In The Matter Of:

Federal Bar Association

Transcript of Proceedings

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ASSOCIATION OF THE FEDERAL BAR OF NEW JERSEY

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JUDICIAL CONFERENCE

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orted by: Howard A. Rappaport, C.C.R.

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MR. LACEY: Good morning, everyone. I want to first introduce Leda Dunn Wettre to talk about the Historical Society of the Federal Court.

MS. WETTRE: Good morning, everyone. I feel like a bit of an intruder here, because this is the Association of the Federal Bar gathering, but I am from a sister federal court group, the Historical Society. I'm here to give you a very brief update on what we are all about and what we have been up to.

First, I'm not sure if all of you know what the Historical Society is, so I think I should tell you what it is and, more importantly, what it isn't.

What it isn't is a group of stodgy academics who meet in the courthouse on Friday nights to pour over historical documents. That's not us.

What it is is a group of federal practitioners like yourself, judges and court personnel, who meet -- we gather based upon an historical topic, and invariably after our event is over, we gather for sumptuous hors d'oeuvres -- and I hope this is sounding better to you -- Judge Debevoise points out more than hors d'oeuvres, and there are a few beverages involved.

So if you are in this room this morning, you are a natural fit for membership in the Historical Society, because I know if you're here, you like to learn something about the district and you like to schmooze federal judges. You are perfect for us.

Here's what we have been up to and some of the things we do. Last fall we had a program that was very well attended, very well received, about the five supporting federal court groups internally.

The previous fall we had a wonderful tribute to the past 13 chief judges of the District, and we had anecdotes about all of them given by people who actually knew them.

We regularly restore and preserve courthouse artwork, including our Lady Justice statue that is an award winning statue with a fascinating history that's in the Lautenberg courthouse in Newark.

We also take oral histories that you can see on the District Court's web site. There is a sub page for the Historical Society, and it is such a valuable thing because three of the individuals whose oral histories we have taken in the past few years has since passed away, and it is just so valuable to have their wealth of information available to all of

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us. That includes Judge Ackerman, David Satz and Stanley Rizman.

I'm sorry to get emotional, but he would have been here today. He was here last year, where Howard is sitting, transcribing the proceedings. It makes me feel very happy that we have something lasting of Stanley.

We annually do a Supreme Court admissions trip, which is a lot of fun, and that's open to our members, and then for members only we annually have a judicial reception, and you will receive our newsletter.

I hope I've gone a little way to convincing you to join. I believe we have membership applications here, but if we don't, they are certainly on our web site, and I hope to see everyone at our next event. Thank you.

(Applause.)

MR. LACEY: Thank you, Leda.

I now want to introduce the Chief Judge. Chief Garrett Brown.

CHIEF JUDGE BROWN: Well, I guess I'm a man that doesn't need an introduction, because I didn't get one, John.

I find myself between two of our valued

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

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

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

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

(Applause.)

CHIEF JUDGE BROWN: I don't know if I need your congratulations. Maybe I need your condolences.

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

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

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

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

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

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

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

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

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

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

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

MR. LACEY: Right here, your Honor.

(Applause.)

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

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

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

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

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

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understand what we go through.
Many of them have come out of the U.S. Attorney's office, the Federal Public Defender's office or private practice. It is incredibly important for them to understand what we do, and they just get it each and every day.
So, on behalf of the organization, I just want to say to all of you judges, thank you so much just for being you and understanding what we do and giving us some leeway when we need it, and also giving us a little bit of a push when we need it as well. Thank you very much.
(Applause.)
MR. LACEY: Last fall Chief Judge Brown and Judge Stan Chesler, who will be here later today, came to us with a proposal. It was a proposal to help both the Court and practitioners in the court.
The court, as many of you know, has many indigent defendants appearing before the judges. In many cases there is not a sufficient number of counsel to represent these folks. Many of them are prisoner rights cases or other civil rights cases.
They need our help. We advise the Court that we would help the Court, and in doing so we also help ourselves, because it gives the opportunity for

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many of our firms and many of our members to appear before judges to argue motions, to have trials that otherwise these folks would not have in this day and age.
The judges have been very supportive in saying to us that, especially for those lawyers involved in this program, they will go out of their way to make sure there are going to be court appearances, that there will be motions heard. You will have the opportunity to argue them before the District Court.
Of course, we as an organization will be supportive of any of those volunteers who help the indigent defendants. So we are putting together a coordinated program led by Bob Goodman and Ed Cole of the organization. And they have already signed up somewhere around 30 to 40 firms, and each of those firms has a contact person, and within those firms are individuals who will be able to receive appointments from the Court.
As part of this program I want to urge all of you -- and I will be saying it again later in the morning -- I want to urge all of you to participate in the program. You can contact us, either by e-mailing me at jlacey@connellfoley.com or

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Bob Goodman or Ed Cole or Ginny Whipple at the Association of the Federal Bar.
You can also write to us. Just drop me a line at any time. Be the contact person for your law firm. If you have a small firm or you are an individual practitioner, give me a call. We will support you in any and every way that we can to make you successful as a participant in this pro bono program. So thank you very much on that issue.
The judge has already mentioned our participation in the New Jersey Commission of Professionalism, so I won't bore you there.
Most importantly, the mandatory CLE. Each one of you received a packet this morning. In order to get credit, we now have a program administered by the state Bar, and it requires that you both sign in and sign out. If you want the CLE credits, do not leave this building without signing out at the same place where you signed in this morning.
Please, people forget and they want to call Ginny after the fact and say, Ginny, can you put my name down? She can't. It is required by us that at the time you are here, when you sign out, you sign your name, you put the time down, and you will get

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the credit for the hours that you have been here.
I urge you all not to forget. I know somebody is going to forget. I'm urging you not to.
With that I want to introduce Paul Zoubek, who is the moderator for our first panel. We have two incredibly fine panels today, and we have three great judges and a very experienced federal practitioner here. I want to thank them all again for being supportive of us and being here today for this terrific program. Thank you.
(Applause.)
MR. ZOUBEK: Thanks, John.
What a wonderful day in New Jersey. New Jersey, wait a minute, the weather will change. We look outside and we have a winter wonderland.
Of course, Judge Rodrigues and Judge Irenas and others from South Jersey who drove up, the palm trees were waving down there, 80 degrees, but it took about two and a half hours to get up here.
I had my first exposure to this event when I was a young lawyer, and it is an absolute pleasure for me to have an opportunity to moderate this panel, which is on a very narrow topic which we guarantee we are going to answer in the next hour and 45 minutes, which is everything you wanted to know

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about the practice of law in the District of New Jersey in 2011.
You are here to hear the panelists and I will give quick and short introductions, because most of the panel does not need lengthy introductions.
We are lucky to have our Chief Judge Brown. As you all know, we have had an incredible tradition of chief judges in this district that have led the District Courts and continue the history of excellence that this Court has had.
I certainly had the pleasure of working in the Camden federal courthouse as an Assistant U.S. Attorney and seeing Chief Judge Gerry in action for a number of years and it was always a terrific experience, and Chief Judge Brown carries it on, serving as Chief Judge since 2005.
He has been on the bench since 1985, served as an Assistant U.S. Attorney for a period of time, and I hope to get the Zanzibar aspect of what he was talking about and his expertise in maritime law that comes from his time spent as chief counsel for the Maritime Administration.
Judge Katherine Sweeney Hayden joined us as well, served as an Assistant U.S. Attorney, served on the Superior Court, and has been a member of this

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distinguished bench since 1997.
Magistrate Judge Patty Shwartz, who is with us, served in the U.S. Attorney's office and has been a magistrate judge since 2003. We will certainly appreciate her perspective on some of the practical aspects of some of the scheduling topics we are going to talk about today.
Bob Goodman, stepping in for Judge Wigenton at the last minute, Bob, we really appreciate that, and that quid pro quo of the signed Duke championship poster is over there that you asked for.
For some of you it is a pleasure for me to be at this proceeding this year, because for the last three or four years I've been at court proceedings across the country, that some of you who know me kept me away from these proceedings.
I think you are all here certainly to hear the perspective of the judges. This is not going to be a presentation about reading rules and read specific numbers of the rules and citing specific cases, but, rather, getting some of the observations of the judges on a variety of topics.
I've asked Bob Goodman to kick in on the first very general topic that I think will set the

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stage for some of the discussion, which is beginning the process as a practitioner, whatever side of the aisle you're on. Principally this panel is going to be on civil issues, assessing your case, and making an assessment of your case in terms of the preparation for discovery needs that you may have and the needs in terms of long-term perspective of getting ready for trial.
You will note we have seven or eight topics in the outline. This is going to be speed law, like speed dating. You're going to get a quick review of some of the topics as we go through it.
We have to move this along and we hope you enjoy it. Bob.
MR. GOODMAN: This is going to sound like a plug for my friend Allyn Lite, but in all seriousness, what I do when I get a new case in, whether it's something that I'm filing in federal court or something that I'm removing to the federal court, is to sit down with his book and take another pass through the rules to make sure that I'm up to date in what I'm doing.
In particular, what I do as a first stage is to identify what my immediate obligations are, both with regard to discovery under Rule 26, in

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this district the preparation of the joint discovery plan, and now, most significantly, identifying what the issues are with regard to discovery of electronically stored information.
What I do with regard to that topic in particular, because I find it to be a somewhat scary topic, is to review the most recent opinions, and in particular the pension committee opinion out of the Southern District, and depending on the sophistication of my client, either giving that opinion itself to the client or general counsel for the client or, at a minimum, making sure that they understand what their obligations are under that opinion. That's what I expect that we are going to be talking about for the next several minutes.
MR. ZOUBEK: One of the topics, and certainly the dinosaur that I am from the practice of law over the years, is I remember something before e-mail, I remember something before the PC, I remember it was very easy when you would go and ask the client to keep the files, just retain the files and make sure that you got the files available. That concept has changed and that concept has evolved significantly.
One of the things that we put in the

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

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

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

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

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

It may even be too late at that point,

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

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

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

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

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

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

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

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and 100 corporations.

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

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

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

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

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

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

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

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

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

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

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

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

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

Those are a couple of examples that I can suggest.

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

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

MR. ZOUBEK: Has this come up in any of

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

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

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

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

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

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

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

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

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

If this opinion is being followed by

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

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

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

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

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

In some of your discovery conferences, Judge Shwartz, has that issue come up?

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

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

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

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

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

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

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

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

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

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

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

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

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the other side pay for the electronic discovery.

MR. ZOUBEK: Judge Hayden.

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

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

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

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

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

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

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

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

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

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

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help you solve the problem. If you can educate us on what your calendars are, sometimes just by virtue of the fact that we may have seen it solved in a different way in a different case, which may not be applying the reasonably acceptable test that's in the case law, but rather a more practical approach.

If you can tell us what your challenges are, and also try to approach it in sort of a can do attitude. This is what we think the other side is looking for. This is where our challenges are.

The courts can sometimes weigh in. Judge Facciola, who you just heard mentioned, has a view about a use of sampling as a mechanism to test for things like that.

I know you didn't want to talk about the rules, but for some reason I always come back to rules. Rule 502. Rule 502 now is in the Rules of Evidence, another tool that you can use to help cut down some of those expenses on the privilege review.

In terms of the expense, we are not in your shoes. We don't know what it costs. There might be some ways that you can educate the judge who you are bringing a problem to to try to resolve, less of a fight about what we can't do, but what we can do.

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MR. ZOUBEK: Judge Irenas, do you have a question?

JUDGE IRENAS: I've had three or four times a situation where electronic records get destroyed, either because there was no hold or despite the fact that there was a hold, but sometimes something is built into a software that got destroyed, things happen.

I'm just wondering how the judges -- if that gets to the district judge more than the magistrate. It comes up two ways. The side who wants to introduce evidence of those records being destroyed or wants a charge of some kind.

You don't really know exactly what was destroyed. You don't have any proof that some valuable bit of evidence is destroyed. All you know is e-mails for six months were totally destroyed or something like that.

I'm just curious, because I've had three or four of those cases where it got destroyed, despite the best efforts of the magistrate or even the lawyers. It just got destroyed. And now we are facing it at trial, where a year of e-mails disappears or a year of documents disappears.

Judge, you referred to having that on

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cross-examination. Have you gotten to the point where the issue of what appropriate instructions --

CHIEF JUDGE BROWN: That didn't have to do with documents that were destroyed during litigation, but where there was a representation they had documents beforehand they could not come up with at all.

As far as destruction, is it intentional? Do we have a litigation hold order in place? What do we have?

Again, you certainly can get an adverse inference where appropriate. Again, very fact sensitive.

As I think about this, we are really creating somewhat of a mine field, and Judge Hayden has given an analogy for war rooms, litigation document war rooms which she says when you tour them, it would be like a prison.

The difference is that in the prison the inmates are protected by the Eighth Amendment. I don't know how cruel and unusual some of the conditions are in the litigation war rooms.

In the process when they discover the three months, six months are missing, all of a sudden that winds up on our plate, and all I can say is it's

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fact sensitive.

MR. ZOUBEK: I think that's an excellent question, Judge.

JUDGE IRENAS: I've had it three or four times.

MR. ZOUBEK: It's fact sensitive, and certainly it comes up --

JUDGE IRENAS: Always it's an accident. I never had a case where I was able to find, even after a hearing, that it was deliberate. It's always, well, it was in the program. The litigation hold didn't go to Smith, and Smith went ahead and destroyed it, notwithstanding a litigation hold or for whatever the reason things get destroyed.

You rarely have proof that there is anything in that group that is hurtful to one side or the other. You just don't know if two years of e-mails disappears. You don't know what's in those e-mails.

How I deal with that is always an issue. Do I let the evidence in about it? Do I give an adverse inference charge at the end of the case?

I frequently have in limine motions on that. In advance they are moving for either to get it in evidence or to get an adverse inference.

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

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

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

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

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

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

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

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

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

Those conferences are going to be used

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

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

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

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

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

Many of us will ask you those questions.

MR. ZOUBEK: What is your anticipation,

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

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

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

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

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

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

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because we know you know what's expected in terms of professionalism, collegiality, problem solving.
MR. ZOUBEK: What kind of mistakes do you see lawyers make?
MAGISTRATE JUDGE SHWARTZ: Sometimes you see folks who haven't even talked to their clients -- not people in this room -- talked to their client before they come to the conference.
There are occasions where folks say, I have to discuss the matter with the client. Okay. That can be as basic as what they really need to talk about resolving the case on a merits basis, a settlement.
Sometimes not really knowing what it is going to take to evaluate the case for resolution or what it's really going to take to try the case, they will start talking about electronic discovery, by way of example, and the wish list of information, and sometimes when that happens, it doesn't happen a lot, sometimes you will turn to a lawyer and say, are you sure? Watch what you wish for, because the deluge of information may come to your way, maybe it is so insurmountable that you can't review it to cull out what you really need. Sometimes it borders on too much.

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MR. ZOUBEK: How do you make a determination as to what you think the appropriate pace of the schedule is in a case?
MAGISTRATE JUDGE SHWARTZ: There is an individual case management. We are going to turn to you to make a proposal to schedule. You really need X amount of time? Or, if you do, tell us why. Is it because you know the key witness is involved in a corporate merger and isn't going to be available for 90 days to be able to step up to that key deposition that the plaintiff wants?
The more you can tell us about the challenges in your case, the realities, the more we can tailor a schedule. There are times where sometimes we have to cut things back from the proposal, because from the judge's point of view, you have a case in front of that judge, it should be your most important case, although the reality is we all know you have other matters. You're going to be on trial for X number of weeks, months, whatever, so that we can move other pieces of the case while litigation counsel is tied up.
The more you can share, the better off you will be to get a tailor made schedule that will make sense to you.

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MR. ZOUBEK: What about instances in which it happens every once in a while where the attorneys aren't cooperating with each other and they haven't worked out an appropriate schedule?
MAGISTRATE JUDGE SHWARTZ: We can invoke the Judge Chesler rule, come to one of our -- make sure I get it right -- rooms that are hot in the summer or cold in the winter and help you get together.
We can give you a more comfortable environment, come into my chambers, or any of my colleagues, her colleague's chambers, and it will make a comfortable environment and require you to talk to each other.
You are duty bound to get this process moving forward. I have had situations where the lawyer who is trying diligently to get the other side to return a phone call, can't do it, write us a letter. Magically when the Court calls to say we would like to have a conference about this, it's remarkable how the phone calls get returned.
We can be used for all kind of things.
MR. ZOUBEK: One of my favorite letters I was asked to write at one point, I asked for a conference to work out a scheduling in a proceeding,

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but I needed to send an agenda letter to the lawyer on the other side for the discussion, and unless I was sending the agenda letter, there would not be a phone call.
MAGISTRATE JUDGE SHWARTZ: Did you find out that that lawyer was not practicing law in New Jersey?
MR. ZOUBEK: Correct.
MAGISTRATE JUDGE SHWARTZ: How shocking.
MR. ZOUBEK: In terms of discovery, handling discovery disputes, Judge Shwartz, what is your experience and what are your recommendations?
MAGISTRATE JUDGE SHWARTZ: As everybody in this room knows, in the District of New Jersey, don't file a motion to get relief from the Court. You present your discovery dispute by phone or letter.
The implementation of the letter process depends on who the magistrate judge is and if they have specific requirements for your case or the way they practice.
My recommendation is -- and this again goes to really educating the out of state lawyer. There are out of state lawyers who believe if it is not done by notice of motion, brief, certification

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and the like, they are actually going to get a real decision.
If you present it in a letter, the magistrate judge will issue an order of some sort. That order is appealable as an order that is issued based upon full briefs.
That is a tip that you can share with some of those who may not have the familiarity, or your state court colleagues who aren't in federal court. They are so accustomed to knee jerk out the motion to compel production of responsive information, that they fail to understand that if they were to do that, you get stuck on the formal motion clock, it takes 24 days before you get a resolution. And if you have a six or eight month fact discovery period, that's a lot of days eaten up on the discovery clock for you to be able to move forward with the rest of the litigation.
The approach that the district has concerning the informal presentation of the issue will get you much faster resolution in order that you can appeal. Sometimes maybe that's what you need. Maybe there really is a fight, but you need something that you got to present because your client wants you to present it.

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As it relates to other types of disputes, not everything is subject to being able to be reduced into writing. I'll give you a quick example.
Sometimes there is a privilege dispute that has come up. The judges are going to know and you are all going to know what the elements are to invoke the privilege.
Sometimes it has to come down to look at the document. The judges aren't going to need a full recitation on the elements of privilege law to help you resolve that issue.
If you're not sure how to present it in a most efficient way, you can drop a quick letter saying you and your adversary have an issue, just to discuss how to clear it up.
MR. ZOUBEK: The problem being, and I certainly hear from young lawyers that come in and ask for advice prior to a conference because they have a lawyer on the other side that they are not able to reach agreement with.
What are the most problematic requests that you find that you get?
MAGISTRATE JUDGE SHWARTZ: The letter from the one side that says the other side just won't

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respond to my discovery demands, just radio silence. It is hard to make a decision when someone is not invoking the advocacy and due process, you know, back and forth, putting your position on the record.
The absence of a response is probably the most frustrating to the party writing the letter and the most difficult for the Court because everybody knows they have to respond.
People in this room tend to respond to overtures, even if they don't want to respond. At least there is a response.
The other, I think, is the no can do. It can't possibly be done response.
There is always a way to come up with a way to resolve a problem. Coming to the table with at least a proposal of a resolution lets you control your own destiny. We'll make decisions if we have to. Sometimes the decisions are not going to be the ones that you would have preferred to have had had you chosen to do it on your own. That's the other challenge. To try to come up with a resolution to the problem, because that's what's going on at the discovery phase, problem solving, more than anything else.
MR. ZOUBEK: What about in terms of

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calls that you may get? I know when I talked to Magistrate Schneider down in Camden, he's developing a list of favorite calls he has gotten over the years.
Without naming names, calls that you may have gotten during depositions and resolution of issues, what is on your top three favorite kind of calls that will go in your book some day?
MAGISTRATE JUDGE SHWARTZ: I'll tell you the very first one I got when I started this job. I actually got a call from a deposition, and I respect the lawyers who were involved in the case, I'm fairly confident it was out of state counsel posing the issue. They were fighting about where to sit.
I hadn't had this job terribly long, and as anyone knows, some of my former colleagues at the U.S. Attorney's office, I would say that was a joke. I thought they were pulling a prank on me.
I restrained myself from having the Charlie McKenna I can't believe you're doing this, go back to run the criminal division. I held back and I listened, because I recognized the voices as not being voices of people I heard speak to me for a dozen years.
It was a real fight. I think the

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resolution was something along the lines, does everybody have a seat right now? Okay, good. Take a seat. Does the witness have a seat? Yes, okay. Does the court reporter have a seat? Okay, yes. Everybody has a seat. Continue your questioning.

I was surprised that that was the question that I got. Wow, they are going to pay me a lot of money to make that kind of a decision? Awesome.

I don't think I can do better than that as an example of the kind of questioning I got.

The other thing I can tell you in terms of deposition disputes, my colleagues and I, I think that almost all of them, maybe all of them would agree, we want to hear from you during a deposition. If you really have a problem you can't resolve, call us while it's going on.

There's one having -- I never took a deposition, you all know that, but having asked a bunch of questions to witnesses in other forums, I know that there is a benefit to getting a ruling while you are in your zone. You are asking the question. You know where you want to go. You took a lot of time to get the witness there.

We would prefer to hear it live. You

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know where you're going, the witness is there. The cold record leaves us only to have to read the cold record and you having to reconvene the deposition.

Hearing it real time is helpful. If we can't decide it on the spot because it invokes complicated issues, or for some reason you just can't get to it, we will have to address it after the deposition. Most of us will give you a time to call back.

As Judge Arleo once said to me, the issues don't come up that much. Something like 20 percent of your cases take 80 percent of your time on the discovery front. Generally, it's not like you get a lot of deposition questions in a lot of cases. I just get a lot of deposition questions in the same case. So it doesn't happen a lot.

That's my advice on how to bring it to our attention.

MR. ZOUBEK: Particularly for younger lawyers in the room, you get the question, somebody comes down the hallway in the midst of a deposition, and X has happened. Should I get the judge involved? Usually the first response is, get back in there, see if you can work it out. You really want to have a threshold before you reach out for the magistrate so

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you are not reaching out three times during a deposition.

Have you found instances in which you think lawyers have made the wrong call on the threshold? And if so, what examples might you have of that?

MAGISTRATE JUDGE SHWARTZ: I think, unfortunately, as I said, at least my own experience, the problems with depositions are in the same case. Sometimes the combatant is not the issue. There is only so much you can do when you realize you have combatants.

MR. ZOUBEK: More sandbox issues than anything else?

MAGISTRATE JUDGE SHWARTZ: Sometimes.

If there is going to be a particularly problematic deposition and I have combatants, I will say, drop me a letter, let me know when that's happening so my staff knows that Jones is going to be deposed that day, combatant A and B taking the deposition, if we have an issue, let's make sure you give them a time to call back.

It doesn't happen as much as you would expect, because the lawyers do understand their responsibility to try to work things out and also the

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limited things that they can do under the rules.

There she goes with the rules.

MR. ZOUBEK: The rules are very useful.

MAGISTRATE JUDGE SHWARTZ: There are so many limitations on what a lawyer can now do.

The other is a lot of lawyers know that the judges in New Jersey will invoke the rules if things get out of hand or they will make the deposition happen in the courthouse. It goes to controlling your own destiny. It doesn't come up terribly much, but we have the power to help control the process.

MR. ZOUBEK: Judge Hayden, Judge Brown?

JUDGE HAYDEN: Again, thinking about the plight and also the opportunity for the younger lawyers, this clearly is a tremendous testing area in which quick thinking and mentored live helps the young lawyers get through. That is what strikes me.

It also strikes me that the powerful amount of discretion in the magistrate judge is informed very much by the reputation of the lawyers. You have heard about the combatants, but also the amount of trust that the lawyers engender in the court is what makes this happen.

MR. ZOUBEK: Before we move on from this

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raising discovery issues with the magistrate judge, does anybody have a question?
MR. GREENBAUM: Yes. I guess I'll direct this to Judge Shwartz. That has never happened in front of her because she's probably the most prompt decider of discovery disputes.
As Judge Shwartz mentions, many times you have the clock ticking, it's important to get prompt rulings.
What advice can you give the lawyers who have a situation where for some reason an issue has blown off the map. You submit it. Sometimes it can be an appeal. Maybe it's a privilege issue. You got your dep scheduled, everything is going forward, and there is radio silence from the other end. It is a sensitive issue, but what advice would you give lawyers on how to deal with that situation?
MAGISTRATE JUDGE SHWARTZ: Sometimes it is presented very shortly before the parties need a resolution of the dispute and the lawyers get frustrated because they haven't heard anything in 24 hours.
My colleagues and I have a number of cases, and I think that sometimes, and I can't speak to everyone, but sometimes the disputes get only

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presented by an electronically filed letter.
I can't say this is the reason why there is an issue. But if there is no paper copy or all the docket entry says is letter from counsel or from party, with nothing else in it, it is very easy to miss the fact that there was an issue presented.
A lot of practicing lawyers may not know how we are getting notice of electronically filed disputes. They had no idea that we weren't getting e-mail pop-ups in the same way that practicing lawyers are. That might be part of it, because it got missed.
There is no court you can run to to get the letters. In this district, before electronic filing, letters usually were not to be filed on the docket. Now with E filing it's happening a lot.
Sometimes that may be the issue, that the lawyer didn't say enough in the description for somebody to know, or if they said a lot, it could have been missed because of the volume that gets filed every 24 hours in every case that the magistrate judge has to handle.
One of the things that you can think about doing is calling to confirm that the letter was received. That's one avenue.

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Another might be that if you have a dispute that you present sufficiently in advance of the time you need a decision. At a minimum first explain contextually what there needs to be decided, how it's affecting the ability to proceed to the next step. The judge is not going to know the level of your details and your facts the way you do.
We may not know a decision on X will help you know how to depose one, two or three or nobody depending on the issue.
The other is if it has been a week and you haven't heard from somebody, a week and a half, depending on what it is, call chambers to make sure somebody has seen it, especially if you have done it by letter, because that is one type of filing.
MR. ZOUBEK: Is there a particular way to caption -- that someone should be captioning that letter or identifying that letter in terms of bringing it to your attention?
MAGISTRATE JUDGE SHWARTZ: I know a lot of you may not be controlling what you're actually entering when you are electronically filing a dispute. Identify which judicial officer it is directed to, if it's a magistrate judge, a district judge, a chief judge.

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Sometimes we have filings that belong to his Honor, and, generally speaking, regarding just what it is, just nice and short, so we know what judge is supposed to be reading the document. Sometimes it's to the clerk's office. Some lawyers, not many, will file things on the docket that shouldn't be, that is not directed to the Court, but where there is a dispute on.
If they are doing a letter, stating issues by way of letter, to which judicial officer it is directed to and what it is about generally. That's another way to look at it, whether it comes in real time or in 24 hours.
MR. ZOUBEK: I was going to move on to a discussion of dispositive motions with the District Court judges, but I want to check to see if anybody had any follow-up questions as it relates to discovery issues that you might want to address to Judge Shwartz?
A VOICE: One point --
MR. ZOUBEK: Identify yourself and go ahead.
A VOICE: One point. In my own practice, if I have an emergent issue and I send a letter, I'll call the Court or deputy or the clerk

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

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

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

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

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

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

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

Judge Brown.

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

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

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

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

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

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

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

MR. ZOUBEK: Okay.

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

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

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

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

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accordingly.

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

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

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

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

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

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

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

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

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

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resolved as a result of fairly broad summary judgment motions, or as a result of settlements.
Whether or not Judge Brown thinks that this is an appropriate reason to bring a summary judgment motion, as a practical matter it happens all the time, and the motions get brought because you think it's meritorious, but because that's going to result in either a resolution by summary judgment or settlement of the case that perhaps couldn't be settled until you brought the motion.
JUDGE HAYDEN: That kind of makes me crazy.
MR. ZOUBEK: That's why I asked it.
MR. GOODMAN: Sorry.
JUDGE HAYDEN: No, really, this unbelievable expense, this volume of papers. I mean, I love going to dinner parties because I love to cook and I know what goes into it and a lovely dinner party, I think of the hours and hours that the host or hostess went into buying and preparing.
When we get these things with the little black things on the side with thousands of little holes and the tabs, I think about the man hours, and really woman hours, that go into putting those things together. The electronic filing hours, the chunks of

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stuff going across, and then it gets wheeled in, because we have to get these things in paper.
First of all, we don't have the money for the paper, that's the truth, and secondly, it's impossible to read this stuff on the screen. So we always ask for the courtesy copies and we usually get them.
Then you just look at this, and all of this is to get the case to settle? Where are all the pressure points of a trial? Couldn't there be some way of saying, we filed all this stuff, but really all you got to do is look at point three? That's why we ask for the table of contents, if you're familiar enough, we kind of need to know where we need to go.
If that's necessary, I'm throwing it out there. If what you want to do is get the judge's attention or pound your adversary or scare your adversary, I just don't think that litigation and the cost of it and the dignity of the process and the fear of the process requires this kind of a production. It is an opera.
MR. GOODMAN: It is not so much that I'm trying to get the judge's attention. It is that I'm trying to get my adversary's attention in those big guy-little guy cases. Very many of them have been

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removed to federal court, and my adversary is a typical state court practitioner who really doesn't want to be there, who really doesn't understand the rules, who really hasn't evaluated his case pretrial, where the case may not be meritorious, but I can't get this person's attention. And I will go out of my way in most of those cases educating, or attempting to educate my adversary about why he has a case that isn't meritorious.
Or if it is meritorious, it is so slim that it ought to go away somehow other than at the end of a long road of discovery and a summary judgment motion resulting in summary judgment or settlement.
I'm just trying to get my adversary's attention because my adversary either hasn't evaluated the case or refuses to. So I'm left with really no choice but to dance the dance that we are discussing.
MR. ZOUBEK: Part of the process should be, if it is being handled the right way, is to narrow the issues if you are going to trial. You have an obligation to your client that if you have a case that has been filed against your client, and you think that there is no legal basis for four of the

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causes of action in the complaint, you are obligated to file that motion, narrow the issues down, and the same relates to a summary judgment motion.
Over the years I always looked at the 14 or 15 inches of the summary judgment motion and figured the judge and the clerk are going to say there has to be a factual issue in there someplace. I'm sure that happens quite a bit, and probably by the number of inches sometimes.
CHIEF JUDGE BROWN: That's why we have a page number limit on briefs.
MR. ZOUBEK: If handled appropriately and done appropriately, it should be part of the process of getting the case ready for trial and narrowing the issues that need to go before the court.
I get a sense that you have seen a few people abuse the process along the way?
JUDGE HAYDEN: It is not even abusing the process. It is maybe a matter of -- this is very helpful to me to hear the lawyers' points of view and what has been said just now is helpful.
If you think of where it's going, I remember going to, long ago, a presentation on appellate advocacy, and Judge Michels said -- started

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

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

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

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

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

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

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

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

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

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

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have.

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

Judge Irenas?

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

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

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

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

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

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

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

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

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

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

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

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

What we have for a lot of young lawyers

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

Judge Debevoise?

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

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

MR. ZOUBEK: Sometimes with a marshal present.

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

MR. ZOUBEK: Judge Cooper?

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

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

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

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

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

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

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

MAGISTRATE JUDGE SHWARTZ: One quick thing.

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

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

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

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

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

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

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responsibility, but it's both sides.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

From a practitioner standpoint, a very

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

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

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

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

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

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

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

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up because all of the evidence law has been presented.

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

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

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

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

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

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

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

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

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

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

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

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

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

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hand, having the magistrate judge participate in the process, some of the issues, we may know who those witnesses are that are at issue. We may say, wait a minute, even I remember that witness, how can Mr. Adversary say I never heard of that witness?

Sometimes we can narrow things down, not having lived with the case to the level that you are, but there are both sides as to who should be the judicial officer going through that process.

There is the sort of pretrial conference or hearings you can have with the district judges like Judge Hayden is talking about.

MR. ZOUBEK: The role in our district as relates to alternative dispute resolution prospects in the case, referral to arbitration or referral to mediation. If the panel could comment on their experiences with that and how they think the process is working.

CHIEF JUDGE BROWN: We do have arbitration. We do have mediation. The matters are referred generally by the magistrate judge.

Our district has a plan for the utilization of magistrate judges, which I think is nationally regarded in terms of case management.

In most cases they will be handling that

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aspect of it, except for dispositive motions which they may get on a report and recommendation basis.

We generally see the cases when they move on to dispositive motion or trial status.

JUDGE HAYDEN: In terms of the magistrate judges being the clearing house for those appointments, I'm in accord with what Judge Brown said.

MAGISTRATE JUDGE SHWARTZ: You know in our Local Rules we have an arbitration program that exists which can result in the assignment of a case to nonbinding arbitration.

We also have a mediation program, $300 an hour between the parties. Judge Arleo is our mediation compliance judge.

In terms of assigning the arbitration, that's for the Chief Judge to decide. It happens when everything in the case has been accomplished but the pretrial order.

The rule is meant to be an alternative dispute resolution mechanism, not a mechanism that maybe we'll try out and keep going and file dispositive motions. It is meant to get you to a final resolution in a more inexpensive way.

As it relates to the mediation program,

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there is a list of mediators. You can see them on the web site. If you think that there is a particular mediator who might be particularly effective for your case, whether by subject matter or personality, I've been asked by lawyers, can you appoint somebody who will leave some bruises during the course of the mediation?

Sometimes I get questions like that. I really need a certain personality. Most of the time we really need somebody who is conversant in a particular subject matter.

Of course, you have your option of hiring your own private mediator as another alternative.

Some of us will try to set up a discovery plan such that it happens after the discovery you need to make it an effective mediation that is completed. The Local Rules have some mechanisms where you can ask for a stay, and I mentioned already arbitration.

MR. ZOUBEK: As I was driving up that long Turnpike drive to come up to North Jersey because I live down in the Haddonfield area, I said, what is one of the things I want to know about the practice of law in the District of New Jersey before

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this court?

I thought about Zanzibar, and I thought about whether or not you could actually venue to prosecute a pirate, Judge, from the open seas in the District Court of New Jersey.

They will want their money back if they don't get the answer to that question. Could you educate us on that one, Judge?

CHIEF JUDGE BROWN: Absolutely. There is jurisdiction, a pirate is hostes humanis generis, an enemy of mankind. They can be prosecuted anywhere they are found.

I will say that Kenya, at least an intermediate court judge has been taking a contrary view because he feels they are getting too many of them dumped from the alliance into Somalia.

We have seen pirates prosecuted generally in the Eastern District of Virginia who have had the poor judgment to attack U.S. warships.

Well, you know the old prosecution adage, we don't catch the smart ones. That is the simple answer on that.

I'll drop one footnote. When I saw Judge Hayden here with this black eye, I said it reminded me of my encounter in Zanzibar. You may

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

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

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

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

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

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

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

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

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

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

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

I want to thank the panelists for their time.

(Applause.)

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

(Recess.)

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

All of them have practiced civil law,

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

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

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

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

MR. FISHMAN: You can do that again.

MR. HAYDEN: No objection.

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

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

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

He is extraordinarily intelligent. As

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

Paul, I welcome you.

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

(Applause.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There was a great, great trial lawyer

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

That's enough of an introductory remark.

(Applause.)

MR. LACEY: Thank you, Joe.

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

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

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

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

MR. FISHMAN: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. FISHMAN: Not mine.

MR. HAYDEN: The mistress.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sometimes a reflexive objection, hearsay.

Counsel, what's your basis?

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

Sustained.

Objection.

Counsel, what's your basis?

State of mind.

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

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

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

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

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

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

As a result of losing the desire to

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

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

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

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

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

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

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

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

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

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

And I have a couple of examples of cases recently in which we have thought out the question about everybody agreed on what happened. A case in front of Judge Hayden recently, a case which was called the "Wise Guys Ticket Brokers" case, in which these fellows had constructed a very complicated computer model to escape the ticket buying restrictions of Ticketmaster.

There was no question really about what

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

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

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

MR. LACEY: Okay.

What I'm hearing from you is at the time

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Lo and behold, none of that pans out.

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

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

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

MR. LACEY: Thank you, Judge.

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

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

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

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

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

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

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very quickly.

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

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

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

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

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

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

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

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

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

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

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

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

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whether it be in the opening or whether it be in the summation or, to some extent, as my friend Alan Silber always says, the defense starts in the cross, and Michael is a master in that.

The defense will begin to go in during the cross-examination of the witness where you can ask the leading questions, where you can begin to go a certain way.

There are a lot of lawyers that can just rest at the end of the government's case, and rest. And the defense goes in solely on the basis of the cross-examination of the witnesses and something that was developed.

Michael Querques was a master of that. I think in this era it's harder to do that. A lot of the defense in certain cases, fraud cases particularly, sometimes witnesses with companies will give you a lot that is helpful to the defendant, and a lot in terms of the chaos of the business, things were happening, they weren't the defendant's fault, can be established on cross-examination.

You are getting ready to do it, but you're not trying to tip it to the government any sooner than you have to.

MR. LACEY: Paul, you are now heading to

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trial, and, quite frankly, whether it's a civil case, I mean, a civil case, generally speaking, you have to prove that it is more likely than not.

In a criminal case the government, as everyone knows, bears a far heavier burden of proving its case beyond a reasonable doubt.

How does the government go about putting together a theme that can convince 12 jurors in a box that this case is proven, or will be proven beyond any and all reasonable doubts?

MR. FISHMAN: I'm not sure it is anything different than everybody here has always said, and I think Judge Chesler said it probably more succinctly than the rest of us.

It has to sound right to the jury. It has to be grounded in reality. It has to be a theory that makes sense to 12 people about why a particular person behaved in a particular way at a particular time.

If it doesn't, then you run the risk, first of all, it may not have happened that way. Part of the things that we have been talking about here, sort of anticipating defenses, I mean, one of the reasons we anticipate defenses and think about defenses as good trial lawyers, because good trial

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lawyers should anticipate whatever argument is going to be made by the other side.

We need to be thinking about the defenses, because if the defenses are plausible, reasonable defenses, maybe the guy didn't do it.

Simply, it is not a matter of trial strategy, it is a matter of convincing ourselves first that it is a case that, as the judge said, is worth our time. We do have a bunch of lawyers, but we have limited resources and the court has limited resources.

We have to decide if a case is worth bringing. We also have to decide it is a case we can win because we should win. Not the other way around. It is not a case we should win because we can win.

All of those questions, I hope, are being asked and answered before we ever get to the place where we have to try to convince the jury.

At the end of the day, it is taking the facts that have already convinced us and presenting them in a way that is compelling for a bunch of folks who don't know that much about the law, have never heard of this, if the voir dire has done its job, and can think about it in a way that is consistent with the theory we already framed in the indictment.

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MR. LACEY: How do you take one of these very complex cases and make it so compelling that you can prove it beyond a reasonable doubt?

MR. FISHMAN: You have to boil it down in some way, again, to the same theme that we are talking about. Whether somebody needed money at a particular time, or needed money for a particular reason, or he's trying to get over on a competitor. Whatever the particular facts are.

If you look at, for example, the case that we had in front of Judge Kugler, the folks who were accused of trying to commit mayhem at Fort Dix, they obviously didn't get to a place where they actually did what we allege they wanted to do.

There are a number of cases that we have like that, in which the defendants take certain steps, and their defense at the end of the day is, we didn't get far enough. What we did was not a crime because whatever we did is not itself illegal, and we never got to a place where the harm that you are accusing us of trying to achieve took place.

What we have to do, the same thing we are asking the jury to do, is boil it down. Here's what these guys were trying to do. Take the evidence that shows what these guys wanted to do was to

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achieve a certain violent result at a certain time. You try to take all those facts and distill it down to that.

In the case that the judge tried involving organized crime, you want to boil it down to the fact that three guys on a particular day decide to get payoffs from union members for the right to work, which everyone should have without having to pay off the mob.

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

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

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

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

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

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

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

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

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

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conversations.

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

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

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

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

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

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

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

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

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

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

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of the preliminaries.
The doctrine of primacy and recency, people remember the most what they heard first and heard last.
One of the things you do with the theme of the case is you get it right out there early and you end up coming back, to some extent, the same thing with the theme of the case.
One of the reasons it's dangerous is a terrible evidential doctrine called opening the door. One better think through their theme of the case and what doors might be opened by going a certain way, because many times in cases, I have seen prosecutors saying, your Honor, the evidence is admissible now. They opened the door. They said in their opening, the briefs will indicate that so and so opened on it, even if this tape wasn't admissible the first time, it's admissible now.
That is why you have to be so tight in terms of how you frame the theory, the theme and theory of your case, because you run the risk of opening the door.
MR. LACEY: Judge, based on your experience, what have you seen that is most effective in terms of using a theme in an opening, and what is

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least effective as a theme in an opening statement, whether civil or criminal?
JUDGE CHESLER: Well, I think the most effective themes are indeed as Joe says, which is, you know, there is a doctrine of military education which some people use to structure both openings and closings.
The opening is tell them what you're going to prove, tell them how you are going to brief it, tell them what you are going to prove again.
In closing, tell them what you proved, tell them how you proved it, tell them what you proved again.
It strikes me that that basic structure makes, indeed, the most effective openings and closings. When you tell them what you are going to prove, or in the defense case you're probably going to -- you may very well be doing what the government is not going to prove and why they are not going to prove it, for example, which is they are not going to prove it because their star witness is a totally incredible individual who is testifying only to save himself from jail. You will hear so many inconsistencies and so many variations in his story that you will find that no reasonable person could

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conclude beyond a reasonable doubt that my client committed the crime which the government charged. If that's going to be your theory, get it out front.
The other most significant thing is in an opening, don't promise something you can't deliver. For the prosecution, that frequently means it may very well be a bad idea after you've told them what you're going to prove and you're going to show how you're going to prove it, to be telling them some sort of wonderful story about witness A is going to say X, B is going to say Y, C is going to say Z, since you have absolutely no idea whether or not Judge Brown is going to say witness A, B and C can't testify at all, or their testimony is limited, or you can't get documents in.
So it is an extraordinarily good idea to make sure that while you get your theme out and you get across what you are going to establish, that you do it in such a way that you are not tying yourself down.
Despite all the preparation that everyone does -- and I can tell you, trying a case against Joe was wonderful. We have all these documents. I go into summation for a document which I've had in evidence. I think we had about 3,000

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documents in evidence. I go into a diary, and I am in rebuttal summation going to refer to one lousy entry on one date in the diary which has not been referred to in testimony, but the document is fully into evidence.
I start to open my mouth. Joe read the document. He knows exactly --
MR. HAYDEN: I almost punched him when he pulled that document out.
JUDGE CHESLER: I got it in, didn't I?
MR. HAYDEN: I almost punched him.
JUDGE CHESLER: In this huge case with massive documents, in the old days, Joe, from my third word in the rebuttal, knew what I was going to do, where I was going to go, objection, sidebar, and we are in front of Judge Gerry.
It is that kind of preparation which is incredibly important, but no matter how well you prepare, you don't know what the judge is going to rule, and you don't know what's going to get in and what's not going to get in, and certainly from the prosecution point of view, promising that somebody is going to testify, or that something is going to get in evidence is something which will be shoved down your throat unmercifully as a prosecutor, by my dear

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friends.
On the other hand, as Joe will tell you, in that same case his co-counsel had promised that his client was going to take the stand and never did. But this was a four and a half month trial, and I thought long and hard and I said, you know something, I don't care what the case law may be out there, it is not going to do me enough good to even risk thinking about it.
MR. FISHMAN: Good call.
JUDGE CHESLER: It was never mentioned at all.
There was that flat out promise that the co-defendant was going to take the stand. It is as risky as can be.
So what I would say is that you are doing a balance, getting a theory out, getting what you expect to prove, but, on the other hand, you sure want to make sure you got sufficient flexibility in there so that you can roll with the punches and you're not going to be caught promising something you can't deliver.
MR. LACEY: Michael, I have seen you in preparation for your trials and cross-examination during trial using a white board in your office.

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What is it you are putting on that white board, and how is it helping you in putting together both your opening and your cross-examination for these government witnesses?
MR. CRITCHLEY: I'm just putting on those things that I want to -- that I think are important. I'm trying to anticipate where I'm going to go in cross-examination to move the case towards my direction.
In preparing for the cross-examination, say, of a government witness, what I try to do is make certain that I don't mimic the mock cross-examination that the government has already conducted before they put the witness on the stand, because they always do that and they play the roles of attorneys so that the witness will anticipate certain areas of cross-examination. The government does not just throw them up.
I try to be as prepared as I possibly can. When I cross-examine, I don't want to be all over the place. I don't want to develop a pattern of cross-examination that is kind of familiar with the mock cross-examination so that the witness feels comfortable in what's going on.
I want the witness to have to try to

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think in real time what my next question is going to be so I don't or she doesn't stand there prepared.
I think the whole purpose of going through those processes that we do before going to trial is develop a theme for cross-examination. If you can't do it on cross-examination, develop your theme, you are just on a one way trip to disaster.
MR. LACEY: How do you build the theme of the case around a cross-examination of a witness whom you never had a chance to talk to? At least in criminal cases.
MR. CRITCHLEY: Paul just mentioned the Dwek case. I'll tell you what we did in the Dwek case.
I say it like I think everybody falls into one silo. In my life experience it's 10 silos, and everybody falls into one of those. Although you may never have met the person personally in life, once you know a little bit about him, you know what silo he falls in.
With all due respect to you, Paul --
MR. FISHMAN: Which silo am I in? Not with Dwek.
MR. CRITCHLEY: With Dwek, you know, I never met him, but I met him. He's a very clever,

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very articulate, very facile guy. He's very skilled in his area. He has been the subject of 15 or 20 depositions.
What do you do? You spend a great deal of time. I spent like six, seven months just getting ready for that cross-examination. What did I do? He was examined in about 13 or 14 341 hearings in bankruptcy, so I listened to every CD. I wanted to see the questions that were asked, the answers he gave, how he answered them, what familiarity did he have with the facts? I got a little bit of an understanding with him there.
Then you get pages of depositions, and you have thousands of pages of depositions, and you read thousands of pages of depositions for six lines of cross-examination. You are starting to understand the guy.
Then you go through the bankruptcy documents. The bankruptcy documents, Solomon Dwek, the docket is probably that thick. There are 7500 to 8,000 entries.
Every day when I got in nine o'clock in the morning, boom boom boom, 11957, Bankruptcy Court, what was the new document entry that day? I just kept going through it, and I found out a lot about

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the guy that I felt can be useful, that he was not going to be prepared for.
When you cross-examine a government witness, it is no longer the case where you say, well, you are despicable, you're doing it to save your life. Jurors turn that off real quick.
You have to show intellectually and analytically why the jury should reject his or her testimony. Not because they come here with baggage, that helps, but you know the record of the U.S. Attorney's office, it is a tried and true cross-examination technique just to say the guy or woman is a piece of crap, but it fails. Then you have to let the witness know, you have to let the witness know, I own you. I own you. You are not going through babble.
And with Dwek, I knew as soon as I cross-examined the guy, the first thing he said is, can you show me a document to refresh my recollection?
If you don't have a document to refresh your recollection, you're dead.
We are before Judge Linares, we have a table about 12-feet long, and I have documents, because I knew every time I asked him a question,

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he's going to say, can you show me -- he was testing me.
After a while, after about eight or nine tests, he got the impression that I had the document and he gave it up.
What I wanted to do with Dwek, I didn't want to make him a little just disbelievable, I wanted to make him despicable. I'm not saying he is, but that's my job. My job, so the jury would detest him.
Whether they did or didn't, I developed a theme that he was just out there, just running his scams.
MR. LACEY: Did you open on that issue that he was a despicable person?
MR. CRITCHLEY: Yes. John Vasquez opened. The government has the hook. No matter what the case, before they say my name is Mr. or Mrs. so and so, they stand up representing the United States of America, the flag is flying, the Marine Corps drum and bugle core is playing, the jury loves him or her. They stand up and say, this is a case about greed. This is a case about corruption. My God, what are we doing here? It's very, very effective, tried and true.

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We try to have our hook, because you have to spend a lot of time because the jury is paying attention to you, certainly those first 25 or 30 seconds. They may turn you off after a minute and a half, but you got their attention, at least for 45 seconds.
Just as the government uses its hook, you have to use your hook.
We either have our hook going in or we play off the government.
But what JV did, I think successfully in the Dwek case, when the government came in, very effective, very, very effective presentation, JV responded with an alternative hook that addressed that issue and that developed our theme.
MR. LACEY: Paul Fishman, I'm going to let you finish up today.
In the closing statement the government has two shots. How do you break that up and utilize the theme both in the initial closing and also in the rebuttal?
MR. FISHMAN: I think that differs case by case. It's hard to answer that question in the abstract.
You have to anticipate, obviously, in

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your original summation, and if you had a well-tried case in which the openings and the cross-examinations, and the defense case, if there is one, has been what Joe and Mike portray it to be, which is a constant reiteration of the defense theme, you know what they're going to say in closing arguments.
You not only have to make your own case, but why your theory is right and the case is compelling. You also have to anticipate those defenses.
To the extent that you miss that, or sometimes we want to save one argument for rebuttal summation because it is a particularly compelling argument, and we know based on what they are going to do it's going to be a fair response, you do that. You have to do it fairly.
The last point I want to make, at the risk of closing the way I began, by showing how horrible it is to grow up in the Fishman household, my older son had to do a one-minute presentation biography of anybody he wanted to do in his third grade class just this week.
He picked Maurice Sendak, not because Maurice Sendak is his favorite author, but he happens

to have an autographed Maurice Sendak book.
He said, dad, I don't know how to do an oral presentation.
Why do you care about Maurice Sendak, I told him. You have to convince them that they care about Maurice Sendak because you care about Maurice Sendak.
At the end of the day, what you have to do is communicate to the jury that your theory is right, that you care about it and that they should care about it. If you can do that, you are going to win.
MR. LACEY: You just heard from the very best.
(Applause.)
MR. LACEY: We thank the four of you for sharing your thoughts today with us. Please, everyone sign out so you get the CLE credit.
Thank you all for coming.
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