

FEDERAL TRADE COMMISSION

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FEDERAL TRADE COMMISSION

In the Matter of: )  
WORKSHOP ON BEST PRACTICES )  
FOR MERGER INVESTIGATIONS.)  
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JUNE 12, 2002

Stimson Room  
New York Bar Association  
42 West 44th Street  
New York, New York

The above-entitled workshop came on for  
comments, pursuant to notice, at 12:02 p.m.

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APPEARANCES:

ON BEHALF OF THE FEDERAL TRADE COMMISSION:

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Competition  
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PANELISTS:

LAREN ALBERT, Axinn, Veltrop & Harkrider  
MEG GIFFORD, Proskauer, Rose  
JOSEPH LARSON, Wachtell, Lipton, Rosen & Katz  
ARTHUR BURKE, City Bar of New York  
KEITH SEAT, Mediator & Arbitrator, Former  
General Counsel of Antitrust, Business Rights  
and Competition Subcommittee of the Senate  
Judiciary Committee  
DAN ABUHOFF, Debevoise & Plimpton

## P R O C E E D I N G S

1  
2 MR. ROONEY: Good afternoon. My name is  
3 Bill Rooney, and I am chair of the antitrust and  
4 trade regulation committee of the City Bar here,  
5 and we are very pleased to host this FTC  
6 workshop on the merger review process. The  
7 committee in the past has participated in  
8 improvements that the agencies have made over  
9 the years in the review process, and we are  
10 particularly pleased to host today's workshop,  
11 and we are equally appreciative of the FTC  
12 personnel who are here to take time out of their  
13 busy schedules and to hear the comments of the  
14 Bar on the review process.

15 I would also like to take just a moment to  
16 alert or remind you of a conference that the  
17 City Bar is sponsoring with the ABA which will  
18 occur tomorrow and Friday on mergers and  
19 acquisitions, getting your deal through in the  
20 current antitrust climate. There are still some  
21 places available for the conference, and we have  
22 a table right outside the door here for  
23 registration.

24 If you would like, there is a government and  
25 an academic discount for the program and full

1 CLE credit is available. The conference will  
2 cover both the HSR filing process as well as  
3 every aspect imaginable of the substantive  
4 merger review process.

5 With that I am very pleased to turn the  
6 session over to Joe Simons, the director of the  
7 Bureau of Competition, who will introduce  
8 today's panel as well as the format. Thank you  
9 very much.

10 MR. SIMONS: Thank's, Bill. Good  
11 afternoon, and I want to particularly thank  
12 everyone here for coming and particularly thank  
13 Bill Rooney and David Starr from the City Bar  
14 Association antitrust committee. For those of  
15 you in the audience who are my age or a little  
16 older, you have been hearing or not hearing but  
17 so much as experiencing the complaints about the  
18 second request process for a very long time, and  
19 I have personally experienced that myself, the  
20 frustrations and the burdens and the expense of  
21 this process. And it seems to have gotten  
22 larger and more burdensome as the years have  
23 gone by.

24 I have also been on the inside at the FTC  
25 previously and I'm there now, and there's a lot

1 of frustration there as well. So what we  
2 thought we would do is launch this program where  
3 we would encourage an active dialogue between  
4 the outside Bar and ourselves so we could get a  
5 better understanding of what the problems were  
6 and see if we can get some solutions and  
7 suggestive criticisms from the people who are  
8 experiencing these issues directly.

9 This is one of five sessions like this. We  
10 held one in San Francisco earlier and we have  
11 another one planned for Chicago next week and  
12 then the following week in Los Angeles and also  
13 another one in Washington. We have already  
14 gotten a fair amount of response and input both  
15 in the sessions that we've already had and also  
16 in writing.

17 We don't really care how the criticism or the  
18 suggestions come in. We just care that they  
19 come in. So if something happens during the  
20 workshop here today and you go back and it  
21 triggers something else and you have  
22 suggestions, please, you can call any one of us  
23 or send us e-mail. We will take it in whatever  
24 form you find most convenient.

25 The panel here with me today are folks who

1 have had a fair amount of experience on our side  
2 in this, and we have got Barbara Anthony, who is  
3 the director of the New York office, I guess we  
4 call it the Northeast Regional Office now.  
5 We've got Steve Bernstein, who is the deputy  
6 assistant director in Mergers I, and we have  
7 Rhett Krulla, who is the deputy assistant  
8 director in Mergers II. And between the folks  
9 on the panel, not so much me but them, there is  
10 a wide range of experience of dealing with the  
11 Second Request process.

12 Before we go any further, I particularly want  
13 to thank Bill and David Starr of the committee  
14 for setting this up and Susan Raitt of the New  
15 York office for putting all this together.  
16 Thank you.

17 This hearing is being transcribed and we want  
18 to keep it as a record as something we can look  
19 back on while trying to come up with our recommendations. So  
20 when you talk, please talk loudly -- one person at a time,  
21 and say your names.

22 The way we're going to do this is we've got a  
23 few people who ahead of time told us that they  
24 have particular issues they would like to raise,  
25 so we're going to go ahead and let them do

1           that.  But first, I would like to call on Arthur  
2           Burke who on behalf of the committee on  
3           antitrust and trade regulations for the City Bar  
4           Association provided us with a very well thought  
5           out written suggestion, so if you want to kind  
6           of summarize that, that might be helpful to  
7           start things off.

8           MR. BURKE:  Thank you very much.  Again,  
9           thank's to the FTC for the opportunity to chat  
10          about these issues.  I think it's a very  
11          constructive process and a useful dialogue.  My  
12          name is Arthur Burke.  I am with Davis and  
13          Polke, and making a brief summary of the issues  
14          the City Bar want to highlight, and also Joe  
15          Larson from Wachtell who also helped to prepare  
16          these comments.

17          In connection with the written submissions  
18          there is a few points we felt we wanted to  
19          emphasize.  Two of the most burdensome aspects  
20          of complying with second requests, I think at  
21          least in our experiences, relate to  
22          significant -- the data requests that are often  
23          included in the multifaceted and multi time  
24          period data requests.  And also the use of the  
25          requests for electronic data.  And I want to



1 talk briefly about both of those issues.

2 With respect to the data request to  
3 interrogatories, it's obvious that many  
4 companies maintain very detailed electronic data  
5 related to sales and costs, and I think most  
6 companies can somewhat readily produce the  
7 preexisting electronic databases they have, but  
8 the most difficult and second requests is their  
9 request that there be additional data compiled,  
10 data that's not really maintained in the  
11 ordinary course of business, that's not  
12 maintained in a centralized fashion by companies  
13 but which has to be gathered perhaps from far  
14 flung regional offices and created and melded  
15 into a kind of new database. That kind of  
16 process is often difficult and time consuming.

17 It often results in somewhat inexact results  
18 and requires a lot of guesswork to actually put  
19 the data together. I guess you can compare the  
20 situation with civil litigation. Normally if  
21 someone serves an interrogatory on you in civil  
22 litigation, you are obligated to create new data  
23 to produce data that exists in a form that  
24 already exists. So that would be one suggestion  
25 that I think would significantly accelerate and

1 facilitate the compliance with the second  
2 request process is to focus on data as it exists  
3 and is as maintained by the company and not so  
4 much focused on creating new databases and  
5 searching and creating new form of data that are  
6 not maintained in the ordinary course of  
7 business.

8 Another issue that we wanted to just  
9 emphasize out of this list is the electronic  
10 data, and I think many of our experiences today,  
11 the volume of electronic data, and by which that  
12 I mean e-mails, power point presentations, Word  
13 Processing, Work Perfect, Microsoft Word DOT,  
14 exceeds by several factors the volume of paper  
15 documents, and I think that's inevitable and  
16 appropriate. Certainly there's a lot of useful  
17 information that the agency has every right to  
18 look at and will want to look at in the course  
19 of reviewing a merger.

20 However, given the potentially enormous  
21 volume of the materials, there are I think a  
22 number of useful limitations that the Commission  
23 has often been willing to agree to and we hope  
24 that will continue and perhaps be  
25 institutionalized. Some of those include,

1 obviously where possible, not requiring a review  
2 of backup tapes. Obviously there may be unique  
3 circumstances where that's necessary, but  
4 certainly as a general rule we hope that can be  
5 a limitation that's usually granted.

6 And additionally some sort of limitation as  
7 to the scope of the individuals for whom  
8 electronic data must be reviewed that is a  
9 narrower group of people perhaps than the scope  
10 for paper documents. Yet given the potential  
11 number of times, the volume of electronic  
12 documents, it's helpful if we can perhaps  
13 identify a smaller, quarter of people who must  
14 review electronic documents that's perhaps not  
15 as large.

16 In a similar vain, it's helpful if you are  
17 willing to agree to shorter time periods for  
18 electronic data, so that while the time period  
19 for the paper documents might be from '98 to the  
20 present, electronic documents might only be  
21 produced for 2000 to the present. Again, I  
22 think, a reasonable limitation that we encourage  
23 in the future.

24 And I guess finally with respect to the  
25 electronic documents, another useful limitation

1 is an agreement as a general matter that be  
2 produced in a common consistent format.  
3 Sometimes in individual circumstances it may be  
4 necessary to produce an Excell spreadsheet in  
5 its native format, but the rules should  
6 generally be that we can produce it in one  
7 homogeneous format.

8 So those are just some suggestions and  
9 thoughts relating to the second request  
10 process. A few of the things we wanted to  
11 emphasize were with respect to the appeals  
12 process. I think everyone, at least to our  
13 knowledge, knows that it has not been utilized  
14 particularly frequently, but I don't think the  
15 Commission should necessarily conclude as a  
16 result of that that there aren't potential  
17 problems out there that create real disincentives  
18 to parties availing themselves of the appeals  
19 process. And because of that -- and that's  
20 probably inevitable to some extent. You can  
21 talk about a client using an independent  
22 arbitrator or mediator to resolve those issues,  
23 but ultimately to resolve some of these issues  
24 there will be a need for guidance from the top  
25 because in some sense parties are always going

1 to have significant disincentives for trying to  
2 fight with the staff too much about these  
3 issues. So those are just a few of the issues  
4 that I wanted to highlight. I think Joe is  
5 going to point out a few other points from our  
6 list. Thank you.

7 MR. LARSON: Thank's, Art. Joe Larson from  
8 Wachtell, Lipton. Sort of divided this up. As  
9 Art said, we both worked on this list, and there  
10 are a couple of points where I wanted to add a  
11 little color commentary. I guess as an initial  
12 matter, which was not in our list but something  
13 we wanted to applaud the Commission for is the  
14 recent policy that was adopted whereby the staff  
15 that issues the second request has to sit down  
16 with the party and set forth their issues and  
17 their theories and enter into a substantive  
18 discussion early on in the process. I think  
19 that's been extremely helpful.

20 It really focuses issues. It really stops  
21 the phenomenon of the two ships passing in the  
22 night when parties are submitting letters or  
23 white papers that I think happened all too  
24 frequently in the past, and we applaud that.  
25 And so far our experience has been that the

1 staff has taken that very seriously and has been  
2 helpful and extremely forthcoming in that  
3 process.

4 As to the second request, on the production  
5 by specification, as we said in our written  
6 comments, the results of doing this are, very  
7 generously speaking, a delve for accuracy. The  
8 logistics of producing several thousand or  
9 reviewing several thousand boxes with multiple  
10 attorneys, multiple views of what the issues  
11 are, what documents may mean, results in a mess  
12 in terms of trying to put a primary  
13 specification.

14 In addition, the specifications are often  
15 overlapping, so it's difficult to know which is  
16 primary, which isn't. I have never used that  
17 column in the document log when I have been  
18 looking for documents, and I have always warned  
19 the staff not to rely on that when they are  
20 looking for documents. I think what's much more  
21 helpful is the person's name and their title,  
22 which will give you an indication what types of  
23 documents they are likely to have.

24 I think notably as well, the Department of  
25 Justice does not require production by

1 specification, and I think that should just be  
2 eliminated because it does produce a material  
3 burden on the parties in terms of slowing down  
4 the document review because of the need to write-  
5 down the specification on each control sheet.

6 For the cutoff dates and updated searches,  
7 with the proliferation of e-mail it has made it  
8 even more difficult than in the past to meet the  
9 45 day for foreign language documents, 30 days  
10 for most specifications and 14 days for some of  
11 the other specifications. It's just not  
12 practically possible to review the volume of  
13 documents in those time frames, even if you do  
14 an update search.

15 In a recent matter with a relatively small  
16 company, after the initial production, two  
17 months later we did the update search, we came  
18 up with another 800 boxes, mostly e-mails. It  
19 just doesn't work, and the staff is generally  
20 very understanding in negotiating limitations on  
21 certain cutoff search dates, which I think is an  
22 indication that in the period between the  
23 issuance of the second request and the  
24 production of the documents, it is not  
25 indicative of normal business conditions.

1           It's unlikely that there will be any material  
2 evidence that would come forth that would not  
3 otherwise come forth by just having the default  
4 rule be you search people once. And parties  
5 have a strong incentive to produce the documents  
6 as quickly as possible because the goal is to  
7 get into substantial compliance and start the  
8 second waiting period. So on the one hand the  
9 parties will have a strong incentive to produce  
10 the documents as quickly as possible, but the  
11 45, 30 or 14 days is really just not practical  
12 in today's environment.

13           In terms of negotiating modifications to the  
14 second request, there's been a trend recently  
15 that we've heard much more from the staff in  
16 terms of timing arrangements and rolling  
17 productions. A presumption that parties have to  
18 roll and the presumption that parties have to  
19 grant more time, now I think it is, everyone  
20 would agree, that it is usually almost always in  
21 the party's interest to negotiate these issues  
22 with the staff, grant more time, but it should  
23 be a negotiation process.

24           You know, Congress just recently reviewed the  
25 statutory framework for the review and the



1 review periods, and that is the default rule.  
2 And again, it should be a process of negotiation  
3 between the parties and the staff as to a give  
4 and take in terms of setting the production  
5 schedule and setting the review schedule as  
6 opposed to a presumption which can often lead to  
7 sort of bad feelings in a sense of bad faith on  
8 the staff side to the extent parties don't just  
9 automatically agree to this.

10 And I guess finally, access to transcripts.  
11 I think there's sort of a split within the  
12 Commission. In some matters we will get  
13 transcripts at the same time that the staff  
14 does. In other matters we don't get them at  
15 all. In other matters we get them at sort of  
16 the end of all the depositions. I think there  
17 should be one policy. And again, in terms of  
18 having the issues truly join would militate in  
19 favor of making the transcripts available to  
20 both sides whenever they are available.

21 MR. SIMONS: Generally what happens in that  
22 situation is you bring somebody in, an associate  
23 or paralegal and they take copious notes anyway,  
24 right?

25 MR. LARSON: But it's never perfect.

1 MR. SIMONS: It's expensive.

2 MR. LARSON: And if you try to bring a  
3 secretary in, a lot of times staff will just  
4 throw them out. Finding an associate who knows  
5 shorthand these days is not easy. Thank you  
6 very much for the opportunity to speak. I think  
7 this was a very good idea and hopefully it will  
8 be helpful.

9 MR. SIMONS: It's been very helpful so  
10 far. Thank you very much. Keith Seat wanted to  
11 say something too. Go ahead, Keith.

12 MR. SEAT: You are hearing lots of concerns  
13 and problems, and I'm here to offer a potential  
14 solution. My name is Keith Seat, and I'm an  
15 independent mediator and want to talk about the  
16 use of mediation in the second request process  
17 and how that can help to streamline the  
18 negotiations and disputes that arise between  
19 parties, private parties and the staff at the  
20 FTC or for that matter DOJ is equally there.

21 My background is as an antitrust litigator.  
22 I cut my teeth at Howard and Simon. I am former  
23 general counsel for the subcommittee on Senate  
24 Judiciary, and I've been in back in the private  
25 sector as in-house counsel and now begun a

1 mediation practice.

2 But I am very enthused about the many  
3 benefits that mediation can offer to disputes,  
4 and there are inherently disputes that arise in  
5 the second request process between the staff and  
6 the parties, and there's a great deal of  
7 frustration that I think you have been hearing  
8 about and will hear more about in the private  
9 Bar about how hard it is to deal with the  
10 voluminous requests that are put out there and  
11 the need to try to work things out, and often  
12 times that goes successfully.

13 When I was in private practice, I often had  
14 good experiences negotiating with staff at FTC  
15 and DOJ, but sometimes it doesn't work out so  
16 easily. And in those cases I think bringing in  
17 an independent mediator can provide great  
18 benefits for everyone involved and that that  
19 would be a voluntary process where the parties  
20 would agree to use of a mediator, and it would  
21 not undercut the authority of staff because it  
22 would not result in a decision.

23 The mediation process doesn't have the  
24 mediator rendering any judgment the way an  
25 arbitrator would, but simply has the, helps the

1 parties to reach their own agreement about what  
2 is best for resolving the disputes at hand.

3 And so if that is brought into the second  
4 request process, then that can be very helpful  
5 to provide the smoothing out of the relations  
6 between the parties so that they will be able to  
7 work towards resolution of the disputes, both at  
8 the second request and then later on through the  
9 process, to reach a favorable outcome hopefully  
10 for all sides in satisfying the goals of halting  
11 the anticompetitive mergers but making sure  
12 decent transactions go through.

13 And the big benefit of mediation is to allow  
14 both sides to deal in confidence with the  
15 mediator who can then be brokered between the  
16 two sides without revealing their confidential  
17 strategies, can help see if there's areas of  
18 overlap where the parties would be able to reach  
19 compromise without disclosing the confidential  
20 information or strategies of the staff to the  
21 private parties or vice versa, and also to be  
22 able, if the mediator has a sufficient antitrust  
23 background, to be able to test the strategies  
24 and the theory on which the staff is seeking  
25 documents and be able to help convey to the

1 private parties the bona fides or lack thereof  
2 without revealing what the strategies are.

3 And so my proposal for the FTC is to actually  
4 encourage mediation whenever there are  
5 negotiations in the second request process that  
6 cause frustration to the parties involved and  
7 that the FTC ought to affirmatively offer  
8 mediation as a way of working through those  
9 disputes to get things going and to help reduce  
10 the frustration level overall. And then once  
11 the private sector is familiar with the process  
12 and more accustomed to it, then it may well take  
13 off and be able to proceed on its own, and it  
14 may be useful to start off with a pilot project  
15 that would allow a certain number of cases to be  
16 mediated in this way and then analyzed to  
17 determine how useful it has been and what the  
18 experience of the parties and staff have been and  
19 then publicized to the wider antitrust Bar.

20 And lots of benefits and really very little  
21 downside. It's not very costly or doesn't take  
22 much time. And if the mediation is not  
23 successful, then the parties are able to proceed  
24 with all the same remedies that they had  
25 previously. If the appellate process is

1 desirable or seen as desirable, they can proceed  
2 with that. But I think in most every case the  
3 mediation process would be very helpful in at  
4 least narrowing the disputes, if not resolving.  
5 I think a paper has been brought that was  
6 circulated around, but I can help answer  
7 questions through the process.

8 MR. SIMONS: Thank you very much. We got  
9 your package. The next person who wanted to say  
10 something was Meg Gifford. Is Meg here?

11 MS. GIFFORD: Yes. My name is Meg Gifford  
12 from Proskauer, Rose. Thank you for the  
13 opportunity to address the panel. I would  
14 actually like to begin by taking just a moment  
15 and commenting on a couple of the proposals that  
16 have been made. I can't endorse wholeheartedly  
17 enough the recommendation to eliminate the  
18 requirements to produce documents by  
19 specification. And I would add to the proposal  
20 on that that it is, I think, not only not useful  
21 but essentially counterproductive to require  
22 that. I certainly view it as counterproductive  
23 for those of us who are trying to do the  
24 production because the time that is required for  
25 young lawyers to go through the vast amount of

1 documents and make that designation is very  
2 substantial.

3           And if it had some real benefit, I suppose we  
4 might agree that some degree of this was useful,  
5 but I really seriously doubt that it has much  
6 benefit because the tendency and I think the  
7 incentive in making these designations is to  
8 designate as many specifications as one can  
9 possibly imagine to protect yourself from some  
10 claim that, you know, you didn't tell us this  
11 document related about. And I see lots of  
12 productions that have designations, five, six,  
13 seven, eight specifications, and I cannot  
14 imagine that's very helpful to staff in tracking  
15 down important documents.

16           With respect to the concept of mediation, I  
17 think that's intriguing, and I -- as Mr. Seat is  
18 an experienced mediator I take, at least to some  
19 degree, his word that it can be done promptly.  
20 But that is my major concern about it because we  
21 are working under very tight time frames here.  
22 It would be interesting to do a pilot program,  
23 but I think one of the key determinates in  
24 whether that pilot is deemed successful has to  
25 be a very close examination and a close

1 evaluation of the degree to which the process  
2 accomplishes the goals that it seems to me it  
3 may accomplish but without changing the time  
4 frames of the parties involved. I think that's  
5 critical.

6 I would like to make a few comments, some of  
7 which I'm sure others will make, because with  
8 all due respect to the Commission, I think that  
9 some of these are so obvious that we all are  
10 overlapping on some of these. I would actually  
11 like to make a brief comment on the clearance  
12 procedure, our favorite subject at this point.

13 MR. SIMONS: It's certainly mine.

14 MS. GIFFORD: But I will say something  
15 anyway. The cases of which I'm speaking I think  
16 are quite rare, but when they happen, it is a  
17 real problem, and that is where you have got a  
18 transaction that is in an industry or line of  
19 business where one of the two agencies has  
20 handled matters in that industry previously but  
21 perhaps a few years ago, perhaps not yesterday  
22 or six months ago, and where the possible  
23 consequences, the possible effects of the  
24 transaction, if there are possible potential  
25 effects, are going to take place in another



1 industry in which the other agency has clear,  
2 acknowledged expertise.

3 From my own personal experience, I have run  
4 into this situation twice and thankfully only  
5 twice where the agency where the recognized  
6 expertise in the downstream industry has claimed  
7 the transaction but the other agency dealt with  
8 a transaction say three years ago.

9 And in one instance we used up about a third  
10 of the 30 day waiting period, and in another  
11 case, to everyone's extraordinary anxiety  
12 including the staff, we used up 12 of a 15 day  
13 waiting period in a cash tendered offer. And I  
14 won't go into the details of how we managed to  
15 get it through in 15 days and the staff did  
16 extraordinary things, but it was very scary to  
17 deal with that.

18 And I would suggest that there be a  
19 presumption. I mean, I think that a protocol  
20 ought to be established that where the other  
21 agency has expertise in a downstream market,  
22 that does not overcome or at least there is a  
23 presumption in favor of the agency that  
24 previously handled the matter and that that be  
25 institutionalized.

1           In what I hope are the nonexistent or at  
2           least extraordinarily rare cases where that  
3           presumption might be reversed after, at the end  
4           of the clearance process, I would suggest that  
5           it would be useful for the agencies to agree to  
6           a process whereby the agency with the  
7           presumptive authority can go ahead and talk to  
8           third parties, because that's the real problem  
9           is not being able to talk to third parties  
10          before that clearance process is completed, as  
11          you know. But can go ahead and talk to third  
12          parties, do interviews, collect information.  
13          And if they lose in the end, it all gets  
14          transferred to the other agency. I'm sure  
15          reasonable people can work this out. Let me  
16          move --

17           MS. ANTHONY: With the help of a mediator.

18           MR. SIMONS: A mediator isn't sufficient.  
19          We have to get an arbitrator for that,  
20          seriously.

21           MS. GIFFORD: Perhaps it's worth it because  
22          although they are rare cases, when they happen,  
23          they are real problem cases.

24           MR. SIMONS: I am very attuned to that.  
25          Literally the first day I showed up in the FTC

1 in June of last year I was confronted with four  
2 or five matters that had been pending for almost  
3 a year, and the degree to which both staffs were  
4 dug in, it was unfathomable. I can't believe  
5 it.

6 MS. GIFFORD: Rules in advance often help  
7 in that situation.

8 MR. SIMONS: Although we tried, and as you  
9 know, all good deeds need go unpunished.

10 MS. GIFFORD: Maybe some different rules.  
11 Comments on everyone's favorite issue,  
12 electronic document discovery. I join in the  
13 discussions that some regularized,  
14 institutionalized procedures be developed for,  
15 beyond what exists today for the handling of  
16 electronic documents. And again, e-mails are  
17 what used to be the major problem, I think  
18 Arthur made the point, that today frequently it  
19 is beyond e-mails. It's all the other  
20 electronic documents that are so difficult to  
21 gather, to identify and frequently are, if not  
22 repetitive, marginally relevant to the ultimate  
23 issues.

24 There are, I think there are a number of  
25 different ways that a protocol in this area

1           could be developed. I will make just one  
2           suggestion, and that is that a sort of control  
3           group approach be used to the merging party's  
4           documents, not necessarily limited to those same  
5           people whose documents were already searched for  
6           CC documents but building on that concept,  
7           particularly in larger companies.

8           The notion being that outside of those  
9           persons who knew about and were actively working  
10          on the transaction plus what I call, I know some  
11          companies refer to them, as the seniors, the  
12          senior VPs or the VPs or the relevant directors  
13          of various groups such as marketing sales,  
14          production and perhaps some others, whether they  
15          were aware of and worked on the deal or not, one  
16          would assume that there are likely to be  
17          relevant electronic documents in the files of  
18          those persons.

19          But beyond such a group and their direct  
20          assistants, that e-mail and other electronic  
21          document production either be severely limited  
22          in time frame or, I would prefer, deferred or  
23          eliminated all together. Deferred I suppose is  
24          not an unreasonable conclusion given that you  
25          might find something in what's already been

1 produced that obviously leads you to come back  
2 and say we've got to look at the e-mails and  
3 electronic documents of a lot of other people.

4 Some alternative to that or a combination  
5 might be to work with a sort of controlled group  
6 concept of whose electronic documents are being  
7 produced. And then add to that documents by  
8 defined categories that you might nevertheless  
9 expect to find in other people's E files, such  
10 as industry analyses, production plans, that  
11 sort of thing, and come up with some combination  
12 of those concepts. It gets you what is really  
13 relevant and what is going to be useful to both  
14 sides in this process.

15 Keeping in mind that this is, one hopes in  
16 most of these processes that that point is not  
17 yet litigation and frankly I think should not be  
18 treated as such.

19 I would also like to make a comment with  
20 respect to one other issue that is far less  
21 susceptible to rules and protocols and process  
22 and is more the result of some of the processes  
23 and the time pressures, and that is the  
24 inadvertent and sometimes careless disclosure of  
25 information in staff interviews of parties that

1 reveal third party sources of information, of  
2 particular information or even of the fact of a  
3 compliant by a third party. And this is  
4 something that causes great concern for third  
5 parties that are otherwise willing to cooperate  
6 on an informal basis in a staff second request  
7 investigation.

8 The other side of this coin, of course, is  
9 staff interviews of third parties that reveal  
10 confidential information of the merging parties  
11 or that convey distinct views of a staff  
12 attorney concerning the merging party's  
13 operations, some aspect of the transaction. In  
14 some cases in both of these situations the  
15 effect is to harm the merging party's or in some  
16 cases third party's reputations.

17 I have particularly noticed this, and again I  
18 want to emphasize this is not frequent, but when  
19 it happens it's a major concern, I have noticed  
20 in staff discussions and interviews relating to  
21 potential third party purchasers of assets in a  
22 settlement context, that some of the questions  
23 that may get asked in the rush of business have  
24 the result, have the effect of providing a  
25 certain view of say a third party's reputation

1 in the business to the other parties that staff  
2 is talking with.

3 And they may, and I have seen some evidence  
4 of this, accelerate the departure of personnel  
5 and customers from the merging parties. I think  
6 I acknowledge and I'm sure others would agree  
7 with me that this concern cannot be eliminated  
8 all together and it can't be eliminated by  
9 specific rules, but I do suggest that staff, no  
10 matter how pressed for time, really must be  
11 trained to be acutely conscious of the potential  
12 effects of their communications on parties and  
13 third parties and that such effects can arise  
14 from more than just a slip of the tongue that  
15 names a third party or a statement, a slip of  
16 the tongue, a statement that merging parties  
17 assert X.

18 Occasionally those things happen. I know  
19 staff is very careful to not make those slips of  
20 the tongue, but the effects that I'm referring  
21 to do arise I think far more often from more  
22 subtle statements and from not thinking through  
23 how a question should be asked with that care to  
24 keep confidential information foremost in the  
25 minds of the staff.

1           And whatever consideration Commission can  
2           give to this issue, I think it would facilitate  
3           the process of the second request analysis, and  
4           I'm quite confident that it would lead to  
5           reduced friction and reduced tension among the  
6           various parties to the process. Thank you for  
7           the opportunity to make these comments.

8           MR. SIMONS: Thank you very much, Meg.  
9           That was very helpful. We have Dan Abuhoff.

10          MR. ABUHOFF: Thank's. It's Dan Abuhoff.  
11          I'm with Debevoise and Plimpton, and I also  
12          thank you for the opportunity to make these  
13          comments. I agree with a lot of things that  
14          have already been said. I won't repeat those  
15          specific suggestions.

16          I think, just to step back for a moment,  
17          because we all practice in this area and  
18          sometimes we all lose perspective. The thing I  
19          would like to emphasize, it's not a specific  
20          suggestion, is the government asks for way too  
21          many documents, way too many documents. Let me  
22          give you the perspective from which that comes.

23          I deal, as do most of us here, in civil  
24          litigation. Aside from that work, the most  
25          burdensome document requests I deal with by far



1 are second requests. Another reason, a better  
2 reason, the fact that we all know this that a  
3 lot of deals are abandoned because the  
4 government issues a second request. The lawyers  
5 throw up their hands, and on their lawyer's  
6 advice, and we tell them, you can't afford it,  
7 you can't respond to the second request, which  
8 is, among other things, uneconomical. Because a  
9 lot of deals are presumably efficient deals and  
10 they don't go forward because people cannot pay  
11 for the second request process.

12 And the third reason I know it's too  
13 burdensome is because it's too burdensome for  
14 the government if you got everything you asked  
15 for, you would have too much stuff, and as a  
16 matter of fact, I know that you have too much  
17 stuff anyway. The most aggressive way, and I  
18 have seen this happen, for a private  
19 practitioner to deal with the FTC, DOJ and  
20 second request process is to give them  
21 everything they ask for and bury them with  
22 paper.

23 And I have seen this done, and it's effective  
24 because I can't imagine being on the receiving  
25 end of that. And the clocks are running and it

1 takes the government extremely long to  
2 negotiate. So I wish I had an easy solution to  
3 all of this. I think the specific suggestions  
4 that have made are helpful. To me it --

5 MR. SIMONS: I think they all go, all these  
6 suggestions go to that problem.

7 MR. ABUHOFF: I think they certainly do,  
8 and I would like to see them all implemented,  
9 and I'm hopeful that they would help. There's  
10 one other aspect of this, and this is perhaps  
11 out of the ambit governing all our collective  
12 authorities, and it seems to me sometimes  
13 responds to second requests get tied up with the  
14 timing issues. Most often, most obviously when  
15 it's time to certify with substantial  
16 compliance, and I think we've all had experience  
17 with substantial compliance. And the government  
18 comes back and says well, maybe not, although  
19 it's maybe not in a single-spaced, three-page  
20 letter, document number 4475 is a bad copy and  
21 you have like 50 complaints like that.

22 And you really get the feeling when you get  
23 that letter that it's really not about  
24 compliance. It's really about timing, which I  
25 don't blame the government for. I mean, it

1       seems to me if we were sitting down setting the  
2       rulings or at least if I was setting the rules,  
3       things would be such and such a way that we  
4       would get half as many docs and twice as much time  
5       to look at the deal, but that's not what we  
6       have, and I don't know how we move in that  
7       direction.

8               Well, the best suggestion I have really,  
9       general suggestion is I think it behooves the  
10      FTC and Department of Justice to do more  
11      balancing when asked for retrieval, not to just  
12      ask for anything that's arguably relevant, and I  
13      don't believe the government insists on  
14      everything that's arguably relevant. In terms  
15      of the spectrum of being very spare in terms of  
16      what you ask for and just about everything  
17      that's way over the side of the spectrum to ask  
18      for everything.

19             And I think the government has to balance the  
20      need and natural desire to have everything  
21      that's arguably relevant with the cost that it  
22      imposes on the private parties. Again, when you  
23      explain to a client, not my perspective but a  
24      client's, the first time what the second request  
25      process is and how much it's going to cost, they

1 are dumb-struck, and often what follows is a  
2 speech how they are American citizens and how  
3 they pay their taxes.

4 And I think we have probably all had  
5 situations in the past where we have all huge  
6 productions at enormous cost. I remember  
7 dealing with the copying costs themselves were  
8 so unconscionable at one point, we stopped  
9 copying. One thing, the client cannot afford to  
10 copy anymore. Another thing, we were confident  
11 that what we were sending was so irrelevant to  
12 the process that we didn't need a copy of it and  
13 we could wait for the transaction to clear to  
14 get it back. That was a few years ago, not  
15 recently. But I think other people must have  
16 had the same experience.

17 So even though it's an amorphous suggestion,  
18 I think the most important thing is the people  
19 in charge all the way down through the staff  
20 have to use their discretion and judgment to  
21 think hard about whether what they're imposed in  
22 terms of burden is worth the cost, and it starts  
23 with the most important, central aspect of the  
24 second request process, which is the list of  
25 people who get searched. When you sit down with

1 the organizational chart, that to me has as much  
2 to do with the scope of the search and the  
3 burden imposed by the search as anything. And  
4 we've all heard well, we would like to hear from  
5 these people anyway even though they're  
6 subordinates and they probably have the same  
7 thing in the files as their superior. It means  
8 something that it's in their files also. I said  
9 well, it doesn't really mean that much, is it  
10 really worth doing.

11 It's that kind of thinking that we really  
12 need. It's that kind of production we'd rather  
13 go into statistical aspects or technical aspects  
14 of electronic production. A lot of the  
15 arguments here in principal is whether the  
16 government need all this stuff. Generally  
17 speaking the government doesn't need this  
18 stuff. And the reason I say that is these are  
19 economic analyses. They're not going to be  
20 decided on an e-mail, a so-called smoking gun  
21 with somebody who is out there in the field and  
22 says we can beat their pants off if we lower the  
23 price by a nickel. It can't be that the economic  
24 analysis is going to turn on that e-mail.

25 There are some litigations that e-mails would

1 be critical. Generally speaking here, no. That  
2 doesn't mean the government should not get any  
3 e-mail, but I think it tells us you need a  
4 different perspective in terms of how wide a  
5 scope of electronic production ought to be.

6 The closest I can come to a specific  
7 suggestion has to do with the request of  
8 information from agents of the party, and the  
9 way this works its way through the request is  
10 the definition of the company in a standard  
11 request always includes not only the company but  
12 its agents, which includes its investment  
13 bankers and its lawyers, etcetera. And I don't  
14 know what the practice of everyone else in this  
15 room is, but I know our practice at Debevoise  
16 and what we do is that causes us to have to  
17 contact other lawyers. They have to be listed  
18 in terms of the list of agencies and then  
19 contact all of them second in a second request  
20 and say that technically you were an agent and  
21 your documents are called for.

22 We don't have power to make you do anything.  
23 The documents normally aren't in our custody and  
24 control, which is why the request shouldn't be  
25 there anyway, but here it is and the government

1 wants it, so please put it together. And  
2 sometimes they do and sometimes they don't.

3 We don't police them particularly. I haven't  
4 had too much feedback from anyone at the FTC or  
5 DOJ about that. As a matter of fact, I would be  
6 curious what the thought is from the FTC, as to  
7 whether that is something you will seriously  
8 follow-up on or you're just happy to get  
9 anything from those people. I mean, what is the  
10 policy?

11 MR. KRULLA: Frequently. It's not a  
12 mechanical exercise in terms of okay, all these  
13 sales agents out here, those may technically be  
14 agents or not, but certainly the investment  
15 bankers, the people involved in the deal, the  
16 law firms involved, those should not be places  
17 to hide documents.

18 MR. ABUHOFF: I agree with that. I think  
19 the issue is, and this plays out in civil  
20 litigation too, you are always responsible to  
21 produce anything in your possession, custody and  
22 control. If you take a box of documents and say  
23 to your investment banker, hold onto this box,  
24 that's within your possession, custody and  
25 control. And I think that has to be produced,

1           whether it's specifically done by the investment  
2           banker or not because it's really a document  
3           held by the company.

4                     But when you are talking about going to the  
5           investment banker files and ask them to produce  
6           their own files, how going to a law firm that's  
7           not involved in the transaction and say go  
8           search your files, now you are asking someone  
9           else for their documents, and we don't have to  
10          worry too much about this now, it seems to me  
11          it's difficult time to find this balancing of  
12          production --

13                    MR. KRULLA: Good faith effort that the  
14          respondent has made to get the material. I  
15          think the one interpretation approach you  
16          suggested which is to draft a request, throw it  
17          over the transom and not worry about it may be  
18          less than what we would hope for in terms of a  
19          good faith effort to get the material. We are  
20          always prepared to back stop that with a  
21          subpoena or CID to the outside source as well.

22                    MR. ABUHOFF: Well, I think that's a fair  
23          way to approach it. You should realize when you  
24          go to a law firm and ask them to produce  
25          documents and the company goes to the law firm



1 and says produce those documents, the company  
2 has to pay the law firm often to do that. So  
3 it's not something -- it's not just a matter of  
4 taking things lightly. It's a serious decision  
5 that a company has to be make about how much  
6 energy is going to be put into this and how much  
7 it's going to require from its various agents.  
8 And that's not a factor for one law firm but a  
9 factor when you deal with 14 law firms. So it's  
10 sort of -- it comes into play. The  
11 justification I have heard from this, and I may  
12 be wrong, in terms of having this requirement,  
13 at least one justification I have heard, is that  
14 the FTC or DOJ wants to be sure it receives  
15 documents that reflect any agreement between the  
16 parties as to what deal might be satisfied -- in  
17 other words, their fall-back position. If  
18 there's an agreement, they might make a side  
19 agreement and have some investment bankers, some  
20 other law firm work that out with someone else,  
21 and they're saying look, the deal will go  
22 forward as long as we don't have to divest more  
23 than 10 percent of the assets. At least it's  
24 been explained to me by one person, and that is  
25 the focus in part of those requests, which

1 brings me to another point, which is I don't  
2 think the government should ask for that  
3 document.

4 MR. KRULLA: Frequently the parties will  
5 claim, they will have attorney involvement and  
6 claim attorney/client privilege for such a  
7 document, the investment banker, that umbrella  
8 is again under the agency concept. I think some  
9 of the other things we've seen is where an  
10 investment banker helps a company identify who  
11 the right buyers are or what the value of the  
12 deal is or the effect of the deal is, and  
13 they've done underlying studies to develop that  
14 information.

15 So the final report is in the possession of  
16 the company but the underlying studies, surveys,  
17 questionnaires, information from customers  
18 that's been collected is only in the hand of  
19 this outside agent, consultant or whoever it  
20 is. And we're certainly very interested in  
21 seeing that because, as Meg talked before about  
22 the embarrassment to customers or complainant if  
23 staff misstates or is too incautious about how  
24 statements or concerns are characterized and  
25 customers may be more candid in talking to a

1 consultant retained by a company than they will  
2 be reporting to the government where there's a  
3 perception of the government and the company are  
4 adversaries.

5 MR. ABUHOFF: That's fair. It seems to me  
6 if that is the basis, the way to produce is to  
7 subpoena the investment bank because what  
8 doesn't seem right is to have the government's  
9 desire for documents from this independent  
10 company, investment bank somehow interfere with  
11 the timing of the transaction and what the  
12 company's ability to claim a substantial  
13 compliance. So it seems to me a subpoena would  
14 get you to the same place probably even more  
15 directly but not that holed up in this  
16 compliance thing.

17 MS. ANTHONY: I think one of the things  
18 we're going to hear today is not every shop  
19 operates in the most consistent way, and I know  
20 in my regional office, we do subpoena them to do  
21 it quickly, and the burden is on us to get the  
22 information. And it's not for the reasons that  
23 you necessarily just articulated, but it may be  
24 more of an issue of product market, geographic  
25 market. It's backup information with respect to

1 studies that can help shed further light on. So  
2 it's a good faith effort to acquire information,  
3 particularly if you're having a disagreement  
4 with the parties over one definition of product  
5 market or geographic market, not necessarily  
6 what was the deal they thought they could get  
7 through.

8 MR. ABUHOFF: I think that's a much  
9 preferred approach. The point about those  
10 agreements which have been in the news quite a  
11 bit with GE Honeywell in terms of what's the  
12 fall-back position, what are the issues. Those  
13 are sensitive subjects because I know there are  
14 companies that do not enter into these  
15 agreements because they're concerned they will  
16 have to produce to the government, giving their  
17 negotiating position away, I'm not blaming the  
18 government for that but I will say that's a bad  
19 result.

20 I mean, it's inefficient to have parties not  
21 entering into agreements like that. They ought  
22 to -- it's important they address that risk, and  
23 it doesn't necessarily indicate what is  
24 anticompetitive and what is not. It's just what  
25 is a reasonable business deal under the

1           circumstances.

2           MR. BERNSTEIN: Can I make just one suggestion  
3           for how to deal with this agent issue. Often if  
4           you come in with the list of agents early in the  
5           process, you sit down and talk to us about why did  
6           we have this agent, what did they do for us, we're  
7           usually able to narrow down the ones we are even  
8           interested in in the first place. So that's  
9           just one way to really cut back in that area.

10          MR. ABUHOFF: Fair enough. But that's all  
11          I had. Generally speaking, again I wish I had  
12          more specific suggestions. To get to the core  
13          of the problem, I think it's a matter of  
14          judgment and expression. And I thank you for  
15          the opportunity to speak.

16          MR. SIMONS: Thank you very much. We found  
17          that very helpful. And one other person has  
18          comments. Lauren Albert.

19          MS. ALBERT: Thank you for providing me the  
20          opportunity to speak today. My name is Lauren  
21          Albert and I am a partner at Axinn, Veltrop and  
22          Harkrider. I have a number of specific  
23          suggestions today for modifications to the  
24          second request process, particularly those  
25          relating to electronic discovery, and I will

1           probably repeat unfortunately what everyone else  
2           has said to some extent.

3           But there's something I want to talk about  
4           first before I get to my detailed suggestions,  
5           and it relates to the FTC's posture during the  
6           second request process. According to the  
7           Senate, the agency was designed to require the  
8           parties to share with the government data they  
9           had assembled and analyzed, analyzing the  
10          transaction at issue. And once the agencies  
11          determined that the merger did expose  
12          anticompetitive concerns and full-fledged  
13          discovery would begin under the aegis of the  
14          court.

15          But it appears we've strayed from Congress's  
16          original intent and the second request process  
17          is now being used by at least some government  
18          lawyers as an opportunity to prepare for trial.

19          As a result the second request process is far  
20          more adversarial than intended by Congress, and  
21          it provides a disincentive to keep people from  
22          complying with the second request and prohibits  
23          the process from being a productive and  
24          cooperative one.

25          At times the FTC appears to be using the

1 second request process as a fishing expedition  
2 as a means of delaying the parties from  
3 certifying compliance. Given the extraordinary  
4 power that Congress has given the agency, the  
5 FTC has an obligation of public fiduciary duty  
6 to use this burden judiciously and not to go  
7 whole hog as we have unfortunately seen in some  
8 cases.

9 For example, in one case we have a gazillion  
10 e-mails to review and asked for modification we  
11 were told no, e-mails are what made the  
12 Microsoft case, you are not going to get the  
13 modification on your e-mail search. And I  
14 understand, from the perspective that a lot of  
15 us in the private Bar are adversarial more than  
16 you, so it may be a case of the chicken and egg  
17 problem, and I will give in on the side of my  
18 firm. That's all I can --

19 MS. ANTHONY: He's getting ready to mediate  
20 right now.

21 MS. ALBERT: I ask the FTC do the same.  
22 You have your Commission Practice Rule number  
23 five, which says, I think it's rule five, meet  
24 within five days of issuance of the second  
25 request, and that's great. But what happens is

1 because you are in your adversarial mode and  
2 they're not forthcoming on their issues we're  
3 not forthcoming on ours either and we don't want  
4 to give you our argument if you are going to  
5 spend the next two months figuring out how to  
6 poke holes in them.

7 And one meeting isn't enough. We need lots  
8 of meetings where the staff is told you need to  
9 be forthcoming, tell them you have a problem  
10 with this, but hey, this looks good here, and we  
11 need to have a continuing open dialogue.

12 Now, as to my specific suggestions. One big  
13 problem is response time on modification  
14 requests, and I suggest 48 hours. What happened  
15 in our experience has been that we ask for  
16 modification. A week later we hear back from  
17 the staff only to ask more questions, not to  
18 give or grant our modification request. So what  
19 happens is we say let's just produce, it's just  
20 not worth asking for any modifications, and so we  
21 produce. It costs our client a lot of money but  
22 at least we get it done with.

23 And the other problem we have is there's not  
24 one person to grant the modification request.  
25 If you go to the person who issued the subpoena,



1           who has to ask his or her boss who has to ask  
2           his or her boss. They then have to ask DC. And  
3           each person has more questions, and by the time  
4           they get them all back to you it's been a month  
5           and you might as well just produce. So my  
6           recommendation is there should be one person who  
7           the parties know. That one person has full  
8           authority to grant all modification requests.  
9           You go to that person, you don't talk to anybody  
10          else, that person doesn't talk to anybody else,  
11          and he/she has it back to you in 48 hours, maybe  
12          asking more questions. I mean, that is a fair  
13          thing usually, but let's get this moving.

14                 The third suggestion is that we have  
15          uniformity in modifications. And Steve, you just  
16          mentioned something, if the parties came to you  
17          with the agent list at the outset, well, how do  
18          we know that? I mean, some of us know some of  
19          these things are normally done because we do it  
20          a lot. But Wachtell might always do this thing  
21          that my firm didn't do, and we didn't know about  
22          it, it never occurred to us to do it.

23                 Maybe there should be some rule book that  
24          says these are the kinds of thing we are usually  
25          willing to modify. Also, another problem we had

1 was, we would ask for a modification. We were  
2 told no, it's FTC policy, we never render  
3 modification, and we would say but we got that  
4 last year in another second request, and we were  
5 told prove it. So we had to find the file,  
6 which took another week, find the letter, fax it  
7 to you or to the FTC and then we were told  
8 sorry, you're still not getting it so. . .

9 MS. ANTHONY: Is that a true story?

10 MS. ALBERT: Yes, it is, and I am not going  
11 to name names.

12 MR. SIMONS: It happens in the reverse  
13 sometimes too. We never did that and we say  
14 well, what about...oh, yes.

15 MS. ALBERT: That partner is long gone, and  
16 which may be the case of what happened at the  
17 FTC.

18 MR. SIMONS: That's a matter of us talking  
19 to ourselves more.

20 MS. ALBERT: Electronic production. I know  
21 you have a whole symposium on that too. We just  
22 went through one of the most horrendous  
23 electronic productions in the history of  
24 mankind, so we have some suggestions for  
25 improving that. The first thing is that the FTC

1 have a group of electronic gurus. I think one  
2 of the problems we all have is we don't know  
3 enough about this. Designate a few techies to  
4 become the people who understand everything  
5 there is to understand about electronic  
6 production.

7           Within five days of issuance of the second  
8 request, those techies meet with the party's  
9 lawyers and techies and sit down and come up with  
10 a plan. And hopefully the FTC's techies will  
11 have enough expertise to say this is how we  
12 would like to have it done and here's what may  
13 help you.

14           The second thing we found absolutely  
15 mandatory in electronic production was a search  
16 term list. And again, we have problems with the  
17 whole getting back to us on time process, so we  
18 ran our own search term list, which was then  
19 second guessed afterwards. So I think, you  
20 know, we do need to get it out there and do it  
21 up front so we don't have second guessing  
22 afterwards. But the problem is when you  
23 submitted it, the staff then come back and  
24 suggest corporate, sale, selling or dollar sign,  
25 which will be in every e-mail. That's not a

1 modification.

2 So we have to come up with some kind of  
3 ground rules for search term lists, and you have  
4 to recognize that maybe you are going to miss  
5 some documents, but that's okay because you will  
6 still get 99 percent of them.

7 But then you have to also be able to modify  
8 the search material list as the process goes  
9 on. And we can say look, we ran your search  
10 term list and we got one percent were  
11 responsive. Let's modify those three words out  
12 because we're obviously putting up too many --

13 MS. ANTHONY: Lauren, I just want to  
14 understand what you are suggesting here, that  
15 the staff become involved in back and forth in  
16 developing or would you rather do it yourself?

17 MS. ALBERT: I would rather do it myself,  
18 but when that happened, then afterwards I  
19 believe the staff asked for a list we get to  
20 them, and they said oh, God, you didn't think of  
21 this word, this word and this word. And I  
22 didn't like the second guessing. I would rather  
23 just do it up front. We can't run it more than  
24 once. We were pulling e-mails from all other  
25 the countries, from people's laptops, home

1 computers, and you can't keep running different  
2 search term lists.

3 Everyone said this already, eliminate the  
4 requirement that you produce by spec. And  
5 that's especially true for electronic documents  
6 because you don't need it. You want all the  
7 documents about the market. You run the term  
8 market through the production and you will  
9 probably be more accurate than our paralegals  
10 and temp attorneys and all that than just  
11 guessed, come up with various synonyms.

12 Another problem we had is the Bates stamping  
13 on electronic documents. It's really very, very  
14 hard to do, and I understand the problem with  
15 keeping control of the documents, which I will  
16 get into, but it has to be eliminated.

17 And one of the primary reasons is electronic  
18 documents, to Bates stamp them -- and we wanted  
19 to produce an electronic format because to print  
20 everything -- literally for one production we  
21 blew the electricity in the client's building  
22 because we were printing so much. So obviously  
23 it saves trees and money and electricity not to  
24 print out everything.

25 But to Bates stamp electronically you have to

1 convert it to another format, and by doing that,  
2 at least in our production, it required  
3 converting that format, which meant you could  
4 use, FTC could search in the program to all  
5 documents about market, have the word market in  
6 it. You would have to pull up each document  
7 with the word market in it. So it's  
8 counterproductive.

9 Now, to insure the integrity of the documents  
10 produced and read-only format CDs, and I will  
11 not even try to explain it, somehow on a server  
12 where we would give FTC access to the server.  
13 But we did it on CDs. It was produced in the  
14 read-only format so they can't be modified.

15 And one of the issues was how to identify the  
16 document, if you have to Bates stamp them at a  
17 deposition or trial, and we suggest the  
18 following protocol: Each custodian's  
19 responsible to track documents that are produced  
20 on CDs, separate from documents, custodians. So  
21 there's John Smith's CD document and each CD is  
22 labeled Bates stamped with its own control  
23 number and his name and typed on Word Perfect,  
24 is it Word so you know what programs to use in  
25 opening it.

1           And then within each CD the title of PST file  
2           should be maintained, custodian's name and CD  
3           document control number. And then to identify  
4           it at trial or at a deposition you would, e-mail  
5           is identified by the document control number  
6           assigned to the CD produced, the custodian  
7           assigned to the CD and date and subject line of  
8           the e-mail.

9           So it's John Smith, CD number 123, so the  
10          e-mail Johnson is sent on number three, and  
11          electronic document not e-mail documents are  
12          identified again by the CD, the name but then  
13          within the CD it's the full path and file name  
14          on the document. So it's a little more  
15          complicated than Bates stamp but there are ways  
16          to identify each document.

17          Another suggestion other people have made is  
18          reducing the time, how far back in time you  
19          search. The second request usually require  
20          production going back four to five years, and  
21          unfortunately, probably more so after Arthur  
22          Andersen, clients are going to keep every piece  
23          of paper going back four or five years.

24          We recently searched 275 people's e-mails  
25          going back five years, which meant we searched

1 through 12 million electronic records. And so  
2 what we suggest is, a lot of other people  
3 suggest, that you have control group and then  
4 either eliminate everyone else all together or  
5 just do them for a one year period.

6 Privilege issues, right now as the second  
7 request is written you only have to log the  
8 documents in the law firm's, the outside  
9 counsel's law firms that weren't shared with the  
10 client or the other parties, and I suggest that  
11 exception be eliminated. If we write a memo for  
12 our client analyzing the merger, it shouldn't  
13 have to be logged. All those back and forth to  
14 the client, it's just so clearly privileged it  
15 shouldn't have to be logged.

16 Also, documents shared with the other party  
17 to the transaction pursuant to a joint defense  
18 agreement shouldn't be logged. This isn't a big  
19 burden because it's not that much, if I didn't  
20 have to simply produce my own files anymore.

21 And then there's a big problem with the  
22 electronic production with inadvertent  
23 production of privileged documents. So with DC  
24 I'm sure you all know better than I do has these  
25 quirky rules on waiver of privilege, which



1 becomes troublesome when you are doing  
2 electronic production.

3 So what I suggest is that the FTC agree, and  
4 this isn't tested but I think there's data that  
5 we think this would be okay, the FTC agree that  
6 documents inadvertently produced isn't a waiver,  
7 and maybe if it's an agreement the court will  
8 enforce that agreement.

9 And then on the continuing obligations  
10 requirement, I think Joe mentioned, this is just  
11 impossible to do with an electronic production.  
12 You are pulling out all the electronic  
13 productions out on your server, running your  
14 searches through it. It just can't be done. So  
15 my suggestion is you do 30 days from issuance of  
16 the second request and that's it.

17 That concludes my suggestions, and once again  
18 I thank you for giving me this opportunity. And  
19 I would love to be part of any future processes  
20 you have to streamline this process. If you are  
21 going to develop guidelines or anything, I would  
22 love to be a part of it.

23 MR. SIMONS: Thank you very much, and we do  
24 hope -- not hope. We are going to have some  
25 kind of output from this process. I think we

1 will have all this input. One of the things I  
2 wanted to specifically ask is I've heard Tom  
3 Leary said on many occasions when he was in  
4 private practice, I know other people do this  
5 too, they have a practice basically of trying to  
6 go through the second request process knowing in  
7 advance they're never going to comply.

8 Does anybody have any kind of experience like  
9 that or everyone in this room just sort of knows  
10 they're going to comply -- nobody, huh? Wow.

11 One of the things that I have been trying to  
12 do since I have back to the Commission is kind  
13 of monitor what's happening with these second  
14 requests and try to get a feel for whether  
15 something's going haywire on a particular one.  
16 And if I spot that, then I usually send one or  
17 more people from my office down to the staff and  
18 have them kind of insinuate themselves into the  
19 process. And I know on a few occasions that's  
20 actually been useful. So one thing, you know, I  
21 can't see everything and I know some folks are  
22 nervous about going over the heads of the staff.

23 But one thing I think you should do is if you  
24 want to call me or send me an e-mail and say I'm  
25 representing so and so in this case and we look

1           like we're kind of spinning our wheels a little  
2           bit in the second request process, maybe someone  
3           can take a look at it, and that doesn't have to  
4           get back to the staff.

5                   And I think that would go a long way to  
6           heading off appeals because basically if we have  
7           an appeal, that means my office has failed  
8           because we were supposed to be supervising these  
9           things. But sometimes it's not possible for us  
10          to figure out all the problems that are going  
11          on.

12                   So if we get some suggestion from the folks  
13          that are involved, that the natives should  
14          probably go look at this, then maybe we get a  
15          chance on it. Let's see what happens.

16                   What else? There were a couple of things.  
17          The appeals. In terms of the backup tapes,  
18          what's kind of the experience been in the room,  
19          have folks had to do this or in the deals  
20          they've been involved in, what's about been  
21          happening. Bruce?

22                   MR. PRAGER: Bruce Prager, Latham and  
23          Watkins. Most recently in the Libbey  
24          transaction, which many people are aware of,  
25          staff was extremely reasonable. The initial

1 request -- at least with respect to this issue  
2 of backup tapes. The initial request of course  
3 was written as broadly as it always is, and we  
4 found that in this case the company had totally  
5 independent servers, they did not have a  
6 centralized system.

7           There was a tremendous amount of storage in  
8 backup. They did not have high capacity  
9 servers, and so there was not -- I don't  
10 remember what exactly the time period was, but  
11 it was maybe two years were current and  
12 everything else was on backup. And staff asked  
13 us to do some inquiry into what it would  
14 actually take technologically and in terms of  
15 cost to restore backups and do an electronic  
16 search.

17           And we sat down first with our internal  
18 people at Latham and Watkins and asked the  
19 client's people and then we went to some outside  
20 vendors to get in effect bids on what it would  
21 cost, and the figures were absolutely  
22 outrageous. I mean, I cannot recall now what it  
23 was going to be, but it was probably working  
24 sort of seven days a week, multiple shifts it  
25 was going to take something like three or four

1 months to restore the backups, and it was going  
2 to cost many, many hundreds of thousands of  
3 dollars.

4 And staff fairly quickly said forget it,  
5 we're not going to put you to that. Now, we had  
6 a couple of conversations with a few gulps and a  
7 few nervous uncertainties on the part of staff  
8 as to whether they were going to really forego  
9 all of it. And in the end I think that they did  
10 a reasonable job of weighing the imposition and  
11 cost as against the burden and value and  
12 ultimately just said forget it, we will do  
13 without it unless we see something down the road  
14 that indicates there's some gold mine that we're  
15 missing.

16 And just to add a slight editorial comment to  
17 that, in addition, to saying it was the right  
18 decision, I think that it's reflective of the  
19 fact that you don't really need all of what you  
20 ask for in the second request. I mean, we can  
21 quarrel about the outcome, but you successfully  
22 prosecuted a preliminary injunction case in that  
23 matter without having gotten any of those backup  
24 files, and yet I can almost assure you if those  
25 were paper files, people would have insisted on

1 going back the entire five years or whatever was  
2 in the request.

3 You would have gotten hundreds if not  
4 thousands of more boxes than you got, and the  
5 point that I think it was Dan made earlier I  
6 think is really what's key here is that merger  
7 cases should not in my view be about that  
8 document. That's not what tells you whether  
9 this merger is going to have an anticompetitive  
10 effect or not. These are not section two cases,  
11 this is not Microsoft, and the fact that people  
12 may have said things in isolated circumstances  
13 ought not to be what leads you to decide to  
14 challenge a particular merger or not challenge  
15 it.

16 MR. COLLINS: Dale Collins, Sterling and  
17 Sterling. We've had similar experiences to  
18 Bruce's, and that's where we go in and basically  
19 give a staff, make available our technical  
20 people to talk to them about to talk to the  
21 staff about what would it take in order to do  
22 the backup tape.

23 Let me just add a little definition of backup  
24 tapes. When I'm talking about backup tapes,  
25 there's two different kinds. There's searchable

1 tapes and non-searchable tapes, that is tapes  
2 that have to be restored to a system. I'm not  
3 talking about the searchable ones. Our view is  
4 basically we will negotiate those in the regular  
5 course. It's the ones that need to be  
6 restored.

7 So as I said, we have had numerous instances  
8 where staff has been very reasonable. They  
9 basically understand this is enormous work on  
10 the parties, particularly when it looks like you  
11 are producing 800 boxes of other stuff. But we  
12 have had occasions and recent occasions when the  
13 staff was not going to give us a limitation. We  
14 went out and got vendor estimates. Our vendors,  
15 the quotes were in excess to \$1,000,000 to  
16 restore the tapes, and it was going to take a  
17 lot longer than three months.

18 Basically we told the staff, we're happy to  
19 explain, we spent six or eight hours on the  
20 phone with them explaining the situation. We  
21 will talk to you as much as you want, we're not  
22 restoring the tapes. And like I said, we never  
23 got the limitation and we didn't restore the  
24 tapes.

25 MR. SIMONS: The suspense is just killing

1 me. What happened?

2 MR. COLLINS: Nothing happened. We put in  
3 a statement for noncompliance and the fact of  
4 the matter is, at least in my view and the  
5 Commission makes its own view on this, the  
6 likelihood going to court to compel the  
7 production in that circumstance is just about  
8 zero. So what we wanted to do obviously was  
9 reach an amicable resolution on this, but we  
10 couldn't.

11 MR. BYOWITZ: Mike Byowitz from Wachtell,  
12 Lipton. I have had very similar experiences to  
13 what Bruce and Dale described. The only  
14 difference I would say is I have run into  
15 precisely the same problem and what I then said  
16 is you want the tapes, I will give you the  
17 tapes. You can go out you think it's easier to  
18 do, do it yourself. I want the modification I  
19 would like it, but I will give you the tapes.

20 And then I get, you can't comply. I said why  
21 not, I haven't reviewed it, I don't know what's  
22 in it, I don't care what's in it.

23 And that brings me to a frankly broader  
24 point, and I think it's a point that people have  
25 touched upon. And I think to some degree



1 mergers are not Microsoft and to some degree  
2 maybe they are. If Bill Gates has some comment  
3 to make about a deal he wants to do and I were  
4 you or Rhett or Steve or Barbara, I would want  
5 to know that, and I would want to use that and I  
6 understand that, okay.

7 If Joe Blow, the marketing -- not the  
8 marketing director but the salesman rep in  
9 Cleveland said that, I don't think any of us  
10 need to be bothered with that. So that's point  
11 one, what do you reasonably need.

12 And the other point is what do the business  
13 people reasonably have access to. If I can,  
14 from sitting in my office if I'm the marketing  
15 director, call back a file, get it and use it,  
16 you should be able to search for that. If I  
17 can't, that should be cutoff then.

18 Now, that -- where I've heard concerns  
19 expressed, and there is a legitimacy to this, is  
20 people purging their files in advance of  
21 mergers. Well, if people purge their files in  
22 advance to mergers, I don't know anybody who has  
23 ever been able to do it. I don't know how to do  
24 it successfully. There's simply too much in too  
25 many places. The government -- and there's

1 paper versions of all this.

2 The government is always going to get the key  
3 stuff. I always operate on the assumption that  
4 the key documents that are bad, good or  
5 indifferent the government is to go to have and  
6 how long are we going to have to spend on our  
7 side producing it and are your folks going to  
8 have to spend weighing through it.

9 And I think a certain degree of suspicion on  
10 the part of the staff of folks like us is  
11 understandable. I wouldn't say it's appropriate  
12 but it's understandable. But I think the  
13 suspicion goes far farther than we have a  
14 capability of doing. You have done this  
15 yourself many years. When you show up at the  
16 FTC on day one, to a substantial degree you  
17 don't know what's in the client's files. You  
18 may know what's in their most recent business  
19 plans, the kinds of things you get asked for in  
20 the first 30 days, but you haven't done the  
21 in-depth investigation and there's no way to do  
22 it. It's only through the process where you  
23 find that stuff.

24 So some of it used to be, at least with  
25 people who haven't earned an extra special

1 degree of suspicion, and there are some I  
2 understand, with those people a little more  
3 credit ought to be given when they say we can't  
4 do this because. . . Because I think at the end  
5 of the day you want enough control in the  
6 process so you can determine what documents you  
7 get.

8           You can determine whose files you get it from  
9 and all that, and I would respectfully submit if  
10 you can't make a case based on that, it's  
11 because there ain't a case to make. If the key  
12 decision-makers don't have the documents or the  
13 people they off-load their documents onto, and  
14 chairmen don't have those documents but someone  
15 has the chairmen's documents, through chairmen  
16 and product manager for the relevant products,  
17 that kind of thing, I think a suggestion was  
18 made a little earlier of control group plus key  
19 managers and this kind of thing.

20           But my frustration from having done this now  
21 on the outside of the government for almost 20  
22 years is its gotten worse continually. Every  
23 once in a while efforts are made to make it  
24 better. In the aggregate it is much, much, much  
25 worse than when I left the government. It's

1 much, much, much worse than the last time a  
2 reform effort was undertaken, and at some point  
3 it's necessary for the government to say enough  
4 is enough. We know we can control the process,  
5 we can pick the people whose files you search  
6 and we can control the specs, you can get it.

7 MS. ANTHONY: Why do you think it's gotten  
8 worse? I'm curious. I know you have given it  
9 some thought but why has it gotten worse?

10 MR. BYOWITZ: Well, we'll follow the  
11 process from the model second request the last  
12 time the reform that was six, seven years ago,  
13 now maybe more than that. The first thing that  
14 happened was within a year we were getting  
15 second requests that had nothing to do with the  
16 model. The model wasn't being followed. I  
17 mean, the model was overly broad, but one of the  
18 nice things about it was it didn't have multiple  
19 subparts, it didn't have tremendous degrees of  
20 overlap among the specs.

21 So it might be reasonable, I still would  
22 quarrel with it, but it might be reasonable to  
23 think to spec the documents this one relates to  
24 competition, this one relates to market  
25 definition, this one relates to entry. Even

1           then it's not that simple to do because a lot of  
2           the documents relate to all of that, but the  
3           problem is a problem --

4           MS. ANTHONY:   You mean we're asking for  
5           more?

6           MR. BYOWITZ:   You are asking for more in  
7           the second requests.  I used to write second  
8           requests.  I still remember how I did it.  I  
9           pulled out my most recent one either in this  
10          industry or something that seemed remotely  
11          applicable, I looked at it and I figured -- and  
12          by the way I'm smarter than that guy or woman so  
13          I will add three other things.  And those three  
14          other things now become in the model.  When the  
15          next person pulls it out, that person thinks of  
16          three more things and at the end of the year you  
17          have 20 things.

18          If we wanted to tell you stories, and I don't  
19          use the word pejoratively, we want to tell you  
20          entry going back about 10 years, whatever, you  
21          don't need documents about entry going back 10  
22          years.  It either happened or it didn't happen.  
23          That's the relevant fact.

24          MS. ANTHONY:   Has there been an increase in  
25          the volume of economic data or information

1           that -- I can say all this because I've only  
2           been here for two and a half years, so over the  
3           course --

4           MR. SIMONS:  It's gotten particularly bad  
5           within the last two years.

6           MS. ANTHONY:  Of course you don't have  
7           any -- they were all at my house for dinner  
8           last night.  Are we asking for more economic  
9           data, statistical data?

10          MR. BYOWITZ:  I think you are after Office  
11          Depot, Staples.  You are asking for far more  
12          data from which you can do econometrics than  
13          before.  One of the problems is that I have been  
14          involved in at least one case of which I can  
15          think of in which we offered to come in early  
16          and say look, what you are asking for is  
17          unbelievably burdensome and you are not going to  
18          be able to do anything with it, can't we talk to  
19          you and figure out some mutually agreeable way  
20          to reduce the burden.  Absolutely not we  
21          produced all the stuff.  It was never used.

22          I mean, it was just a tremendous waste of  
23          time, tremendous effort.  We had a lot of  
24          checking to make sure everything was right on  
25          the data we're producing and all.  I wasn't here

1 at the very beginning, I don't know if it was  
2 made here, but there was a suggestion made that  
3 the requirement to give it this way, cut the  
4 data this way, slice it that way takes an  
5 enormous amount of time. And unless you're  
6 omniscient going in, you don't know what you  
7 really need.

8 What I think, from your standpoint, what you  
9 really want is to say give me the data, I will  
10 figure out some way of figuring out what the  
11 data is, and then you go do your thing, we will  
12 do our thing, you will have to show it to us, we  
13 will tear it apart. Hopefully to reach the  
14 right result you will show it to us before it's  
15 at federal district court, but if it's not we'll  
16 get our shot in federal district court. I think  
17 that would solve a lot of problems because that  
18 takes a lot of time.

19 I mean, I don't know how other people do  
20 this, but we've taken to using the economists to  
21 a very substantial degree because they're used  
22 to dealing with intense amount of data, to put  
23 together the data sets so that the data sets are  
24 at least accurate and you don't get gibberish  
25 when somebody prints it out, and it's a

1 reasonable effort, it's substantial compliance.

2 MR. BURKE: The irony is you end up in  
3 trying to re-format the data to format what  
4 you're asked for, you actually render it  
5 probably less reliable and useful. One would  
6 think the data as used by the company is  
7 probably the most usable reliable data that  
8 business people used when they're trying to  
9 evaluate performance of the company and when you  
10 have to redo fit it into the particular formats  
11 asked for, it becomes less useful and reliable.

12 MR. BERNSTEIN: One of the suggestions  
13 raised before, and I would like to get your  
14 response to this, is to have the company's  
15 financial accounting people come in in the first  
16 30 days and just explain how they keep the data  
17 because sometimes we draft something guessing on  
18 the way you keep it. So at least if we  
19 understood it before we did the drafting, maybe  
20 we could come up with something that would make  
21 sense.

22 MR. LARSON: And then compare that with the  
23 group of specialists in the agency who are  
24 familiar with this and what other companies are  
25 able to do, maybe share some of that across.



1           MR. SIMONS: Let me ask another question.  
2           What's the experience of the folks in here in  
3           terms of the DOJ is doing that they are doing  
4           particularly well and we are not doing?

5           MS. ALBERT: Not asking to produce by spec.

6           MR. SIMONS: Anything else? How are they  
7           working with this timing agreement thing that  
8           examples put out, whatever it was, six months or  
9           so, any experience with that and how that's  
10          working? No?

11          Bruce, did you want to say something?

12          MR. PRAGER: Unrelated to that I wanted to  
13          follow-up on the data issue, and it's a non  
14          second request point. It's a point related to  
15          the merger review process and its progeny to  
16          litigation. I've had too much experience,  
17          unfortunately, in the past three or four years  
18          in litigating with you folks. And probably the  
19          biggest criticism I have from that relates to  
20          the data and the economics which is twofold.

21          Number one, I think that too much of the  
22          strategy throughout the second request and the  
23          investigation is dictated by litigation  
24          considerations. The staff switches from an  
25          inquiring mode to a prosecuting mode in my

1 perspective far too early in the process, which  
2 tends to solidify positions unnecessarily, and I  
3 find that that extends way more than I think is  
4 useful to the inner play or lack thereof of the  
5 economists.

6 MR. SIMONS: In terms of that, it becomes a  
7 matter of timing. And once the compliance is  
8 certified, then you got a limited amount of  
9 time, you got to get ready for court, so that we  
10 have to have some way to deal with that. And if  
11 you want to have more time to kind of be in the  
12 mode where we're not preparing for court. It's  
13 a problem in terms of well, gee, if you're going  
14 to certify in a short period of time, then it's  
15 hard to keep that off the minds of the staff  
16 lawyers.

17 MR. PRAGER: You're right. There's clearly  
18 a tension, and the fact that you don't have  
19 unlimited resources early on, the ideal in my  
20 view would be to have almost two separate groups  
21 in the staff. If you have some people working  
22 on the complaint and how they would put the case  
23 together but leave some other people who are  
24 supposedly untainted by that who are going to  
25 actually make the recommendation to your office,

1           regardless of whether the litigation team thinks  
2           they can win or doesn't think they can win.

3           My perspective from the outside has always  
4           been that the person sitting in your seat and  
5           making that recommendation ultimately to the  
6           Commissioners is trying to make a decision that  
7           shouldn't be based on whether you can win the  
8           case or not. There should be cases that you can  
9           win that you pass on because it's just not in  
10          the public interest. There should also be cases  
11          that you may not think you can win but you  
12          choose to bring anyway because you think there  
13          is some good law to make.

14          But my specific narrow focus coming from the  
15          discussion of data, and this is a strong opinion  
16          that I have is that the staff too early on keeps  
17          the economist locked in a closet, does not allow  
18          for the free flow of information from your  
19          economists to the parties.

20          In both of my recent litigation experiences  
21          the Commission has chosen not to put on its own  
22          econometric evidence but rather only to shoot to  
23          the econometrics that the parties uncovered.  
24          Whether it's fought or not fought, I think at  
25          least in the pre-litigation posture that if the

1 Commission is looking at econometrics and if  
2 they are looking at economic analysis, they  
3 ought to be willing to share that. I mean, the  
4 purpose here as I view it, and maybe even after  
5 25 years of doing this I still have a degree of  
6 idealism that remains, is to try to get to an  
7 appropriate result.

8 And if your people and the economists who are  
9 doing the work on your sides are free to talk to  
10 the parties more openly to share what they're  
11 finding, to share their data and what they're  
12 doing with our data, I think it makes it more  
13 likely that we can come to some understanding of  
14 whether what we're doing is wrong or right. I  
15 mean, sometimes you agree to disagree, there's  
16 no question. But there's a lot of ground that  
17 could be covered if there was more free flow of  
18 information from your side of the table.

19 MR. SIMONS: We're almost out of time.  
20 Does anyone have anymore comments? Yes, sir?

21 MR. HUDSPETH: Steve Hudspeth, Coudert  
22 Brother. I had a question on translations, and  
23 I must say my recent experience has been you  
24 have been pretty good about dealing with that  
25 issue. We did have one situation in the past,

1 we took up every translator available in the  
2 free-lance base in the entire city. It is a  
3 problem, and obviously there's no document that  
4 we are going to turn over to you that we haven't  
5 already gone over ourselves with people who  
6 speak the language, who read it or have it  
7 translated ourselves. But doing the translation  
8 orally with somebody versus having it done in  
9 written form is a very different process and  
10 extremely tedious when it's done in the written  
11 format.

12 If it is possible even for us to provide  
13 independent people that will do translation of  
14 you sitting there and reading the document to  
15 you so you can decide as we have it's  
16 meaningless, put it aside, let's not get a  
17 written translation and focus on translating the  
18 ones that are serious and we need to be looking  
19 at would be very helpful.

20 MR. SIMONS: I want to thank you all for  
21 coming. The suggestions were really very well  
22 thought out and we really do appreciate your  
23 time and effort.

24 MR. ROONEY: We would particularly like to  
25 thank the FTC for making themselves available

1 for a very useful session.

2 MR. SIMONS: Please, if you have additional  
3 comments, get them to us in whatever form is  
4 convenient to you.

5 (Time noted: 1:32 p.m.)

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C E R T I F I C A T I O N   O F   R E P O R T E R  
CASE TITLE:   WORKSHOP ON BEST PRACTICES FOR MERGER  
INVESTIGATIONS

DEPOSITION DATE:   June 12, 2002

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

DATED: JUNE 13, 2002

\_\_\_\_\_  
STEFANIE GERBER