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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

August 23, 2003

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 23rd day of August, 2003, between the hours of 9:03 a.m. and 11:55 a.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

INDEX OF VOTES

Votes taken by the Supreme Court Advisory Committee during this session are reflected on the following pages:

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CHAIRMAN BABCOCK: Okay. On the record. Paula.

MS. SWEENEY: Mr. Chairman, I had an idea, and it's always important to announce these because they don't come very often. If what we are really trying to do is target the vice of the lawyer mills that advertise with no intention of ever doing the work, which is uniformly what we're being told we're after, instead of backing into it by putting all sorts of burdens on the lawyer who later handles the case and is the lead counsel and spends all the money and does the good job and so on, why not approach it from the other end and put the burden on the soliciting lawyer as follows and have a rule that says essentially only or mostly "A lawyer who obtains a case as a result of an advertisement or solicitation of any kind and then refers the case to another lawyer or firm without performing any substantial legal services shall be limited to a referral fee not to exceed" whatever threshold we decide to impose that.

That gets us loose of all of these scary disclosing who all your litigation payments are. It gets us shed of all the consulting issues we've talked about it. It puts the burden where it belongs, which is on the referring -- the advertiser, and it puts the limits

squarely where we mean to put it. Is there any sentiment for that proposal?

CHAIRMAN BABCOCK: Let me hear it again.

MS. SWEENEY: All right.

CHAIRMAN BABCOCK: But the advertising, I think, is only one of the issues that is sought to be addressed by this, but say it again, what you said.

MS. SWEENEY: All right. And it would be possible to drop that first clause if, in fact, it's not just advertising lawyers but any sort of -- just a referral, if that's what the Court is trying to curb, then you can drop the first sentence or the first clause; but as it currently is written it's "A lawyer who obtains a case as a result of an advertisement or solicitation of any kind and then refers the case to another lawyer or firm without performing any substantial legal services shall be limited to a referral fee not to exceed" whatever the threshold is.

If you took off the first part, it would just say, "A lawyer who refers a case to another lawyer or firm without performing any substantial legal services shall be limited to a referral fee not to exceed" whatever.

CHAIRMAN BABCOCK: I think I'm fuzzy this morning because I'm not following you, but let's take the language that we talked about yesterday with Stephen, and are you proposing to amend that or change that or --

MS. SWEENEY: Yeah. I'm proposing to take all of this and throw it away and simply have a two-line rule that says if you take a case, if you refer a case without performing any substantial legal services, you're limited to a referral fee not to exceed X.

MR. GILSTRAP: Chip?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: The response is the same as the response to Carl, who made that same suggestion yesterday. It's not procedural.

MS. SWEENEY: I agree. I don't think it belongs in the rules.

MR. GILSTRAP: Well, then we shouldn't -- if it's going to be approached that way, this committee shouldn't be approaching it. I mean, this committee has been called on to make some type of procedural fix, and just a straight limit on attorney's fees to be paid doesn't fall in there, and if we're going to take that approach, we shouldn't do anything.

CHAIRMAN BABCOCK: Yeah, Stephen.

MR. YELENOSKY: Well, but we already voted that we shouldn't do. The question is how to do it now that the Court's directed us to do it, and it does seem to me that that's the most intellectually honest approach, because the rule as presented to us now is the same thing,

merely with enforcement through a procedural rule that is disqualification and that's really intended not to ever operate. It's intended to do exactly what Paula is suggesting.

CHAIRMAN BABCOCK: Yeah. Well, I think that approach is now in the record, but what we have been presented and asked to work on is something that is like what a subcommittee of our committee would do, and that's present a rule and then we work through it. This is unusual in the sense that it wasn't your subcommittee that did this. It was a Court-created, Court-mandated subcommittee that came up with this rule, so we've got to get through this rule; and I'm sure the Court will take note of the comments about there's a different way to do it and if we want to do it, maybe we could do it that way. So now that's in the record. Judge Patterson.

HONORABLE JAN PATTERSON: And I just want to make an offer that if the Court has any stomach for an analysis about how to fit this in with other State Bar committees, that I'd be glad to address that in some way if the Court sees fit.

CHAIRMAN BABCOCK: Okay. Great. I think we've worked through 7.5(a) and were about to get to 7.5(b) when we took a break yesterday, so let's turn to that. There are five subcategories. I know yesterday somebody

said they had a problem with subcategory (5), but let's start with the introductory language.

MS. BARON: I think we need to start by saying change "litigation payment" to "referral" in (b) --

CHAIRMAN BABCOCK: Right.

MS. BARON: -- because we've changed our definition section.

CHAIRMAN BABCOCK: Right.

MS. BARON: And then we have to decide what needs to be disclosed. This is a very onerous disclosure section, and I think we need to discuss it at some length.

CHAIRMAN BABCOCK: Okay. Do you want to focus just on the general concept, Pam, or any specific subpart?

MS. BARON: Well, I think it requires you to disclose your contract with your client, which I find troubling as an attorney-client privileged matter that's not relevant to the litigation, so I think people should comment on that.

CHAIRMAN BABCOCK: Okay. Paula.

MS. SWEENEY: Why don't we just say there's an attorney-client privilege for everybody who can afford to pay their lawyers by the hour, but if you have a contingent fee you don't have one?

Why are we setting up a two-tiered system of

privilege? Why are we picking on these folks who have contingent contracts and forcing disclosure that we don't force anywhere else? If the vice is what we're trying to solve then solve the vice by limiting the referral fees and don't create these unenforceable, un -- you can't follow this if you tried to.

CHAIRMAN BABCOCK: The part that you're talking about is subparagraph (3) where you have to include a copy --

MR. GILSTRAP: (3) and (4).

CHAIRMAN BABCOCK: Huh?

MR. GILSTRAP: (3) and (4), yeah.

MS. BARON: And (4), which is the client's approval.

CHAIRMAN BABCOCK: Yeah. It's not true, is it, that fee agreements are never disclosed in litigation? I mean, if attorney's fees are at issue, you're entitled to them, aren't you? I mean, I've routinely got them in cases. Frank.

MR. GILSTRAP: Aside from that, you know, it seems to me that the purpose of the rule is served by (1) and (2). I mean, that states that a referral fee is being made and who it's being paid to and the amount; and, you know, you've got to presume that the attorney is not going to sign a false statement, so that gets the information

that's needed. It -- that's all the rule needs. I don't see why we need (3), (4), and (5).

CHAIRMAN BABCOCK: How does everybody else feel about that?

MS. BARON: I agree with it.

MS. SWEENEY: Move we delete it.

CHAIRMAN BABCOCK: Judge Gray.

HONORABLE TOM GRAY: Actually, (1) and (2) do not have the same benefit of (4) because (4) is a specific client approval. You might could meet the requirement of not including a -- in effect the written copy, but an affirmative representation in (1) and (2) that, in fact, it has been communicated to the client, but --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: And you might want to include something about the nature of that communication, whether or not it was in writing or simply an oral communication, which it probably should be a written communication.

CHAIRMAN BABCOCK: Okay.

MR. GILSTRAP: Just state the client's agreed to it, because the client does have to agree.

CHAIRMAN BABCOCK: I suppose that if it became an issue that the client came into court and said, you know, "I did not agree to it," then the documents might

be relevant, but otherwise not.

HONORABLE TOM GRAY: Which is why I've suggested that that representation require there be communicated in writing to the client.

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE TOM GRAY: So that there would be a written --

CHAIRMAN BABCOCK: Okay.

MS. SWEENEY: Mr. Chairman?

CHAIRMAN BABCOCK: Yeah.

MS. SWEENEY: How would this apply in cases where the solicitation takes place on the golf course or in a fashionable country club? How is that disclosed?

CHAIRMAN BABCOCK: There's a subsection for fashionable country clubs.

MS. SWEENEY: Does the institutional client then have to sign on that it was solicited through different means than this envisions, but nonetheless solicited?

CHAIRMAN BABCOCK: Well, is the introductory paragraph limited to advertising?

MS. SWEENEY: I think I want the record to be clear that if it's going to be sauce for the goose, it ought to be sauce for the gander.

CHAIRMAN BABCOCK: "Lead counsel must file

with the court a notice disclosing every referral fee made or agreed to be made with respect to the case." And as we're talking about it now it's got to state the amount and date of each payment made or to be made; the name, address, and telephone number of the person, or identify the attorney to whom each payment has been made or is to be made; and that the client has agreed to it. That's what we're talking about right now. So I don't see any exception there for, you know, a country club or, you know, a jet airplane at 45,000 feet or --

MR. ORSINGER: Well, typically they don't pay referral fees. They just let people go hunt on a lease or use a condo in Colorado, stuff like that, so I don't think that any of that would apply.

MS. SWEENEY: Well, I think that those are payments. They're just payments in-kind, and I think our definition ought to encompass that --

MR. ORSINGER: We have a hundred years of tradition that says that that's not governed the same way as a referral fee.

MS. SWEENEY: We have a hundred years of tradition that also doesn't require evisceration of the attorney-client privilege by posting notices at the courthouse, so as long as we're standing tradition on its ear, let's stand it completely on its ear.

CHAIRMAN BABCOCK: Okay. What do people think about the dropping (3) and (4)? Yeah, Harvey.

HONORABLE HARVEY BROWN: Well, I understand the argument about (4) that it would be nice to have confirmation that the lawyer has done what the lawyer is ethically required to do, but it seems to me that we generally presume that the lawyer acts ethically. For example, lawyers are required to in their engagment letter state that they provide The Lawyer's Creed. We don't require the lawyer to file something with the court saying, "I've complied with this ethical rule." I think we should do the same thing here. We should presume the lawyer will act ethically, and (1) and (2) are enough.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: Carrying that theory to the whole issue of disclosure, is there some way to have an enforcement mechanism for this rule that would not require disclosure of this information in every case for every --

CHAIRMAN BABCOCK: Well, it's not going to be in every case. It's only going to be --

HONORABLE JANE BLAND: Well, where there's referral. I mean, it just seems to me like -- I'm not -- I agree with, I think, Elaine who was saying yesterday was puzzled by exactly what we're accomplishing with

disclosure. If it's only a way for everybody to become aware that there may be a problem, I mean, usually we don't anticipate the problem. When the problem arises then we, you know, trigger the hearing that would give you all the necessary disclosures and that kind of thing, but I don't see why just as a matter of routine we would require this sort of disclosure be made.

CHAIRMAN BABCOCK: Well, I think that the way the rule is set up is that there is a -- there is a requirement that there be a disclosure, and we're now talking about what it's going to be, but if that disclosure is not made, then there are certain consequences that flow from that if it later turns out that, wait a minute, there was a referral fee here, and it was under the circumstances and bring it within (a), and then if that comes out then you get disqualified or you may get disqualified, and that's the reason for having the disclosure I think. Yeah, Richard.

MR. MUNZINGER: The interest that the court has in the amount of the payments presumptively is to ensure itself that the payments don't exceed whatever statutory or rule cap that the Court imposes. Why would we have people reporting amounts and dates of their payments as distinct from simply certifying that the payments made or agreed to be made are within the statutory amount?

There's a good deal to be said -- first off, to discuss the rule is unpleasant because I'm opposed to it. Aside from that, we've been asked to do it, and we're doing it. Paula makes some very good points, obviously. Why are we having clients disclose the contents of their agreements with counsel, which traditionally have, in fact, been privileged unless opened up because of the necessity of the litigation or the substantive law applicable to the case? Why do we want people to state the amount and date of a payment if what we're after is saying the payments don't exceed a certain sum?

And before we get to that I would like to make a point about the Court's ability to impose a restriction on the sum. Yesterday Mr. Soules addressed Goldfarb vs. Virginia, which held -- I think it was in the late Sixties. When I started practicing the Bar had a minimum fee schedule. People would try and hire me, and I would say, "Well, you can't pay me less than X. That's the state minimum fee schedule." The Supreme Court said, "No, that's unlawful because you have -- you are fixing price, a minimum price is unacceptable and so we're not going to permit that under the Federal antitrust laws," which has now been adopted by the State of Texas under the Texas Free Enterprise and Antitrust Act. So we have the same substantive law applying in Texas as we do in the Federal

antitrust laws.

The Court has made it clear in antitrust law that price is sacrosanct, and presumptively, maximum price fixing is as unlawful as minimum price fixing, presumptively. Parker vs. Brown is a Federal antitrust case that says the state may get around certain Federal antitrust laws if it has a comprehensive regulatory scheme which is uniformly enforced that is necessary for the state's purchases. I think you have a Parker vs. Brown Federal and state antitrust issue here. Under what authority does the Supreme Court fix maximum prices?

And before the Court adopts it they certainly need to have someone do some legal research to determine if such a rule will pass antitrust mustard, because it is setting a maximum price in a free marketplace. The rules of the U.S. Supreme Court have told us you can't fix price. You must allow advertising; and those two rules have developed an economic marketplace, as sleazy as we may think it may be, for some, or some of us think it may be, it is still a marketplace. There is clearly a market going on here. So what you're doing is imposing an economic restriction on this segment of the market, and the antitrust laws apply to markets, whether they are submarkets or markets. So we do have an issue there on the Court's ability to impose a maximum. I haven't briefed it,

but the flag is up, and people need to be aware that there is that issue.

CHAIRMAN BABCOCK: Okay. Judge Bland and then...

HONORABLE JANE BLAND: I like Richard's idea of some sort of certification that would just say simply that a referral fee has been made and that it is in compliance with Rule 7.5. And, I mean, normally when we require that kind of certification we don't require this amount of supporting detail, and then if it comes to light that there may be a problem with compliance with Rule 7.5 then somebody can ask for a hearing and then all of this other information might, you know, ought to be provided.

CHAIRMAN BABCOCK: Might tumble out.

HONORABLE JANE BLAND: But initially why don't we just say -- you know, just require some sort of representation by counsel that they're in compliance, and that way that everybody knows that there is a referral fee that's been paid, but we don't have to know to whom or the nature of the contract or anything like that, but just that it's been paid and that it's been paid in compliance, or it has been paid or has been agreed to be paid, I guess.

CHAIRMAN BABCOCK: Okay. Stephen and then, I'm sorry, and then Frank.

MR. TIPPS: I mean, I agree with Jane in that

if we're going to have any kind of disclosure requirement, that's the maximum that we should ask anybody to disclose, which is some sort of certification of compliance. I don't know that we really even need that. I think we could turn this into a procedural rule simply by taking Paula's general prohibition on the practice and then saying that a lawyer who violates that rule is or should be disqualified by the court.

I mean, this rule as drafted still doesn't really have any mechanism for catching violators. I mean, it basically requires disclosure and then says if you make a false disclosure then you can be disqualified. There is no way to ferret out the person who didn't comply, but it seems to me that the rule should be at most three parts: one, prohibits the practice; two, requires certification of compliance with the practice; and, three, imposes a disqualification sanction if you violate the practice. Or it could even be just two parts, one that prohibits the practice and two says that you're disqualified if you violate it.

CHAIRMAN BABCOCK: It's really (d)(3) that's the guts of it because that --

MR. GILSTRAP: And we're not to that.

CHAIRMAN BABCOCK: And we're not to that. Frank, you had a comment?

MR. GILSTRAP: I don't have anything further at this point.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: Just something along the lines of what Paula was saying earlier, what about the idea of putting the burden on the attorney receiving the fee to file something along --

CHAIRMAN BABCOCK: But he's not in the case.

HONORABLE TERRY JENNINGS: But they can still -- well, it is a procedural rule. You're right. Never mind.

CHAIRMAN BABCOCK: And then if he gets in the case then he doesn't have to do it.

HONORABLE TERRY JENNINGS: Never mind.

CHAIRMAN BABCOCK: On the antitrust point that Richard raised, is this not a little -- when you have a minimum fee schedule, you are telling the client they must pay this in all instances, which is kind of a classic price fixing issue; but here, you're not saying that the client must pay this. You're just saying that if a lawyer is not going to do any work in a case he can't get any more than $50,000. That's -- that feels different, but anybody want to comment on that further?

MR. MUNZINGER: I don't know the answer to the question. All I'm saying is I think there is an issue

there. If I were attacking the rule, I would certainly go brief that to determine it. I think there is a legal issue there because the economic effect of the Court's rule is to place a lid on price. You can't pay more than that. It destroys competition, because I might be willing to pay you $60,000 for referral of the case. Paula says, "No, I'll only take 48," so there's price competition among lawyers. She addressed the question yesterday of referring of The Hammer shopping for good lawyers; and in essence what you've done is destroy the market for good lawyers because you've said you can't pay more than X, so the buyer, which is The Hammer who is referring the case, the buyer knows that he can go to anybody he wants and he can't pay more than -- be paid more than 50. You've destroyed people shopping for good lawyers. That's the economic effect of the rule.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: But, again, you know, we're not to that issue. I think Richard Munzinger's arguments, you know, I mean, they're worthy -- they're important. I think we need to address those.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: But right now what we've got is a rule that's calling for disclosure, and we're going down that road. When we get to (d)(3) that's a different

thing. That's not procedural, and I think we may have a real problem at that point.

CHAIRMAN BABCOCK: Yeah. Yeah. Well, it's an interesting point. I wonder if The Hammer knows what status he's been elevated to in these proceedings.

MR. GILSTRAP: And to make it clear on the record, I've never dealt with the guy. I don't think anybody else here has. I think we're just using him as kind of a type.

MR. LOW: No, I've been sued by The Hammer.

MR. GILSTRAP: I was trying to keep you out of the suit, Buddy.

MR. ORSINGER: Who did he refer it to?

MR. LOW: No, it was a doggy little case, and he just -- I don't know what happened. My insurance company handled it. It wasn't any injury to it, obviously, but The Hammer, I got the letter from The Hammer. I have had contact.

JUSTICE HECHT: But you lost to The Hammer?

MR. LOW: Now, wait a minute. Don't put that on the record that I lost to The Hammer. My insurance company must have surrendered.

JUSTICE HECHT: So John Martin lost to The Hammer.

MR. LOW: That's my lawyer.

MR. MARTIN: I never heard of The Hammer until this meeting.

MR. YELENOSKY: Oh, you will.

MR. LOPEZ: He's taking notes.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: I agree with the approach that Stephen Tipps mentioned a minute ago, notwithstanding the fact that it might not be in compliance with antitrust laws. I think if we're going to, in effect, try to regulate the referral fee business by prohibiting fees beyond a certain level, we ought to just flat out say that that's what's prohibited and that you need to disclose or to make a representation in pleadings or otherwise where the court thinks it's appropriate that there was compliance with the rule, including that provision, and then after that I'm not sure what the remedy is. I'm not sure if disqualification is an appropriate remedy or the only appropriate remedy, but that's the approach that I would take. I think that's exactly what Stephen said a minute ago, isn't it?

MR. TIPPS: Pretty much.

CHAIRMAN BABCOCK: Stephen Yelenosky.

MR. YELENOSKY: I don't want to derail that discussion, but the discussion of noncash benefits seemed to end with Richard's comment, and I just want to point out

whatever the practice has been in, you know, allowing somebody to use a deer lease or whatever, once this rule is in effect, if we don't address noncash benefits, don't we create a loophole there where whether it's plaintiff's counsel or defendant's counsel that's making referral payment, that all you have to do is make it in a noncash way? I mean, the way we've defined it at this point wouldn't seem to touch on conferring property with someone or any -- or coupons, to use the Legislature's reference in another context, so don't we have to address noncash benefits? I mean, couldn't one attorney give another attorney a car or an airplane and it be outside this rule?

CHAIRMAN BABCOCK: Well, I think, again, we're getting ahead of ourselves, because that's going to come up in --

MR. YELENOSKY: Okay. That's fine. I just want to make sure we haven't ended that discussion and we can defer it.

CHAIRMAN BABCOCK: With this crowd, I doubt it.

MS. SWEENEY: I think it's part of (1). I think it's part of (1), "State the amount and date of each payment." If there's not an amount but it is a payment, we need to reconfigure (1) to reflect noncash.

CHAIRMAN BABCOCK: Well, I think that I heard

a suggestion that (b)(1) be amended to say something like "State that a referral fee has been paid and is in compliance with this rule" or "with 7.5."

MR. LOPEZ: But is (b) itself defined to be only cash? Because a car sure is payment whether it's cash or not.

CHAIRMAN BABCOCK: Yeah. And Stephen's language from yesterday on (a) said that a referral fee is a payment to an attorney.

MR. LOPEZ: So how does that limit out cars? It's still a payment.

CHAIRMAN BABCOCK: Because when you get down to (d)(3) you can put some language in there, if you want, that says, by the way, this 50,000 can be in money or in favors or in coupons.

MR. LOPEZ: I'm saying it's that way whether you say it or not. Where does it say it has to be cash here?

CHAIRMAN BABCOCK: Right. Okay. I'm with you. Frank.

MR. GILSTRAP: We keep coming back to (d)(3), and I think we have got two diverging approaches here. The approach that I favor is kind of the sunshine approach that Jeff Boyd spoke of yesterday. Let's disclose the fact that the payment has been made or there's been an agreement for

a referral fee, get it out into the sunshine. If the guy doesn't disclose it, he's subject to sanctions. We can do that within the rules. That's procedural.

You know, we've also got the idea that we're going to cap it. If we're going to cap it, that's a completely different approach. I don't think sunshine is the real answer there. If the goal is to cap it, let's just have the people, you know, certify that they're not paying anything in excess of it. But we've got to decide whether -- and I would be opposed to the cap because I don't think it's something the Court can do through the Rules of Civil Procedure. I think we've got to maybe decide what approach we're going to take.

CHAIRMAN BABCOCK: Okay. Well -- Richard.

MR. ORSINGER: I want to comment on 7.5(b)(4), "include a copy of the client's approval of each such payment." I don't know -- I don't do this kind of stuff for a living, but the only place I know of where there might be rules that would require the client to agree to the referral fee is the disciplinary rules and --

PROFESSOR DORSANEO: There's statutes, too.

MR. ORSINGER: There's statutes that require that the client approve a fee-splitting? Which statutes are they?

PROFESSOR DORSANEO: I can't give you the

number right now, but there are separate statutes distinct from the disciplinary.

MR. ORSINGER: Do they stand alone or apply to all attorney-client litigation or is it only in certain areas that it applies?

PROFESSOR DORSANEO: I think they are the statutes that talk about the requirements for fee contracts.

MR. LOW: Richard, I think the part you're talking about is only a contingent fee. Isn't that, Paula, I mean, where you --

MS. SWEENEY: I don't know. I know we have to do it, but I don't know.

MR. LOW: Any time I've had one --

MR. ORSINGER: Well, then let me clarify --

CHAIRMAN BABCOCK: Whoa, whoa, whoa. One at a time.

MR. LOW: Every payment and the client signs and approves, I mean, every payment, but it's only between me and my client.

MR. ORSINGER: But that's at the end of the case, isn't it, Buddy?

MR. LOW: Pardon?

MR. ORSINGER: Isn't that the end of the case when you're splitting up the fee?

MR. LOW: No, it's the end of the case, and it doesn't include those cases I lose --

MR. ORSINGER: That's a different point.

MR. LOW: -- because we don't sign anything.

MR. ORSINGER: What I'm saying is I don't know where there's a requirement that when a referral fee agreement is reached or something of that nature that the client has to agree to it. Maybe there is a statute, but let me at least make a comment about the ethical rules. They don't require the client to approve or even so far as I can tell even be informed of what the referral fee is or the percentage split. They just have to approve of the joint participation of the lawyers.

MR. LOW: But there is an ethics opinion that says you cannot retain without permission from your client. You can't retain another lawyer.

MR. ORSINGER: But that's not my point. This is requiring disclosure about the amount of the fee paid. You have to produce the contract, and in (4) you have to have the client's approval of the payment. Now, if you look at the ethics rules and the comments to 1.04, and the last comment on the subject says, "Paragraph (f) does not require disclosure to the client of the share that each lawyer is to receive." In other words, paragraph (f) requires that the client approve fee-splitting, but it

doesn't require that the client even be informed about how the fee is to be split. Unless there is some statutory requirement for that, which Bill says there may be, and I don't know, then this rule inferentially is creating a requirement that the client approve of the payment, which to me means the percentage or the dollar figure or something. And if, in fact, there is no independent authority for this requirement then we're creating it inferentially in this rule, which is yet another extension of rule-making authority into a new domain.

PROFESSOR DORSANEO: I'm not sure if the statute talks about approval of the nature of the -- exact nature of the split.

MR. ORSINGER: Okay. Then if that's, in fact, the case then this subdivision (4) is creating a new requirement that doesn't exist by law or ethics that the client be advised of the fee-splitting and agree to the ratios or amounts.

CHAIRMAN BABCOCK: Pam.

MS. BARON: I don't agree with the disclosure requirement, but in the interest of getting the bad medicine down quickly, I have a proposed language change which would scrap subsections (1) through (5) and rewrite (b) as follows: "If a referral fee has been paid or agreed to be paid with respect to the case," comma, "lead counsel

must file with the court a notice stating that such fee is in compliance with section 7.5(d)."

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN BABCOCK: Yes.

PROFESSOR DORSANEO: And that would contemplate that we don't say to whom it's paid?

Well, I think there's one aspect of this, I think it is a good idea for the judge to know who's getting the money so that the judge can take appropriate action if there is a relationship between the judge and that person.

CHAIRMAN BABCOCK: Well --

JUSTICE HECHT: Does that mean -- you mean recusal?

PROFESSOR DORSANEO: I mean recusal or disqualification or something like that. The one part of the sunshine that needs to be available is to disclose who the interested parties are here so the judge can take appropriate action.

CHAIRMAN BABCOCK: Well, would the judge have to -- if Paula refers me a case and I give her 50,000 and she's not in the case, she's not of record, but she knows the judge real well and maybe represented him in a personal matter, does the judge have to recuse himself once he finds out that Paula has got that referral fee?

PROFESSOR DORSANEO: I can't answer that, but

I hope so.

MS. SWEENEY: That's got to cut both ways. I mean, if the defense is paying somebody to -- that's the judge's buddy then they're going to have to disclose that, too. You can't make this a one-way street that only one side of the litigation has to disclose all their consultants, referring sources, or folks that they're agreeing to share a fee with but the other side doesn't.

If you're in a small town and somebody refers you a case and you don't want the court to know that they're involved because you don't want the court recused, you ought not -- and they're not doing anything in the case and they're not appearing and they're not arguing and they're not exerting influence, then you ought not to have to disclose that. It ought to be a private contractual matter between the client and that lawyer, and if the other side has got somebody that they're consulting with in the small town, they ought not to have to disclose it either.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: I echo that sentiment. I mean, we're going to tell the judge something that if they didn't know wouldn't bias them, but now they know it, so now we've got to recuse them. Makes no sense.

CHAIRMAN BABCOCK: Judge Gaultney.

HONORABLE DAVID B. GAULTNEY: Is it a recusal

issue or a disqualification issue? That is, if you have an interest in a lawsuit and, say, my brother has an interest in a lawsuit, why am I not disqualified? And is there no requirement that that disclosure be made?

CHAIRMAN BABCOCK: I don't think there is now, is there?

MR. LOPEZ: Well, I'm sure judges have interests in lawsuits and they had no idea they had an interest in the lawsuit, and so it doesn't affect their impartiality if they don't know.

CHAIRMAN BABCOCK: Well, but the point Judge Gaultney is making is disqualification doesn't matter. It's that you're gone, you're history.

MR. LOPEZ: Because of the presumed effect that the interest has on the judge.

MS. SWEENEY: The referring lawyer is the judge's ex-law partner and they hate each other. I don't want the judge to know that's where I got the case. Why on earth should I have to publish that?

MR. MUNZINGER: But if you're sharing a contingent fee with him, would he not have an interest in the lawsuit?

MS. SWEENEY: Sure, and the guy the judge hates, but why does the judge need to know that, hey, you may want to really stick it to these folks because look

who's going to get stuck, is the guy that ran against you last time? Why does anyone have to disclose that?

CHAIRMAN BABCOCK: Okay. Pam as the subcommittee chair has a proposal on the table, and I take it, Pam, that your proposal is deliberate in its omitting the identity of the referring lawyer, correct?

MS. BARON: Yes.

CHAIRMAN BABCOCK: Okay. So that's something we can vote on. But Frank doesn't want to do that.

MR. GILSTRAP: I have one criticism of Pam's proposal. I have one criticism. She is assuming that -- I mean, this is all assuming we're going to keep (d). I mean, you know, and which includes the cap. I mean, that's the purpose of (d). If we don't have (d), we don't need to refer to it. I mean, we could simply have a requirement that disclosure be made.

MR. YELENOSKY: Well, I thought we were already beyond that, but I understood the direction from the Court to write a rule that would include a cap, but if I misunderstood that then we need other direction.

CHAIRMAN BABCOCK: So you want some direction, huh?

MR. YELENOSKY: Judge Hecht, I understood that the Court wanted us to propose a rule that -- I mean, the essence of this is the cap, not disclosure.

JUSTICE HECHT: Well, we want as always the committee's advice on this proposal, which has been made, that does include a cap. So as always we want the committee's advice on this proposal which does include a cap, yes.

CHAIRMAN BABCOCK: So, yeah, Bill.

PROFESSOR DORSANEO: I'd like to hear more discussion about it. I mean, I don't know whether what I said I agree with anymore after hearing what Paula says about it. I'd like to hear more discussion about what are the ups and downs of requiring disclosure of the name.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I think as far as recusal is concerned that we're trying to fix a problem that we create in terms of informing the judge that there may be some reason why they might be biased and now we've got to get rid of them. As far as disqualification is concerned, I don't view that much differently. I mean, Lord knows how many judges have signed judgments that went final that had some distant disqualification that no one ever knew about and, therefore, it made no difference, and when you're just weighing the importance of advising the judge that there may be some remote connection, because if it's not remote then somebody is going to know about it independently from this disclosure. If it's some remote connection, even

though technically there may be a constitutional problem with the judge sitting, if they don't know it and nobody else knows it, I don't know that shining light on this issue really is a big advancement in public policy.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: And when you look at the disqualification provisions, I mean, I'm not sure it's much of a problem anyway. I mean, the only one -- they're disqualified if they served as a lawyer. They know that they have an interest.

MR. LOPEZ: Bingo.

MR. GILSTRAP: And then the third one is they are related by affinity or consanguinity. I mean, to have an interest you have to know it, so I don't think there's really a problem with disqualification.

MR. ORSINGER: Well, you're reading the rule, and it's not the Constitution, and there's not a complete parity there. Are you sure that the knowledge is required under the Constitution?

MR. GILSTRAP: No, I'm not. I'm reading the rule. You're right. The rule says they know that individually or as a fiduciary, they have an interest in the subject matter in controversy.

CHAIRMAN BABCOCK: We're hearing a lot of reasons why the name shouldn't be disclosed. Why should

the name be disclosed? What's the argument for disclosing it? You know, Paula yesterday said in addition she doesn't want to have to disclose her network because The Hammer or Buddy are going to find out all about her network and then disrupt it. So it's an anti-competitive thing, too. Judge Gray.

HONORABLE TOM GRAY: I guess the flip side, if there are networks out there, Paula will be able to find out who those other people's networks are and proceed to go compete with them, but I'm disappointed in Jeff today. He hasn't talked about sunshine today.

MR. BOYD: Everybody else has already been doing it.

HONORABLE TOM GRAY: We are suffering as a profession, or at least my perception of what happened in the last legislative session is that there is an inherent distrust of lawyers and the judicial branch over across the street, and they are wanting us to police ourselves, wanting us to do things to help the situation. I think that a simple certification is not going to do much about the perception, real or imaginary, of a problem; and I think one of the things this allows us to do is really measure the problem. Is it a real problem? The disclosure of the name and the amount is critical to determining the nature and extent of the problem. It may be that, in fact,

there is not a -- as much a real problem as a perceived problem and this can go away, but the -- right now there is a very real perception of a problem, and I would like to see for that reason the names and the amounts required in the disclosure.

CHAIRMAN BABCOCK: Okay. Paula.

MS. SWEENEY: I think that -- well, one, I would respectfully disagree that what happened across the street during the last session had to do with distrust of the legal system. It had to do with corporate interests protecting their bottomline and nothing else. It was facilitated by distrust of the legal system, which allowed it to be vandalized, but that's what happened.

And as to if sunshine is going to be salutary and allow people to see what's really going on then this rule has to go well beyond the instances of only affecting people who cannot afford to pay lawyers by the hour and has to cut across the entire legal system and affect all referral agreements and all networking agreements, and they should all be published and disclosed, and if the payment is an in-kind payment, if the payment is a deer lease, if the payment is golf rounds, whatever form of solicitation or exchange of value there is, then let's shine the bright light of sunshine on all of it. But to make it unilateral and only pick on folks who can't afford hourly lawyers is

worse, I think.

HONORABLE TOM GRAY: And I don't think -- I haven't heard anybody argue that this rule should not apply to both kinds. Notwithstanding Richard's comment earlier that traditionally it hadn't been applied to payments in-kind, I think as drafted it does apply to payments in-kind, and we can deal with that more specifically when we get to (d)(3), but I've got no problem with it applying across the board because it's not a one-way perception problem. It applies to both sides of the litigation aisle.

CHAIRMAN BABCOCK: The clouds are parting and Jeff now wants to speak.

MR. BOYD: No, no, no. I have no point to make, just a question. Why doesn't it go both ways as written? I mean, it seems to me it does go both ways. If somebody calls me from, you know, Oklahoma, and says, "Hey, I've got a case down there, and I need a lawyer," and I say, "Great, I'll give you, you know, X amount of money to send it to me to defend your client," why wouldn't it affect me, too?

MS. SWEENEY: I would think as written -- see, we don't know what's going to come out of the Court. As written this probably applies to everybody, but, you know, it speaks in terms of advertising, and I know, you know, Haynes & Boone and some of those folks advertise or a

whole bunch of law firms do. I'm not saying we have any particular other than to say a non-PI firm, but there are other forms of solicitation than advertising, and I think the record should be clear that we're talking about everybody and not just contingent fee agreements.

MR. LOW: We're talking about a perception or how people perceive, and I'm going to be truthful, there is a perception of people that the Legislature and our courts as a whole, no particular court, are not particularly fair to the plaintiffs. I mean, that is a -- that is -- I'm not saying everybody holds that or even the majority. I'm saying there is some feeling of that, and I'm not including myself or excluding myself, so what we do if we're talking about how things are perceived, we need to do something that does appear to be totally fair. We don't want to make it look like that we're picking on one side. We do have problems on both sides of the Bar, and we need to think about both sides and be sure that it doesn't look like we're just picking on the plaintiff.

CHAIRMAN BABCOCK: Richard, then Anne.

MR. ORSINGER: I wanted to make two points. No. 1, I don't know how any of us know whether or if the public is concerned about the referral fee problem. I've never had a layperson mention the referral fee problem to me. I've only heard other lawyers mention the referral fee

problem to me. So I really think that we're speculating to say that the public cares about this. I think it's factions of the Bar that care about this.

Secondly, I've checked it out, and as I suspected, Frank, Rule 18(b) says a judge is disqualified if they know they have an interest, but if you go back and you look at the Constitution, Article 5, Section 11, "No judge shall sit in any case wherein the judge may be interested." No requirement of knowledge. And so you could disqualify a judge after the judgment is signed if it comes to light.

CHAIRMAN BABCOCK: So there, Frank.

MR. GILSTRAP: But that's always been the case.

MR. ORSINGER: Yes. Right.

MR. LOPEZ: I'm not willing to concede that a judge is affected --

CHAIRMAN BABCOCK: Hang on a second.

MR. LOPEZ: -- unless they know they're interested.

PROFESSOR ALBRIGHT: That's a financial interest. The judge is going to know if he or she has a financial interest in this litigation. If the judge's brother has a financial interest in this litigation I don't think that's disqualification. Am I right?

MR. ORSINGER: If the interest is someone that's within the legal limits of --

CHAIRMAN BABCOCK: Okay. But that's off point a little bit.

MR. ORSINGER: Well, since theoretically somebody is going to look at this record when they make this earthshaking decision, I thought maybe we ought to have some correct information in the record.

MR. GILSTRAP: But in response to that, if I'm a judge and my brother gets a referral fee, I don't have an interest in the case.

MR. ORSINGER: Well, if you have someone within the legal limits --

MR. LOPEZ: Second level of consanguinity.

MR. ORSINGER: -- of consanguinity you're disqualified. SO if you find out that your brother referred the case then you're disqualified.

CHAIRMAN BABCOCK: Anne.

MS. McNAMARA: As somebody who is involved in matters that were rarely on a contingent fee basis, I would want to know if the lawyer I ultimately retained to litigate the case was paying anything to somebody else to get that case through some kind of a referral or recommendation, so I would strongly support Paula's efforts to make it evenhanded on both sides. And how you get to

sort of friendships and compensations in-kind that's below some kind of threshold, I don't know how you do that. I would really want to know if money had changed hands. I never know anyone agreed to anything like that, so if it happened in any cases I was involved in I did not know about it, and I really wanted to.

CHAIRMAN BABCOCK: Yeah, Pete.

MR. SCHENKKAN: And I think that, if I can step in Jeff's shoes since he's unwilling to stand up for disclosure this morning and come out in the sunshine, I think the point of requiring the name in this is to increase the odds that the client will know and the client may well have an incentive -- Anne points out that in her role as client she did, and I think a client who has a potential fee agreement may as well, if they know. They don't know unless the name is out there as well.

So I'm going to either vote against the motion when we get to the vote or encourage that it be amended to include the name before voting for it, because I do think the name serves an important function on both sides.

CHAIRMAN BABCOCK: Carl.

MR. LOPEZ: I would like to take one step back and suggest something that I think is going to be perceived as being counterproductive in the short-term, but

I think may end up being productive in the long-term, and that is this: Assign a true SCAC subcommittee to deal with whatever it is we think we're trying to fix with this rule and we let it go through the normal channel. This isn't some September 1 deadline the Legislature has imposed on us.

I think what we're trying to do here I agree with completely. How we're going about doing it, I disagree with completely, and part of the structural problem we're having here is that this didn't come through the normal -- what I call normal channel of the SCAC, and I think it would be productive to let it do that, let it percolate the way it normally does. You know, I appreciate, you know, we would like to do things yesterday in the way the world works nowadays, but I just want to make that suggestion.

CHAIRMAN BABCOCK: Judge Gaultney.

HONORABLE DAVID B. GAULTNEY: Let me second that. I agree with that. I think one of the problems I'm having today is this rule has no proponent. No, I'm serious. I'm serious. Normally when we have -- I've only been on this committee very briefly, but the subcommittees have done an excellent job, I think, of going and being knowledgeable about every minutia of a rule and defending it, defending their proposal, and then subjecting it to the

criticisms and questions of the committee. I think that's a good process, and I think -- because also I think what we're discovering as we're going through this morning, I think this is useful.

But I want to address some other issue, too, in addition to seconding Carl, and that is to me one of the benefits, a side benefit, an unintended benefit, I think, but I don't know if it's intended or not because we don't have the proponent of the rule here, but one benefit possibly of the rule is from the judge's standpoint. I think recusal and disqualification are important issues, and I don't think you're creating a problem that doesn't exist, because I think the appearance of impropriety will exist after the fact. A judge doesn't know anything about the relationship until that multimillion-dollar verdict comes in, and whoever the person who has an interest in this is known in the community to have benefited from that case.

So, you know, I was with a fairly large firm in Beaumont. There are cases that I'm disqualified from serving on that I knew nothing about. I didn't know the firm even had it, but I have a list of those cases, and I can identify which cases I'm disqualified from, and it makes a difference. If you're disqualified, what you do is of no effect. So you need to be out of the case even if

you don't know anything about the facts or anything else.

So I think that what I'm trying to say is, is that I don't think that this rule was intended to deal with that. I don't think it -- you know, that's its purpose at all. It is a potential benefit to disclosure of the name of someone who has an interest in the case. I'm not saying it's a wise thing or whatever. I'm not taking a position on that, but now I'm kicking back to where Carl is. I think we ought to have a committee approach the rule and present the proposal.

CHAIRMAN BABCOCK: Well, let me just respond to that, and we have from time to time been asked to look at the work product of other committees that the Court by order has created and assigned a task. We did it a couple of years ago with parental notification rules, and we were asked to do that, and we did have a subcommittee which was appointed to look at this rule three meetings ago, and that's Pam and Steve's subcommittee. That's why they're leading the discussion, and so the Court asked us to do that, and they asked us to do it on a particular timetable, and so that's why it's being done the way it's being done.

Buddy.

MR. LOW: And I would point out that the Jamail committee was appointed and selected by the Court, and like on some of his committee includes some people on

this committee. So I just want to point out that it has been studied. I'm not for it. Don't get me wrong, but the procedure for getting here I think has been proper.

HONORABLE DAVID B. GAULTNEY: Well, I didn't mean to criticize the procedure. It just seemed to have a different flavor than the other proposals that I've seen.

CHAIRMAN BABCOCK: Well, it's different because a lot of people on this committee don't like it.

MS. BARON: Well, Chip, I want to say something on this because I do think it's come to us in a different way because normally we would get either a task force report or someone from that committee would come and present it and explain what exactly the problem is we're directing the rule toward, why there is some overwhelming need for it. None of that has been provided. Our initial discussion expressed frustration at that, and we asked that somebody from the committee who is more familiar with it come to this committee and explain the rule to us, and that has not happened.

CHAIRMAN BABCOCK: Well, I tried yesterday to articulate as best I could what the reasons were for the Court charging the Jamail group to do it, and I can't -- I can't improve on that, and I was there. Maybe Elaine can. Tommy was on that committee, too, Tommy Jacks, but he's not here, so anyway.

Let's get back to your proposal, Pam, which was to do it in a particular way, and Richard wants to talk about that first.

MR. MUNZINGER: I think you ought to amend your proposal, Pam, to include a requirement that the identity of the parties to the payments or agreements be disclosed to the trial court in light of the comments that have ban made. If I were an elected district judge in Texas and it turned up after I had entered judgment in a case that my son had profited from a case and I had no knowledge of it, I would be dog meat to my opponents who would claim that I was dishonest, and all of my breast-beating after the fact would be self-serving and ignored, and I think that the trial courts are entitled to have the information for the very reasons that Judge Gaultney said.

So I think your proposal is good because it sidesteps saying the amounts of all these payments, but I think it should be amended to include the identity of the parties to the transaction, and that would solve the problem.

CHAIRMAN BABCOCK: Bill. Think about that, Pam.

MS. BARON: Okay.

PROFESSOR DORSANEO: I also think, you know,

judges should be able to have conversations with people, not about specific cases, and to be aware of what the relationship is.

CHAIRMAN BABCOCK: Right. Stephen.

MR. TIPPS: I think we're suddenly trying to solve far more problems than have been identified. The only problem that I have heard identified is with the existence of large referral fees and the receipt by lawyers who advertise what are perceived to be windfall payments. That was the problem, and it seems to me that the first step that should be taken in trying to deal with that problem is to prohibit the practice, perhaps require a certification of compliance with the prohibition, and create some sort of sanction to make sure that people don't violate the prohibition.

We're now talking -- so that's what this rule is supposed to be about, and then all of the sudden we're talking about another problem or another hypothetical problem, which is that judges don't know who these referring lawyers are and, therefore, maybe they need to be disqualified, but nobody has identified that -- I mean, we've never even heard an anecdotal example of a situation in which some judge presided over a case not knowing that the Texas Hammer was his brother-in-law or something of that nature. I mean, nobody has identified that as a

problem.

CHAIRMAN BABCOCK: The Hammer has got a lot of siblings who are here.

MR. TIPPS: And similarly somebody has proposed that, well, this disclosure would benefit the client because it would make sure that the client knows that there's a referral fee. We've seen no evidence that clients don't know. I mean, presumably the client knows, I mean, the client is in a position to know because the client has hired the Texas Hammer and the client has had to sign an agreement that we have no evidence doesn't almost -- doesn't always include these necessary disclosures. So I think we're trying to do far too much with this rule with regard to the only problem that's been identified.

CHAIRMAN BABCOCK: You know, Pam's right. What we needed here for this meeting was Joe Jamail and The Hammer.

MS. SWEENEY: Let's invite them.

CHAIRMAN BABCOCK: Pam, have you thought about amending your proposal along the lines that Richard suggested?

MS. BARON: I don't want to amend it.

CHAIRMAN BABCOCK: Okay. Well, let's vote on that then. You want to read it again?

MS. BARON: "If a referral fee has been paid or agreed to be paid with respect to the case," comma, "lead counsel must file with the court a notice stating that such fee is in compliance with section 7.5(d)."

CHAIRMAN BABCOCK: Okay. Everybody got that? Okay. Everybody in favor of Pam's amendment raise your hand.

MS. SWEENEY: With the stipulation we're not in favor of the rule or process?

CHAIRMAN BABCOCK: Yeah. That's pretty apparent.

All right. All opposed? It passes by a vote of 18 to 8, so that, Pam, as I understand it, would just be a substitute for subparagraph (b) --

MS. BARON: Yes.

CHAIRMAN BABCOCK: -- and would wipe out (1) through (5), so that will take us to (c).

MR. SCHENKKAN: Okay. But, now, those who voted for that could include those who would also vote for adding a name to it, and you didn't define it that way. So I think we ought to have a vote on whether we want to require the identity of the parties to the agreement as well. The vote might fail, but I think we ought to have a reflection of that.

PROFESSOR DORSANEO: I agree with that,

because that was what I was doing.

MR. HAMILTON: I thought we were voting --

MR. YELENOSKY: I thought people --

MR. SCHENKKAN: Well, I understand some people might have voted for it or against it either on that ground or on a different ground.

CHAIRMAN BABCOCK: All right. Just to test the water here, how many people want the name of the person who's been paid the referral fee in the disclosure? Raise your hand.

MR. ORSINGER: Pretty much everybody that voted against the motion.

CHAIRMAN BABCOCK: All right. Now, how many people do not want the name in? It's 12 to 12.

MR. BOYD: Well, the Chair votes.

MR. GILSTRAP: Chair must vote.

MR. MUNZINGER: That's justice.

CHAIRMAN BABCOCK: Well, for what it's worth for the Court, the name goes in on my vote, so 13 to 12 name goes in.

MR. LOPEZ: I thought 18 of us said we didn't want that the first time we voted. I'm confused.

CHAIRMAN BABCOCK: Well, that's what I thought, too, frankly. I thought our vote was Pam didn't want to amend, but apparently people were --

MR. SCHENKKAN: But the vote was not on not amending it. The vote was on her motion, and I'm in favor of her motion. It's better than nothing or better than what -- than the existing draft, but I also wanted the name in here and so did some others, so it's shifting.

CHAIRMAN BABCOCK: So we're almost evenly split on whether the name -- we are evenly split on whether the name should go in or not, so the Court can take that into consideration when they work on this rule.

Let's talk about time for disclosure. Anybody have any comments on subpart (c)?

MR. MUNZINGER: 15 days is a short period of time for busy lawyers. That's hard. Make it 30 at least.

MS. BARON: Well, the way this works, you have to disclose it in the first pleading you file.

MR. GILSTRAP: In plaintiff's original petition.

MR. MUNZINGER: Well, I understand, but there may be the occasions where it isn't; and if you're saying 15 days, my personal belief is that's too short; and I would ask that it be amended to 30 days.

CHAIRMAN BABCOCK: Yeah. This has two sentences, as I understand it, that you have to disclose it in your initial pleading and then if you make another payment after that then you've got to do it within 15 days,

but Richard says 30. What do people think about 30 versus 15?

MR. ORSINGER: Well, I don't agree that that's the initial pleading. I mean, somebody may file the lawsuit and then later refer the case. It's when the new lead counsel comes in and makes the first appearance, which may be through a motion or a notice of appearance, or it might be an amended pleading.

CHAIRMAN BABCOCK: Okay. I'm with you. But this contemplates two different time periods.

MR. ORSINGER: Agreed, because the second sentence requires it to be done after it's paid, and a contingent fee is usually paid after the -- or when the case is settled, so you would be filing it, you know, after the judgment, probably after the court loses plenary power, which usually isn't paid until the judgment is final by which time the court doesn't have jurisdiction to impose sanctions anyway.

MR. GILSTRAP: Or 15 days after it's agreed to be made. I think the way I read it is if I file a lawsuit and then I refer the case, then the new lead counsel -- and we have an agreement at that time, the new lead counsel has to disclose it when he files his first appearance, and if we do it later, then he's got 15 days after we make the agreement.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: I think -- I don't think we should require disclosure at the exact time of the lawyer's first appearance in the case. I think the lawyer should have some period of time after he appears in the case or she appears in the case to make this disclosure. I can envision a lot of circumstances in which the lawyer appears in the case, there's some urgency to get that done, and it's only later that the lawyer has an opportunity to really sort things out. So I would suggest that we make the disclosure obligation within 15 or 30 days of the lawyer's first appearance in the case or 15 or 30 days of the date of the payment or agreement to pay, whichever occurs later.

MR. LOPEZ: Why can't we just take out the first sentence? I mean, what's so special about the first one?

MR. TIPPS: Well, I mean -- the typical situation is going to be one in which the agreement is made before there is ever any appearance, so there is no obligation to disclose it -- the earliest time would be when you appear.

CHAIRMAN BABCOCK: Orsinger.

MR. ORSINGER: What about doing it by the time the final judgment is signed by the court? That would

cure a lot of our strategy concerns. It would still put it in the public record.

CHAIRMAN BABCOCK: Harvey.

HONORABLE HARVEY BROWN: Well, the problem with that is it doesn't address the issue of disqualification that people are concerned about. Judges want to know sooner than that, but it can't be at the time of the initial appearance because initial appearance might be at the original petition, unless we're going to require them to file something along with the original petition, a new notice, so I think it should be sometime after the suit is actually going forward with an answer on file, et cetera.

PROFESSOR DORSANEO: Why couldn't you just put another paragraph in the petition?

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Or before jury selection, because I've been to some little local towns, where you know, I'd like to know.

MR. SCHENKKAN: It's important to settlement evaluation, right?

MR. LOW: Yeah.

MR. ORSINGER: Now, what does that have to do with the public good? That has to do with litigation strategy.

MR. LOW: Well, every now and then I have to think about my good.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: Whatever the Court does, I would strongly urge that there not be a hard deadline that will then be turned into another gotcha. There are so many gotchas already. If you look at the nature of some of the statutes we operate under, there are so many deadlines that if you miss them by a day or an hour your case is dismissed with prejudice, that if we hang a carrot out there for somebody to jump on and say, "You know, you were 16 days, I'm going to move to disqualify you," we're going to create that additional layer of nonsense and gamesmanship, and I would strongly urge the Court to use language along the lines of "at an early practical time" or "in an early pleading" or if the idea is to do it early in the case.

If the idea is -- if the idea is merely to get some sunshine then I would suggest it be late in the case. If the idea is to discourage referral fees altogether then this rule doesn't accomplish the purpose as previously discussed, but if what we're trying to do other than create gotchas and other than create a chilling effect on litigants is simply to identify folks, please don't put a hard, fast deadline that if missed by a day or two requires disqualification of the lawyer that the plaintiff

has contracted with.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, thinking about this, if you made it -- the way it's worded now, I'm unclear whether it could be -- whether this is a pleading issue or some other issue. If it would be a pleading issue then presumably, but perhaps not, our pleading rules would be applicable and the failure to do it would be a defect that would be waivable unless somebody excepted to the nondisclosure or the lack of information in the pleading, and I'm not sure what this is meant to be. The most sensible place to put it would be in the petition, it would seem to me, and that would be the easiest way to handle things rather than to have some other layer of documentation that needs to be filed; but if we do that, then we buy into the remainder of the rules, presumably, that deal with pleadings.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: And I would amend Bill's statement only to say the petition or the answer since we're talking about shedding sunshine on the entire process, not just one side thereof.

CHAIRMAN BABCOCK: Okay. What's everybody think about that? Carl.

MR. HAMILTON: Well, the problem is, as

somebody said earlier, there may not be a referral fee in place when the first petition is filed.

CHAIRMAN BABCOCK: Yeah. The second sentence would pick that up. Richard.

MR. MUNZINGER: I would be opposed to a rule that would require it to be stated in the petition or the answer. I've been involved in cases in which I have filed or have had filed against me, my pleadings, in various cases or portions of them, and I don't know that that's necessarily something that needs to be in a petition or an answer. It ought to be in a separate document.

CHAIRMAN BABCOCK: Okay. Carl.

MR. LOPEZ: I don't think we should take lightly Dorsaneo's comment about if we're really going to make this part of the pleadings we need to decide because at some point you're going to get an argument that somebody missed limitations and they did it because they were screwing around trying to get the referral fee straightened out and they couldn't get their petition on file until they did. So I'm very much -- at least my knee jerk reaction without thinking about it further would be very much against making it sort of part of the pleading process because of all that it entails, but I don't have an alternative solution to suggest.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: See, if you don't have it worked out, The Hammer keeps that case until almost time for limitation, and you don't really know you don't have a deal, and you've got to file the lawsuit then you're in trouble, and you're going to let limitations run, and you're going to get sued for malpractice. We don't have a relation -- well, at any rate that would be a problem.

CHAIRMAN BABCOCK: Yeah. Well, why don't we just put within 30 days of the first appearance and change 15 in the second sentence to 30 and then we've got it, don't we?

MR. LOW: And add "answer."

MS. SWEENEY: Please don't use numbers. Anything, but don't use 15 or 30 days. Use early, as soon as practical, in the next responsive pleading, in an early pleading, use something to connote if we want early. If we want late, put it before judgment, but please don't put a number on there. It's just going to create a host of problems. We've already got people with all these ARCE motions out there running around with a cottage industry of those.

CHAIRMAN BABCOCK: What kind of motion?

MS. SWEENEY: A-R-C-E.

MR. LOW: A case I lost.

MS. SWEENEY: Sorry.

CHAIRMAN BABCOCK: Judge Sullivan.

MR. SULLIVAN: I think that you're probably going to have to put some sort of hard deadline on it, but I want to speak to Paula's issue because I think it's a serious one; and that is, I think that maybe you back into a solution in terms of saying I think that there needs to be -- because of the Draconian penalty that you're talking about, disqualification, I think there needs to be a finding of an intent to violate the rule as opposed to simply some hypertechnical violation because of the 16th day as opposed to the 15th or whatever, because I think Paula's point is very valid in that regard; and maybe we could reconcile the two conflicting interests that way. I think there's got to be some clarity, though, as to when you do it.

CHAIRMAN BABCOCK: Okay. Pete, you still want to talk?

MR. SCHENKKAN: No.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: The courts have fact found quite a few times that lawyers have intentionally violated Rule 1301 in the malpractice statute by intentionally filing a report that is inadequate, so that is not a hard threshold. Intent is very easy for a court to find.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: I agree with most of what Paula said today, but I don't agree with that one. But I wasn't going to raise this until Judge Sullivan did, and that is, I'm more likely to be against her, to be for what Judge Sullivan is saying, which is have a hard and fast day in there, but we've got -- but I'm more likely to be for that if we don't -- I mean, we have the judge with notice -- in (f) we've got a great sanctions paragraph that's drafted. I think it's great. It gives the judge the opportunity to do such sanctions as are just. I'm not sure why we have it, because is seems to be cumulative of what we have done in here in (d)(1). You know, (d) says "must disqualify," and it just seems to me I would hate to be the trial judge that's got to disqualify the good lawyer because of some technical deal here. I just -- I'm very much against that.

CHAIRMAN BABCOCK: Okay. Yeah, Pete.

MR. SCHENKKAN: Maybe I misunderstood. I thought the point of Pam's motion, which has been adopted and then been amended to include the name, was to make the disclosure that (d) has been complied with, and so it's really not at this point a disqualification criteria, and it's a list of the things that have to be certified. Have I misunderstood this? I thought the proposal was not to have the filing and then have the disqualification, but have the filing be a certification that I've complied with

things that are listed in (d).

MS. BARON: Right. That's correct.

MR. SCHENKKAN: Which isn't that I'm being disqualified --

MR. GILSTRAP: But look at (d)(1).

MR. SCHENKKAN: -- by having decided or have decided to agree to a fee. Maybe we need to discuss what the list is, but I didn't understand (d) was anymore a disqualification criteria.

MR. LOPEZ: What do you mean by that?

MR. SCHENKKAN: I have perhaps misunderstood Pam's motion to be that instead of having this very detailed list of things that are going to have to be disclosed, including copies of these agreements and these advertisements, we're going to get away from that and we're going to certify -- we file something that certified that you have and haven't done these things that are listed in (d), and I sort of assumed, maybe wrongly went too far, that that meant that we were no longer including the disqualification part of (d).

CHAIRMAN BABCOCK: Right.

MR. SCHENKKAN: Just doing it as a list of things you had to disclose.

CHAIRMAN BABCOCK: That's a good point. (c) ought to be amended to say -- in terms of timing it ought

to either be within 30 days or 15 days or within a reasonable time. I mean, those are the three options we're talking about, and then what has to be disclosed is what's required by 7.5(b) because we've now changed 7.5(b) to have a lot less information in it than it was as drafted.

MR. LOPEZ: But, right, (c) would be changed, but would (d) --

CHAIRMAN BABCOCK: (c) is going to be changed to reference back to (b).

MR. SCHENKKAN: But what (b) said was that you would disclose the things listed in (d), if I understood the wording of it.

MR. YELENOSKY: But one of the things listed in (d) has to do with failing to make the disclosure, so we have to --

MR. SCHENKKAN: Correct.

MR. LOPEZ: Can I just ask a question?

CHAIRMAN BABCOCK: Yeah.

MR. LOPEZ: Okay. Help me understand my thinking. If somebody makes a litigation payment of the 60,000, is that automatic disqualification?

CHAIRMAN BABCOCK: A referral fee of $60,000?

MR. LOPEZ: Yeah, the way we're going to --

CHAIRMAN BABCOCK: Well, it depends on what we do with (d), but as currently written probably so.

HONORABLE TOM GRAY: Only disqualification to act as lead counsel.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: Not disqualification to act as counsel in the case. That's the way the rule is drafted.

CHAIRMAN BABCOCK: That's the way the rule is drafted now, which is odd to me.

MR. YELENOSKY: So The Hammer becomes the lead counsel?

MR. SCHENKKAN: Maybe I can --

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: Sorry. Maybe to bring this into focus would be to propose to -- make a motion to propose to edit (d) to read instead of disqualification -- I don't know what the magic word is out of Pam's motion, but that the disclosures must include what are now (2), (3), and (4). The disclosures required in the certification is -- I'm sorry. Would you --

MS. BARON: Well, if the motion just says all you have to file is a notice saying "I paid a referral fee and according to the" -- if it's 13 to 12 -- "to X, and such fee is in compliance with section (d)." That's all you have to say.

MR. SCHENKKAN: Okay. And then so section

(d) would be the referral fee --

CHAIRMAN BABCOCK: Well, Pete, you're ahead of us right now. We're on (c).

MR. SCHENKKAN: Okay. I'm sorry. I'm sorry.

CHAIRMAN BABCOCK: We're trying to fix (c), and we need to be a little bit orderly about this. Judge Gray.

HONORABLE TOM GRAY: With the change in (b), (c) should be, caption, "Time for certification. At the first appearance an attorney -- of an attorney as lead counsel the attorney must certify compliance with this rule. Thereafter, lead counsel must certify litigation payment within," pick a time period, "after it is made or agreed to be made, but no later than the commencement of voir dire."

I think Buddy's point is very, very valid, that if you make a litigation payment two days before voir dire starts and trial is going to last a week, if this rule is going to have any of the purpose, is going to have any teeth to it at all, you've got to make that disclosure. And it's just a certification. I would be more amenable to a longer period of time if we were having more disclosure, but this is just a certification.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: Just for clarification, would

a referral fee ever -- a fee for referral of a case ever be paid that late in the litigation? I just don't know.

MS. SWEENEY: Usually you pay it at the end, the referral fee.

JUSTICE HECHT: But I mean the agreement.

MR. LOW: Agreed to be paid.

JUSTICE HECHT: You wouldn't be agreeing or paying for the first time as voir dire starts, would you, or not?

HONORABLE TOM GRAY: Well, maybe the attorney that has been acting as lead counsel suddenly feels overwhelmed and goes out and hires Paula two days before picking the jury. I mean, it's a simple thing to include as a drop-dead. It may never trigger, Justice Hecht.

CHAIRMAN BABCOCK: You're not going to be in this rule anyway if that happens.

PROFESSOR ALBRIGHT: If that happens you're out of this rule because that's not a referral fee.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I think it ought to say that "Disclosure of any referral fee relating to the case must be made by lead counsel at the earliest practicable time after commencement of the suit." Earliest practicable time would mean after the referral fee, whenever it is, and after the commencement of the suit.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: Well, we've got to go back three steps. The stated purpose of this is to end the abusive practice of taking and passing on without intending to do any work. The stated purpose of this isn't anything else. The stated purpose of this from the Court isn't sunshine. It isn't disequalifying judges. It's not recusal. It's not anything other than ending that abusive practice.

If that's true then make the statement before judgment and sometime before conclusion of the case, because there's no reason -- if you start putting requirements that something be done early in the case and, God forbid, that gets missed or dropped, you're adding another layer of gamesmanship we don't need to add. If all we're trying to do is end the practice that's been described, and I don't know that this would do that anyway, but if that's what we're supposedly aiming at then all we have to do is have this done before judgment. Not -- in other words, not at the early end of the case, just before it's over.

MR. GILSTRAP: Chip?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: I think we're hanging up on this because we don't know what the nature of the penalty

is. Is the penalty going to be disqualification, is it going to be disgorgement, or, you know, is it just going to be a disclosure requirement? If it's going to be disgorgement or disqualification, maybe we need some type of good cause exception or some general language. Maybe we've got the cart before the horse. Maybe we need to figure out what the penalties are. Once we know what the penalties are, I think it will be easy to draw the timetable.

MR. LOPEZ: Second.

CHAIRMAN BABCOCK: Yeah. That's probably right. Anne.

MS. McNAMARA: If you make it evenhanded so it goes in both directions, your typical large defendant would rather know it sooner rather than later because your interest then is to be sure you've got the most qualified person representing you, not someone who was brought into the transaction because of an unnatural arrangement. So I would suggest Carl's language because that tees it up soon enough to make a change if that's what you want to do.

CHAIRMAN BABCOCK: Steve.

MR. YELENOSKY: Well, I think Frank's point is a good one. We haven't figured out what the penalty is, and we've presupposed the disqualification, which based on the passage of Pam's amended motion would seem to be

appropriate only if you never get the certification, and I mean, our penalty could be a motion to compel the certification, and failing at that point, perhaps disqualification; but it doesn't have to be not made disqualification because you missed the deadline.

CHAIRMAN BABCOCK: Well, that's not (b).

MR. SCHENKKAN: A proposal was made that we don't need any separate penalty in here at all because what's provided in what's now drafted as in (f).

MR. LOPEZ: Which could include disqualification.

MR. SCHENKKAN: Well, maybe it could, but we can address that separately, but what we're basically saying is we're getting rid of disqualification on the front end and we're putting it into this hearing in sanctions form in the tail end, and so anyway, I'm in favor of that. Whether that's the current proposal, that would be my suggestion.

CHAIRMAN BABCOCK: Okay. Here's what I see we've got as options. We've got the hard and fast time limit, which Paula worries about being a gotcha, which is either 15 days or 30 days. That's one option.

We've got Carl's thought that it could be at the earliest practicable time. We've got somebody, Buddy's maybe, thought that it be before voir dire.

MR. LOW: No. No. I'm not saying I'm for that. I'm just saying there have been situations, and Paula points out something. We are not -- maybe I can find that out other ways. I'm saying I have been in situations where I had suspicion that somebody had an interest in the case that also had an interest in the jury, that I would have liked to have known about it, but that's a remote.

CHAIRMAN BABCOCK: Okay. Well, anyway, that's a time we could do it, and then Paula says before judgment. So those are four different kind of approaches, and how do we get a sense of what people's preference is?

MR. LOPEŻ: I can't vote on it unless I know that mandatory disqualification is off the table because that affects --

CHAIRMAN BABCOCK: Well, we need to get to that anyway, so let's get to (d), which is the guts of the rule anyway. The first paragraph talks about you're going to get disqualified as acting as lead counsel, and Judge Gray says, "Well, wait a minute, what's that all about, because, okay, now you can't call yourself lead counsel anymore?" Then what does that mean, you can only take half the witnesses or less than half the witnesses?

HONORABLE TOM GRAY: Well, lead counsel in the rules is a very -- I thought, a very clear meaning of, you know, in the context of who you send notices to, and

you designate somebody else as lead counsel, and you can still do anything in the case. It's just that the responsibility for communications goes to somebody else. Now, maybe that's not what they meant by lead counsel, but, I mean, the rule I thought pretty well defined what the purpose of lead counsel was. It's a signing responsibility for compliance with this rule, is the way I was thinking about it.

CHAIRMAN BABCOCK: Okay. Does everybody think that? Alex.

PROFESSOR ALBRIGHT: I think that's true with the rule that we have -- the rules that we have today. If you look at 7.4(a), they have added that the lead counsel is responsible for the suit with respect to the party represented.

MR. YELENOSKY: But we voted that down.

PROFESSOR ALBRIGHT: Did we vote that down?

MR. YELENOSKY: We voted that down.

MR. ORSINGER: But our vote didn't count, so we better talk about it. Just because we voted it down --

CHAIRMAN BABCOCK: Well, it counted for us, but Bill.

PROFESSOR DORSANEO: I disagree. Rule 8's last sentence says -- well, at the beginning it talks about notice, but then it says "Thereafter until such designation

is changed by written notice said attorney, the attorney in charge, shall be responsible for the suit as to such party." And the historical background of this rule is that this rule was not a notice rule. It was a who's in charge, who's the boss rule, and it has that tone at its back end still, although it's primarily a notice rule.

PROFESSOR ALBRIGHT: Well, in that case 7.4 is just --

THE REPORTER: Is what?

PROFESSOR ALBRIGHT: 7.4(a) is just a recodification then.

PROFESSOR DORSANEO: I think that's right.

PROFESSOR ALBRIGHT: So I was wrong, so....

MR. ORSINGER: But Bill used the term "attorney in charge." What does the current Rule 7 --

CHAIRMAN BABCOCK: Let's not worry about that. What's the effect of this disqualification from acting as lead counsel, and it's not disqualifying you from the case obviously.

MR. GILSTRAP: If it's the lead counsel is the person in charge, if The Hammer refers it to the king of torts, and they want the king of torts to try the lawsuit, and now if the king of torts is disqualified as lead counsel, you know, what's the purpose of the referral?

MR. LOW: But he can do anything he wants to.

I've been lead counsel and only taken two or three witnesses and a couple of the other lawyers took all the witnesses.

MR. GILSTRAP: You said lead counsel can just be a title of a person who's responsible?

MR. LOW: Based on responsibility.

HONORABLE LEVI BENTON: Let me say if it isn't clear, I don't like the rule. I don't think it's Texan. I don't think it's American. I don't think a Republican conservative Court ought to ever enact this rule; but having said that, if the rule is enacted as it's written, it's toothless; and we have to revise this rule to give the trial court some clarity, because does that mean the lead counsel, the disqualified lawyer can't do voir dire, can't do opening, can't do closing, can't do direct, can't cross? It's meaningless. It's just a meaningless, toothless rule that the Court should have passed on the opportunity to refer to the Jamail committee, I respectfully submit, but I don't have an opinion.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: I think disqualification -- I think automatic disqualification is far too harsh a sanction, and I also think that if the goal is to make sure that there are no referral fees in excess of the minimum being paid that the certification obligation should be an

obligation of every lawyer who appears in the case; and if you've got a big case with three law firms on the plaintiffs side and three law firms on the defendants side and the goal is to make sure that there are no improper referral fees then it ought to be part of the obligation of any lawyer who is appearing in the case to file the appropriate certification that he's complied with this rule and has not agreed to pay or paid a referral fee; and the sanction then for filing a false certification or failing to comply should be a sanction levied by the judge, which I guess could extend to disqualification.

But the judge ought to be given the opportunity to decide what punishment fits this particular crime; and if the crime is failing to do it within 30 days but doing it within 32, then perhaps not much punishment is necessary. If it's a fraud on the court, then it might be a severe punishment.

CHAIRMAN BABCOCK: Carl.

MR. LOPEZ: I hope that whatever we decide to do it will be along the lines of what's in (f) with some type of, you know, sanctions as are just, reasonable, good cause, that type of -- and I say that in a good way -- wishy-washy language that allows for some leeway or some specific language that talks about the interests of the client because case law talks about it, but I can't believe

the way this is written -- of course, it depends on what lead counsel means. If it's really toothless I'm not sure we even have a discussion because I don't know what it means to be disqualified as lead counsel any more than anybody else around here does, but if it means something serious then I don't see how this application under some of these hypothetical contexts is going to meet the mustard about when the rules you can disqualify a lawyer and leave a client hanging.

CHAIRMAN BABCOCK: Frank, Alex, Paula, and then Bill.

MR. GILSTRAP: Well, I'm not so sanguine about the toothless nature. I think if the Court feels it's too weak they could just strike the word "lead."

MR. LOPEZ: Yeah.

MR. GILSTRAP: And since we're getting short of time, I think I'd like to maybe address this whole -- the (d) as a whole and I guess particularly the cap; and this is, I think, really kind of the heart of the rule; and, you know, we've had the criticism that, well, that's not really procedure. Well, I would go farther than that. I have serious questions as to whether or not this is something the Supreme Court has the power to do.

This strikes me as a legislative matter. It's regulating a contract; and even if the Court has the

power to do it, I would suggest the Court should think very hard before it exercises that power. This is a real slippery slope. If you say that you're going to cap litigation referral fees, what's to keep the Court from saying, "Well, we're going to cap contingent fees"? If it has the power to do one, it has the power to do the other.

MR. YELENOSKY: Or hourly rates.

MR. GILSTRAP: Or hourly rates. And, you know, I don't think that is where we think the Court should go, and candidly, I think the members of the Court should look at this and think long and hard as to whether or not they want to step out on that slippery slope, because once you go out there, there's no coming back.

MR. LOPEZ: I preface everything I say today with what Frank just said. That's my sentiment exactly, but I've been told to sort of ignore that and note it for the record, but then do something, and I'm doing something.

CHAIRMAN BABCOCK: Alex, you want to say anything?

PROFESSOR ALBRIGHT: I was just going to think say that I think we need to start from scratch on (d) because I think when you glance at this rule you think that the attorney is disqualified, and it takes parsing to say what is lead counsel to get to the point that maybe it doesn't mean anything. I don't think that's a good way to

write rules. I don't think we should have it that way. I would make a motion that we say that if a lawyer fails to make the certification then they may be subject to sanctions and use the language of (f).

CHAIRMAN BABCOCK: Okay. Paula and then Bill, right? Yeah.

MS. SWEENEY: You know, the thing that has gotten lost that someone pointed out a second ago that's critical is who are we protecting here, because if we are still trying to protect clients, disqualifying the lawyer they've chosen because the lawyer made a mistake is not the way to do it, and I think disqualifying the lawyer is the wrong way to do this. I mean, the client has chosen this lawyer; and the client has said, "I want, you know, Frank Branson to try my case because he's the best dang trial lawyer out there"; and if, you know, Frank's two-year associate doesn't timely file the designation and the sanction can include -- or doesn't file it at all or is incorrect or whatever, if the penalty is disqualification, we're stepping off a cliff.

There's got to be -- and I think we've got to go with something like (f), but I would actually prefer that the sanction be to he who received the improper fee and not to the -- not to sanction the client, who has -- one, because we have DRs to this effect, the client has

already approved all this, and we're not assuming that these folks are operating outside the DRs. So the clients have approved the arrangement. The client has chosen the lawyer. The client has chosen the structure. Now we're going to allow a strategic form of gamesmanship to come in where the other side can try and disqualify the good lawyer to the detriment of the client, and that's the wrong way to do this. If we're going to do it, there's got to be another remedy, and it has got to be -- to tackle the ill that we're after, it has to be a sanction to he who received the incorrect fee.

MR. LOW: Right.

MS. SWEENEY: And not to the client who somewhere in the chain of lawyers somebody failed to file the right disclosure at the right time, because that's who you're sanctioning when you disqualify lawyers.

MR. YELENOSKY: Chip, I have a proposal.

CHAIRMAN BABCOCK: Okay. Bill wanted to say something first, and then you can give us your proposal.

PROFESSOR DORSANEO: Disqualification is the wrong remedy completely.

CHAIRMAN BABCOCK: Did everybody hear that? Bill said, "Disqualification is the wrong remedy completely."

CHAIRMAN BABCOCK: Okay. Stephen ,what's

your proposal?

MR. YELENOSKY: Well, what we passed and amended, what Pam had proposed and as amended, triggers the requirement to file something only if a fee has been paid. So nobody knows in the lawsuit whether something is supposed to be filed or not except the attorney who has paid the fee. If we change it instead to everybody must file a certification which says either no fee has been paid or, if it has, the stuff we voted on, then everybody knows that there needs to be a certification from all the attorneys in the case.

And we can require that be filed within a certain period of time, and if it's not filed then, as I said before, there can be a motion to compel or whatever. So you don't set up this gotcha situation, and if it is finally not filed because, in fact, the attorney can't truthfully say that that's true then you get perhaps to the most egregious sanction, whatever that is, but the failure to file it would not lead to that egregious sanction. It would lead to what we typically do when somebody doesn't file initial disclosures or whatever.

CHAIRMAN BABCOCK: Okay. Harvey, then Pete.

HONORABLE HARVEY BROWN: Well, (d) right now has really two parts. One is the disqualification, and secondly is the cap. I haven't heard anybody say they are

in favor of disqualification. We're supposed to be finished with this rule in its entirety in 20 minutes. I suggest we vote up or down whether anybody in principle is in favor of disqualification before we keep going through the details.

PROFESSOR ALBRIGHT: And we could vote on caps, too.

HONORABLE HARVEY BROWN: Yeah, but that would be a separate vote.

PROFESSOR ALBRIGHT: Yeah, two votes on that.

CHAIRMAN BABCOCK: Yeah, not a bad idea.

MR. YELENOSKY: I would like to get a vote on that, if I can, the prerogative I guess of the subcommittee chair is to vote on that concept if we've only got 20 minutes left, which is that everybody would file a certification, which not only serves the purpose of preventing us from getting to egregious sanctions and the gotcha thing, but also makes this evenhanded. If we could get a vote on that then we would be in a position to try to draft something. I don't suggest we take a vote on caps, because my understanding from Justice Hecht was that the rule we are directed to draft here will have caps in it.

CHAIRMAN BABCOCK: You want to take a vote on requiring the certifications for everybody, every lawyer in the case, whether there has been a referral fee paid or

not?

MR. YELENOSKY: Right. That way you are able then to compel it if you haven't gotten it.

HONORABLE TOM GRAY: Point of clarification. Every lawyer or every lead lawyer?

MS. SWEENEY: Law firm. No, I would say law firm.

MR. YELENOSKY: I don't care on that.

CHAIRMAN BABCOCK: It may make a difference if it's not a law firm. It's just a solo. So you have two plaintiffs lawyers, two firms, let's say, and then six defense firms; and so you've got eight lawyers and their firms; and so all eight have got to file a certificate; and one of them says "We're in compliance with 7(d)" -- well, I guess they all say, "We're in compliance with 7(d)," but the defense guys, you know, didn't pay any referral fee, just got the case because the client called him up and asked him to represent them.

MR. YELENOSKY: They say "No fee has been paid."

CHAIRMAN BABCOCK: Okay.

MS. SWEENEY: Well, no, they would have to disclose how they got the client and what consideration went to that client to get them to sign on with them.

MR. BOYD: To the client?

PROFESSOR ALBRIGHT: It's referral only.

MR. YELENOSKY: Well, my proposal doesn't go to that extent, but if we want to address that, we can; but if I understand what Paula's saying, it goes beyond.

MS. SWEENEY: If we're soliciting clients and we're talking here about soliciting clients, let's talk about it. We're not soliciting places. We're soliciting clients.

CHAIRMAN BABCOCK: If American Airlines hires -- I'm just trying to understand what you're saying. If American Airlines hires a -- Anne has perked up. If they hire me to defend a personal injury lawsuit that you have filed and I've taken, you know, Anne out to dinner like umpteen times and finally she sent me the file, is that a referral fee within the meaning of this?

MR. ORSINGER: No.

MS. SWEENEY: Well, we got all off on sunshine and all --

CHAIRMAN BABCOCK: See, now we've got Anne's attention.

MR. YELENOSKY: Depends on where you went to dinner.

MS. McNAMARA: When I was agreeing with Paula what I was really concerned about was you and I go to dinner and I give you the case, but then you give it to

your friend because of some relationship between you and your friend that I don't know about.

CHAIRMAN BABCOCK: Yeah.

MS. McNAMARA: Who hasn't been taking me to dinner, so I don't know his competency.

CHAIRMAN BABCOCK: Right.

MS. McNAMARA: So I think taking it to, you know, sort of marketing expenditures that have nothing to do with referring attorneys is going way beyond what we're talking about.

MR. LOPEZ: But you're the client, right? The client is supposed to know.

MS. McNAMARA: Actually, I would like to know what marketing has been done to folks on my staff, but I don't think it's appropriate for this rule. It has nothing to do with what we're talking about.

MS. SWEENEY: Why not? Just because it invades your privacy and your attorney-client privilege? We're not real concerned about that in this rule.

MR. MUNZINGER: It's because we're using Steve's definition of referral fee and we've put all that solicitation fee behind us. We aren't talking about that anymore. We're talking about Mr. Tipps' definition of referral fee. It's off the table.

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: I'm trying to visualize how this all works, and I think the whole concept is wrong. I think what we ought to do is --

CHAIRMAN BABCOCK: Does anybody feel that way?

MR. HAMILTON: If we require some kind of a disclosure to be made so that the court can make a determination of if there's some kind of violation here, let the court pursue it. If I'm the defendant and I find out that the plaintiff has a referral fee or has agreed to one or maybe it's right or wrong, I could care less. My client is not going to want to spend the money to file motions to litigate whether the referral fee is right or whether it's wrong or what.

CHAIRMAN BABCOCK: Good point.

MR. HAMILTON: I think we ought to let the court make a decision on it based upon some kind of information that gets filed so the court can determine if it's all done properly and then refer it to the grievance committee or whatever.

CHAIRMAN BABCOCK: Okay. Pete and then Judge Bland.

MR. SCHENKKAN: I would propose that we amend (d) to read "Referral fee certification requirements are, (1), lead counsel did not divide or agree to divide the

referral fee in violation of Rule 1.04," et cetera; (2), the referral fee does not exceed 50,000 or 15 percent; (3), the client did not retain the attorney paying the referral fee as a result of an advertisment or solicitation of any kind."

Take disqualification out. List the three things that are in (d) that Pam's motion as amended has carried since the attorney making the certification is certifying about the fee, and that's all it is, and then leave this sanctions issue and consequences to (e) and (f), which are yet to be discussed, but as presently drafted do not include disqualification.

And this is not a statement made in opposition, Steve, to your suggestion, but this being applicable to all attorneys who appear in the case, a suggestion in principle I support, but I think we may need to work out the details of. I'm trying to get off the table the opposition that I think, I think, I suspect, is a substantial majority, if not universal, to the disqualification and especially to the automatic disqualification, and get that off the table and get us to the point where we are in agreement that if we're obliged to do this at all and if you're obliged to do it including the cap on the referral fee, that's what it is.

You're certifying "I haven't violated Rule

1.04, it doesn't exceed the cap" -- and I have a problem mechanically with this one -- "as far as I know the client who hired The Hammer who then referred it to me didn't do so as a result of an ad that didn't disclose my name." That's a separate issue we're going to talk about at some point.

CHAIRMAN BABCOCK: Yeah. We'll talk about the advertising in a minute, but, Steve, what Pete said makes a little bit of sense to me, which would be a slight variation on what you called for a vote; but why don't we have a vote on whether we think disqualification is appropriate or nonappropriate?

MR. LOPEZ: Mandatory disqualification.

CHAIRMAN BABCOCK: Yeah. Mandatory disqualification. Right. (d) says "mandatory disqualification as lead counsel," whatever that means.

MR. LOPEZ: You still may get disdisqualified under (f).

CHAIRMAN BABCOCK: Yeah. So, Steve, is it okay if we vote on that?

MR. YELENOSKY: Sure.

CHAIRMAN BABCOCK: So everybody that is in favor of deleting the mandatory disqualification as lead counsel in subparagraph (d) raise your hand.

All opposed? Well, that's something we all

feel the same way about. 23 to nothing we take disqualification, mandatory disqualification as lead counsel, out of the rule. So now let's talk about these subparts. Subpart (3).

MR. ORSINGER: Can we talk about discretionary disqualification?

CHAIRMAN BABCOCK: We're going to get to that in the sanctions. That's what Pete's point was. We'll get to that, and we need to move along a little bit. I think that it's fair to say -- if anybody thinks it's not, speak up. I think it's fair to say that the sense of this committee is that subparagraph (d)(3) is not a good idea for a variety of reasons. It may be nonprocedural, may be substantive, may violate the antitrust laws, it may cause our children to become sick. There are all sorts of reasons why this is not a good idea, but having said all that repeatedly, is there any way we would suggest changing this language in a way that would be helpful to the Court?

In other words, should it be 100,000, should it be 20 percent, or should we just waste -- you know, save our breath and just let them figure it out whether this is the right thing. (c).

MR. YELENOSKY: Well, I agree we should probably save our breath, except for the point I made earlier about allowing this to encompass noncash benefits,

and if it doesn't as it's stated now, modify it so that it would.

CHAIRMAN BABCOCK: Okay. Good point. All right. Let's look at the advertising, subparagraph (4).

MR. ORSINGER: Before we go on, I just have been waiting until we took this up. I think there is a separation of powers issue here because --

CHAIRMAN BABCOCK: Okay. Separation of powers.

MR. ORSINGER: Yes. And I want that in the record that this is clearly legislative. It's beyond the power of the Supreme Court under the Texas Constitution.

MR. SULLIVAN: Before we go on, I just don't want to leave the impression that this is automatically a bad idea, because I think it depends on what you're trying to do and how you go about doing it, and I think there is a question here, there is an intersection with the DR, which the Court clearly I think has the authority to affect. And as a practical matter we do regulate unconscionable fees, and while that may not be regulated with absolute precision, there are certain understandings about what unconscionable fees are. I mean, the contingent fee area, I mean, you can debate it, but once you start sliding much above 40 percent, you know, then it gets into a questionable area, and someone could probably quickly say

that it's -- you know, if someone is talking about a 60 percent or 80 percent contingent fee, there probably wouldn't be much debate about that.

I think there are circumstances where a referral fee on a percentage basis, if it is too high, might be contrary to the client's best interest. I'm not sure I can articulate it very well. Perhaps the absurd example is the best I can do, and that is to say if someone -- if I have a case and I want to refer it and I get a 95 percent referral fee, I think you can construe circumstances where that's not a good thing for the client. You can say, well, gee, you know, the client is still only paying a 40 percent contingent fee, et cetera, et cetera, but when the only person who is going to be truly doing work furthering the client's interest has a 5 percent interest in the 40 percent contingent fee, there may be a problem in terms of creating the right incentives so that the client gets the best result possible.

And I'm not really trying to take a position because I will be the first to say I haven't really thought this through. I simply don't want us to blow by that and not at least consider the possibility that there really is a point.

CHAIRMAN BABCOCK: Okay. Thank you. Anne.

MS. McNAMARA: Any rule that has an absolute

dollar amount is going to require readjustment over time, which will let some future generation of people have this same quality experience of discussing this. So I don't know, I guess inflation adjustments or whatever, but at least at some point that number is going to become increasingly silly.

CHAIRMAN BABCOCK: Richard, then Pam.

MR. MUNZINGER: If you had a rule such as you have now, $50,000 cap or 15 percent of the attorney's fees, whichever is less, if I take 14.9 percent of Paula's fee, I don't have to report anything at all until -- because 14.9 percent of zero is zero. We don't know what she's going to get. We all have it on a contingent fee and until she gets a verdict and a judgment, I haven't been paid a dadgum dime.

MR. LOPEZ: Nor did you know how much it was going to be.

MR. MUNZINGER: I beg your pardon?

MR. LOPEZ: Nor did you know whether you were going to get --

MR. MUNZINGER: No. I don't know. I have no idea what she's going to get. 14.99 percent of $10 is, what, 15 cents or a $1.50? So I don't know under those circumstances what my agreement is, and I won't know until it's paid, until a final judgment is entered or a final

settlement order is entered. About the time that Paula agrees with the defendant to take $10 million, now my 14.99 exceeds $50,000. The cow is out of the barn. We are now closing the barn door. It just seems to me that somebody needs to think their way through about that kind of a cap rule.

CHAIRMAN BABCOCK: Yeah. Your partner Pam had her hand up first, Steve, and then you.

MS. BARON: I just want to point out what Rule 1.04 of the disciplinary rules provides so that people know what is being certified, which may to some extent speak to Jeff's comments. It certifies a proportion of the services performed or it's made with a forwarding lawyer or it's made by a written agreement with a client with a lawyer who assumes joint responsibility for the case. Second, that the client's advised of it and does not object to the participation, and third, that the aggregate fee does not violate paragraph (a) which prohibits unconscionable fees. So all of that is subsumed within (2).

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: Well, I think Richard makes a good point, but I think that the solution is that what we're talking about is an agreement; and if the agreement is solely stated in a percentage, if it later turns out

that the percentage is higher than 50,000, I don't know how this rule could address it. And so, therefore, I think we have to make clear --

MR. MUNZINGER: You got around it.

MR. YELENOSKY: -- we're talking about an agreement for a specific amount that exceeds 50,000 if, in fact, we have any flat amount stated or an agreement for a percentage that exceeds that.

MR. LOPEZ: Has there ever been a referral fee in straight dollars rather than percentage?

CHAIRMAN BABCOCK: Oh, sure.

MR. LOPEZ: Is there?

CHAIRMAN BABCOCK: I can think of one, but Kent.

MR. SULLIVAN: I would propose that we vote on abandoning the hard dollar cap, because I think it is unworkable, and I also think you really create a potential of misalignment of lawyer interest and client interest that can be detrimental to the client. We touched on this earlier. If you have a situation where you clearly have a big case and you can foul it up, but the value to the lawyer is still going to be greater than $50,000 then you have a potential incentive for the lawyer not to refer the case to the lawyer who would be in the best interest of the client.

CHAIRMAN BABCOCK: I assumed that (3) is unpoplar with this group, but I suppose we could vote if we need to.

MR. ORSINGER: What he's saying is we could keep the percentage fee, but the flat number is unworkable until after you've got --

MR. SULLIVAN: I think that's an --

MR. YELENOSKY: It would be an agreement for a flat number, and if you take that out entirely then obviously everybody will move to agreements for flat numbers, however high they may be.

MR. BOYD: They still have to disclose that. There's just no penalty.

MS. SWEENEY: No, we're not disclosing amounts. We're just disclosing identities and the fact of.

MR. YELENOSKY: Right.

MR. BOYD: That's what I mean. You still have to disclose that there is an agreement and, 13 to 12, who that agreement is to.

MR. YELENOSKY: Right.

CHAIRMAN BABCOCK: Why does everybody look at me when they say that? Bill.

PROFESSOR DORSANEO: I think the idea behind this, however well or not so well it was drafted, is to require somebody to make a referral agreement that says two

things, that it's below 15 percent and that the amount of the referral fee will not be in excess of $50,000; and if the agreement said it was above 15 percent or it didn't say, the second point, that there would be something that would need to be disclosed. Now, whether it's drafted well enough or whether we thought about that enough, I'm not sure.

CHAIRMAN BABCOCK: Well, there are two bad things that can happen. One, you can get -- well, I guess not under our proposal. You can't get disqualified anymore as a mandatory matter, but you've still got the sanction that your fee agreement can be voided by the court if it's over $50,000.

MR. ORSINGER: But, you know, interestingly enough, it's the lawyer who tried the case that gets disqualified, not the lawyer who referred the case, right? Or who forfeits the fee, not the lawyer who referred the case.

CHAIRMAN BABCOCK: It just says "an attorney or law firm found to be in violation on this rule."

MR. ORSINGER: But the only duty is on the lead counsel, right? So the one who actually took the fee that was in excess of the public policy limit gets to keep it, and the one that did the work forfeits that part of the fee, which might be the other 70 percent, back to the

client? I think that's the way this works.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: I'd go back to what I urged yesterday on the specific amount. If you do that then exactly what the judge pointed out is going to happen, and somebody can say, "Well, if all I can get for referring it is a maximum of $50,000," or whatever number you put, "I'm going to keep it and just try to do it better. I'll go to a seminar and see what this products liability stuff is and see if I can get me a Phen-Phen recovery here."

MR. LOPEZ: Or just $52,000.

MS. SWEENEY: Yeah. And that is a disservice to the clients, and it puts an economic conflict of interest on the part of the lawyer that doesn't currently exist, because currently the lawyer has the same interest as the client, which is maximizing the recovery, which is the beauty of the contingency fee system. It has nothing to do with -- your economic interest is the same as your clients because the client's interest is getting the best possible recovery and so is yours.

That's mirrored in the current, generally speaking, referral arrangement, which is that the referring lawyer has an interest in getting an astute lawyer who's going to get the best possible recovery, and it aligns his financial interests with the client. If you change that,

you create more harm than good.

CHAIRMAN BABCOCK: We only have a couple of more minutes to talk about this. Can I see if anybody has got a comment about subparagraph (4), which it looks to me like if The Hammer runs an ad and he doesn't say in this ad, "By the way, if you, Ms. Jones, hired me, I'm going to refer this to Paula Sweeney" --

MR. LOW: But they do say, "may be referred."

CHAIRMAN BABCOCK: No, but this -- look at (4) here.

MR. LOW: No, no. I'm not saying -- we're talking about my friend, The Hammer.

CHAIRMAN BABCOCK: Yeah.

MR. LOW: He does put that in his ads, I'm familiar with.

CHAIRMAN BABCOCK: Well, and that's required by the current advertising rule.

MS. SWEENEY: But he doesn't have my permission to put my name in his ad.

MR. LOW: No.

CHAIRMAN BABCOCK: Well, see, I'm just raising an issue with (4) here.

MS. SWEENEY: Well, he can't do that. You can't have some lawyer unilaterally out there announcing in ads he's going to send business to someone else who may not

even know about it. That's incredibly obnoxious.

CHAIRMAN BABCOCK: Well, let's assume that The Hammer is not going to do it without your permission, but I'm just saying how does he know what case he's going to get from his ad such that he can put your name in there?

MR. LOPEZ: To know it's --

CHAIRMAN BABCOCK: Sure doesn't make much sense to me. Richard.

MR. MUNZINGER: No. (4) is requiring some kind of court inquiry or proof as to the client's reason for choosing The Hammer. You know, because how could anybody certify to No. (4) without knowing what the proximate cause in the client's mind of choosing the first lawyer who made the referral? Maybe it's because he liked the way he looked as distinct from his ad. You're forcing people to now talk to the client, asking the client, "Why did you choose The Hammer?"

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: Okay.

CHAIRMAN BABCOCK: "I did it because of his ad."

MR. MUNZINGER: So he says it's because of his ad. Now you're getting into -- I think No. (4) is --

CHAIRMAN BABCOCK: "Now, let's see the ad." The ad doesn't mention Paula Sweeney top, side, or bottom,

so you're out of here.

MR. MUNZINGER: No, I understand, but Paula cannot respond. If Paula is the certifying attorney, she cannot respond to No. (4) without knowing the thought processes of the client she represents that got him to The Hammer in the first place. It's a stupid rule.

CHAIRMAN BABCOCK: John Martin.

MR. MARTIN: The way I read this is these ads that I've seen that don't refer to any law firm, don't refer to The Hammer's law firm much less the law firm it's going to. I think that's what this is talking about.

MR. MUNZINGER: I think No. (4) is unworkable. It's a waste of time to discuss it.

CHAIRMAN BABCOCK: I said two to three minutes, Richard. That's not that much time in the big scheme of things. Harvey.

HONORABLE HARVEY BROWN: I think what this is designed to address is what I've heard has occurred at least in Houston where one lawyer pays for another lawyer to do advertising, and that lawyer then who receives the response to the advertisement refers every case or every case above a certain dollar amount automatically to that lawyer. So the lawyer doesn't want to do advertising directly because of, you know, public perception or whatever, but he, in fact, or she, in fact, is the one who

is indirectly doing the advertising.

CHAIRMAN BABCOCK: That does happen, but this rule is much broader than that.

HONORABLE HARVEY BROWN: Yeah, but I think that may be what this is designed to do.

MS. SWEENEY: If that's what's got Jamail's undies in a knot then let's ban that.

MR. SCHENKKAN: What I was going to say, I have been having a difficult time understanding what (4) was saying that could be made workable, and that seems to me to be -- that sounds like a real abuse and one that could be -- and (4) could be reworded to cover that, to say that the certifying lawyer is certifying that he doesn't have a relationship with the referring paying lawyer where he pays that lawyer for the advertising. Or whatever the problem is. Is that what we're saying? That's workable. We can set something in there because of that.

CHAIRMAN BABCOCK: Paula, and then the guy who doesn't want to waste any more time talking about this will have the final word talking about it. Paula.

MS. SWEENEY: If that's, in fact, what's gotten Mr. Jamail's undies in a twist then let's ban that and not go through all this other nonsense. I didn't know that was going on, but if he's mad because some other big time plaintiff's lawyer who doesn't want to advertise is

paying someone else for doing it, then let's ban that, but let's not vandalize the system --

PROFESSOR DORSANEO: That's what it's about.

MS. SWEENEY: -- because somebody is upset about somebody else's practices.

CHAIRMAN BABCOCK: Richard, final word on this, on this whole rule, so make it good.

MR. MUNZINGER: There are a lot of ways to skin the cat. This is the wrong way to skin the cat. We're attempting to make a procedural rule to address a nonprocedural problem.

CHAIRMAN BABCOCK: Okay. Let's take a 10-minute break.

(Applause.)

CHAIRMAN BABCOCK: Note the applause.

(Recess from 11:02 a.m. to 11:12 a.m.)

CHAIRMAN BABCOCK: We're back on the record, and Judge Bland is going to take us through ad litems quickly in the next 30 minutes.

HONORABLE JANE BLAND: Okay. Everyone should have received yesterday from Deb Lee a copy of the subcommittee's initial draft of recodification of Rule 173, and if you have a copy of that and then also a copy of the proposed Jamail committee report rule, that's basically what we need to work from.

Rule 173, the existing rule, is at the top of our draft, and just with a quick glance at it you can see that the language needs updating because it talks about "minors, lunatics, and idiots," and we don't really use those phrases anymore. Well, "minors" we do, but not "lunatics and idiots." At least not on the record.

MR. SCHENKKAN: Actually we use the latter two when talking to our minors.

HONORABLE JANE BLIND: So but it was the subcommittee's initial impression that the language needed updating and that the big issue facing ad litems and court approval of ad litems, appointment and approval of ad litems' fees is compensation. So with that view, we took the Jamail committee draft and proposed this initial rewrite, which probably will need some wordsmithing because we had one opportunity to meet, but we haven't been able to meet since then.

At the outset, the first, 173.1 is about appointment and there -- it was the consensus of the subcommittee that there are other statutes out there that govern appointment of attorneys ad litem and guardian ad litems in specific kinds of cases, Family Code cases, Probate code cases, parental notification cases, and that this rule was really not intended to govern those relationships.

And one thing that the Supreme Court had asked us to do was to review changes to the Family Code and House Bill 1815; and in House Bill 1815 there are some changes to the scope and duties of guardian ad litems and attorney ad litems in suits affecting the parent-child relationships; and it was our view that those amendments would not affect this rule; and to clarify that this rule was not intended to govern those relationships, we added a sentence in 173.1 that "Except as otherwise permitted by statute or rule" and the intent or the purpose behind that is to take out Family Code appointments of guardians and attorneys ad litems, parental notification appointments of guardians and attorney ad litems, and Probate Code and anywhere else that there may be an attorney or guardian ad litem appointed by statute.

And then so leaving it just to the plain vanilla civil lawsuit we stated that appointment should be -- is only required for a minor or an incapacitated adult, and I think Bobby pointed out that there are also incapacitated minors, so we could say "incapacitated person."

MS. SWEENEY: Incapacitated in more than one way.

HONORABLE JANE BLAND: I know. Right. Because they are -- yeah, they are doubly incapacitated I

guess was his point. But only if a party has no next friend or guardian within the state, which is a recodification of existing Rule 173. And "or the party is represented by a next friend or guardian who appears to the court to have an interest adverse to the party," and that's to make clear that you don't have to have an ad litem in every situation. Namely, if the only party seeking a recovery is a minor and the settlement, the proceeds are only being paid for the use and benefit of the minor, you don't need a guardian ad litem in addition to the minor's next friend, because in that situation there is no division of settlement proceeds among the next friend and the minor, so it's an unnecessary expense to put the parties to. Yes.

HONORABLE HARVEY BROWN: On part (2) should it say instead of "an interest adverse to the party," "an interest that may be adverse"?

MS. SWEENEY: Yeah. Or "potentially."

HONORABLE JANE BLAND: Okay.

CHAIRMAN BABCOCK: We have a bunch of hands down here, Jane. Bill and then Richard and then Buddy.

PROFESSOR DORSANEO: That "except" at the beginning in (a) suggests to me something different than what you're saying you're trying to accomplish.

HONORABLE JANE BLAND: Okay.

PROFESSOR DORSANEO: It suggests that there

are some other statutory requirements that also need to be looked at, you know, rather than there is another body of law, statutory scheme for the treatment of other cases. So I would suggest saying something more specific about the Family Code; and if it is the case that Rule 173 doesn't have operation over there, Richard could probably validate it, that we just say that.

PROFESSOR ALBRIGHT: Couldn't you fix it by just putting a (3)? Instead of "except as otherwise permitted," say, "The court shall appoint a guardian if there is no next friend, if there is an adverse interest, or, (3), if there is another statute that requires it." Isn't that really what you're saying or not?

HONORABLE JANE BLAND: Well, the other statutes that we're talking about have very specific and -- specific requirements that are more burdensome than these.

PROFESSOR ALBRIGHT: Oh, okay.

HONORABLE JANE BLAND: And we just didn't want --

PROFESSOR ALBRIGHT: You don't want to take it out.

HONORABLE JANE BLAND: Right. We didn't want somebody to be thinking they were appointed under this when in reality they were appointed under the Family Code or some other place that has specific requirements that they

must fulfill in discharging their responsibilities that really don't apply to normal ad litem representation, but I don't have any problem with putting in "except as otherwise permitted" and then articulating, if you want to.

PROFESSOR DORSANEO: Well, here's what I have in -- the Legislature amended the Family Code pretty substantially to add a long -- I don't know, oh, I guess, whatever, subchapter to Chapter 107 of the Family Code, actually several subchapters. It looks like it's a comprehensive scheme for ad litem practice in family law cases, and one of the things that's in there is a distinction that's drawn between a guardian ad litem and an attorney ad litem, and what you really have here in this structure is somebody who is called a guardian ad litem who is compensated like an attorney ad litem in this 173 business.

And all I'm saying is if it's -- the engineering needs to be addressed in such a way that we have the least amount of confusion. If this 173 is only about personal injury cases and whatever now chapter of whatever that used to be in the revised civil statutes dealing with the same subject matter, that needs to be made as plain as possible, and I'm just thinking your initial reference doesn't quite get it.

HONORABLE JANE BLAND: Okay. It's too

oblique, so we should be more specific.

PROFESSOR DORSANEO: That's what I think. Yes.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I wish I was more conversant with the rationale behind the Family Code amendment, but there was a task force that worked on that for years before they finally got to the product that has been enacted, but a couple of warnings from the family law area is that, No. 1, the reason we had to struggle with this so much was because of the poor definition between the -- the differences between a guardian ad litem and an attorney ad litem, and I think that if this rule is going to deal with guardians, you should label it as "guardian ad litem representation" rather than "ad litem representation" because there is a constant problem with courts appointing an attorney as an ad litem, and you can't tell what kind of ad litem they are, and sometimes they're referred to as guardians and sometimes lawyers.

And I really wondered if what we want is a guardian, and the distinction that's more or less worked out in the family law is that an attorney ad litem is bound to advocate the desires of the child, and the guardian ad litem makes an independent decision about what's best for the child and advocates that but not as a lawyer. So

typically a guardian ad litem is called as a witness, but, you know, they are not participating as lawyers, but then the Family Code said that they can't ask questions of witnesses unless they're a lawyer, so that's a little schizophrenic.

And we ought to be sure that when we appoint a guardian here we're talking about someone who is going to have the legal authority to hire a lawyer who is going to be a different person from the guardian ad litem and to direct that lawyer what action to take in that court suit. If this guardian is really just going to be a lawyer who is going to be appointed to approve a settlement then I would question whether we ought to call them a guardian ad litem or an attorney ad litem and would encourage the subcommittee, if time permits, to compare to the new family law legislation.

Additionally, on subdivision (a)(2), I'm concerned about in virtually every custody decree there will be a specific provision about which parent has the right to make significant legal decisions relating to the child. Sometimes that's split under joint managing conservatorship. Sometimes that's allocated to one parent, and I'm a little bit concerned about the practice of a parent who has been specifically excluded from the ability to make significant legal decisions for the child to

initiate a lawsuit as a next friend and that you ought not to have the civil system triggering its actions about the appointment of a guardian ad litem at the behest of a next friend who by law has no ability to file the lawsuit as a next friend.

So I feel like your subdivision (2) should -- or you should have a separate subdivision that if the next friend does not have the legal authority to initiate the court proceeding, rather than just that they might have a conflict of interest.

CHAIRMAN BABCOCK: Okay. Buddy. Then Frank.

MR. LOW: Chip, I have some problem with the first part that says "appointment only if," and it says, "the party has no next friend or guardian." Often they will appoint Aunt Sally who knows nothing, you know, as next friend. They will just file it, you know, through Aunt Sally and so -- and she doesn't really have a conflict, but she has no knowledge, no knowledge, about how the damages ought to be divided. There's a conflict between that -- she doesn't have a conflict. She just has no knowledge. So the court may want to appoint an attorney ad litem with reference to dividing the money for settlement or something like that. So I hesitate making it only if you don't have a next friend who has no conflict. The court may feel in big cases, particularly, they do want

to appoint an attorney ad litem.

The other thing I have is back in -- is over on 173(2)(b) about not participated in proceedings except necessary to protect the party's interest. Well, really an attorney ad litem should only be the person who sees that they're -- not how much the case is worth for that, but to see that the division is proper there, their interest insofar as the conflict. That's why you appoint them insofar as a conflict, because you could stretch that to say even though you say don't sit in on hearings and everything like that, well, I need to to see -- to protect the interest. I think the real reason is to protect them with regard to the conflict, and I would make that clear, those two things.

CHAIRMAN BABCOCK: All right. Carl.

MR. HAMILTON: Well, I wanted to answer Buddy in part. Part of the abuse of the guardian ad litem is that, at least in our county, every time there is a minor involved in a case, the court appoints a buddy of his that he wants to pay back as a guardian ad litem, even if there is no conflict of interest at all. And I think one of the things we need to do in this rule is somehow try to make it clear that you don't appoint them in that situation.

MR. LOW: But, Carl, how can there not be if the parent is getting money and the child is getting money?

MR. HAMILTON: Sometimes there's only children involved.

MR. LOW: Okay. Well, then --

MR. HAMILTON: And they still appoint a guardian ad litem.

MR. LOW: That's what I'm saying. The conflict of interest should key it.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: I would urge, though -- I'm sensitive to Carl's issue because I know that there are abuses of that type, but I don't like a phrasing that implies a conflict or assumes a conflict, and I go back to the suggestion that was made a minute ago that we say "potential conflict."

MR. LOW: Yeah.

MS. SWEENEY: Because it is very offensive to me as a lawyer to have a judge based on a finding that there is a conflict of some kind that I have been engaged in, whereas "potential" is fine. That's not a threatening term, and that's what we're looking out for.

MR. LOW: Right.

MS. SWEENEY: So I would urge that, and I realize, Carl, that you-all have a problem with buddies, but let's not stand the apple cart on its head because of that. Let's not insult the rest of the lawyers in the

state.

HONORABLE JANE BLAND: And with respect to Buddy's comment about Aunt Sally, I think that's a good one, and we could say -- instead of saying "The party has no next friend within the state," we could say "has no guardian within this state," because it probably should be either a parent or the duly appointed guardian of the minor; and if not then the court probably should appoint an ad litem.

And with respect to your comment, Richard, about the interplay of the Family Code and this rule, we are trying to keep this separate from the Family Code because under this rule it is truly a guardian ad litem that's appointed because this person makes a recommendation based upon the best interests of the child to the court, and typically that is an attorney, but there isn't a separate -- we don't have a separate guardian ad litem and attorney ad litem, and there's really no need for a separate guardian ad litem and attorney ad litem in this situation as there is in the Family Code where the person does independent -- well, it's just different. It's a different and greater responsibility that a guardian has under the Family Code.

CHAIRMAN BABCOCK: Frank, then Harvey.

MR. GILSTRAP: I want to have clarification

on that point. I've struggled to understand exactly what House Bill 1815 means, and I have talked to at least a couple of attorneys who do ad litem work in personal injury cases, and they've read it to cover -- that it has language in there that's broad enough to cover cases outside the Family Code. 107.021 says "in a suit in which the best interests of a child are at issue other than a suit filed by a government entity the court shall," and I just wondered maybe there's something in the Family Code, Richard, that says this can only apply to a Family Code case.

MR. ORSINGER: I don't think so. I think that that's a fair reading, but I'm not sure that the people who were working on this were concerned with anything other than custody, visitation, termination, and adoption, but that language doesn't say it's limited to just those types of issues.

PROFESSOR DORSANEO: Well, except what that section goes on to say is appropriate, you know, the appointment of either a guardian ad litem, an attorney ad litem, or an amicus attorney doesn't seem to have anything to do with this.

CHAIRMAN BABCOCK: Harvey.

HONORABLE HARVEY BROWN: One of the problems that people complain about for ad litems is the amount of

compensation, and I think that one problem is that some courts view the hourly rate as not being your normal hourly rate but a multiplier because it's, quote, a contingency, because if the plaintiff loses the case then the plaintiff has to pay the fees as court costs; and, of course, the plaintiff has no money, so they say, "We should get a multiplier of two or three"; and I have seen courts that agree with that.

I suggest that we have a provision that the defendant should normally be the one who pays the court costs or the ad litem fees except for good cause, so that we basically switch it and take away this contingency element, which I think will cure some of the complaints about compensation. It's particularly unfair when the defendant is the one who asked for the ad litem --

MS. SWEENEY: Exactly.

HONORABLE HARVEY BROWN: -- for the defendant then to not have to pay for the ad litem.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: You know, did you read the Fifth Circuit case on this? Because I think the real reason behind this is like a case I had where they got a whole bunch of money and the attorney ad litem participated in every deposition. In fact, he made the case, and in the end the plaintiff got a big recovery and a settlement and

then wanted my client to pay a million and a half dollars to him, and the Fifth Circuit held that, no, you only get paid for the work you did with regard to the conflict, not, you know -- you can't be the lawyer. If you need to get more fee, you get it out of the contingency. And that was the answer, and I just wonder if you used any of the language from the Fifth Circuit case. Don't ask me the name of it. I would have told you if I remembered, but there is a Fifth Circuit case.

CHAIRMAN BABCOCK: Paula.

HONORABLE JANE BLAND: We ought to go take a look at that.

MS. SWEENEY: And I know we're trying to hit points for the Court --

CHAIRMAN BABCOCK: Right.

MS. SWEENEY: -- so on page three on the compensation, I wouldn't ordinarily be thinking about this because I don't do, quote, ad litem work, but last week a judge called me and said, "Will you do it? It's a really complicated case and we really want you"; and, of course, you know, "will you do it" came with a signed order, so I said "yes."

MR. LOPEZ: Sure it wasn't "You will do it"?

MS. SWEENEY: But it's not, you know, certainly something that I look for and yet it's something

that apparently the court thought was a service. The point of it is I believe that there must be some consideration of the risk involved. There was a very large settlement for which I now have E&O exposure, and I think that that has to be taken into the calculus here if you want lawyers that you want to serve as ad litems, and this -- the compensation section says "just reasonable hourly fee" and then says that "The court must not consider the amount of the settlement or the judgment or use any percentage or contingent fee," and I'm not advocating a percentage or contingent fee. I agree with that, but the size of the risk to this lawyer who is appointed to come in out of the blue and evaluate a case really ought to be a factor that is considered, otherwise you're going to have people sending back the written order saying, you know, "Gosh, I'm having an operation this week."

CHAIRMAN BABCOCK: With your name crossed out.

MS. SWEENEY: Yeah. Yeah. "My appendix just burst."

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: Well, one thing we could do is put in the disciplinary rule factors that we've included in other sections of rules that we're amending to evaluate attorney's fees in a case, and if that would, you

know, draw a compromise between Harvey's concern that some multiplier is being used that is not related to the actual work done or the actual risk and Paula's concern that a regular normal hourly fee might not work in every situation, that would be one way of --

CHAIRMAN BABCOCK: Yeah.

HONORABLE JANE BLAND: -- incorporating those concerns.

CHAIRMAN BABCOCK: Yeah. Richard.

MR. ORSINGER: Two things. No. 1, probably it would be wise to have a proviso that this rule doesn't apply to suits brought under the Family Code so that somebody doesn't try to import this and create conflicts with the statute.

HONORABLE JANE BLAND: Okay.

MR. ORSINGER: And, secondly, I'd like to ask Judge Bland a question. If you have a custody decree that gives the mother the exclusive right to make significant legal decisions for her child and the father, who has no right, has initiated a lawsuit on behalf of the child as a next friend, how do I -- if I'm representing the mother, how do I get the mother in the position as guardian ad litem to replace the next friend father who has no legal authority to bring the lawsuit? I can't do that under subdivision (a), can I?

HONORABLE JANE BLAND: Normally when that's done it's an attack on the standing of the party that's suing as next friend, and it's basically --

MR. ORSINGER: But this rule says --

HONORABLE JANE BLAND: I've never had somebody come in and -- I've had that happen once before, but they didn't come in under Rule 173. They basically said --

MR. ORSINGER: But that's under the current rule. I'm asking under the new rule since the court's authority is only if the next friend has an interest adverse, what if it's not a question of the next friend has an adverse interest, it's a question of the next friend has no legal authority to act as next friend? Shouldn't that be --

HONORABLE JANE BLAND: I think it's a capacity or standing issue --

MR. YELENOSKY: Yeah.

HONORABLE JANE BLAND: -- that they have no right to bring the lawsuit on behalf of the minor.

MR. ORSINGER: So as the parent in charge I just intervene in the lawsuit --

HONORABLE JANE BLAND: Yes.

MR. ORSINGER: -- and file a motion to dismiss?

HONORABLE JANE BLAND: Motion to --

HONORABLE SARAH DUNCAN: Show authority.

HONORABLE JANE BLAND: -- show authority or strike.

MR. ORSINGER: Okay. So then if that's granted, first of all, it only applies to lawyers, right, and not next friends, so I'm really attacking the lawyer who was hired by the next friend and so --

HONORABLE JANE BLAND: No, no. You're claiming the standing of a party, and that really is not what this rule is intended to govern. You're saying the next friend doesn't have the capacity to bring the suit on behalf of the minor --

MR. ORSINGER: Right.

HONORABLE JANE BLAND: -- because the divorce decree does not grant guardianship to this person, and so you would intervene and move to dismiss that person as next friend.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: You know, Paula raises a really good point that's something else you should consider. I've represented two ad litems that got sued.

MS. SWEENEY: Yeah.

MR. LOW: And one of them was about money that had been invested, and it was eight years later or

something like that, and so after that I learned each time I get burned, and so I wasn't the one. I was representing the person, but you should put something in there outlining that their duties expire -- you know, is not to manage the funds or something that expires upon a certain time, because otherwise it's really not clear, and it does say what their duties are, not to appear in court unless otherwise -- so you should put a cutoff date because that's quite an exposure. You get sued as a guardian ad litem eight years later and you got $200.

CHAIRMAN BABCOCK: Okay. We've got about 15 minutes left. People who have got big comments about -- not that they haven't been so far. I'm just warning people we've got 15 minutes. That was a huge comment, Buddy.

MR. LOW: Thank you.

CHAIRMAN BABCOCK: Maybe the best comment in three days.

MS. SWEENEY: The last thing I would point out is this list, that the presiding judge has a duty to make a list and the ad litems have to be on the list. We did this for a while in Dallas --

HONORABLE JANE BLAND: We took that out of our rule, as you'll notice.

MS. SWEENEY: Okay. All right.

HONORABLE JANE BLAND: That's gone.

MS. SWEENEY: Because the ones you want aren't going to fill out paper work to be on a list.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: In 173.2(a) under "compensation" you had entitlement. On the last line it says "for necessary services performed" and generally the cases speak to "reasonably necessary" and I would suggest that you add the word "reasonably" so that you're not accused of having -- putting a limitation you didn't intend.

CHAIRMAN BABCOCK: What section are you talking about?

MR. MUNZINGER: 173.2(a). It ought to say for -- the last line, "for reasonably necessary services performed" as distinct from "necessary."

HONORABLE JANE BLAND: Okay.

MR. MUNZINGER: Another point on (d), subsection 173.2(d), "other compensation prohibited," you forbid the guardian from receiving compensation. Do you want to give some thought to prohibiting the guardian from paying compensation to someone, such as the judge who appointed him? You know, I said to Chip at the break that I have been blessed to work in a number of places in the state, and I have really seen some very interesting things.

MR. LOW: I thought I had seen about

everything.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, we do this all the time, and maybe we're way past it in this general discussion of attorney's fees or fees, but it always seemed to me, and I think this is perfectly supportable, that we're talking about reasonable expenses for necessary services. We're not talking about attorney's fees being reasonable and necessary. I mean, attorney's fees are necessary in the sense that I need to be paid fees so I can take my children to school, but otherwise, the services of the attorney are made necessary by the problem that the attorney is addressing, and the expenses or fees are set or evaluated under a reasonableness standard, sometimes called reasonable, usual, customary, but it's essentially reasonable. So I would myself take out "and necessary," before "expenses," and I would say "necessary services," but I don't have a -- it's not a big point. If you say "reasonable and necessary" all the time, it's all right.

CHAIRMAN BABCOCK: All right. Carl.

MR. HAMILTON: Well, I question in 173.1(a) the term "incapacitated adult." I thought we used the term "incompetent." "Incapacitated" could mean physically incapacitated but not necessarily entitled to a guardian.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: That's fine. That's a good comment. I will also point out there was a bit of debate on the subcommittee about including this at all because there are those of us that feel that whenever there is an incompetent adult a guardianship should be opened in probate court, but there were others that felt that that might not always be necessary.

MR. YELENOSKY: I would be one of those.

HONORABLE JANE BLAND: That feels like it's not always necessary. And so I think a lot of that depends on how strong the probate Bar has voiced its concerns about these issues in your county.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: The Court should consider the possibility of including a preference in favor of the parent being appointed as a guardian if they are not already the next friend who is disqualified because of the conflict. A couple of years ago the U.S. Supreme Court in Troxel vs. Granville (530 U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000)) ruled that the state can't interfere with the parental exercise of control over their children, and that case had to do with visitation with a grandparent, and there were like six different Supreme Court opinions, U.S. Supreme Court opinions, but for the most part there has to be at least a presumption that the

parent's decision is in the best interest of the child and some showing why the parent's decision shouldn't be respected in light of the first-degree right involved rather than more than just the mere disagreement with the court about the parent's decision.

And Troxel was only in the environment of visitation. It's now replicated itself across America with grandparent visitation statutes being declared unconstitutional in at least half the states, maybe three quarters of them, and somebody ought to look at this from the standpoint of it does not -- it appears to permit the court to appoint someone as a guardian ad litem when a parent might be available and might not be disqualified and, therefore, might be subject to constitutional attack.

CHAIRMAN BABCOCK: Okay. Lamont.

MR. JEFFERSON: Just following up real quick on Buddy's comment on the scope of representation, should we take this opportunity -- and Richard's also about the difference between a guardian ad litem and attorney ad litem. Should we take this opportunity to identify what the scope of the retention is, and I mean, if you're a guardian ad litem appointed for a minor in a case, are you the minor's lawyer or are you the officer of the court just evaluating the parameters of the settlement?

MR. LOW: What I do, I have an order when I'm

appointed which outlines that my duties cease upon receipt of the money and that my duties are only with regard to the conflict so that I don't have to represent the total value, and I have an order that I just would be in contempt of court if they assigned me to do it and they wouldn't sign that order.

MS. SWEENEY: It would be a healthy thing if the rule specified that the purpose is only to evaluate whether or not there is a conflict, because there have been situations where you come in and the lawyer has done a terrible job. It's a crumby recovery, they're really getting shafted, and if you say to the other side, "No, I'm going to try it," you can add money to the settlement, but is that your job? And some people think your job is to get the most possible for the person you're representing. Some say it's only to advocate this is or is not in their best interest or there is or is not a conflict, and it would be helpful to have that clarified, because otherwise you're put in the position of someone second-guessing you five years later, "No, you should have stepped in and tried it" and if the order just says you're appointed, that doesn't give you much guidance.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: But you think it should be the latter, just to report on the division and the

conflict, or do you think it should be the former?

MS. SWEENEY: I think -- I don't have actually a strong feeling. I would do either job if asked to do it, but I want to know what the job is that I'm on the line to do, is more important. My belief, I guess if I were to pick one, is it should just be to advise is there a conflict and is this in the best interest of and not to step in and take over the litigation or anything else. It should be a limited role, especially as currently envisioned here.

CHAIRMAN BABCOCK: Buddy, then Carl.

MR. LOW: But you can't really say whether the settlement is good or bad unless you read all those depositions and do that. So you might have a feeling it doesn't look right, but then if you start doing that you're going to pay the person to read the depositions and do all of that. So I opt for the latter.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: I'd like to suggest that the lawyer appointing, if it is because of an adverse interest, that the order have to state what the adverse interest is.

MR. LOW: Potential.

MR. HAMILTON: Potential.

MS. SWEENEY: Potential.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: I would like to speak strongly in favor of defining attorney ad litem and guardian ad litem in this rule. I mean, the Family Code has gone now to great lengths in 1815 to differentiate between an attorney ad litem and a guardian ad litem, and I would suppose that if we don't do something in this rule, that's going to be imported, because there's not -- it's not clear in the case law as far as I can tell, and I think it's very helpful, particularly on the point that Paula was talking about, to differentiate duties.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: Do you have the Jamail report? Because it does do that. I wonder if you take issue with those definitions. "Guardian ad litem must represent the party's best interest. An attorney ad litem must represent the party's preference."

HONORABLE SARAH DUNCAN: I don't take issue with either one of them. I don't know that either one of them is enough, but I don't know this area of the law the way some of the people around the table do.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: That distinction is, in fact, the one that's recognized around the country in family law, but there's nothing in this rule that I'm reading that says you're appointing an attorney ad litem or can appoint an

attorney ad litem. I think we're assuming that the guardian ad litem being appointed is going to be an attorney ad litem and, therefore, you have a dual role even though you're not appointing them in a dual capacity, and then that creates the potential of a conflict between the duty to advocate the client's wishes and the duty to advocate what you as an individual believe to be in the client's best interest.

So if this is, in fact, an attorney ad litem provision, let's say so. Let's grapple with the ethical problems, and let's put some kind of escape mechanism in place when the conflict develops.

I also wanted to say that while ordinarily guardians have been appointed right at the settlement time because that's when the conflict becomes acute, if there's an automobile accident with a parent and the child in the car, if the case doesn't settle it's going to be tried, and there's a conflict of interest in the lawyer for the parent trying the allocation of damages between the parent and the child to the jury. And so some of these cases, at least occasionally, are going to involve appointing a lawyer as a guardian ad litem who is going to have to go pick a jury and call and cross-examine witnesses and make an argument to the jury on how they answer the jury questions, if I don't misunderstand this.

And which, they truly are playing the role of lawyer there, and we're, if you will, just kind of perpetuating the morass that existed in family law when there was no clear distinction between the role of guardian and attorney and who has what responsibility. Like the guardian is expected to do a report and testify as an expert, but the lawyer is expected never to do a report or testify, but to directly cross-examine and make arguments.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: It was the subcommittee's view that inserting attorney ad litem into this rule, one, would unnecessarily complicate a rule that historically has never been viewed as an attorney ad litem rule but has been viewed as a guardian ad litem rule in the sense that you're describing and, two, might invite the appointment of two lawyers for every minor in the case, and that was not the intent of the rule. It was to avoid unnecessary duplication of representation, not increase the number of lawyers involved in the case; and the subcommittee's view was there just didn't seem to be a problem, although people do sometimes interchangeably refer to attorney ad litem and guardian ad litem in the civil case context.

There did not seem to be, at least to us, a problem with the interchange of those terms, and so to

spend all this time defining separate roles for them might just create confusion where none has existed on the civil side.

Secondly, I disagree with your view that if a case does not settle it will become necessary for a guardian ad litem to appear and represent the minor at trial because that presumes that the lawyer representing the parent has some capped universe of recovery and has to ask the jury to divide those amounts up, and if that were the case then possibly an ad litem should participate in a trial, but the usual case is that the attorney who represents the next friend in his or her individual capacity and in the minor -- also represents the minor is trying to maximize recovery for both, and there's no need for a guardian ad litem to be there, absent some fact-specific conflict, and so I don't think we want to be encouraging the appointment of ad litems to sit through trials where the plaintiff's attorney can do a good job, an excellent job, representing all the parties involved, and that's what we're really trying to cut down on the unnecessary duplication of representation and have representation only occur when it's necessary because of the conflict.

MS. SWEENEY: And I'll modify that just a tiny bit because now in med mal cases you do have a capped

universe of recovery, and I don't think that creates the conflict. So your "other than," I would take out -- I agree with everything you said except that because now you've got a 250,000-dollar cap on the entire case, all the plaintiffs lumped together, and I still don't think that creates the need for the appointment of an ad litem.

HONORABLE JANE BLAND: You're still going to ask a jury to get as much as possible to each --

MS. SWEENEY: In each category.

HONORABLE JANE BLAND: I mean, as long as the incentive is to maximize recovery to the jury and that doesn't come at the expense to one party or the other then I don't see the conflict.

MR. LOPEZ: That's been my experience in Dallas County. I'm not smart enough to remember why that was, but it wasn't a conflict situation.

HONORABLE JANE BLAND: But it was our view that in adding these definitions of attorney ad litem and guardian ad litem, although correct, they didn't advance the ball or address any existing problem, but if there is a problem, we can go back and take a look at that and try to address it.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: As I say, I don't do ad litem work, and it rarely comes up, but just reading

through 1815 and listening to Richard and from what little I do know, there is a big difference between an attorney ad litem and a guardian ad litem, and it's who you owe your loyalty -- or what you owe your loyalty and confidentiality and everything else to, and to just assume that that's a established and not a morass, as Richard calls it, which I agree with, to me, this rule doesn't advance that ball.

And I'm not advocating more representation where it's not needed, but in a case I had, that morass caused us to get attorneys ad litem appointed for all of the children when that perhaps wasn't necessary, and this rule could be used to say that's not necessary directly.

CHAIRMAN BABCOCK: Guys, this has been great. If anybody has got more comments that they want to give to Justice Hecht or Justice Jefferson, do so.

Judge Bland, you will be a resource for the Court this week if they have any questions?

HONORABLE JANE BLAND: Yeah.

CHAIRMAN BABCOCK: Thanks very much everybody for two and a half great days of work.

(Meeting adjourned at 11:55 a.m.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 23rd day of August, 2003, Saturday Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1174.00 .

Charged to: Jackson Walker, L.L.P.

Given under my hand and seal of office on this the 26th day of August, 2003.

ANNA RENKEN & ASSOCIATES
1702 West 30th Street
Austin, Texas 78703
(512)323-0626

D'Lois L. Jones

D'LOIS L. JONES, CSR
Certification No. 4546
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