

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiffs,)
)
STATE OF NEW YORK, STATE OF NEW)
JERSEY, STATE OF CONNECTICUT,)
HOOSIER ENVIRONMENTAL COUNCIL,)
and OHIO ENVIRONMENTAL COUNCIL,)
) Civil Action No. 1:99-cv-1693-LJM-JMS
Plaintiff-Intervenors,)
)
v.)
)
CINERGY CORP., PSI ENERGY, INC., and)
THE CINCINNATI GAS & ELECTRIC)
COMPANY,)
)
Defendants.)

DECLARATION OF JAY TIDMARSH

Jay Tidmarsh, being of legal age and pursuant to 28 U.S.C. § 1746, deposes and states:

1. I am a competent adult and have personal knowledge of the following facts.
2. Attached hereto as Exhibit A is a true and accurate copy of my expert report prepared in the above captioned matter.
3. The report summarizes my analysis and findings and includes a complete statement of my opinions. The report also includes data and other information considered by me in forming my opinions, my qualifications (including my Curriculum Vitae, attached as Exhibit B), a list of publications I have authored within the last ten years, the compensation to be paid for my expert services, and a listing of all cases in which I have testified as an expert at trial or by deposition within the last four years.

4. My opinions are expressed to a reasonable degree of professional certainty.

5. I affirm under penalties of perjury that the foregoing statements are true.

FURTHER AFFIANT SAYETH NAUGHT.

Date: January 7, 2009

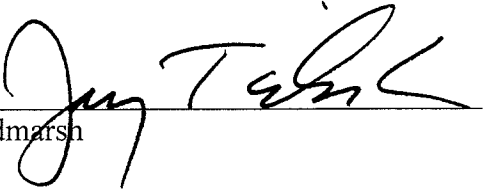

Jay Tidmarsh

EXHIBIT A

EXPERT REPORT

United States v. Cinergy Corp., Civil No. IP99-1693 C-M/S (S.D. Ind.)

Submitted by

Jay Tidmarsh
Professor of Law
Notre Dame Law School
Post Office Box 780
Notre Dame, Indiana 46556

EXPERT REPORT OF JAY TIDMARSH

United States v. Cinergy Corp., Civil No. IP99-1693 C-M/S (S.D. Ind.)

I have been asked my opinion regarding certain issues concerning the application of the Federal Rules of Civil Procedure that are involved in the decision of Judge McKinney to order a new trial and to hold a show cause hearing in the above-referenced case.

1. *Qualifications.* To begin, I am a Professor of Law at Notre Dame Law School, where I have taught since 1989 (save for semester-long visits to Michigan Law School in 2000 and Harvard Law School in 2003). I received my law degree from Harvard Law School in 1982, and practiced as a Trial Attorney with the Civil Division of the United States Department of Justice from 1982 until 1989, where I handled various tort and contract matters for the government. During that time I served as lead counsel for the government in major multibillion dollar toxic tort litigation, including the *Agent Orange* and *Triana* litigations, and as counsel on tort issues in the *Love Canal* litigation.

Since starting my career at Notre Dame, my primary areas of teaching have been Civil Procedure, Complex Civil Litigation, Torts, and Federal Courts. Most of my scholarship is also in these fields, especially in civil procedure, complex litigation, and federal courts. I am the author of numerous articles and author or co-author of six books, including two editions of a civil procedure casebook, a complex litigation

casebook, a civil procedure treatise, and a complex litigation treatise. In addition, I have served in various capacities on Local Rules Committees for the Northern District of Indiana, and as Chair of the Section on Civil Procedure of the Association of American Law Schools. I am a member of the American Law Institute. You can find a fuller description of my background, as well as my publications during the past ten years, on my attached curriculum vitae. My opinions in this case are my own, not those of any organization with which I am affiliated.

2. *Opinions.* In brief, after review of the Order on Plaintiffs' Motion for New Trial written by the Honorable Larry McKinney, various case materials with which you supplied me, and other research I have performed, I have formed two opinions relating to this case. First, counsel for Cinergy Corp. complied with the requirements of Rule 26(a)(1) in its disclosure of Robert Batdorf, and was not required under Rule 26(e) to supplement that disclosure further in light of Mr. Batdorf's subsequent retention as a consultant before the *United States v. Cinergy* trial. Second, it is highly debatable whether the two requests for production of document that the United States has referenced as triggering the obligation under Rule 26(e) to provide a copy of the subsequent consulting agreement between Mr. Batdorf and Cinergy Corp. in fact imposed such a requirement. Put differently, in my opinion, a reasonable attorney could have believed that neither Request No. 17 of Plaintiff's First Request for Production of Documents nor Request No. 6 of Plaintiff United States' Second Supplemental Request for Production of Documents embraced a request for the Batdorf

consulting agreement, so that the failure to provide a copy of that agreement under Rule 26(e) was not unreasonable.

3. *Case Materials Reviewed.* In coming to these conclusions, I reviewed the following case materials:

- (1) The two document production requests mentioned above, as well as the responses of Cinergy Corp.;
- (2) The Batdorf consulting agreement;
- (3) The declaration of Justin A. Savage;
- (4) Plaintiff's Memorandum in Support of Plaintiff's Motion for New Trial Due to Party Misconduct
- (5) Exhibits 1-29 filed in support of Plaintiff's Memorandum in Support of Plaintiff's Motion for New Trial Due to Party Misconduct;
- (6) Cinergy's Amended Rule 26(a)(1) Disclosures;
- (7) The affidavit of Kathryn B. Thomson;
- (8) Cinergy's Opposition to Plaintiff's Memorandum in Support of Plaintiff's Motion for New Trial Due to Party Misconduct;
- (9) Exhibits A, B, B1-B5, C (the Thomson affidavit referenced above), and C1-C10 filed in support of Cinergy's Opposition to Plaintiff's Memorandum in Support of Plaintiff's Motion for New Trial Due to Party Misconduct;
- (10) Plaintiff's Reply to Cinergy's Opposition to Plaintiff's Memorandum in Support of Plaintiff's Motion for New Trial Due to Party Misconduct;

- (11) Exhibits 30-36 filed in support of Plaintiff's Reply to Cinergy's Opposition to Plaintiff's Memorandum in Support of Plaintiff's Motion for New Trial Due to Party Misconduct; and
- (12) Order to Show Cause.

In addition, I briefly scanned the transcripts for Mr. Batdorf's deposition, taken in 2004, Mr. Batdorf's trial transcript, and the trial transcript in which the jury's verdict was read.

4. *Bases for Opinions.*

(a) *Cinergy's Counsel Complied with Federal Rules of Civil Procedure 26(a)(1) and 26(e) in Their Disclosure Regarding Mr. Batdorf.* Near the end of the Order on Plaintiff's Motion for New Trial, the Court indicates that Cinergy's counsel failed to comply with their obligations under Federal Rules of Civil Procedure 26(a)(1) and -(e) in failing to disclose the Batdorf consulting agreement. I begin by noting that counsel for the plaintiff United States did not raise this argument in its own briefing on the issue. With due respect, I believe that the Court's decision on the matter is incorrect.

Rule 26(a)(1)(A), which requires the disclosure of certain types of information without the need for a request from an opposing party, provides (with some exceptions not relevant to this case) in relevant part:

[A] a party must, without awaiting a discovery request, provide to the other parties:

- (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to

support its claims or defenses, unless the use would be solely for impeachment¹

This disclosure obligation is distinct from the obligation of disclosure with respect to expert witnesses, which is contained in Rule 26(a)(2); among the disclosure requirements for expert witnesses is “a statement of the compensation to be paid for the [expert’s] study and testimony in the case.” Fed. R. Civ. P. 26(a)(2)(B)(vi). The principal purpose of mandatory initial disclosure, which was first imposed in 1993 and then significantly amended in 2000, “is to accelerate the exchange of basic information about the case and to eliminate the paperwork involved in requesting such information. . . . Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding which depositions will actually be needed.” Rule 26 advisory committee note (1993).

Thus, Rule 26(a)(1) required Cinergy, through its counsel, to provide (1) the name of Mr. Batdorf; (2) his address; (3) his phone number; and (4) the subject matter of his knowledge. When Cinergy, through its counsel, filed its Amended Rule 26(a)(1) Disclosures on July 1, 2003, it identified Robert E. Batdorf as a “person[] likely to have discoverable information relevant to its defenses.” It further identified Mr. Batdorf as

¹In this report, I use the language from the 2007 amendments to Rule 26. The actual language of Rule 26(a) in effect at the time of the July, 2003 initial disclosure in this case was slightly different; it changed in December, 2007, before the Batdorf consulting agreement was entered into. Most of the 2007 amendments — including those to Rule 26(a) — were “intended to be stylistic only,” and did not change substantive meaning or obligations. *See* Fed. R. Civ. P. Rule 26 advisory committee note (2007); *cf.* Republic of the Philippines v. Pimentel, — U.S. —, 128 S. Ct. 2180, 2184-85 (2008) (stating that the amendments to Rule 19 were stylistic only).

a “Current Employee,” and designated the “Subject” of his information as “Challenged Activities at PSI Stations.” Although the July, 2003 Amended Rule 26(a)(1) Disclosure did not provide either an address or a telephone number for Mr. Batdorf (who was, according to my understanding, still an employee of Cinergy), that failure is irrelevant for present purposes; the requirements of an address and telephone number help the other party to locate a fact witness, and the plaintiff had no apparent difficulty in locating and obtaining discovery from Mr. Batdorf. The point is that Mr. Batdorf had been identified in July 2003, and his deposition had been taken over the course of several days in 2004. Cinergy therefore discharged its obligations under Rule 26(a)(1).

A party’s obligation to disclose the identity of fact witnesses does not end with the mandatory initial disclosure under Rule 26(a)(1). Rather, it is an ongoing one. In particular, Rule 26(e)(1) provides in relevant part:

A party who has made a disclosure under Rule 26(a) — or who has responded to an interrogatory, request for production, or request for admission — must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.²

²In addition to making stylistic changes, the 2007 amendments made two modest substantive changes to the supplementation obligation of the parties. Fed. R. Civ. P. Rule 26 advisory committee note (2007). Those changes have no bearing on the issues in this case; in any event, whatever supplementation obligation Cinergy arguably had — and I do not believe that it had any — arose in April, 2008, after the restyled Federal Rules had come into effect.

In contrast, Rule 26(e)(2) creates a different rule for the supplement of disclosures regarding expert witnesses:

For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

The signing of the consulting agreement did not create any duty of supplementation under Rule 26(e)(1). In order for the duty to supplement to be invoked, the original initial disclosure must "in some material respect" have been "incomplete or incorrect." With regard to mandatory initial disclosures, the duty to supplement usually arises when a party receives new information about additional fact witnesses or additional documents that will support the party's claims or defenses. Because Mr. Batdorf was not a newly discovered witness, there was no duty to supplement for that reason. Nor did any of the remaining information required to be disclosed under Rule 26(a)(1) — Mr. Batdorf's name, his telephone number, his address, or the subject matter of his information — change by virtue of the consulting agreement. The failure to disclose the consulting agreement did not make the disclosure "incomplete" in any sense that mattered for purposes of Rule 26(a)(1). Mr. Batdorf had already been identified.

It is true that the Amended Rule 26(a)(1) Disclosure identified Mr. Batdorf as a "Current Employee." His status subsequently changed to a retired employee, and then to a consultant. Cinergy did not disclose these changes in his employment status. But Rule 26(a)(1) does not require a party to supplement a potential fact witness's

employment status. Rather, the only required elements in the disclosure are the identity, address, telephone number, and subject matter of the witness. This information was disclosed in 2003, and did not change by virtue of the consulting agreement. That fact is made plain by contrasting the supplementation requirements of Rule 26(e)(1), dealing with fact witnesses, and Rule 26(e)(2), dealing with expert witnesses. An expert witness is required in his or her report to disclose compensation terms (*see* Rule 26(a)(2)(B)(vi)), and a change in those compensation terms, if “material,” arguably might require a party to supplement the initial report. There is simply no comparable obligation imposed on parties with respect to fact witnesses.

I should also mention that Rule 26(e)(1) does not require supplementation of Mr. Batdorf’s deposition answers, where he indicated that he was employed by Cinergy and (because the deposition extended into his retirement) that he was retired. In 1993, then-extant Rule 26(e) was amended to clarify that the duty to supplement did not apply deposition testimony other than the testimony of experts. *See* Fed. R. Civ. P. 26 advisory committee note (1993) (“The revision also clarifies that the obligation to supplement responses to formal discovery applies to interrogatories, requests for production, and requests for admission, but not ordinarily with to deposition testimony. However, with respect to experts from whom a written report is required . . ., changes in the opinions expressed by the expert . . . are subject to a duty of supplemental disclosure . . .”).

Finally, if there were any doubt concerning the inapplicability of the duty to supplement the Rule 26(a)(1) mandatory disclosures because of the consulting

agreement (and I do not reasonably believe that there can be), I note that Rule 26(a)(1) requires disclosure only of that identifying information that “disclosing party may use to support its claims or defenses.” In its 1993 iteration, the mandatory initial disclosure requirement made parties disclose the relevant information of all witnesses “likely to have information relevant to disputed facts.” This requirement was consciously pared back in the 2000 amendment to Rule 26(a)(1). Thus, the spirit of the 2000 amendment — to eliminate the obligation to disclose the identity of witnesses whose testimony will support the claims or defenses of the other party but not the disclosing party — is inconsistent with the Court’s Order suggesting that the consulting agreement — which arguably supported the arguments of the plaintiff rather than Cinergy — was required to be disclosed under Rules 26(a)(1) and (e).

Therefore, taken together, Rules 26(a)(1) and -(e) imposed no obligation on Cinergy or its counsel to supplement its Amended Rule 26(a)(1) Disclosure to provide information regarding the consulting agreement with Mr. Batdorf.

(b) *The Failure of Cinergy’s Counsel to Produce Mr. Batdorf’s Consulting Agreement in Response to the Plaintiff’s Document Production Requests Was Not Unreasonable.* In its Memorandum in Support of Plaintiff’s Motion for New Trial Due to Party Misconduct, the plaintiff argued that Cinergy’s counsel violated Rule 26(e) in failing to supplement Cinergy’s document production by producing the Batdorf consulting agreement. In particular, the plaintiff identified two document production requests — Request No. 17 of Plaintiff’s First Request for Production of Documents nor Request No. 6 of Plaintiff United States’ Second Supplemental Request for Production

of Documents — to which it believed that the Batdorf consulting agreement was relevant. Because the consulting agreement was not in existence at the time that these production requests were served and responded to, the plaintiff's argument was not that the failure to provide a copy of the consulting agreement violated the original requests; rather, the argument was that Cinergy had an ongoing obligation to supplement its document production under Rule 26(e)(1). In its Order on Plaintiff's Motion for New Trial, the Court accepted this argument.

I agree with the plaintiff and the Court that, if Request Nos. 17 and 6 would have required the production of the consulting agreement had it been in existence at the time that the requests were made, then Rule 26(e)(1) required Cinergy, through its counsel, to supplement its production and permit the plaintiff to inspect and copy the agreement once it came into existence. The sole issue, therefore, is whether Request Nos. 17 and 6 were broad enough to require the production of the consulting agreement.

I have read and re-read these two Requests, as well as the positions taken by both the plaintiff and Cinergy about how they should be construed. The Requests are not crisply drafted, especially Request No. 17. On the one hand, they can be construed (as Cinergy contends) only to require the production of documents that themselves constitute communications about the operations at the plants identified in the requests. On the other hand, they can be construed (as the plaintiff contends) to require the production of documents that in any way might bear on such communications. On the narrower view that Cinergy espouses, it had no obligation to

disclose the consulting agreement because the agreement itself was not a communication about the events at the various plants at issue. On the broader view that the plaintiff espouses, Cinergy had an obligation to disclose the consulting agreement because, while not itself a communication about the plants' operations, it bore some relationship to those communications.

Determining which construction is correct is not a question of law as much as it is a question of interpretation of language. Simply put, I find merit in both positions. As a former litigator and as someone who teaches the discovery process in the classroom, I am not certain which construction of these Requests is proper. I do not have the certainty espoused by the plaintiff that the broad language of the Requests clearly required production of the consulting agreement. I also do not have the certainty espoused by Cinergy's counsel to the opposite effect. I am somewhat inclined to believe that the Requests were not broad enough to encompass the discovery of the Batdorf consulting agreement; both Requests seem more focused on discovering documents about the historical events that occurred at Cinergy's plants. But I do not have the feel for this litigation — the type of feel that only a lengthy immersion in the actual litigation and adjudication of this case could provide — that allows me to be more definite about the issue. The Court adopted the broader construction advocated by the plaintiff — one that required Cinergy to supplement its production under Rule 26(e)(1).

That said, I am of the opinion that, due to the ambiguity of the language in the Requests, reasonable counsel in the position of Cinergy's counsel might have construed

the Requests in a narrower fashion, and might have believed, therefore, that they were under no obligation to supplement Request Nos. 17 and 6 pursuant to Rule 26(e)(1). In rendering this opinion, I should state a caveat: I do not know whether Cinergy's counsel in fact knew about the consulting agreement before or at the trial. If a reasonable lawyer in the position of Cinergy's counsel were aware of the agreement, however, that lawyer could reasonably construe Request Nos. 17 and 6 not to encompass a request for the consulting agreement, but only to encompass a request for documents relating to the historical events at issue at Cinergy's plants.

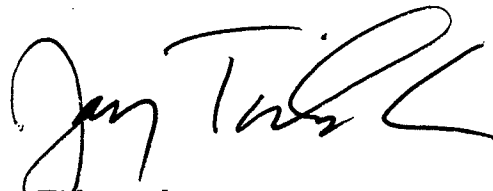
Our system of adjudication remains an adversarial one. The system of disclosure and discovery constitute important inroads on the classic adversarial system, which traditionally failed to provide the parties with any significant pretrial access to information in the opposing party's possession. *See Hickman v. Taylor*, 329 U.S. 425 (1947). Nonetheless, the adversarial core of the system remains. To the extent that the parties do not request information from an opposing party, the opposing party is under no obligation to provide it. (The exception to this statement is the mandatory disclosure regime of Rule 26(a), but as I have indicated, those disclosures did not trigger the obligation to produce the Batdorf consulting agreement.) Determining the precise scope of another attorney's discovery requests — to distinguish what must be disclosed from what may permissibly be withheld — is often a question of judgment. In the reality of the modern American adversarial system, many lawyers construe language in discovery requests as literally and as narrowly as is consistent with their obligation to provide the discovery that is requested. For this

reason, precision in drafting discovery requests is still necessary. I believe that a reasonable attorney operating in this environment could have believed that the consulting agreement was not responsive to the somewhat imprecise Request Nos. 17 and 6 — even though the Court subsequently determined that this belief was erroneous.

5. *Other Matters.* Finally, I have agreed that I will be paid \$250 per hour for my time consulting on this matter; there are no additional benefits or compensation with which I will be provided, nor is my compensation contingent on the outcome of the case. I should note that, in my twenty years in the academy, I have consulted with private and government attorneys on only a handful of occasions (I believe that this consultation is my fifth). I have never before served as an expert witness, and have never given deposition or trial testimony in a case.

Dated: January 7, 2009

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jay Tidmarsh". The signature is stylized with a large initial "J" and a long, sweeping underline.

Jay Tidmarsh
Professor of Law

EXHIBIT B

JAY TIDMARSH

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South Bend, Indiana 46616
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PROFESSIONAL EXPERIENCE

- 2003.** Visiting Professor of Law, Harvard Law School
2000. Visiting Professor of Law, University of Michigan Law School
1999-present. Professor of Law, Notre Dame Law School
1989-99. Associate Professor of Law, Notre Dame Law School (tenured 1995)

Subjects: Complex Civil Litigation, Civil Procedure, Torts, Federal Courts, Remedies, Contracts, Constitutional Law I, Constitutional Law II, Civil Rights Actions, Modern Tort Liability (Products Liability and Toxic Torts), International Environmental Law

- Teacher of the Year, 1995, 2005
- Black Law Students' Association Teacher of the Year, 1997, 2003, 2005

1982-89. Trial Attorney, Torts Branch, United States Department of Justice

EDUCATION

1982. J.D. *magna cum laude*, Harvard Law School

Member, Board of Student Advisers (Chair, First Year Regular Ames Moot Court Competition, 1982)

Teaching Assistant, Federal Litigation (Prof. David Rosenberg, 1981)

1979. A.B. *with highest honors*, University of Notre Dame

Major in History

PUBLICATIONS

- Books:*
- Jay Tidmarsh & Dennis M.P. Ehling, *FEDERAL AND CALIFORNIA RULES OF CIVIL PROCEDURE* (Aspen Publishers forthcoming 2009))
 - Jay Tidmarsh & Roger H. Trangsrud, *MODERN COMPLEX LITIGATION* (Foundation Press forthcoming 2009)
 - Thomas D. Rowe, Jr., Suzanna Sherry & Jay Tidmarsh, *CIVIL PROCEDURE* (2d ed. Foundation Press 2008)
 - Teacher's Manual (2008)
 - Annual Developments and Rules Supplement (2008)
 - Suzanna Sherry & Jay Tidmarsh, *CIVIL PROCEDURE: THE ESSENTIALS* (Aspen Publishers 2007)
 - Thomas D. Rowe, Jr., Suzanna Sherry & Jay Tidmarsh, *CIVIL PROCEDURE* (Foundation Press 2004)
 - Teacher's Manual (2004)
 - Annual Developments and Rules Supplement (2005)
 - Annual Developments and Rules Supplement (2006)
 - Annual Developments and Rules Supplement (2007)
 - Jay Tidmarsh & Roger H. Trangsrud, *COMPLEX LITIGATION: PROBLEMS IN ADVANCED CIVIL PROCEDURE* (Foundation Press 2002)
 - Jay Tidmarsh & Roger H. Trangsrud, *COMPLEX LITIGATION AND THE ADVERSARY SYSTEM* (Foundation Press 1998)
 - Teacher's Manual (1999)
 - Teacher's Update (1999)
 - Supplement (2000)
 - Jay Tidmarsh, *MASS TORT SETTLEMENT CLASS ACTIONS* (Federal Judicial Center 1998)
- Chapters:*
- Jay Tidmarsh, *The Story of Hansberry: The Rise of Modern Class Actions*, in *CIVIL PROCEDURE STORIES* 233 (Kevin Clermont ed., 2d ed., Foundation Press 2008)
 - Jay Tidmarsh, *The Story of Hansberry: The Foundation for Modern Class Actions*, in *CIVIL PROCEDURE STORIES* 217 (Kevin Clermont ed., Foundation Press 2004)
- Articles and Book*
- Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 *TEX. L. REV.* — (forthcoming 2009)
- Reviews:*
- Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 *MICH. L. REV.* — (forthcoming 2009)
 - Jay Tidmarsh, *Foreword*, 22 *NOTRE DAME. J.L. ETHICS & PUB. POL'Y* 225 (2008) (Symposium on the Judiciary)
 - Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 *W. ST. U. L. REV.* 193 (2007) (Symposium on State Civil Procedure)

Jay Tidmarsh, "The Dean of Chicago's Black Lawyers": *Earl Dickerson and Civil Rights Lawyering in the Years Before Brown*, 93 VA. L. REV. 1355 (2007) (book review)

Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. L. REV. 585 (2006)

Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513 (2006)

Jay Tidmarsh, *Looking Forward*, in 1 SEDONA CONF. J. 1 (2000)

Jay Tidmarsh, Book Review, 80 J. RELIG. 702 (2000)

Jay Tidmarsh, *A Dialogic Defense of Alden*, 75 NOTRE DAME L. REV. 1161 (2000)

Jay Tidmarsh, *Whitehead's Metaphysics and the Law: A Dialogue*, 62 ALB. L. REV. 1 (1998)

Jay Tidmarsh, *Civil Procedure: The Last Ten Years*, 46 J. LEGAL EDUC. 503 (1996)

Jay Tidmarsh, *A Process Theory of Torts*, 51 WASH. & LEE L. REV. 1313 (1994)

Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683 (1992)

Jay Tidmarsh, *Tort Law: The Languages of Duty*, 25 IND. L. REV. 1419 (1992)

*Reports,
Papers,
and Other
Publications:*

Brief of *Amici Curiae* Law Professors in Support of Petitioner Goss International Corp., No. 07-618 (U.S. Sup. Ct., filed Dec. 10, 2007), with Salil Mehra (co-signatories include Erwin Chemerinsky, Richard D. Freer, and Louise Weinberg)

Jay Tidmarsh, *Monroe v. Pape*, in ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES (Routledge 2006)

Jay Tidmarsh, *Younger v. Harris*, in ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES (Routledge 2006)

Jay Tidmarsh, *Honoring David Shapiro*, 79 NOTRE DAME L. REV. preceding p. 1677 (2004)

Jay Tidmarsh, "Agent Orange Heads to the Supreme Court," *Jurist*, <http://jurist.law.pitt.edu/forum/forumnew81.php> (December 18, 2002)

Jay Tidmarsh, "Democracy, Globalization, and Law: Some Cautionary Reflections," prepared for "Democracy, Globalization, and Law" Conference (2002)

Jay Tidmarsh, *Mass Tort Settlement Class Actions: Five Case Studies and Their Implications for the Reform of Rule 23* (Federal Judicial Center 1998)

Jay Tidmarsh, *In Memoriam: Father Bill Lewers*, 24 J. LEGIS. 1 (1997)

Jay Tidmarsh, "Mandatory Pre-discovery Disclosure in the Northern District of Indiana," App. 8, pp. 1-12, in Melinda B. Thaler & Ettie Ward, ed., MANDATORY PREDISCOVERY DISCLOSURE: A FIRST LOOK (American Bar Association 1994)

Jay Tidmarsh, *The Civil Justice Reform Act in the Northern District of Indiana*, published in *Federal Civil Practice* (Indiana Continuing Legal Education Forum, 1994)

Advisory Committee Notes, *Local Rules for the Northern District of Indiana* (1993)

Report of the Advisory Group on the Reduction of Cost and Delay in Civil Cases (with Hon. Robert L. Miller, Jr.) (1991)

Jay Tidmarsh, *Indemnity and Contribution* (Torts Branch Monograph, 1987)

Jay Tidmarsh, Actionable Duty (Torts Branch Monograph, 1987)

EDITORIAL POSITIONS

Legal Editor, Twelve Tables Press (2003-present)

SELECTED TESTIMONY, PRESENTATIONS, AND CONFERENCES

- “Rethinking Adequacy of Representation,” University of Cincinnati Law School, February 2008
- “Rethinking Adequacy of Representation,” George Washington University Law School, January 2008
- “Conditions and Reasons in Rule 23,” DePaul University Law School, October 2007
- “Conditions and Reasons in Rule 23,” Loyola University Chicago School of Law, October 2007
- “Choice-of-Law Concerns in the Selection of a Class-Action Rule,” Symposium on State Civil Procedure, Western State University School of Law, April 2007
- “The Dean of Chicago’s Black Lawyers,” Marquette University Law School Faculty Colloquium, March 2007
- Panelist, “The Class Action Fairness Act of 2005,” Federal Judicial Television Network, March 2005
- “Initiatives for the James Humphrey Complex Litigation Center,” George Washington University Law School, October 2004
- “A Positive Theory of Federal Common Law,” Faculty Workshop, Harvard Law School, November 2003
- “Law, Democracy, and Human Rights,” Conference on Democracy, Globalization, and Law, Minneapolis, Minnesota, September, 2002
- Moderator, “The Big Idea in Procedural Scholarship and Teaching,” Section on Civil Procedure Program Meeting, AALS Annual Meeting, New Orleans, Louisiana, January 2002
- Moderator, Panel on the Settlement of Class Actions, Class Action Conference, University of Chicago Law School, October 2001
- “The Sad State of Procedural Theory,” University of Michigan Law School, October 2000
- “Evolving Duty Issues,” Department of Justice Federal Tort Claims Act Seminar, July, 2000
- “Determining the Quantum of Compensation in American Constitutional Litigation,” Conference on Human Rights Remedies, London, England, March 2000
- “Maintaining the Tradition of Scholarship,” Federal Judicial Center Conference on the Craft of Judging, October, 1999
- “The Future of Complex Litigation,” Sedona Conference, April, 1999
- “The Future of Civil Law in the Twenty-First Century,” American Law Institute Annual Meeting, May 1998, *reprinted in* ALI, Remarks and Addresses at the 75th Annual Meeting 85 (1998)

Testimony before Subcommittee on Immigration and Claims, House Committee on the Judiciary, *reprinted in* Hearing before the Subcommittee on Immigration and Claims, House Committee on the Judiciary on the Judiciary on H.R. 1023 (104th Cong.), (September 19, 1996), at 158-72.

“Civil Procedure: The Last Ten Years,” American Association of Law Schools Convention, January 1996

PROFESSIONAL ACTIVITIES AND MEMBERSHIPS

Member, American Law Institute (elected 1998)

Member, Planning Committee, AALS Mid-Year Conference on Constitutional Law (2006-present)

Member, AALS Professional Development Committee (2005-present)

Chair, AALS Section on Civil Procedure (2001-02)

Member, Executive Committee, AALS Section on Civil Procedure (1999-2003)

Member, Seventh Circuit Appellate Rules Advisory Committee (2000-06)

Reporter, Civil Justice Reform Act Advisory Group, Northern District of Indiana (1991-93)

Reporter, Local Rules Advisory Committee, Northern District of Indiana (1990-92)

Member, Local Rules Advisory Committee, Northern District of Indiana (1999-present)

Member, ABA Section of Litigation, Subcommittee on Mandatory Pre-discovery Disclosure Rules (1993)

Member, State Bar of Wisconsin, United States Supreme Court, United States Courts of Appeal for the Fifth, Seventh, Ninth, and Eleventh Circuits, United States Claims Court

LAW SCHOOL AND UNIVERSITY SERVICE

Faculty Advisor, *Notre Dame Law Review*, 1999-2007

Provost Advisory Committee, 2001-05

University Strategic Planning Coordinating Committee, 2001-03

University Academic Affirmative Action Committee, 2001-02

Academic Council, 2000-03

Faculty Senate, 1992-93

University Committee on the Protection of Human Subjects, 1993-96

Faculty Development Committee, 2004-06, 2007-08

Dean Search Committee, 1998-99

Appointments Committee, 1995-99 (Chair, 1996-97), 2008

Clinical Programs Committee, 1995-99 (Chair 1995-99)

Admissions Committee, 1997-98

Faculty Advisor, *Journal of Legislation*, 1990-99

Colloquium Committee, 1999-2000, 2007-08

Faculty Advisor, American Constitution Society, 2001-present

Faculty Advisor, Coalition against the Death Penalty, 2002-present
Upper-Level Writing Requirement Committee, 2006-2008 (Chair 2006-08)
Loan Forgiveness Committee, 2008-present