

# *Welcome to the* **MORNING SHOW**



# Legaltech History....

# 2009: History

## E-DISCOVERY TOWN HALL

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# 2010: History



## HOW THE RULES ARE AMENDED

- Rulemaking is an exacting two to five year, seven stage process



- Rules Reexamination Project so big and important it will take about five years from May 2010 Conference to complete.



# *Welcome to the* **MORNING SHOW**



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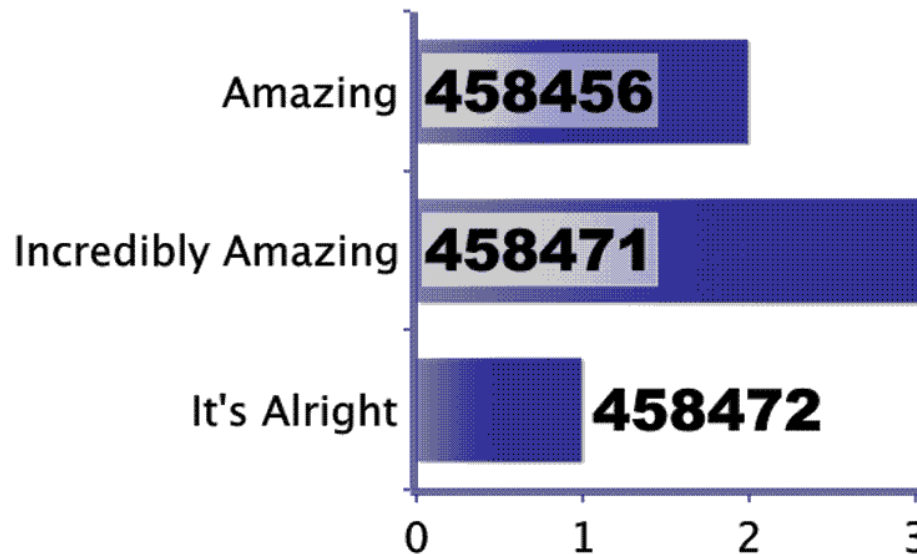
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**TIP**

Capitalization doesn't matter, but spaces and spelling do

# Cost Shifting?

# Boeynaems v. LA Fitness International, LLC.

## 385 FRD 331 (ED PA August 16, 2012)

- Proposed Class Action on behalf of present and former members of LA Fitness Health Clubs.
- Plaintiffs allege that LA Fitness membership practices are misleading and fraudulent. Specifically, the membership forms do not clearly explain the terms under which members may terminate without being obliged for additional dues; in fact, members who terminate must pay dues for two to three extra months after they notify LA Fitness of termination.
- Active judicial case management through a series of pretrial conferences, determining discovery issues, focusing discovery on both class action and merits issues.





# Boeynaems v. LA Fitness International, LLC.

385 FRD 331 (ED PA August 16, 2012)

- Under the allegations and facts of the case, the five individual plaintiffs had very few documents, whereas LA Fitness had millions of documents in two general categories:
- Corporate documents maintained by various corporate managers;
- “Member notes” – application forms, termination notices, and miscellaneous correspondence and emails from members maintained by LA Fitness at a third party storage facility in California.

# Boeynaems v. LA Fitness International, LLC.

385 FRD 331 (ED PA August 16, 2012)

## Discovery prior to the decision:

- The five individual plaintiffs produced all of their documents;
- LA Fitness produced a substantial volume of corporate documents, but plaintiffs were seeking additional emails from selected mid-level corporate managers who dealt with membership and termination policies/practices.
- LA Fitness had made the third party storage facility available for plaintiffs' inspection, but objected to continuing the substantial storage costs for these materials.



# Boeynaems v. LA Fitness International, LLC.

385 FRD 331 (ED PA August 16, 2012)

## Scope:

- The decision uses the metaphor “discovery fence”, which must be flexible, to determine what the topics are within the scope of discovery, and what topics are outside discovery. The “fence” can be expanded if the requesting party is willing to bear the costs of the expansion.
- Asymmetrical discovery. It was clear from the nature of the case that the plaintiffs had very few documents and very little discovery to provide whereas the defendants had millions of documents.



# Boeynaems v. LA Fitness International, LLC.

385 FRD 331 (ED PA August 16, 2012)

## Class Action Aspect:

- Under the Third Circuit Hydrogen Peroxide decision, the Court was obliged to allow discovery on class action issues and to then conduct a “searching” analysis of whether plaintiffs could sustain their burden showing the case should be maintained as a class action.
- Standards for determining whether a case should be maintained as a class action has changed from Eisen to Walmart.
- If the case was not going to be a class action, defendant’s exposure to the five plaintiffs was no more than \$10,000.



# Boeynaems v. LA Fitness International, LLC.

385 FRD 331 (ED PA August 16, 2012)

- On the other hand, if the case would proceed as a class action, the defendant's exposure was multi-million dollars in nature.
- There had already been substantial discovery by defendant, paid for by defendant without objection.
- Defendant objected to the additional discovery plaintiffs sought as not being relevant on the class action issue.

# Cost Shifting?



# Cooperation

# Cooperation

# Proportionality

FRE 502?

# Chevron Corp. v. The Weinberg Group

2012 U.S. Dist. LEXIS 137826 (D.D.C. Sept. 26, 2012)



- Some Ecuadorian citizens [the Lago Agrio Plaintiffs or 'LAPs'] sued Chevron in an Ecuador court, alleging that Chevron was responsible for environmental damage there.
- The LAPs prevailed in the Ecuadorian court and secured a multi-billion dollar judgment against Chevron.
- The centerpiece of Chevron's response is a Racketeer Influenced and Corrupt Organizations Act ("RICO") action against the plaintiff's and their conspirators.



# **Chevron Corp. v. The Weinberg Group**

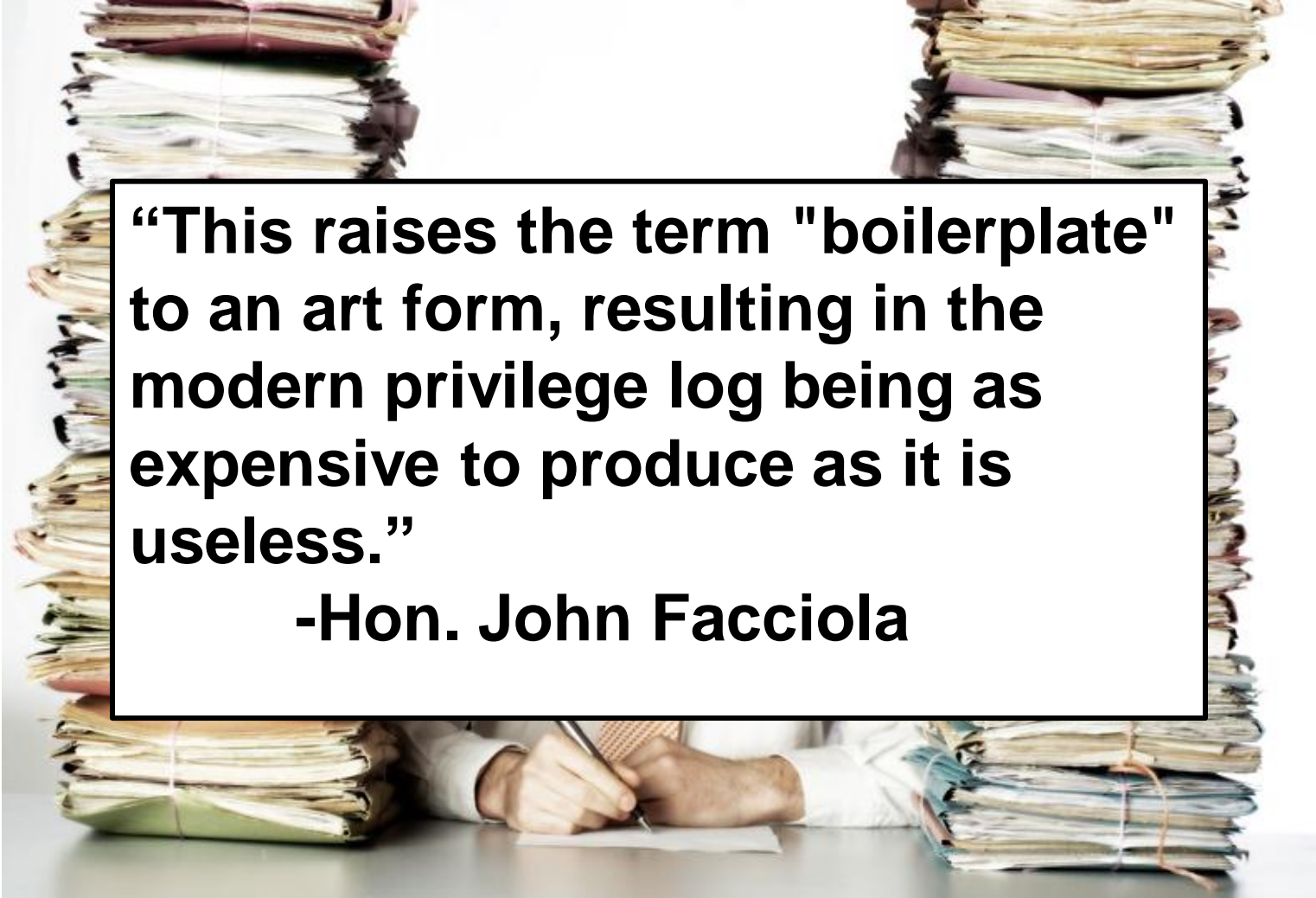
**2012 U.S. Dist. LEXIS 137826 (D.D.C. Sept. 26, 2012)**



- Federal Rule of Civil Procedure 26(b)(5)(A) requires that a party that claims privilege as to information must expressly make the claim and "describe the nature of the documents... not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."







**“This raises the term "boilerplate" to an art form, resulting in the modern privilege log being as expensive to produce as it is useless.”**

**-Hon. John Facciola**



FRE 502?

# Defense of Process

# Defense of Process

# New Rules

# New Rules





# Questions?

