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

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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
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Panelists

Hon. John M. Facciola
*United States Magistrate Judge,
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Gregory S. McCurdy
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Robert M. Hollis, Esq.
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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 *McPeck 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 *McPeck*, 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 *McPeck* 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 *McPeck* 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 *McPeck* 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 *McPeck* 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 *McPeck* 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 *McPeck*, 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.

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

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* case⁴ 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

Hon. Jerry W. Cavaneau

*United States Magistrate Judge,
Eastern District of Arkansas*

Mary Sue Henifin, Esq.

Hale and Dorr LLP

Hon. John J. Hughes

*United States Magistrate Judge,
District of New Jersey*

Stephen D. Susman, Esq.

Susman Godfrey LLP.

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 form 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 it 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., Lief Cabraser Heimann & Bernstein]: Richard Seymour, Lief 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.]