

COPY

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

TRANSCRIPT OF PROCEEDINGS
THE
TWENTY-FOURTH ANNUAL
UNITED STATES JUDICIAL CONFERENCE
FOR THE DISTRICT OF NEW JERSEY

EXPERTS AND THEIR REPORTS:
DISCLOSURE, DISCOVERY & ADMISSIBILITY
AND
DATELINE CLASS ACTION:
A TOP OF THE CENTURY
LOOK AT CLASS ACTIONS IN THE NEW MILLENNIUM

MAYFAIR FARMS
WEST ORANGE, NEW JERSEY
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REPORTED BY: STANLEY B. RIZMAN, C.S.R.

1 MR. HIMMEL: We're going to start the
2 program. If everyone would take their seats, I
3 would appreciate it.

4 Good morning, I am Michael Himmel.
5 I'm President of the Association of the Federal
6 Bar. On behalf of the officers, trustees and
7 members of the Association, I would like to
8 welcome each of you to the 24th Annual Judicial
9 Conference.

10 We have two panels today. One on
11 experts and their reports, and the other one on
12 class actions. Michael Meisel and Bill Maderer
13 have done a great job in putting together a panel
14 on experts, and Jeff Greenbaum has done a yeoman's
15 job in putting together an extraordinary panel on
16 the subject of class actions.

17 We are fortunate to have an
18 extraordinary luncheon speaker who is also going
19 to participate on the class action panel and that
20 is Professor John Coffey of the Columbia
21 University School of Law.

22 Today we have the largest attendance
23 ever at a Judicial Conference. Over 400
24 attendees. Thank you, Michael, Bill, and Jeff for
25 all your hard work.

1 I would also like to thank my
2 Executive Director, *Ginny Whipple Berkner, who,
3 once again, has done an extraordinary job in
4 putting together what I know will be a very
5 successful Judicial Conference.

6 I would be remiss if I didn't mention
7 that we have some extraordinary appointments to
8 the Federal family since our last Judicial
9 Conference. U.S. District Court Judge Marianne
10 Trump Barry is now Circuit Court Judge Marianne
11 Trump Barry. U.S. Attorney Faith Hochberg is now
12 U.S. District Court Judge Faith Hochberg.
13 Magistrate Judge Joel Pisano is now U.S. District
14 Court Judge Joel Pisano. Judge Fuentes in
15 Superior Court has been confirmed by the Senate
16 and will soon be sworn in as a Circuit Judge for
17 the Third Circuit.

18 As you all may know, part-time
19 Magistrate Judge Susan Davis is now going to be
20 Magistrate Judge Susan Davis. And finally, Acting
21 U.S. Attorney Robert Cleary is now U.S. Attorney
22 Robert Cleary. I congratulate all of you.

23 (Applause.)

24 MR. HIMMEL: We are now going to
25 proceed with the panel on "Experts and Their

1 Reports."

2 As the panel is proceeding to the
3 dias, I invite you all to review the hypothetical
4 that is contained in the handout that you picked
5 up when you registered. Thanks, again, and
6 welcome all.

7 MR. MADERER: Assuming everybody has
8 had an opportunity to read the hypothetical, we'll
9 start.

10 Good morning. My name is Bill
11 Maderer. To my left is Michael Meisel. On behalf
12 of both of us, we hope you will enjoy our
13 presentation on experts and find it informative.

14 First, let me briefly introduce our
15 panel. Sitting to Michael's left is Judge John
16 Lifland. Judge Lifland has been on the Federal
17 bench approximately 12 years and, of course, sits
18 in Newark. To his left is Judge Alfred Lechner,
19 also sits in Newark; has been on the bench
20 approximately 14 years. A special welcome to
21 Magistrate Judge Robert Kugler who sits in Camden
22 and is our official representative from the
23 Southern District of New Jersey.

24 (Laughter.)

25 MR. MADERER: To his left, also

1 special welcome to Dan Dooley. Dan is a partner
2 at Price Waterhouse Coopers, CPA, and leads his
3 firm's national securities litigation consulting
4 process; is known to many as an expert and an
5 outstanding consultant in many areas.

6 We want to thank all of our panelists
7 for their participation and the preparation for
8 today. To my left, Michael Meisel, a partner at
9 Cole Schotz Meisel Foreman and Leonard in
10 Hackensack. I'm with *Schaffer Goldstein in
11 Newark.

12 In a recent article in the ABA
13 Journal, litigation experts were described in a
14 couple of different ways. One, an expert is one
15 who knows more and more about less and less. A
16 second definition, one who knows too much about
17 one subject.

18 Finally, they quoted Webster's New
19 World Dictionary of quotable definitions as
20 follows: Experts have been the brains behind the
21 growth of lawsuits since the 1960s. Over the
22 years they have been ubiquitous in court,
23 indispensable in many suits and a flourished
24 industry in their own right. For a fee, experts
25 will do most anything or so it seems.

1 Now, I'm not sure we need to agree
2 with that last observation. But we can agree that
3 expert testimony has become a critical element in
4 almost every case you see brought in Federal
5 court. What we'd like to do in the next hour or
6 so is to discuss some practical everyday issues
7 that confront practitioners and courts alike, and
8 consider them with particular reference to the
9 disclosure, discoverability and admissibility of
10 expert testimony in trials.

11 Now I'll turn it over to Michael.

12 MR. MEISEL: Thanks, Bill.

13 Before we get our panelists' views on
14 the particular kinds of discovery and disclosure
15 issues which we ordinarily confront, let's do a
16 very quick run-through. Take one minute or less
17 to look at the Rule 26 disclosure requirements.

18 Basically, there are six categories
19 that we as trial counsel have to disclose
20 automatically, that is, without any kind of a
21 discovery request. They're complete statement of
22 the opinions and the basis and reasons for the
23 opinions. The data or other information
24 considered by the expert in forming those
25 opinions. All exhibits to be used as a summary or

1 support for the opinions.

2 The expert's qualifications. This
3 includes a list of all publications which the
4 expert authored over the last or preceding ten
5 years. The compensation paid to the expert and,
6 finally, a listing of the other cases in which the
7 expert has testified. In the last four years.
8 This last requirement. That is the listing of the
9 other cases of which the expert has testified in
10 the last four years takes a little bit of the
11 sport out of this topic. We've, in the past,
12 sometimes been successful in bushwhacking opposing
13 counsel where we do a search and we find out that
14 the other side's expert's opinion has been
15 rejected by a court and somehow or another the
16 expert doesn't make disclosure of that to the
17 embarrassment of the retaining attorney.

18 With all of this mandatory disclosure
19 we also need to keep in mind something that is
20 sometimes forgetting. That is that Rule 26 also
21 protects against the disclosure of work product.
22 That is the legal theories of the lawyer or the
23 other representative. That means, at least to me,
24 that the disclosure rules are not absolute. While
25 Rule 26 does require broad and automatic

1 disclosure, it doesn't give your opponent an
2 unlimited license to intrude on your trial
3 preparation.

4 A few of the common disclosure and
5 discovery problems are answered in the reported
6 cases but having looked at them and reciting some
7 of those to you in our discussion and outline, I
8 can tell you that most of the day-to-day problems
9 that we front as trial lawyers are not answered in
10 the case law and even in most cases where courts
11 have made decisions on some of the more
12 troublesome questions, you get *different and
13 sometimes opposite results on the same facts.
14 That is why I think having this opportunity to get
15 our panelists' views should give us as trial
16 lawyers some good insights into what we can expect
17 when we bring these issues into the courtroom.

18 We also have our expert Dan Dooley
19 from Price Waterhouse Coopers and Dan, based on my
20 own personal experiences, is a highly effective
21 testifying expert. This would give us an
22 opportunity and the judges to hear in an informal
23 setting how an expert used the same issues. With
24 that having been said, let's take some of the
25 materials which the expert generates. That is

1 dealing first with the problem of what discovery
2 can you get? What discovery are you likely to
3 have opposition in getting which the expert
4 himself or herself generates?

5 I think probably the most
6 controversial topic is the subject of draft
7 reports where you have in the example that we're
8 using today of preliminary internal drafts
9 prepared by an assistant to the expert which the
10 assistant delivers to the expert and has never
11 shown to the retaining counsel but is something
12 that the expert is using in formulating the final
13 report. The question is, can I, as the opponent,
14 get to those.

15 Judge Lechner, using our
16 illustration, would you require the production of
17 the early drafts of the report prepared by Hy
18 Numbers and Hy Numbers' assistant?

19 JUDGE LECHNER: Well, I think there
20 is a dichotomy to be drawn here. The assistant
21 prepared several preliminary drafts but only
22 e-mailed the last one to Numbers who then
23 substantially revised it. I think initially I
24 would not require the assistant's preliminary
25 drafts be prepared. Only the one that was

1 e-mailed. Obviously, the changes that Numbers
2 made to that last draft.

3 The thing that I think is crucial
4 here is determining whether the report that comes
5 out is a consideration by the expert of the facts
6 and whether it is the expert's statement of an
7 opinion in determining whether the expert used his
8 or her expertise, training and experience to come
9 up with this not only opinion but statement of
10 what the facts are. Considering facts. Excluding
11 facts. That is a determination obviously, as you
12 know, can be very important with regard to
13 credibility and weight concerning the opinion.

14 The earlier reports, I think could be
15 required. I think further discovery would be
16 necessary. Did the assistant speak with Numbers?
17 Was that assistant given some guidance as to what
18 to cull out and how to do it? I don't think there
19 is enough there to know right now. But I would
20 certainly, it seems like an easy call for me that
21 the e-mail report, which was the basis of the
22 substantial revision that finally went out, would
23 be disclosed. Based on what we have right now, I
24 would not be inclined to have those earlier
25 reports produced unless something more were

1 developed during discovery in the interrogatory
2 stage. I guess the input from Numbers to the
3 assistant would be very crucial. Then vice versa.
4 Did Numbers speak with the assistant at a later
5 point? Did the assistant give further data which
6 then changed or caused a substantial revision in
7 the e-mail draft?

8 MR. MEISEL: Dan Dooley, let's
9 start -- try that one out on you. In your world
10 at Price Coopers when does your firm consider that
11 it has issued an expert report insofar as the
12 outside world is concerned?

13 MR. DOOLEY: When I sign it. We
14 essentially sign only one expert report.
15 Everything else before that is a draft. The
16 process can be very laborious. We talk about one
17 assistant. I typically might have on a very large
18 case say six or seven assistants working on it.
19 The number of documents we could be using could
20 run anywhere from a couple of hundred to -- in one
21 case I'm handling now about 2.5 million documents
22 that have been delivered to us in electronic form.

23 You're asked a question at a later
24 date by either the opposing counsel or by the
25 judge as to, did you perform this work? Say it

1 was performed by me or by persons working under my
2 direction and supervision. But if they were
3 working under my direction and supervision,
4 obviously I had control over what they were
5 considering or not considering. We don't consider
6 that to be the report, itself. We consider it to
7 be the evidence that needs to be considered by me
8 or possibly even relied on by me if it gets past
9 the consideration stage in support of the report.
10 But the final product, the report, itself, only
11 goes out of our shop when I put ink to the bottom
12 of it and sign my name and bound myself to the
13 extent I'm signing the firm's name bind *by (my?)
14 firm.

15 MR. MEISEL: In the absence, Doctor,
16 of a directive from counsel, do you retain draft
17 reports? Those internal reports prepared by your
18 assistants or do you discard them as you go along?

19 MR. DOOLEY: It's a complex question.
20 (Laughter.)

21 MR. DOOLEY: That is why I'm an
22 expert.

23 (Laughter.)

24 MR. DOOLEY: Start off with that
25 premise. If by the "report" you mean all of the

1 front part which is expressing the opinions and
2 giving in some summary fashion the basis to be
3 reaching those opinions. Apparently detailed
4 listing of the documents reviewed, the documents
5 considered. Then what we do is usually write over
6 the drafts unless instructed because it is done
7 electronically, we're editing all the time.

8 MR. MEISEL: When you write over,
9 you're talking computer language. Does that mean
10 it can be retrieved? Does it mean that it
11 disappears from the planet including into the
12 electronic *<AOE>theyare (theater?)?

13 MR. DOOLEY: No. It actually could
14 be retrieved. Unless I take the hard drive and
15 throw it over in the Hudson, you know, you can get
16 into a hard drive and basically they have
17 technology today where if you subpoenaed the hard
18 drive, you probably can get at every one of the
19 overlaid electronic versions of the draft.

20 In fact, in a classic case of this
21 which is the investigation on *Mack <KES> and HBOC
22 going on right now, the *<KHREUFR>I to the
23 Securities and Exchange Commission includes every
24 hard drive and every *<UT>der the HBOC so they
25 could see everyone's tracks and e-mail whether

1 deleted or not.

2 MR. MEISEL: Judge Lechner, will you
3 make him *<PROULGS>. Make him go back into his
4 hard drive and have him reproduce those
5 write-overs?

6 JUDGE LECHNER: You mean for the
7 sheer pleasure of it?

8 (Laughter.)

9 MR. MEISEL: There is a rumor
10 floating around.

11 (Laughter.)

12 JUDGE LECHNER: It would depend,
13 obviously, there would have to be some more
14 background developed. Input from the attorney.
15 You look at something far the other end of the
16 spectrum. Judge Simandle's Occulto case where you
17 have an expert preparing a report that was given
18 to him by his Honor. All it says there, "Please
19 retype on your letterhead." That is one extreme.

20 You have got what *<TKAOPBS> talking
21 about, these type-overs, correcting errors,
22 typographical errors, moving paragraphs around.
23 That doesn't seem to be problematic. But the
24 question then in the middle ground there, whose
25 report is it? What did he consider? Not merely

1 rely upon. What did he consider? Is it his
2 report? Is it the attorney's report like in
3 Occulto. So there is a lot there that I think you
4 need to know and a lot more you need to develop.

5 I don't think you can just respond
6 and say produce it or not produce it. But I do
7 think the opposing attorney has a right to
8 challenge at least the credibility of not only the
9 ultimate opinion but the compilation of facts upon
10 which the opinion is based and the methods used to
11 arrive at it. So there could be a strong reason
12 to get into these type-overs as it were.

13 MR. MEISEL: Judge Lifland.

14 JUDGE LIFLAND: Just a thought. To
15 jump ahead a little bit and we will discuss the
16 trial judge's responsibility to assess the
17 reliability of the expert's testimony. In looking
18 at this hypothetical, where the assistant has
19 provided information to the ultimate expert.

20 If that information is in the form of
21 data. Often it is. And if one of the criteria of
22 reliability in your particular case is whether the
23 expert has ignored certain data. That is often a
24 criterion in assessing the reliability of the
25 expert's methodology, which we'll get to in a

1 little bit, then it may be crucial to find out
2 what data the junior person reported to the person
3 who is going to ink the report and going to
4 testify. And if as advocates you can make a case
5 for the relevance of that sort of information, the
6 need for that sort of information, I think you'll
7 find the magistrate judge or the district judge
8 hospitable to requiring turnover of whatever it is
9 that the assistant gave to the ultimate expert.

10 MR. MEISEL: Judge Kugler, would you
11 conduct an in-camera review of draft reports in
12 order to make that decision?

13 JUDGE KUGLER: Probably not because I
14 don't think you need to. If you focus on the word
15 "considered" in Rule 26(a)(2)(B), I think all the
16 adversary needs to show is that the person who is
17 going to testify looked at the document to make a
18 discoverable. If the assistant has given the
19 testifying expert certain documents and testifying
20 expert then goes through them and discards some
21 and keeps some. I think that whole process is
22 important. I think that process of what is
23 discarded and what is kept is discoverable.

24 MR. MEISEL: Does it make a
25 difference to you if this internal preliminary

1 draft prepared by the assistant was never
2 delivered to the lawyer who retained the expert?

3 JUDGE KUGLER: No.

4 MR. MEISEL: Would you still order
5 disclosure?

6 JUDGE KUGLER: Sure.

7 MR. MEISEL: No difference whether
8 the lawyer saw it or not?

9 Bill, sensitive question. But let's
10 ask it. Is it appropriate for a lawyer to
11 instruct the expert to discard all drafts?

12 MR. MADERER: I think that is
13 inappropriate. I think most lawyers are a little
14 more subtle than that.

15 (Laughter.)

16 MR. MADERER: As a general practice,
17 I think many of us do not retain draft reports
18 that may have been forwarded to us by the experts.

19 When I retain an expert, I usually
20 tell that expert that it is my practice not to
21 retain copies of draft reports and "I assume, Mr.
22 Expert that is your practice, also?" Invariably
23 the answer is "Absolutely."

24 Now, I do recognize that there could
25 be an outstanding interrogatory question which has

1 to be answered that may have preceded a retention
2 of an expert or even worse. Although I've not
3 seen it, an order from a magistrate directing that
4 counsel maintain or retain copies of drafts. As I
5 said, I have not seen it. Obviously, if that were
6 in existence, I would retain them and have the
7 expert retain them, also.

8 MR. MEISEL: Final thoughts,
9 panelists? Or do you feel like we've covered it?

10 MR. DOOLEY: One problem with this,
11 though, is that there is a different instruction
12 received almost every time as to what constitutes
13 a draft. If, in fact, the report is based upon,
14 for instance, a couple of hundred different
15 analytical schedules and the analytical schedules
16 are backed by, say, around 2, 000 or 3,000
17 documents and the process of assembling what you
18 consider to be the final impressions that are
19 going to be put in the report is an *utterance of
20 it, when do I start *drafting and when am I
21 stopping research?

22 It is -- if you're dealing with, for
23 instance, a psychologist, maybe that is easy to
24 do. But if you're dealing with someone who is a
25 chemist that actually got to do laboratory tests,

1 when are you finished, when are you out of the lab
2 and into the reporting process? We don't mind
3 keeping everything. Doesn't matter to us one way
4 or the other. It is just a matter of knowing
5 exactly how the court is going to come down ahead
6 of time so you don't ruin the credibility of an
7 otherwise credible expert just simply by an
8 inadvertency.

9 JUDGE LECHNER: Where that
10 inadvertency includes tests that didn't work out,
11 right?

12 MR. DOOLEY: No. I think you would
13 also be obligated to keep all of your testing
14 data.

15 If you told me I want you to keep all
16 of the documents that you were beginning to
17 assemble or that you were going to rely on, even
18 though it is incomplete, you haven't finished the
19 tests, I'd say, okay, fine. I mean, this may be
20 working on something that required me to build a
21 case over four weeks of time. I've not really
22 finished the test until I've gotten to the final
23 step. We can keep everything.

24 Today's retention policies for
25 documentation are pretty powerful. But that is a

1 lot of paper a lot of times or a lot of pieces of
2 data a lot of times. It is just not as easy as it
3 was maybe 30 years ago when a case would involve a
4 thousand documents. Today, you might be looking
5 in my area, going transactions that could run to
6 five million transactions that are being studied,
7 thought about, comments are being made on them.
8 We can keep it all. It isn't as easy to make the
9 line between what is a draft and what is the work
10 process, itself.

11 JUDGE LECHNER: Your report would
12 indicate that was considered and not used?

13 MR. DOOLEY: Yes, your Honor.

14 MR. MEISEL: Judge Lifland, last
15 question on draft reports which the expert
16 generates. Should there be a different standard
17 applied during discovery as opposed to the trial
18 stage when it COMES to disclosure of drafts?

19 JUDGE LIFLAND: Sure. The whole
20 purpose of discovery is to give lawyers something
21 to fight about.

22 (Laughter.)

23 JUDGE LIFLAND: The practice of trial
24 is to present something to the trier of the fact
25 that is appropriate in the broadest terms. So,

1 yes, I think you can expect to produce stuff on
2 discovery which might lead down a path. Whereas,
3 you would never be able to expect -- you would
4 never expect to see that particular item in
5 evidence.

6 MR. MEISEL: Let's move on to a
7 couple of other items which are materials that the
8 expert generates and let's just try these out on
9 Judge Kugler because I would guess that you're the
10 one who gets confronted with these issues, at
11 least during the discovery stage. Engagement
12 letters.

13 Are there any circumstances where
14 you, Judge Kugler, would not order disclosure of
15 engagement letters?

16 JUDGE KUGLER: I can't think of any.
17 So the answer is probably not. Which means that
18 you have to be very careful what you put in your
19 engagement letters to your experts. Because your
20 adversary is most likely going to see it and the
21 jury may end up seeing it.

22 MR. MEISEL: How about hour and
23 billing information? Can you think of any
24 circumstances where you would not require
25 production?

1 JUDGE KUGLER: No. The rule is very
2 clear. Compensation agreement has to be disclosed
3 as part of the expert report.

4 MR. MEISEL: Okay.

5 How about if you have an expert who
6 is employed regularly by an industry, whether it
7 is the tobacco industry or whether it is the FDIC,
8 and this expert is making a million and a half
9 dollars a year testifying 99.9 percent of the time
10 for that one client. Would there be circumstances
11 where you would order that the expert deliver not
12 only hour and billing records in the case in which
13 you are supervising discovery, but also records as
14 they pertain to the other assignments on behalf of
15 that industry-type client?

16 JUDGE KUGLER: I think then you get
17 into Rule 26(b) relevancy, ideas and notions.
18 Yeah, I think some of that can be discovered.

19 I think we've all seen a trial.
20 Cross-examination of an expert as to how much of
21 your time was spent testifying in court on behalf
22 of one side or another and things of that nature.
23 I think every judge in the world would permit that
24 kind of cross-examination. Therefore, I think you
25 can make a case to get that other billing type of

1 information to find out how much an expert has
2 earned in a given year from a particular client.
3 I think sure, it goes to bias and credibility at
4 time of trial.

5 MR. MEISEL: Let's talk about the
6 materials which we as trial lawyers provide to the
7 expert. It seems to me here is where the work
8 product doctrine and the Rule 26 disclosure
9 policies really collide.

10 Bill, any doubt in your mind that
11 Rule 26 now requires us to disclose all fact
12 materials that we provide to the expert, including
13 excerpts of depositions that we so carefully
14 select, documents that we cull out from hundreds,
15 maybe thousands of documents and put 12 of them in
16 front of the nose of our expert? Any question in
17 your mind that we now have to make that
18 disclosure?

19 MR. MADERER: The short answer is no.

20 When you are transmitting these
21 materials to the expert, it is not only the
22 materials themselves but the cover letters, the
23 transmittal letter, the substance of the
24 communication, whether it be oral or written, that
25 I think are going to become the real meat for the

1 *mill whether it be during discovery or trial.
2 Because so often we will say something like, I'm
3 delivering you the 12 boxes of deposition
4 transcripts but I really want you to focus on Dr.
5 Jones' testimony, pages 16 through 84. Many times
6 you'll find an expert. You have to be very
7 careful. That is where they're focusing. That
8 may also be the only thing they're focusing on.

9 I think everything has to be
10 disclosed but the communications between counsel
11 and expert really are the real issue.

12 MR. MEISEL: Judges, any dissent on
13 that?

14 JUDGE LECHNER: You know, I might be
15 persuaded that the comment of focus on points one
16 through three may be work product. That may be
17 something that could be protected. That
18 situation, I think I'd ask to see for that letter
19 in camera, and look at that.

20 Compilations of facts I think are not
21 by the attorney, don't get as high degree of
22 protection as pure core work product would and a
23 comment of an attorney saying, we've got a problem
24 in this area, watch out for this point or be aware
25 of opposing opinions, I think is more in the

1 side of core work product and there I'd be more
2 open to consider redacting that one portion.
3 Because I don't think, unless the comment said
4 consider only this, I don't think I would produce
5 that just on the little facts you've heard right
6 now.

7 MR. MEISEL: Let's take that. That
8 is the tougher question. We, as lawyers, will
9 prepare a memorandum in which we combine a summary
10 of the facts. We may attach to it pertinent
11 exhibits that we select, maybe excerpts of
12 depositions and we combine that in a memorandum
13 with our theories. Our legal theories. We want
14 to have a full and free communication with our
15 expert.

16 Judge Lifland, if the lawyer's pure
17 mental impressions are part of that kind of a
18 combined set of materials, do you consider that
19 data or other information within the Rule 26
20 requirements?

21 JUDGE LIFLAND: Let's take an
22 example. The attorney writes to the expert and
23 said, "You are our only hope in this case where
24 the facts and the law are against us."

25 (Laughter.)

1 JUDGE LIFLAND: Hopefully, that is a
2 pure hypothetical. Should that be disclosed? I
3 think not. That is the attorney's evaluation of
4 the case. There is no way it would ever get into
5 evidence in that form. The only help it gives is
6 perhaps spiritual to the adversary. It does not
7 help the adversary to prepare to oppose. I
8 presented one end of a spectrum.

9 Things that -- things that can be
10 read, and Judge Lechner was averting to this, I
11 think, can be read to trying to skew the expert's
12 approach in one way or the other. To or away from
13 some area of investigation. That is, I think,
14 close to the other end of the spectrum.

15 MR. MEISEL: Dan Dooley, do you ever
16 feel like you're forced into doing what you and I
17 have sometimes referred to as a Kabuki dance using
18 hypotheticals with the lawyer retaining you in
19 order to insulate from discovery a full and free
20 exchange of ideas between co-professionals?

21 MR. DOOLEY: I've learned how to
22 sign. We actually have closed caption for the
23 Kabuki dance. A lot of times that happens. I
24 find it not very helpful, actually. I think it
25 is, a lot of times, overplayed by counsel. You

1 hire the expert because you assume the expert
2 knows what the expert's doing. The expert at some
3 point is going to testify, hopefully truthfully,
4 that he formed an independent or she formed an
5 objective and independent view as to the matter.
6 So my own view is that the amount of communication
7 between experts and counsel should be as little as
8 possible and the amount of iterations in the
9 report between counsel and the expert should be
10 fewer or none.

11 Of course, that requires you to
12 choose your experts very carefully. But whenever
13 you're involved in the discussions over litigation
14 consulting as opposed to over expert testimony,
15 you have to assume everything you say to the
16 expert is going to be discoverable at a later
17 date.

18 If you want to have that separate
19 *Kabuki *dance you * you get a separate consult
20 from the expert you choose. You can *as
21 forthright (ask for it right)* with the
22 consultant. Then you can use the attorney to set
23 the stage for what they want the expert to do.
24 Instead of having the expert carry two bails of
25 water.

1 Judge Kugler, let's say Bill Maderer
2 *(and Mike) are on opposite sides of this
3 franchise case. About 10:30 in the morning Bill
4 is asking my expert *(Mike((PUT IN ABOVE) Dan
5 Dooley if he ever discussed with me my view as to
6 the strength of our case. Dan answers. I say,
7 you can answer that question yes or no. He
8 answers yes.

9 Bill says, what did Meisel say as to
10 how strong or weak a case? Objection. We get on
11 the phone. I think the conversation would
12 probably go something like this: "Judge Kugler,
13 good morning. You remember at our last management
14 conference you said if we had a discovery problem,
15 we should call you."

16 You groan. You say, "Okay. What is
17 the question?"

18 I say, "Well, you know, Bill Maderer
19 is usually a pretty good guy. He had too much
20 coffee this morning. He is getting intrusive. He
21 wants to unnecessarily intrude on my work
22 product."

23 He's asked the question *CHECK Dooley
24 before* of my expert what was Meisel's view of
25 the strength or weakness of the case and I

1 represent to you that his answer will be pure work
2 product. You -- and again with this hypothetical,
3 you say, "Bill, hold the phone away from your ear,
4 I want to ask Meisel a question."

5 You say, "What is he going to say?"

6 I say, "Well, judge, you know what
7 he's going to say. He's going to say -- (phone
8 ringing) he's going to say "Hello."

9 (Laughter.)

10 JUDGE LIFLAND: I have a jury
11 deliberating. If you will excuse me for a second.

12 MR. MEISEL: What Dan Dooley is going
13 to say is that at a very early stage of the case
14 he's going to remember a conversation in which I
15 said to him our case stinks. If it wasn't for the
16 fact that the client is my brother-in-law --

17 (Laughter.)

18 MR. MEISEL: -- we wouldn't be on the
19 phone with you this morning.

20 Now, what are you going to do in that
21 case? It may influence -- it may be material that
22 you could use for impeachment purposes. But are
23 we going to really get into that kind of stuff?

24 JUDGE KUGLER: I disagree with my
25 colleagues. I think most of what we consider to

1 be work product between expert and lawyer is now
2 discoverable.

3 The advisory committee notes to the
4 Rules say that. Most of the decided cases now say
5 that although there are no Circuit Court cases or
6 Supreme Court certainly hasn't addressed the issue
7 yet, I think you're allowed to inquire of the
8 expert in those areas to find out if this is
9 really the expert's opinion or it is the
10 attorney's opinion. I think that is the whole
11 point of the change in the rule. So I would
12 probably, if the foundation was laid, I would
13 probably permit or require the question be
14 answered.

15 MR. MEISEL: Judge Lechner, what is
16 your view?

17 JUDGE LECHNER: I think the last
18 comment would be key for me. If the foundation
19 were laid. Just as it came out right there, I
20 don't see how that will make anything more or less
21 probable in the case or take away from the opinion
22 unless something more can be *KWOPD> to
23 demonstrate that the expert at that point is now
24 trying to stretch or reach or make something out
25 of whole cloth that he or she otherwise would not

1 have done but help us out of a personal bind.
2 Absent that, I'm not sure I'd get into that. I
3 think we'd be getting too far afield. Not only
4 obviously in trial that would come up based on the
5 limited facts. Even in discovery at some point
6 life is finite. We have to move on. I don't
7 think I'd get into that based upon those facts.

8 MR. MEISEL: Bill Maderer, using that
9 illustration, do you need it to conduct effective
10 cross-examination based on the illustration that
11 we've used? Do you need to know that I had that
12 conversation?

13 MR. MADERER: Well, the answer is
14 probably not. I think all of us are being more
15 and more careful as to what we say. Is it really
16 going to go to credibility that would be
17 admissible at trial even if Judge Kugler would
18 allow it to be discovered or discoverable in the
19 pretrial stage? My guess is that Judge Lifland
20 and Judge Lechner would probably exclude that at
21 trial and, therefore, as a practical matter,
22 probably would not mean that much.

23 MR. MEISEL: Why at this point since
24 we're now coming up at the trial stage, maybe
25 Bill, this is the point where you should begin to

1 take us through those issues of admissibility at
2 trial.

3 MR. MADERER: Okay. You really had
4 some developing law in the last few years.
5 Important Supreme Court case was the Daubert case
6 in 1993 and more recently, the Kumho Tire case in
7 1999. As a result of those two cases, it is clear
8 that the District Court is required to engage in a
9 gatekeeping function to determine the
10 admissibility of scientific or technical or
11 related information that comes in as a form of
12 opinion testimony. Essentially, the Court must
13 determine the qualifications of the expert and the
14 reliability and fit. That is the relevance of the
15 opinion to some issue in the case that is
16 important to the trier of fact. Whether it be the
17 jury or the court at a bench trial.

18 In general, the Third Circuit has a
19 liberal standard for admissibility of expert
20 testimony when it comes to the qualifications of
21 an expert and a strong preference for admitting
22 evidence that has the potential for assisting the
23 jury. We've cited some cases in the outline that
24 you might find helpful in that area.

25 Let me start with Judge Lifland in

1 this area. Judge, looking at the hypothetical, do
2 you have any problem qualifying Numbers to testify
3 on the franchise damage issues even though this
4 particular expert apparently has no experience in
5 the area?

6 JUDGE LIFLAND: Let me just
7 congratulate those who created this hypothetical.

8 There are, as I see it, four separate
9 areas that the expert, Numbers, is going to be
10 asked to opine on: Past profit, projected profit,
11 projected profit for three additional stores that
12 don't exist yet, and an opinion that the donut
13 empire would inevitably have led to a successful
14 international *E commerce donut business.

15 I think you --

16 (Laughter.)

17 JUDGE LIFLAND: I think you see what
18 the drafters of the hypothetical were trying to
19 extract from us. First, cull letters past profit.
20 I would imagine most CPAs would be able to readily
21 opine as to past profit. In fact, I'm not even
22 sure you need a CPA for that. That might be a
23 question of fact. Rather than opinion.

24 As to projected profit, that is
25 regularly done by those trained, as Mr. Dooley is

1 trained, as accountants. Even without experience
2 in the field. Again, subject to the overall
3 criterion of having a reliable methodology, that
4 would be something that they couldn't testify to.

5 There is a wrinkle in here,
6 "Projecting profit for 20 years." Probably a
7 pretty long time in these days of instant
8 gratification. And instant stock values based
9 upon what happened yesterday. So there would have
10 to be some inquiry into the methodology for going
11 that far down the road.

12 Likewise, methodology for predicting
13 profits for three additional stores would have to
14 be examined and, finally, this business of
15 successful international *E commerce. I don't
16 know what is out there. But the inquiry would be
17 whether there is some sort of reliable methodology
18 as to that particular inquiry. There may even be
19 a question of fit, i.e., relevance, in the context
20 of this lawsuit on that particular claim. So it
21 is really four separate questions and subsidiary
22 considerations in them.

23 I think from my comments you can
24 divine that I feel these are sometimes very
25 complicated questions and I know you can divine

1 that there is no way to address them in the
2 abstract. You have to get down and dirty with
3 some sort of a hearing. I'd strongly recommended
4 by the Court of Appeals.

5 There is a very recent case called
6 Padillas in the Court of Appeals where the Court
7 made it clear that they have a strong preference
8 for deciding these questions with -- with a trial
9 judge deciding these questions with a Rule 104
10 hearing where the trial judge considers, without
11 being bound by the Rules of Evidence, all of the
12 criteria for admissibility of an expert's
13 testimony. That is -- I would suggest that that
14 may be the death knell of the traditional motion
15 for summary judgment based upon the fact that the
16 expert can't testify. So let's get this case over
17 with right now.

18 The Court of Appeals has an earlier
19 opinion where they opine that maybe it is just as
20 good to have this done in the context of a cold --
21 what they called a cold record; i.e., no 104
22 hearing on summary judgment. The later opinion,
23 Padillas, reversed a fine trial judge for doing
24 just that.

25 So I suggest that not only to protect

1 the result which you hope from the trial but to do
2 it the right way, you expect that the trial judge
3 will want to have a separate hearing and that
4 generates a whole lot of other questions that we
5 can all think about. Namely, when *<TKOUDZ> this
6 in, how do you know it is necessary? When do you
7 raise the objections? All that stuff. Stuff we
8 all deal with.

9 MR. MADERER: Thank you, Judge.

10 Judge Lechner, let's just pick up on
11 on this issue of motions for summary judgment.
12 You've been on the bench 14 years. You've
13 probably heard hundreds and hundreds of motions
14 for summary judgment. Faced with voluminous
15 papers, affidavits, briefs, affidavits of experts.

16 Do you generally hold an evidentiary
17 hearing on the admissibility of the expert report
18 which might be critical to the ultimate outcome of
19 that motion?

20 JUDGE LECHNER: It hasn't come up on
21 a summary judgment. It has come up on pretrial
22 motions a number of times. I think that is
23 critical when it is brought up.

24 I know a lot of times the defendant
25 wants to sit back and not bring it up and wait for

1 trial to get a stable target. Something that is
2 more easily shot down. At that point, if you hold
3 a hearing obviously outside the presence of the
4 jury and *discovered that for whatever reason this
5 opinion is not coming in, the next obvious
6 question presents itself, what happens? Is a
7 mistrial declared? Does the plaintiff get a right
8 to go out and get another person to be the expert?
9 If that happens, who pays all the expenses as far
10 as that is concerned? The reliance of the
11 defendant on that.

12 So at that point it is very, very
13 problematic. It is going to be maybe straining to
14 hear this but I think maybe sometimes the
15 plaintiff needs to ask for a 104 hearing. I
16 realize that may telegraph the wrong issue to the
17 judge. But I think you run the risk if the
18 defendant is not bringing it up and you think your
19 expert could be vulnerable to the opinion of being
20 excluded at the time of trial, sit back and wait
21 until the time of trial, could cause, I think,
22 very serious problems for you. It is tough for
23 us. Nobody raises it, I'm not sure. I don't know
24 about this. I haven't done any research. I'm not
25 sure I have the obligation to go out and look if

1 everybody says that **it is reliable. The Daubert
2 factors are met, et cetera, et cetera, there is no
3 issue there.

4 Do we as judges have an obligation to
5 parcel all of that if the issue hasn't been
6 raised? I don't know. That hasn't been presented
7 as I sit here. I don't know of a case. Unless it
8 is something that is so extraordinary just by the
9 idea it would raise a ridiculous proposition. But
10 to sit back and wait for trial could be very
11 problematic for plaintiff.

12 As far as summary judgment is
13 concerned, you got the issue right there that is
14 raised. At that point you may want to put the
15 summary judgment aside and not consider it. At
16 that point, have the 104 hearing. Because then,
17 it has been raised. The issue has been engaged.
18 I think that is what you have to do. Maybe the
19 parties would be better served by withdrawing that
20 summary judgment and going on to the 104 hearing.

21 Keep in mind what Judge Lifland said.
22 The second extension of 104(a). The Rules of
23 Evidence don't apply except with regard to
24 privilege. I think subsumed in there might be the
25 work product immunity that is concerned there.

1 You could have layers of problems in considering
2 many of these issues. But it is not -- there is
3 not an easy answer to that. But to sit back,
4 ignore it and think it may go away. I think it
5 more to the *benefit to do that, the plaintiff
6 could be really caught between a rock and a hard
7 spot. Once it is raised, I think the better
8 course would be to either put the summary judgment
9 motion on the shelf or perhaps the plaintiff or
10 defendant would withdraw it. Go through that 104
11 hearing and sort that out.

12 MR. MEISEL: I'm sorry, Judge.

13 JUDGE LIFLAND: If I could give you
14 some specifics? I should probably observe from
15 the phone call -- I'm in the middle of a trial
16 right now with a jury deliberating on a bifurcated
17 case. On the damages case there is expert
18 testimony that was taken by video dep two weeks
19 ago. Four weeks ago, I issued a ruling on summary
20 judgment where I narrowed down the case quite a
21 bit. The expert -- the plaintiff's counsel did
22 not present the case to the expert and they've
23 subsequently taken a video deposition on a
24 narrowed-down basis. Defense counsel didn't
25 narrow it down much, either. So I have a question

1 of fit on this expert testimony. If nothing else,
2 trial judges can figure out crazy ways to do
3 things. Last night at seven o'clock all these
4 counsel and the expert were taking a second video
5 deposition to be presented perhaps this afternoon
6 with the case having the facts in it that it now
7 has.

8 You have to be flexible. You have to
9 anticipate that an expert opinion which doesn't
10 relate to what the trial now relates to is not
11 going to get in. And if it is a question of
12 degree, but if it goes beyond the proper limits
13 and the way in which it goes beyond is
14 significant, it won't go in at all.

15 If you have a live expert, that can
16 be dealt with. If you have a video expert, as in
17 my experience probably half of the expert
18 testimony in my court is done by video because
19 experts are never available. Then you have a real
20 problem. So I present that to you as how in
21 actual practice these questions can come and bite
22 you.

23 MR. MADERER: Michael.

24 MR. MEISEL: When you talk a problem
25 with qualification. This is the time to have a

1 conversation with your client. Because if it is a
2 close question, if it is the role of the dais as
3 to whether your expert is going to qualify to
4 testify, you better have the conversation with a
5 client and you have unhappy choices. You have the
6 choice of rolling the dice at trial and the ruling
7 can go against you. I may be there without an
8 opinion which is crucial to your case. That is
9 one unhappy alternative. It is particularly
10 unhappy because if one of the judges decides in
11 the exercise of discretion that they're going to
12 exclude that expert's opinion, then you're left
13 with an argument on appeal. You don't want to be
14 in that posture.

15 But the standard, was it an abuse of
16 discretion? Where are you likely to go on that
17 subject if the judges, and they're all careful now
18 to do this, have made findings as to why they have
19 excluded the testimony.

20 The other choice and it is a really
21 tough one: Do you want to bring that motion, that
22 pretrial motion as Judge Lechner suggested is a
23 possibility in which you are now telegraphing your
24 weakness to your opponent and to the trial court
25 saying, hey, I'm waving a flag here, I've got a

1 problem with qualification with my expert and I
2 want to bring a motion, make a record. At least I
3 know where I stand. To me, it is a very unhappy
4 choice.

5 MR. MADERER: Okay. Let's assume
6 that our expert witness has been qualified and we
7 have to also then worry about the issue of
8 reliability and fit.

9 Judge Lifland, you've had some
10 experience in this area where you have had to hold
11 Rule 104 hearings, make those determinations
12 independent. Some of those cases have been
13 reviewed by a higher authority.

14 JUDGE LIFLAND: I've been reversed
15 once and I've been affirmed once. I'm not sure I
16 really see the difference between what I did.

17 (Laughter.)

18 JUDGE LIFLAND: But that is okay.
19 Let me just back up a little bit.

20 As Judges Lechner and Kugler would
21 pronounce it, in the *Do Beer case, the Supreme
22 Court of the United States changed the landscape
23 completely. I'll call it Daubert, though. And
24 the Third Circuit has picked up on it and in long
25 opinions designed to be helpful to trial judges --

1 (Laughter.)

2 JUDGE LIFLAND: -- they have somewhat
3 expanded upon the Supreme Court's prescription
4 which the Supreme Court invited other judges to
5 do. And then in the *Retiglianno case, which is
6 one where I got affirmed, I recited the expanded
7 version and, of course, that is the governing law
8 from here on out.

9 And there are factors that you
10 consider in deciding whether an expert's opinion
11 is reliable. That is my check list. You have to
12 evaluate what counsel has suggested during the
13 course of this hearing. You have to look at what
14 I came up with as eight factors and there are
15 going to be more in any given case or less in any
16 given case. And then, through counsel, maybe
17 directly, you're going to talk to the expert at
18 the Daubert hearing.

19 Three questions to be resolved.
20 Qualification. We're already talked about that
21 somewhat.

22 Reliability and fit. And the Supreme
23 Court talks about reliable methodology, all kinds
24 of scientific testimony. And if it is really, I
25 think, nothing more than whether it matters in

1 this particular case. The example I just bored
2 you with having a case go to the jury with three
3 situations in it. The expert testified about five
4 situations. Well, that is not fit. That is what
5 counsel were trying to patch up last night in
6 their video deposition. Those are the criteria
7 which have been laid out for us to apply and there
8 are any number of situations in which they get
9 applied in a non-jury case that I -- preliminary
10 injunction hearing, actually. An expert appeared.
11 He had been deposed. About 15 minutes he appeared
12 on the witness stand, as is often common in
13 fast-moving proceedings, and counsel objected to
14 his qualifications and both sides questioned him
15 and I questioned him. I thanked him very much and
16 excused him from the witness stand. That was a
17 Rule 104 hearing.

18 Fortunately, we usually have the
19 luxury of our magistrate judges giving us a heads
20 up that such a hearing may be necessary. Maybe
21 counsel will do this. But I do urge you, don't
22 wait until the last minute because as Judge
23 Lechner observed, you can -- both sides can be in
24 a real bind depending upon what that crazy trial
25 judge does and when that crazy trial judge does

1 it. So these questions have to be addressed as
2 early as possible.

3 MR. MADERER: Thank you, Judge.

4 Judge Kugler, following up. To what
5 extent is there communication between you and the
6 magistrate and the district judges in Camden
7 concerning a sticky expert issue that you may have
8 uncovered during the course of either a pretrial
9 conference or at an earlier stage of case
10 management so that you're, in a sense, working in
11 tandem in alerting that trial judge as this
12 approaches a trial date there is going to be an
13 issue here regarding expert testimony.

14 JUDGE KUGLER: It is an issue we
15 always discuss at the pretrial conference. We ask
16 what kind of in limine motions there are. We talk
17 about the experts. We try to sort out some of
18 that stuff there. But if it becomes clear there
19 is going to be need for a hearing, I'll give dates
20 when briefs must be filed and things of that
21 nature. Of course, I'll move the district judge
22 that this is coming in Camden. The magistrate
23 judges generally do not do the Daubert hearings
24 except on very rare occasions. We'll do it on a
25 report and recommendation basis.

1 But there is a lot of communication
2 with the district judge to alert, in Camden it is
3 him, of all the in limine motions that are coming
4 and when they're coming. But we try -- the judges
5 in Camden almost always will do them well in
6 advance of trial. So that you have some idea as
7 to what is going to happen to your expert.

8 You should also be aware that, as
9 Judge Lechner intimated, if your expert gets
10 tossed after one of those hearings, you may not
11 have an opportunity to get a new one. So a lot is
12 riding on that hearing.

13 MR. MADERER: Thank you.

14 Judge Lechner, obviously the
15 admissibility issue is equally applicable in a
16 bench trial as well as a jury trial. Assuming
17 you're in a bench trial, how do you distinguish
18 your judicial role of deciding admissibility from
19 your factfinding role of passing on the
20 credibility of an expert witness? Or don't you
21 see a difference?

22 JUDGE LECHNER: Obviously, the same
23 standards apply but one is going to run into the
24 other. You're the factfinder.

25 Years ago in an aircraft litigation,

1 antitrust case, we had a 104 hearing about an
2 admissibility of an expert's testimony. It was a
3 long hearing. It went on two days. Maybe even
4 into the third day. Into the afternoon of the
5 first day. This fellow was just not answering any
6 questions. You'd ask him to admit that the sky
7 was blue and he'd go into a 20 minute dissertation
8 it's really black in deep space, as you get
9 closer to the earth with the sun in the horizon it
10 turns blue. That is the way he was answering most
11 questions in the morning and in the afternoon.

12 Finally, I turned to him, "Do you
13 understand why we're having this hearing?"

14 He said, "Yeah."

15 I said, "It concerns whether this
16 testimony you want to offer is going to get into
17 trial."

18 He said, "I understand that."

19 I said, "Do you also understand at
20 some point I'm going to have a rule on your
21 credibility?"

22 He said, "Yes, what's your point?"

23 "To this point you've not been
24 credible."

25 (Laughter.)

1 JUDGE LIFLAND: Judge Lechner has to
2 learn to speak his mind.

3 (Laughter.)

4 JUDGE LECHNER: Judge Lifland likes
5 to do it of two or three days. After a day of it,
6 it gets tiring. It does slump over and it does
7 have an impact on a bench trial. Obviously, on a
8 jury trial, it doesn't because I'm not the finder
9 of fact.

10 I think the experts have to be
11 alerted to that if it is a bench trial. Not a
12 different standard per se but that judges that one
13 person, jury is going to make that determination.
14 Even if that gets in, it is going to impact on
15 what will happen later on during the course of the
16 trial.

17 I think it is absolutely crucial in a
18 bench trial how is that approached and has to be I
19 think even more constrained at that point with
20 regard to being frank and responding and
21 developing credibility. Keep in mind the 104
22 hearing with a jury trial is outside the hearing
23 of a jury. So a lot of missteps can take place
24 there. Not hurt the credibility of the expert.

25 MR. MADERER: Thank you.

1 Dan Dooley, you've testified, I'm
2 sure, in a number of trials and hearings and
3 retained as an expert. Have you been put to the
4 test on the issue of the reliability of your
5 report, that is, the methodology and manner in
6 which -- the manner in which you prepared your
7 opinion and how it is backed up by the kind of
8 industry or accounting expertise that you offer?

9 MR. DOOLEY: Short answer is yes.
10 You should be in every case if the opposing side's
11 counsel is doing his or her job. There are
12 degrees of this. I can speak from experience in
13 my area but I think this transports pretty well
14 over to others.

15 If I'm testifying about matters that
16 deal with accountancy, the ability for me to
17 support those opinions is pretty rock solid. We
18 have a body of generally-accepted accounting
19 principles. There are generally-accepted auditing
20 standards. I can say something and I have a
21 picture to prove it. You can take a selection out
22 of literature. And the calculus in a lot of the
23 accounting that goes on is pretty well able to be
24 demonstrated to be a standard methodology that has
25 to be followed by everyone. That is why they call

1 it generally accepted.

2 When you're dealing with projections
3 in this case you begin to blend both accounting
4 and assumptions about outcomes of future events.
5 It is an area where the accountants try to do it
6 every day. If you think about it, business are
7 always making assumptions in their budgets, in
8 their forecasts.

9 Just to bring it to this particular
10 case, a potential fatality I *thought ought to be
11 tested was the fact that this expert may not have
12 the capability to evaluate the reasonableness of
13 an assumption in either the donut manufacturing
14 business or in E commerce business. So the way
15 that you begin to test the reliability of the
16 expert's methodology for evaluating assumptions
17 becomes a subset of the methodology.

18 When you begin to pull accounting
19 experts out of what they are expert in and there
20 is always the temptation to have them become
21 general business experts, experts in interpreting
22 business law, experts in interpreting a controlled
23 surrounding of the company's business itself, the
24 further you march them on that limb, the more
25 easily it is to saw it off.

1 This is something that you do between
2 the expert and the counsel to make sure that you
3 don't -- that you reach and you grasp, are sort of
4 in sync here. My rule of thumb is, if it is
5 dealing with a matter of the business, itself,
6 since I've never operated a business in my life,
7 you ought to get another expert.

8 I've only been in the business of
9 accounting for all my life. If it is dealing with
10 the matter of analyzing the results of the
11 operation of the business, forward-looking
12 projections within the ken of that expert, then,
13 yes, I would hold myself out as qualified and I
14 would fiercely defend the reliability of my report
15 within those grounds. I think I would win more
16 often than not.

17 If I was pushed further out, I would
18 usually warn the counsel they're probably going to
19 get cut off at the knees at some point.

20 MR. MADERER: Thank you.

21 Brief comment.

22 MR. MEISEL: Brief comment.

23 When you're working with a Dan Dooley
24 who is meticulous about staying within his area of
25 expertise, it is very helpful because it points

1 out that danger in the road ahead. Having
2 listened to the judges' attitudes and they're the
3 ones who have to make the decision on
4 admissibility, I think from a trial tactic
5 standpoint, when it comes down to an issue and
6 possibly a close question on reliability, I think
7 what we're hearing the judges say this morning is
8 that there is a relationship in their minds
9 between credibility and reliability.

10 I know that the lesson that I would
11 take from that is, I'm certainly going to, in my
12 direct examination, bring out the weaknesses and
13 deal with those on the issue of reliability
14 because I don't want these judges to think I'm
15 hiding the ball on them and I'm going to rely on
16 the liberal standard of admissibility that the
17 Third Circuit has set down and I'm going to hope
18 at the end of the day if there is a close
19 question, the judge may say -- I may not agree
20 with the conclusion. It may be in doubt. I may
21 disagree with it but in terms of admissibility, I
22 find there is sufficient reliability. So I think
23 those are very much aligned concepts, credibility
24 and reliability that we as trial lawyers should
25 deal with that frontally.

1 JUDGE LIFLAND: Mike, in the Third
2 Circuit case where I got reversed, the Court said,
3 after saying it didn't matter, that the expert
4 ignored the only objective test for reaching a
5 particular result, said, "This is an issue of
6 credibility. Not of admissibility."

7 So I do think the Court of Appeals
8 will try to draw that line and, therefore, we must
9 draw that line to some degree.

10 MR. MADERER: About 15 years ago I
11 was trying a criminal case against Joe
12 Braunreuther who I think I saw earlier and now
13 Superior Court Judge *Melvacoff as of yesterday, I
14 was doing a cross-examination of a witness. I
15 turned to look at my co-counsel -- I thought it
16 was going pretty well. I turned to look at my
17 co-counsel who gave me a signal like this. I just
18 received that signal from Mike Himmel. So this
19 will conclude our presentation. I hope you found
20 it informative.

21 (Applause.)

22 MR. MADERER: We're going to take
23 about a ten-minute break but that is about it.

24 Thank you.

25 (Recess.)

1 *(Light, wise, Wolfson, role Nick,
2 Wolin, John Pendleton. Coffey)*

3 MR. HIMMEL: If everyone can take
4 their seats on this side and that side of the
5 room.

6 If everyone could come in and get
7 seated, please. We are going to start off with a
8 very brief report from the Historical Society and
9 Magistrate Judge Ronald Hedges will give that
10 report. Judge Hedges.

11 (Applause.)

12 JUDGE HEDGES: Good morning.

13 I just want to take a minute to tell
14 you what your Historical Society is going to be
15 doing in the next few months. I also want to
16 remind you, and you may not be aware of it, that
17 every one of you is a member of the Society.
18 There is an open membership.

19 The Society has commissioned the
20 history of the court that is going to be done by
21 several historians. They're beginning to work on
22 that now and some of them are probably going to be
23 asking to interview various judges and attorneys.
24 We'll be in touch with people later on about that.

25 The first portion of this book is

1 going to be completed by the fall. The board of
2 directors is planning a cocktail party sometime in
3 October at which time a summary of the first part
4 of the history is going to be presented to the
5 Society. So I hope we see all of you in October
6 and thank you for all the support you've given us
7 in the last few years in getting the Society going
8 again. Thank you.

9 (Applause.)

10 MR. HIMMEL: And now for the class
11 action panel. I'd like to introduce our moderator
12 Jeff Greenbaum. Jeff is a senior litigation
13 partner at the law firm of Sills, Cummis. Jeff is
14 also co-chair of the ABA section of Class Actions
15 and Derivative Suits committee. Jeffrey.

16 MR. GREENBAUM: Thank you, Michael.

17 Good morning, everyone. This morning
18 we're going to examine where we come in the class
19 action practice since 1966 when Rule 23 was first
20 adopted in its present form and where we may be
21 going as we enter the new millennium.

22 In 1966 when the present form of Rule
23 23 was adopted, the advisory committee at that
24 time noted that it did not believe that a class
25 action could be used for a mass accident because

1 of all the individual issues that would result.

2 Today, class actions have grown
3 beyond traditional securities and antitrust cases
4 and the occasional class civil rights case to
5 broad-reaching mass tort cases encompassing
6 asbestos claims, exploding fuel truck tanks,
7 firearms, tobacco, breast implants, latex gloves,
8 phen-phen and a myriad of other claims.

9 We have class actions involving
10 employment discrimination, health care,
11 environmental contamination, broad-reaching
12 consumer claims, challenging everything from
13 spring break vacation scams to computations of
14 consumer interest on credit cards.

15 We even have class actions seeking to
16 recover assets taken from victims of the
17 Holocaust. Those seeking to redress torture
18 victims of President Ferdinand Marcos of the
19 Philippines and also challenging slave labor
20 conditions on the island of *<SAOEUP>pan where
21 many garments are manufactured for the United
22 States.

23 Whatever you think of this class
24 action explosion, I think it is safe to say that
25 class actions have certainly evolved beyond what

1 the drafters envisioned in 1966 when they drafted
2 Rule 23. Not only have class extension actions
3 extended their arms to many aspects of our
4 society, they have also become unprecedented in
5 size.

6 There are many class actions which
7 involve millions of class members. Indeed, there
8 are probably few people in this room who can say
9 they never received a class action notice. We've
10 heard of settlements in the billions of dollars
11 including two that are pending before two of our
12 panelists. And we've also heard of attorneys'
13 fees in the hundreds of millions of dollars. As
14 you might expect, with settlements and
15 particularly attorneys' fees of that size, these
16 cases and our profession have become the
17 profession of much comment in the press as well as
18 criticism. Today is no different. If anyone has
19 seen this morning's New York Times, again lawyers'
20 fees become an issue in the press. The complaints
21 many times focus on the size of attorneys' fees.
22 It is argued that attorneys are simply getting too
23 much for the kinds of benefits that go to the
24 class members.

25 There are other complaints that the

1 courts simply do not get sufficient information
2 when they are asked to pass upon settlements and
3 make proper judgments. When they're asked to
4 approve a settlement that may otherwise free their
5 docket from crippling litigation.

6 While there are many who view class
7 actions as really the only form of redress for
8 many citizens who would otherwise have no redress,
9 there are still others who look at class actions
10 as lawyer-driven attacks on corporate America. As
11 a result of all this public attention, Congress
12 has also gotten into the act. Class actions have
13 been the subject of Congressional action four
14 times in the last five years. Twice involving
15 securities class actions. Once involving Y2K and
16 most recently, a Bill has passed one house to
17 federalize virtually every large class action.
18 Class actions are also the subject of attention by
19 the Advisory Committee which is meeting in two
20 weeks to again look at Rule 23.

21 This morning we're going to look at
22 many of these current issues and we will examine
23 from a practitioner's standpoint how these cases
24 are guided through our courts. We will look to
25 the court's role in supervising and selecting lead

1 plaintiffs and lead counsel. We will look at case
2 management issues. We will look at the current
3 battle grounds on class certification, on
4 settlements and, of course, at attorneys' fees.

5 I'm delighted that we've been able to
6 put together a blue ribbon panel this morning and
7 I will now proceed to introduce our panelists. To
8 my extreme right, not as pointed out in political
9 philosophy, we have Allyn Lite of Lite, DePalma,
10 Greenberg and Rivas. Allyn, many of you know, is
11 our former Clerk of the Court. He's also been a
12 reporter of the rules committee for our local
13 rules and the author of our bible, the New Jersey
14 Federal Practice Rules, and he's also a very
15 active plaintiff's lawyer in the class action
16 field.

17 Next to Allyn, we have Melvin *Wise.
18 Mel is probably one of the foremost and most
19 successful plaintiffs' lawyers in the United
20 States. He's the senior partner in the firm of
21 *Milberg, Wise, *PWER <SHAD> <PAOEUPBS> and
22 *Lorrack.

23 Mel is also lead counsel in the
24 Prudential case pending in this district. He's
25 also counsel in the Holocaust recovery actions.

1 Next to Mel we have a United States
2 Magistrate Judge, Freda Wolfson, representing,
3 again, our central vicinage. I won't say our
4 Southern District. That has not yet happened.

5 Next to our Magistrate Judge, we have
6 United States District Judge Alfred Wolin. Judge
7 Wolin has been the recipient, I guess, of the
8 Prudential life insurance policy holder
9 litigation. He has been blessed with that case
10 for many years. And he'll get a chance to speak
11 about that a little later.

12 Next to Judge Wolin, we have Lawrence
13 Rolnick of the Lowenstein, Sandler firm. Larry is
14 also the chair of the State of New Jersey
15 Committee on Securities Litigation.

16 Next to Larry, we have John Pendleton
17 of McCarter & English. John has been a real good
18 citizen. He is Sheila *Birnbaum for the day.
19 Sheila had called yesterday that she was called
20 out to California and had to cancel and she found
21 a very able substitute. As of six o'clock last
22 night, John was our new panelist. John has been
23 active handling a huge class action for
24 Metropolitan Life and we thank him for his last
25 minute appearance.

1 Next to John, we have professor John
2 C. Coffey, the he did borrow professor of law at
3 Columbia Law School. You will hear more about
4 Professor Coffey later during lunch. *Feebly (?)
5 but not least we have Judge William H. Walls of
6 our United States District Court in Newark.

7 Judge Walls, among his many
8 credentials, is the presiding judge in the Cendant
9 class action litigation.

10 I'm sure you'll all agree that we
11 have put together quite a group here. Without
12 further ado, we'll get to our program.

13 First, we will start with an overview
14 of current developments by Professor Coffey.

15 (Applause.)

16 MR. COFFEY: Good morning.

17 My marching orders are to give you a
18 ten-minute overview of everything that is big AND
19 important but not to get too specific because that
20 will preempt all the other people who have to
21 really deal with these issues in detail. Now ten
22 minutes to cover everything. That is fairly
23 heroic. It requires me to resort to what we
24 academics sometimes call the bikini theory of law
25 teaching. Under the bikini method you covered the

1 critical point but only just barely.

2 (Laughter.)

3 In fact, when *it was* discovered,
4 I'll probably use *<SAPB> <TROE> pay method, much
5 is going to be left uncovered. But it is a
6 generalization. I would say that the most
7 important doctrinal development in class action
8 practice over the last three or four years is that
9 it has acquired a quasi-constitutional dimension.
10 In two important decisions. I won't get deeply
11 into their doctrinal nature.

12 Camp product *<WERS> he is
13 {win|within} sore* and this year in *Ortez versus
14 Fiber Board, the Supreme Court has rejected
15 settlement class actions covering broad nationwide
16 class and it has done so finding that the rules
17 and criteria for a settlement class action
18 basically have to be the same as the standards
19 applicable to a litigation class. There is a
20 small exception for manageability but I'll leave
21 that to others.

22 Now, put differently, what this means
23 is that the fact that a settlement is fair,
24 adequate and reasonable doesn't in any way resolve
25 the question of whether it is certifiable. To be

1 certifiable a class has to meet the standards of
2 basically Rule 23 and specifically for a money
3 damage class action Rule 23(b)(3). That rule
4 which particularly requires a finding of what is
5 called predominance. Namely, the common issues of
6 law or fact predominate over individual issues of
7 law and fact can no longer be satisfied by finding
8 that the settlement is overwhelmingly fair.

9 Prior to *Ampere it was possible for
10 many courts to say, well, the overwhelming
11 predominating issue is fairness to settlement.
12 Since I find it fair that resolves many other
13 things. That is exactly what, at a minimum,
14 *Amcam has rejected. We have to independently
15 find, even in the case of a settlement class, that
16 the action has what the court called sufficient
17 class cohesion. It got that idea partly from the
18 predominance requirement but it generalized it.

19 That idea of class cohesion probably
20 extends outside of Rule 23(b)(3) and appears in
21 the adequacy of representation requirement of Rule
22 23(k)(4). So that as a matter of due process it
23 has to be sufficient class cohesion before a class
24 can be certified.

25 What does that mean practically? I

1 think it means practically that certain *sizes of
2 sprawling class actions covering large varieties
3 of class members. Large varieties of somewhat
4 dissimilar defendants, particularly in a mass tort
5 setting, are going to be very hard to certify
6 unless much more legal engineering is done to
7 structuring subclasses, separate counsel and
8 separate negotiations.

9 It requires transaction planning at
10 the settlement stage as elaborate as you might see
11 in a large measure. Not the *con<EPBS>(concerns)
12 that classes can never be certified because they
13 are large but, rather, that much more planning
14 must go in. Much more design considerations have
15 to be thought out at the settlement stage as to
16 who is representing whom and how they're going to
17 negotiate the settlement using separate counsel
18 and having no one having a conflict.

19 That is just a generalized statement
20 that the predominance requirement probably is
21 going to have some implications outside of simply
22 Rule 23(b)(3) and is going to require significant
23 process thought and planning in terms to avoid
24 what the Court sees as conflicts within the class
25 or within counsel.

1 Now, let me not get to the doctrine
2 further and talk about the response, the
3 incentives and what is happening.

4 I would say the response to *Amcam
5 has been the usual phenomenon of some envision and
6 some adaptation. Right away some class actions
7 migrated to State Court in order to avoid the
8 seeming requirements of Rule 23 and to some extent
9 they were successful.

10 Some other class actions sought to
11 migrate from Rule 23(b)(3) to other sections of
12 Rule 23. That is, lawyers try to certify classes
13 under 23(b)(1)(B) which is the limited fund class
14 action section or they tried to certify them under
15 23(b)(2) which permits certification of equitable
16 injunctive classes.

17 So if you screw in some equitable
18 relief, an injunctive relief that said was
19 secondary, your Honor, could you certify under
20 this section, the advantage being, if there is no
21 predominance requirement, no opt-out rights and
22 not the same notice requirements under the (b)(2)
23 or (b)(1), making it a simpler process, one would
24 think *<check <KEB> where you hear developments
25 since *Amcan have begun to curtail those options.

1 First of all, as you just heard,
2 Congress has already preempted most securities
3 class actions or at least securities class actions
4 based on a 10b-5 sort of theory involving purchase
5 and sale of securities from State Court or from
6 Federal Court to the extent you're relying on a
7 state law or common law theory. So that has
8 forced those actions back into Federal Court.

9 Similarly, this is a newer trend and
10 it hasn't yet been clearly in the Second and Third
11 Circuits but it is very difficult in our Circuits.
12 Courts have adjustmmented the standards under Rule
13 23(b)(1) and 23(b)(2) and made them more
14 consistent with 23(b)(3). That is what they said.
15 A related decision was the *Seventh Circuit
16 decision in Jefferson International. That any
17 time you have an action that is seeking more than
18 incidental money damages, you are going to have to
19 give a rate to opt out, you're going to have to
20 have a showing of class cohesion that is about
21 *similar to what the predominance requirement
22 would require and you're going to have to give
23 about the same level of notice.

24 So the ability to evade some
25 requirements by shifting to a different section of

1 the Rule, that may be closing down. Although that
2 is still an open and developing question.

3 So what are the big doctrinal
4 questions which are apparently going to resolve
5 and *TEPBL> you about. This panel, I'll identify
6 three, each of which can be debated from both
7 sides.

8 First of all, the issue future
9 claimants. This is pretty much limited to the
10 mass tort concept. Mass tort and certain kinds of
11 environmental actions, for example, where you have
12 people who have been exposed and are asymptomatic
13 today but may develop illness in the future.
14 Where certain things might happen in the future
15 due to environmental problems.

16 In that kind of *setting, it is clear
17 that the Supreme Court has not yet decided that
18 future claimants can be represented so their
19 rights can be resolved today even though their
20 injuries won't mature in 30 years from day. It
21 may be this can be done one straw in the wind. A
22 very important pending settlement in the phen-phen
23 settlement down in Philadelphia. I don't want to
24 talk about this specifically because I'm involved
25 in that one. I have to disclose that. But

1 phen-phen does try to certify a class for future
2 claimants by structuring in delayed opt-out rights
3 so that individuals whose position deteriorates
4 over time get rights to opt out of the class at
5 that later movement, ten or twenty years later
6 when their condition deteriorates. That is again
7 an attempt to deal with the uncertainty of the law
8 by using opt-out rights and a right to exit as a
9 substitute for simply perfect adequate
10 representation at the time of the original class
11 certification.

12 So issue one that I think is hovering
13 over this field is, can future claimants be dealt
14 with today in class action, and if they cannot,
15 defendants really do not have the option through
16 the class action of securing the global peace they
17 desire. Defendants may instead want to use
18 alternative *devices such as bankruptcy.

19 Other questions. Does Ortiz really
20 put to rest -- the panel will have to answer if it
21 is too hard for me -- does Ortiz really put to
22 rest the nonopt-out class action?

23 Is it possible that a mandatory class
24 where you're dealing with money damages, what *--
25 within whatever a limited fund rational be used by

1 a corporation that sees liabilities greater than
2 its net worth. There may be a slimmer -- slim
3 glimmer of hope around the *edges. Clear the
4 nonopt-out money damages has been severely reduced
5 in its importance after Ortiz. *CHECK last
6 doctrinal question.)

7 Subclass. *Amcam seems to suggest
8 that you need subclasses when there are important
9 material differences. I think there are possibly
10 alternative theories of what *Amcam really means.
11 I think probably *Amcam and Ortiz really mean when
12 you can *test exploding one subclass against
13 another and using the plaintiff's attorney to
14 subordinate one subclass to the other, then
15 subclass is required.

16 I amphasize that interpretation
17 because if a strict, rigorous interpretation of
18 *Amcam is applied to the contemporary class
19 action, I see a problem. I see a future in which
20 the class action would become increasingly
21 vulcanized. There would be so many subclasses
22 that it would not be an effective form. You would
23 have a half dozen subclasses with different
24 counsel and negotiations. Among them would look a
25 lot like a political convention which doesn't

1 reach an easy decision very quickly. I can say
2 that in this primary year without being corrected.

3 Subclasses has a problem in it.

4 There is a point when excessive number of classes
5 does produce a vulcanization of the class which
6 could reduce the effectiveness of the class action
7 as an organizational form. Okay.

8 What else is going on before I finish
9 up?

10 First of all, notice how the size of
11 class action settlements has increased in just the
12 last couple of years. This is probably the most
13 significant phenomenon for the immediate future.
14 Two or three years ago the largest class action
15 we've seen was the NASDAQ class action settling at
16 1.1 billion. At least a money damage class
17 action. Since then we've *den <TOERB>ebb 2.1
18 billion. Senate here in New Jersey over 3
19 billion. Phen-phen, 3.5 billion and possibly the
20 *<SROL> contain necessity * for the immediate the*
21 *Engel class action in Florida where a Florida
22 jury is being asked to consider numbers as large
23 as -- punitive damages of 50 to \$100 billion and
24 legislation is being passed rapidly in states
25 around the country. That is a phenomenon that has

1 political significance.

2 Now, coming back to the area where
3 many of you practice securities class actions.
4 Talk about developments here. Obviously, many
5 people on the panel who know about current
6 **<KWOPLT>s on securities class actions but after
7 an initial decline in 1996 following the passage
8 of the **Prodas *territory litigation* and form
9 Act *(Private Securities Litigation Reform Act)*,
10 securities class actions do *two things.* Balance
11 the number and for a while, they migrated to state
12 court. That migration to state court, which I
13 thought was short-lived and modest anyway, has
14 been ended by a Congressional edict. There will
15 be no more securities class actions covering at
16 least 10b-5 kind of claims in state court.

17 Securities class actions rose
18 markedly in '97 and '98 and then something
19 happened last year. For the last six to eight
20 months, the data shows there has been a
21 significant reduction in *<SKWRURTS> class
22 actions. The *Nero data goes down about eight a
23 month, particularly down on the West Coast,
24 particularly out of California after a decision
25 called Silicon Graphics. That leads to an irony

1 that I just want to leave you with. At the time
2 of the '95 Act, probably the *toughest pleadings
3 in the Second Circuit, the Third Circuit was not
4 markedly different. Now there has been a wave of
5 decisions in maybe six Court of Appeals to find
6 out if the Second Circuit, which hasn't changed
7 the standards, and the Third Circuit is basically
8 in the decision, copied the Third Circuit
9 pleading, standards are now probably the most
10 liberal or easiest to satisfy pleading standards
11 of the recent Court of Appeals' decisions whereas
12 much harder standards apply out in the Ninth
13 Circuit and some other Circuits. It may have a
14 consequence.

15 I suggest to you that the form of
16 choice in the near future for plaintiffs'
17 securities class action is likely to be back in
18 the Second and Third Circuits and likely to be
19 away from the Ninth Circuit with the Silicon
20 Graphics case. We may be seeing a class action in
21 the '90s went West, coming back East. That should
22 at least make for busy times for all of you.

23 Without going any further, I think my
24 ten minutes has expired and I'll turn over all
25 these difficult issues for our panel to solve.

1 Thank you.

2 (Pause.)

3 MR. GREENBAUM: Thank you, Professor
4 Coffey.

5 The first issue we're going to talk
6 about. As these cases become larger and larger,
7 there is a sense that as the class representative
8 is a fiduciary and a fiduciary for many, many
9 people, the court should have some further role in
10 supervising the selection of the class
11 representative and his counsel. Now, that duty is
12 imposed on the court in the securities area by the
13 Private Securities Litigation Reform Act. That is
14 where most of this has been litigated now. But it
15 is not, as you'll hear from the panel, it is not
16 limited to the securities area.

17 We'll start with looking at the
18 securities area and the selection of lead counsel
19 and the plaintiff. The first question I'd like to
20 ask to our panel. I'd like to address this to
21 Allyn Lite. The issue of lead counsel and lead
22 plaintiff, is this an issue that we're going to
23 see hotly contested before the courts or is this
24 the kind of thing that responsible plaintiff's
25 counsel get together on, agree, and then come to

1 the court with a united front and say, here's our
2 selection and clearly qualifies and it is a pro
3 forma issue?

4 MR. LITE: Well, historically that is
5 exactly what happened. That qualified counsel got
6 together and worked these issues out to the great
7 benefit of the number of constituencies, the class
8 No. 1, the court and the process, itself.

9 What happened with the passage of the
10 PSRA is, suddenly, counsel are pitted against one
11 another to the detriment of the process and to the
12 detriment of the class and to the detriment of the
13 process. I think that timing is the key to all of
14 this.

15 Before the passage of the ACT when
16 securities cases were filed, usually within ten
17 days or so or two weeks of these cases being
18 filed, the plaintiff's lawyers got together and
19 worked out an organization of counsel. They would
20 go to the court. Present it to the court.
21 Invariably, the court would find that counsel were
22 qualified and we'd go ahead and allow the case
23 immediately to go forward. With the passage of
24 the statute, you have to wait 60 days. At the end
25 of the 60 days, someone brand-new can come in that

1 never filed a case before and say, I want to be
2 the lead plaintiff. Counsel could then come in
3 and say, I want to be the lead counsel. And then
4 there is collateral litigation over that issue.
5 Who suffers? The class because there is delay
6 involved.

7 There is a case that was just
8 decided, the third opinion finally came down on
9 February 4th in the Northern District of
10 California, a case against a defendant called
11 *Sidell . Judge Ron Walker in California has now
12 written three opinions determining who should be
13 the lead plaintiff and who should be the lead
14 counsel. The case was filed in 1998. Mind you,
15 nothing has happened in this case since 1998
16 because there has been litigation over the issue
17 of who should be counsel and who should be
18 plaintiff.

19 I would suggest to you that the old
20 way where counsel got together, worked the
21 situation out, went to the court with an
22 agreed-upon organization of counsel allowed the
23 cases to move much faster. The PSLRA has worked
24 to the detriment of the plaintiff class and
25 certainly to the detriment of the process.

1 MR. GREENBAUM: Thank you, Allyn.

2 We've also seen a preference in the
3 PSLRA for the institutional plaintiff.

4 The statute says basically in a
5 sense, the biggest plaintiff should really get the
6 job. There has been a split of cases as to
7 whether plaintiffs can aggregate and come in with
8 a group of all investors that ultimately totaled
9 10, 20, 30 percent of all the shareholders.

10 I'd like to ask Mel *Wise, where do
11 you see the courts going on this issue, is it just
12 going to be the institutional plaintiff that is
13 going to get the preference? Will still groups be
14 able to aggregate and come in with the most power
15 in number of shareholders?

16 *MR. WISE: Look, the statute speaks
17 in terms of the largest stakeholder or interested
18 plaintiff. Presumptively plaintiff. It also
19 states that a group can fill that role.

20 What we see is an original attempt to
21 stop a race to the courthouse turn into an open
22 frenzy of solicitation for 60 days. The lawyer
23 who puts in the original work product developing
24 the case files a complaint and can be
25 disenfranchised from any role in that case because

1 somebody else comes in, not even with his or her
2 or its own Complaint, but merely by a motion to
3 intervene in the original lawyer's work product.

4 So what happens is, we have an open
5 game. Everybody and his or her brother or sister
6 can wind up coming in and taking over the case. It
7 was a natural consequence that lawyers were going
8 to try ways into this opportunity. So the law
9 says you announce in a financial publication of
10 nationwide distribution, which could be the
11 Internet, the fact that you filed a case.
12 Everybody who files a case, files a notice
13 inviting other people to come in. All kinds of
14 people start contacting you. Smaller investors
15 who lost, bigger investors who lost. Ones whose
16 losses may not be as big as the others but their
17 own personal net worth are far more significant.

18 As an example, *Self Star case, which was
19 one of the earliest of this type, my client had a
20 million dollars loss. My client -- this was about
21 50 percent of her net worth. Some institution had
22 a \$14 million loss. It was a very small fraction
23 of its net worth. So who has the biggest interest
24 or stake? Theoretically, *in that case.

25 In addition, there are all kinds of

1 other questions concerning what motivation some
2 institutions have to bring these actions versus
3 whether the individual's motivations. Do some of
4 these institutions who come in to take over these
5 cases have been open and *allowed critics of the
6 whole system. So what happens is, lawyers put
7 together groups. Sometimes you have factions or
8 axes of different kinds of groups. You have one
9 group of lawyers here. One group of lawyers
10 there. Each of these groups have dozens, if not
11 hundreds, of individual clients.

12 The first time they tried this
13 aggregation, courts -- some courts would say yes,
14 some courts would say no. The SEC came in and
15 said, you shouldn't have that big a group. The
16 group shouldn't be amorphous. There has to be
17 some control. So lawyers started to develop a
18 structure for their groups. They have committees
19 *pointed of clients. Now, keep in mind -- these
20 committees will then be vested with the authority
21 to act on behalf of this subject group within the
22 class action, which is already an aggregation type
23 process.

24 So all of these things are evolving
25 and hang in the natural consequences of an Act

1 that was ill-conceived in the first place. It
2 gives every advantage to the defendant. All of
3 this that I just described is happening even
4 before class certification. So a lead plaintiff
5 can be chosen by the court because it is
6 presumptively the largest stakeholder and we don't
7 even know if that institution will be capable of
8 carrying the ball as class representative. They
9 may have conflicts. These institutions, we don't
10 even know what is in their files. We don't know
11 what kind of contacts they had with the defendants
12 before they made their investments. What kind of
13 dialogue was going on. Consider them as class
14 representative. All evolving. Quite frankly, I
15 think what courts have to do in these situations
16 is use common sense approaches and try to get
17 control of these situations by having lawyers, who
18 they know are capable, representing clients
19 sometimes like Judge Bryant did in the Oxford
20 case. The judge will say, I'll have one from
21 Group A and one from Group B and one from Group C.
22 So there will be an institutional representative.
23 There will be someone who has a group of
24 individuals who are part of the class and then
25 maybe some other type. *(Check before. (

1 The point is, most of these cases are
2 not going to be appealed. You want to handle
3 these things efficiently. I would not go for the
4 viewpoint that you have to use Rule 23 in the
5 hyper-technical manner. If you do, you're going
6 to lose the whole purpose of Rule 23 which is to
7 give people, who otherwise would have no access to
8 the courts, to get remedies. An ability to get a
9 remedy and to give the defendants a useful tool to
10 get rid of a major problem in a not-too
11 complicated manner.

12 MR. GREENBAUM: Thank you.

13 On the subject of conflicts I'd like
14 to ask Professor Coffey if we have a preference
15 for the institutional investor and we have to be
16 careful to avoid conflicts, how is the new ABA
17 resolution from February, which has now made it
18 unethical for lawyers to make political
19 contributions to seek legal work, how is that
20 going to impact?

21 MR. COFFEY: Let me answer by taking
22 it back half a step. We don't all agree on this
23 panel. I want to give a slightly different
24 perspective.

25 The SEC has filled an amicus brief in

1 several securities class actions. It now takes
2 the position that an aggregation of more than
3 three to five plaintiffs, unless they're part of a
4 family group or other organization, is
5 presumptively inappropriate. In other words, a
6 strong position that the SEC takes, contrary to
7 aggregation.

8 Why do they say that? Why do some
9 courts agree? You'll see the stronger statement
10 of this in a decision called In re Baam, B-a-a-m,
11 securities litigation which sets forth the SEC
12 amicus brief as an appendix. It is on Lexus.

13 They go to a sentence in the
14 legislative history. A controversial sentence
15 that people on this panel can certainly disagree.
16 Sentence that says it was the intent of client to
17 substitute client-driven litigation to
18 lawyer-driven litigation. Those are incendiary
19 words. Idea is that aggregation has probably
20 become disfavored.

21 I think there are many traditional
22 plaintiffs' firms that are beginning to develop
23 relationships with the institutional bar, the
24 institutional plaintiff, community and
25 particularly public pension funds. We are likely

1 to see the public pension funds growing rather
2 *than <WAEUPBG>*(weaker) over the next couple of
3 years, against that backdrop.

4 I do agree with *Mr. Wise when he
5 says the principal impact procedurally of the
6 Private Securities Litigation Reform Act is that
7 it probably has slowed down the pails of
8 securities litigation. The first eight months to
9 a year probably is devoted to organization of the
10 plaintiff's team and that does slow things down,
11 add to cost and make the action hang out there
12 with uncertainty for everyone.

13 I do think the future is probably
14 aggregation of individuals is declining and the
15 role of institutions is gaining.

16 We have seen in the Oxford case a
17 judge try to compromise by putting some
18 institutions and some individuals -- it is a funny
19 idea though because the compromise struck in
20 Oxford Health was that the State of Colorado
21 pension, which found about eight or nine
22 percent -- seven or eight percent of the class was
23 made *(up of) one of a three member team with the
24 other two members of the team each owning
25 something like .1 or 2 percent.

1 As a result, you have a triumvirate
2 of three plaintiffs working by majority vote and
3 that makes the largest shareholder by tenfold a
4 minority member of this partnership. I think that
5 does reduce with the statute's intent the role of
6 the dominant lead plaintiff.

7 You asked me a simple question, which
8 I have so far avoided. I think it is going to be
9 a subject of repetitive litigation at this stage
10 whether or not the particular lead plaintiff if it
11 is run by an elected public official, has been the
12 recipient of campaign contributions by any of the
13 attorneys. I just can't imagine that in this
14 competitive world a plaintiff's attorney, who
15 wants control of this action and thinks it is
16 being preempted because some other institution has
17 come in lately, will not seek to investigate and
18 obtain discovery as to whether or not there is any
19 kind of relationship, political contributions that
20 might violate the ABA rule. It evidences that
21 that could lead to doubt about the adequacy of the
22 representation and it could lead to a finding of
23 an ethical violation. We've not only seen the ABA
24 rule adopted at the ABA, New York, there are
25 already some indications *that the State Courts

1 will deem that to be an existing ethical violation
2 if the contribution was made for the purpose of
3 obtaining business which is different than what
4 the ABA rule requires. So there is discovery.

5 There is this, sometimes a lot of
6 ugly food *bite (fight) within the plaintiff's
7 camp. I think it will focus very heavily on what
8 kinds of contributions have been made where the
9 pension fund is run by a political elected
10 official where it is in New York but not other
11 states.

12 MR. GREENBAUM: We have Judge Walls
13 who has come up with a somewhat novel approach for
14 the selection of lead counsel.

15 Judge Walls, do you want to talk
16 about the building process that you instituted
17 and, also, if you would care to comment on what,
18 if anything, this does to the attorney-client
19 relationship where a client could come in with his
20 own attorney and now you're bidding out other
21 attorneys? What happens to the poor guy who likes
22 his lawyer. How does it work?

23 JUDGE WALLS: They have to play by
24 the rules. With regard to this whole episode of
25 lead plaintiff and lead counsel.

1 I remind all of us that as Professor
2 Coffey indicated, that the purpose of the Private
3 Securities Litigation Reform Act was to
4 concentrate the control of a case in that entity
5 or those entities which had the most financial
6 interest in the outcome. That is Congressional
7 intent which I don't think we can ignore. That
8 was the design as the professor indicated.

9 I think all of us must acknowledge to
10 take control of litigation and place it in the
11 hands of sophisticated clients instead of, as I
12 said, earlier, the earlier discipline, the tail to
13 wag the dog. And also for the second purpose of
14 minimizing costs.

15 With that in mind, then, it seems to
16 me, and it seems to me at the time of Cendant that
17 it was appropriate then to try to minimize costs
18 in cases which, in the main, are settled. Very
19 few security fraud cases are, if what I have seen,
20 have been exposed to even vicariously end up in
21 full battle. They are resolved. So consequently,
22 I thought it was appropriate to follow the lead of
23 Paul Walker in the Northern District of San
24 Francisco to have what I called an adversarial
25 competition in the same manner in which a person

1 selects a lawyer because of his or her skills.
2 Well -- and those skills have been established
3 over trial and other litigation experience.

4 So, to let the adversarial
5 competition take place because we all know in a
6 practical situation that the money is driving the
7 circumstances of whether any of you as members of
8 the firms have certain clients or whether you lose
9 certain clients to other firms. So that is the
10 reality of today's practice.

11 We, therefore, in Cendant, asked and
12 obtained competitive bids from those who wanted to
13 be lead counsel with the right of first refusal
14 being given to the original counsel of whom we
15 later determined -- we had earlier determined to
16 be the lead plaintiff. Consequently, one would
17 have a right to have his original or her original
18 choices to counsel, keeping in mind that even
19 though you're a lead plaintiff, you have to, shall
20 we say, eat a little humility because you also are
21 not representing yourself but you're representing
22 a class.

23 And I think that is salutary in the
24 context that it dealt with at that time,
25 allegation of pay to play which had been made

1 against a firm. And I think it represents what is
2 actually going on today. I think what is quite
3 important from what I've seen in looking at some
4 reported cases since the Act of 1996 -- I ask
5 everyone to look at In re Network Associates.
6 What is driving this little chit-chat we're having
7 and the complaint of the Bar, frankly, is what
8 drove a person to win an academy award. Where is
9 the money? *CHECK.

10 The money is in counsel fees in these
11 matters. So consequently, I would ask that when
12 you read In re Network Associates from West's, you
13 look at what *I tell* my clerks to avoid which I
14 violated that is the introductory sentences
15 because sometimes it misleading but here we have,
16 and I quote, "The District Court held that city
17 pension fund could serve despite prior record of
18 service and failure to seek combative bids for
19 class counsel."

20 I would suggest if you look into the
21 body of the opinion, it is competitive bids.

22 MR. GREENBAUM: Finally -- I'm
23 sorry.

24 JUDGE WALLS: So the thing is, that
25 is what all of this is turning into is a war among

1 and between counsel in this same case which,
2 again, I ask you to read.

3 I'm not quite sure I answered
4 everything you wanted me to say at this time with
5 regard to the virtue of -- a virtue of an auction.

6 I read to you this: "Relentlessly, X
7 and B firms have *traded inflammatory terms of
8 fraud even *as es(?) of criminal conduct *CHECK.
9 Each is unfit the other says to represent a class
10 in this case."

11 That is the camaraderie that is
12 present today in security fraud cases with regard
13 to appointment of counsel.

14 MR. GREENBAUM: We just heard about
15 what happens with the long delay with the courts
16 and the plaintiffs side. What about defense
17 attorneys? Do we get to do anything during this?
18 Do we sit back and watch?

19 Larry Rolnick, do you want to comment
20 on that?

21 MR. ROLNICK: Let me agree with Judge
22 Walls in that what has happened under the Reform
23 Act is that plaintiff's counsel have been doing a
24 splendid job at pointing fingers at each other and
25 demonstrating that the lead plaintiff is not a

1 good representative because the lead plaintiff
2 will not adequately represent the class, that
3 applied counsel are incompetent or subject to
4 conflicts.

5 I'm embarrassed to say its plaintiffs
6 *bar has done a far better job to exposing their
7 weakness than they ever did on the defense side.
8 Having said that, though, defense counsel do have
9 an interest in participating in that hearing. It
10 used to be under the old method that these issues
11 came up in terms of the class certification motion
12 because, as you know, one of the issues that has
13 to be decided in class certification is whether or
14 not the plaintiff is an adequate representative.
15 That ordinarily entails an examination of whether
16 they suffer from conflicts, whether they're
17 subject to unique defenses.

18 The Reform Act has had the effect of
19 moving that portion of the class certification
20 analysis up to the very front of the case because
21 those very issues are being decided when the court
22 determines who should act as the lead plaintiff
23 and who should act as the lead counsel. So, in a
24 way, tactically speaking, by the time you get
25 through the initial process under the new

1 Securities Reform Act, the decision has already
2 been made on that element that this person is an
3 adequate plaintiff. So defense counsel has an
4 interest in being heard.

5 Moreover, the defendant often has
6 information that bears on that subject that is
7 unique. Frequently, there is a business
8 relationship of some kind that has given rise to
9 the class action and the defendant is in a
10 position to say whether or not there are unique
11 defenses or whether or not there has been a
12 business relationship that would make that
13 plaintiff inappropriate.

14 The reason that you want to get that
15 done and get it decided correctly is because if
16 you wait until you're further into the case and
17 then it is determined that the plaintiff is not a
18 good representative, what typically happens is
19 that the court allows the plaintiffs to go out and
20 find another representative.

21 The courts will generally not just
22 dismiss the class action or refuse to certify the
23 class because in that situation you're left with
24 the unsavory result that perhaps a whole class of
25 people who have been injured are not going to be

1 compensated.

2 Having come to the conclusion that
3 defendants like to be heard, however, I have to
4 say there is a considerable debate and certainly a
5 split among the courts as to whether or not
6 defendants can be heard on the issue.

7 The language of the statute allows,
8 quote, "Prove by a member of the
9 *pursuanted(injured?) class that the lead
10 plaintiff would not adequately protect the
11 interests of the class or would be subject to
12 unique defenses."

13 Some courts have seized upon that
14 language and using strict statutory interpretation
15 to say defendants are not supposed to be heard
16 from at this stage. This is something that we
17 only get from the class members about.

18 Other courts have disagreed and have
19 said that consistent with our adversarial process,
20 the court benefits from hearing as many views as
21 possible. It is consistent with our adversarial
22 system to get a full and fair picture of the
23 possible conflicts that may arise in connection
24 with that plaintiff. So I think, in general,
25 you're better off getting it right and getting it

1 right early. I think that courts will benefit
2 from having the fullest possible picture. So
3 defendants ought to try to weigh in on that
4 subject. I would hope that the judiciary would be
5 willing to hear from the defendants.

6 MR. GREENBAUM: Thank you.

7 I'd like to move on to other areas.
8 This is obviously a fascinating area that is being
9 very heavily litigated. I would just end this
10 section by pointing out that this discussion is
11 not limited just to securities class actions
12 because right now, as I mentioned earlier, in two
13 weeks the advisory committee on civil rules is
14 meeting.

15 One of the things they'll be
16 considering is to what extent should the rules
17 actually give some role to the courts in dealing
18 with lead plaintiffs and lead counsel in all class
19 actions.

20 I'd like to now turn to case
21 management issues. I'd like to start by really
22 talking with Magistrate Judge Wolfson and ask,
23 first, are these matters that are going to come to
24 you, to district judges, to take control of these
25 cases when they see a big monster case or is this

1 business as usual and it will stay with you and
2 you have to grapple with all these problems.

3 JUDGE WOLFSON: What you should come
4 away with, there is no bright line rule on these.
5 Sometimes it is going to depend on who the case
6 comes before first. If there is no motion to
7 dismiss filed immediately before an answer is
8 filed, we're likely to see it on the initial
9 conference scheduled by the Clerk's office
10 automatically and it will come to us.

11 On the other hand, if someone moves
12 immediately under 12(b)(6) motion, the D.J. will
13 be the first one to see it. Having seen it, they
14 may decide they want to keep it and case manage it
15 or they may decide to send it off to us. I
16 haven't seen any, as I said, real basis of
17 figuring out how we're going to get them, we're
18 going to keep them or not. I see them on case
19 management when they come in the initial
20 conference dealt with in the same way and get a
21 discovery plan.

22 MR. GREENBAUM: How does the
23 discovery plan differ? You have a monster case,
24 you may have a motion to dismiss which in the
25 nonsecurities case there is no automatic stay.

1 Are you going to stay discovery during that?

2 How do you deal with class
3 certification when the defense counsel say we want
4 to take the plaintiff's deposition and the
5 plaintiff's lawyer says, wait a minute, we want to
6 get into merits discovery, that bears on class
7 certification, it should go on simultaneously.
8 How do you deal with these massive issues?

9 *MR. (FREDA?): Like my other case.
10 Case by case basis. Again, there's no standard
11 rule *(freed a (.

12 What I do appreciate when we get a
13 discovery plan that set forth both the plaintiff's
14 an defendant's views and alerts me before they
15 come in as to what position they've taken and as
16 to whether they've reached a consensus on any of
17 the issues. Sometimes, surprisingly, they do.
18 They may take the view we should go ahead, a class
19 certification first.

20 They may come in and say, we'll file
21 a motion to dismiss and we agree there will be
22 some stay during that time period. They may both
23 agree to that. If we can reach consensus on
24 certain issues, it makes things a lot easier and
25 they can alert me to that.

1 One of the things, though, that we
2 deal with on the phasing and control of discovery.
3 I'll *raise the issue of class cert right out
4 front and let's talk about what the class should
5 be. I've found in the initial conference at some
6 times I'll get certain concessions to the
7 plaintiff that maybe the class isn't as broad
8 as the Complaint makes it appear.

9 For instance, I'm not talking
10 securities area. Let's say employment
11 discrimination cases that are brought against the
12 corporation by 5,000 employees. What the class
13 should be and who the class rep they have then is.
14 Perhaps we can reach some limitations at the
15 initial conference. That might help things along
16 and what kinds of discovery would be needed.

17 From my perspective, it will be
18 whatever discussion takes place at that initial
19 conference, what we can air out. What we can
20 reach agreement on, and then I'll make the call as
21 to what makes sense. That may be setting a
22 briefing schedule. And often is. May sit a
23 certain period of time for *phasing the discovery
24 on a particular issue and then say, all right,
25 particularly if the judges of following appendix

1 N, it is helpful to set up a briefing schedule
2 when the *<PHOEFLG> brief opposition will have to
3 be submitted. Sometimes lawyers will stay. The
4 defendant will say, well, I'm ready to move on
5 this now, I've got my brief. The plaintiff may
6 say I'd like to see the brief. Then I'm going to
7 want some discovery. We'll deal with it as it
8 comes along. Generally, we can set a briefing
9 schedule there.

10 MR. GREENBAUM: One of the issues
11 that comes up at the initial case management
12 conference is many times a plaintiff's lawyer will
13 say, I want an order just saying that there should
14 be no destruction of documents during this case.

15 Judge Wolin has a unique experience
16 on that subject. Judge Wolin, do you want to tell
17 us whether you think those orders are necessary.

18 JUDGE WOLIN: My experience in
19 Prudential was different than Magistrate Wolfson.

20 When I was notified by the MDL that
21 the Prudential case was being transferred to New
22 Jersey, I immediately went to the Manual for
23 Complex Litigation Third to find out what I should
24 be doing in this particular case. Never having
25 experienced a class action before of that

1 magnitude.

2 What was unique about Prudential was
3 that the judicial proceeding followed a regulatory
4 proceeding that had been going on before the case
5 was transferred to me. In that regulatory
6 proceeding, 30 Insurance Commissioners from 30
7 separate states had been engaged in discovery and
8 Prudential had already produced for them one
9 million documents.

10 Now, we all realized initially that
11 this was going to be a document-intensive case. I
12 issued an interim order where I wanted to meet
13 with all counsel involved. At least 40 or 50
14 lawyers showed up on the first date.

15 In my interim order because I didn't
16 know who was going to be lead counsel and what was
17 going to happen later, I had put in that the
18 parties receive all documents and other records
19 containing information potentially relevant to the
20 subject matter of this litigation. Now, these
21 were not my original words. They probably came
22 out of the Manual on Complex Litigation. Little
23 did I know how those words were going to come home
24 to roost later because I got the case sometime in
25 August of 1995 and in July of 1996, a senior

1 executive of Prudential in the Jacksonville,
2 Florida office was fired for allegedly engaging in
3 document destruction.

4 Well, thereafter, almost week in and
5 week out, lawyers were communicating with the
6 court that document destruction was going on but
7 nobody could tell me where or what. Prudential,
8 of course, denied it. They said if something did
9 happen, it was a single occurrence, it was
10 abberational. It was contrary to Prudential's
11 orders.

12 Finally, in December I got a call
13 from *Mr. Wise, seated two seats to my right, who
14 said, hey, judge, we got serious document
15 destruction problems. He said that the lead
16 counsel for Prudential had called him and related
17 to him that in Cambridge, Massachusetts there had
18 been document destruction. He was going to file
19 an Order to Show Cause. He did file an Order to
20 Show Cause. He sought sanctions.

21 I heard that Order to Show Cause
22 sometime around December 18th. December 18th.
23 And after I heard what was involved, I directed
24 that an investigation would take place. And
25 because there was such a clamor about document

1 destruction at this time, people talking about
2 criminal proceedings and other types of remedies
3 they were seeking, I directed plaintiff's counsel
4 to engage in an investigation and the
5 investigation had to be sooner rather than later.
6 So, on what would be a traditional holiday for
7 most people, between December 20th and December
8 24th of that year, 55 depositions were taken.
9 Defended, hundreds of documents reviewed and
10 depositions were taken of Prudential people from
11 the CEO down, every Vice President, General
12 Counsel, every Office Manager in an office where
13 there had been destruction.

14 A report was given to me on or about
15 December 27th. I think I wrote my Opinion and
16 filed it by January 7th. But let me tell you what
17 we found. We found that document destruction had
18 occurred on at least four separate occasions. The
19 document destruction in the Cambridge,
20 Massachusetts office involved 9,000 client files.
21 No document destruction index was prepared and
22 without such an index, all information contained
23 in those files was forever gone from discovery.

24 I found that Prudential's procedures
25 to identify and report document destruction were

1 unduly cumbersome and slow. We did the whole
2 investigation and wrote the Opinion that
3 controlled the investigation and sanctioned
4 Prudential in a shorter period of time than when
5 Prudential first found out about document
6 destruction and reported it to the Court.

7 So Prudential had no employees.
8 Prudential senior management failed to effectively
9 establish a comprehensive document retention
10 policy. The nonexistence of this type of policy
11 made document destruction inevitable. Prudential
12 senior's management had failed to promptly notify
13 the Court of the Cambridge destruction. You know,
14 that was sometime in early December and the class
15 opt-out date was December 19th of that same month
16 and the Court deemed that failure to notify
17 promptly as being inexcusable. I ultimately found
18 there was no wilful conduct on behalf of
19 Prudential. But because I believed that the
20 preservation of the documents is necessary to the
21 integrity of the Court as well as the integrity of
22 the process of litigation, I then imposed
23 sanctions. I just want to tell you quickly what
24 the sanctions were.

25 I found out that Prudential had never

1 communicated by a hard copy of my Order to any of
2 their employees. They had sent what we'll call
3 e-mails for purpose of this conversation here
4 today. They call them *prof notes. It was
5 interesting to find out that not all Prudential
6 agents had access to e-mail. Some who had it
7 didn't know how to access it. And others said, we
8 have 700 messages there and we couldn't look for
9 this one because we never read the 700 in front of
10 it.

11 So I drafted that Prudential had to
12 mail a hard copy of the Court's document
13 preservation order to every employee. I directed
14 they develop a document preservation policy and
15 distribute it to each employee. I directed that
16 they dedicate a hot line to facilitate reports of
17 document destruction. Each call was to be
18 recorded in a log. The anonymity of the caller
19 would be respected. Even up to today, I still get
20 a weekly report of calls of document destruction
21 whether people request anonymity or not.

22 I then fined Prudential \$1 million
23 for unnecessary consumption of the Court's time
24 and resources in regard to document destruction.

25 I awarded counsel fees to *Mr. Wise

1 and when I say "awarded counsel fees to *Mr.
2 Wise," he must have had like 50 attorneys working
3 on this in these four days. I complimented the
4 *Conenshein firm who represented Prudential who
5 staffed and defended every one of those
6 depositions. Then that was pretty much what
7 happened at that particular point.

8 I won't go into what happened in the
9 following week when there was another allegation
10 of wilful destruction of documents when documents
11 were shredded in Florida and I appointed a member
12 of the Bar seated in this room, who will not be
13 named because he beats me in tennis once in a
14 while, to go to Florida and investigate and we had
15 a full investigation of that matter. I rest on
16 document destruction.

17 MR. GREENBAUM: Judge Wolin, that is
18 certainly an extreme case and I think it is one
19 that has gotten the attention of every corporate
20 counsel in America. The question I ask, I direct
21 it to John *Pendelton.

22 What do you do in the routine case
23 when Allyn Lite comes in with this sentence in the
24 case management order there has been no proof in
25 the ordinary case. Will you object to this order?

1 MR. PENDELTON: No. I wouldn't
2 object to this order because I actually think it
3 helps you with your client, Jeffrey, to get the
4 client to focus on the importance of document
5 destruction.

6 If you think that the Prudential case
7 was not the routine case, I would caution you that
8 that is probably not correct. If you are
9 representing a corporation of any size that has
10 thousands of employees and hundreds of locations,
11 they are destroying documents every single day.
12 Those documents may or may not be relevant to the
13 litigation.

14 When you start to produce hundreds of
15 thousands and millions of pages of documents, I
16 can guarantee you that in one of those documents
17 there is going to be a reference to some innocent
18 nonmaterial destruction of document. And *Mr.
19 Wise and his colleagues at the plaintiff's bar are
20 very sophisticated and very good and they will
21 come after you on this.

22 It is a pressure point. So you need
23 to caution your clients and counsel them at the
24 very outset and read Judge Wolin's opinion very
25 carefully and make sure that the company that you

1 are representing immediately notifies its entire
2 work force of the pending class action, how broad
3 the allegations are and the importance of
4 maintaining documents. Because documents will get
5 destroyed. I think if you read Judge Wolin's
6 decision carefully. If the corporation takes
7 reasonable steps to make sure that it doesn't
8 occur, you'll be okay. You can't prevent it from
9 occurring in each and every instance. Hopefully,
10 you can prevent the wholesale destruction that he
11 found in that case. But you need to take
12 immediate and create steps in hard copy and e-mail
13 and any other way you think to notify your
14 employees to make sure they know of the pendency
15 of the class action and they know of the
16 importance of maintaining documents for the case.

17 MR. HIMMEL: Thank you, John.

18 I'd like to turn now to class
19 certification. I'm going to address this to John.
20 If you could just tell us generally where are the
21 battle grounds on class certification going on
22 that?

23 MR. PENDELTON: Professor Coffey, I
24 think, outlined them. I'll just touch on them,
25 once again. You're, probably most of you,

1 familiar with them because at least one of them
2 comes out of the Third Circuit. I'm referring to
3 the United States Supreme Court decision from 1997
4 in the Supreme Court. It is known as the *Amchem
5 Products versus *Windsor case. The Third Circuit
6 case was the *Georgian case. The names changed.

7 This grew out of the asbestos
8 litigation that started seems like 25 or 30 years
9 ago. The court is responding to a crisis in the
10 fact there is not enough money and resources to go
11 around for all the injured plaintiffs and the
12 transactional costs in the litigation are taking
13 up all the money. So you see in the '80s and
14 early '90s an attempt to, through the (b)(2)
15 class, to try and settle all of the claims so that
16 the companies can get out from under liability and
17 a settlement class is approved at the District
18 court level which gives protection for all claims
19 from people who are presently injured and
20 presently suffering from disease or problems
21 associated with their exposure to asbestos, as
22 well as people who might be exposed to asbestos in
23 the future and who might in the future, if they've
24 already been exposed, who might in the future
25 suffer from some illness. And the court

1 throughout and this was, I think as Professor
2 Coffey stated earlier, shocking and a big change
3 in class action practice throughout the
4 settlement. Finding the common issues of fact and
5 law did not predominate because you had this
6 inherent conflict between persons in the class who
7 did not yet suffer from any injury and those who
8 were presently suffering. That when you got pools
9 of money going to those presently suffering from
10 injury, taking away from the ability of future
11 plaintiffs to get benefits, you got inherent
12 conflicts and the lead plaintiffs did not -- were
13 not adequate representatives.

14 Again, going back to the polestar
15 that we were talking about in the securities
16 litigation. The polestar being whether the
17 plaintiffs are adequately representing the class.
18 And the court finding, as a matter of law, when
19 you got these inherent conflicts, you can't
20 approve the settlement because you don't have
21 predominance and you don't have adequacy of
22 representation.

23 A few years later in 1999, in June,
24 the Supreme Court again ruled on a similar issue
25 in the Ortiz versus Fiberboard case. Again, this

1 was the limited fund settlement. Fiberboard tried
2 to put a pot of money into court. This was a
3 mandatory class action. Very different from the
4 opt-out classes that the courts typically deal
5 with in the money damages settlements. And the
6 court found that, I think because Fiberboard was
7 not willing to put up its net worth or any
8 substantial portion of it into the limited fund
9 and was really only putting its insurance
10 policies, it had entered into what they called a
11 tri-lateral settlement with its insurance
12 companies, who were obligated at least to defend
13 and indemnify the company on that lot of its
14 asbestos litigation but not all of it. It only
15 put those assets into the limited fund and tried
16 to bind, again, all present and future plaintiffs.
17 The court threw it out.

18 Professor Coffey asked the question
19 that I think will be the battleground of class
20 action litigation in the next few years, which is,
21 can there be a limited fund settlement?

22 I think a fair reading of Fiberboard
23 and I'd like to hear his response is that, yes,
24 there can but the company is going to have to put
25 up a substantial portion or all of its assets in

1 order to accomplish it.

2 Then you ask the question: What is
3 the benefit of that kind of settlement?

4 **MR. GREENBAUM: * <STAUF>?

5 MR. PENDELTON: Of professor.

6 I think I put it this way. I think
7 in Fiberboard the Supreme Court has frozen the
8 class action like a fly in the ointment. It
9 doesn't want more innovation. It says frankly,
10 that innovation and pushing the envelope on the
11 development of the class action has been
12 accompanied by abuse. That most concerned the
13 court involved the counsels' conduct. The
14 counsels' conflicts rather than the clients'.

15 Counsel in both of these cases had
16 very large inventories of asbestos clients.
17 Inventories of over 50,000 clients that had been
18 assembled on a nationwide basis. Part of the
19 agreement with the defendants was that the
20 inventories of personal claims of individual cases
21 would be settled on a group basis on the
22 condition -- on the condition that the same
23 lawyers would serve as plaintiff's counsel in a
24 class action that was designed to basically cover
25 future claims because the class was defined to

1 cover all people who had not yet sued. Well,
2 linking the settlement to individual cases, 50,000
3 contingent fee bases, very large numbers with
4 bringing a class action that would be on the terms
5 the defendant wanted was an impermissible linkage.
6 That is the kind of conflict that the courts
7 should monitor very carefully.

8 In addition, they were very concerned
9 about present versus future *classes. For I think
10 the court has basically said is because of their
11 fear of conflicts and collusion they don't want
12 expansion of the class action device without there
13 being changes in the rules or legislation. So if
14 we're going to see a nonopt-out limited fund class
15 action, I think it is going to require a revision
16 of the rule rather than judges deciding there is
17 still some way they can find a 23(b)(1) class
18 under the existing rulings.

19 Will there be a change in the rules?
20 I turn that back to you.

21 MR. GREENBAUM: We'll see you in two
22 weeks.

23 I'd like to now turn to the final
24 subject of settlement. I would like to start with
25 really the court's role in this process.

1 Unlike any other litigation in the
2 class action area, the court is asked usually to
3 pass upon the fairness and adequacy of the
4 settlement.

5 I will start by asking Judge Wolin,
6 should a court in those circumstances get too
7 embroiled in the settlement process? What do you
8 agree the court's proper role is in the settlement
9 of class actions?

10 JUDGE WOLIN: I believe that the
11 court has the opportunity to play a positive role.
12 I think it is wisdom on the part of the court to
13 initially defer to the lawyers and let the lawyers
14 seek the court's assistance in settlement.

15 I believe that timing is very
16 important to the process. We settled Prudential
17 in approximately 18 months. After there was 18
18 months of discovery.

19 One important factor that I think was
20 assistive in the settling of the Prudential
21 litigation was getting the view of the management
22 of Prudential as to whether or not they were
23 settlement-minded or whether they wanted to go the
24 long, hard way.

25 In Prudential, the insurance case

1 followed the Prudential security case. With the
2 consent of class counsel and at the request of
3 Prudentials lawyers, I did meet with the CEO of
4 Prudential who conveyed to the Court that
5 Prudential wanted to resolve these issues. That
6 coming on **<URT> heels of Prudential Securities
7 and Prudential Insurance, it was an obstruction to
8 their future business. They wanted to get on with
9 the selling of insurance.

10 When I met with Arthur *Ryan, who was
11 the CEO of Prudential, I said, "Mr. Ryan, do I
12 have your full confidence, authority, consent of
13 your board of directors that we can move forward?"
14 He said, "You have it."

15 I think that is very important in the
16 resolution of a settlement when you're talking
17 about a class action of the magnitude of
18 Prudential. Thereafter, I went, left it to the
19 lawyers. I set time parameters for them to
20 negotiate. They spent about 30 days negotiating
21 all of the issues. Then finally, I received
22 response from both sides where they said, we
23 resolved most of the issues. We have about five
24 thorny matters. Some substantive, some
25 procedural. We'd like your assistance. It is at

1 that time that I then met with counsel and we
2 resolved the outstanding issues.

3 MR. GREENBAUM: Judge Walls, I have a
4 question for you. Now, there is a settlement. I
5 have really two questions.

6 1, to what extent have you found the
7 role of the objectors to be helpful in the process
8 for you to determine whether the settlement is
9 fair and adequate?

10 No. 2, do you believe that sitting
11 there as a district judge, when two parties have
12 reached an agreement and have an interest in
13 having you approve that agreement, do you really
14 get enough information to make an informed
15 judgment whether the settlement is fair and
16 adequate to all of the claimants that may be
17 around the country?

18 JUDGE WALLS: Well, with regard to
19 the first question. I've had objectors come in
20 with regard not to settlement but to another
21 matter -- other matters. Generally, they have
22 highlighted issues which had not been fully
23 exposed. Some of them have been baseless. Some
24 of them have been meritorious. Consequently*, I
25 think over all, I think it is a learning effort

1 which I'm glad to have advanced by objectors.

2 With regard to the second -- the
3 defendants -- really, how one -- I deal with it in
4 the same manner Wolin did. That is, with regard
5 to say the proposed settlement of Cendant. We
6 decided -- "we" meaning the attorneys and I --
7 that at the outset, after I paid my nickel bet to
8 them, that it would be settled within a year.
9 That they would meet with me periodically and let
10 me know what was going on. If I could be of any
11 direct assistance to them, I would.

12 The direct assistance they wanted
13 which they got from me was the ready resolution of
14 motions that were to be thrown back and forth
15 between them as far as some necessary motion
16 practice in the interim. While they basically set
17 about trying to resolve the matter. So I promised
18 and we did. Often, I would just rule from the
19 bench having decided the case before your desired
20 oral argument. Then we work it that way. Then,
21 they came in within the year and I got paid my
22 nickel.

23 MR. GREENBAUM: No discussion of
24 class actions would be complete without a
25 discussion of attorneys' fees.

1 I would like to ask Mel Wise in the
2 area of development of attorneys' fees we have
3 certain limitations that have been talked about by
4 the Circuit which is limiting the fees to only the
5 moneys paid out, rather than the theoretical value
6 of coupons.

7 We have the Prudential case which
8 says you have to factor out any benefit given by
9 administrative agencies to the settlement pot.

10 Do you believe these developments are
11 positive? Do you believe they're becoming too
12 restrictive? What is your view of where we're
13 going with attorneys' fees?

14 *MR. WISE: I think each case is
15 different. A good judge knows what went on and
16 what is happening in a case, judges who are
17 hands-on and know how to handle these situations.

18 There are political aspects to this.
19 Some judges have political attitudes towards these
20 issues. I just want to use a couple of examples
21 of things that happened in my experience just to
22 give you a part of the picture that I think is
23 important. Take Exxon *Valdeez. It is more than
24 ten years since that spill. I don't think there
25 is a lawyer in this room who, when they got that

1 call, and I was one of them, to fly out to Alaska
2 and looked at that spillage and the wreckage that
3 followed, that didn't believe that they could get
4 a result in that case relatively soon and it
5 wouldn't be that difficult a litigation.

6 We will, we had in that case, three
7 kinds of lawyers. The class action lawyers. The
8 people I refer to as lone rangers who are used to
9 representing their individual clients in their
10 home towns and what I have labeled the mass
11 accumulators. The ones who advertise and put
12 together large groups of clients.

13 It took about a year and a half for
14 us to coalesce and to put our shoulders together.
15 It is now ten years, over \$160 million of lawyers'
16 time and millions and millions of dollars of
17 out-of-pocket expenses. We've still
18 sub-*<SKWRUD>si in the Ninth Circuit on the appeal
19 from the jury verdict.

20 There has never been a settlement
21 discussion. The court has never organized or
22 appointed a settlement master or settlement judge
23 or initiated any settlement efforts. There are
24 lawyers who are choking on that case because they
25 haven't been paid for more than ten years. Small

1 firms and big firms, who aren't used to the class
2 action contingency aspect.

3 Or take the Washington Public Power
4 Supply System litigation where I was lead counsel.
5 Eight and a half to nine years until we got paid.
6 We got a \$750 million recovery.

7 I see Paul Saunders here from *KRAF>
8 at had.* His firm represented the indentured
9 trustee. I'm happy to quote David *Boice and Tom
10 *Bahr as having said that was a virtually
11 impossible recovery given the legal difficulties.
12 It was the biggest municipal bond default in the
13 history of America. We were suing 90 governmental
14 agencies. Under today's law with the Supreme
15 Court having gotten rid of aiding and abetting
16 liability, instead of 750 million, we probably
17 would have recovered 50.

18 We actually went to trial against
19 some of those defendants. The court awarded
20 straight lodestar of \$30 million. We appealed to
21 the Ninth Circuit. We got it reversed. We got it
22 remanded. It took another several years after the
23 first five or six to get it finally doubled to 61
24 million, which was still only a two times
25 multiplier. Eight and a half year delay in

1 recovery and fantastic result. Even the court
2 characterized it as fantastic.

3 Take the Prudential case. You missed
4 a very big case, Professor Coffey, when you
5 omitted Prudential because it is close to \$3
6 billion that will be paid out by that company. At
7 the time of the settlement hearing the lodestar
8 was \$19 million. We knew there was going to be a
9 ton of work left in the future because of the
10 uniqueness of the settlement. It had an ADR
11 component. The court awarded 85 million in fees.
12 There were about five million out-of-pocket. So
13 the total came to 90.

14 The Circuit Court remanded the fee.
15 Didn't set it aside. Just remanded it for
16 additional findings. As of now, we have over \$48
17 million in lodestar in that case. Our original
18 prediction of the amount that we would be paying
19 out to victims in that case was, I think, one
20 billion one. It is up to two and a half or three
21 billion because the people filed claims as we
22 asked them to and we're going through a
23 *pre then dus*(tremendous) process, we're really
24 very careful in taking care of their rights.

25 So when you talk about fees, you have

1 to think about what it takes for a law firm to
2 undertake these cases. To have the facilities and
3 the resources to carry it on out no matter what
4 happens in the future. No matter how predictable
5 a case might look at the beginning, you can't
6 really know. They're not all Cendants where the
7 parties can sit down and work out a resolution, a
8 fabulous resolution, in a relatively short period
9 of time.

10 There are defendants who are going to
11 fight *in the last trenches. *Mr. Pendelton's
12 client in the Met Life case fought us for what,
13 four, five --

14 MR. PENDELTON: Five.

15 *MR. WISE: Five years in the last
16 trenches. We finally wound up settling it for one
17 billion seven. We're still **sub-<SKWRULD> see*
18 on the fee application and he has a settlement
19 already approved.

20 When you talk about lawyers and what
21 they have to put up with, think about the
22 resources that have to be behind you to take on
23 these behemoth cases.

24 I just want to *<TPHREBGT> on one
25 other thing. There are an awful lot of negative

1 things said about lawyers and lawyers' cases and
2 these are lawyers' fees and the fees that are the
3 dominant part of the cases.

4 You're all lawyers. Some of you are
5 judges. You practiced on both sides. Many of you
6 only on the defense side. I ask you all to search
7 in your own hearts to recall how many of these
8 cases were not hard fought and whether there was a
9 true battle between us before we came to a
10 resolution. Even if they didn't wind up going to
11 trial, these were battled cases of the heart,
12 fought by lawyers who were fighting diligently and
13 equitably for their clients.

14 Thank you.

15 *MR. GREENBAUM: Thank you, Mel.

16 The last comment to the court. Judge
17 Walls.

18 JUDGE WALLS: I would suggest
19 *(there) are examples that are horrific but they
20 are at the extreme end of that reality that we all
21 *(WORD MISSING) the practice of law and this type
22 of case. That is why I would suggest that the
23 auction method is probably, until something else
24 comes along and I'm quite sure something else will
25 come along, the better program because that

1 permits counsel, hopefully, experienced counsel to
2 make an estimate of what he or she or they will
3 have to do to prevail in the case and based upon
4 their own estimation of the case, they can then
5 make there appropriate bid. So whether a person
6 projects a case will be settled in a relatively
7 short period of time or expects a long battle, all
8 well and good.

9 I would also suggest that in the
10 unlikely event that one's expectations of ready
11 resolution are not met or some unforeseen obstacle
12 occurs, then as I said, in Cendant, the bid, if it
13 had been a successful bid will be a benchmark of
14 reasonableness. That doesn't mean that is the
15 end-all as to what will be awarded by fees.

16 I awarded a fee to a person who I
17 thought, as I said, I again say, he showed great
18 creative verb as being a lead counsel. Therefore,
19 I did not necessarily hold him to the exact limits
20 of his bid. You know, that -- you got a cash cow
21 there, girls and boys. I hope that you don't try
22 to milk it too much. That is the purpose of the
23 PSLRA.

24 MR. GREENBAUM: I'd like to thank our
25 panelists.

1 (Pause.)

2 *MR. HIMMEL: Please join us for
3 lunch when we can hear more from Professor Coffey.
4 Lunch is downstairs.

5 (Recess.)

6 MR. HIMMEL: Would everyone please be
7 seated.

8 I have a number of announcements to
9 make. Before I do so, I think both panels did an
10 outstanding job and we should give them a round of
11 applause.

12 (Applause.)

13 MR. HIMMEL: For those of you who
14 have not had an opportunity to get your 2000
15 sticker for the back of your Association of the
16 Federal Bar code, you have until the middle of
17 April. Thereafter, the Marshal service will not
18 allow you in with your electronic devices. So we
19 request all of you follow through with the
20 membership for the year 2000 and get your sticker.

21 For those of you who are not members
22 of the Association of the Federal Bar, we
23 certainly would welcome your joining the
24 Association of the Federal Bar. The idea process
25 will continue after lunch. If everyone wants to

1 sign up for membership not an association to get
2 that sticker *(I.D.(.

3 Finally, the next major event of the
4 Association of the Federal Bar is the William J.
5 Brennan dinner. It will be held on on June 14th.
6 I'm pleased to advise all of you that this year's
7 recipient will be Circuit Court Judge Maryanne
8 Trump Barry. I invite all of you to attend on
9 June 14th.

10 We will now move to the pro bono
11 award which is now becoming an annual
12 presentation. I would ask Judge Bassler to come
13 forward and make this year's presentation. Judge
14 Bassler.

15 JUDGE BASSLER: Good afternoon.

16 Mike Himmel told me to make this
17 short. So I will.

18 On behalf of the Chief Judge and
19 members of the board, I'd like to announce this
20 year's award to the Lowenstein, Sandler firm in a
21 *perks* of valuable contributions as a member of
22 the court's civil pro bono panel. This firm, as
23 many of you know and as many of *(you) also have
24 done, has responded quickly and promptly to every
25 call from a distressed judge in a case where we

1 felt representation was important.

2 It is my pleasure this year to give
3 them the award and will you take it.

4 (Applause.)

5 (Presented to David Harris.)

6 *JUDGE BASSLER: It is -- pleased to
7 give to my friend Dave Harris. Thanks.

8 MR. HARRIS: On behalf of Lowenstein,
9 Sandler, I'd like to thank the Federal bench for
10 awarding this to the firm.

11 It has always been our pleasure and
12 as well as our duty to engage in as much pro bono
13 work as is feasible. It is part of our legacy and
14 I think it is consistent with much of the spirit
15 of this Bar Association as well as the State of
16 New Jersey.

17 I am particularly proud to be leading
18 an effort right now to expand the pro bono work in
19 Essex County through another bar association and
20 we're hopeful that by expanding the work that we
21 will be able to -- all lawyers will be able to
22 serve even more people, more poor people, more
23 public interest and to present even more issues
24 for the courts to decide in the near future.
25 Thank you.

1 (Applause.)

2 MR. HIMMEL: I now ask Jeff Greenbaum
3 who did such a great job putting together the
4 class action panel to come up and introduce our
5 luncheon speaker.

6 MR. GREENBAUM: Good afternoon.

7 Our luncheon speaker, as I mentioned
8 before, is Adolph, professor of law at Columbia
9 School of Law where he teaches corporate and
10 securities law and class actions and complex
11 litigation.

12 Professor Coffey is a fellow of the
13 American Academy of Arts and Sciences and has been
14 a reporter to the American Law Institute and its
15 principles on corporate governance.

16 As a recognition of his expertise in
17 the class action field, Professor Coffey has the
18 distinction of being quoted by two appellate
19 courts, most important to us as practitioners.
20 Being quoted by the United States Supreme Court in
21 both of its most recent class actions in American
22 Product versus Windsor and Ortiz versus Fiberboard
23 Corporation, and just last month he was quoted by
24 the United States Court of Appeals for the Third
25 Circuit in a class action case entitled, Dyfuss

1 versus Bank & Company which was decided on
2 February 7 of this year.

3 I will spare you the titles of the
4 numerous books that Professor Coffey has authored
5 as well as the titles of the 39 Law Review
6 articles. But I will close in stating that the
7 National Law Journal has recently listed Professor
8 Coffey as one of the hundred most influential
9 lawyers in the United States.

10 Professor Coffey will speak this
11 afternoon on settlements, the good, the bad and
12 the ugly.

13 Professor Coffey.

14 (Applause).

15 MR. COFFEY: Please ignore that
16 introduction. The real reason I'm here and I'm
17 sure you want to know this, is that I was the only
18 person that Jeff Greenbaum called who knew where
19 Mayfair Farms was. Right across from the Chinese
20 Gourmet. I knew that. What he didn't tell you, I
21 live about two miles from here and he had a very
22 low budget. Okay.

23 I am, as you heard, going on to talk
24 about settlements, the bad and the ugly. That
25 takes a certain amount of *Hutzpa for a law

1 professor to address because, as practitioners are
2 fond of saying, all professors know are about
3 formal rules and formal decisions and, frankly,
4 the settlement process is something that has low
5 visibility, is not transparent and isn't something
6 you traditionally learn much about in school. All
7 that suggests I'm pretty disqualified from talking
8 about this.

9 However, this morning I did a back of
10 the envelope calculation as I computed over the
11 last two years, not counted *Amcan where I was on
12 the objector's side. Over the last two years I've
13 participated in settlement hearings that aggregate
14 somewhere over \$7 billion of class actions that
15 were approved. So I've seen a few settlement
16 hearings and I think I've seen some recurring
17 dynamics. I want to talk about them.

18 I want to reach this, though, by
19 first looking at where we are recently seeing the
20 settlement process get heightened scrutiny. There
21 are several different pairs and important for the
22 Bar to recognize, there are strong perceptions
23 that something is a little awry. Particularly in
24 the area of class action settlements.

25 First of all, we have the Supreme

1 Court. The Supreme Court only takes about 100
2 cases a year. In two cases in the last three
3 years, *Amcan and Ortiz, the Supreme Court has
4 rejected nationwide class actions and rejected
5 nationwide class actions where there was really an
6 urgent need to resolve the nationwide asbestos
7 problem where millions upon millions of people are
8 suffering and will be delayed still further in
9 receiving compensation because something in the
10 court's adjustment was so seriously wrong, so
11 seriously wrong that the court had to grant
12 certiorari.

13 What the Supreme Court has done, as I
14 said earlier this morning is, add a kind of
15 quasi-Constitutional dimension to the class action
16 process because it is concerned about the idea
17 that one lawyer could stand up somewhere in a
18 courtroom, State or Federal in the United States
19 and say, your Honor, I represent everyone,
20 everyone living and those people who have been
21 exposed and won't even incur illness for 40 years
22 and I am settling these *claims, myself.

23 The court has added some
24 Constitutional dimension to this. There will be
25 subclass <ELGS>. There will have to be other

1 reforms chiefly focused to *flat certification.

2 As I say, suggest in a moment I'm
3 nervous about some of these reforms. They could
4 be overly sweeping. They could restrict the
5 effectiveness of the class action. I use the
6 phrase the vulcanization of the class action. I
7 use that repeatedly in articles that will appear
8 in the Columbia Law Review in a few weeks.

9 There is a cost as well as a benefit
10 to reforms. Sometimes the cost can make the class
11 action a more impractical device particularly in
12 those areas, small claim areas, where individual
13 litigations are unlikely to obtain representation
14 of their own. Okay.

15 So I'm suggesting, although the court
16 described the problem I'm not sure its answers
17 focused mainly on tightening the scrutiny for
18 class certifications are going to be that
19 effective or make that much a substantial
20 difference.

21 Now, a secondary where criticism has
22 occurred recently is in the area of empirical
23 research. I don't mean law professors. I mean
24 number crunchers. This year the Rand Institute
25 made a study of class actions *in practicing *FIX

1 anyone ry* data. Goes through a number of
2 classifications, studies them in depth, reaches a
3 number of factual conclusions that are
4 disturbing.

5 It finds very often actual
6 compensation received by class members is well
7 below the amount that was negotiated and placed in
8 the settlement fund. It finds -- I'm quoting in
9 some cases -- class counsel gets a much larger
10 share of the actual dollars paid out and indicated
11 by the negotiated settlement. And then it
12 finds -- this was particularly disturbing -- "In a
13 few days he as class counsel got more than the
14 total collected by class members."

15 If the total amount paid by
16 defendants goes more than 50 percent to class
17 counsel and the minority goes to the class
18 members, something is wrong and that tends to add
19 some credence, some weight to what I'll call the
20 collusion scenario that the Supreme Court sketches
21 out in fairly frank terms in its latest decision
22 Ortiz, where it suggests even looking at these
23 fees and having these fees tied to the settlement
24 of this class action will not be a position to
25 hold out or threaten to go to trial. Okay, so

1 what should we do?

2 Well, here's the suggestion. The
3 primary suggestion. Rand Institute says the
4 principal answer is, quote, "Judges need to
5 scrutinize proposed settlements more closely."

6 Well, as long as I practiced law, 30
7 years or so, this idea has been run up the flag
8 pole and dutifully saluted in almost every form of
9 institute concerning class actions. Of course, --
10 can you hear me?

11 Of course, it is correct, I don't
12 disagree with it all. But it is fine form. It is
13 nothing something that could be implemented very
14 easily. We've all known judges to scrutinize
15 class actions carefully. It is not something that
16 is likely to produce a major change in actual
17 behavior or actual practice. Indeed, to be
18 provocative up to the point of being a little
19 offensive. I don't mean to be offensive. I'll
20 suggest part of the problem.

21 Substantial part of the problem may
22 be the courts love settlements a little too much.
23 It is the desire to settle can be too strong.
24 Just as Will Rogers never met a man he didn't
25 like, there are some courts that have never met a

1 settlement they didn't also like a great deal too
2 and the low rate of settlement reversals suggest
3 there is a strong preference for class action
4 settlements particularly at the trial court level.

5 So that is another -- the other thing
6 is the Rand Institute has found some data
7 fragmentary data to be short. It tends to support
8 a problem. The press loves to focus on class
9 actions where something has gone awry. I admit
10 they don't look at class actions where something
11 has gone very right, and there are many of those.

12 The press I'm now going to focus on
13 the Engle classic, a particularly unique one. It
14 followed up on an earlier class action to win my
15 praise for the all time uglies. *Despite class
16 action covering all the flight attendants'
17 secondary tobacco smoke, there in the middle of
18 trial having the most sympathetic class I could
19 imagine, people who didn't choose to smoke, who
20 didn't smoke, who were exposed to tobacco or
21 suffering illness, the plaintiff counsel in the
22 middle of the trial negotiated a settlement under
23 which one hundred million or so in attorneys' fees
24 were paid out on staggered basis and the class
25 received zero in the way of cash compensation. A

1 foundation was set up to do research. No class
2 member got paid a penny. That to me suggests that
3 class counsel has done a lot *period of time* than
4 class members and, again, underlines the fact
5 there can be sharp conflicts. The press focus is,
6 it does the bar little good that they have those
7 examples.

8 A fourth group. Talk about all the
9 people focusing on class actions is Congress has
10 its own diagnosis. It doesn't leave out these
11 diagnoses. I have the background image in my mind
12 the six blind men looking *elephant (elegant?)
13 They have all pieces of the problem. I'm not sure
14 they have the whole problem view.

15 Congress has recently been looking at
16 class actions. Both legs that has already been
17 passed an legislation pending. It will be on the
18 horizon I think for some years to come. Congress
19 sees this pattern. They see in their view a
20 plaintiff's attorney taking a nationwide class
21 action covering everyone in the country down to a
22 world *pry <SEUPBGT> in Louisiana, Alabama,
23 Mississippi, where he brings the case before a
24 judge, a state court judge who just happens to be
25 elected and, strangely enough, the plaintiff's

1 attorney was the chairman of that judge's
2 reelection campaign committee and did a lot of
3 good work. As a result, may get a sensitive ear
4 when it comes time to bring this class action in
5 this far away province. That's certainly
6 defendant's side of the story.

7 Congress has heard that and Congress
8 has already preempted securities class actions in
9 the state courts and they have the possibility
10 before them of preempting or at least permitting
11 defendants to remove any multi-state class action
12 to Federal Court. Thereby changing the Federal,
13 State balance to be sure and also making it
14 impossible to bring a multi-state class action in
15 the state court.

16 Unless -- underline this -- unless
17 the defendants want the class action to be brought
18 in the state court that is the side of the problem
19 that Congress has not focused on. It can also
20 happen -- there is a serious class action,
21 meritorious one approaching trial in Federal Court
22 or in a different state court closer to the real
23 source of the problem, when unable to negotiate
24 with the plaintiff's attorneys, the defendants
25 find another team of plaintiffs' lawyers to bring

1 what I'll call a sweetheart settlement class
2 action at the *12th hour down again in that same
3 rural county in Texas, Louisiana, Alabama
4 Mississippi or wherever. I don't mean to pick
5 only on those states.

6 Once you are looking for someone who
7 will sue you in order to reach a settlement class
8 action, this is a country that now has something
9 like 900,000 attorneys admitted to the bar.
10 You'll probably be able to have an attorney some
11 place who had been *elected in bringing a
12 settlement class action that was crafted.

13 I suggest Congress has only one half
14 of the problem in view. If we're concerned about
15 favoritism, sometimes state judges who are elected
16 and elected in very political and expensive
17 environment may be overly partial to those people
18 who contribute. That could be not only favoritism
19 towards the plaintiff but favoritism towards a
20 *inclusive settlement. We're not looking at the
21 whole problem because we will look at the answer
22 in the past and have been suggested in these
23 Congressional bills. Okay.

24 So what reforms would make sense?
25 Here I advance to a technical I'll try to be a

1 little bit clear on. A while to do what I'm
2 saying, I'm afraid.

3 Initial premise is that the most
4 powerful tool that courts have is the fee award.
5 It is both a **carat and a stick. I don't
6 disagree with the idea that cases are different
7 and some after the fact settlement is necessary
8 but that ignores that litigation. Expensive
9 litigation is really a continuing investment
10 decision. You have to make the decision whether
11 you can carry the case forward with millions of
12 dollars are being expended and by the time you get
13 to the fee award, all of the critical decisions
14 have already been made and it is often difficult
15 ex-post to rectify what has gone wrong because the
16 incentives were awry at an earlier stage.

17 Now, what then am I talking about?
18 What should courts do? Well, first courts should
19 not or should be careful about forcing the
20 plaintiff into a settlement. How do courts do
21 that? Well, let me take issue to be a little
22 provocative again with a recent Third Circuit
23 decision which you just heard about. It was a
24 case called *Bright today's <STHERS> is Banko
25 decided by the Third Circuit only about a month

1 ago in February. The citation, if you want this,
2 is 200 F.3d 238. This is an ERISA class action.
3 Plaintiffs go to trial. Plaintiffs win a very
4 successful recovery, roughly -- I'll round off the
5 numbers -- \$12 million.

6 The District court, just so everyone
7 is aware of this, the District Court is in
8 Pennsylvania. I'm offending no one that I know to
9 be in the audience today. The District court in
10 Pennsylvania denied the request of plaintiff's
11 attorneys to award a fee award out of the common
12 fund, the 12 million on a percentage of the
13 recovery basis. It says the statute is clear.
14 ERISA says this is a fee shifting case and the fee
15 should be paid by the defendant and the Supreme
16 Court has indicated, once they have to pay fees we
17 should use the lodestar formula.

18 It also indicated that the lodestar
19 cannot be adjusted by a risk multiplier. It is
20 perfectly clear in the Delaware Valley and other
21 cases has eliminated the lodestar -- has
22 eliminated the risk flight prior from the
23 lodestar.

24 What does all this mean? The court
25 means, I have to protect the common fund, I can't

1 leave it depleted because Congress wants the
2 defendant to pay the fee. The difference is
3 considerable. On the lodestar basis these
4 attorneys were entitled to a lodestar basis to a
5 fee of \$438,000. They wanted a fee based on the
6 recovery of business of 20 and 30 percent, the
7 normal percentage when you got into percentage of
8 recovery. 20 percent of 12 million *or four
9 million. Lodestar is \$438,000. There is a three
10 and a half million dollars difference there. Put
11 more bluntly: The ratio in this case between the
12 lodestar fee as the maximum percentage, recovery
13 is 1 to 7. Lodestar gives you 1 percentage of
14 recovery gives you 7.

15 Now we'll begin to talk about
16 *reverse *(BELOW HAS perverse) incentives. What
17 the District Court went on to say and what the
18 Third Circuit said when the attorney's appeals
19 said we, of course, understand that if this case
20 had settled before a judgment then there would be
21 a common fund and then the common fund could be
22 used to award a percentage of the recovery fee
23 meaning if you settled before trial. Not for 12
24 million perhaps but maybe for the 6 million that
25 the defendants were offering then you could get a

1 percentage of the recovery and you might get a \$12
2 million fee even though only got a \$6 million
3 recover. If you go to judgment and get 12 million
4 you only get 438,000. The class did twice as
5 well. The attorney did 25 percent as well by
6 going to judgment.

7 At this point we're beginning to look
8 at what I call perverse incentives. Plaintiffs
9 appealed to the Third Circuit. The Third Circuit
10 by a two to one margin says, yes, we do understand
11 that the percentage of the recovery formula will
12 usually be several times greater than lodestar
13 particularly after risk multipliers are subtracted
14 and we do understand that the case, had it been
15 scheduled before trial, could have been treated as
16 a common fund and a percentage of recovery but we
17 really can't do anything about it. We can only
18 make adjustments perhaps if the defendant is
19 insolvent. Absent insolvency, we'll have to use
20 the lodestar. The practical implication of this
21 decision plaintiff's attorneys have a very strong
22 incentive to settle. Settle early. Defendants
23 have a very strong incentive to try to exploit
24 that by suggesting settlement offers well below
25 the litigation merits of the case.

1 I'm not so far talking about anything
2 behaving in a manner that involves actual
3 collusion. I don't think you see actual
4 collusion. I think you do see a kind of
5 structural collusion caused by perverse incentives
6 because it can always be decided, (a), it is in
7 the best interests of the class to settle and go
8 to trial. It is very hard to finance a case for
9 trial when it will get you one-quarter or
10 one-seventh of the fee that you will get from a
11 cheaper settlement. So what should be done?

12 Interestingly enough, there is a, as
13 I say, sentence in this case by Judge Stapleton
14 that I think tells you a good example of what can
15 be done. Stapleton, as I say sentence says, I
16 understand ERISA mandates fee shifting. That is
17 fine. Give the plaintiff the 438,000 that they
18 get from the defendant under fee shifting. That
19 benefits the class and then decides what the
20 appropriate percentage of the recovery should have
21 been. Maybe three million, maybe only two and a
22 half million. I don't have a view on the merits.
23 But take that amount that would be the percentage
24 of the recovery that should be paid out of the
25 common fund, subtract from that the lodestar so

1 there is no double recovery and give the
2 plaintiff's attorney both. That is, the
3 plaintiffs attorney gets a net amount, let's say,
4 of three million, half a million from the
5 defendants two and a half million from the fund.

6 The class benefits because they get a
7 \$12 million settlement rather than merely the much
8 cheaper settlement that you get by going to
9 settlement and not going to trial.

10 What I'm really suggesting here, I
11 tend to defer personally to the percentage
12 recovery form to the lodestar formula. What I'm
13 really insisting on when we have different rules
14 that distinguish between settlement and judgment,
15 you give a much higher fee to a settlement than to
16 a judgment we've designed into the system
17 unintentionally, innocently, but perversely
18 something that will frustrate the interests of the
19 class.

20 Indeed, let's define the interests of
21 the class. I would suggest courts sometimes are
22 much too concerned with pure economy. What the
23 rational class member wants is not the cheapest
24 possible fee to the attorney. What the practical
25 class member wants is the greatest net recovery,

1 that is, agent *<RELGT> recovery minus the fee
2 award. If you economize on the fee at the cost of
3 shrinking the recovery, you have not done the
4 class members any service.

5 The class members rationally *ante
6 want to get the largest net recovery after that
7 fee is subtracted again. I'm not suggesting any
8 particular percentage of the recovery it might --
9 it should be through auctions and competition.
10 Sometimes is much lower than 30 percent. Maybe
11 other cases greater than 30 percent. The point
12 is, a formula that doesn't discriminate and force
13 counsel into the cheap settlement. This is one
14 way to lead into the topic of how the rules should
15 be changed.

16 I think there are other rules that
17 follow the same notion of trying to make the
18 attorney's interest align with the classes'
19 interest.

20 Let me go from this area what the
21 formula should be to a stranger and more exotic
22 area. You've all heard about coupon settlements.
23 You all heard coupon settlements linked with
24 abuse. I think there certainly have been abuses
25 in coupon settlements. I don't think, however,

1 that it is inevitable. I've recently seen class
2 actions in which coupon settlements have been
3 negotiated that are extremely favorable to the
4 class. You'll hear about the **<TOERB> baby
5 settlement for 2.1 billion in Texas. 2.1 billion
6 to OSHA that the plaintiffs got that much. Much
7 of it was in coupons.

8 There was a distinct active feature
9 that I suggest judges should start focusing on.
10 It is now more possible than ever. In fact, it is
11 really I think a talisman of an effective coupon
12 recovery that there will be a market maker in the
13 middle. The court can be shown a financial
14 institution. There are professional market makers
15 will buy and sell the coupons, agreeing to buy
16 them from class members at some percentage of
17 their pays. That is a very interesting
18 distinction.

19 You can use that discounted value.
20 Market maker says, we'll pay for the coupon, give
21 them away. You can say this is the value of the
22 real settlement and award fees based on that. One
23 possibility, it may be overly harsh for
24 plaintiff's attorneys, there is, however, I think
25 somewhat more interesting possibility. I'm

1 actually seeing this already being used. Not as
2 fanciful as it sounds. You can align the
3 interests of the plaintiff's attorney with the
4 class by paying plaintiff's attorney, guess what?
5 Coupons. That sounds funny, there will be a few
6 giggles. If there is a real market maker out
7 there who is willing to deal with this, then
8 paying plaintiff's attorney in coupons perfectly
9 aligns the attorney and the class.

10 If the coupons look a little cheap, a
11 little strange, a little unworthy, plaintiff's
12 attorneys don't want to be paid in them and class
13 attorneys are willing to take the coupon and sell
14 it to the market maker, then we have something
15 that is quite interesting.

16 We have a further feature that I've
17 begun to say we have in some cases now.
18 Plaintiff's attorneys themselves buying the
19 coupons. This gets a little closer to the line
20 because although coupons are not securities, there
21 can be a symmetric information here that is
22 insider trading in coupons. No one knows more
23 about the structure of the market and what the
24 class wants than plaintiff's attorney. Remember,
25 legal ethics does have a strong view. There are

1 ethical rule, one-seventh point in particular, of
2 the model ABA rules when a class *<WEUPBT><EUPBLG>
3 business transaction stemming out of their legal
4 *relationship, you know something when the
5 attorney wants to go in possibly with the court's
6 permission into the market and buy large blocks of
7 coupons which means they're worth something, maybe
8 that settlement has an additional indication it is
9 fair and something to be used. Okay.

10 Beyond all that, let me make one
11 other general proposal. I won't trouble you
12 further. But we do have this problem of
13 overlapping class actions. It may be the most
14 troubling, most difficult to solve problem because
15 on both sides there are abuses, there are large
16 nationwide class actions appearing in parishes in
17 Louisiana where they have no contact with the real
18 merits or the real facts in the litigation and we
19 have class actions being trotted out to Louisiana
20 because the Federal Court has rejected them.

21 You may remember the Third Circuit
22 decision in General Motors. The Third Circuit
23 decision in General Motors rejected a class action
24 on really pre-*Amcan criteria. The same kind of
25 *FIX is today's the Supreme Court later endorsed

1 in *Amcan. What happened? The parties took more
2 or less the same settlement to a parish in
3 Louisiana and settled it in a nationwide class
4 action there. It got reversed by the Illinois --
5 Louisiana Supreme Court got changed modestly
6 eventually was proposed. Challenge back in
7 *Philadelphia before the Third Circuit. The Third
8 Circuit, we have no *capacity to interfere with
9 the class action in state court. We have no
10 jurisdiction.

11 A final wrinkle on this, by the way.
12 In the final settlement, coupons were changed and
13 the plaintiff's attorneys put notice there would
14 be a market maker willing to buy the coupons into
15 the class action notice form. Guess what
16 happened?

17 GM has refused to close the
18 transaction. They are shocked that plaintiff's
19 attorneys told the class there was a market maker
20 willing to buy the coupons. They said that broke
21 the deal because now these people are going to be
22 selling these coupons, they'll all get interest on
23 it.

24 I suggest market makers can very well
25 turn any kind of financial instrument into

1 something that becomes a class equivalent. My
2 point though is, we have this problem of
3 coordination. I think Congress is going about it
4 the wrong way in simply saying, any defendant can
5 remove any class action that involves citizens of
6 more than one state. Involves some kind of
7 overlapping. Multi-state in nature.

8 What should be done?

9 I think the long-term answer already
10 exists on the Federal level. I think it can be
11 extended. I think the multi-district panel could
12 be made by extension, by modification, a
13 multi-district State, Federal panel on which state
14 judges as well as federal judges would serve when
15 there was going to be actions in State and Federal
16 Court that might be consolidated. That would be
17 an example of what I would call cooperative
18 federalism. It might lead to occasions which the
19 panel sitting of half Federal and half State
20 judges would decide to consolidate as a -- or more
21 actions in Federal and State Court. In State
22 Court or might decide to consolidate in Federal
23 Court and would use the same basic criterion
24 either way.

25 I think that is the only kind of

1 approach that gets around what we have now which
2 is dual class actions. And dual class actions is
3 something that I think we're going to see more of
4 particularly as the numbers go up. Because if the
5 numbers get very large, it becomes a very strong
6 incentive to see before you settle with some
7 lawyers here in New York or here in New Jersey
8 whether you can find some other team of lawyers
9 out there in some state court who will settle for
10 half that price as they might because they've done
11 almost no work.

12 I suggested to you there are several
13 problems that are not yet being solved by any of
14 the proposals before the Supreme Court. Before
15 Congress, certainly before the press. We will run
16 into Rand Institute more data that doesn't say how
17 we can solve the problem.

18 The best way is to align the interest
19 of the plaintiff and the class and recognize that
20 the interest again of the class members is not in
21 the lowest possible legal fee but in the largest
22 possible net recovery. That requires that we not
23 create too strong a pressure to settlement by
24 paying more for settlements than for judgments.

25 Okay, on that note, I'll let you get

1 back and eat.

2 (Applause.)

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C E R T I F I C A T E

I, STANLEY B. RIZMAN, a Notary Public and Certified Shorthand Reporter of the State of New Jersey, do hereby certify that prior to the commencement of the examination the witness was sworn by me to testify the truth, the whole truth and nothing but the truth.

I DO FURTHER CERTIFY that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a relative nor employee nor attorney or counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in the action.



STANLEY B. RIZMAN, C.S.R.
Certificate No. X100304
Notary Public of New Jersey
My Commission expires February 14, 2005