

99-01-22

Transcript 1

CV San Francisco

ADVISORY COMMITTEE ON CIVIL RULES HEARING

SAN FRANCISCO, CALIFORNIA

JANUARY 22, 1999

TRANSCRIPT OF PROCEEDINGS

BEFORE:

HON. PAUL V. NIEMEYER, CHAIR

HON. SHIRA ANN SCHEINDLIN

HON. C. ROGER VINSON

HON. DAVID F. LEVI

HON. JOHN L. CARROLL

HON. LEE H. ROSENTHAL

HON. FRANK HUNGER

PROF. RICHARD MARCUS

PROF. EDWARD H. COOPER

PROF. THOMAS D. ROWE, JR.

MARK O. KASANIN, ESQ.

ANDREW M. SCHERFFIUS, ESQ.

REPORTED BY: DYNELE SIMONOV, CSR# 11211

CERTIFIED PRO TEM REPORTER, USDC

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1 JANUARY 22, 1999

8:30 A.M.

P R O C E E D I N G S

2 MR. NIEMEYER: THIS IS THE SET COMMITTEE HEARING  
3 ON THE NOTICE FOR PROPOSED RULE CHANGES OF THE CIVIL RULES  
4 ADVISORY COMMITTEE. THE PROPOSALS WERE ISSUED IN AUGUST  
5 1998 AND WE ARE IN THE PERIOD OF RECEIVING COMMENT. THAT  
6 WILL CONTINUE UNTIL FEBRUARY 1, 1999, WHICH IS THE  
7 DEADLINE. WE HELD ONE HEARING IN BALTIMORE ON DECEMBER 7.  
8 THIS IS THE SECOND HEARING TODAY. WE HAVE QUITE A FEW  
9 PEOPLE HERE, SO WE ARE GOING TO TRY TO KEEP IT MOVING  
10 TODAY.

11 OUR LAST HEARING WILL TAKE PLACE IN CHICAGO ON  
12 JANUARY 29. WE, OF COURSE, WILL BE HAPPY TO RECEIVE  
13 WRITTEN COMMENTS AND WILL CONSIDER THEM. THE PLANS ARE  
14 THAT THE COMMITTEE WILL MEET IN APRIL, 1999 TO CONSIDER  
15 ALL THE COMMENTS THAT HAVE BEEN RECEIVED, TO REACT TO THEM  
16 AND MAKE A FINAL RECOMMENDATION ON THESE PROPOSALS TO THE  
17 STANDING COMMITTEE, WHICH MEETS IN JUNE. IF THERE IS  
18 ANYTHING LEFT TO RECOMMEND AT THAT POINT IN TIME, THE  
19 STANDING COMMITTEE WILL ACT IN JUNE AND WE'LL SEND IT ON  
20 WHATEVER THEIR ACTION IS, TO THE JUDICIAL CONFERENCE,  
21 WHICH MEETS IN SEPTEMBER.

22 IF WE WERE TO ASSUME THAT CONGRESS WOULD ADOPT  
23 ANYTHING, THEN THE RULES WOULD BE TRANSFERRED TO THE  
24 SUPREME COURT FOR ACTION BY MAY 1, 2000, AND THE SUPREME  
25 COURT WILL TRANSFER ITS VIEWS TO CONGRESS ON MAY 1, AND

1 THEY WOULD BECOME LAW ON DECEMBER 1, YEAR 2000, UNLESS  
2 CONGRESS ACTED DURING THE INTERIM. THAT'S THE OVERALL  
3 SCHEDULE.

4 WE HAVE RECEIVED A LOT OF YOUR COMMENTS IN WRITING  
5 AND WE ARE HERE TODAY, OF COURSE, TO RECEIVE YOUR COMMENTS  
6 ORALLY. SINCE WE HAVE A LOT OF COMMENTS AND WE ARE ONLY  
7 GOING TO HAVE THIS ONE DAY, 8:30 TO 4:30, I'M GOING TO TRY  
8 TO CIRCUMSCRIBE THE TIME FOR EACH OF YOU AT ABOUT TEN  
9 MINUTES. IF YOU HAVE SOMETHING VERY IMPORTANT TO SAY AND  
10 IT CAN BE SAID IN ONE MINUTE MORE, WE MIGHT DO THAT.  
11 OTHERWISE, I WOULD LIKE TO INVITE YOU TO SUBMIT FURTHER  
12 COMMENTS IN WRITING. WE ARE READING THEM ALL. WE ARE  
13 GOING TO CONSIDER THEM ALL AND WE ARE GOING TO DEBATE THEM  
14 FULLY IN APRIL.

15 SO WITH THAT SAID, WE'LL BEGIN WITH THE WITNESS  
16 LIST. OUR STAFF HAS CIRCULATED A WITNESS LIST AND WE WILL  
17 TAKE YOU IN THE ORDER IN WHICH YOU ARE LISTED ON THE LIST,  
18 BUT WE ARE HAPPY TO MAKE ACCOMMODATIONS AND CHANGES TO THE  
19 ORDER OF THE LIST, IF YOU LET ME KNOW.

20 WE PLAN TO CONTINUE UNTIL ABOUT 12:30 FOR A LUNCH  
21 BREAK. WE WILL HAVE A MID-MORNING BREAK, AND THEN WE'LL  
22 RESUME AT 1:30 UNTIL 4:30 AND HAVE A MID-AFTERNOON BREAK.  
23 SO THAT IS A GENERAL SCHEDULE.

24 MR. BLECHER, YOU ARE THE FIRST ON THE LIST. ARE  
25 YOU WILLING TO COME FORWARD?

1 MR. BLECHER: GOOD MORNING YOUR HONORS AND MEMBERS  
2 OF THE COMMITTEE. I APPRECIATE AND THANK YOU FOR THE  
3 OPPORTUNITY TO SUCCINCTLY SET FORTH MY VIEWS IN RESPECT TO  
4 CERTAIN PROPOSED RULES CHANGES.

5 I AM MAXWELL BLECHER. I AM PREDOMINANTLY A  
6 PLAINTIFFS' ANTITRUST LAWYER WHO HAS EKED OUT A LIVING  
7 DESPITE THE CHANGES TO THE ANTITRUST LAWS OVER THE PAST  
8 DECADE.

9 FIRST, I WOULD LIKE TO START ON A POSITIVE NOTE  
10 AND ENDORSE THE RECOMMENDED CHANGE TO PROPOSED RULE  
11 26(A)(1) CAPITAL A, WHICH RELATES TO THE INITIAL  
12 DISCLOSURE REQUIREMENTS. I BELIEVE THAT CHANGE BRINGS  
13 THOSE REQUIREMENTS INTO ACCORD WITH ACTUAL PRACTICE, WHAT  
14 IS DOABLE IN REALITY, AND THAT IS CONSTRUCTIVE.

15 BY CONTRAST, I SUGGEST YOU REJECT THE SUGGESTED  
16 CHANGES TO RULES 26(A)(1) AND 34(B) WHICH READ AS A  
17 INTERLACING TEXT I BELIEVE TO BE ANTIPLAINTIFF AND WHICH  
18 WILL EXPAND, RATHER THAN COMPRESS, THE LITIGATE PROCESS.

19 I SAY IT OPERATES PRIMARILY FOR PLAINTIFFS BECAUSE  
20 IN THE REAL WORLD, DEFENDANTS CAN JUSTIFY EVEN THE MOST  
21 SWEEPING DISCOVERY, ESSENTIALLY UNDER THE RUBRICS OF WE  
22 HAVE TO LOOK AT THE CAUSATION AND DAMAGE CLAIMS OF THE  
23 PLAINTIFF AND THAT JUST JUSTIFIES INQUIRY INTO ALMOST  
24 EVERY ASPECT OF THE PLAINTIFF'S BUSINESS ACTIVITY.

25 BY CONTRAST, THESE RULES, I THINK, WILL SEND A

1 CLEAR SIGNAL TO DISTRICT JUDGES TO LIMIT DISCOVERY IN  
2 MAJOR COMMERCIAL LITIGATION, ANTITRUST, INTELLECTUAL  
3 PROPERTY AND THE LIKE. EVEN IF A JUDGE IS PERSUADED IN  
4 THE SECOND PHASE BY THE SHOWING OF GOOD CAUSE TO ALLOW  
5 SUBJECT MATTER DISCOVERY WE ALL UNDERSTAND AND LIVE WITH  
6 COMFORTABLY TODAY, THE PLAINTIFF IS GOING TO HAVE TO PAY  
7 FOR THAT, IF YOU READ 34, THE CHANGE 34(B), AS PART OF THE  
8 OVERALL TEXT. SO WHEN I SEE THIS AS OPERATING IN THE  
9 FIRST INSTANCE, NARROW PLAINTIFF'S DISCOVERY OR IN THE  
10 ALTERNATIVE TO MAKE THEM PAY FOR IT, WHICH IS TO  
11 DISCOURAGE THE PROCESS OF LITIGATING.

12 JUDGE CARROL: WHAT SORTS OF DISCOVERY DO YOU  
13 THINK THAT YOU CAN GET UNDER SUBJECT MATTER THAT YOU WOULD  
14 NOT BE ABLE TO GET UNDER CLAIM OR DEFENSE?

15 MR. BLECHER: IN AN ANTITRUST CONTEXT, IF WE WERE  
16 GOING ABOUT MONOPOLIZING ORANGES AND WE WANTED TO ASK A  
17 QUESTION ABOUT GRAPEFRUITS, IT WOULD NOT RELATE TO THE  
18 CLAIM OR DEFENSE, BUT IT COULD RELATE TO THE SUBJECT  
19 MATTER OF HOW DO YOU CONDUCT YOUR BUSINESS, WHAT KIND OF  
20 CONTRACTS, AGREEMENTS AND RESTRICTIVE PRACTICES DO YOU  
21 ENGAGE IN.

22 SO WE WILL OPERATE AND NARROW WHAT YOU CAN LOOK  
23 AT. IN THE FIRST INSTANCE, I DON'T HAVE ANY QUESTION  
24 ABOUT THAT. AND IF IT DOESN'T NARROW IT, YOU WILL HAVE TO  
25 PAY FOR THAT INQUIRY, WHICH IS ANOTHER WAY OF MAKING IT

1 LESS ATTRACTIVE.

2 JUDGE CARROLL: ONE OF THE COMMENTS RAISED IN  
3 ISSUE THAT I THINK IS IMPORTANT IS ABOUT ELECTRONIC  
4 DISCOVERY. FOR INSTANCE, E-MAIL THAT HAS BEEN ERASED.  
5 WHAT DO YOU DO ABOUT THAT SITUATION, WHERE A DEFENDANT MAY  
6 HAVE AN E-MAIL SYSTEM, WHERE ROUTINELY AND UNDER NORMAL  
7 PRACTICE, AN E-MAIL IS ERASED AS SOON AS IT IS RECEIVED?  
8 PLAINTIFF WANTS TO GO IN AND MAP THE E-MAIL SYSTEM OR  
9 DISCOVER INFORMATION THAT HAS BEEN ERASED AND THE  
10 UNDISPUTED FACT IS THAT IS A HUGE AMOUNT OF MONEY TO DO  
11 THAT. WHAT IS WRONG WITH MAKING, IN THAT SITUATION, THE  
12 PLAINTIFF PAY FOR THAT SORT OF DISCOVERY?.

13 MR. BLECHER: NOTHING. WHAT I SAY IN MY STATEMENT  
14 TO YOU IS THAT IN THE EXCEPTIONAL CASE WHERE THERE IS SOME  
15 REAL BASIS FOR MAKING THE PLAINTIFF PAY OR MAKING THEM  
16 SPLIT IT, IT WAS THE OTHER SIDE WHO ERASED IT. I THINK A  
17 JUDGE CAN EXERCISE DISCRETION TO THAT. BUT  
18 INSTITUTIONALIZING THAT PROCESS AND SAYING EVERY TIME WE  
19 GO BEYOND THE CLAIM OR DEFENSE, WE ARE GOING TO GET INTO  
20 AN AREA WHERE THE PLAINTIFF HAS TO PAY FOR IT I THINK  
21 DISCOURAGES THE PROCESS.

22 MR. KASANIN: I DON'T SEE WHY YOU SAY THAT THAT  
23 YOU PAY FOR IT EVERY TIME THE JUDGE ORDERS IT AS PART OF  
24 SUBJECT MATTER DISCOVERY.

25 MR. BLECHER: AS I READ THE PROPOSED CHANGES,

1 34(B) KICKS IN LARGELY WHERE YOU GO BEYOND THE CLAIM OR  
2 DEFENSE.

3 MR. KASANIN: IT KICKS IN TO IMPLEMENT THE  
4 LIMITATIONS.

5 MR. BLECHER: TO IMPLEMENT THE LIMITATION SO THAT  
6 IF YOU GET -- THE WAY I READ IT AND I THINK THE WAY  
7 SEVERAL JUDGES WOULD READ IT, YOU WOULD GET PAST CLAIM OR  
8 DEFENSE, YOU PERSUADE THE JUDGE THERE IS GOOD CAUSE -- IN  
9 MY CASE, TO GO AFTER THE GRAPEFRUITS INSTEAD OF THE  
10 ORANGES -- THE JUDGE IS GOING TO SAY FINE, BUT IN THAT  
11 SITUATION YOU HAVE TO PAY FOR ALL THE GRAPEFRUIT.

12 JUDGE NIEMEYER: I DON'T THINK WE NEED TO DEBATE  
13 IT. THAT IS NOT THE WAY THE RULE IS WRITTEN. THE RULE IS  
14 WRITTEN UNDER ONE, UNREASONABLY CUMULATIVE OR DUPLICATIVE.  
15 TWO, THE PARTY HAS AMPLE OPPORTUNITY TO OBTAIN THE  
16 INFORMATION SOUGHT, AND THREE, THE FURTHER EXPENSE OF  
17 PROPOSED DISCOVERY OUTWEIGHS ITS LIKELY BENEFIT. THE  
18 JUDGE HAS TO MAKE ONE OF THOSE THREE FINDINGS AND NOT  
19 WHETHER IT IS RELATED TO SUBJECT MATTER.

20 MR. BLECHER: I THINK SUB THREE, WHICH IS ONE OF  
21 THE MORE LIKELY ONES TO BE IMPLEMENTED --

22 PROFESSOR MARCUS: HOW COULD THERE BE GOOD CAUSE,  
23 WHICH IS WHERE YOU START, IN CIRCUMSTANCES WHERE THE  
24 THINGS THAT JUDGE NIEMEYER OR WHAT THE JUDGE FOUND APPLIED  
25 TO THIS DISCOVERY REQUEST, AREN'T THESE TWO DIFFERENT

1 THINGS?

2 MR. BLECHER: I THINK YOU CAN FIND GOOD CAUSE FOR  
3 DISCOVERY INQUIRY, BUT SAY THE TAX YOU HAVE TO PAY FOR  
4 THAT IS TO PAY FOR IT. I THINK, IN THE REAL WORLD, ONCE  
5 YOU GET BEYOND WHAT 26(A)(1) AS IT IS NOW PROPOSED  
6 AUTHORIZES YOU TO GET, CLAIM OR DEFENSE MATERIAL, YOU ARE  
7 GOING TO BE IN A PROCESS EACH TIME OF SAYING WHY SHOULD I  
8 HAVE TO PAY FOR THIS? IN THE REAL WORLD, THAT'S HOW  
9 DEFENDANTS ARE GOING TO READ IT AND COME IN AND ASK -- IF  
10 YOU ALLOW THIS DISCOVERY, AT LEAST MAKE THEM PAY FOR IT.

11 AND THAT THIRD, WHEN I SAY CRYSTAL BALL, THERE ARE  
12 VERY FEW JUDGES THAT CAN PREDICT WHETHER THE BENEFIT OF  
13 THIS DISCOVERY IS GOING TO OUTWEIGH THE BURDEN AT THE TIME  
14 YOU ASKED FOR IT. THAT'S SOMETHING YOU CAN ONLY TELL WAY  
15 DOWN THE ROAD. HOW DO YOU PROPOSE A COST IN MONTH SIX OF  
16 THE LITIGATION WELL BEFORE YOU COLLECT ALL THE MATERIAL  
17 AND ORGANIZE YOUR CASE?

18 JUDGE NIEMEYER: THAT THREE, WHICH HAS BURDEN OR  
19 EXPENSE LIMITATION BEING OUTWEIGHED BY THE BENEFIT OF  
20 DISCOVERY, THAT IS AN EXISTING LIMITATION. MY QUESTION  
21 IS, HAVE YOU EXPERIENCED ANY JUDGE ENFORCING THAT, AND HOW  
22 IS HE ENFORCING IT? IS IT BEING ENFORCED UNFAIRLY TODAY?

23 MR. BLECHER: IN ALL BUT THE MOST EXCEPTIONAL  
24 CASES THERE IS NO COST INVOLVED IN THE DISCOVERY IN MY  
25 EXPERIENCE. IF YOU DO SOMETHING LIKE A HUGE SEARCH,

1 MARGINAL SEARCH, THE NEED TO RECONSTRUCT ELECTRONIC DATA,  
2 THERE MAY BE. BUT PRETTY RARE. IT IS PRETTY RARE. WHAT  
3 I THINK THIS RULE IS GOING TO ENCOURAGE IS THAT IN MANY  
4 CASES, DEFENDANTS WILL COME TO THE COURT AND SAY MAKE THE  
5 PLAINTIFF PAY FOR THIS KIND OF DISCOVERY.

6 JUDGE NIEMEYER: YOUR CONCERN IS THAT BY  
7 HIGHLIGHTING THE SANCTION FOR AN EXISTING RULE, YOU ARE  
8 CONCERNED THAT IT WILL BE APPLIED.

9 MR. BLECHER: I'M CONCERNED THAT YOU ARE  
10 INSTITUTIONALIZING THE PROCESS THAT IS AVAILABLE TODAY,  
11 BUT ONLY IN THE RARE CASES AND IN TRUTH IS RARELY INVOKED.  
12 WHAT I'M CONCERNED ABOUT IS WE WILL GET SERIES OF  
13 LITIGATION, EVERY TIME YOU GET A FAIRLY BROAD DOCUMENT  
14 DEMAND, THE DEFENDANT WILL COME IN AND SAY MAKE THEM PAY  
15 FOR IT. THAT IS GOING TO DISCOURAGE THE PROCESS. IT IS  
16 INORDINATELY EXPENSIVE TO CONCLUDE AN ANTITRUST CASE  
17 TODAY. THIS IS ONLY GOING TO UP THE STAKES AND REDUCE THE  
18 LIKELIHOOD THAT THAT LITIGATION CAN SURVIVE.

19 NOW BACK TO 26(A)(1), THAT IS ANOTHER THING. IN  
20 THE REAL WORLD TODAY, IN MY OFFICE, WE RARELY SEE EITHER  
21 THE DISTRICT JUDGES OR MORE DIRECTLY MAGISTRATE JUDGES ON  
22 QUESTIONS OF RELEVANCY. WE ARE DISCIPLINED TO UNDERSTAND  
23 WHAT SUBJECT MATTER RELEVANCY IS AND EVERYBODY LIVES WITH  
24 IT. ONLY IN THE RAREST CIRCUMSTANCES ARE WE INVOLVED IN  
25 CONFLICT OVER THAT SUBJECT.

1           NOW BY CONTRAST HERE YOU ARE GOING TO HAVE THE  
2 INSTITUTIONALIZED BAR COMING IN IN EACH CASE SAYING THE  
3 PLAINTIFF'S DISCOVERY EXCEEDS CLAIM OR DEFENSE AND WE ARE  
4 GOING TO BE IN A GOOD CAUSE HEARING WITH THE JUDGE ON  
5 ALMOST EVERY DOCUMENT, MAYBE EVEN DEPOSITION REQUESTS,  
6 WHATEVER. IT IS GOING TO BE AN EXPANSIVE AMOUNT OF  
7 LITIGATION. INVENTIVE AND CREATIVE PLAINTIFFS ARE GOING  
8 TO START MAKING PHONY ALLEGATIONS IN ORDER TO ASSURE  
9 THEMSELVES THE DISCOVERY UNDER THE CLAIM OF DEFENSE  
10 RUBRIC. IF I THROW A SECURITIES CLAIM IN HERE OR  
11 ANTITRUST IN HERE, I CAN JUSTIFY INQUIRY THAT I COULDN'T  
12 GET IF I DID A GARDEN VARIETY BREACH OF CONTRACT OR  
13 WHATEVER.

14           PROFESSOR ROWE, JR.: ARE YOU SAYING THAT ONE OF  
15 THE RESULTS WOULD BE --

16           MR. BLECHER: NOT KNOWING THIS PLEADING, I THINK  
17 YOU ARE GOING TO EXPAND THE NUMBER OF CLAIMS THAT  
18 PLAINTIFFS ARE GOING TO MAKE IN ORDER THAT THEY CAN  
19 JUSTIFY DISCOVERY UNDER THE, QUOTE, "CLAIM RUBRIC,"  
20 WHEREAS NOW THEY CAN AT LEAST BE REASONABLY HONEST. I  
21 THINK PEOPLE ARE GOING TO BE TEMPTED TO JUST EXPAND THE  
22 CLAIMS ENDLESSLY IN ORDER TO BE ABLE TO JUSTIFY DISCOVERY.

23           PROFESSOR ROWE, JR.: DO YOU FORESEE THAT THIS IS  
24 GOING TO LEAD TO ENDLESS ROUNDS OF MOTIONS TO AMEND THE  
25 COMPLAINTS AND MOTIONS TO AMEND THE ANSWERS AND ON AND ON

1 AND ON? MR. ICOMMA: ?

2 MR. BLECHER: ABSOLUTELY. WHAT I THINK WE ARE  
3 GOING TO SEE IS A LOT OF FUSSING ABOUT WHAT IS GOOD CAUSE  
4 TO GET BROADER DISCOVERY AND AMENDING THE COMPLAINT TO ADD  
5 CLAIMS SO THAT YOU CAN JUSTIFY THE DISCOVERY WITHOUT  
6 HAVING TO PAY FOR IT.

7 SO I THINK WHAT WE ARE DOING IS TAMPERING WITH A  
8 PROCESS WHICH IN MY EXPERIENCE IS PRETTY EXTENSIVE IN  
9 DEALING WITH BIG CASES, IS WORKING WELL. WE DON'T HAVE A  
10 LOT OF CONFLICT OVER SUBJECT MATTER RELEVANCY. MOST OF  
11 THE CONFLICTS BEFORE MAGISTRATES HAVE TO DO WITH ISSUES OF  
12 PRIVILEGE OR MUCH MORE ESOTERIC ISSUES.

13 PROFESSOR ROWE, JR.: MOST OF THE CONFLICTS THAT  
14 YOU SEE ARE RAISED BY THE DEFENSE IN THEIR COST FOR  
15 PRODUCTION OF DOCUMENTS?

16 MR. BLECHER: DO I SEE THAT TODAY?

17 PROFESSOR ROWE, JR.: YES.

18 MR. BLECHER: NO. AS I SAY, VERY INFREQUENTLY,  
19 ONLY IN THE RAREST CASES DOES THE DEFENDANT COME IN AND  
20 SAY PLAINTIFF OUGHT TO PAY FOR THIS. AND IT IS AVAILABLE  
21 TO THE JUDGE, IF YOU THINK THE DEMAND IS MARGINAL, OR IF  
22 THEY BELIEVE THERE IS VERY LITTLE MERIT TO THE CONTENTS,  
23 BUT THEY ARE CONCERNED ABOUT DENYING IT, IT IS AVAILABLE.  
24 BUT IS IT INVOKED TODAY IN THE REAL WORLD? VERY, VERY  
25 RARELY DO WE DEAL WITH THAT KIND OF REQUEST.

1           PROFESSOR ROWE, JR.:    IN THE COMPLEX CASES DO YOU  
2   SEE THAT THE JUDGES ARE EMPATHETIC WITH THE DEFENDANT'S  
3   POSITION THAT IT IS REVOLTANT TO THE ARGUMENT AND  
4   RESPONSIVE TO THE ARGUMENT?

5           MR. BLECHER:    I THINK TODAY THERE IS A SLIGHT TILT  
6   IN FAVOR OF THE DEFENDANT'S VIEW THAT THE PLAINTIFF'S  
7   REQUEST FOR DISCOVERY ARE TOO EXPANSIVE.   WE CAN DEAL WITH  
8   THAT TODAY BECAUSE THE RULE HAS SUBJECT MATTER RELEVANCY.  
9   AND DESPITE THAT TILT, THEY TEND TO ALLOW A FAIR  
10   REASONABLE RANGE OF DISCOVERY THAT I DO NOT REGARD AS  
11   UNDULY RESTRICTIVE.   I THINK THIS WILL LEAD AND ENCOURAGE  
12   JUDGES TO BE UNDULY RESTRICTIVE.   DISCOVERY IS THE  
13   LIFEBLOOD OF THE ANTITRUST LITIGATION THAT I DO.   AND THE  
14   ANTITRUST LITIGATION THAT WE DO TROUBLE, DAMAGE LITIGATION  
15   IS THE SOURCE AT LEAST UNTIL THE LAST TWO YEARS OR SO OF  
16   ANTITRUST ENFORCEMENT IN THE COUNTRY.   I THINK TO THE  
17   EXTENT THAT WE MAKE DISCOVERY LESS AVAILABLE OR MORE  
18   COSTLY, YOU ARE GOING TO REDUCE ANTITRUST ENFORCEMENT --  
19   PROBABLY ENFORCEMENT IN THE SECURITIES AREA AND  
20   INTELLECTUAL PROPERTY AREA, AS WELL.

21           PROFESSOR ROWE, JR.:    EVEN IF YOU DON'T SEE MUCH  
22   EFFORT ON A DEFENDANT'S SIDE TO MAKE PLAINTIFFS PAY FOR  
23   DISCOVERY THAT THEY CLAIM IS TOO BROAD, DO YOU SEE MUCH  
24   RESISTANCE BY DEFENDANTS ON THE GROUNDS THAT THE AMOUNT OF  
25   DISCOVERY REQUESTED IS SIMPLY EXCESSIVE?

1 MR. BLECHER: TODAY?

2 PROFESSOR ROWE, JR.: YES.

3 MR. BLECHER: IT IS HARD TO SAY WITHOUT TRYING TO  
4 SOUND FAT-HEADED. WE TEND TO GO WITH THE RIFLE RATHER  
5 THAN A SHOTGUN. WE DON'T WANT TO WASTE A LOT OF TIME AND  
6 ENERGY LITIGATING THE SCOPE OF DISCOVERY. I HAVE SEEN, ON  
7 THE OTHER HAND, DISCOVERY DEMANDS FROM THE PLAINTIFF WHAT  
8 EVEN I WOULD REGARD AS UNNECESSARY AND OVERLY BROAD. I  
9 THINK A LOT OF IT DEPENDS ON THE EXPERIENCE, COMMON SENSE  
10 AND REASONABLENESS OF THE INITIATING WARRIOR. TO THE  
11 EXTENT THAT THE DEMANDS ARE UNREASONABLE, WE ALMOST NEVER  
12 LITIGATE RELEVANCY QUESTIONS BEFORE THE JUDGE OR  
13 MAGISTRATE ON THE DISCOVERY ISSUE, ALMOST NEVER.

14 JUDGE NIEMEYER: ALL RIGHT, THANK YOU.

15 JUDGE NIEMEYER: LET'S GO ON TO MR. FINKELSTEIN.

16 ARE YOU HERE? HOWARD FINKELSTEIN?

17 (NO RESPONSE.)

18 JUDGE NIEMEYER: WE WILL MOVE ON TO MR. DUNNE.

19 KEVIN DUNNE, IS HE HERE?

20 MR. DUNNE: I'M HERE. MY NAME IS KEVIN DUNNE. I  
21 AM A LAWYER HERE IN SAN FRANCISCO. I AM PRESENTLY THE  
22 PRESIDENT FOR THE LAWYERS FOR CIVIL JUSTICE. I TOOK THAT  
23 OVER A MONTH OR SO AGO. WE ARE DELIGHTED WITH THE WORK OF  
24 THE COMMITTEE. I WILL ALSO SAY THAT I TAKE THE EXACT  
25 OPPOSITE SIDE OF MR. BLECHER WHO PRECEDED ME AND I WILL

1 TELL YOU WHY.

2 MY EXPERIENCE IS THAT THE REASON YOU DON'T GET TOO  
3 MANY FIGHTS UNDER THE PRESENT RULE RELATED TO SUBJECT  
4 MATTER IS BECAUSE THERE IS NO RULE. IT REALLY IS AN OPEN  
5 INVITATION TO DISCOVERY IN ITS BROADEST SENSE. IT HAS  
6 COST MILLIONS OF DOLLARS IN LITIGATION FEES AND IT ALSO  
7 HAS IMPACTED THE BUSINESS OF THE CORPORATE AMERICA. THE  
8 NUMBER OF HOURS SPENT BY EMPLOYEES, OFFICERS AND DIRECTORS  
9 OF CORPORATIONS IN DISCOVERY IS ENORMOUS AND IT IS NEVER  
10 ENDING. BY EXAMPLE, IN THE TOBACCO LITIGATION THERE WERE  
11 LITERALLY WAREHOUSES FULL OF DOCUMENTS THAT HAVE BEEN  
12 PRODUCED. AND NEW PLAINTIFFS WHO ENTER THE LITIGATION,  
13 THEIR SOLE GOAL IN LIFE IS TO EXPAND ON THAT WAREHOUSE,  
14 NEVER HAVING LOOKED AT ONE DOCUMENT IN THE WAREHOUSE. I  
15 THINK THAT THE PROPOSALS MADE BY THIS COMMITTEE WILL WORK  
16 WONDERS IN TERMS OF CHANGING THE METHOD OF DOING  
17 LITIGATION, AND PRESENTLY UNDER THE RELEVANT TO DISPUTED  
18 FACTS ALLEGED WITH PARTICULARITY. WHAT I SEE IN  
19 LITIGATION IS, AND IT IS PART IN DUE TO THE INFORMATION  
20 TECHNOLOGY AVAILABLE, IS WE RECEIVED 50-, 80-, 100-PAGE  
21 COMPLAINTS THAT READ LIKE NOVELS THAT ARE LITERALLY BASED  
22 UPON MAGAZINE ARTICLES, NEWSPAPER ARTICLES, INVESTIGATIVE  
23 REPORTERS, CONSUMER BOOKS, LITERALLY PACKED INTO A  
24 COMPLAINT. UNDER THE PRESENT RULE, THAT WOULD REQUIRE THE  
25 DEFENSE TO GO AND LITERALLY DISCOURAGE WHATEVER THEY CAN

1 FIND WITH RESPECT TO THOSE DISPUTED FACTS ALLEGED WITH  
2 PARTICULARITY.

3 I DO A LOT OF PHARMACEUTICAL LITIGATION. WHAT  
4 HAPPENS IN PHARMACEUTICAL LITIGATION IS IF A PLAINTIFF  
5 COMES IN AND BELIEVES THAT HER HAIR OR HIS HAIR HAS FALLEN  
6 OUT BECAUSE OF A DRUG THEY HAVE TAKEN, YOU DO NOT GET A  
7 COMPLAINT THAT SAYS, I ALLEGE THAT THIS DRUG CAUSED MY  
8 HAIR TO FALL OUT. WHAT YOU GET IS A COMPLAINT THAT SAYS I  
9 TOOK YOUR DRUG AND NOW I AM SUFFERING SEVERE EMOTIONAL  
10 DISTRESS AND PERSONAL INJURY, I AM SUFFERING FROM  
11 ENVIRONMENTAL SYNDROMES, I AM SUFFERING FROM CHRONIC  
12 FATIGUE SYNDROME AND I AM SUFFERING FROM ATYPICAL  
13 AUTOIMMUNE DISEASE. THE REASON THAT IS ALLEGED IS TO  
14 BROADEN THE SCOPE OF DISCOVERY THAT HAS TO BE PRODUCED BY  
15 A DEFENDANT IN LITIGATION.

16 JUDGE NIEMEYER: OF COURSE THE PROPOSALS WE HAVE  
17 DON'T ADDRESS THAT PROBLEM. WHAT WE HAVE DONE IS TO LINK  
18 DISCOVERY TO CLAIMS AND DEFENSES. AND MR. BLECHER  
19 SUGGESTS THAT THE INCENTIVE THAT THAT CREATES IS TO CAUSE  
20 PLAINTIFFS TO DRAFT YET MORE VOLUMINOUS COMPLAINTS.

21 MR. DUNNE: I DISAGREE AND READ IT THE OPPOSITE.  
22 THE WAY I READ THE CHANGE IS, AS A DEFENDANT ALL I WOULD  
23 HAVE TO DO IS PRODUCE INFORMATION SUPPORTING ITS CLAIMS OR  
24 DEFENSES, SO I DON'T HAVE TO PRODUCE ANY INFORMATION  
25 SUPPORTING THE PLAINTIFF'S CLAIMS. HE HAS TO PRODUCE

1 THAT.

2 PROFESSOR ROWE, JR.: WE ARE TALKING ABOUT THE  
3 SCOPE LIMITATION, NOT THE DISCLOSURE OF THE THING. HIS  
4 ARGUMENT IS THAT BY NARROWING THE SCOPE FOR INITIAL  
5 DISCOVERY, AS OPPOSED TO THE DISCLOSURE, TO CLAIMS AND  
6 DEFENSES, YOU WILL GET BROADER CLAIMS MADE IN THE  
7 PLEADINGS.

8 MR. DUNNE: SO THAT ULTIMATELY, IN THE INITIAL  
9 DISCOVERY -- I AM TALKING ABOUT ATTORNEY-MANAGED, I DON'T  
10 HAVE TO PRODUCE ANYTHING TO SUPPORT HIS CLAIMS, AS I READ  
11 YOUR CHANGES.

12 JUDGE NIEMEYER: THE DISCLOSURE DOES NOT REQUIRE  
13 YOU TO --

14 MR. DUNNE: SO I GUESS WHAT HE IS SAYING IS, I  
15 HAVE, I STILL HAVE TO MAKE THESE VERY LONG COMPLAINTS SO  
16 THAT WHEN I GET TO THE COURT-MANAGED PORTION OF IT, I CAN  
17 BROADEN IT. I SUPPOSE THAT IS WHAT HE IS SAYING.

18 JUDGE NIEMEYER: IT IS STILL ATTORNEY-MANAGED  
19 UNDER THE SCOPE OF DISCOVERY AS DISTINCT FROM THE SCOPE OF  
20 DISCLOSURE. THE SCOPE OF DISCOVERY HAS BEEN, THERE HAS  
21 BEEN A TRANSFER OF BREADTH SO THAT THE ATTORNEY-MANAGED  
22 PART IS RELATIVE TO A CLAIM OF DEFENSE, WHEREAS THE  
23 COURT-SUPERVISED PART CAN EXPAND IT TO SUBJECT MATTER  
24 RELEVANCE.

25 MR. DUNNE: I UNDERSTAND THAT. SO HIS MOTIVATION

1 IN FILING A COMPLAINT IS TO FILE IT BROADLY ENOUGH SO WHEN  
2 HE GETS TO THE SECOND PHASE, HE HAS GOT SOME SUPPORT FOR  
3 THAT. IT IS STILL TO ME VERY IMPORTANT THAT YOU HAVE A  
4 NARROW FIRST PHASE, WHICH IS WHAT, AS I READ YOUR RULES,  
5 YOU ARE DOING.

6 JUDGE NIEMEYER: WE ARE.

7 MR. DUNNE: AND THE REASON FOR THAT IS THAT NOW  
8 WHEN DESPITE THE BROAD CLAIM, I AM REPRESENTING A  
9 PHARMACEUTICAL COMPANY, AND THEY BRING IN A COMPLAINT THAT  
10 SAYS NOT ONLY DOES MY HAIR FALL OUT, BUT I HAVE AUTOIMMUNE  
11 DISEASE AND ARTHRITIS AND EVERYTHING ELSE, ALL I HAVE TO  
12 DO IS AS A DEFENDANT IS GO AND BRING YOU OUT ALL OF THE  
13 TESTING I DID TO SHOW THAT I MADE A GOOD PRODUCT,  
14 GENERALLY THE NEW DRUG APPLICATION.

15 UNDER THE OLD RULE, THE RULE BEFORE IT IS CHANGED,  
16 I WOULD HAVE TO GO AND SEARCH THE FILING CABINETS AND DESK  
17 DRAWERS AND WAREHOUSE FOR ANY POSSIBLE MEMO THAT MIGHT  
18 SUPPORT THEIR CLAIM. THAT, IF YOU DO NOTHING ELSE, IS A  
19 BIG IMPROVEMENT.

20 LET ME JUST SAY, I THINK YOUR -- AND I DON'T KNOW  
21 THAT I UNDERSTAND THE PROPOSALS THAT WELL, BUT AS I  
22 UNDERSTAND THE SECOND PHASE, THE COURT-MANAGED PHASE, IT  
23 DOES NOT HAVE RELEVANCE TO THE SUBJECT MATTER, IT HAS GOOD  
24 CAUSE. AND WHILE I THINK -- AM I WRONG?

25 JUDGE NIEMEYER: IT IS A MISCHARACTERIZATION TO

1 SAY THAT THAT IS A COURT-MANAGED BECAUSE THE DISTINCTION  
2 IS BETWEEN INITIAL DISCLOSURE AND DISCOVERY.

3 MR. DUNNE: IN THE DISCOVERY PHASE, NOW, THE NEW  
4 MOVEMENTS WILL BE GOOD CAUSE. AM I WRONG ON THAT?

5 JUDGE NIEMEYER: ONLY IF YOU WANT TO GET TO THE  
6 SUBJECT MATTER. IF YOUR DISCOVERY IS STILL FREELY  
7 AVAILABLE FOR BOTH PLAINTIFFS AND DEFENDANTS SO LONG AS IT  
8 RELATES TO A CLAIM OF DEFENSE.

9 MR. DUNNE: ALL RIGHT. THAT IN AND OF ITSELF IS  
10 THOUGH AN IMPROVEMENT, BECAUSE, FRANKLY, TODAY, TO ME THE  
11 WAY THE RULES WORK ARE THE RICH GET RICHER. THE RICH  
12 PLAINTIFF'S LAWYERS ARE GETTING RICHER, CAN AFFORD MORE  
13 DISCOVERY. THE PRESENT RULES HAVE VIRTUALLY NO  
14 LIMITATIONS. AND BECAUSE THEY CAN SPEND WHATEVER IT TAKES  
15 IN TERMS OF MANPOWER, MONEY, PARALEGALS, EFFORT.  
16 LITERALLY THEY GET THE WAREHOUSES AND THE PLAINTIFFS'  
17 LAWYERS WHO DON'T HAVE THE MONEY AND CAN'T SPEND THE TIME,  
18 DON'T GET IT. THE RULES HAVE VERY LITTLE IMPACT ON THE  
19 AMOUNT OF DISCOVERY THAT TAKES PLACE.

20 PROFESSOR MARCUS: BEFORE YOU GO ON, I THOUGHT MR.  
21 BLECHER SAID THAT THE NARROWING OF THE SCOPE OF  
22 ATTORNEY-MANAGED DISCOVERY, NOT DISCLOSURE, WOULD PROMPT  
23 PLAINTIFFS' LAWYERS TO MAKE MORE EXPANSIVE COMPLAINTS, TO  
24 ADD CLAIMS. ARE YOU SAYING THAT THE COMPLAINTS THAT YOU  
25 SEE ARE SO BROAD THAT YOU CAN'T IMAGINE THEY COULD BE

1 EXPANDED FURTHER?

2 MR. DUNNE: EXACTLY. IF YOU CAN GET THEM BROADER  
3 THAN THEY ARE TODAY, I WOULD BE SHOCKED. THE REASON THEY  
4 ARE BROAD TODAY IS FOR THE INITIAL DISCLOSURE REASON. SO  
5 I DON'T THINK THAT IT IS GOING TO HAVE ANY CHANGE AT ALL  
6 IN TERMS OF THAT.

7 I STILL HAVE WHAT I BELIEVE IS GOOD CAUSE IS SOME  
8 SLOWING DOWN. WHAT STILL CONCERNS ME IS THAT THE  
9 WEALTHIEST SEGMENT OF THE PLAINTIFFS' BAR IS NOT GOING TO  
10 BE DISCOURAGED IN THE SLIGHTEST BY THESE CHANGES. AND  
11 WHAT CONCERNS ME SLIGHTLY, AS I READ 26(B)(2) III, IS  
12 THERE IS ESSENTIALLY -- AT LEAST IN MY WAY OF READING THIS  
13 -- A VAGUENESS BETWEEN WHAT YOU HAVE TO PAY FOR AND WHAT  
14 IS GOOD CAUSE. AND I AM TROUBLED BY THE FACT THAT THE  
15 RICHEST WILL SAY, OKAY, YOUR HONOR, YOU MAY SAY THIS IS  
16 MARGINALLY GOOD CAUSE VERSUS OBVIOUSLY GOOD CAUSE, BUT IF  
17 YOU ARE WILLING TO PAY FOR IT, HOW CAN THEY COMPLAIN, GO  
18 ON AND GO FORWARD. THEN I'M NOT SURE THAT WHILE THERE WAS  
19 SOME BREAKS, AND I APPRECIATE THAT, AND THAT WILL SLOW  
20 DOWN SOME PEOPLE. IN TERMS OF THE VERY MOST AGGRESSIVE,  
21 THE ONES WHO ARE ALREADY DOING SWEEPS, THEY ARE STILL  
22 GOING TO BE GOING AFTER THE SAME STUFF THEY HAVE ALWAYS  
23 BEEN GOING AFTER AND SAY FINE, WE WILL PAY FOR IT, IT IS  
24 TRIVIAL IN TERMS OF WHAT WE ARE LOOKING FOR HERE.

25 PROFESSOR ROWE, JR.: ONE QUESTION CONCERNING

1 DISCLOSURE. YOU HAD SUPPORTED THE PROPOSED CHANGE ABOUT  
2 NARROWING OF DISCLOSURE ON BOTH SIDES?

3 MR. DUNNE: TRUE.

4 PROFESSOR ROWE, JR.: THE CHANGE AS IT IS PROPOSED  
5 RELATES TO BOTH DOCUMENT PRODUCTION AND NAMES OF  
6 WITNESSES, AND I THINK YOU WERE REFERRING MAINLY TO  
7 EXAMPLES IN CONNECTION WITH DOCUMENT PRODUCTION --

8 MR. DUNNE: TRUE.

9 PROFESSOR ROWE, JR.: -- WITH A FAIRLY HIGH  
10 AGREEMENT IN OUR GROUP ON THAT NARROWING. WE HAVE A VERY  
11 INTERESTING SUGGESTION IN A STATEMENT FROM A LATER  
12 WITNESS, MR. WELLS, THAT POSSIBLY WITH RESPECT TO  
13 WITNESSES IT MIGHT MAKE SENSE NOT TO HAVE THEM ONLY DECIDE  
14 LIMITATION, BUT IN THE INITIAL DISCLOSURE TO KEEP  
15 SOMETHING LIKE THE PRESENT WITNESSES AND ALL PERSONS KNOWN  
16 TO THE DISCLOSING PARTY WHO HAVE PERSONAL KNOWLEDGE  
17 CONTAINING ANY SIGNIFICANT FACTUAL ISSUES RAISED IN THE  
18 PLEADINGS. WOULD THAT BE A SENSIBLE DISTINCTION?

19 MR. DUNNE: WELL, AS A DEFENSE LAWYER, WHAT WE  
20 WOULD HAVE TO DO IS INTERVIEW A LARGE NUMBER OF PEOPLE TO  
21 SEE IF ANYBODY -- OR HAVE YOUR CLIENT, YOU END UP SIGNING  
22 OFF ON THESE THINGS -- INTERVIEW THEIR OFFICERS,  
23 DIRECTORS, EMPLOYEES, DIRECTORS OF REGULATORY AFFAIRS,  
24 DIRECTORS OF RESEARCH, TO SEE IF THEY HAVE INFORMATION  
25 THAT HELPS THE OTHER SIDE. I DON'T --

1           PROFESSOR ROWE, JR.:   WOULDN'T YOU BE DOING THAT  
2 UNDER THE PRESENT PROPOSAL ANYWAY BECAUSE YOU HAVE TO FIND  
3 OUT WHO HAS INFORMATION ABOUT THE ISSUES?

4           MR. DUNNE:   WELL, UNDER THE PRESENT PROPOSAL, THE  
5 MOTIVES LINE UP PERFECTLY.   BECAUSE UNDER THE PRESENT  
6 PROPOSAL, AS A TRIAL LAWYER, I DESPERATELY WANT TO MAKE  
7 SURE THAT EVERY GOOD DOCUMENT IS DISCOVERED AND PRESENTED.  
8 AND CERTAINLY EVERY FAVORABLE WITNESS IS DISCOVERED AND  
9 PRODUCED, BECAUSE THE SANCTIONS ARE OBVIOUS: IF I DON'T DO  
10 IT, IT ISN'T GOING TO GET INTO EVIDENCE.   SO I'M GOING TO  
11 BE VIGOROUS AND DO THAT.

12           UNDER THE OLD HOPEFULLY RULE THAT IS GOING TO BE  
13 CHANGED, MY MOTIVES TO GO FIND EVIDENCE TO HELP THE OTHER  
14 SIDE ARE NOT VERY GOOD.   I'M NOT THRILLED ABOUT THE IDEA  
15 OF GOING TO HELP FIND INFORMATION THAT HELPS THE OTHER  
16 SIDE.

17           MR. SCHERFFIUS:   DON'T YOU GET AN INTERROGATORY IN  
18 MOST OF YOUR CASES REQUESTING THAT VERY INFORMATION THAT  
19 YOU HAVE TO GO AND DO THAT ANYWAY?

20           MR. DUNNE:   IT WOULD BE OVERLY BROAD.   IN OTHER  
21 WORDS, GO GET ALL THE INFORMATION THAT HELPS MY  
22 SIDE --

23           MR. SCHERFFIUS:   NO, THE PLAINTIFF'S ATTORNEY  
24 FILES AN INTERROGATORY ASKING THE NAMES OF ALL OF THE  
25 PERSONS WHO HAVE INFORMATION PERTAINING TO THE PARTICULAR

1 CLAIM THAT --

2 MR. DUNNE: SURE. I GET CONSTANTLY MOST  
3 KNOWLEDGEABLE. THAT COMES ALL THE TIME. BUT THAT -- MOST  
4 KNOWLEDGEABLE DOESN'T NECESSARILY MEAN GO FIND ME THE GUY  
5 WHO WROTE THE BAD DOCUMENT AND, YOU KNOW, THERE MAY BE  
6 SOME -- I OVER GENERALIZE -- THERE MAY BE SOME CLERK, SOME  
7 RESEARCH ASSISTANT, SOME SUMMER ASSOCIATE WHO HAS WRITTEN  
8 A DOCUMENT THAT IS A BAD DOCUMENT, THEORETICALLY. THAT IS  
9 GENERALLY NOT THE MOST KNOWLEDGEABLE PERSON. WHAT I GET  
10 EVERY DAY IS, GIVE ME THE MOST KNOWLEDGEABLE PERSON. SO I  
11 GO GET THE DIRECTOR OF SCIENTIFIC AFFAIRS OR SOMEBODY LIKE  
12 THAT, AND THAT PERSON COMES IN, AND IF THERE IS A BAD  
13 DOCUMENT, THEY CAN PUT IT IN CONTEXT.

14 JUDGE NIEMEYER: I THINK WE HAVE RUN OVER A LITTLE  
15 BIT.

16 MR. CELEBREZE, BRUCE CELEBREZE?

17 (NO RESPONSE.)

18 JUDGE NIEMEYER: DIANE CROWLEY, IS SHE HERE TODAY?

19 MS. CROWLEY: GOOD MORNING, AND THANK YOU FOR  
20 INVITING ME TO SPEAK WITH YOU TODAY ON THIS VERY IMPORTANT  
21 TOPIC. MY NAME IS DIANE CROWLEY AND I AM AN ATTORNEY HERE  
22 IN SAN FRANCISCO. I WOULD ALSO LIKE TO WELCOME YOU TO  
23 CALIFORNIA FOR ALL THOSE WHO ARE VISITORS HERE TO DAY.

24 HERE IN CALIFORNIA, THE SEMINAL OPINION IN THE  
25 DEVELOPMENT OF CALIFORNIA DISCOVERY LAW IS A DECISION BY

1 THE NAME OF GREYHOUND VERSUS SUPERIOR COURT, TO WHICH I  
2 REFERRED IN MY PAPERS. THIS CASE DISCUSSED THE CONCEPT OF  
3 DISCOVERY AS PRIMARILY BEING DESIGNED TO ELIMINATE  
4 SURPRISE AT TRIAL, AND ALSO TO HELP PEOPLE ADEQUATELY  
5 PREPARE FOR THE -- TO RESOLVE DISPUTES WITHOUT DISRUPTING  
6 THE ADVERSARIAL NATURE OF LITIGATION.

7 FROM THIS VERY FINE CONCEPTION HAS COME A  
8 CONSIDERABLY BROADER REALITY. IN CALIFORNIA CIVIL CODE  
9 2017(A) WHICH SORT OF SUMMARIZES THE SCOPE OF OUR  
10 DISCOVERY SYSTEM, THE STATUTE PROVIDES THAT ANY PARTY MAY  
11 OBTAIN DISCOVERY REGARDING ANY MATTER NOT PRIVILEGED THAT  
12 IS RELEVANT TO THE SUBJECT MATTER, AND FURTHER PROVIDES  
13 THAT IF THE MATTER IS DISCOVERABLE EITHER IN ITSELF IS  
14 ADMISSIBLE OR IF IT MAY REASONABLY LEAD TO THE DISCOVERY  
15 OF ADMISSIBLE INFORMATION.

16 JUDGE NIEMEYER: THAT'S ESSENTIALLY THE CURRENT  
17 FEDERAL RULE, IS IT NOT?

18 MS. CROWLEY: PRECISELY, YOUR HONOR.

19 BY ADOPTING THIS STANDARD, THE CALIFORNIA  
20 LEGISLATURE REJECTED THE RECOMMENDATION OF THE AMERICAN  
21 BAR ASSOCIATION THAT THE CRITERIA FOR DISCOVERY IN THE NEW  
22 CALIFORNIA DISCOVERY ACT BE RELEVANT TO ISSUES IN THE  
23 LITIGATION.

24 NOW, JUDGE NIEMEYER HAS ALREADY GUESSED WHY I HAVE  
25 BROUGHT THIS UP. WHAT WE HAVE HERE IN CALIFORNIA IS VERY

1 CLOSE TO THE CURRENT RULE 26. WHAT IS PROPOSED FOR RULE  
2 26 IS VERY CLOSE TO WHAT WE REJECTED.

3 NOW, HERE IS WHAT HAPPENED IN CALIFORNIA --

4 JUDGE NIEMEYER: ACTUALLY, YOU KNOW UNDER THE  
5 CURRENT PROPOSAL THERE WOULD NOT BE AN ELIMINATION OF THE  
6 SUBJECT MATTER RELEVANCY. IT WOULD JUST BE TRANSFERRED TO  
7 COURT SUPERVISION, AND THE NORM WOULD BE RELEVANCE TO A  
8 CLAIM OR DEFENSE. WE HAVE HEARD A LOT OF TESTIMONY UP TO  
9 NOW, EVEN WHEN WE WERE DRAFTING THE RULE AS TO QUESTIONING  
10 WHAT THE DIFFERENCE IS, BECAUSE IT DEPENDS A LOT ON HOW A  
11 JUDGE APPROACHES A CASE, AND THERE MAY BE A GOOD QUESTION  
12 AS TO WHAT THE DIFFERENCES ARE. BUT THE IDEA OBVIOUSLY IS  
13 TO TRY TO COMPORT WITH A POLICY OF FULL WILL AND FAIR  
14 DISCLOSURE AT THE SAME TIME TRYING TO REDUCE THE COSTS OF  
15 DISCOVERY WHICH ARE SUPERFLUOUS OR UNNECESSARY. IT IS  
16 LARGELY LEFT UP TO THE JUDGE, I THINK.

17 MS. CROWLEY: CORRECT. I UNDERSTOOD THE AMERICAN  
18 BAR ASSOCIATION'S SUGGESTION THAT WE LIMIT DISCOVERY TO  
19 ISSUES IN LITIGATION AS BEING MUCH CLOSER TO WHAT IS  
20 PROPOSED HERE TODAY, THE FOCUS ON CLAIMS AND DEFENSES.  
21 THAT SEEMS CLOSER TO ISSUES TO ME THAN SUBJECT MATTER IN  
22 THE LITIGATION FOR REASONS THAT I WILL APPROACH.

23 PROFESSOR ROWE, JR.: THE CHAIR'S POINT IS THAT IS  
24 TRUE ONLY AT A FIRST STAGE AND THE POSSIBILITY OF ANY  
25 SUBJECT MATTER OF DISCOVERY IS STILL AVAILABLE UNDER

1 JUDICIAL SUPERVISION.

2 MS. CROWLEY: YES, BUT WHAT PARTICULARLY CONCERNS  
3 ME IS THE INITIAL DISCLOSURE PORTION OF 26, 26(A)(1).  
4 THAT'S THE AREA IN WHICH I WOULD MOST LIKE TO SEE THE  
5 PROPOSALS ACCEPTED WITH THE NARROWING OF THE FOCUS. THE  
6 REASONS FOR THAT CAN BE SEEN BY A CASE I WOULD LIKE TO  
7 DESCRIBE.

8 I AM A PARTNER IN A LARGE CIVIL LITIGATION FIRM  
9 HERE IN SAN FRANCISCO. WE HAD A CASE IN FEDERAL COURT, A  
10 TRADEMARK CASE IN WHICH WE WERE ADVERSE TO A LARGE  
11 OVERSEAS CORPORATION.

12 THE INITIAL DISCOVERY REQUESTS WERE MADE, OF  
13 COURSE, AND OUR OPPONENT, THE ATTORNEY FOR THE OVERSEAS  
14 CORPORATION, HAD TO RESPOND WHO ARE THE PEOPLE AND WHAT  
15 ARE THE DOCUMENTS LIKELY TO HAVE DISCOVERABLE INFORMATION  
16 RELEVANT TO DISPUTED FACTS. SO HE SERVED US WITH A  
17 MULTI-PAGE LIST OF PERSONS LIKELY TO HAVE KNOWLEDGE OF  
18 DISPUTED FACTS, PAGE AFTER PAGE, STARTING WITH ALL OF THE  
19 CORPORATE OFFICERS, THE PRESIDENT, THE VICE PRESIDENT AND  
20 SO ON.

21 SO THE CASE PROGRESSED. THROUGH EARLY DISCOVERY  
22 WE OBTAINED THE LIST OF THE PERSONS MOST KNOWLEDGEABLE,  
23 TOOK THEIR DEPOSITIONS, TOOK A FEW MORE DEPOSITIONS, TOOK  
24 A TOTAL OF FIVE DEPOSITIONS. AT THAT POINT THOUGHT WE  
25 HAVE A GOOD, SOLID BASIS HERE FOR PROCEEDING TO TRIAL.

1 BUT, YOU KNOW, HE LISTED EVERY CORPORATE OFFICER AND  
2 DIRECTOR, AND HE IS CERTIFIED TO THE COURT UNDER THE  
3 PENALTIES OF RULE 11 THAT THESE PEOPLE HAD DISCOVERABLE  
4 INFORMATION RELEVANT TO DISPUTED FACTS. WELL, WHAT COULD  
5 WE DO? WE WERE DUTY BOUND TO SEE WHAT THESE PEOPLE KNEW.  
6 WE NOTICED THEIR DEPOSITIONS. OUR OPPOSING COUNSEL CALLED  
7 US UP AND SAID, THEY DON'T KNOW ANYTHING, THEY ARE TOO  
8 BUSY. WE SAID YOU TOLD US THAT THEY HAD KNOWLEDGE OF  
9 DISPUTED FACTS SO WE FEEL WE ARE DUTY BOUND TO DEPOSE  
10 THEM.

11 IT ENDED UP IN COURT. WHEN OUR OPPONENT TRIED TO  
12 TELL THE JUDGE THAT THESE PEOPLE DIDN'T KNOW ANYTHING AT  
13 ALL, THE JUDGE BECAME SO ANNOYED WITH HIM THAT HE NOT ONLY  
14 ORDERED THAT THE DEPOSITIONS PROCEED, BUT THAT THEY  
15 PROCEED IN OUR OFFICES IN SAN FRANCISCO AND THAT THEY  
16 PROCEED WITHIN THE NEXT 15 DAYS.

17 WHEN THE ATTORNEY NOTIFIED HIS CLIENTS OVERSEAS,  
18 THEY WERE ABSOLUTELY FURIOUS AND THEY REFUSED TO DROP  
19 EVERYTHING TO FLY TO SAN FRANCISCO TO PARTICIPATE IN A  
20 LAWSUIT ABOUT WHICH THEY KNEW REALLY ALMOST NOTHING. WHEN  
21 THEY HAPPENED, THEIR ATTORNEY, REALIZING HE WAS UNDER  
22 COURT ORDER SAID, OKAY, I WILL SETTLE AND THAT WAS THAT.

23 JUDGE NIEMEYER: YOU CAME OUT PRETTY WELL.

24 MS. CROWLEY: WE CAME OUT PRETTY WELL, BUT WE  
25 ALWAYS HAD THE NAGGING SUSPICION THAT NOT HAD OUR OPPONENT

1 SO CAREFULLY COMPLIED WITH RULE 26, WE WOULDN'T HAVE HAD  
2 IT QUITE SO EASY.

3 JUDGE NIEMEYER: WAS THAT UNDER THE INITIAL  
4 DISCLOSURE?

5 MS. CROWLEY: YES.

6 JUDGE NIEMEYER: AND THE DISTRICT YOU WERE  
7 PRACTICING IN AS OPTED TO USE THE INITIAL DISCLOSURE IN  
8 THE COMP RULES?

9 MS. CROWLEY: YES. SO IF THE PROPOSAL BEFORE THIS  
10 COURT FOR 26(A) HAD BEEN IN EFFECT, THIS WOULD NOT HAVE  
11 HAPPENED. IF THEIR ATTORNEY HAD BEEN ASKED TO LIST ONLY  
12 THE PERSONS WITH RELEVANT KNOWLEDGE OF THE ISSUES AND  
13 OFFENSES IN A TRADEMARK CASE, HE WOULDN'T HAVE LISTED THE  
14 PRESIDENT AND SO ON. MAYBE THEY KNEW WHAT THE TRADEMARK  
15 WAS. THEY KNEW THERE WAS AN ARGUMENT OVER IT, SOMETHING  
16 LIKE THAT. BUT THEY DIDN'T KNOW IF THERE WAS CONSENT TO  
17 THE USE OF THE TRADEMARK. THEY DIDN'T KNOW DATE OF FIRST  
18 PUBLICATION. THEY DID NOT KNOW THE NUTS AND BOLTS ABOUT  
19 HOW THAT TRADEMARK CAME TO BE USED BY THEIR CORPORATION  
20 AND WHAT THE CLAIMS AND DEFENSES WERE IN THE LITIGATION.

21 JUDGE NIEMEYER: I DON'T WANT TO GET IN A POSTURE  
22 WHERE THE COMMITTEE IS DEFENDING ITS PROPOSAL WITH EACH  
23 WITNESS, AND I DON'T INTEND TO DO THAT, BUT I THINK IT IS  
24 USEFUL AT SOME POINT TO PROVIDE A LITTLE BIT OF  
25 CORRECTIONS OF MISCONCEPTIONS. AND THE PROBLEM THAT THE

1 COMMITTEE HAD WITH THE DISCLOSURE INITIALLY WAS A PROBLEM  
2 THAT THREE JUSTICES OF THE SUPREME COURT ARTICULATED WAS  
3 ON AN AUTOMATIC BASIS AN ATTORNEY HAS TO GO TO HIS FILES  
4 AND ASSIST HIS OPPOSING ATTORNEY AND MAKE JUDGMENTS THAT  
5 EVEN THE OPPOSING ATTORNEY MIGHT NOT BE MAKING. SO THE  
6 IDEA WAS TO TRY TO OBTAIN THAT OBJECTION WHICH WE HEARD  
7 FROM A LOT OF LAWYERS ON BOTH SIDES OF THE BAR OF THE "V"  
8 AND REQUIRE DISCLOSURE TO APPLY ONLY TO WHAT EACH LITIGANT  
9 INTENDS TO SUPPORT HIS CLAIM OR DEFENSE, THEN TO MOVE THE  
10 DISCOVERY INTO DISCOVERY PHASE. AND IF YOU WANT TO GET  
11 HOSTILE DOCUMENTS, DOCUMENTS THAT REALLY HELP YOU, YOU CAN  
12 ASK FOR THEM, JUST THE WAY YOU DID ASK FOR THEM UNDER THE  
13 REQUEST FOR DISCOVERY, WHETHER PEOPLE HAD DOCUMENTS OR  
14 DEPOSITIONS OR WHATEVER. I SUPPOSE IN YOUR CASE YOU  
15 PROBABLY WOULD HAVE GOTTEN THE SAME RESPONSE. BUT I SAY  
16 THAT ONLY THAT I DON'T THINK YOUR EFFORT WOULD HAVE BEEN  
17 FRUSTRATED UNDER THIS PROPOSAL ANY MORE -- YOU WERE  
18 SUCCESSFUL UNDER YOUR METHOD OF PROSECUTING THE CASE UNDER  
19 THE CURRENT RULES. I THINK YOU WOULD HAVE BEEN JUST AS  
20 SUCCESSFUL UNDER THESE PROPOSALS.

21 MS. CROWLEY: BUT LOOK AT WHAT HAD TO GO ON. LOOK  
22 AT THE FACT THAT THERE HAD TO BE HEARINGS AND ARGUMENTS  
23 AND THE OTHER SIDE WAS FURIOUS. BECAUSE THE INITIAL  
24 DISCOVERY WAS TOO BROAD, IT BROUGHT IN ISSUES THAT DID NOT  
25 NEED TO BE BROUGHT UP AT THE INITIAL STAGE.

1           PROFESSOR ROWE, JR.: DO I UNDERSTAND YOU, EVEN  
2 THOUGH YOU CAME OUT WELL IN THAT PARTICULAR INSTANCE, YOU  
3 THINK IT IS AN EXAMPLE OF THE RULE WORKING BADLY AND THAT  
4 THEREFORE THE NARROWING WOULD BE GOOD?

5           MS. CROWLEY: EXACTLY.

6           PROFESSOR COOPER: DO I UNDERSTAND THAT THE REASON  
7 YOU DID NOT LIKE THE OVER-BROAD DISCLOSURE WAS BECAUSE YOU  
8 FELT OBLIGED TO GO AHEAD WITH DEPOSITIONS YOU REALLY DID  
9 NOT THINK WERE GOING TO BE FRUITFUL?

10          MS. CROWLEY: WE FELT DUTY BOUND TO TAKE THOSE  
11 DEPOSITIONS BECAUSE OF THAT INITIAL DISCLOSURE THAT THESE  
12 PEOPLE KNEW SOMETHING.

13          PROFESSOR COOPER: IF YOU HAD NOT HAD DISCLOSURE  
14 AT ALL, HOW WOULD YOU HAVE FRAMED YOUR DISCOVERY REQUEST  
15 FOR THE NAMES OF PEOPLE WITH KNOWLEDGE SO YOU WOULD NOT  
16 HAVE THE SAME DILEMMA?

17          MS. CROWLEY: AS WE DID IN THIS CASE, DURING  
18 STANDARD DISCOVERY, WE ASKED FOR THE PERSONS MOST  
19 KNOWLEDGEABLE AND THEY WERE PROVIDED TO US.

20          JUDGE NIEMEYER: I MISUNDERSTOOD YOU THEN. YOU  
21 ARE BASICALLY SAYING THAT THIS MIGHT ELIMINATE THE UNDUE  
22 BREADTH.

23          MS. CROWLEY: YES. 26(A)(1) IS ENTIRELY TOO BROAD  
24 THE WAY IT IS PHRASED NOW. THE PROPOSAL WHICH FOCUSES THE  
25 INITIAL DISCLOSURES ON CLAIMS AND DEFENSES OF EACH PART IS

1 EXACTLY WHAT IS NEEDED TO PREVENT THAT TYPE OF SITUATION  
2 FROM OCCURRING AGAIN.

3 PROFESSOR ROWE, JR.: YOU WOULD NOT EVEN FRAME A  
4 WITNESS IDENTIFICATION INTERROGATORY AS BROADLY AS THE  
5 PRESENT RULE, YOU WOULD INSTEAD ASK FOR MOST  
6 KNOWLEDGEABLE?

7 MS. CROWLEY: PERSON MOST KNOWLEDGEABLE ABOUT THE  
8 TRADEMARK, PERSON MOST KNOWLEDGEABLE ABOUT MARKETING.

9 PROFESSOR ROWE, JR.: YOU WOULD LIST ALL THE  
10 SUBJECTS THAT YOU THOUGHT WERE RELEVANT?

11 MS. CROWLEY: YES.

12 PROFESSOR ROWE, JR.: YOU WOULD NOT GENERALLY ASK  
13 FOR AS MUCH AS THE PRESENT RULE --

14 MS. CROWLEY: WE WOULD NOT ASK FOR EVERYONE  
15 ASSOCIATED WITH THE ENTIRE CORPORATION WHO KNEW FACTS  
16 RELEVANT TO DISPUTED FACTS. THAT'S ENTIRELY TOO BROAD.

17 THE ATTORNEY WHO GAVE US THOSE NAMES WAS TRYING TO  
18 DO A GOOD JOB. HE WAS TRYING, SAYING, OH, GEE, THE  
19 PRESIDENT PROBABLY KNOWS SOMETHING RELEVANT TO SOMETHING  
20 BEING DISPUTED HERE. THAT'S USELESS. THAT'S OVERLY  
21 BROAD.

22 WE CAME OUT WELL ON THIS ONE, BUT THE RULE ISN'T  
23 WORKING THE WAY IT SHOULD TO ADVANCE THE INTERESTS OF  
24 JUSTICE.

25 JUDGE ROSENTHAL: HAVE YOU FOUND YOURSELF DRAFTING

1 YOUR INITIAL COMPLAINTS MORE BROADLY IN ORDER TO ENHANCE  
2 THE RESPONSES YOU GET UNDER INITIAL DISCLOSURE ON THE ONE  
3 HAND, OR HAVE YOU BEEN DRAFTING YOUR COMPLAINTS AS YOU  
4 WOULD IN AN OPT-IN DISTRICT THE SAME AS YOU WOULD IN AN  
5 OPT-OUT DISTRICT?

6 MS. CROWLEY: I WOULD SAY I HAVE NOT BEGUN  
7 DRAFTING IN EITHER FORUM. JUST TRIED TO MAKE THE MOST  
8 HONEST PRESENTATION OF THE ISSUES. I HAVE NOT DONE THAT.

9 JUDGE ROSENTHAL: HAVE YOU SEEN IN ANY CASES THAT  
10 YOU HAVE BEEN INVOLVED IN AROUND THE COUNTRY A DIFFERENCE  
11 IN THE BREADTH OF THE INITIAL COMPLAINTS DEPENDING ON  
12 WHETHER THE DISTRICT IS OPT-IN OR OPT-OUT?

13 MS. CROWLEY: I CANNOT SAY THAT I HAVE SEEN THAT.

14 JUDGE NIEMEYER: JUST ABOUT THE END, IS THERE  
15 SOMETHING ELSE?

16 MS. CROWLEY: IF I'M JUST ABOUT OUT OF TIME, LET  
17 ME JUMP TO RULE 30(D). THIS IS THE ONE RULE THAT IS  
18 PROPOSED THAT WE CANNOT SUPPORT. THIS IS THE RULE THAT  
19 SETS A PRESUMPTIVE LIMIT OF ONE DAY OF SEVEN HOURS OF  
20 DEPOSITIONS WITH THE PROVISIO THAT IF THAT IS NOT LONG  
21 ENOUGH, YOU CAN GET A STIPULATION FROM THE PARTIES AND THE  
22 DEPONENT. IN OUR EXPERIENCE THIS WILL NOT WORK. WE HAVE  
23 MANY CASES IN MASS TORTS. WE HAVE HUGE INSURANCE COVERAGE  
24 CASES. WE HAVE BIG CONSTRUCTION CASES WITH A DOZEN  
25 LAWYERS SITTING AROUND THE TABLE, EACH ONE DEMANDING THAT

1 HE OR SHE BE ALLOWED TO JOIN IN THE QUESTIONING. IN ONE  
2 OF THESE BIG CASES, ONE DAY OR SEVEN HOURS WILL NOT DO.

3 JUDGE NIEMEYER: HAVE YOU PRACTICED IN ANY  
4 DISTRICT WHERE THAT TYPE OF A RULE IS IN EXISTENCE? HAVE  
5 YOU HAD EXPERIENCE WITH TIME LIMIT RULE ON DEPOSITIONS?

6 MS. CROWLEY: NO, NO, BUT THE IDEA OF A  
7 STIPULATION WOULD NEVER WORK, ESPECIALLY WHEN YOU GET THE  
8 DEPONENT INTO THE PICTURE. HE IS TIRED AND WANTS TO GO  
9 HOME. THAT DEFINITELY WOULD NOT WORK. WE CANNOT SUPPORT  
10 THAT.

11 JUDGE VINSON: WHAT DO YOU RECOMMEND?

12 MS. CROWLEY: JUST LET THE DEPOSITIONS ROLL AND  
13 LET THE PEOPLE ASK APPROPRIATE QUESTIONS. YOU CAN ALWAYS  
14 OBJECT IF SOMEONE IS REPETITIVE.

15 JUDGE VINSON: WOULDN'T IT PROVIDE A PROVISIO FOR  
16 STIPULATION RULE OF LONGER TIME IF THERE ARE MULTIPLE  
17 PARTIES, SOMETHING THAT WOULD MEET THE NEED THAT YOU ARE  
18 TALKING ABOUT?

19 MS. CROWLEY: IF YOU ARE GOING TO BE SEEKING  
20 STIPULATION, THERE WILL BE SOMEONE AT THE TABLE WHO WON'T  
21 LIKE IT, MOST PROBABLY THE DEPONENT.

22 JUDGE NIEMEYER: WE HEARD THAT AT THE AMERICAN BAR  
23 ASSOCIATION MEETING THIS SUMMER A LAWYER WHO HAD PRACTICED  
24 IN NEW YORK IN LARGE COMMERCIAL CASES AND THEN HAD TRIED  
25 SOME CASES IN ARIZONA WHERE THEY HAVE THE LIMITATION.

1 WHEN SHE GOT TO ARIZONA OWN, SHE SORT OF CHUCKLED. SHE  
2 SAID THERE IS NO WAY THIS IS GOING TO WORK. THERE IS A  
3 THREE-HOUR RULE. SHE TESTIFIED AND TOLD US SHE WAS  
4 ENORMOUSLY SURPRISED HOW WELL IT WORKED AND THAT THE  
5 LAWYERS GOT TO THEIR BUSINESS OF ASKING QUESTIONS, AND IF  
6 THEY NEEDED MORE TIME, THEY WOULD ACCOMMODATE EACH OTHER,  
7 AND THERE WAS LITTLE DIFFICULTY WITH IT. I UNDERSTAND  
8 WHAT YOU ARE SAYING. THE OTHER PROGNOSIS COULD BE THAT  
9 THE LAWYERS PLAY WITH THE TIME AND TRY TO USE IT UP. BUT  
10 I'M NOT SURE -- THAT SORT OF IMPUTES A PERNICIOUS MOTIVE  
11 IN EVERY LAWYER. AND WHILE I KNOW THAT LAWYERS FIGHT AND  
12 SCRAP, IT IS NOT AN EITHER SIDE SELF-INTEREST. THIS WAS A  
13 RULE THAT WAS PRESSED VERY HARD BY THE PLAINTIFF'S BAR WHO  
14 WERE COMPLAINING THAT THE NUMBER AND LENGTH OF DEPOSITIONS  
15 IS THE WORST EXPENSE THEY WERE FACING AND THEY WOULD LIKE  
16 TO HAVE SOME LIMITATIONS.

17 OF COURSE, THIS DOESN'T ELIMINATE THE DEPOSITIONS  
18 YOU ARE TALKING ABOUT THAT ARE NECESSARY IN SOME OF THE  
19 BIG CASES. THE PARTIES CAN AGREE TO IT, YOU CAN GO TO  
20 COURT TO GET IT. BUT IT DOES FOR THE NORM TRY TO  
21 CIRCUMSCRIBE THE LENGTH. QUITE FRANKLY, WE DON'T KNOW  
22 FULLY WHETHER THIS WILL WORK OR NOT, BUT WE HAVE HEARD  
23 DATA OR INFORMATION FROM SOME DISTRICTS WHERE IT SEEMS TO  
24 BE WORKING PRETTY WELL.

25 IF IT TURNS OUT THAT IT DOESN'T WORK, I GUESS WE

1 WILL HAVE TO ABANDON IT. THAT'S WHY I WAS INTERESTED TO  
2 KNOW WHETHER YOU HAD HAD SOME EXPERIENCE IN DISTRICTS  
3 WHERE THEY HAVE DONE THIS, BECAUSE IT WOULD BE INTERESTING  
4 TO KNOW FROM AS MANY PEOPLE AS POSSIBLE WHETHER IT IS  
5 WORKING OR NOT. I DO UNDERSTAND -- AND I THINK MOST OF  
6 THE COMMITTEE MEMBERS UNDERSTAND -- THE CONCERN AND THE  
7 POTENTIAL EVIL ABOUT HAVING SUCH A RULE COULD CAUSE.

8 MS. CROWLEY: I CANNOT SAY THAT I EVER HAD  
9 EXPERIENCE IN A DISTRICT WHERE THERE HAS BEEN A TIME  
10 LIMIT, BUT I CAN TELL YOU FROM OUR EXPERIENCE, IF YOU HAVE  
11 12 ATTORNEYS AROUND A TABLE, EACH ONE WANTS TO QUESTION  
12 THAT WITNESS AND PROTECT HIS OR HER OWN CLIENT'S INTERESTS  
13 BY THOROUGHLY GOING AFTER WHATEVER PHASE OF THE LITIGATION  
14 THEIR OWN CLIENT IS INVOLVED IN. THEY ALL HAVE A RIGHT TO  
15 DO SO. I DON'T SEE HOW 12 ATTORNEYS IN A COMPLEX CASE ARE  
16 GOING TO WRAP IT UP IN SEVEN HOURS. THERE WILL BE SOMEONE  
17 WHO WILL REFUSE TO STIPULATE AND IT WILL BE MORE MOTIONS  
18 AND EXPENSES.

19 PROFESSOR ROWE, JR.: SO DO I UNDERSTAND YOU  
20 RIGHT, THAT YOU ARE OPPOSED TO ANY GENERAL PRESUMPTIVE  
21 TIME LIMIT AND NOT JUST THE ONE DAY? IF WE SET TWO DAYS,  
22 YOU ARE SAYING THE SAME THING?

23 MS. CROWLEY: A LITTLE LESS LOUDLY, THOUGH. I  
24 WOULD SAY LEAVE THE TIME LIMIT OUT OF THE DEPOSITIONS.  
25 PEOPLE ARE NOT GOING TO STAY AT THE DEPOSITION ANY LONGER

1 THAN THEY NEED TO. IT IS NOT MATTER OF IT IS SO MUCH FUN  
2 THAT THE PEOPLE ARE GOING TO STAY FOREVER AND EVER TO RUN  
3 THE BILLS UP. PEOPLE ARE EAGER TO GET OUT. BUT THEY DO  
4 HAVE A RIGHT TO PROTECT THEIR OWN CLIENT'S INTERESTS. WHY  
5 IMPOSE UPON THEM THE ARGUMENTS AT THE END OF THE DAY AND  
6 WHO IS GOING TO GET THE COURTROOM FOR TOMORROW, AND GET  
7 THE JUDGE? IT IS JUST UNWORKABLE. LET THE DEPOSITIONS  
8 ROLL ON.

9 JUDGE NIEMEYER: I THINK WE HAVE GONE OVER A  
10 LITTLE BIT, BUT I DO APPRECIATE HEARING YOUR POSITION.

11 MS. CROWLEY: THANK YOU, VERY MUCH.

12 JUDGE NIEMEYER: MR. CORTESE?

13 MR. CORTESE, JR.: WITH THE CHAIR'S PERMISSION, I  
14 WOULD LIKE TO YIELD TO MR. PICKLE FROM TEXAS WHO WOULD  
15 LIKE TO CATCH A PLANE THIS AFTERNOON. HE IS NUMBER 23,  
16 AND I WOULD BE HAPPY TO TAKE HIS SPOT.

17 JUDGE NIEMEYER: OKAY. MR. PICKLE.

18 MR. PICKLE: GOOD MORNING.

19 JUDGE NIEMEYER: I HOPE YOU DIDN'T HAVE TO GIVE UP  
20 ANYTHING VALUABLE FOR THAT EXCHANGE, BECAUSE WE WOULD HAVE  
21 ACCOMMODATED.

22 MR. PICKLE: I'M SURE I SOUND SO MUCH LIKE MR.  
23 CORTESE THAT YOU CANNOT TELL FROM MY ACCENT THAT HE AND  
24 ARE NOT THE SAME PERSON.

25 I APPRECIATE THE OPPORTUNITY TO APPEAR BEFORE THE

1 COMMITTEE THIS MORNING IN WHAT WE REGARD AS A VERY  
2 SIGNIFICANT MATTER. WE APPLAUD THE COMMITTEE'S EFFORTS TO  
3 TRY TO BRING SOME REASON AND FAIRNESS BACK TO THE  
4 DISCOVERY PROCESS, PARTICULARLY TO HELP US IN THE  
5 REDUCTION OF UNNECESSARY AND CLEARLY SPIRAL IN COST.

6 WE ARE PARTICULARLY SUPPORTIVE OF THE NEED FOR  
7 NATIONAL UNIFORMITY. THE DEAL WITH THE PATCHWORK OF  
8 ISSUES THAT THOSE OF US WITH A NATIONWIDE PRACTICE  
9 INCREASINGLY FIND VERY FRUSTRATING AND A POTENTIAL TRAP,  
10 EVEN FOR THE VIGILANT, TO TRY TO ENSURE WE HAVE DONE WHAT  
11 THE LOCAL RULES REQUIRE.

12 WE ARE PARTICULARLY SUPPORTIVE OF THIS NATIONAL  
13 UNIFORMITY, IF INDEED WE CAN DO SOMETHING TO ENHANCE  
14 FURTHER JUDICIAL INVOLVEMENT IN THE DISCOVERY PROCESS  
15 PARTICULARLY IN COMPLEX OR LARGE CASES.

16 JUDGE NIEMEYER: HOW DO YOU ANSWER THIS POSITION?  
17 THE DISTRICTS THROUGHOUT THE COUNTRY, 94 OF THEM, HAVE  
18 DEVELOPED IN MANY PLACES FAIRLY SOPHISTICATED LOCAL RULES  
19 DEALING WITH DISCOVERY AND DISCLOSURE AND OTHER MATTERS.  
20 THEY HAVE DONE THAT USUALLY WITH THEIR BAR AND WITH THE  
21 LAWYERS THAT HAVE PRACTICED BEFORE THOSE COURTS.

22 OVER A PERIOD OF TIME THEY HAVE COME TO FIND A  
23 BALANCE OR SOME KIND OF PROCESS THAT WORKS WELL. IF THE  
24 DISTRICT JUDGE AND THE PRESIDENT OF THE BAR AND THE OTHERS  
25 IN THAT PARTICULAR DISTRICT COME BEFORE US AND SAY, LEAVE

1 US ALONE, WHAT WE ARE DOING IS FINE. IT WORKS, AND IT MAY  
2 BE DIFFERENT IN MINNESOTA FROM WHAT IT IS IN TEXAS, BUT IT  
3 WORKS HERE. WHAT'S OUR RESPONSIBILITY?

4 MR. PICKLE: I AM IN A UNIQUE POSITION TO ANSWER  
5 IN THAT I AM BOTH A LAWYER AND A CLIENT, IN THAT I WORK  
6 IN-HOUSE. SO IT IS NOT JUST A MATTER OF WHAT LAWYERS HAVE  
7 TO FACE MOVING FROM ONE JURISDICTION TO ANOTHER TO ENGAGE  
8 IN NATIONAL PRACTICE, IT IS THE VERY PARTIES THEMSELVES  
9 THAT FACE THESE TRAPS OF TRYING TO DEAL WITH BROAD  
10 DISTRICT REQUIREMENTS ACROSS JURISDICTIONAL LINES THAT WE  
11 FIND EXTREMELY DIFFICULT TO COMPLY WITH TO ENSURE THAT WE  
12 INDEED HAVE DONE WHAT THE LOCAL RULES REQUIRE.

13 THE NATURE OF THE PRACTICE THAT I HAVE, HAVING  
14 SPENT 24 YEARS IN CONCERTED LITIGATION, LARGELY MAJOR  
15 COMMERCIAL CASES, TOXIC TORT MATTERS, I HAVE BEEN  
16 ASSOCIATE GENERAL COUNSEL FOR SHELL NOW FOR THE LAST 14  
17 YEARS. I AM RESPONSIBLE FOR ITS LITIGATION SECTION. WE  
18 HAVE A FAIRLY SUBSTANTIAL STAFF OF EXPERIENCED IN-HOUSE  
19 TRIAL ATTORNEYS WHO DO FIRST CHAIR WORK IN CONJUNCTION  
20 WITH WORKING WITH OUTSIDE COUNSEL. SO OURS TRULY IS A  
21 NATIONWIDE PRACTICE THAT COVERS THE ENTIRE GAMUT OF EVERY  
22 CONCEIVABLE TYPE OF LITIGATION THAT YOU CAN IMAGINE.

23 IN ADDITION TO THAT LEVEL OF EXPERIENCE AND HAVING  
24 HANDLED, I'M SURE, WELL IN EXCESS OF A THOUSAND CASES  
25 MYSELF. I HAVE HAD MANAGERIAL RESPONSIBILITY FOR MANY

1 TIMES THAT NUMBER AND HAVE REGULAR CONTACT WITH MY  
2 COUNTERPARTS THROUGHOUT BUSINESS AND INDUSTRY.

3 THAT BREADTH OF EXPERIENCE HAS DEMONSTRATED TO ME  
4 THAT CLEARLY WE HAVE A PROBLEM, AND IT IS A PROBLEM THAT  
5 MANDATES RESOLUTION, PARTICULARLY INSOFAR AS IT RELATES TO  
6 THE SCOPE OF DISCOVERY AND DIRECT APPLICATION TO THE SCOPE  
7 OF DOCUMENTARY DISCOVERY.

8 THE PROBLEM REALLY SEEMS TO BE ENDEMIC. IT IS NOT  
9 SOMETHING THAT CROPS UP EVERY NOW AND THEN IN SOME  
10 EGREGIOUS EXAMPLE, BUT IT IS A PROBLEM IN VIRTUALLY EVERY  
11 SIGNIFICANT CASE THAT WE HAVE. IT IS NOT A MATTER OF  
12 TRYING TO CASTIGATE THE COURT FOR ALLOWING OR ORDERING TOO  
13 BROAD A DISCOVERY. A MAJOR FACTOR IN THE COST IS THAT WE  
14 HAVE TO FIGHT ABOUT IT IN VIRTUALLY EVERY CASE. I WISH I  
15 HAD MR. BLECHER'S OPPOSING COUNSEL THAT WOULD GIVE ME THAT  
16 RIFLE SHOT REQUEST OR A CLEARLY ARTICULATED COMPLAINT.  
17 UNFORTUNATELY WHAT WE GET ARE NOTICE PLEADINGS OR VAGUE  
18 ALLEGATIONS AND GROSSLY BROAD DISCOVERY REQUESTS THAT WE,  
19 OF COURSE, OBJECT TO AND THEN WE HAVE TO COME IN AND TAKE  
20 THE COURT'S TIME FIGHTING ABOUT VIRTUALLY EVERY ONE OF  
21 THOSE REQUESTS.

22 IN A NUMBER OF JURISDICTIONS I AM PLEASED TO SAY  
23 THAT, DUE TO THE CALIBER OF THE JUDICIARY AND THE EFFORTS  
24 OF THE PARTIES, WE CAN GET THOSE DISPUTES RESOLVED. IN  
25 THOSE INSTANCES, CLEARLY THE RULES ARE WELL-SERVED AND ARE

1 WORKING. UNFORTUNATELY, THAT IS FAR FROM UNANIMOUS IN  
2 TERMS OF APPLICATION.

3 WHAT WE REALLY HAVE, AND I THINK, JUDGE NIEMEYER,  
4 YOU CAPTURED IT VERY WELL IN YOUR LETTER WHEN YOU NOTED  
5 THAT AS WE CONTINUE TO ADAPT TO THIS INFORMATION, THE  
6 NOTION OF HAVING ALL INFORMATION ON THE SUBJECT IS  
7 UNATTAINABLE. WE ARE GOING TO HAVE TO MOVE INCREASINGLY  
8 TO A MOTION THAT, ALTHOUGH DISCLOSURE MUST BE FAIR AND  
9 FULL, IT DOES NOT NECESSARILY REQUIRE THAT EVERY COPY OF  
10 EVERY DOCUMENT THAT RELATES TO PARTICULAR SUBJECT MATTER  
11 BE PRODUCED.

12 FOR A LARGE COMPANY, LIKE THE ONE FOR WHICH I AM  
13 EMPLOYED, WITH NATIONWIDE OPERATIONS THAT OVER THE COURSE  
14 OF NEARLY A CENTURY HAS EMPLOYED HUNDREDS OF THOUSANDS OF  
15 INDIVIDUALS, THAT HAS WAREHOUSES OF INFORMATION DUE TO THE  
16 NATURE OF THE BUSINESS THAT WE ARE IN, THE DISCOVERY PHASE  
17 IS LITERALLY CRUSHING IN TERMS OF THE FINANCIAL BURDEN  
18 THAT IT IMPOSES IN TRYING TO DEAL WITH DOCUMENTARY  
19 DISCOVERY.

20 PROFESSOR ROWE, JR.: WHEN YOU FACE THIS KIND OF  
21 PROBLEM, DO YOU TRY TO USE PRESENT LIMITS IN THE RULES  
22 SUCH AS THE COURT'S ABILITY TO RESTRICT DISCOVERY IF THE  
23 BURDEN OR THE EXPENSE OF THE PROPOSED DISCOVERY OUTWEIGHS  
24 THE BENEFIT?

25 MR. PICKLE: ABSOLUTELY.

1           PROFESSOR ROWE, JR.:   AND DO YOU GET ANYWHERE WHEN  
2 YOU CITE THAT PART OF THE RULE?

3           MR. PICKLE:   NUMBER ONE, WE FACE IT IN ALMOST  
4 EVERY SIGNIFICANT CASE.   SO THERE IS A TREMENDOUS  
5 CONSUMPTION OF TIME AND EFFORT OF THE LAWYERS AND THE  
6 COURT TO TRY TO DEAL WITH OVER-BROAD REQUESTS.   SO THERE  
7 IS AN EXPENDITURE THERE AT THE OUTSET THAT HOPEFULLY,  
8 UNDER ATTORNEY-MANAGED PROVISION, THAT HAVE BEEN PROPOSED  
9 BY THE COMMITTEE, WE WOULD NOT HAVE TO ENDURE, AT LEAST AT  
10 THAT STAGE.

11           SECONDLY, THERE IS THE PHILOSOPHICAL ISSUE WITH  
12 WHICH WE DEAL HERE.   THE DISCOVERY RULES THAT BY USE OF  
13 THE DEFINITION OR THE TERM "SUBJECT MATTER" REALLY DOES  
14 NOT PUT ANY LIMITATION UPON US AT ALL.

15           PROFESSOR ROWE, JR.:   THERE ARE EVEN WITHIN THE  
16 EXISTING RULES WITH REFERENCE TO SUBJECT MATTER, THERE ARE  
17 ALSO PROVISIONS THAT EVEN IF SOMETHING IS WITHIN THE  
18 SUBJECT MATTER OF LIMIT, THAT NONETHELESS THE COURT THEN  
19 CAN RESTRICT OR DENY DISCOVERY IF THE BURDEN OR EXPENSE OF  
20 THE PROPOSED DISCOVERY OUTWEIGHS THE LIKELY BENEFIT.   I  
21 WAS WONDERING WHETHER YOU TRIED TO TAKE INITIATIVES TO USE  
22 THAT, HOW COURTS RESPONDED TO SUCH INITIATIVES?

23           MR. PICKLE:   ABSOLUTELY.   WHAT WE HAVE FOUND IS  
24 SIMILAR TO MR. BLECHER'S EXPERIENCES IS THAT COST IS VERY  
25 RARELY EMPLOYED.

1           PROFESSOR ROWE, JR.: OR JUST DENIAL OF DISCOVERY  
2 AS EXCESSIVE?

3           MR. PICKLE: DISCOVERY, BECAUSE WE ARE DEALING  
4 AGAIN WITH THE RULE THAT MANDATES THAT DISCOVERY BE  
5 PERMITTED IF IT IS RELEVANT TO THE SUBJECT MATTER OF THE  
6 CASE.

7           PROFESSOR ROWE, JR.: BUT PERMITS THE COURT TO  
8 RESTRICT IT IF IT IS DISPROPORTIONATE, EVEN IF IT IS  
9 WITHIN THE SUBJECT MATTER. THAT IS IN THE PRESENT RULE.

10          MR. PICKLE: THERE ARE SOME INSTANCES IN SOME  
11 CASES WHERE WE HAVE BEEN SUCCESSFUL IN GETTING THE COURTS  
12 TO TAKE THAT APPROACH. UNFORTUNATELY, WHAT WE SEEM TO SEE  
13 IS A MORE PREDOMINANT ATTITUDE IS THAT DISCOVERY IS  
14 SUBJECT MATTER. IF THEY ASK FOR IT, THEY ARE ENTITLED TO  
15 GET IT. IN A VERY RECENTLY EXPERIENCE OF MY OWN?

16          JUDGE SCHEINDLIN: THEY ARE ENTITLED TO GET IT NOW  
17 AND THEY DON'T HAVE TO GO TO COURT TO GET IT. UNDER THIS  
18 PROPOSAL, AREN'T YOU WORRIED THAT YOU ARE GOING TO BE IN  
19 COURT IN EVERY CASE BECAUSE WHY SHOULD THE PLAINTIFF'S  
20 LAWYER STOP? WHY SHOULDN'T PLAINTIFF'S LAWYERS SAY, OKAY,  
21 I AM READY TO GO TO COURT TO GET WHAT I USED TO GET, I CAN  
22 SHOW GOOD CAUSE TO GET SUBJECT MATTER DISCOVERY. SO YOU  
23 ARE GOING TO BE IN COURT IN EVERY SINGLE CASE WHERE RIGHT  
24 NOW, YOU ARE NOT. YOU WORK IT OUT WITH YOUR ADVERSARY,  
25 YOU KNOW WHAT THE STANDARD IS, YOU HAVE LIVED WITH IT FOR



1 A LONG TIME. SO IT IS GOING TO PUT YOU IN COURT IN EVERY  
2 CASE, WHY SHOULDN'T PLAINTIFF'S LAWYERS GO TO STAGE TWO?

3 MR. PICKLE: I RESPECTIVELY DISAGREE.

4 JUDGE SCHEINDLIN: THEY ARE NOT GOING TO TRY TO  
5 GET THE SUBJECT MATTER DISCOVERY?

6 MR. PICKLE: I THINK WHAT WE ARE DOING HERE AND  
7 WHAT WE ARE SEEING, AT LEAST WHAT THE COMMITTEE IS DOING,  
8 IS CHANGING A PHILOSOPHY, IS CHANGING THE PLAYING FIELD IN  
9 WHICH WE ARE WORKING TO EMPHASIZE TO BOTH THE LITIGANTS  
10 AND TO THE COURTS THAT THE FOCUS HERE IS GOING TO BE ON  
11 DISCOVERY THAT IS RELATED TO ISSUES THAT ARE TRULY GERMANE  
12 TO THE CASE. ONLY IN THOSE CIRCUMSTANCES WHERE SOMEBODY  
13 CAN SHOW GOOD CAUSE ARE YOU ALLOWED TO GO BEYOND THAT  
14 STANDARD.

15 JUDGE SCHEINDLIN: ALL I'M ASKING, AREN'T ARE YOU  
16 GOING TO BE FIGHTING THIS BATTLE OUT IN COURT IN EVERY  
17 CASE SO YOU ARE GOING TO BE IN COURT MORE?

18 MR. PICKLE: HOPEFULLY NOT. I SEE THIS AS A C  
19 CHANGE IN PHILOSOPHY TO BOTH THE COURTS AND THE LITIGANTS  
20 TO LET THEM KNOW THAT WE NEED TO REFOCUS OUR EFFORT TO  
21 CEASE NEEDLESSLY BURDENSOME DISCOVERY THAT IS COSTING THE  
22 SYSTEM AND THE LITIGANTS A FORTUNE TO TRY TO DEAL WITH.

23 I RECOGNIZE AND CERTAINLY POINTED OUT IN JUDGE  
24 NEIMEYER'S LETTER TO THE CONGRESS, THE DIFFICULTY OF  
25 TRYING TO DRAW A DISTINCTION BETWEEN WHAT IS SUBJECT

1 MATTER AND WHAT IS DOCUMENT AND MATERIALS THAT ARE  
2 PERTINENT TO CLAIMS OR DEFENSES. TO ME, THE SIGNIFICANCE,  
3 THOUGH, IS THE CHANGE IN PHILOSOPHY. AND WE WOULD  
4 CERTAINLY ENCOURAGE WITHIN THE CONTEXT OF THE NOTES THAT  
5 WOULD SUPPORT THE RULE, TO GIVE SOME FURTHER ELUCIDATION  
6 OF THAT PHILOSOPHY.

7 THE BEST EXAMPLES IS WHAT WE ENCOUNTER IN A  
8 PRODUCT LIABILITY ACTION. RATHER THAN THE DISCOVERY  
9 FOCUSING UPON THE SUPPOSED DEFECT IF THE PRODUCT, UNDER  
10 THE CIRCUMSTANCES OF ITS USE, AT THE TIME AND PLACE WHERE  
11 IT WAS BEING USED. INSTEAD WHAT WE GET IS DISCOVERY THAT  
12 SAYS, GIVE US EVERYTHING THAT YOU HAVE ABOUT THE HISTORY  
13 OF THIS PRODUCT REGARDLESS OF THE CIRCUMSTANCES OF ITS  
14 USE, REGARDLESS OF THE TIME, REGARDLESS OF THE  
15 RELATIONSHIP BETWEEN ANYTHING ELSE IN THIS PRODUCT AND  
16 WHAT HAPPENED IN THIS CASE.

17 JUDGE SCHEINDLIN: ARE YOU WORRIED ABOUT WHAT MR.  
18 BLECHER SAID, THAT THE PLEADING OF CLAIMS WILL BROADEN AND  
19 PLAINTIFFS WILL START MAKING MORE CLAIMS IN ORDER TO GET  
20 THE SAME DISCOVERY ANYWAY AND YOU WILL BE INVOLVED IN MANY  
21 MORE MOTIONS TO DISMISS ON MANY MORE CLAIMS, AND THERE  
22 WILL BE A LOT OF EXPENSE AND DELAY?

23 MR. PICKLE: I AM TROUBLED BY THAT ARGUMENT  
24 BECAUSE IT, IN ESSENCE, SAYS LET'S NOT CHANGE THE RULE  
25 BECAUSE PEOPLE WILL FRAUDULENTLY PLEAD AROUND IT. WE HAVE

1 RULE 11 TO DEAL WITH NUMBER ONE, IMPROPER CLAIMS. MORE  
2 IMPORTANTLY, AS I INTERPRET THE CURRENT RULE AS PROPOSED  
3 BY THE COMMITTEE, IS THAT IN LARGE AND COMPLEX CASES WHERE  
4 WE MOST OFTEN SEE THE PROBLEMS OCCUR, WE WILL HAVE THE  
5 OPPORTUNITY TO ACCEPT THIS CASE FROM INITIAL DISCLOSURE.  
6 AND MOST IMPORTANTLY HAVE AN ACTIVE JUDICIAL ROLE IN  
7 COUCHING DISCOVERY AND ENSURING THAT IT IS PHASED AND  
8 FOLLOWS SOME LOGICAL PATTERN SO WE CAN DEFINE WHAT THOSE  
9 ISSUES ARE AND WE CAN FOCUS ON WHAT WE REALLY NEED TO BE  
10 TALKING ABOUT IN THE CASE, RATHER THAN WASTING EACH  
11 OTHER'S TIME IN MASSIVE INQUIRIES THAT, IN OUR EXPERIENCE,  
12 TYPICALLY YIELD VERY LITTLE IN TERMS OF WHAT ACTUALLY  
13 WINDS UP IN THE COURTHOUSE.

14 JUDGE CARROLL: THIS IS AN ISSUE THAT RUNS THROUGH  
15 ALL THESE DISCOVERY CHANGES: I KEEP HEARING EVERYONE SAY,  
16 WE NEED JUDGES TO BE MORE INVOLVED AND JUDGES TO BE BETTER  
17 MANAGERS. IF WE ACCOMPLISH THAT FACT, DON'T THE PRESENT  
18 RULES OFFER ENOUGH TOOLS FOR THE JUDGE TO MANAGE THESE  
19 COMPLEX CASES? IF WE COULD CONVINCED THE JUDGE IN THE  
20 EARLY STAGES OF COMPLEX LITIGATION TO GET INVOLVED, TO  
21 LISTEN TO LAWYERS ON BOTH SIDES, TO NARROW THE DISCOVERY  
22 IF THAT WAS APPROPRIATE, ISN'T THAT WHAT WE NEED RATHER  
23 THAN A RULE CHANGE?

24 MR. PICKLE: YES, IF WE STILL HAD THE RULE CHANGE  
25 THAT ACCOMPANIES THE CHANGE IN PHILOSOPHY BECAUSE RIGHT

1 NOW WE STILL HAVE A SUBJECT MATTER FOCUS THAT  
2 PHILOSOPHICALLY ENCOURAGES LITIGANTS TO PLEA BROADLY AND  
3 TO REQUEST BROADLY, AND COURTS TO FEEL IF THIS IS THE  
4 LANGUAGE OF THE RULE, IF IT SAYS THAT I'M TO ALLOW SUBJECT  
5 MATTER DISCOVERY RATHER THAN DISCOVERY FOCUS ON THE  
6 CLAIMS, ON THE ISSUE OF WHAT IS TRULY GERMANE TO THE  
7 CASE --

8 JUDGE CARROLL: THAT IS REALLY NOT A VERY  
9 WELL-DEFINED LINE, IS IT, SUBJECT MATTER VERSUS CLAIM OR  
10 DEFENSE? IT IS IN THE EYE OF THE BEHOLDER.

11 MR. PICKLE: I SYMPATHIZE WITH THE DIFFICULTIES  
12 ENCOUNTERED BY THE COMMITTEE IN TRYING TO DRAW THAT LINE.

13 MR. KASANIN: DO YOU FIND THAT YOUR LAWYERS ARE  
14 FEELING THAT THEY CAN'T ACCOMPLISH ANYTHING IN FIGHTING  
15 DISCOVERY BATTLES BECAUSE OF THE USE OF THE WORDS "SUBJECT  
16 MATTER"?

17 MR. PICKLE: THAT HAS BEEN MY EXPERIENCE. I'M  
18 THANKFUL THAT THEY ARE OUT THERE. WE HAVE SOME PEOPLE  
19 SITTING ON THE PANEL HERE THAT I HAVE BEEN VERY PLEASED  
20 THAT I HAVE HAD MY CASES BEFORE, THAT DO TAKE A MUCH MORE  
21 ACTIVIST ROLE AND DO ENSURE THAT THERE IS SOME FAIRNESS  
22 AND SOME EFFORT TO AVOID UNNECESSARY COST AND EXPENDITURE  
23 OF TIME. UNFORTUNATELY, THERE ARE AN AWFUL LOT OF PEOPLE  
24 OUT THERE ON THE BENCH THAT I THINK UNDERSTANDABLY HAVE  
25 BECOME VERY FRUSTRATED WITH DISCOVERY DISPUTES, WITH

1 HAVING TO CONSTANTLY REFEREE CLAIMS AND THE RESPONSE  
2 UNFORTUNATELY HAS BEEN TO ADVOCATE THE REIGN AND TO ALLOW  
3 THE LITIGANTS TO FIGHT IT OUT ON WHATEVER BATTLEFIELD  
4 THERE IS BY SAYING THAT IF THEY HAVE ASKED FOR IT, IF IT  
5 HAS ANYTHING TO DO WITH THE SUBJECT MATTER, THEN I'M GOING  
6 TO LET THEM HAVE IT BECAUSE THAT IS GENERALLY THE TENOR  
7 THAT THE RULES ENCOURAGE.

8 JUDGE NIEMEYER: THE NEXT PERSON ON OUR LIST IS  
9 ELLEN HAMMILL ELLISON.

10 (NO RESPONSE.)

11 JUDGE NIEMEYER: LET ME ASK THIS QUESTION: IS  
12 THERE ANYONE HERE WHO IS GOING TO BE TESTIFYING WITH  
13 RESPECT TO THE ADMIRALTY OF THE PROPOSED CHANGES? WOULD  
14 YOU JUST RAISE YOUR HAND? I DON'T SEE ANY NOW, BUT THAT  
15 DOESN'T PRECLUDE THEM, WE ARE TRYING TO FORECAST THAT.

16 THE NEXT PERSON ON THE LIST IS MR. WELLS, THOMAS  
17 WELLS. IS HE HERE?

18 MR. WELLS: THANK YOU, JUDGE NIEMEYER. MY NAME IS  
19 TOMMY WELLS. I'M A LAWYER ADMITTED TO PRACTICE IN SUPREME  
20 COURT OF ALABAMA. I AM A MEMBER OF A FIRM WITH OFFICES IN  
21 BIRMINGHAM AND MONTGOMERY THAT HAS 90 LAWYERS. I ALSO  
22 HAPPEN TO BE THE CHAIR ELECT OF THE AMERICAN BAR  
23 ASSOCIATION LITIGATION SECTION. HOWEVER, I'M HERE TODAY  
24 TO SPEAK IN MY INDIVIDUAL CAPACITY RATHER THAN ON BEHALF  
25 OF THE SECTION OF LITIGATION.

1 I ANTICIPATE THE SECTIONS OF LITIGATION AND  
2 ANTITRUST LAW WILL PRESENT THEIR JOINT POSITION TO THIS  
3 COMMITTEE IN CHICAGO. SO MY VIEWS ARE NOT NECESSARILY  
4 THOSE THAT WILL BE PRESENTED BY THE SECTION OF LITIGATION  
5 AND ANTITRUST, BUT I BELIEVE THEY ARE CONSISTENT WITH  
6 THOSE POSITIONS.

7 MY VIEWS, HOWEVER, DO REFLECT MY EXPERIENCE. I  
8 DARE SAY, AT LEAST IN TERMS OF THE FOLKS I HEARD THIS  
9 MORNING, PERHAPS A LITTLE BIT OF A UNIQUE EXPERIENCE,  
10 BECAUSE WHEN I ENTERED LAW SCHOOL, AT LEAST IN TERMS OF  
11 RULES PRACTICE, WHEN I WAS A LAW STUDENT IN 1972, WE STILL  
12 HAD COMMON LAW PLEADING. SO I WENT FROM COMMON LAW  
13 PLEADING TO CIVIL RULES PLEADING, UP THROUGH BEING THE  
14 CHAIR OF THE CIVIL JUSTICE REFORM ACT COMMITTEE IN THE  
15 NORTHERN DISTRICT OF ALABAMA AND ATTEMPTING TO DRAFT THE  
16 LOCAL RULES UNDER THE CJRA. BEEN SERVING FOR A NUMBER OF  
17 YEARS AS THE LIAISON OF THE LITIGATION SECTION OF THIS  
18 ADVISORY COMMITTEE, A JOB THAT, QUITE FRANKLY, I TRULY  
19 ENJOYED AND WISH I STILL HAD THE TIME TO DO.

20 JUDGE NIEMEYER: WE HAVE HAD YOUR TESTIMONY GOING  
21 BACK AS FAR AS THE BOSTON COLLEGE. WEREN'T YOU THERE?

22 MR. WELLS: IT WENT BACK BEYOND THAT TO THE SAN  
23 FRANCISCO MEETING IN JANUARY OF 1997 WHEN THE INITIAL  
24 DISCOVERY COMMITTEE, I GUESS, INFORMAL CONFERENCE WAS  
25 CONVENED AFTER THE TESTIMONY ON THE CLASS ACTION RULES. I

1 PARTICIPATED IN THAT WITH JUDGE LEVI AND PROFESSOR MARCUS  
2 AT THE BOSTON COLLEGE DISCOVERY CONFERENCE IN SEPTEMBER OF  
3 1997.

4 IN TALKING ABOUT DISCOVERY IN CIVIL CASES, IT  
5 BRINGS TO MIND WHAT I THINK IS SORT OF AN INTERESTING  
6 DICHOTOMY IN OUR CIVIL JUSTICE AND CRIMINAL JUSTICE  
7 SYSTEM. IN CIVIL LITIGATION, WHEN WE ARE BASICALLY  
8 TALKING ABOUT REDISTRIBUTING THE MONEY FROM ONE PARTY TO  
9 ANOTHER, WE HAVE FULL DISCLOSURE, FULL DISCOVERY  
10 DEPOSITIONS OF EVERY WITNESS, SO THAT THERE WILL BE NO  
11 SURPRISES AT TRIAL. IN CONTRAST, ONE COULD ARGUE CRIMINAL  
12 LITIGATION, WHEN ALL THAT IS AT STAKE IS LIFE AND LIBERTY,  
13 AND BASICALLY WE HAVE TRIAL BY AMBUSH.

14 WITH THAT DICHOTOMY SORT OF AS AN OVERVIEW, LET ME  
15 MOVE TO WHAT I THINK HAVE SOME VERY CONSTRUCTIVE PROPOSALS  
16 THAT THE COMMITTEE HAS MADE CONCERNING THE CIVIL RULES AND  
17 THE DISCOVERY AND DISCLOSURE PROCESS.

18 I BASICALLY RISE TO SUPPORT THE COMMITTEE'S  
19 ACTIONS. LET ME FIRST TALK ABOUT UNIFORM MANDATORY  
20 DISCLOSURE. I STRESS THE UNIFORMITY. THE UNIFORMITY I  
21 THINK IS ONE OF THE KEYSTONES AND HAS BEEN ONE OF THE  
22 KEYSTONES OF THE FEDERAL RULES OF CIVIL PROCEDURE. IN A  
23 STATE EVEN AS SMALL AS ALABAMA, WE HAVE THREE FEDERAL  
24 DISTRICTS. CURRENTLY UNDER THE CURRENT DISCLOSURE RULES,  
25 WE HAVE THREE DIFFERENT DISCLOSURE PRACTICES, EVEN BETWEEN

1 BIRMINGHAM AND MONTGOMERY, WHERE JUDGE CARROLL SITS, WE  
2 HAVE OFFICES IN BOTH CITIES, I, QUITE FRANKLY, EVEN THOUGH  
3 I HELPED DRAFT THE RULES FOR DISCLOSURE FOR BIRMINGHAM, I  
4 HAVE TO PICK UP THE RULES AND LOOK AT SEE WHICH COURT I AM  
5 TO FIGURE OUT WHICH DOCUMENTS I MUST DISCLOSE. SO I THINK  
6 UNIFORMITY IS A GREAT IMPROVEMENT THROUGHOUT THE RULES.

7           CONCERNING DISCLOSURE, I ALSO THINK THE  
8 COMMITTEE'S RECOMMENDATION AND PROPOSAL IS AN IMPROVEMENT  
9 ON THE RULE 26(A)(1), CURRENT DEFAULT PROVISION. I  
10 BELIEVE IT IS AN IMPROVEMENT BECAUSE IT REMOVES A MAJOR  
11 OBJECTION THAT WAS RAISED TO THOSE PROVISIONS, THAT IS,  
12 DISCLOSURE OF DOCUMENTS THAT HURT YOUR CLIENT. QUITE  
13 FRANKLY, I THINK THAT PUTS LAWYERS ON EITHER SIDE OF THE  
14 CASE IN A VERY AWKWARD POSITION WHERE THEY ARE FORCED TO  
15 DISCLOSE DOCUMENTS THAT MAY BE DETRIMENTAL TO THEIR  
16 CLIENT'S CASE.

17           INDEED, I NOTE THAT ALTHOUGH I BELIEVE THE CURRENT  
18 PROPOSAL IS BASED AT LEAST IN PART ON THE EXISTING LOCAL  
19 RULE IN THE CENTRAL DISTRICT OF CALIFORNIA, IT IS  
20 REMARKABLY SIMILAR TO THE LOCAL RULE THAT WAS DRAFTED BY  
21 THE CJRA COMMITTEE IN THE NORTHERN DISTRICT OF ALABAMA,  
22 WHICH I INDICATED I CHAIRED, HAVING BEEN APPOINTED BY  
23 JUDGE SAM POINTER. INDEED, THE MINORITY WORDING OF THE  
24 COMMITTEE -- THERE WERE TWO ALTERNATIVES THAT THE  
25 COMMITTEE PUT FORTH IN TERMS OF THE DISCLOSURE

1 REQUIREMENTS, THE MINORITY WORDING WHICH REQUIRES  
2 DISCLOSURE OF INFORMATION WHICH A PARTY MAY USE TO SUPPORT  
3 ITS CLAIMS OR DEFENSES IS REMARKABLY SIMILAR TO THE  
4 NORTHERN DISTRICT RULE WHICH REQUIRES INITIAL DISCLOSURE,  
5 AND I QUOTE, "OF ALL DOCUMENTS, DATA COMPILATIONS AND  
6 TANGIBLE THINGS IN ITS POSSESSION, CUSTODY AND CONTROL  
7 THAT MAY BE USED BY IT OTHER THAN SOLELY FOR IMPEACHMENT  
8 PURPOSES TO SUPPORT ITS CONTENTIONS WITH RESPECT TO ANY  
9 FACTUAL ISSUE IN THE CASE. THE EXPERIENCE THAT WE HAVE  
10 HAD IN THE NORTHERN DISTRICT OF ALABAMA WITH THIS  
11 PARTICULAR FORMULATION OF DISCLOSURE HAS REVEALED FEW, IF  
12 ANY, PROBLEMS IN THE IMPLEMENTATION. THEREFORE, I WOULD  
13 SUPPORT THE MINORITY POSITION ON THE DRAFTING OF THIS  
14 PROVISION.

15 AS NOTED EARLIER, MY PROFESSOR ROWE IN A COMMENT,  
16 I BELIEVE, HOWEVER, WHEN YOU MOVE TO WITNESSES, AN  
17 ARGUMENT CAN BE MADE THAT THE DISCLOSURE REQUIREMENT COULD  
18 BE MADE BROADER THAN IS CURRENTLY DRAFTED.

19 AGAIN, I POINT TO THE LOCAL RULE OF THE NORTHERN  
20 DISTRICT OF ALABAMA WHICH DOES REQUIRE DISCLOSURE OF EVERY  
21 INDIVIDUAL BELIEVED TO HAVE DISCOVERABLE, NONPRIVILEGED  
22 PERSONAL KNOWLEDGE CONCERNING SIGNIFICANT FACTUAL ISSUES  
23 EITHER RAISED IN THE PLEADINGS OR THE REPORT OF THE  
24 PARTIES.

25 MR. SCHERFFIUS: DON'T YOU GET THAT IN AN

1 INTERROGATORY ANYWAY?

2 MR. WELLS: QUITE FRANKLY I BELIEVE THAT IS WHY IT  
3 HAS NOT BEEN A PROBLEM IN THE NORTHERN DISTRICT OF ALABAMA  
4 SIMPLY BECAUSE IF WE DIDN'T DISCLOSE IT, THE FIRST FURTHER  
5 INTERROGATORY WE WOULD GET --

6 MR. SCHERFFIUS: WHAT WE WOULD BE DOING IS JUST  
7 ELIMINATING THE NEED FOR ONE INTERROGATORY IF WE WENT WITH  
8 WHAT YOU ARE PROPOSING.

9 MR. WELLS: IT SORT OF COMPLEMENTS THE LIMITATION  
10 OF INTERROGATORIES TO 25, BECAUSE IF YOU DON'T, YOU LIMIT,  
11 SHOULD EFFECTIVELY LIMIT THEM TO 24.

12 PROFESSOR ROWE, JR.: I WONDERED IF YOU HAVE ANY  
13 COMMENT ON SOME THE PROBLEMS RAISED BY A COUPLE OF THE  
14 EARLIER SPEAKERS. I THINK MR. DUNNE SAID THE INCENTIVES  
15 DIDN'T LINE UP THE SAME WAY, BUT IT WAS ALL WITNESSES  
16 RATHER THAN JUST FAVORABLE WITNESSES, BECAUSE YOU WANT TO  
17 BE ESPECIALLY SURE TO GET OUT THE NAMES OF THE PEOPLE SO  
18 THAT YOU CAN USE THEM. AND THEN MS. CROWLEY, I THINK,  
19 SAID SHE ACTUALLY THOUGHT THAT ALL WITNESSES WAS TOO BROAD  
20 AND SHE WASN'T ASKING FOR ALL THAT MUCH.

21 MR. WELLS: WELL, UNFORTUNATELY, HOWEVER YOU DRAFT  
22 THAT, WHETHER YOU ARE DRAFTING IT AS A RULE OR  
23 INTERROGATORY, IT IS SUBJECT TO BEING PLAYED WITH BY THE  
24 PARTIES. I THINK THE INCENTIVE IS CERTAINLY IF YOU GET AN  
25 INTERROGATORY OR HAVE TO DISCLOSE ALL WITNESSES THAT HAVE

1 PERSONAL KNOWLEDGE, NONPRIVILEGED PERSONAL KNOWLEDGE -- I  
2 THINK THOSE ARE TWO IMPORTANT LIMITATIONS -- OF  
3 SIGNIFICANT FACTUAL ISSUES, YOU ARE CERTAINLY GOING TO  
4 GIVE THEM ALL THE WITNESSES THAT YOU ARE GOING TO USE TO  
5 SUPPORT YOUR CASE. BUT AT THE SAME TIME YOU SHOULD GIVE  
6 THEM OTHER WITNESSES THAT MAY HAVE BOTH SUPPORTING  
7 INFORMATION, OPPOSING INFORMATION.

8 I THINK IT IS, QUITE FRANKLY, MORE THE DEFICIT IS  
9 THE DETAILS. AS ALWAYS, I'M NOT SURE YOU COULD DRAFT A  
10 RULE OR INTERROGATORY THAT WOULD GET ONLY THE WITNESSES  
11 YOU WANT. YOU ARE EITHER GOING GET A LITTLE BIT TOO MUCH  
12 OR A LITTLE BIT NOT ENOUGH IN EITHER INSTANCE.

13 PROFESSOR ROWE, JR.: ONE MORE QUESTION ON THAT.  
14 DO YOU HAPPEN TO RECALL IN YOUR LOCAL RULE WHAT THE  
15 SANCTION IS FOR FAILURE TO MAKE DISCLOSURE OF UNFAVORABLE  
16 WITNESSES?

17 MR. WELLS: THERE IS NO SPECIFIC SANCTION IN THE  
18 LOCAL RULE. THE ONLY SANCTION IN THE LOCAL RULE IS IF YOU  
19 DO NOT DISCLOSE A FAVORABLE DOCUMENT THAT SUPPORTS YOUR  
20 POSITION, YOU ARE PRECLUDED FROM INTRODUCING THAT DOCUMENT  
21 AT THE TRIAL OF THE CASE.

22 PROFESSOR ROWE, JR.: THAT'S WHY I ASKED ABOUT THE  
23 BROADER DISCLOSURE OF ALL WITNESSES WITH THIS KIND OF  
24 INFORMATION, WHETHER YOU HAD ANY TEETH BEHIND  
25 NONDISCLOSURE OF WITNESSES WITH UNFAVORABLE INFORMATION.

1 MR. WELLS: NO. THERE IS NONE. QUITE FRANKLY, I  
2 VERY RARELY HAD A CASE THAT LAWYERS ON THE OTHER SIDE,  
3 EITHER BY INTERROGATORIES OR SIMPLY BY ASKING THE FIRST  
4 WITNESS THAT I PUT UP, WHO ARE THE OTHER PEOPLE WHO WORKED  
5 ON THIS PRODUCT OR KNEW ABOUT THIS INSTANCE, AND YOU HAVE  
6 TO LIST ALL OF THEM. THE PEOPLE WHO KNOW ABOUT IT ARE  
7 GOING TO COME OUT ONE WAY OR ANOTHER. THEY MIGHT AS WELL  
8 COME OUT EARLIER RATHER THAN LATER.

9 MOVING TO THE SCOPE OF DISCOVERY. I THINK IT IS A  
10 TREMENDOUS IMPROVEMENT IN TERMS OF THE PHILOSOPHY OF THE  
11 RULES AND IN TERMS OF THE MESSAGE THAT THE COMMITTEE IS  
12 SENDING TO THE PRACTICING BAR TO ALLOW ROUTINE DISCOVERY,  
13 ATTORNEY-MANAGED DISCOVERY, OF MATTERS RELEVANT TO A CLAIM  
14 OR DEFENSE AND LIMITING MORE BROAD DISCOVERY TO THE  
15 SUBJECT MATTER OF THE ACTION TO A SHOWING OF GOOD CAUSE.

16 JUDGE CARROLL: WHERE WOULD THE PATTERN AND  
17 PRACTICE OF OTHER ACTS OF EVIDENCE DO YOU ROUTINELY SEE IN  
18 POLICE BRUTALITY CASES, THAT SORT OF THING, WHICH SIDE OF  
19 LINE DOES THAT FIT ON, SUBJECT MATTER OR CLAIMS OR  
20 DEFENSES?

21 MR. WELLS: AGAIN, IT IS GOING TO DEPEND ON THE  
22 TYPE OF ACTION THAT YOU HAVE GOT. IF IT IS SOMETHING THAT  
23 IS A PART OF A CLAIM OR DEFENSE, FOR EXAMPLE, IF PART OF  
24 THE CLAIM IS THIS PARTICULAR POLICE DEPARTMENT HAS A  
25 PATTERN OF BRUTALITY OR A PATTERN OF DISCRIMINATION, THEN

1 I BELIEVE, IT BECOMES A PART OF THE CLAIM AND THEREFORE IS  
2 ROUTINE DISCOVERY.

3 JUDGE CARROLL: THAT ISN'T LIKELY TO ACHIEVE THIS  
4 MISCHIEF WHICH MR. BLECHER TALKED ABOUT WHICH IS NOW, IN  
5 EVERY POLICE BRUTALITY CASE, WE ARE GOING TO SEE THE CITY  
6 SUED AND A CLAIM RAISED AGAINST THE CITY SO YOU CAN GET  
7 THAT EVIDENCE TO SEE IF THERE IS A CLAIM.

8 MR. WELLS: ONCE AGAIN, I THINK YOU HAVE TO RULE  
9 11 IN THAT CASE. IF PEOPLE ARE GOING TO ATTEMPT TO PLEAD  
10 BASED UPON THE WAY THAT THEY WANT TO GET DISCOVERY AND  
11 ACTUALLY PLEAD THINGS THAT THEY DON'T HAVE A REASONABLE  
12 BASIS FOR, HOPEFULLY THERE WILL BE SOME RULE 11  
13 INVOLVEMENT.

14 JUDGE NIEMEYER: THEY USUALLY SUE THE CITY ANYWAY  
15 FROM MY EXPERIENCE.

16 PROFESSOR ROWE, JR.: HOW MANY RULE 11 CASES HAVE  
17 YOU SEEN IN THE LAST FIVE YEARS, SINCE THE RULE CHANGE?

18 MR. WELLS: I HAD ONE FEDERAL DISTRICT JUDGE IN  
19 BIRMINGHAM ORDER ME TO BRING A RULE 11 MOTION, WHICH IS  
20 THE ONLY ONE THAT I'M AWARE OF.

21 PROFESSOR ROWE, JR.: WHAT DO YOU SEE AS EXACTLY  
22 THE CHANGE IN PHILOSOPHY AND THE CHANGE OF THE RULE MOVING  
23 FROM WHAT TO WHAT?

24 MR. WELLS: LET ME ANSWER THAT IN TWO WAYS.  
25 FIRST, NOW THE WAY I THINK THE PRACTICING BAR SEES THE

1 RULE IS FISHING EXPEDITIONS ARE ROUTINE AND ARE, IN FACT,  
2 EXPECTED. IT IS NO DEFENSE TO SAY, YOU KNOW THE LAWYERS  
3 ON THE OTHER SIDE, WHETHER IT IS THE PLAINTIFF OR  
4 DEFENDANT, IS ON A FISHING EXPEDITION. I THINK THAT FIRST  
5 THE REQUIREMENT TO GO TO A GOOD CAUSE, SHOWING TO GET TO  
6 THE SUBJECT MATTER, AS OPPOSED TO THE CLAIM OR DEFENSE,  
7 THE BROADER DISCOVERY, WOULD GIVE PAUSE TO SOME OF THE  
8 FISHERMEN. THEY MAY WELL NOT BE WILLING TO GO INTO COURT  
9 AND ATTEMPT TO ARTICULATE WHY THEY HAVE GOOD CAUSE TO LOOK  
10 FOR THIS BROADER SCOPE OF DISCOVERY.

11 I THINK IT IS A PRACTICAL MATTER, QUITE FRANKLY.  
12 MOST OF THE TIME WHEN I HAVE BEEN IN DISCOVERY DISPUTES,  
13 EITHER AS A PLAINTIFF OR DEFENDANT, MOST OF THE TIME IF  
14 THE OTHER SIDE COMES IN AND SAYS, JUDGE, HE IS ASKING FOR  
15 -- THE WAY HE HAS PHRASED IT IS SO BROAD, I AM GOING TO  
16 HAVE TO PRODUCE 12 WAREHOUSES FULL OF DOCUMENTS. I NEVER  
17 WANT TO SEE 12 WAREHOUSES FULL OF DOCUMENTS, I'M GOING TO  
18 NARROW IT DOWN. I THINK THAT IS GOING TO CHANGE A  
19 PHILOSOPHY.

20 SECOND, I THINK IT IS A QUESTION OF THE BURDEN.  
21 RIGHT NOW IF THERE IS -- IF I RAISE AN OBJECTION OR THE  
22 OPPOSING PARTY RAISES AN OBJECTION THAT THE DISCOVERY  
23 REQUEST IS OVER BROAD BECAUSE IT GOES BEYOND THE SUBJECT  
24 MATTER, I AM NO DOUBT GOING TO BE FACED ON ONE SIDE OR THE  
25 OTHER WITH A MOTION TO COMPEL AND IT IS GOING TO BE A VERY

1 HARD MOTION TO COMPEL TO DEFEAT IF I AM TRYING TO GET  
2 DISCLOSURE, BECAUSE SUBJECT MATTER IS SO BROAD. IF YOU  
3 FLIP THAT, AND THE PERSON WHO WANTS TO GET THE BROADER  
4 DISCOVERY HAS TO COME IN AND MAKE A SHOWING, I THINK IT  
5 CHANGES -- IT IS NOT A DRAMATIC CHANGE IN THE PLAYING  
6 FIELD, BUT RIGHT NOW I THINK THE PLAYING FIELD IS TILTED A  
7 PRETTY GOOD BIT, MAYBE 45 DEGREES. IT MAY TILT THAT  
8 PLAYING FIELD A LITTLE DIFFERENTLY. NOT DRAMATICALLY, BUT  
9 A LITTLE DIFFERENTLY SUCH THAT IT WILL PERHAPS HOPEFULLY  
10 SIGNAL A CHANGE IN THE SCOPE OF WHAT PEOPLE ACTUALLY ASK  
11 FOR AND WE WON'T HAVE THE SITUATION THAT MR. PICKLE  
12 REFERRED TO EARLIER OF HAVING TO PRODUCE DOCUMENTS IN A  
13 NATIONWIDE CORPORATION THAT SPAN ALL 50 STATES, THAT MAY  
14 HAVE NOTHING TO DO WITH THE CLAIM THAT IS INVOLVED IN THE  
15 LITIGATION.

16 JUDGE NIEMEYER: I THINK WE HAVE GONE A LITTLE BIT  
17 OVER.

18 MR. JUDGE HUNGER: I WOULD LIKE TO HEAR MR. WELLS  
19 WITH RESPECT TO THE PROPOSED IN THE SEVEN-HOUR DEPOSITION.  
20 I WOULD LIKE TO KNOW HOW YOU FEEL ABOUT IT.

21 MR. WELLS: I WOULD BE GLAD TO REFER TO JUDGE  
22 HUNGER. I THINK QUITE FRANKLY THE COMMITTEE HAS HEARD A  
23 LOT ABOUT THE SEVEN-HOUR PRESUMPTIVE LIMIT OF DEPOSITION.

24 FIRST, I THINK WHATEVER THE COMMITTEE DOES TO  
25 UNIFORM STANDARD IS NUMBER ONE. IT IS USEFUL TO HAVE A

1 UNIFORM STANDARD, WHETHER IT IS SEVEN HOURS, WHETHER IT IS  
2 NO STANDARD -- RIGHT NOW WE HAVE GOT, AGAIN, VERY  
3 DISPARATE RULES FROM DISTRICT TO DIRECT.

4 MY EXPERIENCE HAS BEEN IT IS AN EXTREMELY SMALL  
5 PERCENTAGE OF CASES THAT REQUIRE SEVEN HOURS OF ACTUAL  
6 TESTIMONY IN ORDER TO GET WHAT IS NEEDED IN THE CASE. IT  
7 IS A VERY SMALL PERCENTAGE OF CASES. SO BASICALLY THE  
8 SEVEN-HOUR LIMIT IS ONLY GOING TO APPLY, I WOULD  
9 ANTICIPATE, TO PROBABLY LESS THAN 2 PERCENT. AND THAT IS  
10 ONLY MY GUESS WITH NO EMPIRICAL EVIDENCE.

11 JUDGE NIEMEYER: YOU ARE GETTING PRETTY SAFE  
12 BECAUSE I THINK WE LEARNED THAT TWO-THIRDS OR SOMETHING OF  
13 ALL THE CASES HAVE LESS THAN THREE HOURS OF DISCOVERY  
14 ENTIRELY. SO ONLY ABOUT 20 PERCENT OF THE CASES HAVE  
15 MAJOR DISCOVERY IN THEM, SO....

16 MR. WELLS: LET ME MAKE ONE SUGGESTION THAT I  
17 THINK WOULD BE AN IMPROVEMENT AND PERHAPS WOULD ALLEVIATE  
18 SOME OF THE CONCERN ON THE SEVEN-HOUR PRESUMPTIVE LIMIT.  
19 IT HAS TO DO WITH RETAINED EXPERTS.

20 THE CURRENT RULE MAKES NO DISTINCTION BETWEEN FACT  
21 WITNESSES AND RETAINED EXPERTS. SOME WITNESSES, QUITE  
22 FRANKLY, CAN PUT THEMSELVES OUT AS EXPERT WITNESSES, CLAIM  
23 EXPERTISE IN SUCH A WIDE VARIETY OF FIELDS, SEVEN HOURS  
24 WOULD BE WOEFULLY INADEQUATE JUST TO FIND OUT WHAT THEY  
25 ARE AN EXPERT IN, MUCH LESS FIND OUT WHAT THEIR OPINIONS

1 ARE.

2 I WOULD SUBMIT TO THE COMMITTEE THAT THERE ARE  
3 PROBABLY TWO WAYS TO GO ABOUT THIS. ONE WOULD BE TO DRAFT  
4 THE RULE IN SUCH A WAY THAT THE SEVEN HOUR LIMIT EITHER  
5 DOES NOT APPLY TO RETAINED EXPERTS OR ONLY APPLIES TO FACT  
6 WITNESSES, OR AT LEAST, INCLUDE A NOTE IN THE COMMENT THAT  
7 POINTS OUT THAT THERE ARE -- QUITE FRANKLY, MOST RETAINED  
8 EXPERTS, SEVEN HOURS IS QUITE ENOUGH ANYWAY. THERE ARE  
9 SOME, HOWEVER, THAT SEVEN HOURS WOULDN'T BE ENOUGH TO GET  
10 THEIR QUALIFICATIONS OUT. SO I THINK AN EXPLANATORY NOTE,  
11 EITHER A CHANGE IN THE RULE TO EXCLUDE RETAINED EXPERTS  
12 FROM THE SEVEN-HOUR LIMITATION, OR AN INCLUSION IN THE  
13 NOTE.

14 I THINK THERE ARE A COUPLE OF REASONS FOR THAT.  
15 NOT JUST THE LENGTH, BUT THE FACT THAT -- NORMALLY THE  
16 STIPULATION AS THE RULE IS NOW WRITTEN, YOU HAVE TO HAVE A  
17 STIPULATION OF THE WITNESS. A RETAINED EXPERT IS UNLIKE  
18 AN ORDINARY FACT WITNESS. HE IS BEING PAID FOR SITTING  
19 THERE. THE LONGER HE SITS THERE, THE MORE HE GETS PAID.

20 JUDGE NIEMEYER: THAT MEANS HE'LL AGREE.

21 MR. WELLS: USUALLY HE'LL AGREE. USUALLY IT IS  
22 THE EXAMINING PARTY WHO IS PAYING THE OPPOSING EXPERT FOR  
23 THAT TESTIMONY, AND IN THAT CIRCUMSTANCE, I THINK AN  
24 EXCEPTION IS WARRANTED TO ALLOW THAT EXAMINING PARTY,  
25 PARTICULARLY SINCE THEY ARE PAYING WHATEVER THE FEES

1 ARE -- USUALLY MORE THAN THE LAWYER'S FEES -- TO TESTIFY  
2 TO GET OUT WHATEVER INFORMATION THEY NEED TO GET OUT IN  
3 THAT.

4 MR. KASANIN: IN YOUR EXPERIENCE, ARE THE EXPERT  
5 DEPOSITIONS TOO LENGTHY? ARE LAWYERS SPENDING TOO MUCH  
6 TIME DEPOSING EXPERTS?

7 MR. WELLS: YES.

8 JUDGE NIEMEYER: THANK YOU, MR. WELLS.

9 MR. PREUSS: GOOD MORNING. MY NAME IS CHUCK  
10 PREUSS. I PRACTICE LAW HERE IN SAN FRANCISCO. THE  
11 SUBJECT MATTER OF MY PRACTICE IS IN THE  
12 PHARMACEUTICAL/MEDICAL LITIGATION, BASICALLY THE MASS TORT  
13 ARENA. I SERVED IN LOCAL REGIONAL AND NATIONAL EVENTS  
14 CAPACITIES OVER A NUMBER OF YEARS. I HAVE ALSO HAD THE  
15 OPPORTUNITY TO SERVE ON THE BOARD OF THE INTERNATIONAL  
16 ASSOCIATION OF DEFENSE COUNSEL, AND THE LAWYERS FOR CIVIL  
17 JUSTICE. I AM SPEAKING AS AN INDIVIDUAL AND NOT ON BEHALF  
18 OF THOSE ORGANIZATIONS.

19 I THANK YOU FOR THE OPPORTUNITY FOR SPEAKING TO  
20 YOU TODAY AND I THANK YOU FOR YOUR EFFORT IN PREPARING THE  
21 MATERIALS WHICH I THINK ARE EXCELLENT RECOMMENDATIONS.

22 I WOULD LIKE TO CONFINE MY REMARKS PRIMARILY TO  
23 UNIFORMITY AND SCOPE OF DISCOVERY. STARTING WITH THE  
24 UNIFORMITY, I THINK THIS IS A MARVELOUS PROPOSAL TO SAVE  
25 TIME, EXPENSE AND MONEY FOR EVERYBODY. I THINK IT IS

1 SAVING IT FOR ATTORNEYS, I THINK IT WILL SAVE IT FOR  
2 CLIENTS, AND I THINK IT WILL SAVE IT FOR THE COURTS.

3 JUDGE NIEMEYER, IN RESPONSE TO A QUESTION YOU  
4 ASKED EARLIER, WHAT DO YOU SAY TO DISTRICT COURTS THAT ASK  
5 YOU, WELL, OUR SYSTEM IS WORKING FINE, I THINK ONE, YOU  
6 HAVE EXERCISED LEADERSHIP TO GET WHERE YOU ARE HERE TODAY  
7 AS A GROUP, AND I WOULD ASK YOU TO EXERCISE THAT  
8 LEADERSHIP TO THE DISTRICT COURT JUDGES. BECAUSE I THINK  
9 THE ARGUMENT IS THEY MAY HAVE A GOOD SYSTEM, A JUDGE IN  
10 CALIFORNIA MAY HAVE A GOOD SYSTEM, BUT THE SYSTEM YOU  
11 PROPOSE IS A GOOD SYSTEM, TOO, AND WE CAN MAKE IT BETTER  
12 IF IT IS ALL THE SAME. I THINK YOU WILL HAVE A  
13 SIGNIFICANT IMPACT ON COST AND EXPENSE THROUGH UNIFORMITY  
14 ALONE.

15 IN WORKING IN THE MASS TORT AREA, I CAN ASSURE YOU  
16 IT IS VERY FRUSTRATING AND DIFFICULT TO MAKE SURE YOU HAVE  
17 GOT EVERYTHING STRAIGHT WITH EVERY DIFFERENT DISTRICT. IT  
18 REALLY STREAMLINES IT IF YOU KNOW YOU ARE DEALING WITH THE  
19 SAME SET OF RULES.

20 TURNING TO THE SCOPE OF DISCOVERY, I THINK THAT  
21 CHANGING FROM SUBJECT MATTER TO CLAIMS AND DEFENSES IS  
22 SOUND IN BOTH THE CONTEXT OF INITIAL DISCLOSURE  
23 REQUIREMENTS AS WELL AS THE ATTORNEY-GENERATED DISCOVERY.

24 WITH RESPECT TO INITIAL DISCLOSURE, CONFINING IT  
25 TO YOUR OWN CLIENT'S CLAIM OR DEFENSE, I THINK THAT TAKES

1 US OUT OF THE DILEMMA OF RISKING PREJUDICING IN YOUR  
2 CLIENT'S CASE IN TRYING TO COMPLY WITH YOUR DISCOVERY  
3 OBLIGATION.

4 I ALSO LIKE THE FLEXIBILITY OF THE RULE THAT YOU  
5 CAN EITHER OBJECT OR STIPULATE TO AVOID THE INITIAL  
6 DISCLOSURE UNTIL YOU HAVE A SCHEDULING CONFERENCE WHERE  
7 YOU CAN GET THE JUDGE INVOLVED IN THE PROCESS. THAT  
8 OFFERS FLEXIBILITY AND MAKES SENSE IN A HIGH-DISCOVERY  
9 CASE.

10 WITH RESPECT TO GENERAL DISCOVERY GENERATED BY  
11 ATTORNEYS, LIMITING TO CLAIMS AND DEFENSES IN MY VIEW  
12 GIVES MORE ASSURANCE THAT YOU ARE GOING TO DEAL WITH THE  
13 MERITS OF THE CASE AND NOT GET INVOLVED IN DISCOVERY  
14 ABUSE.

15 TO RESPOND TO AN EARLIER REMARK, I DO HAVE A  
16 CERTAIN PESSIMISM ABOUT SUBJECT MATTER. I FEEL THAT  
17 SUBJECT MATTER MEANS THAT I HAVE TO PRODUCE EVERYTHING AND  
18 I HAVE NOT BEEN TERRIBLY SUCCESSFUL IN TRYING TO FOCUS ON  
19 THE CLAIMS OF MY ADVERSARIES. IF I MIGHT GIVE YOU COUPLE  
20 EXAMPLES. I HAVE HAD A SERIES OF LITIGATION OVER THE  
21 YEARS INVOLVING A PRODUCT USED IN SURGERY. IT IS A  
22 FRAGILE PRODUCT, IT CAN BREAK. FREQUENTLY THAT PRODUCT IS  
23 THROWN AWAY. THE CLAIM IS IT IS A MANUFACTURING DEFECT.  
24 THERE IS NO PRODUCT TO EXAMINE, SO BASICALLY DISCOVERY IS  
25 FOR ALL DOCUMENTS UNDER THE UNIVERSE AND ALL KINDS OF

1 PEOPLE, AND I HAVE BEEN UNSUCCESSFUL OVER THE YEARS AND AT  
2 A TREMENDOUS COST TO MY CLIENT IN PRODUCING THIS  
3 DISCOVERY. AND RARELY HAVE I GOTTEN RELIEF --

4 JUDGE CARROLL: WOULD IT BE YOUR VIEW THAT IN AN  
5 INDIVIDUAL CASE THE INITIAL DISCOVERY WOULD BE LIMITED TO  
6 THAT INDIVIDUAL CASE AND WOULD NOT BE ALLOWED TO DISCOVER  
7 INFORMATION ABOUT THAT PRODUCT'S AFFECT ON OTHER PERSONS,  
8 THAT THAT WOULD BE SORT OF STAGE TWO DISCOVERY?

9 MR. PREUSS: YOU MEAN THAT SPECIFIC CASE AS  
10 OPPOSED TO OTHERS? NO, I THINK THAT WOULD BE NORMAL  
11 DISCOVERY I WOULD EXPECT TO HAVE TO GIVE ANYWAY UNDER  
12 EITHER SITUATION.

13 PROFESSOR ROWE, JR.: WOULDN'T THAT RELATE -- I  
14 CAN'T IMAGINE A COMPLAINT SO UNARTFULLY DRAWN THAT THAT  
15 WOULDN'T RELATE TO A CLAIM PRESENTED TO A DEFECTIVE  
16 PRODUCT.

17 MR. PREUSS: AT SOME POINT, YOUR HONOR, I THINK  
18 THAT AFTER A REASONABLE DISCOVERY, I AM ENTITLED TO KNOW  
19 WHAT IS YOUR CLAIM OF THE MANUFACTURING DEFECT, WHERE IS  
20 THE MANUFACTURING PROCESS, WHAT ABOUT THAT MANUFACTURING  
21 PROCESS. I THINK WHAT HAPPENS IS THAT IT IS DIFFICULT TO  
22 GET THE COURTS INVOLVED IN THE PROCESS AND YOU FALL BACK  
23 ON SUBJECT MATTER. THE THING I LIKE ABOUT GOOD CAUSE --  
24 AND I THINK YOU MAKE A DISTINCTION BETWEEN THE TWO  
25 YOURSELF BY SAYING NOW YOU HAVE TO HAVE GOOD CAUSE IN THE

1 RECOMMENDATION. NOW YOU HAVE TO HAVE GOOD CAUSE BEFORE  
2 YOU GET AT SUBJECT MATTER, AND THERE MAY WELL BE GOOD  
3 CAUSE. THAT ISSUE GETS FOCUSED IN RIGHT AWAY ON THE  
4 SCHEDULING CONFERENCE. I WOULD BE DELIGHTED IF I COULD  
5 GET EARLY ON A JUDGE THAT SAYS, ALL RIGHT, YOU HAVE ALL  
6 THESE ALLEGATIONS, I DON'T THINK THE PLEADINGS ARE GOING  
7 TO CHANGE THAT MUCH. WHAT I SEE, IS WHEN THE JUDGE GOES  
8 TO THE PLAINTIFF'S LAWYERS AND SAYS, WHERE ARE YOU COMING  
9 FROM ON THIS CASE, IT TAKES A VERY SHORT PERIOD OF TIME  
10 AND THE JUDGE IS INVOLVED IN THE PROCESS FROM THE OUTSET.  
11 I THINK I RUN A LOT LESS RISK AT HAVING SOME CLAIM THAT I  
12 HAVE EITHER STONEWALLED OR HAVEN'T PRODUCED A DOCUMENT  
13 BECAUSE OF THE BREADTH OF THE SUBJECT MATTER.

14 MR. SCHERFFIUS: MY EXPERIENCE HAS BEEN THAT  
15 FEDERAL JUDGES IN PARTICULAR ARE VERY PROACTIVE IN  
16 DISCOVERY AND ARE OPEN TO CONTACT FROM LAWYERS AND INVITE  
17 EARLY RESOLUTION THROUGH THEIR OWN OFFICE AND THE OFFICE  
18 OF THE MAGISTRATES. YET, I HEAR AT THESE HEARINGS  
19 ANECDOTAL -- AND OF COURSE IT IS NONE OF THE JUDGES UP  
20 HERE -- BUT ANECDOTALLY THAT THE JUDGES ARE NOT ACTIVE  
21 ENOUGH. SOMETIMES I WONDER IF YOU ARE TALKING ABOUT STATE  
22 COURT JUDGES VERSUS FEDERAL JUDGES. I HAVE NEVER HAD A  
23 PROBLEM WITH THE FEDERAL BENCH.

24 MR. PREUSS: I HAVE HAD A MIXTURE OF EXPERIENCES.  
25 BUT GENERALLY SPEAKING, I HAVE BEEN VERY UNSUCCESSFUL IN

1 LIMITING DISCOVERY IN FEDERAL COURTS.

2 MR. SCHERFFIUS: MY QUESTION IS ARE THEY INVOLVED,  
3 WILL THEY GET INVOLVED? YOU MAY NOT LIKE THE RESULT WHEN  
4 THEY GET INVOLVED, BUT I HAVE ALWAYS FOUND THEM INCREDIBLY  
5 ACTIVE, EITHER THROUGH LOCAL RULES OR STANDING ORDERS OR  
6 FEDERAL RULES OR SOMETHING, THEY ARE THERE.

7 MR. PREUSS: THEY WILL MAKE RULINGS BUT, FRANKLY,  
8 I DON'T THINK THAT OFTEN THAT THE JUDGES GET INVOLVED IN  
9 THE CASE TO REALLY UNDERSTAND IT AT THE OUTSET TO SHAPE  
10 THE DISCOVERY. AND I THINK THAT IS A TREMENDOUS BURDEN ON  
11 THEM, AND I ASK THAT IT BE DONE, OF COURSE, BUT MAYBE I  
12 DON'T HAVE SUFFICIENT APPRECIATION FOR THE TIME INVOLVED.  
13 I DO KNOW IT TAKES TIME, AND I THINK IT IS VERY DIFFICULT  
14 FOR THE JUDGE TO GET ON TOP OF IT. THOSE THAT DO MOVE  
15 THEIR CASES FASTER AND DISCOVERY GETS DONE VERY QUICKLY.

16 JUDGE NIEMEYER: YOU REALIZE THAT MR. SCHERFFIUS  
17 REPRESENTS THESE NATIONAL CLIENTS IN THESE NATIONAL CASES  
18 THAT ARE HIGH PROFILE BEFORE THE BEST FEDERAL JUDGES AND  
19 THEREFORE HE IS GOING TO GET ATTENTION.

20 MR. SCHERFFIUS: I'M ONE OF THOSE POOR LAWYERS  
21 THAT COULDN'T AFFORD TO PAY FOR THE DISCOVERY.

22 JUDGE SCHEINDLIN: DO YOU THINK THERE ARE GOING TO  
23 BE MORE REQUESTS FOR CONFERENCES BEFORE THE JUDGE BECAUSE  
24 OF THE REQUIREMENT TO SHOW GOOD CAUSE? TO GET SUBJECT  
25 MATTER DISCOVERY, YOU ARE GOING TO GET INTO COURT MORE

1 OFTEN?

2 MR. PREUSS: I THINK THE ISSUE IS GOING TO BE  
3 FOCUSSED AT THE INITIAL SCHEDULING CONFERENCE. IF I WERE  
4 IN YOUR SHOES AS A JUDGE, I WOULD WANT TO GET THERE. YOU  
5 ARE GOING TO KNOW RIGHT AWAY IF THEY ARE GOING TO GET INTO  
6 SUBJECT MATTER, IF YOU WILL. I THINK WHERE IT IS GOING TO  
7 HELP EVERYBODY IS IF WE CAN DEFINE BETTER WHAT GOOD CAUSE  
8 IS. I'M NOT GOING TO SIT HERE AND GIVE YOU A LIST OF WHAT  
9 I THINK ESTABLISHES GOOD CAUSE. BUT I THINK THAT IS GOING  
10 TO BE THE CRUX OF THE SUCCESS OF THIS. JUDGES ARE EITHER  
11 GOING TO FALL BACK ON SUBJECT MATTER, IN WHICH CASE WE  
12 HAVEN'T MADE ANY PROGRESS, IN MY VIEW, BECAUSE I VIEW  
13 CLAIMS AND DEFENSES TO BE A NARROWER CONCEPT THAN SUBJECT  
14 MATTER, AND YET YOU PRESERVE DISCOVERY BY HAVING SUBJECT  
15 MATTER WITH GOOD CAUSE. BUT GOOD CAUSE IS WHERE THIS  
16 WHOLE THING IS GOING TO STAND OR FALL. AND TO THE EXTENT  
17 THE COMMITTEE CAN DEFINE AND HELP AND GUIDE JUDGES AND  
18 COUNSEL, I THINK WILL BE VERY HELPFUL.

19 JUDGE SCHEINDLIN: YOU THINK WE SHOULD BE DOING IT  
20 NOW IN OUR RULE 16 SCHEDULING CONFERENCE, AND THE ONLY  
21 CHANGE WOULD BE THE BURDEN OF PROOF, AND WE SHOULD BE  
22 DOING THIS DOING RIGHT NOW IN RULE 16?

23 MR. PREUSS: I THINK THAT IS WHAT IS GOING TO  
24 HAPPEN IF THE RECOMMENDATIONS ARE ADOPTED, THE PLAINTIFF  
25 RIGHT AWAY IS GOING TO COME IN AND SAY, I HAVE GOOD CAUSE

1 TO GO TO SUBJECT MATTER RIGHT AWAY, AND BOOM, THE JUDGE IS  
2 GOING TO HAVE TO GET INVOLVED IN THE CASE TO UNDERSTAND  
3 THE CASE, TO MAKE THE RULINGS.

4 JUDGE NIEMEYER: NEXT ON THE LIST I HAVE A MR.  
5 FILICE. IS HE HERE?

6 MR. VALEN: HE IS NOT HERE, BUT HE IS MY PARTNER  
7 AND I AM PREPARED TO SPEAK.

8 JUDGE NIEMEYER: COME FORWARD AND GIVE US YOUR  
9 NAME.

10 MR. VALEN: MY NAME IS STEPHEN VALEN. AS  
11 MENTIONED IN THE WRITTEN MATERIALS PROVIDED BY MR.  
12 FILICE -- HE WAS UNFORTUNATELY CALLED TO TRIAL, BUT HE  
13 ASKED IF I WOULD SAY A FEW WORDS, AND I WILL KEEP MY  
14 COMMENTS BRIEF.

15 OUR FIRM IS A LITIGATION PRACTICE ALMOST ENTIRELY  
16 WHERE WE FOCUS ON MASS TOXIC TORTS AND ENVIRONMENTAL  
17 LITIGATION.

18 JUDGE NIEMEYER: WE HAVE ANOTHER PROJECT THAT  
19 INVOLVES MASS TORTS. I HAVEN'T SEEN YOU TESTIFY BEFORE  
20 THAT, BUT YOU ARE INVITED TO COME FOR US THEN, TOO.

21 MR. VALEN: I LOOK FORWARD TO IT. BUT LIKE MR.  
22 PICKLE, I WAS ALSO FORMERLY IN-HOUSE COUNSEL FOR A LARGE  
23 OIL COMPANY HERE IN SAN FRANCISCO AND MANAGED CASES  
24 NATIONALLY, SO I HAVE A UNIQUE PERSPECTIVE ON THIS ISSUE  
25 BOTH FROM A PRACTITIONER'S POINT OF VIEW AND AN IN-HOUSE

1 POINT OF YOU VIEW.

2 MANY OF MY COMMENTS AND THE COMMENTS WE MADE IN  
3 WRITTEN FORM WERE ADDRESSED BY MR. PICKLE. FIRST OF ALL,  
4 WE WANT TO COMMEND THE COMMITTEE FOR THEIR EFFORTS IN THE  
5 PROPOSED AMENDMENTS. WE WHOLEHEARTEDLY AGREE WITH THEM  
6 AND THEY ARE AN EXCELLENT STEP IN THE RIGHT DIRECTION AND  
7 ALSO WANT TO THANK YOU FOR YOUR WILLINGNESS TO HEAR FROM  
8 THE PRACTICING BAR. SO OFTEN THESE CAN BE MADE IN A  
9 VACUUM AND IT IS IMPORTANT THAT THE PRACTICING BAR ON BOTH  
10 SIDES OF THE AISLE GET A CHANCE TO SPEAK.

11 COMMENTS THAT WERE ADDRESSED IN THE WRITTEN FORM  
12 AND WHAT I WOULD LIKE TO FOCUS MAINLY ON THE AUTOMATIC  
13 DISCLOSURE IN ITS PRESENT FORM, AS THE COMMITTEE IS WELL  
14 AWARE BY NOW, HAS MANY PITFALLS. IN THE AMENDED FORM,  
15 MANY OF THOSE ARE REMOVED. AND IT IS AN EXCELLENT IDEA  
16 WHERE CASES DEAL WITH STRAIGHTFORWARD ISSUES,  
17 STRAIGHTFORWARD FACTUAL CONSIDERATIONS IN A LIMITED NUMBER  
18 OF PARTIES, BUT WHERE THAT FALLS APART, WE BELIEVE, IS IN  
19 THE MORE COMPLEX LITIGATIONS, MASS TORTS, THE CLASS ACTION  
20 SITUATIONS AND COMPLEX ENVIRONMENTAL LITIGATION. OF  
21 COURSE, THERE IS A PROCEDURE IN THE RULES, BUT THERE IS  
22 NOT A LOT OF GUIDANCE IN THE NOTES ON HOW THAT IS TO BE  
23 ADMINISTERED, OTHER THAN TO SAY RULES BY STIPULATIONS.

24 THERE WAS SOME EXCELLENT LANGUAGE BY YOUR HONOR IN  
25 THE INTRODUCTORY STATEMENTS ABOUT HIGH-END DISCOVERY WHERE

1 THERE WASN'T A PRESUMPTION OR RECOMMENDATION OR A  
2 REALIZATION THAT THESE CASES ARE APPROPRIATE FOR THE  
3 OPT-OUT PROCEDURE AS WELL. WHAT I THINK NEEDS TO HAPPEN  
4 IS THERE NEEDS TO BE SOME PRESUMPTION OR A RECOMMENDATION  
5 BY THE COMMITTEE IN THE NOTES TO GIVE THE COURTS GUIDANCE  
6 AND GIVE THE PARTIES SOME RECOGNITION THAT THIS IS LIKELY  
7 TO HAPPEN. IT DOES NOT EXIST THERE NOW. AND SOME OF THE  
8 LANGUAGE THAT IS PRESENTLY THERE IS, I WOULDN'T SAY  
9 CONFUSING, BUT IT JUST FOCUSES ON THE LOW-END OF  
10 LITIGATION WHERE THERE IS NOT GOING TO BE A TERRIBLE  
11 AMOUNT OF DISCOVERY.

12 JUDGE VINSON: I'M NOT FOLLOWING YOU COMPLETELY  
13 ABOUT WHAT YOU ARE ASKING. A PRESUMPTION NEEDS TO BE  
14 WRITTEN IN OR IN THE NOTES ABOUT WHAT?

15 MR. VALEN: THAT IN COMPLEX LITIGATION HIGH-END  
16 DISCOVERY, AS THAT TERM WAS USED IN THE COMMENTS OR THE  
17 MEMO, I BELIEVE IT WAS ON PAGE 8 BY THE CHAIR, THAT THIS  
18 IS OFTEN RECOGNIZED AS INAPPROPRIATE FOR AUTOMATIC  
19 DISCLOSURE, AND THAT THERE SHOULD BE MORE ACTIVE JUDICIAL  
20 MANAGEMENT AND SUPERVISION OF DISCOVERY. AND THAT IS WHAT  
21 WE WOULD PROPOSE -- THERE JUST NEEDS TO BE SOME GUIDANCE  
22 AND RECOGNITION THAT THESE TYPES OF CASES ARE APPROPRIATE  
23 FOR EARLY JUDICIAL INTERVENTION.

24 AND I AM SENSITIVE TO THE COMMENTS MADE EARLIER.  
25 MY EXPERIENCE AND EXPERIENCE OF OTHERS THAT I HAVE DEALT

1 WITH IS THAT WHILE THERE IS ACTIVE JUDICIAL MANAGEMENT, IT  
2 DOESN'T ALWAYS GO TOWARD DISCOVERY. AND WHAT I THINK  
3 NEEDS TO HAPPEN IS THAT -- ESPECIALLY IN THE LARGER CASES  
4 THAT A CASE MANAGER ORDER NEEDS TO BE ENTERED IN EARLY ON  
5 WHERE DISCOVERY IS PHASED AND THAT THERE IS CASE  
6 MANAGEMENT THAT RECOGNIZES THAT CERTAIN CLAIMS NEED TO BE  
7 SHOWN AND FACTS PRESENTED EARLY ON SO THAT THESE LARGER  
8 CASES CAN BECOME STREAMLINED AND REALLY MANAGED OR BROUGHT  
9 TO MORE MANAGEABLE LEVEL.

10           THEY CURRENTLY, WITH WIDE OPEN DISCOVERY, EVEN  
11 WITH THE AUTOMATIC DISCLOSURE, YOU ARE REALLY FOCUSING ON  
12 EACH SIDE'S UNDERSTANDING OF THEIR OWN CASE. BUT NOTHING  
13 REALLY HAPPENS UNTIL THE CASE STARTS TO GET WHITTLED DOWN  
14 AND ESPECIALLY WHERE YOU HAVE MULTIPLE PLAINTIFFS AND  
15 MULTIPLE CLAIMS, THOSE CLAIMS SURVIVE FOR A LONG TIME,  
16 WHEREAS IF THERE WAS A CASE MANAGEMENT ORDER, THOSE CASES  
17 AND CLAIMS COULD BE REDUCED EARLY ON AND GET TO THE MEAT  
18 OF THE CASE.

19           JUDGE SCHEINDLIN: UNDER THE CURRENT RULES ARE YOU  
20 ASKING FOR THOSE CASE MANAGEMENT CONFERENCES AND ARE THE  
21 JUDGES NOT RESPONSIVE TO YOU?

22           MR. VALEN: NO, THERE IS NOT A RECOGNITION THAT  
23 THIS IS SOMETHING THAT OUGHT TO BE DONE BY THE COURTS.

24           JUDGE SCHEINDLIN: WHEN YOU SEEK IT, WHAT HAPPENS,  
25 WHEN YOU ASK THE COURT TO DO IT?

1 MR. VALEN: WELL, IN SOME CASES IT CAN BE DONE,  
2 BUT UNDER THE CURRENT STANDARDS THERE IS NOTHING TO  
3 ENCOURAGE IT. AND IF THIS WAS DONE, THERE WOULD BE, LIKE  
4 I SAID, MORE MANAGEABLE LITIGATION SOONER RATHER THAN  
5 LATER.

6 JUDGE NIEMEYER: I THINK THE IDEA WAS THAT IN  
7 THESE HIGH-END CASES WHERE DISCOVERY IS INTENDED TO BECOME  
8 COMPLEX, THAT ONE PARTY OR BOTH PARTIES WOULD OBJECT TO  
9 THE DISCLOSURE IN ORDER TO LAY IT INTO THE LAP OF THE  
10 JUDGE AND THEN HAVE THAT RESOLVED BY THE JUDGE, WHICH GETS  
11 THE JUDGE INVOLVED IN THE ISSUE, WHICH WE HEARD WOULD BE  
12 SALUTARY AND WHICH WOULD ADDRESS THE QUESTION OF WHETHER  
13 DISCLOSURE WOULD BE APPROPRIATE IN A CASE OF THAT TYPE.  
14 BUT THAT LETS THE PARTIES ELECT OR SELECT THOSE CASES THAT  
15 ARE HIGH-END AS OPPOSED TO HAVING THE COMMITTEE TRY TO  
16 DEFINE WHAT A COMPLEX CASE IS OR HIGH-END CASE IS.

17 MR. VALEN: I DON'T THINK THAT THERE NEEDS TO BE  
18 ANY SORT OF DEFINITION.

19 JUDGE NIEMEYER: YOU JUST PREFER A NOTE OF SOME  
20 KIND?

21 MR. VALEN: THAT IS RIGHT.

22 JUDGE VINSON: WHAT SPECIFICALLY DO YOU HAVE IN  
23 MIND? YOU ARE PROPOSING SOME CHANGE TO RULE 16, BUT I'M  
24 NOT SURE WHAT YOU ARE PROPOSING, BECAUSE RULE 16 NOW  
25 REQUIRES THAT.

1 MR. VALEN: NOT A CHANGE IN RULE 16, JUST A  
2 RECOGNITION IN THE AUTOMATIC DISCLOSURE SEGMENT OF  
3 DISCOVERY THAT IT IS NOT APPROPRIATE IN ALL CASES. NOT  
4 NECESSARILY IN THE RULES, BUT JUST GUIDANCE IN THE NOTES  
5 THAT WHEN THERE IS -- WHEN THERE IS AN OBJECTION TO THE  
6 AUTOMATIC DISCLOSURE, THAT THERE IS A RECOGNITION THAT  
7 MORE OFTEN THAN NOT IN THESE TYPES OF CASES THERE SHOULD  
8 BE -- IT SHOULD BE RECOGNIZED.

9 JUDGE VINSON: ARE YOU SAYING THAT WE SHOULD  
10 SOMEHOW WRITE INTO THE RULE THE FACT THAT THERE ARE  
11 DIFFERENT TYPES OF CASES AND COMPLEX CASES NEED TO BE  
12 HANDLED DIFFERENTLY THAN THE ROUTINE CASE?

13 MR. VALEN: NOT IN THE RULE. I AM SENSITIVE TO  
14 THE DRAFTING ISSUES THAT ARE IN THE NOTES. RIGHT NOW  
15 THERE IS A DISCUSSION ON LOW-END DISCOVERY AND WHY THOSE  
16 CASES SHOULD BE OPTED OUT, BUT THERE IS NOTHING ABOUT THE  
17 HIGH-END, AND THERE SHOULD BE SOME DISCUSSION ABOUT THOSE  
18 IN SOME FASHION.

19 JUDGE SCHEINDLIN: YOU HAVE THE LANGUAGE RIGHT NOW  
20 AFTER THE LOW-END EXCLUSION THAT SAYS, "THESE DISCLOSURES  
21 MUST BE MADE AT OR WITHIN 14 DAYS AFTER THE  
22 CONFERENCE UNLESS A DIFFERENT TIME IS SET BY  
23 STIPULATION OR COURT ORDER OR UNLESS A PARTY  
24 OBJECTS."

25 SO WOULDN'T THAT BRING IT ON? YOU WANT THE NOTES

1 TO EXPLAIN THE KIND OF CASES CONTEMPLATED FOR THAT  
2 SUGGESTION?

3 MR. VALEN: YES, SOME SORT OF CONTEMPLATION THAT  
4 THESE TYPE OF CASES FALL INTO THAT CATEGORY. THE  
5 PROCEDURE IS IN PLACE RIGHT NOW, BUT RECOGNITION OF WHAT  
6 IT REALLY MEANS OR HOW THAT MIGHT BE GUIDED BY THE COURT.

7 JUDGE NIEMEYER: THAT MAY BE SOMETHING THAT MAY  
8 READILY BE IMPLICIT AND MAY BE WORTH MAKING EXPLICIT AND  
9 IT IS A COMMENT I THINK WE CAN LOOK AT.

10 PROFESSOR ROWE, JR.: THERE IS LANGUAGE RIGHT AT  
11 THE BEGINNING OF THE DISCLOSURE RULES. I WANT TO MAKE  
12 SURE YOU HAVE NO PROBLEM WITH THE LANGUAGE AS EXISTING  
13 PROPOSED, BECAUSE RIGHT AT THE BEGINNING IT SAYS, "EXCEPT  
14 IN CATEGORIES PROCEEDING SPECIFIED SUBPARAGRAPH E, THAT IS  
15 THE LOW-END EXCLUSION, OR WORDS TO THE EXTENT OTHERWISE  
16 STIPULATED OR DIRECTED BY AN ORDER."

17 MR. VALEN: THAT'S THE CATCHALL.

18 PROFESSOR ROWE, JR.: THAT'S WHERE THE HIGH-END  
19 COULD COME IN, EITHER BY AGREEMENT OR BY THE PARTIES OR BY  
20 GOING TO THE JUDGE TO SAY, NO, NOT THIS CASE. AS FAR AS  
21 AUTHORITY IS CONCERNED, YOU HAVE NO PROBLEM WITH THE RULE  
22 LANGUAGE?

23 MR. VALEN: THAT'S RIGHT.

24 PROFESSOR ROWE, JR.: ALL YOU WANT IS MORE  
25 EMPHASIS AND GUIDANCE IN THE NOTES?

1 MR. VALEN: EXACTLY. I WANT TO COMMEND THE  
2 COMMITTEE OF THE FACT THAT THEY ARE LISTENING AND HAVE  
3 DONE SUCH A GOOD JOB THEY ARE MAKING THIS AVAILABLE FOR  
4 EVERYONE TO SPEAK.

5 (RECESS.)

6 JUDGE NIEMEYER: LET'S COME TO ORDER. I APOLOGIZE  
7 THAT I TOOK A LITTLE LONGER. THE YOUNGER LAWYERS COMING  
8 ALONG WHO WILL INHERIT THE PODIUM AND POSITIONS AND ALL  
9 OUR OTHER POSITIONS ARE PROBABLY MORE IMPORTANT.

10 JUDGE PANNER, IT IS AWFULLY NICE FOR YOU TO COME  
11 DOWN AND IT IS A PRIVILEGE TO HAVE YOU TESTIFY BEFORE US.  
12 WE ARE ANXIOUS TO HEAR WHAT YOU HAVE TO SAY AND HOPE WE  
13 CAN PERSUADE YOU TO SOME OF WHAT WE ARE DOING, BUT YOU  
14 HAVE A PROBLEM, OF COURSE, THIS IS A GOOD TIME TO GET IT  
15 OUT AND SEE IF WE CAN ADDRESS IT.

16 JUDGE PANNER: YOU NOTICE I GOT HERE BEFORE YOU  
17 CALLED ME. I LEARNED AS A LAWYER YOU TAKE THE WITNESS  
18 STAND DURING THE RECESS BEFORE THE JUDGE GETS BACK ON THE  
19 BENCH.

20 MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, IT IS A  
21 GREAT HONOR AND PRIVILEGE FOR ME TO BE HERE. I ENVY ALL  
22 OF YOU. AS I WAS TALKING TO LEE A FEW MINUTES AGO, IT IS  
23 A GREAT PRIVILEGE FOR YOU TO BE INVOLVED IN THIS EXCITING  
24 VENTURE, BECAUSE THIS IS REALLY THE GUTS OF TRIAL  
25 PRACTICE. I'M NOT SURE THAT YOU HAVE COME UP WITH ALL THE

1 RIGHT SOLUTIONS, BUT I AM SURE YOU HAVE COME UP WITH SOME  
2 GOOD ONES AND I HOPE TO PERSUADE YOU IN ONE AREA,  
3 PARTICULARLY.

4 FOR THE RECORD, MY NAME IS OWEN PANNER. I WAS A  
5 TRIAL LAWYER FOR ABOUT 30 YEARS, HAVE BEEN A DISTRICT  
6 JUDGE SINCE 1980. I AM NOW A SENIOR JUDGE WITH A VERY  
7 ACTIVE CASE LOAD. I HAVE THE PRIVILEGE BOTH AS A LAWYER  
8 AND AS A TRIAL JUDGE --

9 JUDGE NIEMEYER: THAT ALL ADDS UP TO MORE YEARS  
10 THAN YOU SHOW.

11 MR. PANNER: IT'S TRUE, I'M '74, AND I AM VERY  
12 FORTUNATE TO STILL BE HERE AND ABLE TALK TO YOU.

13 IN THE PRACTICE IN TRYING CASES AS A LAWYER AND AS  
14 A JUDGE THROUGHOUT THE WEST, I HAVE HAD A VERY STRONG  
15 FEELING ABOUT DISCOVERY IN FEDERAL COURT. I AM SATISFIED  
16 THAT THE CHANGES THAT YOU HAVE SUGGESTED TO LIMIT THE  
17 DISCOVERY TO TAKE OUT SUBJECT MATTER WILL HELP  
18 PSYCHOLOGICALLY, IF FOR NO OTHER REASON.

19 FOR THE SAME REASON I LIKE THE CHANGES THAT YOU  
20 HAVE MADE TO 26(B), REFERRING TO IT MORE AND EMPHASIZING.  
21 I HAD TO WONDER ABOUT MR. PICKLE'S RECOLLECTIONS, BECAUSE  
22 I HAD SHELL IN MY COURT ON BIG CASES AND I DON'T REMEMBER  
23 THEM ASKING FOR 26(B) RELIEF. IN FACT, IN EVERY SPEECH I  
24 MAKE TO YOUNG LAWYERS OR BARS, I TALK ABOUT 26(B) AND  
25 SELDOM GET ANYBODY TO BRING IT TO ME.

1 BY THE SAME TOKEN, I LIKE 30(B). I LIKE THE  
2 SEVEN-HOUR RULE AND I THINK YOU SHOULD STAY WITH IT. I  
3 THINK YOU SHOULD IGNORE CALIFORNIA LAWYERS BECAUSE THEIR  
4 SYSTEM IS TOTALLY DIFFERENT THAN ANYPLACE ELSE IN THE  
5 WORLD. I LOVE CALIFORNIA, AND DAVID WILL PROBABLY KILL ME  
6 FOR THIS, BUT I HAVE TRIED MURDER CASES IN FEDERAL COURT  
7 IN CALIFORNIA AS WELL AS CIVIL CASES. IT IS A DIFFERENT  
8 CULTURE COMPLETELY THAN AT LEAST THE OTHER AREAS WHERE I  
9 HAVE BEEN.

10 I AM SYMPATHETIC TO THE YOUNG LADY WHO SPOKE HERE,  
11 BUT I CAN'T IMAGINE GOING ON FOR DAYS AND DAYS AND DAYS IN  
12 A DEPOSITION. AS A LAWYER I APPEARED BEFORE JUDGE SPENCER  
13 WILLIAMS THREE TIMES IN A 30-DAY DEPOSITION I WAS BEING  
14 SUBJECTED TO. AND JUDGE WILLIAMS VERY KINDLY SAID, MR.  
15 PANNER, THIS IS FEDERAL COURT, WE'LL TAKE THIS UP IN THE  
16 FORM OF SANCTIONS LATER IF THEY ARE REALLY HARASSING YOU,  
17 SO ON AND ON IT GOES. I THINK IT IS A GOOD RULE, AND I  
18 THINK A LAWYER OUGHT TO HAVE TO EXPLAIN WHEN HE WANTS TO  
19 GO BEYOND SEVEN HOURS.

20 LET'S TALK ABOUT THE THINGS WE DON'T AGREE WITH.  
21 IT SEEMS TO ME THAT THE TWO THINGS THAT YOU ARE REALLY  
22 AFTER HERE ARE UNIFORMITY AND INITIAL DISCLOSURE  
23 UNIFORMITY. WE IN OREGON ARE OPPOSED TO THE ELIMINATION  
24 OF THE LOCAL OPTION, THE LOCAL RULING, BECAUSE OF THE FACT  
25 THAT WE DO NOT BELIEVE IT HAS HAD ENOUGH TIME FOR THE BAR

1 AND DISTRICT JUDGES AND APPELLATE JUDGES EVEN TO DETERMINE  
2 WHETHER IT IS A GOOD RULE OR NOT. UNIFORMITY IS  
3 WONDERFUL, BUT NOT UNLESS IT IS A GOOD RULE, AND WE ARE  
4 NOT SATISFIED THAT THE INITIAL DISCLOSURE CONCEPT IS  
5 CORRECT.

6 JUDGE NIEMEYER: MAY I ASK, IF WE CAME UP WITH A  
7 RULE THAT WAS THE GOOD RULE, DO YOU THINK THAT THE  
8 DISTRICT JUDGES WOULD SUPPORT THE UNIFORMITY? I SAY A  
9 LITTLE BIT OF WHAT THE GOOD RULE IS, OF COURSE, EVERYBODY  
10 MIGHT DISAGREE AND WE MAY END UP WITH 94 DIFFERENT RULES.  
11 I GUESS MY QUESTION IS TO WHAT EXTENT DO YOU THINK THE  
12 DISTRICT JUDGES ARE WILLING TO YIELD? AND THAT IS REALLY  
13 WHAT IT COMES DOWN TO, YIELDING A LITTLE BIT OF THE  
14 CONTROL, IN THIS RESPECT, IN FAVOR OF SOME NATIONAL  
15 INTEREST, RECOGNIZING THAT WE ARE REALLY APPLYING THIS  
16 PROCEDURE TO A UNIFORM NATIONAL SUBSTANTIVE LAW.

17 MR. PANNER: I THINK DISTRICT JUDGES MAY NOT  
18 VIOLENTLY SUPPORT WHAT YOU DO, BUT THEY WON'T OPPOSE IT IF  
19 IT IS A GOOD RULE. ONE OF THE PROBLEMS THAT WE ARE HAVING  
20 IS GETTING THE DISTRICT JUDGES TO SPEAK UP. I THINK THIS  
21 IS SO IMPORTANT THAT -- YOU MAY HAVE HEARD, I WROTE TO  
22 QUITE A FEW DISTRICT JUDGES TO URGE THEM TO TAKE A  
23 POSITION, BECAUSE I THINK ONE WAY OR ANOTHER THEY SHOULD  
24 DO SO. IF THEY ARE IN FAVOR OF IT AND THE LAWYERS ARE IN  
25 FAVOR OF IT, THEN IT IS WONDERFUL. BUT ONLY ABOUT 50

1 PERCENT OF THE COURTS HAVE TRIED IT, AND MOST OF THEM HAVE  
2 HAD LOCAL OPTIONS. 83 PERCENT OF A SURVEY OF PEOPLE,  
3 LAWYERS IN THE FEDERAL JUDICIAL SURVEY, SAID THAT THEY  
4 DIDN'T THINK IT WOULD SAVE ANY MONEY. SO WE ARE NOT  
5 SATISFIED YET THAT INITIAL DISCLOSURE IS THE RIGHT ANSWER.  
6 AND I THINK A LITTLE MORE OF THE GOOD EXPERIMENTATION THAT  
7 IS GOING ON SHOULD BE ALLOWED TO CONTINUE A LITTLE BIT  
8 LONGER.

9 LET ME TELL YOU THE TWO REASONS I THINK THAT THE  
10 INITIAL DISCLOSURE ISN'T GOOD. FIRST, ONE OF THE THINGS  
11 THAT STUDY SHOWED IS THAT LAWYERS WANT ACCESS TO FEDERAL  
12 JUDGES. CONTRARY TO ANDREW'S POINT A LITTLE BIT AGO, A  
13 LOT OF LAWYERS THROUGHOUT THE COUNTRY DO NOT GET GOOD  
14 ACCESS TO FEDERAL JUDGES. TALKING WITH LEE AND OTHER  
15 JUDGES THAT DO, AND I KNOW THERE ARE JUDGES THAT ARE ON  
16 TOP OF DISCOVERY, BUT THERE ARE A LOT OF --

17 JUDGE NIEMEYER: ANDREW PROBABLY HAS A SPECIAL  
18 PRACTICE, BECAUSE MOST OF THE LAWYERS THAT I'VE HEARD WERE  
19 COMPLAINING THEY COULDN'T GET --

20 MR. PANNER: I THINK THAT IS RIGHT. IT IS VERY  
21 DIFFICULT IN MANY AREAS. I JUST CAME BACK FROM A WEEK'S  
22 STAY IN THE EIGHTH CIRCUIT IN ST. LOUIS AND MET WITH  
23 AMERICAN COLLEGE FRIENDS AND FELLOWS THERE. THEY CAN'T  
24 GET ACCESS THEY SAY TO FEDERAL JUDGES ON DISCOVERY  
25 MATTERS. AND THAT IS IMPORTANT. SO WHATEVER WILL BRING

1 THAT ATTENTION EARLIER IS GOOD. I THINK RULE 16  
2 CONFERENCES OUGHT TO BE EARLIER. IN OUR DISTRICT, AS ONE  
3 OF MY GOOD ASSOCIATES, JIM HILLER, WILL EXPLAIN TO YOU IN  
4 A FEW MINUTES, AND I HAVE ASKED THAT MAYBE HE COULD COME  
5 BEHIND ME SO THAT I COULD CATCH A PLANE BACK AND STILL  
6 HEAR HIM, IF THAT'S POSSIBLE. HE'LL HAVE WITH HIM ONE OF  
7 THE PROFESSORS FROM THE UNIVERSITY OF OREGON LAW SCHOOL,  
8 LISA KLOPPENBERG.

9 WE DON'T HAVE A PROBLEM IN OREGON. OUR STUDIES  
10 INDICATE THAT ALMOST 60 PERCENT OF FEDERAL CASES HAVE NO  
11 DISCOVERY ISSUES EVER, AT ALL, FROM START TO FINISH. I  
12 THINK THE REASON FOR THAT IS EARLY ACCESS.

13 I SEE THIS INITIAL DISCLOSURE AS DELAYING ACCESS.  
14 GETTING LAWYERS TOGETHER EVEN ON TELEPHONE CONFERENCES,  
15 GETTING THEM TO AGREE, GETTING THEM TO MEET, GETTING THEM  
16 TO EITHER AGREE OR DISAGREE WITH WHAT IS GOING TO BE  
17 DISCLOSED AND WHAT ISN'T, SUBSTANTIALLY TAKES A LOT OF  
18 TIME. THEN YOU HAVE A HEARING. YOU HAVE A MOTION BY ONE  
19 SIDE IN COMPLICATED CASES TO DO AWAY WITH INITIAL  
20 DISCLOSURE IN THIS PARTICULAR CASE. I DON'T SEE THE  
21 STANDARDS THAT ARE GOING TO TELL A JUDGE WHEN AND UNDER  
22 WHAT CIRCUMSTANCES THAT JUDGE SHOULD ELIMINATE INITIAL  
23 DISCLOSURE.

24 IN ANY EVENT, YOU ARE A LONG WAYS DOWN THE ROAD,  
25 AND, MEANWHILE, ALL DISCOVERY IS STOPPED, WHETHER IT IS A

1 MOTION FOR PRELIMINARY INJUNCTION, AN URGENT MATTER,  
2 WHATEVER. OF COURSE, YOU HAVE WRITTEN IN AS MANY RELIEFS  
3 AS YOU CAN, BUT I REALLY DON'T SEE ANYTHING THAT  
4 ENCOURAGES OR EVEN ALLOWS LAWYERS TO GO TO A COURT BEFORE  
5 THE SUB F CONFERENCE. IT MAY BE THERE, BUT I HAVEN'T BEEN  
6 ABLE TO FIND IT. I THINK THE INTERPRETATION WILL BE WE  
7 HAVE TO GO THROUGH THIS PROCESS BEFORE WE CAN GET TO A  
8 JUDGE ON PROBLEMS THAT ARE RATHER SIGNIFICANT.

9           WHEN YOU GET THERE, WHEN THEY GET TO THE  
10 CONFERENCE, THEY HAVE VERY DIFFICULT JOBS IN DECIDING WHAT  
11 TO INITIALLY DISCLOSE. KEEP IN MIND THAT WE HAVE NOTICE  
12 PLEADING, THAT WONDERFUL THING THAT KEEPS US ALL BUSY,  
13 NOTICE PLEADING. EVEN THE PLAINTIFF MAY NOT KNOW FOR SURE  
14 WHEN THEY FILE A CASE IN FEDERAL COURT UNDER OUR EXISTING  
15 CASE LAW WHERE THEIR CASE IS GOING. THEY HAVE TO DECIDE,  
16 IS IT IMPEACHMENT EVIDENCE THAT I DON'T HAVE TO DISCLOSE?  
17 WHAT IS THE EVIDENCE THAT RELATES TO MY CLAIMS AND  
18 DEFENSES UNDER YOUR AMENDMENT? FIRST, I'M IN FAVOR OF THE  
19 AMENDMENT. IF WE HAVE TO HAVE INITIAL DISCLOSURE, LET'S  
20 PUT IT THAT WAY, BUT I'M NOT SURE THAT SOLVES THE PROBLEM.  
21 WITH MANY EXHIBITS IN THE COMPLEX CASES, WHICH OF THE  
22 THOUSANDS OF EXHIBITS DO I TURN OVER? IF I MAKE A BAD  
23 CHOICE, IS SOME JUDGE LATER, IN LIGHT OF HINDSIGHT, GOING  
24 TO SAY, WELL, THAT WAS A STUPID THING, YOU CAN'T USE THAT  
25 EXHIBIT IN EVIDENCE, YOU SHOULD BE SANCTIONED FOR THAT.

1 THESE ARE RATHER SERIOUS PROBLEMS. I FIND NOTHING IN THE  
2 RULES THAT ALLOWS SUPPLEMENTING THE DISCLOSURES UNTIL THE  
3 PRETRIAL MATERIALS ARE DUE.

4 JUDGE VINSON: JUDGE PANNER, YOU HAVE NOT HAD ANY  
5 EXPERIENCE WITH AN OPT-IN APPLICATION OF RULE 26?

6 MR. PANNER: WE HAVE OPTED OUT. BUT I MUST SAY,  
7 YOUR HONOR, I HAVE TRIED CASES AS A JUDGE IN ABOUT THREE  
8 DISTRICTS NOW WHERE THEY HAVE OPTED IN.

9 JUDGE VINSON: WELL, I JUST WANTED TO RELATE TO  
10 YOU MY EXPERIENCE. WHEN WE OPTED IN, I EXPECTED TO HAVE A  
11 LOT OF COMPLAINTS FROM ATTORNEYS ABOUT THE INITIAL  
12 DISCLOSURE REQUIREMENT. I HAVE ASKED ATTORNEYS, I HAVE  
13 HAD NOT ONE COMPLAINT, NOT ONE COMPLAINT IN FOUR YEARS NOW  
14 WE HAVE BEEN UNDER OPT-IN. EVERYBODY WHO HAS USED IT HAS  
15 NOTHING BUT COMPLIMENTARY THINGS TO SAY ABOUT IT.

16 MR. PANNER: WELL, THAT'S GOOD. I'M NOT  
17 ABSOLUTELY OPPOSED. I JUST DON'T THINK IT HAS HAD QUITE  
18 ENOUGH STUDY. I DON'T THINK THERE HAS BEEN ENOUGH  
19 ACTIVITY. I THINK WE NEED TO KNOW WHETHER YOUR COURT, THE  
20 CAUSE OF THAT, HAS PICKED UP SPEED OR LOST SPEED. I THINK  
21 WE NEED SOME COMPARISONS, FOR EXAMPLE, BETWEEN THE COURTS  
22 THAT HAVE OPTED OUT AND THOSE THAT HAVE OPTED IN. WE  
23 DON'T HAVE THOSE NOW.

24 JUDGE VINSON: THE INTERPLAY IS RULE 16. I  
25 PERSONALLY FEEL THAT RULE 16 IN ITS PRESENT FORM IS AN

1 OBSTACLE TO THE PROMPT AND ECONOMICAL DISPOSITION OF CASES  
2 BECAUSE IT IMPOSES A DELAY. THAT'S WHY OUR COURT HAS AN  
3 INITIAL SCHEDULING ORDER TO GET PEOPLE INVOLVED IN THIS  
4 PROCESS WITHOUT HAVING TO WAIT. FIRST, WE HAVE TO TALK.

5 JUDGE PANNER: THAT IS EXACTLY WHAT WE DO IN  
6 OREGON. WHEN A CASE IS FILED, THEY GET A DISCOVERY  
7 DEADLINE AND MOTIONS DEADLINE AND THE WHOLE WORKS. AND  
8 THEY ARE ENCOURAGED IF THEY HAVE A PROBLEM TO LET US KNOW  
9 AND BRING IT TO US, OTHERWISE WE WON'T BOTHER. AND YOU  
10 ARE GOING TO HEAR THAT EVERY BAR ASSOCIATION, PLAINTIFFS  
11 AND DEFENDANTS, IN OREGON, IS SUPPORTING THAT APPROACH.

12 JUDGE VINSON: I THINK WE ARE SAYING THE SAME  
13 THING THERE. BUT GETTING BACK TO THE AUTOMATIC INITIAL  
14 DISCLOSURE. AS A COMMITTEE, WE WERE FACED, NUMBER ONE,  
15 WITH A NEED TO GET UNIFORMITY, WHATEVER THAT MAY BE. THE  
16 ALTERNATIVES TO GET UNIFORMITY WOULD BE TO GO BACK TO THE  
17 ORIGINAL NO-DISCLOSURE REQUIREMENT OR TO IMPOSE THE FULL  
18 DISCLOSURE THAT WE HAVE FOR SOME INTERMEDIATE GROUND. AND  
19 THE INTERMEDIATE GROUND SEEMED TO BE MUCH PREFERABLE TO  
20 ANY OTHER CHOICE. YOU ARE OPPOSED TO ANY OF THAT, AS I  
21 UNDERSTAND YOUR LETTER.

22 MR. PANNER: LET ME SAY I DON'T THINK YOU CAN  
23 ACHIEVE UNIFORMITY IN THIS AREA. EVEN IF YOU DO THIS IT  
24 WILL NOT RESULT IN UNIFORMITY BECAUSE YOU ARE GOING TO GET  
25 DIFFERENT INTERPRETATIONS BY THE INDIVIDUAL JUDGES AS TO

1 WHETHER OR NOT THERE SHOULD BE AN ISSUE OF DISCLOSURE WHEN  
2 ONE SIDE OBJECTS. IT WILL WORK IN ROUTINE CASES, BUT IN  
3 COMPLEX CASES, MY EXPERIENCE HAS BEEN THAT THERE ARE  
4 DIFFERENT REASONS FOR NOT WANTING INITIAL DISCLOSURE. YOU  
5 ARE GOING GET DIFFERENT RULINGS BY DIFFERENT JUDGES. YOU  
6 ARE GOING TO GET DIFFERENT RULINGS BY DIFFERENT JUDGES ON  
7 WHAT IS THE DIFFERENCE BETWEEN SUBJECT MATTER AND EVIDENCE  
8 SUPPORTING YOUR CLAIMS AND DEFENSES. I'M JUST AFRAID THAT  
9 UNIFORMITY IS A WONDERFUL CONCEPT, LIKE MOTHERHOOD, BUT  
10 I'M NOT SURE IT CAN BE ACHIEVED.

11 JUDGE NIEMEYER: I WISH IT WERE THAT EASY.

12 JUDGE PANNER: I'M VERY CONCERNED THAT IN AN  
13 EFFORT TO GET UNIFORMITY, WE ARE RUSHING TO JUDGMENT.

14 JUDGE NIEMEYER: LET ME SUGGEST, WE ARE GOING TO  
15 TRY TO SEND YOU A LETTER WHICH JUDGE LEVI IS GOING TO  
16 INITIATE. HE IS THE CHAIR OF OUR DISCOVERY COMMITTEE. WE  
17 ARE GOING TO TRY TO INITIATE A LETTER TO YOU THAT GIVES  
18 YOU SOME MORE OF WHAT PERSUADED US AND SEE HOW THAT SITS  
19 WITH YOU. I HOPE WE CAN GET SOMETHING TO YOU SHORTLY ON  
20 THAT. WE GENUINELY UNDERSTAND YOUR CONCERNS, BECAUSE I  
21 THINK IT HAS NOT BEEN EXPRESSED NOT ONLY BY YOU, BUT BY  
22 OTHERS. THE QUESTION THE COMMITTEE IS FACED WITH IS A  
23 BALANCE. IT IS A TERRIBLY DIFFICULT BALANCE BECAUSE THE  
24 DISTRICT JUDGES ARE DOING SUCH A GREAT JOB. AND WHEN  
25 SOMETHING WORKS, YOU DON'T WANT TO FIDDLE WITH IT. IT

1 SEEMS TO ME THE OTHER SIDE OF THE COIN, IS AT SOME LEVEL,  
2 SHOULD WE PRESS FOR A NATIONAL UNIFORMITY. IT IS A  
3 DIFFICULT PROBLEM, AS YOU KNOW. I KNOW YOU ARE WILLING TO  
4 LISTEN TO US AND WE ARE WILLING TO LISTEN TO YOU, AND  
5 ACTUALLY, MAYBE WE CAN MAKE SOME PROGRESS IN THIS. I  
6 REALLY DO APPRECIATE YOUR COMING DOWN TO TESTIFY HERE AND  
7 IT IS A PRIVILEGE, OF COURSE, TO HAVE YOU HERE.

8 JUDGE PANNER: I HAVE THE HIGHEST CONFIDENCE IN  
9 JUDGE LEVI. HE IS AN EXCELLENT STUDENT AND GREAT JUDGE,  
10 AND I WILL BE INTERESTING IN GETTING.

11 THERE ARE A COUPLE OF OTHER THINGS I WOULD LIKE TO  
12 MENTION THAT YOU MAY THINK ABOUT, IF I CAN. FIRST, I  
13 DON'T SEE WHAT HAPPENS WHEN THE PLAINTIFF FILES A  
14 COMPLAINT, NOTICE PLEADING. DO THEY RESPOND  
15 SIMULTANEOUSLY WITH THEIR INITIAL DISCLOSURES WHEN THE  
16 DEFENDANT MAY NOT KNOW WHAT IS GOING ON WITH THE PLAINTIFF  
17 AND THE PLAINTIFF'S COMPLAINT, MAY NOT FULLY UNDERSTAND  
18 IT? ARE THEY THEN BARRED LATER? OR IF THE DEFENDANT  
19 BRINGS A CROSS-CLAIM, IS THERE ANOTHER OPPORTUNITY FOR THE  
20 PLAINTIFF TO RESPOND WITH INITIAL DISCLOSURE? THESE ARE  
21 PRACTICAL PROBLEMS THAT I SEE THAT UNDOUBTEDLY CAN BE  
22 RESOLVED, BUT I THINK IT JUST SEEMS TO ME THERE ARE GOING  
23 TO BE A LOT OF OTHER DISPUTES.

24 MR. SCHEINDLIN: I JUST WANTED TO HEAR YOUR  
25 EXPERIENCE OR WHAT YOUR OPINION IS BASED ON YOU EXPERIENCE

1 ABOUT THE TIME LIMITATION ON DEPOSITIONS. I THINK YOU  
2 SAID SOMETHING ABOUT THAT INITIALLY AND I MISSED IT.

3 JUDGE PANNER: WE ARE VERY MUCH IN FAVOR OF THAT  
4 TIME LIMITATION. BUT AGAIN, WE ARE DIFFERENT IN OREGON.  
5 WE JUST DON'T HAVE THOSE KIND OF DEPOSITIONS. WE DON'T  
6 ALLOW EXPERT DEPOSITIONS UNTIL AFTER THE EXPERT HAS GIVEN  
7 A DETAILED REPORT IN ACCORDANCE WITH THE RULES, WHICH  
8 DOESN'T LEAVE A LOT OF ROOM FOR SPENDING TWO OR THREE DAYS  
9 ON QUALIFICATIONS BECAUSE THEY ARE ALL SET FORTH. AND SO  
10 I THINK IT IS GREAT. I THINK THERE SHOULD BE EXCEPTIONS  
11 ON OCCASION, BUT YOU OUGHT TO ASK THE COURT FOR IT.

12 MR. SCHEINDLIN: UNDER ANY OF YOUR LOCAL RULINGS,  
13 DO YOU PRESENTLY HAVE ANY TIME LIMIT?

14 JUDGE PANNER: NO, WE DON'T HAVE. THEY ARE MOSTLY  
15 JUDGE LIMITATIONS.

16 PROFESSOR ROWE, JR.: I THOUGHT YOU MIGHT FIND IT  
17 HELPFUL TO HEAR JUST A QUICK COUPLE OF OBSERVATIONS ON THE  
18 POINT ABOUT WHETHER THERE SHOULD BE MORE EXPERIMENTATION,  
19 MORE TIME SO THAT YOU AND YOUR FELLOW JUDGES HAVE SOME  
20 IDEA WHERE THIS COMMITTEE IS COMING IN PUTTING FORWARD A  
21 PROPOSAL FOR A UNIFORM RULE NOW.

22 THE CIVIL JUSTICE REFORM ACT OF 1990 DID SET UP AN  
23 EXPERIMENTAL PERIOD AUTHORIZING STUDIES, QUITE LARGE  
24 STUDIES. THEY WERE CONDUCTED. THE REPORTS WERE THEN FED  
25 INTO OUR PROCESS, AND ALSO, OF COURSE, THE AUTHORIZATION

1 FOR OPT-OUTS IN 1993 IN THESE RULES WAS PARTLY BECAUSE OF  
2 THE SENSE THAT IT HAD TO BE DONE TO MAKE THINGS COMPATIBLE  
3 WITH THE CIVIL JUSTICE REFORM ACT, BUT THAT THE IDEA WAS  
4 NEVER GOING TO BE PERMANENT TO CREATE THE DEGREE OF  
5 AUTHORIZATION, SO THAT THERE HAVE BEEN STUDIES. THERE ARE  
6 NOT, AS FAR AS I KNOW, PLANS FOR FURTHER STUDIES IN  
7 PROGRESS. THE CIVIL JUSTICE REFORM ACT HAS SUNSETTED, AND  
8 SO HERE WE ARE IN A SITUATION IN WHICH THE JUSTIFICATION  
9 FOR THE NATIONAL -- FOR THE NON-UNIFORMITY IN MANY  
10 RESPECTS HAS DISAPPEARED AND THERE ARE NOT OTHERS IN  
11 TRAINING AS FAR AS I KNOW THAT IT WOULD BE QUITE A LONG  
12 PROCESS WITH QUITE BIT OF MAINTENANCE WITH FURTHER  
13 NONCONFORMITY WITHOUT PRESENT PLANS OR MAJOR STUDIES TO  
14 TAKE ADVANTAGE OF FURTHER KNOWLEDGE. SO THAT'S SOME OF  
15 WHERE THIS COMMITTEE IS COMING FROM.

16 WE ARE NOT JUST PIG-HEADED, WE ARE GOING TO HAVE  
17 UNIFORMITY AT ALL COSTS. WE MAY STILL SEEM PIG-HEADED. I  
18 THOUGHT THAT WOULD BE HELPFUL FOR YOU TO UNDERSTAND AND  
19 PERHAPS YOUR FELLOW JUDGES ABOUT THE TIME AND THE REASON  
20 FOR GOING --

21 JUDGE PANNER: I DO APPRECIATE THAT, AND I  
22 APPRECIATE THE PROBLEMS THAT YOU HAVE. IT IS OBVIOUS IN  
23 READING JUSTICE SCALIA'S OPINION AND ALL THE BACKGROUND  
24 MATERIALS, AS I HAVE DONE, IT IS A MAJOR PROBLEM.

25 I DON'T SPEAK FROM THE STANDPOINT OF ANYTHING

1 CHANGING IN OUR COURT, BECAUSE IT REALLY IS NOT GOING TO  
2 CHANGE. WE START IMMEDIATELY WITH EVERY CASE, WITH THE  
3 JUDGE INVOLVED IMMEDIATELY. IN FACT, MY INSTRUCTIONS TO  
4 MOST OF OUR JUDGES ARE AS SOON AS THERE IS A RESPONSE BY A  
5 DEFENDANT TO A COMPLAINT, SET UP A TELEPHONE CONFERENCE  
6 CALL AND START RIGHT AWAY TO FIND OUT THE NATURE OF THE  
7 CASE. AT THAT TIME WE WILL ENTER A SPECIAL ORDER, ONE WAY  
8 OR ANOTHER.

9 SO WHAT BRINGS ME HERE ARE MY INSTINCTS AS A TRIAL  
10 LAWYER FOR A LOT OF YEARS. I'M SURPRISED THE LAWYERS  
11 SUPPORT IT AS MUCH AS THEY HAVE HERE TODAY. THANK YOU  
12 AGAIN, VERY MUCH.

13 JUDGE NIEMEYER: THANK YOU.

14 MR. HILLER, DID YOU WANT TO ADD SOMETHING?

15 MR. HILLER: I WANT TO THANK YOU FOR ALLOWING ME  
16 TO TESTIFY HERE TODAY. I WILL GIVE YOU A LITTLE BIT OF  
17 WHY I AM HERE AND MY BACKGROUND. I HAVE BEEN A TRIAL  
18 LAWYER FOR 20 YEARS. I HAVE A GENERAL CIVIL LITIGATION  
19 PRACTICE, PROBABLY ABOUT 50 PERCENT OF IT IS IN FEDERAL  
20 COURT AND 50 PERCENT OF IT IS IN STATE COURT, ALL IN  
21 OREGON.

22 I COME HERE TODAY MORE AS A REPRESENTATIVE. I AM  
23 CURRENTLY THE PRESIDENT OF THE OREGON CHAPTER OF THE  
24 FEDERAL BAR ASSOCIATION, AND I AM ALSO A MEMBER OF OUR  
25 DISTRICT OF OREGON LOCAL RULES COMMITTEE. I USED TO BE

1 CHAIRMAN OF IT, NOW I'M JUST A MEMBER OF IT. I THINK  
2 THINGS MAYBE ARE DIFFERENT IN OREGON, AND I'M HERE TO --

3 JUDGE NIEMEYER: DIDN'T THEY HAVE VISA REQUIREMENT  
4 TO GET IN THERE?

5 MR. HILLER: I AM HERE TO ARGUE ABOUT ONE THING  
6 ONLY AND THAT IS 26(A)(1) AND THE ELIMINATION OF THE  
7 OPT-OUT. LET ME TELL YOU HOW THINGS WORK IN OREGON, JUST  
8 BRIEFLY, AND I THINK JUDGE PANNER ALLUDED TO THEM. WHEN A  
9 CASE IS FILED, WE GET AN INITIAL SCHEDULING ORDER, AS I  
10 HEARD HAPPENS IN OTHER DISTRICTS. THAT INITIAL SCHEDULING  
11 ORDER ACTUALLY SAYS THAT DISCOVERY IS TO BE COMPLETED IN  
12 120 DAYS. UNDER THIS DISCLOSURE REQUIREMENT, WE WOULD  
13 PROBABLY BE 120 DAYS BEFORE WE HAD OUR CONFERENCE. NOW,  
14 FREQUENTLY AND OFTEN, THAT 120 DAYS HAS TO BE EXTENDED.  
15 BUT THERE IS A PUSH RIGHT FROM THE START TO GET TO IT AND  
16 LET'S GET THIS CASE MOVING. IF I HAVE A PROBLEM AND NEED  
17 TO SCHEDULE A MOTION, AND PARTICULARLY IF IT IS AN  
18 IMPORTANT MOTION, I CAN ALMOST ALWAYS GET IT SCHEDULED  
19 WITHIN SEVEN DAYS. IF I AM IN THE MIDDLE OF A DEPOSITION  
20 AND WE HAVE AN ISSUE IN THE DEPOSITION, I CAN PROBABLY GET  
21 AN ANSWER IN SEVEN MINUTES.

22 WE HAVE A LOCAL RULE THAT ENCOURAGES LAWYERS TO  
23 MAKE TELEPHONE CONFERENCES WHEN THEY HAVE DISCOVERY  
24 DISPUTES IN DEPOSITIONS. WE MOVE THINGS QUICKLY. THE  
25 SYSTEM HAS WORKED QUITE WELL AND I THINK IT IS BECAUSE --

1 AND AS MENTIONED IN SOME OF THE MATERIAL -- THE JUDGES  
2 MAKE THEMSELVES AVAILABLE AND GET INVOLVED FROM DAY ONE.

3 JUDGE SCHEINDLIN: YOU ARE SAYING YOU DON'T HAVE  
4 AN ACCESS DROP, YOU DON'T NEED THIS RULE TO GIVE YOU MORE  
5 ACCESS?

6 MR. HILLER: EXACTLY. THE COMPLAINT, IF ANYTHING,  
7 FROM PRACTITIONERS, IS WE CONFERENCE THINGS TO DEATH.

8 JUDGE SCHEINDLIN: WHAT ABOUT AROUND THE COUNTRY,  
9 DO YOU HAVE ANY PRACTICE IN OTHER DISTRICTS?

10 MR. HILLER: I DO NOT.

11 SO WE DON'T HAVE AN ACCESS PROBLEM. WE DON'T EVEN  
12 HAVE MANY DISCOVERY DISPUTES, IT DOESN'T SEEM. TO THE  
13 EXTENT WE DO, WE GET AN ANSWER QUICKLY. WE HAVE ALWAYS  
14 HAD, BY THE WAY, PRETRIAL DISCLOSURES THAT ARE NOW  
15 REQUIRED BY 26(A)(3). WE HAVE HAD THOSE FOR YEARS AND  
16 YEARS, SO WE GET FULL DISCLOSURE BEFORE WE GET TO TRIAL.  
17 BY THE WAY, MOST CASES GET TO TRIAL WITHIN 12 MONTHS, I  
18 WOULD SAY 75 PERCENT OF THEM, AND PROBABLY '95 PERCENT OF  
19 THEM GET TO TRIAL WITHIN 18 MONTHS. I AM GUESSING AT  
20 THOSE NUMBERS, BUT I THINK THEY ARE FAIRLY ACCURATE.

21 IN SHORT, THE SYSTEM WORKS. IN 1993 THERE WAS  
22 THIS PROVISION FOR AUTOMATIC DISCLOSURE. EVERYBODY,  
23 NEARLY EVERYBODY, EVERY JUDGE, EVERY PRACTITIONER THOUGHT  
24 THAT WAS A BAD IDEA. THINGS WERE WORKING WELL IN OREGON,  
25 WHY DO WE NEED THIS? ALL WE COULD ENVISION WAS ANOTHER

1 LAYER OF DISCOVERY, WE WOULD HAVE TO MEET AND CONFER, WHAT  
2 IS WORKING NOW --

3 JUDGE NIEMEYER: THE EASTERN DISTRICT OF  
4 PENNSYLVANIA HAD THE SAME THOUGHTS ABOUT IT, AND EVERYBODY  
5 THAT I'VE TALKED TO SAYS DISCLOSURE IS TERRIBLE. BUT THEN  
6 YOU TALK TO THE PEOPLE WHO ARE ACTUALLY DOING IT, I THINK  
7 THE NUMBER I SEEM TO REMEMBER SOMETHING LIKE 83 OR 87  
8 PERCENT OF THE BAR IN PHILADELPHIA, THINK IT IS TERRIFIC.  
9 WE HAVE NOT HAD ANYBODY THAT SAYS IT IS A BAD THING. ALL  
10 THE FEARS THAT ARE RAISED ARE USUALLY BY PEOPLE WHO  
11 HAVEN'T PRACTICED UNDER IT.

12 MR. HILLER: IT COULD BE.

13 JUDGE NIEMEYER: MY GUESS IS THAT WHETHER THERE IS  
14 ANY OPPORTUNITY TO HAVE ONE JUDGE, JUDGE PANNER MAYBE, BE  
15 A PILOT AND TRY IT JUST ONCE AND SEE WHAT HAPPENS.

16 MR. HILLER: I THINK I KNOW WHAT WOULD HAPPEN.

17 JUDGE NIEMEYER: HE HAS ALREADY SAID NO.

18 MR. HILLER: I KNOW WHAT WOULD HAPPEN UNDER THE  
19 CURRENT RULE THAT YOU HAVE GOT OUT HERE, EVERYONE WOULD  
20 STIPULATE AROUND IT. YOU WILL HAVE SUCH LITTLE  
21 PARTICIPATION IN OREGON BECAUSE --

22 JUDGE LEVI: I'M FROM THE EASTERN DISTRICT OF  
23 CALIFORNIA WHICH SHARES A BORDER WITH THE DISTRICT OF  
24 OREGON AND SHARES A GOOD DEAL OF THE BAR AND ALSO HAS A  
25 VERY SIMILAR KIND OF CASE LOAD. I AM FROM AN OPT-OUT

1 DISTRICT. IN FACT, WE DID YOU ONE BETTER. WE NOT ONLY  
2 OPTED OUT OF WHAT WE COULD OPT-OUT OF, WE OPTED OUT OF  
3 WHAT WE WERE NOT ENTITLED TO OPT-OUT OF.

4 MR. HILLER: WE OPTED OUT OF 26 (F) AS WELL.

5 JUDGE LEVI: WE DID FAR MORE THAN THAT. I CAN  
6 TELL YOU THAT THE JUDICIAL ADVISORY COMMITTEE, WHICH HAS  
7 NOW LOOKED AT THIS IN MY DISTRICT, DOESN'T SEE A PROBLEM  
8 WITH THIS BECAUSE THEY SAY, EFFECTIVELY, WE DO THIS  
9 ALREADY ANYWAY. WHEN A CASE IS FILED AS HAPPENS IN YOUR  
10 COURT, APPARENTLY, THERE IS VERY QUICKLY AN EXCHANGE OF  
11 THE SORT OF OBVIOUS KIND OF DISCOVERY THAT SHOULD GO ON.  
12 YOU WON'T STIPULATE OUT OF THIS. YOU WILL SAY WE ARE  
13 ALREADY DOING THIS IN EFFECT, ANYWAY, AND THIS IS VERY  
14 SIMPLE FOR US TO DO AND YOU WILL JUST DO IT. YOU WON'T  
15 EVEN NOTICE IT.

16 MR. HILLER: WELL, IT COULD BE. I THINK WE'LL, I  
17 THINK WE WILL STIPULATE OUT OF IT, AND FILE THE DISCOVERY  
18 REQUEST WE HAVE ALWAYS FILED OF.

19 MR. KASANIN: THAT IS FINE, YOU ARE ENTITLED TO  
20 STIPULATE OUT OF IT IF YOU LIKE.

21 MR. HILLER: WHAT IF SOMEBODY ASKS YOU ABOUT ALL  
22 THE WITNESSES. IF YOU ASK A QUESTION IN THE INTERROGATORY  
23 IN THE LANGUAGE OF THE RULE AND I GOT THAT INTERROGATORY,  
24 I WOULD PROBABLY SAY, HERE ARE THE WITNESSES I KNOW, BUT  
25 I'M GOING TO OBJECT TO THIS INTERROGATORY BECAUSE IT IS

1 OVER BROAD. I THINK MOST OF OUR JUDGES WOULD SUSTAIN THAT  
2 OBJECTION.

3 MR. KASANIN: IF I SENT YOU AN INTERROGATORY THAT  
4 SAID, TELL ME THE WITNESSES THAT SUPPORT THE DEFENSE,  
5 FACTS THAT YOU MADE IN THE ANSWER THAT YOU JUST FILED AS  
6 YOU KNOW THEM TODAY, YOU WOULD OBJECT TO THAT?

7 MR. HILLER: NO. NO, I WOULD ANSWER THAT IN  
8 AFFIRMATIVE DEFENSE, BUT IF YOU SAY, TELL ME EVERY WITNESS  
9 THAT ANYTHING ABOUT MY COMPLAINT --

10 MR. KASANIN: THAT'S NOT WHAT IT SAYS. IT SAYS  
11 REVEAL THE WITNESSES WHO SUPPORT YOUR CLAIMS AND DEFENSES.

12 MR. HILLER: I READ THE RULE THAT THAT INCLUDES  
13 YOUR DENIALS. MAYBE I'M WRONG.

14 MR. KASANIN: IT WOULD INCLUDE YOUR DENIALS. YOU  
15 FILE YOUR ANSWER AND YOU HAVE DONE AN INVESTIGATION AND  
16 YOU KNOW WHO THE WITNESSES ARE YOU ARE RELYING ON TO DENY  
17 CERTAIN FACTS AND THE OTHER SIDE SAYS, WELL, TELL ME THE  
18 NAMES AND ADDRESSES OF THOSE WITNESSES.

19 MR. HILLER: I WOULD DO IT, BUT I WOULD MAKE AN  
20 OBJECTION, BECAUSE I AM NOT GOING TO SPEND ANOTHER THREE  
21 DAYS TRYING TO RUN DOWN WITNESSES FOR YOU. THIS IS WHAT I  
22 KNOW, THIS IS WHAT I THINK IT IS GOING TO BE.

23 MR. KASANIN: YOU HAVE ALREADY DONE IT. I THINK  
24 JUDGE PANNER WOULD ORDER YOU TO DO THAT IN A MINUTE.

25 MR. HILLER: TO DO WHAT?

1 MR. KASANIN: YOU HAVE DONE AN INVESTIGATION TO  
2 PREPARE YOUR ANSWER. I'M ASSUMING YOU ARE A DEFENDANT.

3 MR. HILLER: THIS WOULDN'T EVEN COME UP. I WOULD  
4 FILE THAT OBJECTION, THEY WOULD SAY, FINE, YOU TOLD ME  
5 WHAT YOU KNOW, GREAT. WE WOULD START TAKING DEPOSITIONS,  
6 AND IF MORE NAMES SURFACED AT THESE DEPOSITIONS, THAT  
7 WOULD GO ON. IT IS REALLY AN ACADEMIC DISCUSSION WE ARE  
8 HAVING.

9 MR. KASANIN: YOU WOULD CALL A 26(F) CONFERENCE.  
10 YOU WOULD CALL THE OTHER SIDE AND SAY, WHAT DO YOU REALLY  
11 NEED HERE AND THEY TELL YOU AND YOU SAY THESE ARE THE  
12 PEOPLE I THINK YOU WANT TO TALK TO AND THEY DO THE SAME  
13 FOR YOU, AND THAT'S A DISCOVERY CONFERENCE. THAT COMPLIES  
14 WITH THE RULE. YOU ARE ALREADY IN COMPLIANCE WITH THE  
15 PROPOSED RULE.

16 MR. HILLER: WHATEVER WE ARE DOING IS WORKING AND  
17 MAYBE BECAUSE WHAT WE ARE DOING --

18 JUDGE CARROLL: MR. WELLS COMES FROM MONTGOMERY  
19 ALABAMA, WHERE HE HAS THREE DIFFERENT DISTRICTS WITH THREE  
20 DIFFERENT RULES. HE HAS A PRACTICE. HE GETS DRAWN INTO A  
21 CASE IN PORTLAND, OREGON, HE HAS TO LEARN YOUR LOCAL LEGAL  
22 CULTURE, A WHOLE NEW SET OF RULES, HE HAS GOT TO LEARN ALL  
23 SORTS OF THINGS.

24 MR. HILLER: LET ME SPEAK TO THAT BECAUSE I HAVE  
25 HEARD ALL THIS ABOUT UNIFORMITY. I AM CONFUSED BY THIS.

1 IF WE ARE IMPOSING AFFIRMATIVE REQUIREMENTS, I UNDERSTAND  
2 THAT. YOU HAVE GOT TO DO "THIS" IN OREGON. THAT IS A  
3 TRAP, ISN'T IT? BUT IF WE ARE SAYING YOU DON'T HAVE TO DO  
4 THIS, I DON'T UNDERSTAND WHAT THAT TRAP IS. ALL WE ARE  
5 SAYING IS YOU DON'T HAVE TO DISCLOSE. YOU DON'T HAVE TO  
6 HAVE RULE 26(F) HERE. HOW DOES THAT TRAP ANYBODY? NOW,  
7 IF YOU SAID YOU HAVE TO DO A, B AND C, I'D AGREE. ALL WE  
8 WANT IS AN ABILITY TO SAY WE ARE NOT GOING TO DO IT.  
9 MAYBE THE RULES SHOULD SAY DISTRICTS HAVE TWO CHOICES, YOU  
10 EITHER HAVE THIS DISCLOSURE RULE OR YOU DON'T HAVE ANY  
11 DISCLOSURE RULE. MAYBE THAT WOULD SATISFY PEOPLE.

12 JUDGE HUNGER: THEN THERE IS A THIRD GROUP OUT  
13 THERE THAT HAS A DISCLOSURE THAT THEY LIKE. YOU WOULD  
14 HAVE TO INCLUDE THAT AND YOU ARE RIGHT BACK WHERE WE  
15 STARTED SOME FOUR AND A HALF YEARS AGO.

16 MR. HILLER: AS I UNDERSTAND THE CONCERN ABOUT  
17 UNIFORMITY, MAYBE I'M WRONG, IS DIFFERENT DISCLOSURE  
18 REQUIREMENTS FROM DISTRICT TO DISTRICT. IF WE HAD TWO  
19 CHOICES, DISCLOSURE UNDER THESE RULES OR NO DISCLOSURE AT  
20 ALL, I DON'T SEE THAT AS A PROBLEM.

21 JUDGE NIEMEYER: WHAT IF WE THOUGHT DISCLOSURE WAS  
22 A GOOD THING FOR THE PROCESS? IN OTHER WORDS, IF WE  
23 THOUGHT THAT THE SYSTEM SHOULD BE MOVING MORE TOWARD THE  
24 FILING OF A COMPLAINT AND FREELY DISCLOSING THE SCOPE OF  
25 COMPLAINT SO THAT EACH SIDE UP FRONT KNOWS WHERE THE OTHER

1 SIDE IS COMING FROM. DOESN'T THAT ENCOURAGE SETTLEMENT,  
2 ENCOURAGE DISPOSITION, UNDERSTANDING OF THE CASES?

3 MR. HILLER: I THINK NOT. IN MY MIND, IT WOULD  
4 CREATE MORE PROBLEMS AND A POTENTIAL SATELLITE LITIGATION.  
5 NOTHING THAT CAN'T BE ACHIEVED VERY QUICKLY UNDER THE WAY  
6 THINGS WORK RIGHT NOW IN OREGON. YOU CAN GET ALL THIS  
7 INFORMATION, AND I DON'T THINK, ALL I'M SAYING IS, IF IT  
8 IS NOT BROKEN, DON'T FIX IT. IT IS NOT BROKEN IN OREGON,  
9 WE OPTED OUT, IT IS WORKING VERY WELL, AND WE DON'T SEE  
10 WHY WE NEED THIS. I'VE GOT TO TELL YOU, I'M SPEAKING ON  
11 BEHALF OF JUST ABOUT EVERY PRACTITIONER. I WRITE A COLUMN  
12 EVERY MONTH FOR THE FEDERAL BAR ASSOCIATION. IT GOES TO  
13 ALL FEDERAL PRACTITIONERS. I TOLD THEM WHAT IS GOING ON.  
14 I SAID, IF ANYBODY THINKS THAT THIS IS A GOOD IDEA, PLEASE  
15 LET ME KNOW. I HAVE GIVEN THEM MY PHONE NUMBER, MY  
16 E-MAIL. I HAVE GOTTEN ANY NUMBER OF RESPONSES ALL IN  
17 OPPOSITION. I HAVE NOT GOTTEN A SINGLE FEDERAL  
18 PRACTITIONER --

19 JUDGE NIEMEYER: YOUR POSITION WOULD BE IF WE WENT  
20 TO A UNIFORM RULE, WE SHOULD GO BACK TO THE PRE-1993?

21 MR. HILLER: YES. WE DON'T THINK IT ADDS VERY  
22 MUCH THAT YOU COULDN'T ACCOMPLISH UNDER THE OLD RULE.

23 PROFESSOR ROWE, JR.: YOUR EXPERIENCE OF COURSE IS  
24 NOT HEARING ANYBODY, YOUR LAWYERS SAYING THEY WOULD LIKE  
25 IS CONSISTENT WITH THE FINDING OF THE STUDIES OF THE

1 LAWYERS WHO HAD NOT PRACTICED UNDER IT SAID, WE DON'T  
2 LIKE; THE LAWYERS WHO SAID THEY HAD PRACTICED UNDER IT  
3 SAID THEY DO.

4 A. ONE THING I WANT TO UNDERSTAND ABOUT YOUR  
5 POSITION, BY THE WAY, ARE YOU IN FAVOR OF UNIFORMITY AND  
6 THINKS THAT THERE SHOULD BE A UNIFORM NO DISCLOSURE RULE  
7 OR AGAINST UNIFORMITY AND THINK THAT PEOPLE SHOULD BE ABLE  
8 TO DO IT DIFFERENT WAYS, OR YOU DON'T CARE, YOU JUST  
9 WANTED OREGON TO BE ABLE TO DO IT WITHOUT DISCLOSURE?

10 MR. HILLER: I GUESS OUR POSITION IS THIS: IF  
11 THERE IS GOING TO BE A UNIFORM RULE ABOUT DISCLOSURE, WE  
12 WOULD LIKE TO OPT-OUT. IF THE POINT IS, NO, WE ARE NOT  
13 GOING HAVE AN OPT-OUT, WE ARE GOING TO HAVE ONE UNIFORM  
14 RULE ONE WAY OR THE OTHER, THEN OUR POSITION IS THERE  
15 SHOULDN'T BE A DISCLOSURE RULE. OUR PREFERRED POSITION  
16 IS, GO AHEAD AND HAVE YOUR DISCLOSURE RULE -- I THINK IT  
17 IS AN IMPROVEMENT, BY THE WAY, OVER THE OLD DISCLOSURE  
18 RULE. IF YOU ARE GOING TO HAVE IT, JUST GIVE DISTRICTS A  
19 CHANCE TO OPT-OUT COMPLETELY. I THINK THAT IS A FAIR  
20 PROBLEM. YOU CAN'T HAVE THIS HALF KIND OF STUFF. IT IS  
21 EITHER YOU ARE IN OR YOU ARE OUT. THAT WOULD BE A SIMPLE  
22 SYSTEM.

23 JUDGE NIEMEYER: I DO APPRECIATE YOUR COMING DOWN  
24 AND TESTIFYING FOR US AND GIVING US THAT INSIGHT. I THINK  
25 YOUR TESTIMONY PROBABLY REPRESENTS THE VIEWS OF A FAIR

1 NUMBER OF PEOPLE IN OTHER DISTRICTS ALSO IN THE COUNTRY,  
2 SO IT IS VERY GOOD FOR US TO BE ABLE TO HEAR THAT.

3 ARE YOU LISTED ON THIS?

4 MR. HILLER: NOT REALLY.

5 MS. KLOPPENBERG: JUDGE HOGAN AND JUDGE PANNER  
6 REQUESTED THAT I COME --

7 JUDGE NIEMEYER: COME FORWARD. WHY DON'T WE HEAR  
8 FROM YOU?

9 MS. KLOPPENBERGER: SINCE THEY HAVE COVERED THE  
10 POINTS FROM OUR DISTRICT, I WOULD LIKE TO SPEAK MORE AS AN  
11 ACADEMIC ON THIS UNIFORMITY. I HAVE A LOT OF SYMPATHY --  
12 I HAVE A NATIONAL PRACTICE, I CLERKED ON THE NINTH  
13 CIRCUIT -- THERE IS A LOT OF VALIDITY TO UNIFORMITY,  
14 ESPECIALLY IN THINGS LIKE NOTICE PLEADING VERSUS CODE  
15 PLEADING. BUT IN DISCOVERY, I THINK ONE OF THE MAIN  
16 LESSONS FROM THE BOSTON COLLEGE CONFERENCE WAS THAT IT IS  
17 WORKING WELL IN THE ORDINARY CASE, IN THE ROUTINE CASE.  
18 AND WHAT THE UNIFORMITY, THE RULE THAT IS BEING SUGGESTED  
19 WOULD ACTUALLY HARM MANY PARTS OF THE COUNTRY IN A ROUTINE  
20 CIVIL CASE. SO I RESPECTFULLY SUGGEST THAT YOU GO BACK TO  
21 THE NUMBERS AND THOSE STUDIES THAT YOU RELIED ON, GO BACK  
22 TO THE BOSTON COLLEGE SYMPOSIUM, WHICH YOU ARE FAMILIAR  
23 WITH, AND REALLY THINK ABOUT IF IT IS WORTH THE COST THAT  
24 WOULD BE IMPOSED IN THE NORMAL CIVIL CASE WHERE THINGS ARE  
25 WORKING --

1 JUDGE SCHEINDLIN: IS THE ONLY HARM THIS CONCEPT  
2 OF DELAY?

3 MS. KLOPPENBERG: THE DELAY AND THE EXPENSE. WE  
4 HAVEN'T HAD A GOOD COMPARATIVE STUDY LIKE THAT. WE HAVE  
5 PEOPLE WHO ARE HAPPY DOING IT, PEOPLE WHO HAVEN'T DONE IT  
6 AND WE HAVEN'T CONTRASTED WHAT IS WORKING IN OTHER  
7 DISTRICTS WITH THAT, I WOULD SUGGEST.

8 MR. KASANIN: I SUGGEST TO YOU THAT DISCOVERY,  
9 PLEADING AND MOTION PRACTICE ARE A PIECE. AND IF  
10 DISCOVERY UNIQUE IN THE DISTRICT, FROM DISTRICT TO  
11 DISTRICT, IT IS VERY LIKELY OVER TIME THAT PLEADING  
12 STANDARDS WILL BE DIFFERENT AND MOTION PRACTICE WILL BE  
13 DIFFERENT. OVER A PERIOD OF YEARS, I THINK NOW WE ARE  
14 ALMOST A DECADE INTO THIS PROCESS. OVER A PERIOD OF  
15 YEARS, THE CENTRIFUGAL FORCES ARE SO POWERFUL THAT YOU  
16 WILL HAVE VERY DIFFERENT PRETRIAL PRACTICE AND VERY  
17 DIFFERENT SUBSTANTIVE LAW DEVELOPED IN THE 94 DISTRICTS.  
18 MAYBE THAT IS OKAY AND WE SHOULDN'T HAVE FEDERAL RULES OF  
19 CIVIL PROCEDURE EXCEPT ON VERY LIMITED TOPICS. BUT I  
20 DON'T THINK A CASE HAS BEEN MADE YET THAT DISCOVERY IS NOT  
21 AMENABLE TO A NATIONAL CONSISTENTLY APPLIED RULE, LIKE THE  
22 OTHER RULES. THAT THERE IS SOMETHING UNIQUE ABOUT  
23 DISCOVERY THAT MEANS DISTRICTS SHOULD BE ABLE TO SAY, WE  
24 DON'T LIKE THE NATIONAL RULE AND WE CHOOSE NOT TO FOLLOW  
25 IT.

1 MS. KLOPPENBERG: I SEE THE CORRELATION, I WOULD  
2 JUST SUGGEST WE RETAIN SUFFICIENT FLEXIBILITY. WE CAN  
3 COVER BOTH THE ACCESS TO JUDGE PROBLEM AND THE DIFFERENCES  
4 IN CASES. THE PEOPLE WE HAVE HEARD FROM HERE ARE TALKING  
5 ABOUT ANTITRUST, MASS TORT, ARE REALLY FOR THE BIG,  
6 COMPLEX CASES, NOT THE ORDINARY CASE. AND I THINK THAT IS  
7 WHERE THAT FLEXIBILITY IS IMPORTANT TO RETAIN. THANK YOU.

8 JUDGE NIEMEYER: MR. VESELKA, I APPRECIATE YOU  
9 YIELDING.

10 MR. VESELKA: MR. CHAIRMAN, MEMBERS OF THE  
11 COMMITTEE, I APPRECIATE THE OPPORTUNITY TO BE HERE BEFORE  
12 YOU. I AM LARRY VESELKA FROM THE FIRM OF SMYSER, KAPLAN &  
13 VESELKA, L.L.P. OF HOUSTON, TEXAS.

14 I COME HERE TODAY TO GIVE YOU A SLIGHTLY DIFFERENT  
15 OPINION THAN MOST OF WHAT YOU HAVE HEARD. I DO FIRMLY  
16 SUPPORT UNIFORM APPLICATION IF THE RULES, I FIRMLY SUPPORT  
17 A BROAD SCOPE OF DISCOVERY, I FIRMLY SUPPORT BROAD AND  
18 FULL INITIAL DISCLOSURES. AND I HAVE CERTAIN PROBLEMS  
19 WITH THE PROVISION THAT YOU HAVE PUT IN WITH REGARD TO  
20 DOCUMENT PRODUCTIONS AND SOME SUGGESTIONS AND WITH REGARD  
21 TO THE LIMITATIONS ON DEPOSITIONS.

22 LET ME START BY SAYING THAT I HAVE BEEN PRACTICING  
23 FOR 22 YEARS. I WAS IN A LARGE FIRM DOING COMMERCIAL  
24 LITIGATION. I DID PLAINTIFF AND DEFENSE SIDE. I FORMED A  
25 SMALL FIRM FOUR YEARS AGO WHERE WE DO ABOUT 50/50

1 PLAINTIFFS AND DEFENSE, THOUGH I CAN TELL YOU THAT IN ALL  
2 OF THAT TIME, I AM TOLD BY OTHERS AND I THINK I MUST  
3 ADMIT, I HAVE MORE OF A PERSONAL PREDILECTION FOR THE  
4 PLAINTIFF'S SIDE. SO IN THE SENSE OF STYLE, I WANT TO GET  
5 INTO THINGS, GET IT DONE, BECAUSE I BELIEVE FIRMLY THAT  
6 THE PROCESS WE ENGAGED IN BEFORE THOSE OF YOU WHO ARE  
7 MEMBERS OF THE BENCH IS A FIRM AND HIGH CALLING OF  
8 SEEKING JUSTICE. I ONLY BRING UP THAT CONCEPT NOW BECAUSE  
9 I DON'T BELIEVE IT IS IN ANY WAY A LAWYER'S FAILURE TO DO  
10 THEIR DUTY WHEN THEY PROVIDE FULL DISCLOSURE OF  
11 INFORMATION OF FACTS OR OF KNOWLEDGE THAT MAY BE HARMFUL  
12 TO THEIR CLIENT. THEY ARE NOT SERVING THEIR CLIENT; THEY  
13 ARE SERVING TRUTH AND JUSTICE. I THINK WE HAVE THAT  
14 OBLIGATION IN THE PROCESS SO THAT THE PROCESS CAN BE AS  
15 EFFICIENT AS POSSIBLE.

16 I BRING THAT UP BECAUSE THE CHANGES YOU ARE  
17 TALKING ABOUT, EVEN AS MUCH AS THEY ARE SMALL, LITTLE  
18 CHANGES, IN THE EMPHASIS, HAVING SHOWED GOOD CAUSE BEFORE  
19 YOU CAN GO TO THE FULL SCOPE OF DISCOVERY. AS YOU HAVE  
20 HEARD FROM THE WITNESSES FOR THE CORPORATIONS AND THE  
21 LAWYERS WHO REPRESENT THE CORPORATIONS, AS I DO OFTEN, IT  
22 IS A PHILOSOPHY. YOU ARE NOT GOING TO HAVE A PROBLEM WITH  
23 ANY OF THE PEOPLE THAT YOU HEARD FROM BEFORE. SHELL OIL  
24 COMPANY HAS PEOPLE THAT HAVE DONE A WONDERFUL JOB. THEY  
25 KNOW WHAT THEY DO. THEY CAN HANDLE IT. BUT THAT

1 PHILOSOPHY IS WHAT PEOPLE HAVE HEARD OUT THERE ABOUT WHAT  
2 YOU ARE DOING IS WHAT IS GOING TO TELL EVERY INSURANCE  
3 COMPANY AND EVERY COMPANY THAT THINKS BIGNESS IS A KING'S  
4 ASS, I DON'T HAVE TO DEAL WITH DISCOVERY, THAT THEY CAN  
5 USE THE CHANGE AND SCOPE AS A NEW MEANS OF STONEWALLING.  
6 THEY ARE NOT GOING DISCLOSE INITIALLY AND THEN THEY ARE  
7 GOING TO QUIBBLE AND QUIBBLE AND QUIBBLE WITH ANY  
8 ATTORNEY-MANAGED DISCOVERY SO THAT YOU ARE GOING TO HAVE  
9 TO GO BACK TO COURT, FILE OBJECTIONS, MORE HEARINGS. AND  
10 WE ALL KNOW THE PROBLEMS AREN'T IN THE CASES WHERE THE  
11 JUDGES GET ACTIVE. THE PROBLEMS COME IN THE CASES THAT  
12 YOU WILL HAVE ACKNOWLEDGED BASED UPON THE STUDIES, IN THE  
13 CASES WHERE YOU DON'T VERY GOOD ACCESS TO THE COURT. IN  
14 THOSE INSTANCES WITH THIS 'CHANGE IN PHILOSOPHY AND THIS  
15 SLIGHT SHIFTING OF THE BURDEN, IT WILL NOT BE FULL AND  
16 FAIR DISCOVERY IF YOU DON'T HAVE THIS ACCESS TO COURTS.

17 LET ME ADDRESS FOUR PARTICULAR POINTS THAT I RAISE  
18 THERE. AND IN THIS I'M GOING TO MAKE SOME SPECIFIC  
19 REFERENCES TO THE RECENT CHANGES TO THE TEXAS RULES OF  
20 CIVIL PROCEDURE.

21 THE TEXAS SUPREME COURT HAS JUST ADOPTED NEW RULES  
22 OF CIVIL PROCEDURE. THEY HAVE BEEN GOING THROUGH THIS  
23 PROCESS SIMULTANEOUSLY WITH YOUR COMMITTEE AND CONSIDERED  
24 MANY OF THE SAME THINGS AND WITH THE SAME IMPETUS, AND  
25 HAVE COME UP WITH SOME --

1 MR. KASANIN: WHAT IS THE DIFFERENCE, IN A  
2 PRACTICAL SENSE, FROM AN INSURANCE COMPANY OR A PRODUCTS  
3 COMPANY FILING OBJECTIONS AND HAVING THE JUDGE RULE ON  
4 THEM OR HAVING THE JUDGE RULE ON WHETHER THERE IS GOOD  
5 CAUSE?

6 MR. VESELKA: WELL, THERE IS A SHIFT OF BURDEN  
7 THERE, WHICH IN SOME INSTANCES, PARTICULARLY IF YOU HAVE A  
8 JUDGE, I DON'T WANT TO DEAL WITH DISCOVERY, AND THE BURDEN  
9 NOW IS IT IS SUBJECT MATTER AND THE OTHER IS, I HAVE TO  
10 SHOW GOOD CAUSE FOR DISCOVERY. I REALLY BELIEVE THE WAY  
11 TO SOLVE THE PROBLEMS, IF WE TALK ABOUT WE ARE TRYING TO  
12 DEAL WITH COST, AS YOU HEARD FROM YOUR STUDIES, THE  
13 PROBLEMS THAT YOU HEAR FROM THE DEFENSE OF COSTS COME FROM  
14 DOCUMENT PRODUCTION. THOSE COSTS ARE MAINLY TWO-FOLD.  
15 ONE, IF THERE ARE JUST TOO MANY PLACES TO LOOK AROUND, AND  
16 TWO, THE COST OF THE LAWYERS TO FLIP THROUGH EVERY PIECE  
17 OF PAPER SO THEY CAN WAIVE THE ATTORNEY/CLIENT PRIVILEGE.  
18 THAT HAS BEEN ADDRESSED BY THE TEXAS CHANGE WHERE THEY  
19 HAVE AUTOMATICALLY BY RULE SAID THERE IS NO WAIVING OF  
20 ATTORNEY/CLIENT PRIVILEGE BY PRODUCING DOCUMENTS.

21 JUDGE NIEMEYER: THAT IS A MIGHTY COMPLEX SUBJECT.  
22 TEXAS PROBABLY HAS DONE AN IMPORTANT THING THERE. THE  
23 FEDERAL RULES, AS YOU KNOW, APPLY STATE PRIVILEGES IN RULE  
24 501 SAYS WE GO TO THE STATE LAW FOR OUR PRIVILEGES. THE  
25 QUESTION COMES, IF WE ARE GOING TO PASS A FEDERAL

1 PROCEDURAL RULE THAT DOES EXACTLY WHAT YOU SAID, AND I  
2 THINK AS EVERY LAWYER IS ASKING FOR IT, PLAINTIFFS AND  
3 DEFENDANTS, IT MAKES IT EASIER, BECAUSE THEY OPEN UP THE  
4 FILE AND LET YOU LOOK. THEN THEY PRESERVE THEIR RIGHT AND  
5 CAN ARGUE ABOUT IT LATER. IF THE FEDERAL COURT SAYS THAT,  
6 YOU ARE FACED WITH THE PROBLEM ARE WE NOW INTERFERING WITH  
7 STATE LAW AND STATE RULES WHICH HAVE BEEN INCORPORATED AND  
8 SUCKED IN THROUGH RULE 501? THERE MAY BE A WAY TO DO IT.  
9 IT IS ONE OF THE THINGS THAT IS STILL ON OUR PLATTER TO  
10 LOOK AT. BUT IT IS A MIGHTY COMPLEX THING FOR A FEDERAL  
11 PROCESS TO DO WHEN WE DRAW ON STATE PROCESS. IF ALL THE  
12 STATES DID WHAT TEXAS DID, WE WOULDN'T HAVE ANY PROBLEM.

13 MR. VESELKA: THAT MAY BE SOMETHING I WILL TRY TO  
14 ADDRESS IN THE WRITTEN COMMENTS I WILL BE FILING NEXT  
15 WEEK.

16 JUDGE CARROLL: IT IS THIS BURDEN SHIFT THAT YOU  
17 SAY IS THE BIG PROBLEM. IN REALITY, YOU ARE NOT GOING TO  
18 SPEND ANY MORE COURT TIME, IT IS JUST GOING TO BE SOMEHOW  
19 INTELLECTUALLY, THE COURT WILL VIEW YOUR REQUEST  
20 DIFFERENTLY THAN IT DID BEFORE.

21 MR. VESELKA: THERE IS GOING TO BE MORE COURT  
22 TIME, MORE OBSTRUCTION BY DEFENDANTS BECAUSE THEY ARE  
23 FEELING THAT THESE RULES REPRESENT A PHILOSOPHY CHANGE.  
24 THEY THINK THEY ARE GOING TO GET AWAY WITH PRODUCING LESS,  
25 SO THEY ARE GOING TO TRY TO PRODUCE LESS, WHICH WILL FORCE

1 MORE ISSUES TO BE CONTESTED, SO THERE WILL BE MORE  
2 HEARINGS AND THERE WILL BE THE BURDEN SHIFT AS WELL. SO  
3 ON CLOSE CASES, THERE WILL BE A REAL CONCERN THERE. I  
4 WOULD LIKE TO ADDRESS EACH OF THOSE FOUR SPECIFIC AREAS  
5 PARTICULARLY.

6 SCOPE OF DISCOVERY I DO NOT BELIEVE SHOULD BE  
7 CHANGED FOR THE SPECIFIC REASON WE SAID: WHEN YOU DON'T  
8 HAVE ACCESS TO JUDGES, THAT YOU HAVE PROBLEMS IN  
9 DISCOVERY, THEN SAYING YOU ARE GOING TO RESTRICT THE SCOPE  
10 FOR ATTORNEY-MANAGED DISCOVERY, BUT LEAVE IT THERE FOR  
11 COURT-MANAGED IS TANTAMOUNT TO SAYING YOU ARE RESTRICTING  
12 THE SCOPE OF DISCOVERY IN THOSE JURISDICTIONS WHERE THE  
13 COURTS DON'T GET INVOLVED.

14 WITH REGARD TO INITIAL DISCLOSURE, IN THAT REGARD,  
15 TEXAS, THROUGH TWO OR THREE OF ITS PROPOSED CHANGES --

16 PROFESSOR MARCUS: IF YOU CAN'T GET TO A JUDGE  
17 ANYWAY, WHY DOES IT MATTER WHAT THE RULE SAYS?

18 JUDGE NIEMEYER: YOU CAN GET TO JUDGE ROSENTHAL,  
19 CAN'T YOU?

20 MR. VESELKA: I HAVE NO PROBLEMS IN THE SOUTHERN  
21 DISTRICT OF TEXAS. THE ACCESS IN THE SOUTHERN DISTRICT --  
22 I CAN'T GET TO JUDGE ROSENTHAL BECAUSE HE WON'T TAKE CASES  
23 FROM OUR FIRM BECAUSE OF CLOSENESS TO ONE OF MY PARTNERS.  
24 BUT I WILL SHOW AN EXAMPLE. TEN YEARS AGO I HAD A  
25 SUBSTANTIAL DOCUMENT CASE. I WAS ON THE DEFENSE SIDE.

1 PLAINTIFF'S LAWYER REPEATEDLY GOING BACK AND ARGUING  
2 THROUGH THINGS. JUDGE LEGGE, WHO IS ON THE BENCH THERE,  
3 HE SAID WE ARE GOING TO HAVE -- EVERY MONTH WE ARE GOING  
4 TO HAVE A 20-MINUTE HEARING IF ALL HAVE ANYTHING THAT  
5 NEEDS TO BE DEALT WITH. IT WAS A BIG CASE. IT WAS GOING  
6 TO TAKE A LONG TIME.

7 BY THE THIRD WEEK, YOU FILE ANYTHING THAT IS UNDER  
8 DISPUTE, LET ME KNOW BY FRIDAY, THE FOLLOWING FRIDAY, WE  
9 WILL HAVE A 20-MINUTE HEARING AND WE'LL RESOLVE IT. IF WE  
10 DIDN'T HAVE ANY TO DISPUTE THAT MONTH, HE KNEW WE WOULD  
11 PASS IT. BUT SETTING THAT UP, KNOWING YOU WERE GOING TO  
12 GET IT, THINGS WOULD GO WRONG, SOMETHING WE COULDN'T AGREE  
13 ON, WE KNEW TO PUT IT OFF AND GET IT RULED ON. IT IS  
14 SOMETHING THAT WOULD HAVE BEEN -- THE CASE GOT TRANSFERRED  
15 TO ONE OF THE OTHER JUDGES -- IN A COURT WHERE IT WOULD  
16 HAVE TAKEN TWO OR THREE YEARS TO GET THAT DISCOVERY DONE,  
17 WE ESSENTIALLY HAD IT DONE IN NINE MONTHS.

18 I HAVE TRIED CASES IN CHICAGO, PHILADELPHIA,  
19 OKLAHOMA, CALIFORNIA AND OTHERS. THAT'S JUST THE FEDERAL  
20 COURT.

21 JUDGE NIEMEYER: BECAUSE YOUR TESTIMONY HAS BEEN  
22 SHARED BY SO MANY, IT IS SOMETHING THAT WE ARE TRYING TO  
23 ADDRESS.

24 MR. VESELKA: THE ACCESS WOULD MEAN IN THOSE  
25 COURTS WHERE THERE ARE PROBLEMS OF ACCESS, AND I WILL SAY

1 IT IS MORE OF A PROBLEM IN CERTAIN COURTS IN THE WESTERN  
2 DISTRICT OF TEXAS.

3 PROFESSOR MARCUS: MY PROBLEM IS, I UNDERSTAND  
4 THAT ACCESS IS VERY IMPORTANT, BUT I DON'T UNDERSTAND WHY  
5 IT CONNECTS UP TO THE CHANGE BEING PROPOSED IN RULE  
6 26(B(1) CONCERNING SCOPE OF DISCOVERY, AND WHY EVERYTHING  
7 IS FINE NOW WITHOUT ACCESS, BUT IT WOULD BE BAD IF THIS  
8 CHANGE WERE MADE.

9 MR. VESELKA: EVERYTHING IS NOT FINE. YOU HAVE  
10 CASES WHERE WE HAVE DISPUTES THAT WE SHOULDN'T HAVE. BUT  
11 IF THERE ARE CHANGES THAT FURTHER ENCOURAGE COUNSEL TO TRY  
12 TO RESTRICT MORE OF WHAT THEY ARE WILLING TO DO -- PEOPLE  
13 WHO DON'T BELIEVE IN DISCOVERY, PLAINTIFF AND DEFENDANTS  
14 IN THAT SENSE -- I BELIEVE IN FULL DISCOVERY, THAT'S WHY  
15 I'M A FIRM BELIEVER IN FULL DISCLOSURE. GET IT OUT, FIND  
16 OUT WHAT THE FACTS ARE, THAT'S HOW YOU ARE GOING TO GET IT  
17 RESOLVED MOST EFFICIENTLY. AS A DEFENSE LAWYER, I WANT TO  
18 GET THE FACTS OUT AND AS A PLAINTIFF'S LAWYER, I WANT TO  
19 GET THE FACTS OUT AND EXCHANGED AS QUICKLY AS I CAN SO I  
20 CAN THEN TRY TO WHOOP SOMEBODY BY FIGURING OUT WHAT THE  
21 LEGAL ISSUES ARE AND ARGUE IT TO A JURY.

22 JUDGE NIEMEYER: YOU ARE ALREADY OVER YOUR TIME.  
23 DO YOU WANT GO TO YOUR MOST IMPORTANT POINT, WHATEVER IT  
24 MIGHT BE? I KNOW YOU HAD SEVERAL.

25 MR. VESELKA: INITIAL DISCLOSURE, I BELIEVE I SAID

1 SHOULD NOT BE RESTRICTED TO THE SUPPORTING. THEY WORK  
2 WELL. YOU DON'T GET EVERYTHING, EVERYBODY LEARNS MORE,  
3 BUT HAVING THAT INITIAL DISCLOSURE -- AND IT SHOULD NOT BE  
4 LIMITED TO ONLY SUPPORTING INFORMATION -- JUST ALLOWS  
5 PEOPLE TO START QUICKER IN FIGURING OUT WHAT NEEDS TO  
6 HAPPEN.

7 DOCUMENT PRODUCTION, COST SHIFTING, WHICH HAS  
8 OCCURRED, I HAVE HAD CASES BOTH IN THE STATE AND FEDERAL  
9 SYSTEM WHERE COST SHIFTING CAN SOLVE A LOT OF THOSE  
10 PROBLEMS IF YOU ARE GETTING OUT ON THE EDGE OF THE SCOPE  
11 RATHER THAN CHANGING THE SCOPE.

12 AND FINALLY, AS TO DEPOSITIONS, LIMITATION OF THE  
13 TIME OF DEPOSITIONS IS FINE. I THINK YOU HAVE A SERIOUS  
14 PROBLEM WITH JUST TRYING TO SAY IT IS SEVEN HOURS, PERIOD.  
15 YOU HAVE TO ADDRESS FOR WHOM, FOR PARTIES --

16 PROFESSOR MARCUS: DO YOU FAVOR THE CHANGES IN  
17 RULE 34(B) CONCERNING COST SHIFTING, REGARDING DOCUMENT  
18 DISCOVERY PERIPHERY?

19 MR. VESELKA: I ALREADY EXPERIENCE IT NOW. I DO  
20 NOT BELIEVE THAT IT IS A PARTICULAR PROBLEM. SO I AM  
21 NOT -- I DON'T HAVE A PROBLEM WITH THE CONCEPT OF COST  
22 SHIFTING AS YOU GET OUT THERE, AND THAT'S THE WAY TO SOLVE  
23 THOSE PROBLEMS IF THERE IS A PROBLEM ON THE SIDE RATHER  
24 THAN DEAL WITH IT ON DISCOVERY.

25 PROFESSOR COOPER: ARE THERE PROBLEMS WITH

1 UNNECESSARY DEPOSITIONS, DEPOSITIONS TAKEN TOO FAR AWAY,  
2 TURNS TOO EXPENSIVE?

3 MR. VESELKA: I THINK THE COURTS HANDLE THAT IN  
4 THE WAY -- THEY ADDRESS THAT NOW, WELL, IF WE ARE GOING TO  
5 DO THAT HERE, OR ARE YOU WILLING TO GO THERE AND THINGS OF  
6 THAT SORT. THAT DOES WORK OUT. I DON'T HAVE A PROBLEM.  
7 I THINK TIME LIMITATIONS ARE WORTHWHILE, BUT I DON'T THINK  
8 YOU HAVE DONE WELL TO SAY SEVEN. TEXAS IS SIX HOURS PER  
9 SIDE, WHICH IS STILL A PROBLEM IF YOU HAVE THREE  
10 DEFENDANTS AND THEY HAVE ISSUES AND CROSS ISSUES BETWEEN  
11 THEM. THEY DON'T KNOW HOW TO DIVVY UP THEIR SIX HOURS.  
12 YOU NEED TO BE ABLE TO SAY SIX OR SEVEN HOURS PER PARTY  
13 THAT HAS A SEPARATE INTEREST OF SOME SORT.

14 JUDGE NIEMEYER: MARK CHAVEZ?

15 MR. CHAVEZ: GOOD MORNING, YOUR HONOR. THANK YOU  
16 FOR AFFORDING ME THE OPPORTUNITY TO ADDRESS THE COMMITTEE.  
17 I'M AFRAID I AM ONE OF THOSE CALIFORNIA LAWYERS, AND IN  
18 ADDITION TO SPEAKING FOR MYSELF, I AM GOING TO BE SPEAKING  
19 FOR OTHER CALIFORNIA LAWYERS.

20 JERRY MANNION, WHO IS CURRENTLY LISTED AS NUMBER  
21 15 ON YOUR LIST OF SPEAKERS, IS UNABLE TO ATTEND AND  
22 THEREFORE I'M GOING TO REPRESENT THE LAWYERS CLUB OF SAN  
23 FRANCISCO.

24 THE LAWYERS CLUB IS ONE OF THE OLDEST BAR  
25 ASSOCIATIONS IN SAN FRANCISCO. IT CONSISTS OF LAWYERS WHO

1 BOTH REPRESENT PRIMARILY PLAINTIFFS AND THOSE WHO  
2 PRIMARILY REPRESENT DEFENDANTS.

3 THE PAST PRESIDENTS OF OUR ORGANIZATION HAVE  
4 INCLUDED SUCH PROMINENT DEFENSE LAWYERS AS THE HONORABLE  
5 VAUGHN WALKER, WHO IS NOW OF THE NORTHERN DISTRICT OF  
6 CALIFORNIA, AND SUCH PROMINENT PLAINTIFF LAWYER OF LEROY  
7 HIRSCH OF SAN FRANCISCO. .

8 WE TRY TO REPRESENT THE ENTIRE LEGAL COMMUNITY AND  
9 WE HAVE SUBMITTED COMMENTS ON THE PROPOSED AMENDMENTS,  
10 MANY OF WHICH WE ENDORSE AND APPROVE, PARTICULARLY THOSE  
11 RELATED TO THE UNIFORMITY. HOWEVER, WE DO HAVE CONCERNS  
12 ABOUT CERTAIN ASPECTS OF THE AMENDMENTS WHICH WE HAVE  
13 DISCUSSED AND I WANT TO TALK A LITTLE BIT ABOUT WHAT  
14 UNDERLIES OUR CONCERN, TO EXPLAIN A LITTLE BIT ABOUT WHAT  
15 THE BASIS IS FOR OUR OBJECTIONS ARE TO SOME OF THESE  
16 RULES.

17 OTHER SPEAKERS WHO HAVE APPEARED BEFORE YOU THIS  
18 MORNING HAVE REFERRED TO A C CHANGE OR A PHILOSOPHY CHANGE  
19 THAT IS REFLECTED BY THE AMENDMENTS. I THINK THAT IS A  
20 VALID CHARACTERIZATION. IT IS CLEAR TO ANYBODY WHO READS  
21 THE DRAFT COMMITTEE NOTES AND READS THE COMMENTARY THAT  
22 HAS BEEN PROVIDED IN CONNECTION WITH THE PROPOSED  
23 AMENDMENTS THAT THERE IS CLEARLY AN INTENTION TO LIMIT THE  
24 SCOPE OF DISCOVERY. OUR CONCERN ABOUT THE WAY THAT IS  
25 BEING DONE IS THAT IT IS GOING TO RESULT IN WHAT WE FEEL

1 IS UNNECESSARY LITIGATION. I DON'T THINK IT IS GOING TO  
2 REDUCE THE COST ULTIMATELY INVOLVED IN LITIGATION. I WANT  
3 TO JUST POINT OUT A FEW OF THE THINGS THAT ARE GOING TO  
4 RESULT FROM SOME ASPECTS OF THESE AMENDMENTS.

5 FIRST OF ALL, WITH RESPECT TO CHANGING THE SCOPE  
6 OF DISCOVERY, I THINK, AS ONE OF THE SPEAKERS MENTIONED  
7 THIS MORNING, WHAT THAT IS GOING TO RESULT IN IS SORT OF  
8 THE KITCHEN SINK APPROACH TO PLEADING. THERE IS GOING TO  
9 BE A DESIRE ON THE PART OF PLAINTIFF'S LAWYERS TO STATE  
10 EVERY CONCEIVABLE CLAIM, EVERY POSSIBLE ALLEGATION, TO  
11 HAVE SOMETHING TO POINT TO IN THEIR PLEADING TO SUPPORT A  
12 DISCOVERY REQUEST. I DON'T MEAN TO SUGGEST THAT THEY ARE  
13 GOING DO SO IN A MANNER THAT IS INCONSISTENT WITH RULE 11.  
14 I THINK WE ALL RECOGNIZE WHAT OUR OBLIGATIONS ARE UNDER  
15 RULE 11.

16 JUDGE CARROLL: ISN'T THAT SOMETHING THAT IS  
17 ALREADY BEING DONE? IF YOU SEE THE RUN OF THE MILL  
18 COMPLAINT NOWADAYS, IT HAS NOT ONLY A GOOD FEDERAL CLAIM,  
19 IT WILL THROW IN EVERY STATE CLAIM THAT IS CONCEIVABLY  
20 RELATED TO.

21 MR. CHAVEZ: I THINK IT VARIES FROM CASE TO CASE.  
22 I DON'T THINK YOU SEE THAT SO MUCH IN INDIVIDUAL CASES. I  
23 THINK YOU SEE THE HUGE COMPLAINTS AND CLASS ACTIONS IN  
24 MORE COMPLICATED CASES, BUT I THINK THERE IS GOING TO BE  
25 THE TENDENCY TO DRIVE THINGS IN THE DIRECTION AWAY FROM

1 NOTICED PLEADING TO MORE EXPANSIVE DOCUMENTS, COMPLETE  
2 WITH EXTENSIVE HISTORIES AND VERY COMPLICATED ALLEGATIONS,  
3 IN AN EFFORT TO SUPPORT DISCOVERY REQUESTS.

4 I DON'T THINK THAT IS IN THE INTEREST OF THE  
5 JUDICIARY OR PRACTITIONERS.. I THINK IT IS GOING TO LEAD  
6 TO FIGHTS OVER PLEADINGS, ISSUES. I THINK WE ARE GOING TO  
7 HAVE ADDITIONAL LITIGATION WHICH IS GOING TO SPAWN OUT OF  
8 THE ISSUE OF WHETHER OR NOT YOU SHOULD GET TO THE SECOND  
9 STAGE OF THE DISCOVERY, WHAT YOU ARE REFERRING TO IS THE  
10 COURT-SUPERVISED DISCOVERY.

11 I THINK IN THE NORMATIVE CASE NOW IT IS GOING TO  
12 BE DISCOVERY THAT IS GOING TO BE LIMITED TO THE  
13 ALLEGATIONS OF THE CLAIMS IN THE PLEADING AND IT IS NOT  
14 GOING TO BE DISCOVERY THAT IS RELATED TO THE SUBJECT  
15 MATTER. I THINK SOME OF YOU RECOGNIZE THAT IN YOUR  
16 COMMENTS TODAY. BUT WITH RESPECT TO MOVING TO THE SECOND  
17 STAGE.

18 JUDGE CARROLL: CAN YOU GIVE ME A PRACTICAL  
19 EXAMPLE OF WHAT YOU ARE TALKING ABOUT?

20 MR. CHAVEZ: I THINK THAT IS ONE OF THE VERY REAL  
21 PROBLEMS. WHAT WE ARE DOING IS MOVING FROM A SYSTEM THAT  
22 IS ESTABLISHED UNDER WHICH WE HAVE YEARS OF EXPERIENCE TO  
23 A NEW SYSTEM. WE ARE CHANGING THE SCOPE OF DISCOVERY, AND  
24 THE ONLY WAY THAT SCOPE IS GOING TO BE DEFINED IS THROUGH  
25 LITIGATION. YOU ARE GOING TO SEE LITIGATION IN EVERY

1 DISTRICT WHERE PEOPLE ARE FIGHTING OVER WHAT EXACTLY IT  
2 MEANS WHEN YOU CAN ONLY GET DISCOVERY THAT IS RELATED TO A  
3 CLAIM IN YOUR CASE, AS OPPOSED TO THE SUBJECT MATTER IN  
4 GENERAL

5 JUDGE CARROLL: DO YOU HAVE ANY SPECIFIC EXAMPLE  
6 OF SOMETHING YOU WOULD GET UNDER A SUBJECT MATTER THAT YOU  
7 WON'T GET UNDER CLAIM OR DEFENSE?

8 MR. CHAVEZ: THAT IS GOING TO REMAIN TO BE  
9 DETERMINED, AND THAT IS GOING TO DEPEND ON THE PARTICULAR  
10 PERSPECTIVE OF A JUDGE IN A THE CASE THAT SAYS, THIS IS  
11 OKAY, THAT IS CLOSE ENOUGH TO YOUR CLAIM; ANOTHER JUDGE  
12 MAY TAKE A COMPLETELY DIFFERENT PERSPECTIVE.

13 JUDGE CARROLL: IS THAT DIFFERENT THAN IT IS CLOSE  
14 ENOUGH TO THE SUBJECT MATTER AND IT IS NOT?

15 MR. CHAVEZ: THE DIFFERENCE IS WE DO HAVE A  
16 ESTABLISHED BODY OF LAW RIGHT NOW. WE ARE GOING TO CREATE  
17 A NEW BODY OF LAW. AND THE ONLY WAY THAT IS CREATED IN  
18 OUR SYSTEM IS THROUGH THE ADVERSARY PROCESS WHICH MEANS IT  
19 IS GOING TO ENGENDER FURTHER LITIGATION TO DEFINE WHAT  
20 THESE STANDARDS MEAN.

21 JUDGE NIEMEYER: WE HAVE THIS ENORMOUS DILEMMA  
22 THAT YOUR COMMENTS RAISE, AND WE RECOGNIZED EVEN EARLIER  
23 WHEN WE WERE DEBATING THIS. ON THE ONE HAND, WE ARE TOLD  
24 BY THE ATTORNEYS, AND PROBABLY RIGHTLY SO, THAT THEY WOULD  
25 LIKE TO HAVE MORE ACCESS TO TAKE THE MATTERS UP WITH THE

1 COURT. USUALLY THAT IS DONE THROUGH MOTION PROCESS OF  
2 SOME KIND.

3 ON THE OTHER HAND, WE ARE TOLD THAT THAT  
4 CONSTITUTES NEW LITIGATION AND NEW EXPENSE. I THINK  
5 PROBABLY BOTH ARE TRUE. WHAT YOU HOPE HAPPENS IS THAT IN  
6 THE PROCESS YOU HAVE THE ELECTIVE OF GETTING TO COURT  
7 EASIER, BUT MAYBE THAT ELECTION IS NOT MADE SO OFTEN AS  
8 THE ATTORNEYS GET COMFORTABLE.

9 BUT I THINK WHAT YOU ARE SAYING IS A VERY TELLING  
10 POINT. WE ARE GOING TO BE FACED WITH A QUESTION OF, ARE  
11 WE GETTING THE COURT MORE INVOLVED AND ISN'T THAT MORE  
12 EXPENSIVE? WHAT WE BELIEVE, AT LEAST WITH THE PROPOSAL,  
13 IS THAT IN THE LONG RUN, AS IT SMOOTHS OUT, IT SHOULD BE  
14 MORE EFFICIENT. BUT WE CAN'T KNOW THAT FOR SURE.

15 MR. CHAVEZ: I THINK NO ONE CAN TELL AT THIS STAGE  
16 WHAT THE ULTIMATE RESULTS OF THESE AMENDMENTS ARE GOING TO  
17 BE. I THINK CLEARLY ONE THING THAT IS EVIDENT IS THAT IN  
18 ORDER TO DETERMINE WHAT GOOD CAUSE IS, THERE IS GOING TO  
19 BE LITIGATION, THERE ARE GOING TO BE FIGHTS IN NUMEROUS  
20 CASES OVER WHAT CONSTITUTES GOOD CAUSE.

21 JUDGE NIEMEYER: WHAT I SUSPECT, THOUGH, IS YOU  
22 ARE NEVER GOING TO HAVE A BOX THAT SAYS, ALL RIGHT, THESE  
23 DOCUMENTS ARE THOSE RELATED TO THE SUBJECT MATTER AND  
24 THESE ARE RELATED TO CLAIMS AND DEFENSES AND ANOTHER BOX  
25 SAYING THESE ARE RELATED TO CLAIMS AND DEFENSES. MY GUESS

1 IS THAT WHEN GET TO THE EDGE, IF SOMEBODY SEES IT IS  
2 RELATED TO THE CASE, THEY ARE GOING TO TURN IT OVER. I  
3 THINK MOST DOCUMENTS ARE PROBABLY GOING TO BE PRODUCED,  
4 REGARDLESS OF WHICH STANDARD YOU APPLY. WHAT THIS DOES IS  
5 THIS SORT OF DOES REVEAL A PHILOSOPHY THAT DISCOVERY HAS  
6 GOT TO HAVE SOME LIMITS AND TO ENCOURAGE JUDGES TO FIND  
7 THOSE LIMITS FAIRLY, TO PROVIDE DISCLOSURE, AT THE SAME  
8 TIME NOT OPENING UP THE PROCESS.

9 WE ARE FACING ENORMOUS DIFFICULTY COMING DOWN THE  
10 ROAD, AND IT IS NOT THE SUBJECT OF THIS HEARING, BUT EVERY  
11 PERSON IN BUSINESS TODAY HAS A COMPUTER ON HIS DESK.  
12 ALMOST EVERY LAWYER HAS A COMPUTER ON HIS DESK. THESE  
13 COMPUTERS ARE GENERATING MILLIONS AND MILLIONS OF  
14 DOCUMENTS IF YOU DEFINE A DOCUMENT AS ANYTHING IN THE  
15 COMPUTER. I DON'T KNOW WHERE WE ARE GOING TO GO IN FIVE  
16 YEARS. WE HAVE GOT TO FIND WAYS TO MAKE SURE THERE IS  
17 FAIR DISCLOSURE IN CASES, BUT SOMEHOW BE ABLE TO DEFINE  
18 LIMITS. IT IS GOING TO DEPEND ON JUDGES MAKING SOME  
19 JUDGMENTS. THIS PROBABLY IS NOT THE BEST ARTICULATION,  
20 BUT IT MAY BE A STEP TO REACHING THAT ULTIMATE NOTION THAT  
21 WE CAN'T HAVE ALL THE INFORMATION, BECAUSE, AS YOU KNOW,  
22 INFORMATION IS GEOMETRICALLY EXPANDING EVERY YEAR. AND WE  
23 ARE JUST GOING TO BOG OURSELVES DOWN INTO A PROCESS THAT  
24 WE CAN'T LIVE WITH. I DON'T KNOW WHAT THE ANSWER IS, AND  
25 I WOULD LIKE TO HEAR, IF ANY PRACTITIONER KNEW HOW TO FIND

1 FAIR DISCLOSURE WITHOUT PROVIDING ALL THE DOCUMENTS OUT  
2 THERE, BUT THAT IS THE HOLY GRAIL.

3 MR. CHAVEZ: I'M VERY SENSITIVE TO THE CONCERN  
4 THAT YOU HAVE ARTICULATED, HAVING REPRESENTED LARGE  
5 CORPORATE DEFENDANTS IN DISCOVERY BATTLES. HOWEVER, YOUR  
6 HONOR, MY CONCERN IS THAT THE CHANGE THAT WE ARE MAKING IS  
7 GOING TO ULTIMATELY ENGENDER FURTHER LITIGATION AND NOT  
8 REALLY ULTIMATELY SOLVE THE PROBLEM.

9 I THINK THE DISTRICT COURTS NOW HAVE AUTHORITY TO  
10 CONTROL THE SCOPE OF DISCOVERY WHICH IS ADEQUATE. I THINK  
11 THE CONCERNS THAT PEOPLE HAVE EXPRESSED RELATED TO ACCESS  
12 TO THE JUDICIARY, IT VARIES FROM DISTRICT TO DISTRICT. IT  
13 DOES VARY FROM JUDGE TO JUDGE. SOME JUDGES ARE VERY  
14 INVOLVED IN A CASE RIGHT FROM THE BEGINNING. BUT THERE  
15 ARE A LOT OF DISTRICT COURT JUDGES AROUND THE COUNTRY WHO  
16 COULD NOT VIEW DISCOVERY AS PARTICULARLY ATTRACTIVE TO GET  
17 INVOLVED IN, DO NOT WANT TO BE BOGGED DOWN IN THE ISSUE OF  
18 DISCOVERY, AND ARE NOT GOING TO WELCOME THESE FIGHTS ABOUT  
19 WHETHER OR NOT GOOD CAUSE EXISTS IN A PARTICULAR CASE,  
20 THEREFORE BE RELUCTANT TO DETERMINE WHETHER OR NOT  
21 SOMEBODY SHOULD BE ENTITLED TO PROCEED TO SUBJECT MATTER  
22 DISCOVERY. I THINK THEREFORE THE NORM IS GOING TO BECOME  
23 THAT THERE IS NOT GOING TO BE SUBJECT MATTER JURISDICTION.  
24 I THINK THAT IS A RESTRICTION THAT IS PROBLEMATIC AS WELL  
25 AS ONE THAT IS GOING TO ENGENDER FURTHER LITIGATION.

1 THEREFORE, I THINK IT IS A LEGITIMATE CONCERN.

2 WE ARE ALSO CONCERNED ABOUT THE EXPENSE AND  
3 ULTIMATE LITIGATION THAT IS GOING TO RESULT FROM THE  
4 RESTRICTION ON DEPOSITIONS. I THINK THE NOTION THAT MANY  
5 DEPOSITIONS CAN BE COMPLETED IN A DAY IS ACCURATE. THAT  
6 CAN CERTAINLY BE DONE IN MANY CASES. HOWEVER, IN COMPLEX  
7 CIVIL LITIGATION, CLASS ACTIONS, OTHER CASES WHERE THE  
8 FACTS AND ISSUES ARE COMPLICATED, I THINK CREATING A  
9 PRESUMPTION THAT SOMEBODY IS GOING TO BE ABLE TO COMPLETE  
10 A DEPOSITION IN ONE DAY IS SOMEWHAT ARBITRARY AND I THINK  
11 INAPPROPRIATE. IT IS GOING TO LEAD TO FIGHTS OVER WHETHER  
12 OR NOT SOMEBODY SHOULD GET MORE THAN SEVEN HOURS OF  
13 DEPOSITION IN A PARTICULAR SITUATION, WHICH AGAIN, I DON'T  
14 THINK THE DISTRICT COURTS ARE GOING TO WANT TO HEAR. THEY  
15 ARE NOT GOING TO GET INVOLVED IN THOSE DISPUTES.  
16 I WISH WE COULD ALL SAY THAT THOSE KIND OF DISPUTES SHOULD  
17 BE WORKED OUT BY THE PARTIES, BUT I'M AFRAID IN MANY CASES  
18 THEY ARE NOT GOING TO BE, AND, THEREFORE, WE ARE GOING TO  
19 BE CREATING MORE DISCOVERY DISPUTES UNNECESSARILY.

20 I THINK THE EXISTING SYSTEM WORKS RIGHT NOW.  
21 THERE ARE LIMITS ON A NUMBER OF DEPOSITIONS WHICH WORK,  
22 AND I DON'T THINK THAT WE NEED TO EXTEND THE LIMITATIONS  
23 TO A NUMBER OF HOURS.

24 JUDGE NIEMEYER: I APPRECIATE YOUR TESTIMONY. I  
25 UNDERSTAND WE HAVE SOME WRITTEN MATERIALS.

1 MR. CHAVEZ: YES, WE HAVE SUBMITTED WRITTEN  
2 COMMENTS, YOUR HONOR.

3 JUDGE NIEMEYER: THANK YOU.

4 JUDGE NIEMEYER: MR. CAMPBELL, YOU ARE UP NEXT,  
5 UNLESS YOU WANT TO DEFER.

6 MR. CAMPBELL: GOOD MORNING, JUDGE NIEMEYER,  
7 MEMBERS OF THE COMMITTEE. MY NAME IS BOB CAMPBELL. I AM  
8 CHAIRMAN OF THE FEDERAL CIVIL RULES COMMITTEE OF THE  
9 AMERICAN COLLEGE OF TRIAL LAWYERS. I APPEAR BEFORE YOU  
10 TODAY ON BEHALF OF THE AMERICAN COLLEGE ITSELF ON ONE  
11 ISSUE, AND ON BEHALF OF THE COMMITTEE, THE COLLEGE  
12 COMMITTEE, ON ALL THE OTHER ISSUES.

13 JUDGE NIEMEYER: DO I DRAW THE CONCLUSION THERE IS  
14 SOME TENSION WITHIN THE COMMITTEE?

15 MR. CAMPBELL: THE REASON THAT THAT IS THIS, JUDGE  
16 NIEMEYER. THE AMERICAN COLLEGE HAS BEEN VERY, VERY  
17 CAUTIOUS OVER THE YEARS ABOUT TAKING STANDS ON RULES OF  
18 BOTH CIVIL PROCEDURE, CRIMINAL PROCEDURE AND EVIDENCE, FOR  
19 THAT MATTER. THIS IS REALLY ONLY THE SECOND TIME THAT THE  
20 ENTIRE COLLEGE, THROUGH THE REGENTS AND THROUGH THE  
21 PRESIDENT OF THE COLLEGE, HAVE COME BEFORE THE ADVISORY  
22 COMMITTEE. ONE WAS ON RULE 11 CHANGING THE LANGUAGE ON  
23 SANCTIONS FROM MANDATORY TO DISCRETIONARY, THAT WAS ABOUT  
24 FIVE OR SIX YEARS AGO, AND RULE 20 AND THE SCOPE OF  
25 DISCOVERY UNDER THE RULE 26(B)(1).

1 JUDGE NIEMEYER: SO YOU ARE SPEAKING ON BEHALF OF  
2 THE COLLEGE IN CONNECTION WITH THE SCOPE, AND ON THE OTHER  
3 SUBJECTS, IT IS THE COMMITTEE?

4 MR. CAMPBELL: THAT'S RIGHT.

5 AS TO THE ISSUE OF THE SCOPE OF DISCOVERY UNDER  
6 26(B)(1) WE HAVE SUBMITTED TO THE COMMITTEE THIS PAST YEAR  
7 A REPORT WITH RESPECT TO THE NECESSITY OF CHANGING THE  
8 SCOPE OF DISCOVERY TO CLAIMS AND DEFENSES FROM THE SUBJECT  
9 MATTER CLAUSE THAT HAS BEEN IN EFFECT.

10 THIS WAS A REPORT THAT I HAD THE ENORMOUS  
11 DISTINCTION OF PENNING, THE ORIGINAL DRAFT, AND THEN  
12 WATCHING IT GO THROUGH ABOUT 15 TO 20 TO 25 GENERATIONS AS  
13 SOME VERY MODEST INDIVIDUALS OF MODEST DISPOSITIONS, LIKE  
14 SILVERMAN FROM NEW YORK AND BELL FROM GEORGIA AND RENFREW  
15 THROUGH FROM SAN FRANCISCO AND MORRIS HAROLD FROM DALLAS,  
16 LAFFITE FROM NEW ORLEANS AND A FEW OTHERS, TOOK A CRACK AT  
17 IT. SO I THOUGHT I WAS WINDING UP WITH PART OF THE MAGNA  
18 CARTA, BUT NONE OF WHAT I HAD ORIGINALLY PROPOSED.

19 IN ANY EVENT, THE FINAL PRODUCT IS WE HOPE A  
20 STRONG ONE. WE SUBMITTED IT TO THE COMMITTEE FOR THIS  
21 REASON: WE HAVE BEEN WITH THIS COMMITTEE FOR THE LAST  
22 THREE TO FOUR YEARS LOOKING AT DISCOVERY RULES. IN THAT  
23 CONNECTION I HAVE SOMETHING ELSE TO SAY ABOUT THE  
24 COMMITMENT THAT THIS COMMITTEE HAS SHOWN TO GET TO THE  
25 BOTTOM OF THE PROBLEMS THAT WE HAVE BEEN WRESTLING WITH

1 DISCOVERY.

2 THE ISSUE CAME BACK TO US AGAIN AND AGAIN BECAUSE  
3 THIS WAS THE PROPOSAL OF THE AMERICAN COLLEGE IN THE FIRST  
4 INSTANCE. ITS PROPOSAL HAS BEEN AROUND FOR A COUPLE OF  
5 YEARS. WHAT IS THE DIFFERENCE, THE QUERY WAS BETWEEN  
6 SCOPE AND DISCOVERY, IF WHAT YOU ARE GOING TO TALK ABOUT  
7 IS MERELY CLAIMS AND DEFENSES, VIS-A-VIS SUBJECT MATTER.

8 SO IN AN ATTEMPT TO RESPOND TO THAT, WE CAME TO  
9 THE COMMITTEE LAST JANUARY A YEAR AGO, WITH THIS REPORT IN  
10 WHICH WE ATTEMPTED TO, NUMBER ONE, INDICATE THAT THE  
11 COURTS THEMSELVES, TRIAL JUDGES OF THIS COUNTRY, DO  
12 INTERPRET THE WORDS "SUBJECT MATTER" IN A DIFFERENT VORTEX  
13 AND DIFFERENT CONTEXT THAN THEY DO IN CLAIMS AND DEFENSES.  
14 TWO, WE GAVE YOU SOME EXAMPLES THAT WERE BASED UPON  
15 REAL-LIFE STORIES, INDIVIDUAL CASES, EXAMPLES OF WHERE WE  
16 BELIEVED THERE WAS A DIFFERENCE BETWEEN SUBJECT MATTER AND  
17 CLAIMS AND DEFENSES.

18 WE HOPE THAT THAT HAS BEEN SOME ASSISTANCE TO THE  
19 COMMITTEE AND THAT YOU HAVE HAD THE OPPORTUNITY TO REVIEW  
20 THAT. I THINK WE SUBMITTED COPIES OF THIS AGAIN IN  
21 CONNECTION WITH OUR COMMENTS THAT WE HAD AT THE END OF  
22 NOVEMBER IN A LETTER THAT WAS SIGNED BY THE PRESIDENT OF  
23 THE COLLEGE, OSBORNE ASKEW OF CHARLOTTE, NORTH CAROLINA,  
24 AND MYSELF, AS WELL AS AN EARLIER SUBMITTAL. IF YOU NEED  
25 ADDITIONAL COPIES, PLEASE LET US KNOW. IN ADDITION TO

1 THAT, WE HAVE SUBMITTED WRITTEN COMMENTS TO YOU WITH  
2 RESPECT TO THE OTHER PROPOSED AMENDMENTS.

3 I WOULD LIKE TO FOCUS JUST ON ONE THING FOR A  
4 MOMENT. OTHER LAWYERS HAVE ALLUDED TO IT IN THE PAST, OR  
5 IN THE PASSING COMMENTS THIS MORNING. THIS COMMITTEE  
6 REALLY HAS BEEN AT THE DISCOVERY RULES FOR A VERY LONG  
7 TIME. I CAN RECALL WHEN JUDGE PAT HIGGINBOTHAM CHAIRED  
8 THIS ILLUSTRIOUS GROUP, AND YOU WERE TALKING ABOUT THESE  
9 DIFFICULT PROBLEMS BACK IN 1995, 1996. AFTER THAT WE WERE  
10 LOOKING AT THE RAND REPORT. I DO NOT RECALL -- I HAVE  
11 BEEN NOW PRACTICING LAW FOR 39 YEARS, I DON'T RECALL A  
12 TIME IN WHICH THIS COMMITTEE -- AND I HAVE FOLLOWED THEIR  
13 ACTIVITIES FOR THE BETTER PART OF 25 YEARS -- HAS GIVEN  
14 THE SORT OF COMMITMENT AND DEDICATION CREATING A DISCOVERY  
15 SUBCOMMITTEE, HAVING JUDGE LEVI PRESIDE OVER THAT, HAVING  
16 EXTRAORDINARY HEARINGS.

17 I THINK, JUDGE NIEMEYER, WE WERE HERE TWO YEARS  
18 AGO ALMOST THIS WEEK IN SAN FRANCISCO IN THE LAW SCHOOL  
19 ACROSS THE STREET TALKING ABOUT SOME OF THESE SAME ISSUES,  
20 TALKING ABOUT SCOPE OF DISCOVERY AND ALL OF THE OTHER  
21 ISSUES THAT HAD EMANATED THE RAND REPORT. WHETHER WE ARE  
22 ON THE ROAD TO DAMASCUS, I DON'T KNOW. BUT I DO KNOW THAT  
23 THE COMMITMENT THIS COMMITTEE HAS GIVEN TO THESE ISSUES,  
24 THE TIME THAT YOU HAVE SPENT, BOTH IN OPEN SESSIONS AND IN  
25 CLOSED SESSIONS, HAS BEEN EXTRAORDINARY, AND THE BENCH AND

1 BAR OWE YOU A VERY, VERY SIGNIFICANT DEBT. WE ARE IN OUR  
2 GRATITUDE NO MATTER HOW THE RULES ULTIMATELY COME OUT.

3 I WOULD LIKE TO ADDRESS MY COMMENTS TO FOUR  
4 ISSUES. ONE IS THE SCOPE OF DISCOVERY IN WHICH I SPEAK ON  
5 BEHALF OF THE ENTIRE COLLEGE. THE SECOND, WITH RESPECT TO  
6 THE QUESTION OF THE NATIONAL RULE, VIS-A-VIS THE LOCAL  
7 OPT-OUT. THIRD IS IN CONNECTION WITH THE PROPOSED  
8 AMENDMENT TO 26(A)(1), ASSUMING THAT WE KEEP THOSE RULES.  
9 AND LASTLY, THE SEVEN-HOUR PROPOSED RULE.

10 THERE IS AN ADVANTAGE THAT MY COMMITTEE HAS, I  
11 MUST SAY TO BEGIN WITH, THAT MAYBE NOT A LOT OF GROUPS  
12 THAT HAVE APPEARED BEFORE YOUR COMMITTEE HAVE. WE HAVE 27  
13 TO 29 PEOPLE ON OUR COMMITTEE AND THEY ARE PREEMINENT  
14 TRIAL LAWYERS FROM VIRTUALLY EVERY PART OF THE COUNTRY,  
15 AND THEY ARE PICKED AND SELECTED THAT WAY NOT ONLY FOR  
16 THEIR EMINENCY AS TRIAL LAWYERS BUT ALSO FROM THEIR  
17 GEOGRAPHICAL REPRESENTATION. WE HAVE PEOPLE FROM NEW YORK  
18 CITY, PEOPLE FROM HOUSTON, DALLAS, SMALLER STATES LIKE  
19 UTAH, LIKE WASHINGTON, LIKE IOWA AND ALSO BOSTON AND OTHER  
20 LOS ANGELES MAJOR METROPOLITAN AREAS. AND THROUGH THAT WE  
21 GET, I THINK, A SIGNIFICANT CONSENSUS OF WHAT IS GOING ON  
22 IN THE EASTERN DISTRICT OF NEW YORK OR IN THE DISTRICT OF  
23 BOSTON, DISTRICT OF MASSACHUSETTS AND SO FORTH. THAT  
24 POSSIBLY ALLOWS US TO SPEAK WITH SOME DEGREE OF A SENSE OF  
25 WHAT OTHER PARTS OF THE COUNTRY HAVE BEEN LOOKING AT OR

1 EXPERIENCING. WITH REGARD TO SCOPE OF DISCOVERY, LET ME  
2 JUST SAY THIS: I DON'T THINK WE COULD HAVE EXPECTED EVEN  
3 20 YEARS AGO WHEN THIS ISSUE WAS FIRST BROUGHT UP THAT WE  
4 START OUT WITH AN UNLIMITED TARGET TO SHOOT AT, I DON'T  
5 KNOW HOW WE CAN THEN EXPECT ZEALOUS ADVOCATES, TRIAL  
6 LAWYERS, AND JUDGES AS WELL TO TRY TO USE A SURGICAL LASER  
7 TO KEEP THEMSELVES WITHIN A REASONABLE BOUND OF LIMITATION  
8 ON DISCOVERY. PRINCIPALLY IT IS DOCUMENT DISCOVERY AS WE  
9 HAVE VIEWED THIS MATTER. I THINK THIS COMMITTEE HAS HAD  
10 THAT SENSE AS WELL IN ITS DISCUSSIONS OVER THE LAST THREE  
11 TO FOUR YEARS. IT IS DOCUMENT DISCOVERY THAT CREATES THE  
12 MOST ANXIETY AND THE GREATEST, SOME CRAMPS.

13           WHAT WE HAVE BEFORE US IS A TEST THAT MAYBE DIDN'T  
14 START OUT TO BE THIS WAY, BUT IT IS VIRTUALLY A BOTTOMLESS  
15 PIT IN WHICH THERE ARE NO REAL SIDELINES IN WHICH IT IS AN  
16 OPEN CONTEST AND IN WHICH WE SPEND A SUBSTANTIAL -- AND  
17 THERE IS A SENSE THAT VIRTUALLY ANYTHING GOES IN  
18 DISCOVERY. THAT OUGHT NOT BE THE CASE. WE SUGGEST TO THE  
19 COMMITTEE THAT, JUDGE NIEMEYER, WE CAN THINK IS CORRECT IN  
20 HIS COMMENT THAT MAYBE IT IS THAT 90 PERCENT OF ALL  
21 DISCOVERY IS NEVER USED, IS NOT ONLY NOT RELEVANT IN THE  
22 ADMISSIBLE SENSE, IT IS NOT RELEVANT EVEN IN THE DISCOVERY  
23 SENSE. WE HAVE LOST OUR WAY IN THIS AREA AND WE BELIEVE  
24 THAT THE TIME HAS COME AND THAT THE COMMITTEE'S  
25 RECOMMENDATION TO PROCEED WITH A SCOPE OF DISCOVERY THAT

1 RELATES TO THE LAWSUIT WHICH YOU ARE TALKING ABOUT, CLAIMS  
2 AND DEFENSES. IT MAKES SENSE AND SENDS A MESSAGE TO ALL  
3 OF US, A SIGNAL TO ALL OF US THAT THIS IS WHAT THIS COURT  
4 IS INTERESTED IN HEARING AND NOT JUST TO A QUESTION OF  
5 SUBJECT MATTER.

6 WE WOULD SUGGEST THAT IN THAT SENSE OUR COMMITTEE  
7 IS COMPOSED OF PLAINTIFFS' COUNSEL AND DEFENSE COUNSEL.  
8 MOST OF MY CAREER HAS BEEN REPRESENTING PLAINTIFFS IN  
9 FAIRLY SIGNIFICANT COMMERCIAL-TYPE LITIGATION. AND I WILL  
10 TELL YOU THAT COUNSEL, IN A CLASS ACTION PLAINTIFF'S CASE  
11 AGAINST TOBACCO COMPANIES AT THIS VERY TIME, IN MY  
12 JUDGMENT, EVERY DOCUMENT THAT HAS BEEN FOUND TO HAVE ANY  
13 RELEVANCY AT ALL IN ALL THE TOBACCO LITIGATION IN THE  
14 VARIOUS COURTS THROUGHOUT THE UNITED STATES, IN BOTH THE  
15 ATTORNEY GENERAL'S CASES, THE CATANO CASES AND OTHER TYPES  
16 OF CASES WOULD HAVE BEEN PRODUCED UNDER THE FRAMEWORK OF  
17 NOT JUST SUBJECT MATTER, BUT OF CLAIMS AND DEFENSES.

18 JUDGE SCHEINDLIN: YOUR EXAMPLES WERE VERY HELPFUL  
19 THAT YOU ALLUDED TO EARLIER. COULD YOU COME UP WITH A  
20 PRACTICAL EXAMPLE OF WHAT WOULD BE GOOD CAUSE TO GO BEYOND  
21 CLAIMS AND DEFENSES AND REACH SUBJECT MATTER? COULD YOU  
22 THINK OFF THE TOP OF YOUR HEAD WHEN SUCH GOOD CAUSE COULD  
23 BE SHOWN?

24 MR. CAMPBELL: THAT'S A VERY GOOD QUESTION BECAUSE  
25 THE ISSUE THAT THE AMERICAN COLLEGE HAS CONFRONTED IN THE

1 LAST SEVERAL MONTHS, SINCE THE INITIAL RECOMMENDATIONS OF  
2 THIS COMMITTEE CAME OUT, IS THERE AN AREA THAT MAKES  
3 SENSE, IS THERE A TIME WHEN GOOD CAUSE COULD BE SHOWN.  
4 THE COLLEGE DOESN'T REALLY LIKE THIS PROPOSAL, THAT IS TO  
5 SAY THE WAY IT IS NOW, BUT IT BELIEVES THAT IT HAS A  
6 SIGNIFICANT PART OF THE LOAD IN HAVING ATTORNEYS --

7 JUDGE SCHEINDLIN: THE CALL TO ELIMINATE THE  
8 SECOND TIER, IT WOULD ELIMINATE THE COURT-MANAGED SUBJECT  
9 MATTER TIER.

10 MR. CAMPBELL: YES. THAT WOULD BE THE PRIMARY  
11 POSITION OF THE AMERICAN COLLEGE, THAT WE HAVE DECIDED TO  
12 SUPPORT THE ADVISORY COMMITTEE BECAUSE WE RECOGNIZE THE  
13 WORK AND THE COMPROMISE THAT THIS STRUGGLE HAS INVOLVED.

14 JUDGE SCHNEINDLIN: THIS WOULD BE A FEDERAL RULE  
15 AND YOU WOULD HAVE TO KNOW WHEN YOU DEVELOP THESE  
16 STANDARDS WHAT IT IS GOING TO COST. YOU CAN'T DO IT  
17 MERELY AS A COMPROMISE.

18 MR. CAMPBELL: I SUPPOSE IF WE ARE TALKING ABOUT,  
19 IN THE PRODUCT LIABILITY CASE, WE ARE TALKING ABOUT -- ONE  
20 OF OUR EXAMPLES IS A SHEARING PIN ISSUE. IT IS AN  
21 AIRCRAFT CASE, 747, AND THE QUESTION IS NOT ONLY THIS  
22 SHEARING PIN AS IT RELATES TO THE LOCKING MECHANISM OF THE  
23 LANDING GEAR, BUT WHAT ABOUT, HAS THERE BEEN A SIGNIFICANT  
24 REVIEW BY THE DEFENDANTS OF SAFETY ISSUES ON OTHER ASPECTS  
25 OF THE AIRPLANE? SO THEY WISH TO EXPAND THE WHOLE AREA

1 BECAUSE THE POSITION IS THAT PERHAPS THE DEFENDANT HAS  
2 FOLLOWED A COURSE OF CONDUCT IN WHICH THEY HAVE IGNORED  
3 SAFETY, IGNORED SAFETY IN CONNECTION WITH NOT ONLY  
4 TRICYCLE LANDING GEARS BUT ALSO PERHAPS WITH WING STRUTS  
5 AND OTHER AREAS. THAT WOULD BE A BASIS FOR GOOD CAUSE.  
6 WE HOPE THAT IN ANY EVENT, THAT THE EXCEPTION DOES NOT  
7 BECOME THE RULE. AND WE TAKE EXCEPTION WITH THOSE THAT  
8 SAY THE COURT IS SIMPLY GOING TO HAVE TO HEAR GOOD CAUSE  
9 MOTIONS IN EVERY CASE. WE THINK THAT IS NOT GOING TO BE  
10 THE CASE. LAWYERS WILL WORK TOGETHER AND THEY WILL WORK  
11 WITHIN THE FRAMEWORK OF THE CASE. THEY WILL STAY ON THE  
12 BALL, CLAIMS AND DEFENSES -- .

13 JUDGE SCHEINDLIN: AS A PLAINTIFF'S LAWYER, WHEN A  
14 PLAINTIFF IS NOT SATISFIED WITH WHAT THE OPPONENT BELIEVES  
15 IS RELATED TO CLAIMS AND DEFENSES, THEY WOULD HAVE AN  
16 OBLIGATION TO COME TO COURT AND TRY TO GET WHAT THEY  
17 BELIEVE THEY ARE ENTITLED TO. SO DON'T YOU THINK THEY ARE  
18 GOING TO COME AND SAY, OH, YOU WON'T GIVE IT TO ME, YOU  
19 MUST BE RIGHT?

20 MR. CAMPBELL: NO, I THINK IN MOST CASES IT HAS  
21 BEEN MY SENSE, JUDGE, THAT IF THE SUBJECT MATTER ISSUE  
22 WERE NOT THERE AND YOU ARE TALKING ABOUT CLAIMS AND  
23 DEFENSES, I THINK THAT LAWYERS ARE GOING TO BE BEFORE THE  
24 COURT WITHIN THE FRAMEWORK OF ATTORNEY-MANAGED DISCOVERY  
25 TALKING ABOUT THIS IS RELEVANT TO THE CLAIM. IT IS

1 RELEVANT. IT MAY NOT BE ADMISSIBLE, BUT IT IS STILL  
2 RELEVANT IN THE CONTEXT OF THE CLAIM AND DEFENSE, BUT NOT  
3 HAVE TO EMBARK UPON A SUBJECT MATTER DEFINITION.

4 MR. KASANIN: SUPPOSE A LAWYER SAID TO A JUDGE,  
5 I'M CONTEMPLATING AMENDING THE COMPLAINT TO ADD ANOTHER  
6 KIND OF CLAIM AND I HAVE CERTAIN GROUNDS FOR DOING SO,  
7 WHICH YOU ARE HAPPY TO SHARE. BUT YOU NEED TO DO A BIT OF  
8 DISCOVERY IN THIS AREA BEFORE YOU FEEL COMFORTABLE  
9 AMENDING THE COMPLAINT. WOULDN'T THAT BE THE SORT OF  
10 THING WHERE A JUDGE MIGHT SAY, THAT'S GOOD CAUSE, IT'S  
11 LIMITED, REASONABLE, AND PERMIT YOU TO DO IT?

12 MR. CAMPBELL: PUT SOME RESTRICTIONS ON IT, I  
13 THINK THAT WOULD BE UNDERSTOOD, JUDGE LEVI.

14 JUDGE NIEMEYER: WE ARE A LITTLE OVER. YOU ARE  
15 OVER YOUR TIME. I DON'T WANT TO BE UNDULY STINGY. HAVE  
16 WE GOTTEN MOST YOU HAVE POINTS OR IS THERE ONE --

17 PROFESSOR ROWE, JR.: ONE OF THE THINGS THAT  
18 STRUCK ME IN THE REPORT, BECAUSE OF WHAT OTHERS DID AFTER  
19 YOU HAD YOUR FIRST DRAFT, THERE WEREN'T THAT MANY CASES  
20 THAT EXAMPLES COULD OFTEN BE HANDLED UNDER OTHER THINGS  
21 LIKE BURDENSOMENESS. DO YOU END UP LOSING VERY OFTEN ON  
22 SUBJECT MATTER ISSUES, FINDING DISCOVERY AND ACTUALLY THE  
23 COURT SAYS, NO, THIS IS SUBJECT MATTER AND YOU HAVE TO GO  
24 AHEAD AND PRODUCE A LOT?

25 MR. CAMPBELL: I THINK THE GENERAL SENSE IS THE

1 KITCHEN SINK IS AVAILABLE. WHY TAKE OUR TIME TALKING  
2 ABOUT THE NUANCES? JUST GIVE THEM EVERYTHING AND RESPOND  
3 TO EVERYTHING. I THINK THAT IS THE SENSE IN MANY COURTS,  
4 PROFESSOR.

5 LET ME JUST SAY THIS ABOUT THE QUESTION -- ONE  
6 LAST COMMENT, JUDGE NIEMEYER, WITH REGARD TO 26(B)(1). IT  
7 HAS BEEN BEFORE THIS COMMITTEE FOR ABOUT 20 YEARS AND THE  
8 QUERY IS, IF IT IS SUCH A GOOD IDEA, WHY HASN'T IT BEEN  
9 ADOPTED BEFORE? I THINK WHAT THIS COMMITTEE HAS SAID IN  
10 1990, THE LAST TIME IT WAS MENTIONED, AND THEN 1979, 1980,  
11 WAS THAT THERE WEREN'T THAT MANY SERIOUS PROBLEMS YET WITH  
12 DISCOVERY AND WITH WHAT WAS OTHERWISE BEING PROPOSED AT  
13 THE TIME. IT WASN'T NECESSARY. BUT WE BELIEVE THAT THE  
14 TIME HAS COME FOR A NUMBER OF REASONS AND FOR THE PUBLIC'S  
15 PERCEPTION OF WHAT GOES ON IN THE WAY OF UNLIMITED  
16 DISCOVERY AND MASS PRODUCTION OF DOCUMENTS, THE TIME HAS  
17 COME TO DO IT.

18 LET ME JUST TURN TO THE QUESTION OF NATIONAL  
19 UNIFORMITY. THAT IS A BIG ISSUE IN THE JUDGMENT OF MY  
20 COMMITTEE. MOST OF THE LAWYERS THAT ARE ON OUR COMMITTEE  
21 HAVE NATIONAL PRACTICES WHO AT ANY ONE TIME MAY HAVE CASES  
22 IN TEN OR 11 DISTRICTS. IT IS IMPORTANT THAT WE HAVE A  
23 NATIONAL RULE OF DISCOVERY, AND NOT A RULE OF CONFEDERATE  
24 STATES. THE LEGAL TENDER HERE IS ONE THAT SHOULD BE  
25 UNDERSTOOD BY EVERYBODY SO WE DON'T ENGAGE IN FORM

1 SHOPPING, WE DON'T ENGAGE IN GAMES, AND WE UNDERSTAND  
2 WHETHER WE ARE IN OREGON OR UTAH OR TEXAS OR NEW YORK, THE  
3 RULES ARE GOING TO BE THE SAME.

4 THE INTERESTING THING IS THAT NO MATTER WHERE YOU  
5 GO -- SEVERAL OF OUR MEMBERS ARE FROM THE CENTRAL DISTRICT  
6 OF CALIFORNIA AND FROM MASSACHUSETTS. CHIEF JUDGE TORO IN  
7 MASSACHUSETTS CALLED ARTHUR MILLER UP ON THE PHONE AND  
8 SAID, APPARENTLY, WE ARE GOING TO OPT-OUT OF THESE RULES,  
9 PREPARE ME A SET OF RULES. MASSACHUSETTS HAS NOW A SET OF  
10 DISCOVERY RULES THAT ARE EVEN MORE BROAD THAN 26(A)(1) IN  
11 TERMS OF INITIAL DISCLOSURE. APPARENTLY THE MASSACHUSETTS  
12 BAR LIKES IT. THE TWO LAWYERS FROM MASSACHUSETTS ON OUR  
13 COMMITTEE HAVE NOT FOUND ANY PROBLEM WITH IT, INCLUDING  
14 ONE IS FRANCES FOX, WHOM I'M SURE YOU KNOW JUST A LITTLE  
15 BIT.

16 JUDGE NIEMEYER: A BROADER DISCOVERY RULE, MORE  
17 FORCEFUL DISCOVERY?

18 MR. CAMPBELL: IT IS BROADER IN THE SENSE THAT  
19 26(A)(1) REGARDS FACTUAL EVIDENCE WITH PARTICULARITY.

20 JUDGE NIEMEYER: TOO BAD FRANCES IS NOT HERE TO  
21 SPEAK ON THAT.

22 MR. CAMPBELL: WE THINK FOR A NUMBER OF REASONS  
23 THAT WE -- THAT THE FEDERAL RULES OF CIVIL PROCEDURE ARE  
24 MEANT TO BE APPLIED ON A UNIFORM BASIS. AND WE ARE AT A  
25 POINT WHERE WE HAVE HAD SUFFICIENT EXPERIMENTATION.

1 I THINK WHAT I WOULD SAY LASTLY IS WE ARE CLEARLY  
2 IN FAVOR OF THE 26(A)(1) CHANGE. AND WITH REGARD TO THE  
3 SEVEN-HOUR RULE, WE THINK IT IS MICROMANAGEMENT. IT IS AN  
4 OVERKILL. WE DON'T BELIEVE THAT A SEVEN-HOUR ISSUE -- I  
5 THINK FRANKLY, AS A PLAINTIFF'S COUNSEL, IT IS FOR GOING  
6 TO BOTHER ME AND CAUSE MORE FRUSTRATION THAN IT IS THE  
7 DEFENDANTS. I CAN GET THROUGH WITH THE DEPOSITION IN A  
8 REASONABLE AMOUNT OF TIME, EXPERT OR LAY. I JUST THINK  
9 THAT IT ALLOWS FOR POTENTIAL GANGSMANSHIP. IT ALLOWS FOR  
10 A WITNESS NOT TO ANSWER QUESTIONS. WE JUST CAN'T MEASURE  
11 JUSTICE IN A TEST TUBE OR ON A STOPWATCH. IT IS VERY HARD  
12 TO DO THAT AS THOUGH TO SAY TO THIS PANEL, WE ARE GOING TO  
13 HAVE A RULE --

14 JUDGE NIEMEYER: OF TEN MINUTES.

15 MR. CAMPBELL: ALL THE JUDGES THAT THEY HAVE GOT  
16 TO ISSUE THEIR OPINIONS WITHIN SEVEN HOURS OF THE TIME  
17 WHEN THE MATTER IS SUBMITTED TO YOU.

18 MR. KASANIN: DON'T TELL CONGRESS THAT.

19 MR. CAMPBELL: SENATOR HATCH HAS HEARD ABOUT THAT  
20 ALREADY. YOU MIGHT BE ABLE TO DO IT SOMETIMES, BUT WE  
21 NEED TO HAVE A GIVE AND PLAY OF WORKING TOGETHER AS  
22 COUNSEL. VERY NICE TO APPEAR BEFORE, THANK YOU, VERY  
23 MUCH.

24 JUDGE NIEMEYER: WE APPRECIATE YOUR INPUT, BUT WE  
25 ALSO WANT TO APPRECIATE OUR THANKS FOR THE WORK THE

1 COLLEGE HAS DONE OVER THE YEARS IN SUPPORTING OUR EFFORTS  
2 IN FINDING OUT WHAT IS GOING ON, WHAT THE VIEWS OF THE  
3 LAWYERS ARE, AND, OF COURSE, THE COLLEGE HAS ALWAYS TAKEN  
4 A VERY SERIOUS APPROACH TO THESE THINGS AND ITS VIEWS AND  
5 COMMENTS CARRY QUITE A BIT OF WEIGHT, I THINK.

6 MR. CAMPBELL: THANK YOU FOR THE OPPORTUNITY TO  
7 APPEAR BEFORE THE COMMITTEE TODAY.

8 JUDGE NIEMEYER: MR. RAFAEL?

9 MR. RAFAEL: THANKS FOR THE OPPORTUNITY TO APPEAR  
10 BEFORE THE COMMITTEE TODAY. I AM THE CURRENT PRESIDENT OF  
11 THE FEDERAL BAR ASSOCIATION FOR THE WESTERN DISTRICT OF  
12 WASHINGTON, AND I'M APPEARING ON BEHALF THE LEADERSHIP OF  
13 THE FEDERAL BAR ASSOCIATION. THE ENTIRE ASSOCIATION HAS  
14 NOT HAD THE OPPORTUNITY IN ANY SYSTEMIC WAY TO CONSIDER  
15 THE PROPOSED AMENDMENTS, BUT THE TRUSTEES OF THE  
16 ASSOCIATION HAVE HAD THAT OPPORTUNITY AND HAVE SUBMITTED A  
17 LETTER FROM THE CHAIR OF OUR LOCAL RULES COMMITTEE,  
18 MICHELLE GAMMA. THERE HAS ALSO BEEN A LETTER FROM THE  
19 PAST CHAIRMAN OF THE CIVIL JUSTICE REFORM ACT ADVISORY  
20 GROUP FROM OUR DISTRICT ENDORSING THE VIEWS EXPRESSED IN  
21 MS. GAMMA'S LETTER. MY OWN PERSPECTIVE IS AS HAVING  
22 SERVED AS THE CHAIR OF OUR LOCAL RULES COMMITTEE FOR TEN  
23 YEARS IN SEATTLE.

24 LET ME COMMENT ON THREE AREAS HERE THAT SEEM TO BE  
25 OF CONCERN TO THE PEOPLE AND THE LAWYERS PRACTICING IN THE

1 WESTERN DISTRICT OF WASHINGTON. THE FIRST IS THE  
2 ELIMINATION OF THE LOCAL OPTION AND THIS IMPOSITION OF  
3 NATIONAL UNIFORMITY. THE PRELIMINARY DRAFT AND THE NOTES  
4 THAT ACCOMPANY IT EXPRESS A COUPLE OF REASONS FOR THE  
5 ELIMINATION OF THE LOCAL OPTIONS, ONE BEING THE PRACTICAL  
6 REASON TO AVOID CONFUSION ON THE PART OF LAWYERS AND  
7 LITIGANTS WHO GO FROM ONE DISTRICT TO ANOTHER AND THE  
8 CONCEPTUAL REASON THAT THE RULES ENABLING ACT CONTEMPLATES  
9 A UNIFORM PRACTICE.

10 WE RESPECTFULLY DISAGREE THAT THE ELIMINATION OF  
11 LOCAL OPTION IS DESIRABLE, AT LEAST AT THIS TIME. THE  
12 WESTERN DISTRICT OF WASHINGTON, THE JUDGES IN THAT  
13 DISTRICT, OPTED OUT IN 1993 AND WE FOUND THE RULES  
14 GOVERNING PRACTICE IN THE DIRECT TO WORK VERY WELL, THE  
15 OPT-OUT HAS BEEN REALLY SUCCESSFUL. I THINK THE  
16 EXPERIENCE IN WESTERN WASHINGTON IS MUCH LIKE THAT IN  
17 OREGON.

18 THE JUDGES IN OUR DISTRICT USE DIFFERENTIAL CASE  
19 MANAGEMENT TECHNIQUES TO MAKE THINGS EFFICIENT. WE HAVE  
20 EARLY ALTERNATIVE DISPUTE RESOLUTION UNDER A VERY  
21 SUCCESSFUL PROGRAM THAT HAS BEEN IN PLACE FOR MANY YEARS.  
22 SHORTENED DISCOVERY PERIODS, EARLY TRIAL DATES, AND FOR  
23 THE MOST PART, ACTIVE CASE MANAGEMENT BY THE JUDGES SO  
24 THAT THE KIND OF PROBLEMS AND EXPENSE AND DELAY AND YEARS  
25 TO GET CASES TO TRIAL REALLY DOES NOT EXIST IN THE WESTERN

1 DISTRICT.

2 JUDGE NIEMEYER: DID THE EASTERN DISTRICT OPT-OUT?

3 MR. CAMPBELL: THE EASTERN DISTRICT DID NOT  
4 OPT-OUT.

5 JUDGE NIEMEYER: SO THE EASTERN DISTRICT IS UNDER  
6 THE RULE AS WRITTEN AND THE WESTERN DISTRICT IS UNDER THE  
7 RULE AS WRITTEN IN 1993?

8 MR. RAFAEL: YES, THAT'S RIGHT.

9 THE DISTRICT OF ALASKA DID NOT OPT-OUT EITHER AND  
10 MANY LAWYERS FROM WESTERN WASHINGTON PRACTICE IN EASTERN  
11 WASHINGTON AND IN ALASKA AND IN OREGON AS WELL. WE HAVE  
12 NOT NOTICED THAT THERE IS WIDESPREAD CONFUSION OR  
13 DIFFICULTY ON THE PART OF LAWYERS PRACTICING FROM ONE  
14 DISTRICT TO THE NEXT. YOU ALWAYS HAVE TO READ THE LOCAL  
15 RULES WHENEVER YOU GO INTO A NEW COURT.

16 JUDGE NIEMEYER: HAVE YOU BEEN IN THE CENTRAL  
17 DISTRICT OF CALIFORNIA?

18 MR. RAFAEL: I HAVE NOT.

19 JUDGE NIEMEYER: I AM TOLD THERE ARE SEVERAL  
20 VOLUMES WHEN YOU WANT TO READ THE LOCAL RULES THERE.

21 MR. RAFAEL: I THINK NORMALLY AS PRO HA VICE  
22 ADMISSION --

23 MR. KASANIN: IN SOME DISTRICTS, WE HAVE BEEN TOLD  
24 SOME JUDGES HAVE OPTED OUT AND SOME OF THE JUDGES HAVE  
25 OPTED IN WITHIN THE DISTRICT. IS THAT A PROBLEM OR DO YOU

1 FEEL, HEY, YOU GOT TO KNOW WHO THE JUDGE IS, WHO YOU ARE  
2 PRACTICING BEFORE, AND IF THE JUDGE HAS OPTED OUT, THAT'S  
3 OKAY, IF THE JUDGE HAS OPTED IN, THAT'S OKAY?

4 MR. RAFAEL: IT IS ALWAYS HELPFUL TO KNOW THE  
5 PRACTICES OF THE PARTICULAR JUDGE BEFORE WHOM YOU ARE  
6 PRACTICING. IT SEEMS TO THE FOLKS IN THE FEDERAL BAR  
7 ASSOCIATION IN WASHINGTON WHO HAVE CONSIDERED THIS THAT  
8 THIS DRIVE TO ENFORCE NATIONAL UNIFORMITY WILL REALLY  
9 RESULT IN MAKING IT HARDER FOR PEOPLE TO UNDERSTAND WHAT  
10 THE PRACTICE IS BEFORE PARTICULAR JUDGES BECAUSE IT WILL  
11 TEND TO KIND OF PUSH THAT UNDERGROUND. AND THERE WILL BE  
12 INDIVIDUAL PRACTICES, BUT THEY WILL NOT BE AS EASILY  
13 DISCERNED AS THEY ARE NOW FROM THE LOCAL RULES.

14 MR. KASANIN: I JUST WONDERED WHETHER YOU THOUGHT  
15 IT WAS IMPORTANT TO HAVE UNIFORMITY WITHIN THE DISTRICT,  
16 AND IF YOU DID, WHY THAT WAS ANY DIFFERENT THAN HAVING A  
17 UNIFORMED NATIONAL PROCEDURE TO ENFORCE AND TO APPLY  
18 UNIFORM NATIONAL LAW?

19 MR. RAFAEL: IT WOULD BE HARD TO DISAGREE WITH THE  
20 NOTION THAT UNIFORMITY IS A DESIRABLE GOAL. I DO HAVE TO  
21 NOTE THAT RULE 83 OF THE FEDERAL RULES OF CIVIL PROCEDURE  
22 CONTAINS A POSITIVE GRANT OF AUTHORITY TO COURTS TO PASS  
23 RULES GOVERNING THE PRACTICE IN THAT DISTRICT AND THE  
24 LANGUAGE IS TO MAKE RULES GOVERNING ITS PRACTICE.

25 MR. KASANIN: NOT INCONSISTENT WITH THE FEDERAL

1 RULES.

2 MR. RAFAEL: BUT IT ALLOWS FOR DEVELOPMENT OF  
3 LOCAL PRACTICES AND PROCEDURES THAT WORK, AND THAT'S  
4 PRECISELY WHAT THE LAWYERS AND JUDGES FOR THE MOST PART  
5 FEEL IN WESTERN WASHINGTON FEEL HAS BEEN DONE AND DONE  
6 SUCCESSFULLY THROUGH THAT LOCAL OPTION.

7 MR. KASANIN: I DISAGREE WITH YOU THAT THIS IS  
8 INTERSTITIAL. IF YOU LOOK AROUND THE COUNTRY -- FIRST OF  
9 ALL, THERE HAS BEEN AN AMAZING DEVELOPMENT AND ARRAY OF  
10 DIFFERENT KINDS OF DISCLOSURE REGIMENS. IT IS NOT LIKE WE  
11 HAVE TWO OR THREE GOING, WE HAVE MANY GOING, AND THEY ARE  
12 CHANGING ALL THE TIME, AND THEY ARE DIFFERENT, PERHAPS,  
13 FROM JUDGE TO JUDGE WITHIN THE SAME DISTRICT. SO WE HAVE  
14 THAT.

15 IN SOME OF THE DISTRICTS THE DISCLOSURE PROCEDURES  
16 AFFECTING THE WAY CASES ARE PLEADED, SO IT IS GOING TO  
17 EFFECT RULE 12 PRACTICE AND IT IS BEGINNING TO CHANGE IN  
18 SOME DISTRICTS NOTICE PLEADING TO A DIFFERENT KIND OF  
19 PLEADING. SO IT IS AFFECTING THE PLEADING STANDARDS. I  
20 SUSPECT OVER TIME IT WILL AFFECT MOTION PRACTICE AS WELL  
21 AND RULE 56(F) PRACTICE BECAUSE, IF YOU ARE IN A DISTRICT  
22 WHERE THERE IS VERY BROAD DISCLOSURE, AND PERHAPS THE  
23 JUDGES DON'T INTEND TO GRANT 56(F) MOTIONS. YOU CAN SAY  
24 THIS ISN'T JUST INTERSTITIAL, THIS ISN'T HOW LONG IS THE  
25 CLERK'S OFFICE OPEN, OR DO WE PUT BLUE BACKING ON OUR

1 PAPERS OR NOT, THIS GOES TO ONE OF THE CRITICAL PARTS OF  
2 THE PRETRIAL PROCEDURE.

3 MR. RAFAEL: YOUR HONOR MAKES A PERSUASIVE POINT.  
4 I THINK PEOPLE IN OUR DISTRICT RECOGNIZE THAT. BUT AS THE  
5 COMMENTARY THAT WAS PUBLISHED NOTES, THE ENFORCEMENT OF A  
6 NATIONAL UNIFORM RULE IS HIGHLY CONTROVERSIAL AT THIS  
7 POINT. AND THERE IS INSUFFICIENT EMPIRICAL DATA FOR  
8 CONCLUDING THAT IMPOSING THE MANDATORY DISCLOSURES THAT  
9 ARE PROPOSED WILL ACHIEVE THE DESIRED GOAL. SO I THINK WE  
10 WOULD HAVE TO SAY WE ARE IN THE CAMP WITH JUDGE PANNER AND  
11 THE FOLKS FROM OREGON WHO SAY IT IS A LITTLE TOO EARLY TO  
12 IMPOSE THIS PARTICULAR FORM OF NATIONAL UNIFORMITY,  
13 ALTHOUGH NATIONAL UNIFORMITY IS A VALUABLE GOAL.

14 MR. KASANIN: HAVING DONE SOME OF THE EMPIRICAL  
15 STUDIES OVER THE PAST YEARS, I WILL GIVE YOU A STATEMENT  
16 THAT I WOULD BE WILLING TO PUT MONEY ON: THE DATA WILL  
17 ALWAYS BE INSUFFICIENT AND IT WILL ALWAYS BE TOO EARLY.  
18 THAT IS THE NATURE OF THIS SOCIAL SCIENCE RESEARCH. IT IS  
19 NEVER GOING TO BE CRYSTAL CLEAR. AS PROFESSOR ROWE SAID,  
20 THERE AREN'T GOING TO BE ANYMORE STUDIES. WE HAVE HAD TWO  
21 VERY BIG STUDIES. I DON'T THINK THERE HAS EVER BEEN A  
22 FEDERAL RULE OF CIVIL PROCEDURE THAT HAS BEEN BASED UPON  
23 TWO EMPIRICAL STUDIES. YOU MAY BE DISSATISFIED WITH THOSE  
24 EMPIRICAL STUDIES AND THERE ARE GROUNDS TO BE  
25 DISSATISFIED, BUT IT IS THE BEST WE CAN DO AND IT IS MORE

1 THAN HAS EVER BEEN DONE ON ANY OTHER CIVIL RULING.

2 MR. RAFAEL: I TURN TO THE ISSUE OF THE SEVEN-HOUR  
3 DISCOVERY. WE ARE OPPOSED TO THE PROPOSED AMENDMENTS TO  
4 THIS RULE AS WELL. THIS CREATES A TWO-TIER SYSTEM OF  
5 PARTY CONTROL DISCOVERY AND COURT CONTROL DISCOVERY.  
6 AGAIN THE STATED PURPOSES FOR THESE PROPOSED AMENDMENTS  
7 ARE TO NARROW THE SCOPE OF DISCOVERY, TO REDUCE EXPENSE  
8 AND TO INVOLVE THE COURTS MORE ACTIVELY IN DISCOVERY  
9 MANAGEMENT. FROM OUR STANDPOINT THERE IS AMPLE EXISTING  
10 AUTHORITY TO CONTROL AND MANAGE AUTHORITY. THE PRESSING  
11 QUESTION IS WHETHER THAT AUTHORITY IS BEING USED. WE  
12 CONCUR WITH THE VIEWS THAT HAVE BEEN EXPRESSED ALL MORNING  
13 THAT THIS RULE WILL ALTER PLEADING PRACTICE AND IT IS  
14 GOING TO ENCOURAGE PEOPLE TO PLEAD MORE BROADLY THAN THEN  
15 WOULD OTHERWISE DO. MIGHT FOOL RULE 11 OBLIGATIONS BUT  
16 WITH A KEEN EYE ON DISCOVERY, BECAUSE THERE WILL BE THAT  
17 DIRECT CORRELATION BETWEEN WHAT YOU PLEAD AS CLAIM OR  
18 DEFENSE AND WHAT DISCOVERY YOU CAN GET WITHOUT A SHOWING  
19 OF GOOD CAUSE. WE ALSO THINK IT IS GOING CREATE A NEW  
20 LAYER OF OBJECTIONS AND MOTIONS ON THIS ISSUE OF GOOD  
21 CAUSE. IT IS GOING TO INCREASE EXPENSE TO LITIGANTS  
22 RATHER THAN REDUCE EXPENSE. IN PRACTICE IT MAY TEND TO  
23 DEFEAT THE GOAL OF NATIONAL UNIFORMITY BECAUSE OF JUDGES  
24 VARYING VIEWS ABOUT WHEN DISCOVERY BEYOND THE CLAIMS AND  
25 DEFENSES IS APPROPRIATE.

1 JUDGE VINSON: WHAT IF WE ELIMINATE THE GOOD CAUSE  
2 CLAUSE?

3 MR. RAFAEL: I AM TRYING TO THINK HOW THAT WORK  
4 PROCEDURALLY AND WHO WOULD HAVE THE BURDEN OF RAISING THAT  
5 WITH THE COURT. IT WOULD STILL BE COURT-MANAGED  
6 DISCOVERY, IS THAT WHAT YOUR HONOR IS CONTEMPLATING?

7 JUDGE VINSON: IT WOULD GO BACK TO CLAIMS AND  
8 DEFENSES. YOU WOULD ELIMINATE SUBJECT MATTER ENTIRELY IF  
9 YOU TOOK THAT CLAUSE OUT.

10 MR. RAFAEL: EVEN IF THAT WERE ELIMINATED, IT  
11 WOULD SEEM TO ME IF THAT IS PUT TO THE COURT FOR A  
12 DETERMINATION, THERE HAS TO BE SOME CRITERIA, THERE HAS TO  
13 BE SOME STANDARD. AND IF IT IS NOT GOOD CAUSE OR IF THERE  
14 IS NOTHING LIKE THAT IN THE RULE --

15 JUDGE NIEMEYER: I THINK THE QUESTION WAS IF WE  
16 ELIMINATE IT ALTOGETHER A SCOPE THAT ADDRESSES SUBJECT  
17 MATTER AND LEFT THE SCOPE ONLY RELATING TO CLAIM OR  
18 DEFENSE, I THINK THAT WAS THE QUESTION, WOULD YOU FAVOR IT  
19 THAT WAY IF IT WERE IN THAT FORMAT?

20 MR. RAFAEL: NOW I'M SPEAKING OFF-BRIEF BECAUSE  
21 THAT IS NOT AN ISSUE THAT OUR COMMITTEE AND OUR GROUP HAS  
22 STUDIED, AND I DON'T THINK I OUGHT TO COMMENT UNDER THOSE  
23 CIRCUMSTANCES.

24 WE THINK THERE ARE BETTER WAYS TO ENCOURAGE COURTS  
25 INVOLVEMENT THAN BY CREATING TWO-TIER DISCOVERY. RULE

1 16(A)(1) COULD BE AMENDED TO REQUIRE AN EARLY CONFERENCE,  
2 RATHER THAN JUST MAKE IT PERMISSIVE, IT SEEMS RATHER  
3 UNANIMOUS THAT WHEN JUDGES HOLD EARLY CONFERENCES AND HAVE  
4 THE LAWYERS IN TO DISCUSS THE CLAIMS AND DEFENSES, WHAT IS  
5 THE CASE ALL ABOUT, WHAT REALLY IS THE SCOPE OF DISCOVERY  
6 HERE, WHAT SORT OF PROBLEMS CAN WE ANTICIPATE --

7 PROFESSOR MARCUS: WHAT IS YOUR DISTRICT'S  
8 POSITION ON RULE 26(F) CONFERENCES?

9 MR. RAFAEL: WE OPTED OUT.

10 PROFESSOR MARCUS: SO WHAT YOU ARE SAYING IS  
11 REQUIRED THAT WOULD BE A GOOD THING TO DO?

12 MR. RAFAEL: NO, WE ARE NOT ADVOCATING THAT RULE  
13 16 BE AMENDED. I WAS REAL TRYING TO POINT OUT --

14 PROFESSOR MARCUS: BUT WE HAVE RULE 26(F), EXCEPT  
15 FOR DISTRICTS THAT OPTED OUT, IT WOULD APPLY IN YOUR  
16 DISTRICT.

17 MR. RAFAEL: YES, IT WOULD. AND RULE 26(F) WOULD  
18 REQUIRE THE CONFERENCE OF COUNSEL AND THE SUBMISSION OF  
19 THE REPORT TO THE COURT.

20 PROFESSOR MARCUS: SO IS THAT THE KIND OF THING  
21 YOU WERE JUST DESCRIBING?

22 MR. RAFAEL: NOT REALLY. THE JUDGES IN OUR  
23 DISTRICT USE SOMETHING LIKE THAT. THEY WILL INVITE A  
24 JOINT STATUS REPORT, ASK THE PARTIES TO BRIEFLY OUTLINE  
25 WHAT THE NATURE OF THE CLAIMS IN THE CASE ARE AND THE

1 APPROXIMATE LENGTH OF TRIAL, HOW MUCH TIME IS NECESSARY  
2 FOR DISCOVERY. AND THEN MOST OF THE JUDGES, WITHOUT  
3 HAVING A CONFERENCE, WILL ISSUE AN ORDER WHICH WILL GOVERN  
4 THE PRETRIAL SCHEDULE.

5 WHAT I'M SUGGESTING IS THAT THESE CHANGES TO  
6 26(B)(1) ARE UNNECESSARY. IF THE GOAL IS TO ENCOURAGE  
7 MORE JUDICIAL INVOLVEMENT IN MANAGING DISCOVERY, THAT CAN  
8 BE DONE BY OTHER MEANS THAN CREATING TWO TIERS OF  
9 DISCOVERY. IT SEEMS LIKE, PERSPECTIVELY, A BACKWARD WAY  
10 TO ENCOURAGE THAT JUDICIAL INVOLVEMENT. RULE 16, FOR  
11 EXAMPLE, COULD BE AMENDED TO REQUIRE EARLY CONFERENCE AS  
12 OPPOSED TO MERELY PERMITTING IT.

13 JUDGE NIEMEYER: DOES THAT COVER IT?

14 MR. RAFAEL: WE HAVE SOME VIEWS ON RULE 30  
15 REGARDING DEPOSITIONS, THEY ARE EXPRESSED IT IN OUR  
16 LETTER, SO UNLESS THE PANEL HAS QUESTIONS --

17 MR. KASANIN: ARE YOU OPPOSED TO THAT?

18 MR. RAFAEL: I'M AFRAID SO. WE ARE OPPOSED TO THE  
19 LIMIT OF ONE DAY IN ALL CASES. THERE IS NOT THAT MUCH  
20 OPPOSITION TO A SEVEN-HOUR LIMIT TO A DEPOSITION. THE  
21 CASE OF THE PARTIES, IT WAS FELT THAT IT OUGHT TO BE  
22 LONGER, THAT THERE OUT TO BE A TWO-DAY PRESUMPTIVE LIMIT.

23 PROFESSOR ROWE, JR.: WE HEARD ABOUT THAT EARLIER  
24 THIS MORNING, SOME PEOPLE THOUGHT THAT RETAINED EXPERTS  
25 ARE ALSO IN THE CATEGORY THAT YOU MIGHT NEED LONGER.

1 MR. RAFAEL: THAT WASN'T THE POSITION THAT EMERGED  
2 FROM OUR DISCUSSIONS. BUT THERE WAS A STRONG OPPOSITION  
3 TO THE NOTION THAT A DEPONENT WOULD HAVE THE VETO RIGHT  
4 OVER WHETHER A DEPOSITION COULD CONTINUE PAST SEVEN HOURS.  
5 WE ALL FELT THAT IF THE LAWYERS COULD AGREE THAT A  
6 DEPOSITION BE EXTENDED SEVEN HOURS, THAT THE DEPONENT'S  
7 CONSENT SHOULD NOT BE REQUIRED. IN ALMOST ALL CASES,  
8 WHETHER THE INTEREST OF JUSTICE REQUIRED IT OR NOT, THE  
9 WITNESS IS NOT GOING TO WANT TO EXTEND HIS OR HER  
10 DEPOSITION. I THINK IT WAS WIGMORE WHO SAID THAT THE  
11 PARTY HAS A RIGHT TO EVERY MAN'S EVIDENCE AND MAYBE THIS  
12 IS ONE OF THOSE CIRCUMSTANCES WHERE THE DEPONENTS WISH TO  
13 GO HOME AND BE DONE, HAS TO YIELD TO THE RIGHT TO OBTAIN  
14 THAT EVIDENCE.

15 JUDGE NIEMEYER: APPRECIATE HAVING YOUR VIEWS AND  
16 APPRECIATE YOUR COMING DOWN AND TESTIFYING BEFORE US.

17 WE ARE GOING TO TAKE A LUNCHEON RECESS FOR ONE  
18 HOUR. 1:40 WE'LL COME BACK AND BEGIN.

19 (LUNCHEON RECESS.)

20 JUDGE NIEMEYER: IS ARCHIE ROBINSON HERE? IS  
21 ANYBODY FROM THE DEFENSE RESEARCH INSTITUTE HERE?

22 MR. WOOD: I'M WELDON WOOD. I HAPPEN TO BE MR.  
23 ROBINSON'S PARTNER. I'M NOT SURE WHERE HE IS.

24 JUDGE NIEMEYER: HAVE YOU SEEN HIM TODAY?

25 MR. WOOD: NO, I HAVE NOT.

1 JUDGE NIEMEYER: YOU WILL BE THE NEXT ONE. LET ME  
2 GO DOWN THE LIST FROM SOME I CALLED THIS MORNING AND SEE  
3 IF ANYBODY IS HERE THAT WE PASSED OVER. IS HOWARD  
4 FINKELSTEIN HERE?

5 (NO RESPONSE.)

6 JUDGE NIEMEYER: BRUCE CELEBREZE?

7 (NO RESPONSE.)

8 JUDGE NIEMEYER: ELLEN ELLISON?

9 (NO RESPONSE.)

10 JUDGE NIEMEYER: WHY DON'T WE HEAR FROM YOU AND  
11 YOU MIGHT, I BELIEVE, SPEAK FOR MR. ROBINSON.

12 MR. WOOD: I BROUGHT WITH ME SOME PREPARED  
13 REMARKS. IS THERE A PLACE I CAN JUST LEAVE THEM?

14 JUDGE NIEMEYER: LEAVE THEM ON THE TABLE THERE AND  
15 WE'LL GET THEM. THEY WILL BECOME PART OF OUR MATERIALS.

16 MR. WOOD: MY NAME IS WELDON WOOD. I PRACTICE IN  
17 SAN JOSE WITH A FIRM KNOWN AS ROBINSON & WOOD. WE HAVE 30  
18 LAWYERS, 31 AS OF TODAY. OUR PRACTICE IS LIMITED TO  
19 DEFENSE OF CIVIL MATTERS. I AM A PAST MEMBER OF THE BOARD  
20 OF DIRECTORS OF DEFENSE RESEARCH INSTITUTE AND A PAST  
21 SECRETARY-TREASURER OF THAT ORGANIZATION. I ALSO HAPPEN  
22 TO BE THE CURRENT PRESIDENT OF THE SAN FRANCISCO CHAPTER  
23 OF THE AMERICAN BOARD OF TRIAL ADVOCATES. THE AMERICAN  
24 BOARD OF TRIAL ADVOCATES IS BY INVITATION ONLY  
25 ORGANIZATION THAT HAS ABOUT 5,000 MEMBERS ACROSS THE

1 COUNTRY WHO ARE MADE UP PRIMARILY HALF AND HALF OF BOTH  
2 PLAINTIFF AND DEFENSE LAWYERS.

3 I LEARNED OF THIS HEARING BY OFFICERS OF DRI, BUT  
4 I AM HERE TO SPEAK AS AN INDIVIDUAL LAWYER. AS A MATTER  
5 OF FACT, I HAVE NOT HAD AN OPPORTUNITY TO DISCUSS WITH MY  
6 PARTNER ARCHIE ROBINSON WHAT HIS REMARKS WILL BE.

7 AT THE OUTSET I'D LIKE TO SAY THAT MY VIEW OF THIS  
8 PROCESS OF LOOKING AT THE ARCHITECTURE OF THE DISCOVERY  
9 RULES RATHER THAN LOOKING AT QUESTIONS OF DISCOVERY ABUSE  
10 IS THE CORRECT APPROACH.

11 AT THE OUTSET OF THIS INQUIRY, JUDGE NIEMEYER  
12 PRESENTED THREE QUESTIONS TO THIS COMMITTEE. ONE, WHEN  
13 FULLY USED IS THE DISCOVERY PROCESS TOO EXPENSIVE FOR WHAT  
14 IT CONTRIBUTES TO THE DISPUTE RESOLUTION PROCESS? TWO,  
15 ARE THERE RULES CHANGES THAT CAN BE MADE WHICH MIGHT  
16 REDUCE THE COST AND DELAY OF DISCOVERY WITHOUT UNDERMINING  
17 OUR POLICY OF FULL DISCLOSURE? THREE, SHOULD THE FEDERAL  
18 RULES FOR DISCLOSURE APPLY IN CASES INVOLVING NATIONAL  
19 SUBSTITUTE LAW AND PROCEDURE AS WELL AS CASES INVOLVING  
20 STATE LAW BE MADE UNIFORM THROUGHOUT THE COUNTRY?

21 BECAUSE THE PHRASE ARCHITECTURE DISCOVERY REFERS  
22 TO DESIGN OR EARLY ARRANGEMENT OF RULES, YOU ARE REQUIRED  
23 TO HAVE AN UNIFORMLY STABLE FOUNDATION. SINCE I THINK OF  
24 FOUNDATION AS THE BOTTOM OF THE THING, I BEGIN MY REMARKS  
25 WITH THE INVERSE ORDER OF JUDGE NIEMEYER'S COMMENTS.

1 I BELIEVE THAT UNIFORM APPLICATION OF THE RULES  
2 ACROSS THE COUNTRY IS ESSENTIAL. LAWYERS, REGARDLESS OF  
3 VENUE, SHOULD KNOW PRECISELY WHAT IS REQUIRED OF THEM AND  
4 THEIR CLIENTS IN THE DISCOVERY PROCESSES. THEY SHOULD BE  
5 ABLE TO ASSESS THAT AND DECIDE WHETHER OR NOT, IN A GIVEN  
6 CASE, IT MIGHT BE MORE EXPEDITIOUS TO SETTLE EARLY THAN  
7 LATE. FAIRNESS I THINK REQUIRES THAT ALL PARTIES IN THIS  
8 FEDERAL JURISDICTION BE TREATED FAIRLY AND EQUALLY,  
9 REGARDLESS OF WHETHER THEY ARE IN FLORIDA OR CALIFORNIA.

10 THERE IS ANOTHER SALIENT POINT TO BE MADE ABOUT  
11 THIS, AND THAT IS THAT THE NUANCES OF THE RULES NEED TO BE  
12 INTERPRETED BY COURTS. AND WHEN YOU HAVE RULES THAT ARE  
13 IN HARMONY RATHER THAN DISCORD, YOU CAN DEVELOP A COHERENT  
14 BODY OF CASE LAW THAT HELPS US ALL UNDERSTAND THE RULES  
15 BETTER. SO I WOULD APPLAUD THE EFFORT TO MAKE THE RULES  
16 UNIFORM.

17 NEXT, WHETHER THERE MIGHT BE CHANGES IN SOME OF  
18 THE PROCEDURAL RULES THAT WOULD BE EFFECTIVE IN COST  
19 REDUCING, I THINK THAT THE BEST EXAMPLE OR AN EXCELLENT  
20 EXAMPLE IS RULE 26(B)(1) WHERE, WHILE YOU DON'T REDUCE THE  
21 SCOPE OF DISCOVERY OVERALL, YOU FACE IT IN THAT YOU HAVE  
22 LAWYER-MANAGED DISCOVERY FOR MATTERS RELEVANT TO CLAIMS OR  
23 DEFENSES. AND WHERE THE PARTIES CAN'T AGREE,  
24 COURT-MANAGED DISCOVERY ON THE BROADER SUBJECT MATTER  
25 ISSUE ON A SHOWING OF GOOD CAUSE. I THINK THAT'S A

1 SALIENT POINT. IT SHOULD LET THE COURT GET INVOLVED IN  
2 THOSE CASES WHERE PARTIES CAN'T AGREE. MY EXPERIENCE HAS  
3 BEEN THAT PARTIES WHO DON'T AGREE IN SOME BIG CASES, SOME  
4 CASES THAT REQUIRE JUST MORE VOCIFEROUS ADVOCACY THAN  
5 OTHERS, THE COURT CAN MAKE THE DECISION. BUT IF THE  
6 PARTIES CAN AGREE, THE COURT DOESN'T NECESSARILY HAVE TO  
7 NECESSARILY USE ITS PRECIOUS TIME ON DISCOVERY DISPUTES.

8 NOW, ANOTHER EXAMPLE OF A GOOD RULES CHANGE THAT I  
9 SUPPORT IS THE PROVISION OF RULE 34(B) PERTAINING TO COST  
10 BEAR. IT SEEMS TO ME THAT IF YOU TAKE INTO CONSIDERATION  
11 BOTH RULE 26 AND RULE 34, THAT YOU USE THEM IN TANDEM, THE  
12 COURT CAN HAVE THE POWER TO DECIDE WHETHER OR NOT A GIVEN  
13 DISCOVERY REQUEST IS REASONABLE, AND IF SO, ORDER THAT THE  
14 PARTY SEEKING THE DISCOVERY PAY THE COST THAT IS  
15 REASONABLE FOR PRODUCING THAT.

16 PROFESSOR ROWE, JR.: MR. WOOD, I DON'T KNOW IF  
17 YOU ARE FAMILIAR WITH THE PART OF THE CHAIR'S LETTER IN  
18 WHICH HE SETS OUT AN ALTERNATIVE IN 34(B), IT IS TARGETED  
19 ON DOCUMENT DISCOVERY, WHICH PEOPLE SAY IS THE LARGEST  
20 PROBLEM AREA, BUT THERE WOULD ALSO BE THE POSSIBILITY OF  
21 LOCATING IT IN 26 SO THAT IT WOULD BE GENERAL AND FOR  
22 OTHER CLAIMS THAT ARE POSSIBLY EXCULPATORY OR OTHER CLAIMS  
23 OF EXCESSIVE DISCOVERY SUCH AS EXCESSIVE DEPOSITIONS AND  
24 SOMEBODY WANTED AN AWFUL LOT. WOULD YOU HAVE ANY PROBLEM  
25 WITH THAT ALTERNATIVE?

1           MR. WOOD: I THINK THE MORE SPECIFIC IS BETTER.  
2 IT CAN BE GENERAL, TOO. MY CONCERN AND MY EXPERIENCE HAS  
3 BEEN IN DOCUMENT PRODUCTION, BUT MAYBE NOT. IT IS  
4 WHATEVER WORKS WITH GETTING THESE RULES, THESE CONCEPTS,  
5 ENACTED INTO LAW. AND I THINK THAT THERE IS NOT A PROBLEM  
6 WITH THE FINE-TUNING THAT'S GOING ON. THE DISCOVERY ACT  
7 HAS BEEN A REAL IMPORTANT PART OF THE JURISPRUDENCE OF  
8 THIS COUNTRY. THAT DEPENDS, I GUESS, MORE ON SOMETHING  
9 THAT YOU WOULD KNOW MORE ABOUT WHETHER OR NOT IT WOULD BE  
10 ACCEPTED IN RULE 26 RATHER THAN RULE 24.

11           MY EXPERIENCE IS THE PROBLEM, IS DOCUMENT  
12 PRODUCTION. YOU REPRESENT A COMPANY THAT IS IN THE  
13 BUSINESS OF PROVIDING GOODS AND SERVICES. IT IS NOT IN  
14 THE BUSINESS OF ORGANIZING ITS INFORMATION SO THAT IT CAN  
15 BE EASILY OBTAINED WITH RESPECT TO LAWSUITS. AND SO IT  
16 GETS VERY EXPENSIVE FOR DEFENDANTS TO PROVIDE DOCUMENTS  
17 THAT ARE RELEVANT TO THE ISSUES. AND I THINK THIS  
18 COMMITTEE HAS PROBABLY HEARD ABOUT SITUATIONS OVER E-MAILS  
19 AND SO ON AND DIFFERENT LOCATIONS THROUGHOUT THE COUNTRY,  
20 THE COMPANY DOESN'T KNOW WHAT IT HAS, SO HOW CAN IT FIND  
21 IT FOR THIS PARTICULAR LITIGATION, ESPECIALLY WHEN YOU  
22 HAVE A SITUATION -- LET'S SAY A MACHINE? YOU HAVE A  
23 MACHINE THAT IS CLAIMED TO BE DEFECTIVE. WE WANT ALL THE  
24 ACCESS THAT HAS EVER HAPPENED ON THAT MACHINE, OR WOULD IT  
25 BE REASONABLE TO SAY, LET'S JUST HAVE RELEVANT TO THE

1 SUBJECT MATTER THIS PART OF THE MACHINE THAT CAUSED THE  
2 ACCIDENT. EVEN THAT, OTHER CLAIMS, OTHER CASES, MAYBE WAY  
3 TOO BROAD, AND IF THE PLAINTIFF WISHES TO PURSUE THAT,  
4 THEN IT IS REASONABLE TO ME THAT THE PLAINTIFF SHOULD BEAR  
5 THE COST OF IT. BUT THEN FOLLOWING UP ON DEPOSITIONS ON  
6 THOSE OTHER CASES, THEN MAYBE YOU ARE RIGHT, MAYBE WE NEED  
7 IT IN OTHER RULES AS WELL.

8 I GUESS I WOULD LIKE TO CLOSE HERE WITH A  
9 DISCUSSION THAT CORRESPONDS TO THE FIRST QUESTION THAT WAS  
10 ASKED: IS DISCOVERY TOO EXPENSIVE FOR THE COSTS WE BEAR?  
11 I THINK THAT MOST OF MY EXPERIENCE HAS BEEN THAT MOST  
12 DISCOVERY IS REASONABLE. IT IS THE EXCEPTIONAL CASE  
13 EITHER CAUSED BY THE NATURE OF THE CASE OR THE NATURES OF  
14 THE OPPONENTS, WHETHER IT IS THE ATTORNEY OR THE PARTIES,  
15 THAT HAVE CAUSED THE PROBLEMS IN MY CASES. THANK YOU.

16 JUDGE NIEMEYER: THANK YOU, MR. WOOD.

17 MR. GREGORY READ?

18 MR. READ: GOOD AFTERNOON. MY NAME IS GREG READ.  
19 I PRACTICE WITH A NATIONAL LITIGATION FIRM WITH OFFICES IN  
20 SAN FRANCISCO AND SIX OTHER CITIES. WE HAVE 265 LAWYERS  
21 AND ALL WE DO IS LITIGATION AND NOTHING ELSE. SO FOR 28  
22 YEARS I HAVE BEEN LABORING IN THE TRENCHES OF DISCOVERY IN  
23 BOTH FEDERAL AND STATE COURTS. TRYING TO REPEAT WHAT  
24 OTHERS HAVE SAID AND GIVE YOU THE HIGHLIGHTS OF WHAT I  
25 THINK IS IMPORTANT ABOUT THESE PROPOSED RULES, WHICH I

1 SUPPORT.

2 THE INITIAL DISCLOSURE CHANGE IN 26(A)(1) IS VERY  
3 GOOD FOR A COUPLE OF REASONS. FIRST, AS MANY PEOPLE SAY,  
4 IT PREVENT PARTIES FROM GOING TO WORK TO DO THE OTHER  
5 GUY'S CASE FOR HIM. IT PREVENTS THE DISCLOSURE OF HUGE  
6 AMOUNTS OF DOCUMENTS OFTEN WHICH ARE TOTALLY UNUSABLE IN A  
7 CASE, AND I WILL GIVE YOU AN EXAMPLE. I AM INVOLVED IN A  
8 CASE GOING ON RIGHT NOW IN WHICH FOR OUR INITIAL  
9 DISCLOSURE I SPENT TWO WEEKS IN OKLAHOMA CITY GOING  
10 THROUGH BOXES OF DOCUMENTS. WE ENDED UP PRODUCING 40,000  
11 PAGES OF DOCUMENTS FOR OUR INITIAL DISCLOSURE OF WHICH --  
12 AND I AM ESTIMATING BROADLY -- MAYBE 100 PAGES HAVE BEEN  
13 REFERRED TO SO FAR IN THE DEPOSITIONS AND SO ON THAT HAS  
14 GONE ON IN THIS LITIGATION. A HUGE WASTE OF TIME AND  
15 MONEY FOR MY CLIENT, AND I MIGHT ADD A HUGE WASTE OF  
16 RESOURCES FOR EVERYBODY ELSE IN THE CASE WHO HAS TO GO PAW  
17 THROUGH THOSE DOCUMENTS LOOKING FOR THINGS WHICH MAY BE  
18 RELEVANT AND OF INTEREST FOR THE LITIGATION.

19 PROFESSOR ROWE, JR.: DO YOU GENERALLY PRODUCE  
20 LARGE NUMBERS OF DOCUMENTS AS OPPOSED TO TAKING THE OPTION  
21 OF IDENTIFYING THEM AS THE RULE PERMITS YOU TO DO WITHOUT  
22 PRODUCING THEM? THE PRESENT DISCLOSURE RULE AS I  
23 UNDERSTAND IT GIVES YOU THE OPTION OF EITHER PRODUCING  
24 THEM AS PART OF THE DISCLOSURE OR SIMPLY IDENTIFYING THEM  
25 AND THEN LETTING THE OTHER SIDE ASK FOR THE ONES IT WANTS.

1 MR. READ: THE ANSWER IS YES, WE GENERALLY PRODUCE  
2 THEM, BECAUSE UNLESS YOU IDENTIFY BY CATEGORY TO A SORT OF  
3 LIST WHAT AMOUNTS TO 40,000 DOCUMENTS WOULD BE AN ONEROUS  
4 TASK ITSELF. SO THE ANSWER IS, IN PRACTICE WE PRODUCE  
5 THEM.

6 I THINK THERE IS ANOTHER VERY IMPORTANT REASON WHY  
7 THIS INITIAL DISCLOSURE PROVISION IS IMPORTANT. I BELIEVE  
8 IT WILL HAVE THE EFFECT, THOUGH IT DOESN'T SAY IT EXACTLY,  
9 OF NARROWING AND FOCUSING SUBSEQUENT DISCOVERY, BOTH  
10 COURT-MANAGED DISCOVERY RELEVANT TO CLAIMS AND DEFENSES  
11 AND -- EXCUSE ME, ATTORNEY-MANAGED DISCOVERY ON THAT AND  
12 COURT-MANAGED ON SUBJECT MATTER. WHY? BECAUSE ONCE EACH  
13 SIDE -- SINCE I AM A DEFENSE LAWYER, I AM GOING TO TALK  
14 ABOUT THE PLAINTIFFS -- ONCE THE PLAINTIFFS HAVE MADE  
15 INITIAL DISCLOSURE OF ALL DOCUMENTS SUPPORTING THEIR  
16 CLAIMS, BOTH THE DEFENSE COUNSEL AND THE COURT IS NOW  
17 GOING TO HAVE SOME VERY IMPORTANT INFORMATION TO SEPARATE  
18 OUT WHAT ARE THE PLAINTIFF'S REAL CLAIMS, WHICH SHOULD  
19 THEN BE PURSUED IN BOTH ATTORNEY-MANAGED AND COURT-MANAGED  
20 DISCOVERY AS DISTINGUISHED FROM ALLEGATIONS FOR WHICH  
21 THERE IS NO REAL BASIS AND, THEREFORE, NO REAL CLAIM. SO  
22 THE RULES DON'T SAY IT, BUT I BELIEVE THAT THAT INITIAL  
23 DISCLOSURE WILL THEN ALLOW WHAT I'M GOING TO CALL PHASE  
24 TWO, ATTORNEY-MANAGED DISCOVERY ON CLAIMS AND DEFENSES.  
25 THE PLAINTIFF SAYS I WANT DOCUMENTS ON A THROUGH Z. IT

1 SEEMS TO ME THAT I, AS A DEFENSE LAWYER, CAN LEGITIMATELY  
2 SAY, WAIT A MINUTE, FOR A THROUGH D IS ALL WE WILL GIVE  
3 BECAUSE YOU HAVE GIVEN US INFORMATION WHICH SAYS THAT IS  
4 YOUR REAL CLAIM. FOR THE REST OF THESE, YOU ARE MAKING NO  
5 CLAIM, YOU HAVE PRODUCED NO EVIDENCE, YOU HAVE PRODUCED NO  
6 DOCUMENTS IN SUPPORT OF SUCH A CLAIM, AND IF YOU WANT  
7 THOSE, WE NEED TO GO TO COURT. AND THE COURT NOW HAS SOME  
8 FRAMEWORK FOR DECIDING WHAT IS RELEVANT TO CLAIMS AND  
9 DEFENSES, AND THEN SUBJECT MATTER IS ANOTHER ISSUE. SO I  
10 THINK THAT INITIAL DISCLOSURE IS A VERY IMPORTANT  
11 PROVISION.

12 HAVING NATIONAL UNIFORMITY IS ALSO VERY IMPORTANT.  
13 I THINK IT IS SELF-EVIDENT. I THINK WE NEED TO, IN THIS  
14 COUNTRY, A SYSTEM SO COUNSEL FOR BOTH SIDES, JUST FOR THE  
15 REASON FOR GETTING A GOOD COURT FOR DISCOVERY, WHICH EVER  
16 SIDE YOU ARE ON.

17 I BELIEVE WE NEED TO TACKLE IN THE NOTES -- I'M  
18 NOT PROPOSING A CHANGE IN THE RULES -- MORE HELP ON WHAT  
19 IS THE DIFFERENCE BETWEEN SUPPORTING A CLAIM OF DEFENSE  
20 AND SUBJECT MATTER. I KNOW MANY PEOPLE ON THE PANEL HAVE  
21 ASKED THAT QUESTION OF MANY OF THE SPEAKERS THAT HAVE COME  
22 BEFORE YOU. IT SEEMS TO ME THAT FIRST IT IS IMPORTANT TO  
23 HAVE A DISTINCTION, SOME DISTINCTION, SO THE COURT KNOWS  
24 THAT THE END PRODUCED EVERYTHING, WHICH AT LEAST, IN MY  
25 VIEW, IS THE CURRENT SITUATION, HAS COME TO AN END. AND

1 THAT THE COURTS NEED TO BE INFORMED BY THESE RULES AND BY  
2 YOUR NOTES THAT THE COURTS ARE TO TAKE A MUCH MORE ACTIVE  
3 ROLE. IN MY VIEW TO USE THE DAUBERT LANGUAGE, THE COURTS  
4 NEED TO BECOME THE GATEKEEPERS MUCH, MUCH MORE THAN THEY  
5 ARE NOW ABOUT WHAT SHOULD BE PRODUCED IN DISCOVERY AND  
6 WHAT SHOULDN'T BE.

7 IN ALL DUE RESPECT TO THE JUDGES ON THIS PANEL, MY  
8 EXPERIENCE IS THAT MOST DISTRICT COURT JUDGES JUST DON'T  
9 WANT ANYTHING TO DO WITH DISCOVERY. WHEN WE COME BEFORE  
10 THEM IN STATUS CONFERENCES AND CASE MANAGEMENT  
11 CONFERENCES, FRIENDS, THEY BASICALLY SAY, GO WORK IT OUT,  
12 GO TALK TO A MAGISTRATE, I WANT YOU TO COME TO A  
13 STIPULATION AND BRING IT BACK TO ME. BUT MANY, MANY  
14 DISTRICT COURT JUDGES IN MY EXPERIENCE ARE NOT WILLING TO  
15 GET THE PARTIES IN A ROOM TO HAVE THEM EXPLAIN WHAT THE  
16 ISSUES ARE, WHAT THE REAL CLAIMS ARE AND THE REAL  
17 DEFENSES, AND SAY LET'S COME UP WITH A PROGRAM TO GET THE  
18 DISCOVERY YOU NEED FOR YOUR REAL CLAIM, AND DEFENSE LET'S  
19 GET THE DISCOVERY THAT YOU NEED FOR YOUR DEFENSE, AND  
20 LET'S GET ON THIS LAWSUIT. AS OPPOSED TO, IN ALL DUE  
21 RESPECT, DON'T BOTHER ME, I WILL SEE YOU IN A YEAR WHEN WE  
22 NOW HAVE HAD THIS DISCOVERY BATTLE AND PRODUCED HUNDRED OF  
23 THOUSANDS OF DOCUMENTS AND TAKEN A HUNDRED DEPOSITIONS IN  
24 BIG CASES, AND TO ME THAT IS NOT THE WAY IT OUGHT TO BE.

25 I BELIEVE THE NOTES AND TENOR OF THESE RULES, IN

1 MY OPINION, NEED TO SAY TO THE COURTS, WE NEED YOU TO  
2 BECOME ACTIVELY INVOLVED IN PROCESS. AND YOU NEED TO LET  
3 COUNSEL KNOW, WHEN YOU COME BEFORE ME, WHICHEVER SIDE YOU  
4 ARE ON, WHAT I WANT FROM YOU IS A DISCOVERY PLAN THAT GETS  
5 ACCOMPLISHED, WHAT YOU NEED AND HAVE TO HAVE ON THIS CASE  
6 AND NOT A BUNCH OF OTHER STUFF.

7           SOME EXAMPLES OF AT LEAST WHAT I THINK ON THE  
8 QUESTION OF WHAT SUBJECT MATTER AND WHAT IS RELEVANT TO A  
9 CLAIM OR DEFENSE, I DO, AMONG OTHER THINGS, AIRCRAFT  
10 ACCIDENT WORK AND A LOT OF PRODUCT LIABILITY CASES. SO  
11 LET ME ANSWER THE QUESTION. MANY, MANY TIMES THE BIG  
12 BATTLE COMES IN A PRODUCTS CASE. LET'S SAY IT IS AN  
13 AIRPLANE CRASH AND I REPRESENT THE AIRPLANE MANUFACTURER.  
14 THE PLAINTIFF SAYS, I WANT FROM YOU AN IDENTITY OF ALL  
15 LAWSUITS FILED AGAINST THE MANUFACTURER IN THE LAST FIVE  
16 YEARS. I WANT FROM YOU AN IDENTITY OF ALL AIRCRAFT  
17 ACCIDENTS INVOLVING THIS MODEL AIRCRAFT. NOW ALL  
18 ACCIDENTS, NOT ALL ACCIDENTS THAT ARE SIMILAR TO THIS ONE,  
19 ALL ACCIDENTS.

20           THEN IT GOES FURTHER. I WANT FROM YOU ALL  
21 ACCIDENTS INVOLVING NOT ONLY THIS MODEL AIRCRAFT, BUT  
22 THREE OTHER MODEL AIRCRAFT, WHICH I, PLAINTIFF'S ATTORNEY  
23 SAY, THEY SHOULD BE SIMILAR OR RELEVANT TO MY CASE THAT I  
24 SAY HELPS PROVE MY CLAIM.

25           IN ONE CASE IN WHICH I REPRESENTED THE

1 MANUFACTURER OF A FIBERGLASS TOP OF A VAN, THEY WANTED  
2 INFORMATION ABOUT ACCIDENTS INVOLVING TOPS MADE BY OTHER  
3 MANUFACTURERS OTHER THAN MY CLIENT. NOW, WHERE THE LINE  
4 GETS DRAWN BETWEEN WHICH OF THOSE LISTS AND ITEMS OF  
5 DISCOVERY ARE RELEVANT TO THE CLAIM OF THE PLAINTIFF AND  
6 WHICH FALL WITHIN THE SUBJECT MATTER WHICH THEN REQUIRES  
7 THE COURT TO BECOME MUCH MORE INVOLVED, I'M NOT POSITIVE.  
8 AND IT IS DIFFICULT FOR ME TO MAKE THAT DISTINCTION, BUT  
9 I'M STILL, ACCORDING TO THESE RULES, BECAUSE I BELIEVE  
10 HAVING A DISTINCTION AND HAVING THAT INITIAL DISCLOSURE  
11 WHICH I THINK WILL HELP FOCUS, BECAUSE ONCE THE PLAINTIFF  
12 SAYS IN AN INITIAL DISCLOSURE -- HERE'S AN EXAMPLE. I'M  
13 AM SUING FOR THIS ACCIDENT INVOLVING A MODEL 36. MY  
14 ALLEGATIONS ARE, HERE'S A REPORT THAT SAYS IT IS A SPIN  
15 ACCIDENT. I BELIEVE I SHOULD, THEREFORE, LEGITIMATELY  
16 THEREAFTER BE ABLE TO SAY, YOU ARE NOT ENTITLED TO  
17 ACCIDENTS INVOLVING OTHER MODELS, OTHER ACCIDENTS THAT  
18 AREN'T SPIN ACCIDENTS, ET CETERA.

19 JUDGE SCHEINDLIN: OTHER MODELS MIGHT HAVE SIMILAR  
20 PARTS, SO EVEN IN DETERMINING WHAT IS RELEVANT FOR THE  
21 CLAIM OR DEFENSE MIGHT END UP BEFORE THE COURT FOR ONE  
22 SIDE SAYS THIS IS NOT RELEVANT AND THE OTHER SIDE SAYS,  
23 YES, IT IS. SO BEFORE YOU EVEN GET TO THE SUBJECT MATTER  
24 ISSUE, YOU MIGHT BE BEFORE THE COURT JUST ON CLAIM AND  
25 DEFENSE?

1           MR. READ: I AGREE. THEY MAY REQUEST THAT, I MAY  
2 OBJECT, AND THAT TAKES US TO COURT. I AGREE. UNDER MY  
3 MOST RESPECTFUL VIEW THE WAY COURTS NEED TO BE INVOLVED, I  
4 WOULD HOPE THAT THE COURT WOULD BE INVOLVED MUCH SOONER  
5 THAN LATER IN REALLY UNDERSTANDING THE CASE AND MAKING  
6 CUTS WHERE THEY SHOULD BE MADE AS TO WHAT IS REALLY FAIR,  
7 THAT WILL GET THE MOST BANG FOR THE BUCK.

8           JUDGE SCHEINDLIN: DO YOU THINK THE SECOND STAGE  
9 THAT TAKES YOU TO SUBJECT MATTER ISN'T REALLY NECESSARY  
10 BECAUSE YOU WOULD HAVE A GOOD, FOCUSED DISPUTE JUST ON  
11 CLAIM OR DEFENSE?

12           MR. READ: IF I HAD MY WAY, I WOULD ELIMINATE  
13 SUBJECT MATTER ALTOGETHER, BUT YOU HAVE TO DEAL IN THE  
14 REALM OF THE POSSIBLE, AND I SUSPECT IT IS NOT POSSIBLE TO  
15 GET MY WAY IN THAT REGARD.

16           PROFESSOR MARCUS: AS I UNDERSTAND IT, YOU WOULD  
17 EXPECT, ON OCCASION, TO BE BEFORE THE COURT ARGUING ABOUT  
18 CLAIM OR DEFENSE AS A STANDARD AS TO WHETHER THERE IS  
19 ANOTHER STEP. DO YOU THINK HAVING ANOTHER STEP IS GOING  
20 TO GET YOU INTO COURT MORE OFTEN?

21           MR. READ: NO, I DON'T THINK SO. I HAD TO FILTER  
22 THAT IN MY BRAIN. I THINK BECAUSE OF THE INITIAL  
23 DISCLOSURE THERE IS GOING TO BE MORE FOCUS. AND IF THE  
24 EFFECT OF THESE RULES IS TO DO WHAT I HOPE, WHICH IS TO  
25 SAY TO COURTS AND COUNSEL ALIKE, WE NEED TO GET --

1 ELIMINATE MORE WAYS TO DISCOVERY AND GET MORE FOCUSED IN  
2 ON DISCOVERY, THEN I THINK YOU ARE GOING TO ASK THE NUMBER  
3 OF TIMES YOU ARE GOING TO GO TO COURT. I DON'T THINK WHEN  
4 I DO THAT THESE RULES ARE GOING TO INCREASE THAT. I THINK  
5 THAT WHEN I DO GET BEFORE A COURT, IT WILL BE A MUCH MORE  
6 FOCUSSED DISCUSSION, I HOPE.

7 JUDGE HUNGER: IS THERE ANYTHING ABOUT THE  
8 PROPOSED CHANGE WHICH, IN YOUR VIEW, IS GOING TO BRING YOU  
9 IN FRONT OF A DISTRICT COURT JUDGE QUICKER THAN SAY A  
10 MAGISTRATE JUDGE? I DON'T SEE WHAT THE DIFFERENCE IS.  
11 YOU ARE STILL GOING TO HAVE A PROBLEM IF THE DISTRICT  
12 JUDGE DOES NOT WANT TO GO INVOLVED, HE IS NOT GOING TO GET  
13 INVOLVED, IT IS GOING TO GO TO A MAGISTRATE.

14 MR. READ: YOU ARE RIGHT, I DON'T KNOW IF THERE IS  
15 ANYTHING THAT COULD BE DONE IN THE RULES THAT WOULD CHANGE  
16 THAT FACT. I DON'T KNOW THAT THERE IS ANYTHING WE CAN DO  
17 EXCEPT IT SEEMS TO ME THE WAY THE WORLD WORKS IS, THESE  
18 RULES GET INVENTED AFTER THREE YEARS OF DISCUSSION AND  
19 DEBATE AND HEARINGS, AND JUDGES GO TO CONFERENCES LIKE  
20 LAWYERS DO, AND THESE THINGS GET TALKED ABOUT. AND JUST  
21 LIKE DAUBERT, TO USE THAT EXAMPLE, IT HAS TAKEN A FEW  
22 YEARS, BUT NOW MOST COUNSEL AND JUDGES ARE WELL-VERSED AND  
23 UNDERSTAND THE SIGNIFICANCE AND THE REASONING BEHIND THE  
24 DAUBERT DECISION. JUDGES, YOU NEED TO GET INVOLVED AND  
25 NOT JUST SHOVE THIS OFF TO A MAGISTRATE. ARE THERE JUDGES

1 THAT ARE STILL GOING TO DO THAT? OF COURSE.

2 JUDGE NIEMEYER: THANK YOU, MR. READ, APPRECIATE  
3 YOUR COMING TO TESTIFY.

4 MR. MICHAEL BRIGGS?

5 MR. BRIGGS: MEMBERS OF THE COMMITTEE, I WOULD  
6 LIKE TO THANK YOU VERY MUCH FOR GIVING US AN OPPORTUNITY  
7 TO SPEAK BEFORE YOU TODAY. WE COMMEND YOUR EFFORTS TO  
8 REVISE THESE RULES. MY NAME IS MICHAEL BRIGGS. I WAS IN  
9 PRIVATE PRACTICE FOR LARGELY LITIGATION PRACTICE IN  
10 ANCHORAGE, ALASKA, FOR 25 YEARS BEFORE MOVING TO HOUSTON  
11 TEN YEARS AGO.

12 SINCE THAT TIME I HAVE BEEN INSIDE COUNSEL FOR  
13 HOUSTON INDUSTRY, INCORPORATED, AND I AM NOW SENIOR  
14 COUNSEL AND RESPONSIBLE FOR ALL THE COMMERCIAL LITIGATION  
15 WITHIN THAT COMPANY, WHICH IS A DIVERSIFIED ENERGY COMPANY  
16 NOW AN INTERNATIONAL ENERGY COMPANY. WE SUPPLY THE  
17 ELECTRICITY AND GAS -- I SUSPECT WE SUPPLY JUDGE  
18 ROSENTHAL'S ELECTRICITY AND GAS IN HOUSTON, TEXAS.

19 JUDGE NIEMEYER: IS THAT FORMERLY HOUSTON LIGHTING  
20 AND POWER?

21 MR. BRIGGS: YES. AS I NOTED IN MY WRITTEN  
22 REMARKS THAT WERE SUBMITTED A WEEK AGO, WE FRANKLY DON'T  
23 HAVE A LOT OF FEDERAL PRACTICE OTHER THAN THE EMPLOYMENT  
24 AREA. BECAUSE OF OUR ACQUISITION OF AMTEX, ACTUALLY  
25 NORANG, WHICH IS THE PARENT, WE EXPECT THAT WE WILL SEE A

1 LOT MORE FEDERAL LITIGATION.

2 JUDGE NIEMEYER: AS I RECALL, HOUSTON LIGHTING AND  
3 POWER GO UP TO THE BORDER OF TEXAS AND THEN GO INTO A  
4 SWITCH WHICH IS OPEN AND THAT WAY AVOIDS FEDERAL POWER  
5 JURISDICTION.

6 MR. BRIGGS: NOT QUITE TRUE. WE ARE, IN FACT,  
7 INTERCONNECTED WITH OTHER COMPANIES, AND ONE OF THOSE  
8 COMPANIES HAS A TIE LINE WHICH GOES TO THE BORDER IN  
9 LOUISIANA.

10 JUDGE NIEMEYER: ARE YOU SUBJECT TO FEDERAL POWER  
11 JURISDICTION?

12 MR. BRIGGS: WE ARE NOT.

13 LET ME JUST SAY I AM LIMITING MY REMARKS BECAUSE  
14 YOU HAVE OUR WRITTEN REMARKS. I WILL LIMIT THEM IN  
15 ADDITION BECAUSE YOU HAVE A LOT OF VERY LEARNED PEOPLE  
16 HERE THIS MORNING AND THIS AFTERNOON AND THEY HAVE GIVEN  
17 YOU THEIR VIEWS, MANY WHICH WE AGREE WITH, MOST OF WHICH  
18 WE AGREE WITH.

19 LET ME JUST SAY TWO OR THREE THINGS. FIRST, WE  
20 SUPPORT THE NOTION OF UNIFORM RULES AROUND THE COUNTRY.  
21 AS THE PERSON IN OUR COMPANY WHO IS RESPONSIBLE FOR  
22 MONITORING THE ACTIVITIES OF OUTSIDE COUNSEL IN TEXAS AS  
23 AND INCREASINGLY IN OTHER PARTS OF THE COUNTRY, IT SEEMS  
24 TO ME THAT HAVING UNIFORM RULES THAT I CAN RELY ON WHEN  
25 TALKING WITH MY COUNSEL IN TEXAS, IN MINNEAPOLIS, IN

1 OKLAHOMA CITY AND LITTLE ROCK, ARKANSAS, ET CETERA, WOULD  
2 BE A VERY BENEFICIAL THING.

3           SECONDLY, WE SUPPORT THE NEW -- THE PROPOSED  
4 CHANGE OF THE DISCLOSURE. WE THINK THAT IS A BENEFICIAL  
5 THING. AGAIN, I CAN'T GIVE YOU THE ANECDOTAL EVIDENCE AS  
6 TO HOW THAT MIGHT AFFECT OUR COMPANY IN FEDERAL COURT  
7 BECAUSE WE HAVEN'T HAD THAT MUCH PRACTICE IN THE FEDERAL  
8 COURT.

9           I CAN TELL YOU THAT, AS MR. VESELKA MENTIONED, THE  
10 TEXAS SUPREME COURT HAS ADOPTED, AS OF JANUARY 1 OF THIS  
11 YEAR, RULES WHICH ADDRESS VERY MANY OF THESE SIMILAR  
12 ISSUES. I'M SURE YOU HAVE THOSE RULES. IF YOU DON'T, I  
13 WOULD BE HAPPY TO SUPPLY YOU WITH A SET. MANY OF THEM  
14 GOING DOWN THE SAME ROAD WHERE, FRANKLY, ONLY NOW  
15 BEGINNING TO FAMILIARIZE OURSELVES WITH HOW THEY ARE GOING  
16 TO WORK. I SUSPECT WE CAN TELL YOU A LOT MORE ABOUT HOW  
17 THEY ARE GOING TO WORK IF YOU TALK TO US IN ABOUT A YEAR.

18           I WILL SAY THAT I AM A LITTLE BIT CONCERNED ABOUT  
19 THE TIME LIMITATION IN YOUR DEPOSITION RULE. ALTHOUGH MY  
20 EXPERIENCE TELLS ME THAT THERE ARE VERY FEW DEPOSITIONS,  
21 PARTICULARLY IF THERE ARE 'EXPERT REPORTS FILED EARLY, THAT  
22 CAN'T BE DONE IN SEVEN HOURS, BUT I WOULD COMMEND YOU TO  
23 THE COMMENTS OF MR. VISELKA. THE TEXAS RULE IS DIFFERENT  
24 THAN YOUR PROPOSAL. IT GIVES SIX HOURS PER SIDE, SUBJECT  
25 TO THE DIFFICULTY OF DECIDING WHAT A SIDE IS IS CASES

1 WHERE THERE IS ONE PLAINTIFF AND MULTIPLE DEFENDANTS. YOU  
2 MIGHT WELL LOOK AT THE POSSIBILITY OF MAKING A SLIGHT  
3 ADJUSTMENT TO YOUR RULE SO THAT THERE IS SOME OPPORTUNITY  
4 FOR EACH SIDE TO HAVE ADEQUATE TIME.

5 WE ARE SUPPORTING ALL OF THESE RULES. WE ARE  
6 WILLING TO GIVE THE SEVEN-HOUR RULE A CHANCE. WE THINK,  
7 FRANKLY, THAT IN THE CASE OF EXPERTS, THAT MIGHT NOT BE  
8 ENOUGH, BUT --

9 JUDGE NIEMEYER: IT IS ONE OF THOSE RULES THAT IT  
10 IS VERY HARD TO FORESEE HOW IT WOULD OPERATE. I THINK OUR  
11 BEST JUDGMENT AT THIS POINT IS THAT IT MIGHT WORK. BUT IF  
12 IT TURNS OUT TO BE A CATASTROPHE, I THINK WE WOULD BE IN  
13 THE LEAD TO CHANGE IT.

14 MR. BRIGGS: I DON'T THINK IT WOULD BE  
15 CATASTROPHE. I'M ON THE SIDE THAT BELIEVES THAT ATTORNEYS  
16 CAN, IN FACT, WORK THESE THINGS OUT IN GOOD FAITH.

17 I HAVE THE OPPORTUNITY OR DISADVANTAGE OF  
18 PRESENTING AN AWFUL LOT OF OUR COMPANY'S WITNESSES. IN  
19 FACT, I HAVE JUST DONE THAT IN A CASE WHERE PROBABLY 15 TO  
20 20 OF OUR WITNESSES HAVE BEEN PRODUCED IN A CASE IN WHICH  
21 WE WERE NOT EVEN A PARTY. AND THEY HAVE ALL BEEN INCLUDED  
22 IN UNDER THAT SIX-HOUR RULE.

23 MR. KASANIN: DO YOU FEEL IT IS IMPORTANT TO HAVE  
24 THE EXPERT'S REPORT AS WELL AS THE LIMITATION ON THE  
25 DEPOSITION?

1 MR. BRIGGS: YES, I DO, VERY MUCH SO.

2 MR. KASANIN: WE HAVE A PRACTICE IN CALIFORNIA  
3 THAT IS DIFFERENT. WE DON'T USE EXPERT REPORTS, GENERALLY  
4 WE USE DEPOSITIONS, THAT IS WHAT CREATES THE LONG  
5 DEPOSITION.

6 MR. BRIGGS: I HAVE DONE IT BOTH WAYS IN ALASKA,  
7 BEFORE I WENT TO TEXAS. THE NOTION OF EXPERT REPORTS IN  
8 ADVANCE OF DEPOSITIONS WASN'T FOREIGN, BUT IT WAS UNUSUAL.  
9 AND THOSE DEPOSITIONS DID TEND TO GO ON MUCH LONGER. IN  
10 TEXAS CIVIL PRACTICE IT IS OFTEN THE CASE THAT THE EXPERT  
11 REPORTS ARE FILED EARLY AND I THINK THE TENDENCY IS THAT  
12 THOSE DEPOSITIONS GET MUCH, MUCH SHORTER.

13 PROFESSOR ROWE, JR.: SIX HOURS ASIDE, I'M A  
14 LITTLE PUZZLED ABOUT THE NEED FOR THAT, IN THAT AT LEAST A  
15 LOT OF DEPOSITIONS, IT IS ONE SIDE THAT IS INTERESTED IN  
16 TAKING THE DEPOSITION, AND THE OTHER SIDE, EXCEPT FOR A  
17 FEW FILL-IN REHAB QUESTIONS, THE OTHER SIDE ISN'T GOING TO  
18 BE INTERESTED IN TAKING THEIR SIX HOURS. A LOT OF  
19 DEPOSITION PRACTICES MAINLY ONE SIDE AND NOT MUCH OF THE  
20 OTHER, IF I'M NOT MISTAKEN. I AM LITTLE BIT PUZZLED.

21 MR. BRIGGS: I THINK THE POINT IS THAT -- I WILL  
22 GO BACK TO THE EXAMPLE I JUST GAVE YOU IN THE CASE WHERE I  
23 PRESENTED ALL THOSE WITNESSES WHERE WE WEREN'T EVEN A  
24 PARTY TO THE LITIGATION. THERE WERE FOUR DEFENDANTS, EACH  
25 OF WHOM WERE TAKING THE DEPOSITION OF OUR WITNESSES IN A

1 CASE FOLLOWED BY PLAINTIFFS.

2 JUDGE NIEMEYER: UNDER THE TEXAS RULE THEY GET 24  
3 HOURS?

4 MR. BRIGGS: IN THEORY, THAT WOULD BE THE CASE.

5 PROFESSOR ROWE, JR.: THEY ARE REGARDED AS  
6 DIFFERENT SIDES?

7 MR. BRIGGS: I THINK THAT UNDER THE TEXAS RULE, AS  
8 I UNDERSTAND IT, AND I AM NOT SURE ANY OF US UNDERSTANDS  
9 IT VERY WELL, THE OPPORTUNITY WOULD BE FOR 24 HOURS. NOW  
10 IT IS INCONCEIVABLE TO ME THAT IN THIS PARTICULAR CASE,  
11 ALTHOUGH THERE WERE A FEW ATTORNEYS THAT SEEMED INTENT ON  
12 USING THE 24 HOURS, BUT I THINK IT WOULD BE VERY UNUSUAL  
13 FOR THAT TO BE NEEDED. AS I SAID, I'M PRETTY CONFIDENT  
14 THAT SOME TIME LIMIT, SIX, SEVEN HOURS IS MORE THAN  
15 ENOUGH. YOU MAY NEED TO ADJUST FOR MORE THAN MULTIPLE  
16 DEFENDANTS TO GIVE THE DEFENDANTS WHO DON'T GO FIRST AN  
17 OPPORTUNITY TO EXAMINE THOSE OTHER WITNESSES.

18 LET ME JUST CLOSE BY MAKING ONE OTHER REMARK. AND  
19 THAT'S ONE OF THE POINTS COVERED IN MY WRITTEN REMARKS AND  
20 THAT IS SOMETHING THAT HASN'T BEEN MENTIONED HERE TODAY,  
21 AN AREA WHERE WE WOULD HAVE LIKED TO HAVE SEEN YOU GO A  
22 LITTLE BIT FURTHER IN IS CLASS ACTIONS. WE WOULD LIKE A  
23 LOT MORE EMPHASIS ON IDENTIFYING, ON LIMITING DISCOVERY IN  
24 CLASS ACTION LITIGATIONS TO THE CERTIFICATION ISSUES  
25 BEFORE WE EVER GET TO THE SUBSTANCE. WE THINK THAT HAS A

1 VERY BENEFICIAL EFFECT ON ELIMINATING CLASS ACTIONS THAT  
2 SHOULD NOT BE, PERHAPS, CLASS ACTIONS.

3 PROFESSOR ROWE, JR.: WHAT IF YOU HAVE A BASIS FOR  
4 A SUMMARY JUDGMENT MOTION ON THE MERITS AS ANOTHER WAY OF  
5 GETTING RID OF IT, THEN YOU MIGHT BE BETTER OFF ON THE  
6 MERITS THAN ON CERTIFICATION?

7 MR. BRIGGS: YOU ARE ABSOLUTELY RIGHT. THAT'S A  
8 TRADE-OFF I WOULD ACCEPT. AGAIN, THIS IS STRICTLY  
9 ANECDOTAL. WE HAVE HAD IN THE LAST FIVE OR SIX YEARS  
10 PROBABLY TEN CLASS ACTION LAWSUITS FILED AGAINST US. I  
11 THINK ONLY TWO OF THOSE HAVE GONE TO CLASS CERTIFICATION.  
12 SO OUR EXPERIENCE IS, IF YOU CAN PREVENT THEM FROM GOING,  
13 BEING CERTIFIED AS A CLASS, THE CASE SIMPLY GOES AWAY  
14 BECAUSE THE ECONOMICS ARE NOT THERE FOR THE PLAINTIFF'S  
15 ATTORNEYS. OBVIOUSLY FAILING THAT, IF YOU GET -- IF IT IS  
16 CERTIFIED, THE NEXT MOTION IN THE CASE, YOU WOULD IMPOSE,  
17 WOULD BE A MOTION FOR SUMMARY JUDGMENT. OBVIOUSLY THAT IS  
18 AN AREA WHERE DISCOVERY ON THE MERITS WOULD BENEFIT THE  
19 FILING OF THE SUMMARY JUDGMENT MOTION.

20 PROFESSOR ROWE, JR.: THE THRUST OF MY REMARKS  
21 HERE IS THAT IT MIGHT BE BETTER OF THE DISCRETION OF THE  
22 DISTRICT JUDGE TO SAY WHETHER THEY DEFINE IT TO  
23 CERTIFICATION ISSUES OR TO SUMMARY JUDGMENTS ISSUES RATHER  
24 THAN ANY GENERAL RULE APPROACH.

25 MR. BRIGGS: I DON'T NECESSARILY DISAGREE WITH

1 THAT SO LONG AS THE JUDGE WILL, IN FACT, TAKE A CLOSE LOOK  
2 AT WHETHER CLASS CERTIFICATION IS UP IN THE AIR, SO TO  
3 SPEAK, IN CONNECTION WITH MAKING THAT DECISION.

4 JUDGE NIEMEYER: THANK YOU, MR. BRIGGS.  
5 APPRECIATE YOU COMING TO TESTIFY.

6 TOM ALLMAN?

7 MR. ALLMAN: GOOD AFTERNOON. LET ME THANK YOU FOR  
8 THE WONDERFUL OPPORTUNITY TO SPEAK WITH YOU TODAY AND FOR  
9 THE THOROUGHLY ENJOYABLE SEVERAL HOURS I HAVE HAD A CHANCE  
10 TO LISTEN TO THIS DEBATE. IT REMINDS ME A LOT OF BEING  
11 BACK IN LAW SCHOOL AND LISTENING TO PROFESSOR MOORE TALK  
12 ABOUT PROCEDURE. I FOUND THIS A VERY STIMULATING  
13 DISCUSSION.

14 I AM HERE ON BEHALF OF BASF CORPORATION WHERE I AM  
15 THE SENIOR VICE PRESIDENT AND GENERAL COUNSEL. I HAVE  
16 RESPONSIBILITY FOR APPROXIMATELY 130 FEDERAL CASES AT THIS  
17 MOMENT IN OVER 33 DISTRICT COURTS AROUND THE UNITED  
18 STATES. I WOULD BE REMISS IF I DID NOT MENTION, AS I HAVE  
19 ALLUDED TO IN MY STATEMENT, WE ARE A VERY LARGE  
20 CORPORATION HERE IN THE UNITED STATES, BUT WE ARE ONLY  
21 PART OF A MUCH LARGER ORGANIZATION WITH WORLDWIDE  
22 RESPONSIBILITIES. AND FROM A WORLDWIDE PERSPECTIVE, THE  
23 AMERICAN JUDICIAL SYSTEM DOES LOOK, AS I SAID IN MY PAPER,  
24 A LITTLE LOONY SOMETIMES. WE THINK THAT DISCOVERY OFTEN  
25 CREATES THE IMPRESSION TO OTHER PEOPLE WHO MUST BE

1 SUBJECTED TO OUR SYSTEM THAT WE HAVE LOST OUR BEARINGS.  
2 AND I WOULD LIKE TO APPLAUD THE COMMITTEE BECAUSE I  
3 BELIEVE THIS IS A FIRST STEP TOWARDS RE-ESTABLISHING WHAT  
4 I THINK IS A COMMON SENSE APPROACH TO DISCOVERY.

5 IN PARTICULAR, I THINK THAT THE IDEA OF COUPLING  
6 INITIAL DISCLOSURE, WHICH I STRONGLY SUPPORT WITH A  
7 RESTRICTION TO THE CLAIMS AND DEFENSES AS OPPOSED TO THE  
8 BROAD SUBJECT MATTER, AT LEAST IN THE NONJUDICIAL PORTION  
9 OF IT, IS AN IMPORTANT FIRST STEP.

10 I HAVE SURVEYED MY OUTSIDE COUNSEL, AND MUCH TO MY  
11 AMAZEMENT, THERE IS NOT A WHOLE LOT OF MEANINGFUL  
12 EXPERIENCE AMONG MY COUNSEL WITH INITIAL DISCLOSURE. THIS  
13 SURPRISED ME QUITE A BIT, AND I SUSPECT IT REFLECTS MORE  
14 OF THE JURISDICTION IN WHICH I'M INVOLVED THAN IT DOES THE  
15 STATISTICS THAT YOU DEAL WITH. HOWEVER, UPON REFLECTION,  
16 AND AFTER TALKING TO MY ATTORNEYS AND THINKING ABOUT MY  
17 OWN EXPERIENCES, ESPECIALLY IN DALLAS AND LOUISIANA, I  
18 REALLY STRONGLY BELIEVE THAT INITIAL DISCLOSURES MOVE  
19 CASES ALONG, GET YOU TO A PLACE WHERE YOU CAN TALK ABOUT  
20 SETTLEMENTS, PROMOTE THE USE OF ADR AND IN GENERAL, REDUCE  
21 THE COST OF THE OVERALL BURDEN OF DISCOVERY, SO I REALLY  
22 ACTUALLY STRONGLY SUPPORT IT.

23 I WAS STRUCK BY THE COMMENTS FROM SOME OF THE  
24 GENTLEMEN I HAVE HEARD HERE TODAY WHO SAY THAT NOBODY IN  
25 THEIR DISTRICT SUPPORTS INITIAL DISCLOSURE, ET CETERA.

1 WHAT I'M STRUCK ABOUT IS THOSE COUNSEL MIGHT HAVE BEEN  
2 FROM THE VIEW OF THE PRACTITIONER AND NOT FROM MY VIEW,  
3 WHICH IS TO THE VIEW OF THE CLIENT. MY JOB AS PROFESSOR  
4 MOORE TAUGHT ME IS TO RESOLVE ALL OUR DISPUTES IN A JUST,  
5 EFFICIENT AND COST-EFFECTIVE MANNER. THAT SHOULD BE THE  
6 TOUCHSTONE, I BELIEVE, OF HOW YOU LOOK AT THESE RULES, NOT  
7 WHETHER OR NOT A PARTICULAR GROUP OF ADVERSARIES ARE GOING  
8 TO BE HAMSTRUNG ONE WAY OR THE OTHER BY THE CHANGE IN THE  
9 RULE. FOR THAT REASON, I STRONGLY SUPPORT IT.

10 I HAVE ALLUDED IN MY WRITTEN STATEMENT, I HAVE  
11 READ THE EXAMPLES THAT WERE DISCUSSED HERE TODAY, THEY ARE  
12 VERY, VERY GOOD EXAMPLES. I HAVE GIVEN YOU TWO MORE IN MY  
13 WRITTEN STATEMENT THAT APPLY TO ME. AND IF I COULD GIVE  
14 YOU SPECIFICS ON ONES THAT THEY HAVE AS WELL. I HAVE ALSO  
15 SAID IN MY STATEMENT THAT I BELIEVE THAT THE MATTER OF  
16 CLASS ACTIONS IS SOMETHING THAT SHOULD BE ADDRESSED IN THE  
17 INITIAL DISCLOSURES.

18 I CURRENTLY HAVE A CASE INVOLVING 67 CLASS ACTIONS  
19 PENDING AROUND THE UNITED STATES. IN SOME OF THE  
20 JURISDICTIONS, WE HAVE INITIAL DISCLOSURE REQUIREMENTS AND  
21 SOME WE DIDN'T. MANY OF THEM HAVE BEEN MDL, WE ARE TRYING  
22 TO GET A SINGLE MDL PROCEEDING, IT STRIKES ME AND I  
23 PROPOSED IN MY WRITTEN STATEMENT, THAT YOU MIGHT WANT TO  
24 CONSIDER AN EXCEPTION FROM INITIAL DISCLOSURE FOR CLASS  
25 ACTIONS THAT ARE GOING TO BE SUBJECT TO THE MDL PROCESS.

1 I THINK THE WHOLE QUESTION OF THE SCOPE OF  
2 DISCOVERY AND THE AMOUNT OF INITIAL DISCLOSURE IN THAT  
3 CONTEXT BEST BELONGS IN THE COURTROOM TO WHOM THE MDL  
4 PANEL ASSIGNS THE CASE ULTIMATELY. AS THE GENTLEMAN FROM  
5 HOUSTON INDUSTRIES NOTED, CLASS ACTIONS HAVE A RISK IN THE  
6 UNITED STATES, AT THIS POINT IN OUR HISTORY, OF GETTING  
7 OUT OF CONTROL.

8 PROFESSOR MARCUS: REPRESENTING A DEFENDANT IN  
9 SUCH A CASE, WOULD YOU SUSPECT THAT YOU WOULD OBJECT TO  
10 DISCLOSURE?

11 MR. ALLMAN: ABSOLUTELY NOT. I REALLY FIRMLY  
12 BELIEVE --

13 PROFESSOR MARCUS: I TOOK IT THAT YOU WANTED TO  
14 DEFER THE QUESTION IN MDL OR POTENTIALLY MDL CASES UNTIL  
15 SOMETHING WAS CLEARED UP.

16 MR. ALLMAN: I WOULD LIKE TO HAVE A SINGLE UNIFORM  
17 DISCLOSURE.

18 PROFESSOR MARCUS: WOULD YOU BE LIKELY TO OBJECT  
19 ON THAT GROUND UNDER THE RULE AS PRESENTLY PROPOSED?  
20 WOULD YOU BE UNCOMFORTABLE WITH THE ABILITY TO MAKE THAT  
21 ARGUMENT TO THE DISTRICT JUDGE IN THAT CASE?

22 MR. ALLMAN: ABSOLUTELY NOT, I WOULD BE HAPPY TO  
23 MAKE THAT ARGUMENT.

24 PROFESSOR MARCUS: WHY DOESN'T THE RULE ITSELF NOW  
25 PROVIDE FOR WHAT YOU ARE TALKING ABOUT?

1 MR. ALLMAN: ARE YOU TALKING ABOUT YOUR PROPOSED  
2 RULE?

3 PROFESSOR MARCUS: YES.

4 MR. ALLMAN: IT ALLOWS ME THE OPTION TO PUT IT  
5 OVER TO THE JUDGE. I RECOGNIZE THAT. I THINK THAT THE  
6 AREA OF CLASS ACTIONS JUST AS YOUR PROPOSED RULE CHANGES  
7 ON SCOPE, WILL SEND AN IMPORTANT SIGNAL TO THE LITIGANTS  
8 AND TO THE COURTS. I THINK EXPLICITLY EXCLUDING CLASS  
9 ACTIONS FROM THE INITIAL REQUIREMENTS WILL SEND AN  
10 EXPLICIT SIGNAL ABOUT CLASS ACTIONS. I DO NOT THINK THAT  
11 CLASS ACTIONS IN THE UNITED STATES TODAY REALLY FIT INTO  
12 THE NORMAL TYPE OF CASES YOU ARE TALKING ABOUT.

13 MY EXPERIENCE HAS BEEN THE CLASS ACTIONS ARE  
14 HIGHLY POLITICIZED AND HIGHLY DIFFERENT THAN ORDINARY  
15 LITIGATION BETWEEN TWO COMMERCIAL OR GRIEVED ENTITIES. I  
16 BELIEVE CLASS ACTION IS A DIFFERENT ANIMAL AND I AM TRYING  
17 TO MAKE A SMALL REQUEST FOR BEGINNING OF AN  
18 ACKNOWLEDGEMENT IN THE RULES ON THAT SCORE.

19 JUDGE NIEMEYER: ARE YOUR CLASS ACTIONS MOSTLY IN  
20 FEDERAL COURT?

21 MR. ALLMAN: NO, THEY ARE ABOUT 50/50, BOTH  
22 FEDERAL AND STATE, BUT AS JUDGE LEVI SUGGESTED, THE COMMON  
23 PLEADING TECHNIQUE IN AMERICAN CLASS ACTION LAWYERS TODAY  
24 IS TO THROW EVERY SINGLE CONCEIVABLE THEORY INTO EVERY  
25 CASE THAT YOU CAN BRING IN. A VERY HELPFUL TREND IN CLASS

1 CERTIFICATION -- GOING IN THE OTHER DIRECTION -- IS  
2 TENDING TO BRING ABOUT A CHANGE IN THE WAY IN WHICH THINGS  
3 ARE BEING DONE. TODAY CLASS ACTION PLAINTIFF LAWYERS ARE  
4 FILING SIMULTANEOUSLY THROUGHOUT THE ENTIRE UNITED STATES,  
5 USUALLY IN THE STATE COURT. AND WHAT YOU ARE SEEING A LOT  
6 OF DEFENDANTS DO IS TRY TO REMOVE IT TO THE FEDERAL COURT.  
7 AND, AS YOU KNOW, CONGRESS IS CURRENTLY BEING ASKED TO  
8 CONSIDER AN AMENDMENT THAT WOULD GIVE THE RIGHT OF REMOVAL  
9 EXPLICITLY.

10 JUDGE NIEMEYER: HAS YOUR COMPANY TAKEN A POSITION  
11 ON THAT?

12 MR. ALLMAN: YES, WE ARE IN FAVOR OF THAT. I  
13 REALLY STRONGLY BELIEVE IN THE FEDERAL COURT SYSTEM, I  
14 BELIEVE THAT THIS IS THE BEST WAY TO DEAL WITH A CLASS  
15 ACTION PHENOMENON.

16 LET ME JUST SAY ON THE SEVEN-HOUR RULE, I AM  
17 STRONGLY IN FAVOR THE SEVEN-HOUR LIMIT. I'M REMINDED OF A  
18 COMMENT BY ONE OF MY FLORIDA COUNSEL WHO SAID, I SAT  
19 THROUGH FAR MORE UNENDING DEPOSITIONS THAN I CARE TO  
20 REMEMBER. THE LAWYERS ARE AT FAULT FOR THESE LONG  
21 DEPOSITIONS.

22 PROFESSOR MARCUS: COULD I FOLLOW UP WITH A  
23 QUESTION ABOUT THAT? WEARING YOUR CLIENT HAT, DO YOU  
24 THINK THAT IS A TOPIC ON WHICH CLIENTS AND ADVOCATES MIGHT  
25 BE EXPECTED TO TAKE DIFFERENT VIEWS?

1 MR. ALLMAN: I NOTED IN MY COMMENT THAT I AM IN  
2 THE DEFINITE MINORITY ON THIS POINT. I MUST TELL YOU THAT  
3 MY PERSONAL CONVICTION IS THAT LAWYERS CAN CONTROL  
4 DEPOSITIONS. A LOT OF IT HAS TO DO WITH WHO YOU SEND TO  
5 TAKE IT. IF YOU SEND A SECOND-YEAR ASSOCIATE WHO HAS  
6 NEVER TAKEN A DEPOSITION, YOU ARE GOING TO HAVE A 20-HOUR  
7 DEPOSITION. ON A SIGNIFICANT DEPOSITION, IF YOU ORGANIZE  
8 YOURSELF, YOU CAN DO IT. I'M GOING TO COUNT ON THE  
9 MAGISTRATE JUDGES AND THE COURTS TO HELP US IF SOMEONE  
10 ABUSES IT AND I RECOGNIZE IT CAN BE ABUSED.

11 MR. KASANIN: WHAT ABOUT THE EXPERT DEPOSITIONS,  
12 CAN THAT BE DONE IN SEVEN HOURS, ORDINARILY?

13 MR. ALLMAN: IN MY PRACTICE IN OHIO, WE ALWAYS HAD  
14 EXPERT REPORTS FIRST, AND I THINK THAT IS THE ABSOLUTE  
15 KEY. AS SOMEONE SAID HERE TODAY, YOU DON'T NEED TO SPEND  
16 A LOT OF TIME ON THE QUALIFICATIONS OF THE WITNESS IF YOU  
17 HAVE A GOOD EXPERT REPORT. I THINK IT WORKS.

18 I ALSO RAISED AN ISSUE IN MY WRITTEN PAPER WHICH I  
19 WOULD LIKE TO ADDRESS. UNLESS YOU HAVE WORKED IN A  
20 CORPORATION IN THE 1990'S, YOU CANNOT CONCEIVE OF THE  
21 EFFECT OF ELECTRONICS. THE USE OF THE ELECTRONIC MAIL  
22 SYSTEM IS NOW SO PERVASIVE THAT INSTEAD OF GOING TO THE  
23 TROUBLE OF PICKING UP A PHONE AND TRYING TO GET A PHONE  
24 NUMBER, PEOPLE ROUTINELY USE THE ELECTRONIC MAIL SYSTEM.  
25 IT MAY BE IMMORAL, THAT'S THE KIND OF THING I'M READING IN

1 THE TIMES, THAT IT IS KIND OF WRONG THAT WE ARE DOING  
2 THIS, BUT IT IS REALITY. IT IS MAKING AMERICAN INDUSTRY  
3 MORE PRODUCTIVE, MORE COMPETITIVE, MORE EFFICIENT.

4 WHAT IS HAPPENING IS THAT THE BROAD SCOPE OF  
5 DISCOVERY, THE IDEA OF HEROICALLY RESUSCITATING THE  
6 PATIENT BY GOING IN AND PULLING UP A CONVERSATION THAT  
7 SOMEONE THINKS THEY DELETED IS HAVING A DETERRENT EFFECT  
8 ON THE USE OF THAT TECHNIQUE AND IS GOING TO CUT BACK ON  
9 THE COMPETITIVENESS IN AMERICA. I WOULD URGE YOU TO THINK  
10 ABOUT IT AND START US DOWN A PATH OF EMPLOYING SOME COMMON  
11 SENSE --

12 JUDGE NIEMEYER: WHAT YOU ARE POINTING TO -- WE  
13 HAVE THOUGHT ABOUT AND WE HAVE DISCUSSED AND WE RECOGNIZE  
14 IT. I DON'T KNOW WHETHER WE HAVE TO FORM A SEPARATE  
15 COMMITTEE TO STUDY IT OR GIVE IT JUDGE LEVI'S COMMITTEE OR  
16 JUDGE CARROLL, WHO IS IN CHARGE OF OUR ELECTRONIC  
17 COMMITTEE. IT IS A CONUNDRUM THE LIKES OF WHICH OUR  
18 SYSTEM HAS MAYBE NEVER FACED. IF WE ARE GOING TO HAVE  
19 DISCOVERY, I DON'T KNOW HOW WE ARE GOING TO BRING THAT  
20 INTO HARMONY WITH THE ELECTRONIC DATA WHICH LITERALLY IN A  
21 FEW YEARS WILL HAVE THE LIBRARY OF CONGRESS ON EVERYBODY'S  
22 PC. IF WE HAVE THAT, IT IS IRRATIONAL TO SAY WE WANT ALL  
23 THE DOCUMENTS, ALL THE DATA OF A PARTICULAR ENTITY THAT  
24 RELATES OR REFERS TO A PARTICULAR MATTER. TO GET TO THAT  
25 DATA AND SORT IT OUT IS GOING TO BE AN ENORMOUS TASK. IF

1 YOU GIVE THAT TO YOUR OPPOSITION TO DO, THEY ARE GOING TO  
2 BE SEEING EVERYTHING THAT THEY OUGHT NOT TO BE SEEING. IF  
3 THEY GIVE IT TO YOU, THEY ARE NOT GOING TO TRUST. YOU CAN  
4 GO ON AND ON.

5 YOU HAVE THESE BACK-UP SYSTEMS. EVERY YEAR YOU  
6 TAKE OUT A TAPE AND YOU STORE THEM SOMEWHERE ELSE WITH A  
7 BILLION DOCUMENTS ON IT. YOU TURN THOSE OVER. I WOULD  
8 LIKE TO HEAR FROM YOU OR ANYBODY ELSE IN THE BUSINESS  
9 COMMUNITY SUGGESTIONS ON HOW TO APPROACH THIS. BECAUSE ON  
10 THE ONE HAND, IF WE ARE GOING TO HAVE DISCLOSURE, WE HAVE  
11 TO HAVE A MECHANISM TO GET TO THE RELEVANT DATA AND NOT  
12 GET IT ALL. ON THE OTHER HAND, WE NEED TO FIGURE OUT HOW  
13 TO GET TO ALL THE DATA.

14 MR. ALLMAN: THE CHANGE YOU ARE SUGGESTING TO  
15 RESTRICT DISCOVERY AT LEAST IN THE ATTORNEY-MANAGED  
16 SECTION TO CLAIMS AND DEFENSES, THAT WILL HELP A LOT.  
17 NUMBER TWO, I HAVE MADE A MODEST PROPOSAL, AND THAT IS  
18 HONOR THE DELETION. WHEN SOMEONE DELIBERATELY ATTEMPTS TO  
19 DELETE AN ELECTRONIC MESSAGE, HONOR THAT AS PRESUMPTIVE  
20 MATTER AND REQUIRE ITS RESUSCITATION UNLESS GOOD CAUSE IS  
21 SHOWN.

22 I HAVE HEARD THE DISCUSSION OF GOOD CAUSE. GOOD  
23 CAUSE IS WHAT A JUDGE UNDER A PARTICULAR SET OF FACTS  
24 BELIEVES IS GOOD CAUSE. I THINK THAT WE ALL WILL BE ABLE  
25 TO IDENTIFY GOOD CAUSE, EVEN IN THAT CASE. BUT I WELCOME

1 THE INVITATION TO SUBMIT A FURTHER STATEMENT ON THIS  
2 MATTER.

3 JUDGE NIEMEYER: THIS WOULDN'T BE IN CONNECTION  
4 WITH THIS, BUT IT IS OUR ONGOING EFFORT. I THINK THE TYPE  
5 OF PROPOSAL THAT YOU JUST SUGGESTED ABOUT HONORING  
6 DELETION, IF THEY BOTH INTENDED TO DELETE IT, I WRITE YOU,  
7 LET'S MEET FOR LUNCH AT ONE, AND YOU WRITE BACK OKAY, AND  
8 AT THE END OF THE DAY WE DELETE IT, IT SEEMS TO ME THAT IS  
9 THE EQUIVALENT OF AN ORAL COMMUNICATION WHICH WOULD HAVE  
10 BEEN GONE. YOU ARE SAYING THAT THAT MAY NOT BE A  
11 DOCUMENT -- ONE APPROACH WE DO NOT CONSIDER THAT A  
12 DOCUMENT UNLESS THERE IS GOOD CAUSE.

13 MR. ALLMAN: PRESUMPTIVELY, YES.

14 JUDGE NIEMEYER: IF YOU HAVE MORE, WE WOULD LOVE  
15 TO HAVE THEM BECAUSE IT IS A PROBLEM WE ARE FACING AND WE  
16 ARE PROBABLY GOING TO BE FACING SOONER THAN WE WOULD LIKE.

17 MR. ALLMAN: IT IS A VERY, VERY PRACTICAL PROBLEM,  
18 I CAN TELL YOU THAT.

19 MR. KASANIN: IT SOUNDS LIKE WHAT HAPPENED IN THE  
20 MANUFACTURING INDUSTRY SOME YEARS AGO WITH THE START OF  
21 PRODUCT LIABILITY IS HAPPENING TO YOU NOW. YOU USED TO  
22 HAVE LITTLE PADS OF PAPER THAT SAY, DON'T SAY IT, WRITE  
23 IT. WELL, WITH THE ADVENT OF PRODUCT LIABILITY, THAT ALL  
24 CHANGED.

25 MR. ALLMAN: I RECOGNIZE THAT IT IS A TECHNOLOGY

1 CHANGE AND IT IS A NEW WAY OF LOOKING AT THINGS. BUT I  
2 WOULD LIKE TO THINK OF THE EXAMPLE OF HANGING UP THE  
3 PHONE. WE GIVE SOME JUDICIAL CREDENCE TO THAT ACT AND I  
4 WOULD LIKE TO SUGGEST THAT YOU DO THAT FOR DELETION AS  
5 WELL.

6 MR. KASANIN: ABOUT THE INITIAL DISCLOSURE, SOME  
7 OF THE PRACTITIONERS THEY TOLD THAT THEY THINK IT STARTS A  
8 CASE GOING, AND THE CASE HAS MOMENTUM OF ITS OWN WITHOUT  
9 ANYONE DOING ANYTHING OTHER THAN WHAT IS REQUIRED BY THE  
10 RULES. THERE ARE OTHER PEOPLE I THINK WHO FEEL THAT THIS  
11 PROCESS IS SLOWING DOWN THE COMMENCEMENT OF THE CASE AND  
12 IT SEEMS TO ME FROM WHAT YOU SAID, YOU WILL NOT AGREE WITH  
13 THE LATTER.

14 MR. ALLMAN: I HEARD THOSE COMMENTS AND I WAS A  
15 LITTLE SURPRISED AT THAT. MY EXPERIENCE HAS BEEN THAT  
16 ALTHOUGH THE RULES ARE THERE AND THEY COULD USE IT TO SLOW  
17 IT DOWN, THAT ONCE THE DISCLOSURE HAS BEEN MADE, THE  
18 PARTIES BEGIN TO TALK AND THEY BEGIN TO VOLUNTARILY  
19 DISCUSS DEPOSITIONS. WHEN ARE WE GOING TO DO IT, WHAT IS  
20 A CONVENIENT TIME FOR YOU. I AM PARTICULARLY PLEASED WITH  
21 WHAT I HAVE SEEN IN DALLAS. DOWN THERE, I AM TOLD BY MY  
22 PRACTITIONERS DOWN THERE, THE PARTIES HAVE A LOT OF  
23 CONFIDENCE IN EACH OTHER. THE JUDGES ARE TOO RIGID ABOUT  
24 ENFORCING THE RULE. THE RULE ACTUALLY USES THE WORDS  
25 "CLAIMS OR DEFENSES," I BELIEVE. THEY THINK IT WORKS VERY

1 WELL AND DOES NOT SO CONTEND.

2 JUDGE ROSENTHAL: THAT IS A SO-CALLED OPT-OUT  
3 DISTRICT THAT OPTED OUT IN A FAVOR OF THE RULE WHICH  
4 LOOKED REMARKABLE LIKE --

5 MR. KYLE: GOING BACK TO YOUR REQUEST THAT THEY  
6 HONOR THE DELETION, DOES THAT MEAN THAT YOU DON'T HAVE TO  
7 PRODUCE THE PIECE OF PAPER OR YOU WANT THE CONVERSATION TO  
8 DISAPPEAR?

9 MR. ALLMAN: IF, FOR EXAMPLE, I COMMUNICATED WITH  
10 JUDGE NIEMEYER AND I SAY SOMETHING, AND THEN I PRINT IT  
11 OUT AND FILE IT. THAT'S A DOCUMENT THAT SHOULD BE  
12 PRODUCED, NO QUESTION. IF, HOWEVER, WE EXCHANGE A  
13 COMMUNICATION AND WE EACH DELETE IT ELECTRONICALLY AND IF  
14 IT INDEED IS ELECTRONICALLY DELETED IN THE ORDINARY COURSE  
15 OF BUSINESS, THEN I WOULD PRESUMPTIVELY LIKE TO SAY THAT  
16 IS GONE. YOU CAN ASK ME ABOUT IT, BUT I DON'T HAVE TO  
17 PRODUCE IT. IF A CONVERSATION OCCURS AND IT TURNS OUT  
18 THAT I RECOMMENDED TO HIM THAT WE FIX OUR PRICES BY 10  
19 PERCENT HIGHER THAN THEY ARE TODAY AND THAT COMES UP,  
20 THAT'S GOOD CAUSE FOR ME TO GO BACK AND TAKE ANY MACHINE  
21 APART. THERE IS NO MESSAGE THAT IS EVER TRULY DELETED.  
22 HEROIC MEASURES CAN BE UNDERTAKEN AT GREAT EXPENSE, AND  
23 THAT IS AN EXAMPLE OF GOOD CAUSE.

24 JUDGE NIEMEYER: I HAVE LEARNED YOU REALLY HAVE TO  
25 DESTROY THE DISK DRIVE IF YOU WANT TO DELETE IT.

1 MR. ALLMAN: IF YOU USE THE INTERNET, THEN YOU  
2 HAVE A WHOLE HOST OF OTHER --

3 JUDGE NIEMEYER: THE BACKUP SYSTEMS AND THE  
4 CENTER.

5 MR. ALLMAN: THANK YOU VERY MUCH.

6 JUDGE NIEMEYER: MR. CORTESE, YOU ARE NEXT.

7 MR. CORTESE: THANK YOU, YOUR HONOR, AND MEMBERS  
8 OF THE COMMITTEE. IT IS AGAIN A PLEASURE TO APPEAR BEFORE  
9 YOU. I SUPPOSE THAT YOU KNOW A LITTLE SOMETHING ABOUT  
10 WHAT I'M GOING TO SAY, BUT I WOULD LIKE TO DEPART FROM MY  
11 PREPARED STATEMENT TO SOME EXTENT AND INDICATE TO YOU AT  
12 LEAST INITIALLY THAT IT HAS BEEN A RARE PLEASURE TO HAVE  
13 OBSERVED THIS PROCESS, THE RULE-MAKING PROCESS, FOR A  
14 NUMBER OF YEARS, I GUESS SINCE THE DAYS OF THE FEDERAL  
15 COURT STUDY COMMITTEE WHICH WAS HEADED BY JUDGE WEISS AND  
16 I WAS A MEMBER.

17 JUDGE NIEMEYER: I CAN'T THINK OF ANYBODY WHO IS  
18 MORE INFORMED ABOUT THE PROCESS AS AN OBSERVER THAN YOU.

19 MR. CORTESE: THANK YOU VERY MUCH, YOUR HONOR. I  
20 DO WANT TO SAY THAT THIS COMMITTEE IS TO BE COMMENDED FOR  
21 THE GENIUS OF A NUMBER OF COMPROMISES YOU HAVE COME UP  
22 WITH, BECAUSE THERE IS SORT OF A JUDICIAL POLITICAL  
23 PROCESS, RULE-MAKING IS. AND YOU HAVE ACHIEVED WHAT I  
24 THINK IS A VERY REASONABLE APPROACH IN THE A LOT OF VERY  
25 DIFFICULT, VERY CONTENTIOUS AREAS.

1           OF COURSE, YOU ARE GOING TO HEAR MANY TIMES WHAT  
2 YOU HEARD FROM MAX BLECHER THIS MORNING. I REMEMBER MAX  
3 WHEN HE WAS TRYING ANTITRUST CASES ON THE PLAINTIFF SIDE  
4 WITH JOE ALIOTO AND I WERE ON THE DEFENSE SIDE WITH OTHER  
5 FIRMS, AND BASICALLY IT WAS GOING TO BE THE END OF THE  
6 WESTERN WORLD AT THAT TIME, TOO. I DON'T THINK IF YOU  
7 MAKE A MODEST CHANGE IN THE SCOPE OF DISCOVERY, SUCH AS IS  
8 RECOMMENDED, THAT THE ENFORCEMENT OF THE ANTITRUST LAWS IS  
9 GOING TO SUFFER SIGNIFICANTLY. I BELIEVE THAT MR.  
10 BLECHER WILL GET DISCOVERY OF HIS ORANGES AND HIS  
11 GRAPEFRUITS AND MAYBE EVEN HIS APPLES, SO HE'LL BE ABLE TO  
12 DISCOVER HIS APPLES AND ORANGES IN THE SAME CASE.

13           BUT TRULY THERE IS A REAL LESSON THERE, AND THAT  
14 IS THAT WE HAVE BECOME SO ACCUSTOMED TO THIS PROCESS WHERE  
15 NO MATTER WHAT YOUR CLAIM IS, IF YOU ASK FOR IT, YOU CAN  
16 GET IT. IF THAT IS SHOCKING, TO CHANGE, THERE IS  
17 SOMETHING WRONG WITH THE SYSTEM. AND WHAT I WOULD URGE IS  
18 THAT YOU CHANGE THE SYSTEM, IF THAT IS THE POINT TO WHICH  
19 WE HAVE BEEN BROUGHT. I THINK, AS MAX ALSO SAID, IT IS  
20 IMPORTANT TO INSTITUTIONALIZE THESE CHANGES. ONE OF THE  
21 THINGS AND THE REASON THAT I WOULD SUPPORT THESE, AS I  
22 HAVE SAID IN MY PAPER AS AN ADVOCATE FOR THE DEFENSE, I'M  
23 DISAPPOINTED YOU DIDN'T GO FORWARD, BUT AS AN OBSERVER OF  
24 THIS PROCESS, I MARVEL AT THE GENIUS OF SOME OF THE  
25 CHANGES BECAUSE I THINK THEY ARE TRUE COMPROMISES. BUT I

1 THINK THEY ALSO GO WELL DOWN THE ROAD TOWARD DIRECTING THE  
2 KIND OF STRUCTURE THAT YOU NEED IN THE RIGHT KIND OF  
3 CASES.

4 NOW, OBVIOUSLY YOU DON'T NEED A STRUCTURE FOR  
5 DISCOVERY WHERE YOUR CASES DON'T INVOLVE DISCOVERY, OR YOU  
6 ARE TALKING ABOUT THE NUMBER OF CASES THAT INVOLVE THREE  
7 HOURS OF DISCOVERY, SUCH AS JUDGE NIEMEYER REFERRED TO.

8 JUDGE SCHEINDLIN: YOU SAID HE COULD HAVE HIS  
9 ORANGES, GRAPEFRUITS AND APPLES. WOULD HE GET ALL THAT BY  
10 EXPANDING HIS PLEADINGS OR SHOWING GOOD CAUSE?

11 MR. CORTESE: LET ME GIVE YOU AN EXAMPLE IN THE  
12 ANTITRUST AREA. LET'S ASSUME HE ALLEGES A CONSPIRACY TO  
13 FIX THE PRICE OF ORANGES IN THE SACRAMENTO VALLEY OR  
14 SOMEWHERE ELSE IN CALIFORNIA. SHOULD HE BE ENTITLED AS  
15 PART OF THAT CLAIM TO EXAMINE WHETHER THERE IS ANY  
16 CONSPIRACY WITH RESPECT TO GRAPEFRUITS? THAT COULD BE A  
17 DEBATABLE QUESTION, BUT I DON'T THINK THAT WE SHOULD  
18 ASSUME THAT JUST BECAUSE HE HAS ALLEGED CLAIM AS TO  
19 ORANGES, WHERE HE MAY HAVE SOME EVIDENCE OF A CONSPIRACY,  
20 THAT HE IS ENTITLED TO EXPLORE WHETHER THERE IS A  
21 CONSPIRACY ABOUT GRAPEFRUITS OR APPLES.

22 JUDGE SCHEINDLIN: IS HE GOING TO GET WHAT HE  
23 WANTS BY ADDING MORE CLAIMS, WHICH IS SOMETHING HE  
24 MENTIONED IS GOING TO HAPPEN, OR IS HE GOING TO DO IT BY  
25 SHOWING GOOD CAUSE FOR SUBJECT MATTER DISCOVERY? HE WAS

1 WORRIED THAT WE WOULD START SEEING EXPANDED CLAIMS.

2 MR. CORTESE: I UNDERSTAND THAT, AND I HOPE THAT  
3 WON'T HAPPEN BECAUSE OF THE RESPONSIBILITY OF FIRST TO  
4 DISCLOSE THE BASIS FOR SUPPORT AND TO HAVE SUPPORTING  
5 FACTS THAT SUPPORT YOUR ALLEGATIONS INITIALLY. THAT IS  
6 ONE OF THE REASONS THAT THE MODIFIED DISCLOSURE MAKES A  
7 GREAT DEAL OF SENSE IN MANY INSTANCES. BUT IF THERE IS  
8 TRULY SOMETHING THAT IS RELEVANT AND IT MEETS THE TEST OF  
9 NEED AND PROPORTIONALITY UNDER THE RULES WITH RESPECT TO  
10 GRAPEFRUITS, IN THAT PARTICULAR CASE, THEN I THINK HE CAN  
11 SHOW GOOD CAUSE FOR DISCOVERY AS TO GRAPEFRUITS.

12 JUDGE ROSENTHAL: THAT IS GOING TO BRING HIM TO  
13 COURT. ARE YOU ONE OF THOSE THAT SEES MORE COURT  
14 INVOLVEMENT?

15 MR. CORTESE: NO, I DON'T THINK SO. BUT THE  
16 OVERALL POINT THAT I WAS GETTING TO IS WHAT I THINK WHAT  
17 THE PROMISE OF THESE RULE CHANGES, THESE AMENDMENTS WE ARE  
18 CONSIDERING NOW, IS THAT THEY WILL ESTABLISH A STRUCTURE,  
19 AN ARCHITECTURE, AS ONE OF THE WITNESSES REFERRED TO, FOR  
20 DISCOVERY IN APPROPRIATE CASES. AGAIN, IT IS NOT ALL  
21 CASES, BUT APPROPRIATE CASES. THAT IS WHAT I REFERRED TO  
22 IN MY STATEMENT AS SORT OF A TRIPARTITE APPROACH, MAYBE A  
23 NEAPOLITAN PLAN OF DISCOVERY, AS JUDGE NIEMEYER, I THINK,  
24 HAS EARLIER REFERRED TO IT AS.

25 YOU HAVE TO FIND A WAY TO DEFINE THE ISSUES IN THE

1 CASE. WHAT ARE THE REAL ISSUES IS ANOTHER WAY TO SAY IT  
2 IN THE CASE. THEN YOU HAVE PRELIMINARY DISCOVERY OR  
3 DISCLOSURE WITH RESPECT TO THOSE CLEARLY INVOLVED ISSUES.  
4 AND THEN ADDITIONAL DISCOVERY IS BASED ON A SHOWING OF  
5 NEED OR GOOD CAUSE FOR PORTIONALITY. I THINK THAT THERE  
6 OUGHT TO BE SOME FURTHER DEFINITION OF WHAT KIND OF GOOD  
7 CAUSE DO YOU NEED TO SHOW. AND MY PERSONAL VIEW IS THAT  
8 THEY ARE OBVIOUSLY -- AND I KNOW SOME OF THE WITNESSES  
9 EARLIER REFERRED TO THE FACT THAT YOU OUGHT TO AT LEAST  
10 SPECIFICALLY REFER TO THE NEED TO SHOW GOOD CAUSE IN THIS  
11 AREA. AND MAYBE YOU CAN DO IT BY SOME EXAMPLES AS TO WHAT  
12 WOULD BE GOOD CAUSE FOR EXPANDING DISCOVERY AND PERHAPS  
13 THAT IS BASED ON THE REQUIREMENTS OF 26(B)(1), (2), (3),  
14 NEED AND PROPORTIONALITY AND SOME ELEMENT OF COST BENEFIT.  
15 I AM DISAPPOINTED THAT JUDGE SCHRIEBER ISN'T HERE BECAUSE  
16 I COULD TALK TO HIM ABOUT THE WOLF REPORT. I BELIEVE HE  
17 WOULD SUPPORT THE VIEW THAT YOU OUGHT TO HAVE THIS KIND OF  
18 STRUCTURE OR ARCHITECTURE OF RULES THAT CONTROLS  
19 DISCOVERY, AT LEAST IN APPROPRIATE CASES.

20 JUDGE NIEMEYER: DID THEY ADOPT THAT REPORT? LORD  
21 WOLFE RECOMMENDED THE DISCLOSURE, RIGHT, INITIAL  
22 DISCLOSURE WITHOUT REQUEST?

23 MR. CORTESE: THAT IS CORRECT, YES. BUT IT WAS  
24 VERY NARROWLY LIMITED ON THE BASIS OF SPECIFIC, VERY  
25 LIMITED SCOPE OF DISCOVERY. AND ALSO IT WAS QUITE CLEAR

1 BECAUSE THE ENGLISH SYSTEM HAS THE LOSER PAYS RULE, IT IS  
2 QUITE CLEAR THAT ADDITIONAL DISCOVERY HAD TO BE BASED UPON  
3 A SHOWING OF NEED, AND IT HAD TO BE PROPORTIONATE TO THE  
4 CLAIM.

5 SO I THINK THAT ALTHOUGH THERE ARE A NUMBER OF  
6 PLACES IN THESE AMENDMENTS WHERE THE COMMITTEE COULD HAVE  
7 GONE FURTHER, AND PERHAPS SHOULD HAVE GONE FURTHER, I  
8 RECOGNIZE THAT AT LEAST THESE CHANGES AT LEAST MOVE US  
9 DOWN THE ROAD TOWARD THAT KIND OF AN ARCHITECTURE OR A  
10 STRUCTURE THAT I THINK WILL SIGNIFICANTLY HELP IN  
11 ATTEMPTING TO LIMIT THE COST AND ATTEMPTING TO FOCUS THE  
12 EFFECTIVENESS OF DISCOVERY, BECAUSE THAT IS REALLY WHAT WE  
13 ARE TALKING ABOUT.

14 I THINK OBVIOUSLY THE AMERICAN SYSTEM OF JUSTICE  
15 IS A SYSTEM OF FULL DISCLOSURE, BUT THAT DOESN'T MEAN THAT  
16 YOU HAVE TO HAVE FULL DISCLOSURE WITH RESPECT TO ANYTHING  
17 A CORPORATION OR INDIVIDUAL EVER DID, BUT FULL DISCLOSURE  
18 WITH RESPECT TO THE CLAIM THAT IS INVOLVED IN THAT  
19 LITIGATION. AND, OBVIOUSLY, THERE ARE GOING TO BE  
20 DIFFERENT POLES MADE BY DIFFERENT PEOPLE AS TO WHAT IS  
21 IMPORTANT AND WHAT IS RELEVANT WITH RESPECT TO THE CLAIM,  
22 BUT WE SHOULD AT LEAST START FROM THE STANDPOINT NOT OF,  
23 IF YOU ASK FOR IT, YOU CAN HAVE IT, BUT IS IT RELATED TO  
24 WHAT IS REALLY BEING CLAIMED IN THIS CASE. I THINK AT  
25 LEAST THESE AMENDMENTS MOVE US DOWN THAT ROAD.

1 I WOULD LIKE TO MENTION ONE THING WITH RESPECT TO  
2 COST-BEARING, AND THAT IS THAT I THINK THAT WILL BE A  
3 SALUTARY RULE. I THINK IT IS OBVIOUSLY JUST A  
4 CONFIRMATION, IF YOU WILL, OF THE INHERENT POWER OF THE  
5 COURT THAT IS ALREADY CONTAINED IN THE RULES OF THE  
6 ABILITY TO CONSIDER WHETHER OR NOT COSTS SHOULD BE BORN BY  
7 A PARTY WHO SEEKS ACCESS TO MARGINAL MATERIAL. MY ONE  
8 LIMITED CONCERN IS THAT IN THIS DAY AND AGE WHERE YOU  
9 REALLY HAVE IN MANY INSTANCES A PARODY BETWEEN PARTIES  
10 THAT, MERELY BECAUSE SOMEBODY CAN PAY FOR IT DOESN'T MEAN  
11 THAT HE SHOULD BE ENTITLED TO IT. AND THERE OUGHT TO BE A  
12 STANDARD IMPOSED WITH RESPECT TO WHAT A PARTY CAN HAVE  
13 ACCESS TO, EVEN IF HE CAN PAY FOR IT. SO I GUESS WHAT I'M  
14 SAYING, IS IT IS NOT A MATTER OF ABSENCE OF DISCRETION ON  
15 THE COURT'S PART WHEN AN APPLICATION IS MADE FOR SOMETHING  
16 THAT MAY NOT BE RELEVANT AT ALL OR DISCOVERABLE AT ALL,  
17 AND THAT THAT IS PERMITTED JUST BECAUSE THE PARTY CAN PAY  
18 FOR IT. I THINK THERE MIGHT BE A QUICK MENTION OF THAT IN  
19 THE NOTES, PERHAPS.

20 I WOULD CLOSE JUST BY SAYING THAT I KNOW THE  
21 COMMITTEE INTENDS TO REEXAMINE THE WHOLE QUESTION OF  
22 PRIVILEGE. AND I KNOW JUDGE NIEMEYER TODAY MENTIONED THAT  
23 THERE WAS SUPPORT ON BOTH SIDES OF THE V FOR THE CONCEPT  
24 OF PRESERVING PRIVILEGE AND TURNING OVER THE DOCUMENTS.  
25 I'M NOT SO SURE THAT IS CORRECT BECAUSE I THINK THERE IS A

1 LOT OF SENTIMENT, PARTICULARLY ON THE DEFENSE AND  
2 CORPORATE SIDE, THAT THAT DOESN'T REALLY SOLVE THE  
3 PROBLEM. WHAT REALLY NEEDS TO HAPPEN IS NOT JUST A  
4 REEXAMINATION OF HOW DO YOU GET AROUND A PROBLEM OF CAN  
5 YOU TURN OVER THESE DOCUMENTS FASTER IF YOU PRESERVE THE  
6 PRIVILEGE, BUT HOW DO YOU PROPERLY IDENTIFY AND SURFACE  
7 THOSE DOCUMENTS THAT ARE DISCOVERABLE AND NONPRIVILEGED?  
8 I THINK EXPERIENCE HAS BEEN THAT DOCUMENT LOGS ARE VERY,  
9 VERY BURDENSOME AND NOT VERY USEFUL.

10 JUDGE NIEMEYER: WHAT'S THE ALTERNATIVE?

11 MR. CORTESE: THAT'S A VERY GOOD QUESTION. AT  
12 THIS POINT, I DON'T HAVE AN ANSWER FOR YOU. ALL I'M  
13 SAYING AT THIS POINT IS I HOPE YOU WILL LOOK AT THE WHOLE  
14 AREA.

15 JUDGE NIEMEYER: I THINK EVEN IF YOU ARE LOOKING  
16 AT A FEW HUNDRED DOCUMENTS, AND YOU START LISTING THEM,  
17 USUALLY THE LOG IF IT IS NOT COMPLETE, ONLY TEASES AND  
18 THEN THEY ARE HAVING FIGHTS OVER THAT THE LOG HAS TO BE  
19 MORE COMPLETE AND SO FORTH.

20 MR. KASANIN: YOUR STATEMENTS ABOUT HAVING SOME  
21 SORT OF STATUTE ON HOW FAR YOU CAN GO BACK ON DOCUMENTS I  
22 THINK IS AN INTERESTING ONE. I THINK IT IS A LITTLE BIT  
23 MORE COMPLICATED THAN THAT. I FIRST THOUGHT AFTER I READ  
24 RICK MARCUS'S VARIOUS POINTS, I GUESS YOU SAW THOSE? RICK  
25 MARCUS, IN RESPONSE TO YOUR PROPOSAL, HAD COME UP WITH A

1 NUMBER OF COMMENTS ABOUT SOME OF THE DIFFICULTIES WITH  
2 TRYING TO CONSTRUCT SUCH A RULE. I TAKE IT SOME DAY WE  
3 ARE GOING TO GO BACK TO THAT SUBJECT.

4 MR. CORTESE: THAT'S THE SECOND POINT THAT I HOPE  
5 YOU WILL RE-EXAMINE.

6 JUDGE NIEMEYER: YOU MAY NEED TO GIVE US MORE  
7 INFORMATION AS TO HOW WE DO IT WITH RESPECT TO EXPOSURE  
8 TORTS OR LONG-TERM TORTS. A SINGLE INCIDENT IS ONE  
9 MATTER. AN AUTOMOBILE ACCIDENT IS NOT HARD TO ADDRESS,  
10 BUT WHEN WE ARE TALKING ABOUT PNEUMOCONIOSIS, WE ARE  
11 TALKING ABOUT SOMETHING ELSE.

12 MR. CORTESE: NO QUESTION ABOUT IT. I WOULD BE  
13 HAPPY TO SUBMIT FURTHER PROPOSALS WITH RESPECT TO THAT  
14 ISSUE. I DO HOPE THAT YOU WILL CONTINUE TO LOOK AT THAT  
15 VERY CAREFULLY. THANK YOU VERY MUCH.

16 JUDGE NIEMEYER: THANK YOU, MR. CORTESE. I  
17 APPRECIATE HEARING YOUR COMMENTS.

18 I'M GOING TO MAKE A LAST CALL TO PEOPLE WHO HAVE  
19 REGISTERED TO TESTIFY AND HAVEN'T DONE SO.

20 HOWARD FINKELSTEIN? BRUCE CELEBREZE? GERARD  
21 MANNION? I THINK I HAVE BEEN TOLD HE WASN'T GOING TO BE  
22 HERE.

23 ARCHIE ROBINSON? LAWRENCE JANSEN? ELLEN ELLISON?

24 (NO RESPONSE.)

25 JUDGE NIEMEYER: I WILL CONCLUDE THIS SECTION. IT

1 DOESN'T CLOSE ALL OUR HEARINGS, BUT IT CLOSES THIS  
2 SESSION. I DO WANT TO EXPRESS THE APPRECIATION OF THE  
3 COMMITTEE, TO THOSE WHO HAVE TESTIFIED AND PROVIDED  
4 MATERIAL TO THE COMMITTEE. IT IS A HELPFUL AND USEFUL  
5 PROCESS, AND I HOPE BY THE SAME TOKEN THOSE OF WHO HAVE  
6 MADE INTERCHANGES WITH THE PANEL AND COMMITTEE HAVE  
7 LEARNED A LITTLE BIT OF WHAT WE ARE DOING AND WHY WE ARE  
8 DOING IT, ALSO. THAT DOESN'T PRECLUDE US FROM CONSIDERING  
9 EVERYTHING AGAIN AND LOOKING AT IT. WE WILL DO SO AT OUR  
10 APRIL MEETING. WE DO HAVE ANOTHER HEARING IN CHICAGO, THE  
11 29TH. AND IF YOU ARE REALLY TERRIBLY INTERESTED IN THIS  
12 ONE, YOU CAN COME TO THAT ONE AND WATCH THAT ONE ALSO.

13           THANK YOU, AND WE WILL STAND ADJOURNED.

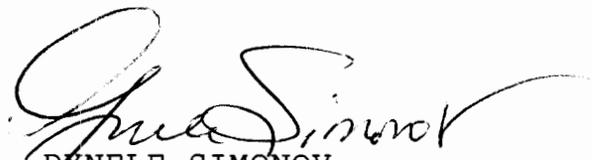
14           (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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## CERTIFICATION

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I, DYNELE SIMONOV, CERTIFIED PRO TEM COURT REPORTER FOR THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE AVENUE, SAN FRANCISCO, CALIFORNIA, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT, PAGES 1 TO 183 CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH PRO TEM COURT REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED AND REDUCED TO TYPEWRITING TO THE BEST OF MY ABILITY.



DYNELE SIMONOV,

CSR NO. 11211