

FCRA Focus Podcast: An Inside Look as a Juror Host: Dave Gettings Guests: Jessica Lohr and Virginia Flynn Posted: November 1, 2022

Darron Franta:

Welcome to Troutman Pepper's podcast, FCRA Focus. This podcast series is designed to educate, inform, and hopefully entertain you as well, on all things related to the Fair Credit Reporting Act. To stay abreast of these issues and to make sure you don't miss an episode, please subscribe via iTunes, Stitcher, Google Play, or wherever you download your podcast. And now your host, Dave Gettings.

Dave Gettings:

Hey everybody, and welcome to another edition of FCRA Focus, the podcast that covers all things credit reporting and Fair Credit Reporting Act. Today, we've got a special session. We're going to take a really broad view of FCRA and credit reporting and actually talk to Jessica Lohr and Virginia Flynn, two attorneys on our Troutman team that recently served as jurors. They got to look at the other side of the jury box, and we thought it would be really helpful and insightful for them to give litigants and companies some insight into what a jury trial looks like from the jury box so that we can maybe put this all into practice in any litigation we see, including FCRA litigation. So, without further ado, I'd like to turn it over to Jessica just to briefly introduce yourself and then, Virginia, if you could do so after that.

Jessica Lohr:

Hey Dave. My name is Jessica Lohr. I'm an attorney in the firm's Consumer Financial Services practice group. My practice is focused on FCRA litigation, a lot of consumer class action defense work. I also focus on cases filed in California and have a host of experience with California-specific credit reporting, debt collection, and other business laws out here in California.

Dave Gettings:

And Jessica, as we sit here recording this podcast, how many dogs or cats right now are you fostering?

Jessica Lohr:

I currently have zero foster animals, although I did just have to give back one of the rescue beagles from the Envigo case who had been transferred out to California, so that was kind of sad.

Dave Gettings:

Jessica, you hold a record of FCRA-focused guests who have delivered puppies in their own house while fostering them. Virginia, can you just give a brief introduction?



Virginia Flynn:

Jessica's like, "Thanks for that guys, I didn't realize there was a standard." I'm Virginia Flynn. I'm in the Charlotte, North Carolina office. I'm a partner in the Consumer Financial Services group with a heavy focus on the intersection of HIPAA and the TCPA. Throw in some managed healthcare work and there we have it. My practice is largely financial services-focused with the healthcare edge to it.

Dave Gettings:

So, Jessica, back to you. Can you just give a high level... I'm not sure how much you're allowed to discuss. I think you can discuss most of it, but just sort of a high-level summary of the jury trial you served on? I think it was only a month or two ago at this point.

Jessica Lohr:

Yeah, that's right. We're allowed to talk about anything we want to at this point, Dave. Your duties of confidentiality are totally discharged after you enter a verdict or, I think, fail to enter a verdict. I served as a juror in a three-week criminal case in San Diego County Superior Court. It was a police-involved shooting incident. The criminal defendant was not a police officer. It was a normal citizen who had been preparing for the Doomsday event and amassed a huge number of AR-15s and other semi-automatic rifles and handguns. He had been doing some meth that day and decided to take his guns out into his residential neighborhood. He was pointing his AR-15s at various neighbors and houses.

As a result, the police arrived. Things escalated quickly. He got into a shootout with the SWAT team and the main question in the case was whether the officers had engaged with him reasonably and used reasonable force, because if they had not, he could have been off the hook for the various gun charges and assault charges that he was tried for. But at the end of the day, we did end up finding him guilty on all counts, but we can talk more about that later.

Dave Gettings:

And Virginia, over to you. What was your trial? I think it was also a criminal trial, wasn't it?

Virginia Flynn:

Yeah, it was a criminal trial. So, this was 2020 right before COVID hit and I was living in Dallas, Texas. I had been there for about six years at the time. We moved to Charlotte about two years ago. It was a criminal case, as well. I wonder often if they're real thrilled to get defense lawyers on civil cases, but I think with criminal, they're a little more willing to allow us to sit on there. It was a domestic abuse case, domestic assault. So, it was two individuals who did not have homes. We'll put it that way, I guess. And they had gotten into a kerfuffle as they call it in Dallas.

It was basically a domestic issue. I think when they were, in the beginning, telling us about the case, they wanted to make sure that anyone with experience, that was a big part of the conversation, about domestic issues. It was not a long trial. We can get into it later, but I think I was very excited to hopefully be picked. I had almost made it onto the Dr. Death panel. He was the first physician to be tried criminally. That was also in Dallas, I think I was called to sit on a jury nine times in the six years I lived there. A lot of trials happened in Dallas, I think.



Dave Gettings:

Going to maybe some practical advice or reflections for lawyers that are listening on the podcast ... When you first sit down in the jury box, after you've gone through voir dire and selection, do you know anything about the case? Is it a total blank slate? And as a juror, is that a little bit of a disorienting process? So, Jessica, why don't you go first?

Jessica Lohr:

We did not know anything about the case until after we got sent to the courtroom, put in the jury box, or assigned juror numbers. Before we started the voir dire, the judge did read the criminal charges, which were very hard to follow. And there were tons of subparts and nobody really knew what was going on. It was definitely a bit confusing, and I think they keep it that way on purpose so that when they're doing the questioning, they're not giving too much away about the case so that they, I think, can try to get more honest answers from the jurors. That would, of course, be different if it was a more publicized case. But in my case, we did not know anything about the case, beyond just a reading of the criminal charges that were being made against the defendant.

Dave Gettings:

Was the first time you ever really learned about the case, opening statements from counsel?

Jessica Lohr:

Yes.

Dave Gettings:

Got it. And Virginia, was it the same for you as well?

Virginia Flynn:

No. We were told more about the case way before opening statements. I mean, enough that you knew what the case was about. It was criminal, that it was a domestic case. On the Dr. Death one, there was a full questionnaire we had to fill out. It was a two-day process because that was a very large case. You knew enough about it. But yeah, way more before opening statements. But when you first walk in and sit down, you're sort of just randomly picked for the case. You don't know at that point. As lawyers, we can sort of figure out, we think, what the case is about. If the state is the plaintiff, then you kind of know what's going on, but they gave us enough information way before opening statements to know what the case was basically about.

Dave Gettings:

Jessica, so not knowing anything about the case, how did that impact what you heard in opening statements and maybe what you would've wanted to hear in opening statements? I imagine it's transferable to most cases, including credit reporting cases where jurors probably don't know much before they hear from counsel.



The opening statements were certainly the first time that we heard the story of the case, and I think they're very important. Of course, you need to convey the facts of what happened to the jury before getting into the various witness testimony. I think what would've been helpful for me, and I think this was particularly the case because I'm a lawyer and I knew what was coming ... But I also heard concerns from other jurors without any sort of legal background, is that neither side addressed, at all, the various elements of the crime, which would apply, I think even more seriously, to a civil case. So, by the time we heard the story and the opening statements and got into the back-and-forth witness testimony, which is very granular, everybody was pretty confused about what we actually needed to find, what we needed to prove. And so, I think addressing the elements more clearly up front would have been helpful. And neither side did it, neither the defense nor the state.

Dave Gettings:

Did you take away if a lawyer had actually made a chart or put up something on a board that listed the elements, do you think all the jurors would've sat there or written them down, and then tracked them through the entire case?

Jessica Lohr:

I think a lot of the jurors would have. It doesn't need to be as detailed or doesn't need to get into every specific element, but I think a high-level overview of what they're going to be asked to decide and when they get that verdict form, what are they going to have to choose, I just think would be very helpful. Especially for a long trial and going into the granular witness testimony, which people seem to have a hard time connecting back to the main crimes that were at issue.

Dave Gettings:

I guess a good takeaway there is as the lawyers, by the time we get to trial, we know the case backward and forward, but the jury really doesn't know anything about it, and so any roadmap we can provide, the better. Virginia, thinking back to your case, do you remember anything specifically helpful, effective, not effective, about opening statements when you were sitting on the jury?

Virginia Flynn:

The judge would not let us have pen and paper.

Dave Gettings:

During the entire trial?

Virginia Flynn:

Correct. So, if there had been a really clear roadmap with really specific elements, it could have been confusing almost because you couldn't write anything down, so you weren't going to remember it. I think the best advice I would say that I took from it, as somebody who trials cases as well, is you need to explain what the case is about in a way that makes sense for the jury. You can walk through the elements all you want, but more often than not, most that aren't of the legal mindset are going to glaze over that. I mean, to be real, I think when you get to the jury instructions, several people ... I was like, "Are you falling asleep? Wake up." I totally agree with





Jessica that it can get very confusing, and I think when that's not done really well, everyone's looking around like, "What's happening?"

But we couldn't have pen or paper. It wasn't permitted. We weren't allowed to have anything to drink. Nothing can be in the box with us. I think if you're talking about very specific elements under the FCRA or whatever it is, you need to figure out a way to explain to them what the case is about and what the elements are without it being too legalese. I think that's where you'll end up losing people right away. Even if you have a pen and paper, I just think some people are kind of already grumpy being in there, frankly. Once they find out what the case is about, they're like, "Oh, perfect," right? So, I think I'd just be mindful about being too lawyerly at that point. You don't want it to be too complicated.

Dave Gettings:

It sounds like it would've resonated with you, Virginia, more just having the lawyer tell a story, so you could understand the narrative. I guess it honestly makes a huge difference whether or not they could take notes, frankly.

Virginia Flynn:

Yeah, no question. I just think if it gets too complicated, people will kind of glaze over it. So, I think making it a story, using analogies where you can, making that opening something where they can say, "I understand what this is about," I think that's the goal, right? Probably any opening, frankly.

Dave Gettings:

I guess one of the takeaways, just based on this conversation, is that all jurors are different, and what would've resonated with Jessica may not have resonated with Virginia.

Jessica Lohr:

Telling the story is important too, right? Don't get me wrong, I'm not saying that the opening-

Dave Gettings:

You can disagree with Virginia. It's okay.

Jessica Lohr:

I think you need to get your themes across, and you need to get the story across. I just think in our case, there was no discussion whatsoever about the actual crimes or the different elements that were going to be evaluated. People understood the story, but they were confused about how the story was going to just even apply in a big picture way. So, I do agree with Virginia. I think you need to get people engaged and tell your story and have themes. I just think that addressing, in the FCRA space, sometimes the story isn't as good for our clients.

Dave Gettings:

No, never.

Virginia Flynn:

That's not true, Jessica. Don't be negative.



I think focusing only on the story could do a disservice. And if there's a hook or some element that you want the jury to focus on when they're deliberating, it might be a good idea to raise that early.

Dave Gettings:

How much of the opening statements do you think jurors actually remembered two weeks into trial, Jessica?

Jessica Lohr:

I think the state did a really good job on the opening statement and I think people really took that story and remembered it. The defense was less memorable. I don't remember, really, what the defense said at all, to be honest. I think that that faded pretty quickly.

Dave Gettings:

So, let's move past opening statements and talk about direct and cross examinations. Virginia, do you recall anything about direct and cross examinations where you sat and said, "Oh, this is particularly effective," or "This was particularly not effective," from a jury's perspective.

Virginia Flynn:

I think you can tell when someone knows what they're doing and when they're not. It was surprising. I mean, I think the defense lawyer in my case, bless his heart, I don't know if he knew what he was doing, y'all. I mean it was rough, okay? And that's okay, but the jurors didn't like it. I think your client gets punished if you have a lawyer that does a bad job, right? Because then they start to roll their eyes. I mean, I had a lively bunch with me, and they had a lot of opinions about the way that the lawyers acted and I think the objections, the way that they objected, some of it was sort of theatrical, but some of it went a long way. Some of it didn't. So, from a cross-examination or even a direct, there were times that the lawyer didn't expect his own client's answer.

Now, it's a criminal case. I think that he was indigent. I think that happens in those scenarios, but these jurors did not give any grace for that. They fully expected these people to be ready to go, to know their job. They've watched a lot of Law and Order, and so they expect and old Matlock moment, and when they're bumbling around and they don't know the answers or the answer is not what they expected, it really is something that sticks out in their minds. I don't think I realized how important it is, that sounds terrible, to have a good lawyer. I know it sounds crazy to say that. You're like, "Of course you want to have a good lawyer," but these jurors, really, they could tell if this person was competent or not and if they had prepared, and they didn't like it when they hadn't done it. They felt like their time was being wasted.

Dave Gettings:

Interesting. Jessica, did you have a similar reaction?

Jessica Lohr:

Yeah. My fellow jurors had a lot of opinions about the lawyers and their preparedness and how they acted, so I think that's definitely something to keep in mind. Also, in the same vein of what

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Virginia was saying about feeling like their time was being wasted, I think you should be as concise as possible in questioning, in a way, because it's tedious to question a witness in direct exam how we have to do it, based on the rules of evidence, and I think it can go on a long time. When the lawyers were dragging things out that didn't seem important or not getting to the point, there were audible protests by my jurors on breaks about how long it was taking and why did they really need to go through it the way that they were doing. I just think being cognizant of the jurors' time and attention span is really important, and don't just drag things out to drag it out. Get to the point and get through it, I think, as quickly and clearly as you can.

Dave Gettings:

Was there any way for the lawyers to convey, through their questioning to the jurors, what was important and what was not important? Because when you don't know all the elements and how it's going to come together at closing, I'd imagine a lot of it might seem pretty irrelevant to a juror.

Jessica Lohr:

I had a hard time with that as a juror. I didn't know what was important. We were allowed to have notebooks and to write down notes, which I was grateful for because when you're listening to all of this testimony, you don't know what specific fact the case was going to hinge on. So, I took a lot of notes, and a lot of the jurors did take a lot of notes. I don't know. It was hard to tell what the attorneys thought was important.

Dave Gettings:

Virginia, over to you. Obviously, everyone comes into jury duty with an open mind and you're going to hear all the evidence. That's the caveat. But would you say you got a sense that jurors made up their mind pretty early on in trial, based on who they liked, who they didn't like, who seemed confident, who didn't? Or do you think everyone really was completely neutral until the end?

Virginia Flynn:

People had their minds made up day one, and I was actually fighting against it, because I was like, "Y'all, we have to wait for the hook." And I think perhaps the amount of importance a juror places on a case, that may change. But I would think even in an FCRA case, they would probably put the same level of importance as they do on a criminal case. It's not going to be some OJ Simpson murder trial. And I say that because for many of them, they want to get in and get out. They had their minds made up almost definitely by day one. No question, right? And I truly thought a lot of it was they picked the lawyer they liked the best. I mean, there was so much commentary about who was competent and who was not. And going back to your earlier question about whether you knew what was important ... You knew what the lawyers thought was important because the good one, the one that did a good job, would pause and look at you or he would talk to you on cross-examination.

Those were really effective tools, and I think we were taught in mock trial and law school, and you're sort of like, "Is this really effective?" But people found it effective if they liked you. There's this whole idea of you personalizing yourself in a trial. "You want them to not like you." You want them to like you. I think that's phooey. I think that's nonsense. You want them to like you. It matters if they like you. You don't want to go crazy. And I think people have their minds made



up, not directly after the opening statements, but they had their path they thought they wanted to go on, and that was from their own personal experiences as well. You come into that, you're not a clean slate, we all know it. It's why picking a jury is one of the most important things that you'll ever do at a jury trial, if not the most. We can talk about jury instructions, et cetera. But picking your jury is so, so important. It's got to be the most important part of the trial, in some ways.

Dave Gettings:

Virginia, when I had a trial in Austin back in 2017, the lawyers actually did the voir dire. They did the questioning. Was that the same way in your trial in Texas?

Virginia Flynn:

Yep. So, I mean, you're already getting to know the lawyers then. The way they ask the questions, the way they respond to you, the way they stand, the way they look at you in the eye. Yep.

Dave Gettings:

So, Jessica, over to you. How impactful was the actual lawyering? Just liking the person that was asking the questions.

Jessica Lohr:

For me, it wasn't impactful, I don't think, because I'm a lawyer so I was able to remove myself from it. For the other jurors, I think it was very impactful because they certainly thought that the defense attorney was rolling her eyes a lot, which they really didn't like. There was a lot of dramatic objections which they didn't like, and there was a lot of comments during deliberation about the attorney's effectiveness. But I had a really good group of jurors and I think because of all of the current political and social state of affairs regarding officer involved shootings, it seemed like people were trying to be particularly impartial and not make a decision. Everyone was very interested in talking about the very specific elements of the crime. I think I had a different experience that Virginia, where although the lawyering was talked about and important, they would make a statement about it and then kind of acknowledge that they shouldn't use that as a basis to make a finding, so it was kind of a unique group of jurors. I would guess that most juries are more like Virginia's experience.

Virginia Flynn:

You know what, though? I think that your point and my point together leads you to the conclusion that you have to know where you are. Were you in LA? San Diego? Where were you?

Jessica Lohr:

San Diego.

Virginia Flynn:

I was in Dallas, Texas. Dave, you were in Austin, Texas. If you don't live where you're going to try your case, local council is so important. A good, local council that understands, right? We had a trial in Henrico County, Dave, if you recall, and-



Dave Gettings:

Virginia. In Virginia, not your name.

Virginia Flynn:

The Commonwealth. We knew what that jury pool would look like, and you get their names before trial, before you even start to pick the jury as the lawyers. So, figuring out if you know who's on there, if people know them, it's so important. I don't think I realized it. But I think knowing where you are and the type of people that are going to make up that jury is so important.

Dave Gettings:

Yeah, I think it's absolutely true. When we had our trial in Austin, Texas, there were some interesting characters. And maybe in the PG-13 version of the podcast, we can talk about some of the jurors, but they had some interesting jobs and gave us some interesting responses on voir dire. Jessica, now we talked a little bit about direct and cross-examinations about lawyering. When you got to closing statements, did you find anything particularly effective about closing, or not effective?

Jessica Lohr:

It was interesting in the closing statements. The defense attorney made a few statements that I think she knew she wasn't allowed to do, and then the state objected to that, and it was fairly disruptive. I think it's interesting as a lawyer. I've not been to trial before. This is a question back for you, Dave. Sometimes, I think lawyers say things that they know is not admissible because it's going to stick with the jury.

Dave Gettings:

Absolutely. 100%.

Jessica Lohr:

That, to me, was a really interesting thing because the defense attorney definitely did that in closing, and I could pick up on the fact, I think, it was intentional. It was somewhat effective because she was making points that she probably wasn't supposed to make, based on the motions in limine that were submitted in the case and the evidentiary objections that were asserted. But it is an interesting thing, and I think we should think about that. When do you make a statement that you are going to be stricken for the impact? Because that was what I picked up on in the closings, and I found that to be a really interesting thing to think about.

Dave Gettings:

I think a lot also depends on how the judge responds because when you were sitting there in the jury box, would you say that the jurors were completely deferential and respectful of the judge? Because if they are and the judge responds really, really strongly to the defense counsel, admonishing him or her for saying something that a person's not supposed to say, that could then have a really negative effect, couldn't it?



It could, yeah. In my case, the judge was very polite and gentle with the attorneys, and so I don't think it had any of that sort of impact. She didn't admonish the attorneys at all in front of the jury. I do agree. I think knowing your judge and how the judge is going to react would also be a really important part of that. That's a good point.

Dave Gettings:

Virginia, the non-Commonwealth version, did you have any recollection of anything really interesting or insightful in closing statements?

Virginia Flynn:

The judge was not gentle. He was a good Texan who had an opinion, and I think that certainly impacted. But I think everybody sort of had the same opinion about who all was struggling and who was doing a good job. I do think he made, as part of the jury instructions when he read them out ... that whatever he'd said or done, that was nothing personal to the case, et cetera. You know that old school trick about having a poster board and then leaving it up so that you're opposing counsel gives his closing while your poster board is up? They did that, and I actually found it very effective. Because while the other guy was talking about his case, he had the poster board with all the elements ...

At that point, this is where they actually brought the elements ... and written out how they met them. It was super effective. It was visually very distracting. It's one of those, again, sort of mock trial tricks you hear about. Well, they're pulling them in Texas. They're pulling them and they're working. So, I remember that being very effective and people being like, "Oh, well remember that board said this," and so much that they wanted that board brought back into the jury room when we were deliberating.

Jessica Lohr:

We had a piece of evidence, Virginia, that was left up from the examination and that the state pointed to in her closing, and that was left up the whole time. I found that also to be effective.

Virginia Flynn:

Right?

Jessica Lohr:

Yeah, it was!

Virginia Flynn:

I'm sure the other lawyers are just nervous because closings are a big deal and you're on stage, the spotlight. But man, you got to have a better team with you that says, "Hey, pull that thing down," because it's just distracting. That's the goal. It helped the other side that had left it up.

Dave Gettings:

When you're on the jury, are you just desperate for visuals or evidence, or just something physical, something different than talking? Does the talking just become monotonous after a while?



Virginia Flynn:

I think so. I do think too many PowerPoint slides is ultimately [inaudible] so you get fatigued from it, so you got to figure out a way to keep it interesting. But visual, yes. I mean, if it's just people talking and talking ... And not every witness is created equally, so the good ones are great. The good ones are great. You can listen to them all day long. The bad ones are terrible and you're like, "How much longer till this person gets off the stand?" So, visuals, I think, would be helpful for witnesses that are really, really dry as well. Their testimony, unfortunately, is just not an interesting topic. And I'm not saying the FCRA is not interesting. I mean you have a whole podcast, Dave, all about it. It has to be interesting. But there may be opportunities to jazz it up a bit.

Dave Gettings:

So, you're saying I should work on our jingle. Is that what you're saying?

Virginia Flynn:

A little song and dance couldn't hurt.

Dave Gettings:

It's a good segue to the wrap-up. Given the fact it's called FCRA Focus, we should maybe focus on the FCRA a little bit, even though it's all transferable. Anything you learned as jurors, could you take it away to an FCRA case or just a consumer protection case in general? Anything you learned in trial that you think could be particularly effective or not effective in trying one of these cases?

Jessica Lohr:

I think having a theme is super important, and then going back to that theme over and over throughout the trial, the opening statements, the closing statements, to the extent you can bring it into the witness examination. Because that's really what's going to stick with people, especially if they don't have somebody like me or Virginia to walk them through the elements and the jury instructions that are really confusing. Having a theme, getting your general story out there very effectively, and then we didn't talk about this quite yet, but I do think the jury instructions are really, really important. That's something that I think lawyers in the FCRA space need to give particular attention to when you're preparing for a jury trial, because that could make or break how the jury decides the case or whether you could get a couple of people to side with you. Those are kind of my two takeaways. I think making sure you have a palatable and convincing theme, and then making sure the jury instructions are clear. Those are my big takeaways.

Dave Gettings:

In the FCRA space sometime we've got cases, actually, fairly often we've got cases where we've got really technical, alleged violations of the statute with very little, actual harm to the plaintiff. How do you think that would resonate with a jury of six or 12 people? I mean, did you get any sense of how the juror would feel about something very technical, where there was actually no harm? Would they end up feeling like the plaintiff might be wasting their time?



I think it depends on the lawyers and how good of a job you do at conveying the lack of harm to the jury. I mean, I think my jury could see through the weeds and the BS pretty well.

Dave Gettings:

This is not the PG-13 version of the podcast, Jessica!

Jessica Lohr:

No. I mean, people could see through it. I don't think that building up a story of fake harm would be very convincing. I think if you can effectively show the lack of harm, it could be persuasive, especially if you were getting into the damages side of it. It seemed, in my jury pool, if I was making an assumption about how they would've acted in a civil case, I think they would've not wanted to give to a plaintiff just because they had brought the lawsuit. I think that they would have evaluated the harm. So, it could be different in different jurisdictions, of course, but I don't think that they would've felt that an FCRA plaintiff would be entitled to a big recovery if they weren't harmed. And if you could show that there was no real damage, I think it would be effective.

Dave Gettings:

Virginia, last word to you. Do you have any recollections of takeaways from your case that could be transferable to a consumer protection litigation?

Virginia Flynn:

I agree with Jessica. I do think wasting someone's time was sort of something I really picked up on from my fellow jurors. They really felt like them being there was a waste of time. And they got that everybody deserved their day in court, but absent some legitimate harm. Now I will say, I do think people tend to find being frustrated continually ... That can be considered harm, whereas when we're talking about concrete harm, we're like, "That's not real harm." I will say that piece I've seen in some other cases, that can be effective. I agree with Jessica that I would fully expect a jury to, at least, properly evaluate whether or not there's real harm or damage, but it depends on exactly where you are and whether or not you'd get \$1,000 or whether you'd get \$100 million. I mean, that's where you've got to know where you are. I wouldn't be too interested in trying some of these CFS cases where you've got a jury pool that may just feel like sticking it to the man.

Dave Gettings:

Well, Jessica, Virginia, we really appreciate your time. Thank you for your jury service and we appreciate you sharing the insights.

Virginia Flynn:

Thanks, guys.

Jessica Lohr:

Thanks, Dave.



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