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MORNING SESSION — 8:30 a.m.

JUDGE ROSENTHAL: Good morning. I think we are ready to start with the morning's panel.

But before we do, let me just take a brief moment, because I suspect that not everyone will be here at the very end, to thank all of those who are not only here but who made the program possible: Dan Capra and the Fordham Law School, in particular, have been enormously helpful; Myles Lynk and Rich Marcus, whose work really did make this possible; David Levi, whose idea this conference was in the first place; and John Rabiej's office, who have all been wonderfully supportive and incredibly well organized. Thanks to all of them and to all of you.

I think we are ready to begin.

PANEL SIX — RULES 26 AND/OR 34 — PROTECTION AGAINST INADVERTENT PRIVILEGE WAIVER

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PROF. COOPER: This panel deals with inadvertent privilege waiver through the production of documents — or perhaps something else — that include privileged information.

Yesterday at lunch I asked my panelists to give me information for suitably flowery introductions, and the upshot of it was agreement that to keep things moving not only would there be simply identification and firm, but for those law firms that have more than two names to give only two names. So, proceeding from your right as you face us, we have Jonathan Redgrave of Jones Day, Washington; Sheila

Birnbaum of Skadden, Arps — and I will depart far enough from the rule imposed on me to observe that she has been a member of the Civil Rules Advisory Committee for the maximum term permitted by the Chief Justice and will continue, as we fully hope and expect, to help us with our endeavors as the Committee goes on; Dan Capra, and I guess the two words would be Fordham Law, who you know is our host; and Jonathan Saveri of Lieff Cabraser.

The topic of inadvertent privilege waiver is one that spans both electronic production and of course paper production. It is a topic that first was brought at least to my attention in an earlier discovery conference that the Committee held at Boston College Law, now quite some years ago, as people started to talk about it. My reaction as a total innocent — and that's a nice word for saying totally ignorant of these problems — was: "I don't believe it! What are you telling me courts do? You inadvertently turn over one thing that is not on its face obviously privileged, you did not realize that it was in the chain of a privileged communication, and the answer is that there is waiver of all privilege with respect to the entire subject matter and that, whatever you try to do among the parties to avoid that result, non-parties are not bound and you may have lost the

privilege anyway? I just don't believe it!"

Well, I stand to be informed. The way we are going to offer it in this panel, at least at the beginning, is going to be in essentially two stages. First, a stage that is designed with the idea that this conference is, among other things, a very important vehicle for informing the Advisory Committee, and the Standing Committee beyond the Advisory Committee, as to what is going on, what the problems are, how lawyers are reacting to them in fact. That will be essentially the first stage. And then a second stage, looking at a number of proposals that have been identified — I'm not sure how far any of them have been developed, although some are actually implemented in practice here or there — to consider how well they might work in addressing these problems.

My hope is that as we go through these two stages the panel discussion itself will become increasingly disorderly — that is, one of us says something, someone else says, "Wait, wait a minute, I have a different story to tell." We'll see how that goes. And of course there will be time at the end and we welcome both questions and observations, instructions, from all sources.

So for the first question I am going to ask

Jonathan Redgrave to describe what it is that lawyer are so afraid of, why indeed this problem of inadvertent privilege waiver through production of something that ought not to have been produced raises such ripulations of fear as they go through the discovery process.

MR. REDGRAVE: Thanks.

The meeting started yesterday with Professor Marcus talking about newness, the concept of newness, and I'm glad to say that we are going to talk about something that is royal and ancient — unfortunately, it's not golf — it's the idea of privilege. In many ways, and I think this is reflected in the materials, this is something that obviously has affected us in the paper world forever.

So what is the driver of waiver concerns now and why should we consider Rules changes?

Obviously, mistakes can and will happen in productions. They happen in the paper world. They happen in the electronic world. The consequences of those mistakes have always been governed by various rules that come out of different jurisdictions, and of course have different things.

There are three different tests: a strict, a lenient, and a middle-of-the-road balancing test. That last

one is the one that is in most jurisdictions, but not all.

For your materials, by the way, in referencing this subject, you should be looking at pages 27-to-33 of the Marcus-Lynk Memo. You should also be able during this to reference Tab 4, which is the Texas Rule 193.3(d). You will also want to reference Tab 8, which is the proposed ABA Standard 32. And then I will also be referencing Sedona Principle Number 10 and the Commentary under that, the four Comments which address some of these issues.

But in terms of these mistakes, what is going on out there in the real practice? Professor Cooper says, "Is this really an issue and a problem?" In many cases, both sides really sit down and they agree on a protective order, a non-waiver order, a return order, which takes care of this. So why do we really need to step in with Rules changes if people are able to do that? Well, there are a number of reasons.

First, just to those agreements and accommodations among parties, those are not uniform and those are not universal. One could ask: why should inexperienced counsel — or, more particularly, why should a client, whose privilege it is anyway for the most part — not get the benefit that experienced counsel may get through doing

agreements and protective orders entered by the court?

Secondly, the reality of the lowest common denominator comes into play. What I mean by that is that you may have a jurisdiction, let's say in the northeast, where the parties agree, the judge enters an order. But you may have a jurisdiction in some other part of the country where the court there entertains a motion by a plaintiff that says, "It was great that the parties up in the northeast had this agreement, they had inadvertent waivers, they gave it back; but too bad, so sad, the bell was rung. Another party who was not an owner or a party to have privilege saw the document. It is lost. None of this mumbo jumbo. Give it back. Pretend it didn't happen." It's like putting a bag over the head of a child and saying the child is not there. It's there, the person saw it, the waiver is exact, it is unforgiving, and the document should be produced. And a judge in the southeast or southwest says, "Okay, it's a waiver, I don't care what that judge in the northeast says."

So that lowest common denominator is what drives law firms, it's what drives corporate counsel, to say, "I've really got to spend a lot of money to make sure I don't get privileged documents inadvertently produced." Okay, so that

drives cost.

Now, then we get to this electronic discovery world and the rule of real estate, which is “location, location, location,” but of course let’s change that to “volume, volume, volume.” That is what we heard a lot about yesterday, and it is very real. So you are increasing the amount of information going out.

Now, electronic discovery is great because there are a lot of tools you can apply to help you find the privileged documents, to try to guard against inadvertent disclosures. But the reality is that with that volume, large productions, you will still have mistakes, and if you multiply those together you still have a big problem.

Which then drives us to: What do you do? Is there really a problem in the law as far as this being litigated? Are people really taking advantage of mistakes?

The answer is yes. I have seen and been involved in privileged motions that deal with waiver documents both on the documents and the subject matter; for privilege logs that say too little, for privilege logs that say too much; for documents that were inadvertently produced by my party, my client; for documents that my client is claiming privilege to as to which another party inadvertently

produced a copy of it. I mean there are all sorts of variations.

And it is driven by the concept of zealous advocacy. There are a number of bar opinions out there that tell lawyers in certain jurisdictions if they were to get a privileged document and the other side didn't take proper steps: "That's their problem. You have a duty to your client in zealous advocacy to go out and use it."

There are also countervailing jurisdictions where the bar authorities have put out ethics opinions that say: "You shouldn't be doing that. You should be returning it."

So there is a lot of variance out there among both the ethical boards and the courts. So with that world of non-uniformity, with the concerns about waiver and subject matter waiver driving in-house counsel, and the volume, I think it is a good time to look at the issue — it is very real — and say: Is there something that the Rules can do to address it?

I will leave the "quick peek" and what is behind that to our second discussion.

PROF. COOPER: Another part of the question, particularly for electronic discovery, but more generally, again from my innocent view, would have been something like

this: "Well, for heaven's sakes, when you are being asked to produce documents" — to take the core illustration of this — "you are going to review them for relevance, you are going to review them for confidentiality, for possible grounds for seeking protective orders, a variety of things you are going to screen for. Why is it that screening for a privilege waiver adds so much more to the burden than you would have to undertake anyway? And then, why is e-discovery somehow, if it is, something that increases the risk?"

And then, surrounding that, something that Mary Sue Henifin said yesterday, and that was, if you remember the exchange, "Well, yes" — and I think it was meant to be more embedded data than metadata. The embedded data in a document may itself reveal information that is privileged in some sorts of litigation, some sorts of documents. Which leads to the question: Has anybody ever thought if you are going to be exchanging information in native format about screening the embedded data — and, if it is possible, in metadata — for privilege?

Sheila, why does the privilege waiver thing augment the burden so much?

MS. BIRNBAUM: Ed, as usual, has asked three questions in one. He does that so well.

Let me just try to do the last one first, embedded data/metadata. When all these young people are reviewing all these things, usually we up until now have not given documents with the embedded data and metadata; we have usually given the TIFF image or the image that you see on your computer. So if we were adding in any way the fact that you had to hand over embedded data or metadata, I think then you would increase the cost exponentially because that would have to all be reviewed for privilege as well: Did that piece of document go to the counsel's office at some point, did the counsel have input into changing some of the language, and is that subject to work product or attorney-client privilege?

So I think what you would have is a situation where now one of the more expensive — or most expensive, in my opinion — parts of discovery is the reviewing of these documents for privilege. That would increase the cost exponentially.

Now what happens? When you're looking at relevancy, why are the privilege aspects of this so important? When you're looking for relevancy, it is pretty

easy to determine whether it is relevant or not, in the sense that you can look at certain computers or certain people's servers or certain names and you can do the searches and that cuts down on the relevancy. But if you give an irrelevant document, so what? You know, it has no meaning in the process usually. So that's not a very big problem and you can do that quite quickly, and if you make a mistake it's no big deal.

But if you hand over a privileged document, it may be an important privileged document or an unimportant document, but you can't do it, because then I think you're setting yourself up for your client being upset, possibly malpractice, and possibly creating this waiver problem in many other places.

So I think more time is spent on the privilege issues. And it's not so easy. It's not every document that says "privileged and confidential" on the front of it. I mean you have to give people a whole list of all the people, all the names of all of the lawyers in-house, all the lawyers outside. There may be email going back and forth. It is a very time-consuming, difficult process, someone sitting with a bunch of names — you know, does that name appear anywhere on the sheet of paper?

So I really do think that the time has come to really look at this issue. The whole game it appears, one of the big games, of discovery is "Gotcha!" — you know: "I got you, you made a mistake. I got this attorney-client privileged document. I'm going to make a lot of hay out of it one way or another."

As we'll talk about some of the solutions that states are considering and operating under, I think it's that experiment that is going on in the states that is very helpful, I think, for the Committee to examine and see how they are working, and I think we are going to talk about some of them.

But I think the problem is very real, it's one of the most expensive parts of discovery, and it will only get worse as we get more and more data that is going to have to be reviewed.

PROF. COOPER: Another range of this phenomenon is captured perhaps in a talk I had just a week ago at lunch with a now-senior New York litigator, who asked what the Committee was up to. Ever alert for a chance to learn something, I said, "Well gee, one of the things we're talking about . . . and what's your experience?"

His response was, "Well, I used to take a very

hard line with privilege waiver. You gave me something privileged and I kept it and I pushed for waiver with respect to everything. Not so long ago, I had a case in which the other side advertently produced a dozen privileged documents, and I told the young people who were actually running the discovery, 'Good, let's keep them.' They said, 'Oh no, we can't do that. We don't do that anymore. We have to give them back.' I said, 'Oh well, okay.' And then that turned out to be a good thing because later on we inadvertently produced a dozen privileged documents and we got them back. Maybe this isn't such a bad idea after all."

That opens up a question that is also touched on — and I would add one more to those tabs you consult. The District of New Jersey Local Role 26.1(d)(3)(A) lists privileged waiver protections among the topics for the 26(f) conference.

What is actually going on out there? We have the horror story, the great fear of waiver. Are lawyers actually insisting on this? What is the practice? Are people in fact, by agreement or by simple understanding that this is the way we behave, returning privileged things?

Joseph Saveri, what is going on?

MR. SAVERI: I think my experience has been

generally that we are moving past an era where we are trying to find an opportunity to engage in, as Sheila says, a "Gotcha!" litigation. I think that from my perspective — and I focus on antitrust cases and big document cases — we want to move cases as quickly as possible to resolution on the merits. It is important for us, particularly when we deal with electronic discovery, and it is also true with respect to the paper discovery that I deal with, just because the volume is so big, that we want to eliminate the transaction costs associated with discovery.

Consistent with what I think we heard yesterday, it is important to get access to the relevant information and to begin as quickly as possible to identify what sources of information there are and, particularly with respect to electronic data, to know the nature and the form of the information that is there.

One of the most frustrating parts about trying to achieve that is the delay that is engendered, I think, in the process as a result of the privilege review. The documents and the materials that — well, there are really two things that happen. One, as a general matter, the whole privilege review slows down the process. In fact, the privilege review I think delays the process as much as any

single part of what the defendants do in organizing their materials to turn over to the plaintiffs.

So I am interested in doing anything to cut through that. If I can get an agreement that we will not keep privileged materials, or if there has been a disclosure we will turn them back, seems to me one of the easiest things for me to offer to expedite the process. My experience has been as a plaintiffs' lawyer that we are more than willing to do that to move the process along.

I come from California, where in fact I think I have an ethical obligation that if I do find one of those documents I will turn them over. And what's good for the goose is good for the gander, and ultimately I think, because I am a repeat player, that if the same thing happens to me, then I'll be afforded the same courtesy.

So I think generally my experience has been that we are being very reasonable about not insisting on keeping the benefits of inadvertently disclosed documents.

MS. BIRNBAUM: Can I just respond a minute to that?

I think there are two types of cases. There are the commercial cases where you have two players who have lots of documents. In those cases, it's very simple:

people stipulate, because what's good for the goose is good for the gander, and everybody wants to be on an even playing field. Everyone got lots of documents. They want to cut through and get some agreements. In those cases, you usually have a stipulated approach to all of this. That seems to work pretty well. You know, "I'm going to produce privileged documents, you're going to produce them, we want to cut the costs, we both have documents."

The kinds of cases that I am in — mass tort cases, products liability cases — there is only one-sided discovery. There are no real documents that the plaintiff has, except medical records, and it's all my records, it's all my documents. In certain places, in certain parts of the country, there aren't reasonable lawyers because they want to make a case over the discovery because that is part of how they are going to get the case to settle. If they make discovery expensive, difficult, create sanctions problems, this is all part of the methodology to get to the settlement.

And so there are different types of cases. The big commercial cases are not a problem, in the sense that people will work it out. But the Rule can't be necessarily for those cases. It's for the case where it is a problem,

and it is continuing to be a problem, and it's going to continue to be a bigger problem as we have more data. So I think you have to keep that in mind.

And there are repeat players that, like Joseph, are going to play by certain rules, and then there are many other people who are going to play by no rules.

PROF. COOPER: Before turning to the range of questions, is there some Rule approach that might be effective, that ought to be considered by the Advisory Committee and on up to the Enabling Act process?

One of the questions that is continually put is the question whether Rules dealing with privilege, however indirectly, however tightly tied to the discovery process, are subject to the special statutory provision that in a way qualifies the Enabling Act.

It is set out in the materials in the book on page 27. Section 2074(b) of Title XXVIII says that any Rule "creating, abolishing or modifying an evidentiary privilege can take effect only if approved by Act of Congress."

Now, this is a departure from the ordinary Enabling Act process, and although it seems to me pretty clear that a Rule dealing with inadvertent privilege waiver is not a Rule that either creates or abolishes a privilege,

it might well be seen as a Rule modifying a privilege. So you've got that question.

Then you have a rather broader question. Reporter Capra is ever alert — indeed, sensitive — to the division of authority and subjects between the Civil Rules and the Evidence Rules. It's an ongoing issue with respect to some of the Discovery Rules that have provisions that overlap and depart from the Evidence Rules at the same time. He is sensitive to both of those things. I will ask him about that.

But I will also add a twist to it. I don't see Dan Coquillette here this morning, so I will do his part of this responsibility. We have been reminded that bar groups dealing with Rules of Professional Responsibility are concerned about a duty either to exploit to the maximum advantage anything they foolishly turn over to you, or honorably and decently to return it to them. There is considerable sensitivity about the overlap between Rules of Procedure and Rules of Professional Responsibility, an overlap encountered rather more often than I think we sometimes pause to reflect on. That is another sensitivity.

Dan, is there anything we can do even if we want to?

PROF. CAPRA: Sheila, wasn't that just three questions again?

MS. BIRNBAUM: Yes.

PROF. COOPER: At least.

PROF. CAPRA: He added the third one with that twist.

MS. BIRNBAUM: He always does that.

PROF. CAPRA: Well, I proceed from what I contend to be two unassailable positions.

The first one is that there are already too many evidence rules in the Civil Rules because where you look for evidence rules is in the Evidence Rules; you don't look for evidence rules in the Civil Rules. It can only be a cause for confusion, misapplication. So I proceed from that premise.

The second premise I proceed from is that it makes no sense to get Congress involved in privilege work. The reason for that is when Congress gets involved with privilege work they will be affected by lobbyists. You'll have all sorts of lobbyists coming down on Washington and talking about various things. And even if it's in the course of this very limited point of forfeiture, it will be pretty much a disaster.

That is why the Evidence Rules Committee has never gone forth with proposed rule-making in this area, because of 2074(b), and the knowledge that once it gets up into Congress it's not your work anymore. They don't benignly neglect it, they have to actually enact it, and if they actually have to get up off their keesters and enact something, it is going to be a disaster.

So in that respect I have just a couple of comments.

Would this rule-making modify an evidentiary privilege? I don't see how you can say it would not modify an evidentiary privilege. In jurisdictions where forfeiture is automatic, it modifies the evidentiary privilege. It means that the privilege can or cannot be asserted. What more could that be than modification?

There are jurisdictions which have what was called "the easy rule," which is to say you always get it back, no matter how bad you were or no matter how negligent you were. Well, any Rule that you are going to draft is going to modify that Rule in those jurisdictions. To argue that the Waiver Rule is somehow not a modification of the Rule of Privilege itself — well, how could you address a privilege without thinking about waiver issues? That's inherently

related.

When the Advisory Committee on Evidence Rules first proposed Rules on privilege, one of the Rules that they proposed was a Waiver Rule, and that was one of the Rules that was rejected by Congress and led to 2074(b). So how can you say that that is not a matter of concern that gave rise to the statute in the first place? I just cannot see how it could not be modifying.

At any rate, it is not for me to answer that; it is for some court to answer that once this Rule gets passed and Congress isn't alerted to the problem and then it becomes a part of a litigation. I don't know, maybe ten or fifteen years later, you will actually have some determination that this Rule, which is intended to regulate and basically provide some kind of concrete guidance for lawyers, will actually be concrete. I guess I don't see how that works.

The next point I would like to make is that this Rule if it were in the Civil Rules would have to, I assume, be attendant to discovery. But not all of the advertent disclosure problems occur in discovery. There are mis-sent faxes, there are letters sent to the wrong place, there is a lawyer responding to email and he hits "reply to all"

instead of “reply to sender.” That is an inadvertent disclosure of privileged information that doesn’t occur during discovery. What Rule governs that? The federal common law governs that, the federal common law that exists today.

So what you would have if you established a Rule, whatever the Rule would be — I am not even talking about the content of the Rule right now — is a Rule that would govern one aspect of inadvertent disclosure, the aspect that occurs during discovery. There would be a conflict, no question about it, with some common law somewhere, some federal common law somewhere, that deals with this second-tier kind of disclosure outside of the discovery situation. I don’t see how that is beneficial to any practitioner or any court.

Thirdly, this Rule would not apply to criminal cases. There is a good number of cases in which inadvertent disclosure occurs in criminal cases. It has happened to the government in the Southern District, I think, four or five times. This Rule, I assume, cannot cover that.

So you are not dealing with basically all of the problem, and if you’re not dealing with all of the problem, what results is a balkanization of the law. To me,

therefore, the only thing that can be done if you really want to regulate this area is to have an Evidence Rule, because an Evidence Rule deals with whether the information is admissible at a trial. That governs criminal cases, that governs civil cases, that governs the mis-sent fax cases.

But, unfortunately, there will never be an Evidence Rule on this issue, and the reason for that is because we know that it would modify a privilege, and we wouldn't propose it because we know that Congress — it's kind of a circular thing. There will never be an Evidence Rule on this point.

So I realize that it's a knotty problem, but I don't think that it can be solved by a Civil Rule.

Finally, just in passing, if the Committee is going to deal with what has been called "inadvertent disclosure" or "inadvertent waiver," the language that is proposed — it is really not a waiver when you think about it; it's a forfeiture. Judge Posner has a long disquisition on the difference between waivers and forfeitures.

But just speaking in an elementary sense, a waiver is an intentional relinquishment of a known right, and this is not what is happening with an inadvertent disclosure.

It's a forfeiture. The reason it is considered a

forfeiture is because counsel has done something that disentitles counsel from invoking the privilege. That's what a forfeiture is. So I submit that this is a forfeiture rule, not a waiver rule.

PROF. COOPER: What Dan has just proved is that we cannot get away from the style project. One of the many fights I have lost was the effort to substitute "forfeit" for "waive" throughout the Rules for precisely the reason that Dan has just given.

PROF. CAPRA: I did not know this. He did not brief me on this.

PROF. COOPER: You can't escape it.

MS. BIRNBAUM: But he wasn't any more successful than you have been.

PROF. COOPER: The word down the line is that Jonathan wants to respond.

MR. REDGRAVE: Yes, that's correct.

I disagree with respect to what the Rules Committee could do if it so chose with respect to the inadvertent waiver. You can substitute other words, but certainly the case law has developed with the concept of waiver in mind for the privilege and the rights.

We have procedural rules that affect substantive

rights. That's just what they do, they affect substantive rights. Do they create or do they destroy the privilege rights? I think that's what you need to look at.

And I think you can craft a Rule that sets forth ways in which privilege claims can be made, sets forth ways in which parties can go about situations where mistakes happen and what do you do to return a document, to adjudicate any challenges to the privilege, and do that all within the purview of the procedural rules and not run afoul of the Rules Enabling Act.

PROF. CAPRA: I need to respond to that, because the issue is not whether it is procedural or not. That's a misnomer. The issue is whether it "modifies a privilege," that's the statutory language, so getting into issues of whether it is substantive or procedure —

MR. REDGRAVE: You're not modifying the privilege if you do it right. You are affecting the way in which a person claims a privilege. And right now on privilege logging requirements, if you don't turn in a timely privilege log, a court can say "you're toast." Well, that was a procedure. Putting forth the defense of that privilege was set forth by a procedure by the court under Rule 26(b)(5). If you didn't follow the procedure, you lost

your right. Well, are you saying then we can't even have that?

It's a procedure that affects the substantive right. It is not changing/modifying that right, the existence of that privilege, but that procedure. That's why I say we can look at a Rule and discuss a Rule, but you've got to be very careful in drafting that Rule not to create, modify, or destroy a right that otherwise exists in the common law of the states or the federal common law.

MS. BIRNBAUM: Can I just add also?

The fact, Dan, that I think we are looking at this only through a discovery prism rather than criminal law, evidentiary, admissibility, etc., I think that also is very limiting. It's not wrong, because I think what the attempt is to try to do is to solve a problem that is creating enormous costs, inefficiencies, time consumption, that can be resolved in a way that says: "Okay, if I do this quick" — and we'll talk about the "quick peek" — "if we do this quick and I get my papers to Lieff Cabraser's office earlier, I'm not going to be punished for that. I'm helping my client, hopefully" — if people want to do this when we talk about the "quick peek" — "I'm helping my client, it's costing them less. I'm taking a risk, but by taking that

risk and getting this done in an efficient, cost-effective way, I don't want to lose my privilege; otherwise I can't do it."

So I think that you can separate this discovery issue from perhaps all the other issues that you are concerned about.

PROF. COOPER: What that does is get us directly into the second wave of this panel.

MS. BIRNBAUM: We planned this.

PROF. COOPER: Well, we planned it because Sheila is the one I am going to call on first.

The generic set of questions is: Well, supposing that in its imperious wisdom the Committees decide that yes there is something that may be within the process that would perhaps have to be transmitted to Congress, with the advice that the Supreme Court thinks this is 2072 not 2074(b), and that would lie down the road. How far would any one of a number of the suggested approaches actually change practice? How far would a lawyer protected by a claw-back or a "quick peek" or some other approach in fact be able to reduce the screening time, their screening cost?

We've got essentially three different sorts of approaches described in the materials.

One of them, one that has the benefit of being an actual real-life rule, is the Texas Rule that appears behind Tab 4. This is 193.3(d). That provides protection against privilege waiver. The Comment to it suggests that it "provides protection even if the party who produced was not diligent in seeking to protect the privilege." The Comment is a very rich source of information about this. I commend it to you because it addresses another real problem that may arise.

But, Sheila — and this may come as a surprise to you — has some experience with the Texas Rule and might be the first to comment on it.

MS. BIRNBAUM: Thank you.

The Texas Rule goes far beyond electronic discovery and far beyond just discovery. It would fit into all categories, and I think that makes it broader than what may be discussed by the Committee.

What it provides is — and it takes away the word "inadvertent," by the way, which is probably a good thing at this point, because it talks about "unintended." It says "the party that produces material or information without intending to waive a claim of privilege does not waive this claim under the Rules of Evidence if within ten days, or a

shorter time ordered by the court, after the producing party actually discovers that such production is made, the producing party amends the response identifying the material or information produced and stating the privilege asserted. If you amend the response to assert the privilege, the requesting party must promptly return the specific material or information and any copies pending a determination by the court as to the privilege."

Actually we are in a case which was hotly contested on discovery. I mean there were eight sanctions motions pending at one time, all over discovery, and all of course going in one direction. There was an inadvertently produced clear attorney-client privilege document. This took effect immediately and the document was returned immediately and it never went to court to determine whether it was an attorney-client privilege because it clearly was an attorney-client privilege. So I have seen this work, and work well, in a case where nobody was giving quarter to any other person in the litigation.

I think it does several things if you have something like this. People can spend less time and money in doing this. Now, in hotly contested cases people are going to do a privilege review because there really is a

concern that some document is going to get out and you can't either put the bag over the child's head or un-ring a bell. In those kinds of litigations, that's the parties' choice to spend the money if they want to do that.

But if we had something that made it easier, and everybody knew what the Rule was and it was clear, I think people in many instances would do either a "quick peek" which will look at that, or spend less time and money doing it, because they knew if they made a mistake they were going to get it back, and it would help the process, at least to some extent.

MR. SAVERI: Excuse me. One of the problems, though, I have with the Texas Rule is that it eliminates this diligence requirement. I think that diligence is important because, after all, the material we are talking about is relevant, it is otherwise discoverable, but we have decided that there is another reason for not making it part of the adjudicative process.

I have a real concern if the privileged information just comes to light at trial. You know, how does that affect the parties' rights who have spent the money, prepared for trial, and then all of a sudden this document comes out and they say, "Well, despite the fact

that we really didn't pay much attention and we weren't diligent, the Rule says we get it back"? Now we have to do all sorts of things to try to un-ring that bell, and I think that is potentially unfair to the parties.

PROF. COOPER: This is another wonderful advertisement for a sort of Reporter secret part of the Rule process, and that is look at the Committee Note. The Comment to the Texas Rule addresses that. The question, Joseph, is: what do you think about this provision in it?

What it says is: "To avoid complications at trial, a party may identify prior to trial the documents intended to be offered, thereby triggering the obligation to assert any overlooked privilege under this Rule. A trial court may also order this procedure."

In effect, it changes the burden to you've got the thing now and the way you can protect yourself against that trial surprise is list before trial every document you intend to use at trial.

PROF. CAPRA: But there is no question that's not to be in a Committee Note, that's to be in the Rule. Wouldn't you agree, Judge Thrash?

VOICE: [Inaudible.]

PROF. CAPRA: Absolutely. That Committee Note is

not going to be helpful at all. That needs to be in the Rule. That's the thing that really affects practice. You can't just throw that in a Committee Note. My gosh, what is going on in Texas?

[Laughter.]

PROF. COOPER: Steve Susman, do you want to comment now or do you want to wait for the comment period?

MR. SUSMAN: Wait.

PROF. COOPER: Okay.

PROF. CAPRA: There is another problem with the Rule. Another problem with the Rule is that it basically puts a burden on the receiving party of having to show that any argument that they make, any pleading that they amend, any witness that they call, is not derived from privileged information. So essentially you are going to do a *Castegar* hearing, or the civil version of a *Castegar* hearing, in most cases, because if you have to turn it back you turn it back.

But I assume that means you cannot use the fruits as well. The Rule doesn't actually say that, but I assume that that's the ordinary rule. So how do you deal with fruits in this situation? You've invited a fruits argument in every case.

MS. BIRNBAUM: I've never seen the fruits argument

made, but I guess it's a good one, because I think what really happens in real life is the document is given back. Usually the document is not an important document. I mean usually it isn't *the* crucial document, that one and only smoking gun document. So as a practical matter, it may in some instances be important, but that's the rare case.

PROF. CAPRA: I was involved in a case where I guess it was Fried Frank disclosed inadvertently part of Board minutes at which Fried Frank gave some advice. It got turned over to the plaintiff. The plaintiff read it, turned it back because it was found to be an inadvertent disclosure under the six- or eight-factor Inadvertent Disclosure Rule that that court was applying at that particular time, and then the plaintiff amended the complaint. The defendant moved to strike the amendment. The plaintiff argued, "I could deduce this change of fact through otherwise ordinary channels." The judge spent maybe about six months trying to figure that out. So that's how the fruits arguments come up — and that's under current law, and that's not even under the Texas Rule.

PROF. COOPER: Okay. We've got to keep this moving.

Another approach suggested is illustrated by the

"quick peek" draft on page 28 behind Tab B. The basic notion of this was something that was inspired by statements.

Lawyers do this a lot. We stipulate to a protective order that provides a sort of two-step process: the first step is the requesting party looks at everything, identifies what is typically a quite small fraction of the total of potentially responsive material that it is actually interested in; then the producing party screens and the discovery process goes on.

There may be some thought that something like that could reduce to some extent those concerns about where within the Enabling Act process that fits. Is it something that comes too close to modifying a privilege?

Jonathan Redgrave, you have some thoughts about "quick peek" and some experience. What do you think of it?

MR. REDGRAVE: Well, I do have some thoughts on the "quick peek" approach.

Before I lose my train of thought on the last discussion, though, I just want to throw out two things.

You heard something about the balkanization. I'm not sure I fully like that term as best to describe what goes on in this world as far as inadvertent production or

how you deal with privilege issues on a “quick peek” approach or whatever.

But the reality is you’ve got a variety of approaches being employed by various federal courts all throughout the country, whether a standing local rule now says “you’ve got to discuss it,” or judges have their nice little “in their back pocket” order, so they go out there. So it is an inconsistent practice already, and the idea behind a Rule would be bring some consistency to that.

Secondly — and this is just a thought to throw out there; I’d be happy to discuss it with anyone later — I think Rule 26 is a much better place for any inadvertent production rule, because you would try to get it to the broadest possible application to the discovery process. I think you see in the Texas Rule — and I’m not an expert on the Texas Rule — but it’s in the Discovery Rules generally, so it applies to all the discovery exchanges.

I think that is better than just Rule 34 because, as my intro into the “quick peek” approach, my practice is much like the game I bought for my kids, the Worst Case Scenario game. I don’t know if any of you have done this. It tells you how to run away from killer bees, it tells you

how to kill a rattlesnake. And I guess now I know the question of how to kill a copperhead, so I'm ahead of my kids when I next play it.

[Laughter.]

But the reality is I have seen an argument in the case where we had a privilege log where we inadvertently turned over the attorney comment field as well as the other privilege log fields on a database. The other side said, "Well, that wasn't a Rule 34, so your non-waiver order doesn't apply. Ha, ha, we get to keep it." Well, we litigated it. We won, but we had to litigate it at great cost.

So I think Rule 26 is a better place for it, to just be as broad as possible within what the Rules can do.

Now the "quick peek." I don't know how many of you understand what this is, so I am going to take two seconds to explain it.

Instead of doing this privilege review, I will say to you: "I've got a large set of backup tapes. I've loaded them on the computer. Do you want to see all the emails? I'm going to bring you into a room and I'm going to let you see it. I haven't pulled anyone out. The general counsel email is on there, all the employees' email. It would cost

me millions of dollars to go through it. I'll tell you what. This case should be simple. I'm going to let you come in, you can spend ten days, you go through it, and at the end of the ten days I am going to now go through what you've selected and that's where I'm going to focus my money. If you selected some privileged documents, I'm going to put them on a privilege log."

Is this a good idea? Is this a good idea? And, even if it is a good idea, will anyone out there actually do it?

Back to the Worst Case Scenario game, I have actually been in a case where someone has done it. The opposing party did this with respect to both paper production and an electronic production of emails. I'm not sure they'd do it again, but quite frankly I don't think they actually ran a waiver risk, I don't think they had a bad experience with it, and it allowed them to save millions of dollars in discovery cost because they didn't have to review it. And the number of documents we actually selected from that process was very few.

But the problem in this is that lowest common denominator again. Remember? We could have a Rule that says "'quick peek' is great in the federal courts" and

there's this non-waiver concept, but as long as you have other jurisdictions in states or territories that say: "Look, we're not going to recognize that. The bell has run. You can't ignore the child in the bag. It's over, you've waived it, and I don't care if this quirky 'quick peek' thing was adopted by the Federal Rules. We don't follow that here in this state and you're done."

So until there is absolute assurance, you've still got the client saying, "Well, there's this risk, and if the document gets out there I still need to spend the money." We're trying to untie that Gordian knot, because what Sheila very well explained is this privilege review process is very hard to explain to associates how do you find privilege.

And the electronic age has made it worse, because what used to be maybe the memo to the client reflecting the client's request for legal advice and then the attorney responding to that request, the prima facie privilege — the emails go back and forth, the associate picks up the email in the middle of the string, how do you know it's privileged? You've got to do all the contextual research. It is very difficult. So I submit it is getting more and more expensive to this, and as a result of the volume I think your privilege logs are getting worse.

Now, with that, if you were to adopt a "quick peek" approach, I think it should be something that is just a voluntary matter. In our case, the party voluntarily said, "We want to do this to save the money," and then entered into the restrictions for both sides with respect to their review. I think, given the uncertainty and the fact that you can't give an absolute assurance with regard to waiver, it would be a mistake to make this a mandatory event, and I think it would also be a mistake to have it out there in the Rules in such a way that a judge feels that they could put a lot of pressure on the party to get the case to trial — "We need to do this regardless of your privilege."

Now, I say that, and I realize a lot of jurisdictions have rocket dockets and there are a lot of pressures and sometimes you need to do creative things to get the case to trial.

Last thing on the "quick peek" approach. If you do this — and I don't think the Rule would necessarily reflect it, and obviously I'm hearing a lot of things, that the Comments aren't going to say anything except "we discussed something and we're not going to tell you what it was" — you've got to have a very strict review process

whereby there are no notes taken, you completely guard as best you can against the bell, anyone ever being able to remember what the bell sounded like. And I think you really can do that.

And it's sad. We had a lot of associates and other people review this production on this "quick peek" approach. If I ask people who were there — I mean they couldn't talk to us about what they saw; all we got was a privilege log — we actually got a non-responsive log, if you can believe that, and we got the other documents, the responsive non-privileged documents. If I ask people now what they saw, they don't know. I mean that bell has long faded in the forest.

PROF. COOPER: We've got about four and a half minutes left before we must open this up for questions. But I would simply first observe that "quick peek" as described could be modified as "quick peek lite" — that is, you would clearly remove everything that was manifestly privileged or otherwise protectable before you entered the "quick peek" process, and of course log it. So it doesn't have to be all or nothing.

Another approach that is also described in the

materials is to suggest: well, one thing Rules can do — and indeed it is often supposed that the soundest Rules are those that build on well-developed practice, bringing regularity and uniformity to things the courts have been doing for some time, trying out and working out — is take a look at what courts are doing now about inadvertent privilege waiver, recognizing that this would likely test still further the line between a discovery-only Civil Rule and a broader Evidentiary Rule.

Behind our Tab B on Page 32 are factors 1 through 6 — and of course you can, as with questions, frame a number of factors in any way: Is this one question; is it three? Is this six factors; is it seven or eight or nine?

Joseph, I think you've had some feelings about the value of multi-factor balancing tests for waiver, here or anywhere else. What about this one?

MR. SAVERI: Well, as a general matter, I think that the language that is set forth here could work well in combination with these kind of "quick peek" proposals, particularly with respect to electronic discovery, to get these cases moving.

Significant to me anyway is there appears to be some kind of diligence requirement written into the list of

factors. E-2 says “the efforts the party made to avoid disclosure of the privileged materials.” So I think this formulation does have the advantage of using concepts and ideas and facts that lawyers are familiar with.

PROF. CAPRA: I would like to respond to that. A seven- or eight-factor test in a Rule makes no sense to me. Why would you have a Rule like that?

For one thing, most courts in the United States have such a rule, but some are five-factor tests, some are eight-factor tests, some are seven-factor tests. So you are going to change, I guess, the law in all of those jurisdictions except for the one that you codify, I guess, even if you do that.

Secondly, whenever you add the “interest of justice,” you might as well just forget about any kind of balancing test at all. If you’ve read any of these cases, it was totally not diligent, it was a lot of information, the person was an innocent bystander, but the interest of justice required it to be returned. All factors point against return, but the interest of justice — okay, you know.

So how do you write it? Writing a Rule is not going to regulate courts in this way. They’ve got their own

multi-factor balancing tests as they exist. It just doesn't seem to me to be appropriate for rule-making.

PROF. COOPER: Joseph?

MR. SAVERI: I guess the question is whether you set forth the factors or you just allow as a general matter that there will be these kinds of protections for inadvertent production. I think you get to the same place.

I think in any event judges can handle this and I think it would be — I mean it has a lot of benefits for the system. I don't care if it's a five-factor test or an eight-factor test or a two-factor test. I think there should be some test, and I think there should be some Rule that permits it. I think everybody would benefit from it.

MR. REDGRAVE: I would just add on that obviously Rule 26(b)(2)(i), (ii), (iii) sets forth a three-factor test, but under 26(c) you set forth a number of other factors for protective orders. I don't think the fact that there may be a test that you set forth that has different factors should be a deciding factor on whether or not this is a good idea or a bad idea. If it is determined that it is a good idea for uniformity, it falls within the Rules Enabling Act, I'd go ahead and see if you can come up with a factors test that could help all the courts.

PROF. COOPER: Okay. We are now where we must hold it open for questions, comments, instructions. We've got hands everywhere. The first one I saw was here.

QUESTION [Paul Alan Levy, Esq., Public Citizen Litigation Group]: Paul Levy from Public Citizen Litigation Group.

This relates partly to the waiver issue, but I want to raise related questions about two forces that haven't really been discussed here and throughout the conference. One is the market and the other is federalism.

Federalism was briefly touched on by Jonathan as a reason not to use the "quick peek" rule, but I don't understand why the concern about what state judges will do in disregarding whatever the Federal Rules say doesn't also apply to all the other Federal Rule solutions that are being proposed with respect to inadvertent waiver.

The second question relates to the market. It seems to me that if businesses demand software that calls for embedded data — for example, there is one major word processing program that has taken the world by storm in part because it embeds the data and leaves it available for future review. If businesses find this embedded data useful, why shouldn't it also be available for discovery,

and why shouldn't it have to be examined for privilege purposes?

MR. REDGRAVE: I'll address it on the federalism point. I would recognize federalism and the issues involved there as more of a fact and a reality, something to be factored into the decision-making for a Rule change, and then it's a reality for what corporations deal with, or any party deals with, realizing there are going to be other jurisdictions that have different rules and laws. That is just a factor to say how useful will this test be in untying the knot. Will it really advance the ball for getting people to do things, or are they just going to be so paralyzed by concerns about the lowest common denominator that it will just happen?

And on embedded data, I think you've seen a lot of discussion in the other panels. There are a number of opinions I could point to out there where the judges are saying, "You know, if the company can get to it, I don't care what you call it, it's data. I mean, 'documents' under Rule 34 is so broad you should be doing that, and to the extent you're producing it you should be reviewing that for privilege too or else you're at your own peril."

MS. BIRNBAUM: I think the question with embedded

data is not necessarily that someone would not be entitled to get it or that it had to be reviewed for privilege. The real question is: in the first instance do you do that and increase the cost, increase the expense, and increase the time? Or do you do it by just giving them a picture or whatever else, and then if somebody thinks there are some documents that are important and they want to know the embedded data, that would cut the amount to a very small amount.

We know in these cases with thousands and hundreds of thousands of pages in the end it comes down to only a few documents that are really important. Those documents you can request further information on.

I think the question is not whether embedded data is discoverable, it's a question of at what point in time it should be discoverable.

MR. SAVERI: The challenge is that — I mean I think we all agree that with the advent of electronic media there is a multiplication of the information. The question is: how do we deal with that in terms of discovery?

The privilege review is not a technological device. It is putting real people, who tend to be fresh out of law school, in rooms for months to deal with this

multiplication of information. I think we are trying to jump past that and come up with a solution to it. This kind of "quick peek" and inadvertent waiver analysis is a kind of categorical response to that, and I think it is something to be considered.

PROF. COOPER: We've got more volunteers than I usually get in an 8:00 o'clock class.

QUESTION [David K. Isom, Esq., David K. Isom Law Offices]: I'm David Isom from Salt Lake City.

I would like to comment about the Texas Rule. I've spent most of my last ten years doing a Texas case that involved 25 million documents and various waves of documents. Before the Rule came into effect, there was a lot of uncertainty for all the reasons we've talked about, and even within the jurisdiction of Texas there were various opinions in the Court of Appeals and one Supreme Court opinion that left us with a lot of uncertainty about waiver and privilege and that sort of thing. When the Rule became effective, it clarified everything for us.

I really liked how it worked. It meant that in one case we just thought we had waived the privilege. We had had some documents around and hadn't asserted what was required under the Rule once it became effective. It worked

for us by clarifying where we were and it made it so that both parties either produced or didn't, but at least we knew where we were. So I thought it was a wonderful thing.

PROF. COOPER: Dan?

QUESTION [Daniel Regard, Esq., FTI Consulting, Inc.]: This is Dan Regard with FTI Consulting.

I have two points to make. The first is on the issue of embedded data and the obligation to review it and produce it because you have taken advantage of the technology. There I would assert that every one of the companies that we work with actually make a conscientious decision to choose those products. Because of the monopolization of the software market right now by Microsoft, there is no choice, it gets created.

Point number two, in 1662 Boyle set forth a law about the pressure of gas, and I think that is very pertinent right now. We have a chamber, a time chamber, for discovery of very limited scope. That chamber has not gotten any larger, but the volume of pressure inside of that chamber has increased exponentially. The sheer volumes do not allow people the time necessary to review these documents. You need a pressure release valve, and that is what inadvertent waiver gives us.

There is no time constraint on the amount of time that you have to review documents once you have received them, but there is time constraint on the amount of time you have to review them before you produce them. It's unfair, it's unbalanced, and that pressure release valve is necessary.

PROF. COOPER: Thank you for not addressing Boyle's Law for the professorate.

We've got Socha over here, and I think Susman has a head start on the line for the next one after that. Mr. Socha?

QUESTION [George J. Socha, Jr., Esq., Socha Consulting]: I have two quick comments.

One, I think with the volume of electronic materials that we are potentially looking at, we ought to take it as a given that when we get into the review and production of electronic materials we will produce privileged materials, no matter how hard we try not to.

Second, there are at least some rare occasions where there are potential technological solutions to technological problems. Metadata is one of those areas that does offer some opportunity as well as some challenge.

Most of the leading electronic discovery

processing vendors offer tools that allow searching of metadata. If we can get to a point where we view use of those tools as sufficiently reliable — and step back and think what it's like to review the paper materials: after a few hours, your eyes start to just roll back in your head — these technological solutions may actually help us move more efficiently through the materials.

PROF. COOPER: Mr. Susman?

QUESTION [Stephen D. Susman, Esq., Susman Godfrey]: My question to Jonathan is whether — you said the "quick peek" thing should be voluntary. But don't you get more protection if the court makes you do it or if a Rule requires you to do it? Nothing is ever perfect in the real world and you're always balancing risk versus expense of eliminating risk. But aren't you better off if a court orders you do this "quick peek" thing?

MR. REDGRAVE: Yes. I'll clarify. If you read the Sedona thing, which is a much longer explanation of it, I say "voluntary" because I don't want courts to say "you must do it this way," but I want the parties to say, "Okay, I'm willing to submit to the court order." That's basically what it is. The court orders you to do it, but you've gone into that knowing the risk, the client knows the risk, and

so you're willing to have the court order it, and therefore when you go to the other jurisdictions the court has ordered you to do this for the expediency of the case, etc., etc. So in that way it is a compelled production.

But at the same time, I would not want to see a Rule that just says, "Okay, you can do it the normal way or the court can just order you, regardless of what you want to do, to do it this other way because you can't have that complete protection." So that's my longer answer.

MS. BIRNBAUM: The proposed Rule has two things in brackets. One is "on stipulation" and "on order of the court." I think what Jonathan and I are suggesting is that it should be both. It should first be agreed to by the parties but then ordered by the court, so that you get that extra protection of a court order, and maybe a court that will enjoin some other parties later on if they try to take advantage of it.

One other thing. In this "quick peek" look, you have not handed anything over to the other side. I mean the side has seen it in a computer or otherwise, but there has been no inadvertent production of it in that sense. I think that makes it a little different than actually handing it over. I mean technically they have seen it, but it has not

been handed over. So that is another way of looking at it.

PROF. COOPER: Allen Black?

QUESTION [Allen D. Black, Esq., Fine, Kaplan & Black]: Allen Black from Pennsylvania.

A couple of observations. One is that these very real problems of expensive document review and so forth that we've been talking about are really the province of the cases with the mega information productions, which are, I think the statistics show, a very, very small minority of the cases in the federal courts.

So there is some question in my mind whether there ought to be an attempt to make a Rule that is applicable to every case in every federal court to deal with the nightmares that occur in 5 percent of the cases or something like that. Isn't there maybe some other way to deal with that nightmare rather than a Rule running through all the federal courts?

The second thought is that from the discussion here and from what I've heard in my practice, the real fear, the real driver here, is the draconian subject matter waiver concern, that somebody somewhere, some judge in a state court in Alabama, some judge somewhere, is going to say that, "No matter what this Federal Rule said" — even if we

put one through — "no matter what the parties stipulated, no matter what the judge ordered, I'm not going to follow that and I'm not obligated to follow it."

So it seems to me that the only effective way to deal with that concern is to just bite the bullet, step up to the plate, and get Congress to pass a statute that says "subject matter waiver ain't the law anymore." And if there's a reason that that can't happen, that's because politically it ain't what ought to happen. I think you have to look at what the real problem is.

Thirdly — this is way off the topic, but since Dan is here — it seems to me that one of the real, real problems with electronic discovery is: how do we figure out how to deal with authenticity issues when it comes time to introduce this stuff at trial? Particularly if it has been produced in native format in discovery, there are the whole issues of inadvertent alterations.

For example — I mean I know nothing about computers, but in our system — and I have complained about it incessantly — when I bring something up, a letter up, from the server to use that letter as a model for the next one, it changes the date on it to the present date. So a

letter I wrote two years ago, I bring it up, and if I decide "oh no, that's the wrong one" and I put it back, it goes back with today's date on it. And also, of course, it makes it very easy to fiddle with stuff, intentional spoliation.

So I think that the evidence folks ought to really look at those issues.

PROF. COOPER: I'm told Jonathan wants to respond, and I know that is going to run out our clock. There is going to be no break. What that means is keep those cards and letters coming. You've got peter_mccabe@ao.uscourts.gov. Address all of those things. We really do want to hear them on all of these topics.

Now, Mr. Redgrave, you've got a final word.

MR. REDGRAVE: A couple quick points. I love having the final word. Thank you very much. It doesn't usually happen.

First, on the small case issue, I have seen a number of reporter cases where it really was a small potatoes case when you think about the money, or even the number of documents, but it involved inadvertent protection or an inadvertent waiver issue and the multi-factor test. I think we should have a Rule that applies to all of it, so that whether it's the little person, the ma-and-pa case, or

IBM v. Microsoft, whatever, the same Rules apply, and we could codify that if it fits and we have enough of a justification for it.

With respect to that point, though — it's something I noted yesterday in comments by various people — we need to make sure that any of these changes don't suddenly make those small cases, the ma-and-pa cases, a lot more expensive for those people who are trying to get into court with their $50,000 or $75,000 or $100,000 disputes by suddenly saying they have to go through all the embedded data, all the metadata.

I think this goes back to the importance of that Rule 26 conference and what we're talking about there. I don't think Congress will ever step in, but I don't think that means that a procedural change is something that should be just disregarded because Congress won't ever step up to the plate on this subject matter waiver issue.

I think there are things that we can do short of that that can make a positive difference for a better, more uniform practice throughout the system, and that's what we should be about.

PROF. COOPER: I'm going to beat you to it. Thank all of the panelists for their wonderful —

PROF. CAPRA: Good job.

PANEL SEVEN: RULE-MAKING AND E-DISCOVERY — IS THERE A NEED TO AMEND THE CIVIL RULES?

Moderator
Professor Myles V. Lynk
Arizona University College of Law
Civil Rules Committee

Panelists
Allen D. Black, Esq.
Fine, Kaplan and Black, R.P.C.

Carol E. Heckman, Esq.
Harter, Secrest & Emery, LLP

Carol Hansen Posegate, Esq.
Posegate & Denes, P.C.

H. Thomas Wells, Jr., Esq.
Maynard, Cooper & Gale, P.C.

PROF. LYNK: Let's get started. I know that some people are still on a break, but I think if we do our initial introductions it may expedite the process.

Steve Morrison came up on the stage and said, "We now see the difference between a judge saying there is no break and a law professor saying there is no break."

[Laughter].

This panel will begin to sort of institutionalize the discussion that I know we've all been having individually and generically: really, is there a need to amend the Civil Rules? In light of the previous discussions we've heard, is rule-making the appropriate device to

address these issues?

I want to do a brief introduction on that topic before I go to our panelists, but first I want to introduce the panelists to you. My introductions will be brief, although they will be just a little bit longer than the previous introductions.

To my far left, Allen Black, Founding Partner of Fine, Kaplan and Black, a commercial litigating firm in Philadelphia. He represents both plaintiffs and defendants in all sorts of commercial and class action litigations. He is a member of the Council of the American Law Institute and he has participated in many Rules Committee conferences dealing with class actions and discovery.

To my immediate left, Carol Heckman is a Litigation Partner in the law firm of Harter, Secrest & Emery, of Buffalo, New York. Prior to joining the firm she served for eight years as a U.S. Magistrate Judge in the Western District of New York, and she has written and spoken widely on electronic discovery and other subjects.

To my immediate right, Carol Hansen Posegate is a Founding Partner of Posegate & Denes, where she practices in the area of civil litigation, employment law, and college and university law. Carol served six years on the Civil

Rules Advisory Committee from 1991 to 1997 and she is currently working on the Practitioners' Comments for the Third Edition of West's Federal Rules of Civil Procedure.

To my far right, H. Thomas Wells, a founding shareholder in the Birmingham, Alabama, office of Maynard, Cooper & Gale. He is a member of the firm's litigation, environmental and toxic tort, and product liability practice. He is one of five Alabama attorneys listed in the *International Who's Who of Product Liability Defense Lawyers.* He also served for five years as the ABA Litigation Section's Liaison to the Advisory Committee on Civil Rules, but I know Tommy best as "Mr. Chairman." He currently serves as Chairman of the ABA House of Delegates, the second-highest office in the American Bar Association.

When discussing whether or not amending the Rules is necessary, I'd like to frame that discussion a little differently. I would like to frame it as: would amending the Civil Rules be helpful?

I say that because, depending on how one defines "necessary," you can always say that something isn't necessary. The litigation process will go forward, the federal common law will develop in this area, parties will propose private solutions in individual cases, and that will

be the law.

The question is: is that the best way for the law to develop in this area? Would it be helpful to have a national standard, even if that national standard was a national baseline, if you will, or default in certain areas, subject to modification by the parties with the approval of the court in different cases?

So would amending the Rules be helpful? At present, we have no national uniformity in this emerging area of electronic discovery, what I like to say is the production of data or information that is stored electronically.

We do have a number of judicial opinions, primarily from the U.S. District Court and U.S. Magistrate Judges. Many of those opinions, some of which have been discussed previously, are very learned and scholarly, but while they may have persuasive force, they are not precedent for other district judges and they certainly do not have the weight of precedence of a circuit court or Supreme Court opinion in this area.

At the same time, we have seen that local district courts, at least four U.S. district courts, have promulgated local rules in this area. It is likely that other U.S.

district courts will promulgate local rules in this area. Do we want local rules in the absence of a uniform national rule to which those local rules must conform? As we have seen under the Federal Civil Rules, local rules develop where you have Civil Rules to fill in the gaps or to apply a national standard to a local situation. Is the alternative really preferable, where we have no national standard but local rules developing?

On the other hand, at least two arguments, I think, have been made throughout the conference with respect to the need, if you will, for national rule-making. One is that it's just not necessary, and so we're getting back to the necessary/helpful dichotomy. But the theory is if these issues only arise in a few cases, the mega-electronic document cases, 5 percent, then it is not necessary because to the extent those cases arise before a district judge or magistrate judge, it will be unusual and the unusual should be dealt with ad hoc, either the common law development of judicial opinions or by local rules.

The other argument that we have heard, I think, is that technological change in this area is so rapid that we must be careful to craft Rules, if we craft them at all, that are flexible enough to accommodate technological

change, that do not focus so narrowly on a specific technology that they become out of date.

My favorite example of that in the current Rules is in Rule 34(a), Definition of Documents, the reference to "phono records." I talk to my students about that and I ask them how may of them know what a phono record is, and each year it gets fewer and fewer. I know that the day when I am the only one in the room who does know what it means that will be the day I should retire.

[Laughter.]

MR. BLACK: What are you talking about, Myles?

PROF. LYNK: What do you mean me, Kimosabe?

[Laughter.]

With that in mind, I'd like to begin by asking Allen Black from Philadelphia — by the way, what we're going to do is we are going to ask each one of the panelists to comment on specific proposals or specific Rules that have been either proposed in our memo or as they've been discussed; after the panelist to whom I will pose the question responds, the other panelists will have an opportunity comment as well; and then after we complete our review, I will open it up to the floor and we will welcome your participation.

We are going to begin with the question of whether or not we should codify in the Rules a requirement that counsel discuss these matters in their own pretrial 26(f) conference, in the conference before the court at 16(b), and in the Form 35 discovery plan they submit. These items are discussed at pages 9-to-13 of the Memorandum at Tab B.

Allen, you've heard the arguments pro and con. What do you think?

MR. BLACK: I think it's almost no-brainer that yes, that should be a required topic of discussion.

I find myself in an unusual position, because usually I come to these conferences and say, "No, no, no, don't fix it, it ain't broke." But I come here thinking, and after the discussion here I continue to think, that we absolutely must deal with electronic information and other technologically stored information, if for no other reason than it's just embarrassing to have the premier set of Rules of Civil Procedure in the United States that don't even seem to acknowledge that computers exist at a point in time when some huge proportion of information in the world is stored on computers and dealt with by computers. By the time a Rule is enacted, and shortly thereafter, we are going to get to the point where almost everything is going to be

electronic.

My local township where I live out in the country in Bucks County, Pennsylvania, just went paperless. It's astounding. So we've got to deal with it.

The particular area of putting it on the checklist of "must discuss" items is a no-brainer to me because I don't see how it can possibly do any harm. And it fulfills, or would begin to fulfill, it seems to me one of the very basic, but often forgotten in these high-powered conferences, functions of the Federal Rules, which is to help practitioners who are perhaps doing their very first case in federal court and are unfamiliar with these things to be alerted to what the important things are, what the important issues are. People who are not from the biggest law firms in the country dealing with the multibillion-dollar cases every day, when they get a client in the door who has a federal case, they pick up the Federal Rules and that's where they start to look.

So to me it seems that the Committee should keep that in mind, centrally in mind, in thinking about what to do about electronic discovery, that you need to put something in the definition of "documents" or "discoverable material" that says it includes electronically or otherwise

technologically stored material. And you need to deal with some of these basics.

With respect to the argument that things are moving so fast that we can't possibly keep up with them, therefore we should do nothing, I don't buy that. I think we have to do something. I think what that argument cautions, and cautions properly, is that we should not attempt to do anything too specific.

I had lunch yesterday with Harris Hartz and Dan Regard. Dan is a consultant in this area. He told me, "You know, in five years there aren't going to be backup tapes, so you better not phrase a Rule in terms of backup tapes." He'll tell you about it. I won't go into it now because I'll get it wrong and it will take too long.

But when we do move into the 20th century with the Rules, or maybe even the 21st if we're lucky, we've got to be careful to do it in a way that's general enough that doesn't get into those kinds of phonograph record problems.

PROF. LYNK: Any other comments?

MR. WELLS: Let me just add, I come to this with the idea that the Rules Committee should heed the physicians' first rule, which is "do no harm." I don't see any harm in adding this to Rule 16, Rule 26. I think it in

fact would be useful to a practitioner in an appropriate case to think about what are you going to do about electronic discovery and include it in the report. I think if you go beyond that you may be treading into the area where you may do some harm.

PROF. LYNK: Carol?

MS. POSEGATE: I might just add a word of caution. I perhaps would be a little slower to move in the direction of incorporating language which specifically addressed electronic data simply because I think we need to always view the Rules in terms of long-term existence and service to the practicing bar.

I suspect many of us in this room completed our law school training at a time when computers were not even something we thought about, much less cell phones and everything else that has changed our life. Our children, on the other hand, can’t imagine a world without these things, and everything that they do is computer-related. So many of us are probably struggling with a lot of definitional issues that are not going to be an issue down the line.

So while I would not be averse necessarily to consideration, I do think we have to think in terms of the longer timeframe.

PROF. LYNK: Let me just follow up that comment with sort of a Devil's Advocate question for the panel. How do you respond to the argument that by adding items to the checklist you trigger lawyers' thoughts — "Well, you know, I hadn't thought about asking for their computer tapes, ah, but now this is something I should focus on?"

MR. BLACK: Good thing. It's a good thing.

MS. HECKMAN: I also think the lawyers really have thought about it, and it is helpful for the court. I mean I can say as a former Magistrate Judge the more early planning you do on a case, the better you can administer that case. The more subjects you have to cover, the more you do cover in your 16(b) conference and in your pretrial orders.

Getting that out on the table and discussing it — I mean if it is a surprise to someone, it shouldn't be. They should be thinking about it. Just as you want early discussion of settlement, an early discussion of some of your unique discovery problems is completely appropriate. If you put it in a Rule, it certainly doesn't do any harm.

If it later turns out that technology has overtaken the utility of such a Rule, you can take it out. But right now it's an issue.

PROF. LYNK: Okay.

Let me stay with Carol Heckman for our next question. We saw significant discussion about the efficacy of defining electronic documents in Rule 34(a). First of all, can you do it in a way again that is helpful and useful, and then should you do it?

Related to that is the Rule 33 interrogatory requests. How does that interact with the definition in Rule 33?

These are items that are discussed at pages 14 to 15 and 16 to 20 in the Memo, and then 21 to 22.

Are we treading into deep water if we begin to try to define what we mean by e-documents or electronic discovery, or is that a necessary predicate to anything else we do in this area?

MS. HECKMAN: Where I come down on that is if all you are doing is adding to a definition, I don’t think I would bother. On the other hand, if you are altering or substantially changing a Rule otherwise with a substantive change, such as a safe harbor provision, then obviously you do need to consider whether you need to define it in order to make your substantive alteration make sense.

I am not too excited about just changing the definition and making no other changes. I think that in

practice attorneys routinely understand that evidence that is introduced in the courtroom, whether it is electronic or hard copy, still has to be subject to disclosure. I can't imagine attempting to offer into evidence an email at trial and the other side objecting on the basis that it has not been disclosed, and me arguing to the judge, "Well, but it's not a document." It would never fly.

And I also know routinely in all discovery demands that I issue and I receive we define "documents" to include e-data. So I don't think there is any lack of uniformity, I don't think there is any lack of predictability.

When I think about a Rule change, I think: Well, is it helpful to facilitate litigation? Is it necessary to provide predictability and uniformity across different districts? And does it provide judges with the flexibility they need in order to exercise their discretion and reach a just result?

I don't think there is anything in the definitions alone that really requires any of that, unless you're changing some other aspect of the Rules.

PROF. LYNK: Okay. What about —

MR. BLACK: Myles, could I just jump in on that?

PROF. LYNK: I'm sorry, Al.

MR. BLACK: I would have thought so too, until I heard that shocking statistic yesterday that 65 percent of the people surveyed, companies surveyed, said that when they got hit with a lawsuit and sent out a document hold instruction they did not include electronic information in that. That was shocking to me. It tells me that Rule 34 has to say "electronic information." It's just got to say it, so that when the outside counsel looks at it and the general counsel looks at it, that 65 percent goes down to 3 percent, which is where it ought to be — 2 percent.

PROF. LYNK: One of the issues the Committee has been wrestling with is the extent to which, for counsel and for the courts, the evolution of document to data is taking place. That is to say, the Rules focus on the discovery of documents because they focus on discovering those tangible items from which discoverable information can be ascertained, whether it is a photograph or a written memorandum or something like that.

In an electronic era, we are focusing on the actual information itself because it can exist and then you download it onto something that's tangible, but it is the information itself that is what the focus is.

Should the Rule reflect that by reflecting a

change, for example, from “document” to “data”? Would that be helpful or is that moving too far ahead of where practice is today? Carol?

MS. POSEGATE: I think you have to be concerned with the mixture of cases that typically one finds in a federal district court’s docket calendar.

I think comments have been made previously here, and I would like to reiterate, that the cases that have consumed much of our discussion are these very large cases involving hundreds of thousands of documents, if not millions of documents. And indeed those cases get a great deal of attention, but the majority of the cases that are on a federal docket tend not to be of that sort, particularly in areas such as the one where I practice, which is the Central District of Illinois. At any given time there may be two or three very significant cases and then there is a whole quantity of cases that are more routine in nature.

I think, if I am not mistaken, that the number two variety of cases found in the federal docket on the civil side are the employment law cases, many of which involve a single plaintiff complaining of some wrong in the workplace, and those cases do not involve typically the kind of volume that we are discussing here. So we have to be mindful of

that when we talk about revising a Rule.

PROF. LYNK: Tom, in the discussion yesterday one of the panels focused on the burdens of production and the fact that in a world of e-discovery, in a world where you are looking not just for, say, active data, which is the data that is in use, but also backup tapes and material which has been stored, that the burden of production on the producing party can be significant, a burden in two ways: (1) the cost of accessing the data, although our technological consultants tell us that that cost of production may actually go down; but (2) the cost of review, reviewing for privilege and relevance millions of documents and millions of information.

Can the Rules properly draw the balance between the burden to the producing party and the value to the requesting party? Do the Rules already properly draw that balance with respect to discovery generally? Or should we have a Rule that in addition to those general requirements focused on the specific issues involved in electronic discovery?

MR. WELLS: Well, Myles, you've done a pretty good job, like Ed Cooper, of asking about four questions in one.

In terms of the privilege review, let me start

there. That reminds me, I was on a Delta flight the other day, and the flight attendant made the usual announcement when we landed, "Be careful when you open the overhead binds, items may have shifted during flight," and then he added, "We all know shift happens."

[Laughter.]

You know, that is sort of how I view the inadvertent privilege idea, shift happens, and it is going to happen more with more documents.

However, in looking at the privilege issue — you know, I thought I was here for a Civil Rules Advisory Committee and it turned out I was here for an Evidence Rules Advisory Committee — I do not think that you can deal with inadvertent privilege issues in the Civil Rules. I think that is a broader question.

I think a better way to do it if you are going to do it is to put it in a case management order, to do it up front, to do it with a court order that says, "If you want to do a 'quick peek'" — and, quite frankly, I think the "quick peek" gives something in big, huge document case to both sides, because, like Steve Susman said, when you get down to it, there are only ten or twelve documents that ever matter in a case, no matter how many documents are produced

— unless you are just dealing with statistics, and then you just do a data compilation and then it's one document that shows all the data compilation.

So I think it is better to deal with that type of issue in an initial case management order. It gives the plaintiff the idea, "Look, I get a quick look at the documents." I know when I'm a plaintiff that I don't want to go through 100,000 pages or one CD-ROM having to look at every page. What I want to find are the ten or twelve documents and then dig in, drill down on those documents.

So I think the case management order is a better place for doing that, and that is probably why I come down more on the side of dealing with electronic discovery primarily in the areas of Rule 16(b) and Rule 26(f), making the parties report to the court on if you are going to have electronic discovery, how you are going to do it, what are going to be the parameters.

The issue of the burden, and the whole backup tape idea, it is a real issue. It is a real burden. It is hard to go tell a client that, "You've been sued in Mississippi and they are asking for all of the documents from every insurance agent of whatever insurance company all across the United States. You have to send out an email telling them

to basically freeze their computers." But that is going to happen.

You know, we talked about the Exxon Mobil situation. He has 400 cases a month. I am not sure you are ever going to be able to deal with a Rule that is going to relieve the burden on somebody who has 400 cases a month from that standpoint.

The inaccessible materials — you know, what is inaccessible today is probably going to be accessible tomorrow; if not tomorrow, probably next week. I think it is short-sighted to try to write a Rule with backup tapes in mind. I am afraid if you do, you will look like the Rules do now dealing with phono records. You know, in ten years you ask somebody what a backup tape is, they are going to look at you like you are from Mars or something.

So I think it is going to be very difficult to draft anything that really gives relief, that is in fact a safe harbor in terms of what you have to do to produce, other than dealing with it on a case-by-case basis in a case management order.

PROF. LYNK: Okay. And so I hear you say that the current Rules, in Rule 37 and in Rule 26, already provide the courts with the tools and the flexibility to deal with

the balancing that must take place when the producing party alleges that the burden of production is far greater than the value of production.

MR. WELLS: I think the courts have the authority now to deal with it. I have looked at the various formulations, and I am not sure that the formulations I have seen do a whole lot in terms of relieving the burden or really create much in the way of a safe harbor.

PROF. LYNK: Okay.

MR. BLACK: Myles, I think that the Committee can draft conceptually and avoid the backup tapes/phonograph records kinds of issues. The concept, it seems to me, is that information that is reasonably available and recoverable ought to be made available routinely. Information that exists but is not recoverable or available within reasonable effort and expense ought to be subject to some other Rule, and that might be good cause, it might be cost-shifting, it might be a combination of that; it might be some sort of marginal utility analysis.

But it seems to me the concept that has come out of this weekend's discussion, and otherwise, is pretty clear: that information — whatever it is, metadata, embedded data — whatever is reasonably available within

reasonable cost and effort, ought to be fair game and turned over at the expense of the producing party; and whatever is not reasonably available with reasonable cost and effort —— and that leaves the flexibility there, as technology changes and everything else, to decide what is “reasonable” and what is “reasonable effort.”

I do agree that 26(b)(2) provides good guidance on the cost/benefit analysis. I don’t think that needs to be specified. But I think there probably does need to be something in there about “reasonably accessible or available data.”

Theoretically, you have that with paper discovery too. I wrote a draft, I threw it in my trash bucket, the janitor came around and took it out and gave it to the BFI people, who took it to the landfill, where it was logged in, so you can figure out where in that landfill, at least within some general parameters, that draft is.

We have not gotten to that degree of craziness with paper discovery because it is so much more difficult, but I do think you need to deal with that “accessible with reasonable effort” kind of issue.

PROF. LYNK: But then you would craft sort of a “reasonably available” standard for electronic discovery or

electronic data that is different from the standard for — for example, would this place the burden on the plaintiff of having to show that the data is reasonably available, or the burden on the defendant or the producing party to show that it is not reasonably available and therefore should not be subject to —

MR. BLACK: Sure, I would think it would have to be the latter. They are the ones who have the information. As technology goes along — you know, for every ten-year period everybody is going to know that backup tapes are tough and optical disks are not and so forth, and ten years from now it is going to be something else. But people will know after a few cases what is and what is not easy.

PROF. LYNK: Okay.

Carol, Tommy talked a little bit about safe harbors, and we talked about whether we should craft, at pages 34 to 40 of our Memorandum, a new Rule, Rule 34.1, or whether we should amend Rule 37, to explicitly provide for protection for producing parties, parties that have a lot of electronic data that may be subject to discovery, such that they can continue to avail themselves of good business practices, which may include some routine document destruction, without fear that that could subject them to

sanctions in civil litigation.

Again, do you think that from what we've heard there is a need for such a crafting of a Rule in this area, which would be available for electronic data and not necessarily available for print data or other forms of documents, or do you think that this is perhaps an area where technological change may overtake any particular rule-making?

MS. POSEGATE: I am not presently persuaded that Rule 37 needs to be amended to deal specifically with electronic discovery. I would state at the outset that as we talk about electronic data it is important to remember that however information is recorded or retained, it is still information, and the discovery process is about the gathering of information.

There is nothing in the language of Rule 37 which would suggest that the authority of the court is any less to deal with issues of electronic discovery than it is any other forms of discovery. And I frankly think that the courts have full discretion at this point in time to deal with whatever issues might present themselves for considerations of sanctions with respect to electronic discovery.

I've gathered from the discussions of the last two days that there would be in all probability a consensus here that if there were deliberate conduct on the part of a plaintiff or a defendant in the destruction of relevant information or other alteration of that information, that under most circumstances a judge should or would consider appropriate sanctions for that conduct. There might be certain circumstances where, because of other factors, a judge would decide that that was not an appropriate course of action. But the discretion should lie with the judge.

I listened as we discussed certain cases that were put up on the board yesterday, about whether or not courts should intervene or impose sanctions. The questions that came immediately from the audience were: "Well, we need to have more information. What about this . . . what about this . . . what about this?"

I think probably sanctions, as much as any area addressed by Discovery Rules, require that there be that exercise of discretion by a court, particularly if you get to circumstances where you have something that falls short of intentional or conscious effort to either destroy or otherwise alter information. I think then it is particularly important that the court have the authority,

unrestricted, to make the proper inquiries to determine whether or not there is an appropriate basis to sanction conduct, and, if so, what that sanction should be.

So at this point in time I would suggest that Rule 37 not be amended.

PROF. LYNK: Okay.

MS. HECKMAN: I'd like to give a little counterpoint to that. It's interesting how my perspective on this has changed after leaving the bench and going back to practice.

As a court, you get parties in with disputes, and the dust is kind of settled and the issues are clear, and they come in. The court wants flexibility. The judge wants to have discretion to call the shots — "What's the problem? Let's get specific. Okay, what's the cost involved? What is this going to take? Let's be pragmatic and let's get a quick decision."

But when counseling corporations, which is what I do now, you've got to rewind all that and think about what is going on two, three, four, five years before that, where you are sitting down with a general counsel of a company and there is definitely a duty to preserve that has arisen. It can be a government investigation, it can be just a claim,

it can be a lawsuit.

A lot of these companies, as we've heard, are subject to ongoing litigation. I have one client who is regularly sued for some of their medical products. They manufacture a laser that is used in eye surgery.

MR. BLACK: Isn't that nice that they're regularly sued?

MS. HECKMAN: So we are sitting, having the conversation of: "Okay, what do we have to preserve? And what if we make a mistake in the way that we decided what to preserve and what not to preserve? Can we do this by employee? Can we do this by department? Is it enough to just print out the email or do we have to actually save the electronic copies of the email? Do we have to save the backup tapes?"

You get into all those discussions and you try to make reasonable decisions based on what you believe the scope of this litigation is likely to be. But we all know when we get into court and we get right up to trial — and this especially happens in patent cases, but it happens in a lot of cases — the issues sharpen and they morph and they change, and you get to trial or you get in front of a judge after a suit is filed and you're really looking at kind of a

different landscape — and meanwhile, you have made decisions two or three or four years before that are based on a different set of assumptions.

Then you come in and you look at the law on spoliation. There are decisions all over the place. There is unintentional conduct that is on occasion sanctioned. There are mistakes that have happened that have been sanctioned. It is not uniformly true that only intentional conduct results in spoliation awards.

I think that is a real problem. I really think the Rules ought to take a look at that because I think that litigants are entitled to some predictability, they're entitled to some uniformity. Lawyers have to be able to advise their clients.

And some kind of rule of reason would not take flexibility away from the judges. If there was a Rule that said, "If you acted reasonably in your decision as far as what records to retain, then you shall not be sanctioned or there shall not be a spoliation order against you, unless perhaps some other circumstances are present." Something like that it seems to me would really help litigants a lot.

And it is a problem, because it does create a lot of cost. What I see is companies taking the most

conservative possible approach to preserving documents. And then you've got the general counsel who is having this discussion with the CFO, who is saying, "Come on, we've got to operate a business here"; and the general counsel is saying, "Yeah, but I'd really hate to see anything bad happen. We can't predict here what is going to happen."

I think if the cost of litigation goes up, in general people's access to the court goes down. I think that is a shame. I think that the courts should be available to resolve disputes at a reasonable cost.

The arguments that I have heard this last couple of days on this issue that go the other way are not convincing to me, frankly.

Someone suggested yesterday that the Rules would be misused by the attorneys. If that is the case, Rule 11 is already in the Rules. I think we have to assume attorneys and companies are not going to misuse the Rules.

People have suggested the case law is sufficient. I don't think in this area of spoliation that the case law is sufficient. It is very hit-and-miss; it is very factually driven; it is very hard to read it and come away with some real guidelines that you can discuss with your clients.

I don't think having it done in the local rules is an answer, because frequently these companies have litigation all over the country, and even beyond, so having a different rule perhaps in each district court does not really solve the problem.

The argument that we should take the long view and this problem will go away — I don't think it is going to go away. You can define it as it is retention of any kind of record, whether it is an electronic record or a hard-copy record. That is something that has been with us since we have had litigation

We have heard the argument don't limit judicial flexibility. My answer to that is if the standard were one of reasonableness, then you are not limiting judicial flexibility.

PROF LYNK: One of the interesting things to note is the context within which this rule-making discussion takes place. Many federal courts — I'm thinking of the District Court of the District of Columbia, the Division in Tucson of the U.S. District Court for Arizona, for example — are virtually paperless today, and they are receiving and filing documents. Many federal agencies define electronic communications, electronic data, in their definitions of

material that regulated parties need to file — I'm thinking of the SEC. The National Archives and Records Administration has done a tremendous amount, as its statutory charge requires, in defining for the Executive Branch and the federal government electronic communications, electronic data.

This goes back to something Allen said. Is it anomalous for the government and for the courts in other guises to be addressing these issues whereas the Federal Rules do not currently provide guidance either to the courts or to parties with respect to these issues?

Whatever technological change there may be, I think it is clear that this is an area that is not going away. It may get more complicated, although I suspect in some ways it will get simpler. I think the question of backup tapes may in fact — if that disappears, I think the access to information will be easier. The question under Rule 26, though, will always be: is this relevant and should it be produced because it is relevant?

Tommy, looking ahead, how do you see the environment within which the courts and civil litigants operate affecting the need or advisability of Civil Rule changes?

MR. WELLS: I think — well, let me back up and maybe not quite answer that question, Myles, but speak to the issue of codifying, or attempt to codifying, in the Rules what I consider to be best practices. I think that is generally a bad idea, because what is a best practice today may not be a best practice next week or next year. And, given the timeframe for the Rules process, quite frankly, you cannot amend a best practice — or a Rule, if you've got it in the Rule — in time to keep it up-to-date.

I think a much better way to handle it is the way, for example, the Civil Discovery Guidelines that the ABA Litigation Section is putting together and amending. Those try to be a best practices guide. They can be amended relatively quickly. As you can see, they were adopted in 1999; they are probably going to be amended in August of 2004 yet again. And those are some guidelines on, for example, the duty of preservation — what do you have to preserve; what is a best practice to tell your client they have to preserve?

I think Carol's idea of the court using reasonableness is a good one, but I think you don't need it in the Rule; you just need the court to look at things like

the Civil Discovery Guidelines, to say, “If you follow that, you are not going to be in a spoliation case later.”

The other thing I think in terms of spoliation — we’ve talked a lot about it, but, quite frankly, in the electronic age somebody would be a lunatic to try to destroy evidence, because you can never get rid of the damn stuff. You know, I delete something from my computer and it is hanging out there in cyberspace somewhere, it is little bits and bytes in areas of my computer that I cannot find and I can never erase. The only way you could ever get rid of it is take the hard drive and put it in the dump, but then they are going to know where in the dump the hard drive is. And besides that, I’ve got it backed up on a Zip drive or a thumb drive. Or somebody hacked into my computer and has it downloaded on their computer somewhere else.

You know, the idea of ever destroying electronic data I think is ludicrous. I think it is there somewhere. You can almost always dig it out, you can mine it.

I think the bigger issue with electronic data is really not so much a civil discovery problem, it’s an evidentiary problem, because the data can be manipulated.

I mean you can do digital photos. It used to be the photograph was the best evidence. Well, now you look at

an altered digital photo — you know, they could move my head over onto your body and, lo and behold, it looks great. Maybe that's not a bad idea.

[Laughter]

PROF. LYNK: You are asserting a fact not in evidence.

[Laughter.]

MR. WELLS: I think the electronic issues are more evidentiary issues long term than they are going to be discovery issues or spoliation issues.

PROF. LYNK: I know Dan Capra appreciates you saying that.

Carol, what do you think?

MS. POSEGATE: I would like to make a couple of different comments.

First, I would like to respond to the remarks that Carol Heckman made. I think she has made a strong case for the desirability of having guidance when one deals with particular clients, because the clients want to know: "How can we stay out of trouble; how can we do the right thing?"

But frankly, in order to get the kind of security that I think she is advocating, one would have to have a Rule that would be very specific, and I don't think that is

what these Civil Rules are about. I think we are dealing with a changing world, I think that we have issues that are unique to virtually every case of size that is out there, and I think it would be extremely difficult — and perhaps even dangerous — to try to get a Rule that would cover all of those circumstances, where a particular client could walk away and say, “Well, I don’t have anything to worry about because I have done A, B, C, D, and E.” I think that would be very difficult to do.

The second point that I would like to make would piggyback some remarks that Tommy Wells made earlier. He spoke in terms of the case management order or the discovery plan that is required by the federal courts. I think that that is an extremely helpful tool. It is the primary way by which parties do focus on issues at the outset, they define the course that discovery will take, and hopefully anticipate many of the concerns that we have raised over the two days of discussions here.

As an attorney, I very much appreciate a strong hand of the court. I appreciate the early attention that a court will give to a case in terms of dealing with discovery matters and moving the case along. I think that to the extent that we can use the available tools that are there

for each and every case, and dealing with it on an individual basis through the case management devices, that that is by far and away the preferable way to handle these matters.

PROF. LYNK: All right. I am gong to let Carol Heckman have the last word before we open it up for comments from the audience.

MS. HECKMAN: Just quickly responding to Carol's first point about it would be difficult to draft a Rule that would deal with the issue of spoliation without having it be too lengthy and perhaps obsolete, the draft that is in the materials on page 39 is not. Not that that would be the only way to go, but it is a simple provision: that there would not be sanctions for failure to produce unavailable electronically stored data unless the information was both requested during discovery and there was a finding that the party acted willfully or recklessly, as opposed to by mistake or accidentally or inadvertently.

PROF. LYNK: Okay. Thank you.

I see a number of hands already. At the top?

QUESTION [Hon. Jerry H. Smith, U.S. Circuit Judge, Fifth Circuit, Chair, Evidence Rules Committee]: Jerry Smith, Fifth Circuit Judge and Chair of the Evidence Rules

Committee.

I hope you were taking notes, taking a few.

This concept of “information” versus “documents” I think is something that needs to be carefully considered. One very common word that I haven’t heard mentioned here today — maybe it was and I missed it — is the word “website.” Now, I wonder what we do about websites. I mean those are obviously high-tech items that are commonly accessible, so we might think we don’t need to discover a website — unless it is password-protected, anyone in the world can get to it.

But there are some interesting issues that involve changes on websites. I’m recalling the Janet Jackson controversy at the Super Bowl. Apparently the MTV website had had a prediction made “look for big things that are going to happen at the half-time show,” and suddenly that information disappeared either the night of or the day after the Super Bowl.

Suppose you have a pharmaceutical company that is making representations about a particular drug, and then the day it is sued that information quickly disappears from the website.

What kind of electronic footprints are there that

indicate changes on a website? Does the webmaster back in his office somewhere have an electronic record about that?

Is a website a document? Well, maybe not unless it is printed out. But a website is certainly information; any fourth grader can tell you that who does his social studies homework using the Web.

So it seems to me that if we broaden the concept to “information,” certainly websites need to be considered and changes in websites need to be considered as something that is discoverable. Are you going to put a freeze on a company’s website once it is sued? Are you going to require it to maintain records of daily changes that may occur on that website?

But the whole concept of information goes beyond that if we depart from the concept of what people normally think of as a “document” and move to the word “information.”

I see a banner up here for Fordham University School of Law. Is that a document? Well no, it is not a document; probably no one here would say it is a document. It might appear on a letterhead somewhere; that would be a document. And yet it definitely conveys information. It tells me the School was founded in 1841. I never knew that, so I learned something from that, so that’s information.

Now, if this were on a website, it would certainly be information. Maybe Fordham would be in a lawsuit sometime involving some land claim out in the Bronx and the question would be "when does Fordham claim that it was founded?" Suppose that Fordham suddenly changed that information on its banners and on its website. Would that be information that is discoverable?

In the age of the website, it just seems to me that that sort of concept of information needs to be carefully considered, and I guess argues in favor of some kind of change in the Rules that would include a broader concept of "information" rather than just "documents."

PROF. LYNK: Thank you, Judge.

MR. BLACK: Just to follow up on that for a second, one of the other issues about websites is the links between websites and other documents, and how far do you go? Do you draw a line at the third degree of separation, the second degree of relationship, the sixth, wherever? If we deal with that, it is probably important to at least be cognizant of those issues.

PROF. LYNK: Thank you.

Judge Facciola?

QUESTION [Hon. John M. Facciola, U.S. Magistrate

Judge, District of Columbia]: One thing we can't lose sight of is this: in the federal courts we don't try cases, we settle them. The Administrative Office of the United States Courts estimated, I think last year, we try less than 3 percent of the cases that are filed. That means that, as Carol just pointed out, the more litigation costs go up, the more we drive the middle class out of the federal courts.

So one of the criteria of these Rules, as Professor Marcus said initially, is not to increase the cost but to reduce it.

We Magistrate Judges settle a lot of cases. In fact, that's a major part of our docket; it's about 50-to-75 percent of my time. If you favor rules that put more work on me, by just talking about "reasonableness" without much clear guidance, every minute I spend on one of those cases is a minute I cannot spend on settling cases. So there is no such thing as a free lunch. The more judicial flexibility, the less time that judge has to spend on other things.

I don't know what the answer is, but I think I must tell you as a judge I am deeply troubled that every day I am beginning to sense that the middle class is being driven out of the federal courts because the costs of

litigation are horrific. In the District of Columbia, we are now compensating counsel under our Laffey Rates in Title VII cases at the rate of almost $400 an hour.

PROF. LYNK: Over here?

MR. WELLS: Apropos to the access issue —

PROF. LYNK: Hold on for one second. We have a question there.

QUESTION [Stephanie Middleton, Esq., Cigna]: Stephanie Middleton from Cigna.

I have picked up three things from what we've heard. One is that this is a big issue for many people, maybe not for everybody. Number two, there is a wide range of opinion as to what should be preserve and produced. Number three, we're not going to get any appellate clarity, so the district judge are going to have to pick and choose amongst either their own judgment or what they see. If you put those three together, what we have is a very important issue where there is no predictability.

That is a very serious problem for those of us who sit on unlimited amounts of information — and that's Exxon Mobil and Microsoft and Cigna — and we really need some guidance from the Rules Committee, especially with respect to the period of time before we get to a judge. Once we get

to the judge and he orders us to do something, fine, we can live with that.

But what we don't have now are some Rules, some clarity, some guidance, as to what is our obligation to preserve. You know, we have very broad Rules about what is producible now. We have heard people saying, "What's the big deal? Save all your backup tapes."

So what I don't know is what are the Rules. And I could be sanctioned because I don't know, it's not clear; it depends on the judge I get to. So these are very serious problems. We do need a Rule.

The clarity — also, as Judge Facciola just said and the gentleman who is in Texas, if you give us some Rules, we can settle these cases; we can sit down with the other side, and the Rules are clear what our obligations are going to be, and we can settle these things.

But right now it's a serious problem — maybe not for the judges. The judge survey that somebody talked about yesterday shows it's not a problem for the judges. They're not paying for this and they're not worried about what they have to preserve.

It's not a problem for the plaintiffs' lawyers. The guy who is getting all this information in his MDL case

in New Orleans, he's happy. I don't know what the other side is thinking.

But it is really a problem for those of us — and I would just ask the Rules Committee to think about the people who it's a problem for. Give us a Rule. It may not be a perfect Rule, but give us a Rule. Before we get to that judge, there is just no clarity for us, no safe harbor. Carol Heckman couldn't have put it better, and she was on the bench and now she is now with corporate clients. We need a safe harbor. We are not taking discretion away from the judge, we're not taking anything away from Rule 37, but give us a safe harbor.

And also consider the cost-shifting. It sounds like it has been working in Texas, and Texas has not become more lawless than it has ever been.

[Laughter.]

This group of people is giving serious thought, but you've got judges out there who don't have the time or the luxury, they haven't been here, and so we are going to get very different results. So I really would encourage the group to come up with some Rules for us, especially on safe harbor and cost-shifting.

PROF. LYNK: Thank you very much.

Before I go forward, Tommy, do you have a comment?

MR. WELLS: I was just wondering. Do you think the formulation on page 35, the 34.1 formulation on duty to preserve, gives you anything? As I read that, I'm not sure that helps.

I represent clients like Cigna and like Exxon Mobil. If you've got 400 cases coming in and you are required to keep on the day you get notice of the suit one day's backup of all your information, you are gong to be spending millions of dollars on backup tapes just to get in the safe harbor.

QUESTIONER [Ms. Middleton]: One thing that is here that is good is "upon notice of commencement of an action." Right now the Rule is if you think there might be a lawsuit filed. Well, every day I know a lawsuit is going to be filed; I don't know which one it is going to be. So that's helpful.

Once I get the lawsuit and I know what the allegations in the complaint are, that helps me shape what I need to save. So that's helpful. It could be better, but it's not bad.

PROF. LYNK: All right. Let's move over here, the gentleman waving his hand.

QUESTION [James Rooks, Jr., Association of Trial Lawyers of America]: I'm Jim Rooks for the Association of Trial Lawyers of America.

Those trial lawyers, and there are 50,000 of them, they all wanted to be here today, but they're all working on the John Edwards for President campaign, so they had to send me.

[Laughter.]

The members of ATLA — who, in case you're not aware, can't be members of ATLA if they spend more than 50 percent of their professional time defending personal injury lawsuits — have no apologies and nothing to hide. They have weapons of mass discovery, and they are not afraid to use them, and they know how to use them.

I have absolutely no doubt that the people who have been speaking on the panels and in the audience are sincere, honest, principled people who are dedicated to their clients. But, my gosh, there has been like a Greek Chorus here, and it seems to be mostly from the corporate counsel. I have heard — tell me if I'm wrong — "we have too much data, so we need new Federal Rules"; "we get overbroad requests for discovery, so we need new Rules"; "we don't know what a document is anymore, so we need new

Rules"; more of our information needs to be classified as inaccessible, we need to take out our electronic trash, we may inadvertently produce privileged material, so we need new Rules"; and finally, "gimme shelter; we sometimes destroy relevant information that would have shown that we are liable, so we need a new Rule giving us a safe harbor."

One of the landmarks in my travels up and down the East Coast sits next to the New Jersey Turnpike. It's a big plant owned by BASF, the company whose legal department was led so effectively by Tom Allman, who is the author of the safe harbor idea. I drove past that on Thursday and I checked out the building to see if it had a sign up there that said "Closed During Production of Documents." No sign. The wheels of progress are turning. That's the way you make money.

We also heard of several examples of how well things work right now. We're never going to agree on whether things are working well if you're spending a million dollars a day on discovery, of course, but how well things work right now — the celebrated *Zubulake* decisions of Judge Scheindlin.

The gentleman who talked, the one from Louisiana, who is happy, who talked yesterday afternoon, he was one of

the lead counsel in the multi-district litigation over the medical called Propulsin. The judge who got that case, Eldon Fallon in the Eastern District of Louisiana, set up an entire website just for that case.

PROF. LYNK: Jim, I'm going to exercise the prerogative of the Chair. Okay, I think you have eloquently made the point you're endeavoring to make. I need to go on just to make sure we get others who have not had a chance to speak before.

QUESTIONER [Mr. Rooks]: Okay. ATLA's position is it ain't necessary.

PROF. LYNK: Thank you. Okay.

QUESTION [Jeffrey J. Greenbaum, Esq., Sills Cummis Radin Tischman Epstein & Gross]: Jeffrey Greenbaum from New Jersey.

I want to put a little historical perspective on this. The Discovery Rules were changed several years ago because there was a sense that there was too much discovery going on, it was too expensive, you were closing courts to people, there were costs of discovery that exceeded the amount in controversy, and that cases were being settled because they had to be settled because you couldn't afford to continue with the discovery.

So there was a shift in focus and there was a two-tiered approach: let's narrow it somewhat, let's allow the relevant information to be produced, but get a court involved when you're going to go that extra step.

Now we hear staggering information over the last two days about how much it costs to go through terabytes of information, to have to do privilege reviews of that kind of information. I think we seem to be going in the wrong direction. We are now going into — just because something is technologically available, that doesn't mean it is going to be relevant, it doesn't mean we should have millions of people reviewing it.

I like Allen's idea of "Well, is it reasonably accessible?" At least that is starting to grapple with the cost concept. But that concept is not perfect either, because just because something is reasonably accessible, that doesn't mean that there isn't tremendous cost to review it.

Let's take embedded data. Just like drafts, they're not relevant for most cases. There are cases when drafts are relevant, and they can be produced and a court can determine if they are relevant. But in most cases they are not relevant. So why should you have to be reviewing

embedded data every time a document is requested? It's not the way we do it for paper. And just because it may be technologically available, that doesn't mean it should be produced.

Now, is it a document? Sure it's a document. But I suggest there should be another level that says you don't get that until you can show that it is relevant to something. Again, this is a whole cost issue and it's trying to get down to those ten documents that Steve Susman was talking about. We have to make some sense out of this process.

PROF. LYNK: All right.

MR. BLACK: Myles, just a quick observation on that. It seems to me that one of the reasons to make metadata and embedded data at least producible, if not automatically so, is that it operates as a darn good deterrent against fooling around with the documents, because if it is in there and you know that the other side can get hold of it, you are not going to fool with it. I think that is a reason that hadn't been mentioned earlier, but I think it is a good one. It is a good deterrent.

PROF. LYNK: And, of course, if it is available but not automatically so, then when it is available might be

the appropriate subject for rule-making, or under what circumstances.

I had said I would go to that gentleman up there at the very back. Jim?

QUESTION [James A. Batson, Esq., Liddle & Robinson]: Jim Batson with Liddle & Robinson.

I represent primarily plaintiffs in employment disputes, including Laura Zubulake — which is how it is pronounced, by the way.

From my perspective, there is little need to modify the definition of what constitutes a “document.” When email came out, for instance, I’m unaware of any difficulty among litigators as to whether an email was a document.

But what I feel must be addressed is how technology has dramatically changed the practice of law. We have heard talk about burdens of reviewing documents and discovery, and I think we’re all still under the same 30 days when we’re now dealing with thousands and thousands of additional documents. My experience is that the current fear of inadvertent disclosure actually slows down the discovery process for a couple of reasons that I would like to just point out.

In practice, I am always hearing a request after I have served a document request including emails, where I expect to get a large volume of emails, and even in situations where my adversary doesn't disagree that the emails that I'm calling for are responsive and certainly relevant, for the purposes of discovery at least, and then they say to me, "But I need a couple more months before I am going to produce anything beyond what what's called for under the Rules because I'm going to have to review thousands and thousands of documents." I recognize the burden and I accede to the request.

Then I get a privilege log in my experience that often appears to contain many documents that I don't think are privileged. I am at a disadvantage in determining whether or not they are privileged because of the limits inherent in the privilege log, and I am put in the awkward position of deciding whether or not the document in question warrants involving the court. And then many times I will go to the court, and then I'm worried about going to the court more than once.

I think that in many instances if there was some way to address inadvertent disclosure, which really has become a problem from technology, that it would speed up the

discovery process because my adversary would be less fearful of me getting some unfair advantage in the litigation, whether it's through waiver or through what I can make of it at trial. If there is a Rule that says: "Hey, he's producing now thousands and thousands of emails; if he gives me an inadvertently privileged document, I am going to give it back to him," the case will move forward. There will be fewer things on the privilege log and there will be fewer instances where I need to involve the court.

So just to recap, when it talks about defining a "document," I think that is going to change constantly. I think backup tapes are going to be gone. I don't think there will be another e-discovery conference in a couple of years, it will be a discovery conference, because most of discovery will be electronic except for depositions.

But when it comes to the practice of lawyers, our practice has changed dramatically by virtue of technology, and I think a Rule that recognized that and allowed for expeditious discovery would be very beneficial.

PROF. LYNK: Thank you.

I just have time for about two more questions. Let me go to the center aisle here and the gentleman on the edge right there at the very top.

QUESTION [Kenneth J. Withers, Esq., Federal Judicial Center]: Ken Withers from the Federal Judicial Center.

Two quick observations and a question on web pages. On web pages, I'm glad you brought that up. That's an example of a non-document. Not only do they change daily, but most web pages run by corporations today are derived from databases. They change according to who is viewing them. They change all the time. They are completely mutable.

Secondly, on the safe harbor concept, given the difficulties in trying to frame that safe harbor concept and the difficulties in putting it in Rule 37, possibly changing existing law by doing so, and/or creating another set of difficulties for judges if you just have a reasonableness standard, it appears to me that the only workable safe harbor is that that is agreed to by the parties as the result of an early meet-and-confer and framed as a case management order at the earliest possible moment in the case. That is the only certain safe harbor that you have.

Finally, a question directed primarily to Allen Black on the conceptual distinction between accessible and inaccessible data and the possible differences that that

might make. Would it be adequate do you think, or possible, for simply a phrase to be inserted in either Rule 26(b)(2) or Rule 26(c), or both, that the accessibility of the data becomes a factor in the benefit-and-burden balance? That would restate current law and, I believe, practice.

PROF. LYNK: Allen, do you want to comment?

MR. BLACK: Yes, it might. I don't think it has to be. I'm just suggesting that that is the kind of general conceptual idea that could be contained in the Rules and that would live with the years. Maybe that's the way to go. I haven't sat down with the drafting to think about whether that is ideal, but it certainly sounds like something that ought to be considered.

PROF. LYNK: I don't think I've gone in this area. The gentleman right there.

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

I actually was the attorney representing the William Morris Agency in the *Rowe* case. You pronounce William Morris just William Morris.

[Laughter.]

I did want to just very briefly give the view from deep in my trench.

First of all, just with respect to “quick peek,” to my immense amazement in that case 6 million documents were produced, to my consternation and great apprehension, on a “quick peek” basis. It actually worked well. Yes, there were great concerns about cost and disclosures were given. The process worked. It was court-supervised. And we did the same with respect to certain electronic discovery documents.

But I think it is also important to get away to some degree from the rarified atmosphere of this very, very distinguished and very, very informed group. I represent plaintiffs and defendants. I see many, many differing levels of expertise in the federal courts and the state courts. I would cast my lot in favor of what I would describe as gentle rule-making. And frankly, I don’t care whether or not it comes in the Civil Rules or it comes with respect to local rules. I think in either case Rules need to give notice, clarity, so that ultimately fairness is produced.

That’s all I have to say.

PROF. LYNK: That’s a nice note on which to end. Please join me in thanking our panel. Now there is a break.

[Break 11:05 – 11:20 a.m.]

PANEL EIGHT: CIVIL RULES ADVISORY COMMITTEE ALUMNI PANEL — THE PROCESS OF AMENDING THE CIVIL RULES

Moderator
Hon. Lee H. Rosenthal
U.S. District Judge, Texas (Southern)
Civil Rules Committee

Panelists
Hon. John L. Carroll
Dean & Professor, Cumberland School of Law

Hon. Patrick E. Higginbotham
United States Circuit Judge,
United States Court of Appeals for the Fifth Circuit

Professor Thomas D. Rowe, Jr.
Duke University School of Law

Hon. C. Roger Vinson
Chief Judge, United States District Court
Northern District of Florida

JUDGE ROSENTHAL: Ladies and gentlemen, I think we're ready to start the long-awaited final panel.

This is the panel that we have come to refer to at earlier similar conferences as the "alumni panel." This is, as the final panel, an opportunity to bring to bear the perspectives of those who have been involved in the Civil Rule-making process before and often, and to use this alumni perspective as an opportunity to look back at the last day and a half and try to summarize, synthesize, and inspire future work — not a small task. But I have great help in

this large task. Let me introduce the assistance that you will receive.

First, on my far left, is John Carroll. John Carroll, starting earlier and working up, has been the Legal Director of the Southern Poverty Law Center in Montgomery, he was a Magistrate Judge in the Middle District of Alabama for fourteen years, he is now a Dean and Professor of Law at Samford University's Cumberland Law School and a former member of this Committee. He is here to speak for Alabama.

To my immediate left is Roger Vinson. Judge Vinson is the Chief Judge of the Northern District of Florida. He has been a District Judge for over twenty years. He is a former member of the Civil Rules Committee.

To my right is Judge Pat Higginbotham. When we say that we wish to hear from the bench, the bar, and the academy, we have Pit Higginbotham representing all three. Judge Higginbotham was a trial lawyer practicing in Dallas for many years. He then was a District Court Judge and a Court of Appeals Judge, both for many years. He is really much older than he looks. He is and has taught at the Southern Methodist University School of Law, the University of Alabama Law School, and the University of Texas Law School, among others, and is a former Chair of the Civil

Rules Committee.

And finally, but not last, is Tom Rowe, who is one of the preeminent proceduralists of our day. He is a wonderful scholar. He is a Professor at Duke, and now I believe at UCLA, and is a former member of and current consultant to this Committee.

We have in this conference followed a model that we have used successfully in recent and other rule-making efforts. We have brought together a — some have called it rarified; I just think it's really talented — group of people who are engaged in and have practical experience in the problems that we are looking at and have asked them to bring to bear on these problems their very diverse sets of experiences. We have tried to bring together people who practice in a variety of subject areas, on both sides of the V, who have a lot of different backgrounds and a lot of different perspectives and opinions. In that I think we have succeeded.

The particular problem that we have found that such a model works best for is just this kind of problem: a very practical set of problems where, not to our surprise, judges are probably the least familiar with the very acute problems that this kind of discovery raises. We are in an

area where the difficulties are felt first and most keenly among the lawyers and the litigants. The judges are the last to know.

As judges, we like to draw on our experience as lawyers — most of us practiced in different kinds of areas before we got to the bench — and we particularly do that in discovery, where facts often matter more than law. But our experience as lawyers, even if we came to the bench relatively recently, is not much use in an area that has changed so quickly.

Rick Marcus gave me a word to describe some of the nature of the kind of insight that we can gain at these kinds of conferences. What we are hearing is “anecdata.” It’s a good word, it’s a really good word. It is not empirical data and the aura that that brings, but what it does bring are the varieties of experiences and difficulties and costs and burdens and harms that can arise if we don’t understand what we are trying to do and don’t appreciate the potential for mischief that can arise.

We have learned in this conference a lot about how electronic discovery is different in critical respects from other kinds of discovery. We’ve heard that volume is the key. We’ve heard that this is going to get worse and worse.

The key question that we are grappling with is whether existing Rules are adequate to accommodate these differences; and, if not, how to change them.

This panel is going to focus on the process that that involves, because this panel, every member of this panel, has had a lot of experience in trying to get —— sometimes succeeding, sometimes not —— improvements to the process made through changing the Civil Rules. This panel is acutely aware of the relationship between what we hope to do and what is feasible to do in the process of achieving Rule Amendments, and it is that kind of wisdom that we hope to hear about today.

The process of the Rules Amendments we all are aware of. We know why it takes so long. It is deliberately transparent, it is deliberately slow, it deliberately goes through a lot of layers after opportunity for comment from a lot of sources, before it can go before the Supreme Court, and then Congress, where we hope they do nothing. But it is because of that process and the peculiar difficulties and benefits that that process provides that we need to at the end take all that we have learned and put it into that context.

To begin that work, John Carroll.

DEAN CARROLL: It's good to be here in New York, the city that has destroyed baseball.

[Laughter.]

I came on the Civil Rules Committee in 1996 and rotated off in 2001. Listening to the discussions here, I'm confident nothing has changed. Whenever anybody wants to raise something about a bad practice, they talk about Alabama.

And on one national issue, I indeed lived in Alabama in 1972, never saw George Bush in a National Guard uniform.

[Laughter.]

JUDGE ROSENTHAL: He remembers you.

DEAN CARROLL: I want to talk about two global considerations that address the question of whether or not the Rules process is the place to deal with electronic discovery.

The first is what I am going to call the politicization of the Rules process. I am told that in the 1960s, when the Rules Committee was looking at the Class Action Rule, that they did so in relative anonymity. In fact, I have heard they drafted the final version sitting in the Board Room of the Riggs National Bank in Georgetown.

Nobody really much cared what they did. They were brilliant, they were scholars. Everybody accepted their work.

That, quite frankly, has changed radically, and I think it has changed for the better in some ways. Beginning with Judge Higginbotham, this Rules process is now a very open process. It begins with gathering data and information, it is widely reported in the journals and newspapers, and representatives from the varying factions of these debates always appear at Rules Committee meetings. In fact, it was a couple of years into the Rules Committee before I realized Al Cortese was not a member of the Rules Committee.

[Laughter.]

But I think what that has done is really changed the dynamic and the value of the Rules process as a vehicle to make change. I think there are three good examples of that during the time that I was on the Rules Committee.

The first is the class action reforms that Judge Higginbotham initiated when he was the leader of this Committee. Nationwide attempts to gather information, the drafting of some very, very interesting and innovative Rules, which after the wide-open process was ended resulted

only in the promulgation of the Rule authorizing interlocutory appeals in class actions.

We then went into the discovery process. I think the discovery process again was that same model of wide-open information from everybody else. We came out with a series of Rules, quite frankly, that were not huge and major additions to the landscape.

The one major addition was Rule 26(b)(1) and the redefining of relevant, and, quite frankly, that occurred only because it had tremendous widespread support. The Section on Litigation of the ABA was in favor of it, the American College of Trial Lawyers was in favor of it, and those groups were enough to carry the day.

The third example. As I was leaving the Committee, the new Rules that came into effect in December on class actions were percolating. There were two Rules dealing with preclusion in those Rules when they were initially promulgated. There was a tremendous, to use Sol Shriver’s [phonetic] word, firestorm over those two provisions, and they really never got anywhere either.

So I guess the thesis of all this is the Rules process is really consensus, and if you don’t have a consensus, there is really no point in jumping into the

Rules process as a vehicle for change.

The second observation is what the Rules have really become. It began in 1983, it continued in 1993, and then in 2000. What the Rules are now are these very, very broad-based tools to allow judges to exercise their discretion on a case-by-case basis. There is no attempt to define or codify how that ought to happen. It is a very free-flowing process.

But it also has as its heart three themes: (1) that lawyers must cooperate; (2) that there has got to be focus to the discovery that you seek; and (3) that the judge has to manage the litigation. And so I think as we look at changing these Rules to incorporate these difficulties presented by electronic discovery we cannot forget that that's where we are: we are in a judge-managed, lawyer-cooperating mode of resolving these sorts of issues.

So having said all that, I think that leads me to my next conclusion, which is there ought to be some slight tinkering with the Rules but certainly not major surgery in this area. I think, if anywhere, there is a consensus that Rule 26 and Rule 16 ought to be the place where these issues are raised. I think that is an outstanding idea, because in this area, even more so than in paper, the parties have the

best solutions to these problems. They know the ins and outs of their systems, they know the ins and outs of their cases, they're the ones that the courts need to rely on, and that's why dealing with these issues at the outset of litigation is very, very important.

I want to throw in a plug for Order 40.25 out of the new *Manual for Complex Litigation (Fourth).* That is exactly the kind of a thing that I think is a great adjunct to the Rues process. It orders the parties to meet and confer, it tells them what they ought to talk about, and it sets forth what generally their preservation obligation is. So I am in all in favor of the 26 and 16 changes that have been discussed.

I also think it is valuable to go ahead and amend Rule 34 to talk about form of production. I think that can stave off lots of difficulties and problems down the line. Beyond that, quite frankly, I don't see any need for changes in the Rules. I don't see any of the Rules as currently — the proposals as drafted really do not add anything, but, more importantly, many of them are tinged with such partisanship that they are just simply not going to get through the process. I don't think that ought to be the sole consideration, but I think the Rules Committee is busy,

I think it has lots of things on the table.

I think it ought to really consider whether trying, for example, to put a safe harbor in, or trying to put in a definition under Rule 37 of the preservation obligation which says you don't have to suspend your document destruction policy — or, more importantly, puts a state-of-mind requirement, which I think is not the Rule in many circuits — into the Rules, I think that's a mistake.

But I think some commonsense tinkering with the Rules in the areas I have suggested, and then education, and then what other parties have discussed — best practices, the Sedona Working Group for example, the ABA, and the *Manual for Complex Litigation.*

JUDGE ROSENTHAL: Thank you.

As you can see, the discussion inevitably turns into a discussion about whether Rules changes are appropriate, and, if so, what they ought to look like, which is really what this entire conference, despite the references to hog farms and ham sandwiches, has been about.

At the end of the panel's discussion, we are going to open it to the audience a little bit earlier than we have on other panels. The question that will be put to the entire audience is not limited. It is the classic catch-all

question and the last thing you do before you send the jury panel out and make your decisions: is there anything about the questions that we've been asking and trying to get a sense about for the last day and a half that you think we ought to know that you haven't had a chance yet to tell us?

Roger, what's your perspective?

JUDGE VINSON: Thank you, Lee.

Well, I'm here to simply say that I've learned a lot. I've learned that some of this embedded data and some of these other things are like hanging chads, and they're out there, and maybe we don't know what to do with them.

I agree with John in many ways, that I think our process, the rule-making process, has changed a lot since the mid-1960s. I would describe it, as I did this morning, as a legislative process. We are the beginning of a process, and we have to consider those who are on either extreme of the positions that are offered and the practicalities and standards that have to be implemented.

Of course, the Civil Rules Advisory Committee is only the first step in what really is a five-step process. At any point along the way there is an opportunity for people to modify and change and attack, and that frequently happens.

I think the Rules themselves are acknowledged to be a very important part of what we deal with, and the principles that we ought to keep in mind are the fact that they ought to be as simple as possible, as self-executing as possible, and they ought to take into mind minimization of cost.

I think the evolution of the changes that were made in the 1990s, culminating in the 2000 Amendments, basically were directed toward a reduction in the burden and cost of discovery, and I think we ought to keep that in mind in whatever we do in the process that we are talking about in electronic discovery.

It seems to me that it is unanimous and there is no opposition to the principles that we've discussed about getting the attorneys early on, in the Rule 26(f) conference, to talk about things related to electronic discovery. In my opinion, the 26(f) implementation was the most important change that was made in the Rules in the last fifteen years, and I think it has had a lot of good consequences flow out of it.

My personal philosophy is the best thing we can do is to let the lawyers control their litigation, with certain guidelines and standards to help them along and some

reminders about what they need to do and when they need to do it. In keeping with that, I think the best thing that our Committee could do would be to take what is I think universally accepted as things that ought to be discussed and mentioned in the Rule 26(f) conference, addressed in the joint report and addressed also in the Rule 16 order, make those changes, and we need to do it immediately, as soon as possible. There is no reason to delay any further.

Our court has recently transitioned to electronic case files, and every federal court in the country is in the process of doing that, and it's going to happen. It is folly for us to proceed without recognition that electronic operations are the rule and not the exception anymore.

After having heard everyone and all of the points that have been addressed over the last day and a half, I've learned also that the judges are the least informed about what needs to be done and how it should be done. Therefore, I would defer greatly to those who are knowledgeable and have had experience in what needs to be done.

But it does seem to me that we don't need to amend all of the Rules as proposed. For example, the amendments to Rules 33 and 34 are really perfunctory, and I would recommend to the Committee that, instead of doing that, that

they simply follow the idea of adding a Rule 26(h), but don't use any of the versions of 26(h) that you see in the materials, but instead address the matters in one concise area about electronic discovery. You can put some of the principles that need to be followed and include some good commentary.

Ed Cooper, for commentary I can't find anything that would be more helpful to judges and attorneys who don't get into this or who are just getting into it than the commentary from the *Manual on Complex Litigation* that is set out in Tab 6 at pages 78 and 79. I think that would be very helpful simply to give some guidance to Magistrate Judges and District Court Judges who from time to time are going to be faced with these matters and who have natural inclinations to do one thing or another, and that is just the proclivity of people.

Unfortunately, as the case law represents, they range from one extreme to the other, and that provides very little guidance. So I think some guidance in the Rules and in the commentary would be very helpful. Beyond that I would say stop, don't do anything else.

JUDGE ROSENTHAL: We've gotten a lot of suggestions during this conference for changing Committee

Notes. One of the limits on the rule-making process that not everyone may be aware of is that we don't change Committee Notes unless there is a change in the Rule that the Note accompanies. That is a good discipline on us, but it is also a limit on our ability to use Committee Notes standing alone as a source of changed explanation and guidance.

Pat, what's your perspective?

JUDGE HIGGINBOTHAM: Well, first a word about the Committee itself. For the lawyers here who may not be aware, this particular set of committees — the Standing Committee, the Civil Committee, and the Rules Committee — enjoy, I think, the very best of staff. We have Peter McCabe and John Rabiej. We have worked with them for years and years. They are outstanding lawyers. They do a terrific, terrific job.

We have been blessed by Reporters. Ed Cooper has been with us — when I became Chair, I got this note asking who I wanted to be Reporter. I said, "That's easy. Cooper." Then he's stuck, he can't get out. But he is absolutely marvelous. He takes the benefit of a lot of discussion, such as we've heard today, and sits down, and out comes a fine-flowing document that you look at and say,

“Yes, that’s what I said and exactly what I had in mind.”

So I want you to understand that this Committee is also staffed, and has been historically, by really fine people. I am particularly pleased to see David Levi as Chairman of the Standing Committee and Lee Rosenthal. These are two of the finest United States District Court Judges in the country. There are none better. There are plenty of good ones, but there are none better than these two, I tell you. I know them both very, very well. We are blessed to have them in these leadership positions.

The lawyers who are on this Committee are outstanding lawyers, they really are. They have been there, they’ve done that, they’ve been in the pit, they’ve been clawed.

Someone asked me, “Pat are you going to explain why you’re in your twenty-ninth year on the federal bench and you’re only fifty-four years old?” I will explain that later.

[Laughter.]

I spent the early part of my life in one courtroom or another. I only got to New York one time. I was smart enough to get out. I couldn’t talk fast enough.

[Laughter.]

I want to first make a couple of general observations about perspective, a large perspective, about the federal courts, and particularly United States District Courts. I happen to have the unqualified view that the most important judicial institution in this country is the United States District Courts. I think they are more important in many ways than all the other courts for a whole host of reasons. At least that has been true in this century.

One of the things that is particularly disturbing — and it was picked up by one of our judges here — is the changing character of the District Courts. I may just take one minute to put it into perspective because I think it is very important to what we are doing.

To state that we are changing the courts and we're driving the litigants out, that we are killing the United States District Court, is to understate it. It is already happening. I spoke with the Association of University Law Professors, who teach in the area of Federal Courts, who made a mistake and invited me for lunch. They were there discussing, as they are wont to do, the Canon of Hart-Wexler and some very wonderful topics.

At lunch I told them: This is very interesting, but while we are examining these large conceptual problems

your floor is rotting out from under you. That is the circumstance that for the past thirty years there has been a steady and unremitting decline in trials themselves. It is a complicated phenomenon.

The ABA, to their great credit, has just recently had a conference on this. Attention is finally being devoted to it.

But let me put it in perspective for you. It is in every category of case. On the criminal side, that's easily explained. Apparently the explanation is there in the Citizen Guidelines: between 95 and 99 percent of all criminal convictions result from pleas. That is up a good bit. They have always been high, but that is up a good 10-to-12 percent.

On the civil side, when I was on the trial bench we had 40-to-45 trials per year. Two years ago, the average United States District Court Judge tried thirteen and one fraction cases — bench trials, civil trials, criminal trials — an average length of two days. Now, I tell you that's an average number, which means that there are a lot of judges who are trying cases and we have districts that are trying none, zero. With all deference to the magistrates who see it as their job to settle cases, I think

that is misguided, but nonetheless that's where we are.

But the reason these cases are settling — and it is with good work and hand-holding — but it is part of a large phenomenon of cost. One of the large costs is indeterminacy. The people cannot go to court; they cannot afford to litigate.

You look at these charts, and I've looked at the numbers, and we've had this decline in trials and there has been an exponential increase in arbitrations. About twelve years ago, the numbers of arbitrations ran — I'll round these up — about 40,000. It jumped within the decade to about 90,000, then the next year it went to 140,000. These are the numbers from the American Arbitration Association.

At the same time, what we are seeing, as Professor Resnick has pointed out, is this incredible disconnect between trials and pre-trial. Pre-trial is the only thing that is going on. The choices that are being made between the federal courts and the arbitrations are not between trial forum; it's between which forum is going to process this case. It ain't gonna be tried.

The fact is that these choices are being made by people who recognize that it is cheaper, or for whatever

their reasons — privacy, for all kinds of reasons — that they want to move toward arbitration. Unfortunately, the Supreme Court in *Circuit City* is still a little behind; they still believe that arbitration is a wonderful way to go.

But that said, for our purposes you cannot load the system any more with higher cost, some of what I have been hearing here talked about — just impossible, these costs.

With all respect to this wonderful crowd, you are not representative. This is the elite of the bar. We don't want to be elitists, but the people who are out there working in the shopping centers in the one- and two- and three-person firms, they are not here, with rare exceptions. And the plaintiffs' lawyers are here, but no longer is that — the plaintiffs' bar can take care of itself.

But what we have here is we have a small segment of the bar. It's an institutional weakness, and we are talking about problems that run throughout the whole system.

The United States District Courts look more like the State Highway Department. They are processing paper. It is increasingly no longer the attractive job for trial lawyers and people who want to try cases and so forth. And there are a lot of social implications to that, but that's

not my point today. I would otherwise talk about that.

But it is in that context that we have turned to rule-making. And discovery is at the heart of this problem. We have never really put our arms around discovery.

The notion that somebody is entitled to every document is utter nonsense. That has never been the law. It has never been a constitutional requirement. *Matthews v. Eldredge,*[1] if you go back and look at it, it is a utilitarian inquiry about what is needed under the circumstances, adequate to the case at hand.

In 1983 — Arthur Miller put it well — we amended these Rules to provide a cost/benefit assessment on discovery. It has not been enforced. It doesn't matter. There is this sense of entitlement to every document.

You don't get that on the criminal side, for heavens sake. I see cases where they are pleading for DNA in capital cases, and we are scratching our heads about whether we are going to give it to them, and that may be outcome determinative. And I hear civil lawyers here making serious arguments that they are entitled to look at backup tapes that cost millions of dollars on the possibility that they might get a document that might be relevant in a civil

[1] 424 U.S. 319 (1976).

case. There is something wrong with this picture. We don't even allow that on the criminal side. We need to get this back in perspective.

That said, now where are we? The Rules process is structured so that you can't run quickly to make quick fixes. I do not see the necessity here of changes. If you are going to make changes, you are going to have to make some value choices, what we call procedural choices. You are going to have to make some decisions — we'll see what the consequences are — but you're going to have to make some choices.

You've got the corporate world, which understandably wants certainty and safe harbors. That is a very powerful argument and it makes practical sense. On the other hand, the other side looks at this and says, "Yes, a safe harbor, but what does that do to my plaintiffs?"

Keep in mind that in this country, peculiar to the rest of the world, there is this commitment to private enforcement of social norms by private litigation. We enforce social norms by using private litigation, the public interest litigation. We are committed to that. The civil rights statutes, the antitrust laws, the securities laws, etc., are private litigation.

The cost/benefit analysis and shifting of costs all have to be decided in that context. You touch one of those buttons and you are going to take any possibility of Rule change off the table.

Class actions, one of the practical suggestions — and I see Mark Kusanin sitting back there and some of the others. The suggestion was made: "Look, when it gets down to certifying a class in some of these things" — John Frank railed about getting a ticket to buy a can of beans or something and the lawyers getting millions kind of thing.

So I say why not have a provision, which came to be known as the "just ain't worth it?" Give to the United States District Court Judge the authority to say, "I'm just not going to certify this class, this is nonsense. All things considered, we're not going to do that."

Of course, what was impossible to go forward, for very good reasons. The political reasons and the conflicting interests are there, because there are normative judgments behind those that tax directly against the basic social judgments about private enforcement in this country.

If you are going to reach into here and you are going to start drawing, for example, a safe harbor, two things about that. You are going to have to make a real

judgment between plaintiffs and defendants and between the enforcement of these private rights of action, because it has a direct bearing upon that.

The other is that a safe harbor defines the inside and the outside. The lawyer from Kirkland & Ellis made this point very, very well. You get in the safe harbor, you're safe; but the implication is if you're not in the harbor then you've got a duty to disclose.

My final point is on this business of spoliation. That is a term that came along. I spent a lot of time in board rooms and others in litigation telling people they can't hide a document, both in practical terms and in real terms, that you go to jail, provided somebody else is going to find it. But here spoliation has taken on a whole new concept. Where is the duty?

I want to remind you of something that is out there that I haven't heard anybody mention. It's called Title XVIII 1512 Section C: "It is a criminal offense, a felony, whoever corruptly destroys a record with intent to pare its availability for use in an official proceeding." There are circuits that read that statute to mean this: that if I tell my staff, through a program of destruction or whatever, to destroy a document with the eye in mind to act

corruptly, if my purpose is to prevent that document from being used in a proceeding.

Now, what do you think a records retention program is? It is get rid of waste and so forth, I suppose, but it is also a conscious decision that you just don't want to keep all these documents around longer than you need them, because when you get past that the only thing they can be used for is against you. But if you read that statute literally, my point about it is not how one comes down, but there is a judgment by the Congress that it is a criminal offense.

I won't say anything about the *Anderson* case, that's before us, but if you look at that, there is a congressional definition that is out there. It is a social judgment. That does mark the outer boundaries there.

When you talk about a safe harbor, you have to say: "Well, that sounds good, that makes it clean, nice, much better for the corporate world, and that clarity always helps." But the difficulty is not with the clarity; the difficulty is the social judgment that is involved in that and the other policy choices that are there, and it means that in the real world that type of Rule is going to have a tough selling on the way up.

But that said, I think that a safe harbor is probably the one provision that in some fashion some kind of a little cleaner statement about the obligations to produce or not would be helpful.

Finally, I think that the judges are doing a good job with these cases. I read the Southern District cases and I thought they did an excellent job in handling their discovery problems. But what I come away from that with is: Why do you need a Rule if the judges are handling it? They say, "Well, gee, not everybody is as good as these judges." I have a high regard for these judges, but let me tell you there are a lot of judges around. We can't write Federal Rules to instruct state court judges. We have leadership.

We've got a lot to do. We can't use the Federal Rules to instruct corporate America or anyone else. There is a teaching job, and a big teaching job, that we need to undertake. But it is through the *Manual,* it is through the other devices, teaching judges and teaching lawyers, and Rules are a poor way to teach.

Before you write a Rule, you've got to know enough about the problem to make the normative judgment that the new course is in order. You can't write a Rule until you know that. Clarity is not an end in itself, it's the means.

JUDGE ROSENTHAL: Pat Higginbotham always was a tough act to follow.

Tom?

PROF. ROWE: There has been some reference to how the Rules process has changed over the years. One of the things I noticed with a little bit of amusement, looking at this panel that we have up here with one present and a bunch of former members of the Committee, I'm from North Carolina and I'm the one who comes from farthest north, which does say something about the way the process has changed.

[Laughter.]

But to get on to some ——

JUDGE HIGGINBOTHAM: The Committee is bilingual.

[Laughter.]

PROF. ROWE: Sí.

I came here as a skeptic of the need for Rule changes, looking for unmet legitimate needs that I thought could be met by rule-making, and I think that may be an appropriate frame of mind to start with.

I have heard a few things that do make me think some amendments would be appropriate, but I also wanted to flag something that has been mentioned on and off, but to try to make it a little more prominent. I think we do need

to be thinking a good deal about alternatives to rule-making, Federal Rules of Civil Procedure, or possibly Federal Rules of Evidence.

There is, of course, the standard background possibility of leaving things to case law. That, of course, while it can work well under the existing Rules, does have some problems of the lack of generality of guidance provided to the courts dealing with these problems. Very little of this is going to be appellate law. I remember asking Pat last night, “Do you see any of this?” He said, “None.” So there may be very good leading decisions by people in this room, but they do not have the force of a Rule or of an appellate decision.

The one intermediate possibility that has been mentioned somewhat but that I could stress some more is various kinds of manuals on some things like this. I wonder if manuals, such as the ABA’s — or whether even there should be consideration of, say, a Federal Judicial Center effort to develop a Manual for Electronic Discovery, which would have some imprimatur of impartiality because of its source; the Sedona principles may be very good, but as I understand that was mainly defense; or maybe the ABA Principles, broader based, would suffice. But I did want to

flag this possibility of alternatives, including the possibility of some kind of manual.

And in some cases, of course, the probable only alternative may be a statute, because there may be certain areas, such as privilege waiver, and particularly trying to deal with the problem of third-party claims, that privilege has been waived. If it is to be dealt with at all, a statute may be the only alternative because of limits on everybody else's power.

One other observation and then I want to do a short academic number. I think that the problem of possible obsolescence of what we might write now, given developments in technology, is a genuine one but not a barrier to all rule-making. It is simply a consideration to be kept in mind in drafting, trying to draft with sufficient generality.

Now, I horrified especially the Chair of the panel by trundling in this little white elephant.

JUDGE HIGGINBOTHAM: We told him academics are here as a matter of affirmative action.

[Laughter.]

PROF. ROWE: What I wanted to suggest briefly is that I found it helpful just in trying to organize my

thinking about this area — and I hope maybe for others continuing to work on this that it might be helpful — to think in terms of several different kinds of considerations, either for the desirability of adopting Rules or considerations in the drafting. You could then do this with respect to various kinds of proposals.

Mercifully, this little item is not big enough for me to create a matrix and I don't intend to fill in even everything here. I just suggest this as for me it struck me as a helpful way of trying to organize thinking about the need for and form of possible Rule changes in this area. This is not necessarily an exhaustive list.

- What had occurred to me is that we have the question of unmet needs that I mentioned as my leading question in this area. In some areas, it seems to me that we have heard about possible unmet needs — the way John and Roger agreed, and I think I agree with them as well — that for purposes of flagging things in the conference of the parties, something specifying that they should talk about the need for dealing with electronic discovery issues.

In some other areas, it seems to me that we haven't heard about unmet needs. For example, cost problems

are definitely there of the conduct of discovery, but do we have a need that is not met by present Rules? People are paying more attention to the 26(b)(2) factors, and that may take care of the problem as well as it can be taken care of.

And in other areas, of course, you have high degrees of controversy, such as the safe harbor and preservation obligations, and whether there could be consensus about an unmet need is another thing.

That's all I will say about unmet needs.

- I have also mentioned alternatives, such as a manual, or in some cases a statute. On privilege waiver, for example, it may be that it is hard to do anything with Rules and that it needs to be left mainly to what we can do at the moment, to conferences of the parties, trying to reach agreements, if possible, in that area.

- Then also there is a concern for issues of the scope of authority, who does have authority to deal with some of these problems. It often may be the Advisory Committee, but sometimes not. Of course, with privilege waiver you have the problems with Section 27(e)(4) and evidence. Whatever can be regarded as being defined as a privilege has to go through Congress.

And then also, perhaps some of the preservation

issues. That might, it occurred to me, also exceed the power of the Advisory Committee to the extent that what the companies want is something that affects pre-litigation conduct, as opposed to conduct during litigation. So this is another consideration that has to be kept in mind.

• I mentioned also obsolescence concerns. That is probably more of a consideration not in whether to have a Rule at all but just in terms of how to draft it.

• Another factor that has been mentioned that strikes me as quite significant is whether a Rule doing something for electronic discovery would mess things up for simpler cases. That is probably more of a drafting concern than it is of a yes/no concern, if applicable, but it is definitely, it seems to me, something to be kept in mind.

• Then finally, there is whether the Rules, if adopted, should be phrased in general terms or should be targeted on electronic discovery. A lot of these problems are problems not unique to electronic discovery, but that may be intensified by electronic discovery, but need to be dealt with on a general basis. So there always has to be the consideration should something like this be drafted in general terms or in terms targeted on electronic discovery. Sometimes that may make sense, but it needs to be kept in

mind.

There may be other factors. I am not going to try to get into them.

JUDGE ROSENTHAL: Thank you.

Tom mentioned the difficulty of determining whether we are talking about problems that pertain to all kinds of discovery or that are unique to or particular to e-discovery.

A lot of what we have been talking about over the last day and a half is reminiscent of the kinds of discussions that we had when we were in the business of looking at the last set of Amendments to the Discovery Rules. But the question that we are dealing with is whether the particular differences between electronic discovery, on the one hand, and other kinds of discovery, on the other, make those problems so much more acute as to require additional or different treatment.

There was one moment that I just wanted to remind you all of, or share with those of you who were not there, in one of the hearings that we had on the last Discovery Amendment issues. This very, very young, enthusiastic lawyer came before us and went on for some time about his realization of the particular beauty of the way the

Discovery Rules are structured. He had been trying to come to grips with the changes that were being proposed and had realized this wonderful structure.

There is this one level where the attorneys manage it, and in most cases that's all that is necessary. And then there is this next level, where the judge, upon the firing of some trigger, becomes involves, the judge asserts control, additional showings have to be made to justify additional work, additional cost, additional burden. That was done particularly in the context of the scope change to 26(b)(1) that we talked about back then.

This young lawyer was thrilled because this was a beautiful discovery structure. It really is a wonderful architecture, framed by these concepts that have borne incredible weight with great success over the years. Relevance, scope, burden, proportionality — those are wonderful, strong, and flexible concepts that can carry a lot of weight.

We have that two-tier structure in the context of relevance. One way to look at these issues is whether that two-tier structure should be adopted to a burden analysis; and, if so, how do you define the trigger that will separate the cases that go on with the attorneys managing it on their

own and the cases that have the trigger for the judge to get involved when and as needed and to facilitate that involvement in an efficient and effective way?

I thought that young lawyer's enthusiasm was wonderful. Of course, I spend my time with a group that thinks that a glass of red wine and the latest volume of *Wright & Miller* or *Moore's* is a terrific time. You are all here on Saturday morning, so you clearly share that set of enthusiasms.

[Laughter.]

But what we really are talking about is an odd intersection of and mix of case management considerations, on the one hand, and the very profound kinds of judgments and decisions that Judge Higginbotham was talking about, on the other.

At this time I would like to invite the panel to make whatever comments, very briefly, on each others' presentations, and then open it to get whatever else y'all, as we say, would like to share with us all.

John?

DEAN CARROLL: I think there is real consensus on this panel that either nothing should be done or very minor tinkering. I don't think I can add anything to that. I

think that's exactly right.

JUDGE ROSENTHAL: I'm not sure that the consensus is that clear or that deep.

[Laughter.]

Roger, anything?

JUDGE VINSON: I think throughout what we've discussed in the day and a half that we've been here is the recognition that the business of American business is business and it's not litigation, and they're not there to facilitate lawyers and litigation, and it is only coincidentally that they get brought into this. We need to keep that in mind.

The phrase that has been used in a number of the local rules and standards is "in the ordinary course of business," which I think is an appropriate term to incorporate somewhere to set out that idea.

I am not sure that I agree with John about just tinkering. I think I would propose making some substantive recognition that we've got a different category of discovery and we need to call it that. But I think you can incorporate within that the idea that the principles of production and discovery, interrogatories, are all intended to encompass electronic information or data, and you can do

that and then set out some other standards, and you can do that very succinctly and in one spot. I think that would be very helpful to the bar and the bench, and probably to the clients.

JUDGE ROSENTHAL: Pat, anything that you wanted to add, or should we hear from our distinguished guests?

JUDGE HIGGINBOTHAM: I think I'd rather hear from the lawyers and people in the audience.

The only footnote I would add would be that — and I'm not sure you would do this by any suggestion in the Rule itself — but it seems to me that on the cost/benefit assessment there is only a small step between that and allocation of the burden of production.

One of the suggestions made earlier in the course of the conference was that district judges should have the authority to shift the cost of production for this sort of third level of production, these backup tapes. That has a logical appeal to it. But it goes back to the practical difficulties, that it addresses a present phenomenon of layering that may not exist tomorrow. That is, we are not necessarily going to have these graduated kinds of production in the future.

And it faces the practical reality that shifting

cost, large cost like that, is a huge normative judgment in this country. You can't really bring it forward as a simple Rule change. It involves very fundamental choices. Within or without the compass of the Committee, it may not be a real good question as a practical question because it won't go anywhere anyway.

JUDGE ROSENTHAL: Tom?

PROF. ROWE: Can I fill in my matrix?

JUDGE ROSENTHAL: No.

PROF. ROWE: I was not serious.

[Laughter.]

I think we're ready to hear from them.

JUDGE ROSENTHAL: Thank you.

Where are the microphones? Scott?

JUDGE HIGGINBOTHAM: While they're waiting, I guess if you are defending a case against Steve, now you just give him documents. Is that right, Steve?

[Laughter.]

JUDGE VINSON: As long as he gets to pick the ten.

QUESTION [Scott J. Atlas, Esq., Vinson & Elkins]: Scott Atlas of Vinson & Elkins, Houston.

I think I share the view of many people here that so many of these issues can be resolved with some changes to

Rules 26 and 16. I came convinced that the single overarching issue that was of concern to my clients — and I handle major corporate litigation — is the issue of safe harbor. I have become much more attuned to some of the arguments by Alan Morrison and others that there are legitimate concerns on the other side and it is a much more complicated issue than I had realized.

But I do hope that, at minimum, if the Committee concludes that you cannot come up with an effective set of Rules concerning safe harbor, that you do, either through 26 and 16 or in some other fashion, communicate to the judges the importance of requiring the parties to talk about this in their meet-and-confer, or maybe even somehow move the process up so they talk about it immediately after the lawsuit has been served, and if they cannot reach an agreement on it, to have court intervention, because the issue of document retention is one that is sort of overarching, because if the documents are not preserved, then most of the rest of these issues are irrelevant.

JUDGE HIGGINBOTHAM: Let me ask Scott a question back. That speaks well to the issues once you've engaged, but the question that was raised earlier by the corporate counsel here was the difficulty they were facing when they

anticipate litigation but it is not there yet, kind of that zone. How would you treat that?

QUESTIONER [Mr. Atlas]: I would have quite a radical solution, which is the opportunity for pre-litigation consultation with the courts, if necessary, because in certain kinds of cases the issue is so overwhelmingly critical in terms of both cost and preservation on each side that there may not be any other alternative if the parties themselves cannot work it out.

PROF. ROWE: Do you have a case or controversy jurisdiction problem?

DEAN CARROLL: Rule 27 authorizes pre-trial depositions.

PROF. ROWE: That's exactly right.

JUDGE HIGGINBOTHAM: Well, a court might. But the criminal —

QUESTIONER [Mr. Atlas]: If we did nothing more than provide a set of criteria, basically injecting the cost/benefit analysis and reasonableness into the process, and a court encouraged the parties to come to a consensus on their own that embodies those criteria, we would have made great progress.

JUDGE HIGGINBOTHAM: What do you do with the

criminal statute that I read earlier, which has been amended to provide that it need not be a pending proceeding? So the statute is addressing in a sense this same zone that you are talking about, and it is the Congress speaking, and speaking with a criminal sanction. What would we do with that?

QUESTIONER [Mr. Atlas]: That's why we have so many great minds on the Committee. It's not an easy problem to solve.

JUDGE ROSENTHAL: Anybody on this side?

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

I'm just concerned that we have become so exhausted with some of the hot-button issues of yesterday afternoon that we are overlooking what I thought was a very persuasive panel that Judge Scheindlin ran yesterday morning with a lot of, I thought, unanimity among the audience members that Rules 33 and 34 have become seriously outmoded, that there are lots of things that are not documents or things, and that we are dealing with a Rule 34 that was written in 1970 and it has to bear the weight of all these 21st-century developments.

I think that through the course of this program several people have said that the focus of Rule 34 should

not be “documents,” it should be either “data” or “information,” and that “documents” should be the subset, so that the superset should be “information” and then “document can be a subset of “information.” Perhaps “electronically stored data” should be a subset of “information” or “data.”

There are lots of things, like the example that was given just this morning about websites. Just because we have now apparently agreed through maybe twenty court cases that emails are documents, when we focus on things like websites —— and I think Ken Withers pointed out a website is really not a document because the website ——

You may or may not know that when you check into, say, General Motors’ website, the General Motors website knows what Zip Code you are dialing in from, and what you see on the General Motors website is completely tailored to where you live. So when I dial in to look at General Motors, because I live in Arizona, it is giving me information that is tailored to Arizona. If you are dialing in from New York, you get information that is tailored to New York. And so, anyway, it is not a document. There is a highly intelligent database that is underlying that website.

And there are probably all sorts of things that we technological illiterates do not even know about that are in

these corporate networks that we are going to have to deal with — I mean some of the examples that the plaintiffs' lawyer was giving yesterday having to do with radar logs or security logs, or cookies, people going in and out.

So I think that the changes that were talked about in Rules 33 and 34, and a lot of the form of production issues that were the focal point of the discussion yesterday with embedded data and metadata, are definitely things that are important and should be looked at now and do relate to unmet needs, and we shouldn't be trying for the next fifty years to cram everything that we're trying to deal with in terms of the new Information Age into the term "document." It just can't bear the weight.

JUDGE ROSENTHAL: Thank you.

Yes, sir?

QUESTION [Stephen G. Morrison, Esq., Nelson Mullins Riley & Scarborough]: Thank you.

JUDGE ROSENTHAL: Steve Morrison, correct?

QUESTIONER [Morrison]: Steve Morrison, Nelson Mullins. Thank you, Judge.

The issue of whether or not normative social values are being changed is so profound and difficult, but it seems to me that the first part of your statement, Judge

Higginbotham, clearly said that by default the federal courts, the United States District Courts, have defaulted in their own ability to deal with social norms — thirteen trials a year, on average, plus a fraction.

The federal courts then, it seems to me, have a duty to determine whether that default position is really the most responsible position in an era of increasing data sources, increasing volume, and exponentially increasing cost. Under those circumstances, no one exists better than the court itself to step forward and lead us, as opposed to passively defaulting.

JUDGE HIGGINBOTHAM: You're a good advocate and I agree with what you said. I think the implications of my remarks were just that.

JUDGE ROSENTHAL: I think Sheila Birnbaum, and then there are two others on this side, then we'll come through and we'll go that way.

QUESTION [Sheila L. Birnbaum, Esq., Skadden, Arps, Slate, Meagher & Flom]: I'd like to make two points.

One is the fact, Tom, that we have manuals — we have the *Manual* now, there's *Manual (Fourth)* that is coming out — doesn't mean that there isn't a need for Rules, even though you are educating people from different methods. I

think those are all very good things, but the Rules are what govern. Whatever you say in a manual is either acceptable or unacceptable, the judge will agree to it or not agree to it, the lawyers will agree or not agree, but it is the Rules that make the difference.

I find it very disturbing, John, to think that because something is political, or because there are two very strong views, the Committee cannot come up with a Rule that is a Rule of rightness and reason because it is unpopular and may never get through. But the question is, the Committee has an obligation if there is an unmet need to try to come to a Rule that is reasonable, respected, and rational. And it may not be liked by everybody. We have Rule changes all the time — 23(f) was not liked by a lot of people —

VOICE: Everybody loves it now.

QUESTIONER [Ms. Birnbaum]: Not everybody, believe me.

JUDGE ROSENTHAL: Another one of those good consensus statements.

QUESTIONER [Ms. Birnbaum]: But I don’t think you can shirk the responsibility of trying to come up with a rule of reason, if it’s popular or unpopular, as long as the

Committee thinks that it is meeting a need and is going to be accepted.

Just one last point is that when the Federal Rules change the states also often change their rules. A Rule change in the federal courts could impact significantly on rule changes in the state courts. And as Texas as showed you, they are making rule changes now that are affecting these issues. I'm not sure the Federal Rules should be behind instead of in front.

PROF. ROWE: I agree about your general point about manuals and Rules. All I was trying to say is that not all of the areas that we have been looking at may be best handled by Rules and that there should be consideration whether something else —

JUDGE HIGGINBOTHAM: Let me add one footnote because I think you touched on a very vital issue, and I agree with it. That is that I don't think the Rules Committee backs away because something is controversial, but they have to make the practical judgment sometimes of what they can get through.

There is a lot of utility, as I think the history of the Committee demonstrates, in going forward with Rules that we know have little likelihood of success. I think

Rule 23(h) is a good example of that. The lawyer who made that suggestion is sitting out in front of us.

One of the values of the process is that you put it out there and people have to look at it and examine it and you end up pulling it down. So it's not an argument that you don't go forward with Rules if you can pass the threshold test that this is something you really want. But you've got to make the threshold judgment that this is a change that needs to be made.

DEAN CARROLL: And I think this is obviously a call the Rules Committee has to make. But particularly in these areas of technology, these two Rules that are the most controversial, the safe harbor and this notion about inaccessible/accessible data and reasonable course of business, I think they are so tinged with so many problems that — I mean it's the Committee's choice as to whether or not they want to get into that briar patch.

I hate to be pessimistic, but I'll buy you a big dinner if they get a safe harbor rule through.

JUDGE ROSENTHAL: She gets to pick the restaurant.

DEAN CARROLL: She gets to pick the restaurant.

JUDGE ROSENTHAL: Yes?

QUESTION [Debra Raskin, Esq., Vladeck, Waldman,

Elias & Engelhard]: Debra Raskin.

As a plaintiffs' lawyer, I was quite interested in hearing Judge Higginbotham refer to arbitrations and to say that there is a public good or a public value in hearing cases in the federal courts as opposed to in the secrecy of arbitrations.

One of the reasons that at least the plaintiffs' employment bar has fought so vigorously against compulsory arbitration is because of the really severe limitations on discovery in that context. So if there is public value to be served, especially in statutory litigation where there is presumably a congressional mandate for private enforcement, that I think speaks to being very careful about limiting the current broad range of discovery.

JUDGE ROSENTHAL: Thank you.

I think Rick Seymour and then over on this side.

QUESTION [Richard T. Seymour, Esq., Lieff Cabraser Heimann & Bernstein]: As previously announced, I'm Rick Seymour from Lieff Cabraser Heimann & Bernstein.

I think that there are two critical factual premises that have been presented here by global corporations that may be true for some companies but are generally not true, and they are critical to what the

Committee does.

The first is the premise that backup tapes are chaotic. Over the last thirty-five years of getting electronic discovery, the vast majority of information I've gotten is from backup tapes. How far back? As I sit here, one of them had data ten years ago that was kept in a cold room. Better to recycle onto new media every year. That was still readable, still usable.

The vast majority of my information has come from backup tapes. Not one single backup tape has been chaotic. They have been duplicates of databases.

You go to an email server. People sort things into folders. There are a lot of things that are readily accessible that we haven't heard about.

Second thing: the premise is that business is concerned about reducing its cost. The most practical problem that I see as a plaintiffs' lawyer specializing in class actions is that business is concerned about increasing its cost so as to increase the transaction costs of anybody who sues it.

Example: taking information which is computer-readable and very cheap to store and maintain in an organized, coherent fashion, and deliberately purging that

data while keeping the backup information on paper because it will be extremely expensive. For instance, if you're dealing with printouts of databases, that is all going to have to be key-entered again before any analysis is going to be done — and you see it in case after case after case. So millions of dollars in reconstruction costs are exported to the other side, and it saves the defendant literally single-digit dollars not to keep the thing in computer format.

The business about the safe harbor — remember *Texaco*, the race discrimination case? Shortly after that all hit the fan, the front page of *The New York Times* carried advice from a senior partner of a very large and well-respected Manhattan law firm saying, "The lesson of this case is" — this is a memo to his clients that got leaked — "the lesson of this case is destroy the documents before the case is filed."

If we give to — this is just repeating the point I made yesterday — companies the ability to define what is their normal business practice, what is going to be inaccessible, we are giving to them the ability to take themselves outside the reach of the law. Thank you.

JUDGE ROSENTHAL: Yes?

QUESTION [Laura E. Ellsworth, Esq., Jones Day]: This is a framework that I ask myself: is there any issue that is unique to e-discovery, has an acute need, is not susceptible to treatment at an early case conference, where the existing law is unfair? My answer to that is there is one thing that meets all those criteria, and it is the preservation obligation, and here is why.

It is unique in the e-discovery world because the preservation obligation in the document world has always been to refrain from conduct — to not destroy, do not take steps to destroy the existing documents. It's the reverse in the e-discovery world, where the technology by its own function self-destructs data. When you turn on the computer, when you recycle backup tapes, the technology itself has the inherent property that data is inadvertently and automatically destroyed. It is the reverse problem.

And so the traditional world, where a preservation obligation is just maintenance of the status quo, no big deal, in the e-discovery world it is a very big deal. And it presents a particularly acute problem, as we've discussed here today. It can be a multimillion-dollar issue. It can happen with tremendous risk if you guess wrong, because you don't have the luxury of time of applying multifactor tests

and figuring it out. It's going to be gone.

And I think it also is inappropriately dealt with in the existing manuals and so forth. It's sort of like Laura's analogy, it's like run the snake over now and check to see later if it was poisonous. You know, you've already spent the million dollars. It's not going to help the snake to find out he was okay after the fact.

So for all of those reasons — and I'm not sure Laura would care whether he was or not — but I think it is a very, very serious area that is not appropriately addressed. And I think, particularly in light of potential criminal penalties, we cannot leave people at that kind of risk.

I'll just mention one other thing really quickly, which is the Rule 34, the consideration of using "information" instead of "document." There is a potential for problems which may be evidentiary, which is this: if you ask the other side to produce "data," not a "document," you are effectively asking them to produce documents that they don't keeping the natural course of their business.

JUDGE ROSENTHAL: What if it was "recorded data?"

QUESTIONER [Ms. Ellsworth]: It doesn't matter, because once you go to "data," what you're asking for is the

production — and I'm not sure it's wrong — but you are asking for the production of information in a form that the company didn't use it.

For example, if I asked for the production of "data" listing every minority employee who didn't make it past grade five, that is going to be produced in a document. And if I ask for the "data" in this format that I like for my case, they have to produce that case and that document and that document and that document, and you run the risk of creating a situation where the primary, if not exclusive, production of materials in the case has been formatted. Because you can format data any way you want, the requesting party can ask for the data in any way they want, the production is defined by and created by the other side. I think that is risky.

JUDGE ROSENTHAL: Thank you.

I think we have only time for one more response. There is an abundance of riches here. Don't forget Peter McCabe's email. This is not your last opportunity. Mr. Beach? Maybe one more.

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

Somebody said earlier on there is a difference

between corporations and searching for truth. I think Judge Higginbotham put his finger on it. What has happened now with the discovery and some of the other things in the federal court has actually made getting at truth harder. What we have done is we have made the discovery so burdensome that cases are settled on discovery issues, that we they can't go to trial, we can't get to the truth on them. Why do we go to arbitration? We go to arbitration because we can avoid a lot of this. We can get closer to the truth in arbitration than we can paying the amount of money.

There are very few cases where you can't find enough evidence for your case in 200,000 documents. You don't need a billion, you don't need 2 million documents.

JUDGE HIGGINBOTHAM: Let me add one footnote to that, going back to Mr. Morrison's comment about the responsibilities of both the Committee and the District Judges.

One of the things that the Committee went forward with several years ago, both the Advisory Committee and the Standing Committee and the Judicial Conference of the United States, was to return to twelve-person juries, perhaps with a 10-2 verdict. Every bit of the literature went one way.

Empirically, there was no real debate over the fact that a twelve-person jury's dynamics of deliberation is different, that there is a greater likelihood of aberrational verdicts, one way or the other, with a six-person jury.

That was defeated in the Judicial Conference of the United States, largely by the District Judges, because they wanted to retain the control over whether it would be twelve person or six person. Of course, they only put seven-person juries.

One of the things that is suggested by the decline of trials is that they do not want to try cases and they're afraid of juries. This is one of the things that all the data point to would have given greater stability.

So I go back to your suggestion. I didn't mean to intend to suggest by my remarks that the judges have not had a hand in this, but they are not the only one. It has been to me an institutional failure that cuts across all lines, but it is one that we ought to all have a great deal of concern about.

JUDGE ROSENTHAL: As we do.

Ladies and gentlemen, that is almost the end of the conference.

Before you go, Judge Levi, who is of course the

Chair of the Standing Committee, would like to express his appreciation and formally end our conference.

JUDGE LEVI: Thank you. I know you're anxious to go. I'll keep you for one minute.

David Starr Jordan was the first president of Stanford. He was an ichthyologist. He said that every time he remembered the name of a student he forgot the name of a fish and he was not willing to make that trade.

Unlike terabytes and gigabytes, speaking for my own document retention system here, I think I'm maxed out. I hope some of you are as well. But that just reflects what a wonderful conference this has been.

All of those who put it together — Myles, Rick, Dan Capra, Judge Rosenthal, our panelists, our audience — you can give yourself a round of applause as you give all of these fine people applause.

So now the Civil Rules Committee has its work cut out for it. It is true that the process is an open process, and that introduces a lot of forces into the process, and the Committee understands that these forces don't always agree. But I will point out that the Committee has in the past, in its history, not shied away from controversy. It has to be realistic, it has to be cautious, it has to know

that it doesn't know everything.

But it has a very good process. You know, if we look back over the past few years, we've seen a lot of proposals that in one way or another were very controversial. The Discovery Rules that mandated uniform disclosure throughout the nation were opposed by many District Judges, and opposed forcefully, and yet that proposal went through. The second opt-out provision in the Class Action Rule was opposed by many defense interests, and yet that proposal went through. The Civil Rules Committee recommended that multi-state conflicting overlapping class actions was a matter that deserved congressional attention, and the Judicial Conference adopted that policy; many plaintiffs' groups did not agree with that.

So there will always be opposition. I think that what we can so to the Committee is: think large, act reasonably. Don't be frightened. The Standing Committee will be there to back you up.

JUDGE HIGGINBOTHAM: Way behind you.

[Laughter.]

JUDGE LEVI: This has been a wonderful conference. Thank you all very much.

JUDGE ROSENTHAL: Thank you.

[Adjournment: 12:45 p.m.]