JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON THE FEDERAL RULES OF CIVIL PROCEDURE
CONFERENCE ON ELECTRONIC DISCOVERY

Fordham University School of Law
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MORNING SESSION — 8:45 a.m.

DEAN TREANOR: My name is Bill Treanor. I'm the Dean of Fordham Law School. It's my pleasure to welcome you to the Civil Rules E-Discovery Conference.

As some of you may know, we at Fordham are getting ready to celebrate our centennial, and so I have been doing some reading into our history, and in particular the way the School got started.

Our first Dean, Paul Fuller, had a remarkable life story. He was orphaned at the age of three, grew up homeless on the streets of New York City, but despite the hardship and tragedy of his early years, became one of the great international lawyers of his generation, a senior partner at Coudert, represented President Wilson in his negotiations with Zapata, and he developed a profound and passionate commitment to the principle that well-constructed legal rules are the foundation of a just society.

It is because of that commitment that this Law School is here, and for a hundred years we have honored that commitment. We carry it forth in many ways. One of the most important ways is through the programs that are run under the auspices of our Philip Reed Chair, which was established in the name of civil justice reform. I would like to acknowledge Professor Capra, whom I will turn matters over to in a moment, who is our Reed Chair holder.

It is through the Reed Chair that we have invited judges and other experts from across the country to analyze the problems arising from electronic discovery and to explore whether a rules-based solution is required. We are also pleased that these proceedings will be published in the *Fordham Law Review.*

So I wish you well as you consider these important discovery issues.

Now I would like to introduce Professor Capra. Professor Capra, who has taught at Fordham since 1981, is one of the nation’s leading evidence scholars. He is the Reporter on the Judicial Conference Advisory Committee on the Federal Rules of Evidence and on the Judicial Conference Committee on Electronic Case Filing Rules. He is our Reed Chair holder. It is my pleasure to introduce Professor

Capra.

PROFESSOR CAPRA: I will not take up much time. This is such an august group that there is not much for me to say, other than thanks. I wanted to thank Judge Rosenthal for doing such a tremendous job, Judge Levi whose idea it was to hold this conference, Rick Marcus who put a lot of this stuff together, and Professor Myles Lynk who put all the agenda together and everything. It is a great job. I really didn't do very much other than to have the gracious assistance of Dean Treanor in providing the facilities. Helen Herman, thank you very much for doing all the groundwork for this.

That's all. I hope you all have a good time here, and if there is anything you need you should come and speak to me. Thanks.

JUDGE ROSENTHAL: Good morning. I am Lee Rosenthal. I am the Chair of the Civil Rules Committee. I am your hostess for today. I am very pleased that all of you are here. I want to thank in particular Dean Treanor and Dan Capra, who has been with his Chair just wonderful in their support of this conference, which made it all possible.

The purpose of these proceedings is to educate the

Committee members who are here, who are engaged in trying to determine whether electronic discovery requires an adjustment to the Discovery Rules or whether those Rules can accommodate these new media and new means of exchanging information. We don't know. We don't know how well the Rules are doing, we don't know how well the Rules will be able to continue to do, and we don't know if the problems that are present can be adjusted or addressed by changing the Rules. We very much hope that all of the experts that we have brought here can help us better understand those questions.

This conference as it is set up, and as I look around the room at the people who have very kindly attended, is an immediate source of frustration because we have such resources here that we cannot possibly mine them in the limited time we have available. So, above all, this conference is an invitation to each of you to continue to be engaged with us as we continue to examine these problems, which we suspect cannot be solved in a day and a half.

With that brief introduction, I want to turn the proceedings over to the Chair of the Conference, the Chair of the Subcommittee on Discovery for the Civil Rules Committee, Professor Myles Lynk, who with Professor Rick

Marcus has done the bulk of the work in putting the agenda materials together and in gathering all of the information that we needed to even begin this. Myles?

PROF. LYNK: Thank you, Judge Rosenthal.

While Professor Marcus and I were delighted to work together to put together much of the materials for this conference, credit must also be given to Judge Rosenthal whose careful hand both as an editor and an organizer and a final arbiter really made much of this conference possible.

Just before D Day, I have often heard the story that then-General Eisenhower went to visit the troopers from the 101st Airborne Division. He stopped before a young trooper and he said, “Young man, do you like jumping out of airplanes?” The trooper looked at the Supreme Allied Commander and he said, “No, sir, I don’t, but I like being around people who do.” Well, I do not know enough about electronic discovery, but I am going to enjoy being around people who do.

This program over the next two days consists of eight panels. Each panel will be moderated either by a Reporter for the Advisory Committee or a member of the Advisory Committee’s Subcommittee on Discovery. Each panel will discuss one of the important issues we have identified

in the area of electronic discovery as possibly appropriate for rule changes. At the conclusion of the panel presentations, we will open the floor for discussion and we very much look forward to a full discussion and participation from the audience. In fact, we hope that there will be a colloquy and interchange between the panelists and those of you who are attending this Conference over the next two days.

The last two panels will look at whether rule change is appropriate; and then, if rule change is appropriate, how such rule change should take place.

One of the interesting issues the Committee has to address is that the rule-making process itself is time-consuming, and so any rule that began to take shape by the end of this year would still be many years aborning before it was finally adopted. One of the issues we need to consider is that fact, that rule-making is a time-consuming process, how will that affect the rules that should be adopted.

Another issue the Committee faces whenever it looks at rule-making is whether or not the rule it adopts codifies existing best practices or whether it should adopt rules to define best practices beyond what is existing in

case law. That is sort of an interesting tension in the rule-making process and we hope to explore that tension today and tomorrow as well.

What that introduction, I would like to turn it over to Professor Richard Marcus, the distinguished Reporter for the Discovery Subcommittee of the Advisory Committee on Civil Rules. Professor Marcus.

PROF. MARCUS: Let me echo the thanks that the others have given to all of you who have given your time to be with us today. This is how we learn, particularly we in the academic biz, about what is really going on and what really matters, instead of the kinds of things that we sometimes become preoccupied talking about.

To talk about this, it occurred to me as I was considering what to say to you today, is sort of like something — it reminded me of a title of a very prominent book about changes in America that came out in 1930 [sic], called *Only Yesterday,* which some of you may recall was by a man named Frederick Lewis Allen,[1] which chronicled the changes that happened in this country for a variety of reasons during the 1920s. He found this made his career. He continued writing books like that, and he wrote another

book in 1950 [sic], called *The Big Change,*[2] describing changes in this country during the first half of the 20th century.

Well, it seems to me "only yesterday" is a theme that goes through my mind concerning the importance and pervasive influence perhaps of what we are here to discuss.

Only yesterday, we didn't worry about, or even know about, these things. Indeed, if you look through the compilation of cases at the back of your materials, you will see a 1997 decision involving Prudential, *In re Prudential Insurance Litigation,*[3] where it was a failure-to-preserve-records problem because the company foolishly thought it was sufficient to send out an email message to its thousands of agents across the country telling them to preserve records. That did not work because only 40 percent or so of them even had email and most of those did not know how to use it. Only yesterday, things were different.

As rule-makers, those who are charged with changing, adapting, improving the rules, one probably should be taking the long view. So whether what happened only since yesterday should be put into rules today is perhaps at

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[1] FREDERICK LEWIS ALLEN, ONLY YESTERDAY:: AN INFORMAL HISTORY OF THE 1920S (Harper & Brothers, 1931).

[2] FREDERICK LEWIS ALLEN, THE BIG CHANGE (1952).

the heart of what we are talking about.

So what I want to talk about is the background mainly for that and then give you some observations about how we got to this point and what thoughts occur to me in a kind of spongy way ought to be in our minds as we go forward.

It seems to me using the "Big Change" as a theme, there are at least three big changes that form the backdrop for our discussion today.

- The first landed in the American litigation scheme in 1938 with the adoption of broad discovery in the Federal Rules of Civil Procedure. The last time this Committee held a discovery conference, Steve Subrin got up and told us about what a revolution that was. It was a remarkable change in the way in which litigation was handled, making this country unique in the world. Indeed, Steve Subrin has recently written an article on the same subject concerning our role or prominence in the world on this topic, entitled "Are We Nuts?"[4] So Big Change Number One is what happened before I believe any of us started being lawyers.

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[3] In re Prudential Insurance Co. of Am. Sales Practice Litig., 169 F.R.D. 598 (D.N.J. 1997).

[4] Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002).

• Big Change Number Two has to do with technology. If you think back to when Big Change Number One happened, technology was quite different, indeed not only in terms of the things that we deal with in today's and tomorrow's sessions, things like email, Blackberries, the Internet, even cell phones — none of that existed only yesterday — back when these Rules were written, there were not any laptops, word processing did not exist, they did not even have electric typewriters, and they used carbon paper to make copies because there were not any photocopy machines. All of those developments had an impact on litigation and discovery.

What they did not do in terms of Big Change Number One is have much of an impact on the Rules. Indeed, there does not seem to be a particular link between those changes and developments in the Rules.

Perhaps there is. Certainly it is not because Big Change Number One, the revolution in discovery, produced no concerns, controversy, or uneasiness. To the contrary, beginning in the 1970s, there was quite a lot of concern about the pervasive nature of possibly intrusive discovery. One began hearing frequently assertions that discovery costs too much, produces too little; that some parties seeking

discovery asked for far too much, they asked for everything. There were counter-assertions that those responding to discovery hid the ball, engaged in “dump truck” tactics. An overall criticism of the Rules was that there was no principle of restraint in the Rules; they simply invited as much as anyone wanted of discovery.

- Which brings us around really to Big Change Number Three, the rule-makers’ response to these other developments. Big Change Number Three started in the 1970s and went on for twenty-five years. It was in a sense a cycle perhaps — it’s hard to make predictions of this nature — a cycle that was completed with the Amendments that went into effect three years ago in December of 2000. It made a lot of changes. I will just mention some of them that seem to me pertinent to what we are talking about today.

It imposed numerical limitations on certain discovery devices; most recently, also a time limitation on depositions. It put a moratorium on formal discovery until the parties get together and discuss how they should handle discovery. It said that the court should order a time limit for the completion of discovery in almost every case. It addressed issues of misbehavior during depositions, in

withholding of allegedly privileged materials, instructions to witnesses not to answer in depositions. It put in place, and eventually in the National Rules without opt-out left in place, an initial disclosure provision that should advance discovery and advance proceedings in a number of places.

And most importantly perhaps, it added what is now in Rule 26(b)(2), what are called the proportionality provisions. In 1983, as that provision was first coming online, Arthur Miller stood before various groups and said that represented a 180-degree change in direction about discovery. Whether that 180-degree change in Rule direction resulted in a shift in the direction of the discovery ship is a question that one can debate, but certainly it seems that those provisions are receiving more attention, and in particular in relation to electronic discovery, than before.

So those are the big changes, the fifty-year-type changes that one might look at. The broad sweep of discovery expansion as a rule-making matter was followed by an era of discovery constraint —— not abandonment, just constraint.

Well, in 1996 the last episode of that discovery-constraint undertaking led to the Discovery Project that the Advisory Committee began in that year. The way to try to do

that was like what we are doing here today: "We need to talk to lawyers and find out what is going on."

Frankly, for myself, I would say I had some expectations about what we would hear and heard many of those things. But there is one thing we heard about repeatedly that was not something that we were expecting to hear about, at least speaking for myself that I was expecting to hear about, and that is what we are here to discuss today.

Beginning in 1997, and frequently, lawyers would tell us, "This is the problem: you are talking about yesterday's problem. Today this is our biggest problem, dealing with these issues."

One reaction to what we were hearing was, "Haven't we just been dealing with that for twenty years? You say that there is an awful lot of material and people are asking for too much. You say that it costs too much to find all this material and it is not worth it. Very little of the material is actually useful or used in the case." Those are the kinds of things that were grounds for objection to discovery for years and years."

So one reaction one might have had, only yesterday, was, "This is not new ground; this is just new

technology. The Rules have not been changed particularly to deal with new technology." So the question is whether they should be.

Something that caught my eye in the last advance sheets for the Federal Rules Decisions seems to me worth quoting at this point. A thoughtful judge dealing now in the present with an electronic discovery problem, carefully examining it, said as follows: "It can be argued with some force that the Rule 26(b)(2) balancing factors are all that is needed to allow a court to reach a fair result when considering the scope of discovery of electronic records," and went on to say, "The options available are limited only by the court's own imagination."

So that is a backdrop for what has been going on as a more careful matter in the last three or four years.

Beginning in 2000, the Discovery Subcommittee launched a careful examination of the issues we are here to discuss today. In the year 2000, we had too many conferences involving many of the people who are here today who assisted us then in evaluating these issues.

One bottom-line reaction that came away from that activity was that there was anything but a pervasive and unanimous view that "something should be done now and here

is exactly what it is," on either one of those points —— "something should be done now in terms of rule changes," it was not clear; and to the extent people felt something should be done, it was not clear what that something should be.

With the passage of that time, and subject always to what we learn today and what we learn hereafter, it does seem that maybe there is something special about this form of information, this form of discovery. Only yesterday it doesn't perhaps seem that way, but today and tomorrow it will seem that way. Let me offer some reasons for thinking so.

First, the volume is astounding. Maybe with electronic evaluation and search techniques that doesn't matter that much, but it dwarfs what we have seen before, even though the numbers we saw before were large numbers.

There are things, there are creatures, that did not exist before and do not quite fit our expectations or descriptions. At least some databases, dynamic databases, designed to be manipulated, designed to provide information on request, are not exactly documents. They do not look like they are exactly suited to treatment under Rule 34 for documents or Rule 33 for interrogatories. They are a

special new creature.

Retention and spoliation may feel and look different and be different in this new world.

Inadvertent destruction takes on new meaning when pushing the “on” button on a computer may cause materials that were available, accessible, findable, usable before to cease to exist.

Automatic removal of excessive, useless, old materials may seem a reasoned response and one that machines can implement without fail where document retention policies regarding hard-copy materials often existed on paper but not in operation.

So gradually, those are just some illustrations of things that may well be distinctive and warrant attention here. Gradually, it became apparent that one should be more serious. So recently there has been an effort to try to put in words what might be in Rules, and those thoughts —— they are thoughts —— are included in your material as they have developed in the minds of the Committee while it looks at these questions.

I want to move into the last set of observations I have, hoping to leave our panelists plenty of time on the first panel to talk about what they came here to discuss and

to give you plenty of time to ask questions or raise additional points that occur to you. Let me make some observations that one might have in mind while looking at these topics today, tomorrow, and afterwards.

First, this is not going to go away. Computers are here to stay for the long term. They are as a central feature of our lives going to be a central feature of our litigation. Just think in Manhattan of recent famous trials — Frank Quattrone, email messages used as critical evidence; Martha Stewart, email messages being in dispute in evidence.

We are regularly told that 90-some-odd percent of business information or human information or some kinds of information exist only in electronic and not in hard-copy forms. Well, if that is correct — although I have always wondered what their counting method was to come up with that number — if that is correct, then it would be remarkable for discovery somehow to overlook this mountain while focusing on the smidgeon that is in traditional hard-copy form. So it is here to stay.

Let me offer some other observations.

I spoke of what I called, I believe, Big Change Number Three, changes in the Rules to respond to criticisms

of discovery, and I think it is worthwhile to keep in mind that not everyone seemingly was entirely satisfied with the extent or nature of Big Change Number Three. So I would call this first observation the “unfinished business” observation.

Some of the criticisms and concerns that have been raised sort of look like the same thing again —— “Well, we didn’t get there on making the responding party immune to the cost of discovery before, and we ought to be trying to get there, and maybe electronic discovery is a vehicle for getting there.”

You can make some very interesting arguments, persuasive in many ways in other parts of the world, shocking perhaps in many ways to litigants from other parts of the world who encounter our discovery, that, “Gee, anyone who wants to put someone to effort to respond to discovery ought to have to reimburse that person for the effort involved.” That is not our starting point in this country. It is a possibility, but as a background matter I think it is important to keep in mind that the retreat from the broadest version of discovery was not an overall retreat from the decision of 1938.

Second observation: In some ways, perhaps newness

is the problem, unfamiliarity is the problem, and that is not necessarily, as I will reiterate, something that Rule changes can cure. After all, as I said, there are lots of technological changes that happened and the Rules were not changed to take account of those.

And, understandably, we have heard repeatedly that lawyers say, “We don’t know what to tell our clients. What exactly will judges do? What exactly do the clients have to do?” Well, a couple of reactions to that.

One, the new and unfamiliar and important, probably inevitably, has some aspects of that kind of uncertainty associated with it.

Two, related to that, if you look at Rules like the Civil Rules, I think it may be clear that often they focus on standards of reasonableness, and it is not clear that those sorts of Rules can provide the kind of certainty that would be a good thing if it could be provided but maybe will come only with experience.

A third, related observation is that a lot of the things that seem to be very important concerns are not related to court rules, the Federal Rules of Civil Procedure — for example, what I might call the “loose lips sink ships” phenomenon: people put things into email messages

that we certainly wish they had not. *Fortune* magazine recently had a story, for example, that said that email is "the corporate equivalent of DNA evidence, a legal albatross." *The Economist* a couple of years ago in commenting on some Wall Street activities said, "To put in a near-indestructible email the sorts of comments you might give vent to around the water cooler is to invite trouble." And so *Fortune* described some companies that were trying to school their employees in wise use of email. That is not a Rules problem. It may be a real problem, but it is not a Rules problem.

Second, again just a sense I get, that perhaps will not be reflected or agreed to by our first panel, and that is the orientation of lawyers and IT people is different. Now, that does not mean either is wrong, but if the reality is that IT people are the world's greatest packrats and they keep everything and are proud of it, then a different reality is that lawyers may find that a challenge to deal with. That is a background for rule-making and discovery decisions, but just a background.

Third observation: another problem that seems to exist from reported cases, some of them described in the materials we gave to you, maybe many of them familiar from

experience to some of you, is a communications problem. What do you do if you are the outside lawyer and you are supposed to tell the court what is available, what has been discarded, what can be done in discovery? You go and talk to the client, and the client says, “Here’s what we can do and here’s what we can’t do.”

There are a number of cases in which the “client” is somebody who does not really know but tells the lawyer what can and cannot be done, and the lawyer turns around and says, “Judge, here’s the situation.” Later on, during the deposition of the IT person, it turns out that the stuff that we told the judge was not available actually was and it isn’t anymore. That is one of the times trouble begins to brew.

What is the solution? Well, I would think on one level the solution is lawyers — and hopefully clients — have to learn about the problem and how to solve it. Perhaps there are rule-making solutions. One can find in the District of New Jersey’s local rule, and I believe in the one from Wyoming, that are in the materials rule-making reactions to that: “You must talk to your client and find out about these things before you establish a discovery plan.”

Next, a couple of observations on preservation, a big topic, less clearly so in the past.

On the one hand, preservation does not mean production. The fact that something is potentially available does not necessarily mean that it has to be obtained by moving mountains. But the flip side is if it is not available, then the decision that it would be worth obtaining it cannot be made at the time it should be made. That is one observation about preservation.

A flip-side observation is preservation above all would be a crippling thing to pursue. If you cannot turn on your computers because you might change something, then how is the world going to move forward?

Two more observations and then I will wind up so that we can turn to our panelists.

One is that judges are actually very smart people. This is not just currying favor; this is my mature view. And I am not going to necessarily say that is true also of law professors. They are practical, they understand generally what is going on, and often they understand what they do not understand. They have been learning, they are still learning, and they are telling others what they have learned. That is what the case law collection that is

described at the back of your materials shows.

So a question in the background is: have they been getting it wrong? Do we have reason to think that there are too few of them who have gotten far enough along the learning curve? Can we teach them through Rules what perhaps they do not really need Rules to know and to do? So is it wrong? Is the case law something we should change? Is it insufficient because not everyone has gotten the word?

That gets me around to something I believe Myles mentioned earlier, and that is changing Rules is hard. Some people think it happens too often. Practicing lawyers do not like it for good reason. It may seem a trap for the unwary. In my judgment, it is not true, as one of our panelists said in a recent article in *Litigation* magazine, that the Federal Rules of Civil Procedure are amended as often as the telephone book, but that was the opening line in an article in the most recent issue of *Litigation* magazine.

It is a cautious, time-consuming, difficult, challenging process. It is by nature all of those things. And just to emphasize what Myles said, if we got the clarion call from this group here and from the larger world and we could see what the goal was immediately, and immediately

begin to pursue it starting next Monday, then the soonest Rule changes dealing with these things could be in effect would be December 1, 2006, basically three more years from now, by which time somebody might be saying, “Only yesterday when we met in Fordham, we thought this was the problem, but now we see that there is this other problem, or that this solution will not be satisfactory.”

So I guess to wrap up what I am going to say and open the first panel with my introductions, the question might be phrased in terms of The Big Change. Do we need big changes to deal with what we are here to discuss? Can we figure out what those changes might be and be confident that they will produce the results that we want and not produce results that we deplore but discover only after the fact?

Surely this is a highly important issue. The Federal Judicial Center has been keeping track of CLE-type sessions on this subject and finds that they occur, and have for two or three years now occurred, at the rate or two or three per week, week in and week out, year-round. So surely there seems to be a groundswell of concern.

Whether that is a groundswell for making Rule changes is a different question. If one wants to know whether it is, at least somebody as technically challenged

as me has to find out from somebody who knows a lot more about these things. So our starting point —— and I am shifting gears now —— is to talk to some people who know a lot, probably more than most of the rest of you do, about these subjects.

PANEL ONE:

TECHNICAL ASPECTS OF DOCUMENT PRODUCTION AND E-DISCOVERY

Moderator
Professor Richard L. Marcus
University of California, Hastings College of Law
Civil Rules Committee

Panelists
Joan E. Feldman
Computer Forensics, Inc.

George J. Socha, Jr., Esq.
Socha Consulting, LLC

Kenneth J. Withers, Esq.
Federal Judicial Center

PROF. MARCUS: Panel One deals with technical aspects of e-discovery. I am going to introduce our heavy-hitter panel on this subject. We have three who are with us today. They have asked that you hold your questions until they are all done. We were going to have an illustration of technical difficulties, but they were removed supposedly, maybe as a transitory measure, but this magical item in front of me is supposed to assist them in making their presentations. I am going to introduce each of them and mention that my role here is as traffic cop, to impose time limits on each of them so there is time for you folks to ask questions or make comments.

First up will be Ken Withers, who is now with the

Federal Judicial Center, where he has been since 1999. He went to Northwestern Law School, spent about ten years in private practice in Boston, and then worked for the Social Law Library in Boston before joining the FJC. So far as I am able to determine from the résumés that I have, he is the only panelist on this panel who has received the Lord Lloyd of Kilgerran Award, which had to do with his graduate studies, I believe, in a related field in Great Britain. His topic is going to be, as I understand it, essential practical differences between electronic discovery and traditional hard-copy discovery.

Then we turn to Joan Feldman —— and I should have said this of Ken; it is even more true of Joan —— who many of you I suspect have heard before. Both of them regularly speak on these topics. She is the Founder of Computer Forensics, Inc. She has a background in records management and a background in litigation services, beginning, as I recall, as a paralegal. She must be one of the most sought-after speakers on this subject. Her résumé lists more than seventy such presentations over the last three years, so that’s two or three per month. Her topic will be current practices in e-discovery, what is actually going on.

And then finally, to try to stare hopefully into

the future, George Socha will talk about what the future presently seems to hold. George is a graduate of Cornell Law School, spent fifteen years in practice in Minneapolis, increasingly addressing issues of electronic discovery in large-ticket litigation. Last year he started his own consulting firm on that topic. He is also a frequent contributor to events on electronic discovery. He will be our final speaker.

After those speakers are done, we will hopefully have substantial time — I think I am coming in ahead of time — for you folks to ask questions, and of course during the rest of the conference and after it is over, further suggestions/reactions are welcome.

I have completed my welcome to you. I would therefore thank you for your attention and turn the floor over to Ken Withers. Ken.

MR. WITHERS: Not only did Professor Marcus come in ahead of time, but he also said everything I wanted to say, so we will save a lot of time here.

My mission in the next ten minutes or so is to spell out the differences between conventional discovery of paper documents and the emerging world of electronic discovery, discovery of information that is created, stored,

or best manipulated and viewed using computers or computer media.

There are differences in degree and there are differences in kind. But first, and probably the most important, has already been alluded to by Professor Marcus, and that is a difference in degree that dwarfs all other, differences in degree and kind alike, and that is volume, the sheer volume of information.

Professor Marcus alluded to statistics from the University of California, his own school, which claimed that 92 percent of all information being created in the world today is created and stored in digital form on magnetic media —— that is, on computers and disks and tapes. George Socha at the end is going to go into a little more detail on what that statistic really means. I simply want to demonstrate a few of the ways that this has occurred.

The fundamental difference between the way people create and communicate information on paper and on computers is that computer data is not tied to any artifact, like a piece of paper or a clay tablet. Computer data is digital, it’s a sequence of zeroes and ones, positives and negatives, ons and offs, a stream of energy. When it is transmitted, there is no transmission of a physical object, like a piece

of paper, but of energy, which takes patterns from one medium and places them on another, like a computer hard drive or a disk. No physical object is moved.

This replication results in the buildup of massive volumes of data, mostly redundant but often containing subtle changes made by the people or the automated systems along the way. That is why one printed document that may surface in conventional discovery, if it is for instance a word processed document or the result of some other automated system, may represent hundreds of copies or versions to be found on computers and on network servers and on disks and on tapes.

The fact that data can be sent to the next cubicle or around the world, to one person or to a million people, with the same click of a mouse creates a buildup of data entirely unlike anything that we have seen in human history. But computers have created whole new categories of data that do not have easy comparisons in the paper world.

The first one that I want to mention briefly is metadata. Metadata is a made-up Greek word. Roughly translated, it is information about information. It is essential for the functioning of a computer. It is contained within each computer file. It tells the computer

such things as the file's creation date, the location of where it was created, how often it has been edited and on what other computers, the date and time it was last viewed or altered. Metadata is usually generated automatically, although it can be designed and manipulated by humans.

[Slide] It is not difficult to view. This is an example of a word processing document in Microsoft Word and what is called the "properties" window, which tells some of the metadata that is available.

[Slide] But computer files themselves may contain data which was never printed on paper, is never viewed on the screen. This is an example of the same word processing document showing the editorial changes that were made, what we call embedded edits.

When one looks at the data on a computer hard drive not through the lens of the operating system, which arranges it much like physical documents in a file cabinet, but through the lens of computer forensic software, we see a totally different world. We can see documents that have been supposedly deleted. References to that file, that document, have been removed from the visible operating system, but the data is still present and still intact on the hard drive.

[Slide] This is a quick example of a document, called Ericaperlvocalresume. The indication using this computer forensic software is that it has been deleted. However, the bottom half of the screen shows the document in its raw form complete with all of the formatting commands that would normally make this look like a very pretty résumé.

Because of the almost magical nature of digital data, that stream of energy, to be transmitted into any medium, we have many more places in which data relevant to discovery or an investigation can be found. And also because of the magical ability of digital data to transform itself in the process of attaching to these different media, we have any number of formats in which the data can be found, as though we have to conduct discovery simultaneously in a number of countries and in a number of languages.

While the volume of discovery increases on a macro level with the number of places, the number of formats, and the sheer numbers of documents that need to be looked at, it also increases on a micro level as each electronic file becomes in essence a little database unto itself.

The typical word processing or email file or other electronic file contains of course the visible data, the

things that one can see if the file is printed out or is shown on a screen. But below that there is another strata: the metadata that we have seen, the formatting commands, the formulas used to create the spreadsheets, the hidden and embedded edits that may be contained within that file.

And below that there is yet another strata: the bedrock on which that file rests, which is the hard drive or the medium itself, which may contain residual data from past files; it may contain what one of our speakers here, Dan Regard, in the past has called “digital packing peanuts,” which is data that is used to fill out the sector on a hard drive. These are the bedrock elements underneath any particular file.

If we are simply looking at paper or the electronic equivalents of paper, what we call PDF or TIFF images, all we see is the visible file. If we look at data in its native format, in the way that it is kept in the normal course of business and manipulated and used, then we see the second strata, the metadata, the formatting, the formulas, etc. If we take the step of going to on-site inspection of the computer media itself —— the computers, the disks, the tapes —— or we take what the forensic scientists call a bitstream image or a bit-by-bit copy of

the data, then we have the ability to look at the residual data.

Each way we view the computer file reveals a different layer, and this may go to the question of relevance. At what stage does this become irrelevant?

But documents themselves as tangible objects are actually disappearing. Today most commercial, governmental, and even personal communications and information are not reduced to immutable physical objects, like paper. When we conduct discovery, we are actually querying databases to generate selected data which we then arrange and present in a particular way. We are no longer looking at existing objects, like paper and file cabinets.

So the primary focus must be on the relevance of the questions being asked and the efficacy of the process being used to obtain the answers, not on the nature of the physical documents involved.

With that, I would like to turn it over to the next speaker. Joan?

MS. FELDMAN: Thank you, Ken, for laying out some of the primary technical issues —— I always like following Ken because he carries the heavy load —— and Rick as well for giving us that chronology.

As was pointed out, twenty-five years ago I started out in the paper cut brigade reviewing what was considered to be huge volumes of material, courtesy of another big technological change, the photocopy machine.

We'll fast-forward to twelve years ago, when I began trying to explain to people that a deleted file could be restored and that there were such things as embedded data and so on.

I believe that today we are in the middle of the next revolution in electronic discovery, and it concerns the overwhelming volume of material that we are facing. There has been a lot of focus on this issue, and for good reason.

[Slide] I like to term it "the tsunami effect." I also know that George when he follows me today will be talking about the fact that this current problem is actually only going to grow and continue to grow.

I would like to talk to you today about what people are doing in the real world to deal with electronic discovery. To that end, again, I want to encourage you to have the mindset that there is an enormous amount of material out there, that it is often difficult to identify where the real value is going to be in going through that material. That is not an idle subject because there is so

much information out there and there is so little in a way that actually turns out to be truly responsive.

There has been a big push in applying technology to solve this problem. There have been some amazing developments in tools for sifting through the electronic documents, for acquiring it more easily, for doing text searching and concept searching. All of these are most helpful because we are trying to deal with a tsunami.

I would just like to tell you that in many ways it is like having a snorkel when you are out in the ocean, that it is a good tool, but we are dealing with a huge volume of material and it is growing.

[Slide] Let me put this in context for you in a real-world example. We were recently called upon to be a mediator in a case involving a large Fortune 100 company. The special magistrate was at a stalemate with both parties. At issue was a huge volume of material. A well-respected large litigation support company, a well-respected large law firm, had assisted the Fortune 100 company in identifying the documents to preserve and produce. They came up with a total volume of 42,000 backup tapes —— that's another issue —— and they identified twenty hard drives. For the judges sitting here today, I think that you might be familiar with

hearing this type of number brought before you.

What was at issue? Plaintiffs dug their heels in and insisted that 42,000 backup tapes be restored and reviewed. Defendant producing the documents said, “It’s expensive, it’s a fishing expedition, it’s not going to yield anything.”

Between the two of them, they probably spent over $75,000 just on motion practice, and the lucky judge got to hear the debates about what a tape was, what was on the hard drives, embedded data. At the end of the day, nothing really had been produced, nothing really had been reviewed.

“Break the deadlock,” that was our charge. As expert witnesses often do, we gently guided the court, and although our mandate was to actually see if it was really worth the money to look at 42,000 backup tapes, we suggested something else. We suggested that they begin focusing on where the evidence might actually be. “Well, we have 42,000 backup tapes and we have twenty hard drives. How much is it going to cost?”

We gently suggested that they needed to focus on where the evidence might actually be. We applied some techniques that the attorneys sitting here today are familiar with. We questioned witnesses. We went from the

point of departure as to where the evidence that they were looking for might actually be stored, in whose hands; what was the evidence —— it was a trade secret theft case; who worked on the documents that might actually have something to do with that; who worked on the product at question.

In one and a half days of interviews with the systems people and with some of the key witnesses who had actually created some of the documents that we felt would be at issue, we actually located another server that had not been disclosed that had been set up by the engineers, as they often do. We like to refer to engineers as our "rogue" folks because they often set up their own systems. They had established their own system, including their own email server. It's like Mount Everest —— you know, it's there.

We located this fact that there had been a server. By the way, in the course of the discovery in a six-month period, they had disabled and mothballed the server. Actually they destroyed the server because they wanted to use it for some other application. They had not been informed by the attorneys or didn't pay attention to it. But, as engineers will often do, they were also packrats and they had created two backup tapes for that server. That is actually where the evidence was. It had been previously

unidentified.

What about the 42,000 backup tapes, the subject of much fevered debate about cost and cost sharing? Were they impenetrable? Was it this monolithic dataset that was going to cost at a conservative estimate $4-to-$5 million? Through questioning of the IT staff, we were able to find the Rosetta Stone that helped us begin to prise apart that monolithic dataset to identify particular tapes that might actually contain evidence.

Through a closer look at some of those tapes as we began this process, we were able to narrow the 42,000 set to thirty-seven tapes —— thirty-seven backup tapes, previously undisclosed data —— not as a result of some technological marvel or breakthrough in text-searching technology. Despite the fixation with blue screens as solutions for electronic discovery issues, I would just suggest to you that a good background in technology, an understanding of how enterprises use their computers, and the same principles that guide experienced litigation attorneys and jurists in their decision-making process, in terms of finding and refining and looking for responsive information, is critical here.

There is a dynamic tension in my field these days

because there is such an emphasis on the ability to process massive amounts of data. That is fine. I am not saying that there —— thirty-seven backup tapes was a lot of data; it was good to have those tools —— but the volume is increasing and we do not necessarily see a corresponding interest in just understanding some of these basic fundamentals.

So that is one issue that we are dealing with and, conversely, all of you are dealing with.

[Slide] There are a few ways to begin chipping away at these issues.

- You must start at the preservation phase because you are going to have to make some decisions about what needs to be preserved; and if you do not and you are continuing to overwrite tapes or reuse or format hard drives, you are going to destroy critical information. So you have to start there.

- You have to learn how to distinguish what kind of data you are looking for. Are you looking for Word documents? Are you looking for email? Are you looking for database types? This question needs to be answered early on.

- Data elements. Ken does a masterful job of explaining things like metadata and embedded data. These are data elements that you may be concerned with. Or you may not; the parties may make a decision that they are not, they don't care, they just want what is on the face of the documents or that compilation. That's fine, but those decisions have to be made.

- Common terminology needs to be developed between the parties. We suggest the adoption of a glossary of terms and that they agree to it, so that you do not have this shifting target as you move through as to what is a database, what is a relational database, what is a file. You need some basic terminology that you agree upon.

- And you also have to make some decisions even at the earliest stages as to how you are going to produce that information. Mention was made of a TIFF image versus a native file. There is a big distinction there. TIFF images do not contain embedded information; they do not contain the original metadata. When you are producing those documents you need to have some idea of what it is you are going to be producing to each other and, unfortunately for everybody, you have to make those decisions early on.

[Taping malfunction —— short gap —— need “hog farm” quote at end and beginning of Mr. Socha’s presentation.]

MR. SOCHA: Now is where […]

Next is the question of more data. The volume of data is expanding rapidly.

[Slide] Here is a little bit more detail from the 2003 study done by the University of California at Berkeley. That followed up on a 2001 study, I believe, where the authors made at that time what they considered to be outrageous projections as to the growth in the volume of material there in electronic form. In the executive summary to the 2003 report, the authors said: “We had no idea. What we thought was outrageous didn’t even come close to what appears to have happened.”

And, importantly for this discussion, is the row on magnetic. Now, they are talking here about 4 million terabytes of data. That is a volume that I think none of us can even begin to conceive of. There is nothing like that in paper out there. So we have got this enormous volume of information that we potentially need to deal with. If we keep trying to buy hog farms instead of just ham sandwiches, we are going to be in a lot of trouble.

[Slide] There are also more types of data and in more places than I think many people really recognize.

- Of course we've got email. There is a lot of discussion about that. That is what captures people's attention. That's the easy picking, though; that's the low-hanging fruit. Email is almost like paper in many ways. You can pull it up on the screen, most people now are used to dealing with it, and you can read what is right there.

- Instant messages, though, it is predicted will be equal in volume to email within a couple of years, perhaps sooner. That is a much more difficult medium to deal with for electronic discovery purposes.

- Text messages, such as the ones sent back and forth by cell phone users, are rapidly growing in use.

- Relational databases, while they have been around for a while, have not for the most part been the subject of discovery requests. I think lawyers have avoided going there because relational databases are simply too esoteric, too complicated, too confusing for most people who have not had to deal with them in some other aspect. If I were to bring up on the screen — and I will not do this to you — the plan for a relatively simple relational database,

what you would see would be lots of boxes over the screen. It's like the anthropology class I had as a freshman in college. The professor put up boxes on different subjects and then started drawing lines to each other. By the time he was done, there were about thirty boxes on the wall and lines from everything to everything.

If you look at that on the screen as a user would, you will see something that is coherent and makes sense, provided they built the relational database property. If you try to go in without knowing what that database is and without the benefit of that user's experience and expertise, you might find yourself just with gobbledygook. But that is where a huge amount of data is stored these days.

- XML datasets. The word processing document we see today is nothing like what you think it is. It may look like something that just gets printed out on a sheet of paper. There is not just metadata there, though. It may be broken up into all sorts of constituent parts that are not even part of that file but elsewhere. So the information is all over the place.

- Digital photos.

[Slide] And then, with expansion also comes better processes and tools, some of the stuff Joan was

talking about. People are learning how to do this better and how to move forward with it. Well, with expansion then follows routinization. We get used to this stuff. It becomes part of what we are doing. Bigger projects can be done than ever before.

In 1996, I handled what was probably one of the largest tape cases that year, with 461 backup tapes. I had a hard time finding any vendor who could handle that work. The largest backup tape case I know of from last year involved 10,000 tapes. Now, most vendors cannot handle that, but there are some who can.

The amount of data we are dealing with in the 1990s — in the late 1980s we were talking about kilobytes; in 1996 10 gigabytes was huge; now 10 terabytes are not unusual. We have to figure out how to deal with that volume because it is only going to get larger.

[Slide] But with routinization also the impossible becomes possible. We discover that we can do things now that we simply could not handle a few years ago. There are vendors out there offering services that were unimaginable six or seven years ago. The data that was essentially inaccessible not long ago is routinely available now, and that is only going to continue to change and be so

moving forward.

And then, finally, with this routinization our expectation level goes up. Because we can do this much, we want to be able to do this much. As we demand more, the people who are providing the services and capabilities turn around and, so far continuously, have been able to offer more to us, which then takes us right back around to expansion.

So looking into the future as best one can at this point, there is an enormous growth in the volume of information we have to deal with, a growth so far beyond what we are capable of doing that we cannot even really begin to imagine in some ways now how we are going to be handling this information in a few years, except to know that most of the issues we are dealing with right now are going to at a very technical and detailed level be yesterday's news, at best.

Thank you.

PROF. MARCUS: Thank you.

This is the time when we hope to be receiving the benefit and insight of the presence of all of you. There are obviously questions one could ask these panelists. If no one else wants to, I will.

We have a question from Jim Rooks.

QUESTION [James E. Rooks, Jr., Center for Constitutional Litigation, Association of Trial Lawyers of America]: For Joan Feldman. You described that representative case. Can you fill in a couple of additional details? You said one of the parties was a Fortune 100 company. Generically speaking, what other kinds of litigants were involved?

PROF. CAPRA: Would you identify yourself when you ask a question?

PROF. MARCUS: We are trying to keep track of who is participating, so if you can say into the mike who you are, then we can keep track of that.

QUESTIONER [Mr. Rooks]: Excellent idea. I'm Jim Rooks for the Association of Trial Lawyers of America.

In the representative case you described, you said at least one of the litigants was a Fortune 100 company. I'm wondering if you could describe generically the other litigant or litigants.

Next, were you brought in as a court-appointed expert? I'm assuming you charged a fee for your services. Was it split among litigants or paid by one side?

MS. FELDMAN: I'll answer the first question. The

other party was a smaller company alleging that the larger company had appropriated their trade secrets, so they were not of the same size as the larger company.

Your second question was the ——

QUESTIONER [Mr. Rooks]: Were you court-appointed?

MS. FELDMAN: Yes, I was a court-appointed expert. Actually I was asked to assist on assessing the cost issue, and that's how I was brought in, because the parties were at a deadlock.

QUESTIONER [Mr. Rooks]: Were your fees split among the parties?

MS. FELDMAN: My fees were split between the parties, yes.

QUESTIONER [Mr. Rooks]: By agreement or by court order?

MS. FELDMAN: By court order.

PROF. MARCUS: Down here.

QUESTION [Stephen D. Susman, Esq., Susman Godfrey]: Steve Susman, Houston. My question for the panel is whether anyone is aware of any studies or surveys that have been done of lawyers who have retained these forensic consulting firms to see whether they really believe anything that they discovered was outcome-determinative. I mean, was

it worth doing, or is it just a huge waste of money? And can you cite me to such surveys?

MR. SOCHA: No such surveys that I know of, so there is nowhere I can cite to. The best I think any of the three of us can do is provide anecdotal information.

I would say that in my experience the electronic discovery activities tend to be very costly. Much of the work is fruitless, which is the case with any discovery activities. I mean, isn't it true? But there have been certainly pieces of information that have come out of electronic discovery that have been critical to the outcome of the cases.

MS. FELDMAN: Mr. Susman, I would say that in approximately 45 percent of the cases that we have worked on the evidence that was disclosed turned out to be critical to the case. I do believe that the focus needs to be narrowed, and it has been our role in guiding our clients to try to help them reduce the scope of their review.

QUESTIONER [Mr. Susman]: Of the lawyers here, is there anyone who can give a testimonial to the fact, or give us an example of how something discovered electronically that couldn't have been discovered in hard copy made a difference?

PROF. MARCUS: Is that responsive to his question?

PARTICIPANT [Richard Seymour, Lieff Cabraser Heimann & Bernstein]: Yes.

PROF. MARCUS: Okay. You are going to be next, but maybe if we've got a response to the question? We also only have one microphone. Sorry.

PARTICIPANT [Mr. Seymour]: My name is Richard Seymour. I handle employment discrimination class actions. I have been discovering electronic databases since 1971. I would have lost virtually all of my cases without it because everyone always denies discrimination. It's the analysis of what took place inside the company that makes the difference. In some instances, we have had to create a database that contains all the job movements of all the employees over a period of a decade and a half in order to be able to do that. But our clients would have lost their cases without that. It would kill us if we didn't have it.

I have to say that there are very few problems with it. Sometimes you have people being unreasonable, the same way that you have with paper discovery, but I have never yet come across something that reasonable people could not sit down and resolve in a very short period of time.

PROF. MARCUS: Thank you. The next questioner is

unfortunately on the other side. There may be a chance — I have no idea of our technical capacities — to have a second microphone.

PROF. CAPRA: We have stereo now.

PROF. MARCUS: Ah, you have two mikes. I was going to suggest that. Go.

QUESTION [James. L. Michalowicz, Tyco International (US), Inc.]: Jim Michalowicz from Tyco, formerly of du Pont.

A question for, I guess, the whole panel. I think the root cause of a lot of the subjects we are going to talk about — spoliation, cost shifting — the root cause seems to be these backup tapes. My question is: do you see any change in terms of technology on the backup tape front, or also on the thinking in terms of the retention of backup tapes, that may go ahead and reduce some of that root cause?

MR. WITHERS: I'll take that first. The short answer is that backup tapes are a technology that will be disappearing quickly, I think, but that is driven mainly by business reasons and not necessarily by discovery costs and risks, although it is somewhat.

The purpose of a backup tape — and we must make

this distinction between backup tapes which are used to capture all of the data on servers and systems for the purpose of disaster recovery —— if the system is struck by lightning the next day, then all of the data can be immediately restored, but it is restored in an unstructured way. Once the data is put back onto the computer system or the media, you must have the original operating system and the original configuration to bring it back to life, to make it usable. So backup tapes are not archival media, they are not used, or they should not be used, for the retention of data that needs to be accessed in the future.

The problem has been digital packrat'ism, and that has been alluded to before. People keep backup tapes long after their logical life, which should be twenty-four hours or until the next backup tape is made. There is no reason to have more than one backup tape for any particular system.

Now, the problem has been that people have been keeping these backup tapes. And indeed, if you ask any good IT person in any company, "Have you ever been asked by the executive suite to recover a lost email from a backup tape?" the answer will be "yes." People have been using them for that purpose. They are not really very good. They are very costly.

What is happening is that that technology is being replaced by parallel processing, by having dual systems operating, often on different continents, simultaneously so that this reduces risk tremendously. If one system goes down, the other system is up. That is the reason why on September 12, 2001, the financial markets in the world continued to operate out of Charlotte, North Carolina, because that is where a lot of the backups were.

So backup tapes as such will probably be disappearing. We hope so. But it will be driven by business purposes.

PROF. CAPRA: Rick, we've got somebody over here.

QUESTION [Chris A. Seeger, Esq., Seeger Weiss]: Hi. Chris Seeger, Seeger Weiss. I think one of the reasons we hear — and this was a question that was asked by Steve Susman — is "why don't hard copies suffice?" I would like to hear you guys address what actually never makes its way into printed form so that hard copies wouldn't suffice? I have heard reports anywhere from only 10 to 40 percent of information that is created by companies ever finds its way onto paper.

MS. FELDMAN: I'd be happy to answer that question for you. Who here has used an Excel spreadsheet? When you

print out the spreadsheets, are your formulas printed out? No. The formulas are embedded in the field. So if you give me a printout, I will not have the complete document.

Probably the other issue that gets a lot of attention is what is referred to as metadata. You can find metadata in any of your documents by opening the "properties" feature. It will show you the date of creation and give you some statistics. Again, not normally printed out, only available in that electronic format, in that native format. Sometimes it is captured during a conversion process to TIFF, but not always.

QUESTIONER [Mr. Seeger]: So if you do not do electronic discovery, that is information you would never get?

MS. FELDMAN: If you do not do your electronic discovery to get that version of those documents, that embedded information is not available to you.

MR. SOCHA: The other piece is a relational or other database. If you just try to print out a database, you will most likely get many, many boxes of garbage and nothing else.

QUESTION [Michael Arkfeld, Assistant U.S. Attorney, Arizona]: Thank you. My name is Michael Arkfeld.

I am an Assistant U.S. Attorney from the District of Arizona.

The question I have for the Rules Committee, and for the panelists especially, is: presently or in the future, with the increase in costs of electronic discovery, will there be a corresponding decrease in the cost of paper production?

MS. FELDMAN: [Nods affirmatively.]

MR. WITHERS: My view is no because people insist on printing out all of their email. I do not know why they do it, but we have many, many cases around the country where people are routinely converting large amounts of digital information into paper for processing. It is becoming astronomical.

As we have mentioned before, things like metadata or the formulas used in spreadsheets — the reaction of many attorneys when they realize that they are missing this information is to ask for it in paper form.

QUESTION [Michael R. Nelson, Esq., Nelson Levine de Luca & Horst]: Mike Nelson, the Philadelphia law firm of Nelson Levine. I defend insurance companies against class action lawsuits.

A quick question for you, Joan, and then a

question for the panel. That cost that was split, was it split 50/50?

MS. FELDMAN: Yes, the split was 50/50 in that case.

QUESTIONER [Mr. Nelson]: As I watched the presentation this morning, I started to think that a lot of what we are going to get into at this conference is about this concept of what is reasonably producible. It sounds like as technology catches up with us that that concept is more or less going to become outdated because everything is going to be "reasonably accessible." As litigation goes on, a lot of these backup tapes are going to be more or less made available anyway as part of this. So as you look at the ever-expanding universe of what is out there, does it make sense to stick to tenets that are in some of the opinions we have now that says "if it is reasonably accessible, it should be produced," because then it gets into a much broader universe as time goes on?

MS. FELDMAN: I think that a definition of "reasonable" is what is critical here. To use a contemporary analogy, you can have a satellite view of what you are going after, which is global and all-encompassing, or you can use on-the-ground intelligence to begin to

identify what actually may be real and valuable.

When you are looking for electronic documents that are responsive to your case, you can of course deal with the universe of those documents in virtual repositories, on backup tapes, in databases, throughout an enterprise, but understanding how people create that information and how they use it, the people that are particular to the issue, and then extrapolate from there I think is the only way people are going to get out of this in terms of what is reasonable, where is your trajectory when you are looking for responsive information, when you are dealing with this huge volume of material that is out there. So I do not think it is purely a technical issue.

MR. WITHERS: I would like to amplify that a little bit. It is indeed true that as the technologies related to search engines and to discovery improve, then more and more things become accessible. The bottom line is that if something is in digital form and it is online, then it is possible to search for relevant names, dates, and relationships with other information, and it would be possible to take a large corporation in the future and place a search engine over top of its entire enterprise-wide data collection and search for everything.

The question is not accessibility; that is a threshold question. The question goes back to Rule 26(b)(1). Accessibility is a 26(b)(2) issue. But is it relevant and do we want to concentrate more on the process by which those searches are conducted and what they are going after?

Then we have the cost beyond that. Once we have gotten down to the relevant information, it still has to be reviewed by attorneys and used in some way or another. That is where the real costs come in, and no technology is going to replace hapless first-year associates.

PROF. MARCUS: Just as a housekeeping matter, I've got five folks who have indicated an interest and then we may be running out of time after that. I'm not sure. We've got a sixth and a seventh.

MR. SOCHA: I was going to say one quick coda on that. You may have to use technology to replace first-year associates if you truly do have to deal with the volume of data out there. You cannot put enough bodies in front of enough boxes or enough screens to in a reasonable amount of time review 10 terabytes of data. It is not possible.

PROF. MARCUS: I've been told we really ought to cut it at five. There will be plenty of chance for others

to participate. We've got five, I think. Anyway, you are next.

QUESTION [Charles A. Beach, Esq., Exxon Mobil Corp.]: Chuck Beach, Exxon Mobil, Irving, Texas.

Let's assume that a lot of critical information does come out of emails. Have there been any studies that show whether that is email that is accessible in the normal course of business or do these critical emails come off of backup tapes?

MR. SOCHA: I know of none.

MR. WITHERS: I know of none either.

PROF. MARCUS: Okay.

QUESTION [Francis J. Burke, Esq., Steptoe & Johnson]: Frank Burke from Steptoe & Johnson in Phoenix, Arizona.

My question for the panel relates to your advice on taming the tsunami. My take-away from Joan's remarks was that perhaps the greatest computer you have access to is the one in your head, and perhaps the way to start is by looking at the corporate relationships and who was working on the data. She took 42,000 tapes down to two or thirty-seven. Judge Scheindlin, I guess, taught us that maybe the first step is sampling, start with a sample and then go from

there. I just wondered if the panel can give us some other ideas. When you have 42,000 tapes, how do you tame the tsunami?

MS. FELDMAN: I think sampling is a great idea. There are different ways of sampling. We use a little different terminology, and that is actually trying to get the catalogues off the tapes so you can do a more effective sampling. But I think you have to use every tool available to you. You have to use your head, you have to use technology, you have to use sampling. I don't think there is one solution. I think the danger right now is focusing only on the technical as a solution. That's my main point. So I respect the different ways of attacking this problem.

PROF. MARCUS: Okay. We've got a Committee member and then we've got three more and then I think we have to take our break.

QUESTION [Hon. Brent H. McKnight, U.S. District Judge, North Carolina (Western), Civil Rules Committee]: Brent McKnight, Western District of North Carolina, Charlotte.

If lawyers come to me early on in a case with claims of spoliation in electronic discovery contexts and ask me to issue a preservation order or have an early

spoliation discovery conference of some sort, knowing that, at least under the current version of the rules, you need some kind of order unless you are relying on the inherent authority of the court to enforce sanctions, I guess my question is: what could I anticipate that technology can tell us about whether and to what extent there has been spoliation to make such an order something that I should issue?

MR. WITHERS: This is a very fact-based question. It depends on the nature of the spoliation that has been alleged. But certainly through computer forensics technology we can determine for the most part whether files have been deleted, whether scrubbing mechanisms have been used. We have several case examples, the *Kucala* case and such, where technologies were used to attempt to destroy evidence.

But you have to have more to start than simply an allegation that spoliation may have occurred because it is theoretically possible to destroy documents. You need something to go on to determine what is going to be the appropriate way to approach this. My view is that early in the case a question of spoliation arising had better be grounded in some evidence outside the speculation that it is

possible to happen before an order can arise.

PROF. MARCUS: I think this is proving that this is a format that works, but there is limited time on the first panel. I think I am going to have to cut it. I thought John Carroll was next — well, golly, I thought that's where next — and then the gentleman on the aisle, then Laura Ellsworth I think were the three that I had noticed. I apologize to those I overlooked. My colleagues will do better.

QUESTION [Hon. John L. Carroll, Dean and Professor, Cumberland School of Law]: John Carroll, Cumberland School of Law, Stanford University.

We are talking about a Rules process that takes three-to-five years to change. You are talking about technology that is happening overnight. What is your view on whether technology has outstripped the Rules process and that any Rule change that might be implemented is obsolete well before it becomes law?

MR. WITHERS: Any Rule that attempts to address a particular technology, such as email or instant messaging or backup tapes, is doomed. It has to be very general, and it really should concentrate on the discoverability of relevant information in whatever format, using whatever technology.

QUESTION [John Vail, Esq., Center for Constitutional Litigation]: This is a specific question for George Socha. This is John Vail from the Center for Constitutional Litigation.

George, you put up a graph of costs. Can you describe the data sources for that graph? It sounded when you were talking that the graph was actually a graph of money spent on consulting businesses. You tell me.

MR. SOCHA: Very quickly, we did a survey to find out a number of things about electronic discovery, but in particular for the costs. We conducted telephone interviews of, if I remember correctly, fifteen or sixteen of the better-known service providers, of maybe nine or ten of the law firms that we knew were most actively involved in electronic discovery activities, and similarly of folks at five or six of the corporate legal departments. We then gathered other data from various third sources. I forget — I ended up with 15 gigabytes of data or something like that, pulled this all together.

We were asking for these costs what people were spending or thought they would be spending for electronic discovery activities that ran the spectrum from the initial preservation and collection of information through the

processing and production of that information to the other side.

PROF. MARCUS: This is going to be our last question of this session. There will be questions in every session, there is time between sessions. We want to hear from everybody who has got something you want to communicate. But for this session we have one more comment and then we will be taking our break.

QUESTION [Laura Ellsworth, Esq., Jones Day]: I'm Laura Ellsworth. I'm with Jones Day.

Most of what you all talked about had to do with production obligations, what we do to search and produce from a known body of data and information. My question goes to the preservation obligation, which I think is a thornier problem and one which is not as susceptible to resolution by Rule 26(b)(2), as many of these issues of what do you do once you have grabbed everything and you're figuring out what you have to turn over.

My question is this: what technological solutions are you aware of that permit us to deal with the problem of how you preserve all the information for purposes of 26(b)(2) analysis and how do you deal with what Professor Marcus identified as you can't cripple the company? But the

thornier issues are if you don't preserve it, you are into the spoliation issues, and that is the larger area of uncertainty for practitioners, I think.

MS. FELDMAN: I think before you can begin effective preservation you have to attend to the identification stage in terms of trying to locate what may be responsive, Laura. So there you might be a bit more broader based.

In terms of the technical ways of preserving it, if you have identified a particular server out of fifty or 400 servers that might be key, you can make a "snapshot" backup, you can make selections of what you are going to do, you can store that information on tape. That doesn't mean that is how you are going to produce it.

In terms of hard drives, you can preserve hard drives forensically for selected drives. But again, it is difficult to preserve documents until you know what you need.

Let me give you the analogy of the warehouse filled with paper that most large companies have. They have destruction schedules. They know to instruct the warehouse to not move the boxes off the shelves for destruction even though it's their due date, for example.

So there are methods that people have developed in corporations over the years. They can apply these methods using good data stewardship to their electronic documents, and many companies are starting to embrace this so that they can more quickly identify, and therefore preserve, responsive information.

PROF. MARCUS: Okay. I am going to have to stop the first session, and only the first of eight, there. We thank our panelists. Thank you.

[Break: 10:40 to 11:00 a.m.]

PANEL TWO: RULES 33 AND 34 — DEFINING E-DOCUMENTS AND THE FORM OF PRODUCTION

Moderator
Hon. Shira Ann Scheindlin
United States District Judge,
Southern District of New York

Panelists
David R. Buchanan, Esq.
Seeger Weiss LLP

Adam I. Cohen, Esq.
Weil, Gotshal & Manges LLP

Hon. James C. Francis IV
United States Magistrate Judge,
Southern District of New York

Paul M. Robertson, Esq.
Bingham McCutchen LLP

JUDGE ROSENTHAL: The next panel is moderated by Judge Scheindlin. In this group Judge Scheindlin needs absolutely no introduction.

JUDGE SCHEINDLIN: Thank you, Lee, for that wonderful introduction.

As the Moderator of this panel, I am going to keep an uncharacteristically low profile. I intend to do nothing but introduce the speakers and the topic. I also will use demonstrative evidence. This is the only piece of demonstrative evidence I am going to use. I am going to cite you to the pages that you might want to look at as we

cover certain of our assigned topics. So if you have it with you, it may be time to make it available.

I am going to begin by introducing the panelists. Everybody on our panel has a title.

Our judge — Judge Francis has been a Magistrate Judge in the Southern District of New York since 1985. He is sitting on my right. A graduate of Yale College and Yale Law School, he clerked for Judge Robert Carter in the Southern District of New York and then joined the Civil Appeals and Law Reform Unit of the Legal Aid Society. He is currently an Adjunct Professor at this very Law School where he teaches constitutional torts. Judge Francis is the author of another case that needs no introduction, *Rowe Entertainment v. William Morris Agency,*[5] the leading case on cost-shifting in the context of e-discovery.

Our author — our author, Adam Cohen, is the author of a leading treatise in this field. He is on my far right. He is the co-author of *Electronic Discovery: Law and Practice,*[6] which recently came out, fall of 2003. He is a partner in the Litigation Department of Weil, Gotshal &

[5] Rowe Entertainment, Inc., et al. v. The William Morris Agency, Inc., et al., 51 Fed. R. Serv. 3d 1106; *aff'd.* 53 Fed. R. Serv. 3d 296 (S.D.N.Y. 2002).

[6] ADAM I. COHEN & DAVID J. LENDER, ELECTRONIC DISCOVERY: LAW & PRACTICE (Aspen Publishers 2003).

Manges. His practice areas include intellectual property and commercial matters for clients in the technology, media, and entertainment industries, with a focus on Internet- and computer-related issues.

On my left, David Buchanan is a partner in Seeger Weiss LLP, specializing in representing individual and corporate plaintiffs in complex litigation, including securities, consumer fraud, pharmaceutical torts, products liability, and pension claims. He is currently involved in some of the largest MDLs pending around town, including *In re Rezulin Product Liability Litigation*, *In re IPO Securities Litigation, In re Delta ERISA Litigation,* among others. Before joining Seeger Weiss, he represented defendants while associated with Fried Frank, a large New York firm representing primarily corporate clients.

On my far left, probably inappropriately far left, is Paul Robertson, who is a Litigation Partner at Bingham McCutchen. He represents clients in many practice areas, including bankruptcy, construction, mergers and acquisitions, directors' and officers' indemnification, products liability, general commercial disputes. Paul is a member of the Defense Research Institute; the Sedona Conference Working Group, and in that capacity he

participated in drafting the recently issued “Best Practices on Electronic Discovery.”

Now I am going to tell you very quickly what our topic is and what is the format that we hope to follow.

We are going to begin roughly at pages 5 through 7 of Exhibit A, which I previously showed you. The topic there is to briefly discuss the definition of e-data, and we are going to do that very briefly; that’s a three-minute segment of this show.

We will then turn to the question of whether Rule 34 needs revision in order to refer to “data” or “information” rather than “documents,” which as you just heard may be a passé concept in the 21st century. Listening to the last panel, I must say that relational databases and formulas for spreadsheets do not entirely sound like “documents.” In any event, that will be found at pages 14 through 15 of your Exhibit A.

Questions that we will cover in that segment will include such things as: In producing data stored on electronic media, should that production include all data stored or maintained as part of the electronic record? —— just to whet your appetite.

Our next topic, our third of four, will be the

form-of-production question. The question there is: should Rule 34 require the requesting party to specify a particular form for producing the requested data; and should the Rule also talk about the grounds on which a producing party might object, such as inaccessibility? That will be found at pages 16 through 20 of your Exhibit.

Finally, we will briefly turn to whether Rule 33 needs to be amended to specify that interrogatories may be answered by the production of electronic data; and, if so, what responsibility might the producing party have to produce that data in some way that is actually usable?

Now, on each topic we have decided to go in this order: our author will go first, Adam will try to give us the very briefest of backgrounds; David and Paul are set up a little bit to be sparring partners, a little bit of plaintiff/defense viewpoints, will then go next; and, as is always appropriate, the judge will get the last word on every topic, and of course that is Judge Francis, not your uncharacteristically quiet moderator. At the end of the session, we will leave hopefully fifteen full minutes for Q&A. We hope to stop at 11:45 and do the Rick Marcus show, with the “you there, you there, you there” part of this.

We are going to begin. We are ready to go. We

are going to talk a little bit about the definition of e-data as a topic. I think we are going to start with Adam on that.

MR. COHEN: Yes. I think what I am going to do is I will put up on the screen a definition that Paul has suggested and let him explain the reasoning behind his wording, and we can talk about it as a panel.

MR. ROBERTSON: Sure. I guess a couple of thoughts just before I start this. The dichotomy that has been set up is between defendants' and plaintiffs' bar. As David and I talked in preparation, we found that on a lot of stuff there is some agreement here on the result that should be reached. We really wanted to make sure that we kept both questions in front of us at all times.

The first one was: Is there a problem; is there something that needs to be fixed? Only then did we get to the second one: Okay, if there is a problem, what is the proposed Rule change? In all instances, even if I thought that there wasn't necessarily a problem, I thought it was important to at least propose a suggested fix, some suggested language. To the extent that a proposal was put forth, at least we had something to talk about.

JUDGE SCHEINDLIN: Some of the Advisory Committee

language on this subject is found at page 6. If you want to look at what is a beginning — not a proposal, but a talking point, a thought, an idea — if you look at page 6, there is one definition, but now we are going to hear another.

MR. ROBERTSON: In this instance, the first question — "Is there a problem?" — the issue here is if we are going to put in some language in the rest of the Rules to talk about electronic discovery, do we need to define what the subject matter is at the starting gate?

If you take a look at some of the other states and federal district courts that have put in rules, none of them did so. None of them defined electronic discovery. I think that looking through it, my thought after looking at what some of the other jurisdictions have done, and the general premise that definitions are not favored in the Federal Rules, I did not think that a definition was necessarily appropriate.

I think that if you talk to folks in the places where it has been put in place, when you talk about electronic discovery, most folks do not need to run to a dictionary to find out what it means.

I thought that to the extent, though, that we use a definition, I thought about the one that had been

proposed, and I thought it was an excellent start, and I molded mine working with that one. I had a couple of comments to it, though.

One, it talks about whether the information is "created, maintained, or stored in a certain capacity." I thought that it's okay to just simply say that it is stuff that is in a digital format.

I thought, too, the final part, the attempt to try to identify some of the sources from which this information could come, the definition was "computers, telephones, PDAs, media players, media viewers, etc." I thought maybe that might suffer from the fatality that Ken Withers had identified, that things move so quickly that if you talk about a PDA, in five years folks are not going to know what that is. You know, the techies tend to change these definitions before you have taken the equipment home.

So I tried with my definition "electronic data is recorded information" —— and I thought it should say "recorded" because there is a danger I think that, although some of this stuff is becoming more abstract, that the abstraction shouldn't be removed from having it tangible. It is something that is kept somewhere, as compared to something that is an ethereal idea in a witness's head ——

"that is readable and available only through the use of electronic or other technological means." I put the "other technological means," and I thought that as we are moving along, maybe we do not want to limit it to electronic means, that for example biological and chemical data, although it sounds awfully farfetched today, I think some of the things that we talk about today sounded farfetched ten years ago.

So that was the proposal that I thought of.

JUDGE SCHEINDLIN: Since this really is our three-to-five-minute segment, does anybody want to say anything more about that, or should we get right into Rule 34 and documents? Anybody want to comment on this one?

MR. COHEN: Just a couple of quick comments.

One, there is a problem with including documents that were created electronically as electronic information because that can be converted into paper and then it is not what we are thinking of as electronic information.

Also I just want to point out there is a very interesting issue in terms of what is tangible when applied to data. Some of you may be familiar with all sorts of different cases, cases applying the "trespass to chattels" theory to documents, to electronic information; cases dealing with whether insurance policies cover electronic

information. So that is something we may all have different theories about in terms of use of the word “tangible” with respect to electronic information.

I think what is clear is that we are not talking about paper, we are not talking about oral testimony, and we are not talking about things like the cow in the “Replevin for a cow” case that we all read on the first day of law school.

JUDGE SCHEINDLIN: Okay. I think we should probably turn to the big topic that we have for our panel, which is Rule 34. Take a look at pages 14 and 15 for the introduction to that topic.

The question that we are really going to begin with, in the order that I mentioned earlier, is: do we need to revise Rule 34 at all to define “data” or “information” and turn away from the concept of “document,” which may be creating misunderstandings and causing problems? We are going to address that in the order we said. Adam, do you want to give us a start?

MR. COHEN: Okay. I am just going to try to set up some of the issues here and give a little bit of context.

[Slide] The current Rule talks about “data compilations,” which to us today probably sounds like a

little bit of an odd formulation. It is not a phrase that we tend to use, although in 1970 it probably sounded almost like science fiction.

[Slide] If you look at the notes where that phrase was imported into the Rule, it is actually quite prescient, I think, in terms of recognizing changing technology, the requirement of using devices, which is similar to what we were just talking about in terms of electronic information, needing to use some kind of technology to look at it.

The last sentence is kind of funny in the conclusion there. It's sort of what Ken was talking about, taking all the emails and printing them out. I think the way we look at this has changed.

[Slide] There is also a recognition of the potential need to check the source itself, so even in 1970 recognizing that there may be information that you do not see when you print this stuff out.

[Slide] I just want to point out that some of these local rules and state rules address whether electronic information is included within the scope of what is normally considered a "document" and whether it presumptively is or it is not. You have these rules in Texas and Mississippi

where you have to specifically request electronic information and it will not be presumptively considered a document.

[Slide] In Virginia, you have this rule dealing with subpoenas. It requires you to produce what they call a "tangible copy of electronic information."

[Slide] The central problem that I see, which was pointed out by the prior panel, is this issue of: do we talk about "medium" or do we talk about "information" whatever the medium? There was a suggestion in the materials of a limited change, adding "data" or "data compilations in any media."

Then there is also a talking point to address the issue of metadata and embedded data, as to whether those are included in the definition of a "document." You have the language there in the materials.

I noted that in one of the footnotes a sort of unintentional suggestion of a definition is a definition of electronic information.

JUDGE SCHEINDLIN: Okay. Dave?

MR. BUCHANAN: I guess when asked to consider the proposed amendment, the first thing that occurred to me is: what do I think we would all agree is information that

should be disclosable in litigation? The last panel I think was pretty instructive in guiding us about the types of information that parties are wrestling with in terms of discovery disputes, and then, once we understand what we think should be disclosable in litigation, then make the definition fit the types of categories to make sure that we are at least broad enough.

The things that came out in the last panel were databases, relational databases, email, spreadsheets, PowerPoints, embedded data, metadata, backup tapes. These are all things that we are talking about as being sources of electronic data that may be disclosable.

Now, I am certainly not advocating a laundry list in a Rule —— I think that would be problematic —— but the definition I think has to encompass those. The definition should not strike a balance between the relative burdens among the parties in terms of identifying or producing certain information. I think that is an important issue. That is an issue that needs to be addressed, though, elsewhere in the Rules, perhaps in Rule 26, or by the court in applying Rule 26.

The definition of “documents” has not caused problems for me in getting all the electronic data that I

have needed. It has included relational databases, emails, metadata, embedded data, in very large litigation. So I think the Rule has been extended in such a way so that the definition encompasses those items.

That having been said, there are two items, embedded data and metadata, that present the thorniest issues under the current Rule. I would submit —— and we'll talk about it in a little bit —— that those should be items that are presumptively documents but perhaps not something that you get in every case.

But in thinking about what a "document" is, it certainly includes everything within the file. It includes the creation date, the edit dates, who did it, all that information that's all within the native file. It includes the embedded information within the file. I think it is the wrong place to strike the balance in Rule 34. If there are any issues of burden, that should be addressed elsewhere.

I could certainly address a proposal for the Rule, if you want to do that now.

JUDGE SCHEINDLIN: If you're staying in this part of it, sure.

MR. BUCHANAN: There has been a suggestion, and I think Adam highlighted it, that we should be talking about

"information" or "data" that is "fixed in a medium." I think that eliminates the ethereal concept that we spoke about a moment ago, information that just crosses the wires, doesn't really register in any system, but yet it preserves the real object of a "document." There is something tangible, there is something physical. It is "information" or "data" that has been "fixed in a medium." Even if it changes over time, it has been fixed.

JUDGE SCHEINDLIN: All right. Paul?

MR. ROBERTSON: I guess I am in general agreement with David on this, that from the defense perspective we do not see that much of a struggle over whether a particular electronic piece of information is considered a "document." The struggle is always whether it is relevant to a particular case.

There are two issues that I think have been identified —— and I look back. The first time I saw them identified is in the article that Judge Scheindlin and Jeff Rabkin did four years ago, which was extremely prescient in nailing some of these issues.[7]

One is: is there a need to untie this to documents? A lot of his stuff doesn't really fit our old

definition of "document." Things like cookies and other embedded information, does that really fit into the definition of "document"; shouldn't it be called "information"?

The second excellent point was: look, these are data compilations. A compilation, if you look at the definition, is a heaping together, a collection of information from other places. Much of this data is not a collection or a heaping together; it is created in the first instance. I think of a cookie again as an example.

But I think that again, although those are issues that have been identified, neither the practitioners nor the bench struggle with them. If you take a look at the *Anti-Monopoly v. Hasbro* case from several years ago, it really sets forth the law here, and I quote it: "It is now black letter law that computerized data is discoverable if relevant." I think that has really become the issue.

So I do not see the need for a fix, even though there is a little bit of a discrepancy between what is being done in practice and what is actually written in the Rules. Given that everybody accepts that the definition described in the Rules today includes not only compilations of data

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[7] Hon. Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is*

but also data itself, there is not really a need for a fix.

To the extent of getting to the point if there were language to be included in the Rules, I think that adding the word “data” before the word “data compilations,” so you simply say “data and data compilations,” would serve that fix. I do not think that it would do any harm.

I do not think that you will find that it is a big-ticket item for either the defense bar or the plaintiffs’ bar or the judiciary, but it would perhaps make the Rules consistent with what everybody’s understanding is and it would clean up that confusion.

JUDGE SCHEINDLIN: All right. Judge?

JUDGE FRANCIS: I think as a judge one of my primary concerns is conflict avoidance. One way to avoid conflicts is to have clarity in the Rules, and particularly in the definitions.

I think that while there has not been a massive problem with the definition of “documents,” for the reasons that my colleagues have described, I think it may well be advisable to bring the definition into conformity with actual practice, particularly because the definition of “document” basically creates a default position. In the

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Rule 34 Up to the Task?, 41 B.C. L. REV. 327 (2000).

absence of judicial gloss on this, people look to the Rules. "Document" I think suggests paper, and I think it may be helpful to expand that.

I think it has implications for other parts of the Rules. For example, when a party is going to respond to a document request, are they going to search for everything but then respond in paper because the Rule currently talks about "documents"? So I think in order to provide some clarity and to bring things in line with real practices.

And also I think to anticipate the future. We may agree that everybody understands now that computerized information is a "document," but when we go on beyond computers and we talk about biological information and so forth, is that going to be encompassed within the information that would be discoverable under Rule 34? I think we should adopt to that as well.

JUDGE SCHEINDLIN: Before we turn to our next topic, which is metadata, let me just ask you all one question. There is information or data that is stored and never reduced to a document, such as transient information, like spreadsheets, and they change every time the parameters are changed, or a daily example might be an e-ticket that is never a document unless it becomes printed. So there is

information in data that is simply stored on a medium but is not yet a document. Does that question make you think that that needs to be addressed in this definitional Rule 34?

MR. BUCHANAN: The important point I think with an e-ticket, for example, is there is a database behind that e-ticket that contains all the parameters. There is something electronic in nature that has been fixed in a form that contains all the parameters of that e-ticket.

The same with the spreadsheet that you highlighted. While it may change day to day and you have multiple versions of the document, the formula, for example, within the document is the same perhaps, or maybe that changes over time too, the resulting numbers.

JUDGE SCHEINDLIN: But as the last panel said, if you printed it out, you would never see that formula. So the question is: can you obtain that data when you think of the term “four-cornered document?” That is the question I am asking.

MR. BUCHANAN: I agree. I think that is more of a production issue in my mind, the format in which it is delivered to the other side.

JUDGE SCHEINDLIN: Okay. Anybody else want to address that?

MR. COHEN: I just want to say that it seems that with the types of electronic information that we have these days and that are becoming more and more prevalent, such as transient data, instant messaging, digitized voicemail, we are moving closer and closer to what is more like oral communication in how evanescent it is.

We might ask ourselves: if we are going to require data like this to be captured and produced, does this mean now that when we have oral conversations about a case when we are under a duty to preserve we should be recording it all?

JUDGE SCHEINDLIN: Let's turn to an issue that at least in the Advisory Committee we spent a lot of time thinking about, and that is the question very specifically now of the production of metadata and embedded data. I shouldn't have thrown in the word "production." Put that aside for a minute. Just whether Rule 34 conceptually would call for the production of metadata and then later embedded data. I would like to take those separately because they are different concepts.

Let's talk for a minute about metadata, starting with Adam.

MR. COHEN: Okay. Just to set up the issue the

way it is set up in the materials, the issue is: do you make this a routine requirement of production; do you make it a permissive requirement?

What are the positions on either side? You know, on the one hand, opposition to routine requirement would be based on the notion that there is not really a likelihood that it is going to be terribly material. It is going to add costs. On the other hand, there are situations where you are going to be adding more costs by stripping that data our — and believe me that happens a lot in real life, oddly enough.

On the other hand, you might need the metadata to facilitate the searching, the manipulation, the kinds of litigation databases that people use right now to handle large amounts of documents. Some of the formats that people produce their documents in, these image formats without the metadata, require a lot of work before they are they actually usable in one of these databases.

So the question becomes: should this be presumptively something that gets produced or is it only available by special permission? We have some positions on that that have been taken by members of the bar and the judiciary.

[Slide] The Sedona Conference document shows a position where this type of information is presumptively not something that is included in a production unless there is separate analysis on a case-by-case basis.

[Slide] The ABA talks about “duty to preserve” in a very broad way, specifying it at “media” rather than the type of information.

[Slide] That brings us to form of production, so why don’t I let the panelists talk about metadata?

JUDGE SCHEINDLIN: We are going to hold off on form for a little while. Let’s just talk about the concept of metadata as something that ought to be produced with the information, or not. Dave?

MR. BUCHANAN: Again, I think, focusing within Rule 34, the conclusion I reach is that this is supposed to talk about the types of forms of documents you can request or the types of forms of information that can be requested in litigation.

I think metadata unquestionably can be relevant to a claim. We have seen —— well, how about in paper productions of years past a file routing slip on the top of a document that showed when a document went to somebody, when it moved to the next person; a revision history that

tracked changes to a contract over time? These types of things were discoverable. They were affixed to a document or to a file.

Now we have electronic documents that have different flavors of similar concepts. Rule 34 needs to contemplate that those types of documents are documents or information discoverable in litigation.

If there needs to be a balance struck, it should be struck elsewhere.

One thing that I think is important to note is there are other proposed changes in Rules 26 and 16 that require the parties to talk. What I heard from the last panel, and I think it is an important issue, is that the parties need to talk. I would expect that metadata and embedded data would be something that would be discussed during those early planning conferences both privately and with the court.

So I think Rule 34 is not the place to limit this. Rule 34 should be encompassing, though, of metadata and embedded data. The question is: is Rule reform necessary to accomplish that?

This is the only area in my practice I think where there is any debate with defendants about whether metadata

or embedded data is a "document." So I do believe that clarification would be helpful in that regard, but it should not be on a showing of good cause within Rule 34.

JUDGE SCHEINDLIN: So in other words, you don't think it's second tier; you think it is presumptively part of the data?

MR. BUCHANAN: It is. It's within the file wrapper.

JUDGE SCHEINDLIN: Okay, it's within the file wrapper. A little patent law. Okay.

Paul?

MR. ROBERTSON: I think that the first thing to do — you know, the issue of whether there is a problem, I think there is a need to unpack embedded data and metadata for a second because they really are different things.

Folks talk about metadata and they quickly say it's information that is embedded in the document. If you look at some of the articles and some of the writings on this, the excellent article by Judge Scheindlin and Jeff Rabkin talked about embedded data as being metadata; they used the terms interchangeably, as a lot of folks do. Sedona talks about metadata being embedded data.

But they really are different things. I think

that the metadata is the information about the information in the document —— things like in an email the code that tells how the email is to be delivered, how it is to be routed; the information in a Word document, paragraph shifts; information in a spreadsheet about how calculations are to be made.

I think, on the other hand, when we talk about embedded data, it is a very different animal. It is typically user-created edits or information that is put into the document purposefully —— things like track changes; things like a sticky note that you put underneath; things like other versions of the document that are hidden beneath it. I think that those are very different things.

I think that when you are talking about embedded data, the way that I understand it more easily is to think about embedded edits. I think that edits to a document certainly are in certain circumstances presumptively discoverable as a type of draft of the document.

I think, on the other hand, in 99.9 percent of the cases metadata is irrelevant because it is not even the envelope that you are sending the email in —— and most of this stuff, by the way, is about email —— it is not the

envelope information, who the email is from, to whom it is being delivered —— but instead it is instructions that you have given to the mailman about how to take it, how it is to be routed, and then information about how that email was actually delivered.

In most instances you don't keep the FedEx package, you don't keep the instructions telling the FedEx man or woman to go to this certain place. It is not typically relevant. It is the equivalent to having to, after doing a document production, to go back and say, "I want to fingerprint your data room to find out who was in there and who was not."

That said, I would certainly agree that in some cases it is very relevant. Martha Stewart is an example of a case where you wanted to find out about who edited this document and when.

But the question I have next is: is there a dispute about whether that is considered a "document"? I think that again the Rules do a very handy job of this. I don't see any cases out there where a court has said, "You can't have it because it's not a document." The issue becomes, "You can't have it because it is not relevant."

Even in those cases where you do need metadata,

information about information, it is usually targeted to a very few spreadsheets, a few emails, and in most cases a requesting party does not want to get with each document sometimes 800 pieces of information about that email that neither do they need nor they understand.

So I think that — is there a problem? — I don't think that there is a problem with respect to metadata. I think that most folks understand that it is a "document," but the question is whether it is relevant.

JUDGE SCHEINDLIN: And the judge?

JUDGE FRANCIS: I love seeing so much agreement between plaintiffs and defendants.

I think there is agreement that metadata and embedded data are information and that they are at least potentially relevant and therefore come within, or should come within, the definition of "document" or "discoverable information," however we characterize it.

I think the tougher issue is whether there should be some good cause requirement imposed before a requesting party has access to that information. There I would point out that as a judge one of the values that I try to embody is doing justice, and that means being able to adapt the law to the facts in a particular case. The more constraining

the Rules are, the more difficult it is for me to do that adaptation.

If there is a good cause requirement, it is a thumb on the scales of justice, and somebody is going to have to overcome that presumption in order to get what may ultimately be relevant discoverable information.

I think it is preferable to leave that to be determined on a case-by-case basis. I think the ABA's approach to putting the burden on the requesting party to ask for that kind of information is fine, but to place a burden of persuasion on that party I think would probably be a mistake.

JUDGE SCHEINDLIN: I think we are going to talk more about metadata and embedded data when we move to form of production, so don't worry that we have left it behind. We are going to get a second round of hearing about it.

We are now going to turn to the form-of-production question. You can look at pages 16 through 20 of your exhibit, where the Lynk/Marcus memo discusses the form-of-production question as possibly addressed in Rule 34(b).

[Slide] The question there is whether Rule 34 should be amended to require, either permissively or mandatory, but that the requesting party state the form in

which the e-data is to be produced. If so, should that request be as simple as “I want paper” or “I want an electronic mode of production”? Or should it be more complicated, such as, “I will be satisfied with a mere TIFF image” or “I want a PDF searchable” or “I want native digital information produced in a specific format, like a DVD, and it has to be compatible with my Windows operating system”?

So the question is: what level of specificity should the requesting party have to express if they should have to make a choice at all?

[Slide} Then, of course, the flip side of that question is: if they don’t specify, is there a default mode of production?

The third question, I suppose, is: the producing party, what is the ground of objection there? Can the producing party say, “I shouldn’t have to produce it all because it is inaccessible”?

So it is sort of that series of questions that we are about to address. And I think, inevitably, in addressing those we are going to get back to the metadata and embedded data because how you produce it may mean whether or not you include those types of information.

So with that quick background —— maybe I did too much —— Adam?

MR. COHEN: Okay. I think that is right. There is the segue right there —— and we should probably talk to some of the technology people about this —— but the parties' determination of whether they are going to resist production of metadata or embedded data may depend largely on what format they have their documents in and they are ready to produce them in. If they have gone and printed out all the emails and scanned them in and created electronic images that are stripped from the metadata, then they are not going to want to produce the metadata.

Why require or permit a specification of the form? Well, if you ask for documents in a certain form, this should preclude you later on from coming in and saying, "No, no, I want something different." On the other hand, making it optional may make sense because at an early stage in the case when you are formulating your request you may not know what format you need or what the other side uses or what is going to make the most sense in general. In any case, there is always going to be a need to balance the burden of producing in a certain form against the utility to the other

party.

Another issue that has come up —— I don't know how common this issue is —— is that there are certain proprietary aspects to certain formats. For example, parties have data that can only be viewed with certain proprietary software and generally will resist producing that type of software. At any rate, this does seem like it would make sense to discuss it in the initial conference.

[Slide] If you look at the Sedona Conference, the position that they represent, they talk about the importance being the substantive information content, that you should not have to produce documents in more than one format. They suggest that "production of electronic data in a commonly accepted image format should be sufficient." Now, that has implications of course for metadata and embedded data. "Data that is not ordinarily viewable or printed when performing a normal print command need not be produced."

[Slide] At the same time, there is a recognition that:

- Electronic formats may be preferable in many cases;
- Whatever format is chosen should deal with the

genuineness/authenticity issues;

- That there should never be a requirement to produce in both hard copy and electronic form. I know this is something that is often the subject of debate based on the case law that is out there already.

[Slide] The ABA has said that you should consider asking for production in electronic form, you should consider asking for production in a form that gives you the ancillary information.

[Slide] And then there are some of the cases that were talked about in the material that deal with these issues in different contexts.

Here the *Bristol-Myers* case[8] shows what happens when a party goes ahead and scans all these paper documents into images and then they want to produce them back in paper as per the ancient past. This was a case where I guess no one had said anything about the fact that these documents were available electronically and were trying to get somebody to pay the cost of a normal paper production when that wasn't really necessary. In that case, they were required to produce an electronic format.

Interestingly, and probably most controversially,

[8] Bristol-Myers Squibb Securities Litig., 205 F.R.D. 437 (D.N.J.

there was no requirement that the other side, the requesting party, pay for any of those costs that were involved in creating the electronic format.

[Slide] The issue of the proprietary format came up in this case that is mentioned in the materials, the *Honeywell* case,[9] where PriceWaterhouseCoopers stated that production of these documents in a usable form would require the use of proprietary software or large cost. The court basically gave them the option of either producing the proprietary software, the proprietary format, using the protective order, or pay for it themselves.

[Slide] And then finally —— and this shows another aspect of this issue —— the *McNally* case,[10] which shows no presumption that you get the computer files when you've got the paper production because you need to show some sort of special basis for it.

JUDGE SCHEINDLIN: Just a quick moderator comment. At Tab 9 of your materials all of these cases and many others are summarized for you, so it is a great resource in the back, the annotated case law.

2002).

[9] In re Honeywell International, Inc. Securities Litig., 2003 WL 22722961 (S.D.N.Y.).

[10] McNally Tunneling v. City of Evanston, 2001 WL 1568879 (N.D. Ill.).

Okay, Dave?

MR. BUCHANAN: I suspect this will be more of a point of departure between the plaintiffs and the defendants, and that is the form of production.

There is no question that plaintiffs prefer as a general matter native production of electronic files. That provides all the embedded data, the metadata to the extent it has been appropriately preserved. It gives you the opportunity to quickly search for terms. In short, it puts you on the same playing field as the defendants, or the company at least, in accessing their own data. Those are the arguments plaintiffs use to get native production.

But you may not want a native production in all cases, and that is why it is important I think for there not to be a presumptive production format of native, because we talk about proprietary formats — or even if we're talking about relational databases, if I have to receive all of your databases in a native format, I may not have the capability of rebuilding that, as opposed to me meeting with you and discussing the appropriate searches to run on the data, extracting the data, running it in reports and producing the electronic versions of the reports that I can then load into my database.

So I think again this is something that is in Rule 34, but I think it is something that will be addressed quite specifically by the parties at their 26(f) conference and at the Rule 16 status conference as to how to treat non-paper documents: how are we going to treat electronic data; how are we going to produce it; how are we going to preserve it; what are we going to do with the embedded data; what are we going to do with the metadata?

The Rule needs to contemplate the production of native data. That is the most easily usable form for litigants as a general matter. That statement can be thrown completely out the window, though, when it came to large proprietary systems where a smaller plaintiff, or even a large plaintiff, didn't have access to the software to view it.

JUDGE SCHEINDLIN: Let me just ask you a few quick questions. So do you favor a Rule that mandates the requesting party should select the form of production it wants? You are usually a requesting party. Should you have to state what you want?

MR. BUCHANAN: I will, and I do, and I will do that in the Rule 26 conference and I will do it in the Rule 16 conference. I think making it permissive to do so and

making it permissive for the other side to object to the form requested is fine. But I think having a presumptive form of production would tilt the scales in favor of something that may not work across a large-scale litigation.

JUDGE SCHEINDLIN: That was only my first question. Should you have to specify to avoid confusion?

MR. BUCHANAN: I think it should be permissive.

JUDGE SCHEINDLIN: Permissive, okay.

The other question I have for you is: should the Rule talk about "the data should be produced in the form in which it is created, in which it is ordinarily created"? Should that be the fallback, presumptive form?

MR. BUCHANAN: Here's what I want. I will let people who are good with language and the Drafting Committee tell me the best way to implement it. What I want is information that is as accessible or as usable as on the defendant's system. I mean that is what I want. In many cases that is native files. In other cases with complex databases, it may be an extract of the data from the databases.

JUDGE SCHEINDLIN: Well, we have those words "created, stored, maintained" that you will see throughout this memo. Which of those words do you like, or all of them

— in the form in which it is created, in the form in which it is stored, in the form in which it is maintained? Do any of those excite you?

MR. BUCHANAN: What excites me is getting the data in an accessible — no, those words don't excite me, frankly.

JUDGE SCHEINDLIN: Okay.

MR. BUCHANAN: It is in a form that is as accessible or as usable as the form in which the defendant maintains their data.

JUDGE SCHEINDLIN: So maybe "maintains" is the one that does.

Okay, Paul?

MR. ROBERTSON: I hate to disappoint once again, and I think it is a function of how reasonably David approaches most of these issues, but I don't substantially depart from what he is saying.

I think that, again, the first question, "Is there a problem?" — as he said, "Look, in some cases I want the data in its native format," and I think that is absolutely right. In some cases, there are issues where the data in its native format is relevant. I think that in other cases you don't want that.

The Sedona Principles took the approach of: Look, in most cases production in paper or TIFF images is acceptable. That draws gasps from a lot of plaintiffs, and rightfully so in these mega-document cases. But I think that sometimes we forget, with all of these numbers of terabytes and petabytes up on the screen, that in most cases the typical sides are not looking at that kind of volume of documents, they're looking at a smaller volume of documents.

So when you create a default position that says things like "you have to express how you want electronic documents to be delivered to you," often it is only 1,000 pages or 2,000 pages, and so getting electronic documents isn't necessarily useful.

I think there are two questions here. One is: is there a presumption that a party should have to produce things in its native format? I think that the answer is there should not be such a presumption because it is a very fact-driven issue.

The second issue I think is a little more conducive to having something done in the Rules, and that is it is a communication problem. The three cases that you see collected on page 8 of the materials are all situations where a producing party gave paper and the requesting party

said, “I don’t want this. I wanted something in electronic format.”

JUDGE SCHEINDLIN: Should the requester have to ask up-front and specify?

MR. ROBERTSON: I think that the answer is this. A caveat, though, is of course if you specify electronic documents —— that doesn’t get you to where you want to go, by the way, because you will sometimes get a TIFF image, and that still is the equivalent of getting a hard-copy document. So I think that, as Dave was saying, you want something that is both electronic but then searchable in the same way that the defendant had it.

I think that there are three ways to go about this: education is one; two is putting something in the Rule 26(f) conference; and three is putting it in Rule 34. I think that the first two answers are the way to go. I think that this is something where education is needed, where places like the *Manual on Complex Litigation (Fourth)* has some language to encourage parties to talk about this. I think it is important to put it in the Rule 26 checklist, to make both parties talk about these kind of things, or suggest that they do, so that they can avoid these situations in cases where they are relevant.

I don't think it is appropriate to put it in Rule 34 for a couple of reasons. One is that there are good reasons that defendants do not to produce things in their native format, and it is not simply to hide things. It is because, for example, you can't Bates stamp things; they are manipulatable by the discovering party; and they can be changed so you go show up in court and something that you produced in one format looks much different than it otherwise did.

I think the other problem is that if you set up in Rule 34 the suggestion that one party "must" or "may" specify and the other party has the right to object, you create a sort of presumption that there is this right to get things in a native format. And I don't think that anybody is going there. I think people are saying it is a communication problem, which I think is best handled with 26(f).

JUDGE SCHEINDLIN: How does that play into our discussion of metadata and embedded data, though? I mean, if you are doing a TIFF image, you are presumptively not getting it. If you are doing paper, you are presumptively not getting it. I think Dave said he thinks he presumptively should get it.

MR. ROBERTSON: I think that there —— and I'd be willing and eager to hear David's comments on this, of course —— but I think that in many cases the metadata is not relevant. When you say metadata, I think that you want to have it searchable.

You want to get an email that even if it is produced in TIFF, you have a concomitant list of searchable data that allows you to organize it by sender, by recipient, by date. That is important. But when I think of metadata, I think about pages and pages of code about how the email got from Tallahassee to Gainesville via some server out in the western part of the country. I don't think anybody wants that and it's very rare that it is needed.

JUDGE SCHEINDLIN: Given our time constraints, we are going to the judge.

JUDGE FRANCIS: This is a series of issues where I think I am firmly ambivalent. I think that I disagree with Dave and believe that it probably would be helpful in avoiding conflict to require the requesting party to identify the form of production. Now, I do not think that that needs to be done in the Rule very specifically, but the Advisory Committee notes might point out that the greater the specificity, the more likely that we will be to avoid

future problems.

If there is such a requirement, should there be a default mode identified? I think that is important. If there is no default mode, then judges are left with the question: "Well, he didn't identify the form of production; that means I should impose a default mode, or it means the request should be stricken?" I don't think that provides enough guidance, so I think there needs to be a default mode.

Which brings us to the $64,000 question, which is: what is that default mode? There I am truly at sea. If I were to write a Rule for today, I think I would say paper production, because that is what everybody is capable of doing, everybody who receives it is capable of analyzing it. It is cumbersome, it is burdensome, but everybody can deal with it.

But as I hear our technological people tell us that paper is going to disappear, that I think would be a Rule that would be quickly archaic. So I am looking for something that would be a reasonable default position. But I think that there needs to be a default position.

And finally, in terms of whether there should be an identification of the responding party's right to object

because it is inaccessible or hard to produce, I think that is in the Rules. I don't think there is a necessity for electronic or other kinds of information to specify the opportunity to object.

Rule 26(b)(2) sets out terrific guidelines for weighing factors to determine whether a document production is too burdensome, too costly, and so forth, and those Rules encompass the question of accessibility. I don't think there is anything necessary to be done there.

JUDGE SCHEINDLIN: Given our time constraints, our last topic, responding to interrogatories, which is found on pages 21 and 22 of your materials, we are going to give that the shortest treatment so we can get to your questions. I'm just going to call on Adam to quickly cover the question and leave it at that.

MR. COHEN: Right.

[Slide] As we race through this, there is the current Rule. I hope that was enough time to read it.

[Slide] And we have some suggestion as to what we could do to sort of tweak this to deal with electronic information. That would include producing the electronic information and, I suppose, identifying it as well, and possibly giving computer software so that you could derive

the answer to your interrogatory from that electronic information.

[Slide] Questions raised in the materials are:

- Whether we need to include this option of giving the "computer software," or whether we stay with, I guess, the more general solution of giving sufficient information to find what you are looking for.

- And a question as to whether parties are employing 33(d) with regard to hard-copy and computerized files. In my experience, they are. This is one of those situations where you might invite somebody over to come run queries on your database.

- And how does the fact that in many cases data produced is prepared for the purpose of responding to an interrogatory —— how does that mesh with the obligation imposed under Rule 34?

JUDGE SCHEINDLIN: I think the real question here is: if a producing party takes the option of producing in this way, you would think the requesting party wants to be able to use it; so if you are going to produce it, do you have to produce enough to make it usable, which may mean the software or other material that goes with it?

Do you want to say just one thing and then we're going to go to questions?

MR. BUCHANAN: The premise of this provision is that it is as easy for the receiving party to access the data as it is for the defendant or for the producing party. If you don't have the software tools to access the data, you don't have the same ease to access the data that the defendant does. So I think any production of electronic data pursuant to an interrogatory request has to be accompanied by the tools to access the data.

JUDGE SCHEINDLIN: Okay.

Now, we have left a full fifteen minutes for you folks, so please use it. I see a hand way back there.

QUESTION [Paul J. Pennock, Esq., Weitz & Luxenberg]: Paul Pennock from Weitz & Luxenberg.

It seems to me that if — well, let me ask you. If we want to specify what we want from a particular company, don't we first need to know how they are doing it, what they have stored, how they have stored it, where they have stored it? And, to touch on the balancing test, the utility against the cost, what are they saying is the burden of producing it? So in order to get to that specification stage, don't we need some type of mechanism to get some very

quick and early depositions of the people in the know? I mean something even a little easier to do that 30(b)(6), something very focused on IT issues, where we can get in — Dave Buchanan has done these depositions many times — and figure out exactly what it is that we are trying to get, and then we can specify what we need?

JUDGE SCHEINDLIN: Let me make a point to the whole audience. You don't have to ask a question. Unlike the usual panel where they say "ask a question, not a statement," not true. You are perfectly welcome to make a statement. So if you want to answer your own question there, what would be your suggestion, and is it Rules-based? Whatever your suggestion is, is it Rules-based; is it something we should do in the Rules?

QUESTIONER [Mr. Pennock]: Yes, I think it would be very helpful to have a Rule that guides magistrates and judges to say, "We're not being unreasonable if we're stepping in within weeks of commencing an action and asking for a series of depositions of particular IT people in order to identify answers to a series of questions," a Rule that would be very specific in order to make the depositions happen quickly and efficiently.

JUDGE SCHEINDLIN: But you can do that at the Rule

16 conference with the court.

QUESTIONER [Mr. Pennock]: You could, but it just seems to me it would be better if the court had some guidance that this is not only a good idea but a necessary predicate to pursuing the electronic discovery that we may be pursuing under these new Amendments.

JUDGE SCHEINDLIN: Okay. We've got to go all over, but here. This gentleman was next. You will be third, Jonathan, I promise.

QUESTION [Michael P. Zweig, Esq., Loeb & Loeb]: I'm Michael Zweig from Loeb & Loeb.

A practical question with respect to the form of production. What method or methods are being used if you are producing material in so-called native format to replace the traditional Bates numbering system so that we could have some evidence of when it was produced, who produced it, where it was produced from, etc.?

JUDGE SCHEINDLIN: Okay. I think we can turn to the former panelist George Socha to maybe address that, because I think there is the equivalent of Bates stamping. I think I have seen it. George?

MR. SOCHA: Sort of.

JUDGE SCHEINDLIN: Sort of, okay.

MR. SOCHA: I think this is one the knottiest issues of producing information in native form: how do you track what you got, who you got it from, who you've given it to, and so on? We're used to Bates numbers with paper. It's easy to do. We do not yet today have any generally accepted counterpart to that. The best you can do is the type of thing that Joan I know has done as well: you keep a log of where the file came from, a path of where it came from if necessary. It's a cumbersome process. We need to figure out a way of doing that, and as far as I know there is no generally accepted approach.

JUDGE SCHEINDLIN: Okay.

MS. FELDMAN: If I could reply now?

JUDGE SCHEINDLIN: Yes, Joan, right. That makes sense.

MS. FELDMAN: You can basically put a wrapper around these documents that allows you to affix any information. Most of the software out there today allows you to easily switch back and forth between native format and this wrapper format.

I have one more comment about embedded versus metadata, if I may.

JUDGE SCHEINDLIN: I promised Jonathan.

MS. FELDMAN: Okay, then I'd be happy to do it.

JUDGE SCHEINDLIN: Okay. Jonathan Redgrave?

QUESTION [Jonathan M. Redgrave, Esq., Jones Day]: Jonathan Redgrave. I'm with Jones Day.

I've got a number of observations on this panel and the presentations here, because in many ways this is the nub of are the Rules going to change.

First — and it is a point that I think Paul made very well — we've got to remember, for the Rules Committee, that the vast bulk of cases don't deal with the mega-documents, the mega-issues, and any Rule change really has to take account of the fact that it shouldn't force onto those cases a world in which it just doesn't make sense for the economy. We've already got enough issues about the price of litigation putting people out of the reach of district courts, and we do not want to impose something that will go further.

Second, the perfect is often said to be the enemy of the good. Perhaps the definition of a "document" could be tweaked or added upon, but is it really necessary? Is it something that we need to change or is it good enough as is? I think my response to that is it probably is if it was standing by itself, *Ceteris Paribus*.

But if you really want to get down into making maybe some tier presumptions about whether certain data should be produced or not produced in the case presumptively — for instance, if you are going to take out inaccessible data, or if you want to take out metadata — if you are going to create those kinds of presumptions in the Rules somewhere else, in Rule 34, then perhaps you do need a separate definition so you can refer back and make it a better process. So I think for changing the definition that is the only reason you want to do that, if it is going to be part of a bigger picture scheme of changing the Rule to build on presumptions.

From the Sedona work, obviously I think there are some good places for building in presumptions — and remember, presumptions are things that can be overcome — but to deal with the vast bulk of cases they could be done this way, but then there is a place for those exceptions to be dealt with.

I think the Rule 16/Rule 26 conference is a great place to get that initial information that helps you understand where that case is going to break on the presumptions one way or another. In the IPO cases I know up

here in New York, part of that Rule 16 conference was an enormous survey of information of the various kinds. They had to come forth and say what their processes were, where their tapes were, where their data were, where the key employees were. That was something that was done up-front, and I think it tremendously guided those parties both on finding the responsive discoverable information and also keeping costs down, so it helped both sides.

In terms of the form, the last thing on the form, I think the proposed Rule change is a good idea to force people into saying, "I really want it this way," and the responding party saying, "I can do it or not." It builds on the Rule 16/26 concept, but I think the proposed Rule does make some sense in that area.

JUDGE SCHEINDLIN: Ms. Tadler? I promised her next. He is absolutely next.

QUESTION [Ariana J. Tadler, Esq., Milberg Weiss Bershad Hynes & Lerach]: Ariana Tadler from Milberg Weiss.

I think both David and Paul commented that they do not think there should necessarily be a presumption of native form being required. But I guess an observation, or perhaps just an issue for thought, is whether there then has to be a corresponding counter-rule, which is that the

expected producing party should not have the ability to set the form prior to any conference and then have the ability later to say, “We’ve already set it in a form and now it’s a burden to go back.”

That is something that certainly I think we as plaintiffs’ counsel have encountered at times, where we understand that on the defense side you may be wanting to set things up so that they are available and preserved, but simultaneously we want you to have an understanding that we may very well want it in a different form and we don’t want to hear “burden” later.

JUDGE SCHEINDLIN: I promised, so right there.

QUESTION [William A. Fenwick, Esq., Fenwick and West]: Bill Fenwick, Fenwick and West, from Silicon Valley.

I have three points to make really. The first one I would consider to be more global. One of the problems that we are struggling with here is that we are trying to impose what is an obsolete paradigm on what is the current reality. What I mean there is we should try to get rid of this word “document” and we should go to “information.”

If you look at Rule 34, the word “document” appears four times in Rule 34. If you changed it to “information,” I think you would enlighten rather than

confuse.

The second point that I wanted to make had to do with the business about you can't tell if there has been any change in data if you produce it in native format. That is not true. You can put a lock that will tell you immediately if one bit of it has been changed. So that is not an obstacle to native format. That doesn't mean that I necessarily endorse native format in every occasion.

The other issue — I'm sorry to say I take issue with the Judge because I thought he did an excellent job — is I think your default is wrong. It should not be paper. If you want paper equivalent, go TIFF. TIFF is pretty easy to access and it greatly increases the efficiency of the review.

I happen to think that images are not the way to go because they do not become machine-searchable, and if you start looking at this from the standpoint of its utility to what you talked about, justly resolving disputes, you ought to be looking to the cost of reviewing, identifying, and specifying the presentation that you are going to make.

JUDGE SCHEINDLIN: Thank you.

QUESTION [David M. Bernick, Esq., Kirkland & Ellis, Standing Rules Committee]: My name is David Bernick.

I'm with Kirkland & Ellis in Chicago. I'm a member of the Standing Committee.

I think we are finding here kind of a reinvention of the same discussion that the prior panel ultimately came to, which is focus and relevance. The issue in Rule 34 is not whether it is relevant, it is not whether it is costly; it is whether something is producible. It is not whether production is required; it is simply what is producible. As a consequence, the definitions or the items in Rule 34 are incredibly broad. I suppose we could make them even broader if in fact what is then included is producible.

But what we end up talking about in the context of this discussion concerning Rule 34 is the ultimate issue, which is then managing the production requirement. That doesn't have to take place through Rule 34. That should take place using all of the other means that are available under the Civil Rules.

For example, the conferences at the beginning of the case —— there don't even need to be depositions. You could have an informal conference with the court that helps the parties identify what the landscape of information is and what kind of production requirements make sense. Rather than creating an obligation on the producing party to

specify or on the requesting party to specify, have a discussion at the beginning, find out what the available information is, and begin at the very first part of the case to focus on relevance and need. That really should be the benchmark for then figuring out these other questions.

So I don't think it is really a Rule 34 issue. I think it really focuses on the other Rules.

MR. BUCHANAN: May I respond?

JUDGE SCHEINDLIN: Yes. One of our panelists asked for a quick response to that, and then we'll go to Mark. You've had your hand up for a while, Mark.

MR. BUCHANAN: Just one observation, and I think I echoed this in my comments. That is that the conferences are really where I would expect that the parties will be able to frame whether native is a good idea, whether embedded information or metadata is a problem in the context of a given case.

The problem that litigants have today —— and Ms. Tadler highlighted this —— is that getting the information today from the defense prior to taking an MIS deposition is virtually impossible. And I'm not sure that the meet-and-confer structure will flesh out in enough detail the type of information that is necessary to develop a meaningful

request under Rule 34. It is my hope that the Rules will be interpreted broadly to require the litigants to really share their IT information at an early phase so that we can accomplish those ends.

And just to respond to Mr. Redgrave on the IPO data questionnaire, what precipitated that questionnaire, as you know, was a spoliation challenge raised by some reports in the news media. Absent that, I'm not sure the litigants would have felt comfortable making a motion to compel for certain discovery that led to that questionnaire.

So I think the current Rules system as it relates to the meet-and-confer process is broken in the context of 2004.

JUDGE SCHEINDLIN: Sadly, we have only three minutes. We are taking until 12:05 because we didn't start until five minutes late, so we have three minutes left. Mark?

QUESTION [Mark O. Kasanin, Esq., McCutchen, Doyle, Brown]: Mark Kasanin from Bingham McCutchen.

As a former member of the Advisory Committee, I have a comment on the rule-making process itself as it relates to Rule 34, and perhaps to other Rules. We already know that technology may very well overtake whatever we do

here because of the three-four-year lag that it is going to take to get a Rule in place even if we move on it right now. By then, some of the things that we are talking about now may well be obsolete or soon become obsolete after that effective date. Other technology will come into play.

If we start with very precise and more specific definitions, I think what we are doing is embarking on a course where we need to keep amending the Rule as we go along to take account of future developments. I'm not sure that that's something that the bench and bar really want to see, and we know that from past experience, that the more times we amend the rules, the more criticism we get. So I think that is just an overall consideration to be kept in mind.

JUDGE SCHEINDLIN: Okay. We've got to go to this side.

QUESTION [Patricia A. Martone, Esq., Fish & Neave]: Patricia Martone, Fish & Neave.

I handle very complex, high-stake, patent infringement litigation. My experience is I think it would be excellent to make sure that electronic discovery is discussed in Rule 26 conferences and Rule 16 conferences. But one of the challenges that we always face is how not to

drown in so much information and documents that we lose sight of the big picture of the case, and keeping the big picture of the case is very important in representing both plaintiffs and defendants.

My experience is not about arguing about metadata. My experience is trying to find out as a plaintiff, for example, what kind of databases the company keeps that allow me to track processes used that are infringing processes to products. And so in the beginning of a case I don't need to discuss the IT aspects of every document in the company, and so I would rather not be — while I think we have to discuss the initial format of production, I would like the flexibility to take depositions from engineers, for example, find out how they access this information, and then perhaps ask focused inquiries.

So I guess I would say I am not in favor of amending the definition of "document." I am very much in favor of early discussion of electronic discovery.

JUDGE SCHEINDLIN: Joan, last word. Did you want to talk now about the metadata and embedded data you mentioned earlier you were about to address? We'll close with that.

MS. FELDMAN: I will say that you may have to

discuss form of production as it relates to preservation. Let me give you an example of a document, a PowerPoint presentation. You have metadata associated with it. That includes the true author's name and the company that it originated from. That's in your metadata, that's in your file properties.

Within your PowerPoint presentation you may have an animated slide from somebody standing like this [gesturing] with the animation going like this [gesturing]. If you print that document out, you don't get the metadata, you don't get the true authorship information, and you don't get anything that might have been embedded in there, say through animation.

Why would that be helpful to you? What about a case involving a biotech firm that had spent $6 million in developing their product, the PowerPoint slides were acquired from someone who had left to start another company? If they had simply printed out that information, no one would ever have known that the true authorship and ownership of that slide was actually the originating company; they wouldn't have known what those edits were.

So when you are making this decision about "here's how we're going to produce it in a static format," you have

to make some provisions at the very least for preservation of the native and some way of linking back because it is part of the document.

JUDGE SCHEINDLIN: Thank you.

I want to take a minute to thank these panelists. Believe it or not, it looks so easy, but they put in a lot of time to prepare. So thank you very much.

DR. CAPRA: We will take a lunch break. We will reconvene here at 1:15.

[Session adjourned: 12:05 p.m.]

JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON THE FEDERAL RULES OF CIVIL PROCEDURE
CONFERENCE ON ELECTRONIC DISCOVERY

Fordham University School of Law
New York, New York
Friday, February 20, 2004

AFTERNOON SESSION — 1:22 p.m.

PANEL THREE: RULES 26, 33, AND/OR 34 — BURDENS OF PRODUCTION: LOCATING AND ACCESSING ELECTRONICALLY STORED DATA

Moderator
Robert C. Heim, Esq.
Dechert LLP
Civil Rules Committee

Panelists
Hon. John M. Facciola
United States Magistrate Judge,
District of Columbia

Gregory S. McCurdy
Senior Attorney, Litigation,
Microsoft Corporation

Robert M. Hollis, Esq.
Civil Division, United States Department of Justice

Joseph M. Sellers, Esq.
Cohen, Milstein, Hausfeld & Toll, P.L.L.C.

PROF. LYNK: All right, ladies and gentlemen. We are going to begin our first program of the afternoon. We

have three panels this afternoon, so it is important that we get started as close to on time as we can.

Let me turn the microphone over to Robert Heim, a member of the Civil Rules Committee, who will serve as Moderator for this program.

MR. HEIM: Thank you, Myles.

Good afternoon, everyone. This is of course all of our favorite spot, right after lunch, but I think we'll be able to keep you entertained and keep you awake.

This topic in your book is "Burdens of Production: Locating and Accessing Electronically Stored Data." We have a panel that deals with this subject in different kinds of ways. Let me introduce them to you.

On my far left is Judge Facciola. Judge Facciola is the Magistrate Judge for the District Court for the District of Columbia. He has a JD from Georgetown and has done a lot of things in his career. He was an Assistant District Attorney right here in Manhattan for a number of years, was in private practice, became an Assistant U.S. Attorney in the District of Columbia where he served in that role for a number of years until he was appointed as a Magistrate Judge in 1997. Judge Facciola has written several opinions on e-discovery. He lectures frequently on

the subject.

I commend to you his decision in *McPeek v. Ashcroft,*[1] and I think the August 2001 opinion in which Judge Facciola talks about such things as using marginal utility theory, for those of you who are economics majors, and small steps in trying to work your way through e-discovery disputes, is a terrific opinion and you should read it.

To show you how these panels tie together, Judge Facciola told me at lunch today that his review of Adam Cohen's book on e-discovery became available today. If you want to read his review of Adam's book, you can find it at www.fclr.org. So you get not only an author but you get a reviewer as well. I didn't ask him what it said.

Also on my left is Joe Sellers. Joe has a JD from Case Western from 1979 where he was on the Law Review. He was in private practice for several years and then spent fifteen years litigating equal employment and civil rights cases for the Washington Lawyers' Committee for Civil Rights. Joe has litigated over a hundred of these cases during that period. He currently practices with Cohen, Milstein, Hausfeld & Toll, a firm that is frequently on the

[1] 212 F.R.D. 33 (D.D.C. 2003).

other side of my cases. Joe is an Adjunct Professor of Professional Responsibility at Georgetown Law Center.

To my far right is Bob Hollis. Bob brings a lot to the table on this subject, first being an electrical engineering degree from Princeton. He went to Law School at Georgetown, also took graduate courses in computer systems at Penn, spent twenty years as the Assistant Director of the Commercial Litigation Branch for Corporate and Financial Litigation at the Department of Justice, and is currently the Director of Foreign Litigation for the Civil Division of the Department of Justice. At lunch Bob said to me that he practices now or observes the courts in various nations throughout the world, and if those countries knew that we were having a conference on a subject like electronic discovery, they would be sure we are crazy.

And then next to me, to my immediate right, is Greg McCurdy. Greg is a graduate of Harvard and NYU Law School. He clerked here in the Southern District of New York for Judge Baer and then went on to clerk for Judge Harry Edwards of the D.C. Circuit. He practiced in New York for Milbank & Proskauer before migrating —— that is a term we use —— to Microsoft where he has represented Microsoft in Paris and now in Seattle. Greg is one of those people who

actually deal with e-discovery problems at Microsoft on a day-to-day basis.

I have to tell you we just couldn't resist having the Department of Justice and Microsoft on the same panel. It was just too tempting to do that.

[Laughter.]

So this is a very distinguished panel.

The format this afternoon is I am going to toss some questions at the various panel members. I said another panel member can comment briefly on the answer given by a particular panel member. We are going to try to reserve at least twenty minutes at the end for questions, do our best. But the format will be I will toss a question, they will respond with what they think is something that will be helpful and useful to all of you, and we will go from there.

Greg, since I introduced you last and since you actually deal with this subject all the time, what actually is the burden of searching backup tapes, for example, for deleted data, or these other kinds of data? Is it cost? Is it time? Is it business interruption? Is it other things? The topic is burden. What is the burden?

MR. McCURDY: Thank you, Bob.

The biggest burden is the one that is not really

at issue here today, and that is the cost of the lawyers' time to review everything once you find it.

But the burden we need to focus on today is the technology burden of how do you even get access to the data that's on these tapes so that you can review it.

We have to start out by really remembering what backup tapes are and what they are for. I brought a couple of examples of them along which I would like to show you. They are basically cheap media in which you dump large amounts of data indiscriminately every day in order to keep it around somewhere in case the house burns down or there is an earthquake, which is actually a real possibility in Seattle. If you have an emergency like that, then you can go somewhere and get it back.

It is not to go look for a file or look for an email. That is never what it is used for in the business purpose. You can use it for that, but it is very, very difficult and rarely done.

One of the earliest forms of backup tapes is this gem, which is probably from the 1970s and 1980s. This one in particular was recorded in 1986. It is from the reel-to-reel variety. You have probably seen things like this in the movies. It holds a lot of data that is indiscriminately

saved from large amounts of servers.

In the 1980s you got to something a little more practical, which was a moderation of the Sony camcorder cassette, which, believe it or not, holds more data than this thing.

Then you came to this variety, which was even larger volumes.

And today we have this one, and helpfully they are bar coded — they didn't used to be bar coded — so it helps keep track of them, which is a challenge in and of itself.

But today a backup tape is created. It's a pretty good copy of what was on the servers. It is not a perfect copy. There are things that are missing, but that is another topic.

As these tapes age, it gets harder and harder to figure out what is on them and get it back.

Now, in most cases, these things are recycled. On a daily, weekly, or monthly basis they are overwritten because it is very expensive to have large numbers of tapes that you have to buy and store someplace. But occasionally they get stored for long periods of time, and that is why you end up with things like this from 1986, which is a real dinosaur.

Well, not many companies still have the hardware lying around, the machines that are used to record this, so when you find it, you have to find that either in a computer junkyard or in a museum or something like that; you have to get the software from that era to run it; and you have to find people who are trained and knowledgeable how to operate that, which is quite a challenge and can be expensive. I'm sure for a price there might be some vendor somewhere who can do it, but it is a pretty high price. In some cases, it is just impossible.

The other factor is these things are not well catalogued, when they were recorded and what was on them, which servers, and which files from which people are on the servers, so it gets very complicated the more back in time you go. And that is where really a lot of the expense is.

There was mention of a case earlier today with —— I don't know —— of 10,000 or 20,000 backup tapes. I mean that's huge amounts of time and effort that have to be spent in restoring them just so that they are on a live server and can then be searched. Then you can do electronic searches to try to find relevant things, and then you can have lawyers review them to see if they are responsive and privileged and all that.

So it is really a very big deal in terms of cost.

MR. HEIM: One question that seemed to come up earlier today was whether when you are dealing with subjects like backup tapes or deleted data, things of that sort, data that is ordinarily not used or accessed by the producing party; should that be subject to discovery at all, or should there be some kind of special showing in view of the burden that is involved, some special showing like cause or good cause or great cause or some variant of cause? Bob, do you have a view on that?

MR. HOLLIS: Yes. Let me address that.

But first let me just put a little disclaimer, obvious to everybody who has litigated sooner or later with the Department of Justice. I am not speaking on behalf of the Department of Justice here.

AUDIENCE: Awwwww.

[Laughter.]

MR. HOLLIS: There are probably 10,000 differing views on this very issue. So I am going to be speaking from the perspective of a lawyer who has spent twenty years principally as a producing lawyer, that is as a defense lawyer on behalf of federal agencies.

I think the one given that everybody in the

Department will agree on is nothing is sacrosanct from discovery. In other words, everything should be discoverable in the right case.

Once you move past that, I think from the trenches there has to be some kind of standard to apply to limit what needs to be produced, at least in the first instance. And again, speaking from the trenches of having conducted lots of discovery, I've got to tell you that in most cases where we've been involved in one form or another with electronic discovery beyond what is readily producible from active computers or from paper files, whatever comes out of that, to use an old expression that I used as a kid in the Bronx, is drek. For the most part, there really isn't a lot of useful stuff that in a typical case will come out of heroic efforts.

Now, I have to emphasize typical case. Clearly, there are cases — certainly my agency has cases — where we would be very interested in metadata and deleted documents and embedded documents, and we ought to be able to get discovery of that.

But at least in the first instance, for the most part, it really is either marginally relevant or marginally material even if it is relevant. And so there needs to be

some kind of standards, some kind of threshold that has to be met, before you reach some of these heroic discovery requests.

I might just drop a real-world example here, a case from some years ago. It was the *Armstrong* case, a discovery request on the White House for email relating to certain topics. This required us to bring back lots of backup tapes where emails were recorded, considerable expense to find them, enormous expense to restore them, even more expense to retrieve them and review them. I must tell you at the end of the day the process cost, as I understand, $25 million and nothing came out of that exercise. Now, I put aside whether it should have taken place or not taken place in that case. I assume that proper showings were made so that discovery should go forward.

But the only point I am making is that this is very costly, and in the typical case it is not sufficiently material, it doesn't advance the case sufficiently, to warrant that cost.

Maybe the standard should be something like "data that's obtainable only at great cost and burden." In that regard, I think, whatever the standard is, it needs to be a very general standard because technologies are going to

change, and certainly what is burdensome and costly for the United States Government might be very different from what is burdensome and costly for an individual bringing, let's say, a Title VII suit.

And so, whatever the standard is, it has got to be sufficiently general to allow the technologies to change and allow the courts to have the flexibility to address, in particular, whether that case warrants meeting that standard.

MR. SELLERS: Can I say a word about that?

MR. HEIM: Yes.

MR. SELLERS: I am struck that we have heard this morning how much the parties who maintain the data may have some control over the format in which it is maintained and the accessibility with which it is maintained. As the technology develops going forward, I think one thing we might want to consider is that the ability of the party who retains the electronically readable data, whether it is generally readable or not, bears some responsibility of demonstrating that it couldn't have maintained this in a more accessible format, because it is after all the party who is controlling the data that has the means of establishing the format in which it is maintained and

collected.

I might add that one thing to consider —— I know that there is another panel dealing with safe havens —— but that it might be worth considering that if a party that retained the electronically readable data has done so in a fashion that makes it readily computer-readable —— that is, searchable —— so that other parties can search it, that that might end its obligation with respect to the cost of production. At that point you create an incentive for parties to maintain the data in a readable fashion.

MR. HEIM: The question occurs to me, without getting into safe havens or safe harbors, or whatever term we are going to use —— and I direct this question to the panel but the second part of the question to Judge Facciola —— is there anyone on the panel that thinks that certain kinds of electronic discovery, the truly inaccessible data —— and I know we could argue about what "inaccessible" means, but we could at least say deleted data, or maybe backup tapes —— should be categorically excluded from discovery?

If no one on the panel wants to jump up and say "yes" to that, although I encourage you to do that, the next

part of the question is: if there is going to be a presumption that some of this really inaccessible data — a presumption only, Judge Scheindlin — if there is a presumption that that is to be excluded from discovery — and I ask the Judge what would the standard be for overcoming the presumption?

JUDGE FACCIOLA: I can't imagine one. I mean the point, it seems to me, is you're dealing with two different situations. If we look at the problem dynamically, as we are as Rules draftsmen, we are looking to the future. The problem is judges look to the past. In *Zubulake* and in *McPeek,* the simple reality is that there were instruments, documents — whatever you want to call them — tapes, on which there was a possibility that relevant evidence existed. I know of no provision in the Federal Rules that would tell me as a judge that I can simply pretend that is not so.

So then the question becomes: how do we assess the likelihood that that document does contain something? In the *McPeek* case, I tried sampling, so that we did an initial sampling of the documents. On the basis of that, we made second decisions.

I think two of the more interesting decisions in the area are Judge Scheindlin's fourth opinion in *Zubulake* and my second opinion in *McPeek,* because that's when the rubber met the road. That is where the two of us had to decide how likely was it that on this tape there was something that somebody should be made to search for.

So as long as backup tapes exist in some place, judges cannot run away from the reality of grappling with Rule 26 and burdensomeness to require someone to search them.

So to answer your question, no, I don't know how when these things are now on a table someone can say, "You are relieved, Judge, of forcing anybody to get them." I think it is impossible to overcome that presumption.

MR. HEIM: Greg, then Bob.

MR. McCURDY: I agree with Bob that there is nothing you can categorically exclude from discovery, but you do have to weigh the burdens.

To Joe's comment about maybe the responding parties should have an obligation or an incentive to maintain things in ways that are easily retrievable, that sort of presumes that companies or the government maintain data for the purpose of litigation rather than for our

business. The purpose of a backup tape like this is business continuance; it's not for litigation.

Of course there are many forms in which data is maintained. They are maintained on the PC and on the server. There they are readily searchable and those are other copies of what is on the backup tape.

So I would suggest it would be good if one could exclude presumptively these difficult and inaccessible sources and focus first on the readily accessible and readily searchable sources of documents, and only if for some reason those are not sufficient you consider going to the difficult ones.

And then weigh the burdens. I mean is it fair to burden the government with $20 million of expense to go hunt for an email that either doesn't exist or there might have just been a second copy of what was already on the PC of the person who wrote it?

MR. HEIM: Bob, do you want to comment?

MR. HOLLIS: You might want to take notes. The Department of Justice agrees with Microsoft. I do agree that, at least at the threshold, one needs to look at what is the particular question before the court. What is this data source that you need to look at? If it is something

that is extremely costly and extremely burdensome, then yes, indeed, there needs to be at least a threshold that at the end of the day what you are going to find will in some way materially advance the litigation.

What is relevant is the criterion, but I think you need to apply to the relevance question some degree of materiality when it comes to very expensive processes.

And what that expensive process is is going to change with time. That is where I get back to whatever it is that comes out of this conference has to be sufficiently generalized that it doesn't become technologically specific, because it may well be that software is going to be generated that makes backup tapes completely transparent.

But at the threshold I do think that if in the facts of a given case to even do the sampling requires inordinate expense, then I do think there ought to be some rebuttable presumption, and that rebuttable presumption should at least bring into the fore the question of materiality in addition to just the possibility that something of marginal relevance is going to be found.

MR. HEIM: Joe?

MR. SELLERS: I certainly agree that the first step ought to be to look at the readily accessible material.

But if the readily accessible material isn't sufficient or leaves questions open, I really think the Rules —— and indeed our jurisprudence —— recognize that the burden rests with the party seeking to resist the discovery to demonstrate why it should be resisted.

I must add that, lest it be thought that only the large companies and government are worried about cost, the plaintiffs are terribly afraid of these costs. Indeed, just to get to the issue of cost-shifting, which seems like a preliminary inquiry, often involves a lot of discovery on the part of the plaintiffs, who are generally people of limited means and often forgo the discovery altogether for that reason.

So part of the reason why I was suggesting that there be some incentive for entities which maintain electronically-readable data to maintain it in a readable form is because I believe ultimately it will make it more transparent and it will reduce the amount of burden that we are all complaining about today.

JUDGE FACCIOLA: Again, I don't know how you square the circle. I mean how do you make the decision it's not material unless you make an initial inquiry of how likely there is something on it?

Please bear in mind in *Zubulake* and *McPeek* Judge Scheindlin and I focused on what we called “key players,” people who seemed to have something to do with the decision at issue. We certainly didn’t search the entire Department of Justice for backup tapes. We searched the backup tapes on the people who made the decision, in my case specifically with the people who made the decision that he claimed was a pretense for retaliation. So having made that initial determination, the search was as narrow as possible.

Isn’t it more permissible to do that narrow a search as possible with the existing document than try to say in advance “backup tapes are not searchable”? The question is: why aren’t they searchable?

MR. McCURDY: One thing is that *Zubulake* and *McPeek* are both employment discrimination cases with a single plaintiff, and so there is not going to be a lot of volume. It is not a commercial litigation with two large companies with products, that have hundreds and thousands of people at those companies working on those products, creating documents about them. So you just don’t have that volume, hundreds and thousands of backup tapes, and knowing which servers are on which for what time and who saved what, where, is quite extraordinary to have to figure out,

especially after the passage of some time. I mean in the near term, soon after the event, it is on the backup tape but it's all on the live servers anyway, so it is kind of irrelevant, which is why most companies recycle them, because they don't need to keep it for a very long time.

MR. HEIM: But it would be very hard to write a Rule that distinguished between the employment case setting and the antitrust and securities litigation that you and I are frequently involved with. How do you do that? I think *Zubulake* and *McPeek* gave us a process that seemed to work, that process works, but what do you do with the kind of cases that you have or that your firm has, Joe?

MR. SELLERS: Right. And indeed, I think there is some serious question as to whether you need a new Rule. As I understand it, both *McPeek* and *Zubulake* are derived from the present version of Rule 26. It seems to me that 26(b)(2) really does set forth the factors that have now been worked with in a couple cases, and we see that those same factors can lead to different results and different kinds of cost-shifting if the parties generally have comparable resources or there are other things that would suggest that there are large entities that can bear the expense more equitably.

MR. HEIM: Yes. Somebody mentioned a case. I think the name is *Thompson.* Judge Scheindlin sent it around. Judge Scheindlin, what is the name of that case where the judge said essentially 26(b)(2) ——

VOICE: *Thompson v. United States.*

MR. HEIN: Yes, it's *Thompson,* right —— you know, that there is already enough guidance in the Rules to be able to figure these things out without trying to import into the Rules issues that may be in the long run more confusing than they are helpful.

I wanted to ask Judge Facciola: what is your view of that as somebody who is on the spot all the time dealing with that?

JUDGE FACCIOLA: This falls particularly to the Magistrate Judges because we supervise so much of the discovery.

The reasoning that I used in *McPeek* was not that different than the reasoning I use in every discovery dispute, which is: if we turn the world upside-down, will we find a pearl or something else? The reason I thought about marginal utility and why it made sense to me in the context is because it captured exactly what I was thinking, which is, as I said in the opinion, we cannot live in a

society where we are going to pay $1 million to produce a single email, that the difference is at the margin. Therefore, I read into 26 that obligation, to make the economic determination: how likely is it that if we do this sorting, the wisdom of doing it will benefit us in some way?

Did I feel that I had a lack of guidance in the case law and in the Rule? I sure did. But in my reasoning I didn't do anything quite different from what I did in other cases.

In my own defense I should tell you — I'm going to make a damaging admission here — all I remember about marginal utility from college was a friend of mine who was dating two girls. He came to me one night and over a beer he said, "You know, my marginal utility for Priscilla is really going up, but after last weekend Jane is on the floor." That's all I remembered. Since it had to do with women and beer, it stuck in my mind.

But I cannot tell you that that was the product of a lot of ratiocination. It is the way I do things every day, the way Jim Francis does things, the way Judge Scheindlin does things all the time. It is unquestionably true that, like the Rolling Stones, lawyers always ask for everything they want, but they have to be satisfied with

what they need. What I was trying to do was to find out what they needed.

MR. SELLERS: I'd just add one thing. I think, lest we focus only on the amount of money that is at issue in these cases as a measure of what justified the expense, I'm not suggesting that constitutional cases get blank checks, but I think we ought to appreciate that there are other kinds of rights and issues in some of these cases that may not lend themselves readily to measures of monetary damages and that nonetheless may justify some significant discovery.

MR. HOLLIS: I might just add that if I had Judge Facciola or Judge Scheindlin as the judge before whom I am practicing in every case, then I suspect there is no need for Rule changes because those two judges bring an incredible sophistication to the analysis. But the truth is that there isn't that kind of uniformity. The problems abound.

We and the Department of Justice —— I'm sure everyone here —— practice in lots of different courts before judges with lots of different levels of sophistication. That is why I think there ought to be some presumptions that we can look to that create at least a uniformity across the

federal judiciary that I can rely on to some extent.

MR. HEIM: Judge, your comment really made me think about whether there is, or whether there should be, a distinction, whether we should draw any kind of a distinction between the obligation to preserve data that is not used on a daily basis and the obligation to search data that actually exists in the active files of the particular company. Roughly speaking, the current preservation standard is something like you have an obligation to preserve if you reasonably anticipate that there is going to be litigation on that subject, or some formulation like that.

How do those two things work together, or don't they?

JUDGE FACCIOLA: I don't know. I keep wondering where we got the words "anticipation of litigation." I assume we borrowed them from another portion of Rule 26 that talks about the work product privilege. I am not sure that's a very good fit because the work product privilege deals with the lawyer working in his office. It doesn't deal, God help us, with Microsoft, which has divisions all over the world and I imagine can anticipate litigation every time the sun rises and goes down again.

So to answer your question, if we are going to borrow that, it is a very liberal standard. In my Circuit, for example, just about any consideration in an employment context that this one is going to be troublesome yields the conclusion they can anticipate litigation.

Again hearkening back to what Judge Scheindlin did in *Zubulake,* the way this is working now —— and this is discussed in Cohen's book —— is that as soon as plaintiff's counsel becomes aware of the possibility, he or she fires off the letter. In fact, there is one in Cohen's book you can use. The theory is as soon as that letter hits the other side's door, they can anticipate litigation.

It is common practice in our circuit that those letters are going out to federal agencies on a daily basis as soon as there is a promotion or other decision, as the person makes her way down to the EEOC counselor and speaks to a lawyer.

In *McPeek,* for example, if you remember the part in the opinion, there was a seven-page letter from plaintiff's counsel. I said obviously that was an anticipation of litigation.

To answer your question, I don't know what the standard should be, but given the proclivity of people to

sue corporations, maybe “anticipating litigation” doesn’t really speak to the reality with which they deal, and maybe we have to come up with time lines or more definite Rules, which, if nothing else, would have the advantage of being clear and understandable by everyone involved.

But to answer your question more particularly, most preservation orders that I think are issued now, if they are issued at all, are requiring that the process of deleting matters from the tape end, and that a snapshot be taken of that system as of that day, and that those backup tapes be preserved.

The problem you are having, of course, in any case, but particularly in employment cases, is if you take a snapshot in 2003, what does that tell you about what happened in 1998? We constantly confront the problem where the data as to 1998 is no longer readable because nobody can figure out how to do that.

And of course when the woman complains that she was fired in 2003 and claims that was the culmination of a process of firing African-Americans that began in 1998, you see how impossible the situation becomes merely because you have taken a snapshot in 2003.

MR. HEIM: I was going to ask you, Joe, and it

seemed to me that I should ask both you and Greg. Some people have suggested one possibility of dealing with this as kind of a compromise situation, since the Judge referred to a snapshot. Does it work if you just — I don't know whether you would put it in the Rule or not, but let's say for a minute that you do put it in the Rule that the responding party or the party to whom the discovery request is made or will be made has a requirement to preserve a single day's full set of backup data, the snapshot, a single day's full set of backup data.

Would that satisfy you, Joe, rather than try to have the full panoply of discovery available on inaccessible data?

MR. SELLERS: I think the key question is the duration for which they keep the snapshot data — that is, if you keep it for some period of time. With all due respect to Judge Scheindlin, I'm not sure that the standard perhaps ought to be the issue of anticipating litigation. Perhaps you look to what the entity has done with respect to other kinds of documents, how it treats personnel records if the analogy is in the employment record. It certainly keeps them for longer than twenty-four hours or forty-eight hours.

But I think if you have some duration by which you

can measure the reasonableness of its retention practice with this kind of snapshot information, I think that may be a reasonable solution.

MR. HEIM: Greg, is there ever a day when you wouldn't be making a snapshot of your backup tapes?

MR. McCURDY: We make backup tapes every day and on a regular basis they are recycled. That is a big, cumbersome process that is designed to help us recover if there is a terrorist attack.

We also keep everything that is required by law to be kept in the relevant files in the HR Department. And the individual business people have their files, and those are kept on servers as well as on their hard drive. When we receive notice of a litigation, we take steps to preserve that, as is our obligation.

I think the idea of backup tape snapshots as a panacea is really misplaced because they are way over-inclusive as well as under-inclusive. They are under-inclusive in that it is going to be that day that the lawsuit was filed and not the three years prior — and God help us if we have to keep backup tapes for every day for the three years prior, because then we are really inundated by the tsunami. So it is under-inclusive in that way.

It is over-inclusive in that so many people and so many different servers are backed up in one single tape and there are so many tapes for every day. And so the obligation to store those and keep them and keep track of what it all is is quite large.

MR. SELLERS: May I say one thing?

MR. HEIM: Sure.

MR. SELLERS: I am sympathetic to what you are saying, Greg, but my concern is that if you have overwriting that occurs every two weeks or three weeks or month or so, you won't even have the information going back to the beginning of the statute of limitations. I don't know how people can make a case.

Historically, of course, companies kept paper records and they kept them for substantial periods of time and you had some degree of confidence that they were there, or most of them were there, and you could look backwards. But if you have overwriting that is very frequent, there will be no record from which to be able to evaluate the claims.

MR. McCURDY: You see, your assumption is that in the electronic world we are keeping less than in the paper world. In fact the opposite is the case. In the electronic

world it is so easy to keep things on hard drives and servers that vast amounts of that accumulate. The backup tapes are just an extra copy of all of that.

It is not the obligation of a business to keep everything for every possible statute of limitations for every possible claim. The business must keep things for its business need and whatever specific legal requirements there are. When there is a lawsuit, there is a new legal requirement, and then one has to stop and focus on keeping that.

But always keep in mind that the backup tapes are just an extra copy of what is already there.

MR. HEIM: I just want to clarify one thing. Because there has been this suggestion of taking the snapshot, a single day's full set of backup data on the day the lawsuit was filed ——

MR. McCURDY: Of the whole company, of all 50,000 employees and 10,000 servers?

MR. HEIM: Let's assume that is the case. It is an antitrust case, it ranges across all your business practices, it is some form that any one of your various divisions could somehow be involved in the alleged conspiracy, even though we know it is not true. What do you

get if you preserve one day, a single day's full set of backup data? Is Joe right, you're not getting anything that happened three years ago?

MR. McCURDY: Sure, you can get stuff that happened three years ago if it is on the person's mailbox on their server or some other storage.

MR. HEIM: Okay.

MR. MCCURDY: A lot of the stuff on there will be quite old. Some of it will be very new.

MR. HEIM: But you don't know what you're getting essentially?

MR. McCURDY: The point about these things is you don't really know what is on it until you go through the painstaking process of searching through the haystack.

MR. SELLERS: My point is that that approach is haphazard, because some people's hard drives may be —— they may save a lot of material; other people do not.

Let me just make clear I am not suggesting —— again, we have the opportunity here to think this through for the future. I recognize that what has happened in the past, maybe something is going to have to be decided case by case, as I think the decisions published now do very ably. But I think we have an opportunity here to set some

standards, even if it is through Advisory Committee notes, that make clear what is expected for the future. I think something more should be expected than kind of daily or weekly overwriting systems.

JUDGE FACCIOLA: Something that I have seen written — I don't know where I saw it, maybe in the Sedona Principles — but the theory is if there is a clearly defined methodology as to how you are doing this, certain arguments could flow.

The interesting thing about the backup cases we have seen is there is no rhyme or reason. If you remember the decisions again that we grappled with, there was a backup tape for August 11th, November 9th, and October 3rd, and no one ever explained to me why that was. Well, no one had to explain it to me. I could understand perfectly. The technician who was doing that didn't really care what was on the backup tape because his job was "make sure when you go home tonight this system is backed up so if we have another hurricane we can open the court tomorrow morning."

MR. McCURDY: It is not archival purposes.

JUDGE FACCIOLA: It is not archival purposes, I understand.

So one of the strange things about this case is

that very haphazardness, and that of course makes doing this extremely consumptive of judicial resources because there is no rhyme or reason.

Again if you go back to those decisions, you will watch Judge Scheindlin and me struggling with: how is this going to work; how likely is it that on August 8th this particular person wrote an email about this particular topic? If there had been some rhyme or reason as to how these had been treated, I think the analysis is different. But the present analysis is quit chaotic.

MR. HOLLIS: I think this conversation has been very useful in that it underscores that perhaps the answer is a case-by-case analysis, that you get into a very slippery slope if you set a requirement that it be a one-day snapshot or thirty-day snapshot or whatever, because what needs to be preserved in any given case is going to be case-specific.

Let me give you just two sides of the spectrum. Suppose I have a case that is purely historical, that is what did my client do three years ago, on the one hand? And suppose I have case that is, does my agency that I am defending have an ongoing Title VII violation? Well, certainly in the one case, the historical case, it is

relatively easy to set a requirement that any backup tape that would deal with the requisite period of time ought to be pulled out of the queue.

MR. McCURDY: That still exists.

MR. HOLLIS: That still exists. Pull it out of the queue and don't overwrite it.

But if you are talking about a prospective case where every single day that I write something on my computer and it goes into a backup tape and we have to preserve it, let me tell you that is extraordinarily expensive. I had one case where that was the requirement, and it was for just a small segment of an agency, just to buy these pieces of plastic here, was close to $665,000 a year. The case was filed in 1998 and it is still pending, so just do the arithmetic.

That just augers for the risk of a "one size fits all" answer. There has got to be some judicial flexibility with the recognition that there are things in a given case that might be appropriate for the parties to agree upon or the court to facilitate the parties agreeing upon which could preserve for a future discussion data and the question of whether you actually want to reproduce them and review them.

MR. HEIM: I have a follow-up question for you, but first I want Joe to comment.

MR. SELLERS: One very quick point. I completely agree with you that flexibility is an essential hallmark of this system. My only concern is that if the system —— again, going forward, not historically, but what is proposed for the future —— is one that permits regular overwriting so that the data does not exist in any organized, accessible way, then when you get to the case you are going to end up with the unpleasant litigation over whether there ought to be a spoliation inference.

Frankly, that is not the way I like to see cases resolved. I don't think anybody likes to see them resolved that way. It is a last resort. So I am just suggesting that we want to try in our effort here to come up with a plan that avoids that as much as possible.

MR. HEIN: When you said "one size fits all" is not going to be useful to us —— and I understood what you meant —— but I did not take your comment to mean that a Rule should not provide some guidance with regard to how a responding party should have to deal with the subject of inaccessible data. Am I right or wrong about that?

MR. HOLLIS: You're correct. I do think that there needs to be some guidance. I think everything that we have heard today in all the various panels tells us that you have a confluence of two things going on. You've got the forensic computer experts sending out literature that I get every week, and every bar journal I ever read talks about that cornucopia of good stuff that is out there.

MR. McCURDY: Which they are well paid to go dig up.

MR. HOLLIS: Right. You have that on the one hand, and then you have what I think is unfortunate, a very few number of polestar cases. Certainly the two judges here give us some polestars to look at.

But I do think that it leaves most practitioners in sort of a quandary as to: What really must I do? How do I deal with my cranky IT people? How do I convince them that there is a reason why they have to do *X,* and they tell me, "It can't be done, it's impossible, never could be done, contrary to technology."

Well, if I have some guidance, either in the nature of a Rule or a Committee Advisory Note, or maybe we're really talking about best practices that perhaps lawyers — some ABA, Sedona Principles if you agree with

them, whatever —— that maybe what we are really talking about is the development of best practices that would allow me to have the vocabulary to use vis-à-vis my client, and also to make sure that I don't get trapped by the spoliation issues that nobody wants to be involved with.

MR. McCURDY: Could I just respond briefly to a comment that Joe made about whether it may not be appropriate to allow companies or government agencies to recycle backup tapes on a regular basis?

I think we might want to draw an analogy to the paper world, where paper piles up on your desk, multiple copies of it, and you dutifully file away that which you need to keep for your business or for legal reasons, and at the end of the day what you don't need to keep for any of those you put in the trashcan, and every night the janitor comes and takes the trash out.

It seems to me that your suggestion is sort of like "don't take out the trash anymore and hold on to all the trash," because what the backup tapes are are just this extra copy of what everybody already has for business or legal reasons. It is very important for the operation of the IT systems to take out the trash on a regular basis, or else you get inundated with it.

MR. SELLERS: I certainly don't want to stop you from taking out the trash. My concern, though, is that over a period of time if you don't keep the other data, the more readily accessible data, that there be some means of reconstructing things. That is my only point.

If you keep it all, then of course the backup tapes can be recycled, as they should be. But if it is the only backup that exists, then I think there is a problem.

MR. HOLLIS: If I could say, I think Joe has hit a really important point, and that is the obligation —— this goes back to the best practices —— the obligation to set up some kind of viable record retention system. When a case comes in, you ought to have some viable mechanism to preserve relevant data that is on active computers. If you do that, then there really is no reason to keep the backup tape. After all, the backup tape is nothing more than a copy of what is already on your active system. So if you set up a well-policed, well-articulated, well-defined document preservation policy off of the active computers, then that may resolve the economic questions of "At what cost should we go to the trash?" Thankfully, Microsoft doesn't throw out all its trash, but that is another lawsuit.

MR. McCURDY: We keep a lot of trash.

MR. HEIM: I want to have enough time for everybody to ask questions or join the discussion, but I did want to ask all of you this question. If you look at the *Manual for Complex Litigation (Fourth)* — it is in the materials, which is why I read it — at 40.25(d) there is a reference in there that says, in effect, that "if the business practices of any party to a lawsuit involve the routine destruction, recycling, relocation, or mutation of electronic data, the party must, pending application to the court" — a party can always make an application to the court — "do one of the following: halt such processes, sequester or remove the material from the process, or arrange for the preservation of complete and accurate duplicates." Now, that is the guidance that is provided from the *Manual for Complex Litigation (Fourth).*

Do you have a reaction to that?

MR. McCURDY: That means stop taking out the trash and take a snapshot every day and keep it in a gigantic warehouse on the off chance that someday somebody might order you to look at it to find something that might not be on one of the active systems.

MR. HEIM: So I gather, Greg, you would be in front of the judge very quickly.

Bob, do you have a reaction?

MR. HOLLIS: I wouldn't read it that harshly. I think it does invite just what I was saying, and that is the development of a best practice for the preservation. It doesn't require you to save backup tapes.

But I think the real problem is in the real world the best-laid plan will not be 100 percent carried out. I mean the Department of Justice has 122,000 people. I can't police 122,000 people to the extent that I was a defendant in a lawsuit. So the real question is: how far from perfection a party needs to establish before you now implicate the backup tapes? I would hope the answer is "not 100 percent perfection."

MR. McCURDY: A reasonable ——

MR. HOLLIS: I hope the answer is "reasonableness, materiality," some of these other vague questions which give the judges the flexibility they need will be brought to bear so that we don't have to save the trash every day, but that we can do something that is a reasonable compromise.

MR. HEIM: Joe?

MR. SELLERS: I again think that it is important

to have flexibility here. I want to draw a distinction, though, between the time period at the point at which a party receives notice of a lawsuit, at which point I think, as I understand it, that provision kicks in, from which the party that may have an obligation to keep this material can try to get relief from the court at an early occasion, by perhaps discussing with the requesting party what is really at issue and find ways to unfreeze things very rapidly.

The other question, though, is: what do you do with retaining information when you have no notice of lawsuit if you are going to be overwriting it? That does not deal with that.

JUDGE FACCIOLA: I would not want to narrow the problem simply to backup tapes. It is to everything in that computer. The argument is made —— and I think again is in the Sedona Principles —— which is if your company has a policy of deleting old files, wherever they are, even on your own hard drive, and you follow that policy, that would be demonstrable evidence that it is inappropriate to say that you had some reason to destroy them.

So the question then, I suppose, a judge confronts is: if such a policy is in existence and it is neutral, should it continue to operate while this litigation is

going? The answer may be it may be able to operate except as to certain persons, because while we all live in a nice little world, we all saw an email not too long ago about "Christmas is coming, let's purge our files."

I'm a judge but I am no fool. I have to realize that there is a tremendous temptation when litigation starts for people to go in there and unsay those damaging things they said in emails. My experience has been informed as a judge by emails I have seen in litigation that I still don't believe existed. I saw an email with a swastika. I saw an email in which one genius sent a Playboy centerfold to another genius suggesting she be compared to the receptionist.

So, having presided over cases like that, I plead guilty as a judge to attempting to preserve that evidence until I can get my hands into that case and see what really is going on.

Now they are selling a hard drive that you can fit on your key chain, so don't give me a lot of baloney about how tough it is to preserve stuff. We saw this morning the capability of these systems to keep more information than you and I can imagine. Since that is so, I want to hear much better argument from counsel as to why they should

continue this regular process of cleaning up their files.

MR. HEIM: I am going to invite the audience to look at this.

JUDGE FACCIOLA: I'm going to leave.

[Laughter.]

MR. HEIM: I will go to my friend David first, Go ahead, David.

PROF. CAPRA: No, we've got one here.

MR. HEIM: Oh, you have one there? Okay, go ahead.

QUESTION [Alan B. Morrison, Esq., Public Citizen Litigation Group]: Alan Morrison from Public Citizen Litigation Group.

I'm sorry to have to do this, but, Mr. Hollis, I can't agree with you less about the *Armstrong* case, since I was co-counsel and you were not.

I should point out first it was not a discovery dispute. The dispute was about the availability of these documents under the FOIA, electronic records, and the requirement that the White House preserve electronic tapes, including all the emails between Colonel North and all the rest of the people in Iran *contra.* That is what the fight was all about. There was no discovery until we had been to

the court of appeals once and back.

There are three published opinions and the government paid us a half a million dollars for changing its record-keeping system. You may think that is drek, but I don't think the American people do.

MR. HOLLIS: I think I should respond. I don't know the *Armstrong* case.

VOICE: Then why did you say anything about it?

MR. HOLLIS: The point I was trying to make ——

VOICE: You're wrong.

PROF. CAPRA: We have somebody here.

MR. HEIM: I think we have rebuttal, though. Bob?

MR. HOLLIS: You may be absolutely correct. The point that I was making was how expensive. I wasn't necessarily suggesting that every exercise of forensic discovery is drek. I am not an attorney on that case —— in the cases that I have handled —— on the *Armstrong* case, the only point I was trying to make was just the dollars, how much it cost.

MR. HEIM: David?

QUESTION [David M. Bernick, Esq., Kirkland & Ellis, Standing Rules Committee]: David Bernick.

Just a couple observations. One is that in

hearing the discussion both in this panel and in the panel before, there is almost a comfort that I get, that at least everybody is living through the same woe that I have experienced on my cases for the last couple of years.

But there is a greater significance to that, which is that a lot of what we are talking about today I think is probably the subject not simply of published opinion but an awful lot of steps that have been taken in individual cases that are not readily achievable from decided opinions —— conventions, moves that have been made by agreement between the parties.

Mr. Hollis here has a tremendous amount of experience. Maybe I have less. But one thing that would be extremely useful is to figure out some way of trying to gather and collect the experience that has now been developed over the last couple of years as people have wrestled through these issues.

For example, every single one of the issues this panel has discussed we have specifically dealt with in a case that I have in the last twelve months, including the question of how to preserve not only what is past —— that is easy —— but it is what gets generated in the future that is the real challenge. I do not know what the right mechanism

is, but if there is some way that people can think of of starting to go back —— in complex cases particularly because they are always going to present to you the problems —— and figure out what actually happened in case management in court to wrestle with some of these problems, I think that there would be a tremendous ability to share wisdom, now that all of us have been through the pain.

Second observation is that we are all operating in the friendly and uniform and consolidated confines of the federal judicial system, but where a lot of the problems lie is what happens in state court. In state court, no matter if it is just state court, the defendant in that case or the plaintiff in that case may have to go through and deal with exactly the same issues as we face here in the federal system, but it is the weak link in the chain that governs. That is, whatever is the most-restrictive set of requirements that is imposed, those are the ones that the company has to abide by, whether they came from state or federal court.

So we have a preservation order that comes out *ex parte* or that comes out *sui sponte* in state court in Alabama that says “preserve every copy that you have of documents falling into the following ten categories.” That means

every single backup tape, even if they are completely duplicative. To try to get that unwound, you can't get that unwound in the federal system where we have a Rule or may have Conventions; you've got to get it unwound in that state court. And if the next state court then does the same thing, you again have got to abide by that.

So as a practical matter, the weak link in the chain is the one which becomes dispositive, which makes me say we ought to look for a Rule here in the federal system, in part, so that there is something more tangible to go down to the state court with.

I, however, am of the view that I have yet to see what that Rule really is. These are case management problems, unfortunately.

QUESTION [Prof. Martin Redish, Northwestern University Law School]: Marty Redish from Northwestern Law School.

I heard relatively little in the panel's discussion about the role of cost-shifting. I'm wondering whether it should get more consideration than it has. I recognize, of course, that that is strongly against the method which we have traditionally abided by.

But I wonder if we were to go back to first

principles, the proverbial Martian coming down and looking at the system, I wonder whether we wouldn't change our attitude towards cost-shifting, because the absence of cost-shifting brings about an inherent inefficiency due to the externality. There is no disincentive to engage in excessive discovery.

By excessive discovery I don't mean necessarily discovery that rises to the level of abusive discovery —— that can be dealt with in other ways —— simply inefficient discovery. If you shift cost back, then there have to be certain triage decisions, certain tragic choices made, which incentivize people to bring about efficiency. I understand of course there are certain categories of litigants for whom this would be infeasible, but what I don't understand is why we don't at least start with a presumption of cost-shifting in this uniquely difficult area of electronic discovery and work from there in a case-by-case situation.

MR. HEIM: For those of you who have not read Judge Scheindlin's approach to this general subject of cost-shifting, you really need to read her views on that subject in *Zubulake.*

Judge Facciola?

JUDGE FACCIOLA: Professor, two points. One, we

purposely stayed away from cost-shifting because it is the subject of the next panel.

The second thing is — and I was thinking about this this morning as we were talking about this — Professor, I am deeply concerned. According to the statistics that I have seen — and I have seen them since I had the pleasure of working with Myles twenty-five years ago — on *pro se* litigation that in the federal court we are still having one out of every four cases being filed *pro se* and *in forma pauperis*, and I am sure that statistic is much greater in those judicial districts that are next to federal prisons.

I tried to think about this in *McPeek.* As you just pointed out, there are just so many cases in our system where the shifting is meaningless because the person on one side doesn't have the money to pay it anyway and it will mean the end of that lawsuit. Think about the two cases that we are talking about. McPeek was a GS-14 who earned $75,000 a year. Zubulake was a broker who made $650,000.

So the problem I have is if we begin with cost-shifting in the first part, we've got a whole group of people to whom it is irrelevant. Mr. McPeek could not

possibly pay the Department of Justice for the search I ordered to be done.

QUESTION [John Vail, Esq., Center for Constitutional Litigation]: John Vail.

I have a question, I guess directed best to Greg. You said that the purpose of retention of these documents is business continuation.

MR. McCURDY: Disaster recovery.

QUESTIONER [Mr. Vail]: If that is the purpose of them, why would you maintain them in a non-readable form? Why aren't they upgraded to a readable form with each upgrade of the machines that you make?

MR. McCURDY: Because when you have a fire or a flood or an earthquake, you usually know that the next day, and then you take your very fresh backup tape, for which hopefully you still have equipment, software, and personnel, and you can upload it and restore it, which is expensive but in the case of an emergency it is worthwhile doing. That is generally why you do not keep it around for long periods of time, because you will know immediately when there is such a disaster.

Now, in some cases — I mean we were talking about the randomness of this, and this comes back to the point

about how IT people tend to be packrats and companies are actually fairly disorganized, despite what some people might think —— tapes are kept for some reason or no reason at all for long periods of time, and then you have a tape that is ten years old or twenty years old. What do you do with that tape?

And then if you get an order to restore it and search it —— and it's not just one, but it's hundreds or thousands or ten thousands of them —— then you have a discovery decision that really decides the case, because it imposes such burdens and costs that it is just worth paying the plaintiff the money to just go away, regardless of whether there is anything relevant that you have to fear on the tape.

QUESTION [William Ohlemeyer, Esq., Altria Group]: Bill Ohlemeyer from Altria Group.

I think you have to temper a lot of this idea about flexibility with reality and practicality. I mean when you consider changes to these Rules, you're going to be asked and you are going to have to make a lot of assumptions about time, money, and effort. I would encourage you to get a real-world perspective on some of that, because a lot of these issues are already dealt with in other parts of the

Rules, a lot of these discussions have business implications in the real world, cost a lot of money, have a lot of business insight that I think you have to factor into what you do.

Quite frankly, I think on a lot of these things a lot of lawyers —— and, with due respect, some judges —— do not know what they do not know. When you sit down and you talk to the business people about how you structure a network and how you manage a records retention program and how that intersects with disposal, suspension, and production, you get a very different insight. I mean it's easy to say, "Sure, you can store everything on a key chain," but once you start trying to retrieve it, and once you start trying to retrieve it on your schedule, not their schedule, and once you start doing it in an adversarial situation where everybody is trying to play "Gotcha!" it gets to be a little more complicated.

Quite frankly, I think you have all the tools as judges that we as lawyers need to deal with some of this, especially what you have talked about the last hour. Any reasonable business is going to have a document retention program. Any reasonable business is going to have a disposal/suspension program. Any litigator involved in

litigation or any lawyer giving advice to his or her client is going to tell them when and how those obligations arise. You are going to produce the information.

And then, and only then, do you get to this whole issue of what happens with these backup tapes that were never designed to be the disposal, suspension, or document retention system. It's one thing to say you can use the backup tapes to reconstruct one of your or your client's failures to comply with all these Rules. It is another thing to say, "I am going to let an opponent, at my cost because they don't have money, make me do all of this while I am trying to defend the lawsuit."

So I really think there are a lot of ways you can solve these problems with the Rules as they exist, by enforcing the Rules as they exist, without getting into situations that really involve technology that was never designed to satisfy the obligations that the Rules already impose on us for retention and disposal, suspension, and production.

QUESTION [Elizabeth Shapiro, Esq., U.S. Department of Justice]: I am Elizabeth Shapiro. I'm from the Department of Justice.

Even so, I wanted to come to the defense of Public

Citizen for a moment, because my colleague Bob intended to refer to the *Alexander* case not the *Armstrong* case. The *Armstrong* case is not at issue at all in this discovery and restoration effort.

But I wanted to emphasize in the *Alexander* case how heroic in fact production was, where in that case there were numerous backup tapes that were ordered to be restored. That entailed, because there were allegations of bad faith, having them restored with forensic protections, which meant copying all of these tapes, and copying them twice, so that you never worked with the original tape. You had to copy it to make a working copy and then you had to copy it to have a copy. All of that copying takes an enormous amount of time.

And you had to determine —— and we had to determine this through litigation —— whether you went to the logical end of tape or whether you went beyond logical end of tape when you made these copies; what kind of tape you would use, because the tapes had different lengths and different abilities. All of that was litigated to the extent that we had demonstrations and we had a trial over which company was appropriate or which contractor was appropriate to do that work.

So there was a trial. We had the judge actually

watching processes take place on-site. We had a decision. This took an enormous amount of time. Then you had to, once you took all of these daily backups, which then you had to get the equipment that could restore them, and then you had to, because there was such an enormous value, de-duplicate, which meant actually hiring people who could write the software to create a de-duplication program, which could then — because each backup is a snapshot of the day, and so you would have such an enormous number of duplicates, you couldn't possibly put that up to a live system and search it.

So once you had this de-duplication program, you had to — you can't just write a new program and apply it — you then had to test it and there had to be sampling and they had to make sure that the bugs were out. So all of this enormous effort went into it.

Then you had to put it into word-searchable form, and then you had to create according to the discovery terms what the relevant terms would be, you had to search the material, and then you had to put it on CDs and you had to physically go through and read every message. This is what the lawyers in this case did for a long period of time.

That effort took $25 million and resulted in zero

relevant documents. That was I think the extreme example my colleague was intending to refer to.

MR. HEIM: So those foreign countries aren't all that wrong.

MR. HOLLIS: This just goes back to my disclaimer. I was right, I certainly don't speak for the Department of Justice, and in this cases I don't have a clue as to those cases. I got my history garbled and I apologize there.

MR. HEIN: Judge Scheindlin?

QUESTION [Hon. Shira Ann Scheindlin, U.S. District Judge, New York (Southern), Civil Rules Committee]: Just a couple observations going back to rule-making. The question is: do we need guidelines, do we need presumptions, do we need to set some standards? The reason I put the question that way is because this is the kind of subject that is unlikely to have appellate guidance. As you know, there are no interlocutory appeals.

So you have at least a thousand of us —— maybe district and magistrate judges 1,200 of us —— so you've got 1,200 of us all over the country who conceivably will make different rules in different cases and create mass confusion possibly as to what is the standard for, for example, backup tapes.

So if we went ahead and bit the bullet in rule-making and at least had presumptions as to what to do about backup tapes —— both in terms of preservation, discoverability, eventually cost-shifting, all of that —— if we created something, we would at least have uniformity and we would give some guidance hopefully to the state courts if we go out in front.

Now, I must say I spoke at a state court conference, and I know the state court judges are considering coming out with rule-making ahead of us. Now, they are talking about doing it, and we may end up with sort of fifty different sets.

So is there a real rule-making role in this area, if only for presumptions, standards, and guidance, that would then control what we need to do for this somewhat new area, unanticipated area, this volume of backed-up material? How do we want to approach it? Should we consider that without it we're just 1,000 or 1,200 judges who might all do different things in different ways and give no guidance to ourselves or the state courts?

QUESTION [Robert F. Williams, Cohasset Associates, Inc.]: My name is Robert Williams with Cohasset Associates.

I would like to share with you some recent survey

research that we have just completed. I think it goes to this question of reasonableness of measuring retention practices. This is a survey of over 2,000 record managers. It is the third data point in four years, so there is consistency as well as size.

Sixty-five percent do not include electronic records in their records holds, 65 percent.

MR. HEIM: Can you repeat that?

QUESTIONER [Mr. Williams]: Sixty-five percent of the surveyed organizations do not include electronic records in their records holds.

MR. McCURDY: Is that because the records management profession grew up in the paper era and they are focused on paper historically? I mean they're struggling to adapt to the new world of electronic. That has been my limited experience with records management professionals.

QUESTIONER [Mr. Williams]: There may be some attribution to that, but I think it is fair to say there is a problem.

The survey also over these four years showed at three different data points a 23 percent decline in the number of organizations that had formal records hold programs. Forty-six percent do not have a formal system for

records hold orders.

MR. McCURDY: Are these litigation holds or sort of ordinary course of business retention?

QUESTIONER [Mr. Williams]: Litigation holds was the way it was phrased. This will be a subject in *Corporate Counsel* in the March issue.

And 70 percent do not have a migration plan in place. And 62 percent — this will be the last statistic — are not at all confident or are only slightly confident that their current information will be accurate, reliable, and trustworthy in just a few years.

So I submit to you that, much as we are all here to talk about an evolution of the law, I think there is also a need for an evolution on the part of corporate America in terms of the focus that they have and the importance of being proactive in addressing this. Are we in a way in corporate America trying to run a marathon with oversize galoshes and wondering why we have blisters?

MR. HOLLIS: Perhaps the last comment emphasizes the point that Judge Scheindlin was saying, that maybe you need — call it top-down or bottom-up, however you want to look at it — some guidelines or presumptions that could then be translated into the real world of corporations and

the real world of government agencies that maintain these documents. So perhaps that is the way to start to address the issue.

MR. HEIM: We have time for one more question.

QUESTION [Michael R. Arkfeld, Assistant U.S. Attorney, Arizona]: Thank you very much. My name is Michael Arkfeld.

I would ask the Rules Committee when you look at whether or not to adopt a Rule in this area not to focus on backup tapes. It's backup data. The reason that is important is what is inaccessible today can be accessible tomorrow. If you focus on backup tapes and call it inaccessible, you give an incentive to the business to keep their information in an inaccessible format for discovery purposes. So if we have today the backup storage media, so it is as cost-effective to put it on a hard drive as it is with a tape, and you can keep it accessible on a hard drive as a backup data, then this issue kind of goes away.

If these Rules are going to be passed in three years, I would suggest to you that backup information will be as accessible as online data is accessible today.

Thank you very much.

MR. HEIM: All right. Well, thank you, the

audience, for your participation. Thank you to the panel.

We do have a migration plan here, so we are going to migrate off here.

New York
Friday, February 20, 2004

AFTERNOON SESSION —— 1:22 p.m.

PANEL FOUR: RULES 37 AND/OR A NEW RULE 34.1 — SAFE HARBORS FOR E-DOCUMENT PRESERVATION AND SANCTIONS

Moderator
Andrew M. Scherffius, Esq.
Ballard, Still & Ayers, L.L.P.

Panelists
Thomas Y. Allman
Former Senior Vice President, Secretary, and General Counsel, BASF Corporation

Stephen G. Morrison, Esq.
Nelson Mullins Riley & Scarborough

Laura Lewis Owens, Esq.
Alston & Bird, LLC

Anthony Tarricone, Esq.
Sarrouf, Tarricone & Flemming

JUDGE ROSENTHAL: Ladies and gentlemen, I think we are ready to get started with the next panel. Because we took our later scheduled break earlier, we are going to show our flexibility and skip the break that was scheduled to occur after this panel.

MR. SCHERFFIUS: My name is Andy Scherffius. I'm a trial lawyer from Atlanta. No one hurt my feelings.

There was no break scheduled. They saw I was the moderator, everybody got up and ran out of the room.

In any event, this section is on preservation, safe harbor, and sanctions. I really have the pleasure today to introduce some people who know a lot about these subjects and who practice in the areas that bring all of these issues into play and I think can give us a lot of insight.

I am going to keep the introductions short. We could make this an hour and fifteen minutes of introductions if we wanted to, given the quality of the panelists, but I have been asked to keep it short.

Secondly, we have been asked to, and we are certainly all agreeable, keep our presentations shorter to allow more time for the give and take that has been so productive here today. So we will make an effort to keep the presentations a little shorter and invite more questions and comments from the audience, and maybe we'll try to field the hot balls and hit them around in here a little bit.

I am going to introduce from my left to my right. Originally, Mr. Greg Joseph was going to be a panelist with us. He got on trial and was unable to make it.

At the last minute, Steve Morrison this morning

agreed to fill in, which was very admirable of him. Steve Morrison is with Nelson Mullins in Columbia, a large firm, primarily oriented toward business corporate work, defense work, in North Carolina, South Carolina, Georgia. Steve over the years has been very active in this area. For several years, he worked closely with a very large software outfit that supplied software to primarily the insurance industry. He has also been very active in DRI and in the ABA as well as Lawyers for Civil Justice, and in those types of organizations has worked very hard on discovery issues and on electronic discovery issues.

To my immediate left is Tom Allman. He has served as a Senior Vice President, Secretary, and General Counsel to BASF Corporation and has held several other legal positions with that corporation, including Chief Legal Officer. He has worked in the Government Relations Office of that company and served as Chief Compliance Officer. I understand he has recently retired from BASF, and our congratulations to him. He has also been active with LCJ, the Lawyers for Civil Justice, has written extensively on the subject and problems associated with electronic discovery and other discovery issues, and in fact recently published an article called, most appropriately, “The Case

for an E-Discovery Safe Harbor." That was back in 2003.

Laura Owens is from Alston & Bird in Atlanta and has been a practicing lawyer about nineteen years. She practices primarily in the area of business and corporate personal injury/wrongful death defense and has been involved in many different types of complex litigation, has been very successful in getting defense verdicts in wrongful death, personal injury, catastrophic industry, and business litigation settings. She has lectured and spoken extensively on this subject of e-discovery and problems associated with defending products liability cases and other kinds of situations in which e-discovery issues arise. She in 2004 wrote an article, the last one that at least I saw, for the DRI, called "Products Planning Liability for E-Discovery." Certainly that is a very timely topic for us to consider.

MS. OWENS: Actually I should say quickly Gary Hayden from Ford wrote the paper and I got to give the speech.

MR. SCHERFFIUS: Okay.

And then we have on my far right Anthony Tarricone. Anthony is practicing in Boston. His primary areas are representing people and plaintiffs in aviation,

medical malpractice, products liability. He has been most active also in this area of e-discovery. He has written several articles that have been published in *Trial* and other litigation-oriented publications. He has been active with various organizations, including the Association of Trial Lawyers of America on the Board of Governors Executive Committee, and has become quite expert on and a commentator on issues involving e-discovery.

Our topic today is, as I said, preservation, safe harbor, and sanctions. I can introduce the topic. I think I am familiar enough with it to at least do that. But what I am going to do here basically is after just introducing the topic is we'll have brief comments and then we'll move on to discussion.

I don't know how much we will be able to talk about cost-shifting. There are cost-shifting issues here, but our primary topic will be on the preservation, safe harbor, and sanctions associated with e-discovery.

There are really a couple of issues involved —— more than a couple. One is preservation once you learn about the possibility of litigation, and then, more from a Rules point of view, is preservation and safe harbor issues once there is litigation.

The Rules of Civil Procedure, as we perceive it, cannot really directly address the issue of what you do before litigation is filed because, given Rules 1, 2, and 3, the Civil Rules start attaching once there is an action. But of course under common law and under provisions of numerous statutes, federal and state and otherwise, there are preservation issues that arise before litigation.

What is safe harbor? Well, safe harbor is in a very general way considered to be provisions that will protect a defendant — or a plaintiff for that matter — who has destroyed or lost e-discovery under circumstances where they can show that their conduct was reasonable, in keeping with good business methods, and the like. And so we will be talking about that.

And then sanctions, how they fit in, where the burdens of proof may be, how should one go about that, do we have mini-trials involving this, and the like.

And then I think the overriding question has been — it has come up several times today — do we need a Rule? Are there things in place that are already handling this? Through the evolution of case law, the consideration of case law, are we already getting the answers that are sufficient without the necessity of a Rule?

In your materials, beginning at page 34, there are some very thought-provoking comments put together by the Advisory Committee and its reporters. Of particular interest are two approaches to this: whether you utilize Rule 34, or whether you go to a new Rule under 26, or do you combine some concept of both?

So that is kind of the framework that we will be working with. I am going to work from the left to the right. Steve Morrison, your thoughts on this, please?

MR. MORRISON: Thank you, Andy.

It's a little bit intimidating sitting here. The judge in the front row is the only one that I know of in the history of the world who has said that a Rule should be sacked.

But in this instance I am an advocate of some Rules changes. I begin with the basic premise that volume is enormous and growing and that, as we heard in the opening panel, that volume will be increasingly searched by more and more people with more and more cases as the case law grows. So I think what we do have to do is deal with some kind of practicality on the volume.

What actually incentivizes people to search large volumes for the hog farm instead of the ham sandwich is two

things essentially. One is that the search is free; you can buy the hog farm for free with no money. The second one is that you can buy the hog farm and find in there something that could eliminate the case because it ends up being a sanctionable piece or an issue that you get somebody tied up in knots on the discovery.

And so it seems to me there are two things we ought to be thinking about from a practical standpoint in terms of rule-making. That is, that there should be some rational cost-shifting at an appropriate time. Number two is there ought to be a rational safe harbor for reasonable conduct.

So the question then becomes: what do we do to begin to talk about creating this appropriate marketplace for reasonable conduct? In that context, I would suggest a couple of things.

One, if we begin with the idea —— and this is just a hypothetical because it has not been proposed, although I think it is embodied largely in the Texas Rule, which I think is working —— one is you begin with the idea that we will search in the active electronic files and the active paper files of a company. That is where a search begins. It is the rational beginning place.

Second, after an appropriate showing of a need to search further into the backup, the metadata, and all of the other stuff, an appropriate showing would be made, then you step down in to that appropriate showing. Once you are in the issue of the appropriate showing, you may be under appropriate circumstances in the area where cost-shifting should take place because you are now talking about heroic measures.

So it is a pretty reasonable kind of approach that I am suggesting; that is, let's begin by searching the active, accessible — however you want to phrase it — data; let's step to a showing of why you need to go further and let's have a rational discussion of that in pretrial conferences and then a ruling; and then within that context would come the proportionality of maybe somebody else should pay for that.

That is, as I understand it, the practicality of the Texas Rule. In talking with Steve Susman, he thinks that Rule is working. He thinks that it is providing a marketplace of reasonableness that we can all begin to focus on.

Now, within that let me move to the question of safe harbors particularly and this issue of preservation.

On the question of preservation, let me just address first the one-day issue; that is, upon suit you give one day. Many, if not most, of the clients that I end up representing are the recipients of the blessing of 4,000 or more lawsuits a year. That means that if there was a one-day rule, they would in essence be saving everything. As Greg from Microsoft said, you would never take the trash out. So we need something more practical as it relates to that at the beginning of preservation.

The question again comes down to: should there be a presumption in all cases that "one size fits all"? There, I suggest that concept should be sacked, that there is not a way for us to come up with a Rule that requires preservation in advance of knowing what the lawsuit is about, that it is the lawsuit that really drives the preservation.

As counsel for Microsoft I thought very effectively said, you have your day-to-day operation, you have your past litigation, you have your other legal requirements, and that tells you what to preserve up to the day you are sued. Then, when you are sued, you have a new obligation that arises based on that lawsuit, which is focused hopefully on the ham sandwich most of the time, or it may be focused on the hog, or it may be focused on ten

hogs, but it is usually not focused on the hog farm in terms of preserving everything.

So I would suggest those steps as a rational basis. Now, with that rational basis in mind, knowing that we are going to deal with the ordinary course of business searches at the beginning, the question becomes: should you be sanctioned or defaulted or should your CEO be fined for an inadvertent, in due course, in good faith, normal type of pushing-the-button destruction of electronic data?

Because that is happening every day, sometimes automatically, sometimes inadvertently —— sometimes in companies with 122,000 employees, or 90,000, or even 10,000, imagine trying to deal with it —— there should be some presumption of good-faith conduct that prevents the sanction. At the same time, there should be some kind of balancing on how difficult something is before you shift the cost and give up the free discovery.

So all we are saying is let’s litigate the substance of the case in almost all cases, as opposed to litigate the discovery conduct of the parties, which we are litigating now in almost all cases. If we could move toward litigating the ham sandwich instead of looking for the error that was made at the hog farm level, which is what we end up

doing in the cottage industry of sanctions litigation that we are all engaged in — by the way, all of us in this room make a lot of money doing that; plaintiffs get settlements for it; we get paid a lot of money for that — but ends up not being relevant to the ham sandwich of the core, center of the bull's-eye if you will, of the actual case.

In that context for safe harbor, I would suggest that it be a series of factors:

- Number 1, was the conduct in fact advertent;
- Was the conduct in fact in the ordinary course of business;
- Was the conduct focused on some core element of the case, like a key person if you will;
- Was the conduct that resulted in the destruction rational in the industry — in other words, is it consistent with other conduct in that particular business in terms of what is saved and what is not saved;
- Is there any other statute or reason that that material should have been saved;
- Is there another lawsuit for which that material should have been saved?

If those rational questions are answered in the negative, a sanction should not be allowed and a safe harbor should be there if the material is destroyed.

Now, I leave it to the judge — and I think it would be within the judge's discretion — to say, "Is there some way that you can, with somewhat heroic measures, if this is at the center of the case and it has been destroyed, can you reconstruct it?" And maybe you should pay for it, maybe you shouldn't, depending on the circumstances, in terms of what is there, but we have heard from our technology gurus that more and more will be able to be reconstructed from either residual data or other kinds of approaches. And there may be a circumstance under which, within the safe harbor, without sanction, without default, you say, "Look, I want you to reconstruct that particular body of material." But it is the ham sandwich you are reconstructing, it's not the hog farm you're reconstructing, if it is possible to reconstruct at all.

So that is my suggestion, Andy, and I hope I didn't take too long.

MR. SCHERFFIUS: I don't think you do. I know that Tom over the years has written extensively on and spoken on this concept of safe harbors. It has been one of

his projects, so to speak, and I'd like you to comment on it a little bit.

MR. ALLMAN: Thanks, Andy.

The focus of my obsession, as you might think of it, with a safe harbor in preservation ——

MR. SCHERFFIUS: I didn't call it that.

MR. ALLMAN: But there is a basis for it. It is, frankly, that when you talk to corporate executives in any company, you will find that this is *the* single largest concern they have, because there is a disjunction between the reality of how corporate life is lived and how some of our rules seem to play out.

For example, a corporate executive with 1,000 cases or 4,000 cases really has to balance the needs of the litigation against the needs to keep a business operating. So during that period of time at the beginning of a controversy and before there is agreement upon whether or not the parties can agree upon how things are going to be handled, there is a period of time in which the corporate parties have to undertake good-faith efforts to preserve information. That really is the standard that I believe applies, a good-faith effort.

But there is some talk, and we have heard some of

it here today, that would elevate preservation obligations to an absolute standard in such a manner that there is a risk of sanctions if it should turn out later, judging in retrospect, the information was not adequately preserved.

So I have long recommended and favored the idea of simply a fairly simple statement in the Rules that would indicate that the Rules are not intended to require the immediate cessation of the ordinary, routine operation of business systems that are not continued in operation in bad faith in order to avoid their obligations under the preservation Rules.

For example —— obviously the *Stevenson* case is an example of that recently —— if someone deliberately fails to stop a system that would destroy information that they should know would be needed in a case, obviously that is something that the courts well know how to handle under their Rule 37 powers. And you can extend that to all kinds of business systems. Some of the facts that Steve just ticked off would be relevant to that inquiry.

But I would recommend that the focus should be on getting the parties to discuss matters early. We have a well-established system growing up of people running in, if they really feel concerned about it, to seek some kind of

preservation orders. You could make it a mandatory subject of meet-and-confer. And, of course, where there is a questionable practice going on, you could either work out a deal between the parties or a court could order it. I do not think that that would be in any way interfering with justice.

I have to come back and tell you that it is my impression, talking with many corporate executives from different companies, that they now all understand their preservation obligations. The real test ought to be whether or not in good faith they have attempted to meet those obligations.

MR. SCHERFFIUS: Thank you.

I think one thing we ought to be considering as we talk about this and work through it a little bit, under Tab 9 in the materials, there is a great summary of many cases on this subject. A lot of these cases involve these issues. Some of them fall under the safe harbor or sanctions area in the preservation area; some of them are under the management area.

One thing I would like you to address, if you would, Laura, as we go here is whether in fact the case law ought to be given the opportunity to evolve as it is doing.

Is it headed in the right direction? Where are some of the weak points? Do we really need a Rule to serve as the horse for the cart?

MS. OWENS: I'll tell you at the beginning that I am going to end up saying that we really need a Rule, or at least some revisions to the Rule.

I am outside counsel largely to companies, businesses, and for a moment I am going to welcome you to my world, not speaking on behalf of my clients or my law firm, but giving my own opinions based on how I have seen the law in this area evolve.

"So, Ms. General Counsel, thank you for inviting me to meet with you today. It's a pleasure to have the opportunity to represent your company in this litigation. But before we talk about the defense theories in the litigation, let's talk about your preservation obligations and let's talk about a litigation budget before we get too far along.

"As you suspend your document retention policy, we need to think also about your electronic evidence. You may need to consider suspending recycling of backup tapes as part of this litigation. Given the time that we anticipate will be involved in the litigation, you are probably going

to be shelving 2,000 to 3,000 backup tapes, based on my discussions with your IT personnel. And given the cost of those, I think you probably need to budget about $200,000 for just the cost of those backup tapes.

"You also are going to need to budget for some retrieval and production cost of evidence potentially off of those tapes, and borrowing from *Zubulake III*, let's estimate $200,000-to-$300,000 for that particular cost.

"Now, the value of your case as we see it is roughly $250,000-to-$500,000. So you've got a case with a value of about half a million dollars and I need you to budget about half a million dollars for the electronic evidence portion of retention and retrieval purely related to disaster recovery systems."

What happens next? My client gets a new lawyer. They keep me but reject my advice. Settlement discussions ensue immediately. At a minimum, some very tough questions begin to be asked, and they are tough questions for outside counsel and in-house counsel to answer.

If you've been around me in the last year or so, you may have heard that this summer I killed a copperhead in my driveway, and I did it by running over it with a Volvo S70 eight times, probably an excessive use of force on my

part.

I know that as the Committee looks at the Rules you are looking at exercising some restraint and not being too excessive in making changes to it. But the Volvo and the copperhead also raise the point of leverage. And certainly once I was behind the wheel of the Volvo, the forces were definitely in my favor.

In the same way, unrestricted and undefined preservation obligations can function as a really excessive force that has the potential to drive litigation purely based on cost issues, as opposed to the merits of the litigation.

That being said, I am in favor of a safe harbor. I am not in favor of a safe harbor —— you raised the point about what is happening in the case law —— because I think that judges are getting it wrong. I think that our judges have been really grappling with these issues with the available tools that are out there for them to use, and the list of cases in which they have struggled through cost allocation is a really good example of that, and it is an indication of the level of energy and resources that both the courts and litigators are devoting to this issue.

If you look at *Zubulake I, II, III, IV* —— Judge

Scheindlin, where I'm from we say bless your heart —— the *Bristol-Myers Squibb Securities Litigation,* the *Rowe* case, the *Murphy Oil* case —— there is a long list of them, and here are cases at the end of your materials, about cost-shifting and the way that judges have been dealing with that.

As I think about it, I have never been before a judge who would require me to produce for deposition every employee in the company, or even the majority of employees in the company. Judges are looking at how to balance the information that is really needed, and we see them doing that.

But, arguably, saving and retrieving from mass quantities of backup tapes would be somewhat analogous to taking the deposition of every employee in the company, and it is analogous, in part, because of the issue of volume. We have heard a lot of people talk today about how in the electronic evidence field the volume of evidence and information increases exponentially. We heard a lot about that from Ken and Joan and George this morning.

I will offer one brief example. My partner, Neil Batson [phonetic], was appointed Enron examiner, and in that litigation his team amassed over 40 million pages of

documents. We haven't really segregated the paper versus the electronic in terms of exact numbers, but I know that in that litigation one of the databases that we put together contained 7,366,177 email messages.

George Socha this morning told us that most vendors cannot even handle a volume of 10,000 backup tapes. Joan's case started out with 42,000. Now, assume that the company in Joan's case got those backup tapes in bulk, and therefore they got them at a discount, so let's say they paid $75.00 a tape. By my math, just for the cost of the tapes alone, that was $3,150,000. That is not retrieval cost off of them, just the cost of the tapes.

The Discovery Rules under which we operate are not supposed to be a shield, and even as a defense lawyer I recognize that and respect that. They are supposed to facilitate the discovery of relevant information. But neither are they supposed to be a sword. When you get into cost systems, particularly in the area of disaster recovery, the cost alone can drive a company, the types of clients I represent, to its knees at the settlement table.

So as everyone struggles with the cost and the quality issues, I have struggled with how to advise our clients about their preservation obligations. That struggle

has primarily focused on what to do about disaster recovery systems that are maintained in the ordinary course of business by companies that want to do the right thing. Not infrequently, the areas of relevance, as someone mentioned earlier, span across multiple areas of the company, and not infrequently relevant evidence continues to be generated and needs to be preserved after the litigation has commenced and additional lawsuits are anticipated.

In corporate America, rarely is a company able to deal with one lawsuit at a time, they have multiple actions going forward, and just as one ends another is beginning. And so these preservation obligations magnify in a sense.

In Joan's case, while the motions practice was proceeding and while Joan was doing her investigation, a company was still preserving 42,000 backup tapes, $3,150,000 on the shelf.

You can understand when you start thinking about it in those terms that a strict rule that all backup media has to be preserved and cannot be recycled really is tantamount either to rendering companies unable to litigate or rendering them unable to maintain a reasonable disaster recovery system.

Companies now that have long had ordinary document

retention programs —— and I am sorry to hear not the highest percentage of them do in that recent survey —— but many companies are also beginning to implement electronic document retention programs for their companies. As they do that, they could use more guidance about how to do that. They need a practical guide that will allow them to maintain disaster recovery systems without preservation obligations that can go so far as to make the cost of the preservation higher than the ultimate value of the litigation.

What always bothered me, moving over to state court for a moment, about the *Linnen* decision,[2] which is the case that first started me worrying about this issue, where a pharmaceutical company was sanctioned for recycling its backup tapes over a four-month time period before the MDL court issued a very specific order, was that I don't think the lawyers in that case at that time or the company had any idea that they should have ceased that ordinary-course-of-business recycling of those particular tapes until the very specific document preservation order was ordered by the MDL court. To my knowledge, the *ex parte* order that was at issue in *Linnen* initially had no specific reference to backup tapes, or even a specific reference to electronic

evidence. And there was, to my knowledge again, no good cause shown for the electronic evidence that was sought on those particular backup tapes.

I think that what our clients are looking for, and what corporate America is looking for, is just more certainty as to what their obligations are that a safe harbor can help to provide. Without a specific rule, I suspect that in the future companies will just simply have to involve the courts much earlier and more often to get guidance about what their preservation obligations are going to be.

Some courts in addressing those issues will effectively implement a safe harbor for the parties that are before them. Some courts will impose narrow limits, not unlike *Zubulake IV,* where the scope of backup tapes was limited to the employees who were defined as key players. Some courts will impose virtually no limits. In essence, the preservation obligation will begin to be controlled by the level of aggression of the requesting party and the level of discretion exercised by the particular court. Surely a safe harbor that would lend some certainty and uniformity to that process would be better.

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[2] Linen v. A.H. Robins, 10 Mass. L. Rptr. 189 (Mass. Sup. Ct.

I have a few specific questions about the language in the proposed Rules. I will run through them quickly or hold them for a moment, if you like, Andy.

MR. SCHERFFIUS: Why don't we hold those and see where the discussion heads when questions are asked, and then you may be the one who will handle some of those answers.

MS. OWENS: I have more questions than answers.

MR. SCHERFFIUS: It sounds like a pretty good basis for a products case, something like a Volvo seven times to kill ——

MS. OWENS: Eight times.

MR. SCHERFFIUS: —— eight times to kill a copperhead. There's something wrong with it.

MS. OWENS: I think I got it in two, but I had to be sure.

[Laughter.]

VOICE: It was backup.

MR. SCHERFFIUS: That's right. Whoever said that is excused.

Anthony, I'd be interested in hearing your comments. Keep in mind we are working in the context of

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1999).

whether or not we need a Rule; and, if we need one, what form should it take.

MR. TARRICONE: I think corporate America has been adequately represented not only on this panel but throughout the day's proceedings.

MR. SCHERFFIUS: I was bushwhacked when Greg dropped off.

MR. TARRICONE: I am here representing a different perspective. I like to think of myself here as a voice for the people, for individual litigants. Anyone in this room could be an individual litigant at some point in your life.

The federal courts, even today, while the bar has been raised higher and higher, the last time I checked, it is still open to individuals. Most of the problems that we have heard about have been problems that arise in this mega-litigation of the IBM's and Microsoft's of the world clobbering it out in the courtroom. I am not a proponent of Rules because Rules that may work wonders in those cases will only raise the bar further to individual litigants and close the courthouse door.

The problem that I see is not what you have been hearing about; it's the other side of the coin, it's stonewalling. From the plaintiffs' perspective in the

litigation that I handle, the information is not divulged initially under Rule 26 requirements, it is not divulged after the plaintiff files a Rule 34 request. It is invariably objected to —— that is, the critical information that ultimately decides the issues in the case. It is only divulged after depositions and motions. That is in 95 percent of the cases I handle. So any Rules that raise that bar further and create further hurdles and presumptions favoring corporate America I think are very much ill advised.

We heard a lot about certainty and costs and megabytes and terabytes. I haven't once heard anybody talk about the fundamental purpose of litigation in this country. The whole world looks at our judicial system, and the reason they do is because our system is designed to uncover the truth. I haven't once heard that mentioned today. I haven't seen it mentioned in any of the articles I've read. All I hear about is expediency, corporate costs, the needs of the company, the CEO, the emails. Let's talk about the truth for a minute.

Remember the first day of law school when you got your *Black's Law Dictionary* and you had to look up words? You look up the word "verdict." It's the Latin word for

veridictum, which is “a declaration of the truth.” Ultimately lawsuits should be decided on information that gets to the truth. They shouldn’t be decided on summary judgment motions because litigants can’t get the documents that unveil the truth, and that’s the direction we are headed in in these kinds of Rules that make it more and more difficult for people to unearth documents that reveal the truth.

It will mean more cases will be decided on summary judgment because individual litigants do not have the information to prove the truth, it’s in the corporate vaults. Well, today it’s in the corporate computers. Now there is an effort here to reclassify some of this data to this category of “inaccessible,” which will put it in a vault with a moat around it, which will make it even more inaccessible.

And then we now have a proposal for presumptions that will allow companies to continue with their regular suspension policies regardless of what has happened, without any concern for public safety, public interest, and public good. I just think this whole effort, while there are some issue to discuss, I think we have lost our moral compass on this. I would ask that we go back to some very fundamental

principles and look at them.

Let me just make a few points here.

The issue of preservation is inextricably linked to all of these other issues, safe harbor and inaccessibility. Preservation is not a procedural matter. I do not think it is a subject for this Committee to consider. I would point out the enabling Act, 26 U.S.C. 2072, states that "The Rules prescribed by the Supreme Court shall not abridge, enlarge, or modify any substantive right."

There is a whole body of law, some of which is in some of the materials I have read, that has developed and evolved on the subject of spoliation of evidence. It is substantive law, it is not Rules. It is law that has focused on preservation duties.

The reason it is unwise to venture into this area is because Rules like this will encourage the drafting of corporate policy designed to prevent the disclosure of information. And one size doesn't fit all. Let me just give you some examples of very practical cases.

There is a case in the First Circuit, *Blitzer v. Marriott Corporation,* where a couple in a hotel room in Boston —— the man was having a heart attack, his wife called

the front desk and asked for emergency personnel, and there was an inordinate delay before the arrival. Some months later a lawsuit was brought against the hotel, why wasn't the call placed immediately? Well, they went to get the telephone logs because all phone calls in hotels are recorded, and there was a regular established practice of purging the logs every thirty days. Well, the poor man who was buried a couple of weeks earlier, his widow hadn't had the foresight to see a lawyer within thirty days of his death, and the logs were gone.

The question whether that activity, following an established company procedure, was reasonable should not be a matter of rule-making and there should be no presumptions established in the Rules that tilt the scales in favor of a spoliator of evidence. That is really my primary concern here.

I will give you another example. The Federal Aviation Administration has a fifteen-day recycling policy that has been long established for radar data. Now, would anybody question the reasonableness of that after a crash of an airplane, a Delta shuttle, because of a mistake made by an air traffic controller? Well, there is a two-year presentment period under the Federal Tort Claims Act and

there is only a fifteen-day recycling requirement.

If evidence is destroyed pursuant to a company policy, it should be fair game in the courtroom. The motivation, the failure to preserve, should be fair game in the courtroom and inferences should be able to be drawn by the fact finder without some presumption in the Rules that favors the spoliator.

In another case, *Lewy v. Remington Arms*,[3] which is also in the materials, a manufacturer of a rifle that had a propensity for accidental discharge, killing several people, had a three-year recycling program and they discarded, purged, destroyed prior complaints of the same problem occurring over and over and over again. In that case, as a rule of substantive law, not of procedure, the court considered whether their practice was reasonable under the circumstances.

I believe that the judges in the federal court have done a phenomenally amazing job dealing with the evolution of the Information Age, keeping up with the evolution of the Information Age, and addressing all of these issues that we have heard. To me it is more a problem of mechanics. It is more a problem of sitting down and

[3] 836 F.2d 1104 (8th Cir. 1988).

working out the issues, people being reasonable, rather than setting Rules that create presumptions favoring one party versus another, rather than establishing definitions that will be obsolete before the ink is dry on the paper.

I was at the conference three years ago, and I know that the technology that was available then is completely obsolete today, and I dare say whatever you put on paper, by the time the ink is dry it will be obsolete again.

I have some other things to say, but I guess I'll wait and sprinkle it in as we move along. Thank you.

MR. SCHERFFIUS: Thank you.

Steve?

MR. MORRISON: Thank you. I actually agree with some of what Anthony said, and that may surprise him and some of the rest of you. But I think we ought to be sure that we are not dealing with just Wall Street; we ought to be dealing with Main Street, and we ought to be dealing with the idea that as more and more electronic data is created, there will be more and more of it that individuals have on their telephone machines, on their instant messaging. My wife and I have communicated today about a little project that we've got going on with each other that we might be

sued on as individuals at some point in time.

And so I think it is fair and appropriate to test any Rules proposals against that backdrop. And so when you say should you be required to preserve things that you ordinarily do not preserve that are not active in your individual lives, you should not as an individual or as business. If you test the question of whether or not you should be looking in discovery in places that are inactive or whether you should look at the center of the bull's-eye at the active stuff that you have in your home computer or in your PDA or whatever it is, you should as an individual look there, but not be required to go further without a showing that you should go further and recover data.

And then, if you are to go further and recover data and you are on Main Street, do you want to shift that cost? Well, sure you do.

And so when I am asking questions now in this world and I am dealing with a pharmaceutical product that involves an opioid, I am asking questions as to what kind of data the plaintiff has on their communications system. I am talking about one person. And so under the proposals that we suggested here, would it be right for that person to be trapped because they in good faith deleted something and

they are now called a spoliator and their case goes away? I suggest no.

So what really we are talking about is a body of Rules that really guide the state and federal courts —— starting with the federal obviously, but we know it will guide the states —— that really have a nice application to Main Street and Wall Street, to the little man and the big man.

I agree with Anthony we cannot afford to be elitist about this, but we do need rules.

MR. TARRICONE: I have to jump in. I disagree with you. The reason I disagree is because, in my home anyway, we don't have established purging policies and we don't have archives for our telephone messages, and we are not in the business, in my home anyway, of making products that affect millions of people around the globe.

MR. MORRISON: But you are making my point, in the sense that your telephone messages automatically go away, and you're not a spoliator because of that, Anthony.

MR. TARRICONE: I agree.

MR. SCHERFFIUS: Gentlemen, gentlemen, let's not turn this into a two-person debate.

MS. OWENS: I would just mention ——

MR. SCHERFFIUS: Let's do one thing here. Let's put it open to the floor and then let the panelists respond. I think we'll get everybody's point of view out.

PROF. CAPRA: I have somebody here who has been itching to speak.

MR. SCHERFFIUS: Please scratch that itch.

QUESTION [Paul Alan Levy, Esq., Public Citizen Litigation Group]: I'm Paul Levy also from the Public Citizen Litigation Group.

I do come to the electronic discovery area from a somewhat different perspective than the one that has been talked about for the entire conference until this last exchange. My exposure to electronic discovery came in a case brought in the District of Minnesota a few years ago by Northwest Airlines, which sued a local union of the Teamsters and all of its officers and the dissident members of the union who were accused of being responsible for the fact that over the millennial New Year there was a substantial increase —— and this in the context of collective bargaining negotiations —— a substantial increase in the number of flight attendants who called in sick.

I represented two gentlemen who fly for Northwest Airlines as flight attendants. Northwest Airlines, having

sued in its home court, as its first step demanded the seizure and preservation of the computers of not only the institutional defendant but the individual defendants', including my two clients', home computers, which were seized. Complete mirror images were created and then forensic experts hired by Northwest Airlines searched those computers using a search procedure which they alone had designated without any input from us.

As a result, my clients' home computers were examined. The pictures that my clients had downloaded from the Internet were subject to inspection. Their letters to their families and personal notes were all examined. I of course had to look over the materials that had been designed for potential disclosure to Northwest Airlines. My clients felt incredibly violated personally. Their personal privacy they felt had been invaded by this search procedure.

And of course cost-shifting was no object because Northwest Airlines was perfectly happy to pay the cost because they were really sending a message: "If you take us on, this is the cost you pay for the fact that we can involve you in litigation."

The concern that I want to raise is I don't suggest that necessarily you want a Rule that says personal

computers that people keep at home are different from the computers that a business is run on. Obviously, there may be evidence that can be obtained, that has to be obtained, from a personal computer.

I don't know that it is in the Rule, I don't even know that it is in the Advisory Notes, but I would urge people to keep in mind the personal privacy concerns that are involved when individuals — and certainly if I were a corporate lawyer, I would be tempted to ask for this kind of discovery in every case because it is a way of increasing the price that the individual pays for being involved in litigation.

So I would just urge a certain sensitivity to the personal privacy that is involved in the examination of personal activities that people engage in on their home computers, on their little home computer networks if they run them wireless at home, and so forth.

MS. OWENS: Quickly to your point, the *Playboy v. Welles* case[4] involved as the producing party the individual, Mrs. Welles, who was the Playboy Bunny who had her bunny web site that kept the bunny on it longer than the magazine wanted her to. I think mirror imaging of hard drives was at

[4] Playboy v. Terri Welles, 60 F. Supp. 2d 1050 (S.D. Cal. 1999).

issue in that case.

MR. SCHERFFIUS: Over here, please.

QUESTION [Robert N. Weiner, Esq., Arnold & Porter]: I'm Rob Weiner from Arnold & Porter.

If preservation obligations are beyond the scope of the Rules Enabling Act, then the courts have been acting beyond their authority for quite some time in imposing sanctions for failure to preserve under Rule 37.

I agree that the discovery process should be about the search for the truth. It frequently is not. It frequently is a game of "Gotcha!" or an effort to impose burdens that affect the outcome of the case.

What litigants need from the Rules is guidelines. We need to know for our clients what kind of preservation obligations we confront. Do we need to retain backup tapes? Do we need to maintain hard drives intact?

You can take the preservation obligations to extreme conclusions because, as we found out this morning, the backups of documents continue to exist on hard drives, even things that we have thought are deleted.

What do we need to do when the litigation commences? The Rules should tell us that. We cannot rely on the development of the common law under the Rules for

that purpose because it is not clear enough, it is not fast enough, and it is a post hoc method of developing the guidelines, which is not useful when we are trying to figure out what our obligations are going forward.

MR. SCHERFFIUS: Anthony, I think you wanted to comment?

MR. TARRICONE: Yes. Let me just respond.

In my view, information is information, whether it is in paper or electronic form. We did not have any Rules defining preservation requirements of paper. I do not think the Rules Committee should venture into what corporate America should do about its preservation policies with respect to data.

I personally —— and I'm sure other people in this room —— have visited warehouses and gone through thousands of boxes looking for that one piece of paper that reveals the truth. The same thing applies with electronic data, except that it is easier to search.

QUESTION [Alfred W. Cortese, Esq., Cortese PLLC]: Al Cortese of Washington, D.C., on behalf of organizations that primarily represent corporate and defense bar interests.

I don't want to be characterized as un-American

for really responding to questions that Andy raised, and Judge Scheindlin and others, as to the real need for some guidance. Underlying what Rob has just indicated, there are lots of things that can be done to tweak the Rules of Procedure to direct the inquiry to where it should be directed —— Steve's ham sandwich, for example.

There are two areas that are extremely important in that regard, and both of those would implement the purpose behind the 2000 Discovery Amendments that apply trans-substantively to all areas of litigation and discovery.

The first of the two areas is obviously the cost of production, and a "quick fix" to 26 and 34 in a paragraph, a very short paragraph, would help enormously in directing the inquiry to what is relevant to the claims and defenses in the first phase; and in the second phase, if it is necessary to go beyond what is ordinarily maintained in the regular course of business or personal affairs, then there ought to be a showing of good cause and substantial need to do that.

The second area, which is very important, and which I think that the Committee really needs to address if they do anything in this area, is of course the preservation

safe harbor area. I agree that the Rules should not deal, and probably cannot deal because it is beyond the rule-making power, with preservation obligations. But they certainly can set guidelines for preservation safe harbors which would guide the judges in determining whether or not there has been spoliation or a sanction is appropriate in any individual particular case.

MR. SCHERFFIUS: Thank you. Anybody want to comment from the panel?

MR. TARRICONE: I will.

MR. SCHERFFIUS: Go ahead.

MR. TARRICONE: The problem with a safe harbor in my mind is that it can have the effect of permitting without any consequence data destruction even before the events that have occurred that might give rise to litigation have been discovered by anybody. To me the reason I view this as a substantive law matter rather than a procedural matter is because it does affect the underlying rights, and what a corporation is doing as its business practices shouldn’t be dictated by Rules of Procedure for litigation.

I proposed this in an article that I wrote in the *SMU Aviation Symposium Journal*. To me this is a substantive rule of law that addresses that. One has to look

objectively at the totality of circumstances, including the nature of the product or instrumentality; the activity or discipline involved; history, frequency, and likelihood of legal claims or occurrences likely to spawn litigation; public safety and pertinent matters of public interest, in determining whether pre-litigation or pre-occurrence destruction of data pursuant to an established business practice is wrongful or sanctionable.

I think judges listening to the evidence in a particular case with the particular facts of that case are in the best position to make that decision.

MR. SCHERFFIUS: Up here, and then I believe Judge Scheindlin wanted to comment after that.

QUESTION [James E. Rooks, Jr., Center for Constitutional Litigation, Association of Trial Lawyers of America]: I'm Jim Rooks again for the Association of Trial Lawyers of America.

I've been following Mr. Allman's articles and proposals for a while now on safe harbor and accessibility. I am looking particularly at page 37 of the Conference book here, which has a possible Rule 26(h) dealing with duty to disclose and preservation and safe harbor. Subsections (2) and (3) look to me a lot like the regime that you have been

proposing. Would you agree with that?

MR. ALLMAN: There are some elements of it that are, yes.

QUESTIONER [Mr. Rooks]: Okay.

A little over a year ago, there was an article in *Legal Times* about the litigation the Department of Justice was conducting against some tobacco companies. Let me read one sentence out of the article: "The Department of Justice team complained to Judge Kessler down in Washington at a hearing that top Philip Morris officials" — and let's assume this is another company — "deleted thousands of email messages they should have kept" — that is an allegation of course; we do not know if that is true — "some of which couldn't be retrieved because the corporation purges its entire email system every three weeks."

As I read the proposal on page 37, purging their emails every three weeks is their ordinary course of business. So that is their safe harbor. By your standard, I believe they have made their information inaccessible, so they will not have to produce it and they will not be accosted for deleting it, let's assume inadvertently.

MR. ALLMAN: Let me just echo the comments that

were made earlier, that backup tapes —— and perhaps in that case that's what you are referring to —— are a secondary form of information. Presumably, the people who are involved in that process also moved copies of folders into relevant filing systems and so on.

But let's take the extreme example and say that they have a uniform, facially neutral policy of deleting all emails within three weeks of their being issued for every single email in the entire company. I would take that to be a permissible corporate decision that they are entitled to live with.

However, if there should be a pattern of conduct, such as was in the rifle case, where it could be shown that repetitively they are doing it for other reasons, I would think that could be litigated. And as I have said in my comments, that would not constitute in my view a valid permission to fit within the safe harbor and would be sanctionable under Rule 37.

QUESTIONER [Mr. Rooks]: As I read the article, the Department of Justice was alleging that these messages were simply gone after three weeks in the ordinary course of business.

MR. ALLMAN: I have been told there are companies,

I believe some of the large Internet provider companies, that do not retain any copies of emails, for example. I am saying that in my view that is permissible. If it is a routine, facially neutral policy and it is applied in such a fashion, then you have to overcome that by showing that it in fact is being applied deliberately in a manner to avoid other responsibilities.

QUESTIONER [Mr. Rooks]: But in the meantime it's legitimate as the ordinary course of business, it's inaccessible, and they have a safe harbor?

MR. ALLMAN: That would be the way I would interpret it, yes.

QUESTIONER [Mr. Rooks]: Thank you.

Mr. Scherffius: Judge Scheindlin?

QUESTION [Hon. Shira Ann Scheindlin, U.S. District Judge, New York (Southern), Civil Rules Committee]: Just a couple of observations.

First of all, even the proposals at page 35 and 37 say that "for good cause shown" the court should order suspension of that policy. So it may be the routine policy to delete every three weeks, but all you've got to do is go to court and say why not here, why it shouldn't happen, why it has got to be suspended.

But my other comment or observation is to ask Mr. Allman and Mr. Tarricone to look at Exhibit 7, which is from the *Manual for Complex Litigation (Fourth),* where there is a discussion of duty to preserve. At the bottom of the page, it says (d). I am wondering if (d) is almost an alternate proposal for what is at page 37.

In (d) it says virtually the opposite. It says until the court gets involved, you actually should halt your business process which involves routine destruction, you should sequester or remove that material from the business process, and you should arrange for the preservation, unless the court says you no longer have to.

So the *Manual* seems to shift the presumption, taking your position essentially, Mr. Tarricone, that it should be preserved unless the court gives you permission to now destroy it. So maybe you are just quarreling with which way the presumption should go, and what is written in the *Manual* sample order is something you would like.

MR. TARRICONE: Yes, except for one thing, your first comment about the thirty days. Litigation does not get started that fast. The event may not be discovered for six months.

QUESTIONER [Judge Scheindlin]: Right.

MR. TARRICONE: That is why periods of limitation are longer. That is the problem with not being able to look at the underlying corporate policy. My concern is that a presumption can essentially bootstrap and protect a corporation that has an unreasonable corporate policy.

QUESTIONER [Judge Scheindlin]: Except the Civil Rules really only apply to litigation.

MR. TARRICONE: I agree.

QUESTIONER [Judge Scheindlin]: Right.

MR. TARRICONE: But that is why there shouldn't be a presumption that recognizes an already established company policy if it is unreasonable.

QUESTIONER [Judge Scheindlin]: But all I am asking you is this: once litigation starts, do you like the presumption at the bottom of page 747 so that the other side has to go to court and say, "This is killing us economically, you should lift this presumption, you should now let us start recycling again"?

MR. TARRICONE: Yes.

QUESTIONER [Judge Scheindlin]: And by the opposite token, Tom, how do you feel if that was the proposed Rule instead of the one at page 37?

MR. ALLMAN: No, I think it is a fine Rule as long

as it has subsection (4) that said “or takes such other reasonable steps as may achieve this purpose,” because it is my conviction that most corporations today really do try to preserve information.

QUESTIONER [Judge Scheindlin]: So you could live with (d) (1)-(3)?

MR. ALLMAN: If I had a reasonable test argument that would allow people to —— although I happen to agree that as a matter of the Rules Enabling Act I do not believe that we should be spelling out preservation obligations in any detail in the Rules.

MR. SCHERFFIUS: This touches on one of the questions I was trying to introduce as the moderator, and that is: where do the presumptions lie and where is the burden of proof and what is the mechanism, with or without a Rule? That has to be considered if you are considering safe harbor, so to me it is a relatively critical issue.

Excuse me, Laura. Go ahead.

MS. OWENS: Looking at this sub-section (d), Judge Scheindlin, the question is not only whether companies or litigants could live with it, but can the courts live with the companies who need to come before them with great frequency for relief of their preservation obligations?

QUESTIONER [Judge Scheindlin]: Of course it starts with “until the parties reach agreement” this is what you should do. Hopefully, the parties would then work it out in a lot of cases.

QUESTION [David M. Bernick, Esq., Kirkland & Ellis, Standing Rules Committee]: David Bernick from Kirkland & Ellis.

I really think this is an interesting discussion because there is actually some reluctance both on the plaintiffs’ side and on the defense side to actually setting out some hard and fast rules in this area.

There is some sentiment of course that has been expressed that there needs to be guidance. The difficulty is that once you start to go down the road of providing that guidance, it starts to have real bite.

You take a look at the question that was posed up here: “Well, gee, you know, documents are destroyed within thirty days,” and that somehow that is exceptional. There are document retention policies that exist today throughout America —— indeed, have existed for years and years and years —— that routinely call for the destruction of all kinds of documents after relatively short periods of time.

Basically what the companies have done is they

have developed a roadmap that goes through the kinds of documents that they generate and figures out what is the business need. If the business need does not go beyond thirty days, the document is not going to be retained more than thirty days. Contrariwise, if it is for example a research report, those generally tend to have very long retention periods.

So a company familiar with its documents for its business purposes, not for litigation purposes, goes through and develops a series of rules that it feels comfortable with. As I think was pointed out earlier here this morning, it is very, very difficult to develop an alternative for that through a set of judicial rules unless you go through exactly the same kind of process that the company goes through, which of course is never going to end up being done.

So if the companies want to be able to develop these rules that are in harmony with their business practices, they generally have been respected by the courts I think to date. It is very difficult to get a spoliation inference if a company had an already-established document retention policy.

Why do companies then today now want to push to,

through the Rules process, get the articulation of a new safe harbor? Aren't we going to end up with the problem that now the courts are going to try to craft a set of Rules that is never going to be as refined and sensitive to the needs of the company than what the company already has done?

So I think that before the companies go down the road and say, "We want guidance, we want to know what the safe harbor is," what is the level of confidence that the safe harbor that you get, if you get what you are asking for, is actually better than where you are today, which is that you can develop your own document retention policy, and if it is a thoroughgoing one and it is well put together, the courts generally will defer to it unless there is some evidence that it is being deliberately abused?

So I think this is again a situation of being careful what you ask for on both sides. The process here starts to unfold, we start to get proposed Rules —— you know, are you really going to like what you get at the end of the day?

MR. SCHERFFIUS: Some of the best writing of Samuel Morrison is what happens to naval fleets caught in safe harbors.

[Laughter.]

A prime example we might remember happened on December 7th in our own history.

A comment?

MR. ALLMAN: Let me just follow up on David's point, and it will help explain my position.

I agree, you have put your finger on a really difficult dilemma. For that reason, when I answered his question, I said some of the elements on that page were what I advocate.

I really advocate a very limited statement in the Rules, one that simply says "these Rules are not intended to apply to . . ." and then spell out a very generic thing that captures what I think we have all said here today, and that is that we are not trying to bring down the operation of a home computer or the operation of a business system or corporation or the FAA. That is really all I advocate as a so-called safe harbor.

I personally have advocated in my articles, as I am sure the questioner knows, that we also spell out a little bit about sanctions, that we say that only a willful violation would meet the sanctionable conduct under Rule 37. I have also suggested it be in Rule 37 and not in some other portion of the Rules, that it not be standalone, and so on.

But that is what I meant earlier when I said some portion of this, because I am concerned that we get too deeply down this road.

MR. SCHERFFIUS: Yes, sir?

QUESTION [Robert L. Byman, Esq., Jenner & Block]: My name is Bob Byman from Jenner & Block.

Like David Bernick, I practice in Chicago. About a year ago, I did a written poll of all of the judges, the federal district judges and the magistrate judges, in the Northern District of Illinois. Oddly enough, almost 70 percent of them actually responded, most of them in writing. To a man and woman, they all said that they thought that the existing Rules gave them the adequate tools. A couple of them were even virulent about saying, “Please, for God sake, if you are on one of those committees trying to write new rules, don’t do it.”

I have read *Zubulake I* and *II* and *Zubulake III* and *IV* and I still don’t know how to pronounce her name. It appears to me that Judge Scheindlin had all of the tools she needed to come to the right result in that case. She could have saved herself a lot of time if Congress or this Committee or somebody had given her some guidelines, but now she has saved that time for everybody else.

And so I guess the question I have of the panel is: what is the hole in the existing Rules? What is it that needs to be fixed? What tool do our judges not have that they need?

MR. SCHERFFIUS: Is there someone who would like to address that, what is the hole?

MS. OWENS: I think someone in the audience does.

MR. SCHERFFIUS: Please.

QUESTION [Charles A. Beach, Esq., Exxon Mobil Corp.] Yes, I would like to address that. Chuck Beach, Exxon Mobil, Irving, Texas.

I think that we do need a safe harbor rule. Using *Zubulake IV* as an example, I loved two-thirds of *Zubulake IV.* I loved the beginning, I loved the end, but in the middle there is a statement that says as soon as I think there is litigation or as soon as the litigation happens, I have to stop the backup tapes on the computer systems for the key individuals.

Now, I work for a corporation that has at any one time close to 15,000 active litigations. We have 400 new cases every single month. If every time I get a new case I have to stop the backup systems for even just the key players, that is going to (1) basically say that we cannot

run our backup system, but (2) just the cost of the tapes — just the cost of the tapes, no administrative costs, not anything else — for our backup systems just in the United States — we have 121,000 backup tapes a month — over $1.9 million a month for just purchasing backup tapes because we cannot put them into the recycling.

Now, when we get those cases, those 400 cases a month, what we do is we put a hold on the destruction of documents. That covers electronic documents and hard-copy documents. It would cover every document, electronic or hard copy, that is in the personal computer at the workstation of every single person involved. The plaintiff is going to get hundreds of thousands of pertinent documents.

What we do not stop, and what we couldn't stop, is the backup system, which is for disaster recovery and is completely different from any system that we have for archiving documents that are kept for business reasons. And even under our system, on your thirty-day, the thirty-day would be stopped on that because that's not part of the backup system.

MR. MORRISON: A quick comment on the question that was asked of the panel on the hole. The hole in the

Rules as they currently exist, as the volume of electronic discovery expands and as more and more people have different places to look for it, is that the Rules as they exist do not and will not create a marketplace of reasonableness within which these issues will be resolved. They will create, and are creating right now, a marketplace of unreasonableness where everyone is going for the whole hog farm and everyone on my side is trying to defend too hard against what the proper zone of reasonableness is.

And so what we need is that guidance for what is the zone of reasonableness within which we are trying to create that marketplace. We've got economics and we've got efforts and we've got technology to consider, but a simple set of Rules that create that zone of reasonableness, a marketplace for reasonableness, begins with what are people doing every day in disposing of their electronic documents in good faith. And if they are doing it in good faith, then let's deal with it with a safe harbor, no matter whether they are individuals or whether they are corporations.

The second piece is whenever we are going to go beyond the measure of what is "ordinarily available" in the due course of the person's business or the corporation's business, then let us consider why we are doing it before we

do it, with a good cause shown, and let us shift the cost where appropriate, under appropriate circumstances, so that people are pushed into this marketplace of looking for the ham sandwich and not the hog farm. That is the hole in the Rules as they exist.

MR. SCHERFFIUS: Anthony and then a question over there.

MR. TARRICONE: I just want to follow up on the comments of Exxon counsel. I gather from what you said that you do not routinely stop the presses, so to speak, with the automatic purging or do an automatic backup for each of those 400 cases every month, that you have a policy that is in effect that was established by the corporation, and I assume that, with 15,000 pending cases, it has not been challenged in all of those cases.

I just fail to see the need for a safe harbor. If in a particular case someone comes in and wants to change the way you are operating, a judge will hold a hearing and decide whether it is reasonable in the particular circumstances of that case in light of the policy that Exxon has.

QUESTIONER [Mr. Beach]: When I need a safe harbor is between the time of that hearing and [inaudible]. I have

to know.

MR. TARRICONE: Well, what are you doing now?

MR. SCHERFFIUS: Anthony, sorry. We are going to have to move on. Over here, please, and then back over here to Judge Francis after that. Thank you.

QUESTION [James L. Michalowicz, Tyco International (US), Inc.]: Jim Michalowicz from the "new" Tyco —— I was supposed to say that last time.

[Laughter.]

Old Jim Michalowicz, new Tyco. I wanted to bring up the *Armstrong* case again —— no.

[Laughter.]

MR. SCHERFFIUS: And now we'll go over here, I believe.

QUESTIONER [Mr. Michalowicz]: I just want to bring up three quick points.

Number one, about the backup tapes, I really want to have a sign that has "backup tape" and a big arrow through it. I think we are our own worst enemies in some cases. I think the backup tape is going away. I think Michael was bringing this up earlier. So we are causing some of these issues and I think we can get away from that process, number one.

Number two is about something that was spoken about before, about snapshots versus backups. They are not synonymous, okay? So that's one thing as far as definitions, they are not synonymous. A snapshot is a way to selectively go ahead and preserve data relative to individual custodians that may have relevant information.

The third thing is that document destruction and spoliation are not synonymous. It is okay to have a record retention program that says "destruction or disposition," and it does not mean that it is spoliation. I think that is another thing just to make a distinction about.

MR. SCHERFFIUS: I think those first two points really point out the difficulty in making a specific Rule.

Judge Francis?

QUESTION [Hon. James C. Francis IV, U.S. Magistrate Judge, New York (Southern)]: I think that this dialogue illustrates the difficulty of coming up with a single safe harbor rule that does not tilt the scales. Maybe the question we should be asking is: is there a way to facilitate multiple safe harbors?

If we can move back the opportunity for litigants to get before us before they are litigants, give Laura's client or Exxon the opportunity to come before us and ask

for an order permitting the continuation of their retention/destruction policy, that will give that litigant or potential litigant in that situation the opportunity to feel safe without having a rule that is too broad for many other cases.

MR. SCHERFFIUS: Thank you for the comments. I have been given the hook. Thank you. I appreciate the panel.

PROF. CAPRA: Don’t go anywhere. We are going to do a quick June Taylor dancer thing and get the new panel on right away.

PANEL FIVE: E-DISCOVERY UNDER STATE COURT RULES AND UNITED STATES DISTRICT COURT RULES

Moderator
Hon. Nathan L. Hecht
Justice, Supreme Court of Texas

Panelists
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JUDGE ROSENTHAL: We are ready to proceed with the last panel of the day. We will end at 5:15 today. We will begin tomorrow morning at 8:30, God bless us every one.

Judge Hecht, I think we are ready. Thank you.

JUDGE HECHT: I am Nathan Hecht from the Supreme court of Texas. Our panel today I will just introduce very briefly. Like all of the others that have been before you all day long, they are very distinguished and experienced in the areas that we are talking about.

First, on my far left, is Mary Sue Henifin, who is a Senior Partner at Hale & Dorr in the Princeton, New Jersey, office. She not only practices in complex cases, she has written chapters on toxicology and medical testimony that are widely cited in the federal courts as well as the state courts, and she continues to be an Adjunct Professor at a medical school

On my immediate left, Judge Jerry Cavaneau is a Magistrate Judge in Arkansas and has been since 1991. Before that he was in a general business litigation practice.

On my right, Judge John Hughes, a Magistrate Judge in the District of New Jersey. He, too, took the bench in 1991 and before that time spent many years in the public defender's office.

Finally, on my far right, Steve Susman, of the Susman Godfrey firm in Houston. Whenever they run lists of the best X lawyers in the United States —— 500, 200, fifty, three, I don't know —— Steve is always on the list. He is both a plaintiffs' and a defendants' real, live, stand-up lawyer in Houston.

Now, they say that bees are aerodynamically unsound and cannot fly. And so as we are thinking about

engineering a bee here, we have some bees in two districts and a state that we want to talk about, rules regarding electronic discovery, and we will see whether they are flying or not.

There is a Rule in the Eastern and Western Districts of Arkansas, which you will find in your materials at Tab 1. It is Local Rule 26.1, which is an outline for the 26(f) Report.

Then there is a Local Rule 26.1 in the District of New Jersey. You will find that at Tab 2.

There is a Local Rule in the District of Wyoming, which we are not going to talk about, but the Rule of Civil Procedure and the court order in Texas and Mississippi, respectively, are at Tabs 5 and 6. You have heard some about the Texas Rule during the day. The focus is on 196.4, which is on the second page of those materials. Then, the Mississippi Order is identical except for one important word.

So you have all of that at the tabs in your papers. The mission that we have been given is to talk about, first, very briefly, how those rules came into being, whose idea they were, how they got adopted, and what the experience, again so far as we are able to tell, has been

under them.

Then we are going to turn to hypothetical cases which we have dreamed up and presume that each case was filed in either one of the districts in Arkansas, the District of New Jersey, or in Texas —— and assume that Texas has the Federal Rules, which it does not, but we will assume it for these purposes —— and how would the issues that relate to electronic discovery and the other issues that we have been talking about today be handled better, or not at all, by the local rules or state rule that I have just mentioned to you.

When we do that, we are going to talk a little bit about the hypothetical and then open the floor for questions at that point, so that we will talk about the issues that are raised by that hypothetical, maybe have a few questions, and then go on to another one, and get as far as we can get before 5:15. So that will be our plan going forward.

First of all then, how did Local Rule 26.1 come about in the Districts of Arkansas, Judge Cavaneau?

JUDGE CAVANEAU: I was dragged into this morass several years ago by my involvement in an antitrust case that we had in the Eastern District of Arkansas, which involved each and every problem that has been talked about

today in spades. That case taught me the importance of early disclosure, early exchange of information, and court involvement in the discovery process when you are talking about e-discovery.

Happily, it also led me to Ken Withers, and we did some work together on some seminars. The Local Rule 26.1 in the Eastern and Western Districts of Arkansas is really Ken's brainchild. He helped draft it — or did draft that, I think — and he is sinking down in his seat now. He takes the credit or the blame.

It is a minimal approach. I think that I am kind of here as a representative of the small country mouse because in our District we do have cases that involve these horrible problems from time to time, but the vast majority of the cases do not. So we wanted to adopt sort of a minimal approach.

The purpose of our Rule, first and foremost, is to force our lawyers, or encourage our lawyers, to think about whether they are going to seek discovery of electronic materials in their particular case. We also wanted to encourage them to think about preservation of data early on. And, perhaps most importantly, to let the courts know if there are going to be problems so that we can take a more

active role in managing the discovery in that particular case.

So what this Rule does basically is just add some requirements to the reporting under Rule 26(f) of the 26(f) conference. We want to know will there be requests for electronic data; and, if so, will those requests be limited to what is reasonably available in the ordinary course of business?

If it goes beyond that, we want to know about scope, cost, and time that may be involved. We want to know if the parties have discussed and talked about the format and media for production, and also the procedures for production. We want to know about steps taken to preserve electronic data —— in other words, the spoliation and preservation issue that has had so much discussion today. And then finally, sub-paragraph (e), if you have any other problems, we want to know about those.

The adoption of that Rule was met with silence from the bar. We did get some response that was favorable, but really they showed a great deal of disinterest. We are a small state. We have been accused of everybody having the same DNA and so on. You've heard about that.

[Laughter.]

So we get along pretty well down there. Everybody knows everybody.

But after the Rule was adopted, and in preparation for this conference, I thought it might be a good idea to see if it has any effect at all and, if so, whether it was good or bad.

So we pulled approximately 10 percent of cases from the last three years —— these are regular civil cases —— and I had my courtroom deputy look at those cases. In about 25 percent of the cases, there was a meaningful response to the questions that we asked about electronic discovery. I think that shows that the vast majority of the cases we have, routine products litigation, things like that, the parties either worked it out or didn't have any real problems.

But in looking through the 25 percent, there were some trends that I thought were interesting. This was not a scientific study and we didn't really have time to follow up on the cases where there were responses, but I noticed several things about the Rule that I think tell me that it is good for our District; and I think it would be good for others to at least adopt, or maybe the Federal Rules in general, a more stringent reporting requirement on the front

end.

First of all, it is apparent from the responses that the lawyers had seriously considered e-discovery issues, and in the majority of cases they had met and conferred and for the most part agreed on various aspects of their production. I will give you three real quick examples.

There was one case involving trademark infringement. It was obviously from the response that the parties had conferred on production of sales and production data, Internet sites, Web pages related to marketing, and had agreed to determine whether the data was reasonably available in the ordinary course of business, and if not to work to determine what the cost of production would be. The parties had also discussed the format for the production, they had ensured that reasonable preservation orders were being taken, and so on.

In another case —— well, in two more cases; these are the last two examples —— there was obviously data that had been overwritten or somehow altered or destroyed. They had gotten together, decided how to deal with that problem, and had in one case even agreed on a protocol and an expert to resolve it.

So I think in a number of cases that we have had in our District because of this Rule the parties got together early, they exchanged information, and they headed off some problems that would have come to the courts and really been consumptive of our time in dealing with them. So I think from that standpoint the early disclosure and reporting requirement was good.

Another aspect that I noticed was that in virtually all of the responses where electronic discovery was involved counsel at least stated that reasonable steps were being taken to preserve electronic data. Again, they had discussed and come to an agreement for the most part as to what steps should be taken to preserve that data.

In the case that I initially mentioned, I think we spent hundreds of hours, if not weeks and months, dealing with spoliation issues. That is one of the biggies and it is a real problem, as you have seen from the discussion today. So I think we have headed that off in some cases by reason of this Rule.

The responses also told us that the counsel had really discussed and given thought to whether there would be requests for production of data not available in the ordinary course of business. In most cases, they had agreed

that they would not go beyond that, but in the few that they had to go beyond it, they had discussed it and actually reached agreement as to how they would do it, who would bear the cost, and it never came to court.

In most cases, the parties had agreed on the form of production. It was interesting in the early years — you know, most of us barely learned to write with a pencil down there — in the early years, they agreed that the production would be in hard copy. That trend has kind of shifted now. I don't know if we have enough of a sample to really tell anything from it or now, but now the agreement is more often that they will produce it in some from of electronic media, on a CD-ROM for example, or in native format — we had one case where they had actually agreed to do that and how they were going to do it. So it has kind of flip-flopped.

Lawyers are becoming a little bit more sophisticated — and I am sure this is more true in other parts of the country — as to the problems and the potential for electronic discovery.

Basically, I think our Rule is benign. It has not caused problems in cases that do not involve extensive electronic discovery. If they do not have that problem in

their case, they can simply ignore that and tell us so in their response on the 26(f) outline.

I would just like to add to what some people have said earlier today. As far as rule-making is concerned, I think the people who are making the rules need to be very careful that you don't set preemptions or things that are going to apply to a wide variety of cases where they just simply do not fit in the ordinary, common, garden variety, day-to-day case that comes up time after time in federal courts, not only in the Eastern District of Arkansas but in a lot of the smaller districts, and even in the major districts. I'm sure that not every case in New Jersey or New York or Boston involves huge, horrible problems of electronic discovery. We need to keep the flexibility as judges to be able to deal with those without adding a layer of cost that may make it prohibitive to litigate the ordinary case.

I think the best thing that the Rules could accomplish is to ensure that the process starts very early in the litigation.

JUDGE HECHT: All right, thanks, Judge.

Now, the New Jersey Rule has that and does a little more. Judge Hughes, do you want to talk about that,

please?

JUDGE HUGHES: Yes. Let me start off by saying I was scared today by all the problems announced about the electronic revolution. I told Peter McCabe that I am going to go the other way and I have called GSA to order a hammer and chisel, so from now on all my orders will be in stone. They will be much shorter, but we'll go with it.

The impetus for the New Jersey Rule, quite frankly, was *Bristol-Myers Squibb,* which I wrote and scared the hell out of everybody in New Jersey, so they decided they better go and try to get a Rule. For purposes of this discussion, it could be subtitled "a pox on both your houses."

What happened in that case, very generally, is that neither side — and very sophisticated parties and attorneys — talked about electronic discovery, and it turned out that the plaintiff, in the traditional, time-honored way, asked for any and all paper documents and got that, and agreed to pay for it at ten cents a page. When it got to be expensive and when they found out that the defendants had an electronic version, they wanted that.

The defendants, on the other hand, never told the plaintiff that they had it available for electronic

production, and, in addition, were making a 20 percent profit on the deal because they were blowing back the paper at eight cents a page and they were charging them ten cents a page, so it was kind of an entrepreneurial thing, too.

But in any event, this led to the Rule, and a lot of other factors. Mary Sue will discuss it from the lawyer's point of view. The court, and I think the lawyers, wanted some Rule that they could show to their adversary and show to their clients and say, "We have to start seriously discussing these issues."

You will note that the Rule, although it imposes a duty on an attorney to investigate and to designate an IT person and things of that nature, does not provide for resolution of certain issues relating to scope or limitation or preservation. It simply identifies those issues as something that is worthy of discussion, as Judge Cavaneau said, early on in the litigation.

I think that is the most important message that I could give to the rule-makers, is if they are going to change the Rules —— and I wouldn't presume to say whether they should or they shouldn't —— but I think it should be more for education and awareness, to get lawyers thinking about the case and deciding what real issues they have,

rather than create presumptions or things of that nature.

I tell lawyers all the time —— and I think, I hope, every judge would agree —— that this is not my case, this is your case, that you are trying. I have found that if the lawyers want the judge to make a decision, invariably the judge will make a decision, and it may not be the one that the lawyers want.

I was amazed just in my general practice that most lawyers were computer savvy enough —— and this was two years ago —— and every year it gets more and more so that they are computer savvy, and their clients certainly are computer savvy, but that this is worthy of an explicit mention I think certainly in the Local Rule, and that is why we did it, so that they talk about this and they present any problems early in the litigation to the Magistrate Judge or the District Judge or whatnot.

I think when you talk about safe harbor, whether you have an explicit provision or not, I think my proverbial safe harbor at the end of the case is if I say to a lawyer, “Did you talk to your adversary or did you talk to your client; did you discuss measures to have prevented this thing?” that goes a long way in how I am going to resolve a

case.

So I think that was the purpose of the Local Rule, and certainly not to hamstring people or to even address issues of cost allocation, which are important issues. But I think that Judge Francis and Judge Scheindlin have gone a long way in identifying factors to handle those things.

From my perspective — I don't want to go off on a tangent — I think one of the most important things is to surgical strike discovery. I would hope that the new electronic revolution can somehow obviate the old "any and all, give me any and all documents," whatever. So I think that is the purpose of the Local Rule.

I think, before Mary Sue talks, I would like to say that if anybody is contemplating a local rule, it was very important to us in New Jersey that we had the lawyers' input on this. This was vetted after a fairly deliberate process through the Lawyers' Advisory Committee. It changed dramatically from the first draft.

I think the first time this was discussed lawyers were concerned that they would be given an added duty, and they have enough work as it is, but they have seen this Rule as help to them to be able to talk to their clients, impress upon them that this is not the lawyer's idea, this is the

Court Rule, that they have to preserve or come up with a plan in order to be able to discuss preservation or inaccessibility or all the issues that you have talked about today. And I think that it has actually helped lawyers.

That's pretty much my spin on it.

JUDGE HECHT: Mary Sue, add to that, please.

MS. HENIFIN: Let me just comment a little bit on the process. The Rule is at Tab 2 in your materials. I commend it to you for your review.

The judges actually brought a proposed rule to the Lawyers' Advisory Committee and asked the Lawyers' Advisory Committee to the Federal Courts to consider the Rule. There was a subcommittee appointed. I chaired the Lawyers' Advisory Committee at that time.

There was a lot of controversy about the draft as it first existed. I would say the sentiment of the lawyers, and these represented a variety — plaintiffs' and defendants' lawyers, various size firms, different kinds of cases that they handled — but the concern was that there would be no new obligations imposed.

So the drafting task of the Lawyers' Advisory Committee was to come up with a Rule that met the concerns of the judges that had to manage discovery — and in my

experience, no judge likes to look at spoliation motions; it's not fun; it doesn't really advance the long-term course of the litigation — to avoid some of these problems by addressing what we called "electronic discovery" at first, but learned was really too specific a term, early on in litigation. And so the Rule changed substantially based on the input from the lawyers.

The first change was to deal with information management systems, because we were very aware through our experiences that discovery and the way information is kept and managed is changing dramatically.

And so our Rule, which is a Local Rule — and I will not really address the merits of having the balkanization of the Federal Rules through Local Rules — but our Rule addresses information management systems, so that it is broader than just e-discovery. And we don't just talk about "data"; we talk about "computer-based information" and "other kinds of digital information."

And then, what the Rule really does is before the first discovery conference, which occurs very early in New Jersey after the issues are joined, it requires the attorneys to review with their client, which is an obligation in any event, the information management systems,

including of course e-discovery, e-type systems, and then to determine who has information.

That part was a little controversial, as long as there was a requirement that an IT-type person be designated as a person "knowledgeable" about those systems. But the Rule was changed so that it just has to be "counsel shall identify a person or persons with knowledge about the client's information management systems, with the ability to facilitate" — and this was very important — "through counsel reasonably anticipated discovery."

The way the Rule was originally drafted, there was concern that there could be some kind of IT-nerd-to-IT-nerd-type communication. Well, that of course would not be acceptable to attorneys in litigation.

Then, of course, the next issue that was addressed was the need to look at the categories of information sought, and then to address attorney-to-attorney in the first instance all the kinds of things that have caused problems in the courts, including inadvertent production of privileged information, cost and who is going to pay for the cost, whether there is a real issue with restoration of data.

So those issues have to be addressed by the

attorneys, and if there are problems, they can be brought at the first case management conference to the Magistrate Judge. In New Jersey, the Magistrate Judges manage discovery.

In an informal survey that I have taken since this Local Rule has gone into effect, there have not been problems. In fact, most attorneys work out these issues at the onset of litigation and make a report to the Magistrate Judge as to what they have agreed upon. But it does avoid delaying thinking about the issues, and it does require the attorneys to think about them from day one.

So I think as a beginning place for considering what needs to be done it is a very good place. We'll let you know, because we have a formal mechanism through the Lawyers' Advisory Committee to monitor the response to this Rule, we can let you know in a year or two if it is really working the way it is intended to.

So that is the experience in New Jersey, where in my experience in litigation in my cases the majority of documents are not paper anymore. Some documents are in cyberspace, there are now offshore companies that are involved in litigation, and the time has come to have a practical mechanism to address these things within the

context of our Rules, which are very well developed.

JUDGE HECHT: Mary Sue, how long has that Rule been in effect?

MS. HENIFIN: It has been in effect —— the recommendation was made to the Board of Judges, it was unanimous, from the Lawyers' Advisory Committee; it was adopted; and it has been in effect now about six months. In every new case that comes before the Magistrate Judges, these issues have to be addressed.

JUDGE HECHT: And your Rule, Jerry, is about two years?

JUDGE CAVANEAU: Three years, end of 2000.

JUDGE HECHT: In Texas, we don't have in state practice a 26(f) report unless one party requests it, so the Texas Rule is a little different. Steve helped write it. Steve, tell us about it.

MR. SUSMAN: Well, what they've got in Arkansas and New Jersey I would call "rules." I mean, just talk to the other side, okay. What we've got in Texas is a real rule.

It began in 1995 when the Texas Supreme Court asked its Advisory Committee to undertake rewriting all the Discovery Rules. The whole idea, what we set about in 1995,

is discovery takes too much time, costs too much money, and produces too little outcome-determinative results; let's greatly restrict the scope of discovery.

It began in 1995, when we first came up with this Electronic Discovery Rule, it was debated for several years, then it went to the whole Advisory Committee, and then eventually became part of all of our Discovery Rules that went into effect on January 1, 1999.

Our main focus in revising Discovery Rules was depositions, which we perceived to be much more expensive and useless than document production. We didn't make many changes in the document production rules.

One we did make dealt with the way that a party asserts a privilege as to documents. I mean, you don't put some junk in your response to the document request, assert some privilege. If you don't withhold anything on privilege, you don't say anything. If you withhold something, you've got to say you withheld something and identify it.

Another change we made was if you produce a privileged document, you do not waive the privilege unless you intend to do so. The minute you discover that you have produced a privileged document without intending to do so,

you can ask for it back, and if you do so promptly you get it back without question.

The final change, of course, dealt with the subject of electronic discovery. Our Rule, which was written in the mid-1990s, without much experience with e-discovery disputes and nothing to go on —— I notice that Mississippi copied us verbatim last year. We didn't copy anyone, I don't think —— maybe we did.

We wanted to make it very clear that if you want something special regarding e-discovery, either what you were asking for or how you want what you were asking for produced, the burden is on you to specify what it is you want and how you want it.

The second thing we wanted to make clear was if you ask for something that the other party does not normally have available in the ordinary course of its business and it requires more than reasonable efforts to retrieve it and produce it in the form requested, then you may object. If the court overrules your objection, it must order the other side, the requesting party, to pay for any extraordinary steps to retrieve the documents or produce them in the form requested, retrieve the information.

Again, the whole purpose of our Rule was to

curtail discovery, to limit discovery, and that is why we put those caveats in the Rule.

Did we succeed? I believe so. Since the adoption of our Rules on January 1, 1999, I have found no cases reported in Texas dealing with our Electronic Discovery Rule, which is pretty amazing.

In preparation for this program, I surveyed all the state trial judges in Dallas and Houston by email and found out — I was really surprised — that very few have had to adjudicate e-discovery disputes, and none of them had any problems with the Rule as it exists.

I think the important lesson we learned in Texas is that any rule, if you are going to write a rule, should be written in a way to make it clear that e-discovery is not the norm, that it should not be sought in every case, and that before you seek it you should consider that you may have to pay a huge amount of money for a lot of useless information. Once the bar gets that message, you just aren't met with many requests for e-discovery, and I think that is probably the way it should be.

JUDGE HECHT: All right. There you have comments on the Rules.

Now we are going to go to these hypotheticals in

the hope that by looking at how each Rule would address the problems that are raised we can see what they cover, what they don't cover; where they work, where they don't work, and so on.

Earlier we talked about addressing Main Street, not just Wall Street, and I think these examples are meant to show more of the mainstream of litigation that seems to be out there in the federal courts.

[Slide] I hope you can see the first one up on the screen. I will just give you a synopsis of it. First of all, a suit by a general contractor against a subcontractor. They each claim breach of contract and fraud against the other. They each seek $1 million damages. One is a little larger than the other. The general contractor, though, has only one employee who troubleshoots computer problems, doesn't have an IT person. The subcontractor relies entirely on outsiders or vendors. The general contractor's lawyer has had a little experience. The other lawyer has not had any.

Each discusses the subject with the client like they are supposed to under 26(f), but, because of the large amount of inexperience and ignorance that has been built up over the years, they do not get very far with a plan. It

just kind of says, “Well, there might be; we’re not sure.” And they talk a little bit, and each agrees to produce paper, because they feel more comfortable with paper, but also documents on CDs.

One of them is smart enough to realize that if he produces the material in a TIFF or PDF format, he strips out a lot of useful stuff, so that is what he does. The other fellow just copies if off the hard drive onto a CD and turns it over. When one realizes that he has given up more than the other, he objects, says that he should get his unstripped data back. The other side says that nobody ever talked about this before.

Jerry?

JUDGE CAVANEAU: I think that lawyer probably needs to call his liability carrier and put him on notice.

In the Eighth Circuit at least, I believe the outcome on that would be pretty clear: he has waived the privilege for any work product production at all because he hadn’t taken reasonable steps, he has let it go, and it is gone.

MR. SUSMAN: In Texas, obviously, our Rule would create the opposite result, because the production was inadvertent; he had no idea this data was there.

But I would like somebody to explain to me how metadata can contain attorney-client information or work product information, because I can't figure it out. Nor can I figure out, if you were in Texas —— because to get it back you've got to specify what it is —— so how is this dude going to specify what is attorney-client privilege or work product about this metadata without having it all blown out? I mean it's ridiculous.

JUDGE HUGHES: Now I know why there haven't been any cases in Texas.

[Laughter.]

Mary Sue, how familiar are the lawyers with being able to talk about this?

MS. HENIFIN: It varies all over the place. Metadata, of course, can contain attorney-client, particularly in transactional-type documents where lawyers are dictating what gets changed in various versions, which usually is part of transactional work.

But in any event, I think in New Jersey this problem would be avoided because the parties would be required to try to come to some agreement about inadvertent production and it would get them thinking about the issue.

In the last case where I have discussed this with

opposing counsel, we agreed that we would return, because we had a lot of electronic data that we would return if we inadvertently produced. That really helps you sleep at night.

JUDGE HECHT: One of the effects of the New Jersey Rule, I hope, is to level the playing field, as it were, between people who are less sophisticated with respect to the technical aspects of these things and address these at a meaningful 26(f) meeting.

The other thing that this Rule I hope accomplishes is to provide specific areas that they have to discuss, one of which is the format and how they are going to turn it over and so forth, so that it doesn't become a problem later on down the road where, as was mentioned this morning, somebody may put it in a version that the requesting party doesn't want or is unhelpful to them and they will ask him to do it over again, which multiplies the cost factor and gives the judge another headache.

So the important thing is —— and we all live in the real world and we know that there are different 26(f) meetings, and some of them last thirty seconds on the phone and some of them are a little longer —— but the purpose of adding a separate section on computer-based discovery, or

digital information, whatever it is called, was to have the attorneys focus on this and realize that at the Rule 16 conference they are going to have to report on what they had to do with respect to each of these precise items.

MR. SUSMAN: Under Texas Rules, another issue presented by this problem is —— well, there are no sanctions imposed against the lawyer who stripped out the metadata, because I don't think the request was specific enough —— but the more interesting question is: under Texas Rules, could you have gotten the metadata in the first place? Absolutely, no question, because it doesn't require extraordinary effort to make it available. It's there. And is it reasonably available to the producing party? Yes.

Someone just showed me how. I did it for the first time on my laptop today. You press on a document, you hit the right key, you get properties, that's the metadata. So of course it's reasonably available.

So a proper request would get all that information in Texas at no cost.

JUDGE HECHT: Okay. Questions to the panel about this hypothetical? Here's one from Mr. Socha.

QUESTION [George J. Socha, Jr., Esq., Socha Consulting]: I'd like to posit a slightly different Case 1.

Instead of electronic materials, you've got paper materials, and those paper materials include fax cover sheets and paper routing sheets and the like. Is it acceptable in a document production to tear off and destroy the fax cover sheets, the paper routing sheets, and the like, and produce only the materials that were sent about? That I think is the analogy for the metadata issue here.

MR. SUSMAN: Why don't you handle that one, Nathan?

[Laughter.]

JUDGE HECHT: Do that when it comes up on appeal. Here's a question here in the middle.

QUESTION [Allen D. Black, Esq., Fine, Kaplan and Black]: Allen Black from Philadelphia.

Steve, in the Texas Rule, is the Rule that electronic data that is readily available is producible whether or not it is normally used in the business? In other words, there might be stuff that is sitting there, but by pushing the button it's there. There are two ways of reading it. One, if it is not ordinarily used every day in the business it is out of bounds. But I think I'm getting you as saying that if it can be retrieved without some sort of heroic effort, it is in bounds.

MR. SUSMAN: That is what I think it means.

QUESTIONER [Mr. Black]: I think that's a big difference.

MR. SUSMAN: "Reasonably available to the responding party in the ordinary course of its business." We don't say it is "reasonably used by the responding party." "Reasonably available." It is available.

QUESTIONER [Mr. Black]: Okay.

JUDGE CAVANEAU: Could we go back to this?

JUDGE HECHT: Hang on just a second. Do you want to comment?

JUDGE CAVANEAU: Well, we very adroitly didn't answer that question.

JUDGE HECHT: I thought it was a rhetorical question.

[Laughter.]

QUESTION [George J. Socha, Jr., Esq., Socha Consulting]: It was a rhetorical question. But there is a question of how do you go about then handling metadata? One way is, as we often do, look by analogy to what we have done with things in the past. We know how we have dealt with this type of issue in the past. Why is metadata any different?

JUDGE HECHT: Jerry?

JUDGE CAVANEAU: I don't think it really would be any different from your example. I guess that gets to the question of the presumption: when you ask for a particular document in electronic format, should all that go along with it or not, just as a matter of course; or should you have to tailor your discovery request specifically "I don't want just the memo, I want the routing sheets"?

JUDGE HECHT: We have a question over here.

QUESTION [Laura E. Ellsworth, Esq., Jones Day]: Laura Ellsworth again from Jones Day.

A question that relates to a personal issue, and I think the larger issue of whether the Federal Rules as a whole should incorporate some kind of meet-and-confer obligation with some specificity.

I am working now on a Western District of Pennsylvania committee that is looking at the possibility of adopting a local rule in this area. One of the things that came up in connection with the New Jersey Rule and the Arkansas Rule is a concern on the part of judges that I think Judge Francis recognized before, which is: to what extent has that checklist precipitated a checklist of problems for you, as opposed to a checklist of solutions

agreed to by the parties or you? In other words, does the meet-and-confer obligation precipitate and raise red flags that would not otherwise have been raised for the parties and actually exacerbate the problems that are presented?

JUDGE HUGHES: I invariably tell lawyers that I am like the Godfather, I want to hear bad news sooner rather than later. I would rather hear up-front that there is going to be a problem later on.

QUESTIONER [Ms. Ellsworth]: Has it generated trouble or not?

JUDGE HUGHES: No, it has obviated. There have been no problems. The silence is deafening. It is almost like the controversy over initial disclosure, how everybody opted in or opted out, that it was going to somehow be a big problem, and it really has not become a problem.

JUDGE CAVANEAU: I would say that we have had the same experience in Arkansas. Now, that may be because we are a more rural jurisdiction. But I think it solved problems and there is no evidence that I saw that it has created problems.

I also polled the district judges and their staffs, all the law clerks and everybody, and they had not had significant problems that have arisen out of this

reporting requirement.

JUDGE HECHT: But to sort of restate what I think is being asked, does it put ideas in lawyers' minds, Mary Sue? I mean, they hadn't thought about it, but now that it is on the checklist, "Ah, that's an idea."

MS. HENIFIN: You mean discovery as strategic advantage? Is that what you're referring to?

JUDGE HECHT: Yes.

MS. HENIFIN: So far that has not been the experience. Really, the intent was not to impose new obligations; the intent was just to make some kind of checklist, not all-inclusive, of what the obligations already are. And it does prevent discovery problems down the road. I mean already, just dealing with this issue of how you produce, in what form, that obviates many, many disputes.

JUDGE HECHT: Tom?

QUESTION [Prof. Thomas D. Rowe, Jr., Duke University School of Law, Civil Rules Committee]: Tom Rowe from Duke Law School.

One probably for Nathan, then Steve. The last sentence of the Texas Rule looks like it is real mandatory that if there have to be extraordinary steps that there is

cost-shifting: "If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information."

Now, we have heard, of course, about the cases in which some plaintiff just doesn't have the resources to take care of that cost-shifting. In some cases, that is not going to be a problem. In other cases, it is going to kill the plaintiff's case. Does this Rule work as mandatorily as it looks, and how do people feel about how it works? Was there resistance to it? Is this the way you want it, the way you think it ought to be?

MR. SUSMAN: I think it's fine. Does it discourage people from ——

QUESTIONER [Prof. Rowe]: Do your clients have the money?

MR. SUSMAN: No, but I don't ask for a big production of electronic —— I don't ask for extraordinary means, because if they take extraordinary means it is going to require me to take them too, and I don't want to do that.

What I want to do is —— I mean I think every case ultimately turns on ten or twelve documents, a very small

number of key documents. Now, what I have learned through this conference that I didn't know before is there is a lot more information that I can get than I have been getting about those ten key documents.

I don't have any problem convincing a federal district judge or state judge that those documents are relevant because I can show them the documents. I would like the complete email chain and I would like to see who got a Bcc of these ten key emails. And certainly don't tell me that you can't give me the attachments. In what I almost always get there is no attachment. In the hard-copy production, what clearly was an attachment to the email ain't there.

So the ability to go get those things in metadata or embedded data on those ten documents is what I really think is important. According to the consultants that I have talked to at breaks, that doesn't take extraordinary effort at all, to get that off whatever is available. That is what I would be interested in. How much can that cost?

QUESTIONER [Mr. Rowe]: Okay.

JUDGE HECHT: Part of the discussion at the time was that the idea of "reasonable" and "extraordinary" would encompass factors like those that have been enumerated and

discussed in more detail by Shira and Judge Francis and others. We didn't try to list them out at the time. I'm not sure we could have thought far enough ahead to know what they were.

But the use of "must," which Mississippi changed to "may," was to try to prevent a state trial judge from saying, "Oh yes, there were extraordinary steps here, and yes, these reasonable expenses really ought to be recovered, but I am just not going to do it in this case. I don't have to and I am not going to." So it was more aimed at that rather than making it a rigid cost-shifting.

"Extraordinary" was used to carry a lot of weight, a huge amount of weight — probably too much, but it was 1999.

Yes, over here?

QUESTION [Leonard A. Davis, Esq., Herman, Herman, Katz & Cotlar]: I'm Leonard Davis. I'm at the Herman, Herman, Katz & Cotlar firm in New Orleans.

We are very active in a large MDL that is in New Orleans. I can tell you from real-life situations that the Rules work. We have had over 7 million pages of electronic documents produced and gone through in this MDL. We've had emails, databases, and whatnot. We don't have these local

rules, such as what you guys have, but I can tell you that the judge who is overseeing this in the district court has looked closely at the *Manual on Complex Litigation.*

We have CMOs in place and we have monthly reporting requirements. Every month we must submit a joint report, liaison counsel to the court. That requires meet-and-confers. And it works. The Rules are in existence already.

The way I look at this is that there are the "haves" and "have nots." The "haves" have and the "have nots" want. The "have nots" want that discovery, but the "haves" know what is there already, and the "have nots" need to know what is there in order to sit down, meet and confer, in order to talk about preservation, in order to talk about how you are going to get the information.

The only way to do it is as our judge in my opinion put forth in his first order — that is, he wants courtesy, professionalism, and case management. Those Rules are already in existence.

So what do you do? You meet up-front and you continue that process. And you can't have one side frustrating the other or you don't move forward. You've got to be reasonable. I believe that if you walk into the court

and you are reasonable and you have shown those efforts, then you can present it to the court and let the judge do what he needs to do. Otherwise it's up to the lawyers to have those meet-and-confers. I think those local rules that you guys have proposed are working, even without those local rules, in other jurisdictions.

JUDGE HUGHES: I think it is a very important point you have raised, and that is that the problems of the electronic revolution provide an opportunity for civility and professionalism that we have not had for a long time because we are all on virgin territory. I think that one reason for the meet-and-confers from my perspective is if I have lawyers come in and say, "We talked about this, we can't resolve it, you need to resolve it," okay, that is what I am paid to do. But you have to at least talk to each other and try to resolve it and solve the problem and not cause the problem. People who cause a problem are, obviously, going to be treated less favorably by me than people who solve problems.

QUESTIONER [Mr. Davis]: And I think it is helpful to the lawyers to have the judge involved in that process so that there is reporting, so that it does occur.

JUDGE HECHT: We are going to take two more and

then go to another case.

QUESTION [Debra Raskin, Esq., Vladeck, Waldman, Elias & Engelhard]: Debra Raskin. I'm a plaintiffs' employment lawyer in New York.

I just want to express from the plaintiffs' side some kind of concern about the mandatory fee-shifting for certain categories of information, not only because, obviously, of difficulty affording that on the plaintiffs' side, but also because I think it does not recognize — and I heard some of this from Mr. Morrison — the idea that the hog farm isn't free. In other words, even if — and I am using the example — a defendant who puts all the backup in readable form and so on, the plaintiffs' side still has the expense of lawyer time to read all that stuff. There are built-in disincentives, whether or not we on the plaintiffs' side are paying for the discovery production, in the using of it, and those limitations are real. I am concerned that this discussion does not seem to recognize that.

JUDGE HECHT: Comments?

Okay, we have one last one in the back.

PROF. CAPRA: We have one here.

JUDGE HECHT: Okay, one and one.

QUESTION [John Vail, Esq., Center for Constitutional Litigation]: When you are talking about the cost-shifting in these cases, at least for the federal courts, are you talking about taxing them as costs at the end of the case or requiring prepayment of them?

JUDGE HUGHES: I think prepayment of them.

QUESTIONER [Mr. Vail]: Because if that is the case, my concern is that I do not think that would be consistent with ——

JUDGE HUGHES: Not that I've done that.

QUESTIONER [Mr. Vail]: —— with the *In Forma Pauperis* statute in a case brought IFP.

JUDGE HUGHES: Yes, I agree.

QUESTIONER [Mr. Vail]: That's my comment.

QUESTION [Richard T. Seymour, Esq., Lieff Cabraser Heimann & Bernstein]: Richard Seymour, Lieff Cabraser Heimann & Bernstein.

I think there are a couple of down-home realities that we have not been talking about. There has been a huge decline in public enforcement as tax cuts and other means have starved enforcement agencies. More and more, the public enforcement of statutory rights, common law rights, falls upon private citizens. More and more, the key

documents are being kept in electronic form. If we have a provision in which companies are allowed to choose for themselves when they will make the documents inaccessible, when they will take them out of the active stream of things that they regularly work on, on a three-week basis or a two-week basis or a thirty-day basis, we are making enforcement impossible.

To shift the cost to the plaintiffs will make the enforcement impossible. And we need to be clear that we are speaking about what will ultimately become a lawless society if there is no public or private means by which people can reasonably enforce their rights.

We have to ask ourselves: what is the value of conceding to a corporation the decision and, presuming that this is a proper decision, to place these documents beyond reach?

One of the things that I have seen in thirty-five years of requesting electronic discovery, I have seen a lot of document retention policies. I very seldom see a document retention policy applied on the schedule set forth in the policy. All the time I see them applied episodically. I see them applied when somebody gets nervous about something.

If we are going to say that there should be no presumption in that case, basically what we are saying is that we are going to abandon the protections of the law for the people who are at stake, and I don't think we should concede that kind of decision to the corporation. Thank you.

JUDGE HECHT: Jerry, do you want to comment?

JUDGE CAVANEAU: I think your point and your point are precisely why I said earlier that I don't think the Rules ought to lock you in in a situation like that, because the devil is in the details, and there are cases where you might say that the information is not "reasonably accessible" where it ought to be produced but the cost ought not to be shifted for various reasons. That is why I think that judges have to have the flexibility to deal with those situations, be sensitive to it, and do it on a case-by-case basis.

JUDGE HECHT: Let me put up another example.

[Slide] You have thirty seconds to read this.

[Slide] We will skip to Hypothetical 3, panel. Here is a sexual harassment claim in which a marketing employee contends that there is a culture of sexual harassment from the CEO on down and that you really have to

look at the entire body of email that is exchanged throughout the company to see that culture. The company has an IT department, it has a policy that it made a year or so ago, but it doesn't discuss PDAs or portable memory devices or text messaging. The plaintiff contends that that's where a lot of this took place, that a lot of the comments that would show this very difficult environment to work in for her, that's where that would be revealed.

So when the plaintiff specifically requests production of that data, the company responds that some of the data has been destroyed, mostly the stuff on the small devices; production is far too expensive given the likelihood of finding anything material to the litigation; and that production will invade employees' privacy by disclosing personal data which the company permits them to keep on company equipment as long as it is incidental, an incidental use. And actually a lot of the employees attempt to file a letter with the court or an *amicus* brief saying, "That's right, please don't do this because it will invade our privacy rights."

The plaintiff responds that disclosure of that data will show she is right and she requests sanctions for spoliation.

Jerry, your rule on this?

JUDGE CAVANEAU: Well, I would have to have a lot more information. I think I would want to know how likely it is that it is on there; do they have anything specific that tells us that they were communicating in this way, in this manner? That would be my first question.

JUDGE HECHT: Whether there is actual ——

JUDGE CAVANEAU: I would be trying to gauge how likely it is that this information is contained on these.

JUDGE HECHT: And how would they do that, by sampling or ——

JUDGE CAVANEAU: Sampling might be one way, or producing witnesses, is there any documentation that might indicate that one way or the other. And I suppose you would have to have some cost information and information on how many we're talking about and so on.

JUDGE HECHT: John?

JUDGE HUGHES: I had one memorable case with two ex-business partners. The plaintiff wanted the defendant's PDA, personal PDAs of the defendant and his wife, but resisted giving up his and his wife's. So I couldn't figure it out.

But I will tell you one thing. This is becoming

an increasingly common request now, for PDAs, home computers, your kids' laptops, and all this other stuff. I am very sensitive to these privacy concerns. I think that is for 26(b)(2). I think that there are Rules that come into play here. There are other ways of discovering this information than going into somebody's PDA, which 90 percent of it is who I'm dating on Friday night, not what I did at work on Wednesday afternoon.

So I think I agree with Judge Cavaneau, you have to have so much information before you make a call on this. And I think that in large measure the Rules are there to address this.

JUDGE HECHT: Steve?

MR. SUSMAN: Can I play judge?

JUDGE HECHT: Sure.

MR. SUSMAN: I would say here that I think the defendant had a duty to warn its employees to preserve all emails on their PDAs and personal laptops. But also, if they say its failure to do so was inadvertent, so as a Texas judge I am not going to impose any sanctions on the defendant.

Before I would consider the request to require the employees to turn over their PDAs and laptops, I would ask

the plaintiff to give me the name of one who you think is the worst violator, I would ask his laptop to be turned over to an independent third-party magistrate, or someone who is like one of these experts who was here today, and a sampling of what is on that laptop to see (1) are there any emails that are not duplicated on the company's email servers and hard drives? If the answer to that question is, "No, they're all duplicated," then I wouldn't go much further.

If there are some emails that are not duplicated, I would ask this third party, "Do any of them have any sexual content? Are these people using their personal AOL accounts too move bad jokes or sexual innuendoes to each other and about each other?" If something showed up — and I think that solves the privacy concerns of the employees. I mean, besides you have only taken one and you've sampled that. If you don't find anything, fine. If you find something, then you may expand the circle and ask for a few more to be produced.

But I think it's producible.

JUDGE HECHT: Mary Sue?

MS. HENIFIN: Well, I don't see that in some ways as different than taking the diary. I think there is case law that deals with the issues that have to be considered,

and it is always a very fact-specific inquiry.

JUDGE HECHT: All right. Questions or comments on that? Here's one.

QUESTION [Michael Coren, Esq., Levy, Angstreich, Finney, Baldante, Rubenstein & Coren]: Hi. I'm Mike Coren from New Jersey.

I'm looking at the hypo. Really in the real world, because we do do this, it seems a little farfetched, because really when you are looking at that fact pattern you are going to ask, "Do you have any?" The stuff that is gone is gone there and you will address the issue of spoliation under your current law.

But as to the stuff that still exists, you are going to key search this. You are going to be not looking for everything on that person's hard drive or on a person's PDA. In reality, you are going to say, "Search for these key words or key concepts." So it really isn't that draconian.

JUDGE HUGHES: Yes, I think you're right. I think that is what I pointed out with Judge Scheindlin and Judge Francis. When you do the surgical strike discovery, you are much more likely to get it, to get a judge to say it is okay. If you are able to do that with search terms or what

else, then the privacy issue becomes less and less important.

QUESTION [Hon. Randall Shephard, Chief Justice, Indiana Supreme Court]: Randy Shephard at the Indiana Supreme Court.

In the instances that each of you represent, you have situations where there is a U.S. District Court Rule and no State Rule or a State Rule and no Federal Rule. Can you say anything about whether the existence of that difference affects things like choice of forum in the jurisdictions represented?

JUDGE HECHT: In New Jersey, everybody wants to go before Judge Corodemus instead of me.

[Laughter.]

I wouldn't have the vaguest idea, to tell you the truth.

MS. HENIFIN: I can answer that from a litigant's perspective. One of the differences that is very important in New Jersey is that Magistrate Judges manage discovery very tightly, and so you have that expectation if you go to federal court that you will have a case management order that deals with discovery and you will have it up-front in your litigation. That may or may not be true, given the

differences between counties and judges, in the state court.

MR. SUSMAN: There are other reasons that I want to stay out of Nathan Hecht's, but electronic discovery is not one of them.

JUDGE HECHT: A question up here.

QUESTION [Hon. Robert B. Collings, U.S. Magistrate Judge, Massachusetts]: I'm Bob Collings. I'm a Magistrate Judge in Boston.

I had a question for Mr. Susman under the Texas Rule, because you seemed to say that they had a duty to warn their employees to keep the data on the PDAs, but they said it was inadvertent, so there would be no sanction. I'm just wondering how such things as negligence or gross negligence interface with the concept of inadvertent. I mean, is it all that they need to do is say it was inadvertent, even though it might have been highly negligent, and that they are not sanctioned in that respect, or is there any challenge to the question of whether it was inadvertent or not?

MR. SUSMAN: I am not sure we have a Texas Rule that deals with the need to preserve documents, or spoliation, or anything like that. I don't think we do have a Texas Rule. It's all case law. While there are some

cases that indicate the same result for negligence and intentional destruction of documents, I don't think I believe that that would be the result. I just think that these lawyers are unfamiliar — "didn't think about it," "it wasn't purposeful" — and therefore I don't think anyone is going to sanction the lawyer or the defendant for not instructing the employees to retain those emails.

PROF. HECHT: A question over here.

QUESTION [Peter J. Gafner, Esq., Boston Scientific]: Pete Gafner, Boston Scientific Corp.

A quick question. Have any of your states done anything regarding Rule 45? We get a lot of third-party subpoenas asking for electronic documents. I don't think I have ever seen a dime from anybody. So I am just curious how we are dealing with that or whether the Rules, in addition to 26 that we are talking about here, we need to think about 45 as well?

JUDGE HECHT: Actually we have a hypothetical on that. Texas doesn't have a rule on it. I don't know about others.

JUDGE HUGHES: The New Jersey Rule doesn't address it. It is only with respect to parties and so forth. That is an excellent question, and that comes up more and more

too, where third parties, innocent or not third parties, say, “Hey, we don’t want anybody going into our systems” and “we didn’t have anything to do with this lawsuit, so stay away from us.” That is an undue burden or expense kind of decision you have to make on Rule 45.

JUDGE HECHT: I thank our panel very much. Thank you for your questions.

JUDGE ROSENTHAL: Ladies and gentlemen, before you go, in addition to thanking this panel, I hope you will join me in thanking all of our panelists and moderators today. This was extraordinarily helpful.

A number of you have asked whether there will be an opportunity to present written comments. Indeed there will be, and that would be very helpful. It would be extraordinarily helpful if you would send them to one person. Peter McCabe has volunteered for that. He is the Secretary of the Standing Rules Committee. He will give you his email address, or we can copy it and just have it be available out at the front desk first thing in the morning.

MR. McCABE: I don’t have email.

JUDGE ROSENTHAL: Right.

MR. McCABE: Well, if you want to send it in the old-fashioned way, you can send it to me in Washington, D.C.

20544. Or if you want to send it email, it's peter_mccabe@ao.uscourts.gov. All the addresses are in the blue book.

JUDGE ROSENTHAL: One of you also mentioned that there were some local rules in the offing in Pennsylvania. It would be very helpful for us to know if there are any other local rule-making efforts that are in nascent or more advanced stages from which we could draw or otherwise be informed.

John Rabiej, do you have any logistical comments you need to make?

MR. RABIEJ: No.

JUDGE ROSENTHAL: Thank you all very much. See you in the morning.

[Adjournment: 5:15 p.m.]

JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON THE FEDERAL RULES OF CIVIL PROCEDURE
CONFERENCE ON ELECTRONIC DISCOVERY

Fordham University School of Law
New York, New York
Saturday, February 21, 2004

MORNING SESSION — 8:30 a.m.

JUDGE ROSENTHAL: Good morning. I think we are ready to start with the morning's panel.

But before we do, let me just take a brief moment, because I suspect that not everyone will be here at the very end, to thank all of those who are not only here but who made the program possible: Dan Capra and the Fordham Law School, in particular, have been enormously helpful; Myles Lynk and Rich Marcus, whose work really did make this possible; David Levi, whose idea this conference was in the first place; and John Rabiej's office, who have all been wonderfully supportive and incredibly well organized. Thanks to all of them and to all of you.

I think we are ready to begin.

PANEL SIX — RULES 26 AND/OR 34 — PROTECTION AGAINST INADVERTENT PRIVILEGE WAIVER

Moderator
Professor Edward H. Cooper
University of Michigan Law School, and
Reporter, Civil Rules Committee

Panelists
Sheila L. Birnbaum, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP

Professor Daniel J. Capra
Fordham University School of Law

Jonathan M. Redgrave, Esq.
Jones Day LLP,
The Sedona Conference

Joseph R. Saveri, Esq.
Lieff Cabraser Heimann & Bernstein, LLP

PROF. COOPER: This panel deals with inadvertent privilege waiver through the production of documents — or perhaps something else — that include privileged information.

Yesterday at lunch I asked my panelists to give me information for suitably flowery introductions, and the upshot of it was agreement that to keep things moving not only would there be simply identification and firm, but for those law firms that have more than two names to give only two names. So, proceeding from your right as you face us, we have Jonathan Redgrave of Jones Day, Washington; Sheila

Birnbaum of Skadden, Arps —— and I will depart far enough from the rule imposed on me to observe that she has been a member of the Civil Rules Advisory Committee for the maximum term permitted by the Chief Justice and will continue, as we fully hope and expect, to help us with our endeavors as the Committee goes on; Dan Capra, and I guess the two words would be Fordham Law, who you know is our host; and Jonathan Saveri of Lieff Cabraser.

The topic of inadvertent privilege waiver is one that spans both electronic production and of course paper production. It is a topic that first was brought at least to my attention in an earlier discovery conference that the Committee held at Boston College Law, now quite some years ago, as people started to talk about it. My reaction as a total innocent —— and that's a nice word for saying totally ignorant of these problems —— was: "I don't believe it! What are you telling me courts do? You inadvertently turn over one thing that is not on its face obviously privileged, you did not realize that it was in the chain of a privileged communication, and the answer is that there is waiver of all privilege with respect to the entire subject matter and that, whatever you try to do among the parties to avoid that result, non-parties are not bound and you may have lost the

privilege anyway? I just don't believe it!"

Well, I stand to be informed. The way we are going to offer it in this panel, at least at the beginning, is going to be in essentially two stages. First, a stage that is designed with the idea that this conference is, among other things, a very important vehicle for informing the Advisory Committee, and the Standing Committee beyond the Advisory Committee, as to what is going on, what the problems are, how lawyers are reacting to them in fact. That will be essentially the first stage. And then a second stage, looking at a number of proposals that have been identified — I'm not sure how far any of them have been developed, although some are actually implemented in practice here or there — to consider how well they might work in addressing these problems.

My hope is that as we go through these two stages the panel discussion itself will become increasingly disorderly — that is, one of us says something, someone else says, "Wait, wait a minute, I have a different story to tell." We'll see how that goes. And of course there will be time at the end and we welcome both questions and observations, instructions, from all sources.

So for the first question I am going to ask

Jonathan Redgrave to describe what it is that lawyer are so afraid of, why indeed this problem of inadvertent privilege waiver through production of something that ought not to have been produced raises such ripulations of fear as they go through the discovery process.

MR. REDGRAVE: Thanks.

The meeting started yesterday with Professor Marcus talking about newness, the concept of newness, and I'm glad to say that we are going to talk about something that is royal and ancient — unfortunately, it's not golf — it's the idea of privilege. In many ways, and I think this is reflected in the materials, this is something that obviously has affected us in the paper world forever.

So what is the driver of waiver concerns now and why should we consider Rules changes?

Obviously, mistakes can and will happen in productions. They happen in the paper world. They happen in the electronic world. The consequences of those mistakes have always been governed by various rules that come out of different jurisdictions, and of course have different things.

There are three different tests: a strict, a lenient, and a middle-of-the-road balancing test. That last

one is the one that is in most jurisdictions, but not all.

For your materials, by the way, in referencing this subject, you should be looking at pages 27-to-33 of the Marcus-Lynk Memo. You should also be able during this to reference Tab 4, which is the Texas Rule 193.3(d). You will also want to reference Tab 8, which is the proposed ABA Standard 32. And then I will also be referencing Sedona Principle Number 10 and the Commentary under that, the four Comments which address some of these issues.

But in terms of these mistakes, what is going on out there in the real practice? Professor Cooper says, "Is this really an issue and a problem?" In many cases, both sides really sit down and they agree on a protective order, a non-waiver order, a return order, which takes care of this. So why do we really need to step in with Rules changes if people are able to do that? Well, there are a number of reasons.

First, just to those agreements and accommodations among parties, those are not uniform and those are not universal. One could ask: why should inexperienced counsel —— or, more particularly, why should a client, whose privilege it is anyway for the most part —— not get the benefit that experienced counsel may get through doing

agreements and protective orders entered by the court?

Secondly, the reality of the lowest common denominator comes into play. What I mean by that is that you may have a jurisdiction, let's say in the northeast, where the parties agree, the judge enters an order. But you may have a jurisdiction in some other part of the country where the court there entertains a motion by a plaintiff that says, "It was great that the parties up in the northeast had this agreement, they had inadvertent waivers, they gave it back; but too bad, so sad, the bell was rung. Another party who was not an owner or a party to have privilege saw the document. It is lost. None of this mumbo jumbo. Give it back. Pretend it didn't happen." It's like putting a bag over the head of a child and saying the child is not there. It's there, the person saw it, the waiver is exact, it is unforgiving, and the document should be produced. And a judge in the southeast or southwest says, "Okay, it's a waiver, I don't care what that judge in the northeast says."

So that lowest common denominator is what drives law firms, it's what drives corporate counsel, to say, "I've really got to spend a lot of money to make sure I don't get privileged documents inadvertently produced." Okay, so that

drives cost.

Now, then we get to this electronic discovery world and the rule of real estate, which is “location, location, location,” but of course let’s change that to “volume, volume, volume.” That is what we heard a lot about yesterday, and it is very real. So you are increasing the amount of information going out.

Now, electronic discovery is great because there are a lot of tools you can apply to help you find the privileged documents, to try to guard against inadvertent disclosures. But the reality is that with that volume, large productions, you will still have mistakes, and if you multiply those together you still have a big problem.

Which then drives us to: What do you do? Is there really a problem in the law as far as this being litigated? Are people really taking advantage of mistakes?

The answer is yes. I have seen and been involved in privileged motions that deal with waiver documents both on the documents and the subject matter; for privilege logs that say too little, for privilege logs that say too much; for documents that were inadvertently produced by my party, my client; for documents that my client is claiming privilege to as to which another party inadvertently

produced a copy of it. I mean there are all sorts of variations.

And it is driven by the concept of zealous advocacy. There are a number of bar opinions out there that tell lawyers in certain jurisdictions if they were to get a privileged document and the other side didn't take proper steps: "That's their problem. You have a duty to your client in zealous advocacy to go out and use it."

There are also countervailing jurisdictions where the bar authorities have put out ethics opinions that say: "You shouldn't be doing that. You should be returning it."

So there is a lot of variance out there among both the ethical boards and the courts. So with that world of non-uniformity, with the concerns about waiver and subject matter waiver driving in-house counsel, and the volume, I think it is a good time to look at the issue — it is very real — and say: Is there something that the Rules can do to address it?

I will leave the "quick peek" and what is behind that to our second discussion.

PROF. COOPER: Another part of the question, particularly for electronic discovery, but more generally, again from my innocent view, would have been something like

this: "Well, for heaven's sakes, when you are being asked to produce documents" — to take the core illustration of this — "you are going to review them for relevance, you are going to review them for confidentiality, for possible grounds for seeking protective orders, a variety of things you are going to screen for. Why is it that screening for a privilege waiver adds so much more to the burden than you would have to undertake anyway? And then, why is e-discovery somehow, if it is, something that increases the risk?"

And then, surrounding that, something that Mary Sue Henifin said yesterday, and that was, if you remember the exchange, "Well, yes" — and I think it was meant to be more embedded data than metadata. The embedded data in a document may itself reveal information that is privileged in some sorts of litigation, some sorts of documents. Which leads to the question: Has anybody ever thought if you are going to be exchanging information in native format about screening the embedded data — and, if it is possible, in metadata — for privilege?

Sheila, why does the privilege waiver thing augment the burden so much?

MS. BIRNBAUM: Ed, as usual, has asked three questions in one. He does that so well.

Let me just try to do the last one first, embedded data/metadata. When all these young people are reviewing all these things, usually we up until now have not given documents with the embedded data and metadata; we have usually given the TIFF image or the image that you see on your computer. So if we were adding in any way the fact that you had to hand over embedded data or metadata, I think then you would increase the cost exponentially because that would have to all be reviewed for privilege as well: Did that piece of document go to the counsel's office at some point, did the counsel have input into changing some of the language, and is that subject to work product or attorney-client privilege?

So I think what you would have is a situation where now one of the more expensive —— or most expensive, in my opinion —— parts of discovery is the reviewing of these documents for privilege. That would increase the cost exponentially.

Now what happens? When you're looking at relevancy, why are the privilege aspects of this so important? When you're looking for relevancy, it is pretty

easy to determine whether it is relevant or not, in the sense that you can look at certain computers or certain people's servers or certain names and you can do the searches and that cuts down on the relevancy. But if you give an irrelevant document, so what? You know, it has no meaning in the process usually. So that's not a very big problem and you can do that quite quickly, and if you make a mistake it's no big deal.

But if you hand over a privileged document, it may be an important privileged document or an unimportant document, but you can't do it, because then I think you're setting yourself up for your client being upset, possibly malpractice, and possibly creating this waiver problem in many other places.

So I think more time is spent on the privilege issues. And it's not so easy. It's not every document that says "privileged and confidential" on the front of it. I mean you have to give people a whole list of all the people, all the names of all of the lawyers in-house, all the lawyers outside. There may be email going back and forth. It is a very time-consuming, difficult process, someone sitting with a bunch of names — you know, does that name appear anywhere on the sheet of paper?

So I really do think that the time has come to really look at this issue. The whole game it appears, one of the big games, of discovery is "Gotcha!" — you know: "I got you, you made a mistake. I got this attorney-client privileged document. I'm going to make a lot of hay out of it one way or another."

As we'll talk about some of the solutions that states are considering and operating under, I think it's that experiment that is going on in the states that is very helpful, I think, for the Committee to examine and see how they are working, and I think we are going to talk about some of them.

But I think the problem is very real, it's one of the most expensive parts of discovery, and it will only get worse as we get more and more data that is going to have to be reviewed.

PROF. COOPER: Another range of this phenomenon is captured perhaps in a talk I had just a week ago at lunch with a now-senior New York litigator, who asked what the Committee was up to. Ever alert for a chance to learn something, I said, "Well gee, one of the things we're talking about . . . and what's your experience?"

His response was, "Well, I used to take a very

hard line with privilege waiver. You gave me something privileged and I kept it and I pushed for waiver with respect to everything. Not so long ago, I had a case in which the other side advertently produced a dozen privileged documents, and I told the young people who were actually running the discovery, 'Good, let's keep them.' They said, 'Oh no, we can't do that. We don't do that anymore. We have to give them back.' I said, 'Oh well, okay.' And then that turned out to be a good thing because later on we inadvertently produced a dozen privileged documents and we got them back. Maybe this isn't such a bad idea after all."

That opens up a question that is also touched on — and I would add one more to those tabs you consult. The District of New Jersey Local Role 26.1(d)(3)(A) lists privileged waiver protections among the topics for the 26(f) conference.

What is actually going on out there? We have the horror story, the great fear of waiver. Are lawyers actually insisting on this? What is the practice? Are people in fact, by agreement or by simple understanding that this is the way we behave, returning privileged things?

Joseph Saveri, what is going on?

MR. SAVERI: I think my experience has been

generally that we are moving past an era where we are trying to find an opportunity to engage in, as Sheila says, a "Gotcha!" litigation. I think that from my perspective — and I focus on antitrust cases and big document cases — we want to move cases as quickly as possible to resolution on the merits. It is important for us, particularly when we deal with electronic discovery, and it is also true with respect to the paper discovery that I deal with, just because the volume is so big, that we want to eliminate the transaction costs associated with discovery.

Consistent with what I think we heard yesterday, it is important to get access to the relevant information and to begin as quickly as possible to identify what sources of information there are and, particularly with respect to electronic data, to know the nature and the form of the information that is there.

One of the most frustrating parts about trying to achieve that is the delay that is engendered, I think, in the process as a result of the privilege review. The documents and the materials that — well, there are really two things that happen. One, as a general matter, the whole privilege review slows down the process. In fact, the privilege review I think delays the process as much as any

single part of what the defendants do in organizing their materials to turn over to the plaintiffs.

So I am interested in doing anything to cut through that. If I can get an agreement that we will not keep privileged materials, or if there has been a disclosure we will turn them back, seems to me one of the easiest things for me to offer to expedite the process. My experience has been as a plaintiffs' lawyer that we are more than willing to do that to move the process along.

I come from California, where in fact I think I have an ethical obligation that if I do find one of those documents I will turn them over. And what's good for the goose is good for the gander, and ultimately I think, because I am a repeat player, that if the same thing happens to me, then I'll be afforded the same courtesy.

So I think generally my experience has been that we are being very reasonable about not insisting on keeping the benefits of inadvertently disclosed documents.

MS. BIRNBAUM: Can I just respond a minute to that?

I think there are two types of cases. There are the commercial cases where you have two players who have lots of documents. In those cases, it's very simple:

people stipulate, because what's good for the goose is good for the gander, and everybody wants to be on an even playing field. Everyone got lots of documents. They want to cut through and get some agreements. In those cases, you usually have a stipulated approach to all of this. That seems to work pretty well. You know, "I'm going to produce privileged documents, you're going to produce them, we want to cut the costs, we both have documents."

The kinds of cases that I am in —— mass tort cases, products liability cases —— there is only one-sided discovery. There are no real documents that the plaintiff has, except medical records, and it's all my records, it's all my documents. In certain places, in certain parts of the country, there aren't reasonable lawyers because they want to make a case over the discovery because that is part of how they are going to get the case to settle. If they make discovery expensive, difficult, create sanctions problems, this is all part of the methodology to get to the settlement.

And so there are different types of cases. The big commercial cases are not a problem, in the sense that people will work it out. But the Rule can't be necessarily for those cases. It's for the case where it is a problem,

and it is continuing to be a problem, and it's going to continue to be a bigger problem as we have more data. So I think you have to keep that in mind.

And there are repeat players that, like Joseph, are going to play by certain rules, and then there are many other people who are going to play by no rules.

PROF. COOPER: Before turning to the range of questions, is there some Rule approach that might be effective, that ought to be considered by the Advisory Committee and on up to the Enabling Act process?

One of the questions that is continually put is the question whether Rules dealing with privilege, however indirectly, however tightly tied to the discovery process, are subject to the special statutory provision that in a way qualifies the Enabling Act.

It is set out in the materials in the book on page 27. Section 2074(b) of Title XXVIII says that any Rule "creating, abolishing or modifying an evidentiary privilege can take effect only if approved by Act of Congress."

Now, this is a departure from the ordinary Enabling Act process, and although it seems to me pretty clear that a Rule dealing with inadvertent privilege waiver is not a Rule that either creates or abolishes a privilege,

it might well be seen as a Rule modifying a privilege. So you've got that question.

Then you have a rather broader question. Reporter Capra is ever alert — indeed, sensitive — to the division of authority and subjects between the Civil Rules and the Evidence Rules. It's an ongoing issue with respect to some of the Discovery Rules that have provisions that overlap and depart from the Evidence Rules at the same time. He is sensitive to both of those things. I will ask him about that.

But I will also add a twist to it. I don't see Dan Coquillette here this morning, so I will do his part of this responsibility. We have been reminded that bar groups dealing with Rules of Professional Responsibility are concerned about a duty either to exploit to the maximum advantage anything they foolishly turn over to you, or honorably and decently to return it to them. There is considerable sensitivity about the overlap between Rules of Procedure and Rules of Professional Responsibility, an overlap encountered rather more often than I think we sometimes pause to reflect on. That is another sensitivity.

Dan, is there anything we can do even if we want to?

PROF. CAPRA: Sheila, wasn't that just three questions again?

MS. BIRNBAUM: Yes.

PROF. COOPER: At least.

PROF. CAPRA: He added the third one with that twist.

MS. BIRNBAUM: He always does that.

PROF. CAPRA: Well, I proceed from what I contend to be two unassailable positions.

The first one is that there are already too many evidence rules in the Civil Rules because where you look for evidence rules is in the Evidence Rules; you don't look for evidence rules in the Civil Rules. It can only be a cause for confusion, misapplication. So I proceed from that premise.

The second premise I proceed from is that it makes no sense to get Congress involved in privilege work. The reason for that is when Congress gets involved with privilege work they will be affected by lobbyists. You'll have all sorts of lobbyists coming down on Washington and talking about various things. And even if it's in the course of this very limited point of forfeiture, it will be pretty much a disaster.

That is why the Evidence Rules Committee has never gone forth with proposed rule-making in this area, because of 2074(b), and the knowledge that once it gets up into Congress it's not your work anymore. They don't benignly neglect it, they have to actually enact it, and if they actually have to get up off their keesters and enact something, it is going to be a disaster.

So in that respect I have just a couple of comments.

Would this rule-making modify an evidentiary privilege? I don't see how you can say it would not modify an evidentiary privilege. In jurisdictions where forfeiture is automatic, it modifies the evidentiary privilege. It means that the privilege can or cannot be asserted. What more could that be than modification?

There are jurisdictions which have what was called "the easy rule," which is to say you always get it back, no matter how bad you were or no matter how negligent you were. Well, any Rule that you are going to draft is going to modify that Rule in those jurisdictions. To argue that the Waiver Rule is somehow not a modification of the Rule of Privilege itself —— well, how could you address a privilege without thinking about waiver issues? That's inherently

related.

When the Advisory Committee on Evidence Rules first proposed Rules on privilege, one of the Rules that they proposed was a Waiver Rule, and that was one of the Rules that was rejected by Congress and led to 2074(b). So how can you say that that is not a matter of concern that gave rise to the statute in the first place? I just cannot see how it could not be modifying.

At any rate, it is not for me to answer that; it is for some court to answer that once this Rule gets passed and Congress isn't alerted to the problem and then it becomes a part of a litigation. I don't know, maybe ten or fifteen years later, you will actually have some determination that this Rule, which is intended to regulate and basically provide some kind of concrete guidance for lawyers, will actually be concrete. I guess I don't see how that works.

The next point I would like to make is that this Rule if it were in the Civil Rules would have to, I assume, be attendant to discovery. But not all of the advertent disclosure problems occur in discovery. There are mis-sent faxes, there are letters sent to the wrong place, there is a lawyer responding to email and he hits "reply to all"

instead of “reply to sender.” That is an inadvertent disclosure of privileged information that doesn’t occur during discovery. What Rule governs that? The federal common law governs that, the federal common law that exists today.

So what you would have if you established a Rule, whatever the Rule would be — I am not even talking about the content of the Rule right now — is a Rule that would govern one aspect of inadvertent disclosure, the aspect that occurs during discovery. There would be a conflict, no question about it, with some common law somewhere, some federal common law somewhere, that deals with this second-tier kind of disclosure outside of the discovery situation. I don’t see how that is beneficial to any practitioner or any court.

Thirdly, this Rule would not apply to criminal cases. There is a good number of cases in which inadvertent disclosure occurs in criminal cases. It has happened to the government in the Southern District, I think, four or five times. This Rule, I assume, cannot cover that.

So you are not dealing with basically all of the problem, and if you’re not dealing with all of the problem, what results is a balkanization of the law. To me,

therefore, the only thing that can be done if you really want to regulate this area is to have an Evidence Rule, because an Evidence Rule deals with whether the information is admissible at a trial. That governs criminal cases, that governs civil cases, that governs the mis-sent fax cases.

But, unfortunately, there will never be an Evidence Rule on this issue, and the reason for that is because we know that it would modify a privilege, and we wouldn't propose it because we know that Congress —— it's kind of a circular thing. There will never be an Evidence Rule on this point.

So I realize that it's a knotty problem, but I don't think that it can be solved by a Civil Rule.

Finally, just in passing, if the Committee is going to deal with what has been called "inadvertent disclosure" or "inadvertent waiver," the language that is proposed —— it is really not a waiver when you think about it; it's a forfeiture. Judge Posner has a long disquisition on the difference between waivers and forfeitures.

But just speaking in an elementary sense, a waiver is an intentional relinquishment of a known right, and this is not what is happening with an inadvertent disclosure.

It's a forfeiture. The reason it is considered a

forfeiture is because counsel has done something that disentitles counsel from invoking the privilege. That's what a forfeiture is. So I submit that this is a forfeiture rule, not a waiver rule.

PROF. COOPER: What Dan has just proved is that we cannot get away from the style project. One of the many fights I have lost was the effort to substitute "forfeit" for "waive" throughout the Rules for precisely the reason that Dan has just given.

PROF. CAPRA: I did not know this. He did not brief me on this.

PROF. COOPER: You can't escape it.

MS. BIRNBAUM: But he wasn't any more successful than you have been.

PROF. COOPER: The word down the line is that Jonathan wants to respond.

MR. REDGRAVE: Yes, that's correct.

I disagree with respect to what the Rules Committee could do if it so chose with respect to the inadvertent waiver. You can substitute other words, but certainly the case law has developed with the concept of waiver in mind for the privilege and the rights.

We have procedural rules that affect substantive

rights. That's just what they do, they affect substantive rights. Do they create or do they destroy the privilege rights? I think that's what you need to look at.

And I think you can craft a Rule that sets forth ways in which privilege claims can be made, sets forth ways in which parties can go about situations where mistakes happen and what do you do to return a document, to adjudicate any challenges to the privilege, and do that all within the purview of the procedural rules and not run afoul of the Rules Enabling Act.

PROF. CAPRA: I need to respond to that, because the issue is not whether it is procedural or not. That's a misnomer. The issue is whether it "modifies a privilege," that's the statutory language, so getting into issues of whether it is substantive or procedure ——

MR. REDGRAVE: You're not modifying the privilege if you do it right. You are affecting the way in which a person claims a privilege. And right now on privilege logging requirements, if you don't turn in a timely privilege log, a court can say "you're toast." Well, that was a procedure. Putting forth the defense of that privilege was set forth by a procedure by the court under Rule 26(b)(5). If you didn't follow the procedure, you lost

your right. Well, are you saying then we can't even have that?

It's a procedure that affects the substantive right. It is not changing/modifying that right, the existence of that privilege, but that procedure. That's why I say we can look at a Rule and discuss a Rule, but you've got to be very careful in drafting that Rule not to create, modify, or destroy a right that otherwise exists in the common law of the states or the federal common law.

MS. BIRNBAUM: Can I just add also?

The fact, Dan, that I think we are looking at this only through a discovery prism rather than criminal law, evidentiary, admissibility, etc., I think that also is very limiting. It's not wrong, because I think what the attempt is to try to do is to solve a problem that is creating enormous costs, inefficiencies, time consumption, that can be resolved in a way that says: "Okay, if I do this quick" — and we'll talk about the "quick peek" — "if we do this quick and I get my papers to Lieff Cabraser's office earlier, I'm not going to be punished for that. I'm helping my client, hopefully" — if people want to do this when we talk about the "quick peek" — "I'm helping my client, it's costing them less. I'm taking a risk, but by taking that

risk and getting this done in an efficient, cost-effective way, I don't want to lose my privilege; otherwise I can't do it."

So I think that you can separate this discovery issue from perhaps all the other issues that you are concerned about.

PROF. COOPER: What that does is get us directly into the second wave of this panel.

MS. BIRNBAUM: We planned this.

PROF. COOPER: Well, we planned it because Sheila is the one I am going to call on first.

The generic set of questions is: Well, supposing that in its imperious wisdom the Committees decide that yes there is something that may be within the process that would perhaps have to be transmitted to Congress, with the advice that the Supreme Court thinks this is 2072 not 2074(b), and that would lie down the road. How far would any one of a number of the suggested approaches actually change practice? How far would a lawyer protected by a claw-back or a "quick peek" or some other approach in fact be able to reduce the screening time, their screening cost?

We've got essentially three different sorts of approaches described in the materials.

One of them, one that has the benefit of being an actual real-life rule, is the Texas Rule that appears behind Tab 4. This is 193.3(d). That provides protection against privilege waiver. The Comment to it suggests that it "provides protection even if the party who produced was not diligent in seeking to protect the privilege." The Comment is a very rich source of information about this. I commend it to you because it addresses another real problem that may arise.

But, Sheila —— and this may come as a surprise to you —— has some experience with the Texas Rule and might be the first to comment on it.

MS. BIRNBAUM: Thank you.

The Texas Rule goes far beyond electronic discovery and far beyond just discovery. It would fit into all categories, and I think that makes it broader than what may be discussed by the Committee.

What it provides is —— and it takes away the word "inadvertent," by the way, which is probably a good thing at this point, because it talks about "unintended." It says "the party that produces material or information without intending to waive a claim of privilege does not waive this claim under the Rules of Evidence if within ten days, or a

shorter time ordered by the court, after the producing party actually discovers that such production is made, the producing party amends the response identifying the material or information produced and stating the privilege asserted. If you amend the response to assert the privilege, the requesting party must promptly return the specific material or information and any copies pending a determination by the court as to the privilege."

Actually we are in a case which was hotly contested on discovery. I mean there were eight sanctions motions pending at one time, all over discovery, and all of course going in one direction. There was an inadvertently produced clear attorney-client privilege document. This took effect immediately and the document was returned immediately and it never went to court to determine whether it was an attorney-client privilege because it clearly was an attorney-client privilege. So I have seen this work, and work well, in a case where nobody was giving quarter to any other person in the litigation.

I think it does several things if you have something like this. People can spend less time and money in doing this. Now, in hotly contested cases people are going to do a privilege review because there really is a

concern that some document is going to get out and you can't either put the bag over the child's head or un-ring a bell. In those kinds of litigations, that's the parties' choice to spend the money if they want to do that.

But if we had something that made it easier, and everybody knew what the Rule was and it was clear, I think people in many instances would do either a "quick peek" which will look at that, or spend less time and money doing it, because they knew if they made a mistake they were going to get it back, and it would help the process, at least to some extent.

MR. SAVERI: Excuse me. One of the problems, though, I have with the Texas Rule is that it eliminates this diligence requirement. I think that diligence is important because, after all, the material we are talking about is relevant, it is otherwise discoverable, but we have decided that there is another reason for not making it part of the adjudicative process.

I have a real concern if the privileged information just comes to light at trial. You know, how does that affect the parties' rights who have spent the money, prepared for trial, and then all of a sudden this document comes out and they say, "Well, despite the fact

that we really didn't pay much attention and we weren't diligent, the Rule says we get it back"? Now we have to do all sorts of things to try to un-ring that bell, and I think that is potentially unfair to the parties.

PROF. COOPER: This is another wonderful advertisement for a sort of Reporter secret part of the Rule process, and that is look at the Committee Note. The Comment to the Texas Rule addresses that. The question, Joseph, is: what do you think about this provision in it?

What it says is: "To avoid complications at trial, a party may identify prior to trial the documents intended to be offered, thereby triggering the obligation to assert any overlooked privilege under this Rule. A trial court may also order this procedure."

In effect, it changes the burden to you've got the thing now and the way you can protect yourself against that trial surprise is list before trial every document you intend to use at trial.

PROF. CAPRA: But there is no question that's not to be in a Committee Note, that's to be in the Rule. Wouldn't you agree, Judge Thrash?

VOICE: [Inaudible.]

PROF. CAPRA: Absolutely. That Committee Note is

not going to be helpful at all. That needs to be in the Rule. That's the thing that really affects practice. You can't just throw that in a Committee Note. My gosh, what is going on in Texas?

[Laughter.]

PROF. COOPER: Steve Susman, do you want to comment now or do you want to wait for the comment period?

MR. SUSMAN: Wait.

PROF. COOPER: Okay.

PROF. CAPRA: There is another problem with the Rule. Another problem with the Rule is that it basically puts a burden on the receiving party of having to show that any argument that they make, any pleading that they amend, any witness that they call, is not derived from privileged information. So essentially you are going to do a *Castegar* hearing, or the civil version of a *Castegar* hearing, in most cases, because if you have to turn it back you turn it back.

But I assume that means you cannot use the fruits as well. The Rule doesn't actually say that, but I assume that that's the ordinary rule. So how do you deal with fruits in this situation? You've invited a fruits argument in every case.

MS. BIRNBAUM: I've never seen the fruits argument

made, but I guess it's a good one, because I think what really happens in real life is the document is given back. Usually the document is not an important document. I mean usually it isn't *the* crucial document, that one and only smoking gun document. So as a practical matter, it may in some instances be important, but that's the rare case.

PROF. CAPRA: I was involved in a case where I guess it was Fried Frank disclosed inadvertently part of Board minutes at which Fried Frank gave some advice. It got turned over to the plaintiff. The plaintiff read it, turned it back because it was found to be an inadvertent disclosure under the six- or eight-factor Inadvertent Disclosure Rule that that court was applying at that particular time, and then the plaintiff amended the complaint. The defendant moved to strike the amendment. The plaintiff argued, "I could deduce this change of fact through otherwise ordinary channels." The judge spent maybe about six months trying to figure that out. So that's how the fruits arguments come up — and that's under current law, and that's not even under the Texas Rule.

PROF. COOPER: Okay. We've got to keep this moving.

Another approach suggested is illustrated by the

"quick peek" draft on page 28 behind Tab B. The basic notion of this was something that was inspired by statements.

Lawyers do this a lot. We stipulate to a protective order that provides a sort of two-step process: the first step is the requesting party looks at everything, identifies what is typically a quite small fraction of the total of potentially responsive material that it is actually interested in; then the producing party screens and the discovery process goes on.

There may be some thought that something like that could reduce to some extent those concerns about where within the Enabling Act process that fits. Is it something that comes too close to modifying a privilege?

Jonathan Redgrave, you have some thoughts about "quick peek" and some experience. What do you think of it?

MR. REDGRAVE: Well, I do have some thoughts on the "quick peek" approach.

Before I lose my train of thought on the last discussion, though, I just want to throw out two things.

You heard something about the balkanization. I'm not sure I fully like that term as best to describe what goes on in this world as far as inadvertent production or

how you deal with privilege issues on a “quick peek” approach or whatever.

But the reality is you’ve got a variety of approaches being employed by various federal courts all throughout the country, whether a standing local rule now says “you’ve got to discuss it,” or judges have their nice little “in their back pocket” order, so they go out there. So it is an inconsistent practice already, and the idea behind a Rule would be bring some consistency to that.

Secondly — and this is just a thought to throw out there; I’d be happy to discuss it with anyone later — I think Rule 26 is a much better place for any inadvertent production rule, because you would try to get it to the broadest possible application to the discovery process. I think you see in the Texas Rule — and I’m not an expert on the Texas Rule — but it’s in the Discovery Rules generally, so it applies to all the discovery exchanges.

I think that is better than just Rule 34 because, as my intro into the “quick peek” approach, my practice is much like the game I bought for my kids, the Worst Case Scenario game. I don’t know if any of you have done this. It tells you how to run away from killer bees, it tells you

how to kill a rattlesnake. And I guess now I know the question of how to kill a copperhead, so I'm ahead of my kids when I next play it.

[Laughter.]

But the reality is I have seen an argument in the case where we had a privilege log where we inadvertently turned over the attorney comment field as well as the other privilege log fields on a database. The other side said, "Well, that wasn't a Rule 34, so your non-waiver order doesn't apply. Ha, ha, we get to keep it." Well, we litigated it. We won, but we had to litigate it at great cost.

So I think Rule 26 is a better place for it, to just be as broad as possible within what the Rules can do.

Now the "quick peek." I don't know how many of you understand what this is, so I am going to take two seconds to explain it.

Instead of doing this privilege review, I will say to you: "I've got a large set of backup tapes. I've loaded them on the computer. Do you want to see all the emails? I'm going to bring you into a room and I'm going to let you see it. I haven't pulled anyone out. The general counsel email is on there, all the employees' email. It would cost

me millions of dollars to go through it. I'll tell you what. This case should be simple. I'm going to let you come in, you can spend ten days, you go through it, and at the end of the ten days I am going to now go through what you've selected and that's where I'm going to focus my money. If you selected some privileged documents, I'm going to put them on a privilege log."

Is this a good idea? Is this a good idea? And, even if it is a good idea, will anyone out there actually do it?

Back to the Worst Case Scenario game, I have actually been in a case where someone has done it. The opposing party did this with respect to both paper production and an electronic production of emails. I'm not sure they'd do it again, but quite frankly I don't think they actually ran a waiver risk, I don't think they had a bad experience with it, and it allowed them to save millions of dollars in discovery cost because they didn't have to review it. And the number of documents we actually selected from that process was very few.

But the problem in this is that lowest common denominator again. Remember? We could have a Rule that says "'quick peek' is great in the federal courts" and

there's this non-waiver concept, but as long as you have other jurisdictions in states or territories that say: "Look, we're not going to recognize that. The bell has run. You can't ignore the child in the bag. It's over, you've waived it, and I don't care if this quirky 'quick peek' thing was adopted by the Federal Rules. We don't follow that here in this state and you're done."

So until there is absolute assurance, you've still got the client saying, "Well, there's this risk, and if the document gets out there I still need to spend the money." We're trying to untie that Gordian knot, because what Sheila very well explained is this privilege review process is very hard to explain to associates how do you find privilege.

And the electronic age has made it worse, because what used to be maybe the memo to the client reflecting the client's request for legal advice and then the attorney responding to that request, the prima facie privilege — the emails go back and forth, the associate picks up the email in the middle of the string, how do you know it's privileged? You've got to do all the contextual research. It is very difficult. So I submit it is getting more and more expensive to this, and as a result of the volume I think your privilege logs are getting worse.

Now, with that, if you were to adopt a “quick peek” approach, I think it should be something that is just a voluntary matter. In our case, the party voluntarily said, “We want to do this to save the money,” and then entered into the restrictions for both sides with respect to their review. I think, given the uncertainty and the fact that you can’t give an absolute assurance with regard to waiver, it would be a mistake to make this a mandatory event, and I think it would also be a mistake to have it out there in the Rules in such a way that a judge feels that they could put a lot of pressure on the party to get the case to trial — “We need to do this regardless of your privilege.”

Now, I say that, and I realize a lot of jurisdictions have rocket dockets and there are a lot of pressures and sometimes you need to do creative things to get the case to trial.

Last thing on the “quick peek” approach. If you do this — and I don’t think the Rule would necessarily reflect it, and obviously I’m hearing a lot of things, that the Comments aren’t going to say anything except “we discussed something and we’re not going to tell you what it was” — you’ve got to have a very strict review process

whereby there are no notes taken, you completely guard as best you can against the bell, anyone ever being able to remember what the bell sounded like. And I think you really can do that.

And it's sad. We had a lot of associates and other people review this production on this "quick peek" approach. If I ask people who were there — I mean they couldn't talk to us about what they saw; all we got was a privilege log — we actually got a non-responsive log, if you can believe that, and we got the other documents, the responsive non-privileged documents. If I ask people now what they saw, they don't know. I mean that bell has long faded in the forest.

PROF. COOPER: We've got about four and a half minutes left before we must open this up for questions. But I would simply first observe that "quick peek" as described could be modified as "quick peek lite" — that is, you would clearly remove everything that was manifestly privileged or otherwise protectable before you entered the "quick peek" process, and of course log it. So it doesn't have to be all or nothing.

Another approach that is also described in the

materials is to suggest: well, one thing Rules can do —— and indeed it is often supposed that the soundest Rules are those that build on well-developed practice, bringing regularity and uniformity to things the courts have been doing for some time, trying out and working out —— is take a look at what courts are doing now about inadvertent privilege waiver, recognizing that this would likely test still further the line between a discovery-only Civil Rule and a broader Evidentiary Rule.

Behind our Tab B on Page 32 are factors 1 through 6 —— and of course you can, as with questions, frame a number of factors in any way: Is this one question; is it three? Is this six factors; is it seven or eight or nine?

Joseph, I think you've had some feelings about the value of multi-factor balancing tests for waiver, here or anywhere else. What about this one?

MR. SAVERI: Well, as a general matter, I think that the language that is set forth here could work well in combination with these kind of "quick peek" proposals, particularly with respect to electronic discovery, to get these cases moving.

Significant to me anyway is there appears to be some kind of diligence requirement written into the list of

factors. E-2 says “the efforts the party made to avoid disclosure of the privileged materials.” So I think this formulation does have the advantage of using concepts and ideas and facts that lawyers are familiar with.

PROF. CAPRA: I would like to respond to that. A seven- or eight-factor test in a Rule makes no sense to me. Why would you have a Rule like that?

For one thing, most courts in the United States have such a rule, but some are five-factor tests, some are eight-factor tests, some are seven-factor tests. So you are going to change, I guess, the law in all of those jurisdictions except for the one that you codify, I guess, even if you do that.

Secondly, whenever you add the “interest of justice,” you might as well just forget about any kind of balancing test at all. If you’ve read any of these cases, it was totally not diligent, it was a lot of information, the person was an innocent bystander, but the interest of justice required it to be returned. All factors point against return, but the interest of justice —— okay, you know.

So how do you write it? Writing a Rule is not going to regulate courts in this way. They’ve got their own

multi-factor balancing tests as they exist. It just doesn't seem to me to be appropriate for rule-making.

PROF. COOPER: Joseph?

MR. SAVERI: I guess the question is whether you set forth the factors or you just allow as a general matter that there will be these kinds of protections for inadvertent production. I think you get to the same place.

I think in any event judges can handle this and I think it would be — I mean it has a lot of benefits for the system. I don't care if it's a five-factor test or an eight-factor test or a two-factor test. I think there should be some test, and I think there should be some Rule that permits it. I think everybody would benefit from it.

MR. REDGRAVE: I would just add on that obviously Rule 26(b)(2)(i), (ii), (iii) sets forth a three-factor test, but under 26(c) you set forth a number of other factors for protective orders. I don't think the fact that there may be a test that you set forth that has different factors should be a deciding factor on whether or not this is a good idea or a bad idea. If it is determined that it is a good idea for uniformity, it falls within the Rules Enabling Act, I'd go ahead and see if you can come up with a factors test that could help all the courts.

PROF. COOPER: Okay. We are now where we must hold it open for questions, comments, instructions. We've got hands everywhere. The first one I saw was here.

QUESTION [Paul Alan Levy, Esq., Public Citizen Litigation Group]: Paul Levy from Public Citizen Litigation Group.

This relates partly to the waiver issue, but I want to raise related questions about two forces that haven't really been discussed here and throughout the conference. One is the market and the other is federalism.

Federalism was briefly touched on by Jonathan as a reason not to use the "quick peek" rule, but I don't understand why the concern about what state judges will do in disregarding whatever the Federal Rules say doesn't also apply to all the other Federal Rule solutions that are being proposed with respect to inadvertent waiver.

The second question relates to the market. It seems to me that if businesses demand software that calls for embedded data — for example, there is one major word processing program that has taken the world by storm in part because it embeds the data and leaves it available for future review. If businesses find this embedded data useful, why shouldn't it also be available for discovery,

and why shouldn't it have to be examined for privilege purposes?

MR. REDGRAVE: I'll address it on the federalism point. I would recognize federalism and the issues involved there as more of a fact and a reality, something to be factored into the decision-making for a Rule change, and then it's a reality for what corporations deal with, or any party deals with, realizing there are going to be other jurisdictions that have different rules and laws. That is just a factor to say how useful will this test be in untying the knot. Will it really advance the ball for getting people to do things, or are they just going to be so paralyzed by concerns about the lowest common denominator that it will just happen?

And on embedded data, I think you've seen a lot of discussion in the other panels. There are a number of opinions I could point to out there where the judges are saying, "You know, if the company can get to it, I don't care what you call it, it's data. I mean, 'documents' under Rule 34 is so broad you should be doing that, and to the extent you're producing it you should be reviewing that for privilege too or else you're at your own peril."

MS. BIRNBAUM: I think the question with embedded

data is not necessarily that someone would not be entitled to get it or that it had to be reviewed for privilege. The real question is: in the first instance do you do that and increase the cost, increase the expense, and increase the time? Or do you do it by just giving them a picture or whatever else, and then if somebody thinks there are some documents that are important and they want to know the embedded data, that would cut the amount to a very small amount.

We know in these cases with thousands and hundreds of thousands of pages in the end it comes down to only a few documents that are really important. Those documents you can request further information on.

I think the question is not whether embedded data is discoverable, it’s a question of at what point in time it should be discoverable.

MR. SAVERI: The challenge is that — I mean I think we all agree that with the advent of electronic media there is a multiplication of the information. The question is: how do we deal with that in terms of discovery?

The privilege review is not a technological device. It is putting real people, who tend to be fresh out of law school, in rooms for months to deal with this

multiplication of information. I think we are trying to jump past that and come up with a solution to it. This kind of "quick peek" and inadvertent waiver analysis is a kind of categorical response to that, and I think it is something to be considered.

PROF. COOPER: We've got more volunteers than I usually get in an 8:00 o'clock class.

QUESTION [David K. Isom, Esq., David K. Isom Law Offices]: I'm David Isom from Salt Lake City.

I would like to comment about the Texas Rule. I've spent most of my last ten years doing a Texas case that involved 25 million documents and various waves of documents. Before the Rule came into effect, there was a lot of uncertainty for all the reasons we've talked about, and even within the jurisdiction of Texas there were various opinions in the Court of Appeals and one Supreme Court opinion that left us with a lot of uncertainty about waiver and privilege and that sort of thing. When the Rule became effective, it clarified everything for us.

I really liked how it worked. It meant that in one case we just thought we had waived the privilege. We had had some documents around and hadn't asserted what was required under the Rule once it became effective. It worked

for us by clarifying where we were and it made it so that both parties either produced or didn't, but at least we knew where we were. So I thought it was a wonderful thing.

PROF. COOPER: Dan?

QUESTION [Daniel Regard, Esq., FTI Consulting, Inc.]: This is Dan Regard with FTI Consulting.

I have two points to make. The first is on the issue of embedded data and the obligation to review it and produce it because you have taken advantage of the technology. There I would assert that every one of the companies that we work with actually make a conscientious decision to choose those products. Because of the monopolization of the software market right now by Microsoft, there is no choice, it gets created.

Point number two, in 1662 Boyle set forth a law about the pressure of gas, and I think that is very pertinent right now. We have a chamber, a time chamber, for discovery of very limited scope. That chamber has not gotten any larger, but the volume of pressure inside of that chamber has increased exponentially. The sheer volumes do not allow people the time necessary to review these documents. You need a pressure release valve, and that is what inadvertent waiver gives us.

There is no time constraint on the amount of time that you have to review documents once you have received them, but there is time constraint on the amount of time you have to review them before you produce them. It's unfair, it's unbalanced, and that pressure release valve is necessary.

PROF. COOPER: Thank you for not addressing Boyle's Law for the professorate.

We've got Socha over here, and I think Susman has a head start on the line for the next one after that. Mr. Socha?

QUESTION [George J. Socha, Jr., Esq., Socha Consulting]: I have two quick comments.

One, I think with the volume of electronic materials that we are potentially looking at, we ought to take it as a given that when we get into the review and production of electronic materials we will produce privileged materials, no matter how hard we try not to.

Second, there are at least some rare occasions where there are potential technological solutions to technological problems. Metadata is one of those areas that does offer some opportunity as well as some challenge.

Most of the leading electronic discovery

processing vendors offer tools that allow searching of metadata. If we can get to a point where we view use of those tools as sufficiently reliable — and step back and think what it's like to review the paper materials: after a few hours, your eyes start to just roll back in your head — these technological solutions may actually help us move more efficiently through the materials.

PROF. COOPER: Mr. Susman?

QUESTION [Stephen D. Susman, Esq., Susman Godfrey]: My question to Jonathan is whether — you said the "quick peek" thing should be voluntary. But don't you get more protection if the court makes you do it or if a Rule requires you to do it? Nothing is ever perfect in the real world and you're always balancing risk versus expense of eliminating risk. But aren't you better off if a court orders you do this "quick peek" thing?

MR. REDGRAVE: Yes. I'll clarify. If you read the Sedona thing, which is a much longer explanation of it, I say "voluntary" because I don't want courts to say "you must do it this way," but I want the parties to say, "Okay, I'm willing to submit to the court order." That's basically what it is. The court orders you to do it, but you've gone into that knowing the risk, the client knows the risk, and

so you're willing to have the court order it, and therefore when you go to the other jurisdictions the court has ordered you to do this for the expediency of the case, etc., etc. So in that way it is a compelled production.

But at the same time, I would not want to see a Rule that just says, "Okay, you can do it the normal way or the court can just order you, regardless of what you want to do, to do it this other way because you can't have that complete protection." So that's my longer answer.

MS. BIRNBAUM: The proposed Rule has two things in brackets. One is "on stipulation" and "on order of the court." I think what Jonathan and I are suggesting is that it should be both. It should first be agreed to by the parties but then ordered by the court, so that you get that extra protection of a court order, and maybe a court that will enjoin some other parties later on if they try to take advantage of it.

One other thing. In this "quick peek" look, you have not handed anything over to the other side. I mean the side has seen it in a computer or otherwise, but there has been no inadvertent production of it in that sense. I think that makes it a little different than actually handing it over. I mean technically they have seen it, but it has not

been handed over. So that is another way of looking at it.

PROF. COOPER: Allen Black?

QUESTION [Allen D. Black, Esq., Fine, Kaplan & Black]: Allen Black from Pennsylvania.

A couple of observations. One is that these very real problems of expensive document review and so forth that we've been talking about are really the province of the cases with the mega information productions, which are, I think the statistics show, a very, very small minority of the cases in the federal courts.

So there is some question in my mind whether there ought to be an attempt to make a Rule that is applicable to every case in every federal court to deal with the nightmares that occur in 5 percent of the cases or something like that. Isn't there maybe some other way to deal with that nightmare rather than a Rule running through all the federal courts?

The second thought is that from the discussion here and from what I've heard in my practice, the real fear, the real driver here, is the draconian subject matter waiver concern, that somebody somewhere, some judge in a state court in Alabama, some judge somewhere, is going to say that, "No matter what this Federal Rule said" —— even if we

put one through — "no matter what the parties stipulated, no matter what the judge ordered, I'm not going to follow that and I'm not obligated to follow it."

So it seems to me that the only effective way to deal with that concern is to just bite the bullet, step up to the plate, and get Congress to pass a statute that says "subject matter waiver ain't the law anymore." And if there's a reason that that can't happen, that's because politically it ain't what ought to happen. I think you have to look at what the real problem is.

Thirdly — this is way off the topic, but since Dan is here — it seems to me that one of the real, real problems with electronic discovery is: how do we figure out how to deal with authenticity issues when it comes time to introduce this stuff at trial? Particularly if it has been produced in native format in discovery, there are the whole issues of inadvertent alterations.

For example — I mean I know nothing about computers, but in our system — and I have complained about it incessantly — when I bring something up, a letter up, from the server to use that letter as a model for the next one, it changes the date on it to the present date. So a

letter I wrote two years ago, I bring it up, and if I decide "oh no, that's the wrong one" and I put it back, it goes back with today's date on it. And also, of course, it makes it very easy to fiddle with stuff, intentional spoliation.

So I think that the evidence folks ought to really look at those issues.

PROF. COOPER: I'm told Jonathan wants to respond, and I know that is going to run out our clock. There is going to be no break. What that means is keep those cards and letters coming. You've got peter_mccabe@ao.uscourts.gov. Address all of those things. We really do want to hear them on all of these topics.

Now, Mr. Redgrave, you've got a final word.

MR. REDGRAVE: A couple quick points. I love having the final word. Thank you very much. It doesn't usually happen.

First, on the small case issue, I have seen a number of reporter cases where it really was a small potatoes case when you think about the money, or even the number of documents, but it involved inadvertent protection or an inadvertent waiver issue and the multi-factor test. I think we should have a Rule that applies to all of it, so that whether it's the little person, the ma-and-pa case, or

IBM v. Microsoft, whatever, the same Rules apply, and we could codify that if it fits and we have enough of a justification for it.

With respect to that point, though —— it's something I noted yesterday in comments by various people —— we need to make sure that any of these changes don't suddenly make those small cases, the ma-and-pa cases, a lot more expensive for those people who are trying to get into court with their $50,000 or $75,000 or $100,000 disputes by suddenly saying they have to go through all the embedded data, all the metadata.

I think this goes back to the importance of that Rule 26 conference and what we're talking about there. I don't think Congress will ever step in, but I don't think that means that a procedural change is something that should be just disregarded because Congress won't ever step up to the plate on this subject matter waiver issue.

I think there are things that we can do short of that that can make a positive difference for a better, more uniform practice throughout the system, and that's what we should be about.

PROF. COOPER: I'm going to beat you to it. Thank all of the panelists for their wonderful ——

PROF. CAPRA: Good job.

PANEL SEVEN: RULE-MAKING AND E-DISCOVERY — IS THERE A NEED TO AMEND THE CIVIL RULES?

Moderator
Professor Myles V. Lynk
Arizona University College of Law
Civil Rules Committee

Panelists
Allen D. Black, Esq.
Fine, Kaplan and Black, R.P.C.

Carol E. Heckman, Esq.
Harter, Secrest & Emery, LLP

Carol Hansen Posegate, Esq.
Posegate & Denes, P.C.

H. Thomas Wells, Jr., Esq.
Maynard, Cooper & Gale, P.C.

PROF. LYNK: Let's get started. I know that some people are still on a break, but I think if we do our initial introductions it may expedite the process.

Steve Morrison came up on the stage and said, "We now see the difference between a judge saying there is no break and a law professor saying there is no break."

[Laughter].

This panel will begin to sort of institutionalize the discussion that I know we've all been having individually and generically: really, is there a need to amend the Civil Rules? In light of the previous discussions we've heard, is rule-making the appropriate device to

address these issues?

I want to do a brief introduction on that topic before I go to our panelists, but first I want to introduce the panelists to you. My introductions will be brief, although they will be just a little bit longer than the previous introductions.

To my far left, Allen Black, Founding Partner of Fine, Kaplan and Black, a commercial litigating firm in Philadelphia. He represents both plaintiffs and defendants in all sorts of commercial and class action litigations. He is a member of the Council of the American Law Institute and he has participated in many Rules Committee conferences dealing with class actions and discovery.

To my immediate left, Carol Heckman is a Litigation Partner in the law firm of Harter, Secrest & Emery, of Buffalo, New York. Prior to joining the firm she served for eight years as a U.S. Magistrate Judge in the Western District of New York, and she has written and spoken widely on electronic discovery and other subjects.

To my immediate right, Carol Hansen Posegate is a Founding Partner of Posegate & Denes, where she practices in the area of civil litigation, employment law, and college and university law. Carol served six years on the Civil

Rules Advisory Committee from 1991 to 1997 and she is currently working on the Practitioners' Comments for the Third Edition of West's Federal Rules of Civil Procedure.

To my far right, H. Thomas Wells, a founding shareholder in the Birmingham, Alabama, office of Maynard, Cooper & Gale. He is a member of the firm's litigation, environmental and toxic tort, and product liability practice. He is one of five Alabama attorneys listed in the *International Who's Who of Product Liability Defense Lawyers.* He also served for five years as the ABA Litigation Section's Liaison to the Advisory Committee on Civil Rules, but I know Tommy best as "Mr. Chairman." He currently serves as Chairman of the ABA House of Delegates, the second-highest office in the American Bar Association.

When discussing whether or not amending the Rules is necessary, I'd like to frame that discussion a little differently. I would like to frame it as: would amending the Civil Rules be helpful?

I say that because, depending on how one defines "necessary," you can always say that something isn't necessary. The litigation process will go forward, the federal common law will develop in this area, parties will propose private solutions in individual cases, and that will

be the law.

The question is: is that the best way for the law to develop in this area? Would it be helpful to have a national standard, even if that national standard was a national baseline, if you will, or default in certain areas, subject to modification by the parties with the approval of the court in different cases?

So would amending the Rules be helpful? At present, we have no national uniformity in this emerging area of electronic discovery, what I like to say is the production of data or information that is stored electronically.

We do have a number of judicial opinions, primarily from the U.S. District Court and U.S. Magistrate Judges. Many of those opinions, some of which have been discussed previously, are very learned and scholarly, but while they may have persuasive force, they are not precedent for other district judges and they certainly do not have the weight of precedence of a circuit court or Supreme Court opinion in this area.

At the same time, we have seen that local district courts, at least four U.S. district courts, have promulgated local rules in this area. It is likely that other U.S.

district courts will promulgate local rules in this area. Do we want local rules in the absence of a uniform national rule to which those local rules must conform? As we have seen under the Federal Civil Rules, local rules develop where you have Civil Rules to fill in the gaps or to apply a national standard to a local situation. Is the alternative really preferable, where we have no national standard but local rules developing?

On the other hand, at least two arguments, I think, have been made throughout the conference with respect to the need, if you will, for national rule-making. One is that it's just not necessary, and so we're getting back to the necessary/helpful dichotomy. But the theory is if these issues only arise in a few cases, the mega-electronic document cases, 5 percent, then it is not necessary because to the extent those cases arise before a district judge or magistrate judge, it will be unusual and the unusual should be dealt with ad hoc, either the common law development of judicial opinions or by local rules.

The other argument that we have heard, I think, is that technological change in this area is so rapid that we must be careful to craft Rules, if we craft them at all, that are flexible enough to accommodate technological

change, that do not focus so narrowly on a specific technology that they become out of date.

My favorite example of that in the current Rules is in Rule 34(a), Definition of Documents, the reference to "phono records." I talk to my students about that and I ask them how may of them know what a phono record is, and each year it gets fewer and fewer. I know that the day when I am the only one in the room who does know what it means that will be the day I should retire.

[Laughter.]

MR. BLACK: What are you talking about, Myles?

PROF. LYNK: What do you mean me, Kimosabe?

[Laughter.]

With that in mind, I'd like to begin by asking Allen Black from Philadelphia — by the way, what we're going to do is we are going to ask each one of the panelists to comment on specific proposals or specific Rules that have been either proposed in our memo or as they've been discussed; after the panelist to whom I will pose the question responds, the other panelists will have an opportunity comment as well; and then after we complete our review, I will open it up to the floor and we will welcome your participation.

We are going to begin with the question of whether or not we should codify in the Rules a requirement that counsel discuss these matters in their own pretrial 26(f) conference, in the conference before the court at 16(b), and in the Form 35 discovery plan they submit. These items are discussed at pages 9-to-13 of the Memorandum at Tab B.

Allen, you've heard the arguments pro and con. What do you think?

MR. BLACK: I think it's almost no-brainer that yes, that should be a required topic of discussion.

I find myself in an unusual position, because usually I come to these conferences and say, "No, no, no, don't fix it, it ain't broke." But I come here thinking, and after the discussion here I continue to think, that we absolutely must deal with electronic information and other technologically stored information, if for no other reason than it's just embarrassing to have the premier set of Rules of Civil Procedure in the United States that don't even seem to acknowledge that computers exist at a point in time when some huge proportion of information in the world is stored on computers and dealt with by computers. By the time a Rule is enacted, and shortly thereafter, we are going to get to the point where almost everything is going to be

electronic.

My local township where I live out in the country in Bucks County, Pennsylvania, just went paperless. It's astounding. So we've got to deal with it.

The particular area of putting it on the checklist of "must discuss" items is a no-brainer to me because I don't see how it can possibly do any harm. And it fulfills, or would begin to fulfill, it seems to me one of the very basic, but often forgotten in these high-powered conferences, functions of the Federal Rules, which is to help practitioners who are perhaps doing their very first case in federal court and are unfamiliar with these things to be alerted to what the important things are, what the important issues are. People who are not from the biggest law firms in the country dealing with the multibillion-dollar cases every day, when they get a client in the door who has a federal case, they pick up the Federal Rules and that's where they start to look.

So to me it seems that the Committee should keep that in mind, centrally in mind, in thinking about what to do about electronic discovery, that you need to put something in the definition of "documents" or "discoverable material" that says it includes electronically or otherwise

technologically stored material. And you need to deal with some of these basics.

With respect to the argument that things are moving so fast that we can't possibly keep up with them, therefore we should do nothing, I don't buy that. I think we have to do something. I think what that argument cautions, and cautions properly, is that we should not attempt to do anything too specific.

I had lunch yesterday with Harris Hartz and Dan Regard. Dan is a consultant in this area. He told me, "You know, in five years there aren't going to be backup tapes, so you better not phrase a Rule in terms of backup tapes." He'll tell you about it. I won't go into it now because I'll get it wrong and it will take too long.

But when we do move into the 20th century with the Rules, or maybe even the 21st if we're lucky, we've got to be careful to do it in a way that's general enough that doesn't get into those kinds of phonograph record problems.

PROF. LYNK: Any other comments?

MR. WELLS: Let me just add, I come to this with the idea that the Rules Committee should heed the physicians' first rule, which is "do no harm." I don't see any harm in adding this to Rule 16, Rule 26. I think it in

fact would be useful to a practitioner in an appropriate case to think about what are you going to do about electronic discovery and include it in the report. I think if you go beyond that you may be treading into the area where you may do some harm.

PROF. LYNK: Carol?

MS. POSEGATE: I might just add a word of caution. I perhaps would be a little slower to move in the direction of incorporating language which specifically addressed electronic data simply because I think we need to always view the Rules in terms of long-term existence and service to the practicing bar.

I suspect many of us in this room completed our law school training at a time when computers were not even something we thought about, much less cell phones and everything else that has changed our life. Our children, on the other hand, can’t imagine a world without these things, and everything that they do is computer-related. So many of us are probably struggling with a lot of definitional issues that are not going to be an issue down the line.

So while I would not be averse necessarily to consideration, I do think we have to think in terms of the longer timeframe.

PROF. LYNK: Let me just follow up that comment with sort of a Devil's Advocate question for the panel. How do you respond to the argument that by adding items to the checklist you trigger lawyers' thoughts — "Well, you know, I hadn't thought about asking for their computer tapes, ah, but now this is something I should focus on?"

MR. BLACK: Good thing. It's a good thing.

MS. HECKMAN: I also think the lawyers really have thought about it, and it is helpful for the court. I mean I can say as a former Magistrate Judge the more early planning you do on a case, the better you can administer that case. The more subjects you have to cover, the more you do cover in your 16(b) conference and in your pretrial orders.

Getting that out on the table and discussing it — I mean if it is a surprise to someone, it shouldn't be. They should be thinking about it. Just as you want early discussion of settlement, an early discussion of some of your unique discovery problems is completely appropriate. If you put it in a Rule, it certainly doesn't do any harm.

If it later turns out that technology has overtaken the utility of such a Rule, you can take it out. But right now it's an issue.

PROF. LYNK: Okay.

Let me stay with Carol Heckman for our next question. We saw significant discussion about the efficacy of defining electronic documents in Rule 34(a). First of all, can you do it in a way again that is helpful and useful, and then should you do it?

Related to that is the Rule 33 interrogatory requests. How does that interact with the definition in Rule 33?

These are items that are discussed at pages 14 to 15 and 16 to 20 in the Memo, and then 21 to 22.

Are we treading into deep water if we begin to try to define what we mean by e-documents or electronic discovery, or is that a necessary predicate to anything else we do in this area?

MS. HECKMAN: Where I come down on that is if all you are doing is adding to a definition, I don't think I would bother. On the other hand, if you are altering or substantially changing a Rule otherwise with a substantive change, such as a safe harbor provision, then obviously you do need to consider whether you need to define it in order to make your substantive alteration make sense.

I am not too excited about just changing the definition and making no other changes. I think that in

practice attorneys routinely understand that evidence that is introduced in the courtroom, whether it is electronic or hard copy, still has to be subject to disclosure. I can't imagine attempting to offer into evidence an email at trial and the other side objecting on the basis that it has not been disclosed, and me arguing to the judge, "Well, but it's not a document." It would never fly.

And I also know routinely in all discovery demands that I issue and I receive we define "documents" to include e-data. So I don't think there is any lack of uniformity, I don't think there is any lack of predictability.

When I think about a Rule change, I think: Well, is it helpful to facilitate litigation? Is it necessary to provide predictability and uniformity across different districts? And does it provide judges with the flexibility they need in order to exercise their discretion and reach a just result?

I don't think there is anything in the definitions alone that really requires any of that, unless you're changing some other aspect of the Rules.

PROF. LYNK: Okay. What about ——

MR. BLACK: Myles, could I just jump in on that?

PROF. LYNK: I'm sorry, Al.

MR. BLACK: I would have thought so too, until I heard that shocking statistic yesterday that 65 percent of the people surveyed, companies surveyed, said that when they got hit with a lawsuit and sent out a document hold instruction they did not include electronic information in that. That was shocking to me. It tells me that Rule 34 has to say "electronic information." It's just got to say it, so that when the outside counsel looks at it and the general counsel looks at it, that 65 percent goes down to 3 percent, which is where it ought to be — 2 percent.

PROF. LYNK: One of the issues the Committee has been wrestling with is the extent to which, for counsel and for the courts, the evolution of document to data is taking place. That is to say, the Rules focus on the discovery of documents because they focus on discovering those tangible items from which discoverable information can be ascertained, whether it is a photograph or a written memorandum or something like that.

In an electronic era, we are focusing on the actual information itself because it can exist and then you download it onto something that's tangible, but it is the information itself that is what the focus is.

Should the Rule reflect that by reflecting a

change, for example, from “document” to “data”? Would that be helpful or is that moving too far ahead of where practice is today? Carol?

MS. POSEGATE: I think you have to be concerned with the mixture of cases that typically one finds in a federal district court’s docket calendar.

I think comments have been made previously here, and I would like to reiterate, that the cases that have consumed much of our discussion are these very large cases involving hundreds of thousands of documents, if not millions of documents. And indeed those cases get a great deal of attention, but the majority of the cases that are on a federal docket tend not to be of that sort, particularly in areas such as the one where I practice, which is the Central District of Illinois. At any given time there may be two or three very significant cases and then there is a whole quantity of cases that are more routine in nature.

I think, if I am not mistaken, that the number two variety of cases found in the federal docket on the civil side are the employment law cases, many of which involve a single plaintiff complaining of some wrong in the workplace, and those cases do not involve typically the kind of volume that we are discussing here. So we have to be mindful of

that when we talk about revising a Rule.

PROF. LYNK: Tom, in the discussion yesterday one of the panels focused on the burdens of production and the fact that in a world of e-discovery, in a world where you are looking not just for, say, active data, which is the data that is in use, but also backup tapes and material which has been stored, that the burden of production on the producing party can be significant, a burden in two ways: (1) the cost of accessing the data, although our technological consultants tell us that that cost of production may actually go down; but (2) the cost of review, reviewing for privilege and relevance millions of documents and millions of information.

Can the Rules properly draw the balance between the burden to the producing party and the value to the requesting party? Do the Rules already properly draw that balance with respect to discovery generally? Or should we have a Rule that in addition to those general requirements focused on the specific issues involved in electronic discovery?

MR. WELLS: Well, Myles, you've done a pretty good job, like Ed Cooper, of asking about four questions in one.

In terms of the privilege review, let me start

there. That reminds me, I was on a Delta flight the other day, and the flight attendant made the usual announcement when we landed, “Be careful when you open the overhead binds, items may have shifted during flight,” and then he added, “We all know shift happens.”

[Laughter.]

You know, that is sort of how I view the inadvertent privilege idea, shift happens, and it is going to happen more with more documents.

However, in looking at the privilege issue — you know, I thought I was here for a Civil Rules Advisory Committee and it turned out I was here for an Evidence Rules Advisory Committee — I do not think that you can deal with inadvertent privilege issues in the Civil Rules. I think that is a broader question.

I think a better way to do it if you are going to do it is to put it in a case management order, to do it up front, to do it with a court order that says, “If you want to do a ‘quick peek’” — and, quite frankly, I think the “quick peek” gives something in big, huge document case to both sides, because, like Steve Susman said, when you get down to it, there are only ten or twelve documents that ever matter in a case, no matter how many documents are produced

— unless you are just dealing with statistics, and then you just do a data compilation and then it's one document that shows all the data compilation.

So I think it is better to deal with that type of issue in an initial case management order. It gives the plaintiff the idea, "Look, I get a quick look at the documents." I know when I'm a plaintiff that I don't want to go through 100,000 pages or one CD-ROM having to look at every page. What I want to find are the ten or twelve documents and then dig in, drill down on those documents.

So I think the case management order is a better place for doing that, and that is probably why I come down more on the side of dealing with electronic discovery primarily in the areas of Rule 16(b) and Rule 26(f), making the parties report to the court on if you are going to have electronic discovery, how you are going to do it, what are going to be the parameters.

The issue of the burden, and the whole backup tape idea, it is a real issue. It is a real burden. It is hard to go tell a client that, "You've been sued in Mississippi and they are asking for all of the documents from every insurance agent of whatever insurance company all across the United States. You have to send out an email telling them

to basically freeze their computers." But that is going to happen.

You know, we talked about the Exxon Mobil situation. He has 400 cases a month. I am not sure you are ever going to be able to deal with a Rule that is going to relieve the burden on somebody who has 400 cases a month from that standpoint.

The inaccessible materials — you know, what is inaccessible today is probably going to be accessible tomorrow; if not tomorrow, probably next week. I think it is short-sighted to try to write a Rule with backup tapes in mind. I am afraid if you do, you will look like the Rules do now dealing with phono records. You know, in ten years you ask somebody what a backup tape is, they are going to look at you like you are from Mars or something.

So I think it is going to be very difficult to draft anything that really gives relief, that is in fact a safe harbor in terms of what you have to do to produce, other than dealing with it on a case-by-case basis in a case management order.

PROF. LYNK: Okay. And so I hear you say that the current Rules, in Rule 37 and in Rule 26, already provide the courts with the tools and the flexibility to deal with

the balancing that must take place when the producing party alleges that the burden of production is far greater than the value of production.

MR. WELLS: I think the courts have the authority now to deal with it. I have looked at the various formulations, and I am not sure that the formulations I have seen do a whole lot in terms of relieving the burden or really create much in the way of a safe harbor.

PROF. LYNK: Okay.

MR. BLACK: Myles, I think that the Committee can draft conceptually and avoid the backup tapes/phonograph records kinds of issues. The concept, it seems to me, is that information that is reasonably available and recoverable ought to be made available routinely. Information that exists but is not recoverable or available within reasonable effort and expense ought to be subject to some other Rule, and that might be good cause, it might be cost-shifting, it might be a combination of that; it might be some sort of marginal utility analysis.

But it seems to me the concept that has come out of this weekend's discussion, and otherwise, is pretty clear: that information —— whatever it is, metadata, embedded data —— whatever is reasonably available within

reasonable cost and effort, ought to be fair game and turned over at the expense of the producing party; and whatever is not reasonably available with reasonable cost and effort —— and that leaves the flexibility there, as technology changes and everything else, to decide what is “reasonable” and what is “reasonable effort.”

I do agree that 26(b)(2) provides good guidance on the cost/benefit analysis. I don’t think that needs to be specified. But I think there probably does need to be something in there about “reasonably accessible or available data.”

Theoretically, you have that with paper discovery too. I wrote a draft, I threw it in my trash bucket, the janitor came around and took it out and gave it to the BFI people, who took it to the landfill, where it was logged in, so you can figure out where in that landfill, at least within some general parameters, that draft is.

We have not gotten to that degree of craziness with paper discovery because it is so much more difficult, but I do think you need to deal with that “accessible with reasonable effort” kind of issue.

PROF. LYNK: But then you would craft sort of a “reasonably available” standard for electronic discovery or

electronic data that is different from the standard for —— for example, would this place the burden on the plaintiff of having to show that the data is reasonably available, or the burden on the defendant or the producing party to show that it is not reasonably available and therefore should not be subject to ——

MR. BLACK: Sure, I would think it would have to be the latter. They are the ones who have the information. As technology goes along —— you know, for every ten-year period everybody is going to know that backup tapes are tough and optical disks are not and so forth, and ten years from now it is going to be something else. But people will know after a few cases what is and what is not easy.

PROF. LYNK: Okay.

Carol, Tommy talked a little bit about safe harbors, and we talked about whether we should craft, at pages 34 to 40 of our Memorandum, a new Rule, Rule 34.1, or whether we should amend Rule 37, to explicitly provide for protection for producing parties, parties that have a lot of electronic data that may be subject to discovery, such that they can continue to avail themselves of good business practices, which may include some routine document destruction, without fear that that could subject them to

sanctions in civil litigation.

Again, do you think that from what we've heard there is a need for such a crafting of a Rule in this area, which would be available for electronic data and not necessarily available for print data or other forms of documents, or do you think that this is perhaps an area where technological change may overtake any particular rule-making?

MS. POSEGATE: I am not presently persuaded that Rule 37 needs to be amended to deal specifically with electronic discovery. I would state at the outset that as we talk about electronic data it is important to remember that however information is recorded or retained, it is still information, and the discovery process is about the gathering of information.

There is nothing in the language of Rule 37 which would suggest that the authority of the court is any less to deal with issues of electronic discovery than it is any other forms of discovery. And I frankly think that the courts have full discretion at this point in time to deal with whatever issues might present themselves for considerations of sanctions with respect to electronic discovery.

I've gathered from the discussions of the last two days that there would be in all probability a consensus here that if there were deliberate conduct on the part of a plaintiff or a defendant in the destruction of relevant information or other alteration of that information, that under most circumstances a judge should or would consider appropriate sanctions for that conduct. There might be certain circumstances where, because of other factors, a judge would decide that that was not an appropriate course of action. But the discretion should lie with the judge.

I listened as we discussed certain cases that were put up on the board yesterday, about whether or not courts should intervene or impose sanctions. The questions that came immediately from the audience were: "Well, we need to have more information. What about this . . . what about this . . . what about this?"

I think probably sanctions, as much as any area addressed by Discovery Rules, require that there be that exercise of discretion by a court, particularly if you get to circumstances where you have something that falls short of intentional or conscious effort to either destroy or otherwise alter information. I think then it is particularly important that the court have the authority,

unrestricted, to make the proper inquiries to determine whether or not there is an appropriate basis to sanction conduct, and, if so, what that sanction should be.

So at this point in time I would suggest that Rule 37 not be amended.

PROF. LYNK: Okay.

MS. HECKMAN: I'd like to give a little counterpoint to that. It's interesting how my perspective on this has changed after leaving the bench and going back to practice.

As a court, you get parties in with disputes, and the dust is kind of settled and the issues are clear, and they come in. The court wants flexibility. The judge wants to have discretion to call the shots — "What's the problem? Let's get specific. Okay, what's the cost involved? What is this going to take? Let's be pragmatic and let's get a quick decision."

But when counseling corporations, which is what I do now, you've got to rewind all that and think about what is going on two, three, four, five years before that, where you are sitting down with a general counsel of a company and there is definitely a duty to preserve that has arisen. It can be a government investigation, it can be just a claim,

it can be a lawsuit.

A lot of these companies, as we've heard, are subject to ongoing litigation. I have one client who is regularly sued for some of their medical products. They manufacture a laser that is used in eye surgery.

MR. BLACK: Isn't that nice that they're regularly sued?

MS. HECKMAN: So we are sitting, having the conversation of: "Okay, what do we have to preserve? And what if we make a mistake in the way that we decided what to preserve and what not to preserve? Can we do this by employee? Can we do this by department? Is it enough to just print out the email or do we have to actually save the electronic copies of the email? Do we have to save the backup tapes?"

You get into all those discussions and you try to make reasonable decisions based on what you believe the scope of this litigation is likely to be. But we all know when we get into court and we get right up to trial —— and this especially happens in patent cases, but it happens in a lot of cases —— the issues sharpen and they morph and they change, and you get to trial or you get in front of a judge after a suit is filed and you're really looking at kind of a

different landscape —— and meanwhile, you have made decisions two or three or four years before that are based on a different set of assumptions.

Then you come in and you look at the law on spoliation. There are decisions all over the place. There is unintentional conduct that is on occasion sanctioned. There are mistakes that have happened that have been sanctioned. It is not uniformly true that only intentional conduct results in spoliation awards.

I think that is a real problem. I really think the Rules ought to take a look at that because I think that litigants are entitled to some predictability, they're entitled to some uniformity. Lawyers have to be able to advise their clients.

And some kind of rule of reason would not take flexibility away from the judges. If there was a Rule that said, "If you acted reasonably in your decision as far as what records to retain, then you shall not be sanctioned or there shall not be a spoliation order against you, unless perhaps some other circumstances are present." Something like that it seems to me would really help litigants a lot.

And it is a problem, because it does create a lot of cost. What I see is companies taking the most

conservative possible approach to preserving documents. And then you've got the general counsel who is having this discussion with the CFO, who is saying, "Come on, we've got to operate a business here"; and the general counsel is saying, "Yeah, but I'd really hate to see anything bad happen. We can't predict here what is going to happen."

I think if the cost of litigation goes up, in general people's access to the court goes down. I think that is a shame. I think that the courts should be available to resolve disputes at a reasonable cost.

The arguments that I have heard this last couple of days on this issue that go the other way are not convincing to me, frankly.

Someone suggested yesterday that the Rules would be misused by the attorneys. If that is the case, Rule 11 is already in the Rules. I think we have to assume attorneys and companies are not going to misuse the Rules.

People have suggested the case law is sufficient. I don't think in this area of spoliation that the case law is sufficient. It is very hit-and-miss; it is very factually driven; it is very hard to read it and come away with some real guidelines that you can discuss with your clients.

I don't think having it done in the local rules is an answer, because frequently these companies have litigation all over the country, and even beyond, so having a different rule perhaps in each district court does not really solve the problem.

The argument that we should take the long view and this problem will go away — I don't think it is going to go away. You can define it as it is retention of any kind of record, whether it is an electronic record or a hard-copy record. That is something that has been with us since we have had litigation

We have heard the argument don't limit judicial flexibility. My answer to that is if the standard were one of reasonableness, then you are not limiting judicial flexibility.

PROF LYNK: One of the interesting things to note is the context within which this rule-making discussion takes place. Many federal courts — I'm thinking of the District Court of the District of Columbia, the Division in Tucson of the U.S. District Court for Arizona, for example — are virtually paperless today, and they are receiving and filing documents. Many federal agencies define electronic communications, electronic data, in their definitions of

material that regulated parties need to file —— I'm thinking of the SEC. The National Archives and Records Administration has done a tremendous amount, as its statutory charge requires, in defining for the Executive Branch and the federal government electronic communications, electronic data.

This goes back to something Allen said. Is it anomalous for the government and for the courts in other guises to be addressing these issues whereas the Federal Rules do not currently provide guidance either to the courts or to parties with respect to these issues?

Whatever technological change there may be, I think it is clear that this is an area that is not going away. It may get more complicated, although I suspect in some ways it will get simpler. I think the question of backup tapes may in fact —— if that disappears, I think the access to information will be easier. The question under Rule 26, though, will always be: is this relevant and should it be produced because it is relevant?

Tommy, looking ahead, how do you see the environment within which the courts and civil litigants operate affecting the need or advisability of Civil Rule changes?

MR. WELLS: I think —— well, let me back up and maybe not quite answer that question, Myles, but speak to the issue of codifying, or attempt to codifying, in the Rules what I consider to be best practices. I think that is generally a bad idea, because what is a best practice today may not be a best practice next week or next year. And, given the timeframe for the Rules process, quite frankly, you cannot amend a best practice —— or a Rule, if you've got it in the Rule —— in time to keep it up-to-date.

I think a much better way to handle it is the way, for example, the Civil Discovery Guidelines that the ABA Litigation Section is putting together and amending. Those try to be a best practices guide. They can be amended relatively quickly. As you can see, they were adopted in 1999; they are probably going to be amended in August of 2004 yet again. And those are some guidelines on, for example, the duty of preservation —— what do you have to preserve; what is a best practice to tell your client they have to preserve?

I think Carol's idea of the court using reasonableness is a good one, but I think you don't need it in the Rule; you just need the court to look at things like

the Civil Discovery Guidelines, to say, “If you follow that, you are not going to be in a spoliation case later.”

The other thing I think in terms of spoliation —— we’ve talked a lot about it, but, quite frankly, in the electronic age somebody would be a lunatic to try to destroy evidence, because you can never get rid of the damn stuff. You know, I delete something from my computer and it is hanging out there in cyberspace somewhere, it is little bits and bytes in areas of my computer that I cannot find and I can never erase. The only way you could ever get rid of it is take the hard drive and put it in the dump, but then they are going to know where in the dump the hard drive is. And besides that, I’ve got it backed up on a Zip drive or a thumb drive. Or somebody hacked into my computer and has it downloaded on their computer somewhere else.

You know, the idea of ever destroying electronic data I think is ludicrous. I think it is there somewhere. You can almost always dig it out, you can mine it.

I think the bigger issue with electronic data is really not so much a civil discovery problem, it’s an evidentiary problem, because the data can be manipulated.

I mean you can do digital photos. It used to be the photograph was the best evidence. Well, now you look at

an altered digital photo —— you know, they could move my head over onto your body and, lo and behold, it looks great. Maybe that's not a bad idea.

[Laughter]

PROF. LYNK: You are asserting a fact not in evidence.

[Laughter.]

MR. WELLS: I think the electronic issues are more evidentiary issues long term than they are going to be discovery issues or spoliation issues.

PROF. LYNK: I know Dan Capra appreciates you saying that.

Carol, what do you think?

MS. POSEGATE: I would like to make a couple of different comments.

First, I would like to respond to the remarks that Carol Heckman made. I think she has made a strong case for the desirability of having guidance when one deals with particular clients, because the clients want to know: "How can we stay out of trouble; how can we do the right thing?"

But frankly, in order to get the kind of security that I think she is advocating, one would have to have a Rule that would be very specific, and I don't think that is

what these Civil Rules are about. I think we are dealing with a changing world, I think that we have issues that are unique to virtually every case of size that is out there, and I think it would be extremely difficult —— and perhaps even dangerous —— to try to get a Rule that would cover all of those circumstances, where a particular client could walk away and say, “Well, I don’t have anything to worry about because I have done A, B, C, D, and E.” I think that would be very difficult to do.

The second point that I would like to make would piggyback some remarks that Tommy Wells made earlier. He spoke in terms of the case management order or the discovery plan that is required by the federal courts. I think that that is an extremely helpful tool. It is the primary way by which parties do focus on issues at the outset, they define the course that discovery will take, and hopefully anticipate many of the concerns that we have raised over the two days of discussions here.

As an attorney, I very much appreciate a strong hand of the court. I appreciate the early attention that a court will give to a case in terms of dealing with discovery matters and moving the case along. I think that to the extent that we can use the available tools that are there

for each and every case, and dealing with it on an individual basis through the case management devices, that that is by far and away the preferable way to handle these matters.

PROF. LYNK: All right. I am gong to let Carol Heckman have the last word before we open it up for comments from the audience.

MS. HECKMAN: Just quickly responding to Carol's first point about it would be difficult to draft a Rule that would deal with the issue of spoliation without having it be too lengthy and perhaps obsolete, the draft that is in the materials on page 39 is not. Not that that would be the only way to go, but it is a simple provision: that there would not be sanctions for failure to produce unavailable electronically stored data unless the information was both requested during discovery and there was a finding that the party acted willfully or recklessly, as opposed to by mistake or accidentally or inadvertently.

PROF. LYNK: Okay. Thank you.

I see a number of hands already. At the top?

QUESTION [Hon. Jerry H. Smith, U.S. Circuit Judge, Fifth Circuit, Chair, Evidence Rules Committee]: Jerry Smith, Fifth Circuit Judge and Chair of the Evidence Rules

Committee.

I hope you were taking notes, taking a few.

This concept of “information” versus “documents” I think is something that needs to be carefully considered. One very common word that I haven’t heard mentioned here today —— maybe it was and I missed it —— is the word “website.” Now, I wonder what we do about websites. I mean those are obviously high-tech items that are commonly accessible, so we might think we don’t need to discover a website —— unless it is password-protected, anyone in the world can get to it.

But there are some interesting issues that involve changes on websites. I’m recalling the Janet Jackson controversy at the Super Bowl. Apparently the MTV website had had a prediction made “look for big things that are going to happen at the half-time show,” and suddenly that information disappeared either the night of or the day after the Super Bowl.

Suppose you have a pharmaceutical company that is making representations about a particular drug, and then the day it is sued that information quickly disappears from the website.

What kind of electronic footprints are there that

indicate changes on a website? Does the webmaster back in his office somewhere have an electronic record about that?

Is a website a document? Well, maybe not unless it is printed out. But a website is certainly information; any fourth grader can tell you that who does his social studies homework using the Web.

So it seems to me that if we broaden the concept to “information,” certainly websites need to be considered and changes in websites need to be considered as something that is discoverable. Are you going to put a freeze on a company’s website once it is sued? Are you going to require it to maintain records of daily changes that may occur on that website?

But the whole concept of information goes beyond that if we depart from the concept of what people normally think of as a “document” and move to the word “information.”

I see a banner up here for Fordham University School of Law. Is that a document? Well no, it is not a document; probably no one here would say it is a document. It might appear on a letterhead somewhere; that would be a document. And yet it definitely conveys information. It tells me the School was founded in 1841. I never knew that, so I learned something from that, so that’s information.

Now, if this were on a website, it would certainly be information. Maybe Fordham would be in a lawsuit sometime involving some land claim out in the Bronx and the question would be "when does Fordham claim that it was founded?" Suppose that Fordham suddenly changed that information on its banners and on its website. Would that be information that is discoverable?

In the age of the website, it just seems to me that that sort of concept of information needs to be carefully considered, and I guess argues in favor of some kind of change in the Rules that would include a broader concept of "information" rather than just "documents."

PROF. LYNK: Thank you, Judge.

MR. BLACK: Just to follow up on that for a second, one of the other issues about websites is the links between websites and other documents, and how far do you go? Do you draw a line at the third degree of separation, the second degree of relationship, the sixth, wherever? If we deal with that, it is probably important to at least be cognizant of those issues.

PROF. LYNK: Thank you.

Judge Facciola?

QUESTION [Hon. John M. Facciola, U.S. Magistrate

Judge, District of Columbia]: One thing we can't lose sight of is this: in the federal courts we don't try cases, we settle them. The Administrative Office of the United States Courts estimated, I think last year, we try less than 3 percent of the cases that are filed. That means that, as Carol just pointed out, the more litigation costs go up, the more we drive the middle class out of the federal courts.

So one of the criteria of these Rules, as Professor Marcus said initially, is not to increase the cost but to reduce it.

We Magistrate Judges settle a lot of cases. In fact, that's a major part of our docket; it's about 50-to-75 percent of my time. If you favor rules that put more work on me, by just talking about "reasonableness" without much clear guidance, every minute I spend on one of those cases is a minute I cannot spend on settling cases. So there is no such thing as a free lunch. The more judicial flexibility, the less time that judge has to spend on other things.

I don't know what the answer is, but I think I must tell you as a judge I am deeply troubled that every day I am beginning to sense that the middle class is being driven out of the federal courts because the costs of

litigation are horrific. In the District of Columbia, we are now compensating counsel under our Laffey Rates in Title VII cases at the rate of almost $400 an hour.

PROF. LYNK: Over here?

MR. WELLS: Apropos to the access issue ——

PROF. LYNK: Hold on for one second. We have a question there.

QUESTION [Stephanie Middleton, Esq., Cigna]: Stephanie Middleton from Cigna.

I have picked up three things from what we've heard. One is that this is a big issue for many people, maybe not for everybody. Number two, there is a wide range of opinion as to what should be preserve and produced. Number three, we're not going to get any appellate clarity, so the district judge are going to have to pick and choose amongst either their own judgment or what they see. If you put those three together, what we have is a very important issue where there is no predictability.

That is a very serious problem for those of us who sit on unlimited amounts of information —— and that's Exxon Mobil and Microsoft and Cigna —— and we really need some guidance from the Rules Committee, especially with respect to the period of time before we get to a judge. Once we get

to the judge and he orders us to do something, fine, we can live with that.

But what we don't have now are some Rules, some clarity, some guidance, as to what is our obligation to preserve. You know, we have very broad Rules about what is producible now. We have heard people saying, "What's the big deal? Save all your backup tapes."

So what I don't know is what are the Rules. And I could be sanctioned because I don't know, it's not clear; it depends on the judge I get to. So these are very serious problems. We do need a Rule.

The clarity —— also, as Judge Facciola just said and the gentleman who is in Texas, if you give us some Rules, we can settle these cases; we can sit down with the other side, and the Rules are clear what our obligations are going to be, and we can settle these things.

But right now it's a serious problem —— maybe not for the judges. The judge survey that somebody talked about yesterday shows it's not a problem for the judges. They're not paying for this and they're not worried about what they have to preserve.

It's not a problem for the plaintiffs' lawyers. The guy who is getting all this information in his MDL case

in New Orleans, he's happy. I don't know what the other side is thinking.

But it is really a problem for those of us — and I would just ask the Rules Committee to think about the people who it's a problem for. Give us a Rule. It may not be a perfect Rule, but give us a Rule. Before we get to that judge, there is just no clarity for us, no safe harbor. Carol Heckman couldn't have put it better, and she was on the bench and now she is now with corporate clients. We need a safe harbor. We are not taking discretion away from the judge, we're not taking anything away from Rule 37, but give us a safe harbor.

And also consider the cost-shifting. It sounds like it has been working in Texas, and Texas has not become more lawless than it has ever been.

[Laughter.]

This group of people is giving serious thought, but you've got judges out there who don't have the time or the luxury, they haven't been here, and so we are going to get very different results. So I really would encourage the group to come up with some Rules for us, especially on safe harbor and cost-shifting.

PROF. LYNK: Thank you very much.

Before I go forward, Tommy, do you have a comment?

MR. WELLS: I was just wondering. Do you think the formulation on page 35, the 34.1 formulation on duty to preserve, gives you anything? As I read that, I'm not sure that helps.

I represent clients like Cigna and like Exxon Mobil. If you've got 400 cases coming in and you are required to keep on the day you get notice of the suit one day's backup of all your information, you are gong to be spending millions of dollars on backup tapes just to get in the safe harbor.

QUESTIONER [Ms. Middleton]: One thing that is here that is good is "upon notice of commencement of an action." Right now the Rule is if you think there might be a lawsuit filed. Well, every day I know a lawsuit is going to be filed; I don't know which one it is going to be. So that's helpful.

Once I get the lawsuit and I know what the allegations in the complaint are, that helps me shape what I need to save. So that's helpful. It could be better, but it's not bad.

PROF. LYNK: All right. Let's move over here, the gentleman waving his hand.

QUESTION [James Rooks, Jr., Association of Trial Lawyers of America]: I'm Jim Rooks for the Association of Trial Lawyers of America.

Those trial lawyers, and there are 50,000 of them, they all wanted to be here today, but they're all working on the John Edwards for President campaign, so they had to send me.

[Laughter.]

The members of ATLA — who, in case you're not aware, can't be members of ATLA if they spend more than 50 percent of their professional time defending personal injury lawsuits — have no apologies and nothing to hide. They have weapons of mass discovery, and they are not afraid to use them, and they know how to use them.

I have absolutely no doubt that the people who have been speaking on the panels and in the audience are sincere, honest, principled people who are dedicated to their clients. But, my gosh, there has been like a Greek Chorus here, and it seems to be mostly from the corporate counsel. I have heard — tell me if I'm wrong — "we have too much data, so we need new Federal Rules"; "we get overbroad requests for discovery, so we need new Rules"; "we don't know what a document is anymore, so we need new

Rules”; more of our information needs to be classified as inaccessible, we need to take out our electronic trash, we may inadvertently produce privileged material, so we need new Rules”; and finally, “gimme shelter; we sometimes destroy relevant information that would have shown that we are liable, so we need a new Rule giving us a safe harbor.”

One of the landmarks in my travels up and down the East Coast sits next to the New Jersey Turnpike. It’s a big plant owned by BASF, the company whose legal department was led so effectively by Tom Allman, who is the author of the safe harbor idea. I drove past that on Thursday and I checked out the building to see if it had a sign up there that said “Closed During Production of Documents.” No sign. The wheels of progress are turning. That’s the way you make money.

We also heard of several examples of how well things work right now. We’re never going to agree on whether things are working well if you’re spending a million dollars a day on discovery, of course, but how well things work right now —— the celebrated *Zubulake* decisions of Judge Scheindlin.

The gentleman who talked, the one from Louisiana, who is happy, who talked yesterday afternoon, he was one of

the lead counsel in the multi-district litigation over the medical called Propulsin. The judge who got that case, Eldon Fallon in the Eastern District of Louisiana, set up an entire website just for that case.

PROF. LYNK: Jim, I'm going to exercise the prerogative of the Chair. Okay, I think you have eloquently made the point you're endeavoring to make. I need to go on just to make sure we get others who have not had a chance to speak before.

QUESTIONER [Mr. Rooks]: Okay. ATLA's position is it ain't necessary.

PROF. LYNK: Thank you. Okay.

QUESTION [Jeffrey J. Greenbaum, Esq., Sills Cummis Radin Tischman Epstein & Gross]: Jeffrey Greenbaum from New Jersey.

I want to put a little historical perspective on this. The Discovery Rules were changed several years ago because there was a sense that there was too much discovery going on, it was too expensive, you were closing courts to people, there were costs of discovery that exceeded the amount in controversy, and that cases were being settled because they had to be settled because you couldn't afford to continue with the discovery.

So there was a shift in focus and there was a two-tiered approach: let's narrow it somewhat, let's allow the relevant information to be produced, but get a court involved when you're going to go that extra step.

Now we hear staggering information over the last two days about how much it costs to go through terabytes of information, to have to do privilege reviews of that kind of information. I think we seem to be going in the wrong direction. We are now going into — just because something is technologically available, that doesn't mean it is going to be relevant, it doesn't mean we should have millions of people reviewing it.

I like Allen's idea of "Well, is it reasonably accessible?" At least that is starting to grapple with the cost concept. But that concept is not perfect either, because just because something is reasonably accessible, that doesn't mean that there isn't tremendous cost to review it.

Let's take embedded data. Just like drafts, they're not relevant for most cases. There are cases when drafts are relevant, and they can be produced and a court can determine if they are relevant. But in most cases they are not relevant. So why should you have to be reviewing

embedded data every time a document is requested? It's not the way we do it for paper. And just because it may be technologically available, that doesn't mean it should be produced.

Now, is it a document? Sure it's a document. But I suggest there should be another level that says you don't get that until you can show that it is relevant to something. Again, this is a whole cost issue and it's trying to get down to those ten documents that Steve Susman was talking about. We have to make some sense out of this process.

PROF. LYNK: All right.

MR. BLACK: Myles, just a quick observation on that. It seems to me that one of the reasons to make metadata and embedded data at least producible, if not automatically so, is that it operates as a darn good deterrent against fooling around with the documents, because if it is in there and you know that the other side can get hold of it, you are not going to fool with it. I think that is a reason that hadn't been mentioned earlier, but I think it is a good one. It is a good deterrent.

PROF. LYNK: And, of course, if it is available but not automatically so, then when it is available might be

the appropriate subject for rule-making, or under what circumstances.

I had said I would go to that gentleman up there at the very back. Jim?

QUESTION [James A. Batson, Esq., Liddle & Robinson]: Jim Batson with Liddle & Robinson.

I represent primarily plaintiffs in employment disputes, including Laura Zubulake —— which is how it is pronounced, by the way.

From my perspective, there is little need to modify the definition of what constitutes a “document.” When email came out, for instance, I’m unaware of any difficulty among litigators as to whether an email was a document.

But what I feel must be addressed is how technology has dramatically changed the practice of law. We have heard talk about burdens of reviewing documents and discovery, and I think we’re all still under the same 30 days when we’re now dealing with thousands and thousands of additional documents. My experience is that the current fear of inadvertent disclosure actually slows down the discovery process for a couple of reasons that I would like to just point out.

In practice, I am always hearing a request after I have served a document request including emails, where I expect to get a large volume of emails, and even in situations where my adversary doesn't disagree that the emails that I'm calling for are responsive and certainly relevant, for the purposes of discovery at least, and then they say to me, "But I need a couple more months before I am going to produce anything beyond what what's called for under the Rules because I'm going to have to review thousands and thousands of documents." I recognize the burden and I accede to the request.

Then I get a privilege log in my experience that often appears to contain many documents that I don't think are privileged. I am at a disadvantage in determining whether or not they are privileged because of the limits inherent in the privilege log, and I am put in the awkward position of deciding whether or not the document in question warrants involving the court. And then many times I will go to the court, and then I'm worried about going to the court more than once.

I think that in many instances if there was some way to address inadvertent disclosure, which really has become a problem from technology, that it would speed up the

discovery process because my adversary would be less fearful of me getting some unfair advantage in the litigation, whether it's through waiver or through what I can make of it at trial. If there is a Rule that says: "Hey, he's producing now thousands and thousands of emails; if he gives me an inadvertently privileged document, I am going to give it back to him," the case will move forward. There will be fewer things on the privilege log and there will be fewer instances where I need to involve the court.

So just to recap, when it talks about defining a "document," I think that is going to change constantly. I think backup tapes are going to be gone. I don't think there will be another e-discovery conference in a couple of years, it will be a discovery conference, because most of discovery will be electronic except for depositions.

But when it comes to the practice of lawyers, our practice has changed dramatically by virtue of technology, and I think a Rule that recognized that and allowed for expeditious discovery would be very beneficial.

PROF. LYNK: Thank you.

I just have time for about two more questions. Let me go to the center aisle here and the gentleman on the edge right there at the very top.

QUESTION [Kenneth J. Withers, Esq., Federal Judicial Center]: Ken Withers from the Federal Judicial Center.

Two quick observations and a question on web pages. On web pages, I'm glad you brought that up. That's an example of a non-document. Not only do they change daily, but most web pages run by corporations today are derived from databases. They change according to who is viewing them. They change all the time. They are completely mutable.

Secondly, on the safe harbor concept, given the difficulties in trying to frame that safe harbor concept and the difficulties in putting it in Rule 37, possibly changing existing law by doing so, and/or creating another set of difficulties for judges if you just have a reasonableness standard, it appears to me that the only workable safe harbor is that that is agreed to by the parties as the result of an early meet-and-confer and framed as a case management order at the earliest possible moment in the case. That is the only certain safe harbor that you have.

Finally, a question directed primarily to Allen Black on the conceptual distinction between accessible and inaccessible data and the possible differences that that

might make. Would it be adequate do you think, or possible, for simply a phrase to be inserted in either Rule 26(b)(2) or Rule 26(c), or both, that the accessibility of the data becomes a factor in the benefit-and-burden balance? That would restate current law and, I believe, practice.

PROF. LYNK: Allen, do you want to comment?

MR. BLACK: Yes, it might. I don't think it has to be. I'm just suggesting that that is the kind of general conceptual idea that could be contained in the Rules and that would live with the years. Maybe that's the way to go. I haven't sat down with the drafting to think about whether that is ideal, but it certainly sounds like something that ought to be considered.

PROF. LYNK: I don't think I've gone in this area. The gentleman right there.

QUESTION [Michael P. Zweig, Esq., Loeb & Loeb]: Michael Zweig from Loeb & Loeb.

I actually was the attorney representing the William Morris Agency in the *Rowe* case. You pronounce William Morris just William Morris.

[Laughter.]

I did want to just very briefly give the view from deep in my trench.

First of all, just with respect to “quick peek,” to my immense amazement in that case 6 million documents were produced, to my consternation and great apprehension, on a “quick peek” basis. It actually worked well. Yes, there were great concerns about cost and disclosures were given. The process worked. It was court-supervised. And we did the same with respect to certain electronic discovery documents.

But I think it is also important to get away to some degree from the rarified atmosphere of this very, very distinguished and very, very informed group. I represent plaintiffs and defendants. I see many, many differing levels of expertise in the federal courts and the state courts. I would cast my lot in favor of what I would describe as gentle rule-making. And frankly, I don’t care whether or not it comes in the Civil Rules or it comes with respect to local rules. I think in either case Rules need to give notice, clarity, so that ultimately fairness is produced.

That’s all I have to say.

PROF. LYNK: That’s a nice note on which to end. Please join me in thanking our panel. Now there is a break.

[Break 11:05 – 11:20 a.m.]

PANEL EIGHT: CIVIL RULES ADVISORY COMMITTEE ALUMNI PANEL — THE PROCESS OF AMENDING THE CIVIL RULES

Moderator
Hon. Lee H. Rosenthal
U.S. District Judge, Texas (Southern)
Civil Rules Committee

Panelists
Hon. John L. Carroll
Dean & Professor, Cumberland School of Law

Hon. Patrick E. Higginbotham
United States Circuit Judge,
United States Court of Appeals for the Fifth Circuit

Professor Thomas D. Rowe, Jr.
Duke University School of Law

Hon. C. Roger Vinson
Chief Judge, United States District Court
Northern District of Florida

JUDGE ROSENTHAL: Ladies and gentlemen, I think we're ready to start the long-awaited final panel.

This is the panel that we have come to refer to at earlier similar conferences as the "alumni panel." This is, as the final panel, an opportunity to bring to bear the perspectives of those who have been involved in the Civil Rule-making process before and often, and to use this alumni perspective as an opportunity to look back at the last day and a half and try to summarize, synthesize, and inspire future work — not a small task. But I have great help in

this large task. Let me introduce the assistance that you will receive.

First, on my far left, is John Carroll. John Carroll, starting earlier and working up, has been the Legal Director of the Southern Poverty Law Center in Montgomery, he was a Magistrate Judge in the Middle District of Alabama for fourteen years, he is now a Dean and Professor of Law at Samford University's Cumberland Law School and a former member of this Committee. He is here to speak for Alabama.

To my immediate left is Roger Vinson. Judge Vinson is the Chief Judge of the Northern District of Florida. He has been a District Judge for over twenty years. He is a former member of the Civil Rules Committee.

To my right is Judge Pat Higginbotham. When we say that we wish to hear from the bench, the bar, and the academy, we have Pit Higginbotham representing all three. Judge Higginbotham was a trial lawyer practicing in Dallas for many years. He then was a District Court Judge and a Court of Appeals Judge, both for many years. He is really much older than he looks. He is and has taught at the Southern Methodist University School of Law, the University of Alabama Law School, and the University of Texas Law School, among others, and is a former Chair of the Civil

Rules Committee.

And finally, but not last, is Tom Rowe, who is one of the preeminent proceduralists of our day. He is a wonderful scholar. He is a Professor at Duke, and now I believe at UCLA, and is a former member of and current consultant to this Committee.

We have in this conference followed a model that we have used successfully in recent and other rule-making efforts. We have brought together a —— some have called it rarified; I just think it's really talented —— group of people who are engaged in and have practical experience in the problems that we are looking at and have asked them to bring to bear on these problems their very diverse sets of experiences. We have tried to bring together people who practice in a variety of subject areas, on both sides of the V, who have a lot of different backgrounds and a lot of different perspectives and opinions. In that I think we have succeeded.

The particular problem that we have found that such a model works best for is just this kind of problem: a very practical set of problems where, not to our surprise, judges are probably the least familiar with the very acute problems that this kind of discovery raises. We are in an

area where the difficulties are felt first and most keenly among the lawyers and the litigants. The judges are the last to know.

As judges, we like to draw on our experience as lawyers — most of us practiced in different kinds of areas before we got to the bench — and we particularly do that in discovery, where facts often matter more than law. But our experience as lawyers, even if we came to the bench relatively recently, is not much use in an area that has changed so quickly.

Rick Marcus gave me a word to describe some of the nature of the kind of insight that we can gain at these kinds of conferences. What we are hearing is “anecdata.” It’s a good word, it’s a really good word. It is not empirical data and the aura that that brings, but what it does bring are the varieties of experiences and difficulties and costs and burdens and harms that can arise if we don’t understand what we are trying to do and don’t appreciate the potential for mischief that can arise.

We have learned in this conference a lot about how electronic discovery is different in critical respects from other kinds of discovery. We’ve heard that volume is the key. We’ve heard that this is going to get worse and worse.

The key question that we are grappling with is whether existing Rules are adequate to accommodate these differences; and, if not, how to change them.

This panel is going to focus on the process that that involves, because this panel, every member of this panel, has had a lot of experience in trying to get —— sometimes succeeding, sometimes not —— improvements to the process made through changing the Civil Rules. This panel is acutely aware of the relationship between what we hope to do and what is feasible to do in the process of achieving Rule Amendments, and it is that kind of wisdom that we hope to hear about today.

The process of the Rules Amendments we all are aware of. We know why it takes so long. It is deliberately transparent, it is deliberately slow, it deliberately goes through a lot of layers after opportunity for comment from a lot of sources, before it can go before the Supreme Court, and then Congress, where we hope they do nothing. But it is because of that process and the peculiar difficulties and benefits that that process provides that we need to at the end take all that we have learned and put it into that context.

To begin that work, John Carroll.

DEAN CARROLL: It's good to be here in New York, the city that has destroyed baseball.

[Laughter.]

I came on the Civil Rules Committee in 1996 and rotated off in 2001. Listening to the discussions here, I'm confident nothing has changed. Whenever anybody wants to raise something about a bad practice, they talk about Alabama.

And on one national issue, I indeed lived in Alabama in 1972, never saw George Bush in a National Guard uniform.

[Laughter.]

JUDGE ROSENTHAL: He remembers you.

DEAN CARROLL: I want to talk about two global considerations that address the question of whether or not the Rules process is the place to deal with electronic discovery.

The first is what I am going to call the politicization of the Rules process. I am told that in the 1960s, when the Rules Committee was looking at the Class Action Rule, that they did so in relative anonymity. In fact, I have heard they drafted the final version sitting in the Board Room of the Riggs National Bank in Georgetown.

Nobody really much cared what they did. They were brilliant, they were scholars. Everybody accepted their work.

That, quite frankly, has changed radically, and I think it has changed for the better in some ways. Beginning with Judge Higginbotham, this Rules process is now a very open process. It begins with gathering data and information, it is widely reported in the journals and newspapers, and representatives from the varying factions of these debates always appear at Rules Committee meetings. In fact, it was a couple of years into the Rules Committee before I realized Al Cortese was not a member of the Rules Committee.

[Laughter.]

But I think what that has done is really changed the dynamic and the value of the Rules process as a vehicle to make change. I think there are three good examples of that during the time that I was on the Rules Committee.

The first is the class action reforms that Judge Higginbotham initiated when he was the leader of this Committee. Nationwide attempts to gather information, the drafting of some very, very interesting and innovative Rules, which after the wide-open process was ended resulted

only in the promulgation of the Rule authorizing interlocutory appeals in class actions.

We then went into the discovery process. I think the discovery process again was that same model of wide-open information from everybody else. We came out with a series of Rules, quite frankly, that were not huge and major additions to the landscape.

The one major addition was Rule 26(b)(1) and the redefining of relevant, and, quite frankly, that occurred only because it had tremendous widespread support. The Section on Litigation of the ABA was in favor of it, the American College of Trial Lawyers was in favor of it, and those groups were enough to carry the day.

The third example. As I was leaving the Committee, the new Rules that came into effect in December on class actions were percolating. There were two Rules dealing with preclusion in those Rules when they were initially promulgated. There was a tremendous, to use Sol Shriver's [phonetic] word, firestorm over those two provisions, and they really never got anywhere either.

So I guess the thesis of all this is the Rules process is really consensus, and if you don't have a consensus, there is really no point in jumping into the

Rules process as a vehicle for change.

The second observation is what the Rules have really become. It began in 1983, it continued in 1993, and then in 2000. What the Rules are now are these very, very broad-based tools to allow judges to exercise their discretion on a case-by-case basis. There is no attempt to define or codify how that ought to happen. It is a very free-flowing process.

But it also has as its heart three themes: (1) that lawyers must cooperate; (2) that there has got to be focus to the discovery that you seek; and (3) that the judge has to manage the litigation. And so I think as we look at changing these Rules to incorporate these difficulties presented by electronic discovery we cannot forget that that's where we are: we are in a judge-managed, lawyer-cooperating mode of resolving these sorts of issues.

So having said all that, I think that leads me to my next conclusion, which is there ought to be some slight tinkering with the Rules but certainly not major surgery in this area. I think, if anywhere, there is a consensus that Rule 26 and Rule 16 ought to be the place where these issues are raised. I think that is an outstanding idea, because in this area, even more so than in paper, the parties have the

best solutions to these problems. They know the ins and outs of their systems, they know the ins and outs of their cases, they're the ones that the courts need to rely on, and that's why dealing with these issues at the outset of litigation is very, very important.

I want to throw in a plug for Order 40.25 out of the new *Manual for Complex Litigation (Fourth).* That is exactly the kind of a thing that I think is a great adjunct to the Rues process. It orders the parties to meet and confer, it tells them what they ought to talk about, and it sets forth what generally their preservation obligation is. So I am in all in favor of the 26 and 16 changes that have been discussed.

I also think it is valuable to go ahead and amend Rule 34 to talk about form of production. I think that can stave off lots of difficulties and problems down the line. Beyond that, quite frankly, I don't see any need for changes in the Rules. I don't see any of the Rules as currently —— the proposals as drafted really do not add anything, but, more importantly, many of them are tinged with such partisanship that they are just simply not going to get through the process. I don't think that ought to be the sole consideration, but I think the Rules Committee is busy,

I think it has lots of things on the table.

I think it ought to really consider whether trying, for example, to put a safe harbor in, or trying to put in a definition under Rule 37 of the preservation obligation which says you don't have to suspend your document destruction policy — or, more importantly, puts a state-of-mind requirement, which I think is not the Rule in many circuits — into the Rules, I think that's a mistake.

But I think some commonsense tinkering with the Rules in the areas I have suggested, and then education, and then what other parties have discussed — best practices, the Sedona Working Group for example, the ABA, and the *Manual for Complex Litigation.*

JUDGE ROSENTHAL: Thank you.

As you can see, the discussion inevitably turns into a discussion about whether Rules changes are appropriate, and, if so, what they ought to look like, which is really what this entire conference, despite the references to hog farms and ham sandwiches, has been about.

At the end of the panel's discussion, we are going to open it to the audience a little bit earlier than we have on other panels. The question that will be put to the entire audience is not limited. It is the classic catch-all

question and the last thing you do before you send the jury panel out and make your decisions: is there anything about the questions that we've been asking and trying to get a sense about for the last day and a half that you think we ought to know that you haven't had a chance yet to tell us?

Roger, what's your perspective?

JUDGE VINSON: Thank you, Lee.

Well, I'm here to simply say that I've learned a lot. I've learned that some of this embedded data and some of these other things are like hanging chads, and they're out there, and maybe we don't know what to do with them.

I agree with John in many ways, that I think our process, the rule-making process, has changed a lot since the mid-1960s. I would describe it, as I did this morning, as a legislative process. We are the beginning of a process, and we have to consider those who are on either extreme of the positions that are offered and the practicalities and standards that have to be implemented.

Of course, the Civil Rules Advisory Committee is only the first step in what really is a five-step process. At any point along the way there is an opportunity for people to modify and change and attack, and that frequently happens.

I think the Rules themselves are acknowledged to be a very important part of what we deal with, and the principles that we ought to keep in mind are the fact that they ought to be as simple as possible, as self-executing as possible, and they ought to take into mind minimization of cost.

I think the evolution of the changes that were made in the 1990s, culminating in the 2000 Amendments, basically were directed toward a reduction in the burden and cost of discovery, and I think we ought to keep that in mind in whatever we do in the process that we are talking about in electronic discovery.

It seems to me that it is unanimous and there is no opposition to the principles that we've discussed about getting the attorneys early on, in the Rule 26(f) conference, to talk about things related to electronic discovery. In my opinion, the 26(f) implementation was the most important change that was made in the Rules in the last fifteen years, and I think it has had a lot of good consequences flow out of it.

My personal philosophy is the best thing we can do is to let the lawyers control their litigation, with certain guidelines and standards to help them along and some

reminders about what they need to do and when they need to do it. In keeping with that, I think the best thing that our Committee could do would be to take what is I think universally accepted as things that ought to be discussed and mentioned in the Rule 26(f) conference, addressed in the joint report and addressed also in the Rule 16 order, make those changes, and we need to do it immediately, as soon as possible. There is no reason to delay any further.

Our court has recently transitioned to electronic case files, and every federal court in the country is in the process of doing that, and it's going to happen. It is folly for us to proceed without recognition that electronic operations are the rule and not the exception anymore.

After having heard everyone and all of the points that have been addressed over the last day and a half, I've learned also that the judges are the least informed about what needs to be done and how it should be done. Therefore, I would defer greatly to those who are knowledgeable and have had experience in what needs to be done.

But it does seem to me that we don't need to amend all of the Rules as proposed. For example, the amendments to Rules 33 and 34 are really perfunctory, and I would recommend to the Committee that, instead of doing that, that

they simply follow the idea of adding a Rule 26(h), but don't use any of the versions of 26(h) that you see in the materials, but instead address the matters in one concise area about electronic discovery. You can put some of the principles that need to be followed and include some good commentary.

Ed Cooper, for commentary I can't find anything that would be more helpful to judges and attorneys who don't get into this or who are just getting into it than the commentary from the *Manual on Complex Litigation* that is set out in Tab 6 at pages 78 and 79. I think that would be very helpful simply to give some guidance to Magistrate Judges and District Court Judges who from time to time are going to be faced with these matters and who have natural inclinations to do one thing or another, and that is just the proclivity of people.

Unfortunately, as the case law represents, they range from one extreme to the other, and that provides very little guidance. So I think some guidance in the Rules and in the commentary would be very helpful. Beyond that I would say stop, don't do anything else.

JUDGE ROSENTHAL: We've gotten a lot of suggestions during this conference for changing Committee

Notes. One of the limits on the rule-making process that not everyone may be aware of is that we don't change Committee Notes unless there is a change in the Rule that the Note accompanies. That is a good discipline on us, but it is also a limit on our ability to use Committee Notes standing alone as a source of changed explanation and guidance.

Pat, what's your perspective?

JUDGE HIGGINBOTHAM: Well, first a word about the Committee itself. For the lawyers here who may not be aware, this particular set of committees — the Standing Committee, the Civil Committee, and the Rules Committee — enjoy, I think, the very best of staff. We have Peter McCabe and John Rabiej. We have worked with them for years and years. They are outstanding lawyers. They do a terrific, terrific job.

We have been blessed by Reporters. Ed Cooper has been with us — when I became Chair, I got this note asking who I wanted to be Reporter. I said, "That's easy. Cooper." Then he's stuck, he can't get out. But he is absolutely marvelous. He takes the benefit of a lot of discussion, such as we've heard today, and sits down, and out comes a fine-flowing document that you look at and say,

“Yes, that’s what I said and exactly what I had in mind.”

So I want you to understand that this Committee is also staffed, and has been historically, by really fine people. I am particularly pleased to see David Levi as Chairman of the Standing Committee and Lee Rosenthal. These are two of the finest United States District Court Judges in the country. There are none better. There are plenty of good ones, but there are none better than these two, I tell you. I know them both very, very well. We are blessed to have them in these leadership positions.

The lawyers who are on this Committee are outstanding lawyers, they really are. They have been there, they’ve done that, they’ve been in the pit, they’ve been clawed.

Someone asked me, “Pat are you going to explain why you’re in your twenty-ninth year on the federal bench and you’re only fifty-four years old?” I will explain that later.

[Laughter.]

I spent the early part of my life in one courtroom or another. I only got to New York one time. I was smart enough to get out. I couldn’t talk fast enough.

[Laughter.]

I want to first make a couple of general observations about perspective, a large perspective, about the federal courts, and particularly United States District Courts. I happen to have the unqualified view that the most important judicial institution in this country is the United States District Courts. I think they are more important in many ways than all the other courts for a whole host of reasons. At least that has been true in this century.

One of the things that is particularly disturbing — and it was picked up by one of our judges here — is the changing character of the District Courts. I may just take one minute to put it into perspective because I think it is very important to what we are doing.

To state that we are changing the courts and we're driving the litigants out, that we are killing the United States District Court, is to understate it. It is already happening. I spoke with the Association of University Law Professors, who teach in the area of Federal Courts, who made a mistake and invited me for lunch. They were there discussing, as they are wont to do, the Canon of Hart-Wexler and some very wonderful topics.

At lunch I told them: This is very interesting, but while we are examining these large conceptual problems

your floor is rotting out from under you. That is the circumstance that for the past thirty years there has been a steady and unremitting decline in trials themselves. It is a complicated phenomenon.

The ABA, to their great credit, has just recently had a conference on this. Attention is finally being devoted to it.

But let me put it in perspective for you. It is in every category of case. On the criminal side, that's easily explained. Apparently the explanation is there in the Citizen Guidelines: between 95 and 99 percent of all criminal convictions result from pleas. That is up a good bit. They have always been high, but that is up a good 10-to-12 percent.

On the civil side, when I was on the trial bench we had 40-to-45 trials per year. Two years ago, the average United States District Court Judge tried thirteen and one fraction cases — bench trials, civil trials, criminal trials — an average length of two days. Now, I tell you that's an average number, which means that there are a lot of judges who are trying cases and we have districts that are trying none, zero. With all deference to the magistrates who see it as their job to settle cases, I think

that is misguided, but nonetheless that's where we are.

But the reason these cases are settling —— and it is with good work and hand-holding —— but it is part of a large phenomenon of cost. One of the large costs is indeterminacy. The people cannot go to court; they cannot afford to litigate.

You look at these charts, and I've looked at the numbers, and we've had this decline in trials and there has been an exponential increase in arbitrations. About twelve years ago, the numbers of arbitrations ran —— I'll round these up —— about 40,000. It jumped within the decade to about 90,000, then the next year it went to 140,000. These are the numbers from the American Arbitration Association.

At the same time, what we are seeing, as Professor Resnick has pointed out, is this incredible disconnect between trials and pre-trial. Pre-trial is the only thing that is going on. The choices that are being made between the federal courts and the arbitrations are not between trial forum; it's between which forum is going to process this case. It ain't gonna be tried.

The fact is that these choices are being made by people who recognize that it is cheaper, or for whatever

their reasons —— privacy, for all kinds of reasons —— that they want to move toward arbitration. Unfortunately, the Supreme Court in *Circuit City* is still a little behind; they still believe that arbitration is a wonderful way to go.

But that said, for our purposes you cannot load the system any more with higher cost, some of what I have been hearing here talked about —— just impossible, these costs.

With all respect to this wonderful crowd, you are not representative. This is the elite of the bar. We don't want to be elitists, but the people who are out there working in the shopping centers in the one- and two- and three-person firms, they are not here, with rare exceptions. And the plaintiffs' lawyers are here, but no longer is that —— the plaintiffs' bar can take care of itself.

But what we have here is we have a small segment of the bar. It's an institutional weakness, and we are talking about problems that run throughout the whole system.

The United States District Courts look more like the State Highway Department. They are processing paper. It is increasingly no longer the attractive job for trial lawyers and people who want to try cases and so forth. And there are a lot of social implications to that, but that's

not my point today. I would otherwise talk about that.

But it is in that context that we have turned to rule-making. And discovery is at the heart of this problem. We have never really put our arms around discovery.

The notion that somebody is entitled to every document is utter nonsense. That has never been the law. It has never been a constitutional requirement. *Matthews v. Eldredge,*[1] if you go back and look at it, it is a utilitarian inquiry about what is needed under the circumstances, adequate to the case at hand.

In 1983 — Arthur Miller put it well — we amended these Rules to provide a cost/benefit assessment on discovery. It has not been enforced. It doesn't matter. There is this sense of entitlement to every document.

You don't get that on the criminal side, for heavens sake. I see cases where they are pleading for DNA in capital cases, and we are scratching our heads about whether we are going to give it to them, and that may be outcome determinative. And I hear civil lawyers here making serious arguments that they are entitled to look at backup tapes that cost millions of dollars on the possibility that they might get a document that might be relevant in a civil

[1] 424 U.S. 319 (1976).

case. There is something wrong with this picture. We don't even allow that on the criminal side. We need to get this back in perspective.

That said, now where are we? The Rules process is structured so that you can't run quickly to make quick fixes. I do not see the necessity here of changes. If you are going to make changes, you are going to have to make some value choices, what we call procedural choices. You are going to have to make some decisions — we'll see what the consequences are — but you're going to have to make some choices.

You've got the corporate world, which understandably wants certainty and safe harbors. That is a very powerful argument and it makes practical sense. On the other hand, the other side looks at this and says, "Yes, a safe harbor, but what does that do to my plaintiffs?"

Keep in mind that in this country, peculiar to the rest of the world, there is this commitment to private enforcement of social norms by private litigation. We enforce social norms by using private litigation, the public interest litigation. We are committed to that. The civil rights statutes, the antitrust laws, the securities laws, etc., are private litigation.

The cost/benefit analysis and shifting of costs all have to be decided in that context. You touch one of those buttons and you are going to take any possibility of Rule change off the table.

Class actions, one of the practical suggestions —— and I see Mark Kusanin sitting back there and some of the others. The suggestion was made: "Look, when it gets down to certifying a class in some of these things" —— John Frank railed about getting a ticket to buy a can of beans or something and the lawyers getting millions kind of thing.

So I say why not have a provision, which came to be known as the "just ain't worth it?" Give to the United States District Court Judge the authority to say, "I'm just not going to certify this class, this is nonsense. All things considered, we're not going to do that."

Of course, what was impossible to go forward, for very good reasons. The political reasons and the conflicting interests are there, because there are normative judgments behind those that tax directly against the basic social judgments about private enforcement in this country.

If you are going to reach into here and you are going to start drawing, for example, a safe harbor, two things about that. You are going to have to make a real

judgment between plaintiffs and defendants and between the enforcement of these private rights of action, because it has a direct bearing upon that.

The other is that a safe harbor defines the inside and the outside. The lawyer from Kirkland & Ellis made this point very, very well. You get in the safe harbor, you're safe; but the implication is if you're not in the harbor then you've got a duty to disclose.

My final point is on this business of spoliation. That is a term that came along. I spent a lot of time in board rooms and others in litigation telling people they can't hide a document, both in practical terms and in real terms, that you go to jail, provided somebody else is going to find it. But here spoliation has taken on a whole new concept. Where is the duty?

I want to remind you of something that is out there that I haven't heard anybody mention. It's called Title XVIII 1512 Section C: "It is a criminal offense, a felony, whoever corruptly destroys a record with intent to pare its availability for use in an official proceeding." There are circuits that read that statute to mean this: that if I tell my staff, through a program of destruction or whatever, to destroy a document with the eye in mind to act

corruptly, if my purpose is to prevent that document from being used in a proceeding.

Now, what do you think a records retention program is? It is get rid of waste and so forth, I suppose, but it is also a conscious decision that you just don't want to keep all these documents around longer than you need them, because when you get past that the only thing they can be used for is against you. But if you read that statute literally, my point about it is not how one comes down, but there is a judgment by the Congress that it is a criminal offense.

I won't say anything about the *Anderson* case, that's before us, but if you look at that, there is a congressional definition that is out there. It is a social judgment. That does mark the outer boundaries there.

When you talk about a safe harbor, you have to say: "Well, that sounds good, that makes it clean, nice, much better for the corporate world, and that clarity always helps." But the difficulty is not with the clarity; the difficulty is the social judgment that is involved in that and the other policy choices that are there, and it means that in the real world that type of Rule is going to have a tough selling on the way up.

But that said, I think that a safe harbor is probably the one provision that in some fashion some kind of a little cleaner statement about the obligations to produce or not would be helpful.

Finally, I think that the judges are doing a good job with these cases. I read the Southern District cases and I thought they did an excellent job in handling their discovery problems. But what I come away from that with is: Why do you need a Rule if the judges are handling it? They say, "Well, gee, not everybody is as good as these judges." I have a high regard for these judges, but let me tell you there are a lot of judges around. We can't write Federal Rules to instruct state court judges. We have leadership.

We've got a lot to do. We can't use the Federal Rules to instruct corporate America or anyone else. There is a teaching job, and a big teaching job, that we need to undertake. But it is through the *Manual,* it is through the other devices, teaching judges and teaching lawyers, and Rules are a poor way to teach.

Before you write a Rule, you've got to know enough about the problem to make the normative judgment that the new course is in order. You can't write a Rule until you know that. Clarity is not an end in itself, it's the means.

JUDGE ROSENTHAL: Pat Higginbotham always was a tough act to follow.

Tom?

PROF. ROWE: There has been some reference to how the Rules process has changed over the years. One of the things I noticed with a little bit of amusement, looking at this panel that we have up here with one present and a bunch of former members of the Committee, I'm from North Carolina and I'm the one who comes from farthest north, which does say something about the way the process has changed.

[Laughter.]

But to get on to some ——

JUDGE HIGGINBOTHAM: The Committee is bilingual.

[Laughter.]

PROF. ROWE: Sí.

I came here as a skeptic of the need for Rule changes, looking for unmet legitimate needs that I thought could be met by rule-making, and I think that may be an appropriate frame of mind to start with.

I have heard a few things that do make me think some amendments would be appropriate, but I also wanted to flag something that has been mentioned on and off, but to try to make it a little more prominent. I think we do need

to be thinking a good deal about alternatives to rule-making, Federal Rules of Civil Procedure, or possibly Federal Rules of Evidence.

There is, of course, the standard background possibility of leaving things to case law. That, of course, while it can work well under the existing Rules, does have some problems of the lack of generality of guidance provided to the courts dealing with these problems. Very little of this is going to be appellate law. I remember asking Pat last night, “Do you see any of this?” He said, “None.” So there may be very good leading decisions by people in this room, but they do not have the force of a Rule or of an appellate decision.

The one intermediate possibility that has been mentioned somewhat but that I could stress some more is various kinds of manuals on some things like this. I wonder if manuals, such as the ABA’s —— or whether even there should be consideration of, say, a Federal Judicial Center effort to develop a Manual for Electronic Discovery, which would have some imprimatur of impartiality because of its source; the Sedona principles may be very good, but as I understand that was mainly defense; or maybe the ABA Principles, broader based, would suffice. But I did want to

flag this possibility of alternatives, including the possibility of some kind of manual.

And in some cases, of course, the probable only alternative may be a statute, because there may be certain areas, such as privilege waiver, and particularly trying to deal with the problem of third-party claims, that privilege has been waived. If it is to be dealt with at all, a statute may be the only alternative because of limits on everybody else's power.

One other observation and then I want to do a short academic number. I think that the problem of possible obsolescence of what we might write now, given developments in technology, is a genuine one but not a barrier to all rule-making. It is simply a consideration to be kept in mind in drafting, trying to draft with sufficient generality.

Now, I horrified especially the Chair of the panel by trundling in this little white elephant.

JUDGE HIGGINBOTHAM: We told him academics are here as a matter of affirmative action.

[Laughter.]

PROF. ROWE: What I wanted to suggest briefly is that I found it helpful just in trying to organize my

thinking about this area —— and I hope maybe for others continuing to work on this that it might be helpful —— to think in terms of several different kinds of considerations, either for the desirability of adopting Rules or considerations in the drafting. You could then do this with respect to various kinds of proposals.

Mercifully, this little item is not big enough for me to create a matrix and I don't intend to fill in even everything here. I just suggest this as for me it struck me as a helpful way of trying to organize thinking about the need for and form of possible Rule changes in this area. This is not necessarily an exhaustive list.

- What had occurred to me is that we have the question of unmet needs that I mentioned as my leading question in this area. In some areas, it seems to me that we have heard about possible unmet needs —— the way John and Roger agreed, and I think I agree with them as well —— that for purposes of flagging things in the conference of the parties, something specifying that they should talk about the need for dealing with electronic discovery issues.

In some other areas, it seems to me that we haven't heard about unmet needs. For example, cost problems

are definitely there of the conduct of discovery, but do we have a need that is not met by present Rules? People are paying more attention to the 26(b)(2) factors, and that may take care of the problem as well as it can be taken care of.

And in other areas, of course, you have high degrees of controversy, such as the safe harbor and preservation obligations, and whether there could be consensus about an unmet need is another thing.

That's all I will say about unmet needs.

- I have also mentioned alternatives, such as a manual, or in some cases a statute. On privilege waiver, for example, it may be that it is hard to do anything with Rules and that it needs to be left mainly to what we can do at the moment, to conferences of the parties, trying to reach agreements, if possible, in that area.

- Then also there is a concern for issues of the scope of authority, who does have authority to deal with some of these problems. It often may be the Advisory Committee, but sometimes not. Of course, with privilege waiver you have the problems with Section 27(e)(4) and evidence. Whatever can be regarded as being defined as a privilege has to go through Congress.

And then also, perhaps some of the preservation

issues. That might, it occurred to me, also exceed the power of the Advisory Committee to the extent that what the companies want is something that affects pre-litigation conduct, as opposed to conduct during litigation. So this is another consideration that has to be kept in mind.

- I mentioned also obsolescence concerns. That is probably more of a consideration not in whether to have a Rule at all but just in terms of how to draft it.

- Another factor that has been mentioned that strikes me as quite significant is whether a Rule doing something for electronic discovery would mess things up for simpler cases. That is probably more of a drafting concern than it is of a yes/no concern, if applicable, but it is definitely, it seems to me, something to be kept in mind.

- Then finally, there is whether the Rules, if adopted, should be phrased in general terms or should be targeted on electronic discovery. A lot of these problems are problems not unique to electronic discovery, but that may be intensified by electronic discovery, but need to be dealt with on a general basis. So there always has to be the consideration should something like this be drafted in general terms or in terms targeted on electronic discovery. Sometimes that may make sense, but it needs to be kept in

mind.

There may be other factors. I am not going to try to get into them.

JUDGE ROSENTHAL: Thank you.

Tom mentioned the difficulty of determining whether we are talking about problems that pertain to all kinds of discovery or that are unique to or particular to e-discovery.

A lot of what we have been talking about over the last day and a half is reminiscent of the kinds of discussions that we had when we were in the business of looking at the last set of Amendments to the Discovery Rules. But the question that we are dealing with is whether the particular differences between electronic discovery, on the one hand, and other kinds of discovery, on the other, make those problems so much more acute as to require additional or different treatment.

There was one moment that I just wanted to remind you all of, or share with those of you who were not there, in one of the hearings that we had on the last Discovery Amendment issues. This very, very young, enthusiastic lawyer came before us and went on for some time about his realization of the particular beauty of the way the

Discovery Rules are structured. He had been trying to come to grips with the changes that were being proposed and had realized this wonderful structure.

There is this one level where the attorneys manage it, and in most cases that's all that is necessary. And then there is this next level, where the judge, upon the firing of some trigger, becomes involves, the judge asserts control, additional showings have to be made to justify additional work, additional cost, additional burden. That was done particularly in the context of the scope change to 26(b)(1) that we talked about back then.

This young lawyer was thrilled because this was a beautiful discovery structure. It really is a wonderful architecture, framed by these concepts that have borne incredible weight with great success over the years. Relevance, scope, burden, proportionality — those are wonderful, strong, and flexible concepts that can carry a lot of weight.

We have that two-tier structure in the context of relevance. One way to look at these issues is whether that two-tier structure should be adopted to a burden analysis; and, if so, how do you define the trigger that will separate the cases that go on with the attorneys managing it on their

own and the cases that have the trigger for the judge to get involved when and as needed and to facilitate that involvement in an efficient and effective way?

I thought that young lawyer's enthusiasm was wonderful. Of course, I spend my time with a group that thinks that a glass of red wine and the latest volume of *Wright & Miller* or *Moore's* is a terrific time. You are all here on Saturday morning, so you clearly share that set of enthusiasms.

[Laughter.]

But what we really are talking about is an odd intersection of and mix of case management considerations, on the one hand, and the very profound kinds of judgments and decisions that Judge Higginbotham was talking about, on the other.

At this time I would like to invite the panel to make whatever comments, very briefly, on each others' presentations, and then open it to get whatever else y'all, as we say, would like to share with us all.

John?

DEAN CARROLL: I think there is real consensus on this panel that either nothing should be done or very minor tinkering. I don't think I can add anything to that. I

think that's exactly right.

JUDGE ROSENTHAL: I'm not sure that the consensus is that clear or that deep.

[Laughter.]

Roger, anything?

JUDGE VINSON: I think throughout what we've discussed in the day and a half that we've been here is the recognition that the business of American business is business and it's not litigation, and they're not there to facilitate lawyers and litigation, and it is only coincidentally that they get brought into this. We need to keep that in mind.

The phrase that has been used in a number of the local rules and standards is "in the ordinary course of business," which I think is an appropriate term to incorporate somewhere to set out that idea.

I am not sure that I agree with John about just tinkering. I think I would propose making some substantive recognition that we've got a different category of discovery and we need to call it that. But I think you can incorporate within that the idea that the principles of production and discovery, interrogatories, are all intended to encompass electronic information or data, and you can do

that and then set out some other standards, and you can do that very succinctly and in one spot. I think that would be very helpful to the bar and the bench, and probably to the clients.

JUDGE ROSENTHAL: Pat, anything that you wanted to add, or should we hear from our distinguished guests?

JUDGE HIGGINBOTHAM: I think I'd rather hear from the lawyers and people in the audience.

The only footnote I would add would be that — and I'm not sure you would do this by any suggestion in the Rule itself — but it seems to me that on the cost/benefit assessment there is only a small step between that and allocation of the burden of production.

One of the suggestions made earlier in the course of the conference was that district judges should have the authority to shift the cost of production for this sort of third level of production, these backup tapes. That has a logical appeal to it. But it goes back to the practical difficulties, that it addresses a present phenomenon of layering that may not exist tomorrow. That is, we are not necessarily going to have these graduated kinds of production in the future.

And it faces the practical reality that shifting

cost, large cost like that, is a huge normative judgment in this country. You can't really bring it forward as a simple Rule change. It involves very fundamental choices. Within or without the compass of the Committee, it may not be a real good question as a practical question because it won't go anywhere anyway.

JUDGE ROSENTHAL: Tom?

PROF. ROWE: Can I fill in my matrix?

JUDGE ROSENTHAL: No.

PROF. ROWE: I was not serious.

[Laughter.]

I think we're ready to hear from them.

JUDGE ROSENTHAL: Thank you.

Where are the microphones? Scott?

JUDGE HIGGINBOTHAM: While they're waiting, I guess if you are defending a case against Steve, now you just give him documents. Is that right, Steve?

[Laughter.]

JUDGE VINSON: As long as he gets to pick the ten.

QUESTION [Scott J. Atlas, Esq., Vinson & Elkins]: Scott Atlas of Vinson & Elkins, Houston.

I think I share the view of many people here that so many of these issues can be resolved with some changes to

Rules 26 and 16. I came convinced that the single overarching issue that was of concern to my clients —— and I handle major corporate litigation —— is the issue of safe harbor. I have become much more attuned to some of the arguments by Alan Morrison and others that there are legitimate concerns on the other side and it is a much more complicated issue than I had realized.

But I do hope that, at minimum, if the Committee concludes that you cannot come up with an effective set of Rules concerning safe harbor, that you do, either through 26 and 16 or in some other fashion, communicate to the judges the importance of requiring the parties to talk about this in their meet-and-confer, or maybe even somehow move the process up so they talk about it immediately after the lawsuit has been served, and if they cannot reach an agreement on it, to have court intervention, because the issue of document retention is one that is sort of overarching, because if the documents are not preserved, then most of the rest of these issues are irrelevant.

JUDGE HIGGINBOTHAM: Let me ask Scott a question back. That speaks well to the issues once you've engaged, but the question that was raised earlier by the corporate counsel here was the difficulty they were facing when they

anticipate litigation but it is not there yet, kind of that zone. How would you treat that?

QUESTIONER [Mr. Atlas]: I would have quite a radical solution, which is the opportunity for pre-litigation consultation with the courts, if necessary, because in certain kinds of cases the issue is so overwhelmingly critical in terms of both cost and preservation on each side that there may not be any other alternative if the parties themselves cannot work it out.

PROF. ROWE: Do you have a case or controversy jurisdiction problem?

DEAN CARROLL: Rule 27 authorizes pre-trial depositions.

PROF. ROWE: That's exactly right.

JUDGE HIGGINBOTHAM: Well, a court might. But the criminal ——

QUESTIONER [Mr. Atlas]: If we did nothing more than provide a set of criteria, basically injecting the cost/benefit analysis and reasonableness into the process, and a court encouraged the parties to come to a consensus on their own that embodies those criteria, we would have made great progress.

JUDGE HIGGINBOTHAM: What do you do with the

criminal statute that I read earlier, which has been amended to provide that it need not be a pending proceeding? So the statute is addressing in a sense this same zone that you are talking about, and it is the Congress speaking, and speaking with a criminal sanction. What would we do with that?

QUESTIONER [Mr. Atlas]: That's why we have so many great minds on the Committee. It's not an easy problem to solve.

JUDGE ROSENTHAL: Anybody on this side?

QUESTION [Francis J. Burke, Esq., Steptoe & Johnson]: Frank Burke from Phoenix.

I'm just concerned that we have become so exhausted with some of the hot-button issues of yesterday afternoon that we are overlooking what I thought was a very persuasive panel that Judge Scheindlin ran yesterday morning with a lot of, I thought, unanimity among the audience members that Rules 33 and 34 have become seriously outmoded, that there are lots of things that are not documents or things, and that we are dealing with a Rule 34 that was written in 1970 and it has to bear the weight of all these 21st-century developments.

I think that through the course of this program several people have said that the focus of Rule 34 should

not be “documents,” it should be either “data” or “information,” and that “documents” should be the subset, so that the superset should be “information” and then “document can be a subset of “information.” Perhaps “electronically stored data” should be a subset of “information” or “data.”

There are lots of things, like the example that was given just this morning about websites. Just because we have now apparently agreed through maybe twenty court cases that emails are documents, when we focus on things like websites —— and I think Ken Withers pointed out a website is really not a document because the website ——

You may or may not know that when you check into, say, General Motors’ website, the General Motors website knows what Zip Code you are dialing in from, and what you see on the General Motors website is completely tailored to where you live. So when I dial in to look at General Motors, because I live in Arizona, it is giving me information that is tailored to Arizona. If you are dialing in from New York, you get information that is tailored to New York. And so, anyway, it is not a document. There is a highly intelligent database that is underlying that website.

And there are probably all sorts of things that we technological illiterates do not even know about that are in

these corporate networks that we are going to have to deal with —— I mean some of the examples that the plaintiffs' lawyer was giving yesterday having to do with radar logs or security logs, or cookies, people going in and out.

So I think that the changes that were talked about in Rules 33 and 34, and a lot of the form of production issues that were the focal point of the discussion yesterday with embedded data and metadata, are definitely things that are important and should be looked at now and do relate to unmet needs, and we shouldn't be trying for the next fifty years to cram everything that we're trying to deal with in terms of the new Information Age into the term "document." It just can't bear the weight.

JUDGE ROSENTHAL: Thank you.

Yes, sir?

QUESTION [Stephen G. Morrison, Esq., Nelson Mullins Riley & Scarborough]: Thank you.

JUDGE ROSENTHAL: Steve Morrison, correct?

QUESTIONER [Morrison]: Steve Morrison, Nelson Mullins. Thank you, Judge.

The issue of whether or not normative social values are being changed is so profound and difficult, but it seems to me that the first part of your statement, Judge

Higginbotham, clearly said that by default the federal courts, the United States District Courts, have defaulted in their own ability to deal with social norms —— thirteen trials a year, on average, plus a fraction.

The federal courts then, it seems to me, have a duty to determine whether that default position is really the most responsible position in an era of increasing data sources, increasing volume, and exponentially increasing cost. Under those circumstances, no one exists better than the court itself to step forward and lead us, as opposed to passively defaulting.

JUDGE HIGGINBOTHAM: You're a good advocate and I agree with what you said. I think the implications of my remarks were just that.

JUDGE ROSENTHAL: I think Sheila Birnbaum, and then there are two others on this side, then we'll come through and we'll go that way.

QUESTION [Sheila L. Birnbaum, Esq., Skadden, Arps, Slate, Meagher & Flom]: I'd like to make two points.

One is the fact, Tom, that we have manuals —— we have the *Manual* now, there's *Manual (Fourth)* that is coming out —— doesn't mean that there isn't a need for Rules, even though you are educating people from different methods. I

think those are all very good things, but the Rules are what govern. Whatever you say in a manual is either acceptable or unacceptable, the judge will agree to it or not agree to it, the lawyers will agree or not agree, but it is the Rules that make the difference.

I find it very disturbing, John, to think that because something is political, or because there are two very strong views, the Committee cannot come up with a Rule that is a Rule of rightness and reason because it is unpopular and may never get through. But the question is, the Committee has an obligation if there is an unmet need to try to come to a Rule that is reasonable, respected, and rational. And it may not be liked by everybody. We have Rule changes all the time —— 23(f) was not liked by a lot of people ——

VOICE: Everybody loves it now.

QUESTIONER [Ms. Birnbaum]: Not everybody, believe me.

JUDGE ROSENTHAL: Another one of those good consensus statements.

QUESTIONER [Ms. Birnbaum]: But I don’t think you can shirk the responsibility of trying to come up with a rule of reason, if it’s popular or unpopular, as long as the

Committee thinks that it is meeting a need and is going to be accepted.

Just one last point is that when the Federal Rules change the states also often change their rules. A Rule change in the federal courts could impact significantly on rule changes in the state courts. And as Texas as showed you, they are making rule changes now that are affecting these issues. I'm not sure the Federal Rules should be behind instead of in front.

PROF. ROWE: I agree about your general point about manuals and Rules. All I was trying to say is that not all of the areas that we have been looking at may be best handled by Rules and that there should be consideration whether something else ——

JUDGE HIGGINBOTHAM: Let me add one footnote because I think you touched on a very vital issue, and I agree with it. That is that I don't think the Rules Committee backs away because something is controversial, but they have to make the practical judgment sometimes of what they can get through.

There is a lot of utility, as I think the history of the Committee demonstrates, in going forward with Rules that we know have little likelihood of success. I think

Rule 23(h) is a good example of that. The lawyer who made that suggestion is sitting out in front of us.

One of the values of the process is that you put it out there and people have to look at it and examine it and you end up pulling it down. So it's not an argument that you don't go forward with Rules if you can pass the threshold test that this is something you really want. But you've got to make the threshold judgment that this is a change that needs to be made.

DEAN CARROLL: And I think this is obviously a call the Rules Committee has to make. But particularly in these areas of technology, these two Rules that are the most controversial, the safe harbor and this notion about inaccessible/accessible data and reasonable course of business, I think they are so tinged with so many problems that — I mean it's the Committee's choice as to whether or not they want to get into that briar patch.

I hate to be pessimistic, but I'll buy you a big dinner if they get a safe harbor rule through.

JUDGE ROSENTHAL: She gets to pick the restaurant.

DEAN CARROLL: She gets to pick the restaurant.

JUDGE ROSENTHAL: Yes?

QUESTION [Debra Raskin, Esq., Vladeck, Waldman,

Elias & Engelhard]: Debra Raskin.

As a plaintiffs' lawyer, I was quite interested in hearing Judge Higginbotham refer to arbitrations and to say that there is a public good or a public value in hearing cases in the federal courts as opposed to in the secrecy of arbitrations.

One of the reasons that at least the plaintiffs' employment bar has fought so vigorously against compulsory arbitration is because of the really severe limitations on discovery in that context. So if there is public value to be served, especially in statutory litigation where there is presumably a congressional mandate for private enforcement, that I think speaks to being very careful about limiting the current broad range of discovery.

JUDGE ROSENTHAL: Thank you.

I think Rick Seymour and then over on this side.

QUESTION [Richard T. Seymour, Esq., Lieff Cabraser Heimann & Bernstein]: As previously announced, I'm Rick Seymour from Lieff Cabraser Heimann & Bernstein.

I think that there are two critical factual premises that have been presented here by global corporations that may be true for some companies but are generally not true, and they are critical to what the

Committee does.

The first is the premise that backup tapes are chaotic. Over the last thirty-five years of getting electronic discovery, the vast majority of information I've gotten is from backup tapes. How far back? As I sit here, one of them had data ten years ago that was kept in a cold room. Better to recycle onto new media every year. That was still readable, still usable.

The vast majority of my information has come from backup tapes. Not one single backup tape has been chaotic. They have been duplicates of databases.

You go to an email server. People sort things into folders. There are a lot of things that are readily accessible that we haven't heard about.

Second thing: the premise is that business is concerned about reducing its cost. The most practical problem that I see as a plaintiffs' lawyer specializing in class actions is that business is concerned about increasing its cost so as to increase the transaction costs of anybody who sues it.

Example: taking information which is computer-readable and very cheap to store and maintain in an organized, coherent fashion, and deliberately purging that

data while keeping the backup information on paper because it will be extremely expensive. For instance, if you're dealing with printouts of databases, that is all going to have to be key-entered again before any analysis is going to be done — and you see it in case after case after case. So millions of dollars in reconstruction costs are exported to the other side, and it saves the defendant literally single-digit dollars not to keep the thing in computer format.

The business about the safe harbor — remember *Texaco*, the race discrimination case? Shortly after that all hit the fan, the front page of *The New York Times* carried advice from a senior partner of a very large and well-respected Manhattan law firm saying, "The lesson of this case is" — this is a memo to his clients that got leaked — "the lesson of this case is destroy the documents before the case is filed."

If we give to — this is just repeating the point I made yesterday — companies the ability to define what is their normal business practice, what is going to be inaccessible, we are giving to them the ability to take themselves outside the reach of the law. Thank you.

JUDGE ROSENTHAL: Yes?

QUESTION [Laura E. Ellsworth, Esq., Jones Day]: This is a framework that I ask myself: is there any issue that is unique to e-discovery, has an acute need, is not susceptible to treatment at an early case conference, where the existing law is unfair? My answer to that is there is one thing that meets all those criteria, and it is the preservation obligation, and here is why.

It is unique in the e-discovery world because the preservation obligation in the document world has always been to refrain from conduct — to not destroy, do not take steps to destroy the existing documents. It's the reverse in the e-discovery world, where the technology by its own function self-destructs data. When you turn on the computer, when you recycle backup tapes, the technology itself has the inherent property that data is inadvertently and automatically destroyed. It is the reverse problem.

And so the traditional world, where a preservation obligation is just maintenance of the status quo, no big deal, in the e-discovery world it is a very big deal. And it presents a particularly acute problem, as we've discussed here today. It can be a multimillion-dollar issue. It can happen with tremendous risk if you guess wrong, because you don't have the luxury of time of applying multifactor tests

and figuring it out. It's going to be gone.

And I think it also is inappropriately dealt with in the existing manuals and so forth. It's sort of like Laura's analogy, it's like run the snake over now and check to see later if it was poisonous. You know, you've already spent the million dollars. It's not going to help the snake to find out he was okay after the fact.

So for all of those reasons — and I'm not sure Laura would care whether he was or not — but I think it is a very, very serious area that is not appropriately addressed. And I think, particularly in light of potential criminal penalties, we cannot leave people at that kind of risk.

I'll just mention one other thing really quickly, which is the Rule 34, the consideration of using "information" instead of "document." There is a potential for problems which may be evidentiary, which is this: if you ask the other side to produce "data," not a "document," you are effectively asking them to produce documents that they don't keeping the natural course of their business.

JUDGE ROSENTHAL: What if it was "recorded data?"

QUESTIONER [Ms. Ellsworth]: It doesn't matter, because once you go to "data," what you're asking for is the

production —— and I'm not sure it's wrong —— but you are asking for the production of information in a form that the company didn't use it.

For example, if I asked for the production of "data" listing every minority employee who didn't make it past grade five, that is going to be produced in a document. And if I ask for the "data" in this format that I like for my case, they have to produce that case and that document and that document and that document, and you run the risk of creating a situation where the primary, if not exclusive, production of materials in the case has been formatted. Because you can format data any way you want, the requesting party can ask for the data in any way they want, the production is defined by and created by the other side. I think that is risky.

JUDGE ROSENTHAL: Thank you.

I think we have only time for one more response. There is an abundance of riches here. Don't forget Peter McCabe's email. This is not your last opportunity. Mr. Beach? Maybe one more.

QUESTION [Charles A. Beach, Esq., Exxon Mobil Corp.]: Chuck Beach, Exxon Mobil, Irving, Texas.

Somebody said earlier on there is a difference

between corporations and searching for truth. I think Judge Higginbotham put his finger on it. What has happened now with the discovery and some of the other things in the federal court has actually made getting at truth harder. What we have done is we have made the discovery so burdensome that cases are settled on discovery issues, that we they can't go to trial, we can't get to the truth on them. Why do we go to arbitration? We go to arbitration because we can avoid a lot of this. We can get closer to the truth in arbitration than we can paying the amount of money.

There are very few cases where you can't find enough evidence for your case in 200,000 documents. You don't need a billion, you don't need 2 million documents.

JUDGE HIGGINBOTHAM: Let me add one footnote to that, going back to Mr. Morrison's comment about the responsibilities of both the Committee and the District Judges.

One of the things that the Committee went forward with several years ago, both the Advisory Committee and the Standing Committee and the Judicial Conference of the United States, was to return to twelve-person juries, perhaps with a 10-2 verdict. Every bit of the literature went one way.

Empirically, there was no real debate over the fact that a twelve-person jury's dynamics of deliberation is different, that there is a greater likelihood of aberrational verdicts, one way or the other, with a six-person jury.

That was defeated in the Judicial Conference of the United States, largely by the District Judges, because they wanted to retain the control over whether it would be twelve person or six person. Of course, they only put seven-person juries.

One of the things that is suggested by the decline of trials is that they do not want to try cases and they're afraid of juries. This is one of the things that all the data point to would have given greater stability.

So I go back to your suggestion. I didn't mean to intend to suggest by my remarks that the judges have not had a hand in this, but they are not the only one. It has been to me an institutional failure that cuts across all lines, but it is one that we ought to all have a great deal of concern about.

JUDGE ROSENTHAL: As we do.

Ladies and gentlemen, that is almost the end of the conference.

Before you go, Judge Levi, who is of course the

Chair of the Standing Committee, would like to express his appreciation and formally end our conference.

JUDGE LEVI: Thank you. I know you're anxious to go. I'll keep you for one minute.

David Starr Jordan was the first president of Stanford. He was an ichthyologist. He said that every time he remembered the name of a student he forgot the name of a fish and he was not willing to make that trade.

Unlike terabytes and gigabytes, speaking for my own document retention system here, I think I'm maxed out. I hope some of you are as well. But that just reflects what a wonderful conference this has been.

All of those who put it together — Myles, Rick, Dan Capra, Judge Rosenthal, our panelists, our audience — you can give yourself a round of applause as you give all of these fine people applause.

So now the Civil Rules Committee has its work cut out for it. It is true that the process is an open process, and that introduces a lot of forces into the process, and the Committee understands that these forces don't always agree. But I will point out that the Committee has in the past, in its history, not shied away from controversy. It has to be realistic, it has to be cautious, it has to know

that it doesn't know everything.

But it has a very good process. You know, if we look back over the past few years, we've seen a lot of proposals that in one way or another were very controversial. The Discovery Rules that mandated uniform disclosure throughout the nation were opposed by many District Judges, and opposed forcefully, and yet that proposal went through. The second opt-out provision in the Class Action Rule was opposed by many defense interests, and yet that proposal went through. The Civil Rules Committee recommended that multi-state conflicting overlapping class actions was a matter that deserved congressional attention, and the Judicial Conference adopted that policy; many plaintiffs' groups did not agree with that.

So there will always be opposition. I think that what we can so to the Committee is: think large, act reasonably. Don't be frightened. The Standing Committee will be there to back you up.

JUDGE HIGGINBOTHAM: Way behind you.

[Laughter.]

JUDGE LEVI: This has been a wonderful conference. Thank you all very much.

JUDGE ROSENTHAL: Thank you.

[Adjournment: 12:45 p.m.]