PUBLIC HEARING ON PROPOSED AMENDMENTS
TO THE FEDERAL RULES OF CIVIL PROCEDURE

DATE: January 12, 2005
TIME: 8:34 a.m.
LOCATION: Ninth Circuit Court of Appeals
95 Seventh Street
San Francisco, California
REPORTED BY: Melissa Roen Williams, CSR, RPR
Certified Shorthand Reporter
License Number 12284

A P P E A R A N C E S

The Civil Rules Advisory Committee:

The Honorable Lee H. Rosenthal, Chairperson
Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure

Frank Cicero, Jr., Esquire
Professor Daniel R. Coquillette
Professor Edward H. Cooper
Daniel C. Girard, Esquire
The Honorable Sidney A. Fitzwater
The Honorable C. Christopher Hagy
Professor Geoffrey C. Hazard, Jr.
Robert C. Heim, Esquire
The Honorable Nathan L. Hecht
Ted Hirt, Esquire
Dean Mary Kay Kane
The Honorable Peter D. Keisler
John G. Kester, Esquire
The Honorable David F. Levi
Patrick F. McCartan, Esquire
The Honorable J. Garvan Murtha
Professor Richard L. Marcus
Thomas B. Russell
The Honorable Shira Ann Scheindlin
The Honorable Thomas W. Thrash, Jr.
Chilton Davis Varner, Esquire

I N D E X

P R O C E E D I N G S

JUDGE ROSENTHAL: Good morning, ladies and gentlemen. I think we're ready to begin.

My name is Lee Rosenthal. I'm chairperson of the Rules Committee. And on behalf of the Civil Rules Committee and the Standing Rules Committee, we are very happy to welcome all of you to this first hearing on the proposals to amend the civil rules to accommodate electronic discovery.

The procedure that we are going to follow this

morning is a simple one. We have seventeen witnesses who are scheduled to appear before us today. We have also from a number of these witnesses received and read written materials that you have submitted, for which we also thank you.

Because we have so many people, and because the chief purpose of this hearing is not only to allow each of you to express your reactions to the proposal and give us suggestions for improving them, but also to allow the members of both the Civil Rules Committee and the Standing Committee to ask questions, we must of necessity limit the time available for each speaker.

We will allow each of the individual speakers up to ten minutes total of roughly uninterrupted time, although that time is not going to be uninterrupted all

00006

at once. The speakers are invited and indeed encouraged to be interrupted by the members of the committees, who of course will have questions of each of you.

I note that most of you are very well -- very knowledgeable about the committees before whom you are appearing today. But let me just remind the audience that the Civil Rules Committee before us proposed these rules changes. They were approved for publication by the Standing Committee. And in our April meeting, the Civil Rules Committee will take into consideration all of the comments and suggestions that we will have received and make decisions on the basis of the record that we will have established by that point. And we do have a court reporter here, and we'll have a court reporter at each of the hearings making a full record of these proceedings.

The proposals that then go forward, if they do, from the Civil Rules Committee will go back to the Standing Committee, which will of course have to approve any of the proposals that we recommend before they can go forward along the process. And that is, as all of you know, a long, deliberately slow, and transparent process. From the Standing Committee, they will have to then go to the Judicial Conference of the United States, then to the Supreme Court, and then to Congress, where,

00007

if they don't become subject to veto, they then become effective, which is -- the earliest possible date is December of 2007. So this is a long and slow process, but one that will make it possible to have a number of thoughts and comments taken into consideration.

We had hoped that today would go down in the annals of history as the day in which the advisory committees were able to consider these wonderful proposals on electronic discovery, but it turns out the day will probably be known as the day in which the Supreme Court decided the case involving sentencing guidelines. But it's all about guidelines. We have to look at it broadly.

And we are here to consider whether the Federal Rules of Civil Procedure, which have done us all proud in many ways over the last decades, whether they can be improved in their ability to handle the unique features of and demands of electronic discovery.

Our first witness this morning is Greg McCurdy on behalf of Microsoft Corporation. Mr. McCurdy.

COMMENTS BY MR. MCCURDY

MR. MCCURDY: Thank you. Good morning, Judge Rosenthal, Members of the Committee. It's a great pleasure for me to be here personally and also for Microsoft Corporation to have an opportunity to comment on these very important proposals.

I think we're most interested in getting some more data and examples of some of the challenges that litigants face in this field, so I would like to give you some of those. I've done some more research beyond the paper I submitted in December.

Rule 1 is really where we have to start out. It really calls for the rules to be construed and administered to secure the just, speedy, and inexpensive determination of every action.

In Microsoft's experience and my personal experience, this happens mostly in a just manner, but rarely speedy, and almost never inexpensive, certainly when electronic discovery is involved. The volumes and the costs are so huge that it has a big, big impact on litigation. Motion practice proliferates, and it's a serious problem.

One of the representatives of the trial bar at the Florida conference last year referred to "weapons of mass discovery." And those of us who are on the receiving end of requests for electronic discovery frequently perceive it as such.

The game in federal court, you know, the determination of actions is unfortunately only in exceptional cases judgement and a trial. Most cases, as you well know, are determined in settlement negotiations, and discovery is all about getting leverage for that. And imposing costs on the other side is sadly one of the best ways to force another party to settle.

In my paper you saw that I quoted the statistics about how much e-mail Microsoft receives. And it's between three and four hundred million external and internal e-mails a month. That can be broken down in various divisions, month to month, business days to weekends, obviously. But it's a huge amount.

90 percent of that external e-mail is spam. It's junk that we need automatic filters to basically delete according to preset rules without any human intervention. That is one of the routine operations of IT systems that is crucial to keep a large IT system running. And not even just a large one like ours, but smaller companies have the same problem and often even worse.

One of the themes I would like to convey is that Microsoft, being a technology and software company, is at the leading edge of -- I guess you can hear me if I step back from the microphone, and then I can see you a little bit better as well -- is at the leading edge of technology. But that doesn't mean that our experiences don't apply to other companies, especially since other companies tend to be our customers and use our products.

One statistic that I found very interesting recently is that in our discovery, over 99 percent of all pages produced were produced in electronic form. Less than 1 percent were produced on paper. And some of

that may be surprising to you. And perhaps to some people in older industry companies that have been around longer than Microsoft, that may not be the case. But that's clearly where the future is going.

How many documents are created nowadays other than with computers? How many documents do you write on a typewriter or with a fountain pen? You know, back in the 1980s, 1970s, there was still a lot of that. But starting with the '90s, there's very little, and since the year 2000, almost none.

So there's some discussion over whether we need these rules and whether they should apply to all discovery, not just electronic discovery. I'm really here to tell you that if it's not already the case, it soon will be the case that virtually all discovery is electronic. The days of paper created documents are over. If there are documents lying around on paper, they were once created electronically and someone decided to print them out. And quite a few people have

00011

decided that that's no longer the efficient way to go.

To give you an example of averages -- you see, we get these huge numbers of incoming e-mails, and we generate a lot of external e-mails. What does that actually look like in discovery?

We did a sample of one of our big cases. We were sued by one of our major competitors in about 1998. And this was a huge case. The files of several hundred Microsoft employees were involved that we had to serve and collect and produce from. We then settled that case a few years later, and the same competitor sued us again.

PROFESSOR MARCUS: Sir, I'm sorry to interrupt you there, but I have a question about what you just mentioned.

You said that the files of several hundred had to be produced. Could you say something about how those folks were selected and whether any undertaking was made to preserve any electronic information once the lawsuit was filed.

MR. MCCURDY: Absolutely. You get a complaint or some other way of getting notice of the lawsuit. You try to figure out what it's about, what the claims are, what the subject matters are. Then as the in-house lawyer you took to, okay, what business units, what

00012

products are implicated, what people work on them, what are their positions, and you come up with a list of the relevant -- we call them custodians. Who would have the evidence?

The fact is, of course, there are no central files, for all intensive purposes. You know, documents are kept by employees that they need in their work within the ordinary course of business on their laptops, on their various client devices, occasionally on their server shares. There's some joint ones, but a lot of it is individuals.

So you come up with this list, and you say, okay, this is a large list. And to a certain extent, you negotiate it with the other side. You say, okay, this is the number of people, these are the types of people we have put under attention and from whom we intend to collect. And then the other side always wants

more. You know, they would like to have thousands. We try to keep it lower.
But there -- in a large, complicated case, there are hundreds of employees whose files we have to go --
PROFESSOR MARCUS: The reason I'm asking you this is that preservation is one of the issues concerned in the amendments. It sounds like what you're saying is

that, even without a provision in Rule 26(f) calling for this sort of discussion, for years and years Microsoft has been undertaking the thought and undertaking the discussion; is that correct?
MR. MCCURDY: Well, there's a common law duty to preserve evidence, so we send notices to everybody who we think has relevant evidence. And then the other side makes their demands, and then that gives us more specificity as to what they're actually looking for.
A lot of that is wildly overbroad. You meet and confer, you negotiate, and you say, oh, you want everything about Windows? Well, you know, that could be every document in the company. Let's be more reasonable about it. And you try to narrow it down. You say, what features are you interested in? What people work on it?
So there is that process of give-and-take for the other side necessarily, which works pretty well if you have another side with a lot of employees and a lot of documents and they are an incentive to be somewhat reasonable. And most of our big cases are like that.
But in any case, just to get you back to numbers, we compared the '98 to the 2003 custodians in these two lawsuits brought by the same competitor on roughly the same topics. And we found that the amount of e-mail and other documents that the two groups of

employees had kept was seven times -- or more than seven times larger five years later.
Now, why do they have more than seven times more documents than they had five years before? I can't give you an exact answer. You know, the passage of time, the accumulation of e-mail. You know, obviously more and more gets created and sent around. There are many, many causes. But it's certainly an empirical fact that that has gone up hugely.
Now, conversely, while the volume has increased, the percentage of e-mail that is actually responsive and useful in the litigation that was produced decreased significantly. So you had a large increase in volume, and a decrease in the percentage. Now, the number of produced documents is still increased. But while in about '98, '99, from these hundreds of custodians there would have been about 15 percent of their documents that were responsive to the request, five years later it's less than 4. It's about 3 and a half percent.
So my point in all of that is what's accumulating is largely repetitious and unrelated to the issues, sort of junk. Because it's so easy to keep. People just, you know, stuff it in there, .pft file on their hard drive, and it accumulates. And that's where

the huge costs come from. Judge Rosenthal?
JUDGE ROSENTHAL: I have two questions. One

of the themes that comes through in a number of comments that we have received is that, even though the volume of electronically generated and stored information is much greater than we're used to on paper, there are increased efficiencies that are available today and will no doubt be even more available in the near future in search engines and search capabilities that will provide a technological solution to this problem with the technology.

I'd like to hear your response as to why that isn't enough as a tool to help reduce the cost and the delay of some of the demands of discovery. That's the first question.

The second question goes to your suggestion on handling data that is reasonably accessible and distinguishing that from data that is not reasonably accessible. You suggest that information that is not located in a reasonably accessible location should be -- you suggest that we should define "reasonably accessible" as in active use for the day-to-day operation of the company's business.

What if you have data that is not part of the day-to-day operation of the business or entity, but it's

00016

really easy to get? Why shouldn't that be as subject to production as data that is just as easy to get but is referred to on a frequent basis?

Those are two separate questions.

MR. MCCURDY: Right. Well, as to your second question, I would say -- and I don't know if I'm contradicting things in my written testimony -- if it's easy to get, I don't see any objection to not -- I mean, that's clearly very accessible, if it's easy to get. And by defining it as or using as part of the definition the fact that the it's used in the ordinary course of business frequently, that is somewhat of a proxy for easy to get, but obviously there are things that you don't use very often that are still easy to get. So I didn't mean that to be an exclusion in some way.

As to your first question, that's a very good point. And of course the advance of search technology is the only reason why we are able to have electronic discovery at all. The volumes are so massive that, without using search terms to narrow the volumes down, we couldn't do anything. Everybody uses it. Sometimes they don't talk about it. But it is impossible, given the volumes, to have individual lawyers and paralegals review every document.

So, yes, it's a part of the solution, it's a

00017

necessary part of the solution, but that doesn't mean it's free. That doesn't mean there are no costs associated. The software and the services provided by vendors that help us narrow the field and focus on what is potentially responsive come at a cost.

You know, a vendor may say to you, oh, it will take you a million dollars to review all of these documents. Well, I have a nifty software product that will help you do that much faster, and you won't need all of these lawyers, and I'll sell it to you for half the price. Well, you know, half a million is still a lot of money. And the way this is rising, you know, it's significant. This technology is not free. It

helps. Without it, we couldn't do it.
JUDGE SCHEINDLIN: I have a follow-up question on 26(b)(2). In the written comments, you are very opposed to the concept that you have to identify that which is inaccessible. I'm wondering why you're so troubled. Maybe it's just a misunderstanding as to what the obligation to identify would be.
I must say that the way I perceive it, it would be very general. We are deeming our back-up tapes to be inaccessible. We are deeming our legacy material to be inaccessible. We are deeming our fragmented material to be inaccessible. I think that's all you
00018
have to say. So we are not turning over those categories.
If you understood it the way I described it, would you be as troubled?
MR. MCCURDY: No, I would not.
JUDGE SCHEINDLIN: But what would you say if it's a law, a requirement to say, I'm not giving you document A, B, but name every document I'm not giving you because it's inaccessible?
MR. MCCURDY: Well, the concept of having to identify is sort of a new obligation, so I have a little bit of a problem with that. But if it is as you describe, identify it in general terms, that is not so burdensome, and that can be done. So I don't have a problem with that.
The identification requirement that is in the proposal was not entirely clear to me. And if it is clarified in the notes, that would be very helpful.
JUDGE SCHEINDLIN: So what you didn't want to do though is a privilege log, document by document, that would require you to retrieve everything just to identify?
MR. MCCURDY: Exactly. You know, you would have to access what is inaccessible, figure out what is unknown. I mean, huge burden and expense. Of course, a
00019
requesting party will want to have as much detail as possible, and a producing party will only want to give broad categories.
JUDGE SCHEINDLIN: But if it were as limited as I proposed in that hypothetical exchange, then that would be --
MR. MCCURDY: I think that would be doable.
MR. HEIM: I have a question that goes to the question Judge Rosenthal asked you. Perhaps it may give you an opportunity to change your mind again on this subject.
As I understood Judge Rosenthal's argument, it is, what's the problem with having this change in the rule that says if it's easy to get, even though not -- it doesn't fall into the routine operation of your computer system, then that should be within the province of the initial request as well?
My question to you is this, since you know systems far better than I. If we're trying to come up with reasonably bright line standards -- I understand that it's impossible to have true, you know, real black/white kind of standards here -- doesn't an easy-to-get kind of approach to this -- wouldn't it be so speculative, so in-the-eye-of-the-beholder, that

it's, you know, whether it's easy to get or not easy to
get, who knows whether it's really easy to get or not?
I mean, aren't we better off staying with
the -- it's either part of what you routinely do to
operate your computer systems for purposes of your
business operations or not?
MR. MCCURDY: If you're looking for a bright
line rule, then I think what you propose is much better
and a much brighter line. Because if you really don't
use something and it's sitting in some warehouse because
you've never bothered to do anything with it, you know,
that's a pretty obvious fact.
Easy to get and inaccessible versus not
accessible are very amorphous terms. There is a
spectrum. And what was accessible yesterday, a month, a
year, three years from now may not be accessible. The
passage of time, the change of technology, the departure
of employees, change in software, all of those things
affect that.
So, yeah, I think you have a very good point.
Inaccessible and easy to use not bright line. There's a
spectrum about which you can argue. I think it's
helpful if the rules say, you know, that there are two
tiers, and the hard-to-get --
Are you okay?
JUDGE ROSENTHAL: We didn't realize that you
were quite so --
MR. KESTER: That was not a reaction.
MR. MCCURDY: Okay. So yes, a bright line
rule, is not -- you know, used in the course of business
or not, that will be a more bright line rule, and I
think that will be a helpful approach.
JUDGE ROSENTHAL: Let me go back and ask one
more question that maybe ties these two strands together
and lets you move into a slightly different area as
well.
Another comment that emerges from the written
materials we've seen is a concern that if we draft a
rule that would make presumptively not discoverable
information that is not reasonably accessible and that
we provide a limited safe harbor for information that
has become lost because of the routine operation of
systems, that we will be encouraging bad litigation
behavior, that we will be encouraging, providing
incentives for companies to purge information,
particularly e-mails, to use today's example, on an
accelerated basis, and that will allow companies, in
particular litigation entities in general, to avoid
keeping what could hurt them in litigation, keeping what
could help them in litigation, but keeping what would be
relevant evidence in cases that will inevitably arise.
Can you comment on those incentives?
MR. MCCURDY: Yeah. I really don't see the
incentives for that. First of all, the safe harbor is
safe harbor from sanctions under these rules. They do
not affect the sanctions that courts can impose in their
inherent powers for violations of court orders or other
statutes.
One of the better comments I think that was
submitted to you was from somebody that does a lot of

employment class action litigation. And she expressed that very concern. But she also cited a few statutes, like Title 7 and maybe the Wage and Hours Act in the employment area, that very specifically tell companies what they must keep and what they must not.

And I bet those statutes also provide penalties if they are not kept. And I'm pretty sure that they provide -- is it ten to twenty years in prison for the intentional destruction of documents? I mean, I think it would be insanity beyond belief for anybody, any serious lawyer, to advise their client that, oh, yeah, this is a way to get rid of something that might come back to bite us. Because the moment you have that thought, you're engaging in basically criminal conduct.

So the routine operations of systems has to strictly be for the business purposes of keeping your IT

00023

systems running. You know, we cannot survive without a spam filter that filters out 90 percent of all incoming e-mail everyday. That's clear. The storage capacity and the budgets of the IT departments will be incredibly strained if they could not recycle back-ups tapes. You know, I put some figures in my testimony about how much it costs just to buy new tapes.

Those are examples of the routine systems. Those are -- you know, they apply to everything. And as has been pointed out, they will delete incoming mail, incoming spam that might be helpful for you. They might delete things on back-up tapes that you may want in your defense. It's a neutral device. The moment they're at all tailored to filter out helpful or not helpful things, you know, God help you. The safe harbor certainly won't help you. So I think fears along that line are very overblown.

You know, one thing about costs in the last five years, our expenses for discovery have tripled. And I want to give you an example of one small case. And this is really what has motivated me personally to be here today and to work on these issues. Because I didn't really focus on electronic discovery until about two years ago. I went to my first meeting a little over a year ago, and then I came in the fourth and last year.

00024

But we have a lot of large cases involving major competitors and the government. They're very complicated and involve a lot of electronic discovery. But we also have some small ones. We occasionally buy small companies that you're never heard of that have a couple of hundred employees, maybe start-ups. They have litigation too. And when we buy companies like that, it's people like me who end up managing them, because these small companies generally don't have any inside lawyers. So it gets referred to the parent companies to manage.

So this is the case of a small software company -- and I don't want to get into the specifics because of the confidentiality of the settlement. But they had licensed one of their products to another small business, another high-tech start-up, that was using it in its operations. That high-tech start-up went bankrupt. They had problems, they went up. So they sued the supplier of their software, saying it was defects in your software that caused us to go out of

business. The defense of this small company was, well, that's not true, your own business mistakes and the dot com bust put you out of business, and anyway, we have limitations on warranties, and we're not here to insure the operation of your business just because we sold you some accounting software.

Well, there was a lot of discovery back and forth, a lot of it electronic. And at some point the plaintiffs heard, because the defendants figured it out finally, that there was a warehouse, and there were 115 back-up tapes from years ago, when it was a small company, in the middle of nowhere.

The plaintiffs clamored for it, desperately wanted it, and brought it to the magistrate judge on a motion to compel in federal court. The magistrate said, yes, you know, you know, sounds like there might be responsive things to your request on it, I'll order the production.

Well, restoring these tapes that were a few years old -- not real antiques, like this tape from 1986 that I brought along, for which clearly there is no more hardware around to run it, never mind the software or the personnel. But, you know, just a few years older. New systems, new servers, new software, new technology all had to be hired. It would cost them a quarter of a million dollars to restore the tape. And by "restore the tape," that means taking it from mass storage device, where you have no way of accessing it, and putting it back on a live server so it can be searched using electronic means. That cost a quarter of a million dollars. And then once those 115 tapes had been restored and could be searched, the search process and getting ready for production would have been another million dollars.

Well, this was not a big case. It was not for a big company. But they chose to settle, just for pure economics. You know, they have very strong defense, but if you're being required to spend a million and a quarter dollars just to produce some documents, well, it makes a lot of economic sense to give the plaintiff a big chunk of that just to go away.

And that's sort of an example that I think is unfortunately too common. You know, these settlements are not reported. They're generally private, confidential. You're not going to find a lot out there in the literature, but they happen.

Now, in a huge case involving us and a major competitor, the costs are far greater than that because of the volume. But luckily, you know, when you're not dealing with a bankrupt company that has nothing left to lose and that maybe has no other systems, that doesn't have back-up tapes, they can go out and press for that very inaccessible stuff that is not used in the ordinary course, is very difficult to obtain, and that is a case in which the two-tier approach would really help avoid abuses.

Now, would that lessen the amount of documents produced that are relevant to the issue? I really don't think so. There's plenty of room for that.

So that's one of the major things I wanted to

tell you all about. And I don't know if we're out of time.

JUDGE ROSENTHAL: Are there any questions from the committee members?

PROFESSOR MARCUS: Could I just follow up on something you mentioned. You mentioned search technology and the impossibility of reviewing -- I think you said it's impossible to review every document.

My question is, in what manner does one perform a privilege review for producing under those circumstances?

MR. MCCURDY: That's a very good point. Now, what's reviewed for privilege is always going to be a very small subset of the overall volume. When I am saying it's impossible to review it all, I'm talking about the broad mass. If you have a couple hundred employees, you can get all their e-mail, you know, those terrabytes are impossible to produce. Once you've narrowed it down using search technology and you've plucked out all of the e-mails coming to and from

00028

members of the legal department, ones that say "privileged" on the label, ones that talk about legal advice, you find that in your electronic search, then you have to have lawyers sit down and actually read them, and that is still very expensive. And those volumes are still large, but they are a small fraction of the volume you started out with.

So absolutely I do not see any way that technology could automate the final privilege review. Yes, you need it to cull out what might be privileged. But those final calls always have to be made by lawyers, and that expense is never going to go away as long as we have this system.

JUDGE ROSENTHAL: Does that mean you're producing vast quantities of things that may not have said "privileged" on the message line or elsewhere in the message, you're producing it without any review for privilege?

MR. MCCURDY: Well, we attempt in our automatic reviews to screen out everything that might be privileged, and then you attempt to screen out everything that's irrelevant, and you narrow it down quite considerably. And then you have techniques where lawyers review it with technology that helps. No, we do not let things go out the door that nobody has looked

00029

at, but it is a subset of the raw material.

And, you know, the proposals about, you know, whether you get something back after you've produced it and whether you've waived, you know, those are helpful. People can agree to that in their protective orders. But it seems like insanity to just say, oh, here are all of my documents, have at it. Because, you know, to ask for something back once you realized that it's privileged, you have to look at it too, so you may as well look at it up front. You're not going to save yourself any time.

JUDGE SCHEINDLIN: I have one more question, although I know our time is limited.

On 37(f), the safe harbor, you don't like the fact that we talk about violating court orders. You seem to be critical of the preservation orders that

courts are giving. Frankly, you think they're just too broad.
If the courts were more specific, if they were to say you have to preserve -- specify electronically stored information, then you would be okay with that limitation? You just don't like overly broad preservation; is that correct?
MR. MCCURDY: I think preservation orders generally are not necessary, except if the requesting
00030
party has some reason to believe that the producing party is being dishonest, hiding stuff, getting rid of things. And then you come running into court, saying, Your Honor, Your Honor, the common law duties, the deterrents are not enough. I need you to tell these --
JUDGE SCHEINDLIN: I think that sometimes -- I think it's a judgement issue. Now, sometimes it's to help the party know what they need to preserve and what they can safely not preserve. Sometimes it's just to give them guidance.
I'm just trying to inquire about the rule language. If the orders were more specific, you would be less troubled?
MR. MCCURDY: Yes. Because in fact, as you say, it can be helpful. If you say, hmm, I understand that there are certain back-up tapes and in the ordinary course they would be recycled or you have this, that, or the other, and I think you really ought to be preserving that. I mean, we agree that maybe this is ambiguous under the common law, but it is my view, then that certainly is guidance for the parties.
JUDGE SCHEINDLIN: And then it could stay in. Because if you violate that, it certainly wouldn't be safe harbor. As I said, safe means from year X.
MR. MCCURDY: Well, I don't think you need to
00031
mention it in the rule, because you have all the power in the world to sanction people for violating your orders, regardless of the safe harbor.
So, you know, it's an invitation to requesting parties to get another club to beat producing parties over the head with. Say, oh, but the judge said you shouldn't do that. Well, the common law, the multiple statutes in the employment area and Sarbanes-Oxley already tell you, you go to jail if you destroy documents. So I mean, if it's specific, there's not a huge harm. But it's another sort of tactical device.
And plaintiffs, you know, this may be the first time they come to see the judge. They come to see the judge and say, oh, judge, we think these people are bad, they're going to hide evidence, and we need you to tell them what to do. And so it starts the litigation out on a nice little note, like, oh, yes, the other guy is bad.
JUDGE ROSENTHAL: No further questions? Mr. McCurdy, thank you very much.
MR. MCCURDY: Thank you.
JUDGE ROSENTHAL: Our next witness is Frank -- I apologize if I mispronounce your name -- Pitre on behalf of Consumers Attorneys of California.
Is Mr. Pitre here?
00032
In that case, our next witness is Mr. Sewell

on behalf of Intel Corporation.

COMMENTS BY MR. SEWELL

MR. SEWELL: Judge Rosenthal and Members of the Committee, my name is Bruce Sewell, and I am vice president and general counsel of Intel Corporation. I'm very pleased to be here. This is a matter which is not only close to my heart, but also close to my professional life, because I spend an inordinate amount of time addressing these issues.

I'm here today primarily to bring one message to you. For those who say that there is no problem and that we don't need new rules to address electronic discovery, I would argue that they're either flat wrong or they don't litigate in today's real world. Possibly both.

In Intel's experience, discovery and other defense costs often exceed actual liability costs. The threat of the costs and the burden of discovery, especially electronic discovery, should not in and of itself be a tool for the plaintiffs to force a case into early settlement.

In the face of a growing trend towards opportunistic litigation, litigation filed by companies that make no products but exist only to file lawsuits,

00033

the specter of having to gather and process millions or in some cases billions of electronic documents is fast becoming the number one item that is discussed when a company is evaluating whether to fight or settle a lawsuit.

Notice pleadings and independent rules work, but not if the notice pleadings is the key that forces a company to spend millions of dollars on discovery every time a lawsuit is filed without adequate consideration for the need for such electronic discovery or the true difficulty of the (indiscernible).

In my testimony today, I will explain why Intel so enthusiastically supports the committee's finding that reform is needed in the discovery area, where the burdens of the cost of discovery are extreme and the probative value of such discovery is often negligible at best. I will also summarize Intel's suggestions for clarifying and improving certain aspects of discovery.

Before turning to the specific comments on those rules, it might be helpful to explain briefly how Intel creates and stores electronic information. Our experience proves at least one thing, that discovery of electronic information is a very different creature than discovery of paper information.

00034

Just by way of background, Intel is a corporation of approximately 80,000 employees. We have nearly 300 different offices. We're located on several continents. Given our size and our technology base, it's no surprise that the company creates and uses an enormous amount of electronic information. This data resides on tens of thousands of notebook computers, desktop computers, active servers, located around the world.

Intel also maintains a disaster recovery system. The purpose of this system is to store in a temporary format enough data to return the overall

network back to a solid and viable state in the event that that network were to crash. The crash could be for any number of reasons: Natural causes, such as earthquake, weather, disaster; or electronic causes, such as a faulty system. Intel has dozens of disaster recovery storage sites located around the world.

For purposes of the proposed rules, it is critical to emphasize the limits of a disaster recovery system such as Intel's. Information which is stored on these systems is very difficult, if not impossible, and expensive to search. In the parlance of the proposed rules, that information demonstratively is not reasonably accessible. Let me explain.

00035

First, consider just the amount of data that is stored on a disaster recovery back-up tape. I've actually brought an example of a fairly modern disaster recovery tape. This little device quite remarkably holds about 200 gigabytes of information. That's the equivalent of 90 million pages of data on just this tape. Intel uses 22,000 of these tapes every week in order to effect our disaster recovery system. The amount of information is absolutely staggering.

It's not simply the amount of information, but it's also the way in which that information is stored which is relevant to this inquiry. Information is not organized by subject matter. It is not organized in a format which is susceptible to any kind of field or word search. We cannot simply plug in all documents related to Pentium 4 or all e-mails received by Greg Barrett and get an answer out of this.

The way these documents are --

JUDGE SCHEINDLIN: Just one question. Is it done by server, a server or particular unit that's being backed up?

MR. SEWELL: It's actually done -- I've been trying to think for days of an analogy that would work here. The best one I can come up with -- and I will confess this is not great -- is if you've seen those

00036

satellite photographs that are taken from 50 miles up, the back-up -- the disaster back-up system is sort of like an automated system which on a routine basis takes a picture at that 50-mile-above-the-surface-of-the-Earth kind of level. It's indiscriminate as to what it's taking a picture of. It's simply capturing a state of the system at a given moment in time. There's no attempt to categorize or catalog or store the data, because the only thing that's important is that you are able to take that image and reproduce it on the network at some later point in time if the network has crashed. So that's the best analogy I've been able to come up with.

So this is an automated system which routinely takes a snapshot, and the snapshot contains an enormous amount of information.

JUDGE SCHEINDLIN: That's not the answer to my question. I want to know if we can know what system by unit within the company, if it was to be identified by back-up tape that it is serving, so to speak --

MR. SEWELL: Not with any great ease, no. There are several back-up disaster recovery servers within the company, but they are not necessarily

assigned to a particular geography or a particular set of individuals. So an individual servicing e-mail in Kuala Lumpur, when the back-up system takes that snapshot, that information could actually be stored on a disk located in the United States. There's not a simple way of parsing out or connecting those things.

JUDGE SCHEINDLIN: One more question along those lines. We have to think this out.

Is this lack of organization going to change? Or will the technology catch up to where in ten years from now, they will be completely organized? Will they be backed up by server, where you will know what index system had this change? Will we get left behind if we don't know that?

MR. SEWELL: That's a great question, and kind of a response to Judge Rosenthal's question, which was, can we rely upon technology to solve this problem that it's created? The answer is, of course, is that you would never hear from someone at Intel that technology would be incapable of doing anything.

The fact of the matter is that these particular tapes are intended for a different purpose. Would it be possible to recreate or to recast these in such a way that they could be searchable? Yes, of course, but at enormous expense.

The purpose of these tapes is not to be searchable. And so there's no events on the horizon at Intel that would suggest we are going to change to make these tapes searchable, because they serve exactly the purpose --

JUDGE SCHEINDLIN: There would be no business necessity to making them organized.

MR. SEWELL: None at all. This is one thing which -- frankly, I have enough grief within my job trying to manage the business for legal purposes. And for me to go to my boss and say, well, now I want you to recast the whole --

JUDGE SCHEINDLIN: I wondered if there were a legitimate business purpose --

MR. SEWELL: And there isn't, and that's the reason why. It could not, and I don't think it would, unless the legal department said you have to do this, and that would be the reason.

JUDGE HECHT: Just to be clear. Just in a routine business, you don't foresee a time that disaster recovery would be more organized, just for that purpose? So that a smaller business could go back and find those -- or maybe even a large business, those documents on the tape?

MR. SEWELL: The answer is no, but let me make sure I explain why. Because it already serves the purpose for this it's intended now. You don't gain any better business events or any better business usage by making it searchable.

There are plenty of ways to search active data, and those are the things that will continue to improve with time. The engines and the facilities we use to manage data which is being used in real time for the business will continue to improve. Disaster recovery in not something which needs improving, in the

sense of being organized and being searchable.
The information -- just to be clear -- that's on these tapes is subject to some form of organizational algorithm. It is -- the problem is that it's not subject to a searchable algorithm, nor is it subject to an algorithm that would be useful in the discovery context.
Actually, these tapes are organized by what's called category. And in the case of a tape such as this, there are approximately 90 million different categories that would have to be understood and would have to be accessed in order to take data out of the tape drives. So there is a storage process, but it's not a process which has any meaning within the litigation or discovery context.
So the bottom line is that because these documents can't be searched, the finding of any

00040

particular file or finding of any particular piece of evidence would be the proverbial needle in the haystack, requiring a huge amount of tedious activity and a lot of manual labor.
Once those tasks are done, once the information is actually taken from the data disk and converted into some sort of searchable file format, then the whole process of having it reviewed by attorneys, having it categorized, having it bates stamped, all of those things would then be on top of that.
So when we think of ordinary discovery, we think of a general model of about a dollar per page, when we're thinking of regular discovery out of an active file server. That would be probably ten times the cost to get discovery on these data disks. And in the case -- routinely our productions today are in the multiple millions of dollars. So we routinely produce between three and seven or eight million documents for each litigation.
So as you can see, the cost requirements are huge. There is a California case which I'm sure you're aware of -- it's a Toshiba Electronics component case -- in which generally the Court found that to search 130 back-up tapes for 15 key dates would cost over $200,000. Processing 800 such tapes would cost between 1.5 and

00041

$1.9 million. And then if you apply that to a company like Intel with the volume of tapes we're talking about, you can see very quickly this becomes -- the cost overshadows the potential liability in the vast majority of these cases.
Not only are these disaster recovery tapes extremely difficult and costly to search, but also the search itself has a fairly marginal chance of success. Tapes only capture information that is on the network at the time that snapshot is taken. The tapes don't capture data that hasn't been created, they don't capture data that's been deleted.
Experts also -- IT experts recognize that companies periodically have to recycle these tapes. In Microsoft's comments we had some indication of the cost of these tapes. Intel's experience is very similar. If we were not able to recycle these tapes, we would ultimately and quickly overburden the system. Our IT departments would simply not be able to maintain or deal

with the data we need to preserve.
JUDGE SCHEINDLIN: Mr. Sewell, getting back to the rule. Accepting all that you say, what are your comments with respect to our two-tier approach? In other words, do you like it? And to the extent you don't like it, how would you change it, and why?

00042

MR. SEWELL: We are absolutely in support of the two-tier approach. And I think what we are particularly supportive of is the notion of a presumption that certain kinds of things are inaccessible, and that disaster recovery tapes should be among that category. So that provides us with the ability to know as we go into litigation what sorts of things are we going to have to be arguing about and what sorts of things can we reasonably --
JUDGE SCHEINDLIN: You would like us to explicitly define back-up tapes as inaccessible?
MR. SEWELL: That would be correct. So we certainly support the proposed rules. The party should not be required to produce data that is not reasonably accessible. The burden of searching for information stored in disaster recovery systems, which by definition is inaccessible -- the benefits of such searches normally (indiscernible). It's a rare case when information available on a disaster recovery system would be probative, and in that case there could be a good cause argument, there could be a showing made that requires that kind of a search. But absent that good cause requirement, it's simply too easy for the requesting party to fire off a scatter shot recovery request demanding that information.

00043

JUDGE ROSENTHAL: Mr. Sewell, let me ask you one question about that. You suggest that we confirm in the rule or clarify in the rule that nothing in the rules should require the suspension of the routine operation of the disaster recovery system, including recycling.
But I have a question about how you would handle the case that you describe as "rare" -- but which by describing it as "rare," you acknowledge it exists -- in which an only source of information that through some combination of circumstances you know to be important is on the back-up tapes.
So if there is no obligation to suspend the routine operation of a system that might recycle the tapes containing that information, but you know that that is the only source of the information, how do you square that?
MR. SEWELL: Well, I think procedurally the question would have to be advanced in front of a court. The judge would make a determination that in this particular case, the general rule -- that suggestion was did not have to stop for recycling -- should be held in abeyance, and therefore the recycling process should be stopped.
JUDGE ROSENTHAL: So you would look to a

00044

preservation order that would retain the assistance of the Court to match the particular needs of that case?
MR. SEWELL: Absolutely. And with some sort of showing by the plaintiff that there was the

likelihood of actually finding this document.
So certainly, if there is a situation in which the only place to get a probative piece of evidence is on the back-up tapes, then we would agree that's the place to go. And then we'll do what's necessary. Although, as you can see from the comments, we propose a cost sharing process in that.
JUDGE SCHEINDLIN: Of course, the problem is, you're the only one who knows it. So when you propose we say nothing and the rules require a party to suspend or alter the operation in good faith of the system, if you know that that's the only place that information resides and that information is material to the case, critical to the case, you would have to suspend it yourself. You couldn't wait for the court order. Because you know what you know, which is that there's something key that's only available on that back-up tape. So it's your own duty to suspend in a limited way for a limited time your machine.
MR. SEWELL: Absolutely. If we know. If we know. My point is that for the vast majority of cases,

00045

we do not --
JUDGE SCHEINDLIN: I thought it was too broad, because nothing in these rules require effort to suspend recycling the back-up tapes because you have your own duty.
MR. SEWELL: Absolutely. Yes, common law duty --
JUDGE SCHEINDLIN: That was not exactly the question. How do you square that with the rule? How would you write into the rule the obligation to preserve what might be on a back-up system if you know it to be the only source of this information and at the same time have a presumption that ordinarily there should be no obligation to preserve or protect from the continued operation of the recycling or other features of your information system?
MR. SEWELL: To some degree, this goes back to a conversation from a few minutes ago, which is, to what extent do you need to write into the rule a common law duty which already exists? We have that obligation. The courts do not need federal rules in order to be able to enforce those rules. So certainly if we have knowledge, then we have to preserve that evidence.
MR. HEIM: Mr. Sewell, are you ever going to have knowledge? Based on my understanding of how you

00046

described the operation of back-up takes, it's a snapshot, it's a point in time, there's been recycling likely that's taken place during that period.
Isn't it always going to be maybe or might?
MR. SEWELL: I can't at this point give you a hypothetical in which we will absolutely know. I can't rule out the possibility that such a situation might exist. But there really is no way for us to know whether the snapshot that was taken at a particular moment in time captured precisely the document that was in question. One might over some period during the course of the litigation develop reason to believe that if it's anywhere, it's going to be on the back-up tapes. But it's not something that's going to be ascertainable easily. It's too difficult.

You could construct a hypothetical in which a particular document becomes more and more prevalent to the litigation, but it's not on X server, it's not on Y server. It was created at a particular point in time. It might be on a back-up tape. That's a possibility.

JUDGE ROSENTHAL: Are we focusing on this hypothetical too much? Is your real point that in almost every litigation, the information that's going to be important is on the active data?

MR. SEWELL: Absolutely. Undeniably. And nor

00047

is there any way to tell what is on the active versus what is not.

That takes me to my final point, which is to come back to this concept of cost sharing, which is something we also had in our comments.

Given the enormous burden that's associated with trying to delve into this information to produce it in any kind of logical format, it does seem to us entirely appropriate that a judge should be involved in that decision and that there should be some ability for the litigants to share the costs. So we're not proposing cost shifting, but we are proposing a situation in which there is cost sharing in the event that these tapes have to be used.

JUDGE SCHEINDLIN: Doesn't the Court have the power already in the rules to assign percentages if they want to?

MR. SEWELL: I think the court does. We're suggesting the rule make it more clear that if the access is to data otherwise deemed inaccessible, in that particular case the Court should assess some cost sharing.

JUDGE SCHEINDLIN: All I'm saying is that once there is cause showing (indiscernible) that also says the Court can use whatever means it thinks appropriate

00048

to --

MR. SEWELL: Yes. I think you already have that. We would like the rules to make it more clear, because we think that it creates the right kind of balance for incentives between the parties with respect to discovery.

JUDGE ROSENTHAL: Do you have any final comments to make?

MR. SEWELL: Nothing.

JUDGE ROSENTHAL: Any final questions?

Thank you, sir. We appreciate your coming.

Ms. Dickson on behalf of the California Employment Lawyers Association.

COMMENTS BY MS. DICKSON

MS. DICKSON: Good morning, Judge, Members of the Committee. My testimony will present a stark contrast to the testimony given by the prior two speakers. We've gone from corporations like Intel to an attorney who represents a group of attorneys who are primarily sole practitioners or small firm attorneys who represent primarily individuals in employment discrimination and labor litigation. The organization I represent, the California Employment Lawyers Association, has about 550 members. As I said, a few of us do some class action litigation, but primarily

00049

(indiscernible).

Electronic discovery was promised to many of us several years ago. It would finally level the playing field. If a plaintiff's attorney received information in electronic form, instead of sitting in our one- or two-person offices, going through thousands of pages of documents, trying to find relevant information, we could search electronically. So I think it was really perceived as something which would be helpful in leveling the playing field.

What I'm hearing here today and what I've read in the comments and what I've read in the proposals gives me some real concern about whether that is the direction in which we are moving. The cost issue alone can seem a completely meritorious case. The cost issue, when combined with the proposed inaccessibility rule, can sink meritorious cases very quickly.

Let me give you an example that just occurred to me as I was listening to the prior two speakers. And I don't want to be giving any ideas to anyone in the room.

Most of our employment cases involve comparative data. Let's say an employer fires an employee for low sales or failure to meet sales quotas or poor performance or bad attendance. Let's say an

00050

employer decided as a business justification to archive performance reviews at the end of the year after they have been given to the employee. The justification is, let's give every employee kind of a fresh start with each new manager so they are not adversely impacted by what prior managers have to say.

So the company says, all right, we'll make this statement, back-up data. We will call it inaccessible in an employment case. So suddenly you don't have the data that you need to prove your underlying claim.

And there is a presumption in this proposal that judges will pay attention to -- particularly those few federal judges who don't know a lot about high technology -- they will assume that what their defendant is saying is accurate, that data is inaccessible. Then the plaintiff either has to pay a large amount of cost for getting critical data or forfeit.

JUDGE ROSENTHAL: (Indiscernible.) But the rules would say "good cause showing."

MS. DICKSON: Well, that may be one of the easiest. It is an example which just occurred to me. But I do think that data that we do need -- and we are seeing cases -- you know, I think the Quinn case is an example. You know, the party's relative positions in

00051

that case made it a little easier for the Court to make the decisions the Court did. And that worked out very well, and they were very thoughtful. But that's not going to be the case with an individual in an entry-level employer, like a janitor or someone like that.

I also wanted to say preliminary that I was a little bit disappointed in the introduction to the committee's report, because it does not describe at all the benefits of electronic discovery. There are many benefits to electronic discovery, and I really saw only

the problems.
JUDGE SCHEINDLIN: Can I go back to your hypothetical for a minute. These are manuals?
MS. DICKSON: Performance reviews.
JUDGE SCHEINDLIN: How do they get to be inaccessible in your hypothetical?
MS. DICKSON: No. The company determined to put them in some kind of back-up system or --
JUDGE SCHEINDLIN: That's not what an electronic back-up system is. I'm trying to figure out in your hypothetical, they have to have been on the system and then intentionally deleted --
MS. DICKSON: Right.
JUDGE SCHEINDLIN: And now they're only

00052

available by being retrieved off of back-up tapes, which would be, you know, as Mr. McCurdy said, sort of suicidal. I mean, this is the kind of thing that your business has to keep. I would think annual performance reviews have to be kept over the years.
To purposely delete them and have the only place where it can be found a back-up tape is a far-fetched example, I must say. That would have been printed out. That's going to be in people's paper files. Not everybody would have deleted it. You would have to put out an order that everybody should hereby delete that from their system.
I think getting everybody to comply with an order to delete it is hard to imagine. I think that's actually going to be in the active data. I guess you could argue the hypothetical that they don't want to give it to you.
But it's important to us to really see in this hypothetical that that is really unfair to you by saying back-up tapes are presumptively inaccessible. If you want to go to them, there has to be some showing. Because from what's been said, it's very hard to retrieve things from back-ups.
MS. DICKSON: I don't know that performance reviews are required by law to be kept for three years.

00053

Certainly hiring data, promotion data, that kind of thing.
JUDGE SCHEINDLIN: Even if they're required, wouldn't a company do it? Wouldn't they need to keep their performance reviews around?
MS. DICKSON: I'm not certain if they would want to if the rule allowed in some way --
JUDGE SCHEINDLIN: Wouldn't they end up in the employees' files?
MS. DICKSON: I do want to respond to that, and I have an immediate response to that, which is, I'm involved in a case right now that is against a software company where employee performance reviews are not being kept. Everyone deals with them online. The employee puts their data online. The employee reviews it online. The employee signs it online. It is not printed out anywhere. There are no hard copy personnel files in this company.
JUDGE SCHEINDLIN: Are there electronic personnel files?
MS. DICKSON: There are currently -- there are --

JUDGE SCHEINDLIN: Again, it's hard for me to understand how that would be deleted and only available on back-up.

MS. DICKSON: If you have to go back more than three years, let's say a five-year period or a seven-year period, then you may get into that problem.

PROFESSOR MARCUS: The example calls for when performance reviews are preserved only electronically and they're added to. In your view as a plaintiff's lawyer, would modification of that electronic material constitute foliation of some sort because it changes it?

MS. DICKSON: What do you mean by modification?

PROFESSOR MARCUS: Well, I assume when you say it's added to that sometimes that changes what is there, that what is -- what's there this week is different than what was there last week as a matter of routine operation of your company.

MS. DICKSON: I suppose there could be some circumstances where that would be foliation. Because if I haven't yet taken the 30(b)(6) deposition of the person most knowledgable about the performance and management database system, that answers your question, which is a segue into other problem, which is electronic discovery with the limitation on the number of depositions we take.

An example I gave in my paper is from a current case. It involves the necessity for me to take ten PMK, person most knowledgeable depositions to discover information about the company's computerized systems. They have separate systems and separate systems administrators in several different areas.

So for example, there are going to be PMK depositions of the human resources database, which is (indiscernible), a payroll database, the separate recruitment, applicant, and initial hire database, batch access data for entry into the facility. Often companies file access data, which has been useful for wage and hour cases or useful for attendance or punctuality kinds of cases. There's a separate training database for all the training employees have. There's a separate database for performance review and management data. There's a separate database for the company's Internet website, with which the company communicates much information with its employees.

This raises other issue, which is that most employee manuals or employee handbooks for a lot of companies are now online. The prior versions are oftentimes not being kept. So when you bring litigation and you want the employee handbook that was in effect at the time your client was employed, that version of the handbook doesn't exist any longer on the accessible data or sometimes has been overwritten by the revision. So that's another example.

Another database has access to the company's computers offsite. Another one is the company's e-mail system. And finally, there's a PMK deposition for the archiving and storage of electronic data. So there are the ten depositions that are presumptively allowed.

JUDGE ROSENTHAL: Have you found it difficult

to expand the number of depositions that you are to take, either by agreement with the other side or by Court order?

MS. DICKSON: We are in the process of trying to work that out. As we have learned more about the need to take more of these depositions, I have not encountered them a lot. I anticipate some problems with that. With some judges, particularly those who are very much interested in this kind of litigation, it is take your best view, take your substantive depositions, and move on. So I see that there is a problem.

I think the committee could write some comments which would be very helpful in this regard with judges, understanding that you do need to understand the systems, that that is going to take some depositions.

I have at least two other quick points. One is sequencing problems. We really need to take these depositions early to understand the systems, to be able

00057

to narrow and focus later discovery, and to take other reasonably focused depositions. The hold on discovery that occurs in federal court, the 90-day hold, is a big problem. We can't even get going with the foundational depositions until after 90 days.

I like the suggestion that the committee made to discuss discovery, electronic discovery in the initial meet and confer. From the plaintiff's perspective, do you know when that will occur? On the 89th day. We have great difficulty getting defense counsel to meet and confer very early in the process.

Talking about a preservation order 89 days after you filed your complaint is a big problem. You know, a lot of data can be lost in 89 days.

JUDGE SCHEINDLIN: How often do you seek a preservation order from the Court before 89 days?

MS. DICKSON: Well, we could do that.

JUDGE SCHEINDLIN: I'm sure. But as a matter of practice, do you do it?

MS. DICKSON: So far we have been lucky and have been able to get voluntary preservation orders. But I could perceive some problem with the Court's schedule --

JUDGE SCHEINDLIN: Usually you negotiate it?

MS. DICKSON: Right. We do usually. You

00058

know, I want something that's safe. And if a defense counsel says, well, I just don't have time to meet and confer, you know, on and on and on down the line, suddenly you bring a motion, then want to bring it ex parte, but the calendar is crowded. It causes a lot of problems. Again, forcing the parties to do this early would be very helpful.

Another helpful thing in that regard would be to make it clear the expectation that the defense -- obviously, defense, that is really the typical situation -- that the employer's counsel is expected to be very forthcoming informally in the initial discussions about the company's system. We do not get that kind of cooperation. So we don't know for some period of time what the systems even look like, what we are even going to be facing. We can't explain it to the judge. So this's a little bit of sequencing problem for everything.

So those are the initial thoughts. And some other things I'll just tell you quickly are positioned on some of the other rules.

We obviously love the provision for authorizing the receiving party to specify the format for production. We have had instances in our office already where we have asked for production of e-mails.

They did come from the company's storage system. They did supply them to us. They were Unix based. We can't read them at all. It would cost somewhere between 15 and 30 thousand dollars to acquire the hardware and software we need to read those.

Usually companies are in the position where they can select among many formats to copy or extract data. And they could easily have given us that kind of information in an easily readable and searchable format, but they did not. We are in the midst of that right now.

And another --

JUDGE SCHEINDLIN: Hold on. Can I get your help on phrasing. We do specify "an electronically searchable form." We would change that to "reasonably usable form"? Do you like "reasonably usable" better than "electronically searchable"?

MS. DICKSON: I think "reasonably usable" sounds like a better phrase. Because it's not just searching you're talking about.

That leads to this very example. I asked -- this was a wage and hour matter, and I asked for data on -- it's a computer class. At this point I asked for the data on 779 employees. We were looking for position, salary, dates --

JUDGE SCHEINDLIN: So you want "reasonably useful" for you. In other words, that example about the Unix system wasn't usable for you unless somebody provided the operating equipment for you to use that. That would be reasonably usable to the receiving party?

MS. DICKSON: Right. And if you apply a reasonable standard -- I mean, they knew we wouldn't be able to read it, and they knew they had a method that could have made it so we could read it.

But when we received data, the data came from a Peoplesoft database. The defense counsel got it into an Excel format, for Excel is easily searchable. You can do all of the calculations, you can do all of the averages, and it was very useful for them. They provided it to us in hard copy. They provided it to us in a 6-point font, Arial Narrow. So we could not scan it. We said, can't you give us this in a usable form? They refused to do so. We had to go to the Court. We had a declaration showing that it came to 180 to 220 hours, because there were 48,000 datapoints that had to be checked. And of course that would have been entered slightly different from theirs, because you never have it (indiscernible).

The Court then -- then there were fights over what's right, what's not. We were lucky in that situation that the Court ordered them to produce the data in the electronic format, and we got an Excel spreadsheet and used the data. But it took a motion.

It took 60 days to get from there to this. So it's very important that they allow the party receiving the data (indiscernible). I've already talked a little bit about the reasonably accessible versus inaccessible matter.

I will say that I have followed somewhat the development of the storage technology industry. And all you have to do is just go on the Internet and look up EMC, Veritas, Legato, Hitachi, Intel. Everyone is saying they are creating hardware and software right now to store and to allow searches of massive quantities of data. The justification that you'll see from a lot of those companies is that they have to have this information for a long period of time and that they have to have it in a reasonably searchable form. The technology is coming, and it's coming quickly.

It seems that thought has occurred to the committee. I really think the notion that we're not going to be able to search massive quantities of data is a temporary problem. So that's not a reason for opposing the inaccessible part of the rules change in addition to the presumption.

As I have indicated, judges may give far too

00062

much weight to that presumption. I think that the undue burden analysis that courts engage in already is sufficient to deal with that problem. I think that it's really not fair to create sort of two loopholes, you know, the one, and then the inaccessible one, which carries with it a presumption against accessibility which is totally counter to the (inaudible).

The clawback provision for privileged information, I do understand the emphasis for the proposed rule change. I think the rule goes too far. I think it is going to cause problems with state laws and ethics provisions, which are at odds with the proposals. There are some states that say (indiscernible) or repeatedly or negligently disclosed, then there's a (indiscernible). So I think there's going to be a problem there.

I also think a more technical procedural problem with that one is not allowing the party who receives the information to keep a copy and immediately go to the Court for a determination on whether or not that document on its face is privileged or not. Right now, the way I understand it, we're going to give everything back, and we have to bring a motion to compel to try to get what you gave back. And it's not absolutely clear whether the Court is even going to see

00063

the document that is the subject of the privilege. So I think that's a procedural loophole.

Finally, the safe harbor provision, particularly on the section two, subsection two, providing safe harbor if the failure to provide information resulted from the loss of information because of the routine operation of the party's electronic system. We do think it will encourage creative companies to figure out ways to routinely operate their systems so that information which is coming up in cases that don't like, like wage and hour or discrimination cases may --

JUDGE SCHEINDLIN: I have one question for you. The opposite of that would be a company, as soon

as it's sued, has to suspend all of its recycling. When you negotiate these preservation orders we talked about, you don't do that? Should they suspend everything? Or do you negotiate part of that, so they can continue --

MS. DICKSON: I think that's where the issue should be addressed is in a preservation order and before the judge and under the existing rules.

What I'm saying is I don't think there needs to be this provision. I'm not saying the minute you sue a company, everything stops. I don't think that's reasonable. I don't think some companies can operate if

00064

you did that.

JUDGE SCHEINDLIN: The company doesn't want to be at risk of being sanctioned if they continue the routine recycling. So the question is, what are they to do? If we don't make a rule or something like that, are they in fear required to stop everything until someone says it's okay to go ahead with recycling?

MS. DICKSON: If they have a fear, they can discuss that with plaintiff's counsel, and they can motion the court with a proposal and have the --

JUDGE SCHEINDLIN: So for 30 days, while all of that is happening, they have to stop recycling? That's what you think?

MS. DICKSON: No. I mean, there is a -- defense counsel can impose some kind of -- you know, there are obviously some -- this is some kinds of information that, you know, it will be perfectly safe for a company to continue its normal operation. But they have to exercise some judgement, and they ought to be exercising caution, Judge.

What I worry about with this provision is that it sort of relaxes that caution somewhat. And I think there is room in the existing procedures for the parties to together try and negotiate this kind of thing and go to the judge and have the judge do it.

00065

Also, I think I read in some of these comments that were committed in writing even earlier that there -- something about there aren't sanctions available under the existing rules? I forgot whose comments it was. But whether this rule really would have much impact anyway. But I do believe it is an unnecessary rule. There are plenty of other safeguards. Someone mentioned some of the laws which require preservation of documents.

So those are my comments.

JUDGE ROSENTHAL: Any other questions? Thank you.

We will now hear from Mr. Michael Brown.

COMMENTS BY MR. BROWN

MR. BROWN: Good morning, Judge Rosenthal, Members of the Committee. My name is Michael Brown. I'm a partner in the law firm of Reed Smith and practice in Los Angeles.

The nature of my practice is such that I am confronted with e-discovery issues on a regular if not daily basis. My practice primarily consists of defending complex product liability actions, often on behalf of pharmaceutical and medical device cases. Those cases sometimes include thousands of plaintiffs, but sometimes include a single plaintiff, yet the

00066
discovery requests and expectations seem to be the same in both, thus raising some of the issues that the committee has dealt with.

What I would like to focus on today concerning the committee's proposals are the following areas: The two tiered approach; cost sharing as it relates to electronic discovery; a safe harbor from sanctions; the early assessment portion of the proposal, particularly with respect to preservation obligations; and lastly, the privilege issues regarding inadvertent production.

With respect to a two-tiered approach, I think a two-tiered approach is absolutely essential. I think it should be the production of information not reasonably accessible should be the rare exception and never the rule.

I would make two clarifications or suggestions as it relates to this approach and the committee's proposal, and that has to do with defining reasonably accessible information. I think we would be better served if we went closer to principal number 8 in terms of describing it as active data, purposefully stored for future use and in a way that permits efficient searching and retrieval. I don't have any problem with the suggestion mentioned earlier that, if in fact it is accessible and available, that would be included also.

00067
I think we also should specifically exclude back-up tapes and other disaster recovery system information from the definition of reasonably accessible. In fact, I think we would all be well served if somehow we could get rid of from the lexicon of e-discovery the phrase "back-up tapes." Somehow it suggests like a back-up quarterback on the sidelines, ready to come in and do the same as the starting quarterback. And in respect to disaster recovery systems and back-up tapes, it doesn't work that way. And I think the sooner we rid ourselves of that notion, the better off we will be.

JUDGE SCHEINDLIN: Sorry to interrupt. What if it's inaccessible, and then technology changes and it becomes accessible? What do we do?

MR. BROWN: Well, I think that technology will be changing, and there will be the ability to add changes to rules and interpretations. But I think that right now the era we're operating in is that we don't have -- that the idea that we do have to preserve or view or identify or search back-up disaster recovery systems is the way it's operating, and I think it's creating a huge cost.

With respect to the second issue of cost sharing, obviously electronic evidence and electronic

00068
discovery is a significant cost, even when it's limited to reasonably accessible data. When we get to data not reasonably accessible, it is prohibitive. I think the rules should take on this issue is little more clearly.

What I would suggest is that, at least for data not reasonably accessible, there be a rebuttal or presumption that there would be cost shifting or at least cost sharing. It can in fact be rebutted, given the facts and circumstances of the case. And even for reasonably accessible information, given the size and

scope of many productions today, I think we would benefit by an explicit reference in there that there may be cost sharing allocations made. And I know the courts already have the power to do that.

I just think that if it's in there explicitly, you are going to get a direction toward narrow -- more narrow requests than we get right now. It is very easy to sit at a wordprocessor and spit out request for production requests that are extremely overbroad. It is a different thing if you have to pay for that in some manner. Then I think we will get more targeted requests for production, and I think that will benefit everyone.

With respect to safe harbor, I believe that e-discovery has become a sanctions trap. I do believe that with respect to the proposal the committee has

00069

made, I would make a couple of suggestions. I would endorse the higher level culpability found in the footnote to rule 37(f) and have it be sanctions only if there's been an intentional and reckless failure to preserve.

Right now the proposal does not allow a safe harbor if there is a violation of a court order. Frankly, I think that should be modified that it be a willful violation of a court order, and the reason I say that is right now there are a lot of preservation orders out there that are very general, and the chances that inadvertently you are in violation of a court order are too great.

Is perhaps the fix to be, as Judge Scheindlin suggested earlier, a more specific preservation order? Possibly. But I still think that you have the possibility that you could violate it unintentionally, and, given the ramifications and sanctions associated with violating a court order, I think there should be a higher level of culpability.

With respect to the early assessment part of the proposal, I am generally in favor of the concept of discussing all of these issues --

JUDGE SCHEINDLIN: Can I interrupt? Can you take off your defense hat for just a minute and pretend

00070

you're on the other side.

For whatever reason, that information is gone and gone forever. We will never get it; right? Whether this happened intentionally or recklessly or whatever, the result is the party that sought it, they will never have it, never.

Are they not entitled to some recompensation in some form? No matter what, it's gone. That's a hypothetical.

MR. BROWN: Your Honor, information is gone all the time.

JUDGE SCHEINDLIN: But this might have been something critical, and you can't even know that. It's gone.

MR. BROWN: We're never going to be able to know that. And the question is, if in the normal course of business that information is gone, should someone be compensated?

JUDGE SCHEINDLIN: It's more than the normal course. It was a Court order to preserve something. And for whatever reason -- I'm just asking you to look

at the other side's perspective -- it's really gone. I didn't mean to do it, but I admit it's gone.
From the other side's position, don't you deserve something?

MR. BROWN: Well, I think that in that hypothetical, the Court likely could fashion something. But there would need to be more included in the hypothetical, including that it existed, it was material --

JUDGE SCHEINDLIN: For sure. But remember, this one, a court may not sanction. So I'm just asking you real honestly.

JUDGE ROSENTHAL: I wanted to -- before you move on to this area, I wanted to touch back on the issue of the two-tiered proposal.
We heard from some of the other witnesses some disagreement about the extent to which it is common or frequent that information that is important to the litigation is found other than on active data.
You deal mostly with pharmaceutical litigation. Can you describe to me very briefly your experience in that regard to cases that you deal with, how often do you actually litigate the need to go into back-up tapes or other inaccessible sources of information? One.
And two, how often do you find anything in those sources of information that makes a difference?
MR. BROWN: Unfortunately, the request for information on back-up takes comes right out of the box without anyone having looked at the active data. I think there's a severe underestimation of what exists in the active data, especially in the pharmaceutical industry, where there are government regulations on data storage by the FDA. Yet we get a request every single time for back-up information, for dynamic database information, which has a whole set of separate issues regarding trade secrets and things like that, and it's an automatic. So we are in that battle all the time.
In terms of whatever is found there, I frankly am -- and I'm involved in a lot of major pharmaceutical kinds of litigation. I'm not aware of anywhere the only place the information was ever found was on a back-up tape or some other disaster recovery.
Yet the cost of going through this -- you will hear this refrain all day from everybody that represents companies inside or outside. There is no bigger cost in litigation today than electronic discovery. And so -- and it's already huge dealing with the active data. You then take it to another level -- much less start going to every country in which we sell a product, which is a different issue -- and then the cost becomes prohibitive. So hopefully that has answered your question.
With respect to the early assessment provisionings, again, I think talking about it is a good idea. I won't change the phraseology and take out references to preservation, in the sense that I think by having that in there -- I think that a written preservation order should be the exception, not the rule. And that by having it in there, you are going to

be encouraging the parties that feel like there's a need for a written preservation order. And once you start down that process, down that path, it becomes very difficult.

I've had the choice of, when we were looking in pharmaceutical litigation, saying, well, what have they done in some of the other cases? And we saw one order that said, "preserve all relevant information." I said, well, gee, from a drafting standpoint, that's easy to accomplish, but from a trying-to-comply-with-it standpoint, we felt it was fraught with peril. The corresponding one was a ten-page one with technical terms that I had no idea what they were talking about, so we agreed on something in the middle.

But I think that the lawyers on both sides would know that a detailed preservation order is necessary. What I wouldn't like to see is just knee-jerk, automatic having that in there. And that's why I would change the language with respect to that.

00074

PROFESSOR MARCUS: Mr. Brown, while you are on that subject, Mr. McCurdy mentioned the fact that Microsoft begins preserving or litigation hold activities upon notice of a lawsuit.

Do your clients usually or often embark on some kind of effort to find and keep track of the information that may be important in cases once they're sued?

MR. BROWN: Absolutely. Litigation holds are not new. In fact, the companies that I deal with are quite sophisticated because, fortunately or unfortunately, they get sued quite a bit. So litigation holds and kind of the common law duty to preserve are well known and are exercised already in my view.

PROFESSOR MARCUS: You don't see a problem with 37(f), the insistence that that be something that was undertaken by the parties seeking protection and safe harbor?

MR. BROWN: Reasonable steps to preserve I think are the standard that should be there. In terms -- but what I would suggest, however, is that before sanctions get imposed, it has to be something more than a negligence type standard. And that's why I raised the footnote approach of an intention and reckless standard.

00075

Lastly, with respect to privilege, I endorse the committee's proposal of having a procedure about inadvertent production up front. The committee asked a question about whether a certificate of destruction would be appropriate. I think it would. And that certificate should also include that that information has not been circulated to anybody else. It's very easy to accomplish. It's not cumbersome, it's not burdensome, and frankly, if it were made under penalty of perjury, I think it would be a deterrent to somebody misusing the information.

JUDGE SCHEINDLIN: Quick question. What if it has been circulated? Do we have an obligation (indiscernible). Because by the time you realize it may have been circulated to a hundred people, of whom they don't particularly care to tell you who they are --

MR. BROWN: Well, I would then have a

provision whereby it goes to court for an in-camera inspection --

JUDGE SCHEINDLIN: (Indiscernible.)

MR. BROWN: Yes. I would at least identify to the Court in camera. Again, the goal of this is not to get at -- have a document provision on the other end either. So I think hopefully there could be a provision in there that would accommodate both.

Those are the substantive comments on the specific proposals that I have. I would just like to commend and congratulate the committee on the very thoughtful work that it has done thus far. In its conclusion to the August 3 revision of the report, the committee suggested that it proceed with caution, and that's certainly a prudent approach for anything, any endeavor we're in.

My only final comment would be the recommendation that the committee proceed and the committee act, because the bench and bar are thirsting for clarity and guidance on this issue. And once the federal rules are worked out, then hopefully the states will follow shortly thereafter so that this monster we know as electronic discovery that is fraught with uncertainty and huge costs can be reduced.

I know there are other people eager to share their views. I hope some of mine were helpful. Thank you very much.

JUDGE ROSENTHAL: Joan Feldman on behalf of Computer Forensics, Inc.

COMMENTS BY MS. FELDMAN

MS. FELDMAN: I want to thank you for opportunity to present some of my opinions concerning all of the hard work you've been involved in, and I want to join with other witnesses that have been participating today in thanking you for the enormous amount of time you have put into this.

I deal everyday with groups of attorneys and judges who are struggling with this issue who have approximately one-tenth of the knowledge of the people sitting in front of me. I'm hoping that through those rule changes and through this commentary, we can begin to clear away some of the fog of war that encircles us.

I have comments on only three of the rule changes, and I'm going to limit my comments simply to that rather than going through the list. They're brief for the first two, which have to do with Rule 26(b)(2) concerning discovery scope. My comments are restricted to the issue of what's reasonably accessible.

This is an issue that stemmed from a conversation concerning such media as back-up tapes or offline data. I believe, as has been presented here, that a description of offline data or inaccessible data as defined as back-up data is probably already outdated. I would like to talk about accessible or reasonable accessibility.

Having said that, though, I do want to address one issue that came up concerning back-up tapes, and that is we too have seen a movement of people that are gathering documents to produce documents where they may have moved active data to an offline or back-up state

and then are raising Judge Scheindlin's argument that therefore it's accessible and they do not need to produce it. So there's already been some shifting there, and that's not the direction that we want to go. But I wanted to make note of that.

I believe that a term of "reasonably accessible" should be substituted. I think that means data that is relatively easy to get to and also to read. It leads into a discussion of how information is produced and how you're going to provide that information to others, which will also hinge upon my main comment today, which is going to be on the -- let me go first to the second point, Rule 37.

JUDGE SCHEINDLIN: Reasonably accessible should be substituted for what?

MS. FELDMAN: I'm sorry. Reasonably accessible should be substituted for this issue of -- excuse me, whether it's a residual data or back-up data versus active data.

JUDGE SCHEINDLIN: So you wouldn't use that in the definition? You would leave it as "reasonably accessible." You want to say back-up tapes are inaccessible?

MS. FELDMAN: Exactly. That's correct.

JUDGE ROSENTHAL: It's a functional description?

MS. FELDMAN: A functional description. Thank you.

Let me discuss the safe harbor provision, to which I have some objection. In our practice, we are routinely helping clients gather and produce information. So in many cases we are working with people, historically defense counsel, who are gathering information. We also assist people who are pursuing that information, requesting parties.

I think it's important to note that companies, even companies like Microsoft that are normally producing parties, are often themselves in the position of asking for data. So I choose to use very specific terms in my work, requesting and producing parties.

When you are a requesting party, you are at a disadvantage, because the producing party has the knowledge of what they have. This is a given, whether it's paper based documents or electronically stored document. There's not anything we are going to be able to do today to change that.

Once this fundamental fact is agreed to, I believe that the burden for identifying responsive data substantive in subsequent actions required to preserve that data most heavily rests upon the producing party. It's a burden that's part of doing business. It's part of the documents of doing business.

People have struggled with this issue for years, and they've learned that they have documents in archival storage, and they're learned that it's a big issue to manage corporate records. And what we've seen, is, particularly in the last five years, the dawning recognition that it's a big issue to manage your computer based records. This is true.

It's not impossible. Many of our clients are doing so in a very comprehensive way. They're doing it

as a course of business to manage their business. They're doing it in light of discovery. But they're doing it.

If we accept this practice, I believe that a good faith effort, a good faith preservation of record can be made by companies and should be expected to be made by companies, in that they should recognize on at least some basic level the primary information their companies may have that may be relevant for litigation.

I think this goes beyond whether it's active or whether it's on a back-up tape. I think it has to do with companies understanding that information is

00081

traveling through their companies, through their e-mail servers. They have information in their companies that are in database stores. They may have information that's traveling through their companies on their voicemail systems.

What's recognized is they should use the tools at hand to begin to identify potentially responsive information or relevant information. They have an obligation to make this effort. To simply say that it's too confusing --

MS. VARNER: You've heard the impassioned discussion concerning disaster recovery. Do you disagree with those comments?

MS. FELDMAN: I believe that it's very difficult to restore and search back-up tapes. I think that's the smallest problem facing us. They need to respond to preserve data, and they need to respond to produce data.

I think the biggest challenge to companies is just recognizing that their data is in many locations throughout the enterprise, often not even at the point of a back-up tape.

To get to a discussion of text searching means --

JUDGE SCHEINDLIN: Wait. I'm sorry to

00082

interrupt. There's been a lot of back and forth so far this morning in that there is an indication (indiscernible) suspend the routine. And somebody says yes, somebody said no. What's your view? Is there ever a time when at least for a period of time it should be suspended until there's a snapshot? What's your view as an expert?

MS. FELDMAN: I believe that the urgency for producing parties is in identifying likely data stores that have deposits of data, whether they're active on the line, possibly imperiled, i.e., routine destruction. They need to identify the location of the majority of responsive data and to have some understanding of how it's --

JUDGE SCHEINDLIN: So you didn't answer. Is there ever a time when a company should, either on its own or by an order to suspend, at least for a period of time --

MS. FELDMAN: Yes. I'll give you an example.

JUDGE SCHEINDLIN: Yes, there may be such a time?

MS. FELDMAN: Yes, there may be such a time.

Let me give you a company example. 400 e-mail servers deployed -- they have hundreds of thousands of

employees, 400 e-mail servers for hundreds of thousands
of employees. You have a case, and it involves one narrow group of employees, a group of engineers that are working on one auto component; right? Are you going to ask them to automatically cease overwriting the data on 400 e-mail servers because they have a program that automatically deletes e-mail messages? Are you going to ask them to freeze that worldwide as a way -- as a safety issue? No.

But I might say, if the people that are at issue are primarily in the United States -- let's look at some subset of 400 e-mail servers. Let's say the five --

JUDGE SCHEINDLIN: But is the back-up done by server?

MS. FELDMAN: Yes, the back-ups are done by server.

JUDGE SCHEINDLIN: Well, others seemed to say no, the back-ups aren't done by server.

MS. FELDMAN: The back-ups are done by server, and in most cases you can identify using a back-up system the servers that have been backed up. It's not so mysterious. It's not difficult. We do this on a routine basis. Now, we often have to help people identify this. It's not the first thing that comes to mind. But I can tell you that that's our first step,

and it's pretty much does; okay?

So you begin to narrow it. You begin to narrow in and target --

JUDGE SCHEINDLIN: So you could suspend backing up that particular server?

MS. FELDMAN: That's correct. Now, I have a question for you. It's not really fair to ask 25 people. You have your own safe harbor.

JUDGE ROSENTHAL: No. We're just inaccessible.

MS. FELDMAN: My question is -- and I think why I do this issue is that people really do need to move very quickly to begin communicating with each other. I find that this is critical to this process. If there's going to be any hope for reducing these costs, these burdensome costs, if there's going to be any hope for protecting the rights of requesting parties to get the evidence that they need, that there has to be a recognition of the urgency to get people together to agree on their role and their the duties for preservation, their identification of this information. This is of great urgency. It begins in the earliest stage.

So my question for you is, I'm making the assumption that the meet and confer component of those

proposal changes is just about the most critical segment for all of us here. And I would like to talk to you about that. I would like to talk to you about the elements that I think need to be included in that section for meet and confer.

I tried to keep my comments limited to broader topics, so that we wouldn't have to get into the nuances of today's technology, which, which the way, have already passed us by as we're sitting here in this room;

okay? So I don't want to get in the trap of working with the committee to develop rules that are going to be obsolete as soon as the laser ink is dry on the document.

So I have some elements for a protocol for meet and confer that I'd like to share with you. And it involves a discussion in the form of production; it addresses how the privilege waiver would be targeted; it addresses preservation issues and steps; it must address a determination of the nature and the logging of the data to be reviewed; and I've included an element that I believe has to be part of this section, which is mutually agreed upon terms, mutually agreed upon costs.

These are things that I think have to be present and I would like to see built into the language. I want to elaborate on them today and get us out of the

00086

realm of the abstract and into the world of concrete electronic discovery.

Form of production. We have tossed this around. We have talked about reasonably accessible, reasonably usable. There are a few things that make electronic data reasonably accessible and reasonably usable. The primary way people do this is they will convert data to make it more usable. They'll take a Word document and they'll turn it into a .pdf document, because they can move it around easier, they can affix numbers to it, they can do a lot of things with it. This has become in a way sort of a token of the realm in electronic litigation discovery support efforts.

If you convert the document, what does it mean? It means that you have to have informed consent before you agree to accept converted documents. You need to understand that as soon as I convert a document, I am losing information that was in that native document. So there has to be understanding of what this means when you're talking about mode of production.

I heard a reference today to someone producing electronic mail when the other side would have difficulty reading that. If the other side said, you know what, it's too difficult converting to a .pdf format, that's fine. But I don't think they should be

00087

able to come back down the road and say, you know, when they converted it, I lost some information. So again, it hangs on an understanding, a clear understanding of the intent, and a clear understanding of the method, and a clear understanding of what's going to be gained, ease of use versus what's going to be lost, perhaps information available in the native format.

So there's an example where a dialogue has to occur to think that two parties are going to stand in front of a judge, you know, that has only dealt with these issues in the most cursory way. And to getting to the nitty gritty fundamentals of this to me is (indiscernible).

So form of production with all its nuances -- I may not be able to provide detailed notes to you about what's some of these nuances are, but I simply want to alert you to some of the issues that we see coming up.

The protection of privilege waiver component, that needs to be addressed. Again, the determination of the format of how the documents are going to be produced

is critical. If I submit a native format Word document to you and that's how you can read it, then it's possible that within that native format there's going to be embedded comments from counsel.

Most of the software we're all using to do

00088

this review process, to get it out the door, to do our privilege review doesn't go down to that level to read in that embedded information. So I may very well inadvertently produce privileged information to you, because the tools I'm using won't catch it. But if I agree that we're all going to use a format at that high level, that means none of us are going to be too concerned for reviewing embedded information, then let's agree to that and have some kind of claw back provision if at a later date we find this kind of data.

But again, we need to understand that what you're agreeing to in the early stages, some of these issues, such as embedded data, might include privileged information.

More critical to understand is that a lot of discussion about back-up data is how problematic it is and how much of it it is. I think that you haven't seen anything yet until you walk into an American business today and you ask them, what's active and what's online on your file servers? It puts back-up tapes in the shade. You have the data on these file servers that's 20 years old. Goes back 20 years.

Think of your own personal file storage system. You don't have to share it with me. Think about all the documents you may have. Think about a

00089

company with thousands of employees, each person their own little library. And it's online. We're not even talking about what's on the back-up tapes. And then think about what's happening today with changes in technology. Your voicemail that used to just be on your telephone voice system, your voicemail could be today or perhaps as soon as next month now wrapped up and incorporated into your e-mail. So that is one location which would effectively, if you combine your voicemail and e-mail, that could give you what? Easily a 25 percent increase in the amount of data on that server it's accessible, it's online, and it's growing at an incredible pace.

So we must deal with the volume of material. You must have a conversation about it. And you're going to have to make decisions. Plaintiffs are going to have to make hard decisions about how far they want to go. Producing parties are going to have to make hard decisions about what they're going to look at. But there has to be some agreement that you can't look at everything. You cannot. You know why you can't? Because you won't have time.

There are no tools to do that. There is no technology great enough today to help you review this information, whether it's active or inactive. There's

00090

no text searching tool, there's no concept searching software that is going to get that down. So the parties have to agree they're not going to look at everything, they are to agree that they're going to use the same guidelines that they've used.

They also need to understand that they need to get a handle on how much they may have to deal with and work backwards to see if there's a possibility they can do their review for privilege before they can produce -- whether it would be possible or even usable by discovery cutoff or by trial.

The other element of this meet and confer session would be to discuss preservation issues, how fast -- this is my question to you. How fast can you get these people to talk to each other? Because this has to happen very quickly. This has to happen almost immediately.

What is the burden -- what's the burden on producing? They must have a knowledge of their inner system. This means that the average attorney, in-house counsel, the average attorney, outside counsel, must have brought his or her knowledge from e-mail and Internet and Word documents and Excel spreadsheets to an understanding of enterprise technology. They have to have some fundamental understanding of what takes place

00091

at the server and for their clients.

Clients can help, companies can help, and in-house counsel can help begin to create some kind of map that they keep up-to-date for where their data is. This is key for me to know what they have and where it's located.

Having a consistent response to litigation is one way that we've seen more successful and larger Fortune 500 companies handle this topic. What does that mean, "consistent"? We know every litigation is different. We understand that. But companies can adopt some consistent guidelines for the way they routinely respond in electronic discovery. A lot of the costs that they're talking about, a lot of this burden they're talking about begins to come down. And the burden is on the front end. The burden is on the end none of us like to do. Organizing, chair kind of meetings, talk about where this stuff is, how long it's kept.

JUDGE SCHEINDLIN: Proposal number 34 on page two, where you said, "Parties should discuss any issues relating to the nature (indiscernible) data, time frames, and stipulations as to what constitutes duplicate or near duplicate data." And that's the specific proposal you're making?

MS. FELDMAN: That's correct. And on this

00092

preservation issue, I'm just saying that knowledge of the system is key, because I believe it's going to be shared with the requesting party. At a minimum it's going to have to be shared with the requesting party. So I think it's a good time to hurry up and get acquainted with what's traveling through these company systems, what's on them.

JUDGE SCHEINDLIN: You don't think our language now captures this?

MS. FELDMAN: No. I think what we've done -- and we've done a good job so far -- is we've addressed this issue of back-up data, archive data, and so on. But I want to shift the focus forward to what's out there, what's current. Because I think that's actually the biggest problem. I think that's a bigger problem. And I think that's the problem that's going to continue

to grow. Also, it doesn't effect decisions concerning preservation.

I can give you an example of one other case we worked on, the Walmart case, where they have a database that was filled with information that was needed by the requesting party, by the plaintiff. I am going to -- as Walmart stated and I'm going to state now, that database was routinely purging itself every three months. This doesn't have anything to do with back-ups. This is just

00093

an online problem database. This was a few years ago. So they weren't -- they said we weren't aware, we weren't aware of how that data was stored, and we had no idea that it was being routinely purged.

My suggestion to --

JUDGE SCHEINDLIN: The language we have now is any issues relating to disclosure or discovery of electronically stored information. If the (indiscernible) were to develop some of the -- would that be sufficient?

MS. FELDMAN: Yes, yes, I do.

JUDGE SCHEINDLIN: Okay.

MS. FELDMAN: I would also like to talk about one of the ways of reducing the volume of data. And I think it needs to be discussed and maybe needs some further conversation. And that is, this is a key fact in American businesses, that for each document that exists, there are probably a minimum of five exact copies of that document located throughout the system, active and online, not including things that might be on back-up tapes or on off-site storage.

This is a point that should be raised in a meet and confer session as to how to address this. In my long history of work in discovery efforts, which goes back to some of the issues raised by the problems of the

00094

new technology of the photocopy machine, we used to have to struggle with, how do you handle the duplicate? Do you preserve the original and only work with these photocopies?

Well, we're sort of backing down. I don't mean to minimize the issue. Because a duplicate e-mail message that's in your inbox, that's a duplicate of the one that's in my inbox. We might agree that it's the same thing, but for an attorney who wants to show that somehow it was different because it was in my mailbox, then it's no longer a duplicate. So if you're typing up e-mail messages that are in thousands of mailboxes and issues like that, there has to be some agreement between the parties, and they do have to take this on.

Another issue we may have to take on that may be more difficult is more near duplicates. Let's take the easiest example of documents that have been converted to a .pdf format that still exist in a Word format. While doing a privilege review for attorney-client privilege, I look at the Word document, and then I find out that there's 20 versions in a .pdf format that are the same document, but it's not a duplicate. In today's parlance, it's not a duplicate. It's a different format; right? So do I have to review it 20 times?

00095

What if there was a word change? What if it

was the a mass distributed letter where only the addressee would change, but there's 10,000 copies? Do I have to produce it 10,000 times, or can I make an agreement -- so one of the sections where you talk about the nature and volume of data, I would like them to address duplicates and near duplicates as well.

All of those things help to reduce volume, which should be a primary concern here, to reduce the volume of data down with good faith efforts, acceptance by plaintiffs. There will be the inevitable arguments you're going to hear that they're not going to get everything. And at the same time it does put I believe some emphasis on a good faith effort to identify responsive data sources so there is an understanding of what's there, and then the process of elimination can take place.

The other thing that I wanted to add into this meet and confer session, an element of it, is something that wasn't originally in there, and that is something that we're seeing to be quite problematic in electronic discovery, and that is an agreed to glossary of terms or an agreed to vocabulary as early on as possible.

I watched one of my clients spend over three and a half million dollars and three months of a special magistrate's time arguing on what the difference between what's a field in a database and what's a record in a database. I am not making that up. What I'm saying is that they chewed through millions of dollars for attorneys' motion for practice, our time, the court's time, because early on when the discussion came up about producing databases, they weren't clear on their terms.

This is a big problem with technology, in that it creates a real arena of smoke and mirrors for people, where they think they understand something and they agree to it and they torture each other down the line with discovery motion practices. I said this, but what I meant was this. I think it's pretty easy to have some fundamental glossary or insist that they actually have agreed to it. It can be two or three pages. Again, we'll provide you with samples for just a starting place.

We feel that if the elements of a meet and confer session are in place and agreed to with some commentary and some guidelines for formal production, how to conduct a discussion of the protection or preservation issues, how to reduce the nature and the volume of the material, this alone will probably be enough to reduce the costs of electronic discovery and move things forward and move things out of the courtroom and into the conference room, where it should be taking place.

And it's not a perfect world, and these aren't perfect solutions. I tried to give you some suggestion that would be as long-lived as possible. Technology changes. You've got to get to the basics. And if you wanted to stem the time it takes to produce, I think it really comes down to a reliance upon good faith conversation.

JUDGE ROSENTHAL: We appreciate your time very much. Thank you.

We'll take a 15-minute break, and then we will

resume. Thank you.

(Morning recess.)

COMMENTS BY MR. ALLMAN

JUDGE ROSENTHAL: Mr. Allman.

MR. ALLMAN: Ladies and gentlemen, first let me express my pleasure of being here today, a very personal pleasure. Approximately five years ago, I testified here in San Francisco before your committee and addressed the issue of electronic discovery at that time, little knowing that over the next five years what I thought was a major problem would explode into the incredible situation we now face, one which you are addressing in a very fine and honorable fashion.

00098

May I also comment on a trend that I have observed since I left my position as a general counsel approximately a year ago, and that is that there is now in America today and American business a very strong, almost explosive growth and interest in records retention programs involving electronic information. And those of us in the private practice know that our clients are demanding and they're insisting that we give them advice on how they can best update their records retention programs and their information management protocols to respond to the demands, not just of electronic discovery, which is simply one part of the picture, but to the need to better understand what information must be retained, how long it must be retained, and what form it is to be retained. And all of this ties dramatically into the work that you're doing here today. And I would like to suggest that you keep that in mind as you go forward, and I will try to comment on that as I make my comments here today.

What I'd like to do is organize my comments around some of the catch phrases that we have seen in the rules and address what I think has been some superb filings that have been presented to you by the participants, and I'd like to respond where I can to some of those filings.

00099

First, let me start with that magic phrase, "electronically stored information." It has not been floated here today as far as I can recall, so I'm going to venture into that, I guess, by saying that, first, I believe it is a useful distinction. It's a meaningful distinction. Someone made a comment to the effect that what's good about it is that it captures that information as held in certain places, and it's not just flows. So I really support that phrase, and I really like the use of it.

But I am somewhat persuaded by some of the comments that have been filed that perhaps it is a subset of a document. Perhaps, as Greg Joseph said, the bar would benefit greatly from not introducing yet a third distinction between documents and things -- electronically stored information. Perhaps you could leave it in 34(a) as part of the document. In other words, the document would include but not be limited to electronically stored information, dah, dah, dah.

JUDGE ROSENTHAL: Let me ask you two questions about that. One of the criticisms that was raised about "electronically stored information" as the label to be put on this stuff we're talking about is that it might

be obsolete, because there might be changes in the way information is stored, and that we might be better

served with a formulation such as "data compilation."
Do you have a response to that or thought about that?
MR. ALLMAN: I have one. And I don't regard that as too much of an issue for this reason. Data already is in the definition of Rule 34, and I don't believe you're suggesting we take it out. So there's a certain inconsistency between data complication and electronically stored information, but it's kind of a -- it's kind of a challenge, and it's kind of a positive challenge to us to understand that by having those two ways of looking at a document, we are really trying to cover the whole waterfront. We're not confining it just to information that contains a document like characteristic, that is a way, an organized method, as opposed to data, which I believe you probably intended or the committee probably intended to be simply raw information in tabular form. So I kind of like having both of them in the rule, and I don't regard them as inconsistent.
That's all I am going to say about electronically stored information. I just wanted to say that my views are changed a little bit after reading the comments that have been submitted. I went through -- and I'm sure all of you did this too. I went through

and said to myself, how would it change if you did it? It would not be hard to do that.
Second thing I'd like to talk about is this wonderful phrase, "presumptive limitations." I swiped that from Doug Shillman's comments in the AcaDoca magazine recently. I have not used that phrase before, but I like the idea of a presumptive limitation. I think that really captures what you're trying to do in Rule 26.
I think that guidance is needed. I think it's a line that can be drawn. I don't believe that it is necessary to spell out that back-up tapes or disaster recovery tapes or anything else fall on one side or the other. I think time and experience will demonstrate where it goes.
I don't agree with Greg Joseph that everything is a burden. This is not all about burden. Accessibility is a different concept. Accessibility has always been part of our rules. When I was just managing hard copy discovery, the question in my mind always was, is it accessible? Did I have to go to the dumpster? Did I have to go to, as Greg said in his written comments, did I have to go dig it up out of someplace? Well, the reason you don't is because it's not accessible. So I think you're updating the rules by

clarifying that it is a self-managed presumptive limitation on accessibility.
MR. KEISLER: Mr. Allman, can I ask you a question about this issue?
MR. ALLMAN: Yes.
MR. KEISLER: I'm with the Department of Justice. And one thing that we are (indiscernible) increasingly seeing stricter documents kind of policies

toward e-mails getting deleted 60 days after being created, and they're not online. Frequently they say to get back-up tapes in response to second requests under (indiscernible).

I heard earlier that Mr. McCurdy said that you've got to create document retention policies that really are sensitive to the kinds of policies we adopt in the rules, that they're going to be driven by other business oriented considerations. I think you said at the beginning that you've been consulting with your clients for litigation about what kinds of document retention policies they should be adopting.

Could you talk about to what extent you think the rules as presently proposed or as might be changed will actually affect the policies that your clients adopt?

MR. ALLMAN: Yes. That's a very tough

00103

question to answer.

In the first place, let me answer the most obvious place it will have an impact, and that is in the formulation of the policies that address litigation holds. Probably half of the inquiries we get today are, how can we better design a litigation hold? Well, obviously, if we adopt the two-tier system and adopt the comment on page 34 of the report, to the effect that the parties in generals will satisfy their preservation obligations by grabbing hold of accessible information, that is going to influence to some extent how people draft their litigation hold policy. So there's a very concrete, specific example in the context of litigation hold.

On the broader issue which you have just raised -- and that is, what happens with respect to the very understandable need to delete volumes of information that is not currently believed to be needed for active use? And that is to say the automatic deletion after 60 days, which is the most dramatic example. I routinely advise our clients, you cannot adopt such a policy without having an out. Have an ability to suspend those automatic deletions for individuals who might be on that list that Greg described, the hundred people who are going to be

00104

involved. So I understand their concern in the Justice Department about those kinds of policies.

But I would like to go back to the essential underlying point here, and that is that the volume of information that's being collected -- Joan just mentioned that everyone is now a little librarian. We each have our own libraries of information. That has to be controlled at some point. Storage technology is cheaper. EMC is doing a great job of having cheaper storage, long-term storage. But there are limits, and those limits are very practical.

If you have to produce -- if you have to go through and produce all of that information, if you have to account for its long-term storage, move it to new kinds of servers, when the time comes that they're no longer state-of-the-art, in other words, it makes sense to weed out information that is irrelevant and extraneous, and there's nothing wrong with that. And the rules should not discourage that.

So that's the second area where I would suggest that we have to be very careful. And nothing I've seen, by the way, in your current proposal would attack that or make it impossible.
The toughest area is where you get into the word preservation. I must say that where I have ended
00105
up -- and I'm a little surprised -- but where I've ended up is kind of where I started, and that is that the rules should not address the preservation obligations. They should not go into anything other than discovery. They should deal with inspection for purposes of copying for production of information, and they should leave --
JUDGE SCHEINDLIN: Even telling people they should discuss that in their Rule 16 conference is too much for you?
MR. ALLMAN: I share the comment made earlier that putting the word "preservation" in that list of things to discuss is a little bit provocative and perhaps unnecessary. But obviously early discussion of any issue is a good idea. Joan listed a very good set of core areas --
JUDGE SCHEINDLIN: She put preservation --
MR. ALLMAN: She did.
JUDGE SCHEINDLIN: That's why I'm asking you, are you saying that the Rule 16 checklist should or should not encourage the parties to discuss preservation issues? It's not like we're discussing a preservation rule. Should it be on the list?
MR. ALLMAN: I would not put it in a rule. I would not have a problem with it being mentioned in the comments, but I would not put it in the rule. I think
00106
it would be better to have the parties discuss what applies to that particular case.
JUDGE SCHEINDLIN: What applies to the case once the case is filed. But your reason for not wanting to put it there -- you said "provocative." What do you mean by that? What is the harm of having it in that list?
JUDGE ROSENTHAL: Can I follow up on that? Its not like the problem is going to go away if it's not put in the list of things to talk about.
MR. ALLMAN: I understand that.
JUDGE ROSENTHAL: It's the 800-pound gorilla in the room.
MR. ALLMAN: It is, and it isn't. I would say that in probably 75 to 85 percent of your cases, it is not in fact a problem. The great majority of cases are tried -- the information is collected and preserved without a lot of disputes over preservation.
What I'm concerned about is creating disputes that are unnecessary. Where there is a real, honest dispute as to whether or not -- let's say the Justice Department sends me a second request, and I've had them, where you ask me for our back-up tapes. I am definitely going to put a hold on my back-up tapes until I can negotiate with the Justice Department a more reasonable
00107
rule, which would probably be something like this. I will save what I have as to the past, but as to the future, we will put in place an effective litigation hold process, make a deal with you guys, and will not be

saving the back-up tapes going forward.
MR. HEIM: Are you concerned with preservation enough of the things that we discussed that it will inevitably lead to kind of routine preservation orders that will be generic and then dealing with the uncertainties of preservation orders, or is it something else?
MR. ALLMAN: That is part of what I'm concerned about. Almost by definition, a preservation order is entered at a time when you do not in fact know what is in the information you're being asked to preserve. And yet, at least as currently written, Rule 37(s), prohibition on the violation of a preservation order, is an invitation to an inadvertent violation of a preservation order. I have real concerns about blanket preservation orders.
There are times, of course -- one of the employment lawyers made a very good point -- that if let's say you have these enterprise database systems and the company is showing a resistance to preserve or to take selective snapshots of a dynamic database, then you
00108
should come to the courtroom and you should obviously air it and have a carefully crafted preservation order that addresses the needs of that particular case.
MR. CICERO: Mr. Allman, I have a question. First of all, I was struck by three key points that you set forth as key issues on the second page of your -- I think it's the second page. I wanted to ask you about the second one.
But before I do that, you stress the issue of preservation and production in both the first and third points. Now, it seems to me that it is an important issue. People know it is. The kinds of cases that I get in -- not as many as you have, I'm sure -- you get a request for preservation orders right at the outset for agreements -- or either an agreement and so on. So I guess I'm a little puzzled as to why we wouldn't want to deal with it specifically.
Let me ask you another question. I was very intrigued by your second key issue, that the rules at the present time are rigid and inflexible, and they provide inadequate inventive to restrain requesting parties from the unreasonable demands for electronic information. Anyway, you suggested how we might incentivize parties not to make unreasonable demands.
And I guess -- do you have any suggestions on
00109
that? Or are we simply saying, well, it's like original sin. It's there. They're going to make unreasonable demands, and therefore we have to provide safe harbor and we have to provide whatever else in the rules in order to deal with it.
Do you have any thoughts on incentivizing parties, whether it's in the initial conference or what?
MR. ALLMAN: I suggest two answers to that question in my paper. The first deals with a little bit more on cost allocation by perhaps including a phrase within the phrase about terms and conditions that would indicate perhaps a presumptive shifting of costs or allocating of costs. Sharing of costs is a good word.
MR. CICERO: Most people reading that though would take that as a suggestion that more costs be

shifted to the requesting party; no?
MR. ALLMAN: Yes. That's my point.
MR. CICERO: Well, how does that incentivize requesting parties not to make unreasonable demands? They'll have to pay the costs?
MR. ALLMAN: That's the rather simple kind of Texas based experience that I'm suggesting.
JUDGE ROSENTHAL: Free market.
MR. ALLMAN: Free market. There you go. I also suggest at the end of my paper that early

00110

discussion does indeed play a role here, and also the idea that the parties know that the routine deletion of information caused by the ordinary operation of a system that's done in good faith, which I prefer to -- that's my formulation. I prefer the good faith formulation. I believe that that will tend over time to discourage people from making unreasonable demands.
I may be naive in this. It may be that it's just the flip side concern that the other folks expressed, that once you give us a presumptive limitation, people are going to try to shift everything to the side that doesn't require the preservation of production. I don't think probably that point or even perhaps my point is really the answer here. Maybe the answer is that we try to find a middle ground, such as the committee suggested.
MR. HEIM: The concern about cost shifting as I understand it, is that what in fact is an unreasonable demand is frequently a gray area that's difficult for a court to kind of filter its way through at that point in the litigation. If we add some kind of cost shifting provision or some sense that the rule should go in favor of cost shifting, you really are -- you're affecting the small litigant, you're affecting the pro se litigant, you're pushing the rules in the direction that we've

00111

never wanted the rules to go. It's the old saw about the English courts that said the courts are open to all like the Savoy Hotel.
How do you deal with that?
MR. ALLMAN: Well, what I proposed in my language is that it would be as follows: That there would be appropriate shifting or sharing of extraordinary costs. And I guess those are weasel words, but really I've tried to address that concern. Because obviously there are times when it is totally inappropriate to require even extraordinary costs to be shifted to someone who either can't afford them or in the case -- in some of the cases, some of the employment cases there are times when the information really is only in your possession, and it's something that's needed for the case.
JUDGE ROSENTHAL: You raise a -- go ahead, please.
MS. VARNER: Would you discuss with us your concern about the identification part of the proposal.
MR. ALLMAN: Yes. That was on my list to try to deal with. And I recognize that this is a difficult concept, and I recognize that the fairness demands that a party to whom you are asking to take action and to question and to raise early what is inaccessible when

00112

they don't know what you think is inaccessible, I recognize they're at a disadvantage.
I would point out that historically, even in the hard copy world, we never asked parties to make a list of what it is we weren't going to go and look and do and chase down and find former employees. You know, we never put that burden on people. I think there was a reason why we didn't. And that is because it would get you off into work product, it would get you off into an area where there would be endless amounts of questions. So that is fundamentally my problem with the identification process.
Having said that -- and I proposed language that does not use that word. It turns your language from a negative to a positive, because I think that makes it parallel to the way we've always written the rules, and that's why I recommended that.
I would think that in those 15 percent of the cases where preservation is an issue and where inaccessibility is really an issue, I would think that the parties would naturally discuss this, and I would think that the requesting party would press the producing party, what is it? What do you have? What systems do you have that you haven't taken into account? And I would expect there to be a dialogue.

00113

And if there wasn't a dialogue and if it was unsatisfactory, I would think the courts could be asked and should be asked to step in. Maybe you have to take a deposition or two. Maybe you're going to have to submit interrogatories. But I'm told by the identification process, and that's the reason why I --
JUDGE SCHEINDLIN: At the beginning of the day, if it was broad enough so that you just said, this is what I'm not giving you in terms of systems, I mean, I'm not giving you our back-up tape system -- I need a couple more examples of words. Joan, do you want to help me? Examples of the big things.
MS. FELDMAN: (Indiscernible.)
JUDGE SCHEINDLIN: Because you're making the cut. You're withholding something that exists, that -- it doesn't capture data, but it's your decision to say it's inaccessible. I'm not talking about a privilege log type of identification. But just those things, those systems you're not producing, those data capturing systems.
Joan, can you --
MS. FELDMAN: Yes. For example, you might say, (indiscernible) we're not collecting removable data, and we're not turning in back-up tapes. It's more of a classification --

00114

JUDGE SCHEINDLIN: Thank you. You just had to name the locations that you're not turning over because you're not considering that accessible.
Is that so burdensome?
MR. ALLMAN: That does not capture adequately what is inaccessible in a given case.
Let me give you an example. The phrase "enterprise systems" was used by someone here recently. The typical company is going to have hundreds, hundreds of databases and enterprise systems, dynamic systems, that they are simply not going to be looking at for your

particular case.
I'm not sure that any of us could ever adequately write a description of every single thing that we're not looking at. And I think it would be kind of dishonest frankly to give you a laundry list that says maybe five categories. I'm not sure it's a very honest list, and I frankly don't think --
JUDGE SCHEINDLIN: Well, you have intrigued me. That's what I want to know. We're not looking at any of our foreign locations. Okay. Now, I, as the requesting party, say, oh, he didn't look at the foreign locations? Well, I have an argument as to exactly why you should be looking at those, knowing the case as I do. It's important to know that you didn't go there.

MR. ALLMAN: Your Honor, if the requesting party wants me to look at the foreign locations, they have an obligation to put that in their request.
JUDGE SCHEINDLIN: It would be 90 pages long.
MR. ALLMAN: No, no, no. It won't be. Well, sometimes they already are.
JUDGE ROSENTHAL: Is it sufficient to get to where the rule is intended to go if the responding party says, here, I'm giving you what I could get from my active data or words to that effect.
Does this sufficiently convey that there has not been any attempt to examine or retrieve information that is not active data?
MR. ALLMAN: I honestly don't know.
JUDGE SCHEINDLIN: Well, it's worse than that. In the hypothetical you just gave, you are not giving all of your active data. You didn't go to your foreign locations.
JUDGE ROSENTHAL: Domestic data.
JUDGE SCHEINDLIN: Yeah. You have to do something --
MS. VARNER: This is one thing to do in a room filled with people. But your concern is this represents sort of a departure from the way things have been done in the past, that you didn't have to identify X, Y, Z.

Could you shelve some of your concern if the rules said you could either identify where you didn't look or you can identify where you did look?
MR. ALLMAN: I think that's what Judge Rosenthal was just suggesting, and I think Greg made that same suggestion. I'm not sure that that accomplishes a whole lot either, because you're then getting into the question of duplications. Why did you go only to this certain place and not to this other place to get to the copy of this same document?
I think I would prefer to let the free market work here. In other words, have the requesting party do the best job they can to specify what they want. If the responding party, they think it's too onerous, too broad, they can state that they think it's too broad. Then the parties could, as in a normal process, either have a Rule 37 motion to compel, or you could more -- hopefully you could handle it in your early conferences and maybe work out --
JUDGE SCHEINDLIN: If it's the way the rule is proposed now, you have a burden to prove that stuff you withheld on accessibility grounds is inaccessible, which

was the burden before the burden shift. Before the seeking party gets to show good cause, you can say, I hereby prove that what I said was inaccessible is really inaccessible. So the cut is accessibility, not burden. I didn't look in the foreign location because it was burdensome. The question is to try to make a second tier for that which is inaccessible. Unless you don't like the two-tier approach.

MR. ALLMAN: Oh, I love the two-tier approach, but I don't like the idea of explicitly spelling out a burden on who has to prove accessible or inaccessible. I think that that's something that should be done as a natural assault. What I just said --

JUDGE SCHEINDLIN: (Indiscernible) -- burden; right? We're saying that the requesting party now has a burden under tier two to make a good cause showing to the Court. To balance that, we said, since you're withholding material on the grounds of inaccessibility, you first have the burden to show that before the burden shifts to a requesting party to show good cause. Because that's new, and a lot of the comments have picked that up and say, you're changing the federal rule.

MR. ALLMAN: I understand that.

JUDGE SCHEINDLIN: So if your (indiscernible) threshold showing inaccessibility --

MR. ALLMAN: I don't believe that you do.

JUDGE SCHEINDLIN: Would you be satisfied with a reformulation of the rule that would keep a burden on the responding party to show inaccessibility but would not have that triggered by this identification requirement proactively?

That is, on your diagram, once there was a request and an objection and the objection asserted that certain categories of information sought are not reasonably accessible, you go to the Court, and the Court looks to you as the responding party to say, okay, now show me that that's really inaccessible, and the requesting party would then have to show good cause.

MR. ALLMAN: I recognize that's somewhat inconsistent with what I said a second ago, but I would not have a problem with that.

I have a little bit of a problem with spelling out burdens in the rules. I think that's something courts develop as they apply them.

JUDGE ROSENTHAL: Isn't putting a presumptive limit another way of saying who's got the burden?

MR. ALLMAN: Yeah. I think it's inherent, frankly. That's what I meant by spell it out. I think it's apparent that you are lying on a line and saying this falls on the inaccessible side of the line. I think when challenged, you have the burden of proving that that's where it properly belongs. I just don't think it has to be in the rules.

PROFESSOR MARCUS: If there's no identification, isn't the next step going to be discovery about what was withheld, or is that something you expect would happen anyway?

MR. ALLMAN: That's what I said earlier. In 95 percent of the cases, 85 percent of the cases, this

is not going to arise, this is not going to be an issue. Where it is an issue, I would hope the parties would discuss it at their first opportunity. If they can't resolve it --

PROFESSOR MARCUS: Wouldn't that be identification, their talking about it, from the perspective of the producing party?

MR. ALLMAN: In the sense that identification means informed discussion of what other information that the requesting party seeks that the producing party has not provided, that is a form of identification. I would call the whole process of discussion to be the identification process. If it's necessary to have discovery as part of that, yes, that would be part of it.

MR. HEIM: I think I'm following up on Professor Marcus' question. I'm not entirely certain. Do you see it as a concern, or maybe it's not

00120

a concern, that as the rule, as the proposed rule is currently framed, that there is almost no reason why a requesting party, after the responding party has identified what it thinks is not reasonably accessible, there is virtually no reason why the requesting party shouldn't take a shot at having that party justify its identification? Because it doesn't have to make any showing at that point in time. It just says, well, prove it. I mean, why wouldn't everybody want to do that? Because if they can't satisfy the Court that it wasn't reasonably accessible, then you're home free.

MR. ALLMAN: You know, I'm not too concerned about that for this reason. I think with the passage of time and a few court decisions that analyze the way this works, I don't think this is going to be much of a problem. I think we're going to come to an agreement fairly early on as to what is fairly reasonably accessible and what is not. I just don't see requesting parties -- and to the extent they do, the extent they abuse it, there are ample opportunities to take care of that. I think I'm not worried about that.

JUDGE HAGY: The way the rule was written down, it won't take very long for defense counsel to

00121

come up with a definition that will be spit back in response to every interrogatory as to the material you're holding back. You're holding back, blah, blah, blah, blah, blah, and such other materials. Boom, you put the burden on the other side. That seems to me it's going to work that way.

MR. ALLMAN: No question. And Judge Scheindlin kind of suggested with Joan's help what it would say. But I am troubled by doing something that becomes a form and doesn't have meaning to it. And I'm especially troubled because it deviates from what we've done in the past. That seems kind of dishonest to me.

JUDGE HAGY: If it doesn't go that way, then the form comes on the response for the response. I am providing this information positively, and they say -- they ask for this other information. Then you come back and say it's not accessible. It seems to me it's going to develop that way, whichever way.

MR. ALLMAN: Well, you're probably right. This is a tough one. This is a very tough issue. Luckily, I get a chance to express my views, so those are my views.
JUDGE ROSENTHAL: You're right. Let me ask you about your views on Rule 37 briefly.
MR. ALLMAN: Yes.

JUDGE ROSENTHAL: You suggested that you thought that the higher level of culpability, that negligence should be present before there was an ineligibility for the safe harbor.
There's been in a number of comments concerns about putting the level of culpability a higher level of concern, that it would be too subjective, it would not sufficiently capture the need for the Court to be able to react to a whole range of possibly sanctionable behavior that falls far short of death penalty kinds of sanctions, and that there is a concern about encouraging parties to purge information on an accelerated basis, which would be even more of a license.
Can you respond to some of those concerns in defense of your position that the higher level of culpability is desirable.
MR. ALLMAN: Interestingly enough, the way your proposal reads, the culpability standard does not explicitly apply to the preservation order in that footnote. I don't know if that's an important distinction in your minds or not.
I meant that to include the preservation order. So I kind of enjoyed the dialogue that you had, Dr. Scheindlin, about the risks. And I tend to share the concern that even a violation of a preservation

order that does not require a certain amount of wilfulness is perhaps unfair because of the likelihood that most preservation orders entered at a time when they don't exactly know what they are ordering preserved might be inadvertently violated.
So I would like to see -- there's a great line in the commentary to Rule 37 that what you're trying to focus on is things that get lost when parties don't intend for them to get lost, or words to that effect. I apologize for not remembering exactly how it's phased. But that deals with intent.
And I do believe that people who intentionally -- people who have, for example, a reason to believe that a particular back-up tape contains information that's solely responsive to this particular case, I do not believe those people can walk away from their obligation to preserve that information. But I don't believe that belongs in the rule, and I don't believe that's the place to deal with it.
I think that Rule 37 should be careful and focus on what it's intended to be focusing on, which is simply advising the practicing bar and the courts that the rules are not intended to force people to stop using productive systems in the manner that they routinely do without any intention to exfoliate or to hide the

information. That's why I like the concept of good faith, and that's why I prefer that.
JUDGE SCHEINDLIN: In your proposal, on page

five, it looks like you do use the phrase "operation of good faith." (Indiscernible) -- unless the party issued in the action requiring the preservation of that system.
I read that, and I had a very bad reaction. You are inviting a preservation order in every case. I really think that would facilitate a wholesale mad dash for preservation orders. Did you really want to stand by that, that we put that --
MR. ALLMAN: Let me be candid with you. Since writing this, I have -- as I stated a few minutes ago, I've really changed my position on preservation. I don't think it should be mentioned at all in the rules. I would not put that in there, no.
Actually, what I did kind of enjoy was the comment made by one of the earlier speakers, where they took something I wrote back in 2000, where I wrote that nothing in these rules is intended to require the suspension -- that was my original proposal to you folks a number of years ago. And you know, there is something to be said for that simple formulation. But I think we've come probably too far now to go back to that.
JUDGE SCHEINDLIN: In your testimony today,

00125

which I thought was very candid, you said you would tell the client to suspend that for a period of time until you negotiate or got a court order or figured out what to do. I thought you said you would actually advise a suspension. You didn't say that --
MR. ALLMAN: I didn't mean to say that as a black letter rule.
JUDGE SCHEINDLIN: No, no. At the pending --
MR. ALLMAN: Yes. And I believe in the Sedona Principle 8 -- I think it's 8 -- that says that it's the responsibility of each party who has electronic information to determine how best to preserve the information on their systems.
JUDGE SCHEINDLIN: There's a suggestion right in the rule that you should never have to suspend the regular operation of your system.
MR. ALLMAN: That's not what the rule would say. It would simply say that nothing in these rules is intended to require that. That doesn't mean that the party would not exercise independent discretion based upon their common law obligation. Which could be sanctioned, failure of which could be sanctioned. As you well know, because you did it. You issued a sanction, you know, that's based on your inherent power and not on your ruling.

00126

Well, thank you, Your Honor.
JUDGE ROSENTHAL: Thank you very much, Mr. Allman.
Mr. Judd.
COMMENTS BY MR. JUDD
MR. JUDD: Thank you, Judge Rosenthal, and Members of the Committee. Thank you for giving me this opportunity to talk today.
I first want to commend you for starting what's been a vigorous national debate about these issues. And certainly hardly a gathering of lawyers today occurs without some discussion of what's going on with e-discovery, either on a practical, personal basis, or in connection with your proposed rules amendments.

And that's good and healthy.
I want to focus my comments on two fairly narrow points that have been discussed at some length already. The first one is the discussion in Rule 26(f) that would require parties to initially discuss in their meet and confer the idea of what documents would be preserved, preserving discoverable information. And while I think that's appropriately listed in the notes or more generally, I think that the rule itself ought to focus on identification of discoverable information, the discovery and identification of information. And I

00127

think naturally from that a discussion of preservation is likely to occur when it arises.
I'm concerned that there not be an overemphasis in the discovery rules on the preservation obligation for many of the reasons already discussed. I think that in those cases where a focused, tailored preservation order is appropriate, certainly the courts have that power and certainly the parties generally tend to be sophisticated enough to identify those situations where one needs to be entered.
PROFESSOR MARCUS: Mr. Judd, one of the concerns that could be behind having something in the rule is that there seem to be circumstances in which later on there's a big problem with the preservation of material that would have been solved if it had been thought out earlier on.
Are you saying that that actually doesn't happen?
MR. JUDD: Is the question does it not happen, that there are problems afterwards?
PROFESSOR MARCUS: Are there no significant number of cases in which two years into the case, it turns out that material, particularly electronically stored information, that existed when the case is filed is no longer in existence, and now somebody is asking

00128

for sanctions as a result of that change?
MR. JUDD: I think that happens, of course. But let me --
PROFESSOR MARCUS: Wait a minute. Calling upon people to talk about this at the beginning explicitly, is it likely to reduce the incidence of that sort of thing?
MR. JUDD: It's possible, certainly. My experience with meet and confer frankly is it's like playing poker, that there's not a lot of meaningful exchange of information. But I am not saying that that shouldn't be a subject of discussions in an initial meet and confer. I'm just saying that the way the rule is now written, where the discussion is focusing on the preservation of discoverable information instead of -- I'm suggesting that the preservation item either be part of the note or one of the items in the list that follows, but that the principal discussion should be on the identification and discovery of information.
I mean, let me be frank. One of the first things we talk about when we're retained in a new litigation with our client is what have you done to preserve documents, to preserve information. We frequently have that discussion even before we're retained, you know, to flag the issue that there are

substantial preservation obligations, to try to get them thinking early on what needs to be done to avoid this problem that you raise.

My point is simply that when the two counsel enter into their meet and confer, the focus ought to be on some discussion as to what information you reasonably intend to seek and what is it that we have and to try to find some common grounds that we can enter into, ideally some agreement. If not an agreement, at least focus the issues so that when we have our initial case management conference with the judge, we can flag those issues and either have an appropriate discovery plan or some type of preservation order.

But again, it seems to me that the focus of the discussion ought to be on what information is discoverable. I believe that naturally preservation is a subset of that. And that's my simple point.

The second point I want to make is with respect to the proposed amendment to Rule 26(b)(2), and like every other defense lawyer who's gotten up here, I certainly endorse the two-tiered approach. And I certainly have found as a matter of course that back-up tapes are frequently listed in initial discovery requests, and certainly this rule addresses the inaccessibility and the difficulties inherent in that.

I would point out, however, that the way that the rule is written, it focuses really only on the question of accessibility. And even the notes focus on the question of accessibility and what's accessible or inaccessible versus active and inactive. And I'm afraid that's buried in that, even though there's no change to this opportunity to make an objection on burdensome grounds and to then initiate the litigation or the discussion about whether even active data or active documents are overly burdensome or not and whether some sort of cost shifting or cost sharing ought to be undertaken.

What I think should occur is that, at least in the notes, that there ought to be some discussion emphasizing that none of this has changed, that burdensome objections are still appropriate, and that there is an existing method to identify and to litigate where something is overly burdensome, where some sort of cost sharing would be appropriate. And I think that the amendments would be well served if that discussion, a short paragraph, is contained in the notes to emphasize that.

Yes?

PROFESSOR MARCUS: Is it adequate to say, as on page 13 in the bottom paragraph, or 55, that if a showing -- that if there is good cause to seek inaccessible material made, the rule that is proposed to be added does not apply, but the limitations in 26(b)(1), Roman numeral one, two, and three, could still apply? It sounds to me like that's what you're talking.

MR. JUDD: I'm saying I think that it's still provided in the rule itself. I think there's still an acknowledgement that nothing has changed with respect to the Court's power to appropriately limit or structure discovery.

What I'm saying is that the note itself is almost single-mindedly focused on the discussion of accessible versus inaccessible. And I think that it would be useful to the bar and the judiciary to ensure that the note highlights the fact that even accessible information or that the discovery and production of accessible information can still be exceedingly burdensome.

JUDGE SCHEINDLIN: You're saying the first tier.

MR. JUDD: Yes.

JUDGE SCHEINDLIN: But when we cover the concept of tier two, we should remind the reader that the proportionality test still applies to the accessible, the tier one. That's all.

00132

MR. JUDD: Precisely.

JUDGE ROSENTHAL: Is it your suggestion that that language be moved from the note into the rule?

MR. JUDD: I don't think so. I don't think that's necessary. But again, these are going to be parsed over and cited and recited, and you know what we do with whatever you write. And again, I --

JUDGE ROSENTHAL: I think you flatter us.

MR. JUDD: We try to take what we can and offer what isn't there. But I do think that would be a useful addition in the notes again, just to highlight that.

I want to thank you.

JUDGE ROSENTHAL: We appreciate your comments very much. Of course, we all remember that the notes to Rule 23 talk about how 23(b)(3) will not ordinarily be appropriate in certain kinds of mass harms and that language.

Thank you very much, Mr. Judd.

Mr. Smoger.

COMMENTS BY MR. SMOGER

MR. SMOGER: Thank you for giving me the opportunity to talk. I have written comments with me. I just recently got back from Thailand and didn't get them to you before, and I will present them to you.

00133

The things that I'd like to talk about are primarily I think things that we've heard over and over again in 26(b)(2) and 37(f).

I'm from a different perspective. I am a plaintiff's attorney and have always been such.

The question that comes to mind -- and I participated -- I go back to the discovery conference we had some years ago, where we spent three days talking about the change in the determination of the rule going from the subject matter to cases and defenses. And the argument at that time was that limitation, the same basis that we now see for electronic discovery were the same basis that the limitation was made, which was inaccessibility of data; the costs of production, to limit the cost of production; and the interference with business activities. And I would submit that that is true of any litigation, and in and of itself that's not sufficient to say where should we change the requirements of discovery of both sides.

Clearly, whether the burden of proof -- and there are burden of proofs at times that defendants

have, and we forget that. I think that there's a good example of advocacy defense attorneys who filed an amicus brief on the other side of the expert witness case because they normally would have the burden of proof.

When you have that burden of proof, then the discovery becomes necessary. And obviously when you don't have the burden of proof, the mechanisms to limit that discovery are something that are to be used and promoted. I mean, that's, you know, the object of defending as best you can the party that you're trying to represent.

So we get to the question -- and I look at -- 26(b)(2) and 37(f) really are ways that this committee is telling judges to do the job that they already have. In each of these situations, I mean, the question of accessibility, which -- the fear regarding accessibility is by definition its limitation. To say that you can automatically say that it's inaccessible, then you've changed the two-tiered approach. So you're saying, okay, you get to change a burden on part of what you would discover. Remember that all of these documents that are supposedly inaccessible must by nature be related to defenses, or they wouldn't be discoverable to begin with.

So you're saying, okay, if they're inaccessible, but they might be related to defenses, then that's a basis for you to prove need. Now, you often -- from the requesting party, that information is difficult. But again --

PROFESSOR MARCUS: Mr. Smoger, maybe this is -- I'm not sure -- something that was said earlier concerning the identification provision of Rule 26(b)(2) was an objection that perhaps it would require one to go disinter that material, look at it, and then report what was there.

Are you saying that in order to identify materials as not having been reviewed, one must make an affirmative decision that they contain discoverable information?

MR. SMOGER: No. I'm not saying that that --

PROFESSOR MARCUS: That would be a provision in your view to enumerate in your --

MR. SMOGER: Oh, I don't think it's sufficient in my view. But you're asking me if I think that that's what's important --

PROFESSOR MARCUS: No. I'm sorry. I phrased that poorly.

If there were a requirement of identification, do you think you would be satisfied by enumerating back-up tapes, fragmentary data by category, the sorts of things without making a representation that of course there is material within 26(b)(1) on those media, but we aren't giving it to you?

MR. SMOGER: The reality is it happens anyway. We can put it in the rule, but the first request for production states, state all material that you keep data on. And the response to that should be a listing of places if anybody has that request.

So do you get that information anyway during

the normal course of discovery? You do.
PROFESSOR MARCUS: You don't need an identification provision in 26(b)(2)? It's not helpful?
MR. SMOGER: What helps is it puts it in the front end of the litigation, before. That's what helps with the conference provisions as well, is you're saying let's get on with this and get this happening.
Mind you, in an MDL, that currently doesn't take place for six months, because it takes that long to set it up, which are one of the major large discovery places that -- types of cases that we're talking about. But what you're doing is you're putting it right up front and telling us to get on with our job, which we should do right away.
JUDGE SCHEINDLIN: I think there was an assumption in your comments that troubles me. You said you wouldn't be producing it anyway if it weren't related to a claim or claiming it wasn't relevant.
The problem is the producing party folks who

00137

have testified are saying we don't think we should have to disinter and review and look for responsive information in that which is truly inaccessible, because it's so burdensome. It's such a unique and different story these days. We shouldn't have to look through 300 back-up tapes at a cost of $2 million or $3 million to see if there's something. We can just say, it's presumptively inaccessible, and whether it would be relevant or not be relevant, we shouldn't even have to go there, unless you can show a special need for us to go there. It wouldn't be a limited review to figure out whether there's something there or not. We shouldn't even have to look at those materials right now initially.
MR. SMOGER: That is understood. But it's no different from the way the courts operate as we sit here today. That is an objection that is immediately made about -- when we put it in into the rule, we're going to have twenty different definitions of inaccessibility. And the inaccessible definitions are going to be per se definitions, where courts, judges don't look any further than defining inaccessibility and saying, if it's this type of material, it must be inaccessible.
As it is now, there's an explanation of where those are. Well, these are held in an archive in

00138

Germany. They're all in German. Are they something really necessary? And generally the courts view that information and review that within the light of the discovery you're trying to obtain and come up with an order that a judge will say reasonably, no, I don't think you're entitled, I'm not going to order the production of this information. That's the reality of practice.
JUDGE SCHEINDLIN: Would you prefer the producing party, typically a defendant, would just say, I'm not producing it, it's too burdensome, and then there would be a motion?
MR. SMOGER: Then there would be a motion, rather than putting into a rule the concept of inaccessible. Because once that is in the rule, then it gets defined, and it would be defined by a number of courts. Once it's defined, and not by this committee,

it will be defined per se that any time you have back-up tapes in a certain fashion, it's automatically inaccessible. And then it will be referred to, and you'll see twenty court orders, none of which are published by other courts, all stating they've defined this as inaccessible.

And then the review becomes the burden not with the actuality of the substance of the material, but

00139

the type of method that was kept. And they said, okay, if it's that's type of material, it becomes inaccessible. That's the reality of the way the practice ends up happening after the rules are written.

PROFESSOR COQUILLETTE: Mr. Smoger, can you see a situation where a particular defendant routinely gets a reasonable inaccessibility finding from a series of courts, and then you're confronted with a situation where you're told, look, we have reasonable inaccessibility findings that have been made in the last five cases, and therefore you're confronted with a situation where you have to decide if you're going to be asking a judge to revisit an issue that's already been decided, such that in effect the burden you're going to be confronted with is higher than the one really specified if the rule? Because you're going to be confronted with a series of enumerated categories of data.

MR. SMOGER: In a short word, yes. I mean, once you get that fifth, I mean, you're not going further. And the question is whether the prior litigants even had the same issues in the litigation. The rulings are already there, and it's very hard in the pressed matter of time to go before a court and have them say, well, there's five that says this, why should

00140

I change that. And the burden becomes extraordinarily high.

JUDGE HAGY: Not very different from what we've got now, where they weigh the costs and benefits and say it's too burdensome to provide the information, overly burdensome. If five times they say that, you come in and say, yeah, but that's key to my case.

MR. SMOGER: I agree with you. That's why I don't think the rule need to be changed, because I don't think we need precise definitions of what inaccessibility is.

JUDGE HAGY: The defendant could say, I'm providing this information, but I'm not providing information that is not maintained in the regular course, something like that, that you got to search for.

MR. SMOGER: They're going -- they say that anyway, and they're going to say that, and we have that evaluation in any case.

JUDGE HAGY: But this makes them define what that is. When we're talking about day to day, ordinary courses, back-up tapes, this, that. Now what you've got, it looks like a privilege log, where they say, we're withholding this information, and they have to list it. You don't go after all 25 things.

MR. SMOGER: And then the difficulty is that

00141

those privilege logs become per se inadmissible in all cases, because it becomes part of the -- even though

this committee doesn't set forth the rule, the case law says that any time you have these type of logs, it will get cited and say I don't have to look at that, because I know by definition they become inaccessible. That's the way the rules are used after they get past this committee.

So my question is, the rule, as Your Honor just said, the rules already take into account the argument of inaccessibility right now. The particular court in examining those rules in that single case weighs the particular information about how that -- those are kept and the needs in that particular case.

But if we establish a rule, then there will be definitions for that rule, and you don't even get to the particularities of how the information is kept for the need. You get to a definition that this type of material is defined per se as being inaccessible.

JUDGE ROSENTHAL: It is your position then that you simply disagree with those who have spoken already who first say that accessibility is different from burden in a way that needs to be spelled out in the rules, and who second say that in fact, although there is certainly litigation and discussion over what will

00142

and won't be produced and under what terms, that it is now too uncertain and too inconsistent in the practice that's developed and in the court decisions that are emerging to be as useful as it should be or as productive as it should be.

Do you disagree?

MR. SMOGER: Two questions. I'll answer the first. Yes, it's uncertain. Yes, it's unpredictable. But there are a million ways that data is stored and a million questions being asked on that data. It is necessarily uncertain and unpredictable. Unless every corporation in the United States wants to keep all their data in the exact same format and have the same exact document retention and destruction policies, it is going to be uncertain.

Every time we litigate against any corporation, we find a different mechanism of how their documents are stored, how they're transmitted, how their e-mails are kept, and how their back-ups are kept. They're unique to the corporation. And some -- and the question of inaccessibility, whether they're deliberately inaccessible or not is a question for the court.

JUDGE ROSENTHAL: My question wasn't clear. I apologize.

00143

Is your primary objection not that there are going to be disputes that will be litigated under principles and decisions that will emerge about the obligation to provide information that is not reasonably accessible? Would you tell us that that's happening anyway?

MR. SMOGER: Correct.

JUDGE ROSENTHAL: And whether we change the rule or don't change the rule, that will continue to occur.

Is it fair to say that your primary objection to putting this into the rule is that it will make it more clear that the property seeking that kind of

information will have the burden of showing the need to obtain it.
MR. SMOGER: That's part of my objection, yes.
The other part is that we will establish rigid guidelines in the courts where it doesn't -- where the burden is actually increased because of the rigidity of the guidelines of what's defined as inaccessible. If this court says legacy information is an example, legacy information will be absolutely impossible to get without a strong showing.
Because there will be cases -- if this committee says that legacy information is in the notes
00144
and that that is not something that is produced in discovery, the testing of the waters by anybody defending these cases will immediately -- I think they will be obligated to say that any time somebody requested legacy information, that it's objected to as inaccessible, because it's put as one of the things that could be inaccessible. Then you have a strict rule that has a very high level for the plaintiffs to get past.
JUDGE SCHEINDLIN: What you really object to is the burden shift itself. All this does is set up the burden shift. Once it's inaccessible, you still get it as the plaintiff's attorney if you make a special heightened showing.
Basically, you don't want to do that. That only defines that material as to what you have to make a heightened showing. It doesn't mean you don't get legacy material. It says if you want to pursue it, you say to a court here's why I need the legacy material anyway, because in the active data that I have now reviewed, none of it's there. It must be old stuff, and that's the only place I'm going to find it. But you just don't really want the second tier burden shift at all, I think.
MR. SMOGER: I'm talking about the level of that burden shift. When we seek information, and
00145
there's costs and expenses depending on the level of that information, it's almost always, whether it's stated or not, the burden shift goes on the plaintiff to describe need. So we have -- we almost always have that burden shift.
The question is whether the exact things by topic are automatically shifted for burden. When it's any kind of a legacy, you have to strong burden to get it, regardless of any other things --
JUDGE ROSENTHAL: Could we need a response to the concern raised in part then by perhaps being more careful in the note language to emphasize that we are not attempting to do anything except give a functional description of what is reasonably inaccessible, and that, because technology changes and because there are as many variations of information storage as there are entities and individuals, that we can't possibly chart in the rule or the notes where that line will fall in any one case. Would that --
MR. SMOGER: I think that you can say it. I think that the reality is within two years we will have set definitions of what accessibility means from a number of courts. They will refer to it, and it will become rigid, whether we say it or not. If we add to

the rules and say accessibility is there, it will be
00146
rejudified in case law in two years, which is what my concern is.
It's my concern for 37(f) as well that, once we say what things are in the routine course of business, then you rejudify the types of things that can be destroyed routinely and then you don't go further. That is just the reality of how litigation practices and how things are dealt with once they're put into a rule generally.
And I understand that this committee, you know, realizes the enormity of putting specifics into the rule. But when -- and I think that -- I agree with other people. It's almost impossible to do that. But I think the rules take care of both of these situations on a case-by-case basis. Once we make them more specific, then there will be interpretation of what accessibility means, and the interpretation language of 37(f) will occur, and then it will be rejudified, whether this committee wants to have it that way or not.
JUDGE SCHEINDLIN: You wouldn't have the words "reasonable" or "accessible" anywhere in the rules?
MR. SMOGER: That would be correct. I think --
JUDGE SCHEINDLIN: Historically, looking back to all of our work, there were some presumptions I think. And the whole question is, if you take it out
00147
entirely, then the presumption is, like any other data, it's discoverable, unless the producing party can show why it shouldn't be. But it's presumptively discoverable.
MR. SMOGER: I understand that. But I want to say very clearly in this practice that even though the rule does not shift the presumption, the reality of practice already shifts the presumption. Once the objection is made and there is an affidavit of costs and it's stated how much effort we'll have to do, then any judge reasonably looking at that information makes the evaluation in any case.
So the rule does not change that. The rule only will rejudify certain definitions, and that would be my concern.
JUDGE HAGY: Maybe defense can come up and say, all right, don't make broad objections. Specify what -- you're not so now (indiscernible) the target. I thought we were -- (indiscernible) you agree with defense counsel. Disclose that, make them say give us the information, period.
MR. SMOGER: Well, if they say that I'm looking for that, that's part of the mandatory disclosures. I didn't object to that. I don't have a problem with that. It is taken care of in the
00148
production where you say, please state all documents and all materials, the situations and where all of your documents are kept, and often you have to move to compel on that. But that answers the question of where things are.
What's important about the 26 -- about the 26(f), the disclosure provision, is it puts it on the table right to begin with. And that's helpful in short-circuiting discovery and moving the case along,

because it normally will take us to get to that same information six months by the time we go through conferences and do it. So you save six months' time in litigation for us to get the same result.

And the last thing I just wanted to say is that in dealing with electronic discovery, we are really dealing with all discovery. These are not really separate. We have to be cognizant of the fact that more than 90 percent of all information is electronic now. The real legacy data was written information, and the real far legacy data was microfiche. And shortly 99 percent of all material will be electronic. So these are not separate rules for electronic discovery. In reality, these are rules for all discovery, with a small exception.

And to add to that, in the legacy data, the

00149

data we're talking about, microfiche and paper discovery, where we have rooms full of documents -- and I am dealing with some cases that do go back to discovery from the '70s, and there were mountains of documents kept in multiple storage. What is the first thing that every litigant does with these mountains of documents? They have to be scanned in and turned into electronic data so we can search them.

And the searchable nature of that is dramatically improving every day. And now there are intelligent searches that aren't just word searches. They can comb documents and find similarities in documents contextually. And in another few years, the enormous impact of the search technology -- millions of documents of microfiche that were impossible for all of us to look at on those readers, they're immediately converted, and they're immediately converted into OCR so we can search and use them.

JUDGE SCHEINDLIN: I apologize to my hungry colleagues. But I want to ask you about -- you don't like the sentence in 37(f). I think you did mention the other. Why do you not like --

MR. SMOGER: Well, I think it's the same thing. The power to give sanctions already exists. And if we say that there's certain parameters of how you

00150

will not sanction, then it encourages those parameters to be used and set up. So if there's one court that says, well, if you have a routine destruction policy every 60 days, that's okay. Everyone will have a routine destruction policy every 60 days. One court will say, if your destruction policy is any greater than 60 days, that's okay, because it's already been determined.

And I think that right now any time you want sanctions, which realistically are incredibly rare, they still have to be by notice of motion, they still have to be explained, and you still have to go in and request it. And you often have to present compelling facts for the sanctions. I don't think there's a need for a higher standard, which we asked for. The standard's already there.

And if -- for those of you practicing on the bench, I think you can count the number of times that you've actually issued sanctions. They are not normal, and we don't need to say when they can be accepted or

when you don't need sanctions, because they are rare to begin with.

JUDGE ROSENTHAL: Thank you.

Thank you Mr. Smoger.

COMMENTS BY MS. LARKIN

MS. LARKIN: I'm going to pour myself some water so I have something to spill on my notes.

JUDGE ROSENTHAL: I'll turn my phone back on if you spill your water. How about that?

MS. LARKIN: Judge Rosenthal, Committee Members, I want to thank the audience for this opportunity to speak about the proposed amendments to the federal rules on electronic discovery.

My name is Jocelyn Larkin, and I'm the litigation counsel with The Impact Fund. The Impact Fund is a legal nonprofit with a unique mission. What we do is provide support to lawyers who are bringing public interest cases. And we do that both through providing grants, but also training and basically technical assistance to lawyers who are trying to bring cases in the public interest.

We also have our own caseload, and we are currently lead counsel in the Dukes vs. Walmart litigation, which is a gender discrimination class action on behalf of 1.5 million female employees.

I will say we've gotten an awful lot of electronic discovery in that case. We filed it four years ago, and last I checked, Walmart is still in business. They seem to be doing fine, despite having to deal with us and many other large cases against them.

JUDGE ROSENTHAL: Can I ask you a question about that case?

MS. LARKIN: Oh, absolutely.

JUDGE ROSENTHAL: How much of the litigation surrounding the discovery you've obtained in that case dealt with inaccessible information?

MS. LARKIN: We had quite a bit of work that we did around e-mail. Walmart, at least two years ago, when I did the 36(b) depositions, they had do many obviously, because they have very many electronic systems and large systems. We had a lot of litigation over -- actually, we did a lot of discovery around the e-mail.

As it turns out at the time, Walmart had servers for e-mail, but they could not identify which employees' e-mails were on particular servers. As a result, we as plaintiffs had to make the judgement that we did not get a vast production of e-mail. And we did not get it, and that was simply because without any indexing essentially of their servers and which employees are on those servers, it wasn't possible for us to search them and use them. We ended up getting more limited e-mail from high level individuals, where there was a specific special litigation hold on their computers.

JUDGE ROSENTHAL: So you had active data, and that satisfied your production?

MS. LARKIN: Yes, in the sense that the most important policy makers were people that we were able to obtain e-mail from. There's absolutely no doubt in my

mind that there's lots of evidence of discriminatory intent in the e-mail of middle managers that we made a judgement based on our information that we didn't get.

This tells you a lot I think about what I mean to say, which is really that we have been working with electronic data in the Title 7 area for a very, very long time. Starting really more than 20 years ago, we began getting payroll and personnel databases in order to prove our cases. The Supreme Court has made clear essentially, and this is really important for the committee to understand, we cannot prove our case unless we have electronic discovery, typically the payroll and personnel data. The prima fascia case must be proved which statistics, which require that we have electronic data.

For the most part, that data is kept in an active way. But there are some times, for example, that, rather than having the personnel data that's really every single day what it looks like, we will agree to and take snapshots of the data once a year.

Both parties agree that those annual snapshots will work and they will accommodate it.

There are a few --

PROFESSOR MARCUS: Ms. Larkin, let me follow up on something you earlier said. The preservation practices in that case, were those the product of earlier negotiations? Or did they come into existence unilaterally by the defendant's actions?

MS. LARKIN: We have a practice and have had a practice for more than ten years of sending a preservation stipulation and order with our complaints to the defendants. That's actually something that was in the manual for complex litigation and is something we have used.

I will say one of my comments about the rule changes is that putting into the rules the requirement that essentially the parties work on that at the front end is going to be very important. I had a circumstance this summer where we did our routine sending of the preservation order to the other side, and the other side said to us they were unwilling to even discuss a preservation order without some local authority establishing that it was necessary unless there was actual proof of foliation. Of course, I had no proof that there was foliation. But rather than doing what would have made sense, which was to sit down with us and talk about what they had, what we thought we needed, come up with a realistic list, the automatic reaction was, no, we're not going to sign anything.

I think one of the great things about the rule is that it does put that obligation on both parties to sit down at the outset, and I think that's going to work out a lot of the problems with respect to concerns about having to save too much information and the like.

When I listen to defense lawyers, it's sort of -- it surprises me. Because sort of the last person they come and talk to is us about what it is we really want. Instead, they struggle with what they should be keeping. If they called us, we would tell them. We could talk about and negotiate what it is that's really necessary, that we do need to keep. So that early

obligation to discuss it I think is going to be very important.
JUDGE SCHEINDLIN: In the typical case when you make this request to defense counsel, do you for example ask them to retain all back-up tapes?
MS. LARKIN: Often we do, because we have no idea what's there. At the outset, as we've described, we don't necessarily know.
JUDGE SCHEINDLIN: And do you ask them to stop
00156
recycling?
MS. LARKIN: No, no, we do not.
JUDGE SCHEINDLIN: Going forward, they keep on recycling?
MS. LARKIN: Well, the point of sending the stipulation and order is to provoke that conversation.
JUDGE SCHEINDLIN: Yes. But I'm wondering what you usually ask for.
MS. LARKIN: Yes. We'll put in that request, because we really have no way of knowing at the outset --
JUDGE SCHEINDLIN: Now, but you don't ask them to stop regular recycling?
MS. LARKIN: Typically, we do not.
JUDGE SCHEINDLIN: Okay. Thank you.
MS. VARNER: Ms. Larkin, do I understand your comments, that you are basically against the two-tier approach?
MS. LARKIN: That's correct. I think Mr. Smoger made a lot of important points on that. But let me just emphasize an additional point that really is the perspective of the groups that I work with, which are nonprofits who are struggling to do this kind of litigation on very limited resources.
And this is -- when we throw around, you know,
00157
you can go to court, you can do this, for us, every time we think about whether we're going to district court, we have to think about the time it takes, how much it costs us, and really whether we're ultimately going to have, you know, a friendly reception from the district court. Because, you know, district courts don't like discovery disputes. And you know that's true.
And so one of the reasons that I have a good deal of difficulty with the two-tiered system I think is that it increases the likelihood of litigated discovery disputes. The way I see the rules now -- I think that Mr. Smoger pointed it out, and I won't repeat it -- but it takes into account a lot of the problems. I think creating the presumption will increase the likelihood the defendants push back essentially and tell us the particular systems are not reasonably accessible.
And one of the things I really want you to think about is from the perspective of the plaintiff, what do you do when the defendant has designated something as reasonably inaccessible, and then they come up with, you know, a declaration from their IT professionals explaining how many hours it will take and how deep the information is and how difficult it is?
From a plaintiff's perspective, the only way I'm going to convince district court that that's not
00158
accurate, that that's not true, is if I hire Joan

Feldman or somebody like her and potentially take discovery of that person to try to establish -- in the same way we had to struggle with this before when there was disputes over the volume of documents and warehouses and the like. I have to hire a professional, who's essentially going to come in and provide expert testimony on a discovery dispute.

JUDGE SCHEINDLIN: One interruption. In listening all morning, there's like a missing step. This's a heck of a lot of active data that are non inaccessible. I guess the word is "accessible."

So have you stopped to really go through the millions and millions of pages, if we can still use that word, of what's accessible and then your argument might be made? If after doing that, what you expected to find isn't there, that's a pretty strong argument that it might in fact be stored elsewhere. But until you've done that -- you know, the comment was made here that people immediately jump to hold onto your back-up tapes, search your back-up tapes, without having looked at first all they can get, which is huge.

MS. LARKIN: Here's the problem. Reasonably inaccessible is not well defined.

JUDGE SCHEINDLIN: It's not there.

00159

MS. LARKIN: It's very difficult to define, I think. And the problem is I think as a result, a lot of defense lawyers are going to apply that label to particular documents or systems that they don't want to produce. Or at the very least, they're going to say, look, the rules are unclear about this, so we're going to make an objection, and then put it to the plaintiffs to have to basically take us to court and make us prove it.

And this goes to my resource question, which is, okay, we are more frequently put I think to litigated discovery disputes.

JUDGE SCHEINDLIN: I asked the defense counsel earlier -- I said, the documents are lost, they really aren't there.

Now I ask you to do the opposite. If you really want some company to store, restore, and search 300 back-up tapes, you could be talking, according to a recent California Court of Appeals case, 2 or 3 million dollars.

Shouldn't you have to make some heightened showing as to request they've got to spend that 3 million dollars on back-up tapes when you haven't even finished maybe your search of all that is accessible, which is active data and more? In other words, it's not

00160

only active data that is accessible. So before you would put a company to that, if you can put another hat on, speaking of resources --

MS. LARKIN: There's no question in my mind there are circumstances where, exactly as it occurred in Walmart, it was tough for them to go to those servers and give us that data. It was too much, and we understood and agreed to that.

But the premise of your hypothetical is that they've already given us all of the active data and we got to look at it and we were -- after we looked at all of it, we realized what we wanted wasn't there. But the

premise they're going to give us the active data at the outset isn't accurate.
JUDGE SCHEINDLIN: That's a different issue.
MS. LARKIN: Yes. But you've given them essentially a new defense, which is that some data is reasonably inaccessible. And you've put me to have to leap through each of these hoops. Even if they establish it's reasonably inaccessible, what you want me to do is essentially show good cause. I understand that. But oftentimes we've not even done discovery to try to be able to show something is good cause if we haven't gotten the data.
So the point that I want to make about it is I feel like the presumption that you've created puts a weight on the scale that favors the defense and will encourage litigated discovery disputes, and that the existing rules provide the ability for district courts to work with the burden -- the justifiable burden issues that are raised by defendants in particular cases.
The other issue that I'm concerned about is that in the existing system, both sides really have strong incentives to work it out and not go to court. And that's because for the plaintiffs, obviously we want to get information. The defendants, when they recognize at some point they have to provide it, they want to figure out what makes sense for them. But I think if you give them this sort of first barrier, this reasonable inaccessibility, they have less incentive to come and work it out with us, and they're going to take a shot at it. Why not take a shot and see if the district court will say, yeah, that's a legacy system, that's out, that's a back up tape, that's out.
JUDGE HAGY: They object to it on the grounds of burdensome and that the benefits are outweighed by the costs. We're not giving them anything they don't already have. We're just making them specify.
MS. LARKIN: Well, I think you're making it harder with us. Right now we work with the presumption that everything is discoverable, and you're changing that. And I think that that changes the incentives.
JUDGE HAGY: I don't think we're changing it. We're defining something -- we are alerting the parties to a problem that they already know exists. As to inaccessible data or data that's difficult to get, they think you can say, we'll give you everything except that which would be a burden for us to get. And you say, what is that? Well, legacy data. And then you go into Rule 26(f) discovery. You're already there, it seems to me.
MS. LARKIN: The problem is we're going to be looking at much more complex discovery, as I've described. We're going to be hiring experts and trying to deal with this definition of reasonably inaccessible. I'd rather live with the rules as we have them now.
JUDGE HAGY: That's what defense counsel said. Don't change it. Don't put this in.
MS. LARKIN: I know you're hungry, so let me try to finish up quickly.
You have my comments in writing. I want to make a point just about the fact that there are many practices that we have worked out in the course of our

work to ensure that a lot of these data issues are done informally. And to the extent that the rules can

emphasize that, I think it would be real important.

We have something we call tech-to-tech calls, where we essentially have our tech person call their tech person, and they work together about fields and how they're going to read data and definitions and the like. The lawyers actually for once keep their mouths shut. It's incredibly efficient, and it's very inexpensive. I would urge you to encourage parties to engage in that kind of nonlitigated discovery. There's nothing worse than lawyers taking technical depositions.

JUDGE ROSENTHAL: Yes, there is. Judges.

MS. LARKIN: Okay. Let me finally say that we are also opposed to the safe harbor provision. I think Mr. Smoger put it very well. I think we need to ensure that each side has incentives to do things as best they can, and sanctions are I think very rare. I don't think it's necessary to create that special safe harbor.

That's all I have.

JUDGE ROSENTHAL: Thank you very much. Was there a question? Thank you Ms. Larkin. I appreciate it.

Mr. Sinclair on behalf of the International Association of Defense Counsel, is he here? All right. I have an old list apparently. And Mr. Kuhn I believe is not going to be with us; is that correct? All right.

Ladies and gentlemen, lunch. I think we can be back in an hour and 15 minutes without too much stretch. There is a lunch facility in the first floor of this building, and, hey, we're in San Francisco.

Thank you very much. We'll resume in one hour and 15 minutes.

(Luncheon recess.)

COMMENTS BY MR. HUNGER

MR. HUNGER: Judge Rosenthal, Members of the Committee, I want to thank you for committing me to appear before you today. I also want to express my appreciation for this undertaking. I can relate to you, if I think back to experiences that I had with this committee with Rule 23, and I see a lot of the same situation going on.

I don't appear before you today as a representative of any special interest group, nor do I appear before you representing any particular body. However, I do appear before you as one who has been involved in litigation, in actual trial litigation for approximately 40 years. I also appear before you as one who managed one of the largest civil lobbies in this country for approximately seven years, and I appear before you as one who had the honor and the privilege to serve on this committee for approximately seven years.

I don't profess in any way to be an expert on computers. I don't know a microchip from a potato chip, and I'm the first to acknowledge that. But I do hope that I can present to you views that are somewhat unbiased.

And I have one recommendation and one area that I would like to concentrate on. And it's nothing new to you, and you've heard a lot about it earlier

today, and that's Rule 26(b). There is one slight aspect to it that I've heard no one mention, and I would like to bring it to your attention.

Basically, I suggest that you consider a provision to the rule that says that after the good cause hearing and after this matter has been litigated between the two parties, if in fact the U.S. district judge or the U.S. magistrate decides that good cause has been shown for inaccessible information, that there arise a presumption that the party who is requesting the information have to pay, and this presumption can be overcome by clear and convincing evidence that an injustice will be done if that is in fact made a part of the proceeding.

I think this is fair. I don't think that it is contrary to what we think of as the American rule, and really it presents nothing new. When I hear of cost

00166

shifting, I think that's really just a matter of semantics.

I don't think anybody in this day and age, when they ask to take the deposition of an expert is really with the opposing party asking that they pay the fee. I don't think of that as cost shifting.

I don't think that now, when anyone produces thousands of pages of documents as a part of their records and the other side can go in and copy them and they pay the fee for it, they don't think of that as cost shifting. So I see an analogy here.

Now, first I suggest, while I know that it's rare for a case in this day and age to actually proceed to a judgement, that when you have the situation where that does arise, then as I interpret that statute, 28 U.S.C. 1920 with the Rule 54, that there would be a basis where this could be passed off on behalf of the prevailing party.

So you would have a situation where there would be a presumption, a presumption could be overcome in a case where there was an injustice, and further, if the matter proceeded finally to a trial and a party had to pay the costs and it was eventually the prevailing party, then it could get its money back. That's my proposal. That's my suggestion. I would be glad to

00167

entertain any questions. I'll be watching the clock.

JUDGE ROSENTHAL: Any questions? Do you think that under your proposal, the rule or the language should provide any specificity as to the factors that we got for it in determining whether the presumption --

MR. HUNGER: No. I have a lot of trust and confidence in the United States judiciary and those who have been selected to serve on it, and I think that each matter would vary with the facts of the case, and it would be a matter of discretion.

Also, one thing that I heard here today -- and again, I tend to approach matters on just a common sense point of view -- is there's been a lot of talk about these proposed amendments, and most of it has been in a vacuum. I don't forget about depositions, interrogatories, requests for admissions. And of course all of that is involved when you have a discovery dispute of some type. Then those are tools that are there and that there available for the lawyers to use.

One thing that I strongly endorse -- and here again, you've heard it from everybody -- that's the two-tier approach. But perhaps contrary to some who have spoken here, I think you've got a good point. I don't see how a party who is requesting the information originally would know what to request if the other party, who is the responding party, hasn't said first what they're claiming to be in assessment. Who knows the records better than anyone? It's the party who has the information. So to me to have some other procedure earlier just puts the requesting party in an untenable position.

And I also do make this suggestion to you today, as one who is a member of a law firm that does a major part of plaintiff's work as well as defense work -- and of course my time with the department. As Peter can say, we have an awful lot of cases where we do represent the plaintiff. And I think that if you put this -- and here again, I don't call it cost shifting. I call it a presumption of cost sharing, which can be overcome, that you're going to cut down on the number of discovery disputes you have, you're going to have people narrowing their requests, and you would have a situation with a presumption which could be overcome when you have someone who is tenuous or lacking in the necessary finances to overcome it.

Let's face it. We all know it. Most of the major litigation that we see now, the big cases, are parties who have a dollar in their pocket. And if they think that there's information there that they really need, they'll pull that dollar out and pay for it.

That's just to me what I would do.

I can give you a real good example of this, and then I'll sit down. When I was in the department, we had 136 major cases that were activated overnight as a result of a decision from the United States Supreme Court. It involved billions of dollars. I went over to -- and as you know, the way the United States gets their money is from the judge's fund, which is a bottomless pit of money, or at least that's the way it's described. So there was a lot of heavy duty pressure coming from the agency and other sectors of the government to settle these cases, because they knew they didn't have to come up with the money.

Well, when I met with the head of the agency, and he was trying to push the department into a settlement, we got into the issue of discovery. And he said, you know, Mr. Hunger, we're going to have to produce over a billion pieces of paper in this lawsuit. And I said, well, that's very interesting, because if that takes place, you're going to have to pay for it. So that matter went quickly by the board. I reduced it by 999 billion pieces of paper in about fifteen minutes. It was done by just saying, okay, pal, you're going to pick up the bill.

Thank you.

MR. HEIM: Can I ask you a question?

MR. HUNGER: Sure.

MR. HEIM: I just want to make sure I understand the concept, and I think I do. Your

presumption of cost shifting --
MR. HUNGER: I don't call it cost shifting.
MR. HEIM: Okay. Whatever you call it. That could be overcome based on the circumstances, the resources of the plaintiff.
MR. HUNGER: Absolutely.
MR. HEIM: And so forth. But it applies -- you would have this apply in situations where the requesting party was asking for inaccessible data?
MR. HUNGER: Absolutely.
MR. HEIM: And your suggestion, I gather, is in part an answer to the question that was asked I think by Professor Marcus or by someone on the committee about what incentive is there for the requesting party to narrow or to be careful about what they're asking for. There's the incentive, because they know if they lose the case, those costs may be taxed against them.
Is that basically it?
MR. HUNGER: Absolutely. And also you're seeing at the time that you ask for it that the judge might rule, okay, you can have it, but you're going to

00171

have to pay for it.
MR. RUSSELL: If the reason was it was not reasonably accessible but they don't have the money to get it, then that satisfies that anyway. It's like they're willing to pay for avoiding the reasonably accessible argument.
MR. HUNGER: If it's reasonably accessible, then you produce it anyway.
MR. RUSSELL: If there's good cause, you ought to have it anyway.
MR. HUNGER: That's correct.
MR. RUSSELL: How about the reason it was not reasonably accessible because of the fact it costs too much to produce it?
MR. HUNGER: Not as I see it. That could be one factor. But if it's accessible, then you have it. And if the Court rules that it is inaccessible and cause has been shown to the judge for it, then after that there would arise the presumption that you're going to have to pay for it.
JUDGE SCHEINDLIN: Mr. Hunger, I have a question too. You sort of presume that the plaintiff is pretty well funded too. You said in big litigation the plaintiff is pretty well funded too. That's true in the big class actions, the manufactures, etc. But you have

00172

to look at the impact on the lady who spoke about doing employment work on a small budget.
And I'm concerned about two things. You said there's nothing new about this. The Supreme Court has said -- I think it was Oppenheimer v. Sanders -- that presumptively producing parties pay. You certainly would be changing that presumption, where now The Impact Fund, Ms. Larkin, has a burden to overcome, a presumption to overcome, whereas before, the Supreme Court said presumptively you pay.
So if I rule the good cause is shown, now go ahead and produce your inaccessible stuff too, you do want to change the presumption. You want to say presumptively now she's going to have to at least share that cost.

Here we've got an underfunded person. If that's the clear and convincing evidence, is that enough? If she says I'm poor, is that enough --
MR. HUNGER: Well, that's a matter that you can certainly take into consideration under the suggestions I made, most definitely.
JUDGE SCHEINDLIN: I don't know if that's the clear and convincing evidence you were thinking of.
MR. HUNGER: Well, what I'm thinking of, Your Honor, that decision is yours.

JUDGE SCHEINDLIN: In other words, anything the Court wants to consider to rebut this presumption, the court could consider.
MR. HUNGER: I see no reason why not. You're in a discovery hearing.
JUDGE SCHEINDLIN: Wouldn't you agree though there is something new in the proposal that does change the way it was, that presumptively the producing parties pay? That's what the Supreme Court has told us.
MR. HUNGER: Well, if that's so, then I can only point you to exceptions to that, and they are there.
JUDGE SCHEINDLIN: One being the deposition of experts that you mentioned?
MR. HUNGER: Yes. And another being the other situation that I mentioned, where, you know, you produce your records, and if you want copies of them, you're going to pay for them.
JUDGE SCHEINDLIN: I also worried about whether or not this will have a chilling effect, so to speak, on public interest and civil rights litigation, where in these fields the plaintiffs will be chronically underfunded, and they would just not be able to bring the kind of what we think of as civil rights type litigation they brought heretofore if there was a

presumption of cost sharing once you got behind the reasonably accessible stuff.
MR. HUNGER: Well, I'm --
JUDGE SCHEINDLIN: You're going to chill some kinds of litigation maybe.
MR. HUNGER: But I am giving you a basis to get to it without that. You're there. You're the judge. You have the discretion. You can look at the situation, and you make the call. And it would be a very unusual situation for that to be able to be appealed.
JUDGE SCHEINDLIN: I understand that. I'm just worried about people not even presenting the cases if they're up against that in the first place.
MR. HUNGER: Well, I hope the people who come into your court, Your Honor, are certainly versed enough to know what their duties and responsibilities are to do that.
MR. KESTER: Sir, why wouldn't you extend this to any kind of discovery?
MR. HUNGER: Because quite frankly, until now I hadn't given enough thought to all of it, coming to present this one situation.
MR. KESTER: Why do you say it's a new subject?

MR. HUNGER: Because of the fact that we're dealing here with a new subject. And first off, there are some instances where you can have a cost added. If you present a deposition in evidence, you can tax that as cost and get your money back for it.
MR. KESTER: I'm not sure this is a new subject. Isn't this a subset of burdensomeness?
MR. HUNGER: Not as I see it.
JUDGE SCHEINDLIN: Well, how does it differ from burdensome?
MR. HUNGER: Well, I'm not sure I understand your question, Your Honor.
JUDGE SCHEINDLIN: He said isn't it a subset of burdensome. You said, "Not as I see it." I just want you to explain.
MR. HUNGER: Well, if I understood his question correctly, he was talking about who had the burden to have to pay for this; is that right?
MR. KESTER: Yes.
MR. HUNGER: And right now there are situations where if you originally accept the burden, you win the lawsuit, you can tax it as cost. I don't know if that answers your question.
PROFESSOR MARCUS: I'm interested in the relationship between imposition of some or all of the

00176

costs and the finding of good cause. If the party seeking production is willing to pay all of the costs that bear on whether there's good cause to direct the discovery --
MR. HUNGER: I'm not trying to evade your question, but you just have to look at the facts.
JUDGE ROSENTHAL: If I can maybe just be a little more abstract. As you presented it, first there has to be a determination that there is good cause, a need for that information, because it's not available elsewhere. And then we get to the question of the terms and conditions of production, including what you've projected as a proposed presumption of cost sharing or shifting. But they're separate?
MR. HUNGER: Yeah. Thank you.
JUDGE ROSENTHAL: Thank you, Mr. Hunger.
Mr. Dukes.

COMMENTS BY MR. DUKES

MR. DUKES: Judge Rosenthal, Members of the Committee. Thank you for the work that you've done in this area. It's a very important area. I think you can see that from the comments you've received already.
My name is David Dukes, and I practice in South Carolina. That probably means you'd like a little explanation as to what I'm doing in San Francisco. We

00177

are national counsel to a computer software company. And because all of their information is maintained in electronic format, including their actual product, I learned a lot about electronic discovery and the problems we were facing at that time.
Currently I'm more involved in the pharmaceutical industry, and I serve as national counsel for pharmaceutical companies. And I'm also president elect of the DRI. So that's the perspective that my comments come from.
I know that one of the things you're

interested in are real world examples of what litigators are facing with electronic discovery. I have a couple of examples for you.

First, in a recent case, one of my clients searched between 400 and 600 million electronic documents. That search led to 8 million electronic documents that were deemed to be potentially responsive. Now, this was significant national litigation. And my point here is not that they had to search too much. But what they did search, we would consider to be reasonably accessible information or active data.

And the point that I make here is, I think this is an example that, even if we limit this to two-tiered discovery where clients are searching for

00178

reasonably accessible information, we are not going to eliminate a lot of things that would potentially lead to discoverable evidence. I think you're going to find that you're getting the bulk of the material through what is actual, active data.

Another example is one of my clients in the last several years had seen their IT staff, which is devoted strictly to complying with electronic discovery requests in litigation, increase over 50 percent. I think this illustrates the importance of what you are focused on.

And frankly, my law firm is well compensated for doing electronic discovery. But I have flown here across the country at my firm's expense because electronic discovery is broke as we know it, and litigants are entitled to more predictability and more consistency in dealing with these electronic discovery issues.

Now, I raised in my written submission some concern about the identification obligation. I'm encouraged by the comments I've heard today, and frankly, I'll be brief today, because some of my colleagues have made some of the comments I was going to make.

But I'm encouraged to hear that if you adopt

00179

an identification obligation that the intent would be that that would be a general description, such as back-up tapes or legacy data or something similar to that, rather than something with the precision of a privilege log. I think that's very important that the committee clarify that.

Also, one of the questions that this committee raised, and I think it's a very legitimate question for the rule making process --

JUDGE SCHEINDLIN: If you could clarify something. As opposed to not doing it at all, you could accept the broad category identification?

MR. DUKES: Yes, Your Honor. My preference coming frankly -- and it may just be because of twenty years of dealing with a different process, responding to discovery, is I had some concerns about imposing that particular obligation. But part of that concern was driven by the fact that I don't think it would be workable to have a privilege log type of process.

JUDGE SCHEINDLIN: You would have to end up searching the inaccessible. But if it were just the broad category identification, that would be okay?

MR. DUKES: Yes, Your Honor. If this committee recommended an identification obligation, I would be under those circumstances.

One of the questions you've asked is, will technology solve this issue of accessible information versus inaccessible information? I have some personal history for that.

In 1990 I was national counsel for a software company. I spent three years on discovery of electronic information in the Bay Area, spent two and a half months before Judge Claudia Wilkin over in the Oakland courthouse on a software case.

And at that time consultants and software vendors were telling us, we have products that will make everything in a corporation accessible. I called it the push the button argument. You just push the button, and everything a corporation has is going to come out easily, it's going to come out in whatever format you want it to come out in.

What we found was there was a disconnect between the marketing arm of these consultants and the technology arm of these consultants. They couldn't do it then. And some of these were good friends, and I hire a lot of consultants, and I purchase software, both as a national counsel and in my capacity as managing partner of my law firm. But we need to be careful not to be lulled into the belief that the marketing pitch about technology addressing these issues of accessible information is going to really solve it.

So I would ask you, if you're seriously considering that argument, make people show you how technology will solve this accessible versus inaccessible issue. Please don't just rely on the marketing pitch as to how it would be done. It wasn't done ten years ago, and based on what I've seen, there still does not exist technology that can make everything in a corporation that people are requesting be produced accessible. There's still that differentiation.

Judge Scheindlin, I think you asked Michael Brown, take off your defense lawyer hat. And I certainly think I'm viewed more as defense lawyer than plaintiff's attorney, so I will do that.

In talking with my corporate clients about these issues, about these rules, my corporate clients -- many of whom I represent not just in products liability litigation, but also in commercial litigation, where they are suing their other corporations -- understand that these rules would apply whether they're a plaintiff or a defendant. And they and I have studied these, and the clients that I have discussed this with are prepared to abide by these rules, whether they're plaintiffs or whether they're defendants.

These rules are an improvement in the status quo and litigation as we know it in America.

JUDGE ROSENTHAL: May I ask you one question? You began by talking about electronic documents. One of the issues what's been discussed in some of the written comments is whether we ought to retain the distinction of written documents on the one hand in Rule 34 and electronically stored information as a separate category

of what is required to be produced.
Do you have a view on that?
MR. DUKES: Your Honor, I do not have a view on that. The view that I had coming in was I was supportive on the way it was proposed. I've heard some comments made today that were thought provoking comments, but I haven't taken the time to go reflect on those and think how that would actually play out in my practice. So I don't. I think it's an important issue, but I don't have the answer to it sitting here.
JUDGE SCHEINDLIN: I have a question also on your 34(f) comment on page 3 of your written. You proposed your own language, and it ended with "violated an order issued (indiscernible) specified information."
And I asked a previous speaker, did he want to back off of that, because it might encourage requests for preservation orders in every case with a specific direction, something that could set up the barrier, you
00183
know, to be violated.
Do you think that by putting that in the rule, we might encourage people to run in and get preservation orders all the time?
MR. HUNGER: No, I don't. I think that was Mr. Allman who said -- and I would back off that. Because I have experience with blanket preservation orders. Fortunately, mostly in the state court system. And there is no worse experience dealing with electronic discovery than blanket preservation orders.
With regard to safe harbor though, Your Honor, I would encourage this committee to consider the higher standard of culpability. I know we've discussed a lot corporate America and large IT staffs and millions of pages of documents today, but there's a whole segment of litigants who are small businessmen and individuals who don't have IT staffs and who don't have any idea what their computer is saving or what it's deleting or how it's deleting. I think as we look at that important issue, we need to look at that group of citizens also. And this is a very, very complicated issue, even for those of us who live with electronic discovery, but I think a better standard is willfulness and recklessness.
JUDGE SCHEINDLIN: What do you think about the fact that when you're dealing with safe harbor, you're
00184
not necessarily sanctioned, you're just thrown on the good judgement of the Court?
JUDGE ROSENTHAL: You're asking if he's comforted by that?
JUDGE SCHEINDLIN: Yeah, I am. Because before (indiscernible) he trusts the judges to figure these things out. All I'm saying is the fact that you wouldn't be in the safe harbor does not mean you're going to be sanctioned. You can hope that the Court, in its wisdom, which Mr. Hunger commented, will get it right. Doesn't that --
MR. DUKES: I understand. And I have enormous respect and competence in the courts. I just prefer them to be interpreting the willfulness and recklessness standard rather than that.
JUDGE HAGY: The willfulness and recklessness standard is the violation of an order. Would you expand it to willfully and recklessly destroying documents,

regardless of whether there's an order?
MR. DUKES: Not in the context of these rules. I think that's an issue that exists in the preservation context before you have a lawsuit. In the context of these rules, it would be an order.
JUDGE HAGY: You mean somebody should take safe harbor if they know that a document could be
00185
relevant and there's no court order, and they go ahead and destroy it.
MR. DUKES: No. I'm sorry. I'm putting that in the context of -- that usually occurs, at least in my practice, frequently when we get a letter that says, we're thinking about suing you, or we get the complaint. At that point, as I understand it, these rules are not intended to apply to that. But that was my understanding of the note, that these apply to after the litigation is entered but not prior to the litigation.
But under the situation that you were describing, I think if somebody recklessly or willfully destroys evidence, whether there's an order or not, that the Court has discretion to sanction them, certainly.
JUDGE ROSENTHAL: Any questions?
JUDGE HAGY: I read your language a little broader than that. You're giving yourself protection --
MR. DUKES: Yeah. The proposed --
JUDGE HAGY: I think it starts before the litigation starts. If you willfully or -- you know, if you don't take reasonable steps to preserve information when you should have known it was discoverable in the action -- well, you're saying you think the action has been started?
MR. DUKES: I thought I read that in the
00186
notes. Now, I may be confusing it with someone else's materials that I read. But I thought there was a statement that said that this was intended not to apply until the action was filed. I understand there are other obligations that apply before the action is filed, but I may have been mistaken. I thought I read that in the context of this.
Thank you very much, Your Honor.
JUDGE ROSENTHAL: Is Ms. Lawler here on behalf of the Federation of Defense & Corporate Counsel?
COMMENTS BY MS. LAWLER
MS. LAWLER: Good afternoon. Thank you so much for your time here today. It's certainly an honor to appear before you.
I am Jean Lawler, and I am a senior partner in the Los Angeles office of Murchison and Cumming, a civil litigation defense firm. And I am appearing before you today in my official capacity as president of the Federation of Defense & Corporate Counsel, which is also known as the FDCC.
Just by way of background, the FDCC is an international organization. It was founded in 1936, and we have approximately 1,400 members. They consist of attorneys that are in private practice, defending civil litigation, of which our membership is limited to 1,050,
00187
and it is by nomination only. We have international members as well. We have corporate counsel who manage litigation brought against their corporate entities, and

then we also have insurance company executives whose companies insure risks that are involved in litigation. So that's the general parameters of our membership.

The FDCC is one of the founding sister organizations of Lawyers for Civil Justice, LCJ. And LCJ has submitted comments, and there was a white paper that was submitted sometime ago. So the FDCC supports the comments that were submitted by LCJ.

I did not provide written testimony before I came here today. It was a matter of time. I apologize for that. But it is my intent to submit some written comments if I might before the comment period expires.

Against this backdrop, I will leave the wordsmithing to this committee and to the scholars among us who study judicial process. But I would really like to really direct my comments to the practicality of the litigation of lawsuits, the day-to-day life in the trenches, if you will.

First, we believe that there is a need for these amendments, and we commend this committee for its fine work. As amazing as it may seem, thinking about it before I came here today, I was thinking it was only in

00188

1994 when my firm first began working with one of our insurance company clients as a guinea pig for e-mail. This was the senior vice president who had e-mail going into his computer in the office and then would transmit it internally. That's ten years ago essentially. What a difference a day makes or a decades makes.

When you think about it too, all of the small business that are out there, they're not the multinational corporations, they're not the computer savvy corporations that we have and will hear from. Many of those industries don't even really use technology much. Think of the construction industry, for example. They may not always be in federal court. But nonetheless, what this committee decides will provide guidance as well to other jurisdictions that then consider how electronics discovery is handled.

So what these multinational corporations and small businesses have in common though, no matter their level of sophistication, is they need to have a level playing field and clear rules, as clear as possible, upon which they can conduct their business, rely upon to make decisions, and price their goods and services.

The FDCC supports both the two-tiered system for discovery of electronic information and the safe harbor provision. We agree with the reasonably

00189

accessible standard but believe that it should refer only to data used in the actual course of business, not the disaster recovery systems.

Again, just, you know, anecdotally, and thinking back -- I'm dating myself here. Think of chron files you may have had when you first became a practicing lawyer. The secretary kept a copy of every single letter that she typed. She had a carbon paper there that she used many times over. That might be like the hard drive or something, you know, as it went along. But the chron file was there. It was kept, and after a while, it was tossed. It was a back-up system that was meant in case a file got lost or who knows what happened to the letter that was put in the file. Well, the

disaster recovery systems, which some have referred to as back-up systems, essentially serve the current and more up-to-date same process and system.

For the actual production of documents -- and again, this is just not necessarily an intellectual approach, but practically speaking -- it seems like having the documents in a .pdf format or .tiff format or something like that where you actually capture a snapshot of the document that exists on the date that it was produced is the best approach and is in keeping with traditional standards of document production.

00190

If you're producing documents in native formats -- and I don't profess to be a computer guru at all -- but the dates can change, things change on them. If you've got your shell letter saved in the computer, sometimes when they pop up and you're going to use it again, it changes the date on it, and you have to look at the second page to that little header there to see what the date of that real letter was, if you didn't save it. So something like that that can be more easily redacted for privilege purposes, if necessary, or marked, something like that seems to make the best sense.

In terms of safe harbor for sanctions, we believe that there should be safe harbor where information is unavailable due to routine computer operations, and we do believe that there should be some willfulness factor there. You know, I defend insurance companies in bad faith actions. Everybody thinks everything they do is willful and malicious. It may be or it may not be, but generally it's not.

PROFESSOR MARCUS: Can I ask a question about that? Some people have asserted that the adoption of Rule 37(f) might affect that behavior in terms of preservation, record keeping, or something. Do you think that could happen?

00191

MS. LAWLER: The cynical of the world probably believe that anything that you do like that would adversely affect it. I think that what you would hope is it would affect it in a positive way. You set out the ground rules and you know what it is, and then the documents, you know, are maintained.

If you have a sinister motive, I'm sure anybody can find a way around anything, if they try and hide something. But then they should have to face the consequences.

I do not see that as engendering negative conduct. Does that make sense?

PROFESSOR MARCUS: I'm going to ask you an unrelated question.

You mentioned .tiff and .pdf documents, which I assume relates to the Rule 34(a) proposal concerning requests for production in certain forms.

Do you have a problem with letting the initial choice rest with the party making the request? Because it might not be .tiff or .pdf. It might be something else.

MS. LAWLER: I do, to a certain extent. Because the purpose behind discovery -- think about it. If you've got a paper document production, you provide the piece of paper, you provide the letter, you provide

00192
whatever it is. If you're providing something that is a Word document maybe, you can go up there and look at the properties and whatever that term is, and you can find how many times a secretary or you or whoever did what to it, metadata or whatever that is. So I think that production in that format, it goes beyond what the traditional intent of producing documents is.
I had many years of loss policies, insurance policy cases in the environmental arena years ago, when that was hot and heavy for insurance coverage purposes. And, you know, you would bring in the drafter of the documents or whatever it was, the drafter of the rules or the drafter of this or that. And that's where the testimony should be as to what was done maybe in connection with preparation of the document. But for purposes of document production, it seems to me that you are producing the document, and that's what's requested --
PROFESSOR MARCUS: Are you sufficiently covered by the provision also in there that you can object if you are the responding party, and it's then left to the parties to work it out or the Court to resolve?
MS. LAWLER: Maybe you are, or maybe you aren't. But by the same token, surely it's in the
00193
discretion of the Court then, and I have the utmost respect for what the judge would decide. But again, it's a matter I think of knowing what the rules are as you go into things and what the expectations are and what the level playing field is. In one case it may be one thing, and in another it may be something else. It may be more expensive here, less expensive there. How is a company going to price products or decide how it conducts its business. You know, there are so many factors that come out of it.
JUDGE SCHEINDLIN: If somebody doesn't make that request, then you as the producing party would simply decide what format. Now, you're talking about .pdf and .tiff. Somebody else may run it all through a printer and send over boxes, and then the receiving party says, oh, no, no, I didn't want boxes. I wanted something searchable, electronically searchable.
Doesn't it make some kind of sense for you to at least know what the person wants? Then you can argue it. But at least you know what they want, rather than face the risk of doing it twice.
MS. LAWLER: Well, certainly, if they have a choice to tell you what they want. I'm not saying they shouldn't be able to tell you what they would like to have it in. Whether they can get it in that format may
00194
or may not be acceptable.
JUDGE SCHEINDLIN: (Indiscernible.) They request, and then you have the absolute right to object and say, no, that doesn't make sense here. And then, if you can't agree, the Court decides.
MS. LAWLER: Well, again, I look at this, and I'm sure the committee does, for long-term. I go back to '94, starting with outside e-mails, and then I come to 2005 and look ahead to either ten or twenty years. What you decide here and in the months to come will

affect future generations of jurists, attorneys, litigants. It will set the stage.
So I -- you know, all of these are ideas. You take them, you sift through them, and I have the utmost respect for what you decide. But I do think that there is merit to trying to decide that this is a type of format, if it makes sense, that it can be decided. It doesn't have to be .pdf, doesn't have to be .tiff, but again, I don't think it needs to be the native format.
MR. KESTER: Correct me if I'm wrong. Did I understand you to say awhile ago that you would view an ordinary, old-fashioned hard copy chron file as something that wouldn't normally be productive?
MS. LAWLER: Well, if it's still maintained when the request for production came in, it probably

00195

would be. I was just equating it to an old fashioned style of emergency back-up system.
MR. KESTER: That's what I thought you were doing.
MS. LAWLER: We think alike. It was just meant to -- yeah.
MR. GIRARD: Do you know if clients you represent have been sanctioned by a federal court solely as a result of the routine operation of their electronic data systems?
MS. LAWLER: None of mine have, no.
MR. GIRARD: Have you heard of anyone having had that experience?
MS. LAWLER: Other than just colloquial things that, you know, I couldn't tell you here. I can't represent specific examples. I cannot.
If I might get back to your question. The difference though between the production of the chron file and the production of the emergency disaster recovery system goes to the accessibility of it. It's one thing to have a chron file sitting on the secretary's desk or in a desk drawer; it's another to have to go back and search the back-up discs and all of that. I just want to make that distinction.
MR. KESTER: What if it's sitting in a

00196

warehouse someplace, not very well indexed, and nobody can find it?
MS. LAWLER: That doesn't sound too accessible, if you don't know exactly where it is. Also, couldn't accessibility be the ability to get in the computer program? Maybe that's an old program that's not made anymore and not easily accessible. There's just so many --
JUDGE SCHEINDLIN: I think what he's asking is, should we have the same divide in paper documents? I mean, in other words, is this accessibility standard unique to e-documents or e-discovery, or, if we're going to do it, should we just do it?
There have always been some I suppose paper documents that are highly inaccessible. We have to ask the question whether this is unique.
MS. LAWLER: Sure. I would always make the burdensome objection on the discovery request. But I think this issue is unique to electronic because of the nature of electronic documents and electronic data.
MR. KESTER: Shouldn't the issue be in each

case (indiscernible)?
MS. LAWLER: It could be. But that way you are not giving the litigants guidance as to what the rules of the game are and how then they would expect to need to play them, play the game. It's not really a game. You know, conduct their business is how I would say it. I'm sorry. Thank you.
JUDGE ROSENTHAL: Any other questions? Thank you very much.
Mr. Conour? I probably mispronounced your name. I apologize.
COMMENTS BY MR. CONOUR
MR. CONOUR: I want to thank you for the opportunity to speak here today. Electronic discovery takes up much of my practice, and I know that the rules are being considered provide an opportunity for much-needed uniformity, guidance, and fairness.
I'd like to say that before addressing the proposed changes, let me just say that these are my own personal comments and do not necessarily reflect the opinions of my firm or clients.
I'm a partner with Drinker Biddle and Reath. We're a large firm that deals with a variety of civil litigation. In my practice area, I focus on national representation of pharmaceutical clients. And we've done this national representation in the diet drug litigation, Propulsid, PPA, hormone replacement therapy litigation, and other litigations of that nature. So I think you can see where I'm coming from on this.
On these and other matters, I have experience on electronic discovery. In fact, in most of these matters, I am the point person for the defendants, at least for my clients, that deal with electronic discovery issues.
I'd like to address an area of particular concern to me that seems to permeate throughout the rules. Before I do that, because you don't have the benefit ever reading comments before I speak, let me give you a preview of where I'm going.
If you took the comments that were presented to you here today and you put them on a spectrum, you would have the plaintiff's opinions on that side of the courtroom, you would have the defendant's opinions on that side of the courtroom. My opinions are going to be somewhere down the next block. It's the same city. And that is because my particular concern is the perception that information routinely used for business purposes is necessarily a fair target for preservation and production without sufficient regard to the cost and complexities involved with the discovery of active data.
In the committee's report and in the notes to the rules, the principal focus in articulating the need for specific rules for electronic discovery is the substantial volume of electronic data that is generated and retained. But the report and the notes also appropriately refer to other characteristics of electronic discovery that just justify specific treatment of electronic discovery in the rules. These characteristics include the dynamic nature of electronics information, the hidden nature of associated

data, and the difficulties in translating electronic information into a usable form of production.
I submit to you that these characteristics are not unique to offline data. In fact, they're very common with what you have defined as reasonably accessible information.
The concern I have is that in the notes and in the rules, in articulating all of the burdens associated with electronic discovery and in articulating all of the problems with electronic discovery, then somehow these concerns get distilled toward protection for offline data without sufficient regard to the burdens with online data. There is no justification provided or no rationale provided for why online data should be treated differently than offline data, when you have the same problems with online data.
Let me speak to that, if I can. If you're comparing online data with, say, paper documents, which is what's happening when you look at the rules and notes

00200

and what have you, there are of course significant differences between active electronic data and paper documents. I mean, after all, how often do you have to spend tens of thousands of dollars on consultants when you're dealing with paper discovery just to tell you where those paper documents are, how to copy those paper documents, or even to tell you how to stop those paper documents from automatically disappearing? It just doesn't happen.
Electronic discovery is something much different, and that's both for offline data and for online data. And it's also true that some forms of electronic information that are online are much more difficult to preserve, much more difficult to review, and much more difficult to produce than other types of online data.
The example I'd like to talk about a little bit today is that of dynamic databases. In my practice --
JUDGE SCHEINDLIN: Before you do, one quick question. Isn't it true that all of our proposals, except for the two tier, do treat the online and the inaccessible the same way? Like the early discussions, and like requests for production, what to do about inadvertent -- everything except the two tier. Is that

00201

wrong?
MR. CONOUR: Two responses to that, Your Honor. First is that I think with respect to the safe harbor provisions, I think that those focus primarily on the offline data when talking about automatic deletions and inaccessibility of materials. I'll speak to that in a little more detail in a moment.
The other thing is in responding to that question, again, the overriding concern is that there is a list of problems for electronic discovery that is provided. And despite those problems being there, there still is the discussion that reasonably accessible information is the information that should be protected from discovery.
JUDGE SCHEINDLIN: So you really are talking about the two tiered proposal, the routine destruction part of a document retention/destruction system.

MR. CONOUR: Primarily.
JUDGE SCHEINDLIN: (Indiscernible.)
MR. CONOUR: That's true, but they all work together. For example, if you're talking about what's presumptively discoverable, that obviously is going to influence the pretrial discussion -- or excuse me, the conference discussions that the parties are going to have and what have you. I think they do play together.

JUDGE ROSENTHAL: Mr. Conour, if I can direct you to stay in focus on the rules proposals themselves. Is your conclusion that there should be a greater emphasis in the proposals on applying the proportionality limits that are already in the rules to the unique features of electronic information?
MR. CONOUR: My specific proposal would be that I would change -- I know this comes late in the day -- but I would change the standard from reasonably accessible information to reasonably available information. And by that I mean information which is reasonably available for production and discovery.
Here's the rationale for that. It seems to me that if you're looking at discovery and you're trying to decide what should be discovered, the focus ought not to be on what is reasonably disclosed or reasonably accessible in the ordinary course of business, but instead what can be reasonably made available in the course of discovery.
Let me explain that, if I can. I was going to talk about dynamic databases. In my practice, I get a lot of requests for data, but I also get requests for actual databases. I'm not sure exactly what this means.
When you're talking about dynamic databases, you're talking about something like on an Oracle or

Sequel or another platform. And typically these databases are large relational databases. The use of the database is made through an enterprise application that a company licenses at a cost of several hundred thousand dollars. The databases often contain dozens of tables, with each table containing multiple fields and sometimes tens of thousands or hundreds of thousands or even millions of records.
JUDGE SCHEINDLIN: By the way, quick question. Would you call that electronically stored information, as opposed to documents? I mean, that would be a good example of the difference between a document and electronically stored information, such that the dynamic databases that you just described don't sound too much like a document, which is usually fixed in form.
MR. CONOUR: I do have to apologize. I haven't given this as much thought as others who have appeared here today. But I do agree with the comments of Mr. Allman as he explained them, that perhaps this is a subset of documents and that should be defined as a subset of documents. I do think that there is a place in the rules when talking about preservation and the two tiered approach where you can speak specifically to this subset. But all the same, I think overall it should be defined as documents.

When you talk about the databases, the one thing to keep in mind is that when you have all of these

tables that are all linked, what have you, no one table presents all of the information relevant to a particular transaction. In fact, if you look at a very simple transaction, like a contact for one consumer, the information regarding that contact could be spread out over dozens of different tables. In order to bring that data together, you have to link the different tables in a variety of ways.

When you reasonably access it in business, when you're linking together some small subset of that data, never does the company have any need to pull together all of the data and spit out a report which deals with every single item pertaining to a transaction. Instead, they have small queries or small reports that can be defined that put together just a small subset of data.

So part of the problem I have when you use the definition of reasonably accessible as meaning something that companies routinely accesses, what are they routinely accessing? Are they routinely accessing the database, or are they routinely accessing all of the data in the databases? I submit to you that they're not routinely accessing all of the data in the database.

00205

JUDGE SCHEINDLIN: Well, then how would you define "reasonably available"?

MR. CONOUR: I would define "reasonably available" as information which can be easily put -- here's the problem when you have too many notes, of course.

By "reasonably available," I would include that information that can be reasonably made available for discovery. From that I mean that information that can be provided to an adversary in litigation without sufficient revision, translation, or substantial work done on it.

And obviously, you can tell from my comments here today, I am not a wordsmith. But I think the focus ought not to be on whether or not a company can access this information everyday, but how easy it is to turn that information over to your adversary in the litigation.

PROFESSOR MARCUS: You mentioned I think that you have had occasion to work with requests for complete databases?

MR. CONOUR: That's correct.

PROFESSOR MARCUS: What happens?

MR. CONOUR: What happens when you get a request for a complete database is you spend hours and

00206

hours working with the other side to explain to them why do they -- why they do not want a database and why the databases cannot be produced. In theory you can produce a database, but in reality it's not something that can actually be done.

PROFESSOR MARCUS: Would a rule provision have a bearing on the way those discussions would go?

MR. CONOUR: I think so. Because I think that if there is a presumption that information which is not reasonably available for discovery is not something that's going to be produced without a showing of good cause, since that doesn't need to be produced in the first instance, I think that would help guide the

parties in terms of their meet and confer in deciding what data they actually want.

Now, when they ask for a database and you finally get them to back away from they can't have a database because it can't be produced, the next thing then is they want all of the data that's in the database in some other form. But there's even problems with that.

To produce all of the data that's in a database in some other form, you have to go through all of the data, and you have to identify that information which is relevant to the litigation. Because much of

00207

the data in the database won't be relevant to the litigation. They're other products or other subjects. Then you have to take that information from one table, find the link to every other table, and do the same tearing down of information across all these tables.

Once you finally produce the information, what you've produced a not a database. Rather, you're producing either just straight text, something like comma delimited ascii text files, or you produce flat tables.

When you do that, what the receiving party gets is something that doesn't look at all like the original database. It doesn't have any of the functionality that comes with searches or queries or reports. They have to spend hundreds of thousands of dollars or maybe tens of thousands of dollars to develop that functionality themselves. They also have to figure out what all the links are, because much of the information is in the way of coded information. So just looking at one table, you can't figure out what that means until you track down what all the different codes are in all the other tables. So what they get -- and again, it's just dozens and dozens of tables, and they have no idea what it means.

And so what I would submit is instead of

00208

requiring production, at least in the first instance, of something like all of the tables in the database, that the parties instead work together to try to figure out which piece of that database is relevant to the litigation, which piece of that information should be produced in the litigation.

And I think that if you set up the standards that data which is not reasonably available for production is presumptively not discoverable, that will require the parties to focus on that part of the data which should be part of the litigation and that part of the data which can easily be pulled out of the database, rather than try to translate the entire database itself.

The other concern I have --

MS VARNER: Mr. Conour, have any of your clients ever given interactive access to a plaintiff to come in and interrogate database?

MR. CONOUR: No, we have not. One of the problems we have with that -- and it's particular to pharmaceutical litigation -- is that we are by federal regulation prohibited from disclosing the identities of patients, health care providers, and others who are involved in adverse event reports, clinical trials, and things of that nature. And that's what plaintiff's

counsel are after in this type of litigation. So we're
00209
actually precluded by regulation from providing that information.
But the second problem that comes with that is that when you provide access to this live data that the company is using on an everyday basis, there's a very real risk that this data can be corrupted or impaired somehow, such that it would impact upon the company's ability to continue to use that database.
So we have not done that. We have done things of the nature of dog and pony shows, if you will, something like that, where we explain databases and explain the data in them to help them come up with some small subset of data that should be produced. But we don't hand them over access to the database.
JUDGE SCHEINDLIN: I have a question about "reasonably accessible." If it wasn't tied to the everyday use in business but to the ease or difficulty of retrieval, wouldn't it be -- much like not just use in business, but basically the ease or difficulty of getting at it.
MR. CONOUR: Well, Your Honor, I agree to a certain extent. But it's not just the ease of getting it. It's the ease of producing it that I think is really driving this. That's what gives me concern.
MR. HEIM: Can you give us an example of that?
00210
MR. CONOUR: Certainly. In pharmaceutical litigation, we are always asked to produce safety databases. These are the databases we use to track adverse event reports. Everyday the company is entering new information into the database, generating reports for the FDA, generating reports for its own safety surveillance.
These databases typically include hundreds of tables. Each table will have multiple fields with sometimes millions of records. Only some of those records will be of interest to the litigants, because they will involve patients using the particular drug in the litigation.
To go through that database and pare down the records to those that might be relevant to the litigation requires you to go through each table and extract out that information which isn't relevant to the litigation, figure out how the tables are linked, figure out what the codes mean, and go ahead and do that.
To do that, you have to generate queries to isolate that data. And these queries are different than what you normally use in business. In business you usually use a query that helps you come up with some small subset of data. But for litigation purposes, you have to design a query that goes across all of the
00211
tables and pulls out all of the data that might be relevant. So it takes a substantial amount of time to do that.
Once you've done that, you've narrowed it down, you now have to export that data into some other fashion. And in exporting that data, you have to be careful that you haven't somehow impaired the data itself or the data structures. Because when you're dealing with that large volume of data, you're going to

end up with those types of problems.
Even then, before you can hand it over to the other side, you have to then go through all of the records and redact out that information that's required to be protected by law, and those can be in millions of freeform narrative records where you have to go through each and every one and redact out the information.
So I would submit that in that context, that type of the database is not reasonably available for production.
JUDGE ROSENTHAL: Mr. Conour, it seems to me that one of the ways to characterize what you're talking about is the difference that we've been exploring for much of the day between accessibility problems on the one hand and burdensomeness problems on the other hand. What you seem to be saying is that your availability
00212
issues are really issues of burdensomeness, as opposed to accessibility questions, which are of a different category.
And I come back to the same question that I started with. Are you suggesting in these terms that if we are going to continue to maintain a distinction that is unique to electronic discovery between active data or accessible data on the one hand and inaccessible data on the other and still be able to recognize that, there are going to be burdensomeness issues for accessible information as well? Is what you're really getting to making clearer in the rule that any active data request is still going to be subject to the proportionality requirements that are already present in the rule?
MR. CONOUR: The first position would be making information which is not reasonably available presumptively not discoverable. But if that doesn't happen, then of course what I would be looking at is something in the rules that more carefully explains that active data can sometimes not be discoverable.
The problem is that the comments right now, they speak very highly about examples of offline data that shouldn't lead to discovery problems, but there's no illustrations or comments discussing the burdens involved with active data, that may be involved with
00213
active data. In fact, in some of the comments they talk about, if information is accessed by a company, regardless of the cost or burden involved in accessing that information, it is discoverable or it's not prohibited from discovery by the reasonably accessible standard. That to me almost seems to suggest that the committee has recognized the cost and burden of dealing with active discovery, but nonetheless we're only going to protect that information which is offline data, not online data.
MR. CICERO: I have heard of some similar cases including in the pharmaceutical industry, and I'm having real trouble with some of the things you say from about three different standpoints. Overall, it sounds to me like some of it is a challenge or raising problems to things that litigants acting in good faith have successfully mastered for at least ten years or more in dealing with a lot of this type of material. Let me just run through three examples.
First of all, I have great difficulty -- and

I've sat here for some time now trying to really parse through the significant difference between the term "available" and the term "accessible." While you're pleading for one as being significantly different from the other, I have a great, great deal of difficulty

00214

seeing where there really is in practice a difference between those two terms.

The second thing that causes me to say that I think you're raising a challenge or raising a problem with a lot of things that have been successfully mastered is when you talk about organizing tables and so on. Now, putting to one side for the moment the question of -- some of the unique questions about confidentiality of information that are present at times in certain industries, like the pharmaceutical one perhaps, it is routinely a problem in electronic discovery, it seems to me, and has been since we've been doing it, the fact that pieces of data are here, there, and everywhere. And if you produce a disk that has the database, the other side is going to want to know how to read and assemble that data. That's a problem that has been successfully dealt with by good faith litigants for a long time. And so I'm really having a lot of problems seeing where you're raising something that is not a rather routine problem that has been dealt with.

As to the problem of corrupting data that you cited, I'm sure you and I'm sure a lot of us here have routinely produced copies of databases or data collections that are active files that our clients are using. And you don't let the other side come in and

00215

deal with the only original files that are there where there is a chance of them corrupting them. You make copies of them. That's something that's routinely done. It doesn't seem to me that that is something that is a significant problem or obstacle to production of these kinds of information.

Now, there are some unique issues raised with respect to confidentiality of information. But I must say that at this point, I've listened to you, and I don't find in -- I'm having difficulty finding something that ought to be dealt with by rule.

The conclusion I come to is a lot of what you're saying is you don't want this stuff discoverable at all because it will corrupt databases, because it's really a puzzle and you have to fit these pieces together, and we don't want to provide the key to putting it all together or whatever. Those are at best, it seems to me, or at worst, burdensome problems and issues. And I think we have to confront the fact that this information -- the very fact that 99 percent of the, quote, unquote, documents that we're dealing with now or have been in the last five years are all on electronic databases means we have to deal with this issue. We've got to provide a way to get at it. Litigants are entitled to it.

00216

That's the conclusion we came to. So that I have a great difficulty seeing where your comments would lead us in terms of what we should change in the proposed rules, other than saying you can't get this at all.

MR. CONOUR: In response to that, let me first say that I understand what you're asking. There's a presumption that the rules already say that information which is accessible or available is discoverable, and that information which is not reasonably --

MR. CICERO: The rules right now say it is material which is relevant and (indiscernible), and that's where we start. And that's where it becomes a problem with -- because it's, you know, various types of information, electronically stored information we heard about today, whether it's disaster tapes or whatever.

But I just don't understand what it is in what we're proposing that really comes afoul of some of the concerns you raise, because I think most of those concerns have been very successfully mastered for ten or fifteen years routinely.

MR. CONOUR: The way I understand the rules and the notes is they provide guidance. The distinction is being made not between what's reasonably available for production, whether a company can routinely access

00217

that information. All I'm saying is that ought not to be the standard. Whether or not a company can ordinarily access data --

MR. CICERO: Tell me quite simply, in your mind what's the difference between "available" and "accessible"?

MR. CONOUR: As the notes are written right now, "accessible" means something that a company accesses internally as part of its business. They can get at it, they can touch it.

To me, "available" means not what the company can do in its business, but is it available for production to the other side? Is it reasonably available without going through all of the tremendous efforts and requirements to put it in a form that the other side can use?

MR. CICERO: But it was the same problem with paper files, carbon copies.

MR. CONOUR: Certainly there are problems with that. But the location of documents and whether they're easy to get to is serendipity. Whether your documents happen to be across the hall or in a warehouse or what have you, what's relevant to litigation and where you find these documents is serendipity. With electronic discovery, it's de facto. It's hard to get at in most

00218

instances. It's not just the rare occasion where you have documents in the salt mine or documents that have been sitting in a basement. It's by the very nature of electronic data itself that can be difficult to get to.

All I'm suggesting is that information which is burdensome, which is difficult, which requires translation, that information is something which ought to be given more protection. It's not whether the company itself can get at it.

I know I'm running --

PROFESSOR MARCUS: Do you have any problem with the protection now provided by 26(b)(2), Roman numeral three regarding unduly burdensome obligations to respond to discovery? Isn't that what you're talking about?

MR. CONOUR: I'm not troubled by the rule. I

don't have a problem with the rule. But what I have concern with is the guidance that's provided in the notes.

PROFESSOR MARCUS: The notes perhaps are about something somewhat different. Would it address your concern if they made clear that as to accessible information, Rule 26(b)(2) still applies?

MR. CONOUR: Yes. Judge Rosenthal raised that question. I know that the notes now that say some

00219

information will still be subject to --

PROFESSOR MARCUS: These notes are about the additional material regarding accessibility. They're not about what was already there.

MR. CONOUR: The problem is that these notes are perceived as being about electronic discovery. They're not perceived about being just reasonably accessible electronic discovery. Because of that, I think there ought to be standards in the notes that deal with even active data. There are still these problems that need to be addressed.

At this point I wanted to say briefly that the problems I have with preservation that I alluded to at the beginning, with these databases, the normal and routine function of these databases is to input data into the databases everyday. This can be in the way of new information, or it can be in the way of updated information. Some databases are designed to track information over a certain period of time. For example, sales over the last six months. Every month that database is going to change. Sometimes every week. Sometimes every day.

What do you do with preservation? Do you preserve the database as it appears at the time the litigation is filed? Do you preserve the database as it

00220

looks the next day, the week after, or the following month? Something needs to address this particular concern. You cannot just freeze a database each and every time it changes. You have to have something to address that.

And what I would submit is something along the lines that, if a database is preserved, the parties should not be sanctioned for failing to preserve subsequent changes to that database that are made in the ordinary and regular course of business. Something along this nature. Because you cannot avoid the fact that even live data is changing everyday, and you cannot create a snapshot of that live data each and every time it changes. Thank you.

JUDGE ROSENTHAL: Thank you, sir.

Mr. Noyes.

COMMENTS BY MR. NOYES

MR. NOYES: Thank you, Your Honor. I wanted to preface my comments by thanking the committee for the opportunity to testify today. I want to remind the committee what I've done in my prepared written testimony, which is I've actually written a long article that should have come out last month, but the way these things go, who knows, it may have come out today. In any case, the whole cite for the article is 71 Tennessee

00221

Law Review 585. I'm not going to read from that law

review article today, but I am going to cover some of the issues addressed in there.

A couple of pieces of background information. I'm a partner at Pillsbury Winthrop here in San Francisco. I've practiced here about ten years. I will be beginning a job as a professor of law this fall in 2005. It goes without saying, but I'll say it anyway, which is, the views in the article and the views here are my known and not necessarily the views or Pillsbury Winthrop or its clients. To emphasize that fact, my colleague and partner, Chuck Ragan, is going to be following me, and I can tell you that I don't actually know the substance of his testimony. So it's clearly not the testimony of the firm that I'm offering.

With that said, I wanted to -- before I get into the actual language of the proposed amendments, I want to cover very briefly what I believe were the six primary arguments for there being a difference between discovery of electronic information and other types of information. And based on those six differences, I concluded that there were three actual differences that were not already accommodated for by the existing federal rules.

The first important difference is electronic

00222

information is different because it's new. Generally, new technology has been accommodated in the rules. As Professor Marcus pointed out, when the rules were first enacted, we didn't have fax machines, didn't have photocopiers, and you couldn't direct-dial a long-distance telephone call. So that's not something that's particularly new, meaning that it's a new technology. However, the possibility of legacy data is something that I believe is unique to electronic information. And that is information -- I think the committee is generally aware of this -- that the responding party either no longer has the technology or possibly the personnel to access and bring it up. It's sort of in a dead language. So that's one way in which the electronic information is different and might warrant changes in the rules.

The second purported difference is that discovery of electronic information increases the likelihood of inadvertently distributed information. I don't believe that this is a true difference. This is really an argument based on the increased cost or the purported greater cost of discovery of electronic information.

But that same issue, increased cost, is only applicable in cases with large quantities of electronic

00223

information. If you have a small amount, the costs to review that for privilege isn't going to be any greater. Conversely, if you have a case with a huge number of hard copy documents, the cost to review that for privilege is going to be is very high and is going to increase the likelihood of inadvertent distribution.

The third purported difference is that that kind of information often required an on-site inspection of a party's computer system by an opposing party. I agree that this is at last arguably different than hard copy information, but I believe that this difference is already accommodated and accounted for in the rules that

permit under 26(c) the producing party to seek a protective order to protect against disclosure of privileged information and in some cases seek a mutual expert to go in and look at that information.

The fourth purported difference is foliation of electronic information. The general issue of foliation I believe is not unique to electronic information. Information is often lost, purposely or otherwise. But the dynamic nature -- and we have heard testimony about that today -- of certain types of electronic information is something that's unique. Electronic information can change without human intervention, and it regularly does, and that's unique

00224

to electronic production and might warrant amendment of the rules.

The fifth purported difference is the form of production. This is something that electronic information -- let me apologize here. I've been using the phrase "electronic information" as a catch-all for sort of the subject that we are discussing now. In any case, with electronic information, you have a question of what form that is going to be produced in, and that is unique to this catch-all of electronic information.

The sixth purported difference is increased volume and cost. As I noted before with inadvertent disclosure, I don't believe that that's a true -- that's just a difference in those cases in which there are large quantities of information, hard copy or electronic information.

So with that in mind, there are differences, and therefore I think there are some changes that should be made to the rules to accommodate discovery of electronic information and provide guidance on those.

I'm going to go into those, but let me give you a little bit of sort of my sense of what the rules intend to do, and we had a little discussion of that earlier, which is that relevant information or self-defined discoverable information should be

00225

discoverable. And that is, the rules are there to define what is discoverable. Generally, it's relevant information or likely to lead to the discovery --

JUDGE SCHEINDLIN: You said volume is not a real difference?

MR. NOYES: It's not a difference that is unique to electronic information.

JUDGE SCHEINDLIN: I wanted to talk about that. What about the replicant and duplicative nature of sending out one document? You send one e-mail, and it's on a hundred servers, which sends it out to a hundred more. I know you're going to say, sure, there are copies of paper documents, but it's nothing like you see with duplicate replication, which creates huge volume.

Don't you see that as a big difference?

MR. NOYES: No, I don't.

JUDGE SCHEINDLIN: You don't see -- it's appearing everywhere, the same document, over and over.

MR. NOYES: I go back to hard copy. If you've got a hard copy mass mailer that's sent out to 10,000 people, that's the equivalent of an e-mail that's being sent out to --

JUDGE SCHEINDLIN: But everybody is not a mass mailer. Everybody is an e-mailer.

MR. NOYES: That's true. But e-mail isn't necessarily always sent out to tens of thousands of people. It depends on the case.

JUDGE SCHEINDLIN: It's not just the e-mailer. It's the recipients. And then they have it, but it's on their server, and it's backed up and it's backed up again so that it repeats itself. It duplicates itself in a whole new way that never would have happened. Your mass mailing example doesn't begin to talk about the number of back-ups that you get, which is one of the problems with back-ups. I see there's a difference. I just wanted to ask you to explore this in your mind maybe at a later time.

MR. NOYES: I'm not sure that we're differing on substance. We're probably differing on the way that we look at it. What I offer on that, and then I'll move on, is you can have a hard copy document that is distributed to tens of thousands of people. You can have a hard copy document that is altered in small ways. You can have an e-mail that is sent out to tens of thousands of people. Each one of those e-mails may have unique aspects to it. And we talked about this in terms of form of production. Each e-mail can be opened at a different time, and that might be significant. So it's not necessarily just the e-mail going out, but it's the other information that goes with it that might be significant.

MS VARNER: You don't seriously doubt that one of these large companies that we're heard from before, like Microsoft, is in the middle of a knowledge deluge? That is very different in terms of volume and scope. It once was everybody, if you wanted to send a copy to somebody, you had to either Xerox it or make a carbon copy and put it in an envelope send it interoffice mail. You're not really challenging --

MR. NOYES: Well, I am to one degree, and that is if the question is, is it different simply because it's electronic information? The answer is no. That doesn't necessarily mean the volume is greater. You have to look at, what is the volume of information? And in a hard copy case, you might have -- in an insurance case, a hundred thousand claims files. That's a large case in which volume and cost is going to be an issue and might be dealt through the rules. In a case of electronic information, yes, you have cases in which it's greater, but it's not simply because it's electronic information that it immediately means it's more costly or voluminous. You look at it on a case-by-case basis. Yes, that is more common with companies like Microsoft, companies -- most companies these days that are large companies and do most of their document management by electronic means.

I think I've explained myself. I'm trying to sort out whether there are differences that are inherent in the nature of electronic information; okay?

So going back to what is sort of my view of the principles of the rules. I believe and the

proposals that I make and comments that I make are based on the idea that the rules are there to provide for the parties to resolve and deal with discovery, and that we want to avoid getting the courts involved unless and until there is a true dispute that cannot be resolved. I mean, discovery isn't filed with the court unless there becomes a dispute, is the simply example. That, combined with the idea of we define what is discoverable, and if it's discoverable, generally it has to be perused if it's asked for does not abide by proportionality and reasonableness.

I want to turn to my analysis of the proposed amendments to the Federal Rules of Civil Procedure. I broke it down into six categories. They're my description. If you're offended by the way I have described the category, that's fine. There's nothing sacred about that.

00229

The first category that I discussed is expanding the initial discovery planning session to include consideration of electronic information, the proposed amendment to Rule 26(f).

My proposal, which I set forth in the prepared written testimony, is a little bit different. Essentially, I agree that it's helpful for the parties to meet and confer at the outset about preservation of discoverable evidence and issues that might arise with respect to discovery of electronic information. But I think that the insertion of this new phrase, "electronically stored information," is not necessarily good. We'll talk about that a little bit further under the second issue. I however don't think that it's beneficial to insert into the rules a specific requirement that the parties meet and confer regarding whether on agreement of the parties the court should enter an order protecting the right to assert privilege after production of privileged information.

As some of the notes of the subcommittee -- I think it was the discovery subcommittee -- indicated, there was a discussion of several specific issues that might be included within those that the parties should meet and confer upon. The one I recall in particular was cost bearing. I believe that conclusion could send

00230

an inappropriate message, meaning undue emphasis, including some of these issues but not others, and I agree that -- I do not believe it should be included in this list. I don't believe it carries an important status beyond other issues that might be discussed.

I also think that this gets into one of the issues on inadvertent disclosure of privileged information, which, as I'll discuss further, I'm not certain that this provides any actual safe harbor for the parties to reach an agreement or not reach an agreement. And if they can't reach an agreement and the other side is willing to reach an agreement and the other isn't and uses that as sort of a gamesmanship type of position, disclosure of information, then you're not certain that if you use such an agreement, it's going to be binding or upheld or is going to protect you from having waived information in other cases in other courts and other jurisdictions.

I also think that that's going to encourage,

as I note, district courts to enact blanket protective orders, or even the district court themselves to have a certain local rule or standing order regarding production of privileged information. And I think that including that within this would encourage some courts or lead them to do that.

JUDGE ROSENTHAL: The notes make it quite clear that the court cannot enter any such order unless the parties agree. Do you think that that is inadequate language to protect against the tendency of courts to just do it anyway?

MR. NOYES: I do. And as I mentioned, I think it might end up with the result of one party not wanting to agree to that and the other party using that against them with the court, already knowing that the court might be inclined to enter such an order. And that's not something that I think is productive for the parties in terms of their negotiations about what should and shouldn't be done, particularly given that this rule as I understand it in the proposal is not intended to effect a substantive change in whether you actually waive a privilege by producing information for --

JUDGE ROSENTHAL: What in the rule do you think might be changed to make it clearer than saying the court can't do this unless the properties agree?

MR. NOYES: Taking it out altogether.

The second issue that I describe is revising the current definition of "documents." And this is the proposed amendment to Rule 34 that's been discussed so much today. Mr. Allman addressed it in particular.

My proposal is simply there should not be a change to Rule 34. I don't believe that it's reasonably in dispute or arguable that electronically stored information or other types of non-hard copy information is not discoverable simply because it appears in another form.

JUDGE SCHEINDLIN: Another suggestion was to leave it with "documents," but specifically refer to electronically stored information as a subset of "documents." You don't like that either?

MR. NOYES: I don't, given the proposal here, because I think "documents" already includes data or data compilations. And that's the phrase that I use throughout, because I think that's essentially all encompassing.

JUDGE ROSENTHAL: Let me ask you a question about that. Judge Scheindlin made the point earlier that "document" tends to be thought of as a fixed thing that contains information, and electronically stored information refers to the information itself. So if you were to step back and look at it in the abstract, perhaps "document" is really a subset of "electronically stored information." That is, "document" is one way of capturing information.

MR. NOYES: Right. I see -- well, I'm not sure. I was going to say I understand that difference. I see the difference you're pointing out.

JUDGE SCHEINDLIN: The last speaker did it. He talked about dynamic databases. He said you actually can take a snapshot of the database at a certain time,

but because it's constantly changing, it doesn't sound like a classic document. I asked him that question. Then he said, well, he could see that it's a subset. Do you remember that exchange? Because he was talking about dynamic databases in a sense of something you can't capture and fix in a moment in time. That's what he said. He has more familiarity with dynamic databases than I do.

MR. NOYES: And let me make a confession. My testimony is based on my experience. I'm a practitioner. I have the benefit of being somewhat unsophisticated. I'm not here as a computer forensic expert. I've had some experience with that just doing discovery. So others have talked about that.

Let me offer this, which is, as I said, I believe that data or data compilation encompasses all of those types of information, and it's already in the rules.

One of the other problems that I believe exists and I want to point out is that by changing the way I see it to include electronically stored

00234

information and documents and having that be two separate categories, whether they're subcategories or not, effects other parts of the rules. The rules use the word "documents," which I would include as already defined to include electronically stored information, elsewhere.

If you are going to make changes to electronically stored information, you will want to make changes to the rules. And I note it's here in 26(a)(1)(d), 26(b)(1), 35, and 36(a). Because, for example, in admitting the genuineness of any documents described in this request, certainly we want somebody to admit the genuineness of electronic information that had been produced.

The third category of change that I discussed is establishing that not reasonably accessible electronic data is discoverable only by a showing of good cause. I had a hard time coming up with what I thought was an orderly and logical way to go through sort of the issues that I have with this, but let me see if I can try to set them out a little bit.

I think that this is a good change, I mean, distinguishing between two tiers of information. And I think it's actually consistent with the rules. It's just not something that's in the rules. I think it

00235

should not only go in 26(b)(2), but it should also go in 26(b)(1), where we create two tiers of information, one of which is discoverable without any showing, one of which is discoverable based on good cause. And since that difference already existed, we're using that same standard, or at least the same standard as proposed, it ought to go in there.

The other reason I think it ought to go in 26(b)(1) is because I don't think that these proposed changes -- or I think of them actually as a clarification of not reasonably accessible information. I don't think that that should alter the objection that can be made on 26(b)(2), sub one, sub two, and sub three, or the objection that can be made on 26(c). And I had a hard time looking at the Rules Committee's

proposals, figuring out how those three parts went together, given where the proposal was placed.

JUDGE SCHEINDLIN: I looked at your proposal on page eight. I thought it was pretty good, with the one exception that it lost the burden shift. It didn't spell out the producing party has to show the inaccessibility and the requesting party has the burden of showing good cause. That's the only thing it dropped.

MR. NOYES: And let me make another

00236

confession. When I was reading over this, just sitting in the audience now, I had a terrible thought that what this was in some way intended to do, but I didn't say this explicitly -- and I guess I ought to now, since we're here for those purposes -- is in my practice experience, the distinction between information that is immediately discoverable because it's relevant to the claim or defense of any party and the second tier information has been emasculated, obliterated, whatever you want to call it. It doesn't have any teeth.

My thought was, well, this will be one way to give that some teeth and make that actually a battle. I think that people in practice need to make it relevant or likely to lead to discovery of admissible information. As moved much beyond that, nobody really fights that, at least in my experience, oh, you really have to go and show good cause on this. Then I had the disheartening thought to myself, well, this is probably just going to emasculate my own proposal, where we don't really fight about that good cause distinction.

So that's something that I share with the committee. But I still think this is the appropriate place and the appropriate test. And maybe that leads me to the committee, if it is going to consider this sort of proposal, ought to put something in the notes. This

00237

ought to have real teeth. And the other distinction between information that is immediately discoverable versus showing of GOOD cause also ought to have teeth.

MR. RUSSELL: You eliminate the requirement to identify what they didn't produce also.

MR. NOYES: Yes. And from my perspective, that's essentially what happens already, to the extent that we were talking about the showing of good cause that already exists in the rules. That's the way that works anyway. You meet and confer about it, you offer your arguments, and then you go to court, and the party who wants to get the information files a motion to show good cause.

So I think that's the way it's probably going to work in practice, I think that's the way it has worked in practice on this showing of good cause, and I didn't believe it is necessary to spell that out in the rules.

The other thing I wanted to raise was that this rule, proposal, the way that it's drafted, is limited to discovery of electronically stored information, and I don't believe that there's a good justification for making information that is not reasonably accessible but exists only in hard copy, to give that some sort of different status. And I think

00238

putting all of the proposals together, that's the result that we would have here. Electronically stored information is one category, and documents are another. Because this is referring only to discovery of electronically stored information, then sort of the limitation on whether it's not reasonably accessible wouldn't necessarily apply to hard copy documents.

The proposal that I make goes back to the language that I described, data or data complications. But I think the point being that's a distinction between information that's reasonably accessible and not is a valid distinction for both.

JUDGE SCHEINDLIN: You think that reasonably accessible for the two tier applies to any discovery?

MR. NOYES: Yes. And I can't be sure of this, Your Honor, but I think it was an article that you wrote that discussed types of hard copy information that might be inaccessible. I won't put words in your mouth, because these might not be the examples.

But documents in storage is very difficult, very expensive to access. Documents converted to microfiche are not searchable by any particular means. You'd have to search literally the entire film to find out what's on it or other documents. There's no indexing system.

00239

In a case, for example, in my practice experience, there was an insurance case where there's a hundred thousand claims files, and they're simply stored in boxes that aren't labeled by, you know, clients or insured, and they are in a warehouse. And you've got a hundred thousand claim boxes and no way to know which information is in which box.

So those to me are distinctions that might be made between hard copy documents that are reasonably accessible versus not reasonably accessible, and I think the rule ought to apply to both categories of information, electronic and otherwise.

The fourth category is the parties are required to produce electronically stored information only in one form unless a court orders otherwise for good cause. I suspect that my proposal here is going to be somewhat controversial, in that my proposal is the parties produce, or at least the presumption is they produce the data or information in each form in which it is maintained. So the presumption would be that you produce it -- let's say it exists on a .pdf, and it also exists on a Microsoft Word document, and it also exists in a hard copy document. You would produce each of those forms in which it's maintained.

As an aside, my experience is that you're end

00240

up with fights in any case because -- Mr. Allman was the one who said 75 or 80 percent of the case, none of these issues are a problem. So let's talk about the 20 to 25 percent that it is a problem. In those kinds of cases, you're going to have a fight about immediately the producing party, probably a plaintiff's attorney, wanting to get all of the different forms.

I'll give you an example: A .pdf, Microsoft Word, and a hard copy document. If I'm a plaintiff's attorney, I'm going to want to see those hard copy documents to make sure there aren't writings on them, as

opposed to a .pdf. I'm also going to want to see the Microsoft Word document, because it's got all the metadata that tells you about who created it, when, what, all those other things.

Now, I admit and see this is an initially greater burden or at least a presumptively greater burden to produce the information in all of the forms in which its maintained.

JUDGE SCHEINDLIN: You wouldn't want the .pdf. I can see your point about wanting the hard copy. There could be notation. And the Word document, it's got the metadata and it's searchable. What then why the .pdf?

MR. NOYES: I probably wouldn't, but I'm thinking from a defense attorney's standpoint, which I

00241

would use .pdf or the .tiff.

JUDGE SCHEINDLIN: Sure. But at most two --

MR. NOYES: Right. So I think that these can be limited somewhat by initially a greater burden to produce all of this presumptively by the fact that you're going to limit the number of motions and the motion practice that's necessary for a plaintiff's attorney who in every case is going to want all types of documents. It's also going to be limited by the requirement that the parties meet and confer on these issues in advance.

JUDGE SCHEINDLIN: Well -- the only reason is I have this case in front of me tomorrow, the exact case, where the plaintiffs do want the paper and the electronic. But that should go away over time, because this won't be paper around. The business will be really producing only an electronic record. This is an historical case, and it should go away?

MR. NOYES: I can only offer you my opinion and my experience. I don't think it's going to go away, because you're always going to have the secretary, the administrative assistant print out a copy and write something on it. I don't think we're going to exist in a completely paperless world. You may disagree. There may come that day, but I don't see it coming.

00242

And if I'm a plaintiff's attorney, and somebody knew to print it out and write something specifically on it, I want to see it. Simply because they printed it out and wrote something on it, that in and of itself might be significant in the case. Why did they print this document and save it?

So continuing on with the issues with request to -- I think it's also going to be limited by the meet and confer process, in which you're going to have parties saying, fine, I'll produce for you in a room my 10,000 boxes of documents, and you can look at them, you can inspect, and you can tell me which ones you want to copy. Most plaintiff's attorneys -- I won't say most. Some plaintiff's attorneys say, fine, I'll tell you which ones I want. I don't want those. I've been through them, I've seen that there's no writing on them.

The meet and confer process should limit some of these, because the parties for cost considerations aren't going to want to actually copy and keep all of the forms in which information might be maintained.

The fifth category or proposed -- proposed amendments that I discussed I call lessening the burden

created by the need to review documents, protecting against inadvertent privilege waiver.

My proposal and conclusion is that the rules should not be amended to address this particular issue. This is much discussion in some of the discovery subcommittees about whether substantive changes that affect the rules of privilege would be valid, and my understanding is that rules were crafted to move away from that and not to effect substantive changes that would have to be done and approved by Congress and by -- at least should be done in conjunction with the Rules of Evidence.

That being said, the way the rule reads to me, I think there are going to be attorneys out there who reasonably read this to say, I can go ahead and produce information in a large document case and then ask for it back and not have waived the privilege. Because otherwise, why would we go to court and get a ruling about it?

As I say, what value is there in an amendment that doesn't provide any such substantive protection? What the proposal would allow the party to do who has produced and waived the privilege is request the document back and then have a hearing so the Court could say, yes, you've waived the privilege. I don't see that much value in that.

I also think that the phrase that's used in here, reasonable time period to request the documents back, is going to result in a significant amount of litigation about how long after disclosure must the documents be sought back. Each judge is going to have a different view as to what's a reasonable amount of time. Their view might differ, even for the same judge, depending on the facts of a particular case. I think this was mentioned by the discovery committee. Is it reasonable to request return of information that's already been used in a deposition, where the witness has already been examined about it, or at least has been presented to the witness, and somebody objects at this point? What about evidence submitted in support of a motion, particularly a summary judgement motion?

And then in any case, as a practicing California attorney, I don't believe that this rule would effect any change in what I'm ethically and professionally obligated to do, because I believe that the rules in California require me -- and I cite several of them -- require me to look at all of that information and make sure I'm not turning over any privileged information and probably any proprietary information of the client.

So I'm not sure if effecting this rule is going to change anything. And I'm not sure that, even if it did, I could rely on it as an attorney, because I would be afraid if I produced information in a federal case and then got it back and even had the Court say, and you haven't waived the privilege, that in some follow-up state case or concurrent state case in California that a court there wouldn't say, well, you turned over the information, you did it voluntarily, and you knew that this was an issue, you've waived the

privilege. Because that's the way the rules read to me in California now, and I wouldn't want to suffer the slings and arrows and potential liability of having done that.

MR. KEISLER: (Indiscernible) -- submit the issue for a judicial determination?

MR. NOYES: And I guess my thinking on this is, what determination are we submitting it for? Because if you've turned something over and waived the privilege, what good is it to you to have a hearing about that?

MR. KEISLER: There may be some question as to whether or not this act of turning it over under the circumstances in which you did effects a waiver, and that would be what the judge would decide. And I think all the rule creates is a mechanism during the interim in which it's litigated.

MR. NOYES: I have two thoughts on that. One,

00246

the situation you're describing to me would lead a reasonable practitioner to say, this must have some impact on whether or not there's a waiver, because otherwise why would they create a mechanism for resolving it?

Second, even if you disagree with that, as I said, in California, the way I read the rules, once I have turned that information over, I've waived the privilege. What good is it for me to go have a hearing, even in federal court, even if the judge decides you haven't waived the privilege in this case, if I've now waived it under California law for California state proceedings?

MR. HEIM: It may help you with a case that you have (indiscernible) privileged document. So if your concern is that that privileged document that was inadvertently produced crops up in a case that you're dealing with currently, this rule might provide a means for you to successfully deal with that issue.

And as to the first point that you raised, well, I think it's something worth thinking about. That could be dealt with in the notes and likely will be dealt with in the notes.

MR. NOYES: And I guess I go back to -- maybe I am confessing or professing my own ignorance here.

00247

I'm not sure and I don't believe what's set forth here is something different than what the parties already do now if there were a dispute about information that had been turned over and somebody said egad, the, you know, paralegal turned over the wrong box. We did everything right and we turned it over to the other side, but somehow they confused the two labels and we sent it to the other side. What would they do? They'd ask the other side for it back. If they didn't give it back, there would be a hearing.

So I don't know what this would accomplish. I think that the complaint of everybody is electronic information is likely to lead to the disclosure, the inadvertent disclosure of privileged information. I am not sure how this rule limits that concern or even addresses it.

MS VARNER: It gets the document out of the hands of the person who -- until that sticks. And there

are a number of the states in this country where that does not happen and where people will say, I'll put it in an envelope, or I'll keep it, but I'm not giving it up. And I think the committee at least made a tentative proposal that that document ought to come back to the person who owns the privilege unless and until the decision on waiver is made.

Now, with regard to whether a waiver has occurred, I think your -- at least my personal view is you're probably correct. There are three schools of thought: You produce it to the other side, and you've waived; you produce it to the other side, and as long as it's inadvertent, you haven't waived, unless you intended to waive; and the third is it depends on the circumstances.

I would say that's not materially different from what exists now, but I do think it's a -- I think it's a material difference if you can get the documents.

JUDGE SCHEINDLIN: I have a question for the committee. What if you've disseminated it to a hundred people? How in the world do you draw it back from the hundred now? Say that request comes out late in the game and a hundred people have it. What are you going to do?

MS VARNER: I think if the judge determined that there was no waiver, under whichever school you happen to be in, if you discovered or --

JUDGE SCHEINDLIN: Before the judge. You talked about it to get it out of the hands of the party that shouldn't have it. Before the judge.

MS VARNER: I think you have to do recall.

JUDGE SCHEINDLIN: Recall from the hundred?

MS VARNER: Whether that's successful or not. But I do think the whole -- that you do the best you can to get it back once you need to.

JUDGE SCHEINDLIN: Maybe we need to clarify --

JUDGE ROSENTHAL: We're running out of time. I wanted to give you an opportunity to talk about safe harbor.

You had suggested in your article or in your comments, I can't remember which one, that there ought to be a snapshot taken based on the electronic information available to the company on the day it becomes aware of the potential for litigation.

MR. NOYES: It's actually a two tier approach. At the time that it becomes aware of potential litigation -- and the phrase I use is the party must preserve (indiscernible) things that are discoverable pursuant to Rule 26(b)(1) and reasonably accessible, which is the first tier under the existing rules and my proposal for those rules.

Then on notice that an action has actually been filed, you have the second tier obligation or the higher obligation, and that is to take a snapshot of inaccessible materials that it stores for disaster recovery or otherwise maintained as back-up data.

One reason why I add on inaccessible materials and add on to that storage for disaster recovery or otherwise maintained as back-up data is because of a problem Judge Scheindlin was referring to earlier, which

is, okay, litigation has been filed, we want to get a snapshot of everything, but it needs to be clear that snapshot doesn't include like residual data or going to every person's computer and freezing every piece of information in the entire business.

JUDGE ROSENTHAL: Which was my question. What are the limits of this, quote, snapshot obligation? I've heard this proposal or variations of it from other sources, and it is often accompanied by criticisms that they are simultaneously overinclusive and underinclusive.

I'm wondering how you would -- first, do you think it ought to be built into a rule in some fashion where this is more along the lines of protocol and good practice? First question.

Second question, how would you limit it so that you wouldn't have these kinds of problems?

MR. NOYES: I hope I've addressed each of those issues. I do think it ought to be in a Rule 26(b), a new sub-part, sub six, which is a preservation obligation.

I don't think that -- you know, let me put

00251

this affirmatively. I do think that it's important for practitioners who are advising clients and in-house counsel, for them to know what are your preservation obligations, and when do they arise. And I think that ought to be made clear, and I think it ought to be made clear in the rules.

JUDGE SCHEINDLIN: Can we as a rules committee promulgate a rule that takes place before there's an action? Say as soon as it's anticipated, you should preserve? Now there's no action pending. How do the federal rules cover the preaction --

MR. NOYES: I leave that to you all to decide. I think you ought to, because it's consistent with the way the rules are set up for prelawsuit sort of jurisdiction of the rules. Meaning you can go and get an emergency deposition before a lawsuit is filed if a witness is going to disappear or die or whatever. I think this is consistent with that and consistent with the idea that if we don't put some limit upon it when you're aware, it triggers some obligation when you're aware that you're going to get sued. Let's say for a specific incident that occurred, I think that's the time at which we ought to know there's a preservation obligation, and it ought to be in the rules.

JUDGE SCHEINDLIN: Oh, I know there's

00252

foundation, common law. I want to know whether we can do it as rules.

MR. NOYES: And again, I leave that to you all to decide. All I can offer is I think it's consistent with the scope of the rules as they exist in other related areas prelawsuit.

As to the other question, which is, how do you make sure that it's underinclusive and not overinclusive? And I went back and forth a whole lot about this and came up with what I described as a two tier obligation.

Let's go to the second tier, which is, once you know you've actually been sued, whether you've been served or otherwise have notice of it. What I intended

to encompass is a snapshot, but the snapshot wouldn't freeze the operation of the business. It's those inaccessible materials that are stored for disaster recovery or otherwise maintained as back-up data.

I recognize that there can be some hay made with that about -- the phrase "inaccessible" is sort of a dynamic phrase, meaning it can change over time. What is accessible will change as technology grows. And I've avoided that in the rule that deals with the distinction between is it discoverable and do you have to show good cause, and then I've embedded back into the rule here

00253

some of the language that's been discussed about disaster recovery or otherwise maintained --

JUDGE SCHEINDLIN: You wouldn't take a snapshot of the active data, but the inactive?

MR. NOYES: The active data would already be covered under the first tier, if it's relevant and discoverable.

JUDGE ROSENTHAL: One more question before we're out of time. Is the practical effect of your proposal that for any company that is a frequent target of litigation, including the United States government, that it would have no ability to recycle any kind of back up information or disaster recovery? It's sued everyday, so it's got to keep every piece of information it ever generated forever? Is that the net effect?

MR. NOYES: I hope not.

JUDGE ROSENTHAL: Peter is a busy guy. His client is sued even as we speak.

MR. NOYES: All of this is limited by the other limitations on what information is discoverable. Once it's discoverable, even if it's accessible, you take a snapshot. I guess the result of that could be if literally a branch of the U.S. government is sued everyday, they would keep a snapshot of every days's information. But I think that at the end of the day,

00254

that's consistent -- I'll go back to what I started with -- that's consistent with the way the rules are written and crafted, which is, if the information is there and you've got it and it's helpful to the other side, then you ought to produce it.

So I guess the answer is yes. Maybe that's not the answer that we want, but, yes.

JUDGE ROSENTHAL: Are there other questions of Mr. Noyes? Thank you, and good luck in your new career.

Mr. Ragan.

COMMENTS BY MR. RAGAN

MR. RAGAN: Thank you, Madam Chairman, Members of the Committee. Thank you for the opportunity to appear today. Thank you for all of your work that you've done over the last several years. It really has been important work.

Let me say at the outset that I did not know about Mr. Noyes' article until last week, and we have not shared views about our respective opinions. My opinion is decidedly my own. I represent no client here today and no organization. I'm being paid by no one. If you think the information, the views that are provided to you are worthless to you, you're getting what I'm being paid for.

I also apologize to the committee for not

having presented written materials earlier. They were provided over the noon hour. I was consumed by a client emergency from 6:00 p.m. Monday until 12:30 this afternoon. And therefore I also probably have to apologize in advance for the disorganization of my oral comments. But at the bottom of my written statement, there is an e-mail address and a telephone number, and I would urge that if there are follow-up questions on these issues that you contact me.

Let me give you some context for where I come from, because although the last speaker and I share a law firm, my history is different. It's closer to Mr. Dukes' history than you might perceive from just the label. I've been working in the field of assisting the Administration of Justice since 1974, when I went to work for Judge Ruth Aldisert, and I worked for the courts here through the '80s, and I was with the 9th Circuit Judicial Conference for seven years. And I've been working more recently with the Sedona Conference, a group you know very well, for two and a half years. I'm also the head of the firms e-discovery task force and also the head of the firm's document retention task force.

With Sedona I am the managing editor of the annotated version, which means it's part of my duties to read virtually every case that I can find on this subject and figure out how it's relevant to those principles. And I'm also a (indiscernible) electronic discovery, and growing out of that work I work with companies of all different sizes, 150,000 employees to 50 employees.

And the net lesson of that vast experience I think is why I respectfully disagree with my colleague from 50 Fremont Street. And that is that the subject that you have been dealing with is indeed -- in my view, it is the most important subject in the federal courts since at least 1970 with those amendments. And I can't communicate to you adequately the respect I have for the work you've done.

As other people have said in written comments to you and in oral comments, you should not allow the perfect to be the enemy of the good. At the same time, while there's a desire to try to keep things simple, sometimes -- and I'll come to a specific here -- the simple is not necessarily fair or right.

The volume and complexity of this stuff -- what my friend from somewhere down the street there said earlier about dynamic databases is absolutely true. And that phenomenon is probably the one aspect of the developing technology that may not be adequately reflected in the notes as you have them today.

He talked about a specific industry. In my experience, the proliferation of databases that are proprietary, customized, and unique to a particular company is the single most difficult issue. And Judge Rosenthal, you're exactly right. To take a snapshot of that is an impossible situation. If that were the rule, it would freeze every entity that has computers, in my mind. And if that were the case, the rule would not only create a disservice to litigant in the courts,

which is your primary objective, but also to the economy and to the society, and we as a country cannot afford that sort of rule making.

So that -- those are some of the high level issues. In terms of timeliness -- in my written remarks I've got a couple of criteria there. I won't bore you with those. But basically the time is right. We have got some anecdotal experience with local rules. We shouldn't go through the cost of trial and error in however many districts there are today as we did with ADR programs in the early '90s as a result of the Biden rules.

Guidance should come from on high. And a reason for that is if guidance comes from the federal rules, the big rules, then the practitioners will

00258

realize that it is something they have to understand. It's not just something that's in Arkansas or Delaware. It's everywhere. So the CLE bar, if you will, is raised, and that's a good thing. Because if the CLE bar is raised, then more people will be doing what some of the very knowledgeable people that have spoken to you and commented to you in the past have done over the years, and there will be fewer issues. And there will be -- and this is an important thing for the judges -- there will be less satellite litigation.

Right now we've got a situation where the rules are unclear, and frankly, it's a game of gotcha. In virtually every case where counsel has the expertise and the funding to do some investigation into electronically stored information, they will press the issue. And as we've seen in case after case, Southern District -- not Judge Scheindlin -- you know, through no one's fault, stuff happened.

In my firm, two instances where not a reckless and intentional discarding of back-up tapes, but in one case change of personnel. They came in, they thought the back-ups tapes were just there to be recycled, and they recycled them. Now, with raising the bar, it will filter down through the food chain, if you will, and people will realize that if those back-up tapes had been

00259

identified as relevant and potentially important material, they're going to be put in a safe place and that won't happen. But you don't get to that level of understanding and standard of care, if you will, until you've set the bar. So that's my first main point.

The second point, and I -- this goes to privilege. And I realize that you've had a history of debate about privilege. And I'm not going to take on the big picture questions about privilege between this committee and the other committee.

But in terms of practical reality, there were some earlier discussion about the three possible rules. And there is a specific question in your transmittal about whether what you've said in the rule is the appropriate thing or whether a less restrictive standard ought to be set. And in my view, a less restrictive standard ought to be set. And the reason for that is the rule ought to be neutral.

The way it's stated now in the proposal, there is ever so slight a presumption or a tendency to think, maybe if it says the court may do this, it's a good

thing to do. And this is an instance where the simple is not necessarily the right or the fair. It's a simple thing to say a court may do that. But -- and this is probably better articulated in my paper. The parties

00260

are in the best position to understand whether there is a potential third party issue from disclosure.

And there shouldn't be any judicial sort of pushing, nudging, wouldn't this be -- let's get through this issue. There shouldn't be any of that. It's up to the parties to decide whether to tender the kind of agreement that you've got in the proposal. That a very simple tweaking.

But the reason I come to that conclusion is I have had the experience where there was case one and a strong managing judge, not present today, in a very substantial case, that made just the sort of recommendation I think, as you know very well. And there was a no prejudice arrangement entered into. There wasn't any order. It was just an arrangement. And there was a review, and there was, you know, very careful rules about note taking and that sort of thing. And that case went forward to its conclusion. There was a state court proceeding. And that was deemed to be a knowing, voluntary waiver of subject matter in a very substantial, very substantial case. So that's the background for that and why I reached that conclusion.

JUDGE ROSENTHAL: Mr. Ragan, are you suggesting that we just change the rule language to clarify that the judge should not be the thumb scale --

00261

MR. RAGAN: Exactly right. And I've suggested what I think was the question. So if that's an area where if my suggestion in the written presentation isn't clear, please don't hesitate to follow up with me.

Now, I wanted to just digress to a couple of small points that have come up this afternoon, and then we'll go to safe harbor.

The database, as I've indicated, is the issue of 2004-2005 in my practice. And addressing Professor Marcus' question about -- first of all, addressing Judge Rosenthal's question about isn't proportionality the answer, I think the answer is yes.

Addressing Professor Marcus' question about whether the language in the notes don't take care of it, I think you might have some more wisdom brought to bear about the complexity of databases. And specifically in your proposal, page 11 notes under subsection (b)(2), second paragraph, this is just the start of this. In many instances, the volume of -- I'd insert "the volume and complexity," just to start the subject.

In terms of the discussion from my friend considerably south of Market in terms of the pendulum swing here about databases, I have had much smaller cases, and there's a same issue about opposition getting access to that information. And this comes up in terms

00262

of the Rule 33 proposal. I have addressed this in my written comments.

And basically I don't think that producing in the manner ordinarily maintained for business makes any sense for these kinds of animals, but there ought to be something like a reasonable matter to the circumstances

or something like that. Please look at my written proposal. It doesn't have a specific language, the suggestion for the Rule 33 issue.

But basically what I'm trying to address, however feebly, is that if you've got this massive database. And in my camp it wasn't anywhere as near as large as my friend over here. This were some thirty different fields, only eight or ten of which are relevant, and all of which could be exported to an Excel spreadsheet, which is perfectly manipulative, perfectly searchable, but not maintained in the ordinary fashion by the company. So it's something that can be produced reasonably.

The last subject -- you've been here a long time this afternoon. I realize my time is short, but I want to address the safe harbor. And I have not spent anywhere near the amount of time that you have with that issue. My vote would be in favor of the higher threshold, recognizing that, as a theoretical matter, it

00263

may make sense to have a standard as low as negligence, but in terms of guidance and what I've referred to earlier as the gotcha syndrome, if you set it that low, you will not reduce the volume of satellite litigation. And I don't think that if it's recklessly knowledgeable deletions that you're going to have a whole lot of wrongs that are not being addressed.

I haven't perhaps stated that as eloquently as I might. But it's for guidance and predictability, so that entities, whether they're businesses or not, can do some planning and have some reasonable assurance that what they're doing will not be subject to second guesses. I think that would be better.

JUDGE SCHEINDLIN: I'm confused by that still. We do punish negligence. If you were on the other side though and it's gone, however that occurred, its gone. And we're not talking about the ultimate -- we called it the death penalty sanctions, the ultimate dismissal. But there may be something in between that that may be the right thing to do to make up for the wrong.

Negligence is not a new concept in the law. I mean, there are causes of action based on negligent conduct all the way for which there are recoveries all the way.

MR. RAGAN: I think the question, Your Honor,

00264

is whether it is something that can be addressed in a rule at present or whether you need to have some fuzzier language somewhere about reasonable circumstances. I mean, if we're talking about simple information which would have been relevant and material that has been lost through inadvertence, if it can be somehow reconstructed so that this may be -- from other data, some --

JUDGE SCHEINDLIN: (Indiscernible) -- it just can't -- it's really gone. It's accidental, but it's gone. I'm just saying that somebody pays some price for that. It may not be the ultimate sanction, but there's a whole range of --

MR. RAGAN: I guess my answer is there are some injuries which are not always compensated.

JUDGE SCHEINDLIN: Sure. This is only a safe harbor. Outside the safe harbor (indiscernible) --

MR. HEIM: Two questions on safe harbor. Do

you agree that regardless of the negligence standard or a higher culpability standard, counsel who are counsel for the responding party, whether they're inside counsel or outside counsel, their behavior isn't going to be different in terms of how they go about trying to honor their obligations to produce documents.
Would you agree with that?
MR. RAGAN: I think their behavior, assuming
00265
we have some guidance in the rules, should not be different. Correct.
MR. HEIM: On the other hand, if you're inside counsel and you're in a large corporation and you're balancing the costs of dealing with discovery obligations and you're trying to design a system to responsibly deal with the need to produce documents in litigation that you're dealing with virtually on a day-to-day basis, are you going to behave differently when you know that the standard is willfulness as opposed to recklessness?
MR. RAGAN: I don't think you should. I have not spent as much time as I would like to have addressing the safe harbor proposals. That's number one.
Number two, from my background with retention work, what you're questioning reminds me of any number of clients that are frozen in terms of not being able to rationalize their management of electronic information because they fear this issue. And what they're doing is they're stockpiling not just back-up tapes, but essentially electronic garbage cans.
MR. HEIM: And the system cost become higher as a result.
MR. RAGAN: Exactly right. Exactly.
00266
JUDGE ROSENTHAL: Any further questions of Mr. Ragan? Thank you, sir.
MR. RAGAN: Thank you so much.
JUDGE ROSENTHAL: You have the honor of being our last speaker for the day.
Ladies and gentlemen, this has been very helpful. As you know, we have two additional public hearings scheduled. The next one is in Dallas, and the final one is in Washington. There is additional time for those who wish to submit written comments until February 15.
We will of course give careful consideration to all that you present, both in writing and here in these hearings. And we are very grateful for the assistance that you are offering us as we grapple with these very interesting and very difficult issues. We appreciate your engagement with us in this process, and we look forward to continuing to exchange views with you. Thank you. Good evening.
(Time noted: 4:03 p.m.)
00267

STATE OF CALIFORNIA)
) SS.
COUNTY OF SANTA CLARA)

I, MELISSA ROEN WILLIAMS, a Certified Shorthand Reporter in and for the State of California, hereby certify that the foregoing is a full, true, and correct transcript of the testimony given and proceedings had in the above-mentioned action; that I reported the same in stenotype to the best of my ability, and thereafter had the same transcribed as herein appears.

_____, 20__, _____
Date Melissa Roen Williams, CSR 12284