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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CHAMBERS OF
U.S. DISTRICT JUDGE
ELDON E. FALLON

IN RE: PROPULSID PRODUCTS MDL No. 1335
LIABILITY LITIGATION SECTION "L"
New Orleans, Louisiana
Wednesday, December 20, 2000
9:00 a.m.

TRANSCRIPT OF STATUS CONFERENCE
HEARD BEFORE THE HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

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New Orleans, LA 70112-4000

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P R O C E E D I N G S

(WEDNESDAY, DECEMBER 20, 2000)

(STATUS CONFERENCE)

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6 THE COURT: Be seated, please. We have a couple of
7 issues today. One is the report of liaison counsel and then
8 the motion of defendants regarding documents to be used in
9 depositions. Let's talk first about the liaison counsel's
10 report, any problems we're having and get over that and then
11 I'll give you a minute to think about what you're going to say,
12 and I would like oral argument from both sides on the
13 defendant's motion.

14 I have before me Joint Report No. 2 from plaintiff
15 and defendant liaison counsel. First with regard to the
16 electronic service web site let me hear from either party.

17 MR. HERMAN: May it please the court. Good morning,
18 your Honor. And learned counsel. Russ Herman of Herman,
19 Herman, Katz and Cotlar, and Herman, Middleton of New Orleans.

20 Verilaw is set. Recently, however, they sent us a
21 contract and the cost that they originally represented to us
22 varied in two respects, but we expect to have those issues
23 worked out to everyone's satisfaction and there is also an
24 issue as to whether they can serve by fax as well as e-mail.
25 We expect to have that issue worked out. So Verilaw should be

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2 up and running by January 3rd. It would handle all of the
3 service requirements of the court and we also intend on every
4 document they serve to have them notice, whoever is receiving
5 documents, that the Court's web site is such and such.

6 THE COURT: How do the defendants intend to use that?
7 What do you plan to do with the servicing?

8 MR. IRWIN: Good morning, your Honor. Jim Irwin for
9 the defendants. We plan on using it the exact same way.
10 Although it does not, the functionality of it does not
11 alleviate some of our service issues because, basically, there
12 are only a handful of us that we need to effect service on.
13 But we're going to find it very easy to upload our documents
14 each time we serve something and then the service will follow
15 from that. So we're satisfied with it and we're looking
16 forward to the January 3rd start-up date.

17 THE COURT: That's good. That is fine.

18 MR. HERMAN: One other report to make to the Court, and
19 that is the Verilaw information forms have been returned to us.
20 Thirty-eight have been returned out of 126. And we had
21 yesterday and again today reminders going out. We expect full
22 compliance with the Court's order by January 3rd.

23 THE COURT: I put in the order that if we don't get
24 compliance, I am going to have to be dismissing cases, so let's
25 make sure that everybody understands that.

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2 MR. HERMAN: Up to now I have been conveying that very
3 gently, but beginning today we will convey that in stronger
4 terms. I don't think we would like to see any of the cases
5 dismissed, nor would the attorneys that have filed.

6 The other issue is that there are a number of
7 cases that are now being transferred in the last -- since we
8 met last, and those folks, many of them I don't think are up to
9 speed with the prior order.

10 THE COURT: We ought to sort those out so if I do have
11 to act, these latter cases will not be in the mix if they have
12 just come aboard and don't have the information.

13 MR. HERMAN: Yes, your Honor. Would your Honor like me
14 to proceed with the other issues?

15 THE COURT: Right.

16 MR. HERMAN: With regard to the master complaint and
17 master answer, we have conferred with that. We're going to try
18 to meet the January 31st date. We hope it won't have to be
19 extended. It will depend, I think, on the frequency of the
20 cases that we get transferred between now and then, because
21 we're going to need, depending upon the nature of the other
22 filings, we'll need to include some allegations in the master
23 complaint.

24 In terms of initial disclosures, we have now
25 received this week from defense counsel on CD ROM approximately

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2 290,000 to 300,000 pages of materials with the general index,
3 and we're now reviewing those for technical quality. We have
4 conferred with the defendants. And if we have any problems,
5 we're certain that it will be remedied in short order.

6 Now that the defendants have made their first
7 production in conformity with Pretrial Order No. 1, we have
8 asked that they accept service, and they have, on our initial
9 Request for Production of Documents. We are discussing
10 sequencing and we hope to come to a mutual agreement. We have
11 a mutual agreement on some of those issues.

12 THE COURT: Does the defendant have anything to add on
13 this?

14 MR. IRWIN: Yes, Judge. Thank you. We are working on
15 document sequencing. One of the things that we furnished to
16 our colleagues across the aisle is an index of the boxes that
17 we have identified. That index shows the boxes that have been
18 produced and those consist of the 290 to 300,000 documents that
19 were produced this week for the IND and NDA. This index also
20 shows documents that have been reviewed by box already by
21 categories, such things as drug safety, the review is now
22 ongoing; regulatory affairs, the review has been completed.
23 And it also identifies what review has yet taken place.

24 We think that this document will be very helpful
25 in further discussions with plaintiff counsel about staging the

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2 production and the ruling out of production of documents. We
3 have accepted service of the Request for Production of
4 Documents that was given to us earlier. That helped us talk
5 with the other side about sequencing and they have now served
6 us with the production. We have accepted service.

7 I meant to mention to Russ this morning, but I
8 forgot to, that we would like to have until January 31 to make
9 any objections to that.

10 THE COURT: Any problem with that?

11 MR. HERMAN: May it please the Court, we don't have a
12 problem with waiting until January 31st for objections, but we
13 would like production to continue between now and January 31st,
14 the defendants reserving without losing any of the objections
15 that they may raise. So that as documents are reviewed by the
16 defendants, they're produced serially.

17 THE COURT: Do you have any problem with that approach?

18 MR. IRWIN: No, your Honor. I've just consulted with
19 my colleague Mr. Preuss, who is supervising the document
20 production, and that is what we plan on doing.

21 THE COURT: Let's do it that way. Put that one in the
22 record and let it reflect it.

23 MR. HERMAN: The document production protocol, your
24 Honor has set December 28th, I believe, for our next motions.
25 We have a very strong difference of opinion as to electronic

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2 production. We do not believe it's resolvable.

3 Learned counsel opposite has asked for additional
4 briefing time and motion time on that issue. We're amenable to
5 it, your Honor, with the understanding that the plaintiffs will
6 not be prejudiced by any loss of electronic information during
7 that time, nor will we be prejudiced because the defendants
8 have placed some of the electronic information on the CD ROM.

9 We intend to produce at a hearing, with your
10 Honor's permission, the individual whom we have retained who we
11 believe is the leading expert in the federal system on
12 electronic production to explain in a more lucid way than
13 counsel can of why it is needed. So we accept counsel's
14 request that that matter can be postponed so they can have
15 additional briefing time, but ask that in terms of status quo
16 issues we not be prejudiced in the additional period.

17 THE COURT: How much time do you need?

18 MR. IRWIN: Your Honor, we appreciate that and we agree
19 that their position should not be prejudiced by virtue of any
20 delay attended with what we think would be a benefit to the
21 entire process. And if I could address that for a second.

22 They have asked for production of documents
23 electronically in Native format. A new term that we also
24 chuckle about because, I think, that is new to many of us. But
25 our position has been, and we have talked about this with

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2 Mr. Herman and Mr. Davis yesterday, that the process will
3 benefit, if the parties can address in some meaningful way the
4 categories of documents that they feel would be of value if
5 they were produced electronically.

6 And I don't want to argue the merits of it at this
7 point, but our position is that since we're producing hard copy
8 versions of the documents, what needs to be done, there needs
9 to be an analysis of what is the value of the electronic
10 version of the same document and what is the burden associated
11 with producing that electronic version. And we don't think it
12 can be done in a vacuum. We don't think the briefing process
13 would be of much value to the Court if we were just to present
14 it to your Honor wholesale.

15 Depositions are taking place in New Jersey, and we
16 will talk about that in a little while, they start on January
17 23. And those depositions will include questions about the
18 defendant's computer system, questions about its preservation
19 of documents, questions about what kind of information is
20 maintained electronically, and much of the record that is
21 developed during those depositions would be the record that we
22 would brief to your Honor about the very issues that your Honor
23 would have to decide; namely, balance, balancing on the one
24 hand the value of the electronic information versus the burden
25 of producing it.

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2 So we think that the briefing should be delayed to
3 accommodate the development of that record. And we think that
4 there could be a basis for us to agree on some of these
5 materials to be produced. And that the plaintiffs should file
6 the first motion, and we should be given a reasonable
7 opportunity to respond to it.

8 THE COURT: What are we talking about realistically
9 from the standpoint of time wise? What's realistic?

10 MR. IRWIN: I think if the depositions are completed by
11 the end of January, that the motion should be filed in early
12 February, I would suggest.

13 THE COURT: How do the plaintiffs feel about that?

14 MR. HERMAN: I want to thank learned counsel for not
15 arguing the merits. Your Honor, we will not agree on this
16 issue. This issue is at an impasse. We will file our motion
17 post haste and then your Honor may, taking into light counsel's
18 need for time, set it at a time that is reasonable. But we do
19 not want to delay filing. We will address the issue of burden.
20 We will address the other issues that counsel raised in his
21 non-merits discussion.

22 THE COURT: Okay. I will give everybody an opportunity
23 to brief it and discuss it with me, or argue it or present any
24 material or any evidence, if there be any evidence. But I do
25 want to get on with this, so I understand the problems. I

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2 understand you need time to brief. But we have got to get over
3 this before we get on to something else.

4 MR. IRWIN: Judge, I would only like to add that I
5 think this is a particular issue that would benefit from oral
6 argument. I will be the first to admit that I am not the best
7 person to argue this particular motion on the merits of the
8 electronics. I think there are other people on our side that
9 might be able to answer those questions best.

10 THE COURT: I agree with that.

11 MR. HERMAN: Your Honor, in that regard, we should be
12 able to file this motion by mid January to give plenty of time.
13 Secondly, if we agree that it does need oral argument and
14 briefing, that we do intend, with your Honor's permission, to
15 offer some expert testimony about this issue.

16 THE COURT: With regard to testimony, let's make sure
17 you know what the testimony is so that if you have any, I'll
18 hear it at the same time.

19 MR. HERMAN: I can advance that now. We have retained
20 Ms. Feldman who has written the premier articles on electronic
21 servicing. We have provided learned counsel opposite, as well
22 as Jonathan, with a copy of the presentations that were made.
23 And we would intend to produce, with the Court's permission,
24 this expert's testimony on the need and type of electronic
25 production.

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2 THE COURT: You take a look at that. If you need
3 anybody, let's let counsel know so we're all on the same page.

4 MR. IRWIN: We will talk about it, Judge.

5 THE COURT: Okay.

6 MR. HERMAN: With respect to plaintiff's fact sheet, we
7 have met and conferred through committee and directly and I
8 believe that we are very close to presenting something to your
9 Honor today in terms of a fact sheet. I need to have
10 Mr. Placitella and Mr. Murray review it, and we will confer
11 today and let counsel know and let your Honor know by close of
12 business today that we have or do not have an agreement. But I
13 suspect we will have an agreement.

14 MR. IRWIN: Your Honor, may I respond, please.

15 THE COURT: Yes, sir.

16 MR. IRWIN: Your Honor, we had been talking about the
17 fact sheet. They have made some progress in New Jersey and
18 actually have entered an order on a fact sheet. We had been
19 working with them as well for the same reason, that it is
20 helpful to have one if they are generally the same. So we have
21 given Mr. Herman the New Jersey version, which is very close
22 to, I think, what we have been talking about, and we hope that
23 that is resolved soon. While all discovery is being discussed
24 in our direction, we're very anxious, obviously, to see things
25 get going the other way, too.

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2 THE COURT: I think we ought to focus on that because
3 that, to me, seems to be another preliminary matter that we
4 ought to get over.

5 MR. IRWIN: Yes, sir.

6 THE COURT: State liaison counsel, I saw the
7 suggestions. I don't have any problem with them. With regard
8 to one of them, Mr. Dumas, you were going to talk with him and
9 find out what his position was. I didn't see his name listed.

10 MR. HERMAN: I have not had an opportunity to meet with
11 him. I feel certain that Mr. Dumas would accept on this
12 committee, and if I may, myself being often in error but never
13 in doubt, suggest that his name should be added at this time in
14 order to save having another order issued. And I will confirm
15 it with Walter today.

16 THE COURT: And I will contact Judge Corodemus and
17 talk with her about the designation of a New Jersey liaison
18 counsel.

19 MR. HERMAN: There is also another name and that is the
20 liaison counsel for West Virginia, Barry Hill, and Mr. Hill is
21 with us this morning from West Virginia. Barry, would you
22 stand up.

23 Judge Fallon, Barry Hill is a past president of
24 the West Virginia trial lawyers and has agreed to serve as the
25 West Virginia liaison as well as undertake other

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2 responsibilities.

3 THE COURT: Fine. Mr. Hill, I am glad to have you
4 aboard. This is a critical part of the case, in my view. You
5 can stand so I can see you, sir.

6 MR. HILL: Yes, sir.

7 THE COURT: It's a critical part of the case, because
8 it seems to me that we ought to all be on the same page with
9 the state court proceedings as well as the federal court
10 proceedings. I want you to feel that you have access to the
11 record here and access to the court.

12 I want you to participate to the extent you feel
13 you need to participate, to take advantage of any of the
14 discovery or any of the work progress going on. Hopefully, it
15 will be of some help to you folks over there.

16 If there is any input you want to make, let's keep
17 that in mind and make the input and I will listen to you. And
18 I invite you to do so.

19 MR. HILL: Thank you.

20 THE COURT: Thank you.

21 MR. HERMAN: Your Honor, lead counsel for the defense
22 would like to address this issue.

23 MR. CAMPION: Good morning, Judge. Tom Campion from
24 New Jersey. Your Honor will be provided with a copy of the
25 orders that Judge Corodemus entered. Actually, they were

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2 signed by another judge in her absence, but they are her
3 orders.

4 And a study of those orders will find no
5 inconsistencies with anything that you have done to date, that
6 I know of. We have proposed to the Plaintiffs Steering
7 Committee and given to them for their consideration a document
8 that we would now like to discuss with the Court. It flows
9 from our concern about state cases, I don't want to say running
10 amuck, but going their own way. We have suggested the
11 following proposal to them and obviously will have no merit but
12 for your approval.

13 We suggest an arrangement of the following type,
14 that we be directed, though we will do it voluntarily, to
15 provide to the court and Plaintiffs Steering Committee a
16 complete list of all state court cases with the relevant
17 information about people, phone numbers and the same. That
18 once that is provided, that the Plaintiffs Steering Committee
19 shall have the option, if it so chooses, to approach those
20 attorneys for the plaintiff and request them to participate in
21 the discovery as it is being conducted here.

22 Failing to obtain approval of that type within a
23 very short period of time, the defendants, Janssen, Johnson &
24 Johnson, will assume the burden of making applications in all
25 of those cases for judicial approval of some sort of

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2 arrangement for cooperation of the individual state cases with
3 proceedings which are being directed by your Honor.

4 We're mindful of the state-federal concerns, and
5 state judges have their own thoughts about things, but it would
6 be a request.

7 In that connection, if this proposal meets with
8 the approval of the Plaintiffs Steering Committee and your
9 Honor, we would also suggest that the Plaintiffs Steering
10 Committee and defense liaison counsel prepare a document for
11 your Honor's consideration which would be then attached to an
12 application that would be made for cooperation on discovery.
13 My colleagues to the right have the matter under consideration,
14 and I hope that they will soon have an answer and that we can
15 present something to you for your consideration.

16 THE COURT: Plaintiffs have any response to that?

17 MR. HERMAN: Yes, your Honor. We would rather be
18 responded to as the colleagues are on the left.

19 THE COURT: It depends how you're looking at them.

20 MR. HERMAN: Your Honor knows where we stand on these
21 issues. We have conferred about it. We're trying to grapple
22 with language that we believe is appropriate and that we can
23 present to -- that as it's presented to the judiciary in the
24 federal system as well as the state systems that it not be
25 offensive to the judiciary nor to the lawyers, and it's not a

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2 very easy -- it's very difficult to walk that line, but we will
3 resolve it before the end of the year.

4 THE COURT: I understand. I think we're all on the
5 same page. It seems to me that it's to the advantage of
6 everyone, both the state court litigants and the federal court
7 litigants and the federal court, as well as all of the state
8 courts, to see if we can profit from each other's experience
9 and not have to re-invent wheels and redo things and do them in
10 a different way, whatever. I know everybody has their own way
11 of doing something, but if we can pull together on this one, it
12 seems to me it would be the right thing to do for the
13 litigants, for the process.

14 So I understand the delicacy of it. And I am sure
15 that counsel on both sides are mindful of that.

16 MR. HERMAN: I also have a recommendation on this
17 issue. And that is if Judge Corodemus is so disposed to
18 appoint someone to liaison with this group, before we would
19 agree to anything on the plaintiffs' side we would certainly
20 like liaison counsel input on it. It doesn't do much --

21 I am concerned that if we, if the MDL sign off on
22 it with defense counsel and we don't get liaison counsel input,
23 then we're going to be met with, even if it's a great document,
24 some suspicion. Put it that way.

25 But we can get that done by the first of the year,

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2 I am certain, your Honor. We will have a meeting on -- I say
3 by the first of the year, certainly by the 15th. We have a
4 meeting scheduled in New Orleans on January 12th.
5 Mr. Papantonio of our committee is called. We expect to have
6 all liaison counsel to meet with us at that time.

7 I know that counsel would like, counsel opposite
8 would like an agreement that we can submit to the Court before
9 that time. I will try to move up the agenda on that. Perhaps
10 we could have the liaison committee meet before the end of the
11 year, and if we can do that I am sure we could come up with a
12 document. This is not going to be an issue in contest.

13 THE COURT: If all state liaison counsel are coming to
14 New Orleans, give consideration to at least bringing them to
15 court. I would like a word with them.

16 MR. HERMAN: Yes, your Honor. Our next meeting date is
17 when, January --

18 THE COURT: 18th.

19 MR. HERMAN: And that's when the depositions, I
20 believe, are scheduled. The depositions of New Jersey are a
21 week later. So the 18th we will invite liaison counsel to come
22 to New Orleans. We will indicate that your Honor would like to
23 address the liaison issues.

24 The expense and time reports, your Honor has
25 extended to January 31st without opposition. Frankly, the

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2 reason for that is that we have had so much organization duties
3 in terms of the various technology and our committee
4 appointments from the PSC will only be going out today, we want
5 to give those folks an opportunity to submit their time records
6 as well.

7 THE COURT: We have extended that to the 31st.

8 MR. HERMAN: Your Honor, I believe --

9 THE COURT: You have something on the stipulation?

10 Where are we with that 803(6)?

11 MR. HERMAN: Well, the defendants basically have agreed
12 to an authenticity stipulation, but not a business record
13 admissibility stipulation. It's better the defense counsel
14 speak for themselves on this issue.

15 MR. IRWIN: Thank you, Mr. Herman. Judge, we think the
16 best way to try to deal with this is to do so as we roll out
17 these productions.

18 THE COURT: I can see that. A 901 objection is one
19 which you can globally deal with. And 803(6) is somewhat fact
20 specific. I've got that. I understand that.

21 MR. IRWIN: We plan on having a meeting to address the
22 803(6) possible stipulation with respect to the IND and DNA.

23 THE COURT: Okay.

24 MR. HERMAN: May it please the court, from the
25 plaintiffs' side, as serial production continues and as those

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2 documents are reviewed, we intend to meet and confer
3 periodically with defense counsel in an attempt to get a
4 stipulation of business record in lieu of filing requests for
5 admissions for each and every document.

6 THE COURT: I think you're going to find that you're
7 going to be able to group them and there will be some groupings
8 that both sides are comfortable with. There may be some
9 groupings that you are not comfortable with and there may be
10 some gray areas. That's the way these things usually shake
11 out. It will be up to focus on the ones that you can stipulate
12 to by groupings.

13 And I know it takes awhile to get comfort in this
14 area. You don't want to stipulate because it may bleed over
15 into something else, but you will be able to get a grouping
16 early on, hopefully.

17 Talk to me about the virtual document depository.
18 As I read, the defendants have some difficulty or conceive of
19 some difficulty with it. Do you want to speak to that?

20 MR. IRWIN: Judge, there were basically three things
21 that I wanted to address on behalf of the defendants to your
22 Honor about this issue. One of them has to do with costs, the
23 second has to do with security and the third has to do with the
24 value with respect to state-federal coordination.

25 On the subject of costs. We have produced the first

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2 300,000 documents in electronic form. Mutilative imaging,
3 which is a phrase that I can throw around, but we have also
4 produced or we will produce, I believe by tomorrow, a complete
5 index of all of these exhibits. And the index is global. It
6 is expansive. It includes the name, the date, the type of
7 document, the subject matter of the document, the Bates range,
8 whether the document is an attachment. All of that information
9 was developed by us at tremendous expense, as I am sure the
10 court is aware.

11 We feel that when we provide this information, as
12 we have and we will continue to do, that we are carrying our
13 fair share of the cost associated with the establishment of the
14 virtual document depository. It is a tremendous expense to us.
15 And we think that that is fair.

16 The numbers that we have seen, I think your Honor
17 was here during parts of the presentations on December 7th and
18 December 8th, show that there will be a monthly charge for the
19 handling of hosting, I guess, of the virtual document
20 depository. We think that that monthly charge should be paid
21 by the Plaintiffs Steering Committee, the plaintiffs who use
22 the virtual document depository.

23 We feel that we probably will not be using the
24 virtual document depository, which gets me to the second issue
25 and that is to do with security. We are not satisfied that the

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2 present technology will provide sufficient security to either
3 side with respect to subjective coding.

4 The people who sat here on my team, who know what
5 they're talking about, tell me that they were not comfortable
6 that the proposals that were made would truly shield the work
7 product that either side might generate in doing subjective
8 coding. One thing that was said to me, which I can relate, is
9 that the systems were on the same server and were not on
10 separate servers and there are ways to penetrate either system,
11 all being on the same server.

12 There are other issues associated with security
13 having to do with the inadvertent disclosure of documents and
14 having to do with the inadvertent or uncontrolled access, but
15 security is a great concern to us when it relates to
16 subjectively identifying and coding the documents.

17 Point No. 3 is a very important point to all of us
18 here and to my colleagues on the left as well. And that is
19 state-federal coordination and we're not convinced that this
20 will promote state-federal coordination. We have said before
21 that we hoped it would.

22 But if there are going to be charges, expense
23 charges, access charges for use of this depository, then we
24 wonder whether it will promote state-federal coordination
25 because we're going to be basically obliged to present the same

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2 information primarily in the same format to plaintiff counsel
3 in state litigations as well.

4 And so one would wonder since the information is
5 so usable, so user friendly, it's already in electronic and
6 imaged form and since we will be providing a terrific index,
7 there will be little incentive for state litigants to use a
8 virtual document depository under those circumstances.

9 And furthermore, if they have to pay, there will
10 be maybe a disincentive. So we're concerned about whether it
11 will really promote that. We still think that it is generally
12 a constructive idea, but the more we have worked with it and in
13 light of our recent production and what we intend to produce in
14 the future, we think that it is best that it be in the province
15 of the plaintiffs.

16 THE COURT: I understand your comments. Let me speak
17 on a couple of them.

18 First, with regard to costs. I think cost is
19 always relative. We think in terms of specific amounts, but
20 the truth of the matter is amounts are relative and so it
21 depends upon how much is expended totally. I think that
22 relativity is significant to cost.

23 No. 2, cost-benefit analysis; that's something
24 that has to be, I think, considered by you because it's a
25 question of whether you pay voluntarily or pay by court order

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2 or if the matter is ultimately resolved amicably have it
3 factored into the overall sum.

4 So look at costs a little more closely because it
5 seems to me that one way or the other you might be paying it,
6 and if that's true, you might as well get some benefit out of
7 it.

8 No. 3, security, with security, I understand your
9 concern. That's a legitimate point and you just have to be
10 comfortable with it. And if you're not comfortable, then I
11 understand your situation. You've got a responsibility to your
12 clients and I appreciate that. But it seems to me security can
13 be accomplished technologically.

14 No. 4, state-federal coordination. I think that's
15 an area in which it would be more meaningful to you perhaps, or
16 to the defendants than to the plaintiffs, because I do foresee
17 there may be more of an opportunity in the state cases
18 resulting in a cost benefit to the defendants. And I don't
19 foresee the state people being gauged. I wouldn't expect their
20 costs to be so prohibitive that it would be prohibitive for
21 them, or even cheaper for them, to get it from you a second
22 time than it would be for them to get it the first time. So
23 that, I think, is something that the more we move into it, the
24 more it should become manageable and attractive.

25 Security is the one thing that I can't give you

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2 comfort on. The costs and the state and federal coordination,
3 I think I have some input on that that you have to take into
4 consideration, because if I can make it work for the states, I
5 am going to try to do so. It seems to me to be advantageous to
6 the states. It seems to me to be advantageous to you. I don't
7 think it makes any sense at all for you have to produce four
8 million documents twice, or three times or four times. That
9 doesn't make any sense to me.

10 So it's both economically feasible and consistent
11 with common sense; so it seems to me to be advantageous to at
12 least look at it that way.

13 But I would like to go forward with this, and if
14 you don't want to get on board now, I respect that, I
15 understand, particularly with regard to security, but I do want
16 to go forward with it, if the plaintiffs are interested in it.
17 If they buy it at this point, then they will have total access
18 to it. I want to hear from the plaintiffs.

19 MR. HERMAN: As your Honor is aware, I have as much
20 technical knowledge, cutting through the technology to me is
21 like trying to get through a bowl of Jello with a buoy knife.
22 I am much better at the latter than the former.

23 I want to say that we're going to make a
24 conscience effort, a conscientious effort to institute a
25 virtual depository of some sort. Of the four presenters, we

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2 believe that two were superior. We believe that the security
3 problems can be worked out. One of the ways to work them out,
4 we believe, is with certain guarantees that the vendor will
5 have to make for our purposes.

6 We have also since we received learned counsel's
7 demurrer to the virtual depository explored an alternative in
8 the HMO MDL pending in Florida before Judge Marino. The
9 plaintiffs in that case, and there are a number of plaintiff
10 groups, have established, more or less, or are establishing
11 more or less a virtual depository for plaintiffs only in which
12 objective evidence, as well as subjective matter, can be
13 accessed. And we're looking at the security system there, so
14 we are proceeding.

15 THE COURT: It just seems to me, folks, and I know that
16 this is a cutting edge situation and a lot of us are not
17 comfortable with a lot of the issues that the technicians and
18 technical people are discussing with us, but it seems to me
19 this is the right way to go. We have all been there in the
20 litigation arena and know that when you go into depositions and
21 have crates and crates of hard copy, depositions are
22 interminable.

23 A deposition that I can read in two hours, will
24 take you four days to take. Going through documents, passing
25 them around, or looking at them a first or second or third

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2 time, all of the things that all of us have dealt with. It
3 seems to me that this new technology makes it easier and more
4 accessible and more manageable, more efficient, and we're
5 missing the opportunity if we don't go into this and take a
6 look at it. It just seems to me that's where this type of
7 litigation is going, so I suggest you get on board.

8 MR. HERMAN: Your Honor, I would be remiss if I did not
9 address now the third issue regarding the depository. As a
10 representative of the Plaintiffs Committee in this case and
11 some 70 or 80 lawyers at law firms who have agreed to
12 participate in the MDL discovery and trial issues, we have made
13 every effort to provide our work product thus far with the
14 state attorneys. I am not going to indicate what the response
15 has been coming the other way. Hopefully, a door has been
16 opened and we will see some movement.

17 The question of depository is not a problem in
18 terms of liaison with objective evidence. If what the virtual
19 depository does is give access to lawyers across this country
20 to documents that are produced that they can access and then
21 evaluate themselves, I believe, a reasonable cost and access
22 can be worked out.

23 However, there is an old saying in Texas, "darn
24 the mule who doesn't pull." And it's not fair for the lawyers
25 that carry the work load on the plaintiffs' side and pull the

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2 load to have their subjective work product exposed to lawyers
3 that are not contributing.

4 THE COURT: I don't have any problem with that. That
5 makes sense to me.

6 MR. HERMAN: So we will proceed. And with your Honor's
7 understanding, we're able to do this and we have every
8 intention of trying to do it. We will separate our workload
9 from the objective documents.

10 THE COURT: The way I see it, at least at this time,
11 what I think the state court can benefit from, the people can
12 benefit from is just access to the documents themselves. In
13 other words, if we have in this litigation hard copies stored
14 in New Orleans and they want to see hard copies stored in New
15 Orleans, everybody is going to have to fly to New Orleans, get
16 either copies of those hard copies and whatever it is. It just
17 seems to me that if they have access to it, it will negate
18 travel and alleviate the necessity for the defendants to
19 reproduce the same documents that they already have access to.

20 MR. HERMAN: One other issue that I want to address
21 about the taking of depositions. The legal profession is
22 moving at a much slower rate than the technology offers. The
23 technology is changing as fast as we can buy it. The evidence
24 management, which is probably the most sophisticated electronic
25 video and CD ROM access for use during depositions locally, the

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2 cost compared to using hard copy is about triple.

3 And so while I deeply respect your Honor's view as
4 to where we're going, and hopefully we can move, it is much
5 more expensive today to take depositions. We have recently,
6 Mr. Murray and I have been involved in perhaps 200 depositions.
7 The access and use of CD ROMs during depositions, in those
8 depositions cost us three to four times. Fortunately, we had a
9 big load of lawyers to carry the cost. I did want to point
10 that out.

11 THE COURT: I understand. Anything else on any of the
12 reports that liaison counsel have?

13 Let's go through the agenda. Virtual depository,
14 we talked about that. Document production protocol, plaintiff
15 fact sheet, master complaint, 803(6) problems, document
16 production sequencing. Do we need anything else on that or
17 have we exhausted that?

18 MR. HERMAN: Your Honor, we don't have anything.

19 THE COURT: Electronic Verilaw, electronic service,
20 confidentiality order. I thought I signed that, didn't I?

21 MR. IRWIN: Your work is never done, Judge, when we
22 don't attach everything that should be attached. And what we
23 did not attach was the agreement that the individuals are
24 supposed to execute to agree to be bound by the confidentiality
25 order. It was just a clerical oversight. We have prepared a

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2 consent motion to attach it and it will be filed today.

3 THE COURT: Okay. The state liaison committee.

4 MR. IRWIN: Excuse me, your Honor. There was one other
5 thing I was asked to bring to the Court's attention. With
6 respect to the document production protocol that your Honor
7 alluded to a little bit earlier on the agenda, we have worked
8 out the agreement about the formatting of the electronic
9 imaging and also the indexing of the documents that I alluded
10 to a little bit earlier, date, type, Bates number, what have
11 you.

12 And that will be memorialized in a joint motion
13 which we are filing today or tomorrow. So all of the
14 formatting and indexing issues will be presented to your Honor
15 for what we hope will be the issuance of an order commemorating
16 that agreement.

17 THE COURT: I have been trying to put my orders on the
18 web site, so I appreciate you all cooperating and giving them
19 in the format that I can do it more easily.

20 While I am on that, anybody has any suggestions
21 about what I should or could do more on the web site? Anything
22 helping you, anything that would help you more?

23 MR. DAVIS: Your Honor, I have a question. When we
24 submit these motions and orders, I've gotten conflicting word.
25 Do you want them by e-mail, do you want a disc?

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2 THE COURT: I can do it either way. If you give them
3 to me in e-mail, that's sufficient for us to move them. If
4 not, the disc is satisfactory, too.

5 MR. HERMAN: May it please the Court, we can relieve
6 defense counsel and plaintiff counsel, I don't think it's
7 necessary anymore to provide five copies of everything plus a
8 disc. I haven't discussed that with Jim, but I will today, and
9 perhaps get back to you on that.

10 THE COURT: Sure.

11 MR. IRWIN: May it please the Court, that is Item 1 on
12 the new business, and we had previously submitted to your Honor
13 an order which, I think, the Court signed, and we are now only
14 responsible for submitting one copy and a disc to one another.
15 We would now like to ask your Honor for permission just to
16 submit to each other, instead of a disc, just use e-mail. We
17 have done that comfortably between our offices.

18 THE COURT: Anybody have any problem with that?

19 MR. DAVIS: No problem.

20 THE COURT: Just for purposes of the record, get me
21 something so that I can authorize that. Let's make sure we do
22 that.

23 MR. IRWIN: We will submit a joint motion, your Honor.

24 THE COURT: New Jersey, Texas depositions.

25 MR. HERMAN: I spoke with New Jersey counsel, Mr. Mike

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2 Coren, who, as I understand it from him, is the secretary for
3 the state lawyers of New Jersey in their endeavors. Advised
4 him that we would cooperate, advised defense counsel, and we
5 have sent two representatives from the MDL to these depositions
6 with the provision that they would not be depositions in
7 substance, they would only be MIS depositions.

8 And secondly, we were not indicating in any way
9 that the MDL's lawyers' rights to go forward with merits
10 discovery should in any way be deterred or hampered by
11 cooperating on this initial set of depositions. We want to
12 show our good faith. And again, in attempting to assist the
13 liaison and cooperation situation without sacrificing the
14 intellectual and professional right to do the type of discovery
15 that we think needs to be done. So we will be attending, your
16 Honor.

17 THE COURT: Fine. There are several liaison counsel in
18 the court. Any comments on this issue? This affects you in
19 some way, shape or form? Anything you want to add? Anything
20 from defendant on this particular point?

21 MR. IRWIN: No, thank you, your Honor.

22 THE COURT: Anything else other than the deposition
23 disclosures? Anything anybody would like to raise, any issue?
24 Okay. Let me hear from you on deposition disclosures, please.

25 MR. IRWIN: Your Honor, I am assuming you want to hear

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2 from us first since we're the mover.

3 THE COURT: Yes, you're the moving party.

4 MR. IRWIN: I was not going to go over the arguments
5 that we made in our motion.

6 THE COURT: No, I've read the briefs.

7 MR. IRWIN: What I was going to do, other than to offer
8 to answer any questions, was to try to respond to some of the
9 arguments that were made by the plaintiffs in response to our
10 motion.

11 THE COURT: Let me hear from the plaintiffs first and
12 then I will give you an opportunity to respond.

13 MR. HERMAN: May it please the Court. We appreciate
14 the opportunity for oral argument because we believe this issue
15 is serious. We believe that it is a one-way issue, that the
16 defendants have a one-way road to travel and that if they're
17 successful in this the playing field is not going to be evenly
18 balanced. The reason for that is that in a products case, and
19 particularly a drug products case, the materials that are
20 presented in discovery and then selected by plaintiffs and then
21 reviewed by plaintiffs which form the subject of not only who
22 they will depose but what questions they will ask, is work
23 product intensive and it only advantages the defendants.

24 The plaintiffs have no -- the plaintiffs who are
25 suffering from a cardiac disease will already have produced the

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2 hospital records and medical records. There is nothing for the
3 defendants to produce in ten days before a deposition.

4 In addition to work product, and we have briefed that
5 issue, I, on behalf of the PSC, urge your Honor that
6 spontaneity during a deposition and the search for truth is
7 paramount in "discovery." Learned counsel opposite are
8 extremely successful, professional and ethical lawyers and
9 professional, successful, ethical defense lawyers review
10 documents with witnesses before depositions, particularly their
11 corporate clients. They talk about the types of questions that
12 could be asked. And if I might use an indelicate phrase, "wood
13 shedding" is an acceptable practice but it doesn't --

14 THE COURT: On both sides.

15 MR. HERMAN: Yes, absolutely. It does not, however --
16 however, the problem is compounded when you provide counsel
17 opposite with your work product and your thinking. Lawyers are
18 supposed to act with integrity, and this group of plaintiff
19 lawyers will, your Honor, inside this courtroom and outside of
20 this courtroom. What is our recourse, to do what is done in
21 most cases, to load up the opposition with 7,000 documents and
22 only question 100 in order to product your work product?

23 Learned counsel opposite cites cases where such an
24 order was entered. And in those cases many times the lawyers
25 didn't oppose it and many times it was thought to be

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2 "expedient" let's get on with discovery. Expediency, your
3 Honor, is not justice. For every case in which this has been
4 done, I can name four cases in which it was not done.

5 BRIGHTFIELD, Ferry-Frosta, Continental Grain, IMC Explosion,
6 Gaylord, Combustion, federal and state cases, all within
7 Louisiana and the Fifth Circuit and I could go on and on.

8 So having talked about work product and
9 spontaneity go to Hall v. Clifton. Hall v. Clifton is a
10 Pennsylvania case your Honor is familiar with, and the whole
11 idea of Hall v. Clifton is to assure that there is no
12 interference with a search for truth during a deposition. To
13 the extent that a plaintiff lawyer is not allowed to confer
14 during the deposition with the plaintiff who is being
15 interrogated except on a matter of privilege.

16 And the same holds true for the defense. Well,
17 how does that have any meaning if for ten days the plaintiffs'
18 work product and mental impressions have been discussed ad
19 nauseam with a team of experienced, well-meaning and ethical
20 lawyers vis-a-vis the witnesses that are going to be deposed.

21 Last, your Honor, as I see it, the only argument
22 that the other side has raised is depositions will be conducted
23 in a more expedient fashion. Well, I don't understand that
24 argument. We have got a stipulation that depositions are going
25 to last two days, except for good cause shown. Now, that's in

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2 the record. I mean, it's there. Plaintiffs abuse it or
3 defendants abuse it, that can be called to your Honor's
4 attention. If we need more time for legitimate reasons, either
5 side, we get more time.

6 But two days in terms of a corporate
7 representative -- excuse me, because 30(b)(6) is different and
8 I don't want to overspeak. But in terms of someone handling
9 research and development at a management level is a short
10 period of time. I don't know where this whole idea of
11 justifying intrusion in the trial lawyer's intelligence, both
12 sides, has come from in the name of expediency. It is not a
13 valid argument.

14 And the fact that depositions in some cases may
15 even take longer because of the ten day rule. If I pick the
16 documents or Mr. Papantonio or Mr. Gauthier and we go to a
17 deposition and we're not getting the answers we need because
18 the witness is so prepared on those documents that we can't
19 really dig into the thinking behind the documents, the
20 subjective reasoning, then where are we without filing
21 additional motions asking for extensions, et cetera.

22 So in conclusion, your Honor, there are three
23 issues here. On the plaintiffs' side, it's our work product.
24 They shouldn't be allowed in advance to know what our work
25 product is.

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2 Secondly, spontaneity and search for the truth
3 comes down heavily on our side.

4 And the third matter is the only issue that the
5 defendants raise here is expediency, which is a test-tube
6 concept. There is no validation, there is no way to measure
7 it. And the fact that it may have been done in some other
8 cases is not sufficient to warrant an intrusion into work
9 product or to destroy the spontaneity of the witness's
10 response. Thank you, your Honor.

11 THE COURT: Any response?

12 MR. IRWIN: Yes. Thank you, Judge. I think the first
13 thing that we would point out is that the cases that the
14 plaintiffs have cited are not MDL cases. They are cases
15 involving individual lawsuits where the issue of case
16 management and complex litigation was not the same challenge
17 that it is here. All of the cases that we have cited come
18 either from that direct -- have that legacy or are described in
19 the manual for complex litigation. We think that is an
20 important distinction. And when we're talking about 2,000,
21 3,000, maybe as many as what we have heard 15,000 plaintiffs, I
22 don't know how many depositions of defendants, efficiency does
23 become a factor and that is why the cases that we have cited to
24 your Honor have chosen this type of process.

25 The two cases that really address the issue are

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2 the San Juan-DuPont case and the Sport case, which is the Third
3 Circuit case. The Sport case involved, of course not an MDL,
4 it was a single case, and in that case the defense attorney was
5 preparing the client for deposition and had reviewed a binder
6 of documents with the client prior to the deposition. The
7 plaintiff then took the defendant's deposition and then asked
8 for disclosure of the binder of exhibits that the defense
9 attorney had used to prepare his client for the deposition.
10 The defense attorney said, no, that is work product.

11 And the Court of Appeal agreed in the Sport case
12 and said, two to three, said that that is work product and it
13 was the mental impressions of the defense attorney preparing
14 his client for a deposition.

15 The DuPont case, the San Juan case very carefully
16 analyzed that and distinguished that in an MDL setting in an
17 opinion written by Judge Sellya. I think it's important to
18 note that Judge Sellya is one of the most recent appointees to
19 the MDL panel. So I think he has obvious credentials when it
20 comes to complex litigation.

21 Judge Sellya pointed out that in the Sport
22 circumstances what was occurring between the lawyer and the
23 lawyer's client was never going to come to light, was the
24 phrase that was used in the DuPont case. Whatever documents
25 the lawyer elected to show to his or her client during

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2 preparing, preparation of that client to be deposed was never
3 intended to come to light in the case.

4 On the other hand, the documents that are going to
5 be presented to a deposed witness in the case by the deposing
6 counsel are going to come to light. They're going to come to
7 light at the deposition. And all this case management order
8 does is require that they be produced earlier. And why? For
9 efficiency reasons.

10 And does it invade the attorney work product? The
11 Court of Appeals of the First Circuit said, no, it does not
12 invade mental impression, work product. It may, it may be
13 ordinary work product. But the courts commonly require
14 disclosure of ordinary work product. We are required to do
15 that when we exchange witness lists and exhibit lists. We're
16 required to do that when we respond to intention
17 interrogatories and we are served with intention
18 interrogatories that ask us to identify what are the exhibits
19 that you maintain support your claim or your affirmative
20 defense. We're required to do that.

21 THE COURT: You also get work product during the
22 deposition.

23 MR. IRWIN: You get it during the deposition when the
24 questions are asked. You get the impressions from the attorney
25 who is asking the questions about where he or she is coming

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2 from.

3 So the courts have said in these MDL settings that
4 it's not attorney work product. And also, Judge, this does
5 level the playing field. It may not feel level right now
6 because the first slate of depositions is often the depositions
7 of the defendant and the burden of producing these documents
8 and identifying them ten days before is felt by the plaintiffs
9 early in the deposition phase of the case. That was an
10 argument that was made and observed and rejected in DuPont.

11 However, our time will come when the playing field
12 will feel unlevel to us and level to them and it will come when
13 we take the depositions of the plaintiff's experts. Often a
14 very fruitful thing for the defendants to do in a litigation
15 involving scientific questions endowed with daze, but the
16 plaintiffs will feel the flame, feel greatly leveled out when
17 we're obliged to produce to the plaintiffs the exhibits which
18 we intend to use to depose their experts ten days before. So
19 the playing field will level eventually in this case.

20 THE COURT: How do you deal with his argument that a
21 response, and we all focus or function in the real world, is
22 that the response to the plaintiffs is that let me give them
23 2,000 documents because we may cover this in good faith and
24 they may feel that way or potentially they over estimate
25 because they don't want to be caught short, if they don't list

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2 them, they won't be able to get into them. So instead of
3 giving him five documents which they feel this witness can
4 speak on, they have to broaden it to include 5,000 documents.
5 How do you deal with that?

6 MR. IRWIN: I think it's a matter of judgment. I think
7 that it's a fair expectation that they would be over-inclusive
8 given the time constraints and given the pressures that we're
9 all going to feel in getting these depositions done and we all
10 get to the road and start flying in airplanes. I think it's a
11 fair expectation that they will be over inclusive and that we
12 will be, too, when our time comes. I think we will just have
13 to exercise judgment.

14 If we get 5,000 documents before a two-day
15 deposition and 1,000 are reviewed, then that may be okay. If
16 we get 25,000, then we will have to exercise our judgment about
17 whether we want to bring that to the Court. I don't think we
18 want to bring petty discovery issues to the Court. If they
19 rose to something beyond petty, then we would do it.

20 That would be my response to that problem. I
21 think we will see it. I expect it will not be a major problem.
22 I think we will see some of it.

23 THE COURT: I understand both sides. I have made some
24 notes from you all. I would like to rule on this. Let me
25 sketch up something. Give me ten minutes and I will be back.

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2 Court will stand in recess for ten minutes.

3 THE DEPUTY CLERK: Everyone rise.

4 (WHEREUPON, A RECESS WAS TAKEN.)

5 THE COURT: Be seated, please. I have before me the
6 defendants' motion requiring disclosure of documents ten days
7 prior to depositions. The defendant moves for an order
8 requiring ten days advanced disclosure of documents which
9 deposing counsel plans to question the deponent about during a
10 deposition.

11 The defendant supports this motion on the grounds
12 of order and efficiency. Defendant also points to a number of
13 cases in which such a procedure has been used successfully, as
14 well as comments in the manual for complex litigation which
15 seems to support the concept.

16 Plaintiff, on the other hand, objects to the
17 advanced disclosures on the grounds that it results in
18 deposition answers that are, at best, not spontaneous and at
19 worse are rehearsed or perhaps counsel inspired.

20 Further, the plaintiffs suggest that advanced
21 disclosures reveal the deposing attorney's thinking and
22 strategy which they feel is work product.

23 The matter is addressed to the Court's
24 discretionary duty to reasonably control the mode as well as
25 the order of interrogating witnesses set forth in the Federal

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2 Rules of Civil Procedure Rule 16 and in the Federal Rules of
3 Evidence Rule 611. Rule 611 provides as follows, 611(a): "The
4 Court shall exercise reasonable control over the mode and order
5 of interrogating witnesses in preparing evidence so as, (1) to
6 make the interrogation and presentation effective for the
7 ascertainment of the truth; and, (2) avoid needless consumption
8 of time; and (3) protect witnesses from harassment or undue
9 embarrassment."

10 There is often some tension between subdivision
11 (1) and (2) of 611(a). Such tension exists in the present
12 case. And this Court must consider the advantages and
13 disadvantages of each based on the facts and circumstances of
14 this particular case.

15 In the "best of all possible worlds," advanced
16 disclosure would promote order and efficiency, objectives to be
17 encouraged in all types of litigation, but particularly
18 multi-district litigation. In the real world, however, one
19 must question the premise that advanced disclosure of documents
20 actually promotes these laudable goals. In an attempt to
21 achieve some spontaneity, as well as purity of witness
22 response, and also, at the same time retain some flexibility in
23 the preparation interrogation, deposing counsel tend to
24 dramatically overestimate the number of documents that they may
25 use. This practice is usually justified, or at least

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1 articulated or explained by an expressed concern that if the
2 documents are not listed they may not be able to be used during
3 the deposition.
4

5 In any event, advanced disclosure usually
6 precipitates such a plethora of documents that any theoretical
7 advantage becomes meaningless in the practical application.

8 Furthermore, there is something to be said for
9 spontaneity and purity of a witness's response. This, after
10 all, is the foundation or the stylobate upon which our search
11 for truth actually rests.

12 Efficiency is important, efficiency is alluring.
13 After all, history has taught us that there is a certain amount
14 of comfort in having the trains run on time. But the courts
15 must be careful not to seek efficiency without regard to
16 consequences. The theoretical advantage of prior disclosure
17 are outweighed in this case by the practical realities and
18 potentially perilous consequences of endangering unfettered and
19 untutored testimony. More over, following the traditional
20 practice in this particular case should not cause any undue
21 hardship to the defendant since the documents at issue will be
22 largely those produced by the defendant, who probably created
23 them or at least assembled them and had access or possession of
24 them for some period of time.

25 Considering all of the ramifications of this

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2 motion and considering the facts and circumstances applicable
3 to this particular case, I don't feel that the motion is
4 sufficient to deviate from the time honored practice of
5 producing or using documents at the time they are tendered to
6 the witness.

7 So for all of these reasons, I am going to deny
8 the motion. Thank you, folks. Court stands adjourned.

9 MR. IRWIN: Thank you, Judge.

10 MR. HERMAN: Thank you.

11 THE DEPUTY CLERK: Everyone rise.

12 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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REPORTER'S CERTIFICATE

I, Arlene Movahed, Official Court Reporter, United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

Arlene Movahed

Official Court Reporter