TRANSCRIPT OF PROCEEDINGS

THE ASSOCIATION OF THE FEDERAL BAR
OF THE STATE OF NEW JERSEY

THE TWENTY-THIRD ANNUAL
UNITED STATES JUDICIAL CONFERENCE
FOR THE DISTRICT OF NEW JERSEY

Employment Update:
New Cases, Strategies & Solutions
and
Media Coverage of
High Profile Legal Proceedings & Trials

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MR. HIMMEL: If we could get started, please?

Good morning. I'm Michael Himmel and I'm the President of the Association of the Federal Bar. On behalf of the officers, trustees and members of the Association, I'd like to welcome each of you to the 23rd Annual U.S. Judicial Conference.

A number of months ago the Association decided that it was going to have two panels for the program today. One on employment law and one on media coverage of high-profile trials.

For me the job was easy. I turned to Rosemary Alito, one of the most outstanding employment lawyers in the state, and to Joe Hayden, one of the most outstanding trial lawyers in the state and a veteran of high-profile cases.

Both of them stepped up to the plate and knocked the ball out of the park in putting today together two extraordinary panels. And it is evidenced by the fact that today we have the largest attendance ever at a Judicial Conference of over 400 attendees.

Thank you, Rosemary and Joe, for all of your hard work.

(Applause.)

MR. HIMMEL: And as all of you know, we are fortunate to have two-time Pulitzer Prize winner Anthony Lewis as our luncheon speaker. As a result of this extraordinary program today, there will not be any formal coffee break. However, all of you may, if you wish, seek coffee in the side room.

I'd also like to take this opportunity to thank my Executive Director, Ginny Whipple, for all the work in putting together today's program as well.

(Applause.)

MR. HIMMEL: At this time I'd ask our distinguished Chief Judge, Anne Thompson, to come up to the podium and make a few welcoming remarks of her own. Thank you.

Judge Thompson.

(Applause.)

JUDGE THOMPSON: Thank you, Mr. Himmel.

Members of the Association of the Federal Bar, members of the judiciary and guests. In 1993 this organization presented the William J. Brennan, Jr., Award to the Honorable A. Leon Higginbotham, former Chief Judge of the Third Circuit Court of Appeals.

The sudden death of former Chief Judge

Higginbotham on December 14th of last year is an event worthy of note at this occasion. Judge Higginbotham was a large man with an impressive physical presence as well as a booming commanding voice. He was gifted with a quick mind, ready wit, unfailing eloquence and an ingratiating charm. Many of us have very personal treasured memories of him and our interaction with him.

The judges of our Circuit who sat during his time can remember his stewardship as Chief Judge as a time of great good will and cordial judicial relations. Now, his biography has been noted in so many recent news articles.

An early achiever, he served on the Federal Trade Commission at the age of 34. He was appointed by President Lyndon Johnson to the U.S. District Court at the age of 36 and by President Carter to the Third Circuit Court of Appeals at the age of 49. He taught at the law schools of Harvard University, the University of Michigan, New York University, the University of Pennsylvania, Stanford and Yale. His books have been written about and highly regarded. I brought my copies here today. I couldn't resist.

"In the Matter of Color," which was

published about 1978. He autographed it for me. Obviously, I treasure it. At that time I had been nominated but had not yet been confirmed. And he wrote, "To Anne: Welcome, with confidence in your ability," and so on. Very nice warm comments. "A Leon Higginbotham, June 22nd, 1979."

And then in 1996 he published -- let me just mention. Among the noted praise for this "In the Matter of Color," let me just mention. I circled it last night because I wanted to share it with you. Judge Aldisert of the Third Circuit Court of Appeals had written, and it was on the jacket, here, this book. "In the Matter of Color" -- "It is not just a history of blacks. It is a history of us all. Higginbotham does this with the style of a polished essayist, the calm analysis of a brilliant judge and the formidable research of an indefatigable scholar."

And then "Shades of Freedom" published in 1996. "Racial politics and the presumptions of the American legal process." Again, an autograph seeker I was. I have my autograph. And he wrote, "To Anne: The Chief Judge from my home town." Because, you know, he was a Trentonian. "A Leon Higginbotham. 9-22-96."

At the time -- I can't get away from the jacket. I circled this. I wanted to just share that comment with you. Senator Paul Simon, former U.S. Senator, State of Illinois, quote: In my lifetime two giants of the bench did not make the Supreme Court. Learned Hand and Leon Higginbotham. Now one has written a book you could expect from him. Eloquent, scholarly, compassionate and a ringing call for justice.

At the time of his death, Judge Higginbotham was Public Service Professor of Jurisprudence at Harvard University, teaching the faculty of the College of Arts and Sciences, in the Law School and the John F. Kennedy School of Government. He was Of Counsel to Paul, Weiss, Rifkin, Wharton & Garrison in the New York and Washington offices. Judge Higginbotham had been the recipient of more than 60 honorary degrees and in September 1995 President Clinton awarded him the Presidential Medal of Freedom, the nation's highest civilian honor.

We remember this great and good man. Personally, I will carry his memory in my heart and mind for the rest of my life.

Each year at this conference -- I'd

like to thank you for the invitation and to express my appreciation to this Association for the consistently constructive job it does in enriching and enhancing the level of service in the federal courts.

Year after year this Association has provided high-level educational programs, and I see we're in for one today, for the benefit of the bench and bar. Its members serve the federal court as arbitrators and mediators. There are in this room members of the U.S. District Court Lawyers Advisory Committee, members of the Civil Justice Reform Act Advisory Committee. Members who work extremely hard attending meetings, planning meetings, working to improve the professionalism of our Court.

The members of this Association serve as pro bono counsel and specific pro se assignments from the judges of this Court. For all of this we are extremely grateful and it is my purpose today to thank you.

To the litigators in this group, let me just quickly say that the Court is still trying to seek to improve its jury utilization figures. At one point, just a few years ago, we were ranked among the lowest districts of the 94 judicial

districts within the federal system in efficient cost-benefit usage of jurors. We were in the company of the Northern Mariana Islands.

Good news. We've improved substantially. We are now ranked in the 30 percent usage range, which is about the national average. The goal, you know, is to reduce the cost of bringing jurors into the courthouse who are neither seated on a jury or challenged. In other words, we are ranked by the number of jurors we bring into the courthouse who are sent home without being voir dired for a specific jury trial. This happens when we overestimate the number of jurors we need to try a case. We overestimate the number of jurors we need to bring in when lawyers settle their cases on the eve of trial without advising the Court clerks in time to call off the jurors.

We waste money when lawyers settle their cases on the courthouse steps. We need your help in saving precious federal dollars. We pay jurors $40 a day in contrast to the state courts where they pay $5 a day. We need your help in realistically projecting what your juror needs are on any specific case.

It is not just the wasted money, of

course, that concerns us. We are also concerned about the public good will, the quality of our public service and the message our court communicates to the outside world through our treatment of jurors. As with other matters of shared responsibility within the profession, we ask your help.

Now, many of you know about the modification of the statewide criminal assignment wheel. By vote of the Board of Judges of our Court in September of 1998, the criminal cases in our court are now being assigned with relevance to their geography. This was always the rule with civil cases. But by tradition, because of the great volume of criminal cases coming out of the Newark grand jury, we operated a statewide criminal wheel. So that a Camden bank robbery would just as likely get assigned to a Newark judge as to a Camden judge. A Passaic County or Bergen County drug conspiracy would just as likely be assigned to a Camden judge as to a Newark judge, with all of the attendant inconvenience for the defendants, their families, their lawyers, the government personnel, and so on.

The new system is automated. It is functioning well. Camden matters are being assigned

to Camden judges. Trenton vicinage criminal matters are being assigned to Trenton judges. And the great volume of Newark-generated criminal matters are being apportioned among the Newark judges with the overflow being sent to Trenton and Camden.

The Clerk's office controls for equal distribution of the workload, so that the Newark judges do not get inundated or unfairly burdened with the criminal business of the Court. We are pleased to announce this change because we believe there will be great benefits to the bar, both the government and the defense, and great benefits to the public.

Finally, I would like to recognize Judge Stephen Orlofsky for chairing the new Criminal Justice Act Management Panel for our Court. That panel also includes Judge Joseph Greenaway, Judge Garrett Brown, Judge Dennis Cavanaugh, Judge John Hughes and Judge Joel Rosen.

The Board of Judges has approved a selected list of 100 attorneys who will be assigned Criminal Justice Act cases on a rotation basis off of the list. Gone are the days when each judge has to rack his or her brain to think of a former law clerk or a former Federal Public Defender or a

former Assistant United States Attorney to assign the next Criminal Justice Act case to.

We now have in place a system where the judges can feel confident that any one of the 100 lawyers on that list, all pre-screened by the Court, can represent any case in our Court.

Obviously, if the case is extremely unusual in some way, the judge may still decide to make a special assignment to a particular defense attorney. But that will not be the norm. That will be the exception.

In the meantime, excellent training programs are being planned. They're going on for the betterment of the criminal bar. President Mike Himmel, in conjunction with Federal Public Defender Richard Coughlin, held a training session attended by over 150 attorneys on February 20th at the Sheraton Hotel in Woodbridge.

Furthermore, opportunities for second chairing exist. If you would like for one of the associates in your office to get the second chair experience, please contact the Clerk's office about that idea. In the meantime, we're very proud of this reform of our C.J.A. program.

Great credit goes to John Barry, former

President of this Association, Judge Maryanne Trump Barry, Chair of the Judges Criminal Law Committee, Judge Stanley Chesler, Jerry Ballarotto, Rich Coughlin, Public Defender, Bill Walsh, Bill Carroll, Tom Henry, our Probation and Pretrial Staff; all of whose expertise coalesced to make this reformation possible.

We hope to see many of you at the Third Circuit Judicial Conference in October of this year. It is going to be held in Pittsburgh at the Doubletree Hotel in downtown Pittsburgh. That is October 17 through 19. It is an open invitational event. Come one. Come all. Early registration is the only limitation. This is Judge Becker's first lawyer and judge conference as the Chief Judge of the Circuit, and he's trying to make it the best conference ever. I must say we're all delighted with him. He has been terrific in every way as Chief Judge.

Presumably, there will be a New Jersey District breakfast on the morning of October 19 at 7:30 a.m. -- the early call -- to which all New Jersey attorneys are invited to attend.

And so I thank you for this opportunity to participate in the program. I was so excited and

thrilled to learn that Anthony Lewis is your honored guest. I've been cutting out his columns and circulating them to my friends for years. I have the utmost admiration for his insights, his facile ability to communicate those insights and his values.

Again, thank you for this opportunity to join with you in this bench and bar collaboration. This is a professional effort with distinction to spare.

Thank you.

(Applause.)

MS. ALITO: This past year in employment law was truly and extraordinary one. This was the year in which the United States Supreme Court told us that male-on-male heterosexual harassment can be sex discrimination. This was the year that the New Jersey Supreme Court told us that one offensive comment by a supervisor, without any touching, without any threats, without any other comments, in itself can sometimes be enough to constitute actionable harassment in the work place. This was the year in which Judge Susan Weber Wright told us that dropping your pants, exposing your private parts, asking for oral sex and fondling

yourself might be gorrish but as a matter of law that was not severe enough to constitute actionable sexual harassment.

This was also the year in which that great legal scholar and Ali McBeal's boss, Richard Fish, expressed the view of many employers in this Circuit when he told a client, "You are a man. You are breathing. Under Title 7, you are liable."

(Laughter.)

Today, to help us understand some of the recent developments in this exciting and sometimes confounding area of law, we have a very distinguished panel. Starting with Neil Mullin, our most distinguished plaintiffs' lawyer, Magistrate Judge Rosen, Judge Bassler, my high school debate partner and Third Circuit Judge Sam Alito, Magistrate Judge Cavanaugh and most distinguished defense lawyer Cynthia Jacob.

Judge Alito, one of the first things that employers ask when they get served with a Complaint is how they can avoid going before that most dreaded of all things the federal court jury. How does an employer get summary judgment in the Third Circuit these days?

JUDGE ALITO: Thank you, Rosemary.

Rosemary promised she would ask me only easy questions. That is not too bad. Obviously, the standard for summary judgment in an employment case is the same as in any other case. There are all sorts of legal questions and factual questions that can come up.

But the pattern that I find repeated in the great majority of cases that come before us for summary judgment is this: The typical case we see is the disparate impact case in which the plaintiff does not have much, if any, direct evidence of discriminatory animus. The plaintiff makes out a prima facie case, which is not terribly onerous. In a-failure-to-hire case that would be the plaintiff is a member of what is called the protected group which can be basically any group these days.

Apply for the position. Did not get the position. Possessed the minimum qualifications for the position and the position went to someone who was in a different group. A woman applied and it went to a man. A man applied and it went to a woman.

The burden of production then shifts to the employer to produce evidence of some legitimate reason for the employment decision and that is

almost always satisfied.

I've never seen a summary judgment case in which that was not satisfied by the employer. Then under our Circuit's case law -- and this is where we differ somewhat from a few of the other Circuits -- the employee has to show either discrimination the old fashioned way, with regular evidence and that is not typical, or the employee has the burden of showing that the employer's articulated reason for the employment action was not its real reason; that it was a pretext for discrimination. And this is where we find most of the summary judgment cases fought out.

The employee attempts to show that the employer's reason wasn't the real reason by showing procedural irregularities or by showing that the employer's decision was such a really bad -- the employer's decision was such a really bad decision that it cannot be -- the reason given cannot have been the real reason.

The employer argues: There may have been some procedural glitches; the decision might not be a great one, but we're not required to make good employment decisions. We're not required to be procedurally perfect. This was our real reason.

And between these two rather -- these two positions, which can be very close, the decision is made whether summary judgment can be sustained or not. Whether a reasonable jury could conclude that the employer's reason was not its real reason, which permits but doesn't compel an inference of discrimination.

MS. ALITO: Judge Bassler, do you think that defense lawyers make summary judgment motions too often?

JUDGE BASSLER: Before I answer that question, I just wanted to say one initial thing. I find myself sitting with an appellate judge to my left and a magistrate to my right and I think there is some symbolic inner meaning to that.

It reminded me of the story of the two Federal District Court judges whose hobby was to go about Sunday mornings in a balloon. One morning the fog came in and they got lost and they let some air out of the balloon and they came down over this golf course and they saw two gentlemen down there playing golf. So they yelled down and said, "We're lost. Where are we? Do you know where we are?"

The one golfer said, "You're over the fourth tee."

So they went back up again. One judge said to the other -- he said, "They must have been appellate judges or they must have been magistrate judges.

"Why do you say that?

"Well, we asked them a simple clear question and we got a quick succinct answer. But we still don't know where we are."

(Laughter)

The answer to your question is no, I don't think so. The reason I say that. My thinking about summary judgment motions has evolved. Originally, when I first came on the bench, I came with an experience from being in the state court where, as a practical rule, you hardly ever granted summary judgment because you knew it was never going to be sustained.

And I recognized early on that the atmosphere had changed in the federal system. And over the years I recognized where there was a meritorious or lack of meritorious claim and laid it out and followed the criteria, your summary judgment would be affirmed.

Judge Cavanaugh, who does just an outstanding job, as you all know, and I have debated

over the years. Is it better to suffer the burdens of the summary judgment motions where very often there is a factual dispute, or do we suffer through three or four days of trial and discover that there is no merit to the case?

And I've gone back and forth on the issue. I've now decided that it is better up front to see whether or not there is a meritorious case, do the extra work on summary judgment and go from there.

My more recent experiences tell me that I would rather do that than waste trial time to discover there is no merit. So I don't think so.

MS. ALITO: Cynthia Jacob, how does a good defense lawyer decide whether they're going to make a motion for summary judgment in the case?

MS. JACOB: It is very strictly based on the facts you have before you and the prima facie case for whatever kind of discrimination case you're handling. Most often, as Judge Bassler pointed out, the plaintiff will have made out a prima facie case and the defense will, of course, come up with the legitimate business reason why they did whatever it is they did, and then it falls in that gray area of was that legitimate business reason really a cover

for something else?

And if the facts are such that there is absolutely no evidence to indicate that the legitimate business reason is anything but a legitimate business reason, obviously you go for summary judgment. And, very often, it really is a fact-on-fact case-by-case analysis in all instances.

MS. ALITO: Neil Mullen, Cynthia makes that motion and it is denied. Do you as a plaintiff's lawyer gain from that, aside from the fact you'll end up in front of a jury? Do you gain other tactical advantages?

MR. MULLEN: Well, sometimes a summary judgment motion educates me about the detailed aspects of the defense. I might have missed it in my discovery. Now I can force them to spell it out. Then they lost the motions. I have the best of both worlds. They know "I'm going to face a trial." They lost.

So the settlement value of my case has gone up. That is what it does. There is a world of difference between the state court and federal court. Judge Bassler said there is a plethora of decisions in the federal court to throwing employment cases out on their nose. I think the

federal court is sort of a hostile environment sometimes. It doesn't happen as much in the state court.

When I read the opinions that were given to me today, it is as if I've been watching the musings of a very intelligent but very Republican jury. The judiciary is doing what I think a jury should do. They're making decisions about fact issues that should be left to the jury. So summary judgment motions are very dangerous for plaintiffs in the federal court. That is one of the reasons why we try to state out of federal court when we have employment cases.

MS. ALITO: In light of employment cases these days, we see that, in addition to naming the employer as a defendant, a number of defendant employees are named. Maybe the individual named as the sexual harasser in those cases but also a number of supervisory employees. So we frequently have a case where there is an employer and five or six individual employees named as defendants.

The Third Circuit has made clear that under Title 7 individual employees can't be held liable but, of course, under the New Jersey Law Against Discrimination, which is the basis of many

claims in federal court, it is an entirely different story. The Third Circuit this year has given us some views as to when individuals can be liable under the state law.

Cynthia, could you fill us in on that?

MS. JACOB: Well, I'm going to pick up on Judge Bassler's theme here except I'm going to reverse it. Here the decisional law has not been quick. It has not been succinct and we still don't know where we are.

The case that everybody is citing most recently is Failla, F-a-i-l-l-a. In that case the Third Circuit held for the first time that the New Jersey Supreme Court, if it ever decided the issue, would follow the Restatement of Torts Section 876(b), which says that an employee aids and abets a violation of the LAD when he knowingly gives substantial assistance or encouragement to the unlawful conduct of his employer.

So you got a knowing understanding that there has been a breach of the law and then there is substantial assistance.

Now, prior to that time we had Judge Irenas writing in a very -- couple of very long opinions, Tyson and Hurley. He applied the criminal

standard for individual liability. The Third Circuit said: No, it is a heightened burden.

The Restatement of Torts has a higher burden because it has to be substantial encouragement. You got to do something affirmative.

But the irony of it is Judge Irenas' decision in Tyson was affirmed by the Third Circuit as well. So we've got in a sense still a problem. Which is it? Is it the Tyson standard, the criminal standard, which is slightly lower, or the Failla standard, which is slightly higher?

I think many of us would truly be thrilled if the New Jersey Supreme Court would finally decide this issue. Right now we got -- we got another train that is on the track. Judge Simandle in a case called Behrens, B-e-h-r-e-n-s, decided that there could be no liability individually under the LAD just as is the case under Title 7.

So we got three different theories swirling around. Most of us believe that for the moment Failla is the law, but who knows? The Supreme Court may come up with a fourth approach to the whole problem.

MS. ALITO: This is one of those issues

where I think everyone would like to see the New Jersey Supreme Court rule on that. The Third Circuit in other contexts has talked about a certification procedure which some other jurisdictions employ with respect to unsettled questions of state law.

Judge Alito, how would such a procedure work?

JUDGE ALITO: Typically, there is a state statute. Delaware and Pennsylvania, on an experimental basis, which permits either the Court of Appeals or the Court of Appeals and the District Court to certify a question to the highest court of the state and, typically, the decision by the highest court of the state -- then they have the discretion to take the question or not take the question, if they want.

Some of us have been pleading for a few years now for the New Jersey Supreme Court to join virtually all of the state Supreme Court's around the country and accept certification.

My colleague, Judge Bassler, and one of my current law clerks, Michael Potenza, has written a wonderful article in the Seton Hall Law Review going over this point. But, apparently -- I had

never thought and I know that Justices might disagree with me. I never thought there was anything the New Jersey Supreme Court thought it lacked the power to do.

The one thing they apparently don't have the Constitutional power to do is to accept certification on questions from the federal court. Maybe that is true as a matter of state Constitutional law. But as a matter of policy, it would certainly be a benefit if they could take certifications from these tough state law questions.

MS. ALITO: Judge Bassler.

JUDGE BASSLER: I just wanted to add a footnote to that. Interesting enough, in the Failla case at page 1540 there is a Footnote 4 in which the Court notes, "We note at the outset there is very little New Jersey case law interpreting the relevant provisions of the LAD as applied to individual employee liability. This case again demonstrates the difficulties associated with the lack of a certification procedure in New Jersey. See Heck versus Trump Taj Mahal Associates." Citing Judge Becker." Noting that the "States like New Jersey lacking a certification procedure face the threat that the federal courts will misanalyze the state's

law."

Recently, California adopted a certification procedure by rule. More recently Pennsylvania adopted a certification procedure by rule on an interim basis for a year to see how it would work.

I have the feeling that there is a renewed interest by members of the Supreme Court of New Jersey in revisiting their earlier decisions. If any of you have the opportunity of talking to one of the Justices one on one, I would hope you would use that as an opportunity to advance the concept of certification. I think it is back on the table. It certainly -- I would urge you to urge them to rethink their position.

MS. ALITO: Judge Cavanaugh, when you get in one of these employment cases in which there are five or six individual defendants in addition to the employer, does that present any particular problems in management? Do you think that helps the plaintiff, hurts the plaintiff or depends upon the case?

JUDGE CAVANAUGH: I think it basically depends upon the case. You know, more pockets to pick is always the way to look at it. Normally,

though, it winds up that the employer is picking up the tab anyway and usually paying the freight. I don't know whether it makes much difference.

MS. ALITO: Judge Rosen.

JUDGE ROSEN: I think that sometimes folks over-name, add too many parties. I understand in the beginning of the case why you would do that. But I believe it often complicates cases and doesn't really help you out or add to your position and can make the case a case management nightmare and also more expensive.

I find that the more experienced attorneys tend to try to hone in a little bit more. But, again, obviously, I would agree with Dennis. It varies case to case. I think there is sometimes over-pleading.

MS. ALITO: Neil, when you are preparing a Complaint and deciding who you are going to name as a defendant and you're thinking about whether to name a number of individual employees, do you really want to name five individual employees and have not just Cynthia Jacob as defense counsel but four other defense counsel up there against you?

MR. MULLIN: You make a good point. Generally, plaintiff's counsel don't want

individuals at all. They only humanize the corporation at trial and give the jury a much lower net worth to consider on the punitive damage phase.

You also don't want five lawyers cross-examining your witness at depositions or at trial. Individuals often get into these cases because we want to ruin diversity and sometimes that works and sometimes that doesn't.

Generally, plaintiffs' lawyers shouldn't bother naming individuals unless they have a unique reason. Sometimes you need to name an individual because you need to have their testimony in deposition have the status of a party admission. Otherwise, you won't be able to admit it in court.

An out-of-state witness. You have that general -- I advise the plaintiffs' lawyers not to name the individuals. Name the corporation.

MS. ALITO: Judge Bassler.

JUDGE BASSLER: In my experience -- in the three cases recently tried, no individuals ended up at the trial.

MS. ALITO: Do you think that was a plus for the plaintiffs?

JUDGE BASSLER: I think so.

MS. ALITO: Cynthia, when a case comes

in to you, sent to you by an employer and there are a number of individual defendants named in that case, too, do you represent all of them?

MS. JACOB: That is an extraordinarily tricky area and everyone faced with that problem has to be acutely aware of the ethical implications of joint representation.

More often than not, you have to find out what the various individual defendants know in such a way that you don't ruin your own status as representing the corporation. This can be difficult. There are certain rules of thumb that most defense lawyers have developed. That is, unless proven otherwise, if there is an individual defendant in a sexual harassment case, they are shipped out. You don't talk to them until they got a lawyer and then and only then do you talk to them in the presence of their own attorney.

In other kinds of discrimination cases it is a little bit different. The presumption there is that you probably can represent the joint defendants particularly when it is a routine decision to hire, fire, promote, et cetera. Because then the company is going to be relying upon what the individual -- what the individual defendants

say. They're backing the decision of their people, so to speak. And if you can ascertain that that is, in fact, the case and ascertain it quickly, then it is to the advantage of the defense to represent all of the defendants. But it is a very tricky area.

And even when you can represent all of the defendants, you sometimes have to send out a letter indicating you have a right to separate counsel, indicating there are certain instances where your case may diverge from that of the corporation, et cetera.

So be very careful when faced with the Complaint that names five or six individuals regardless of the kind of case it is and make sure you do enough investigation before you start talking to them to ascertain what your position vis-a-vis those people is.

MS. ALITO: Cynthia, how about the question under the particular cases on joint representation that can constitute a ratification of the employee's conduct?

MS. JACOB: I know you believe it can. I think there are certain instances where it can. There are certain instances where I don't think it does represent a ratification. Again, it depends on

getting as much information from unnamed parties as you possibly can before you make the decision. But Rosemary has a very good point. That is something that does have to be thought about at the beginning of representation. You don't want to go down the road representing everybody jointly. Then find out there is a conflict and then everybody -- you got to get out.

MS. ALITO: Judge Cavanaugh, one of the most frequent things brought up by plaintiffs' lawyers and one of the big worries about defense lawyers in employment discrimination cases is the question of fee shifting. The prevailing plaintiff is entitled to counsel fees paid by the unsuccessful defendant. The poor defense gets it only in rare instances where the Complaint was brought in bad faith. Could you fill us in on what the current standard is for evaluating of plaintiff's counsel's claim of counsel fees?

JUDGE CAVANAUGH: I have no problem doing that. I'm referring basically to -- I have judge Bassler sitting here. Judge Bassler handled the Blakey case which was --

JUDGE BASSLER: I thought you handled it.

(Laughter.)

JUDGE CAVANAUGH: Did it turn out well? Then I handled it.

(Laughter.)

JUDGE CAVANAUGH: That case was the pilot -- the airline pilot that sued Continental Airlines for the alleged harassment in that other pilots and other individuals were placing pornographic materials, and the like, in places where she could see them. She sued the airlines and Judge -- the case was before us for a long time. There was a lot of judicial activity in that there were a lot of discovery battles that went on with a little bit of a scorched-earth policy for a while.

And a couple of law firms involved. Ultimately, the fees sought were almost $2 million on a case that -- I forget what it was reduced to. It was much lower than that. It was an $800,000 verdict reduced partially to around five or six hundred. But it is a reasonableness standard.

If you look at that decision, the Blakey decision by Judge Bassler, where he does his usual crossing his T's an doting his I's, he really sets forth the standard -- the manner in which one can have their fees reduced; the manner in which the

fees can be elevated. Why they were or in that case were not necessarily. And it comes down to that lodestar of finding reasonable rates for reasonable time.

It is a multiplication. And I think there is a great deal of discretion allowed and one of the problems that we constantly have, of course, is: Is the plaintiff's attorneys, who want to do everything, especially when they know they have a reasonable case because if they're successful, they know they're going to do well. And the Court and sometimes -- sometimes the Court and sometimes the defense, trying to keep the cap on discovery, knowing full well at the tend of the case there is going to be an application for fees. That is a constant problem because plaintiff's counsel also says, "We don't want to commit malpractice. We have to do a lot here."

A reasonableness standard.

MS. ALITO: What about the situation we saw in the Blakey case where counsel fees end up being more than the amount that the plaintiff recovers? What do you do then?

JUDGE CAVANAUGH: I know what Judge Bassler did. He reduced them. He looked at this.

Again, this is laid out very clearly in his opinion. He looked at this and he determined upon a review of other attorneys similarly situated in the community, doing similar type work with similar experience -- he made comparisons. He made some reductions. He looked at the various levels of experience of the associates working on the case; the fact there were two very able experienced lawyers working on the case.

It seems to me every case has two, three, four, eleven lawyers trying. And he had to take that into consideration. He also took into consideration the fact some claims were successful and some were not and he made certain reductions as a result of that. He went through a total analysis.

The problem comes up. I know this is going to be one of your questions. I don't want to steal your thunder. I know Joel has the same problems. When there are settlement discussions -- when you have a 50 or $100,000 case with $250,000 in legal fees and that creates quite a problem.

MS. ALITO: Yes. Judge Bassler.

JUDGE BASSLER: I just wanted to add a couple of things. I'm not sure where you're going on the damage issue. But it is a very thorny area.

And I didn't want people to walk away with a misunderstanding of the Blakey decision. One of the issues that arose on the damage case was the fact that the plaintiff was not successful on all of her claims and Continental was making a very strong argument as a result of that there should be either no fee or reduced fee -- substantially reduced fee because of that fact. Blakey I don't think really creates any new law. What it does do is apply some law that has been out there for a considerable period of time.

And there is somewhat of a tension in this calculation of the lodestar, a figure. There is substantial body of law that says where the core facts are the same, the fact that the plaintiff is not successful on some of the claims is not a basis for reducing the fee. That is well established law and the New Jersey case, the Rendine case, says the very same thing. Failla is a very interesting case.

In re-reading it in preparation for the seminar, I came across another footnote in which this argument came up again about reducing the fee because the plaintiff was not entirely successful.

And in Footnote 15 the Court discusses that. Let me just hit a couple of highlights. The

Court says, "We reject appellant's argument that the District Court should have deducted time to reflect Failla's unsuccessful claims and his limited success. Although Fiella did not succeed on every claim originally asserted in his Complaint, the successful and unsuccessful claims all arose from a common core fact. Noting the Court may reduce the claimed hours to reflect unsuccessful claims that are distinct in all respects from the successful claims."

That is just something I think everybody needs to keep in mind.

MS. ALITO: Going back to the question of the impact on the counsel fees and fee shifting on settlement.

Judge Rosen, how do you find this impacts your effort to settle cases?

JUDGE ROSEN: Well, it can be obviously problematic and also raise ethical issues. It is not unusual to have an agreed-upon figure for -- that the plaintiff will recover. But then the dispute becomes one of what the fees should be and plaintiffs or defendants want to resolve the whole case, understandably.

There are different strategies and

approaches you take. You try to negotiate it. You try to work it out. Sometimes what we do is settle the claim of the plaintiff and the parties reserve the right to litigate in a hearing the fee issue. And all of those strategies have worked. Sometimes we encourage them to mediate it. Some attorneys are willing to go to binding mediation, which is obviously voluntary, to do this.

One practical thing that comes up in these fee petitions, since I have this opportunity I wanted to mention. When you file a fee petition, the local rule requires that the materials that you provide be very specific. And to the extent that the rule doesn't cover it, the more specific you can be in the petition as to your time, your hours and how it was spent and who was doing what, the more likely you are to prevail just because you're providing the information. Gross statements of amounts of money are not terribly helpful and we still get a fair amount of that. It is very hard to break that down and get a handle on it.

MS. ALITO: For the other judges.

Is there anything else that you see attorneys doing on these fee petitions that they should stop or would be we well advised not to do?

Judge Bassler.

JUDGE BASSLER: One thing I would advise is just don't assign the responsibility to a paralegal to prepare those affidavits. You should take the time to read the affidavits carefully. Because, if not, sometimes you're going to find some very embarrassing facts set forth in these voluminous affidavits that you would rather not have exposed to the public.

JUDGE CAVANAUGH: It should also be known, by the way, if there are not proper objections, the Court probably on their own will not -- in the Blakey decision it discusses the defense has to bring forth these proper objections in order to raise them for the Court to deal with them.

MS. ALITO: Neil, I know you'll not find yourself in this situation. We see a lot of less experienced plaintiff lawyers in a case where, at the end of discovery they find that they've spent $100,000 of time on a case that is really a $25,000 case and they go in before one of the magistrate judges to try to settle the case and the settlement that is offered by the employer may very well take care of your client's claim, but it will not come

close to covering counsel fees. What does the plaintiff's lawyer do then?

MR. MULLIN: My feeling is if you want to practice plaintiffs' employment law, then you should never, ever, hold up your client's settlement because you want more fee.

When you take on that case and there is a number on the table your client wants, even if you take a bath on the fees, you have to settle that case. Now, that is one point. I think it is unethical to hold up a settlement.

Number two, I think there has to be an ethics rule that addresses this issue. I think in the best of all possible worlds, we, the plaintiffs' bar, should have to submit a settlement proposal where there is fee shifting in two pieces, what the plaintiff wants and the fees.

The defendant should have to respond to each piece. No one should be allowed to hold up a settlement of the plaintiff based on a dispute over the counsel fees If the parties can't reach an agreement on the counsel fees, that moves on to litigation. But I think this is a matter that has to be addressed and I hope it will be addressed in the near future by the ethics rules or the

procedural rules.

MS. ALITO: To the judges.

Do you think a rule like that would facilitate settlement?

JUDGE ROSEN: I do. I think it is a very good idea. That ethical dilemma has been -- we all had to deal with it on different occasions. I think a rule of that nature would be very helpful in providing guidance to the bar and the Court. I like the idea.

MS. ALITO: Cynthia, is that something defense counsel can live with, be forced to separate out what you're paying on a settlement and what you may be compelled to pay on counsel fees?

MS. JACOB: I'd love to see it happen. If you would like to put a proposed rule to the LAC, I'll put it on the next agenda. The rule is clear for many of us in the defense bar. We believe there are two things that drive these cases; punitive damages under LAD and counsel fees. Many a case goes to trial that should have been settled and settled long before because the counsel fee offer is not sufficient or the overall package is not sufficient.

I think Neil's idea is an excellent one

and I, for one, would be happy to try to get some action on it.

MS. ALITO: Until we see some reforms in this area, does it help avoid this problem by addressing settlement as early as possible in a case?

JUDGE CAVANAUGH: Yes.

MS. JACOB: Yes.

JUDGE CAVANAUGH: In fact, usually is -- the good, experienced plaintiffs' lawyers have figured this out and, normally -- I'm talking settlement when people are coming in to, you know, first have coffee and figure out what we're doing on discovery. They have usually said or I'll ask, "Where does this case stand?"

Assuming that there has been some information exchanged and the company or the defendant knows about the case. They will usually at that point make a demand or be in a position very shortly thereafter to at least discuss it, recognizing that demand may very well change depending upon the amount of work that goes on down the line.

What we usually do -- what I try to do is get a little bit of discovery underway. The

paper discovery. Maybe a deposition of the plaintiff or the main defendant and then get everybody back in because it gets too out of control and talk then.

By then everybody has a good idea to be able to evaluate the strengths of the case and then look reasonably at the fees at that time.

MS. ALITO: Is that a good time, Judge Rosen, to think about sending the case to mediation?

JUDGE ROSEN: Absolutely. I think one of the good things about the New Jersey court rules and the practice that we have here -- I think attorneys are used to it -- is the early intervention of magistrate judges and the ability to chat early about possible resolution of the case. And to perhaps bring some perspective to it either in terms of one of us involved or referring the matter to the Court's mediation or arbitration program. That would be voluntary for arbitration. Those are not mandatory -- not a mandatory part of our arbitration program. But attorneys often, on a voluntary basis, do put employment cases into arbitration.

MS. ALITO: Judge Alito, if a case doesn't settle in the District Court and ends up

before the Third Circuit, is there a procedure available to help facilitate settlement at that point?

JUDGE ALITO: Yes. We started a very aggressive mediation policy a few years ago, which has been quite successful. We have a very experienced lawyer now, Joe Torogosso, who practiced for many years in Philadelphia, who heads the program. And he also enlists the services of a number of district judges in the Circuit to settle cases. Judge Ackerman is very active in working on cases that are not from this district and is successful in settling a lot of them. Under that program a lot of cases are sent automatically to the mediation program and end up being settled and attorneys can also seek to take advantage of it. It is very good program.

MS. ALITO: How do lawyers get in that program if the cases are assigned automatically?

JUDGE ALITO: You just contact the mediator, Mr. Torogrosso, who is in our -- in the courthouse in Philadelphia and request the case to be considered for mediation.

MS. ALITO: One of the other areas of employment law where we've seen a lot of activity in

recent years is with the Americans with Disabilities Act. Of course, New Jersey has prohibited disability discrimination for many years prior to the federal statute. But we're seeing an increasing number of cases and increasingly diverse arguments about what employers' obligations are.

Under both federal and state law an employer has an obligation to provide a reasonable accommodation to a disabled employee. That is easy. The difficult question is what is reasonable in what situations? And the Third Circuit has issued a few decisions this year addressing that topic that Neil will tell us a little bit about.

MR. MULLIN: Well, the Third Circuit has issued opinions in Walton -- a case called Walton, Salley and Gaul. What these cases do -- number one, they lay out the way the Court is going to think about the problem of reasonable accommodation. Burden shifting issues, for example. It is the burden of the plaintiff to show that a reasonable accommodation is possible -- for example, a special kind of chair, a special kind of computer screen -- and to show that the benefit outweighs the cost; it is not some ridiculously costly thing.

The burden then shifts to the

corporation to show that this accommodation imposes an undue burden. Then there are special wrinkles that have come up in some of these opinions.

One thing that is worth noting. The ADA has an exception for drug use. Drug use -- drug addiction can be a disability. The person suffering from a drug or alcohol disability does not get the benefit of the same kinds of rules that affect reasonable accommodation in other cases.

For example, if there is a global policy in the corporation that requires a certain task be done standing. Because of drug use or alcoholism, they can't do that. Or some other global or neutral policy, they can't do. They're out. Drug users and alcoholics who cannot perform according to certain neutral policies are out. Versus someone has a chronic back problem and they can't stand. They have to be reasonably accommodated. The other wrinkle is that the ADA eliminates all protection for drug users who are engaged in current, quote-unquote, current drug use. And a battle has raged -- not a battle.

A lot of opinions are out there in the courts about what is current. Is current is six weeks ago? Is current seven months ago?

The Third Circuit has addressed that and said "current" certainly doesn't have to be today or yesterday. So that has been spoken to.

The Gaul case was interesting because it dealt with what is a burgeoning field in disability law. How should corporations accommodate those who suffer emotional disability? Psychiatric disability?

There, someone suffered from severe depression and other disorders and their co-worker that they were assigned to work with or the person was causing them stress and causing them basically to move towards a nervous breakdown. The Third Circuit said: Look, we can't get into the business of telling a corporation who to assign employees to work with and who not.

The Court made this point; that in determining the costs involved, the reasonable accommodation, you shouldn't just look at the dollar costs. That the administrative costs -- the impact administratively.

Now, what I've spoken of is under the ADA, under the federal law. The Law Against Discrimination I believe has much more liberal standards on certain threshold issues. Like the ADA

says to be even considered disabled and protected by the Act, one must demonstrate you have an impairment that interferes -- substantially impairs an important life function. There is a lot of law on that. There are many, many summary judgment cases tossing people out for failing to prove that.

The Failla case is interesting that Judge Bassler mentioned because it concedes that the LAD has a much lighter standard. You don't have to just show you're handicapped. You don't have to show that your handicap impairs a substantial life function.

So, there is no reason on earth, if you satisfy the requirements, why you would bring a case under the ADA that you can bring under the LAD. Not to mention the remedies under the LAD are $300,000 capped aggregate compensatory and damages. Whereas the remedies under the LAD are unlimited uncapped punitive damages.

MS. ALITO: One more reason you'd like to stay in state court and we'd like to put you in federal court?

MR. MULLIN: Exactly.

JUDGE BASSLER: We'd like you to stay in state court, too.

(Laughter.)

MR. MULLIN: We agree.

MS. ALITO: Judge Bassler, having made that comment, I'm going to pick on you next.

Judge Alito talked about the McDonnell Douglas burden-shifting formula at the beginning and we've all heard about that, for employment lawyers -- the formula for improving employment discrimination through circumstantial proofs. But yet over all these years we're still having debates about how to charge a jury under the McDonnell Douglas formula. Here again, like in the summary judgment context, we come down to what to say to the jury on the question of pretext and I know the Third Circuit this year has given us some more guidance in that area.

JUDGE BASSLER: Yes. I forget the name of the case. But I think essentially the ruling in that decision was that you -- the plaintiff is entitled to a jury instruction to the effect that if the jury disbelieves the employer's explanation or its course of action, they may use that as a basis for inferring discrimination, if I have it correct.

MS. ALITO: So the jury -- once the employer articulates its legitimate business reason

and the jury finds they've done that, the Third Circuit now tells us that the jury must be instructed that if they disbelieve that articulated reason, they can conclude that there was illegal discrimination but they need not conclude there was illegal discrimination. The ultimate issue still remains was the reason for this job action discrimination or not?

JUDGE BASSLER: I'm also not sure which Third Circuit decision addressed this question. But I'm amazed that I'm still getting -- usually, it is from attorneys who are not too experienced in this field -- jury instructions that want me to instruct the jury about the whole burden-shifting process.

So, the Third Circuit, along with, I think, every other Circuit that has considered this issue, has concluded that that is not something that the jury should be instructed about. That is basically a function for the Court in analyzing the burden of proof and the burden of persuasion. But I'm, surprisingly, still getting those old jury instructions. I don't know where they're coming from.

MS. ALITO: And you wouldn't be instructing a jury if that hadn't all been resolved

ahead of time.

JUDGE BASSLER: Yes, exactly. The summary judgment issue.

MS. ALITO: The Third Circuit keeps giving the district courts and the magistrate judges instructions about the details of how to charge a jury. How do we comply with those instructions and still let the jury understand what we're talking about?

Anybody have any idea?

JUDGE CAVANAUGH: Are you suggesting the Third Circuit is unclear on this?

MS. ALITO: Never.

JUDGE ALITO: Are you suggesting the purpose of jury instructions is actually to tell the jury what to do?

JUDGE ROSEN: That is an outrageous suggestion. We won't tolerate it.

MS. ALITO: Judge Bassler.

JUDGE BASSLER: I'll bite the bullet.

MS. ALITO: When you hone down the jury instructions, you get 60 pages of jury instructions. You cut them down to 40 and are ready to charge the jury. Does the jury get a copy of those instructions to take with it?

JUDGE BASSLER: Oh, I do that. Yes. I -- I make sure that the jury -- each juror gets a copy of the instructions and I have found that as a practical matter works very well. I get very few questions back from the jury as to re-reading the instructions.

I want -- I want to address the other question, though, that you raised about -- one that I hadn't resolved in my own mind. That is, clarification to the jury or making certain that you're not reversed on your jury instruction. I have to say that I wimp out on that. I have yet to sit down and really give an honest-to-God plain-English instruction. But I've been on the bench longer than I care to remember. I'm gearing up for it.

(Laughter.)

We'll see what happens.

MS. ALITO: Cynthia, you, Neil and I all worked on the state court model jury charges which are not as short as some of us would like. Is there a practical way to condense those jury charges and put them in plain English so that the juries really understand them?

MS. JACOB: Well, the trouble is I

think Judge Bassler really hit the nail on the head. Whenever you try to do that the appellate court is going to say: Well, you didn't track what the law really is.

An interesting example of this is in the state charge we substituted the words "initial case" for "prima facie case" way back when and -- because we thought prima facie is not a concept.

It is not in the ken of the everyday person on the street. Now on appeal I'm arguing a case where they use the word "initial" instead of prima facie and it just illustrates the problem of going to simple language because the appellate court is always going to say: Well, that simple language is not the same as the technical language that we think constitutes the law in this area and the charge has got to reflect the law.

I think the best we can do is give the jury copies of the written instructions so they can try to piece it together themselves because then there will be somebody in the jury that understands a particular word and there will be somebody who doesn't.

At least, they can have an exchange about the charge, itself. But if you just send them

in with no written instructions, they can flounder, and often do, all over the place because this area of law, in particular, is very subject to the jury just plain deciding whether what happened was fair. They don't care about the law. Was it fair?

MS. ALITO: Should the jury get some form of instruction at the start of the case?

JUDGE ROSEN: A lot of us have been experimenting with that in all cases. Not just in discrimination cases. Employment cases. I've done it a few times with the agreement of counsel. They seem to like a little summary.

MS. ALITO: Yes, Judge Bassler.

JUDGE BASSLER: I try in every case to do that. I can never get the attorneys to agree and I wimp out on that one, too, because I don't want to create another unnecessary issue on appeal. But I think it is crazy, if you think about it, not to give the jury some skeletal idea of what the law is and have them just jump in the middle of this thing with the factual presentation. It is crazy and that is another thing on my to-do list for this year.

MS. ALITO: Cynthia, I see you nodding. You would agree to the instruction?

MS. JACOB: I would. Having some sort

of instruction at the beginning of the case has the jury somewhat focused and gets them off the track of is this fair? Because when they're listening to weeks and weeks of evidence, and often these cases do take a long time to try, they are literally floundering.

Where are they going and what are they really looking for? And we know the juries make up their mind well before they're charged. So it makes sense to at least give them some guidance early on.

MS. ALITO: Neil, Cynthia has agreed to charge the jury at the beginning of the case. Now, surely, you can't have any problem with the jurors knowing what the law is when deliberating.

Neil.

MR. MULLIN: It's a wonderful idea, but we probably won't agree on what the charge should be. So we're back to Judge Bassler's problem.

MS. ALITO: Assuming that you can agree to what the charge is or you've gotten rulings on what the charge is ultimately going to be at the end of the case. Do you have any problem with the idea of the jurors knowing that while they're hearing testimony?

MR. MULLIN: No. I have no conceptual

problem.

MS. ALITO: I understand the "conceptual problem."

MR. MULLIN: It depends on what the word "is" means.

(Laughter.)

MS. ALITO: Judge Rosen, I understand there are some amendments to Rule 26 in the works; that they may have a substantial impact on employment -- litigation in employment discrimination cases.

JUDGE ROSEN: That is correct. Every few years, just when we think we have the Federal Rules figured out, they move to amend them. First of all, I'd like to say my friend and colleague Judge Orlofsky could not be with us today. Yesterday he went to reach for one of his most recent opinions and the pile fell on top of him.

(Laughter.)

JUDGE ROSEN: So he couldn't come. It deprived us all of our air bag on the way up here.

(Laughter.)

JUDGE ROSEN: There is in the works an amendment to Rule 26 that radically changed. This is something you might want to take a look at. It

has been published in a number of sources. 119 of the Supreme Court Reporter are the proposed amendments to the rules. The rule-making changing procedure is well underway. Before I tell you what the changes are, the comment period is actually already over.

And these proposed rules are being submitted to the Court's Advisory Committee on rule making. So this is something that well might happen. It changes Rule 26 significantly in a number of ways.

Number one, pretrial disclosures. The ability of a District to opt out has been eliminated. There was a criticism that for attorneys who practice around the country every court had their own way of doing things. So you can no longer opt out.

The rule, however, has been limited. Rule 26 disclosures will only now require the disclosure of the identity of witnesses and documents. Supporting information that goes to impeachment only need not be disclosed. That is a radical change. Perhaps, however, what is more controversial is the creation of two types of discovery. Lawyer managed and court managed.

Lawyer-managed discovery indicates that parties may obtain discovery regarding any matter not privileged that pertains to a claim or defense in the case. If you want to get further information, and I'm quoting now, "Information relevant to the subject matter," which used to be part of the old rule -- you have to go before a court and show just cause.

That is a substantially narrowing of what is available to attorneys in discovery without going to the Court. I'm not sure I understand the difference between discovery relating to the claim or defense on the one hand and, quote, information relevant to the subject matter on the other hand.

I could see, however, in the area of employment law, for example, a defendant arguing:

Well, if you want files of other persons in similarly situated -- similar situations, then you have to go to the Court and show good cause.

That is one reading.

I'm not -- by the way, I'm not saying that is the reading. But that is how it could have a major impact in employment litigation. That comes up often, as we know. This substantially limits

your ability to get discovery without going to court.

The other changes are really less radical. But that is clearly something that is going to cause problems in my view.

MS. ALITO: Picking up on that issue.

Judge Cavanaugh, is that something that comes up a lot in employment discrimination cases? The plaintiff wants discovery not just about the plaintiff but about every employee in that job category or every employee who ever worked for the company.

JUDGE CAVANAUGH: It comes up all the time, you know, for comparison purposes, and the like. Where the problem really occurs is some of or perhaps even much of that which is contained in the personnel file may very well be discoverable. But they're usually just blanket requests for these other ten employees that did get a promotion over the years -- for everything in their personnel file.

There is information in there about medical histories, finances, that just aren't relevant under the circumstances. So they have to be narrowed. But certain things on comparison -- for comparison purposes or if they're claiming that

somebody was harassing to have other complaints about prior harassment charges; that kind of thing.

One other thing. I think there was one other aspect of what Joel was talking about, if I recall reading it right, about the limitation on the kind of depositions. I thought that was a rather radical change.

JUDGE ROSEN: There was a presumptive limit.

JUDGE CAVANAUGH: For one day, which could be a problem.

MS. ALITO: Good change in these cases, Cynthia? Good change in these cases if the rule is interpreted to mean in the typical case you get discovery as to this plaintiff automatically, but you have to go to the Court if you want discovery about 50 other employees?

MS. JACOB: Well, it could certainly make it a lot harder for the plaintiffs. I'm all for that. There is no question that right now we are often plagued with discovery requests that are extremely broad. And if the moving attorney, in this case the plaintiff's attorney, can show some nexus as to why it might be relevant, they're going to get the stuff.

And discovery -- paper discovery, particularly, as it presently is practiced is onerous on the defendants to the nth degree in many cases. So I think that these are tools that might change the way discovery is conducted.

Certainly, if there is a limitation on depositions, it could eliminate a lot of the "I think I'll depose everybody in sight for at least five days a piece."

And, you know, I plead guilty to that.

Unfortunately, there are some plaintiffs that want to tell their story in such a rambling and diversionary way that you're lucky if you can get anything out of them in one day of depositions. So this will have to be watched very carefully because it will materially increase the burden on the poor magistrates who are already, I think, working as hard as they should and certainly as hard as they can.

JUDGE CAVANAUGH: Joel could work harder?

JUDGE ROSEN: I could, but not everyone else.

MS. JACOB: It bears watching because it will make a big difference.

JUDGE ROSEN: There are a few other aspects of the rule that are interesting. The fee-shifting component that notes explicitly the authority of the Court to make a party pay reasonable costs if the discovery that he or she seeks goes beyond the core discovery

I imagine that is going to be very -- well, it is controversial.

By the way, these rules, if they are approved by the Rules Committee, and I don't know, then they would go to the Judicial Conference, then the Supreme Court, and then the Congress, I believe, has a role in this as well. But assuming this happens, it could be by December of next year.

The one other change that I want to note, very briefly, is a change to Evidence Rule 702 that essentially would codify to some degree the Daubert, Dobert or Daubert decision (laughter) however you pronounce that -- by laying out what the criterion is but also making it explicit that the gate keeping function would apply not just to scientific experts but other technical experts or others with specialized knowledge.

I know the cases have been all over on that. I guess it would be an accountant or things

of that sort. So this is a proposed rule which I believe is less controversial and I believe would be helpful.

MS. ALITO: Our time is almost up.

Before we wrap up, Neil, if you could give one piece of advice to one of the many general practitioners who are moving into the employment field, what would that be?

MR. MULLIN: Stay out of federal court.

(Laughter.)

MS. ALITO: Cynthia, the same question to you. To defense lawyers.

MS. JACOB: I could do the opposite. The piece of advice I would give to the general practitioner who now thinks they're going to make their fortune in employment cases is be very weary.

Many people think this is an easy field of law. They think there is not a complicated body of law surrounding it. They are wrong and they could end up taking cases that are absolutely meritless and then, $40,000 of expenditures on their part later, they're stuck with the dog of all dogs.

So, the first thing they got to do. They got to understand that there is law out there that they've got to learn. And the second thing is

they got to learn to assess their plaintiffs.

MS. ALITO: Judge Cavanaugh, what is the most common mistake you see lawyers make in employment discrimination cases?

JUDGE CAVANAUGH: Not listening to Neil Mullin.

MS. ALITO: Judge Rosen.

JUDGE ROSEN: I would agree with Cynthia that one of the things that I feel badly about is the end of the day at a pretrial conference when an attorney comes in and goes, "My God, help me. I have 40,000 or 50,000 or $20,000 into this case and it turned out to be a disaster."

I guess it is easy for me to say, but I think in the long run you're better off if you take a little more time evaluating your client and your case. I think that is the biggest problem in these cases, since they are so difficult and complicated.

MS. ALITO: Judge Bassler.

JUDGE BASSLER: The one piece of advice I would give both to experienced and inexperienced lawyers is on the mitigation of damages issue. I can't believe how many times this comes up. We all know that the plaintiff has the duty of mitigating his or her damages, but the burden of proof is on

the defendant.

I've ended up at the end of the case, where you look at the evidence, and the defendant simply has dropped the ball.

MS. ALITO: Judge Alito, lawyers arguing his or her first employment case before the Third Circuit.

JUDGE ALITO: Well, what I see that I don't like are briefs that go on and on and on about the boilerplate discrimination law which we know because we have such a huge volume of these cases.

What I'm looking for in these typical summary judgment cases is good argumentation about how the facts of the case fit with the McDonnell Douglas framework or whatever the standard of law is.

I would just echo what some of the other panelists said about the complexity of the law in this area. I think we have more really difficult legal issues in this area than in almost any other area I can think of. Issues that will make your brain hurt thinking about that.

MS. ALITO: Thank you all very much.

(Applause.)

(Recess.)

MR. HIMMEL: At this time I'd like to present to you the President of the Historical Society, Don Robinson, who advises me that he has a very special guest for us. Don.

(Applause.)

MR. ROBINSON: Thanks, Mike.

This morning we are meeting on the eve of a new century. But it isn't the first time that the Court has approached a new century. Project yourselves back 100 years to late 1899. The Honorable Andrew Kirkpatrick, United States District Judge, was the only judge of this Court. He is here. He has a brief message about the Court as we approach the 20th Century.

Judge Kirkpatrick was born in 1844. He studied at Princeton and at Union College, earning his degree in 1863. He read law in the office of Frederick Frelinghuysen until 1866. The judge then began his legal career as an associate and partner of Mr. Frelinghuysen in practicing law in Newark until 1874 when he joined the firm of Teese & Kirkpatrick where he remained until 1885 when he became a judge of the Essex County Court of Common Pleas.

Nominated by President Cleveland for

the Federal Court, Judge Kirkpatrick was sworn in on December 8, 1896.

I present to you the Honorable Andrew Kirkpatrick.

JUDGE BISSELL: The name, Mr. Robinson, is Frelinghuysen.

"Good afternoon. I am pleased to report to you that the state of the United States District Court for the District of New Jersey on the eve of the last century of the second millennium is good.

"Let me begin by summarizing the activities of our court for the fiscal year July 1, 1898 through June 30th, 1899. The statistics which I will report to you can be found in the Annual Report of the Attorney General of the United States for that fiscal year.

"He controls and reports the business of all inferior federal courts, a subject which I will later address as I ask you to look forward with me into the 20th Century.

"Criminal actions. In the fiscal year ending June 30th 1899, this Court disposed of 51 criminal actions, the largest categories of which were Customs, Internal Revenue and Postal offenses.

Of these 51 dispositions, 49 resulted in convictions either by trial or plea of guilty. As of July 1, 1899, 48 criminal actions were pending on the Court's docket.

"On the civil side, the United States is not a particularly active civil litigant in our court. Only three civil actions in which the United States was a party were disposed of in the past fiscal year and 16 such suits remained pending as of July 1, 1899. Private litigants, however, have been more active in the past fiscal year. Ninety-four admiralty and 74 other civil actions were commenced, a total of 168.

"Regrettably, this Court did not enjoy positive clearance in this area, disposing of 73 admiralty actions and 65 other civil actions, a total of 138.

"The Court's backlog continued to grow and is one of the nation's highest. As of July 1, 1899, 383 admiralty suits and 1,337 other civil suits were pending on the Court's docket.

"In Bankruptcy, however, the Court enjoyed greater success. One hundred and fifty-six voluntary and 42 involuntary petitions were filed in the fiscal year ending September 30, 1899, a total

of 198.

"However, 199 bankruptcy cases were disposed of, five by dismissal and 194 by adjudication, resulting in 72 discharges in bankruptcy.

"Regarding the Court's fees and expenses. The Attorney General's report reveals that in the fiscal year ending June 30, 1899, $37,490.95 in expenses of this court were paid. Approximately 9,000 of which had been incurred in prior fiscal years. The major expenses included the salary of the United States Attorney, J. Kearny Rice, in the amount of $3,000 and the salary and expenses of the United States Marshal in the amount of $5,100, including the $3,000 salary for Marshal Thomas J. Alcott, himself.

"Finally, I am pleased to report that fees collected from both the United States of America and private litigants totaled $8,406.22 while the expenses of the office of our Clerk, George T. Cranmer, for such things as clerical hires, stationery, et al., totaled only $2,648.98.

"Accordingly, there was a net positive emolument for the office of our Clerk in the amount of $5,757.24 which served as a basis for Mr.

Cranmer's compensation.

"In short, while the population of private civil suits on this court's docket continues to grow, this court remains fiscally responsible. Its income substantially exceeding its clerical expenses.

"Having reported to you the state of the Court's docket and fisc, let me take this opportunity to look ahead to the future of our court. We stand on the brink of a new century, the last of the second millennium. What lies ahead for our court and its bar? If my successor were addressing your grandchildren and great grandchildren 100 years from now what might he be saying in reviewing the work of our court in the 20th Century?

"Caseload. I predict that the large caseload of this Court will expand dramatically. It already warrants the allocation of a second judge for our district. Moreover, the horseless carriage, however obnoxious it is to our tranquility, will surely become the dominant mode of personal and commercial transportation in the next century, perhaps even eclipsing the railroad.

Injury to person and property caused by

these machines, when driven across state lines, will surely lead to increased tort litigation under our diversity jurisdiction. The recently completed wall of stain has thrust us into the international community where our diplomatic and commercial involvement can only continue to escalate. Interstate and foreign commerce will surely expand, generating increased litigation excontractu by and against corporations formed in New Jersey under its friendly corporate statutes.

"The further business panics like that of 1894 become a regular part of our economic cycle. Increased bankruptcies will also tax the resources of this Court.

In its first ten years, the Sherman Antitrust Act has already been employed vigorously by the Attorney General of the United States. It is safe to predict that his efforts and those of business entities seeking to attack a powerful competitor will increase in the next century. This federalization of business regulation traditionally left to our state governments continues an alarming trend which started with the radical reconstruction legislation of 30 years ago; namely, the increased involvement by Congress in our everyday lives.

"I sense a perception by Members of Congress that, by pandering to public opinion on popular issues of the day, through the hasty enactment of laws in those areas, they can enhance their own popularity and chances of reelection.

"I hope that my successor 100 years from now will not be confronted with a record of such activity during the 20th century, but I fear that he will be.

"Finally, and most alarming, the dramatic increase in new attorneys admitted to the bar in the past year. Our new admitees were 32 in 1898. A sane number consistent with years past. Figures just in for the new admissions in 1899, however, show 197 attorneys and counselors at law joining the bar of New Jersey and this Court.

"It is axiomatic that more lawyers mean more cases and increased competition to secure clients, an alarming, if not unseemly, prospect. Only your restraint lies between us and a litigation explosion.

"As you know, throughout its history this District Court has been served by one judge indeed until the creation of the Circuit Courts of Appeal earlier in this decade, that judge-heard

cases in the Federal Circuit Court as well.

Due to the reasons previously discussed and surely countless others in the next century which we could not even begin to predict, this Court will soon need more judges to assist in moving its docket. Indeed, if I may be so rash, by the year 1999, as you stand on the eve of the next millennium, you may be meeting with as many as five or six judges serving this district.

You chuckle at this prediction because you feel it is preposterous. I assure you that it is not.

I fervently hope that the Judicial Branch will, in the 20th Century, achieve the true equality and independence as an equal partner with Congress and the Executive Branch that the Constitution prescribes.

Presently, that is not the case because our budget, appropriations and administrative oversight are all controlled by the Attorney General of the United States. It is no accident that his annual report reflects the docket, business and expenditures of our district courts. To demonstrate the minutia of administration in which the Attorney General involves himself, the Clerk of our Court,

Mr. Cranmer, is struggling to obtain a Remington typewriter for use in the Clerk's office.

"At the current pace, due to Washington's bureaucratic sloth, I predict that we will be well into the next century before this necessary piece of new technology can be obtained, and God help us if our increased workload ever requires us to beg the Attorney General to authorize the purchase of a second typewriter. What these poor attempts at humor are designed to demonstrate is that the Judicial Branch should control its own budget, seeking and receiving funds from Congress and then expending those resources as needed throughout the court system.

"Surely, an administrator in Washington with one or two clerical assistants could accomplish such a task. If this change is made, the Judicial Branch will no longer be dependent for its funding, manpower, equipment and clerical salaries upon the Attorney General, who, wearing his other hat, is also a most active litigant in our court.

"The Judicial Branch should become fiscally independent and this conflict of interest for the Attorney General should be eliminated. I hope the Congress will have the foresight to pass

legislation which will achieve that goal."

Finally, another distasteful but necessary subject. "Judicial compensation. There is an additional threat to judicial independence; the inadequacy of our compensation. I regret to inform you that on this subject I am not optimistic for the future judges of this court.

Here, happily, however, we have an ally in the Attorney General, as he stated in his 1899 annual report to which I referred earlier. And I quote:

"Facts have come under my observation in the course of the administration of this department which justify my calling the attention of Congress to the salaries paid by the United States to its judicial officers."

"The compensation of the Chief Justice and the Associate Justices of the Supreme Court was fixed more than a quarter of a century ago and has not since been increased. The earning capacity of the legal profession in common with other business and professions has increased greatly during that period.

"It is not an uncommon thing to find a lawyer appearing before the Court in a case where

his fee for one argument exceeds the annual salary of the judge. Judges of the Circuit and District Courts are also inadequately compensated. It is also true of those of the Court of Claims."

Continuing with the Attorney General's observation.

"The courts of the United States are everywhere in the civilized world held in the very highest repute; yet their judges are paid smaller salaries than are allowed by the states to judges in very many jurisdictions.

"I believe that an increase of the salary of the Chief Justice and Associate Justices of the Supreme Court to $20,000 a year, of the Circuit Court judges to $10,000, and the district judges to $7,500 a year would be a simple measure of justice and approved by every just-minded citizen."

And here I close the quote of our friend the Attorney General.

"Like my predecessors," this jurist," I made sacrifices in my income to take this esteemed position which I love. There is not a day when I would rather be doing something else in our profession. For 25 years, or even five years, without a meaningful adjustment in judicial

compensation is unconscionable. Probably, once again, it is the concern about their reelection that so paralyzes members of Congress that they must refuse to provide adequate compensation to both themselves and judicial officers. No other reason could explain their lack of foresight and statesmanship. Human nature and political opportunism being what they are, I doubt that my successor or successors who might be addressing you in 100 years from now will be confronting a rosier picture. Surely, adequate judicial compensation is a simple measure of justice approved by every just minded citizen. But Congressional timidity and posturing has put us in this fix here in 1899 and, in all likelihood, will continue to do so into and through the 20th century."

I note with interest your panel discussion involving media coverage which follow these remarks of mine. Perhaps, you can enlist their support in convincing our Congressmen and Senators that the public will not turn them out of office for paying to themselves and to us a fair salary.

Rest assured, however, that I and those who succeed me will never stray for this reason or

any other from performing our constitutional responsibilities and indeed going that extra mile to bring justice to you and the citizens of the District of New Jersey.

I thank you. I look forward to addressing you next year, the first of the 20th century.

Thank you.

(Applause.)

MR. ROBINSON: Thanks, Judge Kirkpatrick. We'll see you in 100 years.

Joe Hayden, it is all yours. Where is Joe?

Joe, it's all yours.

(Pause.)

MR. HAYDEN: Good morning, everybody. My name is Joe Hayden. On behalf of the Federal Bar Association, I would like to welcome everybody to what we believe will be a very stimulating and provocative panel.

For the past couple of centuries the American public has been fascinated with very dramatic high-profile trials. With the high profile and dramatic trials has come media attention which at times has enlightened and at times has bordered

on the sensational so that the trial, itself, became almost a media event as opposed to a search for the truth.

We can look back at the Scopes Monkey trial. We can look to the Lindberg case, the Shepherd murder trial, the Compolito murder trial in this state. Anybody could have their lists of the top five or top ten.

But the truth is we've always had a tradition in our country of the high profile case. But in the past decade or so, it seems as though these high-profile cases, which have been pretty spread out, have almost appeared on a yearly or bi-yearly basis as though we have the high-profile case of the week.

In the '90s we need only think of Marv Albert's case, O.J. Simpson's case, the Jesse Tementakois case, the trial that Ted tried in terms of Secretary of Agriculture Espe. And we've had these series of high-profile cases to some extent occasioned by the expansion of media coverage from Cable TV, from web sites and computer coverage. So that there would be increasing competition for news and sensationalism comes increasing media trial problems for the lawyers and for the judges.

And it has only confined itself to the criminal area, we need only think in our practice of the Quinlan case, the Baby M case, the O.J. Simpson civil trial, all of the tobacco litigation which is now civil, the sexual harassment cases that were talked about in the earlier panel, all of which were civil.

So that this is not a phenomenon that is unique to the criminal bar. We are very fortunate that we've had a very -- we have a very distinguished group of panelists who have given of their time to be with us today and we're going to address a number of these issues.

First of all, sitting to my left is Judge Maryanne Trump Barry, who has been a federal judge for the last 15 years. She was a First Assistant United States Attorney and Chief of the Appeals Section and has also served as the Chief of the Criminal Law Committee of the Judicial Conference.

Sitting beside her is Judge Garrett Brown, who was the Assistant United States Attorney and the Executive Assistant United States Attorney who was part of the trial team in the Addonizio prosecution for the City of Newark and the Atlantic

City prosecution. Judge Brown has been on our bench for 13 years.

Judge Joseph Irenas has been on the federal bench for seven years and was a senior litigating partner for McCarter & English where he tried complex cases and high-profile cases both in New Jersey and throughout the country.

The gentleman to my left of Judge Irenas is John Q. Kelly who has come to be on our panel from New York. John has a national civil practice and he does a fair amount of criminal work, also. He was one of the two lead counsel in the O.J. Simpson civil trial on behalf of the plaintiffs where he successfully prosecuted that case. He's been involved in the Macy's Parade accident case, the injuries arising out of the Macy's parade a couple of years ago, and a host of other pieces of complex litigation throughout the country. All of his civil litigation is high profile and he has also served as the media correspondent for Fox TV in connection with litigation matters.

Faith Hochberg, our United States Attorney, has joined us on the panel. Faith tried high-profile cases as an Assistant United States Attorney. She was with Cole, Schotz and litigated

major cases. Had positions in Washington and for the past five years has been our United States Attorney. I am told by the historians that is the second longest term for a United States attorney since, at least, the early '50s. So we're very happy that Faith is with us.

Ted Wells is somebody that is known to everybody in our district. Ted has handled high-profile civil and criminal cases throughout the country. He represented lead counsel in the state trial involving Secretary of Labor Donovan years ago in The Bronx with Raymond M. Brown. He recently successfully defended Secretary of Agriculture Espe. He has represented Michael Milken in much of Michael Milken's civil litigation and Ted is literally so busy that he's going to leave around twelve o'clock for a conference call on a national case he's in the middle of. But Ted actually flew back last night. I want to express my appreciation and the Association's appreciation to be with us today and he's actually leaving today the -- and Judge Barry; she looked up. She flew back last night, also. She has our appreciation, too. She came in around one o'clock, also.

Raymond M. Brown is sitting to Ted's

left and Raymond was -- is one of the finest trial lawyers in the state. He is a member of the American College of Trial Lawyers, a past President of the Association of Criminal Defense Lawyers. He has served as the anchor for Court TV for the past four years. He also handled a program on legal issues sponsored by the New Jersey Bar Foundation called "New Process." And he still finds time to do some litigation for his law firm, Brown & Brown, where he is partners with a shy, retiring lawyer by the name of Raymond A. Brown who has tried a high profile case, himself.

And our final panelist is Jim Willse, who has been the Editor of the Newark Star-Ledger -- no longer the Newark Star-Ledger -- the Star-Ledger for the last four years. Prior to that, Jim was the Publisher and Editor of the New York Daily News.

Jim was kind enough to appear on the panel the Historical Society did on a similar topic a few months ago and he was cantankerous enough that we asked him back and we are very pleased to have Jim.

And my first question, which I want to start out giving to the media folks, is:

Do you believe that the media has been

fair and responsible in its coverage of high-profile cases? And let's confine the question to the last decade. And whether there were cases you were directly involved in or cases you followed closely.

Ray.

MR. BROWN: Joe, to begin with, we have to redefine the question a little bit because the term "media" is pretty expansive. For example, although Jim can speak for himself, the Ledger probably is more thorough and balanced in its coverage of legal events than most newspapers around the country.

Certainly, there are places like Court TV, towards which I have a bias, which have been pretty balanced in bringing gavel-to-gavel coverage of trials which I can't imagine if you can -- if you try a case or present gavel-to-gavel, it would be much fairer.

On the other hand, by and large, most media coverage of trials that get high profile is local and it's in local markets. To the extent television is involved, it is pretty irresponsible in the sense that there is a tendency to look for sound bites, to look for that which is sensational and time is at such a premium because you're talking

about a capital-intensive business, that there is not enough time to give balanced coverage.

So overall, I would say there have been some media outlets and institutions that have distinguished themselves and been balanced. But, overall, probably, television, local television in particular, gives short shrift to what we think of as due process which puts a certain amount of pressure on the balance on the media and an awful lot of pressure on lawyers.

MR. HAYDEN: Jim, what is your view?

MR. WILLES: Not surprisingly, it is not very different; particularly the part about the thorough and responsible coverage of the Star-Ledger.

(Laughter.)

MR. HAYDEN: I like the man who makes the lay up.

MR. WILLES: I doubt the word "media" was around when Judge Kirkpatrick delivered his State of the Courts address.

I remember when I was a reporter, a working journalist as opposed to whatever it is I am now, the last high profile case I covered was 20 years ago. The Patricia Hearst trial which at the

time was the trial of the century and attracted worldwide attention. But nothing on the level of an equivalent trial these days largely because the media was not nearly as diverse and fragmented as it is today.

As Ray said, there was no cable TV, there was no CNN, there was no court TV. The National Enquirer was in business. But what has come to be called the supermarket tabloids had not reached their full flower as they have now. National talk radio and probably most difficult of all is the Internet. None of that was around and all of it is around now.

In self-defense, if nothing else, I am inclined to draw a bit of a line around what we do. "We" being newspapers, the Star-Ledger and other grown-up newspapers, that we can call the press as opposed to the collective media and what our brethren do. Media takes in a lot of territory, as Ray says.

It has been my experience, in dialogues like this, that it -- very quickly a discussion of how the media behave veers into a discussion of about how commercial as opposed to public and broadcast as opposed to cable television news

behaves; classically, the Six O'clock News. If it bleeds, it leads. That is where the sound bites from in the courtrooms show up. Those are the cameramen that are elbowing each other out of the way for the press conference on the courthouse steps. From where we sit, where we consider ourselves to be responsible, we take our coverage of legal proceedings and the world generally very seriously. There are practices that other elements of the media subscribe to that we don't. We have enough trouble with our own credibility, keeping mistakes out of the paper, doing our job well, without having it made even more difficult by the rub off from the drudge report and the six o'clock news.

MR. BROWN: Can I add?

It is also important, if we talk about the media, we separate journalism from something else, which is pure entertainment. The highest rated -- legally-related programs right now are People's Court and Judge Judy and programs which are using something that resembles a legal format but are purely for entertainment and have little to do with the law but are watched by more people than watch serious trials.

MR. HAYDEN: The Federal District Court judge in the Southern District two weeks ago in a case called Lauro versus the City of New York granted a partial summary judgment in what is known the Perp Walk case. Perp walk is New York police officer lingo which is short for perpetrator.

What happened in that case is that Fox News called the New York City Police Department and said, "We're interested in a case. We'd like a photograph of the defendant."

The New York City Police Department went upstairs to the holding cell, took the defendant, cuffed him behind his back, brought him down the stairs, brought him out to the parking lot, put him in the back of the police car with his handcuffs cuffed behind his back, drove him around the block so that he could then be photographed as though he were walking into the Police Department after having been arrested.

And the Federal District Court judge in that case granted a summary judgment on a civil rights action in the sense that that was a taking under the Fourth Amendment because it was a staged situation which violated the privacy of Mr. Lauro.

Now, do you think that is fair and

responsible conduct on behalf of the media?

Ray?

MR. BROWN: I don't think you can criticize the media for that conduct. I don't disagree with the judge insofar as the New York Police Department, which staged the event. If the media can get pictures of people who are part of a story, and if they report the story accurately how can you criticize them?

MR. HAYDEN: You don't think you can criticize the media for asking the police to stage the event and walk the guy out and put him in the back of the the car?

MR. BROWN: I only read the newspaper accounts. "Stage" is kind of a loaded word. If they said: I understand you got a guy locked up; we need a place where we can get a picture of him and they understood that would be bringing him outside, I don't see how you can criticize the media.

Criticize the police for acknowledging and responding to the --

MR. WELLS: Hold it. Now, Raymond, you have been --

(Laughter.)

MR. HAYDEN: This is how he does it at

trial. This is how he does it.

MR. WELLS: I want to make sure I know who is sitting beside me.

There was a time in your life if a reporter -- let's even say from the responsible Star-Ledger --

MR. BROWN: They're not responsible as far as I'm concerned. They were involved.

MR. WELLS: The truth is starting to come out now.

If somebody from the Star-Ledger went to somebody in the U.S. Attorney's office and said I want you to parade Ray's client back out there, you would raise so much hell both about the reporter having the audacity to make the request and the government but you would give fire to both sides and you should, I would submit. I know you're working for the Court TV now.

(Laughter.)

MR. WELLS: Ray would say no.

MR. HAYDEN: In fairness to you, not having read the opinion. But the interesting thing in the opinion is that the plaintiff sued the police officer and the City and the Police Department and left out Fox TV. And it was actually mentioned in

the opinion that the issue is whether or not Fox TV could have been joined, also. But, Jim --

MR. BROWN: There was no discovery, Joe.

JUDGE BARRY: Do you know why Fox was not sued? Because the plaintiff read his Bible and the Bible said, "The meek shall inherit absolutely nothing."

Sure, let the reporter -- let them ask. He should have been told no. But he's entitled to ask. Isn't he? You believe in the First Amendment, don't you?

MR. HAYDEN: At some point in time we go from being unfair to staging.

Jim, what is your view? Do you think that the Perp walk is a fair and responsible practice?

MR. WILLSE: This is where I get drummed out of my lodge. I never thought at this dialogue I would part coverage from Ray Brown on a media coverage.

When I came back to New York from San Francisco, I discovered the Perp walk. It is a staple of New York journalism. Less so in other markets. By me -- forget whether it was staged.

The simple act of parading a defendant down the steps of the precinct house raises a question about prejudicial publicity from the start.

I worked at a newspaper, the New York Daily News, that lived on Perp walks. I don't know that we ever asked the cops to stage one. If we did, we probably shouldn't have. But we had the right to do it and they certainly had the option to say no.

But I was then and I remain rather conflicted by this because it is a very distasteful process. But it leaves unanswered one question about you've got a crime that is in the public eye. You have an arrest. And there is a need or an appetite on the part of the public for a picture of this person.

If you're not going to be in an arraignment to take a picture and there is not going to be a booking photo, then the Perp walk by exclusion becomes that much more appetizing to the media, which is not to defend it.

I have not read the case. It always made me very nervous and it continues to do so.

MR. BROWN: The reason the word "staged" is so critical, the Marshals claimed, in

the Oklahoma case involving McVeigh, they had no choice but to take McVeigh out through the door where the media had access and could film him.

So what you saw, every time there was a McVeigh story, was a story of the guy taken by the belly chains and being led from the courthouse -- from the jail to the courthouse.

If it was true that there was no other way to take him, then I suppose -- how could you criticize the media for taking a picture or for being aware of it?

I think there is a difference between a person saying I want to have an opportunity and those who have an obligation to be concerned about due process and saying we won't cooperate.

To suggest to the media, whose job it is to cover the story, that they shouldn't ask is to turn it around and to ignore the responsibility where it should be placed.

MR. WILLSE: If the Perp gets walked, we're going to take the picture. I think we all recognize that there is a certain attitude on the part of the police that this is like a trophy.

MR. HAYDEN: Okay, Ted.

MR. WELLS: I don't know that we're

going to draw the line, but there is a line in there somewhere.

MR. HAYDEN: Okay. I want to move along.

I sidetracked us because it is kind of a current decision that raises a lot of issues.

Ted, a general question in terms of the cases you tried and commented on. Do you think the media has been fair and responsible in the last decade in terms of the way they handled high-profile cases?

MR. WELLS: In terms of high profile criminal trials, I think as a general rule the coverage is biased in favor of the government. When a defendant has a good day in court, rarely -- this is my personal opinion -- do I think the news coverage captures the fact that the defendant has had a really good day or the government's case is in trouble.

If and when there is an acquittal in those rare cases, I think the coverage is fair. But up until that time, I think as a general rule the coverage is usually in favor of the government.

Just with respect to TV, though, I will say that during the period when I served as a

commentator on the O.J. Simpson case, I would have a microphone in my ear. I'll always remember repeatedly being told "You have ten seconds, you have 15 seconds." That is the type of answer you were required to give because of the format.

I think it naturally results in just bad coverage in contrast to, say, Court TV where Ray is able to really deal with the grays that most issues present.

MR. HAYDEN: Faith, what is your position?

MS. HOCHBERG: As I was listening to Ted, I was remembering that a big box New York Times article -- I can't even count column inches but it was a whole bunch of them -- describing the thrilling dramatic oration given by H. Theodore Wells in defending Espe in his summations.

MR. WELLS: It should have been much better.

MS. HOCHBERG: And describe Ralph Smaltz's bumbling, and this was well before the acquittal. I think in trials it is generally pretty balanced coverage.

Where I have a problem is in pretrial stages. I think that what is happening is that the

competition among different media outlets to scoop each other is resulting in far too early speculative press coverage about what the service of a particular subpoena might mean, for example, and causing damage to people that don't deserve it long before indictment.

MR. HAYDEN: John, you tried cases all over the country. You pick juries in the wake of a lot of publicity.

What is your overview as to the fairness and the responsibility of the media coverage in the last decade?

MR. KELLY: First of all, one thing I would like to say I learned a long time ago was not to antagonize the media. Keeping that in mind, I think, overall, they've been pretty fair and responsible in their coverage. I do. You got to keep in mind, just like Ted was talking about or Ray, there are all kinds of time constrictions and things when you're doing commentary or whether you're writing. You have space restrictions and things. You got to remember that.

When you look at it relative to reporting on the political scene or in the sports world, I think the responsibility there is roughly

equivalent. We have to keep in mind that high-profile cases are extraordinarily newsworthy events.

The competition is very intense both between the print media network and the cable networks at night. And in this competition for viewers in the very restricted time frames, they have to cover these cases, I think they do a pretty good job. I'd like to see it better. It is not always accurate. I think with what they have to work with and the time constraints they have, I think, all in all, they do a pretty good job.

MR. HAYDEN: Judge Irenas.

JUDGE IRENAS: I haven't had the super high-profile cases. That O.J. Simpson type. To the extent that the press covers events which -- real events which actually occurred at trial or hearing, I think they do a pretty good job. Every now and then and, maybe fairly frequently, they'll have technical errors. They'll get certain legal principles wrong. So what? They're reporting to a lay readership; for the most part, lay reporters.

On the whole, they do a pretty good job. Where they start manufacturing news is where I think the press begins to get off. Not only in

legal matters, but in other matters as well. But the Perp walk, for instance, is a manufactured event.

The public is led to think something was really happening. Even if we've just picked the guy up; we're taking him from the wagon; now we're walking into jail to be booked.

That never happened. It is manufactured news.

I think at the pretrial stage, to follow up on what was just said, sometimes they begin to manufacture news. Because there isn't that much happening, they report things that tend to become somewhat manufactured. When they do that, they become a little less responsible.

MR. HAYDEN: Judge Barry.

JUDGE BARRY: Two comments.

I don't think it is coincidental. Or let me just say it is more than merely coincidental that the vote of the Judicial Conference of the United States not to permit television coverage in federal court came shortly after the verdict in the O.J. criminal case. With many of the judges had voted, commenting on, "If it ain't broke, don't fix it." And the reference really was to the sound

bites. It was to the shocking. It was to the entertaining.

Which, given what everyone said here today, the time constraints, the entertainment that the television media, at least, is looking for is what is going to hit people.

I have seen, personally -- I cannot speak for my brother and sister judges. I have seen the impact that the O.J. case has had on the trial of a criminal case, where you actually have jurors looking for DNA evidence in a fraud case (Laughter) and wondering why it was not presented.

I think that is something that is going to live with us for quite a while.

MR. HAYDEN: How did a defense attorney plant that seed?

Judge Brown, this panel is about more than media bashing. What are the responsibilities of the lawyers in the high profile case under the RPCs?

I know you teach a course in professional responsibility. Could you in a streamlined fashion lay out for us the ethical duties of the lawyers in our district.

JUDGE BROWN: All right. To understand

the professional restraints on both the lawyers and the judges, I think you have to focus on Rule of Professional Conduct 3.6. That came about essentially because of the Shepherd case where the Supreme Court, Justice Clark writing, talked about the media circus, the carnival atmosphere, and said that the judge should have more control over both the courtroom and the participants. 3.6 was a response to that.

In Gentilli there was a statement made by a lawyer, assertedly in response to prosecution comments, which led to a change in 3.6, which New Jersey has not adopted. But, basically, the plain English answer: You can't get into trouble for what you don't say.

The Rules of Professional Conduct have been sometimes adopted in a gag order by the courts that has the advantage of binding the investigators and parties who are not bound by the Rules of Professional Conduct.

I would note one other thing. Everybody talks about O.J. Bear in mind that at the time the O.J. case was tried California was unique in the jurisdictions in not having a rule controlling comments by counsel similar to 3.6. As

a result of O.J., California did enact that rule.

Bear in mind, also, that while controlling the courtroom the judge not only has to maintain order and decorum be patient, dignified, et cetera, but must abstain from public comment about a pending or impending procedure. And, of course, the New Jersey rule says any court to require similar abstention on the part of court personnel.

So when the media tries to contact the courts for comment and are told everything occurs in open court, that is strictly true. As a matter of fact, the Supreme Court of New Jersey was faced with the inquiry by a judge who wished to talk on Court TV about other cases and they said no, you couldn't do it.

The Tenth Circuit had a case where a judge went on Night Line to discuss an injunction he had entered. Of course, you can imagine what the result is. Reversal and recusal. So there are very definite limitations on both the lawyers and the courts.

MR. HAYDEN: Judge, the RPC appears to be drafted or anticipate lawyers' comments during a jury trial. Would the RPC apply to a bench trial? We see the major civil piece of litigation being

tried in our country this year has been Microsoft which is a bench trial. We regularly see comments by attorneys or public relations firms each day about who won, who lost, what the import of the testimony was.

From your analysis of the RPC, do they apply to a bench trial?

JUDGE BROWN: Most definitely. If you look at it, it prohibits a comment that the lawyer knows or reasonably should know or will have a substantial likelihood of materially prejudicing an adjudicative procedure in the matter. Period.

However, if you look at Comment 6, they do distinguish between criminal jury trials, civil trials and non-jury hearings or trials which may be less affected and say the rule still places limitations on comments, but the likelihood of prejudice may be different as a result.

So your answer is yes and no.

MR. HAYDEN: Judge Irenas, do you believe that the RPC would apply to a bench trial?

JUDGE IRENAS: Well, technically, it does because it applies to an adjudicative proceeding. In the real world you have certainly an endless number of cases that say that a judge,

acting as a trier of fact, can hear inadmissible evidence because the judge, presumably, can sort out at the end of the day what is admissible or what is not admissible and decide the case accordingly.

Also, the rule had the Constitution in one eye. And the words here are "a substantial likelihood of materially prejudicing the adjudicative proceeding."

The Fourth Circuit, by the way, has adopted a lesser standard that said the rule in -- was that Maryland? Whatever state that was in the Fourth Circuit. It could only be reasonable likelihood. So it is a lower standard.

But I think that the substantial likelihood that the judge trying Microsoft is going to be influenced because a lawyer gets out on the front steps and gives a biased -- let's call it biased -- a biased view of what is happening in the court -- from what I hear about that Judge, not very likely.

In the real world I think the impact of this rule on a true bench trial, a civil bench trial, is not very much.

JUDGE BARRY: I would say you don't even have to start parcing substantial likelihood

and what fits within it because you can go to the catch-all in RPC 8.4. It is conduct that is prejudicial to the administration of justice. Period.

JUDGE BROWN: There is a line of cases that involve lawyers who start criticizing the Court and the process as being biased, unfair, ridiculous, et cetera, and have wound up with some discipline as a result. That goes beyond merely a slant on the events.

MR. HAYDEN: Wouldn't the lawyers response be that I assume a trial judge is not going to read press accounts of the testimony during the course of a trial just the way a jury is instructed not to read press accounts of the testimony during the course of a trial, and, therefore, in my opinion, there would be no substantial likelihood of interference because, presumably, the judge wouldn't be reading it?

JUDGE BROWN: Actually, it doesn't make any difference if the judge reads it or not because the judge can see a lot of inadmissible things. The judge is supposed to be unswayed by any public clamor or fear of criticism. So in that regard, yes, there would be a much lesser likelihood of any

interference with the result.

JUDGE BARRY: I can't imagine not reading press accounts.

JUDGE IRENAS: Show me the judge who doesn't read the press accounts and I'll start the Canonization proceedings immediately.

JUDGE BARRY: I don't have that problem because I don't get any press.

MR. HAYDEN: Ted, you were in Washington when you tried Espe. I believe Microsoft was right down the hall?

MR. WELLS: Yes.

MR. HAYDEN: What was done on a daily basis in terms of the lawyers dealing with the testimony?

MR. WELLS: Every day at four o'clock Boise, who is the government lawyer, would have a press conference right out front; then the Sullivan and Cromwell lawyers would follow. They had formal press conferences every day in the courtroom the two months I was down there with them. They are still having them. You can see it on TV. They come out at a set time and they talk about the case and who killed who or who didn't get killed.

MR. HAYDEN: At one point in time

Microsoft's PR firm had a press release trying to explain the meaning of certain tapes which were then later on that day ruled inadmissible by the judge. So they ended up getting in testimony that never got in.

From what you can see, Ted, has there been any indication from the trial judge of any displeasure with the lawyers making comments each day about the importance of the testimony?

MR. WELLS: To my knowledge, no. The judge is clearly aware that press conferences -- formal press conferences are being held every day on the courthouse steps about that case. And, you know, to my understanding, he hasn't done anything about it. Beyond that, I don't know.

MR. HAYDEN: Jim, going to the other side of the coin. What is your view of the professionalism of lawyers in terms of the way lawyers have handled themselves in these high-profile cases, we'll say, in the last ten years?

MR. WILLSE: I'm not sure I want to antagonize any lawyers, either.

(Laughter.)

We don't want this to turn into a love

feast, either. So our impression, collectively, is that the level of professionalism in this part of the world on the part of both judges and lawyers is very high. Lawyers who practice in federal court around here know what they're doing.

I'd be hard pressed to come up with an example of any serious lapse of professionalism which, I hasten to add, is not to say that we don't have disagreements over matters of procedure from time to time, particularly with judges.

We bump into both judges and lawyers in matters of closing hearings and sealing documents, access to juries after a verdict. Occasionally elements of a gag order. None of that is -- no matter how robust the dispute may be, none of that is to suggest that we see a lack of professionalism. We had them in the past and I expect we'll have them in the future.

MR. HAYDEN: Ray, how about your experience looking at the point of view of being a commentator as opposed to a trial lawyer?

MR. BROWN: I think in terms of, from the point of view the craft -- that the lawyers don't get very high grades.

First of all, it's been my experience

most lawyers haven't a clue about 3.6 or whatever the equivalent rule is in the jurisdiction.

And so the education process, even for those who have had courses in ethics, or whatever it happens to be called in that particular curriculum, the numbers of lawyers who talk to the media without any apparent understanding of the ethical implications of what they're saying are legion across the country.

This is not just a case -- a situation restricted to high-profile cases. If you start practicing criminal law today in a major metropolitan area or urbanized state like New Jersey, the odds are before your career is over, at least, you're going to get a call from the Star-Ledger on the Atlantic City Press or some media outlet about some case you're involved in. So every lawyer has to make these judgments. By and large, first of all, there is this thing that is not relevant to anybody in this room called ego.

The temptation when the microphone is in front of your face and there's a camera there and somebody is suggesting what you have to say is important is tremendous and the number of lawyers who fail to make the connection between the

tremendous advantage to come from being seen -- I can remember times when my picture appeared in the paper and somebody would stop me on the street and say, "What do you think about what I said?"

I haven't a clue about what I said. I remembered my picture was in the picture. The advertising advantage to the lawyer who gets an unpaid media appearance is tremendous. It requires a consciousness of self and of the rules of ethics to understand that it's the client's interest that comes first. And the number of lawyers who are insensitive to that, not understanding, that are tremendous in number.

Then on top of that there is the question of skill. In those instances where you can justify in the client's interest saying something to the press, there is the question of mastering this problem, of saying it in a succinct way.

For example, ten years ago one could argue that a cigar was just a cigar. Post Monica, one word has a whole different meaning in the lexicon of Americans.

So the skill of using the right words at the right time and using only economical language so that what you say is all they have the choice

of -- there are a whole range of things you need to learn in order to do.

By and large, I would say that, A, lawyers get bad grades across the country for, A, being oblivious to the ethical nuances. Most haven't a clue about what Gentilli meant or what the '94 amendments meant in terms of your ability to fight back.

For criminal defense lawyers not to really understand there is another level in many other places you can think about is also irresponsible.

So, by and large, I don't think we know the rules and I think lawyers are not trained to handle the media. So in those few instances where it is appropriate, except for a very small percentage of lawyers around the country, lawyers handle the media poorly in terms of the interest of their client and the interest of the profession.

MR. HAYDEN: Judge Brown.

JUDGE BROWN: It seems to me the extent that the lawyers don't understand the RPCs, judges have an educational responsibility to compel them to do so.

One way to do that is to impose a gag

order which just simply tracks the rules and requires not only the attorneys but the parties and investigators to comply or -- instead of facing the possibility of some professional misconduct investigation down the road -- face immediate contempt. That is one way to bring the rules as they exist right to the front of the person's attention. Of course, under Shepherd that is what the judge should be doing.

JUDGE BARRY: I think you would order them to comply with Rule 3.6 so they would have to find Rule 3.6. And then if they violate Rule 3.6, you could hold them in contempt of your order.

I would be very reluctant to hold them in contempt during the trial, though. I would wait until after the trial.

But, of course, then on the expected ineffective assistance of counsel habeas, there will be an ineffective assistance of counsel "because my attorney's conduct chilled his representation because the judge was after him or her" or whatever. But I would order them to comply with Rule 3.6 because you can take swift and immediate action without a gag order.

MR. BROWN: Joe, I hate to disagree

with the judges on the panel. It does seem to me that there are a reason why there are relatively few disciplinary actions or other actions taken by judges. That is because there are few areas of law that are murkier than what 3.6 permits. For example, the very language in our the rule is the language that the court found in the Nevada case was vague and not --

JUDGE BROWN: Precisely one of my points.

MR. BROWN: So how do you enforce?

This is not an area where there are bright lines. That's one of the complications. If you don't know 3.6, maybe you're better off. Because once you got into it, there are so many nuances and that is very complicated.

MR. HAYDEN: Judge.

JUDGE IRENAS: I have a slightly different aspect than the other two judges. I think most lawyers have at least a sense of a proper ethical approach. They understand, I think, in a sense what they're not supposed to do.

My observation is that most lawyers -- I include myself -- in the past are totally inept at dealing with the press. From a technical point of

view, in more cases than not reaction when the press calls is to say nothing when, in fact, it well may be that you should say something. Something you could say that would be both ethical within 3.6 and maybe even helpful to your client in a particular situation.

And I have found less problem with unethical lawyers running out to the courthouse steps and making outrageous statements than lawyers just plain not knowing how to deal with the press and being afraid of the press.

I bet you there are tens of thousands of lawyers in New Jersey; they get a call from the press and their reaction is I can't talk about it.

MR. HAYDEN: John, let's try to confrontize this a little bit.

JUDGE IRENAS: Confrontize?

MR. HAYDEN: Confrontize, yes. Harden. Firm up. Focus it.

MR. BROWN: What were you saying about the prior conversation?

MR. HAYDEN: Let's assume that you have had a prominent client who was sued in a high-profile case or indicted in a criminal case and there has been a massive amount of publicity about

the filing of the Complaint or the filing of the Indictment.

John, what do you think you can do responding on behalf of the client in that high profile case whether it be going to the arraignment, filing the Answer or just holding a press conference to get out your side of the story?

MR. KELLY: I think the response would have to be comparable to the initial exposure on the other side that was given your client in the case, in the first place.

I agree with Ray. The judge is basically dealing with the media is really an art form in itself. You learn certain things on the record, off the record, not for attribution, attribution, who you can trust in terms of the media. But I think what you really have to keep in mind is, first of all, your right to respond has to be responsive to what was put out by the other side.

You also have to keep in mind not your own interest as an attorney but your client's interest. Any time you're dealing with the media, the safest thing for an attorney to keep in mind is, one, you shouldn't fire the first shot; you should only be responding. And, secondly, your response

should be crafted to be in your client's best interest and not your own. If you sort of inch along that way, get your feet wet, learn how to deal with the media and keep your client's best interest at heart, I think you'll be pretty safe.

MR. HAYDEN: Faith, as a government prosecutor, what limitations does the United States Attorney have in terms of the press?

MS. HOCHBERG: We are governed by the provisions of the Justice Department policy which is, for the most part, codified in either the U.S. Attorney's Manual or the Code of Federal Regulations. So that there are very specified points of time when we speak and rules that we follow and we don't say anything beyond that no matter how much and how persistent various press colleagues are.

They may not know the rules that bind us, but we are supposed to. We try to live by them. We have the same constraints. We are not to say anything that could influence or hurt an upcoming or pending trial. Then there are carveouts of the nature of kinds of things we can say. We tend to speak only at defined intervals when the matter is newsworthy and when it's permitted under Justice

Department rules. That is either at the time of an indictment or a plea, be it a plea to an Information or if it's a pre-indictment plea, at the time of a plea, at the close of a trial when it is over, we can speak, if we want to, and then at sentencing. Those are the defined intervals when we do say something and when it is permissible to say something.

MR. HAYDEN: Ted, you represent a public company in a high-profile case which is publicly traded. Are there any complications from the point of view of a defense lawyer when there has been a sensational allegation which potentially could have very adverse economic impact upon your client in terms of how you would choose to respond?

MR. WELLS: Well, the attorney in that situation has to respond very carefully because the SEC, for example, has brought actions alleging that public comments by attorneys with respect to publicly-traded companies, if they are later found to be false, can constitute grounds for SEC action.

Because if you go out and make a statement to the effect it did not happen and let's say the stock moves and it turns out that you knew or should have known that it did happen and you're a

representative of the company, you actually expose yourself and the company to false representation charges.

But, basically, my view has been, and I say this from the perspective of a criminal defense lawyer as opposed to complex high-profile civil litigation, that the criminal defendant in a high-profile case as a general rule cannot win the press game; that the best course of action, if you can persuade your client, which is sometimes very tricky, especially if your client is a public official -- the best course of action is to keep quiet. Because no matter how you spin the story, the first paragraph will lead so-and-so has been indicated and your spin may be somewhere in the third paragraph.

But all you will do is just give another opportunity for there to be a press article about your client.

Ray and I, when we did the Secretary of Labor Donovan case -- they hired a PR firm. They must have spent half a million dollars. Easily.

MR. HAYDEN: And what did you earn?

MR. WELLS: We wanted the money, too. We used to go home. We would ride every day to

court for about a year. We used to talk in the car in the morning about how we had to corral these press people because they were like a whole other front that you couldn't control and they wanted to justify the half million dollars. So they're out there making statements. It never did us any good, because as I said, their spin was always in paragraph three. Paragraph one was Ray Donovan and the other Schiavone defendants had been indicted.

I'm of the school, really, if you can do it, keep your mouth shut, stay low. If you get an acquittal, you'll be okay. But at the same time, to the extent the prosecutors start to play the game and start to leak, be it ala Ken Starr or somebody else, you have to show that you will retaliate and not just sit there and be the subject of an organized leak campaign.

JUDGE BARRY: What you always have to worry about is a sequestered jury, too. If the press gets too hot and heavy, that is lurking out there.

MR. WELLS: Sequestered juries are convicting juries.

JUDGE BARRY: That's right. Most defense attorneys do not want a sequestered jury.

MR. HAYDEN: Before we get to gag orders, let's talk about closure. Let's assume that in a multiple-defendant case you're right in the middle of jury selection and one of the defendants decides to plead guilty during jury selection in a way which at least in the county where the case is being tried is quite the stir, and the defense lawyer, the prosecutor and all of the attorneys for the co-defendants want the plea to take place in a sealed proceeding at least until after the jury selection is over.

Faith, is it that easy for everybody to agree to do it and for it to be done?

MS. HOCHBERG: Agreements are a wonderful thing in the law. It doesn't happen too often where we're concerned. But, unfortunately, in this case agreement alone is not enough. We have, and the courts have carved out as well, a very strong policy that gets phrased more strongly than almost everything I've seen in C.F.R.

Government attorneys have a general overriding affirmative duty to oppose and not to agree to closure, and then it lists some exceptions. Now there is an exception. If failure to close the proceedings will result in a denial of a right of

any person to a fair trial -- certainly, that can be argued -- then it is up to the Court to decide whether the standards are met for closing the courtroom.

It is not enough for the defendant who has the Sixth Amendment right to a public trial to say, "I'll waive my Sixth Amendment right." There is also a qualified First Amendment right to the press to have notice of the possibility of closure and a right to be heard in some fashion.

MR. HAYDEN: Judge Irenas, have you ever dealt with such a problem?

JUDGE IRENAS: I have. I might add, a particular -- a lot of people don't know about it -- a particular CFR is 28 CFR 50.96. Not only is the government basically told to oppose it, you need the express authorization of a Deputy Attorney General or Associate Attorney General before you can consent to it. Not only are they supposed to oppose it in a strong statement against it, but you need somebody in Washington to approve it.

I had just that situation in a case which the pleas of guilty were four years ago. I still haven't sentenced the person. But the pleas were -- they wanted the pleas to be closed.

What we did was I found this regulation and we implemented it. We had a hearing. Made a finding that it should be closed. I won't say why, but there was a reason for it that was consistent with these rules. But I filed a notice with the Clerk's office which, in effect, said I'm sealing something that put the newspapers on notice, I said they could move before me, which they did, to try to undo it.

I also provided that everything would be unsealed -- every 30 days we would relook at it to be sure that it shouldn't be unsealed, which is also in the C.F.R. You are supposed to unseal as soon as you possibly can. We put the press on notice and for a while every 30 days had a hearing on whether to release it or not.

MR. HAYDEN: What kind of notice is given to the press? Are they told much about the underlying subject matter? Are they just saying there is going to be papers filed in connection with a sealed proceeding? How much information are they given?

JUDGE IRENAS: Well, in my particular case, they knew the identity of the defendants. It wasn't a case where we had unknown defendants. They

knew who the defendants were. They knew it was a guilty plea. What they didn't know was the reason for the closure.

JUDGE BARRY: In the situation you described, Joe, where you're trying to get through jury election assuming the jury selection can be done in a day. One can hypothesize that the plea can be taken at 8:30 in the morning or 7:30 at night. Not when nobody is around but the Court.

JUDGE IRENAS: I once did that. I changed the courtroom. I was being chased by a Philadelphia Inquirer reporter who wanted something the party didn't want. We just held the hearing in another courtroom. She was wandering around the courthouse. She didn't know where we were. It was all over by the time she figured out where we were, but it was open.

(Laughter.)

MR. HAYDEN: Jim, one of your reporters receives a tip as to what happened in the closed proceeding. How much information do you need to responsibly report upon what supposedly took place in the sealed proceeding?

MR. WILLSE: Let me back it up a step. If, in fact, there is a desire on one or more of the

parties to close a proceeding and if, in fact, the press is given ample notice with enough detail to understand what the proceeding is, then that is fine.

If in practice that does not happen or if in practice it turns into an Easter egg hunt where the proceeding is held at 7:30 at night or we have to wander from courtroom to courtroom, it seems to me to defy the whole purpose of having an ample opportunity for the press to discuss a legitimate issue.

I would like to think that is not really the view of very many judges; that in order to get the business done, we ought to blow it by the courthouse reporter.

I would make the same point, incidentally, about sealing of documents. Our view is, without taking any position on any particular effort to close the hearing or seal a document, all we ask is that we know about it and that we have the opportunity, if we choose, or other members of the press choose, to raise an objection.

I understand from what Faith says that is the attitude of the U.S. Attorney's office and that's fine. All we want is a shot to talk about

it.

To your question. If I understand it correctly, the proceeding has happened. We weren't there?

MR. HAYDEN: But you were aware it happened.

MR. WILLSE: We were aware it happened either because it happened and we found out about it later or we tried to have it open and failed.

What are we going to report about it? I don't know what the level of information we need is to write a story. That is the sort of judgment we go through virtually every day. At some point there is a critical mass of information where you feel you do know and you can write it responsibly, which is to say you're not getting the feed from just one side to the exclusion of the other which, by definition, imbalances the story. That is vaguer than I'd like it to be. But I don't know how to be more succinct.

MS. HOCHBERG: You're saying if someone leaked a document you knew to be sealed to you that you would go ahead and run it?

MR. WILLSE: We would consider running it.

MS. HOCHBERG: That's the issue that I have. If we are expected to behave responsibly, the courts and my office and others, shouldn't you also have that same burden?

MR. WILLSE: I would submit that we would act completely responsibly and we would --

MS. HOCHBERG: And still consider running it?

MR. WILLSE: -- and absolutely considering running it.

MR. BROWN: Joe, you and I have talked a few times about paranoia in other contexts. But for about 25 years, whenever I've selected a jury as a defense lawyer, I'v always had judges saying, "Don't worry about the press and the fact that the lady in the veneer is knitting a rope for your client. I'm going to pick a fair jury out of this group of citizens."

And then I went to a panel like this for the American Judges Association two months ago and the judges there wanted to jail reporters for reporting leaks from the Starr grand jury on the ground it will prejudice trials of anybody indicted by any of those grand juries.

It is hard to reconcile those questions

because I think one of the areas where perhaps there is more willingness to look at the Emperor is really naked is talking about when you can pick a fair jury and when not and have that a part of the mix in terms of what needs to be sealed or considered sealed.

MR. HAYDEN: I want to hear from Judge Brown. Then I want to talk about gag orders.

JUDGE BROWN: I have a kind of quick question, probably, for Jim. In view of the diverse nature of the media, what is effective notice to the press or the media of closure of a proceeding?

MR. WILLSE: Enough time to respond to it.

JUDGE BROWN: To whom? Under what means?

MR. WILLSE: There are a couple of ways it could happen. If the issue presents itself in the course of a trial, a jury selection on a Tuesday -- if a hearing on that subject is docketed for the next day and it is made known in some general way in the Clerk's office so we know about it or even if a judge is so inclined -- you know who covers the Court -- say to Bob Rudolph, "We're going to have -- we have this issue before us. Based on

past practice, we know this is of interest to the press who may want an opportunity to be heard on it."

There's nothing any more complicated than that.

Similarly, documents that want to be sealed may be a little trickier because you can't define the documents to such a degree that sealing them is pointless. But if there is some way to describe them generically, docket that for the following day, we can respond very quickly. Even if it's in the morning and we need to go in to court in the afternoon, we can do that. We just need enough time to catch our breath, think it through and make a presentation.

MS. HOCHBERG: There is a court decision, I think, on that. It said to put a docket entry. You don't have to chase down --

JUDGE BROWN: My question is, practically, is that sufficient, I think Jim is saying?

MR. WILLSE: We can move pretty fast.

MR. HAYDEN: John, you're in a high-profile case. The first time there's been charges and counter attacks back and forth. You

show up in Court. The trial judge says that he or she wants to impose the following gag order:

All attorneys, parties, and/or agents are prohibited from making any extrajudicial statements about the merits of the case from today forward.

And the judge wants to incorporate that gag order into an order and wants the clients there, -- their agents there in court -- would you consent to such an order?

MR. KELLY: Sure. In having been gagged before, I would say it is a pleasure to be gagged when you're getting ready to try the case.

For example, in pretrial discovery with the Simpson case there was no gag order and we literally had to litigate that case 24 hours a day. We would go through eight hours of deposition. We'd sit there. Figure out what our spin was going to be before we went out to a press conference. We'd take care of all the press conference issues for an hour or two and then we'd hit the evening news waves.

We were required to do it. It was responsive because you had the defendants in this case and his cronies and mouthpieces out there doing the same thing. It just had to be litigated around

the clock.

When you're approaching the trial or you really have to concentrate, you can really take a lot of pressure off your mind and focus your concentration on being gagged. It's probably the optimum way to try a case, all things being equal, and it's been imposed early on and there's been no undue prejudice to either side. It is a treat.

MR. HAYDEN: Judge Barry, do you think that such a gag order is Constitutional?

JUDGE BARRY: My first reaction is if the other side felt as Jim does, you've got no issue. So who cares if it's Constitutional? Everybody agrees that we want this gag order. Perhaps somewhat broader than it need be, but gag orders of that nature have been upheld.

MR. HAYDEN: Some of the cases we've talked about. Certainly, gag orders against the attorneys on the basis of the RPCs -- and we talked about a recent Fourth Circuit case -- have been upheld.

Ray, how about the provision in the gag order pertaining to the client and/or the client's agents? Do you think that -- assuming you do not have a willing defense attorney who feels for

strategic reasons or for reasons of personal convenience -- and I agree with John. There are times when it makes your load a lot lighter. Let's assume you have a client or you do not have somebody willing to agree. Is it Constitutional to go that far in your opinion?

MR. BROWN: Well, some courts have said so.

I should point out that your partner assigned me to a pro bono case in Delaware. I mentioned you and your partner because we lost and I wanted to share the morter. Involving a lawyer in the Amy Grossberg case in Delaware who faced a possible death sentence.

Prosecutors had made extensive -- the judge had entered an order incorporating Delaware's 3.6, which is very much like our 3.6. Notwithstanding that the Attorney General had made comments that were clearly conclusory on Geraldo and elsewhere about the fact that the evidence warranted the death sentence and there was likely to be a conviction.

The -- a second lawyer coming into the case was aware that his clients were going to go on Barbara Walters' program. Barbara Walters

interviewed the defendant and the State filed a motion to have the lawyer removed.

So the sanction to the client for having violated a 3.6 order, which included the client and agents, was that she lost her lawyer of choice in a capital case. That was affirmed by the Delaware Supreme Court.

MR. HAYDEN: Jim, can you envision any instance where the press would oppose such a gag order and appeal it?

MR. WILLSE: I don't think so. We understand the motivation of the gag order. I don't know that we share the sense of relief that comes to the parties. As long as it is not gagging us, even after the fact, I don't know that we would object strenuously.

I want to, if I can, just mention one other thing. It is wonderful to be sitting here among judges and lawyers and listening in on this. I feel like I'm listening to something privileged I wouldn't ordinarily hear. The discussion of how to deal with the press is like how do you deal with Lyme disease?

(Laughter)

MR. WILLSE: I don't want to leave the

idea that certainly us, the responsible and virtuous Star-Ledger, is just this gaping maw that will take any information that comes from any source at any point in a proceeding, sealed or unsealed, spun, unspun, and put it in the paper. We would like to think that we have some ability to judge the merit of the information and the motivation with which it is offered.

There is plenty of stuff that we are told by opposing lawyers by parties to a proceeding, that never does make it into the paper. We can tell the difference between good information and bad information and we tend particularly -- we didn't talk about this so much. We tend particularly to look askance at certain utterances from opposing counsel on the eve of a trial.

We might be interested in some material two months ahead of time. Now the trial is going to begin in a couple of days. I'd like to think that we're more inclined to impose kind of a rhetorical no-fly zone when you start to get close. We have no interest in prejudicing or tilting the proceedings, either.

JUDGE BARRY: You know what's a problem? When you have a bloody crime scene photos

that have been admitted into evidence and the press wants copies of them, the television media, to put them on the Six O'clock News. That is a problem. What do you do?

MR. WILLSE: I go to work for a newspaper, for one thing. It is a problem. From a judge's point of view, I don't know what you do about it because there it is in open court, particularly if there has been a camera in the court. Now the pictures have been either entered into evidence or the camera took a picture of it, I don't know how you keep it out.

MR. HAYDEN: We want to wrap it up because we have our very distinguished speaker. I'm going to ask everybody one more question. Give me a yes or no answer.

MR. HAYDEN: In 47 states in our Union television is permitted in the courtroom in state court proceedings. Television as of now is not permitted in the courtroom in criminal trials in Federal District Court. And, Judge Barry --

JUDGE BROWN: Or civil.

MR. HAYDEN: Or civil -- do you believe that television should be permitted for trials in the District Court?

JUDGE BARRY: No.

MR. HAYDEN: Judge Brown?

JUDGE BROWN: No.

MR. HAYDEN: Judge Irenas?

JUDGE IRENAS: No.

MR. HAYDEN: John Kelly?

MR. KELLY: Yes.

MR. HAYDEN: Faith Hochberg?

MS. HOCHBERG: No in District Court. Yes on appeals. Starting in the U.S. Supreme Court.

MR. HAYDEN: Ray Brown?

MR. BROWN: I have an obvious conflict on whether they should. I'll simply say it doesn't matter what we say here. Sooner or later they will.

MR. HAYDEN: Jim?

MR. WILLSE: Yes.

MR. HAYDEN: The no's win but not enough to appeal.

I also would like to extend regrets from Michael Critchley. As everybody knows, Mike is on this panel. He is one of the finest lawyers in this state. His case is a high-profile lawyer. He is now in Superior Court in Monmouth County on a high-profile case. Because it was an emergency, he had no choice but to be in court. He sends his

regrets.

I would ask everybody to go downstairs for our luncheon and quickly as possible because we have a world class speaker and we'd like to go to lunch.

(Applause.)

(Luncheon recess.)

MR. HIMMEL: If everyone would be seated, we'll start with the luncheon portion of the program.

(Pause.)

I have several announcements to make. But before I do that, I think all the panels did an outstanding job and we should give them a round of applause.

(Applause.)

MR. HIMMEL: For those of you who noticed it when you signed it and for those of you who did not, there was a handout at registration about the John J. Gibbons Inn of Court which focuses on federal practice.

And for those of you who are young here or young at heart, you might want to consider applying for membership to the Inns of Court. I believe they're accepting applications starting immediately for a two-year program starting in September.

Number two, for those of you who did not have an opportunity to get a federal I.D. card or an Association of the Federal Bar I.D. card, we are going to be continuing with the process after lunch. For those of you who are here, who are not

members of the Association of the Federal Bar, you may wish to join and then get an I.D. card.

Finally, the next major event of the Association of the Federal Bar is the William J. Brennan Dinnerand it will be held on June 10th. I'm pleased to advise all of you that this year, as in part years, there will be co-recipients of the award. And this year it will be Senior Circuit Court Judge Robert Cowan and Senior District Court Judge Joseph Rodriguezand I invite all of you to attend on June 10th.

We now move on to the Pro Bono Award presentation. About a year ago Judge Bassler was asked to chair a New Jersey steering committee for the Third Circuit Task Force on counsel for indigent litigants in civil cases. And as a result of his extraordinary effort, a plan was recently accepted by the Board of Judges. Who else would be better than Judge Bassler to make the presentation?

Judge Bassler, please.

(Applause.)

JUDGE BASSLER: This is the first opportunity I've had to publicly express my appreciation to the members of the steering committee, too many to name this afternoon, for the

extraordinary work that they gave in putting together approximately 14 recommendations to the Board of Judges in an effort to improve the success and effectiveness of our Pro Bono Program.

The recommendation that I want to mention right now is the Board's determination that there should be an annual award for extraordinary service to the Pro Bono Program given annually. This is the first such award. It is really my pleasure and privilege to give this award to the firm of Gibbons, Del Deo, Dolan, Griffinger & Vecchione. There isn't a judge on the Court who hasn't at one time or another reached out to that firm for assistance in a typically troublesome case and when that firm hasn't responded very generously to the Court's request.

Now, who from the firm?

MR. LUSTBERG: I get to do this.

JUDGE BASSLER: Here he is.

(Applause.)

JUDGE BASSLER: We actually have two placques. One to go to the firm, itself. You will notice it could be hung in a prominent place. And, in addition, we're going to have a permanent honor roll at the Bar Center in New Brunswick and the

first firm on that, of course, will be yours.

Mr. Lustberg.

MR. LUSTBERG: I'm not going to make a long speech. I want to thank the Court for this very nice award. Of course, I was on the committee that recommended that we have this award. So it's not all that surprising. You know, there is a lot of benefits, obviously, to providing pro bono service to the Court. Some of them may be anticipated and some of them, maybe, are not so anticipated. The anticipated one is that you curry favor with the judges and you get all this good experience for your associates. The unanticipated ones come about with the cases we get appointed to -- the troublesome cases that Judge Bassler mentioned.

For example, when Judge Debevoise appointed us some years ago to a case where we fought for the right to adequate medical treatment for sex offenders; that got me uninvited to partnership meetings at my firm, which I viewed as a huge benefit.

When Judge Politan appointed us to represent a sex offender, and challenging Megan's Law, that got me uninvited to a number of social

events in Chatham where I live. I view that as a benefit as well.

When Judge Wolin and Judge Pisano appointed us to a case where we fought for the rights of, once again, sex offenders to get pornography in the prisons, so far successfully, that actually got my mother to stop calling me, which I viewed as the greatest benefit of all.

(Laughter.)

Seriously, though, it has been our honor as a firm and I know I speak for all of the partners, associates, paralegals and even secretaries at Gibbons, Del Deo to provide service to what we really view as the most superb court in the world. And it has also been our privilege and pleasure to provide service to people who really do need it.

One of the purposes of the recommendations that were enacted now by the -- accepted now by the Board of Judges is to encourage other firms to do likewise.

I guess I'd like to add my personal encouragement. It is a terrific experience. You get good cutting-edge cases involving important constitutional issues. It has been enormously

rewarding for us and we are grateful not only for this award but for the opportunity.

Thank you very much.

(Applause.)

MR. HIMMEL: At this time I'd like to have a former President of this Association, Bill Brennan, come up and introduce our luncheon speaker.

Bill.

MR. BRENNAN: Thank you, Mike.

I'd like to divide this pleasant task into two parts. In the first I'll stick to the script and in the second I'd like to ad lib a bit. The script is the CV of a remarkable newspaperman. The subject of my remarks is, of course, Anthony Lewis, a two-time winner of the Pulitzer Prize and a long-time major player in the pages of the New York Times.

Tony was born in 1927, a graduate of Harvard College. He went to work, to the extent that the Times offers any lowly positions, in a lonely position at The Times as a deskman in its Sunday Department. From that Tony doubtless learned the meaning of the word "ennui." In 1952 he went to the now defunct but then vibrant tabloid of the Washington Daily News.

And it was with the Washington Daily News that he acquired the first of the two Pulitzers. The event that resulted in that award was his series -- this was in the height of the McCarthy era -- directed to an employee of the Department of the Navy who was fired from his job without ever being told why. Commonplace, perhaps, in that era. Not so much so now. Thanks in large part to the work that Tony did in crafting this series of articles.

Following his award of the Pulitzer, he went back to the New York Times. Now in its Washington Bureau. In 1956 and 1957 he was a Neiman Fellow at the Harvard Law School. Following which he came back to The Times and reported on legal affairs for The Times, including the work done by the Supreme Court. And it was in that context that Harvey -- that Tony and my father first became acquainted. And out of that acquaintance an enduring relationship formed and that will be the subject of my ad lib.

For his coverage of the Supreme Court Tony received his second Pulitzer. This time in 1963. Thereafter he became Chief of The Times London Bureau in 1964. And it was from London that

he first began to write the column that appears even today in The Times. Tony is the author of three books. "Gideon's Trumpet," about a landmark case which Arnold, Fortas & Porter handled, indeed, while I was there as a pro bono matter and building upon the last ceremony talking about cutting-edge pro bono work.

Thereafter he wrote a book "Portrait of a Decade" about the great changes in American race relations and following that "Make No Law: The Sullivan Case and the First Amendment," about which I'd like to speak briefly in a moment.

To the extent that Boston would allow itself to have a power couple, Tony is one half of such a couple. His wife, a lovely woman, Margie Marshall, I first met when she was counsel to Harvard University. She's now an Associate Justice on the Supreme Judicial Court of the Commonwealth of Massachusetts.

Now I'd like to get into the ad lib. It was a year ago that we celebrated my father in a program which all those here, who were privileged to participate in it, will never forget. Tony Lewis could have been and should have been on that program. It is only because I was asleep at the

switch at the time that I neglected to think of him even though he should have been in the forefront of my thoughts. The friendship between him and my father informed by a mutual respect and affection was a wonderous thing to see.

One of my jobs following his death was to go through my father's correspondence before sending it over to the Library of Congress.

In 1979 a remarkable series of letters were exchanged between Tony and my father. In that year he was -- he, my father, was unfairly attacked because he was part of small real estate operation which also had Judge Basilon and Judge Skelly Wright as its members.

The Washington press, most unfairly, attacked him for that and there was one nationally respected newsman who came to my father's defense and that was Tony.

I don't want to suggest to you that because of that a friendship, already deep and enduring, became even more deep and enduring. But over the years that is just what the relationship was. And, perhaps, the best illustration of that is the following:

At the end of each term my father, or

one of his clerks under my father's supervision, would dictate his impressions of that term's work of the Court. These were called the Case Histories. There are two sets of those histories in existence. One is in the Library of Congress where access to it is severely restricted. The other is in the personal possession of Tony Lewis. And it was out of that position -- out of that possession, I should say, that "Make No Law: The Sullivan Case and The First Amendment," drew much of its inspiration. Because many of the documents in Tony's safekeeping informed much of that book. And the reason why my father gave his papers to Tony is because he knew that he would treat them as responsively and productively as he has.

So it is against this background that I am privileged to introduce this modest man, Tony Lewis, who has so very little to be modest about.

(Applause.)

MR. LEWIS: Bill, I think I should, maybe, quit while I'm ahead. That was wonderful. Hardly a day goes by that I don't think about your father and miss him and it is very touching for me to hear what you just had to say.

Judges, ladies and gentlemen, thank you

for asking me here today. A conference like this means a lot to me because I am a romantic about law and lawyers. I can say that literally for the reason that Bill has already told you because I'm married to one. But I mean it in the sense of my profound respect for what you all have done, and do, to give our country its extraordinary combination of liberty and order.

I want to speak today about what has happened to our basic government institutions under the pressure of recent events; Monica Lewinsky, impeachment, and all that. I am not going to talk about Monica's dress or the gifts under Betty Curry's bed. We have had enough of the details, gory and humdrum. But the larger implications of what happened in the 13 months beginning in January 1998 cannot -- should not -- be so easily dismissed. As Willie Loman's wife first said on stage 50 years ago, and is saying again now in New York, "Attention must be paid."

When the Senate impeachment trial ended, there was a good deal of self-congratulation. "The system worked," we were told. The Constitution had truiumphed again. But I put it to you that there is no occasion for smugness.

First of all, "the system" that operated over those 13 months, ending in the impeachment and trial of President Clinton, was different in significant respects from what the Framers of the Constitution thought they had created.

Professor Stephen Griffin of Tulane Law School pointed out in a thoughtful paper that the men who met in Philadelphia in 1787 did not have in mind elected Senators or political parties. They knew nothing of opinion polls. They could not have imagined a prosecutor holding the President up to obloquy in hundreds of pages of a "referral" to the House of Representatives.

Most important, they would have no idea that the President would have responsibilities for economic and social policies affecting all the people of a vast country, and that his power, even his legitimacy, would depend in good part on his direct relationship with those people. The Framers were in a different political world: One where a small, white, propertied, male elite made all the political decisions. And where the new Federal Government they were creating would have limited functions, leaving most of the business of governing

to the states. To say that is not to question the Framers' genius. Far from it, it is only to begin looking realistically at the assumption that the system they designed has just triumphantly proved itself.

Put The Framers aside for the moment and think about what actually just happened. Would a rational system to remove a President who threatened the state have invoked the ultimate weapon of impeachment on grounds so feeble that despite great partisan pressure they failed to win a majority in the Senate, much less the necessary two-thirds vote? Would a wise system have put the presidency, and us, through a year of trauma over an illicit sexual relationship?

That is what it was about. Sex. Senator Bumpers was right when he quoted H.L. Menken, "When they tell you something is not about money, it's about money."

When they told us in this case that it was not about sex, it was about sex. Yes, the charges brought by the Independent Counsel, Kenneth Starr, and then by the House of Representatives, were perjury and obstruction of justice. But President Clinton dissembled and evaded as he did to

fend off questions about sex.

Mr. Starr laid a perjury trap for him, bringing the President before a grand jury as no other Federal prosecutorial target would likely have been brought. Justice Department policy, I hope in the presence of the U.S. Attorney and so many judges that I have it right, but I believe the Justice Department policy calls on prosecutors to respect the Fifth Amendment guarantee against forced self-incrimination and, therefore, to avoid calling targets before grand juries. Mr. Starr ignored that policy. And the president rightly or wrongly -- I think wrongly -- decided that refusing to appear would be too harmful to him politically. That was what Mr. Starr had counted on. The trap was sprung.

Ladies and gentlemen, put yourselves back, say, 30 years. If you had predicted then that the President of the United States could be dragged into court by a civil plaintiff claiming that he had committed a sexual tort years before he took office -- if you had predicted that he could be brought before a grand jury by a Federal prosecutor, that his White House lawyers and Secret Service guards could be forced to disclose his confidences, I think you would been have taken off to the funny

farm. But that is where we are. The President has lost much of his expectation of privacy. Decades ago they used to speak of a President's life as a splendid misery.

If it was a misery then, what would we call it now? Which of us would want a life in which we could confide in virtually no one, in which private behavior was subject to criminal investigation? And none of us has responsibilities remotely like those of the President. I wondered, incidentally, whether the judges who held that the lawyer-client privilege does not apply to lawyers paid by the government would be happy if that theory were applied to pierce their confidential relationship with their law clerks -- who also are paid by the government.

How did it happen? You may have noticed that just now I said no one 30 years ago could have expected such developments. I chose that figure deliberately. For the change began 25 years ago, when the Supreme Court held that a special prosecutor, Leon Jaworski, could require President Nixon to hand over tapes recorded in the oval office for use in the prosecution of his former assistants.

Most Americans applauded that Supreme

Court decision. I did. And it is easy to understand why, even putting aside one's feelings about the Watergate affair. In the turmoil of that time, when Americans became aware that at a minimum their President had been involved in dirty business, it was reassuring to have the Supreme Court speak in terms of what the law required. Law over politics; it sounded right. But another law has taken over; the law of unintended consequences.

The breadth of the Supreme Court's opinion invited other breaches of Presidential confidence. Breaches of the protective wall to which the doctrine of the Separation of Powers entitles the Presidency. For those interested, I recommend a recent article in the New Republic by Professor Akhil Reed Amar of Yale Law School. It is entitled, "The Unimperial Presidency."

The point being that we used to worry about the imperial presidency but, starting with the Nixon tapes case, Presidential power has been eaten away.

The next step was the passage by Congress of the Independent Counsel Act which converted what had been an ad hoc response to the crimes of Watergate -- the appointment of Archibald

Cox and then others as Special Prosecutors into a permanent institution. The statute vested the appointment of such a counsel in a special court of three Federal appellate judges. On its face that seemed to violate the notion of the Separation of Powers, since prosecutors are meant to be part of the Executive Branch. But the Supreme Court upheld the statutes constitutionality, emphasizing that it allowed the Attorney General to remove an Independent Counsel if he or she went a stray. That provision, as you know, has proved more theoretical than real, for political reasons that do not need to be spelled out. And just now the provision has become even more theoretical. When Attorney General Reno told Mr. Starr that she was planning to investigate possible wrongdoing on the part of his office, he objected that she had no power to do so -- that she had to appoint another independent lawyer to investigate him.

The claim, in other words, was that she could remove him for wrongdoing but could not inquire to see whether he had done anything wrong. At that point an outside political organization went to the special three-judge court that appointed Mr. Starr and complained about the Attorney General's

plans. So far as I can see, that organization had no standing whatever. And under the statute the Court had no power to review the Attorney General's action. Nevertheless, the judges directed her and Mr. Starr to file briefs on the matter. That is how far the Independent Counsel Act has taken judges from their Constitutional duty of deciding cases and controversies.

When the Supreme Court upheld the Act, Justice Scalia, dissenting, commenting as follows upon the method of appointment by a panel of judges. Quote. "What if they are politically partisan, as judges have been known to be, and select a prosecutor antagonistic to the Administration ...?" Close quote. But, as you know, Justice Scalia was alone in his foresight. The majority's decision was another step in the weakening of the Presidency, in ways that became evident when Mr. Starr began his crusade against President.

But before I return to Mr. Starr, I must mention the third Supreme Court decision that has made the President newly vulnerable. That was, of course, the decision in the Paula Jones case. Again, it won nearly universal approval at the time from me, among others. The President cannot be

above the law, we were told -- as if that solved the problem. The courts said the burden on President of dealing with Ms. Jones' lawsuit should not distract him significantly from his duties.

The burden just about turned out to be the undoing of his Presidency. Ms. Jones was not able to show that she suffered any damage as an Arkansas state employee after the claimed sexual advance by President Clinton except that she did not receive flowers on Secretary's Day or so Judge Susan Weber Wright held. But in the discovery process, the judge allowed her lawyers -- wrongly Professor Amar says -- to ask President about any sexual relationships he had with other government employees. If the relationships were consensual, it is hard to see how the subject could be material to Ms. Jones' claim of harassment, but the question was allowed.

And the rest as they say, is history. Enter Mr. Starr. His deputy prosecutors confronted Monica Lewinsky in the Ritz Carlton Hotel in Pentagon City and made sure she would not telephone the lawyer who had helped her prepare an affidavit denying "sexual relations" with the President. Unadvised of the Prosecutors' threats to put

Lewinsky in prison for 27 years if she did not admit to perjury and other crimes and get immunity for cooperating, her lawyer went ahead and filed the affidavit that afternoon. If he had been advised, he told me, he would of course not have filed. And I would not be here talking to you about this subject.

Mr. Starr's assistants questioned the President in the White House with the testimony going to the grand jury by closed-circuit television. They said it would have to be videotaped because one grand juror was absent. I do not have to tell you that grand jurors are often absent, one or more. Of course, the real idea was to have a videotape that could be played to the country. Thus, the President's misbehavior and misrepresentation would be brought home to the public. But contrary to those expectations, the public that watched Mr. Clinton's testimony imagined how they would feel -- the people, I should say. Imagine how they would feel as targets of those disembodied prosecutorial voices, probing into the most painfully intimate matters -- and they sympathized with the President. Most, in any event.

Then came Mr. Starr's "referral,"

weaving together at the length of a Russian novel asserting facts that Mr. Starr said suggested removing President Clinton from office. It was a gratuitously pornographic document and tendentious in the way it presented evidence. I say "evidence," but it was not evidence in the sense used in our criminal courts. Something asserted by one side and then tested by cross-examination. None of the Starr witnesses was ever cross-examined. The referral used carefully-selected portions of testimony before a grand jury, where the witness had no lawyer to protect him or her and could be harried indefinitely. Nor did the House of Representatives or its Judicial Committee hear witnesses or subject them to cross-examination. The majority simply took the Starr referral as gospel.

In our -- think about, maybe taken a bit long going through history you are familiar with to get to the point, but think about where that process leaves the Presidency and the Constitutional balance of powers. The Framers designed impeachment as a political process, carried out by the popular branch of Congress, the House. But in this case the entire investigation was carried out by a prosecutor. One unrestrained by the usual

requirements of accountability and with no limits on his resources. Upon deciding that the Clinton-Lewinsky relationship raised the possibility of impeachment, Mr. Starr could have referred the matter to the House for investigation, if it chose. The Constitutional order, in my judgment, says he should have done that but he did not.

In Professor Griffin's words, in the last year, "A new Constitutional order has been rapidly created before our eyes ... In this new order, a President can be impeached for conduct arising out of a private lawsuit on evidence developed by a grand jury that is not subject to further examination by the House of Representatives. The system has not worked. It has been changed. And we are all worse off because of it." End quote.

Underneath all this, I think, there is an important phenomenon of contemporary American society. Hostility to politics. There are reasons for the lower state of politicians these days. Among them a campaign finance system that allows elections to be bought and sold. But whatever the reasons, our low opinion of politics and politicians has led us increasingly to look for ways to decide important issues not by political debate but by the

supposedly more lofty processes of the law. That spirit underlies the Independent Counsel Act. It also led to the law that has set up an Inspector General in every government department, operating like a little FBI and harassing honorable officials like Richard Holbrooke. Justice Scalia, dissenting in the Independent Counsel case, said "Nothing is so politically defective as the Act to charge that one's opponent and his associates are not merely wrong-headed, naive, ineffective, but in all probability 'crooks.'"

The temptation to make such charges has been greatly increased by the existence of the Independent Counsel Act. Instead of using the democratic political process to change policies and officials we do not like, we demand that an independent counsel investigate them.

The result of a statute that has judges pick a prosecutor vested with extraordinary power -- and in my judgment pace the Supreme Court -- does so in gross violation of separation of powers -- was to turn a tawdry sexual impropriety into a damaging prosecutorial crusade.

Monica Lewinsky, in her book, objects in detail about her treatment by Mr. Starr's agents

and I think she was right. In the middle of a Starr-crossed year I wrote that a respected professional prosecutor offered Linda Tripp had offered her tapes would have told her to go away and I gave as an example of such a prosecutor Robert Morgenthau, the District Attorney of New York County.

The next day my telephone rang and a voice said, "Mr. Morganthau would like to speak to you."

Oh, dear, I thought, I got it wrong. But Mr. Morganthau got on the phone and said, "You were right."

More recently, William Weld, a former United States Attorney and Governor of Massachusetts said, "The asserted perjury and obstruction of justice that gripped the country for a year," quote, "would not ordinarily be prosecuted." Close quote.

Whatever one thinks of Bill Clinton's conduct -- and I think ill of it -- it should never have become the subject of an impeachment and Senate trial. The perversion of our Constitutional system lowered the bar on attempts to remove the President from office.

Those who managed the impeachment

effectively said that any illegality, however trivial, however private, may be defined as a "high crime and misdemeanor."

We congratulated ourselves on the wisdom of the American people in rejecting the call to remove the President from office. It was the people, we were told, who understood the Constitution and frustrated the partisan attempt to misuse the impeachment provision.

But were we really so wise? Suppose the economy had not been booming. Suppose Kenneth Starr and his assistants had not been so ugly in their methods. Suppose the House Managers had not seemed so vengeful, so intolerant. Would the opinion polls then have opposed the President's removal? Would we have escaped the disaster of overturning an election on such improper grounds.

There is another reason to doubt that the public response to the attack on President Clinton reflected only a profound Constitutional understanding or only that. That is the skill of Bill Clinton.

Professor Ronald Dworkin put it that his "dogged persistence and charm surpassed expectations yet again. We were saved from a

constitutional disaster not by the Framers' prescience but by Clinton's political skills, and by his and our shear good luck."

Yes, I think we were lucky. But we cannot count on luck saving us from future assaults on Presidents.

"We need," Professor Dworkin said, a ""consensus that impeaching a President on the kinds of grounds the House cited is a crime against the Constitution. Otherwise, we cannot be confident that a President less popular or less successful than Clinton would not be impeached by partisan zealots."

There is something else on our agenda for recovery from this episode. That is to restore the essential elements of presidential privacy that was stripped away in Mr. Starr's investigation. It seems to me grotesque that the President of the United States should have to retain a private lawyer in order to have a confidential consultation about, say, the suicide of a government employee. Congress should act to restore the assurance of confidence to discussions between the President and White House counsel. It should legislate a testimonial privilege for the President's Secret Service guards

except as to their observation of actual crimes. And it should overrule the Supreme Court's decision in the Paula Jones case, providing that any civil action against the President be postponed until after he leaves office.

One other institution needs to think -- rethink its role in our system. Can you guess which one I have in mind? I think you guessed it. The press. Rather than risk passing judgment myself on our profession, I want to quote a great friend of the press, Floyd Abrams, the First Amendment lawyer. "I believe the media," Mr. Abrams said recently, have "been complicit, often instrumental, in leading to the impeachment. I refer not to one story or another or one error or another. My point is more basic. It relates to the definition of news, itself.

Once the press, all of it, treated the question of whether the President had sex with Monica Lewinsky and then sought to cover it up as an extraordinarily serious topic, a topic truly worthy of repeated coverage, the dye was cast. The risk of impeachment immediately became the realer once the definition of the story was chosen. The press made sort of a collective judgment that the topic was not

only newsworthy but earth shaking. I fault the press for a collective lack of judgment and sense of proportion."

Well, ladies and gentlemen, I'm afraid this has been a rather grim luncheon speech. But that was what was on my mind. I want to end by saying this. The Framers, as I have been saying, did not give us the process that has just done such damage to the Presidency. What they did give us was an extraordinary institutional stability, a stability that has allowed this country to grow and change in ways unimaginable by the Framers while preserving the promises of democracy and law. That gift is what we should treasure now, rededicating ourselves to the institutions that have kept us stable and free.

Thank you.

(Applause.)

MR. HIMMEL: Tony, I want to thank you for coming and taking off from your busy schedule. I want you to know, in appreciation of that, the Association of the Federal Bar has made a contribution in your honor to an organization I know is very close to your heart and of which you are a director, the Brennan Center at New York University

School of Law.

(Applause.)

MR. HIMMEL: Thank you all for coming.

Lunch is now served.

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