PUBLIC HEARING ON PROPOSED AMENDMENTS
TO THE FEDERAL RULES OF CIVIL PROCEDURE
DALLAS, TEXAS
JANUARY 28, 2005

BEFORE THE HONORABLE LEE H. ROSENTHAL
HONORABLE PETER D. KEISLER
HONORABLE NATHAN L. HECHT
HONORABLE THOMAS B. RUSSELL
PROFESSOR EDWARD H. COOPER
HONORABLE SHIRA ANN SCHEINDLIN
DANIEL C. GIRARD, ESQ.
PROFESSOR RICHARD L. MARCUS
SIDNEY A. FITZWATER

ALSO PRESENT:

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Secretary, Committee on Rules of Practice & Procedure

JAMES ISHIDA
Attorney Advisor, Office of Judges' Program

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P R O C E E D I N G S:

JUDGE ROSENTHAL: Good morning.

Thank y'all for joining us for this, our second hearing on the proposed amendments to the discovery rules to accommodate electronic discovery. We are very pleased to see all of you and very much appreciate the time and thought that you are willing to give to help us make these proposed amendments as good as they can be and to decide what the most appropriate step on the rules enabling act process there is and what is the best path for us to take.

This is, of course, the second of the proposed -- of the hearings on these amendments. We will have a third hearing in Washington the second week of February, and the comment period is scheduled to end on February 15th.

So those of you who have not yet submitted written comments but wish to do so, you, of course, still have time to do just that.

The procedure that we will follow today will be very much like that we followed last -- at our last hearing, for those of you who were present at that.

Each of you will be given an opportunity to present your position, but there will, of course, be questions from the committee members that will give you an indication of the specific concerns that we have, give you an opportunity to respond to them.

It is most helpful to us if in making your comments you are not merely expressing your general concerns about discovery today or tomorrow, but if you speak in specific terms, as well, about the language of the proposed amendments and specific changes that you think could be helpful in improving the proposed amendments or specific language that you think if enacted would cause particular problems.

And with that, I think we are ready to begin with Mr. Wren.

MR. WREN: Thank you, Your Honor.

Good morning. I'm Jim Wren. I am not here with a claimed expertise in matters of electronic storage, per se. I am here as an attorney who practices in electronic discovery and teaches electronic discovery, so I'm here to speak to what I am concerned about might be practical ramifications of --

JUDGE ROSENTHAL: Excuse me, Mr. Wren, you are listed as speaking on behalf of the Texas Lawyer's Association?

MR. WREN: Texas Trial Lawyer's Association.

JUDGE ROSENTHAL: All right. Can you tell us a little bit about the group that you are speaking on behalf of.

MR. WREN: Yes, Your Honor. Texas Trial Lawyers

Association is an organization of plaintiff's trial attorneys, representing primarily individuals, sometimes businesses, but primarily individuals in litigation.

JUDGE ROSENTHAL: Thank you.

MR. WREN: The issues -- what I would like to do is briefly speak to three particular concerns and then to -- or in the midst of that address what I have concerns about in the context of a -- of a practical case, that -- where I think it illustrates how my concern may play out.

First of all, with regard to the proposed language of Rule 37 F, I believe that as currently worded it raises the potential for discovery abuse, certainly not occurring in every situation, or hopefully not even in the majority of situations, but I do believe it increases the chance of it.

Based on my practical experience, I question whether there is even a need for a safe harbor provision, but to go to the specifics of it, I'm very concerned that the combination of the safe harbor provision, with the language from Rule 26 regarding presumed nondiscoverability, and that is the effect, of information deemed by the responding party to be not reasonably accessible, creates a situation in which the -- I believe it invites a situation for a party who wants to prevent the discovery of information, would within its control move the information to a, quote, nonaccessible or unaccessible status, that is, through

archiving, through encryption, et cetera. It's still there, but by that action it creates at least the argument that it is not reasonably accessible.

JUDGE ROSENTHAL: May I ask you a question?

MR. WREN: Yes, Your Honor.

JUDGE ROSENTHAL: You practice in Texas.

MR. WREN: Yes, Your Honor.

JUDGE ROSENTHAL: And Texas, of course, has a much stouter two-tier provision than is proposed in the federal rules. We have heard anecdotally that the Texas provision on the inability to get discovery in the first instance of materials that is not -- that are not used in the ordinary course of the producing party's business has actually not led to discovery abuse, that it has worked very well, and it goes much further than the provision that is proposed in the amendments under Rule 26.

What is your experience?

MR. WREN: Your Honor, quite honestly, the experience I have run into with what I perceived to be attempted discovery abuse did not occur in Texas. The case I was going to speak to is a California case. So in Texas -- I -- let me say at the outset, my experience with opposing counsel is that by in large opposing counsel are honorable and that the companies that I have been in litigation with, by in large, are honorable.

JUDGE ROSENTHAL: Have you found that the Texas provision has encouraged companies to move materials that would otherwise be in the discoverable category under the Texas rule and put them into the nondiscoverable category under the Texas rule in order to -- not for business purposes, but for litigation strategic purposes?

MR. WREN: Thus far, Your Honor, I have not. That has not been my personal experience, quite honestly. But let me tell you the concern with that.

When -- the companies that are potentially affected by that have concerns of litigation that go far beyond just Texas, and so they are not going to rely on just the issue arising under Texas rules in order to make their decisions.

The federal rules are far more broad reaching, far -- I believe it again removes the level of concern that simply a Texas rule would not. Therein lies my concern, that if there is a desire to abuse discovery, with this enacted into the federal rules it potentially provides comfort that a mere Texas rule does not.

JUDGE ROSENTHAL: I'm not sure the Texas Supreme Court would appreciate your characterization of the "mere Texas rule," but go ahead.

(Laughter.)

MR. WREN: I understand. And certainly no -- no disrespect to Your Honor.

JUDGE HECHT: Mere is better than some things.

MR. WREN: My concern is that with the discovery potentially being categorized as -- or the information potentially being categorized as not reasonably accessible, that that would then allow, under the current wording of the rules and the comments, for the party to deem that that is not, quote, discoverable information, and therefore take no -- make no effort to remove it or to safeguard it from the operation of routine destruction.

The -- you appeared to have a question. I don't want to cut you off.

JUDGE ROSENTHAL: Go ahead. Keep talking.

MR. WREN: There is a comment -- there is a statement in the comment that says, and I'm quoting, "in some instances it may be necessary for a party to preserve electronically stored information that it would not usually access if it is relevant and is not otherwise available." That sentence is the only thing that addresses this issue, and I do not believe it is sufficient, for a couple of reasons.

First of all, it does not -- it creates, actually, the distinction, or the arguable potential distinction, between information that is not usually accessed versus information that is not reasonably accessible and, therefore, could create the argument that the --

JUDGE SCHEINDLIN: Can I interrupt with a question also?

So is your concern then that because of the two tier it's not clear whether the producing party should preserve that which it identifies as inaccessible?

That's the real concern, isn't it?

In other words, the two tier, since you don't have to produce the inaccessible right away you should identify it and say I'm not going to produce it because it's inaccessible, but your question is, is there anything that tells that party you ought to hold on to it so the court can make a meaningful ruling as to whether it should be produced anyway.

MR. WREN: That is exactly the primary concern I have.

JUDGE SCHEINDLIN: That's the concern, the preservation --

MR. WREN: Yes. That goes away.

JUDGE ROSENTHAL: Let me follow-up on that.

The notes, as you point out, do make clear that if the producing party has a basis to believe that there is no other source for information that would otherwise be deleted in the ordinary course of the computer's operation, there is a duty to preserve it.

MR. WREN: That's exactly right.

JUDGE ROSENTHAL: Is your real question then that -- or is your real point then that that point is so important that it needs to be emphasized more than the present language does?

MR. WREN: Yes, Your Honor. In fact, by that statement that you just pointed out, of a belief that it is not otherwise available, in effect that creates an additional condition that for a -- for a party who wanted to engage in discovery abuse, but with the desire to have arguments to justify it, the -- that creates one additional basis for saying we believed this information would be otherwise available. Whether it's true or not.

My concern is with the information going away under the combination of the safe harbor provision with the --

JUDGE SCHEINDLIN: Isn't there something in the safe harbor provision that says you have to act reasonably to preserve that what you know will be discoverable in this case, something like that?

MR. WREN: Yes, Your Honor.

JUDGE SCHEINDLIN: Again, you may not have acted reasonably if you don't preserve the only source of information, even if it's inaccessible at the moment, so the two tied together actually might tell a producing party that they better not make it unavailable.

MR. WREN: It might. And I would certainly argue

exactly what you just said, but I am very concerned, under the current wording of the rules that that ambiguity creates an argument for the other side.

JUDGE SCHEINDLIN: What ambiguity?

JUDGE ROSENTHAL: What ambiguity?

MR. WREN: The ambiguity of, for instance, referring to information not accessed or -- or information accessed versus that which is reasonably accessible, and the additional condition being raised of whether they believe it is available otherwise. I desire for there to be no ambiguity that can lead to the arguable justification for destruction of evidence.

JUDGE SCHEINDLIN: I understand.

JUDGE ROSENTHAL: Let me ask you one other question on that about your practice not only in Texas but I gather that you also have questions that proceed under rules of other jurisdictions as well.

In your work on electronic discovery, have you found that in most instances you are able to obtain sufficient responsive information from electronically stored information that is reasonably accessible, that is, that you don't need to resort to backup tapes or fragmented data or legacy data and all of the other ways of characterizing stuff that is hard to get?

MR. WREN: Yes, Your Honor, as a general rule I

have found that. I am concerned about the exception.

Let me turn to a practical example of this.

JUDGE ROSENTHAL: When you say "as a general rule," does that mean in almost every case that has been true?

MR. WREN: True, in almost every case.

JUDGE SCHEINDLIN: Were you going to give us a couple of practical examples?

MR. WREN: Yes.

JUDGE SCHEINDLIN: That might be helpful, I think.

MR. WREN: The example I was going to speak to involved a case I tried in the fall of 2001 in Los Angeles. It involved a publicly-traded NASDAQ company that as the defendant it was a breach of partnership agreement between that company and another company, primarily an individual, very small business, regarding a partnership opportunity, a business opportunity for the partnership.

The business opportunity appeared to come undone and to go nowhere and to die on the vine. In truth, what was appearing, and found by the court, was that for a period of months after the partnership opportunity seemed to have gone away, that the publicly-traded company was actually involved in secret negotiations in the implementation of the business deal that until publicly announced months later was unknown

to the party that I represented.

Now, the way we were able to put that together was through primarily e-mail discovery. There was -- we presented evidence in court that there had been attempts made to delete the record, to delete the trail, e-mails. We were -- in that situation we did have to resort to going to information that would under I believe -- certainly they would have argued would not be reasonable.

JUDGE SCHEINDLIN: Well, where was it?

Where were the e-mails that you retrieved?

How did you get them?

MR. WREN: We had to retrieve them from backup tapes from -- we did one search of a computer hard drive. And my concern is that had there been a clear road map provided for them to on a short cycle not just attempt to delete as they did, but to move everything on short cycle to backup tapes and then routinely continue with the destruction of that, in the months before we ever even found out there was an issue there, the trail would have been gone.

PROFESSOR MARCUS: Excuse me, counsel. You said clear road map. Is there no road map now, without federal rules?

MR. WREN: I don't believe there's clear comfort. I believe that's why there is a push for this. In order

to --

PROFESSOR MARCUS: Is there any legal limitation you're aware of on destroying, deleting, discarding the kind of information you're talking about?

MR. WREN: Yes, there is. Under the exfoliation doctrines under the common law of various states there certainly is a response to that. Here in these rules there is no -- for instance, the continued destruction by routine operation, or even the -- the implementation of routine operation is in no way tied to a valid business or technological justification, and that's the concern.

PROFESSOR MARCUS: But what I was curious about was whether you think there's some failing in the preservation obligations you just mentioned that means that there's inadequate protection in a case like the one you have.

MR. WREN: In the case we had without the -- no. In the case we had, as -- as the rules existed they worked. The -- the exfoliation rules worked.

Whether they would work under the language being proposed by these rules is a concern. Even if the court believed --

JUDGE RUSSELL: What makes you think they work differently?

That's what I have a problem with. What makes you

think they work any differently?

MR. WREN: There is no -- there is no statement in these rules that routine operation for destruction is tied to a valid business or technological reason. It could be simply to avoid litigation, period. That's the only reason.

JUDGE ROSENTHAL: If we made clearer that the routine operation of the system had to be what some have characterized in good faith, but a more precise way of saying that, that is it was a neutral, legitimate business purpose, not targeted to a particular subject matter that was the subject of litigation, would that ease your concern in that respect?

MR. WREN: It would certainly ease it, Your Honor.

JUDGE ROSENTHAL: All right.

MR. WREN: For instance, if there were language in Rule 26 that -- excuse me. If there were language in Rule 37. Let me make sure I'm stating it correctly.

Yes. If there were language in Rule 26 to the effect that a party need not provide discovery of electronically stored information if the party identifies it is not reasonably accessible. A motion by the requesting party to the responding party must show that the information is not reasonably accessible and that lack of accessibility is the result of valid business justifications and/or valid technical limitations.

JUDGE ROSENTHAL: Such as a good document retention and destruction policy that was put into place unrelated to any litigation.

MR. WREN: Unrelated to litigation. Exactly, Your Honor. I'm still questioning whether it's sufficient, but that would go a long way to easing the concerns that would exist.

Your Honor, I don't want to run over my time. If I may speak to another issue.

JUDGE ROSENTHAL: You may briefly. Thank you.

MR. WREN: Okay. I also believe that the issue regarding access to data should not be a discovery -- discoverability issue. It should be tied to cost. That is really the issue.

JUDGE ROSENTHAL: Isn't there a difference between saying that somebody has to produce something in the first instance, number one, and, number two, who's going to pay for that production, recognizing that there are costs of production that go far beyond the physical costs that may be necessary to restore and retrieve data?

There is the cost of the attorneys who have to review it before producing it, the cost of attorneys who have to make decision as to privilege before producing it.

Aren't they related but separate questions?

MR. WREN: Your Honor, I believe that cost is the

issue. And by making it -- by making discoverability the issue, I am concerned that the information can be deemed -- regardless of the willingness of a party to pay the presented cost, that the information simply is not made discoverable. I believe it is a cost issue. That's what this is all about, and it should be treated as such.

JUDGE SCHEINDLIN: But what is the second tier? Why do you say it's not discoverable?

It just shifts into that second tier where you're going to have to make a little bit of a showing, but why is it not discoverable?

MR. WREN: I believe by the way it is worded, you're right, there is that ability to present good cause. But, in essence, what that does is to present a presumption, once there is a showing of not reasonably accessible. In essence, it has created a presumption against discoverability.

JUDGE SCHEINDLIN: I understand. But then you come into the court and you say here's why I really need it, by the way, I'm prepared to share some of the costs of getting it because I realize it's hard to get at, but it's not available anywhere else, and you explain your case and you get it. It's not not discoverable, it's just that you have to have to carry a burden, including cost, which is what you just said you wanted to do.

MR. WREN: And I'm saying, Your Honor, I believe that the proper issue should be one of cost, period. Certainly there needs to be a showing of why it is needed.

But under the rules, as stated, there is a presumption now that it is not discoverable. And I believe that that -- the good cause provision can be to create a burden greater than needs to be created. I think rather the issue ought to be whether the -- assuming that it is not reasonably accessible, that there has been a showing of a proper balancing of the cost.

PROFESSOR MARCUS: Mr. Wren, is it your view that under the rules now a responding party must search all its backup tapes in response to an initial request unless it gets an order from the court relieving it of that?

MR. WREN: No. That's not my position.

PROFESSOR MARCUS: Isn't that what the rule says, that you don't have to do that?

MR. WREN: But it certainly must take steps to review it.

JUDGE ROSENTHAL: So nobody can ever suspend the routine deletion of backup tapes.

MR. WREN: I believe it depends on the situation, but what I want to come back to is that there must be a valid business or technological reason, not just this blanket blessing of continued routine destruction.

JUDGE ROSENTHAL: Just so I understand your position, are you suggesting that by framing the issue in terms of cost rather than discoverability we move more towards the Texas rule and have a presumption of cost shifting for information that is not reasonably accessible?

MR. WREN: Not a presumption, Your Honor, but at least an inquiry into it.

What I would like --

JUDGE ROSENTHAL: Isn't that --

MR. WREN: What I would prefer is that there not be a presumption one way or the other.

JUDGE ROSENTHAL: You mean we not make any change.

MR. WREN: By the due cause requirement there is a presumption, I believe, that unfairly tilts the playing field.

JUDGE ROSENTHAL: Are there other questions of Mr. Wren?

JUDGE FITZWATER: Is it -- is it your concern that the safe harbor will somehow affect exfoliation doctrines in states?

MR. WREN: Yes.

JUDGE FITZWATER: Will you state the basis for that concern.

MR. WREN: Yes. Exfoliation doctrine -- the case

law varies slightly lie in various states but it's relatively uniform, and it goes to a reasonableness of actions taken in light of what is known or should be known.

The current rule, by not tying to business justification or -- the proposed rule, by tying -- without tying to business justification or technological justification, in essence, creates a situation where if routine operation is implemented there is no longer an inquiry required as to whether that is tied to legitimate reasons, whether it is reasonable under the circumstances. And I believe that potentially shifts the law on exfoliation.

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

MR. WREN: Thank you, Your Honor.

I did -- and I apologize for this, I did belatedly prepare written statements as well. May I present those to Mr. McCabe?

JUDGE ROSENTHAL: Certainly. They will be made part of our record.

Mr. Sloan.

MR. SLOAN: Good morning, Judge Rosenthal, members of the committee. Thank you very much for the opportunity to chat with you briefly.

My name is Peter Sloan. You do not have written testimony from me. It will be forthcoming. I will get it

to the committee prior to the 15th. I can't decide where I come down on 37(f), and I'm continuing to mull that over.

I am a private practice lawyer in a law firm in Kansas City, Missouri, Blackwell Sanders Peper Martin. I'm a reformed trial lawyer. It's been six years since I tried a case and I never will for the rest of my career. My sole practice is working with companies on records and information management. I work not really with litigation lawyers outside or in-house, I work with records management professionals, and IT professionals, and some in-house counsel who are striving and groping in the dark to figure out what it is they're supposed to do with their records. Your time is dear, mine is brief, so I will simply make my three comments.

First, I almost hesitate to do this, it will likely make people grumpy, but I think it's an important point so I want to raise it. Throughout the amendments the reference is to electronically stored information and that's what we all call it. Actually though that's not what it is. It's digitally stored information.

JUDGE ROSENTHAL: I have to tell you that we actually considered that during our deliberations and one of our astute members had a computer there and went like this (indicating) and looked up and informed us that the first definition in Webster's on digital was of and pertaining to

fingers, so we moved on from there.

MR. SLOAN: Since I joined this party late I don't mean to take us back to earlier festivities, but I make three brief comments explaining why I do think that's a valid, though perhaps picky, change.

The stuff in which the information is that we all are discussing and wish to see is seldom stored electronically. It's stored predominantly in a magnetic medium increasingly. It's stored optically. Very seldom is it stored electronically. In fact, the term suggests confusion because where digital data is housed electronically, is in memory when it's being processed, so it's not accurate in fact and it can cause confusion.

Second, your task and our hope is that we have rules that stand the test of time, and as technology progresses who knows in what medium this information will be housed. In ten years it could be in the time space continuum for all we know. But what we do know is that it will remain digital. Ever since half a century ago Claude Shannon, Bell Labs, figured out that binary digits or bits could be used to house and transfer information, it's been digital, and it will remain digital.

Last, and most importantly, what we do as lawyers in this field is important and nice but nothing ever gets accomplished until we work with an IT professional. More

than half the time we have no idea what they're talking about. And it shouldn't surprise us that more than half the time they have no idea what we're talking about. And sometimes that is caused or exacerbated by us not using the correct language, or the language that they understand. So with that, I give that suggestion.

JUDGE ROSENTHAL: Do you -- may I ask one question about that?

MR. SLOAN: Um-hum.

JUDGE ROSENTHAL: If we elected not to use "digital," because it has other associations in this transition period that we may be in between the world we used -- the information world we used to live in and the information world that our children will live in, do you have a second choice as an alternative to electronically stored information?

MR. SLOAN: Wouldn't presume to offer one. I suggest that electronic evidence is alliterative and widely used and people generally -- within the legal community people generally understand what we're talking about. My only suggestion is that it would be more accurate to refer to it as digital.

My second point is simply that this work of the committee is tremendously important and is -- is -- is to be commended, and these amendments should be -- should be

passed along and recommended and put into the rules, because they address some critical issues that have faced companies and lawyers, and from my perspective, more importantly, records managers and IT professionals in a great conundrum for some -- for some time. So I applaud the committee's work and I encourage you to push forward.

My third and last point is I get calls from clients about a specific issue, and in my mind it's the elephant in the room, and that is preservation and what do we do with this stuff when a -- when a lawsuit is pending or impending, and I don't know what to tell them. And I understand the committee's reluctance due to the enabling act and other concerns not to tackle preservation head on, but there are things the committee is seeking to do such as the accessible versus not reasonably accessible, such as the safe harbor.

JUDGE SCHEINDLIN: That's my question. If we pass these in the form they are today and you are working in your practice advising the records managers --

MR. SLOAN: Yes.

JUDGE SCHEINDLIN: -- what would you do with inaccessible material once the lawsuit is filed?

What would you say to your client?

MR. SLOAN: I don't know what to tell them under these rules. I still struggle with that.

JUDGE SCHEINDLIN: That's bad. We haven't given

you enough guidance.

Do you think you have to preserve --

MR. SLOAN: Yes. But I believe that you have not because you feel constrained --

JUDGE SCHEINDLIN: I know the reasons, but I'm saying in terms of your being able to give guidance, would you suggest that they preserve the inaccessible if it's not available anywhere else and it might be discoverable under the second tier?

Do they have to hold on to it?

Otherwise what's the point of the second tier, the court says to the requesting party, okay, you win, and the producer says, oh, but it's gone, I held none of it. That doesn't make sense either, does it?

MR. SLOAN: Let's address that in the context of a hypothetical specific.

A client that is large, a company that's large, lots of people using e-mail and lots of dedicated exchange servers and the e-mail is backed up in a traditional way currently onto digital linear tape and there are four incremental nightly runs, what I would advise that company to do is the following. On the active side, on the active side, e-mail is just a medium, it's not a record in and of itself. It's analogous to white paper. There may be record worthy stuff on the white paper or there may not be. E-mail is exactly

the same. But it all comes into this common pot receptacle of the exchange server, and so the first of two things that the company should do in an ordinary course of business is have a process in place so that record worthy e-mail comes out of the common pot exchange server and goes into some form of records managements, and the remainder of the e-mail that is not record worthy really needs to go away.

JUDGE SCHEINDLIN: But you're talking about the active -- that's still on the people's active servers.

How long is that routinely kept with your clients, the e-mail?

Is it six months?

Is it more?

MR. SLOAN: It varies. But if it is truly not record worthy, if there's not a legal requirement, a legal consideration in the ordinary course of business requiring it to be retained, in my mind it's not a business record and it can go away and it should go away.

JUDGE SCHEINDLIN: That's not what I was asking. How long are people keeping it around on their own hard drives?

MR. SLOAN: I leave it to them. Some have routine practices of having it go away in 30 days, some in 60 days.

JUDGE SCHEINDLIN: Okay.

MR. SLOAN: I advise them if they are going to

have that kind of auto purged to have it triggered on a particular date, rather than be rolling, for reasons that will be apparent in a moment. In other words, It doesn't roll off every day in 30 days. It appears on a particular day of the month. So in fact e-mail could be on the active side -- that's nonrecord worthy could be on the active side for anywhere between 30 and 60 days, because that auto purge is going to happen on a particular day. Again this is ordinary course of business, no preservation duty.

On the backup side the whole purpose for disaster recovery media is just that. And I tell clients go talk to your IT professionals and ask them a single question, how long do you need this backup media data to perform disaster recovery, and specifically how many days. Not weeks. Not month. How many days.

And the answer will always be between three days to ten days. Sometimes as long as 30 days if someone's worried about corruption as a disaster event.

JUDGE ROSENTHAL: So your notion of the perfect world would be on that third day that backup tape is gone.

MR. SLOAN: Because it has fulfilled its only purpose in the ordinary course of business, which is to react to the disaster. That's the ordinary course.

Then the plot thickens. The preservation duty arises. What should they do then.

What I hope clients will do is to vigorously pursue a legal hold process.

JUDGE ROSENTHAL: On active data?

MR. SLOAN: On active data, because that's where it's accessible. That's where you can find it, and you can deal with it, and you can move it, and you can protect it, and that's everyone's goal.

PROFESSOR MARCUS: Mr. Sloan, could I ask you a question I think is about that?

MR. SLOAN: Yes.

PROFESSOR MARCUS: One of the things we have heard from some is that e-mail communications in particular have become the new place where companies communicate important information to their employees about a variety of subjects.

What's your expectation about preserving that for a company, that as opposed to what you might call chitchat?

MR. SLOAN: If it is something that is required by law or a legal consideration or a business purpose to keep, it's a record and it should be managed as other records.

PROFESSOR MARCUS: Now, you say "business purpose." If the company notifies all of its employees about things that employees need to be told, that would be business purpose?

MR. SLOAN: In my mind. We're speaking in generalities, but yes.

JUDGE RUSSELL: You give advice to clients. In looking at our safe harbor provisions, what type of advice would you give -- would it be different with the two provisions we have, the one with more culpability and the one with less culpability?

MR. SLOAN: I think that the safe harbor is quite helpful, because it recognizes the validity and the need to have some form of routine process that cleans house appropriately. Appropriately. And for good faith and in good purposes.

I would tell clients that the safe harbor is a -- a wonderful effort to move the ball forward in clarifying that issue, but under either alternative there are great restraints on its extent. And I would also tell clients that hopefully over time the rationale behind the safe harbor will extend itself through judicial decisions, earlier in the process and also perhaps more broadly.

JUDGE KEISLER: Mr. Sloan, Let's say you had a client, picking up on what Mr. Wren was talking about, who said I want to make sure that I preserve anything, even if it's not reasonably accessible, that might not otherwise be available and might be germane to some pending piece of litigation. Is there an easy way for that client to execute that intention, to identify what inaccessible data is not otherwise available and is relevant to litigation, without

undergoing all the costs that responding to discovery with respect to inaccessible data would impose in any event?

MR. SLOAN: It's not going to cost quite as much as retrieving it, making it viewable, hiring the lawyers to look through it and then putting it in a form appropriate for production, but it's not going to be an easy task. I mean, this is why it's inaccessible.

I mean, it's difficult because it's not reasonably accessible.

JUDGE KEISLER: So even the process of identifying the category that you would need to preserve would impose some costs but not as much as producing it?

MR. SLOAN: Yes. Yes. And there is a -- a widely stated notion, that I respectfully do not agree with, and that is, well, it's just preservation, you know, what's the cost, what's the harm, it's just a DLT tape, cost 40 bucks, let's just set it over here. No one has had to go to the expense of getting into it to find out what's there, and we can put that off for another day and we'll sample it then anyway, and it will -- it will all work out, it's not expensive.

What we're focused on there is the cost of storage. And it's minimal. I -- I can see that. The cost of storing digital data is minimal, but the cost of storming is not the same thing as the cost of retaining it. It's not the same

thing. Because another dilemma that faces clients is, okay, backup media, we're going to try to execute a great, vigorous legal hold process on the active side and we're going to minimize as much as possible exercising preservation by holding on to backup media. But we -- we -- it's unclear. It's unclear what the rules say. It's unclear what the court's say. And remember the timing in which these decisions are made. These decisions are agonized over sometimes before the lawsuit is ever actually filed, before it's actually commenced, the preservation duty arguably may have arisen, so there's no order in that case. The rules themselves are not specifically enlightening. And they have to decide what to do.

It is tempting to take that backup tape and set it down and preserve it. The problem with that is whether you get to it or not you run smack dab into what I refer to as the serial preservation dilemma.

You set aside this tape, this backup media, and you may or may not use it in that case but a company of any size, son of a gun, the next week or the next month the next case comes and after that the next case comes. There is no end to this. That -- that backup media can never be put back where it belongs, which is into the proper rotation. That's the central dilemma.

Yes.

JUDGE ROSENTHAL: Which means that, if I understand your nightmare world of the serial preservation dilemma, your client has disposed of nothing and therefore the world of discoverable information is infinite.

MR. SLOAN: Yes.

JUDGE SCHEINDLIN: Can I ask one more?

JUDGE ROSENTHAL: Go ahead. It's your time, then I'll go.

JUDGE SCHEINDLIN: I know our time is short and I have a lot of speakers here, but I have one quick question for you.

I've been reading the comments and some comments are worried that they don't know what "reasonably accessible" is versus "inaccessible." You haven't seemed to have a problem with that.

How do you understand the inaccessible?

MR. SLOAN: I have no problem about that.

JUDGE SCHEINDLIN: Can you quick tell me --

MR. SLOAN: I think because I've been reading your opinions and your notions.

JUDGE SCHEINDLIN: Tell me what you --

MR. SLOAN: Judge, I've heard those who have criticized that concept because it seems ill-defined or not defined.

JUDGE SCHEINDLIN: Tell me what it is. What is

inaccessible.

MR. SLOAN: Because, as with any definitional issue, sure, there's some gray things in the middle, but it's intuitively clear that active data on the network that is accessed on a daily basis in the normal operation of business, that's accessible.

And over here data that is compressed and -- in a backup medium that is extremely difficult to get to, it's not impossible to access it, it's not impossible to get to, but it's not reasonably accessible, that just seems crystal clear to me. And by using that -- that language --

JUDGE SCHEINDLIN: But is it not accessible because it's expensive or because it would take forensic experts? What makes it so hard to do?

MR. SLOAN: What makes it hard to do is the manner in which the information is stored, and, frankly, its volume. It's not impossible to get to it.

JUDGE SCHEINDLIN: No, I will realize that.

MR. SLOAN: And it's designed to not be impossible to get to, because when we have a disaster we need to immediately restore the system.

PROFESSOR MARCUS: How often does that happen?

MR. SLOAN: What makes it difficult to get to is it is stored in a manner that's designed for that purpose, which is the wide-scale restoration of a server environment,

rather than let's go find the e-mail or the memo that Billy Joe sent to Bobby Sue on such and such a date. It's just not designed for that.

JUDGE ROSENTHAL: It's designed to restore the haystack rather than find any particular needle.

MR. SLOAN: Exactly.

PROFESSOR MARCUS: How -- I have a question about backup media.

How often is it used either for disaster recovery or other purposes?

Because one of the notes mentions the possibility that it may have been accessed and that that relates on whether it should be deemed accessible.

MR. SLOAN: The reality of this -- I'm just speaking frankly with you. The reality of it is the stuff is designed to restore systems, and that's its proper purpose. And I encourage clients to pursue solely that purpose.

But the reality of it is occasionally, in some companies, when the CEO loses the e-mail he or she calls the guy in IT and that constitutes a disaster for that IT person's purposes.

(Laughter.)

And the problem there is the company has not pursued the institutional discipline to have process trauma

personnel. So, yeah, that happens from time to time. I wish it didn't, but it's human nature.

I think the language in the rules contemplate that it's not a gotcha rule as proposed. That can happen from time to time, but if it's clear to the court that the purpose of this process and of this data is institutional disaster recovery, we're not going to treat it as reasonably accessible.

JUDGE HECHT: Given that that's human nature, do you see any push either in business or technology to make disaster recovery material more accessible?

MR. SLOAN: I don't. And I see that thread in some of the -- in some of the written testimony and perhaps in some of the concerns of the committee.

Technology is changing constantly. Who knows what will come next. But I do not believe that the fundamental character of disaster recovery storage strategies will change, because think about what they're designed to do. Regardless of if we're using DLT tape or we're using something like Tivoli Storage Manager where we're replicating information and putting it into kind of like a server environment and then backing it up in turn, regardless of the individual process, the purpose of disaster recovery is to take a whole bunch of information off of an active environment and store it somewhere briefly,

in case there is a disaster. And so just by the nature of that request for a process we're going to be compressing that data so it's easier to store, and we're only going to be keeping it properly for a short period of time.

So for those reasons technology will change but I think disaster recovery media and processes will still be reasonably inaccessible under the proposed test.

JUDGE ROSENTHAL: Any other questions?

MR. SLOAN: Thank you very much.

JUDGE ROSENTHAL: Thank you, sir.

Mr. Beach. Good morning.

MR. BEACH: Good morning, Your Honors.

It's not often that I get in the courtroom, and when I get in a courtroom I don't like to see this many judges.

I am Chuck Beach. I'm coordinator of corporate litigation for Exxon Mobil Corporation. I thank you for letting me comment on the rules, but I really want to thank you for the work that you've done. I've been working on this for a couple of years. I know that you've been working on it for a lot longer. I appreciate the effort. I understand what the effort is.

Unfortunately, given the nature of these hearings and the time we have, I'm going to spend most of the time telling you stuff I think you could have done better, but that should not take away from the fact that what you have

put together is a remarkable package. It has identified the problems and it has tried to deal with the problems in a balanced fashion.

I said that I am from Exxon Mobil. Probably for the purposes of this hearing what I should have said is I'm from a company that has 15,000 active litigations. In the year 2004, which was a slow year, we got new litigations at the rate of 225 a month.

A few other numbers. We operate in 200 countries in the world. We have 306 offices around the world, seven -- 70 of them in the U.S. We generate 5.2 million e-mails a day, about half of that in the U.S. We have 65,000 desktop computers around the world and 30,000 laptop computers. These are for our employees, about half of those in the U.S.

The computers we are now putting in have a storage capacity of 40 gigabytes. I am not a techie, but I have looked on the Internet --

JUDGE SCHEINDLIN: One interruption, are you going to give us this in writing? This is great information.

MR. BEACH: I will.

JUDGE SCHEINDLIN: We're frantically writing down how many gigabytes, when you can tell us this.

MR. BEACH: I said I was going to give you these in writing. I'm not sure how much clearance I can give --

JUDGE ROSENTHAL: We have a record being made.

(Laughter.)

MR. BEACH: Okay. I have a record. You shouldn't have told me that. Okay.

JUDGE ROSENTHAL: It will be on a backup tape though.

MR. BEACH: If there's a record, the Business Week article won't come out misquoting what I said, again.

Anyway, the storage -- I will put in written comments afterwards.

JUDGE ROSENTHAL: Thank you.

MR. BEACH: The storage capacity of the computers that we are putting in now, and I think will be completed by next year, is 40 gigabytes. That is the equivalent of 20 million typewritten pages, so that's for each of our employees, has the capacity to store on his laptop or his desktop 20 million gigabytes.

We have, in addition to the 65,000 desktops and 30,000 laptops, we have between 15,000 and 20,000 blackberries and PDAs around the world.

We next year are going to -- with the new technology we're putting in, we're going to have things called thumb drives. Now, I got my older boy a thumb drive for Christmas. You can hold one gigabyte on that. One gigabyte is 500,000 pages. Everybody is going to be walking around with 500,000 pages in his pocket, and we will have an

estimated hundred thousand of those, 40,000 in the U.S.

We have 7,000 servers worldwide, 4,000 of them in the U.S. We have one thousand to 2,000 networks worldwide, about hall of those in the U.S.

We have 3,750 e-collaboration rooms. I assume that they're chat room type things, for people to be working on documents simultaneously. About 3,000 of those are in the U.S.

We have 3,000 databases, 2,000 of those in the U.S.

Our total storage of information that we now have is 800 terabytes, 500 terabytes in the U.S. One terabyte equals 500 million pages. 500 terabytes equals 250 billion pages. 800 terabytes equals 400 billion pages.

I don't have worldwide figures on the disaster recovery system. The latest figures I have on the disaster recovery systems in the U.S. is that we generate 121,000 backup tapes for disaster recovery purposes.

If we were ever to get an order, and we never have, that told us that we would have to stop all of our backup tapes, just the replacement of the backup tapes would cost 1.98 million dollars a month. That's over 20 -- that's about 24 million dollars a year.

Now, I give you these figures because people look at rules from different perspectives. And I think that judges and outside counsel look at a lot of cases. When we're

looking at a lot of cases, we're looking at a lot of cases for a lot of different parties.

When you give a rule, I have to look at a case that I have to be able to do 15,000 times all at once, and I have to prepare to do it 225 times again each month. Now, luckily, it's not just me, but that is the perspective that I'm looking at it.

I'm also looking at it from the perspective of a company that has large, complex, very decentralized computer systems. So a rule that will work for a simple, small computer setup is not going to work as well for a large, decentralized complex.

Now, all that, I'll get to specific comments on the rules. And I'll start with the two-tier discovery proposal in Rule 26(b)(2).

Basically what this would do is it would put two tiers of electronic -- electronically stored information, that which is reasonably accessible, and then people could designate, put everybody on notice of what is not reasonably accessible. And that, until somebody did something to put that back into discovery, would be outside of -- of the discovery.

PROFESSOR MARCUS: Will it be difficult for you to make that designation?

MR. BEACH: I don't think it's going to be

difficult if the guidance in the committee note is as I interpret it. And I interpret that as saying that you can use broad categories.

And I assume that we are going to make that examination and we're going to have broad categories available. There may be some tweaking that we would have to do in particular cases, if there were -- for instance, for certain legacy data. But if we -- from the note, my understanding is that if we say, look, information on a -- on the backup recovery system is inaccessible, that's fine. And if we said, look, in this particular case we have some legacy data that we got from a merger ten years ago and it's on Yang systems and we don't have the software, we don't have the hardware, we have no idea what's on that, we don't know if it's relevant, so we have explained that, we've explained why we don't know it's relevant, we've explained why we can't recover it, your note says that's adequate.

JUDGE SCHEINDLIN: What about preserving?

That seems to be the key question.

Now you've said you identified it as inaccessible and done it in broad categories, I think that's fine, but what are you going to do about preserving it?

MR. BEACH: Well, about preserving, that's where the safe harbor comes in. Obviously, the legacy stuff isn't going to go anywhere, it's not going to be destroyed.

The stuff on the backup tapes, those backup tapes are going to continue to run. And that, as I think we demonstrated, you can't stop 15,000 times, you can't stop 225 times a month. So --

JUDGE ROSENTHAL: But can you -- One quick question. But can you pinpoint it so you stop it on one server?

In other words, you have backup systems that are decentralized, you could theoretically stop it in one unit, one office, one time frame, or couldn't you?

JUDGE SCHEINDLIN: At least segregate it for a period of time until the second-tier motion is made and the court rules?

MR. BEACH: I'm not a techie and I don't want to get in too far over my head. You obviously don't have to stop everything at once. The -- but when you talk about one server, you talk about segregating, that, again, completely ignores the complexity.

When we have to stop something, it's very seldom that we have a decision that is made by -- if all we had to do was stop the stuff for one person, but if you have people dealing in Fairfax, people dealing in Houston, people dealing in Dallas, and people dealing on the West Coast, then you have to stop everything everywhere, because you can't -- you can't pick and choose, and you don't know

quickly enough, and you have to do it 225 times a month.

JUDGE ROSENTHAL: Has it been your experience, Mr. Beach, that if a -- that if when you are put on notice of a litigation and you are able to identify the key personnel who are likely to be the sources of information important to that litigation, and a litigation hold is put on their active data, so that it is preserved pending the development of the litigation and refinement of your understanding of what will need to be produced, if that is a accurate description of how you generally operate, has it been your experience that in most cases you are able to give adequate responsive information in discovery from that active data without any need to resort to backup tapes?

MR. BEACH: Yes. That has been our experience. I don't think we've been sanctioned a lot in discovery for not producing. Maybe we haven't done it fast enough, but I don't think anyone has -- I'm not aware of a big Exxon Mobil case that says that we do a bad job.

PROFESSOR MARCUS: So in Exxon's experience sanctions are not a serious problem?

MR. BEACH: Well, they're a serious threat and they are a serious problem. You don't want to be to faced with them. You want to you want to be able to obey the rules. You want to be able to have clear guidance and be able to do what the rules say you're supposed to do.

PROFESSOR MARCUS: And Under the current rules Exxon has succeeded in that?

MR. BEACH: Well, I'm on record here -- let me not talk about Exxon Mobil. Let me talk about any large company, other than Exxon Mobil. You could not -- you could not stop -- if the rules say, and if under some of the cases say, that when there is a threat of litigation that you would have to stop the backup tapes that held the e-mails and the word documents of the key players, you can't do that. It's a practical impossibility.

PROFESSOR MARCUS: Well, the reason I asked the question I asked is some that I think I recall have suggested to us that there is outburst, onslaught, major concern with sanctions being imposed.

MR. BEACH: Yes.

JUDGE SCHEINDLIN: And so I'm curious whether Exxon has experienced actual sanctions indicating there is such an onslaught.

MR. BEACH: Well, I think -- I think -- no, I am not aware of any important sanction case against Exxon Mobil for discovery. I'm sure that there have been minor discovery violations, but I think that our job is to protect our client. We can't wait for the train wreck. We have to -- and we have to give our client advice. And we want to follow the rules, and we can't -- other people can't follow

the rules.

JUDGE SCHEINDLIN: So the short answer to the original question though, about being able to preserve the inaccessible is -- depends on what the inaccessible is, old legacy stuff you haven't destroyed for 15 years can sit there a little longer but daily backups that are on a three day or weekly or monthly overwrite schedule, you're going to have to keep doing it. You are not going to be able to preserve --

MR. BEACH: You're going to have to keep doing that. Now, under the rules, and what you've set up, whereas you have the -- the -- you have to identify it. I mean, when we get to the safe harbor, you have to identify it. You have to put people on notice, hey, you know, this is stuff we consider inaccessible. Your early discussion, where you have to talk about what's being preserved and what's not being reserved, that puts everyone on notice. So then you can go in and you can ask the court -- if the other side thinks that there is something essential that has to be done that you're not doing, you can get the court to resolve it. People are on notice.

I use the term the early identification and the early discussion of preservation are sort of the entry fee to the safe harbor. Those are the things that may be a pain in the neck on something like that, but you're doing that because

you have to put people on notice that some of this stuff is routinely going on, but it has to routinely go on. It has to routinely go on because you can't do business if it doesn't routinely go on.

PROFESSOR MARCUS: Your -- in a 26(F) conference your lawyers are going to explain the nature of Exxon's information systems to the other side so it can appreciate the complexity and implications?

MR. BEACH: Well, I'm not sure that anybody is going to appreciate the complexity. I don't, and I've been talking to them for a long time.

I think what they will talk about in the conference is, you know, we've -- we've identified the stuff that we think is inaccessible and so that everybody knows that the backup tape is still running. At that conference is the time when people will talk about whether it's okay that that has to keep running, or if it's not, if there's some reason that you need extraordinary discovery, that's the time that you hone in and you limit it. You say, okay, do it for these five people in these -- in this location.

MR. GIRARD: Can you comment on the experiences you've had in those type of exchanges with the opposing parties as to how successful that's been typically?

MR. BEACH: No. I have to say I'm a coordinator of corporate litigation. I just told you, I don't get in

the courtroom much.

MR. GIRARD: The second question then would be --

MR. BEACH: I -- I -- I can tell you one experience, and it was an experience where there was a -- a state investigation of oil prices and we were dealing with a state and they insisted that we stop the backup tapes. We had to stop the backup tapes -- and this is something that I personally handled. We had to stop the backup tapes for e-mail and word documents at nine locations in the United States. And that went on for 13 months. It was an ongoing obligation. We generated 1400 backup tapes a month. The cost was 121,000, just for replacing the backup tapes. So that was over a million dollars just for replacing the backup tapes. And I'm giving you the tip of the iceberg of the cost. The only reason I'm giving you the tip of the iceberg is that's a hard figure I could get at. I could talk about the administrative cost, I could talk about the storage cost but they're pretty fuzzy figures. And we didn't have to search them. We never had to search them. If we had to search them, it would have been then a much greater cost. The irony is -- we had over 10,000 tapes. I'm not sure at the end if we had to search them that there would have been capacity among the vendors in the United States to search them. That's one thing I've asked the techies, you know, can they get information on that, because

my understanding is that there's a lot of stuff that's being saved and there's not even capacity in the market to search it if you had to. This isn't something that -- we can't do it. You have to send it out to vendors to do it.

How do the vendors take Exxon Mobil's system, the backup tapes, and do 'em all. So, I mean, it has to be targeted.

There's -- I mean, the manual for complex litigation says -- makes -- makes two points, I think, that are helpful here.

First of all, it says that broad preservation orders are unduly expensive and unduly disruptive. So let's start from that.

If you don't have a safe harbor, every time you go into a litigation or every time a litigation starts you're in broad preservation mode. That's -- that's the default. And you have to go in and narrow it. That's the reverse of what it should be.

What it should be is everybody's on notice of what's happening. We're giving notice. If there's a problem, let's run in and fix it, but fix it narrowly, fix it something that -- that you can -- that you can handle, that -- that you can -- you can deal with.

The -- well, I can continue, or if you have more questions I can -- I have a couple more things I would like

to say.

JUDGE ROSENTHAL: We are running short on time. If you have some last comments to make --

MR. BEACH: Well, I do want to comment on the point that was raised about sort of the hypothetical nightmare that case-determinative documents are going to be destroyed. That's the nightmare on everybody's mind, that that's what happens. The stuff is going to continue operating, you're going to have some really essential stuff that is going to get destroyed. I think, one, that ignores the vast volume of active data. I'm talking about computers that every employee has on his desk that's going to be able to hold 20 million documents and nobody destroys anything, and when they get through with that they archive it. So there's vast, vast amounts of data in the active, reasonably accessible files.

MR. GIRARD: Can I ask you this question though?

MR. BEACH: Sure.

MR. GIRARD: In a temporal sense, that active data, how long would it stay active?

Say if you have a case file that involves events that go back say three or four years, would it remain within the world of active data at the point where the case was filed?

MR. BEACH: I think I'm the person at Exxon Mobil that keeps the cleanest and the smallest amount of stuff on

the computer, because I print stuff out and put it in files. I have stuff that goes back years. You don't erase it.

Now, the e-mail, at least in our part of Exxon Mobil, we have a limit of a hundred megabytes. I think a hundred megabytes equates to 50,000 typewritten pages. And after that you have to make a choice, are you going to go through all that stuff and delete it or are you going to archive it. I can archive it. I can't go through and delete it. Once it gets that big, you can't go through and delete it. And so everybody's saves it, and it's all -- it's there. I mean, it's --

JUDGE ROSENTHAL: And is it safe to say that if there was a legitimate business need or purpose for keeping it, there is purposeful archiving that occurs?

MR. BEACH: Correct. Yes.

Anything that has a business need or legal obligation is not going to be destroyed by the routine operation of the systems.

The only stuff that is destroyed by the routine operation of the system is something that you do not have a legal obligation or business need to keep. Anything that you have a business need or a legal obligation, that has to be archived in a place where you are going to be able to get at it and you're going to have to keep it for -- if there's

a law, you're going to have to keep it for the -- the statutory period, or if there's a business need you're going to have to keep it for the duration of the business need.

And unfortunately for us, is that while people are real good at saving the stuff, they're not very good at deleting.

JUDGE KEISLER: Some companies though do I think, Mr. Beach, have somewhat more aggressive policies than Exxon Mobil appears to, that move data from categories that we would consider active and accessible into categories that we would consider relatively inaccessible, somewhat more automatically than it sounds like --

MR. BEACH: Well, I don't understand that. I don't -- that to me doesn't ring true. You don't -- as a business purpose you don't put records in a place you can't get them. It doesn't make any sense. You can't run your business that way.

We're in the oil and gas business. We're not in the litigation business. Our systems are made to work in the oil and gas business. You don't put records that you need or that you're obligated to keep in an area that you can't get at 'em. It's a waste of time. It just doesn't happen. I mean -- now, if someone is going through and we have, you know, Arthur Andersen, Enron, people are going through and pushing the delete button, go after it. That's

not what we're talking about.

But the last point -- the last point is that you don't make a rule on the hypothetical worst case. You can't make your rules on a hypothetical worst case.

Your rules are under the mandate of Rule 1 of the Federal Rules of Civil Procedure, which I only mentioned once. I was going to mention a hundred times.

But the mandate is that your rule be administered and for the just, inexpensive, and speedy resolution of every case. If you make your rules based on the hypothetical worst case, it's not going to work. It's going to be inefficient. It's -- it's -- and that's not the way you make rules. You have to make rules with the mandate of federal Rule 1 in mind, is this going to promote the just, speedy, and inexpensive resolution of the case.

JUDGE ROSENTHAL: I think at this time we have to go to speedy.

MR. BEACH: That would be the expedient thing.

(Laughter.)

JUDGE ROSENTHAL: Thank you very much.

Ms. Kershaw.

MS. KERSHAW: Good morning.

I'm going to try to speak up, because even though I was just in the second row, it is a little hard to hear back there. If it seems like I'm shouting at you, please tell

me. I don't want to do that.

My name is Ann Kershaw. I am the founder and principal of A. Kershaw, PC, attorneys and consultants, which is a litigation management firm based in Terrytown, New York.

I want to thank you-all for your hard work in bringing these proposed amendments to the public comment. I support these amendments and I thank you for the opportunity to comment. And I hope that my research and my professional experience will bring some insights.

My firm works primarily with in-house counsel on volume litigation management issues.

Over the past 15 years I've developed a keen interest and expertise in electronic discovery, discovery generally in volume cases or large cases. And in the past year much of our work has been in designing and implementing information preservation protocols, is what I call them, and litigation response plans. We have been on the front line of many of the issues that are affected by these proposed amendments.

About a year ago, maybe a year and a half ago, one of my clients, Altria Corporate Services, asked me to help them assess the impact generally by the proposed amendments. And as part of that process I learned that the committee was interested in getting information, specific information about the burdens of electronic discovery.

So I set about to discuss that with clients that I consult for and other large companies. One of the first things I learned was that the gamesmanship of electronic discovery is so intense that in-house counsel is unwilling to publicly discuss the issues. And I feel that that in itself is a strong indication of a big problem.

I got around the problem, we overcame it by agreeing that all of their responses to my inquiries would remain confidential. So I can't tell you the source -- the specific source of any of the information I'm going to share with you today, but I will discuss generally my findings.

I chose 40 companies that I knew had expressed an interest in electronic discovery. I sent the chief litigation counsel of each company a general questionnaire, which was really just meant to be a guidepost for my follow-up telephone call. And I did call each company. And I spoke with individuals personally responsible in those companies for electronic discovery issues.

And I asked about the company's size. I asked about its information and backup systems, its procedures and experiences with e-discovery, costs, future outlook. I obtained both qualitative and quantitative information. And so far I have 10 sets of responses. That's a 25 percent sample, not -- not too bad so far. I started -- I didn't start this until January 10th, so, you know, we -- we were

moving pretty fast.

I'm continuing to solicit participation, and I'm continuing to call people and I'm -- I'm expecting to get more information. And I'm happy to put the whole gamut of information in written responses, written comments before the close of the February period.

JUDGE ROSENTHAL: That would be helpful.

MS. KERSHAW: Now, forgive me, I'm going to turn to a little bit of reading because I want to make sure I get all the right information.

On the quantitative front, one of the companies was fairly small, about 1200 employees, but the rest were large corporations, with more than 30,000, one 260,000 employees. They include manufacturing, pharmaceuticals, banks, petroleum and computer products companies. They for the most part have offices in the U.S. and worldwide. They all had in excess of 100 cases pending in federal court. One had as many as 2400 cases currently. Another had 3,000.

Now, the information systems of these companies, as you heard, are huge and complex. And the information I got is consistent with what Mr. Beach was telling you, what you've heard I think from Microsoft and Intel.

You're talking about companies with 7,000 servers worldwide, 65,000 desktops in some cases, 30,000 laptops. Some had as many as 5,000 databases, they thought. 1,000 to

2,000 networks, including local area networks. 20,000 blackberries or PDAs. The thumb drives, a hundred thousand range. Imagine, that much data walking around in the back pockets of your employees.

The data volume is also huge. The total data output by these companies is estimated to exceed 800 terabytes, with 5.2 million e-mails exchanged daily.

One company estimated that they're now in the pedabyte territory. I can't define pedabyte, but I know it's bigger than a terabyte.

It was interesting that e-mail volume didn't necessarily coincide with the size of a company.

One company of 177,000 employees reported 2.8 million e-mails per day, whereas another company with 30,000 employees said its traffic is two and a half million a day. My guess is that has something to do with the nature of their business.

JUDGE SCHEINDLIN: Can I interrupt you?

I hope you don't think I'm rude. If we take all this to mean it's a lot of data, a lot of information, you could stop the numbers and tell us what we draw from that. Because I know you're going to go on with more of those numbers. I think we got the point already from Mr. Beach but it's supplemented by you there's a tremendous amount of data, more than we can mention.

MS. KERSHAW: I was giving you these numbers just for the record.

JUDGE SCHEINDLIN: But we're going to run short.

MS. KERSHAW: I was just next going to go into the backup information I got. It's consistent with what you've heard. A 3,000 server company has told me it takes one or two days to back up one server. 3,000 servers, imagine how long that takes.

Regarding document retention policies, all of them reported very comprehensive and robust policies that were not static, that they constantly sought to improve.

And when I asked about their litigation hold procedures, all of them told they me they thought they were very effective for electronic material.

JUDGE ROSENTHAL: May I ask you a question about that area?

MS. KERSHAW: Yes.

JUDGE ROSENTHAL: A number of people have told us that in many cases, most cases, the information necessary fully to respond to discovery is met by active data, without any need to resort to inaccessible information.

Is it your experience that in most cases the requesting party asks for ordinarily in the boilerplate form production request for backup data and inaccessible data, right out of the box?

MS. KERSHAW: Yeah. My experience is that they ask for everything and then you object and you say you're not going to go to your backup tapes and, you know, you see if they're going to make a motion.

But it's also the fact, as Mr. Beach was saying, there's a lot of people save stuff. I mean, think about your own personal experience. How often do you go back and delete work product.

I know I just updated my servers and I just took everything that was on the old one and put it on the new one. You can see stuff I did there in 1995.

JUDGE ROSENTHAL: Active.

MS. KERSHAW: Active. My backup systems don't delete documents and Power Point presentations. We're pack rats. Even when a company puts in a rule to try not to prevent that, excessive saving, people who want to keep it get around that. I have seen people who brought into a new company things from their prior job, keeping it on things like this (indicating) or what have you.

PROFESSOR MARCUS: You mentioned, Ms. Kershaw, that the response with regard to the backup and miscellaneous things you described would be we're not going to go look at those, it's too difficult?

MS. KERSHAW: I'm speaking now as to my personal experience. I'm not speaking now as to the survey. I

didn't ask them about their responses --

PROFESSOR MARCUS: I understand that.

What I'm interested in is if that's correct whether Rule 26(b)(2) on inaccessible information would serve a purpose, because it sounds like you're getting there without the benefit of a rule already.

MS. KERSHAW: I think there has been some discussion about that. The point is the preservation. But I have a client who had a broad preservation order in a case in 1994 where they had to save absolutely everything, and because of the subsequent litigation they're still paying probably a million and a half a year just to store this stuff. I know there's no way you can get it -- it's so old that you can't -- you don't know what's there, but you can't throw it out. That's really that -- what's that -- the serial preservation issue.

But I -- I did ask a lot of questions about accessibility. And let me just quickly note that they all reported a noticeable and critical increase in e-discovery in their cases and a correspondingly dramatic increase in costs.

One company told me that in the last five years the increase cost of -- due to e-discovery went up 300 percent. It's increasingly becoming the most expensive part of corporate litigation. And for the companies I interviewed

they said virtually every case in some level involves electronic discovery. And about a third of the companies responding told me they had settled cases because of e-discovery issues. And 20 percent of them told me that electronic discovery is the most expensive part of litigation. A preservation --

JUDGE SCHEINDLIN: I understand that, but what is the point?

It's going to become the most expensive part because all the records are stored electronically. It's not a surprise. We're in an electronic world, not a paper world. So what do you have to say about our proposal?

What do you have to say about our proposal?

MS. KERSHAW: I'm getting there. I really was setting about on this endeavor to get information for the record. I have opinions, but I'm really -- when I get into some of the other issues on my questions of accessibility, we have to talk about that.

I believe that all of these things about volume and cost and all of that says it's a good thing to start figuring out where the lines are and drawing lines and however we do that it's all good and let's try and go there and let's make sure that if we can that that happens.

JUDGE SCHEINDLIN: So you do support rules now, so to speak?

MS. KERSHAW: Yes. Thank you.

JUDGE SCHEINDLIN: Okay.

MS. KERSHAW: Blanket prediscovery preservation orders. Two companies said they were routine. One quoted a preservation order for me by a federal judge, issued sua sponte in a case with very broad claims, and that order said, "Every -- each party shall preserve all documents and other records containing information potentially relevant to the subject matter of this litigation."

Now, the company subject to that blanket order issued a proper litigation hold - I asked a lot of questions about it - but it was sanctioned anyway, because of employee error in following that hold. And there was no record that any of those employee errors were willful, negligent, or even substantively significant.

PROFESSOR MARCUS: Was that case in a federal court?

MS. KERSHAW: Yes. And this company has since suspended all of its e-mail deletions and it now has 56 servers housing all of its Microsoft exchange e-mail and Microsoft as classified 40 of those servers as unmaintainable, meaning they cannot be reliably backed up.

The same company thinks that -- or told me that it spent more than ten million since 2002 to comply. That company is not alone.

Another company told me that it spends two million a month in tape and people cost alone to comply with a blanket hold. That company also had to suspend its e-mail deletions.

And I'm giving you this data to encourage and support the notion that we really need to find a way to educate the judiciary that these blanket preservation holds are a problem. And under the way the rules currently are, I think there's a concern that because it could take 90 days to get to your meet and confirm, when someone files a suit they're going to give you a notice that they think all the relevant information is on the inaccessible stuff and they're going to get a hold at least for that 90 day period until the meet and confer. Well, that doesn't do a lot of good, because once you have a hold that's where the problem is.

Accessibility, how to think about it and how to identify it.

I asked them -- I have a list --

PROFESSOR MARCUS: I have a question about what you just said.

MS. KERSHAW: Yes.

PROFESSOR MARCUS: We've been told by some that I would say are plaintiff's side that defense counsel try to put off the 26(f) conference as long as possible. But it sounds like you're saying the defense perspective would be

let's do that as soon as possible. Is that the experience you're aware of?

MS. KERSHAW: That's what I recommend in my consulting practice. You know, I can't say I don't run into problems with some law firms. But, you know, I like to see people walk into a meet and confer with a list of everything, as Mr. Beach described, everything that they have been able to identify, what their databases are, what they have.

There are lawyers out there who still are the old school of, you know, let's not make it easy. I think that the new school is -- and I'm going to get to that, because I see this as a trend. The new school is, no, it's let's make it easy. Let's get it when it's created and let's identify it, and let's make it easy to produce and quick to produce, because, frankly, it's a lot less expensive to do that.

I asked -- I have a list of -- and I asked what they thought was accessible or inaccessible.

The list was, you know, active e-mail accounts, deleted e-mail fragments found on hard drives, e-mail found on backup tapes, web sites, information created with old formats, et cetera. I got different answers.

Everybody agreed that active e-mail that is unfiltered is accessible, but there were different answers on web sites. For most of the people they would say it depends.

One company told me that they took this list to all their paralegals in their IT department and nobody could agree. And the point there is that it's not just a technical assessment. I think that it's -- it's good to have a distinction, but I think it's a -- the distinction needs to be more than just a technical definition. It should include all the considerations that generally goes into a discovery issue, including burden and cost and, of course, the considerations of rule one.

The identify piece. Companies clearly know and can identify what they use in the day-to-day conduct of their business. But throughout the years of upgrades and advancements and acquisitions, they have not maintained records of what they have retired and where it is located, and they're not organized on the premises of document retrieval for litigation, so they don't maintain lists and indices of all these potential retired data sources.

Companies I talked to are concerned that there is old data that exists that they do not know about and cannot identify it. If, you know, if the identification is just generally, you know, backups, and this and that, I mean if there's a category that says that -- all the stuff I don't know about, which I think should be a given, but, you know, in this world of gotchas I'm not sure that it is, and that is the concern.

You know, people told me about situations where in a -- in a high profile case that they had done everything under the sun to collect, 72 CDs show up the night before the case goes to the jury. I've just had another case, you know, three years into the case some backup tapes are found in a closet somewhere. They wouldn't have been able to identify that stuff up-front. They're worried if you have this identification requirement that if that happens down the line somewhere their adversary is going to say, you lose, you didn't identify, and they're at a disadvantage because of that.

JUDGE ROSENTHAL: Ms. Kershaw, is your recommendation to us that we provide greater specificity as to what is a sufficient identification?

MS. KERSHAW: Yeah. Yeah. And maybe something in the comments that says, you know, you can -- obviously you can only identify what you know about or that it shouldn't be used against you. I don't know the language.

JUDGE ROSENTHAL: I think you're close to being out of time.

MS. KERSHAW: Okay. Let me move along.

JUDGE ROSENTHAL: Save some for writing.

MS. KERSHAW: I'm going to skip then to the -- some of the anecdotally qualitative information I got.

Well, I've got some great stuff on safe harbor.

JUDGE ROSENTHAL: I promise we'll read it if you submit it in writing.

MS. KERSHAW: Okay. All right. All right. All right.

JUDGE ROSENTHAL: If you have some windup comments you would like to make, that would be wonderful.

MS. KERSHAW: Sure. Sure. Sure.

On the safe harbor, I think you heard it, I'm going to say it again, the e-discovery world is producing a hundredfold times what was available in the paper world, and at the same time there is just so many ways that someone can just inadvertently lose information in the complicated e-discovery world. And, you know, just think about the knowledge gaps that exist between the user and the technologist and the programmer and the developer and all those folks who are trying to keep up with each other.

I just question whether it's fair to have an ordinary negligence standard in the safe harbor. I think that it isn't. And I think a safe harbor with an ordinary negligence standard is really no safe harbor at all. It should have a culpability standard of willfulness or recklessness, particularly for what I call the case killer sanctions, the adverse inference rulings or the striking of a pleading.

JUDGE ROSENTHAL: Of course, the rule is designed

to apply to an entire range of sanctions. If we had language in the note that provided greater guidance, that is, that the higher the sanction the greater degree of culpability that should be required, would that give you some comfort?

MS. KERSHAW: Yes. Yeah.

I also think that one of the best things that can happen in this e-discovery world is for every generator of large data to have very solid, meaningful document retention preservation litigation response plans.

And if you get brownie points for that in the safe harbor notes, that would be great. I think that if you are a company with a meaningful document retention plan that that should weigh in your favor in considerations on a sanction motion.

And, you know, I do want to reiterate, the trend that I saw and heard about, companies being very proactive in getting their information before a lawsuit is filed. Companies that are subject to a lot of litigation know generally what their adversaries want. They want all their marketing documents. If they're a products company, they want their research stuff. They want their financial stuff. They're getting it. Some of them have pop-up boxes now that say should this be saved for litigation. Yes. It goes to a server. If you have a document management program

you click a box. This is all good. I see it happening.

One guy told me about his company is working to link it's litigation department to its human resources department and its consumer complaint department so that as things -- problems emerged in those departments they could quickly identify what documents and where they should start holding, before any lawsuit was filed.

Well, I guess I should wrap up. I can tell.

I also just -- I have to say one more thing, that may have been forgotten in this debate. But everybody said that, you know, we should remember that a really effective way to work on this problem is to narrow the discovery requests. The discovery requests that companies face continue to be very, very broad. And, as you heard, I think you're going to hear again from some other people, technologies -- search technologies are good at finding, you know, a few in a lot, but it's really hard to use those technologies to find all of the relevant stuff out of a mass. And so, you know, getting more targeted discovery requests is a very effective way to do this.

In closing, I'm going to say I think it's fair to say that coping with discovery has been an uphill battle for large data producers facing lots of litigation. And I feel that in effect they have told me in some ways they feel that the litigation owns the company in some areas.

I reiterate -- reiterate the mandate of Rule 1. The rule should be construed and administered to ensure the just, speedy, and inexpensive determination of every action.

Are we there yet?

No.

Huge electronic productions of largely irrelevant material are taking us away from Rule 1.

Can we get there?

I -- I think we can. And I think thanks to your hard, studied and determined work, I am hopeful that we will attain the mandate of Rule 1.

JUDGE ROSENTHAL: Thank you, Ms. Kershaw.

We look forward to your written comments as well.

Mr. Bland. Good morning.

MR. BLAND: Good morning.

Thanks so much, Your Honor. My name is Paul Bland. I'm with Trial Lawyers for Public Justice. We're a public interest law firm. We do civil rights cases, environmental cases. Almost everything I do are consumer class actions, that's sort of my area. I mostly do appellate work. I'm stepping in because one of our civil rights lawyers that was supposed to do this, who has done most of the heavy lifting, has had a baby five weeks early. So I've talked to a lot of people who do discovery, but I myself don't do as much of it as I probably should.

I'd like to talk first about the safe harbor rule, if I might. I think it is very hard to tell how it's going to play out with the law of exfoliation as it currently exits. It differs somewhat from one state to another. There's some states where it's rhetoric, some states where it isn't, and the contours of it change quite a bit.

I understand that the note right now has language designed to indicate that the rule is procedural, that in keeping with the rules enabling act that it's not supposed to be substantive.

I feel almost certain that when charges of exfoliation are raised that this safe harbor is going to be invoked as a way of responding to it, though. I think it's hard to imagine that this will not become a central player in debates about exfoliation.

One thing that immediately pops out to me about the way I think this rule is going to play out in the safe harbor provision, is because it has the language which indicates that it does not apply in cases where there is a preservation order, I think you're going to see that there's going to be in virtually every significant, complex case, a motion at the outset asking for a preservation order with respect to overwriting programs.

JUDGE ROSENTHAL: We had a number of very thoughtful comments at the Fordham conference which

indicated that the real problem for a lot of companies and entities that are sued frequently is not reacting to a tailored specific preservation order but rather dealing with the uncertainty that exists if there is no preservation order in the period before one is obtained or in reacting to an ex parte save everything preservation order.

But if what you suggest would be a likely result of having the safe harbor, a greater frequency of court-ordered preservation requirements tailored to a particular case with input from both sides, is that bad?

MR. BLAND: In -- I -- I certainly take Your Honor's point. I think there is some circumstances where it would be unfortunate.

First, there are a number of jurisdictions where I think right now, under -- under principles of state law that are already out there, that it's pretty clear that there is effectively a -- a -- a -- a rule of law which would amount to a -- a preservation order already.

There are a number of states where when we get into a case we will send a letter at the outset that says under North Carolina law we don't need to go and get an order like this because it's clear these are things you need to keep and we're not going to be able to prove our case down the road if you don't have them. And what we're going to be doing, we're going -- and now I think that such a letter,

and quoting this kind of law, I would be very nervous about it given the language of the rule. I think you would need to add a several month dance at the -- I think you're going to add to an already sort of event laden discovery calendar that you're going to at the beginning have a bunch of litigation about that. I think there are going to be cases where it is, unfortunately.

I take your point there are going to be cases where spelling it out has -- has advantages, but I think that there are a lot of places right now where that can be done without going through a rigamarole, if you will.

One thing that I would also suggest that is -- is -- should be focused on, when you look at this, so much of the discussion is focused on e-mail.

In the consumer class action world a great deal of litigation can only be proven with respect to financial services companies, HMOs or whatnot, with databases, with documents that are never, ever put onto paper. The documents simply don't exist on paper.

I've had several cases where we have gotten into battles over this where -- I listened to some of the discussions, you know, there's zillions of documents and they cost this incredible amount of money. I have been in a number of cases where at the beginning of a case an HMO or bank will come in and say we can't preserve these documents,

we have our overwriting program, and we will have go out and hire an expert and come in. So many of these claims of incredible costs are really wildly exaggerated. Part of the reason for that is that -- one of the things that troubles me about though the whole process here is that in some extent we are making rules about estimates of how much things cost to do with respect to computers right now. Someone is coming in and saying it costs us this much under current technology. These technologies are moving at such a light speed. When I started practicing law none of the lawyers in the large firm had computers on their desks. You know, 15 years ago no one had the Internet.

You know, things have changed so incredibly rapidly. I think that the technology responds somewhat to what the users are looking for. If you say to people, well, if you're going to buy this system --

PROFESSOR MARCUS: Mr. Bland, before you move on beyond databases, may I ask a question about that?

MR. BLAND: Please.

PROFESSOR MARCUS: That's your experience in dealing with the litigations you have handled.

MR. BLAND: In my experience --

PROFESSOR MARCUS: No. No. No. I mean that was the sort of predicate question, that's correct that that is.

MR. BLAND: Yes.

PROFESSOR MARCUS: We have heard that production of databases really can't be done in the sense that they're documents because they're relational and evolving at all times.

How do you go about getting the information you want if the other side has a relational database that is the source of what you want.

MR. BLAND: Typically what we do is ask permission to have our computer person go and analyze the data on their system. There are many companies that find that a better way of doing it, particularly in a case that's going to take years.

A lot of the cases that I will handle there will be three appeals before you actually get to the discovery. You know, in consumer class actions, cases frequently take seven years. I think Mr. Girard will probably be able to speak to this from his experience with it. I have literally had several cases, as I said, over the last year, where we've gotten a hundred cents on the dollar, so these weren't like phony, bad cases, but took three appeals in nine years.

If someone doesn't stop the overriding of the database then when we get to the point we won the last appeal and everyone knows they have to pay, they will say, well, we actually really don't know who our customers are because all

that data from ten year ago is gone.

So we have to have somebody go early in and preserve the stuff. Typically it will be our computer person working on it directly with them.

JUDGE ROSENTHAL: I guess that comes back to my same question. In those kinds of cases are you likely to get involved with the other side early in the litigation to reach a shared understanding as to what needs to be preserved on a specific basis?

MR. BLAND: We frequently do get into that. And it's -- it's -- it's varying levels of formality right now. I am concerned that if we don't get the kind of order that's specified though that we're going to run into problems at the end of a case where the data is gone.

We have had several instances in cases with where we thought there was an understanding and they changed law firms, or whatever, at some place deep into it.

We had a case involving a large HMO in Maryland where they did, in fact, destroy all of the computer data which would allow you to identify any of the people who were double billed. So at the end of the day we had this ridiculous situation where we had essentially proven in summary judgment that they had overbilled in a certain amount and all of the names of the actual clients were gone, so to all the money ends up --

JUDGE SCHEINDLIN: The safe harbors we drafted, shouldn't they have preserved that, if that was the only source of those list of consumers then it would have been absolutely unreasonable not to hold on to that list.

MR. BLAND: That's what we argued, and we got an award in Maryland on that ground.

JUDGE SCHEINDLIN: Okay. And does our safe harbor take that away from you?

MR. BLAND: That one I think you're right. I take your point, Your Honor.

But I also have to say, I'm not sure what the driving need for the rule is, in that, in terms of sanctions orders, the cases where we have pursued those, and from talking to a lot of people who get them, I'm not really aware of widespread federal judges tyrannizing companies by entering unfair sanctions orders. I don't understand the weight of pressing need that gives rise to this, to some extent, which I think is somewhat the flip side of Your Honor's point in my illustration that it wouldn't have hurt so much.

I'd like to briefly also speak, if I could, about -- oh, one other thing which I would like to add. I apologize. I missed on my notes on the safe harbor issue.

I do not know how to pronounce the name of your famous case.

JUDGE SCHEINDLIN: Zubulake.

MR. BLAND: In the Zubulake case, as I understand it, the opinion had some important language that has been quoted and used a lot in subsequent cases about where a company should have reasonably anticipated that litigation was coming. And at least in my review of the -- of the committee note that accompanies the safe harbor provision, while the case is mentioned as an illustration of the fact that courts are looking at this, that language is not there. And I think that that's very important.

It seems to be that the safe harbor imposed -- to the extent it speaks about obligations not to destroy important documents, it does so after a case has been filed.

In the course of reading endless newspaper articles about how electronic discovery issues have come out, I've run into a number of cases where the Wall Street Journal, the New York Times will report incredibly important e-mails that indicated basically that a company knew that something had significant had gone wrong. A drug company has now got a test that shows there are heart problems with people with a certain disease, they are talking about this, they know it's an issue. The language in Zubulake would seem to say at that point this company should start saving e-mails back and forth from scientists saying this is a problem. Things that Elliott Spitzer and people are getting into the front page of the papers. I'm worried that the safe harbor

doesn't seem to have language like that. We would prefer not to see any amendments to this rule, but if you're going to do that we would strongly urge you to consider that at least.

With respect to Rule 26(b)(2), the reasonably accessible language, there are a couple of concerns. Here again, I think that you look at how rapidly technology changes and what pressures are technology going to -- are the technology changes going to react to. I think that the proposal is going to give companies an incentive to devise systems in which they will be able to characterize as not reasonably accessible.

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

We have had several speakers saying today that the incentive that companies react most strongly to is that they need to preserve on an active business information that they have a business need for, they're not going to get rid of that, information that they have a regulatory or legal obligation to keep they're not going to put that in an inaccessible basis.

What you're saying is you don't like the two tier because it requires companies to keep -- it would encourage companies to make inaccessible information for which they have no business need and no legal obligation to keep. Is

that bad?

MR. BLAND: Your Honor, I'd like to say I'm a little cynical. I would like to add what I think is a very strong third reason that's going on with businesses.

After stories come out about Merrill Lynch gets caught with these incredible documents saying we know that this is the worst possible stock but we're going to give it an A rating, Elliott Spitzer writes these cases, the legal periodicals and the corporate counsel digest and stuff, which for some reason they send me for free, is filled with articles saying don't let this happen to you, you need through your company and make sure that you are getting rid of stuff, to make sure that it's not there the next time an Elliott Spitzer comes, you need to have --

JUDGE ROSENTHAL: I don't mean to interrupt you, but I'm not sure you're not answering -- that you're answering my question.

People may write things down that will wind up being helpful to one side or another in litigation, but there is no business need to keep that material, there is no legal or regulatory obligation to keep that material. It's chatter.

Now, is it -- you may want to have it around because it's really helpful in your next case, and there may be, as well, chatter that would be very helpful to the other side, that they would want to have around, but if there's no

business need to keep it, if there's no regulatory or legal obligation need to keep it, is it -- on a policy level is it a -- that an indictment of a rule that it would not require companies or encourage companies to keep stuff that they don't need to?

MR. BLAND: Your Honor, I don't mean to be difficult, but I guess I have trouble with the premise that there is no business need for it.

JUDGE ROSENTHAL: That's the question.

MR. BLAND: I think one of the things we just heard is that most people actually working in a business like to keep their records on things. People go back and look at them. People want to have this stuff to how they're going to operate their lives. I have piles of paper around my desk that, you know, I may not need immediately. But I think one of the things you're seeing in the legal literature on this is a strong pressure from people saying whether you would want to keep this stuff lying around or not, we don't want you to have it, because we don't know when the next one of these e-mails is that's going to cause a problem for us. To avoid the, you know, Elliott Spitzer problem, if you will, we need to hunt down these things, in the normal course that other than this pressure you would keep because you, the regular employee, don't remember everything and think this would be a value to you.

And I think there's a lot of stuff like that there's going to be an incentive to find ways to get rid of it. I mean, people keep -- a lot of people have folders of e-mails that they find are useful to go back and keep and look at. And I think that what you're going to see is that there's going to be pressure to devise systems that will enable the lawyers to say, oh, we don't have to go look for those things, even though the employees themselves would normally keep them.

So if in fact we were talking about all things in which there was no legitimate business purpose -- but I think what is happening is litigation is driving a lot of what's being defined as a business purpose, if you will. And not even necessarily specific business litigation. It doesn't have to be, we found out that this one drug is already causing this. I think a fear some place down the road that somebody is going to have done something that is going to cause the company to become liable is driving the way computer systems are going to be designed.

And I think that if -- if what you are telling these people is, look, the way that we make the best business is at the end of the day we need you to be able to get up and say you can't get there from here, that's that going to be the answer they're going to be able to come up and find.

It reminds me, if I could draw an analogy to the Clean

Air Act -- just one minute. I apologize.

When they first did the Clean Air Act technology enforcing provisions, what the environmentalists call them, air with respect to gas mileage, and they said all cars much reach, you know, 16 miles per gallon or something by this year, and General Motors came in and said we could never do this, it's impossible. And back in the early 1970s the Congress said, well, you know, you just have to do it. And they did.

I mean, as computers are changing so incredibly rapidly the idea that we would now say, well, these things are so expensive to find you could never find them, all kinds of new things are coming up repeatedly in our practice where we're able to get experts to come in and say, well, they say that's old legacy data, no one will be able to figure it out. You know We've got some kid with a baseball cap turned on backwards, he can solve that in like an hour. You know, you give me $150 I can get that stuff out of there for you, where the business came in and said it costs $40,000.

JUDGE ROSENTHAL: Doesn't the rule provide that if you then can come in and say that's not inaccessible, the two-tier structure doesn't apply?

MR. BLAND: Yes. That's true. But as was said earlier, there's now a presumption.

JUDGE SCHEINDLIN: You did great, but that wasn't

the right answer. The right answer is it may not be preserved. That's the answer to her question that you want to give. It's all very well that it's there because you can find this kid to take it out for $150, disproving the cost argument, I understand that.

But if it's not there, the kid won't do you any good. But your concern and a lot of people's concern is the preservation order.

MR. BLAND: Thank you.

MR. GIRARD: Can I ask a quick question before you go?

MR. BLAND: Yes.

MR. GIRARD: Can you comment on the Notion of getting an early tailored preservation order in a consumer case?

Is that realistic, in your experience, that you're going to be able to get the attention of a judge or a magistrate to focus on?

MR. BLAND: That is certainly a fair point. I mean, I think that the very common experience -- it differs a great deal from court to court, but there are many judges who they first raise the discovery order will say something like, look, can't you ALL be gentlemen and gentle ladies and go and work this out. And it can take a long time before you can get -- the thing that makes the discovery process

work so much worse than a trial is that you're not in the presence of a grownup, if you will.

I mean, in a trial people don't make the kinds of objections and so forth, because the judge is right there and there will be consequences. There is a lot more games playing. There is a lot more stonewalling and cheating in discovery, and sometimes it is very slow to get the attention of a court, I think that's very true.

JUDGE HECHT: Just one other question. In your experience is it -- how often are blanket preservation orders issued early in a case?

MR. BLAND: I guess -- I've heard the word "blanket" raised, the idea, I guess, of every single bit of information in Exxon's entire system -- I've never seen anything like that.

We have gotten orders that -- I don't know if you would characterize them as blanket or not, but which say all documents related to the consumers' transactions in this, whether they were charged this charge or not, what dates and so forth, must be preserved. I -- is that a -- is that a blanket or is that a narrow?

I don't -- I guess I apologize if I'm not following the language well.

JUDGE HECHT: No. I'm just trying to get the idea of what kind of blanket orders and how frequently. Anything

relevant to the complaint or --

MR. BLAND: Well, I mean, in theory that is what Rule 26 provides for, but I think that preservation orders tend to be much more narrow than that. You hear anecdotes about these bad state courts in certain places that supposedly do that, but I certainly haven't seen federal judges do something that a defendant has been able to come in and say this is a seriously expensive thing if it's too broad. I mean, it's usually something you can negotiate down with the help of your computer person.

MR. GIRARD: I think part of the question is how often is that happening in cases.

MR. BLAND: I have not seen it very broadly in my cases.

JUDGE SCHEINDLIN: I guess my question is are you seeking preservation orders in those cases?

MR. BLAND: It really depends on the state.

JUDGE SCHEINDLIN: Try federal court.

MR. BLAND: Yes. Although somehow those exfoliation rules sometimes seem to carry over. It's frequently, even in federal court, the law about destruction of evidence is still frequently governed by state law --

JUDGE SCHEINDLIN: Are you seeking preservation orders --

MR. BLAND: In many states we don't. In a few

states we have.

JUDGE SCHEINDLIN: When you go into federal court you tend not to seek one?

MR. BLAND: In many states we do not. I'm sorry. In our experience anyhow, maybe I'm making a choice of law error here, but we in a number of cases don't do that. We send a letter and say -- cite -- you know, here's the California case that we say means you have to do this and that -- that's usually worked for us. But there are some places where we think the state law is mushier and we don't trust it and we do go in and do that at the beginning.

Thank you very much, Your Honor.

JUDGE ROSENTHAL: Thank you, Mr. Bland.

Mr. Gardner. Good morning.

MR. GARDNER: Good morning, judge.

My name is Steve Gardner. I am here as chair emeritus of the National Association of Consumer Advocates, NACA, which is a nonprofit Washington-based advocacy group whose membership is comprised of right now I think a little over 1,000 private and public sector attorneys, law provosts and other such folks. I am testifying somewhat on my own knowledge and somewhat based on the inherited knowledge of members of our organization.

My first point, and I have prepared -- prefiled written testimony. My first point, I'm not going to belabor, NACA,

I think you will hear from almost any plaintiff, lawyer or organization, believes that special treatment of electronic discovery is simply not needed, not called for and is, in fact, going to create more dilatory and side litigation than we currently see.

I'm not going to belabor that except to -- slightly, I guess, by making two points.

I never thought I would be in a position of agreeing with a lawyer from Exxon Mobil, but I do agree that y'all should not rule on the hypothetical worst case. I would extend that to say that you should also not write rules just because Exxon Mobil needs them or other huge corporations, because of their huge data retention policies and data retention practices need them, but recognize that these rules will not just apply to Exxon Mobil but will apply to the Mobil station on the corner, it will apply to mid-sized businesses and other small businesses. So the rules that large corporations may actually need to protect themselves in litigation will just make for side litigation or needlessly hamper discovery when applied across the gamut.

JUDGE SCHEINDLIN: Can I interrupt with one question?

It's not just large business, of course. It's any large organization. In my court the most common defendant is probably the City of New York or the United States, and

those are large organizations, as is Exxon Mobil, and they have many of the same volume issues that Exxon Mobil has. The city -- can you imagine the City of New York and its document retention issues or the United States Government?

So I understand your point that you think some of this is driven by big businesses desire to be protective, and I'm concerned about big organizations which litigate in my court all the time.

JUDGE ROSENTHAL: And let me also follow-up on that with a somewhat different variation of the point, which is that it is not only large entities that have -- are subject to some of the concerns that animate these rules. The small, individually owned service station may, indeed, keep records on a computer and unbeknownst to the operator of that computer there are routine recycling features of that computer that are losing data every time that computer is turned on or turned off. And if that person is subject to discovery, that person may need the safe harbor more than Exxon Mobil.

MR. GARDNER: That person may need the safe harbor I think only -- and to Judge Scheindlin, I do want to make clear, I'm not -- I'm not attempting to bad-mouth big business. I am just saying the real concerns are for any large entity. And some of them are valid, but they can be dealt with as they are dealt with now.

JUDGE SCHEINDLIN: That's the question. Do our current rules give enough protection to the issues that are unique to electronically stored information. That's the question.

MR. GARDNER: I believe that these are exceptions. They are the worst cases is what you're hearing from, by many who have testified.

JUDGE SCHEINDLIN: Actually, it's a daily problem. If you listen to some of the statistics that Mr. Beach gave, about 225 actions a month, I suspect that the City of New York it's more than that and with the United States Government it's more than that. So we're talking about frequent parties in litigation.

MR. GARDNER: But not as to the Mobil dealer, not as to the florist.

JUDGE SCHEINDLIN: They're just a percentage of our parties. The greater percentage of our parties are probably large organizations, once you add the municipalities and the federal government. So do we have a problem or don't we with electronic data?

MR. GARDNER: The problem is when companies refuse to produce information. The problem is not when companies are making production.

I do believe, and I don't want to belabor the point, but I do believe that it is possible to fashion orders now

that protect discoverable data but do not subject the company to sanctions in -- as part of a regularly recycled program.

JUDGE SCHEINDLIN: Let me ask you a very pointed question.

When you bring a lawsuit, do you think -- against a company, the city or federal government, a large entity, do you think they have to stop all their recycling and preserve everything from that moment forward?

MR. GARDNER: At this point I don't think they do, I don't think they should. But I do think that under these rules, if they are adopted, and the company gets to make a unilateral decision initially of what is reasonably accessible -- and I will tell you that my experience is that many of the defendants I deal with don't believe anything is reasonably accessible if it isn't already in the public domain, that they -- if they make that determination then the concerns become very much greater as to the safe harbor.

Let me address -- in fact, let me skip to that. That was I think my last comment, but I had a couple of points I would like to make specifically on the safe harbor.

In passing, I would observe that the two-tier system is going to create nothing but headaches from plaintiff's lawyers. It is my practice now not to get a protective order at the outset. It will be my practice to get a

protective order, and the broadest one possible at the outset, if these rules kick into place, because I won't know what's fixing to happen to them.

JUDGE SCHEINDLIN: Of course, these rules would encourage you to sit down with your adversary and discuss preservation, see if you can come to a voluntary agreement as to what you really need preserved. And probably as reasonable as you can be will help you get what you want.

It's the overpreservation that the adversary is worried about. If you say what I really need are your customer lists so if I win nine years from now I know who gets to recover, they might be able to do that for you.

MR. GARDNER: And I might echo some cynicism of other plaintiff's counsel, judge, in that those are not often extraordinarily meaningful sit-downs. It's unfortunate but true. When we meet in the meet and confer it is pulling teeth rather than exchanging information.

JUDGE SCHEINDLIN: Do you think our proposal here on 16 and 26 are helpful, by highlighting the need to do that early and to make that adversary talk about preservation with you?

MR. GARDNER: Helpful, but I don't think sufficiently mandatory.

Justice Hecht was -- participated in writing some wonderful early disclosures under a Texas law that are more

observed in the breach. The initial disclosures that are asked for, we ask for them, we don't get them, there's insufficient sanctions. It's a great concept, but in reality it is very, very difficult to get that information.

The primary litigation in a lawsuit is avoiding making discovery relevant facts. From a plaintiff's perspective that's what we believe, because in frequent instances that's what we see.

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

We've had several people tell us that it has been -- from the plaintiff's side as well as the defense side, that in the vast majority of cases discovery is fully dealt with, that is, responsive information is found on active sources of the computer, that there's no need to resort to backup tapes or legacy data or what we are terming loosely not reasonably accessible sources. Has that been your experience?

MR. GARDNER: It's certainly been my experience that that's what I get.

JUDGE ROSENTHAL: That's not my question.

Has it been your experience that in most cases that satisfies what you need to get in discovery?

MR. GARDNER: I phrased it inartfully because I was answering your question.

JUDGE ROSENTHAL: I'm sorry.

MR. GARDNER: That's what I get from defendants who claim that that is all they have. I suspect that in a global sense it's not true, that there is other information on -- on -- archived and truly, honestly virtually inaccessible data. But I know that what is produced to me is what is from active files.

JUDGE ROSENTHAL: And in those cases do you then feel the need to pursue what is archived and not accessible?

MR. GARDNER: In a case where defense counsel makes a good faith representation to that, that is what is responsive, I would not feel the need to pursue. Under these rules, I would. Because I would know that they are asserting there might be something else out there in the data they have not even looked at that might be responsive. That causes concerns.

PROFESSOR MARCUS: The 26(b)(2) identification provision would prompt you to pursue discovery you would not otherwise pursue?

MR. GARDNER: If it were -- if I was advised that responsive data might reside on something that they had not looked at, then I would feel the need to make sure that there wasn't something stuck away there that was relevant.

JUDGE RUSSELL: But don't you think that's what's

happening now, they're just not telling you? They're making that determination or they don't know -- they don't know it's out there, they don't ask the question, now they're going to have to say this is accessible and this is not accessible.

Aren't you going to be better off?

MR. GARDNER: Will I be better off today than I was four years ago?

JUDGE RUSSELL: Yeah.

MR. GARDNER: I don't --

JUDGE RUSSELL: At least they're going to tell you it's there. I mean, I think the response you're getting is this is all we have. What they're really saying is we made a reasonable effort to do something, this is all we've come up with. Now they're going to have to say, well, we know there's some other stuff, other information, but we can't get to it.

MR. GARDNER: It's absolutely true that we may -- we will know it. I am just advising you that -- and it is a function of the hide-and-go-seek game that we often play with defendants that we have reason to believe in many instances there is data there that we do need to obtain.

Let me address specifically three points on the -- the safe harbor provision.

One thing, absolutely, please, please, please, keep it

at negligence. Don't give them more reason to be sloppy. Negligence -- you know, negligence is not that low a standard for -- because we're really here talking about large companies and we are talking about large law firms who have plenty of resources and will put a whole lot of resources into this review. So it's not that easy to trip over negligence. Anything else sends a signal that it's okay to be negligent as long as the -- it's the Sergeant Shultz from Hogan's Heros approach, it's okay not to know something as long as you're not affirmatively seeking ignorance.

Secondly, I think there is a small problem with specific language that I would urge y'all to correct. The test is something - and I'm paraphrasing - don't reasonably believe to be discoverable. My understanding is, from reading the initial response to discovery requests that are compelled, they don't believe anything is discoverable.

The pro -- is that an adverb -- I would suggest would be more properly something along the lines of information not that's not discoverable but that may contain information subject to a discovery response request or may contain information, paraphrasing Rule 26, relating to the subject matter of the litigation, whatever that wording is. But something that does not invite the defendant to make a determination, and they could absolutely do it in this

instance, that it's not discoverable.

The fact that the court later determines that it is would then be a fait accompli. They would have determined in advance that it's not discoverable. They could do that because, as I said, they generally don't believe anything is discoverable and thereby have an affirmative deletion policy, even though they also know that there is a request to which that relates pending that has not yet been ruled on. And that is a very wide hole that a defense lawyer who doesn't take advantage of it would be crossing over into negligence as well.

JUDGE ROSENTHAL: If you could wind up your remarks with regard to --

MR. GARDNER: There was one more point also on that, and then I wrote down in response to what one of the members of the committee said -- and I'm trying to decipher my writing.

JUDGE ROSENTHAL: I understand your problem.

MR. GARDNER: Oh, I don't think anything is as acute as this one, Your Honor.

There was a question, I think it may have been from you, judge, about the need -- the question of the need to keep data versus the desire to get rid of it.

JUDGE ROSENTHAL: I hoped I asked it somewhat more artfully, but go ahead.

(Laughter.)

MR. GARDNER: I suspect you did, and I will presume without argument that you did, Your Honor.

The -- the question of whether these rules apply to data that they don't feel as a corporate or as an institutional matter they need to keep but that employees may feel the need to keep is only relevant to the degree that the safe harbor does exist. Otherwise, destruction of -- well, the exfoliation rules sufficiently keep -- put defendants at risk now, I think. And our concerns are -- as to both the two-tiered approach and the safe harbor, is that you're going to create an entire new body of law on what, as Mr. Bland observed, is an ever developing technology. And I think that we are asking for some trouble trying to predict what electronic discovery will be four years from now and to write rules with the almost micromanagement, if you can bring in the -- the committee notes, comments, that these rules do. I think that they go beyond that which is necessary when broadly applied to every federal case.

When they are necessary, as in the Zuba -- Zubulake, Your Honor?

JUDGE SCHEINDLIN: Zubulake.

MR. GARDNER: As in the Zubulake decision the courts have shown themselves quite competent -- very competent to deal with it. And if -- when these arise it is

better to take the current rules and apply them than to write a whole new set of rules --

JUDGE SCHEINDLIN: Mr. Gardner, the one thing we haven't heard about this morning is privilege, and I noticed you did put that in your written comments. If you could just take really a minute, because we are at the end of your time, which should end in two minutes, but could you take a minute and just address your privilege point?

MR. GARDNER: Yes. The -- the problem, and I will have said it much more artfully in my written comments, I hope, is that it presumes facts not in evidence. The -- not in existence, indeed.

The -- the need to create a pullback rule assumes that before documents were produced in wholesale form they will not, in fact, already have been reviewed, and that's just not true.

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

MR. GARDNER: Yes.

JUDGE ROSENTHAL: Have you had any experience under the Texas rule which has a -- is similar in part but, of course, goes much further and actually prescribes the outcome of the privilege forfeiture issue when there's been inadvertent production, which the proposed federal rule does not?

Have you had any experience with that rule?

MR. GARDNER: Not in the privilege context. Most my practice these days is in federal court anyway. But when there has been an inadvertent disclosure, I've given stuff back. But this allows for gamesmanship, and it will create gamesmanship, I can guarantee you, because they will either willfully -- they won't negligently not review it. They will willfully not review it not really caring -- because when I find something I care about and I show it to them then they will go -- man, I'm really sorry, I did not mean to produce that, and now that you have moved -- you know, when I'm at trial or moving for -- defending a summary judgment based on material they produced, they can whip it back.

This also, as I read it, applies not just to electronic discovery. This is a rewriting of the rules overall. And I see -- I don't know an instance where this has been a real problem and that there have been a problem because of sloppy review work by defense counsel. I don't think that exists. And when it -- and in the rare instances when it happens, despite every effort, my experience and the experience of others is we may not like giving the stuff back, but we do and we don't use it, so it's just not necessary.

JUDGE HECHT: Is it your experience that counsel negotiate some kind of provision like this for pretrial or

case management order?

MR. GARDNER: On privilege?

JUDGE HECHT: Yes.

MR. GARDNER: Generally, Your Honor, with -- only if we are entering into a protective order. By which I mean, yes, in every case. In virtually any case when we have discovery we do have to have a protective order. The protective order will provide for inadvertent production of privileged materials, and it's about the only part of the protective order we don't argue about.

JUDGE HECHT: What is different from having a provision in the rules than having that provision in a protective order?

MR. GARDNER: Twofold. One is it is extremely broad in its operation, allows it to be asserted anywhere down the road. Actually, that is the second one as well. There is no limitation on it. The -- it can be literally months or years after the disclosure.

The inadvertent privilege is almost always in my practice limited. If they give it to me in discovery, they got to tell me pretty quick, so I'm not moving forward on it.

JUDGE RUSSELL: The rules say within a reasonable time.

MR. GARDNER: Yes. And that is also an invitation

for -- for additional argument.

But they will say, well, we didn't -- because we didn't have to review it when we produced it, and we didn't need to review it until we were on -- until he brought it up, until he attempted to introduce it, until he put it on his exhibit list, we objected within three days of knowing that we had inadvertently disclosed it.

JUDGE KEISLER: Do you see any countervailing advantage if they're deciding not to engage in the significant privilege review in advance, that you're actually getting the material perhaps more quickly earlier in your own process than you might otherwise?

MR. GARDNER: The --

JUDGE SCHEINDLIN: Particularly in cases of large volume productions, where you would otherwise face a significant delay.

MR. GIRARD: Isn't your response to that that you have the option now to get that material produced by agreeing to terms that provide for the claw back voluntarily in the context of a protective order?

MR. GARDNER: With limitations and with a lot greater specificity than here. And to answer your question directly, I would have to have experience of that to answer it. In other words, I would have to have a wide-open production. In the twenty-whatever-seven years I've been

practicing, I would have to see it first, before I could advise as to whether or not I found it useful. It just doesn't -- it truly -- it doesn't happen.

We don't have -- with one exception I know of. Back when I did regulatory work, Southwestern Bell took the brilliant approach of opening all of its records to people, such as me, representing consumer interests, knowing that we didn't have the staff to go through the roomful of documents. But with that one salient exception of Southwestern Bell in a regulatory proceeding that showed as far as we knew everything, I've never had a defendant offer or -- to do that. Certainly I never got that broad a production.

If I got it, I would feel a lot different about giving a claw back as a principle. But we're not dealing with the -- I don't think this will encourage wide-open production. It will merely encourage claw backs on a more unprincipled basis later.

Thank you very much.

JUDGE ROSENTHAL: Any other questions?

Thank you very much.

Mr. Gregory Lederer.

Sorry if I mispronounced your name.

We will hear from you, Mr. Lederer, and then we will take a brief break.

MR. GARDNER: Good morning.

My name is Greg Lederer. I'm a lawyer from Cedar Rapids, Iowa. I am here on behalf of and as president elect of the International Association of Defense Counsel. IADC is a 2400 member organization of lawyers who defend individuals and entities in civil litigation and represent them in commercial litigation on either side. Membership is peer review and invitation only. How I became a member is a constant mystery to my parents.

I would refer the -- the committee to the written and oral submissions. A number of our members -- I'll -- I'm sure I'll omit someone, but I would refer the committee to the written and oral submissions by Walter Sinclair, David Dukes, and later today Mike Pope, John Martin and Steve Morrison. These folks know far more about electronic discovery in large cases than I do.

I have a different perspective. I come from Cedar Rapids, Iowa, a 30 year lawyer law firm, in a 200,000 Metropolitan area. My cases are not monster cases. But my cases have elements of electronic discovery. Not every time, but often enough that it has become a problem. And I don't represent the Exxon Mobils, because they don't get sued so much in Cedar Rapids, Iowa.

But I represent some significant-sized companies, but I also represent some small companies, a husband and wife

company from New Hampton, Iowa, who install grain bins. They have five computers and they're networked. I represent a company that manufacturers, sells, delivers and pours ready-mix concrete in Iowa and several other states. We have servers in three of those states. They're networked. They have 300 employees, some of whom have PDAs. They have those electronic issues. They are on much smaller scales than what you hear about in testimony. But let me tell you, they have litigation, and when electronic discovery requests comes in, they -- with all due respect to the larger companies and the monster cases, those kinds of requests can paralyze small companies. Because, number one, they are not staffed to handle their normal business activities electronically in the first place.

JUDGE ROSENTHAL: Mr. Lederer, is your overall point that the proposed amendments will help clarify and guide your clients?

MR. GARDNER: Yes. I want to talk specifically about two -- two components, what I call the meet and confer component, I believe is essential, because it has -- it gives the clients that I see and the litigation that I see the opportunity to anticipate problems at an early stage and avoid embarrassment later.

I personally would suggest that the meet-and-confer language be more expansive than simply preservation. I

think that preservation is an important component of that, and I certainly have no problem with its mention, but I would -- I would hope that the language would permit people to meet and confer about all parameters of electronic discovery.

The other point that I want to commend to you is cost shifting. And I will just tell you anecdotally that whenever electronic discovery comes up, in my practice, I take the position that if you want something on this you're going to have to pay for it. So far -- so far that's worked. I'm not that good, and I don't expect that to be successful much longer.

PROFESSOR MARCUS: When you say it's worked, would you tell us how it was worked?

MR. GARDNER: It has worked either because the other side has abandoned their -- their request or we have worked it out at a level that they can afford.

What I'm saying is that no one has taken me to a judge yet on that issue. It will probably happen next week, but it hasn't happened yet.

What I want to commend to you is -- is -- is strengthening the provision that you have proposed to either mandatory cost shifting or at minimum presumption. If -- if -- if you don't do that, then you let the lawsuit control.

I'm a believer in the market. If my -- my mother taught me, if you make a mess, clean it up.

JUDGE SCHEINDLIN: Excuse me. I really have a question that's troubling me. Why is electronic discovery different than any other type of discovery with respect to that?

Are you arguing for a systemwide change -- let me finish.

Should we have a presumption that the requesting party has to pay for what it gets?

What is it about electronic data which is cheaper to produce and cheaper to get at than paper ever was, particularly with respect to obviously here to the active data, why should we shift our presumption to requesting party pays?

MR. GARDNER: I don't believe that you have to change the presumption --

JUDGE SCHEINDLIN: You just suggested that.

MR. GARDNER: -- that the requesting party change on a blanket basis.

JUDGE SCHEINDLIN: I thought you just suggested that.

MR. GARDNER: I'm sorry. I believe that with respect to extra -- extraordinary production that is required --

JUDGE SCHEINDLIN: Are you talking about the inaccessible now, such as the legacy data, the deleted data, the backup data?

MR. GARDNER: If a small company has to undergo expense that they don't have to undergo in the normal course of their day-to-day business, in order to regurgitate electronic evidence or records, then I would suggest that at minimum there be a presumption that the side that wants that evidence should have to pay for it. Otherwise the -- the lawsuit controls.

I believe that the market -- if you put the market in the middle of that discovery transaction, I believe that the market will help the requesting party decide just exactly what they really need and how much they're willing to spend to get it.

I believe that if you combine cost shifting with early discussion -- and I wish I had a suggestion for how to enforce early discussion, because my experience is that it varies from court to court and from judge to judge --

PROFESSOR MARCUS: Do you -- do you usually represent -- represent defendants?

MR. GARDNER: Yes, sir.

PROFESSOR MARCUS: And are you in a hurry or -- to have that meeting or do you want to put it off until the last minute?

MR. GARDNER: It depends, but rarely at the last minute. Normally I would just as soon get in and find out what we're going to talk about, because the sooner I get that resolved, the sooner I can get to the interesting part of the lawsuit.

I urge you to combine those two things. I ask you to give serious consideration to heightening the cost-shifting language.

Thank you very much.

JUDGE ROSENTHAL: Thank you, Mr. Lederer.

We'll take a fifteen minute break.

(Recess taken.)

JUDGE ROSENTHAL: I think we're ready to begin with Mr. Summerville.

Good morning.

MR. GARDNER: Good morning.

JUDGE ROSENTHAL: I understand the microphone has been amplified, so you might find yourself louder than you expected to.

MR. SUMMERVILLE: If you find me too loud, let me know.

Each time I step to a lectern like this I feel compelled to say may it please the court. Good morning.

JUDGE ROSENTHAL: Good morning.

MR. SUMMERVILLE: My name is Darren Summerville.

I'm an attorney with the firm of Bondurant, Mixon & Elmore in Atlanta, Georgia. I'm here today not only on behalf of myself but also on behalf of the Impact Fund, a citizens' right group based in California that provides an array of litigation services to civil rights practices.

I believe the committee heard the testimony of Ms. Joselin Market (phonetic) just a couple of weeks ago. In that same vein I have several comments as to the proposed rules. And as with any discussion or debate, I believe context is quite important and it's important not just to cite what we're really talking about here.

What we're talking about is accessibility to relevant evidence. As to the two-tiered discovery process, let the committee please not lose sight of the idea that we're talking about relevant evidence. We're not talking about evidence that should be swept under a rug from the outset but, instead, something that under the current rules and under the rules since 1939 has been presumed discoverable.

The watershed nature of the proposed two-tier discovery system is just that, a watershed. This would be one of the few exceptions that I certainly have come across or certainly am aware of --

JUDGE SCHEINDLIN: Can I interrupt by challenging the presumption?

MR. SUMMERVILLE: Of course.

JUDGE SCHEINDLIN: The problem is that probably the vast, vast, vast percentage of this inaccessible data is not relevant evidence. That's the problem.

MR. SUMMERVILLE: And that probably is also true outside of the electronic discovery context as well. It is difficult from the outset to know relevant in this corner and irrelevant in another, of course.

JUDGE SCHEINDLIN: Right. But probably we know from experience that with the inaccessible it sweeps up so much that the overwhelming percentage of it is not relevant evidence. Somewhere in there, there may be something, right? But the vast percentage will not be.

MR. SUMMERVILLE: I think on a case-by-case basis that generalized statement is, of course, correct. All the information available to a particular business organization will not be relevant to a given dispute. That is a given.

However, again, let's not lose sight of the idea that within the haystack there are certainly several needles that might very well be out there.

JUDGE ROSENTHAL: Mr. Summerville, has it been your experience that in most cases the accessible data largely provides the information necessary to fully respond to discovery needs?

MR. SUMMERVILLE: As a general statement, I would say that is probably more true than not, but there are

certainly examples that I would like to present to the committee in which that was not the case. And I guess I could use that as a transition to discuss the specific --

PROFESSOR MARCUS: Well, Mr. Summerville, before you make that transition, just one other sort of background question.

Would it be wrong to assume that ordinarily in the litigations on which you have worked the responding party does not go to the inaccessible information in the first instance in responding to discovery, but only later, if at all?

MR. SUMMERVILLE: You would not be wrong at all. In fact, you would be universally correct. Correct that that is the first response, that is, that so-called inaccessible data almost inevitably in my experience digital linear tapes or backup tapes is essentially off the table.

PROFESSOR MARCUS: All right. So Rule 26(b)(2) as currently proposed reflects your experience exactly, it's the same as what's going on now?

MR. SUMMERVILLE: I would say that the factual situation that I have encountered is encompassed within both the existing rule and proposed rule. I may have misunderstood your question, if I could just explain.

Essentially what happens as a matter of course now is there will be a discovery request propounded as to all

documents or information relating --

JUDGE ROSENTHAL: Excuse me. Could I interrupt and ask you a question about that?

Is that -- as part of the continued discovery requests do you always ask for inaccessible information as part of your initial requests?

MR. SUMMERVILLE: I would not term it exactly that way. I would term it in a sense that all relevant information as to a given point of contention.

JUDGE ROSENTHAL: Regardless of whether it is on backup tapes, whether it's legacy data, whether it's accessible, whether it's unactive, you ask for it?

MR. SUMMERVILLE: I would say that's my duty under the current rules and that's how I comport myself.

To answer your question, professor, essentially my experience is that under the current rules a plaintiff - and my work is divided almost evenly between the plaintiff's side and the defense side - will almost inevitably ask a fairly broad discovery request. It will cast the net very widely. In that sense, the objection is almost a boilerplate, that is, that this is an undue burden, it would require time, it would require expense, it would require -- if a defendant was particularly detailed in a request it would require X lawyers and Y paralegals a number of hours to respond to that. And then, unless we can reach and

agreement, obviously a motion to compel follows if my client as the plaintiff has the resources and the wherewithal to pursue that discovery aspect.

That is one of the primary problems, however, with a rule that de facto makes so-called inaccessible data presumptively nondiscoverable without a showing of due -- of good cause. That is, as to certain types of cases and certain types of plaintiffs that information may very well become simply too costly to seek in the first place, that is, a particular example, in a civil rights case or an employment discrimination case, access to circumstantial evidence is almost inevitable, simply because very few defendants simply fester to explain that they did indeed demonstrate racial or gender animus when we bring a complaint. But, in that case, there needs to be access to statistical data that may have been otherwise overwritten. There also may be need to resort to e-mail communications, which are filled with candor about a particular employee's evaluation or a particular supervisor or class of supervisors' policies towards a particular group, maybe a gender or racial or otherwise.

JUDGE ROSENTHAL: In your present practice you said that generally an objection is raised. Is it then your practice to, if you really need this information, that is, if you have not obtained the information that is responsive

to your requests satisfactorily from the active data, is it then your practice to go into court and say I really need this additional stuff?

MR. SUMMERVILLE: It would depend upon the client, bus as general rule I would say yes. And the reason it would depend upon the client is simply depending upon our arrangement with a given client it may very well be that that individual or that organization is not willing to set forth the hundreds of thousands of dollars it would require to either risk -- either pay out their own expenses if the cost shift is awarded against them or simply to pursue the motion to compel. There may very well be instances where we could not resolve those situation issues at all, the initial accessibility question without resorting to a particular expert, be it someone with a baseball cap turned backward, either way they bill out at a fairly high rate, and generally those costs are ones that we have to take to our clients initially to determine whether they wish to go forward.

JUDGE SCHEINDLIN: Do you practice much in the employment area?

MR. SUMMERVILLE: Our firm does do a fair amount of --

JUDGE SCHEINDLIN: Just a question that I have. When you're looking for statistical data, is that -- is that

not kept by the company in -- in some form other than the -- this very disorganized thing called backup tapes?

I mean, can't you get that elsewhere in the company, the HR department, in their record, whatever?

I'm not sure I phrased the question -- but you see what I'm saying.

MR. SUMMERVILLE: I think I do, and I will attempt to answer, and you can tell me if I have satisfied your -- satisfied your -- given the answer to your question.

Some companies do.

Larger companies generally have more diverse and segregated departments that are delineated with particular policies or procedures. For example, one of our larger class actions was against a soft drink manufacturer and that particular manufacturer indeed does have very well-delineated human resources departments.

It's when you digress to the next layer, maybe outside the Fortune 500, as a walking around definition, that those policies may not be as well-defined and those records may not be kept nearly as well.

There are plenty of cases in federal courts and otherwise that revolve around discrimination or civil rights aspects in organizations or companies that don't have those particularly organized fields where you might be able to taylor a request more narrowly.

That is one of the -- the questions --

JUDGE RUSSELL: Mr. Summerville, has it been your experience in this cost sharing if you're going for data that's in the nonactive status that you assume you're going to be bearing some share of the cost to get that?

MR. SUMMERVILLE: I would not say that as an assumption. Certainly as a plaintiff we would want to obviously avoid any of the cost sharing. I have fought it on both sides. I have fought motions to compel, motions for sanctions for withholding that data. I have lost those motions for protective order as to some computer discovery as well.

I would say that in my experience almost inevitably the costs are born by the defendant, that is, the producing party in that regard.

And that has -- again, it's because of the factual nature of those disputes that I'm hesitant to say something of a general nature, except for the fact that that is also one of the reasons for my objections to the rules as currently written. That is, data that is so-called inaccessible from the outset under the proposed rules doesn't seem to be dramatically different, except from the presumptive standpoint, from the current rules. That is, there are policies in place -- excuse me, there are subsets within the rules already to deal with the undue burden

question.

And the notes to the committee's recommended amendments to 26(b)(2) do assert that, that is, the examples that are set out deal with cost, they deal with access issues. And in that sense it's my experience, both from Your Honor's cases and otherwise, that courts are beginning to get a handle on how to delve into the cost issues or the initial accessibility issues, because there are simply a series of a risk/reward or a cost/benefit analysis, if you will, that courts undertake on almost a daily basis, either federal or state.

JUDGE HECHT: If you initially request all relevant information and you anticipate a relatively standard objection and some working out of that over time, even with opposing counsel or with the judge if it may be necessary, is it -- is it your view that in that period of time the responding party is obliged to keep anything that could fall within that very broad request?

MR. SUMMERVILLE: I would think so. Yes, Your Honor. I believe -- the exfoliation law in the jurisdictions in which I practiced almost uniformly would say certainly within once the litigation is commenced and there is a dispute over a particular subset of data then the party charged with -- potentially charged with ultimately producing that data would also be under an obligation to

preserve it.

JUDGE ROSENTHAL: And that would include what we're calling inaccessible data?

MR. SUMMERVILLE: It would. And if that was something that was identified at the outset -- for example, that's another transition I wish to make.

Let me address the situation in which that so-called inaccessible data is known to a particular producing party to have relevant data.

JUDGE ROSENTHAL: Can I flip it before you get there and ask about the situation in which the producing party, the responding party, has a great deal of active data responsive to the discovery requests and also has a great deal of inaccessible data but has no basis for believing that there is relevant information on the backup tapes, to use them as an example, that is not otherwise enable on active data?

Is that party precluded from continuing the ordinary operation of its computers, its recycling, in that situation, nearly because you've asked for all relevant data in any form?

MR. SUMMERVILLE: My experience leads me to -- to subdivide your question slightly.

Generally in a situation where a party that would be producing has a fairly sophisticated backup system, within

that backup system - and I'll use backup magnetic tapes as an example - there are for lack of a better word summaries of what each tape contain. They are of course delineated by date, oftentimes they are divided by server, that makes it easier to determine which tape may have particular data, relevant data. That's, again, something I've asked the committee not to be silent. Is there any need to cite numbers in a sense of numbers of tapes, numbers of hours, and I would hold up a sheaf of documents saying exactly the same thing. But in most cases all of these things could be handled under the current rules with a few simple steps.

One step is I would urge the committee to adopt the changes to Rule 16 and Rule 26 as to the meet-and-confer provisions. And, in fact, I would actually provide -- I would actually suggest that the committee provide even more detailed analysis as to what should be broached in the 26(f) conference simply dealing with the outlay of a particular party's electronic system. Obviously this may not apply if electronic discovery will not come into the radar screen. But if it will, and it's presented to the parties as such, I believe that the rules will be well-served to clarify them as to the design of a particular IT or -- excuse me -- information technology system, to allow for the initial discovery request to be more narrowly tailored. And I think that really gets to the heart of the issue.

PROFESSOR MARCUS: Mr. Summerville, you do represent defendants at such meetings?

MR. SUMMERVILLE: Absolutely.

PROFESSOR MARCUS: Do you provide full information to the other side about your client's information systems during those -- those meetings?

MR. SUMMERVILLE: If the plaintiff's counsel asks the right questions. Essentially if -- if electronic discovery is on the map, I would much rather get it out in the open initially rather than, again, cost may client ten or $100,000 fighting the initial wave of motions that come in discovery practice. I think it simply makes sense, that even if that is a practice however that may be practical with the savvy lawyer or the lawyers who are behind me in the room, that it still makes sense for the committee to address that as part of the rule, that that should be something at the outset, because it simply avoids the other smaller squirmishes. It may not avoid the large scales, but it certainly is a step in the right direction.

JUDGE SCHEINDLIN: You're concerned with our raising the privilege question in that meet and confer and maybe hinting that you could reach an agreement that will cover you later if there's a waiver?

Are you concerned about that one or do you like that, too?

MR. SUMMERVILLE: I am not concerned that the committee recommend it be raised. I am concerned with the hint that you suggested, for a couple of reasons, and I briefly touched on this in my written comments.

But I believe that the rule as written, at least there's a good faith argument to be made that it colors into a substantive aspect that may be beyond the purview of this committee or the rules in general.

Beyond that, the rules themselves I think are much more -- well, the rule itself would be a very inflexible tool into what needs to be a flexible process; that is, the initial conference could easily encompass a called quick peek or a claw back, but that would depend on litigation that a particular party may have already been a party to. It may deal with the relationship of the parties. It may be a question of whether or not a producing party anticipates being involved in another litigation and, as such, a quick peek or a claw-back agreement may not bind themselves as to waiver finding further on down the line.

So I think it would be an absolute step forward to suggest as part of the 26(f) conference that the issue be raised. I do have concerns, however, about putting the thumb on the scale, even to a small -- a small degree at that point.

I'm rapidly running out of time, but essentially --

PROFESSOR COOPER: If this is a pause, your written comments addressed something I have not heard addressed in specific terms. That is, you say that when you need to prove fraud, intent, elements of that sort, you have found that embedded in metadata, may be indispensable. You have illustrations, an actual sense of how often that happens?

MR. SUMMERVILLE: In terms of how often it happens, I can speak to my practice, of course. As to a general statement, I wouldn't be comfortable making that. In general what I mean by that, embedded data and metadata are sometimes inflated. I understand them to be somewhat different. Embeded data may very well encompass, for example, drafts of a different document or a different electronic source of information. Metadata is that which is not actually input by a particular user or information gatherer. That is simply that it is recorded as on more of an encoding technique. But in terms of a fraud aspect or an intent aspect, Fraud in the large part in the jurisdictions in which I practice, of course, requires an affirmative misrepresentation of a knowingly false objective fact.

Now, the key part there generally is proving scienter or willfulness. And in some cases the metadata will provide a trail of bread crumbs, as if you will, as to what individual received the message and when. That is, if the

stock was evaluated at a certain price an individual at a deposition says, oh, that information was simply not shared with me, then metadata provides a very easy trail in those instances, and that may be a good example of when the inaccessible data although almost tangential to the layperson could be critical to a legal analysis. And in those cases, and others like them that I have cited in my written comments, such as knowledge and notice, it's very important not to have that presumption up-front.

JUDGE ROSENTHAL: Why is metadata not reasonably accessible?

MR. SUMMERVILLE: Because it's in the backup tapes. For example, if there had been an overwritten aspect of it, The metadata would be captured on -- depending on the type of server, a uniserver may not capture it, but otherwise on backup tapes there may be metadata as to a particular e-mail sent or received time.

JUDGE ROSENTHAL: But if that e-mail is on active data, wouldn't the metadata also be active?

MR. SUMMERVILLE: Absolutely.

JUDGE ROSENTHAL: That's what I didn't understand.

MR. SUMMERVILLE: And, of course, I would say the majority of situations will be that active data will provide the building blocks for a litigation.

JUDGE ROSENTHAL: It will provide the roof?

MR. SUMMERVILLE: I'm not sure it will stand up to the big storms at that point.

JUDGE SCHEINDLIN: I have another question about metadata.

MR. SUMMERVILLE: Yes, ma'am.

JUDGE SCHEINDLIN: I know that you're not sure there's not much distinction between document and electronically stored information --

MR. SUMMERVILLE: I can't quite hear you.

JUDGE SCHEINDLIN: You wrote you're not sure there's much distinction between electronically stored information and documents. Actually, I was communicate -- all along worried about metadata being anything like a document. It does strike me as far more information. It's stored information, the metadata itself would hardly be thought of as a document.

Do you think that there's some protection in creating the separate category to make sure that people know that, for example, metadata may be discoverable, despite of the fact that it's information and not what we thought of as document in the 20th Century?

MR. SUMMERVILLE: I think the same protection that you're alluding to and that I would support would also be included with a simpler solution and that's simply claiming

that electronically stored information or digitally created information, or whichever definition ends up being part of the rules ends up in part of the rules and is included as a subset of documents under Rule 34.

JUDGE SCHEINDLIN: You like putting the word somewhere in the new rules to make sure that people know that the information itself is discoverable, not just the four corners of what we once thought of as a document?

MR. SUMMERVILLE: Certainly. I would. I would say that in my experience that this has not been a particular stumbling block. There are three instances I can think of in my practice where this was an initial argument, that is electronic data, is it really a document.

JUDGE SCHEINDLIN: I'm thinking about metadata particularly, for example.

MR. SUMMERVILLE: I'm not understood. I'm sorry. I misunderstood If -- I did not answer your question directly. But essentially there are only three instances I can draw from, and both -- and all of those were dispelled of quite quickly. It seems to me that no opinion that I'm aware of really turns on the idea of this electronic nugget of information that would not be included in the four corners of a contract or a document is not discoverable. And it's clear the information is invaluable and under the spirit of the rules would certainly be relevant. And as a

result, I think the subset solution would probably be a more neat one. With that, I again reiterate my thanks for the opportunity to comment.

JUDGE ROSENTHAL: Thank you, Mr. Summerville. Mr. Fish.

MR. FISH: Good morning. My name is David Fish. I practice in the Chicago area, primarily within the Northern District of Illinois.

I'd like to discuss today primarily two of the proposed amendments, the first relating to documents that are not reasonably accessible and also the safe harbor provision.

I feel very strongly that this committee and the rules should not be changed in relationship to these. The rules should be left alone. They adequately deal with these issues.

The problem -- the problem main that I see, and I'll start with the safe harbor provision --

JUDGE HECHT: Could I ask the nature of your practice?

MR. FISH: Sure. I represent primarily small businesses and individuals, primarily against large companies. However, I also represent a number of defendants that are businesses. So I deal with both sides of the discovery disputes.

The -- the problem that I see with the safe harbor

provision is I feel like it gives it a stamp of approval for companies to enact document destruction policies. And what I envision happening is --

JUDGE ROSENTHAL: Don't companies in the ordinary course of business have to have -- if they are well organized don't they in the best of all possible worlds, indeed, have thoughtful crafted, well-implemented document destruction policies?

MR. FISH: Absolutely. And I think that's great and there's nothing wrong with that.

However, when a new federal rule comes down that says you have a safe harbor against being sanctioned as long as your document was destroyed in the ordinary course of business, practically what is going to happen is -- I believe that these companies are going to encourage more destruction, for the various reasons that we've already heard about. If e-mails don't exist anymore, they're not going to hurt a company down the road.

Now, the question was asked earlier should companies be obligated to maintain documents they don't need for regulatory or business purposes. Of course not. It's not the role of legislation to get in the role of people's businesses and help run them. However what's absolutely critical is not blessing a standard of care where you're telling a company ahead of time as long as you destroy

something normally you're not going to be sanctioned.

I'm not aware of any judge that would ever sanction a litigant for permitting a document to be destroyed in the normal course of business, when litigation was not a possibility. That's what the case law currently says. It does not --

JUDGE SCHEINDLIN: But the problem is that we've heard for some companies, some municipalities and the federal government, litigation is always a possibility. They are sued every day and are always in suit. So take that as your hypothetical. Then what?

MR. FISH: Then what has to occur is you need personnel who say, okay, there is -- as Your Honor did in your opinion, the Zubulake case, you identify the key players, and you have to have individuals who can put a litigation freeze on those people.

I'm not suggesting you need --

JUDGE SCHEINDLIN: But Mr. Beach said, and probably correctly, that that's not the way the storage system works. It's not like you can say save all the backup tapes for employee X, and it won't be just X, it will probably be A through Z, so where do you -- how do you store those? How do you stop those?

He's saying it's not so easy as envisioned.

MR. FISH: The way that I have dealt with it in

the litigation that I have handled, is that you identify terms. For instance, I'm involved in a case where we have a class action pending relating to a recommendation to purchase an Enron investment. And there were about ten key players in the decision. And what we did, and it didn't have to go to a court, we sat down under the existing rules, I made an initial discovery request, they objected on the basis that it was unduly burdensome. We sat down and I said, well, look, why don't I give you terms to identify, like, for instance, Enron, the names of the key players --

JUDGE ROSENTHAL: I'm sorry, are you talking about putting that in place as a litigation hold for active data or are you talking about going beyond that to backup tapes?

MR. FISH: What occurred in this case was they did these searches on the backup tapes.

On the accessible -- the accessible data, they were able to easily produce the documents that existed.

For the backup data that they claimed was going to be hundreds of thousands of dollars to search, we worked out a compromise where these terms were searched on the old data, on the backup files.

MR. GIRARD: How did you know that you needed to go to the back up files?

How did that get decided?

Did they raise in the meet and confer the objection to

going to backup data?

MR. FISH: No. It was just a matter of we received documents and they didn't appear to be -- we expected there to be more documents that existed.

JUDGE ROSENTHAL: Mr. Fish, did you do this word term or word search on backup tapes for a very few number of tapes, kind of a sampling process?

MR. FISH: There were -- what -- the way it worked out was we -- we actually had to have a Rule 30(b)(6) deposition of the -- of the person who made -- who -- their records keeper, as they called that person. And he identified a number of tapes I believe that had -- that -- and in this case I believe actually had separate tapes for -- for different employees.

So I'm not a tech expert, but in the way that it was handled, and this is a large financial institution, they were able to do specific searches. I mean, as the tech person said in his deposition, it's essentially like doing a google search, you put in the term that you're looking for and you're going to come up with every e-mail, every document that's on that tape that uses that word.

Now, we got a lot of documents that had nothing to do with what we were looking for, but it was a reasonable compromise. And I believe that the current rules as they exist require that. Before you file a motion to compel you

have to go in and talk to other side. They can object to something being not -- overly burdensome.

JUDGE ROSENTHAL: When you did that search, did you have a reason to believe that you would not find the same information on active data?

MR. FISH: Yes.

JUDGE ROSENTHAL: And you were -- so before you did the search you had already concluded that the active data wasn't going to give you what you needed?

MR. FISH: Well, I had received documents in discovery already and it didn't have any -- we believed that there was more out there.

JUDGE ROSENTHAL: So it was the second stage?

MR. FISH: Yeah. And it was effective for us. But I believe that the current rules already provide for that. I also think technology is changing, and by the time that these rules get enacted there very well may be more effective ways to do searches. I think this is an evolving area of the law. I think the case law is evolving. And I think that it makes sense to leave these rules alone.

JUDGE FITZWATER: Mr. Fish, Let me ask you a question on that last point. Is there a concern that although these rules are intended to deal with electronic discovery that the future will primarily be electronic

discovery and that these rules are establishing normative standards for basically all discovery?

MR. FISH: I think that's a good point. It's not one that I have thought about.

My experience in litigation is it's not all electronic discovery. It's really e-mail. That's where I find the primary disputes coming in, because I've found e-mail to be extremely invaluable in litigation.

But in reality, the vast majority of documents nowadays are kept in electronic format and are printed off of a server somehow or another. So I think that's a very good point.

JUDGE FITZWATER: Another question.

When you say that judges are handling this under the present rules, those who argue for a standard contend that this -- that the existence of a predictable standard is essential and that it just cannot be left up to the vagaries of what judges may do. What's your response to that?

MR. FISH: I believe there is a predictable standard. When I defend cases this is how I treat it with my clients.

I tell them if you know there's going to be litigation or you have reason to believe that there's going to be litigation, you need to maintain the documents for the people who are going to likely have documents relating to

the dispute, the key players in the litigation. You need to gather that stuff. That rule already exists. If you don't do that you're probably going to be sanctioned now.

So I don't think that a special rule needs to be enacted. Other clarification is unnecessary.

MR. GIRARD: What guidance do you give to the person responsible for the documents that are, quote, documents on backup tapes for a large company that may have tapes scattered throughout the world?

That's the problem that we're struggling with.

MR. FISH: Well, my -- yeah. The -- the -- the primary contact that I have had in the defense role is dealing with an in-house lawyer. And it's not an in-house lawyer at a company like Exxon Mobil where there is probably hundreds if not thousands of them. It's ones where there's one or two in-house lawyers and you -- that person then goes and talks to the IT department and tells them -- and my communication to the in-house lawyer is maintain the documents relating to these people.

And they will -- but the primary way that they do it, in the litigation that I've been involved in, is they do a search right away. And I like that as a defense lawyer, because I want to know what's out there. I think it makes a lot of sense if you know that somebody is going to be sued and looking at your documents, you want to know the good and

the bad, so you're going to do the search. And, of course, you end up having to turn some bad documents over, but I think it just -- this isn't gamesmanship, it's providing access to the truth. And by telling people to do that search initially --

PROFESSOR MARCUS: What is it that you search at that point?

MR. FISH: The -- for instance, you may search the name.

PROFESSOR MARCUS: Active data or do you go to all the backup tapes as well and try to search them?

MR. FISH: Well, certainly active data.

PROFESSOR MARCUS: Then with regard to the active data you encounter that comes up on the search, do you do something to keep it available?

MR. FISH: Yes. In terms of what inaccessible data is -- and I think there's a question as to what inaccessible data is, but what I consider inaccessible data to be is anything that -- I can -- by the way, I consider deleted e-mails to be accessible, because I know that when I use Microsoft Outlook when I delete an e-mail, if I need to go back and get it, I can get it with relative ease. I can search that myself.

In terms of looking up backup tapes -- for instance, let's say you know that John Smith is the primary person who

was involved in a dispute, and that person signs their name John Smith or uses a particular e-mail, you could search that backup tape and easily gather every document where John Smith was the person, even if you don't segregate out backup tapes by person. You can segregate out by doing a search term, by knowing how that person signs his or her name.

JUDGE ROSENTHAL: That's if you have a small company with maybe one server and you're just searching a small backup tape library. Is that what your prior experience has been?

MR. FISH: I believe that's correct.

JUDGE ROSENTHAL: One more question, unless others have questions as well.

MR. FISH: Yes.

JUDGE ROSENTHAL: If -- let's assume that you're in that situation and you have searched the active data for John Smith and you are satisfied that through your search and consequent litigation hold that you have maintained as accessible data the e-mail and other electronically stored information that John Smith had during the relevant period. Do you then need to suspend the recycling -- automatic recycling of your backup tapes on the off chance that there might be some additional e-mail that your initial search, for whatever reason, did not preserve as accessible?

MR. FISH: Well, if -- if -- let's say the time

frame for your -- say it's a business dispute, is a two-year period. And let's say that during that two-year period there -- that -- that data is accessible.

JUDGE ROSENTHAL: And you preserve it. As -- and through your litigation hold you've taken steps to be sure that it stays accessible.

MR. FISH: Right.

JUDGE ROSENTHAL: Okay.

MR. FISH: And these -- these parties in a business dispute didn't even know each other prior to that two-year period, of course, you don't have to go back and search something before then. You're not going to find anything.

And I don't think that if currently under the existing rules you went in and asked the judge to do that, I don't think any judge would -- would ever order you to put in a litigation freeze before it's even possible that -- that things would be found.

What -- what I would encourage -- if there is going to be a change to the rules, I would encourage that a mandatory sanction discussion take place.

For instance, if -- if -- if you tell companies they have a safe harbor as long as documents were destroyed in the ordinary course of business, et cetera, et cetera, I think they should also be told that there is a mandatory

sanction that if one of your employees deletes a document and you had reason to anticipate litigation, you're going to be sanctioned. I think that that needs to be balanced out, because right now as I read the rule it's going to be subject to extensive abuse.

If I could turn --

JUDGE ROSENTHAL: Briefly.

MR. FISH: Yeah. Okay. As to the -- the meet-and-confer rules, I think those do make sense. My experience is that those are not taken seriously. I don't think parties discuss them. And quite frankly, I don't think that lawyers are usually prepared at those meetings to make -- to have educated conversations about the details of electronic discovery.

I think from a plaintiff's perspective, it's incumbent upon the plaintiff to be prepared for that and to ask the right questions, because I think in many cases it wouldn't be unreasonable to expect that there would be the destruction of documents before that conversation takes place.

But I -- I thank you for your time, and thank you.

JUDGE ROSENTHAL: There are no further questions? Thank you very much, sir.

Mr. Morrison. Good morning.

MR. MORRISON: Good morning. My name is Steve

Morrison.

I rise to support these rule amendments. I would like to address the compelling need for change, the genius of the two-tier structure and the necessity for an even narrower safe harbor. I come at you from three directions. I'm from South Carolina. I was once the general counsel for about three years of a New York Stock Exchange computer software company where I managed their litigation and I managed their legal affairs in 34 countries. We traded on the New York Exchange and sold the company in 2001 to Computer Sciences. I'm also with Parker, Riley, Mullins and Scarborough. In that role I try cases around the country. it's been my privilege to serve as lead counsel in 24 states now. I've tried over 200 cases to jury verdict and argued 60 appeals, including to the United States Supreme Court.

Thirdly, I come to you as a past president of Lawyers for Civil Justice. I've been very active on the discovery reform agenda for decades, and the past president of the Defense Research Institute.

Coming from those perspectives, I would tell you that the procedure makes a huge difference. The comment that was just made by Judge Fitzwater is that these rules could make a huge difference in how we resolve disputes and these rules can in fact become normative and the genius of the rules that you propose is they are appropriately normative because

they move us toward a more proportional approach to discovery and they move us toward a reasonable sanctions approach towards discovery. Both of those moves are in accord with past moves made by the civil rules committee. But I digress.

The compelling need for change is clear. Electronic data is different. It is vastly faster in its movement and therefore increases in volume much more significantly. That volume increases cost and burden.

Second, the data itself is dynamic. It is not like paper once it's done sitting in a file. It is changeable. Even if you delete it, it is still there.

Third, it is incomprehensible in many instances without the system with which it was created. Under those circumstances electronic data is different. Discovery is also different.

In the old days we searched for artifacts, like we were archaeologists, going for a piece of this and a piece of that. Now we're frequently asked for dynamic information. Information that we've never been asked for before, in a form that we've never been asked for before on the theory that that report can be written for a particular database.

In addition, a lot of uncertainty has been created in the world of those of us who litigate all the time, and our clients, on both sides. We're uncertain now as to what to

preserve, how to search, where to search, what form should the documents take when we produce them. We're uncertain about disaster discovery. We're uncertain about deleted data. We're uncertain about legacy data. We're uncertain about paper electronic form, pdf, et cetera, et cetera. That uncertainty makes it significant that we move to rule changes.

We are, in addition, in a situation where rule changes could make a significant impact in guiding us back toward resolving cases on the merits, under Rule 1. There is, arising in this country, and I litigate it and make a lot of money from it, litigating what I call the sanctions tort or the sanctions crime. And it comes up in case after case after case, involving some circumstantial inference of a conspiracy within a large corporation to do away with data, to hide data, to stonewall, and so forth.

Rarely am I engaged at this point in my career in any case where the stakes are not very, very high. And where the stakes are very, very high, I have found the accusations regarding the conduct of corporate America become meaner and nastier and smaller and there are no holds barred.

JUDGE ROSENTHAL: We heard some speakers earlier suggest that there really isn't any great increase in sanctions allegation or sanctions litigation. You seem to be suggesting a different picture.

MR. MORRISON: I think that the big civil case, the class action, the mass tort, the repeated pattern litigation, the bet-your-company case at the board of directors level for Securities and Exchange violations, and so forth have -- they're the death penalty cases of the civil law, and as such they cast a dark shadow over the entire civil law landscape. And in those death penalty cases sanctions accusations are routine. I regret reporting that to the committee, but they are.

And under those circumstances -- and frequently a judge doesn't see that many death penalty cases in a legal career. Certainly a lot of lawyers don't see a lot of those kinds of civil cases. Under those circumstances we must have resort to rational rules.

But the question is raised are these rules just for these death penalty cases. I would tell you no. As a maybe of my bar, I've been chairman of the house of delegates and done a lot of work with the family law section. The area of most significant concern to the state rules, which, by the way, are guided by you, you -- you determine what the state rules will be by determining what the federal rules are, but the most significant family court issue is dealing with personal computers, cell phones, and personal PDAs, or whatever we want to call them, blackberries, or whatever it is, because that's where the discovery is now in the meanest

and nastiest family law cases.

So if you think you're just talking about Exxon Mobil, you're talking about families in America. You're talking about the small corner business. Somebody earlier talked about a gas station. When's the last time you went into a gas station and actually paid inside the station, if you were in a hurry. It's all electronic. Every transaction at the station is electronic. And it's at the pump.

So there is virtually no business left and no family left in America that doesn't need some guidance as to how we're going to manage discovery in an electronic age.

Let me address two other concerns.

One, I hear on some basis that people think that the technology will catch up with and supersede and make easy discovery. In the first place, as Mr. Beach said, no business in America designs its business to be responsive to discovery. Now, they have to be responsive as a byproduct of being in this great country of ours. It's necessary.

Second, as a computer software developer, executive vice president of a New York Stock Exchange company, I can tell you that there is no product that we saw from 1980 to 2000, and I was EBP and general counsel from 1984 to 2000, we saw no product come out that didn't increase the complexity of finding data in the past. It eased the use of data on a daily basis, but it increased the complexity of

finding data in the past, because you had multiple platforms, multiple operating systems, multiple systems of -- of hardware, new gadgets that you put on top of these things. Everything that we ever had developed cost more to look backwards and cost less to look forward. Another reason there is a compelling need for change.

I understand that there is a -- a question that's raised about whether we should have -- wait on case law to develop. But we know that discovery and procedure drives virtually all of the civil law toward a settlement. I think I read that only one percent of the civil cases filled in the federal courts of the United States last year were actually tried. If that's the case, then the procedure that you implement is critical to us. The likelihood of an appellate decision or a body of appellate law helping us solve this problem is minimal. This is a rules-based problem and should be addressed by this committee. So there is a compelling need for change.

Let me turn to the genius then of the two-tier structure. It focuses first on proportionality. As we should in all discovery. And why there's not more case law on proportionality, I don't know, but the rules need to guide us in that direction.

First we look at the center of the case, what's readily accessible and most likely to produce responsive

information, and you ask us to look at what's reasonably accessible, not the word readily. And you don't look at what's not reasonably accessible, unless there's good cause shown to go to that level. That is a genius level proportionality rule that focuses not only on Rule 1 but on Rule 26 proportionality and fits in perfectly as we begin to go forward with electronic discovery.

The second thing I would say about the good cause shown, is that the good cause shown is to see something that is proportionally appropriate to discovery in this case. And you have said "under conditions." Now, I would ask you to add to those conditions a specific reference to cost shifting, in part because we have an experiment going on here in Texas that works. The states are providing you with a crucible of some experimentation, and when you find one where the plaintiff's bar and the defense bar, as I have found here in Texas, both say, you know, we both focus a whole lot more since we have to pay each other for what we're asking for as to whether we really need it.

JUDGE ROSENTHAL: We heard someone earlier today say that the Texas experience really shouldn't be the source of too much assurance, because most multistate or multinational companies aren't going to form their -- the basis of their behavior on the rule of any one state. Can you respond to that?

MR. MORRISON: Well, I agree -- I agree you're not going to base your -- your behavior on the rule of one state. And I think that -- that makes sense. Texas is a pretty big state. And Texas and California are the two cost-shifting states. California, if it was a nation, would have the sixth largest economy in the world. I don't know how big the Texas economy would be, but it can't be too far behind California. So it's the equivalent of, I don't know, maybe France. It's a -- it's a -- it's a big economy.

(Laughter.)

JUDGE ROSENTHAL: We don't think of ourselves as that.

MR. MORRISON: Well, you probably have a better -- you have a bigger Army than France. What was it General Patton said, I would rather have the Germans in front of me than the French behind me.

I apologize for equating France with Texas.

My point is -- my point is, if I'm doing business in the Texas, my market in Texas is gigantic. Some of my behavior is definitely driven. If I have cost shifting in Texas that's automatic and I have cost shifting in California that is almost automatic, it's being used dramatically, two of the biggest states in the biggest markets in the wealthiest nation that this earth has ever known in the history of mankind are going to drive some

behaviors.

MR. GIRARD: Mr. Morris, do you see any gamesmanship with the producing party being able to shift the cost to the producing party under the two-tier system?

MR. MORRISON: Not if we are truly proportional. There is always a rogue lawyer out there that will game a system. But if we focus on true proportionality, which is what the court should drive us to, what is at the center of this case -- and let us discover what's at the center first, reasonably accessible, if that leads you to conclude that there may be something else out there -- I mean that's a lot of data in most cases, and if that leads you to conclude, and you're on the other side from me, that you need more, you ask for more and you say why you need that more and why it appears to be here. But now you have a case for that. We started at the right place.

Chances are that you and I, once we review that data, would find, as we are finding in Texas and California, that it's not worth your money or my time to go get the other data. Now, maybe we go one circle outside the bull's-eye together and we cost shift a little bit. But what is encouraged now, under the current rule, is let's take the whole target -- well, no, let's not take the whole target, let's take the target and the whole wall that the target is on, and we'll come out from the edges back towards the

bull's-eye. That proportionality is exactly wrong and does not drive us toward the merits of a case, which is ultimately where we need to be.

MR. GIRARD: Do you not often though at the beginning of a case approach the requesting party and identify those areas of discovery that you think are problematic, where you think the requesting party is overreaching and ask for some cooperation there and say, look, we're not going to search these systems, we're not going to put these out of commission, we've got a company here to run and -- and then resort to the court if you can't get cooperation from the requesting party?

MR. MORRISON: Yes. And -- and frequently the requesting party, particularly in the kind of cases I'm involved in, is unwilling to narrow any request, because there is a potential for a sanctions tort. If they have the broadest possible request, and I give them something narrower subject to an objection and something comes up later, only then can they say, well, I asked you for that you intentionally withheld it, you're stonewalling or dumptrucking or any other kind of pejorative phrase that comes up these days.

If we could get with our counsel and focus on the center, as you discuss, that's where it should be. And compromises should be made by both sides. It's not

happening now, because the rules don't facilitate it sufficiently.

Rules can help in this regard. And I would, on the genius of the two-tier, I would encourage -- when we talk about those areas that are not reasonably accessible, I would encourage the committee to think carefully about how you guide us with regard to what you mean by identifying what's not reasonably accessible.

I think what I understand that you mean is some kind of categories. In other words, we are not searching legacy data, we're not search deleted data, we're not searching backup tapes. But it could be interpreted -- unless you are careful in the notes and guidance to us, it could be interpreted as requiring the equivalent of a new privilege law. I understand that's not what you mean, but I would encourage you to make that absolutely clear.

JUDGE ROSENTHAL: We have heard people today and in written submissions and the earlier hearing, express concern that the two-tier approach will encourage responding parties to push information out of the accessible category into the inaccessible category in order to avoid having to, A, produce it, and B, possibly preserve it. Can you comment on that?

MR. MORRISON: Well, I'll comment bluntly. It's silly. The people I represent are not going to take data

that they need to know their customer to sell more product, to run their business, to make a profit, and push it back into some system that they don't have ready access to -- reasonable access to. That would be to defeat the purpose of the whole organization. The state government is not going to do that. My home town, the capital of South Carolina, Colombia is not going to do that. If they need the data it's going to be there for their day-to-day activity.

So the idea that you would all of a sudden change all of your technology to push stuff so it's not reasonably accessible is to subject that you would alternate your systems to run your business to defend a lawsuit. Well, if they did that, they wouldn't be able to pay me.

JUDGE KEISLER: Why can't there be a large category of information, that is saved or not, depending on what the default rule is, information that a company doesn't actually feel it needs for it's business, the question is how much energy is it going to put out in order to clean that out. And it may well be, as Judge Rosenthal intimated, that there is nothing wrong with something that says clean out stuff you're under no legal obligation to preserve, that's not necessary for your business. But isn't it the case that one would expect that there's just some middle category of information that might stay or go, depending on

how companies perceive litigation incentives.

MR. MORRISON: You're postulating there is a category of got to have for the business data, don't need at all, and might be nice to have, might need it some day.

JUDGE KEISLER: Or don't need it at all but it's not worth the effort to get rid of it.

MR. MORRISON: That's sort of like the jars of screws in my closet with my tools. I suppose yes. The answer to that candidly is there probably are that kind of closets around that -- that exist. If we are doing our job as general counsels, you know, we're telling our clients to go ahead and clean the closet if we don't need it to run the business. It -- it cost money. The closet cost money. And the closet in this instance -- I mean, the company that I was involved with running had a server farm at a data center and it was literally five acres under a roof, filled up with servers, and we did outsourcing for lots of other companies. If we had not been cleaning out the data that you're talking about on a nightly basis, that would have had to be 50 acres to keep the business going.

JUDGE ROSENTHAL: Mr. Morris, --

MR. MORRISON: That doesn't mean there aren't closets full of screws somewhere that don't exist for any real purpose. You know, you have to say that that does exist. And for good cause shown under your rule, you would

go search the closet for the screws.

JUDGE ROSENTHAL: Mr. Morris, we're running short on time and I know you wanted to talk a little bit about safe harbor. If you could move to that and wind up.

MR. MORRISON: Yes. The narrow safe harbor is in fact narrow. No sanction for failure to -- for failure to produce something that was in the routine operation of the computer system destroyed, essentially.

And then -- I mean, that's a good start. And it's a place where we need -- we need to have -- we need to have guidance and help. You're routinely destroying information, it makes sense to have that.

But the sanction availability there is the entire scale of sanctions available to any judge anywhere. And I know that -- that this committee, and judges across the country, want that discretion. But for the narrow area that you're talking about, destroyed in the routine course of business, there shouldn't be a death penalty sanction, unless that was done intentionally.

In other words, you have the extremes of sanctions, so if you think about it as a spectrum you have the slap on the wrist, don't do it again, a little bit of attorney's fees, some cost shifting, and so forth. All the way out to default.

JUDGE SCHEINDLIN: You're thinking in the text of

the rule we should add if the sanction is going to be dismissal or default then it has to be willful or reckless, something like that. You think we should pick out those two, put it in the text, and say at that level it has to be willful or reckless?

MR. MORRISON: If the safe harbor is this narrow, yes, Judge Scheindlin.

JUDGE SCHEINDLIN: Okay.

MR. MORRISON: Frankly, there never should be a situation under this narrow safe harbor where the available sanction is default, or striking of the complaint, unless the judge finds under that strange occasion that, boy, you -- you just flat -- there was criminal conduct, you did this culpably.

JUDGE SCHEINDLIN: By the way, I think that's what the case law shows, that those sanctions are not given unless there is willful or reckless, but you would put that right in the text of the rule, of the safe harbor rule, if you're going for the top sanction then it has to be a elevated level of culpability?

MR. MORRISON: Yes, ma'am. I would guide it because the -- because the safe harbor is narrow. It is my hope that this would result in a proportionality of sanction being guided by this rule that would infect, in a good way, the rest of the sanctions litigation that we have.

JUDGE ROSENTHAL: You view an adverse inference instruction as a death penalty or merely extreme torture?

MR. MORRISON: As an old trail lawyer, I view an adverse inference from a federal judge sitting with a robe in my court as a death penalty.

I've -- I have taken more than my time. Thank you.

JUDGE HECHT: One more question.

MR. MORRISON: Yes, sir.

JUDGE HECHT: Having tried so many cases, is it common in your experience to have some sort of claw-back provision as we've talked about in negotiating between counsel?

MR. MORRISON: Yes. And that's an area where I found plaintiff's counsel and defense counsel frequently reach an agreement in a -- in a consent order, that there is a claw back for inadvertent disclosure of information, or if there's some kind of a quick peak arrangement or a just look -- you can look at all of this but if there's something in there I get to claw it back.

And I have found the plaintiff's bar to be very, very honorable in that regard.

JUDGE HECHT: Should it be in the rule?

MR. MORRISON: Yes, sir. There should be a guidance for the courts in that -- in that space. Especially because -- because, Judge Hecht, it's going to be

more common for clients to want to give us 10,000 documents of e-discovery without asking me and my law firm to look at them and pay me to do all of that. And so the claw back is going to be more and more common as we go forward.

That's why these rule changes are so significant, because we will end up with discovery being done on this playing field as well as paper, for a period of years, and then maybe sometime passed my lifetime there won't be paper in most lawsuits.

Thank you very much.

JUDGE ROSENTHAL: Thank you very much.

Mr. Martin.

And to you I think I can say good afternoon.

MR. MARTIN: Someone commented to me that following Steve Morrison is always a tough act to follow and I feel that way even more so after hearing Mr. Morrison's remarks.

I'm here today as a trial lawyer in Dallas, Texas, with the firm of Thompson & Knight, where I've practiced for over 30 years. I've tried a few cases myself along the way.

I'm also here today as second vice president of DRI, the organization of which Mr. Morrison was president a number of years back and of which I will be president in 2007. This is an issue of great importance, great interest to DRI. DRI is -- we have a large educational program for

lawyers, as many of you know. We have had an electronic discovery seminar for several years, and have another one coming up this spring, because it is of such key importance to our members and to corporate members of our organization. So it is an important issue.

The rules that this committee has proposed I think are outstanding. I do have a couple of comments I'm going to make about them.

I've been involved in -- in some rules drafting and rules revisions myself. I have served on our state bar committee that deals with the Texas Rules of Civil Procedure for approximately ten years, and I've served for five years with Justice Hecht on the Texas Supreme Court Rules Advisory Committee. And I think both of those committees need to take a hard look at what you've proposed here to see if we should tweak our Texas rules in any way to deal even better than we have already with electronic discovery. But I'm here primarily to tell you that our rule on electronic discovery, that has been mentioned here several times this morning, has been tremendously effective. It works very well.

I have never heard -- in the six years that it has been in effect, I have never heard one complaint about it from any plaintiff's lawyer that I've dealt with on a case. I have not heard public complaints from the plaintiff's bar

about the rule. And in my personal experience it's working very well.

Just by the luck of the timing I became involved in some very significant aircraft litigation right after the new rule went into effect. Some of it was in federal court, some of it was in state court. And we had various discovery issues related to electronic discovery. It was a weather-related accident and we had a lot of electronically stored weather data. We had need to go back and get some electronically stored policies and procedures to see how the current policies and procedures evolved and developed over the course of that litigation, and we -- we really never had a problem.

The -- I realize the two-tier structure of the Texas rule sets a different standard than your proposed rule does, and I'm really not here to comment on that. I think if you adopt a different standard than in Texas we should look at it and decide whether we want to keep our standard the same or adopt -- or adopt the federal standard. And as somebody who has been who has been involved in these air disaster cases a number of times, where we will have parallel cases going on in state and federal court, there's a lot to be said for having rules that are essentially the same or consistent, and that's not always been the case.

I -- I do think that the court should seriously

consider adopting the -- that the committee rather should seriously consider adopting something along the lines of the Texas cost-shifting provision. It only kicks in when it requires extraordinary steps to produce the data, but I think that really takes away a lot of the incentive of lawyers on either side of the docket to engage in abusive behavior --

JUDGE SCHEINDLIN: Excuse me -- are you suggesting --

MR. MARTIN: -- and ask for something just because a judge might say they can get it.

JUDGE SCHEINDLIN: -- mandatory cost shifting once you have -- the recovery of the data involves extraordinary efforts then you think cost shifting should be mandatory?

MR. MARTIN: Yes.

JUDGE SCHEINDLIN: You don't think it should be discretionary with the court based on --

MR. MARTIN: I think it should be mandatory, because if -- if a lawyer believes that they might be able to get something, they're a lot more prone to ask for it than if they know they're not going to get it. And so I think -- I think there should be -- I think there should be a mandatory presumption, when it requires -- and I like the Texas -- the Texas language. Reasonable expenses of any extraordinary steps required to retrieve and produce the

information.

JUDGE ROSENTHAL: May I ask you a question about that, Mr. Martin?

It's similar to the question I asked Mr. Morrison.

There has been -- a number of people have commented that if we adopt the two-tier provision it will provide an incentive for organizations to move material from accessible status to inaccessible status to avoid initial discovery obligations. Have you found that under the Texas rules organizations have moved -- have made information unavailable except through extraordinary steps in order to shift the cost?

MR. MARTIN: No. I have seen no behavioral change on behalf of Texas-based corporations, or any other businesses that I represent, because of this Texas rule.

And I believe somebody asked the president of the Texas Trial Lawyer's Association that same question this morning and he gave essentially the same answer, that he has not seen any behavioral change either, and I would not expect there to be.

I think it's a good rule. I think it's workable. We're not hearing complaints about it from the plaintiff's bar. And I would urge that one change be made in your proposal.

The other -- the other point I want to make is -- is

really just to second what my good friend Mr. Lederer from Cedar Rapids said this morning, and also to pick up on the point Mr. Morrison made about the impact of these rules changes on individuals, on small businesses, will be tremendous. And I think sometimes that gets lost in these discussions, when we're talking about Microsoft and Exxon and large airlines and other large corporations.

Many small businesses have fairly sophisticated computer systems and they don't use 10 percent of its capability. They don't know what it can do. They don't know what it can't do. They use it for their payroll records and maybe some -- some word processing. And I think we don't want to do anything here that has unintended consequences with regard to those businesses.

JUDGE SCHEINDLIN: And are you worried we have?

MR. MARTIN: I think there's the potential, but I'm not proposing any potential change in the rule. I think it's going to be largely an educational process. I think it's going to be an --

JUDGE SCHEINDLIN: So there is nothing specific that we've done now that you think endangers the smaller businesses or the families --

MR. MARTIN: No. No. The only change I'm here to advocate is the cost shifting.

If there are no other questions, I'll pass to the next

person.

JUDGE ROSENTHAL: Thank you, Mr. Martin.

Mr. Regard, good afternoon.

MR. REGARD: Good afternoon.

JUDGE SCHEINDLIN: Mr. Regard, this may be the weirdest thing that's ever happened to you, but I know who you are and I have a question right off the bat, because a previous speaker talked about searching backup tapes by names and search terms. He said it was pretty easy to search all the backup tapes.

Before you even get started, could you tell me with your expertise, can that really be done so readily as that speaker described?

I know you were here when he said it. He said just search the backup tapes.

MR. REGARD: It depends on who you ask.

JUDGE SCHEINDLIN: Okay. I'm asking you.

MR. REGARD: I know you are. There are a variety of techniques out there that have facilitated searching backup tapes in certain circumstances, this is true.

However, there are a number of legacy systems that have never been searched or never had technologies adapted to them.

Today we have gotten a lot better at it. We don't need to restore an exchange backup server and take a week to

create the environment to restore that served in order to search for an e-mail. We can search across the compressed files if they're on the right backup tapes in the right format, with the right version of exchange. So we have some technologies that have enabled us, but by no means is it comprehensive.

PROFESSOR MARCUS: Would you regard that as reasonably accessible information?

MR. REGARD: If it was the right version?

PROFESSOR MARCUS: If you could do what you just said.

MR. REGARD: I'd like to address the issue of reasonably accessible.

JUDGE SCHEINDLIN: And I apologize.

MR. REGARD: Not at all. And I'm glad you brought that up, Your Honor, because that is one of the primary issues I would like to discuss.

JUDGE SCHEINDLIN: Okay.

MR. REGARD: I have looked over my own notes and had anticipated reading my notes, and they're quite lengthy, and I won't subject the committee to this today or the people who are waiting to travel or to speak. However, I will summarize quickly.

I'm a technologist first; I'm a lawyer second. I don't practice law. I practice consulting, and have done so for

about 20 years.

My perspective on the technologies is that they are extremely complex. And while we are making progress -- progress, such as with the searching of backup tapes with some companies and some technologies, just as other companies tell us they have improved their linguistic searching capability or their neuronetwork searching capability, these are not panaceas, and the technology is not solving the problems as quickly as it is creating the problems.

Arthur C. Clark once said, "Once a technology is sufficiently complex it appears as magic to us," and we all take advantage of magical technologies every day. I know that I for one don't know how my cell phone works, but I wouldn't want to be without it. So we need to bear that in mind.

We have these very complex, almost magical systems that we're trying to grapple with.

JUDGE FITZWATER: Mr. Regard, I have a question that really came to me when this process began sometime ago. Are we talking to the right people and is this process of holding hearings, where we hear primarily from lawyers, a sufficient process for this committee to understand this issue?

As you know, we've had people referring to the tech --

I'm not a techie, the IT people know it. Just -- just as quick an answer as you can give: Is this process sufficient or do we need to have pure technical people talking to us?

MR. REGARD: I think the process has been sufficient. I think that, number one, the attorneys -- the members of the bar that I've had the privilege of listening to today and reading in the literature, have been very attune into the technical aspects.

I think that there are individuals, such as myself, who have stepped forward to speak out. I wish there were more of us. But some people tend to prefer a neutral stance rather than stating out their position. But the public hearings have been very helpful, I think. And certain organizations, such as Pike and Fisher, who have been publishing a lot of opinions and articles have certainly helped in this area. I encourage the committee to familiarize yourself, to the extent you haven't, with the articles there.

JUDGE ROSENTHAL: Mr. Regard, --

MR. REGARD: Yes.

JUDGE ROSENTHAL: -- let me, since time is short -- your criticism of the two-tier structure in your written proposal suggests that the aspect of the burden of inaccessible data can be addressed under the existing rule under the proportionality factors of burden in

26(b)(2)(iii).

My question to you is: If, as others have commented, for whatever reason, litigants and judges are not applying the burden factor, the proportionality factors that are in the rule now with sufficient efficacy, is there a way to address the unique features of electronic data in a way that will facilitate the application of the proportionality factors?

MR. REGARD: I'm glad you raised that, and I did submit some preliminary comments that indicated that position. I've had the opportunity to look over the language more. I am not in the business of crafting legal language, that's not my expertise.

My position is more so with the term reasonably accessible than it is with the two-tier system. And what I would like to say today is an expansion of the committee's thought on what reasonably accessible may or may not mean, would be more important to me, in my experience, combined with a support of the two-tier system, and it's the following.

Summarized very succinctly, reasonably accessible has been talked about mostly as backup tapes versus live data, and it needs to be expanded, perhaps in the notes, to be a more encompassing definition that includes data that may be live data on active magnetic systems but is nevertheless not

reasonably accessible.

JUDGE SCHEINDLIN: Why? Why isn't it reasonably accessible?

MR. REGARD: That's an excellent question. It may not be reasonably accessible because with my experience of databases we have not tens of hundreds but thousands of tables of data that are quickly being generated, or purged, not all of them. Of thousands of tables in a database every individual table may have its own life cycle determined by the needs of the system that created it.

JUDGE SCHEINDLIN: What makes it inaccessible there is a short temporal life?

MR. REGARD: You may have a short temporal life. You may also not have the tools in the company that is using the database to access those temporal tables.

The example of the corner gas station, where you buy your gas at the pump and you leave, yes, that's a -- that's a magnetic transaction. There is a data trail there. But what is the gas station on the corners capability to transfer those transactions, collect them and deliver them in litigation?

Almost zero. They have no control over that equipment. No access to those tables. They don't interfere with the telephone transmissions of the data. You, in fact, have to go to another organization somewhere else in the

world to get those transactions.

JUDGE SCHEINDLIN: Are you moving -- suggesting that we move more towards a standard that would say it is reasonable -- it is not reasonably accessible if the producing party would have to take extraordinary steps or engage in extraordinary effort outside the ordinary course of its business to produce it?

MR. REGARD: That is the direction that I'm thinking. Yes, Your Honor.

I refer to the Sedonna principles, principle number 8? Which talks -- for this I will read -- ask your indulgence to read, "The primary source of electronic data in documents for production should be active data and information purposefully stored in a manner that anticipates future business use and permits efficient searching and retrieval."

I won't read the rest of it, but it's in the same vein. There was a lot of data that my clients, that users of technology create, leave behind, that they may never be aware of or never have access to under the normal operating conditions of the software applications that they use. This goes not only to databases and to backup tapes, it also goes to metadata and to other what I call the technological grease that keeps the wheels of our applications of our operating systems moving.

JUDGE SCHEINDLIN: Let's just stick with metadata

for a moment.

MR. REGARD: Yes.

JUDGE SCHEINDLIN: What's inaccessible about that?

Other than the fact that you're not viewing it on the screen and so the user isn't using it daily in their business, but it's hardly inaccessible to retrieve. It's no big deal to pull up the metadata.

MR. REGARD: Well, it -- that's not necessarily true. There is some metadata that we are familiar with and we become more familiar with in litigation. There's a lot of metadata that we're not familiar with more and the --

JUDGE SCHEINDLIN: Let's stick with the stuff that you are familiar with and you access easily. Why should it suddenly go over to the inaccessible category if it's easily accessed?

MR. REGARD: I'm not trying to suggest that all metadata would classify as inaccessible.

JUDGE SCHEINDLIN: Okay. All right. Then how would you define the cutoff?

It's not just the business use. It's how easy it is to retrieve, right?

MR. REGARD: It's the ease of retrievability.

And -- and one measure might be to question whether the person who is creating and using the data has themselves the

ability to retrieve these hidden, arcane or --

JUDGE SCHEINDLIN: Well, why should it turn on the ignorance of an individual user, be it a lawyer or a secretary, who cares?

If it can be easily retrieved by the IT department, just easy, then it should be produced if it contains relevant evidence, shouldn't it?

MR. REGARD: I would agree with that.

JUDGE SCHEINDLIN: Oh, okay. So how are we going define this cut?

I have a little trouble coming up -- see I like the conversation, which nobody else has time to listen to, I understand, but how are we going to get there?

Where's the line?

MR. REGARD: I haven't come up with language to suggest to the committee.

JUDGE SCHEINDLIN: If you want to submit future comments you can.

MR. REGARD: I would like to submit my written comments, no today, but at a point in the near future.

JUDGE ROSENTHAL: Is it fair to say you want us to move toward a functional description that is not as tied to current technology, such as, backup tapes, as the notes may presently suggest?

MR. REGARD: Absolutely.

MR. GIRARD: Can I ask you a follow-up question? And that would be: The flip side of that is if that happens the areas that are not accessible are going to have to be identified in some way, do you see a problem with that?

In other words, it would be -- the range of potentially difficult areas to access in the area that you describe, it seems to me, to be fairly complex and open-ended in a way that goes beyond what we've been looking at in the context of backup tapes, for example.

Do you think that could ultimately put more burden on the producing party to define those areas that have not been -- that are not accessible?

MR. REGARD: I think if you ask a producing party to make a laundry list of everything that was not accessible, that's the equivalent of asking them to be aware in advance of all the areas where data is actually being created and used, and I don't know if that's necessarily possible. That's part of the problem.

When you -- when you purchase applications, a lot of activity goes on underneath the surface that you don't need to know about, but may in an arcane or very narrow circumstance become -- become necessary to retrieve.

And systems can be changed. The data can be retrieved, but only with extraordinary efforts.

JUDGE SCHEINDLIN: Yeah, but that -- but that's the most dangerous, because that's going to change as technology changes. If we write a note that is too specific and says that something is not easily retrievable, in a month there will be a new invention and it will become easily retrievable. So we don't want to maybe be too specific in listing things that are not easily retrievable, because they will be.

MR. REGARD: I agree. That's why I say we should not have a laundry list.

I'm sorry if I misspoke that. No, I agree with that.

JUDGE RUSSELL: I thought you said put a laundry list.

MR. REGARD: No. I'm not for a laundry list. That would be a poor thing to do.

PROFESSOR MARCUS: You mentioned databases and several other people have also. There is a proposal regarding the definition of -- a description of what's discoverable under Rule 34 that treats electronically stored information as a sort of co-equal with something called document. I'm interested in hearing from you on how discovery is done with regard to databases.

Are they somehow ever produced in whole?

Are they accessed by the other side? Or in some other way do they generate the information obtained through

discovery?

MR. REGARD: I've seen database production handled in a manner -- in a number of fashions, including the two you have just mentioned, where they have been produced in their entirety and where they have been produced as an on-site visit or inspection, if you will.

Largely the production of databases requires one to acknowledge that they contain many thousand -- maybe tens, hundreds or thousands of pieces, each of which may need to be addressed.

So typically it starts with a 40,000 foot view of what does the database contain in terms of the tables, how are those tables structured, which tables are important, what do they contain, which other tables do they require to be interconnected to, and then how will we extract that data, will it be through a report, will it be through a custom written program, will it be through a native capability of the database to export or will it be the native file, which would require the receiving partner -- party to have the native application to read the native file. I've worked with all conditions.

The problem is databases have so many constituent parts and you need to look at the various parts independently. I worked on a case recently where an organization had a database and the judge said, which would seem reasonably --

reasonable, please produce that database, and, by the way, do so quickly. The problem was that the database was really more of a platform than a single application. And the company was using this platform, which was a database environment, to actually house over 400 different types of database applications together.

So where they had the software update rules, which was the crux of the litigation, they also had the EEOC hot line complaints and the customer returns, and a lot of information that was tangential, unrelated, or subject to trade secret or other types of privilege.

By producing all of it at the same time, it opened up a whole other host of problems, and the logistical problems of producing it, which meant that service had to be created, data needed to be migrated, special software needed to be written to facilitate the exportation. The export was done wrong, then it had to be redone. And it just took time was another issue that came up in the case.

So thinking of databases as a single entity is where we need to start not thinking. They are not a single thing. They contain many parts and those parts all have different rules of data retention and they have different values to a particular litigation.

JUDGE SCHEINDLIN: These databases that are short-lived and dynamic, could anybody really think of them

as a "document," as we used the word in the past?

MR. REGARD: I would not. No.

JUDGE SCHEINDLIN: Is "electronically stored information" a good word or would you agree with an earlier speaker that that doesn't capture it?

MR. REGARD: I like "electronically stored information."

One of the things that you should know, the playground snickering going on behind the committee's back of technologists is we know that e-mail is a database. It's mostly stored as a database.

JUDGE ROSENTHAL: You think we don't know that?

MR. REGARD: And that even though we think of e-mails, because they are transmitted under smt format, as a single atomic unit, aren't really stored in our corporate systems as a single unit. They are broken up into pieces, the pieces are organized into tables, and then that is reassembled to look like a single unit when you ask to look at an e-mail.

So we, the technologists, feel that we are not even addressing the databases that we're familiar with as databases. We're still thinking of them in a paper paradigm of discrete atomic components, when they are not.

PROFESSOR MARCUS: Can I just make sure I was understand what you were saying about databases?

Would it be fair to say that there might be an advantage to separating out or describing somewhat differently electronically stored information from documents, so as to focus with regard, for example, to databases on the need to fashion a discovery device that is less than everything and it's the information that is relevant being sought, not the entire database?

That could be what you were getting to.

MR. REGARD: Today, quickly, that comment sounds appropriate. I reserve the right to reflect upon it. Electronically stored information would be more appropriate to describe databases than documents. Absolutely.

JUDGE ROSENTHAL: Just to follow up on what Professor Marcus just said, it also might affect the former production greatly. You're not really going to be printing out, as we think of it, it's not even printable in that sense, the database. You really have to either view it or have the applications to work with it in a different way, so it affects the production, too.

MR. REGARD: It affects the production greatly.

JUDGE ROSENTHAL: Greatly.

MR. REGARD: When you view the data in a database you're only viewing what the software has been designed to allow you to view from that user's perspective.

JUDGE ROSENTHAL: So it's really different from

"document" in that sense, too.

MR. REGARD: Vastly different.

JUDGE HECHT: From the point of view of the spectator, it looks like one of the reasons for a different disaster recovery system might have been limited readily accessible storage in the first place. Maybe -- maybe two systems for more mechanical reasons rather than users. But we had the example earlier where the CEO says I can't find this e-mail and I go back and look on the backup tape to find it, which is not really the purpose of the backup tape but you can do, and do that.

Is there -- do you think that pressure will make it such that what's readily accessible and what's not will -- that distinction will begin to lose meaning, because even disaster recovery will be readily accessible?

MR. REGARD: I think -- I think if we maintain readily accessible as a paradigm between backup tapes and live data, that will go away, and we will find that companies rely on live storage for disaster recovery purposes much more than that of tape.

JUDGE HECHT: How soon -- is that --

MR. REGARD: Oh, I don't know how quickly that is going to happen. One of the things I have found in my research that does concern me is that we have, under one estimate, in 2002 thirteen terabytes -- 13,000 terabytes of

storage media sold. That's expected by 2008 to grow to 15 million terabytes of media in storage capability.

JUDGE ROSENTHAL: Mr. Regard, if I understood your earlier comment, your -- the conclusion that you would draw from the likelihood that backup tapes will in the future move from the inaccessible to the reasonably accessible category doesn't mean that the two-tier distinction is without justification, but because there will still be a lot of information that for the producing party in a given case, under a functional description of reasonably or readily accessible, is not going to be in that category?

MR. REGARD: Yes. But I want to make sure that -- I'm not just saying -- it's not just the volume that makes it reasonably --

JUDGE ROSENTHAL: Oh, I understand.

MR. REGARD: -- accessible.

JUDGE ROSENTHAL: I understand.

MR. REGARD: It's the manner in which it's stored, the tools we have to access, the purpose for which it was created, and the extent to which we readily understand it.

Going to Professor Marcus's issue though on databases helps me transition very quickly to the safe harbor, which I also support and I will sum up in 30 seconds.

JUDGE ROSENTHAL: Good for you.

MR. REGARD: And that is under the safe harbor system we have data -- we need to expand our knowledge beyond just e-mails. And these databases is a key area where we have systems in place that collect, summarize, and dispose of data behind the scenes that the purchasers and operators of software many times don't see or interfere with.

So when we think of the safe harbor taken in the context of complex systems, the data can be extracted eventually, given enough time to plan and special program and extract, but there is almost always going to be data lost while we plan and scope the problem. And we need to think of it in that context. And for that reason I am very much in favor of the safe harbor.

Thank you. Thank the committee.

JUDGE ROSENTHAL: Thank you, Mr. Regard.

Mr. Pope.

MR. POPE: Thank you, Your Honor.

My name is Mike Pope. I'm a trial lawyer from Chicago. I'm not here speaking on behalf of clients or professional organizations. Although I have devoted a major portion of my career to being involved in professional organizations. Most recently I was president of the Seventh Circuit Bar Association, and proud to say I was able to persuade Judge Higgenbotham to come up and talk to us. I've

also been president of the -- of Lawyers for Civil Justice and the International Association of Defense Counsel.

I spent a lot of my time in those organizations trying to figure how can we make the civil justice system better. From that context I certainly come to applaud you for the work you've done and to support the proposed amendments.

One of the things that I focus on a lot is how we are supposed to act as lawyers in terms of explaining to the public, or to in many cases my clients, what's going on, how does the court system work, and is it really rational. And I think therefore a clear understanding by the public of how procedural rules are going to operate is very important. And thus, I think these amendments help. They bring clarification to a very confusing and difficult area of the law in terms of electronic information.

And to the extent there's any question about need, I would support what Steve Morrison said, and I can assure you from my own experience, there is a tremendous amount of confusion and concern. And even among very sophisticated clients as to what really is going on, what is their duty to preserve information. Not so much when does it start but what is their actual job, what do they have to do.

When I first looked at this I -- I said -- this is one of those experiences where you say, wow, this is something really going on here. This is a real trap for the unwary.

And then I looked more closely, and I don't want to sound tripe, but it sounds like it is a trap for the wary as well because, there are no answers absent these rules and these proposed rules. So I think that they bring clarification to the conflict and their adoption will in fact increase respect for the court system and the civil justice system.

I only would add a couple of things, you've heard a lot today. I support the two-tier approach and the safe harbor. The two-tier approach is what we have done all along in complex litigation. I've heard a lot of questions about what happens, what -- what do people ask for. One side asks for everything. The other side goes to their clients and the client says we can't produce that stuff, tell 'em no. And my job, usually, is being intermediary, being the professional, is to say, wait a minute, if you give me what we can produce, then I can sit down and negotiate why we can't produce the other things.

JUDGE SCHEINDLIN: Can --

MR. POPE: It seems to me your approach is very similar to what has been done traditionally.

PROFESSOR MARCUS: Mr. Pope, when you're at that point could you -- one of the features of 26(b)(2) as proposed is identification of inaccessible information. As part of your experience in dealing with these cases, do you provide some information about what it is you're not

producing?

MR. POPE: Absolutely. And why.

I think -- I -- well, I don't live in the same world as some of the lawyers I heard here talk. Mr. Gardner, for example, made it sound like all the lawyers on the other side are all black hearts. I think my job is to sit with my colleague on the other side of the case, whether it's plaintiff or defendant doesn't really matter, and explain to them what we are doing, why we are doing it, and try to get buy-in from the other side as to why that's a legitimate approach.

It seems to me one of the reasons why the two-tiered approach that is in the proposed amendments makes so much sense is that most of everything that's ever used in cases would be within the area of reasonably accessible. So, sure, you want to say we can't do this and I'd like to explain to you why we can't do that, because it doesn't exist in any capacity we can search, and we can't go get anymore. But there normally is a way to go about that, by negotiation. But you have to establish your credibility, certainly, in that regard, and explain why we can't produce something. And then the ball goes back to the other side to say where do you want to go from here.

PROFESSOR COOPER: Do you do the same for paper discovery as you're --

MR. POPE: That's what I'm saying, professor. What I see as good about your proposal is that it builds on the experience many experienced lawyers have had in focusing on what is accessible first, before we had electronic discovery. Now, before we had electronic discovery, discovery was too expensive. It's getting more so.

But the concept of dealing with what you can get your arms around first and producing that and seeing if that isn't enough is a very traditional approach in complex litigation. And in my experience, you hardly ever need to go beyond that, if you're being serious.

One thing I come back to at the end is whether cost shifting should play some kind of a role in that.

But in my personal experience the notion of not readily accessible information playing any major role in cases is almost nill. So that argument, plus the notion that if backup tapes -- as I have been told over and over again, by highly paid professionals, tell me it's almost impossible to search on any practical basis, the notion that we spend so much time worrying about those, instead of focusing on what we can produce because it's readily accessible, it seems to me that's the way we should do it, and that's what you've done.

JUDGE ROSENTHAL: Mr. Pope, as a segue into the safe harbor, which I understand you want to talk about

briefly as well, one of the concerns that we've been dealing with is what you do with the material that is not reasonably accessible while you are examining what is produced as reasonably accessible and determining whether it adequately meets the needs of the litigation, and that's the question of the obligation to preserve what might not be reasonably accessible.

Do you believe that there is a problem in the relationship of the safe harbor proposal and the two-tier proposal or do you believe that it is sufficiently clear in the relationship of those two proposals as to when there might be an obligation to preserve something that is not reasonably accessible?

MR. POPE: Well, I think, judge, that's what the "good cause shown" language is supposed to provide, the flexibility to work in that area. I think once the parties have sat down and said here's what we think is reasonably accessible -- and remember, judges always forget, the lawyers have to learn first what the facts are before that meeting takes place, less we fear you misstate things inadvertently.

But I think that's an area that is not crystal clear right now but that the obvious import of having a safe harbor is that we'll get back to our regular recycling of unaccessible information or backup tapes, anyway, and

therefore that -- my experience is it usually is the party that has the most data that is pushing to have this meeting, so we can seek clarification, we can reach agreement or seek a court order saying here's what we can do and therefore we understand -- both sides understand that that means what you can't do can in fact be destroyed or recycled, as the case may be.

I think what we need is clarification. As I said for the purposes of the rules certainly the safe harbor is intended to provide some clarification for parties so they know what they can do, whether it's reasonable standard -- the only problem I would have with that is we've been trying cases now for about 225 years on the question of what was a reasonable person standard. I don't know whether we've written that much clarification by simply using reasonableness as opposed to something more like intentional or willful, but I leave that to your deliberations. I know you've wrestled with that quite a bit.

The one thing I would add though is if you want us to sit with the other -- with our colleagues and come back to you with agreed orders on some of these things, in my world the -- the -- the wall is divided in two parts. There are cases where both parties have a lot of data and documents. And your experience I'm sure is in those cases they work out agreements very well, mutually assured destruction exists,

no problem, let's find a way to make this work. The real problem comes in the other areas, the area where it's a class action, consumer class action, almost no documents against a big company that has a whole bunch of documents. The one thing I would suggest to you is you consider further the question of cost shifting of -- for not readily accessible information, to see whether that would provide some incentive to allow those negotiations to make more sense.

JUDGE SCHEINDLIN: Again, would you seek mandatory cost shifting or discretionary --

MR. POPE: No. I would say discretionary would be sufficient. I think -- I certainly am not trying to suggest the District Court shouldn't conintue to play a role and have discretion to make these decisions.

But the trouble really is If I'm sitting against the most -- the best lawyer on the other side, who is a plaintiff's class action lawyer, they have no incentive to take anything other than everything. They're worried about embarrassment. If something later comes out why didn't you get it all, you know, there's other implications. And I suggest by having cost shifting as a role here there is an incentive to make this more reasonable.

JUDGE SCHEINDLIN: Of course that -- but that is sort of there now. It says the court may order the second

tier on terms and conditions. Then in the notes terms and conditions includes -- includes caution. So it's there if you want --

MR. POPE: Your Honor, I know that if you look carefully you can see it. I just question whether it's clear enough that is your intent. And maybe if it's clear enough in the note to be your intent, then we won't have a problem with it in the future, but I just didn't know for sure whether, when I read that it, that was your intent that cost shifting could be a factor the District Court could apply.

JUDGE SCHEINDLIN: Oh, yeah.

MR. POPE: I would say it should be clearer, because otherwise -- if it's an incentive it ought to be clear to the other -- the lawyer that, you know, if you're asking for this stuff, you know, you may have to contribute to it.

JUDGE SCHEINDLIN: You may have to.

MR. POPE: But as long as the judge can make that ruling, then you and I are in agreement.

Okay. Thank you very much. I don't want to rush through, with the lunch hanging over everybody's head, but I do really appreciate the work that you have done. And you are -- the rules -- the proposed rules, if you adopt without any changes right now, we would be so much further ahead in

terms of allowing people to have a sense of what's going on in this very difficult area of the law.

Thank you.

JUDGE ROSENTHAL: Thank you, Mr. Pope.

Ms. Owens.

MS. OWENS: You heard from a reformed trial lawyer earlier today. I'll still somewhat unreformed, and I am the head of a products liability practice group at Austin, a firm based in several cities. I practice out of Atlanta, Georgia, with that firm. Our practice group actually is the most active group within our firm in terms of trying cases.

In December, for example -- our small group is about eight partners and among those eight partners we had three cases on trial calendars: One was mine, and it went instead to arbitration; and one was specially set, but was delayed and is being tried this week; and the third was also specially set but was delayed to some other day. So we are pretty frequently in the courtroom among the members of our practice group and pretty frequently involved in discovery, both the old-fashioned paper version and electronic today.

I'm not here though, I should hasten to say, on behalf of my firm or any particular group or any particular client, but I'm here as an individual lawyer who has been engaged in litigation for about 20 years.

I do think though that the groups which I belong and

the trial lawyers with whom I worked with on both sides of the fence would join me in expressing gratitude to you for the time you put in. I saw firsthand the work that you put in at Fordham, and I read that you've been working on this for about five years. I think we're all profoundly grateful for the time you're putting in and also just the level of thought, the depth you're putting into this analysis.

If you were at Fordham you heard me talk about killing a Copperhead by running it over with a Volvo S70 eight times. And I used that at Fordham as an example of use of excessive force, or a situation of undue leverage, where one party has a lot of information to produce and is on the heavy side of the producing end and the other party is primarily on the requesting side with much less to produce.

And I listened at Fordham to an advocate on behalf of requesting parties use the phrase "We have --" speaking of plaintiffs, "-- weapons of mass discovery," talking about discovery in the electronic discovery as not an investigatory tool but as a weapon. And that really reinforces the concept I've thought about, about the excess use of force that can happen without amendments to the rules that have been proposed. So I am here favoring effective amendments to the rules and would like to particularly address the inaccessible data concepts and also the safe harbor provisions.

So today I'll talk about the Copperhead from a new perspective, and that is that the Copperhead didn't know what to expect when it ventured into my driveway. It faced three different sets of circumstances: It faced my foot in a Brooks running shoe; it faced the Volvo; and it faced a very large stick. And that unpredictable set of circumstances, while different in the courtroom, is what both plaintiffs and defendants may face today.

Most now are becoming familiar with the concepts. And most of the clients we represent, the people we hear from are familiar with, for example, the Zubulake decision. Someone said at the ABA meeting last week, "It rocked our world." Some of us might have seen it coming, given it was the fifth in a row of Zubulake decisions. But it was an interesting concept. And in thinking about that world though, our world is not just the Southern District of New York. It's the Southern District of Georgia. It's Colorado, where very recently our firm had a judge enter an order limiting the e-mails that were sought for production by opposing counsel, and equating e-mails today to the telephone conversations of yesterday, essentially the chatter Judge Rosenthal has mentioned. In different courts we would have faced obviously different orders and some judges would have allowed broader discovery today of the e-mails that were sought. And so we do have some issues of

predictability in the litigation that we face today.

You know, some courts, including in Zubulake, have offered to litigants some applicable rules that we can use to begin to get a handle on the production that is sought.

What we're hearing, and what I hear directly from companies today, is that those rules may be harder to apply in more complex litigation and in litigation where it's harder to reach an agreement about, for example, who are the key witnesses, who are the key employees, and also where it's more difficult to know what is particularly on those backup tapes that are currently in storage for the company.

You've heard some about large corporations and the problems that they face. I'll offer to you today an example from a smaller company, based in Atlanta, not one I personally represent but one that shared with me its experiences in the electronic evidence world. That company has told me that it had to restore a hundred backup tapes in order to capture about eight months of data. And I brought some notes with me.

They were unable they say to reduce the number of backup tapes because they had three different servers that were used and those servers were often rebalanced. And because of that rebalancing the practical result was that they ended up with different individuals on different servers at different times. And so even to go after a key

group of individuals, they nevertheless had to include one hundred backup tapes. Cost to restore was $450 a tape for them, and so that cost was $45,000. That company, by the way, because of some previous experiences in litigation, does no recycling of backup tapes today.

The same company simultaneously faces a very large class action. And in that class action so far plaintiff's counsel has not agreed to -- and hasn't gone to the court yet, but plaintiff's counsel hasn't agreed to any restrictions on the time periods or the custodians or the subject matter of the discovery material that is sought. They are seeking everything from every business unit in the company, currently. And with that the company faces the prospect of having to restore several hundred backup tapes and the cost of attorney review of those tapes.

They have got over 1800 tapes for the year 2004 alone. And they have actually a cost of $350 a tape to restore those tapes, so that gets them to around $840,600 in potential cost. The current cost, by the way, for that company to save its backup tapes, just to save, the storage part of it, not the retrieval and processing part of it, is a $100,000 a year.

Putting it in perspective, looking at the over 1800 backup tapes that they have, they believe that those will hold, based on some of the technical analysis we have heard

that I won't engage in, about 266 million documents. Assume that 5 percent of those documents may be privileged and require a more detailed privilege review, they have 13.3 million documents for privilege review at one minute of document, at which I don't pretend I could do, but at one minute a document for privilege review, that would be 221,660 hours, and you can multiply that by attorney fees and it leads to quite a significant number. Now, those are big numbers. I trust that that company will not ultimately have to engage in discovery of all of those backup tapes for a single year. But they certainly get us into the concept very quickly of why sampling is really important and why that concept is important in the comments that are included in the rules, and also why the concept of inaccessible data and cost sharing becomes very important.

I know that some have raised the concern related to inaccessible data that -- that companies will abuse the inaccessible data concept by transferring data into inaccessible formats so that it will become inaccessible. My view really is that the very act of capturing the data off of the active system and transferring it into inaccessible data is in itself access to the data.

I note that the comments that are already written state that if the responding party has actually accessed requested information it may not rely on this rule as an excuse for

providing the discovery, even if it incurred substantial expense in accessing the information.

So it seems to me that to convert from active use into an inaccessible form of storage in some intentional action of trying to avoid discovery could be viewed as access to the data by the courts. So the issue may already be addressed by the existing comments, but to the extent that it's not, I agree with some of the comments that have been made before, that corporations today are not in the business of rendering their business information inaccessible. They are investing a lot of corporate dollars into figuring out better means of having access to their data, and they make those investments for business reasons, not for legal reasons.

And I also would advocate developing these rules from a good faith premise and not from an expectation or presumption of wrongful conduct that certainly could be sanctioned by the courts if it occurs.

I also heard some comment that companies should make -- or be required by the rules to make more of a showing that there was a business purpose for the inaccessible data. And it struck me as that comment was made that that is really not necessary.

I think that the committee has before it enough information about the need for disaster recovery systems and

why those are important to companies that when companies have backup tapes or storage of inaccessible data the business purpose of that storage is generally evident. And there might be slight variations on the theme of why one company would need a disaster recovery system, versus why another company would have that need, or why one company would be having backup tapes --

JUDGE SCHEINDLIN: Should we define this by the business purpose or by the ease of retrieval?

In other words, if this backup system is easily retrieved and easily searched, is it off elements so to speak in the first tier merely because it was designed to be a disaster recovery system, even if it's easily retrieved?

Again it's that line drawn. What do you advice us?

MS. OWENS: Well, my point is that you should stick with your concept of inaccessible data, without requiring a different level of proof that there's a business purpose for having the inaccessible data.

JUDGE SCHEINDLIN: You would stay away from business purposes and you would talk about ease of retrieval?

MS. OWENS: I hear the committee struggling with how we define inaccessible data --

JUDGE SCHEINDLIN: Yes. I'm asking you.

MS. OWENS: -- and so I have given that some

thought, and I've wanted to say off-the-cuff that it's inaccessible if you have to pay somebody to go retrieve it for you. I'll offer the Regard rule. If my client needs somebody like Dan to get it, then maybe it's inaccessible. I think of it --

JUDGE SCHEINDLIN: Then that would be ease of retrieval and not business purpose.

MS. OWENS: Yes, it would be ease of retrieval --

JUDGE SCHEINDLIN: All right.

MS. OWENS: -- but I think that actually the best definition would be to look at whether this is information that a party can access using the systems that it routinely uses in the ordinary course of business. If the company had access to the information using systems that are employed in the ordinary course of business, then that information is accessible.

JUDGE SCHEINDLIN: And if technology will permit that to be done with backup tapes five years from now then they would all cross into the accessible.

MS. OWENS: Well, the reason I'm thinking about that definition is because I think it does allow for advances in technology that might work on both sides.

Technology may cause more information to become even more inaccessible. It may also cause retrievability to be enhanced and more cost effective in the future. I think

that the more simple that language is, actually, the better.

JUDGE ROSENTHAL: Did you want to take a few minutes to talk about the safe harbor as well?

MS. OWENS: I would like to. And I will include in my written comments some concerns about the identification concept.

The comments right now say what would be required in terms of identification might differ with the circumstances. You know, we want to understand what the obligations are and -- and have some predictability there I think, and so I'll express further my concerns about that in my written comments.

I'll also mention that in terms of cost shifting, I understand cost shifting is in the comments, and I know the people in this room read the comments, but I'm sorry to tell you not everybody reads the comments. And so something that -- that is actually stated in the rules, and I would advocate a presumption of cost shifting, be incorporated.

You're tiptoeing around it a bit by leaving it in the comments, I suppose. Perhaps not tiptoeing, but if it's there --

JUDGE SCHEINDLIN: What would be the presumption you would propose?

If it's the second tier presumably requesting party pays?

MS. OWENS: I would propose that the presumption -- that it be not mandatory cost shifting, in other words, but that for inaccessible data there be a presumption.

JUDGE SCHEINDLIN: That the requesting party will pay?

MS. OWENS: Yes.

JUDGE SCHEINDLIN: Which the requesting party could then rebut?

MS. OWENS: Exactly. And I'll offer a brief comment on Texas, that things do seem to be working as far as I hear justice is still being done in the state, and I think that cost shifting can work as a benefit on -- on both sides and as an incentive to the requesting party to exercise some limits in what is requested.

My point about safe harbor is that anyone who deals on the producing side deals with some anxiety today in terms of meeting the obligations that are there under the rules. And some of that anxiety began to develop when the Lennon case in state court came out a few years ago and a company was sanctioned for recycling backup tapes for a four month period of time in the Fen/Phen litigation and that anxiety has continued for me since I read that case.

I noted in some of the comments that were written a concept that litigants and lawyers live with the problems

that are existing right now and so the plea for the safe harbor is really a plea to be able to sleep at night. It's a plea for in-house counsel to be able to -- to rest assured that if they're acting in good faith and putting in place appropriate litigation holds that they're not going to be sanctioned for what happened as a result of the routine operations of their systems.

I think about in-house counsel who receives by fax from CT Corporation the copy of the complaint on his or her desk and they have gone to get a cup of coffee and they come back and what if it is the day that the e-mail system is being purged. What if something is changing on their database at that -- at that time.

We have companies ask us, how quickly do we need to impose litigation hold. Do we have a week, a month. Do we have two hours. You know, what are those rules. So there is a lot of anxiety there related to the safe harbor.

On the concept of whether it should operate based on principle of negligence or willfulness, I'm a products liability lawyer, trust me, almost everything can be alleged to be negligence. We need something that's a little bit stronger there in terms of -- of willfulness.

In my mind, given my personal experience with negligence obligations --

JUDGE SCHEINDLIN: Would you be satisfied with the

suggestion that depending on the level of sanction the level of culpability needs to be raised but there may be a certain type of sanction, like simply shifting cost of certain depositions or whatever, that wouldn't require the higher level of culpability, the range of sanctions would go with the range of culpability?

MS. OWENS: I'm comfortable and agree with the concept of a range of sanctions. I also agree with Steve Morrison's comment that adverse inference to a lawyer is essentially a death sentence. And going back to the Lennon case, after the adverse sanction was given for the recycling of backup tapes in the Lennon case, that case settled.

We're looking for enhancing the likelihood that litigation can be resolved on the merits and not resolved based on discovery issues. And the safe harbor would help. And in my mind a safe harbor based on the broader principles of negligence, which can often and will be often alleged, will be an unsafe place to be.

JUDGE ROSENTHAL: We've heard some criticism or concern that the safe harbor would encourage prospective litigants to set their routine operation programs to operate on a kind of accelerated basis and that that would be a bad development. Do you want to comment on that?

MS. OWENS: Well, you know, right now there are companies that are almost scared to have those -- those

processes in place at all, like the company that -- that is not recycling any backup tapes.

So in my mind the rule does need to shift somewhat in a direction of greater level of comfort with utilizing systems, including disaster recovery systems and including e-mail deletion systems and routine systems in operation that are necessary, because ultimately, given the numbers that we're talking about, whether you're Exxon Mobil or at the much smaller company in Atlanta, Georgia, not only are defendants not going to be able to deal with the volume that's created, you know, plaintiffs are not going to be able to either.

So I'll close that -- that -- that with the changes that have been proposed, as I have addressed them, perhaps in the future we'll get to try a few more cases in federal court and -- and live in the more predictable world that the Copperhead thought that it was in when it ventured into my driveway.

Not unlike children, and perhaps snakes, it's my view that we all behave better when we know what to expect. And even the -- just the -- the actual occurrence of the publication and putting on the Internet the draft rules and the proposal that you have already put out I believe is beginning to make some positive changes in the right directions. People are beginning to get some better ideas

of best practices that they can employ.

And so those changes are -- are needed and I believe will be welcomed by the courts and by most litigants when they are hopefully adopted.

JUDGE ROSENTHAL: Thank you, Ms. Owens, very much.

Mr. Michalowicz.

MR. MICHALOWICZ: If you have to go to the cafeteria I recommend baked fish with cornbread. It's pretty good. My name is Jim Michalowicz. I'm actually a Washington Redskin fan. I was sent to Dallas by Callowitz (phonetic), and I had to drive on Tom Landry Boulevard to get here and that was pretty difficult. Thank you for sending me to Dallas, Peter.

Let me just explain who I am. Again, my name is Jim Michalowicz. I work with Tyco International, a little company of 260,000 employees. I would say a global company. Diversified products. Worked there for about a year. Prior to coming to Tyco I worked for DuPont for 12 years. I'm one of those nonattorneys that is a witness today, and I guess I come from a little bit different perspective. You've got a copy I think now of my -- my testimony.

You might look at this as a process and see where are the breakdowns in the current process and where can the rules actually help support improvements in the process. So

I think the first I would like to kind of just state though, I think is important, is what is the goal here. And I would like to say as an information management professional my focus is developing an efficient process in discovery that delivers an accurate and timely response to a defined discovery request. I think that's one of the issues I think I have right now.

And Professor Marcus, you brought up something about a road map. I'm going to tell you quite honestly, I don't think there is a road map right now. And frankly, there is a lot of people who are making money and taking advantage of the system because discovery really does not necessarily have a road map. This whole industry of electronic discovery grew out of that fact. There really is a lack of clarity. People are making money. We're talking about cost and expenses. Someone is making money off of this.

So what I'm going to look at trying to do again is looking for accuracy, timeliness, and making this efficient, and for all parties.

So the first thing I would like to just mention is I think there truly are seven steps in the discovery process. In a discussion about the early intervention, as far as the discussion I think there needs to be some framework. So I would just like to offer this to everyone.

I truly believe that there is the define stage, define

the scope of the request; identify the custodians and location of information; preserve; collect; index; and review; and produce. We try to do that at Tyco every time we have litigation, to go through the discovery road map.

PROFESSOR MARCUS: When you're at the identify stage of that road map, are you also identifying the places that it's too difficult to inquire? The inaccessible places?

MR. MICHALOWICZ: I would say we're looking for where the evidentiary materials are. If those can be in places that would be maybe considered inaccessible, possibly would go there. Possibly go there.

Is that the primary place we go?

Probably not. Because I truly believe, I think we discussed this again and again, the active area is generally where those evidentiary materials are going to be.

JUDGE ROSENTHAL: Based on that framework of looking at discovery generally, do you believe that, A, the amendments are -- amendments are necessary in this area, and B, do you have specific comments on the proposal?

MR. MICHALOWICZ: Yeah. Absolutely. I think the amendments I think support as far as that, you know, especially as far as the early part about that. There was an interesting question that was raised about the earliness in terms of is that something that the responding parties

urge. I would say absolutely yes. Because I think that definition of scope is so critical. If I look at where the breakdown is for the process, that's the root cause. I can tell you that most often that's the -- the electronic discovery has just exacerbated that issue. So in my mind, as far as the definition of scope -- and I would go ahead and say it's very similar to what we do as companies, what we call early case assessment. We go through the process, we try to see what the risk is, what the costs are associated with it. So we do that already kind of internally. I'm almost like saying let's interject that into the discovery, into the early conference as far as discovery is concerned.

Now, one thing I would just like to say though, I think it's important, is I don't think there's any improvement made to the document discovery process unless all parties agree that these breakdowns are defects to the process. I'm not sure that's true right now. I think there are some advantages to some parties that there are these breakdowns.

So, for instance, in my mind having this what I call unknown part of electronic discovery, how big is it, what's it called, what is defining the scope like that, that can be the advantage to a requesting party. It really could be, that unknown part. So I'm not necessarily sold on the fact that there's a commitment to these proposed rules

amendments, because is it to the advantage of all parties as far as that's concerned.

So in my mind I think the proposed amendments, the 16 -- let me get this right -- 16 and 26 can truly support I think the more efficient process than what we're trying to get to.

One other part I would like just to kind of mention though, as far as the other options I think might be available, I know this gets a little bit away from the rules, but I think that formal production, I think there's something a little confused about this, about the ordinary course. It sounds like the native files, what's kept in the ordinary course, sounds like the easiest thing to do as far as the exchange of evidentiary materials. However, that's not the ordinary course of how we've done traditionally production. So that's one thing that gets me a little concerned sometimes. Sometimes we move to ordinary course the way it's maintained as being the ordinary course that we'll produce it. And they truly are in different kind of formats. And what we're used to is an identification system, an indexing system, so when we have this exchange we can go ahead and go back and forth. I don't think that the technology is really supporting the native file production. So I just want to make a note of that.

However, I think that one thing that can be viewed as

an option sometimes, it should be more, and this may sound very hypocritical somewhat of the litigation process, is we can share an on-line depository sometimes of discovery materials. And I'm surprised sometimes that's not encouraged more. It does help with the efficiency, the timeliness, and I think the accuracy, to view that as an option, to say that the discovery materials can be put on an on-line repository. My feeling is I know my role. I don't win cases. I can help the process as far as discovery manager. I don't want records management to become the issue in the case. I really don't. So I look for ways again help to facilitate as far as that exchange.

The one other thing that I would like to just go ahead and caution, and I know, Judge Scheindlin, you and I might disagree on this, is the accessible and the inaccessible. Because I think -- I think it could be a good rule change, I can support it. It's just that those in the information and records management field don't look at data that way. They don't look at information that way. So I see one of my jobs at Tyco is being a multilinguist. I'm a translator. I work with the IT department, I work with businesses. And what I try to do is to figure out how can I translate now what is -- when we're looking for materials that could be evidentiary materials and break it down to accessible or inaccessible. It's just not the way I go after it right

now. So I try to figure out -- I know what the purpose is I think of doing that, but I usually look at it as active, I looked at archived, and I look at backup data, usually. And I usually see, therefore, that backup data is what we already talked about as disaster recovery. I would caution, however, archived data and backup data is not the same. I think we just have to be real, real careful about that. It could very well be that archived data is accessible data and also that companies have made a conscious decision to archive it because it needs to be retained for regulatory requirements.

JUDGE SCHEINDLIN: But then is it in the first tier?

MR. MICHALOWICZ: Yeah. It could be. And I think that's why I'm having the problem, Judge Scheindlin, is because one company might be viewing archiving as being truly a way to retain information knowledge assets --

JUDGE SCHEINDLIN: Right.

MR. MICHALOWICZ: -- and another company may view that as kind of like a cesspool, say it's not accessible, we don't need access to it, where another company might say, you know what, we've made a conscious effort to use the archive for retention purposes.

JUDGE SCHEINDLIN: I understand what you're saying, but I don't understand what you're suggesting. Do

you like the two-tier approach?

MR. MICHALOWICZ: No.

JUDGE SCHEINDLIN: What divide might you use?

MR. MICHALOWICZ: You know what, I don't have a good response. That's why I said I think what you have down there is probably the best.

PROFESSOR MARCUS: Sounds to me like what you're saying there is that the word archive as you've seen it used doesn't necessarily fall on either side.

MR. MICHALOWICZ: That's right. That's exactly right.

PROFESSOR MARCUS: So that reasonably accessible might be a way of focusing on what someone should really be thinking about?

MR. MICHALOWICZ: I think that's a way of looking at it. This concern about when we say accessible, inaccessible, what's going to start being put into those two categories is where I'm coming from. I guess from an IT and information records management, archiving doesn't necessarily fall into --

JUDGE SCHEINDLIN: What you're worrying about is the first court interpreting the new rule says the archived files are inaccessible, but in the next case they really are inaccessible because of the way --

MR. MICHALOWICZ: Yeah. And I'm worrying how we

as companies may confuse matters there.

So, in other words, if a company has made an investment in an archiving system, and there are smart archiving systems out there that say I need to retain, you know, for government reporting purposes, another company says, well, I've got that, it's called really inaccessible, I think it could get confusing and that one company could hurt from the other one who has actually made an investment into archiving, not because they're trying to say it's accessible or inaccessible, or there's an incentive to make it inaccessible, but because it's a good practice. It's a good practice. That's it.

So I guess one last comment would be as far as I think the safe harbor, I am supportive as far as that proposed amendment.

As one of the editors of the Sedonna principles I used this kind of interesting approach to say that there was a constitution and a bill of rights. And I think that companies have a responsibility to address what I call a life cycle as far as records information management and to address the status that goes from creation all the way through disposition. And if you do that, if you take the time to build that kind of program, you do get a bill of rights. And that right says, yeah, you can go ahead and dispose of that information, which is not needed for

business purposes, does not have a regulatory requirement to it or is not needed for regulatory materials. In addition, you can change and update your records management program, because of changing business needs, because of changing regulations.

And what Laura just said, there is that fear factor right now. Companies feel like they can't do it because disposition destruction is synonymous with exfoliation. That's the fear.

Is it a true fear?

I'm not sure. But I think there is that fear that exists right now.

So I believe that the safe harbor provision helps what I call the bill of rights. A company addresses this and says this is a routine operation, this is not information that's required because of purposes I talked about before, then there should be a safety as far as doing that.

JUDGE ROSENTHAL: Other questions?

Thank you very much.

MR. MICHALOWICZ: Thank you.

JUDGE ROSENTHAL: We appreciate your time.

Mr. Wilson. Good afternoon.

MR. WILSON: Good afternoon.

My name is Ian Wilson. Let me give you a little bit about my background so you can put my comments in

reference. I'm an attorney licensed to practice in the Commonwealth of Virginia. I started my legal career as a judicial clerk for one of the Supreme Court jurists and was in an active commercial litigation practice for about 13 years, where I learned firsthand some of the challenges of electronic discovery.

I also was on the founding team of a technology company this was built and developed and later sold to a multinational corporation. And in October of 2003 I took the position of CEO and chairman of Servient, Inc., which is a company that is developing technology to address electronic discovery and data manipulation issues.

When I litigated I learned when I was last on the docket it's always a good idea to be short. Given I'm last on the docket here --

JUDGE ROSENTHAL: No. No events have overtaken you. But you can still be short.

MR. WILSON: Okay. I would like to be short by addressing one point. I really came here to talk about the issue that -- that really has been talked about today, that is the reasonable accessibility standard setting a norm and how that will play out in the development of future technology and how will that work.

As lawyers we like to put things in compartments. And I think if you talk to a lot of lawyers that are reading the

cases that have come out, there are bright lines being drawn right now.

Backup tapes are inaccessible; archives, near-line storage, accessible. Where really the test though is the burden imposed in accessing the data. And very well the technology may develop, and may be in existence for certain types of backup material, that renders that data accessible.

So I think it's important that we realize that these decisions of reasonable accessibility will be determined in the context of discovery motions, which I learned as a young litigator, I never ran into a judge that liked a discovery motion. But I think it has a danger of really resulting in drawing to a bright-line test, because are we really going to take the time with -- unless we have clear guidance in the rules, to evaluate the reasonable accessibility of the data in a time of changing technology that's a difficult factual determination for a court to make. And it will be a constant changing and differed -- different by the data and the technical infrastructure of the company before the court that day.

JUDGE SCHEINDLIN: So are you saying you don't like that -- those words as the cutoff between tier one and tier two, there's a better cut up or there shouldn't be any cut up, there shouldn't be tier one and tier two?

MR. WILSON: I believe that with the current

state of the technology that reasonable accessibility is the best standard and I am a proponent of that standard.

The difficulty and danger, I believe, and I think it can be addressed in the comments, is that we cannot have that as a -- we cannot fall into a bright-line test of certain storage media.

JUDGE ROSENTHAL: So your bigger point, if you will, is that we can't frame these standards to much in terms of current technology and be limited to current technology, we have to use functional descriptions that will -- that will accommodate changes in technology?

MR. WILSON: That -- that -- that is correct. I think we already see it today in practice in talking with lawyers that are actively practicing today. A common conception today is that backup tapes are inaccessible, and you can see it if you read the decision in an analytical way. That's what a lawyer will pick up.

JUDGE SCHEINDLIN: Right now, the way the notes are structured, it does keep saying backup tapes are presumptively inaccessible, most cases you wouldn't have to search. Would you suggest taking out all reference to backup tapes because the technology will possibly overtake it and it will flip from inaccessible to accessible? So you would take that word out of the notes?

MR. WILSON: No, I don't believe so, because it

truly is a challenge -- it still is a challenge today, but the challenge differs depending on the -- the -- the data set up and the backup systems, and then also the continuing development of technology to address it.

So I think it's a fair point to note that historically backup tapes have been a problem area and have been inaccessible and so special care should be taken as we looking into the burdens that can be imposed on backup tapes. But unless we go further and say, however, storage media alone is not with -- is not the test, I think we fall into a potential trap of a bright line based on storage media.

Now, I brought my written comments with me. I'll hand them up at the -- at the end of the hearing, but I did take a moment just to -- to draft a couple of comments from my humble point of view, to address these points.

And the first is, basically, that the -- the touchstone of reasonable accessibility from the reasonable accessibility test is the burden imposed in accessing the data. The storage media alone should not govern the determination of a reasonable accessibility.

Now, the second point, in trying to look at what a norm -- what this test could do on -- on developing technology, is I think we also have to look at the availability of technology to address the inaccessibility of

the data, and also the party's determination of whether they implement that technology.

Let's say I'm in a start-up company and we decide accessibility of data is a big problem. You might have thousands of backup tapes. And we get our programmers and they put their -- their baseball caps on backwards, stay up all night for three months and come up with a technology that allows you to backup your data in a way that -- that can support a disaster recovery but also you can access the data. That would solve the problem. Now, if I were to come up with that product and put my marketing hat on and walked into the corporate counsel's office and say I've solved your problem, do you think that product would be purchased?

What is the incentive of a corporation to render its data accessible if the rule and practice is inaccessible data is not subject to discovery. The reason we're developing the technology is because of discovery, of addressing the technical problem of storing inaccessible data. I would submit I'd have an awfully hard time selling that product.

So the real issue then is the party's decision in implementation of available technology. I think that's a factor, as things develop, that we need to take into account.

PROFESSOR MARCUS: Mr. Wilson, do you think

someone could develop a product that would make archiving activities create material that would be inaccessible, in other words, design a product with an eye to the rule that would put large amounts of material on the other side of the accessibility gap?

MR. WILSON: I believe so. Which may be more of an interesting product, to render data inaccessible but if you really, really need it we can get it.

JUDGE SCHEINDLIN: But if you can get it then why isn't it accessible?

MR. WILSON: Well, whether it's reasonably accessible.

JUDGE ROSENTHAL: Do you believe that a company would likely invest in such a product, which I imagine would cost something, in order to make inaccessible information that it needed for its own business purposes or had a legal or regulatory obligation to keep?

MR. WILSON: No. I do not believe so. However, I do not believe that the scope of discovery should be based upon the business need of the data, and that there is another line of information.

Let's take, for instance, a contract, the e-mail for the negotiation of that contract may be very important to the litigation but may not necessarily be important to the ongoing business needs of the company. The contract itself

is essential. So can we move the e-mail to an inaccessible storage and continue with the business needs of the company?

JUDGE ROSENTHAL: If no obligation to preserve those e-mails has arisen at that time.

MR. WILSON: Correct.

JUDGE ROSENTHAL: Would there be any reason not to do that?

MR. WILSON: I agree.

JUDGE ROSENTHAL: If there was -- to flip the question, if at the time the e-mails were moved they were targeted for moving because they pertained to the subject of the litigation and an obligation to preserve them had arisen, then nothing in the proposed rules would either permit that to be done or safeguard the person moving them from sanctions.

MR. WILSON: That's correct. But I think, Your Honor, you may have made my point though in terms of the business needs of the data. Because if it's not important to the business needs of the data, it's still relevant and some of the most important evidence in litigation, but our intuitive thought pattern to that fact pattern is that a party may, in fact, move that an inaccessible format.

JUDGE ROSENTHAL: If at the time the materials are moved, the moving party, if you will, moving from accessible to inaccessible, knows that they're relevant, knows that

they're discoverable, then I think that's there's a common law preservation obligation that enters in that I'm not sure your analysis is taking into account. I'm just trying to understand what you're saying.

MR. WILSON: I don't want to move too far into this, because I do think that you can stretch well too far the potential of parties' rendering important data inaccessible, and so when we start to talk in the theoretical we start to move into that realm.

But the question that started with Professor Marcus, I do think there is a potential for technology that can at least move some historic data that we would be interested in along with the -- the chatter to an inaccessible need.

JUDGE ROSENTHAL: Have you announced a new product?

(Laughter.)

MR. WILSON: No.

JUDGE SCHEINDLIN: Given your fears in both directions, that nobody would buy your product if you made it more accessible and they might buy your product if you made it inaccessible, what is your suggestion to us?

Do you not like this divide of a two-tier approach using reasonably accessible or do you?

I'm having a little trouble following where your comments take us.

MR. WILSON: No. I like the divide as a former trial lawyer.

JUDGE SCHEINDLIN: Today, in your testimony.

MR. WILSON: And today. Where it's taking me though is to the point that I believe that in determining reasonable accessibility one factor should be the party's determination in adopting available technology in the decision to make the storage media.

JUDGE SCHEINDLIN: I think I understand. One of the factors to be considered would be the party's intent.

MR. WILSON: Yeah.

PROFESSOR MARCUS: Are you suggesting then that if there's a question about accessibility one could anticipate discovery regarding the thought process by which a company decided to adopt a certain technology?

MR. WILSON: Unfortunately, I have considered that. I thought in determining reasonable accessibility with the ongoing development of technology, you may need discovery about --

JUDGE ROSENTHAL: Why somebody didn't buy your new product.

MR. WILSON: It's certainly not my product.

JUDGE ROSENTHAL: I understand what you're saying.

MR. WILSON: As I tried to reduce it to writing,

"In determining reasonable accessibility, the availability of technology to aid in the accessibility of the data should be considered. Data should not be considered reasonably inaccessible if the burden of accessing the data is the result, in part, of a party's decision to forego implementation of technology that would aid in the accessibility of the data."

JUDGE SCHEINDLIN: Do we have that yet?

MR. WILSON: I'm going to -- I'm going to hand them up.

But that's my -- that's the second one. I think that a factor, in the comments, is the intent of the party, the actions of the parties. And, in fact, it was in the early electronic discovery cases. You know, the very early cases.

JUDGE ROSENTHAL: As I understand those early cases, that was at the time when judges were saying, look, if you guys want to use computers, then you need to take the baggage along with the benefits that it provides. It was your choice, so you deal with the cost of having made that choice. That's somewhat of a different context.

MR. WILSON: That's right. That's right. And I -- and I -- and I agree that that certainly is not a -- and as the law developed is not the major piece. It was not -- was not necessarily the best way, but I think -- I think if we're going to have these rules as norms, the

availability of technology and what the party has done should be an important factor.

JUDGE ROSENTHAL: Would that evolve to a standard that would require every company to be at the forefront of information storage capabilities, that is, in order to meet your standard would ever company, particularly companies of -- who could afford it, in some sense, every company would have to buy the latest and have all the updates in place in order to make sure they had the maximum accessibility to meet your standard? Is that where we would be?

MR. WILSON: I think reasonable accessibility, if that is the touchstone, reasonable is reasonable and not extraordinary. It's a very difficult standard, I know, but it's a very difficult thing to attach to an ongoing and developing technology.

So I just try to understand and think through factors that may allow it to adapt.

JUDGE ROSENTHAL: Thank you, Mr. Wilson.

Are there any questions that have not been asked?

Thank you, sir.

We appreciate your time.

Mr. Cody.

MR. CODY: Thank you for seeing me on short notice, getting me on the schedule.

A little background. 15 year lawyer. Partner with Fulbright & Jaworski, and I practiced in Texas may entire career. I'm here to advocate to you two separate things, but overriding all that, I'm advocating to you how effective our Texas rule has been.

Rule 196(4) was implemented a little over six years ago. I ran a search on West Law yesterday so I could present this to you: There's one reported case. And that may already have been reported to you, but that one reported case dealt with the accessibility of the database. So it has worked marvelously. And it has worked marvelously in two ways.

PROFESSOR MARCUS: Was there lots of reported electronic discovery cases before the rule was adopted?

MR. CODY: There are a few. What I think the rule does, and why we don't see any cases, is I think it took a lot of the discretion, where the parties would fight, where the parties would drag each other into the courts and spend a lot of unnecessary time in discovery disputes, the rule took care of that. And it did it with mandatory cost shifting. And it did it with setting out the standard, a bifurcated, two-step approach, which are the new rules -- proposed rules do. The language is a little different, and I believe that's sound.

So where I'm coming from to the committee is I believe

that the bifurcated approach is sound. I believe in the idea of cost sharing or shifting. I think mandatory is the best way to do it. I have been in cases where it makes the parties play fair. You would -- a lot of this you've already heard before. I've listened to the comments and -- and what I would like though to -- to provide you is a little anecdotal information that I have about the accessibility argument that's been discussed here and the definitions.

Recently we've got a situation where a client is a smaller company, less than 200 employees. And there's a lot of litigants out there that would fall in this category. This company is immature from a company infrastructure perspective. They lack the sophistication of having comprehensive, enforceable policies and procedures to handle some of their processes, including their electronic data.

But I got involved in this matter my record, and I've been doing electronic discovery law -- my record for one person looking at their active e-mail account was 14,000 e-mails. I always thought that would stand the test of time. I have recently discovered the new record is a little over 110,000. And this is where -- and this is what's so important about what y'all are doing, is the definitions you put in with respect to the -- and the instruction you give us with respect to what is not reasonably accessible.

The reasonably piece of this is critical, because this company -- I'm not worried about the backup tapes. What I'm worried about is a 500 gigabyte server where they just save it all, and have for three or four years.

Is that reasonably accessible, if is just a mishmash of data in there?

If you look at the comments --

Can you search that, word search it?

It ultimately may be possible.

Is that reasonable?

That's where you get into this idea we've heard bandied about of burden. This is a small company.

Could they go invest -- is it possible?

Yes, it is.

JUDGE SCHEINDLIN: But, you know, at our last hearing we had some discussion about this and we said even with respect to the first tier, that which is accessible, the proportionality rule still applies. We would hope to clarify that if we haven't already in our notes. There's some misconception. Some people think it's tier one we don't look at the proportionality, but we do. You could still argue even if it's accessible it's unduly burdensome and you shouldn't have to do it. So as long as you know the proportionality rules apply, even to tier one, it doesn't have to be inaccessible for you to have comfort.

MR. CODY: In that instance if that server is accessible then I have to search it.

JUDGE SCHEINDLIN: Right.

MR. CODY: And I may have to search the whole thing.

JUDGE SCHEINDLIN: Yeah.

MR. CODY: And the idea being, if it's inaccessible I wouldn't have to search it globally. I would only have to search it perhaps in parts.

PROFESSOR MARCUS: How could you do that if it was inaccessible?

MR. CODY: For example, in the server you could have directories that would label to individuals which might make it accessible. You could go and pull down someone's particular directory where he may have 400 documents.

PROFESSOR MARCUS: Suppose you had paper records, as in a famous case from a long time ago where a large company had collected paper records on all the claims that had been made regarding its products and just put them in chronologically and not otherwise organized, are you saying all that material would be inaccessible under your approach?

MR. CODY: I would say it would qualify as inaccessible unless you show good cause. That's the beauty of the rule. And that's the beauty of the Texas rule. It's

not saying you don't ever get it. It's just saying this is such a massive amount of data that has no structure that it should fall into this category. And my concern, when reading the comments, was that there was such focus on the inaccessible data being a backup tape or something that is technologically inaccessible that it ignores the technicality of what inaccessible --

JUDGE SCHEINDLIN: My question is still the same. In the first tier your problem is cost and volume. You're saying it's all accessible but it's ridiculous, we shouldn't have to do that.

Fine. It's a matter of burden of proof. You seek a protective order, say it violates the proportionality rules, I shouldn't have to do this at all. You might win that. What's the problem?

MR. CODY: I don't have a problem with that, if that's the way the comments play out.

JUDGE SCHEINDLIN: As long as we clarify that the proportionality rules apply to tier one.

MR. CODY: Yes. Yes. Yes.

JUDGE ROSENTHAL: If the technology exists to make that volume of material, which is readily retrievable, there's not a problem of it being legacy data, it's not compressed, it's not -- it doesn't present those problems, if it is not only retrievable but also subject to

searchability, if it can in fact readily be searched, then is it -- even if it's big, is it then accessible, as you understand the proposed amendment?

MR. CODY: It depends on the economics of making it searchable. If it's very expensive to go out and do that then -- it's a multitude of factors, and that's why this reasonableness concept is so important and it must be applied on a case-by-case basis, I think.

JUDGE ROSENTHAL: So you would view searchability as part of accessibility?

MR. CODY: Absolutely.

JUDGE ROSENTHAL: Given the volume you've described.

MR. CODY: And in today's world it's going to be extremely expensive to tackle this issue. A year from now or ten years from now it may be easy.

JUDGE ROSENTHAL: Two real quick questions.

In the discussions that you have with opposing counsel under the Texas rule, have you encountered difficulties in trying to figure out in those conferences what is subject to being produced without cost shifting and what is not?

MR. CODY: No. It's been very effective.

What it has really promoted is that when they are looking for something specific they come forward and they tell you, and they narrow their request, because, quite

frankly, they know they have to pay for it. It's kind of putting your money where your mouth is. If you really want that data -- and I'm all for that.

I mean, my practice, I'm a commercial litigator, so I practice on both sides of the V all the time. And so as often as not I'm going after it. So when I'm going after it I'm very careful that I focus my inquiry. And I think that's the key to part of the success of the rule.

Any other questions?

Thank you very much.

JUDGE ROSENTHAL: Thank you, Mr. Cody.

Mr. Cortese, you wanted to speak today or did you want to speak in Washington?

MR. CORTESE: I would like to just mention one thing today, and that is that I think it really comes down -- and I would, with Your Honor's permission, like to appear in Washington on behalf of an organization.

But to -- just to cap this, essentially what I'd like to say, and I see the time, is that really this seems to be coming down to where the effort started in the late 1970s and through the 1983 amendments and through the 2000 amendments we are now at the point where essentially all this discussion comes down to, in my view at least, to attempting to make discovery more efficient, less costly, less burdensome, more effective, and to include the signals

to the bar and the bench that it is essential to have elements like a safe harbor and two-tier approach to discovery in order to incorporate all of the things that have been established over those -- that number of years, so that we focus the cases, particularly in this area of electronic discovery, on the -- on the key materials, because there is such a mass of information, as you've heard many, many times, that it's virtually impossible, even if it's technologically accessible, to make it usable in the litigation, and that there ought to be some protection so that companies don't have to go from the large and the small and save everything out of the fear that they will be sanctioned because they didn't save something that might have been relevant, that really nobody knows about.

So I -- I would urge you -- I congratulate you on approaching this area and really it's been an extraordinary illuminating discussion, and I think the package is a good package. It needs to be improved in some respects, improved in the sense that it should be clarified and it should perhaps give a little more bright-line guidance to the extent that that's possible, but I -- I know you'll attend to that and I appreciate your time.

Thank you.

JUDGE ROSENTHAL: Thank you very much.

I want to thank all of you who came and spoke and wrote

and listened for assisting us in the issues that we are dealing with.

I want to also thank all of the people in the Dallas courthouse for their help in gathering us all today and supporting our meeting.

Stay tuned.

We are adjourned.

(Recess taken.)

I N D E X

C E R T I F I C A T I O N

I, PAMELA J. WILSON, CSR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

This the 10th day of January, 2005.

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PAMELA J. WILSON, CSR
Official Court Reporter
The Northern District of Texas
Dallas Division