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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

)	
IN RE: FRESENIUS)	
GRANUFLO/NATURALYTE DIALYSATE)	No. 1:13-md-02428-DPW
PRODUCTS LIABILITY LITIGATION)	
-----)	
)	
FLORELLA DIAL, Personal)	
Representative of The)	
Estate of Carley Dial,)	
Plaintiff,)	
)	
vs.)	No. 1:14-cv-11101-DPW
)	
)	
FRESENIUS MEDICAL CARE)	
HOLDINGS, INC., et al,)	
)	
Defendants.)	

BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK

DAY THREE OF FINAL PRETRIAL CONFERENCE

John Joseph Moakley United States Courthouse
Courtroom No. 1
One Courthouse Way
Boston, MA 02210
Thursday, February 11, 2016
2:35 p.m.

Cheryl M. Dahlstrom, RMR, CRR
Official Court Reporter
John Joseph Moakley United States Courthouse
One Courthouse Way
Boston, MA 02210
(617) 439-3214

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

2 THE CLERK: This is Civil Action 14-11101, Florella
3 Dial v. Fresenius Medical Care Holdings, Inc., et al. Court is
4 in session. You may be seated.

5 THE COURT: I'm going to ask Mr. Hohler just to -- if
6 you could pass out to counsel the redraft that I've done of
7 this. I'd like to go through the redraft with the parties.
8 One more thing. I'm sorry, Dan, to keep grabbing you, but this
9 is a calendar that will be attached to it.

02:36 10 What I have here is a somewhat **expanded jury**
11 **questionnaire.** I want to ask you some questions about it. But
12 also a calendar that will be attached to the jury questionnaire
13 that would tell the jury what they can anticipate. And I think
14 that I may want to have a narrative question -- I have
15 something like it in there now -- that alerts the jury to what
16 our schedule is going to be. As you can see, I've added some
17 material at the end -- or you will see I've added some material
18 on the end. I've also introduced my own introduction to the
19 questionnaire. What I'm going to suggest is -- what I'm going
02:37 20 to suggest is that we just walk through the questionnaire.
21 When we get to the point of timing of the trial, then we'll
22 turn to the schedule.

23 As I indicated, I have some things that can be
24 rescheduled, some things that I think are hard to reschedule.
25 And I want to be sure I'm not interfering with your plans so --

1 and that I'm fairly alerting potential jurors to what they've
2 got in store for them.

3 So let's turn to Page 1, which is the third of the
4 pages here. Here we're just using your materials. I don't
5 think there's anything new in this. What I would ask,
6 recognizing that this is -- if you see something now, tell me.
7 But I'd ask you, after we've had our discussion, to -- we'll
8 try to modify, in response to any of the discussion, the
9 questionnaire, but I'd probably ask you to send over any
02:39 10 suggestions or corrections by none tomorrow so that we can get
11 that taken care of.

12 So Page 1, I don't think, poses any particular
13 problems.

14 Page 2, I think, does not pose any particular problems
15 except -- not a problem, but I'll tidy up with respect to No.
16 15, which was the list of witnesses and lawyers. And I see
17 that we've got that here with the towns they're most associated
18 with.

19 There was some expression of concern, I think, by Mr.
02:39 20 Ketterer about -- but maybe someone else -- about North
21 Carolina plaintiff in Massachusetts, out-of-state people. I
22 don't really think it's a problem. I was just looking at
23 another questionnaire that I did in a case called *Genzyme v.*
24 *Seikagaku*. *Seikagaku* is a Japanese firm. They were fairly
25 upset to be litigating a matter in Massachusetts, were very

1 concerned about things. I didn't ask much in the way of
2 questions except to just identify them. And I think I
3 diffused -- to the degree it was necessary to diffuse, I
4 diffused any legacy of World War II. And I had granted a
5 preliminary injunction for *Genzyme*. It's a patent case. In
6 *Genzyme*, the jury came back and found for *Seikagaku*. So I
7 released them, released the -- vacated the injunction.

8 The short of it is I do think that it's not a problem,
9 but I also think I may mention something along the lines of
02:40 10 this, and see if that's problematic: In the discussion with
11 the jury downstairs -- and we're going to have a -- we'll all
12 troop downstairs at the end of this just to see what's going to
13 happen on Tuesday morning and get a sense of the choreography
14 of it.

15 But I will speak to the jurors before they fill out
16 the questionnaire. And part what I will be saying to the
17 jurors, I think, is that some of you might be wondering why a
18 case involving an individual from North Carolina is in the
19 federal court, and it's in the federal court because of what we
02:41 20 call diversity jurisdiction. And the defendant or one of the
21 defendant entities is here in Massachusetts. And I think that
22 will deal with that. And I don't think that it poses any
23 additional problems for out-of-state lawyers here. I think
24 they'll just understand that you're from somewhere else. If
25 you've got more that you want me to say, I'll say it, but I

1 don't think it's a problem.

2 MR. BENNETT: The only thing I'll mention, your Honor,
3 in response to that is you talked about one of the defendants.
4 It would seem appropriate for us just to be Fresenius Medical
5 Care.

6 THE COURT: So let's talk about that. I should have
7 done it on the -- when I said there was no problem on Page --
8 the first page of the questionnaire with the heading. I asked
9 my secretary just to pull off the original complaint, and she
02:42 10 copied, it, I trust. But Mrs. Dial is referred to as
11 "anticipated personal representative." Is that a term of art
12 in North Carolina or has anticipation been realized?

13 MR. TARRICONE: The anticipation, I believe, is over.
14 The anticipation -- I think it was before the estate was
15 opened.

16 THE COURT: So if I just simply say "personal" --
17 there will be no problem with my saying "personal
18 representative of the estate of Carley Dial."

19 And then, with respect to Mr. Bennett's comment,
02:43 20 referring to Fresenius Medical Care, is that --

21 MR. BENNETT: I would say Fresenius Medical Care
22 Holdings, Inc., d/b/a -- doing business as Fresenius Medical
23 Care North America, or Fresenius Medical Care North America is
24 fine with us too. That's what we would be known as.

25 THE COURT: What are they going to see in documents?

1 MR. BENNETT: Largely Fresenius Medical Care North
2 America, in fact almost exclusively other than the local North
3 Carolina thing.

4 THE COURT: Any problem with that, just cutting it
5 back for the heading? I just don't want to get people
6 distracted.

7 MR. TARRICONE: For the heading, I don't think it
8 really matters, but there are documents that say "FMC" or just
9 "Fresenius."

02:43 10 THE COURT: It will make it easier for me to say the
11 defendant before you is a Massachusetts company. That's why
12 we're here in federal court. And I think that diffuses
13 anything. So I'm striking "Fresenius USA" -- I'm leaving
14 Fresenius Medical Care Holdings, Inc., as the defendant. I
15 don't know why I'd say "doing business as" or all of that.

16 MR. BENNETT: I think our -- I think that doing one or
17 the other would be appropriate. We would, I think -- we
18 operate exclusively under this Fresenius Medical Care North
19 America name. The holdings company is a shareholding company
02:44 20 only.

21 THE COURT: All right. So I'm just going to use
22 Fresenius Medical Care North America, defendant.

23 MR. TARRICONE: Your Honor --

24 THE COURT: For the heading.

25 MR. TARRICONE: Your Honor, you know, I'm just

1 thinking through all these corporate entities. I don't believe
2 they're all Massachusetts corporations.

3 THE COURT: I'm not going to say they are. I'm going
4 to say the defendant here is -- and then, you know, and another
5 defendant is not. But is Medical Care -- Medical Care North
6 America --

7 MR. TARRICONE: The company's headquarters are in
8 Massachusetts, I think, but it's --

9 MR. BENNETT: Yes, your Honor. I think it would be
02:45 10 accurate to say that all of those businesses are headquartered
11 here, and then some of them have an incorporation in New York,
12 some in California, but --

13 THE COURT: I'm just going to say the defendant is
14 here.

15 MR. BENNETT: You ruled on this in the diversity
16 phase.

17 THE COURT: I know.

18 MR. TARRICONE: On the issue of the North Carolina, I
19 think, if your Honor were to say to the jury something to the
02:45 20 effect that this court has jurisdiction and there's -- you
21 shouldn't be speculating about why the case is here.

22 THE COURT: I don't think I'm going to be so harsh
23 that way. "Don't speculate" is a little bit tougher than I
24 might otherwise be. Simply say this court has jurisdiction
25 over such matters and they're here. And then also, you know,

1 if somebody is looking at it and saying, Why are these lawyers
2 from all around, that will -- the case is from all around, you
3 know, North Carolina, Louisiana, Missouri. That's past
4 Framingham, so that's what the jury will think, I think. But
5 I'm not going to dwell on it. I just thought of it as
6 something to be concerned about.

7 Now, going back to the list itself, Mr. McAlear, the
8 jury clerk -- we're now on Page 2 -- says the best thing he's
9 found in his recent experience is for them to identify by name.
02:46 10 So I'm going to tell them to identify by name. They pull these
11 names out rather than picking No. 1, 2, 3, or anything like
12 that on the helpful list of witnesses and lawyers that you've
13 given me.

14 I think, with respect to witnesses, I'm just going to
15 strike the "live" or "by deposition." That introduces a new
16 wrinkle. I think there's only one person who's by deposition,
17 in any event. But these are the witnesses in the case that
18 they will be hearing from, and that's all we really want to, I
19 think, know from them.

02:47 20 So then we turn to Page 3, which is a series of
21 questions about capacity that may tease some of this -- some of
22 this out, that is, the 16, 17, 18, that I think may be helpful
23 if we have people who have problems so that you can get rid of
24 them quickly.

25 19 is the one that's -- I want to focus on with this

1 calendar. Actually, Dan, do you have a clean calendar -- extra
2 copies of the clean calendar? So let me go through this -- and
3 you have a better understanding of when witnesses are going to
4 be on and how it's going to move along.

5 But I start with the 16th. You know that's -- we've
6 talked about how we're going to handle this jury selection.
7 I'm going to shoehorn in on the 16th a fairly complex
8 sentencing at the end of the day. But my expectation is that
9 we'll go through that process of cleaning up, at least those
02:48 10 people that we want to bring in on Tuesday, sometime around
11 2:30 to 3:30. Shouldn't take very long unless there's some
12 fight between you about something. I think there would just be
13 an agreed-upon list, and we'll record that list in front of the
14 court reporter as persons who are being excused. So I don't
15 see that as a problem. If we run on, then the sentencing is
16 going to have to take place later, but -- so that date, I
17 think, is okay.

18 The 17th becomes -- nothing problematic about the
19 17th, I think. We've got the full day. But I want to go back
02:49 20 to this. We talked about 9 to 1, 2 to 4, and you were talking
21 about doing things after that to try to deal with things,
22 certainly to have the time to deal with them. It occurs to me
23 that -- in part, because I have some things I might want to
24 slip into an afternoon break, and the afternoon disappears
25 pretty quickly clear if you take a break between 2 and 4, and

1 make it 2 to 4:30 with a 10- or 15-minute break. And I have to
2 have in mind the court reporters also having to shift around a
3 bit. But is that problematic for anyone, just another half
4 hour there? Okay.

5 So I'm likely to change the language on this to
6 identify that the trial is scheduled to begin with opening
7 statements -- that should be the 17th -- and may continue --
8 and I'm saying through the week ending May [sic] 4th. You may
9 want to change that as a result of things that I'm about to
02:50 10 say. But I'm going to have attached to the jury questionnaire,
11 in addition to the list of witnesses, a form of this calendar
12 so they've got some graphic that shows this.

13 Back to the graphic. I see no problem the week of the
14 16th with any of the times here. I have a couple of things
15 that I'll have to move, but that doesn't seem to me to pose a
16 problem.

17 I turn to the 22nd. I mentioned the swearing in
18 ceremony, but I'll do that at the break. The break would --
19 the United States Attorney is prepared to make a cameo
02:51 20 appearance at 3:00, so I'll honor that. So that's what we'll
21 probably break on. It may take a little bit longer because
22 I'll say a few things. But I don't see that as a problem.

23 On Tuesday, the 23rd, I have a couple of things on. I
24 can move them. But there are a few things that I can't move on
25 other dates, and so I may want to focus on finding a date to

1 move things.

2 On Wednesday, the 24th, a sentencing is scheduled. I
3 can, I think, move that as well to clean up the entire week --
4 virtually the entire week.

5 Thursday, the 25th; Friday, the 26th, I can leave
6 open. We had talked at one point about having Fridays open. I
7 don't know whether you have a view one way or the other about
8 charging on through. I want to be sure -- let me go through
9 the whole list, and then you'll -- maybe you'll have different
02:52 10 views.

11 I come to the week of the 29th, and I start to run
12 into some issues. I've arranged -- the monthly judge's meeting
13 is on Tuesday. Maybe you don't need to know this. But I've
14 arranged that -- I have certain obligations of presentation
15 there, and I'll do it over the lunch period so it won't
16 interfere with our time in this case. So Monday, Tuesday are
17 free.

18 Then here's where I run into something that's hard to
19 move. Wednesday, the 2nd, I have a class-action settlement,
02:53 20 and the notice has been given to members of the class. I
21 shouldn't move it because that just causes problems with the
22 settlement class. That's at 2:00. It may require some time,
23 and I probably would suggest that we take the afternoon -- you
24 take the afternoon of Wednesday, March 2, off. We won't sit,
25 and I tell the jury that we won't sit at that time.

1 Now, the next issue is that on Thursday, May [sic]
2 3rd, I have to be in Washington for a Judicial Conference
3 Committee meeting. I hope to be able to get back in the
4 afternoon, but I don't think I can be sure that I would be back
5 by -- I'm pretty sure I would not be back by 2:30. So that
6 would knock out that day as well.

7 I have a sentencing on -- now scheduled on Thursday,
8 that Thursday. I probably will try and capture that, and I
9 might use -- if we take that day off, I might use that day to
02:54 10 fill in some of this other stuff.

11 Then the possibility is the following week. I've got
12 a case scheduled, you may know, fairly complex False Claims Act
13 case that I'm doing pretrial on, starting on March 7th, but you
14 obviously have priority on it if we have to slip into March
15 7th.

16 Now, what have I, in a somewhat long-winded fashion
17 said? I've said that, I think, that we really have to take off
18 the afternoon of the 2nd and all of the 3rd, and we'll do some
19 rescheduling in that area to deal with other stuff that I've
02:55 20 got here. But those are the kind of unmovable ones.

21 What does that do to you, I guess, is the way to
22 describe that and the presentation. From the plaintiff's case,
23 it strikes me that you will be done by your case.

24 MR. TARRICONE: We will be done well before then, your
25 Honor.

1 THE COURT: Do you have a -- I'm not holding you to
2 you it but an idea?

3 MR. TARRICONE: We expect to be done -- well, we're
4 thinking Thursday, the 25th.

5 THE COURT: Okay.

6 MR. TARRICONE: Or before. Now, you know --

7 THE COURT: Don't worry. There won't be a contempt of
8 court hearing resulting from that misrepresentation.

9 MR. TARRICONE: I've been wrong before.

02:55 10 THE COURT: All right. Okay. I'm just looking at
11 that. And so from the defendants' point of view, what do you
12 see? Because one of the -- we've got to charge a jury.
13 They've got to deliberate. I want to give them fair notice of
14 what's happening.

15 MR. BENNETT: So there is one retained expert who I
16 had in that 2nd or 3rd date that I'll deal with. I still think
17 that if we got the case on the 24th, we would -- although would
18 you think that the lawyers might do instructions with you on
19 the 3rd or have one of -- if you got back in time?

02:56 20 THE COURT: Sure.

21 MR. BENNETT: I think we would like to try to close on
22 the 4th still even with the schedule that you've given us.
23 What I have to do as soon as we're done is call one expert and
24 advise everybody if it's a problem.

25 THE COURT: Okay. But I guess what -- from my

1 perspective -- and I'll raise this as well, which is, I
2 ordinarily don't like to send juries out on Fridays. I will if
3 the parties are okay with it. I just, you know, have this
4 lingering concern about the hydraulic effect of the upcoming
5 weekend and the desire not to come back. And depending, as I
6 expect, your closings are going to be somewhat lengthy. This
7 is not like an OUI case. And my instructions will be
8 sufficiently detailed. I hate to send a jury out after that or
9 have them deliberate for two hours. I say "hate." I leave it
02:57 10 to you. You're the ones who are going to have to live with
11 this. And I truly believe that jurors are diligent in dealing
12 with stuff. It's just an awkward time to send them out.

13 So any thoughts about that part of it? Because one of
14 the things -- I'm going to be telling them we anticipate --
15 something like this: We anticipate the evidence will be
16 completed by the end of the third week, and you may be
17 deliberating, I think, is part of what you're saying. I don't
18 mind sending them out and deliberating.

19 MR. TARRICONE: Your Honor, I agree with your
02:58 20 sentiments about sending them out for a very short time on
21 Friday. I don't think it's an appropriate way to handle it or
22 the better approach anyway.

23 THE COURT: Okay. So it's not likely to be closing
24 then, but we can -- we will be doing instructions as the case
25 goes on. I mean, I'll be asking questions and trying to think

1 things through anyway. My idea of charging conferences is
2 just, you know, is there something you're concerned that I
3 might say or might -- myself or that I might interrupt one of
4 you. It's not I check off on No. 5 and No. 7 and that sort of
5 thing. I'll tell you generally what I'm going to do, but I
6 won't do it until after your closings. So I just don't want to
7 sandbag you in any way.

8 MR. BENNETT: In light of this, it seems that it might
9 make more sense to tell them right in advance that, from
02:59 10 Wednesday noon till Friday, they can get done everything they
11 get done and --

12 THE COURT: You want to include the Friday?

13 MR. BENNETT: I was thinking that was what we were
14 suggesting.

15 THE COURT: You fine-tuned enough -- maybe you're
16 fine-tuning to meet the kind of Procrustean bed that you're
17 trying to fit so that you're fitting your case to meet that.
18 It's not that I don't want you to be tight on this; but on the
19 other hand, all I want to do right now is make sure that my
02:59 20 schedule doesn't cause problems for you and that I'm not
21 misrepresenting to the jury what's going to happen.

22 MR. BENNETT: Okay. So the option would be whether we
23 would present -- think that we would still be presenting some
24 evidence on Friday so that they would come back.

25 THE COURT: We could. I'd rather not take the entire

1 -- if you present evidence -- if you're presenting evidence on
2 Friday, I'd still not -- obviously not send them out at that
3 time. We might use that for charging purposes or other
4 purposes or that sort of thing.

5 As I'm listening to this, I'm hearing that we might --
6 that I'm really looking at the 7th as the day in which the
7 argument and charge takes place, and then I send the jury out.
8 That doesn't interfere with my ability to bring the new jury
9 in. I wouldn't do it on the 7th, but I can do it on the 8th or
03:00 10 -- I have to talk to Mr. McAlear at a time that might not
11 induce a cardiac event when I tell him this, but we can do
12 that.

13 So what I'm going to say is -- I think, is that the
14 jury can anticipate that we think the evidence will be
15 completed by the 4th, that they will begin deliberations the
16 week of the 7th then. I'll put in language in No. 19 that
17 would be something like this, telling them that they're going
18 to be sitting from 9 to 1 and 2 to 4:30, with a morning and an
19 afternoon break and lunch that's going to be provided by us
03:01 20 between 1 and 2 -- for them, not for you -- between 1 and 2.

21 Now, let me ask you something else, which is do you
22 need 1 and 2? 1:45?

23 MR. BENNETT: Fine with us.

24 THE COURT: Is that a problem?

25 MR. TARRICONE: I didn't understand the question, your

1 Honor.

2 THE COURT: Now I'm haggling over price. Do you think
3 that you could do -- instead of starting at 2, we start at
4 1:45, end at 1, start at 1:45. The jurors are generally -- I
5 mean, I think the meals are fine, but they're a little bit like
6 hospital food, and they get through it pretty quickly, and
7 they're ready to get going again. But I also recognize that
8 people have to clean up and do things, and I haven't yet raised
9 it with the court reporters, who also have an interest in this.

03:02 10 MR. TARRICONE: I'm thinking it might depend on the
11 day.

12 THE COURT: I don't want to tell them it depends on
13 the day. I'll leave it at 2 then.

14 MR. TARRICONE: Just for now. It always seems that
15 there are things that have to get done.

16 THE COURT: If it's not with me, it's something else
17 that you've got to deal with, particularly going full days.
18 We'll say 2 to 4:30 on this. I will identify that the jury
19 will not sit on the afternoon of Wednesday, the 2nd, and will
03:03 20 not sit on Thursday, the 3rd. So there will -- this chart will
21 be marked up just to indicate what are the days that are open,
22 what aren't, so they've got some idea of it.

23 But that then is a springboard for asking -- the
24 latter part of Question 19 is: Any problems with that? I'll
25 give them a charge that says something like what I say here,

1 which is, don't expect me to be really nice about excuses. But
2 this will generate anybody who's got a prepaid vacation and
3 anybody who's recalcitrant.

4 As I thought about it, I thought that -- turning to
5 Page 4, I thought that it would be useful to add things that I
6 would have asked them anyway here so that they can provide some
7 sort of answer that gives us a head's up at least somebody's
8 got some problem, something that they're concerned about
9 substantively.

03:04 10 And 21 is to give them space to respond to private or
11 sensitive information because I've asked some questions about
12 their medical condition, and they may be shy about medical
13 conditions of others or things that we've asked before.

14 Now, two things that I wanted to raise with you here
15 is whether to have something in the case -- in the
16 questionnaire about the point at which we talk about the
17 witnesses that's a brief statement of what the case is about.
18 I mean, I do it, but it's also helpful just because they're
19 receiving a lot of information when the judge first is talking
03:05 20 to them, to have two or three pages -- two or three sentences
21 of what the case is about. I would likely put it in after the,
22 say, Question No. 11, which talks about kidney dialysis. Any
23 thoughts about that one way or the other?

24 MR. TARRICONE: Your Honor, plaintiffs think that
25 would be a good idea.

1 MR. BENNETT: The only other alternative, if you
2 didn't want to have it in writing out of context is, when you
3 made your introductory remarks. That's what I was thinking.

4 THE COURT: I was considering that that's what I was
5 going to do. I thought about it a little bit, and thought I
6 could give a short, as I say, two- or three-sentence, maybe
7 two-sentence, idea of what this case is about. It's about a
8 claim that Mr. Dial suffered as a result of some failure on the
9 part of Fresenius, I guess I'd say that.

03:06 10 MR. BENNETT: I think our -- I don't know that I feel
11 strongly about this either way. I think I would prefer it if
12 you said it at the introduction, and then they would fill it
13 out, as opposed to having it written.

14 THE COURT: What I'm going to suggest is -- I would
15 hope that you can both agree on two sentences. If you can't,
16 send me your two sentences. I will think of my own two
17 sentences. I will anyway but just so I don't -- I know where
18 the sensitive parts are -- I think I do -- but the sensitive
19 parts are. And then after those two sentences, I'd say, you
03:07 20 know, Do you have any particular knowledge of the case or any
21 facts -- know of any facts in connection with it? And let it
22 go at that.

23 There may be people who -- that would focus on, and I
24 think you'd like to know that in the questionnaire because --
25 and I sure would because I will be asking the follow-on

1 questions if these people have not been disqualified in some
2 fashion before that. So, again, by noon tomorrow, an agreed
3 upon -- hope springs eternal -- two sentences; failing that,
4 four sentences, two apiece.

5 You know, I've been thinking about what Mr. Ketterer
6 had to say and the request on the original verdict submission.
7 And I have thought about another question that would be
8 something like this -- I'm not yet there, but I'm interested,
9 obviously, in the parties' views with respect to it. And it is
03:08 10 something like this: Do you have any -- or such strong
11 feelings about the civil justice system, lawsuits or lawyers or
12 cases of this type that you may not be able to follow the
13 instructions and function as a fair and impartial juror? Yes
14 or no.

15 I, you know, in my interchange with Mr. Ketterer,
16 talked about my own approach on these kinds of things, but it
17 might be valuable to front that a bit. Someone who says, Kill
18 all the lawyers, you know, we'll get William Shakespeare in the
19 jury panel, or someone who responds in that way. Now, for a
03:09 20 number of people, I will generally say, Do you mean to tell me
21 you can't follow the instructions of the Court?, and then gauge
22 their -- the intensity of what they have to say or their
23 ability to respond to instruction. But I raise it to see what
24 the parties' view is with respect to that.

25 MR. TARRICONE: Your Honor, my experience is that,

1 done properly, that it is a good idea because it sometimes
2 ferrets out people at far ends of either spectrum, a belief.

3 THE COURT: In the questionnaire?

4 MR. TARRICONE: No. I actually --

5 THE COURT: Maybe I was less than clear. I have been
6 giving thought to having a question of this general --

7 MR. TARRICONE: Written question?

8 THE COURT: Written question, in which they would say
9 yes or no and, if yes, please explain.

03:10 10 MR. TARRICONE: Well, I think some people write -- it
11 may be easier for them to write than to raise their hand and
12 say something in the courtroom. So I think we would -- the
13 plaintiffs would welcome that.

14 THE COURT: Okay.

15 MR. BENNETT: I liked your approach that you described
16 the other day, which is that it's a better topic for in-person
17 questioning because they'll understand that they're here in
18 this courtroom with this situation. And I would hate to have
19 somebody check a mark when they think that there's perhaps less
03:11 20 consequence or it's easier to do it and then get up here and be
21 questioned in a way then that has you inquiring into that where
22 they've already taken a written position on it. And so my --
23 our preference would be, in light of all of the attitudinal
24 items that have been taken out, which we're fine with, we would
25 like it to be handled orally.

1 THE COURT: Well, I'm going to think about it. I'm
2 not sure where I go right now. I think that where I'm
3 leaning -- but I wanted to raise it so the parties could at
4 least address it or address their views. Where I'm leaning is,
5 in this introductory setting, to tell them about rules and that
6 sort of thing. But the ultimate obligation they have is to be
7 able to follow the rules, and we're going to be interested in
8 whether or not they can. Now -- or think they can.

9 Now, that doesn't focus them on a particular question,
03:12 10 although it kept -- it gets captured, I think, by -- Question
11 No. 20, is it? "Anything else that might affect your ability
12 to be fair and impartial?" So it doesn't focus them, yes, no,
13 don't like lawyers, don't like civil justice, litigation, that
14 kind of thing, they don't check that off. But if they've got
15 some abiding concern, it has a certain transaction cost to
16 making them write something out and think about it before they
17 do it, and it has to be salient in their mind for them to be
18 able to come to it there. But I think that's probably how I'll
19 end up dealing with that. Nevertheless, I wanted your views,
03:12 20 so I'll think about it some more.

21 I'm trying to think through timing because I have to
22 be in Washington tomorrow, but -- so I'm not sure that the
23 final version of this questionnaire is going to be disclosed to
24 you before Tuesday morning. It might be Monday afternoon, but
25 I might put a short leash on it to say, Any problems with this,

1 tell me. You've got a right to object to anything I do, and I
2 want you to have fair warning about what I'm going to do. And
3 if there's a good reason, I'll change.

4 But what I anticipate, just in terms of timing, is
5 I'll have a questionnaire in final form on Friday -- I'll have
6 it on Friday probably, but I want to look at it over the
7 weekend, the end of the weekend. Probably have it completed to
8 my satisfaction on Monday morning. We can email it to you. I
9 want to get the reproduction -- because there will be a large
03:14 10 number of them, reproduction done on Monday as well, so I say,
11 you know, through Mr. Hohler, let's have any responses that you
12 have or changes that you'd like me to make, including
13 typographical changes, obviously, by, I'd say, something like
14 2:00 so I can get this done. Okay?

15 MR. BENNETT: Your Honor, on the subject of
16 typographical errors, if we could turn to Question 8,
17 previously, and what the parties had submitted, we had, "Yes,
18 someone close to me," or, "No," on those boxes. The way the
19 Court has rephrased it or eliminated those, I think we only
03:14 20 need one check mark -- one box to check there.

21 THE COURT: Yup.

22 MR. BENNETT: So it should say "Yes," "Check if yes,"
23 something like that.

24 THE COURT: Right. I think it probably should --

25 MR. BENNETT: We could put a "yes" on the first box

1 and a "no" on the second.

2 THE COURT: Right. I think, to follow up with, like,
3 10 and 11, which have "yes," "no," maybe it's a little bit
4 difficult with a long list like that, so I'll simply put in,
5 "Check any box that" --

6 MR. TARRICONE: Your Honor, may I suggest that maybe
7 the same format as Question 6 and 9, just where there are
8 multiple ones, to check all that apply.

9 THE COURT: So would that be "check all that apply,"
03:16 10 use that language, for Question 9 -- Question 8? That's the
11 protocol for --

12 MR. TARRICONE: "Check all that apply." "Have you
13 ever..." "Check all that apply."

14 THE COURT: This one says, "Do you or anyone else..."

15 MR. TARRICONE: Right, of course.

16 THE COURT: Yup. This is an area in which I'll permit
17 back strikes, so, you know, you may find some more things here.
18 And I don't take it personally.

19 MR. TARRICONE: Your Honor, while we're on this topic,
03:16 20 if somebody -- I'm just looking at Questions 10 and 11, for
21 instance, experience with kidney issues or dialysis. If
22 somebody responds "yes," would you then make further inquiry
23 with them?

24 THE COURT: Yes. I will be looking through these
25 things too. After the Tuesday exercise, you will have looked

1 at them, ruled out the people who you think are -- shouldn't be
2 even considered. I will look at the questionnaires over the
3 evening, and then I will, I think -- but I'll have to think
4 about this some more. I think the easiest thing is going to be
5 for me to have all of the jurors in and then simply ask each
6 one of them in order something about theirs and do it at the
7 sidebar over here. That's how I think I'm going to do it.

8 MR. BENNETT: Your Honor, will you also permit the
9 parties to take them home, or do we have to look at them on
03:17 10 premises?

11 THE COURT: I want you to look at them on the
12 premises, and I want them passed back. What you'll get -- the
13 questionnaires. What you'll get as well is a list of the
14 jurors, which you can hold onto but may not use -- may not keep
15 past the trial itself but just to keep track of who the jurors
16 are and who are ultimately selected and make notes and that
17 sort of thing. But I'd rather not have the questionnaires
18 leave the building here. I'll let you, on pain of dire
19 consequences, take the questionnaires but bring them back; and
03:18 20 probably after the jury is selected, I'll say we want the
21 questionnaires back. But you will have made your own notes
22 about things that you think are important about particular
23 jurors.

24 MR. TARRICONE: Your Honor, we would ask that we be
25 permitted to take them that night after they're collected, and

1 then we'll return them the next day after we --

2 THE COURT: Not the questionnaires. Well, you all
3 seem very trustworthy to me so okay.

4 MR. TARRICONE: Thank you, your Honor.

5 THE COURT: But you're going to turn them in.

6 MR. TARRICONE: We understand the issue.

7 THE COURT: That, and obviously not make use of them
8 in various sorts of ways. I do not impose, unless I'm asked to
9 do something, anti-internet rules on it. Of course, you may
03:19 10 not contact any of the jurors or conduct any kind of
11 investigation that will come to the attention of the jurors as
12 a result of having received this information. But if you want
13 to run these people through Google or other more up-to-date
14 things, that's up to you if you do it by yourselves, not in
15 some way that comes to the attention of the juror or could
16 conceivably come to the attention of the juror. But you've
17 only got a night to do that. And then afterwards, I suppose,
18 to refine your views of the jurors. Okay.

19 Anything else that we need to talk about? I do want
03:20 20 to go downstairs to meet with Mr. McAlear to choreograph where
21 the chairs are going to be, what we're going to do. But
22 basically what's going to happen is you'll be seated there, and
23 Mr. Hohler will say, "All rise." And then I'll come in and
24 make my comments and make reference to the questionnaire.

25 MR. TARRICONE: Your Honor, we have a couple of things

1 that we'd like to bring to the Court's attention.

2 THE COURT: Sure.

3 MR. TARRICONE: Being mindful of your guidance that
4 we're going to have a Yankee trial, slice thinned, served cold,
5 we were surprised to receive 14 hours of deposition
6 designations from the defendant, including nine hours of Ray
7 Hakim, who, I mean, we thought was out of this case. For us to
8 spend the time to respond to that --

9 THE COURT: Let me understand.

03:21 10 MR. BENNETT: Your Honor, I haven't looked at the
11 timing on that, but what we've done is designated opening
12 amounts, which they've had now for several weeks. They have
13 just narrowed their case in what they sent to us, and we're
14 meeting on Saturday to go through it. There's no chance that
15 we'll be playing that much and that we'll work with them and
16 make sure that it's a reasonable amount and cut it back.

17 THE COURT: Is Hakim in the case?

18 MR. BENNETT: Is Hakim -- they have -- they had
19 designated Dr. Hakim, and then they had taken him out. I am
03:21 20 trying to figure out what to do with the Fig. 2 and 3, which,
21 as I understand it, is coming into evidence. That
22 implicates --

23 THE COURT: In a pale version of its former self.

24 MR. BENNETT: I understand, and I'm waiting to see how
25 that unfolds. But by the time that I hear their opening

1 statement and see the first couple of days, I will have the
2 video depositions down to something that is much, much less.
3 We will meet with them on the weekend of the -- they're going
4 to go through the whole first week and the first half of the
5 second week; and well before that, we'll have it -- know
6 exactly what we need and cut it back.

7 THE COURT: Is that why the eyebrows went up when I
8 said I'm just going to strike out "live" or "by deposition"?

9 MR. BENNETT: I think that the eyebrows went up
03:22 10 because, first off, four of the plaintiff's family are not
11 coming, as I understand it, and so we have those depositions. The
12 primarily general practitioner, who saw the patient from 1995
13 through 2010, is not coming, Dr. Roberts, and so we intend to
14 play Dr. Roberts. And then, as far as us, it's only Dr. Hakim
15 and Dr. Lacson, who we'll be in the process of cutting down as
16 soon as we hear their opening.

17 THE COURT: What are you doing with Hakim now? I
18 still don't understand. Not the chart? What do you want Hakim
19 in here for?

03:23 20 MR. BENNETT: Well, I think it could be the case that
21 we just found out yesterday they didn't intend to play him,
22 because they had designated him up until 5:00 yesterday. And
23 so now I think we may well cut him out. Initially, when I did
24 designations, I didn't designate anything of him. I've just
25 been thinking about what I understand to be coming in related

1 to the PSO where Dr. Hakim's data that became Figs. 2 and 3
2 came out of the PSO and went public and then dealing with Figs.
3 2 and 3.

4 So, I mean, I will do whatever I need to do to cut it
5 back, but I'm not a hundred percent certain about how the --
6 when we thought Figs. 2 and 3 were not coming in, we designated
7 none of those two witnesses for our case in chief.

8 THE COURT: Well, I guess to be continued.

9 MR. TARRICONE: The concern I have is that we have to
03:23 10 respond to the cuts.

11 MR. BENNETT: As far as I'm concerned, you don't have
12 to.

13 MR. TARRICONE: Okay. If that can be deferred --

14 MR. BENNETT: Absolutely.

15 MR. TARRICONE: To spend the time with nine hours --

16 MR. BENNETT: Exactly. I would have said that any
17 time you asked, and I agree to that.

18 MR. TARRICONE: And then the other question that I
19 wanted to raise was, I mean, some of the lists of experts on
03:24 20 the -- on this list, if it's a final list -- and maybe it's
21 not -- but, for instance, Sargent, who was a rebuttal witness
22 to Colton and Zydney, who the Court struck, and it was -- he's
23 a modeling expert. The modeling is out of the case, and we
24 don't understand why he's there.

25 And then the defendant has identified two duplicative

1 experts, general causation nephrology. That's Gennari and
2 Kalantar-Zadeh.

3 THE COURT: What's the story?

4 MR. BENNETT: Well, Dr. Sargent -- we did simultaneous
5 disclosure of these witnesses, and so some of ours are going to
6 change based on what we got from theirs at the same time. But
7 Dr. Gennari is a generic expert who testified in the Ogburn
8 case -- you may have seen him -- on acid-base balance
9 generally.

03:25 10 Doctor Kalantar-Zadeh in this case has a specialized
11 role because he is the -- in our view at least, the foremost
12 researcher on the impact of high predialysis serum bicarbonate.
13 So he has a niche -- we view him as having an important niche
14 role in this case for a patient whose last predialysis reading
15 was 28. There's no possible way that we either think you'll
16 allow us or we want to do duplicative experts.

17 THE COURT: I think you've hit the stonewall at the
18 first level --

19 MR. BENNETT: Exactly.

03:25 20 THE COURT: -- with not me allowing it. What I try to
21 do, though, in the list is -- to the jury is just alert them to
22 people who may appear, and I will say something along those
23 lines.

24 MR. TARRICONE: Well, and just for completeness --

25 THE COURT: Let me add one other thing, which, you

1 know, this is the Sherlock Holmes in me, Hakim is No. 16,
2 between Folden and Gennari; but the alphabet, as I understand
3 it, H comes after G, suggesting that he was parachuted in in
4 this place because the parties weren't sure up until the last
5 moment. So what's going on?

6 MR. BENNETT: We think it should be alphabetical. If
7 that happened, that was a mistake by us.

8 THE COURT: Okay. Go ahead.

9 MR. TARRICONE: Your Honor, and then another one we
03:26 10 were surprised -- again, maybe this is premature but -- just so
11 we don't have to spend time preparing for something that's not
12 going to happen, we would like to have a real list. But Dr.
13 Maddux was stricken by the Court as an expert. He's the
14 medical director who came in after Hakim. And so we were
15 surprised to see him on the list. And, again, I don't know.
16 Maybe that's just an old list.

17 MR. BENNETT: No, that's not an old list. We expect
18 him to testify. Doctor Maddux was the chief medical officer of
19 Fresenius Medical Care on February 3, 2012, and he is also a
03:27 20 fact witness who attended all of the PSO --

21 THE COURT: Also suggests that he's going to testify
22 as an expert.

23 MR. BENNETT: We're not going to violate your order in
24 limine on expert. He's a percipient witness to what happened
25 in the PSO.

1 THE COURT: If he is a percipient witness, then I
2 suppose it's possible. I'm a little concerned about him
3 crossing the line or not even perceiving the line. So that's
4 going to have to be made clear to him.

5 But I'm permitting PSO kind of initiative on the part
6 of the plaintiff. I gather from what Mr. Bennett is saying
7 that Dr. Maddux will be part of the effort to rebut it. So --

8 MR. TARRICONE: Okay. Thank you, your Honor.

9 THE COURT: -- so I will demonstrate my familiarity
03:28 10 with the alphabet by changing "Hakim" to follow "Gennari," but
11 I won't be changing any of the rest of this. This is the list.
12 I'm just going to say to the jury, Here's people who you may
13 hear of or about here, and we want to know something about
14 that. I'll say that at the kind of introduction. Okay.

15 Other things?

16 MR. TARRICONE: Not from the plaintiff.

17 THE COURT: Okay. Mr. Hohler tells me there's a
18 motion in limine that was filed this afternoon.

19 MR. TARRICONE: There was one filed, but we are
03:28 20 certain the defendants haven't had an opportunity to respond.
21 So we assumed it would be taken up on Monday.

22 THE COURT: Not on Monday, but --

23 MR. BENNETT: I can argue the motion.

24 THE COURT: Well, and I can probably rule on it except
25 I don't know what it is. Just so I understand --

1 MR. KOTT: Good afternoon, your Honor. Once again,
2 I'm Joe Kott, representing the plaintiffs.

3 The motion is relating to the treating physician that
4 my opponent referred to earlier, Dr. Roberts, out of North
5 Carolina. He was Mr. Dial's treating physician from
6 approximately 1995 up until approximately 2007, early 2008. He
7 cared for Mr. Dial in the development of his end-stage renal
8 disease. He took care of him for hypertension. He treated him
9 for diabetes. And these are the progenitors of his end-stage
03:29 10 renal disease.

11 The deposition that was taken of him was taken with
12 this compilation of medical records over nearly a decade, and
13 it took him through each and every episode that could be used
14 in ways that we don't feel are proper. First of all, the --
15 much of the information they gained -- when I say "they," I
16 mean the opponent, Fresenius -- was about getting to the point
17 of having renal failure.

18 THE COURT: Can I just pause it? He's coming live?

19 MR. KOTT: No, sir.

03:30 20 THE COURT: So there's a deposition transcript that
21 you can both look at and deal with to the degree that we're
22 talking about too much or --

23 MR. KOTT: Yes, sir.

24 THE COURT: I think it would be helpful for me to have
25 the deposition transcript that is specifically objected to.

1 MR. KOTT: Yes, sir.

2 THE COURT: Of course, I'm benefited from not having
3 looked at any papers here on this issue. But that would shape
4 it to some degree for me.

5 MR. KOTT: Okay. Would you like for us to delay this
6 now or should I continue, your Honor?

7 THE COURT: Well, this is like a trailer in a movie.
8 I'd like to know whether I'm really going to want to see the
9 movie. But you're going to -- to the degree that this remains
03:31 10 hot, I think it's probably going to be resolved by me dealing
11 with deposition transcript.

12 MR. KOTT: Yes, sir. I believe that's where this
13 would head, sir. Would you prefer that we give you that now or
14 just wait?

15 THE COURT: What I'm going to ask for for the
16 deposition transcript is that it be marked up indicating those
17 things that you think are objectionable because it seems to me
18 that, you know, you've got the guy's treating physician.
19 That's going to come before the jury in some fashion. Now, if
03:31 20 he's talking about, you know, bunions that he had, that sort of
21 thing, even if inquired of at discovery, I'm, of course, going
22 to permit that to be excluded.

23 MR. KOTT: Judge, I think there are two major issues.
24 One is that there is an emphasis and a revisiting multiple
25 times of the theme that Mr. Dial, prior to entering into

1 dialysis, was noncompliant once or three or four times during
2 the course of that period. They're arguing noncompliance.

3 THE COURT: Noncompliance in what sense?

4 MR. KOTT: What that means is that he was told, for
5 example, he was recommended to have a coronary angiogram. He
6 decided to undergo medical treatment back in 2001 -- or 2008.

7 THE COURT: As opposed to the angiogram?

8 MR. KOTT: Yes, sir. He made that choice. And he
9 would -- did not want to be on the transplant list. He did not
03:32 10 want to subject himself to a renal transplant well in advance
11 of this dialysis therapy.

12 Our point on the noncompliance is, once he enters
13 dialysis, once he begins, even Dr. Buchanan, who was the
14 Fresenius manager, the clinic manager, says that he was
15 compliant during the relevant period to the facts of our case.
16 We don't want to see the fact that he developed high blood
17 pressure, the fact that he developed diabetes or the fact that
18 he was a Native American or the fact that his family had
19 diabetes -- we don't want the arguments to be that somehow
03:33 20 those conditions caused him to have this reaction and ultimate
21 death to the --

22 THE COURT: I'm going to sort through it this way --
23 start sorting through it because I obviously haven't completed
24 it, this way -- this will not be a trial about blaming the
25 victim. On the other hand, failure during a relevant period to

1 take care might be important, but it's hard for me to see how.
2 I guess, you know, that he developed high blood pressure, fair
3 game. That he didn't take whatever you take for high blood
4 pressure, I'm not sure that's so relevant.

5 MR. KOTT: It's not even that way, Judge. It would be
6 times when he ran out of medications or couldn't afford
7 medications, things of that nature, quite remote to the facts
8 of our case. And I don't want -- like you say --

9 THE COURT: Just -- if I can pause on this. If, for
03:34 10 example, someone is going to say that his condition was
11 exacerbated by failure to take medicine, I suppose that comes
12 in. And then the answer is: He was a poor man or he was
13 someone, you know, who didn't keep track of his meds, that sort
14 of thing. Maybe I'd let that in. But anything that could
15 reasonably be said that could have contributed to his condition
16 as it existed at the time of death is, I think, fair game.

17 Now, I don't want to spend a lot of time about, you
18 know, he was a naughty boy. We've already dealt with the
19 Native American issue. I think I said that Mr. Bennett had
03:35 20 indicated he wasn't going to get into it. And that raises
21 questions, naughty questions, n-a-u-g-h-t-y -- or k-n-o-t-t-y
22 about epidemiological racism. I don't want any of that in this
23 case. Don't need it. So if this deposition needs a haircut,
24 you can suggest the style that you want.

25 MR. KOTT: Okay.

1 THE COURT: But that's how I want to deal with it, tee
2 it up. But they're going to hear from this guy in some
3 fashion, I would suspect, or I will be very surprised if they
4 don't, unless this thing is -- deposition is pockmarked with
5 objectionable material.

6 So what I'm going to do is say that I have this
7 motion, but it should be supported by specific parts of the
8 now-designated deposition that you wish to have excluded. And
9 you can respond to that. Okay?

03:36 10 MR. BENNETT: Thank you, your Honor.

11 THE COURT: All right. Anything else before we go
12 downstairs?

13 MR. TARRICONE: No, your Honor. Thank you.

14 THE COURT: So Mr. Hohler will lead the merry band
15 down to the jury room. I think there's no need for the court
16 reporter to be present there unless somebody wants this to be
17 recorded. Hearing nobody say that --

18 MR. TARRICONE: Your Honor, I was reminded by my
19 co-counsel that both parties submitted proposed verdict slips.

03:37 20 THE COURT: Yes. I have them, not yet ready to talk
21 about them, and I don't think we need to talk about them before
22 the trial begins itself. But we will be talking about them as
23 it goes along.

24 MR. TARRICONE: Thank you, your Honor.

25 THE COURT: But I appreciate that.

1 Mr. Hohler raised the Avandia issue.

2 MR. BENNETT: I filed it early so that you have it.
3 It's fully briefed. I think all the points that I made in
4 opposition orally before --

5 THE COURT: Haven't I dealt with that by -- it hasn't
6 been dealt with that it's not going to come in? That was in
7 the back of my mind. No?

8 MR. BENNETT: You did not rule that way, yet at least.

9 THE COURT: No, I mean, there was some understanding
03:38 10 about what the -- what it was going to be offered for and what
11 it was going to be used for.

12 MR. BENNETT: That's right.

13 THE COURT: Do I have it wrong?

14 MR. TARRICONE: I didn't think it was part of the
15 case, but maybe I misunderstood. We haven't seen the
16 opposition papers either so -- we need a chance to look at them
17 if it's going to be argued.

18 THE COURT: What do you plan on doing with Avandia?

19 MR. BENNETT: The only issue is -- the background
03:38 20 facts -- I don't know if everybody remembers exactly, but a
21 month or two before Mr. Dial's death, the family asked the
22 clinic to put his medical records together to send them to a
23 lawyer for the Avandia litigation because they had seen a TV
24 commercial for it. And we thought that it could possibly some
25 day be relevant if there is a contention, which I don't think

1 there will be, from the family that they didn't know that he
2 was having heart problems right before he died because we think
3 that that's why they sent those materials because they were
4 telling him, Go to the doctor; go to the doctor. It's not your
5 hernia or your acid reflux. It's your heart. We think they're
6 going to say that on the stand. When they do that, we won't
7 have any issues with this.

8 THE COURT: I guess my memory is not altogether clear
9 on this. I think Miss Graziano argued that if I have it
03:39 10 correctly. I understood that there wasn't going to be that
11 kind of contention.

12 MR. TARRICONE: The whole issue is, to me, Avandia is
13 a sideshow and --

14 THE COURT: Well, let me -- will -- is either part
15 intending to permit the word "Avandia" to darken the threshold
16 of this courtroom?

17 MR. TARRICONE: Absolutely not.

18 THE COURT: Okay. They say "absolutely not." Now,
19 the only way on which you anticipate this is, if they were
03:39 20 talking about Avandia, they must have known about this; is that
21 it?

22 MR. BENNETT: That's it; that's it. And there is also
23 an interesting email that we would be able to do without having
24 Avandia if it became relevant or admissible. There's an email
25 from my clinic manager right before the patient died saying, I

1 don't know what this medical question is about because I just
2 rounded with him today, and he said he was doing great. That
3 could conceivably be a prior consistent statement if they try
4 to attack her.

5 THE COURT: The last sentence may. The rest of it may
6 not.

7 MR. BENNETT: I understand. And so, if they don't do
8 anything that we would contend would open the door to this
9 concept, we won't be saying anything about it.

03:40 10 THE COURT: I guess I had thought that this was gone.

11 MR. TARRICONE: This is such a deep rabbit hole.
12 First of all, they see something on television and respond. It
13 wasn't a case. I mean, they had no case. It was rejected.
14 It's just a complete sideshow to get --

15 THE COURT: I guess I'm thinking that there isn't
16 going to be an occasion for the anxious apprehension that seems
17 to be part of this.

18 MR. BENNETT: If that's the case. Then we won't do
19 it. If we think it's open, we would, of course, talk to them
03:41 20 and talk to you before doing anything.

21 THE COURT: I guess I thought that's how I ruled, but
22 maybe I haven't.

23 MR. BENNETT: I didn't think that the transcript would
24 show that, but we may have misheard. I understand your ruling
25 now, and we understand it completely.

1 THE COURT: All right. So that's the ruling to the
2 degree it needs -- there's been a motion for reconsideration or
3 clarification, is that I considered the matter not to be ripe
4 for consideration and that I haven't been presented with any
5 indication that it will become, in any event, relevant to this
6 case. And before any reference is made to Avandia or this
7 related matter, it's going to be brought up to me. So maybe
8 I've now ruled explicitly on that.

9 MR. TARRICONE: That is very clear, your Honor. Thank
03:41 10 you.

11 THE COURT: All right. So downstairs. What I have in
12 mind is this is like the class photo where you're going to sit
13 there on either side of me. I think that the lawyer who is --
14 lawyers who are going to be doing the opening statements should
15 be on either side just so that I -- everybody else who's going
16 to have a speaking role is going to be identified. But that's
17 how I would lay it out, so you think about how you want to have
18 the order. But, Mr. Tarricone, you're doing the opening?

19 MR. TARRICONE: Excuse me, your Honor?

03:42 20 THE COURT: You're doing the opening?

21 MR. TARRICONE: Yes.

22 THE COURT: Mr. Bennett, you're doing it. So you will
23 be on either side of me by the podium.

24 MR. TARRICONE: Yeah. Your Honor, while we're
25 discussing such issues, if there are any particular protocols

1 that you have in your courtroom with respect to where counsel
2 can stand, whether a witness can use a flip chart, that sort of
3 thing.

4 THE COURT: The problem that I'm having is -- there
5 are probably a lot of problems I'm having, but one of them I'm
6 having is I've been doing pretrial in two cases that are very
7 complex, yours and the Wyeth case. And I guess I thought I had
8 told you, but apparently I told the Wyeth people or at least I
9 hope I told the Wyeth people because I have a recollection of
03:43 10 telling somebody this.

11 With respect to openings, I don't control -- I don't
12 limit where you can move about or not. I would say most people
13 use the podium and put it in front of the jury or central
14 between Mr. Hohler and the front row. But no -- apart from, as
15 I always say, at least -- both feet have to be in the well.
16 You can't step into the jury box there. But, otherwise, you
17 can move around a little bit. When you start examining
18 witnesses, it's from that podium right over there.

19 Using the electronics that we have here, it is a rare
03:44 20 situation in which someone needs to approach the witness. You
21 can do it by pointing to things, circling things. The
22 electronics is quite flexible in that regard. So assume that
23 you're going to be addressing the witness from that corner of
24 the jury box over there.

25 In terms of flip charts, yeah, if they want to use

1 flip charts, I'll mark them. I just have to see how it is --
2 how it's going to be done. I would like to have -- first,
3 they're not argumentative, No. 1; but, No. 2, to the degree
4 possible, anything that's going to be used marked for
5 identification still should have been seen by counsel on the
6 other side.

7 With reference to the use of exhibits in opening
8 statement, you can do it. If there is a genuine issue about
9 the admissibility of such an exhibit, I'll have to rule on it
03:45 10 ahead of time. I don't want disclosed to the jury anything as
11 to which there is a likelihood that it will not be -- or I will
12 even say possibility, that it will not make its way to the
13 jury.

14 To the degree that you've got chalks that you would
15 use for chronology and that sort of thing, which would not
16 otherwise get in -- and I think they would not otherwise get
17 it, that is, chronologies that are made by the parties, but I'm
18 not ruling it out. I'm just expressing my preference for hard
19 documents as opposed to summations. Show it to the other side
03:45 20 to be sure that nobody is going to say, Wait a minute. That's
21 wrong or that's argumentative or something like that. But I'll
22 let you do it, let you use that sort of thing. I kind of would
23 prefer that you use the electronics for that.

24 Some people feel more comfortable with air boards than
25 other things. The only concern I have with that, assuming that

1 it's been vetted with the other side is, I get -- my view of
2 the jury gets blocked, and I don't want that to happen unless
3 it has to. Now, I'm not part of the show. The reason I'm off
4 on the side is that I'm off on the side. It's you attempting
5 to talk to the jurors. And so if you say, Look at, the only
6 way -- there are physical constraints in this room. The only
7 way I can do it is this air board, and that means you don't get
8 to see Jurors 7, 8, and 9 and 2, 3, and 4. I will live with
9 that, grumpily. So, you know, you'll do it that way. Those
03:46 10 are the kind of basic rules of the room, nothing more than
11 that, I don't think.

12 MR. TARRICONE: Thank you, your Honor. That's very
13 helpful.

14 THE COURT: All right. Okay. So we'll go downstairs.
15 I'll meet you down there.

16 THE CLERK: All rise.

17 (Whereupon, at 3:47 p.m. the hearing concluded.)
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C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best my skill and ability.

/s/Cheryl Dahlstrom

Cheryl Dahlstrom, RMR, CRR
Official Court Reporter

Dated: February 14, 2016