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## **Amendments To Uniform Guidelines For Taxation of Costs**

LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. BE SEATED.

GOOD MORNING, AND HAPPY NEW YEAR. AND WELCOME TO THE FIRST ORAL ARGUMENT SESSION OF THE YEAR 2001, PERHAPS THE BEGINNING OF THE NEW MILLENNIUM, DEPENDING UPON YOUR CONSTRUCTION OF THE CALENDAR. BUT WE WILL BEGIN THIS MORNING WITH THE AMENDMENTS TO UNIFORM GUIDELINES FOR THE TAXATION OF COSTS. AND I NOTE THAT WE HAVE THREE PARTICIPANTS THAT ARE GOING TO INITIALLY PARTICIPATE. WE ASK YOU TO BE MINDFUL OF YOUR TIME, BECAUSE WE NEED TO STRICTLY ADHERE TO THE TIME PERIODS. SO I THINK, MR. JONES.

GOOD MORNING. MY NAME'S PHILLIP JONES. I AM PRESENTLY THE CHAIRMAN OF THE RULES OF CIVIL PROCEDURE COMMITTEE. WILL BE SPEAKING ON BEHALF OF THE GUIDELINES WHICH WE HAVE SUBMITTED TO THE CLERK, WITH ME IS JUST TYRIE BOYER, WHO WAS THE CHAIRMAN OF THE COMMITTEE AT THE TIME THE GUIDELINE PROPOSALS WERE ORIGINALLY SUBMITTED TO THE COURT BACK IN 1999. AND MR. BOWDISH WHO IS SPEAKING ON BEHALF OF THE PROPOSED GUIDELINES, ALSO. I'M GOING TO DEFER RIGHT NOW TO JUDGE BOYER TO GIVE A LITTLE BIT OF HISTORICAL PERSPECTIVE OF HOW WE GOT WHERE WE ARE TODAY.

GOOD MORNING. MAY IT PLEASE THE COURT AND THIS WILL BE VERY BRIEF. I WAS SIMPLY ASKED TO APPEAR BECAUSE I WAS THE CHAIRMAN OF THE CIVIL PROCEDURE RULES COMMITTEE AT THE TIME THIS GUIDELINES PASSED, THE CIVIL PROCEDURE RULES COMMITTEE. HISTORICALLY, MATTERS COME BEFORE THIS COMMITTEE BY REQUEST OF THE SUPREME COURT OR BY REQUEST OF LAWYERS WHO HAVE AN INTEREST IN THE RULES. MY UNDERSTANDING IS THAT THIS PARTICULAR REQUEST CAME FROM THE SUPREME COURT LIAISON, OR THE PERSON FROM THE SUPREME COURT WHO WORKED WITH THE RULES COMMITTEE APPROXIMATELY THREE YEARS PRIOR TO THE PASSAGE OF THE GUIDELINES THAT ARE PRESENTED TODAY. THERE WAS A SUBCOMMITTEE FORMED, AND OVER A PERIOD OF SEVERAL YEARS, THE SUBCOMMITTEE MET AND FINALLY CAME UP WITH SOME PROPOSED GUIDELINES. THE GUIDELINES WERE THEN PRESENTED TO THE DRAFTING -- TO THE FULL COMMITTEE, AND THEN TO THE DRAFTING COMMITTEE. THEY CAME BACK FROM THE DRAFTING COMMITTEE IN A FORM THAT THE COMMITTEE FELT WAS DIFFERENT FROM THAT WHICH HAD BEEN APPROVED BY THE COMMITTEE, AND SO IT WENT BACK TO THE SUBCOMMITTEE HAVING TO DO WITH THE GUIDELINES. AFTER IT CAME BACK FROM THE SUBCOMMITTEE, HAVING TO DO WITH THE GUIDELINES, IT WAS PRESENTED ONCE MORE TO THE FULL COMMITTEE, AND IT WAS PASSED WITH OVERWHELMINGLY 34-5 OR SOMETHING OF THAT NATURE. IT WAS 30 SOMETHING TO A FEW PEOPLE WHO VOTED AGAINST THE GUIDELINES. IT WAS ALSO VOTED ON THAT THE DRAFTING COMMITTEE WOULD NOT RECONSIDER THIS MATTER. SO IT DID NOT GO BACK TO THE DRAFTING COMMITTEE AND FROM THERE, IT WAS MY RESPONSIBILITY TO SEND IT FORWARD TO DETERMINE WHAT TO DO WITH THE GUIDELINES. I SENT THEM TO THE FLORIDA BAR BOARD OF GOVERNORS. THE FLORIDA BAR BOARD OF GOVERNORS CHOSE NOT TO ACT ON IT BECAUSE THEY ARE GUIDELINES AS OPPOSED TO RULES AND THEY FELT LIKE THERE WAS NO NECESSITY FOR THE BOARD OF GOVERNORS TO ACT ON IT ONE WAY OR THE OTHER.

JUDGE BOYER, COULD YOU TELL US DURING THE WORK OF THE SUBCOMMITTEE OR THE FULL COMMITTEE, HOW MUCH OF A COMPARATIVE ANALYSIS WAS DONE WITH THE WAY COSTS ARE HANDLED IN OTHER STATES OR IN THE FEDERAL JURISDICTIONS?

I KNOW THERE WAS DISCUSSION ON HOW COSTS ARE HANDLED IN OTHER STATES AND OTHER

JURISDICTIONS BUT I DO NOT RECALL AND I'M FAIRLY CONFIDENT THERE WAS NOT A GREAT DEAL OF EMPHASIS PLACED ON THAT. I DO KNOW THAT THERE WAS QUITE A BIT OF COMMENT ON THE GUIDELINES AS THEY PRESENTLY EXIST, AS BEING BEYOND WHAT IS MODERN. THAT IS, THAT THEY NO LONGER FULFILLED THE NEED. THEY DIDN'T CONSIDER THINGS LIKE MEDIATION AND THAT SORT OF THING. BUT AS FAR AS COMPARISON WITH OTHER STATES AND OTHER JURISDICTIONS THERE WASN'T MUCH DISCUSSION ABOUT THAT THAT I RECALL. AND THEN FINALLY, THE GUIDELINES AS THEY WERE REVISED WERE FORWARDED BY ME TO JUSTICE WELLS WITH A REQUEST THAT INDICATING WE HAVE DONE NOW THAT WHICH WE COULD DO AS A COMMITTEE. AND THAT'S WHERE WE ARE TODAY. THANK YOU VERY MUCH.

TO FOLLOW UP A LITTLE BIT ON THAT, THE GUIDELINES THAT WERE SUBMITTED WERE PUBLISHED I BELIEVE NOVEMBER 1st OF 1999. THERE WERE COMMENTS MADE, AND AS A RESULT OF THOSE COMMENTS, IT CAME BACK TO THE RULES OF CIVIL PROCEDURE COMMITTEE THIS PAST YEAR, AT WHICH TIME THE SUBCOMMITTEE RESPONDED TO THOSE CRITICISMS IN THE RESPONSES, AND THE COMMITTEE AGREED WITH SOME OF THOSE, AND A REVISED, I GUESS OR EDITED POSITION WAS THEN SENT TO THIS COURT, I BELIEVE, AROUND AUGUST.

LET ME DIRECT YOUR ATTENTION TO A SPECIFIC MATTER OF EXPERT WITNESSES. WHICH IS, AS I UNDERSTAND, THERE IS A PROPOSED GUIDELINE THAT THERE SHOULD BE PAID AS PART OF REASONABLE AND NECESSARY EXPENSES FOR EXPERT WITNESSES, TRAVEL TIME, FOR ATTENDING DEPOSITIONS --

CORRECT.

AREN'T WE REALLY GOING TO JUST GET INTO ENORMOUS CONFLICT IF WE LOOK LIKE WE'RE SANCTIONING THERE TO BE PAYMENT FOR THOSE TYPE OF EXPENSES? BECAUSE IT SEEMS TO ME FROM MY CAREER THAT WHAT THE UNIFORM COSTS HAVE INTENDED TO DO IS TO TAKE A VERY CONSERVATIVE APPROACH TO THE TAXATION OF COSTS, WITH THE IDEA THAT LITIGANTS WERE GOING TO HAVE TO REALLY SHOULDER THEIR OWN COSTS IN MATTERS OF LITIGATION. THIS WOULD BE REALLY TURNING THE TABLES ON THAT WHEN WE GET IN MATTERS OF EXPERTS AND PAYING FOR TRAVEL TIME. WOULD YOU COMMENT ON THAT?

YES, I'LL MAKE TWO COMMENTS ON IT. ONE WITH RESPECT TO CERTAINLY WITH THE TRAVEL TIME AND ALL, THAT WAS ONE OF THE CRITICISMS THAT WAS MADE ON THE ORIGINAL GUIDELINES THAT WAS SUBMITTED. THE SUBCOMMITTEE AND COMMITTEE AGREED TO AT LEAST SHIFT THE TRAVEL TIME, LODGING EXPENSES FROM THE SHOULD-BE COSTS TO MAY-BE COSTS TO ALLOW THE COURT TO HAVE ACTUALLY TWO DISCRETIONS. ONE WITH RESPECT TO THE REASONABLENESS, AND THEN, TWO, WHETHER THEY SHOULD BE TAXABLE AT ALL. WITH RESPECT TO THE OTHER ASPECT I THINK THE SUBCOMMITTEE'S INTENT WAS TO TRY TO AT LEAST LEVEL THE PLAYING FIELD WITH THOSE PARTIES WHO COULD FINANCIALLY AFFORD TO HIRE EXPERTS VERSUS THOSE PARTIES WHO COULD NOT, TO ALLOW THE PLAYING FIELD TO BE A LITTLE BIT MORE EVEN.

I NOTICED THAT YOU DID SUGGEST SWITCHING IT TO THE MAYBE TAXED PORTION. BUT UNDER THE SECTION THAT'S TITLED "TRAVEL EXPENSES," THERE'S ALSO A PORTION THAT TALKS ABOUT THE EXPERT TRAVEL EXPENSES AGAIN, BUT THERE'S NO SUGGESTION THERE THAT IT BE SHIFTED TO THE MAYBE TAXED PORTION. WAS THAT JUST AN OVERSIGHT? OR IS THERE SOMETHING DIFFERENT IN THAT SECTION THAT I DIDN'T RECOGNIZE?

THE DIFFERENCE UNDER THE D-2 DEALT WITH THE REASONABLE TRAVEL AND LODGING EXPENSES OF EXPERTS THAT TESTIFY AT TRIAL VERSUS THOSE THAT DO NOT.

OKAY.

YOU MENTIONED SOMETHING ABOUT TRYING TO LEVEL THE PLAYING FIELD. NOW, THE AS

SAUMTION IS THAT EXPERTS HAVE TO BE PAID INITIALLY, EXPERTS DON'T AT LEAST FROM MY EXPERIENCE, ACCEPT PAYMENT NOR SHOULD THEY, ON A CONTINGENT BASIS. SO IS THERE A PROBLEM IN THIS NEVER-ENDING BATTLE OF THE EXPERTS IN THAT WE ARE GOING TO ENCOURAGE NOT ONLY HIRING OF EXPERTS, BUT HIRING OF EXPERTS THAT MAY BE FROM OUT OF THE STATE? HIRING OF EACH PARTY HIRING AN EXPERT? AND REALLY MAKING RATHER THAN TRYING TO PUT A LID ON COSTS, REALLY ENCOURAGE INCREASING EXPENDITURE? IN OTHER WORDS, I'M HAVING TROUBLE WITH UNDERSTANDING HOW THIS MIGHT LEVEL THE PLAYING FIELD AS OPPOSED TO MAYBE ENCOURAGE THOSE PARTIES THAT HAVE GREATER RESOURCES TO BE ABLE NOT ONLY TO SPEND THE MONEY BUT ALSO GET REIMBURSEMENT AT THE END OF LITIGATION.

I ACKNOWLEDGE THAT THAT'S ONE OF THE PROBLEMS THAT'S OCCURRING THAT THERE'S THE BAT PL OF THE EXPERTS AND WE HAVE MORE EXPERTS TESTIFYING TO MORE TYPES OF ITEMS AND THINGS OF THAT SORT. CERTAINLY WITH RESPECT TO THE TRAVEL EXPENSES AS IT'S NOT RELATED TO TRIALS, THE FACT THAT IT ALLOWS THE DISCRETION OF THE COURT TO MAKE THAT DETERMINATION WHETHER IT SHOULD BE ALLOWED OR NOT MAY BE THE PROPER WAY TO PUT A CAP ON THAT.

WHAT WOULD YOU SAY IS THE MOST SIGNIFICANT CHANGE IN THESE GUIDELINES FROM THE EXISTING LAW? WHAT PART WOULD YOU SAY WOULD BOTH HAVE THE GREATEST EFFECT AND MAYBE BE THE GREATEST PROBLEM IN THE LONG RUN?

WELL, CERTAINLY ONE OF THE GREATEST CHANGES I THINK IS WHERE IT SHIFTS THE BURDEN, BECAUSE UNDER THE PROPOSED GUIDELINES, THE PRESUMPTION IS THE PREVAILING PARTY SHOULD BE ABLE TO GET ALL THIS COSTS AND THE BURDEN SHIFTS TO THE OPPOSING PARTY TO ESTABLISH THOSE COSTS ARE EITHER NOT REASONABLE OR DON'T LEAD TO PROPER EVIDENCE AND IT SHIFTS IN THAT REGARD. THAT IS A SIGNIFICANT CHANGE.

WHAT ABOUT THE TRAVEL EXPENSES FOR THE ATTORNEY? CURRENTLY IS THAT ALLOWED?

NO, MY UNDERSTANDING IS THAT'S CURRENTLY NOT ALLOWED.

IS THAT A PROBLEM IN A CASE WHERE THERE ARE MULTIPLE DEFENDANTS? AND YOU REALLY HAVE A RIGHT FOR EACH DEFENDANT TO SPEND HIS OR HER -- SEND HIS OR HER ATTORNEY TO WHEREVER THAT EXPERT MIGHT BE. WHAT DO YOU SAY TO THAT SITUATION? WHERE YOU'VE GOT A PLAINTIFF WHO NECESSARILY HAS TO JOIN MULTIPLE DEFENDANTS THAT ALL OF A SUDDEN THIS BECOMES REALLY AN UNDULY BURDENSOME EXPENSE?

I GUESS THE ONLY THING I CAN SAY TO THAT IS IT WOULD REALLY RELATE TO WHAT THE COURT DETERMINES WHETHER IT'S A REASONABLE EXPENSE THAT WAS INCURRED AND WHETHER IT WAS NECESSARY, FOR INSTANCE, FOR ALL THOSE ATTORNEYS TO TRAVEL IF IT'S A PARTICULAR ISSUE THAT RELATES TO ONE PARTICULAR DEFENDANT OR ONE PARTICULAR PARTY.

ONE OF THE CONCERNS THAT I HAVE, AND I'D ALSO LIKE FOR FOR MR. WAGNER TO COMMENT UPON THIS WHEN HE GETS HERE, IS WHETHER THROUGH THIS COMMITTEE, RATHER THAN APPROACHING COSTS WHICH LOOKS TO ME LIKE THAT WHAT THE COMMITTEE IS DOING IS APPROACHING COSTS FROM WHAT IS REALISTICALLY GOING ON IN THE ACTUAL TRIAL PRACTICE, WHICH I APPRECIATE THAT. BUT SHOULDN'T THE BAR AND THE COMMITTEE AND THIS COURT BE CONCERNED WITH DOING THIS ON THE BASIS IN WHICH WE ARE GOING TO ATTEMPT TO RESTRICT THE EVER-INCREASING COSTS OF LITIGATION? AND RATHER THAN PEA PAYING FOR TRAVEL TIME, THERE OUGHT TO BE SOME PENALTY FOR NOT TAKING A DEPOSITION BY TELEPHONE AND PAYING AN EXPERT TO TRAVEL TO MIAMI FROM CALIFORNIA IN ORDER TO GET AN HOUR'S DEPOSITION.

YOU'RE CORRECT AND THAT SITUATION DOES ARISE AND IT WAS ADDRESSED BRIEFLY BY THE SUBCOMMITTEE WHEN THEY DEALT WITH AT LEAST WHEN YOU RUN INTO THE REASONABLENESS

OF THE TRAVEL TIME AND ALL, YOU COULD DO A MOTION FOR PROTECTIVE ORDER, OR I BELIEVE YOU COULD ALSO ASK THE COURT TO RESTRICT THAT AS OPPOSED TO TRAVELING TO A LOCATION THAT THE DEPOSITION EITHER BE TAKEN BY VIDEO CONFERENCE OR TELEPHONICALLY DEPENDING UPON THE CRITICAL NATURE I GUESS OF THAT DEPOSITION.

LET ME ASK YOU SORT OF A BROADER QUESTION. A COMPLAINT THAT WE HEAR OFTEN WITH REFERENCE TO ALL OF THE RULES, FOR INSTANCE, THAT OCCURS FREQUENTLY IN THE FAMILY LAW RULES, IS THAT SOMETIMES IT APPEARS THAT THE RULES ARE MADE FOR THE HIGH-END LITIGATION, AS OPPOSED TO THE AVERAGE OR CERTAINLY PRO SE LITIGANTS THAT ARE OUT THERE. SO WE HAVE THIS CONSTANT TENSION INsofar AS THE RESPONSIBILITY OF THE COURT TO BALANCE THESE CONCERNS. COULD YOU ADDRESS THESE COSTS FROM THAT PERSPECTIVE? IN OTHER WORDS, WHETHER WE HAVE THAT KIND OF A PROBLEM HERE, THAT IS, ALL OF US, IF WE -- IF THAT'S OUR PRACTICE, LITIGATION, AND WE GET INTO THAT, THEN THERE'S A CERTAIN BIAS, PERHAPS, THAT THEN DEVELOPS IN THE WAY THAT WE'RE DOING THINGS. HOW MUCH CONSIDERATION DID THE COMMITTEE GIVE TO THIS FACTOR?

I THINK THE COMMITTEE, WHEN THEY WERE DISCUSSING -- AND THEY ENDED UP WITH AN UNINTEND CONSEQUENCE AS WHETHER WAGNER HAS INDICATED I GUESS IN HIS OPPOSITION. BUT I THINK INTENT OF THE COMMITTEE IN INITIALLY DOING THAT WAS TO ALLOW THE LITIGANT THAT DOES NOT HAVE THE RESOURCES THE ABILITY TO RECAPTURE THOSE EXPENSES FOR DEPOSITIONS THAT MAY NOT BE USED IN TRIAL, OR THE TRAVEL TIME IF THEY HAVE TO GO OUT TO TAKE A DEPOSITION. OR TO HIRE AN EXPERT THAT ULTIMATELY IS NOT USED AT TRIAL BUT IS USED FOR CONSULTING PURPOSES. WHEREAS, THE WEALTHY LITIGANT HAS THE RESOURCES IN WHICH TO DO THAT, THIS ALLOWS AT LEAST THE PRO SE OR THE LESS WEALTHY LITIGANT THE OPPORTUNITY TO RECAPTURE ANY OF THOSE EXPENSES.

I THINK WE'D BETTER ALLOW MR. BOWDISH IF HE'S GOING TO --

THANK YOU, JUSTICES.

MAY IT PLEASE THE COURT, GOOD MORNING. MY NAME IS JIM BOWDISH. I CERTAINLY DID NOT SERVE ON THE RULES COMMITTEE. I FIRST FOUND OUT ABOUT THESE GUIDELINES WHEN THEY WERE PUBLISHED IN THE FLORIDA BAR NEWS. AND I WROTE A COMMENT TO THE COURT ABOUT IT. I'M A BOARD CERTIFIED TRIAL LAWYER. I'VE HANDLED GENERAL CIVIL LITIGATION FOR THE PAST 26 YEARS IN STUART. I'VE HANDLED PERSONAL INJURY CASES FROM BOTH SIDES, PROBATE AND TRUST LITIGATION, REAL ESTATE LITIGATION, AND JUST ABOUT EVERY SORT OF LITIGATION THAT YOU CAN NAME. AND I STAND HERE TODAY IN FAVOR OF THE GUIDELINES. I THINK THE MAIN QUESTION FOR THE COURT WOULD BE: THESE GUYS LINES DO CONTAIN A SHIFT. THEY CONTAIN A SHIFT FROM PROVING THAT THE COSTS ARE REASONABLE TO A SHIFT TO WHERE THE COSTS ARE PRE-SUMP TIFL REASONABLE. I THINK THAT IS A GOOD SHIFT. PERSONALLY I WOULD LIKE TO SEE IF YOU WERE CONCERNED ABOUT PROBLEMS WITH THE COSTS BEING EXCESSIVE, I'D LIKE TO SEE CHANGES TO THE RULES CONCERNING PROTECTIVE ORDERS. OCCASIONALLY, I HAVE ASKED ACTUALLY IN A SMALL CASE, A \$20,000 CASE, A \$25,000 CASE, FOR JUDGES TO LIMIT THE DEPOSITION, OR TO LIMIT THE TIME OF TAKING THE DEPOSITIONS. AND I FIND THEY'RE VERY RELUCTANT TO DO SO, EVEN THOUGH THE RULES AS PRESENTLY WRITTEN SUGGEST THAT YOU CAN DO THAT. I WOULD LIKE TO SEE THE LIMITATION PLACED THERE, SO THAT IF THE TRIAL LAWYER IS CONCERNED ABOUT COSTS, HE DOES NOT UP FRONT. HE SUGGESTS ANOTHER METHOD OF TAKING THE DEPOSITION, OR ANOTHER METHOD OF DISCOVERY, OR LIMITING TRAVEL OR SOMETHING OF THAT NATURE. BUT ONCE THOSE COSTS HAVE BEEN INCURRED, IF THIS COURT IS OF THE PHILOSOPHY, WHICH I AM, THAT THE PERSON WHO WAS SUCCESSFUL IN LITIGATION SHOULD RECAPTURE AS MUCH AS POSSIBLE, SHOULD BE MADE WHOLE, THEN I WOULD SAY THESE GUIDELINES ARE WHAT SHOULD BE ADOPTED. AND I'M IN FAVOR OF THEM, PARTICULARLY WHERE IT COMES TO THE QUESTION OF DEPOSITIONS. AND THAT'S THE ONE THING I'D LIKE TO TALK ABOUT VERY BRIEFLY. IN THE CURRENT RULE, IF A DEPOSITION IS TAKEN AND NOT USED

PRESUMPTIVELY IT'S NOT GOING TO BE TAXED. YOU CAN SHOW THERE WAS A REASONABLE NECESSITY FOR THE TAKING OF THE DEPOSITION BUT IN MY EXPERIENCE OVER 26 YEARS, IF YOU'RE GOING TO HAVE A CIVIL CASE, YOU'RE GOING TO TAKE THE DEPOSITION OF THE OTHER PARTY. AND YOU'RE PROBABLY GOING TO TAKE THE DEPOSITION OF THE KEY WITNESSES. YOU DON'T HAVE TO TAKE A DAY TO DO THAT. YOU CAN LIMIT YOUR TIME. BUT YOU'RE GOING TO TAKE THOSE DEPOSITIONS. I HAVE NEVER SEEN IN MY LIFETIME OF PRACTICING LAW A DEPOSITION ON WRITTEN QUESTIONS. I KNOW IT EXISTS UNDER THE RULES. BUT WHY ISN'T IT USED? BECAUSE YOU CANNOT ASK THE FOLLOW-UP QUESTION. YOU NEED TO HAVE YOUR DEPOSITIONS BEFORE YOU GO TO TRIAL. YOU NEED TO REVIEW THEM SO THAT THAT PERSON CAN BE CROSS EXAMINED AND YOU CAN PREPARE FOR THAT CROSS EXAMINATION. I THINK THAT THOSE DEPOSITIONS PRESUMPTIVELY SHOULD BE TAXED, AND THAT'S WHAT THE RULES DO. AS FAR AS OTHER CONSIDERATIONS --

YOU'RE INTO WHATEVER REBUTTAL TIME YOU'RE --

OKAY, I'M GOING TO ELIMINATE -- I'LL JUST STOP RIGHT HERE BUT I DO ASK THAT THE GUIDELINES BE ADOPTED.

THANK YOU VERY MUCH FOR COMING AND GIVING YOUR EXHECHBLTS COMMENTS.

I'M BILL WAGNER. I'M THE RESPONDENT HERE. I PREPARED BRIEF COMMENTS ANTICIPATING I WOULD HAVE SOME MORE SUPPORT BUT IN HONOR OF GOOD TRIAL LAWYERS I'LL EXPAND MY TIME TO USE THE ENTIRE 20 MINUTES. I ALSO SAW THE NOVEMBER '99 PUBLICATION SENT IN A LETTER. I WAS LATER NOTIFIED THIS COURT WAS GOING TO HEAR ARGUMENTS ON THE MATTER ONLY AFTER I RECEIVED THAT NOTIFICATION THAT THE COMMITTEE SUBMITTED A SUPPLEMENTAL REPORT. WHEN I LEARNED OF THAT, I ATTEMPTED TO GET THE REPORT, GOT IT AND THEN FILED A BRIEF AND I APOLOGIZE FOR THE TYPOS WHICH I FRANKLY DIDN'T REALIZE UNTIL I SAW THEM REVIEWING THEM LAST NIGHT AND I'LL ASK THE COURT'S PERMISSION TO ALLOW ME TO FILE AN AMENDED BRIEF TO CORRECT THE TYPE POES. I'M EMBARRASSED HOW THEY GOT IN THERE BECAUSE OF MY OUT OF TOWN COMMITMENTS. I'LL GENERALLY RELY ON THE BRIEF. ONE OF THE PROBLEMS I FIND IN NOT BEING ABLE TO FIND THE RECORD IS THAT NEITHER I NOR APPARENTLY ANY OF THE MEMBERS OF THE COMMITTEE CAN FIND OUT WHAT IT WAS THAT INITIALLY STIMULATED A REVISION OF THIS OTHER THAN THE FACT THAT THE COURT REQUESTED THE REVISION. AND I SAY THAT BECAUSE I DON'T KNOW IF THE REQUEST WAS, PLEASE UPDATE THE GUIDELINES TO BE CONSISTENT WITH THE CURRENT RULES, WHICH DID INCLUDE SOME CHANGES, MEDIATION, THINGS OF THAT NATURE. OR, BECAUSE OF CERTAIN COMPLAINTS THAT JUDGES HAD SUBMITTED TO THE COURT OR THE COURT HAD HEARD FROM THE JUDGES THAT WERE HAVING TROUBLE WITH THE GUIDELINES. OR WHETHER THE REQUEST WAS, LOOK AT THE GUIDELINES AND SEE WHETHER OR NOT WE OUGHT TO CHANGE THE LAW AND INVENT NEW LAW AND MAKE NEW LAW REGARDING TAXATION OF COSTS. IF THE COMMITTEE DECIDED TO CREATE ALL THIS NEW LAW WHICH THESE GUIDELINES DO, IF THE COMMITTEE DECIDED TO DO THAT, I THINK THEY DID IT INCORRECTLY. THEY HAVE SHOWN NO NEED FOR --

WHY NOT FROM YOU'RE EXPERIENCE MR. WAGNER, IS THERE PRESENTLY A PROBLEM WITH THE TAXATION OF COSTS?

I DON'T SEE A REAL PROBLEM IN THE TAXATION OF COSTS IF YOU WANT TO GO TO THE QUESTION OF GUIDELINES. I CAN SEE THERE'S SOME PLACES WHERE THE GUIDELINES ARE OUT OF DATE. I CAN EXPRESS A COUPLE. ONE IS THEY DO NOT PROVIDE FOR MEDIATION. SINCE THEY'RE GUIDELINES OBVIOUSLY THEY DON'T PROVIDE FOR A LOT OF THINGS, THEY DON'T PROVIDE FOR SUBPOENAS OR FILING FEES. THERE ARE MANY THINGS THE 1981 GUIDELINES DON'T PROVIDE FOR YET THEY'RE CLEARLY ALLOWED. SO I THINK THE COURTS HAVE THE AUTHORITY TO INCLUDE THE MEDIATION COSTS. IF IN FACT THE JUDGES ARE HAVING A DISPUTE AS TO WHETHER MEDIATION COSTS INCLUDES THE COSTS OF PREPARATION FOR THE MEDIATION, THE COST OF

PREPARING LETTERS, I THINK GUIDELINES MIGHT RESOLVE THAT ALTHOUGH FRANKLY I'VE NEVER HEARD ANY PROBLEM OF THAT. THE COSTS HAVE GENERALLY BEEN ACCEPTED BY THE JUDGES THAT I'VE DEALT WITH AS BEING THE COSTS THE MEDIATOR CHARGED FOR THE MEDIATION. IF THERE IS IN FACT A REASON OUT THERE TO ADD SOMETHING ABOUT MEDIATION, IT SHOULD BE DONE. IT'S CLEAR THAT THE RULE ON DEPOSITION HAS CHANGED. AT THE TIME IN 1981 WHEN THIS RULE WAS ADOPTED, THE RULES OF THE SUPREME COURT REQUIRED THAT AN ORIGINAL DEPOSITION BE FILED. AND THEREFORE ONLY THE COST OF THE ORIGINAL DEPOSITION COULD BE HANDLED. ON THE COMMITTEE I WAS CHAIR OF WE ELIMINATED THE FILING OF DEPOSITIONS AND WE INSTEAD SAID THAT ALL COPIES OF A DEPOSITION ARE TO BE CONSIDERED ORIGINALS. THE COURT REPORTERS IN RESPONSE TO THIS AN ECONOMIC RESPONSE TOLD LAWYERS, YOU CAN'T JUST BUY ONE. YOU'VE GOT TO BUY A COPY AND ORIGINAL OR TWO COPIES. THAT'S THE WAY WE CHARGE. PERHAPS IN RECOGNITION OF THAT ECONOMIC REALITY OF WHAT COURT REPORTERS ARE DOING THAT IS ANOTHER AREA I WOULD SUGGEST COULD HAVE BEEN ADJUSTED IN TERMS OF THE GUIDELINES. BUT WHEN THEY TAKE THE NEXT STEP AND BEGIN CHANGING THE LAW ON DISCOVERY, ON TRAVEL COSTS FOR ATTORNEYS, WHAT IS HAPPENING IS IT IS A SHIFT OF THE EMPHASIS. THERE SHOULD BE AND AS A PLAINTIFF'S TRIAL LAWYER I CAN TELL YOU WITH A LOT OF EXPERIENCE, THERE IS AN ECONOMIC DISINCENTIVE TO TAKING FOOLISH DEPOSITIONS FROM THE PLAINTIFF'S STANDPOINT. THERE'S CERTAINLY AN ECONOMIC DISINCENTIVE TO TAKE FOUR HOURS DEPOSITIONS WHEN A ONE HOUR DEPOSITION WILL DO. ONE OF ECONOMIC DISINCENTIVES IS YOU'LL HAVE TO GO TO THE PLAF AND HERE'S THE OFFER, HERE'S THE FEE AND HERE'S THE COSTS. YOU'LL HAVE TO ANSWER WHAT HAPPENS TO THOSE COSTS. YOU HAVE TO PAY THEM BACK. WHY DID YOU SPEND THAT MUCH? THAT'S REDUCED WHAT I CAN GET. SO THERE IS AN ECONOMIC INCENTIVE FOR THE LAWYERS TO KEEP COSTS LOWER PLUS THE FACT THEY ADVANCE THE COSTS. WHAT HAPPENS IF YOU NOW SHIFT IT SO THAT NO MATTER HOW MUCH MONEY I SPEND IN A GOOD CASE, I GET IT ALL BACK. I WANT TO TELL YOU ONE THING I'M GOING TO DO, I'M GOING TO HIRE AN AWFUL LOT MORE EXPERTS. IF THE COURT IS FAMILIAR WITH THE FACT THE JURY INSTRUCTION COMMITTEE IS STRUGGLING OVER THIS WHOLE ISSUE OF WHAT IS EVIDENCE AND WHAT IS MARKETING BY AN EXPERT WHO WANTS TO PUT ON A BIG PRODUCTION, IF THESE GUIDELINES ARE PASSED I'M GOING TO SPEND A LOT OF MONEY ON MARKETING MY CASES BECAUSE I'M GOING TO GET THE MONEY BACK FROM THE DEFENDANT. AND I'M NOT SURE, BECAUSE UNFORTUNATELY INSURANCE POLICIES CHANGE. IN SOME CASE I'LL GET THAT MONEY FROM THE INSURANCE COMPANY EVEN THOUGH IT GOES OVER THEIR COVERAGE. IN SOME CASE I'M NOT BECAUSE IT DOESN'T COVER COSTS. SO THERE ARE IN RESPONSE, YOUR HONOR, THOSE ARE THE THINGS THEY SHOULD HAVE TOUCHED ON. THINGS THAT HAVE IN FACT BEEN AFFECTED. THERE SHOULD BE SOME SUPPORT FOR THAT. NOT JUST BECAUSE RESPECTFULLY LAWYERS LIKE ME WHO HAVE A POSITION AND SOME DEFENSE LAWYERS BUT THIS OUGHT TO COME FROM THE CIRCUIT JUDGES GROUP WHO SAY WE WE'VE GOT THIS PROBLEM. THIS IS WHERE WE'RE FACED WITH IT. THERE IS AN INJUSTICE OCCURRING. AND AS FAR AS I CAN TELL, THIS HAS NEVER EVEN BEEN SUBMITTED TO THE CIRCUIT JUDGES CONFERENCE. IT CERTAINLY WAS NOT CONSIDERED BY THE FLORIDA BAR. IN THOSE TYPES SAFETY PRECAUTIONS, CONSIDERATION BY THE FLORIDA BAR, CONSIDERATION BY THE JUDICIAL CONFERENCE, CONSIDERATION BY THE PLAINTIFF'S TRIAL LAWYERS AND THE DEFENSE TRIAL LAWYERS, CONSIDERATION BY THOSE PEOPLE ARE IMPORTANT SAFEGUARDS THAT HAVEN'T BEEN FOLLOWED IN THIS CASE. AND WHEN I SEE THAT THEY LIST IN HERE AS THE THINGS THEY HAVEN'T HAD A CHANCE TO SEND IT TO THE DRAFTING COMMITTEE, THAT THEY INCLUDE PROVISIONS THEY REALIZE ARE A MISTAKE, THERE'S SOME POLISHING REQUIRED, THAT THERE'S ONE PROBLEM WE HAVE TO ADD TO BUT WE DON'T SUGGEST WHERE IT IS I SAY THIS HAS NOT, WHEN IT HAS SUCH A DRAMATIC EFFECT UPON THE PRACTICE, IT HAS NOT HAD THE SCRUTINY AND CAREFUL CARRY IT REQUIRES.

DO YOU HAVE ANY UNDERSTANDING AS TO WHY THERE ISN'T MORE OPPOSITION RIGHT NOW? AS YOU JUST SAID YOU'RE HERE BY YOURSELF. IS PUBLISHING IT IN THE FLORIDA BAR NEWS SOMETHING THAT REALLY ONLY FEW ATTORNEYS LOOK TO? AND THAT'S NOT REALLY A VERY GOOD WAY FOR US TO ENGENDER INTEREST IN THE BAR AND THE JUDGES?

I HAVE NO EMPIRICAL EVIDENCE OF HOW MUCH RESPONSE YOU GET FROM PUBLICATIONS IN THE FLORIDA BAR BUT I KNOW THEY GO ON FOR PAGES AND PAGES AND PAGES. AND I SUSPECT ALTHOUGH I DON'T KNOW, I'LL TAKE IT BACK, I SERVE ON THE CIVIL JURY INSTRUCTION COMMITTEE AND THE RESPONSE TO THOSE INSTRUCTIONS ARE VERY, VERY, VERY MINIMAL. I SUSPECT A LOT OF PEOPLE THAT GO RIGHT BY THEM AND DON'T REALIZE THOUSAND THEY'RE AFFECTING. I ASSUME YOU KNOW MR. TRAWICK HAD A DEATH IN THE FAMILY AND COULD NOT SHOW UP BUT HE AUTHORIZED ME TO SAY HE AGRID WITH MY BRIEF. I SAID I WASN'T SURE IT WOULD BE HELPFUL WITH THIS COURT BUT IF IT IS PLEASE CONSIDER THE FACT MR. TRAWICK SAID IT WOULD BE HELPFUL.

WHAT DO YOU SEE AS THE MOST SIGNIFICANT IMPACT OR THE IMPACT ON THE STREET, IF YOU WILL, OF THESE PROVISIONS WITH REGARD TO DEMONSTRATIVE AIDS, THE TRAVEL TIME FOR THE LAWYERS, THE ADDITIONAL COPIES AND THE EXPENSES FOR THOSE COPIES? WHAT'S GOING TO BE THE IMPACT ON THE STREET WE'LL SEE IN THE LAW FIRMS ACROSS THE STATE?

FOR THE PLAINTIFF'S LAWYERS WROTE CAN FINANCE IT -- BY THE WAY, THAT INVOLVES ALSO THE QUESTION OF COMPETITION BETWEEN PLAINTIFF'S LAWYERS -- BUT FOR PLAINTIFF'S LAWYERS WROTE CAN FINANCE IT WHO HAS A GOOD CASE THEY'LL SPEND EVERYTHING THEY CAN BECAUSE THEY CAN LEGITIMATELY TELL THEIR CLIENT THEY'RE GOING TO GET THE MONEY BACK. I'VE HAD THE PLEASURE OF DEALING WITH A GROUP OF LAWYERS IN GREAT BRITAIN, AND THE ENTIRE ISSUE OF COSTS WHERE THERE THEY'RE ENTITLED TO GET FULL COSTS, SUBJECT TO COURT APPROVAL, FULL COSTS AND ATTORNEYS FEES, THE WHOLE ISSUE OF ATTORNEYS FEES AND COSTS BECOMES ALL WRAPPED UP IN THE NEGOTIATION AND AT LEAST FROM THE STANDPOINT OF MANY PLAINTIFFS LAWYERS OVER THERE PRESENT A CIRCUMSTANCE IN WHICH THE PLAINTIFF'S LAWYERS THEMSELVES HAVE A CONFLICT OF INTEREST WITH THEIR CLIENTS.

WHAT ABOUT THE PHILOSOPHY THAT THE PREVAILING PLAINTIFF SHOULD BE MADE WHOLE? AND COULDN'T A PROTECTIVE ORDER BE THE VEHICLE FOR AVOIDING THESE EXCESSIVE COSTS THAT WE'RE DISCUSSING AND WE'RE CONCERNED ABOUT?

INSUFFICIENT THINK OLD THAT I REMEMBER WHEN WE WERE STILL GOING OVER FOR PROTECTIVE ORDERS ON WHETHER OR NOT A DISCOVERY DEPOSITION WAS GOING TO BE REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE. AFTER A JUDGE SAYS YOU'VE COME UP WITH SOME STRANGE THING THAT MAYBE THIS INVOLVED, WE TAKE DEPOSITIONS. WE DON'T GO TO THAT ANY MORE. I THINK THERE SHOULD BE AT LEAST SOME PHILOSOPHY OF THIS COURT TO NOT ADOPT A RULE THAT INVITES MORE PARTICIPATION BY JUDGES AT AN EARLY STAGE IN THE CASE. INSTEAD LETTING THEM RESOLVE IT AFTER THE CASE IS OVER WHEN THE MATTER HAS BEEN CONCLUDED. SO I DON'T BELIEVE PROTECTIVE ORDERS ARE NECESSARILY GOING TO WORK, BECAUSE IF I SAY JUDGE, I'VE JUST GOT TO. THE JURY'S GOT TO SEE MY EXPERT, AND I'VE GOT TO REVIEW THE FILE. I'VE GOT TO GO OUT TO CALIFORNIA AND SEE HIM AND THE JURY IS ENTITLED TO SEE HIM ON STAND, I CAN'T DO THAT -- AND IT WOULD BE A CONVINCING ARGUMENT AND A TRUE ARGUMENT. AND THEN ONCE I TAKE THE DEPOSITION, THE DEFENDANT, THE LOSER, NOT NECESSARILY THE DEFENDANT, MIGHT BE THE PLAINTIFF, THE LOSER HAS THE BURDEN OF SHOWING THAT WHAT WAS IN MY MIND, ABOUT WHETHER I NEEDED THIS, WAS WRONG. SO IT'S THE COMBINATION OF ALLOWING THE COSTS --

ALTHOUGH YOU WOULD HAVE TO AGREE THAT THERE IS, SINCE THOSE DAYS WHEN YOU COULDN'T TAKE AN EXPERT'S DEPOSITION WITHOUT MAKING SOME TYPE OF SHOWING, THAT WE'VE HAD A TREMENDOUS EXPLOSION OF COSTS IN LITIGATION.

YES, SIR.

SOMEHOW, WE HAVE GOT TO DEAL WITH THAT.

THAT'S RIGHT, SIR. AND THERE'S NOT ONE DISINCENTIVE TO SPENDING MONEY IN THESE RULES. NOT A SINGLE DISINCENTIVE AND EVERY MOVE IN THESE RULES --

SHOULD THAT BE SOMETHING THAT THIS COURT AND THE FLORIDA BAR IS CONCERNED ABOUT?

I CERTAINLY HOPE THE FLORIDA BAR IS CONCERNED, BECAUSE I'LL TELL YOU, THE PRESS, THE PUBLIC IN GENERAL IS CONCERNED ABOUT THE COST OF LITIGATION. I HOPE THE COURT DID NOT TAKE OFFENSE BY MY INCLUDING A JOKE IN MY THING BUT THAT WAS IN THE NEWSPAPER THE DAY I GOT THIS. I THOUGHT THERE'S WHAT THE PUBLIC SEES. LAWYERS GET PAID BY HOW MUCH MONEY THEY CAN SPEND. HOW MANY DEPOSITIONS IN THE PARTICULAR CASE IS THE JOKE INVOLVED IN THE BRIEF. I THINK THEY SHOULD BE. I THINK THAT THE INSTRUCTION -- THAT WAS MY INITIAL COMMENT, I DO NOT KNOW WHAT THE ORIGINAL INSTRUCTIONS WERE. BUT IF THE ORIGINAL INSTRUCTIONS INFORMALLY OR FORMALLY PASSED ON FROM THIS COURT -- I TRIED TO FIND THE RECORD -- IF THERE ARE INSTRUCTIONS THEY SHOULD BE, SEE WHAT YOU CAN DO TO DEVELOP RULES THAT ARE FAIR BUT THAT ALSO ARE AN INCENTIVE NOT TO SPEND MONEY. JUST TO SHOW YOU, I WOULD COMMENT ONE THING ABOUT FULL COMPENSATION. THERE IS A PHILOSOPHY IN SOME COUNTRIES, A LOT OF COUNTRIES, THAT THERE SHOULD BE FULL COMPENSATION. AND IN EFFECT THAT THE PLAINTIFFS SHOULD GET THEIR ATTORNEYS FEES. THERE ARE STATUTORY PROVISIONS WHICH PROVIDE THAT. THAT IN SOME CIRCUMSTANCES, THE LEGISLATURE TARS DECIDED THE POLICY THAT NOT ONLY SHOULD THE PLAINTIFF, THE RECOVERING PARTY, GET PAID THEIR COSTS BUT THEY SHOULD ALSO GET THEIR ATTORNEYS FEES. THAT IS A MATTER OF SUBSTANTIVE LAW. I THINK IF YOU START ALLOWING FULL COMPENSATION, WHY DON'T WE LET THEM GET THEIR ATTORNEYS FEES TOO? I DON'T THINK IT'S A GOOD POLICY. I THINK THE AMERICAN RULE AS STATED IS A GOOD RULE BUT THAT'S AN ARGUMENT FOR A DIFFERENT DAY. IT'S NOT AN ARGUMENT THAT SHOULD BE EFFECTIVELY PASSED ON AS TO COSTS BASED UPON A SUBCOMMITTEE REPORT THAT DIDN'T GO TO THE FLORIDA BAR, DIDN'T GO TO THE JUDGES, AND VERY FRANKLY, THAT WITH YOUR BUSY SCHEDULE I'M NOT SURE YOU HAVE THE TIME TO CONSIDER AND I HAVEN'T BRIEFED NOR HAVE THE DEFENDANTS BRIEFED THE ENTIRE ISSUE OF THE SUBSTANTIVE EFFECT OF PASSING A RULE THAT SAYS THAT CERTAIN COSTS WILL BE DONE. I DO HAVE A COMMENT FURTHER, AND ONE FURTHER COMMENT ON THAT PARTICULAR ISSUE. THAT HAS TO DO WITH THE IDEA OF THE JUDGE MAY AWARD COSTS. THERE ARE NO GUIDELINES AS TO WHEN THE JUDGE MAY AWARD THOSE COSTS AND MAY NOT. NOW, IF THIS IS INTENDED REALLY TO BE GUIDELINES, THEY SHOULD OFFER SOME GUIDELINES TO THE JUDGES AS TO WHEN THEY DO OR DON'T AWARD THOSE COSTS. AND SOME OF THE COSTS WHICH JUST ARE UNDER THE RUBE RICK "MAY AWARD" ARE HUGE COSTS AS THEY -- SOMEBODY ASKED ABOUT FEDERAL COURT. I'M SURE YOU KNOW IN THE FEDERAL COURTH IT'S A RARE CIRCUMSTANCE THAT A WINNING PLAINTIFF CAN GET THE COST OF EXPERTS. I DON'T LIKE THAT IDEA. I'D LIKE TO BE ABLE TO GET MY COSTS OF EXPERTS. BUT MY ENTIRE CASE IS MANAGED WITH MY CLIENT'S PERMISSION AND CONSULTATION ON THE CONCEPT THAT IF WE SPEND THIS MONEY, IT'S LOST TO YOU OUT OF YOUR NET RECOVERY IF WE WIN. I JUST RESERVE JUST A COUPLE MINUTES HERE IF I CAN TO COMMENT UPON THAT PROBLEM OF THE FABRE ISSUE BUT JUSTICEY NOTED THAT THERE MAY BE A SITUATION IN THIS SITUATION WHERE A PLAINTIFF AND I HAD A CASE LIKE THIS IN WHICH TWO CARS RAN TOGETHER AND THEY WERE ARGUING ABOUT WHICH ONE HAD THE RED LIGHT SO I OBVIOUSLY HAD TO SUE THEM BOTH AND ONE WAS DESTINNED TO WIN AND ONE WAS DESTINED TO LOSE. IF THESE RULES HAD BEEN IN EFFECT MY PLAINTIFF WOULD HAVE WON. AND THIS WAS NOT MASSIVE CASE YOU'RE TALKING ABOUT. IT WAS THE \$30,000 CASE. MY PLAINTIFF WOULD HAVE WON. BUT BY HAVING TO PAY THE COSTS OF THE DEFENSE, INCLUDING THESE HUGE COSTS, WOULD PROBABLY HAVE GOTTEN NEARLY NOTHING ONCE ATTORNEYS FEES, COSTS, THE EVER PRESENT LIENS AND THINGS WERE DONE. THAT IS AN UNINTENDED CIRCUMSTANCE. I'M CERTAIN EVERYONE HERE AND I SUSPECT THE MEMBERS OF THIS COMMITTEE AND SUBCOMMITTEE WOULD SAY WE DIDN'T MEAN THAT TO HAPPEN BUT THIS DOES NOT REFLECT THAT UNDERSTANDING. THAT IS IN THE SITUATION IN WHICH BOTH PARTIES ARE THERE. I HOPE THE COURT ALSO CONSIDERS THE PROBLEMS IF YOUR IDEA IS TO CHANGE THE LAW, THEN I HOPE YOU CONSIDER THE PROBLEM RAISED BY FABRES. I

RAISED THE PROBLEMS. IT IS A PROBLEM. THE PLAINTIFF, THE PLAINTIFF'S LAWYER FACING MALPRACTICE, HAS TO DECIDE, DO I SUE THIS DEFENDANT WHO THIS DEFENDANT SAYS IS AT FAULT, DO I SUE THIS OUTSIDE PARTY BECAUSE THIS DEFENDANT SAYS THEY'RE AT FAULT? THE JURY MAY FIND 10%. THEREFORE, SO MY CLIENT DOESN'T SAY I LOST 10% OF MY RECOVERY I SUE THEM. I REALIZE THERE'S A GREAT CHANCE THE JURY WILL FIND NO RESPONSIBILITY AND YET, I'VE GOT TO TELL MY CLIENT, YOU'RE GOING TO HAVE TO PAY ALL OF THEIR COSTS OF DISCOVERY. THE UNINTENDED CONSEQUENCES INCLUDE CIRCUMSTANCES WHICH I'VE HAD PERSONAL EFFECTS IN WHICH THE OTHER DEFENDANT IS INSURED BY THE SAME COMPANY BUT A DIFFERENT SUBSIDIARY OF THE SAME COMPANY. THE UNINTEND EFFECTS OF THIS HAVE NOT BEEN STUDIED IN MY JUDGMENT. I HAVE TRIED TO TOUCH ON THESE IN MY BRIEF. AND I HOPE YOU HAD A CHANCE TO READ IT WHEN I CHANGE THE ERRORS. BUT PERHAPS I OUGHT TO RESOLVE THE REST BY ASKING IF YOU HAVE ANY QUESTIONS. BECAUSE THERE IS A BASIC BEGINNING PHILOSOPHY: DO YOU INTEND TO DRAMATICALLY CHANGE THE LAW, A? B, IF YOU DO DRAMATICALLY -- DECIDE IT SHOULD BE CHANGED TO ADD THESE ADDITIONAL COSTS, HOW MUCH OF THAT IS SUBSTANTIVE, LAW-MAKE AND HOW MUCH IS PROCEDURAL? TO THE EXTENT IT'S PROCEDURAL SHOULD NOT THIS HAVE INPUT FROM THE PEOPLE MOST DRAMATICALLY EFFECTED, THE CIRCUIT JUDGES AND SHOULD IT NOT HAVE THE SCRUTINY OF THE FLORIDA BAR AND BE PRESENTED WITH ADVERSARIES SUCH AS THE ACADEMY OF TRIAL LAWYERS AND THE DEFENSE LAWYERS ASSOCIATION SITTING HERE INSTEAD OF ONE LAWYER WHO HAPPENED TO FIND THE TIME TO READ IT AND COMPULSIVE I AM AT 67 HAVE THE TIME TO WRITE THE LETTER.

IF WE ADOPT YOUR POSITION, WHAT WOULD BE THE INCENTIVE FOR A LAWYER TO TAKE AN UNPOPULAR CASE? ISN'T THAT ONE OF THE MOTIVATIONS?

ONE ROLE THAT A PLAINTIFF'S CONTINGENT-FEE LAWYER. AND I MUST SAY JUSTICE SHAW, THE TERM POPULAR CASE BRINGS UP ALL KINDS OF THOUGHTS. THERE ARE A NUMBER OF UNPOPULAR CASE THAT THE LEGISLATURE DECIDES I GET ATTORNEYS FEES. SO THAT'S BEEN DECIDED SUB STAN TIFL AND I GET MY COSTS. SO THOSE KIND OF UNPOPULAR CASE. I THINK LAWYERS TAKE CRIMINAL CASES FOR VARIOUS REASONS BUT THIS IS NOT AFFECTED. THIS IS IN THE CIVIL CASE SITUATION IN WHICH THERE IS NO LEGISLATION OR AT LEAST THE GUIDELINES DON'T SPEAK TO THAT LEGISLATION IN WHICH THE PLAINTIFF'S LAWYER HAS TO DECIDE DO I TAKE THIS CASE? I THINK PLAINTIFF'S LAWYERS SERVE A VALUABLE SCREENING DEVICE FOR THE COURT SYSTEM. THEY PROVIDE A MEANS IN WHICH I CAN LOOK AT IT AND I SAY, YOU REALLY DON'T HAVE A CASE. OR YOUR CHANCE OF WINNING ARE ONE IN 100. AND THEREFORE, I'M NOT GOING TO TAKE THE CASE. AND I THINK THAT'S A VALUABLE SCREENING CASE. IT IS TRUE TO THAT INDIVIDUAL PLAINTIFF, THAT INDIVIDUAL PLAINTIFF MAY NOT BE ABLE TO FIND A LAWYER. UNFORTUNATELY TODAY'S ADVERTISING MARKET NOT MANY PEOPLE SAY THEY CAN'T FIND SOMEBODY TO REPRESENT THEM. BUT BY THE WAY, THAT ENTIRE EFFECT IS NOT ADDED TO BY LAWYERS TAKING CASES AND TRYING TO SETTLE THEM AT DIFFERENT VALUES. THAT'S AN ENTIRELY DIFFERENT SUBJECTBY I WAS CONCERNED ABOUT YOUR REFERENCE TO UNPOPULAR CASES. PLAINTIFF'S LAWYERS, I STAND IN THAT POSITION ONLY HERE TODAY, DON'T TAKE UNPOPULAR CASES BECAUSE THEY'RE PROBABLY GOING TO BE LOST. THEY'RE LIKELY GOING TO BE LOST AND THE JUDICIAL SYSTEM SHOULD NOT PUT A POSITION THAT ALLOWS PEOPLE TO FLOOD THEM WITH UNPOPULAR CASES BY SAYING WELL, IF I WIN, YOU GET ALL THIS MONEY BACK.

MR. WAGNER, WOULD YOU ADDRESS THE PHILOSOPHY THAT SEEMS TO BE THE BASIS FOR THE SHIFTING OF THE PRESUMPTION WITH REGARD TO COSTS? IT SEEMS AS THOUGH THAT WE FIRST STARTED DOING THIS SOME YEARS AGO. WE DIDN'T HAVE THE SAME BATTLES THAT WE'RE HAVING TODAY WITH REGARD TO THESE COST ISSUES THAT THE COSTS THEMSELVES BECOME AY TRIAL. AFTER THE TRIAL IS ALREADY OVER, YOU HAVE WITNESSES COME IN TO TALK ABOUT IS THAT A REASONABLE COST OR IS IT NOT? IS THERE NOT SOME VALIDITY TO AT LEAST ESTABLISHING SOME KIND OF PRESUMPTIVE BOUNDARIES WITHIN THE DISCRETION OF THE TRIAL JUDGE WHO SEES THESE COSTS ON A DAILY BASIS TO TRY TO GET AWAY FROM A TRIAL AFTER A TRIAL KIND OF ATMOSPHERE? OR IS THAT A BAD POLICY?

I THINK IT'S PROBABLY A GOOD POLICY BUT I'M NOT SURE THIS DOES IT. THIS JUST MAKES THE TRIAL ON A DIFFERENT ISSUE. THE PRESUMPTIVE ACCURACY OF THE COSTS INVOLVE AND I HAVE BY THE WAY PENDING IN MY OFFICE NOW A MOTION FOR COSTS INVOLVING ALLEGING THIS RULE WITHOUT REALIZING IT WAS STILL PENDING BEFORE THE COURT. AND IT'S A LIST OF EVERY SINGLE DOLLAR THAT WAS SPENT, EVERY PHONE CALL, EVERYTHING LIKE THIS. AND IT'S SIGNED BY A LAWYER. NOT EVEN AN AFFIDAVIT THAT THEY REALLY SPENT IT BUT HE'S A GOOD, QUALIFIED LAWYER. I ASSUME THEY DID SPEND IT. HOW IN THE WORLD COULD I AGREE TO THAT IN THE FIRST PLACE WITHOUT IN FACT TESTING IT? AND PARTICULARLY I'D HAVE TO TEST IT IF THE PRE-PRESUMPTION THAT THE BOTTOM LINE COSTS WILL BE AGAINST MY CLIENT WHO MAY HAVE SOME ASSETS. I'M GOING TO HAVE TO TAKE DEPOSITIONS TO FIND OUT WHETHER -- FIRST I'M GOING TO GET HIS ACCOUNTANT TO SAY THEY SPENT IT. I HAVE TO FIND OUT WHETHER OR NOT REALLY FOUR CONFERENCES WITH AN EXPERT WITNESS N. THIS CASE I THINK FOUR CONFERENCES WERE JUSTIFIED BECAUSE IT WAS A COMPLICATED MEDICAL MALPRACTICE CASE --

MR. WAGNER.

I'M SORRY, SIR.

YOUR TIME IS UP. THE COURT WILL TAKE JUDICIAL NOTICE THAT YOU WERE COMPULSIVE AT AGE 27 AS WELL AS 67. [ LAUGHTER ] MR. JONES?

THANK YOU. JUST THREE ITEMS IN REBUTTAL. I BELIEVE THAT THE INTENT OF THE COMMITTEE IN SUBMITTING THESE GUIDELINES WERE TO MAKE THE PREVAILING PARTY WHOLE IN ANY SORT OF LITIGATION. TO IN ESSENCE LEVEL THE PLAGUE FIELD. I THINK THAT CAN GO TO SOME EXTENT TO THE LITIGANT THAT MAY HAVE A GOOD CAUSE OF ACTION, BUT THE COST OF THE LITIGATION MAY EXCEED THE VALUE OF THAT CASE. AND THIS IS A SCENARIO WHERE HE COULD BE ABLE TO PURSUE THAT AND BE MADE WHOLE. AND THEN, THREE, I THINK THAT THERE ARE SOME SAFEGUARDS BUILT INTO THE GUIDELINES. ONE IS THERE'S THE PROVISION THAT ALLOWS THE DISCRETIONARY COSTS, BUT MORE OVER THERE'S PROVISIONS THAT MAKE THOSE COSTS HAVE TO BE REASONABLE. I JUST THINK THAT PROVIDES SUFFICIENT SAFEGUARDS.

ARE YOU CONCERNED WITH THE IDEA THAT AS TO THOSE DISCRETIONARY MAY COSTS THERE ARE NO GUIDELINES AS MR. WAGNER SAID AND WE THEREFORE HAVE A DISCRETION AND FOR THOSE COSTS IN THAT CATEGORY, ONE JUDGE COULD SAY NO, THE OTHER YES? AND THERE'S REALLY NO WAY TO EVALUATE REASONABLENESS OF WHAT THAT JUDGE DID? AND WE'RE JUST NOW ADDING ON A WHOLE OTHER LAYER OF LITIGATION?

TO SOME EXTENT THAT DOES RAISE SOME CONCERN THAT THERE IS NO STANDARD BUT THERE IS NO STANDARD WITH THE COST GUIDELINES THAT WE PRESENTLY HAVE EITHER. SO I DON'T KNOW -- WE MAY NOT HAVE SOLVED THE PROBLEM. WE MAY BE WORK TOWARDS THE SOLUTION.

THANK YOU.

THANK YOU.

THANK YOU AND THE COMMITTEE AND EACH COUNSEL FOR YOUR CONTRIBUTIONS ON THIS SUBJECT. AND THE COURT WILL TAKE THE MATTER UNDER ADVISEMENT.