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4 THE ASSOCIATION OF THE FEDERAL BAR
5 OF THE STATE OF NEW JERSEY
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8 PRESENTS
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13 THE
14 THIRTIETH ANNUAL
15 UNITED STATES JUDICIAL CONFERENCE
16 FOR THE DISCTRICT OF NEW JERSEY
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22 MAYFAIR FARMS
23 WEST ORANGE, NEW JERSEY
24 MARCH 23, 2006

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1	CHIEF JUDGE BROWN: This is the	1	members of the Bar, officers of our court, as our
2	Thirtieth Annual program. Some of us can remember	2	partners, we shall continue to provide the prompt,
3	when we started this organization and how it grew.	3	efficient justice to all who appear before us.
4	We have had, this year, two successful	4	Thank you very much.
5	programs on cross-examination. We have a stellar	5	(Applause.)
6	program today, as you can see from your program, and	6	MR. HAYDEN: Good morning, everybody.
7	I think all of this is quite an achievement for John	7	My name is Joe Hayden, and I have the privilege of
8	Lacey and for Joe Hayden and for the entire	8	being the president this year of the Association of
9	organization.	9	the Federal Bar.
10	This is a time to look back and to look	10	You will note from the crowd we already
11	ahead, both for the Association and for our court.	11	had earlier in the day that, according to our
12	The Association, as I say, has grown to	12	executive director, Ginny Whipple, we have the largest
13	become the intellectual organization of those who	13	number of paid tickets and paid registrants that we
14	practice before our court. Our court, as you know,	14	have had in the 30 years of the Association of the
15	is the second oldest in the nation, one of the	15	Federal Bar. I think that is a tribute to our
16	thirteen original courts founded under the Judiciary	16	program coordinator, John Lacey, who I would like to
17	Act of 1789. Our first member of the court, of	17	give a hand to.
18	course, was initiated by George Washington.	18	(Applause.)
19	Our two centuries of history will soon	19	I would also like to express my
20	go to press, as I think Ron Hedges will tell you in a	20	appreciation to Ginny Whipple, who has been the
21	moment, because a book, "This Honorable Court," which	21	executive director of this organization for many
22	details the history of our court over the past 200	22	years, and without her experience and without her
23	plus years, has been completed after the author,	23	skill and style, we would not be able to run these
24	Professor Lender, the chairman of the history	24	programs so seamlessly. Although she's not here,
25	department of Kean University, has spent five years	25	she's outside working, we can express our
3		5	
1	researching and writing.	1	appreciation to her.
2	The book is a rarity. It is a	2	(Applause.)
3	comprehensive history, published by a major	3	One mechanical detail. This program has
4	publisher, Rutgers University, and received top peer	4	been approved for ICLE credit for both
5	reviews by numerous academics. Those of us who are	5	Pennsylvania and New York, two and a half credits.
6	subjects eagerly await reading.	6	Anybody who would like that credit, go outside to the
7	Don Robinson and our Historical Society	7	front desk and you will be able to pick up the
8	will commemorate the event at the annual gala on	8	necessary card.
9	May 10th at the ceremonial courtroom in Newark.	9	We are going to start our program in a
10	This past year has been a good one for	10	second, but a very important part of the federal
11	our court, and the future will be even better.	11	program and the federal experience is the Historical
12	As you know, we have struggled with four	12	Society of the District Court for the District of New
13	vacancies of up to three years in duration. This	13	Jersey. We are going to have Judge Hedges give us a
14	makes us a court with, "a judicial emergency,"	14	very brief report of the activities of our Historical
15	according to the Administrative Office.	15	Society.
16	Nonetheless, our judicial officers and	16	(Applause.)
17	staff have worked exceptionally hard to provide the	17	JUDGE HEDGES: Very brief report.
18	just, speedy and inexpensive determination of every	18	Chief Judge Brown told you that the
19	action which the Federal Rules of Civil Procedure	19	Historical Society is going to be sponsoring the
20	enunciate as our primary mission.	20	annual gala. That will be May 10th in the ceremonial
21	Although stretched thin on three	21	courtroom in Newark. It is going to center around,
22	quarters of our authorized judicial strength, we did	22	finally, the publication of the history of our court.
23	not fall far behind. Today we have a full complement	23	As you walked in, you saw a dust jacket
24	of able nominees. We anticipate their is speedy	24	outside. It is the statute of Lady Justice that is
25	confirmation, and thereafter, together with the	25	sitting in the old courthouse.

2 (Pages 2 to 5)

1	We have done a lot this year with the	1	As you will see from our panelists, I
2	Historical Society other than having a book finally	2	think it is all three. It is not because of my
3	come to press. It has been five years in the making.	3	efforts, but solely because of the panelists' efforts
4	Having read it with several other	4	this morning.
5	people, I think anyone who decides to get it, you are	5	Without any further delay -- first of
6	going to enjoy it. It's a very detailed history, the	6	all, I want to thank Joe Hayden for coming up with a
7	most detailed history of any District Court written	7	number of the subjects that we will be discussing
8	in the United States. There aren't many histories of	8	today. He was an integral part of this, and made a
9	District Courts.	9	number of the important phone calls that helped us to
10	On your table you are going to see a	10	obtain the presence of the terrific panelists that we
11	packet of materials that starts with "Nunc Pro Tunc,"	11	will have not only on this panel before you, but on
12	which is our newsletter which is available to anyone	12	our next panel as well.
13	who is a member. And if you go down towards the last	13	I also want to echo Joe's comments
14	two pages, there is an order form for Rutgers	14	concerning Ginny Whipple. She has done a phenomenal
15	University Press, and also something just as	15	job in helping to coordinate this event. I can't
16	important, there is a membership application for the	16	express my appreciation enough.
17	Historical Society.	17	Having said that, I want to make one
18	I would encourage all of you here to	18	personal comment to someone who since last year has
19	become members. We have done a lot this year. We	19	come from the other side of the bench to our side,
20	sent a number of people to the United States Supreme	20	the lawyers' side, and that is Jack Bissell.
21	Court for swearing in. In December we sponsored for	21	For many years Judge Bissell served as
22	the second time a swearing in of new attorneys in	22	the chief of this district. He handled it with
23	Essex County.	23	aplomb, with charm, with grace. He maintained a
24	You all know about the lounges that are	24	balanced lifestyle throughout, and we are so very
25	available for lawyers in our three courthouses, and	25	happy to have him now in private practice, and I'm
	7		9
1	for members of the Society, last fall sponsored a	1	sure he will be doing a terrific job handling
2	reception with judges in Newark. We are looking	2	mediations and arbitrations.
3	forward to doing all that again this year.	3	Again, welcome as a private litigant,
4	One last thing. There is a little	4	Judge Bissell.
5	brochure at the table for you if you're interested in	5	(Applause.)
6	the Historical Society. If you open it up, you are	6	MR. LACEY: Now I want to turn to this
7	going to see on the inside our statute of Lady	7	morning's panel.
8	Justice. You are going to see above it a mural.	8	We have put together a program on the
9	This was one of four murals commissioned	9	do's and don'ts of trying a civil case before our
10	in the 1930s that should have been put in the Post	10	District Court. It has become all the more important
11	Office Building in Newark. One of our former judges	11	in recent years, because, as many of you know, many
12	objected to it and, unfortunately, it was destroyed.	12	of our cases are being resolved through mediation and
13	We are now in the process, hopefully,	13	arbitration, and even seasoned litigators are finding
14	of restoring this, the other	14	that they have to refresh themselves as they go to
15	mural and perhaps two more so they can be put on	15	try cases before these well respected courts that we
16	display someplace for the benefit of the bench and	16	have here in the District of New Jersey.
17	the Bar.	17	To my left, our first panelist,
18	Thank you for your time and support. I	18	Magistrate Judge Patty Shwartz. I've known Patty
19	hope to see you all in May.	19	for --
20	(Applause.)	20	JUDGE SHWARTZ: Some time.
21	MR. LACEY: Thank you, Judge Hedges.	21	MR. LACEY: Longer than she would like
22	Good morning, everyone.	22	to admit.
23	I was given three instructions last fall	23	Patty started out as an Assistant U.S.
24	by Joe Hayden, and that was to make this program fun,	24	Attorney, and she left that office to join the bench,
25	provocative and educational.	25	having attained the level of chief of the criminal
			3 (Pages 6 to 9)

1 division of the United States Attorney's office.
2 Judge Patty Shwartz.
3 (Applause.)
4 To Judge Shwartz' left is Judge Chesler.
5 Judge Chesler is another product of the prosecution
6 team, having served on the federal Organized Crime
7 Task Force for many years, having served as a
8 United States Magistrate Judge, and now having joined
9 and served with distinction on the federal bench as a
10 United States District Court judge.
11 (Applause.)
12 Our next panelist, Judge Linares.
13 I had the pleasure of trying a six-week
14 trial before Judge Linares in the fall. I have had
15 no prior experience with him -- well, with one
16 exception.
17 I have four boys, all of whom are
18 baseball players. They play, among others, some
19 teams from up in the Caldwells.
20 When I walked into Judge Linares
21 courtroom, I recognized the face as being someone who
22 was a rather competitive fellow, who was rather
23 active in challenging some of the refs or some of the
24 umpires in some of the baseball games that I
25 attended.

1 in introducing is Jeff Moryan, who happens to be my
2 partner, and we got to know each other a lot better,
3 probably than either of us wanted to, during six
4 weeks before Judge Linares in the fall. You never
5 know your partners until you try a case with them.
6 Jeff Moryan handled himself so well, we
7 had two very distinct styles that seemed to
8 complement one another, and I found him to be just a
9 terrific, terrific trial lawyer, as I knew he had
10 been from reputation, then I saw with my own eyes,
11 and he did a great job.
12 Jeff Moryan.
13 (Applause.)
14 Dennis Drasco of the law firm of Lum
15 Positan Drasco. He has been a seasoned litigator
16 within our Federal Bar for many, many years. He is
17 the former chair of the litigation section of the
18 ABA. He handles mostly business litigation, and
19 again, I have experience with Dennis, and he's just a
20 terrific litigator and a fine panelist, and I thank
21 you for being here today.
22 Dennis Drasco.
23 (Applause.)
24 MR. LACEY: Linda Wong of the law firm
25 of Wong Fleming. She has made her reputation as a

11
1 Seeing that, and recalling his
2 activities on the baseball field, I thought for sure
3 that he would not mind litigants challenging some of
4 his rulings in his court.
5 I found soon thereafter that that was
6 not the case, and we got along terrifically for a
7 terrific six weeks.
8 Judge Linares, I must also say, has,
9 again with six weeks of experience with many, many
10 issues before him, handled motions quickly, with a
11 thorough -- and I'll say in all cases, I may have had
12 exception with one or two -- but in all cases made
13 the absolutely correct ruling, and he just handled
14 himself from the bench with such grace that it was a
15 pleasure to try a case before him.
16 Judge Katherine Sweeney Hayden. She has
17 such grace, intelligence, and she's able to control a
18 courtroom from the bench without being anything other
19 than being herself. It is another courtroom where
20 you walk in and you just see that you are to act in a
21 civil fashion and nothing else is acceptable.
22 She has proven over and over throughout
23 the years, with each passing day that you see her,
24 that Joe Hayden married up.
25 Our next panelist I take great pleasure

13
1 seasoned plaintiff's lawyer in the employment field,
2 although she also does a tremendous amount of work on
3 behalf of employers, and many seasoned litigators, as
4 well as many employers, find themselves trying to
5 curry her favor, hoping she does not bring one of
6 those lawsuits against one of their clients or
7 against the corporation.
8 Linda Wong.
9 (Applause.)
10 MR LACEY: Starting with our theme now of the do's
11 and don'ts of trying a case in the federal courts.
12 I want to start with Magistrate judge
13 Shwartz.
14 We begin many of our cases -- can
15 everyone hear me?
16 We begin many of our cases with the
17 applicant moving in court for emergent relief, often
18 by an order to show cause, and they are seeking
19 restraints.
20 You have participated, usually are going
21 to be there at the outset, often getting a call from
22 one of the judges.
23 And in terms of advising our litigants
24 on making these applications for temporary restraints
25 before a court, how important is it that they come in

4 (Pages 10 to 13)

1 completely prepared, even though they may have only
2 been assigned the case, or received the case a few
3 days earlier?

4 JUDGE SHWARTZ: Well, the case would
5 originally be presented to one of the District
6 Judges, and the District Judge, of course, would
7 determine whether they are going to issue ex parte
8 restraint or require some notice to be provided.

9 After that event, the District Judge may
10 send the party up to one of the Magistrate Judges to
11 help create an expedited schedule for discovery so
12 that they can prepare for a preliminary injunction
13 hearing.

14 Unfortunately, it is the defendant who
15 is coming in saying, I received this file 45 minutes
16 before I came to Newark. We usually look to the
17 plaintiff to determine the real necessity to get the
18 defendant up to speed in order to be prepared to
19 collect whatever information they need for the
20 preliminary injunction hearing.

21 MR. LACEY: Judge Hayden, when litigants
22 come before you with an emergent application, very
23 often in the context of a corporation claiming that
24 someone is stealing their proprietary information,
25 someone has infringed on their trademark, or a former

1 golly, this is so sudden, or if there has been a
2 series of chats in which this became not just a
3 hypothetical horror, but something that was going to
4 happen.

5 One of the issues that we really do ask,
6 are folks just elbowing other folks out of the way?

7 That's what we do.

8 I'm concentrating on the question of the
9 initial moment when the attorney comes in armed with
10 paperwork and it is sent to chambers.

11 MR. LACEY: Let's assume that Jeff
12 Moryan has come before you with such an application.

13 JUDGE HAYDEN: Which he has.

14 MR. LACEY: Which he has.

15 And he has his client in, and like all
16 good attorneys in these situations, he is given some
17 notice, maybe only a half hour or an hour, to his
18 adversary.

19 So now you have two attorneys in court
20 before you and you see that it's a valid application
21 that seems to have some merit, at least on the face
22 of the papers, are you going to hold a trial-like
23 hearing?

24 JUDGE HAYDEN: I'm going to find out
25 whether or not these lawyers need to put some witness

15
1 employee has now joined a competitor and is working
2 in violation of a non-compete agreement, and they are
3 claiming that they need immediate, temporary
4 injunctive relief, how open are you to those
5 applications?

6 JUDGE HAYDEN: Well, I think the first
7 thing that we try to do is, in looking over the
8 papers, determine if there are immediate restraints
9 that are being sought in the application or merely a
10 schedule that puts everybody ahead of the pack.

11 Once having decided that, we calm down a
12 little bit, because if it is just a schedule, then
13 the real issue is, is this a strategy to get to the
14 top of the motion list or is there a genuine
15 emergency?

16 MR. LACEY: So you actually recognize
17 that strategy in some of our cases, is that right?

18 JUDGE HAYDEN: It has occurred to me.

19 Then do you call for the other side to
20 come in?

21 One of the key questions that I ask,
22 assuming the other side does come in, which I would
23 want, except in the most extraordinary circumstances,
24 if restraints are being requested, one of the first
25 things to find out is if the defendant can say, oh,

17
1 testimony on. Assuming that I believe witness
2 testimony will help me make a better decision, and we
3 have some time, I'll strongly suggest that they do
4 that, and work in an hour, hour-and-a-half within the
5 next couple of days for that possibility.

6 It's throwing down the gauntlet. It is
7 turning the case from a paper case to a witness
8 prepped case, and very often that can help you
9 resolve things, phoniness gets stripped away in the
10 face of terror, and things kind of resolve themselves
11 a little bit better.

12 I really believe I can make a better
13 decision, again and again -- I was just talking with
14 Jeff about the case that we had, and secrets get
15 exposed at the end that you just don't know, and all
16 of the screaming in the world that somebody has
17 assets, you can find that out pretty quickly after
18 20 minutes of a quick examination.

19 MR. LACEY: Judge Linares, what are you
20 looking for when you have seen, at least on the face
21 of the papers, that they seem to have merit and that
22 perhaps a temporary injunction is appropriate?

23 JUDGE LINARES: Well, I want to back up
24 a second, because of some of the practical matters
25 you ought to take into account.

5 (Pages 14 to 17)

1	Number one, let's look at the papers and	1	the facts. It's hard for me to tell you that. I
2	make sure that this is in fact a matter, as Katherine	2	don't grant them often. You really have to convince
3	said, where you need an injunction or a temporary --	3	me you need them, and you have to convince me that
4	where there is really going to be irreparable harm.	4	there will be irreparable harm that can't be dealt
5	We are going to look at that stuff.	5	with at a future date, some harm that is so
6	Timing is an issue. You got to	6	irreparable and so immediate that you do need to do
7	understand that when this TRO is scheduled, often in	7	the restraint right now.
8	the afternoon, three o'clock in the afternoon, the	8	I don't give them often. Obviously
9	end of the day, to the extent that you can control	9	everything is fact sensitive, but I don't give them
10	your timing, my suggestion to you is get to the	10	often.
11	courthouse early so we have a chance to give you a	11	MR. LACEY: The application is going to
12	thorough review.	12	say any number of things trying to show irreparable
13	Check the rules. If you're going to --	13	harm, that if we don't get this injunction
14	if you're asking for temporary restraints, you have	14	immediately, we are going to suffer all of these dire
15	to look at whether or not you've given notice, or if	15	consequences.
16	you're not going to give notice, why, and set it	16	You are trying to read into that and
17	forth.	17	look behind it, I assume with common sense, to say,
18	Don't give us 50 pages to tell us the	18	is that the case, or can they get by until the
19	important things we need to know, with regard to why	19	preliminary injunction application?
20	there is no need to give notice in this particular	20	JUDGE LINARES: The first thing we do is
21	case, if you're asking for temporary restraints, what	21	read the papers. My clerk and I will sit there and
22	is unusual about your case that maybe notice	22	read the papers. We'll see -- I assume you're
23	shouldn't be required, whether or not -- give all	23	talking about a case where you're asking for
24	this stuff right away.	24	temporary restraints between the day you come into my
25	With regard to whether or not I would	25	court and the date we are having the hearing?
19		21	
1	have a hearing, if there is an initial application	1	MR. LACEY: Yes.
2	after I review the paperwork, I see whether or not	2	JUDGE LINARES: At that point we read
3	this is a matter that is appropriate in fact for	3	the paperwork right away. See if we can identify --
4	emergent relief and whether or not notice is required	4	sometimes it's very clear, I mean, there is a history
5	or not, et cetera. Once I do that, I come on the	5	of fraud, the guy absconded, set up a fake bank
6	bench, sometimes I flesh out whatever information I	6	account, whatever it may be.
7	need from the lawyer on the spot.	7	Oftentimes it is not easy. If I'm not
8	If I'm satisfied, at that point I sign	8	convinced, I come out on the bench, I pepper him with
9	the order or I schedule a hearing.	9	questions as to what I think may be the issue, and if
10	There are some times that, as the return	10	I'm still not convinced, I'll tell him I need
11	date -- which I guess is what you're asking me -- I	11	witnesses to convince me, and I'll set up a time for
12	do take witnesses.	12	them to come back either later on that day or the
13	As Katherine said, sometimes the	13	next day or whatever.
14	affidavits give enough, and oftentimes can be	14	MR. LACEY: Judge Chesler, how about in
15	resolved by way of oral argument, that most times I	15	your court? How often are you going to grant that
16	will have a hearing with witnesses.	16	temporary restraining order, and if you're not
17	MR. LACEY: Out of all the applications	17	satisfied that the standard has been met, will you at
18	you receive, I think many federal practitioners have	18	that initial hearing, or that initial application,
19	a tendency to put that order to show cause -- that	19	have any witness testimony?
20	form of order to show cause will include temporary	20	JUDGE CHESLER: It's a rarity that I'm
21	restraints in it.	21	going to have witness testimony at an initial
22	How often are you going to grant that	22	hearing. Certainly, for example, with an ex parte
23	temporary restraint pending a hearing on the	23	application, that's not going to occur. They are
24	preliminary injunction?	24	either going to make a compelling demonstration that
25	JUDGE LINARES: Obviously it depends on	25	they have in fact demonstrated extraordinary

6 (Pages 18 to 21)

1	circumstances at that point in time, or those	1	sits back and says, do I want to go to a preliminary
2	temporary restraints are going to be denied.	2	injunction hearing where I potentially am going to
3	Normally you are going to in fact insist	3	get a full resolution on the merits as a practical
4	on them contacting opposing counsel in connection	4	matter with an appealable order without having my i's
5	with it and you are going to have some informal type	5	dotted and t's crossed?
6	of proceeding.	6	Now you end up frequently with the
7	At that point you are going to determine	7	parties agreeing to a discovery schedule, which is in
8	whether or not there are real issues which have to be	8	fact a realistic one and which will permit the
9	dealt with.	9	development of a full and complete record.
10	At that point usually you got to set a	10	MR. LACEY: Now let's assume it's the
11	schedule. But even then, absent a demonstration that	11	converse. You have issued the TRO, again with the
12	there are really compelling circumstances, the	12	other side claiming that they are going to suffer
13	likelihood of preliminary restraints being granted at	13	substantial harm if this remains in place without a
14	that point in time are usually slim.	14	relatively short turn around on the preliminary
15	That doesn't mean never. What it really	15	injunction hearing.
16	means is that the application has to in fact engage	16	You are going to grant that application
17	in a realistic consideration of the factors which the	17	for a short turn around and maybe some discovery?
18	court is going to be considering, and that you have	18	JUDGE CHESLER: Me? Yes.
19	to show that, for example, a few days hiatus before	19	MR. LACEY: Judge Linares?
20	you can have some sort of real adversary proceeding	20	JUDGE LINARES: Yes.
21	is going to in fact cause irreparable harm.	21	MR. LACEY: And let's assume now we have
22	The fact is, I think all of my	22	the preliminary injunction hearing. Judge Hayden, at
23	colleagues have found this, the average application	23	this point let's assume some discovery has taken
24	for temporary restraining order does not involve any	24	place, are you going to hold a trial?
25	imminent risk of injury. And not infrequently the	25	JUDGE HAYDEN: Well, we had that happen.

	23		25
1	applicants are also seeking through those temporary	1	I'm blessed -- I've been blessed since I came to the
2	restraints the functional equivalent of a full and	2	federal bench with wonderful magistrates, first
3	total victory on the merits.	3	Judge Hedges and now Judge Schwartz. I find in that
4	MR. LACEY: And you find a problem with	4	hearing I'm working very hand in glove with the
5	that?	5	Magistrate Judge.
6	JUDGE CHESLER: On that type of notice,	6	Very often you start a hearing and you
7	yes.	7	hit a bump because things are still evolving. We are
8	MR. LACEY: Assuming that someone has at	8	talking about a hearing in the infancy of the case.
9	least made a good faith application for temporary	9	I'm from the school that honestly
10	restraints, and you happen to deny it, but you are	10	believes that a case that begins bad stays bad.
11	wondering whether perhaps there may be some	11	I think that orders to show cause begin
12	substantial harm that will befall the applicant if	12	badly, because someone comes in gored, and that
13	you don't grant those restraints, will you give a --	13	hearing is where they are gored, and I think it is
14	I assume you all would say you would give a short	14	going to be incumbent upon the judge, some obligation
15	return date, at least for a preliminary injunction	15	to try to get this even again.
16	application.	16	I will begin it, but I don't know that
17	Would that be fair to say?	17	we have really ever gone the full three acts with all
18	JUDGE LINARES: Yes.	18	the solos and arias.
19	MR. LACEY: You may even order some	19	Something happens and we get through the
20	discovery in the interim, some expedited discovery,	20	worst part of it, and that's where the Magistrate
21	assuming it's a good faith application?	21	Judge can be very, very helpful in kind of taking it
22	JUDGE CHESLER: Yes, but I would add	22	back again for some purpose or another. It is kind
23	something here.	23	of just an organic thing. It happens more often than
24	What I have discovered is once I don't	24	not.
25	sign those immediate restraints, the applicant now	25	MR. LACEY: So you are going to refer

7 (Pages 22 to 25)

1	some of the matters that arise before you to the	1	are likely to find when they go before any of these
2	Magistrate Judge --	2	fine panelists?
3	JUDGE HAYDEN: For more discovery, for	3	MR. MORYAN: What we discussed is what
4	more something or other.	4	you just heard, which is probably the best thing that
5	MR. LACEY: Maybe to calm the situation	5	you're going to get the first day you're there, is a
6	a little bit?	6	two or three-day order asking everybody to come back,
7	JUDGE HAYDEN: Oh, yeah.	7	and then most of the times the judges will sit down
8	JUDGE LINARES: Once I have issued the	8	and suggest to you that there might be a way to
9	original order with return dates and briefing	9	resolve this short of what you're asking for.
10	schedules, once we get the paperwork in and we have a	10	In the matter that I had before
11	chance to read it, we have the parties come in before	11	Judge Hayden, that three-day order turned into the
12	the hearing and we try to resolve it.	12	fourth day, fifth day, the sixth day, the seventh
13	Oftentimes it's amazing to me, when I	13	day. We had a lot of conferences, and actually
14	was in practice, and it's amazing to me still, that	14	there was testimony taken, but it got resolved short
15	lawyers don't call each other more, because	15	of issuing a permanent injunction.
16	oftentimes I bring them back into court, the return	16	I found in this district, what I try to
17	date is next week, and whatever it is that was the	17	tell my clients, is you may think that you have a
18	subject matter of the TRO gets resolved by way of	18	right to shutting somebody down or with a preliminary
19	some kind of an order that we can agree on, a consent	19	injunction right out of the box, you're not going to
20	order with regard to restraints, with regard to	20	get it.
21	whatever it may be. It kind of forces everybody to	21	The best you're going to get is the
22	come in. That's at least one thing I do.	22	intention of the judge. The best you're going to get
23	If it doesn't get resolved at that	23	is somebody coming in with a lawyer two or three days
24	point, I find out if there are going to be discovery	24	later, and maybe you'll get the order that you want
25	issues that are going to need to be addressed by	25	if you make a good showing.
27		29	
1	Judge Hedges. If that's the case, then I send them	1	We try to take a deep breath and we try
2	down that day to see him, and that gets addressed at	2	to make our papers as perfect as we can make them. I
3	that point.	3	suggest to them that our affidavits be as factual as
4	This is a practical component. A lot of	4	we can, as detailed as we can, and non-argumentative
5	times the lawyers don't explore these things. When	5	Most judges do not like to see a
6	it comes in by way of TRO, because, as Katherine	6	verified complaint or an affidavit that has argument
7	says, somebody gets a step ahead of everybody, they	7	in it. They respect when you come in with very good
8	want to keep that advantage, not realizing that	8	papers.
9	advantage will go away the day you have the hearing.	9	As a practical matter, I do follow
10	MR. LACEY: Jeff Moryan, you brought	10	Judge Linares' suggestion, which is I get to the
11	many of these applications, usually in the context of	11	courthouse 15 minutes before the clerk's office
12	a franchiser or franchisee relationship going wrong,	12	opens, and I try to get the attention of a judge that
13	usually with the franchisee breaching the franchise	13	will give me attention the whole day.
14	agreement, and in doing so now operating possibly	14	I tell them that I'm staying in the
15	under the franchiser's label, infringing its	15	hallway until I get some form of an order. I'm not
16	trademark, using its products without paying for	16	going back to my office.
17	them, that it is now operating as a particular type	17	I give three extra copies so that every
18	of gas station, for example, that your client now	18	law clerk in chambers has one. Law clerks love to
19	wants to shut down.	19	have their own copies of papers and the judges love
20	The corporate parent also is coming to	20	to have his or her own copy of the papers.
21	you and saying I want this done via TRO, which would	21	I notify my adversaries ahead of time,
22	explain some of the applications going before the	22	and I always have a witness in just in case.
23	courts and ultimately being denied.	23	MR. LACEY: Yes, Judge.
24	In those situations, what are you	24	JUDGE HAYDEN: Just to follow up with
25	talking to your client about in terms of what they	25	what Jeff said, find out if your judge has a

8 (Pages 26 to 29)

1 permanent law clerk. You will find out whether you
2 are in the infancy of the law clerk's career. That's
3 why that factual and supporting stuff for a new law
4 clerk or seasoned law clerk or current law clerk is
5 very helpful.
6 MR. LACEY: Jeff, you talked about
7 bringing a witness along.
8 MR. MORYAN: Right.
9 MR. LACEY: Why are you doing that?
10 MR. MORYAN: Just in case I get
11 extraordinarily lucky and a judge will actually think
12 that I'm entitled to something immediately.
13 MR. LACEY: Hears a case that you may
14 have gotten in a day or two earlier.
15 MR. MORYAN: Hopefully more than that so
16 I can get some sleep, but, yes.
17 MR. LACEY: Now you have a witness who
18 may be testifying under oath at the commencement of a
19 case without any discovery having taken place.
20 You're going to have to live with that sworn
21 testimony for the rest of that litigation.
22 What do you do to make sure that your
23 case is not sunk?
24 MR. MORYAN: Well, you better have a
25 good witness, and you better make sure that your

1 happen, you don't know what judge you're going to be
2 assigned to before you walk into the courthouse and
3 file your papers.
4 I do know that there are judges in the
5 courthouse that did take testimony from my witnesses,
6 and there are some that looked at me and laughed, why
7 did you bring your client here? You knew you weren't
8 going to have testimony.
9 You have to be prepared for the fact
10 that a judge might say, this sounds like you might be
11 entitled to some form of restraint which might harm
12 the other side. If I give them today, I'm not going
13 to rely on your affidavit. Do you have a witness
14 here? If you don't, you may not get what you hoped
15 you would get.
16 MR. LACEY: In these cases do you
17 find the judges are encouraging settlement?
18 They make it clear.
19 MR. MORYAN: Correct.
20 MR. LACEY: Judge Hayden, will you refer
21 people to mediation?
22 JUDGE HAYDEN: At that point I don't
23 think they are ready for it. So I don't think so,
24 no, not immediately.
25 If it pops out, I might, but I don't

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1 facts are supporting the application that you want
2 and you've prepared the hell out of your witness.
3 That is no different than putting
4 somebody on the stand in front of a jury. You need
5 to prepare that witness as if the case will end that
6 day.
7 MR. LACEY: We have heard some of the
8 panelists talk about not putting on witnesses at that
9 original hearing, but nevertheless trying to cut
10 through some of the rhetoric in the papers and seeing
11 whether this is really an emergent application or
12 not.
13 There are some judges in our district
14 who will say, where is your client? Mr. So and so,
15 get up on the witness stand.
16 Then your case, Mr. Moryan, is either
17 going to fly or sink. How do you -- do you know
18 beforehand what the judge is going to do, whether
19 it's going to be one of our panelists here who is
20 going to treat it in a fashion where they try to cool
21 the situation and maybe get to some testimony down
22 the road or whether they are going to put somebody on
23 the witness stand?
24 MR. MORYAN: I don't think you know
25 before you walk into the courthouse what's going to

33
1 anticipate it will happen.
2 MR. LACEY: Judge Linares, you are
3 talking about meeting with the lawyers and trying to
4 calm a situation and suggest that, folks, let's talk
5 reasonably.
6 JUDGE LINARES: I don't refer to
7 mediation at that stage either. Katherine is
8 absolutely correct.
9 When a case starts that way, there is a
10 great deal of animosity. The emotions are running
11 too high. I don't think that's the day to do that.
12 I do encourage mediation all the time --
13 Judge Bissell is very happy, I saw Judge Wolin over
14 there -- and I do encourage mediation as much as I
15 can, and it is certainly a growing practice.
16 In the context of what we are talking
17 about now, I don't think it would be successful at
18 that point. I think the specter of having a hearing
19 before me and having to control the case at that
20 particular point is more important than getting the
21 case out to mediation.
22 MR. LACEY: Is it the experience of all
23 of you that most of these cases when they come in
24 with gangbusters, will often fizzle out within a
25 month or so?

9 (Pages 30 to 33)

1 JUDGE LINARES: Absolutely.
2 MR. LACEY: And they end up getting
3 settled.
4 In either case, it is because of the way
5 you handled it. You are directing them in a
6 particular direction very often with your comments
7 from the bench. Would that be fair to say, that you
8 are looking at these papers and perhaps making
9 preliminary rulings?
10 MR. MORYAN: May I answer that?
11 MR. LACEY: Yes. Jeff Moryan.
12 MR. MORYAN: The answer is yes.
13 JUDGE HAYDEN: Jeff is talking about a
14 David and Goliath situation.
15 One of the hardest things you ever --
16 evenly matched competitors, as it were, is not being
17 too free with what our initial perspective is,
18 because then it can aggravate the case and it won't
19 get resolved.
20 MR. LACEY: I want to move now beyond
21 the temporary restraining order applications and
22 these hearings that may or may not be held. I would
23 like to now move on to the trial and the do's and
24 don'ts of those situations.
25 Linda Wong, when are you going to start

1 that together and directing that with the litigants.
2 How important is that to the trial of the case?
3 JUDGE SHWARTZ: If it's not in the
4 order, it's not going to be heard in front of the
5 fact finder.
6 It is such an important document, it is
7 stunning that it is referred to as only one sentence
8 of Rule 16(d). Basically it commends you to prepare
9 this order in anticipation of trial with very little
10 guidance.
11 The guidance that the district offers
12 you is a format that each judge likes. The most
13 important question that you want to find out is, what
14 format would the judge like me to use?
15 In Camden they use one format. All the
16 judges use the same one.
17 As you move up the Turnpike, and, Carl
18 Poplar, we are one district, we change a little bit,
19 and the judges have different perspectives on what
20 they think is important in the order.
21 As recently as last week I had
22 experienced lawyers prepare an order and use a format
23 that was dramatically different than the district
24 judges format, and unfortunately they had to get the
25 phone call from my poor law clerk telling them they

1 your preparation for a trial before the federal
2 courts here in New Jersey?
3 MS. WONG: I prepare my case as soon as
4 the client comes in. When I have a conversation with
5 that client, I want to see what kind of case it is,
6 see whether we can win or lose the case.
7 After the conversation, but even during
8 the conversation, I'm going to find out what kind of
9 corroborating witnesses there might be, what kind of
10 documents there may be. So I'm preparing a case from
11 the very beginning when a case comes in the door,
12 right through all the motion practice and everything
13 else, right when I'm appearing before the magistrate.
14 I want to impress upon the court what
15 kind of case we have, but I'm also preparing all
16 along the way. I have to strategize, especially when
17 you are in federal court with these plaintiffs in
18 employment cases, the case is on a very fast track
19 and you have to move quickly. You have to make sure
20 all your ducks are in order at all times.
21 MR. LACEY: Magistrate Judge Schwartz, as
22 we approach the trial, there is a federal pretrial
23 order that is in some circles deemed onerous to the
24 litigants.
25 You play an integral role in putting

1 had to redo it in the proper format.
2 It is basically trying your case on
3 paper. You got to list your witnesses, and for some
4 of the judges you have to list a summary of what the
5 witnesses are going to say, you have to list your
6 exhibits, and for some of the judges you have to list
7 every evidentiary objection to every exhibit you're
8 going to offer. Literally, it's trying your case on
9 paper. You have to list every legal issue you expect
10 to raise, every in limine motion.
11 As Judge Chesler told you on another
12 panel, it takes all the surprise out of the trial
13 experience. There is no witness outside the door of
14 the courtroom.
15 JUDGE CHESLER: I said it takes all the
16 joy and spontaneity.
17 JUDGE SHWARTZ: I'm sorry, joy and
18 spontaneity.
19 That's because he hasn't tried a case
20 personally in a long time. I forgot the joy part.
21 JUDGE SHWARTZ: It is important that the
22 attorneys should enjoy the spontaneity, three a.m.
23 and you're copying your exhibits, but it's a document
24 that will help you formulate what your case is going
25 to be, and for some judges it is trying your case on

10 (Pages 34 to 37)

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p>paper.</p> <p>The way the conference is conducted depends on the Magistrate Judge. Some judges do it in the conference room. Sometimes the order will be signed, sometimes they need changes.</p> <p>I have had lawyers not understand the importance of the stipulated facts section. We have to talk a little bit about that and how the document can be used to help you at trial.</p> <p>I've actually asked lawyers to be sure they read their stipulated facts and want to agree to every sentence that is in that section for reasons that we'll talk about in a little bit.</p> <p>Some of the judges do it on the record. For that reason we are able to make some findings and give you some rulings on some of the issues that may be in the order, and you have a record contemporaneously for those findings or you have your adversary proffering certain things or giving you stipulations about how they are going to deal with their evidence at trial during the course of that proceeding.</p> <p>It's an important document to prepare. It's an important conference to be prepared for, and I think the point about preparing your case from the</p>	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p>conclusion that a large percentage of attorneys, and indeed partners who are preparing final pretrial orders, had never tried cases. I would see listed in those final pretrial orders as exhibits documents which under no conceivable view of the Federal Rules of Evidence could possibly be admissible. I would have parties offering their own expert reports as exhibits on the exhibit list and so on.</p> <p>What that told me was that I knew then the level of sophistication and ability of the attorneys I was going to be dealing with at trial, and as a Magistrate Judge, also knew the level of their education in terms of federal trial practice.</p> <p>MR. LACEY: Do you find that some cases will settle at a time in close proximity to the time when they have to prepare the pretrial order?</p> <p>JUDGE CHESLER: You know, John, there is a rumor floating around that a certain relative of yours was the person who imported the final pretrial order into this district in the first place.</p> <p>There is a further rumor floating around that that same relative, after he left the bench and went into practice, was heard to comment, who is the idiot who brought this in?</p> <p>MR. LACEY: He mentioned that to me</p>
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p style="text-align: right;">39</p> <p>time you get your file is critical, because the whole discovery process should be aimed at, what do I want to put in that order and what do I want to offer at trial.</p> <p>MR. LACEY: Judge Chesler, when in relation to the trial is the pretrial order issued?</p> <p>JUDGE CHESLER: At least my practice is I want it issued at the conclusion of discovery.</p> <p>What I discovered over the years was that until the final pretrial order was actually entered, no matter how many times you told attorneys that discovery was closed, they did not internalize it, and that it was not until there was this document which fixed what the evidence was going to be and what was covered by the parameters of discovery, which was filed, that they actually believe discovery is really over and we are now going to proceed to get to trial.</p> <p>To just follow up for a second on what Judge Schwartz said on the significance of the final pretrial order, it is also very significant, in terms of judges being able to size up the attorneys who are going to be trying cases in front of them.</p> <p>I can tell you from my review of the final pretrial orders over the years, I reached the</p>	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p style="text-align: right;">41</p> <p>several times as well.</p> <p>JUDGE CHESLER: The short answer to that, John, is, yeah. What it does is it focuses the attention of the attorneys and the clients on the fact that this is not a walk in the park, that there is really work which has to be done.</p> <p>One of the things which I always found amazing was attorneys who gleefully bombarded each other with reams of paper, who would propound interrogatories which would go on for pages and pages and pages and demand notification in response, actually putting pen to paper and telling the court and opposing counsel how they proposed to try their case.</p> <p>There is no doubt that they indeed do, and that does indeed foster the prospect of settlement.</p> <p>MR. LACEY: So you see plaintiffs demands coming down and defense offers going up?</p> <p>JUDGE CHESLER: I think that's a realistic evaluation of it, yes.</p> <p>MR. LACEY: Now, assuming that we have now filled out the pretrial order, it has a witness list, a list of all your exhibits, it talks about all the objections you're going to be making,</p>

11 (Pages 38 to 41)

1 Judge Linares, if they don't list certain objections
2 to witnesses, to an expert witness, will you allow
3 them to challenge those witnesses at trial and to
4 seek to bar them?
5 JUDGE LINARES: Well, generally the
6 answer is no, I would not allow it. I hate to say
7 that as a blanket statement, you are all lawyers out
8 there, and you know there may be situations where
9 it's a situation that is not quite covered under the
10 pretrial order, or the expert testifies in a manner
11 at trial where you can now come in and challenge it,
12 notwithstanding something that may be in the pretrial
13 order.
14 As a blanket statement, I would say,
15 generally speaking, if you have waived it in the
16 pretrial order, I'm not going to let you do it at
17 trial. I can see situations where there are
18 exceptions and I would be willing to listen to that.
19 That is different than a situation where
20 you have stipulated facts, for example, or something
21 that could be key, because obviously the whole
22 purpose, as Patty Schwartz was saying, of the pretrial
23 order was to put your adversary on notice how the
24 case will be tried on what the facts will be.
25 With regard to an objection to expert

1 and then at trial an expert for one of the parties
2 got on the witness stand, and he was a replacement
3 expert because one of the other experts in the case
4 had died in the interim, and the expert opined that
5 the vehicle had rolled over more than four times.
6 JUDGE LINARES: Those are one of those
7 situations that I was referring to before where there
8 was a stipulated set of facts.
9 In the context of that trial, it was
10 very important for the expert's opinion, on either
11 side, as to how many times the rollover had occurred
12 with regard to the design defect.
13 So in my view, when it was brought to my
14 attention -- I think it was your motion, or Jeff's, I
15 forget whose it was -- that in fact the pretrial
16 order had a stipulation of a four time rollover as
17 opposed to a five time rollover.
18 I posed a question to the adversary.
19 Is that in fact what was in the pretrial order? The
20 answer was, I'm not sure. I don't think it was
21 nefarious.
22 I think the people who were trying the
23 case had not read the pretrial order as to that
24 issue, improperly prepared their expert, improperly
25 put an undue amount of weight on that part of the

1 testimony, I think that's going to be a little more
2 fact sensitive depending how the trial progresses.
3 You prepared your case based on certain
4 assumptions, I'm not going to let the other side
5 change it in midstream.
6 It is very important that even though
7 you spent all that time preparing that pretrial
8 order, that you read it again before trial. It's
9 amazing how many times lawyers forget they stipulated
10 something at trial. A lawyer may bring it up in the
11 middle of the trial, judge, that's not an issue in
12 this case. It was stipulated. Let's look at the pre-
13 trial order. The other side doesn't know it's in
14 there.
15 Maybe it's because the lawyers who are
16 trying the cases are different than the lawyers who
17 participated in the pretrial order, but that's no
18 excuse for you. If you are the one trying the case
19 in front of me, at least read it ahead of time and
20 know what's going to be in there.
21 MR. LACEY: Judge Linares, you have
22 personal experience with that from a trial recently
23 where something like that came up, and actually the
24 parties had stipulated that a vehicle had rolled over
25 a certain number of times, I think it was four times,

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1 factual underpinning of that opinion.
2 In fact, when we looked at the pretrial
3 order, the pretrial order was very explicit as to the
4 number of rollovers involved. I struck the
5 testimony. I think my ruling -- I'm sure you thought
6 that was one of my correct rulings.
7 MR. LACEY: And well considered.
8 JUDGE LINARES: Yeah, yeah.
9 But what I did do was I struck the
10 testimony of the expert and I did an instruction for
11 the jury with regard to the fact that I was striking
12 the testimony and why.
13 Just as an aside, going off on a tangent
14 here, but this is supposed to be a practical seminar.
15 If you're going to have a thorny issue
16 that you anticipate is going to require a judicial
17 instruction in the middle of the trial in the event
18 you win a particular objection -- and it doesn't hurt
19 you to have one prepared for the judge, as a
20 suggestion -- you can say, Judge, I think that's
21 going to require -- if you rule on my motion and you
22 are going to give an instruction, here's a proposed
23 instruction, the way I think it ought to read. It
24 helps the judge a lot to put it in context.
25 Not that I'm suggesting I don't want to

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12 (Pages 42 to 45)

1 do the work, it is just that oftentimes there may be
2 something that you want included in that instruction,
3 that if the judge does it from the bench in a hurry,
4 may leave something out that is important and you may
5 be able to convince the judge that it should be
6 included.

7 Just as a practical hint, if you will.

8 MR. LACEY: The judges highlight the
9 importance of the pretrial order in listing your
10 witnesses, in making sure you have a complete witness
11 list, because if you don't have that person on your
12 witness list in the pretrial order, you will not be
13 permitted to call that person in many cases.

14 As far as exhibits, you will be barred
15 from introducing exhibits that are not in the
16 pretrial order, and lastly, and perhaps in some cases
17 it can be devastating, if you stipulated to a fact
18 and you now get to trial and introduce facts that are
19 contrary to those stipulated facts, you have an
20 instruction from the court to strike the testimony
21 and to advise the jury that they are to disregard any
22 testimony that is inconsistent with those stipulated
23 facts.

24 Fair?

25 JUDGE LINARES: Fair statement.

1 MR. DRASCO: The biggest difference in
2 trying cases in federal court as opposed to state
3 court, in civil cases, is the unanimous jury. It's a
4 huge difference.

5 I made a mistake once that I think -- I
6 still think about. I tried a long case in the
7 Southern District and we were debating how many
8 alternate jurors we would need so we would have
9 enough left to deliberate at the end of the case.

10 The judge insisted that we have nine
11 jurors at the start. Six weeks later we had nine
12 jurors at the end. I was trying the case for the
13 plaintiff, and of course I had to have a unanimous
14 jury, and it hung six to three in my favor.

15 It is important when you are selecting
16 your jury and considering how many alternates you
17 need, and they are non-designated alternates in most
18 cases, you need to realize that the burden is heavy
19 on the plaintiff's side and you got to prevail
20 unanimously on each issue.

21 MR. LACEY: Judge Linares, if you need a
22 minimum of six jurors in a civil case, and you have a
23 lengthy trial scheduled and you pick four alternates,
24 how many are going to participate in deliberations?

25 JUDGE LINARES: Stanley thinks nine

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1 MR. LACEY: Dennis Drasco.

2 MR. DRASCO: I was wondering when you
3 were going to get to me.

4 MR. LACEY: I saved the best for last.

5 The trial has begun. You are defending
6 a corporation in a business lawsuit. How is it that
7 you as a trial lawyer, as all of us aspire to do, how
8 is it that you control the courtroom?

9 MR. DRASCO: Well, I think the issue of
10 control is an issue of, really, credibility. I think
11 every lawyer aspires to control the courtroom.

12 At the outset of the case the judge
13 controls the courtroom. It's a matter of give and
14 take between the lawyers and the judge. And if you
15 have a jury, the role of a jury is important.

16 You can't try to take control right
17 away. The most important thing is to establish
18 credibility, and particularly with the judge, and
19 then that credibility will rub off on the jury.

20 MR. LACEY: Let's talk about the jury
21 right from the point of jury selection.

22 First of all, in federal court there is
23 a very, very important distinction in terms of the
24 number of jurors who must pass on a particular side
25 one way or the other. What is that?

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1 should deliberate. All ten.

2 MR. LACEY: All ten will deliberate.

3 Jeff Moryan, what does that mean to you?

4 MR. MORYAN: Clearly it decreases your
5 odds, the more people you have to convince of your
6 case.

7 One of the things that you have to think
8 about at the time of the trial, jury selection, when
9 you are thinking about jury selection, when you file
10 your complaint, you're not thinking about winning or
11 losing your case.

12 You got to start thinking about trying
13 your case the minute it walks in the door.

14 MR. LACEY: Linda Wong, how are you
15 going to control the courtroom as counsel for a
16 plaintiff who has been, allegedly, been wrongfully
17 terminated in federal court?

18 MS. WONG: I don't think of it in terms
19 necessarily of controlling the courtroom, as how am I
20 going to win this case? I want to win this case.

21 From the opening statement what I like
22 to do is I like to tell the jury, if it's a
23 constitutional case, I want to tell them that this
24 case has to do with constitutional rights, this case
25 has to do with discrimination, this case involves a

13 (Pages 46 to 49)



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<div>1 whistle blower.</div> <div>2 Juries empathize with that. The jurors</div> <div>3 have taken so much out of their personal time, from</div> <div>4 work, they might be losing money, they want a sense</div> <div>5 of purpose. They want to understand, why do I have</div> <div>6 to take all this time out to sit here two, three</div> <div>7 weeks to listen to this case.</div> <div>8 We had a six-month trial. We had jurors</div> <div>9 in a civil rights case who had to take six months out</div> <div>10 of their lives for the trial. We wanted to give them</div> <div>11 a sense of purpose for why they were there. Jurors</div> <div>12 relate to that.</div> <div>13 Another thing that I actually do to</div> <div>14 control the courtroom or try to win the case is I</div> <div>15 will put on all of the defense witnesses in my case,</div> <div>16 to the extent it makes sense, but I want to tell the</div> <div>17 story through plaintiff's witnesses and also through</div> <div>18 the defendant's witnesses as well, and talk about how</div> <div>19 the defendants have done harm to the plaintiff based</div> <div>20 upon how I want to examine them with my direct.</div> <div>21 MR. LACEY: Jeff Moryan, when you are</div> <div>22 examining one of your own witnesses, in terms of</div> <div>23 controlling the courtroom, where do you have a habit</div> <div>24 of standing while you are examining them?</div> <div>25 MR. MORYAN: If I'm allowed, and I do</div>	<div>1 from the witness during cross-examination. He was</div> <div>2 standing, towering, I would say, over this poor</div> <div>3 little fact witness who was about five-foot two</div> <div>4 sitting in the witness stand.</div> <div>5 The point is that I tell lawyers, look,</div> <div>6 you can move around the courtroom.</div> <div>7 Jeff said, as a good lawyer should,</div> <div>8 trying to find out what my idiosyncrasies were, he</div> <div>9 asked my deputy clerk, where does the judge want</div> <div>10 people to stand?</div> <div>11 I want to stand in the back of the jury</div> <div>12 box.</div> <div>13 I know that that would be okay with him.</div> <div>14 That's where he used to stand.</div> <div>15 Generally I give leeway anywhere, except</div> <div>16 during cross-examination, and even direct</div> <div>17 examination, I don't want you standing next to the</div> <div>18 witness, especially on cross. I think it can be</div> <div>19 intimidating, unfair. So I back up the lawyers and I</div> <div>20 say, look, you may have to approach the witness to</div> <div>21 show them a document, a picture, whatever it may be,</div> <div>22 but then back off to the podium or wherever you want</div> <div>23 to go.</div> <div>24 Absent that, I don't.</div> <div>25 MR. LACEY: So you did permit some</div>
<div>1 ask this before the trial starts, I stand directly</div> <div>2 behind the jury, so when my witness is staring at me,</div> <div>3 he or she will always look like he or she is looking</div> <div>4 the jury in the eye. That eye contact with the</div> <div>5 jurors, or perceived eye contact with the jurors, is</div> <div>6 very important.</div> <div>7 Some judges, especially judges that</div> <div>8 tried a lot of cases, will often allow you to do</div> <div>9 that. Some judges will say I'm not letting you go</div> <div>10 back there.</div> <div>11 Some judges will say the only place you</div> <div>12 can stand is at the podium. I don't like the podium.</div> <div>13 I think it defiles both the lawyer and the</div> <div>14 presentation.</div> <div>15 If I'm not allowed to stand behind the</div> <div>16 jury box, then I ask permission to stand at or near</div> <div>17 counsel table.</div> <div>18 MR. LACEY: Would it be fair to say,</div> <div>19 judges, that all of you allow counsel some leeway in</div> <div>20 terms of where they can question their witnesses from</div> <div>21 in your courtroom?</div> <div>22 JUDGE LINARES: I do.</div> <div>23 There is an exception, as you know. I</div> <div>24 don't like, and I think that's one of the rules you</div> <div>25 probably didn't like, but I made Mr. Lacey move back</div>	<div>1 lawyers to stand there and bend over a little bit, as</div> <div>2 long as you're asking about a document.</div> <div>3 JUDGE LINARES: Yes.</div> <div>4 JUDGE SHWARTZ: And if you're shorter</div> <div>5 than five-foot two.</div> <div>6 MR. LACEY: It was a very low, friendly</div> <div>7 tone.</div> <div>8 JUDGE LINARES: And he had a pointer in</div> <div>9 his hand, too.</div> <div>10 MR. LACEY: Judges, when I talk about</div> <div>11 lawyers controlling the courtroom, all of you were</div> <div>12 litigators. Do you have a problem with lawyers</div> <div>13 trying their cases in a particular way before you so</div> <div>14 long as they don't violate the general rules of</div> <div>15 etiquette?</div> <div>16 JUDGE HAYDEN: I'll answer that.</div> <div>17 I live with a lawyer, and he tries a lot</div> <div>18 of cases, and for my part, I'm truly in awe of just</div> <div>19 how terribly difficult trial practice is.</div> <div>20 One tip that I give everybody, no matter</div> <div>21 where you try your cases, state, federal, anywhere</div> <div>22 there is a trial going on, you have to simplify your</div> <div>23 own life. And the trial lawyers in this room who</div> <div>24 come from a kind of simpler generation know that very</div> <div>25 often they got out of bed and their clothes are laid</div>

14 (Pages 50 to 53)

14 (Pages 50 to 53)

<p>1 out for them by something called a wife and that's 2 how it had to be.</p> <p>3 For the lawyers seven, ten years out, 4 the first order of the day is dropping the kids off.</p> <p>5 To try a case in that atmosphere and 6 with that kind of pressure is absolutely, literally 7 impossible if you really want to try that case the 8 way you need to.</p> <p>9 And so I think that between family 10 responsibilities, the inexperience that a lawyer is 11 trying his first, second, third, fourth case, and the 12 demands you make on yourself, making demands on those 13 in your life who love you, is critical to being able 14 to put forth the kind of performance that we are kind 15 of throwing out there.</p> <p>16 Linda mentioned a six-month trial and 17 the impact on the jurors. There was an impact on 18 you.</p> <p>19 MS. WONG: Yes, for sure.</p> <p>20 JUDGE HAYDEN: There just has to be a 21 general acceptance by everyone in your life that this 22 is the most important thing going on in the family, 23 in the world.</p> <p>24 We tell that to the jurors, they are 25 making this happen. I would think that's really the</p>	<p>1 I use it defensively where I know my adversary has 2 some, and I think I will be looked upon as not the 3 equal of my adversary if I don't. To keep it simple, 4 sometimes you're better off without it.</p> <p>5 MR. LACEY: Jeff Moryan, in the new 6 courthouse in Newark, how important is it to be aware 7 of where you are at all times, and equally important, 8 where others are around you?</p> <p>9 MR. MORYAN: This goes back to the 10 question of not only controlling the courtroom, but 11 controlling your own actions. You should always be 12 aware of where you are and what you are doing. Do 13 not -- and this really is going to people who don't 14 try a lot of cases, or haven't tried a lot of cases 15 yet -- do not underestimate the fact that you are on 16 parade, in a sense. The jury is watching you and 17 watching how you react to things. They are watching 18 how you present to them.</p> <p>19 If the jury decides that they don't like 20 Moryan, or they don't like Drasco, or they don't like 21 Wong, it is going to be very hard for any of those to 22 win the case.</p> <p>23 Understand what you're doing, and what 24 you're doing is being watched.</p> <p>25 Know where your adversary is. I was in</p>
<p>1 most important thing that I would want to put across. 2 If you're able to control your life, it 3 really helps to control the courtroom a little bit 4 better.</p> <p>5 MR. LACEY: Dennis Drasco.</p> <p>6 In terms of use of technology during the 7 course of a trial, what is your position on that?</p> <p>8 MR. DRASCO: Judge Hayden was on a panel 9 on cross-examination in the fall. One of the topics 10 was the use of demonstrative evidence during 11 cross-examination.</p> <p>12 Neal Mullin had that topic. Neal stood 13 up, and we all expected he was going to have some 14 props and some technology. His first comment was, "I 15 am a big lump of demonstrative evidence."</p> <p>16 Sometimes the high tech stuff isn't 17 necessary. Sometimes your best technology and your 18 best props is yourself and the simple things.</p> <p>19 I've been on a lot of programs with the 20 use of technology. I'm not convinced it always 21 works. Judges in our district will allow the lawyers 22 to use whatever they want, as long as they have 23 advance notice and the other side has an opportunity 24 to challenge whether the technology is correct.</p> <p>25 I use it where I think it is necessary.</p>	<p>1 the audience of a trial that my partner tried a very 2 long time ago, and he was summing up and his 3 adversary was doing some things at counsel table 4 which I felt were crossing the line, that were 5 unethical.</p> <p>6 My partner didn't see it. Nobody drew 7 the attention of the judge to it. It had an effect 8 on the jury. They stopped listening to the person 9 who was standing there and they were watching these 10 antics at counsel table.</p> <p>11 There were motions made after trial, but 12 since the judge didn't see it, he kind of -- and 13 there were two affidavits submitted, me and 14 plaintiff's counsel in my case, because we were there 15 waiting for the summation to finish. I thought my 16 firm's client and my partner got a raw deal.</p> <p>17 I'm not a big believer in stories and 18 all that, but I will tell you one thing about knowing 19 where you are and potentially making a mistake.</p> <p>20 In the trial that we had in November and 21 December, we had a viewing. We viewed the automobile 22 that was involved in the accident. It was outside 23 the courthouse, and everybody went down, three 24 lawyers from the defense, the lawyers on the 25 plaintiff's side, the jurors, court clerks, deputy</p>

15 (Pages 54 to 57)

1	clerks, the officers in the courtroom, the judge,	1	might occur, not all that different from being a
2	paralegals, everybody. There was a lot of people	2	school teacher, which I spent five years doing before
3	down there.	3	I became a lawyer. Kids will test a teacher.
4	We were down there for a while. It had	4	Lawyers, to a certain degree, test the judge. If
5	been tow trucked in by a tow truck. Judge Linares	5	they are familiar with the judge, they don't bother
6	dismissed the jury and kept counsel and the parties	6	testing the judge anymore.
7	around.	7	Just the overall demeanor and the way in
8	When the jury was out of earshot, the	8	which the court approaches the attorneys and the
9	judge and counsel discussed a couple of issues and	9	trial conveys a message about what will be accepted,
10	then we were breaking up.	10	what won't be accepted, what will work, what won't
11	I turned to the tow truck operator,	11	work, and generally it worked for me.
12	whose name happened to be Jose, and said, "Okay,	12	MR. LACEY: Judge Schwartz, how do you
13	Jose, you can go now."	13	handle that issue? Very often you see it in terms of
14	Needless to say, defense counsel turned	14	discovery disputes, but even leading up to the trial,
15	around, as did the judge, with whiplash like necks,	15	that will lay the groundwork for what happens at that
16	and the paralegal said, "No, his name is Jose, too."	16	trial.
17	Defense counsel realized I wasn't	17	JUDGE SHWARTZ: Usually a picky little,
18	fraternizing with the judge, and they left.	18	whoa, whoa, whoa, we are not going there. That
19	As we were going into the courthouse, I	19	usually gets us right back on track.
20	heard," Mr. Moryan, you came very close to being	20	Sometimes it will be a candid delivery
21	thrown in jail."	21	if you want the court to help you, and help you
22	You need to know where you are and what	22	expeditiously, tell us what the issue is. Remember,
23	you are doing at all times.	23	the purpose of the case is to help the client and we
24	MR. LACEY: Judges, let me deal with an	24	can come back to what we are here for.
25	issue that is close to everyone in the room and is	25	MR. LACEY: Judge Linares, how do you
59		61	
1	especially important before every court in our	1	deal with the issue of contentiousness between
2	district, but especially in your courts.	2	counsel at trial?
3	Many of us are involved in	3	JUDGE LINARES: I take a very active
4	extraordinarily important matters for our firm, for	4	role in that, as you know. Part of what you should
5	our clients, and very often with very high stakes.	5	do, if you practice in the District Court, find out
6	Some matter of contentiousness may develop between	6	the idiosyncrasies of your own judges. Go ahead of
7	counsel on opposite sides. That can spill over,	7	time and call and find out what his or her needs or
8	obviously, into the trial. How is it that each of	8	desires are ahead of time.
9	you will handle the issue of civility among and	9	With regard to this issue, part of what
10	between counsel in your courts?	10	I do in preparation for trial is that I do have a
11	Judge Hayden?	11	pretrial conference on a day that we are not picking
12	JUDGE HAYDEN: Candy, food. We have a	12	a jury, on the day -- before the trial begins, I hear
13	candy jar in the corner where the sidebar takes	13	motions in limine, I go over the voir dire, and I
14	place.	14	give very strict instructions to the lawyers at that
15	Just generally, sort of talk about like	15	time about how I expect them to behave.
16	homey issues, and often we take a break and take the	16	Bickering between the lawyers and acting
17	temperature down. That's how I get by.	17	unprofessionally in the courtroom will not be
18	MR. LACEY: Judge Chesler?	18	permitted, or in my presence.
19	JUDGE CHESLER: I don't know that I have	19	I tell them about things that are
20	any particular techniques.	20	important with regard to those issues, such as
21	What I discovered is that by and large	21	speaking objections that will not be tolerated. If I
22	attorneys have a very good sense of what judges they	22	make a ruling, I'm not going to change my mind, you
23	are in front of and very quickly get a feel for the	23	know, for you to keep talking, and how they are to
24	people of the court.	24	respond to the court. All that I set forth at the
25	There may be a bit of testing which	25	beginning.

16 (Pages 58 to 61)

1 I tell them that I'm going to take very
2 seriously if any of those rules are violated. I
3 never have a problem. Personally, I love lawyers. I
4 think it's a great profession. The lawyers that
5 appear before me have always been wonderful.
6 I'm sure the day will come. I will be
7 challenged on that by some lawyers in front of me,
8 but so far, having that little talk has worked great.
9 MR. LACEY: I'm a witness to it. I saw
10 ten years of litigation ending with a six-week trial.
11 You gave that admonition to counsel before the trial
12 started, and I don't believe that there was a single
13 issue ever raised during the course of the trial.
14 JUDGE LINARES: Before the trial began
15 there was a lot of problems between the attorneys.
16 You could see it through the discovery and how it was
17 working out. You could see the motions. I mean,
18 there were motions about don't let the other lawyers
19 act unethically. What kind of motion is that?
20 MR. MORYAN: I thought it was a
21 particularly good one.
22 JUDGE LINARES: Motion in limine to bar
23 the other lawyers from doing speaking objections.
24 You can just tell from the nature of the
25 motions in limine and the way counsel were addressing

1 concluding our service as jurors.
2 MR. LACEY: Judge Chesler?
3 JUDGE CHESLER: There are any number of
4 pet peeves, but the most important thing that hits me
5 is this. Following up on what Judge Schwartz said,
6 the jury's time is valuable. Court time is valuable.
7 One of the most frustrating things in
8 the world is to have a judge and a jury called to
9 start a trial at 9:30 in the morning. The court goes
10 on the bench at 9:25, and just before you bring the
11 jury in one of the attorneys says, your Honor, I just
12 have to raise this legal issue with you before we
13 bring the jury in.
14 It happens to be a not insubstantial
15 issue which was totally foreseeable, which should
16 have been in the trial brief, which should have been
17 raised the night before because the parties knew
18 about it, and now we have to spend half an hour or
19 perhaps more resolving this issue, perhaps having the
20 court review cases which are brought to its attention
21 for the first time with the jury cooling its heels in
22 the jury room because this matter has been brought
23 before the court without any forethought whatsoever.
24 I can tell you if you want to think of
25 one single way to tick off a judge, that is one of

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1 each other that there was a potential problem.
2 I made my speech. I was very stern
3 about it. It's something that I do take very
4 seriously. The lawyers were great, both sides. I
5 thought they treated each other as professionals, the
6 way they should.
7 MR. LACEY: The jury ended up reaching
8 the correct verdict.
9 We are short on time.
10 JUDGE LINARES: The appeal is up, so
11 you're right.
12 MR. LACEY: I want to ask each of the
13 panelists here if you have a single do or single
14 don't for trial lawyers in our district, but
15 especially in your courts, for litigators, what is
16 it?
17 Magistrate Judge Schwartz?
18 JUDGE SHWARTZ: Hard to pick one. Be
19 prepared and remember you're talking to the jury and
20 trying to get the jury persuaded. The judges are all
21 concerned, both from practicing my position now,
22 about using the jurors time efficiently.
23 I was a juror once, and what I wanted to
24 hear was the evidence. The theatrics, while
25 entertaining for a moment, did not facilitate

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1 the best ways to do it.
2 MR. LACEY: Judge Linares?
3 JUDGE LINARES: I agree.
4 Do's and don'ts, right?
5 In terms of what you should do, get to
6 know your judge.
7 Listening to Katherine before about the
8 aggravating part of litigation, I remember when I was
9 a litigator, the stress that I had with regard to the
10 trial. A lot of the stress had nothing to do with
11 how I was going to try the case, but little things,
12 like how am I going to drop the kids off and get to
13 court on time, what about my expert, if we don't get
14 to him by Wednesday I'm going to lose him by
15 Thursday. These are the things that drive you crazy
16 as a trial lawyer.
17 In federal court you can eliminate a lot
18 of that by going to the judge ahead of time. I can
19 tell you right now, I promise you, you come to me and
20 say, judge, next Wednesday I'm going to lose my
21 expert and I need to get him on the stand Tuesday,
22 and he's coming from Germany, whatever, New York,
23 whatever, I'm going to get your expert on that stand
24 and that amount of stress is gone.
25 If you're going to have a problem

17 (Pages 62 to 65)



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1 delivering your kids to school and you need to start
2 at 9:30 instead of nine, I'm going to work with you.
3 I can't speak for all my colleagues,
4 everybody is going to be different, but you can
5 eliminate a lot of stress by doing that. The things
6 that are going to be stressors, you can raise them
7 before the trial. The expert is going to change his
8 testimony, that's part of the stress of the trial,
9 but you can eliminate the other stuff.
10 With regard to technology, please go to
11 the courtroom ahead of time and check that the
12 courtroom is amenable for the use of the technology
13 you want to use.
14 In my courtroom there is a skylight.
15 The lawyers want to use the big screen to show stuff.
16 Guess what? You can do it, the jury is not going to
17 see it. It's amazing how many lawyers never check it
18 out. They come in with all this fancy equipment,
19 they put the stuff up there and no one can see it.
20 If you're going to use technology, have
21 the paperwork as a backup. Have your slides as a
22 backup, your pictures as a backup, because technology
23 can and often does fail and you don't want to now be
24 fumbling through 15 boxes of papers trying to find
25 your exhibit.

1 will lose track of what truly is behind your case.
2 Be succinct as possible, in openings,
3 closing and presentation of witnesses.
4 In federal court, if you can do it, no
5 podiums, no notes. If you have pockets, take
6 anything out of the pockets. No pink shirts. Do not
7 use anything that you cannot control. If there is an
8 outcome that you can't control, whether it's
9 technology or an exhibit or something, trust me, it
10 will go wrong and it will blow up in your face.
11 The last thing for defendants, when
12 picking a jury, no postal workers, no exceptions.
13 MR. LACEY: Dennis Drasco.
14 MR. DRASCO: How do you follow that?
15 If I can give one tip, having tried
16 cases in the federal court in this district and in
17 New York, the most important thing is prepare your
18 pretrial order as if you were going to try the case
19 next week.
20 It is hard to do, but I think it is very
21 easy to have an associate work on the pretrial order,
22 put everything including the kitchen sink in, and
23 perhaps forget some things.
24 The worst thing that can happen is if
25 you read the pretrial order the week before trial and

1 A hint about that. Don't go to use
2 technology without being prepared and looking at the
3 courtroom ahead of time. Those are my two biggest,
4 there is a laundry list.
5 MR. LACEY: Judge Hayden.
6 JUDGE HAYDEN: Generally admit to
7 yourself how difficult it's going to be, how scared
8 you are, find a mentor, be a mentor, know your judge
9 and know your judge's staff's names and pray a lot.
10 MR. LACEY: Jeff Moryan.
11 MR. MORYAN: I echo everything that has
12 been said up to now.
13 A couple of my do's and don'ts.
14 Trying a case is kind of like buying
15 real estate. The rule in real estate is location,
16 location, location. The word in trial work is
17 preparation, preparation, preparation. If you
18 prepare well enough, you will not be surprised. If
19 you prepare well enough, you will probably out
20 prepare your adversary and out try your adversary.
21 Be yourself at all times. If you are
22 not, the jury senses that.
23 No matter how complex your case is, get
24 it down to one or two themes. If you do more than
25 one or two themes, you will lose track and the jury

1 say, oh my God, I forgot to do this, I excluded this,
2 I didn't object to this. It is really the roadmap to
3 trying a case in the federal court.
4 With few exceptions, as Judge Linares
5 said, you are going to be bound by what's in the
6 pretrial order.
7 You know your case is going to go to
8 trial -- not a lot of cases go to trial. If you know
9 you have a case that will go to trial, roll your
10 sleeves up at the time of the pretrial order and do
11 it yourself, and don't wait until two weeks before
12 like you would if you were trying a case like you
13 would in state court.
14 MR. LACEY: Linda Wong.
15 MS. WONG: It is important to absolutely
16 prepare every single document. You have to prepare
17 your witnesses.
18 I don't know if you saw that movie, "A
19 Civil Action" with John Travolta. Very often we are
20 going out and talking to witnesses and speaking to
21 them until three o'clock in the morning.
22 You have to know your case. Be honest
23 and be respectful to the jury, be respectful to your
24 adversary. Don't worry about the single juror who
25 might be sleeping in the back. Every trial we have,

18 (Pages 66 to 69)

1 two weeks, three weeks, the six-month trial, there is
2 always somebody sleeping in the back. Don't lose
3 your train of thought. Be very clear about what you
4 want to accomplish.
5 MR. LACEY: In sum, what I hear from
6 everyone, in terms of these courts, A, our judges are
7 human. B, if you're straight with them, they will be
8 straight with you, and lastly, you are to prepare,
9 scout out the courtroom, make sure you are ready for
10 trial, and these are the best courts that most of us
11 in this room have ever seen anywhere in this country.
12 It is because of these judges and our chief and the
13 judges in this district who have been doing this for
14 so, so long, and that's why we are one of the oldest
15 and most distinguished districts in this nation.
16 Thank you all very much.
17 (Applause.)
18 MR. HAYDEN: I would like to thank John
19 and our panelists for the superb panel, particularly
20 for the practical suggestions that we can give to our
21 lawyers by the panelists.
22 One of the things that the officers and
23 the board of trustees wanted to do this year was to
24 have our programs be teaching programs to elevate the
25 litigation in the federal court. We know how

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1 difficult it is for younger lawyers to get the trial
2 experience that some of us got easier 25 or 30 years
3 ago. We wanted all of our programs to make our best
4 efforts to be teaching programs, and certainly the
5 tips and the practical suggestions I think went a
6 long way to whether they are young litigators or
7 veteran litigators.
8 Along that line, through the help of
9 Stan Rizman and Howard Rappaport, this program and
10 the next program is being filmed. It will be
11 available to anyone who wants it on a DVD through our
12 Association.
13 We had two of the best cross-examination
14 seminars in the fall with some of the finest
15 cross-examiners in the country. These seminars were
16 taped. They are available on DVD, and if people want
17 to work with their skills, you can get them at
18 basically cost through our Association.
19 We are now going to take a 15-minute
20 break. 15 minutes will mean 15 minutes. And we are
21 going to have another superb seminar as soon as we
22 come back. Thank you everybody.
23 (Recess.)
24 MR. HAYDEN: Our next panel deals with corporate
25 investigations and deferred prosecution agreements

1 and some of the collateral civil and criminal
2 consequences that flow there from.
3 Paul Fishman is going to be our
4 moderator.
5 Paul clerked for Judge Becker on the
6 Third Circuit.
7 He was in the United States Attorney's
8 office for many years. He was the First Assistant.
9 I tried a very difficult RICO case against him, and
10 he's one of the toughest prosecutors I ever faced in
11 a lengthy trial.
12 He is now in private practice where he's
13 doing complex civil litigation and white collar work.
14 Paul, thank you for your time. I turn
15 the program over to you.
16 MR. FISHMAN: Thanks, Joe.
17 (Applause.)
18 Last year we had two panels, Mike
19 Chagaris moderated one, I moderated the other. This
20 year Mike is nominated to the Third Circuit and I'm
21 moderating the panel.
22 John Lacey talked about how his panel
23 had style, grace and even tempered. I cannot do that
24 with anybody on this panel except for Chris, who
25 definitely has style.

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1 MR. TIMPONE: And indictment power.
2 MR. FISHMAN: And indictment power
3 overall of our clients.
4 To my left is the honorable Chris
5 Christie, who, as you all know, is the U.S. Attorney
6 for the District of New Jersey, and has brought a
7 slew of cases that made the topic, Bristol-Myers
8 Squib, and to his left is Walter Timpone, formerly
9 Chief of the Special Prosecutors unit in the U.S.
10 Attorney's office, and now a partner at McElroy
11 Deutsch Mulvaney and Carpenter.
12 To Wally's left is the honorable Alfred
13 J. Lechner, who is a grand poobah of litigation now
14 at Tyco and used to be a United States District Court
15 judge in this district.
16 To his left is Carl Poplar, who has been
17 in private practice for at least the last three or four
18 years, and is viewed by many of us to be the dean of
19 the bar of white collar work, at least in the
20 "Southern Distric" of New Jersey, if not the entire
21 state.
22 To his left is Cathy Fleming, also
23 former Chief of Special Prosecutions in the U.S.
24 Attorney's office, and now a partner at Edwards and
25 Angell.

19 (Pages 70 to 73)

1 What we thought we would do this morning
2 is start with a hypothetical and use that as a device
3 to talk about some of the topics that we think are
4 hot and important in the prosecution and defense of
5 corporations these days, including the much talked
6 about deferred prosecution agreements.
7 Let's start with the following
8 hypothetical.
9 Judge Lechner, you are the general
10 counsel for Auto Parts, Inc. You were hired by the
11 company's very impressive CEO, Joe Jeffrey. It is
12 Monday morning. You've been at work for three weeks.
13 Because it's you, you have been there since 5:45 in
14 the morning.
15 As you are enjoying your first cup of
16 coffee, Sally Smith, the company's also very new CFO,
17 comes into your office, looks terrible, looks like
18 she hasn't slept, and she says to you, "I think we
19 have a problem."
20 She tells you that she has been visited
21 by two government agents, one from the FBI and one
22 from the IRS. They served her with a subpoena and
23 told her that there are allegations swirling around
24 about the company's having inflated its revenues and
25 manipulated its stock price.

1 like this and not have GC know about it, I just think
2 that's problematic.
3 I would tell him that we have to think
4 about this.
5 A number of things are running through
6 my head. We have to talk to the chairman of the
7 board, if not the entire board. We have to get to
8 the audit committee on this. You have to consider
9 outside counsel.
10 Since we were served with a subpoena,
11 we have to start talking as to whether -- whether is
12 not the word -- when we need to make a disclosure, a
13 filing with the SEC on this, whether we can wait a
14 while, or whether it has to be done more promptly
15 than that.
16 I would seek outside counsel's help on
17 that pretty promptly.
18 I would go through all this. I would
19 make some calls to get outside counsel coming in.
20 Another thing I would do when I go back
21 to my office, I would start preparing a privilege log
22 for myself as to listing with whom I spoke, when I
23 spoke, what was said and what the plans were.
24 The client in this situation is not the
25 CEO, and I think knowing the background of this guy,

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1 She tells you when she got the subpoena
2 she went to the CEO, told him about the subpoena, he
3 would deal with it.
4 Nothing has been done. The return date
5 is in a week. Nothing has been done. What do you
6 do?
7 JUDGE LECHNER: I think I might call the
8 headhunter who called me and placed me there. If
9 that doesn't work out, I might go to that truck
10 driving school or look into that.
11 At that point, knowing the CEO has had
12 it for a week or two, that the return date is two
13 days away, that somebody from the IRS and DOJ have
14 been there, you know there are some problems.
15 I think that I would try to get the
16 point across when I go see the CEO that we have to
17 talk about it, we have to find out what's going on to
18 get to the bottom of it.
19 I would not visit him unless I had one
20 of my other 300 staff attorneys with me.
21 MR. FISHMAN: Why is that?
22 JUDGE LECHNER: I want somebody there
23 when I'm talking to him so it's not he said, she said
24 when something blows up at a later point.
25 To have a subpoena sitting with the CEO

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1 it's going to be tough for him to understand that.
2 MR. FISHMAN: Are you talking about the
3 CEO?
4 JUDGE LECHNER: Exactly.
5 You have somebody coming who is real
6 high profile like that, the new GC is there for
7 almost two weeks, that subpoena has been sitting
8 there two weeks and it's due in eight, ten days, and
9 doesn't know about it, doesn't bode well when you
10 have your CFO coming and telling you there is a
11 problem.
12 She's been interviewed by these two
13 government agents. You know that there are problems
14 there. I think you need to start planning on what
15 the outside problem is going to be and start thinking
16 about how you're going to run an internal
17 investigation, who you're going to talk to, when all
18 this is going to happen, coordinating with the board.
19 MR. FISHMAN: When you coordinate with
20 the board, what are you going to tell the board to
21 do? You are the general counsel. They are going to
22 look to you for advice.
23 JUDGE LECHNER: I'll tell them I don't
24 know all that much about it. We have had this now
25 for a week and a half, two weeks. It has been

20 (Pages 74 to 77)

1 residing with the CEO. Although the CFO has been
2 questioned by both the IRS and the Department of
3 Justice, that she was told that the new chief
4 executive officer was going to move on it and take
5 care of it and it hasn't done it. It has been sitting
6 there.
7 So I think those facts by themselves
8 suggest a problematic situation.
9 The board, at least the chairman of the
10 board, has to know about it, and I think the audit
11 committee has to be brought into the loop at that
12 time as well.
13 MR. FISHMAN: I'm going to add one other
14 fact to the hypothetical, which is that you checked
15 the logs of the company's hot line, because assume
16 it's a big company, they have a hot line. Tyco has
17 it, right?
18 JUDGE LECHNER: They do.
19 MR. FISHMAN: Can you tell everybody
20 what kind of hot line you got and how it works? Not
21 your personal one.
22 JUDGE LECHNER: Hypothetically these hot
23 lines are for situations where anonymous calls can be
24 put in for violations of the Foreign Corrupt Act,
25 sexual harassment cases, cooking the books, or

1 deleted, which will be a big problem depending on how
2 far the financial records are spread throughout the
3 corporation.
4 MR. FISHMAN: When do you send the memo
5 that says, keep everything, don't destroy the backup
6 tapes? How soon after you get the subpoena do you do
7 that?
8 JUDGE LECHNER: My initial reaction is
9 going to be to the CEO, tell him in person, orally,
10 he can't destroy anything, he can't touch anything,
11 he can't change anything.
12 Based upon that phone call and what I
13 know, I think I would send that memo pretty promptly,
14 probably that very morning.
15 I would like to talk with outside
16 counsel on this to coordinate, another entry in my
17 personal log that I would be making, and it would
18 take a little while to craft that litigation hold,
19 not just a generic term.
20 Once you got that notice or subpoena
21 from the SEC, you can't take a chance. There has to
22 be a litigation hold that goes into place
23 immediately.
24 Somebody else starts seeing it and they
25 start wondering, can I get in front of this before I

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1 something out of whack along those lines. That's
2 what the hot line is used for.
3 There is usually an ombudsman. That
4 ombudsman will report to the audit committee with
5 regard to the type of complaint that would come in or
6 tip that would come in.
7 MR. FISHMAN: Let's add to the
8 hypothetical that you find out that morning there has
9 been a call to the hot line, and the person that
10 called the hot line claims that the CEO and vice
11 president of sales had been cooking the books with
12 hundreds of millions of dollars in phony sales of the
13 company's products, throw that into the mix.
14 Does that change your analysis here?
15 JUDGE LECHNER: Now I'm definitely going
16 to the head hunters.
17 Yeah, that is problematic, because now
18 it's starting to fall together. Now you're getting a
19 lot of circumstantial evidence here. The CEO is not
20 responding the way you expect that to be done. If
21 not before that, at least definitely after that.
22 Now I'm thinking on a litigation hold.
23 I'm worried about how I'm going to maintain the
24 computers, the financial records, how I'm going to
25 prevent any of the stuff from being changed or

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1 get official notice of this litigation hold? Is
2 there something that I can do, somebody who might be
3 part of this to change or alter the books, change or
4 alter computer entries? You got to balance all that.
5 MR. FISHMAN: Let's talk about the
6 decision to hire outside counsel. Do you make that
7 on your own, or is it a board decision?
8 JUDGE LECHNER: At this point I would do
9 it.
10 MR. FISHMAN: Let's assume for the
11 moment that you hire Cathy and that she has not had a
12 previous relationship with your company.
13 What do you tell her when you call?
14 JUDGE LECHNER: I tell her what we are
15 looking at. I tell her another thing, she hasn't had
16 a previous relationship, and for the foreseeable
17 future she'll not have another one other than this
18 one assignment. I want her focused on this, not to
19 curry favor with anybody inside, and when we hire
20 another attorney, which we probably would, to
21 actually run the investigation, that he would be
22 walled off more with regard to future work.
23 I would want two independent lawyers
24 looking at this, independent with regard to any
25 interest in the financial position of the corporation

21 (Pages 78 to 81)

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p>vis a vis their firms.</p> <p>MR. FISHMAN: Cathy, you are now hired as outside counsel, what's your first move?</p> <p>MS. FLEMING: The first thing that I have to do is run a conflict check, which a lot of people don't realize you have to do it instantly. The first meeting with Judge Lechner is, who is my client? Am I going to be representing the board of directors, the audit committee or the corporation itself?</p> <p>By far the client in this situation is the corporation itself because you get the document production, and that's lots of associate hours.</p> <p>Plus you are in the position of, when you're recommending other counsel, for example, the CEO, now you're going to have lots of lawyers, full service employment for lawyers, and the people you bring in, they will hopefully think of you when the reverse situation comes up.</p> <p>So I'm happy that Judge Lechner called me to represent the corporation. But the first thing we do is establish that is in fact who my client is.</p> <p>Having said that, somebody who brings you in as general counsel, particularly someone who arrives on the scene with only two weeks of</p>	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p>gather the documents. It is not as easy a call since there has been a lag time.</p> <p>You have to discuss why the subpoena has been sitting there while you are all preserving the documents. There will be a document preservation notice of documents that have gone out anyway.</p> <p>You talk about the document production, how it will be done to make sure that you made sure you covered the waterfront, you get all the responsive documents, assuming you can narrow it down, how you're going to do the document production, how you're going to log them in, how you're going to make sure that you have no custody issues, because you want to make sure that the company is not subject to what we all find, which is prosecutors thinking obstruction is going on because the document production has not been perfectly done. So you want to put that in place and make sure that goes on.</p> <p>Then we talked about what we need to do with the different personalities and who will have what counsel.</p> <p>MR. FISHMAN: Do you call the government?</p> <p>MS. FLEMING: After you have the basics in place and you have the subpoena, yes, you can call</p>
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p>83</p> <p>experience, one of the things I'm going to do is I am going to be mindful to make sure I can protect him to the extent that I can do this in the corporation's interest. I need to protect the corporation to the fullest extent possible.</p> <p>So in our first conversation we talked about the events that happened so far. We talk about what other counsel will be needed. I suspect that in this initial conversation, given the circumstances that have come up, one of the conversations we are going to have is, does the CEO need independent counsel, and you have to determine whether he's going to pay for his independent counsel, and who are we going to bring in? Will it be someone we are going to work with.</p> <p>If you are in a place with wonderful Delaware laws, for example, which require corporations to indemnify and pay for their officers, you bring that into mind, but you start to decide how that is going to play out.</p> <p>First and foremost, you have to respond to the call for documents. There is already a lag time.</p> <p>Had the subpoena come in, and had the preservation notice gone out immediately, you have to</p>	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p>85</p> <p>the government.</p> <p>You call the government to introduce yourself, to let them know the corporation is represented by counsel, that you represent all of the current and former employees, so that any contact with people you want to come through you as counsel for the corporation and its current and former employees.</p> <p>You indicate that you would like to hear from the government, what it is that they are looking for. You indicate that you just got involved, that you need some time, you would like to narrow the scope of the subpoena, you would like to talk about rolling production. You, as a lawyer, need to have some capability of being flexible. When you gather the documents, do it appropriately. And you try to find out what is involved. You try to find out whether the corporation is the subject or a target or whether they have some evidence.</p> <p>MR. FISHMAN: Before we ask Chris what he would say in response to those questions, let's throw a couple more facts in.</p> <p>What you don't know, what the company doesn't know, is that the former CFO has been cooperating with the government for a couple of</p>

22 (Pages 82 to 85)

1 months. What the former CFO has told the government
2 is that there are two different schemes afoot here.
3 One is that this company sells parts,
4 among other things, to the military. The CEO has set
5 up another company, unknown to anyone at Auto Parts
6 Inc., and that company buys parts, component parts,
7 on the open market, and then marks them up by
8 20 percent and sells them to this company which then
9 in turn sells them to the government.
10 The CEO is effectively taking a
11 20 percent markup and the government is paying
12 20 percent more than it should.
13 The other thing, the CEO of the second
14 company, that's a false distribution company to which
15 the company is making a substantial number of sales
16 that effectively jack up the company's sales revenue
17 and make the company's profits look way better than
18 they are.
19 Chris knows those facts, you don't.
20 Chris, when Cathy comes in to talk about
21 narrowing the scope of the subpoena, it was sitting
22 on somebody's desk and nobody paid attention to it,
23 she wants some good faith here, what's your reaction?
24 MR. CHRISTIE: We are known in the U.S.
25 Attorney's office for our kindness and consideration.

1 more than that. She'll want to know more than that.
2 I won't be in a position to want to share it. I want
3 to see what they are going to have to say. She will
4 have to come forward with some good faith to us in
5 terms of what kind of production. Will there be a
6 report generated from that internal investigation?
7 If there is, is that report going to be shared with
8 the government or is it not going to be shared with
9 the government?
10 There will be a lot of opportunities for
11 her to show what kind of good faith her client has in
12 terms of cooperating with the government to try to
13 get to the bottom of what is going on, or whether
14 they are going to take it in an adversarial tact from
15 a corporate perspective. As they would say in "The
16 Godfather," go to the mattresses.
17 My level of information sharing is going
18 to feed directly off of the level and measure of good
19 faith and cooperation that she and her client are
20 going to show towards the office.
21 MR. FISHMAN: Do you know enough yet to
22 know whether the company is the target of the
23 investigation, whether you are planning on indicting
24 the company?
25 MR. CHRISTIE: I don't think we know

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1 So first --
2 JUDGE LECHNER: No, be serious.
3 MR. TIMPONE: What U.S. Attorney's
4 office is that?
5 MR. CHRISTIE: You still have cases in
6 front of us, don't you?
7 MR. TIMPONE: I do. Withdrawn.
8 MR. CHRISTIE: First off, as to the
9 issue of time, we'll definitely be willing to give
10 her some more time to get her arms around what's
11 going on. We'll want to agree with her that -- on a
12 date for production, I'm not going to be inclined in
13 the beginning to agree to some type of rolling
14 production. I want her to give me some final dates
15 and I'll give her time to put it together.
16 She'll explain to me this has been
17 sitting around for a while. I'll tell her how
18 unhappy I am about that. She has to get things under
19 control at that place if she's going to be the person
20 who will be representing everyone.
21 As to narrowing the scope of the
22 subpoena, I'll tell you that it is pretty unlikely,
23 given what I know about the scenario that you just
24 laid out.
25 I won't probably tell her a whole lot

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1 enough -- from what you said, I don't think we know
2 enough to know whether the company is a target. We
3 can say it's a subject.
4 MR. FISHMAN: The distinction you draw
5 is how?
6 MR. CHRISTIE: I won't say someone is a
7 target until I'm quite sure that we have enough
8 information to present to a grand jury to ask them to
9 return an indictment.
10 The way I view it, and I think the way
11 the Justice Department views it, is an entity or a
12 person who is in the orbit of the investigation, but
13 we know is involved somehow, but don't know at this
14 point whether or not that person or entity will be
15 subject to criminal charges at some time in the
16 future or not.
17 From what you have laid out we are
18 looking pretty good, but I'm not yet to the point
19 where I'm going to be saying to Cathy that her client
20 is a target.
21 I will suggest to her probably gently
22 that her idea of representing everyone is probably
23 not the greatest idea in the world, and that some of
24 the senior executives might want to consider getting
25 individual counsel.

23 (Pages 86 to 89)

1	Beyond that, that's probably about all	1	not great, but it's too early for me to commit to do
2	the information I would be willing to share at that	2	that.
3	point.	3	MR. FISHMAN: Chris, do you need her to
4	MR. FISHMAN: Do you suggest to her the	4	commit to it now, or do you want to find out in the
5	company should do an internal investigation?	5	end that she did?
6	MR. CHRISTIE: I don't know that I	6	MR. CHRISTIE: No, I won't make a
7	suggest it. I want to see what their attitude is.	7	decision that they are acting in good faith at that
8	It will tell me something if she says	8	point, but I certainly will get indications.
9	we've hired outside counsel to do an internal	9	Since Cathy raises the home court issue,
10	investigation. We are going to prepare a report.	10	if it's somebody we know and have respect for, they
11	When that report is done, to the extent that we can	11	will give us some inkling as to what their attitude
12	share it with you, we will.	12	is towards this.
13	If that's her position, then I'm going	13	A lot of this is touch and feel type of
14	to have one attitude toward the company. If her	14	stuff. Especially when you're dealing with lawyers
15	position is any gradation away from that, the further	15	that you know and that you have worked with a lot,
16	she gets away from it, the further good faith we'll	16	you will be able to tell significantly when they come
17	take the position they are showing.	17	in what attitude they are bringing in with them.
18	MR. FISHMAN: Cathy, do you do an	18	It is much too early from a Thompson
19	internal investigation?	19	memo perspective to decide anything about good
20	MS. FLEMING: First of all, I'm not sure	20	faith as it will ultimately impact upon cooperation
21	in the initial meeting I would walk in and give up	21	and determination of how you deal with the corporate
22	the subpoena that has been sitting around.	22	entity as a whole down the road. There certainly will
23	MR. TIMPONE: I agree.	23	be flags that will be raised that we are going to be
24	MS. FLEMING: I don't know enough yet to	24	watching for.
25	where to start pointing fingers. That would be	25	The other part of this is that it
91		93	
1	irresponsible until I have my arms around what	1	probably is a little bit unrealistic about this
2	actually has happened.	2	hypothetical is Cathy is probably not having her
3	I'm not in the government anymore. I	3	first meeting with me. Her first meeting is going to
4	don't have to believe everything that's told to me.	4	be with the line assistants and maybe a supervisor in
5	A large part of this, unfortunately -- I	5	that area who has been working on the case.
6	go around the country, when you are in a home court	6	They will meet with me beforehand and
7	such as New Jersey, there is a lot of history of	7	we'll talk about what our game plan is in terms of
8	credibility. I would like to think when I come into	8	how to approach the meeting.
9	the U.S. Attorney's office I have the credibility	9	What I have told you is basically what
10	that they know it's going to be done appropriately	10	my instructions will be to my line assistants or to
11	and thoroughly, and I'm going to at least try to	11	my supervisors who will be actually conducting the
12	react appropriately.	12	meeting.
13	The initial conversation is too early to	13	You are not going -- we are not going to
14	say to Chris, as I'm trying to find out as many facts	14	want from the officer's perspective my personal
15	as I can, and the most useful one he gave me is some	15	involvement too early in one of these situations.
16	of your senior executives need independent counsel.	16	That's something that needs to wait until things are
17	I know what that means.	17	much greater developed.
18	But I'm going to say to him, I'm going	18	The other thing that everybody should
19	to get into this as quickly as possible. I have my	19	know is that initial meeting, probably 99 percent
20	arms around it I will come back to you. I understand	20	of the time, is not going to be with me. It will be
21	what you and the Larry Tompkins memo say I should do,	21	with some of the line assistants who have the
22	but I think it's too early to commit to giving a	22	greatest knowledge of the case. Those are the
23	report. I think it's too early to do all that.	23	instructions they are going to walk into the meeting
24	If that means that they are going to	24	with.
25	think I'm not acting in good faith, I think that's	25	MR. FISHMAN: Judge Lechner, are you

24 (Pages 90 to 93)

1 going to do an internal investigation here, not you
2 personally, but are you going to commission one?
3 JUDGE LECHNER: Absolutely.
4 This first meeting, maybe two or three
5 discrete purposes. Number one, to let the U.S.
6 Attorney know that we have counsel, let him know that
7 we have the subpoena and we are going to be
8 responsive to it, and open up lines of communication
9 to hopefully get some more time to look at it.
10 We need to get another attorney in to do
11 the internal investigation. Cathy will represent the
12 company, but not the internal investigation. We are
13 going to have separate counsel doing that.
14 I think it would be premature to start
15 discussing that, but from an internal corporate point
16 of view, I would be looking at a situation where we
17 would be doing an internal cooperation, to cooperate,
18 not capitulate. Later we can talk about that.
19 The idea of designing this, where we do
20 produce a report, but two reports, one for the facts
21 that Wally is going to assemble, how he did it, how
22 he assembled the facts, which by definition will not
23 be privileged.
24 The second report will be his advice to
25 us, which by definition will be privileged.

1 finding, where it's going, and it's pretty serious.
2 But Cathy could do that.
3 The reason that you bring an independent
4 firm in to do it is because at some point you may
5 need to say to the U.S. Attorney's office, we have
6 done an independent investigation, we brought in
7 someone who has no connections to the firm, to the
8 company. We have done a top to bottom review and we
9 have some conclusions.
10 The Thompson memo is always in the back
11 of a corporation's mind now.
12 MR. FISHMAN: Give us ten seconds on the
13 Thompson memo.
14 MR. TIMPONE: It is this really
15 interesting onerous and burdensome memo that the
16 Department of Justice has come up with, basically
17 saying if the corporation wants any consideration
18 from the government as to whether the prosecution is
19 going to go forward or how severely the prosecution
20 is going to go forward, there are certain steps that
21 have to be met.
22 Very often what the government asks for
23 is pretty much complete disclosure of what you have
24 undertaken, what you have found, what steps you're
25 taking to remedy it, and in some circumstances -- and

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1 If I try to put them in one report, or I
2 try to waive the factual portion of that, I'm going
3 to waive the whole report. I know Chris doesn't need
4 the advice I'm getting. He wants the facts and how I
5 got them.
6 If I can make that dichotomy, I can
7 protect the advice I get from counsel.
8 MR. FISHMAN: Wally, you get hired to do
9 the independent --
10 MR. TIMPONE: About time.
11 JUDGE LECHNER: He says about time, he
12 has a free fire zone here. It is virtually
13 unreviewable what he's going to do and how much money
14 he will spend.
15 MR. FISHMAN: Wally, you get hired to do
16 the internal investigation. What is your mission?
17 MR. TIMPONE: The reason I'm being
18 brought in, if the company wasn't really concerned
19 that there was a problem here, I don't think they
20 would need me. What they are looking for in this
21 case is an independent body to come in and do an
22 investigation to find out what went on. That has
23 multiple layers.
24 One is you want to be able to go back to
25 general counsel and say, look, this is what we are

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1 I mean this, I don't see it a lot in New Jersey, but
2 we do see it sometimes -- a demand that the
3 attorney-client privilege be waived.
4 You really need to be cognizant of the
5 fact that some of what you are writing which you
6 think is privileged may no longer be privileged at
7 the end of the day.
8 From the time that you begin your
9 reports to the company, you have to keep that in
10 mind, because what used to be confidential
11 communication between client and attorney is less
12 than that now. It's pretty significant.
13 MR. FISHMAN: If you go to the Justice
14 Department's web site, USDOJ.gov, written by then
15 Attorney General Larry Thompson as a list of criteria
16 that U.S. Attorneys and other folks in main justice
17 should consider, whether or not, as Wally said, to
18 bring a prosecution against a corporation and the
19 extent to which that prosecution will be received and
20 how severe the sanctions should be.
21 When you actually do the investigation,
22 obviously you are going to review all the documents.
23 MR. TIMPONE: First thing.
24 MR. FISHMAN: You're going to try to
25 interview anybody you can.

25 (Pages 94 to 97)

1	MR. TIMPONE: Who knows anything about	1	as from what they would not say.
2	the underlying facts --	2	I wouldn't call the U.S. Attorney right
3	MR. FISHMAN: Are you writing that stuff	3	away, because the subpoena is not to the client, the
4	down? Are you doing an interview memorandum?	4	individual, it's the corporation. I would press my
5	MR. TIMPONE: I have to take notes. If	5	client to find out what the issues were.
6	you expect my memory to last for three weeks, you're	6	Is my client the subject or the target?
7	in a lot of trouble.	7	I would indicate in my own mind that he would
8	There is a down side to that because,	8	probably be at least a subject.
9	again, the attorney-client privilege may get waived	9	I don't differentiate in my mind, in
10	at some point and your notes may become something	10	decision making, between a target and a subject.
11	that will be produced as well.	11	That's too sophisticated for me.
12	I dare anybody to take my notes and make	12	I assume that there is big trouble out
13	any sense out of them at all down the line, but it's	13	there, and I assume that anything that my client
14	a consideration.	14	would say to anybody, counsel Lechner, or the
15	MR. FISHMAN: You're going to turn it	15	investigator counsel Timpone, or to corporate
16	into a formal interview memo?	16	criminal counsel Fleming, is potentially a problem,
17	MR. TIMPONE: I think you are.	17	potentially inconsistent.
18	MR. FISHMAN: Carl, you've been hired by	18	So my client would say nothing. That's
19	the CEO to represent him in connection with this	19	the first step that I would do. Maybe I'm a little
20	investigation. He's come to you and he told you	20	verbose.
21	about the subpoena, and he may or may not have told	21	MR. FISHMAN: Are you going to give him
22	you about his role in the scheme that is being	22	a copy of the subpoena?
23	investigated.	23	JUDGE LECHNER: I would listen to him,
24	Once you've been retained, who do you	24	and depending on where we are going, I would respond.
25	call first?	25	I would obviously bring Cathy into
99		101	
1	MR. POPLAR: I would call the general	1	the loop on this. If Wally were on board, at that
2	counsel first.	2	time I would bring him into the loop on this to make
3	What I would want to do is find out as	3	sure he knows what's going on.
4	much information as I could, knowing full well that	4	Unless there was a reason otherwise, I
5	the client sometimes doesn't give full disclosure	5	would certainly give him a copy of the subpoena
6	during the first interview. I would like to know	6	because he knew what documents were there. He may
7	what the subpoena said. I would like to get my hands	7	have some documents at home that we have to collect.
8	on the subpoena.	8	That would be important for him to know that.
9	I would know by looking at an omnibus	9	It's probably going to become
10	subpoena, a broad sweeping subpoena from the U.S.	10	adversarial. If I find out he refuses to cooperate,
11	Attorney's office on a multi-national corporation	11	he will probably be suspended, if not fired.
12	that this is a serious matter.	12	MR. FISHMAN: Carl, how are you getting
13	I would know because this company would	13	paid?
14	have an adversary called the government, there is	14	MR. POPLAR: I would initially seek to
15	somebody out there from the inside, or formerly from	15	get paid from the company, and if the company would
16	the inside, or a customer that is saying a lot of	16	be guarded, reluctant or hesitant to try to pay me, I
17	negative things about the company.	17	would be reinforced in my concern that there are
18	I know that before this broad subpoena	18	problems out there.
19	was issued, the government's agents would have spent	19	If they are unhesitant to pay, I would
20	a lot of time investigating. They don't commit	20	be less concerned.
21	themselves to a huge amount of document review time	21	I would ask to be indemnified or paid.
22	without having some basis. So I knew then this was a	22	The likelihood in this case with the hot line call,
23	big deal.	23	the omnibus subpoena, I would get a we'll have to
24	I would call the corporate counsel and I	24	wait and see kind of answer as opposed to anything
25	would find out as much from what he or she would say	25	else.

26 (Pages 98 to 101)

1 And how would I get paid? I would make
2 my client go to his piggy bank and pay me personally.
3 You're lucky you got the CEO, reasonably
4 well paid. What do you do when it's somebody who may
5 not have access to those kind of funds?
6 Rich Coughlin is here,
7 isn't he?
8 MS. FLEMING: One of the things you're
9 going to look at is, you're going to see whether the
10 corporation, number one, if it's a Delaware
11 corporation -- I wasn't being flip about that, there
12 are some wonderful statutes in Delaware that provide
13 that companies in the ordinary course advance
14 attorney's fees and indemnification until somebody is
15 adjudicated or pleads guilty.
16 You are going to look to insurance. One
17 of the things you're going to talk about is, is there
18 a lovely AIG insurance policy that takes care of
19 officers and directors? Hopefully you're on the
20 panel. If you're Carl, you're coming in, they will
21 advance the costs and you're going to get paid in
22 that way.
23 If I was in Carl's shoes, what I'm going
24 to do is I'm going to try to help counsel. It helps
25 the company for company counsel to be in on behalf of

1 as a member of the board to make these decisions, not
2 general counsel. So I think that there is not enough
3 involvement right now with the board.
4 JUDGE LECHNER: My friend here missed my
5 earlier comment saying that one of the first things I
6 would do is go to the chairman of the board and the
7 audit committee so they would be in the loop with
8 regard to what's going on here.
9 It's my decision as to who to hire, but
10 I certainly would be in lock step with the board on
11 this.
12 MR. FISHMAN: Are you letting them go to
13 report to the committee?
14 JUDGE LECHNER: Cathy would be reporting
15 to me. When Wally comes on board, he will go to the
16 audit committee and to me.
17 MR. POPLAR: I'm not real happy with
18 that. At the end of the day the company may be
19 potentially indicted, or it may be the subject of an
20 action, or it may be the subject of a class action,
21 and it will potentially affect the life of the
22 company. That's my call, not the general counsel's
23 call who has been working for me for two weeks.
24 JUDGE LECHNER: He's right on that. The
25 board has a right to countermand anybody I hire, but

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1 the officers and directors, even if we have to throw
2 the person overboard at some point.
3 It does help that competent good counsel
4 is involved in the case. It helps everybody. I'm
5 going to do whatever I can consistent with the
6 client's obligations to try to help him get paid.
7 MR. FISHMAN: Chris, do you care?
8 MR. CHRISTIE: No, not really.
9 As a primary matter, no. To the extent
10 that it affects the way people start to conduct
11 themselves, it might matter to me. But as an initial
12 matter, no.
13 MR. POPLAR: Paul, it seems like there
14 is an awful lot of management going on without the
15 board involvement, if I can change my hat for a
16 second.
17 MR. FISHMAN: Go right ahead.
18 MR. POPLAR: I don't know if I was
19 sitting on the board that I would be real happy with
20 general counsel hiring all these lawyers without my
21 ratification or approval and without my input,
22 because this is a big deal.
23 I, as a member of the board or a
24 committee of the board, or the audit committee of the
25 board, I'm of the view that it is my responsibility

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1 it would have to be proactive and go out and bring
2 the board in right away.
3 There is one other point that Carl
4 forgot to mention. It is not just the indictment
5 which you can probably survive or the class action,
6 it's a debarment proceeding. That's the real
7 problem, the debarment.
8 Once you have a conviction and there is
9 a debarment, we sell an awful lot to the Defense
10 Department.
11 What Mr. Christie doesn't understand, we
12 are an essential provider of defense products. We
13 are absolutely crucial to the defense of this
14 country.
15 With regard to our troops in the field,
16 I'm sure he does not want to put them at risk, if we
17 have developed some new armor.
18 There have been prosecutions that have
19 put people out of the loop, so to speak, and it has
20 come back to hurt, and that's why some things like
21 deferred prosecutions are being used or other things
22 along those lines. But that is a consideration.
23 MR. FISHMAN: We'll come back to what
24 Chris' view on that stuff is now that he knows how
25 essential they really are.

27 (Pages 102 to 105)

1 Let's assume for the moment that, Wally,
2 you start doing your internal investigation. One of
3 the things that you discover early on is that the two
4 outside companies, which the CEO may or may not have
5 a relationship, the deals that were cut by the
6 company were actually reviewed. The contracts were
7 reviewed by the general counsel.

8 JUDGE LECHNER: Not this general
9 counsel.

10 MR. FISHMAN: By the previous general
11 counsel.

12 Make a difference how you report here?

13 MR. TIMPONE: No.

14 MR. FISHMAN: What if it was this general
15 counsel?

16 MR. TIMPONE: Big difference on that at
17 the get go, and I think I do go to the audit
18 committee or go to the board and have a discussion
19 with the board.

20 JUDGE LECHNER: At that point he has to
21 report exclusively to the audit committee.

22 MR. FISHMAN: You're doing your internal
23 investigation, one of the people you want to talk to
24 is Carl's client. How do you handle that?

25 MR. TIMPONE: I try to talk to him.

1 company does, and we can hand this over. I say, do
2 you want to continue with the interview?

3 There is a little extra goosing going
4 on -- that's a legal term -- because this person's
5 job is on the line because they have an obligation to
6 talk to me.

7 You have an obligation to tell them and
8 make it clear that you don't represent them before
9 you begin the discussion.

10 MS. FLEMING: Wally, do you have a
11 witness with you?

12 MR. TIMPONE: I never interview alone.
13 That goes back to our days at the U.S. Attorney's
14 office. You don't want to be the witness. If there
15 is ever a dispute between what you said and what the
16 witness said, Mike Devins is in the back of the room,
17 it's Devins who will testify.

18 MR. FISHMAN: Carl, Wally calls you.
19 You know the CEO is represented by counsel. Can you
20 interview him without counsel in these circumstances
21 in the real world? Would you try?

22 MR. TIMPONE: Two different questions.

23 The answer to the first question is it's
24 the CEO, a person with some sophistication will say,
25 I'm represented by counsel, I would like counsel

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1 MR. FISHMAN: How do you set it up?

2 MR. TIMPONE: There is an issue as to
3 whether -- with respect to an internal investigation,
4 if I'm representing the company, whether he has a
5 right to have counsel at the initial interview,
6 because he's an employee of the company and has an
7 obligation to talk to us. I'm not a prosecutor
8 anymore. I don't have to give this guy his rights.

9 I will call him at the office and say,
10 we want to talk to you. We have certain questions.

11 It is very important, extremely
12 important, that at every interview you indicate to
13 whomever it is that you are speaking to that you
14 represent the corporation, you do not represent the
15 individual.

16 I've done this before and actually
17 worked from a script, so it is consistent and it's in
18 every interview and it begins every one of my memos.

19 It says just that, that we don't
20 represent you. We represent the company. The
21 company at some point may decide to waive its
22 privilege and give up all the content of this
23 interview.

24 Unlike most attorney-client privilege
25 relationships, you do not hold the privilege, the

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1 there and I would talk to Carl about setting up a
2 meeting.

3 Would I try? Yes.

4 MR. FISHMAN: Carl, are you going to let
5 Wally interview your client?

6 MR. POPLAR: Probably not. Most
7 probably not. Unless after talking to the general
8 counsel and my client it's clear that my client has
9 nothing to do with any wrongdoing.

10 But if I have a suspicion, even a remote
11 suspicion that my client has something to do with
12 wrongdoing, because, one, he tells me, two, he
13 doesn't tell me it credibly or he doesn't tell me
14 enough, the answer is no.

15 You have to be concerned about the end
16 game. The end game is that I know outside counsel
17 Fleming is going to recommend that they throw me
18 overboard, and I know I'm going to have to deal with
19 prosecutor Christie and the sentencing guidelines
20 because they are going to be pretty significant and
21 pretty serious.

22 The end game is a lot of jeopardy. So,
23 no. I know that there is no privilege, no matter
24 what's said, even if there is minced words.

25 In some of the cases there is no

28 (Pages 106 to 109)

1 privilege, and I know that there will be a high
2 likelihood that whatever my client says to Wally
3 Timpone, it will go over to the government, and his
4 notes won't be a hundred percent accurate because
5 he's not going to dictate them until three or four
6 days later and he'll modify them a little bit and he
7 will sink me more than they should.
8 MR. TIMPONE: How did you get my notes?
9 MR. FISHMAN: It's reputational.
10 MR. POPLAR: They are not
11 contemporaneous notes. He has six interviews lined
12 up. He's doing scribbles.
13 By the time he sits down with his
14 dictating machine or computer, it's a couple of days
15 later and they are paraphrased.
16 I know they are going over to prosecutor
17 Christie, and he is a very sophisticated prosecutor.
18 MR. FISHMAN: If he confesses to Wally,
19 Wally is going to turn that over to Chris.
20 What happens if your guy lies to Wally?
21 MR. POPLAR: It's gone over as an
22 inconsistent statement or an omission, and that's the
23 risk.
24 Based on all the Mirandizing,
25 admonitions, we are not saying anything. If we are

1 sources.
2 So, no, I'm not looking to prosecute
3 somebody who lies to Wally. People lie to Wally
4 every day. I'll have time for that.
5 MR. POPLAR: You mentioned that there
6 was this prosecution --
7 MR. FISHMAN: There are now two.
8 MR. POPLAR: It's obstruction of
9 justice. I would never have thought that.
10 MR. FISHMAN: Computer Associates is one
11 from the Eastern District of New`York, and there is
12 one that comes out of the Enron investigation in
13 which people were prosecuted for lying or giving
14 false statements to a -- during an internal
15 investigation when they knew or had reason to know
16 the results of the investigation would be
17 communicated to the government.
18 Just something else to be wary of when
19 you are in this kind of situation.
20 Cathy, what's your advice?
21 MS. FLEMING: That's with Martha Stewart
22 too. She told her lawyer things.
23 MR. FISHMAN: What would be your advice?
24 MS. FLEMING: Overboard. Fired. You
25 have to see what he has in terms of the contract.

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1 going to get jettisoned, that's the way it is.
2 You can see the moon shot numbers the
3 judges are imposing on corporate defendants these
4 days. It's serious business. You have to think
5 about it.
6 MR. FISHMAN: Chris, if the person
7 knowingly lies during his investigation, are you
8 going to consider prosecuting those people for
9 obstructing justice as they do in the Eastern
10 District of New`York?
11 MR. CHRISTIE: No, I don't think so. I
12 don't think that would be our approach.
13 Whatever goes on in the internal
14 investigation as it is going on, I have to suspect we
15 are not going to know about, and we'll find out at
16 some point if the corporation decides to share some
17 portion of it with us.
18 That will be up in the air, I assume,
19 until they get the results of what they have done.
20 So, no, I think Carl is right in this
21 sense. If we ever did get our hands on it, those are
22 the two things that we would be looking for,
23 omissions or inconsistent statements, and see how
24 that all plays into the overall factual fabric that
25 will be put together from a whole bunch of different

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1 You have to see what policies there are in the
2 company, to see whether there is a policy of
3 administrative leave. You have to determine whether
4 the law protects him to some degree. You have to
5 look at those things. You have to talk to the board.
6 You want to throw him overboard, but,
7 again, you want to do it in a way that you're trying
8 to protect the company.
9 So you want to do it with the least
10 amount of harm to the company as possible, because as
11 you raised earlier, the specter of when you have to
12 start doing public disclosures if it's a publicly
13 held company.
14 If you're tossing overboard your CEO, if
15 you haven't done it before, that's a good time to
16 start. It may be that you have an obligation
17 earlier. So you have to look at those things. You
18 just can't do it that way.
19 MR. TIMPONE: If you have a specter of
20 the Thompson memo over your head, the possibility
21 that the government may be bringing a case against
22 your client, the corporation, that could put the
23 corporation out of business. You want to make sure
24 that you are taking the steps that not only protect
25 the corporation, but protect your position vis- a- vis

29 (Pages 110 to 113)

1 the U.S. Attorney's office. 2 MR. CHRISTIE: If in fact certain senior 3 executives are refusing to cooperate with an internal 4 investigation, we are going to be interested to see 5 how a corporation reacts to that. That will go to 6 one of the core issues in the Thompson memo, is the 7 corporation interested in ferreting out what facts 8 there may be that support wrongdoing and making sure 9 those facts are dealt with. 10 If in fact their CEO refused to 11 cooperate with their own internal investigation, they 12 say, okay, that's no problem, we'll do it without 13 you, that will give you a good indication of how 14 serious the company was in getting to the bottom of 15 what really happened. 16 MS. FLEMING: For example, there are 17 collective bargaining agreements that employees of a 18 lot of companies have that protect them, that give 19 them the right not to be fired if they invoke 20 constitutional rights. 21 There is a case in Massachusetts where 22 the state troopers cannot be fired if they take the 23 Fifth. Even if you legally don't have a right to 24 throw somebody overboard, you may want to talk to 25 them, if they would like to leave the company, we'll	115	1 You are going to want to recoup from 2 this guy the money he has cost the corporation. The 3 corporation may owe him a lot with regard to stock, 4 with regard to options, with regard to deferred 5 payment, deferred compensation. All of that is an 6 offset. You want to think how that will all work out. 7 When you have a CEO, and now it's going 8 beyond circumstantial evidence, now you're getting 9 some more hard evidence here. The question is, what 10 are you going to do? 11 You have to make sure you cooperate, not 12 just for Chris Christie, you want to cooperate for 13 your shareholders. You have to clean up what's going 14 on. To be able to do that, you have to know what's 15 flying there. 16 It's the idea that you may need to 17 facilitate some of the things you want to do. 18 MR. TIMPONE: Your employment details 19 ought to have a for cause clause in there that covers 20 this situation that allows to you get rid of these 21 people under situations like this. 22 JUDGE LECHNER: Why would that give you 23 a problem if the CEO were jettisoned? 24 MR. CHRISTIE: It wouldn't give me a 25 problem if they were jettisoned.	117
1 pay you while this is pending, whatever. 2 MR. TIMPONE: Wouldn't you take the risk 3 of the civil suit that you fire this person ever, he 4 could hurt you? 5 MS. FLEMING: I would recommend to 6 Judge Lechner, whose ultimate decision in conjunction 7 with the board it is, I would say if he's willing to 8 cooperate, and if he's not willing to cooperate, I 9 would get rid of him. 10 JUDGE LECHNER: Do we ever find out 11 about the informant at any time in the scenario? 12 MR. FISHMAN: Why do you care? 13 JUDGE LECHNER: If I was wondering about 14 the informant, I would like to find a bus schedule 15 and have him under it. 16 MR. CHRISTIE: That would mean it's less 17 likely we would turn it over. 18 JUDGE LECHNER: You are going to prevent 19 some part of the investigation from going on. 20 The line that you have to walk is you're 21 not going to tolerate somebody like a CFO doing that, 22 but if you jettison him right away, forgetting about 23 the civil suit which is small potatoes at this point, 24 how are you going to get what you need to get? Maybe 25 you have to suspend him.		1 If Wally goes to Carl and says, I want 2 to interview the CEO for our internal investigation, 3 and Carl says, we are not talking, we are not going 4 to cooperate with the internal investigation and the 5 company then refuses to jettison -- 6 JUDGE LECHNER: I misunderstood your 7 comment. 8 MR. CHRISTIE: No, no. If you didn't, 9 that would indicate to me that there is a corporate 10 attitude that is not vigorous about going after 11 getting to the bottom of this and instead is trying 12 to play it halfway. 13 JUDGE LECHNER: Internally it would be a 14 problem if it were to breach its fiduciary duty. 15 MR. FISHMAN: I want to get to what 16 happens at the end. 17 Does anybody on the panel have an issue 18 with Wally's willingness to interview people without 19 counsel if he thinks they may have criminal 20 liability? 21 MS. FLEMING: Yes, I have a problem with 22 anybody interviewing anybody when they know they are 23 represented by counsel. 24 MR. FISHMAN: What if Wally reached the 25 conclusion preliminarily, based on the documents he	

30 (Pages 114 to 117)

1 has seen, that someone may have criminal liability?
2 MS. FLEMING: I don't have a problem
3 legally interviewing him. It's my craft in those
4 circumstances to tell people that they have a right
5 to counsel, whether they are going to pay for it or
6 not. Even when the company is paying for counsel,
7 that they have a right to independent counsel.
8 It's my practice to simply tell people
9 if they have anything, they want to consult
10 independent counsel.
11 MR. FISHMAN: I think most people who do
12 these investigations would do what Wally did here.
13 There are others who take that view, that you should
14 get the person a lawyer.
15 JUDGE LECHNER: I don't think it's a
16 problem. You give them a warning. If he or she
17 talks to you, you're good to go, but you should give
18 the warning even if it's not legally required.
19 Ethically it's a better thing to do.
20 Once a person knows about that, I don't
21 think you have to, per se. It might torpedo any
22 problems in the future vis a vis the individual you
23 are interviewing in a lawsuit he may have. He has an
24 obligation to go after that.
25 MR. TIMPONE: My preamble, talking about

1 in this.
2 To that degree, it can help to have
3 outside counsel. The point about I don't want people
4 who have prior relationships, this is a one shot
5 deal, is a good one.
6 You can look at it with fresh eyes and
7 say to them, you know what, you have had a
8 relationship for many years with these people. Why
9 not step back for a minute and let us carry the ball
10 on some of the dirty work.
11 JUDGE LECHNER: That's exactly why you
12 have to have counsel who do not have a relationship.
13 That's precisely why.
14 MR. FISHMAN: Chris, let's go to the end
15 game.
16 There are basically two possibilities,
17 maybe one in the middle. You can decline to
18 prosecute the corporation, you can prosecute the
19 corporation, or you can do something in the middle.
20 MR. CHRISTIE: How you decide is you
21 follow the facts. You see whether or not in the end
22 your judgment is the facts merit a prosecution. It
23 is really not more complicated than that. That makes
24 the decision between declining prosecution and
25 something else.

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1 the attorney-client privilege, who has it, who holds
2 it, includes you have the right to your own counsel
3 should you want it. And the follow-up question is,
4 would you like to proceed today? 97 percent of the
5 time they say yes.
6 MS. FLEMING: One of the issues here is
7 we are talking in the abstract. Jim Lechner has just
8 gotten to this company two weeks before, so he really
9 hasn't developed a relationship, and he is Jim
10 Lechner, so he's okay with being tougher than some
11 people.
12 JUDGE LECHNER: I didn't sign that
13 retainer agreement yet.
14 MS. FLEMING: I mean that in a good way.
15 The board members and the CEO and the
16 general counsel are friends and colleagues and know
17 each other for a lot of years. This is a very
18 difficult situation when you are the general counsel
19 who has been brought in by somebody. I'm not talking
20 about a two-week scenario, but you are brought in,
21 you are respected, taking the company public, and now
22 all of a sudden this is happening.
23 People cannot believe ill of their
24 friends and colleagues over a lot of years. This is
25 a very difficult scenario for people really involved

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1 Once you've gotten over that threshold,
2 okay, something needs to be done, then you have to
3 look at, at least from our perspective, if you
4 prosecute this company, what are the collateral
5 consequences of a conviction?
6 The judge was talking about the fact
7 that they are an indispensable supplier of parts to
8 the Department of Defense. We will do our own due
9 diligence on that to see whether or not that's true,
10 but debarment is a major issue for corporations who
11 do business with the government.
12 You have to see one of the collateral
13 consequences that are going to occur to a straight
14 prosecution. If you feel the collateral consequences
15 do not outweigh the need to bring a prosecution, then
16 you go to a grand jury and ask them to return an
17 indictment.
18 If you feel like the collateral
19 consequences are greater, then you have to come up
20 with some way to cure the corporate conduct, punish
21 the individuals aside from the corporation who in
22 fact brought on the illegal conduct, and figure out
23 some way to fix the problems that occurred in that
24 corporation going forward. That's where a deferred
25 prosecution agreement would come in.

31 (Pages 118 to 121)

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p>What the terms are going to depend upon are what the facts are that you are following and how aggressive you want to be.</p> <p>MR. FISHMAN: A deferred prosecution agreement is?</p> <p>MR. CHRISTIE: An agreement between a corporation and the government where we agree to defer any prosecution on a criminal complaint that we would file against the company for a period of time, sometimes as small as one year, sometimes as long as three years, and during that period of time they have to comply with a set of conditions that are laid out in this agreement.</p> <p>If they comply with those conditions over that period of time, at the conclusion of the set period of the agreement, the criminal complaint would be dismissed with prejudice.</p> <p>If in fact they did not, you would have a trigger within the agreement that would allow you to activate the criminal complaint.</p> <p>What we have demanded in the ones that we have done is also a set of agreed upon stipulated facts that go along with the deferred prosecution agreement, so that if in fact you violate the agreement, the trial will be a slam dunk.</p>	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p>We had an opportunity to work with Judge Lacey during the prosecution. It seemed to us to make sense, we had confidence in him, and we asked him to convert his status as an independent adviser to the company to an independent adviser to the government. That's the way he was selected, and he was ratified in the deferred prosecution agreement</p> <p>In the U.M.D.N.J. circumstance, I wanted to pick someone for an institution that we found to be deeply troubled who would be smart and would be tough enough to deal with the politics of what went on at U.M.D.N.J.</p> <p>I think it is very personality driven and experience driven based upon the individual situation you find yourself in. So we picked Herb Stern to do U.M.D.N.J. for those reasons. We picked BMS for those other reasons.</p> <p>MR. FISHMAN: Judge, are you troubled by the lack of judicial involvement in a deferred prosecution agreement?</p> <p>JUDGE LECHNER: It depends how it works out. The thing that touches most corporations is the monitor.</p> <p>Putting the statement of facts aside for the moment.</p>	
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p>MR. FISHMAN: Wally, do you get to negotiate those facts?</p> <p>MR. TIMPONE: No. You try.</p> <p>MR. CHRISTIE: The actions that are within the deferred prosecution agreement, they are both retrospective, in effect, so if there are some people in the corporation who you believe are main players in creating the wrongdoing, you are going to require, as far as the delayed prosecution agreement, for those persons to be fired.</p> <p>You look into the future as well, in terms of controls and other things that will be placed into a corporation to allow them to try to fix the problems that created this issue in the first place, you know, monitors have placed in certain situations, and those people then can make sure that your agreement is being complied with over a period of time.</p> <p>MR. FISHMAN: How do you pick a monitor?</p> <p>MR. CHRISTIE: It depends on the situation. I'll give you two real live examples.</p> <p>Bristol-Myers Squibb, they have already hired Judge Fred Lacey to be an independent adviser in connection with their SEC action that had been brought against them and they had settled.</p>	123	<p>If the monitor is limited to the problem at hand, in this situation here, you know, how the internal controls and how it happened there, that's one thing.</p> <p>But if the monitor can actually run the corporation or have veto power, you take too much away from the company to exist.</p> <p>There are a number of instances with monitors, not locally that I have seen, but throughout the country, where the company is really not run by its shareholders or the board of directors, it is run by a monitor.</p> <p>It is pre fire zone. They can do whatever they want. The only way you can do that is going into court and suing you or suing the DOJ and trying to get that done, and that is not really well received.</p> <p>MR. FISHMAN: Many of the agreements preclude that particular form of relief.</p> <p>JUDGE LECHNER: That's right. Then you trigger the other aspect of that agreement.</p> <p>You virtually put the corporation out of business when you do that. It's a very difficult thing to do.</p> <p>I've seen situations where the monitor</p>	125

32 (Pages 122 to 125)

32 (Pages 122 to 125)

1 is keyed into the criminal conduct and the
2 corporation is run otherwise. That is to be sure the
3 new programs that are put in there, the new
4 educational programs are working, being followed, and
5 it's working its way all the way through.

6 As far as the facts are concerned, I
7 assume that you have -- I don't know, Chris, I
8 haven't actually negotiated one of these, but you
9 would have some input in that.

10 MR. CHRISTIE: Some, yeah. But at the
11 end of the day, you know, we are going to be sitting
12 there saying, these are the facts as we found them.

13 Let's take the BMS situation. We had
14 extensive negotiations regarding that statement of
15 facts. At the end of the day, the facts were the
16 facts. They could play to them to some extent, and
17 they had very able counsel to do that, but I'm not
18 going to agree to a statement of facts that doesn't
19 comply with what my investigation has uncovered.

20 So those facts support completely a
21 prosecution, in fact a conviction of that entity, and
22 if it didn't, they wouldn't be agreeing to the
23 deferred prosecution in the first place.

24 When the judge says a monitor virtually
25 puts them out of business, the key word there is

1 MR. CHRISTIE: I agree with you. It
2 depends upon what the breadth of the conduct is.

3 JUDGE LECHNER: Right.

4 MR. CHRISTIE: In that sense, I would
5 tell you that you look at BMS and U.M.D.N.J. in two
6 very different ways.

7 You look at the powers of Judge Lacey at
8 BMS, and while his mandate is broad, his authority is
9 relatively narrow, where in Judge Stern's situation
10 the breadth is there and the authority is quite broad
11 because of the conduct that brought us to that point.

12 The monitors have to be tailored to the
13 conduct that we go into, we absolutely agree with
14 that, but we don't see the second option, obviously,
15 which I call the Stern option, which is being one
16 that's off the table.

17 JUDGE LECHNER: It is all fact
18 intensive.

19 MR. CHRISTIE: If the entity has shown
20 that they are incapable of governing themselves, then
21 you need to bring someone in who will govern them.

22 MR. TIMPONE: It is important to note
23 that Stern's powers are limited in U.M.D.N.J.

24 JUDGE LECHNER: Does he know that?

25 MR. FISHMAN: We are going to have to

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1 "virtually" the prosecution puts them out of
2 business.

3 At the end of the day I'm not saying
4 that we are giving them great choices, but their
5 conduct has not given us the opportunity to give them
6 great choices.

7 Let's remember, crimes were committed.
8 It is not that I don't like the way they are running
9 the company, therefore I would like to put Herb Stern
10 in because I think he'll run it better.

11 Crimes were committed in running the
12 company. Shareholders were defrauded. The
13 government was defrauded. Conduct needs to be dealt
14 with.

15 The deferred prosecution is a way to
16 make sure that we limit the damage to the
17 shareholders and you allow them to produce the goods
18 and services that they provide.

19 If the company is uncomfortable with
20 that option, we can proceed to indictment and they
21 can take their chances.

22 JUDGE LECHNER: Chris, the point is, if
23 that monitor is keyed into that criminal conduct, you
24 have much less push back than if you try to
25 monitor all other conduct of that company.

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1 let that be the last word.

2 There are some very interesting issues
3 that we didn't have a chance to get to, the scope of
4 the monitor and the fact that the final appeal, if
5 there is a dispute between the board of directors and
6 the monitor, the final decision making authority is
7 the U.S. Attorney himself.

8 If you are all interested in this
9 particular subject, you can find deferred agreements
10 for Bristol-Myers Squib on Chris' web site, not Chris
11 Christie dotcom, whatever it is.

12 MR. CHRISTIE: Or Chris Christie
13 dotcom, it's a link.

14 MR. FISHMAN: The trend here is very
15 interesting. From 1992 to 2001, ten major
16 corporations were prosecuted. Over the last three
17 and a half years, 23 major corporations have been
18 prosecuted with the cases having been resolved by
19 deferred prosecution agreement or a non-prosecution
20 agreement, both of which require fairly stiff
21 obligations on the part of the companies.

22 This is a very important and emerging
23 area of the law and how corporations are being dealt
24 with, and there is a lot of literature out there that
25 is quite interesting.

33 (Pages 126 to 129)

1	MR. CHRISTIE: One other thing, Paul.	1	discussion.
2	There has been a great deal of discussion among the	2	(Applause.)
3	Bar here in this state and elsewhere about the	3	MR. HAYDEN: I, too, would like to thank
4	deferred prosecution and Bristol-Myers Squib.	4	the panel. It's clear we are talking about cutting
5	There was the endowing of a chair at	5	edge issues here.
6	Seton Hall Law School by Bristol-Myers Squib about	6	We only touched the surface on so many
7	business ethics, and there was a lot of discussion	7	of these issues. There is a great deal of debate
8	about a deferred prosecution, especially over the	8	around the country about the pressure put on
9	fact that the U.S. Attorney is an alum of Seton Hall	9	corporations to waive the attorney-client privilege,
10	Law School.	10	to waive the work product privilege, to let officers
11	Let me tell you that came from	11	or employees go during an investigation.
12	Bristol-Myers Squib, that idea. It was an item that	12	The ABA, American College of Trial
13	they placed into the negotiations as something they	13	Lawyers, various Bars have taken positions about
14	were willing to offer to us as one way to try to	14	their concerns as to pressures and the erosion of the
15	bring the matter to a conclusion. It was originally	15	attorney-client privilege.
16	started as an endowed chair to a law school.	16	Our Association, in our last two board
17	I replied that it would have to be a	17	of trustees meetings, has voted to create a standing
18	New Jersey law school. I wasn't interested in	18	committee, a special committee on the attorney-client
19	endowing a chair at a Connecticut or New York law	19	privilege and work product protection.
20	school.	20	Carl Poplar, our president elect, is the
21	They said that Prudential had already	21	chair of that committee. Jeremy Frey is the vice
22	endowed a chair in business ethics at Rutgers. The	22	chair of the committee.
23	only option was Seton Hall.	23	The special committee will examine,
24	MR. POPLAR: You forgot Rutgers Camden.	24	assess and address the issues raised by government
25	MR. CHRISTIE: No, I didn't forget,	25	policies and practices on the attorney-client work
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1	Carl.	1	product protection of New Jersey, and the committee
2	We said to them, that's the option.	2	will solicit the views of members of the Bar as well
3	They brought back to us -- and we thought about the	3	as business and government agencies on this important
4	idea of whether or not what the options of that will	4	subject.
5	be because of my association with the law school.	5	The special committee, with the approval
6	Since it was their idea, and a good	6	of the board of trustees of our Association, will
7	idea, I was not going to worry about any potential	7	publicly report whether these practices have been
8	criticism that would come from that, which was	8	effective and the vitality of the attorney-client
9	unfounded, to stop a good idea.	9	privilege.
10	They went ahead and did that. The	10	This is a committee which is now
11	negotiations between them and the law school were	11	standing, it is just in creation. We do not have an
12	between Bristol-Myers Squib and the law school	12	agenda.
13	without any involvement with the U.S. Attorney's	13	If people have views on these issues,
14	office, and that's the way that worked.	14	please get involved and offer your views to Carl or
15	The only cautionary note in all that is	15	to Jeremy Frey.
16	be careful what you offer, because if you offer	16	At our last board of trustees meeting we
17	stuff, we are going to take you up on it. We are not	17	also had discussions as to whether or not it's time
18	going to limit how much we are going to say yes to	18	for our Association to have a web site, a web site to
19	when you offer.	19	communicate, perhaps to be interactive. We could
20	I know it has been an issue that we	20	either be as creative or sterile as we choose to be,
21	discussed and it was raised before. Since I have	21	depending upon what the Association wants to do.
22	such a large representation of the Bar here today, I	22	Our first vice president, Jeffrey
23	thought I would clear that up directly.	23	Greenbaum, has been appointed as the chair of the
24	MR. FISHMAN: I want to thank the panel.	24	committee to explore whether or not we have a web
25	It has been a very interesting and spirited	25	site.

34 (Pages 130 to 133)

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p>Anybody who has views or positions on that subject, or thinks you have an expertise or suggestion as to how to do it, please communicate with Jeff. This is your Association, and you can get out of it what you choose to put in it.</p> <p>We are now going downstairs for our luncheon speaker. Our luncheon speaker is the chief counsel to Governor Corzine, Stuart Rabner.</p> <p>Lunch will be at the table. We are going to be set up pretty well and pretty efficiently, and we invite you all to come downstairs and to hear the last of our dynamite speakers. Thank you.</p> <p>(Recess.)</p> <p>MR HAYDEN: Our Association every year has a tradition of giving out pro bono awards to law firms who dedicate their time and services on a pro bono basis to litigants.</p> <p>This year we are going to have two awards, and Chief Judge Brown believes they are significant enough that he has taken the liberty and he will present the pro bono awards.</p> <p>At this point in time I turn the program over to Judge Brown.</p> <p>(Applause.)</p>	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p>counsel in a small fraction of these cases. These are cases that are not lacking in merit.</p> <p>The court also recognizes volunteer lawyer time is an extremely valuable commodity.</p> <p>The court greatly appreciates pro bono counsel's donation of time and energy. It is a contribution that makes our system truly a system of justice.</p> <p>We encourage all of you to consider accepting pro bono representation. We have a committee, pro bono committee which is formed as a result of a Third Circuit task force on representation of indigents, chaired by Judge Bassler of our court.</p> <p>There is a pro bono representation primer posted on the court's web site under the Local Rules under Appendix H.</p> <p>The award that is given for pro bono is an acknowledgement of lawyers acting pro bono, to benefit the public. Past recipients of this award have been: In 1999, the Gibbons, DelDeo firm. In 2001, the Greenbaum, Rowe firm. In 2002, the Wilentz firm. In 2003, Matt Boylan. 2004, the Saiber, Schlesinger firm.</p> <p>And today I have the privilege to award</p>
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p style="text-align: right;">135</p> <p>CHIEF JUDGE BROWN: When we broke upstairs, Joe Hayden said, we have one more dynamite speaker for you. I assume he was talking about Stuart Rabner and not me.</p> <p>Thanks, Joe.</p> <p>MR. HAYDEN: No, I said two.</p> <p>CHIEF JUDGE BROWN: You said one.</p> <p>MR. HAYDEN: I said two.</p> <p>CHIEF JUDGE BROWN: In any event, I have been given two very pleasant tasks at this conference. The first is to welcome all of you, and the second to award the pro bono plaques.</p> <p>Equal justice under law, equal justice to all. These were not mere words. While a litigant has the right to represent himself or herself, many litigants are pro se, not by choice, but by default. They cannot find or afford an attorney. You don't have to be a seasoned trial lawyer to know that they may be at a disadvantage, especially in a complicated constitutional case.</p> <p>What should the court do about this?</p> <p>Well, for over 100 years the courts have been authorized to request counsel to represent indigents. Although approximately a thousand pro se cases are filed every year in this state, the court appoints</p>	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p style="text-align: right;">137</p> <p>to two individual firms, Drinker Biddle and Archer Greiner.</p> <p>Accepting the award on behalf of Drinker Biddle are Daniel F. O'Connell, managing partner of the Florham Park office, and Jonathan A. Epstein, managing partner of the Princeton office.</p> <p>(Applause.)</p> <p>CHIEF JUDGE BROWN: Thank you.</p> <p>MR. EPSTEIN: Thank you very much.</p> <p>CHIEF JUDGE BROWN: This represents a lot of hard work in the pursuit of justice.</p> <p>MR. EPSTEIN: Thank you.</p> <p>MR. O'CONNELL: Thank you.</p> <p>Thank you very much.</p> <p>CHIEF JUDGE BROWN: The second recipient is Archer and Greiner. Accepting the award on behalf of Archer and Greiner is Joel Schneider.</p> <p>(Applause.)</p> <p>CHIEF JUDGE BROWN: Mr. Schneider is a member of the firm who worked on a particularly difficult pro bono case.</p> <p>MR. SCHNEIDER: Thank you very much.</p> <p>CHIEF JUDGE BROWN: Thank you very much.</p> <p>(Applause.)</p> <p>CHIEF JUDGE BROWN: On behalf of myself,</p>

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1 the committee and the Association, I would like to	1 here to speak to us today. Thank you.
2 thank the recipients, and to all of you who have	2 (Applause.)
3 contributed your time and your efforts to the pro	3 MR. RABNER: Thank you, Joe.
4 bono program to benefit justice. Thank you very	4 I have to tell you I was always very
5 much.	5 comfortable being below the radar screen, and that's
6 (Applause.)	6 a good place to be.
7 MR. HAYDEN: Folks, can we have your	7 I have to say I was a bit surprised when
8 attention just one more time.	8 Joe and John Lacey asked me if I would be the
9 It is now my distinct pleasure to	9 luncheon speaker today, until Joe explained it to me.
10 introduce our luncheon speaker, Stuart Rabner, the	10 Joe said that they had been trying to
11 chief counsel to Governor John Corzine.	11 get Justice Samuel Alito, Jr. to come. He was unable
12 Stuart is literally somebody who, to	12 to commit for today, given the time that they needed
13 most of us, needs no introduction, but I'm sure there	13 to know in advance, and would I speak instead.
14 are some of you here who don't know him.	14 My reaction was first to appreciate
15 Stuart clerked for Federal Judge	15 Joe's directness and candor, which I cherish. I
16 Dickinson Debevoise, and then served with distinction	16 thought, any day I could be second fiddle to Justice
17 in the office of the United States Attorney for	17 Sam Alito is a very good day for me.
18 19 years.	18 I'm delighted that Joe and John asked
19 He served as a firing line assistant,	19 me, and I'm delighted to be back here among so many
20 chief of criminal, executive assistant, first	20 friends. Thank you for honoring me today.
21 assistant, but most importantly, tried and handled	21 A couple of subjects were suggested to
22 some of their most difficult and complex trials and	22 me. First, to talk about the transition of going
23 criminal investigations.	23 from the U.S. Attorney's office to the Governor's
24 He tried the case involving Prosecutor	24 office. I'll start with the hard part.
25 Bissell, tried the terrorist case with Mr. LaConte,	25 It was by no means easy to leave a place
<hr/>	
1 and handled a number of very sensitive	1 that I've been at for 19 years that is chock full of
2 investigations.	2 dedicated, talented public servants, where I've been
3 During his 19 years he became known as a	3 fortunate enough to work on a string of good cases.
4 lawyer's lawyer to those of us who practice regularly	4 The good part was I had only four days
5 in the federal system. And he became known as a man	5 to pack up 19 years worth of material, so I didn't
6 of absolute integrity. What you saw was what you	6 have a chance to trip down that nostalgic lane which
7 got. He gave it to you straight, like it or not. He	7 would have made it much harder than it was.
8 gave it to juries straight. He gave it to judges	8 The most insightful part of my
9 straight. That's what made him so effective.	9 transition came in a conversation that I had with my
10 Then he was appointed to another	10 children. We sat down and had a family meeting, and
11 position on the executive branch by Governor Corzine	11 I was thinking about changing positions.
12 where he is now going to be involved in governing as	12 They got to interrogate me. My
13 opposed to looking at the activities of government.	13 daughters were asking probing, cautious questions.
14 A kind of an interesting thing happened	14 Dad, are you going to get to try cases
15 with respect to Stuart's public persona, because he	15 anymore?
16 went from being a low visibility attorney just known	16 No.
17 by word of mouth to kind of a media star. After he	17 You like to try cases. Are you sure you
18 was appointed, there was like a week of articles in	18 want to do this?
19 the legal press and our state news publications about	19 I think it will be all right.
20 Stuart's background, what Stuart ate, how he dressed,	20 Are you going to be with your friends
21 what his favorite vacations were, and all of a sudden	21 you've been with over these years? Why is it that
22 we have Stuart Rabner rock star as opposed to low	22 you want to do that?
23 brow fine public servant.	23 My son had the following approach. He
24 But whatever he is, he's not only a fine	24 said: Dad, if you don't take this job, you're going
25 lawyer, he's a fine man, and we are honored that he's	25 to wonder for a very long time what might have been.
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1 Eleven years old. It was probably the
2 best advice I got throughout the process.
3 He said: Before I tell you what I
4 think, you got to tell me, am I going to meet the
5 Governor, Dad?
6 I said: I think so.
7 He said: You take that job, Dad.
8 Sure enough, we had that 21-inch
9 blizzard on Sunday, and I got to take him down to
10 Drumthwacket for the day. They had cookies and soda
11 and a long debate about whether the Governor should
12 be driving a hybrid car, which my 11-year old
13 recommended. So I'm out of the penalty box and all
14 is well at home again.
15 At a very basic level, the work that you
16 do at counsel's office is no different than the work
17 that you do in your practices or the work that I did
18 in the U.S. Attorney's office. Basic questions are
19 put to you and you are asked, is it legal? Are there
20 legal implications? Is it okay to do it this way?
21 The answer is often yes. But should you do
22 it? Or, no, how about if we consider doing it this
23 way?
24 I always viewed the job of a lawyer as
25 trying to get from here to here and offer creative

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1 ways to get there. It is no different, except there
2 may be a few more fires that you try to put out or
3 contain along the way.
4 One thing that's different is the nature
5 of the practice. I went from representing the
6 United States, and I was always very fond of being
7 able to say that to a jury, and not just the people
8 of the United States, but the dozens of agencies and
9 hundreds of agents that would bring matters to you.
10 I downsized my practice to one client,
11 the Governor of the State. I'm pleased that he is a
12 client who appreciates having a lawyer at the table
13 early on in the process. That may date back to his
14 experiences heading an investment banking firm and
15 working with general counsel over there.
16 He's very comfortable bringing the
17 lawyers into the mix and getting them to offer
18 opinions, not strictly limiting it to legal issues,
19 so that you are involved long before there is a
20 problem on the horizon.
21 That is a healthy environment, as we all
22 know from our practices.
23 The down side is that I didn't factor in
24 he's an ex-marine, which means he likes staff meetings
25 in Trenton at eight o'clock in the morning. That's a

1 bit of a challenge for somebody who lives in
2 Caldwell.
3 While I have one client, there are many
4 constituencies that you have to think about as you
5 are evaluating and trying to make recommendations.
6 There is the whole legislature. There are many
7 departments and agencies in government. There is the
8 overriding public interest that you have to evaluate
9 from the outset. There is the press.
10 If you're not looking at issues with all
11 of these angles, as well as the Governor's agenda and
12 his initiatives in mind, then you are not approaching
13 it with the care that needs to be brought to it.
14 The variety of issues is remarkable. On
15 a given day you are trying to get involved. If Dubai
16 Ports World is getting involved in Port Newark, or in
17 the Meadowlands, or Ground Zero, how to deal with
18 thoughtful Court of Appeals decisions about trucking
19 regulations or putting in emergency regulations.
20 Then there is the small matter of a
21 multi-billion dollar budget deficit that you may have
22 heard a little bit about in the last few days.
23 In all of it, the role is to try to give
24 some fresh, independent and as good advice as you
25 possibly can muster for the situation.

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1 I'm grateful that I have an excellent
2 staff that is teaching me through this learning
3 process that I have started on.
4 The staff is much, much smaller than it
5 has been in the past.
6 Some of my predecessors had as many as
7 30 people in counsel's office. Right now there are
8 15 lawyers counting myself. It's a symbolic, pretty
9 tough cutback that the Governor did, not to save
10 money, because 15 salaries is, of course, not that
11 much, but it was a strong message he was sending to
12 all the other commissioners and department heads.
13 If he could cut the Governor's office
14 down from 190 to 125, they could do likewise. We are
15 going to be seeing more of those cuts as we go on.
16 There are folks with expertise in the
17 budget law, folks who know environmental issues
18 inside and out, and people who help oversee the
19 authorities. Those of you who practice before the
20 independent authorities have a good sense of what
21 that means.
22 Most New Jerseyans don't realize there
23 are 50 plus independent state agencies and
24 authorities which have bonding, not just a
25 capacity, but outstanding bonds right now in excess

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1 of \$20 billion. This is a real important significant
2 part of government.
3 Counsel's office has a bit of oversight
4 because the Governor can veto the minutes of a number
5 of these authorities, and that gives us the
6 opportunity to work with them on some things.
7 The biggest change for me going from
8 working on trials and matters in the U.S. Attorney's
9 office to the Governor's office is the amount of time
10 that you can devote to any one issue.
11 As we heard from the panels this
12 morning, and I fully believe in this, before I would
13 walk in to try a case, whether it was ten documents
14 or 10,000 documents, you want to have touched and
15 read each one of them back and forth and put the
16 stickers on them yourself -- I was always a big
17 believer in that, as my trial partners would tell
18 you -- so that you were prepared for curve balls that
19 could come your way, whether your witness is
20 stumbling, or cross-examination or the defense case,
21 and you have the confidence of knowing you prepared
22 it and knew it inside and out.
23 You simply don't have that luxury with
24 the breadth and pace of the issues that come before
25 you. As much as you would like to do that, you are

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1 relying on others, but you can't peel back the onion
2 to the core and put it back together when you're
3 going to court when you are working in the Governor's
4 office.
5 Let me talk about two ongoing projects
6 that the Governor faces that may be of relevance to
7 folks here today. Obviously the Governor placed an
8 emphasis on ethics. It's a priority and will remain
9 a priority for him. Within hours of taking office he
10 signed an executive order that extends the financial
11 disclosures of public employees to hundreds of other
12 individuals.
13 It was a strong message and designed to
14 help set a tone at the outset.
15 Some calls are easier than others. I
16 got a letter that came to me by way of one of the
17 deputy chiefs of staff that included a \$2,000 check
18 to Governor Corzine's reelection campaign and a
19 letter requesting that the fellow who wrote the check
20 be appointed to a particular board. True.
21 We sent the check back. There is no
22 election campaign like that, no fund. Don't hold
23 your breath, that person will not be appointed to any
24 board in the near future.
25 We need to be able to step back and

1 evaluate the kind of patchwork of rules and
2 regulations that have gone into place over the years
3 and try to temper them with common sense.
4 We have been dealing with U.M.D.N.J., no
5 surprise in light of our earlier panel discussion. I
6 learned, not focusing on the scandalous part, but
7 talking to the doctors and nurses who did a terrific
8 job, and the good work that the U.S. Attorney's
9 office has done to uncover that, but they point out
10 to us, given the rules of gifts and honoraria, if any
11 of them won the Nobel Prize, they can't keep the
12 money.
13 We need to try to take a step back, look
14 at these in a practical sense, and not be soft on
15 ethics, but approach it in a way that makes sense,
16 and it will help restore their faith and the people's
17 faith in government.
18 Under the umbrella of ethics, we are
19 also evaluating the process by way of which the
20 government makes decisions, whether awarding
21 contracts and appointing people and finding folks who
22 can provide services for government.
23 What that means is simply insuring there
24 is a process in place for this that is transparent,
25 that has objective measures, that will allow

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1 decisions that are reached to be defended and to be
2 justified if any questions arise later.
3 If the bidding process or the decision
4 making process goes in a way that doesn't allow for
5 that, it may need to be redone, again with an eye
6 toward restoring confidence in our government.
7 Let me spend a minute on a subject that
8 is probably of no interest to the folks here; the
9 process of appointing judges in the state.
10 Counsel's office plays a role in that.
11 It has vetted applicants for state judges over the
12 years, and it is true now as well.
13 The Governor has a number of core
14 beliefs on this. First, he cares about quality,
15 adding quality judges to a bench that has so many
16 quality people on it right now. That is front and
17 foremost for him.
18 He also wants to increase the number of
19 women that are on the bench and is very dedicated to
20 that, as well as increasing diversity on the state
21 bench so that it better reflects the citizens of our
22 state.
23 It's a complicated process. Judges and
24 non-judges would admit that to you. I welcome names.
25 We welcome names of quality individuals, regardless

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1 of the degree of political support that that
2 individual may have.

3 You may have heard about Greg Pau. He's
4 the new director of the Division of Criminal Justice.

5 Greg Pau sent his resume in over the
6 Internet to the transition team after then
7 Governor-elect Corzine was trying to put together his
8 team. He knew no one. He had no rabbis. We took a
9 look at the resume and said, this is a pretty solid
10 person. He was a Deputy District Attorney over in
11 Pennsylvania, and he's now the director, and if you
12 haven't heard about him, I predict you will.

13 That's what we need to do to attract
14 other quality individuals to government as well.

15 John Lacey asked me to touch on one
16 other subject. That was how to foster better
17 relations with and among law enforcement. Let me
18 start with the state Attorney General's office and
19 their relationship with the Governor's office.

20 A couple of simple rules. I'm probably
21 on the phone every day with either the Attorney
22 General or the First Assistant speaking about one
23 matter or another, and try to break bread and have
24 lunch with them on a regular basis, because it's a
25 lot harder to get into tussles with people that you

1 all of our lives depend on trust, good open
2 communications and realistic expectations.

3 Focusing on the last one, I have no
4 expectation that Chris Christie is going to call up
5 the Attorney General and say, you know, we got a
6 great \$20 million fraud case that we have poured our
7 sweat and equity in it, why don't you join us, or why
8 don't you take credit for it yourself.

9 That's not going to happen either.

10 There are a lot of places where they can
11 work together. Just last week the Governor signed an
12 executive order announcing this new Office of
13 Homeland Security and Preparedness in the State of
14 New Jersey, which very quickly puts under one
15 umbrella different important pieces in the post 9-11
16 world that haven't been together until now in the
17 state. I think it's a good way to approach the
18 issue.

19 There are the criminal investigators who
20 do their work. There are those that prepare on the
21 civil preparedness side of the house. There is the
22 funding piece in grants which will be done out of
23 this office and done in a way that looks at threat
24 and need as the primary factors, as the factors that
25 have to be analyzed as money goes out in this area.

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1 break bread with.

2 You can always find it easier to work
3 through issues that way, as we all know from our
4 work.

5 In terms of what we talk about, there
6 are a couple of good benchmarks. We can certainly
7 speak about civil matters which are so closely
8 intertwined with policy and policy initiatives,
9 education, the environment and so on.

10 On the criminal side of the house, we
11 can talk about initiatives, the Governor's desire to
12 bring more work in the area of corruption, the area
13 of gang prosecutions and so on, but not inquire about
14 particulars of criminal investigations and have
15 information come back because of the appearance or
16 the actual conflict that can present.

17 That helps strike the right balance
18 between the constitutionally independent position of
19 Attorney General and the chief executive in the
20 state.

21 I see former Justice Peter Verniero
22 here. You can come back and tell me later if we got
23 this right.

24 As to the relationship between federal
25 and state law enforcement, any good relationships and

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1 There is training. There is the
2 intelligence piece, all together under one umbrella.

3 The criminal investigators are going to
4 work side by side, literally hand in hand at the same
5 office as the federal and state folks who work at the
6 joint terrorism task forces in Newark and
7 Philadelphia that are headed by the FBI. That's how
8 it is done virtually everywhere in the country and
9 going forward in the state of New Jersey.

10 It was pretty gratifying as a citizen
11 last week to see the Governor sign this order and
12 next to him people who made this happen: Chris
13 Christie flanking the Governor, and his role was
14 critical to helping build this new partnership, the
15 Attorney General, the head of the State Police, the
16 head of the FBI from Newark, Les Weiser and the new
17 nominee for this position, all working together,
18 because that is going to be a good model for us as we
19 go forward.

20 You have all been quiet for so long.

21 They haven't given you your food. You
22 listened to a lot of speakers today. You all have
23 day jobs to go back to.

24 I'm going to take my cue from that and
25 thank you again for asking me to come here and

39 (Pages 150 to 153)

1 letting me talk to you about this new rewarding
2 position. Thank you.
3 (Applause.)
4 CHIEF JUDGE BROWN: Joe Hayden is going
5 to give a couple of final remarks. Before he does, I
6 would like to note the outstanding attendance by the
7 members of the Federal Bar.
8 Your participation in programs such as
9 this shows that we have a Federal Bar the equal of
10 none. This is certainly one of the finest Bars in
11 the country, if not the absolute finest. I thank you
12 all.
13 We have quarterly meetings of the boards
14 of judges. We are going to hold our meetings here.
15 All the district judges, Bill Walsh has
16 a room upstairs, upstairs to the right immediately
17 after we get done with the luncheon. Thank you very
18 much.
19 (Applause.)
20 MR. HAYDEN: Before we conclude, I would
21 like to once again thank Ginny Whipple for her
22 Herculean efforts in bringing about this program. We
23 had the largest registration in the history of the
24 Association of the Federal Bar, over 615 registered
25 as of yesterday. People showed up at the door.

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1
2 As you can see, because of Ginny Whipple
3 the programs went off on time, the luncheon went off
4 on time, and everybody is prepared to move forward.
5 So what she did was above and beyond the call of
6 duty, and let's give her a hand
7 (Applause)
8 MR. HAYDEN: At this point the Thirtieth
9 Annual Judicial Conference of the Association of the
10 Federal Bar is hereby adjourned.

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40 (Pages 154 to 155)



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