

1 DR. SHOSKY: Here, again, advertising is a second draft
2 chapter, and we received some very good comments on this chapter.
3 Let me just mention a few things and see what would be the live
4 issues.

5 Number one, not to beat a dead horse, but the timing in
6 this chapter is really an interesting aspect of writing it,
7 because of the report coming out at a time where for the first
8 time in many years the Supreme Court will deal with this issue
9 head on.

10 So the First Amendment issue about gambling advertising
11 will be a hot topic, as this report comes out. And we are trying
12 to draft language and structure the report in such a way that it
13 doesn't really matter what the Supreme Court decides, the
14 language we have will be relevant for the public discussion and
15 for policy makers to follow the wave of that court decision,
16 whatever takes place. So that is one whole set of issues.

17 The second set of issues is that we need, in my
18 opinion, to do a better job and to flesh out more material in the
19 whole aspect of promotions and marketing aspect of that chapter.
20 That is something where we have done quite a bit of legwork,
21 through Lexis-Nexis and elsewhere, but we don't have a
22 particularly solid discussion on that at the moment, which is
23 something that I do think that we need to work on.

24 There is also a third issue, there is also some
25 tangential things, interrelational things with the report. As
26 this advertising takes -- as the advertising discussion takes
27 place, we will be concerned with lotteries, we will be concerned
28 with other gambling aspects that advertise. There will be a lot
29 of cross-referencing to other aspects of the report, but the
30 lotteries in particular.

1 And you will notice in the second draft there is almost
2 every single concept discussed in terms of marketing, by Cook and
3 Clotfelter in their report, not as substantial as we would like
4 it yet, but at least you can see that we are prepared to
5 integrate that material as much as we can.

6 And, as I said, in the lottery discussion yesterday, to
7 the point of describing the ads in some detail, and putting the
8 language from these particular advertisements in the discussion
9 too.

10 So there is a lot of things going on elsewhere in the
11 report that will relate to this chapter, too.

12 CHAIR JAMES: Discussion?

13 COMMISSIONER WILHELM: I fully understand why this
14 chapter was drafted without assuming the Supreme Court's position
15 in Greater New Orleans Broadcasting. On the other hand it seems
16 to me, at least, and I could be totally wrong, it would not be
17 the first time. But it seems to me that the outcome of Greater
18 New Orleans Broadcasting is fairly predictable.

19 That is to say it seems to me, remote, that the Supreme
20 Court will uphold the concept of banning the advertisement of
21 gambling, or to put it to the reverse, it seems to me highly
22 unlikely that the Supreme Court will say that the interstate
23 administrative of gambling is okay under the First Amendment.

24 As I was saying before, I think it is a sharp
25 distinction between advertising about gambling and the actual
26 conduct of gambling.

27 So I do recognize why it was done this way, but it
28 seems to me that if we premise the approach that we take in this
29 chapter to the notion that Greater New Orleans Broadcasting
30 hasn't been ruled on, and therefore we should pretend that it

1 doesn't exist. And I'm not suggesting you put it quite like
2 that, but I think we will -- the chapter will be viewed as
3 irrelevant.

4 So I would suggest that we think about whether there is
5 a way to write this chapter on the assumption that the Supreme
6 Court is probably going to go that way, because it seems to me to
7 be likely.

8 And then I have two specific issues on page 18 of this
9 draft. One is pertaining to the issue I was just discussing that
10 says: Whatever decision is reached likely will take the lower
11 courts years to implement.

12 I would, respectfully, disagree with that. I think
13 that if the Supreme Court does rule that it is unconstitutional
14 to ban the advertising of gambling, gambling advertising will
15 proliferate in a hurry.

16 So I don't think we ought to just say it is going to be
17 a long time. I disagree with that, completely.

18 Also on page 18 you have a problem with your sentence,
19 as government sponsored and government sanctioned gambling,
20 lotteries might be viewed as distinct from casinos or tribal
21 gambling in terms of their advertising interest and their
22 heightened responsibilities to our citizens.

23 I think it is pretty clear that tribal gambling is
24 governmental gambling. And I think, certainly, the gambling
25 tribes would agree with that. I'm not suggesting that there is
26 an inclusion from that, but I believe the sentence as it is
27 written is not accurate.

28 COMMISSIONER LEONE: John, could I ask a question about
29 what the first part of your statement would mean? I think --
30 just sitting here listening two things occurred to me, if you

1 assume the court outcome you are talking about, two issues would
2 still remain on the table.

3 One is the possibility of governmental entities, states
4 with the lotteries, develop new ideas about what is appropriate
5 advertising and what is not.

6 COMMISSIONER WILHELM: Yes.

7 COMMISSIONER LEONE: -- models of what we think is a
8 good idea, and what is a bad idea. So that part of the chapter
9 could be -- but I don't think we have concluded what our position
10 is, as a Commission. And I think in terms of writing the chapter
11 that is what is needed.

12 And the second point would be --

13 CHAIR JAMES: -- our position is on --

14 COMMISSIONER LEONE: What our position is on state --
15 on calling on states to adopt certain restrictions on advertising
16 or include certain disclosures, or other things. We haven't had
17 a specific proposal.

18 COMMISSIONER BIBLE: On lotteries?

19 COMMISSIONER LEONE: On lotteries.

20 COMMISSIONER BIBLE: On governmental gaming?

21 COMMISSIONER LEONE: On governmental gaming. I am less
22 clear about the tribal gaming because while John is right that
23 it is governmental gaming, it has been as I understand it, from
24 an advertising point of view, subject to the restrictions on
25 commercial gaming. It has the exemption that the governments
26 have?

27 COMMISSIONER BIBLE: Yes, I believe tribal and
28 lotteries are subject to an exemption. That is my recollection.

29 COMMISSIONER LEONE: My second point is that even if
30 the restriction on commercial gambling is limited, it would still

1 be possible to place limits on what casino advertising, or to
2 have requirements on what needs to be in the advertising, and
3 that would probably turn out to be litigated too.

4 There are innumerable examples of permitted advertising
5 which also have conditions attached to them, everything from a
6 simple bait and switch to disclosure statements about other
7 things.

8 And it would be possible to imagine federal legislation
9 which took a court decision and then said some things about how
10 the --

11 COMMISSIONER BIBLE: In terms of the lotteries, or
12 commercial --

13 COMMISSIONER LEONE: Commercial gaming.

14 COMMISSIONER BIBLE: Because my -- well, my read of the
15 legal environment, I think, is the same as yours, John. And I
16 don't know how detailed they go into the case of what goes up to
17 the Ninth Circuit, or the Supreme Court -- jurisdiction, but at
18 the Appellate level, the Greater New Orleans Broadcasting v FTC
19 case, which came out of the 9th Circuit indicated that the
20 commercial gambling can advertise.

21 COMMISSIONER LEONE: My point is that even many
22 activities in advertising still --

23 COMMISSIONER BIBLE: But I believe once the court
24 decision is made, and if the newer case follows similarly, that
25 the body of law that applies generally to advertising for other
26 commercial activities is going to apply?

27 COMMISSIONER LEONE: That is my point, too.

28 COMMISSIONER BIBLE: And we requested the advertising
29 people that appeared before us at the last meeting to brief the
30 issue as to whether those restrictions could also apply to a

1 governmental entity. Because then you have a choice, I don't
2 think it would be an appropriate choice, that those restrictions
3 apply to other -- to advertising and commercial gambling basis,
4 they also apply to governmentally operated.

5 COMMISSIONER LEONE: My question is, will we make a
6 recommendation about that, will we be at all specific about --

7 COMMISSIONER BIBLE: Well, I would think that that
8 would be appropriate.

9 CHAIR JAMES: I certainly hope so.

10 COMMISSIONER LEONE: We don't have anything in draft,
11 or anything?

12 COMMISSIONER BIBLE: Well, don't look at me, I don't
13 know.

14 COMMISSIONER MCCARTHY: That hasn't fallen under any
15 particular committee, subcommittee, has it?

16 CHAIR JAMES: It is on the draft report subcommittee.

17 COMMISSIONER WILHELM: I would not necessarily be
18 opposed to something like you are talking about, Richard. So I
19 don't mean this next comment to disagree with that comment.

20 But it seems to me that separate and apart from
21 whatever legislative recommendations somebody might want to make,
22 it seems to me this is the kind of an area where we might think
23 about, and I don't know how people would feel, but we might think
24 about recommendations directly to the industries involved, as
25 well as to the states.

26 Now, one could argue that recommendations to states, or
27 commercial, or tribal gambling establishments might be a waste of
28 time, and that one might be right, I don't know.

29 But if it was up to me, personally, which of course it
30 isn't, I would be delighted if the ban on the advertisement of

1 gambling were to continue in effect. But, apparently, that is
2 not going to be the case, at least that is my understanding.

3 So I think we might consider, and I believe this would
4 make sense in a number of areas, pathological gambling is another
5 one, recommending to the commercial industry, and to the states
6 with respect to their lotteries, and to the tribes with respect
7 to their gambling establishments, a voluntary but enforceable
8 codes of conduct, that is enforceable by those who accept the
9 voluntary guidelines with respect to advertising.

10 And I think the same thing might make sense with
11 respect to pathological gambling. And the reason that I think
12 about that with respect to these kinds of issues, goes back to my
13 lack of confidence in the legislative approach on most of these
14 things. Either that it won't work, or that it won't have --
15 either it won't be passable, or that it will work, as I was
16 saying earlier.

17 Whereas it seems to me that we ought to put the burden
18 on a lot of these things where it belongs. That is to say I
19 think we ought to consider recommending to the American Gaming
20 Association, the National Indian Gaming Association, and the
21 Pari- mutuel people, and the states, you know, that certain kinds
22 of things ought to be adhered to with respect to advertising.

23 And, likewise, with respect to pathological gambling,
24 and that they ought to have, they ought to consider independent
25 enforcement force for those who subscribe to these codes, if
26 people have complaints about them, and that there ought to be
27 efforts to persuade everybody involved in these issues to
28 subscribe to these codes, and that kind of thing.

29 My own view, particularly in an area like advertising
30 where apparently the legal remedies are going to be far more

1 limited than they used to be, is that we ought to give some
2 consideration to those kinds of approaches, in addition to
3 whatever else we might recommend.

4 CHAIR JAMES: Is there any disagreement to what John
5 just said?

6 (No response.)

7 CHAIR JAMES: I think the challenge for us then comes
8 to be when you talk about the recommendations that we would make,
9 and what would be in that code of conduct, fleshing that out a
10 little bit.

11 COMMISSIONER BIBLE: And I believe you requested, at
12 least from the AGA some information, I think we had some
13 testimony last meeting that they were developing some sort of a
14 voluntary guide for --

15 DR. SHOSKY: In fact we received that this morning.

16 COMMISSIONER BIBLE: -- not use cartoon characters, and
17 things of that nature.

18 CHAIR JAMES: I definitely want to see some of that in
19 this chapter. And this, Jim, is where I think the principles of
20 what we were trying to get at with marketing to -- in one of your
21 recommendations, frequent players, in terms of how they are
22 marketed, and how they are advertised, how they are reached.
23 That some of those principles could apply there as well.

24 And, again, I suspect that if we look we could find
25 some best practices, and excellent models at states, casinos,
26 some tribal governments, and we could find some very poor models
27 in all those categories as well, but it doesn't hurt to point to
28 good practices.

29 Any other additions on that chapter? Do you think you
30 have enough? You know, what I haven't done this morning, John,

1 as we have wrapped up, which we did yesterday, which was very
2 helpful was to get you to give back to us what you thought you
3 heard so we could say, no, no, no.

4 DR. SHOSKY: I thought I was off the hook, but I guess
5 not.

6 Okay, well, let me just take us back to advertising,
7 quickly. The first comment was that -- concerning the Supreme
8 Court case we should consider in the drafting of the chapter,
9 that the outcome is fairly predictable, and that the ban on
10 gambling advertising will be eliminated, and in the wake of that
11 that gambling advertising might proliferate. And so with that in
12 mind we should prepare for that eventuality in the chapter.

13 We should also specify, if we could, in terms of the
14 language of the chapter; in terms of the recommendation,
15 particular limitations or restrictions on content. And there was
16 much discussion about what would happen when this case comes
17 down, would the body of restrictions on commercial speech and
18 other areas immediately apply to gambling advertising.

19 The answer seemed to be that we think so, but I know we
20 are waiting on a document, and we talked about that.

21 Also there was discussion about recommendations to the
22 industry, as well as to states, that tried to formulate a best
23 practices paradigm. We should indicate excellent models that we
24 recommend, and broaden the discussion, not just to government,
25 but to all segments of the gambling industry.

26 And I, myself, indicated that we had received the HEA's
27 material this morning, and I have it here. At the break I can
28 probably give it to everybody.

29 CHAIR JAMES: Yes, if you could get some member of the
30 staff to copy that and make it available to all of us.

1 DR. SHOSKY: I'm sure we can do it at the break.

2 CHAIR JAMES: Good. Any further discussion?

3 (No response.)

4 CHAIR JAMES: Thank you, John, I appreciate that. I
5 know that the next topic is Indian gaming. I want to get it as
6 close to where we are in the schedule, in case someone stepped
7 out of the room and is not going to be back until 11.

8 So I am going to break until 11, and pick up there. I
9 will say this, having taken off of the schedule some of the
10 organizational issues and some of the process issues,
11 acknowledgment, and resources, and all of that, we will buy back
12 some time this afternoon, as well, between that 2:15 and 3
13 o'clock time period.

14 So we will try to keep as much on schedule as we can.

15 So with that I'm going to break until 11 o'clock. We
16 will start exactly at 11.