COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF CIVIL PROCEDURE

Friday, February 11, 2005

8:30 a.m.

Judicial Conference Center
One Columbus Circle, N.E.
Washington, D.C. 20544

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SPEAKERS:

TODD SMITH
JIM ROOKS
KELLY KUCHTA
GREG ARENSON
ADAM COHEN
JOSE LUIS MURILLO
SANFORD SVETCOV
HENRY ROSEN
DARNLEY STEWART
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P R O C E E D I N G S

JUDGE ROSENTHAL: Good morning. My name is Lee Rosenthal. I'm Chair of the committee. And on behalf of the committee, I want to thank all of you for coming today and for testifying to assist us in understanding the intricacies and the complexities of electronic discovery.

Because there are a large number of you who are scheduled to testify today--we have 15 this morning and another 11 this afternoon--it will be necessary to impose time limits. Each of you will be given 15 minutes, and that will have to include questions.

So I would urge you not to repeat your written statements--if you have filed them, we have read them--and to please be as specific as possible in focusing your criticisms, concerns, or points on the proposed rules. That would be the most helpful to us.

And with that, I think we are scheduled to begin with Mr. Smith. And if you could all, please, as well speak into the microphones. If you

don't, the people who are behind you will not be able to hear you.

Good morning.

MR. SMITH: Good morning. My name is Todd Smith. I practice in Chicago. I'm the president of the Association of Trial Lawyers of America this year. ATLA is a 60,000-member association. And by the way, I brought my attorney with me, Jim Rooks. Jim is the senior policy research counsel for ATLA.

ATLA represents personal injury plaintiffs, civil rights plaintiffs, employment and environmental litigation plaintiffs, defendants in criminal cases, and either side of commercial and family litigation. We have filed a written statement with the committee, and I don't propose to read that to you. Instead, I want to speak this morning directly to just three matters that we mention in the written statement.

First of all, ATLA made an effort, a strong effort, over the last eight months to reach out to our membership to try and learn as much as we could from their own experiences with electronic

discovery. I described that effort in my written statement to you.

Most of the writing that has been done on this subject appears to have focused on major complex litigation, much of it businesses suing businesses. Our members tend to be involved in what I would call a smaller scale litigation, and we wanted to know the extent to which our membership found themselves involved in these issues, electronic discovery, in their practices.

I was a bit surprised, and I think Jim Rooks and ATLA was a bit surprised, at the context our members have had, the extent of that in their areas of practice. We urged them to provide comments to the committee with real-life examples, their experiences with e-discovery, to broaden the base of information available to this committee. Based on what we've seen on the judicial conference Web site, it appears that there have been a number of--more than just a few who have done just that at our request.

Members told us, and they appear to be telling

the committee as well, that they believe the present federal rules generally work quite well for all kinds of discovery, even in complex cases, and need little, if any, change. They don't believe that the proposed amendments would improve federal practice. They believe that, if adopted, these proposals would invite additional discovery abuse, give corporate litigants procedural and substantive advantages beyond those they already enjoy, and continue what we feel is a steady erosion of the right to discovery.

Secondly, I offer a hypothetical case in the written report to show what we think this proposed rules changes on how it could have a negative impact on litigation. The case is in the materials as family of Patient A v. Company X. It's a hypothetical, but the danger posed by any rule that would give cover to litigants who want to "claw back" discovered evidence that will actually prove negligence or other wrongdoing is anything but hypothetical.

And talking about cases that don't really exist

can trivialize the issue. So let me give an example of real life. It doesn't exactly involve electronic discovery, but the proposed rule of 26(b)(5)(B) on recovery of documents under a claim of privilege, if we can address that, is not limited to electronic evidence. It would apply to paper documents as well.

Not so long ago, I represented a medical malpractice victim. We were well into the case, and we were at a stage where the main question was whether the health care provider would be settling the case or whether we would be going to trial, and we were going through expert discovery.

One day, I received an item from defense counsel's office, which my assistant took to be a letter to me. It was, as a result, opened, placed in my stack of mail for me to read. It was a two-page letter, and part way through the second page, and I realized that the letter was not really intended for me at all. It was a letter from defense counsel to a representative of the malpractice insurer who insured one of the

defendants in the case.

I was amazed at what I saw. It wasn't about some facts that we hadn't learned or that we hadn't discovered. It was worse than that. The lawyer was telling the insurer that he had consulted with an expert witness whom he had used a number of times before, and he wrote that the doctor-expert had told him that the provider of care clearly had not satisfied the standard of care for the medical specialty involved and that there was considerable exposure in this case.

The lawyer in the letter went on to say that the doctor told him, however, if the case went to trial, he would still be willing to take the stand and testify that the standard of care had been met. In short, I was looking at a letter that said, "Don't worry. Our expert will lie for us."

Now I won't ask you what I should have done with that letter. I don't want to really deal with that issue directly. We can, if you like, but--and I won't ask you to put yourself in my shoes, or the defense lawyer's shoes, or the judge's shoes, or

even the malpractice victim's shoes.

Justice matters in situations like this. And if I get a letter like that, and if the defense lawyer is allowed to retrieve it, and if I can't use it to refer to it at trial, is justice really served in a situation like that?

JUDGE ROSENTHAL: Mr. Smith?

MR. SMITH: Yes?

JUDGE ROSENTHAL: Would your concerns about the provision be addressed somewhat if it was revised to provide that rather than having the defense lawyer retrieve the letter, the letter could be submitted to the court, for the court then to determine whether it was privileged in the first place? And if it was deemed privileged, if that privilege had been forfeited?

MR. SMITH: I don't believe that would remedy my complete concerns here. I tend to feel that once information is there and that there should not be an ability to retrieve this. And because of the overwhelming liability aspects of this particular example, I'd be very troubled if this were even in

question as to whether this were usable.

And I guess what Your Honor is suggesting is that it would go, and a decision would then be made on that point. I feel a rule of this nature that compromises this sort of a situation is not advisable.

JUDGE HECHT: Mr. Smith--

MR. SMITH: Yes?

JUDGE HECHT: --we've heard testimony that it's quite common to have--for counsel to have an agreement like this in litigation. Do you know from your membership whether they commonly agree to these sorts of things or not?

MR. SMITH: Agree to concerns about waiver?

JUDGE HECHT: This sort of claw back idea? If it's common to put that in a pretrial order?

MR. SMITH: I don't know that--I can say I don't know that from my membership. I can't tell you that my members have indicated that. Maybe Mr. Rooks can help me with that?

MR. ROOKS: I've seen several references in it to letters that I've gotten courtesy copies of, but

there are only about a half dozen of them. I think the gist of it was that, yes, this is done, if it's done by agreement. It's done by agreement.

It's not done because of a rule, and it isn't necessary to have a rule to encourage it. It's already out there. The range of situations in which it could happen, obviously, range from the trivial to the extremely serious.

JUDGE ROSENTHAL: Mr. Smith, if that kind of agreement was in place, would you have resisted, nonetheless, returning the letter because of the agreement?

MR. SMITH: Well, I was troubled by this letter a great deal. I suppose I--it's not common to receive something like this, but it's not the only experience I've had.

I was concerned for my colleague on the other side of the bar for the error that had clearly been made. So I did have concerns there. On the other hand, I was deeply concerned about the fact of what I was reading. And my concern, ultimately, is that justice be served.

And if I'm actually seeing in a letter of that nature that they're going forward with someone who is going to present, frankly, a fraud on the court, with having true feelings that say there was a violation of the standard of care but willing to testify otherwise, I think, on balance, that should weigh--that should carry the day. And that's what I believe we're ultimately talking about is achieving justice.

PROFESSOR MARCUS: Mr. Smith?

MR. SMITH: Yes?

PROFESSOR MARCUS: When you say "carry the day," would that not include the possibility, under what Judge Rosenthal suggested, of a ruling that under the crime fraud exception to the privilege, there is no privilege for this document that you have?

MR. SMITH: I don't think the crime fraud exception, in and of itself, would cover what I'm talking about. My example, perhaps, is as extraordinary as it gets. In other words, I believe this was a suggestion that a fraud, a lie,

would be provided under sworn testimony to the court and jury.

But I think--I'm concerned that we provide protection at all for relevant information and evidence that should be getting to the finder of facts so they can reach the proper decision based upon what the truth is. That's my concern.

PROFESSOR MARCUS: But isn't that what the privilege does when it's properly invoked?

MR. SMITH: Well, I think to some extent. But once it's waived and it's out there, what do you do to the lawyer on the other side who now has the information and needs to be using that?

JUDGE ROSENTHAL: Mr. Smith, we have heard a number of people, representing both plaintiffs and defendants, express in different ways that most cases involving electronic information have discovery of that information focused on information that is reasonably accessible. That is, in most cases, there is no attempt made and no significant litigation over the information that might be deleted or fragmented or legacy or on

back-up tapes, whatever the case may be.

Has that been your experience or the experience of the members who responded to your communication?

MR. SMITH: With regard to is it 26(b)(2), not reasonably accessible?

JUDGE ROSENTHAL: Yes, sir.

MR. SMITH: Well, we have concerns about that, and I think the experience has been that the rules currently operate very well there. The information is freely exchanged. And I may be missing your question a bit.

JUDGE ROSENTHAL: I'm sorry. Perhaps it wasn't clear. My question is whether you received information from your members about the frequency with which they go to inaccessible information and spend the time and the money to get the back-up tapes restored or the deleted information restored as opposed to focusing discovery on information that is active data or reasonably accessible?

MR. SMITH: I believe there is a frequent effort. I can't tell you the nature of that. Again, I'll ask Mr. Rooks to chime in if he can.

But I believe there is frequently, routinely an effort to pursue information that I don't know whether it would be called inaccessible. It just may be more difficult to obtain. So, Jim?

JUDGE ROSENTHAL: I'm not talking about just putting a request in your initial discovery motion or request for production as a kind of a boilerplate. I'm talking about actually pursuing back-up information, inaccessible information, even after you have received the reasonably accessible information. Did you get any sense from your members' communications as to how frequent that is?

MR. ROOKS: Again, I've only seen maybe a half dozen letters. I haven't actually gone through the log on the Web site to see who's an ATLA member and who isn't. But the overall sense is that whether it's accessible or inaccessible, they don't have all that many fights about it. And because the rules presently, as they presently are, are working well enough. But I think there are certainly some examples of cases in which they have pursued it, clearly.

But overall, the picture we get is that this is a problem--in other words, discovery disputes are a problem in a very comparatively small number of cases. So I don't think they fight over accessible or inaccessible a lot.

JUDGE ROSENTHAL: Thank you.

MR. SMITH: We are limited in time, and I wanted to get to something that I thought the committee would find quite interesting in materials that we distributed this morning. And I know you haven't really had an opportunity to look at those closely. But we've provided three exhibits with my written statement, and those exhibits were circulated today.

Just a few days ago, we discovered some fascinating statements on the point regarding routinely--on 26(b)(5)(B) as well as 26(b)(2)--pardon me, 37(f) and 26(b)(2). I think they would address both of those. And they came from people who ought to know about information technology, 19 senior information technology professionals. They're well-credentialed, vastly

experienced professionals who run their departments.

And you'll see that in the materials, it's from their statements that we find some very interesting information. It's clear in the statements in those exhibits that they are concerned with running the best information systems they can.

It's a group of information technology professionals discussing the retention of e-mail. They aren't focused on destroying crucial evidence or dodging discovery requests. These people weren't talking to their companies' management or legal departments or to the news media or the public. They were talking to each other. So you can see the communications and how important, well, these rules may be to them.

We downloaded the messages they sent amongst themselves and put them in Exhibit A to my written statement. We brought 100 copies of that today. Every one of the messages is there in the same order in which they were written. We also downloaded the rules for permissible use of that

e-mail list and put that in Exhibit B, which follows immediately behind Exhibit A. We formatted the messages to make these easier to read, but we changed none of the content.

We segregated the information that would indicate who the 19 authors are, who they worked for, and who owns the e-mail list. Under the e-mail list rules, that information is not confidential, but we removed it to a separate document, Exhibit C. And that's just for this committee, so the identities of these folks are not disclosed beyond the committee here, and that would be the committee's decision. It's not confidential by virtue of the rules, however, on that e-mail list.

In Exhibit C, we also produced the entire body of original raw traffic on the e-mail list exactly as it was downloaded. We had no interest in publicizing the identities of these folks.

As we look through Exhibit A, we can see comments that address several issues that had been raised during the deliberations over these rules.

The need for specific e-mail retention policies is discussed here by these IT folks from different companies, the most appropriate length of time for the retention of e-mail messages or the most appropriate size of the storage space allotted to users, and whether the push for e-mail limits really comes from technical people or from lawyers. And you'll see that discussed in there.

We put the comments that we thought are most relevant and informative into bold type for you. We weren't surprised by anything we saw there. With regard to the need for e-mail retention policies, the authors wrote as follows, "Many of us don't have a retention policy." Again, this supports the proposition a lack of storage is hardly a priority issue.

"I know that the type of organizations that," the person continues, "I've worked at have not wanted to establish any for e-mail due to the 'once we lose it, we'll need it' mentality."

Another comment--"I really don't understand the perceived need to clean house every X ticks of the

clock." Another comment--"We'd rather our users focus on their work than constantly worrying about their mailbox size."

Another comment--"The nonlegal benefits to forced e-mail retention basically boil down to speed of the system, available storage space, and number of tapes it takes to back-up the e-mail system. I would say that unless you have a legal requirement to enforce limited retention, you probably do yourself more harm than good by trying to implement this." That's in the one area with regard to retention.

On the subject of appropriate amounts of storage space or time limits on retention, they say, "We are at three months for sent and trash." Another one says, "We have a 365-day retention on e-mail and a 7-day retention on trashed mail." Another says, "We have no limit at all on any folders whatsoever."

Another says, "I personally have 250,000 stored e-mail messages, and they come in handy more often than you'd think. Storage space is cheap. And

ease of work for IT staff should not get in the way of the organization's mission."

Finally, as to the legal, not technological, impetus for retention policies, they wrote, "We are taking a serious look at our retention policy for e-mail. We have a whole staff working group looking at this issue, and legal is involved."

Next, "Our mailbox policies were initially a suggestion from our legal department. They wanted very strict rules on the keeping of e-mail (one suggestion was no more than three weeks of e-mail to be kept). We formed a staff working group and went to upper management with a proposal. We set these limits based on legal reasons, not on technical reasons."

JUDGE ROSENTHAL: Mr. Smith? Mr. Smith, I think that we'll be able to read this.

MR. SMITH: Yes, I--

JUDGE ROSENTHAL: Perhaps you could use your time to make the point.

MR. SMITH: That's the point. The point simply is there.

JUDGE ROSENTHAL: Excuse me. I think we have a question first.

MR. SMITH: Pardon me. Go right ahead.

MR. CICERO: One question. I'm Frank Cicero from Chicago.

MR. SMITH: Yes, Frank. How are you?

JUDGE ROSENTHAL: Can you use the mike, Frank?

MR. CICERO: Yes, if I can find it. I'd like to go back for just a second to your discussion about what's been referred to here as the claw back provision. Because the example you cited, I think, is an unusual one. I've had similar experiences, but I think there's another important consideration that I'd like your observation on. And that is that the--I think much of the impetus for voluntary agreements to return documents or provide something for inadvertent disclosure or for a rule like this is to expedite discovery.

Plaintiffs--not plaintiffs, parties who want discovery regularly want it as quickly as possible. And in order to avoid having thorough reviews made that avoid inadvertent discovery, parties make

agreements that say if, inadvertently, things are produced that are privileged, we'll provide a way to get it back.

And I think there's an interplay between timeliness or efficiency and expedition and the problem that we're talking about here. Do you have any observations about that as a--providing a need or at least a reason why your organization might think it's a good idea?

MR. SMITH: I much prefer what you described, Frank. In other words, I would prefer that the parties get together on that kind of issue. And so, a party, you know, at arm's length, they're deciding this amongst themselves. I think that's the better approach, myself.

I'm not offended by people getting together and making an agreement of that sort. I don't know if that helps you or not, but that's--

MR. CICERO: Well, I think, in part--certainly that's one of the options. But I think, in part, one of the motivations behind a rule like this is to help with the expedition of discovery, in case

parties--well, I'll let it end there.

MR. SMITH: I guess if parties don't reach an agreement, then the rule would control it under the circumstance of this proposed rule, and I'm not comfortable with that. If information has come to light that bears significantly on the truth that's going to be presented in the courtroom, on justice, that's what troubles me.

And if there's been a waiver without the kind of agreement you're talking about, I'm troubled by that claw back.

JUDGE ROSENTHAL: Any other questions for Mr. Smith?

MR. SMITH: In conclusion then--well, the last element of the material I was just citing briefly, it does comment clearly that they are trying to limit the amount of material that would be available in legal discovery.

JUDGE ROSENTHAL: Now this is material, if I understand it correctly, that they're talking about that there is no regulatory or statutory requirement to keep and that, according to the

discussion you've characterized, that there is no business need or use to retain. Is that correct?

MR. SMITH: Well, I don't know that there would be no business need or use. It sounds to me like there's comments there that indicate that once you've lost it, that's when you need it again. So that they find that they do need it, in fact.

But it's clear from these comments that the discussion, ultimately, is occurring on retention based upon legal discovery. And I think the rule, 37(f), that's being proposed does encourage the destruction rather than the retention. And this is a clear indication of just that, that what's going on there is they're discussing this only because of legal discovery as opposed to other issues.

JUDGE ROSENTHAL: Thank you, Mr. Smith.

MR. SMITH: ATLA is glad to be with you. We very much appreciate your efforts. We wish we could support the hard work that's going on on these rules, but we felt we should address the problems that we see. But we certainly appreciate everything the committee has done.

Thank you very much.

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

Mr. Pickle? Is Mr. Pickle here?

[No response.]

JUDGE ROSENTHAL: Is Ms. Kuchta? I apologize if I've mispronounced. Mr. Kuchta, I really struck out there. I apologize.

MR. KUCHTA: Not a problem. Thank you very much for inviting me here, or accepting my request to testify.

I'm not going to read the comments that I have. First, I guess I want to start with and preface that I'm not an attorney. I'm representing more from a business and technology perspective. In my position, I help parties deal with their electronic discovery issues. I think it gives me some unique insight into the business and technology issues.

In my comments, I specifically state this is not purely a legal decision or problem. This is actually--there's a three-legged stool, and business and technology are really the other

portions of that leg.

I wanted to make sure that I expounded upon the issue that I talked or the example I gave you, just to make sure I'm clear. I'm not going to spend much time. But in 2003, my staff--and there's a slide in my comment that depicts this. But my staff had looked at things because we saw the correlation between storage space and the cost.

And in 1956, IBM came out with their computer. If you take $100 in 1956 and spent $100 from 1956 through present, today, or through 2003--excuse me--and bought storage space, took that space, printed it to paper--because that's what we all know and can appreciate, piles of paper--laid those end to end. In 1956, if you got off the train at Penn Station in New York, you'd get to the ticket counter.

In 1980, if you bought the same $100 of storage space, printed it to paper, laid it end to end, left the train, you'd get to the post office across the street. In 1990, you'd get to the Hudson River on the East Side. In 2000, you'd get to Detroit.

You could lay that paper end to end to Detroit. And in 2003, you'd get it to New Delhi, India.

That is a very big testament here to understand the business and technology issues because, if you'll look, everybody talks about Moore's Law of computing. Well, actually, if you look at storage space, in my estimation, technology has outpaced Moore's Law in semiconductors in the ability to save storage space cheaply.

That is a very big, important point because what it does for businesses is it does not require them to actively manage their data. And since it does not, there is not any financial penalties for them. It's very cheap. They can be very relaxed on their business records.

I'm not here to say that this is all their problem. But I think that a lot of these issues here lie within the different parties. And I guess this is probably a perfect time to say that we all know that electronic discovery is expensive.

I could tell you what is going to be coming very soon is almost everybody, all of us consumers,

have computers on our desks. The gentleman spoke from ATLA about big companies. This is not going to be just a big company problem. This is going to be an issue with every one of us that uses technology. And we see that in things that happen, in legal events. People are speaking on Internet chat rooms, on instant messaging, through their Palm Pilots.

So, please, the main purpose that I would like to make a comment on is understand there are some things that needs to be addressed from a legal perspective with legal changes, but let's not overstep the boundaries--because I have some very real concerns.

And I'm only going to go out to the next three to five years--we don't know what technology is going to be. And there are some specific rules that you discuss about changing, you know, what formats are discoverable. And I have to tell you, in three to five years, I can't tell you what's going to be discoverable as far as formats are concerned because of the change of technology.

It's all driven by the consumer.

JUDGE HECHT: Mr. Kuchta, let me ask you a question.

MR. KUCHTA: You may.

JUDGE HECHT: Do you foresee the continued use of back-up tapes as disaster recovery?

MR. KUCHTA: Specifically, it's been predicted for a very long time that back-up tapes would be the demise and they would be soon discarded. I don't know that I can ever predict that they ever will. Judge Scheindlin had made the association between inaccessible and accessible data, the things that are--that was a very well-thought out decision at that particular time.

In my comments, I specifically stated, though, that has changed. In the 2002-2003 timeframe, I was involved in the Medtronic v. Dr. Michelson matter. And in that, the initial estimate that I was privy to was that the discovery was going to cost $300 million by Medtronic to produce their 100 terabytes of data and review it.

At that particular time, the judge ordered a

reasonable cost of about $4,800 to restore a tape, search it for information. Today, I can tell you that is probably under $1,000. And what was inaccessible yesterday may become accessible today. So it's very difficult to put rules like that in, and business and technology changes. So I don't know that tapes will ever go away.

PROFESSOR MARCUS: Follow-up question. Then if you were going to have a rule, wouldn't the term "reasonably accessible" be a fairly good way of describing what you should be asking under the conditions that prevail?

MR. KUCHTA: I think that it is. I think that your rules need to be flexible and need to be open for interpretation. Otherwise, you'll find yourself here in two years, three years, something along that nature, and that is the point or one of the points that I wanted to leave with you today. I think that it is.

JUDGE KEISLER: Excuse me. Do you think that the current formulation proposed rule is not sufficiently flexible?

MR. KUCHTA: No, I think that it is, with maybe some minor tweaking. I think that it is. I think--and that brings up, too, probably the most important point. I think the 9th Circuit tried to develop a model. And in my opinion, only my opinion, when I find that we have very scorched-earth litigation over electronic discovery issues or a lot of tension between the parties, it's because there's not been a lot of disclosure.

Oftentimes, as humans, if we lack information about what is really there, we have to conjecture and draw up some idea of what goes on. And oftentimes, the party that's left with no information or little information is left to draw a very negative conclusion when, in fact, it might not be a negative conclusion. Sometimes it is, as the gentleman from ATLA had spoken about. But I think that early and full disclosure is very much the name of the game.

But what I want to identify, though--and this is coming from a business perspective. I see this each and every day, and for the practicing

attorneys, I know you see that. The general counsel is governed by, obviously, the CFO, CEO, and the paradigm in business, and it's the same thing with data storage, don't spend a dollar today that you can spend next month or next year. You defer your expenses.

What we see in discovery is that discovery is pushed off until the very end. It is expensive. It's very expensive. And so, the parties have a business and a financial interest to try and defer that cost, look for some way out, do some negotiations. Unfortunately, some people don't approach it that way.

So what happens is, is you have all this massive amount of data that is collected during that period of time. In the Michelson matter, I was brought in 18 months after discovery had happened, and it was at least a year before we had gotten some electronic documents. And over that time, there was tens of terabytes of data that were saved, that we're now privy to this. So that is a unique aspect of the justice system and the

process, the way it works.

I think the gentleman had asked about, you know, expediting discovery. And I think expediting discovery and disclosure is absolutely the way to go. Now let it be said that I'm in favor of document retention policies, and I want to make sure I stress that point. That is a very real decision that a business needs to make, and it is a business decision because in America we are not becoming a manufacturing community, but one based on ideas. We need access to the information.

And the volume of information that we are now saving is incredible, not from an electronic discovery perspective, but to manage it. Corporations have a pretty good feel that the individuals who use their data know what's on their computer. But collectively--

JUDGE SCHEINDLIN: Could I interrupt you for a sec?

MR. KUCHTA: Yes, you may.

JUDGE SCHEINDLIN: Okay. You were talking before about the accessible/inaccessible divide.

MR. KUCHTA: Sure.

JUDGE SCHEINDLIN: And I think you said that you supported that. But when I look at your written materials at page 4, you said, "I strongly recommend that you reconsider the attempt to distinguish whether data is accessible or inaccessible."

So I'm confused between your written comments and your oral comments. Which is it? Do you think that we're doing the right thing in having a divide, or do you think we're doing the wrong thing in having that divide?

MR. KUCHTA: Very good question. Thanks for asking me to clarify it. I think at the time that you had made that ruling, it was a very good decision. I think that looking and now having the hindsight of it being 20/20, that I think that that is going to be something that is going to be difficult to attain and keep.

JUDGE SCHEINDLIN: So you don't think we should do this two-tier approach, trying to divide between accessible and inaccessible?

MR. KUCHTA: I think it's going to be very, very difficult. And I think it may lend itself to some abuse in what is accessible and what is not accessible.

So there are two elements in my area. One is that I think that the lines are becoming blurred about what is inaccessible and accessible. And I haven't really applied it to a financial term, that was going to cost or take a great deal of effort to recover data. I think that is coming down, the cost and the time necessary.

JUDGE SCHEINDLIN: So if there is a distinction, it's about cost. Is that what you're saying?

MR. KUCHTA: I really think it's about cost.

JUDGE SCHEINDLIN: Okay. That's helpful.

MR. KUCHTA: I really think it's about cost.

JUDGE SCHEINDLIN: Thank you.

MR. KUCHTA: You bet. I'll open it for other questions because I know that you're very short on time.

JUDGE ROSENTHAL: Just one question. In terms

of the potential for abuse that you were talking about, you mentioned a minute ago that you thought that businesses should be encouraged to have document retention and destruction policies that would allow them to manage their electronic information.

Does that mean that you think that with such policies, businesses will decide what to keep readily available and what to allow to become inaccessible based on business needs? Is that the model you're looking for?

MR. KUCHTA: Actually, I don't know. I agreed with everything except for the inaccessible portion of that. I think that we're going to have to start discarding information that is clearly not required by regulatory or legal requirements and it has no business nature. We need to destroy that.

I can't tell you how many times when we have discovery, and we get the dancing baby spam. We have a lot of junk that we're saving.

JUDGE ROSENTHAL: So you mean really inaccessible. You mean gone?

MR. KUCHTA: Really inaccessible. I mean it's gone.

JUDGE ROSENTHAL: Okay.

MR. KUCHTA: And I think businesses have that right, and individuals should have that right as well.

JUDGE SCHEINDLIN: And can I get your views clarified a little bit on the safe harbor?

MR. KUCHTA: Sure.

JUDGE SCHEINDLIN: At the end of your written materials, I think you say you don't think we should do that. I think you were opposed to it. Your "recommendation is that the proposed changes be removed from consideration" is what you wrote.

MR. KUCHTA: My concern is that, in general, I think I would be in favor of it. But I think that it would be very difficult to define how it could be applied in a manner that could not be open to abuse. And when I'm saying it from that perspective--

JUDGE SCHEINDLIN: Abuse by whom?

MR. KUCHTA: The individuals that are saving

the data. It's a very subjective decision about what data to save and what data to collect. I see varied parties that get the same type of subpoena from a government or from a legal matter, they take different interpretations, and their outcomes are very readily different.

The same thing with the safe harbor rule. I think that is going to be open to--the way it's written, open to a lot of subjectivity about what can be saved and how--when our duty is really required to do that.

I think what I'm proposing, though, is that companies who actively manage their data are not going to have this issue. Their costs for electronic discovery are going to go down. It will be very expensive when they make that first leap to doing that, but that is really my comments.

And I will answer any other questions and, for the sake of time, give the rest of my parties behind me the opportunity. Does anybody have any other questions?

MR. GIRARD: I just have one quick one.

JUDGE ROSENTHAL: All right.

MR. GIRARD: Do you think if you put multiple data retrieval consultants in a room that they would be able to agree on what constitutes inaccessible information as opposed to accessible?

MR. KUCHTA: I think that under--

MR. GIRARD: --answer to that question?

MR. KUCHTA: The answer is--I think that the answer is yes. I think that it may take a little bit and that often in a discovery process, it takes a little bit. But I've been privy to most of the large electronic discovery service providers, and I've worked on many of those, and we can come up with some very reasonable objectives.

Because, ultimately, at the end of the day, if they're getting paid by businesses, they're being paid to be reasonable. And I think that is very definitely something that can happen. Very rarely do you ever get somebody that is very unreasonable. And oftentimes, it's a lack of ignorance or information that they have.

JUDGE ROSENTHAL: Thank you very much.

MR. KUCHTA: You're welcome. Do you have a question?

JUDGE ROSENTHAL: Mr.--

MR. KUCHTA: Thank you.

JUDGE ROSENTHAL: I think that's it. Thank you, sir.

Mr. Arenson and Mr. Cohen, please? Good morning.

MR. ARENSON: Good morning. I'm Greg Arenson of Kaplan Fox in New York, and this is Adam Cohen of Weil Gotshal in New York. Adam is also the co-author of the leading treatise in this area, as you probably know.

We're both here representing the New York State Bar Association Commercial and Federal Litigation Section. We've submitted a report, which I believe you all have.

JUDGE ROSENTHAL: We do.

MR. ARENSON: We're going to just highlight a few areas that, hopefully, will provide some additional insight on the proposed rules, which, in general, we do endorse.

I will discuss one aspect of the proposed safe harbor under Rule 37(f) and also some aspects of the procedure for handling privileged information that is inadvertently disclosed. Adam will discuss the notion of reasonable accessibility and also the electronically searchable form under Rule 34(b).

Turning first to the Rule 37(f), safe harbor. That, in part, depends on the routine operation of an electronic information system under both of the definitions that are being proposed. We think that the advisory committee note to the proposed rule should provide more guidance as to what factors may be considered in determining the routine operation of an electronic information system.

We suggest that there are really sort of two factors that go into the determination that a court might make. First would be the capabilities of the system, and the second would be the policies that are place regarding the storage on the system. And in our report, we break that down under the capabilities sort of to three aspects.

The first is the manner in which the electronic

information system, which means both the hardware and the software, and those electronically stored information. The second is any difficulties in modifying that system that might alter or destroy electronically stored information. And then whether some portion of the system is designed to destroy litigation-related material. And of course, Evidence Eliminator is one that comes to mind, and that's sort of a negative when you look at it.

Looking at the other set of factors, under the policies, that's what you would expect is that you would look at the policies regarding preservation, alteration, and destruction of electronically stored information that's outside the context of litigation and see what that says if, of course, they have the policies. And then also what the policies are once the potential litigation is known to the company or to the individual, if they've got it.

Turning then to the Rule 26(b)(5)(B)--

JUDGE SCHEINDLIN: One question. On the 37(f),

do you support the as-drafted version, or do you have views on the footnote version?

MR. ARENSON: We have views in the report, and it's definitely the as-drafted version, Judge Scheindlin.

JUDGE SCHEINDLIN: Why is that? Why do you not--

MR. ARENSON: Really two reasons. One is that we feel that the as-drafted version is a more objective rule, not a subjective rule. That if you start looking for recklessness and willfulness, you have to get into the operation of what the person who lost the information or can't produce it did.

With just the negligence standard, really, you can use a reasonable person, what they should have done. And some of the routine operation description that I've just gone through would bear on that as well.

JUDGE ROSENTHAL: Mr. Arenson, some have suggested that we should consider in the note, or even perhaps in the rule, adding some language to the effect that the culpability ought to be a

factor in deciding whether the more severe sanctions might be appropriate if the safe harbor didn't apply. Do you have a view on whether such language would be appropriate or useful?

MR. ARENSON: Well, first of all, as you probably know, Judge Rosenthal, there are a variety of views out there among the courts. And so, essentially, I hate to say it, this way you'd be legislating what the view ought to be. I think that in the 4th Circuit, there is sort of you take a look at the culpability, you also take a look at the importance to the litigation of the material that cannot be produced. That, to me, seems to be a more rational standard.

And you have different standards perhaps in the different circuits and even among the different district courts as they apply it to the facts. So I would not be in favor of this committee taking a position with regard to that. But that's my position. I can't say that's necessarily the bar association's position.

JUDGE SCHEINDLIN: One more question. I know

you want to move on to other topics.

MR. ARENSON: No problem.

JUDGE SCHEINDLIN: But on 37(f), this concept of a litigation hold, do you think this is something that really can be implemented, can be done right? Have you had experience with it yourself? Are people confused by it? Can they really teach it and do it with their clients?

MR. ARENSON: I haven't had sufficient experience. Judge Scheindlin, as you know, I tend to be on the plaintiff's side rather than the defendant's side in major cases. And my experience has been that the instructions are generally given out by defense counsel in the cases that I am involved in. And the question is always the implementation.

That depends on the system. That depends upon their corporate culture sometimes. So it's hard to know. I think it's the right idea. I think it's the right approach. But I haven't had any experience where it's really been a problem.

JUDGE SCHEINDLIN: Thank you.

JUDGE ROSENTHAL: Thank you. Go ahead, please.

MR. ARENSON: Okay. Turning briefly to 26(b)(5), we have a suggestion that the obligation of the party that has received the information after notice not to use, disclose, or disseminate the information. Pending resolution of the privilege, claim should be in the rule and not in the notes.

Currently, you've got that in the notes. We think it's really important to have that obligation out there where people can see that that's what they have to do without reading the notes and where it's very clear that that's what the person who receives the inadvertently disclosed information has to do.

We also support the concept that once the notice has been given, that there is an obligation to return, sequester, or destroy the material. But we do note that maybe it doesn't quite apply to all electronically stored information because, as we all know, deletion doesn't destroy the material.

And sequestration, when you think about what

might be on a CD, doesn't make sense because it's just one of a whole bunch of documents. And I have had experience where production of information is on CDs, and how I would give back one piece of it and get another CD in place of it. I mean, it's a lot of extra work.

And so, therefore, the knowledge that you can't use the information, which we're proposing to put back into the rule, seems to us to be the better way to go about this in terms of it. And we don't have a good solution as to the language. But the concept is the right one. You just can't use it.

With that, unless somebody's got a question on this point--there we go. Professor?

PROFESSOR MARCUS: Following up on what you just said, do you think it would be wise to consider providing that the party who receives the notice has the option of seeking a ruling from the court on whether the privilege is properly asserted with regard to these materials?

MR. ARENSON: I think currently couldn't either side really make that motion either way? One to

demand that the material either not be considered privileged or that it be produced if it's sort of in this--it's inadvertently produced. And of course, the party that produced it may want to protect the privilege.

PROFESSOR MARCUS: So you say that's implicit?

MR. ARENSON: I think it's implicit. But you are closer to the draftsperson of this rule, and so you may know that it wasn't meant to be implicit.

JUDGE SCHEINDLIN: Mr. Arenson, are you comfortable with the reasonable time idea, or do you think there should be a time limit that the producing party has to act by?

MR. ARENSON: I'm comfortable with the reasonable time because in these things, as usual, it's fact driven. If you say you have to do it within 30 days, well, somebody will do it on the 31st day, and that may or may not have been reasonable, given where we are.

MR. GIRARD: I have a quick question, Greg.

MR. ARENSON: Sure, Dan.

MR. GIRARD: Have you had the experience where

once the implications of a document become clear in the litigation that the privilege claim is asserted?

MR. ARENSON: Well, I can't say I personally have had that experience, but certainly I'm aware that that sort of thing does go on. But that still doesn't mean that whatever the privilege is that is applicable, if it was applicable, shouldn't be litigated and decided by a court. You may disagree about that, but I think that's where the proper resolution should be.

MR. GIRARD: Thank you.

MR. ARENSON: Adam, it's your turn.

MR. COHEN: Well, first of all, I just want to thank you all for having me here. It's a real honor.

And I would like, before I get into the two topics that I was going to address, to speak to this litigation hold issue because it is something that I deal with every day. And yes, the concept is a valid concept, and it's what people do all the time. The trick is in the implementation. That's

why we see very sophisticated parties and sophisticated law firms being sanctioned.

It seems like every month there is a big sanctions case with a big company or a big law firm. It's not because they're bad people. It's because it's incredibly difficult to implement a litigation hold over electronic information perfectly, and that's why we believe that the safe harbor makes sense.

I was going to speak about the accessibility issue and also about the default format issue. And I have my notes on a computer, which I thought would be appropriate, given the subject matter today.

We generally support this distinction of accessible versus not reasonably accessible. But we feel that the standard of reasonably accessible, it needs to be explicit in the rule or the notes that this standard is flexible enough to take into account all of the factors that a court should be considering in determining whether something is reasonably accessible. And I think also that there

needs to be some additional clarity on what kind of description of inaccessible information needs to be made by the party that's claiming that that exists.

We feel that, you know, it should be clarified that a court is not merely considering the medium in which the information is kept. There's, you know, a lot of talk about back-up tapes and hard disks. And I think that regardless of the speed at which people move away from mediums like that, it's inevitable it's going to happen, and that a court should be considering the frequency with which the electronically stored information question has been accessed in the past.

I think one can get the impression from reading what's in the rule and the comment that having access to the information, period, would turn that into accessible information, and you know, as an example, you may want to access information for the purposes of demonstrating the expenses, the difficulties involved in accessing that information.

You may have accessed a back-up tape in the

past to recover some important e-mail, but it doesn't seem that that shouldn't necessarily--

JUDGE SCHEINDLIN: Can I interrupt you? I know it's a bit rude. But my question is what makes things inaccessible anyway? Is it just cost and burden, or is it anything else?

MR. COHEN: Well, I think, first of all, we should move away from saying accessible or inaccessible and talk about the reasonably accessible and not reasonably accessible, and I think it is cost and burden.

JUDGE SCHEINDLIN: Is it cost and burden?

MR. COHEN: Absolutely. It's cost and burden.

JUDGE SCHEINDLIN: Well, if it's cost and burden--if it's cost and burden, don't we have a rule covering cost and burden?

MR. COHEN: Well, we do have a rule covering cost and burden. But we're talking here about what needs to be produced in the first instance, I guess.

JUDGE SCHEINDLIN: But I mean courts have a rule now to assess whether something is unduly

burdensome or unduly costly. What does this add?

MR. COHEN: Well, I think what this adds is it eliminates the uncertainty, you know, that you have violated some kind of discovery obligation when in response to an initial document request, you don't produce, for example, deleted e-mails on a hard drive.

Now in practice, people are not doing that anyway. But in this area, this has always been one of these sort of open questions that no one has had a firm answer on. And that's what I think this rules does.

JUDGE SCHEINDLIN: At earlier hearings, people have called it the elephant in the room, meaning you may not produce it, but do you preserve it so that the court can then rule on it?

MR. COHEN: Absolutely. People do preserve it. Generally, the uncertainty with the inaccessible information has been, for example, deleted e-mails on hard drives. I don't think people are going out and saying, okay, you're not allowed to use your computer anymore because you might destroy deleted

e-mails.

And then with the other example that's in the notes, you know, not reasonably accessible is back-up tapes. You know, people have struggled and are continuing to struggle with what to do about back-up tapes. It's an easier case, like the Zubulake case, where you have a limited number of key persons and you're able to segregate and identify certain back-up tapes. It's the harder case where you're dealing with entire departments of large corporations and you're not sure of what your duties to preserve are.

JUDGE SCHEINDLIN: So you tell your client to preserve it, even though they don't have to produce it? This so-called inaccessible--

MR. COHEN: Well, first of all, what precisely you preserve will depend on the particular case. But I totally endorse the notion, and I think in practice what everyone does, that the preservation obligation has to be viewed as much broader than the production obligation and that you're not going to not preserve information because you have some

argument that you're going to make later, that you shouldn't have to produce it because it's not relevant or something like that.

JUDGE SCHEINDLIN: I'm sorry to have a dialogue. But then does that mean that you stop recycling?

MR. COHEN: Well, in some cases, you do. People absolutely do that. And then they can argue about, you know, whether and who should bear the expense of deriving information from back-up tapes.

Okay. So my second point on accessibility was about how you identify the information that's not reasonably accessible. You know, I think there's a certain lack of clarity there in the rule.

Clearly, it's going to be a case-by-case determination to some extent. But I think it's incumbent on us to point out those areas of lack of clarity, and you know, questions arise as to whether it's sufficient to say something like "back-up tapes" or "deleted information on hard drives" or whether there is some more specific identification that's contemplated here.

I'm just going to move--

PROFESSOR MARCUS: Mr. Cohen?

MR. COHEN: Yes?

PROFESSOR MARCUS: What do you do now about conveying to the other side? You usually represent defendants?

MR. COHEN: Well, I'm basically in IT litigation. So I tend to work on both sides.

PROFESSOR MARCUS: Okay. Well, what is it your understanding about how people presently communicate to the other side what they haven't examined, if they haven't examined everything?

MR. COHEN: In most cases where there is sort of a symmetrical relationship, both parties have large amounts of electronic information, the issue doesn't come up. Because, you know, both sides, there is this mutually assured destruction notion that if you start raising issues like back-up tapes and deleted e-mails, you know, what's good for the goose is good for the gander.

I think in the asymmetrical cases, those issues get raised when the plaintiff doesn't--takes a

deposition of let's say a 30(b)(6) deposition of an IT person and discovers that they haven't received information on back-up tapes, or they simply, you know, ask about what collection efforts were made in a letter, and they get the answer.

There are generally, at least in the cases I have experience with, it's not something that is discussed up front in the first instance. One of the reasons we support the notion of discussing all of these issues at the initial conference and before.

JUDGE ROSENTHAL: You'll have to wrap up.

MR. COHEN: Okay. I think you can see from our report that on the default format issue, I think there are lots of problems there that that's going to create technically. And so, you know, we don't support the way that that default format is currently implemented of those rules.

JUDGE ROSENTHAL: Is your criticism that there is a default outlined, if there's no request--if there is no agreement and no court order, or with the way in which the default is described?

MR. COHEN: I think that our position is that, theoretically, you know, perhaps there is a way to describe a default format. I don't know what that is. And the current way it's done is not sufficient. It seems to me that if you're going to have discussion at an early conference about format of production, then why should someone be forced to produce in a specific format later on if the person didn't request production in a specific format?

JUDGE ROSENTHAL: If we did not specify a default but did give some guidance as to whether there should be a limit on the number of different formats in which the same information should be provided, would you be comfortable with that?

MR. COHEN: You know, it's not something I can express a position on on behalf of the section. But you know--

JUDGE ROSENTHAL: I'm asking you then.

MR. COHEN: I think, personally, I think, yes, that makes sense.

JUDGE ROSENTHAL: Any other questions?

[No response.]

JUDGE ROSENTHAL: We very much appreciate your coming and for the detail and thought that the association obviously put into the report.

And for those of you who submitted detailed reports, I extend the same compliment and will not take the time to say that over and over again. Thank you.

MR. COHEN: Thank you very much.

JUDGE ROSENTHAL: Mr. Murillo? Good morning.

MR. MURILLO: Good morning. My name is Joe Murillo. I am vice president and associate general counsel of Philip Morris USA.

And I am here to share our perspective. You will not be shocked to hear that it is somewhat of a defense perspective. We are, indeed, a defendant of some note and some notoriety. But it's precisely because of that that we are here. We welcome this committee's work. We welcome the rules. And what we would like to emphasize--and I'm going to very much take you up on your offer that I not follow my comments. I think they speak for themselves.

What we want to emphasize is what we have seen is the need for corporate defendants, particularly defendants such as us, that have litigation every day, every year--that produce information, documents every day, every year, case after case, thousands upon thousands of cases, millions upon millions of documents, gigabytes upon gigabytes of data, et cetera, et cetera, ad infinitum--we need clarity because we need to be proactive. We cannot wait for the demand to collect documents.

We collect documents every day. We have a staff of 58 lawyers and paralegals in my group that do nothing but go with the business, collect their documents, understand the data, understand what is accessible, understand what the business uses every day to conduct the business of the corporation, and find ways to be able to crank this information out as quickly and efficiently as possible. That is what we try to do.

What we need, please, are clear rules so that we can go off and do our job and anticipate and be proactive. That is what we have tried to do for

the past 7, 8, 10 years. We need sustainability. That's why we need--we think there needs to be clarity.

As to formats, we think the clearer you can be on what the guidelines are, what are our duties? Do we have the duty to be perfect? Is that what we're talking about? I hope not. Right? But the more clarity we can get on these crucial points, the better off we can go off and plan to do our work, both as a plaintiff and a defendant.

Yes, ma'am?

JUDGE ROSENTHAL: One of the prior speakers, Mr. Cohen, raised a skepticism about whether we could specify a default form of production that was good enough to be included in the rules. And by that, I, of course, mean what form of production would be among those from which a defendant or producer could pick if there was no agreement and no court order? Do you share his skepticism?

MR. MURILLO: I do not. I think that while rules need to be written with the future in mind, and I understand comments and agree with comments

that I don't think we should be tied to particular formats that lead to inflexible situations. Take our example, for example.

We post documents on a public Web site, which we are required to do under the master settlement agreement. Every time we produce documents in a smoking and health liability case, we are required, within a specified period of time, to post those documents in a specified format with specified objective coding, with specified rules and procedures.

We also have proactively taken the step, which I freely admit works to our advantage as well, to then provide a plaintiffs-only Web site, whereupon, at no cost, the same type of information for confidential and trade secret documents can be made available to litigants.

If I were in the situation where in each case, each of the 2,000 cases that we have at any given point, more or less, we had to run around and satisfy a request--this one would like TIFF, this one would like the metadata, this one would like

whatever--we could not function.

So we think that whether you tell us what the format should be, which has the danger of cementing you in to the lack of flexibility for the future, or it is further clarified, right, that the format is something that is either as we produce it or have it in the regular course of business for production, or something that is agreed upon in advance in some logical fashion, right? We don't share that skepticism, in sum.

JUDGE ROSENTHAL: Thank you.

MS. VARNER: Mr. Murillo?

MR. MURILLO: Yes, ma'am?

MS. VARNER: You state in your written comments that you don't believe that the burden analysis under Rule 26(b)(2) is sufficient to protect litigants in electronic discovery. Would you elaborate on why that is so?

MR. MURILLO: Could you give me a page?

MS. VARNER: Yes. It's on page 2. It's your first bullet on page 2. "It is insufficient to rely on a burden analysis under Rule 26(b)(2)."

MR. MURILLO: Right. Really, that goes to the need for clear rules. We think that there needs to be a recognition that the way that electronic data exists is not necessarily the way that the rules contemplated the burden analysis. And I think given the massive nature of the data and the options available to litigants in asking or producing the data calls for the need to have guidance.

I need guidance in advance as to what about inaccessibility? What about back-up tapes? What about data sources that are recycled not even in a back-up tape scenario, but every day? We have accounts payable systems that every day turn themselves over. So we think that the concept of having specific coverage for the types of electronic records that exist in America today is a good concept.

And I do not think that it is a situation where technology will make these rules irrelevant in some future period. I think we have to face the fact that there are a myriad of different types of

information that could be available, only an infinitesimal portion of which are really what you would like us to discover.

JUDGE ROSENTHAL: Are there other questions?

MR. MURILLO: Professor Marcus?

JUDGE ROSENTHAL: Rick, I'm sorry.

PROFESSOR MARCUS: I think you said earlier that your 58 lawyers and paralegals have a conception of what is and is not accessible, and you've just mentioned clear rules. Do you think the current proposal on 26(b)(2), to amend it, will provide a clear rule? And related to that, what is the understanding of your 58 people on what is and is not accessible?

MR. MURILLO: Well, that's a good question. What we try to anchor our understanding is superior knowledge of the business. That is one of the reasons that we chose to take most of this work in-house from outside counsel. And I hasten to add that behind the 58 people that work for me, there are hundreds of outside counsel, many of whom are represented in rooms like this across the country,

that also work for us and that provide support on these issues.

But the point is that we believe--the theory of our case, if you will, is that the better you understand the business that you are supporting, the records that they are creating, the documents that they are generating and how they treat these things, the better you can support both collection efforts and really substantive litigation. And therefore, we try to understand what the business uses to run the business every day, and that is what I consider the available information to us.

I use the language of inaccessible/accessible because it's the language of the rule. And if I had my druthers, the more you can do, whether it's in the notes or otherwise, to clarify that inaccessible/accessible should be judged against the concept of what does the business use in the regular course of its business each day, right, the happier I would be.

Again, because whichever way you go, I need the clarity so that I can do this with some concept of

sustainability.

PROFESSOR MARCUS: Okay. Can I ask one related question?

JUDGE ROSENTHAL: Yes, please.

PROFESSOR MARCUS: When you have decided how much to search to respond to discovery, how do you go about acquainting the other side with this familiarity of the details of your business so that it understands why you haven't looked in other places?

MR. MURILLO: Assuming they have not been on Google, found our site, and done it on their own, based on the massive amount of information that exists about every conceivable detail of our business in the public domain at this point, I would say that we try to be as clear as we can in our answers and objections to written discovery in advance or at pretrial conference or at Rule 26 conferences so that people understand what is going on.

And clearly, if they have follow-up questions after they've digested the typically massive amount

of information made available to them, if they have a particular question about a document, that "why don't I see the response to this letter" or "is there anything that tells me when this particular presentation was created," we'll take those requests under advisement. And if it's available and not burdensome, we will comply with that request.

But the key point I'm making is that there is not lot left to wonder about how our company operates. And therefore, there is so much information out there that we rarely face the situation that is contemplated with these sort of, you know, I'll call them "crime scene investigation, forensic-type" questions about metadata and the like.

JUDGE SCHEINDLIN: You just used the phrase "if it's available and not burdensome," we'll give it to them. But that wouldn't have anything to do with whether you access it for business regularly. In other words, what does that have to do with producing relevant information that the other side

is entitled to in litigation? So, as long as it's available and not burdensome, you just said, "I'll give it," which you didn't tie to business use.

MR. MURILLO: Yes, Your Honor, that's a good question. And I think that one of the things that I am concerned with, but I think has been adequately covered in other comments, is I am not an IT expert by any stretch of the imagination. But what little I know is that a little information is dangerous.

And there is a big cry between the famous back-up tapes in the famous vault in the famous bowels of some warehouse, right, and lots of other partial, perhaps inconclusive, perhaps sometimes used, perhaps sometimes not used information that is available in our data systems.

So, in other words, if I were, in fact, in an employment case, and there are a series of very specific questions with respect to one employee, right? There are things that we might be able to do to dig into the bowels of the hard drives of employment records and the like, right, that I'm

happy to consider.

My problem is I cannot do that, right, and not bankrupt the company for 2,000 smoking and health cases just because plaintiffs are trying to get some advantage over me in the discovery process.

JUDGE ROSENTHAL: Thank you very much.

MR. MURILLO: Thank you. Yes?

MR. GIRARD: As I read your comments, you're focused on the results of a national standard. In terms of doing your job, is there anything in the accessibility/inaccessibility proposal that enhances things from your perspective?

MR. MURILLO: I think it is certainly a huge step in the right direction. As I mentioned to Professor Marcus, the closer we can get to clarity on the issue of what is accessible, right, and I've seen proposals for different comments that could go in the notes. Again, from my perspective, and I think the Sedona Principles lay it out very nicely, it is things that are used in the regular course of business, accessed in the regular course of business. That, to me, needs to be at least the

starting point.

JUDGE ROSENTHAL: Thank you, sir.

Mr. Svetcov and Mr. Rosen?

MR. SVETCOV: Good morning, Judge Rosenthal and members of the committee. Thank you for having us.

My name is Sandy Svetcov. I'm a partner at the Lerach Coughlin firm in San Francisco. With me is Henry Rosen, one of my partners who is in the San Diego office of the firm.

I'm an appellate lawyer. He's a trial lawyer. And I've tried carefully to stay away from these issues. I have my hands full on the FARA Committee with unpublished opinions. But my firm asked me to help assemble the letters that we've submitted. And so, if you kind of look at us as a restaurant, I'm the maitre 'd, and he's the chef de cuisine.

I have just a couple of themes that I'd like to talk about, and then I'm going to turn it over to Henry because he really knows this stuff and deals with it daily.

You know, while you're having these hearings and thinking about these rules, there are federal

district judges in 95 districts who are solving these problems under the existing rules. I've heard testimony today about a rule called not reasonably accessible. The word "reasonably" in there--I'm an appellate lawyer--is just another word for "burden." And burden is already in the rules.

What I'm hearing about the technology and, God knows, I know I'm an anachronism. I've been doing this for 40 years, and I'll try to struggle along for a few more. I write my briefs out in pencil to start with. Then my secretary takes over with the word processor.

But the rules cover this today. And when you put the word "not reasonably accessible" in this, "reasonably" is not going to add clarity, it's going to add flexibility. And you already have flexibility in burden. So why are you doing this? If this committee folded its tent and went away, district courts are going to be able to do their work.

JUDGE ROSENTHAL: Is the question whether we

are able to do our work or whether it can be done better?

MR. SVETCOV: Well, that's a real question. And the technology, I think, will tell you that maybe--maybe the technology will outstrip the proposals that you already have in place. And that's a real question because, apparently, the issue was accessibility at one point.

Two years ago, the question was--it's no longer a question of accessibility. The stuff is accessible. It's just how expensive and difficult it is to get at. That's one theme.

Second theme is the magistrates filed papers three or four days ago. I read their papers. They're the people who are doing this, and they're not supporting this. So that raises a really big red flag for you. Why are you doing this if the people in the trenches are not doing this?

Third, on the Appellate Rules Committee, the rules are--we set up procedures which are party neutral. I'm listening to testimony where plaintiff's lawyers come in and say "no" and

defense lawyers say "great" and the companies say it's great. There is something wrong there. You need to step back and make sure these are really party neutral because what I'm hearing is they're not party neutral. Somebody wants these very badly.

And I think, having been a corporate defense lawyer for 10 years in a prior life, I know why they want it. They want words like "not reasonably accessible" as tools for litigation. And is that what you want--more battles than you already have in this area? That's crazy.

I read an article in the Federal Bar Association last month. It's called "Why I Hate Discovery" by an academic who used to be a corporate defense lawyer. And he's proposing the worst possible idea. He wants a Rule 23(f) discretionary appeal for discovery issues. Now that is the craziest proposal I've ever heard of.

JUDGE ROSENTHAL: That would be fun for the Appellate Rules Committee to consider.

MR. SVETCOV: Well, it's actually going to be

in this--because 23(f) is a civil rule, God bless you, you're going to have that one, too.

JUDGE ROSENTHAL: You mean 26(f). 23(f), you may remember, that was a couple of years ago.

MR. SVETCOV: It's the class--I know. But the 23(f) discretionary appeals in class actions is a small slice of federal cases compared to discovery in every federal civil case.

So, and here's the one that really floors me. In Rule 26(b)(2), if the responding party says not reasonably accessible--he just has to say it, not reasonably accessible--now the requesting party has to file a motion. The problem with that motion is what do I say in that motion? Is it--I guess it's a motion to please help me, Your Honor. Because there is no other standard in the rule for what that motion is supposed to say.

JUDGE ROSENTHAL: Is it your understanding that under current practice, the responding party would simply file an objection, saying that this is too costly, too burdensome to produce? We're not going to do it now, or we're not going to do it. And

then the requesting party files a response, any motion to compel, saying you need to do it and then the--

MR. SVETCOV: Or the respondent would file a motion for protective order, carrying an initial burden. The thing is flipped--it's flipped in reverse, and it doesn't make sense to do it that way.

JUDGE ROSENTHAL: Mr. Svetcov, is it your concern that the burden is shift and the party who files the first motion is changed, or is your concern that it is addressed in the rules in the first place?

MR. SVETCOV: Well, I think it's already addressed in the rules. Under the current rules, if the proposed, the requested discovery is burdensome, the responding party has the ability to make a motion for protective order, and the court has the ability to resolve the question.

JUDGE ROSENTHAL: So is your concern that it's already in the rules, and you don't like shifting the burden?

MR. SVETCOV: I'm not sure there's a burden shift. I'm concerned with a motion that has no content. And you know, as an appellate lawyer, I'm not without experience in the trial courts. I've tried jury trials. I've tried court trials. And more importantly, as an appellate lawyer, I've watched over this system for 40 years.

I was a state and federal prosecutor for 25 years. I was a corporate defense lawyer. I worked in the state legislature in Sacramento. I was a lawyer in the Navy. I love our legal system. And I don't like it tinkered with unnecessarily, and that's what I'm seeing here.

And I think I've said enough. I've used my time. Unless you have questions, I think Mr. Rosen--

JUDGE HAGY: What is it about "identifies" that you don't understand? You can't just say it's not reasonably accessible. It says you have to identify that which is not reasonably accessible. And rather than what you've got now is the defendant responds, "The request is unduly

burdensome. However, I'll provide the following." But you don't know what he's not providing.

This requires him to tell you what it is that he's not providing, to get him to get it, and put context to a motion.

MR. SVETCOV: Well, I take it that the same obligation exists today to say why it is unduly burdensome. And district judges would, it seems to me, want to know the answer to that question in a motion for a protective order.

JUDGE HAGY: It's really brought about by a motion to compel. Generally, the burden is on not the party who is defending, but the party who wants the additional information. But I think you've got--we'll go to your litigating partner.

MR. SVETCOV: That's a great idea.

MR. ROSEN: Thanks for letting us testify today. I wanted to really emphasize the fact that we are in favor of party neutral rules, and we believe that the proposed amendments to 26(f), which require the meet and confer on the subject of the computer e-discovery, is really the way to go.

And our proposal would be that that would be beefed up.

When I heard that the Federal Rules Committee was addressing these rules, these proposed changes, I was very excited when I heard the term "e-discovery," because it's something that I've dealt with for the whole 14 years that I've been in this practice.

I've been in this practice in a very exciting time to see the transition of document productions from paper productions to this electronic. And I was hoping that the proposed rules would address what I see is the biggest problem with e-discovery. And it's exactly that, that there is not adequate meet and confer on the front end of the cases.

For that reason, we have suggested that this meeting about e-discovery should occur within 21 days of filing and not within 21 days of the scheduling conference. The reason for that suggestion is simple. In securities cases, in my practice area, and in a ton of other federal cases, the scheduling conference doesn't happen early

enough.

I have had a lot of case in the District of Colorado, for example, and in that case, you don't have discovery until the case is deemed at issue. And that doesn't occur until an answer has been filed.

JUDGE ROSENTHAL: Are you suggesting that as a requirement for every case? I mean, securities cases in which you sue large entities who have in-house counsel and staffs of outside lawyers at the ready may lend themselves to being able to have a meaningful meet and confer within 21 days after getting the complaint. But there are many cases in which that is simply not the case.

MR. ROSEN: Well, I think that the problems that I've seen every day and the problems that were identified by Judge Scheindlin would have been remedied had there been an initial meeting to determine simply is there an e-discovery issue in this case?

If there is no e-discovery issue in the case, then I think that that requirement could be--it

could be written in such a way that you don't have to do it that early.

JUDGE ROSENTHAL: But you're suggesting that in every single case, within 21 days after the complaint is filed, there has to be this exchange of information?

MR. ROSEN: When I think that--in order for there to be a litigation hold, which really is effective, I think--and that both sides understand what's going on. Because if you have a simple, small case where there is only a couple of back-up tapes at issue, then that's one thing. But if you do have a very, very large company, then you really do have to give a lot of thought to how the litigation hold is going to occur. Otherwise, by the time the case is deemed at issue, you are going to lose a lot of data.

And I think that the rules can be written with enough flexibility so that that meet and confer can occur, and the depth of it can depend on what kind of case it is.

MR. GIRARD: Do you currently have information

about the other side's electronic storage capabilities before you propound your initial discovery request at this point?

MR. ROSEN: We have no information. In every one of my cases, I send in a very early letter, asking the other side to identify what steps they are taking to preserve the electronic record. I have refined that letter with the help of the forensic computer experts that we've hired. And I am flatly given the same response every time, and that is, "We are complying with our obligations to preserve the record."

So we will not find out for a year and a half that certain portions--and I can give you five different examples, if you like, of what happens when you don't have that early meet and confer, when you don't have a meeting of the minds as to what is being preserved.

One case, there will be a decision by the defense lawyers to--the responding party lawyers to preserve electronic documents from headquarters, but they won't preserve them from the regional

sites. They will then argue, well, this was a reasonable step because the speakers, the decision-makers in the case were all at headquarters. But with complex accounting frauds, what is happening on the ground at regional levels can be very important.

Another case, a company goes into bankruptcy before the case is deemed at issue. And in that case, there is no e-mail server. The e-mails are pushed to every individual's hard drive, and by the time the case was at issue, the hard drives have all been thrown out. And so, there will be a four-year period in the case where there is no e-mail at all.

And I don't think this suggestion applies only to my practice. I think that in tons and tons of complex cases, there would be--justice would be served, the record would be greatly enhanced by this early meet and confer. For that reason, we are very excited to see the proposed changes to Rule--to the early meet and confer, although we do think those need to be beefed up.

By the same time, we are very, very concerned about the proposed discussion regarding reasonably accessible, and it's really very simple. I'm surprised I haven't heard more discussion of it today. The reason is, is that the notes make the suggestion that what is reasonably accessible isn't what you all have been talking about, and that is what is the cost of that information? But it has to do with whether or not it's active data. It has to do with whether it's on a back-up tape that's on a legacy system or not.

But I can tell you, in case after case, the best information that's relevant in that case is going to be--could be inactive data. I think there's a reason why--

JUDGE ROSENTHAL: Could be in, space, active data or--

MR. ROSEN: Could be inactive data, and I'll give you an example.

MR. SVETCOV: Inactive. One word, no space.

JUDGE ROSENTHAL: Thank you.

MR. ROSEN: Inactive data. And I think the

reason is there's a lot of--for example, again, to go back to accounting fraud, it's a huge part of our practice. Those are backward-looking by nature. A company comes forward and restates three years of financials. Well, the stuff that was dealt with three years ago is not active anymore, and it's not on the active people's files. And so, to get that data, you have to go to back-up tapes.

And I think that it really has to be emphasized that if the committee is being told still today, in 2005, that it's expensive and difficult to restore back-up tapes, they are being given that information by forensic people who either are not experienced in this area or just like when you go out to get bids on a house, paint job, or a remodel, you're going to get a wide variety of prices.

The question came up earlier about whether you could get a group of forensic experts to agree on the definition of "reasonably accessible." And if that definition is dictated by cost, the answer is absolutely not. Because still, to this day, you're

going to get a disparity in bids in restoring data from a back-up tape, which is quite shocking. And the reality is I consulted with a couple of firms that I use a lot now, and partially because over the years their prices have dropped drastically. And they say it's shocking. If you had asked this question five, six years ago, restoring back-up tape is cost 10, 100 times greater than it is today.

JUDGE SCHEINDLIN: Mr. Rosen, a question was asked earlier of one of the lawyers who testified, how often in a case do you really have to go to this back-up material or to what the notes seem to imply is inaccessible? What percentage of your cases do you really find data there that you need and use in the case?

MR. ROSEN: Well, frequently. All the time. Now there--

JUDGE SCHEINDLIN: All the time you go to restored information? Legacy or back-up tape type information, inactive data?

MR. ROSEN: Well, I think the issue of whether

something is on the legacy system or not is a separate question.

JUDGE ROSENTHAL: Well, let's start with that.

JUDGE SCHEINDLIN: Well, but legacy has to be restored in some way because it's outdated. You've got to build again.

MR. ROSEN: That's right. And our forensic experts, in order to get our work and to get the work of the producing parties, who, frankly, are bigger clients than we are, they have had to develop the systems to address the old legacy systems.

JUDGE ROSENTHAL: I think the question is how--in what percentage of your cases, how often--

JUDGE SCHEINDLIN: Restate it.

JUDGE ROSENTHAL: --do you go to information that has to be restored before it can be retrieved, examined, and produced?

MR. ROSEN: In cases where if there's a class period that's four years old, in every single one. In every single one.

JUDGE SCHEINDLIN: Overall in your practice,

what? More than 50 percent of the time, you're going--

MR. ROSEN: If 60 percent of our cases are accounting frauds, I would say that it's at least in 60 percent of the cases.

JUDGE ROSENTHAL: So it varies by subject area. Is that fair?

MR. ROSEN: It varies by subject area.

JUDGE SCHEINDLIN: And how about cost shifting? When you've had to put the adversary to the expense of that kind of retrieval, have there been requests for cost shifting? And if so, how have courts handled that?

MR. ROSEN: Well, one of the reasons why we think the court rules are dealing just fine with this system is that, of course, we have to engage in very lengthy meet and confers on the subject of who bears the cost and on the subject of whose burden it is.

And I can tell you the forensic firms are really coming along in this area, and a lot of times now we are hiring the same firms. We are

agreeing to the same firms in order to make it much cheaper. And it really, really does depend on the facts and circumstances of the case. If you've got a case where it's merely--

JUDGE SCHEINDLIN: Does that mean you're agreeing to cost shifting? Is that what you're saying?

MR. ROSEN: No.

JUDGE SCHEINDLIN: No?

MR. ROSEN: What I'm saying is that whether costs are shifted depends on the circumstances of the case. If you've got a--

JUDGE SCHEINDLIN: How often does that occur, and does it occur because courts order it or because you agree to pay some of the cost? How does this work?

MR. ROSEN: I would say that in--we are winning the fight primarily on the issue of if it goes to the court on who has to pay for shifting. But we are willing to share the costs on a very, very frequent basis. The issue of whether the costs get shifted will depend on whether it's simply

restoring something from a back-up tape or, in the more extreme situation, where you have to go to hard drives and be more of like a criminal investigator to find deleted e-mails. That, I would note, is more of the exception than the rule. That is not occurring on a frequent basis, in my experience, actually searching people's--

JUDGE ROSENTHAL: Shira, we have one other person who wants to ask a question. I'm sorry.

MR. ROSEN: Sorry. Someone else has a question?

JUDGE ROSENTHAL: Judge Walker?

JUDGE WALKER: I do. I hear you saying that the outer limits are probably not cost or burden because that's changing. I hear you saying even that business necessity is not the outer limit because what's useful for litigation may long ago have not been useful for the business.

So, and when we've heard--you probably were here when we were told that there needs to be some sort of definition of an outer limit. What is it?

MR. ROSEN: Well, I think that the rules

provide for--the unduly burdensome, I think, is the proper limit. And I think that it is--

JUDGE WALKER: That doesn't go to retention, though. If it's not available, then it's never going to be produced. It can't be produced.

MR. ROSEN: Well, I think the issue of retention is a very interesting subject. Obviously, the courts can only pass rules that apply to cases once they've been filed. You guys are not pretending to propose rules which are going to dictate retention policies.

But I think that the issue of a reasonable litigation hold that occurs once a case has been filed is something that has to be evaluated on a case-by-case basis. And so, the rules must be flexible enough to evaluate that.

JUDGE WALKER: So I should hear your comments speaking to the litigation hold concept, not to the folks who are wondering how to run their business on a day-to-day basis?

MR. ROSEN: Right. I don't think that--I mean, it would be great for me to be able to say I think

they should retain their records for 10 years. We're not going to dictate policy or pretend to be able to influence policy on how long people should hold documents.

MR. HIRT: Mr. Rosen?

MR. ROSEN: Yes?

MR. HIRT: Can I ask you a question? Just going back to something you said earlier, do you read the language in the note about legacy systems and back-up tapes as suggesting that they would be automatically deemed reasonably inaccessible, even if it weren't costly to retrieve the data?

MR. ROSEN: That's the way I read it because of the comments in conjunction with the idea of active versus inactive data.

MR. HIRT: Because I do think--at least the way I read it, and I've actually heard other people say the same thing you said, so maybe it's ambiguous. But I read the first paragraph of the committee note on (b)(2) as being very careful to say that some information stored in back-up tapes or disaster recovery systems or legacy data may be

expensive and costly to retrieve. But not to suggest as a categorical matter that all such information was automatically inaccessible.

MR. ROSEN: And I saw that language in the note as well. But my more primary concern was this notion of active versus inactive. I think that the gentleman from Philip Morris, who suggested that we really need clarity and it has to be limited to stuff we're using frequently--I think there's a reason why that request was made.

And I think that's--to me, that's one of the scarier features of this rule and why I believe people perceive it as really narrowing the scope of discovery. And I think that if you read that--the other thing I think that is somewhat frightening is reading that in conjunction with the safe harbor provision. And that is if reasonably accessible means only active data and you only search for active data in response, but during the course of normal business destruction, inactive data is destroyed, then you're protected by the safe harbor.

And I think the rules need to be modified or rewritten to address that concern. I think I might be out of time, but I'll take more questions.

JUDGE ROSENTHAL: I think you are. Mr. Keisler, last question.

JUDGE KEISLER: It's not sufficient, to your mind, that the material on active data says specifically the fact that the party does not routinely access the information does not necessarily mean that access requires substantial effort or cost? That doesn't deliver all that you think is necessary to say on that point?

MR. ROSEN: No, I don't. I really don't. Because I think over and over again that the magistrates and 10 other people's responses have all picked up on that point. And that is the fear that people are going to use the active versus inactive as a dividing line.

JUDGE ROSENTHAL: Thank you very much, both of you.

MR. ROSEN: Thank you.

JUDGE ROSENTHAL: We appreciate your time.

Darnley Stewart, please? Ms. Stewart. And no pressure, Ms. Stewart, but we're going to take a break after your remarks.

[Laughter.]

MS. STEWART: I want to let Judge Rosenthal and all of you know that I'm afraid I've been on the road. I didn't have a chance to get my remarks to you beforehand. But I spoke to someone, and I will be getting them to you in the next couple of days. Okay?

JUDGE ROSENTHAL: Thank you.

MS. STEWART: My name is Darnley Stewart. I'm a partner at a firm in New York called Bernstein, Litowitz, Berger & Grossman. We're a Lerach Coughlin "lite," if you will. We do all class action work, primarily in securities litigation.

I come to this issue, though, with two different perspectives. As a partner in a firm with pretty substantial resources, even though we're not that large, and a firm that mostly does securities litigation, but I primarily do discrimination work on behalf of plaintiffs. And I

am the vice president of the New York affiliate of the National Employment Lawyers Association, which is the--pretty much the only organization in the country that is only comprised of people who primarily do individual employment and some class action work on behalf of individual employees.

I want to answer something that both Judge Rosenthal and Judge Scheindlin asked today as a way to get into my remarks. Both of you asked whether--and I think when you were talking to Mr. Smith from ATLA, whether it was his impression that the majority of his constituency have to access inaccessible data at some point, and you asked this also of the people from the Lerach law firm.

And certainly, in our securities practice, that is true. We--in almost every single one of our securities cases, we are seeking and we are getting what would be called inaccessible data. Because you also have to remember a lot of these companies have gone out of business. Try getting active data from Arthur Andersen. So we are doing that.

On behalf of the people in NELA who are--the

vast majority of whom are solo practitioners or small firm practitioners around the country, I don't think they are. And as we move forward in this new digital world, it causes me concern, and I think, thanks to all of your hard work, we have an opportunity here to maybe do what we've always thought electronic discovery would do, which is to level the playing field. And in that regard, I have a couple of ideas and some thoughts on the proposed rules.

Before I get, though, because it came up this morning, I do want to make a couple of comments about the claw back provision because I didn't intend to address it today, but there were a couple of things I wanted to raise that came up in my mind during Mr. Smith's comments.

The remark was made that often there is an agreement between the parties, usually when you're negotiating a confidentiality order, to--that there will, if there is an inadvertent production of a privileged document, that there will be a claw back provision. It will be given back.

Since I've been a plaintiff's lawyer, which is longer now than I was a defendant's lawyer, I've never agreed to that provision. But I had a senior partner at Covington & Burling recently tell me that it is the first time that any plaintiff's lawyer has ever said that to him. And I want to explain to you why that is the case and why I'm not in favor of the provision.

There is a well-developed body of law on this issue. And it has provisions in it, and it's consistent among various jurisdictions, I believe. I'm only familiar with two or three because it's come up in those different jurisdictions, and certainly 2nd and 3rd Circuit are consistent with one another.

But one of the parts of that test is that the court will look at whether there is a public interest to be served by the waiver of the privilege with respect to that document, and that is why I always will argue that I will not agree to that provision in an agreement of confidentiality order because I like the common law rule, and I

think it serves--it's much more useful. So I just wanted to say that's why I never agree to that provision. That's why I would oppose this.

And also because at times when I have gotten inadvertently produced documents, they have been similarly shocking to the one that Mr. Smith described this morning. They have revealed that the defendants are not being truthful with the court, and they often reveal that there has been over redaction.

So I've found them to have been very useful documents, and they have helped to resolve cases. And I have gotten the crime fraud exception on one document like that. So I just wanted to say that.

We were talking about I think someone used the word today "asymmetrical." And my concern with the small solo practitioners, the small firm practitioners around the country now, I think they're already behind the eight ball. And I fear, as we go forward, that they're going to be even more so. I can exhort them to read the Zubulake scriptures. I can exhort them at conferences that

they can barely afford to pay $350 to attend that they need to get savvy on these rules.

But I fear that it is an asymmetrical situation, and there are ways that we can help out. I think the first way is in the proposed changes to Rule 16 and 26(f). I think I agree with my colleagues from the Lerach law firm. These are very important and can be very helpful to the smaller practitioners who are in an asymmetrical situation.

However, I would advocate that they go even further and incorporate some of the provisions that I think have worked out very well in, say, the District of New Jersey. So I would include in the proposed language of the rules that there also be in the 26(f) planning beyond what form the document, the data shall be produced in, what measures have been taken and will be taken to preserve discoverable data from alteration, and the anticipated scope, cost, and time required for disclosure or production of data that the parties claim cannot be produced without undue burden and

expense.

We have to get into these conversations early. If we wait for the request and then the identification, and then we have to bring our motion, it's going to be too late. And it's very important, and it's important for, again, the solo practitioners to see this in the rule and know that this is the kind of information they have to get into. So it actually will serve a very useful purpose.

I'm also in favor of the duty to investigate prior to meeting. I think judges probably get very frustrated with the parties when it's clear that they've just sort of had a conversation on the phone. And I think, again, we have an opportunity here to really change that.

And if there's a duty to investigate and actually look at what your company's IT systems are and come to the yearly conference with specific information about your systems, and even just an overview of your systems and what databases are involved, it will certainly help the person in the

asymmetrical situation to know what is there and what they can ask for.

And for situations where it's not asymmetrical, and I really don't think I'm in a generally--our firm is in an asymmetrical situation because we're good, and we have resources. But even for us, it will save a lot of time. It will help us focus our discovery requests. It will cut down on the number of 30(b)(6) depositions.

Now we are taking 30(b)(6) depositions at the beginning of the case just to find out about questions of burden and scope and what is there. If that is already provided to me, I don't have to have those depositions. So it will save everybody a lot of time and money.

So, at least, the parties should come to the initial planning conference with an overview of the various databases, file directories, and maybe file labels. New Jersey has enacted these types of provisions, and my understanding is they have been very successful. I know at least Judge Hughes has said that it's really caused the parties to talk

early and often. So we would be in favor of going even further.

I want to say just a quick word in this regard about special masters. With the enactment of the changes to Rule 53 in 2003--and I believe Judge Scheindlin is a former head of that subcommittee--they really can take on many more different tasks now and at different stages of the litigation. And again, I'm going to this leveling of the playing field.

And I think if there is something in the advisory committee notes that the judges can--that encourages the judges and maybe the parties to seek the assignment of a special master, even to talk at that early phase about what--if we're talking about burden and we're talking about what's accessible, what's not accessible, it would be tremendously helpful to have a special master with particular knowledge about technology there before it has to go to the judge, who may or may not--will certainly not have the knowledge base of the judges on this committee, and it would be very, very helpful.

And I think I would encourage the advisory committee to make that available or at least encourage judges and parties in the advisory notes to maybe assign a special master to help with these particular issues.

I want to make a quick comment about the changes to Rule 26(b). It's clear what we're talking about is undue burden and expense. And certainly, as plaintiff's litigators, we get the claim all the time. And I understand there's been comments, well, you're dealing with undue burden and expense now, what difference does that make if they're saying it's unduly burdensome or it's not reasonably accessible?

And maybe you have a point, but then why do we need to go there? It gives them yet another kind of technical term that they will apply in response to every single request for electronically available information, and we know that they will because they always make the claim of undue burden the first instance now.

I have a series of credit discrimination cases

under the Equal Credit Opportunity Act. We've sued 10 different financing companies and banks, and in each of those cases, we--it's a disparate impact case, and we have sought transaction data. Ten times there has been a claim of undue burden. They cannot--they've even said, "If we are asked to produce nationwide data like this, we cannot do it."

Well, in every single case, they have been able to produce the data. It's been easily analyzed and, of course, has demonstrated disparate impact. And that's another concern I have. We have a phrase "reasonably accessible," which is susceptible to a number of different interpretations. And yet, in the notes, there's no real definition, and the only inference that is given is whether it can be used in the ordinary course of business.

And let me give you an example from one of our credit discrimination cases. We requested all transaction data--and it was about discrimination in car financing terms. We had asked for all

transaction data going back a long period of time. Well, after 90 days in the car business, application data, when you go to the dealership, it falls off the system. More than that, we learned that after a certain point of time, this one company, they just took--they put them onto cartridges, and they put them off in storage somewhere.

Well, those ones that went back to the early '90s were certainly not used anymore in the ordinary course of business. They were never used. And they told us, "It's inaccessible. They're on these old cartridges. We're not going to be able to give it to you." In fact, we got it from them. They were fairly easily converted. It was not expensive. So there wasn't undue burden or expense, but they were inaccessible. And they were not used in the ordinary course of business.

So I think if we're going to go down this road, it's just--it's very dangerous to have the only inferent be ordinary course of business. And where we already have undue burden and expense, which,

again, has a well-developed body of law, I don't think--

JUDGE SCHEINDLIN: When you've experienced this restoration of older data, has anybody asked for cost shifting, in your experience?

MS. STEWART: You know what? We haven't. There hasn't been that issue because, honestly, Judge Scheindlin, it hasn't been that expensive. In one case, for our expert, we had to buy a special computer so he could convert the data from these old cartridges.

And so, I guess, would a little solo practitioner be able to buy a computer for their expert? No, they couldn't even afford an expert in the first instance. So, but it really was not that expensive.

JUDGE LEVI: But you paid for it.

JUDGE HAGY: But you paid for it.

MS. STEWART: We paid for it.

JUDGE HAGY: So it is cost shifting. You just accepted it.

MS. STEWART: Well, I guess--yes.

JUDGE ROSENTHAL: But it wasn't very much cost.

MS. STEWART: That's right. That makes it easy, right? You know, we would adhere to the cost shifting test that's in Zubulake I. I mean, I think that that's a very fair test, and that's the one that if cost shifting was going to be considered, that's what we would--that's what we would follow.

JUDGE LEVI: Could I ask one?

JUDGE ROSENTHAL: Sure.

JUDGE LEVI: Then do you seek that cost at the end of the case if you prevail?

MS. STEWART: Well, it's part of our--you know, you file a petition with the court and an application for fees and expenses. So, yes, the expenses, that would be expert expenses.

JUDGE LEVI: That would be part of your expenses. What if you lost the case, and you hadn't paid? The other side had paid. Would you--

MS. STEWART: God forbid. If we lost the case--

JUDGE LEVI: Let's say, you know, instead of

finding disparate impact, let's say the company was put to some expense and demonstrated to a jury that it was not disparate impact. So it was not upheld, and they sought costs?

MS. STEWART: So what's your question? I'm sorry.

JUDGE LEVI: Would that be fair, and is that what happens?

MS. STEWART: If they sought cost from me? It's never happened, so--

JUDGE LEVI: You always win?

MS. STEWART: Honestly?

[Laughter.]

MS. STEWART: Or it's worked out, more often than not.

JUDGE KRAVITZ: The court would be party neutral.

JUDGE ROSENTHAL: And if it's worked out, that is, if the case settles, do these costs just simply rest on the party who bore them during the case?

MS. STEWART: Yes. Yes. And if--when we make our application to the court for our fees and

expenses, those would be the reasonable--the court would have those in front of the court.

I want to just say one more thing because I know everyone--I agree with Mr. Svetcov that for us to make an empty motion, it's nonsensical. And there is very--there's no reason not to follow the language, the language from--you can kind of borrow from the language--if we're going to go down this road, we can borrow from the language on privilege that the rule uses.

"When a party withholds electronically stored information otherwise discoverable under these rules by claiming that such production would cause undue burden/expense, the party shall make the claim expressly must show that production of the information will cause undue burden/expense." I think that makes a lot more sense. It puts the burden on them.

I would also add in the advisory notes, the advisory notes really need to make clear that the nonproducing party will provide very specific information as to what is being withheld and that

the requesting party has the ability to test or sample the electronically stored information pursuant to Rule 34.

JUDGE ROSENTHAL: Could I ask you a question about the first thing you said?

MS. STEWART: Yes.

JUDGE ROSENTHAL: If a party, indeed, had the--if a responding party had the burden of showing that it could not provide the information without undue burden and expense--

MS. STEWART: Incurring undue burden and expense, yes.

JUDGE ROSENTHAL: --then would you have a problem if the burden would then shift to the requesting party to show that even though there would be significant burden and cost, good cause nonetheless can be shown for the production?

MS. STEWART: I think once they had made--yes, once they had made their showing and we had an ability to test the data and to probe their showing, and if they were--still won that at the end of the day, yes.

Again, it comes to the balancing test, the proportionality test of the rules and sort of the balancing test that Judge Scheindlin talks about in Zubulake I. Right, then we would have to come forward and say come up with--it would probably be worked out at that point whether we would do some kind of cost shifting. But we would need to show for good cause.

JUDGE ROSENTHAL: All right. Frank?

MR. CICERO: Just one quick question. I passed on asking this of Mr. Svetcov, but since you endorsed his comments, I'll ask it of you. I'm not clear on why a motion would be an empty motion. Do you believe that simply said a motion to compel the party to show why the information is not reasonably accessible, would that get the attention of the court sufficiently?

MS. STEWART: Yes. But what's the point of that? That's what I don't understand. Usually, when we make a motion to compel, we have affidavits. I mean, it's a meaningful motion. We know exactly what we're talking about.

Here, they've just said one line, which is that this is not reasonably accessible. I don't know anything about the data. I have no way to make any kind of showing at all that I would normally make on my opening motion. So--

MR. CICERO: What I'm saying is wouldn't it be enough to get the attention of the court without you making a showing. So that the party would have to come in then and make the showing. If they didn't make--if they just said, well, it's not reasonably accessible, that's not a showing.

MS. STEWART: I agree. But that might not well happen. But I agree with Mr. Svetcov that it seems a wasted effort because I make a motion based on nothing except someone else's representation, and it doesn't seem like it's a meaningful use of anybody's time. Yes?

MR. GIRARD: Ms. Stewart, is there a point that, ultimately, in order to get it, you still have to show good cause so that the burden then flips back to the plaintiff after they respond to the motion?

MS. STEWART: No. I only need to show good cause if it's been deemed to be--it's going to cause undue burden or expense.

MR. GIRARD: Right. So the sequence is you file a motion because they've invoked inaccessibility.

MS. STEWART: Yes.

MR. GIRARD: Then they respond and make their showing. But before you get it, the way the proposal is written, you have to then show good cause, as I read it, so that you end up--it seems like there's another round of briefing. Her opening brief doesn't have to make that cause showing.

MS. STEWART: Right. Because I can't. I literally cannot. So I just think in the first--

JUDGE SCHEINDLIN: I think what the issue might be, that people are concerned about, is wouldn't you need some discovery possibly to contest the accessibility argument? In other words, if the other side says it's not reasonably accessible, we would say, "Well, before I could challenge that,

I'm going to need to know about your system."

MS. STEWART: Absolutely. And that's why I said the notes--

JUDGE SCHEINDLIN: So you move into a whole round of discovery on the accessibility question before we even pass step one.

MS. STEWART: Right.

JUDGE SCHEINDLIN: Right. That's an issue.

JUDGE ROSENTHAL: I think Mr. Bernick had the last question.

MR. BERNICK: Oh. Well, maybe it's just a review of what people have said so far. But I mean, technically, at least my experience in this has been that there is discovery because this is a complex area, and people tend to shoot in the dark on either side.

Ms. STEWART: Right.

MR. BERNICK: So as a practical matter with the rule commonplace is that the producing party takes the first step by providing the identification, which if it's taken seriously is a serious and informative process.

And to answer Professor Marcus's question, I presume that in that process, the defendant or producing party who knows their information the best would have to provide an identification and explore what is it they knew or what it is they didn't know about their own information.

MS. STEWART: Well you would hope that it would be--

MR. BERNICK: Inevitably, because they're going to be scrutinized by the court and tested in a motion practice process, most responding parties wouldn't want their credibility to be sacrificed immediately.

MS. STEWART: I've never found defendants have that much of a problem.

[Laughter.]

MR. BERNICK: My experience has been very different. When you're first before the court on the very initial matter before the case, you don't want to compromise your credibility. And this is a situation where because of the focus that's taking place in this area, it's a good opportunity to have

your credibility become compromised if you're not forthright with the court.

You have an identification process. There will then undoubtedly be requests for discovery. If there are ambiguities, 30(b)(6) depositions. A motion then can be filed with the benefit of both the identification and discovery, or the discovery can take place in connection with the motion. And what the rules really contemplate is to, in a sense, force the parties to hash out at the very beginning what is reasonably accessible, what's not reasonably accessible, so they can then get on with life.

Why--isn't that the way that discovery problems generally are resolved? And all that's really special here is that there's a recognition that electronic data has become a big problem. It's not a problem that anybody's created. It's the fact that technology has evolved. We're dealing with a massive amount of information that perhaps nobody really wants to have become incorporated in the litigation. I don't understand why it's such a

blind and useless process.

MS. STEWART: I guess, if that's what the rules contemplate, then my fear is that's not what they say. If they say that it has to be--that the nonproducing party just has to identify it's not reasonably accessible, and then we have to file our motion. And I guess if the rules really contemplate that they have to make a very specific showing with their reasonable--with their identification of the reasonable accessibility issue, then maybe we would have less of a problem with that aspect. But it definitely should not be the burden is on us to make our motion to compel.

JUDGE ROSENTHAL: One last question.

MS. STEWART: Okay.

MR. CICERO: Just one comment on that because I think that the--I think that the intent of that is you have to make a choice of who makes the first move. And the intent was, okay, the party that says I can't produce it has the obligation, you make the first move to make them prove it. And then you get into the process that Mr. Bernick

and--

MS. STEWART: Well, when I read the transcript from the first day of testimony in California, I saw that somebody said, well, isn't it always the case that the defendant just cries "undue burden," and then you have to come to court? And the truth of the matter, again, is 100 percent of the time when that objection is made, I say, "Okay, go ahead and make your motion for protective order, or I want to see the data by next Friday." And it's 50-50 whether I'm going to have to eventually go to court.

So maybe as a practical matter you're right. But we do have a rule, 26(c), that provides that if they're not going to produce, that they have to come forward and make a showing and file their motion. And I think that should be the same here.

JUDGE ROSENTHAL: Thank you, Ms. Stewart.

MS. STEWART: Okay. Thank you.

JUDGE ROSENTHAL: We'll take a 15-minute break, ladies and gentlemen.

[Recess.]

MR. REDGRAVE: --tried to submit to the committee is my view of what would be, I think, really minor additions or amendments to what the rules committee has promulgated here.

Overall, I think that this has been a very complex task that's been undertaken with a heroic amount of effort on behalf of the advisory committee, and I think that what you came out with was really something that parties have talked about in this room. You know, they wanted something that is a neutral, and I think that what the committee has done has been true to that standard.

Now are there rough edges that people seem to take issue with? Of course. There are rough edges, both for people that are traditionally thought of as defense bar or people traditionally thought of as plaintiff's bar.

But what I've tried to emphasize in my comments is the fact that whatever changes are made, there has to be a comprehensive look at these rules, not in the perspective of a traditional tort or traditional employment law, but how these rules

apply to everyone, everywhere. How they apply to individuals in the technology age, where so many people are going to have so many computing devices. How they apply to large corporations and complex litigation and everything in between.

So I want to make sure that when you see the totality of my comments, including a red line of the proposed rule and the committee note, please understand that I'm trying to be as helpful as I can. And in that regard, I don't think there's necessarily any magic language for some of these. So what I want to focus my comments on this morning are three particular aspects of the proposed rule changes--the privilege provision, just quickly, 26(b)(5), and then going on to the two-tier ,and then to the safe harbor.

COURT REPORTER: Could you re-introduce yourself for the record, please?

MR. REDGRAVE: Sure. Jonathan Redgrave.

And one final preface before I get there, I will note, although I haven't done as much work as this committee, I think I have read about 170 of

the comments in my spare time in the last several weeks. I've read the transcript from the San Francisco hearing. I've not had a chance to see the Dallas one.

With respect to the privilege provision, the claw back, I think only minor changes are necessary in that provision to accommodate a number of comments that have been raised. I think particularly I want to speak to the fact that I do not believe that this rule proposal transgresses the enabling act. I think it is a procedural proposal. To the extent there's any ambiguity in that, I believe that can be clarified in the committee note.

I think the substantive provision has been raised here this morning, and I addressed it in my comments, that perhaps the note should have a provision whereby the party that's being asked to sequester it can, instead of sequestering and returning to the producing party, be able to provide that to the court for a challenge. So if we had any of the instances that certain people

have referenced today, they think a gross abuse of justice or something like that, it's going to be going straight before the court.

And I think that's a good change, and I think it's something that will really stop anyone trying to abuse a provision like this. Again, it's procedural only. It's meant as a way to really give a best practice to all litigants. But it doesn't change the substantive effect. If there's a waiver, there's a waiver. In different jurisdictions, that's just going to be dealt with by the judges as it has been.

But this is a better practice. I think, Judge Rosenthal, you made a remark in response to a comment this morning, it's not just about if it's isn't broken, don't fix it. Can we make the rules better? And I think all of the testimony over the past couple of years really go to the fact that the rules can be made better to address situations dealing with electronic discovery.

JUDGE SCHEINDLIN: Can I ask one quick question on that one? When you get that request you're

supposed to destroy it, return it, or sequester it, is that something you can do after you've disseminated the thing electronically possibly to hundreds of people? What lengths do you have to go to to try to retrieve in order to return when you may have disseminated widely?

MR. REDGRAVE: Well, I think the truth is it's going to be a reasonableness standard for that like it is for so many things. That the party that was asked to give it back, when they're called to account with the court, they'll say, "Well, I notified the people that I sent it to of the fact that the request was made."

Obviously, to the extent they don't control those parties, they can't do anything else. And the reality is, that may play into a court's determination of a waiver of the privilege.

JUDGE SCHEINDLIN: But they have to notify everybody they can think of that they might have sent--

MR. REDGRAVE: That's correct. And they may be able to take other steps. Depending if it's their

consultant or their expert, there's greater levels of control. So it's not a perfect situation, but it does make the practice better.

With respect to the two-tier, I've made a number of comments with respect to the placement of the provisions within the rule. I think it's important that the clarification be made that even if data is accessible, of course, the proportionality standards of 26(b)(2)(i) through (iii) are applicable to that data. What we're talking about here is just special considerations of accessibility.

Now whether you place it where I've suggested towards the beginning of the rule or even if you took, I believe, the magistrates judges association comment that talked about perhaps making it as a subset consideration, I think the concept is what should be discussed. I think the committee is right in its recommendation that a two-tier system would improve the practice.

Now I say that, recognizing that there are going to be rough edges, and I think the parties

that have testified at prior hearings and this morning note that there are situations where it could be hard to apply. That's true with any rule. But does it overall make the practice better by providing a presumptive guidance for the parties as to where you should be starting? And I say it does.

JUDGE SCHEINDLIN: Is it presumptively clear that you preserve the inaccessible? I realize we presumptively don't produce it, but do you preserve it?

MR. REDGRAVE: That will depend on the situation of the case, Your Honor. Because when we're talking about inaccessible data, it may very well be that you know you have a large mass of data. Whether it's on a tape, whether it's on the old legacy system, you don't know for sure whether there's data in there that may be responsive or not.

But you don't go to the ends of the earth--the duty to preserve is one of reasonableness and good faith, okay? So in reasonableness and good faith,

do you have some special belief that in this legacy system or on that back-up tape, is there unique data? It's quite true, you're not going to be able preserve everything. I think every--

JUDGE SCHEINDLIN: I guess what I'm asking, have we given enough guidance in this rule-making effort to talk about the second tier in terms of preservation as opposed to production, or are we leaving everybody on their own to figure it out?

MR. REDGRAVE: There's two responses to that, Your Honor. To a certain degree, I'm not sure you can address that because a lot of that is really prelitigation. Secondly, with respect to what you can address in terms of the litigation, the more specificity you try to put into the committee note, the more problems you may raise for yourself in terms of "You left this out. You included something. Why did you do that?"

And there is a degree of truth to the fact that the magistrate judges, district court judges really do understand how to apply reasonableness and good faith to the determinations. But the important

point about having the two-tier is to give presumptive guidance to the parties and to the courts that just like in a case where you're looking at 10 employees were involved, for instance. And you go to the employees to collect their documents. What do you have?

You ask them what's on their hard drive. You say, did you use any file space on the servers, the joint servers within the company? Did you share any documents on some distributive device? That's the only place. You go through that entire process.

But you don't bring in your forensic analysis, whether it's with your own in-house IT staff or with a computer specialist to say, well, we're just going to skip over the employee interview and find out what they really have been using in this case, to just dig through their computer drive and get everything.

The question is where do you draw lines? I mean, this is where it's all coming down to. Corporations, litigants, they're really confused

about where to draw the lines because they're trying to do the right thing. And by providing this presumptive guidance, I think it can provide a line. But as with any presumption, it is going to shift, depending on the circumstances.

I think if you look at, for instance, the things that the Sedona Principles have tried to put out there, I go around the country talking about them as presumptive guidance because there are certain circumstances--for instance, we heard this morning maybe in the labor context--where the parties will know, really will know that they're going to have to take some steps to go back and find some data. You know, that's different.

You're talking about having a presumptive part of the rule, though, that can deal with a lot of the cases and then give flexible guidance whereby you can shift that presumption. So that's where I think it really comes up.

I did make in the comments a suggestion with respect to the motion practice. I saw a number of comments where they're just confused that the, you

know, party makes their objection, and they have to specify. I saw one comment or a number of comments concerned about the level of specification necessary. "We don't need a privilege log."

Well, certainly if you required a privilege log-type level of specificity, it might defeat the purpose. I suggested that really where we should focus this on is in the cases where it matters. In those early meet and confers, in the early 26 conference, that's where the parties should be engaging in that back and forth about what they're not producing.

I think there's a lot of cases out there where you don't need to have this detailed information or even--maybe even a general information exchange because they just get along fine. They'll be able to understand what they're supposed to do with the presumption and apply it. It won't become an issue.

But in the cases where it does, having that focus in the committee know as far as what you do in the meet and confer sessions to exchange that

information, I think the practice will quickly embrace what this committee is saying to practice, to get in there, get in there early. And that goes back to a comment I make at the outset of my written comments about the totality.

When you're looking at is this rule proposal fair, you've got to look at the totality of the fact that we're going to be forcing litigants to try and come up front earlier, to get in there with specificity, get people that know things in the door. Okay?

And so, I think when you look at the overall scope of it, the two-tier actually does serve a very good purpose. Whether you define it a little bit differently to accommodate some of the comments, again, I think you can. I'd be concerned about trying to draw too many distinctions because you get into trouble when you get into that level of detail on the committee note, much less a rule.

But I think it's a good thing, and I urge the committee to go forward with a two-tier approach. With--

JUDGE HAGY: If I may just follow up on Judge Scheindlin's question? I'm sort of surprised. I assumed that if you identified something as not reasonably accessible, and therefore I'm not going to produce it, that that would carry with it a kind of a duty to preserve it until the issue was resolved, while you indicated it may not necessarily be preserved.

Do you think we need to consider specifying that if you say it's not reasonably accessible, you will preserve it, although not produce it, until the matter is resolved?

MR. REDGRAVE: I would not favor that in the rule or in the committee note either. The reality is there's a lot of things that are not accessible that you could say is it possible? Is it theoretically possible there's information there? Of course, it's true.

However, we don't run out and take depositions of everyone to preserve their knowledge when a lawsuit is filed or when you know the lawsuit is coming. There have to be reasonable measures or

reasonable bounds with respect to the measures that have to be taken to preserve information under the common law duties. It is not an absolute duty. It is not a strict liability standard as far as preservation.

So a lot of this discussion really comes down to that, what is the duty? What is the duty to preserve in the common law context? What is the scope and contour of that? And that is the interplay that you're seeing here with respect to these rules changes. And what you're brushing up against is are you interfering or are somehow modifying or changing that?

And I think what's important is that the committee recognize that the parties should be talking about it. You recognize the fact that it does have an interplay with respect to what's actually eventually discoverable and what's produced. But I don't think you should step out and change or try to change that law, which is out there in existence, with respect to what is the scope of that preservation duty.

JUDGE HAGY: What do you think would happen if you said something is not reasonably accessible, and they move to make you show it. And then you come in, and they show a need for it, and the judge balances the cost and the benefits and says, "All right, I want the plaintiff to pay for half of it." And you say, "Jeez, you know, we destroyed half of that." You would be sanctioned, wouldn't you?

MR. REDGRAVE: With respect to what the ultimate peril is, there is peril. And where I go back to my comment is the fact that if--I mean, it's a sliding scale. Parties have their duties to understand what they need to preserve in that situation.

And with respect to what they're saying is inaccessible, they may understand that for half of that stuff that's inaccessible, they know it's still in dispute as far as whether or not the other side is going to seek to have it produced in the case. They may understand that they may nevertheless need to keep copies of that pending the determination. But there may be other things

that are inaccessible that they really don't believe they have an obligation to keep, to preserve, okay? They make that decision at their peril.

I mean, that's part of the dilemma facing counsel that are advising corporations, or entities, and those entities, whether they be government or private. They're facing those challenges, and they do have to make decisions, and they do. And then they have to come into court and be able to defend them in good faith. And if they can't, yes, they're in trouble.

Whether it's sanctions, and the whole range of sanctions, depending on what the level of the violation, what it is that's lost. There's an entire matrix of what the potential consequences are. But that dilemma is real, and that's what they have to balance. But that is their duty, and they've got to fulfill it as they see it.

JUDGE ROSENTHAL: Mr. Marcus? Professor Marcus?

PROFESSOR MARCUS: I'd like to pursue what you

said about the 26(f) conference and to relate it to the other things you've just said. Am I right in understanding that your view is that once somebody has invoked 26(b)(2), if it's changed the way the proposal is written, then the later unavailability of that information would not be covered by the safe harbor proposed 37(f), even though one side said at that point that the information was inaccessible?

And I wonder if you think that the approach to the litigation hold spelled out in 37(f)(1) should take account of the level of disclosure in the 26(f) conference concerning computer systems made by the party who's invoking 37(f)? That may be too many questions, but I think they're related to each other.

MR. REDGRAVE: Objection. Compound.

[Laughter.]

PROFESSOR MARCUS: I think that applies in this setting.

JUDGE ROSENTHAL: Overruled. Mr. Redgrave, it's overruled.

[Laughter.]

MR. REDGRAVE: As to the first question, I'm not sure that was correct as far as how my interplay was with 26(b)(2) and 37(f), that if you have information that's not reasonably accessible that you can still, even if there is maybe in your disclosures in talking about not reasonably accessible data, if that is then, if you follow the other provisions of 37(f), if it's destroyed in the routine system operations, can you still benefit from the safe harbor? I think the answer is you still can benefit from the safe harbor.

JUDGE ROSENTHAL: Does that depend on--excuse me for interrupting--the answer to the first of the questions? Does that depend on the extent to which there was a basis for believing that unique discoverable information was on the material identified as inaccessible?

MR. REDGRAVE: Yes.

JUDGE ROSENTHAL: And I tried to underline the word "unique" there.

MR. REDGRAVE: Yes, it does. Now if I'm

following the second part of the question, we're talking about Rule 37(f) and whether or not--you're going to have to refresh me on the second part of the question.

PROFESSOR MARCUS: Well, I think that there's relation--I thought you emphasized your support for 26(f).

MR. REDGRAVE: Yes.

PROFESSOR MARCUS: 26(f) exchange of information about these questions. My suggestion was that it might be that that should relate to the court's attitude toward sanctions later and ask the question whether this party invoking 37(f) made a sufficient disclosure of the operation of its systems and what would be preserved back in the 26(f) conference?

MR. REDGRAVE: I believe that there will be an interrelationship when you get to 37 and implications there with respect to what the party did early in the litigation as far as how they disclosed, how they interacted with respect to the discovery and disclosure obligations, how they went

about their entire course of discovery.

I mean, right now, we know. Behind any sanctions order that I see, there's a lot of history in those cases. And whether you make that more explicit in the committee note or not, I fully expect the district court judges will look and magistrate judges will look very carefully at what the parties did in their early conferences.

And I think it goes both ways, too, that if a party really thought they needed certain information preserved, and they just kind of, for lack of a better term, lay in the weeds and they kind of were trying to play some game, towards the end of the case say, "Aha, you didn't save it." But there was an opportunity, the other side was engaged in a discourse at the beginning of the case, it's going to go the other way. And I think that will weigh against that party if there was a lot of discussion about what needed to be preserved, and they didn't say they wanted it preserved.

So I think that's where I go back to my comment

about seeing everything as a totality. I think there is interplay there, and whether or not you need to make it more specific, I don't know. I think that's going to be the way it plays out.

JUDGE SCHEINDLIN: I have one question just going back to inaccessibility. Is it anything other than cost and burden to you? When you're advising and trying to decide what's inaccessible, how are you defining it?

And the reason I ask that is reading a lot of the comments, I'm being told that technology is making more and more things accessible because it's cheaper and easier than it was a year ago or five years before that. So what is the definition to you, and is it just cost and burden?

MR. REDGRAVE: Two responses. The first one and the last point you made about technology, I think it's important that you stick with a concept like accessibility rather than particular technology because technology will change that sliding scale of accessibility.

Now how do you define it, which is the thornier

question? That is a question that I think if you adopt it, people will really, in practice, reach a definitional stage of a year out or so where they have a better understanding.

But right now, it is not solely--it's like a subpart of cost and burden. But it's a unique subpart because it also ties in with the scope question. Scope of your duty to produce. Scope, how far do you have to go with respect to collecting information, collecting data, to produce it in any given case, okay?

So it's tied with that entire scope concept. So how far do you have to go? How far does the net have to be cast? Now within that is, wow, I'm going to reach a certain point of undue cost. I'm going to have marginal returns. I'm not getting much back for my money for the additional search to talk to the 201st custodian, the 202nd custodian. I'm not going to get much when I go to the data systems in Asia, when I know it's a U.S. case.

It's a balancing there with respect to the scope of duty that then does have a large component

in terms of burden and cost. So, and that's why I went back to my earlier comment, though. Even if you do say it's accessible--like Weslaw, I've got access to a tremendous of amount of stuff, but if you said produce it all, well, just because it's accessible doesn't mean they don't still have that burden issue on the proportionality test.

JUDGE ROSENTHAL: I guess to put a point on the question, if it is a subset of cost and burden and if there are already factors in the rules requiring that cost and burden be addressed, why do we need a two-tier structure specifically for this cost and burden analysis?

MR. REDGRAVE: Yes. I think that's a great question. It's been raised in a number of the comments. And I would suggest that the inclusion of this presumptive distinction between accessible and inaccessible is very valuable.

But as I said, the way in which you do it could be modified. I've suggested one way where it comes up, I think, more logically in the rule. The magistrate judges, I think, said if you're going to

go down this road, maybe it's more sensible to do it as part of 26(b)(2)(iii).

In any event, even if you put it there, I think it still is a two-tier distinction that is valuable. Maybe that makes more sense to explain it down there. But the fact is you're creating, kind of setting forth in the rule the presumptive guidance to the parties that things that are not in that set of things that are being accessed in the ordinary course of business, that are things that people are going into and going out of, that's where you should start in the lawsuit. And you recognize there are a number of cases you are going to go beyond that, okay, and I mean, that's really where we are.

Is it a perfect solution? Absolutely not. Is it a better solution than where we are? Yes. I mean, that's where I think we are. And I think with some of the other changes in terminology that I suggest, we get over some of the hurdles some of the comments have had with respect to dating ourselves in terms of technology. So in terms of

Rule 26(b)(2), I think the two-tier, you may want to shift it around, but I think it still is a valuable distinction.

In terms of 37(f), I've made comments that go to the culpability standard. And the reason I need to explain this a little bit is the way the safe harbor is drafted right now, it's a very narrow safe harbor talking about this inaccessible data.

I assume we've gone through this preservation drill at the beginning of the case, and we're getting to the end or somewhere down the road in the case, and we've got the inaccessible data that's been in the routine course of the operation of the data systems. It's gone.

For that particular subset of data, I think the culpability standards should be higher than just pure what I think has been bandied about as negligence. I don't know if that's a proper attribution. But that's where I'm talking about in that particular context because step back for a second, back to our discussion of the common law duty of preservation. You've got good faith,

reasonableness governing that duty. Once you've defined the scope of that duty, you look at whether there's been a breach of that duty.

And so, that duty is not an absolute duty to keep everything. If that's that standard out there right now, all you're doing is applying the standard as it right now to this inaccessible data. You're not really changing things. And I question whether or not the majority, or whatever you call that thing that's in the main text of the proposal, is really doing very much.

And I think, if we're going to be taking a safe harbor, we're either going to do one thing and say this inaccessible stuff, we should have a higher standard of culpability. Or secondly, if you're going to go forward and look more at the broader preservation duty, you should recognize that this reasonable and good faith duty, that's applying to everything.

It's not an absolute duty. You cannot. If it was, everyone fails. I'll serve discovery requests on anyone sitting at this table, and you'll fail if

I set you to a standard of absolute perfection to preserve the things in your BlackBerrys, your cell phones, your PDAs, your home TiVo, whatever it is. It's just the way in which the world is today with respect to technology.

And with respect to people who have made comments as to this is going to somehow make discovery harder, if people are going to find stuff, it just ain't so. There's going to be a lot more information produced in discovery, period. That's one of the reasons I think the inadvertent production rule is a very important thing. We are going to have more and more documents produced, data produced, and we're going to be able to do a lot of that more efficiently and cheaper.

But just because those technology innovations are there that are going to help us, it doesn't at all change the fact that I think these rules proposals are good and are necessary. And I think we should look at this as a way in which to harmonize that increased technological reliance, but realize that at the end of the day, we still

need tangible information for judges and juries to look at.

Okay, there is a translation process. And in between are the lawyers who actually have to review the stuff, understand the stuff, advise clients about what this means in terms of the claims and defenses, okay? It's not just we have this big pile of information. Poof, now we've got a result. There is this interaction where humans still have a huge part to play because in the end that data is for us. It shouldn't run our lives.

So that's really it for my comments. I really didn't come with anything prepared other than to try and talk about those three things. I really appreciate the intense effort that's gone into this. There is no perfect language. Please do not wait for perfect language to arise. It never will.

Please keep in mind my comments are trying to be helpful. In terms of specific language I suggest in the rules, I don't think any of my suggestions are particularly magic. I've made some particular suggestions as far as committee notes

that I think would improve. But I think my written comments probably explain pretty much everything there.

JUDGE ROSENTHAL: Thank you very much, Mr. Redgrave.

MR. REDGRAVE: Thank you.

JUDGE ROSENTHAL: Mr. Tarricone? Good morning.

MR. TARRICONE: Good morning, Judge, members of the committee. Thank you for allowing me to be here this morning.

I'd like to start by just telling you the perspective that I come from and that I try to bring to you this morning. I've spent 26 years representing individuals in I guess what we've been calling asymmetrical litigation--David versus Goliath--the individual litigants who have a right to use the federal courts equally with the corporations and the corporate interests that you've mostly heard from and who have mostly been driving this entire process.

And in my view, this entire process has been too focused on corporate expediency and corporate

costs and the need for certainty with respect to preservation standards, and too little focus has been put on the issue of access to justice for individual litigants and the essential purpose of litigation, which is to reveal the truth.

And I think we need to refocus ourselves a little bit and remember that this entire civil litigation process is to resolve disputes through an adversarial system of weighing and evaluating evidence with the ultimate goal of determining the truth. And I believe that these rules are elevating expediency and issues of cost and retrieval over the quality of evidence. And I would urge that there would be a focus on the quality of evidence that is given to the fact finder, regardless of where it is. It may be inaccessible. But it may be the best evidence of what happened.

And just as one example that I saw in the paper a few days ago, there were tapes that were electronically stored at an Enron facility, which revealed the exact reason why there was a power

shutdown. And this is in a civil case, a civil litigation between two power companies, energy companies, one suing Enron. And it had to do with the shortage, the energy crisis back in 2000 and 2001.

And there is a tape that was electronically stored, where an Enron employee says to another, "We want you guys to get a little creative and come up with a reason to go down," meaning to shut down the power plant. And indeed, they did. And the next day, there were huge blackouts, and we all know what happened.

That tape was preserved in that case, that electronic data, because the FBI seized it. We don't have that benefit in most litigation.

JUDGE ROSENTHAL: Mr. Tarricone, could I ask you a question?

MR. TARRICONE: Yes.

JUDGE ROSENTHAL: How often in your cases has it been your experience that you have needed to restore data from tapes or any other kind of media that before you could have it retrieved and

produced? That is, how often do you have to go to--

MR. TARRICONE: I cannot--I cannot view that as a particularly common problem in my litigation. However, let me just give you a scenario.

JUDGE ROSENTHAL: Hang on. Before you do that, would you mind giving us a little bit of a fuller picture of the type of litigation you have? So we get a better of sense of--

MR. TARRICONE: I handle complex personal injury litigation--aviation cases, medical malpractice, and product liability mostly. Let me give you an example of a case, a case involving the crash of a twin-engine airplane. At issue was the overhaul of an engine and, in particular, a fuel control unit.

Under federal aviation regulations, every nut, bolt, washer, spring, screw has to be accounted for, whether it's a new part or a used part that's put back into the engine. And in this case, four people were killed when an engine failed on take-off and the propellor of the plane wouldn't

feather. And we were looking at why it failed and why wasn't it feathered.

And the claim was against an overhauler, a big facility, and also against a fixed-base operator, another large facility. And we needed to get the exact records of what happened when they did the overhaul, which parts were replaced and which ones weren't. And initially, we were told there were no such documents.

JUDGE ROSENTHAL: Was this electronic record?

MR. TARRICONE: Well, first, we were given paper. Let me start by saying it's my experience that it is the rare case that computer-based information is voluntarily identified and turned over to plaintiff's counsel in this asymmetrical litigation. It is a very rare case. It usually is discovered after depositions and conferences and motions.

And in this case, what happened was we get our initial, you know, multiple boxes of documents. There's not a single bit of electronic data that's produced. We're told that it doesn't exist. We go

for nine months trying to figure out where this information is. And eventually, we get to one witness who says, "Oh, that's out in a warehouse. We have our old computer system. It's out there."

Well, how difficult would it be to access that? He says, "Oh, I can go out there tomorrow and just type in an inquiry and retrieve it." And we went back to court, and it delayed the process for nine months. Ultimately, we got the information.

Another example of a case, and this is one--we don't usually handle employment cases in our office. Someone came to the office--

JUDGE ROSENTHAL: I'm sorry. On that first example you just gave?

MR. TARRICONE: Yes?

JUDGE ROSENTHAL: That was information that did not need to be restored? He just typed it in, and it came.

MR. TARRICONE: Well, it was--we had been told by previous witnesses, higher ups in the company, that it was their old system, that it was a system that was no longer in use, that it was inactive

material, all the claims that we've been discussing here today. When, in fact, it was really quite readily accessible. There was no cost shifting issue, and eventually, we received the information.

In the same case, e-mails had to be obtained from five years earlier when the overhaul was done. And eventually, they revealed why the wrong propellor governor was put on the airplane and why the propellor didn't feather.

Now I represented one family, a widow and five children. And you know, it's not "Goliath versus Goliath" symmetrical litigation, where you have mutually assured destruction if you don't reveal information. It's more the effort of stonewalling, which I think is the real problem in the discovery process for ordinary Americans seeking access to justice, David versus Goliath.

JUDGE HAGY: The way we've drafted it, you wouldn't have had to wait nine months. At least this was our intent. You wouldn't have had to wait nine months to find out there was this information they thought was inaccessible.

In their first response to you, when you asked for documents, they would have had to say, "I'm responding this, and we have this other inaccessible information, including maybe what's out at a warehouse." Wouldn't you have gotten to it quicker that way?

MR. TARRICONE: In that case, I don't think so because they didn't disclose that anything existed.

JUDGE HAGY: They didn't know about it, or they didn't object to it?

MR. TARRICONE: Well, I don't--I wouldn't assume they didn't know about it. They didn't reveal any information about it. We had to discover it through the discovery process by taking 20 or 30 depositions at extreme cost. And one of the things I think this points out is that this two-tier process, just by creating another tier, it creates another hurdle. And for an individual litigant, that means more cost.

And it ultimately results in one of two things. Either the case not being pursued because a lawyer can't afford to take the case who's not being paid

$350 an hour with a team of lawyers to access the information, or the case goes forward without what might be outcome-determinative evidence because once the case is filed, the litigant, the individual litigant, can't afford to go through the process to obtain the information.

And I think one of the problems here is that when you create this two-tier, it is another hurdle. And there then becomes another battle in the overall war of the case, which I think could be very drawn out and require additional depositions, motions, could require hearings, could require experts. It's just one more hurdle.

JUDGE HAGY: How is it different from the current proportionality test, where somebody says, "I'm not going to turn it over. It's too burdensome." And then you've got to go through it to show you have a real need for it and it's not that burdensome. But that's the current test, and it didn't work in your case.

Now we're trying to say, okay, make them identify in advance, make them think "Do I have any

electronic discovery?" Because half the time, probably in that case, it never occurred to them. Maybe it did. But now they have to. Right up front, it's told if you want to protect this stuff, you better tell us about it and tell us it's reasonably inaccessible. You go through the same battle as you do--

MR. TARRICONE: With one exception. I don't think they should be able to unilaterally declare that it's inaccessible and then put the burden on the requesting party to file a motion and then go through this entire discovery process. It's two-tier. It is one more burden.

JUDGE HAGY: Don't they unilaterally do it now? Say "I'm not going to--"

MR. TARRICONE: I think it's a more difficult--they have to come in and prove that it's unduly burdensome.

JUDGE HAGY: Well, maybe it works different. But in my court, when somebody claims something is unduly burdensome, and the other party--they're required to meet and confer about it and then move

to compel if they can't work it out. Same burden.

MR. TARRICONE: Well, it often gets resolved when they meet and confer.

JUDGE HAGY: Wouldn't it happen here, too?

MR. TARRICONE: I don't think so because here it sort of shifts the burden. And just having the category of inaccessibility gives cover to somebody that wants to try to secret away information.

JUDGE ROSENTHAL: Mr. Bernick, I think you had a question?

MR. BERNICK: Yes. I've read through a lot of comments, and I think that your comment is saying the same thing, which is that litigation is a search for the truth. I think the committee agrees with that proposition.

If you went back to the period of time before there was significant electronic storage of information and just dealt with an ordinary document case, you represent your individual who's concerned about cost, one of the experiences that I think people often reported was that big companies would take discovery requests, and they would say,

"Give me everything that you've got regarding the design of X or Y or Z."

And they would take that very seriously, and they would say, "Well, I'll tell you what? Why don't you pay a visit to our warehouse where we store all of our documents? We will diligently show you all of the different segments of the warehouse where all these documents are stored, and you can tell us what it is that you want."

And the response, of course, is that, "Well, that's ridiculous. I don't have the time or energy, and I don't have the knowledge, really, to be able to compel where I should go to get what I really need. You're producing too much that's useful for the litigation."

And ordinarily, I think the court is generally sympathetic to that. That is, that you can't simply open up the keys to the warehouse. You've got to do more to be more focused on what is really useful for the litigants.

If here we abandoned the idea of accessibility--you had a company that got a

discovery request which names the maker of a certain product--we're such great people. We're now going to give you all of our back-up tapes. We're going to give you all of our information. Show up, and we'll invite you in. Wouldn't you have the same complaint, which is that that's not really a truth-seeking effort because there's not been an effort to weed out what's really going to be useful for the litigation?

Wouldn't you have the same kind of problem if people took seriously the idea there shouldn't be any limitation that set access, which incorporates not just cost and burden, but also captures, I think, the idea of what's really useful for the litigation? Wouldn't you have the same problem if you abandoned the idea of access, that the individual plaintiff is really disadvantaged?

MR. TARRICONE: I'd like to start by hoping that parties act in good faith. So let's start with that premise and that there is not going to be stone-walling by producing a lot of unnecessary information.

I've spent many days in warehouses looking through boxes of paper before it was electronically stored. And I think your question points out something that's important for this committee to consider. That electronic data--you know, what used to fit in an entire warehouse now fits in a shoe box. And while it may require searching, it can be done by sorting and with a computer search sometimes, not always.

Now this is called a stick drive. It didn't exist when I was at that first conference back in 2000. This holds 1 gigabyte of information.

JUDGE ROSENTHAL: Several have shown us. Thank you.

MR. TARRICONE: But it's amazing. And the new iPod has 60 gigabytes of information.

JUDGE ROSENTHAL: Oh, my daughter showed me that one.

[Laughter.]

MR. BERNICK: But it's also true that that may be searchable, word searchable, but most of the material that we're probably talking about here

that's controversial was never made to be word searchable.

MR. TARRICONE: When this process started back in the late 1990s, and there was a lot of concern about archives going back 10 years from then, you know, we're moving forward. Today, it's 2005. Information from the year 2000 will become less relevant every year as we move forward.

And the searchability, the search capabilities, the storage capabilities will continue to advance. I don't know how anybody can define accessibility or inaccessibility, and a couple of people today have commented that, well, we need to have a definition. It can't be defined because it's a moving target. And that's why I think it's ill-advised and just creates another hurdle.

And again, when it's Goliath versus Goliath, it doesn't matter because of the mutually assured destruction practice.

JUDGE ROSENTHAL: It's deceptive.

JUDGE HECHT: One other question. You have not commented on the claw back provision, the

inadvertent production provision. Is it commonplace in your kind of litigation for the parties to agree to that sort of thing or not?

MR. TARRICONE: I have never agreed to that.

JUDGE HECHT: Is that on principle, or it just doesn't come up?

JUDGE ROSENTHAL: Because you don't have that problem perhaps?

MR. TARRICONE: Because it hasn't been raised all that often. A couple of times it has. I just haven't agreed to it. And I have had instances where things have been inadvertently revealed. But it really hasn't been an issue in my practice.

JUDGE ROSENTHAL: Have you dealt with the presence of such agreements in other cases? That is, have you been advised of cases in which there was that kind of agreement in place, and the issue was the effect of a disclosure on third parties?

MR. TARRICONE: No. I haven't had that experience. You know, I'd like to comment on Rule 37 before I run out of time--

JUDGE ROSENTHAL: Briefly, please. Thank you.

MR. TARRICONE: --if I could? I have real concerns about the proposed Rule 37. And in my view, and this may be a radical view, I think it exceeds the authority of this committee because it abridges the rights of individuals that have been developed in virtually every jurisdiction in the concept of spoliation.

And the concept of spoliation and the remedies that go along with it, which in some jurisdictions, it is a separate cause of action. It is a minority view. But it is a separate cause of action in some jurisdictions.

In almost all jurisdictions, it gives rise at least to an inference. It sometimes can result in dismissal or default or shifting of the burden of proof, striking of a defense, striking of a claim. And in most jurisdictions, it focuses on reasonableness.

What Rule 37 does to abridge that right--well, it does two things. First, as I read the rule, an action has to be commenced before there is any obligation. And the law in many jurisdictions is

that when one should reasonably anticipate litigation from an event or occurrence or activity, there is an obligation to preserve. And this changes that. And it may not be the intent of the committee, but I believe that a plain reading of the rule changes that.

The second part of it, though, which I think is the real problem, is that this is a de facto preservation standard. Any routine procedure is reasonable under this rule. In every court where I've read a decision, reasonableness depends on the particular circumstances. What might be reasonable in one company might not be reasonable in another company because of the nature of the business. Within the same company, what might be reasonable under one set of circumstances won't be reasonable under another set of circumstances. And I'll give you a couple of examples.

The Federal Aviation Administration, the radar data from all the radar facilities. They recycle the tapes every 15 days. Perfectly reasonable, unless a plane crashes. And I've had cases where

planes have crashed, and the data hasn't been preserved because they were relying on their standard routine procedure of recycling the tapes.

Now under this rule, I can't do anything about that because it's established that the routine practice is reasonable. Under existing law, I have pretty good spoliation claim in most jurisdictions, especially if the FAA is [audio gap], which is, you know, the case I'm talking about.

Now another example, there's a 1st Circuit decision, the Blintzer case, where a man is a guest at a Marriott hotel, has a heart attack. His wife calls the front desk and asks for an ambulance to be sent, and it's quite sometime before an ambulance is sent. A claim is brought against the hotel a year or so after. There's a three-year statute of limitations in Massachusetts.

The hotel had a 30-day purging policy. And the telephone logs were purged after 30 days, wherein would lie the answer as to how much time elapsed between the man's wife calling the front desk and the call being made to the ambulance company. And

in that case, the court said that may be your usual routine. It may be perfectly reasonable, usually. But in this case, it isn't. You should have anticipated litigation from this, and I think there was an inference was the remedy there.

But this rule, as it's written, establishes a preservation standard. I don't think it is the role of this committee to give certainty to corporate America with respect to their preservation standards. It's a business decision that each company has to make on its own, and they shouldn't be given cover of this rule. And I dare say that I believe this rule will encourage the adoption of preservation standards that are intended to destroy useful information, information that should see the light of day in litigation.

JUDGE ROSENTHAL: Any other questions?

MR. TARRICONE: I would just--let me just give you one quote. Franklin Delano Roosevelt.

JUDGE ROSENTHAL: Is it in your written materials?

MR. TARRICONE: No.

JUDGE ROSENTHAL: All right.

[Laughter.]

MR. TARRICONE: "Rules are not necessarily sacred, but principles are." And I would ask that you keep the focus on, again, that truth-seeking purpose of litigation. That's a principle that we really shouldn't lose sight of.

Thank you.

JUDGE ROSENTHAL: Thank you, sir.

Mr. Kiker?

MR. KIKER: I'd like to thank the committee. I'm Dennis Kiker.

In the interest of full disclosure, I do come at this from a defense perspective. I represent exclusively manufacturers and almost exclusively in product liability cases. So I do have a viewpoint on a lot of the rules.

In the interest of time, however, I'm going to limit my discussion to one particular aspect. I'm willing to take questions, obviously, on any of the rules. I do endorse the two-tiered provision. I do endorse the safe harbor provision. And I think,

as Mr. Redgrave indicated, I think, personally, that if these rules went into effect today, it would be a great improvement and provide a lot of clarity for all of the parties. The case law would develop, life would go on, and everybody would survive.

But in the interest of improvement and making some detailed improvements, there is one particular or perhaps two, but one particular area that concerns me. My role is as--the title is national discovery coordinator, which is a fancy title for a rather mundane existence. My existence revolves around Rule 26, 33, 34, and 36. I respond to discovery.

When the need comes, I negotiate meet and confer. I will file motions for protective order, and I will respond to motions to compel. That's a big part of my job. And so, in dealing with that, one of the issues that came to light to me, and it's based upon recent experience is the provision in Rule 34 regarding the form of production.

I think the issue here is we're trying to

translate a traditionally paper existence into an electronic existence. And under the paper existence, it was very easy. We produced documents in the form they were kept in the ordinary course of business, or we organized them by request number. But we were dealing with pieces of paper, so it was very easy.

Translating that into the electronic world is a little bit difficult, and I think that the presumptive forms that are proposed by the rules, absent agreement of the parties, are problematic in two respects. First, they don't--they aren't necessarily the best form of production to make the document, the information usable to the litigants. And second, they don't, at least with current technology--and I think that future technology may resolve this in some respects, and it may exacerbate it in others. But they make it difficult to provide protections for certain types of information--proprietary information, trade secret information, which is another big part of my job.

And so, let me start at the beginning. The form of production not being necessarily the best form of production. The best thing I can do is give you an example. Certain of my clients maintain product information in a relational database. If I want to know about the manufacturing specifications for a particular product, they will query the database, produce a report, and I've got a complete detailed specification of how that product is built.

If I'm going to produce it now in the form it's kept in the ordinary course of business, I've got to produce my proprietary database, together with all of the information in it and the interface that allows you to query that database. My client will have a problem with that.

If I have to produce it in an electronically searchable form, my options are pretty limited. I can extract a flat file, which is--import that into an Excel spreadsheet, and you can play with it and use it. But it's certainly not as useful as the specification itself, printed out on a piece of

paper or converted to a TIFF or PDF image. But the rules wouldn't allow me to do that unless the other parties agreed.

And I wouldn't want to suggest that parties are disagreeable, but I think we do run into the situation where parties sometimes aren't assured they're getting everything they need. So I think that we need to have a compromise in there that would allow us to produce it in alternate form.

The reason that's important secondarily is that electronic information right now is difficult to protect. A lot of the information that companies produce is necessarily confidential. It may run from customer lists. It may run from confidential pricing information. It could be the formula to Coke. I don't represent Coca-Cola, so I can say that. Some of my clients, though, do have their own formulas to Coke that we like to preserve. We have to redact that information. We have to be able to mark documents as confidential when they're produced.

And this isn't just a hypothetical concern. I

have one client in the western district of Oklahoma recently in a lawsuit, was produced a document by a plaintiff's expert that was produced under protective order from another one of my clients in a different litigation.

We knew where that document came from because it had a Bates number and a confidential banner on it that identified the source of that document, the case in which it was produced. And we were able to go and seek the appropriate remedies to have that document--parties address the wrongful disclosure. Electronic documents are not that easy to protect.

JUDGE ROSENTHAL: May I ask you a question?

MR. KIKER: Yes.

JUDGE ROSENTHAL: Is it your advice to us that we not attempt to specify any default that would apply if the parties did not agree and the court did not order?

MR. KIKER: Essentially, yes. I think providing a default is not a bad thing as long as it's understood that there are potential exceptions in appropriate circumstances. Absolutely.

JUDGE ROSENTHAL: How would you trigger those exceptions without agreement or court order?

MR. KIKER: I think you'd put it in the rule. The language that I proposed in the rule would simply have that be--it basically state that if it's practicable, you'd produce it in the form it's ordinarily kept in the ordinary course of business or in an electronically searchable form. But in appropriate circumstances, you may produce it in an alternate form.

JUDGE ROSENTHAL: Without specifying that alternate form?

MR. KIKER: Well, obviously--correct. Without the rule specifying the alternate form. Absolutely.

JUDGE SCHEINDLIN: But isn't the way we drafted it, you don't hit the default unless there is no agreement or a court order. So if you know you don't want the default and you can't reach agreement, why not go to the court and say, "Here are my circumstances. Here is how I'd like to produce it in this case. I think we should order

it." Then it will never be in the default with the court order at your suggestion.

MR. KIKER: I think I'm trying to save you some work on having to decide that decision, to make that decision. I think in the most--

JUDGE SCHEINDLIN: Well, that's there, of course, so that the parties will agree. Nobody wants to go to court. So it's to encourage them to agree that the next step is court, and the last step is default. Isn't that the way it's drafted?

MR. KIKER: I think that's absolutely correct, and I would be one who would--

JUDGE SCHEINDLIN: You have protection.

MR. KIKER: I would absolutely--I endorse the up-front discussion between the parties to try to resolve these issues. It's been my experience that the issues are not always resolved. And it seems to me that rather than immediately going to the default of going to the court that the parties should be able to produce the documents.

We know our documents. We know the best form that they're produced. If I produce them, a

specification, and you know, my opposing party says--

JUDGE SCHEINDLIN: But your goal may not be to help your adversary. That's where the dispute arises. The adversary may have needs as to how they want the documents produced, and you may not agree with those needs.

MR. KIKER: Right.

JUDGE SCHEINDLIN: All I'm saying is you really can't agree and you don't want the default, you could ask the court, explaining why in this case you have to do it a certain way.

MR. KIKER: Absolutely. And I agree. And that's why I prefaced my comments, saying that if these rules went into effect today, I could do my job. I could live with it for the most part. I would like to make the system and the process a little more seamless so that we don't have to petition the court every time there's a disagreement because there are too often too many disagreements.

MR. HIRT: Mr. Kiker, how often would you get

to the default? I mean, I guess the thing that I just puzzle over is, given the extraordinary implications for the costs and usefulness of the information to the requesting party, why wouldn't any but an extremely naive counsel specify the form of production he or she wants in making a request?

MR. KIKER: My experience has been that, and I think as time goes on, as more and more parties become savvy, so to speak, about the forms of production and the usefulness of it, I think justifiably in many cases there is a lot of reluctance on the part of the Davids of the world to accept the Goliaths of the world's statement as to here is what's best for you in this case. And the reaction then is to say "give me everything."

I mean, we've all seen the request for production that encompasses a whole page, and they say "give me every document." And in this, and you know, and they want it in every form, and that's typically the opening salvo when you have these discussions.

And until you have that rapport, until you have

that level of trust built up among the parties, I think it's going to be difficult in the beginning to come to an agreement on all these issues. I think it's a worthwhile endeavor, and I think the parties need to focus on those issues. But the form of production is one that I think will be difficult to agree on until that trust is built up.

A lot of the times, I deal with lawyers that I've never met. And I deal with them once, and I never see them again because it's an extraneous lawsuit down in Wyoming or Montana or somebody. And I'll never see this lawyer again. He has no reason to trust me. I have no reason to trust him.

And so, he's going to ask for everything. I'm going to try to--I'm going to be reasonable, obviously, and I'm going to try to give him what he needs. But I see this running into a problem.

MR. HIRT: But even in that situation, you don't get to the default, do you? I mean, the requesting party requests something in 10 different forms. You say no. That goes to the court. Then the court decides. But the default is for the

situation which there is no specification in the document request as to form, and I'm just wondering, you know, why any experienced requesting party counsel would ever just let the thing get to that point?

MR. KIKER: Well, I think oftentimes there is no specificity in the request as to the form. "Provide me all documents related to this product." Period. Does that specify the form? Absolutely not. If I'm going to interpret documents the way the rules tell me, I've got to give you everything in every form that it exists. And so, now I have to go to the default or make a judgment call or petition the court.

JUDGE HAGY: First, talk to the other side.

MR. KIKER: First, talk to the other side.

JUDGE HAGY: And then go to the court.

MR. KIKER: And then go to the court. Or produce it in a reasonably usable format. And my experience is I give them the specification, and they're satisfied. This wouldn't allow me to give them the specification if they didn't express it

and they didn't trust me with that. I've given them the piece of paper. They work with it, and it's okay. Or I gave them the PDF or the TIFF.

One other issue I thought, and this is just a bit of clarification as to the reasonably accessible requirement--

MS. VARNER: Mr. Kiker, could I interrupt you just for a moment?

MR. KIKER: Oh, absolutely.

MS. VARNER: And I ask you a question, given that you do national discovery. Some have suggested that the issue of burden and expense is already adequately addressed in the current rules, and we don't need to be drafting new amendments. In your experience and your practice, how often have you been able to persuade a court to prohibit document discovery under the existing (b)(2) based on burden, expense, and proportionality?

MR. KIKER: That would vary, depending on the jurisdiction and the circumstances, as it probably should. Most cases, fairly regularly. I mean, we go in, and there's a compromise drawn somewhere

between where the plaintiffs would like to be and where the defendants would like to be. And there is a compromise drawn.

I tend to think, philosophically, that those who say this is already in the rules, the two-tiered approach is there implicitly in the rules because, as several people have commented, I already have the argument that it's overly burdensome, that the cost is too much relative to the value of the data.

I think electronic information is different enough from what we are all accustomed to in the world of paper that it is worth making that distinction now. Particularly--and I like the reasonably accessible standard because of its lack of definitiveness, because we don't know where the technology is going to be in five years. We don't know what is going to be accessible in five years.

But understanding and tipping our hat, so to speak, to the fact that this is different than the file cabinet and the shredding box and the dumpster. I think Microsoft drew that analogy very

well in their comments, and I endorse that.

JUDGE SCHEINDLIN: But whatever the technology is, what would make something inaccessible?

MR. KIKER: I'm glad you ask that question. Because to me, the issue really isn't the information. The rules speak to whether information is accessible or inaccessible. To me, it's the source of the information which makes that data inaccessible.

If I know information exists, somebody drew an analogy a moment ago of an old computer system where the product specifications are on that system. I know the information exists. It's relevant. I think the burden there is probably affirmative to go and get it and produce it in this case, even if it's relatively inaccessible. To me, the issue here is the source of the data.

The sources being back-up tapes are, you know, for the most part, not accessible because they're not used for business purposes. They're not easily searched for the type of information we want.

JUDGE SCHEINDLIN: But that could change.

MR. KIKER: That will change.

JUDGE SCHEINDLIN: That's technology. So that doesn't really define it. What would make something inaccessible as the technology changes? What is the definition is what I'm trying to get at? You think it's the source. What does that mean? Is it too expensive, too difficult to retrieve? What does it mean?

MR. KIKER: I think it's a little of all of the above, and I don't think that the committee is well advised to try to define accessible.

JUDGE SCHEINDLIN: But I'm asking you to try to understand it. Can't it be back-up tape--

MR. KIKER: What I can tell you today, I can tell you today for a particular client, and it will differ for different clients, what is accessible to that particular client. For example, I have a client who has legacy data from an old e-mail system that is there. They can load those tapes onto a minicomputer. They can translate those tapes. They can install the software, and they can get it. It's very time consuming, very expensive.

Is there relevant information on there? Your guess is as good as mine. That is the consummate fishing expedition. Does it make sense to go get that? It's not really reasonably accessible because the time and the burden and the expense of getting make it so.

The whether or not it's reasonably accessible depends to me, in large part, on what the information is. If the information is important and relevant and I know where it is, is the expense that--because it's expensive to get out of there, does that make it inaccessible? I'm not sure. I think that's a difficult thing to define. I think this is one thing that the courts are going to have to deal with on a case-by-case basis.

JUDGE ROSENTHAL: Are there any other questions of Mr. Kiker?

MR. GIRARD: Very quickly. I have one. Go ahead.

JUDGE ROSENTHAL: Rick, go ahead.

PROFESSOR MARCUS: I have a question about Rule 34(a), which I don't think you've mentioned. It's

prompted by what you said about electronically stored information being different and also your reference to the relational database production problem that you mentioned.

34(a) proposes to make explicit and somewhat separate the notion of electronically stored information sought through discovery. Do you think that's a helpful distinction to make, and do you think that a relational database is properly thought of as a "document?"

MR. KIKER: That's a good question. I do think that it is an excellent distinction to make, and I do not, for my part, consider a relational database to be a document. It is too transient. It is too ephemeral, so to speak. The information changes too actively.

I think a document--and that's why I think it's important to draw these distinctions in the rules, to recognize that we're really dealing with information in a completely different form than traditionally we are used to it. The document does not change. The document does not move in

location. The document can't be cut up into pieces and used in different ways.

Whereas data, information, electronic information, the bits and bytes that make up that database can. And so, document doesn't readily describe what we're dealing with. And the problem is we know what we're dealing with today. We know that what we're dealing with today is vastly different than what we were dealing with 10 years ago.

Nobody has a vision of what we'll be dealing with in 10 years, and I think it's time that the rules recognize that this is a different world. This is a different environment from a business perspective and from a litigation perspective.

JUDGE ROSENTHAL: Mr. Girard, last question.

MR. GIRARD: Are the requests that you're getting evolving, are they becoming more sophisticated? As I would guess that a lot of the problem is, from your perspective, people are propounding requests that are based on models from the paper era. And I'd be curious to know if

you're seeing any increase in sophistication on the part of the requesting parties in how they're framing the request?

MR. KIKER: Oh, absolutely. I think you're beginning to get a broader understanding among the bar generally, both sides of the bar. Both in the terms of the requests and the quality of the discussions revolving around the request as to what we're actually going to produce.

I'm a big advocate of the meet and confer. That's a big part of my job because we always start here, arm lengths apart, and our goal is to get somewhere into the middle so that we get the information necessary to resolve the lawsuit.

JUDGE ROSENTHAL: Mr. Kiker, thank you very much for your time.

Mr. Greenbaum?

MR. GREENBAUM: Good morning, everyone. I want to start with explaining the capacity in which I address you, and I hope I don't use up my 15 minutes.

[Laughter.]

JUDGE ROSENTHAL: Do we have to hear about the House of Delegates?

MR. GREENBAUM: I'm here to express the views that are set forth in my letter. That letter also expresses the views of 50 other individuals who happen to be all the members of the council and the Federal Practice Task Force of the ABA Section of Litigation. They include people who are lawyers on the plaintiff side, lawyers on the defense side, business lawyers who could be on a plaintiff's side or defense side, depending on the case. A number of federal judges. However, they've not been approved by the ABA, and they do not reflect ABA policy.

With that disclaimer, let me start by saying I believe there is a need to act now, and it is important to develop uniform national standards. I think the proposals on the table are excellent, and I'm very grateful for the opportunity of hoping to make some suggestions to try to make them better.

Let me start with early discovery planning. I'm in agreement with the views generally

expressed. It's a good idea to discuss these issues early. I do have some concerns, and I guess the common thread of some of my comments is that more guidance is needed as to some of these areas, and one of them is what happens when parties don't agree on the proper form of discovery?

I'm concerned that when you start seeing routine preservation orders being entered in every case and that there is a danger that we may have overbroad preservation orders that become very difficult to comply with and that become traps for the unwary.

And I give as an example, without commenting on the facts of that case because that's a separate issue altogether, the preservation order cited in the Philip Morris case, where in Case Management I, which I presume was entered in somewhat of a routine fashion--maybe even ex parte, but I assume not ex parte--but the preservation order was preserve all documents containing information which could be potentially relevant to the subject matter of the litigation.

Now that, to me, is not helpful. And it's basically taking a discovery process that's supposed to be lawyer-driven and now superimposing a court requirement before there is any discussion of the issues in the case, before the parties have presumably focused on what they want in the case, and I think the note should explain that that's not what we're talking about.

We should not have broad preservation orders. Any preservation order should be carefully tailored to the specific issues in the case. And it may not be able to be issued right off the bat after the first conference because, at that time, both the parties and the court may not have a sufficient understanding of not only the technology and the systems that are available to the parties, but also of the issues in the case.

If you have--and I think the goal of this is to refine the issues so that we're dealing with very ascertainable areas. So, for example, in the Zubulake case, those whole series of opinions were basically about one discovery request, which said,

"Give me the e-mails discussing me among my supervisors." Now that's very--you can deal with that. But if you have broad request cases that talk about practices of companies generally, that's when you start getting into the preservation difficulties of how do you deal with all of these issues.

I don't think any preservation order should be done as a matter of ex parte practice. They should not be generalized. And I do think, unfortunately, we are going to be seeing an era where people will be posturing to try the spoliation case. And I think it's inevitable. I think we will see that because, in hindsight, the most good faith type of conduct is hard to stand up if you keep taking deposition upon deposition and follow every trail. If you look hard enough, you're probably going to find some problem somewhere.

And I've already been seeing this happening. I got a letter recently in a very--class action against a major institution, where we're on a motion to dismiss phase, no discoveries really had

gone forward on either side, and the letter said, "I am going to be seeking electronic information in this case, and therefore be on notice that you have an obligation to discontinue all data destruction and back-up tape recycling policies."

Now I sat with that letter. Maybe other counsel may have just said, "I'm not going to even respond to that." I responded. But I only took that as an effort to try to set something up for later that if in two years from now, if we get there, there has been documents that are not there and they were on back-up tapes, maybe inaccessible tapes, they said, "We'll put you on notice at the beginning of the case."

I responded thinking, well, if there's a legitimate issue here, maybe they'd go to the court. They didn't go to the court. And that just furthered my sense that this was really done just for posturing.

PROFESSOR MARCUS: I'm sorry to interrupt. But it seems to me the most pertinent proposal that's made is the proposal to add to 26(f) a provision

saying discuss any issues relating to preserving discoverable information. It strikes me that maybe that would be desirable in a case like the one you described. I don't see how it would be undesirable, and I'm not sure what rule provisions you have in mind to solve the problem you're describing.

MR. GREENBAUM: I am seeking a little more guidance on what is the default without a preservation order in place. Let's assume you have--and what I'm suggestion that unless you know that particular information is going to be relevant to a case and is not available in any other--

PROFESSOR MARCUS: Is this a comment on 37(f)(1)?

MR. GREENBAUM: No. This really deals with the preservation discussion and how you define--

JUDGE SCHEINDLIN: Is really part of your question is that if it's two-tier and the material is inaccessible, do you still have to hold onto it?

MR. GREENBAUM: That's correct, and I don't think you should--

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

MR. GREENBAUM: --as a general rule.

JUDGE ROSENTHAL: Can I ask you a question about that? Because that was exactly the one question I wanted to ask you, if I may? I understand the position and the attraction of having that as a bright line, but what do you do about a situation--and people apparently disagree about how frequently this is likely to arise. But assume with me, for the purpose of this discussion that there is a situation present in which you have a basis for believing, a good basis for believing--you as the party holding material likely to be sought in discovery--that the only source of discoverable information, important discoverable information is on inaccessible locations?

MR. GREENBAUM: I've built in an exception to that.

JUDGE ROSENTHAL: How do you do that, given the language you propose?

MR. GREENBAUM: I think you--I haven't worked

through the wording, but I think unless you have, you know, good reason to believe that information is not available in any other source. And again, we're all talking about good faith. So I think, in the general case, you would not have an obligation to preserve that unless you know, and it could be shown that you know by the nature of the claims, maybe by the nature of letters that were written putting you on notice, by the nature of discussions that were had.

Obviously, if someone says, "Well, I want this specific tape that has the e-mails about this particular employee," and you say, "I don't think that's accessible." And then they go to court, and in the meantime, you allow it to be destroyed, I wouldn't want to be sitting in that chair. So, obviously, there's some common sense here, and it's all going to be tested by good faith.

But I think there should be a bright line that says unless you have that situation, that unless somebody makes an issue about broadening preservation to inaccessible data, that you should

not, in the first instance, have to preserve it without a court order. And once a court order is in place, obviously, your conduct is going to be judged based on how you comply with that court order.

And in that instance, the court is going to want to address the issues earlier rather than later. There are other issues, however, that a court may need to defer addressing these issues until more information can be had, maybe even discovery on the issue.

JUDGE ROSENTHAL: I think Mr. Bernick had one more question before you go on.

MR. BERNICK: I'm struggling a little bit with this notion of there being a bright-line test. Even before electronic discovery, again, in an ordinary case that involved a significant product or a significant area of business for a company, the litigation is filed.

I know of very few companies that had seen litigation that wouldn't take steps to preserve documents that might be relevant to the litigation

because of the risk of a spoliation claim and because of, frankly, the obligation to litigate--be prepared to litigate in good faith with the evidence that's relevant. So companies every day of the week have to make these kinds of decisions, and they've made those kinds of decisions without there being a bright-line test.

Now this rule, through the sanction language that's been quoted, attempts to provide some further guidance for that decision-making. But to say that there has to be then a bright-line test that can be followed really says that we can spell out by rule what should happen in the whole, almost an infinite range of different kinds of circumstances that a company sees.

I would think that, A, if you can't have a dialogue with the other side so that you could reach agreement or precipitate the issue, the company then exercises its judgment in order to act affirmatively to preserve documents that are expected to be relevant. If they do a good job, the current language that's being proposed for Rule

37, that does provide them with protection.

By doing that, by keeping Rule 37 nonspecific, you give the latitude to the companies in a tailor-made program that fits their circumstances. But these problems are not novel problems. They've always existed.

MR. GREENBAUM: I am addressing the differentiation between not accessible data and accessible data. Obviously, you have a duty to put in a litigation hold. Obviously, if there's information on your active systems that is relevant to the litigation, you must preserve it and not allow it to be recycled and destroyed. I'm not saying anything that's inconsistent with that.

MR. BERNICK: But the accessibility language that is built into Rule 37 to the extent it talks about preservation of discoverable information, discoverable under these rules would include considerations of accessibility. So Rule 37, as I read it, interfaces with the two-tiered structure.

All that I think you would then do in order to address the issue of accessibility is to build

accessibility, your judgment about accessibility, into the program or into the freeze that you've put in place. If you've done a reasonable job of that, then again Rule 37 gives you protection.

MR. GREENBAUM: Well, all I'm saying is that in Rule 37, you should add the word "accessibility."

MR. BERNICK: But it's already there because it talks about "discoverable." And under the new language that would talk about accessibility as being a parameter for discovery, Rule 37 already incorporates the notion of accessibility, at least as I read it. I may not read it the right way.

MR. GREENBAUM: Well, I just don't think it's clear enough because you're always going to be judged in 20/20 hindsight. And what looks reasonable at the beginning of the case, two years later, after many depositions may not look as reasonable. And that's why I think there's a need for a little greater certainty, and I suggested a modest change to that by just tying it into the two-tier system.

JUDGE SCHEINDLIN: Jeff, one quick question

that we've asked--at least I have--of many of the people today. But I know you spend a lot of time on this. Where do you draw that line of inaccessible? Is it about cost and burden, or is it something different?

MR. GREENBAUM: Well, I think it is about cost and burden, but I do think you need to go through the effort. And I think the definition is pretty good. I think the Sedona Principles are helpful. I think the definitions that are in the rule now about talking about legacy data and--

JUDGE SCHEINDLIN: But why is that inaccessible? Can't you be more concrete? Is it anything other than the cost and burden of retrieving it that helps you define something as inaccessible?

MR. GREENBAUM: I think it is cost and burden. But that being said, I still think the rules are not sufficient as it is, and we do need that, very badly need that two-tier approach.

JUDGE SCHEINDLIN: Well, what does it add? We've always dealt with cost and burden. What is

it that we're adding if it's all about cost and burden?

MR. GREENBAUM: Well, because I think we have enough experience now to generalize. Because right now what you have is the judges in 93 districts and however many judges there are and then there are magistrate judges, all making their own judgment sometimes early in a case before, you know, the issues have been developed, before a demonstration of burden and cost can even be done, as to, "Well, I think you can do that. Press a button."

And I think there's enough learning that's taken place now that says basically back-up systems, disaster recovery systems that are not searchable, that are not indexed--

JUDGE SCHEINDLIN: But that's going to be something subject to technology. That can't be fixed.

MR. GREENBAUM: It may change over time. I agree with that.

JUDGE SCHEINDLIN: Correct. So we can't fix that in the rules as inaccessible.

MR. GREENBAUM: Certainly today, and I think you can point that out in the rule that this may evolve over time. I think cost and burden is a good part of the test.

JUDGE ROSENTHAL: Last question, I think.

MR. CICERO: Just to amplify that, it seems inevitable to me that it will evolve over time not only by technology, but also by judicial decisions.

MR. GREENBAUM: Yes.

MR. CICERO: Which, as they do that, if you get something from somebody in one case, you'll be citing it in the next case and citing--and that will take into consideration changes in technology. If we try to define it too much, then we'll be restricting what the courts can do or will do with respect to future--

MR. GREENBAUM: I think you've done a pretty good job up until now. I mean, I think the rule as drafted does a pretty good job with it.

Let me move on to one or two other areas. We talked about--there was discussion of the form of production and the default. I think the word

"default" is really a misnomer, and I think it should be expanded. Right now, the default is only there if someone doesn't request a form, and it gives the producer a choice.

Under our existing structure of discovery, a responder has two choices. Right now, you can produce something in the form it's maintained or in response to a particular request. I think that's a useful concept, and the responder should always have a choice, knowing their systems, of saying that this is the form we want to produce it in. And the other side can show good cause why that's not what that person needs.

But whether it's electronically searchable, the form it's maintained, there has to be some flexibility built in there so that the producing party can do something consistent with that party's systems. And therefore, I would be in favor of taking out the word "default" by taking that choice and expanding it in all instances and then letting the requester say, "Well, no, that doesn't work for me," and then explain why.

Safe harbor, there's been a big discussion about the level of culpability, and there is concern by many that, well, if you have negligent spoliation, you could have, you know, bet the company case where you get this atomic bomb type of adverse inference and that it's not helpful.

And my compromise on that would be to list the level of sanctions that are available and specify the level of culpability required for each one. So, for example, you want to have a redeposition, the judge may say that's a reasonable remedy. You know, I want to call it a sanction to do if, you know, certain documents are negligently destroyed.

On the other hand, if it's an adverse inference or the striking of defenses or claims, you're not going to want to do that unless there is some kind of willfulness. And I think that's what most judges are going to do anyway. But if you put that in a rule, you're going to give people a lot more comfort that these systems are not going to be running away from them, and that if they act in good faith, there's going to be some protection.

Thank you.

JUDGE HAGY: Call it sanction guidelines?

MR. GREENBAUM: No, I think you can put it right now, Rule 37 has a listing of the range of sanctions. And all you would need to say is, you know, we would not expect these sanctions to be imposed unless there is some type of willfulness.

JUDGE ROSENTHAL: I think it was a booker joke. It's only funny to a small group.

[Laughter.]

JUDGE ROSENTHAL: Thank you, Mr. Greenbaum.

Mr. Paul?

MR. PAUL: Thank you, Your Honor. I'm George Paul. I'm a practitioner in Phoenix, Arizona. It's a great privilege to be here this morning. I have with me Mr. Mike Prounis from New York City, and also Mike Faraci from Navigant Consulting, and Professor Gary T. Ford, who is our Ph.D. survey expert.

Our testimony is like Mr. Greenbaum's. I need to make the statement that it is not endorsed or approved by the American Bar Association. But we

are here as a group of people who work together in the ABA and its Digital Evidence Project, which is an interdisciplinary working group that's been working on digital evidence issues for some time.

And what we decided to do was to conduct, to the best of our ability, a scientific survey. And I'm going to ask Mike to explain a little bit about the survey first and the survey population.

MR. PROUNIS: Thank you very much, George.

We were looking--we were searching for the voice of the unorganized rank and file in terms of in-house counsel. And as George says, we wanted to do that in a scientific manner. I just would note that we could have increased our response rate considerably by targeting some specific segments of the bar, but we opted not to.

In fact, most of our respondents were not familiar with the existence or the details of the proposed amendments. So we were hoping to give you a different perspective perhaps.

These respondents, by and large, have post 2000 litigation experience, both as defendants and

plaintiffs. The 65.5 percent of them either run law departments or supervise lawyers within law departments, and the majority have over 21 years experience in terms of practice experience. The majority work for billion-dollar plus organizations spread across the industrial horizon, mostly manufacturing, financial services, transport, communications, and utilities.

And 25 percent of those respondents actually are members of the Fortune 180. So they're $10 billion-plus organizations. But we felt that as owners of the ESI and as primary buyers of legal services and the ones who will be implementing these rules, it would be interesting to hear their voice.

MR. PAUL: This is spelled out and detailed in our 60-something page preliminary survey report. So what we did was survey this population not only about our perceived policies behind these rules, but also about current practices, what is going on? Are some of the things that perhaps you've been hearing in hearings anecdotally, are they really

real, or are they urban myths, so to speak?

So one of the principal findings that we focused on was the concept of the meet and confer session, the prediscovery meeting, because it seems to me like this is one of the keystones of these new rule amendments. Prediscovery meetings, meet and confer meetings were happening about 25 percent of the time in cases where people had electronically stored information. So they're happening. They're not happening in every case, but they are happening.

The interesting data, at least as we perceive it, and we've laid it out for the entire world to review, is that in the cases where people are meeting and conferring and where they are able to state, "Yes, I know what happened in those meetings," "I remember," or "I have that data," there is an ability to agree, a very strong ability to agree, when perhaps some of the gamesmanship is dropped and some of the collaboration among advocates occurs.

For example, over 80 percent of the respondents

who had meet and confer sessions about electronically stored information were able to either agree without any assistance of the court or with some assistance of the court, but not including a court order. Only maybe 17 percent of the respondents had to have a court intervene.

JUDGE ROSENTHAL: Mr. Paul, may I ask you a question, since you very helpfully have included the details of the survey and the survey results. Could you summarize the lessons that you draw from your survey results for us as we look at these proposed rules?

MR. PAUL: Yes. I think that as far I think meet and conference sessions are critical to how these rules are going to work in the future. If they're not taken seriously, there is going to be some problems because we have such complex information systems. And unless people are actually trying to discuss them with one another, there is really not going to be this search for truth that we've been talking about.

Mike, what would you also say as an executive

summary that we would like to give to them?

MR. PROUNIS: Well, in terms of the form of production, we found it very interesting that paper is still winning out. 46.3 percent of the most recent experience, they agreed to produce ESI as paper. I would note that 30 percent indicated they agreed to produce ESI as native, and a combined 25 percent agreed to produce ESI in a searchable format. We specified what might be called a fat PDF file, which contains both the image and the text.

So the default formats are being used out there. Again, the last part of this is TIFF, is 38.8 percent of the respondents are producing in TIFF. And it suggests that people are producing in multiple formats.

JUDGE ROSENTHAL: The same information in multiple formats?

MR. PROUNIS: Yes. That's right.

MR. PAUL: On privilege waiver, which seems to be one of the main areas of concern of the committee, what our finding was is that when people

talked about privilege waiver in advance, they were likely to be able to have an amicable solution to it. But when it came up in the middle of a case before prediscussion, there was a less likelihood of people being able to agree. They started disagreeing. They started to claim waiver. Not very many courts ruled on waiver. Only one court upheld the waiver of the attorney-client privilege.

Now one of our most interesting findings was about sanctions, because we're talking about spoliation sanctions so much. We found that spoliation sanctions just aren't coming up that much, at least as reported by these respondents. Very, very few said that they had had it requested against them. Very few had requested against others, and over 90 percent of the people just said it had never come up in their case. We only had one--well, less than 1 percent of the people had actually been sanctioned.

Somewhat contradictorily, though, when we asked people did they think that taking action about sanctions for spoliation of ESI was important,

everyone seemed to very much believe it was a very important topic. But their experience did not show that this was dominating the recent cases involving ESI.

Let's talk a little bit about how electronic discovery has changed data management costs.

MR. PROUNIS: Right. Unlike five years ago, when I believe an ABA survey suggested that 84 percent of people really did not have an electronic discovery protocol, 69 percent of the respondents here suggested that it's very much front and center. That ESI was influencing their records management policies.

The survey also suggests that the archives appear to be growing, corporate archives. Even though people are aware that they can legally reduce the size of their archives, it seems that most people are not doing so.

And my final point in terms of a high-level summary is that 69.7 percent of the respondents did not agree when asked if they settled their most recent case to avoid the financial cost of

electronic discovery, which I found a bit surprising.

MR. PAUL: I'd like to go back just very, very briefly on the data management. One of our focused interviews with one of the acknowledged experts in this area requested us to inquire of this group into whether there were either electronic or cost-effective ways to search for privileged materials. So I don't have to have just a bunch of associates looking through a lot of paper.

And the response was not really. There really aren't tools available, all right? And again, the statistics are laid out in tables in Appendix A.

And I think two quick final points. Our report shows some real confusion, and we've heard a lot of discussion in testimony this morning about reasonable accessibility. Our report showed a lot of confusion, maybe not surprisingly so, about reasonable accessibility. For example--

MR. PROUNIS: Back-up.

MR. PAUL: --information stored on back-up tapes. Well, almost 60 percent of the respondents,

and these are people from large, sophisticated companies, felt that's reasonably accessible, okay? And so, it sort of--again, this is sort of one of these things that may be contradicting some of the urban myths.

Now if you ask them information stored on legacy systems, well, only 7 percent say that's reasonably accessible. So that's something that's very much in accordance with what you would intuitively think. But then you get, well, how about a hand-held device? Well, gee, people don't really know about a hand-held device. How about a laptop? There is not a consensus.

And so, this whole idea of reasonable accessibility is problematic, not only in regards to the legal standard that a court might apply in determining the burdens of proof and the cost of production, but also just the understanding of the general legal community about the concept of reasonable accessibility. It's a problematic issue for the general populace.

JUDGE ROSENTHAL: May I just ask one quick

question?

MR. PAUL: Yes, Your Honor.

JUDGE ROSENTHAL: And it may be in the explanation of the procedure you followed. When you asked these questions, did you provide the survey respondents with a copy of the language describing--of the proposed rule and the accompanying note?

MR. PAUL: No, we--

JUDGE ROSENTHAL: So it was just a question of--

MR. PAUL: We tried to just use the words "reasonably accessible."

JUDGE ROSENTHAL: Okay.

MR. PAUL: We did not want to give them a definition because--and we actually, it was a very conscious decision, did not want this to be a test on the rules. We did not want people trying to give uninformed quick responses to rules. We wanted them engaging in broad policies.

JUDGE ROSENTHAL: Okay. Thank you.

MR. PAUL: The final point is that we did ask

people--we figured most people will not have been expert on the rules. Most people maybe won't even have heard about the rules. Truthfully, over 30 percent of the general population and another 50 percent said, "Well, I've heard about rules. I don't know anything about them."

But we wanted to ask them about what the committee has identified in its materials as the issues, the areas of concern, the places that you're folding in new procedures into the rules. And so, we did ask them about that. And although people hadn't really been familiar with the rules, they were really quite supportive of action in the areas that are being addressed. And that's found on page 10 of our report, and we've given you some examples.

That, for example, inadvertent production of privileged materials, a huge majority believe that this needs to be addressed involving ESI. The idea of reasonable accessibility. Although people can't really define it, a very strong majority think, you know, that is something that we really need to

address. Rule makers need to address that.

So I think that the lesson there is that, yes, there has been a focus on proper areas. Yes, even people that haven't even studied up on this believe that these are areas. They do this all day long.

A lot of these people have had over 10 cases. A lot of them had hundreds of cases involving ESI, and sort of the personal testimony about this is that the overwhelming complexity of the information systems at litigants now is going to demand a new--sort of a new age of collaboration, I think, among advocates because that's going to be the only way that they're going to work through all the various problems that we have been discussing here today--as to the meet and confer, a robust meet and confer process.

JUDGE ROSENTHAL: Thank you very much. We appreciate all of your effort and your coming here today.

MR. PAUL: Thank you.

JUDGE ROSENTHAL: Ms. Carter? DeGenova-Carter. I'm sorry if I only got half of your name.

MS. DeGENOVA-CARTER: You got it all out, frankly, and that happens. Good morning.

JUDGE ROSENTHAL: Good morning.

MS. DeGENOVA-CARTER: I am here today on behalf of State Farm, and we'd like to thank the committee for allowing us to come and give our support and our explanation and commentary on the proposed amendments.

Let me give you a brief idea of what I do every day. I am counsel for State Farm. I work in the litigation department, and primarily my job is to handle institutional discovery. We handle the discovery that comes in from all of the different jurisdictions that would be involving corporate documents, requests for corporate information, et cetera.

What I'd like to do today is give you our support and our rationale for our position, but also give you some practical illustrations of why we feel the way that we do about the rules. And we'd like to address three different areas. The first being the two tiers of discovery, second

being cost allocation, and third being the safe harbor rule.

But before I do that, I wanted to give you a little bit of brief background about State Farm. Obviously, we're one of the larger insurers in the United States. We do business in all 50 states, the District of Columbia, and also in three provinces in Canada. We have over 69,000 employees, over 16,000 agents, and approximately 156,000 active e-mail boxes.

We send and receive over 5 million e-mails a day, and each of the size of those e-mails is approximately 25 kilobytes. We also have all different kinds of databases and servers.

As an insurance company, we handle claims. The majority of those are auto and fire claims. And for the year 2004, we had 12.7 million claims that we handled for our policyholders. Unfortunately, since we handle so many of those claims, we're also a major user of the court system.

Last year, we had for just auto suits over 125,000 auto suits in which we were defending our

policyholders in some court of jurisdiction. For the fire side of the company, we had over 18,000 lawsuits that we were defending. And then we also have at the end of the year 2004 approximately 3,000 suits just against the State Farm enterprise.

So we're looking at currently, right now, State Farm is involved in over 150,000 lawsuits in some jurisdiction or another. Obviously, from that standpoint, we're here to support the rules because we think that they give us guidance on how to handle this new trend of electronic discovery. Given the size and the volume of the information that we handle, we get requests for electronic information every day. I see them come across my desk as if it's just the normal course of business.

One thing that we are concerned about is that the rules retain the overall goals of the '93 and the 2000 amendments, which really did a good job focusing on making sure that parties were serving meritorious relevant discovery. And we want to be sure that with these amendments that the parties are still doing that, and simply because we have a

new topic, electronic discovery, we're not opening the door for parties to have less meritorious, very overbroad discovery.

And on the first topic of the two tiers, State Farm supports the two tiers. We think that we need some type of classification to help us handle the different types of requests for electronic discovery that we get. We might suggest that, as many here have today, that reasonably accessible be more further defined or clarified better. And I know that it's a very difficult concept, trying to create a definition for this, this beast of information.

We do have a couple of suggestions, and one might be defining it from a user and searcher perspective. So maybe a suggestion would be active or online data that is searchable, using the native application in which it was created. In layperson speak, it would be active online information that is searchable in the manner in which it was created.

If we don't want to or the committee doesn't

want a specific definition, another idea that we thought of was maybe a noninclusive list of factors that you consider, very similar to Judge Scheindlin's Zubulake opinion, where there is a list of factors, such as is this information information that's active? Is it online? Is it easily retrievable? Is it information that can be retrieved obviously without a lot of burden and with minimal effort and minimal cost?

Now we understand that that's very difficult to do, but we think that if we have a definition of accessible versus inaccessible, it will make the discovery process clearer for both sides. Right now, I think that there is an uncertainty with what responding parties have to produce and what requesting parties are entitled to.

Just as an example, in the costs that we do face searching our active system, if we had a request to search one of our servers for e-mail, and we have 49 different servers that house all of those 156,000 mailboxes, and they're located in four different spots all across the country. One

request to search one server for 10 terms that a plaintiff gives us, for search and review, costs $125,000. We've had to do it, and we've done it because we didn't know--we didn't have guidance on whether this was accessible information, whether it was inaccessible.

So we thought, okay, it's been asked for. We had a judge that said, "Okay, plaintiff, give them the 10 terms that you want searched on the server," and we paid for it. And it--

JUDGE SCHEINDLIN: Can I interrupt? I just had a question about that, given an earlier speaker.

MS. DeGENOVA-CARTER: Sure.

JUDGE SCHEINDLIN: Earlier this morning, we heard that that may be a matter of shopping. Did you pay an outside vendor that $125,000, or was that in-house?

MS. DeGENOVA-CARTER: This was outside at the time, and it was done probably about a year ago.

JUDGE SCHEINDLIN: So, according to the earlier speaker, you might have been able to buy that cheaper?

MS. DeGENOVA-CARTER: Well, yes, maybe we could have. But we didn't know. And at the time, you know, we had about 45 days to complete it.

JUDGE SCHEINDLIN: I understand. So maybe it can be bought cheaper. Maybe the costs will go down next year?

MS. DeGENOVA-CARTER: Yes, exactly. And that's a very good point. The costs very well could go down next year, and I know a number of speakers have said and State Farm would agree with the fact that we have to be flexible. But I think we can still give a definition and be flexible. The definition that we proposed would change with technology.

As a new technology became available, if your system could be searched in that technology, then your information would be considered to be readily accessible, and you would have burden to produce that. And you would have the burden to pay for that, and I think most companies would probably find that to be reasonable.

JUDGE ROSENTHAL: Professor Marcus?

PROFESSOR MARCUS: In the example you gave about the judge's order that you search the server using 10 terms, how would that be handled differently under Rule 26(b)(2) as it has been proposed?

MS. DeGENOVA-CARTER: Current--for us, under Rule 26(b)(2), right now, that information would fall into an accessible category. So it's--

PROFESSOR MARCUS: When you received a Rule 34 request that included that information, what did you do in response? And then what happened after that?

MS. DeGENOVA-CARTER: Right. Sure. Obviously, what we did is we, first off, objected and said this is very broad. I think the request was for any and all documents that you have relating to this case. So we served our objections on the other party.

And then they came back and said, okay, now that you've described to us this e-mail system that I described--which we said, "Wait a second. We can't go search 156,000 mailboxes. Let us know

either the parties you think that are involved or give us more of a definite definition."

And so, that's when they came up with the idea, well, we can limit it to terms that we think would be operative in this case. And we said, well, we would rather, obviously, have it restricted to the parties that were involved. But the judge agreed that 10 terms, they were relevant terms, that we should search our system for that.

So what we did was we found the servers and the mailboxes that would be affected, and we contacted our vendors who we would use, and we had to do a search for the 10 terms. Then we had to review all of the information that we found, which actually cost a lot more money than did the search itself. And that would be one of the reasons that we would suggest, for cost allocation, a presumption in tier two for inaccessible information that--a presumption of cost shifting for information that's not reasonably accessible.

Obviously, that presumption would be able to be rebutted by clear and convincing evidence of the

need or that this information is relevant and is available.

PROFESSOR MARCUS: I'm sorry to press you on this.

MS. DeGENOVA-CARTER: No, that's fine.

PROFESSOR MARCUS: But that sounds a lot like what I would expect would happen under Rule 26(b)(2) as proposed to be changed.

MS. DeGENOVA-CARTER: It is.

PROFESSOR MARCUS: I'm not clear on why it's different.

MS. DeGENOVA-CARTER: Well, it would be different because I think we have more guidance, and potentially, we may not have had to do that search. If we could classify that this information was either--in this case, it would have been accessible.

But I think if it was a different example, and it was possibly inaccessible information, then we have a whole other area in which we have another opportunity to pursue, well, maybe we should be--maybe we should be defining the scope. Maybe

defendants need to define the scope further.

But right now, as it stands, we don't have the division between inaccessible and accessible. Whereas, for your example, it would be the same. But in other examples, it could be very different.

PROFESSOR COOPER: Can I ask one further question? You got a lot of responses searching for 10 terms. You reviewed it. What proportion of the material that came up was, in fact, responsive to the request?

MS. DeGENOVA-CARTER: Very little. I think that maybe we probably--five or six documents.

MR. CICERO: E-mails?

MS. DeGENOVA-CARTER: Mm-hmm. And in actuality, it's because those terms were used so--these were very common terms, I should say, also. So they were used in the e-mails. It was not a case of here is the requesting parties, all the information that they want in one e-mail. It was a very limited amount of information that was actually available.

JUDGE HAGY: Did you argue the cost in that

case to the court, that it was unfairly burdensome because it was going to cost a million dollars and the sample shows you're not going to get anything or--

MS. DeGENOVA-CARTER: We did argue cost, but we were still ordered to do it. So we complied.

JUDGE HAGY: So now the reasonably accessible test, why wouldn't the same thing happen? Or do you define reasonably accessible as being something other than cost benefit?

MS. DeGENOVA-CARTER: No. For this example, I would say that it would be the same results because it's e-mail and it's active. It would be different if it were back-up tapes or maybe, for example, some of the other systems we have that we do maintain electronic information and have record retention guidelines where some of that information is held for a certain number of years.

So I've heard a number of people here today say, well--I think one of Judge Scheindlin's questions, well, if you're dealing with back-up tapes, then maybe we never get to that point

because those wouldn't have the relevant information on it to begin with. But if you're handling--if you're not just focusing on the back-up tapes, large companies have other types of systems that could be considered to be inaccessible.

JUDGE ROSENTHAL: Can I ask just one other question? How often, in your experience, has it been necessary for you to restore information from inaccessible sources in order to satisfy discovery needs?

MS. DeGENOVA-CARTER: Very rarely. Normally, we can get the information that we need, that even the other side feels is responsive, from what we have and consider accessible from the active information.

JUDGE ROSENTHAL: Are there other questions of Ms. DeGenova-Carter? Yes, sir?

MR. KESTER: Just quickly. How typical is this example that you gave us in terms of its cost and in terms of how often such things happen?

MS. DeGENOVA-CARTER: That's probably an

atypical example. Normally, what we get are requests for searching certain individual's mailboxes, which we do all of the time. That would be the more typical. Search a few mailboxes, search a few people's computers.

We don't have very many requests to restore back-up tapes or to do searches on all of our servers. I think once we explain and educate the courts on what our system is like, then the court and the opposing counsel normally will narrow down their search.

But for example, we do have requests--I received this request last month, and this is from an ongoing case in federal court in a Midwestern state. And the request was the parties wanted exact copies of all of our hard drives on desktop computers, laptop computers, notebook computers, PDAs, servers, and other electronic media related to this action from November 1, 2002, to August of 2003.

So they pretty much wanted everything that we had, and we actually had to spend the time to go in

and explain to them in court through laborious motions this is a very broad request. We can't comply with this. This would take hours and hours and thousands of dollars.

And we do have the requests. We had another request where we had to search servers, again, for certain terms. I think the requesting parties feels if they give the terms that we want, and we can go and search them, that that won't cost a lot of money. Again, it still does. And we did this search in-house. I think we learned from doing it out-house.

But the search was, again, for--10 seems to be the magic number--10 terms, for example, fraud, defraud, fraudulent, in a bad faith claim. We searched three legal domain servers. It took 537 hours and cost us internally $48,811, and that was for one request in one bad faith case.

JUDGE ROSENTHAL: Any other questions?

[No response.]

JUDGE ROSENTHAL: Thank you very much.

Ms. Coukos? Good morning.

MS. COUKOS: Good morning. Good afternoon, I'm not quite sure where we are now.

JUDGE ROSENTHAL: Sorry. It's functionally morning, before lunch.

MS. COUKOS: I'll accept that. My name is Pamela Coukos. I'm a counsel to the firm of Mehri & Skalet here in Washington, D.C. We are a small plaintiff's firm that does complex and class action litigation in a number of areas. My practice area is primarily employment discrimination cases.

And I want to focus today my comments specifically on the reasonably accessible language, to just respond to some of the issues that have come up this morning. With respect to the other issues, you already have some written comments.

And I will be quite frank with the question that's been asked of a number of witnesses. I don't usually need to go into legacy data to litigate my cases. However, I believe this rule change is going to have a big impact on my practice because I don't see the issues as confined to just restoring information that is in some kind of

legacy system. And let me explain a little bit why I see that to be the case.

In a surprising number of my cases, there is some document or set of documents which we refer to the shorthand of "management knowledge." It's the PowerPoint to the senior executives or the memo to the CEO or some internal reporting about how the company believes they're doing on diversity. Obviously, this is pretty relevant information to our claims.

In the old days, it would be in somebody's file cabinet probably, and it would be searched for in response to a discovery request. These days, it could be anywhere. It could be on a server. It's probably in somebody's e-mail box attached to some e-mails about this.

And it might not be active. You know, it might be sort of the equivalent of the file cabinet. Might not have been accessed for two, three, or four years. But it's not that difficult to get to. And if we look at what's currently in the rule now, it's relevant. Let's assume it's not unduly

burdensome to get to and that there isn't a valid cost issue because if that were the case, then those would be the objections that would be presented.

So, as we've been talking this morning, there is some other thing about it that means not just that there should be cost shifting or something else, but that it's not discoverable. That I can't get it without satisfying a good cause standard, which, as we all know, is more than just relevance. There's some kind of really good reason.

JUDGE ROSENTHAL: Can I interrupt you for a second?

MS. COUKOS: Sure.

JUDGE ROSENTHAL: Your paper proposes as a substitute for the standard of inaccessible without undue burden or expense. And my question is this. You seem to assume that it all comes down to a question of cost shifting. But if there is, let's just assume that we have your standard in place, and a party comes in and says the stuff that you want, requesting party, I cannot give you without

spending a ton of money and spending a ton of time.

So my first question is not merely how much of the cost of restoration is appropriate to share or allocate, but should there be any requirement to produce in the first place? Does your standard adequately convey that there are separate and distinct questions, the first being is production required? The second being, if so, if good cause is shown, if there is need, then the question is on what terms should that production occur?

MS. COUKOS: Sure, and I think that those are separate questions under the existing rule. Those would be separate questions under the rule as proposed.

And let me just clarify, the reason I put forward some alternate language is not because I really endorse this concept but because, to be honest, there is a perception that the decision has basically already been made that there is going to be some change along these lines. And if so, you know, I propose some alterations that I think make it a little bit harder for the other side to have

recourse to this exception.

And I'm concerned about both active data, where there is something that's required to get to it, and also data that's sort of--that's really inactive because it's not used on a daily basis. And what we've been hearing, I think, from a lot of people is that's how they want to define accessible is how is it used in the business? Is it really being gotten to on a regular basis?

And if it's inactive, but not that hard to get to, then I'm just not sure what this rule is adding that would really be beneficial. And I'm concerned that it actually will be a way to constrain a good fact-finding process.

You know, what we're talking about is the potential evidence in a case, the factual narrative that will determine whether the claims success or fail, whether the defense succeed or fail. And you know, there was some discussion of what are the limits? And the limits, I think, are cost and burden and, frankly, relevance--all of which are already in the rule that we have.

And to start talking about how often is it used on a daily basis, if there is no cost issue and no burden issue and relevance is satisfied, then that, to me, is cutting back on the fact-finding process in an inappropriate way. You know, I've done legislative drafting in the early part of my career. I never wrote some language without meaning to change something that was already in place. And so, that's why you're hearing a lot of concerns from the plaintiff's bar.

You know, my law professor, like many law professors on civil procedure, would say something like, well, I'll give you all the substantive law. You give me all the rules of procedure, and I'll beat you every time. And the interplay of substance and procedure here, I think, particularly on these class action cases, is that I have to show that my class action is manageable, that there are common issues.

If there is a centralized database of information that isn't that hard to get to that can be produced to me that we can use to litigate the

case, in some ways, that concedes some aspects of manageability of the case. And I think that's the reason why we're running into a lot of resistance to producing that information or claiming that it's really hard to work with, really expensive, and I'm just worried about writing into the rule yet another basis to withhold it.

I think that was the main issue I wanted to bring forward. I don't if there are any questions.

JUDGE SCHEINDLIN: Can I ask a quick question?

MS. COUKOS: Sure.

JUDGE SCHEINDLIN: If this framework were to stay, what would you expect a party to do in terms of designating or identifying that which they say is inaccessible? What would you hope they would do so that you would understand their claim?

MS. COUKOS: Well, I hope that the rule would be understood and applied to require some kind of good faith determination about accessibility before it's simply identified--and I explained in my written comments why I'm concerned about that identifies language--and to tell me about why it's

inaccessible. And this happens already.

You know, I have conversations with people about, "Yes, you know, we converted our database six years ago, and we still have the old tapes, and here is what we think is on them." And usually I'll say, "You know what, I don't think I need it. I don't think I need it right now. Let's start with what we have already, and you know, maybe it makes sense to preserve it, and if we have to get there, we will."

But the more information that I can get up front about why it's inaccessible, what the issues are involved in getting at it and, as I think Ms. Stewart explained, to test those assertions in a meaningful way, the more likely it is we'll be able to actually to just resolve it without having to come in.

But just to echo another point people have made, this whole idea that I've got to move to compel every single time, that's really troubling. That's not anywhere in the current rules or practice, you know? It's sometimes we move to

compel. Sometimes it's frequently a protective order motion. But again, usually, we have some basis of information to proceed.

And you know, as written, that's not really necessarily part of the process. And maybe it will evolve through a lot of litigation of this issue, but it would be much better to clarify those responsibilities up front.

JUDGE ROSENTHAL: Are there other questions?

[No response.]

JUDGE ROSENTHAL: Thank you very much.

And our last witness for the morning session, Mr. Nelson? And I'll caution you in a way that I did one of the earlier witnesses. No pressure, but you're all that stands between us and lunch.

[Laughter.]

MR. NELSON: I'm mindful of that, Your Honor. I'm also mindful that the afternoon session is supposed to start promptly at 1:00 or earlier. So I will be brief, and I certainly understand if you all defer questions in light of the lunch period.

Thank you for the opportunity to provide my

comments. I'm with the Philadelphia-based law firm of Nelson Levine. I practice in complex litigation, defending consumer class actions.

I attended a number of conference on this matter, including the Fordham conference. You may remember me. I was the one with the crutches, if you remember the one attorney hobbling around?

JUDGE ROSENTHAL: It looks like you're doing better.

MR. NELSON: I have done better, yes.

There's been a lot of commentary that there is no need for rules and the rules we currently have work well. I don't think there's any need to rehash it, since it's been covered so well by the committee note and your report as to the need for some kind of guidance.

But I can share with you that a lot of this guidance is necessary not just as we embrace litigation, but corporate America needs that guidance on how to act on a prospective basis. And absent that, there is not a uniform or national standard that we all can live by. And that causes

undue expense, in and of itself, to err on the side of caution.

I am in favor of a two-tier approach with respect to Rule 26(b). In reality, I see how this works is not an empty motion practice, as has been suggested, but a respondent will respond that they have some discoverable documents and then will most likely assert that there is the possibility of some reasonably inaccessible data just because the process to go and find that data, in and of itself, would require the exhaustive search we're trying to avoid.

If the plaintiff feels after--or the requesting party feels after having seen what has been produced and having seen that objection based upon the reasonably inaccessible aspect to this, then the plaintiff simply has to file a motion which doesn't sound, according to these rules, like there's an awful lot of grounds to contest, and then that would go before the court.

I don't see that being a very difficult motion practice to adhere to, either by the attorneys--

JUDGE SCHEINDLIN: Let me just ask you, though, to contest your claim of inaccessibility, say you're the party raising the accessibility.

MR. NELSON: That's right.

JUDGE SCHEINDLIN: Now to contest that, aren't you going to engage in expensive discovery so that the requesting party can prove in the end that it's actually accessible? How could they prove it without discovering your entire system and the difficulties of retrieval and the cost, et cetera?

MR. NELSON: Well, that challenge only comes out like the red flag in an NFL football game.

JUDGE SCHEINDLIN: I don't know what that means.

MR. NELSON: The requesting party--okay. Well, it means that you get to contest the referee's ruling on it, on a call. I don't want to make this too long. We're just--I'm a Philadelphia Eagles fan suffering from the effects of the Super Bowl.

Be that as it may, the way I see this working out is that the reasonably inaccessible data is defined in very broad scopes, but hopefully with

enough detail so that somebody can really comprehend the inaccessibility of it. At that point, plaintiff, having read that--or requesting party, having read that, will buy it or not buy it. And then, only then, if they don't buy it, then it moves forward before a hearing before the judge.

JUDGE SCHEINDLIN: Involving the discovery?

MR. NELSON: Involving the discovery.

JUDGE SCHEINDLIN: So how much would you have to disclose to substantiate the inaccessibility claim?

MR. NELSON: Well, hopefully, in order to have made that objection that it was reasonably inaccessible, you would have done a good faith effort to describe, well, there is some legacy data, or there's back-up tapes. That there's a likelihood that there is some data there that may comport.

JUDGE SCHEINDLIN: Well, that's not enough. Wouldn't you have to show why it's inaccessible? Not just that it's legacy data, but there is some difficult in getting it to you?

MR. NELSON: Certainly, and it's going to depend upon the circumstances. There's about nine different circumstances that are put in the proposed committee notes right now that talk about the different aspects of inaccessibility. And I would submit to you that most of those are going to be the grounds for why this data is inaccessible, but it's going to be determined by the circumstances.

So, for instance, one of my clients is a large insurance company. They buy other insurance companies routinely. Those insurance companies have computer systems. They are no longer functional. And even the IT people that ran those systems are no longer available. And in order to read into that system, they're going to have to buy technology to reconstruct the ability to read and then learn what's there. I think that would certainly qualify as inaccessible data.

The fact that data is routinely destroyed as a matter of back-up systems to deal with catastrophes, I think that would certainly get into

the realm of inaccessible data or reasonably inaccessible data. And I think those kind of descriptions would adequately be laid out in this position before there's even a contest by the party that's responding to the discovery request.

But keep in mind there's also going to be some documents produced at the very same time. And so, the requesting party is going to be able to see what they already have, and they're going to be able to see what the potential is for maybe getting some additional documents or data they don't need.

With respect to the identification process, which you're getting to, I think there is some vagueness with that. I respectfully suggest that that be modified in some way so that parties aren't required to produce what is tantamount to the equivalent of a privilege log. That, in and of itself, would require an exhaustive review of data that they normally wouldn't have to review.

With respect to the second phase, if despite the fact the showing of inaccessibility, the court orders the data to be evaluated by the requesting

party, I respectfully suggest that the cost of that should be presumed to be the requesting party's.

JUDGE SCHEINDLIN: Can we just go back one step?

MR. NELSON: Sure.

JUDGE SCHEINDLIN: What is your view on the preservation of the inaccessible?

MR. NELSON: Well, that's an interesting question. But if I can get to that when we deal with Rule 37, if that's okay, for the sake of efficiency?

With respect to the concept that there is going to be unscrupulous companies putting data into the inaccessible category, the courts always have the ability to sanction bad faith conduct. And in the real world, what's going to happen is if a responding party overplays that card, the sanction is available, and there's no reason to be worried about corporate America hiding the ball. I just don't think that's going to happen. It does happen from time to time, and you folks are wonderfully adept at dealing with it.

With respect to 37, this rule as it's written, in my opinion, is somewhat not workable. There are two sections of this that grant safe harbor protection, the first of which says the party took reasonable steps to preserve the information. The second steps is it results from the failure of the routine operation of the party's systems.

Well, if the system is designed to have a routine deletion--not destruction, deletion--then how can a party take reasonable steps to stop the routine? Isn't what we're really talking about here avoiding the cost of stopping the routine deletion of data that is generally unnecessary?

And so, from my perspective, this rule should be written, "A court may not impose sanction under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless the party intentionally or recklessly violated an order issued in the action requiring the preservation of the information."

There's been some talk about whether or not it should be a negligence standard or it would be a reckless standard. I echo the sentiments that have been expressed that, right now, spoliation of evidence is really about intentional or reckless conduct. It's not about negligence. There is no reason to take what is an already complicated subject and somehow put negligence as the issue as opposed to what is already spoliation of evidence intentional and reckless.

With that, I'll take any questions if you have any.

JUDGE ROSENTHAL: Are there any questions? Go ahead, Mr. Bernick.

MR. BERNICK: I've asked a number of people, and I guess I'm under the same pressures and operate under the same risks.

JUDGE ROSENTHAL: I didn't even have to say anything.

MR. BERNICK: But a number of people have commented on the interface between the proposed change to Rule 37, the doctrine of spoliation. All

that Rule 37 really talks about is limitation on the ability to impose sanctions under the rules. So I mean, as you read Rule 37, do you believe that it really displaces spoliation? And part of that also is, is spoliation law prelitigation or during litigation?

You can make an argument that once you're in litigation, the standard should be not simply good or bad faith, that you have an affirmative obligation to take steps to preserve evidence. And then it's more appropriate that the standard not be based upon a subjective, but rather on a more objective test.

MR. NELSON: Don't you have affirmative obligations to take reasonable steps, not every possible step you could possibly imagine?

MR. BERNICK: But that's what the rule spells out, a reasonable standard.

MR. NELSON: Exactly. So if you violate the reasonableness, which is now a question of negligence, aren't you talking about a higher issue, which is reckless or dishonest conduct? I

mean, you can satisfy reasonableness and still be negligent--I mean not negligent. You can be not negligent and satisfy reasonable.

MR. BERNICK: You can be non-negligent--

MR. NELSON: Let me try to phrase it a different way. With respect to the reasonableness practice, you can be reasonable and still be wrong. You have a right to be wrong and still be reasonable.

JUDGE ROSENTHAL: Even us. That's true. That's true.

MR. BERNICK: Isn't that appropriate?

MR. NELSON: Well, sure. But from the standpoint of spoliation, I think in this situation, since there's so much data and there's so many potential mistakes, I think it has to be a recklessness or a dishonest conduct. We are talking about systems that routinely do this as a matter of good housekeeping.

JUDGE ROSENTHAL: Thank you, sir.

MR. NELSON: Thank you.

JUDGE ROSENTHAL: We very much appreciate your

time. Forty-five minutes? That's pushing it, but we do have a lot to get through before the afternoon. So we will resume in 45 minutes. Thank you.

[Recess.]

AFTERNOON SESSION

[1:47 p.m.]

JUDGE ROSENTHAL: We're going to begin with Mr. Socha. Good afternoon.

MR. SOCHA: Thank you, Your Honor. Members of the committee, thank you for this opportunity.

I would like to start--there are three points I'd like to cover, if possible, during the time available to me. First is the question of reasonably accessible. Second is an issue of form or forms of production. And then, finally, if there's time, possibly some discussion about the back-up tapes because we always seem to be coming back to back-up tapes.

Under reasonably accessible, there have been questions throughout the day of how one goes about defining reasonably accessible. I have a modest proposal for you here. I've got a set of five factors to consider when thinking about whether electronically stored information truly is reasonably accessible. I've categorized them as type, form, location, ability, and effort.

For type, the question I think is, is the information of a type that the producing party routinely and knowingly uses or that a reasonable organization or entity in the shoes of that person or organization would routinely and knowingly use? So an example of that would be the text of a word processing document. People who are creating word processing documents work with and expect to see the text.

The metadata generally is not something that most users expect to have there. Many of them don't even know much of the information that follows along hidden with a word processing document. However, if it's someone who does routinely use and make use of that information or an organization that does, that changes things. So first is the type of information.

Second is the form. Is the information being sought in a form that's consistent with the form or forms that are routinely and knowingly used by the responding party or the producing party or, again, would reasonably be used? There, an example would

be information from, as used earlier, the example of a relational database system, an enterprise database system, where most of the people in the organization and the key people perhaps in the organization make limited use of that data.

They know how to put it in perhaps, using a limited set of forms or approaches. They know how to get it out in a limited set of reports. What they don't know is anything about the other 4,523 tables of information in that system or how to get at that or get out of it. And it may well be that there is not anybody in the organization who, with the expertise available and the tools available to that person, can readily get at that information. Yes?

JUDGE ROSENTHAL: Is it your advice to us, Mr. Socha, that we put these factors in a rule or that we draw attention in the notes to these kinds of considerations or that we use the term "reasonably accessible" and have the Manual for Complex Litigation and case law fill in these details?

MR. SOCHA: I would leave the rule the way you

have it formulated now. I would use the term "reasonably accessible." I would suggest considering putting language of this type into the notes to help better explain what is meant by reasonably accessible. And with these five areas, I have tried very hard to stay away from tying them to today's technology and today's technological problems because, as you've heard over and over, those are changing, and those will continue to change.

JUDGE ROSENTHAL: Go ahead.

MR. SOCHA: Putting this in the Manual for Complex Litigation probably isn't the right place for it because these factors can apply and these issues apply not just in complex litigation, but in less complex litigation as well.

The third factor is location. Where is that information actually stored? Is it, once again, in a location that is knowingly and routinely used by the party or that you would reasonably expect the party to knowingly and routinely use? Or is it somewhere- yes?

MR. CICERO: Let me interrupt you there, if I may, because I was waiting to see how often the word "routinely" would come up.

MR. SOCHA: Quite a bit. But we can take it out.

MR. CICERO: This had come up earlier in the day in one form or another, and I've been puzzling over that because--

JUDGE ROSENTHAL: Frank, would you talk into the microphone?

MR. CICERO: I'm sorry. I've been puzzling over your use of the word "routinely" and others who have used similar terms. Because it seems to me that--well, I start to think about, you know, the old days, when you had things stored in salt mines and that, or wherever they were. And probably a lot of the things--the material that was stored there was not routinely available. It depends on how you define "routinely." But it was not routinely available. It wasn't kept for use in the daily course of business or anything else, or it wouldn't have been out there. It would have

been in someone's office.

But nevertheless, you routinely had to go search in those places if you had document requests. What do you mean, is that a necessary term, or is it too restrictive?

MR. SOCHA: It's not a necessary term. It may not even be the best term. Here is what I meant by it, and I'm not sure what others mean by "routinely," but here is what I was thinking of. I was thinking of the type of activity that you engage in as a matter of course rather than one where you have to sit back and say, "Okay, now how do I do this? How do I take care of this?"

So it's not so much a question of frequency, not that use of routinely. But routinely instead as an indication of matter of course rather than exception.

MR. CICERO: So salt mines would be routinely under that definition--

MR. SOCHA: Salt mines could be routinely under that.

MR. CICERO: --if you send people out there

from time to time to get stuff?

MR. SOCHA: That's right.

JUDGE HECHT: And just to follow up on that, and it might be different for different people?

MR. SOCHA: It most certainly will be different for different people. So, again, it may not be the best word for this, by any means. But I figured I'd suggest something.

Online servers most likely would be an example of locations where people routinely go for information, but I wouldn't look at this factor in isolation. I'd look at it in combination with the other factors.

Back-up tapes or, rather, disaster recovery back-up systems--because not all disaster recovery systems use back-up tapes--may be a location that's not used on a routine basis to get the information back. It may be something that's used on a routine basis just to get information in.

I can go into back-up tapes a little more now or come back to that after I get through these, whichever you would prefer.

JUDGE ROSENTHAL: I think it might be helpful if we got these five factors out and then moved on from there.

MR. SOCHA: Okay. Fourth is ability. And the question there is whether the producing party has the hardware, the software, and the expertise to gain access to this information or whether they've got to find someone or some organization that can get at this information that they don't, once again, knowingly and routinely go after.

One example there is that most of the companies that I have seen that need to produce electronic files have a pretty good handle on how to produce an individual's PST file or the file that's used to store outlook e-mail messages and related things. That's generally a fairly straightforward proposition, and there is often someone within the IT department of the organization or someone similar to that who can get that file, get it to the attorneys. The attorneys can go through the review and then get it onto the other side.

If, however, it's a situation--and I think

these are unusual situations, by the way--where it's necessary to get a forensically correct copy of the hard drive of a computer, it's generally going to be unlikely that a company is going to have on staff someone who has the training, the experience, and the equipment to do that correctly. They'll have to turn to outside resources.

Finally is effort. And I haven't heard a lot of direct discussion today about effort. But it seems to me that the effort required for the producing party to gain access to and produce the requested information ought to somehow be proportionate to the magnitude of the dispute. So that there shouldn't need to be $125,000 or $125 million worth of electronic discovery effort required to deal with a lawsuit where there is $50,000 at issue.

JUDGE ROSENTHAL: Is effort cost and burden?

MR. SOCHA: Effort is the closest to cost and burden. I tried to isolate it, calling it effort here, instead of cost and burden, because I think all of these--type, form, location, ability, and

effort--can be considered as cost and burden factors.

Those were the five factors that I thought might be useful in helping explain or describe what's meant by reasonably accessible.

The second point I wanted to cover--unless there are questions about that--is form of production. And I think what I want to bring up here ought to be relatively uncontroversial. I think it's just one of those things that has managed to slip through the cracks along the way.

The rules, as they are drafted, and the notes, as they are drafted, right now talk about a form of production. And in some instances, a form of production makes sense. But that's not universally true.

If I am a producing party and I have electronically stored information to provide to the other side. It's relevant. It's not privileged. I might have, as an example, e-mail messages, word processing documents, spreadsheet files, and information out of a large relational database

system. If I had to choose a single form of production, all that information had to be produced in the same form--PDF or TIFF or native--I'd be in trouble, to a certain extent, and the requesting party probably would be in trouble as well.

If I decided to hand it all over in native form, that would be fine in a way for the e-mail messages, the word processing documents, and the spreadsheet files, at least as far as the requesting party goes, because they ought to be able to open and work with those. But if I hand them over a large Oracle database, chances are there is not a single thing they can do with that.

Similarly, however, if I convert everything to paper or quasi-paper, PDF or TIFF, that can be useful for some of the materials, but it poses its own problem. Any single form might be problematic.

So I suggest revising both the rules and the notes to say instead and talk instead about forms, plural, of production rather than a form, singular. And in my written materials, I've got a suggestion for language to consider using in the notes to talk

about that further. Questions on forms of production?

The third area then that I wanted to address was back-up tapes because there is so much discussion about back-up tapes. We seem to be obsessed with back-up tapes these days. They are not going away from a long time to come. Yes?

PROFESSOR MARCUS: I'm sorry I was slow on the uptake there. But regarding form of production, 34(a) as presently proposed to be changed says the request may specify the form in which electronically stored information is to be produced. And then in the absence of that, 34(a) says a responding party must produce the information in a form in which it is ordinarily maintained or in an electronically searchable form.

If those two were pluralized, that would address what you're talking about?

MR. SOCHA: That would address what I'm talking about. I think it would help as well, though, to have some commentary in the notes to explain what's meant by that difference because it would be so

easy for people to slide right over a plural versus a singular there. Yes?

JUDGE ROSENTHAL: In our note, in the language that says that parties only have to produce in one form, would you suggest that we clarify that to make it clear that the same information only need be produced in one form?

MR. SOCHA: That makes sense. What I'd be concerned about is disparate types of information having to be produced all in one form, trying to force everything into a single container.

JUDGE ROSENTHAL: Thank you.

MR. SOCHA: We seem to be obsessed these days with back-up tapes, and back-up tapes are not going to go away for quite some time for two reasons. One, they're not going away in the business world, the world of people who use back-up tapes. First, organizations, especially large ones, have enormous investments in their back-up tape systems. They have got huge machines that have robotic arms that move tapes around, pull them out of one slot, move them over, stick them into another slot. Very

complex, very expensive systems.

And they're going to be reluctant to throw those out, even if there is something better available. They're going to wait until the pain of continuing on with what they have is far greater than the pain of replacing it all. And for many, that's not going to happen for some time.

Second, the people who make tapes and tape back-up systems don't want to see these systems go away. So they are working very hard to make them run faster, to allow more information to be stored on the tapes, and, to the extent they can, to make it easier to get the information off the tapes.

Third, we're talking about litigation, and litigation is looking at what happened in the past. So even if a company gets rid of a back-up tape system today, it's likely for some period of time to still have some tapes sitting around.

Back-up tapes and systems, I've heard people talking about these as if they're all the same, but they're not. They can differ enormously. I'll give two examples, which I think highlight the

challenges of dealing with them, and I think I'm done with my time after that, if I'm guessing correctly.

A simple system is a single server that has a dedicated tape drive attached to it. And each night, someone puts a tape into that machine, and that tape copies the contents of the entire server. That tape then goes offsite for maybe 90 days, comes back, and is rewritten again. That's the simplest extreme.

There, if you have a tape and you have a machine similar to the one you were starting with, you can restore the information at some cost off of that tape onto the computer.

At the other extreme, you have the robotic arms and the silos. The most important thing, though, is you've got what's called a many-to-many relationship. On the one hand, you've got many, many back-up tapes being created each night. On the other hand, you have many, many servers where that information is coming from. And there's a computer system or a series of computer systems in

between that make these two things work.

Any one tape could have information on it from multiple--3, 5, 10, 15, more--different servers. Any one server can have information on multiple different tapes. It's designed that way to allow the organizations to get as much information copied off those computers in as short a time as possible and get them on the tapes.

Everyone who uses those systems and has had to restore information from them recognizes that the systems are not designed to allow information to flow easily the other direction. It can be a very arduous process. And even the best of absolute disaster recovery scenarios call for 48 hours for a massive restore of a system which, by the way, doesn't tell you, for litigation purposes, anything about what's on those tapes.

So there's a huge range of complexity with back-up tape systems.

JUDGE ROSENTHAL: Are there questions?

MS. VARNER: Could you address Mr. Rosen's comment this morning that it's not very expensive

to deal with back-up tapes? I don't know if you were here this morning.

MR. SOCHA: I was.

MS. VARNER: But we had a comment that that cost had been driven way down, and it was that you could find vendors who could do it quite cheaply.

MR. SOCHA: If you are talking about my first example, that is, for the most part, true. If you have a single back-up tape that is a whole copy of a server, you can get the information restored off that back-up tape generally at a cost of anywhere from a few hundred to a few thousand dollars. At that point, you have not yet looked through that information in any way. You have just recovered it off of that tape and put it onto a computer.

However, at the other end of the spectrum, this can be an enormous problem. There's an organization I'm working with right now, a company, a defendant in a series of lawsuits that has been under a preservation order to hold all back-up tapes not from all of their systems worldwide, but from a significant number of them.

In the past roughly eight months, they have spent just in order to buy new tapes, new tubs in which to put the tapes so they can be transported from the data centers out to the storage facilities, labels for the tapes and related items--in the past eight months, they've spent just shy of $6 million. That's just for the tapes. That doesn't talk about the money spent in additional time on the part of their people to order new tapes, open up the packages, remove all the packaging material, label the tapes, initialize the tapes so the system can read them, put them in.

All of this is just to get the information on the tapes. There are--I don't even know off the top of my head the count for the number of tapes, but it is an enormous number. If you needed to go there and start pulling information off those tapes, and that's one of those many-to-many systems, you can't identify a single tape as one likely to have the information you're looking for, not the way discovery requests are posed.

JUDGE ROSENTHAL: Mr. Bernick?

MR. SOCHA: The cost they've paid to save those tapes is nothing compared to the cost they would have to pay to try to actually find information on those tapes. So there's no one answer to this.

MR. BERNICK: Part of the problem is that when you get into preservation orders, they ask that you preserve all copies of back-up tapes. By their nature, from day to day, if you back up daily will be identical copies, in large part, of the day before. So an awful lot really depends upon getting a dialogue going, would you agree?

MR. SOCHA: Yes.

MR. BERNICK: So that people understand that a little word like "copies" has enormous impact when it comes to preserving back-up.

MR. SOCHA: I agree, and I think the most important thing you're doing with the rules here is encouraging the attorneys to talk early and talk often and talk a lot about these issues. That's going to go a lot farther than anything else is to helping with this. There is also the perception often that lawyers are doing a lot of electronic

discovery now. I don't think that's true.

I hear two very different stories. When I hear what folks from law firms say publicly, I get a very different story from the one I hear when I go into their offices, we close the doors, and they talk about what's really going on. Even in the law firms that are the most advanced, including some of the ones that hold themselves out as having electronic discovery practice groups, it is only a minuscule, for the most part, percentage of the lawyers who actually are involved in any fashion in electronic discovery.

That is, I think, why what you're doing here is so important and why the portions of the rules that talk about talking early and often are so important because they help heighten the awareness that, sooner or later, this is what all these lawyers are going to have to be dealing with.

JUDGE SCHEINDLIN: Just one quick question on the form of production. What do you think about our proposed default? If there really isn't an agreement or an order, do you like those two

categories or don't like them? Would you prefer usable form instead of searchable? Have you thought about that default?

MR. SOCHA: I've thought about it, and I have conflicting thoughts about it, of course.

JUDGE SCHEINDLIN: We all do.

MR. SOCHA: Of course. On the one hand, I think it is potentially a very useful approach to try to force the parties to deal early on with what the form of production will be. I think that's a good idea. The problem I see is if you are talking about a default form of production, then what do you make that default form of production, especially if you get into an arena where you have forms of production rather than a form of production? I think you're stuck.

I think you try your best to encourage folks to talk early and often. But dictating a form of production probably is going to create more problems to solve.

JUDGE SCHEINDLIN: Would you take it out? Would you just--

MR. SOCHA: I would take the default form out, but I'd still try to have the language strongly encourage discussion very early and very often.

JUDGE SCHEINDLIN: Thank you.

JUDGE ROSENTHAL: If there are no other questions, thank you, Mr. Socha.

MR. SOCHA: Thank you.

JUDGE ROSENTHAL: Mr. Hacker and Mr. Wochna?

MR. HACKER: Good afternoon.

JUDGE ROSENTHAL: Good afternoon.

MR. HACKER: Thank you for allowing us to come together before you and offer our opinions. My name is Damon Hacker, and I'm the president of one of the leading forensic companies in the country. I'm here today with my business partner and chief legal officer of our organization, Don Wochna.

And hopefully, we're going to try to paint a somewhat different viewpoint on the changes to the rules than what some of the large organizations may be posturing.

As an organization that helps parties involved in disputes get to facts of the matter by examining

the information that's on computer systems, including both the visible and invisible information, I believe we have a unique perspective on the proposed changes.

We use forensically trained attorneys combined with highly competent and trained computer investigators together in computer analysis teams, which kind of allows us to bring both the technical aspects of an investigation together as well as some of the legal perspectives.

Following much of the existing case law, such as Simon Property v. mySimon, and Antioch v. Scrapbook Borders, we've been able to set out protocols and procedures that allow us to have a lot of success in lowering the cost of discovery for our clients as well as shortening the timeframes.

Because we've taken an approach like this and our approach and tools are very neutral, we're often appointed as an independent, and we're working both sides of the cases and really helping to become truly a nonadversarial discovery

approach.

We're happy that as much thinking and work has gone into the proposed changes. And for the most part, we believe the committee has those right. We do have a few items that we do have concerns with. And upon review of those comments provided by others during this public comment period believe some of the facts have been at best exaggerated and at worst may be misrepresentative. Specifically, we're extremely concerned about the language surrounding reasonably accessible.

Today, many companies try to hide behind a pretense that data has been deleted--data that has been deleted and/or removed from systems or is only available in the legacy systems and back-up tapes is not reasonably accessible. They offer a variety of reasons, which we've heard today and through the comments, why they should not be discoverable, including burden, associated costs, and the fact that data is not generally accessed by the corporation. During our time today here, I'd like to show that that just isn't the case.

We'd like to show that the problems and issues that are being raised may have been problems three to five years ago, but are routinely disappearing and becoming very accessible today. Technology, even in the past two years, I have seen make some dramatic changes in this area, and they've help to improve efficiencies and help lowering those costs.

Technology is going to continue to improve. I've heard that several times today. Therefore, I feel that we shouldn't be going about making the rules to address today's problems or that are going to solve technology that's going to be here even in the very short future.

Next, I'd like to dispel this image that the seemingly inaccessible data--yes?

PROFESSOR MARCUS: Am I understanding you correctly to say that in the very near future, there is going to be nothing that is inaccessible?

MR. HACKER: No, I think it's got to be looked at on a case-by-case basis.

PROFESSOR MARCUS: Would the standard reasonably accessible be a way to look at it on a

case-by-case basis?

MR. HACKER: Well, that depends. I think that the definition of reasonably accessible has to be carefully looked at. You know, from the standpoint of what is on a computer and what is on computer systems, the tools that most people may have today, one would say, you know, is not reasonably accessible--but that some people even know about. But the tools that are out there, do exist today, and there is more coming.

I mean, I've seen a tremendous number of companies that have jumped into this arena, both from a service standpoint as well as from the standpoint of offering new tools and software, that are going to be out there to help bring more accessible.

That's going to kind of lay into my next point, which is, you know, to talk about the cost and kind of dispel this truth that much of what has gone on--

PROFESSOR MARCUS: Is that a profitable activity, providing those tools?

[Laughter.]

MR. HACKER: I would assume that it is, or they wouldn't--

PROFESSOR MARCUS: There is an element of cost in accessing this data using those tools?

MR. HACKER: Yes, but I would say that that's relatively low. I mean--yes, go ahead.

MR. WOCHNA: If I could interject just quickly, I believe your observation is correct. In the future--actually today, nothing is inaccessible. It's a matter of money.

But in the future, if the rule is drafted properly--and just as a former alumni of the University of Chicago, I've been practicing 22 years. I'm very sensitive to the economic analysis of law, make sure we get the burden on the right side of the party to induce people to incorporate the technology properly.

If you write the rule correctly, then as the technology shows up, so that even the most difficult stuff today to access will become cheaper, will become easier to access, that will

only occur if somebody has got the inducement to buy that technology.

JUDGE ROSENTHAL: So we should write the rule to tell a company that if it's a choice between improving health benefits for their employees or getting cheaper technology to recover information that might be useful in litigation some day, they ought to choose the latter?

MR. WOCHNA: It's never that Hobson's choice, though.

JUDGE ROSENTHAL: I appreciate that. I was trying to make a point.

MR. WOCHNA: No. In fact, you should--

JUDGE ROSENTHAL: Or raise a question.

MR. WOCHNA: I don't think the committee need dictate the purchase of technology at all. The committee simply needs to do what we try to do in the common law, what we try to do all the time, and that is to place the burden of incurring the cost of discovery upon the party that is best able to incorporate the technology to drive the cost down.

Which, in this case, would be to tell a

producing party that you have to produce documents. You have to produce them in the forms, et cetera, that are being requested unless you can come to court and show that the documents are not accessible. I wouldn't say for reasonably accessible. I would say you have to show they're not technologically accessible.

JUDGE ROSENTHAL: At all or--

MR. WOCHNA: I think, ultimately, you would start at all because if I were the plaintiff, I would say, well, what if I could do that? In fact, Damon and I have discussed on a couple of occasions, and we don't have an answer to this yet. But it would be great to have a kind of gaming solution that if the plaintiff says, "I can recover your documents for you off of your systems for X number of dollars using computer forensics."

And the defendant says, "Well, that's crazy. We can't do it in-house for anything less than millions." There's got to be a way for the documents to be produced, and somebody to incur the risk that the documents can be produced and

recovered in that economic fashion, as the plaintiff is indicating.

And we get put into that situation frequently when we're called into court, and we testify what we're going to do, how we're going to do it. And if the court says they only want to spend X number of dollars doing it, we'll do it for those number of dollars.

But that's the technology that's available today in cases. There is going to be more technology tomorrow and more two years from tomorrow. And in 5 or 10 years, we'll all look back at this and go, wow, why were we ever so worried about back-up tapes or legacy systems? Because there are companies out there right now trying to solve those problems, but they're only going to solve them if somebody is out there willing to buy the solution.

MR. KESTER: Both of you are just saying that what's reasonable is going to change. Isn't that what you're saying?

MR. WOCHNA: What's technologically accessible

is always going to change. What's reasonable is going to be a function of one plaintiff's attorney saying this is reasonable, defendant's counsel saying absolutely not.

And our concern is that the standard--you've got two big areas that we're most concerned about--the standard not be a way for people to hide behind the standard and not disgorge relevant data that's really important.

While it may be true you're never going to find on back-up tapes deleted stuff, because it never gets saved to a back-up tape, it's absolutely not the case that at the bottom end of the pyramid, where your most distributed computers are at--you start imaging your laptops and your PCs and your desktops, et cetera--as you go through the process of recovering data, that is where you're going to find deleted data and instant messages and things that were communicated to one another that never made it to the back-up tape, never made it to the server.

And if the defendant's got the ability at that

point in time to say to plaintiff this stuff's not accessible--Microsoft's comments have gone so far to say that the deleted stuff on a hard drive ought to be rendered--ought to be considered not accessible because it was deleted. Well, that would be--that would be a horrible thing to happen.

In cases of theft of intellectual property, where your CFO or your major sales person has left and taken with them your customer list, and you're now trying to prove the customer list is being used improperly by a competitor. He didn't leave behind a memo that says, "Here is where I left all the stuff." He tried to do as much as he could to disguise what he had done. And that's exactly what we do is we find all of that information. We never find it--excuse me. We very rarely find it in active files.

And if the defense capability or, rather, if a defendant is enhanced in their ability to prevent access to that information by making it more expensive or engaging people in a lot of motion practice to get to that data, I think your rule is

going to do a disservice.

JUDGE ROSENTHAL: Are you describing a situation in which good cause could be shown for obtaining that information and required its production?

MR. WOCHNA: Yes. But, again--yes, that's true. But even under your proposed rule, it seems that we've got at least one additional motion practice than what we've got at the present time. A lot of times we can run in and support a TRO or a request for a preliminary injunction based upon an analysis of 20, 30, 40, a couple hundred computers in the client's system, showing here are the computers we've already looked at.

We're one week into this litigation. We've got to stop X, Y, and Z from doing something nefarious, et cetera. Here is the data we've found on our computers that evidence the fact something went to our competitor, and we expect we're going to find a whole lot more when we get to the defendant.

Now it seems to me that we run in early on. We've got some motion practice to start with. It

strikes me that as part of those types of cases, these rules are going to invite a lot more motion practice as defendants in a knee-jerk reaction are going to say, "Active data, here it is. I won't even give you the metadata. I won't even tell you when the file was created because that's metadata, and our people don't use it all the time."

So you have to rely initially on the written document. And if you think this July 25th document was actually created in May, well, then you're just going to have to file a motion to try to get that information out of us. And we're just going to go down this path. I think, ultimately, we're going to get there, but I'm just concerned that you're going to have a tremendous more motion practice involved. We're going to show up as experts in all of that, I assume.

I did not mean to jump all over that.

MR. HACKER: A lot of that actually goes to my second point, which is that I believe that the computer forensics has been, in some senses, misclassified as being this heroic effort that

people have to go through to get this. And although we love to have that as kind of label that we're some kind of special "walk on water" kind of people, rarely there is no heroics going on in this industry.

The tools, I have to tell you, coming from an IT background and being in an IT department, that every IT department is called upon on a daily basis to recover files that have been inadvertently modified, that were previously deleted. Go back and--you know, the back-up tapes and that. They're using some of the same tools that we're using. It's available out there, and they're doing it today. And this is not heroics that, you know, that's happening.

JUDGE HAGY: That being so that everything is reasonably accessible, so what's wrong with calling it reasonably accessible?

JUDGE ROSENTHAL: Shouldn't you change your company's name?

MR. WOCHNA: To?

MR. HACKER: To?

JUDGE HAGY: Reasonably Accessible? May I make a comment, Professor Marcus? What would you substitute for reasonably accessible or just take away the concept and assume everything's accessible?

MR. WOCHNA: I think you ought to assume everything is accessible unless somebody shows you it's not.

JUDGE ROSENTHAL: So is your proposed standard one that's similar to what was suggested earlier that instead of reasonably accessible, it would be something like inaccessible without undue cost and burden?

MR. WOCHNA: That would be fine. That would fine. And that would be--you know, a lot of times, I do a lot of seminars, et cetera, and I'll get a whole bunch of attorneys initially thinking to themselves that in litigation, the first thing you do is you grab back-up tapes or you grab servers. Because in their minds, they've got the distribution of data in the defendant in the shape of a pyramid. And they're thinking to themselves

as the data gets consolidated as we go up the pyramid, to the server layer or to the back-up tape layer, that's where I'm going to find good stuff.

We do a fair amount of time trying to educate attorneys that they really ought to consider grabbing the data at the most distributed level, which is the area where people have got their PCs, their laptops, et cetera, by identifying--as we were talking about earlier this morning--identifying who's involved in this litigation, who are you going to call as witnesses.

If you've got 200 or 300 people, then you've got 200 or 300 computers. Imaging those computers first and then doing a simultaneous analysis on all that stuff first, you may find you never need to get to the back-up tape side. You never need to get to the server side, and you never need to get into these fights about whether or not the data, as you chase it up this distribution pyramid, it's going to get more costly, and it's going to get more difficult to receive it.

And yet, curiously enough, the stuff you may

ultimately want isn't there anyway because it never got saved going up the chain. It's someplace in unallocated places on lower level computers.

JUDGE ROSENTHAL: Mr. Bernick, last point.

MR. BERNICK: How do you reach agreement on who those 200 people are? And won't the plaintiffs in the case insist that that decision should not be made up front, that it should await their receipt of organization charts and their conduct of deposition discovery to determine who is really involved in the case?

MR. WOCHNA: Yes, I would agree with that. I think plaintiffs, and if they're trying to figure who's involved, initially we recommend a 30(b) deposition to try to figure out who in the organization does what, where does this data get distributed, and how does it work? Who's involved in this matter?

And then as that comes out, the nice thing is as that comes out, you can then grab those computers as they come out. You create clones of them, in effect. And you keep adding clones to the

case. And you keep on searching, and that can be done--

MR. BERNICK: But when do you do the search?

MR. WOCHNA: You can do the search--you can do the search even as clones are being added and then keep on kicking back relevant data as the case grows. And that searching process is done electronically. Now let's make it clear. It's done electronically, using software to drill down through this stuff and find in this myriad mass of information the things that are relevant to that particular case.

JUDGE LEVI: Including any attorney-client document?

MR. WOCHNA: In fact, on the flip side, we absolutely do. We absolutely help the attorneys find the stuff that ought to be preserved. And then the protocols, by the way, for all this, and these aren't ours--Simon v. mySimon, Playboy Enterprises-- these are all protocols set up by the federal courts that we think are excellent cases. Antioch v. Scrapbook Borders. Absolutely excellent

cases.

JUDGE ROSENTHAL: Well, since you didn't talk fast enough.

[Laughter.]

MR. WOCHNA: I just love this area. I do apologize. I am more than animated.

JUDGE ROSENTHAL: Well, in that case, you are in a group of people who share your enthusiasm. Thank you very much.

Ms. Middleton? Is Ms. Middleton here? There she is. I'm sorry. I didn't see you. Good afternoon.

MS. MIDDLETON: Good afternoon. I want to thank you for this opportunity to talk to you and thank you also for all of your work.

I'm strongly in favor of having these rules, and I tried to look at them recently as if I hadn't been involved, watched everything as it developed, and tried to imagine reading these rules from the perspective of someone, a judge or litigant, who may not know everything that you all know. And a couple of things jumped out at me that I'd like to

talk about.

The first one was that--and getting back to my desire for these rules, I thought maybe be careful what you wish for because one of the things that concerned me was there seems to be perhaps a suggestion that there should be more court preservation orders. And I do have one story in my comments, and I also want to correct a comment. It says--this was wishful thinking--that CIGNA companies may have several lawsuits pending at any one time. That's several hundred lawsuits pending at any one time.

But in a case not long ago, the plaintiffs went to court and gave the judge what appeared to be probably a very reasonable order, supported by a motion that cited the Manual for Complex Litigation. And the judge signed the order, ex parte. And basically, the order would have required us to inform all of our 37,000 employees that they must not alter, delete, move, change, do anything with any data related to--this is related to our health care business--anything related to

health care claims. It essentially would have shut down our business.

And we were faced with the situation of, in essence, ignoring a court order and being in contempt for a period of time, and it was a significant period of time before we could get before the judge.

So after that experience, and I do think that there are more judges who are signing preservation orders without the knowledge you have and inclined to err on the side of overinclusiveness, who may be signing a preservation order with no concept of the real-life implications of these. So to the extent the notes could reflect that preservation orders are not necessarily the norm, and if they are entered, they should be very narrowly and carefully tailored to require the preservation of very specific data, perhaps located in specific places because, again, it can be very burdensome on a large company.

But also I have a concern that the litigants are going to be rushing to court and involving

judges in discovery disputes more and more because, as they read these, if the safe harbor goes through, they're going to say, "Well, I'm going to get an order right at the beginning so that I'm going to get the court to sign this order." So these fact procreations or whatever the other side is, I can get sanctions against them. So I would encourage a note to reflect that.

I am concerned with the phrase that party need not produce--the party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. I would ask that you consider just taking out that last phrase there and just say "a party need not provide discovery of electronically stored information that is not reasonably accessible." That, to me, is the corollary to that you normally provide the documents and the information that's reasonably accessible and that's been asked for.

And then on motion by the requesting party demonstrating the need and the relevance, the responding party must show that the information is

not reasonably accessible. Otherwise, the way it's worded, I'm concerned that in initially responding to the typical first request for production, I--maybe some judges would say I have to create a privilege log or something akin to that.

Or some judges might expect me to list all the places, or plaintiffs or requesting party, all the places I didn't think to look, which sort of is an impossibility because I didn't think of it. Or just basically create a road map for the other side, if they choose to, to harass me in terms of discovery.

If I list and I didn't check the BlackBerrys and the home computers and the three laptops of these 85 people who might possibly have discoverable, you know, relevant information, that's exactly what the other side is waiting for, and then we're mired in discovery disputes and back before the judge. So I am concerned about this term "specifying."

JUDGE ROSENTHAL: Professor Marcus?

PROFESSOR MARCUS: How do you deal with that

kind of problem now?

MS. MIDDLETON: What I do now is I turn over the documents that would appear to be responsive and that I could find and that I could know about. The other side comes back and says, you know, "We think that you didn't give us the following thing, or did you check with the laptop or the BlackBerry of your CEO?" And then I say, "No, I didn't. Here it is." Or "That's ridiculous. I'm not going to get--I didn't check all my back-up tapes. No, I didn't." And then we're off to the races.

PROFESSOR MARCUS: Okay. So one thing I'm getting at is it sort of sounds like you are saying you are opposed to the change to Rule 26(b)(2) because it's going to make your life harder?

MS. MIDDLETON: No. I'm not saying that. I'm saying that I think that we will end up in burdensome motion practice and involving the courts more often than we have now.

I think, ultimately, what we want to do here is have, number one, clear rules. And they may not be rules I like. But if they're clear and I can tell

my client what to do, fine. And number two, give us rules that will allow the parties to police ourselves to some extent, so that we're not dragging each other into court.

And again, as in-house counsel, primarily what I want to do, knowing that 95 percent of my cases or more are going to be settled, is I want to get to the merits, and I want to get the cases settled quickly, efficiently, cost effectively, and not spend millions of dollars on discovery disputes and turning over documents that are not relevant, restoring back-up tapes that don't have any materials that really make any difference in the case.

JUDGE ROSENTHAL: May I ask you one question?

MS. MIDDLETON: Yes.

JUDGE ROSENTHAL: How frequently have you found it necessary to restore data from legacy or back-up, or whatever the case may be, in order to be fully responsive to discovery?

MS. MIDDLETON: I've not gotten that far. I could see it coming in a couple of cases, quite

frankly. You sometimes enter into the economic decision that this case, it's not an $80 million case. It's $1 million case. I'm going to settle it, even though I don't want to, because it's going to cost me a million dollars to restore, review, do the privilege review, get a human being who understands what we're turning over.

So we have engaged in some restoration of back-up tapes for other reasons, and I know how expensive and burdensome it is. But I've never had to turn it over in litigation. But it's not to say that they haven't been asked for.

The other concern I had was the language as saying that the requesting party could specify the form. I would ask that you consider changing that to request the form of production. I think that's what you're saying is that they can request what form, but using the term "specify" to me makes it--suggests that they should be the ones who get to determine what the form is, as opposed to the parties together.

They can request the form. The parties get

together and discuss is this really the form that you want? Is it native format? Is it PDF? What is it? So I think that the term "specify" gives a little too much leverage to the requesting party, when a very perfectly reasonable production, useful production could be something other than what the requesting party has "specified."

You've asked a couple of times today, I've noticed, about this whether when we talk about reasonably accessible, all we're talking about is cost and burden. And I guess at the very end, perhaps that's all we're talking about.

But when you do have hundreds of lawsuits coming in, and I think what I've seen in almost every lawsuit is the initial complaint is overly broad. And there is no downside for the plaintiff or a requesting party to be overly broad at all times because the only--the only downside for them is that some of their claims get dismissed. Some of their requests get denied. But they have no incentive to be narrow.

Whereas on the producing party side or the

defendant, I mean, there are plenty of incentives for us to be reasonable. We will be sanctioned or whatever else if we're not reasonable in how we respond. And again, we can get some of these claims in an overbroad complaint, and I dismiss perhaps after several motions. But as these rules stand, when the complaint comes in, if it's an overly broad complaint, you're, in essence, under an obligation to preserve, although what we talked about is produce--preserve everything that might be discoverable.

And discoverable is to be interpreted broadly under the rules. So we're not necessarily limiting ourselves to what might be material or relevant. It's pretty much everything. And so, what I'm finding is I get these overly broad complaints, and these would be RICO claims, various class action claims. They're extremely broad. The first amended complaint cuts the case in half, but in the mean time, I've already had to shut down things, tell people they have to preserve things, the back-up tapes, suspend them.

So, again, if we can come up with an incentive to have the requesting parties be somewhat reasonable, and one of those incentives, obviously, would be a presumption of cost shifting built into the rules that could be overcome by a showing of need, relevance, and if it's unjust to shift the cost. But without that presumption, I'm not--I don't think that many judges will necessarily give adequate consideration to what the cost might be.

And again, large corporation, yes, we have plenty of money. But hundreds and hundreds and hundreds of lawsuits come in, and you end up settling cases that really shouldn't be settled and for increasingly large amounts.

It used to be what a nuisance value was 20,000. Now a nuisance value might be 500,000 because of electronic discovery. So anything you can do in there to take into account that there are very few incentives to the requesting party to be narrow with their requests at the outset would be much appreciated.

I also had a few tweaks, talking about native

format. I have a concern about what appears to be a suggestion that production in native format would be the preference, and I think other witnesses have talked about it. But it's, to me, I wouldn't want to suggest--the rules to suggest that that's the favored format. You can't Bates stamp it. You have authentication problems. You have difficulty at depositions and trials with native format.

And I would also recommend changing searchable to usable or saying searchable or usable because you had a lot of--and technology improvements notwithstanding, you're going to, I think, always have certain kinds of information you've produced that's not going to be searchable. Perhaps it's audiotapes or graphic displays or whatever. So usable, to me, would also encompass that kind of thing.

On the Rule 37, safe harbor. I think a safe harbor is necessary, but I'm concerned that the safe harbor as written is less of a safe harbor than perhaps already exists today. You talked earlier about spoliation law, and there is always a

degree of culpability considered when you get to spoliation. But I'm not sure that there's any--the way this is worded, that there is any showing of culpability required here.

And I would encourage--I like the--Mr. Nelson's formulation or something akin to it, which is a court should not sanction a party unless the party has recklessly or intentionally allowed relevant and material information to be lost or destroyed.

JUDGE SCHEINDLIN: Are you talking about any type of sanction or just the ultimate sanctions of dismissal or default?

MS. MIDDLETON: Well, I would say an adverse jury instruction is an ultimate sanction as well. If by sanction you mean the party has to go back and redepose--allow redeposition and even pay--

JUDGE SCHEINDLIN: Right. Right.

MS. MIDDLETON: --even pay for things. To me, those aren't the sanctions I'm talking about. I'm talking about the--

JUDGE SCHEINDLIN: The punitive sort of case dispositive sanctions? Yes, okay.

MS. MIDDLETON: Yes. Or even something that would be personally aimed at the behavior of the in-house counsel who forgot--who was unable to stop the back-up tapes, did not know that some piece of information might have been on some back-up tape.

Again, the preservation is sort of the elephant in the room. We're not supposed to be putting the preservation law into these rules. But when we talk about what should be produced and what should be sanctioned, preservation is all over that. And as I read these rules, when I get this complaint that's overbroad, but that's what the complaint is, and I know that there's something on the back-up tapes because everything is on the back-up tapes, currently, I have to consider having all my back-up tapes saved for fear of being sanctioned.

Because there are some judges, maybe no one in this room, who would say there was evidence on those back-up tapes, and you didn't turn it over. And those back-up tapes have been taped over, whatever. The plaintiff happened to save a copy of that e-mail. You didn't turn that e-mail over, and

those back-up tapes were taped over. Adverse sanctions.

That's what concerns me. So, quite frankly, I certainly do, and I think other corporate counsel are, again, erring on the side of save everything. Save your back-up tapes until this kind of--until these rules come out. And until the judges and other litigants, until we can get some more certainty in this area.

JUDGE ROSENTHAL: Are there other questions of Ms. Middleton?

[No response.]

JUDGE ROSENTHAL: Thank you very much.

MS. MIDDLETON: Thank you.

JUDGE ROSENTHAL: Mr. Leddin?

MR. LEDDIN: Good afternoon. My name is Brian Leddin, and I want to thank you for the opportunity to speak before you today. There has been a lot of discussion this afternoon and this morning about preservation and harvesting of documents, and I want to talk about when things go bad and with respect to the claw back provision of 26(b)(5)(B).

I represent products liability defendants, and I have been involved in large-scale production and review of documents electronically, both that were scanned in paper and those that were collected from company servers and desktops and like. And I can tell you that in the process of doing that, it introduces new areas of errors, opportunities for errors, especially with respect to identifying and logging privileged documents and making sure that they're not released when they shouldn't be.

Certainly, in the paper world, when you have a contract reviewer looking at documents and they come across something with the firm letterhead on it, they're pretty much assured that that's something they should funnel off and have reviewed more extensively by more seasoned attorneys to make the decision about whether it's privileged.

But what you run into in the electronic world, especially with respect to e-mails and PowerPoint presentations and the like, is that not only is there a huge increase in the volume of materials that are reviewed, but there's a great deal of

informality involved in the method in which the correspondence is made and the way that people are identified as authors of documents.

With respect to e-mail addresses alone, if you think about in your own life, I'm sure that everyone has at least two or three, maybe more, e-mail addresses that they're currently using and have had more than that in the past, based on what servers you're identified with and what companies you're working for.

When you take the past and the paper world, a contract reviewer would be looking at documents, would have a list of--a counsel list that they would basically bang that list against as they went along to the side if they had a document that might be privileged. If it turns out that it might be on that list, it goes into another area where more senior people look at it and make the decision about whether it's privileged, put it on the log.

In this case, you've got not just the person's name, you've got all the variations of their e-mail addresses that may possibly be ticked off. And

then you have other kinds of informal correspondence that goes back and forth that really can't tie to a person's name. And so, other methods, other tools have to be created to identify those types of documents that might be privileged.

One method is used is keyword searches that look for either the e-mail address, the name of attorneys that are known, or for words that suggest legal or communications. And finally, there are ontologies that are developed by linguists, and it seems every meeting I go to of a similar nature to this, there is always some vendor in the room that knows how to do those things and suggests they have a solution.

I suggest they do have solutions, but they're not perfect. And the problem with the imperfect solutions is that eventually and inevitably a privileged document is going to go out the door that shouldn't have. And it's not because the defense bar is trying to hide the ball. It's that the ball is enormous, and we're trying to figure out which things are being tracked out as the ball

is rolling out of the door.

The final point I wanted to make with respect to avenues for error with respect to privilege is not just, you know, the inability of the contract attorneys and the attorneys doing the review to identify privileged documents and set them aside in a privilege log. It's also the fact that when you start to introduce electronic review and online review of documents, you're now introducing a new level of control that is beyond the law firm that's directing the litigation with the in-house counsel.

Because now a vendor has come into place that runs that Internet-based review platform. A technician somewhere in California throws a switch on Saturday night, and all the things you marked privileged on Sunday go out that shouldn't have. There has to be a way, a reasonable way for that material to be retrieved if it's produced when it shouldn't have been.

JUDGE ROSENTHAL: How frequently do you see consensual arrangements or quick peeks, claw backs, those kinds of protocols?

MR. LEDDIN: In my experience, the claw back agreement has been put in place and has worked well. My opinion with respect to quick peeks is they are really an area for a great deal of mischief. And the idea of letting someone into your system to review documents before you've even had your own people do it is really, I think, a big mistake.

I think a better way to look at what a quick peek can do is not allow someone to look at the substance of your materials, but better to describe to them the architecture of your system so they can better formulate their questions and their request for production so that it matches up with your ability to produce things.

JUDGE ROSENTHAL: Mr. Keisler?

JUDGE KEISLER: Mr. Leddin, I wondered if I could ask you about how the reasonable time portion of this claw back rule would work because there's one thing that's puzzling me a little bit. Which is, I suppose, in the first instance, it's up to the party that has the document to decide whether

the notification was made in a reasonable time because he or she then decides whether to give it back.

We've heard today that many lawyers don't like entering into these agreements, and any multi-factor inquiry into what's a reasonable time could certainly leave room for someone in good faith to say "I don't think that was reasonable." And if that's so, then I suppose, you know, we have litigation before the court over whether there is an obligation to return the document, which seems inconsistent with the notion that the purpose of this rule is to at least prevent further dissemination of the document while the judge decides whether he's going to waiver.

Now you have a sort of second phase in which the judge has to decide whether the notification was made in a reasonable time. Do you think this could be a problem? Do you think not?

MR. LEDDIN: Well, to answer your question about reasonable time first, I think I would be a bad lawyer if I gave you a number or a date or a

time for reasonable time. It's going to depend on the circumstances of what it was that was discovered that was produced that shouldn't have been and how quickly it was and how that information was communicated to the party that received it that shouldn't have. So that there's not an unreasonable delay in turning things around and retrieving them.

With respect to--I'm sorry. I lost track of the second part of your question.

JUDGE KEISLER: Well, I guess I'm just wondering, one possibility would be to eliminate the reasonable time requirement. That might bear on whether there was a waiver because how diligent the producing party was might turn out how quickly he or she asserted it. But it wouldn't leave in the requesting party's control the initial decision about whether to sit on the document longer while the parties litigated over whether a request was made in a reasonable time.

MR. LEDDIN: The obligation to make the request in a reasonable time is on the party that produced

it improperly.

JUDGE KEISLER: Right.

MR. LEDDIN: If the party that received it and, received it, realized they shouldn't have, I think they have an ethical obligation to notify the producing party that they've gotten something that they shouldn't have. I disagree with the analysis that was given this morning with respect to what the obligation is of the receiver of produced privileged material is.

But I think the key that I'm trying to get to with respect to the return of documents is that it's not that the document comes back and disappears for good. It goes in a privilege log, and a judge has to make a call on whether that document should have been produced in the first place. And it only returns the parties to the position they should have been in had that document not been erroneously produced.

JUDGE SCHEINDLIN: Is that necessary? Would you be opposed to the receiving party not returning it to you, but saying, "Okay, you've just notified

me that it's privileged. I'm going straight to the court." I'm going to bring that document right down the street to the courtroom and say, "Judge, they gave this to me six months ago. Now they tell me it's privileged. I'd like a ruling now. I don't see any reason I've got to go giving it to them and waiting around for them to give it to you. Here it is."

MR. LEDDIN: I think that's effectively-- I'm arguing the same position because what I'm saying is--

JUDGE SCHEINDLIN: That's okay with you, to add that, "or take it right to court." The receiving party--

MR. LEDDIN: As soon as it's identified--as soon as it's identified, it really goes on the privilege log, and it's for the judge to make the call.

JUDGE SCHEINDLIN: Right.

MR. LEDDIN: You can make that--

JUDGE SCHEINDLIN: But I'm saying they don't have to give it back to you and wait for you to

come to court. They can skip that and go right to court.

MR. LEDDIN: As long as it's returned, sequestered, destroyed, however it's meant so that it doesn't continue to propagate.

JUDGE SCHEINDLIN: Right. And that's my next question is how far does the receiving party have to go to retrieve it if it's already been disseminated electronically?

MR. LEDDIN: Right. I think the answer you got this morning was appropriate. I think the receiving party has to contact anyone that received it from them and try to obtain it back. Beyond that--

JUDGE SCHEINDLIN: Any? What if it was already in the thousands because it was electronically distributed?

MR. LEDDIN: If it was electronically distributed to an e-mail list, that e-mail list would receive a notification that document should have been returned.

JUDGE SCHEINDLIN: And if it was posted to a

document depository online?

MR. LEDDIN: Eventually, it's on a billboard, and it's gone. I mean, you've got to do the best you can to get things back when they were produced when they shouldn't have been.

JUDGE SCHEINDLIN: But this inadvertent disclosure thing, isn't it a well-developed common law bunch of factors already in your circuit and in mine? In the 2nd and 3rd Circuit, there's a lot of case law about the factors and how to do this. What--

MR. LEDDIN: Yes, I read Judge Hagy's comments, and I think they're on the mark. My concern here is I think it--and this really gets back to the point I wanted to make initially, which is because of the volume of data and because of the informality with which it's moved through the system and the certainty that privileged documents are going to slip through, it's important that the courts and the parties deal with this issue before anything is produced. So that everyone knows what the rules are going to be before the first document

rolls out the door.

And if that's the case, if there's an agreement on how the materials will be returned and what's a reasonable time to make that call on the fact that something was produced that shouldn't have been, all those issues should be dealt with before the first item is produced. And if that's the case, then 26(f) will have done its job.

JUDGE ROSENTHAL: Any other questions or comments?

[No response.]

MR. LEDDIN: Thank you.

JUDGE ROSENTHAL: Thank you very much.

Mr. McDermott, please?

MR. McDERMOTT: Thank you. My name is David McDermott. I'm a certified records manager and the president of ARMA International. I'd like to introduce Cheryl Pederson, who is also a certified records manager and president-elect of ARMA International.

We'd like to, first off, thank the Committee on Rules of Practice and Procedure of the Judicial

Conference of the United States for allowing us to make comments to the proposed amendments involving electronic discovery. ARMA is here to testify as experts in records and information management and not as legal experts.

ARMA is the Association for Records Management Professionals with over 10,000 members in 53 countries. ARMA International members range from records and information managers, archivists, librarians, to educators in both public and private sectors. ARMA is a recognized standards developer for the American National Standards Institute, ANSI, on records retention and disposition.

ARMA is also a member of the Sedona Conference working group on electronic document retention and protection. Good record retention policies are good for business, independent of the need to keep records for litigation purposes. A records management program utilized by an organization and followed in a consistent manner and in the normal course of business will help to ensure that records are available and accessible for discovery and

litigation purposes.

ARMA International applauds the committee's efforts to address electronic discovery. However, we caution the committee against adopting any rules that may inadvertently cause large financial burdens to the parties due to increasing volumes of materials stored electronically. We also caution the committee against adopting any rules that may discourage entities from implementing and following best principles and best practices of records management.

ARMA International agrees with the committee's assertion that there should be an attempt to adopt a consistent set of rules, rather than allowing the adoption of local rules by various district courts across the nation. ARMA recommends the adoption of the records management standards developed by the International Organization for Standardization, ISO 15489, by any entity that is responsible for records and information management.

We also recommend that the language within the proposed rules for determining whether information

is reasonably accessible should be clarified. ARMA is concerned that the language in the proposed rule allows the party with the burden of production to determine what is reasonably accessible. We urge the courts to determine accessibility based on best principles and best practices of records management.

Poor record-keeping practices by an organization should not be allowed as a means of frustrating electronic discovery. It is important to note that records destruction within an organization is acceptable, provided that it is conducted in strict adherence to that organization's records retention policy. The records retention policy should include all applicable state and federal laws or regulations.

Courts would need to resolve issues of deliberate data destruction or whether data was deleted accidentally. We would urge courts to be informed about an entity's records management program and the retention schedule applicable to the records subject to discovery.

Generalizing legacy information into the category of inaccessible should be reconsidered. Many federal regulations require the retention of data beyond the active use within a corporation, thereby requiring inactive data to be accessible if required by a regulatory authority during its life-cycle. Yes, sir?

PROFESSOR MARCUS: Sorry to interrupt. The term in the rule presently is "reasonably accessible." And perhaps that term would be as flexible and useful as any. It sounds like your concern is with what's in the note that discusses the meaning of that term?

MR. McDERMOTT: Correct.

PROFESSOR MARCUS: A little earlier this afternoon, we heard a comment that everything is accessible. I gather you're not saying that. So it sounds like what you're saying is that the question of accessibility is identical with the question of preservation, which I'm not sure I follow. But it seems like they're somewhat different.

MR. McDERMOTT: Okay. Let me try to--in a best practice for records management, where companies are following retention requirements that are researched--the legal requirements, state requirements, any requirements, and that company is following that retention policy and adhering to it in the normal course of business.

If that company has destroyed those records according to that policy and can show through documentation that they followed the policy--they have information showing that they destroyed those records--it is not reasonably accessible to assume that they can go back to a back-up tape and pull that information back, if you followed those retention--

PROFESSOR MARCUS: To use back-up tapes, in your illustration then, you'd say what's on a back-up tape is not reasonably accessible. And that's somewhat different from the question whether you'll make somebody go get it anyhow because it shouldn't have been lost in all of its other forms.

MR. McDERMOTT: Correct. If you're following

your retention schedule, those records should be available outside of the back-up tapes, if you followed your policies set in place.

PROFESSOR MARCUS: Then what I'm getting at is it sounds like what you're talking about has to do with good cause for going to inaccessible materials, not for whether they are accessible?

MR. McDERMOTT: Good cause. You'd have to show good cause, and the courts would have to determine what that is.

Courts would need to resolve issues of deliberate data destruction or whether data was deleted accidentally. We would urge courts to be informed about an entity's records management program and the retention schedule applicable to the records subject to discovery.

Generalizing legacy information in the category of inaccessible should be reconsidered. Many federal regulations--I've read this, but I want to make sure I don't miss my spot. Many federal regulations require the retention of data beyond the active, back to that, use within a corporation,

thereby requiring inactive data to be accessible.

Good records management practices distinguish between back-up tapes, which are used solely for disaster recovery or restoration of data, and records being retained in an electronic form in order to meet retention schedule requirements.

Therefore, the fact that records are stored on back-up tapes may not be the best criteria for determining whether records should be reasonably accessible. We suggest that the committee make a distinction not so much on the format or storage, but rather between records stored temporarily for disaster recovery or restoration and records that should remain accessible based on retention schedule.

We'd like to make the following recommendations. The proposed rule should include language that encourages good records management programs so that the organizations may respond to discovery requests in a timely manner and without a need for extraordinary or heroic measures. ARMA recommends the following text for incorporation in

Rule 26 or the committee's commentary to Rule 26.

"For corporate entities or any parties subject to statutory or regulatory retention requirements, a party will be expected to provide a copy of its formal records retention policies and procedures or otherwise articulate its record retention practices in the absence of a written policy. Records subject to a party's records retention policies and procedures, whether formal or informal, will be assumed to be reasonably accessible, and a party's failure to follow its practices and procedures will not relieve the party from the requirements of discovery."

Further, language in the rules should acknowledge that legacy data be considered reasonably accessible during its entire retention period, regardless of whether it is in active use or being retained to meet legal and regulatory requirements. ARMA recommends the following text for incorporation in Rule 26 or the committee's commentary to Rule 26.

"Legacy data can be considered reasonably

accessible during its entire retention period, whether it is in active use or being retained to meet legal and regulatory requirements, regardless of the format or technology used for storage."

JUDGE ROSENTHAL: May I ask a flip side of the question? Are you saying that if a record is not required under the party's retention policy and procedure to be retained, number one, and not--and therefore not required by statute or regulatory obligations to be retained--take e-mail as an example, most e-mail. Does that mean that it would be assumed after a period of time, depending on the party's computer system, to be not reasonably accessible?

MR. McDERMOTT: You know, and that's a great question. Best practices for records management would call for a policy surrounding e-mail and the retention and disposal. Records management views e-mail as a delivery mechanism. What we are concerned with is the content of the information being delivered by that e-mail, whether it's in the body of the e-mail or as an attachment.

Records that say something like, "Hey, Dave, let's go to lunch," is not a record. But records dealing with--in an e-mail that might deal with a contract or an HR situation, those need to be classified and moved out of an e-mail system into the proper class of records, and that's what best practice of a records management program would dictate.

JUDGE ROSENTHAL: So what you're saying is that--I think you answered my question. If the policy is designed along the criteria that you've described, then information that was not required to be retained under that policy could safely be discarded?

MR. McDERMOTT: Could safely be discarded.

JUDGE ROSENTHAL: And would not be viewed as accessible?

MR. McDERMOTT: That's correct.

MR. CICERO: Do you find that your example solves the problem, though? Because if e-mail--

JUDGE ROSENTHAL: Hold on.

MR. CICERO: If the e-mail you talk about says,

"Dave, let's go to lunch and talk about that Vioxx problem that came up in Georgia," it's the same substantive--I mean, from form and everything else, it's the same type of document, but it may have a very different significance.

MR. McDERMOTT: And you are correct. The difference on what you just mentioned was, "Hey, Dave, let's go to lunch and talk about the Vioxx problem." Then that becomes part of a class of correspondence for particularly that type of record or for that class.

MR. CICERO: Yes, but somebody that's simply making a--setting up criteria for whether to keep e-mails or not is not going to suggest within an IT department that they analyze what the records say.

MR. McDERMOTT: There is a disconnect between IT and records management.

MR. CICERO: Okay. Within records management. Whoever is doing--establishing the criteria for whether or not to keep the type of casual document you were talking about is not going to make an analysis, I assume, of the content of each one of

those million documents a day--million pieces of mail a day that are within a company.

MR. McDERMOTT: Best practices would indicate that the individual receiving the mail would have to determine whether that is a record or not. It comes back to ethics and requiring people to make the decision on what is a record and what is not, and will it have value?

I don't believe it reasonable to retain every e-mail ever received. They are just--they're not records. And that's a good records management best practice.

MR. CICERO: But they may be information relevant to a litigation.

MR. McDERMOTT: They certainly may. Good records management policy in the case of litigation calls for the ability to put record holds across groups or functionalities of departments. And once you know you're in an imminent litigation or you have been subpoenaed, holds are put in place across groups, across classes of people, and across classes of records. And that's best practices of

records management.

Once we know there is a litigation, all disposal is stopped, or it should be stopped. So courts, plaintiffs, defendants can find that information through discovery and produce it.

JUDGE ROSENTHAL: Professor Marcus?

PROFESSOR MARCUS: What you just said prompts another question. I think you said once we know there's litigation, all destruction must stop. Could you elaborate on exactly what that means and how it's supposed to work under best practices?

MR. McDERMOTT: I can. When an attorney or a director or a manager or whoever receives a subpoena, and that is handed up through to the legal department or an attorney, the records management group typically will work with the legal department on determining what records are required. An e-mail is sent or a communication is sent to anybody and everybody who may have involvement with that particular action.

PROFESSOR MARCUS: Okay. My concern was what you're talking about is developing a strategy for

identifying the people or sources that should be preserved, not just all of everything?

MR. McDERMOTT: Absolutely. And quite honestly, I've seen subpoenas where it's everybody, and then the attorneys work that down. And again, I'm not an attorney. I'm the support to our legal department. So they work that down, and we know the class of record, the class of people. And communication is sent to those people to halt any and all disposal.

And we have found that you have to be very specific. You have to include electronic records. You cross your Ts and dot your Is. And then it's not only important to get that communication out to those people. But best practice would indicate that you would follow that up on maybe a monthly or even a quarterly basis that we have an ongoing litigation, continue to hold these records.

It's just not about doing it one time. It's about making sure you're constantly in the face of the individuals that may have access to those records or the ability to have access to those

records.

JUDGE ROSENTHAL: Are there any other questions?

[No response.]

MR. McDERMOTT: I'd like to thank you for allowing us to present today.

JUDGE ROSENTHAL: Thank you.

Dabney Carr? Good afternoon, Mr. Carr.

MR. CARR: Good afternoon. Thank you for allowing me the chance to appear before you today and also thank you for accommodating my schedule and moving me from tomorrow to today.

I would like to--just as a brief introduction to myself, I'm an attorney in private practice in Richmond, Virginia. Primarily practice in the area of products liability, but also do a general litigation practice, primarily for defendants.

The perspective that I think I offer--and I was not here this morning to hear the commentary this morning--but it may be different from a lot of people with a greater feel of expertise and the technology or from the companies that are engaged

in e-discovery all the time. It's from the perspective of a practicing attorney, many of whose clients are not involved in litigation all the time.

I find that, primarily, litigants are people who are in litigation rarely. Maybe the first time a company might be involved in litigation and, hopefully, for them, their last. And also they are involved in litigation that is not necessarily multi-million dollar litigation.

In the work that I do, primarily, though it runs a scope of cases, a million case is still a big case. And for the companies that I represent and that I deal with, that it is usually a great deal more expensive to retrieve and produce electronic information than it is in the more common example of paper discovery that more of the lawyers are used to.

And as I sat here this afternoon and listened to the people and the comments before me, it occurred to me that what brings us here and to this point is that great difference between the cost

involved in electronic production and the difference in paper production.

In preparation for coming here today, I canvassed my colleagues by e-mail, as a matter of fact, to find examples of people who have had problems with the discovery of electronic information. And in general, the responses I got were that not so much with issues of sanctions or preservation problems or things like that, it was more along the lines that in dealing with your garden-variety commercial litigation case, it was far more expensive to go through the discovery process to produce electronically stored information than it would typically be in the case of information that's stored in hard copy.

And I think the reason for that is that computers give us a much greater ability both to store a great deal of information and to retrieve it. But that at some point in the process of producing the information, you have to bring the information back to a human form. In the sense that you may be able to retrieve easily millions of

pages of information, but at some point, a lawyer usually has to go through it. And that is the human level that becomes so expensive.

Or a lawyer has to define or a litigant has to define what in this great mass of litigation that I've been able to keep and store is relevant to the information--relevant to the case that I am involved in.

And the second point that I was thinking about as I was sitting here and that I expressed in my comments was that the committee should keep in mind the general unfamiliarity that litigants and judges as well have with the issues which this committee has now become experts on. And that would be, from my practice, that the default rules that apply when you are talking about paper discovery don't work as well for the kind of--for electronically stored information primarily because of the expense of production.

And let me give you an example of what I'm talking about. In the world that I practice in, as a general rule, discovery issues are worked out by

the litigants. The court is almost never involved. The advice I always give to clients when they're from outside where I practice in the courts of Virginia is that you never want to bring a discovery dispute to the court. The courts actively don't want to hear them because of the time involved and because they have a lot of other things that they need to deal with.

And I always tell people that if we have a discovery dispute and we have to file a motion to compel or respond to one and have to go to court, the rule is that somebody is going to be sanctioned. And so, that is the last thing that you want to do. Someone will have to pay is the standard rule.

And sometimes you hear the old saying that what motivates people mostly is fear. Well, the fear of appearing before a federal judge on a discovery dispute is one thing that motivates me a great deal.

JUDGE ROSENTHAL: Boy, those Texas lawyers are sure brave.

[Laughter.]

MR. CARR: Perhaps. Perhaps. Well--and so, the rules--my point being that the rules, as other people have expressed, that you come up with in this process have to be rules that the litigants can understand and apply without having to ask the courts for help. And the reason for that is because in the main, they will be rules that the litigants will be having to work out for themselves.

And where I practice, the lawyers get along pretty well. We're probably more reasonable in dealing with one another than others. But the issue is, is how do you allow for the efficient production of relevant information without setting up circumstances where you're going to break the bank for one party or the other? So that you want rules where neither party will be able to hold the gun of the cost of production to the other's head in order to get a case settled.

Which I heard Ms. Middleton mention that earlier on, that sometimes they settle cases that

they wouldn't otherwise settle because of the cost of production. And in the kind of cases--I would say the majority of the cases where I deal with, where the value of the case is simply not going to be into the millions of dollars, that that becomes a real issue, where you start getting into electronically stored information.

The only two areas that I want to mention today, which were included in my comments, were in the areas of reasonable accessibility, the two-tier discovery, and in the safe harbor. I support the proposed rule on the reasonable accessibility. The only area in which I had suggested in my comments any minor change was on the portion of the rule that talks about identifying reasonably inaccessible information. And there are a couple of points I'd like to make about that.

The first is, is that if you have a requirement to identify reasonably inaccessible information, I can tell you what I think most litigants will do and what I certainly would do. Is that you will quickly come up with your standard list of

reasonably inaccessible information, which you will include in every discovery response that you ever do. A little like if you see discovery responses today, there's always general objections at the front of them.

All that litigants will do, will come up with laundry lists of different things that they have not looked at, again, motivated by the fear that they haven't identified something. And that if--under the current language, if they fail to identify information that they have not looked at and that information later comes to light that there is information of that type, that that information will be considered reasonably accessible because it was not identified as reasonably inaccessible.

The second point that I would say about that is that if the current language remains, that at least that the rules be clarified to make clear that the requirement can be satisfied by such generalized descriptions. For instance, disaster recovery back-up tapes. But still--

JUDGE SCHEINDLIN: I have a question for you.

MR. CARR: Yes, ma'am?

JUDGE SCHEINDLIN: Now you're going to have to support this showing, this claim that it's inaccessible. So at some point, you're going to have to make a case for that. What is your duty to investigate that it's really inaccessible? What are you going to say eventually to the court or to the adversary? How are you going to explain this position you're taking?

MR. CARR: Typically, what happens is that those issues get narrowed down in the course of the attorneys going back and forth, and that the way the process works is you say, "Here is what I've given. I haven't looked at all these things." And then what happens is the other side will say, "Well, what about this? What about that?"

And as you come up with things that might actually exist, once you get past the boilerplate, then you have to support that. And in that back and forth, you either say, "Well, yes, we do have this, and we can get it." And you produce it, and

it never gets to court. Or you do have to--

JUDGE SCHEINDLIN: Right. But that's what you're doing now without this rule.

MR. CARR: I'm sorry?

JUDGE SCHEINDLIN: That's what you're doing now. That's your experience now without this rule. People make requests and you say, "That's burdensome. We don't want to go there. We shouldn't have to go there. Let's sit down and negotiate. Let's keep this back-up stuff off limits. Let's go to the legacy because it can be restored. and we think that there's really stuff there."

You know, you work it out. You negotiate. You work it out. How is all this going to change your practice, since you apparently are doing pretty well at negotiating and identifying what to give and what not to give?

MR. CARR: I'm not sure I--well, let get to your point, which is that I think the rules need the reasonably accessible/reasonably inaccessible standard in there. And the reason is, is because,

otherwise, the parties don't know where the balance lays.

So if there is the rule here that you only have to look at the reasonably accessible and produce the reasonably accessible, that gives the parties the guideline, the rule of the road that they can then apply.

JUDGE SCHEINDLIN: Well, except you have the power to define that for yourself. Apparently you say all I've got to do is to label it as inaccessible, and I've passed step one. I've told the other side that's inaccessible. So I don't have to do it. I'm not going to do it. I've placed it in the second tier.

Now I say to you you're going to have to defend that placement.

MR. CARR: Yes.

JUDGE SCHEINDLIN: But we're not telling you which it is, really. It's still going to be your call.

MR. CARR: As the way I understand your question, my point is that if there is no standard,

reasonably accessible versus inaccessible, then the parties are left with nothing to go by, and you get into a lot more of the dispute--

JUDGE SCHEINDLIN: Why nothing? But you always do. You say that's unduly burdensome. I shouldn't have to do that, or that's very costly, I shouldn't have to do that. You do that all the time.

MR. CARR: Yes.

JUDGE SCHEINDLIN: You draw that line. You say unduly burdensome or unduly expensive or both. I shouldn't have to go there. Now you're going to have to litigate this if we can't work it out. One of us is going to have to make a motion to compel or for protective order if we can't negotiate it. But, in fact, you said you negotiate.

MR. CARR: No. Yes, you do. But sometimes you can't work them out.

JUDGE SCHEINDLIN: Right.

MR. CARR: And sometimes what parties will end up doing, from my side, is that they feel they have to produce more and spend more than they would without this standard and go into the inaccessible

information.

JUDGE HAGY: So you support the standard? You like the inaccessible?

MR. CARR: Yes.

JUDGE HAGY: The only difference is you don't want the producing party to have to identify--

MR. CARR: That was my first point, yes.

JUDGE HAGY: And the reason you say that is because it would be boilerplate?

MR. CARR: Yes.

JUDGE HAGY: And my question is, what's wrong with boilerplate? Any other person, what you want to do is hand over some stuff and then lay in the weeds and hope you have a party who doesn't know about legacy information or back-up information or all of those things that would otherwise be in the boilerplate?

MR. CARR: No, I would say that I certainly don't want it to lay in the weeds.

[Laughter.]

JUDGE HAGY: You don't want to identify it. No, it wasn't an invitation. I was just--hide in

the weeds, I meant.

MR. CARR: Or hide in the weeds.

JUDGE HAGY: Okay. But you see, that's our purpose is to make you identify so that the issues raise to the top so the parties can discuss it. Whereas under your method, I don't see how it would ever get discussed.

MR. CARR: Well, I think under--

JUDGE HAGY: Except among sophisticated counsel.

MR. CARR: A lot of times, the parties don't know what all that they have. That's one of the things that came to mind the way I was approaching it. Is that you're asking a little bit to I wouldn't call it exactly define a negative. But you are asking them to express the negative. What haven't you given us?

And as I see what the obligation ought to be, and that I read in the rules and the way I would propose it, is that you go and get everything that reasonably you can get. But then to have to go beyond that and to identify everything that you

cannot get is difficult to begin with and could be, at times, somewhat impossible.

JUDGE SCHEINDLIN: Yes, but the problem is you're doing the defining, right, of what is difficult to get. And nobody knows what criteria you've selected. For example, you may say, as some witnesses have, I'm defining it as that which I don't ordinarily access.

MR. CARR: Correct.

JUDGE SCHEINDLIN: Somebody else might come back and say, "Well, so what? You don't access it, but it's easy to get. It's cheap. It's easy. It can be done in an hour. I don't care if you use it. Go get it."

MR. CARR: But won't you always have that problem with any standard as to what should be initially produced is that the party has to interpret what that means and tell you what they have produced. And then what I'm saying is if they've told you what they have produced, why do they have to go on and tell you what they have not produced? It may be more just semantic--

JUDGE ROSENTHAL: Well, I think we're kind of arguing about the same thing, which is the best way to frame in a rule an ability to draw that line and the ability for the other party to, if they believe it appropriate, test where you've drawn the line. And I don't think anybody's disputing that that ability should be there. We just need to make sure we have framed it appropriately.

I think Mr. Girard had a question.

MR. GIRARD: When you do your meet and confer now, though--

MR. CARR: Yes? I'm sorry.

MR. GIRARD: When you do your meet and confer with the opposing side, you haven't already gone out and searched, right? You're talking about on both sides spending money and taking time and employees and distracting people. And so, aren't you horse trading with the other side at that point?

MR. CARR: Yes. The meet and--yes. And again, where I'd say that typically of my experiences in the practice and the courts I work in is that the

attorneys are able to work out a lot of this. Because the meet and confer does occur typically before you would go to any great expense, at least, and requesting parties are usually willing to define what it is they really want, what is it you really need? That's the question that goes back and forth.

So, yes, that would be true. And that does reduce the expense.

MR. GIRARD: So when you say, though, that you want to have it be that you go out first and get what you can and then talk about what you can't get, that would be a change then in the way you're currently doing it, wouldn't it?

MR. CARR: I picture that the way that we would do this would incorporate the early conversation that you talk about. And so, whether it would be a change in the way we do it--if they were to request something, and then we would go to look and realize that we couldn't find it, then we would include that as inaccessible, and we would tell them that.

MR. GIRARD: I have trouble seeing how it would

be different from what you're currently doing because I think you're just making a series of tradeoffs with the other side. And on their side, they're evaluating your arguments and making decisions about how much money they want to spend, and you're doing it from your perspective. And I'm just not sure how different the practice would actually be under this rule from your perspective.

MR. CARR: And you're talking specifically about the obligation to identify reasonably inaccessible information?

MR. GIRARD: And also the sequencing of how you spend that money that you commit to the discovery process. Because I think that you're on both sides intelligently not spending that money until you think you've reached some kind of agreement about what makes sense.

MR. CARR: Well, let me disagree with you a little bit there. Because I think at the point in time when the money gets spent is when you have to go back to your client and say this is what you have to look for. And as I say, what I learned

from my colleagues and from the examples of people was that in general with the production of e-discovery, it's always a lot more expensive because of the volume of information that can be retrieved that then has to be gone through by someone in some fashion. So that's where the money gets spent.

And where the parties always disagree at that point is the breadth of what has to be gone and gotten as being relevant to the case. And that my experience is that the breadth of what is gone and gotten and retrieved is much broader than what anybody will think is ultimately relevant.

JUDGE SCHEINDLIN: May I ask one--go ahead?

MR. CARR: Yes, ma'am?

JUDGE ROSENTHAL: In your experience, have you--how frequently have you had to resort to restoring information that was "inaccessible" as opposed to being able to satisfy the discovery needs of the case from information that was not required to be restored?

MR. CARR: Not a lot of experience with having

to restore information. Most of the expense comes involved in--I've heard a couple of the consultants testify earlier about seeking the information at the distributive level. I think that's what he called it, at the bottom level. That's where the big expense is.

Having, you know, I'd say a big number for a case, say, 30 people--and this was an example that was given to me--who could have on their laptops discoverable information. That would take a great deal of time to get all that information from people who could be out on the road or not around, was extremely expensive. And it was the recovery of information at the distributive level that is, in my experience and the experience of my colleagues--

JUDGE ROSENTHAL: Is that required?

MR. CARR: --is where the money is spent and where the time is spent. And then the next area where that tends to be a lot of money is spent is the review of the material. And that would be mostly in the form of attorney hours.

JUDGE ROSENTHAL: And are you talking about information that required no restoration at all--

MR. CARR: Yes.

JUDGE ROSENTHAL: --that under our proposal would be within the first tier?

MR. CARR: Yes, I think that's right. And that's where I say what brings us here is that we have this very expensive condition.

JUDGE SCHEINDLIN: And that was my follow-up question is I wonder if your information on cost is anecdotal or empirical? And what I mean by that is a lot of the comments, they were ignoring the benefits of the electronic age.

In other words, it should be making a lot of this less expensive because searchability, collectibility, producibility are now at the shoe box level and not the truck so that their cost, in effect, should be going down. And some of the comments have actually said that. So I'm wondering how empirical that reporting is, or is it anecdotal?

MR. CARR: Oh, it's clearly anecdotal.

JUDGE SCHEINDLIN: Right.

MR. CARR: I haven't made any attempt to be empirical.

JUDGE SCHEINDLIN: No. And the reason I raise it, there has to be some benefit to this world we live in in the sense of things I said--searchability, collectibility, and producibility. They have to be cheaper, logically. Logically.

MR. CARR: I can only speak for my experience. And that is, is that the effect of the ability to obtain information because of the benefits of computers only gets people to ask for more information. That's been my experience.

I can tell you, and going through it day to day, it's a lot easier in the hard copy age, where you can say there's the files over there. Send them to the outside copier, get them copied. That's a few thousand dollar problem. But that if people think, and today you can, you can retrieve almost anything. So they'll ask you to retrieve almost anything.

JUDGE SCHEINDLIN: But I just wonder if you're really forgetting the era of the megacases. I mean, there were always huge document cases with paper review of millions of documents.

MR. BERNICK: It's so much worse now.

JUDGE SCHEINDLIN: Is it?

MR. BERNICK: It's an order of magnitude worse. I can't resist.

JUDGE ROSENTHAL: Microphone, David. It may be worse, but we can't hear about it.

MR. BERNICK: But just very briefly, there are clearly massive efficiencies. That's why the technology is being used. But they're efficiencies for business activities. The very fact of broad distribution enables people to function much more cohesively, even when they're not in the office, et cetera, et cetera, et cetera. There are enormous efficiencies from the business point of view.

But you're now taking that collection, that snapshot, out of the business and putting it into the litigation world, and those same rules of efficiency that led to the creation of the data

don't necessarily make it more efficient for the manipulation of that data by lawyers in the courtroom in the discovery process. And you know, I can't tell you it is all, of course, anecdotal. But I'll tell you the anecdote.

I sat next to a guy who does litigation for GE. This must have been three or four years ago. It was a Kenny Feinberg soiree on the other side of town. And I was supposed to be the leader of the panel, the panel was supposed to talk about recent developments in the discovery process. And the question that got put--actually, I was on the panel with him. The question that got put to all of us was, well, what do you think about electronic discovery? Has it been a net benefit, or has it been a net burden? You know, what about the computer in litigation?

And I was first, and I knew this guy was next to me, and I thought, oh, for sure, he's going to say it's the best thing since sliced bread because it's a sophisticated big company. So I came out and I said I think it's a big pain in the neck.

Once you actually know what you want to do, you can develop technology for litigation that makes your task more efficient. But when it comes to discovery, it's horrific.

And as I said that, I was worried that I was going to find this knife in my back, and he was going to skewer me. He says electronic discovery is the bane of our existence. It's made our process horrifically--

JUDGE SCHEINDLIN: I'm sorry. Who is this other person?

MR. BERNICK: From General Electric.

JUDGE SCHEINDLIN: General--well.

MR. BERNICK: But that is what you're dealing with. You're dealing with an organization that creates enormous volumes of data. So you can have technology that helps litigation, once you've defined the population of data and you're working with it. But the retrieval, what comes in the funnel is much, much more.

JUDGE ROSENTHAL: Any more questions for Mr. Carr, not for Mr. Bernick?

[Laughter.]

MR. CARR: Thank you for your time.

JUDGE ROSENTHAL: Thank you very much. Come down to Texas any time.

Mr. La Sala? Good afternoon.

MR. LA SALA: Good afternoon, Judge Rosenthal and distinguished members of the committee.

It's a great pleasure for me to be here today, and I thank you for the opportunity to present these comments to you. My name is Lawrence La Sala, and I am the assistant general counsel for litigation for Textron, Inc., which is a company headquartered in Providence, Rhode Island.

I appear here today, however, as a representative of the Association of Corporate Counsel, formerly known as the American Corporate Counsel Association, or ACCA, but now referred to as ACC. ACC is the in-house bar association for lawyers who practice in legal departments of corporations and other private sector organizations worldwide. It has over 17,600 individual members who represent more than 8,000 organizations.

To my right is Ron Peppe, who is ACC's vice president for law and communications, to the extent anyone has any questions about the organization or its membership.

ACC members cover a broad spectrum of interests. They include solo practitioners providing all-around legal services to small private companies, general counsel to nonprofits who are struggling to make ends meet, and chief legal officers to the world's largest publicly traded companies. Yet ACC members, large and small, are very concerned about the issues under consideration by this committee.

E-discovery and records retention challenges often top the list of concerns faced by our members and their clients, and we speak with confidence when we suggest that the issue affects and frustrates organizations of every size, shape, and color. A predominant thread among ACC members suggest that a widespread relief exists that the current state of the rules frequently permit discovery issues, and particular e-discovery

issues, to overshadow the rest of litigation and inhibit the creation and maintenance of effective corporate records management programs.

For ACC members, the lesson seems to be this. The ability to leverage and manipulate e-discovery requests and procedures, be it through overbroad discovery requests or threats of sanctions for unavailable or inaccessible data, will frequently be case determinative, regardless of the merits of the case or the amount in controversy relative to the cost of document or records production.

So we are here to plead, essentially, that the need for consistency, predictability, and fair rules that take into account the business realities that our members go through have never been greater. Given the widespread perception among ACC members upon reviewing this committee's proposals for amendments to the civil rules, the ACC's board of directors took an unusual act, which was to unanimously adopt a formal policy regarding e-discovery at their February 1st board meeting. And a copy of this policy has been submitted to you

and I believe is part of the preparation materials that you have.

Unlike many of the speakers here today, it is not my intention to join the debate on how specific language of the rules should read or to address many of the specific points of construction that other speakers have discussed and will discuss. Frankly, the diversity of our membership makes reaching a consensus on those things quite difficult.

What I am here to do is to express the ACC's strong support for two key proposals that our members believe are crucial to create a fair and predictable playing field for litigants engaged in discovery. First, ACC supports the enactment of a presumptive limitation in Rule 26(b) on the need to preserve and produce inaccessible information. Second, ACC supports the enactment of the safe harbor provision in Rule 37, providing that sanctions will not be applied against companies for the routine loss of information, which can occur despite the good faith operation of conventional

record systems.

These two proposed revisions represent the least that any corporate litigant--large, middle-size, or small--has a right to expect from the rules that govern the litigation in which it is involved. And the reason I say this is because I think it is far too easy when debating these rules and the revisions to lose sight of the fact that most corporations and organizations affected by these rules do not exist solely for the purpose of litigating lawsuits.

They exist to manufacture products, to provide services, or to engage in a million other business-related activities. In running their businesses, these companies are mindful of a multitude of factors and costs and risks that can affect their success. One and only one of those factors is the existence of litigation.

Thus, while ACC members cannot ignore the existence of litigation or the responsibilities that litigation imposes, litigation cannot and should not be the driver that determines corporate

policy and how business is run.

The proposed revisions to Rule 26(b), for instance, with regard to electronically stored information that is deemed by the producing party to be inaccessible is a good example of a provision that balances business realities with litigation needs. On the one hand, it permits business entities to avoid in most instances the time-consuming and costly restoration of data that, A, is not used in the normal course of business and, B, is of insignificant evidentiary value.

On the other hand, as the advisory committee notes rather aptly, the volume of potentially responsive information that is reasonably accessible will frequently be very large. And I would add that this accessible information is the information actually used by the businesses and is, therefore, likely to contain the most relevant information in most of the cases.

I've read some of the submissions and the transcript of the California hearings, and some of these arguments have been repeated here in various

forms today. But for many corporate litigants, to save information and to designate information as inaccessible will actually change the process by which they save data and they save records, and they will do it in a way to permit them to avoid litigation responsibilities.

An argument we heard earlier here today is that, in fact, companies will go out and design records retention programs to eliminate potentially damaging evidence. To be frank, this argument is not based in the reality of how corporations work.

First, it presupposes a level of focus on preventive legal considerations by nonlegal employees that does not exist, as well as a certain spirit of cooperation between nonlawyers--business people and the lawyers. I can tell you from experience that most of the time, my business partners don't want to hear from me and particularly when I am suggesting a policy that's going to make their lives more difficult and cause them more work.

They basically want to do their jobs, and that

is what they're focusing on. They are not focusing on making my life easier, particularly when it comes to discovery obligations.

Second, the argument in some part makes no sense because if you look at the examples that are provided in the committee note for inaccessible data--disaster recovery systems, i.e., back-up tapes, legacy systems, deleted items that would require reconstruction--it is simply inconceivable that a corporation would take the information that it needs to run its business and convert it, as a matter of policy, to a format that renders it completely unusable for the corporation itself.

And finally, to the extent that there is some evidence or an argument to be made that a corporate litigant has taken steps to improperly categorize certain information as inaccessible, the rule and its revisions permit the requesting party to challenge that designation and, in fact, the initial burden of proof is on the withholding party. If the misconduct has occurred, proper redress can be made to the court.

So, in sum, ACC believes that the proposed revisions to Rule 26(b) levels the playing field and properly balances legitimate business interests with litigation interests.

The same can be said for the revisions to Rule 37 regarding the establishment of a safe harbor for information lost as a result of routine operation of a party's electronic information system. Again, taking a step back, businesses create records retention policies for many business-related reasons having nothing to do with litigation.

Spam is blocked, and questionable e-mails are purged to prevent computer viruses and an overload to the e-mail system. Automatic e-mail deletion protocols are activated to increase system efficiency, open up server space, and save costs. Likewise, the same cost considerations go into back-up tape rotation and the overwriting of back-up tapes and data on servers and the like.

The ACC understands the need to incorporate features into such programs which allow a response to litigation holds when appropriate. But without

a safe harbor provision, the current environment actually threatens to turn the business equation on its head. Instead of encouraging the incorporation of reasonable features, corporations and corporate records managers, through their legal counsel, are being asked to redesign records retention systems so that crucial business needs take a back seat to potential litigation concerns.

PROFESSOR MARCUS: Can I ask a question there, just because it sounds like something some of our witnesses might be thinking. I gather what you just said is that litigation concerns have affected the design of information management systems?

MR. LA SALA: That is correct.

PROFESSOR MARCUS: But it sounds like some other witnesses are saying that litigation might have that kind of effect if deeming something inaccessible would be a way to keep it beyond the reach of discovery. And I thought you said that that wouldn't happen.

It seems to me there may be a tension there between the litigation pressure you're talking

about now and the impossibility I think you mentioned regarding that same kind of litigation pressure affecting information management in terms of what is accessible and not accessible. Could you comment on that?

MR. LA SALA: I think what I'm trying to say is that the pressure that companies are feeling from litigation, and from the current state of uncertainty that they're litigating in, is it is easy and safe at this point, though not the best corporate practice, to suspend records retention policies to not back up tapes or recycle back-up tapes.

And what I have actually found in trying to develop a comprehensive policy for my own company is, in talking to other in-house counsel and records managers, there are significant amounts of companies out there who know they need to do something. They need to control this data somehow. But they're not even getting to that stage yet.

They're not implementing policies. They're not implementing automatic e-mail deletion systems.

They're basically doing nothing, putting the corporate imperatives, if you will, on the back burner because of current litigation and the fear that they're going to do something by implementing these policies to put them in a bad way in that litigation. Does that answer your question?

PROFESSOR MARCUS: Well, I guess. My reason for asking was that it sounds like the lawyers are calling the shots in those instances now. And you said the lawyers wouldn't call the shots in those other instances, and that didn't seem to fit together to me.

MR. LA SALA: Well, I think if the lawyers yelled loud enough in any organization, they're going to get hurt. On a day-to-day basis, it is the business units and the business people that are making their own decisions about records retention type issues.

If there is a significant litigation, which companies certainly the size of Textron and others that ACC represents, there is always at least one significant litigation. It is the lawyer's

job--the in-house lawyer's job to inform management that they need to take a step back.

PROFESSOR MARCUS: That shot-calling tends to be litigation specific?

MR. LA SALA: In the first instance. It's really a notification. It's a notification to senior management.

PROFESSOR MARCUS: Right. So the other situation then perhaps is when just in overall company-wide forever kinds of information management practices, which would be much less likely to be affected by lawyer input?

MR. PEPPE: They may not even exist. That's one of the issues. Sixty-two percent of our members come from small law departments. Our members include 98 or 99 of the Fortune 100 companies. But at the other end, the large bulk of business in this country is done through these smaller companies and smaller departments.

And frankly, the standard, we get more requests from companies' lawyers looking for document retention policies as if it's something you can

just copy and put in place, and assuming then they have to go sell it to management.

Before I joined ACC--I've been on the staff for about a year--I was general counsel for U.S. operations of the International Manufacturing and Construction Company. It was always very interesting trying to sell to management in another country these types of policies and procedures because, frankly, they don't deal with them anywhere else.

It was very interesting hearing earlier today someone pointing to the Chicago school and an economic analysis. Because if we're going to go down that path, we really need to look at what's really driving the economic analysis areas, the relative cost benefits for the plaintiffs versus the defendants in some of these cases.

In fact, in most of the world where my company did business, the loser paid. So there was a very different perspective about what you went and asked for. There's no loss here to go ahead and ask for these things. So it does tend to come up, to

answer your question, in a litigation contest because most companies on the smaller side tend to become aware of these things when they have a problem. It's after the lawsuit comes in.

Sitting in the lawyer's chair, we have a little different role because we have duties to the court and otherwise, where we're trying to enforce these things. And we try and explain to the company what they have to do. But quite often there is some push-back until it becomes a matter of a particular litigation as opposed to a general policy.

There is a little bit of it more in the air now, where people are a little more concerned generally. But those things ebb and flow. And so, that's partly why our association saw this consensus on a couple of key points that to the extent there are standards and something recognizable that as the in-house counsel, we can take back to management and say here is something you can build your system around and something we can work on from a common basis, you tend to make more progress in developing those systems.

MR. GIRARD: May I ask a question? Recognizing that members don't run businesses with a view to being sued and defending litigation, does it not benefit them to cut to the chase when it comes to discovery as much as possible in the sense that policies that favor an effective exchange of information I would think would be to your members' benefit as opposed to creating a risk of collateral litigation over issues surrounding accessibility?

And I guess the question I would tender out there is do you not see in a rule that in some respects I think may be best the producing party with an extra trump in their hand, an extra trump card, in the sense of being able to invoke inaccessibility or lack of reasonable accessibility that might create an increased possibility of basically satellite litigation that ends up making a case harder or more expensive to get it done?

MR. LA SALA: I think, to go back to Jonathan Redgrave earlier today, who said we need to look at your proposals as a whole, we're not here talking about the initial meet and confer, but it is

something that we support. And I think that a lot of these issues will and should be addressed, so that the collateral litigation you're talking about I think, in most cases, would not end up happening.

The other point I would make on that is because the revision does place such an emphasis on active data and producing the active data and essentially--or implicitly in the rule and expressly in the note encourages the parties to first take a look at the active data and see if what they really need is in there. And in my experience, I think, by and large, most cases will be resolved at the active data point.

I don't think a lot of cases will move into inaccessible data. For me, inaccessible data is--it may be slightly different than what other people view it as. For me, it's really about disruption to the business, which is consistent with the comments we're making.

It's about having to suspend disaster recovery policies. It's having to suspend automatic e-mail deletion policies on a small or a large scale.

It's about taking IT people, who are busy enough just running our systems, and having to divert their attention for a day or a week, or whatever, to take care of this data when there is a perfectly acceptable pool of active data, easily accessible data that can be looked at first to determine if there are issues.

So the answer to your question is, sure, it is entirely possible that we may be putting in an extra step and require some collateral litigation on discovery issues. Frankly, I think a lot of that happens anyway, particularly with some of the uncertainty that we have right now.

And I think to the extent that, as corporations, we have certainty about what our obligations are and are not, we will actually be in a better position on the front end of the case to decide what to do and not to do.

JUDGE ROSENTHAL: We're running short on time. Ms. Varner?

MS. VARNER: This will be quick. You've studied the proposed amendments?

MR. LA SALA: Yes.

MS. VARNER: Assume that you file a response that says the following is reasonably inaccessible, and we haven't searched it and we're not producing it. Do you believe that you are under a preservation obligation until that issue is resolved under the proposals as currently drafted?

MR. LA SALA: The proposal, as currently drafted, sets a standard that the parties need to preserve the information that they knew or reasonably should have known was going to be responsive. And I think that's about as best as you're going to get.

In some instances--it's always a judgment call. And in some instances, I'm going to make the determination that, yes, I need to preserve that information, and in other instances, I'm going to make the determination that I don't and run the risk--and I understand there's a risk that I might get sanctioned somehow at the end of the day for not preserving it.

But there certainly will be instances when from

a litigation perspective it doesn't make sense to preserve the information, and there will also be instances when from a business perspective I just can't do it.

MR. GIRARD: Quick question. Does ACC have a position on whether the proposal with respect to identification that you're claiming is not reasonably accessible, do you have a position as to whether that's going to give you more certainty?

MR. LA SALA: I don't think we've drilled down to that level of detail with the membership. Actually, I don't think it possible, and I suspect if we polled them we would get a multitude of answers.

MR. PEPPE: You would get a mix of answers. And frankly, the answer you'd probably get from most of the members is inaccessible means "I asked for it, and nobody can find it." And so, then we get back to the question earlier of everything is accessible for a cost. But when you're dealing with that many cases and that kind of caseload, it's not accessible as far as the counsel knows.

JUDGE ROSENTHAL: Last question, Judge Walker?

JUDGE WALKER: I'll be brief. We're hearing today from several witnesses that document retrieval and preservation and analysis tools are becoming more and more available at lower and lower cost. And we're hearing a lot about litigation requirements versus business retention requirements and best practices, so to speak. This is my question.

Is this maybe just hopeful thinking? Are we perhaps coming to a point where litigation requirements and business practices and best practices can become one and the same? And that leads to the question, what do you think that litigation requires that best practices don't require?

MR. LA SALA: I think that we are moving in that direction, and I think that would be an ideal place to end up. I think that the way the corporate world is set up, we are not close to being there yet. You are--

JUDGE WALKER: Is that where you're going,

though?

MR. LA SALA: I think that is a fine place to end up. I think that good, responsible records retention practices do need to take into account best practices in terms of responding and dealing with litigation, sure. But the systems, currently as they exist in most companies, are not able to do that.

JUDGE WALKER: But understanding we're headed to a different world, technologically, really what I'm saying is does litigation require things that business practices would never require?

MR. LA SALA: I think the answer is, in some instances, yes. Particularly under the current scheme where it is very easy for plaintiffs to serve a prelitigation preservation notice or an overly broad discovery request calling for you to retain, under threat of sanction, all of your back-up tapes and suspend your e-mail deletion policies. And I don't think that all of litigation requires that type of response.

MR. PEPPE: Well, that's a general discovery

issue, too, not just an e-discovery issue. I mean, we heard the predictions 30 years ago about the paperless society. And I don't know about you, but the more computers we have, the more paper we have floating around. And e-discovery generally means something gets printed out, and then they sort through it the old-fashioned way eventually.

JUDGE ROSENTHAL: Well, this table would certainly bear your observation out. Thank you.

MR. LA SALA: Thank you.

JUDGE ROSENTHAL: Mr. Butterfield? Good afternoon.

MR. BUTTERFIELD: Good afternoon. I'd like to thank the committee for giving me the opportunity to appear and present my comments and testimony.

My name is William Butterfield. I am a partner with the law firm Finkelstein Thompson & Loughran. We have offices in Washington, D.C., and in San Francisco, California.

I come here as a plaintiff's practitioner. I am typically involved in complex litigation involving antitrust claims, securities,

commodities, and consumer claims. And I'm often the guy who is responsible for electronic discovery in those cases. I've been handling that electronic discovery since the early '90s, when we imaged paper documents and threw them up on a server, a client server, and made them accessible to lawyers around the country.

Today, typically, the cases I work on, we have documents under management running anywhere from about 3 million pages to over 10 million pages. So I deal with these issues every day.

JUDGE ROSENTHAL: May I ask a question about your written submission?

MR. BUTTERFIELD: Yes.

JUDGE ROSENTHAL: You were critical, if I understood it correctly, of the two-tier proposal, as it's come to be known, because it, to use your words, "delegates to the responding party the decision as to whether information is on the not reasonably accessible side of that divide."

But if the proposal provides a mechanism and prescribes a procedure for challenging that drawing

of the line and for requiring the party that drew that line to back it up and puts the burden on that party to do that, why isn't that the answer to your concern about allowing the producing party to make that initial determination? It's only an initial determination.

MR. BUTTERFIELD: It's an initial determination, but I think it can be argued that--well, first of all, I would say I haven't heard anything yet today and I haven't seen anything that demonstrates to me that there is a reason to adopt this rule and that there's a reason not to stay with the current way of dealing with these situations, which, in the Zubulake case, there has been a very fair way of addressing these issues and dealing with them.

And I don't understand why it's necessary to adopt new rules with this arbitrary, arguably, concept of reasonable accessibility, which is going to have to be litigated in every case. But--

MS. VARNER: Excuse me. If I might follow up with that, Your Honor?

JUDGE ROSENTHAL: Please.

MR. BUTTERFIELD: Yes?

JUDGE ROSENTHAL: And we'll give you a chance to answer.

MS. VARNER: You state in your comments that you believe that this sort of turns the litigation system on its head. But doesn't the proposed rule mirror the way that discovery has traditionally been done? That is, one side asks the other side, and the other side, who has the information, makes its objections and talks about burden and whether things are responsive and relevant?

And then the requesting party has the ability to try to test that through a motion to compel. Why is this conceptually any different?

MR. BUTTERFIELD: Currently, there is a presumption that all relevant information is discoverable. Under--and obtainable unless the responding party shows that there is an undue burden producing that. The rule change will incorporate a system in which information must be relevant and accessible to be discoverable unless

the requesting party demonstrates good cause.

So it shifts the burden. So it's not exactly the same as the current scenario. And my comment is that under the current state of the--the current rules and the current case law, there is a more than adequate protocol for dealing with these issues.

Second, under the reasonably accessible language and the new proposed Rule 26(b)(2), I made the point in my comments that this rule change almost creates a disincentive for typical responding parties to adopt new technology.

And let's say you have two responding parties, and one decides, okay, we're going to adopt--and I mention some new technology in the footnotes to my comments that make it easier to archive backed-up data and easier to retrieve that data. Well, let's say one company decides, okay, as a business decision, we think it's a good idea to spend the money, buy the technology, incorporate it.

That company may be subject to a different standard with respect to production of their

documents than another company that says, no, we would rather pay our executives bonuses, and we're not going to buy this technology. And by the way, we have more shelter from requests from plaintiffs.

JUDGE HAGY: Excuse me. But don't you also--aren't they also giving up the fact that they may be deleting the very evidence that will disprove the plaintiff's case? You're always assuming that what's deleted is bad for the company. It may be good.

MR. BUTTERFIELD: I'm not assuming anything.

JUDGE HAGY: So they don't have an incentive--you say they have an incentive to not preserve documents. It seems to me you may just as likely be destroying the evidence that will help you as you will that would hurt you.

MR. BUTTERFIELD: I've seen both sides of the picture. I've practiced for a long time, and I've seen companies that are at least were alleged to intentionally have destroyed data and seen lots of cases where discovery and documents are produced that proves the defendant's case.

Discovery is about the search for the truth. And when you say that just because that smoking gun might be contained in a "inaccessible" back-up tape, it's not discoverable unless there is some good cause shown, then I question whether or not we are bending the rules too far.

PROFESSOR MARCUS: Can I ask you a question there?

MR. BUTTERFIELD: Yes.

PROFESSOR MARCUS: How often do you--you used back-up tapes as our conventional illustration of this. How often do you, in fact, seek and get information from back-up tapes, and how often do you get it without making some kind of showing like good cause, why it's worth getting?

MR. BUTTERFIELD: That's a great question. And in my current practice, I know that if I seek back-up tapes, I'm going to get a big fight. So I don't seek back-up tapes unless I have a darned good reason to seek them.

And I heard, I think, three times since I've been here today that members from the other side of

the aisle have said that, you know, with the plaintiff's bar there is no downside to having overbroad requests. It doesn't hurt them. It harms the defendants. Well, it costs a lot of money for the plaintiff's side to obtain those documents, to keep them under management on an extranet or some other vehicle, and to review them.

So there is a downside, and it's not in my best interest to request back-up tapes unless there is a good reason to do so.

JUDGE ROSENTHAL: May I ask you two questions to follow up on that? I'm sorry, Professor Marcus. Go ahead. You do it first.

PROFESSOR MARCUS: It sounds to me like what you were saying, though, is that in order to get these things, you have to do something a whole lot like what you say is a new obstacle, something like a good cause showing. It sounds like that's what you're doing now.

MR. BUTTERFIELD: What I'm saying is that under the current rules and under the current case law, I have sufficient barriers and concerns about going

after back-up tapes, and I don't think it's necessary to change the rules. I think there's an adequate procedure that exists currently to deal with these situations.

JUDGE ROSENTHAL: I'd like to press you a little bit on the question that Professor Marcus asked you. You said that you don't seek back-up tapes, and I assume that the same answer or same description would apply to other forms of data that would require restoration, such as legacy data?

MR. BUTTERFIELD: Yes.

JUDGE ROSENTHAL: Unless you have a good reason for doing so?

MR. BUTTERFIELD: Yes.

JUDGE ROSENTHAL: Because you expect it to be resisted because it's expensive and difficult and all the reasons that animate these proposals?

MR. BUTTERFIELD: That's right.

JUDGE ROSENTHAL: But my specific question is how often does that occur? That is, how often have you found it necessary, in your judgment, to seek restoration of information because the amount of

the information you got without needing restoration was inadequate to respond to your discovery needs?

MR. BUTTERFIELD: I don't think I've had to do it.

JUDGE ROSENTHAL: You've never had to do it?

MR. BUTTERFIELD: No. You know, I know that if I do it, and if I go--let's say I litigate the matter, and the court applies the standards from the Zubulake case, I could be facing a huge bill.

Now, but I want the opportunity--let's say that my client comes to me, and my client says, "You know, there's an e-mail. It's about three years old. It's probably not in the active files of the company anymore, but I can tell you that this is going to make the case."

I want the opportunity to go after that e-mail. Even if I lose under the Zubulake task, and I have to pay for it, I at least want the opportunity to do that. And I understand that there is the good cause language in the new rule, but the new rule shifts burdens. And I haven't understood to this point why it's necessary to do that.

Getting to--and I want to discuss in my limited time the interplay--

JUDGE HAGY: Doesn't the new rule require--if you challenge it, the new rules requires the producing party to establish that or to show that it's inaccessible. And then that shifts so they have the burden. They have to show it's inaccessible. That shifts back to you to say, "But judge, here is my witness, and she says there is this e-mail that just knock dead, right on. And I want that. That's all I'm looking for."

MR. BUTTERFIELD: Wouldn't you agree that it shifts the burdens from how they exist presently?

JUDGE HAGY: I don't think so. Ultimately, if it's established that it's relevant. But if it's established, and I think you made a good point. Currently, if it's relevant, it's presumed that you get it. Now you say if it's relevant and accessible, it's presumed you get it.

Well, it seems to me if the producing party comes forward and establishes that it's not accessible, it doesn't shock me if it's not

accessible after considering the value to you, the value of what you've already got the cost to produce it, the value of now the litigation. Then it should be presumed you don't get it. That doesn't shock me.

They have the burden of first establishing, though--at least that's our intent, I think, to say, hey, it's not accessible. If you challenge it, they've got to come forward and say this is why we don't think it qualifies as accessible.

MR. BUTTERFIELD: What they do is they come back and say and--we heard one gentleman from the defense side say they're going to boilerplate.

JUDGE HAGY: That's the initial response. Then you challenge it, and then they've got to lay their cards down.

MR. BUTTERFIELD: But my point is, again, that I think the burden shifts. But I do want to talk about the safe harbor provisions. And first of all, because of the way the safe harbor proposed rule is structured, presently, when I enter into a case--and by the way, I applaud the committee. I

think it's great that they are forcing litigants and judges to deal with electronic discovery issues early.

I think in the kind of cases I litigate, the practitioners on both sides are typically steeped in the area. They do that anyway. But I've seen too many cases where that hasn't happened, and I applaud the committee's efforts.

But presently, when I file a lawsuit, I conduct a discussion with the defense side and, in fact, in another case I just got done with two months with a joint technology committee where we structured a document production format agreement, and we also discussed document preservation issues. And the way I look at it, unless I believe that the defendants are not adhering to their requirements to preserve documents, I don't seek a preservation order.

With respect to the new Rule 37, that's the first thing I'm going to do right out of the box. Because unless there's a preservation order, in many ways, we are giving the responding

parties--and I talk about this interplay, and I'm really worried about this. Because I ask whether the responding party can classify relevant data, maybe the smoking gun I'm talking about, as not reasonably accessible and, using that classification, destroy data and then use the safe harbor provision to insulate itself.

JUDGE ROSENTHAL: There's language in the safe harbor provision that says that there is no safe harbor available to someone who fails to take reasonable steps to preserve, and then the language is in there.

MR. BUTTERFIELD: To preserve discoverable evidence.

JUDGE ROSENTHAL: But why wouldn't that specifically just apply to what you have just described? That is, the party knows the only place that the smoking gun is located is on what they have designated as inaccessible. Why wouldn't that be a pretty easy case to defeat any safe harbor argument?

MR. BUTTERFIELD: The argument I worry about is

them coming back and saying we--it was not discoverable, in our view, because it was not reasonably accessible. Because it was not reasonably accessible, we could destroy it, and the safe harbor provision, particularly if you apply a standard higher than negligence, the safe harbor provision will provide cover.

And I agree that there could be arguments going both ways. What I said in my papers is that if that's the position of the committee, why doesn't the committee write an exception into Rule 37(f) to exclude the destruction of data from safe harbor, where the decision to destroy that data is made solely by the responding party?

JUDGE HAGY: As a tradeoff, suppose we say that when you say data is inaccessible and you notify that in a lawsuit. You say, "We're holding some back. It's inaccessible." And it would be my thought that if they then destroyed that, I wouldn't want to stand before a judge if I did it and say, "Well, we destroyed it. We thought it was inaccessible."

But as a tradeoff to say you must preserve when you claim that it's inaccessible, what would you think about the plaintiff having to make the motion to see inaccessible data within a regular period of time? Because as it is now, there is no time limit on when the plaintiff has to move to make you establish its accessibility.

MR. BUTTERFIELD: I think the rule is problematic for both defendants and plaintiffs. Because the defense--if I represent a company, both sides, when a lawsuit starts, you know, they go down roads, and where you end up is oftentimes a lot different than where you start. So documents that you think may not even be relevant or may be marginally useful may become vitally important.

So you may, in good faith, advise your client, as corporate counsel, "You know what? This is on back-up tapes. I don't think it applies to the lawsuit. I don't have a problem if you destroy it." What happens then? It's too late. It can't be challenged.

JUDGE ROSENTHAL: Professor Marcus, we'll give

you the honor of the last question.

PROFESSOR MARCUS: I think he's actually answered whatever I was going to ask, to the extent I was going to ask it. So I'll defer the honor back to Chris Hagy.

JUDGE HAGY: And I'll give it back to Mr. Butterfield.

MR. BUTTERFIELD: If there are no other questions, thank you very much.

JUDGE ROSENTHAL: Thank you.

Mr. Romine? Good afternoon.

MR. ROMINE: Good afternoon. Thank you, Chairman Levi, Judge Rosenthal, Professor Cooper, the rest of the committee.

This is the third time that I've testified in front of the committee, and each time I'm impressed with the professionalism of the Administrative Office of the Courts, and they really do a good job of organizing these things. So thank you very much.

You have my written statement, and I'm not going to rehash that. I'd like to instead talk

about three examples from my own practice. Going way back to ancient history in the late '90s, before e-discovery was as prevalent as it is today, I was involved in a couple of cases. One was a major antitrust class action. The other was one of the states' litigation against the tobacco industry. And I was on the plaintiff's side in both cases.

And in both cases, the defendants produced literally warehouses full of paper documents, warehouses full. And I was one of a team of dozens of lawyers in both cases looking at these documents. And I could tell just by looking at some of the documents, some of the files that I looked at, because lawyers can tell these things, these files had been reviewed by defense counsel. Maybe a paralegal or maybe a lawyer, I don't know. But they had been reviewed.

And I know in the tobacco litigation that it cost the defendants millions of dollars to produce this material. And in the antitrust case, I expect that it did. I'm not sure that it did.

So this is an example that may be an argument in favor of the Rule 26 changes that were made in the year 2000, shrinking it from subject matter of the litigation to relevant to the claim or defense of any party. But it's not an argument in favor of what I think is the thinking behind the current rule, which is that electronic discovery is more expensive than paper discovery. Electronic discovery, my experience, is not more expensive than paper discovery. It's less expensive.

The second example is I was involved in a commercial arbitration a couple of years ago. It was AAA arbitration, but the parties agreed to use rules similar to the rules of civil procedure. And my client was a mid-sized business that had a lot of electronic information and a lot of paper information.

And the client was overjoyed that it could respond to the discovery requests primarily by downloading what existed on its employees' PCs and sending them to me on a CD, which I could then, you know, review on my PC. There was some paper files,

20 or 30 boxes, that existed from before things were done on computer that they had to ship to me, and people in my office had to look through them page by page and use stickies to identify things that were responsive, things that were not responsive, things that were privileged, things that were not privileged.

And in that case, the paper discovery was much more unwieldy. The electronic information was much more wieldy.

The third example is I represented a couple of class representatives, individuals, plaintiffs in a securities class action. One of these individuals was computer literate, the other was not. A similar situation, the class representative that was computer literate sent me an 8.5 by 11 envelope full of the paper discovery that he had, and he e-mailed me the rest of the discovery that he had.

With the class representative that was not computer literate, she and I spent six hours in her self-storage unit in Fort Lauderdale, Florida, looking for responsive documents. We were there

until 10:00 at night. They closed at 9:00. We got locked in and had to climb over the fence in order to get out.

So paper discovery is not better--or paper discovery is not cheaper than electronic discovery. It's just not.

JUDGE ROSENTHAL: Can I ask you a question?

MR. ROMINE: I've represented--

JUDGE ROSENTHAL: Excuse me, Mr. Romine?

MR. ROMINE: Yes?

JUDGE ROSENTHAL: May I ask you a question?

MR. ROMINE: Sure.

JUDGE ROSENTHAL: Sorry to interrupt you.

MR. ROMINE: No problem.

JUDGE ROSENTHAL: It's the same question that we've asked a number of other people.

MR. ROMINE: Right.

JUDGE ROSENTHAL: In your practice, how frequently have you been required to have recourse to information that you had to have restored, whether it was from back-ups or legacy data or similarly relatively inaccessible storage media,

before it could be retrieved and looked at and produced? How often have you had to have recourse to that kind of information after you have exhausted sources of what was reasonably available?

MR. ROMINE: Right. I think once.

JUDGE ROSENTHAL: In how many years?

MR. ROMINE: About 11 years. And just for the committee's knowledge, we had some computers that had crashed, and we were told that responsive documents likely were on those computers.

JUDGE ROSENTHAL: And that was pretty easy to figure out that that computer, in fact, had responsive documents because it had crashed?

MR. ROMINE: Well, we thought that it did because it belonged to someone who was involved in the issues in the case. So we thought that some responsive documents were on that computer. It was sitting somewhere in the company's premises, but it had not been successfully restored. And we tried to restore it, and we could not.

JUDGE ROSENTHAL: And were you also able to--or how easy was it for you to make the assumption or

reach the conclusion that the information that was likely to be on that computer was not also available in accessible sources?

MR. ROMINE: We weren't. We never knew. It's possible that the information on that computer was also produced from other sources.

JUDGE SCHEINDLIN: There was a presumption in the last question. I think Judge Rosenthal used the word "accessible," naturally. How do you--do you like that split? And if so, how do you define these terms?

MR. ROMINE: I'm ambivalent as to the split. What I'm most concerned about is the idea that a party need not produce information that it identifies is not reasonably accessible. It's not-- it's not the burden of the responding party to prove that the information is not reasonably accessible. It's not on the burden of the responding party. It's on the burden of the requesting party to file a motion to compel.

Under the current rules, it's the burden of the responding party to show facts why there is an

undue burden. If the party doesn't show facts why it's an undue burden, the party risks waiving the objection. Under the proposed rule, the burden is on the requesting party--to put it in your lap, Judge Rosenthal, and say, "Judge Rosenthal, the defendant over here," or the litigant--it doesn't have to be plaintiff or defendant. "Judge Rosenthal, this litigant over here says that this information is not reasonably accessible. And I want you to determine whether it's reasonably accessible or not."

JUDGE ROSENTHAL: I'm sorry.

MR. ROMINE: That's okay.

JUDGE ROSENTHAL: Are you suggesting that if we clarified that it was the burden of the responding party to show that the information was not reasonably accessible or was reasonably inaccessible, that that would satisfy your concern?

MR. ROMINE: It would go half way, but it would not satisfy them. The reason it goes half way is because the way the proposal is currently drafted, the responding party is under no obligation to do

anything until and unless the requesting party files a motion to compel. The responding party is required to do nothing until I ask you, Judge Rosenthal, to determine whether the information really is reasonably accessible or not.

Under the current practice, the responding party has to say here is why there's an undue burden. Neither under the proposed rule nor under the proposed comment to the rule does the responding party have any burden to do anything, including meet and confer.

JUDGE ROSENTHAL: Professor Marcus?

PROFESSOR MARCUS: I want to go back to the computer that you couldn't restore. And it strikes me that you'll agree with me that that's one instance in which there's truly inaccessible information.

MR. ROMINE: It was functionally inaccessible.

PROFESSOR MARCUS: Okay. Did the responding party in that instance make a motion for a protective order to be excused from producing that information?

MR. ROMINE: We were the responding party, and, no, we didn't make any motion.

PROFESSOR MARCUS: Oh, you were the responding party?

MR. ROMINE: Yes. This was our computer.

PROFESSOR MARCUS: I thought you just said that the reason you're opposed to the change is that right now the responding party has the obligation to make a motion with the judge to be excused from producing, whereas under this arrangement things would be different. It strikes me that very often they would work very much the same.

MR. ROMINE: I don't think that's true. The responding party under the current rules does not have a burden to make a motion. The responding party under the current rules has an obligation to set forth in its responses to discovery why the information is objectionable or why there is an undue burden to produce.

I want to refer back to what Dabney Carr said in support of the rules or support of the rule change. He said litigants have to understand and

apply, without having to ask the courts for help, the discovery rules. Well, that's what's happening now. He himself said that 99 percent of the time when he has a discovery dispute, he works it out with opposing counsel in a meet and confer.

Under the current rules, that doesn't happen because there is no meet and confer obligation--I'm sorry. Under the proposed rules, that doesn't happen because there is no meet and confer obligation. Under the proposed rules, the requesting party has to file a motion to compel.

JUDGE HAGY: I think under every court I know, maybe it's by local orders, you can't file a motion to compel without having certified that you've meet and conferred. Nor can you file for a motion for protective order until you certify that.

So we don't envision that going away. Maybe you're saying that we ought to specifically put a meet and confer requirement here?

MR. ROMINE: Again, that would be a step in the right direction. But my point is the way that the proposed rule is written, there is no obligation

for the responding party to specify or to justify why the information is not reasonably accessible until the requesting party files a motion to compel. And that is not going to happen in every circumstance.

JUDGE HAGY: You're also saying under the current rules, there's an obligation on the responding party to state why a request is unduly burdensome or oppressive. I never see it. They just say it's unduly burden or oppressive. And then even though there's no meet and confer provision here, the parties say, "I'm going to move to compel that," and they get together and they meet and confer.

So we don't have a meet and confer now. Then if they have to, they can argue what is unduly--what is oppressive and burdensome.

MR. ROMINE: I think that there are cases, and one of them is cited in my written materials--there are cases in which a party has objected on grounds of unduly burdensome. They don't make any effort to show why, and their objection is waived.

JUDGE HAGY: A lot of cases the other way, too. It all depends on what the ultimate fact showing is. If it's just nonsense, it's not unduly burdensome, then the other way.

JUDGE ROSENTHAL: I think we have Mr. Girard and then Professor Marcus, and then we will probably be almost out of time.

MR. GIRARD: But quickly, aren't you saying that under the existing system, that because the presumption is that if a party resisting discovery fails to show good cause, then they waive their objections and that that process flushes out whatever their objections are in the context of the meet and confer?

MR. ROMINE: No. There is no good cause requirement now.

MR. GIRARD: I'm talking about currently.

MR. ROMINE: Right. There is no good cause requirement.

MR. GIRARD: My understanding of the way Rule 26 works currently is that there is a good cause requirement if you're resisting discovery. In

other words, if the dispute is litigated, the party resisting discovery has to show good cause.

MR. ROMINE: No. That's not the way it works.

MR. GIRARD: Okay. Tell me how it works.

MR. ROMINE: Under the rules--I'm sorry, Your Honor. The way I understand it, there is no good cause in the rule. The way the rule is applied by judges in the cases that I've read is the party resisting discovery has to show undue burden. That's different than good cause. It's different than good cause. The responding party has to show undue burden.

And let me just explicate that because I think it's important. Under the current rule, requesting party requests, responding party says undue burden. You have a meet and confer. Either you work it out 99 percent of the time, like Mr. Carr said, or you don't work it out the 1 percent of the time, and the requesting party files a motion to compel.

Here's how it works under the proposal. Requesting party makes a request. Responding party says it's not reasonably accessible. Then you may

or may not have a meet and confer. Then you have a motion to compel in most cases in which the requesting party cares. Then you have a motion to compel.

Then the judge says, "Well, I agree. It's not reasonably accessible." The judge must make that finding. Then the requesting party says, "Well, even if it's not reasonably accessible--"

JUDGE SCHEINDLIN: But you have skipped a step. The judge isn't going to do that. The burden is on the producing party to make the showing--

MR. ROMINE: Yes. Yes.

JUDGE SCHEINDLIN: --that it's not reasonably accessible.

MR. ROMINE: That's right. Thank you, Your Honor.

JUDGE SCHEINDLIN: And then the judge can decide.

MR. ROMINE: Yes.

JUDGE SCHEINDLIN: But it is, the burden is on the party who asserted that to prove it.

MR. ROMINE: After the motion to compel was

filed.

JUDGE SCHEINDLIN: I agree with you.

MR. ROMINE: After the motion to compel was filed.

JUDGE SCHEINDLIN: Clearly after--right, after the motion.

MR. ROMINE: So then the judge says, "All right. I agree with you. It's not reasonably accessible." And then the plaintiff says--or excuse me, the requesting party says, "Well, all right. So it's not reasonably accessible, but I've got good cause."

So you've already found that it's not reasonably accessible. But now I'm going to say you should give it to me anyway because there's good cause. And I would say it's adding three or four unnecessary steps to a process that works well now.

And let me just--I realize I may be running out of time, but I think this is an important point.

JUDGE ROSENTHAL: I think Professor Marcus had a question first.

MR. ROMINE: Okay. I'm sorry.

JUDGE ROSENTHAL: No. Go ahead.

MR. ROMINE: The reasonably accessible language is okay, but there's no reason that I can see why the reasonably accessible language must logically be tied to a system where the responding party has the ability on its own initiative just not to produce documents.

There's language in my written materials that says you can incorporate the words "reasonably accessible" into the undue burden standard in Rule 26(c) or the burden of production outweighs the likely benefit under Rule 26(b)--

JUDGE SCHEINDLIN: So it would become a factor that a court would consider?

MR. ROMINE: A factor the court would consider, yes.

JUDGE SCHEINDLIN: Right.

JUDGE WALKER: Can I ask a yes/no question?

JUDGE ROSENTHAL: Yes.

JUDGE WALKER: Did you tell them about the computer that had crashed and you couldn't restore?

MR. ROMINE: Did I tell the other side? No.

JUDGE ROSENTHAL: Did you say that into the microphone?

MR. ROMINE: No.

JUDGE ROSENTHAL: Go ahead.

JUDGE SCHEINDLIN: Is one of your concerns with the self-designating reasonably accessible problem that the party may also then feel free not to preserve it? Is that one of your concerns?

MR. ROMINE: Yes. Yes, that is one of my concerns. And the--I read a newspaper article about the hearing in San Francisco. I wasn't there, so my apologies to the court. But the vice president from Intel said that people like me are not litigating in today's world. But I've been litigating in today's world or the contemporary world for the last 11 years, and I think the committee is somewhat at a disadvantage because you hear from people who have vastly different perspectives on litigation and how it works in today's world.

And I would submit that the way the committee

gets to learn what's happening in the real world from an objective point of view is to read the cases like Zubulake and like the Row Entertainment cases. And the proposed rules, if they go into effect, will basically encourage and bless litigants who delete and destroy evidence for the specific purpose of making them not reasonably accessible.

And it will encourage litigants to employ document retention or, rather, document destruction data for the specific purpose of avoiding Rule 37 sanctions. And I agree with the immediate past speaker, Mr. Butterfield. I don't see any reason why plaintiffs now or, for that matter, defendants now in an answer should not move for a preservation order at the time they file their complaint or the time that they file their answer.

Because if a litigant is going to be under the threat of sanctions only if there is a preservation order, then I think you're going to get these boilerplate motions at the get-go, saying, "I want the judge to get a preservation order. Otherwise,

all of my evidence is going to disappear."

JUDGE ROSENTHAL: Any other questions of Mr. Romine?

[No response.]

JUDGE ROSENTHAL: Thank you.

MR. ROMINE: Thank you.

JUDGE ROSENTHAL: Mr. Daley?

MR. DALEY: Thank you. Good to see you again. My name is James Daley. I am a partner in the law firm of Shook, Hardy & Bacon. My office is in Kansas City, Missouri.

I have really three things to tell you about my background that I think might bear on my remarks, and I have three themes I think that are advanced by the proposed federal rules and then three examples or suggestions of potential modifications to the proposed rules that I think would be helpful.

First of all, I came to this area first from the standpoint of technology and as a technologist in undergraduate computer programming, leading to my master's degree in information services. Then

practiced law as a first chair trial attorney for first 15 years until I realized I didn't know my four children very well.

So then I applied, for the last 10 years really, my technology background and my knowledge of the anatomy of a case and, indeed, these rules to try to work with folks both in the records retention industry, the technology industry, and my colleagues at the bench and bar to try to explore proactive ways, creative ways to deal with e-discovery issues.

And I'm going to submit to you that it's my experience that in this arena, the big issues are not back-up tapes, and the big issues are not deleted or erased data or fragmented files. The big issue that catches the attention of general counsel and IT directors around the country and around the world that I deal with on a daily basis is the issue of unstructured or individual electronic data. That is the big issue.

And I don't know if you've heard this perspective, but I'll just take a moment to impact

this because I think it's helpful to reflect for a moment on how we got into this mess. We got into this mess because we failed to see a strategic inflection point that happened sometime between 1970 and 1985.

Coincidentally, 1970 was the first federal rules comment dealing with data compilations. But not until about 15 years later in the mid '80s did we all get a PC on our desktop. And not until then did we, by the good works of Bill Gates and others, get personal productivity software on those desktops. First, a word processing spreadsheet, then e-mail. Then we had local area networks so we could propagate the e-mail and documents all throughout a local network and then a wide area network.

So fast forward to today. We have instant messaging. We have text messaging. We have the USB memory keys that I brought my remarks today to share with you on. And we're in the situation where records retention staffing has been cut in the last 20 years. We no longer have the trusty

paper file clerks, let alone electronic file clerks.

We've got people we're asking to do more for less. They have little incentive or no incentive to do anything except save everything when they get a hold notice. Companies on the priority scale, when they're looking at how to budget their money in a difficult economy in particular, have no incentive to move electronic records retention to the fore.

The companies that I speak with, the Fortune 100 to 500 companies I speak with, have had these projects on the books for years--two, three, four, five years. But they always get cut. Why? Because there is no incentive for them to do otherwise. And I would submit to you that the proposed rules give them that incentive.

It gives the management of corporations the incentive to allocate the resources to deal with this issue, which is only getting worse, to the detriment of plaintiffs and defendants and the administration of justice alike.

If for no other reason, these proposed rules give the cache, give the juice, so to speak, for top management to allocate this as a priority to deal with it in a responsible way. I submit to you that corporations are not trying to hide the ball. That's not been my experience in my 25 years. And I have worked on both sides of the bench.

My former firm, I did a fair amount of plaintiff's work, and I know it's easy to get jaundiced to one side or the other, and I know the courts are asked to be the arbiter, the neutral detached arbiter, and to balance the need or the desire for perfect information on the one hand with the burdens and the expense of doing what is reasonable.

And I realize there is somewhat of a sliding scale, even if we don't articulate it. You know, IBM's bar in terms of reasonableness is going to be more than the "ma and pa" shop.

But the bottom line is this--without the incentive provided by these proposed federal rules, I think we're going to stay in that holding

pattern. And I don't think we're going to have the type of predictability and guidance that corporate America needs to deal with this issue and that the IT folks and records managers of corporate America are yearning for.

JUDGE HECHT: Let me ask you this. Why do you think it provides or how do you think it provides more incentive?

MR. DALEY: Well, probably in two main ways. The first is that it increases the profile of e-discovery. It increases it in a way that is far more dramatic than the 11 federal district courts and 9th Circuit and state courts or state legislatures, who are currently trying to tinker with e-discovery from a statutory rules-based or guidelines-based standpoint.

So it increases the profile. It gives them some assurance that if they do certain things, if they abide by these standards, then whether they're in Minnesota or California or Florida, they'll have a baseline for which they can budget human resources, technical resources and, you know what,

money. Okay? So predictability for them goes far beyond just the standards. It's predictability of expense.

JUDGE ROSENTHAL: May I ask you a question about that to follow up on Judge Hecht's question? The one proposal that was made would be to include, either in rule language or in the note language, language to the effect that if a company has a policy in place for routine destruction and retention that applied to electronic information that did not base--that was not based on any particular case and the relationship of information to that case, that would be a factor for examination in determining whether the company had acted reasonably if information was lost.

Do you think that that would provide the kind of incentive you're talking about? Would you be in favor of that kind of language, or do you think it's a level of detail that we should not include in rule or note language?

MR. DALEY: I'm really whole-heartedly in favor of that, and I think that is a--that would be a

major boost to moving forward in initiatives that have really remained dormant for years.

The end-game here, we all know--those of us who deal with technology and e-discovery--the end-game here is having electronic records management systems that assist individuals, you and me, in managing the electronic information that we generate, transmit, and receive day in and day out. And until that happens, you know, until that happens, back-up tapes and inaccessible data pale in comparison.

JUDGE ROSENTHAL: Let me just ask one other follow-up question. If the rules have this powerful ability to influence corporate behavior, perhaps you could comment on the concerns that we've heard from a number of speakers that if we draw a line between inaccessible and accessible and if we also have a safe harbor, that it will embolden companies to make information that might be helpful to the other side in litigation inaccessible faster in order to make it unavailable in litigation.

MR. DALEY: You know, I frankly don't think that is a specious argument. I don't think the argument holds true that just because you provide a safe harbor and you provide a mechanism by which they're encouraged to do the responsible thing--that is to say, have policies that are well reasoned, tailored to the business, have procedures that implement those policies, and have processes that could be demonstrated and should be demonstrated when challenged in terms of how those procedures are communicated, coordinated, and complied with.

Then in that event, you've got, I think, the better situation. We can't live in an atmosphere of fear, uncertainty, and distrust. At some level, we have to trust each other to do the right thing, absent evidence of the contrary. I don't think it is particularly helpful to have the lack of guidance and uniformity and consistency that we have now. So the argument that the status quo is better than the proposed rules, I think, is just respectfully incorrect.

JUDGE SCHEINDLIN: Jim, you said earlier that the problem is probably not with the so-called inaccessible data anyway. It's with the massive amount of data that is agreed upon to be accessible, but how do we deal with it? So if we're going to have this divide for the part that really isn't all that important, how do you define the inaccessible? What is your personal sense of it?

MR. DALEY: Well, I tell you, I've been doing this as a litigator for last 11 years. I have not ever, absent corruption of data, found data that could not be accessible with enough time and money.

JUDGE SCHEINDLIN: Right.

MR. DALEY: So, to me, accessibility is not the issue, as I mention in my remarks.

JUDGE SCHEINDLIN: Right. So it's not the issue. But we're writing this whole rule and having two days of debate about it. So, A, should we bother? And if so, what's inaccessible to you?

MR. DALEY: I think active/inactive is a much better distinction. I really do.

JUDGE SCHEINDLIN: Oh, but people have said that inactive--some of the inactive material is easily accessed. It's relevant. And under all our principles of discovery, why should it be presumptively off limits at all? It's not hard to get. It's relevant, you know?

MR. DALEY: Let me give you a few examples of what I mean by it and why I draw the distinction. I've had occasion to recover data from portable air quality devices used in airplanes at the time that we had smoking on airplanes. These were 20-year-old. I've dealt with Bernoulli boxes, with old TK cartridges, with old IBM 3480 cartridges with paper tape, with punch cards, you name it.

You can find--you can find the hardware and software museums around the country and hot sites to make that which is inaccessible accessible. I'm not sure how you draw that distinction.

JUDGE SCHEINDLIN: Oh, but only with some big expense, right? Okay.

MR. DALEY: Right. I think, though, if you look at active/inactive as an operational

definition, again, it's a matter of proof. It's a matter of evidence. But if I am actively accessing certain types of data, whether it's on a back-up tape, whether it's an online or near-line system, I think the fair thing to do is to require a due diligence exploration of that.

If it's inactive, however, for instance, a historical archive tape--and I've got some clients that have 30,000 of these things. They're paying $250,000 a year storing in three separate continents just because they're afraid to deal with them. And that's just the real-life situation of one client, let alone many. Those are tapes that they have no active reason to access.

JUDGE SCHEINDLIN: In other words, but for litigation, they would now destroy them?

MR. DALEY: Exactly. But for these broad protective orders they've received since the early '90s, which have been shopped around and incorporated by reference by other courts, they wouldn't have them. They haven't touched them. They have no current business use. They're from

platforms that have long ago retired.

JUDGE SCHEINDLIN: Maybe it's semantics, but is all inactive data going to fall into your 5:00--I'm sorry to do that to you--but 10 of 5:00 definition here? In other words, we've been using the word "inactive," I think, differently than you're now using it.

You're saying it's inactive because it has no purpose in the whole world, except that it's being stored pursuant to some judge's protective order. Otherwise, nobody would want it. That isn't how I understood inactive until now.

So I don't know if your definition is universally accepted of what is inactive. And if we went down that road, we'd have to start all over again, getting everybody's input as to what inactive means.

MR. DALEY: I know. I've struggled with the accessibility/inaccessibility versus active/inactive. I will tell you that it highlights a problem of translation between the technology community and the legal community and

the records management community.

JUDGE ROSENTHAL: May I just have one question, and then Frank, and then I think it will be time.

In general, putting aside for the moment the particular label that you're using, are you in favor of a two-tier structure that draws a line somewhere between the stuff that you do not need to spend a lot of money and undergo a lot of effort to restore before you even retrieve it and examine it on the one hand. And on the other hand, the stuff that does require that kind of cost, expense, and burden just to restore before you even get to this traditional steps that have accompanied preproduction activity of information?

MR. DALEY: I'm very much in favor of the two-tier structure. I think it very much advances the predictability, the guidance of the administration of justice.

JUDGE ROSENTHAL: Does that functional description of the line make sense to you, given the ambiguity that we've been talking about?

MR. DALEY: I think it still obtains, I really

do.

JUDGE ROSENTHAL: Frank, just one second? No? Frank, just a footnote and to hers.

MR. CICERO: Okay, I had a footnote to yours.

JUDGE ROSENTHAL: Oh, okay.

[Laughter.]

JUDGE SCHEINDLIN: And I took that away from him. So, if you don't mind, I just want to follow up.

MR. CICERO: --this criteria that you have set forth because I've had a number of discussions, as I think a lot of us have, in the halls and elsewhere today, about that terminology. Not necessarily what you need. And you said a moment ago that there are semantic differences in understanding between or among lawyers.

As you use the term or the criteria, active/inactive, does the data that you describe which are on old airplane smoke detectors and various others, is that active or inactive?

MR. DALEY: Inactive.

MR. CICERO: Okay. You see, what troubles me

about that is--let me give you another example. There are classes of cases, which I'm sure you recognize, where all of the relevant data is inactive data. Toxic waste cases, where the records may go back 10, 15, 20 years, and those are the relevant records for a personal injury or a property damage claim.

Or we had examples cited this morning of securities cases, where it may not be 15 or 20 years, but it may be 3, 4, or 5 years. But one thing we know about all of it is that it's not actively used in the business at the present time. And that's where I have a problem with that distinction.

Because it depends on what cases you're talking about, but there are large categories of cases where all of the relevant data is data which are not used in business at the present time and which the business doesn't want to come to light or even see. Except for the fact that somebody comes along, and they still have it and they want to see it. And it is relevant and material to the

litigation. Indeed, it is all the evidence relating to respective litigation.

JUDGE ROSENTHAL: Shira, did you want to follow up?

MR. CICERO: Well, I just wonder, I mean, under your definition, I gather all of that type of information is not active information?

MR. DALEY: Well, I think it's fair to draw a distinction in the electronic realm between what is reasonably--that which is active and used in the ordinary course of business and can be reasonably accessed versus that which is inactive and can't reasonably be accessed.

JUDGE SCHEINDLIN: My only follow-up was that Judge Rosenthal asked a question. It's now three minutes ago. But she used the word "restore." Is it always a matter of restoration for this sort of inactive material? I mean, it might be inactive, but it may not need to be restored.

JUDGE ROSENTHAL: No, I did.

JUDGE SCHEINDLIN: No, no. You used the word "restore." Right. But I'm asking you, as somebody

who has far more technology background than I, it may be old, it may be inactive, but does it need to be restored or just retrieved? And there is a difference.

JUDGE ROSENTHAL: And I guess my question, to follow up on her follow-up, if I can--

JUDGE SCHEINDLIN: Well, I don't know. I'd like to get an answer.

JUDGE ROSENTHAL: - with whether that restoration factor makes any sense, based on your technology knowledge?

JUDGE SCHEINDLIN: Okay. But could you do mine first? Then we can follow up with that because I need to know whether you think that all the inactive needs restoration as opposed to just retrieving sometimes?

MR. DALEY: Well, I guess from a technology perspective?

JUDGE SCHEINDLIN: Right, right.

MR. DALEY: It's hard to do one without the other. In other words, we know we have to restore and oftentimes convert some of these old data types

so that they're even readable or reasonably--

JUDGE SCHEINDLIN: Okay. So you would always use the word "restore?"

MR. DALEY: I would.

JUDGE SCHEINDLIN: Okay. That answered my question.

JUDGE ROSENTHAL: Now I think we were asking the same question.

JUDGE SCHEINDLIN: I don't know. But anyway--

JUDGE ROSENTHAL: But I think you've answered it to my satisfaction for right now, given the hour.

MR. DALEY: Again, thank you for the opportunity.

JUDGE ROSENTHAL: Thank you for your patience and our somewhat fragmented questions.

And Mr. Lewis and Ms. Longendyke? Good evening.

MS. LONGENDYKE: You did very well with my name. That doesn't happen very often.

JUDGE ROSENTHAL: I've butchered everybody else's, so at least I got one right.

MS. LONGENDYKE: Good afternoon, everyone. My name is Carole Longendyke, and with me is Paul Lewis. And we represent P.G. Lewis & Associates, a data forensics firm in Whitehouse Station, New Jersey, with more than two years' experience in the preservation, recovery, and analysis of electronic evidence.

Our firm's perspective is based on our knowledge and understanding of relevant technology, as well as our experience with that technology in a variety of civil litigations and criminal matters. Since significant focus is being placed upon inaccessible information and the relative costs associated with producing it in discovery, I would like to address a few points relating to these topics specifically.

The hazards of labeling data inaccessible. It has been our experience that data cannot be inaccessible in that it either exists or does not exist. And if it exists, it can be preserved and recovered. We therefore feel that the term "inaccessible" should be excluded from the rules,

and emphasis placed instead upon the varying levels of accessibility relative to cost and complexity.

Furthermore, the ease with which an individual can render a document inaccessible is such that a blanket definition can have serious consequences. Consider as an example documents sent to a computer's recycle bin. For all intents and purposes, this document has been discarded and is no longer an active discoverable document. The document can very easily be recovered, however, at any time and for whatever purpose determined by the user.

We are concerned that an overgeneralized term, such as inaccessible, might provide an incentive for the manipulation of data across the varying levels of inaccessibility.

JUDGE ROSENTHAL: Can you give us some ideas as to a functional description of the levels of accessibility that you have referred to?

MS. LONGENDYKE: Certainly. For a user to send a document to a recycle bin, that user still has the opportunity to bring that file back into an

active state.

JUDGE ROSENTHAL: I understand. Go ahead. Perhaps I could ask it this way.

MS. LONGENDYKE: Okay.

JUDGE ROSENTHAL: One of the formulations that was suggested to us was something along the lines of inaccessible without undue burden and expense, or something along those lines. Would you be more comfortable with that kind of a formulation?

MS. LONGENDYKE: I actually address that in another part of my statement. Is that okay if I just continue? Okay. Because that is a big point that I would like to make.

JUDGE ROSENTHAL: I think I'm suggesting that we would--I at least--I don't want to speak for the other members of the group--would like to hear more about that area.

MS. LONGENDYKE: Oh, absolutely.

MR. LEWIS: We have eight minutes, but eight very powerful minutes.

MS. LONGENDYKE: Okay. In fact, the next section addresses that very clearly. Well, I'll

just move on here.

Discovery that is limited to that which is perceived as accessible has, in the past, encouraged willful destruction of responsive information, and rules written with such limitations will likely provide similar incentive in the future.

The relative value of Tier 1 and Tier 2 discovery. The value of less--

PROFESSOR MARCUS: Excuse me. What limited that discovery to that which was deemed accessible?

MS. LONGENDYKE: Excuse me?

PROFESSOR MARCUS: I thought you said discovery that was limited in the past to that which was accessible had led to the loss of data.

MS. LONGENDYKE: Well, what I'm saying is if discovery is limited to that which is accessible, then--

PROFESSOR MARCUS: This isn't about things that happened in the past.

MS. LONGENDYKE: Well, in cases and situations that we have seen in our business in data

forensics, when discovery is just limited to "give us what you can give us right now, give us what is active and what is most accessible," is excluding a great deal of information.

PROFESSOR MARCUS: That had been the practice in a number of cases in which you had been involved?

MS. LONGENDYKE: Well, I think that as--considering that there has been a limited understanding of the availability of alternate methods for recovering information, which is really the thrust of our point here is that there is this second-tier discovery, this recovery of information is not that difficult, although it's been ignored in the past, I think.

PROFESSOR MARCUS: Did you hear Mr. Romine testify a little while ago about the computer that he couldn't get anything off of?

MS. LONGENDYKE: Yes, I did.

PROFESSOR MARCUS: Would you regard that data as inaccessible?

MS. LONGENDYKE: No, I would not.

MR. LEWIS: No.

PROFESSOR MARCUS: Okay.

MS. LONGENDYKE: The value of less accessible information in litigation cannot be discounted merely because it is available in lesser quantities and in less accessible locations. The notion that the sheer volume of data from the most accessible sources somehow negates the value of the smaller proportions in the less-accessible locations is invalid.

As an example, I provided data forensic services to both the defense and the prosecution in the recent Enron/Merrill Lynch Nigerian Barge trial in Houston, Texas.

JUDGE ROSENTHAL: May I ask one more question? I'm sorry.

MS. LONGENDYKE: Sure.

JUDGE ROSENTHAL: We do have your written statement. So rather than just reading, it might be more helpful if you responded to questions that a number of us might have. And I do have a question.

MS. LONGENDYKE: Okay.

JUDGE ROSENTHAL: What do you think is the appropriate role of balancing the difficulty, the cost, the expense, and the delay of having to obtain information that is at a more difficult level of access? And you've said there are levels.

And on the one hand, in relationship to the importance of it to the case and the availability of other information that might be easier to get, that might be responsive to the same discovery needs, what's the role of all of those factors in deciding whether you should have to get access to require access to the less available information in the first place and in deciding on what terms that should be done?

MS. LONGENDYKE: Well, I think that it's not necessarily more difficult. It's just a different process. Acquiring information on a computer that has been deleted, that is maybe not an active file, retrieving it--it can't be produced in typical methods of discovery, in just printing something out, for example, a document that is active. So

it's just a different process.

Computer forensics is the process of finding the latent information, finding and retrieving and recovering the deleted data. And in our experience, it's--frankly, I think there's a lot of hoopla about nothing. It's not such a difficult, nor is it costly--

JUDGE ROSENTHAL: Then why does it--go ahead.

JUDGE SCHEINDLIN: Can I follow up with another sentence you were about to read? You said, in this Texas litigation, it wasn't the accessible sources that proved valuable, but the recovery and analysis of documents previously deemed inaccessible that proved--that were the gold mine. That was the gold mine.

Well, what were they? What were those inaccessible materials that produced the gold mine in that litigation?

MS. LONGENDYKE: It was back-up tapes that they had required restoration. And frankly, it was not a very difficult process whatsoever to take those back-up tapes that had been previously determined--

JUDGE SCHEINDLIN: How old were these? Why did you have to go to back-up tapes, and how long--what date range were they?

MS. LONGENDYKE: It was back in 1999, and I believe most of their data, their active data was lost in September 11.

JUDGE ROSENTHAL: It was a criminal case.

JUDGE SCHEINDLIN: No, I know that. But it was a September 11th loss. That's why you had to go to the back-up tapes?

MS. LONGENDYKE: I believe so, yes.

JUDGE SCHEINDLIN: And those tapes were still around two years later?

MS. LONGENDYKE: Yes, they were.

JUDGE SCHEINDLIN: They were around.

MS. LONGENDYKE: They were tapes from 1999.

JUDGE SCHEINDLIN: So they were around at least two years--for two years as of September 11th?

MS. LONGENDYKE: Yes.

JUDGE SCHEINDLIN: So somebody kept them for two years anyway. Do you know why they were kept?

MS. LONGENDYKE: No, I don't.

JUDGE SCHEINDLIN: No. But that produced the material?

MS. LONGENDYKE: Yes. Yes, and--

MR. LEWIS: Can I give another example of that? Is in a recent case example or--I'm sorry, correction--in a hypothetical case example, there was a situation where--and it was a sexual harassment case, and the corporation was attempting to defend itself from e-mail messages that were committed to hard copy and presented by the plaintiff.

We determined that the e-mail messages that were presented were not even e-mail messages. They were Word documents that were fabricated to look like e-mail messages, and then the Word documents were deleted. So they never would have been backed up or archived onto a back-up tape. They would only be found on the computer, the source computer that created those Word documents and then immediately deleted those documents after they were printed.

But we were able to determine that it was a

Word document, not an e-mail, when it was created, when it was deleted, when it was printed, what printer it was printed to, who was logged in at the time.

JUDGE SCHEINDLIN: You were able to do that from retrieving deleted areas or fragmented areas of the hard drive?

MR. LEWIS: Right.

JUDGE SCHEINDLIN: Right. Which we would have thought maybe was inaccessible under this divide. I get your point. Okay.

MR. LEWIS: Exactly. And it was an inexpensive process to do that.

JUDGE SCHEINDLIN: I got it.

JUDGE ROSENTHAL: I think I'd just like to press a little bit more on what you believe the role is of the kinds of proportionality factors that we've been talking about?

MS. LONGENDYKE: Well, certainly, because we are called into cases to provide data forensic services, to search for the deleted data, from our perspective, it's every case we work on, we find

something that can be perceived as the smoking gun. Something that was not found in the typical discovery processes.

And furthermore, the forensic approach or the data forensic approach to recovering information is such that we can target our search very narrowly. So if we're looking at a situation of something that happened, let's say we want to look at someone's activities on a computer or looking for documents during a specific timeframe and maybe e-mails between certain people, we don't have to restore 10 years' worth of back-up tapes. It can be very, very targeted.

And we have had cases exactly like that, where we're given a timeframe, we're given people's names. And we go in. We go to the company. We recover the back-up tapes that are relevant, and we're able to recover the information even on the back-up tapes or from individual computers, the latent data as well.

JUDGE ROSENTHAL: Could I ask--I'm sorry. Did somebody have a question?

MR. LEWIS: I was just going to add--

JUDGE ROSENTHAL: Go ahead.

MR. LEWIS: With today's technology, it is possible to search through a warehouse of documents, including the so-called shredded documents, very, very quickly and very cost effectively and with tremendous precision. So the technology exists today to provide that.

MS. LONGENDYKE: And it's our perspective that we would like to see the rules written in a way that allows for the big picture, that does not distinguish between accessible and inaccessible or active and inactive, because we see every day very relevant information being produced from these inactive files and from back-up tapes and such.

JUDGE SCHEINDLIN: Of course, while you see it every day, I suspect it's just the tip of the iceberg. People go out and hire you when they need to go way back or behind. In most of the mass of litigation, you're not hired. 99.8 percent of the cases, I suppose, never get a forensic expert digging in back-up tapes. You're seeing a tip of

the iceberg world, where every day you are retrieving things from back-ups.

But we've asked lawyer after lawyer how often have you had to go to back-ups, and the answer all day has been once or nuts. And we aren't hearing a lot of lawyers in the real world going there.

MS. LONGENDYKE: And it is a dramatically booming market. We are--I present regularly law firms, and once I explain to them the value of data forensics, you hear head smacking. People are--attorneys are starting to really understand how it is not so expensive. It's not so difficult.

JUDGE ROSENTHAL: May I ask one other question about that? Just give us a sense of the added expense for, if you can, in general terms, tell us how much it would cost someone who wanted to undergo the kind of searching that you're talking about, a day of your time or however long it is. Is there an average that you can give us?

MS. LONGENDYKE: Certainly.

MR. LEWIS: We have about 300 matters that we worked on in 2004 for corporations of all sizes,

including Fortune 500. And our average case billable is $13,800. So it's not a significant amount of money.

JUDGE HAGY: Would you consider it a significant amount of money in a case involving a $2,500 claim?

MR. LEWIS: Yes.

JUDGE HAGY: You've been focusing on inaccessible and accessible. The key word is "reasonable." We don't have a law against inaccessible. We say reasonably. You've got to prove it's not reasonably accessible. If what you're saying, in fact, is true, you can do it cheaply and easily and it's cost benefit, well, then it's reasonably accessible. There is no inaccessible.

Doesn't that do it? The word "reasonably" gets you right where you want it.

MS. LONGENDYKE: Yes, yes. I would agree with you, yes. Reasonably accessible, based on cost, balanced with the relative return.

MR. LEWIS: We also find that in the meet and

confer stage, we're able to--or we see the scope of discovery being limited significantly. So it's not 10 years of back-up tapes, it's three or four specific personal computers, if there is an intelligent discussion on the front end.

MR. CICERO: You say you represent both big and small companies. Do you find even in big companies with extensive computerized functions that there is not--there is or is not this kind of awareness that you're sharing with us about where information might be, how to get it? Can they do it in-house? Can they restore these?

Or do they need people like you who would come in and say, no, no. It could be over here. It could be over here, and this is how you get it?

MR. LEWIS: One way to answer that is there's been some discussion about this infinite world or this tremendous amount of data called a computer network that could be a global computer network. It's ludicrous to look at the network that way.

If the problem is identified, the scope of discovery can be limited to sometimes one desktop

computer. So it just requires a conversation on the front end. The data will reside in very deliberate, very specific locations.

MR. CICERO: But I assume if they could do that inside the organization, they would have less need for people outside to come and help them. So I guess my question is, is it more likely or less likely that even businesses or companies with a fairly sophisticated computer system inside need help from people who have the services like you provide to come in and help them say here, here, here, here, or not?

MR. LEWIS: Well, we've been involved in situations where major corporations with tremendous IT talent was not able to find very specific pieces of information. So it's a cost benefit whether to employ individuals to provide the service internally or, for the one or two times a year that you may need to use it, to reach outside.

MR. CICERO: And so, then just lastly, would it be fair to say at least with the talent that is in the corporation before they come outside and get

additional help, part of that information is inaccessible in the sense that they do not have either the resources or the talent or the knowledge or the skill or whatever it takes to get it?

MS. LONGENDYKE: I would agree with that. I think that most IT departments, most IT personnel are not trained in the forensic recovery of data. And they may be able to restore back-up tapes with no problem, but it's that latent data--the data that's been deleted and computer hard drives that have been formatted when the CEO leaves the company and wants to cover his tracks.

It would require forensic tools and, specifically, software and hardware tools in order to recover that data. And that's why I said that the data forensics is not necessarily more expensive. It's just a different process. But IT department can print out files. It can provide it, the active files.

But, yes, to answer your question, I believe that it does require somebody with special skills such as a data forensics firms. Someone who is

trained in that process specifically.

JUDGE ROSENTHAL: So it's cheap and easy, but not well known.

MS. LONGENDYKE: That is the best way I've heard it put. Thank you.

MR. LEWIS: Exactly.

JUDGE ROSENTHAL: And so, we should end on that before your secret is out of the bag.

[Laughter.]

JUDGE ROSENTHAL: Thank you very much.

MS. LONGENDYKE: Thank you, all.

MR. LEWIS: Thank you.

JUDGE ROSENTHAL: We will resume at 8:30 tomorrow morning.

[Whereupon, at 5:05 p.m., the hearing was recessed, to reconvene at 8:30 a.m., February 12, 2005.]

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF CIVIL PROCEDURE

Saturday, February 12, 2005

8:30 a.m.

Judicial Conference Center
One Columbus Circle, N.E.
Washington, D.C. 20544

COMMITTEE MEMBERS:

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KENNETH J. WITHERS, FEDERAL JUDICIAL CENTER

SPEAKERS:

THEODORE B. VAN ITALLIE, JR.
AL CORTESE
ARIANA TADLER
TED KURT
CRAIG D. BALL
CHERI A. GROSVENOR
MICHAEL RYAN
KEITH ALTMAN
RUDY KLEYSTEUBER
MIKE HEIDLER
STEVEN SHEPARD
JOSEPH MASTERS
DAVID TANNENBAUM

P R O C E E D I N G S

JUDGE ROSENTHAL: Good morning. Just so our record is clear, to express the dedication of all those who are with us, it is 8:30 on Saturday morning. It is a beautiful day here in this conference room, and we are very grateful that you are all here with us to continue to explore electronic discovery and the rules under which it should be conducted.

We will begin this morning with Mr. Van Itallie. And I apologize if your name does not resemble what I just said.

MR. VAN ITALLIE: Very close, Judge. Van Itallie, just like the country.

JUDGE ROSENTHAL: That would have been too easy.

MR. VAN ITALLIE: Thank you very much, Judge. My name is Theodore Van Itallie. I am the head of litigation for Johnson & Johnson. It is unquestionably a privilege to have the chance to talk to the committee and submit our comments.

From a perspective standpoint, I have the good

fortune to work for a corporation that has an extraordinarily good reputation in this country. And one of my principal responsibilities as head of litigation is to seek to protect and burnish that reputation in courts around the United States, and we are long-term participants in the judicial process. We've been at it for over 100 years, and we expect to be at it for a continued long period of time.

We are in courts on a regular basis, and our reputation precedes us and follows us. And our standing in courts before the judiciary is critical to us. We abhor discovery battles. We are allergic to the prospect of a sanctions motion, and we work really extraordinarily hard to try to avoid, you know, any basis on which any adversary could make those kind of accusations against us.

But we are also an extraordinarily complex company with almost 200 operating companies worldwide. We have a blindingly complex information architecture. And you know, we have the essential business needs to recycle back-up

tapes in appropriate circumstances, to run programs like Mail Manager that do purge outdated e-mail. And taking that kind of set of circumstances, combined with the developing patchwork of local federal rules and uncertainty about what the standards are, meeting this fundamental obligation and protecting our reputation is, frankly, crushingly--increasingly crushingly difficult.

So the development of these new rules and the prospect for uniform development of a body of law for people in our position I think is going to be extraordinarily valuable. And I think that the overall effort is really an extraordinary contribution to development of standards in the area.

A couple of specific points that I would make with respect to the individual rules. Starting first with the two-tier in Rule 26(b)(2), it does seem to me that there is no question that that will not simply serve the needs of data producers. That there's a very strong prospect that that will accelerate the discovery and therefore the progress

towards the merits of the accessible data.

I think the presumption that accessible data is not likely to be the basis on which a good objection for burdens or anything else could be sustained is going to streamline the early disclosure--

JUDGE SCHEINDLIN: I'm sorry. I didn't understand. How's it going to make it faster?

MR. VAN ITALLIE: I beg your pardon?

JUDGE SCHEINDLIN: We were told yesterday it was going to make it slower because it was going to inevitably result in discovery and a motion to compel the second tier. How is it going to make it faster? We were told it would probably slow it down by a year.

MR. VAN ITALLIE: Well, I think with respect to the first tier, I think it will clearly expedite the process, and I think it will probably--I think there's a strong likelihood that that will satisfy the litigants in the majority of circumstances.

JUDGE SCHEINDLIN: I see. You don't think people will still raise the proportionality

factors, even with respect to the first tier, and say just because it's accessible doesn't mean we should give it to you? It's going to be very burdensome.

MR. VAN ITALLIE: I think the bias is going to be against that. I think the rules express the bias that that's going to be produced more readily, and I suspect that that's the way it will develop.

I also think there is an advantage to separating from prior case law on burden and expense by focusing the development of standards on this accessibility/inaccessibility issue. And I think that, you know, I think the game has changed, that certainly the factual circumstances have changed. Just the sheer amount--

JUDGE SCHEINDLIN: Sorry to interrupt again, but you may not have been with us all day yesterday. Everybody yesterday seemed to agree that what makes it inaccessible was burden and expense, the very thing you say we're not going to be focusing on. When we ask witnesses, well, what makes it inaccessible, most admitted that it was

either burden or expense or both.

MR. VAN ITALLIE: Yes, but I think that there is an element of that. My point is that I think the standards that should be applied in the area are likely to--I think it's important that they develop with respect to the new circumstances of electronic discovery. I don't think you just transfer the old case law over.

And I also think the prospects of uniform case law developing around this issue is improved by having this new construct, have people focusing on this new construct.

JUDGE SCHEINDLIN: Well, but then what makes it inaccessible if it's not burden and expense? What else?

MR. VAN ITALLIE: It's at least burden--it is at least burden and expense.

JUDGE SCHEINDLIN: Is it something else?

MR. VAN ITALLIE: Well, I think that remains to be seen. But I think the analysis, given the proliferation of, you know, multiple copies of materials, given the--from my standpoint, the yield

from the review of inaccessible material, depending on the circumstances, being low, I think the analysis overall just could well be different.

JUDGE SCHEINDLIN: What's the definition then? What's inaccessible?

MR. VAN ITALLIE: Well, again, that's clearly going to be developed in the case law.

JUDGE SCHEINDLIN: But to you?

MR. VAN ITALLIE: I think it is at least circumstances where, as has been pointed out--

MR. CICERO: Can I ask a specific question on that because I wanted to follow up on something you said a minute ago?

JUDGE ROSENTHAL: I think he was in the middle of his answer. Let him give this answer, and then we can follow up. Sorry, Frank. Go ahead.

MR. VAN ITALLIE: I agree with the comments that have been made about inaccessibility. I mean, clearly, if you've got computer systems that no longer have operating systems that allow you to retrieve them, that's going to be inaccessible.

When the analysis will include the expense to

retrieve the data, the potential yield from the review, it will include the cost of review and privilege. You know, this is all of the things we've spoken about. And they will be balanced against, you know, the likelihood you're actually going to find something that's unique within those materials.

JUDGE ROSENTHAL: Go ahead.

MR. CICERO: I apologize for interrupting--

JUDGE ROSENTHAL: No, go ahead.

MR. CICERO: --you, Mr. Van Itallie, and also my colleagues. But on the point that you were discussing with Judge Scheindlin, you said something that I wanted to clarify in my own mind a few moments ago about I thought you said you routinely accessed back-up tapes for certain purposes. Did I misunderstand what you said? You used the term "back-up tapes," I thought.

MR. VAN ITALLIE: Well, no. I mean, I was talking about recycling back-up tapes. I was not talking about accessing back-up tapes for--

JUDGE ROSENTHAL: May I ask you a question

about back-up tapes in general? How often in your experience in handling e-discovery in the cases that your company is involved with has it been necessary for you to recover data or restore data on back-up tapes or legacy sources because you were unable to satisfy the discovery needs of the case through information that was readily accessible?

MR. VAN ITALLIE: I, frankly, can't think of an instance where that has occurred.

JUDGE ROSENTHAL: Have there been litigation battles over efforts to make you do that?

MR. VAN ITALLIE: Not that I can think of sitting here, frankly.

JUDGE ROSENTHAL: Is that because you've been able to negotiate with opposing counsel to avoid having to do that, at least before there was an ability to analyze the readily accessible information and see if that was enough?

MR. VAN ITALLIE: Yes. And just because of the wealth of information that's, in effect, readily available.

JUDGE ROSENTHAL: May I ask one other question?

When you think of information that you don't have to apply forensic tools to to restore, computer forensic tools--or to recover, whatever the right term is--but that is dispersed across a large number of information gatherers and producers, all of the various employees across the world who have their own PCs, their own data forces?

MR. VAN ITALLIE: Right.

JUDGE ROSENTHAL: Is that kind of dispersal and distribution problem part of accessibility, or is that simply part of the general volume and cost of electronic discovery?

MR. VAN ITALLIE: Well, I mean, I think--

JUDGE ROSENTHAL: Or both?

MR. VAN ITALLIE: Yes, I think in circumstances where those individuals are on our network or have a network connection available to them, there are means available which would allow each of them individually to, in effect, collect and transmit their data just to a central repository. And I think in that circumstance, I would consider that to be accessible.

JUDGE ROSENTHAL: What about--

MR. VAN ITALLIE: There may be other circumstances where you actually would have to go sort of door to door--

JUDGE ROSENTHAL: Exactly.

MR. VAN ITALLIE: --that may raise another set of issues.

JUDGE ROSENTHAL: How do you handle those kinds of situations now?

MR. VAN ITALLIE: Well, I mean, we do have the capability to collect from individual user's PCs, whether they are, you know, at individual corporate locations or in the field. And that is something which, you know, frankly, that the issue of the form of production that Rule 34 implicates because it's quite difficult to undertake a collection of that character and still consider that to be a production in the manner in which the documents are ordinarily maintained.

So, I mean, that does get to another point that I think has been made and remade, but I do think there's an issue with the Rule 34 default for

production and the form in which documents are ordinarily maintained.

PROFESSOR MARCUS: Sir, and before you go on, you said you have the ability to collect information from these dispersed PCs and the like?

MR. VAN ITALLIE: Right.

PROFESSOR MARCUS: When you have a litigation hold, do you expect that the users of those dispersed units will honor and implement that hold? Do you know what I mean by a litigation hold?

MR. VAN ITALLIE: Sure.

PROFESSOR MARCUS: Do you?

MR. VAN ITALLIE: Well, we rely on that to be the case.

PROFESSOR MARCUS: Okay.

MR. VAN ITALLIE: Yes.

JUDGE ROSENTHAL: I think Justice Hecht had a question.

JUDGE HECHT: Do you ever have occasion to employ outside forensic experts to assist you in responding to discovery or get discovery from someone else?

MR. VAN ITALLIE: Well, yes. I mean, you know, in terms of forensic experts, in terms of actually restoring or mirroring or trying to reconstruct or secure deleted data, that's not something which we have been called upon to do. But we are heavily reliant on experts in order to basically assist in the process of collection and review of what is frequently massive amounts of electronic data.

But with respect to particular forensic reconstruction, data location issues, I mean, that is not something which we have historically been called upon to undertake.

JUDGE ROSENTHAL: Frank, please?

MR. CICERO: Mr. Van Itallie, I just reread your comments about identifying inaccessible information here, and hearing you here today raises a question that some of us have been discussing that has been troubling me. And it is whether even saying in the rules as we propose them that there is this two-classification arrangement for data will stimulate activity to get the inaccessible data.

You suggest that you've managed quite well to provide so much information to people that they're comfortable with that, and they don't see the need to try to get at the kinds of things that you say are very difficult to get at. And I'm wondering, and I'd like your reaction, to whether the very fact that you lay out two categories of information will stimulate litigation or requests of the so-called inaccessible information, either because of the suspicion that the custodian of the information is moving the line so that stuff that should be accessible is not accessible or for some other reason?

You seem to manage very well in keeping-- from what you've said, in keeping the inaccessible information inaccessible.

MR. VAN ITALLIE: Well, yes, I mean, I think that there is protection from us, but for us, though, clearly in the designation component, and I have a slightly different view, I guess, of that designation component. And one of my areas of concern is, you know, the sort of boundaries of

what that entails.

But as I look at the rule, the first predicate is discoverable information, and it's, as I read the rule, I would be identifying inaccessible information that is already within the discoverable data penumbra. Now I guess there are circumstances where you genuinely can't--there's just no prospect of figuring out and no one has any memory as to what might be within the particular repository, and there's an advantage in that circumstance potentially in identifying that as--even though you may not have a reason to think that it is necessarily discoverable, but it may be prudent to identify it in that category.

But I do have concern about some of the discussion that suggests that there may be obligations beyond the kind of borders of discoverability for identification. But I mean, in terms of your specific question, is this construct going to encourage efforts to obtain inaccessible data and motion practice and fight about that? Again, I think that our experience suggests that

the accessible data will be--will fulfill most discovery needs, and on that basis, I don't think there should be excessive concern that people will be drawn to fight about the inaccessible category.

JUDGE ROSENTHAL: Mr. Girard?

MR. GIRARD: Are you concerned at all with the way it's set up in terms of the proposal where if someone is, let's say, baited by the fact that you've identified some category of material as being inaccessible, and then they file a motion, and now you have to make your showing of inaccessibility. Could you see the potential that that may put you at expense that it sounds like you're currently avoiding?

MR. VAN ITALLIE: Well, I mean, I guess it's going to be hard to see exactly how that's going to unfold. But I think, again, the advantages for us, when we do identify a repository that contains discoverable information but has been nonetheless clearly inaccessible, to have this--to have that in the second layer and not to have--well, simply to put that, in effect, in the background and focus,

in the first instance, on the accessible material, I think overall that's going to be beneficial to us in terms of streamlining the process.

I do continue to think that the likelihood people are going to be satisfied by the rather substantial amount of information that's generally accessible is going to, you know, maintain the focus of that area, and I don't think--I don't foresee that this is going to beat people into fighting about genuinely inaccessible material.

JUDGE SCHEINDLIN: Will you preserve the inaccessible? Will you preserve it until--

MR. VAN ITALLIE: Well, I've heard that question come up. And if it's material that you consider in the first instance to be discoverable, I think you're taking your life in your hands not preserving it.

JUDGE SCHEINDLIN: Even if it's inaccessible, you'll hold onto it?

MR. VAN ITALLIE: If it's discoverable information. That would certainly be my understanding.

JUDGE SCHEINDLIN: Right. Of course, one of the concerns there is people say they don't know if it's discoverable because they're not sure what's on it. They've got old tapes lying around and--

MR. VAN ITALLIE: Yes, and then you're going to get into some--there will be risk balancing in that area, and I think it depends upon the basis for their comfort that it really is not discoverable. It's just not likely to be discoverable at the end of the day.

If I can just make a couple of other quick points.

JUDGE ROSENTHAL: May I ask one other--Rick, you had a question first, please?

PROFESSOR MARCUS: Can I just follow up?

JUDGE ROSENTHAL: Go ahead.

PROFESSOR MARCUS: I think you said you had identified a repository. Is that what you--could you tell me a little bit more about how you regard the identification requirement of 26(b)(2) to work, what you would be likely to be saying, when you examined what you had, to convey what you were not

examining?

MR. VAN ITALLIE: Well, I would just--I think that was simply a single example. But if you did have an antiquated repository of back-up tapes that, you know, were on index, and nobody could--and there was no one around who could remember what they were, I think that is something that would be appropriately identified under the rule.

PROFESSOR MARCUS: It wold not cover the gambit of things that you might consider in that inaccessible category?

MR. VAN ITALLIE: I think it does.

PROFESSOR MARCUS: Okay.

MR. VAN ITALLIE: Yes, that's inaccessible data, which is therefore identified.

JUDGE ROSENTHAL: May I ask you to comment on some of the concerns we've heard expressed that the two-tier structure in combination with Rule 37(f) might lead companies in particular to feel that they can move information to inaccessible repositories and then destroy it with greater

latitude than they would now enjoy and that that would have the effect of enabling companies to remove information in order to shield it from discovery. That's the first question.

And a related question is the concern we've heard expressed that companies will be--will have a disincentive to update technology that would make more information accessible and will instead keep older technology because it would have the benefit of reducing accessibility or delaying accessibility.

MR. VAN ITALLIE: Right. Yes, I mean, I've heard those comments. I don't think there's any evidence of it. I think it is extremely unlikely that there will be those kinds of motivations in dealing with what is a fundamental business tool, the information architecture of the corporation. I mean, they are--that is the kind of the lifeblood of the way business is transacted.

And you know, I do not see it being perverted to a purpose in that fashion. I mean, I think that's--maybe there's a leap of faith there, but I

don't think there's any evidence of it. And I think the central business importance of the data system, that's the ultimate goal that's going to be served, not some nefarious motive of that sort.

Although I think that does help me transition to a related point that I am concerned about, and that's with respect to the Rule 37 safe harbor because I think it is those concerns, Judge Rosenthal, some of which were expressed around the table yesterday by witnesses that, you know, there is this perception somehow that such manipulations might occur.

And I do foresee the prospect of efforts to obtain, you know, to put blanket protective orders as being an issue going forward just because there is this sinister concern about somehow what corporations might do. And I think that, clearly, a broad protective order can be a crippling consequence for any enterprise, but an enterprise like us, which is complex and where our hold orders and discovery obligations are not limited to, you know, a small group of individuals.

I mean, generally, we are fighting about products. The applicable evidence is spread through thousands of individuals within an organization. So we would just genuinely be crippled by a broad protective order. And I do think that it would be tremendously valuable, and I think there are places that the committee has made reference to it. But to stick something into the notes on Rule 37 just, you know, conveying the concern about broad protective, broad, in effect, knee jerk or thoughtless protective orders, I think, that would be very important.

I think the opportunity for early discussion of these issues in the Rule 16 conference, that's the place where these matters ought to be worked out in the first instance. And it's really protective orders that come out of what's agreed or come out of that process which I think are the appropriate ones to govern the safe harbor, Rule 37.

Because there's a--one of my concerns is under a traditional protective order, it may still be appropriate to, if you have a completely reliable

hold on a system, and you could be--you've audited your employees, and you're assuring yourself that they are not taking things off active systems, it may be appropriate to continue to recycle your back-up tapes in the background.

But I think the way Rule 37 has set the construct up, once there is a protective order, there's a presumption even that has to stop. So I think there is--you know, to my mind, this is a real two-edged sword. I do foresee, frankly, you know, a lot of early efforts to get these broad protective orders in.

JUDGE SCHEINDLIN: A lot of witnesses said that they would do that because--what you call their sinister concern that you would be destroying things, I don't know that it was a sinister concern. But what they thought the rule does is give the permission to now destroy without consequence.

So to protect themselves and be sure that the information is there, should it be discoverable, they said I now have no choice but to get a

protective order because the other side has permission through the rules, essentially, to delete--to delete or destroy. That's the argument.

Do you see that from their point of view, the other side's point of view, that the rule gives a blessing to going ahead and destroying? And so, to stop that, they have no choice but to get a protective order.

MR. VAN ITALLIE: You mean once you have a narrowly tailored protective order that makes it clear what the boundaries are? Is that what you're saying that that--

JUDGE SCHEINDLIN: I'm saying because the rule would appear to permit a company to continue its ordinary business practice of destroying information, and the other side says, well, I don't want them to continue right now until I have a chance to see what's there on the active data to know if I'm going to have to go behind it.

MR. VAN ITALLIE: Right.

JUDGE SCHEINDLIN: So the only way to assure that it will be there when I need it is to get a

protective order because of the rule. So that's the logic. It's not a matter of sinister concern. It's a matter of the permission is granted to continue to destroy.

MR. VAN ITALLIE: Well, yes, but I think that makes the point. I think there will be efforts to get those protective orders, and I think they are going to be highly problematic.

JUDGE KEISLER: Mr. Van Itallie, whenever you've gotten these broad preservation orders in the past, and I assume the feeling is that they're kind of flexibly given by some judges and they have very broad implications for the operations of these businesses, have you ever gone back to the judge with--early on with a motion to reconsider or modify in which you've laid out, with some sort of declaration from an IT person, you know, "Here is what the consequences are for our business. Here is why I see it necessary," and try to get it changed that way?

MR. VAN ITALLIE: No question. Yes, no question. And we've had good success with that

because I think there is a growing recognition of the consequences for these orders for large enterprises, and I think that's as long as you can satisfy the court that you've got a reasonable system, I think there is a generally good prospect.

But I mean, whether that's going to be uniform and whether you'll be able to be persuasive to all courts, I think this is--it is still relatively unusual, I think, to--at least in our practice--to have these blanket orders. But I do foresee that, frankly, there's going to be more requests for it in the face of this rule. So I think we're anticipating--I'm anticipating a lot more, you know, that this will be more of an issue once these rules take hold.

Now we are still--we think we're in a better place than we would be otherwise. But I think there is, again, our interest is in dealing with tailored appropriate, you know, narrowly drawn orders. And to the degree that the rules convey and the notes emphasize the significance of that, that's going to be tremendously valuable from our

standpoint.

JUDGE ROSENTHAL: Yes, sir? Last question, I think.

PROFESSOR MARCUS: Picking up on that, some witnesses have said that the textual requirement in Rule 26(f) that there be discussion of preservation at the 26(f) meeting would make that too prominent. Am I right in interpreting what you're saying to mean that you think it's a good idea to insist on that sort of discussion up front?

MR. VAN ITALLIE: Well, yes. I mean, I think, first of all, our headquarters are in the District of New Jersey. So we are currently subject to a local rule, which mandates those sorts of discussions. Yes, I mean, I think our major problem is a fundamental misunderstanding at the outset of a case, which sets up the prospect for a kind of "gotcha" sort of motion.

I think from our standpoint, we're better off having things clarified. And I fundamentally feel that if there is going to be an effort made to stop the ordinary management of data systems, the

recycling of back-up tapes, that that--that really the party that is proposing that has an affirmative obligation to bring that to the fore at the earliest opportunity because I think that is--there should--encouraging the presentation of that issue and a more rapid resolution of it is significant.

Because, you know, I think we are--what we want to be able to do is to convey, first of all, how crippling it can be, how vastly disproportionate the expense from that kind of a proposal. And particularly, where we have--where there really is not a demonstrated need for it and where there are good methodologies in place to, you know, basically indicate that it's really not warranted. So, yes, I mean, we are in favor of that kind of an issue coming up at the earliest opportunity.

JUDGE ROSENTHAL: Any other questions?

MR. VAN ITALLIE: Can I make one other point on an issue that I have not heard come up, and that is instant messenger. You know, there is an entire population of workers coming into the workforce right now for whom instant messaging is, you know,

the most fundamental way for them to communicate.

It is, at this point, very easy for anyone to download an instant message to their laptop, even when corporate systems like ours do everything we can to prevent it happening. I mean, you can just do it, even if you deny administrator rights and the rights to load other software onto your computer.

So I think many companies are looking at basically establishing a corporate standard in the area because they don't have any choice. Their employees are already communicating in that fashion. And the default instant messenger setup and the way I think it will be set up by most businesses is that, you know, once you have had this sort of discussion with a group of people and you close out that session, it is not preserved. It's gone.

It resides temporarily on your random access memory--if that's still the pertinent term--and then when you close it out, it's gone. And there is no business need to, when the computer is turned

off or when you close out the system to preserve that. And I take from the language in Rule 34 of electronically preserved information that that would exclude stuff that transitorily resides in RAM.

But I do see the prospect of arguments being made that if we're going to use this means of communication, we are somehow obligated to establish it or configure it in a way that preserves it, even when there is no business need. So I don't think this is a hypothetical issue. I think it's going to increasingly be on us.

But just as we don't record--we're not obligated to record our--set up our phone systems to record conversations, I would--I think it would be where there's not a business need, I don't think there should be a litigation or discovery need to--

JUDGE SCHEINDLIN: Well, what's your suggestion? I mean, we actually mention instant messaging in the notes or in the rule? What is your suggestion to it?

MR. VAN ITALLIE: Well, I think--I think, I

mean, yes. To the degree that a comment could be made about electronically stored does not encompass transitory RAM-related information. I mean, obviously, that would spike the issue, and I think it ought to be spiked.

MR. KESTER: But you're saying it isn't electronically stored?

MR. VAN ITALLIE: I'm saying it isn't. That would be my point of view. Yes, that would be my point.

JUDGE ROSENTHAL: It's just not stored. Is that your point?

MR. VAN ITALLIE: It's not stored. I regard it as not being stored.

JUDGE HAGY: Is it stored until the computer is turned off? Is that why you're concerned?

MR. VAN ITALLIE: Well, yes, that's right. That it resides in the memory of your computer when it is turned off, and if it doesn't do that, it's not--

JUDGE ROSENTHAL: Is it stored after you close out that IM session?

MR. VAN ITALLIE: No.

JUDGE ROSENTHAL: It's just like when you hang up the phone, there is no vestige of what you said in that conversation that was just concluded?

MR. VAN ITALLIE: That's correct.

JUDGE SCHEINDLIN: But that's a choice. You could configure the system either way. It could be recorded.

MR. VAN ITALLIE: At substantial expense.

JUDGE SCHEINDLIN: Right. I understand. I didn't say you should, but you could. It's possible to do it one way or the other.

JUDGE ROSENTHAL: You could do it on the telephone, too. Just like when I call the credit card company and they say, "By the way, your phone call is recorded." You, too, could have quality control.

[Laughter.]

MR. KESTER: But the analogy here is a bunch of people sitting around the table, having a conversation. No one is making a transcript of that. If they made a transcript, then you would

have a--

MR. VAN ITALLIE: I agree with that. I think that is the analogy. It's a hallway conversation on the computer, basically.

MR. KESTER: Yes, yes.

JUDGE ROSENTHAL: Anything further?

[No response.]

JUDGE ROSENTHAL: Thank you very much.

I believe Mr. Claiborne is not going to be with us this morning. So Mr. Cortese? Al?

MR. CORTESE: Good morning, Your Honor.

JUDGE ROSENTHAL: Good morning.

MR. CORTESE: Members of the committee. It is a real pleasure to appear before you, and I do want to say that I'm here today on behalf of the United States Chamber of Commerce Institute of Legal Reform and the Lawyers for Civil Justice.

The Institute for Legal Reform is an affiliate of the Chamber of Commerce of the United States, and somebody told me they have three million members. I can't believe that. But--

JUDGE ROSENTHAL: Is that too low or too high?

MR. CORTESE: That's what they told me. I think it's awful high. But that's what I'm told.

And the Lawyers for Civil Justice is a coalition of defense and corporate counsel. So we come at this with a particular perspective, but with an effort to really assist the committee in doing what I think they have already done very effectively, which is to move the rules in the direction that they have been moving, I think, for at least 20 years. Which is toward trying to fit the discovery into the needs of the case so that discovery is more effective, less costly, and less burdensome.

And that incorporates, in effect, the proportionality requirement from the 1983 amendments, which was, in effect, moved further by the '93 amendments, which require disclosure, and the 2000 amendments, which essentially set up the two-tier, the purpose of which is to move the good stuff further forward and to worry about the really difficult information, at least, later.

And I would submit to you that we are now at

the point, and you'll all recall that in connection with the 2000 amendments--I think Judge Niemeyer was chair at the time, and he indicated that there was going to be a need then--I think that was '99 or '98--to deal with the problem of electronic discovery, and here we are.

So I think that this is not--your proposals are certainly not earth-shattering, ground-breaking, or very new. In fact, they're fairly similar to proposals that were made in 1978 that were not promulgated by the committee--

JUDGE SCHEINDLIN: Al, one early interruption. Do you think the two-tier of the 2000 amendments has cut back on discovery at all?

MR. CORTESE: I don't know the answer to that.

JUDGE SCHEINDLIN: Okay. Fair enough.

MR. CORTESE: And that is really the problem, Judge. That is really the problem because what the rules can do is to give the signal. And I know, and I read in I think Magistrate Judge Hedge's statement, and it was implicated in the magistrate's position that, well, those rules don't

work. So why do we need more rules? Well--

JUDGE SCHEINDLIN: I don't know if it's don't work or didn't make a whole lot of difference, despite the prediction--

MR. CORTESE: Yes, well, I mean, they didn't entirely serve their purpose. But the point is, I mean, you have to have rules and you have to be sending signals to the parties. And the purpose of that signal was to do the 180-degree turn from very liberal discovery covering everything that is represented to proportionality and balance and focus that's represented in the 1983 amendments, and it's been carried forward, as I indicated.

So I think that the two-tier approach is extremely important and could be beneficial if it's properly enforced. Obviously, one of the ways to enforce that, in effect, is essentially what you've heard before, the presumption of cost sharing. And I know that had been considered and rejected, frankly, in connection with the 2000 amendments. But that was then. This is now. The problem has grown by magnitudes.

And because we've now got the experience in Texas and California and New York, where cost sharing, either on a presumptive or a mandatory basis or a factor basis, has tended to decrease the disputes, and that was the testimony in Dallas, certainly, with respect to the Texas rule. And it even came from the president of the Texas Trial Lawyers Association, who said he was concerned about this rule but wasn't concerned--didn't have any problems with the Texas rule.

And I think Judge Rosenthal pointed out to him that you thought that the Texas rule was much stouter, I think you put it, Your Honor, than the current proposal. But the point is that there have to be some incentives to direct the parties to concentrate on the needs of the case. And when you're in a situation like this--and you've heard all of these stories about the multiplicity and the magnitude and the complexity of this data. But the point is to get to the information that probably, in 99 cases out of 100, could solve the problem in the case and would be all that you need.

I mean, it's exactly what Your Honor said in the MTBE cases that, basically, you know, if you've got tapes from 40 years ago sitting on the shelf and they're not being used, well, you don't have to produce them, but save them because they're there and they're not in the recycling process. But I'm not going to let you get into the current recycling information of 200 companies who operate worldwide just because you think you want only the covers of the back-up tapes.

And did you ever find out what that was?

JUDGE SCHEINDLIN: No. But I did say what you said.

MR. CORTESE: Thank you, Your Honor.

[Laughter.]

MR. CORTESE: And I think there needs to be a little brushing up perhaps of the description of reasonably accessible, and I think we can deal with that. I deal with that in my paper, and we will--and I do want to indicate that we will be filing a comment by the 15th on behalf of the institute and the Lawyers for Civil Justice that

will deal with some of these issues.

Does Your Honor have a question?

JUDGE ROSENTHAL: No. You anticipated it.

MR. CORTESE: All right. Thank you.

And I think that the one most important clarification really goes right to this issue of preservation. That is really a lot of what's driving this whole problem because, frankly, companies are over preserving in the anticipation that they're going to get a lawsuit because many of them get hundreds of lawsuits a month. So the only alternative is to save everything because something in the company has got to be relevant to something that they're going to get sued for.

And I think that some of the witnesses are correct when they say that the combination of the two-tier and the safe harbor, in essence, at least gives some protection to the problem of--to the parties that have the problem of over preservation by basically indicating that unless you know something is relevant to the case, and it's on a back-up system and nowhere else--it's not

duplicated. It's unique, I think, as Judge Rosenthal put it--you don't have an obligation to save that back-up material or the legacy data, or whatever, and that you can recycle that in the regular course of business. There obviously has to be a regular recycling routine in order to lose that.

And stuff is going to happen. I mean, we've had a lot of experts here give us a lot of different opinions on how hard and how easy this all is. Well, it's a massive problem, and no matter how hard you try, no matter what extent of good faith you demonstrate, something's going to get lost. And it happens all the time.

And therefore, I think that people who are making good faith efforts to do that and who are attempting to assist in moving the checker forward in discovery ought to have at least some protection when they have made the decision, which, of course, is always checked in 20/20 hindsight, that at the time that they're confronted with it, "Well, we don't really need to look there."

Now if they looked there, maybe they would find something. As Judge Hagy said the other day, maybe it's good for them. Maybe it's good for the other guy. But we don't know. So we ought to be able to let our systems run, our processes run, because to stop them would essentially almost stop the business. Yes?

JUDGE SCHEINDLIN: Do you share the prior speaker's concern about an uptick in the number of preservation orders--

MR. CORTESE: Yes. I do. I do. But I think that will be handled as it works out, and I think the answer to it is, I think, the one that Mr. Van Itallie gave, which is that really the orders ought to be tailored to the needs of the case. And that's one comment that I have on the safe harbor proposal. We prefer--we have our own formulation of that, which we think is a little clearer and a little more direct, and that will be in the comment. And actually, it's close in my comment that I filed recently.

But the more I look at it, the more I prefer

the footnote alternative. And I think with the addition of maybe a word like "specified information," "preserve specified information," and a note that explains what that means in terms of preservation orders that that would be sufficient.

JUDGE ROSENTHAL: I'm sorry. So that you would prefer that in the rule, the description of the preservation order that it violated would make someone ineligible for the safe harbor we should add the words "specified--information specified" in a preservation order? Something like that?

MR. CORTESE: Yes, right. Yes, Your Honor. I think it just takes one word, and it's in my statement, but I can't find it now.

JUDGE HAGY: All information? How do you specify? That's like the identification of the inaccessible information. It could be very broad or very narrow, specific information. Specified information in a preservation order could be all information, and then they could say that was specified, and that doesn't do you any good at all, right?

MR. CORTESE: Perhaps. Perhaps. But what I'm trying to--

JUDGE HAGY: It's what's it mean, I know--

MR. CORTESE: What I'm trying to get across is the fact that the word tips you off to the fact that there ought to be an explanation of what you need in terms of tailoring preservation orders to the needs of the case and the claims in the case, rather than the preservation order we've seen, which is hold everything that's relevant to the subject matter.

JUDGE ROSENTHAL: Would that likely lead to parties seeking preservation orders that would be broad, but specific? That is, preserve everything, and by everything, we back-up tapes, legacy data. We mean the et cetera, et cetera, et cetera.

MR. CORTESE: No, no. I don't think so. I think that we're not talking about categories of information. We're talking about the claims in the case and what information is likely to be related to those claims. In other words, a number of people have said and the computer consultants who

say they can find anything any time for not a lot of money always start out with a name or a document or something like that.

I don't know if you've had this experience, but every time I go into my computer and try to find something, it takes me quite a number of tries. I know it's there.

JUDGE ROSENTHAL: We can recommend some people who can help you.

[Laughter.]

MR. CORTESE: I bet.

JUDGE WALKER: At low cost.

MR. CORTESE: And they're only going to charge me an average of $13,000.

JUDGE ROSENTHAL: Mr. Keisler?

JUDGE KEISLER: There's a perception among some of the people at the Justice Department involved with enforcement issues--

JUDGE ROSENTHAL: You need to use the microphone.

JUDGE KEISLER: I'm sorry. There is a perception among some of the people at the Justice

Department involved with enforcement that document retention periods under standard document retention policies are getting shorter. And some of that is attributed to litigation concerns.

Not anything sinister or unlawful, but just as one is thinking, as a company, how long one wants to let things sit in the system--even though there is capacity for it--one of the considerations is sometimes it's better with less around than more when there's no preservation order or other legal obligation.

Do you share the perception? Is it the case that the members of your organization are increasingly going to shorter standard retention periods?

MR. CORTESE: Frankly, I don't know, Mr. Keisler. But I have had and, in fact, in some of the testimony here that the real consideration regarding retention policies are the multiplicity of legal requirements, business requirements, and the litigation tail is wagging the preservation dog, but not in terms of shortening preservation

policies that are in place.

But I can--I might be able to get you an answer to that. I don't know offhand. But my view on that is that there are so many requirements. I mean, you take the Tread Act, you take Sarbanes-Oxley, you take all the legal requirements, all the regulatory requirements, all the business requirements, that that is not a problem. And that companies cannot, in effect, legally or practically, shorten their retention policies for purposes of trying to avoid bad documents showing up.

And then every time you shorten a retention policy, you're going to throw out the good with the bad.

JUDGE KEISLER: Well, you have to have some--I mean, all of these automatic systems--

MR. CORTESE: Yes.

JUDGE KEISLER: --some period of time after which things start getting either moved to some archive system or maybe deleted entirely. So wherever that point is, there has to be some

reconciliation between this general principle that the system operates under and whatever specific legal preservation requirements there are.

So I'm not sure how that's accomplished. I don't know if you know. But that's going to be true, I suppose, whatever the length of the retention period unless you were to decide you're going to save things forever, which, of course, nobody does.

MR. CORTESE: Right. I don't really know. Well, actually, that's not--I mean, those tapes in the MTBE cases were 40 or 50 years old. And some companies do save everything forever for some reason. I mean, I have all my--I have 5,000 e-mails in my outbox. I've never cleaned it out. My inbox, I mean.

But in any event, I think those considerations really are going to be driven by the business and legal needs rather than the litigation needs. And therefore, I think that what business really wants is guidance from the courts, at least in this litigation tail, that enables them to follow the

legal and business requirements rather than be controlled by the litigation risk.

Because the risks are significant. Even though a lot of them haven't been sanctioned, they're very concerned about that. They want to do the right thing.

Yes, Your Honor?

JUDGE ROSENTHAL: We've heard some concern by some speakers that by putting the preservation topic up front and specifying it as a topic to be discussed in the early meet and confer that we are giving it too large and too early a role.

Others seem to believe that that would be good because it's not going to go away if it's not talked about, and if it's talked about earlier, the likelihood of problems emerging later might be reduced. Do you have a view on that?

MR. CORTESE: I was earlier concerned about that, more from a rule-making standpoint, because it was something that had never been mentioned in the rules, and it deals with an area of substantive law.

JUDGE ROSENTHAL: We refer to it as the "P" word.

[Laughter.]

MR. CORTESE: But now it's out on the table, and I think it has to be out on the table because it's the elephant in the room. It's driving this whole thing.

JUDGE ROSENTHAL: So you're comfortable now with keeping it in the Rule 26 topics and Rule 16?

MR. CORTESE: We'd prefer that you put it into the note in terms of discussion and cast the 26(f) in terms of the existing language, which is discussions relating to disclosure and discovery of information because that's what the rules require you to do. The rules don't require you to preserve information. Then that effect is that that's what happens.

But from the standpoint of rule-making, it might be better to say related to the disclosure and discovery and then in the note explain the need for early preservation orders tailored to the needs of the case, and so forth.

Judge Levi?

JUDGE LEVI: I think you were in San Francisco many years ago, when we first started down this road, and you remember that I think there was a lawyer there from Milberg Weiss, and there was the general counsel from Intel and--among many others. And the general counsel from Intel described what his litigation hold typically was, and I think he even had a copy there. And the lawyer from Milberg said that was a very reasonable litigation hold.

And when we started on this path, it seemed to us that there was actually quite a bit of agreement between parties that try to do these things right as to what needs to be done. In other words, the kind of preservation order that some have described here sounds quite unreasonable to virtually to everybody. And yet there's probably quite a bit of agreement as to what would be reasonable in any particular--any particular case.

But I continue to hear this fear about an early preservation order. And that was different than what I thought was the concern in San Francisco,

which was uncertainty. And it would seem to me that the people that you represent would benefit tremendously from getting into court early with either an agreed-upon or, if not agreed upon, a proposal for a reasonable preservation order that I would think most courts would be inclined to grant.

MR. CORTESE: I think you're absolutely correct, Your Honor. I don't remember the particular conversation you referred to, but that is true. And I think you've had in many instances here--there are a number of lawyers on both sides of the V who support these proposals.

With respect to the concern about early preservation orders, it's really what we might call the drive-by preservation order.

JUDGE LEVI: In federal court--if you can focus on federal court?

MR. CORTESE: I don't have the answer to that. But that's another thing that perhaps we could check into. But it's still the fear. And well, how common is it? I mean, we had the Philip Morris example. That's an order of grave concern, and

even the litigation section pointed that out.

JUDGE SCHEINDLIN: You mean the preservation order?

MR. CORTESE: The preservation order, yes. Yes, Your Honor.

JUDGE SCHEINDLIN: I think this is just speaking across the table--

MR. CORTESE: But I want to--let me--

JUDGE SCHEINDLIN: --for one minute. The Manual for Complex Litigation has a form preservation order, which I've looked at, and it's very overbroad. So that may be a part of the problem is the form.

MR. CORTESE: That's an excellent suggestion.

JUDGE SCHEINDLIN: Yes, it has to be looked at because--

JUDGE LEVI: Well, that's a problem. I mean, the committee doesn't draft that.

JUDGE SCHEINDLIN: No, no. I'm just saying to you that may be a source of some of the problem with broad orders.

JUDGE LEVI: That could be. But I was

impressed by what the gentleman from Johnson & Johnson said, which is when they go in, and they have an affidavit or a declaration from their IT person, and they explain what the damage to this company would be and what it is they're prepared to do by way of discovery, which is so broad to begin with, I would think that would be very powerful to most judges.

MR. CORTESE: I would hope so. But the point is, sometimes it is not, and it is important for the rules to address that so that they lay out the rules of the game for everybody. So that even the least sophisticated lawyers can understand what their obligations are. And now there is a good bit of uncertainty, certainly, with respect to that.

I think I've already said that we would support the--we support very strongly the two-tier and the safe harbor, and we have some suggestions with respect to not only them, but other elements that I'd like to leave to our written comments.

But I do want to right now take the opportunity to thank you very much for getting into this

subject. It's an extraordinarily important, extraordinarily difficult subject, but it's something that will help, really, I think an awful lot because I believe that if properly applied--and let's hope this time we can get it properly applied by the right guidance--that it will, in fact, reduce the costs and burdens and make discovery more effective.

JUDGE ROSENTHAL: If there are no further questions?

MR. CORTESE: Ms. Varner has a question.

JUDGE ROSENTHAL: We have one question.

MS. VARNER: Mr. Cortese, you are very familiar with the proposed amendments, and I'd like your feeling as to what, for example, some of your clients or the members of the U.S. Chamber would do. They declare certain categories of information to be inaccessible or not reasonably accessible. Would they then implement a litigation hold on those materials until that determination has been made?

MR. CORTESE: Absolutely. They have to. They

have to. They cannot take the risk of not doing that.

And I think, you know, that's one of the real problems today because it's the companies that don't have that kind of process in place. I mean, we heard somebody has 58 people that are taking--that are managing documents for litigation purposes. But the smaller companies, they don't have any idea what to do.

And I think if there is a direction in the rules and the notes that that's what they need to do, they are much more likely to do it. And the general counsel would not be able to take the risk of not putting in place a litigation hold.

And that's really one of the reasons why we think that in this balance--and I think these rules are all about balance and proportionality in approaching discovery--that the balance is struck when you are able to permit a company to run its processes in a business-like way and manage its data in a business-like way, but still preserve the information that's necessary for the litigation on

both sides. And that's how the litigation hold, I think, works together with the safe harbor and the two-tier.

JUDGE HAGY: Mr. Cortese, at the bottom of page 2, when you're talking about the two-tiered approach, you say it has the practical benefit of confirming that such information--that is information not reasonably accessible but still could be ordered for good cause--need not ordinarily be preserved.

And you don't mean, do you, that if such information has been--is inaccessible, but for good cause should be discovered, you don't have to preserve it? You don't mean that?

MR. CORTESE: No. I mean that that takes into account the fact that if a company or if an individual has knowledge of the unique information that's in inaccessible data, then that should be preserved.

JUDGE HAGY: It should be.

MR. CORTESE: But you can't--you don't just get the protection by declaring something inaccessible,

but that that's the natural implication. That's why I think it needs a little more clarification and a little more explanation that ties these two components together.

JUDGE ROSENTHAL: And if that organization or individual did not know because there was no knowledge of what, in fact, resided on those inaccessible materials, then it would be up to the judgment of that organization. And I guess your comment would be that the risk of destroying would probably not be one that most would be willing to run?

MR. CORTESE: Right. That's probably correct. I mean, I had a general counsel just yesterday tell me that he runs the same risk every day, maybe many times. You have to make these judgments.

And the problem that's presented, obviously, is that the judgments you make today on incomplete and uncertain information are always second-guessed later, when you've got the more information and better information. Well, that's a difficult position to be in.

JUDGE HAGY: Let me make it clear. You read 26(b) as having to do with preservation?

MR. CORTESE: The combination of 26(b) and two-tier, in effect, tells me--and I think this is what should be clarified--that unless you have knowledge of unique information on back-up systems or inaccessible data, inaccessible information, that you can permit the regular operation of your inaccessible information.

That's because of the multiplicity, the magnitude, the complexity of all that information, and you can't know--you can't know all what's in there. But you do have in place procedures that will retain the information that is accessible that will serve the purposes of the litigation.

This is all about permitting companies to manage their data in their regular course of business if they have taken steps to preserve the information that's necessary in a particular litigation.

Yes, sir? Professor Marcus?

PROFESSOR MARCUS: I think more than once

you've said you must preserve if there is information that is unique to the back-up systems and not otherwise available, which is certainly an important concern. But I'm wondering how you would envision that that insight would ever come into the mind of a company?

And I am asking because it sounds like something that might never happen. So that, you know, ostensibly things would be preserved, but actually nothing would ever be preserved?

MR. CORTESE: Well, that may be true. It might never happen because, in most instances, the information that's necessary for the litigation is going to be in what's accessible because of the duplication and the masses of information that are produced on these back-up systems.

And it's in instances where, for example, the computer goes down--in 9/11--and they know that there's information on that, and that it's going to be backed up somewhere. But it happens instantaneously. That's what a disaster recovery system is all about. And they can go back and

retrieve that information reasonably efficiently from the back-up system. And that does happen very rarely.

JUDGE ROSENTHAL: Any other questions?

[No response.]

JUDGE ROSENTHAL: Thank you very much.

MR. CORTESE: Thank you very much.

JUDGE ROSENTHAL: Ms. Tadler? Good morning. Good morning, Ms. Tadler.

MS. TADLER: Good morning. Thank you for permitting me the opportunity to be here today to speak to you all. And also, like so many others who have been here in the last two days, thank you also for spending as much time as you all have and encouraging others to think about these issues, which are obviously critical to litigation and its ultimate evolution in terms of how we access information.

Just by way of background about who I am, I'm a partner at Milberg Weiss. I principally do plaintiff's work. And generally, my practice in particular is in the context of securities class

action work, as well as consumer fraud class action work. Obviously, that's no surprise to you that these cases tend to be among the largest in the system, and they also tend to be the most document intensive.

I would say that certainly in the late '90s and even beginning in 2000, we saw cases which had multi-million pages of productions, and we thought that that was becoming the more commonplace of the situations with documents. That is just simply not true. I mean, I have cases now, where one case in particular, the IPO securities litigation, we are dealing with in excess of 20 million pages/images, and discovery is ongoing.

JUDGE ROSENTHAL: May I ask you a question that ties into just this volume point?

MS. TADLER: Sure.

JUDGE ROSENTHAL: How frequently in your litigation experience have you had to resort to information that is not reasonably accessible as opposed to satisfying your discovery needs with the information that can readily be obtained? And I'm

talking about electronically stored information, of course.

MS. TADLER: Right. Not to be cute, but I guess my first question back would be, well, what is your definition of reasonably inaccessible? And that's sort of the tension I think that we're all facing--

JUDGE ROSENTHAL: I'll answer that because I really want to know. How often, to use the examples that have been cited most frequently in the last couple of days, how often have you had to have back-up tapes restored or have legacy data restored or fragmented data restored or deleted information restored before you could even examine it as opposed to simply--as opposed to relying on information that did not require that kind of technological restoration before you could even read it?

MS. TADLER: It is sporadic. It is not in every case. It is not in the majority of cases.

JUDGE ROSENTHAL: Can you give me an example?

MS. TADLER: Can I give you--

JUDGE ROSENTHAL: Well, not an example. Can you give me some better feel, more precise feel for the frequency in which this has been necessary?

MS. TADLER: I can tell you that, for instance, in the IPO cases issues have come up because, in particular, in those series of cases, which are 310 separate class actions coordinated in the system for pretrial purposes, we faced 9/11 issues. We actually appeared before the judge in that matter literally just days from the 9/11 incident.

So in that situation what we had to do was deal with specific defendants--they happen to be defendants--although, obviously, we're focusing on responding parties in this discussion--who I had to negotiate with on an independent basis as to whether information was available from some other system. And the negotiations in those situations are very, very intense. And it requires a lot of education.

And I'm going to be the first to tell you that although I consider myself fairly informed on these issues among the plaintiff's bar, I am an

ignoramus, okay? I am learning every single day, in part, because I have to, but, in part, because I also happen to really enjoy the subject, if you will.

JUDGE ROSENTHAL: Well, we share your passion.

MS. TADLER: I know.

JUDGE ROSENTHAL: But other than that, is there--other than the 9/11 circumstance, can you--have there been other cases in which you have had to resort to back-ups, legacy, et cetera--

MS. TADLER: Yes.

JUDGE ROSENTHAL: As opposed to--

MS. TADLER: Yes. My firm, throughout its history, has had situations, whether they be consumer-oriented cases or securities-oriented cases, where back-up tapes in certain situations have had to be searched. But we approach that situation from a very reasonable standpoint. And what we do is we really do try to isolate down who the relevant people are or the relevant department, and then we go to the opposing party and we say how is it that you then can look to narrow down what

you would otherwise consider to be an extraordinary burden?

One of the problems that creates even greater tension here is the fact that to the extent we want to talk about a disaster recovery program and the saving of information on medium like back-up tapes, many companies, unfortunately, don't seem to have some kind of organizational data which helps them to go to those back-up tapes and figure out where is John Doe's information. Was he on server one, server three, server five? Which of these tapes are the most likely or are, in fact, the tapes?

JUDGE ROSENTHAL: Is that the many-to-many problem we heard about yesterday?

MS. TADLER: I think so. I think so. You know, it strikes me that if I had a disaster recovery program, I would want to know that these people's information is in this particular sector. These people's information are in this particular sector. Companies don't work that way. Should they be faulted about that? I have feelings both ways about it, depending on the circumstances.

But part of it, the answer is no because of the evolution of technology. Technology has moved so quickly people didn't envision that it was going to evolve this way.

JUDGE WALKER: May I ask you to clarify that? You discussed back-up tapes in a disaster or data loss scenario, which I very well understand. Have you had any occasion to utilize back-up tapes not regarding--not relating to 9/11 and not relating to disaster or loss of data, but simply to further explore beyond the scope of otherwise available data? Do you understand my question?

MS. TADLER: I do. I do. And I have to answer now both on a personal level and on a firm level, as well as I've been at multiple firms in my practice. So on a personal level, separate and apart from a 9/11-oriented issue or a situation where I have had parties who have come and told me that their system has crashed--okay?

And in that situation, I have said to them, "I'm sorry. You need to now go to your back-up tapes. But before you get all concerned about

that, let's sit down and talk about how we're going to go about that."

There are people in this committee who know I am huge advocate of the meet and confer process.

JUDGE WALKER: But we know about where there is a loss of data, we are automatically alerted to the necessity for some kind of back-up, whether it's tape or whatever. We know about that and the obvious need to refer there.

But in a situation where a company, the data seems to be intact, but you sense a problem of some sort. Have you ever had to look behind an otherwise intact data set to back-up tapes for further discovery?

MS. TADLER: Yes. Because there are--and when I say "yes," I'm speaking not only--I'm not speaking specifically about my own experience, but of my colleagues at my firm and also at my prior firm because I've been particularly focused on one particular case for a while.

But the fact of the matter is that in those instances, they generally involve class actions

where by the time the case is filed, the distinction between the time of filing and the actual time of the alleged wrongdoing has already allowed for systems to change, for the changes in the types of hardware and software that are being utilized.

And as a result, there are times when we necessarily have to say "you need to go back." Those instances in which either my firm or myself tangentially being involved required us bringing in resources because we didn't have the ability either.

So one of the things--and I want to answer your question because I know you have one. But I want everybody to remember that as much as there is a cost and burden component to the responding party, there is a cost and burden component to the requesting party in terms of education, dedication of resources, hiring of vendors. We don't just have sort of inherent knowledge that when you give me your back-up tape I know what to do with it. There's a cost issue on my side, too.

JUDGE ROSENTHAL: In the occasions in which you do think that you will need back-up information--again, I'm focusing on that just because it's a handy example--is it your--is it customary to first examine the information that doesn't require this kind of additional cost, burden, effort to obtain?

That is, to first go through the first tier of information and see if it will satisfy your needs, or if it will be deficient in some respect, before you incur the additional cost and effort of the information that is such as back-up tapes that might not be reasonably accessible?

MS. TADLER: The answer is an absolute yes.

JUDGE ROSENTHAL: So sequencing of the sort I've described is frequent?

MS. TADLER: Yes. But with the following clarification, which is that in every case that I am in and the first thing that I speak to my opponent about is preservation. And what I do is I seek--I don't always get--a responsive party, meaning somebody who is willing to sit down with me

and talk about these issues.

And I am somewhat further hampered, if you will, insofar as the PSLRA, Private Securities Litigation Reform Act, has an automatic stay of discovery at the time of a motion to dismiss being filed. There are responding parties who presume that because of that provision, they need not speak to me any further about that issue until we get into discovery.

JUDGE SCHEINDLIN: Yes, but you also have a statutory preservation order, right? In the PSLRA, there's a statutory requirement of preservation?

MS. TADLER: That is correct, Your Honor. However, when you're dealing with a massive case where you have a responding party who claims that, notwithstanding that order, they're going to have to otherwise, without input from me, make reasonable judgments because otherwise their business is going to be crippled by saving everything in a case that happens to be huge and impacts regions, departments, foreign offices, domestic offices, necessarily in order for

discovery from my perspective to be productive, I want to still get in there and talk to my opponent and say, "Tell me what your situation is. What are the kinds of things that you are looking at or you're concerned about?"

So that they don't make what they consider to be a reasonable judgment that I don't.

JUDGE SCHEINDLIN: Can I ask you to do two things? I'm worried about your time, and I wondered, for the benefit of the committee--obviously, I'm familiar with the attachments. But would you tell the committee why you gave these attachments to us, and secondly, what are your views, quickly, on the rules? Because I'm afraid you're going to run out of time. We'll never get that on the record. So--

MS. TADLER: Thank you. The attachments that I provided, obviously, are tools that were used in the IPO securities litigation to address issues in terms of preservation. But also the questionnaire that is attached, the document preservation protocol order, was something that not only

facilitated our discussions in terms preservation, but it actually facilitated our discussions in terms of everyday discovery because it precluded the necessity, if you will, for sort of a very rote 30(b)(6).

I'm a big fan of the 30(b)(6) deposition. But in a case like this, with 55 banks and, you know, another 309 issuing corporations and another thousand individual officers and directors, we would have been taking a lot of 30(b)(6) depositions to only then turn around and ask for the next one for more complex information.

So together with a number of people on the plaintiff's side as well as on the defense side, we sat down and worked on the kinds of concerns and questions that we had, which ultimately led to this preservation protocol. And you know, I don't think it happens to be a perfect tool. I'm sitting here now two years later, there are things I would do differently.

Do I think it's a horrible tool? No. Am I, you know, dissatisfied with what it has

accomplished to date? No. But because of the way things have changed, I could see making further adjustments and modifications.

JUDGE SCHEINDLIN: But the point was it was an early negotiated preservation order that--

MS. TADLER: Absolutely. To give it timing.

JUDGE SCHEINDLIN: --didn't go to court. It didn't go to court. You negotiated your own preservation order early.

MS. TADLER: That's correct. And to give a timing sequence so that you understand, these cases were initiated in early 2001. This order, I believe, was entered in 2002. And the motions to dismiss in this case were resolved in February 2003.

So this was, in fact, resolved before the stay would have otherwise been lifted as a result of the ruling on the motion to dismiss.

JUDGE SCHEINDLIN: Okay. And your views on the rules?

MS. TADLER: Yes. My views on the rules. You know, I obviously only briefly touched upon them in

my submission, and I would have liked to have been more substantive on that, although I had family circumstances which precluded me from doing so.

My feeling about the reasonable accessible standard is that it is premature. It definitely is putting a potential shift in burden on the parties, whether we're talking about actual litigation parties or just discovery parties and who's sitting on whatever side of the fence because, truly, in complex litigation, oftentimes both sides are requesting parties and are responding parties.

I am very concerned that to the extent it is more often the case that the requesting party is the party is the party seeking to discover the truth and to prove his or her claim, that we are creating further burdens for that party. And I think that what we have to remember, and I think I ended my submission with this is what we're here to talk about in terms of the rules are to provide means by which to discover the truth, whatever that truth may be.

I don't think that reasonably accessible is a

sufficiently defined term. I also am very concerned about the two-tier approach. And you know, I think that that particular area, although we've heard a fair amount of testimony about it, I think a lot of people have spoken specifically about the reasonably accessible component and haven't often gotten to the two-tier aspect.

But I certainly--I looked, for instance, at the recent magistrates report. To some extent, I endorse some of the things that they are saying. I am very concerned about the way in which that process would work.

And just to break it down for you, my opponent says reasonably inaccessible. Now I have to go back, and I have to draft a motion. I draft a motion. "Your Honor, wah, wah, wah. Defendants say reasonably inaccessible." Well, I'm not going to put in a motion like that. I feel obligated to put more substance in.

So now I'm being put to some kind of burden, in my mind, of, okay, what do I know about their systems? Uh, nothing. Okay. Why do I need the

information? In essence, I'm being put already to a good cause standard to show why I need it to further persuade the judge, the magistrate, as to why I should have access to that information.

MS. VARNER: Excuse me. Why would you feel that you had to file something more than they have said it is inaccessible, and we don't believe--we believe there is, A, it may not be and, B, if it is, there is good cause. And then just file that pro forma motion, which leaves the burden, under the language of the rule, that the responding party "must show" that it is inaccessible? What is the burden shift there?

MS. TADLER: Well, let me answer the first question, which is why would I feel obligated to do more than that? I suppose it's inherently because of just how the process has worked for so many decades, which is when I do a motion to compel, I usually append an affidavit or some kind of substance as to why I am seeking and why I think I'm entitled to the relief that I am seeking.

In addition, it strikes me that if all this is,

is, you know, a piece of paper to say they said inaccessible, motion to compel, I guess I'd be inclined to turn the tables. Why shouldn't they then make a motion for a protective order?

MS. VARNER: Because--

MS. TADLER: And--I'm sorry.

MS. VARNER: Because--and no one is operating under these rules. But I would assume that in a large majority of cases, people might say, "Okay, if you believe it's inaccessible, I'm not going to go into motions practice right now. We'll look at the stuff that is accessible. We'll see if we have a problem." I would think there are going to be a lot of cases where somebody might just accept that representation.

MS. TADLER: Well, isn't that a dangerous representation? And I guess one of the points that I wanted to make to you all today is the number of people in the litigating population who really have absolutely no comprehension of any of the issues that we are talking about.

And if somebody is sitting in a situation and

says, "Okay, you said reasonably inaccessible. So, you know, I'm not inclined to do anything now." Are we basically fostering ignorance? We're allowing then the lack of the discovery. We're deterring the discovery of truth because of a burden that we've now created. I don't see how that is, in any way, equitable.

Go ahead. I'm sorry. Go ahead.

MS. VARNER: I do think that Milberg Weiss may be in a different category than lots of people who have cases in federal court. And I'm assuming--I'm not a judge, but I'm assuming the discovery proceeds in many cases where someone asks for X, and the responder says, "I'm going to give you X minus whatever," making appropriate objections, and no motion practice results from that. People work it out. They go along. They believe they've got enough for their case.

I do think that having the responder file a motion for protective order may, in fact, result in more motion practice than the way the rule is currently framed, and I do think that in your cases

that you all are, quite frankly, dealing with a different level of document production than is true for the majority of cases in federal court.

But I'd be interested if other people disagree. That would just be my--

MS. TADLER: No--

JUDGE SCHEINDLIN: I'll just take one second, since she said other people. On our employment docket, which is a huge part of our docket, I am finding plaintiff's lawyers are routinely asking for more and more levels of discovery of electronic information, including material that's not on the active systems.

And one example I can give you is if you are suing, let's say, a bankrupt company or a company no longer in business. Basically, they don't have any active data. It's all legacy. They're asking for it. It has to be rebuilt or restored, and then there's question of cost.

But taking it right out of the complex commercial area into the everyday employment material, which is a huge part of the federal

docket across the country, I at least, am seeing more. Just to answer. I'm sorry to interrupt.

MS. TADLER: Just to give you a feel, though, on the population that really is not, in any way, educated on these issues. On Wednesday evening, I went to a New York County Lawyers Association program, CLE program about electronic discovery. Granted, the majority of the people there are state practitioners. However, the majority of the people that raised their hands said they do some federal work.

A poll was taken. How many of you are familiar with the concept of electronic discovery? I'm going to estimate there were 50 people in the room. Four of us. So three others raised their hand. How many of you have ever even thought to ask for electronic discovery? Two of us raised our hand.

The discussion then ensued, ended up being very different from the format that the moderator had anticipated because of the lack of information and knowledge on these issues.

And my fear, going back to your question, is

that we need to be very careful about the kinds of burdens or presumptions or standards that we're creating when we have a fair population that really don't understand these issues, and the burden is actually, therefore, increasing for them because of the lack of knowledge.

JUDGE ROSENTHAL: Mr. Keisler, last question.

JUDGE KEISLER: Ms. Tadler, there's a line in your written testimony in which you've described the era of today as one in which technology like e-mail, instant messaging, write fax or e-fax, and electronic databases serve as a principal means of communication. I was just wondering, since you mentioned instant messaging--and I know that we heard this morning from Mr. Van Itallie about that--do you go after, obtain, and use instant messaging in your work?

MS. TADLER: We do in specific types of cases. I tend to think that it is going to become a more routine--because it is in our requests.

JUDGE KEISLER: And how do you get it? Because we were told today it doesn't stay on the system,

and people don't print it out. So where is it reposed that you can--

MS. TADLER: I have to tell you on that I don't have an answer for you. I don't know.

JUDGE ROSENTHAL: But you put it in the request anyway?

MS. TADLER: But we put it in the request, and we have vendors who are working with us who tell us that it is accessible through a variety of means.

JUDGE ROSENTHAL: Do you put it in every request?

MS. TADLER: No. No. It really depends on the type of case, the types of defendants. I mean, again, not to be boring, but on the IPO cases, you're dealing with investment bankers. That's how they communicate. But it happens to be that at the time period that we were looking at in these cases, it wasn't as routine.

I'll leave you with this--do you have any other questions? Because I want to leave you with an important comment.

JUDGE ROSENTHAL: No, I think we are out of

time.

MS. TADLER: Okay. Right before I came down to Washington, I spoke to my IT guy as well as my litigation tech support guy, and they told me that in the last three weeks, Microsoft actually released their XP multimedia operating system for home entertainment. This is just the beginning.

This is going to enable every one of us to sit in our home or in your office with, in essence, a television screen where you access your telephone, your e-mail, any other electronic information, video teleconferencing. And all of that is going to be able to transmit across different media.

JUDGE ROSENTHAL: I think you said it all when you just said what you said a second ago, "my IT guy."

[Laughter.]

MS. TADLER: Thank you, again.

JUDGE ROSENTHAL: Thank you.

Mr. Kurt? Mr. Kurt, are you appearing as Skipper Ted Kurt? And I'm referring to the written testimony that we received in which you note that

your column appears on a monthly basis in the Toledo Bar Association News, "Cruising The Internet With Skipper Ted Kurt."

MR. KURT: I didn't wear my skipper cap this morning, Your Honor. Perhaps I should have.

Actually, no, I'm appearing and testifying on my own behalf. And although I'm very active with the Toledo Bar Association, my comments should not be construed as representing the Toledo Bar Association.

But thank you for the reminder that I am the skipper. Our editor of the Toledo Bar News said to be sure to get a picture of me standing outside the Thurgood Marshall Building with my cap. So I may do that.

I would like to bring attention to--excuse me. I have a cold here. I would like to bring attention to the fact that electronically stored information or this stuff we're talking about--I actually have a problem with the term "electronically stored information." But this stuff we're talking about is much more than e-mail.

The testimony that I have--excuse me--heard this morning and some yesterday concerns e-mail, instant messaging, and so forth. There is quite a bit more of information that one would consider electronically stored.

I mentioned in my statement that I drove here, excuse me, with my son. And in the car, we had 11 items that contained potentially discoverable electronically stored information--a digital camera, GPS unit, which without which I wouldn't have been here, a couple of cell phones, a PDA device, and my blood sugar monitor. And this is just my stuff. My son had most of the same stuff.

All of this contains information that one would consider, I guess, electronically stored.

JUDGE ROSENTHAL: Mr. Kurt, may I interrupt you and ask you a question? You mentioned in your written comments that you found the term "electronically stored information" unduly limiting. Do you have an alternative to propose?

MR. KURT: Perhaps the term "digitally stored information" or "digitized information," "optically

stored information." I'm not certain whether information on a CD-ROM really is electronically stored. Certainly, very likely, it's digitally stored. Perhaps it's optically stored. I don't know.

I am a skipper. However, I'm not that well versed in that type of technology. But electronically stored information might be too limiting. If there is information that is optically stored, perhaps the term "electronically stored information" might not apply.

In the introduction to the committee's comments, there is reference to--information to adequately accommodate discovery of information generated by, stored, and retrieved from, so forth, through computers. Certainly I think that is very limiting.

My blood sugar monitor here is not a--I don't know if it's a computer. I think perhaps not. If I were to sue my endocrinologist--for the record, Dr. Elliott, I have no plans to do that--but perhaps he could attempt to discover my blood sugar

monitoring record to indicate that perhaps I was not compliant.

So I don't know whether or not under the proposed amendments whether or not the information in, for example, the blood sugar monitor would be construed as electronically stored information.

I've heard a lot of discussion this morning about instant messaging. There is information on everyone's laptops, at least everyone who--that goes online to the Internet. There are temporary Internet files, cache files, records of downloaded files, cookies. I call these electronic fingerprints. Every time we go on the Internet, we leave these fingerprints for others to dust, really, and find out where we were and when we were there.

I mentioned in my notes that I had a friend who asked me to help him clean up his computer. The first thing I did was to look at his temporary files, and I mentioned to him, I said, "You've been at the Sports Illustrated swimsuit site." "Oh, no. No." I said, "Why don't you just buy the

magazine?" He said, "I never went to the site."

"Let's see. You were there this morning. You were there twice yesterday. You were there a week ago." "How do you know?" I said, "Well, it's right here." And there were other sites that I won't mention this morning.

But I just want to bring attention to the fact that there was a lot of information out there that most litigators, as Ms. Tadler just mentioned, most fine, excellent litigators with years and years of experience perhaps are not aware of the existence of this type of information.

And I'm doing my best, at least in Toledo, northwest Ohio, to educate attorneys about the existence and the potential existence of this material.

JUDGE ROSENTHAL: Did you have any other particular comments on the rules that you wanted to share with us, the proposed rules?

MR. KURT: No, I don't.

JUDGE ROSENTHAL: Are there any questions of Mr. Kurt?

[No response.]

JUDGE ROSENTHAL: Thank you very much.

MR. KURT: Thank you, Your Honor.

JUDGE ROSENTHAL: Don't forget your stuff.

Mr. Ball? Good morning.

MR. BALL: Good morning, Your Honor. Good morning, ladies and gentleman.

Ladies and gentleman, my name is Craig Ball. I am from Houston, Texas. You have in your packages the information which I submitted with respect to my specific comments on the rules, and I hope that it is, in some small way, helpful.

I am a long-time trial lawyer. I've had the pleasure of dealing with a number of you in a professional capacity in the past, and I have, in recent years, also moved away from the practice of law and become a formally trained computer forensic examiner. And I have since then devoted 100 percent of my time to the focus on the teaching and study and practice of electronic discovery.

I don't have a constituency here today. I'm not here for the trial lawyers or any of the

clients or the courts for whom I serve as special master. My constituency is just my concern for where electronic discovery is going.

I want to thank the committee, as others have done, but I want to thank the committee for something a little different. Not only what you have contributed, but also for providing me, in truth, the best day and a half of continuing legal education that I have had perhaps in my career.

It is stunning, astounding, when you consider that this was anybody could come and talk, the caliber and quality of information and the papers, if you will, that have been submitted. Everyone--

JUDGE SCHEINDLIN: Can we say, for the record, that we agree with that, and most of us have talked about how much we've gained and learned from all those who've come to speak with us. Thank you for coming.

MR. BALL: Thank you. When I started as a lawyer--sadly, a very long time ago--discovery was challenging always, but not as challenging in this way. Because when I made a request for production

or when it was served upon me, someone would go to a room designated to hold files, and they would go to a metal box designated to hold files. And they would look through a folder and a file. And if it had the Doe v. Roe case, that's would be where they would go.

They didn't go into every file and every file cabinet and every room searching, absent an allegation of tampering or loss, because there was a records management system in place that allowed us to say with reasonable particularity, "This is where we keep that stuff. We don't need to look in the other places."

But as there has been a rush to automate, really willy-nilly over the course of the last roughly 20 years since the introduction of the personal computer, we've seen that the cost savings and the increases in productivity have often come on the backs of giving up all of the sensible records management techniques that were part and parcel of business operations for most of my career and, in fact, most of all of our careers.

And those savings, in a sense, have been deferred costs. And they're coming back like chickens coming home to roost now as we realize that we have allowed information to fall into hundreds, in some instances, thousands, in some instances, local hard drives, back-up tapes, personal devices, blood pressure meters, the airbag modules on your automobile that monitors your speed and your braking activity before each collision. And in all manner of good, solid determinative evidence that we have allowed to slip into many different places.

We need to focus, I think--and let me add that in driving over here this morning, I passed Georgetown Law School. And there, engraved on the pediment in stone, was the sentiment that, "Law is just the means. The end is justice." And I found that instructive today because will the end of the reasonably accessible test be, in any way, to engender broader access to relevant information?

Is there any way that that test or that hurdle is going to result in better quality, higher

quality, more probative information coming before the tryers of fact. And I think the answer has to be, no, it's not set up for that purpose. It's intended as a way to make it harder to get to relevant evidence.

JUDGE ROSENTHAL: Mr. Ball, does your practice focus on cases in which you are specifically charged with obtaining information that would be considered not reasonably accessible? That is, that would require forensic tools or means other than those customarily used by the organization in its own data management to obtain access to?

MR. BALL: A substantial portion of it does, certainly, Your Honor. And--

JUDGE ROSENTHAL: And can I ask you a question?

MR. BALL: Please.

JUDGE ROSENTHAL: Is it your experience that--we just heard Ms. Tadler say that her practice is to first look at the information that can be obtained without this additional level of effort and expense and see if that will satisfy discovery needs before resorting to this

information that does require additional effort and expense to even obtain before you even begin to read it, review it, examine it for privilege, et cetera. Is that consistent with the way your cases are handled?

MR. BALL: That is the ideal, but it is an ideal that cannot be realized as long as we understand that while we are making that effort, another effort is ongoing to destroy the things that will not exist in accessible data.

I think it's important that we focus on the fact that back-up tapes would be 100 percent cumulative evidence. You would never need to look at them if it were not for the fact that people are deleting information. And the back-up tapes--

JUDGE ROSENTHAL: Wait, when you say people are deleting--

MR. BALL: Yes.

JUDGE ROSENTHAL: Let's divide that concept a little. On the one hand, there is the kind of intentional deletion that what you are talking about sounds like. When you say "people are

deleting," I hear that as saying there is some guy out there who, either in deliberate disregard and disobedience of common law or other preservation duties, is targeting information for deletion or allowing it to occur, knowing that it needs to be produced because of its relationship to a particular litigation.

That's one kind of destruction. And I don't think anybody in this room would say that should somehow be protected.

MR. BALL: But it is, and it will be by this rule.

JUDGE ROSENTHAL: Well, hang on. Hang on. The second kind of destruction of information would be the kind of information that is routinely recycled, et cetera, that is not--that is being handled under a routine pre-existing policy.

And the question then is what do you do about the possibility or probability or certainty, because any one of them could exist in different circumstances, that that information that is subject to the kind of routine recycling might

contain responsive discoverable information? And then the question is whether that information exists elsewhere that is readily available?

MR. BALL: Let's look at that practically.

JUDGE ROSENTHAL: If you can tell me exactly which end of that are you looking at?

MR. BALL: I'll try. If we look at that practically for a moment, back-up systems are designed to really, truly only bring a system back up on its feet in the event of some disaster.

JUDGE ROSENTHAL: System wide?

MR. BALL: Well, or local to that system. It could be just one hard drive. The issue, the problem is that there is no business purpose for wanting to bring your systems back up to the way they appeared six months or two years ago.

What has happened, of course, is that if it were just truly a back-up system, and it had a, let's say, a 30-day lifespan--because much beyond that, you really begin to lose significant information. The facts of how events happen, the facts of how litigation proceeds at a relatively

slow pace means that if that were truly adhered to, that information would already be gone, essentially without culpability.

But that's not where we find ourselves arguing, is it? We find ourselves arguing about companies that have kept sometimes thousands of tapes, sometimes claiming, "We keep them. We have no means even to look at them."

And so, I'm concerned that we are fashioning a rule that is essentially going to be designed to protect people that say we are so inept in our business practices, we are so confused in how we do business that you need special rules to protect us from our own ineptitude. And that's really--that's harsh, I admit.

But I want to come back to what you raised a moment ago. And it seems to me that there has been little or no focus of one other aspect, and that is the individuals are generally the people who delete the data. We've only looked at Nancy Temple and David Duncan in the Enron case, not to single them out alone, or the Frank Petrone matter, or even the

Martha Stewart case, where you had issues of tampering with electronic information.

Ultimately, it comes down to there may be somebody in the organization because we have foolishly vested the ability to shred evidence on every desktop and every individual, largely without any supervision or controls. And we won't find that out, will we, until we have a chance to look at the active data.

And then once we find that out, we need to be sure that it hasn't disappeared in the back-up data. Because once that active data is gone, there are really only two ways to get it back, practically speaking. The back-up tapes, which you can view as a type of forensics, if you choose, or the way I tend to focus on it, which is computer forensics and the unallocated space and so forth.

So we have to find a way to preserve the status quo, which is we're willing to look at the active data first. I don't know a requesting party who sensibly wouldn't say, "Of course, I'll look at this first. The burdens for me are huge, too."

But I just need to be sure that if I find that there's a gap here, that someone has gone and had a delete-a-thon on the day when he heard the subpoenas are coming, that information is not lost to me because you've gone on and deleted your back-up tapes.

JUDGE SCHEINDLIN: How likely are you to find it on the computer hard drive in that space that you were talking about?

MR. BALL: If the individual has not taken certain extraordinary steps to defeat computer forensics, there is a tremendous likelihood.

JUDGE SCHEINDLIN: I thought that was the answer. And given that, the companies we hear from are not so worried about the individual computers as they are about the back-up system for the entire company. So nobody is going to interfere, I think, with your ability to do the computer forensics on the individual's computer and dig out the deleted information, which you said is overwhelmingly likely to find it.

Now the back-ups is a different problem because

they're talking about a big company, big system, hundreds of back-ups, night after night. Why can't they continue the practice of recycling safely?

JUDGE ROSENTHAL: And that goes to the point about is it available elsewhere in a way?

JUDGE SCHEINDLIN: Yes.

MR. BALL: I think that, within reason, they can recycle. But they have to have--they have to segregate, in a sense, their use of back-up systems as a true means of disaster recovery, which is a very short window and a window essentially so short as not to impact much of any litigation because it just takes time to get to court, versus these informal and very awkward archival systems. "Let's go ahead and keep six months ago. Let's keep a year ago."

It was pointed out a moment ago, well, if you had a transcript of--if you have a conversation at the water cooler, you don't have evidence of that. It's transitory. But if you were to tape it or had a transcript of it, it's fair game for discovery. Or, well, we don't tape our phone calls. Phone

calls are then ephemeral. But if you tape your phone calls, they're fair game for discovery.

If you are making informal archives, albeit poorly managed, poorly indexed, hard to get to, they are fair game for discovery. Get rid of it quickly once it has lost the utility as a disaster recovery tool.

JUDGE ROSENTHAL: You think that's good?

MR. BALL: I think that it's good practice from an IT standpoint, and I think it is good practice from an information standpoint because once you allow it to lose that unique character as a disaster recovery tool, it takes on the character of an archive. And I think that makes it unquestionably fair game for discovery.

JUDGE SCHEINDLIN: Mr. Ball, the only response to your argument, because I've obviously heard it before, is the big company that says we are sued every day or we are in suit every day. So we could never safely keep it for the one week that's really needed to restore the system because somebody always wants us to keep it as part of some

litigation somewhere.

So for the really big company, can they recycle if they're always in suit with somebody?

MR. BALL: I think this is not going to be a satisfactory answer, I'll preface it that way. I think they can recycle if they have put proper steps in place to prevent the active data from being deleted in such a way that the evidence is not available in that realm.

JUDGE SCHEINDLIN: But can they ever ensure that the one individual employee somewhere is paying no attention or intentionally deleting?

MR. BALL: Can they ensure it? Absolutely no. But right now, they take essentially--they take minimal, if any, steps. Again, we've vested the ability to destroy evidence in every individual with a computer, a PDA, a personal computer, et cetera. That may seem unsatisfactory again, but it's as if you put a shredder in every individual's office and gave them access to the file room.

JUDGE ROSENTHAL: Mr. Ball, are you essentially arguing over or worrying about what a reasonable

litigation hold looks like? And you're making a general statement that, in general, to vest that kind of discretion with individuals is not, in your judgment, a reasonable litigation hold by itself. Isn't that what--

MR. BALL: I think that we have seen the abuses sufficiently. They are notable. What I want to digress for a moment and say is, where are the parade of horribles? By that, I mean where are the abusive district judges who have sanctioned people for innocent destruction? I've read the cases. You all have made the cases in many instances. That's not what happens.

When you look at a Laura Zubulake case or you look at a Philip Morris, or we could name them all, generally, you're looking at a situation of fairly overt, fairly egregious, fairly contemptuous action. No one has cited me to the case where we tripped over it, it was purely innocent, and you've sanctioned us $2.75 million and stopped 15 of our experts from testifying. That case hasn't come down the pike that I know about.

JUDGE ROSENTHAL: May I ask you one other question? Nathan, you had a question, clearly. Go ahead, please.

JUDGE HECHT: Did I understand you correctly to say that there is no business reason to keep serial back-up tapes? No?

MR. BALL: There is no functional business reason for you to have the need to bring your systems back up the way they existed three years ago. I mean that kind of time travel is rarely necessary.

JUDGE HECHT: Right. But if you could bring it up the way it existed yesterday, Friday, is there any reason to keep Thursday's back-up tape?

MR. BALL: There are some belt and suspenders reasons to do it. I mean, obviously, you want a rotation. And you have to understand that there are different kinds of back-ups. We speak in rather specific terms, but there are such things as incremental back-ups. You have full back-ups. You have something called brick-level back-ups that may not have come to your attention.

But those are specialized back-ups that just focus on backing up individual users' e-mail accounts, for example. Those are very easily searchable. Those you can go to and you can get to an individual user because they're built for that kind of accessibility. They're the kind of thing where the CEO says, "I've pushed the wrong button. I need an e-mail from six months ago."

JUDGE HECHT: But isn't that an archival reason to keep the tape?

MR. BALL: It is. Or, if you will, yes, it's an archival purpose. It's designed to be able to get back to it beyond just how did we look at close of business yesterday?

JUDGE HECHT: And your point is if you keep it for that reason, it's fair game for discovery?

MR. BALL: If it's not available in active data. Absolutely. It's cumulative if it's available in active data.

JUDGE SCHEINDLIN: But do you oppose the two-tier or not because that almost sounded like you liked the--or you accept or like the two-tier?

MR. BALL: I honestly do not like the two-tier. I think that it gets us no further down the road. I believe the system is not broken.

JUDGE SCHEINDLIN: What is your objection, though, to the two-tier? What is the problem with it?

MR. BALL: Well, to begin with, you've heard--I don't want to repeat everyone else. The reasonably accessible test really has no meaning, and the closer you get to the data, the less meaning it acquires.

For me, for example, it's just 1s and 0s. I mean, what you see depends upon the template that you superimpose against those 1s and 0s. For example, five years ago, you didn't have something called the "recycle bin" on your personal computer. Now you do. Now things that are in the recycle bin are deemed easily accessible.

That data really hasn't functionally changed. A certain functionality has been added to the computer sort of a la Norton Utilities that, a Microsoft way of bringing good ideas into its

operating system--and that sounded much more complimentary of Microsoft than I meant to be. The idea is that they added functionality.

Well, all data is accessible until it's obliterated. All data is accessible until it's obliterated. All data is inaccessible until you have the tools and software to look at it. Some of that functionality is built into the tools you use. Some more of it will come in.

Those of you who are using, for example, Google desktop, and I know you all are gearheads enough that a number of you will know what I'm talking about, a search utility that applies the Google power to your own personal computer. You know you've gained a tremendous ability to find things you didn't have before you started it.

We're seeing that movement. Right now, saying inaccessible, accessible, reasonably inaccessible, I don't think it draws a line. And I think that if you draw a line that everyone sees in a different place, it's not very instructive.

JUDGE ROSENTHAL: Can I ask a follow-up

question on that, Shira? Do you mind?

One of the alternative formulations we heard was inaccessible without undue expense or burden. Do you have a reaction to that?

MR. BALL: I do. And that is that I believe, as others have said, as here others on the panel have said, how do you separate the concept of accessibility or inaccessibility from undue burden and cost? Isn't that really what you're saying?

Since undue burden and costs are already effectively built into the rule, since the common law already shows us a number of decisions that apply those in a way that lawyers can look to instructively, why do we add another term that really doesn't define anything, that creates, I believe, a greater sense of confusion or another excuse, if it's abused, of why you're not going to get to relevant evidence?

JUDGE ROSENTHAL: It sounds like we're all, in essence, talking about how to make those factors, those proportionality factors and their application to this particular and new body of information

clearer?

MR. BALL: Yes. And I believe--I believe that the courts have been doing a quite good job of it so far. They're going to have more and more challenging because right now we're dealing with a gargantuan knowledge gap. Why do lawyers ask for all of this stuff and these broad retention things? Partly it's because we know nothing about the systems against which we're making our requests.

If we knew, if we immediately had a meet and confer where somebody said, "Here's what we're willing to keep. You've asked us to keep the moon. But this is what we're going to keep. This is what we have, and we're not going to change anything on." At least the issue would be joined.

And I could then run to court and say, "Your Honor, it's not reasonable what they're going to do. I move for a protective order. I move for a preservation order." I then have that. But that needs to be there. We have to bridge that knowledge gap.

JUDGE ROSENTHAL: Do you get hired to be part

of the meet and confers?

MR. BALL: Yes. If not physically present, I'm often brought in to advise--

JUDGE ROSENTHAL: Virtually present?

MR. BALL: --as to what it should be. I will sometimes get the phone calls. I'm the person sometimes that people will call and say, "They've offered us this. Is this going to be sufficient to find the smoking gun?" And I'll opine as to whether I think that the sample is sufficient.

JUDGE HAGY: Let me add to that. I've always thought that the reason and purpose for our two-tier approach was to do exactly what you said. Here's what I'm going to give you. Here's what I'm not going to give you. That generates a meet and confer. Now you know that it's out there. And you know you need to discuss it.

As earlier speakers have said, probably 90 percent of the plaintiff's attorneys and 90 percent of the defense attorneys currently don't even consider e-discovery. When they respond, they're not thinking about what they're not turning over.

It's just to make people think about it, focus, to begin a conversation. And maybe it's not a good way to do it because it may repeat the cost benefit analysis. Or as another individual said yesterday, he thought it was beneficial because at least we got people communicating on the issue. And maybe that's not our job.

But you know, you just said what needs to be done is at a meet and confer identify what I'm giving and what I'm not giving. And that's exactly what the response which identifies the inaccessible materials does.

MR. BALL: But there are two elements missing from that, Your Honor, and that is this. One is it's not set up that they're going to tell us, "Here is what we have, and these are things we're not going to keep." And there is nothing to preserve the status quo to then allow me to get to court and say, "Judge, stop them because they're going to destroy these things." Do you follow me?

JUDGE HAGY: Well, what do we currently have to preserve the status quo? We don't have anything.

So we're not adding or deleting anything with respect to preservation orders. It has nothing to do with preservation orders.

MR. BALL: Well, if your point is that it really doesn't add or delete anything, we can learn to live with the reasonably accessible/inaccessible test. But I do agree with you. I don't think it really does add anything except an extra procedural step that must be overcome by, again, additional cost.

Because in order to overcome that, that means, as a lawyer seeking discovery, I have to bring an expert in immediately. That's good for me personally. It's bad for the system.

JUDGE HAGY: It gives you--it highlights that you need to do exactly what you've said is beneficial to do at a meet and confer.

MR. BALL: But how is--and the thing is in the meet and confer, once you say, "We deem it inaccessible," it appears with the way the rules are structured that you have no obligation to preserve that information you deem inaccessible.

JUDGE ROSENTHAL: Mr. Ball, I don't mean to cut you off, but I am. Two points. One, we do have language in the note that attempts to bring some light to this relationship of the second tier and the preservation issue.

Perhaps one way of hearing what you're saying would be that we need, at a minimum, to look to see if that needs to be clarified further. It sounds as if you think that that is not enough guidance. Would that be fair?

MR. BALL: Yes. Certainly it is not enough guidance if you will go with what I must iterate I do not think is a necessary change.

JUDGE ROSENTHAL: I accept that that's your position. Certainly you've made that quite clear, and I appreciate that.

MR. BALL: Thank you.

JUDGE ROSENTHAL: You had a question, Mr. Cicero?

MR. CICERO: We can discuss it later, when we're at our meeting.

JUDGE ROSENTHAL: All right. Are there other

questions of Mr. Ball?

[No response.]

JUDGE ROSENTHAL: Well, thank you. You do have, obviously, great expertise, and we appreciate you sharing it with us.

MR. BALL: May I--

JUDGE ROSENTHAL: Certainly.

MR. BALL: I would just close with one thing because I really want to reiterate it. It was well stated by George Socha yesterday, and I want to reiterate it because you've heard many things over and over again. I'm concerned if you don't hear multiple things over and over again, you may not give it sufficient weight.

JUDGE ROSENTHAL: People make that mistake with juries all the time.

[Laughter.]

MR. BALL: As I said in my written materials, Your Honor, I am, as Niels Bohr said, an expert by virtue of the fact of having made most of the mistakes in a narrow field.

Rule 34(b), the one specifying form of

production, I think it's imperative that if--the change as to forms, it's important because there are just a number of growing important aspects of evidence--databases, spreadsheets, sound recordings, video, as the media center was mentioned--we're going to see more of that. It simply doesn't lend itself to one universal aspect or form. I do hope you will change it there and also take it out of the subpoena rule in 45, where it also exists.

Thank you all very much for listening.

JUDGE ROSENTHAL: Thank you.

We'll take a 15-minute break, ladies and gentlemen.

[Recess.]

JUDGE ROSENTHAL: Okay. Ms. Grosvenor? Good morning.

MS. GROSVENOR: Good morning, Your Honor, members of the committee. Thank you very much for the opportunity to appear today. I appreciate everybody taking their time on this Saturday morning to accommodate all of the interest in this

subject.

I have to say I wish I could have been here yesterday. It's been so interesting to hear everybody's points of view this morning.

My name is Cheri Grosvenor. I'm a business litigator at King & Spalding's Atlanta office. And before I begin, let me clarify that my remarks here today are my viewpoints. I'm not appearing to present the firm's viewpoints or the views of our clients. To the extent that my comments coincide with our written submission, they are also the views of the signatories to that letter.

The point that caused us to submit the written commentary and for me to appear today is slightly different than some of the focus that you've heard of the discussion most of this morning. Our concern relates to the amendment to Rule 26(b)(2), and we fully support the inclusion of the two-tier approach.

However, we have some concern that with all of the focus on what constitutes reasonably accessible information and how are you going to handle

inaccessible information and that process, that the balancing test that appears in Rule--in Subsection iii of Rule 26(b)(2) may become pushed to the background with the treatment of reasonably accessible information.

We frequently in our practice hear the argument that if it's reasonably accessible, that must mean it's quick, easy, and cheap to produce it, and that's just simply not been our experience. And we fear that that argument does have some appeal to an uninitiated audience. And so, we feel very much that accessibility does not fully answer the question of burden. And so, we think it's important to provide a little bit of anecdotal information along those regards.

JUDGE SCHEINDLIN: Can I interrupt solely in the interest of time?

MS. GROSVENOR: Sure.

JUDGE SCHEINDLIN: If we were simply to remind the reader of rules that the proportionality test applies to the accessible also, would that do it?

MS. GROSVENOR: I believe so. I think that you

could really address it in the notes.

JUDGE SCHEINDLIN: Okay. I think there's a great inclination around the table to accept that suggestion. So if that helps you?

MS. GROSVENOR: Great. I do feel that that could be easily addressed in the notes and just a reminder that--because what we don't want to see happen out of this process is that the new language leads to then fights over valid objections to reasonably accessible data because you have cases where you get estimates that it's a multi-million dollar effort just to get and process the e-mail that everyone admits is reasonably accessible. And we hear that from clients--

JUDGE SCHEINDLIN: I guess what I'm saying is point well taken, counselor.

MS. GROSVENOR: Okay. I will comment on one other question that I've heard debated this morning, which is I've heard a couple of representations made that people's practice is to approach the discovery by reviewing the information is accessible before moving on to the information,

a determination on the inaccessible information.

I will say that that has not been my experience in many cases. I've found that, unfortunately--

JUDGE ROSENTHAL: I'm sorry. Your experience as a responding party?

MS. GROSVENOR: As a responding party. That's correct. My practice is primarily defense of complex commercial cases, and so my perspective is largely as a responding party.

And I have found that you, unfortunately, do encounter practitioners who recognize the hammer that can be the discovery burden. And you do encounter that it is used as a method of imposing additional burden and cost. And so, I would not say it is universal that requesting parties do take the time to go through what is the accessible information.

And so, I think that the distinction that is being proposed is meaningful in that regard, provided that the right signals are provided by the committee and the notes that allows for that distinction to remain meaningful. So that you do

have an informed dialogue through the disclosures, so that people are aware of what they're getting. They look to that, and then they still have the avenue provided in the rule to then, should it be insufficient through what's available, to pursue what's inaccessible.

And given that the committee has already seemed receptive of that comment, I'm happy to provide further examples or answer any specific questions. But I gather that the point is well taken from the written submission. So I won't occupy any other time unless people have specific questions.

JUDGE SCHEINDLIN: The only one I would ask is what I've asked so many people, but I don't want to leave you out, which is how do you draw that line? How do you define inaccessible?

MS. GROSVENOR: Well, I actually think that it is really just formalizing what responding parties have already been doing. I think in my experience with clients responding to large discovery requests that this is what they've already asked themselves is, "What can we get to? What are we using?"

I think that one of the principles of the Sedona Principles explains that, No. 8, and has a pretty good delineation of that. That language, active data, information purposely stored in a manner anticipating future business use and permits efficient searching and retrieval. I think that that actually has a pretty good scope, and I think it's an inquiry that clients have already been asking themselves.

And so, I think in practice, as this plays out, that it may not be the difficulty--

JUDGE SCHEINDLIN: Can you read that one more time? Could you read that one more time? Could you read those words?

MS. GROSVENOR: Sure. This is from the Sedona Principles. "The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval."

JUDGE ROSENTHAL: Can I ask one question about that?

MS. GROSVENOR: Sure.

JUDGE ROSENTHAL: We've heard about two different aspects of--we've heard a lot of different aspects of problems with electronic information, but two that seem to apply particularly in this discussion are somewhat different. One is the problem of having to forensically restore or recover information because, for some reason based on the way in which it was stored, it is not available without that--it can't even be looked at without that kind of step being taken. That's one category.

The second category is the fact that a lot of electronic information is dispersed over a huge number of potentially different places where it could be located. In any one of those places, it may not be hard to retrieve. But the large amount of distribution and dispersion that characterizes some of these networks or lack of networks, as everybody with their own PC, makes that difficult.

Is your notion of accessibility one that covers both of those situations, both of those features?

Or is it something different?

MS. GROSVENOR: Well, I think that they're really two very different issues. I think, in my experience, clients are aware that they are going to have to tackle the problem of information being dispersed. If you have multinational corporations, it raises issues of how are you going to translate? You know, who are you going to be able to use to--if you've got e-mails in Japanese, you're going to have to use your Japanese personnel to help sort out responsive material.

And I think clients recognize that, and I think that is where we feel that the reference to the balancing test that's already in 26(b)(2) can be so useful is, you know, you look at what has to be done. The clients recognize that that has to be done. But they want to see it focused and have some kind of enforceability of reasonable limits so that it doesn't become an easy avenue to force someone to the settlement table just by virtue of the cost. But so that parties can really get at what do we really need to litigate this case?

And you know, one presumption that I hear in these arguments so often that I think is unfortunate is companies are looking at this also as this is equally likely to be what's going to disprove a claim as it is to be what's going to prove a claim. You know, sometimes you hear the assumption that, you know, it's the smoking gun. Well, the defense needs those documents a lot of times, too. And so, it's a problem that has two sides that coin.

Now with the other aspect of the recovery materials, I think that is why the importance of inaccessible material because that is not formatted in a way that's designed for actual business use, other than in the event of an emergency and to restore that snapshot, and you've already heard good discussion of that. But I think that goes to the inaccessibility aspect.

JUDGE ROSENTHAL: Mr. Cicero?

MR. CICERO: I'd like to direct your attention to the question of preservation for a moment because we've had two contrasting views expressed

here in the last two days. If you were here yesterday, you heard some of them again this morning about the question concerning--about the question of obligation with respect to the information that is designated not reasonably accessible.

Is there a preservation obligation? What is the extent of the preservation obligation? Or is preservation a completely separate issue? Because some, I think, infer from the two categories that, well, if it's not reasonably accessible, we don't have a preservation obligation. What would you advise?

MS. GROSVENOR: Well, I don't think you can say that the preservation obligation is entirely unrelated to the reasonably accessible or inaccessible determination. And I think that that has to be evaluated on a case-by-case situation. I think what's reasonably inaccessible at one company may be somewhat accessible at another company. And so, I think that has to be evaluated based on the scope of the case and the situation with the data

storage.

I think that Mr. Van Itallie's comment this morning was well taken that companies recognize that there is risk inherent in that, and there is going to have to be some risk balancing.

MR. CICERO: Well, what would be your response if a requesting party said, "Well, okay, you've designated this material as not reasonably accessible. We won't fight about all of that or a certain designated category of certain parts of it we think are reasonable. We won't fight about it now, but we want you to preserve it all."

MS. GROSVENOR: Well, I think that's where it's helpful to have that in the initial conference, the planning conference. Because if there is going to be a clear fight over that, I think these proposed amendments give you a good avenue to get a matter before the court and resolve it quickly.

And that's where bringing it to the front end of the process is extremely helpful. And I think that's one of the key areas of electronic discovery developments is that people are now recognizing

that this has to be resolved on the front end of a case.

JUDGE ROSENTHAL: Mr. Girard, do you have a question? And then Professor Marcus.

MR. GIRARD: I'd be interested to know what you do now in regard to the 26(f) conference as far as sharing information relating to electronic issues with your adversary? And whether you think that the proposed change requiring discussion of issues relating to discovery of electronically stored information would change your practice, and whether it would prompt people on the producing party side to give the requesting party more information that would allow them to frame requests that are more targeted than they probably currently are?

MS. GROSVENOR: I do believe, actually, that it is going to enhance the discussions. I think that--and really had two different experiences. It depends entirely right now on sort of what is the beginning level of knowledge of the other side and what kind of entity are you dealing with?

In the complex cases where you have two

corporate entities on--you have plaintiffs and defendants that are corporate entities, those discussions are already taking place because both sides are going to be requesting parties. Where you have perhaps a less sophisticated plaintiff, those discussions probably aren't going on as much.

Corporations certainly aren't requiring a specific request asking for electronic information. They already presume that that's part of the discovery obligation, in my experience. But those discussions are not as fulsome at the initial conference in some instances.

MR. GIRARD: Would you like to see the rule, the proposal go farther than it does? Or do you think it's adequate?

MS. GROSVENOR: I think it's adequate.

JUDGE ROSENTHAL: Professor Marcus?

PROFESSOR MARCUS: A related question. The proposal on 26(f) now says in the text one thing that should be discussed is preservation. Am I right in understanding that you think that's a good thing to have there in the rule?

MS. GROSVENOR: I do. I do. I think it focuses both parties because it makes both the requesting party and the producing party aware of the circumstances. And I think it can help the counsel for the responding party get a handle on what their client's situation is and get their client focused on it so that appropriate steps are taken early in the litigation.

JUDGE ROSENTHAL: Are there other questions?

[No response.]

JUDGE ROSENTHAL: Ms. Grosvenor, thank you very much.

MS. GROSVENOR: Thank you.

JUDGE ROSENTHAL: Mr. Ryan? Good morning.

MR. RYAN: Good morning. My name is Michael Ryan. I'm an attorney and a shareholder in the law firm of Krupnick Campbell Malone in Fort Lauderdale, Florida. I, along with my partners, represent people and companies who have been damaged through the wrongful acts of others.

Before I begin, let me say and echo what Mr. Ball commented on earlier. I think that I've

learned more just this morning than I have in debating these things amongst myself and my colleagues over the coming weeks leading to this. Rather than perhaps some of the notes and commentary, what we probably needed were for judges and practitioners to have an ability to watch this process and see this debate and energize how judges are going to deal with this issue because all that's been discussed is being addressed in the well of the courtroom.

Before I also begin, I want to tell you that I am chair of ATLA's Electronic Discovery Litigation Group. As the name suggests, that group is dedicated toward addressing legal and technical issues in this evolving area. I am not chair because of some unique knowledge or talent or great experience. I think I was at the first meeting and the only one with a passion to discuss these issues.

So I can't answer a lot of your technical questions. But what I can do is tell you that I've spoke to lots of lawyers on both sides, and I've

lectured on these issues as well. I am not here on behalf of ATLA--yes?

PROFESSOR MARCUS: Mr. Ryan? Just related to that. Do you have a sense in the present of how frequently ATLA members look for electronic information through discovery? We heard comments a little while ago about a meeting of lawyers in which very, very few had ever thought about doing that, much less done it.

MR. RYAN: I think that's an accurate, although anecdotal--it's hard for me to scientifically answer that. But I think that's true. Right now, we don't have people who are regularly asking for it in routine vanilla cases. What I end up talking to a lot of people about are these big document production cases we've seen that tend to justify the involvement.

I will say, though, at a recent meeting, I was surprised at the number of--and I say vanilla--routine cases that this was coming up in. Contract disputes, two companies arguing over whether there was appropriate due diligence. Someone raised it

in a medical malpractice context that apparently the doctor had gone paperless.

So I think we are at the cusp, and I think the timing is well suited for this discussion because we are going to be faced with regular practitioners who don't have great resources asking for this. And certainly, as we've heard from Mr. Ball and others this morning, the technology is becoming more cost effective to be able to manage this even in a simple fashion.

But I don't speak on behalf of ATLA. I speak for myself as an individual lawyer who has argued motions for production, dealt with the issues of collection, and lectured to lawyers about how to deal with this. Let me first say that what I advocate to all lawyers that I speak to on both sides, and what I sincerely tell this committee, is I don't want too much information.

My goal is not to get 10 million pages of images. I can't manage that. I have great resources, and I work in MDL settings. I don't want that. What I do think and what the committee

needs to be commended for more than anything else is the recognition that up-front discussions and court involvement early on this very serious issue will solve much of what we're debating on reasonably accessible, on preservation, on claw back, on the other issues.

JUDGE ROSENTHAL: May I ask you one question about that? And I've asked a number of others. In your experience and in the experience that you have learned about of your members and others you've spoken with, how frequently have you found it necessary to go to information that is inaccessible in the sense that forensic measures have to be taken to recover it or restore it before it can even be looked at? That's the first question.

And the second question is, is it your practice to look first to how much the readily available information will adequately satisfy your discovery needs before you incur the additional expense of the inaccessible information?

MR. RYAN: In short, it is not frequent that back-up tapes are restored. Second, I do want to

go first and see what's there. Now let me expand on those answers.

The issue of back-up tapes, in my experience in talking to lawyers, seems to come up in more discrete cases that are targeted and focused either by timeframe or individual. The big case that I might be involved with that involves 10 years of information flow, back-up tapes become less important.

With respect to how to deal with the issue, my concern is always preservation. I am faced with the problem that I have perhaps an intransigent producing party who I don't know when I'm going to get that first tier. It may be months. It may be a year, due to battles over production and wanting to be efficient. So I don't know when I'm going to be in a position to really say have I received, or are there tell-tale signs of something missing?

JUDGE ROSENTHAL: Do you negotiate what steps will be taken to preserve information while you are looking through the first tier to make those determinations?

MR. RYAN: It is. That's what I advocate. That's what the people I work with advocate, and I think you'll hear from someone later this morning about a very effective way of dealing with--and it was dealt with in the Propulsid litigation and Johnson & Johnson, and I'll let him expand on that.

But there are very efficient ways to deal with it if you have rational parties on both sides and a court that is involved early. Because if the parties are left to themselves, particularly given some of the language, I think, of the rule and the notes, I think there are tactical advantages that can be found to a producing party that is willing to go through motion practice.

And I have personally dealt with the issue of whether portions of a database are accessible because we don't routinely access it in that manner, we don't believe it's accessible because we have to go through some work. Now I may prevail on that, and I have prevailed each time. But that has resulted in months and months of litigation.

And I think there is something to be found in

the notes and in the language of reasonably accessible that will at least give lawyers who want to litigate this the opportunity to go before a court which may or may not be sophisticated on the issues of electronic discovery and take their changes because there certainly is no downside. There are no penalties or consequences for that.

JUDGE SCHEINDLIN: But it would be true now that the same party could say, "I object to the request for my databases. It's unduly burdensome and expensive. I shouldn't have to do it." And then you're met with the objection, and it's going to take the time and effort to pursue the motion practice.

MR. RYAN: You know, I thought of that as I was developing this theme that I think it's going to increase motion practice. And I looked at the magistrate judges' commentary on this. Obviously, we haven't spoken, nor do they find me persuasive. But I noticed that they, too, were concerned about the motion practice.

And I think it's because what's percolating in

the judiciary right now is adequate. If you look at some of the sensational cases that have come out and said--and usually, they're reported to me, they're sent to me, and they say, "Look, here's another example where the court said lawyers are going to have to pay for data." And then you read below the reporting line and you see, well, that was back-up tapes, and they were searching.

JUDGE ROSENTHAL: Let me ask you a question about that. When you say "pay for data," you mean, I think--and tell me if I'm wrong--the costs of applying the forensic steps necessary to restore the data. You don't mean shifting to the requesting party the cost that the responding or producing party will incur to review that data, examine it for privilege, and to understand it before it's produced, do you?

MR. RYAN: Well, that's what's reported. That's correct. That it's the cost of restoring it. I am facing cost motions right now dealing with electronic discovery. And fortunately, there are very good opinions that I think energize this

discussion, and it doesn't turn on reasonably accessible. It's turns on was it active? Is this part of what the company has active?

I think there are some other subtle and unique issues that may pop up that deal with whether data is accessible or not. And it deals with whether servers were taken offline. Technically, the company doesn't address anything on those servers right now. But it may take very little effort to make that accessible.

I think there are also issues of, you know, the technology flow and whether we're going to catch up and get ahead of where Rule 26 will be if it goes through as phrased. That is, back-up tapes may become antiquated. You know, certainly you've probably heard that from those who are more technologically savvy. But I think those two are very important.

JUDGE SCHEINDLIN: Let me interrupt with this question. If "accessible" is the wrong word, because it doesn't create much of a divide and because technology will quickly overcome the

concept of accessibility, is there any other divide that does make some sense in terms of the practice itself?

Because do you tend to ask for certain data first, and you're willing to review that first, and you're not anxious to go to the second tier because you told us you don't want to get inundated because you have to be reasonable for your own self-preservation. So what is that second tier if we've got the wrong words?

MR. RYAN: I think that--I think it turns a little bit too much on technology for me to give you a precise, and I think there are some people who have made some suggestions who are technologically more inclined. I tend to think of it as is it a universe of data that is actively--does it live and breathe? Is it an active database? Is information added to it on a regular basis, and is information taken from it?

And I distinguish that from the restoration that's necessary for disaster where you don't really have that. It's not part of the business

practice to restore. It's there. But if you look at virtually every database that I've had to encounter, I have heard arguments that we don't access it. I've been through lengthy depositions on whether they access it. And in the end, that was an active, living, breathing universe of information.

JUDGE SCHEINDLIN: Well, I've got you about why accessibility is not it. I'm trying to find out how you would define a second tier if you were forced have such a--yes?

MR. RYAN: I understand. I misunderstood the question. I apologize. I think the second-tier issue is dealing with the--there is a burden aspect to it, and I think that's what's troubling everybody, and there's a preservation aspect that's troubling everybody.

I think that if in the business function of the company they do not utilize the information on a daily basis or a monthly basis, they do not serve the business mission, but it's kept for some alternative reason--and that's what we have really

in the back-up tape situation. It's kept for a per chance issue. I think that's what we're looking at in terms of costly, cost shifting fishing expeditions that everyone seems worried about.

So if we were to define it, I think that it comes down to, as Your Honor has identified, multiple factors. But I think, fundamentally, if the data is living and breathing, all else would be something that would fall into that inaccessible area.

JUDGE HECHT: Do you like Sedona Principle No. 8?

MR. RYAN: I don't know about the specific number. I've heard that definition this morning. I think that's a very good definition. And I know Mr. Altman, who will be testifying later, also has some thoughts on that.

I think that--it makes it, I think, easier for the judges who have to be faced with it, personally.

JUDGE SCHEINDLIN: So if it was better defined, what is your view on second tier or two-tier?

MR. RYAN: Let me address the issue of the tiers in terms of motion practice.

JUDGE SCHEINDLIN: Okay. Okay.

MR. RYAN: I think there are two tiers of data information. That's clearly the case. That's what we're talking about. That's not the 800-pound gorilla in the room. What the concern is, are we causing more motion practice because up front there is an incentive for people to say this is inaccessible because we don't utilize it often. We don't access it like you're asking us to.

And so, my suggestion on that, I think, is to integrate and put perhaps some stronger language up front on what needs to be done. I am a strong advocate for this meet and confer process. I think it works, and I have experienced it.

When you get the technological people sitting around the table, you eliminate the lawyers' plausible deniability, and 99 percent of the problems that people are talking about get solved. That's in my experience. There will always be the producing party who doesn't want to produce some

back-up information because they've destroyed all their e-mails.

JUDGE SCHEINDLIN: So you would solve the two-tier by having the parties negotiate those tiers up front in their meet and confer? It's that simple.

MR. RYAN: Negotiate up front. And I would encourage the court, and it seems almost counterintuitive, but I think the court being involved in that process early on is important. I'm not suggesting the conference be held there, but if we're going to cut down on the motion practice, being involved early on preservation and that discussion would be helpful.

JUDGE ROSENTHAL: And if agreement is not possible and judicial involvement is necessary, is there any way to do that without motions?

MR. RYAN: There isn't. But I think it has to be dealt with up front. I don't think we should go through the process of allowing them to produce and then saying we don't believe these following databases are reasonably accessible. And then lead

to motion practice. I think we should deal with that up front because there are going to be tremendous issues of cost later on if we do that, perhaps going to back-up tapes because now things have been destroyed, and the preservation problem. I mean, that's what's underlying this.

I think most rational people and reasonable people on my side of the V would say as long as I know it's there. Okay, I understand you say database X is not accessible, but if you're telling me you're going to preserve it so we can get this in front of the court, then I have less concern.

JUDGE SCHEINDLIN: Exactly. I have to make an admission that what I'm about to say is not a question. So I'm going to admit it right up front. But the problem is, is I've heard some lawyers say here that by making a motion, if the judge then sits on the motion for four months, there's a real question of preservation over the course of that six months that it took to make and decide the motion.

So that is a comment that favors what you say

about getting it done somehow earlier than motion practice, which has to await the decision.

MR. RYAN: And I think related to that, and there was a very good set of questions about, well, what's the problem with the motion practice and protective order versus motion? And I was sitting here thinking, what do I do pragmatically? I'm filing a motion to compel inaccessible. They're going to file in opposition. In many courts, I can't file a reply. That's number one.

I think, number two, the problem is that delay that's going to be occasioned by it. And I think, third, there is some commentary that says if it's inaccessible, you're excused from producing. Well, and I think it's in the notes. It says you're excused if it's inaccessible. And I don't think that's really what was being intended. I think what was intended was you may or may not have to produce it, but you don't have to produce it right up front there.

And so, I'm concerned about some of that language, and I could direct Your Honor to my

concern there.

JUDGE ROSENTHAL: May I ask a question, following up on Judge Scheindlin's observation? If you were able to obtain, either by negotiation or by court order or some combination of the two, a way to satisfy your preservation concerns while you were examining the first tier of material and testing the inaccessibility claimed as to the second tier, and then deciding whether you were going to file motions to bring that to the court if you couldn't resolve it by agreement and getting the court to determine good cause and everything else, would that satisfy your primary concern over the two-tier motion issue?

MR. RYAN: It would. I think that that would solve the problem greatly. And I think that it would also give the courts more time to be deliberate about it.

I mean, there will be a position put forward by someone who says, Judge, "And if you don't handle this immediately, we're going to have destruction." And I know the courts hesitate to accept emergency

motions except when, you know, my leg's going to fall off if you don't hear my hearing today. So I think that's critically important if we can preserve it.

I think there are a couple of other issues I just want to raise, and it's not significant. It hasn't been discussed much this morning. But this issue of claw back provisions. I commend the committee for thinking of, suggesting that. It is something that I've tried to negotiate, and I must not be persuasive because I've never been able to convince a producing party that it's in their interest to produce quickly as much information as possible.

What I see happening is that there is still a document by document, line by line review, and there's very little trusting that goes through in the claw back. In addition, because of I have concerns with the lack of timeframe, as the magistrate association raised, as to when this can be raised, I think there is a specter of when a producing party could ask for this material back,

for instance, on the eve of settlement, where a party and the producing party may have interests that are separate and apart from the public safety issues.

And because it doesn't require specifically that the document actually be privileged or that there be some court review, there could be literally an abuse of this that may result in more motion practice later.

JUDGE SCHEINDLIN: Would that be solved if the receiving party had the alternative of taking the document directly to court?

MR. RYAN: I think in the scenario I just provided, the public safety issue, the receiving party may not want to.

JUDGE SCHEINDLIN: Oh, oh, I see. Because of settlement.

MR. RYAN: Because they have a settlement.

JUDGE SCHEINDLIN: Yes, yes. Right.

MR. RYAN: But in a more general sense, I do think that there is nothing that allows the--at least from the rule, that allows the receiving

party to go to the court.

JUDGE SCHEINDLIN: No, right. Right now, it says return, sequester, or destroy. But if one option was or go to court, would that solve some--

MR. RYAN: I think it would. In the end, I question whether we'll ever see many folks actually utilize it, although I recommend it.

JUDGE HECHT: Do you make those agreements often?

MR. RYAN: I have not made those. I have asked for them, and I have said that it will expedite discovery. But much like my experience with broad-umbrella confidentiality orders that were meant to expedite discovery, they don't. Because in the end, it still causes tremendous review. It's not as if they're going to hand me the keys to the warehouse and say go look for the documents.

So I think it's admirable, and it was certainly a laudable goal to try to do this. I think, in effect, it probably won't be used much, if ever.

JUDGE ROSENTHAL: Professor Marcus?

PROFESSOR MARCUS: I want to go back to

something you said earlier about the 26(b)(2) accessibility definition problem. It seems to me, on the one hand, you said I don't like it when the other side says, "We don't use that. We don't access that system very often." But on the other hand, you seem to say what I'm interested in is whether it's something that is used regularly, it's living, breathing data in the sense that they interact with it regularly.

So are you in favor of a definition that says used in the ordinary course of the responding party's business as opposed to reasonably accessible, which seems to look at the difficulty of accessing the information?

MR. RYAN: I think difficulty is one-size-fits-all. I could envision two different scenarios where either would work for me, but neither would work in another scenario. That is to say, I know a database that's active, that is getting information that they are sending to it. But they may not regularly go and look it. Okay? But it's kept for some reason, to serve some big

business mission purpose, whether it's regulatory or the business mission.

I have encountered a producing party saying that's not accessible because it's going to take us work to get it to you. So I think what I'm really talking about is do they have a universe of information that they're actively adding information to or taking from? And it doesn't matter on the timeframes. Because it presumably is serving the business purpose if they've spent the time to do it.

So I can't say used in the ordinary course of business because I'm certain I'm going to have motion practice that we don't use it in the ordinary course of business as they're requesting it. I think that there needs to be, much like what was said about the Sedona Principles--and there is much that I don't agree about in the Sedona Principles--but I think that definition of active data is important. And I think that's really where the divide seems to be.

That is, if they're actively adding information

or taking from it, even if they don't do it regularly, it's something that is accessible. It's something that can be produced.

JUDGE ROSENTHAL: Can I ask a question about if on the example you just gave of the database that was not--was described by the producing party as difficult to provide in production without some additional--without some unusual cost or burden associated with it. What was the nature of that cost or burden?

MR. RYAN: It was the cost, really, of the IT people having to query it. And my response to that was if you had kept the information on index cards and stored it in a warehouse, you would have had to have sent a team of lawyers or staff to go get it. This issue that there is a cost crisis in the production of some of this electronic data is incrementally or differentially, I think, overstated.

JUDGE ROSENTHAL: Well, hang on one second. Is the cost of that searching that database, is that a cost because there was something about the way in

which that database was stored that did not--that required some technological massaging or conversion or translation before it could be read in the way that the producing party or the requesting party wanted or needed?

MR. RYAN: I think all databases require some effort to bring them down.

JUDGE ROSENTHAL: To bring them down?

MR. RYAN: To bring them down to where the requesting party can utilize them. That's by definition. Whether it's in a warehouse or not. Absolutely, you're going to have that.

The question that I think Your Honor presents is there is also a scenario where they have to write software because it's no longer active. It's a legacy database that nobody can do. And in my experience and having heard how people have dealt with this, the parties reach some agreement on it. And they either reach an agreement that somebody is going to write the software, or they get the software. And I think the case law is evolving to address that issue. But for the most part, that

usually is a database that's been taken offline.

So the costs that we're being asked, we're really querying the database to do--it's almost analogous to what you'd have to do to go to a warehouse to get the information. Telling the staff, go and look into these file cabinets and pull that information.

JUDGE SCHEINDLIN: So this offline database that you just described, would you consider that inaccessible or second tier, whichever one?

MR. RYAN: I would.

JUDGE SCHEINDLIN: You would?

MR. RYAN: I think that that presents--I don't call it inaccessible.

JUDGE SCHEINDLIN: No, but second tier?

MR. RYAN: I would consider that something that the parties need to negotiate because you could take offline a database that is absolutely relevant, and there is limited burden. And if it was kept in a warehouse in paper, they'd have to give it to me.

JUDGE ROSENTHAL: Well, subject to the

proportionality test.

MR. RYAN: Correct. But presumably, you've met that issue by getting access to it. If you don't, then that's another question.

But if this was a database that went to drug safety or went to the safety and health, and they kept it in some time, and they made a decision to take it offline, just as they made the decision to go to the warehouse, that, I think, embedding the cost shifting analysis in that and whether it should be now accessible turns the presumption, I think, on its head of the producing party paying.

JUDGE SCHEINDLIN: So you don't accept that one as second tier, really?

MR. RYAN: Maybe it's our vernacular of "second tier." I would accept--in the process of my requesting, I would accept the active databases, and I would accept the right to go fight with them to get that.

JUDGE SCHEINDLIN: I see.

MR. RYAN: But I do not accept that that's data that is equivalent to back-up tapes.

JUDGE SCHEINDLIN: Gotcha.

MR. RYAN: Where you're talking about the inability to find a specific or unique package of information that is very difficult to find.

JUDGE ROSENTHAL: Is that any different from saying that there are levels of inaccessibility that will change as technology changes?

MR. RYAN: That's absolutely correct.

JUDGE ROSENTHAL: Anything further of Mr. Ryan?

[No response.]

MR. RYAN: Thank you very much for the time, and I apologize for running over.

JUDGE ROSENTHAL: Mr. Altman?

MR. ALTMAN: It's still morning. Good morning, everyone. My name is Keith Altman. I'm the director of adverse event analysis for Finkelstein & Partners, which is a law firm based in Newburgh, New York.

In addition to litigating cases, my firm, through me, provides discovery consulting services to numerous law firms around the country. In the last seven years, I've worked on several large

pharmaceutical cases and probably have helped manage about 60 million pages of paper discovery and several hundred gigabytes of database discovery.

And I'm the one that usually is the person who actually has to work with this information. I'm the one that coordinates with the experts who are going to have to take this information and render opinions based on it. So when I talk about this, I'm coming from the perspective of the guy who gets the dump and has to make heads or tails out of it. So it's a little different perspective than just simply asking for it, and it's somebody else's responsibility.

I've lectured at the Judicial College for the State of New Jersey, for the State of Mississippi. I've also written a book chapter in a book put out by the Federal Bar Association on electronic discovery.

I actually want to comment on the Judicial College in the State of Mississippi to show where electronic discovery has come to. When we did this

session, it was about a half-day session. One of the judges walked up to me, an older gentleman, and said, "You know, I can't understand why you guys are here. This stuff is completely unimportant to us. I deal with divorce cases. I don't deal with any of this stuff."

At the end of the session, he came back up to me and says, "Now I understand." He said, "Just last week, I'm dealing with a simple divorce case. A husband and wife, one of the allegations that the husband was spending too much time on the Internet, with Internet porn and things like that. And the issue was raised whether I should allow what was on that hard drive to be made accessible through discovery in this case, and I just didn't know how to deal with it."

And so, I think that just shows that this is not the problem with the big cases. It's not the problem with the small cases. This is an issue of this is where everything is going. Everything is about electronic information these days.

JUDGE ROSENTHAL: Mr. Altman, I wanted to ask

you one question about something in your written submission. You said that--and your pages aren't numbered. I'm sorry. You said in your discussion that in your lectures and in the cases that you handle, you recommend a very strong preservation order signed at the same time as the complaint is filed. And as part of that, you recommend an order that would stop all routine records recycling.

And you say that you recognize that this kind of order can be very difficult for the party subjected to it, and then you go on to say--and here's what particularly caught my eye--"This is one of the desired effects."

MR. ALTMAN: Part of the problem with negotiating preservation orders, and I've been involved in that process for most of these litigations, they take too long--six months, nine months, a year. We're still negotiating preservation orders after these litigations have started.

I think there has to be some way, and I don't know exactly what the way is, to bring the parties

to the table very quickly. This data is fragile. It's transient.

And you know, for example, take a pharmaceutical litigation. A drug gets pulled off the market. The most important e-mails that might exist are the e-mails that were done in the 30, 60 days up to the withdrawal of that product. We all know very often these litigations get filed very quickly after such an event. So preserving that information and given the fact that I--

JUDGE ROSENTHAL: May I ask you a question? Are those e-mails subject to any statutory or regulatory preservation requirement because of the pharmaceutical industry's highly regulated nature?

MR. ALTMAN: Some of them may be. But I will tell you, my first--I recommend four depositions take place as early as possible, and they are the records manager, the MIS manager, and in the pharmaceutical context, the director of safety surveillance and the director of sales force automation. Which are really the four key pieces of information.

And my experience in being at the depositions of many records managers is that while they appear to have a very strong records retention protocol for their electronic information, they will freely admit that the format of the information is irrelevant to how long you need to keep it. It doesn't really matter.

When you sit and you start talking to people out in the trenches, they don't even know that there is a records retention policy. They don't have any particular protocols at all. They kind of do what they want, when they feel. And I'm not suggesting that people have dishonorable intentions because I truly believe that these problems are just human nature type problems.

I, myself, and there was another gentleman before, I have every e-mail I've ever sent or received. That's my records retention policy. Is that necessarily the best one? For me, it works. For somebody else, it may not work. And unfortunately, there isn't necessarily, for lack of a better term, a standard of care of what's the

best way to do that.

JUDGE KEISLER: How much of a records retention policy depends upon the operation of an automatic system, and how much of a records retention policy depends on individuals knowing what it is and manually choosing to follow it?

MR. ALTMAN: Well, in a typical corporation, there is generally an automatic--often an automatic purge of your inbox and your e-mails. People are instructed that they should save things that are relevant for business purposes. If this is a drug safety issue, you need to save it for X period of time. And you're supposed to move it out of your inbox and put it into some other place that is not purged on a regular basis.

But there is a big disconnect with how that's going on. Companies are trying to put these procedures in place, but people are not necessarily aware. And when you talk to these people, if you ask them, and I try to suggest to the attorneys that they ask in every deposition, "Are you aware of the records retention policy with respect to

e-mail? What do you personally do to protect your e-mails in accordance with the records retention policy?"

And unfortunately, the reality is that they don't know. They don't have good answers to that. And I've seen this, you know, at the level of director of safety surveillance in an organization all the way down to, you know, the low-level staff. So it's really a problem.

So this kind of ties back to what you've asked me. In the very short term, I think you need to do something so that the other side comes to the table to work with you to negotiate a more reasonable preservation order that is consistent with the goals of that particular case.

I would love to be able to sit down and say, "Those 97 servers out here that at first glance I said you need to save because I don't know any better? You don't need to save anything off of there. We don't think there's any relevant information there." That would be a great and wonderful goal.

PROFESSOR MARCUS: You mentioned that there is a problem getting the people on the front line to do what the policy says. Is that also a problem with preservation orders? Do they suddenly start sitting up and listening when there is a preservation order, or is that just something else that goes to the top of the management pyramid but doesn't really filter down to all of the people who are in control of the data?

MR. ALTMAN: My general experience, because those are also serious questions I suggest people ask is, "Were you aware of the litigation hold? How were you informed about that? And did you do things to comply with it?"

I have found that there generally is an awareness of the need to preserve, and I truly believe people are trying to do their best to preserve information. And there is not nearly the problem that exists before there is some kind of litigation hold.

JUDGE SCHEINDLIN: I've been reviewing your written comments. And clearly, you support meet

and confer, and you even have lots of hints on how to do it well. But we've spent a lot of time talking about the two-tier and accessibility, you might as well weigh in while you can. What is your bottom line on that proposal?

MR. ALTMAN: I think that trying to put this concept of accessibility or inaccessibility is just too subjective to be workable. I could think of--to say it's simply back-up tapes or to say it's simply on a hard drive, I could think of lots of examples of each that would break the mold.

For example, if I have a server, okay, it's got a database on it. We don't use it anymore. But it's sitting in somebody's office, and all that somebody has to do is plug--you know, sit down at it, and they can access the data. Well, I don't access that on an everyday basis. Does that make that inaccessible?

Or the question that was raised, and I often deal with this, and a great context to that, in pharmaceutical litigations, what do you do with the sales reps? You might have 3,000 sales reps out on

the street, each one of which with a laptop. And they obviously are collecting lots of information as they go out into doctors' offices and things like that.

It becomes a major problem when the pharmaceutical litigation starts. What do you do with 3,000 sales rep laptops that it's not even like you can just--you know, they're all hooked up in a network. They're all out in the field. How do you preserve that kind of information? Does that make that inaccessible?

I can tell you my general feeling on--

JUDGE ROSENTHAL: Can I ask you a question? And I don't mean to interrupt you, but I want to just make sure you share with us a little bit how you deal with those 3,000 people.

MR. ALTMAN: Well, you know, I'd like to talk about the Propulsid model.

JUDGE ROSENTHAL: That's fine.

MR. ALTMAN: I was involved in the Propulsid litigation. It was interesting to hear Mr. Van Itallie speak, and I had not ever met him before.

But I believe Ken Conour, who spoke in San Francisco, was part of that process, and I must tell you that process worked extremely well. Right from the first minute of that litigation, we had many, many meet and confers.

We came up with a preservation model that I think it really resolves a lot of the issues that takes place, and it was actually very simple. And what we said is, okay, we're going to start preserving information today. All the back-up tapes that could possibly have discoverable information on it, you will put those aside. You will never use those again.

You will tell everybody in the company about the litigation, about the litigation hold, what kind of information is relevant. You will implement a collection process by which each person will be told if you create a document, going forward, relevant to Propulsid, you will send it to the centralized collecting point.

And then you go out and you buy brand-new back-up tapes, and you start recycling your back-up

tapes. Because at that point, the back-up tapes, going forward, are really just for the normal disaster recovery purposes. And in doing that, that brings the cost down tremendously.

Or the parallel to that is you say to the sales reps, "Do you have information relevant to Propulsid on your laptop? If you do, send a copy of it here." And you have to take some effort to do that.

You know, I see people complaining about the effort of having to go to 2,000 workstations to look for relevant material. It's not realistic that that has to happen. Usually, a company can identify here's the people that are likely to contain information relevant to this litigation.

First of all, I don't think there's any real burden to send a communication out to the entire organization. I mean, you can do that in one broadcast e-mail and say even if you're not a primary person that has relevant information, just check your machine quickly. Do a rudimentary check to see if you happen to have anything on there.

MR. CICERO: Mr. Altman, let me interrupt you, if I may, for just a moment. Because the example you're using, I may be naive, but I don't think I am, having gone through this kind of a process numerous times with paper documents and so on. I would not consider, nor do I think I'd have the temerity to suggest, that going to 3,000 laptops to get it meant that the material was not reasonably accessible.

It seems to me you've got the same thing--in some ways something easier than you had when you had going to get paper records, calendars, et cetera, et cetera, et cetera, from salesmen all over the place. So that while I take your point as far as using the example of the fact that there are documents or records, hard drives all over the place, and there may well be defense counsel--or not defense counsel--producing counsel who don't want to supply that kind of stuff.

But I suspect that most people looking at that would not find that, at least as I understand that concept of what we're driving at, that that would

be not reasonably accessible material. It seems to me it's, just as you said, there are very routine ways to get it. Most people would recognize that.

MR. ALTMAN: Unfortunately, that's not--

MR. CICERO: I'm sorry?

MR. ALTMAN: I was going to say, unfortunately, that's not my experience. I can tell you in some of the litigation I'm involved in, they've argued that having to do anything associated with sales force laptops is unreasonably burdensome and gets into this accessible issue.

JUDGE SCHEINDLIN: Burdensome, but not inaccessible.

MR. ALTMAN: Well, but they're trying to tie the whole thing together. And they're using Zubulake as the basis for a lot of that inaccessibility. It's not your fault, but it's--but I think, frankly, they are distorting it. I'm agreeing with--

MR. CICERO: That may be. They may be arguing that. They've been arguing that for years about salesmen's records, whether they were in the trunk

of the car or whatever.

JUDGE ROSENTHAL: Okay. We've solved the problem. We're going to get rid of salesmen.

[Laughter.]

JUDGE ROSENTHAL: Professor Marcus?

PROFESSOR MARCUS: It seems to me that if you've been having this problem for a long time, it's not at all clear why having the reasonable accessibility provision in the rule makes a difference. It sounds like this is a headache for you, and you think it will continue to be a headache. But if the rule is about something somewhat different, why is it bad for what you do?

MR. ALTMAN: Because I think the definition is what's going to be the problem. I think there is the appropriate mechanism now to deal with such a thing.

PROFESSOR MARCUS: Do you agree with the previous speaker that active versus inactive is a good dividing line between what you should be looking for, first off, and what you should be looking at only later?

MR. ALTMAN: I think we--I think we differ a little bit. We're mostly consistent with that.

PROFESSOR MARCUS: So it's a problem of defining where that dividing line is?

MR. ALTMAN: Absolutely.

PROFESSOR MARCUS: How would you define it?

MR. ALTMAN: Well, let me put it to you this way, in all the litigation I've been involved in, I've never asked to go to back-up tapes. It's never happened. Not even once. That doesn't mean they shouldn't be saved. But I've never gone back to the back-up tapes. Okay?

So, in my mind, generally, back-up tapes are more of the inaccessible type. But let me give you an example of one that would not be. Let's say, for example, there is a discrete server that no longer existed that was backed up onto one particular back-up tape in total. Here is the whole database is on this one back-up tape. It wouldn't take very much effort to restore that one back-up tape that you specifically know contains the information for that particular database. That

would not be inaccessible.

If I don't know where to find things, you know, I have a sea of 500 back-up tapes--

PROFESSOR MARCUS: Why would one back-up tape not be inaccessible, but 1,000 be inaccessible?

MR. ALTMAN: If I knew that--if I said that I want everything, if everything that was on all 1,000 back-up tapes was relevant and discoverable, and I met the burden of having to get that information, then if I'm asking you for the whole thing, technically, you just turn over all the back-up tapes to me. And you can say, "Here they are." You don't have to look through them because you've got to give them all to me.

JUDGE ROSENTHAL: What about privilege?

MR. ALTMAN: Well, you know, given those issues. But that's the whole point of the claw back provision as well, which kind of falls apart. It's exactly the same thing. It's designed to minimize having to review a lot of the material. But I don't think that's likely to happen.

But I could see that one specific back-up tape,

I don't think it's burdensome to have to do one thing. It's when I have 1,000 that I don't know where on the 1,000 back-up tapes the stuff that I need to review is and the effort of getting it to a point where I can review it.

Let me go to the other end of the spectrum. What I think is always accessible is something that somebody could sit down at a machine and touch, okay? Whether it's by plugging in a server, I could sit down. I could touch it. I could get at it, somebody's machine.

The fact that I may have to go, you know, to another office and sit down at their machine and do it, that doesn't make it inaccessible. But I can touch it. I can feel it. I don't have to do a whole lot of work just to get it to that point.

JUDGE SCHEINDLIN: What if you had to hire somebody to restore it? Would that change its status?

MR. ALTMAN: That's starting to get to be--that's starting to move more into where I would consider the inaccessibility. But I still think

you have to weigh how much effort is required for that.

Like, for example, if I had to hire somebody to restore a single back-up tape just because I don't have the person to do it, I don't know that that would make that back-up tape truly inaccessible in what you're meaning. You know, it's obviously a more difficult issue when you start talking about the tapes.

JUDGE ROSENTHAL: Can I ask one more question, and then I think we will have extended your time, and I apologize for that.

I was struck by your statement just a second ago that you had never had to go into a back- up tape, although you have obviously throughout these various litigations ensured that they were maintained in case that need arose.

Do you have any idea how much--let's just take the Propulsid case as an example--what the financial cost was of having to stop the recycle of all of those back-up tapes that were place at that time, and go out and get brand-new back-up tapes to

be able to move forward, and then to just hang on to the back-up tapes throughout the duration of the litigation?

MR. ALTMAN: I'm not aware of what that cost is. Clearly--clearly, there was a cost. But I think it's a lot less than the uncertainty of saying save all your back-up tapes going forward because we don't know, and I've heard anecdotal information that could be several hundred thousand dollars per month. That is not what we're looking for. We're looking for reasonable protection of the information to give courts and attorneys the opportunity to sit down.

MS. VARNER: Excuse me. I take it that--

JUDGE ROSENTHAL: One more question. This will be--

MS. VARNER: I take it that there was no cost sharing for that cost, whatever it was?

MR. ALTMAN: To preserve the data?

MS. VARNER: For purchasing the new tapes, which was necessitated by the fact that there was a freeze or a hold on the old ones?

MR. ALTMAN: I'm not aware of whether there was or wasn't. I just don't--I was not involved at that level.

I just want to end with one thing. I truly believe that the meet and confer process is really the solution to many of the problems raised by these issues. I've had the opportunity to participate not just in Propulsid, but many of these other processes. I think that discussing preservation protocols in those meet and confers are very, very valuable.

I think what producing parties will find is there may be quite a bit of information they thought they needed to maintain is really stuff that the requesting party is not going to be looking to and they can not have to preserve that information. I think that they can define good, solid production protocols and work together to minimize the cost and the burden of producing that information.

And that if this becomes a more regular part of these litigations, even down to the lower, you

know, simple divorce or simple contract dispute, that it will ultimately take care of a lot of the problems that have been raised today. And that trying to regularize--I don't know if that's the right term--some of these things or put a definition of inaccessible versus not reasonably accessible in the rules that are going to always create debate will just complicate issues that often don't happen.

JUDGE ROSENTHAL: Thank you very much.

MR. ALTMAN: Thank you.

JUDGE ROSENTHAL: Mr. Kleysteuber? Good morning.

MR. KLEYSTEUBER: Good morning.

JUDGE ROSENTHAL: Before you begin, let me introduce all of--our next speakers are all students at the Yale Law School, who I was very privileged to be able to meet when I went and taught one of Professor Resnick's procedure classes. And as I said to one of them earlier, if it is the mark of a good teacher to inspire students to independent thought that, indeed,

questions the statements made by the teacher, I am a great teacher.

[Laughter.]

MR. KLEYSTEUBER: Thank you for that introduction. And thank you for letting me come this morning. I do just want to say, to start out, that I'm coming to this as a lawyer in training. So be gentle and--the only reason I am really coming is because I'm a lawyer in training who happens to have a life of experience with technology.

JUDGE ROSENTHAL: Are you a gearhead?

MR. KLEYSTEUBER: I'm sorry?

JUDGE ROSENTHAL: Are you a gearhead? Wasn't that the term we heard earlier?

MR. KLEYSTEUBER: I guess you could call me that, yes. And I don't even have as much experience with technology as some of my colleagues who will follow.

But I'm coming these rules, as are the five of us, with a fresh eye, if you will, and we're not--we're not looking at it from the perspective

of precedent so much as just what the rules say on their face, the language that's being used, and what we as gearheads, if you will, would take them to mean in our regular course of using our technology.

I have very simple points, really. And they can be made quite quickly. So I won't take much of your time. The first is that I think the rule revisions take into account, more than anything, costs as a primary motivating factor. And I think that throwing around the idea of costs is a very easy way of skirting a very complicated issue because the costs are multi-faceted, and they're always changing.

In fact, they're always falling. If you had a chance to look at my little graph, which I was proud of, the cost of magnetic storage has plummeted--and this even shocked me--by, since 1980, I think it was seven orders of magnitude. The costs of data storage are just constantly changing. And to make a rule that's grounded in the idea of it's going to cost a lot to buy a lot

of hard drives or it's going to cost a lot to buy a lot of tapes may be jumping the gun. I'm sorry?

JUDGE ROSENTHAL: I think we've heard a lot of concern that, in fact, it's the very decrease in the cost of data storage and the lack of a reason to get rid of material that has resulted in a huge volume of stuff that leads to the much larger cost of human eyes having to examine it before it can be determined to be responsive, relevant, and nonprivileged.

MR. KLEYSTEUBER: Someone earlier made a point about people no longer keeping records retention policies, management policies, and I think that while that's a valid point, what we are seeing, in fact, in the technology world is a paradigm shift about what you do with records. Do any of you all use Google's g-mail?

Okay. One person at least. You'll know that--you probably know that Google made a big fuss when they introduced a competing mail server because they let you have a gigabyte of storage which was then, when they announced it, a big deal.

And they eliminated--this is the more important part--the use of any folders.

You can't actually make a folder anymore on g-mail because Google's entire idea was you don't need to spend your time sorting your data into files that then is going to be this is the one file that contains all of the records pertinent to this matter. Rather, you just do a search for the keywords, and the search is so fast and so good--it's so clever, in fact--you don't need to spend your time managing the records. The computer does it for you.

So I think that it's true that if you build it, it will come, right? If we build more storage capacity, we'll find something to put on it. But as our computers get cleverer and as we make programs that can better understand what we're looking for, the problem of filtering out privileged information, the problem of finding the relevant records is actually still going to go away, I think.

JUDGE WALKER: Would I be correct in

understanding your comments with regard to the increasing storage capacity that there is likewise a quantum leap in the accessibility of that stored information?

MR. KLEYSTEUBER: That's correct. Yes.

JUDGE WALKER: The two go together. Even if we had cheaper and cheaper and faster and faster back-up tapes, that wouldn't be what you're talking about?

MR. KLEYSTEUBER: Right.

JUDGE WALKER: You're talking about storage and accessibility, aren't you?

MR. KLEYSTEUBER: Yes, and the accessibility is also coming from faster and faster processing, which is something that I didn't really bring up. But you all, I'm sure, heard about the new announcement that the Pentium 4, we're moving past that. In a few months, we'll have IBM making a chip that runs about at least twice as fast, maybe four times as fast as our current processors.

When you can process data faster, you can search better and more intuitively through it. I'm

sorry. I do think that the costs to search are really falling as well.

JUDGE ROSENTHAL: May I ask you a question that we've also heard some debate about? And that is the adequacy of our descriptions and labels, electronically stored information?

MR. KLEYSTEUBER: I read one set of comments that was submitted that used the term "electronic records." I quite like that. I'm not as uncomfortable with it because I think judges will pretty much get the gist of what you're saying there. I am more uncomfortable with other language that's inserted, particularly in the note to Rule 26(b)(2) with reasonably inaccessible.

I think that putting in--enshrining a particular technological process, such as deletion, or a particular technological task, such as disaster recovery, is it's going to date your rule before it's even created. Google has anticipated this. We're no longer talking about archives and records. We're just going to search everything every time because we can do that.

The empirical evidence that we have in terms of whether the costs of the specific tasks of recovering deleted data or recovering disaster recovery data, as far as I can tell, is anecdotal. And while we have--

JUDGE SCHEINDLIN: Does that mean that everything essentially stays online? There's no offline anymore?

MR. KLEYSTEUBER: That's the paradigm that Google wants to move you toward at least.

JUDGE SCHEINDLIN: It would all be online. Would that mean, so it's all active? It's searchable. It's online.

MR. KLEYSTEUBER: It's all active and all searchable because it actually costs more to move it into the inactive zone than to just buy a new hard drive, which will cost you nothing.

JUDGE ROSENTHAL: Does that mean you can't delete it, even if you wanted to?

MR. KLEYSTEUBER: No, it doesn't mean that. And certainly I think that computer programmers will always know people will want to erase things.

But it means that--it explains, for example, the emergence of programs like scrubbing programs that erase your hard drive because you know that your hard drive is so big. There is stuff left on there from eons ago that just hasn't been overwritten yet because you don't need that space yet.

JUDGE SCHEINDLIN: But the one thing that would remain, even in the new world that you just described, would be a disaster recovery back-up system in case there was a complete crash or a--

MR. KLEYSTEUBER: But even the disaster recovery system--I'll tell a personal anecdote here, even though I'm against anecdotes. I have a server at home, and the way I do disaster recovery is I just keep an entire copy hard drive. I have a back-up drive, a tape drive which I no longer use. And I use the phrase in my comments that back-up tapes may some day be like mimeographs. You know, it's a very slow system that doesn't work very well.

JUDGE SCHEINDLIN: But I'm not talking about the way to do it, but there will be a disaster

recovery system.

MR. KLEYSTEUBER: I think so. But the way to do it may, in fact, be so analogous to the routine operations that to talk about it as disaster recovery and assume that disaster recovery means cost doesn't equate. I'm just going to copy over an image of yesterday's things to get disaster recovery.

MR. CICERO: I'd like to follow up on that for just a moment, if I may. Because your comments toward the end of your paper tied in with a couple of questions here. We have heard over and over--and your comments about Google searches, et cetera.

We have heard over and over here that the problem with back-up tapes is that there is no way to go in and find a particular subject. That they're not organized the way other things are and so on. Everything is just copied. You're suggesting and I ask that isn't conceivable that in a few years, or maybe less time, there will be a way to search all those things routinely?

MR. KLEYSTEUBER: I think that's not--

MR. CICERO: That Google or somebody will come up with a way where if you want to know about salesman Joe Sax's activities, they'll be able to go into all these back-up tapes, or whatever they are, the back-up storage devices, and they'll find it?

MR. KLEYSTEUBER: And this ties in also to the question of legacy and 26(b)(2).

PROFESSOR MARCUS: Can I--

MR. KLEYSTEUBER: Go ahead. I'm sorry.

PROFESSOR MARCUS: Is it possible that using terms that you might think could become passe soon would have a benefit because as they become passe, they are replaced by a world in which nobody has to worry about that anymore, and you've conveyed exactly the message you want to convey about the old stuff that may still be lying around? Unless Frank Cicero is right that it will become somehow searchable. So if your new world is coming, maybe that simply supplants the note in a desirable way?

MR. KLEYSTEUBER: I don't want to tread on my

friend Mr. Tannenbaum's feet because this is the whole focus of his comments. But if you choose words that protect a certain interest, right now, you are, in fact, freezing the status quo. And companies that want to keep certain kinds of data inaccessible to plaintiffs will preserve the idea of a back-up system and disaster recovery in the old frame of mind precisely because they can then say, "Oh, but we don't really have access to it. It's kind of too expensive."

JUDGE KEISLER: You read our note, don't you, as, in the word's of your testimony, "permanently labeling these scenarios disaster recovery"?

MR. KLEYSTEUBER: At least until the next revision.

JUDGE KEISLER: Until the next revision. Well, permanently while this is in effect as unreasonably accessible. And I've heard that reading from other people, colleagues of mine, too, and it's not my reading. And I'm just wondering whether we simply need to add another sentence to clarify.

The way I read a sentence like "some

information may be stored solely for disaster recovery purposes and be expensive and difficult to use for other purposes" is not to say that all information stored for disaster recovery purposes is necessarily expensive and difficult to use for other purposes, but rather there is a--at least a subset of that information. And with respect to that information, the label "reasonably accessible" would not apply, but that there could be other disaster recovery information.

The other way, I'm just wondering would it be sufficient, do you think, to clear up--assuming that that's a consensus view of the committee that that's what we're trying to say--to add a sentence or two that just says we're not saying that these categories are forever, or even today, in all instances not accessible?

MR. KLEYSTEUBER: In my view, that would be a significant improvement, but I personally still take the use of the term "reasonably inaccessible" as too easy of a label to grab onto. I think the work that's being done in Rule 26(b) is in the

balancing test--(b)(2). And that is what really needs to be focused on.

And when you add a term following it, like reasonably inaccessible, that people can grab onto and say, "Well, that's really what it's trying to say. It's not trying to say balancing test. It's trying to say reasonably inaccessible," that that's where the focus is going to be.

And the work that you really want to be done is you want the judges to balance the costs with the potential benefits.

JUDGE ROSENTHAL: And I think that one way, as we've said, to look at our effort is to make those proportionality factors clearer and more effective applied to this stuff, which, I take from your comments, we will not be referring to as discovery in a short period. We will be referring to it as Googling?

MR. KLEYSTEUBER: Well, I think Google might take umbrage at that.

JUDGE ROSENTHAL: They might like it. It will be like Kleenex.

MR. KLEYSTEUBER: It might dilute their trade name.

JUDGE HAGY: If I may, I think we ought--not just this time, but a lot of us have been using the word "not reasonably inaccessible," which is not a term we use. And just for the record, what we're really--I think when the record says that, what we're really trying to say is not reasonably accessible. That's what the statute, the proposed statute--

MR. KLEYSTEUBER: Reasonably inaccessible or not.

JUDGE HAGY: Reasonably inaccessible is a difficult concept.

MR. KLEYSTEUBER: And I'm looking back, and I have "unreasonably accessible," which is completely wrong.

I'll just make one more comment because I know I'm running low on time. It's about Rule 37, and I think that the motive behind the suggested amendment, as I take it, is very worthwhile, which is to point out to judges that there is some stuff

that goes on behind the scenes that causes sometimes some data to be lost.

But I think that crafting the safe harbor provision, as it's written at least, is dangerous partly because it really creates a big loophole for people to walk through.

And I'll just tell you that if I were sued and the new rules were in effect, I would quickly go to my computer and set my data retention policy on my Internet Explorer cache to be one day on the history, 50 kilobytes of retention of cached files, and then I'd quickly run my hard drive scrubbing program--if I had something to hide.

JUDGE ROSENTHAL: If you did that the day after you were sued, you'd be in a world of trouble.

MR. KLEYSTEUBER: Yes. Clearly--

[Laughter.]

JUDGE ROSENTHAL: Even under the proposed rules.

MR. KLEYSTEUBER: The way I'm telling it is to make it clearly manifest that it would be a bad faith activity. But the way the proposed rules are

written, at least I could make a plausible argument that I am anticipating needing lots of hard drive space for my litigation, and you know, these are things that would have been deleted anyway. I'm just making sure that I have lots of free space.

JUDGE HAGY: How do you argue in a jail cell?

[Laughter.]

JUDGE ROSENTHAL: Keep up with your law school friends.

JUDGE HAGY: Study a little more.

MR. KLEYSTEUBER: I guess what I just want to say about that rule is that if you are going to make that amendment, I would really highlight the idea of intent. And I try to make a practical distinction between deleting and erasing. Erasing being the automatic thing that's overwriting, and deleting being the intentional thing.

But changing any kind of data retention policy in any way after the point of lawsuit is, in fact, deleting, and perhaps an addition to the note to that effect or some other way of bringing that to judges' attention would be helpful.

JUDGE ROSENTHAL: You actually raise an interesting point, which has been brought home to me in various conversations I've had, which is that many companies, we have been told, do not have adequate routine retention and destruction policies, particularly with respect to their electronic information.

But if they tend to be companies that have some lawsuits that they have already faced or if they are on notice of pending litigation, they are most reluctant to then change any aspect of their retention policy or their destruction policy because they are on notice of litigation. So they're in sort of a paralyzed situation, which is not good for anybody.

MR. KLEYSTEUBER: I think they could still ask the judge for permission to change, given some reasonable necessity that had arisen in their regular course of business.

JUDGE ROSENTHAL: I think they hope not to be asking the judge for anything.

MR. KLEYSTEUBER: All right.

JUDGE ROSENTHAL: Any other questions?

[No response.]

JUDGE ROSENTHAL: Thank you very much, sir.

MR. KLEYSTEUBER: Thank you.

JUDGE ROSENTHAL: Mr. Heidler?

MR. HEIDLER: Your Honor and members of the committee, thank you for the opportunity to testify this afternoon, I see it already is.

I'd like to start out by briefly describing what I hope to bring to this process. Because I see this as an incredibly complex process because it deals with two complex fields--the field of law and the field of technology. And I can only imagine the enormous legal expertise that has gone into this process. And as someone who has spent several years as a professional technology consultant and project manager, I hope that I can bring a lot of technical expertise to this process that might otherwise be under represented.

So, with that goal in mind, I'd like to comment specifically on the proposed amendments to Rules 26(b)(2) and 34(b). Overall, I like the proposed

amendment to Rule 26(b)(2) because I think it's necessary to balance the interests of requesting and responding parties. In particular, as someone who has consulted on large and small technology projects, I know that it can be more difficult to access data that must be restored or to access data that relies on obsolete systems.

JUDGE SCHEINDLIN: Let me ask you about your topic heading on page 2. You say the reasonably accessible standard is necessary for electronic discovery because unlike paper documents, electronic data must be restored, and the technologies upon which it depends can become obsolete.

So would your great divide between Tier 1 and Tier 2 be the necessity of restoration or the bringing back an obsolete system so that it's now usable? Would that be the real divide?

MR. HEIDLER: The way I see this divide is there's a placeholder in the rule itself, and it stands for what's in the notes. The note mentions many factors that can lead to data being not

reasonably accessible. Two of them that I have specific qualifications to address are restoration and obsolescence because I've dealt with that in my professional experience.

JUDGE SCHEINDLIN: But the others would just be cost and burden, which we've discussed a lot in the day and a half we've been sitting here, wouldn't they be? This is what makes it really unique to e-discovery as opposed to paper?

MR. HEIDLER: That is correct.

JUDGE SCHEINDLIN: You do agree with that?

MR. HEIDLER: And in fact, I would boil everything down to cost. Even burden is just a measure of time, as I see it. And time is a measure of cost as well.

JUDGE SCHEINDLIN: Right. This distinguishes electronic material from paper, this idea of restoration?

MR. HEIDLER: Precisely.

JUDGE SCHEINDLIN: Right. Okay.

MR. HEIDLER: So these are factors that are unique to electronic data that do not present

themselves in the paper world.

JUDGE SCHEINDLIN: Right. Okay.

MR. HEIDLER: So I feel particularly qualified to address these concepts of data restoration, data obsolescence. As part of my professional career prior to beginning law school, I was charged with writing proposals for technology projects. And I know that in drafting a proposal and estimating the cost for a project, I would require more time and more money for a project that required restoring data or accessing data that was needed to be restored into an obsolete system.

JUDGE SCHEINDLIN: Can I interrupt with just a question because I don't understand? How do you bring obsolete data back? Does it mean writing a program? Is that what it generally means?

MR. HEIDLER: When I say obsolete data, I mean legacy data. Data that's based on an obsolete system.

JUDGE SCHEINDLIN: I know. So how do you bring it back, in a word? Not a whole--

MR. HEIDLER: Okay. A large system would have

data backed up from its database. And whenever that database becomes obsolete, whenever the hardware and the operating system become obsolete and become replaced by newer versions and newer models, it becomes more difficult to access that data in the old environment.

JUDGE SCHEINDLIN: And you do it by?

MR. HEIDLER: You would do it by reconstructing the old environment.

JUDGE SCHEINDLIN: Okay. That's what I needed.

MR. HEIDLER: There are several ways that one could do this. If--depending on how the data is arranged in the database, if the database has an intuitive arrangement, if the items in the database are well named and not too complex, then this could be done by querying the database directly, as someone previously mentioned.

If the database is complex, if the software application that uses the database performs specific calculations on the data or provides some reporting functionality, then the responding party could need to reconstruct that environment in order

to access the data.

JUDGE SCHEINDLIN: That was helpful. Thank you.

MR. HEIDLER: You're welcome. And in my comments, I describe how this process of restoring data into a system could cause a small to medium-sized organization to spend over $65,000. And I used the methodology that I've used to estimate a project of this scope to do that. And that estimation does not include the cost to restore data from tape. So that--

JUDGE ROSENTHAL: I'm sorry. I didn't mean to interrupt you. I wanted to pick up on the answer that you gave just a minute ago. Reconstructing data from a database that is designed to meet a certain functionality, reconstructing it so that it can provide other information that might be responsive in litigation, is that reconstruction function that you're discussing--is that a function applied to what we have been thinking of as active data?

MR. HEIDLER: This is data that would have been

previously taken offline.

JUDGE ROSENTHAL: Okay. All right. Thank you.

MR. HEIDLER: You're welcome. And so--

JUDGE ROSENTHAL: Wait. I've got to ask one more question. I'm sorry.

MR. HEIDLER: Please.

JUDGE ROSENTHAL: On these complex databases, trying to understand how they operate and the limitations of them in discovery, if that database had not previously been taken offline--if it was still online--would there be any forensic type of--computer forensic type of work or any other cost or burden to the producing party to provide it in the--well, in order to--to understand what it said, examine it, and to produce it?

MR. HEIDLER: There are multiple components that go into these large business systems. One of them is the database. Sometimes the database on its own could supply the data, and it would probably need to be formatted, unless the requesting party were willing to take the data as it was with some kind of privilege agreement.

JUDGE ROSENTHAL: That's just a formatting problem. And I want to understand, just doesn't mean it's trivial perhaps, but it is a problem of formatting rather than restoring or reconstructing?

MR. HEIDLER: One problem would be formatting. In other cases and with other databases I've used, and I could describe all of the technical terminology to explain why this could be, but I don't think it would be particularly useful. But in some cases, it's just not practical to obtain data directly from a database. The database is poorly designed. Some commercial databases on which I've worked don't follow the normalization patterns that are required for responsible and professional database development.

And in those cases, it would be particularly burdensome to access the data directly from the database. A responding party would need to go through another step to either write software or to implement the software that was designed originally to access the database in order to get to the data.

JUDGE ROSENTHAL: Would it be consistent with

the divide of 26(b)(2) to think of that as not reasonably accessible?

MR. HEIDLER: I think it depends on the issue, on the amount in controversy, on the resources of the parties. Ultimately, it's something that I think should be left to the discretion of a judge. However, I think putting these factors in the comment and in the note would be helpful in that process.

JUDGE ROSENTHAL: Thank you. Go ahead, please. I'm sorry.

MR. HEIDLER: So in my comments, I describe how, without the need to restore data from tape, just restoring data to an application environment could cost a small to medium-sized organization over $65,000. Now were that technology obsolete, then the cost would be much more variable. But it could exceed $100,000 just to get data to the point where it is accessible.

And I don't say all of this to suggest that it will be the norm or it will be typical in litigation, but rather, I think when all of these

factors line up for a party and a party needs to reconstruct an application that requires expensive software licenses or complex software, it could lead the party to pay upwards of over $100,000 to access data or to make it accessible to them.

And finally, I'd like to comment on the proposed amendment to Rule 34(b) as well. As I read the proposed amendment to that rule, it might allow a responding party to produce data in a cumbersome format because the rule does not require the requesting party to specify a data format. So if the requesting party does not specify a data format, then the responding party may produce the data in a form in which it is already maintained.

And not knowing--and not having the knowledge about litigation that all of you do, my concern would be that a responding party or someone who is anticipating litigation would store data in multiple formats, one of which they know would be burdensome, so they could supply that format in litigation.

So the suggestion that I include in my comment

would be to require the requesting party to specify at least one data format, based on a conversation in discovery conference. So the parties would agree on that ahead of time.

JUDGE ROSENTHAL: Half our civil dockets in many jurisdictions are pro se. It might not be reasonable to expect--to require a pro se litigant to specify the electronic format in which it wants information to be provided. That's part of the concern. Because we have to write these rules for all cases.

MR. HEIDLER: That makes sense. Otherwise, those were all of the comments that I had. I'd like to thank you for the opportunity to participate in the process. You have my comments, and if you have any questions on them, I'd be glad to answer them.

JUDGE ROSENTHAL: Thank you very much.

Mr. Shepard?

MR. SHEPARD: Your Honors, members of the committee, thank you. I'm grateful for Judge Rosenthal having come to speak at our school and

also for the opportunity to learn more and think more about these issues. As law students, we're coming very new to a longstanding and fascinating discussion, and it's an honor to be able to add our voices to those who have already spoken today.

I would like to briefly touch on the proposed reasonable accessibility standard. I was interested to hear that the comments earlier today drew a real distinction between this proposed standard and the procedure through which it would be applied. A lot of the testimony would begin by speaking first about the standard and then talking about a distinct question about the increase in motion practice or the two-tiered system of review in the proposed changes to 26(b)(2).

It seemed to me that the question, which was well phrased by Professor Ball earlier this morning, whether or not a reasonable accessibility standard--

[Laughter.]

JUDGE ROSENTHAL: We're laughing because you promoted him.

MR. SHEPARD: From our point of view, everyone here is a professor.

[Laughter.]

JUDGE ROSENTHAL: Good comeback. That's good.

MR. SHEPARD: It seems to me that his question, whether or not the reasonably accessible standard makes it easier for a court to reach the relevant information and to make the right decision depends on the procedure in which that standard is applied.

In the Zubulake case, Judge Scheindlin employed the reasonable accessibility standard in the context of the defendant corporation's 26(c) motion for a protective order. And the standard there seemed to be a useful shorthand. It allowed Judge Scheindlin to say, well, we don't need to consider the motion to shift costs relevant to these requests because everybody knows that these requests are for active information, are for optical disks. It's just simply so easy to get that talking about the cost doesn't make sense in this context.

The advantages of the reasonable accessibility

standard in the Rule 26(c) context would be to keep the conversation not necessarily on the type of technology used, but on the cost that would occur if the defendant or that the responding party, rather, would incur in accessing the data.

It would also make more sense in this context because the responding party is going to be more familiar with the storage system and will also help to reduce the motion practice. Because in this context, the responding party will be making both arguments at once, both that the data is not reasonably accessible and that it poses an undue burden or expense, which is the concern under 26(c) protective motion.

And finally, it looks different in the 26(c) context rather than 26(b)(2) context because, in the 26(c) context, the true cost of making an error is lower. If coming from the side of making a motion for a protective order, if the court gets it wrong, so to speak, and calls something inaccessible when it really should be considered reasonably accessible, there still will be further

opportunity to access this data if the responding corporation or if the responding party isn't able to make the further showing that, all right, even if it is reasonably inaccessible, it also causes us too much of an undue burden in order to access it.

I'd also like to touch briefly on the Rule 26(f) conference. It seems that everybody who has spoken here today agrees that this is a really good idea. I suggest only a minor addition to this rule. And that would be to bring in the technical experts as early as possible.

I know Judge Rosenthal earlier made mention of the New Jersey District rule, which requires lawyers to confer with their clients on these technical issues before attending the 26(f) conference. This seems an excellent idea that could also perhaps be integrated into the notes published by this committee because this is an area in which, I'm sure, we're all familiar.

There is a great potential for people not to know what they don't know. It's easy to feel that you're familiar with the system because you've

worked with something similar to it or you've dealt with something like that in the past. And yet when it comes down to a specific question that you hadn't anticipated before, you find too late after the fact that you really should have talked with the expert beforehand.

Finally, I would like to echo Mr. Kurt's concern earlier today with the phrase "electronically stored information." He suggested "digitally stored information." But I'm concerned that the word "information" might prove to be a little under inclusive over the long term.

This is a concern that might not arise in the next 2, 3 years, perhaps 10 years down the road. But I would suggest using the word "data" rather than "information." When folks hear "information," they tend to think of something that was created by a human user, something that is understandable by--has been created by a human being that refers to some underlying fact.

More and more, computers themselves are generating data that doesn't look like an e-mail or

a note that somebody wrote to somebody else. It looks like--well, to use Mr. Kurt's example, it looks like a blood sugar monitor and the levels of blood sugar that a patient was having.

The examples that came to my mind and that Rudy talked about earlier were caches of saved Web pages that people have visited, cookies that have been placed on the computer. And we can imagine as the software becomes more and more powerful, for computers to interact with their users, computers themselves will be generating more and more information automatically without people understanding what's going on.

It's important that the word "data" be included so that all of that information remains discoverable.

JUDGE ROSENTHAL: Are there any questions?

JUDGE WALKER: May I?

JUDGE ROSENTHAL: Certainly.

JUDGE WALKER: Within this scope of kinds of information that computers are generating, and following up on the earlier reference to the Google

paradigm, so to speak, there is also a, is there not, a dictionary or index type of data that these computers are generating, which in itself becomes an independently searchable vehicle of sorts, which may even provide a measure of insurance against purposeful deletions?

Would that be a fair thing to add to your comment about the use of the word "data" as computer-generated information?

MR. SHEPARD: Yes, Your Honor, I think it would. And when you speak of the indexing feature that many computers are capable of, it also reminds me of what some people have been calling metadata.

JUDGE WALKER: Yes.

MR. SHEPARD: Which refers to the logs the computer keeps of who sees a file and at what time. And this can occur, as Your Honor points out, without the user of that file even understanding what's going on.

JUDGE WALKER: And not even knowing how to delete it.

MR. SHEPARD: And not even knowing how to

delete it. And so, it can provide someone earlier said electronic footprints or fingerprints that show when people have accessed it. I think the rules should make clear that that, too, will remain discoverable.

JUDGE ROSENTHAL: Thank you very much.

MR. SHEPARD: Thank you for the opportunity.

JUDGE ROSENTHAL: Mr. Masters, do you have data for us or information for us?

[Laughter.]

MR. MASTERS: Your Honors, members of the committee, thank you for allowing me to be here. I will be as brief as possible. And my comments included the obligatory notes on 26(b)(2), but I think a lot of what I've said have been echoed by my colleagues, and I'd like to focus on Rule 34(b), which Mr. Heidler talked about a little bit. But I'd like to go more in depth.

I've been involved professionally with computers for over 12 years. And as a learning lawyer and, hopefully, practicing lawyer in the future, I read these amendments as giving me the

ability to bury data in the future with 34(b) as written. And I think it's really a matter of clarification more than anything else.

In my comments, I highlighted three different scenarios where I felt that the rule did not adequately address. I have an "expensive to read" scenario, where data--so 34(b) providing the opportunity to either have data in its originally stored format or in an electronically searchable format, which, to me, does not adequately explain what electronically searchable actually means in the rules.

But to start with the expensive to read scenario, I give an example of the Oracle database, but I believe in the--there's another example in there. Is it Zubulake or Zubulake?

JUDGE SCHEINDLIN: Zubulake.

MR. MASTERS: Zubulake. Thank you.

JUDGE SCHEINDLIN: So Ms. Zubulake informs me.

MR. MASTERS: In that case, I believe data was requested in HP Open Mail format, and I have no idea what that is. But I mean, if I were told I

was getting data in an HP Open Mail format, I would be fairly concerned that I would have to buy something expensive to read it.

Even today in law school, part time I work for a company, and largely what I do is take legacy data and convert it to a standard database format. So I deal with legacy data all the time. And I deal with a lot of expensive to read data.

So being able to produce data in its currently stored format or its originally stored format does concern me, if that's allowed, especially if you have these pro se attorneys who aren't requesting a format of data. If only one format of data is required, and they're allowed to produce--and the producing party is allowed to produce a very expensive to read data, is that something that--

JUDGE SCHEINDLIN: So who should pay the cost of converting it to a usable format? Should it be the producing party that takes the legacy data, converts it with what you need--

MR. MASTERS: Assuming that the data is online, assuming there aren't costs in retrieving the data,

I--for example, let's take HP Open Mail. I'm positive that there's a way to export that to text, and that would presumably be electronically searchable. But the rule, as it stands, if I'm the attorney for UBS Warburg and I produce in an HP Open Mail, that's it. That's all I've got to do.

JUDGE SCHEINDLIN: But I'm still saying the only question is cost, right? Isn't there a cost to you, as the producing party, to convert that to a more usable format?

MR. MASTERS: One, I think it's an extremely minimal cost in this circumstance.

JUDGE SCHEINDLIN: Then it's minimal for the receiving party, too.

MR. MASTERS: Well, not if HP Open Mail is extremely expensive to buy. In other words--

JUDGE SCHEINDLIN: No. Let me just follow up. So you're assuming the producing party still has the software. For them, it would be a trivial cost. But for the receiving party, it would be an expensive item?

MR. MASTERS: Right. And I think that's a safe

assumption. Because if you own HP Open Mail, it has the opportunity to export it to text.

JUDGE SCHEINDLIN: I see.

MR. MASTERS: But if you don't have HP Open Mail, you can't read HP Open Mail.

JUDGE SCHEINDLIN: So it would be equally burdensome. That's a different case. But if it would be inexpensive for the producing party, they ought to produce it in a readable format or usable format?

MR. MASTERS: Yes. Absolutely.

JUDGE SCHEINDLIN: Thank you.

MR. MASTERS: So that's the expensive to read scenario. The sort-of-searchable scenario addresses what I believe is a confusion with--or at least a lack of thorough explanation about what "searchable" is meant to mean. If I am given a PDF file that has--so a PDF file can have either text data in it, or it can have image data in it. If I'm given a PDF file with image data in it, is that searchable?

If I'm a producing party, am I allowed to,

let's say--and I have done this as part of my job. We have had text data that we have reproduced as image data so that it would be less easy for our competitors to copy it and use it. I mean, this is something that we do just in the normal course of business, and I don't see why it wouldn't happen in the legal world.

JUDGE SCHEINDLIN: I have another question, but it's simply based on my ignorance and your knowledge. Is that image file searchable or not? I mean, you answer your own question. I don't know the answer.

MR. MASTERS: I mean, it's--so what do we mean by searchable? If I want to find a word in it, I can't.

JUDGE SCHEINDLIN: You can't?

MR. MASTERS: I can't. Unless we assume that I can export the image somewhere and run it through an optical character recognition software to then give me text. But then that's probably going to be an--I mean, optical character recognition is shady, and especially if when I'm generating these images,

I blur them or I make them harder to read.

JUDGE SCHEINDLIN: But then the problem isn't in the word "searchable." We're okay saying in a searchable format. That's just not a searchable format.

MR. MASTERS: Right. But the notes and the rule don't make explicit what searchable means because a lot of the notes concerning the rule talk about the equivalent in the hard copy world. So within a hard copy world, a document is searchable by looking over it and reading the words and kind of scanning it. I mean, that's searchable to some degree.

JUDGE SCHEINDLIN: Electronically searchable? Does that help any?

MR. MASTERS: I think it does. I mean, I have some suggestions in here as well. Yes, I believe I actually use the term "electronically searchable."

JUDGE SCHEINDLIN: Okay. All right.

MR. MASTERS: You used the term "electronically searchable" as well. That's in the rule. So as long as the note--that's already there.

JUDGE SCHEINDLIN: Oh, we did use it.

MR. MASTERS: So as long as the notes explain that. And to give an example, I would say there needs to be some way of searching for if it's text data, if you want to search for characters within the data using some, you know, reasonable common program.

JUDGE SCHEINDLIN: Okay.

MR. MASTERS: And the third--the third scenario, which I think is the most devious, but also kind of where the world is going with digital rights management, is a situation where you instead of producing data in a document format, in a file format, you produce data in a program format. You wrap it up in a program. That limits your ability to do it.

So, in other words, I could--if I were asked to produce 100,000 e-mails, I could give you a program that had those encrypted in the program and would allow you to read, say, each e-mail. You could search, say, each e-mail. But you couldn't search the whole e-mails. You have to go to each e-mail

and search within each e-mail.

And then I could also make it scroll so you couldn't actually kind of read it at your own rate. I can make it scroll one line every 30 seconds, every minute.

JUDGE SCHEINDLIN: And your language suggestion to prevent people from playing that game would be?

MR. MASTERS: To say you want a file format. You want a file. Sorry. So it's not just electronically searchable form. Electronically searchable file format is what I was saying.

JUDGE SCHEINDLIN: Yes. How are these hundreds of thousands of lawyers going to know what the heck that means?

MR. MASTERS: Well, I think the notes could also solve this problem as well. Explain specifically you don't want this scenario. I mean, my main concern is the scenario, not so much--I mean, I'm sure my words are not nearly as good as, you know, the committee's thinking about this stuff for ages, and I don't know the people who are going to be applying it. So--

JUDGE SCHEINDLIN: No. I must say, personally, I found your comments on numbered page 3 to 7 to be critically important. So I, for one, enjoyed reading them.

MR. MASTERS: Thank you.

And I mean, those were my main concerns with the rule. The other--those were the three scenarios.

The only other piece of 34(b) that I was slightly concerned with was this one file format. There is also an implication in the rule that parties are only going to store--there is only one original file format, and I find that not to be true in my business. People store data in lots of different formats.

JUDGE ROSENTHAL: We've had several people suggest that we need to make those plural.

MR. MASTERS: So my suggestion on that was just saying a party needs to only supply one readable format, say, by the other party. But, again, if you're going to supply a format that's really difficult to read, you know, you should probably

have to supply another one.

JUDGE SCHEINDLIN: It also wouldn't be one format for different types of data, right? It might be a different format for a database than it would be for word processing?

MR. MASTERS: Absolutely. Absolutely. And that raises the point--I don't know what the full scope of the committee notes are usually. But it would very interesting for me to see examples like--so I deal with getting databases every day, different databases, and we always ask for them to be in some kind of ASCII format. So it just means readable bare text. And that's what we ask from all of our sources, and that's what we get.

And that sort of explication in the committee notes, I think, would be really helpful, especially when you're talking about an electronically searchable form. The committee probably--

JUDGE SCHEINDLIN: Can I ask one question, though? Are we going to get outdated? Because we've been hearing all day that if we put things down like ASCII format, in two years, somebody will

say "mimeograph." I mean, is that going to last?

MR. MASTERS: Well, I mean, I'm not going to prognosticate here, but we've been using the term "ASCII" since for, you know, 40 years.

JUDGE SCHEINDLIN: I know, but next year--

JUDGE ROSENTHAL: For how many years?

MR. MASTERS: Forty, I'd say.

JUDGE SCHEINDLIN: True.

MR. GIRARD: Is there a generic way of describing--

JUDGE SCHEINDLIN: True, but what I'm worried about is next year is the end of ASCII format.

MR. MASTERS: I would--I mean, all ASCII means is bare text. And I think that if you have data which is text, you know, you've got a letter, you've got fields in a database that are text or numbers or whatever, that sentiment of just wanting the--

JUDGE SCHEINDLIN: You don't think ASCII format will be outdated is the short answer.

MR. MASTERS: I don't think so. No. I don't think ASCII format will be outdated. It's been

along a long time.

JUDGE HAGY: Rule 34 starts with "unless the court otherwise orders." Don't you think that people would be concerned about giving unusable formats to pro se litigants or others and then be drawn back in front of the court and have to explain it?

MR. MASTERS: I would hope so.

JUDGE HAGY: I mean, it really does work that way, generally.

MR. MASTERS: I mean, I would certainly hope so. I mean, again, I'm coming to this, you know, fairly new. But when I read it and I come from my tech background, I am just instantly worried that--I guess from my perspective, yes, I would certainly hope that was the case. But wouldn't it be worth having the committee specify in notes exactly what it means by these terms, just in the odd instance this would happen? You know, while you're at this draft stage.

JUDGE HAGY: But then we'd take away your job. So your job, you're not a techie guy anymore. Your

job will be to advise the techies, "That's the most ridiculous form of production I've ever seen. We'll get hammered." And then you get paid big bucks.

MR. MASTERS: I appreciate your concern. So I just--

JUDGE SCHEINDLIN: So can I just back up one more second to file format? Is that going to date us, too, or is that one that will also last?

MR. MASTERS: I think it would. I think that the--there is certainly a distinction between an application and a file. Or a document or something like that. I mean, I don't think that those terms are going away either. I mean, there is a fundamental difference.

JUDGE SCHEINDLIN: Okay. Thank you. That's all I needed. Thank you.

JUDGE ROSENTHAL: Professor Marcus?

PROFESSOR MARCUS: You would say a document is something different from these other things you've been talking about?

MR. MASTERS: No, I would say a file and a

document, in my mind, are essentially the same thing.

PROFESSOR MARCUS: The reason I'm asking is that Rule 34(a), as proposed to be rewritten, would distinguish between electronically stored information or data, or whatever that phrase is, and document. Would you be more comfortable just calling everything in the world a document, or would it make more sense to have an alternative designation?

MR. MASTERS: For electronic document or electronic files?

PROFESSOR MARCUS: Yes. Applications, all those things you just mentioned.

MR. MASTERS: I honestly don't know. I mean, I don't think I have enough knowledge to give you a good answer to the question. I do think that there's a reason why this committee is meeting to talk and promulgating specifically e-discovery rules. There must be some reason for making a distinction between the hard copy and the electronic stuff.

And so, simply from my beliefs on 34(b), I would say that, you know, if you're talking about electronic stuff here, you want to at least make a distinction between electronic files and electronic applications because that addresses that one scenario. But I don't know in the context of 34(a).

And then, quickly, some of the comments raised today I wanted to touch on briefly. In terms of why you might want to restore Thursday's back-up, when you have Friday's back-up--I do this all the time. This is very common when you've got databases. Somebody makes a mistake in a database, you don't catch it for a couple of days.

So I just wanted to bring in a real-world example where you, as a business, we--I keep on one of our servers, keep 50 days' worth of back-ups that are full back-ups. And we sometimes will have to go back and find the one that was right before when we screwed up.

JUDGE ROSENTHAL: You're talking about business reasons, not for litigation purposes?

MR. MASTERS: Exactly. Right. It's purely business reasons.

In terms of how retrievable is deleted data, my experience, actually, is that deleted data is harder to retrieve than it has been represented this morning. Generally speaking, what happens is your file is spread across on chunks all across your hard drive. When it's deleted, simply the reference to those chunks in the file table is removed. And, you know, those chunks could be overwritten. It might not be.

It may be that you've got an enormous hard drive. Generally speaking, people tend to expand to the size of their hard drives. And because that file could be spread out all over the system, there is a decent chance that some of the chunks are going to be written over.

So if you delete a file from your hard drive, yes, immediately thereafter the entire thing is retrievable. But as time goes on, it becomes much less likely that you'll be able to find any of it.

And if you delete, say, the first chunk of it,

you're going to have to do very expensive forensic breakdowns to try to find the rest of it and reconstruct it. Because once you lose the first--depending on the file system, usually first chunk points to the second chunk points to the third chunk. So as soon as the first chunk is gone, it's hard to reconstruct the file. It becomes much harder.

And then in terms of instant messenger, I believe all instant messenger caches are actually initially kept and then will be removed from your cache. And I don't think someone had said earlier that it would very expensive to log on instant messenger, and I don't--I mean, it depends on your question of expense, and if you need an IT guy to go to everyone's computer and turn something on.

But from a simple user functionality standpoint, I wouldn't describe it as an expensive process.

JUDGE ROSENTHAL: Thank you very much.

MR. MASTERS: Thank you.

JUDGE HAGY: Did I understand--you say instant

messenger matters do not disappear? That when you turn it off it goes away?

MR. MASTERS: I believe at the very least, with Yahoo! and AOL, which I have used, you have a cache of conversation that is stored on disk like your temporary Internet files.

JUDGE HAGY: And it's stored for how long?

MR. MASTERS: Until it would be overwritten. That's at least my understanding of what's going on. I've seen it in our organization with Yahoo! at the very least.

JUDGE SCHEINDLIN: But couldn't it be configured either way?

MR. MASTERS: Yes. Absolutely.

JUDGE SCHEINDLIN: Yes, you could configure it to not save it. So companies could do that?

MR. MASTERS: Yes. Absolutely.

JUDGE ROSENTHAL: Thank you very much.

And our final speaker, Mr. Tannenbaum, you have that honor.

MR. TANNENBAUM: So I just want to echo everyone else who said thank you very much for

letting us testify. I can't tell you how exciting it is to be a law student, first-year law student, to be able to offer our thoughts on this process.

I also do think we have a fairly unique perspective because we did grow up with this technology. A number of people have worked with it.

My particular experience comes from working on updating intellectual property laws to deal with new technology, and a lot of the arguments that are made in that arena are very similar to the arguments that are made here. Namely, that the new costs, supposed costs of technology require an updating of the rules. And I believe very strongly that those arguments don't hold water in that context and that they should be very seriously examined in this context.

So I just wanted to make three main points, and the first is that I think the discussion so far has focused not as much on human agency as it ought to. And to the extent that it's focused on the human agency, it's focused in some ways in the wrong

place. It's focused on what people do when they're responding to a discovery request or how difficult it is to recover certain kinds of files. But there has been very little discussion about the decisions that go into the design of systems.

And I'm concerned that some features of the rules as proposed will seriously affect the decisions that people make when they're deciding how much data should be retained and in what format it should be retained and how easily it could be retrieved. So let me just turn to two specific parts of the rules. The first one is in 37(f), the safe harbor provision. And here, I think the language betrays a little bit of this lack of focus on the design.

There is language referring to the routine operation of the system and also to the nature of the system. The notes say that determinations about culpability would be different based on the nature of the system. But there actually is no nature of a computer system. It's everything is malleable. Everything is pliable. Everything can

be configured.

So, from my perspective, as somebody who hasn't been around the law for a very long time, that sees the way that software has changed over even my short lifetime, it doesn't seem to make sense to let defendants or responding parties off the hook simply because of the nature or the design of their system. It seems like--

JUDGE ROSENTHAL: Can I ask a question?

MR. TANNENBAUM: Sure.

JUDGE ROSENTHAL: You seem to be--well, are you assuming that it is something to be deplored if an organization, whether it's a business or a government or school or whatever, any large data producer, if an organization sets its computer system up to routinely operate to get rid of information that it does not need or find useful for the purposes of that organization, and it is not required to keep for regulatory or legal purposes, including the obligations of preservation related to litigation, but they want to get rid of everything else?

MR. TANNENBAUM: Right.

JUDGE ROSENTHAL: And they want to do so on a timely basis. That is, they don't want this stuff sitting around. They want it out of there within six weeks, two weeks, whatever the appropriate time is. Is that bad?

MR. TANNENBAUM: I don't know whether it's deplorable or not. I think a different question that is more interesting to me is whether or not the rules should provide incentives for people to do that when they would not otherwise do it, or that they should provide an excuse for companies--

JUDGE SCHEINDLIN: But the whole premise is they would otherwise do it. That's the entire premise is that for the business to run, they need to do this every 30 days or whatever it is.

JUDGE ROSENTHAL: If that's their business choice.

JUDGE SCHEINDLIN: Right. So the premise is that they would do it otherwise.

MR. TANNENBAUM: Well, I think it's important to distinguish between two different cases. One

where business finds it economically efficient to go through the files and delete them. And the other case where the business just doesn't care all that much, but for the possibility of litigation.

JUDGE ROSENTHAL: What we've heard, though, is that there is a great need for businesses to care because data management is an important part of what businesses need to do.

JUDGE SCHEINDLIN: But I think there's a miscommunication here. You talked about deleting. I think this was written for the recycle effort--

JUDGE ROSENTHAL: Exactly.

JUDGE SCHEINDLIN: --of the disaster back-up tapes that companies need to and want to recycle these. We're not talking about deletions.

JUDGE ROSENTHAL: No. We're talking about erasures, to use the distinction drawn by your colleague who spoke earlier perhaps.

JUDGE SCHEINDLIN: I wouldn't even say that. I would just say the recycling of the back-up systems.

MR. TANNENBAUM: Right. Well, with regard to

the back-up question in particular, I think there are a few things to say about this. One is, I think, that this will surely become an outdated technology. Back-up tapes are very slow. As people point out, they're difficult to search.

And I think Professor Marcus asked the question whether or not--I think it was Professor Marcus--whether or not including this language, which might be eventually outdated, will allow the rules to then be flexible in the future. And I think that's not necessarily true. Because I think, as my colleague Mr. Kleysteuber pointed out, there may be lock-in because the rules specify a particular kind of technology.

So I was reading Microsoft's comment before I came here today. And Microsoft says they would like to keep this back-up tape language in the rules because it makes it clear to them that using back-up tapes is a basis on which they can claim that data is not readily accessible.

Now if I were Microsoft, and I were thinking strategically and rationally, I would be very

hesitant to move from a back-up tape system, even if another system came along which I would otherwise choose, but for this provision in the rules.

And I were a chief technology officer who thinks strategically or a software company thinking strategically about the kind of software I'd want to sell, I would create--in response to this 37(f) provision, I would create a piece of software which would quickly delete data which was not necessary for business purposes or didn't have to be preserved because of other statutory obligations.

I would immediately delete it from reasonably accessible sources and move it onto back-up tapes. So that in the case of an emergency, the business would have access to the information. But under these rules, my company or the company I was selling to could argue that the information was not really accessible and that it had been routinely destroyed.

Also--and these programs already are popular--under the current rule, it says that one

of the things that the committee will take into account is whether or not this kind of software is generally applied. This might not actually be in the notes. It may have been in the preparatory comments that accompanied the notes.

And again, I think this is an issue. Just, I think, because a piece of software is generally applied in an industry that it's not necessarily a good--again, I don't mean--to the issue of culpability, I just think that we don't want to encourage companies to quickly take up software which routinely destroys data if they wouldn't otherwise do it.

JUDGE HAGY: Do you understand that more often than not, or as often as not, they're destroying information that would help them defend the case? So they really don't--I mean, it seems to be a mind set that companies think that all they have is information that proves they've been hurting people, and they're trying to destroy that. Where as often as not, it's the information that would help their case.

So that they're not--I think there would be some balance in writing off or rewriting or destroying information just naturally.

MR. TANNENBAUM: And I think this is the argument that the company's ordinary business practices and concerns would lead it not to pick up systems which would destroy data in an excessive manner, a way which would subvert justice. And I think that probably is true in some cases.

But it seems to me that there are a large majority of cases, or a large number of cases, where companies are producing information that they don't want to be saved. And if there is no cost to them deleting the data, then that just lowers an obstacle to them deleting it gratuitously. That's my feeling. And I understand there's a range of concerns about that.

So my second concern with this design issue is with 26(b)(2), this question of reasonably accessible. And here, again, I think if I were a software designer or chief technology officer, I would adopt technology which made data not

reasonably accessible.

And CIGNA submitted comments in which they talked about a database system that they have which makes it difficult for them to extract particular kinds of information because the engine is running. And to extract this information makes it difficult for them. It slows down their system, and so it's very costly.

And I would just say CIGNA presented this in their comments as something which is static, as something that was a given. But actually, software can be designed so that this wouldn't be the case, so that their engine wouldn't be slowed down. And those marketing centers might already exist, if CIGNA's competitors have produced software like that, or someone--or they have another business reason to use software which allows them to extract data.

Those may be sufficient incentives for them to adopt a software which would also lead to the production of more information, except that the rules as written give them a counter reason not to

adopt that kind of software. And I think this just goes to my original point, which is that these issues are dynamic, and that by creating rules that give incentives to companies not to preserve data, you're changing the kind of technology that's produced.

And I understand there are other constraints. It just seems unnecessary to me to introduce an additional constraint.

JUDGE SCHEINDLIN: Well, I want to just say that on page 7--one second--of your comments, just for the record, I really liked your suggestion where you said responding parties that wanted to embargo data would have to show that the information is not reasonably accessible using currently available methods of technology. I thought that was a very helpful point. I just wanted to say it.

MR. TANNENBAUM: Oh, thank you very much.

JUDGE SCHEINDLIN: No question. Right.

JUDGE KEISLER: I was going to suggest the calculus for this company you described is actually

very complicated, though, isn't it? Because the company might decide, if it's driven principally by litigation concerns, that it wants to make this information costly to retrieve. So it can go to a judge and say, "This is costly to retrieve."

That company also has to think, doesn't know which judge it's going to be before, what his or her disposition is going to be, if the good cause showing is made. Then they have to spend lots of money to actually retrieve the data.

So I just wonder whether, you know, in the wash, all of these different considerations, when you make something more costly to do, you still face the prospect that you might have to do it and then incur the cost, even if--I mean, it's essentially unknowable how that's going to work out in the end.

MR. TANNENBAUM: Right. And some companies may be more risk averse than others. But companies which think they can make a good argument that good cause does not exist might not be willing to invest in this technology.

I also think that including language like specifying back-up tapes in the notes gives a company good reason to believe that the burden of proof will not be on them to show that there is not good cause. And I think limiting that kind of language, which allows the calculus to bend in favor of not adopting technology, which allows for the ease for production of information, searching information, would be a good idea.

The second point I want to emphasize, and I've touched on this a number of times, is that the rules that you write do have an effect on the market and the sorts of software that is developed. And I think there were just some--

PROFESSOR MARCUS: Do you have an example of that?

MR. TANNENBAUM: Yes, there were some examples in the comments. Philip Morris submitted a comment, which I thought was one of the best comments made because it's provided detailed information, about the kind of systems that they've innovated to deal with these electronic discovery

requests. So they've modified--

PROFESSOR MARCUS: No, my question was the rules.

MR. TANNENBAUM: I'm sorry?

PROFESSOR MARCUS: Do you have an example of where the Federal Rules of Civil Procedure have influenced the design, adoption, or something like that of electronic programs?

MR. TANNENBAUM: Well, I think this Philip Morris example may illuminate it.

PROFESSOR MARCUS: Okay. Go ahead.

MR. TANNENBAUM: I mean, Philip Morris, presumably in response to the liberal rules of discovery that are currently enshrined in the Federal Rules of Civil Procedure, has had to provide a number--an immense number of electronic documents, and they've innovated these systems within their own company to deal with this problem.

So they've modified their Outlook Express program so that they can easily put documents into a repository. They've created common storage space. And there is no reason to believe that if

companies were afraid that they would be put in the same position as Philip Morris, they could buy the software from Philip Morris, and there could be a market created for the software.

But if you create these safeguards that protect producers of information, I just don't know that the advantages of this piece of software would be as strong.

And to answer your question about a specific rule, I also--you know, I can't cite a specific passage, but I would point you to the comment from Philip Morris in which they say the Federal Rules of Civil Procedure have a profound effect on how litigants determine what it is they're obligated to preserve. And they go on to say that it affects how they preserve that information.

So they say by specifying what is and is not presumptively discoverable, the rules will have a direct impact on and provide guidance to litigants in developing proper, yet efficient, information management systems.

So from the perspective of these litigants, it

seems like they do make decisions based on the rules. Now that might just be how I read it. I don't know. But at least they say it.

The third and final point I wanted to make was just about empirical data. I've just been struck by the number of anecdotes which have been put before the committee. And I know that this is a very complicated field. There is a lot of information to pick up. I've been very impressed by how energetic the committee has been in trying to collect information.

But I have to say, I have not been impressed with the quality of the data that's been presented. There doesn't seem to be a very good empirical study of what the actual costs of electronic discovery are and what they will be in the near future. And I have to say some of the anecdotes that were presented in the comments just don't pass--they just seem kind of suspicious to me.

So just like Philip Morris saying their e-mail server, now they've had to expand it perhaps by 132 gigs a month, and that updating their system cost

them $5.5 million. I have to tell you, 132 gigs a month is just not a lot of storage space, and it's hard for me to understand where all those costs come from.

And maybe there are personnel costs and costs that we can't see. But I would just urge the committee to be suspicious of those sorts of estimates.

JUDGE ROSENTHAL: We would welcome the assistance of the Yale Law School, indeed, any part of Yale University that wants to conduct such a study.

[Laughter.]

MR. TANNENBAUM: Right. And I think there's a very active technological community, which I think would be interested in providing that kind of information. And when I go back, I'm going to post the proceedings of this meeting on the Web and encourage people to submit those sorts of proposals.

But the committee might consider making a specific request for empirical information on

discovery costs as opposed to the legal questions, which I think are intimidating to geeks and nerds like myself. But we can maybe provide some assistance on the technological front.

The final point I want to make is I think it's important to compare the cost of electronic discovery to the cost of paper discovery, which I also haven't seen very much. These costs seem very astronomical. But it seems to me that the paper discovery cost must be pretty astronomical as well.

And the high cost of electronic discovery, focusing on that seems counterintuitive to me because my entire experience with technology has been that it reduces the cost, not only of storing information, but also retrieving and searching information. So thank you very much.

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

Fifteen minutes before we gather again? This does end the public hearings that we have had on these proceedings. The comment date will end--comment period will end on February 15th.

And thank you all, once again, for participating with us and helping us learn about these enormously important and interesting issues.

[Whereupon, at 12:48 p.m., the hearing was adjourned.]