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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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HYPERLAW, INC.,
Plaintiff,

WEST PUBLISHING COMPANY,
Defendant.
-----x

94 Civ. 589

January 27, 1997

10 a.m.

10 Before:
11 HON. JOHN S. MARTIN,
12 District Judge

13 APPEARANCES

14 LAW OFFICES OF PAUL RUSKIN

15 Attorney for Plaintiff

BY: PAUL J. RUSKIN

16 CARL HARTMANN

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(Case called)

MR. HARTMANN: Your Honor, Carl Hartmann for
hyper law.

May I inquire?

THE COURT: Good.

MR. HARTMANN: May I examine from here, your
Honor?

THE COURT: Sure.

MR. HARTMANN: At this time, the plaintiff would
waive its opening argument.

MR. RITTINGER: I have a motion, your Honor. I
assume that plaintiff is now announced that he is ready for
trial.

THE COURT: Correct.

MR. RITTINGER: Your Honor, if I can take one
minute to set the motion up. I think we would save some
valuable time as a result of waiving the jury.

What West objects to in this case, and in other
cases, is piracy. It is always cheaper, as has been so many
times, to copy than to create.

Now, if your Honor looks at the Feist decision,
before the Feist decision I don't think there is any
question that the sweat-of-the-brow theory would give

1 copyright protection to the compilations at issue here
2 simply because of the sweat of the brow. But, of course,
3 the sweat of the brow is not mutually exclusive to
4 creativity and originality. But when you look at what the
5 Supreme Court said in Feist it's true that it really was a
6 false pretext that copyright could be based on sweat of the
7 brow.

8 But in doing that it said a couple of things that
9 are very important to the issues in this case. The first
10 thing that it said was it recognized that piracy and copying
11 was not a good thing and it talked about the modicum of
12 creativity that was necessary. And it said things like a
13 minimal amount, a slight amount, a modicum, a modicum no
14 matter how humble, how crude, how obvious, all of those
15 things that really have not been an issue in this case
16 before your Honor with respect to star pagination.

17 And it said something else and that is what
18 relates to our motion.

19 It also said that we are not even saying that
20 there isn't room for protection of what has happened even in
21 this case, under the Feist case, under circumstances that
22 will be called upon another day to decide, and that is
23 deciding on an unfair competition basis whether or not
24 someone can or cannot do wholesale copying. But of course,
25 your Honor, Mr. Sugarman and Hyperlaw have been very careful

1 throughout this entire case to always say that we do not
2 want to engage in wholesale copying except for star
3 pagination which, again, is not an issue before your Honor
4 right now.

5 Now, I don't know, and I don't really have to
6 know, whether this is a strategy designed to attempt to get
7 a decision on the compilations that are at issue in this
8 case and still not appear to be a pirate or if he really
9 means what he says and he doesn't really have any intention
10 of wholesale copying. But if you now take a look at the
11 Feist decision and you look at it in the context of the
12 fair-use defense, which is also an issue in this case, and
13 the Supreme Court in Feist, first of all, says, no sweat of
14 the brow. But it also says but the creativity doesn't have
15 to be much.

16 Well, how do you protect then in a situation
17 where the creativity isn't much? You turn to fair use. And
18 the fair-use factors are right there to protect the more
19 thin, if you will, copyright protection that a factual
20 compilation might be entitled to as opposed to a 750-page
21 novel. But the way you protect against an abuse of a
22 copyright is by the application of the fair-use defense once
23 you find that modicum of creativity.

24 Now, I now turn that to what I am talking about
25 today. Your Honor will recall that at the pretrial

1 conference on Wednesday at the end of the conference I
2 brought up the fact that at the justiciability hearing,
3 which was a justiciability hearing for purposes of deciding
4 whether or not there was a controversy sufficient for this
5 case to go forward.

6 We all know that the court is not in the business
7 of giving advisory opinions and we all know what the
8 requirements are for justiciability. I might not be able to
9 pronounce it well -- justiciability. And with respect to
10 star pagination, there was, based upon the product that
11 Mr. Sugarman was going to sell, a justiciability controversy
12 because he intended to star paginate his entire product. We
13 object to that. Your Honor found against us and we are
14 going to the Second Circuit and time will tell.

15 But what about what is left in this case? What
16 has he said about that? What he said at the justiciability
17 hearing, and what he has really said regularly and
18 consistently throughout this case, is that I only have a
19 present intention of doing two things. One is I want to be
20 able to make an intermediate copy and copy approximately 1
21 to 2 percent of the cases that I can't get or I have been
22 unable to get for whatever reason from the Circuit Courts of
23 Appeals that appear in your advance sheets. That is number
24 one.

25 And let's go back to Feist. It may very well be

1 an infringement of our copyright for him to copy even that 1
2 or 2 percent if it includes our protected compilations,
3 those four compilations that are at issue in this case.

4 THE COURT: Well, let me interrupt you for a
5 minute because I am not sure this is a compilation case.

6 MR. RITTINGER: I definitely think it's a
7 compilation case. It's both. We have four compilations.

8 THE COURT: Let me tell you what I think. I
9 think the compilation issue was raised in connection with
10 the star pagination but what we are getting to right now is
11 the copying of individual cases, cases authored by judges of
12 various courts, and it seems to me that is really what is at
13 issue in this part of the trial. All they are doing is
14 copying cases that were authored by some judge out of your
15 various reports.

16 MR. RITTINGER: What they want to copy, and it
17 depends on what you listen to and when, but the most they
18 want to copy is your decision with our enhancements in that
19 decision and our enhancements are a compilation. We have a
20 compilation, for example, of all of the cites, every single
21 case that has ever been cited by the Court of Appeals from
22 whenever this case begins until today.

23 We have taken those cases and we have looked at
24 them and we have made sure, number one, that those cases
25 conform with the digest title that we originally gave to

1 that case before it was cited in the case that we are
2 looking at.

3 Then, number 2, we look at it to see that it
4 conforms with the way we want it to be cited and if it's not
5 we change it.

6 Then, number 3, we make a judgment. We say is
7 that cite good enough for our readers? And we have
8 unfortunately, and I hope you don't have to find out because
9 I think it's moot, but we have boxes of guidelines that tell
10 the various attorney editors at West, which have been based
11 upon decisions over the years as to what should be cited,
12 what additional cites should be added to cites, what cites
13 should be deleted, what cites are more permanent than other
14 cites, so it will take one cite out and put another cite in.

15 All of these things, your Honor, and let me just
16 jump ahead to something that I think was said at the
17 November 22 summary judgment motion. Your Honor said, and
18 this subject really only came up very briefly at that
19 argument, but your Honor said that you didn't think cleaning
20 up the cites added much of substantial value to your
21 decision. And I say two things to that, your Honor.

22 First of all, I think factually if we get to it
23 you will see that we do much more than just clean up a cite.
24 But even probably cleaning up a cite may very well be a
25 modicum. It may be humble. It may be crude, and it may be

1 obvious, but that is all we have to do. But even more
2 important for purposes of what we are talking about when we
3 talk about copying the cases, it doesn't matter whether we
4 have added anything substantial to your opinion. I am sure
5 that you don't think that because we had a paralegal cite or
6 an alternative cite or we make a correction because you
7 miscited a statute that you think we have changed the
8 substance of an opinion that we spent days working on. But
9 that is not the test.

10 I don't think Shakespeare would think that
11 whoever wrote West Side Story really added a lot of
12 creativity too. It's a different degree. But you don't
13 look at it on the basis of the final product. You look at
14 it on the basis --

15 THE COURT: I never heard anybody sing one of my
16 opinions.

17 MR. RITTINGER: Well, it may be a bad example and
18 I am hoisted on my own petard on that. The point is this:
19 It's not looking as to whether or not we make any
20 substantial contribution to the previous public domain work,
21 it's looked at on the other end as to whether or not there
22 is any modicum, humble, crude, obvious, slight, minimal
23 creativity or judgment and it is beyond peradventure, we
24 submit, although we are jumping ahead at where the motion
25 is, it's beyond peradventure --

1 THE COURT: Let's get back to where the motion
2 is.

3 MR. RITTINGER: Where the motion is, your Honor,
4 that is what this case is about. This case is about whether
5 or not that is or is not sufficient under the Feist
6 standards, and I might say not only the Feist standards but
7 because equity does really follow the law, I really believe
8 that, what the Second Circuit has done regularly and
9 consistently since Feist and that is find that modicum of
10 creativity.

11 It's very easy for somebody to stand up and say
12 that is crude, that is humble. But we thought of it first.
13 And somebody had to do it and it wasn't just saying, okay,
14 every single name in town in alphabetical order. It's more
15 than that. It's more than that on the file lines.

16 I will get back to my motion.

17 THE COURT: We are going to have a trial. You
18 are summing up. Let's move on.

19 MR. RITTINGER: I am summing up for this reason,
20 your Honor: Because there really is no need to sum up. If
21 all he is going to do is take 1 or 2 percent, which is all
22 he said he is going to do, or all he is going to do is use
23 our Court of Appeals' decisions for purposes of getting the
24 names of counsel that he cannot get out of two circuits,
25 then, as I said on Wednesday, I say again, we deem that to

1 be a fair use because we understand that we are not dealing
2 with West Side Story here. We are dealing with something
3 that has a thinner copyright than a West Side Story has.

4 But if he gets on the stand and he tries to say
5 that he is going to do something in the form of wholesale
6 copying, then we do object to that and we don't want him to
7 do that. But that is not a justiciable controversy in this
8 case.

9 So I submit, your Honor, and we have a brief and
10 a motion that we would like to file, that there is no longer
11 a justiciable controversy, and I would point out going back
12 to the conference, when we raised this at the conference,
13 you could see the scrambling start.

14 I don't think you have to have 20-20 vision or be
15 a rocket scientist to see what is going on here. I believe
16 what they want to do is they want to come into this
17 courtroom, act like they are not going to copy much, get a
18 declaration which they think they are going to get from your
19 Honor, but which we think they won't, and once they get the
20 declaration to go out and do the wholesale copying. That is
21 what I think they are trying to do. But they are not
22 entitled to do that. They are only entitled to do what they
23 have testified regularly and consistently under oath that
24 they have a present intention of doing and that is two
25 things that I now, on behalf of West, say go ahead and do

1 it.

2 May I hand up the brief and the motion papers,
3 your Honor?

4 THE COURT: Surely.

5 MR. RITTINGER: Your Honor, there is attached to
6 the motion papers Mr. Sugarman's testimony at the
7 justiciability hearing, as well as a letter that I received
8 from I think Mr. Ruskin which after said, "remember, your
9 Honor said go out and try to stipulate," and he said, "I am
10 not interested in trying to stipulate any settlement with
11 you but I will take admissions." I think that shows what is
12 really involved in this case, your Honor.

13 THE COURT: I will reserve decision on that
14 motion and allow Hyperlaw's counsel to respond in connection
15 with any post trial briefing.

16 MR. HARTMANN: Your Honor, before we begin, may I
17 make one response? I just simply --

18 THE COURT: Do you want me to rule now?

19 MR. HARTMANN: No.

20 THE COURT: Let's proceed.

21 MR. RITTINGER: We have a pretrial brief we would
22 like to hand up as well, your Honor.

23 THE COURT: Sure. Actually it's a mid-trial
24 brief.

25 MR. RITTINGER: You are thinking a lot faster.

1 THE COURT: Proceed.

2 MR. RITTINGER: I can deem that as an opening,
3 your Honor.

4 THE COURT: It sounded more like a summation but
5 I will take it as an opening.

6 MR. HARTMANN: Your Honor, I would like to call
7 Ms. Donna Bergsgaard as our first witness please.

8 DONNA BERGSGAARD,

9 called as a witness by the Plaintiff,

10 having been duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. HARTMANN:

13 Q. What is your position at West?

14 A. I am the manager of the manuscript department.

15 Q. Are you an attorney?

16 A. Yes, I am.

17 MR. HARTMANN: Your Honor, we prepared binders of
18 exhibits which your Honor has.

19 May I approach the witness?

20 THE COURT: Sure.

21 Q. Ms. Bergsgaard, I am providing you with two
22 binders, one of them labeled Plaintiff Hyperlaw's Trial
23 Exhibits 1 through 7 and the second is --

24 THE COURT: It looks like another case in which I
25 should have required the filing of an environmental impact

1 statement.

2 MR. HARTMANN: That is all our exhibits, your
3 Honor.

4 Q. Ms. Bergsgaard, if you would please in the
5 exhibits turn to Exhibit number 41. Would you look at the
6 exhibit please, particularly the first two or three pages.

7 Do you recognize this as the redacted version of
8 Feist versus Real Telephone that you were examined on in
9 your deposition?

10 A. It appears to be.

11 Q. Now, when West received the Feist decision from
12 the Supreme Court, in what ways could West have gotten that
13 from the Supreme Court?

14 A. West receives the slip copy as it was filed by
15 the court. We would have received it in electronic form and
16 also in the journal copy, which is the slip copy of the
17 Supreme Court.

18 Q. And when you say you received it in electronic
19 form, does that mean you downloaded from the Supreme Court's
20 Hermes' system?

21 A. That is correct.

22 Q. And the Supreme Court Hermes' system is just
23 briefly what?

24 A. That is a project that allows the court to
25 electronically transmit opinions to different courts and I

1 believe now that they have their own bulletin board or will
2 be having their own bulletin board very soon. But at this
3 point it was project Hermes.

4 Q. Whose employees provided that information up on
5 Hermes? Where did the information that was on Hermes come
6 from?

7 A. The clerk of the Supreme Court I believe loads it
8 to the computer in the program called Project Hermes for
9 distribution.

10 Q. If you look, certain materials are redacted out
11 of West case report, is that correct?

12 A. Yes.

13 Q. And, for instance, the headnotes don't appear.

14 A. That is correct.

15 Q. No West topic numbers or cross references, is
16 that correct?

17 A. That is correct.

18 Q. Now, with regard to just the document that sits
19 in front of you, in other words, leaving out West's
20 headnotes and its top key numbered topics, is there anything
21 in this decision as it sits here that West says that it has
22 authored?

23 A. Well --

24 MR. RITTINGER: I object to the form of the
25 question, your Honor.

1 THE COURT: Overruled.

2 Q. You may answer, ma'am.

3 A. When we receive the opinion from the slip opinion
4 as it was filed by the Supreme Court, we do quite a bit of
5 changing, adding, modifying and deleting information from
6 the slip opinion to create our case report. And we have
7 done that in this situation.

8 Q. Let me ask the question again just so we are
9 clear.

10 Is there anything in here that West has authored?

11 MR. RITTINGER: Asked and answered, your Honor.

12 THE COURT: Overruled.

13 A. Well, we can take a look at the dead copy which
14 speaks for itself, but we would be the author of expanding
15 citations. We look at every citation that is in the opinion
16 and we expand upon those citations. We create the caption
17 of the case and indicate how that is going to be cited. We
18 have authored or I should say we have compiled the attorney
19 summary in this particular case. The attorneys come in on a
20 different listing. They are not available on the slip
21 opinion. And we compile that attorney summary and get
22 information from other sources to add to our summary.

23 Q. Do you author the attorneys names?

24 A. No, we don't author it but we do compile the
25 attorney information and add information to it from other

1 sources.

2 Q. Well, when you say you compiled information,
3 where do the attorneys' names come from that you compile?

4 A. Well, for the Supreme Court the attorneys are
5 listed on what the court calls a docket sheet or the order
6 list that lists all of the cases that are going to be argued
7 before the Supreme Court on that particular day. And what
8 we do then is use that as the basis for our attorneys'
9 summary. It may be a year or two later before the Supreme
10 Court comes out with its decision but yet we take it from
11 that order list. We save it and then we begin to merge it
12 in with our case report when the case has been decided. So
13 from that we have to delete information that was on the
14 docket sheet and we look up and add the city names. We
15 remove some of the language that the court had in the docket
16 sheet as far as those attorneys go. So we do --

17 THE COURT: Such as?

18 THE WITNESS: They have argued. They have the
19 caption of the case. They have the docket number of the
20 case so we do some changes. And I have exhibits of those
21 available that I could talk about.

22 Q. My question again, so we are clear, is whether
23 you received that text from the court, the names of the
24 attorneys. Did you receive it in a document from the court?

25 A. Yes, it comes on a docket sheet.

1 Q. And you physically cut up that sheet and paste
2 the attorneys' names on another sheet, isn't that correct?

3 A. That is correct.

4 Q. And there is no question that those names that
5 you are cutting up and pasting onto a sheet is prepared by
6 the U.S. government, is there, the names themselves?

7 A. The names come from the docket sheet.

8 Q. And you never add attorneys that aren't listed on
9 the court docket sheet, do you?

10 A. Yes, we do.

11 Q. When do you do that?

12 A. We would do that when we receive a call from an
13 attorney and they would indicate that they had been party to
14 the case. Maybe their name was not on a docket sheet or it
15 wasn't listed in a card so we do get information for our
16 attorney summaries from the attorneys themselves.

17 Q. And when that information comes from the
18 attorneys, would you put that into the published case
19 without checking with the court?

20 A. We do in certain circuits, yes.

21 Q. I am talking about the Supreme Court.

22 A. The Supreme Court, yes, we would. I think for
23 the Supreme Court we would do that. They also have
24 additional listings that we choose not to put into our case
25 report and those are all the attorneys on the brief. They

1 are available in the U.S. reports and also we put them on
2 our Westlaw but we don't choose to compile them in our
3 attorney summaries for print. So there are other names.

4 Q. And those names are called in to you by the
5 attorneys?

6 A. The attorney brief names are on the briefs.

7 Q. So you get the attorney brief names from there.
8 You get the attorney names from the court and sometimes
9 other attorneys call --

10 THE COURT: Let's not sum up.

11 MR. HARTMANN: I am sorry.

12 Q. When you get these attorney names, do you ever
13 delete names of parties that were put there by the court?

14 A. We are just going to talk about the Supreme Court
15 in this instance?

16 Q. Yes.

17 A. These would be the attorneys that argued the
18 case. I don't recall offhand whether we have deleted it.
19 It happens quite frequently in the Court of Appeals. I
20 don't recall instances where somebody maybe was deleted
21 because perhaps they don't do the argument. That could
22 happen but the dead copy would show that.

23 Q. Can you tell which things West did or didn't do
24 to the attorney names by looking at this copy?

25 A. I can, yes.

1 Q. Well, could a reasonable person, someone who
2 hadn't prepared this?

3 MR. RITTINGER: Your Honor --

4 THE COURT: Sustained.

5 Q. How can you tell, ma'am?

6 A. We add in the city and the state for the
7 attorneys that does not appear in the copy.

8 Q. Can you tell whether these names have been
9 changed since they were given to you by the court by looking
10 at it?

11 A. You would look at the dead copy.

12 THE COURT: Where do you get the city and state
13 from?

14 THE WITNESS: We look it up on the West Legal
15 Directory or in other Bar Association journals, Bar journals
16 and telephone directories.

17 Q. Do you look it up in Martindale-Hubbell?

18 A. No.

19 Q. Did you used to?

20 A. We used to use Martindale-Hubbell, yes.

21 Q. When did you stop using them?

22 A. It was a few years ago when West Legal Directory
23 was made more complete and we decided to use our own
24 product.

25 Q. At the time you testified in your deposition were

1 you still using Martindale-Hubbell?

2 A. I don't believe we were at that point. We had
3 still some old sets around in the building. We hadn't been
4 updating them, and we may still have some of our older
5 Martindale-Hubbell sets around. But generally we use West
6 Legal Directory to find the source of attorneys.

7 Q. Now, if you look back at Exhibit 41 for a second,
8 in the first page of it, which is page 1282, and I would
9 like to go through these things one by one and ask you about
10 authorship. In the part that says "Feist Publications" down
11 to the word "Inc.," "Company, Inc.," does West author the
12 names of the parties in the case, a Supreme Court case?

13 A. In this instance we didn't do editing. Sometimes
14 we do editing of captions. In this case we didn't. But our
15 capitalization is unique to West and the capitalization to
16 us indicates to our readers what we believe the title of the
17 case will be for citing and the capitalization here would be
18 something that West chose to put in and how we are going to
19 caption this case.

20 THE COURT: What do you mean the capitalization?

21 THE WITNESS: This is not a very good example,
22 your Honor, but in long captions West chooses what will be
23 in capital letters and that will be what the case is going
24 to be. This one isn't a very good example but I have others
25 that I can show you later.

1 THE COURT: This is --

2 THE WITNESS: Both the titles here happen to be
3 capitalized by West and that will be its title. I don't
4 know if there is a better example to show you what I am
5 talking about but I do have it.

6 THE COURT: That will do.

7 MR. RITTINGER: Your Honor, the only thing I am
8 thinking is it's going to be very painful to have to go over
9 this in direct testimony in our case. If you want we can
10 try to pull out exhibits now to show you those.

11 THE COURT: Let's let counsel conduct his own
12 examination.

13 Q. So is there anything else that West does to the
14 names of the parties in Supreme Court decisions that you
15 would consider authorship by West?

16 MR. RITTINGER: I object to the form of the
17 question, your Honor.

18 THE COURT: Overruled.

19 A. Well, we would have to look at all the dead copy.
20 We do some editing to the court captions as you will see
21 later on. In this particular case we could look at dead
22 copy, but I believe that we probably did not do any further
23 editing to this other than our characterization of the
24 caption.

25 Q. How about to other cases, just generally to the

1 Supreme Court, what other things do you do to the names of
2 parties?

3 A. Well, I would have to take a look at all of the
4 examples but, as I said, we characterize the parties. We
5 actually use a compilation of titles. There is a title that
6 appears on the order list. There is a title that appears
7 for the case on the syllabus that comes from the court and
8 one that comes from the slip opinion. They are all slightly
9 different, and we use a compilation of those titles to get
10 the full names of the parties, as well as their position
11 like petitioner or appellant. So it's more of a compilation
12 of the titling.

13 Q. Alright.

14 Now, is there anything else you would do to the
15 names of parties?

16 A. If we are limiting it just to the Supreme Court
17 case, there may be other things that I can't think of right
18 now, but I think I have answered your question.

19 Q. Take a second. If there is anything else that
20 you do to the names of parties we would like to know it.

21 A. Well, if I can speak generally --

22 Q. About Supreme Court cases, certainly.

23 A. I think we do more titling to federal circuit --

24 THE COURT: Talk about the Supreme Court please.

25 THE WITNESS: I can't think of anything else.

1 There might be, but right here on the stand I can't think of
2 anything else.

3 Q. If you take a moment, do you think that you can
4 remember anything else?

5 A. Well, we publish more than 65,000 cases a year,
6 so I think I have answered your question. I have nothing
7 more to add.

8 THE COURT: Let's move on.

9 MR. HARTMANN: Certainly, your Honor.

10 Q. If you now look at the line below Rule Telephone
11 Service Company, Inc., where it says No. 89-1809, can you
12 tell me what that is?

13 A. That is the court's docket number.

14 Q. Where does West get that?

15 A. We get that from the slip copy.

16 Q. And that is prepared by the court and sent to
17 you?

18 A. It appears on the slip copy, yes.

19 Q. And how does West get that out of the slip copy?

20 A. We cut and paste it from the slip copy and we
21 style it. We put "NO" period, that is our style, and we put
22 a period at the end and we rearrange it. The caption
23 portion is all rearranged according to West's style and we
24 place that directly below our caption of the case.

25 Q. Does West claim that doing that to the docket

1 number reflects originality or authorship?

2 THE COURT: Let's let her answer factual
3 questions. Mr. Rittinger will tell you what the arguments
4 are.

5 Q. If you look down below that to the two lines that
6 start with "argued and decided," argued January 9, 1981 --
7 '91, excuse me, Cite decided March 27, '91, where does West
8 get these?

9 A. The dates appear on the slip opinion but not in
10 this exact form. West has chosen to publish both the
11 "argued" and the "decided" date and we put them in the style
12 and the format with the abbreviations that we have chosen to
13 use.

14 THE COURT: Does the "argued" and "decided" date
15 appear on the Supreme Court slip opinion?

16 THE WITNESS: Yes, it does, your Honor.

17 THE COURT: You have chosen to do exactly what
18 the Supreme Court does.

19 THE WITNESS: In this instance we have. Not all
20 of the dates appear on slip copy.

21 Q. Now, if you would turn over two pages please to
22 1284 and you see a section that says "syllabus."

23 A. Yes.

24 Q. Can you tell me where West publishing obtains the
25 syllabus of a case?

1 A. The syllabus is prepared by the Reporter
2 Decisions Office for the Supreme Court and is attached as
3 kind of a front matter to the slip opinion.

4 Q. Once again has West decided to arrange it in the
5 same manner by putting it at the front of theirs as an
6 editorial decision of West?

7 MR. RITTINGER: Objection to the form of the
8 question.

9 THE COURT: Sustained.

10 Q. Does West ever make any changes to the syllabus
11 of the court?

12 A. We do make one change, yes.

13 Q. What is that?

14 A. Actually we make two changes. We add the
15 footnote to the syllabus, as you see the star from the
16 syllabus dropping down to the footnote. That is not the way
17 it appears in the slip copy and we remove a portion --

18 THE COURT: How does it appear in the slip copy?

19 THE WITNESS: In the slip copy it appears as a
20 note that comes before the syllabus and before the Supreme
21 Court caption and, again, I would have an example of that.
22 The footnote has other information in it that we do not
23 believe that is of value to our readers so we remove a
24 couple of sentences from the footnote.

25 Q. But the language that is in the footnote is

1 exactly as it appears in the Supreme Court Reporter or in
2 the slip opinion from the court rather?

3 A. It is not exactly the same. We have modified the
4 note.

5 Q. I am not asking that. I am sorry.

6 The language there, is it taken verbatim from the
7 government?

8 A. No, it is not.

9 Q. So the phrase "The syllabus constitutes no part
10 of the opinion of the court" doesn't appear on the Supreme
11 Court version?

12 A. That does but you asked me whether it was
13 verbatim.

14 THE COURT: What has been changed?

15 THE WITNESS: We have deleted a sentence and we
16 have also added parallel citations to that cite. We
17 expanded the citation.

18 Q. Except for the citation is the language there
19 taken out of the Supreme Court docket?

20 A. Yes, after we have modified and added, expanded
21 it, yes.

22 Q. Now, the actual syllabus itself, the text that
23 occurs in the syllabus, are there any changes made to that
24 by West?

25 A. Yes.

1 Q. What would that be please?

2 A. Well, we add the cross references. If you notice
3 on page 1285 under the word held we have added pages 1287 to
4 1297 so our readers will be able to find the holding of the
5 court, and we have done that throughout the syllabus. We
6 also verify the syllabus for the citations and we would add
7 any parallel citations to that as we determined to.

8 Q. Where you say you have added that parallel
9 reference to parallel citation, is there any way that a
10 reader is informed that that is an addition of West?

11 MR. RITTINGER: Objection.

12 THE COURT: Sustained.

13 Q. Does West do anything else to the syllabus of the
14 opinion?

15 A. No, I think that is probably all we do to it.

16 Q. And at the end of the syllabus it says, "916 F.2d
17 718, see 8/10/1980 reversed." Where does that come from?

18 A. That generally the Court Report of Decisions has
19 included that as the lower court reference. Sometimes it's
20 not complete or the cite isn't available. We will add
21 parallels to that and check that cite but generally that is
22 coming right on the copy.

23 Q. Does West do anything either in the text or
24 anywhere else in the book to identify what changes it makes?

25 MR. RITTINGER: Objection.

1 THE COURT: Sustained.

2 Q. Down below that you will see that on 1285 at the
3 bottom you see something O'Connor J. delivered the opinion
4 of the court in which Rehnquist, White, Marshal, so on,
5 concurred in the judgment. Could you tell me where that
6 text came from?

7 A. The judge's listing is on the slip opinion and we
8 do style it, however, into our own style with the
9 abbreviations and the capitalization.

10 Q. What kind of changes does West make?

11 A. I would have to look at the dead copy of it. In
12 the listing in the Supreme Court they have their judges
13 listed in a couple of different places. It is our style to
14 indicate that the Chief Judge is a capital C period, capital
15 J period always listed first, and the other judges have the
16 abbreviation JJ after them.

17 Q. Does West make any other changes to the name of
18 the judges?

19 A. Other than the styling of it and the
20 capitalization, that would be our normal procedure.

21 Q. And, again, is the way that West does this is
22 that they receive a document from the court and they
23 physically cut it out and they paste it onto their own copy
24 sheet?

25 A. Well, that is only one of the things we do but,

1 sure, we do rearrange it in the order that we want the
2 attorneys to appear or the judge line to appear in. It
3 doesn't appear in this exact format in the slip opinion.
4 So, yes, we do have to cut it out and put it and rearrange
5 it in the order and then we have our preparers going through
6 preparing and styling the information, compiling it
7 according to our editorial instructions. And the dead copy
8 would show you that very clearly.

9 Q. And do you ever add names of judges or take any
10 judges names out?

11 A. No, we wouldn't.

12 Q. How about the phrase "concurring in the judgment,"
13 is that taken out of the Supreme Court's original document?

14 A. I believe that it is. I would have to look at
15 dead copy on that one. There are some instances where we do
16 characterize and add in whether it was concurring or
17 dissenting. I don't remember in this particular case. We
18 would have to look at the dead copy.

19 Q. Now, down below that on 1286, you have the names
20 of the attorneys, is that correct?

21 A. That is correct.

22 Q. And although we have touched on it, once again,
23 West gets those --

24 THE COURT: We have had that.

25 Let's move on.

1 Q. Now starting from the phrase "Justice O'Connor",
2 from there to the end of this case, which would be at page
3 1297, can you tell me whether West changes the text?

4 A. Yes.

5 Q. Could you tell me any ways that West changes the
6 text of Supreme Court opinions?

7 MR. RITTINGER: Your Honor, it would be much more
8 probative if he just showed her the dead copy which he has.

9 THE COURT: Objection overruled.

10 A. I am sorry, could you ask the question again?

11 Q. Sure.

12 Could you tell me from the words Justice O'Connor
13 through to the end of the case what changes West has made?

14 A. The dead copy would definitely be of help and
15 speak for itself, but I can tell you generally what we have
16 done.

17 Q. Can you tell me what all the changes are that
18 were made?

19 A. I can try. Do you want me to do that and tell
20 you what we have done here in this case?

21 THE COURT: Yes.

22 Q. Certainly.

23 A. We would have, first of all, checked every
24 citation, the court citation that the court referred to, and
25 we have added or chosen to add in and expand the court cite

1 with parallel citations to the Supreme Court Reporter and to
2 the Lawyers Co-op Edition. We would also have checked the
3 statute citations and called -- well, we would have either
4 changed them or called the court and notified them of the
5 change.

6 Q. Any other change?

7 A. We may have added in some alternative citations.
8 I am just going to scan through here. Alternative citations
9 would be something where the court had used a slip opinion
10 number and we would have deleted that and added in a full
11 citation of a case. So there might be an alternative cite.
12 There would be parallel cites we would have added.

13 Q. When you say you add parallel cites, where do you
14 get those from?

15 A. We have decided what parallels we think would be
16 best for our readers to use and we do that based on the
17 National Reporter System is a comprehensive set and we want
18 the people to be able to use one unit and go freely into the
19 other unit so we do want to have the National Reporter
20 System cite used as a parallel. But there are other
21 parallels, as well as in the Supreme Court we have chosen to
22 use the Lawyers Co-op edition.

23 THE COURT: Is that also called for in the
24 uniform system of citations that are generally used by
25 lawyers, those two parallel cites?

1 THE WITNESS: In the blue book, your Honor, I
2 don't know.

3 There are perhaps more than 20 different
4 locations of a Supreme Court case now so there would be many
5 different choices that we could make when we select what
6 parallels we want to put in. We have chosen those two
7 because we think it would help the reader.

8 Now, as far as where we get those from, we have a
9 library at West, as well as using our Insta-Cite system, the
10 in-house version of the system.

11 Q. So you look them up somewhere?

12 A. Yes, we do.

13 Q. Go ahead. Any other changes you made?

14 A. Well, we also add the extension pages again to
15 help. When the court is referring to a particular point at
16 471 U.S. at 556, for example, we do add the extension page
17 where that issue can be found in the Supreme Court Reporter
18 to help our readers again find or quickly locate that issue
19 of law. And we do that because we want to have an
20 integrated comprehensive research system.

21 Q. And where do you get that information?

22 A. We either look it up if it's not available. We
23 have attorney editors reading the point of law and finding
24 out what that extension page should be.

25 Q. When you say "look it up," where do you look it

1 up?

2 A. You have to read the case and then read the
3 source and find out where it's being cited, what the
4 proposition of law that is being cited is and then add that
5 page to the citation.

6 Q. But you are going to look it up in another set of
7 books or on a computer program?

8 A. You would look it up at the source, yes.

9 Q. And talking about adding and taking out cites, is
10 another change that West makes to remove cites of certain
11 competitors, for instance, LEXIS cites or U.S. Law Week
12 cites?

13 A. We do choose to delete citations from court
14 decisions, yes. When we view that the citation is a
15 temporary cite or just simply a cite or a slip opinion cite
16 or a cite that is not widely known or available to our
17 readers we will use an alternative cite. So we will delete
18 the cite that the court used in the opinion and add in a
19 citation that we believe would be of more use to our
20 readers.

21 Q. And you always remove LEXIS and you always remove
22 U.S. Law Week, is that correct?

23 A. No.

24 Q. When do you not?

25 A. There are situations where we leave a LEXIS cite

1 in.

2 Q. What would such a situation be?

3 A. Well, one offhand would be where LEXIS was the
4 only source or LEXIS is referring to something that there
5 was no other parallel cite to or another instance, we leave
6 LEXIS in and add a Westlaw cite when there is no printed
7 source for it.

8 Q. And are there any other changes that you make to
9 the text of the Supreme Court decision?

10 A. With regard to the citations we change, we add,
11 we modify, delete, and we can talk about that more later on
12 with more examples, but that is basically what we do.

13 Q. And sometimes when you change cites, do you call
14 and check with the court?

15 A. Yes. Once in a while we will certainly. It may
16 be that the judge has a volume and a page number that
17 doesn't go at all with the title and we read both opinions
18 and it's clear to us that the court is missing a line.
19 Maybe the court intended to cite both cases. And then we
20 would contact the court out of a matter of professional
21 courtesy.

22 We have the greatest respect for the judiciary.
23 We want the opinions to be correct and we would call them
24 and bring that to their attention.

25 Q. And would they sometimes tell you in response to

1 such a call that it was okay to make the change that you are
2 asking about?

3 A. Yes, they may.

4 Q. Are there some times they might tell you not to
5 make the change you are asking about?

6 A. Once in a while on a statute citation we may have
7 misinterpreted the statute and we were wrong, so, yes, they
8 may tell us, no, you don't have that one correct.

9 I was going to add that there are many other
10 changes that we make to citations where we don't call the
11 court.

12 Q. And if you call the court and ask about a change
13 and they told you not to, you would never put it in, would
14 you?

15 A. We may add it in brackets, but I don't know that
16 that situation has come up. I don't recall a situation like
17 that. Our intent is to make a very accurate report and I
18 don't remember that situation coming up, but sometimes we do
19 add things in brackets if there is a difference.

20 Q. When you say your intent is to make a very
21 accurate report, what exactly do you mean?

22 A. We want our reporting to be accurate. We want it
23 to be very usable to all of our readers and we don't want
24 errors. We want it to be very easy to use.

25 Q. You just used accurate to redefine accurate.

1 When you say --

2 THE COURT: Let's move on.

3 MR. HARTMANN: Thank you, your Honor.

4 Q. Did you make any other changes?

5 A. Are we just talking about the Feist case?

6 Q. No, we can use the Feist case but also if you
7 know other changes.

8 THE COURT: Supreme Court cases.

9 Q. Supreme Court cases.

10 A. There are situations where there are dissents
11 that come in on separate slip opinions which we then have
12 combined with the opinion, and the reverse happens in the
13 Supreme Court where we choose to publish the dissents
14 separately if they go to two or more cases and then we will
15 publish them "precede" and "follow". So there is a
16 combination of putting the "concur" and "dissents"
17 together. There may be some instances also where we would
18 add a file line if there had been a rehearing which is
19 not -- it's fairly rare, but there are occasionally
20 rehearings in the Supreme Court and we would add that
21 information as a file line.

22 Q. Where would you get that information?

23 A. That information would come on the order list
24 from the court.

25 Q. So you would take it directly off a document from

1 the court?

2 A. We would find it on the document. We would
3 research it to find out what case that was referring to and
4 then we would style it, write the file line and add it to
5 our court caption.

6 Q. Would you ever change the file line?

7 MR. RITTINGER: Objection.

8 THE COURT: Overruled.

9 A. The file line does not exist anywhere. It's
10 something that West creates. We are just getting
11 information off of an order sheet.

12 Q. Did you ever change that information?

13 A. Yes. I don't know what you mean by change it,
14 but we --

15 Q. I know you style it.

16 THE COURT: Please let her answer the question.

17 MR. HARTMANN: I am sorry, your Honor.

18 A. It may not say rehearing denied. It may say -- I
19 think in the Supreme Court what they usually do is on this
20 day, you know, these motions are denied, and then they list
21 all the cases. So we need to really create an accurate
22 representation of what was happening in that motion.

23 Q. I guess what I am saying is aside from styling
24 it, would you ever change the information you received from
25 the court?

1 MR. RITTINGER: Objection.

2 THE COURT: Sustained.

3 Q. Are there any other changes that -- let's go back
4 for a second.

5 You said that you might reorder where the
6 concurrences or dissents came. Did you say that?

7 THE COURT: She said they might where they have a
8 dissent or concurrence that applies in two cases.

9 Q. If that occurs, do you ever change the text of
10 the concurrence or the dissent?

11 A. I am not sure I understand what text means.

12 THE COURT: You do the same type of thing you do
13 to any opinion, I take it.

14 THE WITNESS: Yes.

15 THE COURT: But nothing more or less.

16 THE WITNESS: That is correct.

17 Q. Are there any other changes that you make to the
18 text, to Supreme Court decisions as you receive them from
19 the court?

20 A. Well, I think I have listed -- again, I don't
21 know that I have gone through every single change we have
22 ever made, but I think that you have an idea of the kind of
23 work that we generally do.

24 Q. I understand generally that is the case.

25 Are there any other specifics that you know of?

1 A. At this point I think I have answered the
2 question fully. To the best of my knowledge, this is the
3 kind of thing that we do.

4 Q. And are you the head of the department that does
5 this, by the way?

6 A. Yes.

7 Q. And have you testified about what this department
8 does in other proceedings, for instance, the 1988 Mead Data
9 case?

10 A. My testimony in the Mead Data case was very
11 limited actually to just the arrangement of cases that had
12 to do with one exhibit. That was all my testimony.

13 Q. But you testified as the head of that department
14 there also?

15 A. I testified as having been instrumental in
16 creating the exhibit that was introduced at that point.

17 Q. Now, are there any other changes in this specific
18 decision? Are there any other changes that West has made
19 that you haven't mentioned?

20 THE COURT: Sustained. Asked and answered.

21 Let's move on.

22 Q. If you now take a look at Exhibit 13, I am sorry.
23 And if you look at page 1 of Exhibit 14 or Exhibit 13,
24 excuse me.

25 Do you recall that Hyperlaw applied at your

1 deposition with a redacted version of the entire 1 F.3d, the
2 entire volume of 1 F.3d?

3 A. I don't remember that. I remember there were
4 some pages that were redacted. I don't remember that it was
5 the entire volume.

6 Q. Do you remember signing a set of interrogatories
7 which presented to you the redacted version of all of 1 F.3d
8 and asked what changes West made?

9 A. There were interrogatories, yes. I do remember
10 that.

11 Q. And you do --

12 A. I just don't remember if it was the entire volume
13 or not. I am sorry.

14 THE COURT: Is there any dispute about that?

15 MR. RITTINGER: I don't really know, your Honor,
16 to tell you the truth.

17 THE WITNESS: I don't think it matters.

18 MR. RITTINGER: I don't recall, your Honor. We
19 would have to look at it.

20 MR. HARTMANN: Would you like me to examine the
21 witness off the interrogatory?

22 THE COURT: You can examine the witness any way
23 you want.

24 Q. If you look at Exhibit 42 for a second. And if
25 you would look specifically at the interrogatory numbered H1

1 Int. 4, which is on page 6, and also H1 Int. 5. Do you now
2 recall that in answering these interrogatories you were
3 supplied with the complete set of 1 F.3d redacted?

4 A. Yes, it appears to be.

5 Q. And you signed these interrogatories?

6 A. Yes, I did.

7 Q. Now, when you were given or when you were asked
8 the question in your interrogatories what changes occurred
9 in 1 F.3d, did you inform Hyperlaw of that?

10 MR. RITTINGER: Your Honor, that is not the way
11 to ask the question.

12 THE COURT: Overruled.

13 A. Maybe you could repeat that question.

14 Q. Certainly.

15 When you were asked in the interrogatories that I
16 just pointed to whether you could identify what changes were
17 made in 1 F.3d, either in the full text version or in the
18 redacted version, did you do that?

19 A. Did we tell Hyperlaw?

20 Q. Yes.

21 A. The interrogatory will speak for itself. It's
22 very complicated. There are many pages here. I guess it
23 just speaks for itself.

24 Q. Well, is there anywhere in this interrogatory, no
25 matter how complicated, that sets forth the changes West

1 made?

2 A. We did not go page by page with the dead copy to
3 show you all the changes that West made but I believe that
4 was available during discovery. And that was what the
5 answer said, was that the materials for having you find that
6 out were available and I believe that is part of the
7 interrogatory answer.

8 Q. Did West ever supply Hyperlaw with anything that
9 showed all the changes that West says it made to 1 F.3d?

10 A. We supplied the dead copy during discovery.

11 Q. Does the dead copy reveal all changes that West
12 makes between the time it receives it and what goes into 1
13 F.3d?

14 A. It has all of the corrections that West would
15 make up to the advance sheet and the plate correction
16 volumes would show what was made for bound volume and those
17 were all supplied during discovery.

18 Q. The plate corrections were supplied to Hyperlaw
19 during discovery?

20 A. Absolutely.

21 Q. Do you know where or when that was?

22 A. We sent over more than 300 boxes for discovery to
23 our law firm where the discovery took place. And our
24 records show the plate corrections and dead copy for these
25 were supplied.

1 Q. Are you aware of a letter between Mr. Musilek and
2 myself that said that that was not the case?

3 MR. RITTINGER: Objection, your Honor. This is
4 not the time to argue whether or not there was or was not
5 full compliance with discovery.

6 THE COURT: It has to do with her credibility
7 whether she knows what was done.

8 Overruled.

9 Q. You can answer the question, ma'am.

10 A. I lost track. What was the question?

11 Q. Are you aware of the letters back and forth
12 between Mr. Musilek and myself in which Mr. Musilek and
13 Mr. Tostrud state --

14 MR. RITTINGER: Objection. The letters speak for
15 themselves. They are not exhibits and it's totally
16 inappropriate to be cross examining this witness on an
17 exchange of correspondence three years ago between counsel.

18 MR. HARTMANN: It is an exhibit. It's Exhibit
19 47.

20 THE COURT: Show it to her.

21 MR. RITTINGER: It hasn't been admitted, your
22 Honor.

23 THE COURT: Overruled.

24 A. I can just --

25 Q. Ma'am, if you could look at Exhibit 48.

1 A. Yes.

2 Q. Have you ever seen the June 15 letter that was
3 sent to me by Schatz, Paquin signed by Eric Tostrud dated
4 June 15?

5 A. Yes.

6 Q. You have seen that?

7 A. Yes.

8 Q. If you will, I would like you to look back at
9 Exhibit 13 please.

10 I am sorry, one other question.

11 On the plate corrections that you said you
12 produced to us, did you ever in your entire deposition with
13 me mention the existence of plate corrections?

14 MR. RITTINGER: Objection.

15 THE COURT: Sustained.

16 Q. Have you ever testified under oath previously
17 about what changes West makes and not mentioned the
18 existence of these plate corrections?

19 THE COURT: Sustained.

20 MR. HARTMANN: Thank you, your Honor.

21 Q. If you look at 13, Exhibit 13, again please.

22 Do you recognize this as a copy of the full text
23 version, the published version of Sweet Home Chapter?

24 A. Yes.

25 Q. And this is a document you were examined about

1 previously in deposition, is that correct?

2 A. That is correct.

3 Q. What I would like to do is do what we did with
4 the Supreme Court, go through this and ask what kind of
5 changes West makes.

6 MR. RITTINGER: May I do a quick voir dire if he
7 is going to be asking the witness about this document? I
8 assume he is going to introduce it into evidence.

9 THE COURT: She already said she reviewed it
10 once. Let's have him ask his questions.

11 MR. HARTMANN: Your Honor, I would like to move
12 13 into evidence please.

13 MR. RITTINGER: I would like a short voir dire,
14 your Honor.

15 THE COURT: Sure, go ahead.

16 MR. RITTINGER: Or an offer of proof as to why
17 it's coming in.

18 I will do a voir dire quick, your Honor.

19 VOIR DIRE EXAMINATION

20 BY MR. RITTINGER:

21 Q. This is the first hundred pages of 1 F.3d, is
22 that correct, that you have before you?

23 A. Yes.

24 Q. How many pages are there in the entire F.3d, and
25 I will just show it to you. Do you know?

1 A. Over 1500, 1585.

2 Q. If you wanted to be able to identify changes,
3 deletions and additions that are made, would you go to the
4 first 100 pages or would you go to the dead copy?

5 A. I would go to the dead copy.

6 Q. Now, is this exhibit representative of all of the
7 types of cases you receive from the Court of Appeals?

8 A. No.

9 Q. How many circuits are represented by this first
10 hundred pages?

11 A. Only three, the District of Columbia, First
12 Circuit, Second Circuit.

13 Q. And there are 1500 pages in 1 F.3d.

14 Do you have any estimate as to how many pages
15 there are in the entire F.3d series?

16 THE COURT: Too many, next question.

17 Q. How about the second --

18 THE COURT: Let's move on.

19 MR. RITTINGER: Your Honor, I object.

20 THE COURT: Objection overruled.

21 DIRECT EXAMINATION (Continued)

22 BY MR. HARTMANN:

23 Q. Okay, ma'am, looking at this exhibit, the names
24 of the parties, for this set of books can you tell me the
25 types of changes that West makes to the names of parties?

1 A. Yes if we are going to start at the caption of
2 the case, is that what you would like me to do?

3 Q. Names and parties.

4 A. The appellants and appellees, the names of the
5 parties?

6 Q. Sure.

7 A. West would receive the slip opinion and we would
8 again characterize the parties by how we are going to be
9 citing to them so we use the underscoring of the party name,
10 and in this case it was Sweet Home Chapter of Communities
11 For A Great Oregon versus Babbitt. We don't cap the first
12 name or his title.

13 I will be talking only about this case and not
14 all examples of things that we do.

15 Q. I am sorry, ma'am, you can expand it if you would
16 like.

17 A. In some instances if the title is very long we
18 may shorten it with an "et al." If there are many, many
19 titles, I have seen one case where we have put the titles
20 into an appendix or put them into a footnote. In some
21 instances we will delete duplicate names from a title.
22 Maybe there are two titles and we will combine them and put
23 two cases after it. So we do some editing to the title work
24 to make it readable and concise and, again, underscoring, so
25 it's very quick to read how we believe the title should be

1 characterized.

2 Then we prepare the docket number for the court.

3 Q. I am sorry, ma'am, I would like to stop here.

4 And the names of the parties, where do you get
5 those?

6 A. They are on the slip opinion.

7 Q. Where do you get the slip opinion?

8 A. That comes from the court.

9 Q. In the case of a District of Columbia circuit
10 case, where do you get the slip opinion?

11 A. The slip opinion, again, comes from the court.

12 We happen to be the slip printer for the District Court of
13 Columbia. We create the slip opinion, but it comes from the
14 court.

15 THE COURT: Now, the cases or the slip opinions
16 that you create for the District of Columbia, are all the
17 captions done therefore in the same form and you would then
18 publish them in your Fed. 3d now?

19 THE WITNESS: No, not for the District of
20 Columbia. They own their own form of slip opinion.

21 Q. How about in the Fifth Circuit?

22 A. The Fifth Circuit, we do style the caption
23 according to the West style and that becomes part of the
24 contract. That is what we are supposed to do under that
25 contract.

1 Q. But the style you use in the Fifth Circuit is
2 identical to what the court uses?

3 A. We are the slip printer for the Fifth Circuit and
4 part of our contract is to style the caption and create the
5 front matter in the West style, so to speak, so that --

6 THE COURT: Let's get to the bottom line.

7 Does the caption that appears in the Fifth
8 Circuit cases slip opinions, is that the exact same caption
9 that you find in Fed. 3d?

10 THE WITNESS: Yes, it would, your Honor.

11 Q. How about the Eleventh Circuit?

12 A. The same is true for the Eleventh Circuit. That
13 is treated like the Fifth Circuit, yes.

14 Q. And at the bottom of the fifth and Eleventh
15 Circuit opinions as they are put out by the court, isn't
16 there a West copyright notice that says that you claim a
17 copyright in the syllabi, the headnotes?

18 A. Yes, there is.

19 MR. RITTINGER: Objection.

20 THE COURT: Overruled.

21 Q. Does that copyright notice list the names of the
22 parties as one of the things you claim a copyright in?

23 MR. RITTINGER: Objection, your Honor.

24 THE COURT: Overruled.

25 A. No, it does not.

1 Q. Thank you.

2 Let's move on to the docket number.

3 I am sorry, are there any other types of changes
4 that West makes to the names of parties in Federal Reporter
5 series decisions, Fed. 2d, Fed. 3d?

6 A. In some instances we style or we add language to
7 the caption, such as "appeal of," "in the matter of" to make
8 it clear. So we do add, we modify, we change, we delete
9 language to make a concise samples, and we have examples
10 that better illustrate that.

11 Q. Does that language "in the matter of" come from
12 courts?

13 A. Yes.

14 Q. Can the reader distinguish when it came from the
15 court and when West did it?

16 MR. RITTINGER: Objection.

17 THE COURT: Sustained.

18 Q. Let's move on for a second to the docket number.

19 Where does West get the docket number in cases
20 from the Courts of Appeals?

21 A. The docket number comes from the court documents.
22 I believe generally it's on the slip opinion. There might
23 be some instances where it's not. It generally is not
24 located in the exact position where West has chosen to
25 organize it.

1 Q. But you always get it from the court, isn't that
2 correct?

3 A. Yes. It's a court record.

4 Q. Do you ever assign a different docket number than
5 the court assigns it?

6 A. No.

7 Q. If you discovered an error in a docket number on
8 a document, would you call the court to check about the
9 change?

10 A. Yes, we would.

11 Q. And if the court told you not to change it, would
12 you change it?

13 A. Well, the docket number represents what the file
14 of the court is so, no, we can't make up the docket number
15 for the court.

16 Q. Thank you.

17 Now, are there any other changes that West ever
18 makes to the docket numbers of Courts of Appeals decisions
19 that appear in F.3d?

20 A. Yes.

21 Q. What else?

22 A. Sometimes the language will come in and it will
23 say docket number, docket, file number, and we will delete
24 that language or we add a number if there isn't one. Our
25 style is always to include the capital "NO" period. And the

1 other thing we will do there is we will combine docket
2 numbers. If there is a large case that maybe has ten
3 different docket numbers, we will combine those and put a
4 dash through there to show a combination, a consolidation,
5 or we may expand the number if the court has truncated it.

6 Q. Any other changes to the docket numbers?

7 A. That is generally it.

8 Q. Now, moving down to the next line where it says
9 United States Court of Appeals, what would that line be
10 called?

11 A. That is our court line.

12 Q. And where does that information come from?

13 A. The court line comes from the slip opinion. They
14 generally identify the court. And it doesn't appear in the
15 location in the slip opinion nor does it appear on that
16 form. West has chosen to have its own court line language
17 for each of the circuits and each of the courts that it
18 reports and we put it into that style.

19 Q. In some courts does it appear there in that form,
20 for instance, the Fifth and the Eleventh Circuits?

21 A. Yes, in the Fifth and Eleventh Circuits it would
22 because we would have styled it.

23 Q. How about other circuits?

24 A. Generally it does not read the same from the slip
25 opinion to the West court line.

1 Q. Does it sometimes in the Third Circuit?

2 A. I would have to look at the dead copy.

3 Q. But I am not asking for just this case. I am
4 asking for all cases. Does it sometimes appear in this form
5 and in this location in Circuit Court opinions?

6 MR. RITTINGER: Your Honor, I don't know what
7 case he is referring to when he says in this case.

8 MR. HARTMANN: She is the head of this
9 department.

10 THE COURT: Overruled.

11 MR. RITTINGER: She has --

12 THE COURT: Overruled.

13 A. Every slip opinion that comes in from the court
14 is a little bit different. As you can see from looking at
15 the dead copy, sometimes the court line is at the top of the
16 case, sometimes it is after captions, sometimes it's after
17 attorneys. It can be all over the place and generally the
18 court language would be "In The United States District Court
19 For The District of Columbia" and it may have different
20 language and we always take out the extraneous language and
21 put it into our style.

22 Q. You take out the words "in the" and "for the?"

23 A. Yes, we do that.

24 Q. Sometimes does it appear as it appears here?
25 Sometimes when it comes from the court, does it appear as it

1 appears here?

2 MR. RITTINGER: Objection.

3 THE COURT: Overruled.

4 A. The dead copy would speak for itself.

5 Q. Do you know?

6 A. Generally there are some changes that are made to
7 it.

8 Q. But sometimes there are not changes?

9 THE COURT: She doesn't recall.

10 Let's move on.

11 Q. Now, the next section after that which says
12 "argued and decided," what would those lines be called?

13 A. Those would be called the date lines.

14 Q. And where does that information come from?

15 A. It does depend on the circuit again. Some
16 circuits include both dates on the slip opinion. Other
17 circuits do not. And it comes from other court documents.
18 Generally the court will say that their opinion was filed on
19 the particular day, filed in this case it would be July
20 23rd. We would change the word "filed" to be "decided"
21 whenever we have two dates, the argue date and a decided
22 date. We change the word "filed" so people don't think the
23 appeal was filed on a particular date. So that would be a
24 change we make. And then we may have to compile the dates
25 from other sources if they are not readily available on the

1 slip opinion. Again, like I said, it may come from a
2 different source.

3 Q. Is there ever a time when the court doesn't have
4 the "decided" date on an opinion?

5 A. Well, actually it does happen in the electronic
6 transmission world where they don't have the dates on it.
7 Generally they do have a date. They don't always have their
8 "argue" dates.

9 Q. For the information we talked about, the names of
10 the parties, the name of the court and the date lines, is
11 the way that West does this is they take the copy from the
12 court, cut it up and actually paste it onto their documents?

13 A. Yes, we do rearrange it. We take it from --

14 THE COURT: But it is a cut-and-paste job?

15 THE WITNESS: That part of it is. The
16 reorganization is a cut-and-paste job, yes, your Honor.
17 Then there is editing beyond that.

18 THE COURT: Let's move on.

19 Q. One last question.

20 You made a distinction before about the names of
21 the parties. Let's talk about the thing at the very top of
22 the page Sweet Home Chapter Of Com. For A G. Or. V Babbitt.
23 What is that called?

24 A. That is called a running head.

25 Q. And does West author this running head?

1 A. Yes, we do.

2 Q. Is this one of the things that West claims a
3 copyright in?

4 MR. RITTINGER: Objection, your Honor.

5 THE COURT: Sustained.

6 MR. RITTINGER: Also, your Honor, I don't think
7 it's an issue in this case. I don't think they have
8 claimed --

9 THE COURT: I sustained your objection. Do you
10 want me to overrule it?

11 MR. RITTINGER: No.

12 THE COURT: Thank you.

13 Q. Alright. Now, the next heading appears here
14 after the decided dates.

15 One last question about the running head. Is the
16 running head what is used in the citation of the case?

17 A. We create two additional titles. One is the
18 running head title that you will see on the pages here, the
19 odd pages. The other title is considered a digest title and
20 the digest title appears in our digest publications as well
21 as on Insta-Cite and that very slightly we use different
22 abbreviations for it. The running head does have to be
23 created so it can fit on the top of the page. It's limited
24 to a certain number of characters and the digest title is
25 not so limited so we can have a little broader title. But

1 it is the digest title typically that we are using in our
2 Insta-Cite service for citing purposes.

3 Q. But the running head is used for citation also,
4 isn't that correct?

5 A. Yes, I believe people do use it for citation.

6 Q. Alright.

7 The next section that is below --

8 THE COURT: We will hear about it in 15 minutes.

9 (Recess)

10 THE COURT: Proceed.

11 MR. HARTMANN: Thank you, your Honor.

12 Q. Ms. Bergsgaard, we were looking at Plaintiff
13 Exhibit 13, the Sweet Home case, and we had just finished up
14 I think with the "argued" and "decided" lines and I was
15 asking you the part after that that starts with "parties"
16 down to I guess the word "fish" or right around in there, is
17 that written by West?

18 A. Yes.

19 Q. And the headnotes that follow that "fish," the
20 one that says "one fish key symbol 12," what is that called?

21 A. That is our digest topic and key number.

22 Q. And that is written by West?

23 A. Yes, it is.

24 Q. And the headnote below that is written by West?

25 A. That is correct.

1 Q. And the text that was above it starting with the
2 word "parties" down to "Sentel filed an opinion," is that
3 called the syllabus?

4 A. That is called the synopsis.

5 Q. And you said that was written by West.

6 At the end of the headnotes it says after the
7 third one, it says "Appeal From The United States District
8 Court for the District of Columbia, 91 CV 01468, what is
9 that called?

10 A. That is called an appeal line.

11 Q. And where does that information come from?

12 A. The appeal line can come from different sources
13 again. Sometimes it is on the slip opinion, sometimes it
14 comes on other court documents that are related to the case.
15 We don't normally publish the appeal line. In this we had a
16 brief period of time where we were experimenting and putting
17 that information into the court -- a copy of our case
18 reports as this was an example, but you will see many times
19 where we have now reverted back to the practice where we
20 don't use that information. We include it in our synopsis
21 instead.

22 Q. Isn't it true in fact in terms of not putting
23 certain information in in some circuits the decision comes
24 to you from the court with the docket number in it and you
25 actually take them out when you put them in 1 F.3d?

1 A. I am sorry, I didn't follow that question.

2 Q. In some circuits does not the docket information
3 come from the court and you remove it?

4 A. The docket information?

5 Q. Yes, the docket number for the lower court
6 decision.

7 A. The lower court docket number?

8 Q. Yes.

9 A. Yes. The lower court docket number is generally
10 coming with the appeal line. That is what we call the
11 appeal line. It will tell you the lower court, the lower
12 court docket number in some cases and the lower court judge.
13 And West chooses to put that information in the synopsis, at
14 least the lower court judge information. We tried for a
15 period of time to include these in our case reports and, as
16 I said, we decided not to. It was redundant information, so
17 we no longer include the appeal line if we have a synopsis
18 in the case.

19 Q. But aren't there some cases where West removes
20 the reference to the lower court docket number?

21 A. From the appeal line?

22 THE COURT: In some places where you get an
23 official report which will tell you or give the lower court
24 docket number and then you remove it, does that happen?

25 THE WITNESS: Yes.

1 Q. Thank you.

2 Now, the line that follows that, again, it says
3 John McCloud and it describes the attorneys and things like
4 that. That information, what is that called?

5 A. That is the attorneys' summary.

6 Q. And where does that information come from?

7 A. It's compiled by West.

8 Q. Where does it come from? Where does West get it
9 from?

10 A. We may get it from different sources. It may be
11 on the slip opinion. It may be coming in a separate letter
12 from the court clerk. It may come from the docket sheet as
13 filed in the clerk's office and the dead copy will show you
14 many different examples of where the attorney information
15 comes from. When we receive the attorney information from
16 whatever source it happens to be, then we compile that
17 attorney summary. We will delete information, such as the
18 addresses, the telephone numbers. We may add in information
19 that does not appear anywhere and that would be the City of
20 practice.

21 Q. Where would you get that?

22 A. We verify every attorney's name and we look that
23 up in our West Legal Directory or the telephone books or the
24 Bar Association books.

25 Q. And I think --

1 THE COURT: What happens when the attorney who
2 appears is John Martin?

3 THE WITNESS: If we can't tell, your Honor, we
4 don't add in the city unless we can verify it because we
5 want to make sure we don't put the wrong attorney with the
6 wrong party. You are right. That causes a lot of
7 difficulties.

8 Q. I believe you said before with regard to the
9 Supreme Court that that information used to come from
10 Martindale-Hubbell but now it comes, to some extent at
11 least, from West Legal Directory?

12 A. We research it off of the West Legal Directory.
13 We will look up the name, find out where the city of
14 practice is, and we will add that into our compilation of
15 the attorney summary.

16 Q. And I believe you testified previously in this
17 case that at least some of the names listed in West Legal
18 Directory came from Martindale-Hubbell, isn't that correct?

19 A. No, I didn't say that and I don't believe that is
20 true.

21 Q. It's your belief that names did not come from
22 Martindale-Hubbell?

23 A. Are you asking me if West Legal Directory has
24 names that are also in Martindale?

25 THE COURT: The source for West Legal Directory

1 was Martindale-Hubbell.

2 Q. For some of the names.

3 A. I do not believe West Legal Directory -- that was
4 an independent product that West created by sending out
5 forms to all of the attorneys and asking for information.
6 That was independently created by West.

7 Q. But wasn't one of the sources that West used to
8 independently create it also Martindale-Hubbell for
9 attorneys that didn't respond?

10 A. No.

11 MR. RITTINGER: Your Honor, I object. I missed
12 what this was about. I think he is asking the course of the
13 West Legal Directory right now and I believe that is
14 irrelevant in this case.

15 THE COURT: Objection overruled.

16 Q. You don't recall testifying about that
17 previously?

18 A. What I have said is that for our compilations of
19 the attorneys' summaries, we use the West Legal Directory.
20 We used to use Martindale before the West Legal Directory
21 was created and we also use Bar Association books and we use
22 telephone directories. And that is our source of
23 information.

24 Q. And for the cases that we have been talking about
25 in this examination and in this case, the Mendell v. Gollust

1 case and Sweet Home and Feist, do you know whether those
2 came out at that time you were using West? For instance,
3 Mendell v. Gollust was 1990.

4 A. I don't remember exactly when. There was a time
5 when we had Martindale-Hubbell as a reference tool, as I
6 testified before, and once West Legal Directory became more
7 complete we no longer had a need to purchase the
8 Martindale-Hubbell sets, but we still had them in-house as a
9 part of our library and we could use them as a reference
10 tool.

11 Q. I understand. I guess I am asking in 1990 when
12 Mendell v. Gollust was written you were still using
13 Martindale-Hubbell, is that correct?

14 MR. RITTINGER: Your Honor, asked and answered.

15 THE COURT: Sustained.

16 Let's move on.

17 MR. HARTMANN: Thank you, your Honor.

18 Q. Alright. Are there any other changes that West
19 makes to material in the Federal Reporter series with regard
20 to the names of attorneys or their cities?

21 A. Yes. We will delete duplicate names of counsel.
22 We will combine the names of counsel so they all appear for
23 the appellant. All the attorneys that appear for appellant
24 are together in a paragraph. We will reword the language of
25 the court. We will add "argued." We will add information

1 on people who are on the brief. We will delete deceased
2 attorneys' names or attorneys that had been terminated from
3 the case.

4 THE COURT: You mean when I die all the
5 references to me in Fed. 2d will disappear?

6 THE WITNESS: No.

7 THE COURT: And when I became a judge it was
8 actually the legal equivalent of dying.

9 THE WITNESS: Occasionally there will be a
10 reference that the attorney has died and someone else has
11 taken their place and we will style those according to our
12 guidelines that were written by the other attorney.

13 Q. And sometimes does that information come to you
14 from the court?

15 A. The information about whether the attorney has
16 been terminated or died, yes, it does.

17 THE COURT: Are we back in the Felipe case,
18 Mrs. Thomas?

19 We had a criminal case we tried where the
20 defendant would send out orders to terminate on sight. So
21 the word "terminate" has a particular reference.

22 MR. HARTMANN: It certainly didn't pertain to
23 lawyers, I hope.

24 Q. And also the information, the other information
25 you talked about, such as the names of the cities and things

1 like that, sometimes that also comes from the court, is that
2 correct?

3 A. There are some listings that have the addresses,
4 the phone numbers and the city. Some do not. And we have
5 chosen the style that we want to compile the attorney
6 summary in and we delete information, we add information, we
7 modify the information.

8 I am just going to take a second to think to see
9 if I mentioned everything on the attorney listings or the
10 attorney summaries.

11 The other thing we do is we do reorganize this
12 information and we place it before the judge's line and all
13 of the reorganization that we do is not simply just a cut
14 and a paste. It is reorganizing according to our editorial
15 guidelines that attorney editors have decided that the best
16 place for the attorney information is after the headnotes
17 and that that would be the place where we want to put it in
18 our National Reporter System so people can locate it very
19 quickly.

20 Q. Were there a number of discussions about locating
21 them in other places?

22 A. The style that we have set up has been in
23 existence for more than the 20 years that I have been there,
24 but there are many different places that you could put an
25 attorney summary. One of those choices is not to include it

1 at all and if you look at other reports you will find that
2 the attorney summary can be located anywhere in a case
3 report.

4 Q. And when you say it's been in effect for 20
5 years, so West always does it that way and they always
6 follow that basic rule, is that correct?

7 A. Well, I wouldn't characterize it that way. We
8 make editorial judgments as to the best format for a
9 particular case report and we want to be consistent and we
10 will consistently organize the material in the order that
11 our editors deem is most usable to our readers.

12 Q. I understand that, ma'am. I guess what I am
13 asking is you just said for 20 years you have been putting
14 it in the same place. I guess what I am asking is is that
15 pursuant to some sort of an internal style manual or a rule
16 or a system that you use?

17 A. That is the style that our editorial department
18 has set up and determined that that was the most or the best
19 location for people to locate the attorneys is right after
20 the editorial work.

21 Q. That has been in place, as far as you know, for
22 at least 20 years?

23 A. Yes.

24 Q. Thank you.

25 One other question I wanted to ask you: You were

1 saying that sometimes you have to go out and find the city
2 of practice. How frequently does it happen that on the
3 docket sheet for the case an address doesn't appear for an
4 attorney?

5 A. Well, for the Supreme Court there is never any
6 attorney city information contained at all. Other circuits
7 when it's on the docket generally on the docket there is the
8 telephone and the address is there. Some slip opinions have
9 it, some don't.

10 Q. But do you get the briefs from these cases?

11 A. No, we do not. We do get the Supreme Court
12 briefs, but we don't use that as a source for our attorney
13 information.

14 Q. But you do get the docket sheet for the appellate
15 cases for the Federal Reporter cases?

16 A. We get the general docket sheets from some of the
17 circuits, yes.

18 Q. And I guess what I am asking is does it occur
19 very often that the docket sheet doesn't have at least the
20 city that the attorney is in?

21 A. Yes.

22 Q. It does?

23 A. The cities are not always on the slip opinion.
24 We don't get the docket sheets for all of the circuits and,
25 as I said, for the Supreme Court the cities are never

1 listed.

2 Q. Now, are there any other changes that you can
3 think of that West makes to the names or addresses of
4 attorneys?

5 A. Well --

6 Q. To the Federal Reporter series, I am sorry.

7 A. Well, I think we have gone over it. We add
8 information. We change some of the language. We modify it.
9 We delete some. We create it.

10 THE COURT: You just repeated yourself.

11 Q. Once again, is this done mechanically the same
12 way the other information is done, you simply cut it out of
13 the physical document from the court and paste it down onto
14 a piece of paper?

15 MR. RITTINGER: Any question that begins "once
16 again" has to be objectionable as having been asked and
17 answered.

18 THE COURT: Overruled.

19 A. I would say it is not mechanical. I disagree.

20 Q. I am not asking that, ma'am. I am asking is this
21 material physically cut out of the document you get from the
22 court and pasted down?

23 A. We do. We have to merge it so it is in the order
24 that we have determined editorially where we want it to be
25 placed.

1 THE COURT: The question is is that done by
2 cutting and pasting?

3 THE WITNESS: Yes, it is.

4 THE COURT: Thank you.

5 We will get along a lot better if you just answer
6 the question you are asked not worry about what point he is
7 trying to make. Leave that to Mr. Rittinger.

8 Q. On page 2, the next page of this exhibit, once
9 again we are on Exhibit 13, and the next line starts with
10 "before Mikva" and ends with "circuit judges" and then
11 continues below that.

12 What is that information starting with "before
13 Mikva" down to "Judge Sentel?"

14 A. That would be the judge line.

15 Q. Where does that information come from?

16 A. That would be on the slip opinion.

17 Q. And does West make any changes to the judge line?

18 A. Yes, we do.

19 Q. What changes does West make to the judge lines if
20 you list all of them for Federal Reporter?

21 A. Again, we capitalize the names. We put them into
22 a format that West has chosen to use.

23 THE COURT: What do you mean by that?

24 THE WITNESS: We will use "before Mikva" with the
25 Chief Judge coming first and followed by the circuit judges.

1 This style may vary on the slip opinion and, again, the slip
2 opinions are the best to show the work that West has done,
3 the editing that West has done.

4 One other thing we do is we will add the full
5 name of the judge. If there are two judges on the bench
6 with the same last name we will add in the full name so
7 there is no confusion.

8 Q. Where do you get all that information again, like
9 the full name of the judge?

10 A. We will look through the court document. We may
11 have to call the court.

12 Q. Do you ever change the names of the judges?

13 A. No, we do not. We may correct it if it's
14 misspelled.

15 Q. When you say you put it in our own format are you
16 following, again, an internal policy or rule or a system
17 that West uses? Is there like a manual?

18 A. Yes, we have guidelines for how we would like to
19 present the judge information in the clearest way that we
20 can.

21 Q. So the person that actually does this is just
22 reading it out of a manual and doing what the manual says,
23 is that correct?

24 A. I wouldn't characterize it as that because every
25 slip opinion can be different. We have slip opinions coming

1 in from over 3500 judges so the styles can vary greatly and
2 we will follow general guidelines, but every case is really
3 edited on a case-by-case basis.

4 Q. I am not asking about all the judges out there.
5 I am asking about U.S. Courts of Appeals writing cases that
6 appear in Federal Reporter series. What I am asking is is
7 their style manual or is there something, a rule out there
8 that people look at and then use to construct this so it's
9 the same every single time?

10 A. We do have general guidelines, yes. As I said,
11 it can vary because the slip opinions vary. We do many
12 case-by-case decisions on a case-by-case basis.

13 Q. So it doesn't always say "before Mikva," is that
14 what you are saying?

15 A. No. The rules are guidelines that are set up but
16 the slip opinions can vary greatly and they may have
17 something very different, for example, in the way they had
18 their attorneys on one particular case.

19 THE COURT: The issue is no matter how the slip
20 opinions may vary, does West have guidelines so they all
21 appear the same once they are published in West?

22 THE WITNESS: Yes.

23 Q. Thank you.

24 Now, are there any other changes that West makes
25 to the court lines, the judge lines in Federal Reporter

1 series cases?

2 A. Other than the ones we have talked about, that
3 would be it.

4 Q. Now, the next portion of the opinion that starts
5 with "Mikva, Chief Judge," what is that section called?

6 A. You could call it anything you want to. You can
7 refer to it as the text of the opinion.

8 Q. Let's refer to it as the text of the opinion. In
9 the text of the opinion -- first of all, where does West get
10 the text of the opinion?

11 A. That comes from the slip opinion.

12 Q. Does West make changes to the text of the opinion
13 that it gets from the courts?

14 A. Yes.

15 Q. What changes does West make to the slip opinions
16 that it gets from the courts?

17 A. Are we talking just about changes that are below
18 this judge line? We are not talking about what --

19 THE COURT: We already covered what is above
20 that.

21 A. We are going to talk about what is below the
22 judge line.

23 Q. We are talking about what you call the text of
24 the opinion.

25 A. The text of the opinion, what is below the judge

1 line, West makes many different decisions when it's
2 publishing the slip opinions. Did you want me to just
3 begin?

4 Q. Certainly, please.

5 A. Okay.

6 One of the things we do is we verify, as I said
7 before, every statute cite. If there is an error in the
8 statute cite we will correct it. We will also add parallel
9 cites to a statute to U.S. Code and Congressional News, so
10 we will expand the cite.

11 Q. Can I ask you a quick question about that? In
12 the circuits where you are the official printer, do you ever
13 do that as part of what you do for the court?

14 A. Only for the Fifth and the Eleventh Circuits.
15 And part of that contract is to do the cite checking and
16 verification.

17 Q. Once again, at the bottom of those slip opinions
18 that you print in the Fifth and the Eleventh Circuits, it
19 says "copyright West Publishing Company." Again, it doesn't
20 say headnotes, syllabi. It doesn't mention anything about
21 changes to the text, corrections to cites, does it?

22 A. No, it does not, and we would not claim a
23 copyright in the work that we did for the slip opinion
24 except for the synopsis and the headnotes.

25 Q. So in some circuits West claims a copyright on

1 the corrections to the citations but in other circuits it
2 doesn't?

3 THE COURT: Sustained.

4 Q. What other changes do you make, ma'am, or does
5 West make? I am sorry.

6 A. Then we look through the opinion and we check
7 every opinion cite that has been cited. We will look at the
8 caption of the citation and we will verify that against our
9 Insta-Cite system. If the caption is incomplete or
10 incorrect, we will make the correction or expand the
11 citation.

12 Q. When you say you look it up as in the Insta-Cite
13 system, let's go back again to the Gollust case.

14 Did you use the Insta-Cite system to look up
15 these cites in 1990?

16 A. Yes.

17 Q. Did you also use other research methods such as
18 Sheppards?

19 A. No, we don't use Sheppards for opinion citation
20 or verification.

21 Q. Did you no '90?

22 A. No.

23 Q. What did you use besides Insta-Cite?

24 A. We use Insta-Cite and we use the book itself. We
25 go back and verify, for example, if it's referring to an

1 official citation to a state report we have a library and we
2 can go back and use that. Insta-Cite has been available
3 since the late '70s and we have always used that. Before we
4 had verifier books that we used for opinion verifying.

5 Q. In fact, don't you keep on your computers what
6 these people use, and don't you also keep lists, for
7 instance, of popular names of cases so that if they see a
8 name of a case referred to they can look it up quickly?

9 A. We have a popular name listing, yes, we do, but
10 the reason for the popular name listing is that if a judge
11 is citing to a case that is on the popular name list and did
12 not add a citation, West editors determine that we will not
13 add a citation in those instances because they are so
14 popular that a citation is not necessary.

15 THE COURT: I have never written such a decision.

16 Q. What other changes do you make, Ms. Bergsgaard?

17 A. We will then expand and correct the caption of
18 the case as the judge has used it in the opinion. Then we
19 will check the citation and we will check to make sure that
20 it is the correct volume, the correct cite form. For
21 example, if a judge was using BAKR for Bankruptcy Reporter
22 we would change that to BR, which is the standard citation
23 style.

24 We will check the page numbers and we will also
25 take a look at the extension pages to make sure that there

1 hasn't been an error that has been made there. We will add
2 in parallel cites or expand that cite with selected parallel
3 cites that we choose to use. We may add in a state report
4 citation. We may add in a Westlaw cite or we may add in, as
5 I said, the Supreme Court or the Lawyers Co-op Edition.

6 Q. Did you also, as you did in Supreme Court cases,
7 remove, for instance, LEXIS citations and U.S. Law Week
8 citations?

9 A. Yes, and I can get to that.

10 Q. I am sorry.

11 A. I can get to it in a just a minute. As far as
12 the parallel cites go, West chooses which ones that we are
13 going to add. In the example of the blue book, for example,
14 or the state courts, the blue book a few years ago decided
15 that if you were citing to a case, a state case that is
16 outside of your jurisdiction, you no longer had to cite to
17 the state report cite and West does not follow the blue book
18 and we have decided we are going to add in all of those
19 state report cites. And we do get calls from the law clerks
20 telling us not to do that but we believe it's, again, in the
21 best interest of our reader to have both the state report
22 cite and the National Reporter System cite.

23 Q. Now, in some cases the decisions you receive from
24 the court already have those parallel cites in them, don't
25 they?

1 A. Some do and some do not.

2 Q. So in some cases West is adding them but in some
3 cases the court is adding them?

4 A. The court may use them, yes.

5 Q. Is there any way to differentiate between those
6 two cases?

7 MR. RITTINGER: Objection.

8 THE COURT: Sustained.

9 A. So we corrected the title. We are adding
10 parallel citations in that West chooses.

11 The other kind of thing we may do is we may just
12 delete the citation and add in a new one. I think that is
13 what you were referring to before with a LEXIS site. There
14 may be some situations when the court is using a slip
15 opinion or a temporary LEXIS site or site that we believe is
16 not widely available to our readers and we will put an
17 alternative cite in. So we will delete what the court has
18 cited and add in a Westlaw cite, a National Reporter System
19 cite instead of the slip opinion cite.

20 Q. Again, is there a style manual for this? For
21 instance, is there a manual which says we usually take out
22 the LEXIS cite unless it's the only cite available? Is that
23 written down somewhere?

24 A. Well, I don't know if it's written down in that
25 language but we do have guidelines that our opinion

1 verifiers use that have been written by editorial, yes.

2 Q. And those guidelines, the ones that you are
3 talking about now that says what you do and don't put in, do
4 you know if those were ever produced to Hyperlaw?

5 A. Yes, I do.

6 Q. Do you know when they were produced to Hyperlaw?

7 A. They were all produced to Hyperlaw during
8 discovery.

9 Q. I guess I am asking do you know when they were?

10 THE COURT: I take it you didn't do any of the
11 production yourself. You gave certain things to your
12 counsel, is that correct?

13 THE WITNESS: That is correct.

14 THE COURT: Let's move on.

15 MR. HARTMANN: Thank you, your Honor.

16 Q. Those manuals that we are talking about, have
17 they been in existence for a long time?

18 A. We have had manuals and they are really a series
19 of memoranda that come up when we are looking at a case and
20 we decide that this may have some applicability to another
21 case. We will write the memoranda. They have been around
22 for many years. They are constantly revised and updated.

23 Q. And that is what the people that are actually
24 doing these changes are working from, those manuals?

25 A. In part they are. We do a case-by-case training

1 on the job so we are actually using live cases and that is
2 the way we train, but we do have files of examples that
3 provide guidance for how to do the opinion verification.

4 Q. Now, are there any other changes that we haven't
5 discussed yet to the text of the court of opinion and
6 Federal Reporter series?

7 A. Yes. Another type of alternative cite that we
8 use is when the court is writing the opinion they will
9 sometimes say petition or cert. filed on a particular date
10 with the year. What West does is we will look to see
11 whether the petition has been granted or denied and if it
12 was granted or denied prior to the date that the decision
13 was authored, then we will change the language from petition
14 filed to cert. denied or cert. granted. We also then delete
15 the date and just leave the year with the citation. We add
16 the citation to the cert. denied. We do change, we call it
17 a court line, the parenthetical information that is after
18 the parallel cite, and we do make changes to those. That
19 typically identifies the court and the year but if the court
20 is identified in a volume, then you don't use the court in
21 that court line, so we will make changes to the court line
22 according to those guidelines.

23 Q. Any other changes that you make to the text of
24 court opinions in the Federal Reporter series?

25 A. Yes.

1 I think I have explained the parallel cites and
2 we have examples of that so if I have forgotten anything we
3 can look at it at a later point, but we do combine
4 information and throughout the publication process West
5 receives amending orders, supplemental opinions, additional
6 information that may pertain to the case.

7 When we receive additional information we, first
8 of all, look at it. We need to identify that it's related
9 to a particular case. And then we have options as to how we
10 are going to present that information. We may choose not to
11 publish the order at all but to put the information in the
12 file line. That would be such as a rehearing denied, and
13 West would create the file line but not publish the order.

14 We may choose to publish the order separately
15 with cross references between the two. We may choose to
16 incorporate the entire order into the text of the opinion
17 and we may or may not put a file line in there indicating
18 what has been amended. Or we can do a combination of
19 things. We can publish the subsequent order in part and
20 incorporate part of that order directly into the opinion.
21 So we have many different options and the West editors would
22 look at all of those options for how long we are going to
23 take care of this case.

24 Q. And sometimes when this is happening, is it the
25 court directing what you should do? Does the court

1 sometimes say put a footnote in this place or append this
2 order to our decision?

3 A. The court, when it's writing its amending order,
4 will certainly direct that this language be changed. That
5 is not a direct to West as to what West should do with it.
6 West can choose to publish that order in any of the
7 different ways that I have mentioned.

8 Q. Can you think of any situation, for instance,
9 where a court has said add footnote 13 to this point in the
10 order and West has not done so if the opinion had not yet
11 been published?

12 A. We can publish that order separately. That is a
13 choice that we can make.

14 Q. Have you ever done that?

15 A. Yes, we have.

16 Q. When a court said "add it as a footnote" you
17 published it separately?

18 A. We can publish the order separately, yes. We
19 have exhibits we can show you.

20 Q. I am asking a very specific question.

21 Do you know of any instance where a court has
22 said "add a footnote" where it has been published as a
23 separate order?

24 A. Well, I don't know. I don't know whether the
25 court has ever said "add this footnote" and we didn't do it.

1 We can make a judgment when we receive orders and we make a
2 decision as to how we are going to incorporate and how we
3 are going to publish those. We have many different options,
4 as I said, and it is a West editorial decision as to how we
5 are going to do that.

6 Q. So the answer would be nobody. You don't know of
7 any instance where that has ever occurred?

8 A. I cannot say. You would have to look at the dead
9 copy.

10 Q. Now, what happens when an amending or superseding
11 order or any kind of subsequent information on that case
12 comes out after West has already published the permanent
13 bound volume, does it then combine those?

14 A. We can. We do have, again, a series of options
15 that we can use when we get a subsequent order. We will
16 read the order and if we need to, if it's so major and
17 changes the case where the readers would be confused, we can
18 republish the case in its entirety incorporating those
19 amendments or the subsequent order.

20 Q. How is that done after the permanent volume is
21 published?

22 A. We would republish the opinion in its entirety,
23 give it a new citation, and then we do what we call kill
24 references to the prior opinion. We delete that cite from
25 any of our digest publications or our cases reported so

1 people can't find it. We also make notes in our case
2 history system that the case has been republished at a
3 certain location.

4 Q. And sometimes do the cases that you actually
5 receive from the courts say up on top of them reprint and
6 contain all that information exactly as you just described
7 it?

8 A. The notations that you are referring to reprint
9 means that the slip opinion was reprinted.

10 Q. But sometimes do courts order that decisions be
11 reprinted?

12 A. They don't order West to reprint them. They
13 reprint their own slip and you will see on slip opinions it
14 will say "corrected" or it will say "reprinted" and that is
15 an indication on the slip opinion. I am talking about a
16 different decision that is made.

17 Q. So sometimes the decision to reprint is made by
18 the court and it's reflected in a document that you get and
19 you simply put into the book that way, is that right?

20 A. No.

21 Q. You never print something that the court says
22 reprint? I am not asking whether they order it. I am
23 asking whether you do it.

24 A. We make an independent decision on how we are
25 going to do it. The word "reprint" or "correct" on a slip

1 opinion is simply that. It's that the slip opinion has been
2 reprinted or the slip opinion has been corrected. That has
3 nothing to do with how West is going to treat it in its
4 publication. West is an independent unofficial publisher.

5 Q. I understand the point that you are an
6 independent publisher. What I am asking is sometimes when
7 they put "reprint" on a decision do you publish that in your
8 book the way it comes from the court?

9 A. No.

10 Q. Noting that it's a reprint, that the court
11 ordered the reprint?

12 A. No.

13 MR. RITTINGER: Your Honor, that is a different
14 question.

15 THE COURT: That is alright. She can answer
16 that.

17 A. No.

18 Q. If a slip opinion comes to you and it says
19 "reprint," what does West do with it?

20 A. We will read it to find out what the change is.
21 If it was a minor change, then we may incorporate it into
22 the original opinion, the first opinion. If it is a major
23 change, we may choose to republish it or we may publish it
24 separately as an entirely new case. It just depends.

25 Q. Can you think of any instance that you know of

1 where a court has ordered a slip opinion reprinted changing
2 the opinion and West hasn't printed it?

3 A. What haven't we printed? I am not following your
4 line of questioning.

5 The courts often issue --

6 THE COURT: Let me ask you this: It seems to me
7 that most times we get a reprinted or corrected opinion
8 would be well before you ever published anything in the
9 advance sheet, isn't that true?

10 THE WITNESS: It can be, yes.

11 THE COURT: How many cases in a year do you think
12 you have where after an advance sheet is published you get
13 an opinion from a certain court that is either corrected or
14 reprinted?

15 THE WITNESS: It does happen, particularly in the
16 Ninth Circuit.

17 THE COURT: Everything happens in the Ninth
18 Circuit. But approximately how often in the real world and
19 then how often in the Ninth Circuit?

20 THE WITNESS: Oh, I don't know the statistics.
21 We republish cases maybe a couple come up every week at
22 least. We also have the option of withdrawing an opinion
23 from advance sheet.

24 Q. I am sorry, a couple of reprints come up after
25 the bound volume has come out?

1 THE COURT: After the advance sheet.

2 A. Again --

3 Q. In Federal Reporter?

4 A. Again, I am thinking of the National Reporter
5 System.

6 THE COURT: Let's keep it to Federal Reporter
7 system.

8 A. I don't know. I don't have any statistics on
9 that.

10 THE COURT: Let's move on.

11 Q. On these combines, and this may be a bad way to
12 phrase this question, but is everything to the north of the
13 combine and the south of the combine government text? In
14 other words, when West does a combine, it's adding something
15 that the court has written to something that was already
16 there, isn't that correct?

17 A. Not always. Sometimes we will take the court
18 order and we will remove the correcting part of the order
19 and merge that into the text and then we add an editor's
20 note indicating what we have done, and then we will publish
21 the remainder of the order.

22 Q. And I guess what I am asking is in all the
23 text -- let's take a situation where you append a subsequent
24 order to the end of a text, do you ever append something
25 that the court doesn't write, anything other than exactly

1 what the court writes?

2 A. We will append the order from the court after we
3 have done our editing and our modification to it.

4 Q. I understand that. What I am asking is the
5 actual stuff that you append, it's always things that come
6 from the court, isn't it?

7 A. Yes.

8 Q. Now, on the combines, what about in the Fifth and
9 Eleventh Circuits, what happens with combines there? In
10 other words, where you are the printer and a decision
11 changes after you have gotten the information from the court
12 initially but before you print the slip?

13 A. That doesn't happen in a slip opinion. When we
14 receive the judicial decision from the Fifth or the Eleventh
15 Circuits we will prepare that according to the contract
16 guidelines and we will issue the slip opinion. If the court
17 modifies their slip opinion, they may reissue a slip
18 opinion.

19 Q. In which case you are the publisher?

20 A. In which case we are the publisher.

21 Q. So you will publish that combined new slip
22 opinion?

23 A. The slip opinions generally are not combined in
24 the Fifth Circuit as they will issue a corrected slip or
25 they will issue an amended slip.

1 Q. But they do sometimes, isn't that correct?

2 A. Well, they issue the slip opinion and that is
3 done over here by a group of people that are doing contract
4 administration. For West reporting of the decision in
5 Federal Reporter 3d we take the slip opinion and then do our
6 editing to it and prepare it for the Federal 3d. It's at
7 that point if something would come in later that we can
8 combine it for our advance sheet or for bound volume
9 purposes. That is an independent editorial decision made
10 for us or made by us as we prepare the Federal 3d. At that
11 point we are no longer an agent of the court because we have
12 done their slip opinion.

13 So there are two different decisions that are
14 going on, one with the slip opinion and then we publish or
15 make our own decisions for Fed. 3d.

16 Q. Now, how many times would you guess in, say, four
17 or five volumes would you get a combine of the Federal
18 Reporter series? How often does that happen in Federal
19 Reporter?

20 A. Well, we did a little statistical analysis --

21 Q. I don't want to hear about your statistical
22 analysis. I want to know if you know personally.

23 A. Yes, I do.

24 Q. About how many times does it happen?

25 A. About 15 and a half percent. 13 to 15 percent.

1 Q. 13 to 15 percent of all cases in the Federal
2 Reporters have combines?

3 A. In a particular volume, yes, or file line.

4 Q. I am sorry, you just slid something else in
5 there.

6 THE COURT: You weren't asked about file lines.

7 Q. Skip file lines. I want actual physical
8 combines.

9 A. Well, the combine and the file line are together.
10 They are related.

11 THE COURT: They may be, but that is not the
12 question you were asked. Please just answer the question
13 you were asked.

14 Q. Let me help you.

15 Isn't it true you found 6 out of about 800 cases?

16 A. No.

17 Q. I am sorry, 8 out of 600 cases.

18 A. That are --

19 Q. That are actual combines. Leaving aside file
20 lines for the moment.

21 A. I don't know. We did them together. We didn't
22 separate them out when we took a look at them because to us
23 they are related, file lines and combines.

24 THE COURT: Please, you have answered the
25 question.

1 Q. Are there any other changes you made besides the
2 ones you said to Federal Reporter series?

3 A. We will merge again a dissent or a concurrence
4 may come in separately in a separate slip opinion. We will
5 merge that in with the reporting of the decision.

6 Q. I am sorry, can you explain what you said?

7 A. A concurrence or a dissent may come in separately
8 as a separate captioned opinion.

9 Q. And West considers putting the concurrence or the
10 dissents with the decision as a change?

11 A. I am just telling you what we do to the text, as
12 you ask, and we will combine those. We will delete the
13 caption and the other portions that appear on the dissent
14 and we will combine those and print them under one caption
15 in our case report.

16 Q. Does West ever print the dissent as a completely
17 separate decision?

18 A. Sometimes that does happen.

19 Q. In Federal Reporter series?

20 A. I am sure it has happened in the past. It does
21 happen. Dissents can be filed late.

22 Q. Do you ever recall ever seeing a dissent printed
23 as a separate decision in Federal Reporter series?

24 A. Well, I am going to say that it can happen.

25 THE COURT: The question is do you ever recall

1 seeing it?

2 THE WITNESS: Do I recall it offhand? I don't
3 recall it offhand.

4 THE COURT: Thank you.

5 Q. Are there any other changes that West -- I guess
6 you just said they put together the consents and dissents
7 and concurrence. Are there any other changes that West
8 makes to the text of the court opinion in Federal Reporter
9 series?

10 A. Yes, occasionally we have to redraw maps and
11 plates. Sometimes the exhibits come in and we can't
12 reproduce them in color, for example, or they are not
13 reproducible, so we will actually have an artist redraw them
14 or make slash marks to indicate different colors and --

15 Q. When you say redraw it, do you mean that this
16 person that does it does a completely separate drawing not
17 based at all on the original?

18 A. It's, of course, based on the original.

19 Q. Is it a duplication of the original as much as
20 possible?

21 A. We do redraw it to make it look like the original
22 but there might be differences. Like I said, we can't
23 reproduce color so yellow will become hash marks. Blue may
24 become dots. So there are some differences in the way we do
25 that. That is drawn by West people.

1 Q. Any other changes that West makes to the text of
2 court opinions as they appear in Federal Reporter series?

3 A. We do make corrections when we find when our
4 lawyer editors are reading the case and we are finding that
5 the court has misspoken. They may have convicted the wrong
6 party, something like that. I have seen that. We will
7 definitely make those changes. We generally call the court
8 and ask.

9 There are all kinds of other things that happen
10 to cases. Footnotes may not be marked up in text. There
11 may be three different footnotes numbered 3. There may be
12 starred footnotes that cannot be reproduced. There may be a
13 footnote A and B. There may be some headings that are
14 missed. It may go from one sub-heading to three. There are
15 just many different things that we look for and that we
16 correct in the text of the court opinion.

17 Q. And what you just said was that sometimes when
18 that happens you call the court, is that correct?

19 A. That is correct.

20 Q. And the court tells you to make that change?

21 A. Yes.

22 Q. And is such a change always memorialized?

23 A. Yes.

24 Q. Always?

25 A. Yes.

1 Q. Where is that memorialized?

2 A. The way we do that is we will write a note on the
3 side of dead copy and we will say "okay per call." We also
4 have call slips that we add to the back of the case.

5 Q. Excuse me, have you ever produced the call slips
6 for any text to Hyperlaw?

7 A. Yes.

8 Q. When was that?

9 A. They are in the back of the dead copy.

10 Q. Are those all the call slips that exist for those
11 cases?

12 A. Yes, unless they are in the plate correction
13 folders.

14 Q. And what are the plate correction folders?

15 A. Those would be corrections that we would make
16 between advance sheet and bound volume.

17 Q. If there is such a correction in a plate
18 correction folder and we didn't get the plate correction
19 folder we wouldn't have gotten those cards, isn't that
20 correct?

21 A. That is correct, but you did receive the plate
22 correction folders.

23 Q. When did we receive the plate correction folders?

24 A. With the dead copy.

25 Q. Were they together with the dead copy?

1 A. They are in a separate folder but they are
2 together, yes.

3 Q. In the same boxes?

4 A. No, they are not in the same box.

5 Q. What boxes were they in?

6 THE COURT: Different boxes.

7 Q. They were not with the dead copy, is that
8 correct?

9 A. We --

10 Q. We were produced files that said dead copy for 1
11 Fed. 3d. Were the plate correction folders there?

12 MR. RITTINGER: Your Honor, we have a video of
13 their production that they took. It might take you ten
14 minutes to look at it but you can see what we are dealing
15 with here.

16 THE COURT: The first thing we can get is what
17 this witness knows.

18 A. I know that we produced the plate correction
19 folders to Hyperlaw.

20 THE COURT: Do you know that they produced to
21 Hyperlaw or you produced them to your lawyers?

22 THE WITNESS: We produced them to our lawyers.

23 THE COURT: Were those in separate boxes?

24 THE WITNESS: They are stored at West in separate
25 boxes, sir.

1 THE COURT: Okay.

2 Q. And they were not boxes marked dead copy, were
3 they?

4 A. No.

5 Q. Are they marked correction plates?

6 A. No.

7 Q. What are they marked?

8 A. They are just in a folder and those folders may
9 have been placed in the boxes. We store them separately but
10 they may have been placed in there for purposes of discovery
11 but they are in a little brown folder like this. And I just
12 checked the records. We submitted them for discovery.

13 Q. And there were production numbers on them?

14 A. I don't know.

15 Q. You submitted them to your lawyers.

16 A. Yes, we did.

17 Q. Thank you.

18 Any other changes you make?

19 I am sorry, you were talking about changes that
20 were made and I asked you whether all changes were noted.
21 Aren't there some times when changes are discussed with
22 courts when notations are not made?

23 A. Our standard practice is to note on the copy
24 where the correction is coming from, whether it was the
25 court correction. If it's an editor making the correction,

1 we initial the side of the dead copy. So we know who is
2 authorizing that correction, or we pin a little note to the
3 back of the case.

4 Q. And there are some times when that notation
5 doesn't get made?

6 A. Our business practice is make the notation.

7 THE COURT: Let's move on. Nobody has yet to
8 invent an infallible system.

9 Q. Are there times when those changes that you speak
10 with the court or the court speaks with you about do not get
11 published in any formal order, don't appear in any court
12 file, in essence is West the only one that has that change?

13 A. I don't know.

14 Q. You don't know?

15 A. I don't know. Our intent when we call the court
16 is to call a correction to the court's attention so the
17 court can correct the copy. I don't know what happens in
18 the clerk's offices but that is our intent in calling, is to
19 call it to the attention of the court so they can correct
20 their file.

21 THE COURT: Let's move on.

22 Q. Any other changes you make to the text of the
23 opinion of Federal Reporter series?

24 A. We do make changes to italic and bold and other
25 styling changes.

1 Q. You make spelling changes, corrections of
2 spelling?

3 A. Yes, we do.

4 Q. Corrections of quotes?

5 A. Quote marks, yes, we do.

6 Q. Anything else?

7 A. Not that I can think of right now. I think we
8 hit the categories.

9 Q. In any copyright notices that you know of, do you
10 know if it has ever listed things like parallel citations or
11 corrections to text as something they are claiming are
12 copyrighted?

13 MR. RITTINGER: The question is objectionable as
14 to form. We will stipulate we don't have a copyright notice
15 that says parallel citations, specifically alternative
16 citations, if that will move it along more quickly.

17 THE COURT: Good.

18 Let's move on.

19 Q. Also changes to text.

20 THE COURT: Move on.

21 Q. Any other changes that you can think of to text
22 in any volume, anything that West does to these opinions?

23 A. Well, we make numerous decisions and I am a
24 little bit nervous right now so I think I have gotten -- I
25 have told you the categories of them. We have exhibits that

1 will show this.

2 THE COURT: Let's move on.

3 MR. HARTMANN: Your Honor, just as a housekeeping
4 function I move 41, 42, 47 and 48 which the witness has been
5 examined on.

6 MR. RITTINGER: I object to 47 and 48, your
7 Honor.

8 MR. HARTMANN: That is the correspondence of
9 counsel. You allowed examination.

10 THE COURT: On what ground?

11 MR. RITTINGER: It's correspondence of counsel
12 with respect to --

13 THE COURT: You don't question the authenticity,
14 correct?

15 MR. RITTINGER: I don't question the
16 authenticity.

17 THE COURT: Objection overruled.

18 (Plaintiff's Exhibit

19 (Plaintiff Exhibits 41, 42, 47 & 48 received in
20 evidence)

21 Q. Ms. Bergsgaard, this is a different question than
22 the one I have been asking.

23 Other than the points we talked about, that I
24 have taken you through this case, other than the things that
25 appear in the Sweet Home case, are there any other changes

1 that West makes to anything in Federal Reporter series? In
2 other words, is there something that, for instance, doesn't
3 appear in Sweet Home that West does change somewhere else?

4 THE COURT: I take it as far as you know you have
5 testified as to all of the changes that West makes in the
6 Federal Reporter subject to perhaps having overlooked
7 something?

8 THE WITNESS: Yes.

9 THE COURT: But there is nothing else you can
10 think of.

11 Let's move on.

12 Q. If you would take a look, Ms. Bergsgaard, at --

13 THE COURT: How much longer do you think you are
14 going to be?

15 MR. HARTMANN: I was going to say, I probably
16 have no more than a half hour. I am going to examine her
17 about one set of documents that remains.

18 THE COURT: I think we will have something to eat
19 before we do that.

20 See you back here at 2 o'clock.

21 MR. HARTMANN: Thank you, your Honor.

22 (Luncheon recess)

23 (Continued on next page)

24

25

1 AFTERNOON SESSION

2 2 p.m.

3 MR. HARTMANN: I have about 15 more minutes
4 maximum with this witness, and probably less, and half hour
5 with Mr. Sugarman.

6 DONNA BERGSGAARD resumed.

7 DIRECT EXAMINATION (Continued)

8 BY MR. HARTMANN:

9 Q. Ms. Bergsgaard, we were about to take a look at
10 three exhibits simultaneously, and I apologize for this.
11 It's 2-16 and 17, which together form the body of works
12 related to Mendell v. Gollust. We will look at them one at
13 a time to identify them first.

14 A. Is that Exhibit 2 --

15 Q. 2-16 and 17.

16 Would you like a sticky to mark those?

17 A. Okay.

18 You are talking about the trial exhibit number?

19 Q. Yes.

20 A. That is different from the other exhibit number.

21 Okay.

22 Q. The other exhibit number I think was the
23 deposition, the one you were deposed on.

24 A. I just wanted to be clear that I had the right
25 exhibit number. Okay.

1 Q. Let's just identify them first. If you take a
2 look at Exhibit 2, and if you were to turn in about 4 or 5
3 pages in, you will see where the text starts Cardemone,
4 circuit judge.

5 A. Yes.

6 Q. Now, what we are looking at now is what you call
7 the dead copy?

8 A. This is a photocopy of the dead copy.

9 Q. And the dead copy is what, just a quick
10 definition?

11 A. Dead copy is when West takes the slip opinion and
12 then we add our editorial enhancements to it and that
13 becomes our publication copy that we use in the publication
14 process. Once it is published in the advance sheet, we call
15 it dead copy because it has already been published.

16 Q. So this would show any changes that were made
17 between the time it was the slip opinion and the time when?

18 A. When it was published in advance sheet.

19 MR. HARTMANN: Your Honor, I offer Exhibit 2.

20 MR. RITTINGER: No objection.

21 THE COURT: Received.

22 (Plaintiff's Exhibit 2 received in evidence)

23 Q. Now, if you look at Exhibit 16, which I know this
24 is confusing, it was Exhibit 12 to the complaint and some
25 other exhibit to your deposition, and if you would look at

1 the bottom right-hand side of those pages, you will notice
2 that they are numbered sequentially like 12/1, 12/2, 12/3.
3 I would just like to you look at 12/4, 12/5, do you see
4 that?

5 A. Yes.

6 Q. Now, that is a redacted version of what? What
7 has it been redacted from?

8 A. It appears to be a photocopy of either the
9 advance sheet or bound volume for the Mendell v. Gollust
10 case.

11 Q. Is this the redacted version of the Mendell v.
12 Gollust case that you were examined on in your deposition?

13 A. I believe so.

14 MR. HARTMANN: Your Honor, I would like to offer
15 this into evidence as Exhibit 16.

16 MR. RITTINGER: I have no objection to the marked
17 up copy. I do object to the letter not on authenticity
18 grounds, your Honor, but on relevancy grounds.

19 THE COURT: I will take it for what it's worth.

20 (Plaintiff's Exhibit 16 received in evidence)

21 Q. Finally, if you look at Exhibit 17, which was 13
22 to Hyperlaw's complaint, and if you look in about three
23 pages into that, you will see the caption United States
24 Courts of Appeals and it says Ira Mendell versus Gollust.

25 A. Yes, I see it.

1 Q. Can you identify what that document is we are
2 looking at?

3 A. Yes, that appears to be the slip copy of Mendell
4 versus Gollust.

5 Q. Now, were you aware prior to Hyperlaw's filing
6 the complaint in this case that there had been a dispute
7 about what the copyright claims were in Mendell v. Gollust?

8 MR. RITTINGER: I object to the form of the
9 question.

10 THE COURT: Sustained.

11 Q. First of all --

12 THE COURT: Any question I don't understand I
13 sustain the objection to.

14 MR. HARTMANN: First of all, I would like to move
15 17 into evidence, your Honor.

16 MR. RITTINGER: I object. I know what this is
17 being done for. I don't know if your Honor does. But it's
18 out of the case. It's not relevant and maybe he should make
19 an offer of proof to tell you why he is doing it so we can
20 get beyond it.

21 MR. HARTMANN: I am only offering it because it's
22 the example that has been used all through this case, your
23 Honor.

24 THE COURT: Received.

25 MR. RITTINGER: Same objection as to the letter.

1 THE COURT: Same ruling.

2 (Plaintiff's Exhibit 17 received in evidence)

3 Q. Ms. Bergsgaard, just to be clear, what is Exhibit
4 2 is actually that slip opinion that is attached to Exhibit
5 17 basically marked up by West with the changes it's going
6 to make, is that correct?

7 A. That is correct.

8 Q. Now, if you look over at Exhibit 2 and Exhibit
9 16 -- well, I won't ask you about that.

10 If you look at Exhibit 2 and you go back to that
11 page we were talking about first, the one that at the bottom
12 says confidential W015978 --

13 A. Yes.

14 Q. The first page.

15 Could you go down just a little bit of this text,
16 and you don't have to do it where there is repeated
17 examples, and just tell us what the notations on the
18 physical text mean, if you would. For instance, at the top
19 there is a BJ-10 in front of "before" and then a curlicue
20 mark after the colon.

21 A. The BJ-1 lozenge is a mnemonic that tells the
22 publication computer at the direction of the editorial how
23 this is going to be set up for publication. It also becomes
24 a mnemonic for the search engine on Westlaw. If you were
25 going to search a judge's name, for example, or paragraph

1 number, the mnemonics work as well as.

2 THE COURT: What do you mean by mnemonic?

3 THE WITNESS: A mnemonic is a computer code that
4 is programmed to mean a certain thing in the program such
5 as -- it's just an identification of a field for a computer
6 program.

7 Q. Aren't basically the codes over on the left the
8 field markup for Westlaw?

9 A. No, they actually are for both print and for
10 Westlaw.

11 Q. And they tell the typesetting or the computer
12 what to do, is that it?

13 A. Well, they set it up. There is a preamble that
14 is written for each publication and the computer preamble
15 really takes the mnemonic then and identifies that this line
16 will be set at this point type and it will be italic or it
17 will be bold.

18 Q. What does BJ-10 mean, do you know?

19 A. BJ-1 is identifying that as the court
20 constitution. So this is going to be before Oaks, Chief
21 Judge, and we are going to run that all into one line and
22 the BJ means the judge line, "before judge" line.

23 Q. So it's not something that appears in the final
24 printout. That is just commands to the system, as it were.

25 A. It will set it up. The preamble will read the

1 BJ-1 line and set it up in the style that we have programmed
2 it.

3 Q. It's something the computer does though?

4 A. Well, the computer does nothing without being
5 programmed and the program is written by editorial people
6 working with the programmers.

7 Q. I understand. I guess what I am saying is these
8 are commands to the computer to do something.

9 A. Yes. That is what a mnemonic is.

10 Q. The next thing after the word "before" there is a
11 like a curlicue.

12 A. That is the symbol for delete.

13 Q. The general copyrighting symbol for delete?

14 A. Yes, it is.

15 Q. And three lines under Oaks, do you know what
16 those are?

17 A. That is the underscore.

18 Q. Is that a general copyrighting symbol for
19 underscoring?

20 A. Yes, it is.

21 Q. At the end of that after the word "judge" there
22 is what looks like a check after "Pollack, District Judge."
23 What is that?

24 A. That is an indication that it's a footnote.

25 Q. And the footnote is the one that appears down at

1 the bottom?

2 A. That is correct.

3 Q. And that was in the original slip opinion?

4 A. Yes, it was.

5 Q. Moving down, I take it the DJ-1s and the DP-1s
6 are the same thing as the BJ-1s?

7 A. They are mnemonics, yes.

8 Q. In front of the word "background" it says CCO or
9 CC --

10 A. What looks like an O is actually a lozenge. It
11 just is a lozenge. It looks like an O. CC means that it's
12 going to be centered.

13 Q. And down at the bottom it says FD with a square.

14 A. I believe that is an F, and it isn't coming out
15 very well but that is a footnote. That is a mnemonic for a
16 footnote.

17 Q. Turning to the next page, which would be W015979,
18 on the second line down it says Rule 60(b) motion and right
19 after the "(b)" there is like a slash into it. Does that
20 mean it has been checked?

21 A. Yes.

22 Q. What would that checking entail?

23 A. We would look up Rule 60(b). We would read a
24 portion of the rule and a portion of the case to make sure
25 that it was substantively correct.

1 Q. How about the next line down, 15 U.S.C. Section
2 78, the cite there is 1988, it does have a check on it also,
3 is that the same?

4 A. Yes, we would have looked up that cite. We would
5 have made sure that the codification of it at 15 U.S.C.
6 matches the act, the Securities Exchange Act. We want to
7 make sure that that is accurate and the checkmark indicates
8 that it has been verified and that it was accurate.

9 Q. How about the squiggly line to the left on the
10 next paragraph? The question presented is whether and then
11 on the left side there is a squiggly line.

12 A. The squiggly line would have been made by our
13 editors when they are reading the case to summarize the case
14 for the synopsis and for the headnotes. Very often they
15 will write a little squiggly line or a line in text to mark
16 a particular point that they want to bring up in one of the
17 headnotes or the synopsis. And this would be a typical mark
18 that they would make.

19 Q. Down at the bottom of that page they have crossed
20 out 5702 and written in 2. Two would become in other words
21 1 F.3d page 2, is that correct?

22 A. No, that is not true.

23 Q. What is the 2 then?

24 A. We renumbered the opinion here so we can keep
25 track of the pages I guess more or less when this is going

1 to be keyboarded. The case may be separated.

2 Q. So that is just a sequential number?

3 A. This is a sequential number on our slip copy so
4 that we can keep track of any inserts we might have made for
5 the keyboarding.

6 Q. Now, is there anything else on that page that we
7 haven't already discussed?

8 The CC again means center it?

9 A. That is correct.

10 Q. And the DP is a mnemonic?

11 A. That is correct.

12 Q. Page 3 at the bottom, W015980, is there anything
13 on that page we haven't discussed already?

14 A. No.

15 MR. RITTINGER: There are things on the page we
16 haven't discussed.

17 MR. HARTMANN: We will go through one at a time.

18 MR. RITTINGER: We don't have to.

19 THE COURT: What is the objection?

20 MR. RITTINGER: The objection is the question is
21 incomprehensible in the context it's being asked.

22 THE COURT: Objection overruled.

23 Q. Ms. Bergsgaard, on page 3, are there any types of
24 changes that are noted there that we haven't already talked
25 about, the type of change?

1 A. No.

2 Q. On page 4, now we see for the first time on the
3 left side what looks like a "greater than" symbol. Does
4 that have a meaning?

5 A. I am noticing that in each instance there is a
6 hyphen that is appearing in that line that we would need to
7 delete when it's being keyboarded.

8 Q. And down below that for the first time about
9 midway down just in front of the word Mendell v. Gollust,
10 1988-'89, there is a little line coming up there and it says
11 something DV. What is that?

12 A. D/C -- it could be a note if this is the District
13 Court case.

14 Q. In other words, the District Court case was
15 reported in Federal Security Law Reporter by CCH at 94.086,
16 and am I correct in saying that a Westlaw cite has been
17 added by you?

18 A. Yes. We would have verified the citation and
19 expanded the cite with the Westlaw cite, that is correct.

20 Q. And the thing that is above that, there is
21 something that looks like a 80-CE or something at the end of
22 that.

23 A. What you are seeing there is the sent language.
24 Sent language again is a markup for the computer. These are
25 codes that we put on the keyboard in order to do hypertext.

1 Q. What is a hypertext link?

2 THE COURT: If I don't know that yet I will never
3 learn.

4 Q. Down below that I guess the next thing we get --
5 there is a line through May 23. What does that mean?
6 Someone has checked the date.

7 A. I am sorry, the Rule 60(b) was checked. It just
8 went through the date.

9 Q. And down below that we see that the Mendell v.
10 Gollust, that cite has been supplemented again with a
11 parallel Westlaw cite?

12 A. That is correct.

13 Q. On the next page, is there anything on this page,
14 any type of change that we haven't discussed before?

15 A. No, with the different mnemonics but we have
16 talked about them.

17 Q. The little squiggly line over on the right side,
18 that is just one of those kind of remind me?

19 A. It looks like there was a question mark that
20 somebody crossed out so it might have been a note to
21 somebody as they were going through and the question was
22 resolved so they crossed it out.

23 Q. So, in other words, someone may have seen
24 something with this cite and thought something was odd about
25 it and asked somebody?

1 A. That is correct.

2 Q. Down at the bottom nothing new there, no type of
3 changes were ever talked about?

4 A. No.

5 Q. Now, the next page, any changes there that we
6 haven't talked about?

7 A. No, we have added the Supreme Court and L. Ed.
8 cite for Blau versus Layman. So we have expanded that
9 citation. Then there is an id. site if you see that down a
10 few lines again going to the Blau versus Layman case.

11 Q. So that means someone checked it and said, yes,
12 that is the right site, it really is to the Blau case as
13 opposed to a missed id.?

14 A. Yes, we do check that to make sure that the
15 extension pages are correct and that that is coming from the
16 Blau case and then we have added in the Supreme Court, the
17 West Supreme Court citation and extension pages. So if
18 somebody wanted to check the issue that the judge is citing
19 they can easily do that.

20 Q. Alright.

21 Now the next page, the one W015984.

22 A. I would like to mention that we also expanded the
23 citation for Kern County Land Company.

24 Q. Okay. And that would be the same type of change
25 as the one for Blau?

1 A. Yes. We expanded it to include the Supreme Court
2 and the L. Ed. citation.

3 Q. On the next page, W015984, are there any types of
4 changes that we haven't discussed up to now?

5 A. Again, we have expanded the citations with
6 extension pages on that page as you can see.

7 Q. But no other types of changes we haven't
8 discussed?

9 A. I don't see anything new on this page.

10 Q. Why don't we flip over to the next one, W015985.
11 Any types of changes we haven't discussed here?

12 A. It appears that we expanded many of the cites,
13 but they are the same type that we have been talking about.

14 Q. Right in the middle or at the end of the first
15 paragraph there in the second-to-last line which says
16 235-236, and then there is a little notation underneath that
17 between the "236" and the "Second Circuit." What is that?

18 A. I am sorry, I didn't follow the page.

19 Q. We are on page --

20 THE COURT: Page 8.

21 Q. Middle of the page right after that first full
22 paragraph there is a little note just before "Second
23 Circuit" that says something --

24 A. That is again the sent language.

25 Q. That is for the computer again?

1 A. Yes. That identifies the citation. Again, it
2 goes back to the hypertext linking.

3 Q. Let's go over to page 9. Is there anything new
4 here, any type that we haven't discussed before?

5 A. We are adding a Westlaw cite and parallel cites.
6 I don't see anything that we haven't already discussed.

7 Q. Next page 10. We may have missed it before but
8 for the first time over on the left-hand column on page 10
9 there is a little 2 in square brackets. What is that?

10 A. That is the headnote reference number where
11 headnote 2 is coming from where the editors are going to be
12 summarizing the issue of law for headnote "2" that begins in
13 this area of the opinion.

14 Q. And that is part of the National Reporter System,
15 your reference system?

16 A. The headnotes are part of the key number system,
17 yes.

18 Q. And is there anything else on this page, a type
19 of change we haven't talked about?

20 A. Not that I see offhand.

21 Q. Why don't we flip over to page 11, W015988. Any
22 changes here that we haven't seen before?

23 A. No.

24 Q. What is the thing all the way on the bottom there
25 just above the page number? It looks like a long string

1 number.

2 A. Again, that is the hypertext link number.

3 Q. And the lines on the right side with the little
4 asterisk, those are, again, someone's notes to themselves to
5 go back to that part?

6 A. Yes.

7 Q. The next page, page 12, any type of change that
8 we haven't seen before?

9 A. Just a different variation on some of the
10 parallel cite decisions that we make here. On cert. denied
11 the U.S. report hasn't been published yet so we add in the
12 dash citation for the U.S. and we will be filling that in
13 whenever it becomes available. It's the second to the
14 bottom or second-to-the-last line.

15 Q. Is that always done?

16 A. We do use dash cites and then fill them in when
17 we can, yes.

18 Q. And on the next page, 13, anything there?

19 A. Most of it would be still the adding the
20 parallels as we discussed previously.

21 Q. And the next page, 14, which is W015991.

22 A. I don't see anything we haven't discussed.

23 Q. Page 15, W015992.

24 A. I think we have discussed everything on this
25 page.

1 Q. 16, W015993.

2 A. Again, there is parallel cites, but we discussed
3 those.

4 Q. Why don't you, starting at page 16, just start
5 continuing down and when you get to the next thing that is a
6 change rather than me just asking you every page number,
7 just look through and tell me what the next change you see
8 is a type that we haven't talked about.

9 A. On page 21 --

10 Q. W15998.

11 A. Yes. If you look four lines up on the first
12 paragraph on that page, you see that we made a cite
13 correction. The court had LEUER and we changed it to LINE,
14 with probably an "R" at the end and it probably got cut off
15 here on the photocopy. That would be a change that we would
16 make when we corrected the title of the citation.

17 Q. In other words, just to clarify, when you go
18 through you look at each cite and if it's the wrong name you
19 put in the right name?

20 A. Yes, if there is a misspelling or if the title is
21 not complete we will expand it, yes.

22 Q. Why don't you start up at page 21 and keep
23 looking through until you find the next thing that we
24 haven't talked about, the next type of thing.

25 A. If you look at Footnote 2.

1 Q. Which page?

2 A. Page 22.

3 Q. W015999.

4 A. Yes. And if you look at Footnote 2, about five
5 lines down, we have a cert. denied cite and the court used
6 the U.S. Law Week cite. We have deleted that. This would
7 be an alternative cite so we deleted that citation. We
8 added in the dashes for the U.S. and the Supreme Court and
9 L. Ed.

10 Q. If you just continue from there and find any
11 other types of changes we haven't discussed.

12 A. If you look at page 24 and that would be a
13 citation --

14 Q. Where on 24?

15 A. W016001, our page 24. Do you see a citation, the
16 end of the first paragraph, the second line it says cert.
17 denied 109 Supreme Court?

18 Q. Yes.

19 A. There the court had 125. We changed that to 175.
20 We corrected the cite on that one and added in the L. Ed.
21 citation and the U.S. dashes.

22 Q. Okay. If you can continue from there and find
23 any other types of changes we haven't discussed.

24 A. On page 26 we discussed this, but this is a
25 different instance. The court is citing to an extension

1 page to Blau versus Layman and they are quoting something
2 from it as coming from page 411 and we have looked at that
3 and it was 413 so we made the change, the extension page
4 where the quote was coming from. And then there is again
5 another citation correction change at the end of that
6 paragraph to cert. denied 109 Supreme Court 125 and we
7 changed that to 175.

8 Q. Okay. Any other changes after that?

9 A. Footnote 3 at the end on page 27, there we have
10 changed the Public Law number and the statute. We have
11 corrected that. The court had Public Law number 98 I
12 believe it was 376 and we changed that to Public Law
13 100-704. We also changed the statute cite. It was 96 Stat.
14 1265. We changed that to 102 Stat. 4677.

15 Q. Over on the left side there is what looks like a
16 stamp that says "HIST." Is that what it says? Do you see
17 that?

18 A. Oh, history.

19 Q. Yes.

20 A. Yes.

21 Q. What does that mean?

22 A. That means just that it's part of the statute
23 verification and we aren't going to style these statutes for
24 use in the headnotes because they are historical and the
25 editors wouldn't be using them for citation in the

1 headnotes.

2 MR. HARTMANN: I have no further questions of the
3 witness.

4 MR. RITTINGER: Two quick questions now.

5 CROSS-EXAMINATION

6 BY MR. RITTINGER:

7 Q. In connection with the exhibit you are looking at
8 right now, in this particular case the Court of Appeals did
9 not cite any state court decisions, is that correct?

10 A. That is correct.

11 Q. You have a whole different set of rules for
12 parallel cites, alternative cites, et cetera, for state
13 court decisions, is that correct?

14 A. Yes.

15 Q. But, of course, the Court of Appeals do cite
16 state court decisions, is that correct?

17 A. Yes.

18 THE COURT: That was three questions.

19 MR. RITTINGER: I know. One point or one more
20 set of questions.

21 If I can have Federal Reporter 3d., series one,
22 marked as defendant next next exhibit.

23 THE COURT: I will take judicial notice of it.

24 MR. RITTINGER: May I approach the witness, your
25 Honor?

1 THE COURT: Yes.

2 Q. The first case which you have discussed at length
3 and you went over with Mr. Hartmann, if we can turn to that,
4 is the Sweet Home case, correct?

5 A. That is correct.

6 Q. Now, in the first hundred pages are there any
7 decisions that contain file lines?

8 A. No.

9 Q. Did I ask you to go through 1 Fed. Reporter and
10 pick out the cases that do have file lines?

11 A. Yes.

12 Q. Did you do that?

13 A. Yes.

14 Q. Did you do a calculation of the percent of cases
15 in the entire volume in comparison to those that have file
16 lines?

17 A. Yes.

18 Q. What was that percentage?

19 A. A little over 15 percent.

20 MR. RITTINGER: Thank you. I have no other
21 questions of this witness at this time, your Honor.

22 THE COURT: You may step down.

23 (Witness excused)

24 THE COURT: Call your next witness please.

25 MR. HARTMANN: Your Honor, we would like to call

1 Alan Sugarman.

2 ALAN D. SUGARMAN,

3 called as a witness by the Plaintiff,

4 having been duly sworn, testified as follows:

5 MR. HARTMANN: Since we have gone through Mr.
6 Sugarman's background and history in previous proceedings --

7 THE COURT: I certainly don't want it twice.

8 Either that or wake me when it's over.

9 DIRECT EXAMINATION

10 BY MR. HARTMANN:

11 Q. Mr. Sugarman, I ask you to look at the same
12 exhibits we were just looking at again, 2-16 and 17. In
13 particular I would like you to look at Exhibit 16.

14 A. Yes, I have Exhibit 16.

15 Q. And the letter, the two-page letter that starts
16 at page 12-2 that is labeled 12-2 and 12-3, do you recognize
17 that letter?

18 A. Yes, I do. It's a letter I sent in September 19,
19 1991 to Jim Schatz, counsel for West.

20 Q. And you testified about this letter at length in
21 a prior proceeding here, is that correct?

22 A. Yes, I have.

23 Q. And the attachments to that letter, there are I
24 believe three versions of the Mendell v. Gollust case
25 attached there, one called the redacted version, one called

1 the scanning version and one called the Hyperlaw version.

2 A. I think so. I see 12-4 the first redacted
3 version.

4 Q. Let's talk about 12-4. What did you do to get
5 this redacted version?

6 A. I took a volume of the West Federal Reporter and
7 I excised the pages for Mendell v. Gollust of the case. I
8 then took a black magic marker and I redacted or blacked out
9 certain areas.

10 Q. Why did you redact out those certain areas?

11 A. This was information that appeared to be material
12 that West had written, such as digest, synopsis, et cetera.
13 In fact, I probably overexcised on this particular one.

14 Q. Now, why did you redact, for instance, what you
15 redacted and, as an example, on page 12-5 not redact the
16 name of the circuit judge who wrote the opinion or the names
17 of the judges on the panel? In other words, why did you
18 redact what you redacted?

19 MR. RITTINGER: That has been asked and answered,
20 your Honor.

21 THE COURT: I will allow it.

22 A. Well, I redacted the case synopsis because West
23 claims and it appears to be pretty clear they claim they
24 authored this.

25 Q. If there had been anything else in this opinion

1 that you could distinguish as West authorship, would you
2 have redacted that?

3 MR. RITTINGER: Objection.

4 THE COURT: Overruled.

5 A. Yes, I would have redacted anything. In fact, I
6 even, if you look on page 12-8, redacted the cross reference
7 to the key number, to the digest number.

8 Q. Could you tell me why you selected the Mendell v.
9 Gollust decision to use as the example to West of what you
10 wanted to scan or wanted to copy out of their Reporter?

11 A. Yes, that case had been appealed to the U.S.
12 Supreme Court.

13 Q. So it was a case that was the lower case of a
14 Supreme Court case?

15 A. Yes.

16 Q. And --

17 A. And the name of the case on appeal I believe I
18 recall as Gollust V Mendell. I think it's reversed.

19 Q. And in your product, what is the relationship of
20 this case to the case that is on your Supreme Court Disc?

21 A. On the Supreme Court Disc, as I was working on
22 putting it together, this would have been the case that had
23 resulted in the Supreme Court opinion that was on appeal to
24 the Supreme Court so the concept would be to have the lower
25 court case that would link into the Supreme Court opinion.

1 Q. When you say "link in," I know the judge has
2 heard enough about hypertext to last a lifetime, when you
3 read Supreme Court case it cites to Mendell and you click
4 and it copies to Bendell v. Gollust?

5 A. That is the concept I had, yes.

6 Q. When you copy materials, and what you intend to
7 do in West cases, do you ever intend to copy any of their
8 tables of contents or the headnotes or the tables that lay
9 around decisions, any of that material?

10 A. I am not sure. With a particular opinion I have
11 indicated what I would not copy, which is the headnotes
12 digest. I would not copy anything else from a volume of,
13 say, the one Federal Reporter, including the generally
14 several hundred pages of front matter that appears before
15 page 1 which includes all sorts of digests and other
16 information.

17 Q. Okay.

18 MR. HARTMANN: I just have a couple of more
19 questions and I will be done, your Honor.

20 Tell me as briefly as humanly possible what you
21 can do with your product that you cannot do with the Federal
22 Reporter or the Supreme Court Reporter? What things does
23 your product contain?

24 A. Well, the --

25 MR. RITTINGER: Objection.

1 THE COURT: Overruled.

2 A. The differences between my CD ROM as compared to
3 the Federal Reporter and Supreme Court Reporter is, first of
4 all, I have both sets of opinions on the same CD ROM so that
5 one can go back and forth between Supreme Court opinions and
6 appellate opinions.

7 Number 2, obviously it's fully text searchable.
8 It has billing and searching on it. It has hyperlinks on
9 it. And it permits me to create a concordance of every
10 single word that appears in it.

11 Q. What does that mean in terms of the user?

12 A. For the user it permits him to see or help assist
13 him in doing searching for particular words or language.

14 Q. Does it mean, simply put, that there is a place
15 in your program where I can look through every word in every
16 decision on your case and click on it and see where that
17 occurs?

18 A. Yes, it does. And the other difference between
19 my product and the West printed product is that we include
20 the unpublished opinions from some of the courts. What we
21 do not have is we don't have digests, we don't have
22 headnotes, and we don't have tables of history, et cetera.

23 Q. And --

24 A. For example, the statute cited -- I didn't mean
25 history. I meant the statute cited in a particular case.

1 Q. Have you ever described or do you describe a
2 product that is ever going to have index, headnotes and
3 cross index, things like that? Is that what your product
4 is?

5 A. No, I have never described any product where I
6 would create a digest or summaries as West has done as they
7 have described today.

8 Q. Can you tell us how your product competes against
9 the West product in the marketplace?

10 A. It's generally used by people that do not need
11 the assistance of the West digest and headnotes, generally
12 smaller practitioners who also may not want to pay the extra
13 money for it, and in the general public there are people who
14 may not even be attorneys and don't need or want or can
15 afford the many extra features in the West products.

16 Q. And do you sell your product?

17 A. Well, I license the product, yes.

18 Q. You never sell it?

19 A. No.

20 Q. So the people that get your product, they use it
21 for --

22 A. They use it generally in almost all cases for
23 research.

24 Q. Do you also take your CD and sell it to larger
25 corporations?

1 A. Well, law firms and even a couple of courts also
2 use it possibly because of the convenience of the product.

3 Q. And do you also sell your CD for the purposes of
4 selling cases to other publishers?

5 A. I don't sell the CD but the same data that is in
6 there I sell to other publishers, including the defendant
7 here.

8 Q. Not West Publishing?

9 A. I am not sure who West is today but apparently
10 whoever they are, it's the West group I believe now.

11 Q. Which unit of it?

12 A. If Lawyers Co-op still exists as a unit it would
13 be to Lawyers Co-op.

14 Q. Has West Publishing ever told you that your
15 product competes against theirs in the market in a way that
16 would put them at a disadvantage?

17 A. No, they haven't told me that. In fact, Vance
18 Hooperman in his deposition testified that --

19 THE COURT: I don't want to you testify to what
20 somebody else testified in deposition. Thank you.

21 Q. Mr. Sugarman, have you been able to find out
22 about what the market is for cases or how your product
23 competes against West's products in the market for cases?
24 Have you tried to get information about that?

25 A. Well, I haven't done any market surveys. I do

1 know that completeness is of interest to the market and also
2 that the star pagination feature.

3 Q. Do you have any idea what West's sales of its
4 case products might be or how much it makes or where it
5 sells them? Have you ever tried to get that information?

6 A. We have tried to get information in discovery but
7 we obtained no such information.

8 Q. What was the information you tried to get?

9 MR. RITTINGER: Your Honor, it's irrelevant. I
10 move to strike.

11 THE COURT: Sustained.

12 Q. You have heard Ms. Bergsgaard's testimony here
13 today?

14 A. Yes, I have.

15 Q. If you had an unlimited amount of money, could
16 you go out and get the court opinions of the Court of
17 Appeals from courts?

18 A. With all the corrections that were added, no, I
19 could not.

20 MR. HARTMANN: Thank you.

21 I have no further questions, your Honor.

22 At this time our final witness we ask --

23 THE COURT: Mr. Rittinger has some questions for
24 this witness. I know it's a surprise to you that he would
25 want to cross examine.

1 MR. HARTMANN: I am sorry.

2 CROSS-EXAMINATION

3 BY MR. RITTINGER:

4 Q. Mr. Sugarman, let me ask you to keep Exhibit 12
5 in front of you.

6 THE COURT: Exhibit 16 you mean.

7 MR. RITTINGER: Exhibit 16, yes.

8 Q. Does that case have a file line?

9 A. I do not think so, no.

10 Q. Let me ask you this: If it had a file line would
11 you have crossed it out?

12 A. If I thought that it had been put in by West and
13 for the purpose of this letter, yes, I would have crossed it
14 out.

15 Q. You know what we are referring to when we talk
16 about a file line?

17 A. I believe I do but there seems to be variations
18 on what it might be.

19 Q. Well, you are the one that selected the first
20 hundred pages of 1 F.3d to analyze, correct?

21 A. Yes.

22 Q. And you identified certain corrections that you
23 found in those first hundred pages, correct?

24 A. Yes.

25 Q. And there were no file lines in those first

1 hundred pages, is that correct?

2 A. I don't believe so.

3 Q. Did you continue to look through the book to see
4 if there were file lines in any of the subsequent cases?

5 A. No, I did not look specifically for file lines.

6 Q. Do you seek to copy West file lines in this case?
7 Is that one of the things you are seeking a declaration
8 according to your understanding?

9 A. Yes, we would seek to copy them if the court were
10 to conclude that they were not copyrightable.

11 Q. Let me show you page 386 of 1 F.3d and ask you if
12 you see a file line.

13 A. I do see a file line.

14 Q. Could you just read it?

15 A. It says, "Rehearing and suggestion for rehearing
16 en banc denied. September 2, 1993."

17 Q. Do you know whether those words appear anywhere
18 in any court opinion?

19 A. Actually looking at that I would have no idea of
20 knowing whether the Sixth Circuit put that in there, whether
21 that was put in by West, because some courts do use file
22 lines so the answer is by looking at that alone, no, I would
23 not be able to know.

24 Q. Some courts use file lines.

25 A. Yes.

1 Q. What courts use file lines?

2 A. Any court that modifies an opinion and restates
3 it will include a file line. Any court that has an opinion
4 en banc after reargument will put in a file line.

5 Q. Where do they put it?

6 A. They put it in the caption.

7 Q. Let me ask you this then, let's just take the
8 caption, this case right here. Are you aware of any place
9 else where this caption exists in the form that it looks
10 right now? I am at page 386 of a case of United States
11 versus Jason Brian Velez.

12 A. Well, I assume you mean to first exclude all of
13 the first headnotes and synopsis.

14 Q. I am just talking about the caption.

15 A. I consider the caption, and I noted in your brief
16 before you talked about above the line and below the line
17 but to me the caption is from the very beginning, the names
18 of the parties right up to the beginning of the authoring
19 judge.

20 Q. Let's refer to the caption as that part starting
21 with "United" and ending with "Appellant." Are you aware of
22 any other place where this case will be captioned as it is
23 here in the West Reporter?

24 A. First of all, no one ever uses that as a
25 caption --

1 THE COURT: Please answer the question.

2 A. Number 2, that includes the synopsis, which
3 apparently is authored by West.

4 THE COURT: He is not asking you that. He is
5 simply asking you the top part that identifies the parties.

6 THE WITNESS: The top part that identifies the
7 party prior to synopsis I don't know if it does appear. I
8 cannot look at that and tell you whether or not prior to the
9 beginning of the synopsis if that is what the Sixth Circuit
10 opinion says.

11 Q. In your many years of litigation and and your
12 review of all the dead copy, were you ever able to identify
13 one caption that was identical as it came from the court and
14 as it was published by West?

15 MR. HARTMANN: Objection.

16 Q. Can you identify one?

17 A. The Fifth Circuit and the Eleventh Circuit
18 captions are identical.

19 Q. Other than the Fifth Circuit and the Eleventh
20 Circuit, can you identify one?

21 A. If you mean identical down to the last period, I
22 can't specifically recall any but I do recall in going
23 through the documents and the comparison that in many cases
24 there are absolutely no changes to the names of the parties
25 if we put aside typographical changes and fonts.

1 The docket number appears to be exactly the same.
2 The dates of the decision appears to be exactly the same, so
3 there is absolutely no difference of any substance between
4 the two.

5 Q. You can't identify any that look the same other
6 than the Fifth and the Eleventh Circuits, is that correct?

7 A. You mean look the same as far as the words or the
8 appearance?

9 THE COURT: Let's move on. It's getting
10 argumentative.

11 Q. The court line --

12 A. Can I see this, by the way? We don't have extra
13 copies.

14 Q. Sure.

15 The court line, is that the way the Sixth Circuit
16 identifies itself in its opinions, as it appears in the
17 court line?

18 A. I don't know. The circuits use different styles.
19 They may use the same style. They might use a different
20 style.

21 Q. So you don't know the answer to that?

22 A. When you say the court line, what is the court
23 line?

24 Q. I am talking about immediately under the docket
25 number.

1 A. You mean "United States Court of Appeals Sixth
2 Circuit?"

3 Q. Right.

4 A. I don't know. I know that there are many
5 different ways the circuit courts identify themselves. Some
6 say United States Court of Appeals for the Sixth Circuit.
7 Some say of the blank circuit. Other says the blank circuit
8 U.S. Court of Appeals, so there are various ways in which
9 that is done.

10 Q. Do you know of any Circuit Court where it is
11 identified or where it identifies itself underneath the
12 caption starting with the names of the parties?

13 A. Actually some circuits --

14 Q. Other than the Fifth and the Eleventh Circuits.

15 A. Well, I would have to look at the actual slip
16 opinions. This question has never been posed to me. I do
17 know electronically a couple of courts don't even have the
18 name of the circuit in the caption.

19 Q. Electronically?

20 A. Yes. Sometimes, yes. Sometimes it's either on a
21 cover sheet or something that is not provided.

22 Q. Now, next we have the date it's argued and the
23 date decided. Do you know where that information appears
24 when it comes from the Court of Appeals, the Sixth Circuit?

25 A. It may be in the same location, it may be in a

1 different location.

2 Q. Do you think it might be in the same location?

3 A. I don't know.

4 THE COURT: That is something you redacted in
5 Mendell v. Gollust.

6 THE WITNESS: Yes, I pointed out as I did this,
7 and I did this in '91, that I would not redact that today
8 because I have seen this information consistently in Court
9 of Appeals opinions, so I now know this definitely -- this
10 information, the fact that it was argued on January 25, '93
11 and the fact it was decided that day, comes from the court.

12 Q. Is it your position that any fact that comes from
13 the court, no matter how it's compiled or arranged, should
14 not be protected by copyright in this action?

15 MR. HARTMANN: Objection.

16 THE COURT: Sustained.

17 Q. Directing your attention to the file line, "The
18 rehearing and suggestion for rehearing en banc denied," is
19 it your belief that at times the main opinion comes in and
20 with it will come a file line that says "rehearing and
21 suggestion for rehearing en banc denied" in the same
22 opinion?

23 A. It's possible.

24 Q. Well, if it's possible can you give us one
25 example where that has happened?

1 A. Sitting here without searching, no.

2 Q. Do you recall seeing it in your searches of the
3 files or the documents in this case?

4 A. That particular language would be a little less
5 likely but not impossible because sometimes there is a delay
6 between the date the opinion is issued and the date it's
7 released and someone may have filed a motion and it may have
8 been summarily denied. Most likely one would find that
9 rehearing en banc had been granted and you might find that.

10 Q. Let me ask you this: If you were going to
11 publish this case and you did not have the information with
12 respect to the rehearing and the suggestion for rehearing
13 being denied -- strike that. Withdrawn, and I will ask it
14 again.

15 Could you give your readers an accurate depiction
16 of what this case stands for without the information with
17 respect to the file line?

18 A. In that particular file line?

19 Q. Yes.

20 A. Well, there could be some readers who would have
21 been interested to know that there was a denial en banc.
22 They can either find it there or perhaps they can find it in
23 another location.

24 Q. Oh, they could find it in another location. How
25 is it they can find it in another location?

1 A. There are other research tools that could be used
2 and perhaps it may be in there and may not be in there.

3 Q. There are other places it could be published in
4 addition or other than creating a file line and putting the
5 information at the spot in the West case where it appears,
6 isn't that correct?

7 A. You are talking about a file line about a denial
8 of a rehearing en banc.

9 Q. Do the courts actually refer to anything as a
10 "file line"? Have you ever heard a court refer to it as a
11 file line?

12 A. I believe in the correspondence, again West and
13 the courts, there are references to the file line. In fact,
14 I believe that one of the pieces of correspondence we have
15 that is an exhibit, either yours or ours, today is a letter
16 from the Fourth Circuit asking West to not use a file line
17 saying "amended" when all they are doing is a minor
18 typographical correction. So, yes, I believe that is used
19 frequently.

20 Q. I missed that. There is correspondence from the
21 court where the court is telling West not to use a file
22 line?

23 A. Asking West that they please not use a file line,
24 saying that one of their opinions had been corrected when
25 all they had done is perhaps corrected a typographical

1 error. And I believe that is in our exhibits or I can look
2 for it if you like.

3 Q. Let me ask you this: When you went through the
4 dead copy, did you look for examples of cases where file
5 lines were contained?

6 MR. HARTMANN: Objection, asked and answered.

7 THE COURT: Overruled.

8 A. When I looked -- well, if you are talking about
9 the 1 F.3d set that we put in --

10 Q. I am not talking about that now. I don't mean to
11 rush you but --

12 A. I would like to finish the answer.

13 1 F.3d was picked because it was just the first
14 volume. That was picked without ever looking at it. We
15 then took the first 100 pages. It was purely a completely
16 arbitrary decision. We did not look at it or analyze before
17 we picked it.

18 Q. But I am asking you now did it ever occur to you
19 before today that there were no file lines published in
20 those first hundred pages?

21 A. Yes, but that is only the exhibit --

22 Q. Yes, thank you.

23 A. Yes.

24 Q. Did you ever go back into any of the records that
25 were produced in this case to attempt to find dead copy for

1 cases which contained file lines?

2 A. I didn't have to attempt. They were in other
3 documents that were produced by you and that we had, yes.

4 Q. So you did find cases that had file lines in
5 them, correct, and dead copy for those cases?

6 A. Yes.

7 Q. And those file lines you know are created as a
8 result of a subsequent order issued by the court, isn't that
9 correct?

10 A. Not necessarily.

11 Q. It is in many situations, is that correct?

12 A. In many situations, yes.

13 Q. And West creates the language to describe what
14 that subsequent order says, isn't that correct?

15 A. In all cases, no.

16 Q. In many cases.

17 A. In some cases, yes.

18 Q. Do you have any idea whether it's 90 percent, 70
19 percent or 20 percent?

20 A. I haven't done a statistical analysis.

21 Q. You have kind of ignored the issue of file lines,
22 isn't that correct?

23 A. No, I haven't ignored.

24 MR. HARTMANN: Objection.

25 THE COURT: Let's move on.

1 Q. All Supreme Court decisions are available from
2 sources other than West, isn't that correct?

3 A. I believe so, yes.

4 Q. In fact, there is an official report for the
5 Supreme Court called the United States Reports, isn't that
6 correct?

7 A. Partially and to the extent that there is an
8 official reporter for opinions that are over 2-1/2 to 3
9 years old.

10 Q. You don't need West to get Supreme Court cases,
11 isn't that correct? There are multitudes of sources,
12 correct?

13 A. There are other sources, yes.

14 Q. But you don't need West.

15 A. I am never quite sure what goes on during the
16 2-1/2 year period about the corrections and it appears to me
17 possible that there are corrections that are in West that
18 have not yet been recorded in the Supreme Court Reporter, so
19 because I know there is communications between West and the
20 Supreme Court I believe there might be some corrections
21 approved by the court in the Supreme Court Reporter that are
22 not or haven't yet been made publicly available.

23 Q. Do you call the clerk and ask for all
24 corrections?

25 A. For a while I was receiving corrections once I

1 became aware that they would provide that service.

2 Q. Do you get the corrections from the Supreme Court
3 now?

4 A. I did for last year.

5 Q. Did you try to go back and get it for previous
6 years?

7 A. That seemed to be -- well, for previous years I
8 could go back to the U.S. Reports.

9 Q. So you don't need West for Supreme Court cases,
10 is that correct?

11 A. Certainly to know what was authoritative over
12 2-1/2 years ago I would say yes.

13 Q. Why couldn't you go to the U.S. Reports?

14 A. I said over 2-1/2 years ago when the U.S.
15 Reports -- I said yes to your question.

16 Q. I am confused. There is a point in time where
17 you had the initiative to go to the Supreme Court and ask
18 them to give you any corrections, correct?

19 A. I received them last year. I haven't decided
20 this year what to do but, yes, that is correct.

21 Q. If you haven't decided what to do, you want to
22 get them from West instead of getting them from the Supreme
23 Court, is that what you want to do?

24 MR. HARTMANN: Objection, your Honor.

25 THE COURT: Overruled.

1 A. I feel that if it's not --

2 Q. The question --

3 THE COURT: Let him answer.

4 A. If it's not copyrighted I have an absolute right
5 to copy it from West, even if I can walk across the street
6 and get it from another source. That is my position.

7 MR. RITTINGER: I move to strike. I have not
8 asked the witness a legal question. I have asked him do you
9 prefer to get --

10 THE COURT: Motion denied.

11 Move on please.

12 Q. Let me ask you this: Your product you
13 acknowledge you are selling for a commercial purpose, is
14 that correct?

15 A. Yes.

16 Q. You are in the business of making a profit on
17 your product, correct?

18 A. Yes.

19 Q. It is true, is it not, that no one can do what
20 you want to do with respect to the one or two percent of the
21 West cases that you say you can't get by utilizing your
22 product, isn't that correct?

23 MR. HARTMANN: Objection, your Honor,
24 incomprehensible.

25 THE COURT: Sustained for that reason.

1 Q. I will try again.

2 Your contract, your license agreement, prohibits
3 anyone from making a copy of anything that appears on the
4 Hyperlaw CD, isn't that correct?

5 A. My license agreement says what it says.

6 Q. Is it your understanding that that is what it
7 provides for, Mr. Sugarman?

8 A. It's my understanding that the license agreement
9 did not allow for substantial amounts of copying, yes.

10 Q. So no one could take your license, your product,
11 excuse me, and do what you want to do with the West product,
12 isn't that correct?

13 MR. HARTMANN: Objection, your Honor.

14 THE COURT: Overruled.

15 A. Yes. Someone could copy -- let me put it this
16 way: I don't have a license agreement with West for their
17 books so what I intend to do with the West books has nothing
18 to do with the license agreement.

19 Q. I understand that. But in order for someone to
20 get ahold of your product legally, they have to agree that
21 they will not do exactly what you want to do with the West
22 product, isn't that correct?

23 MR. HARTMANN: Objection, your Honor.

24 THE COURT: Overruled.

25 A. The license agreement might be able to be

1 interpreted that way, but the license agreement does say
2 that no copyright whatsoever is claimed in the text of
3 opinions and it makes it absolutely clear. There is no
4 copyright claim at all.

5 Q. Now, your product begins in 1993, is that
6 correct?

7 A. For the federal appellate opinions.

8 Q. And you have testified previously, have you not,
9 that for \$450 someone can get from your product what they
10 would have to pay between 1000 to \$1200 for the West
11 product, correct?

12 A. Whatever my testimony was.

13 Q. Does that sound about right to you?

14 A. If they want the cases without the digest, the
15 headnotes, yes.

16 Q. And you are out marketing your product as being a
17 substitute for the West product, isn't that correct?

18 A. I don't market as a substitute, as an
19 alternative. I don't believe it's a direct substitute.
20 It's clearly not a direct substitute.

21 Q. You don't go out to people and say you can get
22 everything that you get from West that you need for half the
23 price?

24 THE COURT: That is a different question.

25 Q. Do you?

1 A. I don't believe I ever said that everything they
2 need they can get from Hyperlaw.

3 Q. Did you also describe your product as being a
4 substitute for between 40 and 50 West volumes each year at
5 the justiciability hearing?

6 A. A substitute?

7 Q. Yes.

8 A. I don't know if I used the the word substitute.

9 Q. Did you, in words or substance, imply that your
10 product could be used in place of 40 to 50 volumes of the
11 West product per year?

12 A. Well, at that time that was if it had star
13 pagination, if it had the corrections, if it had the
14 complete cases. Yes, then it would substitute for those
15 people who did not want digest and headnotes.

16 Q. We will assume it has star pagination. If it has
17 star pagination, which is what you were assuming when you
18 gave that answer, then your product would substitute for
19 that many volumes per year, is that correct?

20 A. I don't know if I said that. It was probably 30
21 a year and direct substitute, I think that would be -- if I
22 said it I guess the testimony says what it is. If you are
23 asking me today if it's a substitute obviously it isn't.

24 Q. But you believe there are many people who would
25 buy your product and forego buying the West product?

1 A. There might be some people who can't afford the
2 West product and who don't need the extra enhancements of
3 West who would buy my product, yes.

4 Q. And your product sells for how much now?

5 A. For sole practitioners it's \$450 a year.

6 Q. And it does not have star pagination on it now?

7 A. No, it does not.

8 Q. Do you intend to increase the price when and if
9 you do star pagining?

10 A. No. I suspect I would rely upon increased sales.

11 MR. RITTINGER: Your Honor, can I have a minute
12 please?

13 THE COURT: Sure.

14 (Pause)

15 MR. RITTINGER: No further questions at this
16 time.

17 THE COURT: Anything further?

18 MR. HARTMANN: Five minutes, if I might.

19 THE COURT: Sure.

20 REDIRECT EXAMINATION

21 BY MR. HARTMANN:

22 Q. About this issue about only supplying an analysis
23 of the first hundred pages, Mr. Sugarman, I want to show you
24 what I have marked as Exhibits 52 and 53. These have
25 previously been provided to the defendant with plaintiff's

1 interrogatories, the first set of interrogatories. Do you
2 recognize what those volumes are?

3 MR. RITTINGER: Can we see them, your Honor? I
4 don't know what they are.

5 THE COURT: Sure.

6 MR. HARTMANN: I will bring them to you. They
7 are exhibits to Westlaw's first interrogatories sent to your
8 client requesting what changes they made in all F.3d
9 redacted by Mr. Sugarman by hand.

10 MR. RITTINGER: What is this?

11 MR. HARTMANN: An exhibit to plaintiff Hyperlaw's
12 first interrogatories.

13 (Pause)

14 MR. RITTINGER: Okay.

15 Q. Mr. Sugarman, have you supplied to West
16 Publishing Company the entirety of 1 F.3d redacted in the
17 way that you would redact it for use in your product?

18 A. Yes. These are two volumes of the entire or I
19 think there is one other volume that was prepared by me
20 personally. I believe I recall staying up most of the night
21 blotting out all of the West information for purposes of
22 attaching to Hyperlaw's first set of interrogatories to
23 West. It's every single page from 1 F.3d.

24 Q. When you did that you didn't select out certain
25 cases from 1 F.3d and ignore others, it's every single page

1 of cases in 1 F.3d, right?

2 A. Right.

3 Q. Now, the second question, you were asked about
4 file lines. When you found file lines in the 1 F.3d set
5 that you sent to West, did you redact out file lines?

6 A. No, I did not redact out file lines. By then
7 after the extensive amount of work I had been doing with the
8 appellate opinions I realized that a lot of courts put them
9 in and you couldn't look at these and know where they came
10 from.

11 Q. Now, Mr. Rittinger asked you about placement of
12 various information, including file lines and combines
13 around inside of decisions. When you get a supplementing or
14 amending decision, do you place it in a place in your
15 product where West places it in theirs?

16 A. Sometimes it's already inserted by the court.

17 Q. But if it's not inserted by the court, what do
18 you do with what they call combines?

19 A. My general practice is to insert it at the
20 beginning of the opinion. I have a choice. I can either
21 put it at the beginning or the end. There aren't too many
22 other choices.

23 Q. But what you try to do is place it at the
24 beginning?

25 A. Yes.

1 Q. So you don't reproduce the form of the combine
2 that they do?

3 A. No.

4 Q. You were asked about your license prohibiting
5 other uses. Does your license specifically state in the
6 text of it that it's being done by license and not by
7 copyright?

8 A. Yes. It's quite specific that it's a license
9 agreement. I explicitly or the agreement specifically says
10 that it is not attempting to protect the text based upon any
11 theory of copyright.

12 Q. Now, you were also asked about your license
13 stopping people from doing things. Are you familiar with
14 licenses that are used by LEXIS and Westlaw?

15 A. I have seen them, yes.

16 Q. Do those licenses prohibit secondary use very
17 similar to yours?

18 MR. RITTINGER: We will stipulate those licenses
19 prohibit secondary use just like his.

20 THE COURT: Okay.

21 Q. One final question: Would you explain to the
22 court why the Supreme Court, the official version of the
23 Supreme Court U.S. Reports is not a replacement for Supreme
24 Court Reporter for that two-year period?

25 A. Because it doesn't exist for the two-year period.

1 There is no United States Reports.

2 Q. So what is the de facto Supreme Court Reporters
3 of the first 2 years?

4 A. The de facto Supreme Court Reporter is the
5 Westlaw Supreme Court Reporter.

6 MR. HARTMANN: No further questions.

7 REXCROSS EXAMINATION

8 BY MR. RITTINGER:

9 Q. But you can go to the clerk and get the
10 corrections, you know that, right?

11 A. For the Supreme Court only and I must be
12 emphatic, only the Supreme Court, yes.

13 Q. When you say for the Supreme Court only, have you
14 tried to go to the Second Circuit and asked for corrections?

15 A. Yes.

16 Q. And they told you no?

17 A. They have an awkward practice here.

18 Q. It's a lot of work, right?

19 A. It's a lot of sweat, yes.

20 Q. You don't want to do that, isn't that right?

21 A. It's a lot of sweat of the brow.

22 Q. You don't want to do that, right?

23 MR. HARTMANN: Objection.

24 THE COURT: Please.

25 MR. RITTINGER: No more questions, your Honor.

1 THE COURT: Thank you. You may step down.

2 (Witness excused)

3 MR. HARTMANN: Your Honor, the final witness we
4 would call here is Mr. Opperman and a couple of other other
5 people that were going to testify through their deposition.
6 The only one that I will now offer is Mr. Opperman and it's
7 primarily for the point, your Honor, and we can go through
8 reading it on the stand, that Mr. Opperman says that he
9 doesn't consider Hyperlaw's product a competitor in the
10 market.

11 Well, we will go on, your Honor. Thank you.

12 We rest.

13 MR. RITTINGER: Your Honor, let me get this
14 straight, they are now resting. The only exhibits that have
15 been introduced into evidence are the ones they moved into
16 evidence. They are not moving for any of the remaining
17 premarked exhibits, is that correct?

18 MR. HARTMANN: Your Honor, most of these exhibits
19 are already in evidence through the various hearings and
20 testimony in the hearings.

21 THE COURT: This is a new proceeding so you
22 better make sure what your record is and what you want in in
23 this proceeding.

24 MR. HARTMANN: We move the admission of the
25 balance of our exhibits here.

1 MR. RITTINGER: We are going to have to go over
2 that one by one.

3 THE COURT: Why don't you do that overnight.

4 MR. HARTMANN: Thank you, your Honor.

5 MR. RITTINGER: Your Honor, I renew my motion to
6 dismiss for the reasons expressed this morning.

7 THE COURT: Same ruling.

8 MR. RITTINGER: I now would like to move for a
9 directed verdict.

10 May I be heard, your Honor?

11 THE COURT: You may if you want, but I am going
12 to reserve decision in any event.

13 MR. RITTINGER: Then I will try not to waste much
14 of the court's time. But I believe that the law is clear
15 after Feist as to what they have a burden to prove that we
16 haven't done. This is a declaratory judgment action and the
17 burden of proof is on them and far from proving that we have
18 not a modicum of creativity, however obvious, however crude,
19 et cetera, they put our witness on the stand who testified
20 without contradiction as their witness to numerous changes,
21 additions and deletions with respect to all four of the
22 compilations that are at issue in this case and, your Honor,
23 I respectfully submit that this case should end based upon a
24 directed verdict at this time. For sure they have not met
25 their burden of proof.

1 THE COURT: Decision reserved.

2 Call your next witness.

3 MR. RITTINGER: We are going to call Ms.
4 Bergsgaard. We can probably use ten minutes to move the
5 exhibits up to the front of the courtroom so they will be
6 easier to get at and make it a little faster than running
7 them back and forth.

8 THE COURT: Why don't we break for the afternoon.
9 I have a 4 o'clock conference.

10 I will see you at 10 o'clock tomorrow morning.
11 You can use use that extra time to shorten your
12 presentation.

13 MR. RITTINGER: Is there a time they have to put
14 in their response to our first motion to dismiss?

15 THE COURT: We will discuss that after we finish
16 tomorrow.

17 MR. HARTMANN: Thank you, your Honor.

18 (Trial adjourned to January 28, 1997 at 10 a.m.)

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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 HYPERLAW, INC.,

4 Plaintiff,

5 v.

94 Civ. 589

6 WEST PUBLISHING COMPNAY,

7 Defendant.

8 -----x

9 January 28, 1997
10 a.m.

10

Before:

11

HON. JOHN S. MARTIN,

12

District Judge

13

APPEARANCES

14

LAW OFFICES OF PAUL RUSKIN

15 Attorney for Plaintiff

BY: PAUL J. RUSKIN

16 CARL HARTMANN

17 - and -

18 LAW OFFICES OF LORENCE L. KESSLER

BY: LORENCE L. KESSLER

19

20

SATTERLEE, STEPHENS, BURKE & BURKE

21 Attorneys for Defendant

BY: JAMES F. RITTINGER

22 JOSHUA M. RUBINS

23 - and -

24 LOCKRIDGE, GRINDAL, NAUEN & HOLSTEIN

BY: JOSEPH M. MUSILEK

25

1 MR. HARTMANN: Your Honor, if we might, we'd like
2 to make a motion. We had a discussion with opposing counsel
3 to admit the following documents as exhibits. Exhibit 1; 2
4 has already been admitted, 3, 4, 5, 6,

5 MR. RITTINGER: Your Honor, on 4, 5, and 6, we
6 have no objection as to authenticity. We do object on the
7 grounds of relevancy and I assume that your Honor will take
8 them for what they're worth.

9 THE COURT: That's why I became a judge, so I can
10 say that.

11 MR. HARTMANN: 11, 12, 13 has already been
12 admitted; 14, 15, 16 and 17 have already been admitted, 18,
13 23, 27, 33, 34, 35, 36, 37, 38, 39, 41 has already been
14 admitted; 42 has already been admitted; 45, 47 has been
15 admitted; 48 has been admitted; 51 and 55, subject to the
16 following limitations that it reads: Exhibits to prior
17 filings which are previously-filed affidavits of Sugarman --

18 MR. RITTINGER: I didn't even understand that.
19 I'm sorry. I thought you eliminated advisor completely. I
20 don't know what I'm agreeing to or being asked to agree to.

21 MR. HARTMANN: Just one second. And also
22 Plaintiff's Exhibit 52 on which the witness was examined
23 yesterday. And 55, just Mr. Sugarman's prior affidavits
24 filing in this case, not for the purpose of the truth of the
25 matter just for the notices to what he stated in his

1 affidavit.

2 THE COURT: You just want to introduce his prior
3 affidavits?

4 MR. HARTMANN: Yes.

5 THE COURT: Without exhibits?

6 MR. HARTMANN: Yes, just his affidavits without
7 exhibits, but not for the --

8 MR. RITTINGER: But not for the truth for what's
9 contained therein?

10 MR. HARTMANN: Yes.

11 THE COURT: I suppose as to West or something.

12 MR. HARTMANN: That's not an issue.

13 THE COURT: I'll take it for that, but not for
14 the truth of what's in them, your Honor.

15 MR. RITTINGER: Your Honor, I think that what we
16 have agreed is that we've agreed with respect to question
17 27, 34 through 39, 45 and 51. We have no objection on the
18 grounds of authenticity and we understand that Mr.
19 Hartmann's to cross-examine the witness on these and that
20 will take care of the foundation, if he does that.

21 If he doesn't, then we would have an objection as
22 to foundation and relevancy.

23 THE COURT: All right. I understand as to the
24 others, there's no objection.

25 MR. RITTINGER: As to the others, there's no

1 objection. They're the others that we went over.

2 THE COURT: All right.

3 MR. RITTINGER: We call Mrs. Bergsgaard.

4 Your Honor, we're going to try to streamline
5 this. If it's all right, could I have Mr. Rubins and Mr.
6 Musilek stand up here and be ready to hand exhibits and that
7 type of thing?

8 THE COURT: Terrific.

9 MR. RITTINGER: I think have we provided the
10 Court with -- talking about the Environmental Act, four
11 bound volumes of exhibits.

12 THE COURT: I have five.

13 MR. RITTINGER: I think it might be easier if we
14 hand your Honor an extra copy rather than struggling with
15 the volumes. I don't know.

16 THE COURT: Having gone through all the work to
17 put together the volumes, I should use them.

18 MR. RITTINGER: If you can use it, but
19 unfortunately these are not going to follow in order. So --

20 THE COURT: Let's see how it goes and then --

21 MR. RITTINGER: O.K.

22 THE COURT: You're still under oath.

23 DONNA BERGSGAARD, resumed.

24 DIRECT EXAMINATION

25 BY MR. RITTINGER:

1 Q. Mrs. Bergsgaard, I just want to ask you a couple
2 of quick questions before I ask you to give a quick summary
3 of your background.

4 In connection with the Fifth Eleventh Circuits,
5 the slip opinions that West supplies to the Circuits do not
6 include the attorney summaries, is that correct?

7 A. That's correct.

8 Q. And they also do not include file lines, is that
9 correct?

10 A. That's correct.

11 Q. Now, in connection with the Supreme Court -- and
12 you did hear Mr. Sugarman's testimony yesterday with respect
13 to the Supreme Court?

14 A. Yes, I did.

15 Q. At what point are any corrections initiated by
16 the Supreme Court incorporated into West's Supreme Court
17 Reporter?

18 A. At the time that we publish our permanent-bound
19 volume, which is two and a half years or three after our
20 advance sheet and interim-bound volume.

21 Q. And why does it happen that way?

22 A. Because we don't receive the corrections from the
23 Reporter of Decisions Office until they are ready to go to
24 print with their volume. So, our advance sheet and our
25 interim volumes do not contain those corrections.

1 Q. Well, then is it true that with respect to
2 corrections that the Supreme Court makes that those
3 corrections are not published by West until the same time
4 that the Supreme Court in its official Reporter publishes
5 them?

6 A. That's correct.

7 Q. So, Mr. Sugarman gains no advantage whether
8 permitted or not by having access to the West advance sheets
9 and being able to copy the West advance sheets with respect
10 to the Supreme Court reporter, is that correct?

11 A. That's correct, except he has the advantage of
12 our editorial work and our additions that we make to the --
13 for the advance sheet.

14 Q. I'm sorry. But in connection with getting
15 anything that the Supreme Court does, he's not going to get
16 them out of those advance sheets; correct?

17 A. That's correct.

18 Q. Now, just very quickly, would you relate your
19 highest educational degree and your professional experience
20 commencing whenever it started to date?

21 A. I have a juris doctorate degree from William
22 Mitchell College of Law in St. Paul. I graduated in 1980
23 and I'm admitted to the bar. I started work at West
24 Publishing Company in 1977 in the editorial department
25 answering questions on the manuscripts, as well as creating

1 case histories. I worked in that position for about a year
2 and a half and went as the manager of the manuscript
3 department. And in 1983, I was named manager to the
4 manuscript department. And in 1988, I was named executive
5 of the company.

6 Q. Now, could you just very quickly describe what
7 the manuscript department is at West and what it does?

8 A. Yes. We have about 250 people working on the
9 Reporters and the digests. We are responsible for the
10 receipt and the preparation and the arrangement of the
11 judicial decisions that West chooses to collect for the
12 National Reporter system as well as for Westlaw.

13 And in addition to that, we provide the support
14 for our editorial area that is responsible for the headnotes
15 and the synopsis of Reporter cases. We have about 80
16 lawyer-editors that we support in that work.

17 Q. All right. Now, what is the editorial department
18 at West and how does that interrelate, again, very quickly
19 with the manuscript department?

20 A. We are the support department for editorial. We
21 have -- it's more of a payroll distinction than anything.
22 We work very closely together in creating the case reports
23 for West.

24 Q. And you mentioned attorney-editors. Could you
25 just generally describe again quickly what their duties and

1 responsibilities are?

2 A. Our editors write the synopsis, the -- they read
3 every case. They create and write the synopsis. They write
4 the points of law, the headnotes. They assist in writing
5 the file lines. They help us in the selection of cases that
6 we want to include in the Reporters. They help us with
7 really any question that comes up on the manuscript with
8 extension pages, any question that's on a manuscript will
9 end up being resolved by an attorney-editor.

10 Q. And you also mentioned yesterday opinion
11 verifiers. Could you tell his Honor what an opinion
12 verifier is, how many there are and what their duties and
13 responsibilities are?

14 A. Yes. We have about 19 opinion verifiers and they
15 are trained in citations system and how to find research and
16 how to find material and in the case-citing process. It
17 probably takes about six months to train someone into
18 opinion verifying after they have had some background
19 working with judicial decisions.

20 MR. RITTINGER: I believe we have a distinction
21 on this, your Honor.

22 Q. Mrs. Bergsgaard, for every advance sheet and
23 every bound volume of both the Supreme Court Reporter and
24 the Federal Reporter, West has filed and has obtained
25 certificates of copyright registration, is that correct?

1 A. Yes.

2 MR. RITTINGER: Your Honor, we have some
3 documents which are representative copies as Defendant's
4 Exhibit A.

5 A. We would move for their admission with the
6 stipulation that we have them for all both advance sheets
7 and Reporters.

8 THE COURT: Received.

9 (Defendant's Exhibit A received in evidence)

10 Q. Mrs. Bergsgaard, yesterday you talked about dead
11 copy. Would you just generally and quickly explain to Judge
12 Martin one more time what dead copy is?

13 A. Yes. Dead copy is when we have the slip opinion.

14 THE COURT: When he says explain to me, he really
15 means talk to the Court Reporter.

16 THE WITNESS: O.K. When we have the dead copy --

17 MR. RITTINGER: Actually, I meant to you.

18 A. We receive the slip opinions. We choose to
19 gather slip opinions. We use that to form the basis of our
20 case report. We will add material to it. We'll delete
21 material. We'll rearrange, we'll modify and put our
22 editorial work with it and that becomes what we will use for
23 publication and we call that our case report.

24 After that, it also has a routing sheet on it, so
25 it will tell all the publications steps that will need to be

1 taken for that case to be published. And after publication,
2 it becomes what we call dead copy. And "dead" meaning that
3 it's been published in the advance sheet.

4 Q. Let me just show you a copy of what's been marked
5 as defendant's --

6 MR. RITTINGER: I think it may be easier to do it
7 this way. We have a stipulation as to authenticity, I think
8 admissibility with respect to all of our exhibits except
9 two. So, I will move for the admissibility of all our
10 exhibits.

11 MR. HARTMANN: No, I'm sorry that's not the
12 stipulation.

13 THE COURT: What is the stipulation?

14 MR. HARTMANN: We went over our documents. We
15 didn't make the stipulation to admissibility of all the
16 documents.

17 MR. RITTINGER: Then I'll do it this way.

18 MR. HARTMANN: We certainly would stip to the
19 dead copy.

20 MR. RITTINGER: O.K., I'll have to do it one by
21 one. I thought we had a stipulation.

22 Q. Let me show you Exhibit DP and is that an example
23 of dead copy?

24 A. Yes.

25 Q. Now, in connection with the preparation for this

1 trial, you have gathered various examples of dead copy, is
2 that correct?

3 A. That's correct.

4 Q. Would you tell the Court how you went about
5 selecting the dead copy that has been premarked as exhibits
6 in this case?

7 A. Yes, we just -- we store our dead copy in
8 archives. We just pick some numbers and ask them to call up
9 dead copy boxes. We did look for examples to show the Court
10 combines and file lines, otherwise we just picked cases at
11 random and sent them to our attorneys.

12 Q. Now, yesterday we talked about West enhancements
13 above the line and below the line. I want to start by going
14 and talking about the West enhancements below the line. And
15 first I want to talk -- yesterday, you testified about
16 citation corrections and revisions. Do you recall that
17 testimony?

18 A. Yes.

19 Q. And you testified that West had various written
20 guidelines with respect to the corrections and revisions
21 that it makes in its citations, is that correct?

22 A. That's correct.

23 Q. I'd like to show you now Exhibits K, M and Q, and
24 ask you first with respect to K, could you describe briefly
25 what Exhibit K is?

1 A. Exhibit K is instructions to our statute
2 verifiers, the statute verifiers verify every statute that's
3 cited in a Court opinion and they are different from the
4 opinion verifiers. There is a little more extensive
5 training that needs to go on.

6 THE COURT: I'm sorry. What exhibit are we
7 looking at?

8 THE WITNESS: Exhibit K.

9 A. And it is just a collection of memoranda that
10 have been written by our lawyer-editors and supervisors in
11 connection with how to verify and style statutes.

12 Q. And do those guidelines change from time to time
13 over the years?

14 A. Yes.

15 Q. And who makes the decisions with respect to
16 changing those guidelines?

17 A. The attorney-editors.

18 Q. Now, would you take a look at --

19 MR. RITTINGER: I move for the admission of
20 Exhibit K, your Honor.

21 MR. BERGER: No objection.

22 THE COURT: Received.

23 (Defendant's Exhibit K received in evidence)

24 Q. Would you take a look at Exhibit Q and explain
25 what Exhibit Q is?

1 A. Exhibit Q is memorandum that deals with
2 correcting citations. This would be used by our opinion
3 verifiers to go through and give them some guidance in when
4 they're going to be correcting citations and how they're
5 going to go about doing that, when they're doing their job
6 of opinion verifying.

7 Q. Now, do these guidelines change from time to time
8 over the years?

9 A. Yes. Yes, they do.

10 Q. And on the same business which you previously
11 testified with respect to Exhibit K.

12 MR. RITTINGER: I move for the admission of
13 Exhibit K.

14 THE COURT: Received.

15 (Defendant's Exhibit K received in evidence)

16 Q. Exhibit M, would you describe what Exhibit M is?

17 A. Exhibit M is the popular name listing that I
18 talked about yesterday with Mr. Hartmann. It is the listing
19 of cases that our editors have deemed to be popular so that
20 if a Court is using one of these cites to one of these cases
21 and does not have a citation, we will not add it in and that
22 would be contrary to our normal procedure.

23 Q. Now, just so it's clear, if a case is cited by a
24 Court without a citation that is not on that list, West will
25 add a citation, is that correct?

1 A. Yes.

2 Q. But if it is on that list, it will not add a
3 citation?

4 A. That's correct.

5 Q. And who made the decision to put those cases on
6 the popular name list?

7 A. The decision is made by our attorney-editors as
8 they are reading the cases, they know which cases are cited
9 most frequently and make the determination when the case I
10 guess rises to the level of no longer needing a cite to
11 point people to it.

12 Q. And from time to time are new cases added to the
13 list?

14 A. Yes.

15 Q. And, again, based upon decisions by the
16 attorney-editors?

17 A. That's correct.

18 MR. RITTINGER: Move for its admissibility, your
19 Honor.

20 THE COURT: Received.

21 MR. BERGER: I object. Could I make a projection
22 to the record?

23 This is an document that we've never seen before.
24 It was obviously prepared within the last few months.

25 THE COURT: When was this list first prepared?

1 THE WITNESS: We've had a popular name listing at
2 West as long as I've been there. So, there has been one
3 since -- for 20 years. It just gets updated.

4 THE COURT: This is the current one that's
5 updated.

6 The objection is overruled.

7 MR. RITTINGER: Your Honor, just to make this a
8 little bit faster, we're now going to show you four or five
9 examples of corrections in dead copy and we'll be working on
10 the D exhibits.

11 First I'd like to refer the witness to Exhibit
12 DP.

13 THE COURT: D?

14 MR. RITTINGER: D for "dead" I guess and P.

15 MR. HARTMANN: I'm sorry. Which were those? DP?

16 MR. RITTINGER: DP. Your Honor, it might be
17 easier on these if we just hand you up copies.

18 THE COURT: O.K.

19 Q. Mrs. Bergsgaard, you have Exhibit DP in front of
20 you. I'd like to direct your attention to page 9 of the
21 majority and page 5 of the concurrence and ask you if you
22 can point out an example of a correction that West made
23 there.

24 A. Yes. At the very top of page 9 in the majority
25 opinion, the Court is citing to McCulloch v. Maryland, and

1 the spelling there is McCulloch.

2 On page 5 of the concurrence, the concurring
3 judge is using an alternative spelling of McCulloch,
4 M'Culloch.

5 We normally would accept either of the
6 alternative spellings in this case because using an
7 apostrophe instead of a small C was sometimes done back in
8 that time period; however, in this case, we did choose to
9 make the change to make it consistent, make the citation
10 style consistent within the opinion.

11 Q. And are these the types of changes that opinion
12 verifiers make consistently as they review court cases at
13 West?

14 A. Yes.

15 MR. RITTINGER: Move for its admission, your
16 Honor.

17 MR. HARTMANN: No objection.

18 THE COURT: Received.

19 (Defendant's Exhibit DP received in evidence)

20 Q. Next, I'd like to show you Exhibit DX. I direct
21 your attention to page 10 and ask you if you could just
22 quickly point out the word on page 10?

23 A. O.K.

24 Q. With respect to corrections?

25 A. Just for corrections, if you take a look in the

1 footnote 3, you can see that West verifiers have made
2 changes to some company names AcroMed has been changed to
3 its correct way, A-c-r-o-M-e-d.

4 We also changed Cibavision Corp. CIBA was in all
5 caps, and we have made that lower case to conform to our
6 digest title.

7 We also made a change in I.E. dePont. The small
8 "de" we made it a capital "De."

9 Q. Again, these are types of changes, corrections
10 that West editors make throughout the process with respect
11 to court cases?

12 A. Yes.

13 MR. RITTINGER: Move for its admission, your
14 Honor.

15 MR. HARTMANN: No objection.

16 THE COURT: Received.

17 (Defendant's Exhibit DX received in evidence)

18 Q. Next, I'd like to show you Exhibit DY and
19 specifically refer you to Page 2, first.

20 A. If you'll look down about eight lines from the
21 first paragraph, this is a statute correction. The Court is
22 using racketeering influenced --

23 THE COURT: I'm sorry. Where are we in this
24 document?

25 THE WITNESS: It's the -- right under -- if you

1 see inter alia, it's the line -- I'm sorry -- it's Page 2
2 slip opinion, Page 2, the first paragraph under the judge's
3 name.

4 THE COURT: O.K. I found the slip opinion. It's
5 the headnote beforehand. O.K.

6 THE WITNESS: And if you see the line that starts
7 inter alia --

8 THE COURT: Yes --

9 THE WITNESS: -- that line we made a correction
10 to the judge's characterization of the RICO Act. It should
11 be Racketeer-Influenced and Corrupt Organization's Act and
12 we represented -- we changed it from racketeering to
13 racketeer.

14 Q. Let me now direct your attention to page 5 of the
15 slip opinion.

16 A. This is in footnote 2. When you look down to the
17 first cited case in footnote 2, it says see Canal Co. v.
18 Plumbers and Steamfitters. That was not a complete title.
19 So, we have expanded that title to read Canal Const.
20 C-O-N-S-T Co. v. Plumbers and Steamfitters Local Union 100.

21 Q. And could you now look at page 11 and point out
22 any corrections there.

23 A. On page 11 of the slip opinion, in footnote 6 at
24 the very bottom, the very last line, the judge is quoting
25 from U.S. Report and is using the running head from that

1 report for the title of the case. And it's entitled Motor
2 Coach Employees v. Lockridge. West has changed that title
3 to read Amalgamated Asn'n of St. Elec. Ry. and Motor Coach
4 Employees of America v. Lockridge. That's the title that
5 West has chosen to use for -- as its digest title for that
6 case.

7 Q. Now, we had testimony yesterday and I just want
8 to go over this very quickly. You testified as to what a
9 running head is. And I believe you also testified as to
10 what a digest head is?

11 A. Yes.

12 Q. And it is true, is it not, that West attempts to
13 conform all Court citations to the digest title that it
14 gives to any case that its previously reported on?

15 A. Yes.

16 Q. And that's an example of West doing that?

17 A. That's correct.

18 Q. And that happens regularly and consistently
19 throughout the Federal Reporter and the Supreme Court
20 Reporter. Is that correct?

21 A. Yes.

22 Q. And these other examples that often --

23 THE COURT: Let me ask you this: Are the way you
24 give those titles any different from that set forth in the
25 blue book?

1 THE WITNESS: We don't use the blue book styling
2 for titles.

3 Q. The examples that you've given with respect to
4 Exhibit DY, those are types of corrections that West makes
5 regularly and consistently throughout the editorial process,
6 is that correct?

7 A. Yes.

8 Q. And these are examples of them?

9 A. Yes.

10 MR. RITTINGER: Move for its admissibility.

11 THE COURT: Received.

12 MR. HARTMANN: Your Honor, can I make a one-time
13 running objection to all the documents that are --

14 THE COURT: If you stand up.

15 MR. HARTMANN: I'm sorry, your Honor.

16 Most of these documents were not produced to us
17 until the exhibit production in this case on Friday and most
18 of them are after this case was long running. Subject to
19 that, I won't make any more objections to these.

20 THE COURT: Overruled.

21 (Defendant's Exhibit DY received in evidence)

22 Q. Next, I'd like you to take a look at Exhibit DZ,
23 and particularly page 10, please.

24 A. On the slip opinion page 10, that's up in the
25 corner in the second -- I guess it would be the beginning of

1 the first full paragraph on that page starting with the fact
2 that Borell did more. There is a citation to Baxter Health
3 Care Co. v. Anderson. The correct title for that case is
4 Anderson v. Baxter Health Care Corporation and West
5 verifiers made that change.

6 Q. And is this an example of the type of corrections
7 that West makes regularly and consistently throughout the
8 editorial process to Court decisions?

9 A. Yes.

10 MR. RITTINGER: Move for its admission, your
11 Honor.

12 THE COURT: Received.

13 (Defendant's Exhibit DZ received in evidence)

14 Q. Mrs. Bergsgaard, you talked about correcting
15 Court citations. Are there ever times when you make
16 corrections or changes to Court citations when the citation
17 is not wrong?

18 A. Yes.

19 Q. And could you give examples of that?

20 A. Well, that would be when the citation style is
21 not one that -- I guess that would not conform to what West
22 editors have chosen for the style of a Reporter such as NY
23 Supp. We would change that to NYS. Bankruptcy sometimes is
24 referred to as Bankr. We changed that to B.R., which is our
25 an abbreviation for Bankruptcy Reporter.

1 Q. And does West do this regularly and consistently
2 throughout the editorial process?

3 A. Yes.

4 Q. Let me show you Exhibit DI. And specifically if
5 you could take a look at page 14 and 16 of the opinion, of
6 the slip opinion. And could you point out any correction or
7 change that West made there?

8 A. O.K. It's the similar change on both pages 14
9 and 16. This is a dissenting opinion and the judge is
10 referring back to the majority opinion at certain pages.
11 We've deleted the word "majority" and just characterized it
12 as the opinion at, and then we would be filling those page
13 numbers when we had it published in the advance sheet.

14 And on page 16, again, we have deleted the
15 Court's language of majority.

16 Q. And, again, this is a type of correction that the
17 West people will make throughout the editorial process when
18 they're looking at slip opinions?

19 A. Pursuant to editorial direction.

20 MR. RITTINGER: I move for its admission.

21 THE COURT: Received.

22 (Defendant's Exhibit DI received in evidence)

23 Q. Any of these corrections or changes or
24 modifications that we've been talking about thus far in the
25 examples that you pointed out, did West seek the Court's

1 permission to make any of those changes before it made them?

2 A. No.

3 Q. And were any of those changes, corrections,
4 modifications made as a result of a direction by the Court?

5 A. No.

6 Q. Now, it is true that at times, West does go to
7 the Court and seek its permission before it makes a change,
8 is that correct?

9 A. Yes.

10 Q. Can you give any estimate as to the percentage of
11 changes, corrections, modifications, etc., that are made in
12 connection with Court cites that are done by West on its own
13 initiative recognizing the change and making a decision to
14 make the change where they go and seek the Court's
15 permission before the change is made, as opposed to where
16 they don't go to the Court.

17 A. There's a very small percentage of instances, but
18 it would be a very small percentage.

19 Q. When you do contact the Court to seek its
20 permission, pursuant to your normal practices, is the
21 opinion verifier or the attorney-editor supposed to make a
22 notation somewhere in the dead copy?

23 A. Yes. They would note on the side, as I said
24 yesterday, they would note it on the side "per Court call"
25 if they made the change pursuant to a call.

1 Q. Thank you.

2 Next I'd like to move to the subject of
3 alternative citations. Now, you've testified yesterday at
4 length as to what alternative citations are and I will not
5 ask you to repeat that testimony. But I would like to show
6 you exhibits N, O, P, U and V and ask you if you can
7 identify -- can you identify, first of all, what all of
8 those are?

9 A. These are instructions and guidelines for
10 verification, our opinion verifiers.

11 Q. And do they relate to alternative citations?

12 A. Yes.

13 Q. Would you, first of all, explain what Exhibit N
14 is with respect to alternative citations?

15 A. Defendant's Exhibit N explains when we are going
16 to add a Westlaw cite to looseleaf publications and it gives
17 the listing of the looseleaf publications when we're going
18 to add a cite, an alternative Westlaw cite and when we will
19 not.

20 Q. And are all of those guidelines with respect to
21 each one of those looseleaf services based upon a decision
22 that was made at some time at West by an attorney-editor?

23 A. Yes.

24 Q. And do you have an understanding as to what the
25 basis for that decision was?

1 A. Well, we wanted again in our Reporters, it is an
2 integrated research system. We want to make sure that
3 people can find and have access to the opinions as quickly
4 as possible. It may be difficult for some of them to locate
5 looseleaf cites, but if they can find it in the Westlaw
6 database, we would want to give them that citation as an
7 added enhancement.

8 Q. And those guidelines do not include an
9 instruction to delete the cite, is that correct.

10 A. Right. We don't delete the cite covered in this
11 memo.

12 Q. We are going to come on situations where you do
13 delete cites, is that correct?

14 A. That's correct.

15 Q. And could you just quickly explain now while
16 we're on the subject why -- that's based upon a decision at
17 some time made by a West attorney editor, is that correct?

18 A. That's correct.

19 Q. And do you have an understanding as to what the
20 general reasons are that they make these type of decisions?

21 A. We would be deleting citations to Reporters that
22 we did not believe had a wide circulation and replacing them
23 with a citation that has -- is more widely used. We would
24 also try to enhance the Court citation if the Court is using
25 a slip opinion that's not going to be easy to find in a

1 couple of years from now. So, we would be adding a cite to
2 that.

3 Q. Why don't you just leave the cite in though? Why
4 has a decision been made to take out certain cites?

5 A. Well, there are over 170 providers of full text
6 Federal and State case law in over 700 sources. So, there's
7 a wide variety of sources that we could use. We don't think
8 it's in the best interests of the reader to have a whole
9 long string cite. It makes the opinion very, very difficult
10 to read. So, we select which cites we think would have
11 the -- would be most usable for our readers in our research
12 system.

13 Q. So, there are times when attorney-editors make a
14 decision that the cite should be left in because it's a
15 useful cite; correct?

16 A. That's correct.

17 Q. And there are other times when they make a
18 decision that the cite should be completely eliminated
19 because for whatever reason, they don't believe that that
20 source is readily enough available to serve your readers, is
21 that correct?

22 A. That's correct.

23 Q. And when they do that, though, they always add in
24 a new cite; correct?

25 A. That's correct.

1 Q. And that's based upon a judgment that that cite
2 is more readily available, is that correct?

3 A. Yes.

4 Q. And that goes on continually throughout the
5 process with respect to the publishing of case reports by
6 West, is that correct?

7 A. Yes, yes.

8 Q. Could you take a look at Exhibit O and quickly
9 explain what that is?

10 A. Defendant's Exhibit O is a listing of
11 publications that if supplied in copy would be deleted. We
12 also list cites that we would always retain and then we
13 would expand with a Westlaw or a NRS cite.

14 MR. RITTINGER: I move for the admissibility of
15 both N, which was the previous exhibit, and O, your Honor.

16 THE COURT: They're received.

17 (Defendant's Exhibits N and O received in
18 evidence)

19 Q. Next, would you take a look at Exhibit P?

20 A. Exhibit P is talking about when we would add in a
21 Westlaw cite and it's dealing with full text tables. I can
22 just explain what that is very quickly.

23 In the Courts' appeals, they have opinions that
24 are nonprecedential and they are sometimes called
25 unpublished or tabled decisions. In our print product, we

1 choose to publish those with only the title, the docket
2 number and the mandate.

3 On Westlaw, there is actually an opinion written
4 and that appears on Westlaw. Sometimes the Courts are
5 starting to refer to these and cite to them and the Court
6 may refer to this unpublished opinion and say, you know,
7 memorandum at page 2 or page 5.

8 We believe that would be very difficult for our
9 readers to find. So, we will be adding in the Westlaw cite
10 and that is the subject matter discussed in Defendant's
11 Exhibit P.

12 Q. And are there times when you add in the Lexis
13 cite?

14 A. We don't usually add in the Lexis cite, but we
15 would retain it.

16 Q. And what are the situations where you don't
17 delete -- where you retain the Lexis cite?

18 A. We would retain it in an instance such as the one
19 I just described. We would add in the Westlaw cite if we
20 had it available to us.

21 Q. And let --

22 MR. RITTINGER: I move for its admissibility,
23 your Honor.

24 THE COURT: Received.

25 (Defendant's Exhibit P received in evidence)

1 MR. BERGER: Your Honor, I object on relevance.

2 THE COURT: I'm sorry. I can't hear you.

3 MR. BERGER: I'm sorry. Your Honor, we object on
4 relevance. We neither intend to copy the tables for
5 Westlaw, and that's what this applies to.

6 THE COURT: This is in addition to the citations
7 and the text of the published opinions of the various
8 Courts, isn't that correct?

9 THE WITNESS: Yes, it is.

10 THE COURT: The objection is overruled.

11 MR. HARTMANN: Thank you, your Honor.

12 Q. Next, would you take a look at Exhibit U. Would
13 you describe what Exhibit U is?

14 A. Exhibit U just again, a collection of memoranda
15 dealing with opinion-verification instructions and some of
16 it deals with NLRBs. Some of it is dealing with public
17 domain cites, prior reports, just a collection of copy -- of
18 opinion-verification instructions.

19 THE COURT: What exhibit are we looking at?

20 THE WITNESS: We're just looking at this
21 collection, Defendant's Exhibit U. It's just a
22 miscellaneous collection of guidelines for the opinion
23 verifiers.

24 Q. Are each of those guidelines based upon a
25 decision that a West attorney-editor made at some point in

1 time in the editorial process at West?

2 A. Yes.

3 Q. And are they changed from time to time?

4 A. Yes.

5 MR. RITTINGER: I move for its admissibility,
6 your Honor.

7 MR. HARTMANN: No objection.

8 THE COURT: Received.

9 (Defendant's Exhibit U received in evidence)

10 Q. Exhibit V is the last one, if you could take a
11 look at that one quickly.

12 A. And that is the same. It's just more examples
13 dealing with what were guidelines for attorney verification.

14 MR. RITTINGER: Move for its admissibility, your
15 Honor.

16 MR. HARTMANN: No objection.

17 THE COURT: Received.

18 (Defendant's Exhibit V received in evidence)

19 Q. Are all of the guidelines that West utilizes in
20 the process of publishing its case reports with respect to
21 alternative cites in writing?

22 A. No.

23 Q. And how do the opinion verifiers or
24 attorney-editors know what to do when they come upon a
25 situation that is not in writing?

1 A. Every case is really handled on a case-by-case
2 basis. If there's something that comes up that the verifier
3 doesn't really know what to do, there is no guideline, then
4 it's queried to the query editors and the lawyer-editors who
5 will look at it and make the decision on a case-by-case
6 basis.

7 Q. I'm going to, your Honor, now go to examples in
8 dead copy.

9 THE COURT: Sure.

10 Q. Let me show you first of all, Mrs. Bergsgaard,
11 Exhibit DU.

12 MR. RITTINGER: Again, if I forgot, your Honor, I
13 move for the admissibility of Exhibit V, as well.

14 THE COURT: Received.

15 (Defendant's Exhibit V received in evidence)

16 Q. Could you take a look at Exhibit DU and
17 specifically page 2 and tell his Honor what that represents
18 an example of?

19 A. Yes, on the slip opinion, page 2 on the
20 second-to-the-bottom line, there is a citation to National
21 Bank of Commerce v. Kimberly-Clark Corporation. The Court
22 has cited to Westlaw with an extension page. At the time
23 that we were verifying the case has now been published and
24 we can add in the F. 3d cite which we believe to be more
25 readily accessible to our readers. So, we've deleted the

1 docket number, the Westlaw date, the extension page and the
2 specific date of the decision and added in the F.3d cite and
3 the extension page.

4 Q. And this is an example of an alternative cite
5 change?

6 A. Yes, it is an alternative cite because we are
7 providing an alternative to what the Court had originally
8 written.

9 MR. RITTINGER: I move for its admissibility,
10 your Honor.

11 THE COURT: Received.

12 (Defendant's Exhibit DU received in evidence)

13 Q. Next I'd like you to take a look at Exhibit DX.

14 MR. RITTINGER: And, Judge, I think you already
15 have the exhibit up there.

16 Q. And specifically if you could take a look at page
17 14 and page 26.

18 A. O.K.

19 Q. Could you explain what type of a change is
20 demonstrated on those pages?

21 A. In this instance, at the time the -- well, the
22 Judge is referring to Michael v. Shelly and that's going to
23 be on the bottom of footnote -- or on page 14 right where
24 footnote 5 is dropped from.

25 The Court is using petition for cert. filed in

1 giving the U.S. Law Week cite with the U.S. Court line and
2 date, specific date, June 2nd and the docket number.

3 When West verified this information, we did a
4 case history search and found out that petition -- that
5 cert. was actually denied. Then the next thing we do is
6 make sure that it was denied prior to the date that the
7 Judge authored the opinion so we can make the opinion
8 correct and up to date as of the time the Judge wrote the
9 opinion. So, we deleted.

10 Q. Let me see if I understand that correctly. If
11 that action had taken place after the Court had written the
12 opinion, is that what happened in this case?

13 A. No, this happened -- the cert. was denied prior
14 to the time the judge wrote the opinion. If it had been
15 denied after the judge -- the date of the judge's writing
16 the opinion, we would not update that citation.

17 Q. Well, why would you not update that citation?

18 A. We want to make the judge's opinion accurate as
19 to the time that he wrote it with that. It wouldn't have
20 been denied at that point. So, we have deleted the words
21 "petition for filed." We have deleted the U.S. Law Week
22 cite and we've deleted the court line and the date of the
23 cert. filed.

24 We have then had an alternate cite of cert.
25 denied and we have added in the Reporter locations where the

1 cite petition for cert. denied can be found.

2 Q. On page 26?

3 A. Page 26 actually shows two alternative cites.
4 Right under the quote, the judge is citing to Michael v.
5 Shelly again with the petition for cert. filed. We've made
6 the same correction throughout the opinion changing the
7 language to cert. denied and a few lines down in that
8 paragraph, there is a citation to Talbert v. C.R. Bard,
9 Incorporated. The Court is citing again to a slip -- a
10 docket number and Westlaw cite and we have substituted our
11 alternative cite of F.3d with the extension pages.

12 Q. Next let me show you Exhibit DE.

13 Could you take a look at page 2 and page 7 of
14 Exhibit DE?

15 A. O.K. On page 2, we have another example of an
16 alternative cite MCM Partners v. Andrews, Bartlett and,
17 again, we're removing the Court's cite and adding an
18 alternative to the West Reporter, the F.3d cite.

19 On page 7, the Court is citing to what we had --
20 what I described earlier as an unpublished opinion. They're
21 citing to Mem. Op. at 1. We would research that to find out
22 what the Court is talking about there and they're talking
23 about this unpublished memorandum. So, we've removed the
24 words Mem. Op. at 1 and substituted the Westlaw cite at the
25 specific extension page.

1 MR. RITTINGER: I move for its admissibility,
2 your Honor.

3 THE COURT: Received.

4 (Defendant's Exhibit DE received in evidence)

5 (Continued on next page)

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1 MR. RITTINGER: Your Honor, maybe I can do the
2 last one quickly. I would show the witness Exhibit DV,
3 which is not in yet. It's another example of a dead copy.

4 MR. HARTMANN: No objection.

5 MR. RITTINGER: Your Honor, I would ask the
6 witness to look at page 5 of DV and it would be an example
7 of where a Westlaw cite was added but the LEXIS cite is
8 retained.

9 MR. HARTMANN: We will stipulate to that, your
10 Honor.

11 THE COURT: Okay.

12 Q. Let me move to the area of parallel cites and,
13 again, you discussed yesterday what parallel cites are so I
14 won't go over that again, but it's the opinion verifiers who
15 do the work of inserting the parallel cites at West, is that
16 correct?

17 A. Yes.

18 Q. How do the opinion verifiers decide what parallel
19 cites to add?

20 A. There are guidelines that are written.

21 Q. Let me show you Exhibits U and N and ask you if
22 you could start with U, which I think has already been
23 admitted, and explain just quickly what that covers with
24 respect to parallel cites.

25 A. Again, these are instructions to our opinion

1 verifiers indicating what parallels they will use and the
2 situations that they will use them in.

3 Q. And Exhibit N.

4 A. Defendant Exhibit N again, as I just explained,
5 is when we would use a Westlaw cite as a parallel.

6 Q. I would now like to turn to the dead copy and
7 just show a couple of examples of parallel cites, your
8 Honor.

9 First, if you could take a look at Exhibit DG and
10 if you could look at page 4 and page 8 of Exhibit DG.

11 A. Okay.

12 On page 4 on the bottom of the page, Footnote 1,
13 West has added in a parallel cite to the 114 Supreme Court
14 2730.

15 Q. Page 8.

16 A. And page 8 is an example of adding a parallel
17 cite to Westlaw on State versus Flamer.

18 MR. RITTINGER: I move for its admissibility.

19 THE COURT: Received.

20 (Defendant Exhibit DG recieved in evidence)

21 Q. And those are the types of parallel cites that
22 West adds throughout the process, is that correct?

23 A. Yes.

24 Q. And that is based upon a decision or a judgment
25 made by West that these cites are more readily available

1 than other cites, is that correct?

2 A. That is correct.

3 Q. Let me show you next Exhibit DP, which I think
4 your Honor has up already someplace.

5 If you can take a look at page 11, the footnote.

6 A. On page 11 there are numerous examples of West
7 adding in parallel cites to the Supreme Court and to the
8 Lawyers Co-op Edition.

9 Q. And do you see any parallel cites with respect to
10 statutes there?

11 A. I don't see it on this page. We do add in cites
12 to U.S. Code and Congressional News in the concur/dissent.

13 I am on the wrong page, I am sorry.

14 Q. In the concurred/dissent.

15 A. Yes, in the concurred/dissent on page 11 we have
16 added in the parallel cite to the Senate report which is to
17 the U.S. Code and Congressional Administrative News.

18 Q. So West also adds parallel cites to statutes as
19 well as cases, is that correct?

20 A. Yes.

21 Q. And are those based upon the same editorial
22 judgments that you have testified with respect to when it
23 adds parallel cites to cases?

24 A. That is correct.

25 Q. Let me show you Exhibit D A.

1 MR. RITTINGER: I move for its admissibility,
2 your Honor.

3 THE COURT: Received.

4 (Defendant's Exhibit DP received in evidence)

5 MR. RITTINGER: Maybe we can do this quickly.

6 MR. HARTMANN: If they would like to make a
7 proffer we will stipulate to all this stuff.

8 THE COURT: Let's let him do it his way.

9 MR. HARTMANN: Okay.

10 Q. Would you take a look at page 802-1 through 33
11 and describe what parallel cites are being added there and
12 to what.

13 A. Okay. Right below the judge's name there is a
14 citation to Executive Cleaning Services. Again the cite is
15 to a NLRB Reporter. We have added the parallel cite of
16 Westlaw. This would be an example of what I testified
17 before to under that one exhibit that we talked about. We
18 have added the Westlaw cite throughout the opinion to the
19 NLRB citations that the judge used.

20 Q. And that is based upon a judgment?

21 A. Yes, it is.

22 Q. What is the basis for that judgment according to
23 your understanding?

24 A. It's based on what our attorney editors believe
25 would be the best way to have the case represented in our

1 Reporters.

2 MR. RITTINGER: I move for its admissibility,
3 your Honor.

4 THE COURT: Received.

5 (Defendant's Exhibit DA received in evidence)

6 Q. Next I would like to show you Exhibit HH.

7 Can you identify what Exhibit HH is?

8 MR. RITTINGER: I can give you a copy, your
9 Honor.

10 THE COURT: Alright.

11 A. Defendant Exhibit HH is an Insta-Cite printout.
12 Insta-Cite is West's citator available on Westlaw that gives
13 parallel citations as well as case history.

14 Q. And how many citations does that show that are
15 available to find a Supreme Court decision?

16 A. If we looked at one example on the second page of
17 the exhibit, dealing with the Ogilvy versus U.S., and there
18 are eight parallel citations or eight other sources where
19 that particular case has been published but those are only
20 the ones that West tracks. West tracks over 400 different
21 publications in the Insta-Cite product and that is what is
22 listed here.

23 Q. With respect to the Ogilvy case, are some of the
24 Reporters that it can be found in bound volume Reporters?

25 A. They are permanent volumes, yes.

1 Q. Permanent volumes, similar to the Supreme Court
2 Reporter?

3 A. Yes.

4 Q. And the Lawyers Edition?

5 A. Yes.

6 Q. Why did West choose or why does West choose to
7 continue to always add the Lawyers Edition to a parallel
8 cite?

9 A. That may change, but at this point our belief is
10 that the Lawyers Edition is a very credible research tool.
11 It is a little bit different than the Supreme Court. They
12 do have annotations and we believe it does have a readership
13 and we would want to make sure that if someone just had the
14 Supreme Court they can find the L. Ed. and vice-versa.

15 Q. Now, was West also of that same opinion last
16 year?

17 A. Yes.

18 Q. Was West also of that same opinion ten years ago?

19 A. Yes.

20 Q. Now, when these other publishers publish Supreme
21 Court decisions, do they add the Supreme Court Reporter as
22 an alternative citation?

23 A. They don't. Lawyers Edition does add Supreme
24 Court but they also use ALR as parallel cites, so they have
25 chosen different parallel cites to include in their reports.

1 Q. Other than Lawyers Edition, are you aware of any
2 publisher that adds a Supreme Court Reporter as an
3 alternative cite?

4 A. Not to my knowledge.

5 Q. And other than Lawyers Edition are you aware of
6 any other publication in the Supreme Court reporter that
7 adds a Lawyers Edition as an alternative cite?

8 A. Not to my knowledge.

9 MR. RITTINGER: Your Honor, we have a series of
10 about eight exhibits. I think I can make an offer of proof
11 that will get us through this quickly, but I think it will
12 be described more accurately if I let Mr. Rubins describe
13 what it is.

14 THE COURT: Sure.

15 MR. RUBINS: Your Honor, the offer of proof
16 consists of Exhibit WA through WJ, and these are exhibits
17 showing that opinion that Ms. Bergsgaard referred to, Ogilvy
18 V United States, as published in the following different
19 publications: As published as a slip opinion by the Supreme
20 Court itself; as published by West in its advance sheet; as
21 published by U.S. Law Week; as published by U.S. Tax
22 Reporter; as published by Employment Practices Decisions; as
23 published by U.S. Tax Cases; as published by California
24 Daily Opinion Service; as published by Daily Appellate
25 Report; as published by Florida Law Weekly Federal, and as

1 published by Colorado Appellate Report, and it's offered,
2 your Honor, to demonstrate that the Supreme Court's own
3 opinion refers to Supreme Court opinions it cites only with
4 the United States Reports citation.

5 West, your Honor, is familiar with and uses that
6 citation, as well as Supreme Court Reporter and Lawyers
7 Edition, and that as with respect to the others none of them
8 cite to the Supreme Court Reporter. None of them cite to
9 Lawyers Edition. Some only use the U.S. cite that the
10 Supreme Court itself uses, and some of them put in other
11 parallel cites other than the ones that West uses.

12 MR. HARTMANN: We accept the proffer. No
13 objection to the admission of the exhibits.

14 THE COURT: Received.

15 (Defendant's Exhibits WA through WJ received in
16 evidence)

17 Q. Next I would like to show you Exhibit DC, and I
18 ask you to turn to page 17 and briefly describe what that is
19 an example of.

20 A. I believe that is on page 5 of the slip opinion.

21 Q. Okay.

22 A. There is a quote almost three-quarters of the way
23 down to Bloomer versus Millinger, 68 U.S. 340. We have
24 added in the Reporter of Decisions, Volume One, Wall., and
25 that is the way that we cite to that particular Reporter.

1 Q. And when do you use or when do you make a cite to
2 that type of a Reporter? When will you add that as a
3 parallel cite?

4 A. We will add one "Wall." as a parallel cite to all
5 of them.

6 MR. RITTINGER: I move for its admissibility,
7 your Honor.

8 THE COURT: Received.

9 (Defendant's Exhibit DC received in evidence)

10 Q. Are there occasions that West chooses to add
11 citations to publications other than West Publications other
12 than the one you just described?

13 A. Yes.

14 Q. Would you briefly describe when that is?

15 A. When we add parallels to the state citations, the
16 state official reports. I believe I talked about that
17 yesterday.

18 Q. I don't want to go into that other than just to
19 show you Exhibit DH, and I think now direct you to page 17
20 and ask you if you can quickly identify what that is an
21 example of.

22 A. Yes.

23 If you look on page 17 of the slip opinion there
24 the court is citing to Arnold versus State, 224 Southeast 2d
25 386. I believe that is probably the current blue book rule

1 now but we have chosen to add in the Georgia State Report
2 cites. We have added in 236 Georgia 534. Then to make the
3 court line more readable we have deleted "Georgia" and just
4 left the date, which is our style.

5 Looking down in that same paragraph, the court
6 has cited to Stevens versus State. The court there had the
7 wrong volume number, 237. We have changed that to 227. We
8 have also then added in the Georgia citation. And we have
9 done that throughout the opinion.

10 MR. RITTINGER: I move for its admissibility,
11 your Honor.

12 THE COURT: Received.

13 (Defendant's Exhibit DH received in evidence)

14 Q. Ms. Bergsgaard, quickly with respect to state
15 court opinions, West will always insure that there is an
16 official cite if there is an official cite, is that correct?

17 A. Yes, that is our editorial decision.

18 Q. And it will add the unofficial National Reporter
19 cite if that is not there, is that correct?

20 A. That is correct.

21 Q. And if the court uses the National Reporter and
22 it's not the official cite, then it will add the official
23 cite?

24 A. Yes.

25 Q. And it does that throughout each one of the case

1 reports that it publishes in the Federal Reporter and the
2 Supreme Court Reporter, is that correct?

3 A. Yes.

4 Q. Can you give an estimate as to what percentage of
5 the case reports that West publishes involved some expansion
6 of the citations by parallel cite or alternative cite?

7 MR. HARTMANN: I object, your Honor. I would
8 like it limited to just the reports involved here.

9 THE COURT: Sustained.

10 MR. RITTINGER: I thought I did.

11 Q. Let's take the Federal Reporter.

12 A. Well, in my estimation working with the parallel
13 cites, I would say that probably maybe 75 to 80 percent of
14 the cases have cite expansions.

15 Q. And that is in connection with the Federal
16 Reporter?

17 A. Federal Reporter.

18 Q. How about the Supreme Court Reporter?

19 A. Well, I believe virtually every case in the
20 Supreme Court Reporter has citation expansions.

21 THE COURT: That is because they only publish or
22 cite to U.S. and you do the other two, is that correct?

23 THE WITNESS: That is correct.

24 Q. I would like to direct your attention just
25 quickly to what you testified yesterday to being partial

1 extensions and cross references. Could you quickly explain
2 what they are?

3 A. Those would be the ids. and the supra cites post
4 and ante. West would look at those citations. We would
5 again add in the volume number. We would find the extension
6 page and to make it as readable as possible for our users.

7 Q. And does West maintain guidelines with respect to
8 that?

9 A. Yes.

10 Q. Let me show you Exhibit S.

11 A. Defendant Exhibit S is just memoranda, guidelines
12 for the opinion verifiers dealing with completing partial
13 cites and extension pages.

14 MR. RITTINGER: I move for its admission, your
15 Honor.

16 THE COURT: Received.

17 (Defendant's Exhibit S was received in evidence)

18 Q. Are all the guidelines with respect to that
19 subject matter in writing?

20 A. No.

21 Q. Next I would like to show you Exhibit DP. I
22 would like to direct your attention to page 10 of the main
23 opinion and page 2 of the concurrence.

24 First of all, start with page 10 and just explain
25 what that is an example of.

1 A. That is an id. cite that we have expanded.

2 Q. Could you take a look at page 2 of the
3 concurrence?

4 A. Again, that is an expansion or an id. that we
5 have expanded.

6 Q. Is page 2 of the concurrence an example of an
7 extension page?

8 A. Yes.

9 Q. Who makes the decision with respect to an
10 addition to an extension page?

11 A. That would be made by attorney editors.

12 Q. Could you just quickly describe what the process
13 would be?

14 A. Sure. The court here has used 460 U.S. at page
15 542. We have added in, again for the convenience of our
16 readers, 103 Supreme Court at 1348, and we would have to
17 have attorney editors or legally trained people to find
18 those extension pages because we do read the opinion and
19 make sure that the extension page is what the court was
20 referring to for that legal proposition.

21 Q. Is it fair to say that West, first of all, made
22 an editorial decision that it was going to add a page
23 reference to an extension page, is that correct?

24 A. That is correct.

25 Q. But before it does that it has a lawyer editor

1 who has to read the decision and read the cite and then make
2 a judgment as to what page should be cited, is that correct?

3 A. Yes.

4 Q. And that happens throughout the entire editorial
5 process at West with respect to both the Supreme Court
6 Reporter and the Federal Reporter, is that correct?

7 A. That is true.

8 Q. Could you quickly look at page 2 to 3 of the
9 dissent/concur and just describe what that is an example of.

10 A. Page 2, this is what I talked about before, the
11 court is referring to "ante" as well as on page 3 "ante" at
12 8. Again, when we fill these pages in or when we fill in
13 those cites on pages we would have an attorney editor
14 double-checking to make sure we have the right proposition
15 of law being cited to.

16 Q. Are page 3 and page 6 of the dissent/concurs also
17 other examples of that?

18 A. Yes.

19 Q. Just very quickly describe what they are.

20 A. Sure.

21 Q. Not that you haven't been doing it quickly.

22 A. I am trying.

23 On page 6 if you look toward the bottom of the
24 opinion, the court has "see supra at," and they have left a
25 dash. They haven't filled in the cite. That is, I guess,

1 not uncommon. We do find dashes in court opinions. And
2 then we would fill in that dash and, again, it would be an
3 attorney editor reading to find out what part of the opinion
4 the court is referring to.

5 Q. Are there any other types of changes and
6 modifications, additions or deletions that West makes below
7 the line?

8 A. Yes.

9 Q. Could you generally describe what those are?

10 A. We do combines. We combine orders.

11 Q. We will talk about combines when we go above the
12 line. Let's skip that for now.

13 Anything else? Anything with respect to
14 punctuation, things of that nature?

15 A. We do punctuation changes. We do styling
16 changes, capitalization changes.

17 Q. And that is done regularly and consistently
18 throughout the editorial process, is that correct?

19 A. That is correct.

20 Q. And those types of changes for the most part are
21 made without seeking the court's permission, is that
22 correct?

23 A. Yes.

24 Q. And those types of changes are made for the most
25 part without being advised or directed by the court, is that

1 correct?

2 A. That is correct.

3 Q. Let me show you Exhibit E.

4 Could you explain what Exhibit E is an example
5 of?

6 A. The first page of Exhibit E is an example of an
7 appendix that is a map that the court appended as published
8 in our Reporter, the Supreme Court Reporter. The map was
9 redrawn because it was in color and we can't reproduce
10 color, so it was redrawn with different shadings to
11 represent the different districts.

12 On page 2 of that exhibit we have how the map
13 looked in U.S. Law Weekly which is different from the West
14 version, and then we have on the third page the redrawing as
15 it appears in the U.S. Supreme Court's L. Ed. edition, which
16 is the Lawyers Co-op Edition. You can see they are
17 different.

18 Q. Are there other types of graphics that West does
19 itself that appear throughout the case reports other than
20 maps?

21 A. There are different maps, different plats. We
22 make a decision as to whether to photo something or to
23 typeset it so we will change the way that exhibit looks.
24 All of those decisions are made by attorney editors.

25 MR. RITTINGER: I move for its admissibility,

1 your Honor.

2 THE COURT: Received.

3 (Defendant's Exhibit E recieved in evidence)

4 MR. RITTINGER: Your Honor, I am happy to report
5 we are done with below the line and I would now move above
6 the line if this is a convenient time.

7 THE COURT: Why don't we take ten minutes.

8 (Recess)

9 Q. Ms. Bergsgaard, I want to now direct your
10 attention to above the line.

11 MR. RITTINGER: And we have some graphics, your
12 Honor. I don't think we have to bother with all of them.
13 By above the line I am going to be referring to the caption,
14 court line, date line as one element, the file line as
15 another element, and the attorney summary as a third
16 element. Just putting up the graphic from 71 Federal
17 Reporter 3d 292 -- I don't know if it's necessary.

18 Do you want her to point out where the various
19 elements are?

20 THE COURT: I think I have heard it all.

21 MR. RITTINGER: We will take that away.

22 First of all, let's talk about the captions, the
23 court line and the date line.

24 Does West have guidelines with respect to what we
25 call the court caption?

1 A. Yes.

2 Q. I would like to show you Exhibits EE and GG.
3 GG is in a separate binder someplace up there,
4 your Honor, and this is EE.

5 Could you identify and describe what Exhibit EE
6 is?

7 A. Exhibit EE are guidelines and memoranda dealing
8 with the title preparation, and that would mean how West is
9 going to modify the titles, how they are going to
10 characterize it, what is going to be capitalized, any
11 abbreviations, and those kinds of instructions. And they
12 are in Exhibit EE.

13 Q. Now, when I ask you these type of questions I am
14 going to exclude the Fifth and Eleventh Circuits for the
15 reasons you testified to yesterday. But other than the
16 Fifth and Eleventh Circuits, are any of the slip opinions in
17 the same form, the caption that you received the slip
18 opinion as what West ultimately publishes?

19 A. No.

20 Q. It makes changes, is that correct?

21 A. Yes.

22 Q. You described it yesterday as doing cut and paste
23 and other additions and deletions. Could you generally
24 describe what that process consists of?

25 A. Well, sometimes the copy will have different

1 titles and we, first of all, select which title from which
2 documents we are going to use. We want to get the most
3 complete title. And we will cut and paste that so that it
4 is in the order that West is going to be publishing it in.
5 And then from that it forms the basis for our editing of the
6 title.

7 MR. RITTINGER: I move for the admissibility of
8 EE.

9 THE COURT: Received.

10 (Defendant's Exhibit EE received in evidence)

11 Q. Could you take a look at Exhibit GG and again
12 describe what that is?

13 A. Defendant Exhibit GG are the instructions for our
14 copy preparation area and it lists the general guidelines
15 that we have for all cases and then from the specific
16 instructions for the Supreme Court.

17 THE COURT: What exhibit are we looking at?

18 MR. RITTINGER: GG, your Honor. That is in a
19 separate volume.

20 THE COURT: I have an Exhibit G here.

21 MR. RITTINGER: It's double G, your Honor. It
22 should be separate.

23 THE COURT: I got it.

24 A. The beginning part of that is the general
25 instructions for how we are going to prepare the case and

1 that does include the caption, the date lines, the court
2 lines and the docket numbers, and so on. Specific
3 instructions are also given for each court.

4 Q. When you say "each court," you are talking about
5 the Supreme Court and each the Courts of Appeals, is that
6 correct?

7 A. Yes.

8 Q. Have those guidelines been developed over the
9 years at West?

10 A. Yes, they have.

11 Q. And are they based on decisions and judgments
12 made by attorney editors how to best express the caption of
13 a case?

14 A. Yes.

15 Q. And the court line?

16 A. Yes.

17 Q. And the date line?

18 A. Yes.

19 MR. RITTINGER: I move its admission, your Honor.

20 THE COURT: Received.

21 (Defendant's Exhibit GG received in evidence)

22 Q. Let me show you Defendant DQ.

23 Could you take a look at the caption received
24 from the court and as marked up by West and also, if you
25 can, you should have there the caption as published by West

1 and can you describe those modifications and changes or
2 deletions that were made with respect to the caption?

3 A. Sure.

4 In this instance there are actually two titles to
5 the case. There is "In The Matter Of Melvin Luster, Appeal
6 of Dennis Quaid, Trustee," and the second action is "In The
7 Matter Of Harold Friedman, Appeal Of Dennis Quaid, Trustee."

8 What West did is to combine the title. We
9 deleted one of the lines that says "Appeal Of Dennis Quaid,
10 Trustee." We wanted to make it a simple title that was more
11 readable, so then we added the editorial note following the
12 second "Appeal Of Dennis Quaid, Trustee" to indicate that he
13 was on appeal in two of the cases.

14 We also deleted the docket numbers from the title
15 caption area. We deleted the appeal information, the lower
16 court docket number, and the lower court judge for both of
17 the cases that are listed in the title and we characterized
18 the title indicating which would be underscored or capital
19 letters, rather, in our Reporter. That, again, means that
20 is an indication to our readers how the case should be
21 cited.

22 We did delete the punctuation as well "In The
23 Matter Of" colon. We deleted the colon.

24 THE COURT: That is an indication to your readers
25 as to how the matter should be cited according to what

1 standards though?

2 THE WITNESS: To our standard. We are going to
3 cite to this matter of Luster.

4 Q. Is that going to become the running head?

5 A. Yes, we made the running head Matter Of Luster.

6 Q. Is that going to become the digest title?

7 A. Yes.

8 Q. Is that an example where if someone cites it
9 different than that in a subsequent case that you will
10 change it to the digest title?

11 A. Yes.

12 Q. And that is not a standard that is imposed by the
13 blue book for anybody else, is that correct?

14 A. No.

15 Just continuing on the caption, we combined the
16 docket numbers for the case adding NOS period to indicate
17 that there were multiple docket numbers. We changed the
18 court line to read United States Court of Appeals, Seventh
19 Circuit, and then we did some punctuation and some
20 abbreviating of the "argue" date and the "decided" date.

21 Q. Did you make any changes -- and I am sorry if I
22 missed this -- in the date lines?

23 A. That was an abbreviation in this case. We
24 abbreviated the month, again to get a clean copy. A quick
25 read of that caption is what we are looking for.

1 MR. RITTINGER: I move for its admission, your
2 Honor.

3 THE COURT: Received.

4 (Defendant's Exhibit DQ received in evidence)

5 MR. RITTINGER: Your Honor, we have an
6 enlargement of the next exhibit, which is DH.

7 Q. Just quickly, on the blowup of the caption from
8 the slip opinions in DH, on what is the right-hand side are
9 the three captions as came from the court on the slip
10 opinions, is that correct?

11 A. That is correct.

12 Q. And over here on the left-hand side is the
13 caption as published by West, is that correct?

14 A. That is correct.

15 Q. Could you describe what deletions and
16 modifications that were made in connection with Exhibit DH?

17 A. Yes.

18 Is it proper for me to point or should I not
19 point?

20 THE COURT: You are allowed to point here though
21 it's not generally socially acceptable.

22 A. We have deleted volume one of two. We took the
23 file date and reorganized it to our file or where we
24 normally put the file date, which is in this area.

25 We have also deleted the word "filed" and added

1 the word "decided." Again, we do that so that people are
2 not confused and think that it was going to be when the
3 appeal was filed.

4 The court line, which you see here on the slip
5 opinion, has been changed to follow the docket number and we
6 have taken out the words "for the." We put a comma and
7 styled it in the style that we think is easier for our
8 readers to see.

9 The next thing we have done here is we have taken
10 the docket numbers, which appear here. This is a caption of
11 two cases. We have combined the docket number from here and
12 the docket number on the second case, which is here, and put
13 them on one line.

14 Next, we have taken the title of the case, Flamer
15 versus State of Delaware, and we have taken the second title
16 of the case which appears here, Bailey versus Snyder, and we
17 have combined these two titles into the format that you see
18 here. We have capitalized it so that this case will be
19 known as Flamer versus State of Delaware. We have not
20 capitalized him when he is an appellant here. And then
21 Bailey versus Snyder, so we will have two titles. We have
22 taken that information from here, from this area.

23 The next thing we have done is we have deleted
24 the appeal information in the lower court docket number from
25 this line, as well as I guess it probably would have been

1 over here as well.

2 The "argue" date we have compiled to put in this
3 area from the first case, February 16, 1994. Then we have
4 taken the "argue" date from the second case and we have
5 added that to follow the "argue" date from the first case.
6 And here is the appeal line from the second case that we
7 deleted.

8 Then I guess we aren't going to talk about the
9 attorneys. The attorneys come next here.

10 Q. Let's hold off on the attorney summaries until we
11 get to the attorney summaries.

12 A. Alright.

13 We have taken the judges also and reorganized
14 those.

15 MR. RITTINGER: I move for the admission of the
16 exhibit.

17 I don't know what your practice is with the
18 demonstrative evidence.

19 THE COURT: We already have a copy in the book,
20 right?

21 MR. RITTINGER: Right.

22 THE COURT: It's received.

23 (Defendant's Exhibit DH received in evidence)

24 Q. Next I would like to show you Exhibit DF, and we
25 also have an enlargement of that.

1 Does DF represent another form of caption that
2 was received from another Court of Appeals?

3 A. Yes.

4 Q. And that is shown on the right-hand side, is that
5 correct?

6 A. That is correct.

7 Q. And it's the West caption on the left-hand side?

8 A. Yes.

9 Q. Incidentally, going back to the last exhibit, the
10 West caption as it was published, that does not appear
11 published in any other place other than West, is that
12 correct?

13 A. That is correct.

14 Q. At least authorized.

15 A. That is correct.

16 Q. Would you do the same thing quickly with respect
17 to Exhibit DF.

18 A. In this exhibit, this is the slip opinion as it's
19 received by the court. We have deleted the corrected
20 reprint and the date. We have deleted the notation for
21 publication. We have taken the court line and again
22 reformatted it to read "United States Court of Appeals,
23 Ninth Circuit." We place that in the arrangement that we
24 are compiling for our caption here.

25 We have also removed the lower court docket

1 number and the characterization of the opinion called "order
2 and amendment." We have taken this out. We have put the
3 docket number of the case again below the caption of the
4 case.

5 We put the caption of the case "Megan Roulette
6 versus, City of Seattle," and we capitalized that to
7 indicate how the case will be cited. We have done
8 punctuation and motion into a paragraph. We have removed
9 the appeal line information. We have removed the city of
10 argument. It says, "Argued and submitted March 8, 1995,
11 Seattle Washington." We have removed Seattle, Washington.
12 We have changed again the "filed." The word "filed" we have
13 deleted. We have added the word "decided March 18, 1996"
14 and we have created our own file line which we think
15 characterizes what is happening in this action, which is "as
16 amended on denial of rehearing and rehearing en banc,
17 September 17, 1996."

18 Q. We will get to file lines in a minute. But that
19 is something that a West attorney editor created by himself,
20 is that correct?

21 A. Yes.

22 Q. That does not appear anywhere in any court order,
23 is that right?

24 A. That is right.

25 Q. Why did you delete the order and amended opinion?

1 A. It just wasn't necessary here in the caption.
2 This caption is much clearer, easier to read than this, we
3 believe anyway, and it isn't necessary.

4 Q. Anything else with respect to the caption, the
5 court line and the dateline?

6 A. I think I have it. The judge's listing I think
7 is a little bit different but we have talked about the main
8 elements and you can see they are very different.

9 MR. RITTINGER: I move for its admission, your
10 Honor.

11 THE COURT: Received.

12 (Defendant's Exhibit DF received in evidence)

13 (Continued on next page)

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1 Q. Last, with respect to captions, I would like to
2 show you Exhibit DP. Exhibit DP is an opinion from the
3 Supreme Court, is that correct?

4 A. That's correct.

5 Q. First of all, would you just explain how do
6 opinions from the Supreme Court arrive with respect to their
7 captions?

8 A. We receive them on -- there's actually two
9 separate slip opinions that are coming through. One is
10 the -- this is the slip opinion, one slip opinion, front
11 page that contains the syllabus of the Court.

12 This is the slip opinion that contains the
13 decision from the judge and is what we do here for our
14 caption is we kind of take a combination of the information
15 that we receive on these two slip opinions. You can see
16 that we delete the note. Notice on the top of the slip
17 opinion, that has the judge's opinion on it. We delete the
18 Court. We do not use the Court line in our Supreme Court
19 Reporter.

20 We use the docket number below the caption. We
21 take the caption of the case from the copy that is coming in
22 from -- that's on the judge's opinion because it has more
23 complete information than the syllabus and, again, we're
24 going to characterize that with our capitalization. We add
25 the word "decided."

1 Well, we take the decided and the argue dates
2 from the syllabus because they aren't contained in this slip
3 opinion and we put "argued and decided." Then we take the
4 slip opinion notation off. We use the note that appears
5 here, but we drop that as a footnote to the syllabus with
6 modifications to the footnote.

7 And then on the syllabus page, of course we're
8 deleting the Court line again. We're deleting the title.
9 The appeal line information is also deleted.

10 Q. Do you add a citation to our caption?

11 A. Yes, we add for our permanent bound volumes.
12 We're going to be adding the U.S. citation and the lawyers'
13 addition citation.

14 Q. And that appears above the caption?

15 A. It appears above the caption.

16 MR. RITTINGER: I move for its admission, your
17 Honor.

18 THE COURT: Received.

19 (Defendant's Exhibit DP received in evidence)

20 MR. RITTINGER: We're now going to move to file
21 lines and combines. You testified about those yesterday.
22 Maybe the quickest way of getting into this is to show you

23 Exhibit DC.

24 Q. Is Exhibit DC one example of --

25 MR. RITTINGER: Well, your Honor, by

1 background -- by way of background --

2 Q. Yesterday you testified to the various options, I
3 think five or six that West has when it receives a
4 subsequent order from a Court; correct?

5 A. Yes.

6 MR. RITTINGER: Your Honor, I take it there's no
7 need to repeat that testimony.

8 THE COURT: Correct.

9 Q. Does Exhibit DC represent one example of the way
10 that West treats that type of the subsequent order?

11 A. Yes. In Exhibit DC, the petition for rehearing
12 information is coming in on an order sheet from the Court
13 and when West editors have looked at this, we have decided
14 that we aren't going to be publishing the order list and
15 that the best way to handle the rehearing denial is through
16 the file lines. So, West has created the file line
17 rehearing denied October 30, 1995.

18 Q. Now, that file line does not appear in any Court
19 order, is that correct?

20 A. That's correct.

21 Q. And it was written by whom?

22 A. West editors.

23 Q. And what did West editors have to do before they
24 created that file line?

25 A. We had to read the order and do the research to

1 make sure that was the same case and then we have to decide
2 how best to characterize that action and place it in the
3 file line.

4 Q. Now, is it always easy to create a file line?

5 A. No.

6 Q. And would you explain why?

7 A. Well, this one is fairly clear, but sometimes
8 it's not always clear what the Court is doing in the
9 subsequent orders and you really do need to read it and then
10 try to characterize it in the fewest words, but characterize
11 it accurately and that can be quite difficult.

12 Q. Let me next show you Exhibit DE and ask you if
13 you can explain briefly what this is an example of.

14 A. DE is another example of a file line that West
15 created for a rehearing that was denied October 23, 1995.
16 In this instance though the Seventh Circuit is issuing a
17 full order discussing the rehearing denied.

18 Again our option is to publish the order or to
19 add it to the back of the case or to use a file line to
20 convey the information. In this instance, the West editor
21 has decided to use a file line and not publish the order.

22 Q. Are there other ways that you could convey this
23 information without publishing the order or without doing a
24 file line?

25 A. Sure. We could create a table of rehearing

1 denieds.

2 Q. An in the Federal Reporter, you choose not to do
3 that, is that correct?

4 A. That's correct, except for the Fifth Circuit has
5 a table of rehearing.

6 MR. RITTINGER: I move for its admission, if we
7 haven't already done that.

8 THE COURT: Received.

9 MR. RITTINGER: I think that's in.

10 (Defendant's Exhibit DE received in evidence)

11 Q. Next, I would like to ask you to take a look at
12 Exhibit DA.

13 THE COURT: DA?

14 MR. RITTINGER: I think you already have it.
15 It's ATT v. NLRB; yes, DA.

16 Q. Is DA another example of how West treats a
17 subsequent Court order?

18 A. Yes. In DA, the Second Circuit issued a separate
19 slip opinion and its caption was "order on petition for
20 rehearing."

21 When this order was received by West, we did the
22 research and found the opinion, the prior opinion by the
23 Second Circuit. This did go to our editor and the editor is
24 indicating that she wants this combined for bound volume.

25 What that means then is that this order will

1 MR. RITTINGER: May I continue, your Honor?

2 THE COURT: Sure.

3 Q. The Second Circuit didn't tell you to do it that
4 way, is that correct?

5 A. That's correct.

6 Q. You didn't seek the Second Circuit's permission
7 to do it that way, is that correct?

8 A. That's correct.

9 Q. The Second Circuit didn't give you the language
10 for the file line, is that correct?

11 A. Yes.

12 Q. And an attorney editor created that language, is
13 that correct?

14 A. That's correct.

15 Q. And that happens regularly and consistently
16 throughout the editorial processes with subsequent cases
17 when Court records are issued, is that correct?

18 A. Yes.

19 Q. Now, what about if you receive a second order
20 just before you're about to start printing the bound volume,
21 what do you do in those situations?

22 A. Well, that -- we have, again, the same number of
23 options. We have to do a very careful analysis. If it's
24 very close to the time the bound volume is going to be
25 published, we can delay the bound volume schedule in order

1 to combine them together, if we believe that to be the best
2 interests of our readers. We can even destroy signatures if
3 we need to to combine it and publish it together.

4 Q. Has West done that over the years?

5 A. Yes, we have, and the other option.

6 Q. Is that based upon an editorial judgment that the
7 combination of this decision is important enough to do that?

8 A. Yes.

9 Q. That comes at a cost, is that correct?

10 A. Absolutely. And the cost does factor into the
11 decision. The other option we would have is to republish it
12 together or we can if the order is not.

13 Q. Let me stop you there. When you say republish it
14 together, is that the process that you talked about
15 yesterday where you republish it and then delete any
16 references to the prior published opinion?

17 A. Yes.

18 Q. So, we don't have to go into that?

19 A. O.K.

20 Q. Anything else?

21 A. Well, I was just going to say the other option
22 that we have is if the order isn't going to be so confusing
23 to the reader, then we can publish the order separately and
24 cross-refer them.

25 Q. And does that happen on occasion?

1 A. Yes.

2 Q. And, again, how you do this and what form you use
3 is based upon a decision that is made by attorney editor, is
4 that correct?

5 A. Yes.

6 Q. Let me show you Exhibit DB.

7 MR. RITTINGER: I might have -- I guess that's
8 already in.

9 Q. DB, and ask you if you can advise the Court as to
10 what that is an example of.

11 A. This is an example where we did -- there was a
12 modification that was issued, again, in a separate order
13 that was issued by the Second Circuit. And what West did is
14 choose not to publish that order, but incorporate the
15 amendment into the opinion as you can see here and then we
16 added -- created the file line which was as modified October
17 23, 1995.

18 Q. Next, let me show you --

19 MR. RITTINGER: I don't think that is in. So, I
20 move for that admission.

21 THE COURT: Received.

22 (Defendant's Exhibit DB received in evidence)

23 Q. Next, let me show you again Exhibit DF, which
24 also was the enlargement. Now, just going through the dead
25 copy, you've already testified that this -- about the file

1 line, but going through the dead copy, could you point out
2 to the Court how that file line and why that file line was
3 created?

4 A. Yes. In this instance, the case had already been
5 published at 78 F.3d 1429. The Ninth Circuit issued an
6 amending order. When we had our lawyer editors look at
7 this, we noticed that it dramatically changed the headnotes,
8 the editorial work in the case. And with such major changes
9 to the issues of law, it would be confusing to have the
10 opinion available without these corrections.

11 We definitely have to let the attorneys know what
12 happened in the case and let them find that very easily.
13 So, the decision was made here to republish the case with
14 the corrections in its entirety and at a new cite which we
15 did and we would kill references to former cites of 78 F.3d
16 1425.

17 We also, not only did we incorporate the
18 corrections into the republication, but we did choose to
19 publish the order that amended it and because it dealt with
20 the rehearing and the rehearing en banc and there was a
21 dissent from that rehearing which is important for attorneys
22 to know about, so we published that order, but we deleted a
23 portion of the order, added an editor's note that says
24 amendments incorporated for the purpose of publication.

25 Q. Let me just stop you there. With respect to a

1 Court order, then you deleted some language from the Court
2 order?

3 A. Yes.

4 Q. And then you added an editorial note which you
5 created yourself, is that correct?

6 A. Yes.

7 Q. And that was done by an attorney editor?

8 A. Yes.

9 Q. I'm sorry. You can continue.

10 A. And the purpose for this was to try to come up
11 with some way of giving the -- making the case report the
12 easiest for our users that we could and this is how we chose
13 to do it in this instance.

14 Q. Is this file line an example of a file line that
15 you believe is somewhat difficult to create?

16 A. We did need to read it and decide what we were
17 going to do and we chose that language to indicate how we
18 were going to do it.

19 Q. Do you always republish an opinion this way if
20 the Court chooses to publish a republished slip opinion?

21 A. No.

22 Q. So, you make the decision how you're going to do
23 it?

24 A. Yes.

25 Q. Next, I'd like to show you Exhibit II?

1 A. Exhibit II is, first of all, it's the electronic
2 receipt of an amending -- I guess it's an order on rehearing
3 and then the second copy is the slip.

4 Q. When you say it's an electronic receipt, you mean
5 you received it from the Court's bulletin board?

6 A. Yes.

7 Q. Does anybody in the world have access to
8 receiving cases from the Court's bulletin board?

9 A. Yes.

10 Q. Go ahead. I'm sorry.

11 A. The second is the Court's slip opinion in that
12 case. We receive both copies and the second copy is just
13 the Court's slip opinion, printed slip of it and what chose
14 to do in this instance is to publish that order separately
15 rather than republishing it together with its former
16 opinion.

17 What we did is we did add in the
18 cross-references. We added in a line to the order that says
19 prior report 64 F.3d 1250. We also added in the line when
20 the Court's said slip Op. 9977 was being amended. We did
21 add in the citation to that.

22 And one of the reasons we published this
23 separately is because the case -- the prior case had been
24 out for, I'm going to say approximately a year. I can't
25 tell for sure here.

1 But when a case is out and being cited for a
2 length of time, then we think it's better to amend things by
3 having it -- a separate order, because it would be cited.
4 It's available and the best way to let people know that is
5 by updating the case history to cite and then they would
6 look at Sheppard's and so on.

7 Q. Mrs. Bergsgaard, based upon your experience at
8 West, I believe you testified yesterday as to what you
9 believe the percentage of Court of Appeals reported cases
10 contain file lines. What is your best estimate in that
11 regard?

12 A. I would say between 13 and 15 percent of every
13 volume.

14 MR. RITTINGER: I think I should move for its
15 admission, your Honor.

16 THE COURT: Received.

17 (Defendant's Exhibit II received in evidence)

18 Q. Now, I'd now like to move to the subject of
19 attorney summaries and, again, you testified at some length
20 yesterday about that. But let me see if we can get to some
21 examples quickly.

22 The opinions you received from the Court of
23 Appeals, do they always contain the information on the
24 attorneys involved in the case?

25 A. Not other slip opinion.

1 Q. I'm talking about the Court of Appeals now.

2 A. Yes.

3 Q. All right. How do you get that information?

4 A. We get it from docket sheets, some of it is
5 printed on the slip opinion. If it's not, we get the docket
6 sheets. There's other reports and other Court documents
7 that are available that we need to obtain in order to create
8 our attorney summaries.

9 Q. Is all of the information that West provides in
10 its attorney summaries, I'm talking about the general
11 categories of information, always available from a Court?

12 A. The basic names are available from the Court, but
13 we add in information to our attorney summaries.

14 Q. And there are times that you have to go to
15 sources other than the Court to obtain that additional
16 information; correct?

17 A. Yes.

18 Q. Yesterday you testified about using the West
19 product --

20 A. West Legal Directory.

21 Q. Thank you.

22 And you previously used Martindale-Hubbell?

23 A. As a resource tool. And we also have
24 directories, bar directories from all over the United
25 States.

1 Q. Let me show you again the dead copy for Exhibit
2 DH. Now, if you would, turn --

3 MR. RITTINGER: I think you have that, Judge. I
4 don't know.

5 Q. If you would to the pages where the attorney
6 information, could you show and describe generally what the
7 process was with respect to the attorney summary in Exhibit
8 DH?

9 A. In this case, we took the information that was on
10 the slip opinion and we did cut and paste it and rearrange
11 it because we're taking it from several locations on the
12 slip opinion and that provides the basis for us to start our
13 editing.

14 We deleted the street address, the post office
15 box numbers of the attorneys, West has chosen in the
16 attorneys' summaries to only include the city and the state.
17 We've deleted the zip codes. We have deleted Esq. We have
18 deleted counsel at several times because what we're trying
19 to do here is make it a concise statement of -- a concise
20 summary of the attorney information.

21 We're going to make a single paragraph of all the
22 attorneys appearing for the appellant and a single paragraph
23 for those appearing for the appellee.

24 Q. Are there any other changes or additions that are
25 made with respect to that exhibit?

1 A. I think I pretty well described that.

2 Q. And West has selected the arrangement in which it
3 provides the attorney information, is that correct?

4 A. That's correct.

5 Q. And does it use that same arrangement in the same
6 form each time it publishes an attorney summary in the
7 Federal Reporter?

8 A. We have basic guidelines that we follow.

9 Q. It is true that you do not follow the selection
10 in format that you receive from the Court, is that correct?

11 A. That's right. That's right.

12 Q. Now, let me show you Exhibit DQ and ask you if
13 you could describe again what happened in there with respect
14 to the attorney summaries.

15 A. This is an example where the attorney information
16 is coming from the Court in a general docket sheets that at
17 the back of the exhibit and West will take the information
18 from this general docket sheet that can be several pages
19 long and the attorneys can be located throughout the docket.

20 We locate the attorneys that we need from the
21 docket sheet and then we do cut and paste those so that we
22 can begin our editing process. There's extensive revision
23 in this example. We've deleted the phone numbers. We've
24 deleted some of the Court notations that they put on their
25 docket sheets. We've removed the floor numbers, suite

1 numbers. We've removed the attorney names that appear in
2 duplicate.

3 The Court has information on the docket that's
4 relating to the appellant. They've got actually the
5 captions of the cases. We're not going to use that in our
6 attorney summaries. So, we delete that. We add the word
7 "argued" after the attorney's name who argued the case. We
8 add words like for appellant and for appellee in our summary
9 so we can make sure that it's clear.

10 We've added in docket numbers in this case
11 because it is -- there are two titles to the case. And then
12 the cities of practice were given here, so we would have
13 looked them up to verify them.

14 I think all the -- the attorneys actually
15 represent one of the most difficult summaries that we do
16 because the editing is quite extensive and we also get more
17 feedback on the attorney names than from our customers
18 because if the attorney names aren't right, they do let us
19 know and we will add in -- we -- sometimes the Court's
20 docket isn't right and we will get names from counsel
21 themselves.

22 So, all we do, we hear more about the attorney
23 summaries than any other part of the opinion.

24 Q. I forgot to ask you, Mrs. Bergsgaard, but of
25 course West has guidelines that cover attorney summaries, is

1 that correct?

2 A. That's correct.

3 Q. Let me show you Exhibit FF and ask you if you can
4 identify what that is?

5 A. These are guidelines that our copy preparers
6 would follow when creating the attorney summaries.

7 Q. And are all the guidelines with respect to
8 attorney summaries contained in writing?

9 A. No.

10 Q. And are these guidelines prepared or have they
11 been prepared over the years based upon decisions made by
12 West as to what information it wishes to provide in its
13 foreign summaries?

14 A. Yes, yes, and they have changed, as I said, of
15 all the things we do, this is the most difficult. So, we
16 have many instructions that have changed and continually
17 revise the attorney summary guidelines so that we can
18 present it in the clearest form that we can.

19 MR. RITTINGER: I move for its admission, your
20 Honor.

21 THE COURT: Received.

22 (Defendant's Exhibit FF received in evidence)

23 MR. RITTINGER: I have just two more examples,
24 your Honor.

25 Q. Let me show you Exhibit DD, ask you if you could

1 just quickly describe what DD is an example of?

2 A. DD is an example of an attorney summary where
3 West added the city of practice for the attorney.

4 Q. And where did it get that information, can you
5 tell from that?

6 A. I can tell you we would have looked it up first
7 on the West's legal directory and if we can't find it there,
8 we would go further into the bar directories.

9 MR. RITTINGER: I move for its admission, your
10 Honor.

11 THE COURT: Received.

12 (Defendant's Exhibit DD received in evidence)

13 Q. And last, let me show you Exhibit DM, which is
14 dead copy for the Supreme Court Reporter. I think that you
15 have testified at various times with respect to the attorney
16 information, how you receive it from the Supreme Court.
17 Would you just quickly summarize that?

18 A. The attorney information that we receive from the
19 Supreme Court is actually listed on a docket -- a docket
20 sheet. Well, I guess it's the journal copy that lists oral
21 arguments for a particular day and they will list who is
22 arguing the case in that action. We use that.

23 Q. That information is available to one and all, is
24 that correct?

25 A. Yes, it is. We use that information, but we do

1 have to save it until the case is decided. We don't get any
2 attorneys on the slip opinions from the Supreme Court. From
3 that docket sheet then, we do remove the docket number, the
4 title of the case, we remove argued by. We remove Mr. ,
5 Mrs., and then we look up the city of practice and summarize
6 it again according to our guidelines.

7 Q. What do you do if you find a common name?

8 A. We will look at the opinion to find out where the
9 action is arising. And generally that will tell you what
10 state you're in, what city you're in.

11 Q. Mrs. Bergsgaard, is it fair to say that each
12 volume of the Federal Reporter and the Supreme Court
13 Reporter contain in effect a compilation of summaries,
14 attorney information for every case report in each volume
15 drawn from various sources selected, arranged and worded by
16 West?

17 MR. BERGER: Objection.

18 THE COURT: Overruled.

19 A. Yes.

20 Q. Is it fair to say that each volume of the Federal
21 Reporter and the Supreme Court Reporter contains in effect a
22 compilation of every case and statute cited in the reported
23 cases in the form of citations preferred and selected by
24 West, including corrections, parallel citations and
25 alternative citations?

1 MR. BERGER: Objection.

2 THE COURT: Overruled.

3 A. Yes.

4 Q. Is there anyplace else where the attorney
5 compilation can be found in the form as selected by West as
6 it's found in its Federal Reporter and the Supreme Court
7 reporter?

8 A. No.

9 Q. Is there anyplace else where the compilation of
10 cases as cited by West can be found other than in the West
11 reported cases?

12 A. No.

13 MR. RITTINGER: I have no further questions, your
14 Honor.

15 THE COURT: Let me just ask you this: I'm not
16 sure I understand what's going on.

17 With respect to the Federal Reporter, for each
18 circuit, you published everything that they put out as an
19 opinion, is that correct?

20 THE WITNESS: That gets a little bit into the
21 selection, which we haven't talked about here, but basically
22 the Court has issued opinions under their Court rules that
23 you're familiar with that are precedential opinions for
24 precedential value.

25 They also issue, as I mentioned before the

1 unpubs, but there's many different orders that aren't
2 labeled, either one, and West makes the decision as to those
3 opinions and those orders how we're going to treat them.

4 THE COURT: And those are basically the rehearing
5 denials?

6 THE WITNESS: There's rehearings and amendments
7 and many different types of orders.

8 THE COURT: Thank you.

9 MR. BERGER: Your Honor, our cross-examination of
10 Ms. Bergsgaard will probably be less than a half an hour.
11 If you'd like to do --

12 THE COURT: Let's go to it.

13 MR. BERGER: May I approach the witness, your
14 Honor?

15 THE COURT: Sure.

16 CROSS-EXAMINATION

17 BY MR. HARTMANN:

18 Q. Ms. Bergsgaard, I'm giving you the trial exhibits
19 that we spoke about yesterday.

20 MR. HARTMANN: Your Honor, this is just going to
21 be the documents that they wanted the foundation for.

22 Q. If you would look, please, first to Exhibit 23.
23 And if you'd look at the bottom of the first page of Exhibit
24 23, first of all, this is, is it not, a letter from the U.S.
25 Court of Appeals for the Fifth Circuit to Alan Sugarman

1 dated November 22, 1993.

2 THE COURT: It purports to be? How could she
3 authenticate that?

4 MR. HARTMANN: They've already agreed to
5 authenticate, your Honor. I'm just identifying the
6 document.

7 THE COURT: For what purpose are we going through
8 this? I don't understand.

9 MR. HARTMANN: Well, Mr. Rittinger just asked a
10 series of questions about how Mr. Sugarman could get the
11 document from the Courts the same way that West could and
12 this letter is a letter that states that West gets them for
13 free and Mr. Sugarman pays.

14 THE COURT: Let's move on.

15 MR. HARTMANN: I'm sorry, your Honor?

16 THE COURT: Let's move on.

17 MR. HARTMANN: Should I examine on this or not,
18 your Honor?

19 THE COURT: I don't understand what this witness
20 is going to add. Is the document not admitted? And if it's
21 not admitted, why isn't it admitted?

22 MR. HARTMANN: I don't know, your Honor. They
23 are objecting to the --

24 THE COURT: As what I'm trying to find out from
25 Mr. Rittinger.

1 MR. RITTINGER: Because it's hearsay. He can ask
2 the witness whether or not she knows if Mr. Sugarman has to
3 pay.

4 West doesn't get it for free. West has a
5 contract with the Fifth Circuit. So, he's mischaracterized
6 as I understand the situation with the Fifth Court. I'm not
7 testifying. She can testify about that, if she shows. He
8 can't get it in through from a letter from the clerk of the
9 Fifth Circuit.

10 MR. HARTMANN: May I inquire, your Honor?

11 THE COURT: Yes.

12 BY MR. HARTMANN:

13 Q. Ms. Bergsgaard, on the second page of that
14 letter, it says, you are correct that West and Lexis
15 received this Court's corrections at no charge and on the
16 first page, it says that Mr. Sugarman would be charged \$35
17 for seven slip opinions.

18 Is it true that West is not charged as the Court
19 said in this letter?

20 A. We have a contract with the Court to provide --
21 we are the slip publisher and in instances where we are not
22 the slip publisher, we do have to pay for the slip opinion
23 subscription just like everyone else.

24 Q. I understand that. But in this letter, it --

25 THE COURT: We're talking about this Circuit?

1 A. I don't know. I don't know anything about this
2 letter. I have not seen this letter. What I can tell you
3 is that we, because of our contract with the Court to
4 publish the slips, we are not charged for that slip opinion
5 subscription.

6 THE COURT: Next?

7 MR. HARTMANN: Thank you.

8 THE COURT: Do you know what the charge for that
9 would be, if you did not have this contract?

10 THE WITNESS: I don't know.

11 THE COURT: Next?

12 Q. Do you know if the amount that the Court says it
13 would charge --

14 THE COURT: She says she doesn't know. Let's
15 move on.

16 MR. HARTMANN: O.K. Thank you, your Honor.

17 Q. Now, if you look at Exhibit 33, please. This is
18 a, I believe a letter from Mr. Smith, your West editorial
19 counsel to the U.S. Court of Appeals. And he states, unless
20 the Court enters an order which specifically states --

21 THE COURT: What's the objection to this letter?

22 MR. RITTINGER: I have no idea what it's being
23 offered for, your Honor.

24 THE COURT: It's authentic; right?

25 MR. RITTINGER: I'm not objecting on authenticity

1 grounds.

2 THE COURT: That's received. Let's move on.

3 MR. HARTMANN: May I move 33 through 38 on the
4 same basis? They're all essentially the same type of
5 document.

6 MR. RITTINGER: The problem with these is some of
7 these show things in effect that are not in effect now,
8 authentic -- I don't care.

9 THE COURT: They're received.

10 (Defendant's Exhibits 33 through 38 received
11 in evidence)

12 MR. HARTMANN: Thank you, your Honor.

13 Q. Ms. Bergsgaard, do you still have West exhibits
14 up there? I'd like you to look, if you could, to West's
15 exhibits.

16 Ms. Bergsgaard, on this document, first of all,
17 just very briefly, once again, what is this document?

18 A. This is a dead copy of our case report for the
19 opinion as published at 97 F.3d on page 300.

20 THE COURT: What's the exhibit number?

21 THE WITNESS: It's Defendant's Exhibit DF.

22 Q. Now, with regard to this exhibit, can you tell if
23 there's been a republication or a reprint or a correction by
24 the Ninth Circuit itself by looking at the file?

25 A. Well, yes. This was one of our blowups as well.

1 The Ninth Circuit typically, as I think I said before
2 reprints their slip opinion. They do say "corrected
3 reprint" on the top and this does happen from circuit to
4 circuit.

5 Q. And at the back, is that right at the back of the
6 exhibit there's a page 311?

7 A. Yes.

8 Q. If you look on page 311, kind of towards the
9 bottom right under the heading that says "order"?

10 A. Yes.

11 Q. There's a parenthetical that says, editor's
12 comment memo incorporated for the purpose of publication.
13 Do see that?

14 A. Yes.

15 Q. Who incorporated the amendments for the purpose
16 of publication?

17 A. We incorporated those into our case report.

18 Q. So, that would you take a look back at what the
19 Ninth Circuit did?

20 A. The Ninth Circuit when they do their slip
21 opinions, they always do the order and they do republish the
22 entire order with their corrections.

23 Q. So, it was the Ninth Circuit that did that?

24 A. In -- and they republish their -- they reprinted
25 their slip opinion.

1 Q. So, it was the Ninth Circuit that did that?

2 A. West chooses how it's going to do this. And the
3 Ninth Circuit reprint all of their orders that way.
4 Sometimes we will incorporate them in this instance like in
5 this instance and other times we will not.

6 Q. The editor's note that says, amends incorporated
7 for the purpose of publication, states that, but the Ninth
8 Circuit did exactly that in its publication, is that
9 correct?

10 A. Well, we added the editor's note to let our
11 readers know because we are incorporating the amendments
12 into the case report.

13 Q. I understand that. But what you published is
14 identical to what the Ninth Circuit published?

15 A. No.

16 Q. Except for your editor's note?

17 A. This is not identical to our case report and I
18 don't think we need to go through step by step.

19 THE COURT: Other than the stylistic changes you
20 made in parallel cites, etc., the text?

21 MR. HARTMANN: I withdraw the question to the
22 witness.

23 I have no other questions for the witness, your
24 Honor.

25 MR. RITTINGER: We rest, your Honor.

1 MR. HARTMANN: No rebuttal, your Honor.

2 THE COURT: What I would suggest we do is we come
3 back at 2 o'clock and I'll hear argument. I have no
4 intention of deciding this today. But I think it might be
5 well to have some arguments so we can focus the issues that
6 I'm then going to ask you to brief.

7 MR. RITTINGER: Yes, your Honor.

8 (Luncheon recess)

9 (Continued on next page)

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1 AFTERNOON SESSION

2 2 p.m.

3 THE COURT: I will hear from counsel for
4 Hyperlaw.

5 MR. HARTMANN: I think Hyperlaw's argument
6 remains largely unchanged from its briefs, but I can go
7 through it again if it please the court.

8 First of all, I would like to point out that West
9 does not have a copyright actually not for one reason for
10 but several different reasons. Copyright protection under
11 the title is not available for any work of the federal
12 government. To the extent that there is material in here
13 under Section 10105, it's with the federal government and
14 there is no copyright there.

15 THE COURT: Where does that get you?

16 Nobody has the right to copyright the works of
17 William Shakespeare but yet if you put a compilation
18 together, footnoted with cross references to other
19 Shakespeare plays, you might end up with copyrightable work.

20 MR. HARTMANN: All you would end up with, your
21 Honor, is a compilation upon which you have copyright which
22 contains noncopyrightable original text all of which can
23 still be copied.

24 THE COURT: Suppose I put out Complete Works of
25 William Shakespeare and in Macbeth, for example, I drop

1 footnotes at various places to compare to Act 1, Scene 3
2 King Lear and I do that to point out similarities in
3 Shakespeare's writings that appear at various of his plays.
4 All of my footnotes are original works.

5 You wouldn't suggest, would you, that you could
6 then scan with my footnotes into your computer system.

7 MR. HARTMANN: There would be three predicate
8 assumptions in that argument, your Honor.

9 First of all, I would be able to distinguish them
10 as your footnotes. There would be no question about that.

11 Second of all, the section of the copyright law,
12 17 U.S.C. 403, particularly the report out of the committee
13 on that, wouldn't apply. In other words, you hadn't done
14 what they said you couldn't do which is add some new matter
15 in the form of an introduction, editing, illustrations, et
16 cetera, to include a general copyright notice in the name of
17 a commercial publisher which suggests to the public that the
18 bulk of the work is not uncopyrightable.

19 Shakespeare is slightly different from that.
20 When you got through that you would have to deal with still
21 the problem that is involved in the Bank's case and in
22 Wheaton, which is what is the entire copyright scheme is all
23 about, and what do art and science have to do with
24 government publications of the most fundamental public
25 record which are the decision of courts?

1 If I could, in fact, tell which ones were yours,
2 I could then redact yours out in theory. But you would have
3 to be able to identify them, first of all. I would have to
4 be able to tell from the text which they were and then
5 you --

6 THE COURT: Why is that?

7 MR. HARTMANN: Because if you don't know --

8 THE COURT: What is your authority for that
9 proposition?

10 MR. HARTMANN: That they have to be identifiable
11 from the text? The differences in appearance between a
12 derivative work and the pre-existing work, which are driven
13 primarily by functional, utilitarian or mechanical purpose,
14 cannot be considered as independent research --

15 THE COURT: Is that an attempt to frustrate the
16 court reporter?

17 MR. HARTMANN: I am sorry.

18 "The differences in appearance between the
19 derivative work and a pre-existing work, which are driven
20 primarily by functional, utilitarian or mechanical purpose
21 cannot be considered when making or seeking artistic
22 differences." Also, obviously they can't --

23 THE COURT: What are you quoting from?

24 MR. HARTMANN: Entertainment Research Group, 853
25 F. Supp. 319. But contained within that concept are also

1 the --

2 THE COURT: This isn't a derivative work. Mr.
3 Rittinger would tell me it's a compilation.

4 MR. HARTMANN: If I were in Mr. Rittinger's
5 position I would tell me that too.

6 THE COURT: What is wrong with his position?

7 MR. HARTMANN: Well, let's go back to Bentley
8 versus Tibble, which really is almost dead on point, and
9 let's start at Bentley versus Tibble. That said one who so
10 embodies copyrighted and uncopyrighted matter that ones
11 reading work cannot distinguish between the two has no
12 copyright claim and there is no copyright reader "is left to
13 ascertain for himself by verbal comparison word for word."

14 I asked Ms. Bergsgaard at the end there even
15 where it says word for word what her change was in the Ninth
16 Circuit. She said, well, they made a choice but they chose
17 to do it exactly like the court did. There is no way to
18 tell and they don't know so they can't tell us
19 prospectively.

20 Also, Groves Press. Groves Press talks about, I
21 can't remember, either 20,000 changes or 40,000 changes to a
22 single work. Fine, 20 or 30,000 changes. I, as a reader,
23 can't possibly distinguish what they are but beyond that
24 they don't change the fundamental nature of the work. The
25 fundamental nature of the work here is that it's a

1 government work written by federal judges and put out, and
2 unfortunately I don't know whose to blame, certainly not
3 West, I don't think, but unfortunately West has the only
4 official copy of a lot of these things. There are changes
5 that were made by judges that were communicated between West
6 and the court that nobody is ever going to be able to tell.
7 That is the official record at this point.

8 Also, just to go back to what your Honor said
9 about the Shakespeare comparison, another big difference
10 here is that West isn't really claiming a true compilation
11 copyright. They are creating a new animal. It's kind of an
12 medi-compilation. It's the concept that the compilation
13 exists within one case so they are saying you can't copy one
14 case because that one case is in itself a compilation. That
15 completely confuses the concept of what a compilation
16 copyright gets you, which is only a copyright in the
17 compilation, in the order and the selection.

18 THE COURT: But you are not copying one case, you
19 are copying them all.

20 MR. HARTMANN: We are not copying them all, your
21 Honor. Mr. Sugarman has made it very clear in his
22 deposition, and also in his affidavit, and if I can read
23 from the affidavit it says that they will "copy that and the
24 noncopyrighted material from the Supreme Court Reporter
25 series, Federal Reporters to existing decision it publishes,

1 and it will copy and add certain of the noncopyrighted
2 portions of the decisions in other noncopyrighted materials
3 from prior years of the Supreme Court Reporter and Federal
4 Reporter series to the CD ROM product." "Certain" -- that
5 is all we have ever said.

6 THE COURT: Certain portions of various
7 decisions.

8 MR. HARTMANN: That is exactly right. We never
9 said, nor do we intend, to copyright absolutely everything,
10 nor in the order or in the compilation that they do. For
11 one thing, we publish everything, unpublished, published
12 decisions, anything that Hyperlaw can get its hands on from
13 the Court of Appeals and Supreme Court Reporter it
14 publishes. It doesn't reflect their selection or
15 arrangement.

16 What they are claiming is a selection and
17 arrangement. And if they are, selection and arrangement is
18 based on the total body of the work. A, we don't agree they
19 have one but even if they did we never said that is what we
20 are copying. For instance, the Gollust case, which has been
21 the fundamental kind of the poster child of this entire
22 argument, that is not a case from during the period when Mr.
23 Sugarman reports cases. It's well before then. It's a
24 couple of years before.

25 What he said about Gollust in the beginning and

1 why this whole rigamarole started is that Gollust is the
2 case that went up to the Supreme Court. Mr. Sugarman wants
3 to report the lower court decision from the Supreme Court
4 case, which happens to be a Court of Appeals case, because
5 he wants to be able to put a little mouse on it and click on
6 it and have the reader pop into that case. That is what we
7 said.

8 Now, what West wants to say is that individual
9 case is somehow not copyable because it's a compilation in
10 and of itself. It's just not true. There is no law that
11 supports it. It's a complete and utter distortion of the
12 entire concept of what compilation copyright gets you. All
13 compilation gets you is a copyright and a selection in
14 overall arrangement. For instance, Mr. Sugarman testified
15 that when he does amending or subsequent orders, he moves
16 them out in his product now, and would in the future, up to
17 a different place. That is not their arrangement. It's
18 completely different.

19 So basically the whole red herring of the
20 copyright or the compilation argument is, as I say, a
21 perversion of the basic concept of what you get in
22 compilation. In one of the major tenets of what you do get
23 in compilation -- well, let's go for a moment into that
24 medi-compilation that one case is somehow a compilation.
25 The primary concept there would then be thinness. You can't

1 tell which is theirs. It's primarily government work. They
2 have admitted that 90 percent of it is facts that they cut
3 and paste.

4 Facts aren't themselves copyrightable under
5 Harper V Row. I just don't know how to respond, your Honor.
6 It's not something that the law has ever seen before. This
7 is a completely new argument. And I think really Mr.
8 Rittinger set forth their argument best when in his initial
9 motion, which we still would like to respond to in writing,
10 if we can, your Honor, he got up and said he didn't like
11 Feist or he didn't think Feist applied to this somehow and
12 that if they didn't win here they were going to go on to
13 some sort of an unfair competition concept and that is what
14 really was going on in Feist.

15 I would like to point out in Feist the court
16 cited the Joyce and Paterson article, I can't remember, five
17 or seven times, a whole bunch of times, and that article
18 just slays the West v. Mead case. This is West v. Mead post
19 Feist. That is all it is. The court wholly adopted that
20 article. It relied on it over and over and over again and
21 that article took apart the whole argument with West V Mead
22 and that is what this case is again West v. Mead, about text
23 as opposed to pagination, but it's the same argument being
24 pushed.

25 Should I continue?

1 THE COURT: Yes.

2 MR. HARTMANN: Let me actually go back to the
3 question you asked. Even if there is some slight
4 modification in a text that some change that you could find
5 was arguably copyrightable, you would still fall within
6 Morrissey versus Procter & Gamble, which says minor
7 modifications to the expressions of things like captions and
8 names can't be afforded copyright protection given the
9 limited number of ways of expressing them.

10 Ms. Bergsgaard said that one of the hardest
11 things they did, one of the most complex things they did was
12 attorneys' names because, golly, they have to look up the
13 attorney name. They get it from a docket which is supplied
14 to them by the court. They cut that up, paste it down and
15 then they say that this incredible effort of creativity is
16 they go up and look up what city that person is in. If --
17 well, I won't put it that way. The distinction between that
18 and a white pages of a phone book escapes me. It's a fact,
19 first of all. It's a fact taken from the court, second of
20 all. All they are doing is formatting.

21 THE COURT: But they are also deciding whether or
22 not the city is an important consideration to the reader.
23 That is their editorial judgment.

24 MR. HARTMANN: It's still a fact, your Honor.
25 The fact that my name is Carl Hartmann and I am an attorney

1 in New York doesn't make this an original work. It makes
2 the fact they put a fact in there. The telephone company
3 made a decision on how they are going to abbreviate McDonald
4 versus MacDonald. As a matter of fact, in some cities
5 MacDonald as MAC comes first and in some cities MC comes
6 first. That is a decision. There is a decision in what
7 order they are going to put them. They could have done it
8 by phone numbers first or reversed the order. They could
9 have not included street addresses.

10 I guess the phone company decided to create
11 street addresses, to put street addresses in. They could
12 have put in the city. They could have not put it in the
13 city. They could have put in the street number but not the
14 actual number on the street. You know, that is as much a
15 decision as to put in attorney's names.

16 So anyway, if you have a very limited numbers of
17 ways of putting facts together that also can't be protected
18 and that is clearly what is going on here as well.

19 Feist also made it clear that corrections of
20 spelling, punctuation, capitalization, addition of cross
21 references, changes in typeface, in font, all that kind of
22 stuff is classic sweat of the brow.

23 Once again, as I said, part of the problem is
24 that this is a governmental work so particular provisions
25 apply, 403 being the one most applicable.

1 Would your Honor want to hear -- I am sorry, one
2 other thing before I finish up.

3 Minuscule variations to the original text under
4 Alfred Bell, under Gerlock, under Albratton & Son, under
5 F.S. Marketing, all of which are cited in our brief, when
6 you have a set of facts which you are getting from a public
7 record, which you are getting from the U.S. government, on
8 top of that which is a judicial opinion and you are simply
9 moving those facts around, I asked at one point Ms.
10 Bergsgaard where do they consider putting, for instance, I
11 think it was the attorney's names? Where else would you put
12 them? You can put them at the end or you can put them at
13 the beginning. I doubt they are going to randomize and put
14 them through the body or change them into some creative way.
15 It's just antithetical to the concept.

16 Once again, you get back to that concept where
17 the reader is left to ascertain for himself by verbal
18 comparison word for word, which is not Bentley versus Tibble
19 but Laser Cohn, the 1990 Fourth Circuit case.

20 Then finally, your Honor, on this, without
21 getting into the concept of the fair use yet, I don't know
22 if you want to hear argument on that. Finally, the most
23 overriding fact in everything that was said here, which may
24 not be most, but certainly interesting, is the 17 U.S.C. 402
25 argument which says that you can't have a copyright in

1 ideas, procedures -- excuse me, 102 -- ideas, procedures,
2 processes, systems, method of operation, concepts and
3 principles. To the extent these aren't facts or aren't
4 government work or they are government work and you can't
5 tell or they are minuscule variations or it's just lots of
6 other variations, then it's a processor system. If you use
7 a manual and someone looks up in the manual it's a processor
8 system. The fact somebody deviates from that is not the
9 issue. The question is is it a system.

10 I asked Ms. Bergsgaard at one point, and she said
11 this has been done this way for 20 years, before I was
12 there. Okay, fine. It was done for 20 years.

13 I think at the end of the day though, your Honor,
14 that this is basically a court opinion and you can't get
15 copyright court opinions no matter how many bells and
16 whistles you stick at the beginning or the end and how many
17 cites you change. The kinds of changes they make to the
18 text of these opinions are exactly the kind of stuff that
19 Feist said are sweat and brow. That is all.

20 THE COURT: Let's assume that any one of these
21 changes individually is not sufficient to entitle it to
22 copyright protection. Haven't they added enough new
23 material to satisfy that modicum that Mr. Rittinger keeps
24 telling me about in toto?

25 MR. HARTMANN: First of all, the problem with

1 that is the modicum Mr. Rittinger wants to talk about is a
2 modicum for looking at a compilation copyright.

3 Mr. Ruskin reminded me that the size of the phone
4 bill in Feist was not determinative the Supreme Court said.
5 20,000 changes, your Honor, to Grove Press, 20,000 changes.
6 You can't accumulate noncopyrightable stuff and create
7 copyright. It's not allowed. You certainly can't do it
8 under the provisions of 17 U.S.C. 403 to government work.
9 That specifically is prohibited even more than normally.
10 Again I go back to what the subcommittee said when they
11 reported it out. You simply can't add new matter in the
12 form of introductions, editing, illustrations and then get
13 government stuff. So the answer to your Honor's question is
14 no, that won't do it.

15 THE COURT: Anything further?

16 MR. HARTMANN: Do you want to hear argument on
17 fair use or can we submit that on briefs?

18 THE COURT: It's up to you.

19 MR. HARTMANN: Let me just hit the things very
20 quickly. The elements of fair use and how they have been
21 met in this case basically are this: Purpose and character
22 of the use is the first element. Hyperlaw's product is
23 admittedly for sale commercially but it is primarily a
24 research tool. I don't think anybody disputes that.

25 THE COURT: What difference does that make?

1 MR. HARTMANN: The Supreme Court said in Campbell
2 versus Acoff that the mere fact it's sold commercially is
3 not the dispositive factor, it's whether or not what its use
4 is, which is research, and whether the work is --

5 THE COURT: This isn't research in terms of R&D.
6 It isn't some scientist sitting at MIT. This is legal
7 research for which everybody charges a lot of money per
8 hour. It's a commercial use. It's not a research use in
9 that sense.

10 MR. HARTMANN: If I can quote out of Sallinger
11 versus Random House, 650 F. Supp. 413, it said, "The
12 protection of the statute should not turn on sack cloth and
13 missionary zeal." It, rather, directs the court to make an
14 appraisal of social usefulness and fair play.

15 Research of the law on the social usefulness
16 scale is probably a ten.

17 THE COURT: I can get you a lot of people who
18 would disagree with that. Almost any doctor in the country.

19 MR. HARTMANN: Also, the Nimron copyright goes
20 into that in some detail, cited in our brief at 13.05.
21 Commercial uses are compatible with fair use and it goes
22 into a long discussion. The purpose and character of the
23 use is really whether it's transformative, whether it refers
24 to whether CD ROM adds something new with a further purpose
25 or different character than West copyrighted Reporters.

1 See, for instance, American Geophysical Union versus Texaco.
2 Here we are comparing a book which provides indexing and
3 cross referencing to a national system with a CD ROM which
4 provides a number of things that that book couldn't possibly
5 hope to provide.

6 THE COURT: You are comparing a case in a book to
7 a case in a CD ROM. If somebody wants to read a case they
8 have the choice of reading it in the book or to strain their
9 eyes by going and doing it on Mr. Sugarman's CD ROM.

10 MR. HARTMANN: But the transformative issue
11 discussed in American Geophysical, it's not on the
12 individual unit, it's on the product. Fair use assumes
13 already that there is, in essence, a copyright and now you
14 are trying to get around the copyright. So here what we are
15 saying is is the product transformative?

16 THE COURT: It all depends what we consider is a
17 copyrighted item here. They have a copyright in each case
18 because of all of the changes they make, and we are talking
19 about the use of the product with respect to each case.

20 MR. HARTMANN: That is certainly how they are
21 trying to define it, your Honor.

22 THE COURT: And if I accept that definition where
23 is the transformation?

24 MR. HARTMANN: The whole concept of
25 transformation exists not in individual elements of a work

1 but in the work. The work is transformative in the best
2 sense of the word. It provides all the cases instead of
3 just some of the cases. In other words, we don't select out
4 the so-called unpublished decision.

5 Testimony at hearing was that we had 40 percent
6 more cases than they have on their product. That is a big
7 difference. That is important. You can boolean and search
8 in our product. You can't on theirs. You can get word
9 concurrence. The fact it's on a CD ROM is a huge
10 difference. It can be transported in and out of word
11 processors and other systems as you use it. It can be
12 stored and things like that. In addition to that, this
13 produces a word concordance that is useful to the
14 researcher.

15 Just the coverage alone makes it a transformative
16 product, but all the other things as well. If you get down
17 to a discussion of the individual case, if there were some
18 way to copyright an individual case per se, one of their
19 individual case reports, what would be being said is somehow
20 adding the name of the author and citations, all of which
21 are noncopyrightable events, directly contrary to Grove
22 created a copyrightable thing. Now, if you then try to move
23 into what would transformation of that be, you push the
24 arguments two steps beyond where the law is. You can't
25 create hypothetical on hypothetical to get there. What it

1 is is an individual case which is not in itself
2 copyrightable, which is copied and put in a work which is
3 not reflective of their work, not reflective of the
4 compilation or the selection. I can't think of a single

5 case that would be even close to those in terms of that kind
6 of result.

7 The next element of the fair-use argument would
8 be the nature of the work and in *Consumers Union of the*
9 *United States versus General Signal*, 724 F.2d 1044, and also
10 in *Nimron* copyrighted 13.05, there is a discussion of the
11 nature of the work being thin or the more imaginative or
12 less imaginative -- as your Honor once pointed out, you
13 aren't singing this. It isn't a work of art. It isn't a
14 play. It isn't artistic expression. The more it tends
15 towards the end of the mechanical and the reporting of
16 facts, the thinner that gets and the nature of the work
17 closest in on it, on any fair-use argument. Here that
18 approaching limit is very, very, very thin. They said, by
19 the way, in *Consumers* that since the risk of restraining the
20 free flow of information is more significant with
21 informational work the scope of permissible fair use is far
22 greater.

23 The next element or the next factor is the amount
24 and substantiality of the portion used in relationship to
25 the copyrightable work as a whole.

1 Now, when you are talking about the amount used
2 out of this product you are talking about what are things in
3 there that aren't facts, and generally that discussion
4 occurs in the context of something already in the decision,
5 already in the work that is copyrightable and how much of
6 that you are taking.

7 It's almost impossible to have this discussion in
8 the context of something that isn't, but even if you were
9 to, you would have to look at the portion of what is added
10 that would be copyrightable and when you get by all the
11 things like the expansions of citations and the fonts and
12 the case changes and the punctuation and all that kind of
13 stuff down to what is even arguably copyrightable, you are
14 at such a minuscule portion of the total whole that not only
15 can you not tell what it is, which is the copyright problem
16 with it, it can't be redacted out by someone who wants to do
17 that, which is what Mr. Sugarman tried to do, but on top of
18 that, you are at a minuscule part of a minuscule part and
19 you are into the whole minuscule variations argument again.

20 Then, finally, there is the effect of the use on
21 the potential market for copyrighted work and there are a
22 couple of ways to go at this. Earlier in this case, and in
23 the arguments before your Honor, West sought to portray Mr.
24 Sugarman as a zealot who was out there not really producing
25 a commercial product. He wasn't really a competitor to

1 West, who Mr. Opperman said didn't have anything that West
2 considered even in the market with them and the court should
3 not even allow him into this court because they didn't have
4 a product that they were concerned with or care about. Now
5 that they have lost on the 12(b) argument he flipped over
6 and Mr. Sugarman and Hyperlaw are, with all three or four of
7 its employees, this magna corporation that is going to come
8 after West product.

9 The Hyperlaw log product doesn't compete with
10 West. Theirs is an acutely indexed cross reference book
11 that relies on a National Reporter System to get people in
12 and out with headnotes and things like that. What Mr.
13 Sugarman sells are cases. The only cross referencing in his
14 work is what we are trying to do in this case, which is the
15 ability to put your mouse on that case and click on it.
16 There is no other cross referencing system.

17 If you buy Mr. Sugarman's work and you want to
18 find out what the subsequent case history is or if you want
19 to find its relationship to other cases of that type or
20 things like that, you are probably still going to have to go
21 to another product, quite possibly West but possibly
22 Sheppards or CCH or BNA. This is a collection.

23 Mr. Sugarman's work is a collection of cases
24 searchable by boolean search and nothing more. Again, I
25 would point out to your Honor that we can't really tell you

1 much more about how we compete in their market because we
2 haven't been able to get information about the market.

3 Finally, I would like to say one last thing, your
4 Honor, which is that we pled in our complaint that this was
5 not an unfair use of their product. West has never joined
6 that issue. West has never, up until the last two or three
7 weeks, started arguing the unfair competition argument. The
8 time for that has come and gone long ago. It's set out
9 count by count in the complaint and it's also set out in the
10 prayer for relief. That issue is never joined. It's a
11 fallback position.

12 That is it, your Honor.

13 THE COURT: Before I hear from Mr. Rittinger, let
14 me ask you this: What do you believe is the status of Mr.
15 Sugarman's hearing testimony in this trial?

16 MR. HARTMANN: The status of the hearing
17 testimony?

18 THE COURT: Correct. Is that before the court as
19 if it were testimony in this trial?

20 MR. HARTMANN: No, your Honor, we didn't put it
21 into evidence and neither did the other side.

22 THE COURT: Then how do I make the determinations
23 that you say I should make as to what Mr. Sugarman intends
24 to do with this product?

25 MR. HARTMANN: Because what is before the court

1 is the description of the product contained in his affidavit
2 which was attached to his 3G statement which specifically
3 describes it in paragraph 3, which was admitted today into
4 evidence.

5 THE COURT: As --

6 MR. HARTMANN: For the notice of what --

7 THE COURT: As what exhibit number?

8 MR. HARTMANN: It was the last one, the one we
9 had the argument or the discussion about. It was 55. And
10 it specifically says what Hyperlaw will do. It will copy
11 noncopyrighted materials from the Supreme Court Reporter
12 series, Federal Reporter series --

13 THE COURT: You don't have to read it to me. I
14 can read.

15 MR. HARTMANN: In addition to that, your Honor,
16 what is also before the court is Mr. Sugarman's complaint
17 where Mr. Sugarman said that --

18 THE COURT: The complaint is not evidence.

19 MR. HARTMANN: That is true, but it's notice of
20 what the product would be, your Honor.

21 THE COURT: It's nothing.

22 MR. HARTMANN: Mr. Sugarman has also testified
23 about his product here. But I think the affidavit covers
24 the full description of the product.

25 THE COURT: Mr. Rittinger.

1 MR. RITTINGER: Your Honor, let me just cover
2 very quickly some of the things that Mr. Hartmann said and
3 let me jump back.

4 There is absolutely, as I think your Honor
5 recognizes, no obligation for a copyright holder to point
6 out what is copyrighted and what is not in a compilation.

7 THE COURT: That goes back to the very issue that
8 I raised with you at the outset as to what is the standard
9 here. Is this a derivative work when we talk about the
10 cases or is it a compilation? Because we are talking about
11 somebody who is not copying the entire work. They are
12 copying a portion of it which is basically a public document
13 from which or on which you have made certain additions.
14 That seems to me to invoke the standard of a derivative
15 work.

16 MR. RITTINGER: We think it is a compilation and
17 we are not seeking protection for one case. We never sought
18 protection --

19 THE COURT: 50 cases, 100 cases.

20 MR. RITTINGER: Then you have a compilation.

21 THE COURT: If you have 50 cases from different
22 volumes you don't have a compilation.

23 MR. RITTINGER: Yes, you do. You have a
24 compilation of selection, arrangement --

25 THE COURT: I tell you right now you are going to

1 lose that issue.

2 MR. RITTINGER: Within one volume, your Honor,
3 and each volume. That is where the compilation is.

4 THE COURT: I would suggest you direct your
5 attention to where I come out if I disagree with you and say
6 the standard here is one for derivative work.

7 MR. RITTINGER: If it is a derivative work, then
8 we have added to each one of those cases in each of the four
9 areas that we talked about.

10 THE COURT: If it is a derivative work doesn't it
11 have to reflect what it is that you added?

12 MR. RITTINGER: I don't think there is any
13 requirement that I am aware of under the copyright law in
14 that regard. In the first place, it's a false issue because
15 in most instances he can find out. He doesn't want to.

16 THE COURT: How do I find out if I pick up one of
17 my opinions that is reported in Fed. Supp., how do I know
18 from looking at it what is mine and what you have added?

19 MR. RITTINGER: I assume you have your opinion
20 back in chambers and filed in the court records where we got
21 it in the first place.

22 THE COURT: Let's assume somebody in Oshkosh
23 having heard so much about me wanted to read one of my
24 opinions and they go to Fed. Supp. and find one, how do they
25 tell what is mine and what is yours?

1 MR. RITTINGER: I guess the first question is is
2 this someone who now wants to copy from us?

3 THE COURT: He wants to copy all of the opinions
4 of John S. Martin in Federal Reporters.

5 MR. RITTINGER: I would say under those
6 circumstances in all due respect, your Honor, I don't know
7 how many decisions you have had copied but we would probably
8 deem that to be, 1, a fair use, so it wouldn't matter, and,
9 2, it may not even be enough of a copying because you are
10 talking about -- well, there are two things always involved
11 whenever you are talking about copying what are, in effect,
12 facts. One is is it de minimis, and it might be de minimis
13 under those circumstances and it may very well be a fair
14 use. But if he really wants to find out, he is a publisher
15 like Mr. Sugarman and what he should do is come to the
16 courthouse like we did when we got it in the first place.

17 THE COURT: He says that is not what the law
18 requires. The law requires you to make clear in your
19 derivative work what it is that you have added.

20 MR. RITTINGER: Where is that in the law?

21 THE COURT: That we will see when we read his
22 cases and your cases.

23 MR. RITTINGER: You won't see it when you read
24 his cases. I read the only case he cites, and that is the
25 Bentley case, and one thing for certain it doesn't stand for

1 that proposition. I invite your Honor to read it.

2 I am not aware of any case that imposes that
3 obligation. If there was such a case I guess I would
4 reasonably expect that it would have been cited to your
5 Honor. It has not been, and I think truthfully, your Honor,
6 if that kind of a burden is going to be imposed, as we say
7 in the brief, it's a burden that ought to be imposed not by
8 a court but by Congress because certainly that issue has
9 come up before in terms of considering what the requirements
10 are in notice.

11 THE COURT: Let's talk about what Congress
12 provided in Section 403. Isn't the whole history of Section
13 403 one that says that you have got to make it pretty clear
14 to the public what it is you have added to my opinion and if
15 you are going to say that somebody can't come in and copy
16 all of the opinions of this court that you publish?

17 MR. RITTINGER: Your Honor, I don't know what
18 more I can say. We would like an opportunity to brief that
19 point. We do not believe that the law imposes that
20 obligation on us with respect to a derivative work. We do
21 believe, first and foremost, that this is also a
22 compilation. I understand what your Honor is saying and we
23 want an opportunity to brief that. We don't think there is
24 an obligation in that regard.

25 THE COURT: Alright.

1 MR. RITTINGER: Let me just talk quickly about
2 the Grove Press case because that was cited in the summary
3 judgment motion.

4 Grove Press was a preliminary injunction case in
5 California where the court held that there was not
6 sufficient evidence for purposes of granting a preliminary
7 injunction. It did grant a preliminary injunction on the
8 unfair competition issue. It's pre-Feist. It has no
9 relevance to what is involved in this case.

10 Your Honor, I am confused as to what evidence is
11 before this court. I do not believe that the Sugarman
12 affidavit is before this court for the purpose of what the
13 truth is in that affidavit.

14 THE COURT: I will accept it for that purpose and
15 if you want an opportunity to cross examine Mr. Sugarman I
16 will give it to you.

17 MR. RITTINGER: Let me back up then. Let me
18 start where I think where we are on the issue of our motion
19 in the first place.

20 We quite clearly a week ago pointed out to
21 plaintiff that what he testified to at the justiciability
22 hearing we would deem that to be a fair use. That is,
23 again, going back to the one or two percent of the cases and
24 using our cases to get the court summaries or court names in
25 certain circuits and certain situations where he couldn't

1 get it himself. We said we would deem that to be a fair use
2 and they scrambled and they said that wasn't good enough.

3 Now, in most declaratory judgment actions that I
4 am aware of, one of the plaintiff's obligations at trial is
5 to put somebody on the stand and testify as to what they
6 intend to do. That is a prerequisite to a declaratory
7 judgment action. That did not happen in this case and, boy,
8 if they were not on notice I don't know how they could not
9 have been on notice. I fully expected something between
10 last Wednesday and before we started this morning where they
11 would come in and say, no, we intend to do something more.
12 And that really goes to what is involved in this case.
13 Because he doesn't care about what he says he intends to do.
14 He has a much bigger goal here. Is it to be a pirate or is
15 it to be a public do-gooder? I don't know. But that is not
16 really what the purpose of this action should be. It is to
17 adjudicate what he has a present intent to do. So we have a
18 justiciability hearing. He clearly testifies that he is not
19 going to engage in any kind of wholesale copying. Indeed,
20 not only is he not going to engage in wholesale copying, his
21 lawyers put into the pretrial order that wholesale copying
22 isn't an issue here.

23 Now, wouldn't you think with all of that notice
24 that Mr. Sugarman would have gotten on the stand and at
25 least given your Honor some idea of what he intended to do?

1 But he didn't. I would say on that basis alone your Honor
2 can dismiss the case because there is nothing within the
3 four corners of this trial, and that is what we had, a
4 trial, not a trial where the complaint is evidence and not a
5 trial where the affidavits are evidence and not a trial
6 where summary judgment affidavits are evidence, but we had a
7 trial.

8 THE COURT: But I have already ruled that I will
9 receive that affidavit as if it were direct testimony.

10 MR. RITTINGER: I would like to read it and I
11 would like to have an opportunity to see if I want to cross
12 examine because I don't know what it says.

13 THE COURT: Why don't we take 15 minutes.

14 (Recess)

15 (Continued on next page)

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1 REDIRECT EXAMINATION Continued

2 BY MR. RITTINGER:

3 Q. Mr. Sugarman, I take it that you do not consider
4 taking 75 percent of West historical cases to be wholesale
5 copying?

6 A. No.

7 Q. What percentage does it take to be wholesale
8 copying in your mind?

9 THE COURT: Let's move on.

10 Q. You're aware that your attorney submitted a
11 pretrial order in this case that said that wholesale copying
12 was not an issue?

13 A. Yes, that's what I understand, yes.

14 MR. RETTINGER: I have no further questions, your
15 Honor.

16 THE COURT: Anything further?

17 MR. HARTMANN: Nothing further, your Honor.

18 THE COURT: You may step down.

19 THE WITNESS: Thank you.

20 (Witness excused)

21 MR. RETTINGER: Your Honor, I don't know where we
22 are. I guess we're back to arguing the merits of the
23 copyright claims in this case.

24 And, your Honor, what I will say as to that is
25 that there is uncontroverted evidence put on by the

1 plaintiff in the form of Mrs. Bergsgaard's testimony and our
2 testimony and substantiated by the exhibits in this case
3 that with respect to each of the four areas of compilation
4 that we talked about, that West regularly and consistently
5 throughout the process makes changes in the form of
6 modifications, additions and deletions.

7 We believe that this is a compilation case, your
8 Honor. We also believe that some of the rhetoric which has
9 come from the plaintiffs with respect to the ability to copy
10 in this case, as I said before, is handled by the
11 application of the fair use defense, but not by ignoring
12 what the Supreme Court said in Feist.

13 I guess I intended to impart in the Court's mind
14 a notion of a modicum of originality. I certainly wanted to
15 have the Court think about the fact that these matters do
16 not have to be anything of great originality or great
17 creativity. That is not the law. And I do not hear
18 plaintiff arguing anything different and it couldn't argue
19 anything different if it wanted to. We're talking about
20 humble, crude, obvious, very small, very minimal, etc.

21 Now, I did give somewhat of a closing argument at
22 the opening and I don't want to repeat the whole thing, but
23 what Mr. Hartmann says that I said about Feist is not what I
24 said about Feist. I think that's pretty clear.

25 What I said about Feist was that the Supreme

1 Court, I think it is fair from reading that decision,
2 recognized that as a result of doing away with the
3 sweat-of-the-brow theory, a great deal of inequity could
4 take place in this arena and, therefore, it did two things
5 and probably three things, really.

6 One, it provided for what we've already talked
7 about, maybe ad nauseam, that the threshold of having
8 copyright protectability in a compilation of facts is not a
9 difficult one to meet. The Supreme Court says most will
10 meet it.

11 I do not think that it is fair to compare even if
12 you take the compilation of the four involved here, which I
13 would consider to be the most thin and that's the caption,
14 the Court lines and the date lines in my view and compared
15 that to the one that I suppose I consider to be the most
16 substantial and the file lines because there it's even more
17 than just a compilation of facts. It's more than a
18 deletion, an addition, a changing. It's actually a
19 changing.

20 But if no matter where you go on those --

21 THE COURT: How many ways are there to say
22 rehearing denied?

23 MR. RETTINGER: There probably are more than one
24 and that's all it takes, but there are more than just
25 rehearing denied on that and you see that testimony in at

1 least two examples and you heard Mrs. Bergsgaard's testimony
2 in that regard and it really has not been contradicted.
3 Somebody has to sit down and they have to read a subsequent
4 order and they have a choice at that point in time and not
5 the same thing as putting a telephone directory in
6 alphabetical order, your Honor.

7 I really don't think there is any way in the
8 world that anybody can fairly compare it to that and they
9 read it and they make a decision and sometimes they
10 implement it by a file line and sometimes writing that file
11 line is easy, but other times it's not all that easy.

12 But whether it's easy or it's a little bit more
13 difficult, there's a decision that's made and that's the
14 decision that Feist talks about there has to be made in
15 these things. And you don't have just one decision. You
16 have hundreds of decisions. And when you look at this, I
17 think I'm off on where I was going on this and I want to get
18 back to the thin protection and how you really can protect
19 an abuse of a compilation of facts and there's a methodology
20 of doing that and that's built into Feist.

21 But if you look at each one of what happens here,
22 and it's never been contradicted by plaintiff. They want to
23 ignore the fact that you can't. I started out by saying
24 before, if you took a summary of all the cases cited by the
25 Federal Courts and said, I'm going to do what in my judgment

1 is good for these cases. I want to help the practicing
2 attorneys of the United States and I think the best way to
3 do this is to do A, B, C and D. Well, it's not A, B, C and
4 D, your Honor. You know that. It's also many, many, many
5 more things than A, B, C and D.

6 That's what they do with every single cite and if
7 you do that and tracked it from and published in it a
8 separate book, nobody can argue that it's not protected by
9 copyright. And if you did the same thing with the
10 attorneys' summaries, nobody could argue that it's not
11 protected by copyright under Feist. So, it overwhelms that
12 standard.

13 And compare it with the Second Circuit cases that
14 we've talked about before, a listing of all the streets and
15 avenues in New York, what makes it copyrightable protected
16 because we talk about what avenues are more important. A
17 listing of businesses. And what makes it protectable?
18 Because you eliminate those you think are going to go out of
19 business. This isn't rocket science here, but the Second
20 Circuit has affirmed those things and that's only one
21 decision in that case.

22 The baseball card case, you take all the baseball
23 cards and you say premium, common. One decision,
24 compilation, all facts, matter of law protected by
25 copyright. I believe the Second Circuit there or the

1 baseball statistic case where you have the normal statistics
2 that people follow on pictures. And you decide I'm going to
3 eliminate one or two, because I don't think they're
4 important, eliminate them.

5 That act, that creative decision is enough in
6 this Circuit and I say throughout the United States because
7 I don't know any cases that go the other way when there is
8 that modicum of creativity. So, I believe that the evidence
9 is overwhelming that we have met that standard with respect
10 to Feist.

11 And what else Feist says, I legitimately did not
12 believe that wholesale copying was an issue in this case.
13 And I legitimately did not believe that until after the
14 plaintiff had closed.

15 And Mr. Sugarman then again got on the stand
16 because Mr. Sugarman had plenty of time between Wednesday
17 of last week and if his lawyers had been paying attention to
18 what was going on or when they read this motion that we
19 filed once the case started to have him get on the stand and
20 testify about something different.

21 So, there is wholesale copying that could go on
22 in this case and what I said to your Honor in the beginning
23 of this case was that what I really thought what
24 Mr. Sugarman was doing was trying to hide his intent because
25 he wanted to come in and try to act that he was a do-gooder

1 for the world and he wasn't a pirate, but, in fact, your
2 Honor, that's not what the testimony showed.

3 THE COURT: It doesn't matter what he is.

4 MR. RETTINGER: It matters for fair use, your
5 Honor, and in terms of fair use, which I guess is before
6 this Court at this point in time, although we've had no
7 discovery with respect to the issues of fair use and
8 wholesale copying, but we didn't believe it was an issue.

9 But in any event, I don't think there's any
10 question that when you talk about the wholesale copying that
11 he's now testified in his reawakened testimony, when it
12 finally dawned on people that there was not a justiciable
13 controversy.

14 So, we've got to get him back to the stand and
15 we've got to get him to testify beyond something what he
16 swore to under oath regularly and consistently for the last
17 six months. When they'd look at him I believe a pirate, I
18 am a wholesale copier, I can get stuff from the Supreme
19 Court if I want to work, but I don't want to work. I can
20 get things from the Court of Appeals, if I want to, but I
21 don't want to because it costs me money.

22 That does go to fair use. It may not go to the
23 issue of copyrightability, but it certainly goes to the
24 issue of copying. I don't think it should escape your Honor
25 as to what happened as to the credibility of this plaintiff

1 before this Court.

2 Going back to the issue of copyrightability, I
3 acknowledge and I tell you, your Honor, we have a thin
4 copyright. I'm not going to tell you I think any factual
5 compilation is going to be a thin copyright. But that's
6 where you look at the fair use standard.

7 That doesn't mean that it's not protected by
8 copyright. It just means that when somebody who has a right
9 to get at the access to facts and these for the most part
10 are facts, there's no question about that. But there is
11 also no question that a factual compilation is entitled to
12 copyright protection.

13 So, just because the facts, despite whatever Mr.
14 Hartmann says does not make it not subject to copyright

15 protection, we know that it is. And if your Honor feels
16 that there are situations where other publishers should have
17 access to facts, you can do that, but you do it by saying
18 it's a fair use.

19 I don't care if Mr. Sugarman takes one or two
20 percent of our cases. I said that at the beginning of this.
21 I'll deem that to be a fair use. I don't care if he takes
22 one or two cases. I don't think that's a copyright
23 infringement. I think it's de minimis. It's not a
24 copyright infringement at all.

25 But when he starts taking the entirety, the 75

1 percent of the selection, arrangement and coordination of
2 these compilations, then that's something different. And I
3 really don't know where the Court draws the line on fair use
4 based upon this witness' testimony. I don't know how you
5 could do it because there certainly hasn't been anything
6 precise in any regard as to where you would stop for fair
7 use or where it isn't fair use.

8 You could certainly make a declaration if all
9 he's going to do is take one or two of the cases, even if it
10 is subject to copyright protection that it is a fair use. I
11 don't know where you draw the line between there, because he
12 hasn't told us what he's going to do. As a matter of fact,
13 it is somewhat --

14 THE COURT: We have to draw a closure sometime
15 today, Mr. Rittinger.

16 MR. RITTINGER: All right, your Honor.

17 Let me just say then, we welcome the opportunity
18 which I think your Honor has given us to brief the issue of
19 a derivative work. We can understand in some ways how
20 someone could consider this to be a derivative work, but we
21 think it's more proper to call it a compilation.

22 Either way, we do not believe that the law
23 requires us to do what the plaintiff wants us to do and that
24 is to signal to them what is subject to copyright protection
25 and what is not.

1 Section 403 certainly doesn't do that. It's a
2 notice requirement. Bender who has litigated this case has
3 never contended that that was an obligation and -- I'm only
4 pointing out, your Honor, that.

5 THE COURT: Bender may have their own fish to
6 fry.

7 MR. RITTINGER: Well, that's true, your Honor.
8 But I'm only pointing out the distinguished copyright
9 counsel for the co-defendant has never made that argument.

10 THE COURT: As determined, it's in his client's
11 interest not to make that argument. That's all you've
12 established.

13 MR. RITTINGER: We'll make the argument in the
14 briefs, your Honor. We would welcome the opportunity to put
15 in briefs on that issue and any other issues, on the issue
16 of the compilations on the issue of notice or any other
17 notice that your Honor wishes to have something further on.

18 THE COURT: Well, I do think it is worthwhile for
19 there to be post-trial briefs submitted. And without
20 limiting your right to raise any issues you want, I would
21 like you to focus on the Section 403 issue.

22 MR. RITTINGER: Yes, your Honor.

23 THE COURT: And also remember what I said at the
24 conclusion of the Star pagination about fair use being
25 equitable doctrine in which the five factors are not

1 necessarily the Alpha and the Omega and one of the things
2 that occurs to me is the question of whether or not there is
3 an interaction between Section 403 and the fair use
4 analysis. So, you might want to address that issue.

5 Also I think the question of a compilation, let
6 me just focus, Mr. Rittinger, because you talked and I think
7 I took down your words. Selection, arrangement and
8 coordination and why I think this is not a compilation case.

9 As I understand what Mr. Sugarman does and
10 intends to do is that he is not interested in taking all of
11 314 F.2d -- to use an ancient volume which came out when I
12 was a law clerk -- but he wants to be able to go back and
13 copy all of those cases in 314 F.2d that have been cited
14 within the last 10 years and opinions that he is including
15 on his CD Rom product.

16 And that's why I have problems that this is a
17 compilation case. Because it isn't that he is taking any
18 volume per se and copying it. He's not copying the
19 arrangement. He's not copying the index. He's not copying
20 all the headnotes. He's copying individual cases.

21 In the course of that, he may end up through a
22 series of copying efforts copying every case because the way
23 he is going about it is he's going through the text of
24 reported opinions and then from that text going to the cases
25 that he needs.

1 He's not making the selection on the basis of
2 what is 314 F.2d. He's making a selection on the basis of
3 what is in current Supreme Court cases and current Second
4 Circuit cases. I mean, I think that's the issue, as I
5 perceive it.

6 MR. RITTINGER: Your Honor, I can address that
7 now.

8 THE COURT: No.

9 MR. RITTINGER: I think it would be better to
10 address it.

11 THE COURT: Not only am I tired, the Court
12 Reporter is tired and Mrs. Thomas is tired. My law clerks
13 have all the energy in the world and they'll be happy to
14 stay here until 8 o'clock and discuss this matter more fully
15 with you, but they'll do it without the rest of us.

16 And then the other issue is whether or not the
17 plaintiff is entitled to an item-by-item declaration here.
18 In other words, is it the caption, the court line, the date
19 line, the file line or is it only if you establish, taken in
20 combination those items are copyrighted.

21 I mean, that's an issue that I see presented.
22 Also, given the nature of this copying, for example, let's
23 take rehearing denied. I think I might not have too much
24 difficulty saying that if all that West added was lines and
25 said rehearing denied, that was not copying

1 copyrightability.

2 Now, it is probably the case that in 90 percent
3 of the cases which there is a file line, that's really all
4 there is on the file line? There may be a small percentage
5 of cases where you have that complex subsequent history that
6 requires detailed study and the exercise of great judgment
7 as to how you articulate that.

8 It is therefore the declaratory judgment, should
9 it focus on that and simply say absent something
10 extraordinary, the file line is not per se subject to
11 copyright protection, which gets into the other overall
12 problem that we've had in the testimony examples of certain
13 changes. Some of which are more substantive than others.

14 Yet I'm not sure from the testimony or I would
15 say from the testimony probably that those more creative are
16 less frequently occurring, maybe rarely occurring.

17 But the parallel cites we know are going to be in
18 all Supreme Court Reporters, but situations in which a
19 selection from the various obscure Labor Law Reporters, for
20 example, might be chosen and does that make any difference
21 to the analysis? But I'm just kind of thinking out loud
22 with you, so you can focus.

23 MR. RITTINGER: I appreciate it, Judge.

24 THE COURT: These are not easy issues.

25 MR. RITTINGER: But we like to think they're

1 easy, but we understand and we would like --

2 THE COURT: If I thought they were easy, I would
3 have decided from the bench, as I did last time. I may be
4 wrong, but I found it easy to be wrong.

5 MR. RITTINGER: We want you to be right this
6 time, that's all, but --

7 THE COURT: I bat 500, usually I've got a very
8 well-balanced coin.

9 All right, now, when do you want to submit your
10 brief? It seems to me the plaintiff should submit a brief
11 in which they respond to the motion, raise whatever
12 arguments they want and I'll give Mr. Rittinger an
13 opportunity to respond.

14 MR. HARTMANN: Your pleasure, your Honor.

15 THE COURT: No. I'm not the one who has to do
16 the work. You tell me how long you need.

17 MR. HARTMANN: Would 30 days be appropriate, your
18 Honor?

19 THE COURT: Sure.

20 MR. HARTMANN: Thank you, your Honor.

21 MR. RITTINGER: Could we have another 30?

22

23

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25

1 THE COURT: Sure. And then I'll give you a week
2 to reply. And then when I get all this wisdom, we'll
3 probably have another argument.

4 MR. RITTINGER: We look forward to it.

5 THE COURT: Off the record.

6 (Discussion off the record)

7 (Proceedings adjourned)

8 (Trial concluded)

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