FEDERAL TRADE COMMISSION

GENERAL MANAGEMENT WORKSHOP

I N D E X

For The Record, Inc.
Waldorf, Maryland
(301)870-8025

FEDERAL TRADE COMMISSION

In the Matter of:)
MERGER BEST PRACTICES WORKSHOP)
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June 18, 2002

Federal Trade Commission
55 East Monroe Street
Suite 1860
Chicago, Illinois

The above-entitled workshop came on for comments, pursuant to notice, at 12:00 noon.

APPEARANCES:

ON BEHALF OF THE FEDERAL TRADE COMMISSION:

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MR. BERNSTEIN: Thank you all for coming here today. This is the fourth of seven Merger Best Practices Workshops that the FTC is holding. The purpose of these workshops is to see if there are some ways that we could reduce the burden associated with the second request process while making sure the FTC still gets the information they need to evaluate the mergers in front of them.

My name is Steve Bernstein. I'm the Deputy Assistant Director for the Mergers 1 Division. With me up here is Rhett Krulla, Deputy Assistant Director for Mergers 2.

MR. KRULLA: Good afternoon.

MR. BERNSTEIN: Peter Richman, an attorney from the Mergers 3 Division.

MR. RICHMAN: Good afternoon.

MR. BERNSTEIN: Each of these sessions is being transcribed. So, if you'd like to make some comments, please first identify yourself and the organization that you're with and then just go ahead and make your comments.

There's a few people that we've asked to come here specifically who've had some recent experiences with the second request process. We wanted to get their input and I thought we'd start off by calling on them and seeing what they have to say. And after they're done, we'll go ahead and open it up to everyone else.

Mark, do you want to go first?

MR. MCCAREINS: I'm happy to do that. I'm Mark McCareins, for the benefit of the transcriber. I'm with the law firm of Winston & Strawn. The views I'm about to express are not those of my clients, my partners or maybe even myself. But Mr. Krulla, the honorable Rhett Krulla, that called me a while back and asked if I would participate in this forum. And I gladly agreed and put it on my calendar.

And didn't think much about it until yesterday I was looking at my calendar. And my major event yesterday was my Little League play off game at 5:45. I'm a coach. So, I'm thinking while I'm coaching what should I say to this august group. And we started off the ball game with a controversy before the first pitch was even thrown. These are ten year olds.

The umpire had one version of how long the pitching space should be. The other team's coach had another version. And I had a third version. So they brought out the measuring tape. And thankfully, these other two folks were not lawyers. So, we couldn't just blame the whole legal profession for this problem. So, the rules are very specific about what the pitching distance should be. Yet three grown adults with a tape measure with finite issues to measure could not readily conclude what the proper pitching distance should be.

And a light bulb went off in my head. And I don't know if it has in yours yet either, but I thought there was a tie in to the Hart Scott rules. The rules of engagement seem to be pretty straight forward. We're all intelligent, clear thinking adults, mostly lawyers. Yet even amongst this group we have disputes about interpreting these various rules and how they apply to our perspective clients.

So, with that, my comments, and Rhett had indicated that I only had five minutes or so, so I thought that opening reference might take up about 90 seconds. So, I figured I had about three minutes. I had another joke in my back pocket if I still need more time. But I had three items I just wanted to address to the group.

The first was timing. I think that all parties have a healthy respect for each other in the process and want to arrive at an efficient solution. From my vantage point, however, sometimes the requests for additional information at the end of the first waiting period come in a little too close to that 30 day clock, the last tick. And at least from my perspective, and not speaking for the private bar, but we aren't mind readers. And going back to my baseball analogy, this is imperfect science. And it's hard for us, I think, sometimes to anticipate the types of questions that you all may ask leading up to or trying to forestall a second request.

So, the later in the game that those request come and the more detailed those requests are, the harder it is for us, at least for me, to comply with those in an efficient manner. And I want to comply. I want to get you the information. But sometimes, without reference to any particular client, it may be difficult for the client with somewhat limited resources and a number of offices spread all over the country and the electronic issues, to get this information compiled, reviewed, processed and off to you in a short window of time.

So, from a timing perspective, I just want to make the casual observation that the more time we have to process that information the better. And we're all in the same boat. We're trying to get you the information. And sometimes, and I've had calls on the 28th and 29th day with a list of 12 or 15 points. They want follow up. They want back up. And I'm saying I'm trying to do my best but it's 4:00 o'clock. And it's not a question of trying to forestall the process. It's just difficult sometimes for clients to collect that information.

The second brief point I wanted to make was establishing a good line of communication between your office and ours. I'm a big believer for being pro-active, being open. Let's get going on things and on occasion it's been difficult, at least on the deals that I've worked with,

to find out who was the decision maker, is that a final decision? Is that the final request for information? And again, we're trying to conserve our resources too and sometimes it's difficult when I get a request and it's modified later in the day or the next day and I've launched my client on a project and I find out later in the day or the next day that things have changed.

I think it's very good and I'm all for it to get whoever's working the file on the phone early, say who I am, here's my interest. I'm trying to get this deal done. I'd give you my cell phone number but I think I'm probably the only working lawyer that doesn't have a cell phone. But here's how you contact me and let's get this started.

I know there's a bit of a cat and mouse game to determine early on who actually has the file. And I think you probably have some bigger issues between the agencies right now and these guidelines, who takes jurisdiction over what. So, this is probably the lesser of a couple of evils. But lines of communication I think are important to open those, to get it on the record early and to try to get those requests processed as quickly as possible.

The last point I wanted to make before I adjourn is I think maybe to dispel a perception or a myth that the DOJ or FTC may have that, you know, we've all analyzed these deals. You spend tons of time, you've got an economist

engaged for months and, you know, this is a kind of hide the ball situation. It's not necessarily a hide the ball information. You may get requests from clients, you know, 24 hours. Get the Hart Scott done. Let's do your 4C search, get something in.

I may not have the luxury of really having a really good handle on the market definition when that first Hart Scott is going in. As a result, and defining relevant markets is not a precise science either. And it's hard for us, at least on my end, to predict the types of questions or the nature of concerns that you're going to have.

So, don't be surprised if you make some requests and we express some chagrin that we hadn't thought about that. Again, it's difficult from our side to somewhat predict where your concerns are going to be. I think, at least on behalf of my clients, we always try to be responsive. But don't necessarily have a negative view as to our side of the fence as far as our motivations to stall the process, hide the ball or whatever. There may be some logistical issues, timing issues on our end that may impede our ability to process your request.

So, I don't know if that was in anyway responsive to the request for the topic here today.

MR. KRULLA: Yeah, it's very helpful, Mark. Mark raised several points relating to principally to the initial

30 day review period prior to issuance of a second request. Why don't we stick with that topic for the moment? And does anybody else have any thoughts on how we can make more effective use of that initial review period?

MS. TAYLOR: Hi, I'm Pam Taylor of Bell, Boyd & Lloyd in Chicago and I've seen cases where there's been really effective use of the initial 30 day period, when the staff is willing to meet with people very early on and shortly after the Hart Scott is filed. If the parties are prepared to come in and talk to the staff about what the issues are, it can be a very effective way of narrowing the issues or eliminating them entirely.

It's particularly helpful in cases when, you know, there really isn't an issue but it looks like there is on the surface. And there's some explaining, educating that needs to be done to get the staff up to speed on the issues and clarify that there really isn't a problem there. It's also very effective in large transactions where there are issues because you can eliminate questions that arise initially and they turn out not to be a problem upon further investigation. You can get them off them the table early and get them out of the way before the second request issues. And that can be very effective also.

MR. BERNSTEIN: Thank you, Pam. Any other thoughts?

MR. KEILER: Louis Keiler with Sonnenschein law firm. I would agree. One problem I know is a common problem and the recent protocol to divide responsibility between the two agencies which are designed to solve that is deciding which of the two agencies is going to handle the transaction. So, who do you go and see?

And since we're not going to have the apparent -- division of responsibilities, I suggest that the agencies commit to a much shorter period to resolve between themselves which of the two agencies is going to handle the transaction. So, that, say, no later than a week after the initial filing, you know who to go in and see.

MR. BERNSTEIN: Thank you.

MR. DUBROW: I'm John Dubrow from McDermott, Will & Emery. Just following up on what Mark said in terms of early interaction. It's obviously crucial to the staff, but I found in some cases that getting up to senior management really quickly, where senior management pushes themselves down very quickly as basically eliminating what would have been a very lengthy second request.

I had had a meeting where I was called in for the first meeting by the staff attorney. And basically all the way up through senior and section chief, the DOJ managed section chief was there. So, we thought we had a big problem here. They were obviously very interested in it

but, you know, when you have a case where there's a dispositive issue, which we had there, we were able to bring, basically bringing in so things weren't getting filtered so much and, you know, ultimately we were able to cut it off in 30 days rather than having three months worth of investigation on something that didn't really merit it.

MR. KRULLA: What can we do during the initial 30 day period to better tailor the second request if we're going to issue one to the issues at hand and to make it, make the second request, data request compatible with how the company keeps their records? Suggestions have been raised in prior forums about communication during that initial period between the IT Department of this company, the reporting company and the agency's IT people regarding what kind of data is normally retained by the company and the extent to which that might facilitate us fashioning our questions with an eye toward the data that actually exists as opposed to the data we can hypothesis. Any thoughts on that?

MR. BRUCE: Greg Bruce, R. Shermer. We have worked with several --

COURT REPORTER: Excuse me --

MR. BRUCE: Greg Bruce with R. Shermer. We've worked with various respondents a number of different times. And one of the things that they've talked about is just

having you guys meet with their managers. It's bringing in the business people beyond just the attorneys and sitting down so it goes beyond the IT folks. It's sitting down with all of the various management. And as such, that allows you guys to get a good feel for how they run the business, what's going on and then that allows them to better target whatever information.

MR. KRULLA: Thank you.

MR. BERNSTEIN: Have any of you come in before the waiting period even starts on certain transactions recognizing that there might be some significant issues? Has anyone tried that and if so, was the experience positive? Negative?

MR. KEILER: We tried it once and never tried it again because we went in and saw the wrong people. We worked with one agency and the other agency wound up getting clearance.

MR. BERNSTEIN: Again, for the record can you state your name?

MR. KEILER: Oh, Louis Keiler with the Sonnenschein firm.

MR. BERNSTEIN: Thank you. John?

MR. DUBROW: Jon Dubrow with McDermott again. We've had some matters, including with your shop, Steve, where we had major transactions that we knew were going to

get looked at. We spoke with FTC and DOJ and said, please work it out. Tell us who gets clearance. When you get clearance, tell us and we'll come and start working with you.

With that we've been able to take, spend the up front time taking things that really shouldn't be part of an investigation and get them off the table first. And then, you know, at an appropriate time start preparing the clock. We have been effective and I don't think we've eliminated second requests by doing that. But we've probably narrowed the scope of it. Sometimes it works against you. But if you can do that, you can help yourself.

MR. BERNSTEIN: The other question I wanted to ask, and this is following up on something that Mark had said. The request we make during the initial waiting period for information, how consistent are those requests? It seems to me that there's a general set of information that we often ask for like recent strategic plans, competitive assessments, list of customers and things like that. Are any of you seeing something different, more unusual requests coming in during the initial period?

MR. MCCAREINS: This is Mark McCareins. Many of the requests I've had in that time period are more market related for industry type information, competitive files, things that maybe a 4C document might have triggered the

question. And again, if you've got a couple of days to pull that together and you can go back to your business people and your VP in charge of Sales and Marketing and they've got some sort of competitive file that may not be available to you on the Internet or whatever, you know, we can help and have done so. But it's also usually the business plans and strategies that might be the next level of documents after the 4C's.

MR. BERNSTEIN: Do you think there might be any benefit to us putting together a model excess letter that we could put out on the Internet so at least the general stuff that we consistently ask for in investigations would be out there for people to incorporate into their planning and then some of the more specific things would be things that would still come up but at least that would be more limited?

MR. MCCAREINS: I think for the bulk of the people in this room, maybe all of us, I think as part of our anti-trust counseling and planning, we probably already requested those documents and tried to get access to them in our evaluation period. But for some others who may not do this as frequently, that might not be a bad thing to do, to have a template that people can look at as they're making their Hart Scott filing, the type of information that your office might reasonably expect if there is an issue.

MR. RAVEN: Marc Raven from Sidley Austin. I

think Mark McCareins is correct that we in this room tend to know what kinds of things we're most likely to be asked for. Although, my own experience varies from a totally open ended request to a very focused inquiry on one line in a 4C document.

But I think another benefit of having a form letter maybe that it makes it a little easier for us to go to find, certainly with ones who don't have experience with this and say, this is what FTC says. They are reasonably likely to want to see in the event there are any issues.

MR. BERNSTEIN: That's a good point.

MR. KEILER: Louis Keiler again. I would suggest that if there were any guidelines of that nature, that they be joint guidelines from both agencies because my own experience, I see a greater divergence of dealing with the Department of Justice than with the Federal Trade Commission in terms of what the staff asked for, particularly when the field offices handle the matter.

MR. MUTCHNIK: Jim Mutchnik of Kirkland. My thought about having a template, I would be concerned that the staff would have a expectation that we have to have the document. One of the troubles we have now is we get a request for a third party studies or marketing studies. We don't have them and there's a sense of skepticism on the staff that says, how can you run your business without the

document? And if you set up a template, it may be held to a higher standard than is necessary.

MR. BERNSTEIN: Thanks, Jim.

MR. KRULLA: Go ahead.

MR. BAKER: Steve Baker. One of the questions; I had a call last night from a practitioner who had a request, who said that there seemed to be at least a perception that the second request was broader at the FTC than the Justice Department now and that it's easier to narrow them and negotiate it at Justice Department. I don't know if that's true or not but, I mean, obviously to the extent it is.

MR. KRULLA: Sometimes at the end of the 30 day review period, we come to the point where we determine that there are unresolved issues and further information or documents are required. We issue a supplemental request for information in many of those instances. Any thoughts on how we can make those supplemental requests more effective in terms of getting us the information and the documents we need to analyze the acquisition? Understand what's going on while minimizing the burden and expense and delay to the parties of the transaction?

MS. TAYLOR: Hi, I'm Pam Taylor again from Bell, Boyd & Lloyd. I'd just like to address the issue of back up e-mails, which I'm sure you all have experience with. I'd just like to propose we stop asking for those. And I have a

couple of reasons for that, my radical proposition. But one is both a burden and fairness issue.

I worked on a transaction once where one side had two years of backup tapes. The other side had 30 days. And the company that had 30 days said, you know, we'll give you 30 days but after that you're out of luck. And the burden on the company that had two years backup was enormous. So, it seems that just out of fairness and in an attempt to reduce burden, it would be a good idea to eliminate that request.

Secondly, I just think as a matter of practice I've seen that when people get an important e-mail, they either hit the print button and put it in a file or they keep it in their in box, in which case it would be on their hard drive and you'd easily be able to get it in a simple request for production. People delete things that aren't important and they go in the back-up files and then ultimately they get disposed of some day.

So I think that the likelihood that you're actually going to get documents that are going to be helpful to you for back up e-mail tapes is really minuscule in comparison to the burden on parties who have to produce them.

MS. SULLIVAN: Lisa Sullivan, I'm with Howrey, Simon, Arnold & White. I'm actually filling in today for

Joel Chefitz, who you asked to come. I would follow up on that point of we agree completely with that. The FTC seems to have recently taken the attitude, with respect to e-mail archive, that the burden is more on the company to prove that there is zero possibility that there won't be any relevant document in e-mail archives before the FTC is willing to agree to eliminate the scope of e-mail archives.

And, again, to reiterate another point you just made, the expense and the burden on the company is generally quite huge. Even when using a document recovery company, the cost runs into tens of thousands of dollars and often takes several months for companies to tell us that they can't perform the restoration.

So, I think even if not eliminating all together the e-mail archive requirement, there needs to be some flexibility within the FTC staff to determine whether there will be anything available in e-mail and to weigh the burden and time against what benefit the FTC will get out of requiring an e-mail search.

MR. RICHMAN: Just one question. When you're talking about eliminating the burden, are you saying we're just not going to search it or we're not going to ask you to retain it in case we want it searched?

MS. SULLIVAN: My suggestion would be that at the beginning, maybe during the 30 day period, if the second

request seems like it would be likely, that the FTC contact attorneys for the parties and suggest that at that point the IT Department start preserving the e-mails or put the company on notice that certain e-mails may be producible at a later date. And at that point the company can start creating a collection of e-mails that you can search later. But requiring someone to go back two years, I do think is burdensome and should be eliminated.

MR. RICHMAN: Just in terms of the number of deals that you all see, how often have we actually asked somebody to go back and search back up tapes?

MS. SULLIVAN: I've had one with Mr. Krulla recently. The companies actually wound up calling off the deal where the FTC was insistent that e-mail archives be searched going back a number of years.

MS. TAYLOR: Pam Taylor. I just want to speak to that point again. I'm sorry. I have just seen a broad variety of practices. I don't think there's uniformity. I think some staff will say just give us what's on your hard drive right now. And others are consistent on going back. And there's just not a uniformity of practice. And I think it would helpful.

MR. KRULLA: What happens to high level confidential e-mails that are for eyes only that go to senior managers and are not to be duplicated? After those

are read, what steps can we take or how can we work with the bar and the industry to assure that we get a glimpse of those kinds of e-mails?

MR. MCCAREINS: Mark McCareins. I was going to answer your other question, not specifically that one. I've probably been involved in two to three second requests a year for the last 20 years. And that may say something about my clients as opposed to me or maybe how I follow Hart Scott rules in the first place. But in any event, I've never had these issues.

I mean, we've had debates about translations and back up e-mails. But the way I've done it is just say early on, okay, Rhett or whomever, I'm going to come in probably after we get this second request within 24 hours, hopefully. And in that first period, there will be an indication that you're going to issue a second request. So, my people are in the position to know with our org chart who's who, how do we keep our files, what's our record retention policy and have an IT person available.

Take your broad, over-reaching, you know, unconscionable second request, which I generally don't pay much attention to, and sit down with the people who know about the documents and what we have and say, okay. But let's make this work because my view is, the stuff that you may be trying to get, it may help me. I may want this

stuff. I don't know what it looks like, but there may be helpful documents that we haven't been able to find yet.

So, I'm in a pursuit for these documents as much as you are. Now, at some point in time, then the client steps in and says, are you crazy? You know, this is going to cost $150,000 and five million man hours and our computers will shut down. We can't do that. Now, that's, you know, but I've never come to a situation where that's a deal breaker on any of those situations.

Maybe my view is we're going to go through with a deal. We're not going to produce that, sue us. You want all this stuff the Japanese translated and you think you're entitled to it? I don't think so. Sue us. I mean, I think it happened once. But I think there are bigger issues and that is you need information. We need information.

We should know what information and how it's stored out there. And you should be permitted to ask some questions. And then we take your broad second request and come to a letter agreement. And you know who on the org chart are people whose files you want. You know how we store our documents, how are document retention is operated. And talk to our IT people.

MR. RAVEN: Marc Raven from Sidley. Rhett, let me address your second question about, you know, a key e-mail message and how you are sure that you pick it up. Two

comments on that. One is, I think the kinds of e-mails that you're referring to are ones that are going to be generated sometimes before the Hart Scott is filed.

So, you know, if they're sent, deleted, they're presumably gone. And I don't think there's really much you can do to help parties to keep those. The other thing to recognize about back ups is that you're not necessarily going to capture that e-mail message, particularly if, you know, if the parties intend to handle it or a party intends to handle it in a way that means it's not going to lie around, you're not necessarily going to capture it on a back up tape.

If it's sent on day one, received on day one and the sender and the recipient delete it, it's not going to get backed up. Or if you're looking at weekly backups and that e-mail was sent and deleted any time over the course of one week, it's not going to get backed up.

So, the difficulty is that, you know, we're going through very voluminous back up tapes with very low yields. You may, you know, find documents that are responsive to the second request, but, you know, they're not going to provide any information. They're largely going to be redundant of what's live on the systems, on the people's PC's and on servers.

And you're already now, you're over the cost just

reviewing the stuff that's live is, I would say, not just necessarily in the tens of thousands but it can be in the hundreds of thousands of dollars.

MR. KRULLA: Yeah, we're always looking for these documents that are intended not to be preserved. That would be the equivalent of a confidential face to face statement between high level executives. I recall prior to the days of e-mail, I was on a discovery search going through documents. And I found a document, a memorandum that said, after you read this memorandum, destroy it. And below that handwritten it said, done, and the initials.

So, while companies may conscientiously implement procedures to eliminate the record of memos like that that now often take the form of e-mail, one of the challenges we face in conducting our investigations is to figure out how most cost effectively, cost effectively for the companies, and most expeditiously for the staff, how to get a glimpse of that because as you noted, these kind of documents are things that are typically generated prior to the HSR filing, often prior to the time when the company is expecting to make an HSR filing because after that period there may be greater sanitization of the files.

So, one of the questions we could explore is how can companies to the extent they maintain back ups of e-mails, if they anticipate that they're going to be doing HSR

filings in the future, how can they preserve material in a manner that will minimize the burden and expense on the companies in complying with a government request for information or documents, if that request comes in?

Any thoughts on that?

MR. ROBERTSON: Robbie Robertson, Kirkland & Ellis, -- for now anyway. But --

MR. KRULLA: Welcome to the FTC.

MR. ROBERTSON: Thank you. But I've had the same problem. Not just merger cases but in conduct cases. And it is extraordinarily expensive to search e-mails, especially if you're going back to back up tapes. You can't change the way companies do business in terms of keeping back ups. What happens is it's done by accident because over the last ten years, most big companies have changed their systems three or four times. They do keep the tapes, generally. They don't know what else to do with them.

But then trying to find a set of documents and trying to weed out the privileged documents and weed out the documents that you may think are highly sensitive is very expensive. And a typical case, if it's a large company, which I've been working for on a lot of these cases, you can be talking about 800, $900,000 of expense, not lawyer's time. And at the end of the day you find there's not much there.

And what you find that really is helpful, this stuff is currently on I Drives or in some other form when you actually get your hands on it. But you'd like to see that stuff. And e-mails, a lot of time people will keep them in other places. And a lot of large companies, they're all on shared drives and things like that where they tend to park these documents.

So, I think that at some point there needs to be some better sophistication both on the FTC side and also on the lawyer's side for both in house and in law firms to figure out how to do this because you don't want to spend a million dollars chasing something that's not there. You could have spent a little bit less time and a lot less money finding something you really want to look at.

And I think part of it is a lack of understanding, at least from my part when I first got into these big cases, and knowing how much it does cost and how expensive it really is. And how you have to do it mechanically. Nobody that I've dealt with at the FTC really understood it either. And we had to get some of the technical people inside the FTC to talk about, can we just give you the tape? Well, no, we don't know what to do with the tape. No, we don't have a machine that can even read it. That kind of problem.

I think that there could be a little bit more done to develop a way to systematize getting at these older

documents or older e-mails and not spend so much money doing it.

MR. KRULLA: How can we use sampling techniques to minimize the burden? If there's a cost estimate of a million dollars or x million dollars, the next question I would raise is, well, how many tapes are we talking about and can the company identify the departments or organizations or the persons or the time periods covered by those tapes? With that information, can we reduce the burden on the companies while focusing in on, through sampling, focusing on those back ups that may be most likely to yield useful information?

Any thoughts on that?

MS. SULLIVAN: Again, Lisa Sullivan from Howrey. I think that in certain circumstances you can but it does require the FTC to have experienced IT people communicating with the IT people at the client. Some companies will store their e-mail archives on a person by person basis or department basis or an office basis. Other store them on a daily or weekly. So, for some companies, it is possible to go in and say, we would like to sample the CEO's e-mail archives for a certain month. In other companies it's not stored like that.

Restoring the CEO's e-mail will require restoring the entire office's e-mail for an entire day or for an

entire week or for an entire month. So, it is possible but it's going to vary from company to company. And the FTC needs to think cognizant of that.

MR. BERNSTEIN: And I think that's probably why, Pam, you're not seeing the consistency from case to case is because so often we try to balance what the company needs to go through to get us the information we want versus the value of that information. And for certain companies, as you mentioned, they may, it may be easy to search for a year but impossible to search for three years. And we try to do our best to understand that and then make appropriate modifications.

MR. RAVEN: Marc Raven from Sidley. The other comment I want to make is that I think it can be a mistake in many instances to start out a merger investigation with the assumption that it's a conduct investigation and therefore you're looking through old or deleted e-mails for some sort of a smoking gun. These cases, you know, more often than not, are going to be decided on economic facts or at least they should be. And that's not the kind of stuff that people are going to go through and sanitize. That's going to be, you know, the current business documents that are still going to be live on the systems.

So, I think, you know, you have to approach the problem from the right perspective to begin with and not

assume that, you know, every merging party has something, you know, buried in a deleted e-mail somewhere.

MR. BERNSTEIN: Yeah, Mark, that's a point we've heard.

MR. ROBERTSON: Robbie Robertson, again. I think e-mails are where all the good and bad documents are. I love e-mails. The hard part is getting to it. And I think that one thing, what I'm talking about is not that you shouldn't look at e-mails. You need to look at them. But I think there's a lack of understanding as to how you do it mechanically.

I didn't understand it. I had to go to an outside company to have them explain it to me when I had three different e-mail systems and all these different computer things, how do you actually search it? How do you come up with the search terms that lead to something less than 400 boxes of e-mails?

When we went through a process like that recently and did the search terms, we tried to negotiate it between the lawyers. We came up with great terms. The FTC lawyers came up with great terms. But we really didn't understand the process that well because we're not the ones who are actually doing the work. We came up with what we thought were good search terms and we still ended up with 400 boxes of e-mails. And it wasn't that helpful.

So there has to be, I think, a better technical understanding of how to get to the documents that you really want.

MR. HUEBNER: Pete Huebner with Applied Discovery. To Mr. Robertson's point; the key here, I think, is you want to be efficient. If you could find a process that keeps your documents electronic throughout the review process, then you can apply automated search facilities. So, in your case, instead of getting 400 boxes, by keeping those documents always electronic for review process, you can apply your key word searches throughout the entire process. You're not necessarily shuffling through paper.

The other advantage to that, that type of a process where everything's kept electronic, is all the set up is up front that converts these electronic documents into paper is removed. So a lot of your timing issues, in terms of deadlines and how you're going to get to the actual start of the review can be eliminated by, again, keeping the documents in their original forms, which is electronic.

MR. DUBROW: This is John Dubrow. Even if you do that, you don't have 400 boxes but you still have the same amount of stuff that somebody's got to sit in front of a computer screen --

MR. MCCAREINS: Review still has to take place, absolutely.

MR. DUBROW: Which is really where the burden lies. I mean, we can get copiers that cost money. But you can copy a box of documents for a couple of hundred bucks when you can just pay $5,000 --

MR. HUEBNER: But by doing key word searches, his original process was to crawl through all the raw data and look for items that everybody agreed was going to, you know, take off the table or we were going to be concerned about. By continuing to apply that search capability you can, instead of necessarily read through every document, you can go right to the documents that have those critical key words. Look at those first and determine if these are relevant to the situation at hand.

Review will always have to take place. I mean, you can't, you can't avoid it. You're right.

MR. DUBROW: But what you're saying is you might be able to put this in on the search terms, but it still might be privilege stuff. It still might have --

MR. HUEBNER: Absolutely. You still have to go through that. You still got to designate it as privilege or responsive or whatever. But it's appropriate. But by automating the process, you can reduce the human error involved with reading, looking for those key words. And basically the computers will find those key words for you and pull up those documents that trigger those key words.

MR. RAVEN: Marc Raven. This again goes to the burden when you have to go to multiple layers, you know, repetitive back ups and so forth. There are some types of files that are difficult or impossible to word search. And we ran into that situation recently where we had, you know, a very good system where we're trying to find certain types of documents by looking for key words.

But because we were trying to err on the side of -- we still had a lot to review. And even then, when you are looking for certain, looking at certain types of files such as image files or spreadsheets, which can, you know, be numerous, word searching is problematic.

MR. ROBERTSON: I was going to say, my example of 400 boxes, that was nine percent of the document set. So we did the first search. The problem is we didn't really understand how to do the search to get stuff that is relevant. And that's an area where I think we could use more expertise with lawyers here but also with the FTC, because nobody really understood how to get out what you really wanted to get.

MR. KRULLA: For the record that was Robbie Robertson.

MR. ROBERTSON: Robbie Robertson.

MR. BERNSTEIN: Steve, did you want to add something?

MR. BAKER: Yeah, one of the questions people seem to be kind of asking is how many cases you've asked for these kind of details and of the ones we do ask for, how often do they end up being valuable to your investigations? I don't know if you guys are free to answer that. If you can, it would probably help people understand kind of what we're doing.

MR. RICHMAN: I think we strayed, sorry, Steve. I think we strayed from the archive issue to electronic files that are kept in an easily accessible fashion. I'm not sure, I think we were mixing Pam's original archive issue, please don't make us go through data tapes, especially if they're on legacy systems that we have to recreate to just a general electronic discovery issue. So, if we can separate those two out, I think it would be most helpful because one burden is we're asking you to build a system that no longer exists or recreate a system or have a third party vendor do. The other is how do we narrow these exceedingly large electronic document productions, in large parts because nobody deletes, nobody throws away paper. Well, nobody, there's nobody who deletes files off their hard drive. And then, when you go to a LAN-based system, there's absolutely nobody that ever goes through a LAN-shared space for a group or for even an individual's files and deletes old files there because you never know whose they are and who wants

them.

So, you know, we've taken what used to be a horrible process on paper, and technology has expanded the universe of things we're asking you to search. I think there's an iterative process that we might be able to get to. This is in response to Robbie Robertson.

MR. ROBERTSON: Robertson.

MR. RICHMAN: Robertson. Your original point is if we come up with search terms and it turns out that you get a lot of junk, as we might say if you were to come to me and say, “I don't think you want this type of document which anybody could do. Here's a thousand boxes of it. Give me a sample, let me look at it."

The same thing, if you do a search electronically, I think it's possible that if we can agree on the initial group search terms, give us a sample and we can figure out relatively quickly or the IT people can what the terms are that are bringing in the 400 boxes and maybe we can add another search term to cull out the extraneous information you don't want to provide, you don't want to review and we don't want to have to read.

MR. ROBERTSON: Robbie Robertson again. And I agree with that. I think that we just need to get more sophisticated about it because all this, just learning how to do this sometimes is a plus. I mean, years ago I would

find a thousand cases to finally find the one I like. And then, I can get 10 or 12 because I know how to search that.

But there's a certain thing about doing searches on emails that can lead you astray very quickly. Now, you're looking for a document that has a the word marketed, that might get you a list on who's going to the grocery store to any section that has the name marketed for that particular group of, a respondent, for example. If you're looking for an acronym, often that will be the name of a group and wind up with millions of documents. And I think that there are outside companies that are getting better at this that we can use that are learning how to do the searches. So, I think that all this, we're better off learning how to do the searches in the first place.

Now, it would help if it was all electronic and you guys could look at it in that form, too. But that's a fight that we all have to go through.

MR. McCAREINS: Mark McCareins. Remember that we're dealing with all these issues on a daily basis, not with you or DOJ but in private litigation. So, my focus is what is the federal district judge going to order me to do or magistrate under the federal rules. And I think most folks practitioning in this area would say that the courts are a half step or two behind the technology. And you go in front of our magistrates across the street and we're trying

to educate them about the difference and they try to cut the baby in half and maybe there's a reported FRD decision that may go up to a district court judge.

But there's a huge body of law there that maybe my humble suggestion is that the best solution is to appoint a task force on electronic discovery issues within your shop. And the ABA section on litigation has a multi-volume trader seller electronic discovery. The ABA anti-trust section is coming out with a civil discovery handbook later this year that is about 40 to 50 pages, single-spaced with footnotes, because I've had it in some of them, on current trends, issues just like this.

So, maybe I'm wrong but you're bar should not be any higher on what should be produced or what can be compelled to be produced. That bar shouldn't be any higher than what the federal judges are doing in a court, on a daily basis in the federal courts and federal discovery. So, these issues are not unique to many of us and maybe we just need to transfer what we're doing in this other room to you folks. Maybe a task force may help.

MR. RAVEN: Marc Raven. One other quick thought is that while word searching can do you a lot of good in limiting the volume of documents, sometimes a broader brush approach is really the only way that you can deal with these massive volumes. And with that, I mean, for example, in

settling for a year shorter time frame than for the paper documents or deciding that you only need electronic documents from half or two-thirds of the people whose files are being produced.

I believe it makes a huge difference because again while you can oversimplify by thinking you word search it, it pops up and you produce it; of course, it also has to get read, privilege reviewed and processed. And that is, you know, time consuming and expensive. It's lawyer time that adds to the bill, this is not just the cost of using the vendor.

MR. BERNSTEIN: Just to go back to Steve's question a while back which was whether we're actually getting anything useful from archive email. And I went around our division and asked people what their experience has been, and it's varied but some folks have said that in some cases, it's been the most critical and most important material they've gotten. Now, that's not every case, but in some cases it's been very important. So, that's just one point I wanted to make.

Also, in terms of negotiating issues relating to electronic documents, whether it be archive emails or just electronic documents generally, I think one of the reasons people are reluctant to make cuts, whether it be going on term searches or cutting back to one year instead of three

years, is the fear that they're going to completely miss something. The wrong word is going to be in the term search and a whole category of documents isn't going to show up.

I think you're more likely to get a modification, I'm only speaking if you're negotiating with me because I don't know what others think, but if you create some kind of safety net. In other words, you say, for these key people, we're going to search them for the full three years. We're going to search them, not by key search terms, we're going to search them completely. But on these, what we consider less important employees on the organizational chart, give us a break on these. Either cut it back to one year, let us do search terms, something like that.

I would be less reluctant to agree to some kind of modification like that knowing that I had a safety net there that some people would be searched completely so that we didn't inadvertently modify it in a way to cause us to miss a category completely.

MR. ROBERTSON: Robbie Robertson again. I'll say one more thing. What can aggravate all this, why we're all so paranoid about emails and document -- for, it is the attorney-client privileges or how it says in the document that's an issue in that case. And you're always deathly afraid that you're going to turn over something privileged, not because there's something bad in it but because you may

inadvertently waive something. That's the fear.

And if you're dealing with a civil litigant and you inadvertently produce something, you write them a letter, say I inadvertently produced something, you get the document back. And if you don't, you have the judge, you can complain about it and get the document back. It's usually an embarrassing thing but it's not a big deal.

Well, there isn't, as far as I can tell, a consistent view from not just the FTC but the government side at any agency, as to how to deal with this issue. And most people will tell us that if you produced it, that's too bad, and that you won't get it back or we'll talk about it later. And there had been some position by the FTC in the past that these rules don't apply to them, the ABA rule on this particular point.

And maybe that's the right decision. But if deters people from handing over what you have if you've done the search and you think you culled out all the attorneys' names and all that kind of stuff. You're afraid to turn it over in electronic form until you have a bunch of outside counselors you hire culling them page by page through every document and every email. And that's what takes an extraordinary amount of time and added expense. And so, maybe that's an issue that may need to be brought up as well.

MR. BRUCE: I'm Greg Bruce, and I don't want to sound like a broken record but that actually has come up a number of times from the different respondents we've worked with, -- one of those. So, they'll come up to us and say, you know, look, we're not trying to hide anything here. It's something that -- earlier about, this is just business. This is a business transaction, so we're more than willing to comply. We would love to come in and just sit down with you guys up front, attorneys as well, but as the general operating business, to sit down and understand what it is your looking for, understand what your concerns are, and then figure out the best way to deliver those to you, record search or email search or whatever it is.

It's having that opportunity to sit down with you, that is probably the thing you've heard the most across the board. And you always feel like there's this barrier, and you know, our attorneys sometimes are the ones keeping us out. But other times, there is just the feeling of we don't talk directly with, you know, the implication that they're in that business, people along with their counsel, outside counsel. It could go a long way in knowing what is it that you're there for, how can we best comply, because, again, a lot of us, we've got nothing to hide. We're more than happy to comply, just tell us what you need.

MR. RAVEN: I'm Mark Raven. To go back from the

constructive suggestions, just to quit whining for a second, one other thing that I was reminded about with Robbie's comment about privilege review is that as I think you're, I'm sure you're all aware that the privilege log that's required for a second request production is more detailed than the privilege log that's normally required in litigation. And it requires something, more investigation and in any event a lot more time to get down on paper. So that, you know, again, when you consider the volumes of electronic documents that clients, particularly sophisticated companies, tend to have nowadays, you can just tack that on to all of the other burdens that have already been identified.

And, you know, it's obviously essential, just by the time doing the privilege from you but you can't forget about it at the time of the hearing and submitting the law to, which can then, you know, slow down back into the process.

MR. MUTCHNIK: This is Jim Mutchnik. I have a comment. I think the fact that we've been talking about this for a half hour may be indicative of the fact we come to you to try to negotiate these issues. It may take a month or two months to work out the rules where we may be better served in making the calls that Marc was discussing under the federal rules about, should we be entitled to

this, and just make your decision and produce and assume that's good enough until you tell us it's not. And I just question the utility of the thing. Not today, of course. I'm sure --

MS. SULLIVAN: Lisa Sullivan, and I'll comment just on Mr. Mutchnik's comments. One thing that we would find helpful is a little more clarity or information on the appeals process. We've been, I've had the experience where I've been told you would either have to comply with X instruction, whether that be email archives or something else, or else there's an appeals process. But you can't just produce and say sue us.

If there were published opinions on what went through in the appeals process or if the FTC would explain past decisions that had been made in the appeals process appealing different instructions, then it would give a lot of guidance to the companies to know whether we can go ahead and just produce without searching email archives. Or go ahead and produce without complying with instruction X, Y or Z.

But the companies are operating essentially in a void when they're told, well, you can go ahead and certify compliance but you're not in compliance with our rules and you're supposed to go through the FTC's appeals process, not certify compliance.

MR. BERNSTEIN: And that is a suggestion we've heard a couple of times to make that process more transparent and make those decisions public. And that's something we are considering right now.

MR. RAVEN: Just to add to that, Marc Raven here, what's a good analogy is the pre-merger office now has its informal opinions online which is greatly helpful. And you can search them and come up with, you know, half a dozen examples to give you some instruction that's, information that's been floating around that's just a little easier to get your hands on.

MR. BERNSTEIN: Has anyone been through the appeal process at DOJ, and any thoughts on whether that works better or worse than our current process?

MR. McCAREINS: A short rebuttal, I mean, ultimately the test is substantial compliance, and what does that mean? I mean, that's like the reasonable man test, you know. There's a little gray, you make a good faith reasonable effort. 99 or 98 times out of a 100, they get exactly what they want. We're fighting over the two percent. We've made an effort. We've made a tender that this is all we can do.

Rhett says, I know you can do more. I say I can't and, you know, I fish or cut bait and say, I think with a substantial compliance you do what you got to do and tell me

if I'm not. But if you've got those lines of communication open and, I think you can convince them that you're making a good faith reasonable effort and you're all trying to speed this process up. I mean, I personally have never gotten to that point where somebody just said, you know, well, the deal is going to create or we're fighting over one of these, what I would call hyper-technical discovery issues.

When the record has been made on both sides as to what you want and why you can't do it, that we shouldn't even involve the appeals process. Frankly, I don't want to use the time in the appeals process. We got so much other stuff going on on whether that's an expedited appeal, when I can get a ruling in 36 hours which I'm sure I can't or I go up on Justice and it takes me a little bit of time. I don't want to lose the time. I'd rather make a decision, make the production, make a judgment call and go forward. And maybe that's just me.

MR. KRULLA: Now, there is a middle ground approach that we've developed between what's required by the literal terms of the second request and what the responding companies may be inclined to produce or may be comfortable producing within the time they have available. And that's to negotiate modifications to the second request.

Does anybody have thoughts on how that process has worked and how we can improve that process?

MS. SULLIVAN: Lisa Sullivan again. For the most part, the modification process, in my experience, has been very good. However, the essential problem that I've experienced is that typically, I've been negotiating with junior people of the FTC who tell me or the other people I'm working with that they don't have the authority to make the modification.

So, what happens is there's an extensive dialogue between the attorneys and the junior staff people of the FTC where it's explained the basis for the request for modification and the reasons that we're asking for a modification, and we'll even go to the extent to memorialize that in a letter to that staff attorney. But that staff attorney then tells us that they don't have the authority to make the modification. It takes anywhere from several hours to several days to get a decision from the FTC, and perhaps because of not clear lines of communications, we don't always get a modification that makes sense based on the explanation that we've given to the staff attorney.

If we were dealing with the staff attorney that has the power to make modifications, I think the modifications will make a lot more business sense for the companies.

MR. RICHMAN: Has that been anybody else's experience where the person you're talking to doesn't have

the authority to modify?

MR. MUTCHNIK: This is Jim Mutchnik. Yes, and it's my experience with modifications that it's a lot of work with very little gain. What you're blocking with is, well, we understand your position, and move forward at your own risk and then we certify substantial compliance. And in fact, very few staff attorneys go I agree during compliance that's usually preserving their right to challenge you under this sort -- So, I question the utility of full-blown negotiations to the extent that it's --

MR. BERNSTEIN: We talked about, a lot about the email issue, are there other specific areas involving modifications or things in the second request that are particularly troubling? Is translation a big problem? Data specs? Anything out there that sticks out as one of the areas where you are running into trouble?

MR. RICHMAN: Somebody's got to be upset about data specs.

MR. DUBROW: This is John Dubrow. It's not really a big issue but the spec-ing requirement seems to add a burden that I think doesn't really add much value. I think the DOJ standard second request doesn't include it any longer, you know, why do you need Mr. Smith's file program in three different specs. It just adds time and file folders.

MR. RAVEN: Marc Raven. I'll second that and also question whether at the end of the day you really get much benefit when you, you know, parties typically have the responsibility to decide what spec improves the document. And you know, frankly, I think it invites mischief whereas if you just ask people to produce documents that's been kept in the normal course of business, you know, that's what you're going to get and you get all these people's files to look at for particular issues.

MR. KRULLA: Any suggestions for how staff can ascertain whether the companies have produced what we've asked for under a particular specification if the production is not identified by spec?

MR. DUBROW: John Dubrow. I mean, I think that's, stands with the, you know, parties' efforts to certify compliance. You can't certify compliance if you haven't, if you come up with a list of people, you put them on a search list and say, well, we searched for adding whether or not that person, in moving the document to spec need, I don't think it has any additional value. Well, mind you, it doesn't add any additional value, just maybe it's pertinent for somebody to certify if you're saying I've looked for all documents that responds to that spec or as that's modified.

MR. KRULLA: What about as we move from a HSR supplemental request production to litigation? What

latitude do you believe that defendant should have to pull out documents and use those in the defense that are on their face responsive to the second request? And, either (a) companies failed to produce in response to the second request, or (b) negotiated out of production because, for example, it would be too burdensome to locate those documents.

What comfort can the Commission staff have in preparing a case that if we go to litigation, the defendants are not going to confront us with the very documents that they've asked us to negotiate out of the investigation?

MR. McCAREINS: Mark McCareins. I have an answer. Again, under the federal rules, in using the private litigation analogy, your process is much like a preliminary injunction where there's expedited discovery and we move heaven and earth in a 60-day period to try to do expedited discovery and you may not get everything. Not that there's any bad faith, but you've got other things to do. You've got briefing, you got witnesses, you got experts, and you got a preliminary PI hearing set 60 days out.

Depending on the outcome of that PI hearing, you have a full-blown trial on the merits. The fact that additional documents are discovered after that first wave, I've never seen anybody preclude it from introducing those documents at the permanent injunction hearing and trial on

the merits because they weren't produced by either side of the PI hearing. It's an argument that I might keep in the back of my hat when somebody does that to me, but I've never seen that successfully used. So, I mean, maybe the analogy isn't perfect but it's still, I think it's apt to what happens in the second waiting period.

MR. KRULLA: Well, if a responsive document is found after the certification, it's produced as part of the defense evidence. Should that be grounds for the agency to bounce the production and say, well, it turns out you were not in substantial compliance because here you've identified a document that you believe is significant, relevant to the examination of the acquisition and you failed to produce it. And we didn't know you failed to produce it because we didn't know it existed until you confronted us with it.

MR. McCAREINS: Mark McCareins. I started down this road, I'll continue, Professor. Is this a negotiated-out document in your hypothetical?

MR. KRULLA: Let's say it's one that was not addressed, that appears to be responsive to the second request but is now produced by the defendant from its files without a Bates Number identifying it as a second request document. So, it has not been negotiated out.

MR. McCAREINS: But it appears to be responsive? Or I mean, there's some question about it?

MR. KRULLA: All right, let's say it's responsive.

MR. McCAREINS: And it's not negotiated out?

MR. KRULLA: Right.

MR. McCAREINS: I still take the position that what we're talking about here is substantial compliance and we're producing literally tens of thousands of documents, and the fact that I didn't produce one document doesn't mean you should decertify substantial compliance. I don't --

MR. DUBROW: This is John Dubrow. I strongly agree with that. We are, as Mark said, having to turn over a vast amount of documents. To the extent that the process takes on a life of its own and becomes, you know, I think that's wrong for the result that that gets you which is what's the substance of the transaction?

I've had different experiences with different jobs, different agencies. You know, you find some of those documents sometimes. But if the person calls you up and says, you know, there's a document referred to and I can't find it, there's two approaches to that. One is I got to bounce you, and the other is which just leads to, well, fight about whether it's responsive or whether it exists or you say, look, you know, I'll get this thing. You know, I'll give it to you tomorrow, if it exists. And in part, it's, you know, who you're dealing with and trying to get to the right result in the process.

MR. KRULLA: Does the failure to produce the document in response to the second request, if it's clearly responsive, call into question the authenticity of document if it's later produced by the defendant in court? And just where did this document come from if it wasn't previously produced?

MR. ROBERTSON: I'll try the next one. Robbie Robertson. I'll speak up. And I have been precluded in that trial in using that -- that is civil litigation, and I think that that also caused other people not to deal. We'll use their documents by moving to exclude them. But the issue always in court is, in a regular civil litigation context, is have you prejudiced the other side? That's usually the standard the judge would use.

And if I find something and I didn't produce it in civil litigation, I'd better get it over to the other side pretty quick; otherwise, I may be precluded later on after the depositions have taken place, after the discovery has already taken place, even in a PI hearing. And I think that under those circumstances, you absolutely should seek preclusion and you'll probably get it in court from the FTC's side, any party can do that and will likely have that about it.

If there's no prejudice at all, if you simply trip over a document, those happen, you do find documents after

the second request has already been complied with, or in the case of civil litigation, after you've done all your production, you find something. It does question its authenticity and I think that you want to go and make that argument, that maybe the authenticity is questionable, but it may be an honest mistake.

There are other remedies that the FTC has, of course. You can say that there wasn't compliance with the second request. You can change the, you know, take your clock out and start over again, that happened on at a case some of us know about. Not that -- was involved but we've had that happen to us. There are remedies that the government has, that civil claimants don't have.

But I think that the issue ought to be fairness and being able to make sure that the government, like any other party, in any case is not prejudiced. So, if you have it, you ought to turn it over right away. If that does happen and the depositions haven't yet started, if you're having depositions or a hearing that hasn't yet started and you're not prejudicing something, then any government agency should be accommodating. But I also think it goes both ways. That's my personal view.

MR. MUTCHNIK: This is Jim Mutchnik. While we are on the topic of hiding or pulling things out of your pocket, I was wondering why the FTC was taking a position not to

provide our clients with copies of their own transcripts, I mean, here in front of you for interviews and depositions?

MR. KRULLA: Do you believe it would be useful in the course of the investigation to have those copies of the transcript?

MR. MUTCHNIK: Sure, and a lot cheaper than having somebody come in and have to transcribe it, you know, at $250 bucks an hour plus traveling.

MR. KRULLA: Is the concern that --

MR. MUTCHNIK: -- the cross question and answer.

MR. KRULLA: Raised from time to time from the staff that having the transcript may facilitate coaching of the next witness. Is that a valid concern or specious?

MR. MUTCHNIK: I don't think it's very valid because that's our job, to make certain that we provide the information and make sure the witnesses are well prepared and the fact that you're lining up the particular sentence or word is probably not going to carry the day with you guys anyways. So, I think the concept of preparedness and knowing what your people have said and where you're going and making sure our evidence is lining up the same, that we're not pulling things out of the hat later on, that seems like a fair place to go.

MR. BERNSTEIN: Jim, has it been your experience that you're not getting the transcripts at all or they're

making you wait until the end of the depositions before they hand them over?

MR. MUTCHNIK: Oh, well after the end of the depositions and heading towards a heap of trouble, so you're unable to use the stuff as your, before you're heading to trouble, you try to use it affirmatively with management, getting a sense of where management was thinking based on all of the evidence of having those shared between both sides.

MR. BERNSTEIN: Okay, thanks.

MR. ROBERTSON: Robbie Robertson again. And I've just been casing all these views and I'll just tell you what my personal view is on that subject. Everybody at every litigation, they were on a roll except for -- And I think we even did that. And I think that people do coach, but the lawyers are there and their witness is there and they know what they said. What the transcripts need to be used for in substantially large companies is to be able to inform other people what happened. Because what happens is the witness comes back and tells his boss or his CEO, hey, maybe that position ain't going great. Nothing came up about you.

Well, guess what? Something did. I think it can help us with the honest flow of information so that decisions can be made, not just in how to litigate, how to prepare somebody as Jim mentioned, but also how to kind of

make sure that the senior management in a large company know what really is happening so they can make the right decision whether to try to resolve the case. And many times, that really is the right answer. You may have a problem, but you can't really convey it to the people who are the decision-makers who weren't there getting busted. So, there a lot of other uses for it.

I think the coaching issue is real. I think that people do it under civil litigation all the time so people can say they're not lying. That is an issue. But I think it's relatively small considering the fact that a lot of people in the DC Bar will take with him an associate and write down word for word what happens at every one of these hearings. And so, they know exactly what was said. You just don't have the real transcript.

So, I don't know that it really is preventing me, even when I'm coaching, if that ever happens. But that's my view. I think it ought to be a moral thing, that is, if you're all witnesses, I don't think you ought to necessarily get those --

MR. KRULLA: Any other thoughts on investigational hearing transcripts or on modification negotiations?

MR. ROBERSTON: I'm sorry?

MR. KRULLA: Any other thoughts on modification negotiations or on the investigation hearing transcripts?

Not from the person who just spoke. From anyone else?

MR. BERNSTEIN: Going back to the backup emails, in your civil litigation, what has your experience been in terms of those backup emails? Have you found useful information there or have you found that not to be useful? Have you continued to ask for it in your civil litigation?

MR. McCAREINS: Mark McCareins. A lot of it just depends on the case and the amount of resources that our clients can spend on those cases. If I've got a three-million-dollar case and I go to the client and say it's going to cost $600,000 dollars to kind of flush out this issue, they're going to fire me and get another law firm. If I've got -- company case and we've got resources to do it, then we'll make the effort.

So, a lot of it is a sliding scale, but recently, in the Third Circuit, in the price fixing case, we used a sampling solution which worked out well. And the independent consultants come in and talk to each other and the sample is devised and the client goes out and responds to the sample. I mean, I haven't seen it as being a big deal. And ultimately, you know the court is going to ask as the mediator and is going to balance the burdens. And so, if one side or the other takes a too aggressive position, it's not going to fly with an industry, so the sampling issue is I think --

MR. MUTCHNIK: I have a, this is Mutchnik again, I have a miscellaneous question. Have you been studying or have any statistics to make available about the number of companies that file and then pulled and refiled? On whether that's on the rise or steady? Particular trends information?

MR. KRULLA: In my experience, it's a phenomenon, I think, that started in the 1990's. I don't recall seeing it prior to that.

MR. McCAREINS: You're dating yourself.

MR. KRULLA: I think it's increasingly being used. I think in the beginning, companies were very wary that, oh, this is a trick by the staff to get more time. We have these model second requests. We have word processors. We were able to turn around the second requests very quickly. Ultimately, it's up to the chairman whether to issue it, but staff sometimes have input in drafting it for the chairman.

So, we don't usually need the extra time in order to get our act together. We have been instructed by successive bureau directors, successive management, that we are not to encourage companies to withdraw and refile unless we have a good faith belief that it could obviate issuance of a second request. So, we provide companies, when they ask us, candid assessment when they say how about if we withdraw and refile.

Our mind is never closed. Our feet are not cast in cement. So, it's hard to say, look, no matter what you do, I'm going to issue a second request or I'm going to ask the chairman to issue one in 30 days. I can't say that. But we will provide our best candid assessment as to whether we think it might be in the company's interest to withdraw and refile.

I don't know that we have any actual statistics on how many of those withdrawals wind up in a second request. I think more often than not, a second request is not issued when that additional period is extended. I think if you took out of all HSR filings, the ones that withdrew and refiled, the number of second requests that issue out of the total universe as a percent would be a lower number than the number of second requests that issue out of the ones that withdrew and refiled. That's, I suspect, because the ones that withdrew and refiled recognized that there is, at least on the face of it, outstanding questions that need to be addressed.

So, you're going to see a higher fraction than the few percent out of the total universe that gets second request. But I think more often than not, our experience, certainly my experience has been that when companies withdraw and refile, more often than not we can eliminate the problem in 30 days.

Part of the problem we face and welcome your thoughts on is the filing fee issue that if we identify in the first 30 days or first 15 days on the cash tender offer a problem, there is the vehicle of withdrawing and refiling within 48 hours or two business days without paying a new filing fee. Sometimes we're not able to eliminate the concerns in that next 30 days and we had an experience last year where we wound up issuing a second request. But within several weeks after issuance of the request, we were able to resolve the concerns.

Any suggestions in terms of the obligation, if you want to avoid the refiling fee of resubmitting, starting that clock again within two days? Would it be helpful to the bar if there were more latitude on that front?

MR. MUTCHNIK: This is Mutchnik. In response, I'm glad to hear a sort of, from what you just said, I didn't quite understand who was making decisions and how much we could really trust and that's good to know. I think I'd like to see some statistics like I mentioned, and then start trending that out for us to get a sense of what your lists are. I'd like to see some better understanding of who is making the suggestion that a refiling would be useful, at what level of a commitment recognizing that you haven't made a full commitment not to issue a second request.

I'd like to, I think that was my big comment --

MR. ROBERTSON: Robbie Robertson again. I think it's a good idea to have some monitoring on the 48-hour window in some cases. There are some cases where we encourage clients to file even though the closing is not going to happen way down the line because we want to get everything done and cleared and make sure that all the issues have been resolved before other people start making financial commitments and things like that. And so, it is helpful if you know that when there's a question that comes up, we can resolve the question and hopefully give the FTC what they need.

The problem comes with the specter of the second request coming over the horizon. It is a little bit of a threat but it's more of a business decision point that in any businesses, especially the smaller ones, when they see the second request is actually an issue, then they'll decide whether to go on with the transaction or not because they have this fear that it's going to be inordinately expensive to get through the process which may or may not be true.

But it just, it's a matter of history that that's how a lot of businesses operate, especially with private equity companies where they buy and sell companies all the time. If they see a second request, they are apt to look at it and decide are we going to stick with the deal or not, regardless of what the outcome is going to be. And so, I

think that in a case where you could help resolve the issue without having to trigger another time period, at least the parties can agree to do that, I think makes sense.

Jim and I have had cases where that has happened, where we've gotten to that point, the second request did come down and actually the deal was off. And we felt we could have gotten the deal through. And that one's a bad result, I think, for the economy, a bad result for the process.

MR. BERNSTEIN: Jim, to try to answer your question dealing with whether there is a trend, I have not seen any statistics but my guess is that when the clearance process is working well, there is not as many pull and refiles. When the clearance process isn't working well, there tends to be more because the experience I've had has been that most of the pull and refiles have come about because we didn't have enough time to investigate up front.

And while, again, I can't give you statistics on how those have turned out, I can tell you in every one of my cases where it was pulled, had it not been pulled, there would have been a second request. Because if you had told me, Steve, I'm thinking of pulling and refiling, and there wasn't going to be a second request I would have told you, don't do that, there's not going to be a second request, let the waiting period run. So, to the extent that helps answer

your question.

MR. RICHMAN: And just one other thing to add on that is, I've had recent experience with a couple of situations where the pull and refile decision came from the parties. And in full knowledge that a second request was going to issue, but to give us a little more time to take out of any potential responsibility the burden of searching for markets that we were ultimately able to dispense with and, you know, on the order of half the delivery of ultimate documents.

So, I mean, there is, occasionally, I think this came up in the lines of communication. It just takes too long to get us the information when we have, on some of these cases, potentially thousands of overlaps to get those out of the way. And those, especially in an electronic property, it takes you a long time to get the people who understand it to us and then there is a learning curve for us, even in industries that we know about, just to make sure that we're not missing the boat. And if we can cut out divisions or we can cut out countries, I'd rather do that before the issuance of the second request because then we don't have to negotiate.

MR. BERNSTEIN: Steve.

MR. BAKER: I've got a question for you guys. You've been hearing from them on everything and I'm sure

there are some things that a private counsel do to you guys during the course of the mergers that drive you nuts, that, you know, maybe have given you a bad feeling or makes you really be on guard with a lot of other people where the same issue doesn't come in. Have each of you got something in particular that's kind of a pet peeve that you'd like to see people avoid that you think that doesn't advance the process that could be --

MR. KRULLA: Well, I think in initiating negotiations on modifications to a second request, it's important for counsel to have done their homework, to come in with organization charts, to have some familiarity with what the production involves, where relevant documents are likely to reside, how the data is kept. I've had instances where counsel, as soon as they get the second request, say, okay, I want to come in, I want to negotiate, I want modifications, and they don't have a clue as to what's involved in complying with the request or why they need the modifications other than that they believe they're entitled to them.

So, I think there's a lot more credibility with staff and staff are going to be more sensitive to the concerns if counsel for the parties have done their homework, made an assessment as to who's got the documents, what the flow of documents is, who are the people

responsible for organizations. When they come in even with org charts and they say, well, we want to exclude these people, I say, well, what do they do? Oh, I don't know. Well, they should have at least done enough homework so they can explain to me why those people should be excluded.

MR. BERNSTEIN: That's probably the biggest problem that I see. Very often at that first meeting after the second request issues, opposing counsel comes in and they say, now, tell us what you really want. Well, you know, the second request just issued two days ago, that's what the Commission asked for. The more you can come in and give us concrete suggestions, bring samples and bring the org chart. The quickest place to make real cuts is just bring in the org chart because I think that's the area that people are most comfortable with.

So, that's usually the most productive area. And I think it's important to focus on those areas where you know we can have productive negotiations at the beginning. But the more homework you do, the better off we are.

And also, going back to the initial waiting period, again, there are certain types of information we're always going to ask for if there's an overlap in the case, a significant overlap. That's the customer list, the recent strategic plans, recent business plans, things like that. And we're asking that, it's totally voluntary, we're asking

that because we think that that information could help resolve the issues early on.

So often when we put out this request, a voluntary request in the initial waiting period, we start getting yelled at. Well, if you don't want to give us the information, that's fine. But we're only asking for it to help us understand the markets better and see if we can resolve something quickly.

So, someone made the comment about the process maybe not being open enough or not cooperative enough, that goes both ways. We're happy to sit down and talk to you about the case. We want to be as open as possible. But if every time we explain that we have a concern, we start getting berated.

It's so unpleasant that, you know, it doesn't foster a cooperative relationship. So, that's the other point I would like to add.

MR. KRULLA: I think this, the approach Steve mentioned of coming in early and saying, well, what do you really want, does serve a useful purpose in one context. It's not useful in terms of the modification at the second request. Where it is useful is we're in the first 30 days, we have not been able to resolve concerns; so, our only recourse is to issue the second request and we issue it based on available information. And at that point, the fact

we have issued the second request obviously does not mean that we're heading off to litigation.

We may determine based on documents, information, hearings, third party input, that the investigation can be terminated at any point. So, the key documents, key information that would enable us to make that determination, get us some high level up-front documents, can be very useful in terms of giving us a sense early on as to whether this matter is worth pursuing.

Second, it may be that in a given transaction, we identify one or more markets or product areas where there's a problem and perhaps other aspects of the transaction do not appear to be a problem where we can identify where the problem lies and can identify a fix to the problem, and the parties are willing to work with us on a consent that fixes the problem.

In those instances, if we can identify, reach a level of confidence so we can advise the Commission what the problem is and that the fix fixes the problem, then the question of substantial compliance or compliance with the second request is really a moot issue. The real question is do we have sufficient information and documents to give us the confidence we need and give the Commission the confidence it needs to determine either that there is no problem or there is no problem in certain markets, that

we've identified the problem in other markets, and that the fix cures the problem, then the exercise of going through the full production of the second request or modifying the request to get to that end is mooted.

And, I think, the problem I've seen are counsel who don't want to get to the issues, don't want to get to the merits, they just want to get to compliance. They want to start the clock, put the gun to our heads, defy us to bring a case, rather than working with us in, through the second request process to educate us on where is the problem, where is there not a problem, and how can the problem evaporate or be fixed.

So, I think, early on, that's constructive. In my experience, frequently that process doesn't begin to happen as a matter of tactic by the defense counsel until after they've started the clock. They say, first, we want to go through this million-dollar production, and now we'll sit down and confront what's been staring us in the face all along, that there's an anti-trust problem and that needs to be fixed.

MR. BERNSTEIN: Just to follow up on that. Over the past three years in our division, very few matters have even resulted in substantial compliance, regardless of which way they came out. So, there are ways to do it and I just encourage you to come talk to us early and try to be

cooperative about it.

MR. KEILER: Yes, I was just going to comment on the last point based on -- I would suggest it would be helpful, but I know it's not the staff's position, or bureau director or in the case of the Justice Department, management of the anti-trust agreement. I've been through that process in two different situations where we did not, in fact, go through a substantial compliance. It was either we thought we would answer the problem or we thought we had a fix. And the process went on interminably because there was no clock on it.

MR. KRULLA: Is that FTC or DOJ?

MR. KEILAR: One was with the FTC and one was with DOJ.

MR. RICHMAN: Just one point, and this was, very quickly, I mean, it was something that Greg brought up and Mark, you actually started with which is communication. At the outset of negotiations for a second request, bring in the one person in the company that actually knows what the boxes on the org charts mean, and the person who knows whether the person in that seat has been there for longer than three weeks, whether their position predates the announcement of the merger. I mean, there's, the bulk of the burden is by cutting out the bodies. I mean, if you don't have to search the people at all, then, we're not

going to ask, we're going to get the information.

But before we can make those cuts, we actually do need to know what people do, and I'm one of those horrible people who said, I know that her files are in the trunk of her car but I want her trunk searched because, historically, I know for that industry, for that person, that job title, that's where the documents are. That's where they reside and they're actually relevant to the broader case. But if you bring somebody in who actually knows it and you don't rely on the homework that you've done which is good homework, but we're going to look at a job title and you may have just missed it because the org chart isn't clearly printed, we're going to ask and it delays the process.

Secondly, we need to know, especially now, post-Y2K changeover, we need an IT person to talk, not to us, but to our IT people to explain the issues about data storage and legacy systems. If the company didn't see fit to migrate something from an old system to SAP, then it's probably not especially relevant to the company's operations, we need to understand that. On the other hand, it may have been an expense issue and we may actually want that data and you may want that data because if we have to do econometrics, that may be the data that is dispositive in dismissing an issue.

So, we need those two groups in and we need to

have open discussions on our end. And I think that that's going to be 90 percent of the burden, the truly unnecessary burden and can be discussed fairly quickly.

MR. BERNSTEIN: Well, we're already past 1:30, so I want to wrap this up. But I think, Steve, did you want to add something?

MR. BAKER: I just have one question. Obviously people have been talking about second request as a process for years and years and years and years, the model second request, and I guess a lot of people here have done this for a long time. Has any of the stuff gotten better? Is there anything the FTC has implemented in recent years particularly that's improved the process? Maybe not.

MR. DUBROW: John Dubrow. Okay. To continue the tribute here that there used to be an index requirement that actually made you close out every document. And it was pretty useless, but they've made that pretty simple now where you can say this range belongs to this and this demand. That spec-ing issue, but you don't have to do index right now. So, there were some things like that that have made things more simple.

MR. BERNSTEIN: I also want to add that we're accepting written submissions, so if there is something that you didn't have a chance to discuss here that you want to put in writing, you can submit that to one of us and we'll

make sure it gets put into the record of what we're doing here.

Okay. Thank you all for coming. This was really, really helpful.

(Whereupon the meeting was concluded at 1:35 p.m.)

C E R T I F I C A T I O N O F R E P O R T E R

DOCKET/FILE NUMBER: _____

CASE TITLE: Merger Best Practice Workshop

DATE: June 18, 2002

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: JUNE 19, 2002

_____

RITA LANGLEY

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

_____

NANCY SMITH