

NATIONAL ASSOCIATION OF SECURITIES DEALERS

ARBITRATION IN RE:

ARTHUR H. WEYRAUCH, MARY T.)

WEYRAUCH MARY T. WEYRAUCH)

TTEE, et al.,)

Claimants,)

v.)

Case No. 05-02267

MERRILL LYNCH; PIERCE,)

FENNER & SMITH, INC.,)

Respondents.)

PANEL MEMBERS:

Philip C. Bennett, CPA, Chairperson

John W. Platt, Industry Arbitrator

Marc Gertner, Public Arbitrator

TRANSCRIPT OF PROCEEDINGS

June 14, 2006

Tampa, Florida

8:57 a.m.

Reported by: Melanie L. Giamarco CSR/RPR/RMR/CRR

Job #: 7549

1 Direct Examination - George C. Pratt
 2 you'd like to call this witness?
 3 MR. LIPNER: Sure. We'd call George
 4 Pratt as our next witness.
 5 CHAIRMAN BENNET: Mr. Pratt, if I may
 6 swear you in, please?
 7 GEORGE C. PRATT, after having been duly
 8 sworn, was examined and testified as follows:
 9 CHAIRMAN BENNET: Thank you, sir. Would
 10 you give us your name and address for the record,
 11 please?
 12 THE WITNESS: George C. Pratt, care of
 13 Farrell Fritz, 1320 Reckson Plaza, Uniondale, New
 14 York, 11556.
 15 CHAIRMAN BENNET: Thank you, sir.
 16 DIRECT EXAMINATION
 17 BY MR. LIPNER:
 18 **Q. Farrell Fritz is a law firm?**
 19 A. Yes.
 20 **Q. How long have you been affiliated with**
 21 **Farrell Fritz?**
 22 A. In my current stint, since 19 -- since
 23 2001.
 24 **Q. And if we --**
 25 A. Before that I, founded the firm back
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1 Direct Examination - George C. Pratt
 2 before I went on the bench.
 3 **Q. Okay. Let's go back even further than**
 4 **that. Would you describe for the Panel your**
 5 **education, please, briefly?**
 6 A. Undergraduate degree from Yale 1950, law
 7 degree 1953.
 8 **Q. What did you do after you graduated from**
 9 **law school?**
 10 A. I clerked for Judge Charles Froessel,
 11 New York State Court of Appeals, for two years.
 12 **Q. The New York State Court of Appeals is**
 13 **the highest court in the State of New York?**
 14 A. Yes.
 15 **Q. And after clerking for Judge Froessel,**
 16 **what did you do next?**
 17 A. I went with the firm of Sprague & Stern
 18 in 1955 as an associate, became a partner, left them
 19 in 1960 and formed my own firm, and that firm
 20 eventually evolved into what is now known as Farrell
 21 Fritz today. I practiced law with them for 20 years,
 22 and then went on the Federal District Court for the
 23 Eastern District of New York.
 24 **Q. Okay. I just want to ask you what kinds**
 25 **of matters and what the nature of your practice was**
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1 **Direct Examination - George C. Pratt**
 2 **in your first stint at Farrell Fritz.**
 3 A. Well, we were a suburban law firm, did a
 4 lot of things related to real estate. My work was
 5 largely in condemnation, real estate tax assessment
 6 and municipal law. We represented, I think, six or
 7 seven villages on Long Island.
 8 **Q. You testified you were appointed to the**
 9 **federal bench in 1980 --**
 10 A. 1976.
 11 **Q. 1976. And how long did you sit on the**
 12 **Federal District Court?**
 13 A. Six years.
 14 **Q. About how many cases did you hear during**
 15 **that time?**
 16 A. Oh, gosh. I tried to be on the bench
 17 all the time. In terms of numbers of cases, we got,
 18 oh, probably, in those days, three to five hundred a
 19 year, but most of them did not actually go to trial.
 20 **Q. I understand. And did there come a time**
 21 **when you were elevated to the second circuit court of**
 22 **appeals?**
 23 A. Yes.
 24 **Q. When was that?**
 25 A. 1982.
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1 Direct Examination - George C. Pratt
 2 **Q. And you were an associate justice in the**
 3 **second circuit court of appeals?**
 4 A. I was a judge of the --
 5 **Q. Judge, oh, I'm sorry. I should know**
 6 **that.**
 7 A. -- United States Court of Appeals for
 8 the second circuit.
 9 **Q. And how long were you a judge for the**
 10 **court of appeals on the second circuit?**
 11 A. Thirteen years.
 12 **Q. And there came a time when you retired**
 13 **from the judiciary?**
 14 A. Yes.
 15 **Q. When was that?**
 16 A. January 31st, 1995.
 17 **Q. And what did you do when you retired?**
 18 A. I became a full-time law professor at
 19 Touro Law Center in Huntington. And doing that, as I
 20 told my colleagues, that's a half-time job for
 21 somebody used to a federal judge's schedule. I got
 22 solicited to do arbitration work. And I eventually,
 23 after ten years, I gave up law professoring and done
 24 virtually full-time work as an arbitrator.
 25 Occasionally I testify as an expert witness and do
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1 Direct Examination - George C. Pratt
 2 some other consulting work.
 3 **Q. What courses did you teach at Touro Law**
 4 **School?**
 5 A. The main course was civil procedure.
 6 **Q. State? Federal?**
 7 A. I beg your pardon?
 8 **Q. It's a state procedure course or a**
 9 **federal procedure course?**
 10 A. We work basically on the federal rules.
 11 But I tried to point out significant differences and
 12 parallels and so forth. Each semester, you had to
 13 teach another course, and I varied there, sometimes
 14 federal courts, class actions, civil rights
 15 litigation, taught some seminars for interns in the
 16 U.S. attorney's office.
 17 **Q. And you said you rejoined Farrell Fritz**
 18 **in 2001?**
 19 A. Yes.
 20 **Q. And been there continually ever since?**
 21 A. Correct.
 22 **Q. Do you have a title at the firm?**
 23 A. Special counsel, whatever that means.
 24 **Q. In addition to your employment, have you**
 25 **had any other involvement with either the creation,**

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1 **Direct Examination - George C. Pratt**
 2 **formulation or modification of procedural rules in**
 3 **New York and/or the federal system?**
 4 A. Yes. Both. In 1964, I believe it was,
 5 I was approached by the presiding justice of the
 6 Supreme Court, second department, Judge Krist [ph],
 7 who asked me to be the second department's
 8 representative on the -- what was called the
 9 committee to advise and consult with the judicial
 10 conference on the civil practice law in rules. They
 11 had just been enacted, they knew there were a lot of
 12 bugs in them, and the initial function of the
 13 committee was to really work out the bugs, largely
 14 drafting problems and so forth and consistency.
 15 But it was intended and has continued as
 16 a long-term committee which studies various aspects
 17 of the rules and makes recommendations to the
 18 judicial conference for changes in the rules, and
 19 reviews any proposed changes that come up. I served
 20 on that committee until I went on the federal bench.
 21 And then the last seven years I was on
 22 the federal bench, I was a member of the standing
 23 committee on the rules of procedure, which is the
 24 group that reports to the judicial conference of the
 25 United States on any proposed changes in the federal

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1 Direct Examination - George C. Pratt
 2 rules of civil procedure, criminal, bankruptcy and
 3 appellate.
 4 **Q. I show you a copy of a document and ask**
 5 **you if you can identify it.**
 6 A. Oh, this is my biography as Farrell
 7 Fritz puts it out.
 8 **Q. Is it a summary of the testimony that**
 9 **you just gave?**
 10 A. Not a complete summary, but it is
 11 accurate.
 12 MR. LIPNER: I want to offer this
 13 document as -- do we have a number or should we start
 14 in the 10,000 series?
 15 CHAIRMAN BENNET: Well, the thousand
 16 series is the respondent's numbering system.
 17 MR. LIPNER: That's taken. That's why I
 18 said the 10,000 series. I was joking.
 19 MR. STERN: Leave me enough room.
 20 MR. LIPNER: I'm trying to set a record.
 21 CHAIRMAN BENNET: I think the next
 22 number for the claimants is 781. 781's not used.
 23 I'm sorry, number 789.
 24 MR. LIPNER: That's an even better
 25 number.

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1 Direct Examination - George C. Pratt
 2 CHAIRMAN BENNET: Mr. Stern?
 3 MR. STERN: Mr. Bennett, as you know,
 4 I've objected to this witness testifying, and I do
 5 object to all of the exhibits that will be shown to
 6 this witness, but if it's all right with the Panel, I
 7 would ask that there be -- I assume the Panel is
 8 going to allow the exhibits to be admitted, but I'd
 9 like my objection to be noted for the record.
 10 CHAIRMAN BENNET: Well, the other option
 11 is to defer accepting any of the exhibits until after
 12 you've had a chance to question the witness, as well.
 13 MR. STERN: Whatever the Panel's
 14 pleasure is, that's fine. My objection to the
 15 documents, in general, is based on relevance.
 16 MR. LIPNER: It's fine, Mr. Chairman.
 17 Why don't I mark them for identification and hand
 18 them up.
 19 CHAIRMAN BENNET: Sure. That's good
 20 enough.
 21 MR. LIPNER: And then I'll move them all
 22 in at the end, either one at a time or en masse.
 23 CHAIRMAN BENNET: That works. We'll
 24 mark this as 789 for information purposes.
 25 (Claimants' Exhibit 789 was marked for

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1 Direct Examination - George C. Pratt
2 identification.)

3 MR. LIPNER: At this time, I offer Judge
4 Pratt as an expert on civil procedure. Oh, I'm
5 sorry, I should have asked you one other question.

6 **Q. (By MR. LIPNER) Where are you admitted
7 to practice law?**

8 A. I beg your pardon?

9 **Q. Where are you admitted to practice law?**

10 A. Fourth Department of New York State.

11 CHAIRMAN BENNET: I'm sorry, and you're
12 looking to qualify him as an expert on civil
13 procedure?

14 MR. LIPNER: As an expert, civil
15 procedure, yes.

16 CHAIRMAN BENNET: All right. Very good.
17 Mr. Stern.

18 MR. STERN: And my objection to that,
19 Mr. Bennett, is again, it's a relevance objection. I
20 don't think that an expert on the law is appropriate
21 for this proceeding. I don't object to Mr. Pratt's
22 expertise in the area of law, I object to his
23 testifying here, so, just need to -- my objection can
24 be simply continuing on that basis in the record. I
25 don't need to keep saying it.

1 Direct Examination - George C. Pratt

2 CHAIRMAN BENNET: I understand. Okay.
3 Fair enough.

4 MR. LIPNER: Good.

5 **Q. (By MR. LIPNER) Judge Pratt, I've put
6 two books in front of you, one is marked 7A at the
7 bottom, the other is marked 7B. We'll put 7B aside
8 for a few minutes and we'll start at 7A. Mr. Platt,
9 and if I get the names mixed up, it's got nothing to
10 do with you, it's because there's a judge in the
11 eastern district named Platt, so it's a -- who I do
12 appear before.**

13 **If you would take the three books in the
14 corner, three, 7As, and hand them to each of the
15 arbitrator, I'd appreciate it.**

16 **And Judge Pratt, I draw your attention
17 to Exhibit A in the book in front of you and ask you
18 if you reviewed this document in preparation for your
19 testimony here today.**

20 A. I did. My A does not have the subpoena.

21 **Q. It's B.**

22 A. Oh, I think I saw the forwarding letter.

23 **Q. No fair leading the lawyer. The --
24 directing your attention to Exhibit B in this book.**

25 A. Yes.

1 Direct Examination - George C. Pratt

2 **Q. Is this a document you've seen before?**

3 A. Yes.

4 **Q. And turning -- directing your attention
5 to the second page, can you tell us who signed this
6 document, what his status was? I don't know if you
7 can read the name.**

8 A. I assume they are attorneys in the firm
9 of Sidley and Austin. I am not sure whose signature
10 it is.

11 **Q. Now, directing your attention to tab D
12 like "dog" -- "delta," "delta," is this a document
13 that you reviewed in preparation for your testimony
14 here today?**

15 A. Yes.

16 **Q. Would you read into the record the date
17 on this letter?**

18 A. May 18, 2006.

19 **Q. And if you just draw back for a second
20 to tab A, what was the date on the covering letter
21 and subpoena in tab B?**

22 A. The covering letter is May 17, 2006.
23 The subpoena is the same date.

24 **Q. There are statutes and cases and rules
25 cited in this letter; do you see that?**

1 **Direct Examination - George C. Pratt**

2 A. Yes.

3 **Q. Have you read each of the cases and
4 statutes and rules cited in this letter?**

5 A. I do not believe I've read the Tom sat,
6 but I have read the code provision. I did not read
7 the court of appeals citations beginning matter of
8 Terry.

9 **Q. Without regard to those two citations,
10 in reading this letter, did you find anything
11 inaccurate or wrong about the statement of the law in
12 this letter?**

13 A. No. I found it to be a fairly
14 straightforward presentation of the law that governs
15 subpoenas both in federal -- under the federal rules
16 and under New York State law.

17 **Q. Now, directing your attention to tab E
18 like "Edward," would you read into the record the
19 text -- well, first, what's the date of this letter?**

20 A. May 22, 2006.

21 **Q. And would you read into the record the
22 text of the letter?**

23 A. "Dear sir, in response to your letter to
24 me of May 18, 2006, we disagree with your
25 interpretation of the law governing subpoenas and

1 Direct Examination - George C. Pratt
 2 arbitration. In any event, your argument is moot
 3 because," small "i," "the subpoena called for
 4 documents to be produced for the hearing (thus the
 5 June 6, 2006 return date, for the convenience of the
 6 parties, the week before the hearing begins)," and
 7 small double "i," "responsive documents already have
 8 been produced by the subpoena recipient, copies of
 9 which are enclosed. Sincerely."

10 **Q. I direct your attention on that page to**
 11 **the statement, "We disagree with your interpretation**
 12 **of the law governing subpoenas and arbitration." In**
 13 **preparation for your testimony today, did you read**
 14 **cases and statutes relating to the law governing**
 15 **subpoenas and arbitration?**

16 A. Yes.

17 **Q. Do you have an opinion as to whether**
 18 **attorney-issued discovery subpoenas are permissible**
 19 **in arbitration?**

20 A. In any arbitration?

21 **Q. Well, let me correct that. Do you have**
 22 **an opinion whether, under federal law,**
 23 **attorney-issued subpoenas directed to third parties**
 24 **to produce documents are lawful in arbitration?**

25 A. Yes. I have an opinion.

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1 Direct Examination - George C. Pratt

2 **Q. And what is your opinion?**

3 A. My opinion is that they are not lawful
 4 or enforceable. Subpoenas in federal -- that are
 5 governed by the Federal Arbitration Act can be issued
 6 only by the arbitration panel or a member of the
 7 panel.

8 **Q. And do you have an opinion as to whether**
 9 **this arbitration is governed by the Federal**
 10 **Arbitration Act?**

11 A. Yes.

12 **Q. And what is your opinion?**

13 A. I believe that the -- it falls within
 14 the concept of affecting commerce, meaning interstate
 15 commerce. And under the applicable rules of both
 16 federal law and New York State law that affects
 17 commerce, it's -- the validity of the subpoena is
 18 covered by Section 7 of Title V, which is the Federal
 19 Arbitration Act, or part of it.

20 **Q. I draw your attention to book two. One**
 21 **second. No, no, no, strike that. I'm going to show**
 22 **you a copy of the Federal Arbitration Act, Section 7,**
 23 **and ask you if that's the statute to which you just**
 24 **referred (tendering document to the witness).**

25 A. Yes.

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1 Direct Examination - George C. Pratt

2 **Q. Would you read the first six lines or**
 3 **so, choosing an appropriate stopping point, into the**
 4 **record?**

5 A. "The arbitrators selected either as
 6 prescribed in this title or otherwise or a majority
 7 of them may assemble in writing any person to attend
 8 before them or any of them as a witness and in a
 9 proper case to bring with him or them any book,
 10 record, document or paper which may be deemed
 11 material as evidence in the case."

12 **Q. Under this statute, who under the**
 13 **Federal Arbitration Act is authorized to issue**
 14 **subpoenas to witnesses?**

15 A. The arbitrators or a majority of them.

16 **Q. Is there any provision in this statute**
 17 **that authorizes an attorney to issue a subpoena in**
 18 **arbitration?**

19 A. No.

20 **Q. Is there a case that you can cite to the**
 21 **Panel that stands for that proposition within the**
 22 **federal court system?**

23 A. Yes.

24 **Q. Do you have a copy of that case with**
 25 **you?**

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1 **Direct Examination - George C. Pratt**

2 A. The answer to the question is yes.

3 **Q. And which case is that?**

4 A. Let me be sure I get the right one.
 5 (Reviewing document.)

6 (Discussion held off the record.)

7 A. Well, one case is National Broadcasting
 8 against Bear Stearns.

9 **Q. And what court decided that case?**

10 A. That would be the second circuit court
 11 of appeals.

12 **Q. And I direct your attention to page four**
 13 **of the court's decision in that case.**

14 A. Yes.

15 **Q. I'll ask you to read into the record the**
 16 **first two sentences of the head note number two on**
 17 **the right-hand column.**

18 A. "The methods for obtaining evidence
 19 under Section 7 are more limited than those under
 20 section 1782 in two, and possibly, three ways:
 21 First, Section 7 explicitly confers authority only
 22 upon arbitrators, by necessary implication, the
 23 parties to an arbitration may not employ this
 24 provision to subpoena documents or witnesses."

25 **Q. Is there any question in your mind that**

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1 **Direct Examination - George C. Pratt**
2 **under federal law, the arbitrators have the power to**
3 **issue subpoenas, but the parties do not?**

4 A. No question whatsoever.

5 **Q. In your preparation for this testimony**
6 **today, did you read any federal appellate cases that**
7 **hold to the contrary?**

8 A. No.

9 **Q. Did you in your preparation for your**
10 **testimony here today read any Federal District Court**
11 **cases that stand for the same proposition?**

12 A. I'm sure I did.

13 **Q. I direct your attention in the 7B book**
14 **in front of you to tab J like "Jerry." Is this a**
15 **case that you read in preparation for your testimony**
16 **here today?**

17 A. Yes.

18 **Q. And what court decided this case?**

19 A. This is the U.S. District Court for the
20 Southern District of Florida.

21 **Q. And what date -- on what date was this**
22 **order filed with the clerk?**

23 A. It's stamped "Filed July 31, 2003."

24 **Q. I direct your attention to page four of**
25 **the Surratt case that you're looking at right now.**

1 **Direct Examination - George C. Pratt**
2 **And I'll ask you to read into the record the**
3 **paragraph on the bottom of four, the first full**
4 **paragraph on the page.**

5 A. "Respondent also argues that the
6 subpoena is proper under section 10322(a) of the NASD
7 Code of Arbitration procedure which provides that,
8 'The arbitrators and counsel of record to the
9 proceedings shall have the power of the subpoena
10 process as provided by law.' Section 10322(a) is not
11 an independent grant of power to attorneys in
12 arbitration proceedings; however, as it allows
13 counsel to issue subpoenas only 'as provided by law.'

14 The FAA is controlling authority in this action
15 because the underlying facts relate to interstate
16 commerce, specifically stock trading in national
17 markets. While the FAA allows arbitrator-issued
18 subpoenas, it is silent on the issue of
19 attorney-issued subpoenas. Courts have interpreted
20 this silence to mean that attorney-issued subpoenas
21 in arbitration actions are forbidden. See National
22 Broadcasting Company v Bear Stearns and Company,"
23 with a citation, and then a paren, following that,
24 "Section 7 explicitly confers authority only upon
25 arbitrators. By necessary implication, the parties

1 **Direct Examination - George C. Pratt**
2 to an arbitration may not employ this provision to
3 subpoena documents or witnesses, emphasis, an
4 original," also cites Bergen against Bush with a
5 citation, and the parenthetical after that, which is
6 in quotes.

7 "While an arbitration panel may subpoena
8 documents or witnesses, the litigating parties have
9 no comparable privilege." And then continuing the
10 text, "The FAA does not allow attorney-issued
11 subpoenas in arbitration actions, and this court
12 therefore grants claimants' motion to quash."

13 **Q. And the arbitration that underlay the**
14 **Surratt case involved what arbitration organization?**

15 A. NASD.

16 **Q. And who was the respondent in that case?**

17 A. Merrill Lynch, Pierce, Fenner & Smith,
18 Incorporated.

19 **Q. Do you have any reason to believe that**
20 **the Surratt case does not govern this arbitration?**

21 A. I'm not sure what you mean by "govern."
22 I didn't know arbitrations were governed by any
23 cases.

24 **Q. Is it your understanding -- well, strike**
25 **that. I'll put it a different way.**

1 **Direct Examination - George C. Pratt**
2 **The respondents in this case have argued**
3 **that, notwithstanding what we see in the Federal**
4 **Arbitration Act, a provision of New York State law**
5 **authorizes the issuance of the subpoena in this case.**
6 **Did you hear them make that argument earlier in the**
7 **morning when they challenged this testimony?**

8 A. I believe there was some reference to
9 that, yes.

10 **Q. In your opinion, does New York State**
11 **procedural law governing arbitration have any effect**
12 **on this proceeding?**

13 A. In my opinion, no.

14 **Q. Would you read into the record the last**
15 **sentence on page five of the Surratt decision that**
16 **you have in front of you from Judge Ryskamp that**
17 **begins with, "Since the FAA governs"?**

18 A. "Since the FAA governs this dispute, the
19 court will not address respondent's contention that
20 New York and Florida permit attorneys to issue
21 subpoenas in arbitration actions."

22 **Q. Now, you're not an expert in Florida**
23 **law.**

24 A. Correct.

25 **Q. Do you consider yourself an expert in**

1 Direct Examination - George C. Pratt

2 New York law?

3 A. Many aspects of it, yes.

4 Q. In your preparation for your testimony
5 here today, did you review New York's statutes
6 governing subpoenas?

7 A. Yes.

8 Q. Did you read any New York cases
9 governing subpoenas in arbitration?

10 A. Yes.

11 Q. Did you read any scholarly commentaries
12 regarding New York law and the issuance of subpoenas
13 in arbitration under New York law?

14 A. Yes.

15 Q. Did you find any appellate authority for
16 the proposition that New York law permits attorneys
17 to issue third-party discovery subpoenas in
18 arbitration?

19 A. No.

20 Q. Did you find any authority that denies
21 to attorneys the power to issue third-party discovery
22 subpoenas in arbitration?

23 A. Yes.

24 Q. Can you briefly describe what that
25 authority is?

1 Direct Examination - George C. Pratt

2 A. Well, most of it comes directly from the
3 court of appeals and simply says discovery is not
4 permitted in arbitrations except in extraordinary
5 circumstances.

6 Q. And do you have or are you able to point
7 to the name of the case that makes reference to that?

8 A. I had a list here to make it convenient,
9 but I've got the case. It's De Sapio against
10 Kohlmyer.

11 Q. Now, I draw your attention back to book
12 7A that you have in front of you and particularly to
13 tab D like "delta."

14 A. Yes.

15 Q. Is the De Sapio against Kohlmyer case
16 from the New York court of appeals referenced in this
17 letter?

18 A. Yes. Top of page two.

19 Q. To your knowledge, is the citation
20 correct?

21 A. I can tell you in a minute. It appears
22 to be.

23 Q. And would you read into the -- is the
24 quotation an accurate quotation from De Sapio?

25 A. Yes.

1 Direct Examination - George C. Pratt

2 Q. Would you read that into the record,
3 please?

4 A. Do you want the preceding quotation
5 or --

6 Q. From the words, "The availability of
7 disclosure."

8 A. "The availability of disclosure devices
9 is a significant differentiating factor between
10 judicial and arbitral proceedings. It is
11 contemplated that disclosure devices will be
12 sparingly used in arbitration proceedings. If the
13 parties wish the procedures available for their
14 protection in a court of law, they ought not to
15 provide for the arbitration of the dispute," citing
16 Weinstein, Korn & Miller.

17 Q. What's Weinstein, Korn & Miller?

18 A. That's probably the most used treatise
19 on New York civil practice. Weinstein is Judge
20 Weinstein of the southern -- of the Eastern District
21 of New York, and the Miller is Professor Miller from
22 Harvard.

23 Q. And Korn was appellate division, first
24 department?

25 A. That, I don't know. Then the last

1 Direct Examination - George C. Pratt

2 sentence of the quote, "Under the CPLR, arbiters do
3 not have the power to direct the parties to engage in
4 disclosure proceedings."

5 Q. Now, I draw your attention to tab H like
6 "Harry." And in particular, I draw your attention to
7 the second page of tab H like "Harry." Is this a
8 document you reviewed in connection with your
9 testimony here today?

10 A. Yes.

11 Q. Where did you get this document?

12 A. You gave it to me.

13 Q. Who wrote this document?

14 A. It says Judith Welcom, W-e-l-c-o-m,
15 under the letterhead of Sidley, Austin, Brown & Wood.

16 Q. And are you able to discern from the
17 letter who Ms. Welcom and Sidley and Austin were
18 representing when they wrote this letter?

19 A. They appear to represent Merrill Lynch
20 in an NYSE arbitration.

21 Q. And would you read into the record the
22 last sentence of the first paragraph of that letter?

23 A. "This letter is set forth a summary of
24 MLIM," that's Merrill Lynch Investment Managers,
25 "objections to the subpoena and is without prejudice

1 Direct Examination - George C. Pratt
2 to MLIM's right to seek relief from the court or to
3 interpose additional or more detailed objections in
4 the event that a response to the subpoena is
5 required."

6 **Q. So am I correct, just to summarize, that
7 this is a letter responding to a subpoena issued by
8 an attorney for an arbitration claimant at the New
9 York Stock Exchange?**

10 A. Yes.

11 **Q. Would you read into the record the
12 second paragraph?**

13 A. "As an initial matter, the subpoena is
14 procedurally defective. NYSE rule 619 F extends
15 subpoena power only 'as provided by law.' In this
16 case, New York law would apply. New York law,
17 however, requires a court order for pretrial document
18 discovery of third parties. See CPLR 3120(b).
19 Moreover, New York law does not permit an extra
20 territorial subpoena on an entity such as MLIM
21 located in New Jersey nor is the subpoena proper
22 under the Federal Arbitration Act which extends only
23 to subpoenas issued by an arbitration panel as
24 opposed to subpoenas issued by counsel for a party.
25 See 9 USC Section 7. Enforcement of such a subpoena

1 Direct Examination - George C. Pratt
2 must be sought in federal court in the district in
3 which the arbitrators are sitting. And, accordingly,
4 the form in which our action is already pending is
5 the appropriate forum to rule on the issues raised by
6 the subpoena."

7 **Q. Thank you. Part of the paragraph that
8 you just read referred to a subpoena issued by a New
9 York lawyer to an entity located in New Jersey; do
10 you see that?**

11 A. Yes.

12 **Q. Now, I'd like to draw your attention
13 back to tab B like "boy," "bravo."**

14 A. Yes.

15 **Q. And ask you if this is an
16 attorney-signed subpoena addressed to someone in New
17 Jersey.**

18 A. It is.

19 **Q. And it came from New York?**

20 A. Yes.

21 **Q. Do New York subpoenas have any
22 extraterritorial effect? Are they valid in New
23 Jersey?**

24 A. Not in any circumstance I can think of.

25 **Q. Drawing your attention back to tab H**

1 **Direct Examination - George C. Pratt
2 like "Harry" and that second paragraph, is there
3 anything at all in that paragraph that you either
4 disagree with or that you think is an inaccurate
5 statement?**

6 A. Well, the requirement of a court order
7 under 3120(b) of the CPLR, I believe, has been
8 changed since that time.

9 **Q. Okay. We'll talk about that.**

10 A. But other than that, it seems to be a
11 fairly accurate statement of the law.

12 **Q. Now, let's talk about CPLR 3120(b).
13 What is that statute? CPLR stands for --**

14 A. That's part of the discovery section of
15 the CPLR, and it relates to the production of
16 documents. The rule used to be that you needed a
17 court order to do it. They changed it to let
18 attorneys do it, in actions.

19 **Q. "In actions."**

20 A. Yes.

21 **Q. What does that mean?**

22 A. Lawsuits --

23 **Q. Stuff in court.**

24 A. -- pending in the courts of New York.

25 **Q. Is an arbitration under New York law an**

1 **Direct Examination - George C. Pratt
2 action?**

3 A. No.

4 **Q. Article 31 of the CPLR which contains
5 section 3120(b), does it also contain provisions for
6 party depositions?**

7 A. Yes.

8 **Q. Does it contain provisions for nonparty
9 depositions?**

10 A. Yes.

11 **Q. Does it contain a whole host of other
12 discovery devices that are available in court
13 proceedings?**

14 A. Yes.

15 **Q. Do those other discovery devices,
16 including depositions, are they available in
17 arbitration under New York law by statute?**

18 A. No.

19 **Q. In your opinion, was the subpoena at tab
20 A -- I'm sorry, tab B valid or enforceable?**

21 A. Neither.

22 **Q. Now, I draw your attention to tab M in
23 claimants' exhibit book.**

24 A. That's in 7B, right?

25 **Q. 7B, yes. And I'll represent to you and**

1 Direct Examination - George C. Pratt
2 the Panel, just to move through this quickly, that
3 this is a series of subpoenas that I collected from
4 other cases. Have you reviewed these subpoenas?

5 A. You gave me this book this morning, and
6 I looked through M through Z.

7 Q. Am I correct that they all involve
8 subpoenas issued by Merrill Lynch or its attorneys?

9 A. Yes.

10 Q. And not subpoenas issued by arbitrators.

11 A. Correct.

12 Q. And those subpoenas, were they issued
13 before the decision in the Surratt case or after the
14 decision in the Surratt case?

15 A. I did not look at the dates.

16 Q. Okay. Let's take a quick look at the
17 dates. In M, a subpoena issued by Dorsey & Whitney
18 on behalf of their client Merrill Lynch, what's the
19 date?

20 A. April 2004.

21 Q. How many subpoenas are there in tab M?

22 A. Four.

23 Q. Do you see the words at the bottom of
24 that subpoena, "Herein fail not at your peril"?

25 A. I do.

1 Direct Examination - George C. Pratt

2 Q. Do you think it's appropriate to put
3 those words on this document?

4 MR. STERN: Mr. Bennett, I am really --
5 I know you ruled before on this, and I've been biting
6 my tongue here because I know you've allowed this
7 testimony, but we are now looking at subpoenas from
8 other actions having nothing to do with this case
9 whatsoever, and we've wasted so far almost an hour.

10 CHAIRMAN BENNET: Well, it's yet to be
11 seen whether or not it has any applicability to this
12 particular action.

13 MR. STERN: But these subpoenas, in
14 particular, that we're now looking at with this
15 witness clearly don't.

16 CHAIRMAN BENNET: I understand. And
17 once Mr. Lipner is done, I have a couple of questions
18 of the Judge before I allow you to do your
19 questioning just so we can help clarify some issues
20 that I have, as well, okay?

21 MR. LIPNER: Sure.

22 Q. (By MR. LIPNER) In tab N, we have some
23 more subpoenas.

24 A. Yes.

25 Q. How many?

1 Direct Examination - George C. Pratt

2 A. I count five.

3 Q. In tab O, how many subpoenas?

4 A. Nine, I count.

5 Q. What's the date of those subpoenas?

6 A. The first one is September 5, 2003. I
7 imagine they all are the same date. No, they aren't.
8 The last one is October 17, 2003.

9 Q. And do you remember what the date of the
10 Surratt decision was that involved Merrill Lynch? It
11 was at tab J in this book.

12 A. I remember it was 2003. July 31, 2003.

13 Q. So these subpoenas were issued after
14 that decision.

15 A. Yes.

16 Q. If we were to go through briefly tab Q,
17 tab S, tab T, tab U, tab V, X, Y and Z, I'll
18 represent to you you'll find 70 or 80 attorney-issued
19 subpoenas by Merrill Lynch. Are any of them valid,
20 in your opinion?

21 A. In my opinion, no.

22 Q. Are any of them enforceable?

23 A. No.

24 Q. Is there any basis in law that you know
25 of for an attorney sending them out?

1 Direct Examination - George C. Pratt

2 A. There's no authorization in law. The
3 only justification there could be for them is in
4 arbitration; if the parties agree to do something, it
5 can be done.

6 Q. The arbitration agreement in this case
7 says that the parties will follow the rules. And I
8 would ask you to simply read into the record the
9 document I'm about to show you which is section 10322
10 of the NASD's rules, part A.

11 A. "The arbitrators and any counsel of
12 record to the proceeding shall have the power of the
13 subpoena process as provided by law."

14 Q. Is there anything in that rule which, as
15 you understand it, authorizes attorneys to issue
16 subpoenas that are not consistent with either state
17 or federal law?

18 A. No, there's nothing in the rule. And
19 there's that case that I read from that said it's
20 not -- this is not an additional grant of power. You
21 look to the applicable law to determine whether
22 subpoena is authorized.

23 MR. LIPNER: I have no further questions
24 for this witness at this time.

25 CHAIRMAN BENNET: Before we move on,

1 Direct Examination - George C. Pratt
2 Mr. Lipner, let me, for the record, make sure that we
3 all understand exactly what actions you're requesting
4 of the Panel. We had this conversation previously,
5 but I want to have it again at this point in time.

6 MR. LIPNER: Sure.

7 CHAIRMAN BENNET: Okay?

8 MR. LIPNER: Sure.

9 CHAIRMAN BENNET: And you are. You're
10 not seeking to preclude the introduction of the
11 documents received by Wurdemann the CPA, you're
12 seeking exactly what?

13 MR. LIPNER: I am not seeking that the
14 documents be suppressed, but when I hear testimony
15 and I see where the parties are going, I have to
16 reserve the right to be able to do that. But that's
17 not what I'm seeking. What I'm seeking is to have
18 the Judge's testimony admitted for several purposes.
19 The first is to show that Witness William Wurdemann
20 violated his professional standards with respect to
21 my client by responding to this improper subpoena.

22 CHAIRMAN BENNET: But this witness is
23 not testifying to that.

24 MR. LIPNER: The validity and
25 enforceability of the subpoena is what the accounting

1 Direct Examination - George C. Pratt
2 rule requires to -- and it's section 301 of the Code
3 of Professional Conduct. The code says that an
4 accountant shall keep his client's confidences unless
5 the accountant has been served with a valid and
6 enforceable subpoena. That's what the accounting
7 rules say. And it does put the burden on the
8 accountant, because it's their rules to determine
9 whether it's valid and enforceable.

10 So the question of the validity and the
11 enforceability of the subpoena is a question that I
12 am going to be asking Mr. Wurdemann on
13 cross-examination, William Wurdemann, because it will
14 go to his bias and credibility if he takes the
15 position -- well, when he testifies as to why he
16 thought the subpoena was valid and/or why he produced
17 documents.

18 CHAIRMAN BENNET: Are you anticipating,
19 and this may be not -- but are you anticipating
20 qualifying him as a hostile witness at some point?
21 Is that where you're going?

22 MR. LIPNER: I anticipate -- well, no,
23 they're going to call him as a witness; I get to
24 cross-examine him. I don't need to characterize him
25 that way. But I do want to ask him these questions

1 Direct Examination - George C. Pratt
2 because I think it goes to his credibility, his bias
3 and his involvement in my client's affairs.

4 CHAIRMAN BENNET: So is it fair to
5 state, then, that what you're asking of the Panel is
6 simply to consider, during his testimony, consider
7 the fact that, in your opinion, possibly the Judge's
8 opinion, maybe the Panel's opinion, that he responded
9 to an invalid subpoena?

10 MR. LIPNER: That's part of it, yes.

11 CHAIRMAN BENNET: That's part of it.
12 What's the other part?

13 MR. LIPNER: Second part. We have a
14 claim for punitive damages. This is an abuse of
15 process. This is a violation of the arbitration
16 agreement. The arbitration agreement says the
17 parties shall abide by the rules. The rules say you
18 only have such subpoena power as provided by law.

19 And legal process, or at least something
20 that looks like legal process, was served from New
21 York to New Jersey in a Florida arbitration, and the
22 respondents are claiming -- the respondents are
23 claiming -- that New York law authorizes them to do
24 it. And that's incorrect.

25 In fact, when respondents wrote to me

1 Direct Examination - George C. Pratt
2 and said, we disagree with your interpretation, the
3 purpose of having Judge Pratt come down is to
4 demonstrate to you that this is not a matter of
5 interpretation. This is one hundred percent crystal
6 clear.

7 And also to show to you, as I just did,
8 that Merrill Lynch has a policy of having its
9 attorneys, whether they're in-house or outside,
10 because some of these attorneys were issued by
11 in-house subpoenas, to ignore federal rulings like
12 Surratt against Merrill Lynch, and taking the
13 position that there are no consequences associated
14 with what they do, ousting the arbitrators of an
15 opportunity to manage discovery, taking it on
16 themselves to decide what discovery shall be, sending
17 subpoenas to third parties, receiving documents,
18 using those documents, and then saying it's moot, you
19 have no remedy, you're wasting the arbitrators' time,
20 why are we doing this.

21 The reason is, I got 61 subpoenas that
22 went out by Merrill Lynch's attorneys after Sidley
23 and Austin told an investor's attorney you can't do
24 that.

25 CHAIRMAN BENNET: And not to take sides,

1 Direct Examination - George C. Pratt
2 but I think Mr. Stern is exactly correct. Those
3 subpoenas have no direct relevance on this particular
4 arbitration.

5 MR. LIPNER: That's correct.

6 CHAIRMAN BENNET: Okay. So I'm going to
7 set aside the second part of your argument just now.

8 MR. LIPNER: I think it goes to the
9 punitive damages argument.

10 CHAIRMAN BENNET: I understand. Judge,
11 I have a question for you. During the administrative
12 comments of this arbitration hearing, I indicated to
13 all the parties, and I think you'll agree, that this
14 is not a judicial hearing, this is an arbitration,
15 okay, and there are differences under the --
16 different rules. And as you well know, I'm sure,
17 this panel -- now, you'll have your chance,
18 Mr. Stern, in a second.

19 This panel, as far as I'm concerned, is
20 controlled by the rules of arbitration of NASD. And
21 a little while ago, you read, particularly out of
22 rule 10322 under "Subpoenas and Power to Direct
23 Appearances," section A, relative to the subpoenas,
24 that the arbitrators and any counsel of record to the
25 proceeding shall have the power of the subpoena

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1 Direct Examination - George C. Pratt
2 process as provided by law.

3 And I want to make sure I understand
4 your opinion, just your opinion, relative to that
5 particular section. And do I understand that it is
6 your opinion that federal law and state of New York
7 law does not provide for the ability for counsel of
8 record to issue subpoenas, valid subpoenas.

9 THE WITNESS: Discovery subpoenas.

10 CHAIRMAN BENNET: Under discovery rules,
11 yes, exactly.

12 THE WITNESS: That's my opinion.

13 CHAIRMAN BENNET: That's your opinion.
14 Okay, thank you. Mr. Stern, would you like to
15 question this witness?

16 MR. STERN: I would, Mr. Bennett. And
17 there's a lot that I would like to respond to about
18 what Mr. Lipner said. And if the Panel is going to
19 consider a request as is stated on these documents
20 for punitive damages, or for any of the other relief
21 claimants seek here, I would like to respond to that,
22 but I don't want to waste time doing that now, and
23 I'd rather proceed with cross-examination, if that's
24 all right with the Panel.

25 CHAIRMAN BENNET: That's fine.

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1 Cross-Examination - George C. Pratt

2 CROSS-EXAMINATION

3 BY MR. STERN:

4 **Q. Judge Pratt, it's proper to call you**
5 **"Judge Pratt," still?**

6 A. A lot of people do, still.

7 **Q. I've never had a chance to cross-examine**
8 **a judge before. It's a lifelong dream.**

9 **You were very careful, Judge Pratt, in**
10 **stating that your opinion is that under federal law,**
11 **attorney-issued discovery subpoenas are not**
12 **permissible in arbitration. Do you remember**
13 **answering that question at the beginning of your**
14 **testimony?**

15 A. Yes.

16 **Q. And you talked in some detail about the**
17 **Federal Arbitration Act, right? I want to focus you**
18 **on New York law, okay? And you said in response to**
19 **one of Mr. Lipner's questions that, in your opinion,**
20 **New York State law has no effect on this arbitration.**
21 **Is that what you said?**

22 A. I don't know much about this
23 arbitration. If you're talking about the subpoena
24 issue, that's what I have focused on.

25 **Q. Okay. And your opinion, sir, is that**

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1 **Cross-Examination - George C. Pratt**

2 **New York law does not have an effect on whether the**
3 **subpoenas issued in this case are valid.**

4 A. My opinion is that the federal law does
5 not authorize them. The New York law is that if the
6 proceeding affects commerce, then you look to federal
7 law, you don't look to New York law.

8 **Q. And on that last point, Judge, can you**
9 **cite me any authority at all that says if it affects**
10 **interstate commerce, one does not look to New York**
11 **law to determine whether subpoenas issued in a case**
12 **are valid?**

13 A. I can't give you the case right now. It
14 is a relatively recent case in the state court of
15 appeals. It was a lead article by Professor Segal in
16 his New York State Bar that I read, oh, maybe a
17 couple weeks ago.

18 **Q. And you say, sir, that the court of**
19 **appeals has held that if an arbitration affects**
20 **interstate commerce, New York law does not affect the**
21 **propriety of subpoenas. That's what you're saying to**
22 **us, sir?**

23 A. To the extent that there's any
24 difference between federal and state law, that's
25 correct.

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1 Cross-Examination - George C. Pratt

2 **Q. But you don't have any cite for us for**
3 **that, right?**

4 A. I don't, but I could provide it.

5 **Q. And in the materials that you've studied**
6 **before you came here and that Mr. Lipner provided**
7 **you, you don't have that; do you?**

8 A. No.

9 **Q. And you were shown by Mr. Lipner an**
10 **unpublished decision from Judge Ryskamp in, I think**
11 **he's in West Palm Beach.**

12 A. Surratt?

13 **Q. Yes, sir. And that's at tab J in the**
14 **claimants' book. And that, sir, is what you were**
15 **relying upon for finding that the Federal Arbitration**
16 **Act would apply rather than New York law to the**
17 **issuance of subpoenas in an arbitration?**

18 A. Oh, not just that.

19 **Q. What were you relying on that for, sir?**
20 **Tell us again.**

21 A. This is an example of a case that
22 happened to involve Merrill Lynch. This is an
23 application of -- a correct application of federal
24 law to an NASD arbitration.

25 **Q. And sir, in that unpublished decision,**

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2 **can you tell us, as a long time appellate judge, tell**
3 **me what the binding effect of that decision is on any**
4 **case other than the one that it was being decided in?**

5 A. In terms of binding effect?

6 **Q. Yes, sir.**

7 A. It has no binding effect other than the
8 case that it has beyond its persuasive powers.

9 **Q. No binding effect whatsoever, right?**

10 A. It is a precedent that a judge would
11 consider along with lots of other precedents that say
12 the same thing.

13 **Q. And sir, when exactly was that decision**
14 **rendered?**

15 A. July 31, 2003.

16 **Q. And you are aware, sir, that the New**
17 **York law changed in a very important way after that**
18 **time, aren't you, regarding discovery?**

19 A. There were changes, yes.

20 **Q. In fact, you mentioned it, it wasn't in**
21 **any of the claimants' papers, but you mentioned that**
22 **the provision regarding nonparty subpoenas was**
23 **amended, right?**

24 A. A provision with respect to document
25 discovery requiring a court order, yes.

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1 Cross-Examination - George C. Pratt

2 **Q. I want to take you through some of that**
3 **slowly, if we could, sir.**

4 CHAIRMAN BENNET: Hang on just a second,
5 please.

6 (Changing tape.)

7 CHAIRMAN BENNET: Okay, go ahead.

8 **Q. (By MR. STERN) I want to show you a few**
9 **provisions of the CPLR, sir. Actually, I've got the**
10 **whole book here, so -- my book has got some**
11 **notations, but anything you want to look at in here,**
12 **you let me know. I've got the book, but I'm going to**
13 **try to focus on a few provisions. The CPLR is the**
14 **civil procedure code governing in New York, right?**

15 A. Yes.

16 **Q. The New York analog of the federal rules**
17 **of civil procedure, is that right?**

18 A. Yes.

19 **Q. I'm going to show you, sir, something**
20 **we've marked as Respondent's 1003 for identification.**

21 MR. LIPNER: I object. This is not a
22 complete document. It ends in a partial sentence.

23 MR. STERN: It's the complete statute,
24 Mr. Lipner. I think you know that. And this
25 commentary, you're free to put in, if you'd like to.

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1 Cross-Examination - George C. Pratt

2 MR. LIPNER: Mr. Chairman, I object to
3 the presentation of a partial document. I think he's
4 trying to hide something from you, and you ought to
5 demand the full document.

6 MR. STERN: Respectfully, Mr. Bennett,
7 this is getting to be an outrage. I sat quietly
8 while Mr. Lipner took this witness through, frankly,
9 piles of junk that had nothing to do with this case.
10 What I have put before this witness, a
11 well-credentialed judge who can tell us if the full
12 statute that is there is, in fact, the full statute.
13 It is Section 7505 of the CPLR.

14 CHAIRMAN BENNET: All right. We'll
15 accept this.

16 (Respondent's Exhibit 1003 was marked
17 for identification.)

18 **Q. (By MR. STERN) And as I said, Judge**
19 **Pratt, I do have the whole book here, so if you want**
20 **to check if any of these statutes I'm handing you are**
21 **complete, I just don't have copies of the book, but**
22 **if you want to see that, that's fine.**

23 **Now, am I correct, sir, that Section**
24 **7505 of the CPLR is still in effect?**

25 A. Oh, yes.

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1 Cross-Examination - George C. Pratt

2 **Q. And what it says, sir, is, "An**
3 **arbitrator and any attorney of record in the**
4 **arbitration proceeding has the power to issue**
5 **subpoenas," correct?**

6 A. Yes.

7 **Q. Okay. That's the first sentence of it,**
8 **right? I want to show you, sir, the next section of**
9 **this CPLR, which I'm going to mark as Respondent's**
10 **1004.**

11 (Respondent's Exhibit 1004 was marked
12 for identification.)

13 **Q. Judge Pratt, I've handed you a copy of**
14 **section 2302 of the New York CPLR, both (a) and (b),**
15 **and this particular statute was amended and is**
16 **effective as of 2004; do you see that at the top?**

17 A. Yes.

18 **Q. Could you read the first sentence of**
19 **part (a) of 2302, sir?**

20 A. "Subpoenas may be issued without a court
21 order by the clerk of the court, a judge where there
22 is no clerk, the attorney general, an attorney of
23 record for a party in an action, an administrative
24 proceeding or an arbitrator." Shall I continue?

25 **Q. That's enough, sir. This section says a**

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1 **Cross-Examination - George C. Pratt**

2 **subpoena may be issued by an attorney for a party to**
3 **an arbitration; does it not, sir?**

4 A. Yes.

5 **Q. So we've now established that New York**
6 **law says, in arbitrations, attorneys can issue**
7 **subpoenas, correct?**

8 A. Yes.

9 **Q. That's what 7505 said?**

10 A. Yes.

11 **Q. And is this section, section 2302**
12 **regarding the authority to issue subpoenas,**
13 **reiterates that the subpoenas may be issued without a**
14 **court order by an attorney of record for an**
15 **arbitration, right?**

16 A. Correct.

17 **Q. The next section I want to show you,**
18 **sir, is the section that you mentioned in response to**
19 **Mr. Lipner's questioning, section 3120.**

20 MR. STERN: And we're going to mark that
21 as Respondent's 1005.

22 (Respondent's Exhibit 1005 was marked
23 for identification.)

24 **Q. (By MR. STERN) Take your time looking**
25 **at that. That one's a little bit longer, sir. The**

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1 **Cross-Examination - George C. Pratt**

2 **full statute is covered over those two pages.**
3 **Actually, the body of it is on the first page.**

4 A. (Reviewing document.) Yes.

5 **Q. This is the particular section of New**
6 **York's procedural code that was amended after that**
7 **Surratt decision in 2003, right, sir?**

8 A. Yes.

9 **Q. And what this holds, sir, is, in that**
10 **very first paragraph, "After commencement of an**
11 **action, a party may serve on any other party a notice**
12 **or on any other person a subpoena duces tecum." And**
13 **what's a subpoena duces tecum, sir?**

14 A. That's a subpoena for documents or other
15 physical things.

16 **Q. And sir, this specifically provides that**
17 **any party may serve on any other person a subpoena**
18 **seeking documents in discovery. That's what it says**
19 **in the subparagraph little "i"; does it not?**

20 A. Yes.

21 **Q. These three statutes together, sir, hold**
22 **that under New York law, an attorney in an**
23 **arbitration may serve a subpoena on any other person**
24 **seeking discovery; do they not?**

25 A. They -- that's what they say, but what

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2 they've been held to hold is that they authorize an
3 attorney to issue subpoenas for hearings, not for
4 discovery.

5 **Q. Well, sir, where it says, "The parties**
6 **seeking discovery," can you explain to me how that**
7 **doesn't mean discovery, sir?**

8 A. Where does it say that?

9 **Q. In the subparagraph little "i." It**
10 **says, "The subpoena duces tecum to produce and permit**
11 **the parties seeking discovery designated documents or**
12 **any other things."**

13 A. This is after the commencement of an
14 action.

15 **Q. And you're putting some emphasis on**
16 **"action." Does that mean something, sir?**

17 A. It means under the CPLR an action or
18 special proceeding.

19 **Q. And you're saying an arbitration's not**
20 **an action, sir?**

21 A. It is not.

22 **Q. Can you show me, sir, in the CPLR where**
23 **an action is held not to be --**

24 A. Just look at the court of appeals in the
25 Kohlmyer case.

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1 Cross-Examination - George C. Pratt

2 MR. LIPNER: Before he hands a document
3 to a witness, I'm entitled to look at it.

4 CHAIRMAN BENNET: Let him look at the
5 book.

6 MR. LIPNER: Thank you.

7 **Q. (By MR. STERN) You told me the CPLR,
8 sir, says an action does not include an arbitration.
9 Is that what you told me?**

10 A. It says you don't get discovery in
11 arbitrations.

12 **Q. The CPLR says that, sir?**

13 A. That's what the court of appeals says in
14 Kohlmyer.

15 **Q. Okay. Let's look at that Kohlmyer case
16 for a moment, sir. That's in the book that
17 Mr. Lipner gave you, I think. It's -- actually, no,
18 it's not, it's in the book that he handed me.**

19 MR. LIPNER: Want me to give him this?

20 MR. STERN: If you want to.

21 MR. LIPNER: Do you want to look through
22 this and see if you can find the definition of an
23 "action"?

24 **Q. (By MR. STERN) Sir, the Kohlmyer case
25 you're referring to, that's De Sapio v Kohlmyer?**

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2 A. Yes.

3 **Q. That was 1974, sir, right?**

4 A. Yes.

5 **Q. And in fact, at that time, the CPLR did
6 not permit attorneys in an arbitration to seek
7 discovery. The CPLR itself didn't permit it; isn't
8 that right?**

9 A. It's never permitted them.

10 **Q. Well, sir, you just agreed with me that
11 the CPLR was amended in 2003 to specifically permit
12 service of a subpoena on nonparties for documents.**

13 A. Not in an arbitration, for discovery
14 purposes.

15 **Q. Are you able to cite us to any
16 authority, sir, whatsoever that held that since the
17 law was changed in 2003?**

18 A. No, but if the intent of the legislature
19 had been to change a long-standing position of the
20 state court of appeals, the discovery ordinarily is
21 not permitted in arbitration except by order of the
22 court, they would have said so.

23 **Q. I want to walk --**

24 A. Either in the amendment itself or in the
25 supporting documentation behind the amendment.

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1 Cross-Examination - George C. Pratt

2 **Q. Okay. Let's talk about that a little
3 bit. I want to walk through this slowly one more
4 time. Article 7505 says, "An arbitrator and any
5 attorney of record in the arbitration proceeding has
6 the power to issue subpoenas." Now, you agree with
7 me, sir, that that includes arbitration proceedings;
8 right?**

9 A. Oh, yes.

10 **Q. And New York CPLR in Article 23 which is
11 Respondents's 1004 that I showed you specifically
12 says, "Subpoenas may be issued by an attorney of
13 record in an arbitration proceeding," right?**

14 A. Yes.

15 **Q. Okay. And 3120, since this was changed
16 in 2003, specifically says, "A subpoena duces tecum
17 may seek documents in discovery," right? And that's
18 not express, sir?**

19 A. That says "in an action."

20 **Q. Okay. Sir, does it ever say an action
21 doesn't mean arbitration? You've got the CPLR in
22 front of you. Now, if you want to show me where in
23 the CPLR it says an action does not include an
24 arbitration, I'd be happy to look at it.**

25 A. Ordinarily, definitions are not set up

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2 in an exclusive way. "Action" and "special
3 proceeding" are defined in section 105(b). The word
4 "action" includes a special proceeding. The words
5 "plaintiff" and "defendant" include petitioner and
6 respondent respectively in a special proceeding. The
7 words "summons" and "complaint" include the notice
8 and petition and the petition respectively in a
9 special proceeding. Never does it say it includes an
10 arbitration.

11 **Q. Well, sir, it doesn't say it includes a
12 litigation, either, right? It says it includes a
13 special proceeding. It doesn't exclude anything,
14 does it, in that section?**

15 A. It says "an action and a special
16 proceeding."

17 CHAIRMAN BENNET: Is there a definition
18 of "special proceeding" in there?

19 MR. LIPNER: There's a definition of
20 "action."

21 MR. CROWELL: No, there's not.

22 CHAIRMAN BENNET: He just read that.

23 MR. LIPNER: No, he said that -- no, he
24 didn't. He was reading the definition of "special
25 proceeding," if I may.

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2 THE WITNESS: I was reading the
3 definition of "action" and "special proceeding."

4 MR. LIPNER: So 103(b), you did not
5 read. You read 105.

6 THE WITNESS: One form of action.
7 "There is only one form of civil action.
8 Distinctions between actions at law and suits in
9 equity, and the forms of those actions, suits have
10 been abolished. Action or special proceeding." It
11 says, "All civil judicial proceedings shall be
12 prosecuted in the form of an action, except for
13 prosecution in the form of a special proceeding as
14 authorized."

15 It speaks of it as a judicial
16 proceeding. The cases distinguish a judicial from a
17 nonjudicial proceeding, and they do not authorize
18 attorneys to issue subpoenas in nonjudicial
19 proceedings for discovery purposes.

20 **Q. (By MR. STERN) So, sir, even though the**
21 **CPLR couldn't be more crystal clear in saying that**
22 **attorneys in an arbitration may issue subpoenas,**
23 **subpoenas are defined in the CPLR to include**
24 **discovery subpoenas on nonparties, your position is**
25 **because, somehow, in that language, one is supposed**

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2 **to divine that that does not mean an arbitration? Is**
3 **that your position?**

4 A. You're supposed to look beyond the
5 statutes to how the courts interpret the statutes.

6 **Q. And I've asked you, sir, if you can cite**
7 **me a single authority since the law was changed,**
8 **because we agree, they were not permitted before**
9 **2003, and you cited me a 30-year-old case. Can you**
10 **cite me one, sir, in which a court has held that**
11 **after that change, attorneys cannot issue subpoenas**
12 **in arbitration?**

13 A. I am not aware of any case that has
14 decided it, one way or the other. But my
15 interpretation of it is, as I said before, since the
16 law was clearly established previously, if there was
17 an intent to change the rule about discovery
18 subpoenas in arbitrations, there would have been a
19 clearer indication of that from the legislature.

20 **Q. Sir, just so we're clear, you have those**
21 **claimants' books in front of you still?**

22 A. Yes.

23 **Q. Can you just turn to tab H in that book?**

24 A. Tab H. Yes.

25 **Q. That was the letter from a case four**

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1 **Cross-Examination - George C. Pratt**

2 **years ago written by an attorney from my firm that**
3 **Mr. Lipner asked you about.**

4 A. Yes.

5 **Q. The statute in the second paragraph that**
6 **you read from when Mr. Lipner was asking you**
7 **questions, that 3120(b), that doesn't exist anymore;**
8 **does it, sir?**

9 A. I think it's changed by the amendment;
10 wasn't it?

11 **Q. It was.**

12 A. They changed it from letters to numbers,
13 apparently.

14 **Q. And, in fact, that language requiring a**
15 **litigant or an attorney to seek a court order before**
16 **serving a nonparty with a subpoena has been**
17 **eliminated entirely, right?**

18 A. Correct. Essentially, they made a
19 subpoena a discovery device in actions.

20 **Q. Sir, do you know an attorney by the**
21 **names of James Wicks?**

22 A. Yes.

23 **Q. Who's James Wicks, sir?**

24 A. He is the head of litigation at Farrell
25 Fritz.

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2 **Q. And are you aware that Mr. Wicks has**
3 **published on the topic of the amendments to section**
4 **3120?**

5 A. No.

6 **Q. Let me show you something we found on**
7 **your firm's website about that.**

8 MR. STERN: I'm going to mark this as
9 Respondent's 1006.

10 (Respondent's Exhibit 1006 was marked
11 for identification.)

12 **Q. (By MR. STERN) I'm going to represent**
13 **to you, Judge, this is something we found last night**
14 **on your website, your firm's website, Farrell Fritz,**
15 **and Mr. Wicks wrote this article, I don't know**
16 **whether he wrote it, but it's on your website**
17 **currently, regarding the amendments to the CPLR.**

18 A. It's dated December 10, 2002.

19 **Q. Oh, that's right. I see that there.**
20 **And The Suffolk Lawyer, what's that, sir?**

21 A. That's the Bar Association of Suffolk
22 County, their monthly publication.

23 **Q. And Mr. Wicks describes the previous**
24 **practice under 3120 here, and feel free to read any**
25 **of this that you'd like, but just -- I want to be**

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1 **Cross-Examination - George C. Pratt**
2 **clear on one part of it which is on the second page,**
3 **and if you want to read the whole thing, go ahead,**
4 **but whenever you're ready, let me know. The**
5 **paragraph I want you to look at it is on the bottom**
6 **of the second page.**

7 A. "The law amends?"

8 **Q. Yes, sir. And this is the section of**
9 **the CPLR we've been discussing, the 3120, right? Not**
10 **the first sentence where it says "First," but "Next,"**
11 **right, 3120?**

12 A. Yes.

13 **Q. And this is exactly what you just agreed**
14 **with me, that the law changed, it permitted the**
15 **ability -- it permitted the service of a subpoena**
16 **upon a nonparty essentially equally to a party,**
17 **correct?**

18 A. Yes.

19 **Q. And can you tell me, sir, if -- do you**
20 **see anything in Mr. Wicks' description of this law**
21 **that carved arbitrations out of that change to the**
22 **law?**

23 A. I don't see any discussion of
24 arbitration at all. He's talking about actions.

25 MR. STERN: I have nothing further.

1 Redirect Examination - George C. Pratt

2 MR. LIPNER: Quick redirect.

3 CHAIRMAN BENNET: Sure.

4 REDIRECT EXAMINATION

5 BY MR. LIPNER:

6 **Q. Judge, you made reference on your**
7 **cross-examination to a court of appeals case**
8 **regarding the Federal Arbitration Act.**

9 A. Yes.

10 **Q. Couldn't remember the name. Does the**
11 **name Diamond Waterproofing refresh your recollection?**

12 A. What was the date?

13 **Q. Now you're tougher on me. Sometime in**
14 **January '06, or maybe before.**

15 A. That could well be it. I'm terrible
16 with case names. Always have been.

17 **Q. Now, we talked about the definition of**
18 **an action. Is there any doubt in your mind that**
19 **"action" means something in court?**

20 A. Certainly, when it's used in a statute
21 like the CPLR or the FRCP, the words are chosen very
22 carefully.

23 **Q. And would you read into the record the**
24 **first words of the amendment to 3120(b) that counsel**
25 **placed before you?**

1 **Redirect Examination - George C. Pratt**

2 A. It's now 3121.

3 **Q. Thanks.**

4 A. "After commencement of an action."

5 **Q. And everything following that is**
6 **inclusively referring to actions?**

7 A. Sub "i" and sub double "i."

8 **Q. Any discussion in 3120 of arbitrations?**

9 A. Not that I am aware of.

10 **Q. Any discussion anywhere in Article 31**
11 **about arbitrations?**

12 A. No.

13 **Q. Can you tell me what the section is that**
14 **allows third-party depositions in an action?**

15 A. Oh, gosh. It's 3107.

16 **Q. Does that apply in arbitration?**

17 A. No.

18 **Q. Does it say that?**

19 A. Does it say it doesn't apply?

20 **Q. Yes.**

21 A. No.

22 **Q. Now, I want to draw your attention back**
23 **to CPLR 7505. You can put that down. There's a book**
24 **in New York that we use called McKinney's; are you**
25 **aware of that?**

1 **Redirect Examination - George C. Pratt**

2 A. Yes.

3 **Q. What is it?**

4 A. It's West Publishing Company's annotated
5 version of the consolidated laws.

6 **Q. And that's the same publishing company**
7 **as published this book, correct?**

8 A. Yes.

9 **Q. Now, within McKinney's, are there**
10 **scholarly or other commentaries provided?**

11 A. Frequently.

12 **Q. Is there a commentary under CPLR 7505?**

13 A. Yes.

14 **Q. Do you know who Vincent Alexander is?**

15 A. I know Professor Alexander. I wrote a
16 forward for one of his books.

17 **Q. And where is he a professor?**

18 A. St. John's Law School.

19 **Q. In New York?**

20 A. Yes.

21 **Q. I'm going to pass you a copy of**
22 **Professor Alexander's commentaries on CPLR 7505.**

23 **Would you read into the record the third paragraph of**
24 **Professor Alexander's commentaries?**

25 A. "The subpoena power conferred by CPLR

1 Redirect Examination - George C. Pratt
 2 7505 is limited to the procuring of evidence for the
 3 hearing or trial of the dispute. Depositions or
 4 other forms of pretrial discovery are not ordinarily
 5 contemplated in arbitration proceedings. CPLR
 6 3102(c) authorizes discovery in aid of arbitration
 7 only by court order."
 8 **Q. Now, is the provision that authorizes**
 9 **discovery in arbitration only by court order still in**
 10 **the CPLR?**
 11 A. Yes.
 12 MR. STERN: Excuse me, can I hear that
 13 read back?
 14 CHAIRMAN BENNET: Sure. As a matter of
 15 fact, I'd like to get a copy of that --
 16 MR. LIPNER: I have them, but it's going
 17 to take me a few minutes to collate them so that I
 18 take out things that he might object to.
 19 CHAIRMAN BENNET: I'd like to hear it
 20 again.
 21 MR. LIPNER: Okay, read --
 22 THE WITNESS: Read the paragraph again?
 23 CHAIRMAN BENNET: Yes, sir, whatever --
 24 everything you just read.
 25 MR. STERN: I wanted to hear the
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1 Redirect Examination - George C. Pratt
 2 question and answer read back.
 3 CHAIRMAN BENNET: Okay, sure.
 4 (The last question and answer was read
 5 back.)
 6 CHAIRMAN BENNET: Now, Judge, if you
 7 would, please.
 8 THE WITNESS: Read that paragraph?
 9 CHAIRMAN BENNET: Yes, please.
 10 THE WITNESS: "The subpoena power
 11 conferred by CPLR 7050 is limited to the procuring of
 12 evidence for the hearing or trial of the dispute.
 13 Depositions or other forms of pretrial discovery are
 14 not ordinarily contemplated in arbitration
 15 proceedings. CPLR 3102(c) authorizes discovery in
 16 aid of arbitration only by court order."
 17 CHAIRMAN BENNET: And 7505? I'm sorry,
 18 7505, what section heading is that?
 19 MR. LIPNER: CPLR 7050.
 20 CHAIRMAN BENNET: And the heading is?
 21 MR. LIPNER: The heading is?
 22 MR. STERN: Just to be clear, this is
 23 not a statute. The witness is reading from a
 24 commentary.
 25 MR. LIPNER: Right. But the title of
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1 Redirect Examination - George C. Pratt
 2 the statute.
 3 MR. KUBLER: "Powers of Arbitrators."
 4 CHAIRMAN BENNET: "Powers of
 5 Arbitrators"?
 6 MR. KUBLER: 7505, "Powers of
 7 Arbitrators."
 8 CHAIRMAN BENNET: Okay. Thank you.
 9 **Q. (By MR. LIPNER) Now, has the**
 10 **legislature changed CPLR 7505 in recent memory?**
 11 A. No.
 12 **Q. Now, I direct your attention to the**
 13 **other statute that respondent put in front of you,**
 14 **2302 of the CPLR. Here's a copy. And he had you**
 15 **read in section one; do you remember that?**
 16 A. Yes.
 17 **Q. Now, as you sit here, I draw your**
 18 **attention to tab K like "Kenny," "Kenneth."**
 19 MR. STERN: "Kilo."
 20 MR. LIPNER: "Kilo," if you're a pilot.
 21 **Q. (By MR. LIPNER) Is this something you**
 22 **reviewed before today?**
 23 A. The Giacalone case, yes.
 24 **Q. And who were the parties to the**
 25 **Giacalone case?**
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1 **Redirect Examination - George C. Pratt**
 2 A. Kelly Giacalone, that's
 3 G-i-a-c-a-l-o-n-e, against Merrill Lynch, Pierce,
 4 Fenner & Smith, Inc.
 5 **Q. And what court decided this case?**
 6 A. Supreme Court, New York State, New York
 7 county.
 8 **Q. And when was this case decided?**
 9 A. December 2005.
 10 **Q. So this case was decided after the**
 11 **amendment to 3120(b), correct?**
 12 A. Yes.
 13 **Q. Would you read into the record the**
 14 **court's decision?**
 15 A. "Upon the foregoing papers, it is
 16 ordered that this motion to quash the subpoena dated
 17 January 12, 2005, is granted. CPLR section 2302(a)
 18 pertains to compelling the attendance of a person as
 19 a witness or production of documents at an
 20 arbitration hearing and is not a discovery device.
 21 However, the court sua sponte grants respondent's
 22 discovery of the subpoenaed documents pursuant to
 23 CPLR 2302(c)."
 24 **Q. Now, on your cross-examination,**
 25 **Mr. Stern asked you what the binding effect of the**
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1 **Redirect Examination - George C. Pratt**
2 **Surratt case was, and you said it's a district court**
3 **case and it's persuasive, correct?**

4 A. I said its binding effect is to the
5 extent that it is persuasive.

6 **Q. And would you say the same thing about**
7 **the lower court case in Giacalone?**

8 A. Yes.

9 **Q. Now I'm going to change the question.**
10 **Do either of those decisions have a binding effect on**
11 **Merrill Lynch outside of that particular legal**
12 **proceeding?**

13 A. That raises a very interesting question
14 of collateral estoppel and other forms of estoppel.
15 It might well be viewed as creating an estoppel
16 against Merrill Lynch.

17 **Q. Now, if Merrill Lynch disagreed with the**
18 **decision, for example, in Surratt, in the Federal**
19 **District Court in Florida, what was Merrill Lynch's**
20 **remedy if they disagreed with Judge Ryskamp?**

21 A. Ultimately, there could be an appeal.
22 They could seek an appeal by -- under the
23 interlocutory appeals statute, but they wouldn't be
24 likely to get it, so they'd have to wait until a
25 final judgment and action in order to take an appeal.

1 Redirect Examination - George C. Pratt

2 **Q. And then they could take an appeal.**

3 A. Yes.

4 **Q. And that appeal would be an appeal as of**
5 **right, they could just file it, correct?**

6 A. Yes.

7 **Q. In your opinion, is it appropriate for**
8 **Merrill Lynch to not appeal, and instead, to continue**
9 **issuing subpoenas as though the Surratt case had**
10 **never existed?**

11 A. My opinion as to whether it is
12 appropriate? If they had appealed and lost, then
13 they'd have a published decision that they would be
14 confronted with, it would show up in all the research
15 that people do on computers and so forth. So from
16 that point of view, it probably is inappropriate for
17 them to appeal.

18 **Q. Oh, you mean, strategically.**

19 A. Strategically, yes.

20 **Q. But what about in terms of the propriety**
21 **of what Merrill Lynch does?**

22 MR. STERN: Mr. Chairman, I object to
23 this. Again, I mean, I don't know where this
24 possibly could be going and how this witness is
25 qualified any more than Mr. Lipner to give a speech

1 Redirect Examination - George C. Pratt
2 about this.

3 CHAIRMAN BENNET: Yeah, I'm not sure
4 what the relevance is of the Judge's opinion on other
5 Merrill Lynch actions relative to this particular
6 arbitration.

7 MR. LIPNER: No, but I'm not talking
8 about other Merrill Lynch actions relative to other
9 arbitrations as they relate to this one, although I
10 still --

11 CHAIRMAN BENNET: But you're clearly
12 asking about Merrill Lynch alternatives on other
13 arbitration cases, and my point is, I'm not sure what
14 relevance it has on this case.

15 MR. LIPNER: In this case. No, no, my
16 point was that having lost the Surratt case and
17 having lost the Giacalone case and having chosen not
18 to appeal, is it appropriate for Merrill Lynch to
19 continue the practice which has been ruled against
20 them in two courts that we know of.

21 CHAIRMAN BENNET: Well, here again, I
22 have to agree with Mr. Stern. I'm not sure what the
23 relevance is on this particular arbitration hearing.
24 This panel's going to make its own determination
25 based upon statutory provisions, that kind of thing.

1 Redirect Examination - George C. Pratt

2 MR. LIPNER: Fair enough.

3 CHAIRMAN BENNET: Not based upon other
4 cases in which Merrill Lynch may or may not have been
5 the loser, if you will, okay.

6 MR. LIPNER: Okay.

7 A. Could I amend an answer that I gave with
8 respect to what the remedy might have been for
9 Merrill Lynch on the Surratt case?

10 **Q. (By MR. LIPNER) Okay.**

11 A. It looks to me like this was a separate
12 action brought in a district court to quash the
13 subpoena which means that the order, the final order,
14 could have been appealed immediately.

15 MR. LIPNER: I have no more questions.

16 CHAIRMAN BENNET: Okay. Mr. Stern,
17 before we -- a few issues on my mind. First of all,
18 you gave us Respondent's 1003 as a single-page
19 summary of an action on 7505. I assume you have the
20 full case, or at least a summary of that case in
21 addition you could give us?

22 MR. STERN: The statute, sir?

23 CHAIRMAN BENNET: Yes, sir.

24 MR. STERN: That is the statute, sir.

25 CHAIRMAN BENNET: That one -- the one

1 Redirect Examination - George C. Pratt
 2 paragraph, two sentences, that's the entire statute?
 3 MR. STERN: That is.
 4 MR. LIPNER: What he didn't include was
 5 the commentary under it.
 6 CHAIRMAN BENNET: Do you have that
 7 available?
 8 MR. LIPNER: I will provide you with a
 9 full set.
 10 MR. STERN: Well, I don't object if he
 11 wants to provide that. There's lots of commentary we
 12 could provide from lots of books.
 13 CHAIRMAN BENNET: I understand. But, I
 14 mean, but this is a particular action that you're
 15 providing, I'd like to have the commentary on it,
 16 okay?
 17 MR. STERN: Sure.
 18 CHAIRMAN BENNET: Secondly, also,
 19 Mr. Lipner, I gather you have the -- whatever backup
 20 documentation for the section of this -- that the
 21 Judge read into the record a few minutes ago?
 22 MR. LIPNER: I'm going to give you a
 23 full book. I just have to glean out one or two
 24 things that might be objectionable.
 25 CHAIRMAN BENNET: I just want to make
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1 Recross-Examination - George C. Pratt
 2 sure the Panel gets those documents.
 3 MR. LIPNER: You're going to get it by
 4 the end of the next break.
 5 CHAIRMAN BENNET: Okay. Fair enough.
 6 Thank you. Okay, Mr. Stern, you have some -- a few
 7 things?
 8 MR. STERN: I have just a couple things,
 9 Mr. Chair.
 10 RECCROSS-EXAMINATION
 11 BY MR. STERN:
 12 **Q. Do you still have that commentary on**
 13 **7505 in front of you, Judge?**
 14 A. Yes.
 15 **Q. That's what Mr. Lipner gave you, right,**
 16 **before we were just discussing here?**
 17 A. Yes.
 18 **Q. Do you know when that was written, sir?**
 19 A. Most likely, soon after --
 20 **Q. When the statute was passed in 1964,**
 21 **sir?**
 22 A. Oh, I doubt that.
 23 **Q. That's the date that's on there, isn't**
 24 **it, sir, for the statute?**
 25 A. I'm looking for some clues. The date of
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1 Recross-Examination - George C. Pratt
 2 the statute, 7505, is that --
 3 **Q. Yeah, that's 1964, sir.**
 4 A. '64, that's when the CPLR went into
 5 effect.
 6 **Q. Right.**
 7 A. Commentaries were written over a period
 8 of time, and they are frequently amended, and there's
 9 a citation here to 1982, another one in 1984, so it
 10 had to have been written after 1984, or at least
 11 amended after 1984.
 12 **Q. Mr. Lipner points out to me that there's**
 13 **a cite to 1997 in the commentary, but you actually**
 14 **can't tell when this was written, and, in particular,**
 15 **if it was written after the change in the discovery**
 16 **laws that we've been discussing, right?**
 17 A. Oh, I doubt that it was written after
 18 that.
 19 MR. LIPNER: But I will represent to the
 20 Panel that in addition to looking in the main volume,
 21 I went to the pocket part to see whether there had
 22 been any additional relevant commentaries written,
 23 and there were no additional written relevant
 24 commentaries written.
 25 CHAIRMAN BENNET: And if there had been,
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 2 Mr. Stern will find them tonight, I'm sure.
 3 MR. LIPNER: Oh, absolutely. I invite
 4 him to do so.
 5 MR. STERN: I promise not to raise the
 6 issue again.
 7 MR. LIPNER: He can call Vincent
 8 Alexander and ask him if he can write something
 9 overnight.
 10 CHAIRMAN BENNET: That's all you have,
 11 Mr. Stern?
 12 MR. STERN: Yes.
 13 CHAIRMAN BENNET: Okay. Here's what I
 14 propose. It's now 2:55. It's time for the afternoon
 15 break. Judge, we're obviously finished with your
 16 testimony. We appreciate you being here this
 17 afternoon.
 18 THE WITNESS: And I appreciate you
 19 taking me out of order.
 20 CHAIRMAN BENNET: Not a problem. Thank
 21 the respondents, it was their idea, and we appreciate
 22 that.
 23 THE WITNESS: Thank you, Mr. Stern.
 24 CHAIRMAN BENNET: We'd like to take
 25 15-minute break, five minutes of which the Panel will
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