

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

presents

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

Electronic Discovery  
And  
Hot issues practicing in  
Federal District Court

Mayfair Farms  
West orange, New Jersey  
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Reported By: Stanley B. Rizman, C.S.R.

**Rizman  
Rappaport  
Dillon&Rose, LLC**  
Certified Court Reporters

66 W. Mt. Pleasant Avenue  
Livingston, NJ 07039  
(973) 992-7650 Fax (973) 992-0666  
1-888-444-DEPS  
E-mail: [reporters@rrdrcsr.com](mailto:reporters@rrdrcsr.com)

<p>1 MS. ALITO: I'd like to welcome you to the 2 Annual District Court Conference of the Association 3 of the Federal Bar. 4 Before we get started, I'd like to 5 acknowledge the people who put this program together 6 today, Bill Maderer and Greg Parliman, who worked 7 very hard and did a fantastic job in gathering 8 together all the speakers you'll be hearing from 9 this morning. 10 I'd also like to thank our Executive 11 Director, Ginny Whipple Berckner who, as usual, has 12 done a wonderful job in putting the program 13 together. 14 As is traditional, we'd like to start the 15 day with remarks from our Chief Judge Bissell, who 16 will tell us about the State of the court. 17 Thank you, Judge. 18 (Applause) 19 CHIEF JUDGE BISSELL: The state of the 20 Court, New Jersey, of course you didn't need me to 21 tell you that. 22 I'm going to take a moment but first, 23 however, to introduce to you our new and incoming 24 Chief of Pretrial Services officer and Chief 25 Probation Officer and also to take the opportunity</p>	<p>2 1 have an open-door policy. We have a website for 2 those who would like to get some information on 3 pretrial and our number is on there. It's 4 NJPT.USCOURTS and it provides you with information 5 on what it means to be coming into the court system. 6 If you have an initial appearance, or a 7 bail hearing, please call us and thank you for 8 everything. 9 CHIEF JUDGE BISSELL: Our next new chief, 10 the Chief of the Probation Office, is also named 11 Chris. Which makes it easy for me who doesn't 12 remember names very well to at least get hold of one 13 of them whenever I need them. 14 Chris Maloney comes to this office 15 through a different group. He has not served in 16 this district before. 17 However, he has a wealth of experience 18 both in the field and increasingly responsible for 19 supervisory positions in the national office of The 20 Probation and Pretrial Services in Washington, D.C. 21 He holds a degrees from the University of 22 Massachussets, at Pittsburgh, a Bachelor of Arts 23 there, he has taken graduate studies in Florida 24 Atlantic University and Clark University as well as 25 at Suffolk University pursuing graduate degrees in</p>
<p>1 as well to thank their predecessors. 2 JUDGE BISSELL: First on the Hit Parade 3 will be Chris Doser, our incoming Chief of Pretrial 4 Services. She has served in just about every 5 position in that office that you could imagine for 6 the last twelve years. 7 A graduate of Trenton State College of 8 Trenton, New Jersey with a Bachelor of Science in 9 Criminal Justice, she also holds a Masters in Public 10 Administration from Rutgers University and is a PHD 11 candidate at that school as well for a degree in 12 Public Administration. 13 Chris has, as I said, served in our 14 district for the long and well, particularly and 15 most recently as Tom Henry's First Assistant. 16 And with that, as I said, I'd like to 17 also ask you not only to welcome Chris, but to join 18 me in a round of applause for Tom Henry in thanks 19 for his devoted service to our court. Thank you. 20 Chris, if you will, please. 21 MS. DOSER: Thank you, Judge Bissell. 22 I see many familiar faces here, but for 23 those who aren't familiar, I'm very pleased to be 24 here today as the new Chief of Pretrial. 25 Feel free to call on us at any time. I</p>	<p>3 1 public administration as well. 2 I think it's very safe to say that when 3 we introduced Chris Maloney, one of the final 4 candidates for this position, he was a complete 5 stranger to almost all of us. It didn't take him 6 very long to take care of that, and we are extremely 7 pleased that a man of Chris' talents and abilities 8 sought us out. And it's our pleasure to seek him 9 out as well. 10 I'd like to introduce the new Chief of 11 Probation, Chris Maloney, and I also ask you to join 12 me in thanking his predecessor, Joe Naporano, for so 13 many years of faithful service to our Court. 14 Thank you. 15 MR. MALONEY: Thank you, Judge Bissell. 16 As the judge mentioned I'm coming up from 17 the Washington, D.C. area. 18 I'm looking forward to getting to meet a 19 lot of you in my new role as Chief and if any of you 20 know any relative, give me a call. 21 I come from Washington, but I look forward 22 to getting to know all of you and working with you 23 in my new role. 24 Thank you. 25 CHIEF JUDGE BISSELL: I just wanted to</p>

1 give a brief and not too boring, hopefully,  
2 statistical report of -- with regard to some of the  
3 Court's accomplishments in the past year.

4 As you know, we had the good fortune to -  
5 - pretty much at the start of 2003 to have a full  
6 compliment of District Judges, and it really shows.

7 Facing criminal and civil cases together,  
8 we cleared the calendar this year. That's the first  
9 time I can recall that happening in a long, long  
10 time in this Court and I and we are extremely proud  
11 of our judicial officers.

12 We moved a total of over 8,000 civil and  
13 criminal cases together. And, as I tell you, if you  
14 have the judge power, you can do it. And, happily,  
15 that's been the case this year, and it looks like it  
16 will be for some time to come.

17 In some categories we continue to  
18 maintain a very high leadership role when considered  
19 nationwide. Our 7.9 months of averaged disposition  
20 time from start to finish in our civil caseload  
21 across the board continues to rank as 16th in the  
22 country out of 94 districts. A place that we've  
23 been happy to enjoy and have retained for many years  
24 and will continue to do so, I can assure you.

25 The jury utilization under the vigorous

1 leadership of Chief Judge Thompson, who has just  
2 joined us this morning, continues to be a high  
3 priority here. It will be discussed again, I think  
4 in the course of the program later this morning.  
5 But just to give you a kind of example of how  
6 conscientiousness and awareness of that topic can  
7 bring about results, the significant statistic in  
8 that field is how many jurors are unused in a given  
9 period when they are summoned to court to be used in  
10 cases.

11 A used juror means one who is either  
12 seated or excused either for cause or by peremptory  
13 challenge.

14 A good benchmark nationwide is considered  
15 to be about thirty percent. As of last summer, we  
16 were kind of languishing around forty percent and  
17 not particularly happy with that. But I can advise  
18 you that in the last five months, because with Judge  
19 Thompson's help we all kind of woke up to this  
20 topic, we reduced that figure to twenty percent. So  
21 that with your assistance, I might add, such as  
22 letting us know when a case is settled, hopefully at  
23 least a day before jurors come in, we've been able  
24 to move into an area where we're comfortable and I  
25 hope we'll continue to stay there.

1 of the national budget, we continue to be a target  
2 for Congressional efforts to reduce same,  
3 particularly in an election year for reasons which,  
4 though regrettable, are all too obvious.

5 One of our judges has recently attended  
6 meetings at the Administrative Office of the Courts  
7 to address this problem and will surely be  
8 emphasized at the national meeting at U.S. Chief  
9 Judges which will be held in Washington next week  
10 and which, of course, I'll be attending.

11 Among the most draconian measures that  
12 Congress is apparently considering is a hard freeze  
13 of the budgets for all federal agencies, including  
14 all aspects of the judicial branch for the next  
15 fiscal year.

16 I'm advised that such a freeze would  
17 require that extensive escalating expenses, such as  
18 salaries, security enhancements and rental expenses,  
19 among others, is being sought with an a static  
20 overall appropriation. Such action would generate  
21 the need to lay off some 4,400 judicial branch  
22 employees throughout the nation. More than twenty  
23 percent of its work force.

24 While I cannot predict the particular  
25 impact on staff in other districts, not even the

1 The prompt and fair disposition of all of  
2 our cases and the maximum utilization of our jurors  
3 and our ADI programs remains our top priority in all  
4 of our functioning at full speed.

5 I'd also like to take a moment and this  
6 will be emphasized later at brunch today, when the  
7 award for excellence in pro bono services report is  
8 given, that prolonged service on the bar remains  
9 obviously a very, very important asset of the  
10 successful practice and successful movement of our  
11 cases in Federal Court.

12 I urge all of you to either continue or  
13 initiate voluntary service in the pro bono field.  
14 Judge Bassler's committee worked very hard to  
15 coordinate that effort and you can feel free to  
16 contact him at any time and, hopefully, get on the  
17 rolls. We do need to -- nothing mandatory about it,  
18 we haven't found that rule and we won't, but it is a  
19 high voluntary calling, I assure you.

20 At this time I must regret to say,  
21 however, that -- and I hate regret you on a not too  
22 optimistic prospect here as we look down the road at  
23 the time of the year.

24 Although the entire budget for the  
25 Federal Judiciary is above one half of one percent

<p>1 judicial grants for any court can reasonably be 2 expected to absorb such an impact. 3 I urge all of you here to contact your 4 congress persons and senators to vigorously oppose 5 any such freeze and to impress upon them the need 6 for ample funding so that our judicial grants, 7 already fiscally strained, will be treated like a 8 co-equal grant of government mandated by our 9 Constitution and will be able to effectively 10 discharge its duties. 11 With that hope and exaltation you heard 12 enough of me, and I'll turn it back to the program 13 chair. 14 Thank you very much. 15 [Applause] 16 MR. MADERER: If I could ask the 17 panelists from Panel One to join me on the dias. 18 We're moving along at our traditional 19 fifteen-minute layout. 20 Good morning, ladies and gentlemen. 21 Actually, it's been a very good morning. We just 22 received a phone call from the General Counsel of 23 Jersey Paper Company. We told you that Jersey Paper 24 had been sued in federal court for price fixing with 25 two major competitors.</p>	<p>10 1 These and other relevant questions will be 2 answered by our outstanding panel here this morning. 3 We are honored to have Magistrate Judges 4 Madeline Cox Arleo and Judge Ronald J. Hedges both 5 of whom sit in Newark. 6 Many thanks to Judge Hedges for the 7 excellent paper included in the handout that you'll 8 find in the -- the handout, there, the white one. 9 We also have two litigators. Sitting to 10 my left, to my -- the third over is my partner, Jeff 11 Lorell, whose business litigation practice at 12 Saiber, Schlesinger often involved electronic 13 discovery. 14 Seated to his left, is John Scordo from 15 Pitney Hardin, Kipp &amp; Szuch who recently co-authored 16 an excellent two part article in the Metropolitan 17 Corporate Counsel magazine entitled "Electronic Data 18 Production." 19 Sitting to Jeff's right, we welcome John 20 Sanders, Senior Vice President and Associate General 21 Counsel to Schering Plough. His responsibilities 22 include employment and commercial litigation. 23 Finally, to his right, is Jason Straight, 24 From Kroll Ontrack, one of the leading legal 25 consultants that provides data recovery and</p>
<p>11 1 The Complaint alleges that 2 representatives of Jersey Paper's marketing 3 department repeatedly met with their competitor 4 counterparts for the past five years and agreed to 5 fix prices on photocopy paper. 6 The General Counsel told you that he is 7 not particularly concerned because he has counseled 8 the marketing department on what was legally 9 permissible. And he was confident that the company 10 personnel would follow through with his advice. 11 The General Counsel also tells you that 12 all of the company's voluminous documents and e- 13 mails are stored on computer, but that the entire 14 computer system was upgraded a year ago. We hang up 15 the phone, elated and overwhelmed. How are we going 16 to get a handle on the documents, paper and digital? 17 Are documents being destroyed on a daily basis 18 pursuant to the company's document retention policy? 19 New Jersey Paper's small in-house staff will 20 coordinate the digital production and who will 21 perform the privilege review? 22 Well, the fight that's before us is to 23 pay for the identification and production of the 24 documents contained on the company's obsolete 25 computer system.</p>	<p>13 1 electronic evidence services. 2 Thanks also to Kroll for the excellent 3 handout, which also you may pick up at the front 4 desk. 5 If you go to page twenty two, you can 6 find the definitions for "meta data" and if you 7 don't know what that is you'll learn about that 8 during the course of this session. 9 I would ask that Judge Arleo start the 10 session by discussing the federal and local rules 11 and initial scheduling conference that pertains to 12 electronic discovery. 13 Please come up here. 14 JUDGE ARLEO: Good morning. 15 For those of you who are not aware of it, 16 we do have a -- a new local rule that was placed 17 into effect back in October of last year. I'm not 18 too clear if the -- is the local rule included in 19 the handout? 20 MR. MADERER: It is. It should be the 21 very first item in the book. 22 JUDGE ARLEO: And I'd just like to go 23 through this handout very briefly. 24 Some of the important changes as it 25 relates to electronic discovery that some of you may</p>

<p>1 not even be aware of.</p> <p>2 What the rule does is impose an</p> <p>3 affirmative obligation on lawyers before -- well</p> <p>4 before the Rule 16 Conference and even before the</p> <p>5 Rule 26 Meet and Confer Conference with your</p> <p>6 adversary in preparation for the Rule 16 Conference.</p> <p>7 I'd like to draw your attention and we'll</p> <p>8 read the rule together. It's 26.1.D, and it</p> <p>9 requires -- it -- 26.1.B relates down to 26.20 at</p> <p>10 the bottom and it discusses the affirmative</p> <p>11 obligation that a lawyer now has to speak with his</p> <p>12 client and familiarize himself with your client's</p> <p>13 electronic retrieval system, to learn "How</p> <p>14 information is stored and how it can be retrieved."</p> <p>15 And the rule is very specific in this instance.</p> <p>16 It provides that the counsel, the lawyer,</p> <p>17 shall further review with the client the client's</p> <p>18 information files, including currently maintained</p> <p>19 computer files as well as historic, archival,</p> <p>20 back-up and legacy computer files, whether incurred</p> <p>21 or historic media or formats such as judicial</p> <p>22 evidence which may be used to support claims or</p> <p>23 defenses.</p> <p>24 So, I guess the first thing you have to do</p> <p>25 is make sure you even know what legacy, archival and</p>	<p>14</p> <p>1 to identify as clearly as possible the categories of</p> <p>2 information which may be sought.</p> <p>3 So lawyers have the obligation to notify</p> <p>4 each other, not six months into discovery or nine</p> <p>5 months into discovery, but at the very first meet-</p> <p>6 and confer at the latest, of the type of computer</p> <p>7 discovery that you may be seeking.</p> <p>8 The -- at that meet and confer you will</p> <p>9 also require the parties to discuss and attempt to</p> <p>10 agree on, and this is the last part of the rule and</p> <p>11 it's very specific in this instance,. "The</p> <p>12 preservation and production of digital information</p> <p>13 procedures to deal with inadvertent production,</p> <p>14 where the restoration of the deleted digital</p> <p>15 information may be necessary, whether backup or</p> <p>16 historic or legacy data is within the scope of</p> <p>17 discovery and the procedures for producing digital</p> <p>18 information."</p> <p>19 Finally, the parties are obligated to</p> <p>20 discuss who will bear the cost of preservation,</p> <p>21 production and restoration, if required.</p> <p>22 Finally, at your Rule 16 Conference, you</p> <p>23 are now required to direct -- to discuss with the</p> <p>24 magistrate judge, if at issue, whether electronic</p> <p>25 discovery is requested and to share the results of</p>
<p>15</p> <p>1 historical files even are, and have a meet and</p> <p>2 confer with your client to understand the computer</p> <p>3 system.</p> <p>4 The rule also imposes an obligation on the</p> <p>5 lawyer to have the client designate someone with</p> <p>6 knowledge of the information system who can</p> <p>7 "Facilitate reasonably anticipated discovery."</p> <p>8 So, particularly in a smaller</p> <p>9 organization, if the client is a corporation or a</p> <p>10 large organization, you now have the duty not only</p> <p>11 to understand how information is stored and</p> <p>12 retrieved, but to have your client designate someone</p> <p>13 that you can speak to about digital computer issues.</p> <p>14 The rule also places on the lawyer</p> <p>15 notification obligations before the Rule 26 meet-</p> <p>16 and-confer conference. And I can point your</p> <p>17 attention again to, I think it's page three in the</p> <p>18 handout, of the local rule, sub-section 2, under</p> <p>19 "Duty to Notify."</p> <p>20 It requires a party seeking discovery of</p> <p>21 computer evidence to notify the opposing party as</p> <p>22 soon as possible, for obvious reasons, including --</p> <p>23 I think Judge Hedges will talk about it in a little</p> <p>24 while, information preservation, but no later than</p> <p>25 the Rule 16 at the meet-and-confer Conference, and</p>	<p>17</p> <p>1 the meet and confer and the discussion about --</p> <p>2 about computer discovery. The cost, the scope and</p> <p>3 the retrieval.</p> <p>4 MR. MADERER: Thank you, Judge Arleo.</p> <p>5 We now know what our obligations are, John</p> <p>6 Sander, Schering in-house counsel, says it's common</p> <p>7 for employees to transfer information from work</p> <p>8 computers to home computers or simply use home</p> <p>9 computers to telecommute from home.</p> <p>10 To what extent do you include a review of</p> <p>11 home computers in order to satisfy a company's</p> <p>12 obligations under the -- under the rules of</p> <p>13 discovery?</p> <p>14 MR. SANDER: Well, I -- Bill and, you</p> <p>15 know, in fair disclosure, Bill's an excellent</p> <p>16 moderator, and like an excellent moderator, he</p> <p>17 actually called me yesterday to tell me he was going</p> <p>18 to ask that question. So I had a day to think about</p> <p>19 this, which was good.</p> <p>20 You know, in reality, it's an issue. When</p> <p>21 we -- when we are in a process, where we are</p> <p>22 individually sitting down with employees and</p> <p>23 reviewing what they have electronically, it</p> <p>24 certainly is something we would ask them and we</p> <p>25 would preserve and/or retrieve anything that they</p>

<p>1 had transferred to a home computer. It's never been 2 a big issue in our company because we have a very 3 small number of telecommuters, where I think is 4 where you would see this quite a bit.</p> <p>5 Also, most people in our company have 6 laptops, so it's -- there's not really a need for 7 most people to use their home computers for work. 8 But I think it's an excellent point. It's something 9 that I think that we will probably put into our 10 document and hold notices, which I'm going talk 11 about later when my time comes, but it is something 12 that probably should be drawn to people's attention 13 so that we make sure we do cover that.</p> <p>14 MR. MADERER: All right. Thank you.</p> <p>15 Obviously, a new body of laws are being 16 developed concerning electronic discovery.</p> <p>17 I've asked John Scordo to highlight some 18 of the issues that must be considered both in the 19 early stages of the litigation and throughout the 20 prosecution and defense of a case.</p> <p>21 John.</p> <p>22 MR. SCORDO: Thanks, Bill.</p> <p>23 Obviously, there's a lot of cases across 24 the board all over the country, including New Jersey 25 that some are conflicting and provide a sort of some</p>	<p>18</p> <p>1 that get attached. The amount of communication that 2 gets created in connection with even a mundane 3 business transaction -- it just multiplies 4 exponentially.</p> <p>5 So, you have a ton of information. The 6 problem is in that ton of information, it's not all 7 in the same format.</p> <p>8 In the old days, everything was on paper 9 and you could have a copy. In the electronic area, 10 you've got e-mail files, you've got Word documents, 11 you've got Power Point presentations, Excel 12 spreadsheets, there's a whole host of different 13 formats that the data is in, and I'm just listing 14 the Microsoft ones. I mean, there are many others.</p> <p>15 So I think with those two ideas in mind, 16 it becomes very clear that electronic discovery is 17 different. It's much more difficult to do it -- as 18 unbelievable as that sounds, because we all know how 19 much work we do when we do paper discovery.</p> <p>20 I -- to me, I think you'll probably get the 21 best reference to that principle in the case of 22 Buyers in the Northern District of Illinois 2002. 23 And I think that's referenced in Judge Hedges 24 materials.</p> <p>25 I have some materials that I can make</p>
<p>19</p> <p>1 general principles. I think you can take out of, at 2 least this discussion, that you really should, I 3 think, keep in mind that doing the pretrial 4 conferences and pre-discovery conferences and I know 5 some of the officers on the panel are private and 6 some of these topics are more detailed.</p> <p>7 The first -- the first topic that I 8 thought was important for practitioners to know is, 9 you need to be able to make a persuasive argument 10 that electronic discovery is different.</p> <p>11 Most of the judges here and the 12 magistrates here I think have accepted that 13 proposition. But, you know, you could be in many 14 other federal courts where they are not so 15 enlightened and I would -- I don't think I'm going 16 to -- stretching that far to say the state courts 17 are, you know, not really on the cutting edge of 18 this.</p> <p>19 Electronic discovery is different.</p> <p>20 Basically because you have, believe it or not, much 21 more information than you did in the paper world. I 22 think, as everybody knows who does e-mails, you can 23 CC a million people, you can hit öreply to all.ö 24 People require just very little conversational, 25 öThanks, I'll be there.ö There's strings of e-mails</p>	<p>20</p> <p>1 available by e-mail. I figured since this was 2 electronic discovery, instead of doing a handout, I 3 have an article that I can e-mail. My e-mail is 4 JScordo@PitneyHardin.Com, and I'll be happy to send 5 that to you as well as the supplemental site, which 6 I'll reference here today.</p> <p>7 But I think in the Buyer's case and a 8 recent case at the District Court of Maryland, the 9 Thompson case, which is 219 FRD 93, you'll see a 10 very, I think, a very good discussion of why it's 11 different.</p> <p>12 I think the next principle to keep in 13 mind, and this is sort of a very broad one, is sort 14 of where should you look first, and I think the 15 courts have pretty much come to the conclusion that 16 the, quote/unquote, active data, is where you start 17 and where your discovery obligation lies. Just to 18 start, basically, there could be a lot of discussion 19 about how much is active and how much is inactive.</p> <p>20 But the general line drawing is where the business 21 people ordinarily access the information. The 22 business person has the e-mail on his laptop, the 23 Word documents, the Power Point, if they're 24 available on the company server that the whole 25 company has access to. That's sort of the active</p>

<p>1 data that is quote/unquote, used in the ordinary 2 course of business. That's probably a good place to 3 start. I think that's a fair proposition in that 4 that distinction has been recognized in cost- 5 shifting type cases which I know Judge Hedges will 6 talk about. It's been recognized in document 7 preservation sanction-type cases which I have some 8 reference to, and I know some other people will 9 address, and it's also been recognized in -- in what 10 I call a form of production case, and that's really 11 the leading case in New Jersey, which is Bristol- 12 Myers.</p> <p>13 So, I think that general concept is 14 clearly -- clearly, I think gives us at least a 15 place to start and I think you need to understand 16 that you need to speak to the business person and 17 say, "If your boss asked you find everything about 18 the XYZ contract, where would you look?" and you'll 19 usually get the answer, "Well, my secretary has a 20 file drawer, I have my e-mail, here's my folder. I 21 have my Word documents and Power Point 22 presentations." And if you get at all the 23 information that they ordinarily access, you have to 24 have the right list of witnesses, and ask them the 25 right questions, but you've got what I would call</p>	<p>22</p> <p>1 of levels, and I'm not sure the courts are really 2 going to get in to what's active, accessible in the 3 ordinary course of business or not.</p> <p>4 But I think it's pretty fair to say in a 5 lot of contexts that distinction has been drawn and 6 I think it should be the first thing we need to 7 figure out.</p> <p>8 After that, another issue that's come up 9 is the form of the production that you need to make. 10 Paper versus electronic.</p> <p>11 Luckily, in New Jersey we actually have a 12 leading case on that, which is the Bristol-Myers 13 case, 205 FRD 437. And, again, that's in the 14 articles and I'm sure it's in the handout as well.</p> <p>15 In that case Magistrate Hughes wrote a 16 very lengthy opinion on when you need to produce 17 paper and when you need to produce electronic. I 18 suggest everybody read it. It's a pretty nice 19 overview of the area. The specific holding in the 20 case was a little more narrow and, again, it was 21 sort of a basic, common sense approach.</p> <p>22 If the material is already in electronic 23 form, in the ordinary course of business at your 24 client's, you don't turn it all into paper and have 25 a paralegal sit and print it or just hit print,</p> <p>24</p>
<p>23</p> <p>1 the active data.</p> <p>2 Now, the one caveat to that is, there's a -- and 3 I think they'll be a lot of fights on this, frankly. 4 How much active and how accessible does it have to 5 be to qualify as active.</p> <p>6 MR. MADERER: Excuse me. Just one second, 7 John. We have a car plate. I apologize.</p> <p>8 MR. SCORDO: Sure.</p> <p>9 MR. MADERER: I'm going to be a little 10 embarrassed for somebody whose license plate WEM, I 11 believe?</p> <p>12 (Discussion off the record.)</p> <p>13 MR. MADERER: I apologize.</p> <p>14 MR. SCORDO: Oh, that's okay.</p> <p>15 The one caveat to that, that sort of general, 16 active versus inactive distinction is, and I think 17 that some of this material is brought in from Judge 18 Hedges and it references some of the cases which are 19 set in my article, which I will get to you, how 20 inaccessible does it have to be?</p> <p>21 There's, you know, nearline storage, and 22 there's, you know, which is right on your desktop. 23 There's, you know, storage on the company server and 24 then you can go farther down to the back-up tapes 25 and, you know, the archives. There's a whole host</p>	<p>25</p> <p>1 print, print. You need to let your adversary know 2 it's available in the ordinary course of business in 3 electronic.</p> <p>4 If you're getting paper, on the other hand, you 5 don't have to tell your adversary, "Well, I'm 6 scanning all this paper into an electronic file." 7 But, if the adversary makes a request for an 8 electronic production of paper and basically the 9 paper just scans through the copy machine. Instead 10 of another copy coming out, it just gets burned to a 11 CD. You do have an obligation to, if your adversary 12 requests and I'm sure this is the kind of thing 13 that's going to come up at a conference. You say: I 14 have a fair amount of paper. I do have vendors. 15 And I think most vendors do offer the option of 16 scanning into a CD as opposed to printing out 17 another hard copy. And in that case, you do have to 18 make that available as well. You can't insist that 19 If I have paper, you're getting paper.</p> <p>20 That's the form-of-production issue. And 21 again, I would suggest that you people read Bristol- 22 Myers on that.</p> <p>23 The next sort of main topic, and this sort 24 of relates to a lot of the cost-shifting areas. I 25 know some of the other panelists will talk about it.</p>

26  
1 When do you have to produce quote/unquote, deleted  
2 data, and, as most people know, I'll just give a  
3 brief explanation. Deleted doesn't mean it's gone  
4 from the hard drive. It's just means it's been  
5 marked available to be overwritten. Meaning, the  
6 next time you hit "save" the computer might decide  
7 to overwrite that file or it might not. The  
8 computer has its own way of deciding which piece of  
9 the disk to use.

10 So if you have downloaded, you know, a  
11 hundred songs off the internet, luckily, you  
12 probably have covered up that deleted section. But  
13 if your computer is not that active, the deleted  
14 file can be sitting on your hard drive for -- for  
15 years, literally. And it's just -- it's just marked  
16 as available but it's not deleted.

17 The courts on that, no surprise, there's a  
18 split of authority. I think there's sort a -- sort  
19 of a balancing test that goes into play, and that  
20 comes into the cost-shifting analysis which you'll  
21 hear about later.

22 To me, looking at the cases cited in the  
23 article, it was really no broad generalizations you  
24 could draw. If you really -- obviously, you need to  
25 make a particularly large showing of why you think

27  
1 something was deleted or in your conferences you may  
2 find out that the company has given all employees  
3 new laptops, or new desktops with saved hard drives  
4 or did not. So, you really need a reason to be --  
5 to ask to go to the next step, and that is to ask  
6 your adversary to look for, quote/unquote, deleted  
7 data.

8 The Rowe case, R-o-w-e, has a nice sort of  
9 description of that. And, of course the -- the  
10 leading case that you'll hear about as well, is the  
11 Zooba Lake case. The Zooba Lake opinion -- there's  
12 three or four of them. But those are sort of the  
13 main cases that have come out of the Southern  
14 District in the last couple of years and they've  
15 sort of been picked up around the country. I'm not  
16 aware of a New Jersey case that's cited it yet, but  
17 they sort of have been picked up as -- as the place  
18 to start. So, that's Rowe and Zooba Lake.

19 Another hot topic that comes up is this  
20 reference to "meta data." I think people just like  
21 saying the word, but it really just means hidden  
22 data in a document. Usually a Word document. It  
23 basically just means Word keeps track of who  
24 authored the document. Certain information about  
25 who edited it.

28  
1 It keeps some -- it keeps some dates and  
2 that kind of thing. I'm only aware of one case that  
3 addressed the issue. It's the Momah case, M-o-m-a-  
4 h, out of the Eastern District of Pennsylvania and  
5 it's referenced in the article. And in that case  
6 they found it was discoverable.

7 There's been a lot written about meta  
8 data. I'm not sure it's really that relevant. I  
9 mean, it really only comes into play when you need  
10 to find out who looked at a document at a certain  
11 time or who authored it.

12 Although I was surprised to actually have  
13 a case just a few months ago where we actually did  
14 have to get the meta data out of a particular  
15 document to find out who drafted it, who came up  
16 with this particular contract when it was that that  
17 was at issue, and it ended up to be a dispositive  
18 fact that came out in mediation, albeit not the  
19 litigation.

20 But, you know, we literally had nailed it  
21 down to this language, of course, first written by a  
22 lawyer in a certain company on a Friday afternoon.  
23 It was an exchange with the business people.  
24 Everybody left for vacation. I mean, you know, we  
25 were able to nail it down to that particular level

29  
1 of detail. I'd be surprised if it really needs to  
2 happen that way in -- in most litigations, but it is  
3 available if you need that.

4 I guess the last -- the second to last big  
5 issue in electronic discovery is the document  
6 preservation issue. And I know we're going to hear  
7 some more about that. That, to me, is the most  
8 difficult one.

9 There's a whole host of cases that I say  
10 in the article where there's specific instances  
11 where people intentionally destroy documents. I  
12 mean, one client went out and bought a hard drive  
13 eraser program, and, you know, those -- those cases  
14 really aren't too difficult. It's pretty clear that  
15 you're going to get in trouble and you're going to  
16 be given sanctions for doing that.

17 The more troubling cases are those that  
18 reference the destruction of data just on the use --  
19 the every day use of the system. Either people are  
20 marking e-mails deleted -- the backup tapes that the  
21 company saves for disaster recovery purposes  
22 sometimes tend to get recycled or thrown out and --  
23 and it's these kind of normal, every day use of the  
24 electronic system that technically is quote/unquote,  
25 destroying data.



<p>1           There's probably a couple of cases on it 2 which you'll see referenced in my article. The 3 Zooba Lake 3 case was the last word on it, up until 4 a couple of months ago. And then recently there's a 5 case out of the District Court of Maryland, 6 Thompson, which is 219 FRD 93. And, again, if you 7 e-mail me, I'll give you all these sites which went 8 into the issue of when a party will be sanctioned 9 and it referenced the Zooba Lake 3 opinion. And to 10 me it's just very hard to really get the potentials 11 on that because it's a troubling area and it's a 12 difficult area. Especially when you're just using 13 your computer every day, as a normal course of 14 business. And I think that's probably where a lot 15 of the -- a lot of the practitioners in the Sadona 16 Conference really got their start, and that is 17 you'll see references to that in the materials. 18           The Sadona Conference was basically a 19 group of lawyers, judges, in-house lawyers, people 20 involved in the technology aspect, the vendors, and 21 that kind of thing. They got together and tried to 22 come up with sort of some general principles of when 23 -- when electronic discovery will be available, who 24 will pay for it, how much do you have to do. 25 That's referenced at their site, and I think the</p>	<p>30 1 Hedges is going to talk about that in a little more 2 detail. 3           MR. MADERER: Thank you, John. 4           Coincidentally, the Sadona Conference is 5 meeting today and tomorrow at their annual meeting 6 in Arizona concerning two days on the subject which 7 we're able to cover in an hour and a quarter. See, 8 here in New Jersey we're efficient. 9           Judge Hedges, John spoke about sanctions. 10 I know some courts have sanctioned parties with an 11 adverse inference jury instruction for destroying or 12 failing to preserve relevant digital data when that 13 conduct is intentional or done in bad faith. 14           Do you think an adverse jury instruction, 15 adverse inference jury instruction should be given 16 when the Court finds mere negligence in a company's 17 failure to preserve and/or maintain digital 18 information? 19           JUDGE HEDGES: If you're in the Circuit -- 20 the Second Circuit, the answer is yes because that 21 very issue was put before the Circuit last year and 22 it's -- it extended this concept of failure to 23 produce information at discovery to a negligent 24 failure and approved an adverse inference. 25           MR. MADERER: And nothing in the Third</p>
<p>31 1 handout may have the latest version. If you go 2 there, and, again, this is in my article, Sadona 3 conference.org. the latest principles are there, 4 including a little -- a nice little discussion of 5 how the principles changed from 2003 to 2004. 6 That's sort of -- I would suggest some suggested 7 reading as well. 8           The Sadona principles I think have been 9 picked up in the Southern District cases, Rowe 10 and/or Zooba Lake . I'm not sure if they were cited 11 in any New Jersey cases. But they really are -- not 12 really too controversial but they basically draw the 13 same -- the same distinctions on the active versus 14 inactive. And when you should shift the cost and 15 when you shouldn't. But I would suggest you read 16 those, also. 17           That's really the main issues. And, of 18 course, the last issue and the most interesting and 19 the most complicated is when you actually do decide 20 to go past active data and you want to maybe look at 21 deleted data or back-up data, or things of that 22 nature. The courts have developed a body of law on 23 when the cost of that should be shifted, how you 24 should do it, when you should -- when you need a 25 vendor, and that kind of thing, and I know Judge</p>	<p>32 1 Circuit as of this moment, Your Honor. 2           JUDGE HEDGES: Nothing in the electronic 3 context. 4           MR. MADERER: Okay. Thank you. 5           We'll move on to Jeffrey Lorell. 6           Jeff, how do you get your arms around the 7 appropriate document requests in a big case, 8 recognizing that asking for every digital document 9 may produce an avalanche of material that you may 10 not want to review. And, similarly, how do you 11 respond to such a request if your adversary serves 12 you on one? 13           MR. LORELL: Well, that's, of course, the 14 question of the hour. 15           My assignment from Bill was to pull 16 together some practical thoughts on digital 17 discovery in eight to ten minutes. A near 18 impossible task. But to try and do that, I've 19 distilled some thoughts into eight simple -- eight 20 simple principles or points that are really based on 21 common sense. 22           First, and this is what we've just been 23 talking about and that is document preservation. 24 Seek to preserve all digital data at the earliest 25 possible minute.</p>

<p>1 Now, that doesn't mean two weeks or a week 2 before the Rule 16 Conference, when it comes to 3 mind, oh, gee, I've got an obligation to do this. 4 It means when litigation is reasonably anticipated. 5 And there are two parts to that. 6 The first is internal with the client. 7 You have to warn your client at the earliest 8 possible time to suspend all routine document 9 destruction, to suspend auto-delete programs, to 10 suspend overwriting that would otherwise occur that 11 would remove data and to work with the client to 12 make that a top priority. 13 Document preservation has to be a top 14 priority from senior management communicated all the 15 way down not only through the IT department or IS 16 department at the client, but to the department 17 heads, to key players, to the people involved in the 18 litigation, to everyone who in any way, shape or 19 form could be touching any of the relevant data. 20 And that usually means forming some sort of action 21 plan, a formal action plan, which is distributed 22 clearly. I'm sure it's something John is going to 23 cover. And forming an action-response team or 24 litigation-response team, that will generally 25 include outside counsel, inside counsel, members of</p>	<p>34 1 it all into -- organized into one, single, readable 2 and searchable source. And that's a daunting task. 3 So, you've got to learn what's there, how 4 difficult it is and how expensive it is, not only 5 for the Rule 16 Conference, but to confront these 6 issues with your adversaries. 7 Three. Propound discovery requests for 8 digital information as narrowly and precisely as 9 possible. You know the old adage, "Be careful what 10 you ask for. You may get it." 11 Well, this is absolutely applicable in the 12 digital age, because you could get piles and piles 13 of data that is not -- documents that are just not 14 relevant at all because you've asked -- because your 15 demand is just so broad that it's brought in this 16 net with thousands of documents that you've got to 17 sift through. 18 You don't want -- you also don't want such 19 broad requests coming back to you and to your 20 client. You want them to -- you want your request 21 to be reasonable and to be very focused. To 22 increase the court that the -- the likelihood that 23 the Court will enforce your document request if 24 there's a dispute, and also to decrease any 25 likelihood, as I'm sure Judge Hedges will talk</p>
<p>35 1 the IT staff, senior management and, in many cases, 2 outside consultants as well. 3 That is absolutely critical at the 4 earliest stage. And the corollary, which is, put 5 your opponent on notice of their duty to preserve 6 digital documents even before the litigation begins. 7 Write a letter. There are some sample letters in 8 Jason's materials that are wonderful. That's 9 something you should do. 10 Point number two, and this is something 11 that -- that -- that -- Judge Arleo just mentioned. 12 It's now expressed in Rule 26.1, but it's a matter 13 of common sense. So whether you're in another 14 district or you're in State Court New Jersey, you've 15 got to learn the client's information system. What 16 is the data? Where is it? How difficult is it to 17 get? How expensive is it to get? 18 Imagine you're representing a client 19 that's got subsidiaries or offices in different 20 parts of the state, different parts of the country. 21 Your job is to get the data from different locations 22 from various laptops and -- and desktops at each 23 location, some of which are sitting in a corner 24 because they haven't been used, from multiple 25 servers, from archives and from back-up data. Get</p>	<p>37 1 about, that the cost of that is going to be shifted 2 to you. 3 To give an example. Don't ask for e-mails 4 from everybody in the sun over a 20-year period, or 5 a 10-year period. Name the key players that you 6 know from other documents or from your client's 7 involvement are involved. Ask for e-mails from a 8 particular list of people over a narrow period of 9 time. As narrow as you can reasonably make it to 10 get what you need for the case, related to a 11 specific topic. That kind of request is much more 12 reasonable and much more easily complied with. 13 Ask for, particularly if there are 14 certain documents where the date of the production, 15 the date of the creation of the document, who looked 16 at the document, who worked on the document are key 17 to a case, and sometimes they are. 18 I had one case in which that was really a 19 determinant fact. Ask for the production of that 20 document in electronic format which will allow you 21 to access the meta data. And you work with your own 22 client's in-house IT people or an outside consultant 23 to make sure you frame those requests properly, and 24 you can discuss them properly. 25 Ask for, specifically, out-going, out-</p>

<p>1 bound PC based faxes. And the reason I say that is  2 most people don't realize that in many companies  3 out-bound PC-based faxes are saved on another server  4 that no one ever searches. And they're archived  5 differently and they're archived in a different  6 place. And those are frequently overlooked.  7 Incoming PC-based faxes go into the e-mail queue.  8 So, you get those when you get the normal discovery  9 about e-mail, but out-bound people frequently don't  10 get it. And, of course, it goes without saying, ask  11 for, you typically do, all non-identical paper  12 copies. So, you may get an electronic format or  13 image of an e-mail that was sent, but you also want  14 the copy that is in somebody's files that has hand-  15 written notations on it.</p> <p>16 Four, prepare responses and objections to  17 digital discovery requests by being very specific  18 and explain what databases were or will be searched  19 and what databases will not be searched.</p> <p>20 Be explicit about what is accessible and  21 what is not accessible. I was just yesterday  22 looking at a document response in a case in which I  23 was substituting as counsel. And in that response  24 this is something you see in 95 percent of the  25 document responses. You see it says a whole host of</p>	<p>1 is it going to be in? Is it just readable? Is it  2 readable and searchable and so on, or are you going  3 to get it in both?</p> <p>4 And, as John mentioned, talk about cost  5 sharing. Talk about cost sharing even with regard  6 to imaging of paper documents.</p> <p>7 I have been involved in cases in which the  8 document production, when you've got a number of  9 parties, routinely goes to an outside provider who  10 images the documents and sends electronic copies to  11 every party in the case. And the cost of imaging,  12 rather than being born by each party separately, is  13 shared by everyone and is a fraction of what it  14 would otherwise be.</p> <p>15 Six. Bring a qualified computer  16 consultant on board the litigation team as early as  17 possible. Now, obviously there are some cases where  18 the budget doesn't allow that, and the consultant  19 can be an in-house person. The difficulty, while  20 you may have very sophisticated people in-house that  21 can deal with all the IT issues, the trouble is  22 getting their time and attention and getting them to  23 dedicate themselves for days or hours to work on  24 projects for one case as opposed to other demands  25 being made by the -- the line people in the company.</p>
<p>1 objections, it's burdensome, it's this, it's that,  2 and it says "subject to the foregoing, all relevant  3 documents in response to this will be produced."</p> <p>4 Now, I happen to know that some of the  5 original legacy data that might be responsive to  6 that was never even searched by our predecessor, and  7 so a -- a document response which says all documents  8 will be produced is not accurate. It's absolutely  9 not truthful.</p> <p>10 So, be specific, and then you don't have  11 any problem about whether your response is accurate  12 or not. There won't be any sanctions later on when  13 someone discovers there are e-mails on a computer  14 system that goes back five years that no one's ever  15 looked at.</p> <p>16 Five. Confer with your adversary well in  17 advance of any actual document production about the  18 format the format in which the electronic data will  19 be produced. So, that's -- not only are you talking  20 about the stuff - - the data before your Rule 16  21 Conference, but before it's actually produced. Are  22 you going to be producing paper images? Are you  23 going to be producing the information in electronic  24 format only? Are you going to do it in both? If  25 you're producing an electronic format, what format</p>	<p>1 So having an outside consultant - - this is music to  2 Jason's ears, I'm sure, is very important - -  3 particularly in the big case to help. This is  4 something that you'll discuss with senior  5 management, with your in-house IT people, who'll  6 find what you need. You want to minimize the cost.  7 But it's something to consider before you file the  8 Complaint, before you file the Answer, when you're  9 talking about document preservation, that's the time  10 to think about, do I need an outside consultant?  11 What help do I need from inside the company?</p> <p>12 Seven. Never, never, never, never, under  13 any circumstances, allow your adversary or your  14 adversary's expert free reign to search through your  15 client's digital files. Come in and search through  16 your client's digital files.</p> <p>17 That creates all sorts of issues with  18 regard to security, with regard to -- when I say  19 "security," I mean accidental deletion, altering or  20 damaging of data. It raises all sorts of questions  21 with regard to attorney-client privilege. It raises  22 all sorts of questions with regard to  23 confidentiality.</p> <p>24 But, notwithstanding that, you should  25 consider, when it's appropriate, the idea of</p>

<p>42</p> <p>1 engaging - - jointly engaging a neutral outside 2 consultant, an independent computer consultant, who 3 can come in and retrieve data from both sides or as 4 many sides as there are. Do the digital 5 investigation, establish a database which he then 6 gives to the lawyer for that party to review for 7 privilege, for confidentiality, for relevance, and 8 so forth. So, that you are producing the data. Not 9 the consultant. But you've gotten it from a third 10 party. There's no question about whether it's been 11 done properly and it's been done completely and 12 everybody shared the cost of it.</p> <p>13 So, that is certainly something to 14 consider. And in those circumstances, you can 15 stipulate around issues of waiver of attorney-client 16 privilege, and so forth.</p> <p>17 Number eight. Voluntarily, in my view 18 voluntarily produce in the first instance all of the 19 requested documents from active files, from deleted 20 files that can be easily retrieved. I think that's 21 what they mean when they say "near-line data." 22 Because you know when you press "delete" on your 23 computer for an e-mail, it goes into "trash" and it 24 can easily be restored from the trash. If you 25 delete if from "trash," it goes somewhere else. It</p>	<p>44</p> <p>1 documents. And if you are compelled by the Court to 2 go into that, then suggest data sampling, which is 3 merely a test run.</p> <p>4 Let's take a tape from the key period, a 5 back-up tape, and let's develop the protocol for 6 searching that, put in the key words, let's develop 7 -- let's get the data off that, let's see how many 8 relevant documents we really got from the most 9 relevant time period and how much it costs and how 10 much time. And then, based on the results of that 11 sampling, you have much better factual information 12 for the Court to determine how much further you must 13 go into inaccessible sources.</p> <p>14 In the end, I know this -- all of this is 15 a very controversial topic. In the end I think 16 what's going to happen, and I'd be interested to 17 hear what -- what John has to say about this. But I 18 think that as time goes on, clients will become more 19 and more sophisticated and will recognize the 20 potentially huge litigation costs for retrieving 21 data that has been archived or is on Legacy systems 22 that can't easily be accessed, I think that 23 sophisticated clients will begin storing all their 24 data in readable and searchable forms. Not because 25 it's relevant to litigation, but because it's</p>
<p>43</p> <p>1 can still be restored. If it can be restored 2 easily, I believe you're under a duty to produce it.</p> <p>3 Produce data from archives that are easily 4 -- not easily that are accessible for business 5 purposes to people in the company. If it's 6 accessible for routine business purposes, even if 7 it's a little bit difficult, I believe you're under 8 a duty to produce that. Any other sources where the 9 retrieval of or access to the information is 10 relatively simple.</p> <p>11 For example, if there are back-up disks, 12 optical disks, that can be searched easily and -- 13 and -- and scanned easily and searched easily, that 14 should be a source that you go to for the ordinary 15 production of documents.</p> <p>16 If your adversary wants more - - they want 17 back-up tapes where the data is stored in a linear 18 fashion and it costs a tremendous amount of money 19 and a tremendous amount of time to go back and pull 20 all the data off that tape, only a small piece of 21 which is responsible, ask for and demand a showing 22 of special need, relevance and argue the issue of 23 whether the benefit outweighs the burden -- the -- 24 the -- the -- whether the burden outweighs the 25 marginal benefit from this additional source of</p>	<p>45</p> <p>1 relatively easy and inexpensive to do that. And if 2 you do it at the outset, it will cut down litigation 3 costs.</p> <p>4 MR. MADERER: Thank you, Jeff. 5 We will hear from John Sander. 6 John, as an in-house counsel, I know 7 you're concerned with implementing your company's 8 document intent policy and converting and preserving 9 privilege. How do you go about doing that both 10 before litigation commences and after litigation?</p> <p>11 MR. SANDER: Well, Bill, let me give -- 12 let me step back for a second and give you a few 13 reflections really on what electronic discovery 14 means to in-house counsel and -- and then I'll get 15 to the document preservation point.</p> <p>16 You know, I had to put this 17 diplomatically. This is not one of life's great 18 pleasures for us, dealing with electronic discovery.</p> <p>19 We are in an era now where there is a 20 focus and I would say, in my jaundiced view, a 21 fixation with obstruction of justice, document 22 destruction, document preservation.</p> <p>23 We read in the papers about Martha 24 Stewart, about Arthur Andersen. For those of you in 25 the employment area, you may remember the Texaco</p>

<p>1 case, which at it's root, really was a document 2 destruction issue. And so, we live in a era where 3 as in-house counsel we have to expect plaintiffs 4 lawyers and prosecutors to scrutinize very, very 5 carefully what we do in this area. And it's much 6 more complex in the era of electronic discovery, 7 where documents are being created, altered, 8 destroyed in the every day course of business. 9 And it's not just a matter of Rule 37 10 sanctions or adverse evidentiary inferences, as bad 11 as they are, for your client. 12 In-house counsel are increasingly being 13 asked to testify about the completeness of document 14 production. We are -- depositions are being taken. 15 We are being asked to supply affidavits. There have 16 been in-house counsel asked to testify before Grand 17 Juries. So this -- it focuses the mind. Let me 18 put it that way. 19 And it's an area of -- where occasionally 20 there are great technically complex issues. And 21 many of us of a certain age, and I can see Rosemary 22 cringing over there. I won't mention a particular 23 age. But I think a lot of us who did not grow up in 24 this kind of -- in this kind of computer culture are 25 not the most adept at doing this. And, of course,</p>	<p>46 1 transaction, your paper files," that's pretty easy. 2 No one really minds that. They expect that. But 3 when I go in, usually with, you know, maybe with a 4 couple of associates from a firm like Jeff's firm or 5 some outside consultants and I say, "You know, we're 6 really interested in you. We want to look at your 7 e-mail for the last year." All of which is not 8 categorized by subject matter. 9 So I'm not only looking at their e-mails on 10 the Acme Widget transaction, but I'm looking at all 11 their other business issues. I'm looking at their 12 snide comments about the boss. I'm looking at the 13 resumes they've sent out to headhunters. I may be 14 looking at the notes from their spouse to bring home 15 a quart of milk. I mean, we all tell people not to 16 do this -- 17 MR. LORELL: You don't do that. 18 MR. SANDER: Well, I wasn't going to say 19 that. That's never happened at Schering Plough, of 20 course. But people do use e-mail for personal 21 reasons. You just can't stop it. 22 Every single company I know tells people 23 not to do it, and that we will monitor and access 24 your e-mail, but it doesn't stop people. It doesn't 25 stop -- I would imagine anybody in this room for</p>
<p>47 1 we do have IT people available to us. But I'm 2 always amazed at how even the IT professionals don't 3 agree on some basic points, which is -- such as what 4 data can be recovered? How long will it take to do 5 it? What resources do we have to bring to bear? 6 How much will it cost? 7 And you can get three different answers 8 from three different IT professionals or, worse yet, 9 as I've seen happen before, you'll get the same 10 answer from the first three that you talk to. 11 You'll then go ahead and respond to your document 12 request. And then six months later, you'll locate 13 another IT person who says, "Oh, I know how to 14 recover that data." 15 Hopefully, by that time, you have not 16 already submitted an affidavit or given testimony 17 under oath that you've already produced everything 18 that you had. 19 The other point which I think that we 20 don't think of as lawyers, but as somebody who has a 21 lot of contact with ordinary business people, it 22 really is something different about electronic 23 discovery and that is it's highly intrusive. 24 When I go into a business person's office 25 and I say "give me your files on that Acme Widget</p>	<p>48 1 using e-mail for personal reasons. So, I am not a 2 popular person when I have to go in and -- and 3 search people's e-mails or hard drives. And I know 4 that's not a concern in the federal rules, but it's 5 something that I think as lawyers we ought to be 6 aware of when you know, we very politely, undertake 7 electronic discovery. 8 And the last general point I'll make about 9 this before I get to document preservation is I 10 often wonder: Do we overrate the importance of 11 electronic communications as evidentiary materials? 12 I think we all -- we see this as kind of the 13 treasure trove. This is the place where we will 14 find out what people really think when they don't 15 think people are listening to what they say. This 16 is where the larceny lurks in the hearts of men. 17 And I -- I'm sure that's true. But I also wonder if 18 e-mail is not also the most casual, the most 19 hurried, the most ill-thought out, the most 20 uninformed communications that we engage in and I 21 always think about -- a few months ago I was in an 22 amusement park with my small children and I happened 23 to sit down on a bench next to a guy who, literally, 24 had his baby in his left hand, feeding with a 25 bottle, so it was the left-hand, one-hand feed,</p>

<p>1 which for those of you who have kids know is a 2 pretty tricky maneuver. And in the right hand he 3 had the Blackberry and he was punching in messages 4 with the thumb. And it's really extraordinary but 5 I'm a worrier and all I could think about was of is 6 some day a summary judgment motion in a major 7 antitrust case is going to die because of that 8 message that he pumped in as he was feeding his baby 9 and listening to the ferris wheel go around. And I 10 just wonder. Are we -- have we caught up with the 11 reality of electronic communications? Which is, you 12 know, they may be very probative, but they also may 13 be so -- you know, so uninformed and so -- so 14 incompetent that they really should be barely 15 admissible at all, but, anyway, I'm venting a little 16 bit.</p> <p>17 Let me talk about document preservation. 18 I think the single -- the single best 19 thing that we can do as in-house lawyers to -- to 20 minimize the problems our companies have in this 21 area is to have a good document preservation 22 protocol or policy. And I think if you are a large 23 organization, this should be in writing. It should 24 be something -- if you have more than one lawyer, 25 for example, in your law department who is engaged</p>	<p>1 If you have a reasonable belief if they have made a 2 non-frivolous threat or intention to litigate known 3 to you, I think that you probably at that point have 4 an obligation to preserve documents. It gets even 5 harder than that.</p> <p>6 Suppose, in the pharmaceutical industry, 7 for example, we -- we routinely have adverse events 8 reported to us. People's bad experiences with 9 particular products. Where do I draw the line 10 there? I certainly can't regard each one of them as 11 a trigger for document preservation, but on the 12 other hand, if somebody has had an injury after 13 using our product and I have reason to believe that 14 might lead to litigation, that's probably a trigger 15 for me to preserve documents. And decisions in that 16 area can be very, very tricky. I've even had a case 17 where I saw an account in the media that led me to 18 issue a document preservation notice. No, I'm not 19 going to tell anybody what that was, but it -- it -- 20 really, the source can come from almost anywhere. 21 It could even be word of mouth. If you have -- if 22 you have something that puts you on notice that you 23 can reasonably anticipate litigation, then you have 24 to -- you have to act and you have to act quickly. 25 The second element, I think, is you've got</p>
<p>1 in this, I think it's something that should be in 2 writing and people should be trained on this so 3 there's a common understanding as to what we need to 4 do and when we need to do it.</p> <p>5 I think you can phrase these policies a 6 number of different ways. But let me just tell you 7 what elements I think we really need to have in 8 them.</p> <p>9 One is you've got to identify what the 10 trigger will be for document preservation. That's 11 something when I was a young litigator, 20 years 12 ago, that was pretty simple. You just waited for 13 that document request to come in and that was your 14 trigger to say make sure you don't destroy any of 15 these. I mean, the documents that they're looking 16 for.</p> <p>17 That, clearly, is not sufficient anymore. 18 Sure, a document request, a subpoena, a civil 19 investigative demand is clearly a trigger for 20 document preservation, but I think a Complaint 21 certainly is also, in this day and age, clearly a 22 trigger for document preservation.</p> <p>23 Then it gets harder. I think a lawyer's 24 letter can be a trigger for document preservation, 25 whether or not they ask you to preserve documents.</p>	<p>1 to designate who's going to be responsible for 2 document preservation. It could be in an in-house 3 legal department. It could be the attorney who's 4 handling that particular matter or it could go 5 higher. You could have the head of litigation, for 6 example, be responsible for that. In a small law 7 department, it might even be the General Counsel 8 who's responsible, but I think you need to designate 9 who is responsible so that somebody is both 10 responsible and accountable for doing this.</p> <p>11 Have a form of document hold notice 12 drafted and ready to go. These issues always come 13 up when you're busy with about fifteen other things 14 and you rarely have the time that you want to sit 15 down and -- and compose a document hold notice. 16 Have one ready. Have a form ready. Have blanks 17 where you can fill in the particular documents that 18 you want to hold and be ready to go out with that 19 immediately.</p> <p>20 Send it out widely. It's often an art 21 form to decide what you need to preserve and who 22 needs to be aware of that. And there's no real rule 23 I can give you to help you. But send it out widely. 24 Send it out to the people you -- who receive it 25 should also be instructed to send it to any of their</p>

<p>1 subordinates or colleagues who think they might have 2 documents that are relevant, that are in the 3 suggested areas.</p> <p>4 Make it a simple, strong document, that 5 ought to read like the Declaration of Independence, 6 or, you know, the Magna Carta, or the '95 Theses. I 7 mean, it shouldn't read like a typical lawyer memo, 8 that they will not pay much attention to. So I 9 encourage the use of bold face, capital letters, 10 whatever you need to do to make sure that the 11 business person understands this is something that's 12 very serious.</p> <p>13 You certainly need to specifically discuss 14 electronic documents in a document hold notice. 15 People do not understand that a document includes 16 digital and electronic information unless you really 17 hit them over the head with it and you have to spell 18 out specifically what you're looking for. 19 Specifically, what kinds of electronic information 20 that you want them to -- to maintain.</p> <p>21 As was mentioned, I think, by Jeff or 22 John, a lot of people don't understand that you have 23 to suspend document destruction policies when you 24 are under an Order to or under an obligation to 25 preserve documents.</p>	<p>54</p> <p>1 corporations there's a certain turnover. New people 2 come in, people leave, new product lines change, so 3 people's responsibilities change and it's not at all 4 uncommon for a new person to come in and see, you 5 know, a big bunch of documents and say, Gee, let me 6 clean my office and get rid of this stuff and 7 possibly violate an Order which they never received. 8 Because, frankly, they did not have that 9 responsibility at the time that you were sending out 10 the notice.</p> <p>11 So, I think those are the main thoughts 12 that I have on document preservation.</p> <p>13 And, you know, I thank you all for 14 inviting me and I look forward to taking any 15 questions that you may have.</p> <p>16 MR. MADERER: Thank you, John. 17 Let's move on to Jason. 18 Jason, how do consultants like Kroll 19 assist counsel in the process of electronic 20 discovery? Will the company have the proper 21 bankruptcy after they get your bill?</p> <p>22 MR. STRAIGHT: Well, the answer, as 23 anything in electronic evidence is, it depends. But 24 -- but thank you. It's certainly a pleasure and an 25 honor to be on this distinguished panel. I</p> <p>56</p>
<p>55</p> <p>1 Many business people will say to you, you 2 know, "I sure hope that Complaint doesn't come in 3 until after our document destruction period has 4 expired." And they don't understand that if we're 5 having that conversation, we have to preserve it 6 right now.</p> <p>7 And the other -- I guess the last element 8 of that is give them a contact that they can talk to 9 about this, and that's generally going to be the in- 10 house attorney. And in appropriate circumstances 11 you may have to call them up as well. As well as 12 sending this memo or e-mail, or however you do it, 13 you may have to call them up and specifically go 14 over it with them to make sure that they understand 15 it.</p> <p>16 A couple of things that -- that I think 17 people sometimes forget when they do this is you 18 absolutely must bring your IT people into the loop 19 on any document preservation notice because they 20 have to be aware of the obligation so that if there 21 is any automatic deletion going on, that they can 22 suspend that.</p> <p>23 The other thing that -- that I think 24 people forget to do is sometimes you need to 25 redistribute these notices because in -- in most</p>	<p>57</p> <p>1 appreciate the invitation.</p> <p>2 I've certainly been set up very nicely by 3 my fellow panelists. Although I don't expect to get 4 any business from these guys because they don't need 5 any consulting. I think they really have a -- have 6 a mastery of the subject matter, which is great to 7 see.</p> <p>8 But what I spend a lot of my time doing is 9 guiding counsel through this process and helping 10 them set up their litigation-response teams and help 11 them identify where relevant data is.</p> <p>12 But one thing I think a consultant can be 13 helpful in doing even -- even helping John or Jeff 14 or John in these matters is serving as a translator. 15 I mean, John mentioned you've got to bring the IT 16 people into the process, and that's absolutely 17 critical, but that's easier said than done because 18 lawyers and IT people speak completely different 19 languages and the role that we often serve is as 20 translator and interpreter between the lawyers and 21 the IT people because often they just completely 22 miss each other.</p> <p>23 So, for instance, this -- I don't know if 24 -- you know, even some of these sophisticated guys 25 may not have ever seen a server hard drive opened up</p>

<p>1 and see the templates. This is a hard drive, this 2 holds many, many gigabytes of data. This would be 3 considered a storage device that contains active 4 data. You can also recover deleted data off of this 5 server -- off of a server hard drive. 6 This is the -- I'm sure you've heard about 7 these. You've read about them, but how many of you 8 have actually ever seen a DLT tape? This is an 9 archive tape. It holds hundreds of gigabytes of 10 data. And there are many different types of these. 11 There are DLTs. There are LTOs. There are eight 12 millimeter dats. There are four millimeter dats. 13 What does it all mean? The IT people are going to 14 start throwing these terms around, expecting you to 15 understand what they're talking about and most 16 lawyers just don't. 17 A consultant will understand. And not 18 only will they understand what these are, but 19 they'll say, "Sure, we can handle it, send them to 20 us. We can deliver back to you whatever data you're 21 looking for from these various media types." 22 So, I will note these -- if any of you 23 have been involved -- if anything is going to 24 bankrupt a company in electronic discovery, it's 25 these guys, these archive tapes. Most of your</p>	<p>58 1 the person who's responsible for implementing that 2 who may tell you: Well, yes, that's the policy, but 3 we've been overburdened for the last 18 months; 4 we've been short staffed, so we've just been putting 5 laptops of terminated employees in that closet over 6 there. 7 That is something you need to find out 8 early on in litigation rather than in a deposition 9 of your IT manager. By the way, that is becoming a 10 very common tactic in litigation. Deposing not only 11 in-house counsel but -- but IT professionals as well 12 to ask them, "What have you done to preserve data in 13 this litigation? What instructions have you 14 received on your obligations here?" 15 One way to avoid that whole mess is to -- 16 is to have a consultant come in and do a -- have 17 experts come in and conduct your data harvesting, 18 your data collection, imaging hard drives. 19 Let the consultants provide the affidavits 20 as to how the process was conducted. Let the 21 consultants be deposed. Let them be in the hot seat 22 over whether this was done properly or not. So that 23 -- that -- that's a definite reason to consider 24 using an expert. 25 The other thing is if data collection --</p>
<p>59 1 clients are keeping way too many of these. Although 2 the decision -- as John mentioned, the decision on 3 what you can get rid of is very prickly and it's 4 difficult to decide what's safe to get rid of so -- 5 and, unfortunately, that is a question for counsel. 6 A consultant can assist in making that analysis, but 7 it's really -- it's a legal question. 8 So, those are the -- the interpretation 9 role and the translator role is -- is -- is a major 10 value add that I think a consultant can bring to 11 these -- to these matters. 12 You shouldn't assume that your client's 13 document destruction policy, document retention 14 policy, excuse me, is being properly followed. I 15 mean, certainly an important step is to ask your 16 client what is your preservation policy? What's the 17 policy for instance, when an employee is terminated 18 or leaves the company? 19 "Well, we have this written policy here 20 that says we take that employee's hard drive, we 21 reformat it and we put it in the queue to give to 22 the next new hire." 23 So, there's no data on any old hard drives 24 from terminated employees. Well, that's a nice 25 policy, but you want to make sure you're talking to</p>	<p>60 1 if the data collection process isn't performed 2 properly, you can lose irrevocably information like 3 meta data. Meta data is easily altered and it's 4 important to make sure that your collection process 5 is done in such a manner that even if meta data is 6 altered during the process, that you're able to 7 trace back to the original piece of electronic 8 evidence and authenticate that piece of evidence. 9 Maintaining chain of custody throughout the 10 collection process is important. And that's 11 something a consultant will do as a matter of 12 course. 13 The other, you know -- I can pull out -- I 14 don't want to get too prop reliant here, but the 15 devices -- you know, I have a Blackberry, I have a 16 PDA because a PDA does things the Blackberry doesn't 17 do, I have a cell phone that I can record little 18 voice messages to myself on. All of these things 19 contain data. Now -- that it's not available from 20 any other source. 21 Now, in a lot of litigations this is not 22 relevant. But you want to -- you want to make sure 23 you understand what kind of data you're talking 24 about, what the universe is of data, and what you 25 need to do to collect that data. And a consultant</p>



<p>1 can certainly help with that.</p> <p>2       Probably the biggest and -- and -- and --</p> <p>3 I am being serious when I say this, Bill, that</p> <p>4 consultants really can actually save money in the</p> <p>5 electronic discovery process because we are able to</p> <p>6 apply technology to filter this vast universe of</p> <p>7 data that your client presents you with. The 200</p> <p>8 archive tapes and 30 hard drives that you need to</p> <p>9 search. We can apply technology to do a number of</p> <p>10 things to reduce that data. Most notably, we can</p> <p>11 eliminate duplicate documents, so that you only have</p> <p>12 to review one copy of each document.</p> <p>13       We can apply key-word lists to all of the</p> <p>14 documents in your universe and just give you the</p> <p>15 documents that take hits on that key word list to</p> <p>16 review. We can apply date filters.</p> <p>17       We can pull data -- we have technology</p> <p>18 available to us that allows us to pull data off of</p> <p>19 these archive tapes in an efficient and relatively</p> <p>20 inexpensive way and focus just on the documents and</p> <p>21 the particular individuals that -- that you're</p> <p>22 interested in.</p> <p>23       So, that's probably the biggest cost</p> <p>24 savings. And also through involving us early,</p> <p>25 involving a consultant early, you know, a consultant</p>	<p>1 the allocation of costs.</p> <p>2       Judge Hedges, how do you go about that?</p> <p>3 And what are the standards you use?</p> <p>4       JUDGE HEDGES: A couple of quick</p> <p>5 introductory notes before I actually talk about</p> <p>6 that.</p> <p>7       My outline is in your materials and</p> <p>8 there's a mistake on page 51, so I'd appreciate your</p> <p>9 fixing it. It's in the "conclusion" section, and it</p> <p>10 says "Date sampling" and that's wrong. It should be</p> <p>11 data, d-a-t-a, sampling.</p> <p>12       The Second Circuit case I mentioned before</p> <p>13 was the Residential Funding case. It's cited at</p> <p>14 page 48 of the outline.</p> <p>15       A comment before I talk about this. There</p> <p>16 is not much more at the Circuit level addressing</p> <p>17 cost shifting. As a matter of fact, there's</p> <p>18 basically none at the Circuit level addressing cost</p> <p>19 shifting. The only case that's really talked about</p> <p>20 electronic discovery is the Ford Motor case, which</p> <p>21 is cited in the material, out of the Eleventh</p> <p>22 Circuit. And, interestingly, there's an opinion out</p> <p>23 of the Court of Claims from last year that rejected</p> <p>24 a record retention policy of the government and --</p> <p>25 as a sanction because information that should have</p>
<p>1 will always encourage you to discuss with the</p> <p>2 opposing side the scope of discovery very early on</p> <p>3 in the case.</p> <p>4       Your local rule here in New Jersey makes</p> <p>5 that a requirement, which gives you a head start on</p> <p>6 that. But that is, really, the best way to contain</p> <p>7 cost is to address these issues very early on in the</p> <p>8 litigation. And in the document production phase as</p> <p>9 well. Keeping the documents in electronic form</p> <p>10 throughout the process is critical.</p> <p>11       There's no reason to go to paper anymore.</p> <p>12 You can produce electronically as the other</p> <p>13 panelists have discussed. And that can save you a</p> <p>14 tremendous amount of money. Various studies have</p> <p>15 been done showing that keeping documents in</p> <p>16 electronic form can save you 50 percent or more in</p> <p>17 the discovery process.</p> <p>18       I'm going to stop there. I don't want to</p> <p>19 take too much of Judge Hedges' time. I don't think</p> <p>20 it would be a good idea to take the judge's time.</p> <p>21       MR. MADERER: Thanks very much, Jason.</p> <p>22       We saved the practical report issue for</p> <p>23 last, and that is how does the Court allocate costs</p> <p>24 for which you have a substantial digital production</p> <p>25 and sides cannot agree -- parties cannot agree on</p>	<p>1 been preserved was not preserved, ordered the</p> <p>2 government to produce backup tapes. So, we're</p> <p>3 beginning to see case law at the appellate level.</p> <p>4 There isn't much.</p> <p>5       Going back and talking about cost</p> <p>6 shifting. There are a couple of things you have to</p> <p>7 bare in mind whenever we're talking about cost</p> <p>8 shifting.</p> <p>9       Number one, and this is something I</p> <p>10 continually say to lawyers, and lawyers don't seem</p> <p>11 to use much, is Rule 26.(b)2 of the Federal Rules,</p> <p>12 which has a proportionality rule built into it. It</p> <p>13 always amazes me when there are discovery disputes</p> <p>14 that attorneys don't take advantage of Rule 26.(b)2</p> <p>15 and make arguments with regard to the need to limit</p> <p>16 discovery or impose some other type of controls on</p> <p>17 discovery because of a number of factors.</p> <p>18       Second, and this goes toward your</p> <p>19 obligations under the local rules that Judge Arleo</p> <p>20 mentioned. Remember when you serve discovery</p> <p>21 requests or you produce discovery, under Rule 26G of</p> <p>22 the Federal Rules, you are certifying that you've</p> <p>23 done this in good faith, that you've done it not for</p> <p>24 purposes of delay, and the like.</p> <p>25       It's something that can lead to sanctions</p>

<p>1 and there are some decisions cited in the outline 2 that address sanctions for the failure of a party or 3 an attorney, for that matter, to respond to 4 discovery requests.</p> <p>5 The most famous one now is out of the 6 Southern District. For some reason, these all seem 7 to come out of the Southern District. It's the 8 Metropolitan Opera decision that's cited in the 9 materials, where, among other things, the defendant, 10 after the case started, just junked its computer 11 system to avoid producing discovery. The result was 12 there was a judgment of liability imposed upon them 13 by the Court.</p> <p>14 The other comment I would make is there is 15 no explicit tradition in the Federal Rules of Civil 16 Procedure that allows for cost shifting. The jury 17 has basically come in on that. Everyone now says 18 that the courts have an implicit authority under the 19 Federal Rules to shift costs.</p> <p>20 There are three cases I want to mention to 21 you and we don't have much time. So I'll go through 22 them pretty quickly. They're in the materials 23 starting with page 28.</p> <p>24 The first is the McPeck opinion decided by 25 Judge Facciola, out of the District of Columbia.</p>	<p>66</p> <p>1 mentioned before.</p> <p>2 The first real decision that came anywhere 3 on cost shifting was by Magistrate Judge Francis in 4 the Southern District of New York, the Rowe 5 Entertainment case. It did a couple of things.</p> <p>6 First, it rejected the defendant's argument 7 that discovery of electronic material was unlikely 8 to lead to the discovery of relevant information. 9 What happened there is the defendants only offered 10 general representations that there wasn't anything 11 there. More interestingly, they had already 12 produced data that contradicted their arguments.</p> <p>13 So, if you're going to make an argument 14 against electronic discovery, be careful what your 15 client produced before the day you come into court.</p> <p>16 Second interesting thing. It rejected the 17 argument of the defendants saying that everything 18 important is always on hard copy. And we'll talk 19 about that a little more in the Zooba Lake opinion.</p> <p>20 The third thing Rowe Entertainment did, 21 Judge Francis adopted an eight-factor test to 22 determine whether electronic information should be 23 made available and whether costs should be shifted. 24 That's the first decision that really came out in 25 this area. It's been adopted by district courts in</p> <p>68</p>
<p>67</p> <p>1 What happened there and interesting from 2 our point of view is it really isn't a cost-shifting 3 decision, but it's a decision about how a judge can 4 look into what is really a voluminous request for 5 production of electronic materials from the 6 government.</p> <p>7 Judge Facciola borrowed a term from 8 economics called marginal utility, which basically 9 says, in our context, if there is an actionable 10 event on a certain date, it's most likely that 11 electronic information is generated on or near that 12 date.</p> <p>13 Judge Facciola proceeded from that premise 14 and the other thing that's important for us to think 15 of as lawyers and judges is that he's the first 16 judge that really came out with -- in an opinion 17 talking about this concept of doing data sampling or 18 test runs.</p> <p>19 And I would recommend that to all of you. 20 Whenever I have electronic discovery issues, the 21 first thing I'll try to do is figure out if there's 22 a way to do data sampling before we have to get into 23 voluminous discovery or we even have to address cost 24 shifting.</p> <p>25 The second opinion starts at page 35,</p>	<p>69</p> <p>1 a number of cases.</p> <p>2 The next big opinion, and it starts at 3 page 35, and this is the big opinion in the country 4 now, the Zooba Lake opinion by Judge Sherashone out 5 of the Southern District of New York. One of four. 6 And the last time I saw her I asked her if she's 7 stopped, and I think -- she hoped she's at the last 8 opinion at this stage. Very interesting case.</p> <p>9 Again, it begins by rejecting the argument 10 of the defendants that it had already produced 11 responsive documents which consisted of 100 pages of 12 e-mail.</p> <p>13 Here's one of the arguments that was 14 successfully used against the defendant. The 15 plaintiff had 450 pages of e-mail. Pretty hard to 16 say you produced everything in a 100 when the 17 plaintiff has four times as many as the defendant's 18 arguing.</p> <p>19 Second argument. Interestingly, the 20 defendant said: Look, we produced everything, but 21 it was entirely likely that a lot of the information 22 that the plaintiff wanted was on back-up tapes.</p> <p>23 Stop and think about it. A defendant and 24 an attorney cannot certify that they've produced 25 everything when they haven't looked at back-up tapes</p>

<p>70</p> <p>1 where relevant material was likely to be.</p> <p>2 Judge Shimlen also began with the</p> <p>3 presumption, which the Supreme Court has stated and</p> <p>4 the Federal Rules really suggest, that the</p> <p>5 responding party bares the expense of complying with</p> <p>6 discovery requests.</p> <p>7 Zooba Lake also rejected the assumption</p> <p>8 that there's an undue burden of expense whenever</p> <p>9 electronic discovery is involved. And,</p> <p>10 interestingly, and this is talked about before, she</p> <p>11 went into this concept of accessible or inaccessible</p> <p>12 data to determine whether information would be</p> <p>13 unduly burdensome or expensive to produce.</p> <p>14 Basically, suggesting if any materials is</p> <p>15 accessible, you never shift costs. Because it's</p> <p>16 kept in the normal course of business. It's used</p> <p>17 for business purposes. There's no reason cost</p> <p>18 should be shifted.</p> <p>19 And last, what Judge Shimlen did in Zooba</p> <p>20 Lake, one is she goes through Judge Francis' factors</p> <p>21 in the Rowe opinion. She rejects some. She</p> <p>22 modifies some. She comes out with a seven-factor</p> <p>23 test. This is now the gold standard, if you will,</p> <p>24 for electronic discovery until we start seeing some</p> <p>25 Circuits going beyond that.</p>	<p>72</p> <p>1 Chief Judge Bissell, Judge Brown, Judge Hayden,</p> <p>2 Judge Kugler, Judge Wolfson, Judge Chesler and Judge</p> <p>3 Pisano.</p> <p>4 Many of us appear regularly before the</p> <p>5 District Court. Certain issues are turning up more</p> <p>6 and more each day. Hopefully, this -- what I'll</p> <p>7 call seventy five main interactive, where I will</p> <p>8 encourage questions from the floor will give us</p> <p>9 guidance in our future appearances before the</p> <p>10 District Court.</p> <p>11 There are a number of topics we plan on</p> <p>12 covering. Let me give you some previews of coming</p> <p>13 attractions.</p> <p>14 First, we're going to talk about certain</p> <p>15 jury issues. The concept of note taking. Is it</p> <p>16 good? Is it bad? What's the judge's practice?</p> <p>17 Another sub-topic under Jury Issues is juror</p> <p>18 questioning of witnesses through the Court. The</p> <p>19 practice of it. Is it good? Is it bad?</p> <p>20 We're also going to talk about preliminary</p> <p>21 substantive charges to the jury about the case prior</p> <p>22 to the actual start of the trial.</p> <p>23 And, finally, under Jury Issues, we're</p> <p>24 going to talk about the notion of charging the jury</p> <p>25 before summations.</p>
<p>71</p> <p>1 Let me just suggest one thing, if I could.</p> <p>2 Page one of my outline. There's a footnote that has</p> <p>3 a number of sources of useful information. I have</p> <p>4 two new ones to give you, both published recently.</p> <p>5 They're both treatises. One is called "Electronic</p> <p>6 Discovery in Evidence." It's published by Law</p> <p>7 Partner Publishing in Arizona.</p> <p>8 The other is written by Joan Feldman who</p> <p>9 is a forensic computer analyst. It's called "The</p> <p>10 Essentials of Electronic Discovery" and it's</p> <p>11 published by Glassner Legal Works, which is right</p> <p>12 here in Essex County, I believe.</p> <p>13 MR. MADERER: Thank you, Judge Hedges, and</p> <p>14 thanks to all our panelists.</p> <p>15 (Applause)</p> <p>16 MR. MADERER: As I said earlier, we do</p> <p>17 things efficiently in New Jersey. So, we're going</p> <p>18 to take our 15 minute break and please be back in</p> <p>19 ten minutes.</p> <p>20 Thank you.</p> <p>21 (Recess)</p> <p>22 MR. HIMMEL: All right. Good morning,</p> <p>23 everyone. My name is Michael Himmel and it's my</p> <p>24 privilege to moderate this panel.</p> <p>25 We have a distinguished Panel before us.</p>	<p>73</p> <p>1 We're then going to move onto the issue of</p> <p>2 whether there are truly fewer civil trials than ever</p> <p>3 before. And if so, what is the cause of it? Is it</p> <p>4 the expense? Discovery just keeps going on and on</p> <p>5 and on. Motion practice. Are there any</p> <p>6 alternatives? Abbreviated discovery and motion</p> <p>7 practice schedules. Or perhaps what they do in the</p> <p>8 Southern District in New York, pre-motion</p> <p>9 conferences with the Court prior to any motions</p> <p>10 being filed.</p> <p>11 We'll also talk a little bit about the</p> <p>12 role of local counsel in this district as well as</p> <p>13 whether oral argument is still a useful tool or not.</p> <p>14 And last but not least, we'll talk about</p> <p>15 the Feeney Amendment to the Patriot.</p> <p>16 The Feeney Amendment was passed in</p> <p>17 Congress and signed into law by the President in</p> <p>18 2003. It was designed to address a number of</p> <p>19 alleged deficiencies in the U. S. Sentencing</p> <p>20 Guidelines, mainly child victim offenses. However,</p> <p>21 it's much further reaching than that. And the</p> <p>22 question really is: Has Congress gone too far?</p> <p>23 This amendment was passed without any</p> <p>24 input from the federal judiciary, without any input</p> <p>25 from the U.S. Sentencing Commission or from</p>

<p>74</p> <p>1 organized bar associations, academians or probation 2 officers. And has it limited the Court's ability to 3 grant downward departures under the Sentencing 4 Guidelines. 5 Those are some of the topics we're going 6 to talk about. It's a lot to cover and we'll -- 7 let's start right now. 8 On the issue of Jury Issues, if I'm a 9 juror and I'm on -- I'm sitting on a jury panel in 10 Trenton, before you, Judge Brown, and I want to take 11 notes, it's a very complicated case. Would you 12 allow me to take notes? 13 JUDGE BROWN: Well, I guess that would 14 depend on which side of the hallway you're on 15 because Judge Thompson has, for a long time, allowed 16 jurors to take notes and also to pose questions of 17 witnesses. And in 18 years I have done neither for 18 a variety of reasons. 19 As far as note taking is concerned, we're 20 looking for -- everybody else is taking notes. The 21 judge is taking notes. The lawyer is taking notes. 22 Why can't the jurors take notes? 23 For one thing, they have to keep their 24 notebooks somewhere, and we have to keep control of 25 them.</p>	<p>76</p> <p>1 my court. 2 MR. HIMMEL: Judge Chesler, what about in 3 your courtroom in Trenton? 4 JUDGE CHESLER: My courtroom in Trenton is 5 going to be almost exactly like Judge Brown's 6 courtroom. 7 MR. HIMMEL: So, if I'm a juror and I have 8 a question and the lawyers don't ask it, I'm going 9 to go to my grave not knowing the answer to the 10 question? 11 JUDGE CHESLER: That's correct. 12 On the other hand, it means that if you've 13 had a stray idea which has no business being 14 introduced into the courtroom at all and no -- no 15 basis for it even being heard by your fellow jurors, 16 then at least we're not going to have the trial 17 infected by you voicing that particular idea and 18 having the attorneys and the Court make rulings 19 about whether or not a juror's particular idea of 20 what is relevant is, in fact, appropriately to be 21 posed to a witness. 22 MR. HIMMEL: Let me ask you this, though, 23 Judge Chesler. On the issue of note taking. I'm 24 not that smart. I can't remember everything and I - 25 - I want to get it down. I don't want to depend on</p>
<p>75</p> <p>1 Secondly, they can't be necessarily 2 watching the witnesses, and, third, in my courtroom 3 everything is on tape. And, as I tell them, if you 4 want to hear the testimony of a witness again, just 5 ask. It can be played back. So they can listen 6 again if they wish to do so. 7 And as far as questioning of witnesses, I 8 haven't done that. My feeling is, first, we've got 9 several lawyers who are paid to ask or not ask 10 questions. They know the case far better than I do 11 or the jurors do. And the sort of questions, well, 12 it might tell us what the jurors are interested in. 13 I'm concerned that a lot of times, even after you 14 spend the time and effort, and you can't really 15 minimize the time and effort, you have to tell the 16 jury no, I'm sorry, you can't ask that question. 17 Maybe with or without an explanation. 18 So, I have avoided those. But on some of 19 the other issues, like preliminary substantive 20 charge, I would give it if appropriate, but it's 21 still a lot of work involved. Some of the case may 22 be tossed out and some of the case may change. So 23 aside from the general instructions on credibility 24 and the like, I generally don't, but I do charge 25 before summation. Okay. So, that's what happens in</p>	<p>77</p> <p>1 someone else's recollection. I want to put it down 2 as I recall. What's the downside to letting me do 3 that? 4 JUDGE CHESLER: I think the major problem 5 with taking notes is the fact that absent real 6 substantial preliminary instructions in any case of 7 even moderate complexity, the juror in fact does not 8 know what particular types of information are indeed 9 going to become relevant and important in 10 determining the factual issues which are ultimately 11 presented to the jury for consideration. Which 12 means there is a tremendous likelihood that they are 13 going to take notes and focus on issues and facts 14 which ultimately are of no significance whatsoever, 15 as opposed to paying attention to the witness 16 demeanor and evaluating whether or not the manner in 17 which they answer questions and their overall 18 testimony has some reasonable degree of credibility. 19 MR. HIMMEL: Judge Hayden, if I'm a juror 20 in your court, a complicated securities case, are 21 you going to allow me to take notes? 22 JUDGE HAYDEN: Yes. 23 MR. HIMMEL: Why? 24 JUDGE HAYDEN: I'll talk to the lawyers 25 first and most of the time they will agree. My</p>

<p>1 instructions will be that people are free to take 2 notes. We pass out steno pads for that purpose with 3 not a lot of paper in there. That's the old 4 fashioned way. The jurors are told that at the end 5 of the day they'll hand in their note pads, they'll 6 get them back the next morning and they'll have them 7 available during deliberations. The note taker or 8 takers are not any more important than the other 9 folks who are sitting on the jury. They will have 10 no more weight. And everybody is told and exhorted 11 to rely on his or her own recollection and 12 perception of what went on. 13 I'm really drawing it from having used it 14 and having found that most of the jurors do not take 15 notes after the first couple of days. There's 16 always one or two or three who don't take notes at 17 all. There does not seem to be any inhibition in 18 terms of body language and the way they get along 19 between the note takers and the non-note takers. We 20 destroy the notes after the jury deliberates. They 21 don't take them out of the courtroom or out of the 22 courthouse with them. I see it as a nod to the 23 importance of the task, not so much the complexity, 24 but the importance. 25 There are times - - there are cases that I</p>	<p>1 as much as possible the uniformity of conduct and 2 attention among the jurors. Now, I know that's not 3 always possible, some are going to pay more 4 attention than others. Some are going to doze and 5 we have those risks and you can't avoid it. But the 6 lack of uniformity in the taking of notes and the 7 possible squabbles in the jury room as to who took 8 the best notes, whose notes are accurate, whose 9 weren't, who took notes on this witness and that 10 witness or what have you, to me more imperils the 11 propriety of jury deliberations than the benefits 12 served by taking notes. 13 I also agree that it's very important that 14 the jurors pay careful attention to the witnesses 15 with all of their senses, including observing them. 16 Observing the way a witness testifies, if he 17 exhibits nervous habits or not. Is that nervousness 18 or it could be natural for anybody in a strange 19 environment or the product of fabrication, or the 20 like. And you just can't do that if your head's 21 down in a note pad. 22 I take very copious notes at the bench but 23 that's for my own reasons, in terms of retrieval and 24 I use it as an index to the transcript afterwards, 25 if the daily copy is out. But I know that in doing</p>
<p>1 would never even mention taking notes to the lawyers 2 or think about it. It just doesn't fit. I have not 3 done it in criminal cases. I don't think I'm 4 particularly interested in doing it in criminal 5 cases at this point. But it's hard to sit there all 6 day. I'd rather have a person doodling, frankly, 7 and paying attention because that's how they work 8 off their nervous energy than falling asleep and I 9 haven't found it to be a hindrance and to at least a 10 PR point and a sense of fostering attention-paying 11 and seriousness, I found it to be a help. 12 MR. HIMMEL: Chief Judge Bissell, do you 13 allow jurors to take notes? 14 JUDGE BISSELL: I do not and, most 15 respectfully, I think that some of Judge Hayden's 16 remarks support the reason not to. 17 If you have a trial with any duration and 18 a juror takes some notes early, then they kind of 19 taper off, does that mean when deliberations begin, 20 somebody takes a look at his notes and has a very 21 easily refreshed recollection of witnesses one, two 22 and three, but less of a recollection as to the 23 witnesses in the middle of the case, or even at the 24 end of the case? 25 I think it's important to try to generate</p>	<p>1 that, I will go for minutes and minutes and minutes 2 at a time, without even looking at the witness 3 because of the fact that I want to take those 4 comprehensive notes, so the (inaudible) of the 5 jurors have a little greater involvement in the 6 process by taking notes, I think, is outweighed by 7 its deficiencies. 8 MR. HIMMEL: Judge Pisano, do you allow 9 note taking in your courtroom? 10 JUDGE PISANO: Yes. First, I make -- I 11 make a judgment call on whether the case is going to 12 be long enough or complicated enough that they might 13 find note taking useful. And if I determine that 14 the jurors would find it useful, then I do permit 15 it. 16 I do not permit note taking during 17 counsel's arguments, openings or closings, nor 18 during the charge because they're going to get a 19 hard copy of the charge. And I have found in post- 20 trial interviews with jurors that they have been 21 uniformly thankful of having had the ability to take 22 notes. I haven't had a single problem with anybody 23 having arguments with one another or relying too 24 much on one juror's notes as opposed to another. I 25 have not had a problem with that at all.</p>

<p>1 MR. HIMMEL: Judge Wolfson, if I happen to 2 be down in Camden on your jury, are you going to let 3 me take notes? 4 JUDGE WOLFSON: Yes. 5 MR. HIMMEL: Civil or criminal? 6 JUDGE WOLFSON: I've done both. And 7 actually every instance that I've had, I've always 8 asked the attorneys first if they have a preference. 9 They've always wanted to do it. Both sides. I 10 think it's a good thing. I also do what Judge 11 Pisano does. I do not tell them -- I tell them that 12 they can't take notes during the charge, during the 13 closing, the opening. That's not the evidence. 14 They do get the hard copy of the charge, so they 15 don't need to do that. I tell them it's important 16 to listen, instead. 17 I also give -- in my preliminary charge 18 with some one like Judge Hayden, a fairly 19 substantial charge on how to use your notes and that 20 your recollection controls. 21 The fact that someone takes notes and 22 someone doesn't, no difference should be given in 23 the jury room during deliberation. And I have found 24 that even though they are allowed to take notes, 25 they still ask during deliberations for the dirty</p>	<p>82</p> <p>1 cases, also, and I do it by telling the jurors that 2 they have to put it in writing and give it to me and 3 then I give it to counsel to read and I entertain 4 any objections that counsel might have to it. And 5 if there's no objection to it or if I overrule the 6 objection, I will ask the witness the question. I 7 do preface it all by telling the jurors in the 8 beginning that they have the right to ask questions, 9 but they should be careful. 10 Two things. Number one, they can only ask 11 questions about the facts. I've had questions that 12 the jurors, in essence, are looking for a legal 13 conclusion from the judge and I don't answer that. 14 I also tell them that it's unlikely that any one 15 witness will have all the answers, "So the question 16 that you may have, may in fact, be answered by a 17 later witness." 18 But, with those in mind, I've never had a 19 problem with it. I've had objections sustained. 20 And I merely tell the juror that there's been an 21 objection that's been sustained. Otherwise, it's 22 asked. 23 MR. HIMMEL: When the juror submits the 24 question to the Court, do the lawyers know which 25 juror the question is coming from?</p> <p>84</p>
<p>1 copy of a transcript. 2 I think note taking is a good thing. 3 Maybe it's because of my own learning. I'm one of 4 those people who learns best by taking notes and I 5 always have. And I think there are going to be some 6 people on the jury who may feel the same way. Some 7 people are just good listeners and they prefer to 8 listen and they can keep it all in. Others find by 9 taking notes, it keeps things better in mind and 10 also alert. 11 I feel very strongly about that, even 12 though I do LiveNote, and I can look up on the 13 screen at any point and see what the testimony is. 14 I find I still take notes because it keeps me 15 attentive to what the testimony is instead of 16 phasing out, and I think that's important for some 17 jurors and I have not had any problem with this and 18 all the attorneys that have appeared before me have 19 liked it. 20 MR. HIMMEL: Judge Kugler, I'm sitting on 21 your jury and the plaintiff and defense lawyers are 22 just not asking the right questions. I want to have 23 one of my questions answered. Are you going to 24 allow me to ask the question through the Court? 25 JUDGE KUGLER: Yes. And I do in criminal</p> <p>83</p>	<p>1 JUDGE KUGLER: Sure. Because the juror 2 has to get my attention somehow. They raise their 3 hand or they use -- somehow get my attention if they 4 have a question. And I've talked to the jurors 5 about it after the verdicts and they like it. They 6 seemed to be more involved in the case when they can 7 ask questions. 8 MR. HIMMEL: So, you allow questioning 9 during the testimony as opposed to the conclusion of 10 the testimony of a witness? 11 JUDGE KUGLER: I do. In fact, I tell the 12 jurors that they have to ask the question before the 13 witness leaves the stand. Because once the witness 14 is done, we can't get them back. 15 MR. HIMMEL: Judge Hayden, what is your 16 practice with respect to jurors asking questions? 17 JUDGE HAYDEN: Haven't done it yet, but 18 I'm really intrigued. Sounds good to me. 19 MR. HIMMEL: Judge Pisano, what's your 20 practice with respect to jurors asking questions? 21 JUDGE PISANO: I have not -- I have not 22 gone into the area, myself. I -- I'm from the old 23 school to the extent I think lawyers try cases the 24 way they want to try them, ask questions that they 25 want to ask and don't ask questions that they don't</p> <p>85</p>

<p>1 want to ask. I have not had the experience of there 2 being not enough questions. Probably there have 3 been too many questions. And I suppose that fits, 4 perhaps, into one of our other topics, of the death 5 of the trial lawyer. I have not permitted juror 6 questioning for the reasons that I've stated. 7 I also wonder how I would deal with it if 8 Juror No. 6 were continually raising his hand asking 9 questions of the witness. So I've stayed away from 10 it. But I do admit I'm finding it interesting. 11 JUDGE KUGLER: It doesn't happen. They 12 don't ask that many questions. And you can never 13 tell before the start of the case in which case 14 they'll ask questions. 15 I've had very long complex cases. They've 16 asked no questions. I've had three-day personal 17 injury cases and they've asked five or six 18 questions. There's just no way of predicting. 19 JUDGE PISANO: The last thought. Your 20 problem in going to your grave never having the 21 question answered. 22 I talk to jurors after every trial and 23 there are times when jurors will say, "Why didn't 24 they ask Mr. Smith this? Why didn't they ask them? 25 I wanted to ask this." And you can at least have a</p>	<p>86 1 among other things, that as a result of those 2 questions in a civil case. He significantly changed 3 the nature of his presentation as he went ahead in 4 order that somehow or other, to satisfy the juror or 5 kind of read into the mind of the juror. Well, you 6 may be doing that, for that juror who asked that 7 question, but what about the other five, six, or 8 seven that are sitting on the panel? 9 I get involved in many non-jury trials as 10 a lawyer when, frankly, the judge took us in 11 directions that none of us had ever contemplated. 12 And I think probably without really thinking through 13 what the true guts of the case were, as prepared by 14 the lawyers. So, that kind of - that threat or 15 shift in emphasis in the manner in which you try the 16 case based upon one or two questions from a juror. 17 And all of a sudden, they say "Oh, my god, they did 18 this?" You know or something like that. I -- I 19 don't think that's necessarily a good thing. So, 20 I'd like to -- I try to keep an open mind on it. I 21 think the system that's put forth in the State Rule 22 is probably workable, but I'd like to see either 23 some statistics or other articles come out in the 24 future that would demonstrate what the experience 25 with that rule would have been.</p>
<p>87 1 dialogue, theoretically, about the subject matter 2 and make the juror somewhat satisfied that -- that 3 the inquiry would not have been stupid. 4 MR. HIMMEL: Chief Judge Bissell, do you 5 permit jurors to ask questions of the Court? 6 JUDGE BISSELL: I haven't tried it yet, 7 but I'm not opposed to it, either. I think I'd like 8 to have a little bit more information on the State 9 Court experience. There is now a rule in State 10 Court. I guess it's 1:8-C, as I understand it, in 11 which there is a format presented for the asking of 12 questions. Written submissions to the judge at the 13 conclusion of a witness's testimony or before that 14 witness leaves the stand, then analyze and a 15 determination made. 16 I don't recall whether that rule is 17 mandatory or elective before the Superior Court 18 Judges. 19 There is a brief article about it, though, 20 appearing in the Law Journal this past spring, about 21 ten months ago. But I did find some things 22 disquieting about that article. It was by an 23 attorney named John Norton from West Orange. I 24 don't know if he's here, and there may be people 25 that know him, I'm not sure. But he indicated,</p>	<p>88 1 among other things, that as a result of those 2 questions in a civil case. He significantly changed 3 the nature of his presentation as he went ahead in 4 order that somehow or other, to satisfy the juror or 5 kind of read into the mind of the juror. Well, you 6 may be doing that, for that juror who asked that 7 question, but what about the other five, six, or 8 seven that are sitting on the panel? 9 I get involved in many non-jury trials as 10 a lawyer when, frankly, the judge took us in 11 directions that none of us had ever contemplated. 12 And I think probably without really thinking through 13 what the true guts of the case were, as prepared by 14 the lawyers. So, that kind of - that threat or 15 shift in emphasis in the manner in which you try the 16 case based upon one or two questions from a juror. 17 And all of a sudden, they say "Oh, my god, they did 18 this?" You know or something like that. I -- I 19 don't think that's necessarily a good thing. So, 20 I'd like to -- I try to keep an open mind on it. I 21 think the system that's put forth in the State Rule 22 is probably workable, but I'd like to see either 23 some statistics or other articles come out in the 24 future that would demonstrate what the experience 25 with that rule would have been.</p> <p>89 1 MR. HIMMEL: Judge Brown? 2 JUDGE BROWN: Well, as I'm sitting here 3 and thinking about jurors asking questions, my first 4 question to myself is, "If it ain't broke, why fix 5 it?" Because we have, by theory, at least two and 6 probably a lot more experienced lawyers who know a 7 lot and are being paid to know a lot and decide 8 which questions to ask, which questions not to ask. 9 And unless you subscribe to the idea that lawyers 10 are stupid or incompetent, what would be added by 11 this? I don't see the need for it. I mean, I've 12 been meaning to ask the question to clarify a point 13 if I want to. Beyond that, I think that the jurors 14 are going to stumble into areas that the lawyers 15 have intentionally stayed away from for either legal 16 or strategic reasons. I don't see the need. 17 JUDGE KUGLER: But if it's -- if it's 18 irrelevant, then you sustain the objection to the 19 question. 20 JUDGE BISSELL: Right. So, you tell the 21 juror, hey, you're a dummy. 22 JUDGE KUGLER: No. No. You don't tell 23 the juror the basis of your sustaining the lawyers 24 objection. So there's no need to tell them why 25 you're sustaining the objection to their question.</p>

<p>90</p> <p>1 JUDGE BROWN: I think you're changing the</p> <p>2 juror nature -- just instead of being the decision</p> <p>3 maker, the juror is now becoming an active</p> <p>4 participant. Sort of an ancillary counsel, and that</p> <p>5 gives me some concern as well.</p> <p>6 MR. HIMMEL: Anything else from the panel</p> <p>7 on these subjects? Judge Wolfson.</p> <p>8 JUDGE WOLFSON: Just a comment that Judge</p> <p>9 Kugler made a moment ago.</p> <p>10 I mean, I have some concerns -- I have not</p> <p>11 done it, yet. Though I'm not convinced that I</p> <p>12 won't. But one of the concerns I have is when you</p> <p>13 make the ruling that you're not going to hear an</p> <p>14 answer to the question that you were asked, are they</p> <p>15 then going to dwell on why? Were they on the wrong</p> <p>16 track? Is it not relevant? Is there some other</p> <p>17 reason? And I don't want to have them begin to</p> <p>18 think of all the reasons why this isn't part of the</p> <p>19 case, which I think may be confusing.</p> <p>20 I'd be curious, though, before you go, how</p> <p>21 many lawyers in the courtroom think asking questions</p> <p>22 is a good idea? How lawyers feel about it, if you</p> <p>23 would ask them that?</p> <p>24 MR. HIMMEL: Does anyone want -- yes?</p> <p>25 True?</p>	<p>92</p> <p>1 MR. HIMMEL: Yes?</p> <p>2 MR. PEARLMAN: I've -- I've tried cases</p> <p>3 with -- where jurors did ask questions and I find it</p> <p>4 very useful. I find that they ask very few</p> <p>5 questions, but the questions that they do ask are</p> <p>6 helpful. Sometimes because they're things that</p> <p>7 lawyers didn't ask that perhaps they should have</p> <p>8 asked. But more than that, it's useful because it</p> <p>9 helps the juror get an answer to something the</p> <p>10 juror's concerned about and it, quite frankly, helps</p> <p>11 the lawyer.</p> <p>12 With respect to Judge Bissell, I think it</p> <p>13 does help the lawyers to understand what concerns a</p> <p>14 juror. It may be something that is important. It</p> <p>15 may be something that is fundamental to the case.</p> <p>16 It may not be, but I think it's very useful for an</p> <p>17 attorney to know what's concerning the jurors, just</p> <p>18 as it's useful for an attorney to know what's</p> <p>19 concerning the judge in a Bench trial or a panel in</p> <p>20 an appellate argument or a judge in a motion.</p> <p>21 JUDGE BISSELL: Peter, how long has the</p> <p>22 State rule been in effect? Do you know,</p> <p>23 specifically?</p> <p>24 MR. PEARLMAN: Relatively recent, within</p> <p>25 the last couple of years. My experience has been</p>
<p>91</p> <p>1 A SPEAKER: I've done it in a couple of</p> <p>2 jurisdictions. One of my partners had a month-long</p> <p>3 trial before a very good State Court trial judge in</p> <p>4 Middlesex County. After the plaintiff's first</p> <p>5 expert witness testified, the jury asked 26</p> <p>6 questions. Twenty-two of which were very, very good</p> <p>7 questions. They reflected the fact that they hadn't</p> <p>8 actually picked up on what the expert had to say and</p> <p>9 it was important for the plaintiff, and that helped</p> <p>10 the plaintiff.</p> <p>11 Now, you could say the plaintiff's lawyer</p> <p>12 did a bad job, the witness was not adequately</p> <p>13 prepared, but the quality of information that the</p> <p>14 jury had at that point was much better than if they</p> <p>15 hadn't asked the questions.</p> <p>16 I mean, one of the issues -- I hate to</p> <p>17 step on the panel's time here, whether it</p> <p>18 systemically biases the trial in favor of the</p> <p>19 defendant because they go later? And while it is</p> <p>20 true if they get the drift of the jury wrong or just</p> <p>21 one out of six, or one out of eight or one out of</p> <p>22 whatever. If we're getting two or three of them, if</p> <p>23 you're doing your job, you're going to figure out</p> <p>24 how you're going to move your cases marginally to</p> <p>25 meet what seems infinite.</p>	<p>93</p> <p>1 once -- twice in State Court and once in Federal</p> <p>2 Court.</p> <p>3 JUDGE BISSELL: Apparently there are no</p> <p>4 statistical studies out as a result of any long term</p> <p>5 use of the rule, is that correct?</p> <p>6 MR. PEARLMAN: That's -- that's my</p> <p>7 understanding. I'm not sure how they would</p> <p>8 statistically deal with it. But, no, I haven't seen</p> <p>9 any studies on it.</p> <p>10 MR. PEARLMAN: Right, Peter Perlman.</p> <p>11 MR. HIMMEL: Yes?</p> <p>12 MR. GREENBAUM: I'd like to share a little</p> <p>13 information about the state ruling.</p> <p>14 MR. HIMMEL: Mike -- Mike -- would you ask</p> <p>15 him to --</p> <p>16 MR. GREENBAUM: It was in effect --</p> <p>17 THE REPORTER: Ask them for their name.</p> <p>18 Ask him for the name, first.</p> <p>19 MR. HIMMEL: State your name.</p> <p>20 MR. GREENBAUM: Jeffrey Greenbaum.</p> <p>21 It was in effect now a little over a year and it was</p> <p>22 preceded by a pilot program, on which there was a</p> <p>23 statistical analysis done and there were</p> <p>24 questionnaires given out to lawyers and to judges</p> <p>25 and the jurors after each trial, with probably ten</p>



<p>1 or twelve judges around the state and there were 2 many judges, when they started out, that were very 3 reticent about the questioning by the jury, but 4 uniformly when they all went through it, they all 5 loved it and recommended it to the Supreme Court. 6 MR. HIMMEL: Let's move on to the subject 7 of giving preliminary substantive charges to the 8 jury prior to the start of the trial. 9 Has any member of the panel ever done it? 10 Judge Pisano? 11 JUDGE PISANO: Yes. I give a limited 12 instruction at the beginning of the trial to give 13 the jury an idea of what the -- what the legal 14 landscape is. It's always preceded by a disclaimer 15 that the charge at the end of the case will be very 16 detailed and will control the deliberations. 17 And I limit the first instruction to 18 pretty much what the elements of the -- what the 19 claims are. Is there an affirmative defense? If 20 so, who has to prove what? And I try to keep it 21 very short. But, it does give the jury the benefit 22 of what the general legal standards are. 23 MR. HIMMEL: Do you find that it allows 24 the jury to focus better on the evidence? 25 JUDGE PISANO: Yes. They -- again, in</p>	<p>94</p> <p>1 a table of responses. I'd just like to take a 2 moment and share those with you, not only on this 3 topic, which is particularly interesting, but the 4 two that preceded it. 5 With regard to juror note taking, the 6 first question was asked, "Do you allow it?" and the 7 judicial officers that responded -- these are 8 judicial judges only, fifteen said yes and eight 9 said no. 10 "What is your opinion about this practice?" 11 Thirteen thought it was favorable and nine said 12 unfavorable. That means presumably one out of two 13 had a different opinion. 14 In regards to the jurors questioning the 15 witnesses, eight do it and 15 do not, and the 16 opinion on the practice is with seven in favor and 17 15 unfavorable. So, presumably that pretty much 18 dovetails. 19 But, listen to this. On the question of 20 "Mini substantive pre-charges" as we talked about 21 here, six said that they did it and fourteen did 22 not. Twenty, however, felt favorably about the 23 opinion and three did not. So, I think what that 24 means is that this is an idea that is, at least, 25 kindled and under consideration.</p> <p>96</p>
<p>1 discussing cases with jurors, they have always told 2 me that they found it helpful to have some advance 3 knowledge of what the -- what the legal standards 4 were. And I do it in criminal cases as well. What 5 the elements of the charge are, et cetera, et 6 cetera. 7 MR. HIMMEL: Judge Brown. 8 JUDGE BROWN: I have done it a few times 9 with agreement of the counsel. And I'd like to do 10 it a lot more. The problems that I find are, first 11 off, it may take a substantial period of time to get 12 an agreement. 13 Secondly, there may be aspects that will 14 no longer be in the case at the end of motions. 15 And, third, whereas Judge Pisano said, we're going 16 to have to tell the jurors to disregard what we said 17 before when we send in the final charge. 18 Theoretically, I think it's a good idea, and 19 practically, I've found a lot of difficulties with 20 it, so that's why it's rarely done. 21 JUDGE BISSELL: I have a couple of 22 thoughts on that if I can back-track just a minute. 23 Our jury utilization committee collected 24 some data and responses from the judges, themselves, 25 last year and came up with, among other things, with</p> <p>95</p>	<p>1 Now, I don't know if in seven or eight 2 months since this survey was run whether there have 3 been any significant changes in the practice of 4 those judges. I do not do it. I am a bit concerned 5 about potentials of inconsistency between a pre- 6 charge like this and the ultimate instructions to 7 the jury, particularly in a criminal case. 8 I think another thing you can't lose sight 9 of here is that if the attorneys give good opening 10 statements, and they certainly are permitted to lay 11 out to the jury the nature of their claims, and even 12 at least dust the legal issues or the issues which 13 they -- of which those things involve and which the 14 evidence is going to address, one, I think that's 15 probably the best deal, of course, because they know 16 their cases better than we do. 17 And, two, it basically keeps us out of the 18 case at that point and until the later stages when 19 the real issues and the real claims that are going 20 to the jury are taking shape. 21 MR. HIMMEL: What about the notion of 22 charging the jury before summations? 23 In civil cases I like it. In criminal 24 cases I don't like it because I get -- because the 25 government gets the last word in. So where am I as</p> <p>97</p>

<p>1 the defense lawyer?</p> <p>2 What is the practice of the panelists?</p> <p>3 Judge Wolfson?</p> <p>4 JUDGE WOLFSON: I do it in both civil and</p> <p>5 criminal. And, in fact, in each of the cases I ask</p> <p>6 the attorneys first and then I just won't do it</p> <p>7 again, you know, unilaterally. And in both civil</p> <p>8 and criminal, they've all agreed that they prefer</p> <p>9 having the charge first. They like to incorporate</p> <p>10 it, then in their summation they're not going to be</p> <p>11 subject to criticism that somehow they're misstating</p> <p>12 the law. In fact, sometimes they use a power point</p> <p>13 that takes it right from the instructions.</p> <p>14 MR. HIMMEL: What do you do to remedy my</p> <p>15 concern that the government's going to get the last</p> <p>16 word in?</p> <p>17 JUDGE WOLFSON: Well, the only thing I do</p> <p>18 is after they're all done, then, you know, I will</p> <p>19 spend a few minutes telling them, "Okay, now you're</p> <p>20 going to start your deliberations, recall this --</p> <p>21 this is the verdict sheet. We'll go through all</p> <p>22 that. If you have a question, you'll approach me. --</p> <p>23 some of those basic type of charges we give at</p> <p>24 the end so that I'm still the last one speaking for</p> <p>25 a couple of moments before they go in.</p>	<p>98</p> <p>1 aren't the last people that they hear. I find it</p> <p>2 very effective.</p> <p>3 MR. HIMMEL: Yes, Judge Irenas.</p> <p>4 JUDGE IRENAS: I do a combination. I give</p> <p>5 the lawyers the written charge before summation and</p> <p>6 I allow them to use it. They can actually read it</p> <p>7 to the jury if they think it's relevant -- I allow</p> <p>8 them to use it, but I don't give it until</p> <p>9 afterwards.</p> <p>10 And my reason is something that you sort of</p> <p>11 alluded to. This flamboyant plaintiff's lawyer or</p> <p>12 the -- or Grady O'Malley for the government</p> <p>13 (laughter) gets -- gets the last word, and I don't</p> <p>14 think that telling them about the verdict sheet is</p> <p>15 enough of a cool-down period.</p> <p>16 Listening to me drone on for 45 minutes</p> <p>17 could cool down anybody. And so if I get them a</p> <p>18 little bit cooled off when they go into the jury</p> <p>19 room, but I recognize the idea that the lawyers</p> <p>20 shouldn't be -- you know, shouldn't be in their</p> <p>21 closings confused as to what the charge will be. So</p> <p>22 I give them the written final charge. We have a</p> <p>23 charge conference. We put the objections on the</p> <p>24 record already, before the closing. It's all done.</p> <p>25 And either way, I think that rules require that the</p>
<p>99</p> <p>1 MR. HIMMEL: Judge Pisano, your practice?</p> <p>2 JUDGE PISANO: Exactly the same.</p> <p>3 MR. HIMMEL: Judge Chesler?</p> <p>4 JUDGE CHESLER: I haven't used the</p> <p>5 procedure, but I think it could be a very good idea</p> <p>6 and in an appropriate case, if the parties are</p> <p>7 inclined to want to proceed that way, I'm certainly</p> <p>8 willing to do it.</p> <p>9 MR. HIMMEL: Judge Hayden, do you charge</p> <p>10 before summations?</p> <p>11 JUDGE HAYDEN: Case dependent, yes.</p> <p>12 MR. HIMMEL: Anyone else want to be heard</p> <p>13 on that?</p> <p>14 JUDGE BROWN: I do it in both. I started</p> <p>15 doing it several years ago and I found it very</p> <p>16 effective. It allowed the lawyers to tie their</p> <p>17 closing arguments into the law without any dispute</p> <p>18 as to what the charge was or what's being allowed to</p> <p>19 the jurors to follow it better.</p> <p>20 I think it also allowed me to explain</p> <p>21 what can be rather dry and boring, and give them a</p> <p>22 copy of the charge. You can tell them what the law</p> <p>23 is going to be, saving, as Judge Wolfson does, the</p> <p>24 analysis of how you go about your business, how do</p> <p>25 you fill out the verdict sheet, so that the lawyers</p>	<p>101</p> <p>1 lawyers have the charge.</p> <p>2 JUDGE IRENAS: Yeah.</p> <p>3 JUDGE HAYDEN: Yes.</p> <p>4 JUDGE IRENAS: -- I don't know if it has</p> <p>5 to be in writing, but they certainly have to know</p> <p>6 what the charge is going to be. But I go a step</p> <p>7 further. I actually give it to them. I mark it as</p> <p>8 an exhibit, a court exhibit, I call it C-1 or C-2.</p> <p>9 I give it to the lawyers and they sit there.</p> <p>10 Frequently, they'll sit there and read right from it</p> <p>11 if they like something in it, and use it. But</p> <p>12 that's --</p> <p>13 JUDGE WOLFSON: But, Judge --</p> <p>14 JUDGE IRENAS: -- that's what I do.</p> <p>15 JUDGE WOLFSON: But, Judge Irenas, that's</p> <p>16 the problem, though. You'll have the attorneys</p> <p>17 picking and choosing which parts they want to read</p> <p>18 before they've gotten the whole charge. If they've</p> <p>19 got the benefit of the whole charge --</p> <p>20 JUDGE IRENAS: Well, they have the whole</p> <p>21 charge.</p> <p>22 JUDGE WOLFSON: No, no the jury's -- the</p> <p>23 jurors don't, yet. So, you've got the attorneys</p> <p>24 getting up and picking out the -- like this part,</p> <p>25 this part, and of course when we instruct the jury,</p>

<p>102</p> <p>1 it's considered the charge as a whole and, ôdo not 2 single out one instruction.ö So if they've heard it 3 all, when they heard the attorneys, they know parts 4 were being picked out.</p> <p>JUDGE IRENAS: You see, I consider they 6 hear very little of what I say. I'd like -- I'd 7 like to put it -- I did one case where I projected 8 it on a screen, like, with a bouncing ball, and I 9 read it as it was being projected on the screen, 10 because the case was a 135 page charge, but I wanted 11 them to get it through their eyes, not just through 12 their ears.</p> <p>But I give a written copy, as I think you 14 all do, or most of you do, to the jury, and they've 15 routinely said to me they love having the charge in 16 there, and they can get it.</p> <p>I give them a strong charge about they've 18 to -- to consider the whole charge and they can't 19 pick out any one part as being -- you know, the 20 whole thing, the usual from the benchbook but, I 21 think reasonable people that can disagree with that. 22 But I thought that was at least a half way solution 23 where part of the problem, at least, is dealt with. 24 Whether the part that Freda talks about is dealt, 25 with, that's a different story.</p>	<p>104</p> <p>1 through ADR. We impose too many artificial barriers 2 on you, particularly in the federal system because 3 we -- we have the initial scheduling conference, we 4 have settlement conferences, we have the joint final 5 pretrial conference with the Order, which is a 6 herculean undertaking. We understand that. But all 7 these barriers I think lead to one thing and one 8 thing only. It is just too damn expensive for your 9 clients to try cases anymore.</p> <p>We've had this discussion and I know Judge 11 Irenas has some very good ideas about this because 12 when you -- when you look it over from a historical 13 perspective, from 25 or more years ago -- we were 14 talking about this the other day. There weren't any 15 trials that went on four and five weeks at a time.</p> <p>JUDGE IRENAS: Go down south today.</p> <p>JUDGE KUGLER: Yep. There weren't --</p> <p>JUDGE IRENAS: They'll handle three trials 19 in a week.</p> <p>JUDGE KUGLER: There weren't two years of 21 discovery and a hundred depositions in a case in 22 those days and I know that the rule makers under the 23 Federal Civil Procedure keep restricting the amount 24 and the types of discovery you can do because of 25 that concern. That it has just become too expensive</p>
<p>103</p> <p>1 MR. HIMMEL: Let's move on to our next 2 subject, whether there are fewer civil trials or 3 not. We have a lot to cover.</p> <p>Here's the statistics. Since 1976 federal 5 civil lawsuits have increased 75 percent. Civil 6 trials have decreased 45 percent.</p> <p>Judge Kugler, do you find there's fewer 8 civil trials in Camden? And, if so, how do you 9 account for it?</p> <p>JUDGE KUGLER: There's no questions there 11 are fewer civil trials. Not only in Camden, but 12 across the country. In 2003 only 1.7 percent of our 13 civil cases actually went to trial and 4.1 percent 14 of our criminal cases. Criminal cases are 15 different. I mean, the sentencing guidelines have 16 had a lot to do with that.</p> <p>But why? That's a great question.</p> <p>The ABA has a commission they have 19 established to study this. They just had a 20 Vanishing Civil Trial Symposium in San Francisco in 21 December.</p> <p>The -- the reasons that you hear mostly 23 are that ADR is too widespread. I think that's 24 ironic. There is just too much judicial pressure 25 put upon lawyers and litigants to settle or go</p>	<p>105</p> <p>1 to do that.</p> <p>JUDGE IRENAS: Your first panel should 2 have taught us all something.</p> <p>JUDGE KUGLER: Yes. Exactly.</p> <p>JUDGE IRENAS: Read the cases. They're 6 talking about 150,000, 300,000, 400,000 dollar costs 7 --</p> <p>JUDGE KUGLER: Right.</p> <p>JUDGE IRENAS: I don't know how many of 10 you have had civil rights cases, but I try to settle 11 as opposed to trial, and the plaintiffsÆ lawyers 12 says "I now have \$95,000 in the case. I can't 13 settle because the caseö -- he'll even tell me, ô- 14 because the case is only worth \$50,000. And so how 15 can I settle the case when I already have \$95,000 -- 16 I had a Cliff Van Syok case with 26 days of 17 depositions of one witness. One witness.</p> <p>JUDGE KUGLER: The plaintiff --</p> <p>JUDGE IRENAS: The other side paid back in 20 kind, though. Thirteen days an another witness, 12 21 days on another witness, the whole system. And now 22 with electronic discovery, it's just too expensive.</p> <p>A lawyer sits down. Why should I spend a 24 million dollars when maybe I could settle for a half 25 million?</p>

<p>106</p> <p>1 JUDGE WOLIN: The problem that he</p> <p>2 illuminates, why a lawyer has \$95,000 in a \$50,000</p> <p>3 case, is the burden of fee shifting.</p> <p>4 I've had lawyers come before me and say "I</p> <p>5 don't care if my client gets a dollar, I've got a</p> <p>6 \$100,000 in costs." So, fee shifting and statutory</p> <p>7 fee shifting has just turned the system upside down.</p> <p>8 JUDGE BISSELL: The argument, I think, in</p> <p>9 truth, though, is an example or examples of why</p> <p>10 cases do go to trial. Mainly because the lawyers</p> <p>11 got too much in it and they've got to go to trial</p> <p>12 and take advantage of the fee-shifting statute.</p> <p>13 Unless, of course, they would go ahead and settle it</p> <p>14 in such a way that everybody compromises a little</p> <p>15 bit. So I'm not entirely sure that that argument</p> <p>16 cuts to the heart of diminution of trials. To me,</p> <p>17 it might indicate at least one factor that would</p> <p>18 generate a trial where it might not otherwise occur.</p> <p>19 The -- Judge Debevoise and I share a lot</p> <p>20 more common ground than sometimes it appears, I</p> <p>21 guess, given our political leanings, but I -- I</p> <p>22 think we're both in agreement on this.</p> <p>23 A VOICE: It's too conservative.</p> <p>24 JUDGE BISSELL: The -- the reduction of</p> <p>25 the number of jury trials isn't necessarily bad. We</p>	<p>108</p> <p>1 and the decrease in civil trials and it's their --</p> <p>2 their opinion that we grant summary judgment too</p> <p>3 frequently. I'm not so sure that's true, and I'm</p> <p>4 don't -- I'm not real comfortable with the</p> <p>5 statistics that they rely on because we don't keep</p> <p>6 good track in the area of statistics on summary</p> <p>7 judgment. But that -- that undercurrent is out</p> <p>8 there about Rule 56 and its effect on the number of</p> <p>9 civil trials that we have.</p> <p>10 MR. HIMMEL: Do you allow summary judgment</p> <p>11 motions in a non-jury case?</p> <p>12 JUDGE KUGLER: I am strongly considering</p> <p>13 prohibiting them in a non-jury case because I think</p> <p>14 they waste time. I mean, invariably, it's this</p> <p>15 thick. And you want us to read it and we read it.</p> <p>16 But I think your time and your effort and your</p> <p>17 client's money is better served just to come on in</p> <p>18 and put the witnesses on rather than me reading the</p> <p>19 affidavits.</p> <p>20 MR. HIMMEL: Judge Brown, do they waste</p> <p>21 time in our jury system?</p> <p>22 JUDGE BROWN: It depends. I mean, we've</p> <p>23 all seen B.S. summary judgment motions and</p> <p>24 responses.</p> <p>25 But I find that the summary judgment and</p>
<p>107</p> <p>1 now have available, through our court programs, a</p> <p>2 real menu of opportunities for resolution.</p> <p>3 Our arbitration program -- our mediation</p> <p>4 program which I happen to think is under-utilized,</p> <p>5 regrettably. That's mostly our fault. Settlement</p> <p>6 conferences at the levels of both the magistrate</p> <p>7 judges and the district judges.</p> <p>8 A summary judgment practice, which has</p> <p>9 been well endorsed by the Supreme Court of the</p> <p>10 United States and my understanding is that we are</p> <p>11 not reluctant to reply and, frankly, as far as</p> <p>12 settling a case is concerned, I still believe it's</p> <p>13 the best resolution and there's nothing necessarily</p> <p>14 inherently more fair about a trial, and the vagaries</p> <p>15 of the results you're going to get before a jury,</p> <p>16 then in negotiating settlement by the people who</p> <p>17 know the case best.</p> <p>18 So, the reduction in civil jury trials is</p> <p>19 a reality. But I prefer to think it's because of</p> <p>20 the fact that there are more and equally good</p> <p>21 options to seek resolution.</p> <p>22 JUDGE KUGLER: There's a lot of -- Mike,</p> <p>23 there's a lot of interest in the academic community</p> <p>24 right now, and there's some articles coming out this</p> <p>25 year about the role of Rule 56, summary judgment,</p>	<p>109</p> <p>1 Rule 12 offers the assistance of a very valuable</p> <p>2 function in terms of either disposing of a case that</p> <p>3 there is no basis to go forward or narrowing a case</p> <p>4 or disabusing the party who feels that this is a</p> <p>5 meritless case of that unjustified view. So I -- I</p> <p>6 value it.</p> <p>7 Even in non-jury cases, I think if we find</p> <p>8 out whether or not there is a triable issue, before</p> <p>9 I have to try it certainly saves me a substantial</p> <p>10 period of time.</p> <p>11 And as far as the question of the</p> <p>12 disappearing civil trial. To paraphrase Mark Twain,</p> <p>13 I think the reports of death are highly exaggerated.</p> <p>14 At least in my court. I've been doing a fair amount</p> <p>15 of trials.</p> <p>16 We do have a very active ADR system, which</p> <p>17 is good. And as long as we understand that a trial</p> <p>18 is not a failure of the system, it's a</p> <p>19 constitutional right.</p> <p>20 The Court may mediate, persuade, help them</p> <p>21 find common ground, but in my view no litigant</p> <p>22 should ever feel that the Court pressured them to</p> <p>23 settle.</p> <p>24 MR. HIMMEL: What about a situation where</p> <p>25 the plaintiff, as an individual, has limited funds,</p>

<p>110</p> <p>1 litigating against a big corporation?</p> <p>2 Is there any way to limit the discovery in</p> <p>3 the motion practice so the plaintiff can have his or</p> <p>4 her day in court?</p> <p>5 JUDGE BROWN: I think that's what our</p> <p>6 district and magistrate judges do on a regular</p> <p>7 basis.</p> <p>8 MR. HIMMEL: So, you don't find that some</p> <p>9 cases are just being litigated to death with respect</p> <p>10 to motion practice?</p> <p>11 JUDGE BROWN: If they are, I think it's</p> <p>12 because somebody hasn't brought it to the Court's</p> <p>13 attention or it hasn't been raised during the course</p> <p>14 of the scheduling conferences that we regularly</p> <p>15 hold.</p> <p>16 MR. HIMMEL: In the Southern District in</p> <p>17 New York I alluded to earlier, they have a pre-</p> <p>18 motion conference between the judge and the lawyers</p> <p>19 before any motion is carried to trial. Have any</p> <p>20 members of this panel been confronted with that?</p> <p>21 JUDGE BISSELL: I think our magistrates do</p> <p>22 that on a fairly regular basis. At least mine does.</p> <p>23 And that as discovery has progressed to a point</p> <p>24 where a summary judgment motions might be right,</p> <p>25 that conference takes place and a timetable for</p>	<p>112</p> <p>1 write them a letter back dismissing the motion</p> <p>2 without prejudice. I'll hear the testimony and I'll</p> <p>3 make my Daubert decision and my Rule 702 decision</p> <p>4 when I hear it in context. I'm not going to hold</p> <p>5 two trials. One will be enough.</p> <p>6 MR. HIMMEL: Yes?</p> <p>7 MR. DRASCO: Mike, I participated in the</p> <p>8 Vanishing Civil Trial Symposium that Judge Kugler</p> <p>9 talked about, and that symposium took place the week</p> <p>10 that Newsweek had an issue called "Lawsuit Hell" and</p> <p>11 it talked about -- it included -- some of the</p> <p>12 commentators talked about juries not being capable</p> <p>13 of deciding the kinds of complex issues that come</p> <p>14 before them today. I -- I -- and that was</p> <p>15 disturbing to, I think, to the people who</p> <p>16 participated in the symposium.</p> <p>17 I'd like to hear the comment from the</p> <p>18 judges as to whether, assuming we can get by Rule</p> <p>19 56, and we have enough money to finish discovery,</p> <p>20 are the -- are juries today capable of, as they</p> <p>21 traditionally have been, in deciding our cases?</p> <p>22 MR. HIMMEL: No question they are. Yes.</p> <p>23 JUDGE HAYDEN: Yeah. Sure they are. I</p> <p>24 mean, we're also talking about the art of being a</p> <p>25 trial lawyer. Isn't that the other end of the issue</p>
<p>111</p> <p>1 summary judgment motions or cross motions to summary</p> <p>2 judgments is usually set and the rest of the case is</p> <p>3 put on hold.</p> <p>4 Perhaps there are still expert witnesses</p> <p>5 to be deposed, but they're not that critical maybe</p> <p>6 to a summary judgment motion, or the finalization of</p> <p>7 that burdensome pretrial order can be put on hold so</p> <p>8 that the motions could take place.</p> <p>9 So either by rule or by practice it takes</p> <p>10 place here, but probably more often before the</p> <p>11 magistrate judge in the second or third scheduling</p> <p>12 order than before the District Judge itself.</p> <p>13 MR. HIMMEL: Any questions --</p> <p>14 JUDGE IRENAS: Going back to your question</p> <p>15 about non-jury trials, summary judgment?</p> <p>16 MR. HIMMEL: Yes.</p> <p>17 JUDGE IRENAS: I have banned Daubert</p> <p>18 hearings in pre-trial -- excuse me, in non-jury</p> <p>19 cases.</p> <p>20 I consider it an utter waste of time and</p> <p>21 duplicative. And furthermore, when I hear the</p> <p>22 actual testimony and context, I'm likely to make a</p> <p>23 more informed Daubert decision anyhow. So that's at</p> <p>24 least one context where I will not -- I write the</p> <p>25 lawyer when the motions come flying in. I just</p>	<p>113</p> <p>1 and isn't that precisely what that evokes? If</p> <p>2 somebody chooses to be a trial lawyer or winds up</p> <p>3 being a trial lawyer, then that's part of a trial</p> <p>4 lawyer's job. There's one trial lawyer who's not</p> <p>5 here because he's on television, and I send his</p> <p>6 greetings. He said, "Take a moment, work it in,"</p> <p>7 and I just did. But I think all of us who have been</p> <p>8 catching glimpses of our -- of our homegrown trial</p> <p>9 lawyers and their colleagues on Court TV over the</p> <p>10 last couple of months would agree with me. It's a</p> <p>11 difficult, honorable, incredibly wearing and</p> <p>12 demanding art and part of the profession.</p> <p>13 One of the things that is not happening is</p> <p>14 feeding in young and maturing lawyers into the queue</p> <p>15 that can be mentored and sent out to try cases. I</p> <p>16 think it was a very good connection with our earlier</p> <p>17 panel. Would electronic discovery be this strong,</p> <p>18 this massive explosion, if trial lawyers were around</p> <p>19 saying, "We're never going to get it in, that has</p> <p>20 nothing to do with anything, the hell with it." As</p> <p>21 opposed to the trucks that come with the 56 motions</p> <p>22 into chambers. So, I just throw that out for -- for</p> <p>23 thought.</p> <p>24 MR. HIMMEL: Judge Chesler?</p> <p>25 JUDGE CHESLER: Picking up on what -- what</p>

<p>1 Judge Hayden said.</p> <p>2 It strikes me that indeed one of the major</p> <p>3 reasons for the vanishing trial may be the vanishing</p> <p>4 trial lawyer.</p> <p>5 I have had on any number of occasions a</p> <p>6 sneaking suspicion when I sat down with senior</p> <p>7 partners in major law firms in this district at</p> <p>8 final pretrial conferences and reviewed the final</p> <p>9 pretrial orders that have been submitted to me, that</p> <p>10 these senior partners had progressed through the</p> <p>11 entire partner track being litigators without ever</p> <p>12 having tried a case.</p> <p>13 And, quite frankly, that despite the -- I</p> <p>14 mean, one reason why litigants settle is, of course,</p> <p>15 because trial frequently is a zero-sum game for</p> <p>16 large amounts of money. But one second -- a second</p> <p>17 component of that may very well be that you have</p> <p>18 supposed trial attorneys on both sides who have</p> <p>19 never tried a case and, quite frankly, do not want</p> <p>20 their first jury trial to be an experiment involving</p> <p>21 fifty or a hundred million dollars.</p> <p>22 JUDGE BISSELL: I'd like to comment on</p> <p>23 Dennis' question about dealing with the juror's</p> <p>24 grasping of the issue. I think it probably does</p> <p>25 reflect on the case that's well tried. I tremble</p>	<p>114</p> <p>1 JUDGE WOLFSON: I decide whether to grant</p> <p>2 it or not. I do hold oral arguments. I think I'm</p> <p>3 in actually the minority, certainly in Camden, by</p> <p>4 having a regular return date. The actual return</p> <p>5 date that is listed on the motion and letting</p> <p>6 attorneys know that if I do want argument, it is</p> <p>7 going to be held on that date, and they should</p> <p>8 expect that.</p> <p>9 I reserve oral argument for cases where, I</p> <p>10 think, one, perhaps the papers weren't as good, and</p> <p>11 I need to bring them in to discuss some of the</p> <p>12 issues. I think they haven't really hooked on an</p> <p>13 issue that was there, that I want to make sure</p> <p>14 they're aware of, maybe we need some more briefing.</p> <p>15 When I think it's a very important issue</p> <p>16 and I want to give them one last chance to get their</p> <p>17 views out there and I will admit I use oral argument</p> <p>18 for settlement purposes.</p> <p>19 I find that if I can decide the motion on</p> <p>20 the record, right there, they know where we are. I</p> <p>21 can usually bring them back in the robing room.</p> <p>22 We're going to have a settlement within a week</p> <p>23 because they know where they are. They need that</p> <p>24 motion decided. And that's very helpful. And even</p> <p>25 if we need -- if I need to reserve for some reason,</p>
<p>115</p> <p>1 when called upon to try a patent case in front of a</p> <p>2 jury because I said, gosh, how can anybody ever</p> <p>3 grasp this? But the point is, the patent trial law</p> <p>4 firm is about as meticulous and well organized and</p> <p>5 careful in the presentations and using graphic and</p> <p>6 visual aides decades before anybody got to see it.</p> <p>7 Many of us might learn from them in terms of how to</p> <p>8 really try a complicated case in front of a jury.</p> <p>9 And, frankly, although over the years, and</p> <p>10 I'm sure my colleagues are in the same position,</p> <p>11 there have been times when a jury verdict has come</p> <p>12 down, that it is not the verdict I would have</p> <p>13 reached.</p> <p>14 In almost 25 years on the State and</p> <p>15 Federal bench, I've only granted five, I think,</p> <p>16 judgment NOVs and on two of those the Court of</p> <p>17 Appeals reversed me and said that the jury got it</p> <p>18 right in the first place.</p> <p>19 So, I think they, one, are capable and,</p> <p>20 two, strive very hard to get it right and to render</p> <p>21 a just verdict and they usually do.</p> <p>22 MR. HIMMEL: Let's move on to oral</p> <p>23 argument. Is it still a useful tool?</p> <p>24 Judge Wolfson, what's your practice in</p> <p>25 allowing oral arguments discussions?</p>	<p>117</p> <p>1 certainly the comments I've made, the questions I've</p> <p>2 alerted the attorneys to what the weak points are</p> <p>3 and where it's likely to come out, and they want to</p> <p>4 undertake settlement before they even get that</p> <p>5 decision.</p> <p>6 So, I think it's very useful.</p> <p>7 MR. HIMMEL: Judge Pisano, what's your</p> <p>8 position?</p> <p>9 JUDGE PISANO: I -- I do not have oral</p> <p>10 argument in every case. Generally speaking, if I</p> <p>11 have questions or doubts as to how the motion ought</p> <p>12 to come out, then I will bring counsel in because</p> <p>13 that can help me in making a decision.</p> <p>14 What I'm careful to do, though, is to</p> <p>15 advise counsel before they come in as to whether I</p> <p>16 think I need oral argument only on specific aspects</p> <p>17 of the motion, so that they don't spend a lot of</p> <p>18 time preparing for the whole thing and then have</p> <p>19 only a little bit of it brought forward.</p> <p>20 But it has, although I don't as a general</p> <p>21 rule, have oral argument on every case, it has</p> <p>22 actually changed my mind a couple of times.</p> <p>23 MR. HIMMEL: Do you find it a useful tool</p> <p>24 for settlement purposes?</p> <p>25 JUDGE PISANO: Oh yes. Of course.</p>

<p>1 JUDGE IRENAS: My problem is that if 2 you're the non-moving party, you don't have that 3 second bite. You have the moving party has the 4 moving brief and the reply brief and you can't get 5 before the Court because most courts do not allow a 6 SUR reply brief and maybe there is something 7 important that you want to get before the Court on 8 oral argument. And yet I would say certainly at 9 this point a majority of the district judges are not 10 allowing or not permitting oral argument. So you 11 don't have an ability to respond to the reply brief 12 from the moving party.</p> <p>13 JUDGE WOLFSON: Well, you're probably not 14 shy about responding if you call the Court and say, 15 "Is there argument?" and they say, "No." Saying then 16 "May I submit a two-page?"</p> <p>17 MR HIMMEL: Right.</p> <p>18 JUDGE WOLFSON: -- sur reply to address 19 something that was brought up in their papers? And 20 if you say it in that way as opposed to another 21 brief.</p> <p>22 MR HIMMEL: Right.</p> <p>23 JUDGE WOLFSON: But something very short 24 and directly to the point, you would have wanted to 25 address at oral argument. I don't know. I think</p>	<p>118</p> <p>1 the State Court or motions to transfer to another 2 court, that I normally am going to permit oral 3 argument on those types of motions. Not in all 4 cases, but in that sort of the presumption in 5 which I operate. And when I receive that calendar 6 from my courtroom deputy, about two weeks before the 7 formal return date, which I also preserve, my clerks 8 and I go over it and we make the choice then, a 9 decision then, as to which of those cases are going 10 to be decided on the papers, which of those cases is 11 going to be handled on oral argument and then the 12 lawyer is promptly advised. So that at least more 13 than a week in advance of the return date or the 14 adjourned or adjournment date, as the case may be, 15 they know they're coming in for oral argument or 16 not.</p> <p>17 One point, although this may seem a little 18 Polyanic, but I do believe it. Not all lawyers are 19 as skilled in all aspects of litigation. Some are 20 excellent writers and not particularly good on their 21 feet. Others are -- others are modest or mediocre 22 writers with very good oral elegance. And, I think, 23 frankly, the client ought to have the benefit of 24 what that lawyer's strengths are. Particularly in a 25 motion it may very well mean either the success or</p> <p>120</p>
<p>119</p> <p>1 most of us would be agreeable to that.</p> <p>2 JUDGE BROWN: Yes. As far as oral 3 argument is concerned, I do use the motion calendar 4 today as a control and everything that looks like 5 it's substantive I'll determine whether oral 6 argument will be helpful to the Court. I can do it 7 by telephone if it's more convenient to the parties 8 and I -- it doesn't have to be on that motion day, 9 sometimes later in the week at one o'clock I can do 10 that.</p> <p>11 I find it useful as a control not only for 12 settling purposes but also for status purposes. 13 Okay. We've resolved this motion. Let's start 14 talking about a trial date, let's get the trial and 15 the pretrial order in, and the like. I think it's 16 very helpful for that purpose. So, I do allow a 17 fair amount of oral argument, but, again, focused on 18 areas that I think it would be helpful.</p> <p>19 JUDGE BISSELL: I similarly am selective 20 in the choosing of cases for oral argument. 21 Although I think I have a general presumption that 22 if a motion is dispositive, and that includes not 23 only summary judgment motions, but probably six 24 motions, motions to dismiss for lack of subject 25 matter or into jurisdiction, motions to remand to</p>	<p>121</p> <p>1 the failing of this case. So that I think for that 2 reason -- that's another good reason to support 3 oral argument in critical motions.</p> <p>4 I also agree that it's a chance for us to 5 ask questions on the points that really concern us. 6 And although I don't do it in advance, I guess I 7 don't perhaps grasp it as quickly as Joel does. But 8 by the time the morning rolls around, I will often 9 ask the lawyers, sometimes with a call and even 10 before they come to the well of the court, 11 "Counselor, I'd like you to focus on these -- these 12 issues. The others really don't need expounding 13 here."</p> <p>14 So, they have a half an hour or an hour 15 maybe to organize their arguments in that respect 16 and it can make the difference.</p> <p>17 I have changed my mind, particularly on a 18 close call with regard to summary judgment either on 19 the bench or on later reflection. It can make a 20 difference.</p> <p>21 MALE SPEAKER: I'm curious as to how our 22 judges feel about a practice adopted in some of the 23 districts in which the judges issue preliminary 24 written or sometimes oral opinions before oral 25 argument usually three days or a week before oral</p>

<p>1 argument. Then the lawyers that come in to --</p> <p>2 invited to address the issues as framed by the</p> <p>3 preliminary bidding?</p> <p>4 MR. HIMMEL: I think we're running out of</p> <p>5 time, so I'm going to move on to the Feeney</p> <p>6 Amendment We all need to cover local counseling.</p> <p>7 Everybody in this room realizes how</p> <p>8 important it is to have local counsel in New Jersey.</p> <p>9 I know it's a strong view of Chief Judge Bissell.</p> <p>10 Somehow you have to help us communicate when this is</p> <p>11 a lawyer from another state, how important it is.</p> <p>12 The Feeney Amendment. It has been</p> <p>13 suggested that the real effect of the Feeney</p> <p>14 Amendment was to make it more difficult for</p> <p>15 defendants to obtain downward departures from the</p> <p>16 U.S. District Court and to sustain it on appeal.</p> <p>17 One of the aspects of the Feeney Amendment</p> <p>18 which was passed last April was it expands the</p> <p>19 authority of the appellate courts to give downward</p> <p>20 departures under a de novo standard of review. And</p> <p>21 one of the phenomenons that has developed is Judge</p> <p>22 Weinstein in the Eastern District of New York. He</p> <p>23 has actually now video-taped certain of his</p> <p>24 sentencing hearings because he wants the Second</p> <p>25 Circuit to get the full flavor - - the full flavor</p>	<p>122</p> <p>1 Judge Bissell, what would you say is substantially</p> <p>2 reduced." No questions, it's not -- you know, it's</p> <p>3 not maybe it'll happen. It's supposed to happen.</p> <p>4 And in support of Congress' concern, the departures</p> <p>5 that were being granted might be undermining the</p> <p>6 goals of the Sentencing Act. The Congress cited</p> <p>7 Sentencing Commission data that showed greater</p> <p>8 downward departures granted by District Courts had</p> <p>9 grown from 5.8 percent in 1991 to 18.3 in 2001.</p> <p>10 The material I'm going to share with you</p> <p>11 regarding the Feeney Amendment you can get at the</p> <p>12 U.S. Sentencing Guidelines site. USSC, U.S.</p> <p>13 Sentencing Commission.gov and look for the press</p> <p>14 release from October of 2003.</p> <p>15 The highlights of the Amendment that I</p> <p>16 want to share with you, very quickly, are as</p> <p>17 follows:</p> <p>18 "The Amendment prohibits downward</p> <p>19 departures based upon acceptance of responsibility,</p> <p>20 minor role in the offense, gambling addiction or</p> <p>21 legally required restitution." The last two might</p> <p>22 go right to the heart of any white collar cases.</p> <p>23 People are -- are -- are involved in now.</p> <p>24 The Feeney Amendment limits the</p> <p>25 availability of downward departures based on family</p> <p>124</p>
<p>123</p> <p>1 of the sentencing. Not just the tangible, but also</p> <p>2 the intangible as well.</p> <p>3 Circuit judges have written and expressed</p> <p>4 their outrage because now judges that grant downward</p> <p>5 departures are going to be identified. They have to</p> <p>6 be identified I believe by the Chief Judge in the</p> <p>7 district and by the U.S. Attorney and those names</p> <p>8 are then sent to the Sentencing Commission and,</p> <p>9 certainly, that is within the purview of the House</p> <p>10 and Senate Judiciary Committee. Those names also go</p> <p>11 to the Department of Justice.</p> <p>12 So, a lot of judges have been outraged as</p> <p>13 to the recent development since the onslaught of the</p> <p>14 Feeney Amendment.</p> <p>15 Judge Hayden, what's your view of the</p> <p>16 Feeney Amendment?</p> <p>17 JUDGE HAYDEN: I think it touches every</p> <p>18 single person in this room whether or not he or she</p> <p>19 practices criminal law.</p> <p>20 The Feeney Amendment required, and it was</p> <p>21 added on to the Patriot Act and went into effect on</p> <p>22 April 30th of last year. That within 180 days of</p> <p>23 it's passage, that the U.S. Sentencing Commission</p> <p>24 would promulgate guidelines, quote to ensure that</p> <p>25 the incidents of downward departures are, unquote --</p>	<p>125</p> <p>1 ties and responsibilities and abhorrent behavior.</p> <p>2 It further authorizes limited departures</p> <p>3 by the District Court per fast-track dispositions</p> <p>4 that are authorized by the Attorney General or the</p> <p>5 United States Attorneys.</p> <p>6 It requires courts to state their reasons</p> <p>7 for departure and that has been formalized and</p> <p>8 formulated into a three-page statement of reasons</p> <p>9 that will shortly -- must shortly become part of</p> <p>10 every judgment of conviction that we enter and it</p> <p>11 will be created, this Statement of Reasons, this</p> <p>12 three-page Statement of Reasons, by the checking off</p> <p>13 of boxes by trained Probation Department personnel</p> <p>14 and by our deputy clerks.</p> <p>15 Mike mentioned appellate review. The</p> <p>16 Feeney Amendment requires de novo appellate review</p> <p>17 of departures "The Court of Appeals shall review de</p> <p>18 novo the District Court's application of the</p> <p>19 guidelines to the facts." It requires de novo</p> <p>20 review when the District Court fails to provide the</p> <p>21 three-page written Statement of Reasons that I just</p> <p>22 told you about, which is not the District Court's</p> <p>23 creation, but a capturing, not necessarily by the</p> <p>24 Court at all, but by somebody trained to check out</p> <p>25 the various boxes.</p>



<p>1 De novo review is -- requires the</p> <p>2 appellate court to reject the sentence if it is not</p> <p>3 consistent with the guidelines or not justified by</p> <p>4 the facts of the case.</p> <p>5 And, finally, routinely, de novo review is</p> <p>6 required in any case in which the district court</p> <p>7 departs from the guidelines without government</p> <p>8 consent, even where the district court justifies the</p> <p>9 departure as a matter of law. And as a consequence</p> <p>10 to this, and as discussed in his decision, Judge</p> <p>11 Weinstein is video-taping all sentences. And you</p> <p>12 can read his reasons. Nice, short little opinion.</p> <p>13 Opinion and order at 219 FRD 262 and that was</p> <p>14 decided January 30, 2004. 219 FRD 262.</p> <p>15 A wonderful opinion because it talks about</p> <p>16 the human element of sentencing and what was</p> <p>17 supposed to happen, what is in fact court procedure</p> <p>18 and law.</p> <p>19 Now, I would ask you to bear with me</p> <p>20 because this is the link that I see and this is why</p> <p>21 I believe that this affects everybody.</p> <p>22 There is a division of the Department of</p> <p>23 Justice called the Office of Justice Programs. It</p> <p>24 has a website at OJP.USDOJ.GOV. It issues in July</p> <p>25 of each year statistics regarding the United States</p>	<p>126</p> <p>1 one in every 143 U.S. residents were in either a</p> <p>2 state or federal prison or a local jail as of</p> <p>3 12/31/2002.</p> <p>4 Further examining those statistics, black</p> <p>5 males between the age of 20 and 39 years of age</p> <p>6 accounted for one-third of all sentenced inmates</p> <p>7 under state or federal jurisdiction. 10.4 percent</p> <p>8 of U.S. black male population between the ages of 25</p> <p>9 to 29 was in prison, 2.4 percent -- and that</p> <p>10 compares to 2.4 percent of Hispanic males and 1.2</p> <p>11 percent of white males in the same age group, 25 to</p> <p>12 29.</p> <p>13 The growth in the federal prison system is</p> <p>14 up 61 percent from 1995 to 2001. Examining that 61</p> <p>15 percent growth, the breakdown between the years 1995</p> <p>16 and 2001 attributed 48 percent of the total growth</p> <p>17 to drug offenses, 21 percent to immigration</p> <p>18 offenses.</p> <p>19 Brent Staples reviewed a book in Sunday's</p> <p>20 New York Times. He said that the rate of U.S.</p> <p>21 incarceration compares with Japan 14 times. Or</p> <p>22 eight times the rate of incarceration of people in</p> <p>23 France and six times the rate of incarceration in</p> <p>24 Canada.</p> <p>25 The book that Brent Staples was reviewing</p>
<p>127</p> <p>1 prison population. And I share with you the</p> <p>2 highlights of its report from last July and I ask</p> <p>3 you to take note of two statistics that I'll tell</p> <p>4 you about again at the end of this very short</p> <p>5 presentation because I guarantee you those numbers</p> <p>6 are going to change and they are going to go up.</p> <p>7 At year end 2002, the last time the U.S.</p> <p>8 prison population was studied and data was</p> <p>9 finalized, the nation's prison population had -- had</p> <p>10 undergone its largest increase in three years. It's</p> <p>11 up 2.6 percent.</p> <p>12 The federal prison population was up 4.2</p> <p>13 percent in comparison with the state prison</p> <p>14 population, which went up 2.4 percent.</p> <p>15 The Federal Bureau of Prisons is the</p> <p>16 nation's largest prison system. It has 163,528</p> <p>17 prisoners as of 12/31/2002.</p> <p>18 State prisons were operating between one</p> <p>19 percent and 16 percent of capacity. Federal prisons</p> <p>20 at the end of December 2002 were operating at 33</p> <p>21 percent over capacity. Overall, at year end 2002,</p> <p>22 the United States incarcerated 2,166,260 persons.</p> <p>23 Breaking down the rate of incarceration,</p> <p>24 one in every 110 men who are U.S. residents were in</p> <p>25 prison. That means -- and if you add the women in,</p>	<p>128</p> <p>1 was a book called "Life on the Outside" by Jennifer</p> <p>2 Gonnerman, G-o-n-n-e-r-m-a-n.</p> <p>3 She reports in her book that the American</p> <p>4 prison system disgorges 600,000 people each year who</p> <p>5 she describes as angry and unskilled.</p> <p>6 Now, I share those with you because I</p> <p>7 think the Feeney Amendment will in fact drive up two</p> <p>8 of those statistics that I shared with you very,</p> <p>9 very easily.</p> <p>10 The rate of federal incarceration, I'm</p> <p>11 sure, will go up more than the 4.2 percent reported</p> <p>12 for 2002 and the number of federal inmates, 163,528,</p> <p>13 cannot help to swell.</p> <p>14 Thanks.</p> <p>15 MR. HIMMEL: Any other members of the</p> <p>16 panel want to be heard on this issue?</p> <p>17 JUDGE BISSELL: One thing you have to also</p> <p>18 keep in mind is that the congressional leadership</p> <p>19 continues with a campaign of disinformation to the</p> <p>20 public about the Feeney Amendments, particularly</p> <p>21 with their origins.</p> <p>22 The Chairman of the House Judiciary</p> <p>23 Committee, just a week or so ago addressed the</p> <p>24 Judicial Conference of the United States and issued</p> <p>25 a press release with regard to that.</p>
	<p>129</p>

<p>130</p> <p>1 Let me share with you a couple of his</p> <p>2 comments.</p> <p>3 He, of course, chastised the Judiciary for</p> <p>4 having the gall to question this legitimate</p> <p>5 legislative act. But beyond that, in the course of</p> <p>6 it, stated with regard to the passage of the</p> <p>7 amendment, and I quote, "The Feeney Amendment was</p> <p>8 approved by the House of Representatives on a</p> <p>9 straight up or down vote by an overwhelming</p> <p>10 bipartisan majority 357 to 58. The final Bill which</p> <p>11 included weakened Feeney provisions, passed the</p> <p>12 House 400 to 25 and the Senate 98 to nothing."</p> <p>13 But what he doesn't tell you, however, is</p> <p>14 that the Feeney Amendments was stealth legislation</p> <p>15 beyond even our wildest imagination. Drafted in the</p> <p>16 bowels of the Justice Department at the midnight</p> <p>17 hour, with no impact from the judiciary, no</p> <p>18 committee referrals in the Congress, and then</p> <p>19 appended with this rider to the Amber Alert</p> <p>20 legislation who no one would oppose nor should they.</p> <p>21 So, when the Chairman indicates this</p> <p>22 overwhelming congressional endorsement of the Feeney</p> <p>23 Amendment -- nonsense.</p> <p>24 He continued, quote, "The Feeney Amendment</p> <p>25 represents a legislative response to a longstanding</p>	<p>132</p> <p>1 judiciary's constitutional obligations as time goes</p> <p>2 along.</p> <p>3 I think in some instances, as a practical</p> <p>4 matter, given the fact that you don't get a large</p> <p>5 number of those particular cases and also given the</p> <p>6 fact that most downward departures are either</p> <p>7 government made or government endorsed, that we are</p> <p>8 not going to be hit with a rash of downward</p> <p>9 departure sentences that will subject us to this</p> <p>10 type of scrutiny. But it -- but it certainly as a</p> <p>11 matter of principle and certainly as a matter of</p> <p>12 what is on the horizon in the future. It's a cause</p> <p>13 for greater concern for guarding the legitimate</p> <p>14 separation of powers in our government.</p> <p>15 MR. HIMMEL: Judge Hayden?</p> <p>16 JUDGE HAYDEN: I just want to make one</p> <p>17 clarification.</p> <p>18 When I was talking about how the amendment</p> <p>19 applies to downward departures in all cases, it's</p> <p>20 not just those limitations as to sex offenses. In</p> <p>21 all cases.</p> <p>22 JUDGE BISSELL: Some of the limitations</p> <p>23 are limited to sex offenses. Others are not.</p> <p>24 JUDGE HAYDEN: Yes. But the ones I</p> <p>25 mentioned are all over.</p>
<p>131</p> <p>1 congressional concern that the sentencing guidelines</p> <p>2 were increasingly being circumvented by some federal</p> <p>3 judges whose inappropriate downward departures</p> <p>4 resulting in a return to sentencing disparities."</p> <p>5 That's equally misleading.</p> <p>6 The catalyst of the Feeney Amendments was</p> <p>7 a sentence or two in a sex offense area that</p> <p>8 happened to get this particular guy's dander up and,</p> <p>9 hence, led to basically using, basically, an</p> <p>10 elephant gun to shoot a mosquito.</p> <p>11 But that remains the rhetoric that is out</p> <p>12 there. I don't know if it represents the</p> <p>13 unconsidered thinking of other members of the</p> <p>14 Congress. It couldn't represent anybody's</p> <p>15 considered thinking, but that is what we're up</p> <p>16 against in terms of where this is going.</p> <p>17 And make no mistake. Although happily</p> <p>18 with the intervention of the Senate Judiciary</p> <p>19 Committee, the strict limitations and direct</p> <p>20 legislative guidelines, by Congress which also, by</p> <p>21 the way, is the first, were limited to the sex</p> <p>22 offense areas.</p> <p>23 This is the camel stowed under the tent</p> <p>24 and we all run the risk of this type of further</p> <p>25 incursion on the legitimate exercise of the</p>	<p>133</p> <p>1 MR. HORN: Yes.</p> <p>2 If I may. In 1987 and 1989 when Estrada</p> <p>3 came down and the sentencing guidelines were</p> <p>4 declared constitutional, it has had an impact not</p> <p>5 only on the judiciary, and not only on those</p> <p>6 individuals who were being sentenced, but it had a</p> <p>7 tremendous impact on we, the members of the Bar.</p> <p>8 Because what it did was it implemented a -- a cookie</p> <p>9 cutter, lowest denominator -- common denominator of</p> <p>10 counsel and took away from those of us who wished to</p> <p>11 be creative, those of us who wished to work harder,</p> <p>12 those of us who wished to be better advocates to</p> <p>13 present arguments to you, the bench, as to why this</p> <p>14 client was not so much different, but why it wasn't</p> <p>15 in the heartland.</p> <p>16 And all this does, almost 20 to 30 years</p> <p>17 later, is further restricts we, the attorneys who</p> <p>18 are trying to give the effective assistance to</p> <p>19 counsel. So it really -- it -- it well, I'm -- you</p> <p>20 know, I'm shocked by it.</p> <p>21 It goes well beyond Judge Bissell's</p> <p>22 concerns because it affects everyone in the criminal</p> <p>23 justice system plus the general public with the</p> <p>24 long, long, long, long, even longer sentences of</p> <p>25 warehousing people at a great cost to the public.</p>

1 MR. HIMMEL: I'm getting a hook. So, I  
2 want to thank the members of the panel.  
3 (Applause)  
4 MR. MADERER: Now, Judge Bissell, you will  
5 not be clear of this Circuit business.  
6 JUDGE BISSELL: I'm going to Washington  
7 next week. I'm going on the (inaudible).  
8 MR. MADERER: If we take -- if we can take  
9 one thing away from this excellent panel it is that  
10 you need to know the judge before whom you are going  
11 to be giving summation or civil or criminal.  
12 Ladies and gentlemen, we now move our  
13 venue downstairs for lunch. We have three and half  
14 minutes to do that and then the remainder of the  
15 program.  
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23  
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A				
ABA 103:18	accessed 44:22	admit 86:10	ahd 96:13	among 9:11,19
Abbreviated 73:6	accessible 23:4	116:17	ahead 47:11 88:3	66:9 80:2 88:1
abhorrent 125:1	24:2 38:20,21	adopted 68:21,25	106:13	95:25
abilities 5:7	43:4,6 70:11,15	121:22	aides 115:6	amount 20:1 25:14
ability 74:2 81:21	accidental 41:19	ADR 103:23 104:1	ain't 89:4	43:18,19 63:14
118:11	accomplishments	109:16	albeit 28:18	104:23 109:14
able 7:23 10:9 19:9	6:3	advance 39:17	alert 83:10 130:19	119:17
28:25 32:7 61:6	account 52:17	95:2 120:13	alerted 117:2	amounts 114:16
62:5	103:9	121:6	ALITO 2:1	ample 10:6
about 2:16 3:4 7:7	accountable 53:10	advantage 65:14	alleged 73:19	amusement 49:22
7:15 8:17 13:7	accounted 128:6	106:12	alleges 11:1	analysis 26:20
15:13,23 17:1,2	accurate 39:8,11	adversaries 36:6	allocate 63:23	59:6 93:23 99:24
17:18 18:11	80:8	adversary 14:6	allocation 64:1	analyst 71:9
21:19 22:6,17	acknowledge 2:5	25:1,5,7,11 27:6	allow 37:20 40:18	analyze 87:14
25:25 26:21	Acme 47:25 48:10	33:11 39:16	41:13 74:12	ancillary 90:4
27:10,24 28:7	across 6:21 18:23	41:13 43:16	77:21 79:13 81:8	Andersen 45:24
29:7 32:1,9	103:12	adversary's 41:14	83:24 85:8 96:6	and-confer 15:16
33:23 37:1 38:9	act 52:24,24	adverse 32:11,14	100:6,7 108:10	and/or 17:25 31:10
38:20 39:11,17	123:21 124:6	32:15,24 46:10	118:5 119:16	32:17
39:20 40:4,5	130:5	52:7	allowed 74:15	angry 129:5
41:9,10 42:10	action 9:20 34:20	advice 11:10	82:24 99:16,18	annual 1:4 2:2
44:17 45:9,23,24	34:21	advise 7:17 117:15	99:20	32:5
46:13 47:22	actionable 67:9	advised 9:16	allowing 115:25	another 24:8 25:10
48:12 49:8,21	action-response	120:12	118:10	25:17 27:19
50:5,17 53:13	34:23	advocates 133:12	allows 62:18 66:16	35:13 38:3 47:13
55:9 58:6,7,15	active 21:16,19,25	affects 126:21	94:23	72:17 81:23,24
61:24 64:2,5,15	23:1,4,5,16 24:2	133:22	alluded 100:11	97:8 105:20,21
64:19 65:5,7	26:13 31:13,20	affidavit 47:16	110:17	118:20 120:1
67:3,17 68:19	42:19 58:3 90:3	affidavits 46:15	all.ö 19:23	121:2 122:11
69:23 70:10	109:16	60:19 108:19	almost 5:5 52:20	answer 22:19
72:14,20,21,24	actual 39:17 72:22	affirmative 14:3	76:5 115:14	32:20 41:8 47:10
73:11,14 74:6	111:22 116:4	14:10 94:19	133:16	56:22 76:9 77:17
76:2,19 79:2	actually 10:21	after 24:8 45:10	along 10:18 78:18	84:13 90:14 92:9
83:11 84:11 85:5	17:17 24:11	52:12 55:3 56:21	132:2	answered 12:2
87:1,19,20,22	28:12,13 31:19	66:10 75:13	already 10:7 24:22	83:23 84:16
88:7 89:3 90:22	39:21 58:8 62:4	78:15,20 85:5	47:16,17 68:11	86:21
92:10 93:13 94:3	64:5 82:7 91:8	86:22 91:4 93:25	69:10 100:24	answers 47:7
96:10,20,22 97:5	100:6 101:7	98:18	105:15	84:15
97:21 99:24	103:13 116:3	afternoon 28:22	altered 46:7 61:3,6	anticipate 52:23
100:14 102:17	117:22 122:23	afterwards 80:24	altering 41:19	anticipated 15:7
102:24 104:11	adage 36:9	100:9	alternatives 73:6	34:4
104:14 105:6	add 7:21 59:10	again 7:3 15:17	although 8:24	antitrust 50:7
107:14,25 108:8	127:25	24:13,20 25:21	28:12 57:3 59:1	anybody 48:25
109:24 111:15	added 89:10	30:6 31:2 69:9	115:9 117:20	52:19 80:18
112:9,11,12,24	123:21	75:4,6 94:25	119:21 120:17	81:22 100:17
114:23 115:4	addiction 124:20	98:7 119:17	121:6 131:17	115:2,6
118:14 119:14	additional 43:25	127:4	always 47:2 49:21	anybody's 131:14
120:6 121:22	address 9:7 22:9	against 68:14	53:12 63:1 65:13	anyhow 111:23
125:22 126:15	63:7 66:2 67:23	69:14 110:1	68:18 78:16 80:3	anymore 51:17
127:4 129:20	73:18 97:14	131:16	82:7,9 83:5	63:11 104:9
132:18	118:18,25 122:2	age 36:12 46:21,23	94:14 95:1	anyone 90:24
above 8:25	addressed 28:3	51:21 128:5,5,11	amazed 47:2	99:12
absent 77:5	129:23	agencies 9:13	amazes 65:13	anything 17:25
absolutely 35:3	addressing 64:16	ages 128:8	Amber 130:19	56:23 58:23
36:11 39:8 55:18	64:18	ago 11:14 28:13	amendment 73:15	68:10 90:6
57:16	adept 46:25	30:4 49:21 51:12	73:16,23 122:6	113:20
absorb 10:2	adequately 91:12	87:21 90:9 99:15	122:12,14,17	anyway 50:15
academians 74:1	ADI 8:3	104:13 129:23	123:14,16,20	anywhere 52:20
academic 107:23	adjourned 120:14	agree 16:10 47:3	124:11,15,18,24	68:2
acceptance 124:19	adjournment	63:25,25 77:25	125:16 129:7	apologize 23:7,13
accepted 19:12	120:14	80:13 113:10	130:7,7,23,24	apparently 9:12
access 21:21,25	administration	121:4	132:18	93:3
22:23 37:21 43:9	3:10,12 5:1	agreeable 119:1	Amendments	appeal 122:16
48:23	Administrative	agreed 11:4 98:8	129:20 130:14	Appeals 115:17
	9:6	agreement 95:9,12	131:6	125:17
	admissible 50:15	106:22	American 129:3	appear 72:4



73:11 87:8 97:4 100:18 106:15 117:19 <b>bite</b> 118:3 <b>black</b> 128:4,8 <b>Blackberry</b> 50:3 61:15,16 <b>blanks</b> 53:16 <b>board</b> 6:21 18:24 40:16 <b>body</b> 18:15 31:22 78:18 <b>bold</b> 54:9 <b>bono</b> 8:7,13 <b>book</b> 13:21 128:19 128:25 129:1,3 <b>boring</b> 6:1 99:21 <b>born</b> 40:12 <b>borrowed</b> 67:7 <b>boss</b> 22:17 48:12 <b>both</b> 4:18 12:4 18:18 39:24 40:3 42:3 45:9 53:9 71:4,5 82:6,9 98:4,7 99:14 106:22 107:6 114:18 <b>bottle</b> 49:25 <b>bottom</b> 14:10 <b>bought</b> 29:12 <b>bouncing</b> 102:8 <b>bound</b> 38:1 <b>bowels</b> 130:16 <b>boxes</b> 125:13,25 <b>branch</b> 9:14,21 <b>break</b> 71:18 <b>breakdown</b> 128:15 <b>Breaking</b> 127:23 <b>Brent</b> 128:19,25 <b>brief</b> 6:1 26:3 87:19 118:4,4,6 118:11,21 <b>briefing</b> 116:14 <b>briefly</b> 13:23 <b>bring</b> 7:7 40:15 47:5 48:14 55:18 57:15 59:10 116:11,21 117:12 <b>Bristol</b> 22:11 25:21 <b>Bristol-Myers</b> 24:12 <b>broad</b> 21:13 26:23 36:15,19 <b>broke</b> 89:4 <b>brought</b> 23:17 36:15 110:12 117:19 118:19 <b>Brown</b> 72:1 74:10 74:13 89:1,2 90:1 95:7,8 99:14 108:20,22 110:5,11 119:2 <b>Brown's</b> 76:5 <b>brunch</b> 8:6	<b>budget</b> 8:24 9:1 40:18 <b>budgets</b> 9:13 <b>built</b> 65:12 <b>bunch</b> 56:5 <b>burden</b> 43:23,24 70:8 106:3 <b>burdensome</b> 39:1 70:13 111:7 <b>Bureau</b> 127:15 <b>burned</b> 25:10 <b>business</b> 12:11 20:3 21:20,22 22:2,16 24:3,23 25:2 28:23 30:14 43:4,6 46:8 47:21,24 48:11 54:11 55:1 57:4 70:16,17 76:13 99:24 134:5 <b>busy</b> 53:13 <b>Buyers</b> 20:22 <b>Buyer's</b> 21:7 <b>b)2</b> 65:11,14 <b>B.S</b> 108:23  <b>C</b> <b>calendar</b> 6:8 119:3 120:5 <b>call</b> 3:25 4:7 5:20 10:22 22:10,25 55:11,13 72:7 81:11 101:8 118:14 121:9,18 <b>called</b> 17:17 67:8 71:5,9 112:10 115:1 126:23 129:1 <b>calling</b> 8:19 <b>Camden</b> 82:2 103:8,11 116:3 <b>came</b> 28:15,18 67:16 68:2,24 95:25 133:3 <b>camel</b> 131:23 <b>campaign</b> 129:19 <b>Canada</b> 128:24 <b>candidate</b> 3:11 <b>candidates</b> 5:4 <b>can/Æt</b> 80:5 <b>capable</b> 112:12,20 115:19 <b>capacity</b> 127:19,21 <b>capital</b> 54:9 <b>capturing</b> 125:23 <b>car</b> 23:7 <b>care</b> 5:6 106:5 <b>careful</b> 36:9 68:14 80:14 84:9 115:5 117:14 <b>carefully</b> 46:5 <b>carried</b> 110:19 <b>Carta</b> 54:6 <b>case</b> 6:15 7:22 18:20 20:21 21:7 21:8,9 22:10,11	24:12,13,15,20 25:17 27:8,10,11 27:16 28:2,3,5 28:13 30:3,5 33:7 37:10,17,18 38:22 40:11,24 41:3 46:1 50:7 52:16 63:3 64:12 64:13,19,20 65:3 66:10 68:5 69:8 72:21 74:11 75:10,21,22 77:6 77:20 79:23,24 81:11 85:6 86:13 86:13 88:2,13,16 90:19 92:15 94:15 95:14 97:7 97:18 99:6,11 102:7,10 104:21 105:12,14,15,16 106:3 107:12,17 108:11,13 109:2 109:3,5 111:2 114:12,19,25 115:1,8 117:10 117:21 120:14 121:1 126:4,6 <b>caseload</b> 6:20 <b>cases</b> 6:7,13 7:10 8:2,11 18:23 22:5,7 23:18 26:22 27:13 29:9 29:13,17 30:1 31:9,11 35:1 40:7,17 66:20 69:1 78:25 79:3 79:5 84:1 85:23 86:15,17 91:24 92:2 95:1,4 97:16,23,24 98:5 103:13,14,14 104:9 105:5,10 106:10 109:7 110:9 111:19 112:21 113:15 116:9 119:20 120:4,9,10 124:22 132:5,19 132:21 <b>caseö</b> 105:13 <b>casual</b> 49:18 <b>catalyst</b> 131:6 <b>catching</b> 113:8 <b>categories</b> 6:17 16:1 <b>categorized</b> 48:8 <b>caught</b> 50:10 <b>cause</b> 7:12 73:3 132:12 <b>caveat</b> 23:2,15 <b>CC</b> 19:23 <b>CD</b> 25:11,16 <b>cell</b> 61:17 <b>certain</b> 27:24 28:10,22 37:14 46:21 56:1 67:10	72:5,14 122:23 <b>certainly</b> 17:24 42:13 51:21 52:10 54:13 56:24 57:2 59:15 62:1 97:10 99:7 101:5 109:9 116:3 117:1 118:8 123:9 132:10,11 <b>certify</b> 69:24 <b>certifying</b> 65:22 <b>cetera</b> 95:5,6 <b>chain</b> 61:9 <b>chair</b> 10:13 <b>Chairman</b> 129:22 130:21 <b>challenge</b> 7:13 <b>chambers</b> 113:22 <b>chance</b> 116:16 121:4 <b>change</b> 56:2,3 75:22 127:6 <b>changed</b> 31:5 88:2 117:22 121:17 <b>changes</b> 13:24 97:3 <b>changing</b> 90:1 <b>charge</b> 75:20,24 81:18,19 82:12 82:14,17,19 94:15 95:5,17 97:6 98:9 99:9 99:18,22 100:5 100:21,22,23 101:1,6,18,19,21 102:1,10,15,17 102:18 <b>charges</b> 72:21 94:7 98:23 <b>charging</b> 72:24 97:22 <b>chastised</b> 130:3 <b>check</b> 125:24 <b>checking</b> 125:12 <b>Chesler</b> 72:2 76:2 76:4,11,23 77:4 99:3,4 113:24,25 <b>chief</b> 2:15,19,24,24 3:3,24 4:9,9,10 5:10,19,25 7:1 9:8 72:1 79:12 87:4 122:9 123:6 <b>child</b> 73:20 <b>children</b> 49:22 <b>choice</b> 120:8 <b>chooses</b> 113:2 <b>choosing</b> 101:17 119:20 <b>Chris</b> 3:3,13,17,20 4:11,14 5:3,7,11 <b>Circuit</b> 32:19,20 32:21 33:1 64:12 64:16,18,22 122:25 123:3 134:5	<b>Circuits</b> 70:25 <b>circumstances</b> 41:13 42:14 55:10 <b>circumvented</b> 131:2 <b>cited</b> 26:22 27:16 31:10 64:13,21 66:1,8 124:6 <b>civil</b> 6:7,12,20 51:18 66:15 73:2 82:5 88:2 97:23 98:4,7 103:2,5,5 103:8,11,13,20 104:23 105:10 107:18 108:1,9 109:12 112:8 134:11 <b>claims</b> 14:22 64:23 94:19 97:11,19 <b>clarification</b> 132:17 <b>clarify</b> 89:12 <b>Clark</b> 4:24 <b>clean</b> 56:6 <b>clear</b> 13:18 20:16 29:14 134:5 <b>cleared</b> 6:8 <b>clearly</b> 16:1 22:14 22:14 34:22 51:17,19,21 <b>clerks</b> 120:7 125:14 <b>client</b> 14:12,17 15:2,5,9,12 29:12 34:6,7,11 34:16 35:18 36:20 46:11 59:16 62:7 68:15 106:5 120:23 133:14 <b>clients</b> 44:18,23 59:1 104:9 <b>client's</b> 14:12,17 24:24 35:15 37:6 41:15,16 59:12 108:17 <b>client/Es</b> 37:22 <b>Cliff</b> 105:16 <b>close</b> 121:18 <b>closet</b> 60:5 <b>closing</b> 82:13 99:17 100:24 <b>closings</b> 81:17 100:21 <b>Coincidentally</b> 32:4 <b>collar</b> 124:22 <b>colleagues</b> 54:1 113:9 115:10 <b>collect</b> 61:25 <b>collected</b> 95:23 <b>collection</b> 60:18,25 61:1,4,10 <b>College</b> 3:7 <b>Columbia</b> 66:25
--	---	---	--	--

<b>combination</b> 100:4	11:18,24 17:11	<b>conference</b> 1:5 2:2	<b>contained</b> 11:24	<b>counsel</b> 10:22 11:6
<b>come</b> 5:21 6:16	<b>company</b> Æs 32:16	13:11 14:4,5,6	<b>contains</b> 58:3	11:11 12:17,21
7:23 13:13 21:15	45:7	15:16,25 16:22	<b>contemplated</b>	14:16 17:6 34:25
24:8 25:13 27:13	<b>compares</b> 128:10	25:13 30:16,18	88:11	34:25 38:23 45:6
30:22 41:15 42:3	128:21	32:4 34:2 36:5	<b>context</b> 33:3 67:9	45:14 46:3,12,16
51:13 52:20	<b>comparison</b>	39:21 100:23	111:22,24 112:4	53:7 56:19 57:9
53:12 55:2 56:2	127:13	104:3,5 110:18	<b>contexts</b> 24:5	59:5 60:11 73:12
56:4 60:16,17	<b>compelled</b> 44:1	110:25 129:24	<b>continually</b> 65:10	84:3,4 90:4 95:9
66:7,17 68:15	<b>competitor</b> 11:3	<b>conferences</b> 19:4,4	86:8	117:12,15 122:8
88:23 106:4	<b>competitors</b> 10:25	27:1 73:9 104:4	<b>continue</b> 6:17,24	133:10,19
108:17 111:25	<b>Complaint</b> 11:1	107:6 110:14	7:25 8:12 9:1	<b>counseled</b> 11:7
112:13 113:21	41:8 51:20 55:2	114:8	<b>continued</b> 130:24	<b>counseling</b> 122:6
115:11 117:3,12	<b>complete</b> 5:4	<b>conference.org</b>	<b>continues</b> 6:21 7:2	<b>Counselor</b> 121:11
117:15 121:10	<b>completely</b> 42:11	31:3	129:19	<b>counsel's</b> 81:17
122:1	57:18,21	<b>confident</b> 11:9	<b>contract</b> 22:18	<b>counterparts</b> 11:4
<b>comes</b> 4:14 18:11	<b>completeness</b>	<b>confidentiality</b>	28:16	<b>country</b> 6:22 18:24
26:20 27:19 28:9	46:13	41:23 42:7	<b>contradicted</b> 68:12	27:15 35:20 69:3
34:2 70:22	<b>complex</b> 46:6,20	<b>conflicting</b> 18:25	<b>control</b> 74:24	103:12
<b>comfortable</b> 7:24	86:15 112:13	<b>confront</b> 36:5	94:16 119:4,11	<b>County</b> 71:12 91:4
108:4	<b>complexity</b> 77:7	<b>confronted</b> 110:20	<b>controls</b> 65:16	<b>couple</b> 27:14 30:1
<b>coming</b> 4:5 5:16	78:23	<b>confused</b> 100:21	<b>controls.ö</b> 82:20	30:4 48:4 55:16
25:10 36:19	<b>complicated</b> 31:19	<b>confusing</b> 90:19	<b>controversial</b>	64:4 65:6 68:5
72:12 84:25	74:11 77:20	<b>congress</b> 9:12 10:4	31:12 44:15	78:15 91:1 92:25
107:24 120:15	81:12 115:8	73:17,22 124:4,6	<b>convenient</b> 119:7	95:21 98:25
<b>commences</b> 45:10	<b>complied</b> 37:12	130:18 131:14	<b>conversation</b> 55:5	113:10 117:22
<b>comment</b> 64:15	<b>compliment</b> 6:6	131:20	<b>conversational</b>	130:1
66:14 90:8	<b>complying</b> 70:5	<b>congressional</b> 9:2	19:24	<b>course</b> 2:20 7:4
112:17 114:22	<b>component</b> 114:17	129:18 130:22	<b>converting</b> 45:8	9:10 13:8 22:2
<b>commentators</b>	<b>compose</b> 53:15	131:1	<b>conviction</b> 125:10	24:3,23 25:2
112:12	<b>comprehensive</b>	<b>connection</b> 20:2	<b>convinced</b> 90:11	27:9 28:21 30:13
<b>comments</b> 48:12	81:4	113:16	<b>cookie</b> 133:8	31:18 33:13
117:1 130:2	<b>compromises</b>	<b>conscientiousness</b>	<b>cool</b> 100:17	38:10 46:8,25
<b>commercial</b> 12:22	106:14	7:6	<b>cooled</b> 100:18	48:20 61:12
<b>commission</b> 73:25	<b>computer</b> 11:13,14	<b>consent</b> 126:8	<b>cool-down</b> 100:15	70:16 97:15
103:18 123:8,23	11:25 14:19,20	<b>consequence</b> 126:9	<b>coordinate</b> 8:15	101:25 106:13
124:7	15:2,13,21 16:6	<b>conservative</b>	11:20	110:13 114:14
<b>Commission.gov</b>	17:2 18:1 26:6,8	106:23	<b>copies</b> 38:12 40:10	117:25 130:3,5
124:13	26:13 30:13	<b>consider</b> 41:7,25	<b>copious</b> 80:22	<b>court</b> 1:5,11 2:2,16
<b>committee</b> 8:14	39:13 40:15 42:2	42:14 60:23	<b>copy</b> 20:9 25:9,10	2:20 3:19 4:5
95:23 123:10	42:23 46:24	102:5,18 111:20	25:17 38:14	5:13 6:10 7:9
129:23 130:18	66:10 71:9	<b>consideration</b>	62:12 68:18	8:11 10:1,24
131:19	<b>computers</b> 17:8,8	77:11 96:25	80:25 81:19	21:8 30:5 32:16
<b>common</b> 17:6	17:9,11 18:7	<b>considered</b> 6:18	82:14 83:1 99:22	35:14 36:22,23
24:21 33:21	<b>concept</b> 22:13	7:14 18:18 58:3	102:13	44:1,12 63:23
35:13 51:3 60:10	32:22 67:17	102:1 131:15	<b>corner</b> 35:23	64:23 66:13
106:20 109:21	70:11 72:15	<b>considering</b> 9:12	<b>corollary</b> 35:4	68:15 70:3 72:5
133:9	<b>concern</b> 49:4 90:5	108:12	<b>Corporate</b> 12:17	72:10,18 73:9
<b>communicate</b>	98:15 104:25	<b>consisted</b> 69:11	<b>corporation</b> 15:9	76:1,18 77:20
122:10	121:5 124:4	<b>consistent</b> 126:3	110:1	83:24 84:24 87:5
<b>communicated</b>	131:1 132:13	<b>Constitution</b> 10:9	<b>corporations</b> 56:1	87:9,10,17 91:3
34:14	<b>concerned</b> 11:7	<b>constitutional</b>	<b>correct</b> 76:11 93:5	93:1,2 94:5
<b>communication</b>	45:7 74:19 75:13	109:19 132:1	<b>cost</b> 16:20 17:2	101:8 107:1,9
20:1	92:10 97:4	133:4	22:4 31:14,23	109:14,20,22
<b>communications</b>	107:12 119:3	<b>consultant</b> 37:22	37:1 40:4,5,11	110:4 113:9
49:11,20 50:11	<b>concerning</b> 18:16	40:16,18 41:1,10	41:6 42:12 47:6	115:16 118:5,7
<b>community</b> 107:23	32:6 92:17,19	42:2,2,9 57:12	62:23 63:7 64:17	118:14 119:6
<b>companies</b> 38:2	<b>concerns</b> 90:10,12	58:17 59:6,10	64:18 65:5,7	120:1,2 121:10
50:20	92:13 133:22	60:16 61:11,25	66:16 67:23 68:3	122:16 125:3,17
<b>company</b> 10:23	<b>conclusion</b> 21:15	62:25,25	70:17 133:25	125:20,24 126:2
11:9 18:2,5	84:13 85:9 87:13	<b>consultants</b> 12:25	<b>costs</b> 43:18 44:9,20	126:6,8,17
21:24,25 23:23	<b>conduct</b> 32:13	35:2 48:5 56:18	45:3 63:23 64:1	<b>courthouse</b> 78:22
27:2 28:22 29:21	60:17 80:1	60:19,21 62:4	66:19 68:23	<b>courtroom</b> 75:2
40:25 41:11 43:5	<b>conducted</b> 60:20	<b>consulting</b> 57:5	70:15 105:6	76:3,4,6,14
48:22 56:20	<b>confer</b> 14:5 15:2	<b>contact</b> 8:16 10:3	106:6	78:21 81:9 90:21
58:24 59:18	16:6,8 17:1	47:21 55:8	<b>cost-shifting</b> 25:24	120:6
<b>company's</b> 11:12	39:16	<b>contain</b> 61:19 63:6	26:20 67:2	<b>courts</b> 9:6 19:14

19:16 21:15 24:1 26:17 31:22 32:10 66:18 68:25 118:5 122:19 124:8 125:6 <b>Court's</b> 6:3 74:2 110:12 125:18 125:22 <b>cover</b> 18:13 32:7 34:23 74:6 103:3 122:6 <b>covered</b> 26:12 <b>covering</b> 72:12 <b>Cox</b> 12:4 <b>co-authored</b> 12:15 <b>co-equal</b> 10:8 <b>created</b> 20:2 46:7 125:11 <b>creates</b> 41:17 <b>creation</b> 37:15 125:23 <b>creative</b> 133:11 <b>credibility</b> 75:23 77:18 <b>criminal</b> 3:9 6:7,13 79:3,4 82:5 83:25 95:4 97:7 97:23 98:5,8 103:14,14 123:19 133:22 134:11 <b>cringing</b> 46:22 <b>critical</b> 35:3 57:17 63:10 111:5 121:3 <b>criticism</b> 98:11 <b>cross</b> 111:1 <b>culture</b> 46:24 <b>curious</b> 90:20 121:21 <b>currently</b> 14:18 <b>custody</b> 61:9 <b>cut</b> 45:2 <b>cuts</b> 106:16 <b>cutter</b> 133:9 <b>cutting</b> 19:17 <b>C-1</b> 101:8 <b>C-2</b> 101:8 <b>C.S.R</b> 1:25	41:20 42:3,8,21 43:3,17,20 44:2 44:7,21,24 47:4 47:14 57:11 58:2 58:4,4,10,20 59:23 60:12,17 60:18,25 61:1,3 61:3,5,19,23,24 61:25 62:7,10,17 62:18 64:11 67:17,22 68:12 70:12 95:24 124:7 127:8 <b>database</b> 42:5 <b>databases</b> 38:18 38:19 <b>date</b> 37:14,15 62:16 64:10 67:10,12 116:4,5 116:7 119:14 120:7,13,14 <b>dates</b> 28:1 <b>dat</b> s 58:12,12 <b>Daubert</b> 111:17,23 112:3 <b>daunting</b> 36:2 <b>day</b> 2:15 7:23 17:18 29:19,23 30:13 46:8 50:6 51:21 68:15 72:6 78:5 79:6 104:14 110:4 119:8 <b>days</b> 20:8 32:6 40:23 78:15 104:22 105:16 105:20,21 121:25 123:22 <b>de</b> 122:20 125:16 125:17,19 126:1 126:5 <b>deal</b> 16:13 40:21 86:7 93:8 97:15 <b>dealing</b> 45:18 114:23 <b>dealt</b> 102:23,24 <b>death</b> 86:4 109:13 110:9 <b>Debevoise</b> 106:19 <b>decades</b> 115:6 <b>December</b> 103:21 127:20 <b>decide</b> 26:6 31:19 53:21 59:4 89:7 116:1,19 <b>decided</b> 66:24 116:24 120:10 126:14 <b>deciding</b> 26:8 112:13,21 <b>decision</b> 59:2,2 66:8 67:3,3 68:2 68:24 90:2 111:23 112:3,3 117:5,13 120:9 126:10 <b>decisions</b> 52:15	66:1 <b>Declaration</b> 54:5 <b>declared</b> 133:4 <b>decrease</b> 36:24 108:1 <b>decreased</b> 103:6 <b>dedicate</b> 40:23 <b>defendant</b> 66:9 69:14,20,23 91:19 <b>defendants</b> 68:9 68:17 69:10 122:15 <b>defendant's</b> 68:6 69:17 <b>defense</b> 18:20 83:21 94:19 98:1 <b>defenses</b> 14:23 <b>deficiencies</b> 73:19 81:7 <b>definite</b> 60:23 <b>definitions</b> 13:6 <b>degree</b> 3:11 77:18 <b>degrees</b> 4:21,25 <b>delay</b> 65:24 <b>delete</b> 42:22,25 <b>deleted</b> 16:14 26:1 26:3,12,13,16 27:1,6 29:20 31:21 42:19 58:4 <b>deletion</b> 41:19 55:21 <b>deliberates</b> 78:20 <b>deliberation</b> 82:23 <b>deliberations</b> 78:7 79:19 80:11 82:25 94:16 98:20 <b>deliver</b> 58:20 <b>demand</b> 36:15 43:21 51:19 <b>demanding</b> 113:12 <b>demands</b> 40:24 <b>demeanor</b> 77:16 <b>demonstrate</b> 88:24 <b>Dennis</b> 114:23 <b>denominator</b> 133:9,9 <b>department</b> 11:3,8 34:15,16,16 50:25 53:3,7 123:11 125:13 126:22 130:16 <b>departs</b> 126:7 <b>departure</b> 125:7 126:9 132:9 <b>departures</b> 74:3 122:15,20 123:5 123:25 124:4,8 124:19,25 125:2 125:17 131:3 132:6,19 <b>depend</b> 74:14 76:25 <b>dependent</b> 99:11 <b>depends</b> 56:23	108:22 <b>deposed</b> 60:21 111:5 <b>Deposing</b> 60:10 <b>deposition</b> 60:8 <b>depositions</b> 46:14 104:21 105:17 <b>deputy</b> 120:6 125:14 <b>describes</b> 129:5 <b>description</b> 27:9 <b>designate</b> 15:5,12 53:1,8 <b>designed</b> 73:18 <b>desk</b> 13:4 <b>desktop</b> 23:22 <b>desktops</b> 27:3 35:22 <b>despite</b> 114:13 <b>destroy</b> 29:11 51:14 78:20 <b>destroyed</b> 11:17 46:8 <b>destroying</b> 29:25 32:11 <b>destruction</b> 29:18 34:9 45:22 46:2 54:23 55:3 59:13 <b>detail</b> 29:1 32:2 <b>detailed</b> 19:6 94:16 <b>determinant</b> 37:19 <b>determination</b> 87:15 <b>determine</b> 44:12 68:22 70:12 81:13 119:5 <b>determining</b> 77:10 <b>develop</b> 44:5,6 <b>developed</b> 18:16 31:22 122:21 <b>development</b> 123:13 <b>device</b> 58:3 <b>devices</b> 61:15 <b>devoted</b> 3:19 <b>dialogue</b> 87:1 <b>dias</b> 10:17 <b>die</b> 50:7 <b>difference</b> 82:22 121:16,20 <b>different</b> 4:15 19:10,19 20:12 20:17 21:11 35:19,20,21 38:5 47:7,8,22 51:6 57:18 58:10 96:13 102:25 103:15 133:14 <b>differently</b> 38:5 <b>difficult</b> 20:17 29:8,14 30:12 35:16 36:4 43:7 59:4 113:11 122:14 <b>difficulties</b> 95:19	<b>difficulty</b> 40:19 <b>digital</b> 11:16,20 15:13 16:12,14 16:17 32:12,17 33:8,16,24 35:6 36:8,12 38:17 41:15,16 42:4 54:16 63:24 <b>diminution</b> 106:16 <b>diplomatically</b> 45:17 <b>direct</b> 16:23 131:19 <b>directions</b> 88:11 <b>directly</b> 118:24 <b>Director</b> 2:11 <b>dirty</b> 82:25 <b>disabusing</b> 109:4 <b>disagree</b> 102:21 <b>disappearing</b> 109:12 <b>disaster</b> 29:21 <b>discharge</b> 10:10 <b>disclaimer</b> 94:14 <b>disclosure</b> 17:15 <b>discoverable</b> 28:6 <b>discovers</b> 39:13 <b>discovery</b> 1:9 12:13 13:12,25 15:7,20 16:4,5,7 16:17,25 17:2,13 18:16 19:10,19 20:16,19 21:2,17 29:5 30:23 32:23 33:17 36:7 38:8 38:17 45:13,18 46:6 47:23 49:7 56:20 58:24 62:5 63:2,17 64:20 65:13,16,17,20 65:21 66:4,11 67:20,23 68:7,8 68:14 70:6,9,24 71:6,10 73:4,6 104:21,24 105:22 110:2,23 112:19 113:17 <b>discuss</b> 16:9,20,23 37:24 41:4 54:13 63:1 116:11 <b>discussed</b> 7:3 63:13 126:10 <b>discusses</b> 14:10 <b>discussing</b> 13:10 95:1 <b>discussion</b> 17:1 19:2 21:10,18 23:12 31:4 104:10 <b>discussions</b> 115:25 <b>disgorges</b> 129:4 <b>disinformation</b> 129:19 <b>disk</b> 26:9 <b>disks</b> 43:11,12 <b>dismiss</b> 119:24
---	---	---	--	--



dismissing 112:1	51:25 52:4,15	dry 99:21	120:25 121:18	9:18
disparities 131:4	53:17 54:2,14,25	dummy 89:21	128:1 132:6	enjoy 6:23
disposing 109:2	56:5 62:11,14,15	duplicate 62:11	elated 11:15	enlightened 19:15
disposition 6:19	62:20 63:9,15	duplicative 111:21	election 9:3	enough 10:12
8:1	69:11	duration 79:17	elective 87:17	81:12,12 86:2
dispositions 125:3	doesn't 4:11	during 13:8 61:6	electronic 1:9	100:15 112:5,19
dispositive 28:17	doing 19:3 21:2	78:7 81:16,18	12:12,17 13:1,12	ensure 123:24
119:22	29:16 45:9 46:25	82:12,12,23,25	13:25 14:13	enter 125:10
dispute 36:24	53:10 57:8,13	85:9 110:13	16:24 18:16	entertain 84:3
99:17	67:17 79:4 80:25	dust 97:12	19:10,19 20:9,16	Entertainment
disputes 65:13	88:6 91:23 99:15	duties 10:10	21:2 24:10,17,22	68:5,20
disquieting 87:22	109:14	duty 15:10,19 35:5	25:3,6,8 29:5,24	entire 8:24 11:13
disregard 95:16	dollar 105:6 106:5	43:2,8	30:23 33:2 37:20	114:11
distilled 33:19	dollars 105:24	dwelt 90:15	38:12 39:18,23	entirely 69:21
distinction 22:4	114:21	d-a-t-a 64:11	39:25 40:10	106:15
23:16 24:5	done 2:12 32:13	D.C 4:20 5:17	45:13,18 46:6	entitled 12:17
distinctions 31:13	42:11,11 57:17		47:22 49:7,11	environment
distinguished	60:12,22 61:5	<b>E</b>	50:11 54:14,16	80:19
56:25 71:25	63:15 65:23,23	e 11:12	54:19 56:19,23	equally 107:20
distributed 34:21	74:17 75:8 79:3	each 16:4 35:22	58:24 61:7 62:5	131:5
district 1:5,6,11	82:6 85:14,17	40:12 52:10	63:9,16 64:20	era 45:19 46:2,6
2:2 3:14 4:16 6:6	90:11 91:1 93:23	57:22 62:12 72:6	67:5,11,20 68:7	eraser 29:13
20:22 21:8 27:14	94:9 95:8,20	93:25 98:5	68:14,22 70:9,24	escalating 9:17
28:4 30:5 31:9	98:18 100:24	126:25 129:4	71:5,10 105:22	Especially 30:12
35:14 66:6,7,25	don't 48:17	earlier 71:16	113:17	essence 84:12
68:4,25 69:5	doodling 79:6	110:17 113:16	electronically	Essentials 71:10
72:5,10 73:8,12	Doser 3:3,21	earliest 33:24 34:7	17:23 63:12	Essex 71:12
107:7 110:6,16	doubts 117:11	35:4	elegance 120:22	establish 42:5
111:12 114:7	dovetails 96:18	early 18:19 40:16	element 52:25 55:7	established 103:19
118:9 122:16,22	down 8:22 14:9	60:8 62:24,25	126:16	Estrada 133:2
123:7 124:8	17:22 23:24	63:2,7 79:18	elements 51:7	et 95:5,5
125:3,18,20,22	28:21,25 34:15	ears 41:2 102:12	94:18 95:5	evaluating 77:16
126:6,8	45:2 49:23 53:15	easier 57:17	elephant 131:10	even 9:25 14:1,4
districts 6:22 9:25	76:25 77:1 80:21	easily 37:12 42:20	Eleventh 64:21	14:25 15:1 20:2
121:23	82:2 100:17	42:24 43:2,3,4	eliminate 62:11	35:6 39:6 40:5
disturbing 112:15	104:16 105:23	43:12,13,13	else's 77:1	43:6 47:2 52:4
division 126:22	106:7 114:6	44:22 61:3 79:21	embarrassed	52:16,21 53:7
DLT 58:8	115:12 127:23	129:9	23:10	57:13,13,24 61:5
DLTs 58:11	130:9 133:3	Eastern 28:4	emphasis 88:15	67:23 75:13
document 11:18	downloaded 26:10	122:22	emphasized 8:6	76:15 77:7 79:1
18:10 22:6 27:22	downside 77:2	easy 4:11 45:1	9:8	79:23 81:2 82:24
27:22,24 28:10	downstairs 134:13	48:1	employee 59:17	83:11 97:11
28:15 29:5 33:7	downward 74:3	economics 67:8	employees 9:22	105:13 109:7
33:8,23 34:8,13	122:15,19 123:4	edge 19:17	17:7,22 27:2	116:24 117:4
36:23 37:15,16	123:25 124:8,18	edited 27:25	59:24 60:5	121:9 126:8
37:16,20 38:22	124:25 131:3	effect 13:17 92:22	employee's 59:20	130:15 133:24
38:25 39:7,17	132:6,8,19	93:16,21 108:8	employment 12:22	event 67:10
40:8 41:9 45:8	doze 80:4	122:13 123:21	45:25	events 52:7
45:15,21,22 46:1	draconian 9:11	effective 99:16	encourage 54:9	ever 38:4 39:14
46:13 47:11 49:9	drafted 28:15	100:2 133:18	63:1 72:8	57:25 58:8 73:2
50:17,21 51:10	53:12 130:15	effectively 10:9	end 44:14,15 78:4	88:11 94:9
51:13,18,20,22	DRASCO 112:7	efficient 32:8	79:24 94:15	109:22 114:11
51:24 52:11,18	draw 14:7 26:24	62:19	95:14 98:24	115:2
53:2,11,15 54:4	31:12 52:9	efficiently 71:17	112:25 127:4,7	every 3:4 29:19,23
54:14,15,23 55:3	drawer 22:20	effort 8:15 75:14	127:20,21	30:13 33:8 40:11
55:19 56:12	drawing 21:20	75:15 108:16	ended 28:17	46:8 48:22 82:7
59:13,13 62:12	78:13	efforts 9:2	endorsed 107:9	86:22 117:10,21
63:8	drawn 18:12 24:5	eight 33:17,19,19	132:7	123:17 125:10
documents 11:12	drift 91:20	42:17 58:11	endorsement	127:24 128:1
11:16,17,24	drive 26:4,14	91:21 96:8,15	130:22	everybody 19:22
20:10 21:23	29:12 57:25 58:1	97:1 128:22	energy 79:8	24:18 28:24 37:4
22:21 29:11 35:6	58:5 59:20 129:7	eight-factor 68:21	enforce 36:23	42:12 74:20
36:13,16 37:6,14	drives 27:3 49:3	either 7:11,12 8:12	engage 49:20	78:10 106:14
39:3,7 40:6,10	59:23 60:18 62:8	29:19 87:7 88:22	engaged 50:25	122:7 126:21
42:19 43:15 44:1	drone 100:16	89:15 100:25	engaging 42:1,1	everyone 34:18
44:8 46:7 51:15	drug 128:17	109:2 111:9	enhancements	40:13 66:17

71:23 133:22 everything 4:8 20:8 22:17 47:17 68:17 69:16,20 69:25 75:3 76:24 119:4 evidence 13:1 14:22 15:21 56:23 61:8,8 71:6 82:13 94:24 97:14 evidentiary 46:10 49:11 evokes 113:1 exactly 76:5 99:2 105:4 exaggerated 109:13 exaltation 10:11 examining 128:4 128:14 example 7:5 37:3 43:11 50:25 52:7 53:6 106:9 examples 106:9 Excel 20:11 excellence 8:7 excellent 12:7,16 13:2 17:15,16 18:8 120:20 134:9 exchange 28:23 excuse 23:6 59:14 111:18 excused 7:12 Executive 2:10 exercise 131:25 exhibit 101:8,8 exhibits 80:17 exhorted 78:10 expands 122:18 expect 46:3 48:2 57:3 116:8 expected 10:2 expecting 58:14 expense 70:5,8 73:4 expenses 9:17,18 expensive 35:17 36:4 70:13 104:8 104:25 105:22 experience 4:17 86:1 87:9 88:24 92:25 experienced 89:6 experiences 52:8 experiment 114:20 expert 41:14 60:24 91:5,8 111:4 experts 60:17 expired 55:4 explain 38:18 99:20 explanation 26:3 75:17 explicit 38:20	66:15 explosion 113:18 exponentially 20:4 expounding 121:12 expressed 35:12 123:3 extended 32:22 extensive 9:17 extent 17:10 85:23 extraordinary 50:4 extremely 5:6 6:10 eyes 102:11 e-mail 20:10 21:1 21:3,3,22 22:20 30:7 38:7,9,13 42:23 48:7,20,24 49:1,18 55:12 69:12,15 e-mails 19:22,25 29:20 37:3,7 39:13 48:9 49:3  <b>F</b> fabrication 80:19 Facciola 66:25 67:7,13 face 54:9 faces 3:22 Facilitate 15:7 Facing 6:7 fact 28:18 37:19 64:17 76:20 77:5 77:7 81:3 82:21 84:16 85:11 91:7 98:5,12 107:20 126:17 129:7 132:4,6 factor 106:17 factors 65:17 70:20 facts 77:13 84:11 125:19 126:4 factual 44:11 77:10 failing 32:12 121:1 fails 125:20 failure 32:17,22,24 66:2 109:18 fair 8:1 17:15 22:3 24:4 25:14 107:14 109:14 119:17 fairly 82:18 110:22 faith 32:13 65:23 faithful 5:13 falling 79:8 familiar 3:22,23 familiarize 14:12 family 124:25 famous 66:5 fantastic 2:7 far 19:16 73:22 74:19 75:7,10 107:11 109:11	119:2 Farms 1:17 farther 23:24 fashion 43:18 fashioned 78:4 fast-track 125:3 fault 107:5 favor 91:18 96:16 favorable 96:11 favorably 96:22 faxes 38:1,3,7 federal 1:1,11 2:3 8:11,25 9:13 10:24 13:10 19:14 49:4 65:11 65:22 66:15,19 70:4 73:24 93:1 103:4 104:2,23 115:15 127:12 127:15,19 128:2 128:7,13 129:10 129:12 131:2 fee 106:3,6,7 feed 49:25 feeding 49:24 50:8 113:14 feel 3:25 8:15 83:6 83:11 90:22 109:22 121:22 feeling 75:8 feels 109:4 Feeney 73:15,16 122:5,12,13,17 123:14,16,20 124:11,24 125:16 129:7,20 130:7,11,14,22 130:24 131:6 feet 120:21 fee-shifting 106:12 Feldman 71:8 fellow 57:3 76:15 felt 96:22 ferris 50:9 few 28:13 45:12 49:21 92:4 95:8 98:19 fewer 73:2 103:2,7 103:11 field 4:18 7:8 8:13 fifteen 53:13 96:8 fifteen-minute 10:19 fifty 114:21 fight 11:22 fights 23:3 figure 7:20 24:7 67:21 91:23 figured 21:1 file 22:20 25:6 26:7,14 41:7,8 filed 73:10 files 14:18,19,20 15:1 20:10 38:14 41:15,16 42:19 42:20 47:25 48:1	fill 53:17 99:25 filter 62:6 filters 62:16 final 5:3 95:17 100:22 104:4 114:8,8 130:10 finalization 111:6 finalized 127:9 finally 12:23 16:19 16:22 72:23 126:5 find 12:8 13:6 22:17 27:2 28:10 28:15 41:6 49:14 60:7 81:13,14 83:8,14 87:21 92:3,4 94:23 95:10 100:1 103:7 108:25 109:7,21 110:8 116:19 117:23 119:11 finding 86:10 finds 32:16 finish 6:20 112:19 firm 48:4,4 115:4 firms 114:7 first 2:22 3:2,15 6:8 13:21 14:24 16:5 19:7,7 21:14 24:6 28:21 33:22 34:6 42:18 47:10 66:24 67:15,21 68:2,6 68:24 72:14 75:8 77:25 78:15 81:10 82:8 89:3 91:4 93:18 94:17 95:10 96:6 98:6 98:9 105:2 114:20 115:18 131:21 fiscal 9:15 fiscally 10:7 fit 79:2 fits 86:3 five 7:18 11:4 39:14,16 72:7 86:17 88:7 104:15 115:15 fix 11:5 89:4 fixation 45:21 fixing 10:24 64:9 flamboyant 100:11 flavor 122:25,25 floor 72:8 Florida 4:23 flying 111:25 focus 45:20 62:20 77:13 94:24 121:11 focused 36:21 119:17 focuses 46:17 folder 22:20	folks 78:9 follow 11:10 99:19 followed 59:14 follows 124:17 footnote 71:2 force 9:23 Ford 64:20 foregoing 39:2 forensic 71:9 forget 55:17,24 form 22:10 24:9 24:23 34:19 53:11,16,21 63:9 63:16 formal 34:21 120:7 formalized 125:7 format 20:7 37:20 38:12 39:18,18 39:24,25,25 87:11 formats 14:21 20:13 forming 34:20,23 forms 44:24 formulated 125:8 form-of-product... 25:20 forth 42:8,16 88:21 fortune 6:4 forty 7:16 forward 5:18,21 56:14 109:3 117:19 fostering 79:10 found 8:18 28:6 78:14 79:9,11 81:19 82:23 95:2 95:19 99:15 four 27:12 38:16 58:12 69:5,17 104:15 fourteen 96:21 fraction 40:13 frame 37:23 framed 122:2 France 128:23 Francis 68:3,21 70:20 Francisco 103:20 frankly 23:3 79:6 88:10 92:10 107:11 114:13 114:19 115:9 120:23 FRD 21:9 24:13 30:6 126:13,14 Freda 102:24 free 3:25 8:15 41:14 78:1 freeze 9:12,16 10:5 frequently 38:6,9 101:10 108:3 114:15 Friday 28:22
--	--	---	--	---

from 2:8,15 3:10 4:21 5:16,21 6:20 10:17,22 12:14,24 17:7,9 23:17 26:4 31:5 33:15 34:14 35:21,22,24,25 35:25 37:4,6,6,7 41:11 42:3,9,19 42:19,24,25 43:3 43:25 44:4,8 45:5 47:8,10 48:4,14 52:20 57:4 58:21 59:24 61:19 64:23 67:1 67:5,7,13 72:8 73:24,25,25 75:23 78:13 84:13,25 85:22 86:9 87:23 88:16 89:15 90:6 95:24 98:13 101:10 102:20 104:12 104:13 112:17 115:7 118:12 120:6 122:11,15 124:9,14 126:7 127:2 128:14 130:17 133:10 134:9 front 13:3 115:1,8 full 6:5 8:4 122:25 122:25 function 109:2 functioning 8:4 fundamental 92:15 funding 10:6 64:13 funds 109:25 further 14:17 44:12 73:21 101:7 125:2 128:4 131:24 133:17 furthermore 111:21 future 72:9 88:24 132:12	55:9 75:24 117:10 generate 9:20 79:25 106:18 generated 67:11 gentlemen 10:20 134:12 gets 20:2 25:10 51:23 52:4 97:25 100:13,13 106:5 getting 5:18,22 25:4,19 40:22,22 91:22 101:24 134:1 gigabytes 58:2,9 Ginny 2:11 give 5:20 6:1 7:5 26:2 30:7 37:3 45:11,12 47:25 53:23 55:8 59:21 62:14 71:4 72:8 72:12 75:20 82:17 84:2,3 94:11,12,21 97:9 98:23 99:21 100:4,8,22 101:7 101:9 102:13,17 116:16 122:19 133:18 given 7:8 8:8 27:2 29:16 32:15 47:16 82:22 93:24 106:21 132:4,5 gives 22:14 42:6 63:5 90:5 giving 94:7 134:11 Glassner 71:11 glimpses 113:8 go 13:5,22 23:24 27:5 31:1,20 38:7 43:14,19 44:2,13 45:9 47:11,24 48:3 49:2 50:9 53:4 53:12,18 55:13 63:11 64:2 66:21 76:9 81:1 90:20 91:19 98:21,25 99:24 100:18 101:6 103:25 104:16 106:10 106:11,13 109:3 120:8 123:10 124:22 127:6 129:11 goals 124:6 god 88:17 goes 26:19 38:10 39:14 40:9 42:23 42:25 44:18 65:18 70:20 132:1 133:21 going 2:22 11:15 17:17 18:10 19:15 23:9 24:2	25:13 29:6,15,15 32:1 34:22 37:1 39:22,23,24 40:1 40:2 44:16 48:18 50:7 52:19 53:1 55:9,21 58:13,23 63:18 65:5 68:13 70:25 71:17 72:14,20,24 73:1 73:4 74:5 76:5,8 76:16 77:9,13,21 80:3,4 81:11,18 82:2 83:5,23 86:20 89:14 90:13,15 91:23 91:24 95:15 97:14,19 98:10 98:15,20 99:23 101:6 107:15 111:14 112:4 113:19 116:7,22 120:2,9,11 122:5 123:5 124:10 127:6,6 131:16 132:8 134:6,7,10 gold 70:23 gone 26:3 73:22 85:22 Gonnerman 129:2 good 6:4 7:14 10:20,21 13:14 17:19 21:10 22:2 50:21 63:20 65:23 71:22 72:16,19 82:10 83:2,7 85:18 88:19 90:22 91:3 91:6 95:18 97:9 99:5 104:11 107:20 108:6 109:17 113:16 116:10 120:20 120:22 121:2 gosh 115:2 gotten 42:9 101:18 government 10:8 64:24 65:2 67:6 97:25 100:12 126:7 132:7,7,14 government's 98:15 graduate 3:7 4:23 4:25 Grady 100:12 Grand 46:16 grant 10:8 74:3 108:2 116:1 123:4 granted 115:15 124:5,8 grants 10:1,6 graphic 115:5 grasp 115:3 121:7 grasping 114:24 grave 76:9 86:20 great 45:17 46:20	57:6 103:17 133:25 greater 81:5 124:7 132:13 Greenbaum 93:12 93:16,20,20 greetings 113:6 Greg 2:6 ground 106:20 109:21 group 4:15 30:19 128:11 grow 46:23 grown 124:9 growth 128:13,15 128:16 guarantee 127:5 guarding 132:13 guess 14:24 29:4 55:7 74:13 87:10 106:21 121:6 guidance 72:9 guidelines 73:20 74:4 103:15 123:24 124:12 125:19 126:3,7 131:1,20 133:3 guiding 57:9 gun 131:10 guts 88:13 guy 49:23 guys 57:4,24 58:25 guy's 131:8 G-o-n-n-e-r-m-a-n 129:2	131:17 happy 6:23 7:17 21:4 hard 2:7 8:14 9:12 25:17 26:4,14 27:3 29:12 30:10 49:3 57:25 58:1 58:5 59:20,23 60:18 62:8 68:18 69:15 79:5 81:19 82:14 115:20 harder 51:23 52:5 133:11 Hardin 12:15 harvesting 60:17 hate 8:21 91:16 having 41:1 55:5 76:18 78:13,14 81:21,23 86:20 98:9 102:15 114:12 116:4 130:4 Hayden 72:1 77:19 77:22,24 82:18 85:15,17 99:9,11 101:3 112:23 114:1 123:15,17 132:15,16,24 Hayden's 79:15 head 53:5 54:17 63:5 headhunters 48:13 heads 34:17 head/Es 80:20 hear 26:21 27:10 29:6 44:17 45:5 75:4 90:13 100:1 102:6 103:22 111:21 112:2,4 112:17 heard 10:11 58:6 76:15 99:12 102:2,3 129:16 hearing 2:8 4:7 hearings 111:18 122:24 heart 106:16 124:22 heartland 133:15 hearts 49:16 Hedges 12:4,6 15:23 20:23 22:5 23:18 32:1,9,19 33:2 36:25 63:19 64:2,4 71:13 held 9:9 116:7 hell 112:10 113:20 help 7:19 41:3,11 53:23 57:10 62:1 79:11 92:13 109:20 117:13 122:10 129:13 helped 91:9 helpful 57:13 92:6 95:2 116:24 119:6,16,18
--	--	---	---	---

<p> <b>helping</b> 57:9,13  <b>helps</b> 92:9,10  <b>hence</b> 131:9  <b>Henry</b> 3:18  <b>Henry's</b> 3:15  <b>her</b> 69:6,6 78:11  110:4 129:3  <b>herculean</b> 104:6  <b>here?ð</b> 60:14  <b>hey</b> 89:21  <b>he'll</b> 105:13  <b>hidden</b> 27:21  <b>high</b> 6:18 7:2 8:19  <b>higher</b> 53:5  <b>highlight</b> 18:17  <b>highlights</b> 124:15  127:2  <b>highly</b> 47:23  109:13  <b>him</b> 5:5,8 8:16  87:25 93:15,18  <b>Himmel</b> 71:22,23  76:2,7,22 77:19  77:23 79:12 81:8  82:1,5 83:20  84:23 85:8,15,19  87:4 89:1 90:6  90:24 92:1 93:11  93:14,19 94:6,23  95:7 97:21 98:14  99:1,3,9,12  100:3 103:1  108:10,20  109:24 110:8,16  111:13,16 112:6  112:22 113:24  115:22 117:7,23  118:17,22 122:4  129:15 132:15  134:1  <b>himself</b> 14:12  <b>hindrance</b> 79:9  <b>hire.ð</b> 59:22  <b>Hispanic</b> 128:10  <b>historic</b> 14:19,21  16:16  <b>historical</b> 15:1  104:12  <b>hit</b> 3:2 19:23 24:25  26:6 54:17 132:8  <b>hits</b> 62:15  <b>hold</b> 4:12 18:10  53:11,15,18  54:14 110:15  111:3,7 112:4  116:2  <b>holding</b> 24:19  <b>holds</b> 3:9 4:21 58:2  58:9  <b>home</b> 17:8,8,9,11  18:1,7 48:14  <b>homegrown</b> 113:8  <b>honor</b> 33:1 56:25  <b>honorable</b> 113:11  <b>honored</b> 12:3  <b>hook</b> 134:1 </p>	<p> <b>hooked</b> 116:12  <b>hope</b> 7:25 10:11  55:2  <b>hoped</b> 69:7  <b>hopefully</b> 6:1 7:22  8:16 47:15 72:6  <b>horizon</b> 132:12  <b>HORN</b> 133:1  <b>host</b> 20:12 23:25  29:9 38:25  <b>hot</b> 1:10 27:19  60:21  <b>hour</b> 32:7 33:14  121:14,14  130:17  <b>hours</b> 40:23  <b>house</b> 55:10 123:9  129:22 130:8,12  <b>huge</b> 44:20  <b>Hughes</b> 24:15  <b>human</b> 126:16  <b>hundred</b> 26:11  104:21 114:21  <b>hundreds</b> 58:9  <b>hurried</b> 49:19 </p> <hr/> <p style="text-align: center;"><b>I</b></p> <p> <b>idea</b> 41:25 63:20  76:13,17,19 89:9  90:22 94:13  95:18 96:24 99:5  100:19  <b>ideas</b> 20:15 104:11  <b>identification</b>  11:23  <b>identified</b> 123:5,6  <b>identify</b> 16:1 51:9  57:11  <b>Illinois</b> 20:22  <b>illuminates</b> 106:2  <b>ill-thought</b> 49:19  <b>image</b> 38:13  <b>images</b> 39:22  40:10  <b>imagination</b>  130:15  <b>imagine</b> 3:5 35:18  48:25  <b>imaging</b> 40:6,11  60:18  <b>immediately</b> 53:19  <b>immigration</b>  128:17  <b>impact</b> 9:25 10:2  130:17 133:4,7  <b>imperils</b> 80:10  <b>implemented</b>  133:8  <b>implementing</b> 45:7  60:1  <b>implicit</b> 66:18  <b>importance</b> 49:10  78:23,24  <b>important</b> 8:9  13:24 19:8 41:2  59:15 61:4,10 </p>	<p> 67:14 68:18 77:9  78:8 79:25 80:13  82:15 83:16 91:9  92:14 116:15  118:7 122:8,11  <b>impose</b> 14:2 65:16  104:1  <b>imposed</b> 66:12  <b>imposes</b> 15:4  <b>impossible</b> 33:18  <b>impress</b> 10:5  <b>inaccessible</b> 23:20  44:13 70:11  <b>inactive</b> 21:19  23:16 31:14  <b>inadvertent</b> 16:13  <b>inappropriate</b>  131:3  <b>inaudible</b> 81:4  134:7  <b>incarcerated</b>  127:22  <b>incarceration</b>  127:23 128:21  128:22,23  129:10  <b>incidents</b> 123:25  <b>inclined</b> 99:7  <b>include</b> 12:22  17:10 34:25  <b>included</b> 12:7  13:18 112:11  130:11  <b>includes</b> 54:15  119:22  <b>including</b> 9:13  14:18 15:22  18:24 31:4 80:15  <b>incoming</b> 2:23 3:3  38:7  <b>incompetent</b> 50:14  89:10  <b>inconsistency</b> 97:5  <b>incorporate</b> 98:9  <b>increase</b> 36:22  127:10  <b>increased</b> 103:5  <b>increasingly</b> 4:18  46:12 131:2  <b>incredibly</b> 113:11  <b>incurred</b> 14:20  <b>incursion</b> 131:25  <b>indeed</b> 77:8 114:2  <b>Independence</b>  54:5  <b>independent</b> 42:2  <b>index</b> 80:24  <b>indicate</b> 106:17  <b>indicated</b> 87:25  <b>indicates</b> 130:21  <b>individual</b> 109:25  <b>individually</b> 17:22  <b>individuals</b> 62:21  133:6  <b>industry</b> 52:6  <b>inexpensive</b> 45:1 </p>	<p> 62:20  <b>infected</b> 76:17  <b>inference</b> 32:11,15  32:24  <b>inferences</b> 46:10  <b>infinite</b> 91:25  <b>information</b> 4:2,4  14:14,18 15:6,11  15:24 16:2,12,15  16:18 17:7 19:21  20:5,6 21:21  22:23 27:24  32:18,23 35:15  36:8 39:23 43:9  44:11 54:16,19  61:2 64:25 67:11  68:8,22 69:21  70:12 71:3 77:8  87:8 91:13 93:13  <b>informed</b> 111:23  <b>inherently</b> 107:14  <b>inhibition</b> 78:17  <b>initial</b> 4:6 13:11  104:3  <b>initiate</b> 8:13  <b>injury</b> 52:12 86:17  <b>inmates</b> 128:6  129:12  <b>input</b> 73:24,24  <b>inquiry</b> 87:3  <b>inside</b> 34:25 41:11  <b>insist</b> 25:18  <b>instance</b> 14:15  16:11 42:18  57:23 59:17 82:7  <b>instances</b> 29:10  132:3  <b>instead</b> 21:2 25:9  82:16 83:15 90:2  <b>instruct</b> 101:25  <b>instructed</b> 53:25  <b>instruction</b> 32:11  32:14,15 94:12  94:17  <b>instructions</b> 60:13  75:23 77:6 78:1  97:6 98:13  <b>instruction.ð</b>  102:2  <b>intangible</b> 123:2  <b>intent</b> 45:8  <b>intention</b> 52:2  <b>intentional</b> 32:13  <b>intentionally</b> 29:11  89:15  <b>interactive</b> 72:7  <b>interest</b> 107:23  <b>interested</b> 44:16  48:6 62:22 75:12  79:4  <b>interesting</b> 31:18  67:1 68:16 69:8  86:10 96:3  <b>interestingly</b> 64:22  68:11 69:19  70:10 </p>	<p> <b>internal</b> 34:6  <b>internet</b> 26:11  <b>interpretation</b>  59:8  <b>interpreter</b> 57:20  <b>intervention</b>  131:18  <b>interviews</b> 81:20  <b>intrigued</b> 85:18  <b>introduce</b> 2:23  5:10  <b>introduced</b> 5:3  76:14  <b>introductory</b> 64:5  <b>intrusive</b> 47:23  <b>invariably</b> 108:14  <b>investigation</b> 42:5  <b>investigative</b> 51:19  <b>invitation</b> 57:1  <b>invited</b> 122:2  <b>inviting</b> 56:14  <b>involve</b> 97:13  <b>involved</b> 12:12  30:20 34:17 37:7  40:7 58:23 70:9  75:21 85:6 88:9  124:23  <b>involvement</b> 37:7  81:5  <b>involving</b> 62:24,25  114:20  <b>in-house</b> 11:19  17:6 30:19 37:22  40:19,20 41:5  45:6,14 46:3,12  46:16 50:19 53:2  60:11  <b>Irenas</b> 100:3,4  101:2,4,14,15,20  102:5 104:11,16  104:18 105:2,5,9  105:19 111:14  111:17 118:1  <b>ironic</b> 103:24  <b>irrelevant</b> 89:18  <b>irrevocably</b> 61:2  <b>issue</b> 16:24 17:20  18:2 24:8 25:20  28:3,17 29:5,6  30:8 31:18 32:21  43:22 46:2 52:18  63:22 73:1 74:8  76:23 109:8  112:10,25  114:24 116:13  116:15 121:23  129:16  <b>issued</b> 129:24  <b>issues</b> 1:10 15:13  18:18 31:17 36:6  40:21 41:17  42:15 46:20  48:11 53:12 63:7  67:20 72:5,15,17  72:23 74:8 75:19  77:10,13 91:16 </p>
---	---	---	--	--

97:12,12,19 112:13 116:12 121:12 122:2 126:24 item 13:21 it'll 124:3 it.ö 113:20 it?ö 89:5 itÆs 89:17 95:20 LÆm 52:18 LÆve 52:16	70:19,20 71:13 72:1,1,1,2,2,2,2 74:10,13,15,21 76:2,4,5,11,23 77:4,19,22,24 79:12,14,15 81:8 81:10 82:1,4,6 82:10,18 83:20 83:25 84:13 85:1 85:11,15,17,19 85:21 86:11,19 87:4,6,12 88:10 89:1,2,17,20,22 90:1,7,8,8 91:3 92:12,19,20,21 93:3 94:10,11,25 95:7,8,15,21 98:3,4,17 99:1,2 99:3,4,9,11,14 99:23 100:3,4 101:2,3,4,13,13 101:14,15,15,20 101:22 102:5 103:7,10 104:10 104:16,17,18,20 105:2,4,5,8,9,18 105:19 106:1,8 106:19,24 107:22 108:12 108:20,22 110:5 110:11,18,21 111:11,12,14,17 112:8,23 113:24 113:25 114:1,22 115:24 116:1 117:7,9,25 118:1 118:13,18,23 119:2,19 122:9 122:21 123:6,15 123:17 124:1 126:10 129:17 132:15,16,22,24 133:21 134:4,6 134:10 judges 6:6 9:5,9 12:3 19:11 30:19 67:15 87:18 93:24 94:1,2 95:24 96:8 97:4 107:7,7 110:6 112:18 118:9 121:22,23 123:3 123:4,12 131:3 judge's 63:20 72:16 judgment 50:6 66:12 81:11 107:8,25 108:2,7 108:10,23,25 110:24 111:1,6 111:15 115:16 119:23 121:18 125:10 judgments 111:2 judicial 1:5 6:11 9:14,21 10:1,6	14:21 96:7,8 103:24 129:24 judiciary 8:25 73:24 123:10 129:22 130:3,17 131:18 133:5 judiciary's 132:1 July 126:24 127:2 junked 66:10 juries 46:17 112:12,20 jurisdiction 119:25 128:7 jurisdictions 91:2 juror 7:11 72:17 74:9 76:7 77:7 77:19 79:18 84:20,23,25 85:1 86:5,8 87:2 88:4 88:5,6,16 89:21 89:23 90:2,3 92:9,14 96:5 jurors 7:8,23 8:2 74:16,22 75:11 75:12 76:15 78:4 78:14 79:13 80:2 80:14 81:5,14,20 83:17 84:1,7,12 85:4,12,16,20 86:22,23 87:5 89:3,13 92:3,17 93:25 95:1,16 96:14 99:19 101:23 juror's 76:19 81:24 92:10 114:23 jury 6:25 32:11,14 32:15 66:16 72:15,17,21,23 72:24 74:8,9 75:16 77:11 78:9 78:20 80:7,11 82:2,23 83:6,21 91:5,14,20 94:3 94:8,13,21,24 95:23 97:7,11,20 97:22 100:7,18 101:25 102:14 106:25 107:15 107:18 108:21 114:20 115:2,8 115:11,17 jury's 101:22 just 3:4 5:25 7:1,5 10:21 13:22 19:24 20:3,13 21:17 23:6 24:25 25:9,10 26:2,4 26:15,15 27:20 27:21,23 28:13 29:18 30:10,12 33:22 35:11 36:13,15 38:21 40:1 46:9 48:21 50:10 51:6,12	57:21 58:16 60:4 62:14,20 66:10 71:1 73:4 75:4 79:2 80:20 83:7 83:22 86:18 90:2 90:8 91:20 92:17 95:22 96:1 98:6 102:11 103:19 103:24 104:8,25 105:22 106:7 108:17 110:9 111:25 113:7,22 115:21 123:1 125:21 129:23 132:16,20 justice 3:9 45:21 123:11 126:23 126:23 130:16 133:23 justified 126:3 justifies 126:8	K keep 19:3 21:12 74:23,24 83:8 88:20 94:20 104:23 108:5 129:18 keeping 59:1 63:9 63:15 keeps 27:23 28:1,1 73:4 83:9,14 97:17 kept 70:16 key 34:17 37:5,16 44:4,6 62:15 key-word 62:13 kids 50:1 kind 7:5,16,19 25:12 28:2 29:23 30:21 31:25 37:11 46:24,24 49:12 61:23 79:18 88:5,14 105:20 kindled 96:25 kinds 54:19 112:13 Kipp 12:15 know 5:20,22 6:4 7:22 13:7 14:25 17:5,15,20 19:4 19:8,13,17 20:18 22:5,8 23:21,22 23:23,25 25:1,25 26:2,10 28:20,24 29:6,13 31:25 32:10 36:9 37:6 39:4 42:22 44:14 45:6,16 47:13 48:3,5,22 49:3,6 50:1,12,13 54:6 55:2 56:5,13 57:23,24 61:13 61:15 62:25 75:10 77:8 80:2 80:25 84:24	87:24,25 88:18 89:6,7 92:17,18 92:22 97:1,15 98:7,18 100:20 101:4,5 102:3,19 104:10,22 105:9 107:17 116:6,20 116:23 118:25 120:15 122:9 124:2 131:12 133:20 134:10 knowing 76:9 knowledge 15:6 95:3 known 52:2 knows 19:22 Kroll 12:24 13:2 56:18 Kugler 72:2 83:20 83:25 85:1,11 86:11 89:17,22 90:9 103:7,10 104:17,20 105:4 105:8,18 107:22 108:12 112:8
J J 12:4 Jail 128:2 January 126:14 Japan 128:21 Jason 12:23 56:17 56:18 63:21 Jason's 35:8 41:2 jaundiced 45:20 Jeff 12:10 33:6 45:4 54:21 57:13 Jeffrey 33:5 93:20 Jeff's 12:19 48:4 Jennifer 129:1 Jersey 1:1,6,18 2:20 3:8 10:23 10:23 11:2,19 18:24 22:11 24:11 27:16 31:11 32:8 35:14 63:4 71:17 122:8 Joan 71:8 Job 2:7,12 35:21 91:12,23 113:4 Joe 5:12 Joel 121:7 John 12:14,19 17:5 18:17,21 23:7 32:3,9 34:22 40:4 44:17 45:5,6 54:22 56:16 57:13,14 57:15 59:2 87:23 Join 3:17 5:11 10:17 joined 7:2 joint 104:4 jointly 42:1 Journal 87:20 JScordo@Pitne... 21:4 judge 2:15,17,19 3:2,21 4:9 5:15 5:16,25 6:14 7:1 7:18 8:14 12:4,6 13:9,14,22 15:23 16:24 17:4 20:23 22:5 23:17 31:25 32:9,19 33:2 35:11 36:25 63:19 64:2,4 65:19 66:25 67:3 67:7,13,16 68:3 68:21 69:4 70:2	J J 12:4 Jail 128:2 January 126:14 Japan 128:21 Jason 12:23 56:17 56:18 63:21 Jason's 35:8 41:2 jaundiced 45:20 Jeff 12:10 33:6 45:4 54:21 57:13 Jeffrey 33:5 93:20 Jeff's 12:19 48:4 Jennifer 129:1 Jersey 1:1,6,18 2:20 3:8 10:23 10:23 11:2,19 18:24 22:11 24:11 27:16 31:11 32:8 35:14 63:4 71:17 122:8 Joan 71:8 Job 2:7,12 35:21 91:12,23 113:4 Joe 5:12 Joel 121:7 John 12:14,19 17:5 18:17,21 23:7 32:3,9 34:22 40:4 44:17 45:5,6 54:22 56:16 57:13,14 57:15 59:2 87:23 Join 3:17 5:11 10:17 joined 7:2 joint 104:4 jointly 42:1 Journal 87:20 JScordo@Pitne... 21:4 judge 2:15,17,19 3:2,21 4:9 5:15 5:16,25 6:14 7:1 7:18 8:14 12:4,6 13:9,14,22 15:23 16:24 17:4 20:23 22:5 23:17 31:25 32:9,19 33:2 35:11 36:25 63:19 64:2,4 65:19 66:25 67:3 67:7,13,16 68:3 68:21 69:4 70:2	J J 12:4 Jail 128:2 January 126:14 Japan 128:21 Jason 12:23 56:17 56:18 63:21 Jason's 35:8 41:2 jaundiced 45:20 Jeff 12:10 33:6 45:4 54:21 57:13 Jeffrey 33:5 93:20 Jeff's 12:19 48:4 Jennifer 129:1 Jersey 1:1,6,18 2:20 3:8 10:23 10:23 11:2,19 18:24 22:11 24:11 27:16 31:11 32:8 35:14 63:4 71:17 122:8 Joan 71:8 Job 2:7,12 35:21 91:12,23 113:4 Joe 5:12 Joel 121:7 John 12:14,19 17:5 18:17,21 23:7 32:3,9 34:22 40:4 44:17 45:5,6 54:22 56:16 57:13,14 57:15 59:2 87:23 Join 3:17 5:11 10:17 joined 7:2 joint 104:4 jointly 42:1 Journal 87:20 JScordo@Pitne... 21:4 judge 2:15,17,19 3:2,21 4:9 5:15 5:16,25 6:14 7:1 7:18 8:14 12:4,6 13:9,14,22 15:23 16:24 17:4 20:23 22:5 23:17 31:25 32:9,19 33:2 35:11 36:25 63:19 64:2,4 65:19 66:25 67:3 67:7,13,16 68:3 68:21 69:4 70:2	J J 12:4 Jail 128:2 January 126:14 Japan 128:21 Jason 12:23 56:17 56:18 63:21 Jason's 35:8 41:2 jaundiced 45:20 Jeff 12:10 33:6 45:4 54:21 57:13 Jeffrey 33:5 93:20 Jeff's 12:19 48:4 Jennifer 129:1 Jersey 1:1,6,18 2:20 3:8 10:23 10:23 11:2,19 18:24 22:11 24:11 27:16 31:11 32:8 35:14 63:4 71:17 122:8 Joan 71:8 Job 2:7,12 35:21 91:12,23 113:4 Joe 5:12 Joel 121:7 John 12:14,19 17:5 18:17,21 23:7 32:3,9 34:22 40:4 44:17 45:5,6 54:22 56:16 57:13,14 57:15 59:2 87:23 Join 3:17 5:11 10:17 joined 7:2 joint 104:4 jointly 42:1 Journal 87:20 JScordo@Pitne... 21:4 judge 2:15,17,19 3:2,21 4:9 5:15 5:16,25 6:14 7:1 7:18 8:14 12:4,6 13:9,14,22 15:23 16:24 17:4 20:23 22:5 23:17 31:25 32:9,19 33:2 35:11 36:25 63:19 64:2,4 65:19 66:25 67:3 67:7,13,16 68:3 68:21 69:4 70:2	J J 12:4 Jail 128:2 January 126:14 Japan 128:21 Jason 12:23 56:17 56:18 63:21 Jason's 35:8 41:2 jaundiced 45:20 Jeff 12:10 33:6 45:4 54:21 57:13 Jeffrey 33:5 93:20 Jeff's 12:19 48:4 Jennifer 129:1 Jersey 1:1,6,18 2:20 3:8 10:23 10:23 11:2,19 18:24 22:11 24:11 27:16 31:11 32:8 35:14 63:4 71:17 122:8 Joan 71:8 Job 2:7,12 35:21 91:12,23 113:4 Joe 5:12 Joel 121:7 John 12:14,19 17:5 18:17,21 23:7 32:3,9 34:22 40:4 44:17 45:5,6 54:22 56:16 57:13,14 57:15 59:2 87:23 Join 3:17 5:11 10:17 joined 7:2 joint 104:4 jointly 42:1 Journal 87:20 JScordo@Pitne... 21:4 judge 2:15,17,19 3:2,21 4:9 5:15 5:16,25 6:14 7:1 7:18 8:14 12:4,6 13:9,14,22 15:23 16:24 17:4 20:23 22:5 23:17 31:25 32:9,19 33:2 35:11 36:25 63:19 64:2,4 65:19 66:25 67:3 67:7,13,16 68:3 68:21 69:4 70:2	
L L 12:4 Lail 128:2 January 126:14 Japan 128:21 Jason 12:23 56:17 56:18 63:21 Jason's 35:8 41:2 jaundiced 45:20 Jeff 12:10 33:6 45:4 54:21 57:13 Jeffrey 33:5 93:20 Jeff's 12:19 48:4 Jennifer 129:1 Jersey 1:1,6,18 2:20 3:8 10:23 10:23 11:2,19 18:24 22:11 24:11 27:16 31:11 32:8 35:14 63:4 71:17 122:8 Joan 71:8 Job 2:7,12 35:21 91:12,23 113:4 Joe 5:12 Joel 121:7 John 12:14,19 17:5 18:17,21 23:7 32:3,9 34:22 40:4 44:17 45:5,6 54:22 56:16 57:13,14 57:15 59:2 87:23 Join 3:17 5:11 10:17 joined 7:2 joint 104:4 jointly 42:1 Journal 87:20 JScordo@Pitne... 21:4 judge 2:15,17,19 3:2,21 4:9 5:15 5:16,25 6:14 7:1 7:18 8:14 12:4,6 13:9,14,22 15:23 16:24 17:4 20:23 22:5 23:17 31:25 32:9,19 33:2 35:11 36:25 63:19 64:2,4 65:19 66:25 67:3 67:7,13,16 68:3 68:21 69:4 70:2	L L 12:4 Lail 128:2 January 126:14 Japan 128:21 Jason 12:23 56:17 56:18 63:21 Jason's 35:8 41:2 jaundiced 45:20 Jeff 12:10 33:6 45:4 54:21 57:13 Jeffrey 33:5 93:20 Jeff's 12:19 48:4 Jennifer 129:1 Jersey 1:1,6,18 2:20 3:8 10:23 10:23 11:2,19 18:24 22:11 24:11 27:16 31:11 32:8 35:14 63:4 71:17 122:8 Joan 71:8 Job 2:7,12 35:21 91:12,23 113:4 Joe 5:12 Joel 121:7 John 12:14,19 17:5 18:17,21 23:7 32:3,9 34:22 40:4 44:17 45:5,6 54:22 56:16 57:13,14 57:15 59:2 87:23 Join 3:17 5:11 10:17 joined 7:2 joint 104:4 jointly 42:1 Journal 87:20 JScordo@Pitne... 21:4 judge 2:15,17,19 3:2,21 4:9 5:15 5:16,25 6:14 7:1 7:18 8:14 12:4,6 13:9,14,22 15:23 16:24 17:4 20:23 22:5 23:17 31:25 32:9,19 33:2 35:11 36:25 63:19 64:2,4 65:19 66:25 67:3 67:7,13,16 68:3 68:21 69:4 70:2	L L 12:4 Lail 128:2 January 126:14 Japan 128:21 Jason 12:23 56:17 56:18 63:21 Jason's 35:8 41:2 jaundiced 45:20 Jeff 12:10 33:6 45:4 54:21 57:13 Jeffrey 33:5 93:20 Jeff's 12:19 48:4 Jennifer 129:1 Jersey 1:1,6,18 2:20 3:8 10:23 10:23 11:2,19 18:24 22:11 24:11 27:16 31:11 32:8 35:14 63:4 71:17 122:8 Joan 71:8 Job 2:7,12 35:21 91:12,23 113:4 Joe 5:12 Joel 121:7 John 12:14,19 17:5 18:17,21 23:7 32:3,9 34:22 40:4 44:17 45:5,6 54:22 56:16 57:13,14 57:15 59:2 87:23 Join 3:17 5:11 10:17 joined 7:2 joint 104:4 jointly 42:1 Journal 87:20 JScordo@Pitne... 21:4 judge 2:15,17,19 3:2,21 4:9 5:15 5:16,25 6:14 7:1 7:18 8:14 12:4,6 13:9,14,22 15:23 16:24 17:4 20:23 22:5 23:17 31:25 32:9,19 33:2 35:11 36:25 63:19 64:2,4 65:19 66:25 67:3 67:7,13,16 68:3 68:21 69:4 70:2	L L 12:4 Lail 128:2 January 126:14 Japan 128:21 Jason 12:23 56:17 56:18 63:21 Jason's 35:8 41:2 jaundiced 45:20 Jeff 12:10 33:6 45:4 54:21 57:13 Jeffrey 33:5 93:20 Jeff's 12:19 48:4 Jennifer 129:1 Jersey 1:1,6,18 2:20 3:8 10:23 10:23 11:2,19 18:24 22:11 24:11 27:16 31:11 32:8 35:14 63:4 71:17 122:8 Joan 71:8 Job 2:7,12 35:21 91:12,23 113:4 Joe 5:12 Joel 121:7 John 12:14,19 17:5 18:17,21 23:7 32:3,9 34:22 40:4 44:17 45:5,6 54:22 56:16 57:13,14 57:15 59:2 87:23 Join 3:17 5:11 10:17 joined 7:2 joint 104:4 jointly 42:1 Journal 87:20 JScordo@Pitne... 21:4 judge 2:15,17,19 3:2,21 4:9 5:15 5:16,25 6:14 7:1 7:18 8:14 12:4,6 13:9,14,22 15:23 16:24 17:4 20:23 22:5 23:17 31:25 32:9,19 33:2 35:11 36:25 63:19 64:2,4 65:19 66:25 67:3 67:7,13,16 68:3 68:21 69:4 70:2	L L 12:4 Lail 128:2 January 126:14 Japan 128:21 Jason 12:23 56:17 56:18 63:21 Jason's 35:8 41:2 jaundiced 45:20 Jeff 12:10 33:6 45:4 54:21 57:13 Jeffrey 33:5 93:20 Jeff's 12:19 48:4 Jennifer 129:1 Jersey 1:1,6,18 2:20 3:8 10:23 10:23 11:2,19 18:24 22:11 24:11 27:16 31:11 32:8 35:14 63:4 71:17 122:8 Joan 71:8 Job 2:7,12 35:21 91:12,23 113:4 Joe 5:12 Joel 121:7 John 12:14,19 17:5 18:17,21 23:7 32:3,9 34:22 40:4 44:17 45:5,6 54:22 56:16 57:13,14 57:15 59:2 87:23 Join 3:17 5:11 10:17 joined 7:2 joint 104:4 jointly 42:1 Journal 87:20 JScordo@Pitne... 21:4 judge 2:15,17,19 3:2,21 4:9 5:15 5:16,25 6:14 7:1 7:18 8:14 12:4,6 13:9,14,22 15:23 16:24 17:4 20:23 22:5 23:17 31:25 32:9,19 33:2 35:11 36:25 63:19 64:2,4 65:19 66:25 67:3 67:7,13,16 68:3 68:21 69:4 70:2	
L L 12:4 Lail 128:2 January 126:14 Japan 128:21 Jason 12:23 56:17 56:18 63:21 Jason's 35:8 41:2 jaundiced 45:20 Jeff 12:10 33:6 45:4 54:21 57:13 Jeffrey 33:5 93:20 Jeff's 12:19 48:4 Jennifer 129:1 Jersey 1:1,6,18 2:20 3:8 10:23 10:23 11:2,19 18:24 22:11 24:11 27:16 31:11 32:8 35:14 63:4 71:17 122:8 Joan 71:8 Job 2:7,12 35:21 91:12,23 113:4 Joe 5:12 Joel 121:7 John 12:14,19 17:5 18:17,21 23:7 32:3,9 34:22 40:4 44:17 45:5,6 54:22 56:16 57:13,14 57:15 59:2 87:23 Join 3:17 5:11 10:17 joined 7:2 joint 104:4 jointly 42:1 Journal 87:20 JScordo@Pitne... 21:4 judge 2:15,17,19 3:2,21 4:9 5:15 5:16,25 6:14 7:1 7:18 8:14 12:4,6 13:9,14,22 15:23 16:24 17:4 20:23 22:5 23:17 31:25 32:9,19 33:2 35:11 36:25 63:19 64:2,4 65:19 66:25 67:3 67:7,13,16 68:3 68:21 69:4 70:2	L L 12:4 Lail 128:2 January 126:14 Japan 128:21 Jason 12:23 56:17 56:18 63:21 Jason's 35:8 41:2 jaundiced 45:20 Jeff 12:10 33:6 45:4 54:21 57:13 Jeffrey 33:5 93:20 Jeff's 12:19 48:4 Jennifer 129:1 Jersey 1:1,6,18 2:20 3:8 10:23 10:23 11:2,19 18:24 22:11 24:11 27:16 31:11 32:8 35:14 63:4 71:17 122:8 Joan 71:8 Job 2:7,12 35:21 91:12,23 113:4 Joe 5:12 Joel 121:7 John 12:14,19 17:5 18:17,21 23:7 32:3,9 34:22 40:4 44:17 45:5,6 54:22 56:16 57:13,14 57:15 59:2 87:23 Join 3:17 5:11 10:17 joined 7:2 joint 104:4 jointly 42:1 Journal 87:20 JScordo@Pitne... 21:4 judge 2:15,17,19 3:2,21 4:9 5:15 5:16,25 6:14 7:1 7:18 8:14 12:4,6 13:9,14,22 15:23 16:24 17:4 20:23 22:5 23:17 31:25 32:9,19 33:2 35:11 36:25 63:19 64:2,4 65:19 66:25 67:3 67:7,13,16 68:3 68:21 69:4 70:2	L L 12:4 Lail 128:2 January 126:14 Japan 128:21 Jason 12:23 56:17 56:18 63:21 Jason's 35:8 41:2 jaundiced 45:20 Jeff 12:10 33:6 45:4 54:21 57:13 Jeffrey 33:5 93:20 Jeff's 12:19 48:4 Jennifer 129:1 Jersey 1:1,6,18 2:20 3:8 10:23 10:23 11:2,19 18:24 22:11 24:11 27:16 31:11 32:8 35:14			

121:19 133:17 latest 16:6 31:1,3 laughter 100:13 law 31:22 50:25 53:6 65:3 71:6 73:17 87:20 98:12 99:17,22 114:7 115:3 123:19 126:9,18 laws 18:15 Lawsuit 112:10 lawsuits 103:5 lawyer 14:11,16 15:5,14 28:22 42:6 50:24 54:7 74:21 86:5 88:10 91:11 92:11 98:1 100:11 105:23 106:2 111:25 112:25 113:2,3,4 114:4 120:12 122:11 lawyers 14:3 16:3 30:19,19 46:4 47:20 49:5 50:19 57:18,20 58:16 65:10,10 67:15 75:9 76:8 77:24 79:1 83:21 84:24 85:23 88:14 89:6 89:9,14,23 90:21 90:22 92:7,13 93:24 99:16,25 100:5,19 101:1,9 103:25 105:11 106:4,10 110:18 113:9,14,18 120:18 121:9 122:1 lawyer's 51:23 113:4 120:24 lay 9:21 97:10 layout 10:19 lead 52:14 65:25 68:8 104:7 leadership 6:18 7:1 129:18 leading 12:24 22:11 24:12 27:10 leanings 106:21 learn 13:7 14:13 35:15 36:3 115:7 learning 83:3 learns 83:4 least 4:12 7:23 19:2 22:14 73:14 76:16 79:9 86:25 89:5 96:24 97:12 102:22,23 106:17 109:14 110:22 111:24 120:12 leave 56:2 leaves 59:18 85:13 87:14	led 52:17 131:9 left 12:10,14 28:24 49:24 left-hand 49:25 legacy 14:20,25 16:16 39:5 44:21 legal 12:24 53:3 59:7 71:11 84:12 89:15 94:13,22 95:3 97:12 legally 11:8 124:21 legislation 130:14 130:20 legislative 130:5 130:25 131:20 legitimate 130:4 131:25 132:13 lengthy 24:16 less 79:22 let 25:1 45:11,12 46:17 50:17 51:6 56:5 60:19,20,21 71:1 72:12 76:22 82:2 130:1 letter 35:7 51:24 112:1 letters 35:7 54:9 letting 7:22 77:2 116:5 let's 44:4,5,6,7,7 56:17 74:7 94:6 103:1 115:22 119:13 let's 119:14 level 28:25 64:16 64:18 65:3 levels 24:1 107:6 liability 66:12 license 23:10 lies 21:17 Life 129:1 life's 45:17 like 2:1,4,10,14 3:16 4:2 5:10 6:15 8:5 10:7 13:22 14:7 17:16 27:20 48:4 54:5 54:7 56:18 61:2 65:24 75:19,24 76:5 80:20 82:18 85:5 87:7 88:18 88:20,22 93:12 95:9 96:1 97:6 97:23,24 98:9 101:11,24 102:6 102:7,8 112:17 114:22 119:4,15 121:11 liked 83:19 likelihood 36:22 36:25 77:12 likely 67:10 69:21 70:1 111:22 117:3 limit 65:15 94:17 110:2	limitations 131:19 132:20,22 limited 74:2 94:11 109:25 125:2 131:21 132:23 limits 124:24 line 21:20 40:25 52:9 linear 43:17 lines 56:2 link 126:20 list 22:24 37:8 62:15 listed 116:5 listen 75:5 82:16 83:8 96:19 listeners 83:7 listening 49:15 50:9 100:16 listing 20:13 lists 62:13 literally 26:15 28:20 49:23 litigant 109:21 litigants 103:25 114:14 litigate 52:2 litigated 110:9 litigating 110:1 litigation 12:11,22 18:19 28:19 34:4 34:18 35:6 40:16 44:20,25 45:2,10 45:10 52:14,23 53:5 60:8,10,13 63:8 120:19 litigations 29:2 61:21 litigation-response 34:24 57:10 litigator 51:11 litigators 12:9 114:11 little 15:23 19:24 23:9 24:20 31:4 31:4 32:1 43:7 50:15 61:17 68:19 73:11 81:5 87:8 93:12,21 100:18 102:6 106:14 117:19 120:17 126:12 live 46:2 LiveNote 83:12 local 13:10,16,18 15:18 63:4 65:19 73:12 122:6,8 128:2 locate 47:12 location 35:23 locations 35:21 long 3:14 5:6 6:9,9 47:4 74:15 81:12 86:15 92:21 93:4 109:17 133:24 133:24,24,24	longer 95:14 133:24 longstanding 130:25 look 5:21 8:22 21:14 22:18 27:6 31:20 48:6 56:14 67:4 69:20 79:20 83:12 104:12 124:13 looked 28:10 37:15 39:15 69:25 looking 5:18 26:22 38:22 48:9,10,11 48:12,14 51:15 54:18 58:21 74:20 81:2 84:12 looks 6:15 119:4 loop 55:18 Lorell 12:11 33:5 33:13 48:17 lose 61:2 97:8 lot 5:19 18:23 21:18 23:3 24:5 25:24 28:7 30:14 30:15 46:23 47:21 54:22 57:8 61:21 69:21 74:6 75:13,21 78:3 89:6,7,7 95:10 95:19 103:3,16 106:19 107:22 107:23 117:17 123:12 love 102:15 loved 94:5 lowest 133:9 LTOs 58:11 luckily 24:11 26:11 lunch 134:13 lurks 49:16 <hr/> M <hr/> machine 25:9 made 40:25 52:1 68:23 87:15 90:9 117:1 132:7 Madeline 12:4 Maderer 2:6 10:16 13:20 17:4 18:14 23:6,9,13 32:3 32:25 33:4 45:4 56:16 63:21 71:13,16 134:4,8 magazine 12:17 magistrate 12:3 16:24 24:15 68:3 107:6 110:6 111:11 magistrates 19:12 110:21 Magna 54:6 mails 11:13 main 25:23 27:13 31:17 56:11 72:7	mainly 73:20 106:10 maintain 6:18 32:17 54:20 maintained 14:18 Maintaining 61:9 major 10:25 50:6 59:9 77:4 114:2 114:7 majority 118:9 130:10 make 14:25 18:13 19:9 20:25 24:9 25:18 26:25 34:12 37:9,23 49:8 51:14 54:4 54:10 55:14 59:25 61:4,22 65:15 66:14 68:13 76:18 81:10,11 87:2 90:13 111:22 112:3 116:13 120:8 121:16,19 122:14 131:17 132:16 maker 90:3 makers 104:22 makes 4:11 25:7 63:4 making 59:6 117:13 male 121:21 128:8 males 128:5,10,11 Maloney 4:14 5:3 5:11,15 man 5:7 management 34:14 35:1 41:5 manager 60:9 mandated 10:8 mandatory 8:17 87:17 maneuver 50:2 manner 61:5 77:16 88:15 many 3:22 5:13 6:23 7:8 12:6 19:13 20:14 35:1 38:2 42:4 44:7 46:21 55:1 58:2 58:2,7,10 59:1 69:17 72:4 86:3 86:12 88:9 90:21 94:2 104:1 105:9 115:7 March 1:19 marginal 43:25 67:8 marginally 91:24 mark 101:7 109:12 marked 26:5,15 marketing 11:2,8 marking 29:20 Martha 45:23 Maryland 21:8
--	---	--	---	---

30:5 <b>Massachusetts</b> 4:22 <b>massive</b> 113:18 <b>Masters</b> 3:9 <b>mastery</b> 57:6 <b>material</b> 23:17 24:22 33:9 64:21 68:7 70:1 124:10 <b>materials</b> 20:24,25 30:17 35:8 49:11 64:7 66:9,22 67:5 70:14 <b>matter</b> 35:12 46:9 48:8 53:4 57:6 61:11 64:17 66:3 87:1 119:25 126:9 132:4,11 132:11 <b>matters</b> 57:14 59:11 <b>maturing</b> 113:14 <b>maximum</b> 8:2 <b>may</b> 13:3,25 14:22 16:2,7,15 27:1 31:1 33:9,9 36:10 38:12 40:20 45:25 48:13 50:12,12 55:11,13 56:15 57:25 60:2 75:21 75:22 83:6 84:16 84:16 87:24 88:6 90:19 92:14,15 92:16 95:11,13 109:20 114:3,17 120:14,17,25 133:2 <b>maybe</b> 31:20 48:3 75:17 83:3 105:24 111:5 116:14 118:6 121:15 124:3 <b>Mayfair</b> 1:17 <b>McPeck</b> 66:24 <b>mean</b> 20:14 26:3 28:9,24 29:12 34:1 41:19 42:21 48:15 51:15 54:7 57:15 58:13 59:15 79:19 89:11 90:10 91:16 103:15 108:14,22 112:24 114:14 120:25 <b>meaning</b> 26:5 89:12 <b>means</b> 4:5 7:11 26:4 27:21,23 34:4,20 45:14 76:12 77:12 96:12,24 127:25 <b>measures</b> 9:11 <b>media</b> 14:21 52:17 58:21	<b>mediate</b> 109:20 <b>mediation</b> 28:18 107:3 <b>mediocre</b> 120:21 <b>meet</b> 5:18 14:5 15:1,15 16:5,8 17:1 91:25 <b>meeting</b> 9:8 32:5,5 <b>meetings</b> 9:6 <b>meet-and-confer</b> 15:25 <b>member</b> 94:9 <b>members</b> 34:25 110:20 129:15 131:13 133:7 134:2 <b>memo</b> 54:7 55:12 <b>men</b> 49:16 127:24 <b>mention</b> 46:22 66:20 79:1 <b>mentioned</b> 5:16 35:11 40:4 54:21 57:15 59:2 64:12 65:20 68:1 125:15 132:25 <b>mentored</b> 113:15 <b>menu</b> 107:2 <b>mere</b> 32:16 <b>merely</b> 44:3 84:20 <b>meritless</b> 109:5 <b>mess</b> 60:15 <b>message</b> 50:8 <b>messages</b> 50:3 61:18 <b>met</b> 11:3 <b>meta</b> 13:6 27:20 28:7,14 37:21 61:3,3,5 <b>meticulous</b> 115:4 <b>Metropolitan</b> 12:16 66:8 <b>me.ö</b> 98:22 <b>Michael</b> 71:23 <b>Microsoft</b> 20:14 <b>middle</b> 79:23 <b>Middlesex</b> 91:4 <b>midnight</b> 130:16 <b>might</b> 7:21 26:6,7 39:5 52:14 53:7 54:1 75:12 81:12 84:4 106:17,18 110:24 115:7 124:5,21 <b>Mike</b> 93:14,14 107:22 112:7 125:15 <b>milk</b> 48:15 <b>millimeter</b> 58:12 58:12 <b>million</b> 19:23 105:24,25 114:21 <b>mind</b> 19:3 20:15 21:13 34:3 46:17 65:7 83:9 84:18 88:5,20 117:22	121:17 129:18 <b>minds</b> 48:2 <b>mine</b> 110:22 <b>Mini</b> 96:20 <b>minimize</b> 41:6 50:20 75:15 <b>minor</b> 124:20 <b>minority</b> 116:3 <b>minute</b> 33:25 71:18 95:22 <b>minutes</b> 33:17 71:19 81:1,1,1 98:19 100:16 134:14 <b>misleading</b> 131:5 <b>miss</b> 57:22 <b>misstating</b> 98:11 <b>mistake</b> 64:8 131:17 <b>moderate</b> 71:24 77:7 <b>moderator</b> 17:16 17:16 <b>modest</b> 120:21 <b>modifies</b> 70:22 <b>Momah</b> 28:3 <b>moment</b> 2:22 8:5 33:1 90:9 96:2 113:6 <b>moments</b> 98:25 <b>money</b> 43:18 62:4 63:14 108:17 112:19 114:16 <b>monitor</b> 48:23 <b>months</b> 6:19 7:18 16:4,5 28:13 30:4 47:12 49:21 60:3 87:21 97:2 113:10 <b>month-long</b> 91:2 <b>more</b> 9:22 19:6,21 20:17 24:20 29:7 29:17 32:1 37:11 37:12 43:16 44:18,19 46:6 50:24 63:16 64:16 68:11,19 72:5,6 78:8,10 80:3,10 85:6 87:8 89:6 92:8 95:10 104:13 106:20 107:14 107:20 111:10 111:23 116:14 119:7 120:12 122:14 129:11 <b>morning</b> 2:9 7:2,4 10:20,21 12:2 13:14 71:22 78:6 121:8 <b>mosquito</b> 131:10 <b>most</b> 3:15 9:11 18:5,7 19:11 25:15 26:2 29:2 29:7 31:18,19 38:2 44:8 46:25	49:18,18,19,19 55:25 58:15,25 62:10 66:5 67:10 77:25 78:14 79:14 102:14 118:5 119:1 132:6 <b>mostly</b> 103:22 107:5 <b>motion</b> 50:6 73:5,6 92:20 110:3,10 110:18,19 111:6 112:1 116:5,19 116:24 117:11 117:17 119:3,8 119:13,22 120:25 <b>motions</b> 73:9 95:14 108:11,23 110:24 111:1,1,8 111:25 113:21 119:23,24,24,25 120:1,3 121:3 <b>Motor</b> 64:20 <b>mouth</b> 52:21 <b>move</b> 7:24 33:5 56:17 73:1 91:24 94:6 103:1 115:22 122:5 134:12 <b>moved</b> 6:12 <b>movement</b> 8:10 <b>moving</b> 10:18 118:3,4,12 <b>much</b> 6:5 10:14 19:20 20:17,19 21:15,19,19 23:4 30:24 37:11,12 44:9,10,11,12 46:5 47:6 54:8 63:19,21 64:16 65:4,11 66:21 73:21 78:23 80:1 81:24 91:14 94:18 96:17 103:24 106:11 133:14 <b>multiple</b> 35:24 <b>multiplies</b> 20:3 <b>mundane</b> 20:2 <b>music</b> 41:1 <b>must</b> 8:20 18:18 44:12 55:18 125:9 <b>Myers</b> 22:12 25:22 <b>myself</b> 61:18 85:22 89:4 <b>M-o-m-a</b> 28:3 <hr/> <b>N</b> <hr/> <b>nail</b> 28:25 <b>nailed</b> 28:20 <b>name</b> 37:5 71:23 93:17,18,19 <b>named</b> 4:10 87:23 <b>names</b> 4:12 123:7	123:10 <b>Naporano</b> 5:12 <b>narrow</b> 24:20 37:8 37:9 <b>narrowing</b> 109:3 <b>narrowly</b> 36:8 <b>nation</b> 9:22 <b>national</b> 4:19 9:1,8 <b>nationwide</b> 6:19 7:14 <b>nation's</b> 127:9,16 <b>natural</b> 80:18 <b>nature</b> 31:22 88:3 90:2 97:11 <b>near</b> 33:17 67:11 <b>nearline</b> 23:21 <b>near-line</b> 42:21 <b>necessarily</b> 75:1 88:19 106:25 107:13 125:23 <b>necessary</b> 16:15 <b>need</b> 2:20 4:13 8:17 9:21 10:5 18:6 19:9 22:15 22:16 24:6,9,16 24:17 25:1 26:24 27:4 28:9 29:3 31:24 37:10 41:6 41:10,11 43:22 51:3,4,7 53:8,21 54:10,13 55:24 57:4 60:7 61:25 62:8 65:15 82:15 89:11,16,24 116:11,14,23,25 116:25 117:16 121:12 122:6 134:10 <b>needs</b> 29:1 53:22 <b>negligence</b> 32:16 <b>negligent</b> 32:23 <b>negotiating</b> 107:16 <b>neither</b> 74:17 <b>nervous</b> 79:8 80:17 <b>nervousness</b> 80:17 <b>net</b> 36:16 <b>neutral</b> 42:1 <b>never</b> 18:1 39:6 41:12,12,12,12 48:19 56:7 70:15 79:1 84:18 86:12 86:20 113:19 114:19 <b>new</b> 1:1,6,18 2:20 2:23 3:8,24 4:9 5:10,19,23 11:19 13:16 18:15,24 22:11 24:11 27:3 27:3,16 31:11 32:8 35:14 56:1 56:2,4 59:22 63:4 68:4 69:5 71:4,17 73:8 110:17 122:8,22 128:20
--	---	--	---	---



<b>Newark</b> 12:5	<b>NOVs</b> 115:16	47:13 88:17	<b>open-door</b> 4:1	67:14 71:8 75:19
<b>Newsweek</b> 112:10	<b>number</b> 4:3 18:3	117:25	<b>Opera</b> 66:8	76:12 78:8 86:4
<b>next</b> 4:9 9:9,14	35:10 40:8 42:17	<b>OJP.USDOJ.G...</b>	<b>operate</b> 120:5	88:1,4,7,23
21:12 25:23 26:6	51:6 62:9 65:9	126:24	<b>operating</b> 127:18	90:16 95:25
27:5 49:23 59:22	65:17 69:1 71:3	<b>okay</b> 23:14 33:4	127:20	104:14 105:19
69:2 78:6 103:1	72:11 73:18	75:25 119:13	<b>opinion</b> 24:16	112:25 129:15
134:7	84:10 106:25	<b>old</b> 20:8 36:9	27:11 30:9 64:22	131:13
<b>nice</b> 24:18 27:8	108:8 114:5	59:23 78:3 85:22	66:24 67:16,25	<b>others</b> 9:19 20:14
31:4 59:24	129:12 132:5	<b>once</b> 85:13 93:1,1	68:19 69:2,3,4,8	80:4 83:8 120:21
126:12	<b>numbers</b> 127:5	<b>one</b> 4:12 5:3 7:11	70:21 96:10,13	120:21 121:12
<b>nicely</b> 57:2	<b>O</b>	8:25,25 9:5	96:16,23 108:2	132:23
<b>nine</b> 16:4 96:11	<b>oath</b> 47:17	10:17 12:8,24	126:12,13,15	<b>otherwise</b> 34:10
<b>NJPT.USCOUR...</b>	<b>objection</b> 84:5,6	21:13 23:2,6,15	<b>opinions</b> 121:24	40:14 84:21
4:4	84:21 89:18,24	28:2 29:8,12	<b>opponent</b> 35:5	106:18
<b>nod</b> 78:22	89:25	33:12 36:1 37:18	<b>opportunities</b>	<b>ought</b> 49:5 54:5
<b>none</b> 64:18 88:11	<b>objections</b> 38:16	38:4 40:24 45:17	107:2	117:11 120:23
<b>nonsense</b> 130:23	39:1 84:4,19	48:2 50:24 51:9	<b>opportunity</b> 2:25	<b>out</b> 5:8,9 6:22 19:1
<b>non-frivolous</b> 52:2	100:23	52:10 53:16	<b>oppose</b> 10:4	24:7 25:10,16
<b>non-identical</b>	<b>obligated</b> 16:19	57:12 60:15	130:20	27:2,13 28:4,10
38:11	<b>obligation</b> 14:3,11	62:12 65:9 66:5	<b>opposed</b> 25:16	28:14,15,18
<b>non-jury</b> 88:9	15:4 16:3 21:17	69:5,13 70:20	40:24 77:15	29:12,22 30:5
108:11,13 109:7	25:11 34:3 52:4	71:1,2,5 74:23	81:24 85:9 87:7	37:25 48:13
111:15,18	54:24 55:20	78:16 79:21	105:11 113:21	49:14,19 53:18
<b>non-moving</b> 118:2	<b>obligations</b> 15:15	81:23,24 82:18	118:20	53:20,23,24
<b>non-note</b> 78:19	17:5,12 60:14	83:3,23 84:10,14	<b>opposing</b> 15:21	54:18 56:9 60:7
<b>normal</b> 29:23	65:19 132:1	86:4 88:16 90:12	63:2	61:13 64:21,22
30:13 38:8 70:16	<b>observing</b> 80:15	91:2,16,21,21,21	<b>optical</b> 43:12	66:5,7,25 67:16
<b>normally</b> 120:2	80:16	96:12 97:14	<b>optimistic</b> 8:22	67:21 68:24 69:4
<b>Northern</b> 20:22	<b>obsolete</b> 11:24	98:24 102:2,7,19	<b>option</b> 25:15	70:22 75:22 78:2
<b>Norton</b> 87:23	<b>obstruction</b> 45:21	104:7,7 105:17	<b>options</b> 107:21	78:21,21 80:25
<b>notably</b> 62:10	<b>obtain</b> 122:15	105:17 106:17	<b>oral</b> 73:13 115:22	83:16 88:23
<b>notations</b> 38:15	<b>obvious</b> 9:4 15:22	111:24 112:5	115:25 116:2,9	91:21,21,21,23
<b>note</b> 58:22 72:15	<b>obviously</b> 8:9	113:4,13 114:2	116:17 117:9,16	93:4,24 94:2
74:19 76:23 78:5	18:15,23 26:24	114:14,16	117:21 118:8,10	96:12 97:11,17
78:7,19 80:21	40:17	115:19 116:10	118:25 119:2,5	99:25 101:24
81:9,13,16 83:2	<b>occasionally</b> 46:19	116:16 119:9	119:17,20 120:2	102:2,4,19
96:5 127:3	<b>occasions</b> 114:5	120:17 122:17	120:11,15,22	107:24 108:7
<b>notebooks</b> 74:24	<b>occur</b> 34:10	122:21 127:18	121:3,24,24,25	109:8 113:15,22
<b>notes</b> 48:14 64:5	106:18	127:24 128:1	<b>orange</b> 1:18 87:23	116:17 117:3,12
74:11,12,16,20	<b>October</b> 13:17	129:17 130:20	<b>order</b> 17:11 54:24	122:4 125:24
74:21,21,22 77:5	124:14	132:16 134:9	56:7 88:4 104:5	131:11
77:13,21 78:2,15	<b>off</b> 9:21 23:12	<b>ones</b> 20:14 71:4	111:7,12 119:15	<b>outline</b> 64:7,14
78:16,20 79:1,13	26:11 43:20 44:7	132:24	126:13	66:1 71:2
79:18,20 80:6,8	58:4,5 62:18	<b>one's</b> 39:14	<b>ordered</b> 65:1	<b>outrage</b> 123:4
80:8,9,12,22	79:8,19 95:11	<b>one-hand</b> 49:25	<b>orders</b> 114:9	<b>outraged</b> 123:12
81:4,6,22,24	100:18 125:12	<b>one-third</b> 128:6	<b>ordinarily</b> 21:21	<b>outset</b> 45:2
82:3,12,19,21,24	<b>offense</b> 124:20	<b>only</b> 3:17 15:10	22:23	<b>outside</b> 34:25 35:2
83:4,9,14	131:7,22	28:2,9 34:15	<b>ordinary</b> 22:1 24:3	37:22 40:9 41:1
<b>nothing</b> 8:17 32:25	<b>offenses</b> 73:20	36:4 39:19,24	24:23 25:2 43:14	41:10 42:1 48:5
33:2 107:13	128:17,18	43:20 48:9 58:18	47:21	129:1
113:20 130:12	132:20,23	60:10 62:11	<b>organization</b> 15:9	<b>outstanding</b> 12:2
<b>notice</b> 35:5 52:18	<b>offer</b> 25:15	64:19 68:9 84:10	15:10 50:23	<b>outweighed</b> 81:6
52:22 53:11,15	<b>offered</b> 68:9	96:2,8 98:17	<b>organize</b> 121:15	<b>outweighs</b> 43:23
54:14 55:19	<b>offers</b> 109:1	103:11,12 104:8	<b>organized</b> 36:1	43:24
56:10	<b>office</b> 3:5 4:10,14	105:14 115:15	74:1 115:4	<b>out-bound</b> 38:3,9
<b>notices</b> 18:10	4:19 9:6 47:24	117:16,19	<b>original</b> 39:5 61:7	<b>out-going</b> 37:25
55:25	56:6 126:23	119:11,23 133:5	<b>origins</b> 129:21	<b>over</b> 6:12 12:10
<b>notification</b> 15:15	<b>officer</b> 2:24,25	133:5	<b>other</b> 9:25 12:1	18:24 37:4,8
<b>notify</b> 15:19,21	<b>officers</b> 6:11 19:5	<b>onslaught</b> 123:13	16:4 19:14 22:8	46:22 54:17
16:3	74:2 96:7	<b>onto</b> 73:1	25:4,25 37:6	55:14 60:5,22
<b>notion</b> 72:24 97:21	<b>offices</b> 35:19	<b>Ontrack</b> 12:24	40:24 43:8 47:19	93:21 104:12
<b>notwithstanding</b>	<b>often</b> 12:12 49:10	<b>open</b> 88:20	48:11 52:12	113:9 115:9
41:24	53:20 57:19,21	<b>opened</b> 57:25	53:13 55:7,23	120:8 127:21
<b>novo</b> 122:20	111:10 121:8	<b>opening</b> 82:13	57:22 60:25	132:25
125:16,18,19	<b>oh</b> 23:14 34:3	97:9	61:13,20 63:12	<b>overall</b> 9:20 77:17
126:1,5		<b>openings</b> 81:17	65:16 66:9,14	127:21



overburdened 60:3	53:17 62:21 76:17,19 77:8 131:8 132:5	per 125:3 percent 7:15,16,20 8:25 9:23 38:24 63:16 103:5,6,12 103:13 124:9 127:11,13,14,19 127:19,21 128:7 128:9,10,11,14 128:15,16,17 129:11	81:10 82:11 85:19,21 86:19 94:10,11,25 95:15 99:1,2 117:7,9,25 Pitney 12:15 Pittsburgh 4:22 place 6:22 22:2,15 27:17 38:6 49:13 110:25 111:8,10 112:9 115:18	36:9 40:17 80:1 80:3,7 possibly 56:7 post 81:19 potentially 44:20 potentials 30:10 97:5 power 6:14 20:11 21:23 22:21 98:12 powers 132:14 PR 79:10 practical 33:16 63:22 132:3 practically 95:19 practice 8:10 12:11 72:16,19 73:5,7 85:16,20 96:10,16 97:3 98:2 99:1 107:8 110:3,10 111:9 115:24 121:22 practices 123:19 practicing 1:10 practitioners 19:8 30:15 pre 97:5 110:17 preceded 93:22 94:14 96:4 precisely 36:8 113:1 predecessor 5:12 39:6 predecessors 3:1 predict 9:24 predicting 86:18 preface 84:7 prefer 83:7 98:8 107:19 preference 82:8 prejudice 112:2 preliminary 72:20 75:19 77:6 82:17 94:7 121:23 122:3 premise 67:13 preparation 14:6 prepare 38:16 prepared 88:13 91:13 preparing 117:18 present 133:13 presentation 88:3 127:5 presentations 20:11 22:22 115:5 presented 77:11 87:11 presents 1:2 62:7 preservation 15:24 16:12,20 22:7 29:6 33:23 34:13 41:9 45:15,22 49:9 50:17,21 51:10,20,22,24
overwhelmed 11:15	15:8 26:25 37:13 41:3 79:4 96:3 97:7 104:2 120:20,24 121:17 129:20	perception 78:12 peremptory 7:12 perform 11:21 performed 61:1 perhaps 73:7 86:4 92:7 111:4 116:10 121:7 period 7:9 37:4,5,8 44:4,9 55:3 95:11 100:15 109:10	plaintiffs 46:3 plaintiffs/E 105:11 plaintiff's 91:4,11 100:11 plan 34:21,21 72:11 plate 23:7,10 play 26:19 28:9 played 75:5 players 34:17 37:5 please 3:20 4:7 13:13 71:18 pleased 3:23 5:7 pleasure 5:8 56:24 pleasures 45:18 Plough 12:21 48:19 plus 133:23 point 15:16 18:8 20:11 21:23 22:21 35:10 45:15 47:19 49:8 52:3 67:2 79:5 79:10 83:13 89:12 91:14 97:18 98:12 110:23 115:3 118:9,24 120:17 points 33:20 47:3 117:2 121:5 policies 51:5 54:23 policy 4:1 11:18 45:8 50:22 59:13 59:14,16,17,19 59:25 60:2 64:24 politely 49:6 political 106:21 Polyanic 120:18 popular 49:2 population 127:1,8 127:9,12,14 128:8 pose 74:16 posed 76:21 position 3:5 5:4 115:10 117:8 positions 4:19 possible 15:22 16:1 33:25 34:8	
overwhelming 130:9,22	parties 16:9,19 32:10 40:9 63:25 99:6 119:7 partner 12:10 71:7 114:11 partners 91:2 114:7,10 parts 34:5 35:20 35:20 101:17 102:3 party 15:20,21 30:8 40:11,12 42:6,10 66:2 70:5 109:4 118:2 118:3,12	person 21:22 22:16 40:19 47:13 49:2 54:11 56:4 60:1 79:6 123:18 personal 48:20 49:1 86:16 personnel 11:10 125:13 persons 10:4 127:22 person's 47:24 perspective 104:13 persuade 109:20 persuasive 19:9 pertains 13:11 Peter 92:21 93:10 pharmaceutical 52:6 phase 63:8 phasing 83:16 PHD 3:10 phenomenons 122:21 phone 10:22 11:15 61:17 photocopy 11:5 phrase 51:5 pick 13:3 102:19 picked 27:15,17 31:9 91:8 102:4 picking 101:17,24 113:25 piece 26:8 43:20 61:7,8 piles 36:12,12 pilot 93:22 Pisano 72:3 81:8		
own 26:8 37:21 78:11 80:23 83:3	passed 73:16,23 122:18 130:11 past 6:3 11:4 31:20 87:20 patent 115:1,3 Patriot 73:15 123:21 pay 11:23 30:24 54:8 80:3,14 paying 77:15 79:7 PC 38:1 PC-based 38:3,7 PDA 61:16,16 PEARLMAN 92:2 92:24 93:6,10 Pennsylvania 28:4 people 2:5 18:5,7 19:23,24 21:21 22:8 25:21 26:2 27:20 28:23 29:11,19 30:19 34:17 37:8,22 38:2,9 40:20,25 41:5 43:5 47:1 47:21 48:15,20 48:22,24 49:14 49:15 51:2 53:24 54:15,22 55:1,17 55:18,24 56:1,2 57:16,18,21 58:13 78:1 83:4 83:6,7 87:24 100:1 102:21 107:16 112:15 124:23 128:22 129:4 133:25 people's 18:12 49:3 52:8 56:3			
O'Malley 100:12				
<b>P</b>				
pad 80:21 pads 78:2,5 page 13:5 15:17 64:8,14 66:23 67:25 69:3 71:2 102:10 pages 69:11,15 paid 75:9 89:7 105:19 panel 10:17 12:2 19:5 56:25 71:24 71:25 74:9 88:8 90:6 92:19 94:9 105:2 110:20 113:17 129:16 134:2,9 panelists 10:17 25:25 57:3 63:13 71:14 98:2 panel's 91:17 paper 10:23,23 11:5,16 12:7 19:21 20:8,19 24:10,17,24 25:4 25:6,8,9,14,19 25:19 38:11 39:22 40:6 48:1 63:11 78:3 papers 45:23 116:10 120:10 papers? 118:19 Paper's 11:2,19 Parade 3:2 paralegal 24:25 paraphrase 109:12 park 49:22 Parliman 2:6 part 12:16 16:10 90:18 101:24,25 102:19,23,24 113:3,12 125:9 participant 90:4 participated 112:7 112:16 particular 9:24 28:14,16,25 37:8 46:22 52:9 53:4				

52:11,18 53:2 55:19 56:12 59:16 <b>preserve</b> 17:25 32:12,17 33:24 35:5 51:25 52:4 52:15 53:21 54:25 55:5 60:12 120:7 <b>preserved</b> 65:1,1 <b>preserving</b> 45:8 <b>President</b> 12:20 73:17 <b>press</b> 42:22 124:13 129:25 <b>pressure</b> 103:24 <b>pressured</b> 109:22 <b>presumably</b> 96:12 96:17 <b>presumption</b> 70:3 119:21 120:4 <b>pretrial</b> 2:24 3:3 3:24 4:3,20 19:3 104:5 111:7 114:8,9 119:15 <b>pretty</b> 6:5 21:15 24:4,18 29:14 48:1 50:2 51:12 66:22 69:15 94:18 96:17 <b>previews</b> 72:12 <b>pre-charges</b> 96:20 <b>pre-discovery</b> 19:4 <b>pre-motion</b> 73:8 <b>pre-trial</b> 111:18 <b>price</b> 10:24 <b>prices</b> 11:5 <b>prickly</b> 59:3 <b>principle</b> 20:21 21:12 132:11 <b>principles</b> 19:1 30:22 31:3,5,8 33:20 <b>print</b> 24:25,25 25:1,1 <b>printing</b> 25:16 <b>prior</b> 72:21 73:9 94:8 <b>priority</b> 7:3 8:3 34:12,14 <b>prison</b> 127:1,8,9 127:12,13,16,25 128:2,9,13 129:4 <b>prisoners</b> 127:17 <b>prisons</b> 127:15,18 127:19 <b>private</b> 19:5 <b>privilege</b> 11:21 41:21 42:7,16 45:9 71:24 <b>pro</b> 8:7,13 <b>probably</b> 18:9,12 20:20 22:2 26:12 30:1,14 52:3,14 62:2,23 86:2 88:12,22 89:6	93:25 97:15 111:10 114:24 118:13 119:23 <b>probation</b> 2:25 4:10,20 5:11 74:1 125:13 <b>probative</b> 50:12 <b>problem</b> 9:7 20:6 39:11 77:4 81:22 81:25 83:17 84:19 86:20 101:16 102:23 106:1 118:1 <b>problems</b> 50:20 95:10 <b>procedure</b> 66:16 99:5 104:23 126:17 <b>procedures</b> 16:13 16:17 <b>proceed</b> 99:7 <b>proceeded</b> 67:13 <b>process</b> 17:21 56:19 57:9,16 60:20 61:1,4,6 61:10 62:5 63:10 63:17 81:6 <b>produce</b> 24:16,17 26:1 32:23 33:9 42:18 43:2,3,8 63:12 65:2,21 70:13 <b>produced</b> 39:3,8 39:19,21 47:17 68:12,15 69:10 69:16,20,24 <b>producing</b> 16:17 39:22,23,25 42:8 66:11 <b>product</b> 52:13 56:2 80:19 <b>production</b> 11:20 11:23 12:18 16:12,13,21 22:10 24:9 25:8 37:14,19 39:17 40:8 43:15 46:14 63:8,24 67:5 <b>products</b> 52:9 <b>profession</b> 113:12 <b>professionals</b> 47:2 47:8 60:11 <b>program</b> 2:5,12 7:4 10:12 29:13 93:22 107:3,4 134:15 <b>programs</b> 8:3 34:9 107:1 126:23 <b>progressed</b> 110:23 114:10 <b>prohibiting</b> 108:13 <b>prohibits</b> 124:18 <b>projected</b> 102:7,9 <b>projects</b> 40:24 <b>prolonged</b> 8:8 <b>prompt</b> 8:1	<b>promptly</b> 120:12 <b>promulgate</b> 123:24 <b>prop</b> 61:14 <b>proper</b> 56:20 <b>properly</b> 37:23,24 42:11 59:14 60:22 61:2 <b>proportionality</b> 65:12 <b>proposition</b> 19:13 22:3 <b>Propound</b> 36:7 <b>propriety</b> 80:11 <b>prosecution</b> 18:20 <b>prosecutors</b> 46:4 <b>prospect</b> 8:22 <b>protocol</b> 44:5 50:22 <b>proud</b> 6:10 <b>prove</b> 94:20 <b>provide</b> 18:25 60:19 125:20 <b>provider</b> 40:9 <b>provides</b> 4:4 12:25 14:16 <b>provisions</b> 130:11 <b>public</b> 3:9,12 5:1 129:20 133:23 133:25 <b>published</b> 71:4,6 71:11 <b>Publishing</b> 71:7 <b>pull</b> 33:15 43:19 61:13 62:17,18 <b>pumped</b> 50:8 <b>punching</b> 50:3 <b>purpose</b> 78:2 119:16 <b>purposes</b> 29:21 43:5,6 65:24 70:17 116:18 117:24 119:12 119:12 <b>pursuant</b> 11:18 <b>pursuing</b> 4:25 <b>purview</b> 123:9 <b>put</b> 2:5 18:9 32:21 35:4 44:6 45:16 46:18 59:21 77:1 84:2 88:21 100:23 102:7 103:25 108:18 111:3,7 <b>puts</b> 52:22 <b>putting</b> 2:12 60:4	76:8,10 83:24 84:6,15,24,25 85:4,12 86:21 88:7 89:4,12,19 89:25 90:14 96:6 96:19 98:22 103:17 109:11 111:14 112:22 114:23 130:4 <b>questioning</b> 72:18 75:7 85:8 86:6 96:14 <b>questionnaires</b> 93:24 <b>questioning</b> 94:3 <b>questions</b> 12:1 22:25 41:20,22 56:15 72:8 74:16 75:10,11 77:17 83:22,23 84:8,11 84:11 85:7,16,20 85:24,25 86:2,3 86:9,12,14,16,18 87:5,12 88:2,16 89:3,8,8 90:21 91:6,7,15 92:3,5 92:5 103:10 111:13 117:1,11 121:5 124:2 <b>queue</b> 38:7 59:21 113:14 <b>quick</b> 64:4 <b>quickly</b> 52:24 66:22 121:7 124:16 <b>quite</b> 18:4 92:10 114:13,19 <b>quote</b> 123:24 130:7,24 <b>quote/unquote</b> 21:16 22:1 26:1 27:6 29:24	126:12 <b>readable</b> 36:1 40:1 40:2 44:24 <b>reading</b> 31:7 108:18 <b>ready</b> 53:12,16,16 53:18 <b>real</b> 53:22 68:2 77:5 97:19,19 107:2 108:4 122:13 <b>reality</b> 17:20 50:11 107:19 <b>realize</b> 38:2 <b>realizes</b> 122:7 <b>really</b> 6:6 18:6 19:2,17 22:10 24:1 26:23,24 27:4,21 28:8,9 29:1,14 30:10,16 31:11,12,17 33:20 37:18 44:8 45:13 46:1 47:22 48:2,6 49:14 50:4,14 51:7 52:20 54:16 57:5 59:7 62:4 63:6 64:19 67:2,4,16 68:24 70:4 73:22 75:14 78:13 85:18 88:12 115:8 116:12 121:5,12 133:19 <b>reason</b> 27:4 38:1 52:13 60:23 63:11 66:6 70:17 79:16 90:17 100:10 114:14 116:25 121:2,2 <b>reasonable</b> 36:21 37:12 52:1 77:18 102:21 <b>reasonably</b> 10:1 15:7 34:4 37:9 52:23 <b>reasons</b> 9:3 15:22 48:21 49:1 74:18 80:23 86:6 89:16 90:18 103:22 114:3 125:6,8,11 125:12,21 126:12 <b>recall</b> 6:9 77:2 87:16 98:20 <b>receive</b> 53:24 120:5 <b>received</b> 10:22 56:7 60:14 <b>recent</b> 21:8 92:24 123:13 <b>recently</b> 3:15 9:5 12:15 30:4 71:4 <b>Recess</b> 71:21 <b>recognize</b> 44:19 100:19 <b>recognized</b> 22:4,6
--	---	---	--	--

## R

**raise** 85:2  
**raised** 110:13  
**raises** 41:20,21  
**raising** 86:8  
**rank** 6:21  
**rarely** 53:14 95:20  
**rash** 132:8  
**rate** 127:23 128:20  
128:22,23  
129:10  
**rather** 40:12 60:8  
79:6 99:21  
108:18  
**reached** 115:13  
**reaching** 73:21  
**read** 14:8 24:18  
25:21 31:15  
45:23 54:5,7  
58:7 84:3 88:5  
100:6 101:10,17  
102:9 105:5  
108:15,15

## Q

**qualified** 40:15  
**qualify** 23:5  
**quality** 91:13  
**quart** 48:15  
**quarter** 32:7  
**question** 17:18  
33:14 42:10 59:5  
59:7 73:22 75:16

22:9 recognizing 33:8 recollection 77:1 78:11 79:21,22 82:20 recommend 67:19 recommended 94:5 record 23:12 61:17 64:24 100:24 116:20 recover 47:14 58:4 recovered 47:4 recovery 12:25 29:21 recycled 29:22 redistribute 55:25 reduce 9:2 62:10 reduced 7:20 124:2 reduction 106:24 107:18 reference 20:21 21:6 22:8 27:20 29:18 referenced 20:23 28:5 30:2,9,25 references 23:18 30:17 referrals 130:18 reflect 114:25 reflected 91:7 reflection 121:19 reflections 45:13 reformat 59:21 refreshed 79:21 regard 6:2 40:5 41:18,18,21,22 52:10 65:15 96:5 121:18 129:25 130:6 regarding 124:11 126:25 regards 96:14 regret 8:20,21 regrettable 9:4 regrettably 107:5 regular 110:6,22 116:4 regularly 72:4 110:14 reign 41:14 reject 126:2 rejected 64:23 68:6,16 70:7 rejecting 69:9 rejects 70:21 related 37:10 relates 13:25 14:9 25:24 relative 5:20 relatively 43:10 45:1 62:19 92:24 release 124:14 129:25 relevance 42:7	43:22 relevant 12:1 28:8 32:12 34:19 36:14 39:2 44:8 44:9,25 54:2 57:11 61:22 68:8 70:1 76:20 77:9 90:16 100:7 reliant 61:14 reluctant 107:11 rely 78:11 108:5 relying 81:23 remainder 134:14 remains 8:3,8 131:11 remand 119:25 remarks 2:15 79:16 remedy 98:14 remember 4:12 45:25 65:20 76:24 remove 34:11 render 115:20 rental 9:18 repeatedly 11:3 reply 107:11 118:4 118:6,11,18 report 6:2 8:7 63:22 127:2 reported 1:25 52:8 129:11 <b>REPORTER</b> 93:17 reports 109:13 129:3 represent 131:14 representations 68:10 representatives 11:2 130:8 representing 35:18 represents 130:25 131:12 request 25:7 33:11 36:20,23 37:11 47:12 51:13,18 67:4 requested 16:25 42:19 requests 25:12 33:7 36:7,19 37:23 38:17 65:21 66:4 70:6 require 9:17 16:9 19:24 100:25 required 16:21,23 123:20 124:21 126:6 requirement 63:5 requires 14:9 15:20 125:6,16 125:19 126:1 reserve 116:9,25 Residential 64:13 residents 127:24	128:1 resolution 107:2 107:13,21 resolved 119:13 resources 47:5 respect 85:16,20 92:12 110:9 121:15 respectfully 79:15 respond 33:11 47:11 66:3 118:11 responded 96:7 responding 70:5 118:14 response 38:22,23 39:3,7,11 130:25 responses 38:16,25 95:24 96:1 108:24 responsibilities 12:21 56:3 125:1 responsibility 56:9 124:19 responsible 4:18 43:21 53:1,6,8,9 53:10 60:1 responsive 39:5 69:11 rest 111:2 restitution 124:21 restoration 16:14 16:21 restored 42:24 43:1,1 restricting 104:23 restricts 133:17 result 66:11 88:1 93:4 resulting 131:4 results 7:7 16:25 44:10 107:15 resumes 48:13 retained 6:23 retention 11:18 59:13 64:24 reticent 94:3 retrieval 14:13 17:3 43:9 80:23 retrieve 17:25 42:3 retrieved 14:14 15:12 42:20 retrieving 44:20 return 116:4,4 120:7,13 131:4 reversed 115:17 review 11:21 14:17 17:10 33:10 42:6 62:12,16 122:20 125:15,16,17,20 126:1,5 reviewed 114:8 128:19 reviewing 17:23 128:25 rhetoric 131:11	rid 56:6 59:3,4 rider 130:19 right 12:19,23 18:14 22:24,25 23:22 50:2 55:6 71:11,22 74:7 83:22 84:8 89:20 93:10 98:13 101:10 105:8 107:24 109:19 110:24 115:18 115:20 116:20 118:17,22 124:22 rights 105:10 risk 131:24 risks 80:5 Rizman 1:25 road 8:22 robing 116:21 role 5:19,23 6:18 57:19 59:9,9 73:12 107:25 124:20 rolls 8:17 121:8 Ronald 12:4 room 48:25 80:7 82:23 100:19 116:21 122:7 123:18 root 46:1 Rosemary 46:21 round 3:18 routine 34:8 43:6 routinely 40:9 52:7 102:15 126:5 Rowe 27:8,18 31:9 68:4,20 70:21 rule 8:18 13:16,18 14:2,4,5,6,8,15 15:4,14,15,18,25 16:10,22 34:2 35:12 36:5 39:20 46:9 53:22 63:4 65:11,12,14,21 87:9,16 88:21,25 92:22 93:5 104:22 107:25 108:8 109:1 111:9 112:3,18 117:21 rules 13:10 17:12 49:4 65:11,19,22 66:15,19 70:4 100:25 ruling 90:13 93:13 rulings 76:18 run 44:3 97:2 131:24 running 122:4 runs 67:18 Rutgers 3:10 R-o-w-e 27:8  S	S 73:19 Sadona 30:15,18 31:2,8 32:4 safe 5:2 59:4 Saiber 12:12 salaries 9:18 same 9:2 20:7 31:13,13 47:9 83:6 99:2 115:10 128:11 sample 35:7 sampling 44:2,11 64:10,11 67:17 67:22 San 103:20 sanction 64:25 sanctioned 30:8 32:10 sanctions 29:16 32:9 39:12 46:10 65:25 66:2 sanction-type 22:7 Sander 17:6,14 45:5,11 48:18 Sanders 12:20 sat 114:6 satisfied 87:2 satisfy 17:11 88:4 save 26:6 62:4 63:13,16 saved 27:3 38:3 63:22 saves 29:21 109:9 saving 99:23 savings 62:24 saw 52:17 69:6 saying 27:21 38:10 68:17 113:19 118:15 says 17:6 38:25 39:2,7 47:13 59:20 64:10 66:17 67:9 105:12 scanned 43:13 scanning 25:6,16 scans 25:9 schedules 73:7 scheduling 13:11 104:3 110:14 111:11 Schering 12:21 17:6 48:19 Schlesinger 12:12 school 3:11 85:23 Science 3:8 scope 16:16 17:2 63:2 Scordo 12:14 18:17,22 23:8,14 screen 83:13 102:8 102:9 scrutinize 46:4 scrutiny 132:10 search 41:14,15 49:3 62:9
---	---	---	---	--

searchable 36:2 40:2 44:24	73:25 74:3 103:15 122:24	118:23 126:12 127:4	70:21,22,24 72:12 74:5 75:18	sources 43:8 44:13 71:3
searched 38:18,19 39:6 43:12,13	123:1,8,23 124:6 124:7,12,13	shortly 125:9,9 showed 124:7	75:21,22 77:18 79:15,18 80:3,4	south 104:16 Southern 27:13
searches 38:4 searching 44:6	126:16 131:1,4 133:3	showing 26:25 43:21 63:15	82:18 83:5,6,16 87:21 88:23 90:5	31:9 66:6,7 68:4 69:5 73:8 110:16
seat 60:21 seated 7:12 12:14	separately 40:12 separation 132:14	shows 6:6 shy 118:14	90:10,16 95:2,24 98:23 104:11	112:11 116:11 116:14,25
second 23:6 29:4 32:20 45:12	serious 54:12 62:3 seriousness 79:11	side 63:2 74:14 105:19	107:24 110:8 112:11 116:11	120:19 121:22 131:2 132:3,22
52:25 64:12 65:18 67:25	serve 57:19 65:20 served 3:4,13 4:15	sides 42:3,4 63:25 82:9 114:18	somebody 23:10 47:20 52:12 53:9	113:2 125:24 somebody's 38:14
68:16 69:19 111:11 114:16	server 21:24 23:23 38:3 57:25 58:5	sift 36:17 sight 97:8	79:20 110:12 113:2 125:24	somehow 85:2,3 88:4 98:11
114:16 118:3 122:24	58:5 servers 35:25	signed 73:17 significance 77:14	122:10 someone 15:5,12	122:10 39:13 77:1 82:21
Secondly 75:1 95:13	serves 33:11 service 3:19 5:13	significant 7:7 97:3	82:22 something 17:24	18:8,11 27:1 34:22 35:9,10
secretary 22:19 section 26:12 64:9	services 2:24 3:4 4:20 8:7 13:1	similarly 33:10 119:19	18:8,11 27:1 34:22 35:9,10	38:24 41:4,7 42:13 47:22 49:5
securities 77:20 security 9:18	serving 57:14 session 13:8,10	simple 33:19,20 43:10 51:12 54:4	50:24 51:1,11 52:22 54:11 60:7	61:11 65:9,25 88:18 92:9,14,15
41:18,19 see 3:22 18:4 21:9	set 23:19 57:2,10 111:2	simply 17:8 since 21:1 97:2	100:10 101:11 105:3 118:6,19	118:23 sometimes 29:22
30:2,17 32:7 38:24,25 44:7	settle 103:25 105:10,13,15,24	103:4 123:13 single 36:1 48:22	121:9,24 somewhat 87:2	37:17 55:17,24 92:6 98:12
46:21 49:12 56:4 57:7 58:1 65:3	106:13 109:23 114:14	50:18,18 81:22 102:2 123:18	74:24 songs 26:11	106:20 119:9 121:9,24
78:22 83:13 88:22 89:11,16	settled 7:22 settlement 104:4	sit 12:5 24:25 49:23 53:14 79:5	121:9,24 somewhere 42:25	106:20 119:9 121:9,24
102:5 115:6 126:20	107:5,16 116:18 116:22 117:4,24	101:9,10 site 21:5 30:25	74:24 songs 26:11	106:20 119:9 121:9,24
seeing 70:24 seek 5:8 33:24	119:12 seven 41:12 88:8	124:12 sites 30:7	121:9,24 somewhat 87:2	106:20 119:9 121:9,24
107:21 seeking 15:20 16:7	96:16 97:1 seventy 72:7	sits 105:23 sitting 12:9,19	74:24 songs 26:11	106:20 119:9 121:9,24
seem 65:10 66:6 78:17 120:17	several 75:9 99:15 sex 131:7,21	17:22 26:14 35:23 74:9 78:9	74:24 songs 26:11	106:20 119:9 121:9,24
seemed 85:6 seems 91:25	132:20,23 shape 34:18 97:20	83:20 88:8 89:2 situation 109:24	74:24 songs 26:11	106:20 119:9 121:9,24
seen 47:9 57:25 58:8 93:8 108:23	share 16:25 93:12 96:2 106:19	six 16:4 40:15 47:12 86:17 88:7	74:24 songs 26:11	106:20 119:9 121:9,24
selective 119:19 Senate 123:10	124:10,16 127:1 129:6 130:1	91:21 96:21 119:23 128:23	74:24 songs 26:11	106:20 119:9 121:9,24
130:12 131:18 senators 10:4	shared 40:13 42:12 129:8	119:23 128:23 skilled 120:19	74:24 songs 26:11	106:20 119:9 121:9,24
send 21:4 53:20,23 53:24,25 58:19	sharing 40:5,5 sheet 98:21 99:25	small 11:19 18:3 43:20 49:22 53:6	74:24 songs 26:11	106:20 119:9 121:9,24
95:17 113:5 sending 55:12 56:9	100:14 Sherashone 69:4	smaller 15:8 smart 76:24	74:24 songs 26:11	106:20 119:9 121:9,24
sends 40:10 senior 12:20 34:14	shift 31:14 66:19 70:15 88:15	Smith 86:24 sneaking 114:6	74:24 songs 26:11	106:20 119:9 121:9,24
35:1 41:4 114:6 114:10	shifted 31:23 37:1 68:23 70:18	snide 48:12 solution 102:22	74:24 songs 26:11	106:20 119:9 121:9,24
sense 24:21 33:21 35:13 79:10	shifting 22:5 64:17 64:19 65:6,8	some 4:2 6:2,16,17 9:21 13:24,25	74:24 songs 26:11	106:20 119:9 121:9,24
senses 80:15 sent 38:13 48:13	106:3,6,7 Shimlen 70:2,19	18:17,25,25 19:5 19:6 20:25 22:7	74:24 songs 26:11	106:20 119:9 121:9,24
113:15 123:8 sentence 126:2	shocked 133:20 shoot 131:10	22:8 23:17,18 25:25 28:1,1	74:24 songs 26:11	106:20 119:9 121:9,24
131:7 sentenced 128:6	short 60:4 94:21	29:7 30:22 31:6 32:10 33:16,19	74:24 songs 26:11	106:20 119:9 121:9,24
133:6 sentences 126:11		34:20 35:7,23 39:4 40:17 47:3	74:24 songs 26:11	106:20 119:9 121:9,24
132:9 133:24 sentencing 73:19		48:5 50:6 57:24 65:16 66:1,6	74:24 songs 26:11	106:20 119:9 121:9,24

stated 70:3 86:6 130:6	stumble 89:14	sure 14:25 18:13 23:8 24:1,14 25:12 28:8 31:10 34:22 36:25 37:23 41:2 49:17 51:14,18 54:10 55:2,14 58:6 59:25 61:4,22 85:1 87:25 93:7 106:15 108:3 112:23 115:10 116:13 129:11	taking 56:14 72:15 74:19,20,21,21 76:23 77:5 79:1 80:6,12 81:6,9 81:13,16 83:2,4 83:9 96:5 97:20	87:21 93:25 tend 29:22 tent 131:23 term 67:7 93:4 terminated 59:17 59:24 60:5 terms 58:14 78:18 80:23 109:2 115:7 131:16 test 26:19 44:3 67:18 68:21 70:23 testified 91:5 testifies 80:16 testify 46:13,16 testimony 47:16 75:4 77:18 83:13 83:15 85:9,10 87:13 111:22 112:2
statistical 6:2 93:4 93:23	subordinates 54:1	surely 9:7	talents 5:7	testifies 80:16
statistically 93:8	subpoena 51:18	surprise 26:17	talk 15:23 18:10 22:6 25:25 32:1 36:25 40:4,5 47:10 50:17 55:8 64:5,15 68:18 72:14,20,24 73:11,14 74:6 77:24 86:22	testify 46:13,16
statistics 88:23 103:4 108:5,6 126:25 127:3 128:4 129:8	subscribe 89:9	surprised 28:12 29:1	talked 64:19 70:10 85:4 96:20 112:9 112:11,12	testimony 47:16 75:4 77:18 83:13 83:15 85:9,10 87:13 111:22 112:2
status 119:12	substantial 63:24 77:6 82:19 95:11 109:9	survey 97:2	talking 33:23 39:19 41:9 58:15 59:25 61:23 65:5 65:7 67:17 104:14 105:6 112:24 119:14 132:18	Texaco 45:25
statute 106:12	substantive 72:21 75:19 94:7 96:20 119:5	suspend 34:8,9,10 54:23 55:22	talks 102:24 126:15	thank 2:10,17 3:1 3:19,21 4:7 5:14 5:15,24 10:14 17:4 18:14 32:3 33:4 45:4 56:13 56:16,24 71:13 71:20 134:2
statutory 106:6	substituting 38:23	suspicion 114:6	tangible 123:1	thankful 81:21
stay 7:25	sub-section 15:18	sustain 89:18 122:16	tape 43:20 44:4,5 58:8,9 75:3	thanksgiving 5:12
stayed 86:9 89:15	sub-topic 72:17	sustained 84:19,21	taper 79:19	thanks 3:18 12:6 13:2 18:22 63:21 71:14 129:14
stealth 130:14	success 120:25	sustaining 89:23 89:25	tapes 23:24 29:20 43:17 58:25 62:8 62:19 65:2 69:22 69:25	that/Es 52:14 95:20 120:4
steno 78:2	successful 8:10,10	swell 129:13	target 9:1	their 3:1 11:3 18:7 30:16,25 32:5 35:5 40:22 44:23 48:9,11,11,14 53:25 57:10 68:12 74:23 77:17 78:5 79:8 80:15 85:2 89:25 93:17 97:11,16 98:10 99:16 100:20 102:11 102:12 108:1,2 113:9 114:20 116:16 118:19 120:20 121:15 123:4 125:6 129:21
step 27:5 45:12 59:15 91:17 101:6	successfully 69:14	symposium 103:20 112:8,9,16	task 33:18 36:2 78:23	theirs 3:1 11:3 18:7 30:16,25 32:5 35:5 40:22 44:23 48:9,11,11,14 53:25 57:10 68:12 74:23 77:17 78:5 79:8 80:15 85:2 89:25 93:17 97:11,16 98:10 99:16 100:20 102:11 102:12 108:1,2 113:9 114:20 116:16 118:19 120:20 121:15 123:4 125:6 129:21
Stewart 45:24	sudden 88:17	Syok 105:16	team 34:23,24 40:16	theoretically 87:1 95:18
still 43:1 73:13 75:21 82:25 83:14 98:24 107:12 111:4 115:23	sued 10:24	system 4:5 11:14 11:25 14:13 15:3 15:6 29:19,24 35:15 39:14 66:11 88:21 104:2 105:21 106:7 108:21 109:16,18 127:16 128:13 129:4 133:23	teams 57:10	theory 89:5
stipulate 42:15	sufficient 51:17	systemically 91:18	technically 29:24 46:20	there.ö 19:25
stop 48:21,24,25 63:18 69:23	Suffolk 4:25	systems 44:21	technology 30:20 62:6,9,17	Theses 54:6
stopped 69:7	suggest 24:18 25:21 31:6,15 44:2 70:4 71:1	Szuch 12:15	telecommute 17:9	they/El! 101:10 they/Eve 106:11 thick 108:15 thing 14:24 24:6 25:12 28:2 30:21 31:25 50:19 55:23 57:12
storage 23:21,23 58:3	suggested 31:6 54:3 122:13		telecommuters 18:3	
stored 11:13 14:14 15:11 43:17	suggesting 70:14		telephone 119:7	
storing 44:23	summary 50:6 107:8,25 108:2,6 108:10,23,25 110:24 111:1,1,6 111:15 119:23 121:18		television 113:5	
story 102:25	summation 75:25 98:10 100:5 134:11		tell 2:16,21 6:13 17:17 25:5 48:15 51:6 52:19 60:2 75:3,12,15 82:11 82:11,15 84:14 84:20 85:11 86:13 89:20,22 89:24 95:16 99:22 105:13 127:3 130:13	
stowed 131:23	summations 72:25 97:22 99:10		telling 84:1,7 98:19 100:14	
straight 12:23 56:22 130:9	summer 7:15		tells 11:11 48:22	
strained 10:7	summoned 7:9		templates 58:1	
strange 80:18	sun 37:4		ten 33:17 71:19	
stranger 5:5	Sunday's 128:19			
strategic 89:16	Superior 87:17			
stray 76:13	supervisory 4:19			
strengths 120:24	supplemental 21:5			
stretching 19:16	supply 46:15			
strict 131:19	support 14:22 79:16 121:2 124:4			
strikes 114:2	suppose 52:6 86:3			
strings 19:25	supposed 114:18 124:3 126:17			
strive 115:20	Supreme 70:3 94:5 107:9			
strong 54:4 102:17 113:17 122:9	sur 118:6,18			
strongly 83:11 108:12				
studied 127:8				
studies 4:23 63:14 93:4,9				
study 103:19				
stuff 39:20 56:6				

60:25 67:14,21 68:16,20 71:1 74:23 82:10 83:2 88:19 97:8 98:17 102:20 104:7,8 117:18 129:17 134:9 <b>things</b> 31:21 53:13 55:16 61:16,18 62:10 65:6 66:9 68:5 71:17 83:9 84:10 87:21 88:1 92:6 95:25 97:13 113:13 <b>think</b> 5:2 7:3 15:17 15:23 17:18 18:3 18:8,9 19:1,3,12 19:15,22 20:15 20:20,23 21:7,10 21:12,14 22:3,13 22:14,15 23:3,16 24:4,6 25:15 26:18,25 27:20 30:14,25 31:8 32:14 41:10 42:20 44:15,18 44:22 46:23 47:19,20 49:5,12 49:14,15,21 50:5 50:18,22 51:1,5 51:7,20,23 52:3 52:25 53:8 54:1 54:21 55:16,23 56:11 57:5,12 59:10 63:19 67:14 69:7,23 77:4 79:2,3,15 79:25 81:6 82:10 83:2,5,16 85:23 87:7 88:12,19,21 89:13 90:1,18,19 90:21 92:12,16 95:18 96:23 97:8 97:14 99:5,20 100:7,14,25 102:13,21 103:23 104:7 106:8,22 107:4 107:19 108:13 108:16 109:7,13 110:5,11,21 112:15 113:7,16 114:24 115:15 115:19 116:2,10 116:12,15 117:6 117:16 118:25 119:15,18,21 120:22 121:1 122:4 123:17 129:7 132:3 <b>thinking</b> 88:12 89:3 131:13,15 <b>third</b> 12:10 32:25 42:9 68:20 75:2 95:15 111:11 <b>Thirteen</b> 96:11	105:20 <b>thirty</b> 7:15 <b>Thompson</b> 7:1 21:9 30:6 74:15 <b>Thompson's</b> 7:19 <b>though</b> 9:4 76:22 82:24 83:12 87:19 90:11,20 101:16 105:20 106:9 117:14 <b>thought</b> 19:8 86:19 96:11 102:22 113:23 <b>thoughts</b> 33:16,19 56:11 95:22 <b>thousands</b> 36:16 <b>threat</b> 52:2 88:14 <b>three</b> 15:17 27:12 36:7 47:7,8,10 66:20 78:16 79:22 91:22 96:23 104:18 121:25 127:10 134:13 <b>three-day</b> 86:16 <b>three-page</b> 125:8 125:12,21 <b>through</b> 4:15 11:10 13:23 25:9 34:15 36:17 41:14,15 57:9 62:24 66:21 70:20 72:18 83:24 88:12 94:4 98:21 102:11,11 104:1 107:1 114:10 <b>throughout</b> 9:22 18:19 61:9 63:10 <b>throw</b> 113:22 <b>throwing</b> 58:14 <b>thrown</b> 29:22 <b>thumb</b> 50:4 <b>tie</b> 99:16 <b>ties</b> 125:1 <b>time</b> 3:25 6:9,10 6:16,20 8:16,20 8:23 18:11 26:6 28:11 34:8 37:9 40:22 41:9 43:19 44:9,10,18 47:15 53:14 56:9 57:8 63:19,20 66:21 69:6 74:15 75:14 75:15 77:25 81:2 91:17 95:11 104:15 108:14 108:16,21 109:10 111:20 117:18 121:8 122:5 127:7 132:1 <b>times</b> 69:17 75:13 78:25 86:23 95:8 115:11 117:22 128:20,21,22,23	<b>timetable</b> 110:25 <b>today</b> 2:6 3:24 8:6 21:6 32:5 104:16 112:14,20 119:4 <b>together</b> 2:5,8,13 6:7,13 14:8 30:21 33:16 <b>told</b> 10:23 11:6 78:4,10 95:1 125:22 <b>Tom</b> 3:15,18 <b>tomorrow</b> 32:5 <b>ton</b> 20:5,6 <b>tool</b> 73:13 115:23 117:23 <b>top</b> 8:3 34:12,13 <b>topic</b> 7:6,20 19:7 25:23 27:19 37:11 44:15 96:3 <b>topics</b> 19:6 72:11 74:5 86:4 <b>tossed</b> 75:22 <b>total</b> 6:12 128:16 <b>touches</b> 123:17 <b>touching</b> 34:19 <b>toward</b> 65:18 <b>trace</b> 61:7 <b>track</b> 27:23 90:16 108:6 114:11 <b>tradition</b> 66:15 <b>traditional</b> 2:14 10:18 <b>traditionally</b> 112:21 <b>trained</b> 51:2 125:13,24 <b>transaction</b> 20:3 48:1,10 <b>transcript</b> 80:24 83:1 <b>transfer</b> 17:7 120:1 <b>transferred</b> 18:1 <b>translator</b> 57:14 57:20 59:9 <b>trash</b> 42:23,24,25 <b>treasure</b> 49:13 <b>treated</b> 10:7 <b>treatises</b> 71:5 <b>tremble</b> 114:25 <b>tremendous</b> 43:18 43:19 63:14 77:12 133:7 <b>Trenton</b> 3:7,8 74:10 76:3,4 <b>triable</b> 109:8 <b>trial</b> 72:22 76:16 79:17 81:20 86:5 86:22 91:3,18 92:19 93:25 94:8 94:12 103:13,20 105:11 106:10 106:11,18 107:14 109:12 109:17 110:19 112:8,25 113:2,3	113:3,4,8,18 114:3,4,15,18,20 115:3 119:14,14 <b>trials</b> 73:2 88:9 103:2,6,8,11 104:15,18 106:16,25 107:18 108:1,9 109:15 111:15 112:5 <b>tricky</b> 50:2 52:16 <b>tried</b> 30:21 87:6 92:2 114:12,19 114:25 <b>trigger</b> 51:10,14 51:19,22,24 52:11,14 <b>trouble</b> 29:15 40:21 <b>troubling</b> 29:17 30:11 <b>trove</b> 49:13 <b>trucks</b> 113:21 <b>true</b> 49:17 88:13 90:25 91:20 108:3 <b>truly</b> 73:2 <b>truth</b> 106:9 <b>truthful</b> 39:9 <b>try</b> 33:18 67:21 79:25 85:23,24 88:15,20 94:20 104:9 105:10 109:9 113:15 115:1,8 <b>trying</b> 133:18 <b>turn</b> 10:12 24:24 <b>turned</b> 106:7 <b>turning</b> 72:5 <b>turnover</b> 56:1 <b>TV</b> 113:9 <b>Twain</b> 109:12 <b>twelve</b> 3:6 94:1 <b>twenty</b> 7:20 9:22 13:5 96:22 <b>TWENTY-EIG...</b> 1:4 <b>Twenty-two</b> 91:6 <b>twice</b> 93:1 <b>two</b> 10:25 12:9,16 13:5 20:15 32:6 34:1,5 35:10 71:4 78:16 79:21 84:10 88:16 89:5 91:22 96:4,12 97:17 104:20 112:5 115:16,20 120:6 124:21 127:3 129:7 131:7 <b>two-page</b> 118:16 <b>type</b> 16:6 22:5 65:16 98:23 131:24 132:10 <b>types</b> 58:10 77:8 104:24 120:3	<b>types.ö</b> 58:21 <b>typical</b> 54:7 <b>typically</b> 38:11 <hr/> <b>U</b> <b>U</b> 73:19 <b>ultimate</b> 97:6 <b>ultimately</b> 77:10 77:14 <b>unbelievable</b> 20:18 <b>uncommon</b> 56:4 <b>unconsidered</b> 131:13 <b>under</b> 6:25 15:18 17:12,12 41:12 43:2,7 47:17 54:24,24 65:19 65:21 66:18 72:17,23 74:3 96:25 104:22 122:20 128:7 131:23 <b>undercurrent</b> 108:7 <b>undergone</b> 127:10 <b>undermining</b> 124:5 <b>understand</b> 15:2 15:11 22:15 54:15,22 55:4,14 58:15,17,18 61:23 87:10 92:13 104:6 109:17 <b>understanding</b> 51:3 93:7 107:10 <b>understands</b> 54:11 <b>undertake</b> 49:6 117:4 <b>undertaking</b> 104:6 <b>under-utilized</b> 107:4 <b>undue</b> 70:8 <b>unduly</b> 70:13 <b>unfavorable</b> 96:12 96:17 <b>unfortunately</b> 59:5 <b>uniformity</b> 80:1,6 <b>uniformly</b> 81:21 94:4 <b>unilaterally</b> 98:7 <b>uninformed</b> 49:20 50:13 <b>United</b> 1:5 107:10 125:5 126:25 127:22 129:24 <b>universe</b> 61:24 62:6,14 <b>University</b> 3:10 4:21,24,24,25 <b>unjustified</b> 109:5 <b>unless</b> 54:16 89:9 106:13 <b>unlikely</b> 68:7 84:14 <b>unquote</b> 123:25
---	---	---	---	--

unskilled 129:5	31:13	90:24 99:7,12	114:17,25 115:4	wish 75:6
until 30:3 55:3	very 2:7 3:23 4:12	101:17 108:15	118:13 120:25	wished 133:10,11
70:24 97:18	5:2,6 6:18 8:9,9	114:19 116:6,13	121:10 123:2	133:12
100:8	8:14 10:14,21	116:16 117:3	133:19,21	witness 75:4 76:21
unused 7:8	13:21,23 14:15	118:7 124:16	WEM 23:10	77:15 80:9,10,16
upgraded 11:14	16:5,11 18:2	129:16 132:16	went 29:12 30:7	81:2 84:6,15,17
upside 106:7	19:24 20:16	134:2	70:11 78:12 88:3	85:10,13,13 86:9
urge 8:12 10:3	21:10,10,13	wanted 5:25 69:22	94:4 103:13	87:14 91:5,12
use 17:8 18:7 26:9	24:16 30:10	82:9 86:25	104:15 123:21	105:17,17,20,21
29:18,19,23	32:21 36:21	102:10 118:24	127:14	witnesses 22:24
48:20 54:9 64:3	38:17 40:20 41:2	wants 43:16	were 7:16 28:25	72:18 74:17 75:2
65:11 80:24	44:15 46:4,4	122:24	31:10 38:18 56:9	75:7 79:21,23
82:19 85:3 93:5	49:6 50:12 52:16	warehousing	86:8 88:13 90:14	80:14 96:15
98:12 100:6,8	54:12 57:2 59:3	133:25	90:15 91:6 93:23	108:18 111:4
101:11 116:17	60:10 63:2,7,21	warn 34:7	94:1,2 95:4	witnessÆ 87:13
119:3	69:8 74:11 79:20	Washington 4:20	102:4 104:13	woke 7:19
used 7:9,11 14:22	80:13,22 83:11	5:17,21 9:9	113:18 124:5	Wolfson 72:2 82:1
22:1 35:24 69:14	86:15 91:3,6,6	134:6	127:18,20,24	82:4,6 90:7,8
70:16 78:13 99:4	92:4,4,16 94:2	wasn't 48:18 68:10	128:1 131:2,21	98:3,4,17 99:23
useful 71:3 73:13	94:15,21 99:5,15	133:14	133:3,6	101:13,15,22
81:13,14 92:4,8	100:2 102:6	wasof 50:5	weren't 80:9	115:24 116:1
92:16,18 115:23	104:11 109:1,16	waste 108:14,20	104:14,17,20	118:13,18,23
117:6,23 119:11	113:16 114:17	111:20	116:10	WOLIN 106:1
using 30:12 49:1	115:20 116:15	watching 75:2	West 1:18 87:23	women 127:25
52:13 60:24	116:24 117:6	way 26:8 29:2	we'll 7:25 14:7	wonder 49:10,17
115:5 131:9	118:23 119:16	34:15,18 46:18	68:18 73:11,14	50:10 86:7
USSC 124:12	120:22,25	59:1 60:9,15	74:6 98:21	wonderful 2:12
usual 2:11 102:20	124:16 127:4	62:20 63:6 67:22	we're 7:24 10:18	35:8 126:15
usually 22:19	129:8,9	78:4,18 80:16	29:6 32:7 48:5	word 20:10 21:23
27:22 34:20 48:3	Vice 12:20	83:6 85:24 86:18	55:4 65:2,7	22:21 27:21,22
111:2 115:21	victim 73:20	99:7 100:25	71:17 72:14,20	27:23 30:3 52:21
116:21 121:25	video-taped	102:22 106:14	72:23 73:1 74:5	62:15 97:25
utility 67:8	122:23	110:2 118:20	74:19 76:16	98:16 100:13
utilization 6:25 8:2	video-taping	131:21	91:22 95:15	words 44:6
95:23	126:11	ways 51:6	112:24 113:19	work 9:23 17:7
utter 111:20	view 42:17 45:20	weak 117:2	116:22 122:4	18:7 20:19 34:11
U.S 9:8 73:25	67:2 109:5,21	weakened 130:11	131:15	37:21 40:23
122:16 123:7,23	122:9 123:15	wealth 4:17	we've 7:23 33:22	75:21 79:7 113:6
124:12,12 127:7	views 116:17	wearing 113:11	60:3,4,4 75:8	133:11
127:24 128:1,8	vigorous 6:25	website 4:1 126:24	104:10 108:22	workable 88:22
128:20	vigorously 10:4	week 9:9 34:1	WeÆll 33:5	worked 2:6 8:14
	violate 56:7	104:19 112:9	weÆre 32:8	37:16
V	visual 115:6	116:22 119:9	106:22	working 5:22
vacation 28:24	voice 61:18 106:23	120:13 121:25	weÆve 6:22	Works 71:11
vagaries 107:14	voicing 76:17	129:23 134:7	119:13	world 19:21
valuable 109:1	voluminous 11:12	weeks 34:1 104:15	whatsoever 77:14	worrier 50:5
valuable 109:1	67:4,23	120:6	wheel 50:9	worse 47:8
value 59:10 109:6	voluntarily 42:17	weight 78:10	while 9:24 15:24	worth 105:14
Van 105:16	42:18	Weinstein 122:22	40:19 91:19	write 35:7 111:24
vanishing 103:20	voluntary 8:13,19	126:11	Whipple 2:11	112:1
112:8 114:3,3	vote 130:9	welcome 2:1 3:17	white 12:8 124:22	writers 120:20,22
variety 74:18		12:19	128:11	writing 50:23 51:2
various 35:22	W	well 3:1,11,14 4:12	whole 20:12 21:24	84:2 101:5
58:21 63:14	waited 51:12	4:24 5:1,9 11:22	23:25 29:9 38:25	written 28:7,21
125:25	waiver 42:15	14:3,19 17:14	60:15 101:18,19	38:15 59:19 71:8
vast 62:6	want 31:20 33:10	21:5 22:19 24:14	101:20 102:1,18	87:12 100:5,22
vendor 31:25	36:18,18,20,20	25:5,18 27:10	102:20 105:21	102:13 121:24
vendors 25:14,15	38:13 41:6 43:16	31:7 33:13 35:2	117:18	123:3 125:21
30:20	48:6 53:14,18	36:11 39:16	whoÆll 41:5	wrong 64:10 90:15
venting 50:15	54:20 59:25	45:11 48:18	widely 53:20,23	91:20
venue 134:13	61:14,22,22	55:11,11 56:22	widespread 103:23	wrote 24:15
verdict 98:21	63:18 66:20	59:24 60:2,11	Widget 47:25	
99:25 100:14	74:10 75:4 76:25	63:9 73:12 74:13	48:10	X
115:11,12,21	76:25 77:1 81:3	75:11 88:5 89:2	wildest 130:15	XYZ 22:18
verdicts 85:5	83:22 85:24,25	90:5 95:4 98:17	willing 99:8	
version 31:1	86:1 89:13 90:17	101:20 107:9	winds 113:2	Y
versus 23:16 24:10				

<b>Yeah</b> 101:2 112:23	<b>10.4</b> 128:7	<b>3</b> 30:3,9
<b>year</b> 6:3,8,15 8:23	<b>100</b> 69:11,16	<b>30</b> 62:8 126:14
9:3,15 11:14	<b>110</b> 127:24	133:16
13:17 32:21 48:7	<b>12</b> 105:20 109:1	<b>30th</b> 123:22
64:23 93:21	<b>12/31/2002</b> 127:17	<b>300,000</b> 105:6
95:25 107:25	128:3	<b>33</b> 127:20
123:22 126:25	<b>135</b> 102:10	<b>35</b> 67:25 69:3
127:7,21 129:4	<b>14</b> 128:21	<b>357</b> 130:10
<b>years</b> 3:6 5:13 6:23	<b>143</b> 128:1	<b>37</b> 46:9
11:4 26:15 27:14	<b>15</b> 71:18 96:15,17	<b>39</b> 128:5
39:14 51:11	<b>150,000</b> 105:6	
74:17 92:25	<b>16</b> 14:4,6 15:25	<b>4</b>
99:15 104:13,20	16:22 34:2 36:5	<b>4,400</b> 9:21
115:9,14 127:10	39:20 127:19	<b>4.1</b> 103:13
128:5,15 133:16	<b>16th</b> 6:21	<b>4.2</b> 127:12 129:11
<b>Yep</b> 104:17	<b>163,528</b> 127:16	<b>400</b> 130:12
<b>yesterday</b> 17:17	129:12	<b>400,000</b> 105:6
38:21	<b>18</b> 60:3 74:17	<b>437</b> 24:13
<b>York</b> 68:4 69:5	<b>18.3</b> 124:9	<b>45</b> 100:16 103:6
73:8 110:17	<b>180</b> 123:22	<b>450</b> 69:15
122:22 128:20	<b>1976</b> 103:4	<b>48</b> 64:14 128:16
<b>young</b> 51:11	<b>1987</b> 133:2	
113:14	<b>1989</b> 133:2	<b>5</b>
<b>you/Ere</b> 90:1	<b>1991</b> 124:9	<b>5.8</b> 124:9
	<b>1995</b> 128:14,15	<b>50</b> 63:16
<b>Z</b>	<b>2</b>	<b>51</b> 64:8
<b>zero-sum</b> 114:15	<b>2</b> 15:18	<b>56</b> 107:25 108:8
<b>Zooba</b> 27:11,11,18	<b>2,166,260</b> 127:22	112:19 113:21
30:3,9 31:10	<b>2.4</b> 127:14 128:9	<b>58</b> 130:10
68:19 69:4 70:7	128:10	<b>6</b>
70:19	<b>2.6</b> 127:11	<b>6</b> 86:8
<b>ô</b>	<b>20</b> 51:11 128:5	<b>600,000</b> 129:4
<b>ô</b> 105:13	133:16	<b>61</b> 128:14,14
<b>ôconclusionô</b> 64:9	<b>20-year</b> 37:4	
<b>ôdo</b> 102:1	<b>200</b> 62:7	<b>7</b>
<b>ôIf</b> 89:4	<b>2001</b> 124:9 128:14	<b>7.9</b> 6:19
<b>ôIs</b> 118:15	128:16	<b>702</b> 112:3
<b>ôMay</b> 118:16	<b>2002</b> 20:22 127:7	<b>75</b> 103:5
<b>ôNo.ô</b> 118:15	127:20,21	
<b>ôOkay</b> 98:19	129:12	<b>8</b>
<b>ôreply</b> 19:23	<b>2003</b> 6:5 31:5	<b>8,000</b> 6:12
<b>ôsubstantially</b>	73:18 103:12	<b>9</b>
124:1	124:14	<b>93</b> 21:9 30:6
<b>ôSure</b> 58:19	<b>2004</b> 1:19 31:5	<b>94</b> 6:22
<b>ôThanks</b> 19:25	126:14	<b>95</b> 38:24 54:6
<b>ôWell</b> 59:19	<b>205</b> 24:13	<b>98</b> 130:12
<b>ôWhat</b> 60:12	<b>21</b> 128:17	
<b>ôyour</b> 82:20	<b>219</b> 21:9 30:6	
<b>û</b>	126:13,14	
<b>ûô</b> 118:16	<b>25</b> 1:19 104:13	
<b>\$</b>	115:14 128:8,11	
<b>\$100,000</b> 106:6	130:12	
<b>\$50,000</b> 105:14	<b>26</b> 14:5 15:15	
106:2	65:11,14 91:5	
<b>\$95,000</b> 105:12,15	105:16	
106:2	<b>26G</b> 65:21	
<b>1</b>	<b>26.1</b> 35:12	
<b>1.2</b> 128:10	<b>26.1.B</b> 14:9	
<b>1.7</b> 103:12	<b>26.1.D</b> 14:8	
<b>1:8-C</b> 87:10	<b>26.20</b> 14:9	
<b>10-year</b> 37:5	<b>262</b> 126:13,14	
	<b>28</b> 66:23	
	<b>29</b> 128:9,12	
	<b>3</b>	