Inquiry Concerning a Judge: Joseph P. Baker

MR. CHIEF JUSTICE

GOOD MORNING AND WELCOME TO THE ORAL ARGUMENT CALENDAR FOR THIS FRIDAY AT THE FLORIDA SUPREME COURT. THE FIRST CASE THAT THE COURT HAS ON ITS ORAL ARGUMENT CALENDAR IS THE INQUIRY CONCERNING JUDGE JOSEPH P BAKER. MR. KING.

MAY IT PLEASE THE COURT. MY NAME IS DAVID KNG OF THE LAW FIRM OF KING BLACKWELL AND DOWNS IN ORLANDO, AND I REPRESENT JUDGE JOE BAKER IN THIS PROCEEDING. IT SOUR POSITION, IN THIS PROCEEDING, THAT THE DECISION OF THE JQC WAS IN ERROR, THAT IT WAS WRONG, THAT IT IS NOT SUPPORTED BY THE LAW NOR THE FACTS, AND THAT JUDGE BAKER SHOULD NOT BE SANCTIONED IN ANY WAY, BUT RATHER HE SHOULD BE EXONERATED FOR THE CHARGES THAT WERE MADE IN THIS PROCEEDING. , TO BEGIN WITH, I THINK YOU NEED TO LOOK AT THE CHARGE IN THIS CASE, YOUR HONORS. AND THE CHARGE WAS, DURING THE PENDENCY OF THE CASE, THE UNIVERSAL UBS CASE AGAINST DISNEY VACATION VILLAGES, JUDGE BAKER MADE INQUIRIES OF SEVERAL COMPUTER CONSULTANTS AND EXPERTS AND THEN THEY SAY, IN YOUR MEMORANDUM EXPLAINING YOUR DECISION, YOU DISCLOSE FOR THE FIRSTHAND THAT YOUHADMADE THESE INQUIRIES. THAT IS NOT WHAT THE FACTS IN THIS CASE ESTABLISHED. THE FACTS IN THIS CASE ESTABLISHED THAT JUDGE BAKER, IN THE MIDDLE OF THE TRIAL, AT THE TIME THAT HE MADE THE INQUIRIES OR CONTEMPORANEOUS WITH THE TIME HE MADE THE INQUIRY, FILED, ON THE 15th OF MAY, A 8-PAGE MEMORANDUM, A THOUGHTFULLY THOUGHTFULLY-CONCEIVED, CAREFULLY-EXPLAINED MEMORANDUM, EXPLAINING EXACTLY WHAT HE HAD DONE, TO THE PARTIES.

BUT ISN'T IT A BASIC PREMISE THAT WE HAVE GOING INTO TRIALS, THAT THE TRIAL JUDGE IS NOT GOING TO GO OUT AND TALK TO PEOPLE WHO ARE NOT GOING TO BE SUBJECT TO SCRUTINY, WITHIN THE RULES OF COURT? CROSS-EXAMINATION. I MEAN, ISN'T THAT A BASIC TENET OF THE WAY THAT WE GO FORWARD WITH TRIALS IN THIS COUNTRY?

THAT IS A FUNDAMENTAL ISSUE THAT YOU ARE GOING TO DECIDE WHERE THE LINES ARE IN THIS CASE IN THIS COURT.

WAS THERE ANY DOUBT ABOUT THAT?

YES, SIR. THERE IS SOME DOUBT, I WOULD SUGGEST.

COULD A JUDGE THAT IS INVOLVED IN ONE OF THESE, IN A TRIAL, JUST CHASE DOWN SOME WITNESS THAT IS IN SEATTLE, THAT HE HAPPENS TO THINK OR SHE HAPPENS TO THINK HAS SOME INFORMATION AND GO AND TALK TO THAT WITNESS?

NO, SIR, BUT THAT IS NOT REALLY WHAT IS INVOLVED HERE. THIS IS -- CANON 3-B-7 DEALS WITH TWO TYPES OF THINGS. IT DEALS WITH EXPARTE CONTACTS, WHICH ARE IN THE JQC CONCEDES, ARE CONTACTS BETWEEN ATTORNEYS, PARTIES, AND WITNESSES. THAT IS WHAT IS DESCRIBED BY THE EX-COMMUNICATION ENFORCEMENT. THE OTHER PART OF THE DEFINITION IS "OTHER COMMUNICATIONS", AND THAT IS WHAT YOU ARE ADDRESSING, THAT IS WHAT WE ARE ADDRESSING IN THIS CASE. HOW FAR, WHAT IS THE PROPER RANGE OF THE OTHER COMMUNICATIONS?

DID JUDGE BAKER ADVISE THE PARTIES BEFORE HE INQUIRED?

NO, SIR.

OKAY. AND IT IS YOUR POSITION THAT THAT IS PERFECTLY ALL RIGHT?

MY POSITION, OUR POSITION IS, YOUR HONOR, THAT, WHEN HE GIVES CONTEMPORANEOUS NOTICE, THAT IS SUFFICIENT.

YOU CALL IT CONTRARY NOTICE. THAT IS WHY I ASK YOU WHETHER HE ADVISED THE PARTIES IN ADVANCE.

NOT BEFORE.

HAD HE ALREADY DONE --

HE HAD ALREADY CONTACTED THE PARTIES.

WOULD YOU REFRESH US, WITH REFERENCE TO THE FACTS. TELL US EXACTLY WHAT HAD OCCURRED. WHAT HAD HE DONE.

HE HAD TALKED TO SEVERAL OR A COUPLE OF PEOPLE, AND HE WROTE, IN HIS MEMORANDUM, EXACTLY WHAT HE HAD DONE IN ACTUALLY IN BOTH OF THE MEMORANDUMS. HE EXPLAINED WHAT HE HAD DONE AND THE HISTORY OF THE CASE, THAT HE FILED DURING THE TRIAL. FOUR DAYS INTO THE TRIAL, HE SAID IN ANTICIPATION OF THIS LAWSUIT AND THIS ISSUE OF DAMAGES, I MADE SOME INQUIRIES OF COMPUTER CONSULTANTS AS TO HOW THEY MIGHT APPROACH THE QUETION OF DAMAGES. THEIR FIRST CHOICE WAS MARKET VALUE, BUT FAILING THAT, THEY SUGGESTED THE COST OF DEVELOPMENT OF THE IMPROVED VERSION. THAT IS THE FIRST --

WE OFTEN TALK IN GENERAL TERMS ABOUT COMPARING OUR SYSTEM OF JUSTICE WITH THE SYSTEM THAT THEY HAVE OVER ON THE CONTINENT AND ACTUALLY, WE SAY, AROUND THE WORLD, AND ACTUALLY WE HAVE WHAT WE SAY OR CALL IS AN ADVERSARY SYSTEM OF JUSTICE, WITH REFERENCE TO THE CONTROL OF PRESENTATION OF INFORMATION TO THE FACT FINDER OR TO THE JUDGE, IS PRESENTED THROUGH THE PARTIES PARTIES. AND HOW DOES THIS CONDUCT OF THE JUDGE, HERE, SQUARE WITH OUR SYSTEM, WHERE WE LEAVE THAT UP TO THE PARTIES, TO DECIDE WHAT INFORMATION THEY ARE GOING TO PRESENT TO THE COURT, IN ORDER FOR THE COURT TO DECIDE THE CASE?

IT SQUARES, JUSTICE ANSTEAD, BECAUSE THESE ARE NOT, JUDGE BAKER WAS NOT ACTING AS THE FACT FINDER IN THIS CASE. JUDGE BAKER WAS DETERMINING THE LAW, AND IT HAS ALWAYS BEEN TRADITIONALLY APPROPRIATE FOR A JUDGE TO HAVE A WIDE-RANGING OPPORTUNITY TO DEVELOP THE LEGISLATAE OF FACTS IN THE CASE.

WHAT ACTUALLY HAPPENED IN THIS CASE? TELL ME ABOUT THE TRIAL OF THIS CASE AND WAS THERE AWARD OF DAMAGES?

THE TRIAL WENT ON TO CONCLUSION. THERE WAS A $2 MILLION AWARD AGAINST DISNEY VACATION AND THAT WENT AWAY. IT WAS LATER TAKEN UP AND REVERSED.

DO YOU KNOW WHETHER THE INDEPENDENT INQUIRIES HAD ANYTHING TO DO WITH HIS ANALYSIS OR HIS ULTIMATE DECISION?

AGAIN, THE INQUIRIES THAT HE MADE WERE TOWARD DETERMINING THE PROPER MEASURE OF DAMAGES.

CAN WE PRETTY MUCH ASSUME THAT PROBABLY THEY PLAYED A SIGNIFICANT ROLE IN HIS EVENTUAL DECISION TO TAKE AWAY THE JURY'S AWARD IN THIS CASE?

I THINK THE TESTIMONY IN THIS CASE WAS, IT WAS CORROBORATIVE OF HIS FINAL DECISION, BUT THAT HE HAD ALWAYS HAD GREAT DIFFICULTY WITH THE PLAINTIFF'S MEASURE OF DAMAGES IN THE CASE, AND THE TRIAL OF THE CASE, WHICH IS IN THE RECORD, THE TRIAL OF THE CASE REFLECTS A GREAT DEAL OF THOUGHTFUL DISCUSSION BETWEEN JUDGE BAKER AND ATTORNEYS, WHILE JUDGE BAKER IS STRUGGLING WITH THE ISSUE OF WHAT THE MEASURE OF DAMAGES IS.

COME BACK AND TELL US, IN EITHER YOUR VIEW OR JUDGE BAKER'S VIEW, THEN, WHAT THE PARAMETERS ARE FOR A SITTING JUDGE, PRESIDING OER A JURY,IN A ITUATION IKE THIS, IN TERMS OF OFF-THE-RECORD INQUIRIES THAT THE JUDGE MAY MAKE, IN ORDER TO INFORM HIM, IN OTHER WORDS TO INFORM HIMSELF FURTHER, OKAY, BUT NOT RELYING ON THE WITNESSES THAT ARE PRESENTED BY THE PARTIES. GIVE US, IF WE WERE GOING TO WRITE, NOW, PURSUANT TO YOUR BELIEFS ABOUT THE INTERPRETATION OF THIS RULE, WHAT WOULD WE SAY?

WELL, LET ME ANSWER THAT TWO WAYS. THE FIRST IS, WHATEVER YOU SAY, IT IS NOT A DISCIPLINARY CASE. THERE ARE NO DISCIPLINARY CASES ANYWHERE IN THIS COUNTRY INVOLVING THIS KIND OF A SITUATION. SECONDLY, I THINK WHAT YOU SHOULD WRITE IN A DORF INDICATED -- IN A COMPLICATED CASE INVOLVING COMPUTER SOFTWARE, A JUDGE HAS THE RANGE TO READ AND THINK AND UNDERSTAND WHAT THE ISSUES ARE IN THE CASE, AND IF THE JUDGE EXPLAINS WHAT HE HAS DONE, GIVES NOTICE TO THE PARTIES, I SUBMIT TO THE COURT THAT, IN THIS UNIQUE SITUATION WHERE THE JUDGE IS NOT THE FACT FINDER, WHERE THE JUDGE IS THE JUDGE IN A JURY TRIAL, THAT SHOULD NOT SUBJECT THE JUDGE TO BEING --

SO THE JUDGE CAN CONSULT WITH WHATEVER ARRAY OF EXPERTS THE JUDGE DECIDES IS APPROPRIATE.

THE JUDGE NEEDS TO UNDERSTAND WHAT IT IS HE IS DOING.

BUT MY QUESTION IS WHETHER THE JUDGE CAN CONSULT WITH AN ARRAY OF EXPERTS AT HIS CHOOSING.

AND IN THIS CASE HE DID CONSULT WITH SEVERAL PEOPLE AND HE CAN.

I AM ASKING YOU WHETHER OR NOT YOU RECOGNIZE THAT THAT IS THE POSITION THAT, UNDER THAT CANON, THE JUDGE IS FREE TO CONSULT WITH ANY EXPERT THE JUDGE THINKS IS APPROPRIATE.

THE JUDGE IS FREE, AS LONG AS HE PROVIDES NOTICE AND AS LONG AS HE IS NOT GUILTY OF UNFAIRNESS.

IS THE NOTICE BEFORE OR AFTER?

THE NOTICE CAN BE AFTER, AS LONG AS IT IS CLEAR THAT HE HAS PROVIDED NOTICE. NOW, THEY MAY ARGUE THAT THE NOTICE WAS NOT AS PRECISE AS IT COULD HAVE BEEN AND PERHAPS IT WASN'T.

LET ME --

DID HE HAVE DISQUALIFICATION IN THE CASE AFTER THAT?

IN CIRCUMSTANCES THERE HAVE BEEN DISQUALIFICATION CASES INVOLVING THAT SITUATION. WE WILL TALK ABOUT THOSE. THEY HAVE BEEN CITED BY THE OTHER SIDE.

YOU LAY GREAT STRESS ON THE FACT THAT THE JUDGE WAS MAKING A DECISION ON QUESTIONS OF LAW. HOWEVER, WHAT HE WAS REALLY MAKING DECISIONS ON WERE ISSUES OF, THAT WERE MIXED LAW AND FACT IN THAT THEY WERE DMGE ISSUES, AND WHAT CONCERN THAT I HAVE IS THAT, UNDER THIS COURT'S CASE LAW, IN BROWN VERSUS THE STATE OF STUCKEY, WE HAVE MADE IT VERY CLEAR THE DEFERENCE THAT WE ARE GOING TO GIVE ON NEW TRIAL ISSUES, TO TRIAL JUDGES. NOW, DOESN'T THAT SOMEWHAT BRING US INTO TROUBLING AREA, EVEN WHERE YOU HAVE GOT AN ISSUE OF LAW,BUT ESPECIALLY WHERE YOU HAVE GOT ONE OF THESE MIXED QUESTIONS, AS TO WHAT THE TRIAL JUDGE CAN DO, IN GOING OUTSIDE THE RECORD.

WELL --

HOW CAN WE GIVE DEFERENCE?

YOUR HONOR, YOU GIVE DEFERENCE TO THE TRIAL JUDGE IN THIS SITUATION, BECAUSE HE IS CHARGED WITH ANNIHILATION OF CANON 3-B-7, AND THERE ARE TWO HALLMARKS OF CANON 3-B-7. ONE IS SECRECY AND THE OTHER IS UNFAIRNESS. THAT IS WHAT THAT CANON IS ALL ABOUT, A SECRET CONTACT THAT IS UNFAIR TO ONE OR THE OTHER OF THE PARTIES.

IT SEEMS TO ME THAT YOU ARE REALLY ASKING US TO REWRITE THE CANON, BECAUSE THE CANON IS VERY CLEAR, IN ITS COMMENTARY, THAT ALL COMMUNICATIONS FOR A JUDGE TO MAKE WITHOUT SIDE PARTIES, DURING A -- WITH OUTSIDE PARTIES DURING A LAWSUIT, ARE PROHIBITED AND THERE IS VERY, VERY NARROW EXCETIONS THAT THIS CASE DOESN'T FALL INTO, SO ISN'T, IN THIS CASE,NOT ONLY ARE THESE CONSULTANTS NOT PART OF THE PROCEEDINGS, BUT ONE OF THE PEOPLE WAS HIS SON-IN-LAW, AND SO THERE IS NO INFORMATION IN THE RECORD ABOUT WHAT THE INFORMATION WAS. THIS WAS A, YOU KNOW, AN ISSUE OF THE DAMAGES. I MEAN, SO I GUESS WHAT I AM HAVING TROUBLE WITH IS WE ARE NOT HERE TO READOPT RULE 3-B-7. I AM READING IT, I AM READING THE COMMENTARY, AND I WANT YOU TO TELL ME WHAT IS NOT CLEAR ABOUT WHAT IS IN THAT RULE AND THE COMMENTS TO IT.

BUT MY CLIENT IS BEING SANCTIONED, BECAUSE SUPPOSEDLY HE HAS DONE SOMETHING THAT IS UNFAIR AND SECRET, AND THAT IS NOT THE CASE. IN BOTH SITUATIONS, IT IS NEITHER UNFAIR. THE JQC MADE A FINDING HERE, THAT HIS MOTIVES WERE NOT FOR THE RESULT OF FAVORITISM FOR EITHER PARTY. THAT TAKES CARE OF THE UNFAIRNESS ASPECT OF IT. SECRETLY. THEY DIDN'T PROVE IT WAS DONE SECRETLY. THE EVIDENCE ESTABLISHED DIFFERENT FROM THEIR CHARGE THAT HE GAVE NOTICE TO THE PARTIES OF WHAT HE HAD DONE.

IS THERE A VIOLATION OF 3-B-7 IF, SINCE THESE EXPERTS WERE NOT EXPERTS ON THE LAW, ISN'T IT PRECLUDE BY 3-B-7?

THERE IS NOT A VIOLATION OF 3-B-7, AND THERE IS NOT A CASE IN THE UNITED STATES, IN ANY OF THE 50 STATES, THAT HAS EVER SANCTIONED A JUDGE FOR DOING WHAT JUDGE BAKER DID IN THIS CASE. NOW, AT THE START OF THIS PROCEEDING, AT THE JQC LEVEL --

LET ME JUST STOP YOU AGAIN.

YES.

A JUDGE SHALL NOT INITIATE, PERMIT OR CONSIDER OTHER COMMUNICATIONS MADE TO THE JUDGE OUTSIDE THE PRESENCE OF THE PARTIES, CONCERNING A PENDING PROCEEDING, EXCEPT, AND THE EXCEPT IS UNDER, B, IT SAYS A JUDGE MAY OBTAIN THE ADVICE OF A DISINTERESTED EXPERT IN THE LAW, APPLICABLE TO THE PROCEEDING, IF THE JUDGE GIVES NOTICE TO THE PARTIES, OF THE PERSON CONSULTED AND THE SUBSTANCE OF THE ADVICE AND AFFORD THE PARTIES REASONABLE OPPORTUNITIES TO RESPOND, AND THEN THE COMMENTARY SAYS, EVEN IN THAT ONE, THAT IS DISCOURAGED, AND THE WAY THAT THEY SUGGEST DOING IT IS ALLOWING

AN AMICUS BRIEF TO BE FILED. WHAT IS NOT -- THAT IS WHAT JUDGE BAKER, WHATEVER HIS MOTIVES WERE, DID NOT FOLLOW THAT CANON.

AND I SUGGEST TO YOU, AND THE TESTIMONY IN THE PROCEEDING BELOW, FROM JUDGE SCOTT, MISS MASHBURN, ALSO, WAS CONSISTENT WITH THE IDEA THAT THE OTHER COMMUNICATIONS HASOT TO BE INTERPRETED FROM THE STANDPOINT OF WHAT IT FOLLOWS. EXPARTE COMMUNICATIONS. ALL, YOU CAN'T MEAN ALL OTHER COMMUNICATIONS, BECAUSE COMMUNICATIONS ARE READING WHAT YOU READ, IF YOU READ INFORMATION ABOUT COMPUTER SOFTWARE, HAS THE JUDGE VIOLATED THAT, BECAUSE HE GOES OUT AND READS AN ARTICLE ABOUT COMPUTER SOFTWARE? THERE HAS GOT TO BE SOME LIMIT, AND THIS COURT HAS GOT TO FACE THE FACT THAT THERE IS SOME LIMIT TO "OTHER COMMUNICATIONS". NOW, REGARDLESS, IF YOU THINK JUDGE BAKER STEPPED OVER THE LINE ON OTHER COMMUNICATIONS, STILL THIS IS A SANCTION PROCEDURE, AND THERE ARE NO DISCIPLINARY CASES ANYWHERE, SKIPING A JUDGE FOR DOING THAT. -- DISCIPLINING A JUDGE FOR DOING THAT. AT THE START OF THE JQC PROCEEDING, I WAS VERY TENTATIVE ABOUT THAT STATEMENT, BECAUSE I THOUGHT MAYBE THEY WOULD FIND A CASE SOMEWHERE ON THAT, AND I WAS TENTATIVE IN THE PROCEEDING AND I SAID IT SORT OF CAUTIOUSLY AND NOW I CAN SAY IT SORT OF BOLDLY, BECAUSE THERE IS NOTHING IN THEIR BRIEF. THERE IS NOTHING IN ANY OF R RESEARCH THAT SUGGESTS THAT THIS COURT, ANYWHERE IN THIS COUNTRY, HAS SANCTIONED A JUDGE, WHERE HE HAS GIVEN NOTICE, WHERE E HS NOT ACTED IN SECRECY, WHERE HE HAS NOT BEEN INVOLVED WITH AN UNFAIR COMMUNICATION BETWEEN A PARTY, A WITNESS, A LITIGANT, AN ATTORNEY, WHERETHERE IS NOTHIG UNFAIR ABOUT THE COMMUNICATION.

ARE THERE INSTANCES THAT SAY THAT THIS CONDUCT IS APPROPRIATE?

THERE ARE CASES THAT, THE FOUR CASES HE CITED. HE CITED TWO CASES FROM WASHINGTON STATE. A MARRIAGE SITUATION, WHERE THE JUDGE WAS THE FACT FINDER. A SENTENCING, WHERE THE JUDGE WAS THE FACT FINDER. HE CITED TWO CASES FROM CALIFORNIA.

I AM NOT TALKING ABOUT THE CASES HE CITED. YOU KEEP SAYING THAT THERE ARE NO CASES THAT SANCTION A JUDGE. I AM ASKING YOU ARE THERE CASES THAT APPROVE THIS CONDUCT?

THERE ARE NO CASES.

SO YOU HAVEN'T BEEN ABLE TO FIND A CASE THAT SAYS THAT THIS CONDUCT IS APPROPRIATE, UNDER THAT RULE.

TO MY KNOWLEDGE.

IS THAT CORRECT?

YES, SIR. THAT IS CORRECT.

SO THERE ARE NO CASES IN YOUR VIEW, ON ITHER SIDE OF THE ISSUE?

NO DISCIPLINARY BODY HAS SEEN FIT TO TRY TO GET A CASE OF SANCTIONS AGAINST A JUDGE, I WOULD SUBMIT, FOR THIS TYPE OF CONDUCT. NOW, IT HAS HAPPENED, YOUR HONOR. IT HAS HAPPENED, BECAUSE WE HAVE GOT A BUNCH OF CASES WHERE JUDGES HAVE BEEN DISQUALIFIED, WHERE JUDGES HAVE BEEN RECUSED, WHERE CASES HAVE BEEN REVERSED. AND THERE HAS BEEN A SUGGESTION THAT THERE HAS BEEN AN OTHER COMMUNICATION LIKE THAT, BUT NOT ONE CASE IS THERE, WHERE A JUDGE HAS BEEN SANCTIONED FOR THAT. MR. CHIEF JUSTICE

YOU AREN YOUR REBUTTAL TIME.

SO I WILL SAVE THE REST OF MY TIME FOR REBUTTAL THEN. THANK YOU. MR. CHIEF JUSTICE

THANK YOU. MR. PELL -- PILLANS.

THANK YOU, YOUR HONOR. I AM CHARLES PILLANS, AND I REPRESENT THE JUDICIAL QUALIFICATONS COMMITTEE IN THIS MATTER. THE CASE IS WHAT I TAKE TO BE AT THE HEART OF MR. BAKERS ARGUMENT AND IT WAS SET BY MR. KING AT THE OUTSET, THAT THERE IS NO VIOLATION OF 3-B-7 IN THIS CASE, BECAUSE HE DISCLOSED THESE COMMUNICATIONS WITH THE EXPERTS IN THE COURT, AND HE EXPLAINED EXACTLY WHAT HE HAD DONE. THERE FOR THIS EXCUSES ANY POTENTIAL VIOLATION OF THE CANON. BUT I THINK JUSTICE ANSTEAD HIT THE POINT ON THE HEAD INITIALLY, WHICH WAS AT THE TIME JUDGE BAKER HAD THIS COMMUNICATION, IF YOU READ THE ORIGINAL HISTORY OF THE CASE, WHICH WAS FILED, IT WAS CLEAR AT THAT TIME, JUDGE BAKER SAID, THAT HE DID IT, AND TO READ FROM THE DISCLOSURE THAT WAS MADE, HE DID IT IN ANTICIPATION OF THIS LAWSUIT, AND THIS ISSUE OF DAMAGES. I MADE SOME INQUIRIES OF COMPUTER CONSULTANTS. IT WAS NOT A SITUATION WHERE HE GAVE ANY THOUGHT NOTICE OR THE -- ANY NOTICE OR THE PARTIES HAD ANY OPPORTUNITY TO BECOME INVOLVED IN THOSE COMMUNICATIONS COMMUNICATIONS. MR. CHIEF JUSTICE

JUSTICE SHAW HAS A QUESTION.

WHAT DO YOU UNDERSTAND THE CANON TO PROHIBIT?

I UNDERSTAND THE CANON TO PROHIBIT, FIRST OF ALL, A CLASSIC EXPARTE COMMUNICATION WITH THE LAWYERS ON ONE SIDE OR THE OTHER. I UNDERSTAND THE CANON TO PROHIBITORY COMMUNICATIONS RELATING TO MATTERS INVOLVED IN THE CASE. IF YOU LOOK AT, AND THIS IS WHAT I THINK IS AT THE HEART OF THIS CASE. IF YOU LOOK AT THE COMMENTARY TO THE CANON, IT SAYS, AFFECTION PLAINING WHAT THE EXCEPTIONS ARE A JUDGE SHALL NOT CONDUCT ANY INDEPENDENT INVESTIGATION OF THE FACTS OF THE CASE.

BUT THAT IS THE PROBLEMS, DEALING WITH IT, IF HE HAD READ, IF HE PICKED UP AN ARTICLE IN THE NEWSPAPER AND READ IT, THAT DEALT WITH THAT, WOULD THAT HAVE FALLEN UNDER --

PROBABLY NOT, AND I DON'T MEAN TO SAY THAT THERE --

IF HE HAD GONE TO THE LIBRARY WELL, WHERE DO YOU DRAW THE LINE? HOW DO YOU DRAW THE LINE?

WELL, IT WOULD NOT ALWAYS BE EASY. LET'S SAY A JUDGE GOES TO THE LIBRARY AND READS A TEXT, AND I THINK THAT VERY POSSIBLY, THE LITERATURE IN THIS WOULD SUGGEST THAT HE SHOULD MAKE THAT KNOWN, SO THAT THE LAWYERS COULD THEN LOOK AT THE TEXT AND FILE SOME SORT OF RESPONSE. I AGREE, AND THERE ARE GRAY CASES. THE FINDINGS OF FACT BY THE COMMISSION SAID THAT THERE MAY BE CASES WHERE THERE IS AN ISSUE AS TO WHETHER WHAT THE JUDGE DID WAS OR WAS NOT PROPER, BUT THE, IN THE FINDINGS, THEY SAID THIS IS NOT ONE OF THOSE CASES. THIS IS NOT A CLOSED CASE.

BUT IS THIS A DISCIPLINE CASE OR IS THIS A CASE FOR DISQUALIFICATION?

THIS IS A DISCIPLINE CASE, AND I WOULD LIKE TO ADDRESS ONE REMARK MADE BY MR. KING AS REPEATED, AND HE WAS CORRECT UP TO A POINT. THAT THERE WAS NO DISCIPLINARY CASE IN THE UNITED SATES THAT HE COULD FIND, IN WHICH THIS ISSUE HAS EVER BEEN SPECIFICALLY ADDRESSED, AND HE WAS CORRECT, EXCEPT THAT, WHEN HE FILED HIS REPLY BRIEF, HE INCLUDEDED IN THAT REPLY BRIEF, AN ARTICLE, AND HE RELIED ON A NUMBER OF ART COMMITTEES IN THAT REPLY BRIEF THAT HD NVR BEEN CITED BY EITHER PARTY BEFORE. AN ARTICLE BY GENTLEMAN NAMED MARLOWE, AT PAGES 10-TO-12 OF HIS REPLY BRIEF, AND IN THAT LOWER VIEWARTICLE, THEY DISCUSSED THE ASE CALLED IN RE MATTER OF HUTCHINSON,

WHICH WAS A WASHINGTON COMMISSION ON JUDICIAL CONDUCT CASE REPORTED AT 1995 WESTLAW 102265. IN WHICH A UDGE WAS CENSURED BECAUSE HE INITIATED EXPARTE COMMUNICATIONS WITH CERTAIN PEOPLE, REGARDING THE ISSUE OF GENDER RESIPT SURGERY, AND A CASE IN WHICH TWO GENTLEMEN WERE HAVING A SEX CHANGE AND HAD A PETITION BEFORE THE COURT TO HAVE THEIR NAME CHANGED.

DO YOU AGREE THAT WHAT JUDGE BAKER WAS INVOLVED IN WAS MAKING A DECISION ON ISSUES ON LAW.

NO, SIR. IF YOU LOOK VERY SPECIFICALLY AT THE MEMORANDUM OF LAW OR MEMORANDUM OF DECISION, WHICH WAS AN ORDER AND WHICH IT DID SIGNIFICANTLY INFLUENCE, BECAUSE HE INCLUDED A DISCUSSION OF IT IN THE ORDER RULING ON THE MOTION FOR NEW TRIAL, AND THE, WHAT AMOUNTED TO A REMITTATURE. YOU WILL SEE TAT WHAT WAS THE ISSUE WAS THE LAWYER FOR THE PLAINTIFF WS SAYING WE HAVE TO LOOK AT THE COST TO DISNEY OF MODIFYING THIS COMPUTER SOFTWARE AND JUDGE BAKER WAS SAYING, NO, THAT IS NOT RIGHT, AND HE WENT OT AND HE CONSULTED COMPUTER EXPERTS, AND HE HAS A DISCUSSION OF HOW YOU COULD COMPUTE, IN A GENERIC WAY, WITHOUT LOOKING AT DISNEY'S COST, WHICH WAS TROUBLING HIM, BECAUSE HE SAID DISNEY'S COST MAY BE DIFFERENT FROM WHAT IT WOULD NORMALLY COST TO MODIFY SOFTWARE. LOOKING AT IT IN A GENERIC WAY, YOU CAN DETERMINE THE COST OF MODIFICATIONS TO SOFTWARE IN THE FOLLOWING MANNER. THAT IS FACT, YOUR HONOR. THOSE WERE THE FACTS. IT MAY BE A MIXED QUESTION AS YOU INDICATED, BUT THOSE ARE FACTUAL ISSUES THAT HE IS LOOKING AT.

WOULD IT MAKE A DIFFERENCE, IF IT WERE A QUESTION OF LAW?

IF IT WERE A QUESTION OF LAW THERE IS ANOTHER EXCEPTION TO THE RULE, WHICH I BELIEVE JUSTICE PARIENTE MENTIONED THAT HE CUTS EXPERTS AND MAKES THAT DECISION, I THINK, AND VERYDAY JUDGES RESEARCH THE LAW.

WHAT BOTHERS ME IN FOCUSING IS THAT, IN A MATTEROF DISCIPLINE, IS THE RULE REALLY CLEAR ENOUGH, WHERE JUDGES HAVE GUIDANCE AS TO WHAT THEY ARE DOING, GOING TO JUSTICE SHAW'S QUESTION ABOUT COMMUNICATIONS? IF HE HAD GOT AND NEWS LETTER IN THAT HEEGULALY GOT NEWSLETTERS, WOULD HE NT BE ABLE TO READ THAT NEWSLETTER?

I DON'T -- THAT IS NOT, YOUR HONOR, AS I SUGGEST THAT THIS CASE SHOULD BE DECIDED ON THE FACTS OF THIS CASE OF WHAT HE DID OF INDEPENDENTLY GOING OUT AND CONSULTING EXPERTS.

BUT WE HAVE GOT TO GIVE, BUT IN WRITINAN OPINION IN THIS MATTER, W HAVE T TO GIVE SOME GUIDANCE.

AND I THINK THAT THE GUIDANCE IS THIS, YOU CANNOT DO.

WHAT IS IT THAT YOU CANNOT DO?

GO OUT AND INDEPENDENTLY CONSULT EXPERT WITNESSES.

BUT YOU CAN READ A NEWSLETTER THAT COMES INTO YOUR OFFICE?

YOU CAN'T PRECLUDE JUDGES FROM DOING. THAT I AM SURE EVERY JUDGE AECHBRY MEMBER OF THIS COURT DOES THAT, AND IT DOESN'T, BUT IF YOU, YOUR HONORS --

DOES SBINT -- DOES INTENT PLAY ANY PART OF THIS AT ALL?

NO, YOUR HONOR.

IS IT A PER SE VIOLATION AND INTENT HAS NOTHING TO DO WITH IT?

NO, YOUR HONOR, WE DON'T BELIEVE INTENT HAS ANYTHING TO DO WITH IT. THERE ARE SEVERAL CASES, THE GRIDLEY CASE AND THE SURGEIES CASE. THE SURGE -- THE STURGIS CASE. THE STURGIS CASE, HE WAS HAVING GOOD MOTIVES FOR WHAT HE DID, BUT THAT WAS NOT AN EXCUSE FOR THE VIOLATIONS.

IS IT CLEAR HERE THAT THE JQC AT ALL TIMES NEVER CHALLENGED THE MOTIVES. IS THAT CORRECT?

IT IS VERY EXPLICIT ABOUT THAT. THEY DID NOT CHALLENGE BAKER'S MOTIVES.

I AM NOT SURE WE HAVE A CLEAR ANSWER TO SOME OF THE QUESTIONS TT WERE PREVIOUSLY POSED, AND THAT BEING IF THIS INFORMATION HAD BEEN WRITTEN IN ARTICLE FORM THE IDENTICAL INFORMATION, WOULD WE HAVE A VIOLATION ON THE READING OF THAT ARTICLE?

IF HE HAD SAID HERE IS WHAT I HAVE WRITTEN. HERE IT IS. PLEASE PROVIDE ME WITH YOUR SPONSOR REVIEW TO IT, AND THIS LEADS ME BACK, JUSTICE, AND HE DID NOT DO THAT. THIS LEADS ME BACK TO WHERE I WAS ORIGINALLY ATTEMPTING TO MAKE A POINT. MR. BAKER SAID THAT THE JUDGE FILED HIS ORIGINAL FINDINGS. HE DID NOT FILE IT. HE DID NOT MAKE IT A PART OF THE RECORD. IN FACT, JUDGE BAKER DISCLOSES I AM THE ONE THAT --

I AM NOT SURE I UNDERSTAND YOUR ANSWER STILL. IS YOUR ANSWER, YES, HE COULD HAVE, IF HE HAD MADE THIS DISCLOSURE?

CONTEMPORANEOUSLY AND THE OPPORTUNITY. OF AN ARTICLE.

SO IT IS THE DISCLOSURE THAT IS THE PROBLEM, NOT THE SUBJECT MATTER.

THE TIMING, THE MANNER AND WHAT HE DID. HERE IT WASN'T CONTEMPORANEOUS. WE DON'T KNOW WHO HE TALKED TO. HE DIDN'T EVEN REMEMBER WHO HE TALKED TO, UNTIL EARLY ON. HE DOESN'T REMEMBER EXACTLY WHAT HE SAID, EVEN AT THE TIME OF THE HEARING. HE COULDN'T REMEMBER WHETHER THESE WERE THE ONLY PEOPLE HE TALKED TO. AND I SUBMIT, JUSTICE LEWIS, THAT HE DID NOT GIVE THE LAWYERS NOTICE AND OPPORTUNITY TO RESPOND, AS MR. DAVIS, MR. KING, CONTENDS. IF YOU READ THE TRANSCRIPT OF THE, THAT PORTION OF THE TRIAL, IT ENDS AT PAGE 885 -- IT BEGINS AT PAGE 885. JUDGE BAKER STARTS OFF, WHEN THEY ARE HAVING THIS DISCUSSION ABOUT THE PROOF OF DAMAGES ISSUE AND HE SAYS I HAVE DONE SOME RESEARCH. I HAVE TALKED TO THE LAW CLERKS. WE HAVE LOOKED IN THE LIBRARY, AND I HAVE NOT FOUND ANY AUTHORITY FOR YOUR POSITION ON DAMAGES. HE THEN HANDS THEM THIS MEMORANDUM, AND IT SENT RESTING THAT, AT NO TIME IN ALL OF THIS DISCUSSION, DOES EVER CALL TO THE ATTENTION OF THE LAWYERS, LOOK, HERE, LET ME TELL YOU, I HAVE DISCUSSED THIS WITH SEVERAL EXPERTS, AND I WOULD LIKE TO HAVE YOUR VIEW ON THAT. QUITE TO THE CONTRARY. WHAT HE SAID WAS, AFTER HANDING THEM THIS MEMORANDUM OF LAW, HE SAID I WOULD LIKE TO HAND YOU THIS. I HAVE PREPARED SOME OF MY MOTTS THOUGHTS, AND ON PAGE 9222 OF THE TRANSCRIPT, HE IS -- ON PAGE 922 OF THE TRANSCRIPT, HE SAYS I DON'T WANT TO FOCUS ON PAGE 2, LINE 3, AND SO-AND-SO AND YOU SAID THIS AND WE DON'T AGREE WITH THIS LINE AND THAT PHRASE AND SO FORTH. I DON'T KNOW. MAYBE JUST COINCIDENCE. PAGE 3, LINE 2 OR PARAGRAPH 2 IS THE VERY PARAGRAPH IN WHICH HE MAKES MENTION OF THE FACT HE HAD DISCUSSED THIS WITH CONSULTANTS, AND HE SAID I DON'T WANT YOU TO FOCUS ON THAT, AND THERE IS NEVER ANY CONVERSATION OR DISCUSSION WITH THE LAWYERS, AT ANY TIME DURING THE TRIAL, SUBSEQUENT TO THAT, ABOUT THIS ISSUE, SO DID HE GIVE FAIR NOTICE? I SUBMIT, YOUR HONORS, THAT HE DID NOT.

ISN'T ONE OF THE PROBLEMS HERE, THAT, WHEN A JUDGE GOES OUT AND SPEAKS WITH EXPERTS

OR CONSULTANTS IN AREAS THAT ARE PENDING BEFORE THAT JUDGE, THAT, REALLY, ALTHOUGH THE EXPERTS MAY NOT HAVE A STAKE IN THE OUTCOME OF THAT CASE, IF THERE ARE EXPERTS THAT ARE IN THE AREA OF THE COMPUTER PEOPLE THAT, SAY, HE GOES AND TALKS TO MICROSOFT, THEY MAY HAVE A VERY STRONG INTEREST IN HOW, WHAT THE RESULT IS, BECAUSE THEY HAVE A DISTINCT POINT OF VIEW THAT MAYBE DAMAGES SHOULD BE LIMITED IN AN AREA THAT INVOLVES COMPUTER SOFTWARE, SO WE REALLY HAVE NO WAY OF KNOWING WHAT THEY TOLD HIM AND WHAT CONTEXT, AND WHICH IS VERY DIFFERENT THAN AN ARTICLE THAT ANYBODY COULD GO LOOK AT AND SAY, WELL, THIS IS WHAT THE ARTICLE S.

THAT'S CORRECT. AND MY EXPERIENCE IS THAT MOST EXPERTS DO HAVE A POINT OF VIEW, AND THE FINDINGS OF THE COMMISSION WERE, SINCE WE DON'T KNOW AND THEY DIDN'T KNOW AT THE TIME EXACTLY WHO THESE PEOPLE WERE, WE COULDN'T TELL WHETHER OR NOT THESE WERE PEOPLE THAT CAME WITH SOME BIAS, SO THAT IS CORRECT, JUDGE.

MR. PILLANS, HOW DO YOU RESPOND TO OPPOSING COUNSEL'S STATEMENT THAT ISSUES HAVE BEEN THE CAUSE OF GRANTING NEW TRIALS OR RECUSAL, BUT THAT THERE HAVE BEEN NO DISCIPLINARY SANCTIONS SOUGHT OR IMPOSEED, AS A RESULT OF THIS TYPE OF CONDUCT?

I RESPOND IN TWO-WAYS, YOUR HONOR. FIRST, I MENTIONED THIS CASE, HE HUTCHINSON CASE THAT WAS THE SUBJECT, AND THERE ARE SOME OTHER ISSUES BESIDES JUST CONSULTATION.

IN FLORIDA WE HAVE HAD A NUMBER OF CASES THAT HAVE BEEN, WHERE THERE HAVE BEEN RECUSALS, AND WHERE THERE HAVE BEEN NEW TRIALS, AND HAVE THEIR EVER BEEN ANY SANCTIONS?

THE GENERAL THEME OF WHAT I UNDERSTAND JUDGE BAKER TO BE SAYING IS THIS IS MERE JUDICIAL ERROR. IT IS NOT THE PROPER SUBJECT OF DISCIPLINE, AND WE CITE IN OUR BRIEF AND I WOULD COMMEND YOUR HONOR IN RE JUDGE PERRY'S CASE, WHERE HE MADE EXACTLY THE ARGUMENT THAT THIS WAS REVERSIBLE ERROR, WHAT HE DID. IF HE MADE A MISTAKE, IT COULD NOT BE THE SUBJECT TO DISCIPLINE AND THIS COURT SPECIFICALLY REJECTED THAT CONCEPT, AND WE CITE IN OUR BRIEF, A NUMBER OF OTHER CASES OF OTHER STATES, WHERE THAT SAME ARGUMENT HAS BEEN REJECTED, SO --

BUT IN FLORIDA, WE DON'T HAVE A SIMILAR SITUATION, WHERE THERE HAS BEEN A SANCTION.

THERE HAS NOT BEEN A CASE WHERE THERE HAS BEEN A SANCTION ON THESE FACTS THAT I AM AWARE OF.

BUT NORMALLY, WHEN WE SPEAK OF DISCIPLINE, WE ARE THINKING OF BAD INTENT ON THE PART OF THE JUDGE OR BLATANT VIOLATION OF SOME RULE, AND EVEN YOUR RESPONSE TO SOME OF THE INQUIRIES WOULD LEAD ONE TO BELIEVE WE ARE IN SORT OF A GRAY AREA HERE. IT IS NOT A BLACKAND WHITE. DO YOU AGREE WITH THAT?

NO, SIR. FIRST, AS I CITED THE GRIDLEY AND THE STURGIS CASE, TO SAY INTENT IS NOT NECESSARILY A PREREQUISITE TO A DISCIPLINARY PROCEEDING. SECONDLY, I SAID THERE ARE CASES THAT WOULD BE GRAY. I SAID, AS THE COMMISSION FOUND IN THIS CASE, THIS IS NOT ONE OF THOSE CASES. THIS IS NOT A CLOSE CASE. WE CAN ALL COME UP WITH HYPOTHETICALS OF SITUATIONS OF READING A MAGAZINE ARTICLE OR READING A TREATISE OR SOMETHING THAT WOULD, MAYBE, RAISE ANOTHER ISSUE. THAT IS NOT THE ISSUE BEFORE THE COURT. THE COMMISSION DECIDED THIS CASE ON THE FACTS OF WHAT JUDGE BAKER DID, IN THIS INSTANCE.

WHAT WAS THE REACTION OF THE PARTIES, AFTER JUDGE BAKER MADE THE DISCLOSURE? DID THEY SEEK TO RECUSE THE JUDGE?

NO, SIR. YOU HAVE TO REMEMBER --

WHY SHOULDN'T WE TREAT THIS, THEN, IF WE ARE ASSUMING THAT, IF JUDGE BAKER HAD DISCLOSED TO THE PARTIES IN ADVANCE, AND SECURED THEIR PERMISSION TO DO THIS, THAT IT WOULD HAVE BEEN ALL RIGHT. THAT IS IF THE PARTIES HAD CONSENTED TO, YES, JUDGE, FOR THE BENEFIT OF YOU GETTING BACKGROUND INFORMATION AND HAVING A BETTER UNDERSTANDING OF WHAT OUR EXPERTS AND OTHER WITNESSES ARE GOING TO TESTIFY TO, AND OF OUR THEORIES OF THE CASE, WE THINK THAT IT WOULD BE PERFECTLY FINE FOR YOU TO CALL IN COURT-SELECTED EXPERTS, AND HERE, AFTER HE DID IT, GAVE THE PARTIES A CHANCE TO OBJECT, AND APPARENTLY DID THEY OBJECT AT ALL?

NO, SIR.

OKAY.

AS I --

WHY WASN'T THERE, IN EFFECT, THEN, AS A PRACTICAL MATTER, THAT WE HAVE THE SAME SITUATION? THAT IS THAT EVEN THOUGH OBVIOUSLY THE BETTER PRACTICE WOULD HAVE BEEN FOR HIM TO ADVISE THEM IN ADVANCE, BUT NOW IF HE MAKES A FULL DISCLOSURE AND IF THE PARTIES ACCEPT THAT, THEN, WHY ISN'T THAT TANTAMOUNT TO THE OTHER WAY AROUND?

YOUR HONOR, FIRST, TO SAY THAT THEY DIDN'T OBJECT IS NOT TO SAY THAT THEY ACCEPTED IT. IT JUST NEVER BECAME AN ISSUE, ONE WAY OR THE OTHER. AS THE COMMISSION FOUND IN ITS FINDINGS, THERE WAS REALLY NOTHING THE LAWYER COULD GO DO AT THAT POINT EXCEPT MOVE FOR A -- COULD DO AT THAT POINT, EXCEPT MOVE FOR A MISTRIAL, AND HE WAS FOUR DAYS INTO A VERY EXPENSIVE CASE, AND IT JUST NEVER CAME UP AGAIN.

DID THE LAWYERS TESTIFY DURING THE JQC PROCEEDINGS?

NO, SIR. NO, SIR.

SO ALL WE HAVE, THEN, IS THE RECORD, INSOFAR AS THE --

YES, SIR.

WAS THERE A LATER, IN TERMS OF THE NEW TRIAL OR THE APPEAL? HOW WAS THIS RAISED?

IT WAS RAISED, BECAUSE THE JUDGE INCLUDED, IN HIS -- IT WAS AN ORDER. IT WASN'T JUST SOME ADVICE. IT WAS AN ORDER ON THE MOTION FOR NEW TRIAL AND DIRECTED VERDICT ISSUE. HE, AGAIN, DISCLOSED THIS COMMUNICATION TH ESE EXPERTS AND RELIED UPON IT, IN HIS PART, IN MAKING HIS DECISION. THAT WAS PART OF THE RECORD. THAT IS WHAT WENT TO THE FIFTH DCA AND PROMPTED THE FIFTH DCA, THEN, TO SAY, AND IT WAS MADE A SUBJECT OF AN ISSUE WITH THE FIFTH DCA, AND THAT IS WHAT CAUSED THIS, THE FIFTH DCA TO SAY WHAT IT DID IN ITS OPINION.

DO WE KNOW THAT THERE WAS ANY CLAIM IN THE APPEAL THAT THE OPPOSING PARTY HAD, REALLY, WAIVED ANY RIGHT TO RELY ON WHAT THE JUDGE HAD DONE AS BEING IMPROPER, BECAUSE THEY HADN'T OBJECTED EARLIER?

JUDGE, THE BRIEFS ARE NOT A PART OF THE RECORD. THE BRIEFS TO THE FIFTH DCA ARE NOT PART OF THE RECORD.

THE APPELLATE OPINION DOESN'T DISCUSS THAT?

NO. IT SAYS THAT THIS WAS AN ISSUE THAT CAME UP. I AM TRYING TO CLOSE, AND I DON'T WANT TO --

WHEN WE TALK ABOUT THIS BEING A GRAY AREA, JUSTICE LEWIS ASKED YOU A QUESTION, FOR INSTANCE, EARLIER, THAT I AM NOT SURE THAT I UNDERSTOOD YOUR RESPONSE TO.

GIVE ME ANOTHER OPPORTUNITY.

THAT IS, FOR INSTANCE, IF THE, IF THE JUDGE HERE, HAD FOUND A PARTICULARLY GOOD LAW REVIEW ARTICLE THAT DISCUSSED ALL KINDS OF HYPOTHETICALS, THAT CAME VERY CLOSE TO THE KIND OF ISSUES BEING TRIED HERE, WHETHER OR NOT HE WOULD HAVE TO MAKE A DISCLOSURE TO THE PARTIES OF READING THAT LAW REVIEW ARTICLE, I AM NOT SURE WHAT YOUR ANSWER TO THAT WAS, IN TERMS OF US DRAWING LINES.

MY ANSWER TO THAT WOULD BE, IF HE WAS GOING TO RELY UPON THAT LAW REVIEW ARTICLE AND HAVE IT INFLUENCE HIM IN SOME WAY IN MAKING HIS DECISION, I THINK HE HAS OBLIGATION TO THE PARTIES TO CALL THAT TO THE PARTY'S ATTENTION AND SAY THIS IS AN ARTICLE. I FIND IT INFLUENTIAL, PERSUASIVE. I THINK THAT --

DON'T WE HAVE JUDGES' ORDERS AND CERTAINLY APPELLATE OPINIONS THAT, BY THE THOUSANDS, FOR THE FIRST TIME REFLECT A LAW REVIEW ARTICLE OR A TREATISE OR SOMETHING?

ABSOLUTELY.

THE FIRST TIME THE PARTIES FIND OUT ABOUT THAT IS WHEN THE ORDER OR THE DECISION COMES OUT, AND --

BUT JUSTICE --

-- TALKING ABOUT A GRAY AREA.

AGAIN, LET ME POINT OUT WE DON'T CONCEDE THIS IS A GRAY AREA, WHAT JUDGE BAKER DID IN THIS CASE, BUT HERE YOU ARE TALKING ABOUT A SITUATION WHERE YOU ARE IN TRIAL. THE TRIAL IS GOING ON FOR SEVERAL WEEK'S TIME, THE LAWYERS ARE INTERACTING WITH THE JUDGE IN THIS MATTER. THIS ISSUE WAS ONE THAT WAS THE SUBJECT OF DISCUSSION OVER A PERIOD OF SEVERAL WEEKS. IT IS QUITE DIFFERENT FROM THE 20 MINUTES THAT WE HAVE TO STAND HERE.

BUT WE HAVE TO, IF WE ARE GOING TO BE WRITE, AND GIVE SOME GUIDANCE AS TO HOW THIS IS GOING TO WORK, TAKE INTO CONSIDERATION OUR OTHER CASE LAW OUT THERE. I AM CONCERNED, AS I SAID TO MR. KING, ABOUT WHAT WE HAVE SAID IN BROWN VERSUS STATE OF STUCKEY, ABOUT THE DEFERENCE TO THE TRIAL JUDGE, BUT I AM, ALSO, CONCERNED ABOUT WHAT WE HAVE SAID IN RESPECT TO THE FRYE RULE AND THE FACT THAT APPELLATE JUDGES, ESPECIALLY, HAVE TO KEEP BE AWARE, UP TO THE TIME OF THE DECISION, ABOUT WHAT THE SCIENCE IS, AND HOW CAN WE MEASURE THOSE THINGS WITH A RESTRICTIVE DEFINITION OF COMMUNICATION HERE?

YOUR HONOR, THE SUPPLEMENTAL AUTHORITY THAT WAS FILED BY MR. KING, US SUGAR CORPORATION CASE, DISCUSSED THIS VERY ISSUE IN THE FIRST DCA, PARTICULARLY THE APPELLATE DE NOVO REVIEW SITUATION, AND THE COURT THERE NOTED THAT THERE NEEDS TO BE SAFE GUARDS ESTABLISHED. I AM HERE REPRESENTING A PARTICULAR CLIENT ON A PARTICULAR FACT SITUATIN. I DON'T HONESTLY AVE THE ANSWER AS TO HOW YOU ADDRESS THE FRYE ISSUE. I DON'T THINK IT IS SPECIFICALLY RELATES TO WHAT HAPPENED TO JUDGE BAKER IN THIS PARTICULAR CASE. MR. CHIEF JUSTICE

THANK YOU, MR. PILLANS. MR. KING.

AY IT PLEASE THE CORT. YOU ADDRESSED THE FRYE CASE. YOU ADDRESSED ALL OF THE CASES NOT AS A SANCTION ISSUE, WHERE THE JUDGE INVOLVED HAS NOT BEEN INVOLVED IN SECRECY AND HAS NOT BEEN JUDGED UNFAIR TO EITHER OF THE PARTIES IN THE CASE. IT IS PARTICULARLY SIGNIFICANT THAT JUDGE BAKER, BACK IN 1989, WROTE A VERY LENGTHY CASE HISTORY. IT IS AN EXHIBIT IN THIS CASE, IN THE CASE OF POKE CITRUS INDUSTRIES VERSUS DOYLE CONNOR, A VERY LENGTHY DEPOSITION ABOUT CITRUS CANKER, AND IT IS VERY CLEAR IN THAT DECISION THAT, HE TALKED WITH OTHER PEOPLE, AND HE LISTS THEIR NAMES, AT THE END OF THE DECISION. IT IS FURTHER REMARKABLE THAT THAT WORK, WHICH IS THE SAME KIND OF THING HE DID IN THIS CASE, WAS COMMENDED IN A DECISION OF THE SUPREME COURT, IN 1990, IN A FOOTNOTE. IT SAYS, IN JUDGE MacDONALD'S CONCURRING OPINION, FOR A FINE ANALYSIS OF THE SCIENTIFIC ASPECTS OF THE FLORIDA CITRUS CANKER EPIDEMIC, FROM A JUDICIAL PERSPECTIVE, I RECOMMEND ORANGE COUNTY CIRCUIT JUDGE JOSEPH P BAKER'S CASE HISTORY.

BUT COMING BACK TO THE, TRYING TO WORK THROUGH WHAT THIS CANON IS INTENDED TOMEAN, I AM HAVING A HARD TIME WITH THE FACT THAT COMMUNICATIONS, AS SBNDED BY THIS CANON, DOESN'T -- AS INTENDED BY THIS CANON, DOESN'T MEAN THAT A JUDGE SHOULD NOT GO OUT AND TALK TO EITHER EXPERTS OR LAY WITNESSES THAT ARE NOT GOING TO BE SUBJECT TO CROSS-EXAMINE AND PUT UNDER OATH IN ORAL COMMUNICATIONS. ISN'T THAT WHAT IT IS INTENDED TO DO?

NO, SIR. I DON'T THINK -- BECAUSE IF YOU SAY THAT, YOU CAN'T. IT IS A SLIPPERY SLOPE, BECAUSE YOU CAN'T SAY THAT DOESN'T APPLY TO THE APPELLATE JUDGE WHO READS AN ARTICLE ON DNA THAT MIGHT HAVE THE VERY SAME INFORMATION THAT THE CONVERSATION HE MIGHT HAVE WITH THE AUTHOR OF THAT ARTICLE SAYS.

ISN'T THAT ONE OF THE POTENTIAL BRIGHT LINES, THOUGH, THAT IS THAT EVERYBODY, THAT THAT IS OUT THERE IN THE MARKETPLACE, AND IN THE LEGAL COMMUNITY, THE ARTICLES THAT ARE WRITTEN. EVERYBODY IS AWARE OF THOSE AND WE SEE THAT. EVERYBODY IS NOT AWARE OF WHO A JUDGE MIGHT CHOOSE TO GO AND VISIT WITH AND THEN CLEARLY THE ABILITY TO RECAPTURE, ONCE A JUDGE DOES THAT, IN TERMS OF WHAT QUESTIONS WERE ASKED, WHAT QUESTIONS WERE REPEATED? WHAT EFFECT, THEN, THAT IS GOING TO HAVE ON THE JUDGE. WHAT INTEREST DO THOSE PARTICULAR PEOPLE HAVE IN THE MYRIAD OF POTENTIAL INTERESTS THAT THEY MAY HAVE AND NOT EVEN BE AWARE OF IT? THAT IS BECAUSE OF WHO THEY ARE OUT THERE, AS OPPOSED TO HAVING A COURT EXPERT IN THE COURTROOM, FOR THE VERY PURPOSE OF GIVING THE JUDGE THE BENEFIT OF THIS BACKGROUND OR BEING ABLE TO ASK QUESTIONS AND THEN HAVE THE PARTIES SUBMIT THEIR ARGUMENT. IN OTHER WORDS SAFEGUARDS THAT COULD BE IN PLACE IN OTHER SITUATIONS SIMPLY AREN'T THERE IN A SITUATION LIKE THIS, ARE THEY?

YOUR HONR, I THINK THE SAFEGUARD WILL BE THERE, IF THE BRIGHT LINE IS THE TWO PURPOSES OF THE CANON 3-B-7. IT IS TO PREVENT SECRECY AND UNFAIRNESS.

BUT ISN'T THERE SECRECY HERE, BECAUSE WE DON'T KNOW WHAT THE JUDGE ASKED THESE PEOPLE. WE DON'T KNOW WHAT THE RESPONSES WERE, AND WE DON'T KNOW JUST EXACTLY, YOU KNOW, WHAT THE INTERESTS OF THESE PEOPLE MAY HAVE BEEN, THEN, AS I SAY, IN THIS MYRIAD OF POTENTIAL INTERESTS THAT PEOPLE V.

NO, SIR.

AND SO WHAT GUIDELINES WOULD A JUDGE APPLY, THEN, TO HERSELF, WHEN SHE IS SAYING, NOW, I KNOW JUDGE BAKER HAS DONE THAT AND LIKES TO DO IT. NOW I HAVE GOT A CASE, AND I WANT TO GO OUT AND TALK TO SOME EXPERTS, AND AS A MATTER OF FACT MY DAUGHTER IS GOING WITH SOMEBODY THAT WORKS FOR THIS COMPANY, AND, BOY, IT IS OBVIOUS TO ME HE IS REALLY GOOD ABOUT THIS, AND I AM GOING TO GO TALK TO HIM, AND, BOY, ENDS UP HAVING A

FIVE-HOUR CONVERSATION WITH HIM, AND HE FEELS LIKE, LIKE I HAVE BEEN SO ENLIGHTENED, AND THEN COINCIDENTALLY, DOWN THE ROAD SOMEWHERE, IT IS FOUND OUT THAT THAT BOYFRIEND'S COMPANY ACTUALLY HAD A CONTRACT WITH ONE OF THE PARTIES IN THE CASE, AND MAYBE THE BOYFRIEND WASN'T EVEN AWARE OF IT AT THE TIME.

YOUR HONOR, SECRECY IS NOT THE REASON WE ARE HERE. WE WOULDN'T BE HERE, IF JUDGE BAKER HAD NOT DIVULGED THIS INFORMATION. HE IS THE REASON HE IS HERE! HE DIVULGED IT TWIC, IN TWO LENGTHY MEMANDUMPTION, AFTER THE FACT. AND IF HE HADN'T HAVE DONE THAT, WE WOULDN'T BE HERE. I SUBMIT TO YOU THAT THE -- THERE WAS NO OBJECTION FROM ANYBODY AT ANY TIME, UNTIL EVIDENTLY, IN A BRIEF TO THE APPELLATE COURT, BECAUSE IT WAS RAISED IN THE APPELLATE COURT. THESE ARE NOT UNSOPHISTICATED LAWYERS BACK AT THE TRIAL COURT. FROM A SANCTION STANDPOINT -- MR. CHIEF JUSTICE

MR. KING, YOUR TIME IS UP. THANK YOU VERY MUCH. THANK YOU, MR. PILLANS.