

1 little bit?

2 MR. SCHENKKAN: I want to support what Jeff
3 was saying by mentioning that "a purpose" of this rule you
4 might be able to narrow down to would be by requiring
04:40 5 disclosure of referral fees narrowly defined and perhaps
6 not defined, just the phrase "referral fees," and the
7 client acquiescence in those referral fees by the lead
8 lawyer does two things. One, it makes the lead lawyer who
9 really is a real lawyer he's going to stand up in this.
04:40 10 Remember he's got obligations in this too. And two,
11 creates somebody with a little bit more incentive and
12 opportunity to know that he might not have been well
13 served, to wit the client who now has an opportunity to
14 get fee forfeiture of the referral fee. But I'm not
04:40 15 saying that that is a good solution for everything. It
16 doesn't mean we need these other provisions in there about
17 caps on fees. There might be better ways to do this; but
18 it seems to me that the prophylactic of having a lead
19 lawyer who has to disclose pure referral fees and
04:41 20 disclose whatever it is the case of the client agreement
21 or consent to those might actually serve some limited
22 public good.

23 CHAIRMAN BABCOCK: Richard and then Paula
24 and then Bill.

04:41 25 MR. ORSINGER: It seems to me like we're

1 talking like we're somehow protecting the client; but you
2 don't have to have something filed in the district clerk's
3 office to protect the client. You only have to disclose
4 it to the client. And I'm having a hard time imagining;
04:41 5 and I wish somebody at some point in this debate would
6 articulate what hypothetical instance where filing this
7 piece of paper in the district clerk's is going to help
8 somebody. How is it going to help the client if it is
9 filed in the district clerk's official instead of giving
04:41 10 it to the client? How is it going to help the grievance
11 system? How is it going to help the public at large? How
12 is it going to help our reputation in the community that
13 these pieces of paper are filed in the clerk's office?
14 I'm having a hard time figuring out how this benefits
04:42 15 anybody. Maybe it let's the other lawyer know something,
16 the things of the opposing party. He can disqualify a
17 good lawyer two weeks before trial for not having tried.
18 I have not heard examples where this accomplishes anything
19 positive.

04:42 20 MS. SWEENEY: The sunshine theory, I see far
21 far greater abuses. The doctor with a longstanding
22 relationship with an insurance company paying a lawyer by
23 the hour that is unable to quit working for that carrier
24 who isn't doing the right thing by his doctor. Let's
04:42 25 start getting some disclosure of that in this rule. You

1 have to disclose all the clients that you represent, who
2 is paying you, how much they paid you last year. How
3 dependent on it are you and following their advice or
4 acting in the client's best interest. There are great
04:43 5 abuses there even in this system. We're not looking at
6 those. If we start regulating fees and requiring
7 disclosure and requiring sunshine, then let's get sunshine
8 on every fee agreement in the state and not single out
9 this one category of litigants.

04:43 10 HONORABLE TERRY JENNINGS: On the
11 disqualification, if the whole idea is to help the client,
12 you would be disqualifying the lead attorney who
13 presumably is the one that knows everything there is to
14 know about the case and who is best able to prosecute the
04:43 15 case.

16 MR. ORSINGER: You ought to disqualify the
17 referring attorney and --

18 HONORABLE TERRY JENNINGS: So then they have
19 the Hammer step in and step in as lead counsel.

04:44 20 CHAIRMAN BABCOCK: Poor Hammer.

21 HONORABLE CARLOS LOPEZ: He appeared in
22 front of me and he did a decent job, believe it or not.

23 HONORABLE TERRY JENNINGS: That certainly
24 isn't helping the client.

25 CHAIRMAN BABCOCK: Justice Gray.

1 HONORABLE TOM GRAY: May I suggest that on
2 the vote it be whether or not it's going to be limited to
3 just referral fees involving lawyers or whether it's more
4 open ended and is intended to capture something other than
04:44 5 referral fees.

6 CHAIRMAN BABCOCK: Judge Bland has a
7 proposal that might bring some closure to at least 7.5(a).
8 And it was, Judge Bland?

9 HONORABLE JANE BLAND: It was Stephen's
04:44 10 language, the vote to replace 7.5(a) with Stephen's
11 proposed language.

12 CHAIRMAN BABCOCK: Okay. Do you want to
13 read that one more time, Stephen?

14 MR. TIPPS: I moved the phrase around. It's
04:44 15 the same thing as hers. "A referral fee is a payment by
16 lead counsel or any other person, in considering of the
17 referral of a client or case, to an attorney who does not,
18 and is not reasonably expected to, provide substantial
19 professional services or appear in the case."

04:45 20 MS. BARON: One more time. I'm sorry. One
21 more time.

22 MR. TIPPS: "A referral fee is a payment by
23 lead counsel or any other person, in consideration of the
24 referral of a client or case, to an attorney who does not,
04:45 25 and is not reasonably expected to, provide substantial

1 professional services or appear in the case."

2 MS. BARON: Thank you.

3 MR. GILSTRAP: There is a dangling modifier.

4 MR. TIPPS: I tried so hard.

5 (Laughter.)

6 MR. GILSTRAP: "To a person," does that
7 modify "payment" or "attorney"?

8 MR. TIPPS: "Payment by lead counsel or any
9 other person to an attorney."

04:46 10 MR. GILSTRAP: Okay.

11 CHAIRMAN BABCOCK: Richard.

12 MR. MUNZINGER: That addresses payment. It
13 doesn't address agreement to pay. It wouldn't reach a
14 contingent fee which isn't paid until after the case is
04:46 15 over with. So you have to put something in the definition
16 that addresses agreement to pay if you're going to have
17 the kind of sanctions that you have prior to trial.

18 MR. TIPPS: Or you could just later describe
19 the sanction as either payment of a fee or agreement of a
04:46 20 fee.

21 MR. BOYD: That's in there already.
22 Subparagraph (b) says "lead counsel must file with the
23 court a notice disclosing every litigation payment made or
24 agreed to be paid with respect to the case."

04:46 25 MR. GILSTRAP: Can you read it again?

1 MR. TIPPS: "A referral fee is a payment by
2 lead counsel or any other person, in consideration of the
3 referral of a client or case, to an attorney who does not,
4 and is not reasonably expected to, provide substantial
04:47 5 professional services or appear in the case."

6 MR. GILSTRAP: I'm having trouble with "lead
7 counsel" or "any other person" who is making fee payment
8 or not. Can we not just say "payment by a lawyer" or
9 "payment by a person"?

04:47 10 HONORABLE CARLOS LOPEZ: How about if you
11 just say "payment" period?

12 CHAIRMAN BABCOCK: Except Bill wanted --

13 MR. TIPPS: Bill wanted "other person in
14 addition to lead counsel."

04:47 15 MR. ORSINGER: You don't need "lead counsel"
16 because "lead counsel" and "other person" is every person.

17 MR. TIPPS: I think we get there if we
18 simply say "a payment in consideration of the referral of
19 a client or case." I don't think we need to specify who
04:48 20 it is by.

21 CHAIRMAN BABCOCK: You're the author of
22 this.

23 MR. TIPPS: I'm going to strike "by lead
24 counsel or any other person."

25 CHAIRMAN BABCOCK: Okay.

1 MR. TIPPS: So it says "A referral fee is a
2 payment in consideration of the referral of a client or
3 case to an attorney," da, da, da.

4 MR. GILSTRAP: Does "to an attorney" refer
04:48 5 to payment or to referral?

6 MR. TIPPS: It refers to payment. "A
7 referral fee is a payment, in consideration of the
8 referral of a client or case, to an attorney."

9 MR. GILSTRAP: I think it could be read
04:48 10 either way.

11 MR. TIPPS: Okay. The other way to do it is
12 to say "A referral fee is a payment to an attorney who
13 does not and is not reasonably expected to provide
14 substantial professional services or appear in the case in
04:48 15 consideration of the referral of a client or case."

16 CHAIRMAN BABCOCK: How many people are in
17 favor of that raise your hand?

18 PROFESSOR DORSANEO: One other thing?

19 CHAIRMAN BABCOCK: All right. Put your
20 hands down. One other thing.

21 PROFESSOR DORSANEO: Why don't we just take
22 the appearance thing out if it just makes it all
23 pointless, take the last part out.

24 MR. ORSINGER: Because they'd put their name
04:49 25 on the pleading and it gets the Rules anyway.

1 HONORABLE NATHAN HECHT: He's got
2 "appearance" out.

3 CHAIRMAN BABCOCK: He's got it out.

4 MR. TIPPS: I'm being faithful to what was
04:49 5 proposed in the Jamail Committee.

6 MR. GILSTRAP: The Jamail committee had
7 "appearance" too.

8 PROFESSOR DORSANEO: I know. But I don't
9 know why he had it, and I don't know why it should be in
04:49 10 there.

11 MR. ORSINGER: But if the point is to have
12 their name in the record, why do we care if their names is
13 on a pleading or whether it's on some piece of paper on
14 the disclosure.

04:49 15 CHAIRMAN BABCOCK: Steve, are you happy with
16 your language?

17 MR. TIPPS: I think it's a substantive issue
18 whether or not we allow you to circumvent the rule by
19 appearing in the case.

04:49 20 CHAIRMAN BABCOCK: Read the language one
21 more time; and that's what we're going to vote on.

22 MR. TIPPS: As modified: "A referral fee is
23 a payment to an attorney who does not and is not
24 reasonably expected to provide substantial professional
04:49 25 services or appear in the case in consideration of the

1 referral of a client or case. Jane says it better the
2 other way.

3 MS. SWEENEY: I suggest you can't take out
4 "or appear in the case," because then otherwise you're
04:50 5 going to get into the middle of parsing in every PI case
6 who did what.

7 MR. TIPPS: Yes.

8 MS. SWEENEY: And that's not right and that's
9 not appropriate. If they are on the pleadings and they
04:50 10 have appeared, then this ought not to apply.

11 MR. TIPPS: Then I'm going to leave "appear
12 in the case and," and I'm going to move "in consideration
13 of referral back up earlier like I had it before because
14 Jane told me to.

15 CHAIRMAN BABCOCK: Okay.

16 MR. TIPPS: Jane wins and Frank loses.

17 CHAIRMAN BABCOCK: All right. Everybody in
18 favor of that language raise your hand.

19 (21 "yes" votes.)

04:50 20 MS. SWEENEY: Can we note for the record we
21 are not in favor of this Rule?

22 MR. ORSINGER: Subject to our general
23 opposition to the Rule.

24 CHAIRMAN BABCOCK: All opposed?

25 (Two "no" votes.)

1 CHAIRMAN BABCOCK: The vote is 21 to two,
2 the Chair not voting. So that takes care of that.

3 Does anybody want to move on to disclosures, or do
4 we want to go wet our whistles,

04:51 5 MR. LOW: Well, let's see. Which do we do
6 better?

7 CHAIRMAN BABCOCK: Harvey.

8 HONORABLE HARVEY BROWN: I think we debated
9 the disclosures pretty well, I think we could vote on it
10 right now.

11 MR. GILSTRAP: Well, (5) is a problem. (5)
12 is a problem

13 CHAIRMAN BABCOCK: No. I don't think we
14 have scratched the surface on the disclosures frankly.
04:51 15 Let's, you can sleep in. We're going to do this until
16 11:00 and then we're going to talk about ad litem fees
17 11:00 to 12:00.

18 MS. SWEENEY: Do we start at 9:00 o'clock?

19 CHAIRMAN BABCOCK: 9:00 o'clock.

20
21 (Adjourned 4:51 p.m.)
22
23
24
25

CERTIFICATE OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

I, ANNA RENKEN, Certified Shorthand Reporter,
State of Texas, hereby certify that I reported the above
hearing of the Supreme Court Advisory Committee on the
22nd day of August, 2003, and the same were thereafter
reduced to computer transcription by me. I further
certify that the costs for my services in the matter are
\$_____ charged to Charles L. Babcock.

Given under my hand and seal of office on
this the _____ day of _____, 2003.

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9 other person to an attorney."

04:46 10 MR. GILSTRAP: Okay.

11 CHAIRMAN BABCOCK: Richard.

12 MR. MUNZINGER: That addresses payment. It

13 doesn't address agreement to pay. It wouldn't reach a

14 contingent fee which isn't paid until after the case is

04:46 15 over with. So you have to put something in the definition

16 that addresses agreement to pay if you're going to have

17 the kind of sanctions that you have prior to trial.

18 MR. TIPPS: Or you could just later describe

19 the sanction as either payment of a fee or agreement of a

04:46 20 fee.

21 MR. BOYD: That's in there already.

22 Subparagraph (b) says "lead counsel must file with the

23 court a notice disclosing every litigation payment made or

24 agreed to be paid with respect to the case."

04:46 25 MR. GILSTRAP: Can you read it again?

1 MR. TIPPS: "A referral fee is a payment by
2 lead counsel or any other person, in consideration of the
3 referral of a client or case, to an attorney who does not,
4 and is not reasonably expected to, provide substantial
04:47 5 professional services or appear in the case."

6 MR. GILSTRAP: I'm having trouble with "lead
7 counsel" or "any other person" who is making fee payment
8 or not. Can we not just say "payment by a lawyer" or
9 "payment by a person"?

04:47 10 HONORABLE CARLOS LOPEZ: How about if you
11 just say "payment" period?

12 CHAIRMAN BABCOCK: Except Bill wanted --

13 MR. TIPPS: Bill wanted "other person in
14 addition to lead counsel."

04:47 15 MR. ORSINGER: You don't need "lead counsel"
16 because "lead counsel" and "other person" is every person.

17 MR. TIPPS: I think we get there if we
18 simply say "a payment in consideration of the referral of
19 a client or case." I don't think we need to specify who
04:48 20 it is by.

21 CHAIRMAN BABCOCK: You're the author of
22 this.

23 MR. TIPPS: I'm going to strike "by lead
24 counsel or any other person."

25 CHAIRMAN BABCOCK: Okay.

1 MR. TIPPS: So it says "A referral fee is a
2 payment in consideration of the referral of a client or
3 case to an attorney," da, da, da.

4 MR. GILSTRAP: Does "to an attorney" refer
04:48 5 to payment or to referral?

6 MR. TIPPS: It refers to payment. "A
7 referral fee is a payment, in consideration of the
8 referral of a client or case, to an attorney."

9 MR. GILSTRAP: I think it could be read
04:48 10 either way.

11 MR. TIPPS: Okay. The other way to do it is
12 to say "A referral fee is a payment to an attorney who
13 does not and is not reasonably expected to provide
14 substantial professional services or appear in the case in
04:48 15 consideration of the referral of a client or case."

16 CHAIRMAN BABCOCK: How many people are in
17 favor of that raise your hand?

18 PROFESSOR DORSANEO: One other thing?

19 CHAIRMAN BABCOCK: All right. Put your
20 hands down. One other thing.

21 PROFESSOR DORSANEO: Why don't we just take
22 the appearance thing out if it just makes it all
23 pointless, take the last part out.

24 MR. ORSINGER: Because they'd put their name
04:49 25 on the pleading and it gets the Rules anyway.

1 HONORABLE NATHAN HECHT: He's got
2 "appearance" out.

3 CHAIRMAN BABCOCK: He's got it out.

04:49 4 MR. TIPPS: I'm being faithful to what was
5 proposed in the Jamail Committee.

6 MR. GILSTRAP: The Jamail committee had
7 "appearance" too.

8 PROFESSOR DORSANEO: I know. But I don't
9 know why he had it, and I don't know why it should be in
04:49 10 there.

11 MR. ORSINGER: But if the point is to have
12 their name in the record, why do we care if their names is
13 on a pleading or whether it's on some piece of paper on
14 the disclosure.

04:49 15 CHAIRMAN BABCOCK: Steve, are you happy with
16 your language?

17 MR. TIPPS: I think it's a substantive issue
18 whether or not we allow you to circumvent the rule by
19 appearing in the case.

04:49 20 CHAIRMAN BABCOCK: Read the language one
21 more time; and that's what we're going to vote on.

22 MR. TIPPS: As modified: "A referral fee is
23 a payment to an attorney who does not and is not
24 reasonably expected to provide substantial professional
04:49 25 services or appear in the case in consideration of the

1 referral of a client or case. Jane says it better the
2 other way.

3 MS. SWEENEY: I suggest you can't take out
4 "or appear in the case," because then otherwise you're
04:50 5 going to get into the middle of parsing in every PI case
6 who did what.

7 MR. TIPPS: Yes.

8 MS. SWEENEY: And that's not right and that's
9 not appropriate. If they are on the pleadings and they
04:50 10 have appeared, then this ought not to apply.

11 MR. TIPPS: Then I'm going to leave "appear
12 in the case and," and I'm going to move "in consideration
13 of referral back up earlier like I had it before because
14 Jane told me to.

15 CHAIRMAN BABCOCK: Okay.

16 MR. TIPPS: Jane wins and Frank loses.

17 CHAIRMAN BABCOCK: All right. Everybody in
18 favor of that language raise your hand.

19 (21 "yes" votes.)

04:50 20 MS. SWEENEY: Can we note for the record we
21 are not in favor of this Rule?

22 MR. ORSINGER: Subject to our general
23 opposition to the Rule.

24 CHAIRMAN BABCOCK: All opposed?

25 (Two "no" votes.)

1 CHAIRMAN BABCOCK: The vote is 21 to two,
2 the Chair not voting. So that takes care of that.

3 Does anybody want to move on to disclosures, or do
4 we want to go wet our whistles,

04:51 5 MR. LOW: Well, let's see. Which do we do
6 better?

7 CHAIRMAN BABCOCK: Harvey.

8 HONORABLE HARVEY BROWN: I think we debated
9 the disclosures pretty well, I think we could vote on it
10 right now.

11 MR. GILSTRAP: Well, (5) is a problem. (5)
12 is a problem

13 CHAIRMAN BABCOCK: No. I don't think we
14 have scratched the surface on the disclosures frankly.
04:51 15 Let's, you can sleep in. We're going to do this until
16 11:00 and then we're going to talk about ad litem fees
17 11:00 to 12:00.

18 MS. SWEENEY: Do we start at 9:00 o'clock?

19 CHAIRMAN BABCOCK: 9:00 o'clock.

20
21 (Adjourned 4:51 p.m.)
22
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CERTIFICATE OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

I, ANNA RENKEN, Certified Shorthand Reporter,
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