

In The Matter Of:
Federal Bar Association

Transcript of Proceedings
March 24, 2011

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Min-U-Script® with Word Index

<p style="text-align: right;">Page 1</p> <p>1 2 3 4 ASSOCIATION OF THE FEDERAL BAR OF NEW JERSEY 5 35TH ANNUAL 6 UNITED STATES DISTRICT COURT 7 JUDICIAL CONFERENCE 8 9 10 11 Mayfair Farms 12 West Orange, New Jersey 13 Thursday, March 24, 2011 14 15 16 17 18 19 20 21 orted by: Howard A. Rappaport, C.C.R. 22 23 24 25</p>	<p style="text-align: right;">Page 3</p> <p>1 you are a natural fit for membership in the 2 Historical Society, because I know if you're here, 3 you like to learn something about the district and 4 you like to schmooze federal judges. You are perfect 5 for us. 6 Here's what we have been up to and some 7 of the things we do. Last fall we had a program that 8 was very well attended, very well received, about the 9 five supporting federal court groups internally. 10 The previous fall we had a wonderful 11 tribute to the past 13 chief judges of the District, 12 and we had anecdotes about all of them given by 13 people who actually knew them. 14 We regularly restore and preserve 15 courthouse artwork, including our Lady Justice statue 16 that is an award winning statue with a fascinating 17 history that's in the Lautenberg courthouse in 18 Newark. 19 We also take oral histories that you can 20 see on the District Court's web site. There is a sub 21 page for the Historical Society, and it is such a 22 valuable thing because three of the individuals whose 23 oral histories we have taken in the past few years 24 has since passed away, and it is just so valuable to 25 have their wealth of information available to all of</p>
<p style="text-align: right;">Page 2</p> <p>1 MR. LACEY: Good morning, everyone. I 2 want to first introduce Leda Dunn Wettre to talk 3 about the Historical Society of the Federal Court. 4 MS. WETTRE: Good morning, everyone. I 5 feel like a bit of an intruder here, because this is 6 the Association of the Federal Bar gathering, but I 7 am from a sister federal court group, the Historical 8 Society. I'm here to give you a very brief update on 9 what we are all about and what we have been up to. 10 First, I'm not sure if all of you know 11 what the Historical Society is, so I think I should 12 tell you what it is and, more importantly, what it 13 isn't. 14 What it isn't is a group of stodgy 15 academics who meet in the courthouse on Friday nights 16 to pour over historical documents. That's not us. 17 What it is is a group of federal 18 practitioners like yourself, judges and court 19 personnel, who meet -- we gather based upon an 20 historical topic, and invariably after our event is 21 over, we gather for sumptuous hors d'oeuvres -- and I 22 hope this is sounding better to you -- Judge 23 Debevoise points out more than hors d'oeuvres, and 24 there are a few beverages involved. 25 So if you are in this room this morning,</p>	<p style="text-align: right;">Page 4</p> <p>1 us. That includes Judge Ackerman, David Satz and 2 Stanley Rizman. 3 I'm sorry to get emotional, but he would 4 have been here today. He was here last year, where 5 Howard is sitting, transcribing the proceedings. It 6 makes me feel very happy that we have something 7 lasting of Stanley. 8 We annually do a Supreme Court 9 admissions trip, which is a lot of fun, and that's 10 open to our members, and then for members only we 11 annually have a judicial reception, and you will 12 receive our newsletter. 13 I hope I've gone a little way to 14 convincing you to join. I believe we have membership 15 applications here, but if we don't, they are 16 certainly on our web site, and I hope to see everyone 17 at our next event. Thank you. 18 (Applause.) 19 MR. LACEY: Thank you, Leda. 20 I now want to introduce the Chief Judge. 21 Chief Garrett Brown. 22 CHIEF JUDGE BROWN: Well, I guess I'm a 23 man that doesn't need an introduction, because I 24 didn't get one, John. 25 I find myself between two of our valued</p>

Page 5

1 organizations, the Association and the Historical
2 Society, both of which honor our great court, which,
3 as we know, is the oldest undivided court in the
4 country. We are the second oldest after Virginia,
5 but Virginia split up. We are still intact.

6 We have a lot of history over the years.
7 The Historical Society has done a great job in
8 preserving that history, both in terms of the book
9 and also in terms of the art.

10 We have an exhibit. Keith Miller has
11 spearheaded putting together the photographs of the
12 artwork that we have of the different judges, and Jim
13 Waldron of the Bankruptcy Court also acted on that
14 committee. I encourage you to see that exhibit,
15 which will be in our court gallery in Trenton.

16 We also have another project, to try to
17 rescue the group portraits of the court that go back.
18 I go back as far as I can remember, because I've been
19 on the court for what has been about 25 years now.
20 But we are trying to dig some of the others out of
21 the archives, because I'm getting to the point now
22 where I'm almost history myself. I've been a member
23 of the Bar of this court for 42 years.

24 (Applause.)

25 CHIEF JUDGE BROWN: I don't know if I

Page 6

1 need your congratulations. Maybe I need your
2 condolences.

3 Jim Meaney, I can remember when I was
4 first admitted to the court your dad being there, and
5 hopefully some of the others can as well.

6 It is a great court with a great history
7 going back a long time, and I encourage everybody to
8 support the Historical Society.

9 Also, the Association, a great
10 association, a great program here, we'll address some
11 of your questions about federal practice.

12 One thing I wanted to draw to your
13 attention, and I guess this is the first public
14 announcement, the New Jersey Commission on
15 Professionalism, which is composed of our court, the
16 State Court, the Bar Association and the law schools,
17 setting up a professionalism day which will, in each
18 of the state court vicinages, I believe it's on
19 October 19th, have two hours where they will have a
20 program on professionalism, and also assist in
21 getting the two hours of CLE that everybody now
22 needs.

23 We'll participate also, and it's
24 contemplated that our program will be the day
25 beforehand, i.e., the 18th of October.

Page 7

1 And John Lacey has also agreed that the
2 Association of the Federal Bar, as an organization
3 that puts on great programs, will help take the lead
4 in putting together those programs. You will see
5 more on that later, but that's coming up.

6 Now, I think you know pretty much about
7 the way our court is going right now. We have two
8 vacancies, two hearings down in Washington the
9 beginning of March, and things are moving right
10 ahead. You read a lot about budget cuts, yes, well,
11 we are on a continuing resolution again. Tune in for
12 the latest.

13 Aside from that, the court is in good
14 shape. Our CJRA figures for old cases, old motions,
15 are good, certainly better than the average, in
16 pretty good shape.

17 The federal trial is far from dead.
18 People talk about the vanishing federal trial. I
19 haven't seen it. I've been on trial pretty much
20 since I got back from Zanzibar in January.

21 We got our own board meeting later on
22 today, and beforehand I made some calls around to our
23 judges to see what would be on the agenda, and would
24 you believe, I couldn't reach any of them. Everybody
25 was on the bench. So that tells you something.

Page 8

1 I'm going to turn the program over right
2 now to the next person who is on here, who is
3 supposed to be John Lacey. And where is he?

4 MR. LACEY: Right here, your Honor.

5 (Applause.)

6 MR. LACEY: It is true that you need no
7 introduction. However, I did not want to step on the
8 toes of Paul Zoubek who will be giving you that
9 introduction in just a few moments.

10 Welcome, everyone, and thank you for
11 braving the weather.

12 As you can see, I wore my spring tie to
13 celebrate the beginning of spring today. I am very
14 impressed with the turnout.

15 I want to make a few announcements to
16 all of you. As Judge Brown has demonstrated to you,
17 he has been extraordinarily supportive of this
18 organization as a whole and all of its members.
19 These judges here have been supportive of lawyers in
20 general, and it is really something that we
21 appreciate.

22 So many of us are toiling every day
23 dealing with clients, dealing with state court
24 judges, federal court judges, dealing with clerks,
25 dealing with court administrators, and these judges

Page 9

1 understand what we go through.

2 Many of them have come out of the U.S.
3 Attorney's office, the Federal Public Defender's
4 office or private practice. It is incredibly
5 important for them to understand what we do, and they
6 just get it each and every day.

7 So, on behalf of the organization, I
8 just want to say to all of you judges, thank you so
9 much just for being you and understanding what we do
10 and giving us some leeway when we need it, and also
11 giving us a little bit of a push when we need it as
12 well. Thank you very much.

13 (Applause.)

14 MR. LACEY: Last fall Chief Judge Brown
15 and Judge Stan Chesler, who will be here later today,
16 came to us with a proposal. It was a proposal to
17 help both the Court and practitioners in the court.

18 The court, as many of you know, has many
19 indigent defendants appearing before the judges. In
20 many cases there is not a sufficient number of
21 counsel to represent these folks. Many of them are
22 prisoner rights cases or other civil rights cases.

23 They need our help. We advise the Court
24 that we would help the Court, and in doing so we also
25 help ourselves, because it gives the opportunity for

Page 11

1 Bob Goodman or Ed Cole or Ginny Whipple at the
2 Association of the Federal Bar.

3 You can also write to us. Just drop me
4 a line at any time. Be the contact person for your
5 law firm. If you have a small firm or you are an
6 individual practitioner, give me a call. We will
7 support you in any and every way that we can to make
8 you successful as a participant in this pro bono
9 program. So thank you very much on that issue.

10 The judge has already mentioned our
11 participation in the New Jersey Commission of
12 Professionalism, so I won't bore you there.

13 Most importantly, the mandatory CLE.
14 Each one of you received a packet this morning. In
15 order to get credit, we now have a program
16 administered by the state Bar, and it requires that
17 you both sign in and sign out. If you want the CLE
18 credits, do not leave this building without signing
19 out at the same place where you signed in this
20 morning.

21 Please, people forget and they want to
22 call Ginny after the fact and say, Ginny, can you put
23 my name down? She can't. It is required by us that
24 at the time you are here, when you sign out, you sign
25 your name, you put the time down, and you will get

Page 10

1 many of our firms and many of our members to appear
2 before judges to argue motions, to have trials that
3 otherwise these folks would not have in this day and
4 age.

5 The judges have been very supportive in
6 saying to us that, especially for those lawyers
7 involved in this program, they will go out of their
8 way to make sure there are going to be court
9 appearances, that there will be motions heard. You
10 will have the opportunity to argue them before the
11 District Court.

12 Of course, we as an organization will be
13 supportive of any of those volunteers who help the
14 indigent defendants. So we are putting together a
15 coordinated program led by Bob Goodman and Ed Cole of
16 the organization. And they have already signed up
17 somewhere around 30 to 40 firms, and each of those
18 firms has a contact person, and within those firms
19 are individuals who will be able to receive
20 appointments from the Court.

21 As part of this program I want to urge
22 all of you -- and I will be saying it again later in
23 the morning -- I want to urge all of you to
24 participate in the program. You can contact us,
25 either by e-mailing me at jlacey@connellfoley.com or

Page 12

1 the credit for the hours that you have been here.

2 I urge you all not to forget. I know
3 somebody is going to forget. I'm urging you not to.

4 With that I want to introduce Paul
5 Zoubek, who is the moderator for our first panel. We
6 have two incredibly fine panels today, and we have
7 three great judges and a very experienced federal
8 practitioner here. I want to thank them all again
9 for being supportive of us and being here today for
10 this terrific program. Thank you.

11 (Applause.)

12 MR. ZOUBEK: Thanks, John.

13 What a wonderful day in New Jersey.
14 New Jersey, wait a minute, the weather will change.
15 We look outside and we have a winter wonderland.

16 Of course, Judge Rodrigues and Judge
17 Irenas and others from South Jersey who drove up, the
18 palm trees were waving down there, 80 degrees, but it
19 took about two and a half hours to get up here.

20 I had my first exposure to this event
21 when I was a young lawyer, and it is an absolute
22 pleasure for me to have an opportunity to moderate
23 this panel, which is on a very narrow topic which we
24 guarantee we are going to answer in the next hour and
25 45 minutes, which is everything you wanted to know

Page 13

1 about the practice of law in the District of New
2 Jersey in 2011.

3 You are here to hear the panelists and I
4 will give quick and short introductions, because most
5 of the panel does not need lengthy introductions.

6 We are lucky to have our Chief Judge
7 Brown. As you all know, we have had an incredible
8 tradition of chief judges in this district that have
9 led the District Courts and continue the history of
10 excellence that this Court has had.

11 I certainly had the pleasure of working
12 in the Camden federal courthouse as an Assistant U.S.
13 Attorney and seeing Chief Judge Gerry in action for a
14 number of years and it was always a terrific
15 experience, and Chief Judge Brown carries it on,
16 serving as Chief Judge since 2005.

17 He has been on the bench since 1985,
18 served as an Assistant U.S. Attorney for a period of
19 time, and I hope to get the Zanzibar aspect of what
20 he was talking about and his expertise in maritime
21 law that comes from his time spent as chief counsel
22 for the Maritime Administration.

23 Judge Katherine Sweeney Hayden joined us
24 as well, served as an Assistant U.S. Attorney, served
25 on the Superior Court, and has been a member of this

Page 14

1 distinguished bench since 1997.

2 Magistrate Judge Patty Shwartz, who is
3 with us, served in the U.S. Attorney's office and has
4 been a magistrate judge since 2003. We will
5 certainly appreciate her perspective on some of the
6 practical aspects of some of the scheduling topics we
7 are going to talk about today.

8 Bob Goodman, stepping in for Judge
9 Wigenton at the last minute, Bob, we really
10 appreciate that, and that quid pro quo of the signed
11 Duke championship poster is over there that you asked
12 for.

13 For some of you it is a pleasure for me
14 to be at this proceeding this year, because for the
15 last three or four years I've been at court
16 proceedings across the country, that some of you who
17 know me kept me away from these proceedings.

18 I think you are all here certainly to
19 hear the perspective of the judges. This is not
20 going to be a presentation about reading rules and
21 read specific numbers of the rules and citing
22 specific cases, but, rather, getting some of the
23 observations of the judges on a variety of topics.

24 I've asked Bob Goodman to kick in on the
25 first very general topic that I think will set the

Page 15

1 stage for some of the discussion, which is beginning
2 the process as a practitioner, whatever side of the
3 aisle you're on. Principally this panel is going to
4 be on civil issues, assessing your case, and making
5 an assessment of your case in terms of the
6 preparation for discovery needs that you may have and
7 the needs in terms of long-term perspective of
8 getting ready for trial.

9 You will note we have seven or eight
10 topics in the outline. This is going to be speed
11 law, like speed dating. You're going to get a quick
12 review of some of the topics as we go through it.

13 We have to move this along and we hope
14 you enjoy it. Bob.

15 MR. GOODMAN: This is going to sound
16 like a plug for my friend Allyn Lite, but in all
17 seriousness, what I do when I get a new case in,
18 whether it's something that I'm filing in federal
19 court or something that I'm removing to the federal
20 court, is to sit down with his book and take another
21 pass through the rules to make sure that I'm up to
22 date in what I'm doing.

23 In particular, what I do as a first
24 stage is to identify what my immediate obligations
25 are, both with regard to discovery under Rule 26, in

Page 16

1 this district the preparation of the joint discovery
2 plan, and now, most significantly, identifying what
3 the issues are with regard to discovery of
4 electronically stored information.

5 What I do with regard to that topic in
6 particular, because I find it to be a somewhat scary
7 topic, is to review the most recent opinions, and in
8 particular the pension committee opinion out of the
9 Southern District, and depending on the
10 sophistication of my client, either giving that
11 opinion itself to the client or general counsel for
12 the client or, at a minimum, making sure that they
13 understand what their obligations are under that
14 opinion. That's what I expect that we are going to
15 be talking about for the next several minutes.

16 MR. ZOUBEK: One of the topics, and
17 certainly the dinosaur that I am from the practice of
18 law over the years, is I remember something before
19 e-mail, I remember something before the PC, I
20 remember it was very easy when you would go and ask
21 the client to keep the files, just retain the files
22 and make sure that you got the files available. That
23 concept has changed and that concept has evolved
24 significantly.

25 One of the things that we put in the

Page 17

1 materials for today was we prepared from our firm --
2 and a young lawyer at the firm, Kristen Polovoy,
3 assisted in preparing the document -- which is, E
4 discovery, best practices, survival guide, preparing
5 and monitoring the litigation hold notices.

6 Certainly, Bob, I would like your
7 perspective on it, and certainly any of the judges.

8 This is something that almost needs to
9 be instantaneous, certainly when litigation begins.
10 But one of the most difficult parts of it is
11 anticipating when your obligation to put a hold
12 notice in place occurs.

13 Bob, maybe you can talk a little bit
14 about that in terms of its not necessarily at the
15 point in time when litigation has been filed. What
16 is your perspective on how you evaluate that issue?

17 MR. GOODMAN: If you literally read
18 Judge Scheindlin's opinion, and I believe it's going
19 to be followed by the judges before whom you are
20 appearing, if you are having a conversation with your
21 client about this subject, it is time to immediately
22 advise the client that there ought to be in some form
23 litigation holds put on discoverable electronic
24 material.

25 It may even be too late at that point,

Page 18

1 depending on the perspective of the individual judge
2 that you are before, and obviously as the opinion
3 states in many places, this is all a subjective
4 process.

5 You need to insure that litigation holds
6 are placed immediately once the case or the matter
7 has gone far enough that there are discussions with
8 counsel.

9 MR. ZOUBEK: I've had matters where that
10 litigation hold needs to go to a Fortune 500 company,
11 and I have had instances in which a three or four
12 person entity needs to deal with the litigation hold
13 issues.

14 What do you as a practitioner do to
15 address the issues in terms of evaluating the level
16 of sophistication of your client on that issue?

17 MR. GOODMAN: It all has to do with the
18 level of sophistication of your client.

19 My personal practice largely involves
20 single plaintiff product liability cases in this
21 court, but I'm also involved in class actions and
22 patent cases. It runs the gamut of levels of
23 sophistication.

24 My clients are on occasion individuals
25 and small corporations, but they are also Fortune 50

Page 19

1 and 100 corporations.

2 You've got to sit down and have that
3 conversation with your client and assess then what
4 their level of sophistication is. There aren't any
5 rules that I've been able to determine for my own
6 personal practice to decide how sophisticated a
7 client is in advance without sitting down and having
8 a conversation with him.

9 MR. ZOUBEK: One of the topic areas that
10 I think is really key, and one of the things that is
11 focused on in this outline, which hopefully is
12 helpful to some of you, is the need, not just talking
13 to -- you know, you have to talk to key players at
14 first, but you also have to sit down and learn a
15 little bit about ESI, electric stored information.

16 As we talk about some of the practical
17 issues, any of the judges have any comment on some of
18 their experiences in dealing with electronically
19 stored information?

20 MAGISTRATE JUDGE SHWARTZ: By the time
21 the issue comes to us, there is somebody complaining
22 about the absence of preservation by the adversary.

23 Two things I want to point out, the
24 pension committee case that was just discussed
25 decided by the same judge.

Page 20

1 What was notable about that is it was
2 plaintiffs who were being penalized largely for the
3 failure to produce and preserve.

4 Most of the opinions you see out there
5 are usually pointing the finger at the defendant for
6 failing to preserve when they should have believed
7 there was a possibility of litigation.

8 Here the plaintiffs were the initiators
9 of the data preserved, and I think that might have
10 put some of the strong language in her Honor's
11 opinion about the obligations to preserve and how
12 it's as routine as our Rules of Professional Conduct
13 and Competency to be sure that we know we are
14 fulfilling our responsibilities as lawyers who have
15 clients who may have litigation.

16 The other thing I can point out is when
17 you are meeting with your client, my recommendation
18 is, unfortunately, kind of think about what happens
19 if this is a problem later. When you are talking to
20 your client, be prepared that somebody some day may
21 be asking your client about what efforts were made to
22 preserve.

23 When you write those preservation
24 letters, e-mails, et cetera, write them with the idea
25 that some day they may get produced and you want to

Page 21

1 have them produced to a court saying we discharged
2 our obligation and therefore we weren't acting in a
3 negligent way.

4 It is almost looking at it from the
5 opposite point of view. What if this is a problem?
6 What would I want to show the court that my client
7 discharged their obligation?

8 With that in mind it is educating
9 yourself on what their ESI is, where they keep it,
10 who has it, what steps were maintained to keep it so
11 it can be produced, whether it was a writing, to whom
12 it was distributed and the like.

13 Those are a couple of examples that I
14 can suggest.

15 JUDGE HAYDEN: I am so blessed that I
16 have never had one of these leave Judge Schwartz'
17 hands to get into mine, so I'll pass.

18 CHIEF JUDGE BROWN: I think that's
19 accurate. There is sort of a diminishing return
20 point. Most of these discovery disputes, as you
21 know, are raised before the magistrate judges. On
22 occasion we get an appeal, and we are dealing with a
23 very minority, because most of these are resolved
24 very favorably at the magistrate level.

25 MR. ZOUBEK: Has this come up in any of

Page 22

1 your trials, where something is discovered during the
2 course of a trial, that a witness is on the stand,
3 has not kept records or -- have you seen that issue
4 come up in trials?

5 CHIEF JUDGE BROWN: I have seen it come
6 up as cross-examination on credibility. They haven't
7 supported it. They could have supported it.
8 Therefore we can infer that either it was never there
9 or it was not accurate.

10 I saw one come up at one point where
11 there was a witness who claimed to have records, did
12 not have records, could not produce the records, and
13 it was very detrimental.

14 MR. ZOUBEK: I think one of the
15 challenges as well, one of the things that I have
16 seen in practice as well, if you have a brewing
17 controversy with a party, affirmative use of what I
18 would call the litigation hold warning letter to the
19 other side, I think is an important tool that you can
20 use, because one of the things you want to make sure
21 that happens is so much of this electronic evidence
22 is so effervescent.

23 The analogy I use sometimes when I'm
24 working with corporations in terms of their need to
25 have a robust electronic stored information program

Page 23

1 basically says, it used to be, certainly from the
2 criminal investigation standpoint, you could never
3 get a Title III wiretap on a corporation for all the
4 conversations that the corporation was going to have
5 about how it was going to run its business.

6 That was back when I was in the U.S.
7 Attorney's office. You would never get access to
8 that. These days, since everybody translates their
9 phone conversations that they used to have years ago
10 into electronic e-mails, all that is available and
11 can be effervescent and you want to make sure you
12 grab that as quickly as possible.

13 MR. GOODMAN: We can even step back from
14 that point and look at the opinion, and if anyone is
15 not familiar with it in this group, you should be
16 aware that according to the opinion, failing to issue
17 a written litigation hold constitutes gross
18 negligence.

19 So if you have, as I did, well past the
20 time that the first opinions were issued by the
21 Southern District with regard to this subject, kind
22 of a loosey-goosey practice with regard to how I
23 convey the litigation hold information to my client
24 and exactly what it is that I convey to them.

25 If this opinion is being followed by

Page 24

1 this court and other courts around the country, you
2 start off with the position that failing to issue
3 that written litigation hold letter is gross
4 negligence.

5 MR. ZOUBEK: I think, Judge Schwartz, if
6 you can comment on this as well.

7 I think one of the issues that is very
8 important is a tendency at times for folks to sit
9 with your business client, representatives of your
10 client, plaintiff or defendant, and talk to them
11 about what the needs -- that they need to make sure
12 that they retain this information, give them the hold
13 notice.

14 The question is whether or not you sit
15 down, or someone sits down with the folks who are in
16 the information systems department, and you can
17 actually understand what they are saying.

18 I have to say that sometimes I'm not
19 able to cut through all of the various formulations
20 for the programs that they have and where things
21 might get stored.

22 In some of your discovery conferences,
23 Judge Schwartz, has that issue come up?

24 MAGISTRATE JUDGE SHWARTZ: As you know,
25 our Local Rule 26.1 requires that the lawyers educate

Page 25

1 themselves on their client's information systems and
2 be able to identify the go-to person, whether a
3 lawyer or an information systems employee who can
4 answer those questions.

5 There have been at times, where in an
6 effort to try to resolve a problem, the suggestion
7 from the court has been, let's have the information
8 systems persons speak to each other, let everyone
9 else be a spectator, and let them talk to each other
10 with the idea to find the information, not gain a
11 particular advantage in a litigation, because your
12 interest is getting the information your client has
13 and getting the information your adversary's client
14 has.

15 It has been an effective means of doing
16 that. Some firms, whether the clients or the
17 lawyers, decide to have an outsider do it, but that
18 person still has to go through the same exercise of
19 educating themselves on the electronic system.

20 So my suggestion is, unfortunately, you
21 need to know as much as your client does about its
22 own recordkeeping.

23 MR. ZOUBEK: One of the substantial
24 issues that applies across a great deal of litigation
25 these days is the issue of the cost of electronic

Page 27

1 the other side pay for the electronic discovery.

2 MR. ZOUBEK: Judge Hayden.

3 JUDGE HAYDEN: I think one of the things
4 that, or two things that occurred to me. First, this
5 is a full employment opportunity for the younger
6 lawyers, because they are far more adept than their
7 betters in the firm to really get their arms around
8 some of this infrastructure. I think it is a time
9 for the younger lawyers to step forward, because what
10 they have been doing and are more intuitive about and
11 can be helpful, and certainly for leadership of the
12 firm to recognize that. There are very few things
13 that one can do early out of practice.

14 The second thing is I remember in
15 Maryland, Paul Graham -- I'm trying to remember the
16 magistrate judge, an Italian name -- Facciola --
17 they have written extensively about electronic
18 discovery.

19 One of the points that they have made is
20 that the federal judges are literally deciding their
21 way out of jobs. People are going to go to private
22 arbitration and mediation on the theory that they
23 will set the boundaries on how far they are willing
24 to go and duke it out and get a result, rather than
25 the hemorrhaging, than the more fearful and cover

Page 26

1 discovery, the monumental cost sometimes of pulling,
2 mirroring computers, searching for records.

3 To what extent, Bob, or Judge Shwartz,
4 to what extent is there a determination made on how
5 you get to a point where you determine how deeply you
6 are going to require a review of legacy filings, of
7 backup tapes, evaluate the issue of the cost?

8 When I'm sitting down with a client now,
9 and I review for them what the estimate is going to
10 be, of pulling, reviewing, doing a privilege review
11 of all of the records, that is a monumental cost that
12 is being added to the up front part of litigation
13 that is having a substantial impact on what's
14 happening in discovery these days.

15 MR. GOODMAN: The easy answer that I
16 have is, you have to do the evaluation on a case by
17 case basis.

18 The problem with our Local Rule and with
19 the Southern District opinions is that they kind of
20 assume that all cases are the same, that all clients
21 are the same, that all litigation can justify this
22 kind of an exercise.

23 It has not yet been made clear to me the
24 extent to which the court is going to take that into
25 account when the applications are being made to have

Page 28

1 your rear end and where are we going type of
2 litigation goes.

3 Perhaps one of the things that the
4 judges have to do is get ourselves more involved with
5 these costs and be educated, and you are the ones to
6 do it for us so that we can call a halt.

7 Thank heaven our magistrate judges tend
8 to be younger than we are, but I really think that a
9 lot of this is driven by the fear that you are not
10 going far enough as well as just beating the other
11 side to death.

12 We are good as judges in keeping the
13 playing field even, but when we don't know how big it
14 is -- and that's at least my personal problem, I
15 don't know how big it is in terms of cost and how far
16 people have to go.

17 Maybe touring a law office, touring a
18 war room the way you would tour a prison, now I
19 understand what they are talking about.

20 It's really something to think about,
21 because we just don't know how far to push it.

22 MAGISTRATE JUDGE SHWARTZ: And I do
23 think that while the rule is written in a general
24 fashion, at least in New Jersey, you can have access
25 to more than a dozen magistrate judges. We try to

<p style="text-align: right;">Page 29</p> <p>1 help you solve the problem. If you can educate us on 2 what your calendars are, sometimes just by virtue of 3 the fact that we may have seen it solved in a 4 different way in a different case, which may not be 5 applying the reasonably acceptable test that's in the 6 case law, but rather a more practical approach. 7 If you can tell us what your challenges 8 are, and also try to approach it in sort of a can do 9 attitude. This is what we think the other side is 10 looking for. This is where our challenges are. 11 The courts can sometimes weigh in. 12 Judge Facciola, who you just heard mentioned, has a 13 view about a use of sampling as a mechanism to test 14 for things like that. 15 I know you didn't want to talk about the 16 rules, but for some reason I always come back to 17 rules. Rule 502. Rule 502 now is in the Rules of 18 Evidence, another tool that you can use to help cut 19 down some of those expenses on the privilege review. 20 In terms of the expense, we are not in 21 your shoes. We don't know what it costs. There 22 might be some ways that you can educate the judge who 23 you are bringing a problem to to try to resolve, less 24 of a fight about what we can't do, but what we can 25 do.</p>	<p style="text-align: right;">Page 31</p> <p>1 cross-examination. Have you gotten to the point 2 where the issue of what appropriate instructions -- 3 CHIEF JUDGE BROWN: That didn't have to 4 do with documents that were destroyed during 5 litigation, but where there was a representation they 6 had documents beforehand they could not come up with 7 at all. 8 As far as destruction, is it 9 intentional? Do we have a litigation hold order in 10 place? What do we have? 11 Again, you certainly can get an adverse 12 inference where appropriate. Again, very fact 13 sensitive. 14 As I think about this, we are really 15 creating somewhat of a mine field, and Judge Hayden 16 has given an analogy for war rooms, litigation 17 document war rooms which she says when you tour them, 18 it would be like a prison. 19 The difference is that in the prison the 20 inmates are protected by the Eighth Amendment. I 21 don't know how cruel and unusual some of the 22 conditions are in the litigation war rooms. 23 In the process when they discover the 24 three months, six months are missing, all of a sudden 25 that winds up on our plate, and all I can say is it's</p>
<p style="text-align: right;">Page 30</p> <p>1 MR. ZOUBEK: Judge Irenas, do you have a 2 question? 3 JUDGE IRENAS: I've had three or four 4 times a situation where electronic records get 5 destroyed, either because there was no hold or 6 despite the fact that there was a hold, but sometimes 7 something is built into a software that got 8 destroyed, things happen. 9 I'm just wondering how the judges -- if 10 that gets to the district judge more than the 11 magistrate. It comes up two ways. The side who 12 wants to introduce evidence of those records being 13 destroyed or wants a charge of some kind. 14 You don't really know exactly what was 15 destroyed. You don't have any proof that some 16 valuable bit of evidence is destroyed. All you know 17 is e-mails for six months were totally destroyed or 18 something like that. 19 I'm just curious, because I've had three 20 or four of those cases where it got destroyed, 21 despite the best efforts of the magistrate or even 22 the lawyers. It just got destroyed. And now we are 23 facing it at trial, where a year of e-mails 24 disappears or a year of documents disappears. 25 Judge, you referred to having that on</p>	<p style="text-align: right;">Page 32</p> <p>1 fact sensitive. 2 MR. ZOUBEK: I think that's an excellent 3 question, Judge. 4 JUDGE IRENAS: I've had it three or four 5 times. 6 MR. ZOUBEK: It's fact sensitive, and 7 certainly it comes up -- 8 JUDGE IRENAS: Always it's an accident. 9 I never had a case where I was able to find, even 10 after a hearing, that it was deliberate. It's 11 always, well, it was in the program. The litigation 12 hold didn't go to Smith, and Smith went ahead and 13 destroyed it, notwithstanding a litigation hold or 14 for whatever the reason things get destroyed. 15 You rarely have proof that there is 16 anything in that group that is hurtful to one side or 17 the other. You just don't know if two years of 18 e-mails disappears. You don't know what's in those 19 e-mails. 20 How I deal with that is always an issue. 21 Do I let the evidence in about it? Do I give an 22 adverse inference charge at the end of the case? 23 I frequently have in limine motions on 24 that. In advance they are moving for either to get 25 it in evidence or to get an adverse inference.</p>

Page 33

1 Notwithstanding all the care you folks
2 are talking about, even in today's world, and even
3 with Shira Scheindlin on the prowl, there is a lot of
4 stuff that gets done carelessly, or maybe
5 deliberately done that results in things being
6 destroyed.

7 CHIEF JUDGE BROWN: My experience has
8 been the same. Difficult issues. They are not cut
9 and dry. I don't see a situation where someone
10 orders destruction of dangerous documents, but,
11 rather, where somebody has just not read the letter,
12 not done what they are supposed to in the program,
13 for some reason had a glitch that destroys everything
14 after six months.

15 JUDGE IRENAS: At least that's what the
16 evidence shows.

17 MR. ZOUBEK: The white collar
18 practitioner knows those issues can come up, and
19 sometimes intent does become an issue, from both
20 sides of the aisle.

21 I think one of the things you will see
22 in the outline, and you will see it in the line of
23 cases, that it is a very fact sensitive analysis of
24 what the background is and the explanation of what
25 happened.

Page 34

1 Let's move on from ESI. We are at a
2 point, you got the litigation hold notices in place,
3 you have done some initial assessment of what
4 discovery you think you are going to need in the
5 case. Then you're going to get ready to go over and
6 see Judge Shwartz because you have had the honor of
7 having your case assigned to her and she needs to set
8 forth the discovery schedule and work on discovery
9 process in your particular case.

10 MAGISTRATE JUDGE SHWARTZ: Obviously all
11 of you in this room know that each of the magistrate
12 judges invite you to propose to us a plan for how you
13 would like to see your case scheduled for a pretrial
14 process and you have an opportunity to share with us
15 your problem.

16 Each one of us will want to come up with
17 a plan that fits for your scheme.

18 My advice to the younger lawyers who may
19 be sent on their merry way to come to the Rule 16
20 conference, ask the lawyers who are supervising the
21 litigation everything you think you want to know
22 about the case. Don't be afraid. Ask some
23 questions. It is not just a, quote, scheduling
24 conference.

25 Those conferences are going to be used

Page 35

1 to educate the Court for the first time from a
2 lawyer's point of view what the case is about, beyond
3 the cold pleadings that get filed.

4 In addition, it is a chance to raise
5 your problems, see if there is a mechanism to present
6 those issues to the Court if they need to be made to
7 troubleshoot them. Maybe resolve them.

8 As it relates to electronically stored
9 information, talk about whether there are going to be
10 issues concerning that. Don't be surprised if you're
11 asked whether or not you as the plaintiff, or you as
12 the defendant, have assured your client has put in
13 the litigation hold.

14 The best thing I can tell you about this
15 process is, again, the Court is trying to help solve
16 those early problems in a good faith effort to try to
17 avoid the district judges from having them darken
18 your doorstep at trial and you are not distracted.

19 Come to the conference ready to raise
20 your issues, talk about your case, talk about what
21 you really need to be able to both pursue the case
22 for a full-blown trial, but also to evaluate the case
23 for settlement purposes.

24 Many of us will ask you those questions.

25 MR. ZOUBEK: What is your anticipation,

Page 36

1 Judge, as to what the lawyers will have worked out,
2 not only by the rules, but your practice, by the time
3 they come to see you?

4 MAGISTRATE JUDGE SHWARTZ: Many of them
5 come in ready to have a plan to propose. Very much
6 depends on what the lawyer's experience is with
7 whatever the judge they are in front of, whether it's
8 in federal court, cases that have been removed.

9 Lawyers that have not been in federal
10 court don't appreciate the fact that they need to
11 actually talk with their adversaries before they get
12 there, because there is a self-executing discovery
13 that goes on in state court.

14 Sometimes it is up to you who have
15 experience in the federal court to help along your
16 adversary who may not have as much.

17 As it relates to those who are not
18 New Jersey practitioners, you are the host lawyer
19 sponsoring local counsel, we look to you -- I say
20 "we," I think the people in this room look to you as
21 the New Jersey lawyers to educate your out of state
22 lawyers how we do things here in New Jersey. We look
23 to you a lot.

24 A lot of us will require New Jersey
25 counsel to participate in all of those conferences

Page 37

1 because we know you know what's expected in terms of
2 professionalism, collegiality, problem solving.

3 MR. ZOUBEK: What kind of mistakes do
4 you see lawyers make?

5 MAGISTRATE JUDGE SHWARTZ: Sometimes you
6 see folks who haven't even talked to their clients --
7 not people in this room -- talked to their client
8 before they come to the conference.

9 There are occasions where folks say, I
10 have to discuss the matter with the client. Okay.
11 That can be as basic as what they really need to talk
12 about resolving the case on a merits basis, a
13 settlement.

14 Sometimes not really knowing what it is
15 going to take to evaluate the case for resolution or
16 what it's really going to take to try the case, they
17 will start talking about electronic discovery, by way
18 of example, and the wish list of information, and
19 sometimes when that happens, it doesn't happen a lot,
20 sometimes you will turn to a lawyer and say, are you
21 sure? Watch what you wish for, because the deluge of
22 information may come to your way, maybe it is so
23 insurmountable that you can't review it to cull out
24 what you really need. Sometimes it borders on too
25 much.

Page 38

1 MR. ZOUBEK: How do you make a
2 determination as to what you think the appropriate
3 pace of the schedule is in a case?

4 MAGISTRATE JUDGE SHWARTZ: There is an
5 individual case management. We are going to turn to
6 you to make a proposal to schedule. You really need
7 X amount of time? Or, if you do, tell us why. Is it
8 because you know the key witness is involved in a
9 corporate merger and isn't going to be available for
10 90 days to be able to step up to that key deposition
11 that the plaintiff wants?

12 The more you can tell us about the
13 challenges in your case, the realities, the more we
14 can tailor a schedule. There are times where
15 sometimes we have to cut things back from the
16 proposal, because from the judge's point of view, you
17 have a case in front of that judge, it should be your
18 most important case, although the reality is we all
19 know you have other matters. You're going to be on
20 trial for X number of weeks, months, whatever, so
21 that we can move other pieces of the case while
22 litigation counsel is tied up.

23 The more you can share, the better off
24 you will be to get a tailor made schedule that will
25 make sense to you.

Page 39

1 MR. ZOUBEK: What about instances in
2 which it happens every once in a while where the
3 attorneys aren't cooperating with each other and they
4 haven't worked out an appropriate schedule?

5 MAGISTRATE JUDGE SHWARTZ: We can invoke
6 the Judge Chesler rule, come to one of our -- make
7 sure I get it right -- rooms that are hot in the
8 summer or cold in the winter and help you get
9 together.

10 We can give you a more comfortable
11 environment, come into my chambers, or any of my
12 colleagues, her colleague's chambers, and it will
13 make a comfortable environment and require you to
14 talk to each other.

15 You are duty bound to get this process
16 moving forward. I have had situations where the
17 lawyer who is trying diligently to get the other side
18 to return a phone call, can't do it, write us a
19 letter. Magically when the Court calls to say we
20 would like to have a conference about this, it's
21 remarkable how the phone calls get returned.

22 We can be used for all kind of things.

23 MR. ZOUBEK: One of my favorite letters
24 I was asked to write at one point, I asked for a
25 conference to work out a scheduling in a proceeding,

Page 40

1 but I needed to send an agenda letter to the lawyer
2 on the other side for the discussion, and unless I
3 was sending the agenda letter, there would not be a
4 phone call.

5 MAGISTRATE JUDGE SHWARTZ: Did you find
6 out that that lawyer was not practicing law in
7 New Jersey?

8 MR. ZOUBEK: Correct.

9 MAGISTRATE JUDGE SHWARTZ: How shocking.

10 MR. ZOUBEK: In terms of discovery,
11 handling discovery disputes, Judge Schwartz, what is
12 your experience and what are your recommendations?

13 MAGISTRATE JUDGE SHWARTZ: As everybody
14 in this room knows, in the District of New Jersey,
15 don't file a motion to get relief from the Court.
16 You present your discovery dispute by phone or
17 letter.

18 The implementation of the letter process
19 depends on who the magistrate judge is and if they
20 have specific requirements for your case or the way
21 they practice.

22 My recommendation is -- and this again
23 goes to really educating the out of state lawyer.
24 There are out of state lawyers who believe if it is
25 not done by notice of motion, brief, certification

Page 41

1 and the like, they are actually going to get a real
2 decision.

3 If you present it in a letter, the
4 magistrate judge will issue an order of some sort.
5 That order is appealable as an order that is issued
6 based upon full briefs.

7 That is a tip that you can share with
8 some of those who may not have the familiarity, or
9 your state court colleagues who aren't in federal
10 court. They are so accustomed to knee jerk out the
11 motion to compel production of responsive
12 information, that they fail to understand that if
13 they were to do that, you get stuck on the formal
14 motion clock, it takes 24 days before you get a
15 resolution. And if you have a six or eight month
16 fact discovery period, that's a lot of days eaten up
17 on the discovery clock for you to be able to move
18 forward with the rest of the litigation.

19 The approach that the district has
20 concerning the informal presentation of the issue
21 will get you much faster resolution in order that you
22 can appeal. Sometimes maybe that's what you need.
23 Maybe there really is a fight, but you need something
24 that you got to present because your client wants you
25 to present it.

Page 42

1 As it relates to other types of
2 disputes, not everything is subject to being able to
3 be reduced into writing. I'll give you a quick
4 example.

5 Sometimes there is a privilege dispute
6 that has come up. The judges are going to know and
7 you are all going to know what the elements are to
8 invoke the privilege.

9 Sometimes it has to come down to look at
10 the document. The judges aren't going to need a full
11 recitation on the elements of privilege law to help
12 you resolve that issue.

13 If you're not sure how to present it in
14 a most efficient way, you can drop a quick letter
15 saying you and your adversary have an issue, just to
16 discuss how to clear it up.

17 MR. ZOUBEK: The problem being, and I
18 certainly hear from young lawyers that come in and
19 ask for advice prior to a conference because they
20 have a lawyer on the other side that they are not
21 able to reach agreement with.

22 What are the most problematic requests
23 that you find that you get?

24 MAGISTRATE JUDGE SHWARTZ: The letter
25 from the one side that says the other side just won't

Page 43

1 respond to my discovery demands, just radio silence.
2 It is hard to make a decision when someone is not
3 invoking the advocacy and due process, you know, back
4 and forth, putting your position on the record.

5 The absence of a response is probably
6 the most frustrating to the party writing the letter
7 and the most difficult for the Court because
8 everybody knows they have to respond.

9 People in this room tend to respond to
10 overtures, even if they don't want to respond. At
11 least there is a response.

12 The other, I think, is the no can do.
13 It can't possibly be done response.

14 There is always a way to come up with a
15 way to resolve a problem. Coming to the table with
16 at least a proposal of a resolution lets you control
17 your own destiny. We'll make decisions if we have
18 to. Sometimes the decisions are not going to be the
19 ones that you would have preferred to have had had
20 you chosen to do it on your own. That's the other
21 challenge. To try to come up with a resolution to
22 the problem, because that's what's going on at the
23 discovery phase, problem solving, more than anything
24 else.

25 MR. ZOUBEK: What about in terms of

Page 44

1 calls that you may get? I know when I talked to
2 Magistrate Schneider down in Camden, he's developing
3 a list of favorite calls he has gotten over the
4 years.

5 Without naming names, calls that you may
6 have gotten during depositions and resolution of
7 issues, what is on your top three favorite kind of
8 calls that will go in your book some day?

9 MAGISTRATE JUDGE SHWARTZ: I'll tell you
10 the very first one I got when I started this job. I
11 actually got a call from a deposition, and I respect
12 the lawyers who were involved in the case, I'm fairly
13 confident it was out of state counsel posing the
14 issue. They were fighting about where to sit.

15 I hadn't had this job terribly long, and
16 as anyone knows, some of my former colleagues at the
17 U.S. Attorney's office, I would say that was a joke.
18 I thought they were pulling a prank on me.

19 I restrained myself from having the
20 Charlie McKenna I can't believe you're doing this, go
21 back to run the criminal division. I held back and I
22 listened, because I recognized the voices as not
23 being voices of people I heard speak to me for a
24 dozen years.

25 It was a real fight. I think the

Page 45

1 resolution was something along the lines, does
2 everybody have a seat right now? Okay, good. Take a
3 seat. Does the witness have a seat? Yes, okay.
4 Does the court reporter have a seat? Okay, yes.
5 Everybody has a seat. Continue your questioning.
6 I was surprised that that was the
7 question that I got. Wow, they are going to pay me a
8 lot of money to make that kind of a decision?
9 Awesome.
10 I don't think I can do better than that
11 as an example of the kind of questioning I got.
12 The other thing I can tell you in terms
13 of deposition disputes, my colleagues and I, I think
14 that almost all of them, maybe all of them would
15 agree, we want to hear from you during a deposition.
16 If you really have a problem you can't resolve, call
17 us while it's going on.
18 There's one having -- I never took a
19 deposition, you all know that, but having asked a
20 bunch of questions to witnesses in other forums, I
21 know that there is a benefit to getting a ruling
22 while you are in your zone. You are asking the
23 question. You know where you want to go. You took a
24 lot of time to get the witness there.
25 We would prefer to hear it live. You

Page 46

1 know where you're going, the witness is there. The
2 cold record leaves us only to have to read the cold
3 record and you having to reconvene the deposition.
4 Hearing it real time is helpful. If we
5 can't decide it on the spot because it invokes
6 complicated issues, or for some reason you just can't
7 get to it, we will have to address it after the
8 deposition. Most of us will give you a time to call
9 back.
10 As Judge Arleo once said to me, the
11 issues don't come up that much. Something like 20
12 percent of your cases take 80 percent of your time on
13 the discovery front. Generally, it's not like you
14 get a lot of deposition questions in a lot of cases.
15 I just get a lot of deposition questions in the same
16 case. So it doesn't happen a lot.
17 That's my advice on how to bring it to
18 our attention.
19 MR. ZOUBEK: Particularly for younger
20 lawyers in the room, you get the question, somebody
21 comes down the hallway in the midst of a deposition,
22 and X has happened. Should I get the judge involved?
23 Usually the first response is, get back in there, see
24 if you can work it out. You really want to have a
25 threshold before you reach out for the magistrate so

Page 47

1 you are not reaching out three times during a
2 deposition.
3 Have you found instances in which you
4 think lawyers have made the wrong call on the
5 threshold? And if so, what examples might you have
6 of that?
7 MAGISTRATE JUDGE SHWARTZ: I think,
8 unfortunately, as I said, at least my own experience,
9 the problems with depositions are in the same case.
10 Sometimes the combatant is not the issue. There is
11 only so much you can do when you realize you have
12 combatants.
13 MR. ZOUBEK: More sandbox issues than
14 anything else?
15 MAGISTRATE JUDGE SHWARTZ: Sometimes.
16 If there is going to be a particularly
17 problematic deposition and I have combatants, I will
18 say, drop me a letter, let me know when that's
19 happening so my staff knows that Jones is going to be
20 deposed that day, combatant A and B taking the
21 deposition, if we have an issue, let's make sure you
22 give them a time to call back.
23 It doesn't happen as much as you would
24 expect, because the lawyers do understand their
25 responsibility to try to work things out and also the

Page 48

1 limited things that they can do under the rules.
2 There she goes with the rules.
3 MR. ZOUBEK: The rules are very useful.
4 MAGISTRATE JUDGE SHWARTZ: There are so
5 many limitations on what a lawyer can now do.
6 The other is a lot of lawyers know that
7 the judges in New Jersey will invoke the rules if
8 things get out of hand or they will make the
9 deposition happen in the courthouse. It goes to
10 controlling your own destiny. It doesn't come up
11 terribly much, but we have the power to help control
12 the process.
13 MR. ZOUBEK: Judge Hayden, Judge Brown?
14 JUDGE HAYDEN: Again, thinking about the
15 plight and also the opportunity for the younger
16 lawyers, this clearly is a tremendous testing area in
17 which quick thinking and mentored live helps the
18 young lawyers get through. That is what strikes me.
19 It also strikes me that the powerful
20 amount of discretion in the magistrate judge is
21 informed very much by the reputation of the lawyers.
22 You have heard about the combatants, but also the
23 amount of trust that the lawyers engender in the
24 court is what makes this happen.
25 MR. ZOUBEK: Before we move on from this

Page 49

1 raising discovery issues with the magistrate judge,
2 does anybody have a question?

3 MR. GREENBAUM: Yes. I guess I'll
4 direct this to Judge Schwartz. That has never
5 happened in front of her because she's probably the
6 most prompt decider of discovery disputes.

7 As Judge Schwartz mentions, many times
8 you have the clock ticking, it's important to get
9 prompt rulings.

10 What advice can you give the lawyers who
11 have a situation where for some reason an issue has
12 blown off the map. You submit it. Sometimes it can
13 be an appeal. Maybe it's a privilege issue. You got
14 your dep scheduled, everything is going forward, and
15 there is radio silence from the other end. It is a
16 sensitive issue, but what advice would you give
17 lawyers on how to deal with that situation?

18 MAGISTRATE JUDGE SHWARTZ: Sometimes it
19 is presented very shortly before the parties need a
20 resolution of the dispute and the lawyers get
21 frustrated because they haven't heard anything in 24
22 hours.

23 My colleagues and I have a number of
24 cases, and I think that sometimes, and I can't speak
25 to everyone, but sometimes the disputes get only

Page 50

1 presented by an electronically filed letter.

2 I can't say this is the reason why there
3 is an issue. But if there is no paper copy or all
4 the docket entry says is letter from counsel or from
5 party, with nothing else in it, it is very easy to
6 miss the fact that there was an issue presented.

7 A lot of practicing lawyers may not know
8 how we are getting notice of electronically filed
9 disputes. They had no idea that we weren't getting
10 e-mail pop-ups in the same way that practicing
11 lawyers are. That might be part of it, because it
12 got missed.

13 There is no court you can run to to get
14 the letters. In this district, before electronic
15 filing, letters usually were not to be filed on the
16 docket. Now with E filing it's happening a lot.

17 Sometimes that may be the issue, that
18 the lawyer didn't say enough in the description for
19 somebody to know, or if they said a lot, it could
20 have been missed because of the volume that gets
21 filed every 24 hours in every case that the
22 magistrate judge has to handle.

23 One of the things that you can think
24 about doing is calling to confirm that the letter was
25 received. That's one avenue.

Page 51

1 Another might be that if you have a
2 dispute that you present sufficiently in advance of
3 the time you need a decision. At a minimum first
4 explain contextually what there needs to be decided,
5 how it's affecting the ability to proceed to the next
6 step. The judge is not going to know the level of
7 your details and your facts the way you do.

8 We may not know a decision on X will
9 help you know how to depose one, two or three or
10 nobody depending on the issue.

11 The other is if it has been a week and
12 you haven't heard from somebody, a week and a half,
13 depending on what it is, call chambers to make sure
14 somebody has seen it, especially if you have done it
15 by letter, because that is one type of filing.

16 MR. ZOUBEK: Is there a particular way
17 to caption -- that someone should be captioning that
18 letter or identifying that letter in terms of
19 bringing it to your attention?

20 MAGISTRATE JUDGE SHWARTZ: I know a lot
21 of you may not be controlling what you're actually
22 entering when you are electronically filing a
23 dispute. Identify which judicial officer it is
24 directed to, if it's a magistrate judge, a district
25 judge, a chief judge.

Page 52

1 Sometimes we have filings that belong to
2 his Honor, and, generally speaking, regarding just
3 what it is, just nice and short, so we know what
4 judge is supposed to be reading the document.
5 Sometimes it's to the clerk's office. Some lawyers,
6 not many, will file things on the docket that
7 shouldn't be, that is not directed to the Court, but
8 where there is a dispute on.

9 If they are doing a letter, stating
10 issues by way of letter, to which judicial officer it
11 is directed to and what it is about generally.
12 That's another way to look at it, whether it comes in
13 real time or in 24 hours.

14 MR. ZOUBEK: I was going to move on to a
15 discussion of dispositive motions with the District
16 Court judges, but I want to check to see if anybody
17 had any follow-up questions as it relates to
18 discovery issues that you might want to address to
19 Judge Schwartz?

20 A VOICE: One point --

21 MR. ZOUBEK: Identify yourself and go
22 ahead.

23 A VOICE: One point. In my own
24 practice, if I have an emergent issue and I send a
25 letter, I'll call the Court or deputy or the clerk

Page 53

1 and say, this is coming, rather than rely on them to
2 put it on the docket, and identify what's happening,
3 try to glean from a long list of things what they
4 have to do every day.

5 Oftentimes they will say send a letter
6 or do a motion or get some guidance on what the judge
7 wants.

8 MR. ZOUBEK: That call should simply go
9 to your clerk, Judge?

10 MAGISTRATE JUDGE SHWARTZ: Anybody in
11 our chambers can answer those questions.

12 MR. ZOUBEK: Moving on. One of the
13 things that we wanted to talk a little bit about --
14 and again this is the speed law for today and
15 discussion, we're going through a lot of topic
16 areas -- but as to both Judge Brown and Judge Hayden
17 to talk about, first, use of motions to dismiss in
18 cases and their experiences in terms of use of that
19 instrument.

20 Sometimes I often find myself,
21 particularly when I'm local counsel in New Jersey,
22 that I have counsel that is using motions to dismiss
23 reflexively because it's something available in the
24 rules and it's something that we need to file and we
25 are going to file it without a full and complete

Page 54

1 evaluation as to whether it's the right thing to do
2 under those circumstances and what your real
3 opportunity is to get a successful result for your
4 client.

5 Judge Brown.

6 CHIEF JUDGE BROWN: Well, that's an
7 interesting question. The function of a dispositive
8 motion, we get some of them, we look and say, why did
9 you bring this motion? I think it's brought
10 reflexively. It is something that you can do to
11 delay things, maybe. It will get a response from the
12 Court.

13 Some of them, on the other hand, do have
14 considerable amount of merit. You certainly have
15 thrown a monkey wrench in the gears because it will
16 take a while before the judge decides it.

17 My feeling for both motions to dismiss
18 and summary judgment is I like to get a brief that is
19 within all of the rules, has a decent table of
20 contents and table of citations, because in most of
21 your motions you are probably not going to get oral
22 argument. I'm going to read those and see if I can
23 deal with it accordingly.

24 If you have a claim stated, or if you
25 have issues of material fact and something brings

Page 55

1 this motion for some other purpose, don't necessarily
2 welcome that. I realize that it seems that one of
3 the functions is to get the Court's attention.

4 You file a summary judgment motion,
5 maybe I knock out a few counts, maybe I don't. But
6 at least I get the Court's attention. I have seen
7 that happen.

8 Or as a place marker, as it were, for a
9 Rule 50, or for the intensification of settlement
10 discussions, I have seen that happen as well, Paul.

11 MR. ZOUBEK: Okay.

12 JUDGE HAYDEN: Judge Brown was
13 mentioning getting the judge's attention.

14 The brief and how it looks and how it
15 cites is really very important. Appearances matter.

16 As you can see, I'm supporting the Black
17 Swan look today to kind of make the point that
18 appearances matter. I took a fall.

19 But if I get a brief that looks like I
20 do by citing pre Twombly law, or worse, only citing
21 Twombly and bringing it forward to Fowler, I'm
22 already out with my divining rod in a motion to
23 dismiss, that I have somebody who is giving me a
24 canned brief and it just flops at that point. I
25 really lose it and I instruct my law clerks

Page 56

1 accordingly.

2 But a brief packed with footnotes in
3 order to make the brief limits, then I get mad as
4 well.

5 One time I had nothing better to do,
6 which I should never let my chief know, I simply
7 electronically stretched out the footnotes, copied
8 and pasted them and made them in the right format,
9 you can pack in 25 to 50 percent more text. Not bad.

10 We don't like footnotes, because if it's
11 that important you should put it in the text, but
12 also we know what you're up to. As opposed to a
13 tree, put this more into the context of what I
14 believe is going on.

15 The message in the dispositive motions
16 that I finally learned is there ain't going to be any
17 trial. We are not in the era of trying cases, so you
18 better all be good case managers, judges, and this is
19 the way it works.

20 Every time there is a trial, or
21 sometimes every time there is an oral argument, and
22 it happens, it always does, that the issues change,
23 they morph, something else is the issue, something
24 gets discovered, something that could never have been
25 written down, whatever the case, I kind of get

Page 57

1 frustrated and upset at where justice lies.
 2 An interesting statistic, albeit civil
 3 cases are, you know, way up in the nineties in
 4 settlement. You have the little guy versus the big
 5 guy, it is not settled because of a settlement. It
 6 is a non-trial disposition, that's what they call
 7 them, a non-trial disposition, and it means that the
 8 matter is resolved at the dispositive motion stage,
 9 which tells you the little guy lost, of course.
 10 There is a whole strata of justice
 11 issues, doing the right thing issue that is of
 12 concern to trial judges.
 13 We know when something finally hauls its
 14 way into the courtroom and lurches through the door,
 15 I've gotten banged up and still gotten there, very
 16 often there is an issue that needed to be aired that
 17 could have been aired if there had not been over
 18 motion practice, if it hadn't been removed and then
 19 banged up.
 20 If you are in fact in the big guy
 21 position, understand that you really have to look
 22 good, be good, be fair, not show off and use all
 23 kinds of clever means of making the issue confuse the
 24 law clerks, or the judge, it happens, and maybe
 25 you're going to get oral argument and kind of be

Page 58

1 taken down because you really don't have a
 2 meritorious motion.
 3 If you are the little guy and you are
 4 responding to the big guy, respond well. Respond
 5 timely, write a quick good brief, we do read them,
 6 and above all, our law clerks read them.
 7 In order to help the law clerks learn
 8 the job and get good at the job because we need them
 9 to do that, we tell them how to read, what to look
 10 for.
 11 If in fact we are in the era, and we
 12 appear to be, of the vanishing trial, the statistics
 13 are bearing out that we are, and we have been talking
 14 about the cost of teeing up all of these, if it is
 15 going to be a virtual trial on paper, then please
 16 support and be as efficient and clear as you possibly
 17 can be and instruct the younger ones that, you know,
 18 the computer aided research that gives a District
 19 Court judge facing a motion to dismiss summary
 20 judgment decisions is not helpful and vice versa.
 21 So just, I think, fairness, even though
 22 motion practice can make a lot of cases go away and
 23 disguise and distort the issues, fairness is what we
 24 look for. We remember the law firms and the lawyers
 25 who give us fair motions and we remember those who

Page 59

1 don't.
 2 CHIEF JUDGE BROWN: To follow up on what
 3 Judge Hayden said.
 4 I have some fairly simple principles.
 5 Our court's mission is to provide prompt, efficient
 6 justice. I know Rule 1 says speedy. I don't know
 7 what we do about speedy, but at least prompt and
 8 efficient.
 9 We are in the dispute resolution
 10 business, whether alternative or otherwise. I have
 11 picked up a number of atypical old or complex cases I
 12 have inherited. The system does not really like old
 13 cases. We try to keep track of motions more than six
 14 months, cases more than three years, and to focus on
 15 them.
 16 One way I find to deal with that is to
 17 provide a prompt, realistic trial date for some of
 18 these old cases so that instead of kicking the can
 19 down the road, well, judge, we need more discovery,
 20 we need more dispositives. Okay. When can we get
 21 this case to trial? Whether you try the case,
 22 whether you settle the case, you focused on the
 23 issues.
 24 I think that when we take that approach,
 25 whether the case was going to be tried or whether

Page 60

1 it's not, we at least approach a resolution without
 2 the interminable dispositives and partial
 3 dispositives. I agree with Judge Hayden on that
 4 point.
 5 MR. ZOUBEK: One of the things as a
 6 practitioner that I have certainly seen, and I'm sure
 7 Bob can comment on this as well, not all roads lead
 8 back to electronic discovery these days, but it
 9 really drives a lot of the court of litigation these
 10 days, and when you sit down with a client and you are
 11 asked to budget out and project what the electronic
 12 discovery costs are going to be, the full discovery
 13 costs in a case, that there is significant pressure
 14 from clients to see what you can do by attempting to
 15 get rid of a case at a motion to dismiss stage.
 16 Have you seen an increase in the filings
 17 of Rule 12 motions?
 18 MR. GOODMAN: Not really. Litigation
 19 costs are something, and most of my clients are large
 20 corporations that are -- the foremost concern to
 21 almost all of my clients, but that really hasn't
 22 changed significantly how they address cases and
 23 whether they are willing to take cases to trial or
 24 not. Although I am most often the big guy in the big
 25 guy-little guy case and see a lot of cases that get

Page 61

1 resolved as a result of fairly broad summary judgment
2 motions, or as a result of settlements.
3 Whether or not Judge Brown thinks that
4 this is an appropriate reason to bring a summary
5 judgment motion, as a practical matter it happens all
6 the time, and the motions get brought because you
7 think it's meritorious, but because that's going to
8 result in either a resolution by summary judgment or
9 settlement of the case that perhaps couldn't be
10 settled until you brought the motion.

11 JUDGE HAYDEN: That kind of makes me
12 crazy.

13 MR. ZOUBEK: That's why I asked it.

14 MR. GOODMAN: Sorry.

15 JUDGE HAYDEN: No, really, this
16 unbelievable expense, this volume of papers. I mean,
17 I love going to dinner parties because I love to cook
18 and I know what goes into it and a lovely dinner
19 party, I think of the hours and hours that the host
20 or hostess went into buying and preparing.

21 When we get these things with the little
22 black things on the side with thousands of little
23 holes and the tabs, I think about the man hours, and
24 really woman hours, that go into putting those things
25 together. The electronic filing hours, the chunks of

Page 63

1 removed to federal court, and my adversary is a
2 typical state court practitioner who really doesn't
3 want to be there, who really doesn't understand the
4 rules, who really hasn't evaluated his case pretrial,
5 where the case may not be meritorious, but I can't
6 get this person's attention. And I will go out of my
7 way in most of those cases educating, or attempting
8 to educate my adversary about why he has a case that
9 isn't meritorious.

10 Or if it is meritorious, it is so slim
11 that it ought to go away somehow other than at the
12 end of a long road of discovery and a summary
13 judgment motion resulting in summary judgment or
14 settlement.

15 I'm just trying to get my adversary's
16 attention because my adversary either hasn't
17 evaluated the case or refuses to. So I'm left with
18 really no choice but to dance the dance that we are
19 discussing.

20 MR. ZOUBEK: Part of the process should
21 be, if it is being handled the right way, is to
22 narrow the issues if you are going to trial. You
23 have an obligation to your client that if you have a
24 case that has been filed against your client, and you
25 think that there is no legal basis for four of the

Page 62

1 stuff going across, and then it gets wheeled in,
2 because we have to get these things in paper.

3 First of all, we don't have the money
4 for the paper, that's the truth, and secondly, it's
5 impossible to read this stuff on the screen. So we
6 always ask for the courtesy copies and we usually get
7 them.

8 Then you just look at this, and all of
9 this is to get the case to settle? Where are all the
10 pressure points of a trial? Couldn't there be some
11 way of saying, we filed all this stuff, but really
12 all you got to do is look at point three? That's why
13 we ask for the table of contents, if you're familiar
14 enough, we kind of need to know where we need to go.

15 If that's necessary, I'm throwing it out
16 there. If what you want to do is get the judge's
17 attention or pound your adversary or scare your
18 adversary, I just don't think that litigation and the
19 cost of it and the dignity of the process and the
20 fear of the process requires this kind of a
21 production. It is an opera.

22 MR. GOODMAN: It is not so much that I'm
23 trying to get the judge's attention. It is that I'm
24 trying to get my adversary's attention in those big
25 guy-little guy cases. Very many of them have been

Page 64

1 causes of action in the complaint, you are obligated
2 to file that motion, narrow the issues down, and the
3 same relates to a summary judgment motion.

4 Over the years I always looked at the 14
5 or 15 inches of the summary judgment motion and
6 figured the judge and the clerk are going to say
7 there has to be a factual issue in there someplace.
8 I'm sure that happens quite a bit, and probably by
9 the number of inches sometimes.

10 CHIEF JUDGE BROWN: That's why we have a
11 page number limit on briefs.

12 MR. ZOUBEK: If handled appropriately
13 and done appropriately, it should be part of the
14 process of getting the case ready for trial and
15 narrowing the issues that need to go before the
16 court.

17 I get a sense that you have seen a few
18 people abuse the process along the way?

19 JUDGE HAYDEN: It is not even abusing
20 the process. It is maybe a matter of -- this is very
21 helpful to me to hear the lawyers' points of view and
22 what has been said just now is helpful.

23 If you think of where it's going, I
24 remember going to, long ago, a presentation on
25 appellate advocacy, and Judge Michels said -- started

Page 65

1 haranguing us about staples. And he said, you got to
2 understand, if we put these things on our laps and
3 they pull our knees and our pants and we destroy our
4 suits. We are all going, what the hell is he talking
5 about his suit?

6 Now I'm kind of in a position to ask you
7 to come into chambers and figure out, let's drill
8 down. You have a great point to make at somebody's
9 deposition transcript. Cool. Nothing better than a
10 direct quote. That's what makes it sane.

11 If it is buried in the appendix and you
12 don't really pinpoint it for me, or if you give me
13 half a page, and I kind of know there must be
14 something after that, I don't know what the answer to
15 all of this is, but understand when we really try to
16 give it our attention sometimes it's very
17 frustrating.

18 Maybe we can make life easier for you if
19 we granted more oral argument, because then we can
20 come in, we can have some understanding of what's
21 going on, and then we'll all get there real fast in
22 terms of what the real issue is.

23 That is a problem, both in terms of the
24 style of the court and I think the expectation of the
25 lawyers. I don't think lawyers expect oral argument.

Page 66

1 CHIEF JUDGE BROWN: Interesting oral
2 argument. Change over the past the 40 years. Used
3 to have great big sheets, and you look and see the
4 oral argument set in before Judge Whipple, Judge
5 Shaw, Judge Augelli, et cetera, then we moved away
6 from that. It is somewhat atypical.

7 From my own perspective, if I'm going to
8 have oral argument, I'm going to have to read the
9 briefs anyway. I can read the briefs on a train, on
10 a plane, at midnight at night, et cetera, and see if
11 there is an issue that I think needs oral argument or
12 whether I can resolve it on the papers.

13 If I had to schedule oral argument on
14 everything, it's going to be unnecessary in some
15 instances. That's why, I suppose, I do the first cut
16 by just simply reading the briefs and the exhibits.
17 It seems to work for me. If I had oral argument in
18 every case, also, wait for a couple of weeks.

19 I look at this motion and I just simply
20 say, maybe I can decide it on the phone. Maybe I can
21 decide it with a letter opinion. Maybe I have to sit
22 down and actually write a lengthy opinion. Whatever
23 the case may be.

24 I think the flexibility is necessary
25 given the volume of motions, the volume of cases we

Page 67

1 have.

2 MR. ZOUBEK: That's one of the
3 challenges.

4 Judge Irenas?

5 JUDGE IRENAS: I want to put in a pitch
6 for oral argument.

7 MR. ZOUBEK: I was about to do the same.

8 JUDGE IRENAS: I find much more often
9 than not things get clarified. I know where the
10 lawyer's heart is beating. Sometimes I can read 300
11 pages of briefs, I don't even know what's bothering
12 the lawyer.

13 When you get an oral argument, sometimes
14 they are very good on their feet and you suddenly
15 realize what's at issue.

16 Any lawyer that asks for oral argument,
17 I give it to you, anyone. I ask for oral argument on
18 a bunch of other ones where they don't ask for it.

19 I have found it to be useful. I have
20 found it to be far more useful than not. Sometimes
21 you get a case where it's a waste of time.

22 Every one of those, I think there are
23 two or three where it is useful, and maybe it might
24 tick off my fellow judges rather than the Bar, but I
25 think it's a useful exercise. I think lawyers like

Page 68

1 it, it is a chance for them to strut their stuff,
2 even if they don't like to do it before me.

3 I'm very much in favor of oral argument.
4 I find it much more useful.

5 MR. GOODMAN: I was surprised by Judge
6 Hayden's comment that she thinks that lawyers don't
7 expect oral argument, because if there is one subject
8 about which I hear more grousing at the trustees
9 luncheons of this organization is, how do we get
10 judges to schedule more oral argument? How do we
11 convey to them that we really want oral argument?

12 I'm not suggesting that I want oral
13 argument in all of my motions in all of my cases, but
14 typically I do want it, and more important to me, my
15 clients expect to know that there was oral argument
16 on those occasions when I lose, in particular.

17 MR. ZOUBEK: One thing from private
18 lawyer's experience and law firm experience, I have
19 certainly seen in mentoring younger lawyers, that it
20 has a substantial impact on. The younger lawyers are
21 not getting into court to argue on their feet as much
22 as I had an opportunity to do when I was coming up
23 through the ranks. Not to say you should have oral
24 argument on everything.

25 What we have for a lot of young lawyers

Page 69

1 that we are trying to work with, they may get a
2 deposition along the way, they are very good at
3 electronic filing and sending the briefs in, but they
4 don't get to go to court.

5 Judge Debevoise?

6 JUDGE DEBEVOISE: Let me second the oral
7 argument side. You get the parties before you, you
8 have an opportunity to discuss not only the motion
9 itself, but something totally outside, the motion may
10 come up where you can go off and resolve things and
11 get something done.

12 There's another aspect to it, which is
13 pro se litigants. I think it's very important that a
14 pro se litigant have an opportunity to come into
15 court, make his or her say and be heard before you
16 are thrown out of court.

17 MR. ZOUBEK: Sometimes with a marshal
18 present.

19 JUDGE DEBEVOISE: Here is a vote for
20 oral argument in as many cases as possible.

21 MR. ZOUBEK: Judge Cooper?

22 JUDGE COOPER: Just a technical point.
23 When you look at the docket, you fight a summary
24 judgment motion, a dispositive motion, it says, if
25 given a return date, and then automatically on the

Page 70

1 docket it says, there will be no oral argument unless
2 the courtroom deputy notifies you that oral argument
3 is scheduled.

4 The purpose of that notice is not to
5 tell you to go away. The purpose of it is so you
6 won't show up on Monday the 24th.

7 We don't have motion days anymore, most
8 of us don't, but don't be discouraged by that notice.
9 Call up and say I would like oral argument. The
10 judge will at least know you want it. Don't be
11 discouraged by the automatic thing that goes on the
12 docket.

13 MR. ZOUBEK: Motion day, that's when
14 many of us got to know each other. That's true. I
15 remember being shifted around by Pat Rocca and Ted
16 Formaroli before Judge Gerry.

17 I know we have a lot to go through, but
18 there is a promise that you get your money back if
19 you haven't gotten everything you wanted to know
20 about the District Court.

21 We want to move on to the discussion of
22 preparing for the pretrial conference and pretrial
23 order.

24 MAGISTRATE JUDGE SHWARTZ: One quick
25 thing.

Page 71

1 On the final pretrial, the best advice I
2 can give you is make sure you use the form for the
3 District Judge to whom the case is assigned. You may
4 waive things if you use the wrong form. That's my
5 most important advice to give on that subject.

6 The Camden judges seem to have a
7 consistent form. As you move north up the Turnpike,
8 the special preferences of the court become more and
9 more pronounced. I can say no more.

10 MR. ZOUBEK: In terms of suggestions for
11 practitioners in terms of preparing, in addition to
12 the form, preparing for the pretrial conference and
13 what you find effective.

14 MAGISTRATE JUDGE SHWARTZ: Sometimes I
15 hear it, it kind of goes back to the very first thing
16 you talked about, preparing for the Rule 16
17 conference.

18 The adversary is not accustomed to the
19 fact that this is actually a joint submission, and it
20 is not the kind of document that can be prepared the
21 day before the date of submission.

22 The challenges I hear the lawyers state
23 is not getting the other side to recognize we really
24 need to get together to put this together. That
25 obligation is on both sides, not just the plaintiff's

Page 72

1 responsibility, but it's both sides.

2 The other challenge I hear from the
3 practitioners in terms of preparing components of the
4 order, crafting stipulations of fact, and the
5 wordsmithiness of each side, and that sometimes that
6 makes a challenge on the stipulated facts.

7 As a suggestion, you can have some facts
8 that can be stipulated to. You avoid some trial time
9 that you need to use up because it's a force to read
10 something to the jury.

11 Understanding that the legal issue
12 section is meant to have the legal issues you want
13 the decision maker, whether the judge at a bench
14 trial or a jury trial to decide. These are the kind
15 of things that coming in that I see that is sort of a
16 more practical challenge.

17 MR. ZOUBEK: Judge Brown, you mentioned
18 to me that there are times when you will be involved
19 in the pretrial process.

20 CHIEF JUDGE BROWN: The problem is,
21 again kicking the can down the road, especially when
22 I inherit an elderly or complex case, and I sort of
23 work back from the trial date and I set down a final
24 pretrial conference before me, and sometimes there
25 may be dispositives that are pending or set forth

Page 73

1 there and I try to rule on them at the time.
 2 Recently I found a rather interesting
 3 and daunting prospect. The final pretrial order was
 4 about a foot high. These were good lawyers. This
 5 was about a projected seven day non-jury trial.
 6 My reaction was, wait a second, there
 7 are all of you there, only one of me, you expect me
 8 to read all of this?
 9 The explanation was, well, we were
 10 afraid that if we don't, under your rules we are
 11 going to waive something, and we don't want to do
 12 that. I throw that out as a concern.
 13 Then I went back to the drawing board,
 14 With my assurance that they wouldn't necessarily
 15 waive something if they raised it once rather than
 16 five times, I think I'm going to get a shorter one.
 17 The final pretrial order has taken on a
 18 life of its own. I'm somewhat of a dinosaur. I go
 19 back before a lot of things.
 20 I can remember steam engines before the
 21 diesels and I remember propeller airliners, and I
 22 remember life before the final pretrial order.
 23 I remember when Judge Lacey and
 24 Judge Stern advocated bringing it in. At the time I
 25 was in practice and I didn't like it because I had to

Page 74

1 identify my witnesses, my theories, my exhibits
 2 before the trial. I didn't particularly like it.
 3 I went on the bench, I changed my view
 4 considerably. But there was a time beforehand, maybe
 5 call it trial by ambush, but we have gone in the
 6 other direction, I think. Some of these final
 7 pretrial orders, and believe me, from a judge's point
 8 of view they are very helpful in trying a case, but
 9 some of them become encyclopedic.
 10 Maybe Judge Shwartz wants to address
 11 that.
 12 MAGISTRATE JUDGE SHWARTZ: They do.
 13 Take a look at it as the plan for the
 14 trial. Peter Pearlman made a very valid point, this
 15 is exactly what you do to prepare for trial. The
 16 only difference now is you have to tell the other
 17 side, exhibits and the like.
 18 It is supposed to be when you have what
 19 you expect the trial to be, not everything you
 20 learned in the discovery process.
 21 The judges use it, the district judges
 22 with whom I work most frequently use that document
 23 and rely upon it. The times that I have tried cases
 24 I've used it.
 25 Remember, especially in New Jersey, the

Page 75

1 way that the delegation of authority is with respect
 2 to the pretrial and the trial process, in some cases,
 3 if there is no dispositive motion, the first
 4 education the District Judge is going to get from
 5 your case is from that final pretrial order.
 6 You want to use it to educate that judge
 7 so they know what's coming and how to allot time for
 8 your trial.
 9 It's very informative. Some lawyers
 10 think you are doing this to make us settle, sometimes
 11 that's what happens, but other times it is a tool
 12 that enables you to help your client understand the
 13 challenges you face in terms of proving a particular
 14 cause of action.
 15 I've had lawyers actually ask me, please
 16 order my client to come to the final pretrial
 17 conference. I want them to see that.
 18 From the District Judge's point of view,
 19 you know something, I think I might have a way to
 20 resolve this case short of a trial.
 21 Everything that happened in the pretrial
 22 conference is not what the purpose of the order is.
 23 MR. GOODMAN: The phenomenon that
 24 Judge Brown observed has occurred because the
 25 preparation of that document has become a completely

Page 76

1 defensive effort. I don't think the document any
 2 longer -- while it does provide you with an
 3 opportunity to really look at your case and order all
 4 of your evidence and put it all down on paper, to a
 5 large part, preparing the document is an effort in
 6 insuring that you haven't waived something, that you
 7 got every i dotted and t crossed and it's all there
 8 on paper.
 9 This is one of the problems I have with
 10 the process now, is what is the practical result of
 11 having an adversary who doesn't dot all the i's and
 12 cross all the t's? I have yet to see a district
 13 judge at trial preclude that adversary from offering
 14 that evidence that isn't identified in the final
 15 pretrial order.
 16 I'm sure that Judge Brown is about to
 17 tell me that he has done it, but I haven't seen it.
 18 MR. ZOUBEK: Judge Hayden, what has your
 19 experience been about the effectiveness of the
 20 pretrial order and suggestion for practitioners and
 21 focusing on it so it is most helpful to the court?
 22 JUDGE HAYDEN: I really do not use it as
 23 a document itself except in that circumstance where
 24 there has not been motion practice or a bench trial
 25 type of issue where there is a lot of advocacy in it.

Page 77

1 For the most part, I always thought of
2 it as, you know, the trial is the appeal from the
3 pretrial order kind of legacy of it having been
4 created. That's about all I have to say.

5 CHIEF JUDGE BROWN: I do use the final
6 pretrial order extensively. For one thing, it is
7 stipulated facts, should be carefully drafted,
8 because I'm going to read or give those to the jury.

9 Similarly, I rely upon your estimate as
10 to the length of the trial, the issues that you have,
11 the witnesses that you are going to call, and if
12 there are experts, we have a right to rely upon their
13 expert reports and deposition testimony.

14 If someone decides all of a sudden their
15 expert is going to do a complete 180 at the time of
16 trial, I will preclude them and have done so.

17 I think that, really, absent good cause,
18 that final pretrial order is going to govern the
19 trial of the case.

20 MR. ZOUBEK: I'm a practitioner, I'm
21 getting ready for a trial in the District Court of
22 New Jersey, and I'm looking at issues that are going
23 to come up at trial and I'm thinking about motions in
24 limine that I want to file.

25 From a practitioner standpoint, a very

Page 78

1 active practice, Assistant U.S. Attorneys narrow the
2 issues in a criminal trial and the same thing on the
3 civil side.

4 Judge Brown, first, your perspective of
5 the use of motion in limine in a case and the most
6 effective use of motions in limine.

7 CHIEF JUDGE BROWN: Obviously it is case
8 specific and fact specific. They can be quite
9 useful. A final pretrial order may set down
10 in limines.

11 Useful, I'll try to decide those to give
12 the parties some guidance. Some of them may require
13 a context and may just sort of trigger the
14 possibility of the ruling during trial.

15 I welcome them. If I can rule on them
16 or should rule on them, I'll do so. If it is
17 something I'll reserve on, you got your point in
18 there and I will be alerted to it when it comes up.

19 JUDGE HAYDEN: I think that my
20 experience with a pretrial order is that it is you
21 guys talking to one another, but the in limines are
22 you talking to me and a powerful educational tool.

23 I'm really able to know what some of the
24 sticking points might be, and also permit, when the
25 moment is ripe, for an evidence ruling that is teed

Page 79

1 up because all of the evidence law has been
2 presented.

3 I don't welcome any motion, as you can
4 tell, but, seriously, they are very, very, very
5 helpful when you know you're going to have a trial.

6 CHIEF JUDGE BROWN: I think it can be
7 very useful for planning purposes. If there is a
8 witness, if there is a line of evidence as to which
9 there is serious dispute and the Court's ruling will
10 assist the parties, I will be happy to rule on that,
11 and then we know whether Dr. Jones is or is not going
12 to testify, or whether the Smith meeting is or is not
13 relevant.

14 MR. ZOUBEK: Certainly from the
15 practitioner's standpoint, in terms of teeing up
16 issues, educating the judge as to issues that are
17 going to come up, getting your viewpoint before the
18 Court, it also becomes a very practical matter in
19 terms of trying the case, getting as many of those
20 motions in limine banked in before the Court, because
21 during that trial, with the witness preparations and
22 things that every once in a while can go a little
23 different than you anticipate during the course of a
24 trial, it's good to have those lined up, up and ready
25 to go so that everybody is not running back to the

Page 80

1 office to brief a matter which you should have
2 identified earlier.

3 CHIEF JUDGE BROWN: Back when I was a
4 young lawyer, back in the late '60s or early '70s, I
5 had good fortune to be in Judge Lacey's office when
6 he was the U.S. Attorney.

7 The one thing he taught me from the
8 beginning is if there was an evidentiary issue that
9 is going to come up, think about it in advance. If
10 it is important enough, brief it, give it to the
11 judge. That way you can get yourself a prompt
12 ruling.

13 Again, every now and then you see
14 someone who hasn't thought about how they are going
15 to get this in, how they are going to oppose it, and
16 all of a sudden denying in the middle of the trial
17 you have someone trying to offer something or trying
18 to oppose something, and they really haven't thought
19 about it and haven't articulated it.

20 If it is important enough to offer it,
21 or if you think you should oppose it, think about
22 your reasons. If there is law on there, try to get a
23 prompt ruling.

24 MR. ZOUBEK: Any District Judge want to
25 have a comment on the motion in limine practice

Page 81

1 before we move on? Judge Irenas?
 2 JUDGE IRENAS: If I get 10 in limine
 3 motions, nine of them will never come up at trial.
 4 If I defer them, they never come up. One party will
 5 get educated and not raise it or both parties will
 6 forget it.
 7 My policy, except in rare instances,
 8 like a Daubert motion, something like that, I defer
 9 and I'll hold a 104 hearing if necessary.
 10 I hesitate to rule on things out of
 11 context, because I find trials always develop
 12 differently than everybody anticipated, always. If
 13 you rule on it too early, you run the risk of ruling
 14 on them out of context.
 15 That doesn't mean they shouldn't be
 16 filed. There could be good reasons for filing, but I
 17 overwhelmingly defer them on the theory that 80
 18 percent of them are going without me having to rule,
 19 and those that I have to rule on will be in context,
 20 sometimes even after a 104 hearing.
 21 CHIEF JUDGE BROWN: When I'm talking
 22 about context, I mean at the final pretrial
 23 conference or after and before trial. Trial is
 24 looming. We are trying to figure out which witnesses
 25 are going to be called, how much time the trial is

Page 82

1 going to take and the like.
 2 Then maybe some of them I can rule on,
 3 some of them I can defer. At least I would like to
 4 have the issues teed up.
 5 JUDGE IRENAS: I'm not suggesting they
 6 should be filed necessarily. My policy is rarely to
 7 grant them or deny them without prejudice.
 8 MR. ZOUBEK: Until the court reporter
 9 takes that actual testimony, it is not actually
 10 banked.
 11 One issue that Judge Hayden was talking
 12 about before -- we have about 10, 15 minutes left --
 13 is the topic that Judge Hayden discussed, which is,
 14 are trials becoming obsolete in the District of New
 15 Jersey? What is the impact? What do we see as the
 16 future?
 17 Judge Brown and I talked a little bit
 18 about that, I think he's trying two cases at once
 19 right now, so they are not going away.
 20 JUDGE IRENAS: That's in the morning.
 21 MR. GOODMAN: Something else you learned
 22 from Judge Lacey.
 23 CHIEF JUDGE BROWN: You have to look at
 24 the older cases, the ones that necessarily shouldn't
 25 go to trial, to resolve them one way or another.

Page 83

1 Sure a lot of them get settled, but I may have to
 2 resolve the dispute, however it gets resolved. There
 3 are a fair number of them that seem to go to trial.
 4 I make all reasonable efforts to resolve
 5 things if they can be resolved. If not, that's what
 6 they pay me for.
 7 MR. ZOUBEK: Somebody has a question?
 8 A VOICE: The last two cases I had go to
 9 trial, the pretrial conference before the District
 10 Court, which I found much more useful, one in a jury
 11 case, one in a non-jury case.
 12 The rules contemplate pretrial
 13 conference before the magistrate judge.
 14 CHIEF JUDGE BROWN: Anyone?
 15 JUDGE HAYDEN: I do my own pretrial
 16 conferences.
 17 CHIEF JUDGE BROWN: I do them in complex
 18 cases, old cases, cases that we are going to set down
 19 for trial in the near future.
 20 By and large, the final pretrial
 21 conferences will be handled by the magistrate judge
 22 in most of my cases.
 23 JUDGE HAYDEN: The one that leads to the
 24 pretrial order or the pretrial conference before the
 25 actual trial?

Page 84

1 CHIEF JUDGE BROWN: The one that leads
 2 to the pretrial order.
 3 JUDGE HAYDEN: Oh, okay, no. I'm with
 4 you on that.
 5 MAGISTRATE JUDGE SHWARTZ: Obviously we
 6 do it the way it is done in this district typically,
 7 although there are some exceptions, the magistrate
 8 judges are doing the final pretrial.
 9 The one thing that some of us will try
 10 to do, it kind of harkens back to the pretrial order,
 11 some of us will try to help with the ones that are
 12 discovery based. We try to talk through the issues
 13 with the lawyers, and we may be able to help ferret
 14 out what is not necessary to be briefed.
 15 Once you get an offer of proof from your
 16 adversary, the party who thinks they need to file a
 17 motion, they might not have to.
 18 Having the trial judge help finalize the
 19 final pretrial order may have some advantages,
 20 because you may be able to get rulings on the spot on
 21 some of those in limine or evidentiary applications
 22 that don't like the levels of briefing that has been
 23 alluded to by Judge Irenas and the others.
 24 I can understand from a practical point
 25 of view that there may be some desire. On the other

Page 85

1 hand, having the magistrate judge participate in the
2 process, some of the issues, we may know who those
3 witnesses are that are at issue. We may say, wait a
4 minute, even I remember that witness, how can
5 Mr. Adversary say I never heard of that witness?
6 Sometimes we can narrow things down, not
7 having lived with the case to the level that you are,
8 but there are both sides as to who should be the
9 judicial officer going through that process.
10 There is the sort of pretrial conference
11 or hearings you can have with the district judges
12 like Judge Hayden is talking about.
13 MR. ZOUBEK: The role in our district as
14 relates to alternative dispute resolution prospects
15 in the case, referral to arbitration or referral to
16 mediation. If the panel could comment on their
17 experiences with that and how they think the process
18 is working.
19 CHIEF JUDGE BROWN: We do have
20 arbitration. We do have mediation. The matters are
21 referred generally by the magistrate judge.
22 Our district has a plan for the
23 utilization of magistrate judges, which I think is
24 nationally regarded in terms of case management.
25 In most cases they will be handling that

Page 86

1 aspect of it, except for dispositive motions which
2 they may get on a report and recommendation basis.
3 We generally see the cases when they
4 move on to dispositive motion or trial status.
5 JUDGE HAYDEN: In terms of the
6 magistrate judges being the clearing house for those
7 appointments, I'm in accord with what Judge Brown
8 said.
9 MAGISTRATE JUDGE SHWARTZ: You know in
10 our Local Rules we have an arbitration program that
11 exists which can result in the assignment of a case
12 to nonbinding arbitration.
13 We also have a mediation program, \$300
14 an hour between the parties. Judge Arleo is our
15 mediation compliance judge.
16 In terms of assigning the arbitration,
17 that's for the Chief Judge to decide. It happens
18 when everything in the case has been accomplished but
19 the pretrial order.
20 The rule is meant to be an alternative
21 dispute resolution mechanism, not a mechanism that
22 maybe we'll try out and keep going and file
23 dispositive motions. It is meant to get you to a
24 final resolution in a more inexpensive way.
25 As it relates to the mediation program,

Page 87

1 there is a list of mediators. You can see them on
2 the web site. If you think that there is a
3 particular mediator who might be particularly
4 effective for your case, whether by subject matter or
5 personality, I've been asked by lawyers, can you
6 appoint somebody who will leave some bruises during
7 the course of the mediation?
8 Sometimes I get questions like that. I
9 really need a certain personality. Most of the time
10 we really need somebody who is conversant in a
11 particular subject matter.
12 Of course, you have your option of
13 hiring your own private mediator as another
14 alternative.
15 Some of us will try to set up a
16 discovery plan such that it happens after the
17 discovery you need to make it an effective mediation
18 that is completed. The Local Rules have some
19 mechanisms where you can ask for a stay, and I
20 mentioned already arbitration.
21 MR. ZOUBEK: As I was driving up that
22 long Turnpike drive to come up to North Jersey
23 because I live down in the Haddonfield area, I said,
24 what is one of the things I want to know about the
25 practice of law in the District of New Jersey before

Page 88

1 this court?
2 I thought about Zanzibar, and I thought
3 about whether or not you could actually venue to
4 prosecute a pirate, Judge, from the open seas in the
5 District Court of New Jersey.
6 They will want their money back if they
7 don't get the answer to that question. Could you
8 educate us on that one, Judge?
9 CHIEF JUDGE BROWN: Absolutely. There
10 is jurisdiction, a pirate is hostes humanis generis,
11 an enemy of mankind. They can be prosecuted anywhere
12 they are found.
13 I will say that Kenya, at least an
14 intermediate court judge has been taking a contrary
15 view because he feels they are getting too many of
16 them dumped from the alliance into Somalia.
17 We have seen pirates prosecuted
18 generally in the Eastern District of Virginia who
19 have had the poor judgment to attack U.S. warships.
20 Well, you know the old prosecution
21 adage, we don't catch the smart ones. That is the
22 simple answer on that.
23 I'll drop one footnote. When I saw
24 Judge Hayden here with this black eye, I said it
25 reminded me of my encounter in Zanzibar. You may

Page 89

1 have realized that I had a similar situation, because
2 I was out cold. Because I was coming back on a
3 dow late at night into Zanzibar harbor. We had been
4 offshore on a sandbar.

5 I asked the captain, why do you use this
6 sandbar? Why don't you go further out?

7 He said, because I don't want to tangle
8 with the Somalis. We were that close.

9 We get off in the dark and we clamber up
10 this coral seawall to the top. Yours truly, carrying
11 a big backpack of work, or whatever, slips, falls
12 face first onto the coral and knocks himself out
13 cold.

14 I had a huge swelling there for a while,
15 I had an eye patch, I actually looked like a pirate.
16 All I needed was the parrot. So, fair is fair.

17 MR. ZOUBEK: What were you doing in
18 Zanzibar, Judge?

19 CHIEF JUDGE BROWN: I was actually
20 teaching the law of piracy. That grows out of my
21 course on admiralty and maritime law. I couldn't get
22 piracy in there.

23 We had another program in Zanzibar which
24 was close enough to Somalia that you actually found
25 sea captains and security personnel who tangled with

Page 90

1 the pirates, but far enough that they were not about
2 to climb the seawall the way I did.

3 That is what I was doing, teaching a
4 course on maritime crime called, "Pirates, Slavers
5 and Smugglers."

6 MR. ZOUBEK: We have an expectation in
7 the criminal panel that's coming, Mr. Fishman will
8 outline his plan for prosecution of pirates in
9 New Jersey.

10 I want to thank the panelists for their
11 time.

12 (Applause.)

13 MR. ZOUBEK: Judge Brown, I'm sure the
14 other judges as well said, if there is still anything
15 else you want to know about the District of
16 New Jersey, you can ask him out in the lobby.

17 (Recess.)

18 MR. LACEY: Our second panel this
19 morning is comprised of a number of trial lawyers who
20 I have known for most of my adult life, and in some
21 cases, part of my childhood. These are some of the
22 most experienced and skilled trial attorneys that our
23 state has seen in our generation. That is why they
24 are here today.

25 All of them have practiced civil law,

Page 91

1 but, generally speaking, they are criminal
2 practitioners, because these are the folks who
3 generally are former prosecutors and who in some
4 cases became defense attorneys. Those are the people
5 who, as very young lawyers, started cross-examining
6 witnesses, started utilizing trial strategies before
7 many of us knew what a trial strategy was.

8 I want to thank them all for being here
9 today with us.

10 The second from the end, to my left, is
11 Paul Fishman. He is our United States Attorney.

12 I have had the privilege to know Paul
13 since the mid 1980s when I was in the U.S. Attorney's
14 office and he was my supervisor. I have said nice
15 things about him in the past, and despite --

16 MR. FISHMAN: You can do that again.

17 MR. HAYDEN: No objection.

18 MR. LACEY: Despite me being his second
19 biggest fan, beside Paul himself.

20 MR. FISHMAN: That's an extra two points
21 on your next guideline.

22 MR. LACEY: I continue to say nice
23 things about him because, quite frankly, he deserves
24 it.

25 He is extraordinarily intelligent. As

Page 92

1 you can see, he's mildly witty, and he is an awesome
2 trial lawyer. To see him at work is, again, to see
3 an artist.

4 Paul, I welcome you.

5 He has been an Assistant U.S. Attorney,
6 a supervisor of Assistant U.S. Attorneys, he has been
7 a First Assistant, and he is now U.S. Attorney and we
8 are very privileged to have him here today.

9 (Applause.)

10 MR. LACEY: Immediately to my left is
11 the Honorable Stanley R. Chesler, again, someone that
12 I was privileged to meet when I was in the
13 U.S. Attorney's office. I first met him when he was
14 with the Organized Crime Strike Force.

15 He is perhaps best known for his work
16 involving Anthony Provenzano. However, his work went
17 far beyond that.

18 He has dedicated himself as a public
19 servant since the 1980s, and he became a magistrate
20 judge for more than a dozen years before he was
21 elevated, and quite deservedly so, to the District
22 Court.

23 Again, I want to say thank you for being
24 here, Judge, and your public service over these many
25 years is something that very, very few people fully

Page 93

1 understand, but the people who know you best do
2 understand it. And thank you.
3 JUDGE CHESLER: Thank you, John.
4 (Applause.)
5 MR. LACEY: I first saw Joe Hayden when
6 I was in law school and I was studying at the
7 district courthouse in Newark. As some law students
8 who aren't really all that thrilled about studying
9 will do, I was looking for a distraction.
10 I walked into a courtroom, and here was
11 the mayor of Union City on trial along with a bunch
12 of other folks, and in the midst of that trial, in
13 the midst of, quite frankly, some chaos during the
14 course of that trial and a lot of characters was a
15 figure who stood out from the rest, someone who was
16 dignified, someone who was coordinating a very
17 difficult defense team, and a very active defense
18 team, by the way, and it was Joe Hayden.
19 He handled himself -- when you see him
20 at trial, you see him using his hands, you see him
21 using his eyes. The glasses, I don't think he needs
22 them, but he uses them as a weapon. Usually the
23 victim is on the witness stand and he's utilizing
24 them.
25 Joe, I thank you for being here today.

Page 94

1 (Applause.)
2 MR. LACEY: Finally we have Mike
3 Critchley, who is my neighbor in Roseland, right
4 across the street. Mike is well known as among the
5 most skilled trial lawyers of his time. He has most
6 recently defended the mayor of Ridgefield.
7 MR. FISHMAN: You had to bring that up,
8 right?
9 MR. LACEY: Mayor Suarez.
10 Paul, quite frankly, there had to be one
11 defeat among the 140 plus victories. Mike was
12 fortunate enough to be that lucky trial attorney.
13 MR. CRITCHLEY: I was half of it. John
14 Vazquez was the other half.
15 MR. LACEY: As Joe points out, it was
16 more than luck.
17 When you know what goes into it, you
18 realize how skilled these folks are. You realize how
19 well prepared they are, and you realize the time it
20 takes, really -- and we'll talk about that -- the
21 time it takes to be fully prepared and to develop a
22 theme early on in the case and ultimately to try
23 that.
24 Mike, thank you very much for being here
25 today with us.

Page 95

1 (Applause.)
2 MR. LACEY: I'm going to ask Joe Hayden
3 to start our program off just by talking a few
4 minutes about the trial theme and how you develop it
5 and when you develop it and what you use to develop
6 it.
7 Joe.
8 MR. HAYDEN: Thank you, John.
9 I must say, I would like to compliment
10 you and the Association for putting together programs
11 with such distinguished lawyers. I always believed
12 that a mission of our Association is to elevate the
13 level of professional excellence.
14 I think our first program was excellent,
15 we are going to try to make this program excellent,
16 and hopefully we will all be better lawyers when we
17 walk out of here.
18 I have had the privilege of trying cases
19 against U.S. Attorney Fishman and Judge Chesler.
20 They are great lawyers.
21 I go to court to watch Michael
22 Critchley, because Michael Critchley is a great
23 lawyer. But more than that, everybody is a
24 professional, ethical lawyer, which is what this
25 Association is about.

Page 96

1 It has been written that he who frames
2 the issue wins the debate. That is a principle of
3 advocacy which I believe applies as much to trial
4 work as it does to debating.
5 In my mind, juries do not make a
6 quantitative computer-like analysis of what the facts
7 are and then spit out which has the most merit on its
8 side. I believe juries make decisions on impressions
9 of the proofs.
10 I believe the impressions of the proofs
11 are informed by which theme of the case, theory of
12 the case they identify with.
13 Is the case a case about a corrupt
14 politician who for reasons of greed took money and
15 sold out his office? Or is the case a case about a
16 prosecution brought on the basis of a tainted,
17 polluted witness who is selling his soul to curry
18 favor with the prosecution and therefore there should
19 be an acquittal?
20 In the area of fraud, does the case
21 involve a greedy businessman who is ripping off the
22 shareholders and investors in the company? Or does
23 the case involve a businessman who is operating in
24 good faith and maybe takes somewhat reckless steps to
25 keep the company afloat when it's floundering?

Page 97

1 You can look at the case and the issues
2 in many different ways. It is which side is able to
3 make the fact finder, whether it be judge or jury,
4 identify with their theory of the case that
5 ultimately will prevail.

6 By theory of the case I mean theme, or
7 to use the vernacular, why my side should win. What
8 is the headline?

9 We all go, and we are going to be
10 involved in preparation. We are going to learn the
11 facts. We are going to learn the law. But the art
12 form and the real difficult issue is, how do we mold
13 it altogether? How do we take the clay of the facts
14 as informed by the structure of the law, because the
15 law is always the strike zone, and then adopt the
16 theory of the case by the time we get to trial?

17 You may find, with all of these
18 experienced trial lawyers, different answers as to
19 how they do it. We haven't all sat down. There may
20 be disagreement.

21 I'll tell you that from my own point of
22 view, the first thing I do as quickly as possible is
23 to try to learn the facts. Learning the facts is not
24 only reading the documents, it's going out to the
25 scene and feeling where the case is about and talking

Page 98

1 to witnesses as early as possible. It's from
2 witnesses and people you learn the grizzle and the
3 flavor of the case. That is so important, as opposed
4 to just reading reports, reading statements or
5 reading depositions.

6 The law, I indicated, is always the
7 strike zone in terms of what the prosecution has to
8 prove. The first thing I'll do and the last thing
9 I'll do right before trial is to read the indictment
10 to see, what is the theory of the prosecution, what
11 they charged?

12 Then I'll read the statute to make sure
13 I understand what the elements of the offense are,
14 and then I will read the model charge so that I can
15 understand what in the Third Circuit the judge will
16 charge the jury the prosecution must prove.

17 But there is more than that. Then I
18 think I have to take time to think about it.

19 We live in an era where there is an
20 information explosion between all we have in the
21 Internet, texting, cell phone and voice mail, all the
22 reproduction of information, there is such a strong
23 possibility of being inundated with information that
24 you can look at the details and not see the theme.

25 There was a great, great trial lawyer

Page 99

1 that I learned from when I was younger, Michael
2 Querques -- I don't know if anybody knows Mike, Mike
3 was legendary. If someone went to his office on the
4 weekend, he would be in there alone, sometimes for
5 hours.

6 You say to Mike, what were you doing?
7 Why were you there?

8 I was thinking about my case. I needed
9 time to think about my case and how I'm going to
10 explain it.

11 With all the information available, it
12 is possible not to take that time.

13 The other thing that I would strongly
14 recommend to all lawyers, but particularly young
15 lawyers, talk to other lawyers about your case.
16 Trial lawyers are generous people. Trial lawyers
17 know how scary it is and how difficult it is and how
18 time consuming it is.

19 We all call one another, Mike, Ted,
20 myself, just in terms of a case, what would you do?
21 What do you think of this issue?

22 I think when you're younger you are more
23 afraid to say, I don't know, I don't understand.
24 It's like you want to act like you got it all
25 together.

Page 100

1 It is much easier now for me to call a
2 peer or a contemporary about a trial issue or a trial
3 theme than it was when I was a younger lawyer, and I
4 probably missed out a lot in terms of trying to
5 protect it.

6 In our firm I go to Justin all the time,
7 and we'll have some kind of a mock trial before any
8 of our lawyers goes out and into court because
9 somebody a little bit divorced from the case can see
10 an issue that you can become too immersed in.

11 Everybody, of course, is aware that you
12 have to have your theory of the case ready by the
13 time of the opening, but you actually have to have
14 your theory of the case ready by the time of jury
15 selection.

16 Who you put on that jury and who you
17 challenge may well be informed as to what you think
18 the theme of your case will be and who will be more
19 or less receptive to your theory. You use it in jury
20 selection, so you better well know it in your own
21 mind.

22 In openings, that's when you carve out
23 on the record your position and theory of your case.

24 I was talking to Ted Wells a few years
25 ago just about openings, and Ted made the remark to

Page 101

1 me, he spends much more time on his openings than his
2 summation. After you try the case, if you're pressed
3 you can throw it together, you know what you got and
4 you can do it.

5 When you are doing your opening you are
6 carving out your position, and you are carving out
7 your position as a matter of record. You can alter
8 it a little bit, you can move it around a little bit,
9 but once you are locked in it is going to be very
10 hard to walk away from, so it becomes concrete.

11 For that reason you really got to think
12 through what the theory of your case is when you open
13 and then preparation will do the rest.

14 That's enough of an introductory remark.
15 (Applause.)

16 MR. LACEY: Thank you, Joe.

17 I want to point out to everyone here,
18 very often you will hear about folks going to trial
19 and putting together their opening statement maybe
20 the morning of or the night before a very important
21 trial. These folks have a different way of doing it,
22 and they start thinking about their case, as Joe has
23 alluded, long before a trial ever begins.

24 Paul Fishman, I want to start with you,
25 because the cases, at least criminal cases, start at

Page 102

1 the U.S. Attorney's office and they have to start
2 somewhere, usually with someone bringing some
3 information to the government, the government
4 investigating it, and then ultimately deciding that
5 it is worthy of bringing an indictment.

6 Paul, can you go through the process of
7 the government putting together a case and its theme
8 of the case?

9 MR. FISHMAN: Sure.

10 I do want to start with one observation
11 and a story first.

12 I learned something this morning from
13 you, John, was that you spent your law school career
14 hanging out in the District Court instead of
15 studying. I liked to go study at the Radcliffe
16 library. Apparently your studying was more
17 successful than mine.

18 I was on my way back from Camden last
19 night from the swearing in of George Leone, our
20 former chief of appeals, who is now on the Superior
21 Court in Camden. I was talking to my wife on the
22 cell phone, and she told me she had just come out of
23 the bathroom, and written on the wall in the bathroom
24 was the words, "Noah stinks." I have two sons named
25 Ian and Noah.

Page 103

1 My wife, reacting as any mother would
2 under the circumstances, called Ian into the
3 bathroom, handed him the Magic Eraser and said, "Take
4 that off the wall."

5 He burst into tears and said, "I did not
6 do that."

7 Whereupon his younger brother Noah
8 folded like a cheap suit and confessed he had written
9 it there in hopes of getting his older brother in
10 trouble. True story.

11 He promptly admitted to me when I got
12 home an hour and a half later that he actually
13 managed to mimic his brother's handwriting. First,
14 two of you in the room are going to have to represent
15 my children, probably not before too long.

16 But the second reason is because of this
17 morning's panel and in answer to John's question, how
18 we look at the evidence from the very beginning is
19 very important to how we frame our case.

20 It's always possible that confronted
21 with even the most compelling evidence that someone
22 might actually have done something, we have to think
23 twice before we pull the trigger and bring the case.

24 Because it turns out, as it did there,
25 that the suspect who looked to be most incriminated

Page 104

1 by the evidence was in fact not guilty at all. We
2 always, I hope, in my office, think about that as we
3 proceed down this road.

4 I also think that Joe is exactly right,
5 how we frame the issue in a case from the outset is
6 critically important.

7 While it is true, as Joe said, that for
8 a defense lawyer you have to start thinking about
9 your theory, what it is, before you get to jury
10 selection, is that at jury selection you really have
11 to state your public claim in opening as a defense
12 lawyer.

13 We don't have that luxury. We have to
14 stake our claim at the time we bring the case. If
15 the issue is going to be framed, we view our drafting
16 of the indictment as our opportunity to frame an
17 issue, to frame the theory of the case that we expect
18 and hope to live with from that point all the way
19 through to a conviction.

20 From the very beginning of an
21 investigation, what we are thinking about is, yes,
22 what we have to prove to win, but what are we going
23 to say about the case at the very beginning when we
24 charge it to make sure the theory of the case is
25 consistent with the evidence?

Page 105

1 In thinking about this, I tend to think
2 our cases kind of break down into different
3 categories. This is a slightly gross generalization,
4 but there are some cases like bank robberies in which
5 everybody understands exactly what happened. What
6 happened is a crime. Someone walked into a bank,
7 pointed a gun at a teller, said give me all your
8 money and left.

9 Frequently the only issue in a case like
10 that, assuming the bank was federally insured and so
11 forth, the question is, who was the guy with the gun?

12 The theme for that kind of case, how we
13 think about framing that case, is a question of who,
14 not what happened. There may be a motive question,
15 maybe a why it happened question, maybe we need to
16 figure out that person is more likely than that
17 person because that person needs money, and if
18 evidence points to that person, we may try to
19 corroborate the evidence we get. Really, that kind
20 of case is focused on who did it. In framing the
21 case, we think about that.

22 It is much more common, though, I think
23 in federal court, particularly in the kinds of cases
24 that Joe was talking about, corruption and fraud
25 cases, in which the question is not so much who. We

Page 106

1 often know who. The question is, what were they
2 thinking?

3 And so, for example, in the classic
4 insider trading case -- I'll use the case that is on
5 trial now in the Southern District about which I know
6 nothing more than what's in the papers -- is that
7 this fellow on trial bought stock on a lot of
8 occasions at very convenient times.

9 We know the purchases took place. We
10 know how much he bought. We know how much he sold it
11 for. We know how much he made. The question is,
12 what did he know and what was he thinking? The
13 theory of that case is framed by intent.

14 Similarly, in the case that Mike won,
15 the Suarez case, the money changed hands from Dwek to
16 someone who took money. The question is, what was he
17 thinking when he took the money?

18 In all of those cases, what we are
19 talking about and thinking about, we framed the case
20 from the very beginning, what does the evidence show
21 about the state of mind of the defendant?

22 It is our obligation and our job in the
23 first instance to reach that conclusion and be
24 assured ourselves that we are convinced beyond a
25 reasonable doubt, and that we can convince a jury

Page 107

1 beyond a reasonable doubt, that that is the state of
2 mind of the defendant.

3 In terms of themes, I'll use the case
4 that I tried against Joe, now probably almost 20
5 years ago. We indicted the head of the Atlantic City
6 Ironworkers union and his girlfriend. Joe
7 represented the girlfriend.

8 The business manager for the
9 Atlantic City Ironworkers union actually inherited
10 the union from his father-in-law. His father-in-law
11 was the business agent. When he retired, he became
12 the business agent.

13 His wife, the daughter of the former
14 union president, worked in the union office. Her two
15 sisters worked in the union office. He had a
16 girlfriend on the side.

17 He couldn't steal from the union because
18 his wife would have known he had a girlfriend. So he
19 started shaking down contractors.

20 Our theme of the case is this was a case
21 about how he was paying for his marital infidelity.
22 It wasn't about the fact that he wasn't faithful to
23 his wife, but our theory of the proof was that the
24 reason that he had to do this was because of this
25 extramarital relationship.

Page 108

1 To be fair, she got acquitted. Joe did
2 a great job. The main defendant got convicted.

3 But from the very beginning that was our
4 theory of the case.

5 I know Joe is dying to say something. I
6 can see it on his face.

7 MR. HAYDEN: During the trial Paul
8 called the girlfriend his mistress.

9 MR. FISHMAN: Not mine.

10 MR. HAYDEN: The mistress.

11 MR. FISHMAN: So anyway, from the very
12 beginning, in every case that we are putting
13 together, the question for us is, did it happen? If
14 it did, why did it happen? What is our theory going
15 to be? And then framing that issue.

16 Just for a minute on drafting of
17 indictments. You will see indictments from our
18 office often contain lots of explanation about what
19 happened. We do that for lots of reasons.

20 One is, it is our chance to get out
21 front and tell the story in a document that the jury
22 is actually going to see in the jury room. That's
23 very important.

24 Second, it is obviously important
25 because it enables us to get facts out sometimes in

Page 109

1 the public, that are important for the public's
2 understanding of the case and why it was brought.
3 Third, as you will hear from lots of
4 prosecutors, it enables us to make sure there is
5 certain evidence that is clear to the Court why
6 certain evidence actually will be within the ambit of
7 the indictment and how certain pieces of proof
8 actually are part of our theory in the case and why
9 they should be admissible.
10 It also provides, effectively, a road
11 map for the defense so the defense can understand our
12 theory of the case, which, honestly, I think they are
13 entitled to.
14 A word on that. It is often the case
15 that defendants, prosecutors and defense lawyers talk
16 to each other during the investigative phase of the
17 case.
18 In my view, even though Joe will tell
19 you and Michael tell you that you don't have to
20 commit your theory as a defense lawyer until that
21 part of the case, it is always a good idea for us to
22 be talking to defense lawyers throughout the
23 investigation, because they want to know what our
24 theory is going to be, and, honestly, we want to know
25 what their theory is going to be.

Page 110

1 Frequently we will refine our theories
2 depending on how that dialogue goes. Some evidence
3 is irrelevant, some evidence is more damning than
4 other evidence, but throughout the investigation we
5 should be trying to maintain that dialogue between
6 our office and the defense lawyers so that we can
7 both understand exactly what the case is going to be.
8 The truth is, because cases don't come
9 to trial in a month, often in complicated white
10 collar cases they don't come to trial for six months,
11 nine months, a year or longer, some prosecutors
12 perceive that we have an advantage not disclosing our
13 theory until the indictment.
14 The truth is the folks who are defense
15 lawyers have enough time to respond -- I thought I
16 did when I was on the other side -- if you have a
17 federal case, to respond to that theory. So we don't
18 give up much by disclosing our theory to defense
19 lawyers during investigation, except in the most
20 unique of cases. It is to our advantage, I think, to
21 have that dialogue earlier rather than later.
22 MR. LACEY: Thanks, Paul.
23 Mike Critchley. I want to go back to
24 the beginning of your building of a defense.
25 You just heard from the prosecutor that,

Page 111

1 among other things, he's looking to discuss things
2 with you even pre-indictment so he can pick your
3 brain about what the possible defenses might be, and
4 that he might be able to insert some accusations in the
5 indictment to make it more likely that evidence will
6 be allowed in at the time of trial.
7 What are you doing from the very time
8 that your client comes into the office that
9 contributes to the building of the defense case?
10 MR. CRITCHLEY: First of all, John, I
11 want to thank you. I've been searching for this
12 seminar for about 35 years. How to win a criminal
13 defense trial in 45 minutes. Found it.
14 What happens, you get a call from
15 someone, either they have been arrested at
16 seven o'clock in the morning, they are down at the
17 U.S. Attorney's office, you have an opportunity to
18 speak to family, or they come to you about an
19 investigation.
20 The first thing I do, they come in to
21 see me and I sit down with them and I equate my
22 position -- and John will bear with it -- I'm like a
23 diagnostician when they first come in.
24 The first thing I do is I listen a lot.
25 When I'm listening, I'm making evaluations. I'm

Page 112

1 ruling in and ruling out defenses. I'm ruling in and
2 ruling out issues.
3 Before you can do that, you have to have
4 a pretty good understandings of the law, Rules of
5 Evidence and Procedure.
6 I'm letting the person talk because I'm
7 making a decision, A, do I want the case? Is the
8 person capable of defending him or herself? Do they
9 have enough money, seriously, to create a defense
10 that has to be established? I listen to them and
11 make an assessment, is this a case that I want? Is
12 it going to trial?
13 When I take a case now to go to trial --
14 there aren't that many that you have. Obviously 97
15 percent of the cases that come to the office are
16 resolved by mitigation and not exoneration.
17 I take a case that I find is
18 interesting, I try to enjoy. I tell them that this
19 is a very dangerous enterprise that we are about to
20 enter into. It is a proceed with caution type of
21 proceeding.
22 When you go to trial very few things
23 happen to you, and most of them are bad. We just
24 have to sit down and make a decision.
25 I try, like Joe said, right on the

Page 113

1 money, and it's a truism, I mean, I try, we try early
2 on to get as much facts as we possibly can. I spend
3 a great deal of time front loading the file because I
4 want to get through the ID process as much of a case
5 as I possibly can so that it marinates in my head for
6 a period of time.

7 You will be surprised how the
8 subconscious works and how you are reading things and
9 how you understand the file, understand the case, it
10 just develops.

11 Then I tell them, can we go to trial?
12 Then we sit down with the government and we make a
13 decision as to whether yea or nay, because obviously
14 it is a decision that has to be done very carefully.

15 I've been to these seminars a number of
16 times, I'll give an instance, it reminds me of an old
17 joke, how I do get to Carnegie Hall? Practice. How
18 do you stand a chance of winning a trial? Nothing
19 but total preparation and commitment.

20 I would like to think that we are big
21 tough men and women when we walk into a courtroom.
22 But every one of us that does this, if you're
23 truthful, you tell everybody, I'm scared to death.
24 I'm walking in there like I control the environment,
25 but my stomach is going up and down, I'm about to

Page 114

1 vomit. Everybody is looking at me like I'm the sea
2 of calm and confidence, and I know I'm nervous as
3 hell.

4 When you're a young attorney, you see
5 Judge Brown, Judge Brown comes out, counsel, are you
6 ready? You want to say, hell no. I want to go home.

7 But preparation is the absolute key.
8 And preparation, by that I mean, not glancing through
9 the file. I mean, that type of preparation, that
10 hurts, it hurts you emotionally, it hurts you
11 physically, and you compromise everything you like to
12 get ready for trial.

13 Because you know that you have in your
14 hands the responsibility of making a decision that is
15 going to affect someone else's life. Preparation is
16 the key.

17 It seems so simple, I thought, a seminar
18 to hear preparation? Preparation, there is a certain
19 foundation. To be an attorney where you have a
20 chance of winning, you have prongs, you have
21 preparation, but in addition to preparation, you have
22 to have a good understanding, a deep understanding of
23 the law.

24 In addition to having a deep and good
25 understanding of the law, you better be skilled in

Page 115

1 the Rules of Evidence. Often the Rules of Evidence
2 are something that we last thought about and lost it,
3 but the Rules of Evidence are so important, you have
4 to be able to handle it, because in the course of a
5 trial those types of decisions are happening in
6 nanoseconds.

7 The last seminar we talked about in
8 limine motions. I prefer filing in limine motions,
9 particularly when it comes to Rules of Evidence,
10 because often you have objections made to questions
11 you have, and some are sophisticated objections and
12 some are reflexive objections.

13 Sometimes a reflexive objection,
14 hearsay.

15 Counsel, what's your basis?

16 Well, it's not being offered for the
17 truth.

18 Sustained.

19 Objection.

20 Counsel, what's your basis?

21 State of mind.

22 There are times when those exceptions
23 you are trying to argue are very important. If it is
24 very important, just don't rely on a reflex decision.
25 Make sure you give an opportunity for the judge to

Page 116

1 understand it as it applies to the context of the
2 case.

3 The next thing that you have to do is
4 make certain you understand the Rules of Criminal
5 Procedure. If you don't know that, you're going to
6 be lost.

7 On top of that, after you prepared and
8 after you have all these components going, then you
9 have to have skill in trying a case.

10 The skill level, I think, in trying a
11 case is the easiest thing to accomplish. I'm not
12 saying you do it real good, but you can take high
13 school students and teach them how it is to try a
14 case. Sometimes we see attorneys, we know it, the
15 public don't know it, they are trying a case, but
16 they didn't do the types of things that have to be
17 done to get ready for a trial. They are
18 rope-a-doping it.

19 I'm just going to digress for a moment.
20 I equate a trial to a prize fight. It is a veritable
21 fist fight. Sometimes you have boxers that are 27,
22 28 years old. They are still in the physical
23 strength that they have as a young man, they still
24 can be good, but they lose the desire to train.

25 As a result of losing the desire to

Page 117

1 train, it affects their abilities to win or lose. I
2 often find attorneys, after they do it a while,
3 because it's a difficult process, they lose their
4 desire to prepare. Once you lose your desire to
5 prepare, that's a recipe for losing.

6 On top of that, you have to be trial
7 lucky. We can spend a seminar on all those things.
8 That's what I do.

9 MR. LACEY: Paul, let me ask you this,
10 because you alluded to it a little while ago. It
11 goes for plaintiffs attorneys as well.

12 In drawing an indictment, you talked
13 about there being two types, one being the bank
14 robbery, or maybe the drug deal where there is a buy
15 and bust, but those other types of cases.

16 You discussed framing the issue in the
17 indictment in a way that will get certain evidence,
18 or hopefully maximize the chances of you getting
19 certain evidence into the trial when the matter is
20 being tried before one of these judges.

21 How is that done and how does that help
22 with your trial theme?

23 MR. FISHMAN: Well, if you step back, we
24 have the flip side of what Michael is talking about,
25 we get certain evidence, preliminary evidence that

Page 119

1 they had done. The question that was presented to
2 the judge on a motion to dismiss was whether if it
3 was true, it violated the law. Now, a motion to
4 dismiss in a criminal case, that is sort of a harder
5 issue to adjudicate. The end of the day the real
6 question is whether their conduct had actually been a
7 criminal violation.

8 We have to think about all those things.
9 When I'm talking about framing the indictment, what I
10 want to do is not frame it so that the evidence
11 otherwise inadmissible becomes admissible. Our goal
12 is to explain to the Court in the indictment why the
13 particular evidentiary issues that will come up are
14 consistent with the theme of the case and are part of
15 the proof that actually goes with the case.

16 What it does basically is foreshadow the
17 in limine motion that Mike wants to make by
18 effectively presenting the issue four square to the
19 Court, that setting, so that when the Court is
20 evaluating that motion that Mike wants to make, I
21 have an indictment to point to that says no, this is
22 exactly why it is relevant and this is why we should
23 win the 404.3 motion.

24 MR. LACEY: Okay.

25 What I'm hearing from you is at the time

Page 118

1 something may or may not have occurred. Somebody
2 bought stock, somebody was over prescribing a
3 particular drug beyond what anybody would consider
4 reasonable in the health care area, Medicare billings
5 for a particular institution are way out of line, a
6 politician accepted money under certain
7 circumstances, something like that.

8 As we do the investigation, we are
9 trying to figure out what the evidence is and
10 ultimately, is it admissible evidence? We have the
11 same issues that Michael does. We want to be sure
12 before we pull the trigger and indict somebody, A, is
13 the person guilty, and can we prove it?

14 We also want to make sure that we have a
15 real legal theory, that what exactly happened is in
16 fact a crime.

17 And I have a couple of examples of cases
18 recently in which we have thought out the question
19 about everybody agreed on what happened. A case in
20 front of Judge Hayden recently, a case which was
21 called the "Wise Guys Ticket Brokers" case, in which
22 these fellows had constructed a very complicated
23 computer model to escape the ticket buying
24 restrictions of Ticketmaster.
25 There was no question really about what

Page 120

1 you are framing the indictment, you are thinking
2 about evidence rulings that may or may not be made by
3 the District Court, and you are thinking about a
4 trial strategy that is first and foremost -- when I
5 say first and foremost, you're thinking about a trial
6 strategy at the time you are actually framing the
7 indictment.

8 MR. FISHMAN: You shouldn't bring an
9 indictment until you have thought that through.

10 I remember early in my tenure as U.S.
11 Attorney, I was getting briefed on a particular case
12 that assistants were contemplating indicting, and
13 they were giving me a recitation of what the proof
14 was.

15 I turned to one of the lawyers in the
16 case and I said, how are you going to get that in?

17 They had an answer, but if they hadn't
18 had an answer, we would have stopped and they would
19 have had to go back and rethink that particular
20 count. Without that evidence being admissible, the
21 count wouldn't apply. We had to be thinking about
22 that really from before we indicted.

23 If we don't have a theory with a case
24 that is consistent with the law and how we are going
25 to prove it, we are not going to win.

Page 121

1 MR. LACEY: Judge Chesler, I want you to
2 hark back a little bit to your time in the U.S.
3 Attorney's office, and, quite frankly, you handled
4 some charging instruments that up to that time were
5 some of the most complex charging documents that the
6 government had brought against racketeers.

7 Can you give us a little bit of insight
8 into the process that you went through in putting
9 together those types of instruments, and, again, how
10 a theme of the case was thought out even while you
11 were charging these cases?

12 JUDGE CHESLER: What hit me as I was
13 listening to my colleagues here, first of all, what
14 Joe said about Mike Querques, that he would sit there
15 and he would think.

16 The truth is, you got a mass of
17 information, a mass of evidence. Now you've got to
18 think about what you actually have.

19 What Mike Querques did, I think a good
20 prosecutor has to do that, and you got to think about
21 it from a number of points of view, what potential
22 charges can be brought based upon the evidence which
23 you have.

24 Sometimes you also got to think about,
25 when you are talking about themes, I can bring this

Page 122

1 charge, but the next thing you got to be thinking
2 about is, if I were a defense lawyer, what defenses
3 would I bring to these charges? What are the likely
4 problems with being able to get a jury to accept
5 these charges? That can run the gamut.

6 But, for example, take a relatively
7 straightforward charge like making a false statement
8 to an FDIC insured bank institution, a relatively
9 ordinary white collar charge.

10 If you present it purely to a jury, and
11 if you draft it in such a way that all the jury
12 learns is X made a statement to a bank on some bank
13 application, it was false, it was FDIC insured, ergo
14 you should convict, a reasonable defense approach to
15 that is, these folks have charged my client with
16 glorified spitting on the sidewalk. This is
17 something which lots of people do and don't get
18 charged with.

19 What is there that in fact warrants my
20 poor shlemiel being charged and tried in federal
21 court for having made some false statement about the
22 amount of income that they have?

23 One of the things you're thinking about
24 as a prosecutor is what you can in fact legitimately
25 get into evidence and what charges, additional

Page 123

1 charges perhaps, might be appropriate for
2 demonstrating, for example, that the loss to the FDIC
3 insured institution is relevant information and is
4 admissible, and it's not going to be probably
5 relevant or admissible on a pure false statement to
6 an FDIC bank because it's not an element of the
7 offense, and whether or not they lost money or didn't
8 lose money is not an element of the defense.

9 That is something you are going to be
10 considering when you construct an indictment about
11 what charges can reasonably be brought.

12 For example, while a false statement may
13 not support evidence about the amount of loss, other
14 types of fraud charges brought in connection with the
15 offense might very well demonstrate that an actual
16 loss is a component and can be shown to the jury, and
17 therefore you can show the jury why they might want
18 to convict.

19 From a prosecutor's point of view, it is
20 frequently, in white collar cases, not sufficient to
21 demonstrate to a jury that, yes, the elements of a
22 crime have been established beyond a reasonable
23 doubt.

24 If you are a prosecutor, you are also
25 thinking, all right, about telling the jury, why as

Page 124

1 an ordinary human being the facts of this case
2 warrant a criminal conviction. I think you can do it
3 within the realm of the Rules of Evidence and a
4 properly constructed indictment.

5 The second thing you always got to be
6 thinking about is whether or not the theory of the
7 case actually conforms with reality. From a
8 prosecutor's point of view, what sometimes happens is
9 your agents get a wonderful theory of the case.
10 Since they get wrapped up into the nitty gritty, they
11 frequently can have a view of the case which doesn't
12 correspond to what you can actually establish.

13 Paul was mentioning, for example, a case
14 which might involve what we are describing of a
15 particular narcotics substance.

16 Your agents might have concluded that
17 this means that you have a doctor defendant who is
18 the center of a massive conspiracy to profit from
19 selling huge quantities of oxycodone.

20 In fact, in pursuit of that theory, your
21 agents got a search warrant for the doctor's office
22 where they believe, through informant testimony,
23 there were huge quantities of cash and that huge
24 quantities of money were deposited in banks.

25 Lo and behold, none of that pans out.

Page 125

1 In fact, the only money you can establish is that the
2 doctor got the typical, ordinary reimbursements from
3 Medicare and Medicaid for treating these folks that
4 the doctor would have gotten anyway.

5 You face an extraordinary risk of then
6 presenting this trial -- this case to a jury under
7 the theory that our doctor is a kingpin of a massive
8 conspiracy.

9 So what I thought about, what I would do
10 is exactly what Mike Querques did. After you got it,
11 you got to think. You got to sort out, what would
12 they do? What would you do to counter it? You got
13 to think about the Rules of Evidence. You got to
14 think about the fact that some cases are of a nature
15 that in fact the mere technical violation of the
16 offense is not going to be sufficient to prevent a
17 jury nullification defense on various reasons and
18 consider how you are going to potentially counter a
19 jury nullification defense.

20 MR. LACEY: Thank you, Judge.

21 Joe, let me ask you this. Mike alluded
22 to it earlier in terms of the very first meeting with
23 a client and being a diagnostician.

24 You now have the government putting out
25 a charge against your plan that you have to face. As

Page 126

1 you have heard, they are already thinking about what
2 their opening statement is, what the trial is going
3 to look like, what evidence rulings may be, and they
4 are even thinking about jury nullification.

5 What are you doing from the outset,
6 after you get this charging instrument, you meet with
7 the client, to confront the government's case as part
8 of your theme, and how are you building it?

9 MR. HAYDEN: Well, the first thing is
10 before you construct a defense, you have to know what
11 you are defending against. You have to go out of
12 your way to understand the charging document,
13 understand the law, and then look at the discovery,
14 and the client will want to say, we can defend here,
15 we can defend here. How is there, what is in the
16 discovery going to help the government prove their
17 case?

18 In the beginning it's all about
19 understanding the theory of the prosecution.
20 Sometimes, although you are thinking about it,
21 projecting, reining the client back from wanting to
22 jump in to talking about the defense until you
23 understand some of the pitfalls of the case, some of
24 the potential traps for what looks like an easy
25 defense, but two moves down, you will get knocked out

Page 127

1 very quickly.

2 The first thing you got to do -- the
3 second thing is apropos understanding the theory of
4 the prosecution. You want to try to hold the
5 prosecution to what their theory of the case is.

6 They have indicted, they have utilized
7 the statute, certain elements, they have a conspiracy
8 count which defines what their theory of prosecution
9 is. You certainly don't want them to embark on a new
10 theory.

11 There are cases which say if you amend
12 the indictment it will be a violation of due process.
13 It is up to the lawyer to understand their theory to
14 try to hold them by objections.

15 Paul very candidly talked about one of
16 the reasons we may have a lengthy indictment is to
17 help ourself in terms of evidential issues by putting
18 some allegations in the indictment that will make it
19 easier to prove.

20 It always makes me crazy for somebody to
21 argue, your Honor, the evidence is admissible. Why?
22 Well, we put it in the indictment. So what? Is it
23 an essential element?

24 Somebody is charged with corruption,
25 they put mortgage fraud in. Your Honor, we can prove

Page 128

1 the mortgage fraud. It is overt act 98. Therefore
2 we want to prove it.

3 It is the defense lawyer in this case
4 who has to try to hold the government to their
5 theory, make the motions, and if it's in the
6 indictment the government starts out with a leg up,
7 and it may be the defense has to come back two or
8 three times to argue why it is 401 irrelevant, 403
9 unfairly prejudicial and really not part of the
10 theory of prosecution.

11 I had a case we argued in front of Judge
12 Chesler, we went two or three times, days, arguing as
13 to whether or not it was one theory or two theories
14 and whether or not what was in the charging document
15 was what they were going to be held to. Those are
16 things that lawyers do argue. That's what
17 sophisticated lawyering is about.

18 To make the argument you have to
19 understand it and then be fairly aggressive in terms
20 of trying to make the record to hold the prosecution,
21 if you can, to the theory of the case.

22 MR. LACEY: Joe, are you trying to
23 understand it or are you trying to characterize it?

24 MR. HAYDEN: The first thing you got to
25 do is understand it. You characterize it at trial,

Page 129

1 whether it be in the opening or whether it be in the
2 summation or, to some extent, as my friend Alan
3 Silber always says, the defense starts in the cross,
4 and Michael is a master in that.
5 The defense will begin to go in during
6 the cross-examination of the witness where you can
7 ask the leading questions, where you can begin to go
8 a certain way.
9 There are a lot of lawyers that can just
10 rest at the end of the government's case, and rest.
11 And the defense goes in solely on the basis of the
12 cross-examination of the witnesses and something that
13 was developed.
14 Michael Querques was a master of that.
15 I think in this era it's harder to do that. A lot of
16 the defense in certain cases, fraud cases
17 particularly, sometimes witnesses with companies will
18 give you a lot that is helpful to the defendant, and
19 a lot in terms of the chaos of the business, things
20 were happening, they weren't the defendant's fault,
21 can be established on cross-examination.
22 You are getting ready to do it, but
23 you're not trying to tip it to the government any
24 sooner than you have to.
25 MR. LACEY: Paul, you are now heading to

Page 130

1 trial, and, quite frankly, whether it's a civil case,
2 I mean, a civil case, generally speaking, you have to
3 prove that it is more likely than not.
4 In a criminal case the government, as
5 everyone knows, bears a far heavier burden of proving
6 its case beyond a reasonable doubt.
7 How does the government go about putting
8 together a theme that can convince 12 jurors in a box
9 that this case is proven, or will be proven beyond
10 any and all reasonable doubts?
11 MR. FISHMAN: I'm not sure it is
12 anything different than everybody here has always
13 said, and I think Judge Chesler said it probably more
14 succinctly than the rest of us.
15 It has to sound right to the jury. It
16 has to be grounded in reality. It has to be a theory
17 that makes sense to 12 people about why a particular
18 person behaved in a particular way at a particular
19 time.
20 If it doesn't, then you run the risk,
21 first of all, it may not have happened that way.
22 Part of the things that we have been talking about
23 here, sort of anticipating defenses, I mean, one of
24 the reasons we anticipate defenses and think about
25 defenses as good trial lawyers, because good trial

Page 131

1 lawyers should anticipate whatever argument is going
2 to be made by the other side.
3 We need to be thinking about the
4 defenses, because if the defenses are plausible,
5 reasonable defenses, maybe the guy didn't do it.
6 Simply, it is not a matter of trial
7 strategy, it is a matter of convincing ourselves
8 first that it is a case that, as the judge said, is
9 worth our time. We do have a bunch of lawyers, but
10 we have limited resources and the court has limited
11 resources.
12 We have to decide if a case is worth
13 bringing. We also have to decide it is a case we can
14 win because we should win. Not the other way around.
15 It is not a case we should win because we can win.
16 All of those questions, I hope, are
17 being asked and answered before we ever get to the
18 place where we have to try to convince the jury.
19 At the end of the day, it is taking the
20 facts that have already convinced us and presenting
21 them in a way that is compelling for a bunch of folks
22 who don't know that much about the law, have never
23 heard of this, if the voir dire has done its job, and
24 can think about it in a way that is consistent with
25 the theory we already framed in the indictment.

Page 132

1 MR. LACEY: How do you take one of these
2 very complex cases and make it so compelling that you
3 can prove it beyond a reasonable doubt?
4 MR. FISHMAN: You have to boil it down
5 in some way, again, to the same theme that we are
6 talking about. Whether somebody needed money at a
7 particular time, or needed money for a particular
8 reason, or he's trying to get over on a competitor.
9 Whatever the particular facts are.
10 If you look at, for example, the case
11 that we had in front of Judge Kugler, the folks who
12 were accused of trying to commit mayhem at Fort Dix,
13 they obviously didn't get to a place where they
14 actually did what we allege they wanted to do.
15 There are a number of cases that we have
16 like that, in which the defendants take certain
17 steps, and their defense at the end of the day is, we
18 didn't get far enough. What we did was not a crime
19 because whatever we did is not itself illegal, and we
20 never got to a place where the harm that you are
21 accusing us of trying to achieve took place.
22 What we have to do, the same thing we
23 are asking the jury to do, is boil it down. Here's
24 what these guys were trying to do. Take the evidence
25 that shows what these guys wanted to do was to

Page 133

1 achieve a certain violent result at a certain time.
2 You try to take all those facts and distill it down
3 to that.
4 In the case that the judge tried
5 involving organized crime, you want to boil it down
6 to the fact that three guys on a particular day
7 decide to get payoffs from union members for the
8 right to work, which everyone should have without
9 having to pay off the mob.

10 The proof may be much more complicated
11 than that, but the theme is these guys not only took
12 a public risk, but they took something, a right away
13 from people who had the right to work and shouldn't
14 have had to pay tribute for that privilege.

15 Whatever the case is, you are looking
16 for that theme.

17 MR. CRITCHLEY: We are all saying the
18 same thing. In our office we like to say, we want
19 the facts to stop moving. We want the facts to stay
20 still. What do I mean? As you are getting ready,
21 you are understanding new facts, new issues are
22 coming up. Your understanding of the case is as the
23 facts are moving.

24 Once the facts are still, no matter how
25 complicated they are, once the facts are still, it

Page 134

1 has been my experience, almost like an object, you
2 control the facts, then you can move them around to
3 fit your theme. If you don't have complete control
4 of the facts, then it is just total disorganization.

5 It is very difficult. I mean, years ago
6 we would get these documents in boxes and we think we
7 can handle everything. Now it's a little dangerous
8 thing called CDs, DVDs, they look harmless, but they
9 are evil.

10 Inside each of those is about 40,000
11 pieces of paper that someone expects you to read.
12 You try to say, okay, you get a client, you have to
13 prepare the client to testify. In our office you
14 start with the presumption that the client is going
15 to testify, he or she is going to testify.

16 That helps us and helps the client, and
17 we can spend a lot of time on why we do that. We may
18 make a decision during the course of the trial not to
19 testify, but we never make the decision not to
20 testify before.

21 Paul was talking before about the case
22 in New York, the insider trading case. There is a
23 case with literally millions of pieces of paper that
24 has been covered over the span of eight or nine
25 years. There are thousands of recorded

Page 135

1 conversations.

2 How do you get a client prepared to
3 potentially testify in a case like that?

4 Mr. Dowd is an excellent attorney. I
5 don't know how he's going to do it. I always want a
6 client to testify because I think the days of -- in
7 federal cases, the days of winning a case on
8 cross-examination are over, subject to exception.
9 All cross-examination does, it sets it up and tees it
10 up so that the jury will accept an alternative
11 narrative.

12 How do you get someone to accept your
13 narrative? I tell people, when you have a lot of
14 facts you may not -- you're getting ready, you got
15 all the hot documents, you think you have the hot
16 documents, you are ready to deal with
17 cross-examination.

18 I say, okay, let's try to understand the
19 facts. In addition to understanding the facts, let's
20 understand the themes of our case, because in the
21 event you are confronted with a document, one of
22 those hundreds of thousands of documents that we have
23 not touched, if you understand the theme of the case,
24 and we may not have gone over the questions and
25 answers, you are better prepared to answer the

Page 136

1 questions in such a way that is consistent with what
2 we want to do with the jury.

3 MR. LACEY: Joe, how do you use your
4 theme in your opening statement?

5 MR. HAYDEN: Well, I had a great
6 experience years ago. I was involved in an Inn of
7 Court. We gave an exercise to the young people who
8 came into the Inn of Court of doing an opening
9 statement on an accident case or something like that.

10 Just as part of the exercise they asked
11 the masters to sit in the jury box so that the people
12 would have somebody to open to.

13 I remember listening to a half dozen
14 openings, and after two or three of them, after about
15 30 seconds, my mind would be, well, will this person
16 get to the point? What is this person's position?
17 What you see is the slow wind up really doesn't work
18 out very well.

19 One of the things you will see, the
20 government does it, a lot of the defense attorneys do
21 it, is you will start out with the theme of your
22 case, really, in the first two minutes. That's what
23 I do. And then you can back up with the
24 preliminaries, and now I would like to take an
25 opportunity to reintroduce myself and go through some

Page 137

1 of the preliminaries.

2 The doctrine of primacy and recency,
3 people remember the most what they heard first and
4 heard last.

5 One of the things you do with the theme
6 of the case is you get it right out there early and
7 you end up coming back, to some extent, the same
8 thing with the theme of the case.

9 One of the reasons it's dangerous is a
10 terrible evidential doctrine called opening the door.
11 One better think through their theme of the case and
12 what doors might be opened by going a certain way,
13 because many times in cases, I have seen prosecutors
14 saying, your Honor, the evidence is admissible now.
15 They opened the door. They said in their opening,
16 the briefs will indicate that so and so opened on it,
17 even if this tape wasn't admissible the first time,
18 it's admissible now.

19 That is why you have to be so tight in
20 terms of how you frame the theory, the theme and
21 theory of your case, because you run the risk of
22 opening the door.

23 MR. LACEY: Judge, based on your
24 experience, what have you seen that is most effective
25 in terms of using a theme in an opening, and what is

Page 138

1 least effective as a theme in an opening statement,
2 whether civil or criminal?

3 JUDGE CHESLER: Well, I think the most
4 effective themes are indeed as Joe says, which is,
5 you know, there is a doctrine of military education
6 which some people use to structure both openings and
7 closings.

8 The opening is tell them what you're
9 going to prove, tell them how you are going to brief
10 it, tell them what you are going to prove again.

11 In closing, tell them what you proved,
12 tell them how you proved it, tell them what you
13 proved again.

14 It strikes me that that basic structure
15 makes, indeed, the most effective openings and
16 closings. When you tell them what you are going to
17 prove, or in the defense case you're probably going
18 to -- you may very well be doing what the government
19 is not going to prove and why they are not going to
20 prove it, for example, which is they are not going to
21 prove it because their star witness is a totally
22 incredible individual who is testifying only to save
23 himself from jail. You will hear so many
24 inconsistencies and so many variations in his story
25 that you will find that no reasonable person could

Page 139

1 conclude beyond a reasonable doubt that my client
2 committed the crime which the government charged. If
3 that's going to be your theory, get it out front.

4 The other most significant thing is in
5 an opening, don't promise something you can't
6 deliver. For the prosecution, that frequently means
7 it may very well be a bad idea after you've told them
8 what you're going to prove and you're going to show
9 how you're going to prove it, to be telling them some
10 sort of wonderful story about witness A is going to
11 say X, B is going to say Y, C is going to say Z,
12 since you have absolutely no idea whether or not
13 Judge Brown is going to say witness A, B and C can't
14 testify at all, or their testimony is limited, or you
15 can't get documents in.

16 So it is an extraordinarily good idea to
17 make sure that while you get your theme out and you
18 get across what you are going to establish, that you
19 do it in such a way that you are not tying yourself
20 down.

21 Despite all the preparation that
22 everyone does -- and I can tell you, trying a case
23 against Joe was wonderful. We have all these
24 documents. I go into summation for a document which
25 I've had in evidence. I think we had about 3,000

Page 140

1 documents in evidence. I go into a diary, and I am
2 in rebuttal summation going to refer to one lousy
3 entry on one date in the diary which has not been
4 referred to in testimony, but the document is fully
5 into evidence.

6 I start to open my mouth. Joe read the
7 document. He knows exactly --

8 MR. HAYDEN: I almost punched him when
9 he pulled that document out.

10 JUDGE CHESLER: I got it in, didn't I?

11 MR. HAYDEN: I almost punched him.

12 JUDGE CHESLER: In this huge case with
13 massive documents, in the old days, Joe, from my
14 third word in the rebuttal, knew what I was going to
15 do, where I was going to go, objection, sidebar, and
16 we are in front of Judge Gerry.

17 It is that kind of preparation which is
18 incredibly important, but no matter how well you
19 prepare, you don't know what the judge is going to
20 rule, and you don't know what's going to get in and
21 what's not going to get in, and certainly from the
22 prosecution point of view, promising that somebody is
23 going to testify, or that something is going to get
24 in evidence is something which will be shoved down
25 your throat unmercifully as a prosecutor, by my dear

Page 141

1 friends.

2 On the other hand, as Joe will tell you,
3 in that same case his co-counsel had promised that
4 his client was going to take the stand and never did.
5 But this was a four and a half month trial, and I
6 thought long and hard and I said, you know something,
7 I don't care what the case law may be out there, it
8 is not going to do me enough good to even risk
9 thinking about it.

10 MR. FISHMAN: Good call.

11 JUDGE CHESLER: It was never mentioned
12 at all.

13 There was that flat out promise that the
14 co-defendant was going to take the stand. It is as
15 risky as can be.

16 So what I would say is that you are
17 doing a balance, getting a theory out, getting what
18 you expect to prove, but, on the other hand, you sure
19 want to make sure you got sufficient flexibility in
20 there so that you can roll with the punches and
21 you're not going to be caught promising something you
22 can't deliver.

23 MR. LACEY: Michael, I have seen you in
24 preparation for your trials and cross-examination
25 during trial using a white board in your office.

Page 142

1 What is it you are putting on that white board, and
2 how is it helping you in putting together both your
3 opening and your cross-examination for these
4 government witnesses?

5 MR. CRITCHLEY: I'm just putting on
6 those things that I want to -- that I think are
7 important. I'm trying to anticipate where I'm going
8 to go in cross-examination to move the case towards
9 my direction.

10 In preparing for the cross-examination,
11 say, of a government witness, what I try to do is
12 make certain that I don't mimic the mock
13 cross-examination that the government has already
14 conducted before they put the witness on the stand,
15 because they always do that and they play the roles
16 of attorneys so that the witness will anticipate
17 certain areas of cross-examination. The government
18 does not just throw them up.

19 I try to be as prepared as I possibly
20 can. When I cross-examine, I don't want to be all
21 over the place. I don't want to develop a pattern of
22 cross-examination that is kind of familiar with the
23 mock cross-examination so that the witness feels
24 comfortable in what's going on.

25 I want the witness to have to try to

Page 143

1 think in real time what my next question is going to
2 be so I don't or she doesn't stand there prepared.

3 I think the whole purpose of going
4 through those processes that we do before going to
5 trial is develop a theme for cross-examination. If
6 you can't do it on cross-examination, develop your
7 theme, you are just on a one way trip to disaster.

8 MR. LACEY: How do you build the theme
9 of the case around a cross-examination of a witness
10 whom you never had a chance to talk to? At least in
11 criminal cases.

12 MR. CRITCHLEY: Paul just mentioned the
13 Dwek case. I'll tell you what we did in the Dwek
14 case.

15 I say it like I think everybody falls
16 into one silo. In my life experience it's 10 silos,
17 and everybody falls into one of those. Although you
18 may never have met the person personally in life,
19 once you know a little bit about him, you know what
20 silo he falls in.

21 With all due respect to you, Paul --

22 MR. FISHMAN: Which silo am I in? Not
23 with Dwek.

24 MR. CRITCHLEY: With Dwek, you know, I
25 never met him, but I met him. He's a very clever,

Page 144

1 very articulate, very facile guy. He's very skilled
2 in his area. He has been the subject of 15 or 20
3 depositions.

4 What do you do? You spend a great deal
5 of time. I spent like six, seven months just getting
6 ready for that cross-examination. What did I do? He
7 was examined in about 13 or 14 341 hearings in
8 bankruptcy, so I listened to every CD. I wanted to
9 see the questions that were asked, the answers he
10 gave, how he answered them, what familiarity did he
11 have with the facts? I got a little bit of an
12 understanding with him there.

13 Then you get pages of depositions, and
14 you have thousands of pages of depositions, and you
15 read thousands of pages of depositions for six lines
16 of cross-examination. You are starting to understand
17 the guy.

18 Then you go through the bankruptcy
19 documents. The bankruptcy documents, Solomon Dwek,
20 the docket is probably that thick. There are 7500 to
21 8,000 entries.

22 Every day when I got in nine o'clock in
23 the morning, boom boom boom, 11957, Bankruptcy Court,
24 what was the new document entry that day? I just
25 kept going through it, and I found out a lot about

Page 145

1 the guy that I felt can be useful, that he was not
2 going to be prepared for.

3 When you cross-examine a government
4 witness, it is no longer the case where you say,
5 well, you are despicable, you're doing it to save
6 your life. Jurors turn that off real quick.

7 You have to show intellectually and
8 analytically why the jury should reject his or her
9 testimony. Not because they come here with baggage,
10 that helps, but you know the record of the U.S.

11 Attorney's office, it is a tried and true
12 cross-examination technique just to say the guy or
13 woman is a piece of crap, but it fails. Then you
14 have to let the witness know, you have to let the
15 witness know, I own you. I own you. You are not
16 going through babble.

17 And with Dwek, I knew as soon as I
18 cross-examined the guy, the first thing he said is,
19 can you show me a document to refresh my
20 recollection?

21 If you don't have a document to refresh
22 your recollection, you're dead.

23 We are before Judge Linares, we have a
24 table about 12-feet long, and I have documents,
25 because I knew every time I asked him a question,

Page 146

1 he's going to say, can you show me -- he was testing
2 me.

3 After a while, after about eight or nine
4 tests, he got the impression that I had the document
5 and he gave it up.

6 What I wanted to do with Dwek, I didn't
7 want to make him a little just unbelievable, I
8 wanted to make him despicable. I'm not saying he is,
9 but that's my job. My job, so the jury would detest
10 him.

11 Whether they did or didn't, I developed
12 a theme that he was just out there, just running his
13 scams.

14 MR. LACEY: Did you open on that issue
15 that he was a despicable person?

16 MR. CRITCHLEY: Yes. John Vasquez
17 opened. The government has the hook. No matter what
18 the case, before they say my name is Mr. or Mrs. so
19 and so, they stand up representing the United States
20 of America, the flag is flying, the Marine Corps drum
21 and bugle core is playing, the jury loves him or her.
22 They stand up and say, this is a case about greed.
23 This is a case about corruption. My God, what are we
24 doing here? It's very, very effective, tried and
25 true.

Page 147

1 We try to have our hook, because you
2 have to spend a lot of time because the jury is
3 paying attention to you, certainly those first 25 or
4 30 seconds. They may turn you off after a minute and
5 a half, but you got their attention, at least for 45
6 seconds.

7 Just as the government uses its hook,
8 you have to use your hook.

9 We either have our hook going in or we
10 play off the government.

11 But what JV did, I think successfully in
12 the Dwek case, when the government came in, very
13 effective, very, very effective presentation, JV
14 responded with an alternative hook that addressed
15 that issue and that developed our theme.

16 MR. LACEY: Paul Fishman, I'm going to
17 let you finish up today.

18 In the closing statement the government
19 has two shots. How do you break that up and utilize
20 the theme both in the initial closing and also in the
21 rebuttal?

22 MR. FISHMAN: I think that differs case
23 by case. It's hard to answer that question in the
24 abstract.

25 You have to anticipate, obviously, in

Page 148

1 your original summation, and if you had a well-tried
2 case in which the openings and the
3 cross-examinations, and the defense case, if there is
4 one, has been what Joe and Mike portray it to be,
5 which is a constant reiteration of the defense theme,
6 you know what they're going to say in closing
7 arguments.

8 You not only have to make your own case,
9 but why your theory is right and the case is
10 compelling. You also have to anticipate those
11 defenses.

12 To the extent that you miss that, or
13 sometimes we want to save one argument for rebuttal
14 summation because it is a particularly compelling
15 argument, and we know based on what they are going to
16 do it's going to be a fair response, you do that.
17 You have to do it fairly.

18 The last point I want to make, at the
19 risk of closing the way I began, by showing how
20 horrible it is to grow up in the Fishman household,
21 my older son had to do a one-minute presentation
22 biography of anybody he wanted to do in his third
23 grade class just this week.

24 He picked Maurice Sendak, not because
25 Maurice Sendak is his favorite author, but he happens

1 to have an autographed Maurice Sendak book.

2 He said, dad, I don't know how to do an

3 oral presentation.

4 Why do you care about Maurice Sendak, I

5 told him. You have to convince them that they care

6 about Maurice Sendak because you care about Maurice

7 Sendak.

8 At the end of the day, what you have to

9 do is communicate to the jury that your theory is

10 right, that you care about it and that they should

11 care about it. If you can do that, you are going to

12 win.

13 MR. LACEY: You just heard from the very

14 best.

15 (Applause.)

16 MR. LACEY: We thank the four of you for

17 sharing your thoughts today with us. Please,

18 everyone sign out so you get the CLE credit.

19 Thank you all for coming.

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	15:25	80 (3)	26:25	administered (1)
\$	26.1 (1)	12:18;46:12;81:17	accurate (2)	11:16
	24:25		21:19;22:9	Administration (1)
\$300 (1)	27 (1)	9	accusations (1)	13:22
86:13	116:21		111:4	administrators (1)
1	28 (1)	90 (1)	accused (1)	8:25
	116:22	38:10	132:12	admiralty (1)
1 (1)	3	97 (1)	accusing (1)	89:21
59:6		112:14	132:21	admissible (10)
10 (3)	3,000 (1)	98 (1)	accustomed (2)	109:9;118:10;119:11;
81:2;82:12;143:16	139:25	128:1	41:10;71:18	120:20;123:4,5;127:21;
100 (1)	30 (3)	A	achieve (2)	137:14,17,18
19:1	10:17;136:15;147:4		132:21;133:1	admissions (1)
104 (2)	300 (1)	abilities (1)	Ackerman (1)	4:9
81:9,20	67:10	117:1	4:1	admitted (2)
11957 (1)	341 (1)	ability (1)	acquittal (1)	6:4;103:11
144:23	144:7	51:5	96:19	adopt (1)
12 (3)	35 (1)	able (17)	acquitted (1)	97:15
60:17;130:8,17	111:12	10:19;19:5;24:19;	108:1	adult (1)
12-feet (1)	4	25:2;32:9;35:21;38:10;	across (5)	90:20
145:24		41:17;42:2,21;78:23;	14:16;25:24;62:1;	advance (4)
13 (2)	40 (2)	84:13,20;97:2;111:4;	94:4;139:18	19:7;32:24;51:2;80:9
3:11;144:7	10:17;66:2	115:4;122:4	act (2)	advantage (3)
14 (2)	40,000 (1)	above (1)	99:24;128:1	25:11;110:12,20
64:4;144:7	134:10	58:6	acted (1)	advantages (1)
140 (1)	401 (1)	absence (2)	5:13	84:19
94:11	128:8	19:22;43:5	acting (1)	adversaries (1)
15 (3)	403 (1)	absent (1)	21:2	36:11
64:5;82:12;144:2	128:8	77:17	action (3)	adversary (13)
16 (2)	404.3 (1)	absolute (2)	13:13;64:1;75:14	19:22;36:16;42:15;
34:19;71:16	119:23	12:21;114:7	actions (1)	62:17,18;63:1,8,16;
180 (1)	42 (1)	Absolutely (2)	18:21	71:18;76:11,13;84:16;
77:15	5:23	88:9;139:12	active (2)	85:5
18th (1)	45 (3)	abstract (1)	78:1;93:17	adversary's (3)
6:25	12:25;111:13;147:5	147:24	actual (3)	25:13;62:24;63:15
1980s (2)	5	abuse (1)	82:9;83:25;123:15	adverse (3)
91:13;92:19		64:18	actually (28)	31:11;32:22,25
1985 (1)	50 (3)	abusing (1)	3:13;24:17;36:11;	advice (7)
13:17	18:25;55:9;56:9	64:19	41:1;44:11;51:21;66:22;	34:18;42:19;46:17;
1997 (1)	500 (1)	academics (1)	71:19;75:15;82:9;88:3;	49:10,16;71:1,5
14:1	18:10	2:15	89:15,19,24;100:13;	advise (2)
19th (1)	502 (2)	accept (3)	103:12,22;107:9;	9:23;17:22
6:19	29:17,17	122:4;135:10,12	108:22;109:6,8;119:6,	advocacy (4)
2		acceptable (1)	15;120:6;121:18;124:7,	43:3;64:25;76:25;96:3
	6	29:5	12;132:14	advocated (1)
20 (3)	60s (1)	accepted (1)	adage (1)	73:24
46:11;107:4;144:2	80:4	118:6	88:21	affect (1)
2003 (1)		access (2)	added (1)	114:15
14:4	7	23:7;28:24	26:12	affecting (1)
2005 (1)		accident (2)	addition (5)	51:5
13:16	70s (1)	32:8;136:9	35:4;71:11;114:21,24;	affects (1)
2011 (1)	80:4	accomplish (1)	135:19	117:1
13:2	7500 (1)	116:11	additional (1)	affirmative (1)
24 (4)	144:20	accomplished (1)	122:25	22:17
41:14;49:21;50:21;	8	86:18	address (6)	afloat (1)
52:13		accord (1)	6:10;18:15;46:7;	96:25
24th (1)		86:7	52:18;60:22;74:10	afraid (3)
70:6	8,000 (1)	according (1)	addressed (1)	34:22;73:10;99:23
25 (3)	144:21	23:16	147:14	again (19)
5:19;56:9;147:3		accordingly (2)	adept (1)	7:11;10:22;12:8;
26 (1)		54:23;56:1	27:6	31:11,12;35:15;40:22;
		account (1)	adjudicate (1)	48:14;53:14;72:21;
			119:5	80:13;91:16;92:2,11,23;

121:9;132:5;138:10,13 against (7) 63:24;95:19;107:4; 121:6;125:25;126:11; 139:23 age (1) 10:4 agenda (3) 7:23;40:1,3 agent (2) 107:11,12 agents (3) 124:9,16,21 aggressive (1) 128:19 ago (7) 23:9;64:24;100:25; 107:5;117:10;134:5; 136:6 agree (2) 45:15;60:3 agreed (2) 7:1;118:19 agreement (1) 42:21 ahead (3) 7:10;32:12;52:22 aided (1) 58:18 ain't (1) 56:16 aired (2) 57:16,17 airliners (1) 73:21 aisle (2) 15:3;33:20 Alan (1) 129:2 albeit (1) 57:2 alerted (1) 78:18 allegations (1) 127:18 allege (1) 132:14 alliance (1) 88:16 allot (1) 75:7 allowed (1) 111:6 alluded (4) 84:23;101:23;117:10; 125:21 Allyn (1) 15:16 almost (9) 5:22;17:8;21:4;45:14; 60:21;107:4;134:1; 140:8,11 alone (1)	99:4 along (6) 15:13;36:15;45:1; 64:18;69:2;93:11 alter (1) 101:7 alternative (6) 59:10;85:14;86:20; 87:14;135:10;147:14 although (5) 38:18;60:24;84:7; 126:20;143:17 altogether (1) 97:13 always (24) 13:14;29:16;32:8,11, 20;43:14;56:22;62:6; 64:4;77:1;81:11,12; 95:11;97:15;98:6; 103:20;104:2;109:21; 124:5;127:20;129:3; 130:12;135:5;142:15 ambit (1) 109:6 ambush (1) 74:5 amend (1) 127:11 Amendment (1) 31:20 America (1) 146:20 among (3) 94:4,11;111:1 amount (6) 38:7;48:20,23;54:14; 122:22;123:13 analogy (2) 22:23;31:16 analysis (2) 33:23;96:6 analytically (1) 145:8 anecdotes (1) 3:12 announcement (1) 6:14 announcements (1) 8:15 annually (2) 4:8,11 answered (2) 131:17;144:10 Anthony (1) 92:16 anticipate (7) 79:23;130:24;131:1; 142:7,16;147:25;148:10 anticipated (1) 81:12 anticipating (2) 17:11;130:23 anticipation (1)	35:25 anymore (1) 70:7 Apparently (1) 102:16 appeal (4) 21:22;41:22;49:13; 77:2 appealable (1) 41:5 appeals (1) 102:20 appear (2) 10:1;58:12 appearances (3) 10:9;55:15,18 appearing (2) 9:19;17:20 appellate (1) 64:25 appendix (1) 65:11 Applause (12) 4:18;5:24;8:5;9:13; 12:11;90:12;92:9;93:4; 94:1;95:1;101:15; 149:15 application (1) 122:13 applications (3) 4:15;26:25;84:21 applies (3) 25:24;96:3;116:1 apply (1) 120:21 applying (1) 29:5 appoint (1) 87:6 appointments (2) 10:20;86:7 appreciate (4) 8:21;14:5,10;36:10 approach (6) 29:6,8;41:19;59:24; 60:1;122:14 appropriate (6) 31:2,12;38:2;39:4; 61:4;123:1 appropriately (2) 64:12,13 apropos (1) 127:3 arbitration (7) 27:22;85:15,20;86:10, 12,16;87:20 archives (1) 5:21 area (5) 48:16;87:23;96:20; 118:4;144:2 areas (3) 19:9;53:16;142:17	argue (7) 10:2,10;68:21;115:23; 127:21;128:8,16 argued (1) 128:11 arguing (1) 128:12 argument (31) 54:22;56:21;57:25; 65:19,25;66:2,4,8,11,13, 17;67:6,13,16,17;68:3,7, 10,11,13,15,24;69:7,20; 70:1,2,9;128:18;131:1; 148:13,15 arguments (1) 148:7 Arleo (2) 46:10;86:14 arms (1) 27:7 around (9) 7:22;10:17;24:1;27:7; 70:15;101:8;131:14; 134:2;143:9 arrested (1) 111:15 art (2) 5:9;97:11 articulate (1) 144:1 articulated (1) 80:19 artist (1) 92:3 artwork (2) 3:15;5:12 Aside (1) 7:13 aspect (3) 13:19;69:12;86:1 aspects (1) 14:6 assess (1) 19:3 assessing (1) 15:4 assessment (3) 15:5;34:3;112:11 assigned (2) 34:7;71:3 assigning (1) 86:16 assignment (1) 86:11 assist (2) 6:20;79:10 Assistant (7) 13:12,18,24;78:1; 92:5,6,7 assistants (1) 120:12 assisted (1) 17:3	Association (10) 2:6;5:1;6:9,10,16;7:2; 11:2;95:10,12,25 assume (1) 26:20 assuming (1) 105:10 assurance (1) 73:14 assured (2) 35:12;106:24 Atlantic (2) 107:5,9 attack (1) 88:19 attempting (2) 60:14;63:7 attended (1) 3:8 attention (14) 6:13;46:18;51:19; 55:3,6,13;62:17,23,24; 63:6,16;65:16;147:3,5 attitude (1) 29:9 Attorney (13) 13:13,18,24;80:6; 91:11;92:5,7;94:12; 95:19;114:4,19;120:11; 135:4 attorneys (10) 39:3;78:1;90:22;91:4; 92:6;116:14;117:2,11; 136:20;142:16 Attorney's (10) 9:3;14:3;23:7;44:17; 91:13;92:13;102:1; 111:17;121:3;145:11 atypical (2) 59:11;66:6 Augelli (1) 66:5 author (1) 148:25 authority (1) 75:1 autographed (1) 149:1 automatic (1) 70:11 automatically (1) 69:25 available (6) 3:25;16:22;23:10; 38:9;53:23;99:11 avenue (1) 50:25 average (1) 7:15 avoid (2) 35:17;72:8 award (1) 3:16
---	--	---	---	--

<p>aware (2) 23:16;100:11</p> <p>away (9) 3:24;14:17;58:22; 63:11;66:5;70:5;82:19; 101:10;133:12</p> <p>Awesome (2) 45:9;92:1</p>	<p>111:22</p> <p>bearing (1) 58:13</p> <p>bears (1) 130:5</p> <p>beating (2) 28:10;67:10</p> <p>became (3) 91:4;92:19;107:11</p> <p>become (5) 33:19;71:8;74:9; 75:25;100:10</p> <p>becomes (3) 79:18;101:10;119:11</p> <p>becoming (1) 82:14</p> <p>beforehand (4) 6:25;7:22;31:6;74:4</p> <p>began (1) 148:19</p> <p>begin (2) 129:5,7</p> <p>beginning (12) 7:9;8:13;15:1;80:8; 103:18;104:20,23; 106:20;108:3,12; 110:24;126:18</p> <p>begins (2) 17:9;101:23</p> <p>behalf (1) 9:7</p> <p>behaved (1) 130:18</p> <p>behold (1) 124:25</p> <p>belong (1) 52:1</p> <p>bench (6) 7:25;13:17;14:1; 72:13;74:3;76:24</p> <p>benefit (1) 45:21</p> <p>beside (1) 91:19</p> <p>best (7) 17:4;30:21;35:14; 71:1;92:15;93:1;149:14</p> <p>better (12) 2:22;7:15;38:23; 45:10;56:5,18;65:9; 95:16;100:20;114:25; 135:25;137:11</p> <p>bettors (1) 27:7</p> <p>beverages (1) 2:24</p> <p>beyond (10) 35:2;92:17;106:24; 107:1;118:3;123:22; 130:6,9;132:3;139:1</p> <p>big (11) 28:13,15;57:4,20; 58:4;60:24,24;62:24;</p>	<p>66:3;89:11;113:20</p> <p>biggest (1) 91:19</p> <p>billings (1) 118:4</p> <p>biography (1) 148:22</p> <p>bit (15) 2:5;9:11;17:13;19:15; 30:16;53:13;64:8;82:17; 100:9;101:8,8;121:2,7; 143:19;144:11</p> <p>Black (3) 55:16;61:22;88:24</p> <p>blessed (1) 21:15</p> <p>blown (1) 49:12</p> <p>board (4) 7:21;73:13;141:25; 142:1</p> <p>Bob (10) 10:15;11:1;14:8,9,24; 15:14;17:6,13;26:3;60:7</p> <p>boil (3) 132:4,23;133:5</p> <p>bono (1) 11:8</p> <p>book (4) 5:8;15:20;44:8;149:1</p> <p>boom (3) 144:23,23,23</p> <p>borders (1) 37:24</p> <p>bore (1) 11:12</p> <p>both (18) 5:2,8;9:17;11:17; 15:25;33:19;35:21; 53:16;54:17;65:23; 71:25;72:1;81:5;85:8; 110:7;138:6;142:2; 147:20</p> <p>bothering (1) 67:11</p> <p>bought (3) 106:7,10;118:2</p> <p>bound (1) 39:15</p> <p>boundaries (1) 27:23</p> <p>box (2) 130:8;136:11</p> <p>boxers (1) 116:21</p> <p>boxes (1) 134:6</p> <p>brain (1) 111:3</p> <p>braving (1) 8:11</p> <p>break (2) 105:2;147:19</p>	<p>brewing (1) 22:16</p> <p>brief (12) 2:8;40:25;54:18; 55:14,19,24;56:2,3;58:5; 80:1,10;138:9</p> <p>briefed (2) 84:14;120:11</p> <p>briefing (1) 84:22</p> <p>briefs (8) 41:6;64:11;66:9,9,16; 67:11;69:3;137:16</p> <p>bring (9) 46:17;54:9;61:4;94:7; 103:23;104:14;120:8; 121:25;122:3</p> <p>bringing (7) 29:23;51:19;55:21; 73:24;102:2,5;131:13</p> <p>brings (1) 54:25</p> <p>broad (1) 61:1</p> <p>Brokers (1) 118:21</p> <p>brother (2) 103:7,9</p> <p>brother's (1) 103:13</p> <p>brought (9) 54:9;61:6,10;96:16; 109:2;121:6,22;123:11, 14</p> <p>Brown (43) 4:21,22;5:25;8:16; 9:14;13:7,15;21:18; 22:5;31:3;33:7;48:13; 53:16;54:5,6;55:12; 59:2;61:3;64:10;66:1; 72:17,20;75:24;76:16; 77:5;78:4,7;79:6;80:3; 81:21;82:17,23;83:14, 17;84:1;85:19;86:7; 88:9;89:19;90:13;114:5, 5;139:13</p> <p>bruises (1) 87:6</p> <p>budget (2) 7:10;60:11</p> <p>bugle (1) 146:21</p> <p>build (1) 143:8</p> <p>building (4) 11:18;110:24;111:9; 126:8</p> <p>built (1) 30:7</p> <p>bunch (5) 45:20;67:18;93:11; 131:9,21</p> <p>burden (1)</p>	<p>130:5</p> <p>buried (1) 65:11</p> <p>burst (1) 103:5</p> <p>business (7) 23:5;24:9;59:10; 107:8,11,12;129:19</p> <p>businessman (2) 96:21,23</p> <p>bust (1) 117:15</p> <p>buy (1) 117:14</p> <p>buying (2) 61:20;118:23</p>
				<p>C</p> <p>calendars (1) 29:2</p> <p>call (22) 11:6,22;22:18;28:6; 39:18;40:4;44:11;45:16; 46:8;47:4,22;51:13; 52:25;53:8;57:6;70:9; 74:5;77:11;99:19;100:1; 111:14;141:10</p> <p>called (7) 81:25;90:4;103:2; 108:8;118:21;134:8; 137:10</p> <p>calling (1) 50:24</p> <p>calls (7) 7:22;39:19,21;44:1,3, 5,8</p> <p>calm (1) 114:2</p> <p>Camden (5) 13:12;44:2;71:6; 102:18,21</p> <p>came (3) 9:16;136:8;147:12</p> <p>can (166) 3:19;5:18;6:3,5;8:12; 10:24;11:3,7,22;17:13; 20:16;21:11,14;22:8,19; 23:11,13;24:6,16;25:3; 26:21;27:11,13;28:6,24; 29:1,7,8,11,18,22,24; 31:11,25;33:18;35:14; 37:11;38:12,14,21,23; 39:5,10,22;41:7,22; 42:14;43:12;45:10,12; 46:24;47:11;48:1,5; 49:10,12;50:13,23; 53:11;54:10,22;55:16; 56:9;58:17,22;59:18,20; 60:7,14;65:18,19,20; 66:9,12,20,20;67:10; 69:10;71:2,9,20;72:7,8, 21;73:20;78:8,15;79:3,6,</p>

22;80:11;82:2,3;83:5; 84:24;85:4,6,11;86:11; 87:1,5,19;88:11;90:16; 91:16;92:1;97:1;98:14; 24;100:9,10;101:3,4,7,8; 102:6;106:25;108:6; 109:11;110:6;111:2; 112:3;113:2,5,11; 116:12,24;117:7; 118:13;121:7,22,25; 122:5,24;123:11,16,17; 124:2,11,12;125:1; 126:14,15;127:25; 128:21;129:6,7,9,21; 130:8;131:13,15,24; 132:3;134:2,7,17; 136:23;139:22;141:15, 20;142:20;145:1,19; 146:1;149:11	71:3;72:22;74:8;75:5; 20;76:3;77:19;78:5,7; 79:19;83:11,11;85:7,15; 24;86:11,18;87:4;94:22; 96:11,12,13,13,15,15,20; 23;97:1,4,6,16,25;98:3; 99:8,9,15,20;100:9,12, 14,18,23;101:2,12,22; 102:7,8;103:19,23; 104:5,14,17,23,24; 105:9,12,13,20,21; 106:4,4,13,14,15,19; 107:3,20,20;108:4,12; 109:2,8,12,14,17,21; 110:7,17;111:9;112:7, 11,13,17;113:4,9;116:2, 9,11,14,15;118:19,20, 21;119:4,14,15;120:11, 16,23;121:10;124:1,7,9, 11,13;125:6;126:7,17, 23;127:5;128:3,11,21; 129:10;130:1,2,4,6,9; 131:8,12,13,15;132:10; 133:4,15,22;134:21,22, 23;135:3,7,20,23;136:9, 22;137:6,8,11,21; 138:17;139:22;140:12; 141:3,7;142:8;143:9,13, 14;145:4;146:18,22,23; 147:12,22,23;148:2,3,8, 9	144:8 CDs (1) 134:8 celebrate (1) 8:13 cell (2) 98:21;102:22 center (1) 124:18 certain (19) 87:9;109:5,6,7; 114:18;116:4;117:17,19, 25;118:6;127:7;129:8, 16;132:16;133:1,1; 137:12;142:12,17 certainly (21) 4:16;7:15;13:11;14:5, 18;16:17;17:6,7,9;23:1; 27:11;31:11;32:7,42;18; 54:14;60:6;68:19;79:14; 127:9;140:21;147:3 certification (1) 40:25 cetera (3) 20:24;66:5,10 challenge (5) 43:21;72:2,6,16; 100:17 challenges (7) 22:15;29:7,10;38:13; 67:3;71:22;75:13 chambers (5) 39:11,12;51:13;53:11; 65:7 championship (1) 14:11 chance (6) 35:4;68:1;108:20; 113:18;114:20;143:10 chances (1) 117:18 change (3) 12:14;56:22;66:2 changed (4) 16:23;60:22;74:3; 106:15 chaos (2) 93:13;129:19 characterize (2) 128:23,25 characters (1) 93:14 charge (9) 30:13;32:22;98:14,16; 104:24;122:1,7,9;125:25 charged (6) 98:11;122:15,18,20; 127:24;139:2 charges (7) 121:22;122:3,5,25; 123:1,11,14 charging (6) 121:4,5,11;126:6,12;	128:14 Charlie (1) 44:20 cheap (1) 103:8 check (1) 52:16 Chesler (13) 9:15;39:6;92:11;93:3; 95:19;121:1,12;128:12; 130:13;138:3;140:10, 12;141:11 chief (37) 3:11;4:20,21,22;5:25; 9:14;13:6,8,13,15,16,21; 21:18;22:5;31:3;33:7; 51:25;54:6;56:6;59:2; 64:10;66:1;72:20;77:5; 78:7;79:6;80:3;81:21; 82:23;83:14,17;84:1; 85:19;86:17;88:9;89:19; 102:20 childhood (1) 90:21 children (1) 103:15 choice (1) 63:18 chosen (1) 43:20 chunks (1) 61:25 Circuit (1) 98:15 circumstance (1) 76:23 circumstances (3) 54:2;103:2;118:7 citations (1) 54:20 cites (1) 55:15 citing (3) 14:21;55:20,20 City (3) 93:11;107:5,9 civil (8) 9:22;15:4;57:2;78:3; 90:25;130:1,2;138:2 CJRA (1) 7:14 claim (3) 54:24;104:11,14 claimed (1) 22:11 clamber (1) 89:9 clarified (1) 67:9 class (2) 18:21;148:23 classic (1) 106:3	clay (1) 97:13 CLE (4) 6:21;11:13,17;149:18 clear (4) 26:23;42:16;58:16; 109:5 clearing (1) 86:6 clearly (1) 48:16 clerk (3) 52:25;53:9;64:6 clerks (5) 8:24;55:25;57:24; 58:6,7 clerk's (1) 52:5 clever (2) 57:23;143:25 client (45) 16:10,11,12,21;17:21, 22;18:16,18;19:3,7; 20:17,20,21;21:6;23:23; 24:9,10;25:12,13,21; 26:8;35:12;37:7,10; 41:24;54:4;60:10;63:23, 24;75:12,16;111:8; 122:15;125:23;126:7,14, 21;134:12,13,14,16; 135:2,6;139:1;141:4 clients (10) 8:23;18:24;20:15; 25:16;26:20;37:6;60:14, 19,21;68:15 client's (1) 25:1 climb (1) 90:2 clock (3) 41:14,17;49:8 close (2) 89:8,24 closing (5) 138:11;147:18,20; 148:6,19 closings (2) 138:7,16 co-counsel (1) 141:3 co-defendant (1) 141:14 cold (6) 35:3;39:8;46:2,2;89:2, 13 Cole (2) 10:15;11:1 collar (4) 33:17;110:10;122:9; 123:20 colleagues (6) 39:12;41:9;44:16; 45:13;49:23;121:13
--	--	---	---	---

colleague's (1) 39:12	95:9	57:23	22:17	cost (7) 25:25;26:1,7,11; 28:15;58:14;62:19
collegiality (1) 37:2	component (1) 123:16	congratulations (1) 6:1	convenient (1) 106:8	costs (5) 28:5;29:21;60:12,13, 19
combatant (2) 47:10,20	components (2) 72:3;116:8	connection (1) 123:14	conversant (1) 87:10	counsel (14) 9:21;13:21;16:11; 18:8;36:19,25;38:22; 44:13;50:4;53:21,22; 114:5;115:15,20
combatants (3) 47:12,17;48:22	composed (1) 6:15	consider (2) 118:3;125:18	conversation (3) 17:20;19:3,8	count (3) 120:20,21;127:8
comfortable (3) 39:10,13;142:24	comprised (1) 90:19	considerable (1) 54:14	conversations (3) 23:4,9;135:1	counter (2) 125:12,18
coming (11) 7:5;43:15;53:1;68:22; 72:15;75:7;89:2;90:7; 133:22;137:7;149:19	compromise (1) 114:11	considerably (1) 74:4	convey (3) 23:23,24;68:11	country (3) 5:4;14:16;24:1
comment (6) 19:17;24:6;60:7;68:6; 80:25;85:16	computer (2) 58:18;118:23	considering (1) 123:10	convict (2) 122:14;123:18	counts (1) 55:5
Commission (2) 6:14;11:11	computer-like (1) 96:6	consistent (6) 71:7;104:25;119:14; 120:24;131:24;136:1	convicted (1) 108:2	couple (3) 21:13;66:18;118:17
commit (2) 109:20;132:12	computers (1) 26:2	conspiracy (3) 124:18;125:8;127:7	conviction (2) 104:19;124:2	course (13) 10:12;12:16;22:2; 57:9;79:23;87:7,12; 89:21;90:4;93:14; 100:11;115:4;134:18
commitment (1) 113:19	concept (2) 16:23,23	constant (1) 148:5	convince (4) 106:25;130:8;131:18; 149:5	Court (97) 2:3,7,18;3:9;4:8;5:2,3, 13,15,17,19,23;6:4,6,15, 16,18;7:7,13;8:23,24,25; 9:17,17,18,23,24;10:8, 11,20;13:10,25;14:15; 15:19,20;18:21;21:1,6; 24:1;25:7;26:24;35:1,6, 15;36:8,10,13,15;39:19; 40:15;41:9,10;43:7; 45:4;48:24;50:13;52:7, 16,25;54:12;58:19;60:9; 63:1,2;64:16;65:24; 68:21;69:4,15,16;70:20; 71:8;76:21;77:21;79:18, 20;82:8;83:10;88:1,5, 14;92:22;95:21;100:8; 102:14,21;105:23; 109:5;119:12,19,19; 120:3;122:21;131:10; 136:7,8;144:23
committed (1) 139:2	concern (3) 57:12;60:20;73:12	constitutes (1) 23:17	convinced (2) 106:24;131:20	courtesy (1) 62:6
committee (3) 5:14;16:8;19:24	concerning (2) 35:10;41:20	construct (2) 123:10;126:10	convincing (2) 4:14;131:7	courthouse (6) 2:15;3:15,17;13:12; 48:9;93:7
common (1) 105:22	conclude (1) 139:1	constructed (2) 118:22;124:4	cook (1) 61:17	courtroom (4) 57:14;70:2;93:10; 113:21
communicate (1) 149:9	concluded (1) 124:16	consuming (1) 99:18	Cool (1) 65:9	Courts (3) 13:9;24:1;29:11
companies (1) 129:17	conclusion (1) 106:23	contact (3) 10:18,24;11:4	Cooper (2) 69:21,22	Court's (5) 3:20;55:3,6;59:5;79:9
company (3) 18:10;96:22,25	concrete (1) 101:10	contain (1) 108:18	cooperating (1) 39:3	cover (1) 27:25
compel (1) 41:11	conditions (1) 31:22	contemplate (1) 83:12	coordinated (1) 10:15	covered (1) 134:24
compelling (5) 103:21;131:21;132:2; 148:10,14	condolences (1) 6:2	contemplated (1) 6:24	coordinating (1) 93:16	
Competency (1) 20:13	Conduct (2) 20:12;119:6	contemplating (1) 120:12	copied (1) 56:7	
competitor (1) 132:8	conducted (1) 142:14	contemporary (1) 100:2	copies (1) 62:6	
complaining (1) 19:21	conference (18) 34:20,24;35:19;37:8; 39:20,25;42:19;70:22; 71:12,17;72:24;75:17; 22;81:23;83:9,13,24; 85:10	contents (2) 54:20;62:13	copy (1) 50:3	
complaint (1) 64:1	conferences (5) 24:22;34:25;36:25; 83:16,21	context (7) 56:13;78:13;81:11,14, 19,22;116:1	coral (2) 89:10,12	
complete (3) 53:25;77:15;134:3	confessed (1) 103:8	contextually (1) 51:4	core (1) 146:21	
completed (1) 87:18	confidence (1) 114:2	continue (3) 13:9;45:5;91:22	corporate (1) 38:9	
completely (1) 75:25	confident (1) 44:13	continuing (1) 7:11	corporation (2) 23:3,4	
complex (5) 59:11;72:22;83:17; 121:5;132:2	confirm (1) 50:24	contractors (1) 107:19	corporations (4) 18:25;19:1;22:24; 60:20	
compliance (1) 86:15	conforms (1) 124:7	contrary (1) 88:14	Corps (1) 146:20	
complicated (5) 46:6;110:9;118:22; 133:10,25	confront (1) 126:7	contributes (1) 111:9	correspond (1) 124:12	
compliment (1)	confronted (2) 103:20;135:21	control (5) 43:16;48:11;113:24; 134:2,3	corroborate (1) 105:19	
	confuse (1)	controlling (2) 48:10;51:21	corrupt (1) 96:13	
		controversy (1)	corruption (3) 105:24;127:24;146:23	

crafting (1) 72:4	7:10	2:23;69:5,6,19	defer (4) 81:4,8,17;82:3	desire (5) 84:25;116:24,25; 117:4,4
crap (1) 145:13	D	decent (1) 54:19	defines (1) 127:8	despicable (3) 145:5;146:8,15
crazy (2) 61:12;127:20	dad (2) 6:4;149:2	decide (11) 19:6;25:17;46:5; 66:20,21;72:14;78:11; 86:17;131:12,13;133:7	degrees (1) 12:18	despite (5) 30:6,21;91:15,18; 139:21
create (1) 112:9	damning (1) 110:3	decided (2) 19:25;51:4	delay (1) 54:11	destiny (2) 43:17;48:10
created (1) 77:4	dance (2) 63:18,18	decider (1) 49:6	delegation (1) 75:1	destroy (1) 65:3
creating (1) 31:15	dangerous (4) 33:10;112:19;134:7; 137:9	decides (2) 54:16;77:14	deliberate (1) 32:10	destroyed (12) 30:5,8,13,15,16,17,20, 22;31:4;32:13,14;33:6
credibility (1) 22:6	dark (1) 89:9	deciding (2) 27:20;102:4	deliberately (1) 33:5	destroys (1) 33:13
credit (3) 11:15;12:1;149:18	darken (1) 35:17	decision (14) 41:2;43:2;45:8;51:3,8; 72:13;112:7,24;113:13, 14;114:14;115:24; 134:18,19	deliver (2) 139:6;141:22	destruction (2) 31:8;33:10
credits (1) 11:18	data (1) 20:9	decisions (5) 43:17,18;58:20;96:8; 115:5	deluge (1) 37:21	details (2) 51:7;98:24
crime (8) 90:4;92:14;105:6; 118:16;123:22;132:18; 133:5;139:2	date (6) 15:22;59:17;69:25; 71:21;72:23;140:3	dedicated (1) 92:18	demand (1) 43:1	demonstrate (2) 123:15,21
criminal (14) 23:2;44:21;78:2;90:7; 91:1;101:25;111:12; 116:4;119:4,7;124:2; 130:4;138:2;143:11	dating (1) 15:11	deep (2) 114:22,24	demonstrated (1) 8:16	demonstrating (1) 123:2
Critchley (11) 94:3,13;95:22,22; 110:23;111:10;133:17; 142:5;143:12,24;146:16	Daubert (1) 81:8	deeply (1) 26:5	deny (1) 82:7	detrimental (1) 22:13
critically (1) 104:6	daughter (1) 107:13	defeat (1) 94:11	denying (1) 80:16	develop (8) 81:11;94:21;95:4,5,5; 142:21;143:5,6
cross (2) 76:12;129:3	daunting (1) 73:3	defend (2) 126:14,15	dep (1) 49:14	developed (3) 129:13;146:11;147:15
crossed (1) 76:7	David (1) 4:1	defendant (8) 20:5;24:10;35:12; 106:21;107:2;108:2; 124:17;129:18	department (1) 24:16	developing (1) 44:2
cross-examination (22) 22:6;31:1;129:6,12, 21;135:8,9,17;141:24; 142:3,8,10,13,17,22,23; 143:5,6,9;144:6,16; 145:12	day (21) 6:17,24;8:22;9:6;10:3; 12:13;20:20,25;44:8; 47:20;53:4;70:13;71:21; 73:5;119:5;131:19; 132:17;133:6;144:22, 24;149:8	defendants (4) 9:19;10:14;109:15; 132:16	depending (5) 16:9;18:1;51:10,13; 110:2	develops (1) 113:10
cross-examinations (1) 148:3	days (13) 23:8;25:25;26:14; 38:10;41:14,16;60:8,10; 70:7;128:12;135:6,7; 140:13	defendant's (1) 129:20	depends (2) 36:6;40:19	diagnostician (2) 111:23;125:23
cross-examine (2) 142:20;145:3	dead (2) 7:17;145:22	defended (1) 94:6	depose (1) 51:9	dialogue (3) 110:2,5,21
cross-examined (1) 145:18	deal (10) 18:12;25:24;32:20; 49:17;54:23;59:16; 113:3;117:14;135:16; 144:4	Defender's (1) 9:3	deposed (1) 47:20	diary (2) 140:1,3
cross-examining (1) 91:5	dealing (6) 8:23,23,24,25;19:18; 21:22	defending (2) 112:8;126:11	deposited (1) 124:24	diesels (1) 73:21
cruel (1) 31:21	dear (1) 140:25	defense (36) 91:4;93:17,17;104:8, 11;109:11,11,15,20,22; 110:6,14,18,24;111:9, 13;112:9;122:2,14; 123:8;125:17,19;126:10, 22,25;128:3,7;129:3,5, 11,16;132:17;136:20; 138:17;148:3,5	deposition (17) 38:10;44:11;45:13,15, 19;46:3,8,14,15,21;47:2, 17,21;48:9;65:9;69:2; 77:13	difference (2) 31:19;74:16
cull (1) 37:23	death (2) 28:11;113:23	defenses (10) 111:3;112:1;122:2; 130:23,24,25;131:4,4,5; 148:11	depositions (7) 44:6;47:9;98:5;144:3, 13,14,15	different (9) 5:12;29:4,4;79:23; 97:2,18;101:21;105:2; 130:12
curious (1) 30:19	debate (1) 96:2	defensive (1) 76:1	deputy (2) 52:25;70:2	differently (1) 81:12
curry (1) 96:17	debating (1) 96:4		describing (1) 124:14	differs (1) 147:22
cut (5) 24:19;29:18;33:8; 38:15;66:15	Debevoise (4)		description (1) 50:18	difficult (8) 17:10;33:8;43:7; 93:17;97:12;99:17; 117:3;134:5
cuts (1)			deservedly (1) 92:21	dig (1) 5:20
			deserves (1) 91:23	dignified (1)

93:16 dignity (1) 62:19 digress (1) 116:19 diligently (1) 39:17 diminishing (1) 21:19 dinner (2) 61:17,18 dinosaur (2) 16:17;73:18 dire (1) 131:23 direct (2) 49:4;65:10 directed (3) 51:24;52:7,11 direction (2) 74:6;142:9 disagreement (1) 97:20 disappears (3) 30:24,24;32:18 disaster (1) 143:7 disbelievable (1) 146:7 discharged (2) 21:1,7 disclosing (2) 110:12,18 discouraged (2) 70:8,11 discover (1) 31:23 discoverable (1) 17:23 discovered (2) 22:1;56:24 discovery (38) 15:6,25;16:1,3;17:4; 21:20;24:22;26:1,14; 27:1,18;34:4,8,36;12; 37:17;40:10,11,16; 41:16,17;43:1,23;46:13; 49:1,6;52:18;59:19; 60:8,12,12;63:12;74:20; 84:12;87:16,17;126:13, 16 discretion (1) 48:20 discuss (4) 37:10;42:16;69:8; 111:1 discussed (3) 19:24;82:13;117:16 discussing (1) 63:19 discussion (5) 15:1;40:2;52:15; 53:15;70:21	discussions (2) 18:7;55:10 disguise (1) 58:23 dismiss (8) 53:17,22;54:17;55:23; 58:19;60:15;119:2,4 disorganization (1) 134:4 disposition (2) 57:6,7 dispositive (9) 52:15;54:7;56:15; 57:8;69:24;75:3;86:1,4, 23 dispositives (4) 59:20;60:2,3;72:25 dispute (11) 40:16;42:5;49:20; 51:2,23;52:8;59:9;79:9; 83:2;85:14;86:21 disputes (7) 21:20;40:11;42:2; 45:13;49:6,25;50:9 distill (1) 133:2 distinguished (2) 14:1;95:11 distort (1) 58:23 distracted (1) 35:18 distraction (1) 93:9 distributed (1) 21:12 district (42) 3:3,11,20;10:11;13:1, 8,9;16:1,9;23:21;26:19; 30:10;35:17;40:14; 41:19;50:14;51:24; 52:15;58:18;70:20;71:3; 74:21;75:4,18;76:12; 77:21;80:24;82:14;83:9; 84:6;85:11,13,22;87:25; 88:5,18;90:15;92:21; 93:7;102:14;106:5; 120:3 divining (1) 55:22 division (1) 44:21 divorced (1) 100:9 Dix (1) 132:12 docket (8) 50:4,16;52:6;53:2; 69:23;70:1,12;144:20 doctor (4) 124:17;125:2,4,7 doctor's (1) 124:21	doctrine (3) 137:2,10;138:5 document (22) 17:3;31:17;42:10; 52:4;71:20;74:22;75:25; 76:1,5,23;108:21; 126:12;128:14;135:21; 139:24;140:4,7,9; 144:24;145:19,21;146:4 documents (18) 2:16;30:24;31:4,6; 33:10;97:24;121:5; 134:6;135:15,16,22; 139:15,24;140:1,13; 144:19,19;145:24 d'oeuvres (2) 2:21,23 done (19) 5:7;33:4,5,12;34:3; 40:25;43:13;51:14; 64:13;69:11;76:17; 77:16;84:6;103:22; 113:14;116:17;117:21; 119:1;131:23 door (4) 57:14;137:10,15,22 doors (1) 137:12 doorstep (1) 35:18 dot (1) 76:11 dotted (1) 76:7 doubt (6) 106:25;107:1;123:23; 130:6;132:3;139:1 doubts (1) 130:10 dow (1) 89:3 Dowd (1) 135:4 down (45) 7:8;11:23,25;12:18; 15:20;19:2,7,14;24:15, 15;26:8;29:19;42:9; 44:2;46:21;56:25;58:1; 59:19;60:10;64:2;65:8; 66:22;72:21,23;76:4; 78:9;83:18;85:6;87:23; 97:19;104:3;105:2; 107:19;111:16,21; 112:24;113:12,25; 126:25;132:4,23;133:2, 5;139:20;140:24 dozen (4) 28:25;44:24;92:20; 136:13 Dr (1) 79:11 draft (1) 122:11	drafted (1) 77:7 drafting (2) 104:15;108:16 draw (1) 6:12 drawing (2) 73:13;117:12 drill (1) 65:7 drive (1) 87:22 driven (1) 28:9 drives (1) 60:9 driving (1) 87:21 drop (4) 11:3;42:14;47:18; 88:23 drove (1) 12:17 drug (2) 117:14;118:3 drum (1) 146:20 dry (1) 33:9 due (3) 43:3;127:12;143:21 Duke (2) 14:11;27:24 dumped (1) 88:16 Dunn (1) 2:2 during (16) 22:1;31:4;44:6;45:15; 47:1;78:14;79:21,23; 87:6;93:13;108:7; 109:16;110:19;129:5; 134:18;141:25 duty (1) 39:15 DVDs (1) 134:8 Dwek (9) 106:15;143:13,13,23, 24;144:19;145:17; 146:6;147:12 dying (1) 108:5	65:18;100:1;127:19 easiest (1) 116:11 Eastern (1) 88:18 easy (4) 16:20;26:15;50:5; 126:24 eaten (1) 41:16 Ed (2) 10:15;11:1 educate (8) 24:25;29:1,22;35:1; 36:21;63:8;75:6;88:8 educated (2) 28:5;81:5 educating (5) 21:8;25:19;40:23; 63:7;79:16 education (2) 75:4;138:5 educational (1) 78:22 effective (12) 25:15;71:13;78:6; 87:4,17;137:24;138:1,4, 15;146:24;147:13,13 effectively (2) 109:10;119:18 effectiveness (1) 76:19 effervescent (2) 22:22;23:11 efficient (4) 42:14;58:16;59:5,8 effort (4) 25:6;35:16;76:1,5 efforts (3) 20:21;30:21;83:4 eight (4) 15:9;41:15;134:24; 146:3 Eighth (1) 31:20 either (9) 10:25;16:10;22:8; 30:5;32:24;61:8;63:16; 111:15;147:9 elderly (1) 72:22 electric (1) 19:15 electronic (15) 17:23;22:21,25;23:10; 25:19,25;27:1,17;30:4; 37:17;50:14;60:8,11; 61:25;69:3 electronically (7) 16:4;19:18;35:8;50:1, 8;51:22;56:7 element (3) 123:6,8;127:23
				E
				earlier (3) 80:2;110:21;125:22 early (9) 27:13;35:16;80:4; 81:13;94:22;98:1;113:1; 120:10;137:6 easier (3)

elements (5) 42:7,11;98:13;123:21; 127:7	112:19 entitled (1) 109:13	40:13;43:8;45:2,5; 79:25;81:12;95:23; 100:11;105:5;113:23; 114:1;118:19;130:12; 143:15,17	86:11 exoneration (1) 112:16	29:12 face (5) 75:13;89:12;108:6; 125:5,25
elevate (1) 95:12	entity (1) 18:12	everyone (11) 2:1,4;4:16;8:10;25:8; 49:25;101:17;130:5; 133:8;139:22;149:18	expect (9) 16:14;47:24;65:25; 68:7,15;73:7;74:19; 104:17;141:18	facile (1) 144:1
elevated (1) 92:21	entries (1) 144:21	evidence (53) 22:21;29:18;30:12,16; 32:21,25;33:16;76:4,14; 78:25;79:1,8;103:18,21; 104:1,25;105:18,19; 106:20;109:5,6;110:2,3, 4;111:5;112:5;115:1,1,3, 9;117:17,19,25,25; 118:9,10;119:10;120:2, 20;121:17,22;122:25; 123:13;124:3;125:13; 126:3;127:21;132:24; 137:14;139:25;140:1,5, 24	expectation (2) 65:24;90:6	facing (2) 30:23;58:19
else (7) 25:9;43:24;47:14; 50:5;56:23;82:21;90:15	entry (3) 50:4;140:3;144:24	evidential (2) 127:17;137:10	expected (1) 37:1	fact (27) 11:22;29:3;30:6; 31:12;32:1,6;33:23; 36:10;41:16;50:6;54:25; 57:20;58:11;71:19;72:4; 78:8;97:3;104:1;107:22; 118:16;122:19,24; 124:20;125:1,14,15; 133:6
else's (1) 114:15	environment (3) 39:11,13;113:24	evidentiary (3) 80:8;84:21;119:13	expects (1) 134:11	facts (27) 51:7;72:6,7;77:7;96:6; 97:11,13,23,23;108:25; 113:2;124:1;131:20; 132:9;133:2,19,19,21, 23,24,25;134:2,4; 135:14,19,19;144:11
e-mail (2) 16:19;50:10	equate (2) 111:21;116:20	evil (1) 134:9	expense (2) 29:20;61:16	factual (1) 64:7
e-mailing (1) 10:25	era (4) 56:17;58:11;98:19; 129:15	evolved (1) 16:23	expenses (1) 29:19	fail (1) 41:12
e-mails (6) 20:24;23:10;30:17,23; 32:18,19	Eraser (1) 103:3	exactly (10) 23:24;30:14;74:15; 104:4;105:5;110:7; 118:15;119:22;125:10; 140:7	experience (14) 13:15;33:7;36:6,15; 40:12;47:8;68:18,18; 76:19;78:20;134:1; 136:6;137:24;143:16	failing (3) 20:6;23:16;24:2
embark (1) 127:9	ergo (1) 122:13	examined (1) 144:7	experienced (3) 12:7;90:22;97:18	fails (1) 145:13
emergent (1) 52:24	escape (1) 118:23	example (10) 37:18;42:4;45:11; 106:3;122:6;123:2,12; 124:13;132:10;138:20	experiences (3) 19:18;53:18;85:17	failure (1) 20:3
emotional (1) 4:3	ESI (3) 19:15;21:9;34:1	examples (3) 21:13;47:5;118:17	expert (2) 77:13,15	fair (7) 57:22;58:25;83:3; 89:16,16;108:1;148:16
emotionally (1) 114:10	especially (4) 10:6;51:14;72:21; 74:25	excellence (2) 13:10;95:13	expertise (1) 13:20	fairly (5) 44:12;59:4;61:1; 128:19;148:17
employee (1) 25:3	essential (1) 127:23	excellent (4) 32:2;95:14,15;135:4	experts (1) 77:12	fairness (2) 58:21,23
employment (1) 27:5	establish (3) 124:12;125:1;139:18	except (4) 76:23;81:7;86:1; 110:19	explain (3) 51:4;99:10;119:12	faith (2) 35:16;96:24
enables (3) 75:12;108:25;109:4	established (3) 112:10;123:22;129:21	exception (1) 135:8	explanation (3) 33:24;73:9;108:18	faithful (1) 107:22
encounter (1) 88:25	estimate (2) 26:9;77:9	exceptions (2) 84:7;115:22	explosion (1) 98:20	fall (4) 3:7,10;9:14;55:18
encourage (2) 5:14;6:7	et (3) 20:24;66:5,10	exercise (5) 25:18;26:22;67:25; 136:7,10	exposure (1) 12:20	falls (4) 89:11;143:15,17,20
encyclopedic (1) 74:9	ethical (1) 95:24	exhibits (3) 66:16;74:1,17	extensively (2) 27:17;77:6	false (5) 122:7,13,21;123:5,12
end (11) 28:1;32:22;49:15; 63:12;91:10;119:5; 129:10;131:19;132:17; 137:7;149:8	evaluate (4) 17:16;26:7;35:22; 37:15	exists (1)	extent (6) 26:3,4,24;129:2; 137:7;148:12	familiar (3) 23:15;62:13;142:22
enemy (1) 88:11	evaluated (2) 63:4,17		extra (1) 91:20	familiarity (2) 41:8;144:10
engender (1) 48:23	evaluating (2) 18:15;119:20		extramarital (1) 107:25	family (1) 111:18
engines (1) 73:20	evaluation (2) 26:16;54:1		extraordinarily (3) 8:17;91:25;139:16	fan (1) 91:19
enjoy (2) 15:14;112:18	evaluations (1) 111:25		extraordinary (1) 125:5	far (14) 5:18;7:17;18:7;27:6; 23;28:10,15,21;31:8;
enough (14) 18:7;28:10;50:18; 62:14;80:10,20;89:24; 90:1;94:12;101:14; 110:15;112:9;132:18; 141:8	even (22) 17:25;23:13;28:13; 30:21;32:9;33:2,2;37:6; 43:10;58:21;64:19; 67:11;68:2;81:20;85:4; 103:21;109:18;111:2; 121:10;126:4;137:17; 141:8		eye (2) 88:24;89:15	
enter (1) 112:20	event (4) 2:20;4:17;12:20; 135:21		eyes (1) 93:21	
entering (1) 51:22	everybody (19) 6:7,21;7:24;23:8;		F	
enterprise (1)			Facciola (1) 27:16	
			Facciola (1)	

67:20;90:1;92:17;130:5; 132:18	65:7;81:24;93:15; 105:16;118:9	131:8;136:22;137:3,17; 145:18;147:3	foreshadow (1) 119:16	110:1;123:20;124:11; 139:6
fascinating (1) 3:16	figured (1) 64:6	Fishman (19) 90:7;91:11,16,20; 94:7;95:19;101:24; 102:9;108:9,11;117:23; 120:8;130:11;132:4; 141:10;143:22;147:16, 22;148:20	forget (4) 11:21;12:2,3;81:6	Friday (1) 2:15
fashion (1) 28:24	figures (1) 7:14		form (6) 17:22;71:2,4,7,12; 97:12	friend (2) 15:16;129:2
fast (1) 65:21	file (12) 40:15;52:6;53:24,25; 55:4;64:2;77:24;84:16; 86:22;113:3,9;114:9		formal (1) 41:13	friends (1) 141:1
faster (1) 41:21	filed (10) 17:15;35:3;50:1,8,15, 21;62:11;63:24;81:16; 82:6	fist (1) 116:21	Formaroli (1) 70:16	front (12) 26:12;36:7;38:17; 46:13;49:5;108:21; 113:3;118:20;128:11; 132:11;139:3;140:16
father-in-law (2) 107:10,10	files (3) 16:21,21,22	fit (2) 3:1;134:3	format (1) 56:8	frustrated (2) 49:21;57:1
fault (1) 129:20	filings (3) 26:6;52:1;60:16	fits (1) 34:17	former (4) 44:16;91:3;102:20; 107:13	frustrating (2) 43:6;65:17
favor (2) 68:3;96:18	final (17) 71:1;72:23;73:3,17, 22;74:6;75:5,16;76:14; 77:5,18;78:9;81:22; 83:20;84:8,19;86:24	five (2) 3:9;73:16	formulations (1) 24:19	fulfilling (1) 20:14
favorably (1) 21:24	finalize (1) 84:18	flag (1) 146:20	Fort (1) 132:12	full (5) 27:5;41:6;42:10; 53:25;60:12
favorite (4) 39:23;44:3,7;148:25	finally (3) 56:16;57:13;94:2	flat (1) 141:13	forth (4) 34:8;43:4;72:25; 105:11	full-blown (1) 35:22
FDIC (4) 122:8,13;123:2,6	find (16) 4:25;16:6;25:10;32:9; 40:5;42:23;53:20;59:16; 67:8;68:4;71:13;81:11; 97:17;112:17;117:2; 138:25	flavor (1) 98:3	fortunate (1) 94:12	fully (3) 92:25;94:21;140:4
fear (2) 28:9;62:20	finder (1) 97:3	flexibility (2) 66:24;141:19	Fortune (3) 18:10,25;80:5	fun (1) 4:9
fearful (1) 27:25	fine (1) 12:6	flip (1) 117:24	forums (1) 45:20	function (1) 54:7
Federal (27) 2:3,6,7,17;3:4,9;6:11; 7:2,17,18;8:24;9:3;11:2; 12:7;13:12;15:18,19; 27:20;36:8,9,15;41:9; 63:1;105:23;110:17; 122:20;135:7	finish (1) 147:17	flops (1) 55:24	forward (5) 27:9;39:16;41:18; 49:14;55:21	functions (1) 55:3
federally (1) 105:10	firm (8) 11:5,5;17:1,2;27:7,12; 68:18;100:6	floundering (1) 96:25	found (9) 47:3;67:19,20;73:2; 83:10;88:12;89:24; 111:13;144:25	further (1) 89:6
feel (2) 2:5;4:6	firms (6) 10:1,17,18,18;25:16; 58:24	focus (1) 59:14	foundation (1) 114:19	future (2) 82:16;83:19
feeling (2) 54:17;97:25	first (49) 2:2,10;6:4,13;12:5,20; 14:25;15:23;19:14; 23:20;27:4;35:1,44;10; 46:23;51:3;53:17;62:3; 66:15;71:15;75:3;78:4; 89:12;92:7,13;93:5; 95:14;97:22;98:8; 102:11;103:13;106:23; 111:10,20,23,24;120:4; 5;121:13;125:22;126:9; 127:2;128:24;130:21;	focused (3) 19:11;59:22;105:20	four (9) 14:15;18:11;30:3,20; 32:4;63:25;119:18; 141:5;149:16	G
feels (2) 88:15;142:23	finger (1) 20:5	focusing (1) 76:21	Fowler (1) 55:21	gain (1) 25:10
feet (2) 67:14;68:21	finish (1) 147:17	folded (1) 103:8	frame (6) 103:19;104:5,16,17; 119:10;137:20	gallery (1) 5:15
fellow (2) 67:24;106:7	firm (8) 11:5,5;17:1,2;27:7,12; 68:18;100:6	folks (17) 9:21;10:3;24:8,15; 33:1;37:6,9;91:2;93:12; 94:18;101:18,21; 110:14;122:15;125:3; 131:21;132:11	framed (4) 104:15;106:13,19; 131:25	gamut (2) 18:22;122:5
fellows (1) 118:22	firms (6) 10:1,17,18,18;25:16; 58:24	follow (1) 59:2	frames (1) 96:1	Garrett (1) 4:21
felt (1) 145:1	first (49) 2:2,10;6:4,13;12:5,20; 14:25;15:23;19:14; 23:20;27:4;35:1,44;10; 46:23;51:3;53:17;62:3; 66:15;71:15;75:3;78:4; 89:12;92:7,13;93:5; 95:14;97:22;98:8; 102:11;103:13;106:23; 111:10,20,23,24;120:4; 5;121:13;125:22;126:9; 127:2;128:24;130:21;	followed (2) 17:19;23:25	framing (7) 105:13,20;108:15; 117:16;119:9;120:1,6	gather (2) 2:19,21
ferret (1) 84:13	finger (1) 20:5	follow-up (1) 52:17	frankly (5) 91:23;93:13;94:10; 121:3;130:1	gathering (1) 2:6
few (11) 2:24;3:23;8:9,15; 27:12;55:5;64:17;92:25; 95:3;100:24;112:22	firm (8) 11:5,5;17:1,2;27:7,12; 68:18;100:6	foot (1) 73:4	fraud (6) 96:20;105:24;123:14; 127:25;128:1;129:16	gave (3) 136:7;144:10;146:5
field (2) 28:13;31:15	first (49) 2:2,10;6:4,13;12:5,20; 14:25;15:23;19:14; 23:20;27:4;35:1,44;10; 46:23;51:3;53:17;62:3; 66:15;71:15;75:3;78:4; 89:12;92:7,13;93:5; 95:14;97:22;98:8; 102:11;103:13;106:23; 111:10,20,23,24;120:4; 5;121:13;125:22;126:9; 127:2;128:24;130:21;	footnote (1) 88:23	frequently (7) 32:23;74:22;105:9;	gears (1) 54:15
fight (6) 29:24;41:23;44:25; 69:23;116:20,21	firm (8) 11:5,5;17:1,2;27:7,12; 68:18;100:6	footnotes (3) 56:2,7,10		general (4) 8:20;14:25;16:11; 28:23
fighting (1) 44:14	first (49) 2:2,10;6:4,13;12:5,20; 14:25;15:23;19:14; 23:20;27:4;35:1,44;10; 46:23;51:3;53:17;62:3; 66:15;71:15;75:3;78:4; 89:12;92:7,13;93:5; 95:14;97:22;98:8; 102:11;103:13;106:23; 111:10,20,23,24;120:4; 5;121:13;125:22;126:9; 127:2;128:24;130:21;	force (2) 72:9;92:14		generalization (1) 105:3
figure (5)	first (49) 2:2,10;6:4,13;12:5,20; 14:25;15:23;19:14; 23:20;27:4;35:1,44;10; 46:23;51:3;53:17;62:3; 66:15;71:15;75:3;78:4; 89:12;92:7,13;93:5; 95:14;97:22;98:8; 102:11;103:13;106:23; 111:10,20,23,24;120:4; 5;121:13;125:22;126:9; 127:2;128:24;130:21;	foremost (3) 60:20;120:4,5		Generally (9) 46:13;52:2,11;85:21; 86:3;88:18;91:1,3;130:2

generation (1) 90:23 generis (1) 88:10 generous (1) 99:16 George (1) 102:19 Gerry (3) 13:13;70:16;140:16 gets (6) 30:10;33:4;50:20; 56:24;62:1;83:2 Ginny (3) 11:1,22,22 girlfriend (5) 107:6,7,16,18;108:8 given (4) 3:12;31:16;66:25; 69:25 gives (2) 9:25;58:18 giving (6) 8:8;9:10,11;16:10; 55:23;120:13 glancing (1) 114:8 glasses (1) 93:21 glean (1) 53:3 glitch (1) 33:13 glorified (1) 122:16 goal (1) 119:11 God (1) 146:23 goes (14) 28:2;36:13;40:23; 48:2,9;61:18;70:11; 71:15;94:17;100:8; 110:2;117:11;119:15; 129:11 Good (33) 2:1,4;7:13,15,16; 28:12;35:16;45:2;56:18; 57:22,22;58:5,8;67:14; 69:2;73:4;77:17;79:24; 80:5;81:16;96:24; 109:21;112:4;114:22, 24;116:12,24;121:19; 130:25,25;139:16;141:8, 10 Goodman (15) 10:15;11:1;14:8,24; 15:15;17:17;18:17; 23:13;26:15;60:18; 61:14;62:22;68:5;75:23; 82:21 go-to (1) 25:2	govern (1) 77:18 government (25) 102:3,3,7;113:12; 121:6;125:24;126:16; 128:4,6;129:23;130:4,7; 136:20;138:18;139:2; 142:4,11,13,17;145:3; 146:17;147:7,10,12,18 government's (2) 126:7;129:10 grab (1) 23:12 grade (1) 148:23 Graham (1) 27:15 grant (1) 82:7 granted (1) 65:19 great (19) 5:2,7;6:6,9,10;7:3; 12:7;25:24;65:8;66:3; 95:20,22;98:25,25; 108:2;113:3;136:5; 144:4 greed (2) 96:14;146:22 greedy (1) 96:21 GREENBAUM (1) 49:3 gritty (1) 124:10 grizzle (1) 98:2 gross (3) 23:17;24:3;105:3 grounded (1) 130:16 group (6) 2:7,14,17;5:17;23:15; 32:16 groups (1) 3:9 grousing (1) 68:8 grow (1) 148:20 grows (1) 89:20 guarantee (1) 12:24 guess (3) 4:22;6:13;49:3 guidance (2) 53:6;78:12 guide (1) 17:4 guideline (1) 91:21 guilty (2)	104:1;118:13 gun (2) 105:7,11 guy (16) 57:4,5,9,20;58:3,4; 60:24,25;62:25;105:11; 131:5;144:1,17;145:1, 12,18 guy-little (2) 60:25;62:25 guys (6) 78:21;118:21;132:24, 25;133:6,11 <div style="text-align: center;">H</div> Haddonfield (1) 87:23 half (9) 12:19;51:12;65:13; 94:13,14;103:12; 136:13;141:5;147:5 Hall (1) 113:17 hallway (1) 46:21 halt (1) 28:6 hand (5) 48:8;54:13;85:1; 141:2,18 handed (1) 103:3 handle (3) 50:22;115:4;134:7 handled (5) 63:21;64:12;83:21; 93:19;121:3 handling (2) 40:11;85:25 hands (4) 21:17;93:20;106:15; 114:14 handwriting (1) 103:13 hanging (1) 102:14 happen (11) 30:8;37:19;46:16; 47:23;48:9,24;55:7,10; 108:13,14;112:23 happened (12) 33:25;46:22;49:5; 75:21;105:5,6,14,15; 108:19;118:15,19; 130:21 happening (6) 26:14;47:19;50:16; 53:2;115:5;129:20 happens (14) 20:18;22:21;37:19; 39:2;56:22;57:24;61:5; 64:8;75:11;86:17;87:16;	111:14;124:8;148:25 happy (2) 4:6;79:10 haranguing (1) 65:1 harbor (1) 89:3 hard (4) 43:2;101:10;141:6; 147:23 harder (2) 119:4;129:15 hark (1) 121:2 harkens (1) 84:10 harm (1) 132:20 harmless (1) 134:8 hauls (1) 57:13 Hayden (38) 13:23;21:15;27:2,3; 31:15;48:13,14;53:16; 55:12;59:3;60:3;61:11, 15;64:19;76:18,22; 78:19;82:11,13;83:15, 23;84:3;85:12;86:5; 88:24;91:17;93:5,18; 95:2,8;108:7,10;118:20; 126:9;128:24;136:5; 140:8,11 Hayden's (1) 68:6 head (2) 107:5;113:5 heading (1) 129:25 headline (1) 97:8 health (1) 118:4 hear (14) 13:3;14:19;42:18; 45:15,25;64:21;68:8; 71:15,22;72:2;101:18; 109:3;114:18;138:23 heard (14) 10:9;29:12;44:23; 48:22;49:21;51:12; 69:15;85:5;110:25; 126:1;131:23;137:3,4; 149:13 hearing (5) 32:10;46:4;81:9,20; 119:25 hearings (3) 7:8;85:11;144:7 hearsay (1) 115:14 heart (1) 67:10	heaven (1) 28:7 heavier (1) 130:5 held (2) 44:21;128:15 hell (3) 65:4;114:3,6 help (22) 7:3;9:17,23,24,25; 10:13;29:1,18;35:15; 36:15;39:8;42:11;48:11; 51:9;58:7;75:12;84:11, 13,18;117:21;126:16; 127:17 helpful (10) 19:12;27:11;46:4; 58:20;64:21,22;74:8; 76:21;79:5;129:18 helping (1) 142:2 helps (4) 48:17;134:16,16; 145:10 hemorrhaging (1) 27:25 Here's (2) 3:6;132:23 herself (1) 112:8 hesitate (1) 81:10 high (2) 73:4;116:12 himself (5) 89:12;91:19;92:18; 93:19;138:23 hiring (1) 87:13 Historical (10) 2:3,7,11,16,20;3:2,21; 5:1,7;6:8 histories (2) 3:19,23 history (6) 3:17;5:6,8,22;6:6;13:9 hit (1) 121:12 hold (21) 17:5,11;18:10,12; 22:18;23:17,23;24:3,12; 30:5,6;31:9;32:12,13; 34:2;35:13;81:9;127:4, 14;128:4,20 holds (2) 17:23;18:5 holes (1) 61:23 home (2) 103:12;114:6 honestly (2) 109:12,24 honor (7)
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5:2;8:4;34:6;52:2; 127:21;25;137:14 Honorable (1) 92:11 Honor's (1) 20:10 hook (6) 146:17;147:1,7,8,9,14 hope (8) 2:22;4:13,16;13:19; 15:13;104:2,18;131:16 hopefully (4) 6:5;19:11;95:16; 117:18 hopes (1) 103:9 horrible (1) 148:20 hors (2) 2:21,23 host (2) 36:18;61:19 hostes (1) 88:10 hostess (1) 61:20 hot (3) 39:7;135:15,15 hour (3) 12:24;86:14;103:12 hours (13) 6:19,21;12:1,19; 49:22;50:21;52:13; 61:19,19,23,24,25;99:5 house (1) 86:6 household (1) 148:20 Howard (1) 4:5 huge (5) 89:14;124:19,23,23; 140:12 human (1) 124:1 humanis (1) 88:10 hundreds (1) 135:22 hurtful (1) 32:16 hurts (3) 114:10,10,10	identified (2) 76:14;80:2 identify (8) 15:24;25:2;51:23; 52:21;53:2;74:1;96:12; 97:4 identifying (2) 16:2;51:18 ie (1) 6:25 III (1) 23:3 illegal (1) 132:19 immediate (1) 15:24 immediately (3) 17:21;18:6;92:10 immersed (1) 100:10 impact (3) 26:13;68:20;82:15 implementation (1) 40:18 important (24) 9:5;22:19;24:8;38:18; 49:8;55:15;56:11;68:14; 69:13;71:5;80:10,20; 98:3;101:20;103:19; 104:6;108:23,24;109:1; 115:3,23,24;140:18; 142:7 importantly (2) 2:12;11:13 impossible (1) 62:5 impressed (1) 8:14 impression (1) 146:4 impressions (2) 96:8,10 inadmissible (1) 119:11 inches (2) 64:5,9 includes (1) 4:1 including (1) 3:15 income (1) 122:22 inconsistencies (1) 138:24 increase (1) 60:16 incredible (2) 13:7;138:22 incredibly (3) 9:4;12:6;140:18 incriminated (1) 103:25 indeed (2)	138:4,15 indicate (1) 137:16 indicated (1) 98:6 indict (1) 118:12 indicted (3) 107:5;120:22;127:6 indicting (1) 120:12 indictment (22) 98:9;102:5;104:16; 109:7;110:13;111:5; 117:12,17;119:9,12,21; 120:1,7,9;123:10;124:4; 127:12,16,18,22;128:6; 131:25 indictments (2) 108:17,17 indigent (2) 9:19;10:14 individual (4) 11:6;18:1;38:5;138:22 individuals (3) 3:22;10:19;18:24 inexpensive (1) 86:24 infer (1) 22:8 inference (3) 31:12;32:22,25 infidelity (1) 107:21 informal (1) 41:20 informant (1) 124:22 information (25) 3:25;16:4;19:15,19; 22:25;23:23;24:12,16; 25:1,3,7,10,12,13;35:9; 37:18,22;41:12;98:20; 22,23;99:11;102:3; 121:17;123:3 informative (1) 75:9 informed (4) 48:21;96:11;97:14; 100:17 infrastructure (1) 27:8 inherit (1) 72:22 inherited (2) 59:12;107:9 initial (2) 34:3;147:20 initiators (1) 20:8 inmates (1) 31:20 Inn (2)	136:6,8 insert (1) 111:4 Inside (1) 134:10 insider (2) 106:4;134:22 insight (1) 121:7 instance (2) 106:23;113:16 instances (5) 18:11;39:1;47:3; 66:15;81:7 instantaneous (1) 17:9 instead (2) 59:18;102:14 institution (3) 118:5;122:8;123:3 instruct (2) 55:25;58:17 instructions (1) 31:2 instrument (2) 53:19;126:6 instruments (2) 121:4,9 insure (1) 18:5 insured (4) 105:10;122:8,13; 123:3 insuring (1) 76:6 insurmountable (1) 37:23 intact (1) 5:5 intellectually (1) 145:7 intelligent (1) 91:25 intensification (1) 55:9 intent (2) 33:19;106:13 intentional (1) 31:9 interest (1) 25:12 interesting (5) 54:7;57:2;66:1;73:2; 112:18 intermediate (1) 88:14 interminable (1) 60:2 internally (1) 3:9 Internet (1) 98:21 into (36)	21:17;23:10;26:24; 30:7;39:11;42:3;56:13; 57:14;61:18,20,24;65:7; 68:21;69:14;88:16;89:3; 93:10;94:17;100:8; 103:2,5;105:2,6;111:8; 112:20;113:21;117:19; 121:8;122:25;124:10; 136:8;139:24;140:1,5; 143:16,17 introduce (4) 2:2;4:20;12:4;30:12 introduction (3) 4:23;8:7,9 introductions (2) 13:4,5 introductory (1) 101:14 intruder (1) 2:5 intuitive (1) 27:10 inundated (1) 98:23 invariably (1) 2:20 investigating (1) 102:4 investigation (7) 23:2;104:21;109:23; 110:4,19;111:19;118:8 investigative (1) 109:16 investors (1) 96:22 invite (1) 34:12 invoke (3) 39:5;42:8;48:7 invokes (1) 46:5 invoking (1) 43:3 involve (3) 96:21,23;124:14 involved (10) 2:24;10:7;18:21;28:4; 38:8;44:12;46:22;72:18; 97:10;136:6 involves (1) 18:19 involving (2) 92:16;133:5 Irenas (14) 12:17;30:1,3;32:4,8; 33:15;67:4,5,8;81:1,2; 82:5,20;84:23 Ironworkers (2) 107:6,9 irrelevant (2) 110:3;128:8 i's (1) 76:11
I				
Ian (2) 102:25;103:2 ID (1) 113:4 idea (7) 20:24;25:10;50:9; 109:21;139:7,12,16				

issue (56) 11:9;17:16;18:16; 19:21;22:3;23:16;24:2; 23:25;25:26;7:31:2; 32:20;33:19;41:4,20; 42:12,15;44:14;47:10; 21:49;11,13,16;50:3,6; 17:51;10;52:24;56:23; 57:11,16,23;64:7;65:22; 66:11;67:15;72:11; 76:25;80:8;82:11;85:3; 96:2;97:12;99:21;100:2; 10;104:5,15,17;105:9; 108:15;117:16;119:5; 18;146:14;147:15 issued (2) 23:20;41:5 issues (42) 15:4;16:3;18:13,15; 19:17;24:7;25:24;33:8; 18;35:6,10,20;44:7;46:6; 11;47:13;49:1;52:10,18; 54:25;56:22;57:11; 58:23;59:23;63:22;64:2; 15;72:12;77:10,22;78:2; 79:16,16;82:4;84:12; 85:2;97:1;112:2;118:11; 119:13;127:17;133:21 Italian (1) 27:16 J jail (1) 138:23 January (1) 7:20 jerk (1) 41:10 Jersey (23) 6:14;11:11;12:13,14, 17;13:2;28:24;36:18,21, 22,24;40:7,14;48:7; 53:21;74:25;77:22; 82:15;87:22,25;88:5; 90:9,16 Jim (2) 5:12;6:3 jlacey@connellfoleycom (1) 10:25 job (10) 5:7;44:10,15;58:8,8; 106:22;108:2;131:23; 146:9,9 jobs (1) 27:21 Joe (27) 93:5,18,25;94:15; 95:2,7;101:16,22;104:4, 7;105:24;107:4,6;108:1, 5;109:18;112:25; 121:14;125:21;128:22; 136:3;138:4;139:23; 140:6,13;141:2;148:4 John (11) 4:24;7:1;8:3;12:12; 93:3;94:13;95:8;102:13; 111:10,22;146:16 John's (1) 103:17 join (1) 4:14 joined (1) 13:23 joint (2) 16:1;71:19 joke (2) 44:17;113:17 Jones (2) 47:19;79:11 Judge (219) 2:22;4:1,20,22;5:25; 8:16;9:14,15;11:10; 12:16,16;13:6,13,15,16, 23;14:2,4,8;17:18;18:1; 19:20,25;21:15,16,18; 22:5;24:5,23,24;26:3; 27:2,3,16;28:22;29:12, 22;30:1,3,10,25;31:3,15; 32:3,4,8;33:7,15;34:6, 10;36:1,4,7;37:5;38:4, 17;39:5,6;40:5,9,11,13, 19;41:4;42:24;44:9; 46:10,22;47:7,15;48:4, 13,13,14,20;49:1,4,7,18; 50:22;51:6,20,24,25,25; 52:4,19;53:6,9,10,16,16; 54:5,6,16;55:12,12; 57:24;58:19;59:2,3,19; 60:3;61:3,11,15;64:6,10, 19,25;66:1,4,4,5;67:4,5, 8;68:5;69:5,6,19,21,22; 70:10,16,24;71:3,14; 72:13,17,20;73:23,24; 74:10,12;75:4,6,24; 76:13,16,18,22;77:5; 78:4,7,19;79:6,16;80:3, 5,11,24;81:1,2,21;82:5, 11,13,17,20,22,23;83:13, 14,15,17,21,23;84:1,3,5, 18,23;85:1,12,19,21; 86:5,7,9,14,15,17;88:4,8, 9,14,24;89:18,19;90:13; 92:20,24;93:3;95:19; 97:3;98:15;114:5,5; 115:25;118:20;119:2; 121:1,12;125:20; 128:11;130:13;131:8; 132:11;133:4;137:23; 138:3;139:13;140:10,12, 16,19;141:11;145:23 judges (46) 2:18;3:4,11;5:12;7:23; 8:19,24,24,25;9:8,19; 10:2,5;12:7;13:8;14:19, 23;17:7,19;19:17;21:21; 27:20;28:4,7,12,25;30:9; 34:12;35:17;42:6,10; 48:7;52:16;56:18;57:12; 67:24;68:10;71:6;74:21, 21;84:8;85:11,23;86:6; 90:14;117:20 judge's (6) 38:16;55:13;62:16,23; 74:7;75:18 judgment (12) 54:18;55:4;58:20; 61:1,5,8;63:13,13;64:3, 5;69:24;88:19 judicial (4) 4:11;51:23;52:10;85:9 jump (1) 126:22 juries (2) 96:5,8 jurisdiction (1) 88:10 jurors (2) 130:8;145:6 jury (36) 72:10,14;77:8;83:10; 97:3;98:16;100:14,16, 19;104:9,10;106:25; 108:21,22;122:4,10,11; 123:16,17,21,25;125:6, 17,19;126:4;130:15; 131:18;132:23;135:10; 136:2,11;145:8;146:9, 21;147:2;149:9 Justice (4) 3:15;57:1,10;59:6 justify (1) 26:21 Justin (1) 100:6 JV (2) 147:11,13 K Katherine (1) 13:23 keep (6) 16:21;21:9,10;59:13; 86:22;96:25 keeping (1) 28:12 Keith (1) 5:10 Kenya (1) 88:13 kept (3) 14:17;22:3;144:25 key (6) 19:10,13;38:8,10; 114:7,16 kick (1) 14:24 kicking (2) 59:18;72:21 kind (29) 20:18;23:21;26:19,22; 30:13;37:3;39:22;44:7; 45:8,11;55:17;56:25; 57:25;61:11;62:14,20; 65:6,13;71:15,20;72:14; 77:3;84:10;100:7;105:2, 12,19;140:17;142:22 kinds (2) 57:23;105:23 kingpin (1) 125:7 knee (1) 41:10 knees (1) 65:3 knew (5) 3:13;91:7;140:14; 145:17,25 knock (1) 55:5 knocked (1) 126:25 knocks (1) 89:12 knowing (1) 37:14 known (4) 90:20;92:15;94:4; 107:18 knows (8) 33:18;40:14;43:8; 44:16;47:19;99:2;130:5; 140:7 Kristen (1) 17:2 Kugler (1) 132:11 L LACEY (35) 2:1;4:19;7:1;8:3,4,6; 9:14;73:23;82:22;90:18; 91:18,22;92:10;93:5; 94:2,9,15;95:2;101:16; 110:22;117:9;119:24; 121:1;125:20;128:22; 129:25;132:1;136:3; 137:23;141:23;143:8; 146:14;147:16;149:13, 16 Lacey's (1) 80:5 Lady (1) 3:15 language (1) 20:10 laps (1) 65:2 large (3) 60:19;76:5;83:20 largely (2) 18:19;20:2 Last (12) 3:7;4:4;9:14;14:9,15; 83:8;98:8;102:18;115:2, 7;137:4;148:18 lasting (1) 4:7 late (3) 17:25;80:4;89:3 later (7) 7:5,21;9:15;10:22; 20:19;103:12;110:21 latest (1) 7:12 Lautenberg (1) 3:17 law (39) 6:16;11:5;13:1,21; 15:11;16:18;28:17;29:6; 40:6;42:11;53:14;55:20, 25;57:24;58:6,7,24; 68:18;79:1;80:22;87:25; 89:20,21;90:25;93:6,7; 97:11,14,15;98:6; 102:13;112:4;114:23, 25;119:3;120:24; 126:13;131:22;141:7 lawyer (26) 12:21;17:2;25:3; 36:18;37:20;39:17;40:1, 6,23;42:20;48:5;50:18; 67:12,16;80:4;92:2; 95:23,24;98:25;100:3; 104:8,12;109:20;122:2; 127:13;128:3 lawyering (1) 128:17 lawyers (70) 8:19;10:6;20:14; 24:25;25:17;27:6,9; 30:22;34:18,20;36:1,9, 21,22;37:4;40:24;42:18; 44:12;46:20;47:4,24; 48:6,16,18,21,23;49:10, 17,20;50:7,11;52:5; 58:24;65:25,25;67:25; 68:6,19,20,25;71:22; 73:4;75:9,15;84:13; 87:5;90:19;91:5;94:5; 95:11,16,20;97:18; 99:14,15,15,16,16; 100:8;109:15,22;110:6, 15,19;120:15;128:16; 129:9;130:25;131:1,9 lawyer's (4) 35:2;36:6;67:10;68:18 lawyers' (1) 64:21 lead (2) 7:3;60:7 leadership (1) 27:11
--

leading (1) 129:7	112:6	21;28:2;31:5,9,16,22; 32:11,13;34:2,21;35:13; 38:22;41:18;60:9,18; 62:18	57:9;115:2;116:6; 123:7	maker (1) 72:13
leads (2) 83:23;84:1	18:15,18;19:4;21:24; 51:6;85:7;95:13;116:10	little (22) 4:13;9:11;17:13; 19:15;53:13;57:4,9; 58:3;61:21,22;79:22; 82:17;100:9;101:8,8; 117:10;121:2,7;134:7; 143:19;144:11;146:7	lot (42) 4:9;5:6;7:10;28:9; 33:3;36:23,24;37:19; 41:16;45:8,24;46:14,14, 15,16;48:6;50:7,16,19; 51:20;53:15;58:22;60:9; 25:68;25;70:17;73:19; 76:25;83:1;93:14;100:4; 106:7;111:24;129:9,15, 18,19;134:17;135:13; 136:20;144:25;147:2	makes (8) 4:6;48:24;61:11; 65:10;72:6;127:20; 130:17;138:15
learn (7) 3:3;19:14;58:7;97:10, 11,23;98:2	18:22;84:22	live (5) 45:25;48:17;87:23; 98:19;104:18	lots (4) 108:18,19;109:3; 122:17	making (7) 15:4;16:12;57:23; 111:25;112:7;114:14; 122:7
learned (5) 56:16;74:20;82:21; 99:1;102:12	liability (1) 18:20	lived (1) 85:7	lousy (1) 140:2	man (3) 4:23;61:23;116:23
Learning (1) 97:23	library (1) 102:16	Local (6) 24:25;26:18;36:19; 53:21;86:10;87:18	love (2) 61:17,17	managed (1) 103:13
learns (1) 122:12	lies (1) 57:1	locked (1) 101:9	lovely (1) 61:18	management (2) 38:5;85:24
least (16) 28:14,24;33:15;43:11, 16;47:8;55:6;59:7;60:1; 70:10;82:3;88:13; 101:25;138:1;143:10; 147:5	life (8) 65:18;73:18,22;90:20; 114:15;143:16,18;145:6	long (10) 6:7;44:15;53:3;63:12; 64:24;87:22;101:23; 103:15;141:6;145:24	loves (1) 146:21	manager (1) 107:8
leave (3) 11:18;21:16;87:6	liked (1) 102:15	longer (3) 76:2;110:11;145:4	luck (1) 94:16	managers (1) 56:18
leaves (1) 46:2	likely (4) 105:16;111:5;122:3; 130:3	long-term (1) 15:7	lucky (3) 13:6;94:12;117:7	mandatory (1) 11:13
led (2) 10:15;13:9	limine (11) 32:23;77:24;78:5,6; 79:20;80:25;81:2;84:21; 115:8,8;119:17	look (27) 12:15;23:14;36:19,20, 22;42:9;52:12;54:8; 55:17;57:21;58:9,24; 62:8,12;66:3,19;69:23; 74:13;76:3;82:23;97:1; 98:24;103:18;126:3,13; 132:10;134:8	luncheons (1) 68:9	mankind (1) 88:11
Leda (2) 2:2;4:19	limines (2) 78:10,21	looking (7) 21:4;29:10;77:22; 93:9;111:1;114:1; 133:15	lurches (1) 57:14	many (26) 8:22;9:2,18,18,20,21; 10:1,1;18:3;35:24;36:4; 48:5;49:7;52:6;62:25; 69:20;70:14;79:19; 88:15;91:7;92:24;97:2; 112:14;137:13;138:23, 24
leeway (1) 9:10	limit (1) 64:11	looks (3) 55:14,19;126:24	luxury (1) 104:13	map (2) 49:12;109:11
left (5) 63:17;82:12;91:10; 92:10;105:8	limitations (1) 48:5	looming (1) 81:24	M	March (1) 7:9
leg (1) 128:6	limited (4) 48:1;131:10,10; 139:14	loosey-goosey (1) 23:22		marinates (1) 113:5
legacy (2) 26:6;77:3	limits (1) 56:3	lose (7) 55:25;68:16;116:24; 117:1,3,4;123:8	mad (1) 56:3	Marine (1) 146:20
legal (4) 63:25;72:11,12; 118:15	Linares (1) 145:23	loss (3) 123:2,13,16	Magic (1) 103:3	marital (1) 107:21
legendary (1) 99:3	line (4) 11:4;33:22;79:8;118:5	lost (4)	Magically (1) 39:19	maritime (4) 13:20,22;89:21;90:4
legitimately (1) 122:24	lined (1) 79:24		Magistrate (50) 14:2,4;19:20;21:21, 24;24:24;27:16;28:7,22, 25;30:11,21;34:10,11; 36:4;37:5;38:4;39:5; 40:5,9,13,19;41:4;42:24; 44:2,9;46:25;47:7,15; 48:4,20;49:1,18;50:22; 51:20,24;53:10;70:24; 71:14;74:12;83:13,21; 84:5,7;85:1,21,23;86:6, 9;92:19	marker (1) 55:8
length (1) 77:10	lines (2) 45:1;144:15		mail (1) 98:21	marshal (1) 69:17
lengthy (3) 13:5;66:22;127:16	list (4) 37:18;44:3;53:3;87:1		main (1) 108:2	Maryland (1) 27:15
Leone (1) 102:19	listen (2) 111:24;112:10		maintain (1) 110:5	mass (2) 121:16,17
less (2) 29:23;100:19	listened (2) 44:22;144:8		maintained (1) 21:10	massive (3) 124:18;125:7;140:13
lets (1) 43:16	listening (3) 111:25;121:13;136:13			master (2) 129:4,14
letter (24) 22:18;24:3;33:11; 39:19;40:1,3,17,18;41:3; 42:14,24;43:6;47:18; 50:1,4,24;51:15,18,18; 52:9,10,25;53:5;66:21	Lite (1) 15:16			masters (1) 136:11
letters (4) 20:24;39:23;50:14,15	literally (3) 17:17;27:20;134:23			material (2) 17:24;54:25
letting (1)	litigant (1) 69:14			materials (1) 17:1
	litigants (1) 69:13			matter (18)
	litigation (32) 17:5,9,15,23;18:5,10, 12;20:7,15;22:18;23:17, 23;24:3;25:11,24;26:12,			

18:6;37:10;55:15,18; 57:8;61:5;64:20;79:18; 80:1;87:4,11;101:7; 117:19;131:6,7;133:24; 140:18;146:17	Medicaid (1) 125:3	84:17;87:3;103:22; 111:3,4;123:1,15,17; 124:14,16;137:12	moment (2) 78:25;116:19	53:6;54:8,9;55:1,4,22; 57:8,18;58:2,19,22; 60:15;61:5,10;63:13; 64:2,3,5;66:19;69:8,9, 24,24;70:7,13;75:3; 76:24;78:5;79:3;80:25; 81:8;84:17;86:4;119:2, 3,17,20,23
matters (3) 18:9;38:19;85:20	Medicare (2) 118:4;125:3	Mike (17) 94:2,4,11,24;99:2,2,6, 19;106:14;110:23; 119:17,20;121:14,19; 125:10,21;148:4	moments (1) 8:9	motions (26) 7:14;10:2,9;32:23; 52:15;53:17,22;54:17, 21;56:15;58:25;59:13; 60:17;61:2,6;66:25; 68:13;77:23;78:6;79:20; 81:3;86:1,23;115:8,8; 128:5
Maurice (6) 148:24,25;149:1,4,6,6	meet (4) 2:15,19;92:12;126:6	mildly (1) 92:1	Monday (1) 70:6	move (13) 15:13;34:1,38:21; 41:17;48:25;52:14; 70:21;71:7;81:1;86:4; 101:8;134:2;142:8
maximize (1) 117:18	meeting (4) 7:21;20:17;79:12; 125:22	military (1) 138:5	money (19) 45:8;62:3;70:18;88:6; 96:14;105:8,17;106:15, 16,17;112:9;113:1; 118:6;123:7,8;124:24; 125:1;132:6,7	moved (1) 66:5
may (58) 15:6;17:25;20:15,20, 25;29:3,4;34:18;36:16; 37:22;41:8;44:1,5;50:7, 17;51:8,21;63:5;66:23; 69:1,9;71:3;72:25;78:9, 12,13;83:1;84:13,19,20, 25;85:2,3;86:2;88:25; 97:17,19;100:17;105:14, 18;118:1,1;120:2,2; 123:12;126:3;127:16; 128:7;130:21;133:10; 134:17;135:14,24; 138:18;139:7;141:7; 143:18;147:4	member (2) 5:22;13:25	Miller (1) 5:10	monitoring (1) 17:5	moves (1) 126:25
Maybe (30) 6:1;17:13;28:17;33:4; 35:7;37:22;41:22,23; 45:14;49:13;54:11;55:5, 5;57:24;64:20;65:18; 66:20,20,21;67:23;74:4, 10;82:2;86:22;96:24; 101:19;105:15,15; 117:14;131:5	members (5) 4:10,10;8:18;10:1; 133:7	millions (1) 134:23	monkey (1) 54:15	moving (6) 7:9;32:24;39:16; 53:12;133:19,23
mayhem (1) 132:12	membership (2) 3:1;4:14	mimic (2) 103:13;142:12	month (3) 41:15;110:9;141:5	Mrs (1) 146:18
mayor (3) 93:11;94:6,9	men (1) 113:21	mind (7) 21:8;96:5;100:21; 106:21;107:2;115:21; 136:15	months (9) 30:17;31:24,24;33:14; 38:20;59:14;110:10,11; 144:5	much (37) 7:6,19;9:9,12;11:9; 22:21;25:21;36:5,16; 37:25;41:21;46:11; 47:11,23;48:11,21; 62:22;67:8;68:3,4,21; 81:25;83:10;94:24;96:3; 100:1;101:1;105:22,25; 106:10,10,11;110:18; 113:2,4;131:22;133:10
McKenna (1) 44:20	mentioning (2) 55:13;124:13	mine (4) 21:17;31:15;102:17; 108:9	monumental (2) 26:1,11	must (3) 65:13;95:9;98:16
mean (11) 61:16;81:15,22;97:6; 113:1;114:8,9;130:2,23; 133:20;134:5	mentions (1) 49:7	minimum (2) 16:12;51:3	more (51) 2:12,23;7:5;27:6,10, 25;28:4,25;29:6,30;10; 38:12,13,23;39:10; 43:23;47:13;56:9,13; 59:13,14,19,20;65:19; 67:8,20;68:4,8,10,14; 71:8,9,9;72:16;83:10; 86:24;92:20;94:16; 95:23;98:17;99:22; 100:18;101:1;102:16; 105:16,22;106:6;110:3; 111:5;130:3,13;133:10	myself (6) 4:25;5:22;44:19; 53:20;99:20;136:25
Meaney (1) 6:3	mentored (1) 48:17	mirroring (1) 26:2	morning (12) 2:1,4,25;10:23;11:14, 20;82:20;90:19;101:20; 102:12;111:16;144:23	N
means (5) 25:15;57:7,23;124:17; 139:6	mentoring (1) 68:19	miss (2) 50:6;148:12	morning's (1) 103:17	
meant (3) 72:12;86:20,23	mere (1) 125:15	missed (3) 50:12,20;100:4	morph (1) 56:23	name (4) 11:23,25;27:16; 146:18
mechanism (4) 29:13;35:5;86:21,21	merger (1) 38:9	missing (1) 31:24	mortgage (2) 127:25;128:1	named (1) 102:24
mechanisms (1) 87:19	merit (2) 54:14;96:7	mission (2) 59:5;95:12	Most (43) 11:13;13:4;16:2,7; 17:10;20:4;21:20,23; 38:18;42:14,22;43:6,7; 46:8;49:6;54:20;60:19, 24;63:7;70:7;71:5; 74:22;76:21;77:1;78:5; 83:22;85:25;87:9;90:20, 22;94:5,5;96:7;103:21, 25;110:19;112:23; 121:5;137:3,24;138:3, 15;139:4	names (1) 44:5
mediation (8) 27:22;85:16,20;86:13, 15,25;87:7,17	meritorious (5) 58:2;61:7;63:5,9,10	mistakes (1) 37:3	mother (1) 103:1	naming (1) 44:5
mediator (2) 87:3,13	merits (1) 37:12	mistress (2) 108:8,10	motion (42) 40:15,25;41:11,14;	nanoseconds (1) 115:6
mediators (1) 87:1	merry (1) 34:19	mitigation (1) 112:16		
	message (1) 56:15	mob (1) 133:9		
	met (4) 92:13;143:18,25,25	mock (3) 100:7;142:12,23		
	Michael (9) 95:21,22;99:1;109:19; 117:24;118:11;129:4, 14;141:23	model (2) 98:14;118:23		
	Michels (1) 64:25	moderate (1) 12:22		
	mid (1) 91:13	moderator (1) 12:5		
	middle (1) 80:16	mold (1) 97:12		
	midnight (1) 66:10			
	midst (3) 46:21;93:12,13			
	might (21) 20:9;24:21;29:22; 47:5;50:11;51:1;52:18; 67:23;75:19;78:24;			

narcotics (1) 124:15	next (9) 4:17;8:2;12:24;16:15; 51:5;91:21;116:3;122:1; 143:1	115:10,11,12;127:14	115:1,10;117:2	100:22,25;101:1; 136:14;138:6,15;148:2
narrative (2) 135:11,13	nice (3) 52:3;91:14,22	obligated (1) 64:1	Oftentimes (1) 53:5	opera (1) 62:21
narrow (5) 12:23;63:22;64:2; 78:1;85:6	night (4) 66:10;89:3;101:20; 102:19	obligation (6) 17:11;21:2,7;63:23; 71:25;106:22	old (10) 7:14,14;59:11,12,18; 83:18;88:20;113:16; 116:22;140:13	operating (1) 96:23
narrowing (1) 64:15	nights (1) 2:15	obligations (3) 15:24;16:13;20:11	older (3) 82:24;103:9;148:21	opinion (11) 16:8,11,14;17:18; 18:2;20:11;23:14,16,25; 66:21,22
nationally (1) 85:24	nine (5) 81:3;110:11;134:24; 144:22;146:3	observation (1) 102:10	oldest (2) 5:3,4	opinions (4) 16:7;20:4;23:20;26:19
natural (1) 3:1	nineties (1) 57:3	observations (1) 14:23	once (12) 18:6;39:2;46:10; 73:15;79:22;82:18; 84:15;101:9;117:4; 133:24,25;143:19	opportunity (15) 9:25;10:10;12:22; 27:5;34:14;48:15;54:3; 68:22;69:8,14;76:3; 104:16;111:17;115:25; 136:25
nature (1) 125:14	nitty (1) 124:10	observed (1) 75:24	one (87) 4:24;6:12;11:14; 16:16,25;17:10;19:9,10; 21:16;22:10,10,14,15, 20;24:7;25:23;27:3,13, 19;28:3;32:16;33:21; 34:16;39:6,23,24;42:25; 44:10;45:18;50:23,25; 51:9,15;52:20,23;53:12; 55:2;56:5;59:16;60:5; 67:2,22;68:7,17;70:24; 73:7,16;76:9;77:6; 78:21;80:7;81:4;82:11, 25;83:10,11,23;84:1,9; 87:24;88:8,23;94:10; 99:19;102:10;108:20; 113:22;117:13,20; 120:15;122:23;127:15; 128:13;130:23;132:1; 135:21;136:19;137:5,9, 11;140:2,3;143:7,16,17; 148:4,13	oppose (3) 80:15,18,21
nay (1) 113:13	Noah (3) 102:24,25;103:7	obsolete (1) 82:14	occasion (2) 18:24;21:22	opposed (2) 56:12;98:3
near (1) 83:19	nobody (1) 51:10	obviously (9) 18:2;34:10;78:7;84:5; 108:24;112:14;113:13; 132:13;147:25	occasions (3) 37:9;68:16;106:8	opposite (1) 21:5
necessarily (5) 17:14;55:1;73:14; 82:6,24	nonbinding (1) 86:12	occurred (3) 27:4;75:24;118:1	occurs (1) 17:12	option (1) 87:12
necessary (4) 62:15;66:24;81:9; 84:14	none (1) 124:25	October (2) 6:19,25	o'clock (2) 111:16;144:22	oral (30) 3:19,23;54:21;56:21; 57:25;65:19,25;66:1,4,8, 11,13,17;67:6,13,16,17; 68:3,7,10,11,12,15,23; 69:6,20;70:1,2,9;149:3
need (40) 4:23;6:1,1;8:6,9;10, 11,23;13:5;18:5;19:12; 22:24;24:11;25:21;34:4; 35:6,21;36:10;37:11,24; 38:6;41:22,23;42:10; 49:19;51:3;53:24;58:8; 59:19,20;62:14,14; 64:15;71:24;72:9;84:16; 87:9,10,17;105:15;131:3	non-jury (2) 73:5;83:11	off (14) 24:2;38:23;49:12; 57:22;67:24;69:10;89:9; 95:3;96:21;103:4;133:9; 145:6;147:4,10	offense (4) 98:13;123:7,15; 125:16	order (29) 11:15;31:9;41:4,5,5, 21;56:3;58:7;70:23; 72:4;73:3,17,22;75:5,16, 22;76:3,15,20;77:3,6,18; 78:9,20;83:24;84:2,10, 19;86:19
needed (6) 40:1;57:16;89:16; 99:8;132:6,7	notice (6) 17:12;24:13;40:25; 50:8;70:4,8	offered (1) 115:16	offer (3) 80:17,20;84:15	orders (2) 33:10;74:7
needs (12) 6:22;15:6,7;17:8; 18:10,12;24:11;34:7; 51:4;66:11;93:21; 105:17	notifies (1) 70:2	offering (1) 76:13	offered (1) 115:16	ordinary (3) 122:9;124:1;125:2
negligence (2) 23:18;24:4	notwithstanding (2) 32:13;33:1	office (28) 9:3,4;14:3;23:7;28:17; 44:17;52:5;80:1,5; 91:14;92:13;96:15;99:3; 102:1;104:2;107:14,15; 108:18;110:6;111:8,17; 112:15;121:3;124:21; 133:18;134:13;141:25; 145:11	one-minute (1) 148:21	organization (6) 7:2;8:18;9:7;10:12,16; 68:9
negligent (1) 21:3	nullification (3) 125:17,19;126:4	officer (3) 51:23;52:10;85:9	ones (7) 28:5;43:19;58:17; 67:18;82:24;84:11; 88:21	organizations (1) 5:1
neighbor (1) 94:3	number (12) 9:20;13:14;38:20; 49:23;59:11;64:9,11; 83:3;90:19;113:15; 121:21;132:15	offense (4) 125:16	only (15) 4:10;36:2;46:2;47:11; 49:25;55:20;69:8;73:7; 74:16;97:24;105:9; 125:1;133:11;138:22; 148:8	Organized (2) 92:14;133:5
nervous (1) 114:2	numbers (1) 14:21	often (12) 53:20;57:16;60:24; 67:8;101:18;106:1; 108:18;109:14;110:9;	onto (1) 89:12	original (1) 148:1
New (27) 6:14;11:11;12:13,14; 13:1;15:17;28:24;36:18, 21,22,24;40:7,14;48:7; 53:21;74:25;77:22; 82:14;87:25;88:5;90:9, 16;127:9;133:21,21; 134:22;144:24	O	offshore (1) 89:4	open (6) 4:10;88:4;101:12; 136:12;140:6;146:14	others (4) 5:20;6:5;12:17;84:23
Newark (2) 3:18;93:7	object (1) 134:1	officer (3) 51:23;52:10;85:9	opened (4) 137:12,15,16;146:17	otherwise (3) 10:3;59:10;119:11
newsletter (1) 4:12	objection (4) 91:17;115:13,19; 140:15	offense (4) 125:16	opening (16) 100:13;101:5,19; 104:11;126:2;129:1; 136:4,8;137:10,15,22, 25;138:1,8;139:5;142:3	ought (2) 17:22;63:11
	objections (4)		openings (7)	ourselves (4) 9:25;28:4;106:24; 131:7

out (92) 2:23;5:20;9:2;10:7; 11:17;19;24;16:8;19:23; 20:4;16;27:13;21;24; 36:1;21;37:23;39:4;25; 40:6;23;24;41:10;44:13; 46:24;25;47:1;25;48:8; 55:5;22;56:7;58:13; 60:11;62:15;63:6;65:7; 69:16;73:12;81:10;14, 24;84:14;86:22;89:2,6, 12;20;90:16;93:15; 94:15;95:17;96:7;15; 97:24;100:4,8;22;101:6, 6;17;102:14;22;103:24; 105:16;108:20;25;112:1, 2;114:5;118:5,9,18; 121:10;124:25;125:11, 24;126:11;25;128:6; 136:18;21;137:6;139:3, 17;140:9;141:7,13,17; 144:25;146:12;149:18 outline (4) 15:10;19:11;33:22; 90:8 outset (2) 104:5;126:5 outside (2) 12:15;69:9 outsider (1) 25:17 over (18) 2:16;21;5:6;8:1;14:11; 16:18;34:5;44:3;57:17; 64:4;66:2;92:24;118:2; 132:8;134:24;135:8;24; 142:21 overt (1) 128:1 overtures (1) 43:10 overwhelmingly (1) 81:17 own (17) 7:21;19:5;25:22; 43:17;20;47:8;48:10; 52:23;66:7;73:18;83:15; 87:13;97:21;100:20; 145:15,15;148:8 oxycodone (1) 124:19 P pace (1) 38:3 pack (1) 56:9 packed (1) 56:2 packet (1) 11:14 page (3)	3:21;64:11;65:13 pages (4) 67:11;144:13,14,15 palm (1) 12:18 panel (8) 12:5;23;13:5;15:3; 85:16;90:7,18;103:17 panelists (2) 13:3;90:10 panels (1) 12:6 pans (1) 124:25 pants (1) 65:3 paper (8) 50:3;58:15;62:2,4; 76:4,8;134:11,23 papers (3) 61:16;66:12;106:6 parrot (1) 89:16 part (15) 10:21;26:12;50:11; 63:20;64:13;76:5;77:1; 90:21;109:8;21;119:14; 126:7;128:9;130:22; 136:10 partial (1) 60:2 participant (1) 11:8 participate (4) 6:23;10:24;36:25;85:1 participation (1) 11:11 particular (23) 15:23;16:6,8;25:11; 34:9;51:16;68:16;75:13; 87:3,11;118:3,5;119:13; 120:11,19;124:15; 130:17,18,18;132:7,7,9; 133:6 Particularly (10) 46:19;47:16;53:21; 74:2;87:3;99:14;105:23; 115:9;129:17;148:14 parties (7) 49:19;61:17;69:7; 78:12;79:10;81:5;86:14 parts (1) 17:10 party (6) 22:17;43:6;50:5; 61:19;81:4;84:16 pass (2) 15:21;21:17 passed (1) 3:24 past (5) 3:11;23;23:19;66:2; 91:15	pasted (1) 56:8 Pat (1) 70:15 patch (1) 89:15 patent (1) 18:22 pattern (1) 142:21 Patty (1) 14:2 Paul (21) 8:8;12:4;27:15;55:10; 91:11,12,19;92:4;94:10; 101:24;102:6;108:7; 110:22;117:9;124:13; 127:15;129:25;134:21; 143:12,21;147:16 pay (5) 27:1;45:7;83:6;133:9, 14 paying (2) 107:21;147:3 payoffs (1) 133:7 PC (1) 16:19 Pearlman (1) 74:14 peer (1) 100:2 penalized (1) 20:2 pending (1) 72:25 pension (2) 16:8;19:24 people (23) 3:13;7:18;11:21; 27:21;28:16;36:20;37:7; 43:9;44:23;64:18;91:4; 92:25;93:1;98:2;99:16; 122:17;130:17;133:13; 135:13;136:7,11;137:3; 138:6 perceive (1) 110:12 percent (5) 46:12,12;56:9;81:18; 112:15 perfect (1) 3:4 Perhaps (4) 28:3;61:9;92:15;123:1 period (3) 13:18;41:16;113:6 permit (1) 78:24 person (18) 8:2;10:18;11:4;18:12; 25:2,18;105:16,17,17, 18;112:6,8;118:13;	130:18;136:15;138:25; 143:18;146:15 personal (3) 18:19;19:6;28:14 personality (2) 87:5,9 personally (1) 143:18 personnel (2) 2:19;89:25 persons (1) 25:8 person's (2) 63:6;136:16 perspective (8) 14:5,19;15:7;17:7,16; 18:1;66:7;78:4 Peter (1) 74:14 phase (2) 43:23;109:16 phenomenon (1) 75:23 phone (8) 23:9;39:18,21;40:4, 16;66:20;98:21;102:22 photographs (1) 5:11 physical (1) 116:22 physically (1) 114:11 pick (1) 111:2 picked (2) 59:11;148:24 piece (1) 145:13 pieces (4) 38:21;109:7;134:11, 23 pinpoint (1) 65:12 piracy (2) 89:20,22 pirate (3) 88:4,10;89:15 pirates (4) 88:17;90:1,4,8 pitch (1) 67:5 pitfalls (1) 126:23 place (11) 11:19;17:12;31:10; 34:2;55:8;106:9;131:18; 132:13,20,21;142:21 placed (1) 18:6 places (1) 18:3 plaintiff (4) 18:20;24:10;35:11;	38:11 plaintiffs (3) 20:2,8;117:11 plaintiff's (1) 71:25 plan (9) 16:2;34:12,17;36:5; 74:13;85:22;87:16;90:8; 125:25 plane (1) 66:10 planning (1) 79:7 plate (1) 31:25 plausible (1) 131:4 play (2) 142:15;147:10 players (1) 19:13 playing (2) 28:13;146:21 pleadings (1) 35:3 Please (4) 11:21;58:15;75:15; 149:17 pleasure (3) 12:22;13:11;14:13 plight (1) 48:15 plug (1) 15:16 plus (1) 94:11 point (37) 5:21;17:15,25;19:23; 20:16;21:5,20;22:10; 23:14;26:5;31:1;34:2; 35:2;38:16;39:24;52:20, 23;55:17,24;60:4;62:12; 65:8;69:22;74:7,14; 75:18;78:17;84:24; 97:21;101:17;104:18; 119:21;123:19;124:8; 136:16;140:22;148:18 pointed (1) 105:7 pointing (1) 20:5 points (9) 2:23;27:19;62:10; 64:21;78:24;91:20; 94:15;105:18;121:21 policy (2) 81:7;82:6 politician (2) 96:14;118:6 polluted (1) 96:17 Polovoy (1) 17:2
--	---	---	--	---

poor (2) 88:19;122:20	prank (1) 44:18	president (1) 107:14	problems (5) 35:5;16;47:9;76:9; 122:4	71:9
pop-ups (1) 50:10	pre (1) 55:20	pressed (1) 101:2	Procedure (2) 112:5;116:5	proof (8) 30:15;32:15;84:15; 107:23;109:7;119:15; 120:13;133:10
portraits (1) 5:17	preclude (2) 76:13;77:16	pressure (2) 60:13;62:10	proceed (3) 51:5;104:3;112:20	proofs (2) 96:9,10
portray (1) 148:4	prefer (2) 45:25;115:8	presumption (1) 134:14	proceeding (3) 14:14;39:25;112:21	propeller (1) 73:21
posing (1) 44:13	preferences (1) 71:8	pretrial (36) 34:13;63:4;70:22,22; 71:1,12;72:19,24;73:3; 17,22;74:7;75:2,5,16,21; 76:15,20;77:3,6,18;78:9; 20;81:22;83:9,12,15,20; 24,24;84:2,8,10,19; 85:10;86:19	proceedings (3) 4:5;14:16,17	properly (1) 124:4
position (9) 24:2;43:4;57:21;65:6; 100:23;101:6,7;111:22; 136:16	preferred (1) 43:19	pretty (4) 7:6,16,19;112:4	process (28) 15:2;18:4;31:23;34:9; 14;35:15;39:15;40:18; 43:3;48:12;62:19,20; 63:20;64:14,18,20; 72:19;74:20;75:2;76:10; 85:2,9,17;102:6;113:4; 117:3;121:8;127:12	proposal (5) 9:16,16;38:6,16;43:16
possibility (3) 20:7;78:14;98:23	pre-indictment (1) 111:2	prevail (1) 97:5	processes (1) 143:4	propose (2) 34:12;36:5
possible (7) 23:12;69:20;97:22; 98:1;99:12;103:20; 111:3	prejudice (1) 82:7	prevent (1) 125:16	produce (2) 20:3;22:12	prosecute (1) 88:4
possibly (5) 43:13;58:16;113:2,5; 142:19	prejudicial (1) 128:9	previous (1) 3:10	produced (3) 20:25;21:1,11	prosecuted (2) 88:11,17
poster (1) 14:11	preliminaries (2) 136:24;137:1	primacy (1) 137:2	product (1) 18:20	prosecution (15) 88:20;90:8;96:16,18; 98:7,10,16;126:19; 127:4,5,8;128:10,20; 139:6;140:22
potential (2) 121:21;126:24	preliminary (1) 117:25	Principally (1) 15:3	production (2) 41:11;62:21	prosecutor (5) 110:25;121:20; 122:24;123:24;140:25
potentially (2) 125:18;135:3	preparation (17) 15:6;16:1;75:25; 97:10;101:13;113:19; 114:7,8,9,15,18,18,21, 21;139:21;140:17; 141:24	principle (1) 96:2	Professional (3) 20:12;95:13,24	prosecutors (5) 91:3;109:4,15;110:11; 137:13
pound (1) 62:17	preparations (1) 79:21	principles (1) 59:4	Professionalism (5) 6:15,17,20;11:12;37:2	prosecutor's (2) 123:19;124:8
pour (1) 2:16	prepare (5) 74:15;117:4,5;134:13; 140:19	prior (1) 42:19	profit (1) 124:18	prospect (1) 73:3
power (1) 48:11	prepared (11) 17:1;20:20;71:20; 94:19,21;116:7;135:2; 25;142:19;143:2;145:2	prison (3) 28:18;31:18,19	program (22) 3:7;6:10,20,24;8:1; 10:7,15,21,24;11:9,15; 12:10;22:25;32:11; 33:12;86:10,13,25; 89:23;95:3,14,15	prospects (1) 85:14
powerful (2) 48:19;78:22	preparing (10) 17:3,4;61:20;70:22; 71:11,12,16;72:3;76:5; 142:10	prisoner (1) 9:22	programs (4) 7:3,4;24:20;95:10	protect (1) 100:5
practical (8) 14:6;19:16;29:6;61:5; 72:16;76:10;79:18; 84:24	prescribing (1) 118:2	private (4) 9:4;27:21;68:17;87:13	project (2) 5:16;60:11	protected (1) 31:20
practice (20) 6:11;9:4;13:1;16:17; 18:19;19:6;22:16;23:22; 27:13;36:2;40:21;52:24; 57:18;58:22;73:25; 76:24;78:1;80:25;87:25; 113:17	present (9) 35:5;40:16;41:3,24; 25;42:13;51:2;69:18; 122:10	privilege (9) 26:10;29:19;42:5,8; 11;49:13;91:12;95:18; 133:14	projected (1) 73:5	prove (20) 98:8,16;104:22; 118:13;120:25;126:16; 127:19,25;128:2;130:3; 132:3;138:9,10,17,19, 20,21;139:8,9;141:18
practiced (1) 90:25	presentation (6) 14:20;41:20;64:24; 147:13;148:21;149:3	privileged (2) 92:8,12	projecting (1) 126:21	proved (3) 138:11,12,13
practices (1) 17:4	presented (5) 49:19;50:1,6;79:2; 119:1	prize (1) 116:20	promise (3) 70:18;139:5;141:13	proven (2) 130:9,9
practicing (3) 40:6;50:7,10	presenting (3) 119:18;125:6;131:20	pro (4) 11:8;14:10;69:13,14	promised (1) 141:3	Provenzano (1) 92:16
practitioner (9) 11:6;12:8;15:2;18:14; 33:18;60:6;63:2;77:20, 25	preservation (2) 19:22;20:23	probably (11) 43:5;49:5;54:21;64:8; 100:4;103:15;107:4; 123:4;130:13;138:17; 144:20	promising (2) 140:22;141:21	provide (3) 59:5,17;76:2
practitioners (7) 2:18;9:17;36:18; 71:11;72:3;76:20;91:2	preserve (5) 3:14;20:3,6,11,22	problem (16) 20:19;21:5;25:6; 26:18;28:14;29:1,23; 34:15;37:2;42:17;43:15, 22,23;45:16;65:23; 72:20	prompt (7) 49:6,9;59:5,7,17; 80:11,23	provides (1) 109:10
practitioner's (1) 79:15	preserved (1) 20:9	problematic (2) 42:22;47:17	promptly (1) 103:11	prowl (1) 33:3
	preserving (1) 5:8		prongs (1) 114:20	public (8) 6:13;9:3;92:18,24; 104:11;109:1;116:15;

133:12 public's (1) 109:1 pull (3) 65:3;103:23;118:12 pulled (1) 140:9 pulling (3) 26:1;10;44:18 punched (2) 140:8,11 punches (1) 141:20 purchases (1) 106:9 pure (1) 123:5 purely (1) 122:10 purpose (5) 55:1;70:4,5;75:22; 143:3 purposes (2) 35:23;79:7 pursue (1) 35:21 pursuit (1) 124:20 push (2) 9:11;28:21 put (18) 11:22,25;16:25;17:11; 23;20:10;35:12;53:2; 56:11,13;65:2;67:5; 71:24;76:4;100:16; 127:22,25;142:14 puts (1) 7:3 putting (16) 5:11;7:4;10:14;43:4; 61:24;95:10;101:19; 102:7;108:12;121:8; 125:24;127:17;130:7; 142:1,2,5	92:21;93:13;94:10; 121:3;130:1 quo (1) 14:10 quote (2) 34:23;65:10	38:13 reality (3) 38:18;124:7;130:16 realize (6) 47:11;55:2;67:15; 94:18,18,19 realized (1) 89:1 really (54) 8:20;14:9;19:10;27:7; 28:8,20;30:14;31:14; 35:21;37:11,14,16,24; 38:6;40:23;41:23;45:16; 46:24;55:15,25;57:21; 58:1;59:12;60:9,18,21; 61:15,24;62:11;63:2,3,4, 18;65:12,15;68:11; 71:23;76:3,22;77:17; 78:23;80:18;87:9,10; 93:8;94:20;101:11; 104:10;105:19;118:25; 120:22;128:9;136:17,22 realm (1) 124:3 rear (1) 28:1 reason (11) 29:16;32:14;33:13; 46:6;49:11;50:2;61:4; 101:11;103:16;107:24; 132:8 reasonable (12) 83:4;106:25;107:1; 118:4;122:14;123:22; 130:6,10;131:5;132:3; 138:25;139:1 reasonably (2) 29:5;123:11 reasons (8) 80:22;81:16;96:14; 108:19;125:17;127:16; 130:24;137:9 rebuttal (4) 140:2,14;147:21; 148:13 receive (2) 4:12;10:19 received (3) 3:8;11:14;50:25 recency (1) 137:2 recent (1) 16:7 Recently (4) 73:2;94:6;118:18,20 reception (1) 4:11 receptive (1) 100:19 Recess (1) 90:17 recipe (1) 117:5	recitation (2) 42:11;120:13 reckless (1) 96:24 recognize (2) 27:12;71:23 recognized (1) 44:22 recollection (2) 145:20,22 recommend (1) 99:14 recommendation (3) 20:17;40:22;86:2 recommendations (1) 40:12 reconvene (1) 46:3 record (7) 43:4;46:2,3;100:23; 101:7;128:20;145:10 recorded (1) 134:25 recordkeeping (1) 25:22 records (8) 22:3,11,12,12;26:2,11; 30:4,12 reduced (1) 42:3 refer (1) 140:2 referral (2) 85:15,15 referred (3) 30:25;85:21;140:4 refine (1) 110:1 reflex (1) 115:24 reflexive (2) 115:12,13 reflexively (2) 53:23;54:10 refresh (2) 145:19,21 refuses (1) 63:17 regard (5) 15:25;16:3,5;23:21,22 regarded (1) 85:24 regarding (1) 52:2 regularly (1) 3:14 reimbursements (1) 125:2 reining (1) 126:21 reintroduce (1) 136:25 reiteration (1)	148:5 reject (1) 145:8 relates (7) 35:8;36:17;42:1; 52:17;64:3;85:14;86:25 relationship (1) 107:25 relatively (2) 122:6,8 relevant (4) 79:13;119:22;123:3,5 relief (1) 40:15 rely (5) 53:1;74:23;77:9,12; 115:24 remark (2) 100:25;101:14 remarkable (1) 39:21 remember (20) 5:18;6:3;16:18,19,20; 27:14,15;58:24,25; 64:24;70:15;73:20,21, 22,23;74:25;85:4; 120:10;136:13;137:3 reminded (1) 88:25 reminds (1) 113:16 removed (3) 36:8;57:18;63:1 removing (1) 15:19 report (1) 86:2 reporter (2) 45:4;82:8 reports (2) 77:13;98:4 represent (2) 9:21;103:14 representation (1) 31:5 representatives (1) 24:9 represented (1) 107:7 representing (1) 146:19 reproduction (1) 98:22 reputation (1) 48:21 requests (1) 42:22 require (4) 26:6;36:24;39:13; 78:12 required (1) 11:23 requirements (1)
Q				
quantitative (1) 96:6 quantities (3) 124:19,23,24 Querques (5) 99:2;121:14,19; 125:10;129:14 quick (8) 13:4;15:11;42:3,14; 48:17;58:5;70:24;145:6 quickly (3) 23:12;97:22;127:1 quid (1) 14:10 quite (8) 64:8;78:8;91:23;	reading (8) 14:20;52:4;66:16; 97:24;98:4,4,5;113:8 ready (17) 15:8;34:5;35:19;36:5; 64:14;77:21;79:24; 100:12,14;114:6,12; 116:17;129:22;133:20; 135:14,16;144:6 real (13) 41:1;44:25;46:4; 52:13;54:2;65:21,22; 97:12;116:12;118:15; 119:5;143:1;145:6 realistic (1) 59:17 realities (1)			

40:20 requires (3) 11:16;24:25;62:20 rescue (1) 5:17 research (1) 58:18 reserve (1) 78:17 resolution (15) 7:11;37:15;41:15,21; 43:16,21;44:6;45:1; 49:20;59:9;60:1;61:8; 85:14;86:21,24 resolve (12) 25:6;29:23;35:7; 42:12;43:15;45:16; 66:12;69:10;75:20; 82:25;83:2,4 resolved (6) 21:23;57:8;61:1;83:2, 5;112:16 resolving (1) 37:12 resources (2) 131:10,11 respect (3) 44:11;75:1;143:21 respond (8) 43:1,8,9,10;58:4,4; 110:15,17 responded (1) 147:14 responding (1) 58:4 response (6) 43:5,11,13;46:23; 54:11;148:16 responsibilities (1) 20:14 responsibility (3) 47:25;72:1;114:14 responsive (1) 41:11 rest (6) 41:18;93:15;101:13; 129:10,10;130:14 restore (1) 3:14 restrained (1) 44:19 restrictions (1) 118:24 result (9) 27:24;54:3;61:1,2,8; 76:10;86:11;116:25; 133:1 resulting (1) 63:13 results (1) 33:5 retain (2) 16:21;24:12	rethink (1) 120:19 retired (1) 107:11 return (3) 21:19;39:18;69:25 returned (1) 39:21 review (7) 15:12;16:7;26:6,9,10; 29:19;37:23 reviewing (1) 26:10 rid (1) 60:15 Ridgefield (1) 94:6 right (25) 7:7,9;8:1,4;39:7;45:2; 54:1;56:8;57:11;63:21; 77:12;82:19;94:3,8; 98:9;104:4;112:25; 123:25;130:15;133:8,12, 13;137:6;148:9;149:10 rights (2) 9:22,22 ripe (1) 78:25 ripping (1) 96:21 risk (7) 81:13;125:5;130:20; 133:12;137:21;141:8; 148:19 risky (1) 141:15 Rizman (1) 4:2 road (5) 59:19;63:12;72:21; 104:3;109:10 roads (1) 60:7 robberies (1) 105:4 robbery (1) 117:14 robust (1) 22:25 Rocca (1) 70:15 rod (1) 55:22 Rodrigues (1) 12:16 role (1) 85:13 roles (1) 142:15 roll (1) 141:20 room (10) 2:25;28:18;34:11;	36:20;37:7;40:14;43:9; 46:20;103:14;108:22 rooms (4) 31:16,17,22;39:7 rope-a-doping (1) 116:18 Roseland (1) 94:3 routine (1) 20:12 Rule (23) 15:25;24:25;26:18; 28:23;29:17,17;34:19; 39:6;55:9;59:6;60:17; 71:16;73:1;78:15,16; 79:10;81:10,13,18,19; 82:2;86:20;140:20 rules (28) 14:20,21;15:21;19:5; 20:12;29:16,17,17;36:2; 48:1,2,3,7;53:24;54:19; 63:4;73:10;83:12;86:10; 87:18;112:4;115:1,1,3,9; 116:4;124:3;125:13 ruling (11) 45:21;78:14,25;79:9; 80:12,23;81:13;112:1,1, 1,2 rulings (4) 49:9;84:20;120:2; 126:3 run (7) 23:5;44:21;50:13; 81:13;122:5;130:20; 137:21 running (2) 79:25;146:12 runs (1) 18:22	22:10;88:23;93:5 saying (10) 10:6,22;21:1;24:17; 42:15;62:11;116:12; 133:17;137:14;146:8 scams (1) 146:13 scare (1) 62:17 scared (1) 113:23 scary (2) 16:6;99:17 scene (1) 97:25 schedule (8) 34:8;38:3,6,14,24; 39:4;66:13;68:10 scheduled (3) 34:13;49:14;70:3 scheduling (3) 14:6;34:23;39:25 Scheindlin (1) 33:3 Scheindlin's (1) 17:18 scheme (1) 34:17 schmooze (1) 3:4 Schneider (1) 44:2 school (3) 93:6;102:13;116:13 schools (1) 6:16 screen (1) 62:5 se (2) 69:13,14 sea (2) 89:25;114:1 search (1) 124:21 searching (2) 26:2;111:11 seas (1) 88:4 seat (5) 45:2,3,3,4,5 seawall (2) 89:10;90:2 second (11) 5:4;27:14;69:6;73:6; 90:18;91:10,18;103:16; 108:24;124:5;127:3 secondly (1) 62:4 seconds (3) 136:15;147:4,6 section (1) 72:12 security (1)	89:25 seeing (1) 13:13 seem (2) 71:6;83:3 seems (3) 55:2;66:17;114:17 selection (4) 100:15,20;104:10,10 self-executing (1) 36:12 selling (2) 96:17;124:19 seminar (4) 111:12;114:17;115:7; 117:7 seminars (1) 113:15 send (3) 40:1;52:24;53:5 Sendak (6) 148:24,25;149:1,4,6,7 sending (2) 40:3;69:3 sense (3) 38:25;64:17;130:17 sensitive (5) 31:13;32:1,6;33:23; 49:16 sent (1) 34:19 serious (1) 79:9 seriously (2) 79:4;112:9 seriousness (1) 15:17 servant (1) 92:19 served (4) 13:18,24,24;14:3 service (1) 92:24 serving (1) 13:16 set (9) 14:25;27:23;34:7; 66:4;72:23,25;78:9; 83:18;87:15 sets (1) 135:9 setting (2) 6:17;119:19 settle (3) 59:22;62:9;75:10 settled (3) 57:5;61:10;83:1 settlement (7) 35:23;37:13;55:9; 57:4,5;61:9;63:14 settlements (1) 61:2 seven (4)
		S		
		same (18) 11:19;19:25;25:18; 26:20,21;33:8;46:15; 47:9;50:10;64:3;67:7; 78:2;118:11;132:5,22; 133:18;137:7;141:3 sampling (1) 29:13 sandbar (2) 89:4,6 sandbox (1) 47:13 sane (1) 65:10 sat (1) 97:19 Satz (1) 4:1 save (3) 138:22;145:5;148:13 saw (3)		

15:9;73:5;111:16; 144:5 several (1) 16:15 shaking (1) 107:19 shape (2) 7:14,16 share (3) 34:14;38:23;41:7 shareholders (1) 96:22 sharing (1) 149:17 Shaw (1) 66:5 sheets (1) 66:3 shifted (1) 70:15 Shira (1) 33:3 shlemiel (1) 122:20 shocking (1) 40:9 shoes (1) 29:21 short (3) 13:4;52:3;75:20 shorter (1) 73:16 shortly (1) 49:19 shots (1) 147:19 shoved (1) 140:24 show (9) 21:6;57:22;70:6; 106:20;123:17;139:8; 145:7,19;146:1 showing (1) 148:19 shown (1) 123:16 shows (2) 33:16;132:25 Shwartz (34) 14:2;19:20;24:5,23, 24:26;3;28:22;34:6,10; 36:4;37:5;38:4;39:5; 40:5,9,11,13;42:24;44:9; 47:7,15;48:4;49:4,7,18; 51:20;52:19;53:10; 70:24;71:14;74:10,12; 84:5;86:9 Shwartz' (1) 21:16 side (25) 15:2;22:19;27:1; 28:11;29:9;30:11;32:16; 39:17;40:2;42:20,25,25;	61:22;69:7;71:23;72:5; 74:17;78:3;96:8;97:2,7; 107:16;110:16;117:24; 131:2 sidebar (1) 140:15 sides (4) 33:20;71:25;72:1;85:8 sidewalk (1) 122:16 sign (5) 11:17,17,24,24;149:18 signed (3) 10:16;11:19;14:10 significant (2) 60:13;139:4 significantly (3) 16:2,24;60:22 signing (1) 11:18 Silber (1) 129:3 silence (2) 43:1;49:15 silo (3) 143:16,20,22 silos (1) 143:16 similar (1) 89:1 Similarly (2) 77:9;106:14 simple (3) 59:4;88:22;114:17 simply (5) 53:8;56:6;66:16,19; 131:6 single (1) 18:20 sister (1) 2:7 sisters (1) 107:15 sit (13) 15:20;19:2,14;24:8, 14:44;14:60;10:66;21; 111:21;112:24;113:12; 121:14;136:11 site (3) 3:20;4:16;87:2 sits (1) 24:15 sitting (3) 4:5;19:7;26:8 situation (5) 30:4;33:9;49:11,17; 89:1 situations (1) 39:16 six (8) 30:17;31:24;33:14; 41:15;59:13;110:10; 144:5,15	skill (2) 116:9,10 skilled (5) 90:22;94:5,18;114:25; 144:1 Slavers (1) 90:4 slightly (1) 105:3 slim (1) 63:10 slips (1) 89:11 slow (1) 136:17 small (2) 11:5;18:25 smart (1) 88:21 Smith (3) 32:12,12;79:12 Smugglers (1) 90:5 Society (8) 2:3,8,11;3:2,21;5:2,7; 6:8 software (1) 30:7 sold (2) 96:15;106:10 solely (1) 129:11 Solomon (1) 144:19 solve (2) 29:1;35:15 solved (1) 29:3 solving (2) 37:2;43:23 Somalia (2) 88:16;89:24 Somalis (1) 89:8 somebody (21) 12:3;19:21;20:20; 33:11;46:20;50:19; 51:12,14;55:23;83:7; 87:6,10;100:9;118:1,2, 12:127;20:24;132:6; 136:12;140:22 somebody's (1) 65:8 somehow (1) 63:11 someone (19) 24:15;33:9;43:2; 51:17;77:14;80:14,17; 92:11;93:15,16;99:3; 102:2;103:21;105:6; 106:16;111:15;114:15; 134:11;135:12 someplace (1)	64:7 sometimes (52) 22:23;24:18;26:1; 29:2,11;30:6;33:19; 36:14;37:5,14,19,20,24; 38:15;41:22;42:5,9; 43:18;47:10,15;49:12, 18,24,25;50:17;52:1,5; 53:20;56:21;64:9;65:16; 67:10,13,20;69:17; 71:14;72:5,24;75:10; 81:20;85:6;87:8;99:4; 108:25;115:13;116:14, 21;121:24;124:8; 126:20;129:17;148:13 somewhat (5) 16:6;31:15;66:6; 73:18;96:24 somewhere (2) 10:17;102:2 son (1) 148:21 sons (1) 102:24 soon (1) 145:17 sooner (1) 129:24 sophisticated (3) 19:6;115:11;128:17 sophistication (5) 16:10;18:16,18,23; 19:4 sorry (2) 4:3;61:14 sort (11) 21:19;29:8;41:4; 72:15,22;78:13;85:10; 119:4;125:11;130:23; 139:10 soul (1) 96:17 sound (2) 15:15;130:15 sounding (1) 2:22 South (1) 12:17 Southern (4) 16:9;23:21;26:19; 106:5 span (1) 134:24 speak (4) 25:8;44:23;49:24; 111:18 speaking (3) 52:2;91:1;130:2 spearheaded (1) 5:11 special (1) 71:8 specific (5)	14:21,22;40:20;78:8,8 spectator (1) 25:9 speed (3) 15:10,11;53:14 speedy (2) 59:6,7 spend (5) 113:2;117:7;134:17; 144:4;147:2 spends (1) 101:1 spent (3) 13:21;102:13;144:5 spit (1) 96:7 spitting (1) 122:16 split (1) 5:5 sponsoring (1) 36:19 spot (2) 46:5;84:20 spring (2) 8:12,13 square (1) 119:18 staff (1) 47:19 stage (4) 15:1,24;57:8;60:15 stake (1) 104:14 Stan (1) 9:15 stand (9) 22:2;93:23;113:18; 141:4,14;142:14;143:2; 146:19,22 standpoint (3) 23:2;77:25;79:15 Stanley (3) 4:2,7;92:11 staples (1) 65:1 star (1) 138:21 start (12) 24:2;37:17;95:3; 101:22,24,25;102:1,10; 104:8;134:14;136:21; 140:6 started (5) 44:10;64:25;91:5,6; 107:19 starting (1) 144:16 starts (2) 128:6;129:3 State (17) 6:16,18;8:23;11:16; 36:13,21;40:23,24;41:9;
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44:13;63:2;71:22;90:23; 104:11;106:21;107:1; 115:21 stated (1) 54:24 statement (11) 101:19;122:7,12,21; 123:5,12;126:2;136:4,9; 138:1;147:18 statements (1) 98:4 states (3) 18:3;91:11;146:19 stating (1) 52:9 statistic (1) 57:2 statistics (1) 58:12 statue (2) 3:15,16 status (1) 86:4 statute (2) 98:12;127:7 stay (2) 87:19;133:19 steal (1) 107:17 steam (1) 73:20 step (6) 8:7;23:13;27:9;38:10; 51:6;117:23 stepping (1) 14:8 steps (3) 21:10;96:24;132:17 Stern (1) 73:24 sticking (1) 78:24 still (9) 5:5;25:18;57:15; 90:14;116:22,23;133:20, 24,25 stinks (1) 102:24 stipulated (3) 72:6,8;77:7 stipulations (1) 72:4 stock (2) 106:7;118:2 stodgy (1) 2:14 stomach (1) 113:25 stood (1) 93:15 stop (1) 133:19 stopped (1)	120:18 stored (6) 16:4;19:15,19;22:25; 24:21;35:8 story (5) 102:11;103:10; 108:21;138:24;139:10 straightforward (1) 122:7 strata (1) 57:10 strategies (1) 91:6 strategy (4) 91:7;120:4,6;131:7 street (1) 94:4 strength (1) 116:23 stretched (1) 56:7 Strike (3) 92:14;97:15;98:7 strikes (3) 48:18,19;138:14 strong (2) 20:10;98:22 strongly (1) 99:13 structure (3) 97:14;138:6,14 strut (1) 68:1 stuck (1) 41:13 students (2) 93:7;116:13 study (1) 102:15 studying (4) 93:6,8;102:15,16 stuff (5) 33:4;62:1,5,11;68:1 style (1) 65:24 Suarez (2) 94:9;106:15 sub (1) 3:20 subconscious (1) 113:8 subject (9) 17:21;23:21;42:2; 68:7;71:5;87:4,11; 135:8;144:2 subjective (1) 18:3 submission (2) 71:19,21 submit (1) 49:12 substance (1) 124:15	substantial (3) 25:23;26:13;68:20 successful (3) 11:8;54:3;102:17 successfully (1) 147:11 succinctly (1) 130:14 sudden (3) 31:24;77:14;80:16 suddenly (1) 67:14 sufficient (4) 9:20;123:20;125:16; 141:19 sufficiently (1) 51:2 suggest (1) 21:14 suggesting (2) 68:12;82:5 suggestion (4) 25:6,20;72:7;76:20 suggestions (1) 71:10 suit (2) 65:5;103:8 suits (1) 65:4 summary (11) 54:18;55:4;58:19; 61:1,4,8;63:12,13;64:3, 5;69:23 summation (6) 101:2;129:2;139:24; 140:2;148:1,14 summer (1) 39:8 sumptuous (1) 2:21 Superior (2) 13:25;102:20 supervising (1) 34:20 supervisor (2) 91:14;92:6 support (4) 6:8;11:7;58:16;123:13 supported (2) 22:7,7 supporting (2) 3:9;55:16 supportive (5) 8:17,19;10:5,13;12:9 suppose (1) 66:15 supposed (4) 8:3;33:12;52:4;74:18 Supreme (1) 4:8 sure (31) 2:10;10:8;15:21; 16:12,22;20:13;22:20;	23:11;24:11;37:21;39:7; 42:13;47:21;51:13;60:6; 64:8;71:2;76:16;83:1; 90:13;98:12;102:9; 104:24;109:4;115:25; 118:11,14;130:11; 139:17;141:18,19 surprised (4) 35:10;45:6;68:5;113:7 survival (1) 17:4 suspect (1) 103:25 Sustained (1) 115:18 Swan (1) 55:17 swearing (1) 102:19 Sweeney (1) 13:23 swelling (1) 89:14 system (2) 25:19;59:12 systems (4) 24:16;25:1,3,8 T table (5) 43:15;54:19,20;62:13; 145:24 tabs (1) 61:23 tailor (2) 38:14,24 tainted (1) 96:16 talk (23) 2:2;7:18;14:7;17:13; 19:13,16;24:10;25:9; 29:15;35:9,20,20;36:11; 37:11;39:14;53:13,17; 84:12;94:20;99:15; 109:15;112:6;143:10 talked (8) 37:6,7;44:1;71:16; 82:17;115:7;117:12; 127:15 talking (28) 13:20;16:15;19:12; 20:19;28:19;33:2;37:17; 58:13;65:4;78:21,22; 81:21;82:11;85:12;95:3; 97:25;100:24;102:21; 105:24;106:19;109:22; 117:24;119:9;121:25; 126:22;130:22;132:6; 134:21 tangle (1) 89:7 tangled (1)	89:25 tape (1) 137:17 tapes (1) 26:7 taught (1) 80:7 teach (1) 116:13 teaching (2) 89:20;90:3 team (2) 93:17,18 tears (1) 103:5 technical (2) 69:22;125:15 technique (1) 145:12 Ted (4) 70:15;99:19;100:24, 25 teed (2) 78:25;82:4 teeing (2) 58:14;79:15 tees (1) 135:9 teller (1) 105:7 telling (2) 123:25;139:9 tells (2) 7:25;57:9 tend (3) 28:7;43:9;105:1 tendency (1) 24:8 tenure (1) 120:10 terms (36) 5:8,9;15:5,7;17:14; 18:15;22:24;28:15; 29:20;37:1;40:10;43:25; 45:12;51:18;53:18; 65:22,23;71:10,11;72:3; 75:13;79:15,19;85:24; 86:5,16;98:7;99:20; 100:4;107:3;125:22; 127:17;128:19;129:19; 137:20,25 terrible (1) 137:10 terribly (2) 44:15;48:11 terrific (2) 12:10;13:14 test (2) 29:5,13 testify (10) 79:12;134:13,15,15, 19,20;135:3,6;139:14; 140:23
--	--	---	---	--

testifying (1) 138:22	121:10;125:9;141:6	5:11;7:4;10:14;39:9; 61:25;71:24,24;95:10; 99:25;101:3,19;102:7; 108:13;121:9;130:8; 142:2	Trenton (1) 5:15	23;35:16;37:16;43:21; 47:25;53:3;59:13,21; 65:15;73:1;78:11;80:22; 84:9,11,12;86:22;87:15; 94:22;95:15;97:23; 101:2;105:18;112:18, 25;113:1,1;116:13; 127:4,14;128:4;131:18; 133:2;134:12;135:18; 142:11,19,25;147:1
testimony (6) 77:13;82:9;124:22; 139:14;140:4;145:9	thoughts (1) 149:17	thousands (5) 61:22;134:25;135:22; 144:14,15	trial (115) 7:17,18,19;15:8;22:2; 30:23;35:18,22;38:20; 56:17,20;57:12;58:12, 15;59:17,21;60:23; 62:10;63:22;64:14;72:8, 14,14,23;73:5;74:2,5,14, 15,19;75:2,8,20;76:13, 24;77:2,10,16,19,21,23; 78:2,14;79:5,21,24; 80:16;81:3,23,23,25; 82:25;83:3,9,19,25; 84:18;86:4;90:19,22; 91:6,7;92:2;93:11,12,14, 20;94:5,12;95:4;96:3; 97:16,18;98:9,25;99:16, 16;100:2,2,7;101:18,21, 23;106:5,7;108:7;110:9, 10;111:6,13;112:12,13, 22;113:11,18;114:12; 115:5;116:17,20;117:6, 19,22;120:4,5;125:6; 126:2;128:25;130:1,25, 25;131:6;134:18;141:5, 25;143:5	trying (33) 5:20;27:15;35:15; 39:17;56:17;62:23,24; 63:15;69:1;74:8;79:19; 80:17,17;81:24;82:18; 95:18;100:4;110:5; 115:23;116:9,10,15; 118:9;128:20,22,23; 129:23;132:8,12,21,24; 139:22;142:7
testing (2) 48:16;146:1	three (18) 3:22;12:7;14:15; 18:11;30:3,19;31:24; 32:4;44:7;47:1;51:9; 59:14;62:12;67:23; 128:8,12;133:6;136:14	toiling (1) 8:22	78:22	t's (1) 76:12
tests (1) 146:4	threshold (2) 46:25;47:5	told (3) 102:22;139:7;149:5	top (4) 44:7;89:10;116:7; 117:6	Tune (1) 7:11
texting (1) 98:21	thrilled (1) 93:8	took (11) 12:19;45:18,23;55:18; 96:14;106:9,16,17; 132:21;133:11,12	topic (8) 2:20;12:23;14:25; 16:5,7;19:9;53:15;82:13	turn (5) 8:1;37:20;38:5;145:6; 147:4
Thanks (2) 12:12;110:22	throat (1) 140:25	tool (4) 22:19;29:18;75:11; 78:22	topics (5) 14:6,23;15:10,12; 16:16	turned (1) 120:15
theme (36) 94:22;95:4;96:11; 97:6;98:24;100:3,18; 102:7;105:12;107:20; 117:22;119:14;121:10; 126:8;130:8;132:5; 133:11,16;134:3; 135:23;136:4,21;137:5, 8,11,20,25;138:1; 139:17;143:5,7,8; 146:12;147:15,20;148:5	throughout (2) 109:22;110:4	top (4) 44:7;89:10;116:7; 117:6	total (2) 113:19;134:4	turnout (1) 8:14
themes (4) 107:3;121:25;135:20; 138:4	throw (3) 73:12;101:3;142:18	total (2) 113:19;134:4	totally (3) 30:17;69:9;138:21	Turnpike (2) 71:7;87:22
theories (3) 74:1;110:1;128:13	throwing (1) 62:15	touched (1) 135:23	tough (1) 113:21	turns (1) 103:24
theory (51) 27:22;81:17;96:11; 97:4,6,16;98:10;100:12, 14,19,23;101:12;104:9, 17,24;106:13;107:23; 108:4,14;109:8,12,20, 24,25;110:13,17,18; 118:15;120:23;124:6,9, 20;125:7;126:19;127:3, 5,8,10,13;128:5,10,13, 21;130:16;131:25; 137:20,21;139:3; 141:17;148:9;149:9	thrown (2) 54:15;69:16	tour (2) 28:18;31:17	touring (2) 28:17,17	twice (1) 103:23
therefore (5) 21:2;22:8;96:18; 123:17;128:1	tick (1) 67:24	touring (2) 28:17,17	towards (1) 142:8	two (27) 4:25;6:19,21;7:7,8; 12:6,19;19:23;27:4; 30:11;32:17;51:9;67:23; 82:18;83:8;91:20; 102:24;103:14;107:14; 117:13;126:25;128:7,12, 13;136:14,22;147:19
thick (1) 144:20	ticket (2) 118:21,23	tradition (1) 13:8	track (1) 59:13	Twombly (2) 55:20,21
thinking (25) 48:14,17;77:23;99:8; 101:22;104:8,21;105:1; 106:2,12,17,19;120:1,3, 5,21;122:1,23;123:25; 124:6;126:1,4,20;131:3; 141:9	Ticketmaster (1) 118:24	train (3) 66:9;116:24;117:1	trading (2) 106:4;134:22	tying (1) 139:19
Third (4) 98:15;109:3;140:14; 148:22	ticking (1) 49:8	transcribing (1) 4:5	tradition (1) 13:8	type (5) 28:1;51:15;76:25; 112:20;114:9
though (3) 58:21;105:22;109:18	tie (1) 8:12	transcript (1) 65:9	train (3) 66:9;116:24;117:1	types (7) 42:1;115:5;116:16; 117:13,15;121:9;123:14
thought (14) 44:18;77:1;80:14,18; 88:2,2;110:15;114:17; 115:2;118:18;120:9;	tied (1) 38:22	translates (1) 23:8	transcribing (1) 4:5	typical (2) 63:2;125:2
	tight (1) 137:19	traps (1) 126:24	transcript (1) 65:9	typically (2) 68:14;84:6
	timely (1) 58:5	treating (1) 125:3	translates (1) 23:8	
	times (17) 24:8;25:5;30:4;32:5; 38:14;47:1;49:7;72:18; 73:16;74:23;75:11; 106:8;113:16;115:22; 128:8,12;137:13	tree (1) 56:13	traps (1) 126:24	ultimately (4)
	tip (2) 41:7;129:23	trees (1) 12:18	treating (1) 125:3	
	Title (1) 23:3	tremendous (1) 48:16	tree (1) 56:13	
	today (17) 4:4;7:22;8:13;9:15; 12:6,9;14:7;17:1;53:14; 55:17;90:24;91:9;92:8; 93:25;94:25;147:17; 149:17		try (42) 5:16;25:6;28:25;29:8,	
	today's (1) 33:2			
	toes (1) 8:8			
	together (16)			

94:22;97:5;102:4; 118:10 unbelievable (1) 61:16 under (8) 15:25;16:13;48:1; 54:2;73:10;103:2;118:6; 125:6 understandings (1) 112:4 understands (1) 105:5 undivided (1) 5:3 unfairly (1) 128:9 unfortunately (3) 20:18;25:20;47:8 Union (9) 93:11;107:6,9,10,14, 14,15,17;133:7 unique (1) 110:20 United (2) 91:11;146:19 unless (2) 40:2;70:1 unmercifully (1) 140:25 unnecessary (1) 66:14 unusual (1) 31:21 up (80) 2:9;3:6;5:5;6:17;7:5; 10:16;12:17,19;15:21; 21:25;22:4,6,10;24:23; 26:12;30:11;31:6,25; 32:7;33:18;34:16;36:14; 38:10;22:41;16:42;6:16; 43:14,21;46:11;48:10; 56:12;57:3,15,19;58:14; 59:2,11;68:22;69:10; 70:6,9;71:7;72:9;77:23; 78:18;79:1,15,17,24,24; 80:9;81:3,4;82:4;87:15, 21,22;89:9;94:7;110:18; 113:25;119:13;121:4; 124:10;127:13;128:6; 133:22;135:9,10;136:17, 23;137:7;142:18;146:5, 19,22;147:17,19;148:20 update (1) 2:8 upon (6) 2:19;41:6;74:23;77:9, 12;121:22 upset (1) 57:1 urge (3) 10:21,23;12:2 urging (1) 12:3	use (27) 22:17,20,23;29:13,18; 53:17,18;57:22;71:2,4; 72:9;74:21,22;75:6; 76:22;77:5;78:5,6;89:5; 95:5;97:7;100:19;106:4; 107:3;136:3;138:6; 147:8 used (6) 23:1,9;34:25;39:22; 66:2;74:24 useful (11) 48:3;67:19,20,23,25; 68:4;78:9,11;79:7; 83:10;145:1 uses (2) 93:22;147:7 using (5) 53:22;93:20,21; 137:25;141:25 usually (6) 20:5;46:23;50:15; 62:6;93:22;102:2 utilization (1) 85:23 utilize (1) 147:19 utilized (1) 127:6 utilizing (2) 91:6;93:23	57:4 vice (1) 58:20 vicinages (1) 6:18 victim (1) 93:23 victories (1) 94:11 view (18) 21:5;29:13;35:2; 38:16;64:21;74:3,8; 75:18;84:25;88:15; 97:22;104:15;109:18; 121:21;123:19;124:8, 11;140:22 viewpoint (1) 79:17 violated (1) 119:3 violation (3) 119:7;125:15;127:12 violent (1) 133:1 Virginia (3) 5:4,5;88:18 virtual (1) 58:15 virtue (1) 29:2 VOICE (4) 52:20,23;83:8;98:21 voices (2) 44:22,23 voir (1) 131:23 volume (4) 50:20;61:16;66:25,25 volunteers (1) 10:13 vomit (1) 114:1 vote (1) 69:19	wants (8) 30:12,13;38:11;41:24; 53:7;74:10;119:17,20 war (4) 28:18;31:16,17,22 warning (1) 22:18 warrant (2) 124:2,21 warrants (1) 122:19 warships (1) 88:19 Washington (1) 7:8 waste (1) 67:21 Watch (2) 37:21;95:21 waving (1) 12:18 way (56) 4:13;7:7;10:8;11:7; 21:3;27:21;28:18;29:4; 34:19;37:17,22;40:20; 42:14;43:14,15;50:10; 51:7,16;52:10,12;56:19; 57:3,14;59:16;62:11; 63:7,21;64:18;69:2; 75:1,19;80:11;82:25; 84:6;86:24;90:2,93:18; 101:21;102:18;104:18; 117:17;118:5;122:11; 126:12;129:8;130:18, 21;131:14,21,24;132:5; 136:1;137:12;139:19; 143:7;148:19 ways (3) 29:22;30:11;97:2 wealth (1) 3:25 weapon (1) 93:22 weather (2) 8:11;12:14 web (3) 3:20;4:16;87:2 week (3) 51:11,12;148:23 weekend (1) 99:4 weeks (2) 38:20;66:18 weigh (1) 29:11 Welcome (5) 8:10;55:2;78:15;79:3; 92:4 Wells (1) 100:24 well-tried (1) 148:1 weren't (3)	21:2;50:9;129:20 Wettre (2) 2:2,4 what's (15) 26:13;32:18;37:1; 43:22;53:2;65:20;67:11, 15;75:7;106:6;115:15, 20;140:20,21;142:24 wheeled (1) 62:1 Whereupon (1) 103:7 Whipple (2) 11:1;66:4 white (6) 33:17;110:9;122:9; 123:20;141:25;142:1 whole (3) 8:18;57:10;143:3 whose (1) 3:22 wife (5) 102:21;103:1;107:13, 18,23 Wigenton (1) 14:9 willng (2) 27:23;60:23 win (11) 97:7;104:22;111:12; 117:1;119:23;120:25; 131:14,14,15,15;149:12 wind (1) 136:17 winds (1) 3:25 winning (4) 3:16;113:18;114:20; 135:7 wins (1) 96:2 winter (2) 12:15;39:8 wiretap (1) 23:3 Wise (1) 118:21 wish (2) 37:18,21 within (4) 10:18;54:19;109:6; 124:3 without (9) 11:18;19:7;44:5; 53:25;60:1;81:18;82:7; 120:20;133:8 witness (25) 22:2,11;38:8;45:3,24; 46:1;79:8,21;85:4,5; 93:23;96:17;129:6; 138:21;139:10,13; 142:11,14,16,23,25; 143:9;145:4,14,15
	V			
	vacancies (1) 7:8 valid (1) 74:14 valuable (3) 3:22,24;30:16 valued (1) 4:25 vanishing (2) 7:18;58:12 variations (1) 138:24 variety (1) 14:23 various (2) 24:19;125:17 Vasquez (1) 146:16 Vazquez (1) 94:14 venue (1) 88:3 veritable (1) 116:20 vernacular (1) 97:7 versa (1) 58:20 versus (1)	wait (4) 12:14;66:18;73:6;85:3 waive (3) 71:4;73:11,15 waived (1) 76:6 Waldron (1) 5:13 walk (3) 95:17;101:10;113:21 walked (2) 93:10;105:6 walking (1) 113:24 wall (2) 102:23;103:4	W	

<p>witnesses (11) 45:20;74:1;77:11; 81:24;85:3;91:6;98:1,2; 129:12,17;142:4</p> <p>witty (1) 92:1</p> <p>woman (2) 61:24;145:13</p> <p>women (1) 113:21</p> <p>won (1) 106:14</p> <p>wonderful (5) 3:10;12:13;124:9; 139:10,23</p> <p>wondering (1) 30:9</p> <p>wonderland (1) 12:15</p> <p>word (2) 109:14;140:14</p> <p>words (1) 102:24</p> <p>wordsmithiness (1) 72:5</p> <p>wore (1) 8:12</p> <p>work (16) 34:8;39:25;46:24; 47:25;66:17;69:1;72:23; 74:22;89:11;92:2,15,16; 96:4;133:8,13;136:17</p> <p>worked (4) 36:1;39:4;107:14,15</p> <p>working (3) 13:11;22:24;85:18</p> <p>works (2) 56:19;113:8</p> <p>world (1) 33:2</p> <p>worse (1) 55:20</p> <p>worth (2) 131:9,12</p> <p>worthy (1) 102:5</p> <p>Wow (1) 45:7</p> <p>wrapped (1) 124:10</p> <p>wrench (1) 54:15</p> <p>write (7) 11:3;20:23,24;39:18, 24;58:5;66:22</p> <p>writing (3) 21:11;42:3;43:6</p> <p>written (8) 23:17;24:3;27:17; 28:23;56:25;96:1; 102:23;103:8</p> <p>wrong (2) 47:4;71:4</p>	<p style="text-align: center;">Y</p> <p>yea (1) 113:13</p> <p>year (5) 4:4;14:14;30:23,24; 110:11</p> <p>years (23) 3:23;5:6,19,23;13:14; 14:15;16:18;23:9;32:17; 44:4,24;59:14;64:4; 66:2;92:20,25;100:24; 107:5;111:12;116:22; 134:5,25;136:6</p> <p>York (1) 134:22</p> <p>young (11) 12:21;17:2;42:18; 48:18;68:25;80:4;91:5; 99:14;114:4;116:23; 136:7</p> <p>younger (13) 27:5,9;28:8;34:18; 46:19;48:15;58:17; 68:19,20;99:1,22;100:3; 103:7</p> <p style="text-align: center;">Z</p> <p>Zanzibar (7) 7:20;13:19;88:2,25; 89:3,18,23</p> <p>zone (3) 45:22;97:15;98:7</p> <p>Zoubek (58) 8:8;12:5,12;16:16; 18:9;19:9;21:25;22:14; 24:5;25:23;27:2;30:1; 32:2,6;33:17;35:25; 37:3;38:1;39:1,23;40:8, 10;42:17;43:25;46:19; 47:13;48:3,13,25;51:16; 52:14,21;53:8,12;55:11; 60:5;61:13;63:20;64:12; 67:2,7;68:17;69:17,21; 70:13;71:10;72:17; 76:18;77:20;79:14; 80:24;82:8;83:7;85:13; 87:21;89:17;90:6,13</p>			
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