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TTAB ROUNDTABLE - USPTO
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>> GERARD ROGERS: All right. I think we are going to get started. It is -- we are fortunate to have Deputy Director Rea here, but she has a very busy afternoon schedule. Before I turn it over to her for some remarks I do want to let everyone know that Alica Del Valle from salesforce.com is small on the screen but she is participating from the West Coast. She heard about the snow here I think and decided not to make the trip out and Steven Meleen tells me that Linda McLeod will be joining us during the program. A couple of quick announcements, if you have a cell phone or BlackBerry or something please turn it off because it will interfere with the mic. There is a sign-in sheet at the front. Please sign in so we know who is here. And I want to thank all of the organizations which agreed to send people to the roundtable today. We are happy that you could be here with us today and we are happy that Deputy Director Rea could take some time out of her schedule. So I will turn it over to the deputy director.

>> TERESA STANEK REA: First of all, at the outset I happen to think that the TTAB is one of the true gem business units of the USPTO; and there is no doubt that Jerry and Cindy do an awesome job. That's the very reason we are having our second TTAB roundtable with you today. It is important that we stay on our toes to communicate with all of you, and all of our

stakeholders, and work to deliver the services & resources that you need and that can be used to drive forward your particular priorities.

You might remember that our first TTAB roundtable actually occurred when Board representatives and the USPTO's general counsel met and they asked for your input for the amendments that were proposed in the 2006-rules to provide a governing framework for inter-partes cases. And the reason we regularly continue to engage in dialogue with you now is because, as was true then, your keen insights, experiences and inputs are vital to shaping the world's most transparent and business friendly trademark system. And that's why as Deputy Director of the U.S. Patent and Trademark Office -- or the United States Trademark and Patent Office -- I implore all of us to continually engage in discussions so that we all better understand our user community and the challenges different parties face. And in the same way we seek to hear from you, we also want to be as transparent as possible -- so our consultations are also useful in letting you understand where the Agency leadership is going to, and where we stand on key decisions being made. We want to be able to reflect on these experiences. And we want to know what works, what doesn't work and what should be modified so that we actually work substantively toward common goals.

And I'm proud to state that we already have a strong track record of making strides collaborating together. We have worked towards building a standard protective order for use in inter-partes cases and increasing the percentage of cases in which the Board's interlocutory attorneys handle motions by phone conference thereby easing accessibility to attorneys and parties. It should be used as much as possible because it does facilitate reaching that goal of enhancing collaboration. And finally we have increased the number of precedential decisions because of the hard work of Gerard Rogers, especially during the last six years because we got calls from you -- our shareholder community; the real practitioners -- where you requested clearer, consistent and more useful guidance. And I can't stress enough how firmly committed Director Kappos and I are to working closely with you to build and foster a user friendly and business friendly regime here at the TTAB.

We have a great team of individuals right here ready, willing and able to testify today and the fact that you have taken time out from your busy schedules to be here has not gone unnoticed. I am very pleased and I hope you engage in a lively discussion so that perhaps we are forced to reconsider the way things are, and what we ought to be doing. And we may even be able to come up with a more smooth path to actually handle all of the pressing issues that confront the TTAB.

Now we need transparency and the same transparency has always been a hallmark of our trademark's team in the past and it is the same sort of partnership that we are actually counting on for the future.

Now many of you out there know that in a previous life before I came to the USPTO I was engaged for many years in private practice counseling clients. I personally understand and empathize with the challenges that you face. All the attorneys and judges of the TTAB are here to work with you, to ensure an efficient and timely resolution of the challenges that you may face. And I encourage you to take the opportunity offered by this roundtable to begin an open and honest dialogue.

And as Director Kappos likes to say we offer at this agency the world's first and only 21st Century trademark and patent office. So thank you very much. Jerry?

>> GERARD ROGERS: Thank you. Thank you, Terry. As you can see I have to remember to turn on my mic and I will ask each of you here to do the same during the day. We are webcasting the session. And so we want everyone who is listening in to the webcast to be able to hear you.

I also want to note that because our time is rather limited here we are not going to be taking questions from viewers of the webcast or the audience at this point. We want to maximize the time that the participants here have. But we certainly will follow up this session by posting a transcript and recording of the session. And we will provide opportunities for further feedback after the meeting. So those ideas that you can bring to the table today will be aired and will be vetted and then we will hopefully generate additional comments that we can consider.

As Deputy Director Rea noted we did in -- when we proposed our amended rules in 2006 we had a meeting of the general counsel, and David Sams who was the chief judge, of course, at that time, and I sat down with representatives of most of the same organizations that are here today. I don't think we officially called it a roundtable, but I would like to think of it as part of a dialogue that has led to increasing phone conferences and the standard protective order and issuing more precedential decisions. In that sense I'd like to think of the Board, as throughout the David Sams era, and I hope into the future, working very closely with all stakeholders. So this will hopefully be a good start, as Deputy Director Rea said.

I do want to note that I am going to ask you, in a minute, each of the participants to introduce yourself and your firm or your corporation and what organization you are here on behalf of today so that we will have that preserved as part of the recording of the session. But before I do that I want to note

that when participants come before the Board to make arguments during an oral hearing or engage in a phone conference with one of our interlocutory attorneys, on a contested motion or more than one contested motion, to be handled in the phone conference it is often the Board attorneys and judges who make the observations and make the comments and who pose the questions. But I think today we are switching chairs. And so I think we look at this as a session where it is in large part your opportunity today to make comments and to make observations and to ask questions of us and for us to do more listening and less speaking today. So I hope that we will have a good session today and that everyone can generate some ideas on the agenda, questions that we sent out in advance. And we will be happy to be as responsive as we can during the course of the discussion and see where it goes from there.

So with that can we start perhaps with Jay Hines and work our way around clockwise?

>> JAY HINES: Yes, I am Jay Hines from Cantor Colburn on behalf of the Intellectual Property Owners Association.

>> BETH CHAPMAN: Beth Chapman with Oblon Spivak. I am here as a member of the Trademark Office Committee of IPO.

>> ERICA FISCHER: Erica Fischer with General Electric Company and I am here on behalf of the Association of Corporate Counsel.

>> STEVE MELEEN: Steven Meleen here on behalf of the AIPLA. As Judge Rogers mentioned my colleague Linda McLeod from Finnegan will be joining us.

>> JODY DRAKE: I am Jody Drake and I am here as a member of the Trademark Public Advisory Committee.

>> LYNDA ROESCH: I am Lynda Roesch and I am here on behalf of the USPTO Subcommittee of the International Trademark Association.

>> JONATHAN HUDIS: Good afternoon, Judge Rogers. I am Jonathan Hudis, a partner here in Alexandria, Virginia, with Oblon Spivak and also chair of Division 2 Trademark and Unfair Competition for the American Bar Association Intellectual Property Section. And I am here with Cheryl Black representing the ABA IPL section.

>> CHERYL BLACK: Cheryl Black. I am with the law firm of Goodman, Allen & Filetti. I am representing the ABA Intellectual Property Law section today.

>> GERARD ROGERS: Alica, I don't know if we can hear you now.

>> ALICA DEL VALLE: My name is Alica Del Valle and I am trademark counsel here at salesforce.com and here on behalf of the Association of Corporate Counsel.

>> GERARD ROGERS: Thank you. As you all saw from the agenda

-- I am sorry, I do need to make sure -- I am sure you all know her but I do want to formally introduce for the record Cindy Greenbaum, managing interlocutory attorney at the Board and who does a great job with our attorneys keeping motion practice within goal. So that's something that's always nice to be able to point to when we do our year-end report.

And so in the first session today we wanted to acknowledge that Trademarks this year has put up on its web page the Trademarks dashboard where they provide a lot of information in a very easy to look at visual manner and while the Board has not yet developed a dashboard, we certainly are looking forward to doing so and to getting more information up on our web page. In the interim however we have certainly put up a good deal of information that we didn't previously report on a regular basis. Cindy and I wanted to work through a few of those charts today and discuss what some of these metrics show, what they capture, what they don't capture, what they actually mean. And then have a little bit of a discussion with you about what things you may want to see in addition to this information. And we hope that we will find out what kinds of information and in what formats you would like to see information put on our web page so that you can structure your practices and you can counsel your clients about what they are likely to be involved in, if they get involved in a proceeding at the Board.

There is a lot of data which we might all be curious about and might all like to have and certainly Cindy and I would certainly like to have all sorts of data as management tools but not everything is easily accessible through our database of electronic files; but whatever is important to all of you and to practitioners before the Board we will certainly make every effort to derive from our databases and to put in a format where we can post it up on the web page and have it be useful to you.

But with that let's first take a look at some of the slides. If I could ask in the control room can you get the slides active so I can run through those.

[**Slide 1**] Right. Thank you very much. Okay. This first slide and again this -- all of these slides with these charts are available on the TTAB's web page. This is just a chart of filing levels. It tells us what is coming in the front door for appeals; it is telling us the number of applications that are subject to final refusal and that are appealed on a quarterly basis to the Board. We provide in the year end column on the far right a comparison to the previous year. So you can see whether the trend is up or the trend is down. Again, extensions of time to oppose. Quarterly basis and annual total and a comparison to the previous year, the number of extensions of

time to oppose.

Oppositions is the number of pleadings that we get. It is not necessarily the number of applications that are opposed. We certainly get oppositions that may challenge more than one application if they are all ripe for opposition.

However, any opposition which is instituted and which might be consolidated with other oppositions later on each would be considered a separate opposition at least until we consolidate them. Cancellations again could be proceedings brought against more than one registration at one particular time. And again, if you look at these figures and you can see how the Board is doing compared to Trademarks. And we have heard from Commissioner Cohn in various forums, most recently at the TPAC meeting, that trademark filings were up this year, they were up 8% and, of course, we are then wondering what does that mean for the Board? And we will -- will we be getting more work down the road? And certainly if you look at the fourth quarter well, appeals were up considerably compared to previous quarters. Oppositions were up considerably in the fourth quarter, not so much more compared to the first quarter. Fourth quarter was the highest quarter for appeals and oppositions. Given the lag time we see in trademark filings and before things start showing up at the Board, these might be early indicators that we are going to have an increased workload at the Board. So we will see. And maybe that's a good sign for the economy.

[**Slide 2**] The next slide, this is one of the two -- this represents one of the two traditional performance measures that the Board has focused on. We have tended to focus on the work that is within the Board's control. And that means the control of the attorneys and the control of the judges. And so, final decision pendency covers ex-parte appeals and oppositions and cancellations and the concurrent use case that might go all the way to trial. But this is basically a reflection of the time it takes judges to issue final decisions on the merits. We say in the upper left-hand corner all types because we don't sort out the time it takes judges to issue final decisions in ex-parte appeals once they are completely briefed and/or argued. If that's a division that would be useful we can certainly look in to divided -- into further subdividing this data and posting it in that format.

This slide tells you a number of things, if you will, the workload that is accumulating for the judges to decide, the number of decisions that they issue and the average time to issuance and what we have left waiting on the shelves to be decided. You can see during the year the third and the fourth quarter again were -- second quarter was not far behind -- but

we had a lot of both appeals and trial cases maturing to ready for decision, and ready for decision means either the case has been completely briefed and submitted for decision on the merits or there has been an oral argument. Again, doesn't matter if it is an appeal or inter-partes case. A slight increase of cases maturing to ready for decision. We issued about the same number of decisions, just we were off by five -- as we did in fiscal 2010. Again, combined appeals and trial decisions.

We hope that will be a figure that will increase in the coming year as all the judges that were working on the manual revision are now back to working full time on decision writing; and again the most important figure we have on this slide is the average time to issuance from ready for decision and you can see the quarterly breakdown and basically at the end of the year we had an increase in pendency. We also had an increase in the number of decisions, or cases I should say, awaiting decision. And also I want to, on this slide, make clear that when we say issued decisions we are capturing the number of cases finally decided. We may actually have written fewer opinions than the 452 number because of consolidated cases and related cases, but this is the number of applications added to the number of oppositions and added to the number of cancellations that were finally decided during the course of the year.

[Slide 3] End to end pendency is something that the TPAC in recent years has been somewhat interested in and we have discussed with the TPAC and begun to track this information and again we posted this all up on our website for the first time this year. So here we are talking -- we break this out -- end to end pendency, commencement to completion, of appeals, commencement to completion of trial cases. We also provide you the median here.

On the previous slide we were only talking about averages. We don't post median time to final decision for appeals and trial cases, from the time that the cases are assigned to judges for decision. Something we could consider doing if it's of interest to you and will help with your practice. End to end processing -- we are trying to give you the averages and the medians and I know from some informal discussions I have had with Jody and a few others that perhaps some of this data should be further sliced and diced and perhaps we should throw out some of the older cases and throw out some of the younger cases. That's why we give you the median. But again we want to hear from you today about what kinds of data and information would be helpful for you in client counseling and in structuring your practices. Again this is median and average trials and appeal time.

The one thing you will note from this slide is that they

have all gone up somewhat. Not dramatically but they have all gone up this year over last year and it is worth comparing the information on this slide to the information on the next slide.

[**Slide 4**] Accelerated case resolution as everyone knows is something that the Board has been pushing. You have been discussing it in discovery and settlement and discovery planning conferences with our attorneys and with your adversaries in inter-partes cases and we have not had lots of ACR cases as you can see from this slide. We decided six in 2010 and again another six in 2011 but you will see that the time to disposition for end to end processing is a good deal shorter than for regular trial cases. So it clearly is a process that offers the opportunity for a lot of savings in processing time.

I will also note that we had three cases in September alone submitted for decision by the judges under ACR. So that might be an indication that more people are opting for faster processing times over full and complete discovery and full and complete trial. Not that we think you are necessarily giving up a lot of options and opportunities to address the substance of your case when you opt for an ACR proceeding as opposed to a trial proceeding. It lets you get to the merits much quicker. Cindy is going to run you through the next slide which is contested motions and what we report there.

[**Slide 5**] >> CINDY GREENBAUM: Okay. So we are reporting a couple of things. First is the number of decisions issued which really is the number of orders that we mail out on contested motions. And as you can see over the course of the fiscal year we ended up with 785 orders that issued, which is lower than last year, but I am just going to fast forward. So what we have in the bottom right-hand corner, number awaiting decision, it is basically the same. Knocking at the door waiting to be decided is the same as what it was in the first quarter of fiscal '10. We are keeping up with what we had even though we issued fewer of them. We did a fair number of motions by phone and this again is contested motions by phone. There are uncontested motions that are also handled by telephone but this measure doesn't capture them and this is something that we are very excited about. It is something that we pushed along because we heard from members of the public that this was something that was very important to them to have us handle cases by telephone if at all possible. So we started doing that more commonly in around fiscal 2009. Started really in fiscal 2008 but there was a big push I think in fiscal 2009. And you can see we do about a quarter of the cases that way that we are able to do. Not all contested motions are eligible to be decided by telephone. And

this measure actually might be a little bit higher than what we are seeing here.

In reality the number of motions that are decided, the types of motions that are decided, by phone are the types of motions that the attorneys can handle on their own rather than having to discuss and consult and get signed off by a panel of three judges. And depending on how many contested motions an attorney has of one sort or the other a type that requires consultation with the judges or the kind they can do by themselves they can do the kind -- they can issue a decision on a contested motion under their own signature on orders that are not potentially dispositive. They wouldn't be able to do it on a summary judgment motion but this measure -- percent with phone -- doesn't make that much differentiation. Based on all the orders that we issued about a quarter of them were handled by phone. If we had a better measure we might have a slightly different figure. Not sure if that's of interest or not but I thought I would point that out.

Also something that Jerry mentioned earlier in one of his slides on the top left where it says contested motions it doesn't say all types but it should. So this slide really deals with all types of motions, dispositive ones and everything else. And number of motions resolved, so that number is different from the number of decisions issued or number of orders issued because sometimes we have an order that addresses several motions. And so we just started keeping track of the number of motions resolved and reporting that back out to the public. I think it might have been in the beginning of fiscal '10 or '11. This is a relatively new measure for us but gives us a more accurate reflection of what we are doing. We have average time from RFD which is ready for decision. And for us we measure our ready for decision date based on when the reply is due on a contested motion or when it comes in, if that's earlier than when the reply is due. And if the motion is one that can be resolved by phone and is resolved by phone by the interlocutory attorney, then that RFD changes to the date of the phone conference. Because they usually hear additional arguments and we hope to encourage interlocutory attorneys to pick up the phone which they are doing a lot. So I think that's helping as well. So as you can see we came out the end of the year at 9.6 weeks. Our goal for the year was ten weeks. We were right within our goal that is an average measure. This is an average of all our motions from the time they were ready for decision until the time they went out the door and I think that's it. All right. That's it.

>> GERARD ROGERS: I think I will -- we have got a couple of slides after these charts that deal with some challenges the

Board faces from increasingly large records and our need to more actively manage cases which kind of relate to our two main subjects of discussion for the second and third parts of the agenda today. But before I get in to that I do want to throw it open to the floor if there is any response to the kinds of data that we collect and we monitor and we report and if there is anything that you think would be useful in terms of structuring your practices and counseling your clients that you would like to see, anything more, anything different, anything presented in a different way.

>> JODY DRAKE: Jerry, for TPAC I have a couple of comments from members who had suggested we might consider including number of default judgments and also a number of inter-partes proceedings that settle. And then another member had a comment showing pendency based on Board time versus due to delay by parties. This would help determine whether there should be more intervention in proceedings to help accelerate proceedings.

>> GERARD ROGERS: Thank you, Jody. On that last point I often think of chess players playing with their timers where they are keeping track of the amount of time that they spend making their moves and I wonder whether we should provide each of our attorneys with a little timer so they can press it for the time they have the motion pending before them and one for the parties, too, when they file a case and we can compare the two at the end to see who has been racking up the most time. All useful comments. I think in particular the question about what percentage of cases settled is one that comes up frequently. And I know something that Commissioner Cohn has talked about in forums and I have talked about, one of the questions we always have is how do we define settlement? And is it a withdrawal by a plaintiff? Is settlement a default for a defendant. We don't know whether some of those actions are or are not as the result of a settlement that may not be filed with us. I think we would need the assistance of the bar in trying to further define what characterizes, and what would be considered, a settlement.

>> ALICA DEL VALLE: Can you hear me? Hi this is Alica again from the ACC. Along those lines if we can't actually define specifically what a settlement is for the purposes of a metric would it be possible to define at what stage a resolution is reached? So that there may be the possibility that it could be a settlement but at least you know how far in to the proceedings a particular matter is resolved.

>> GERARD ROGERS: Thank you Alica. We actually once before did a run through our database and compared or tried to track the percentage of trial cases that were terminated without an answer ever having been filed because we are often told and we

were certainly told when we were proposing to amend our rules in 2006 that many cases are settled before an answer. There is default, plaintiff's withdrawal and there is no need in most cases to have a conference and disclosures. When we were working on those rules we did at least one test where we ran through the database and we saw what percentage of cases are terminated, again could be on a settlement, could be on a default, whatever, without an answer having been filed. And it was a surprisingly high percentage, at least in that one year that we looked at, of about two thirds of cases. We can see many cases are filed that never really proceed very far, at least along the prosecution timeline. However, some of those cases can pend for many years before they are terminated without an answer having been filed. And I can tell you I looked at one case recently that didn't have an answer filed, because we handled a motion to dismiss, converted it to treat it as a motion for summary judgment because it referred to matters outside the pleadings and we were able to do so even though we no longer convert motions to dismiss to motions for summary judgment under our current rules, because this case had had five years worth of extensions and suspensions all consented by the parties. Again if that case ends up terminating without an answer ever being filed it is still pending at the Board for five years. If it doesn't require a trial and doesn't get decided on the merits, it won't factor in to that average commencement to completion processing time because only the cases that are decided on the merits factor in to that; but nonetheless it is pending at the Board for an appreciable period of time. But it is a very useful suggestion to try and figure out when cases start and when they stop. And what causes them to stop if we can do that.

>> JAY HINES: Jerry, I think as an extension to that another telling statistic might be looking at the extension practice of the Board. And, you know, those 16,000 extensions and the percentage of those where a proceeding is never filed and compare that to the ones that don't go beyond the answer. I think that would be a good demonstration also.

>> GERARD ROGERS: And are you talking about just extensions of time to oppose that don't result in oppositions or extensions even after an opposition is filed?

>> JAY HINES: I am talking about just extensions before an institution.

>> GERARD ROGERS: And obviously we get with 16 or 15, 16,000 extensions of time to oppose every year, and only 4,000 oppositions, so we obviously get a lot of extensions that don't result in oppositions. Again I don't know how we would figure out whether the parties had actually settled their differences

and therefore didn't file an opposition, but it is certainly something that we can dialogue with people about and figure out if there is a way to track that information.

>> With regard to the ACR measures, are they currently measured from the time a proceeding is instituted or at the time when the parties designated to be an ACR proceeding?

>> GERARD ROGERS: Sorry. I forgot my own rule about turning on the mic. Those commencement to completion times for ACR cases are from the start of the case until it is resolved on the merits. They are faster in discovery and trial. Overall processing time is less than the average trial case. The ACR cases are kind of double counted, if you will, in the pendency to final decision metric because the final decision metric would include final decisions in ACR cases and final decisions in non-ACR cases but again that's just measuring the component of time -- the part of the overall processing time -- that the case spends in the hands of a judge for writing of a final decision.

>> ERICA FISHER: I think it would be helpful to have measures from the point it was designated as an ACR to the end to show how much faster it is to go through that process rather than the regular proceeding.

>> GERARD ROGERS: Okay. And I thank everyone for these ideas and I want them to keep coming. I can't promise that our IT systems will support finding this data but we will do our best. Yes.

>> CHERYL BLACK: Yes. Another possible measurement is the uncontested motions that are decided by the interlocutory attorneys, if we can get data on that.

>> GERARD ROGERS: Okay. Thank you. And are you -- would you want sorted out the time that it takes, which should be virtually none for ESTTA to approve consented motions?

>> CHERYL BLACK: Not the automatic ones. The ones that are actually handled by the attorneys.

>> GERARD ROGERS: Okay. So not consented, not necessarily contested. But not consented either.

>> JONATHAN HUDIS: I think what Cheryl means is consented but not processed through the ESTTA system. Whether it is decided by an interlocutory attorney or a legal assistant.

>> GERARD ROGERS: And the reason I asked for the clarification is because we get quite a few motions that are not consented but they go uncontested and therefore are granted as conceded. So you would want those included in addition to consented ones that are not approved automatically?

>> CHERYL BLACK: Yes.

>> GERARD ROGERS: We will say consented and uncontested or conceded.

>> CHERYL BLACK: We would also like to see the breakdown

between the ex-parte and the inter-partes on the final decision. I think that would be helpful.

>> GERARD ROGERS: Okay.

>> STEVE MELEEN: Along those same lines I think one of the issues that we have -- these numbers are all very helpful -- but the more that you take various types of motions and/or cases and just convert them to an average, the more you run in to problems of the average not really reflecting specifics about some things that are decided very quickly. For example, telephone conferences. Even if they are contested they are going to be decided in a day. The interlocutory attorney usually does a great job of deciding it on the phone and getting an order out in the next day or two. If you have one of those and you have one that is very difficult and takes a long time and takes, you know, several months then it looks like the average is a month. Same thing for inter-partes versus ex-parte, if you look at the second chart it appears that the inter-partes cases are taking considerably longer than the appeal and to combine those in to one category I think sometimes hides some data that would be helpful if it was broken out more.

>> GERARD ROGERS: Let me clarify, Steve. On the pendency to final decision slide we do combine but we can certainly break out the final decisions being written by judges in inter-partes and ex-parte cases. We are trying to figure out how much time that judges are spending writing decisions and it almost doesn't matter what kind of decision you are writing, but we can certainly break that out. But we are not lumping together completion or end to end processing, the commencement to completion of appeals with commencement to completion of trials. We separate out end to end processing times.

>> STEVE MELEEN: Right. And if there is not a significant difference in the ready for decision dates that might not be helpful. I wanted to echo Jody's comment that I think would be helpful on all of those end to end dates, one thing that came through very clear from the people that I talked to we like the ability to have consented extensions even if it makes cases drag out. And we would hate to see the TTAB end that because we are trying to improve performance statistics overall and certainly don't blame the TTAB for any of those.

>> LYNDA ROESCH: I want to third that. That when the two parties consent, while it may be a delay in terms of the ultimate decision or resolution, when two parties agree they are not really asking for a third party to change what they are agreeing to. Obviously they need the approval of the Board but the two parties come to you telling we are happy to live like this. There is a reason why there is a cooling off period in Europe and that might work here. Might want to think about

that. I wanted to echo also what Steve was saying. I think breaking out appeals from oppositions and cancellations any time you could in these metrics would be helpful. But those kind -- that kind of information could be helpful also.

>> GERARD ROGERS: Okay. Actually can I ask in the control room so we can bring Alica back on the screen so she is not left out there as a voiceless participant for the rest of the presentation. We have transitioned in to the second item on the agenda and this is, I think, where we are expecting to hear more from all of you and less from us. Because we have heard very often in the past whether it was when we were proposing amendments to the rules in 2006 or whether it was during the recent publication of the request for comments on whether the Board should be more involved in settlement talks; and we know from articles that are published from time to time on the Trademark Reporter and Law 360 and various other blogs and other discussions, that there are various camps, if you will, out there about whether the Board should be more or less like a court. Whether the flexibility that we have heard Steve and Lynda praise in the Board's proceedings, the ability to get these consented extensions is a good thing or potentially problematic, because we have also heard that it means longer delays for parties who are trying to clear marks. And this was a position particularly championed by the former head of the TPAC, John Farmer and I want to acknowledge his comment in that regard.

So perhaps we can hear from you now and I will let Jonathan get started on the differences between the Board and the court and what differences should be preserved and where we should be more like them and where we should be less like them.

>> JONATHAN HUDIS: Okay. First of all, to start out, Judge Rogers, I think this panel is truly blessed. You have people around this table who have been practicing in this area before the Board and in the courts for many years. I have worked with a lot of people around this table. I have litigated against them and they are all superior in the practice of this area of the law. With all due respect to John Farmer who I greatly respect his abilities, his background is litigating before the United States District Court for the Eastern District of Virginia. Known as one of the few rocket docket district courts throughout the country. The Board is not a rocket docket nor should it ascribe to be one. As you already heard from some of my colleagues there are good reasons that our clients want things to slow down. We do want the time to work out settlements that go way beyond the issues that are before the Board.

As you and your colleagues have said many times the

jurisdiction of the Board is to deal with obtaining or maintaining registration, not matters of infringement or unfair competition. The settlements that we get for our clients through the context of a Board proceeding go way beyond most times what are the issues litigated before the Board. Now your questions on this part of your agenda seem to me to look at process from filing to trial and not in the nature of the Board trial itself.

Is that correct? Because that will portend my answer.

>> GERARD ROGERS: You can address any and all of those. This is an open forum and we want to hear anything you have to say about the process, the measurement of the process, portions of the process.

>> JONATHAN HUDIS: Okay. Let's take it from your stated assumptions and questions. In a district court proceeding once you have filed, in one form or another there is usually supervision conducted by a magistrate judge, although not uniformly throughout the country. There is a Rule 16 conference and backed up from that Rule 16 conference is the duties of the parties to engage in a meeting of counsel similar to what you have at the Board since August 2007. So that is your Rule 26(f) meeting of counsel. Now where district court departs from Board practice is as a result of the meeting of counsel there is some form or another of what's called the civil case management plan which basically is a set form that the district courts promulgate on their websites and you download and fill in what is the case is about. Is there any problem with jurisdiction? Venue? Have all the parties who are defendants been served? What are the essential claims made and what are the bases for the claims factually? And then the parties are given some kind of leeway to put in their own schedule for automatic disclosures, for amending pleadings, to conduct and finish discovery; should discovery be in phases or not?

Now all of that would not necessarily be needed in a Board case because in a district court case of plenary jurisdiction you are not going to have only liability but also damages, something that the Board never gets into. So you go through that whole process on a time set by the parties, usually agreed to by the district court judge. Then you get a date for a final pretrial conference, something that the Board does not have. That's where the court engages. The court sets a trial date, a schedule for pretrial disclosures, a unified set of disclosures prepared by the parties jointly, a set of motions filed by the parties individually, and then you go to trial. Of course, the nature of a Board trial is you submit your evidence, as far as the Board is concerned, put forth on paper whether it is deposition transcripts, your notice of reliance, fruits of

discovery, what you can get out there on the Internet from databases. You submit that in and then there is a break. And then the defendant goes; and there is a reply if there are counterclaims and so on. You don't get that break in trial in a district court. It goes in front of the judge and/or jury until finished. You get a jury verdict or a decision from the bench.

There is more -- if you had to put that all in a nutshell there is more active engagement by the court, and there is more passive engagement by the Board (especially the interlocutory attorneys) during the process. The question is you already have an experiment which is getting larger and larger with these telephone conferences. How far do you want to take that? For example, do you want an interlocutory attorney to, in all cases, participate in the meeting of counsel?

I am not saying that's a good or bad thing. I am just putting that out there. Do you want to have another meeting of the parties before trial starts? Should the interlocutory attorney be involved in that part of the process? For the times that I have been engaged with the interlocutory attorney through the process, the process runs smoother and runs faster.

>> GERARD ROGERS: The existing process without adding in all of those other potential opportunities to interface?

>> JONATHAN HUDIS: That's correct.

>> GERARD ROGERS: Okay. Let me kind of follow up on this question because I think if I can understand, the summary answer is that you prefer the flexible Board approach, the more passive than active approach as opposed to a district court, for resolution of Board disputes which are limited in their focus for various reasons that you have talked about.

Am I correct in --

>> JONATHAN HUDIS: You are correct, that's my preference with two exceptions. An obstinate adversary or a pro se applicant.

>> GERARD ROGERS: Are you suggesting that the Board should try to identify some of these cases and become more actively involved? As you know this year the Board became more involved in the Redskins case, and is potentially likely to become involved in other cases that look like they are going to be actively litigated and have the potential to create very large records. We will most likely look to self-identify cases that can benefit from that kind of involvement, but I suspect that the number and the percentage of those cases would be rather limited. Most cases are not -- don't generate that kind of a record. But you may be carving out another subset of cases that either you would want us to self-identify and be more actively involved in or at least have the potential to use existing measures to engage the Board more frequently in those cases.

>> JONATHAN HUDIS: Yes. I mean one example that comes to mind, I brought it up the last time you had a public forum, was UMG versus Mattel, where the Board expressed displeasure at the large record and the motion practice that was going on in that case. The Board will see for itself when you have a large number of motions coming before it. That's a case where the Board knows "we have to get involved, otherwise the paper is going to keep coming and coming and coming."

>> GERARD ROGERS: And to follow up, that may not be -- well, I guess sometimes you have obstinate adversaries on both sides and these are cases that we will be self-identifying or figure out, and be trying to figure out whether we need to be more actively involved in discovery if it is not going to settle. You mentioned pro se parties. I am wondering if you think that the Board should be more uniformly involved in cases with pro se parties or it should be left to counsel that is representing the non-pro se to engage the interloc when necessary?

>> JONATHAN HUDIS: The former. It is not our job to teach an adverse pro se what the law is and what the procedures of the Board are.

>> GERARD ROGERS: No, no, I certainly understand that. We heard that loud and clear in the comments that we received when we proposed amended rules in 2006 and we have certainly seen as our experience under those rules that often the Board is involved in settlement and discovery planning conferences when there is a pro se party. I think half the cases or maybe more involve pro se, at least half the cases where the Board is involved in the conference.

>> CINDY GREENBAUM: I think that's right. I haven't looked lately.

>> GERARD ROGERS: We offer this opportunity to the parties so the Board can provide the instruction to the pro se and you don't have to. That's not what I was suggesting, but I was wondering whether you thought we should as a matter of course have, perhaps, regular phone conferences or such in cases involving pro ses or whether it is up to the party that's represented by counsel to not instruct the pro se but to initiate the conference with the interlocutory when necessary because the interloc will then have to provide the instruction.

>> JONATHAN HUDIS: That's the kind of situation I would envision.

>> GERARD ROGERS: Okay.

>> JONATHAN HUDIS: The latter.

>> JODY DRAKE: Jerry, I was interested what percentage of cases, what percentage of cases are pro se cases. Must be a very small number I would think.

>> GERARD ROGERS: I am not really sure. I guess we will

have to look in to that and see if we can figure it out.

>> JODY DRAKE: I actually think they are growing, the number of cases are growing just because it is much easier to file your application on your own. People feel like they can just keep going on their own. At least that's my observation these days.

>> GERARD ROGERS: Yes, and I think the judges at the Board would and the attorneys who have to deal with pro ses in motion practice would certainly say that they spend a good deal of time on cases involving pro se parties. And we write enough final decisions in cases involving pro se parties. I see them every week when I prepare the weekly summary. They are not infrequent. We will look in to that and see if we can figure out the percentage, yes.

Let me go back to something that is again on this -- on the list of questions for the first or the second part of the agenda. And that is when we had the request for comments out there on Board involvement or potential involvement in settlement negotiations while the overwhelming sense of the comments was that we should not be more directly involved in settlement talks than we already are there seemed to be support that consented extensions and suspensions should require a little bit more of a detailed showing and should not be so readily available through ESTTA. I am going to ask Cindy to explain a little bit about what ESTTA will allow extensions and suspensions to be automatically approved and when the system will not and will kick it out to a paralegal or attorney for further review.

>> CINDY GREENBAUM: So I actually was just looking in to it this morning. My understanding is that ESTTA was designed to allow extensions of time to file an answer up to, I think, one year from when the case is instituted. So up to one year from when the notice of opposition or petition to cancel is filed. If during that year the defendant wanted additional time to file an answer ESTTA was designed to allow that consent and after that ESTTA was supposed to kick it over to a paralegal so somebody could take a look at it. Once an answer was filed ESTTA would look to when the case was commenced. So if it was commenced -- I think I am saying this backwards. After an answer is filed ESTTA would allow up to two years from commencement for consented extensions of time to, I guess, extend discovery. Because it would be after the answer was filed and after that second year from commencement ESTTA was designed to kick a case over to a paralegal so somebody could take a look at it and see what's going on with the case. And I was actually curious as to what your thoughts were about the timing, whether we should be making that kind of distinction before an answer or after an answer and, you know, the one year

-- up to one year before an answer is filed and after two years if an answer is filed, and this is from commencement, or if that's too long or too short because it is something that we are considering potentially changing depending on what we hear.

>> GERARD ROGERS: After the Bose decision came down Trademarks had the Bose roundtable discussion on the future of the use-based register, and that involved a lot of discussion and reducing all discussion to a transcript, and sorting out and charting all of the proposals and comments, and then categorizing them as suggestions which would require statutory changes or suggestions which would require rules changes, and suggestions which could be changed on our own without statutory or rules changes. And as most of you are aware, the office has now proposed some -- a pilot project with post registration in anticipation of possible rules changes, to allow post registration, to require the same kinds of information that examining attorneys collect. And so expecting that we will do that -- go through kind of a similar process here -- ESTTA triggers are the kind of thing which would not require a rules change or a statute change. We can simply change the practice and change the ESTTA triggers. I don't think we would do it very quickly and easily. We would want to develop a consensus from the bar about the kinds of time frames that would be useful. But to follow up on Cindy's questions, the time frames involved are something we want to hear from people about, but also we would like to hear from people if you run up against those time frames and your extension or your suspension is not going to be automatically approved by ESTTA and it is going to get kicked out and reviewed by a paralegal or attorney, what extensions of cause should we allow beyond a point in time.

>> BETH CHAPMAN: The IPO -- certainly in extreme cases and what's an extreme, who knows, that is part of what needs to be defined -- generally speaking our committee and our organization certainly believes that the Board's practice on generally being much more flexible requires a lesser commitment of resources for the trademark owners and we certainly believe that it leads to a more manageable, less expensive alternative to what is offered in district courts. And IPO would like to see the flexibility and the almost automatic granting of extensions and suspensions continue because it facilitates the negotiations. Sometimes if you are in the middle of negotiations and you get this order from the Board “Nope, this last one was denied because we decided that was the end of it, and now you have to show extraordinary circumstances or you have to show specific progress about settlement or we are not going to grant one again even if the parties consent.” That can be very disruptive of negotiations that are ongoing and IPO would be in favor of

keeping the Board's practice of allowing the cases to proceed and we recognize there are extreme problem cases but those should be few and far between.

>> GERARD ROGERS: Can I ask you Beth, how often do you think that kind of interruption of negotiations occurs, as opposed to cases where if the Board essentially requires a more detailed explanation and won't grant a consented extension, helps bring the parties to some sense of finality either in terms of settlement or moving on to trial?

>> BETH CHAPMAN: I don't know any specific statistics on that. But I certainly know that it can disrupt if there are, in fact, ongoing settlement negotiations. All of a sudden you are not talking about settlement but how to convince the Board to give you more time. It is disruptive in that sense. I don't have percentages but it certainly can happen.

>> CHERYL BLACK: I would like to kind of comment a little bit about what Beth is saying, but from the ABA viewpoint, of not so much, you know, there is an understanding that the Board wants to know what's going on at a certain point and that's fair and there is information that parties may not want to share and put in to the record. Another consideration is, maybe, at that point the interlocutory attorney holds a conference with the two parties where they discuss it and if it is clear that there is ongoing discussion about settlement and it looks like it makes sense that the parties are in the best position to work that out, that the Board goes ahead and grants it without additional information being in the record.

>> CINDY GREENBAUM: Cheryl, actually we are doing that. At least some of the attorneys are doing that and I think it is a good idea. I just saw an order yesterday as a matter of fact. It is something I can share with them. Thank you.

>> GERARD ROGERS: I want to follow up on Cindy's comment. And say that I don't think when the Board requires explanations yes, we -- you may see orders from us that say well, what issues have been settled and what issues remain to be settled and that kind of thing -- I don't think we are looking for how much money is going to change hands. That there is going to be an assignment and license back. I think we are asking questions because we want to generate a response. I mean we have actually had people tell us in the past when we issue orders saying we can't grant any further extensions or suspensions unless we get an explanation of the progress you are making, we had people say "Well, we don't read those orders. We just docket them for the time the next one is due." Of course, those are the orders where we approve it but say the next one is going to require some kind of an explanation. So we are not sure that the orders even get read sometimes.

I am sure everyone here reads them but some other people don't. But I don't think that the Board is looking for details. I just think we are looking for some kind of indication of progress and we also don't know whether, you know, as Jonathan says or as Beth has alluded to, sometimes these negotiations may be global in scope and may end up involving things that are far beyond the Board proceeding, but if you can even tell us that and I have in the past had phone conferences where people have told me this is part of a global dispute and we have resolved matters in this country and that country but we have others that still need to be resolved and we want to keep the Board thing pending. If we know something like that, that's fine. We don't need to know how you resolved in one country as opposed to another, but we need to understand that some progress has been made.

>> BETH CHAPMAN: Excuse me. But you have to understand that you are asking for that information in a public record and it is settlement negotiations that are not completed by definition. And so which countries things have worked out in and where they haven't worked out and what's the progress, even in more general terms is sensitive information. Please just keep in mind, you are asking that it be put in a public record.

>> JONATHAN HUDIS: We fully understand, and we have practiced before the Board long enough to appreciate, the need for the Board and the trademark part of the USPTO to fulfill their obligations to move matters along, but what you are hearing from Cheryl and from Beth, first of all, I heartily agree. There is a big difference between asking the parties what have they done in the last three or six months since the last suspension versus what issues are being discussed in your negotiations. Those should not even be questions put into the interlocutory orders. Because to one degree or another it sends the lawyers and their clients into a state of concern. Because frankly to the rest of the world private settlement discussions are none of their business. If you want to know how many phone calls did you have, what were the exchanges of correspondence, have you exchanged settlement drafts, fine. What terms are being discussed or have to be discussed, whether it is global or domestic those should not be put in the public record. As Cheryl wisely suggested if you want to have that kind of discussion in an untaped discussion among the party's counsel and the interlocutory attorney, fine. But those records are out there for potential adverse -- future adverse parties and competitors to look at. You have to be very careful about what is being made into a public record. There is a way to push the parties without having that kind of information being put into a response explaining why should you get another extension or

suspension.

>> GERARD ROGERS: Thank you. And we certainly appreciate your perspective on this issue. I think I would remind everyone, too, if you get those orders and you are uncomfortable putting anything in a written response to an order you can certainly request a phone conference and I mean you could always, of course, designate something as confidential and submit it under seal, but if you don't want to do that and you just want to do a phone conference then you can certainly request a phone conference. And as Cindy alluded to, Board attorneys may initiate them but we are certainly willing to have the parties and counsel initiate the phone conferences, too.

>> ALICA DEL VALLE: Yes. I was thinking that there may be some utility in (cutting out) kind of satisfies this metrics of (cutting out) at what point things were terminated and to the extent that the termination --

>> GERARD ROGERS: Alica, pardon me. I had my mic still on. So we lost part of your beginning of your question. I will ask you to repeat so everyone has the benefit of your full question.

>> ALICA DEL VALLE: My comment basically was that there may be some utility in approaching this possible kind of limitation on how many automatic extensions there are in comparison to a possible measuring of at what point in the proceeding termination occurs. So to the extent that there is -- that the proceedings are going to prolong -- through a prolonged process it may make sense to have some limitation and I think the proposal saying at that point you could schedule a call to discuss what has been going on including all the details to address the concern would be advisable and I think would be a good step in reaching settlement for those cases that are being settled.

>> GERARD ROGERS: Thank you. And if I could ask everyone here I will note that the Board is still four years later operating under two sets of rules governing our inter-partes cases. Fortunately we are down to 515 total proceedings operating under the old rules. Those -- we are talking about 325 disputes because of consolidated cases. But of those we don't really have anything to do in nearly 150 of them because they have been submitted for decision or they have been decided and we are awaiting the expiration of appeal period or they are on appeal. So we can't really do anything about those. But we still have 86 cases as of last report that were commenced prior to the new rules taking effect and are suspended for settlement talks. So the Board has an interest in wrapping up these cases, all cases, but particularly those that are involved in settlement talks, as quickly as possible, so that we don't have to maintain two sets of rules moving forward. And if there are

any suggestions for any -- from any of you about how we could possibly speed resolution of these cases where settlement discussions are still theoretically going on, we would certainly be willing to hear those suggestions. And again I think this kind of gets to the point of at some point we have to draw a line and move things on because they are impacting adversely our operations.

>>In all 86 these are consented to extensions?

>> GERARD ROGERS: Yes. Generally. I mean there may be some where they have had to justify them along the way or we have asked for explanation but we have found the explanations good enough. Our average when we showed the slide earlier is four years or so of commencement to completion processing time. So we have got cases that are already at that age and they are still suspended for settlement talks. I don't know whether they are suspended prior to answer or after answer but clearly one of the cases I talked about earlier doesn't have an answer in it. So it could be pending for another four years if it doesn't settle. So that's the kind of interest we have in trying to move some of these things along. I certainly understand everyone's concern about maintaining the flexible approach and maintaining the availability of consented extensions and suspensions and not impinging unduly on the parties' discussions. But then again, we have an administrative need to certainly move some things along, lest we be criticized for having an unduly long average end to end processing time.

>> CHERYL BLACK: I think it goes back to what Lynda and Steve mentioned, on pendency, dividing out and delay due to the Board or the parties. It is really outside the hands of the Board, but for the sake of working towards a resolution, the parties have agreed to continue this proceeding. So I think if you do the measurements so that it reflects the distinction between Board delays, if there are any, and party delays, then maybe it won't adversely affect your measurements and the parties would be happy, as well as everyone else, that you allow them to continue to work towards settlement.

>>If you took these 86 cases out of this calculation I wonder what they would do to your pendency.

>> GERARD ROGERS: Actually until they have get decided on the merits they will have no affect on pendency. If you don't settle and after five years the parties decide okay we have to go to trial, then we will have the adverse impact. So it is really more a concern about just trying to make sure that we can reduce that number as quickly as possible and get ourselves to the point where we can operate under one set of rules going forward. I don't know how many of you are involved in cases operating under both sets of rules but it -- it is -- it can be

confusing. And it is certainly something we would like to avoid moving forward.

>> Have you tried sending out a note to those parties saying so-and-so is available for a settlement conference? When you get the consented extension on these cases maybe you could do that.

>> GERARD ROGERS: Well, we have been told that we are not wanted in most settlement discussions.

>> I understand and I participated in drafting some of those responses. But if you are looking for a way to move those 86 cases that would be one option. Maybe somebody -- maybe a couple of people would take you up on it. I don't know.

>> GERARD ROGERS: And the number of comments received in response to the request for comments on settlement did suggest that doing something as a pilot project might be useful if it is on consent of parties. Maybe this is fertile ground to contact parties.

>> LYNDA ROESCH: Federal courts do a settlement month and they do send out a note to everyone saying "would you be willing to participate in this settlement conference on such and so?" It is usually during one month out of the year. And they get attorneys in the jurisdiction to act -- and sometimes magistrates to do it and it does push settlements through faster.

>> GERARD ROGERS: Denise who is our Technical Program Manager and works with our supervising paralegal, Denise has been working with Cindy and I to identify which cases are still pending under the old rules and what the various statuses may be and how we can move them forward. And we certainly have increased the frequency with which we ask the parties about the progress they are making in settlement talks in these cases. Other than to nudge them more frequently we haven't done anything in particular. And certainly the number of cases proceeding under the old rules is falling, but we would like to hasten the demise of the old rules if we could, as quickly as possible.

Any other comments or thoughts? I think the next session will be particularly useful, as we think about various proposals to increase the Board's sanctioning power or change motion practice or things like that. If there are any final comments before we take a break then I certainly want to hear them now.

>> STEVE MELEEN: One final comment, I don't think that anybody has specifically answered the question of, you know, do we want you to adjust the period when ESTTA kicks you out of the automatic extension. I think I speak for everyone that we don't want it any shorter. It is nice to have that automatic extension, that you file it and you don't have to worry about

"am I late on discovery that was due?" We understand there comes a point when you need some explanation and I have been always generally able to get extensions without disclosing any substance of settlement, but just saying we have sent a proposal and we talked and we have a few issues outstanding and I think as long as that's the case it is pretty lenient. It is not too painful for us to tell the Board what we are doing and sometimes it is helpful to remind the other side that the ball is in their court and we are going to tell the TTAB that the ball is in their court and maybe you should respond before that deadline but what is most important to us for the extensions to be able to continue to be available as long as, you know, it is reasonable, both sides agree to it and it is not abused.

>> JODY DRAKE: Along that note TPAC, again TPAC comments that instead of suspending proceedings for six months while the parties are engaging in settlement it would be more helpful if the parties had an opportunity to elect extensions of periods of one or two or three months or explicitly seek an extension for a longer period of time.

>> GERARD ROGERS: So greater variety in options, more choices.

>> JODY DRAKE: Yes, and the feeling being that maybe it is putting a little pressure on the parties, too. If you know you have an automatic six month extension on both sides, both sides would have to agree but it does provide a little more flexibility. Maybe the clients need the pressure, too. So...

>> GERARD ROGERS: And that may present some IT issues for our ESTTA system. We will have to think about how easily the system could be adapted to handle consented extensions of varying durations or consented suspensions. I think for the most part when you are getting stuff approved by ESTTA automatically you are getting a particular extension or suspension because that's what you are asking for. Before we had these types of filings automatically approved by ESTTA we would sometimes order suspensions only when the party requested suspension. There may be a few situations where ESTTA is required to do that or may give you extension or suspension times other than what you asked for. I know with extensions of time to oppose we have certain extensions that we grant and sometimes the party will file for something less than the final six month -- I mean final 60-day extension but we will give them, you know, what the system gives as the last final extension. So again that would require changing ESTTA. So we can certainly look in to adapting the systems.

Okay. I think we have come to our break time and if everyone wants to take 10 or 15 minutes. Our cafeteria is still open in case you need something to drink or sustain you through

the next session. And there is also coffee and restrooms are just to the right outside the room here. Thank you. And we will start again at 2:30.

(Break)

>> GERARD ROGERS: Okay. I think we'll get back to work, and it's a pleasant discussion. I don't really consider it work. But I wanted to just run through a couple of other slides, the last two slides of the day.

[Slide 6] This is one which shows one of the challenges the Board is facing, and this is one example of an ex parte case and one example of an inter-partes case. The Lorrilard Licensing case, the appeal, as you can see from the parenthetical, applicant has made many thousands of pages of evidence of record. In fact, that was 10,000 pages in an ex parte appeal, so that was quite a case for us to work through.

One of the -- I think that case illustrates that in the age of the Internet and when a lot of material can be easily downloaded and turned into a record, people are want to do so. Now, of course, it's the outlier. It's an extreme example. But we do have many ex parte cases at the Board that are thicker than the Manhattan phone book when I guess the phone books used to be a lot thicker than they are now. There aren't as many phone numbers to list in the phone book. We used to get inter-partes records that were as thick as the Manhattan phone book or white and yellow pages combined. Now we get ex parte cases that way, and it's not unusual.

The second case listed on this slide is the General Mills case that Judge Kuhlke worked on recently and issued as a precedential decision. Again, this was a tremendous record. One of the things we did in-house before this case was heard at oral hearing, because we knew the size of the record, was to discuss what we might do at the oral hearing and what the panel might be able to discuss with the parties at oral hearing to make it more efficient for the Board to work its way through the really large record. But it didn't turn out -- I mean, it turned out to be somewhat helpful, but not as helpful as we had hoped. So therefore, I think moving forward, what we really have to be concerned about is not figuring out ways to deal efficiently with large records, but have a more managed and modulated record and a discovery and trial practice that will prevent us from having such large records when, as we've alluded to in our discussion, our issues are relatively limited to those of registrability and should not require the kinds of records that you would have to submit in district court.

So one of the things that we've done -- and I've asked Judge Mark Bergsman to come up to the table here, to talk about this in a moment.

[Slide 7] We had in the Amanda Blackhorse versus Pro Football case, essentially this was the Redskins 2 case, this was a case where the parties -- we have a new class of plaintiffs, and we find the parties in discovery again, and the first case at the Board was very lengthy, resulted in a very large record, has a very lengthy appellate history, and we were concerned that this case might essentially be a sequel that would equal the first.

So Judge Bergsman and Judge Kuhlke and Judge Cataldo worked with one of our interlocutory attorneys to issue an order to set the stage for a conference with the parties, and then we issued another order after the conference, giving the results of that conference, and the whole purpose of this was to help the parties wind up discovery and prepare for trial in a way that would avoid unnecessary introduction into the record of evidence on issues that were really settled by the prior litigation.

So I'm going to ask Judge Bergsman to tell us a little about his work on that case, and I think it will help presage our discussion on discovery practice and motion practice the way it is these days and what we should think about doing about it.

And if I can ask in the control room, we're finished with the slides now, so we can bring back Ms. Del Valle. Thank you.

>> MARC BERGSMAN: In Blackhorse versus pro Football, we weren't really geniuses in figuring out this was going to be a problem case. Judge Walters spent six months on the decision I think the first time, and she wrote that the case was overly contentious. The parties argued about decisions that had been rendered earlier and just kept rearguing.

Then the district court judge, on appeal, said this case was overly contentious, and the record was way too large for this type of proceeding. So we had two judges identify it as overly contentious and the record being way too large. So it didn't take rocket science to figure out this case is going to be a repeat, and we are not going to let that happen.

So we used -- I forget exactly what rule it is, but we used that and said we're going have a conference under 2.120. We are going to have a pretrial conference, and we are going to outline how this case is going to be done. And Judge Kuhlke was on the Total case with the extremely large record, so she was very attuned to what we were trying to accomplish. And ultimately, both counsel were very happy that we had done this, and we let the parties know that if they reargued any decision we previously decided that we would immediately not consider the brief. Once we found it, boom, brief was gone, so don't

reargue. I think they were very pleased with that.

And what we also did is we decided -- we made our kind of conclusions of law ahead of time. We said what are our issues? Issues are disparagement and laches. We set forth, "Here is the law we are going to apply on disparagement". We set that forth. "Here's the law we are applying on laches." So we said, "now you know what evidence -- here is the law -- you know what evidence you have to put in." Then we also required -- since we knew it was going to be a large record, we required an index of what they were going to put down in the proceeding. We used the TTABVUE. I think there's very little confidential information. There's sales information that affects the laches, but other than that, there's going to be very little.

They'll have the exhibits, where it's going to be in TTABVUE, and then the parties said we will put the Bates numbers down too so that you will know. This is going to be helpful for them. So we should have a fairly orderly trial where we're going to be able to identify the information pretty quickly.

So this leads us to what are we going to do in the future? And I think that -- well, two things are, one, I think one of our biggest problems with what we call large records is not necessarily that they're large, but they're mostly irrelevant. And if we had a large record that was compelling reading, that was relevant -- when I'm going through a file, I have the DuPont case opened up on my desk, and page 567, where they list all the -- where they list all the factors. And I'm going through the evidence, I'm saying, well, which factor does this meet? The fact that the witness likes to take a long walk on the beach, it's not there. And so I just ignore that, and I'm flying through this, and I've got hundreds of pages of irrelevant information. It's not so much the size, it's the irrelevancy.

That's one thing.

The other thing is when we have a lot of information and it's just given to us without a guide to go through it, sort of here's the information. We hope you can find something relevant and probative. Figure it out for yourself. Not helpful.

So that's the major problem. The other one is -- I agree with Jonathan Hudis, when he said it's really contentious litigants. As far as going forward, I think that's where the interlocs are going to be most helpful because they are going to be able to identify the cases where the parties have been overly contentious, and they're going to be able to say to Jerry, to Cindy, "I think we've got a case here that we're going to have to watch," and they're going to want -- then we'll identify it and bring the parties in to have a pretrial conference.

As far as the large records go, the only way we will get a

hint on that is if they file a motion on summary judgment, and we see that we get way too big a case on motion for summary judgment, and say, "I think this is an indication that we are going to have a large case." But again, I think it's really overly contentious litigation. I think that's where we're going to focus our attention.

But we're planning this, and this is in development. Certainly any input you have about how we can identify this and what to do would be welcome.

>> GERARD ROGERS: Please, Jonathan, let me just, before you start, point out that the thing that was perhaps most unique about the Blackhorse case was that we did bring the parties and counsel into the Board's office. We certainly have phone conferences on a regular basis. So there were two unique aspects to this. One, it was a pretrial conference. It was a conference not focused on planning for discovery, but planning for the completion and end of discovery and for trial; and two, bringing the parties and the counsel into the Board's office is -- obviously, we don't plan to be bringing parties and their counsel into the Board's offices on a regular basis, but in cases where it might be particularly appropriate, we'll have to think about doing that because there was certain synergisms, I think, achieved by having everybody present in the office with a panel of judges and not just the interlocutory attorney. So that's what really set this conference apart.

>> JONATHAN HUDIS: I have to say wow, and congratulate the members of the Board who took that upon themselves to proactively manage the case. When you see a lot of contentious discovery motion practice, it's continuing all the way through and you know the case is not settling because you're getting now, under the new rules, multiple pretrial submissions, that's at the point where I think the Board might want to get the parties together and do a final pretrial order, similar to what you did here with the initial pretrial order in the Blackhorse case.

You have a chance before the damage is done to encourage the parties to submit into the record clearly what is relevant to the Board in rendering its decision.

Now, in terms of Pro Se cases, it wouldn't hurt if you did an initial pretrial conference order of the type that judge Bergsman just described in the Blackhorse case. If the pro se party is going to be without judgment enough to take a case all the way without the benefit of counsel -- notice I'm choosing my words very carefully -- then -- don't waste the party-with-counsel's time, and don't waste the Board's time where all you are going to submit is this record that's just tossed to the Board and say "you figure it out." Give the pro se some

structure about what that person has to do to prove its case or to defeat the other party's case and move on. I mean, you don't want to actually be the pro se party's lawyer, of course, but at least give enough so that you're getting structure around what is being submitted to the Board.

These outlier cases are there because there has been some point in the process where supervision was necessary and it wasn't had. Had somebody been warned ahead of time this is going to be the result if you give us this large, irrelevant record, maybe it could have been forestalled before the damage was done.

>> GERARD ROGERS: Thank you. Let me ask you to follow up. Since in the Blackhorse case we actually brought the parties and counsel in and had the conference here, I take it you may be suggesting that even if we don't bring the parties in, in a case that involves a pro se, one of the lessons learned from Blackhorse might be applied in those pro se cases, and that would be a pretrial order focusing on the law that will be applied at trial.

You know, we'll have to consider that and take that under advisement. I don't think we want to make too much more work for ourselves and necessarily issue a pretrial order in every case involving a pro se, and certainly, I'll look at how many cases go to trial and involve a pro se. Because if that would involve a lot more work for the Board, the return on investment might not be that great. Many pro ses go to trial and don't contribute to overly large records. They just do a very bad job at trial, and they lose for that reason. But we can certainly keep an eye out for cases that involve a very contentious pro se and counsel on the other side and think about using the pretrial order. Thank you.

>> LYNDA ROESCH: Can I ask a question? When you say overly contentious, do you mean that during depositions and trial testimony, people are objecting to evidence and objecting to testimony of witnesses? Or is it more than that? Because when you're the attorney of record and you're trying to put the case together and you get an objection, you've got to go back and make sure that you've got the foundation there, either for the testimony of the witness or for the exhibit, I often feel like I'm spending a lot of time putting together what you might consider to be irrelevant evidence to get the particular exhibit or the particular testimony into evidence.

And I do feel bad when you put together all the papers for the Board and you think I'm not sure they need all this, but I've got to make sure I cover everything too. So there's a delicate balance there. I know that there are definitely abusive practices that go on, even in depositions and certainly

at trial testimony, when you don't have -- you know, if you are in front of the judge, the judge will rule right away. It's in or it's out. And you often can get -- you know what the reason is, if it's out, and you can get around it. But we don't have that in the context of trial testimony with the Board. I mean, I don't -- I wouldn't feel comfortable calling the Board in the middle of the trial testimony. Maybe that's something that you would welcome, but it seems like it would be disruptive.

>> JONATHAN HUDIS: I've done it.

>> LYNDA ROESCH: During trial testimony?

>> JONATHAN HUDIS: Yes, I've done it.

>> MARC BERGSMAN: I don't think that we're so much concerned about the fighting that goes on in the deposition. It's afterwards when we have motions. It's everything. I'm moving that we stipulate a motion that the sky's blue. No, no, the sky is not blue. It gets to that everything is being fought over. And it's -- it's just motion after motion. Then you know there's civil litigation, and it becomes the Rambo litigation.

Our interlocs get a great sense of when that's happening. And when that's happening during the discovery phase, there's really no reason to believe that that will end in the trial phase. So at that point, when our interlocs identify this case has become a problem, the parties are just going at each other rather than accomplishing anything, I think that's when we step in. As Judge Rogers says, it's not something we want to do all the time. Ultimately, our goal is, "is this case going to -- if we step in, can we save time and money?" If we could save time and money, that would be the ultimate goal.

And the ultimate goal would only be determined after we write the final because we would have controlled how the evidence is coming in, what evidence is coming in, and then it would make for a smoother trial. It may take a little bit more work up front in that we have to have the -- the pretrial conference, but the -- ultimately, that will save the day. And we'll have fewer objections. It doesn't mean that you won't be objecting during a deposition. But ultimately, you'll go, well, that's not case dispositive. It's a bench trial. I'm not going to pursue this objection in my brief. So that's kind of the goal is to make it more cost-effective, more cost-effective litigation. Does that answer your question?

>> LYNDA ROESCH: To some extent. I just wondered if the Board felt like the objections made during trial testimony create additional evidence that is really not necessary for them to review. So are we giving you stuff that's wasting your time, basically?

>> GERARD ROGERS: If I can try and respond to, I think the initial impetus of your question was how are we going to

identify overly contentious cases, and I think what we are first talking about is identifying cases that are still in discovery, so they haven't gotten to the point of contentious testimony deposition taking because we're concerned about those cases that don't look like they're going to settle, don't look like they're going to go smoothly into trial, and we want to try and catch them before they are at the end of the discovery period or shortly after the end of discovery, so that we can give them the instructions they need.

We, of course, are not going to be seeing testimony depositions or hearing about objections during testimony depositions unless we get called. We are really going to be dependent on our interlocutory attorneys identifying cases that are getting, quote unquote, out of hand during discovery so that we can step in before trial gets taken.

Now, your second point -- and I understand your concern about whether practitioners are required by their adversary sometimes to create and to pursue longer testimony depositions and to create larger records because of objections and the need to overcome those objections and to get into the record what you want. I don't think that we would fault any practitioner for doing that. Obviously, you need to do what you need to do for your client. And it's not as much of a problem for us if the objections are not pursued at final hearing because then we're just left with the evidence and not the objections to rule on.

I think the problems that Judge Bergsman has been alluding to are the introduction of evidence that's not really relevant, that's just cumulative, and certainly, we get a lot of that. But then also, we see the maintenance at final hearing of many more objections than are necessary because they don't really deal with whether we should be looking at the evidence but with its probative value. And we certainly understand, our judges certainly understand that evidence is -- that it may be relevant but may not be very probative of the result to be reached. And we certainly understand that Internet materials or printed publications are not evidence of the truth of the matter asserted in those materials. So we don't need to be reminded at final hearing that the material is hearsay and can only be introduced for a limited purpose.

So I think while we would like to avoid the introduction of unnecessary evidence and we would like to avoid having to decide at final hearing unnecessarily maintained objections, I think what we're really trying to focus on is getting people teed up so that their trial will be more efficient even before they start it. And to that extent, we certainly promote efficiency in all the information we put on the Board's webpage about ACR. ACR is a subject for another roundtable in the future. But we

hope that for many cases even that don't go by ACR that parties can look at the ACR cases that we've digested on our website and look at some of the stipulations and agreements that parties have reached to smooth the introduction into the record of the trial evidence. Then we don't have overly contentious cases.

>> MARC BERGSMAN: When we're talking about the evidence coming, Linda McLeod and I were talking at the break, she was concerned that usually when you have to put in evidence regarding the fame of a mark, there's a lot of evidence that needs to come in. That's fine, as long as it goes to show the fame of the market. Here's our advertising. Here's the number of occurrences that have happened. Here's the number of people that have seen it. Here's the market share. Here are references showing the renown of the mark. If it's all relevant information pointed to that, even if it turns out to be you have a marketing director and it's a 200-page deposition, a 300-page deposition, if it's relevant and it's yes, this is important information. Oh, as I'm digesting it, I'm putting a star by the page number. Oh, this is going to be important. Oh, I'm going to quote this. This is good.

But if you have a 300-page deposition of which there might be two pages, nine pages of relevant information -- and that's not unusual for us to get -- then this is getting a little out of -- what's going on? That's what we are looking for. Again, it's not so much the volume; it's the relevancy. If it's relevant, we're good. If it's irrelevant, we're really frustrated and starting to get irritated.

>> GERARD ROGERS: I don't think anybody wants to irritate Marc. Do they? While he is deciding your case at final hearing.

Okay. Unless there are any further questions or discussion on the Blackhorse case and some of the issues that it raises, I think I'd like to move into some of the questions that are listed for this portion of the program. One of the things that we've occasionally heard in the past is that cases shouldn't be so readily suspended for as many motions as they are now, under the rules that require suspension, and that maybe some of the cases should continue while the motions are being worked on.

That, of course, if we were to adopt such an approach, would present issues for us in terms of staffing and in terms of timing and resources. But nonetheless, I think it's a discussion that we want to have, and we want to hear from you about whether there are certain types of motions that you think we should not suspend cases for when they're filed or whether it is a situation that perhaps should be not automatic but on a case-by-case basis. You know, for example, if a particular motion to compel that's focused comes up early in discovery and

relates only to interrogatories, should we continue with the rest of discovery while we are trying to resolve that motion to compel? Just an example to give you a sense of that.

I think Jay had his hand on the microphone first.

>> JAY HINES: Just speaking for the IPO committee, I think their preference was they liked the automatic suspension and would rather not see it changed.

>> AIPLA had a similar point of view, but there could be cases or situations where a case-by-case determination would work so long as there was certainty in knowing soon after those motions were filed what was going to happen to the case. So if you weren't going to automatically suspend it, somehow convey to the parties it's going forward, you know, or it's not. I don't know if that would take a rule change or it's just something could you have a phone conference with the parties so they know the status.

>> JONATHAN HUDIS: That was ABA's feeling as well. If you are going to depart from your current practice, we agree with Jay's comments that we want certainty. If you are going to depart from that practice, then have a telephone conference, and the interlocutory attorney should spend maximum, a week or two, to decide the outstanding issues so that you know what issues have been resolved going forward.

>> One caveat we had on that was there are instances where a party will abuse the automatic suspension, you know, just before a deposition is supposed to take place, they file a motion to compel, so you can't move forward with the depositions. That can also be handled on a case-by-case basis, as long as there's a mechanism to consult with the interlocutory attorney and get the suspension lifted or at least argue why it should be lifted.

>> GERARD ROGERS: Well, and I think the interlocutory attorneys are quite willing to handle a lot of motions to compel by telephone conference, so that may be a way where we can -- we may have already issued the suspension order when the motion comes in, but if the non -- if the non-moving party wants to avoid a lot of delay associated with disposition of that motion, they can request the option to present their response during a phone conference.

And something, I think, we constantly need to remind people that you can be the movant, you can be the non-movant. Anybody can request a phone conference that is interested in keeping the case moving. We don't limit phone conferences to certain kinds of motions. We don't have phone conferences for motions for summary judgment or potentially dispositive motions, but for most anything else, if a conference with the attorney will help you avoid delay and get the case back on track, then they are certainly willing to have that conference. So you might

actually end up in a situation, Steve, where the case actually is technically suspended but you have the phone conference so quickly and get the motion decided quickly enough that there's little adverse effect in terms of delay from the suspension.

>> JONATHAN HUDIS: Judge Rogers, when you had the 1998 proposed rules changes, there was a section that dealt with whether cases are suspended automatically upon filing a motion versus waiting for the suspension order. And the Board's response to the bar groups that submitted comments was "we want control over our own docket." The problem is, from the time of the filing of the motion until that suspension order kicks out, it can be weeks. That is a problem. The Board may want to control its own docket, but we are in this neither-neither land, and we ask this of attorneys at bar conferences. What do we do? The response is treat it effectively as if the proceeding is suspended when the motion was filed. So you are in this neither-neither land.

What we are hearing from colleagues around the room is we need certainty. We need certainty on timing. We need certainty on result. So there's two separate periods of delay. There's the kickoff of motion seeking a suspension order and the kickout of the ultimate suspension order pending resolution of the motion. One you can control, the other is up in the air and it's very difficult to plan with your client.

>> GERARD ROGERS: I wonder, though, how, if we structured our system so that there would be an automatic suspension upon the filing of particular kinds of motions, whether that could be the subject of abuse that Steve has alluded to where parties can quickly gain a suspension the day before a deposition or something like that.

>> JONATHAN HUDIS: Don't your rules say -- and practices of suspension orders say that the filing of such a motion does not suspend the time for already-served discovery and already-noticed depositions?

>> GERARD ROGERS: Correct, but that doesn't mean that people aren't confused. And I don't know how they would react if they got a suspension -- automatic suspension notice, like, kicked out from ESTTA the same day that they filed a motion, and then there might be some confusion. I guess we could craft an automatic suspension order that would recite that information in the rule, but we certainly would want to avoid confusing parties about what the effect of the suspension would be.

>> CINDY GREENBAUM: Jonathan, excuse me. I'm sorry. That's just for motions to compel, not for other potentially dispositive motions. I just wanted to be clear about that.

>> JONATHAN HUDIS: That's my understanding. If I was in a situation Steve was in and somebody pulled that with me, I would

be on the phone with the interlocutory attorney the next day. I'd say it's very nice, you know, your rules say this is a non-dispositive motion to compel. My discovery deposition is still going forward; right? And I would want the interlocutory to say to my adversary, that's right, you're going forward with the deposition.

>> GERARD ROGERS: The next question that we had posed in this section of the agenda is I think one that has come up time and time again, relates to processing time of the Board, and that is -- also relates to this discussion we've been having about overly contentious parties. But should the Board explore rulemaking that would allow greater powers to sanction parties, or are the potential satellite litigation costs regarding motions for sanctions not worth the potential benefits?

I mean, again, in Trademark Reporter articles, on blogs, and in other forums, people will point to abusive motion practice and the lack of authority like the district courts, that the Board doesn't have the same authority and doesn't have the same practices regarding sanctioning of parties who are abusive in their motion practice, and that that's a draw-back for Board litigation. I would like to get your thoughts on that, whether you agree or whether you disagree, and I think this is certainly a subject where people differ widely.

>> BETH CHAPMAN: Jerry, what kind of additional sanctions is the Board thinking about that you don't have? Sanction powers?

>> GERARD ROGERS: Nothing in particular. I mean, I will point out that the Board years ago used to say in orders where parties would request us to apply sanctions and would request costs and fees that the Board is without authority to award costs and fees. And I think we then came to the conclusion -- both boards, the Patent Board and the Trademark Board, that that's not actually so. It's not that we are without authority, but it's just not our practice to award costs and fees and that we wanted to avoid getting involved in satellite litigation about issues like this. So we now say in our orders that we just do not award sanctions or fees. It's not our practice to do so.

So certainly that could become part of our practice, and we've certainly seen articles like the one by Alan Cooper from so long ago about the creative use of sanctions in Board proceedings that involve nonmonetary sanctions but other ways of sanctioning parties. We have done things like require people to write out by hand certain rules to make sure that they understood those rules, and we have certainly entered judgment. And I know I worked on cases where we have barred parties from introducing certain depositions.

So we do things like that, but among many commentators, we're

still viewed -- I think the Board is still viewed as potentially not strong enough. So we're not thinking about anything in particular other than these attempts that we've made to be creative in the use of sanctioning powers.

But just wondering whether we should be considering sanctions more or having more motions for sanctions. We get motions under Rule 11 from time to time, but not that often, and I don't know that we want to increase the number of Rule 11 motions we get. But again, just because people -- some people say that the Board should sanction parties more, it's certainly part of the discussion we want to have with you all.

>> JODY DRAKE: Jerry, the TPAC comment would be they would encourage the possibility of exploring rulemaking that would limit monetary sanctions being available by discretion of the Board rather than upon motion of the parties and would also recommend the Board have discretion to sanction parties on an escalating scale based on conduct that has taken place in a proceeding. So the TPAC would be in favor of exploring a rule that would grant you the ability -- or you say you already have the power in place; you just haven't exercised it. But I guess the TPAC comment would be yes, we would be in favor of looking or exploring further rulemaking that would be -- you would be in a position to award monetary sanctions at your discretion

>> JONATHAN HUDIS: The ABA would not be in favor of satellite litigation in front of the Board on monetary sanctions. As I have experienced in my own practice, sort of the maddening, is that the sanctions power of the Board is not applied evenly across the board.

Certain cases we have seen the Board bend over backwards to give a party yet one more chance to comply with the rules, especially on discovery issues. The Board has many -- and as you listed some of them -- sanctions power at its disposal, preclusion of evidence, judgment. You can't file further motions unless you have a telephone conference with the interlocutory attorney, things of that nature. There are plenty of procedural nonmonetary sanctions at the Board's disposal that it should be applying evenly across the board when circumstances warrant it. We would not be in favor of monetary sanctions. It was a disaster in the district courts, and it would be even more of a disaster before the Board. It would just grind your practice to a halt.

>> LYNDA ROESCH: In fact, to second what he is saying, I think you'll find that you have more motions rather than less, and you will spend much more of your time dealing with those issues as opposed to actually what we would say is moving the peanut forward and getting the case resolved.

>> ERICA FISCHER: I think -- and we agree that monetary

sanctions can be explored, but with what Jody said, also making it be in the sole discretion of the Board rather than allowing parties to move for motions. That way you wouldn't have what happened with Rule 11 when it was first introduced.

>> The AIPLA is also concerned about the proliferation of satellite litigation if monetary sanctions were allowed. I am not sure on the proposal from TPAC how that would work, giving the Board this discretion to enter monetary sanctions to me sounds like an invitation for a party to ask you to exercise your discretion. So I think there would still possibly be this satellite litigation, which would drive the cost of the proceeding up.

>> There are certainly views within AIPLA that the Board could do more, as Jonathan mentioned, to utilize the sanctioning power it does have when parties are being abusive, but we certainly don't -- I mean, I think the general feeling is the Board has the power. You don't necessarily need additional authority. It just, you know, might be exercised a little more often or a little more evenly.

>> JAY HINES: And IPO concurs with the AIPLA and ABA on this, just to weigh in.

>> GERARD ROGERS: I think we got an answer from everybody on that one. That's good. Everybody voted. It's -- election season is coming up. That's good practice for all of us. Let me ask if any of you have suggestions about how the sanctioning authority that the Board has can -- how we can make sure that we apply it more evenly. Is it because we need more motions from the parties seeking sanctions? Should the -- are you advocating that the Board step in more often when it views one party as getting out of hand? I guess I am just wondering about how we get to that point of dealing with who should be sanctioned and how evenly we apply those sanctions.

>> JONATHAN HUDIS: I'll give you a scenario, Judge Rogers. Linda serves me -- we are adversaries in a fictitious Board proceeding. Linda serves me with an interrogatory. Please give me your sales and advertising figures for the last ten years in connection with the products sold under your mark. And as we all know, there is an automatic imposition of the Board's protective order if she and I have not agreed. I tell her tough, you are not getting it. And I have a page-long list of objections why, knowing full well what the Board's policy is on that. Says it in the TBMP, imposition of an automatic protective order.

Linda does her due diligence to have a good-faith negotiation with me. She sends me an email detailing why I should give her that information. I don't answer her. She calls me. We have a five-minute conversation. I say Linda, no, you're not getting

it. All right? So she's -- then she follows up with an email confirming our conversation. I've asked you again. You're still not going to give it? She moves.

In an interlocutory order, the Board says, "Jonathan, give it to her and you have 30 days." I ignore the Board's order and I don't give it to her. Linda then does her due diligence again, even though she doesn't have to. She sends me an email, "the Board's order says give me X, Y, Z. Give it to me." I say no. She does fully as the Board requires, then she moves, "I want sanctions they can't put in sales and advertising figures at final hearing." The Board right then and there under -- what was it? – 2.120(g)? -- should say precluded. End. Not 30 days more. Not one more chance. The Board's already spoken. She moved, she got an order against me. I still didn't give it to her. End. Apply those sanctions across the board as they are written in the rules in the TBMP.

And there shouldn't be any more guess work.

>> GERARD ROGERS: So it's like a one-strike option? Well, two strikes, one on the motion to compel and one on the motion for sanctions? All right. That's fine, and I'm not arguing against it or for it. I just -- we obviously need to hear from everybody on suggestions like this.

>> JONATHAN HUDIS: And if I'm not sending emails and making emails to my client saying we're giving it to her, the client says no, I've done my due diligence with my client.

>> STEVE MELEEN: If everybody abused the system as badly as Jonathan, it would be simple, but a lot of times it's a lot more complicated than that. Obviously, that's a great example of a situation where sanctions would be appropriate. It's not always that clear cut.

>> GERARD ROGERS: I certainly agree with you there, and I think Cindy and all the attorneys would agree with you there. I don't know if you have any thoughts, Cindy, about how the attorneys handle situations like this. I think we have to acknowledge that there's a good deal of discretion that we invest in the interlocutory attorneys, and there's a good deal of variety in the way that they handle and manage their cases. It certainly doesn't mean that we don't strive for uniformity, but I don't know that we can ever get them to all work in lockstep.

>> CINDY GREENBAUM: Well, that's true. Also, if you have a motion for sanctions, the attorney is writing it, but the judges are the ones making the decision there. So not only do you need uniformity with the attorneys, you need also the judges to have the same conclusion.

Now, in Jonathan's example, it's clear cut. I am thinking how many of those do we get? Pretty rare. Usually we will get

a Jonathan who will say I'm giving you one thing. The Board says I have to give you 20 things. I am going to give you one. Then what do you do? What is it? How important is it to the case? Many other considerations that may go into the attorney's -- the interlocutory attorney's -- review of the case.

This is a potentially dispositive motion when you have a motion for sanctions to kill the case. So there are many other considerations. It would be nice if we had a bunch that were clear-cut, and I think that when we do have them that are clear-cut, we will get the same result. I really don't see how we can end up with -- maybe there would be a situation where -- I don't know what it would be -- maybe there would be a situation where you have a Jonathan in the example you gave and we wanted to give you one more chance anyway. I don't know why. Maybe there's something else on the record we want to know about. I don't know. Based on what you said, I don't know why we wouldn't go to judgment at that point.

>> JONATHAN HUDIS: We had a case a few years ago of that variety. There was a motion to compel, we didn't get what we wanted, we filed a motion for sanctions, and when the motion for sanctions was pending, we got half a loaf. It was our opinion -- without revealing the nature of the case or parties, it was our opinion we should have gotten the full loaf. And there really, to our mind, wasn't very much room for wiggling. We're the litigants. We are the advocates. Obviously, the Board has to make its decisions in its reasonable discretion. But in the cases where you get, Cindy, a half a loaf, sanction them on the portion they didn't give. That's one way.

What I think we're advocating on behalf of the ABA is certainty across the board. And Steve makes a good point. There are cases that are -- you know, it's not yin or yang, it's somewhere in between. We're asking you to exercise your discretion. But we have had instances -- at least in my practice, where we feel it's pretty clear-cut and still the party gets one more chance.

>> GERARD ROGERS: Thank you, Jonathan. It's certainly useful for us to hear that and to hear all of the opinions being expressed here today.

Another question that we had posed in this section of the agenda is a little bit more expansive, and that is what opportunities exist for savings of time and resources in motion practice, and should certain types of motions be limited or excluded from Board practice? I guess this might suggest we are interested in fundamentally changing the way Board practice works. I don't think you should read that suggestion into these questions, but again, many of these questions are prompted just

because many stakeholders want us to have this discussion. So we have no preconceived notion of what the answer should be. We just want to ask the questions because we've been asked to ask the questions.

So I don't know if -- if there is concern among any of you about the length of time it takes for a trial case to go from completion -- from commencement to completion. If you think of things that -- you know, that could be time savers and that could allow us to squeeze some time out of a Board proceeding, I would certainly like to hear from you if you have any suggestions.

>> JODY DRAKE: Jerry, the TPAC comment on this question was potentially creating a special discovery section of attorneys or judges to deal with issues and motions raised during discovery since discovery often takes the most time and is where there are often the most contentious issues between the parties. And wherein most resources are spent by the parties. So if there were dedicated attorneys or judges primarily focusing on just these sorts of issues and motions and developing an expertise, then the assumption would be maybe things would move along a little quicker.

>> GERARD ROGERS: So not focus on particular motions, but just getting the motions decided quickly?

>> Correct.

>> JONATHAN HUDIS: The Board also might want to consider expanding the section of the TBMP even more than it has already with the items of discovery on which the Board has announced policy. That seems to shut down disagreements very quickly. You know, what's relevant? What's not relevant? The types of motions you are seeing over and over and you've ruled on the same issue over and over. Just put it in the TBMP when you update it next.

>> ERICA FISCHER: I think also, in addition to the parties being able to request phone conferences, having the interlocutory attorneys exercise more discretion to require conferences before a motion is made, to sort of focus the issues the parties would be able to submit briefs or letters on, or maybe so parties would sort of stop being very persistent with their position if they get an inclination during a conference that a certain motion or position wouldn't be something that would be supported by the interlocutory attorney, if the motion was made.

>> CINDY GREENBAUM: Erica, we actually do that sometimes. We don't do that in every case, and I don't know that that would be something that you all would be interested in having us do, but I think there are certainly times where the attorney is aware of things that are going on in the case and they want to

take this proactive approach, and they do require that to great effect. But I don't know that every single case would fit that bill.

>> JONATHAN HUDIS: Cindy, one of the questions Judge Rogers asked was what are the materials? There are many courts where the judge says you may not file a motion to compel until you've had a telephone conference.

>> GERARD ROGERS: Right. I'm not sure. I don't monitor what the interlocutory attorneys do closely enough to know, but I think I've heard in the past about some attorneys when they've been involved in the party's settlement and discovery planning conference, suggesting that a phone call would be in order for pretty much any motion. I don't know if any of you have had that experience in conferences where attorneys have said that to you, but certainly I think some have thought about whether that should be part of their conference order and whether they should make that comment.

>> CINDY GREENBAUM: It's not only during the discovery and settlement conference. I have seen orders that were not the result of the settlement and discovery conference where that kind of scenario plays out. So it's something our attorneys are aware of. Some of them do it more than others. It's sometimes a matter of discretion of the attorney. And we don't want to take that away from them. That's what we are paying them for, among other things. But it certainly -- you know, I understand what you are saying, and it's certainly something we can take another look at. But again, I would not be expecting this in every case.

>> BETH CHAPMAN: Well, for better or for worse, I think IPO is relatively happy with the current motion practice. Without going through each of the separate questions on it, our committee in IPO essentially believes that the way it is now is okay, and particularly filing -- having to file a motion for leave to file a motion would be unnecessary, and you'd end up having two motions instead of one, both in terms of cost and time. That is IPO's general position.

>> GERARD ROGERS: Thank you. I don't think any of us here are advocating motions for leave to file motions. I think the thing that many of the attorneys have done in cases where they thought more oversight was necessary was to order that no motion be filed by a particular party without first calling the Board and getting -- explaining why the motion needed to be filed and getting permission to do so. So that's something I think is not unusual for the attorneys to do.

>> BETH CHAPMAN: I have a question with that. If someone has to call the Board, and by definition it's an inter-partes case, do they have to include the other party on the phone call?

>> CINDY GREENBAUM: It depends on what you are asking.

>> GERARD ROGERS: I don't think we would view most of those phone calls as ex parte communications. I think the interlocutory attorneys are astute enough to advise anyone who calls that you can't argue the merits of the motion. You can tell me what kind of motion you would like to file, and I'll tell you whether I think it's appropriate for you to file it, given the restrictions I've placed on you, but you are not going to argue the merits of the motion. I know in the days when I was doing phone conferences, sometimes I would get that kind of a call, and I would say, well, let's see if we can get the other side on the phone right now, and we'll see what happens. And so I don't think that we really run the risk of improper ex parte communications by requiring that phone call prior to the filing of a motion.

>> JONATHAN HUDIS: On this last set of questions, Judge Rogers, we had quite a bit of discussion regarding whether there should be categorical limitations on any of these motions, and our consensus view was no.

What did catch our attention is summary judgment and a mechanism to convert it to an ACR ruling.

Back when I started, in my younger days in practice, there would be a very large set of motions filed or briefs filed with attachments and declarations and motions for summary judgment. It was disposed of quite easily by the Board saying there are XYZ issues of fact; denied.

Since over the last two years the Board has been encouraging ACR rulings and going back to the Miller case, that was a converted summary judgment motion, when the interlocutory attorney or probably, by this point -- because it's dispositive -- it would go to a Board member to rule on the case. Instead of disposing of the motion for summary judgment saying there are issues of fact, get the attorneys on the phone. Ask them: “Are you satisfied with your record, both of you? Would you stipulate to having the entire case decided on these papers and your evidence, and would you stipulate to allowing the Board to decide issues of fact based on these papers and your evidence?”

There could be a couple of responses. One is “categorically no. Decide on these papers, and if it's not summary judgment, we want the proceeding to go back to the scheduled trial.” Or “yes, and we want further submissions,” and make that your ACR record. So instead of a Board member taking all this time to read through the papers and just disposing of this one motion, and if the parties are satisfied with everything that they've given you, whether as originally filed or supplemented, you can dispose of the whole case.

>> GERARD ROGERS: No, I certainly agree with that, and I think most of the attorneys and the judges at the Board would agree we would love to convert as many motions for summary judgment into ACR records as we can get the parties to agree to. But of course, as you alluded to, they -- ACR is a consented procedure, so we can't force parties to do it. Sometimes we have a little more sway over them. If we make it clear that motions are not going to be considered at all because the briefs were over length or they were untimely filed. But you might save all that time and effort you put into preparing these if you agree to have us handle this as an ACR case.

And we have had parties agree to that so that they didn't have to redo their submissions because they were a day late or they were a few pages over or something like that. I know I've worked on cases like that where the parties have agreed to ACR. So I think we do make those phone calls, but I'm gathering from your suggestion that we probably should have -- if I understand you correctly -- some more of a screening process when we get summary judgment submissions, and perhaps more frequent phone calls to inquire of the parties as to whether it's a good candidate for conversion and not just offer it when there's no other option for the parties.

>> JONATHAN HUDIS: Yes.

>> ALICA DEL VALLE: This is Alica, the voice in the sky. Along the lines, I guess, further to the conversion of summary judgment to ACR, I'm wondering if it may also be a possible resource and time saver, just because there are so few cases that are actually using ACR -- and I've had this happen a number of times where the discussion -- ACR comes into the discussion during the initial conference but parties are reluctant to use it because they haven't done so in the past and aren't certain that this is something that they want to try on something that they're doing for their client. And I'm wondering if there's any way to get an interlocutory attorney involved to discuss more in depth what that process means and how it can be used where there is a possible candidate for ACR, earlier on rather than waiting until the summary judgment phase?

>> GERARD ROGERS: Yes, we certainly have interlocutory attorneys available to discuss ACR at any time. As you probably have seen, we've posted a lot of information on our webpage about cases where parties have agreed to ACR, and cases that have gone to final disposition under ACR. Sometimes the parties agree to ACR, and then they talk so much about their stipulated submissions and what they agree to put in the record that they agree to settling the case. That's another positive benefit of ACR discussions.

Now, I -- except for our attorneys being involved early on, I

think they normally get involved when one party requests or the parties stipulate to ACR, and then the attorney will get them on the phone to make sure that they understand the nature of the proceeding and it's very clear about what they want because sometimes we get stipulations to proceed by ACR that are not as complete as they need to be or not as full and robust as we need them to be. So we can certainly inquire into and talk with the attorneys about more frequent involvement.

But I guess I'm wondering if you have a particular trigger that you're thinking of. Jonathan is suggesting that the trigger be when the motion comes in and we have some kind of a screening for it, but it sounds to me like you're suggesting something after the settlement and discovery planning conference but prior to a motion for summary judgment coming in. And again, we certainly encourage the parties throughout the proceeding to revisit whether ACR might be appropriate, but I don't know that we have a particular juncture where it would be appropriate for the attorney to just automatically or regularly inject themselves into the case. But if you have any suggestions, we'd certainly be happy to hear them.

>> ALICA DEL VALLE: And I think it's automatic in -- getting involved automatically is certainly not what I am proposing, but to make it a viable opportunity for parties to opt to have the involvement of an interlocutory attorney in the discussion in the initial conference because that's where I've come across it, I've proposed it, because I think that for whatever reason the case would warrant it. And I've had a number of parties just say no, I don't think it's something I want to try because I have no experience with it, I have no exposure to it. I don't really know that this is going to get me where the client needs to be. By virtue of that, it's off the table.

>> CINDY GREENBAUM: Alica, have you ever tried to contact an interlocutory attorney to participate in a discovery and settlement conference? Because it sounds to me like if you have identified a case where ACR might be a good possibility, at least from your point of view, you may want to just involve the interlocutory attorney and have a three-way discovery and settlement conference, and you can bring up ACR, it's one of the things you are required to discuss, and you can hear what the other side has to say, and the interlocutory attorney will certainly chime in and talk about the benefits and whether it's a good idea or bad idea in this case. If you haven't tried that, you may want to as you go forward.

>> ALICA DEL VALLE: Got it.

>> GERARD ROGERS: Sorry, Linda, I think had you your light on.

>> LINDA McLEOD: I was going to chime in that AIPLA had the

same discussion that ABA did, that when motions for judgment are filed, a phone call from the interlocutory attorney, if it's appropriate, suggesting that the parties could consider going ACR at that route, would be welcome. The parties can then have a choice of whether they want to stipulate it or not, but at least the call could be there to plant the seed because I think a lot of parties don't think about it. But maybe one adversary is interested in it and the other is not. Maybe if it seems like the parties are not knowledgeable about it, maybe some information that it's appealable, other things like that, would help the parties to embrace the idea where there are summary judgment motions on file.

Just another question, AIPLA was wondering about the status of plug-and-play for ACR.

>> GERARD ROGERS: That's a good question. I think we -- Judge Cataldo and I have been working on some plug-and-play, I think we refer to them in house as turnkey options.

Judge Cataldo and I have been working on at least four different options. I was trying to get them out before the close of the fiscal year and post it up on our website, but as you all are aware, we often have a rush in the last month of the fiscal year in terms of getting motion decisions out and final decisions out, then the month of October is appraisal month and reporting month, so we've been sidetracked some.

But they're very close to being ready to post on the Web. They are not the kind of -- neither the AIPLA suggestions that we've already got posted up on the website nor the Board's anticipated plug-and-play or turnkey options -- are not really truly plug-and-play or turnkey in the sense that there's no way to indicate through a filing through ESTTA that the parties have agreed to some alternative procedure and have the system spit out an appropriate trial order. That would be wonderful if we could do that, and maybe when the office transitions to Trademarks Next Generation, we will be able to do that and to spit out appropriately crafted discovery and trial schedules based on the type of proceeding that the parties agree to.

So I think in the short-term, what we're really talking about doing are posting some additional options up on the webpage that are alternative views of what a discovery and trial process might look like, but the parties would still have to agree to one of the alternatives and tell us they want to pursue it and adapt it or change it if they thought it would be useful to have something kind of in between one of the two options that we're suggesting. But what we will be doing -- and I hope this will be done very soon, now that we're kind of through the reporting month and appraisal period, is Judge Cataldo and I will look at these one more time. What we've done as we went back and forth

was look at the timing and the considerations and how the numbers would work out in terms of the periods that we were prescribing and that sort of thing. We certainly don't want to put anything out there that we haven't really thought through.

But we essentially have four options that we are working on that, I think, if I recall correctly, about a 15-month proceeding and maybe an 18-month proceeding and then one that might go closer to 20 months. There's a few months' difference between three different proceedings that would essentially be cross-motions for summary judgment type proceedings, and then there's one which is about the same length of time as the third cross-motion's option, but that would essentially just be a more abbreviated discovery period, a more abbreviated trial period. And what we're hoping to do with each of these four options is to show people that if you're willing to agree to certain restrictions and certain limitations, you can get in and out of a Board proceeding within a particular period of time.
We think that there's some attraction to that and to being able to discuss with your clients, "if we're willing to agree to certain limitations or restrictions, we can get in and out of the Board in 14 months or 18 months or whatever the proceeding is that you would agree to." So hopefully they'll be posted up on our website within the next couple of weeks or so and that we, again, focus on the time you will spend before the Board under that kind of a proceeding.

This discussion suggests two more things. One, I think, relates to something that Alica has brought up, and that is when we had the request for comments out there on settlement talks, one of the things that there seemed to be some support for was the possibility of having a second conference of the parties near the end of discovery or after discovery but prior to trial. It's not something that we require under the current rules. It's something that we could consider if that's something that the parties support. And that might go a long way towards, as Alica suggests, having the parties have a second opportunity to discuss the possibility of ACR after they've had disclosures and after they've had discovery but before they embark on trial. I don't know if anybody's thought about that as a possibility or not.

>> JONATHAN HUDIS: When we submitted our comment letter to the Board, ABA supported that -- with the consent of the parties.

>> GERARD ROGERS: Right. Okay. Another question which I think we've discussed more internally and it hasn't been discussed so much externally or been posed to the Board, but we grant very few partial summary judgments in Board cases. In other words, we tend to, as Jonathan said earlier, look at the

entire record, look for a few genuine issues of fact, and we deny the motion for summary judgment and say the parties will have to go to trial. Or we look for cases where we can dispose of all claims and wrap up the complete case on summary judgment.

But occasionally, the Board has an interlocutory attorney and a panel that agree that we've got -- and I am just going to think back generally to a case that I worked on: We've got a plaintiff with a dilution claim and two separate alternative theories for a 2(d) claim, which we need not go into why they both were there. But in that case, the panel agreed to throw out, essentially, one of the 2(d) claims and to throw out the dilution claim but let the plaintiff move forward on the second 2(d) claim, the alternative 2(d) claim, on the theory that they had a particularly famous mark, and the marks might be close enough and the goods might be close enough given the fame of the mark that they might prevail on that claim.

That case eventually resulted in settlement because then the parties, once we disposed of two of the three claims, ended up settling the third one. And we've gotten a handful of other cases I can point to where we did partial summary judgment. Sometimes they result in settlement, sometimes they don't. But again, this is a question we discussed internally in the past, and we wonder whether the practitioners find partial motions for summary judgment -- partial summary judgment orders, whether it was requested as a partial or whether we simply choose to grant part of it but not all of it, useful.

>> LYNDA ROESCH: I'll respond. I think even the decision on the summary judgment motion can be helpful either in terms of settlement or in organizing your evidence in the trial testimony period. So granting summary judgment motions in a partial context would be helpful too in both -- would help to streamline what goes forward, obviously, and it helps in terms of the settlement. So I think we would support that.

>> JONATHAN HUDIS: I'd agree with what Lynda just said. For example, if somebody moves for summary judgment on a likelihood of confusion case and the Board finds that there is an issue of fact with regard to the factors but not standing or priority, issue a partial summary judgment ruling on standing and priority. At a minimum, you have some avenues for settlement, because maybe one of the hotly contested issues is, in fact, priority. Second, as Lynda just said, it's less that has to be put forward for trial.

>> GERARD ROGERS: Well, we've got now about ten minutes left, and I know Lynda has a plane waiting for her, so I think we'll excuse you if you feel a need to get to National Airport. But we thank you for being here. And then I'd like to just close the session by throwing it open and letting everybody know

that we're hoping to have a second roundtable on ACR in the spring sometime, and if there are any thoughts now about other subjects which we should think about having discussions on, or other issues that we need to engage stakeholders in dialogue on, then I'd be happy to hear any suggestions. If you have them now, or if you think of them later and you want to add them to the mix later on.

>> CHERYL BLACK: I actually have two comments just about the open discussion. One is the consideration with the discovery conferences. If it could be required that lead counsel participate in those, someone who could actually make decisions about what happens in discussions and just as a consideration if that could be a requirement.

The other comment has to do with sanctions where we talked about it being most of the cases are cut and dried, black and white, but there are gray areas. If, perhaps, the Board could issue some precedential decisions or sanctions given with the guidance of how those gray areas are handled in the application of the rules for sanctions.

>> GERARD ROGERS: Thank you. We are always willing, from any of the organizations, to take suggestions about what areas of the law, be they procedural or substantive, you think we need to provide more guidance on in terms of precedential decisions.

>> STEVE MELEEN: I also have a couple to throw in the mix here of comments we receive from people. The first is pretty simple, and I don't know the board's position, but that litigants should be able to make a registration of record simply by referencing it. It seems to be a little bit excessive to have to jump through the hoops of printing it out and resubmitting it for the Board's own records. There are probably very good reasons why that's required, but they're not clear to us.

And then the second has to do with the TTAB standard protective order. I've received comments from a number of in-house counsel that really have an issue of being precluded from accessing the highest level of confidential materials. Again, I can go into a lot of detail why they feel and I agree that they should be treated equally with outside counsel or at least there should be a provision in the standard protective order that allows that as an option, perhaps with a declaration they are not actively involved in the business or they are, in fact, a licensed attorney subject to all the disciplinary rules of their state. It just -- it makes it -- it makes it difficult sometimes and seems to put you at a disadvantage if you are representing someone who has in-house counsel that's your primary contact, where the other side may be dealing directly with the business people, because it adds a layer of information

that you can't see or you can't share with them and makes it difficult for them to do their jobs.

Again, I'm sure both those issues have been considered, but we just throw those out there for consideration.

>> Just a follow-up. There's another protective order comment that circulated was the category of documents highly confidential. The way it currently reads in the protective order, the standard protective order, is that both the counsel in house and outside counsel, have access, but so do the parties. So we have a lot of discussions in cases trying to revise that to not allow parties, namely business people, to see highly confidential data.

>> JONATHAN HUDIS: Judge Rogers, I think --

>> GERARD ROGERS: If I can, Jonathan, I just want to make sure I understand these two. In one tier of protected information, we want to make it more accessible, but on the other tier, we want to make some less accessible?

>> To parties, not counsel.

>> GERARD ROGERS: I understand that. Okay.

>> I think one issue that arises from that is it sort of makes the second level redundant or unnecessary. It doesn't add much to the confidentiality, and it doesn't help -- I mean, if you don't want it to be public -- well, it seems to sort of conflate to a two level where you are either going to mark it confidential just because you don't want the public seeing it or you are going to go all the way to trade secret so that the party can't see it -- trade secret/commercially sensitive, I should say. And then either -- then you cut out in-house counsel as well.

>> GERARD ROGERS: Before I hear from you, Jonathan, I just want to say there will be a transcript of this, and we hope others in your organizations that couldn't be here today or maybe couldn't watch the webcast will be able to access that on the webpage, and if there are additional suggestions, additional comments from any of the organizations, we'd certainly love to have them in the future.

But even in regard to these particular comments on the standard protective order, if AIPLA wants to submit them to me, we'll certainly take them under consideration, and if any of the other organizations have anything to say about the standard protective order, we'll certainly take them under consideration.

>> JONATHAN HUDIS: Judge Rogers, you had asked if there was any other Board practices that would call out for a meeting, such as this one. The protective order is one of them. Steve and I are good friends for a long time. I do disagree with his position on in-house counsel. There's two Federal Circuit cases that have spoken to this issue a long time ago, and it's in the

new version of the TBMP. That particular issue has to be looked at very carefully because once those highly confidential trade secret materials go into the coffers of your adversary's offices, you don't know where they're going. And I do understand the point of view of the in-house counsel that reached out to Steve's and AIPLA's committee, but there are countervailing concerns on the other side about access by outside counsel to highly confidential material.

The issues we just discussed are only a few. I think it's been widely expressed as the opinion of the outside bar that the Board's standard protective order is very long and complicated -- and could be, with some work, streamlined. There are things that are redundancies, and things that are just not necessary that could really use work to make the standard protective order more useful.

>> GERARD ROGERS: Well, thank you, and I won't take it personally, having written up the standard protective order many years ago.

(Laughter)

You know, we did so -- just to provide a little historical background, you know, we did so because we had the request from many practitioners that we promulgate something, especially in cases where a party that knew trademark practice was facing off against a practitioner who didn't or a pro se. It was something they could say look, I am not trying to pull the wool over your eyes. This is the Board's standard order because in many cases parties or practitioners felt they were unable to get agreement on a protective order because the adversary felt they were somehow being hoodwinked, and it was useful for the Board to have one.

So at the time we developed it, we certainly took lots of suggestions. I can't recall, given my age and passing of years. But I know we had a number of suggestions from stakeholder organizations at that time, and a number of individual attorneys said "this is what we use in my firm, and we find it useful." So we took a lot of suggestions in, then we drafted what we thought would be kind of the greatest common factor.

And we knew it would not be all things for all people, and we know from the proposed amendments to the rules in 2006 that it generated -- that the proposal to make it the standard order in most cases -- was one of the subjects which generated the most discussion at that last meeting we had with stakeholders. So we know it's an issue of continuing concern, and we know that we'll never be able to have an order that will solve all needs, but we're certainly willing to continue to discuss it and to discuss it openly and try and tinker with it, just as the parties, of course, are always free to agree to changes to it.

I do have to say, though, that it's served us pretty well, and I know our interlocutory attorneys, before we made it the standard order, were able to apply it in many cases to help break log-jams in discovery, and I think most parties live with it.

So we're not averse to changing it, but we certainly view having a standard protective order in place as a very useful thing.

If there's any further comments, we'd be happy to hear them. Otherwise, I think we'll -- we'll wrap up. No? Okay. Thank you all for being here. Thank you.

>> ALICA DEL VALLE: Thank you.

>> GERARD ROGERS: Thank you, Alica.