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The Journal of Court Innovation

The *Journal of Court Innovation* is published by the Center for Court Innovation, the New York State Judicial Institute, and Pace Law School to promote and highlight innovative programs and strategies in court systems around the United States.

Geared to both practitioners and academics, the *Journal's* audience includes court administrators, attorneys, judges, scholars, non-profit executives, legislative and executive branch officials, and anyone interested in improving the administration and delivery of justice.

The *Journal* invites submissions of articles about innovative programs and strategies in court systems. Topics of interest include, but are not limited to: jury issues, case management, judicial selection and evaluation, court structure, judicial training, technology, problem-solving courts, and efforts to create stronger links between courts and communities. Submissions, which can be anywhere from 8 to 35 pages, will be reviewed by the executive and managing editors as well as outside reviewers.

For complete submission guidelines, visit <http://www.courtinnovation.org/submission.htm>.

Inquiries or submissions can be directed to: *Journal of Court Innovation*, 520 Eighth Avenue, 18th Floor, New York, New York 10018, 212.373.1683, Attn: Article Submission, or e-mailed to wolfr@courtinnovation.org.

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A WORD FROM THE EXECUTIVE EDITORS

With this volume of the *Journal of Court Innovation* we have a change in the masthead. Robert Keating, one of our founding editors, has taken on a new position as Vice President for Strategic Initiatives at Pace University. Judge Keating provided much of the vision, energy, and leadership that helped take the *Journal* from an abstract idea to a tangible reality. And, while we will miss Judge Keating, we are very happy to announce the arrival of Judge Juanita Bing Newton as the new Dean of the New York State Judicial Institute and as our new co-Executive Editor of the *Journal*.

This issue is divided into two parts. Part One reproduces the transcript of the December 1, 2008 Colloquium on the Future of Commercial Litigation in New York: Developing a Cost-Efficient Process for the Electronic Age. As Jeremy Feinberg notes in his introduction, the Colloquium had its genesis in an earlier project undertaken by New York's Unified Court System: the Commercial Division Focus Group Project, a series of focus groups held throughout the State over a two-year period that focused on the division of the New York trial courts that handles complex commercial cases. The Colloquium, sponsored by the Judicial Institute, brought together members of the bench and bar for a full-day discussion about two topics of particular moment in commercial cases: e-discovery and alternative dispute resolution (ADR). The keynote speeches, the two panel discussions and the article by Thomas Y. Allman explore issues that are national in scope. We think you will find the in-depth discussions of the panelists and speakers to be thought-provoking and enlightening.

In Part Two, you will find two practice pieces. Michelle Manasse takes a close look at obstacles confronted by practitioners in a Georgia mental health court and Robert Wolf considers statewide coordination of problem-solving courts. We round out the issue with two book reviews submitted by our student editors.

As always, we welcome your feedback.

COLLOQUIUM ON THE FUTURE OF
COMMERCIAL LITIGATION IN
NEW YORK: DEVELOPING A
COST-EFFICIENT PROCESS
FOR THE ELECTRONIC AGE

INTRODUCTION TO THE COLLOQUIUM

*Jeremy R. Feinberg**

Attempting to capture in a one-day program all of the problems and competing burdens presented in modern commercial litigation, much less come up with appropriate solutions, is a very ambitious task. Even if the panelists and audience for such a program contained all of the relevant constituencies—judges who hear commercial cases, attorneys practicing commercial litigation, in-house counsel, law professors and students, and clients—the challenge would remain daunting indeed. Nonetheless, the New York State Judicial Institute addressed the matter head on, with its December 1, 2008, *Colloquium on the Future of Commercial Litigation in New York: Developing A Cost-Efficient Judicial Process for the Electronic Age* (the “Colloquium”). The Colloquium focused on issues relating to electronic discovery and alternative dispute resolution (ADR), providing some useful and enlightening dialogue on the issues, at least partially answering many questions and raising a host of others for future discussion.

* Statewide Special Counsel for the New York Unified Court System’s Commercial Division and a member of the Planning Committee for the Colloquium on the Future of Commercial Litigation in New York.

The New York State Unified Court System (UCS) includes a Commercial Division dedicated to handling complicated business disputes. The Commercial Division is part of the trial court of general jurisdiction, the New York Supreme Court, and spans 24 parts across ten different judicial districts in New York State: The counties of New York, Kings, Queens, Westchester, Nassau, Suffolk, Albany, and Onondaga, as well as the entire Seventh and Eighth Judicial Districts in the western part of the State.¹

The Colloquium resulted in part from the UCS's previous positive experience in bringing together interested stakeholders to talk about how to improve commercial litigation in New York. In 2005 and 2006, the courts conducted a Commercial Division Focus Group Project, traveling to five different locations around the State and bringing together judges, litigators, and clients to talk about what was working and what could be improved in the Commercial Division. Moderated by seasoned litigator Robert Haig,² the Focus Group project collected opinions and comments from groups in New York, Nassau, Monroe, Albany, and Onondaga Counties. The Office of Court Administration prepared a report to the Chief Judge,³ addressing ways to improve the Commercial Division, as well as successes of the Commercial Division that could be shared with other parts of the court system. The Colloquium was, at its core, an attempt to expand on the helpful discussions that took place in the focus groups nearly three years earlier, but with a broader audience and a more targeted set of discussion topics.

In planning the Colloquium, we attempted to draw as speakers and panelists a wide range of viewpoints from academia, the judiciary, clients, and the Bar. As a starting point, we invited Chief Judge Judith S. Kaye⁴, who created the

1. For a current list of Commercial Division Justices, visit www.nycourts.gov/courts/comdiv.

2. Mr. Haig is a member of the law firm of Kelley, Drye & Warren, resident in the firm's New York City office. He also was a member of the Colloquium's Planning Committee.

3. The Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups is available at <http://www.nycourts.gov/reports/ComDivFocusGroupReport.pdf>.

4. The Honorable Judith S. Kaye was New York's Chief Judge from 1993 until December 31, 2008, when she retired pursuant to the State's mandatory retirement rule for judges.

Commercial Division in 1995, to present introductory remarks. We then selected as keynote speakers two individuals with a wealth of knowledge and experience in their respective fields. For the electronic discovery portion of the program, we invited Kenneth J. Withers, whose vision and leadership as the Director of Judicial Education Content at the Sedona Conference⁵ is well-known and respected nationally. To kick off our discussion of ADR, we were pleased to have with us the Honorable Stephen Crane, a retired Justice of the New York State Supreme Court, Appellate Division, Second Department, and a mediator at a private ADR firm. Justice Crane was the Administrative Judge of New York County when the court system promulgated ADR rules for the Commercial Division shortly after the Commercial Division was created. He provided a historical framework for the growth of ADR in the Commercial Division.

The Planning Committee chose the Colloquium topics readily. Electronic discovery has, arguably more than any other issue, charted the course for commercial litigation, both in New York and nationally, over the past few years. As one focus group participant noted in 2005, electronic discovery “is going to affect how you litigate and whether you can litigate any complex litigation; and of course, it starts with the question of how do you handle [electronic] discovery and then the next question is if you get [through electronic] discovery, how do you handle trials?” As another judicial participant noted, “I guess it’s here to stay and we are going to have to learn to deal with it Electronic life is a fundamental reality” One way to “learn to deal with it,” of course, is to discuss it in a setting like the Colloquium.

Alternative dispute resolution has rapidly gained acceptance, and use, in the commercial litigation context. No longer are litigants and lawyers asking, “Why should I do that?” Instead they are focusing on questions such as, “When is the right time to go?” or “Who is the right neutral to involve in the process?” or “What issue(s) should the ADR address?” New York’s Commercial Division embraced ADR as well: the downstate

5. The Sedona Conference® brings together leaders at the cutting edge of issues in the area of anti-trust law, complex litigation and intellectual property law to engage in dialogue to move the law forward. See www.sedonaconference.org.

counties of New York, Westchester, Nassau, Kings, Queens, and Suffolk and the Eighth Judicial District in the western part of the State all have formal ADR programs with rosters of available neutrals, protocols, and, in many cases, standards of conduct formally articulated and available.⁶ Commercial Division Uniform Rule 3 (22 NYCRR 202.70[g][3]) permits a justice of the Commercial Division to direct a matter to ADR at any time, or to refer the matter at the request of the parties. The Colloquium sought to study ADR's role in future commercial litigation by investigating these and other questions.

The other vital piece to planning the Colloquium was to secure the services of two excellent moderators to keep the discussion focused, pique the audience's interest and enlist its participation. For the electronic discovery program, we were pleased to have with us Maura R. Grossman, Counsel at the New York law firm of Wachtell, Lipton, Rosen & Katz. Ms. Grossman is a well-known expert in the field who designed and taught a program to New York State judges on the basics of electronic discovery as part of the court system's ongoing judicial education programs. For the ADR portion of the Colloquium, we turned to Daniel Weitz, Esq., who, among many roles, serves as the New York Office of Court Administration's Coordinator of ADR Programs, and is the Chair of the New York City Bar Association's Committee on ADR. Suffice to say, the immense success of this Colloquium is due in large part to Ms. Grossman's and Mr. Weitz's work both in the planning and in the execution. Their efforts are evidenced in the pages that follow. We are pleased that the *Journal of Court Innovation* has published the transcript of the Colloquium proceedings so that others can share in the on-going discussion.

6. Subsequent to the Colloquium, Suffolk County on Long Island launched its own Commercial Division ADR program.

TRANSCRIPT OF PROCEEDINGS

COLLOQUIUM ON THE FUTURE OF COMMERCIAL LITIGATION IN NEW YORK: DEVELOPING A COST-EFFICIENT PROCESS FOR THE ELECTRONIC AGE

at

THE NEW YORK CITY BAR
42 West 44th Street
New York, New York

December 1, 2008

Van Sedacca
Aldorine Walker
Michael Daugenti
Official Court Reporters

A.M. APPEARANCES:

Honorable Robert G.M. Keating, Dean, New York State Judicial Institute

Honorable Judith S. Kaye, Chief Judge of the State of New York

Morning Keynote Speaker: Kenneth J. Withers, Esq., Director of Judicial Education and Content, the Sedona Conference®

E-Discovery Moderator: Maura R. Grossman, Esq., Wachtell, Lipton, Rosen & Katz

E-Discovery Panelists: Thomas Y. Allman, Esq., Attorney
and Consultant, Former General
Counsel of BASF Corporation

James M. Bergin, Esq., Morrison &
Foerster, LLP

Honorable John L. Carroll, Dean,
Cumberland School of Law,
Samford University

Honorable Elizabeth H. Emerson,
New York Supreme Court,
Commercial Division, Suffolk
County.

P.M. APPEARANCES:

Peter Passidomo, Esq., Vice Dean, New York State Judicial
Institute

Afternoon Keynote Speaker: Honorable Stephen Crane, JAMS,
Associate Justice (ret.), New York Supreme Court, Appellate Di-
vision, First Department

ADR Moderator: Dan Weitz, Esq., Coordinator, Unified
Court System, Office of ADR Programs

ADR Panelists: Simeon Baum, Esq., President, Resolve
Mediation Services, Inc.

Honorable Alan Scheinkman, New York
Supreme Court, 9th Judicial District

Honorable Elizabeth S. Stong, United
States Bankruptcy Judge, Eastern District
of New York

Stephen P. Younger, Esq. Patterson,
Belknap Webb & Tyler, LLP.

DEAN KEATING: It's been my pleasure over the last six years to introduce the Chief Judge on a number of occasions on a number of subject matters most of which are defined and expanded by the Chief Judge's keen intellect and leadership. When you look at the things that the Court system's done over the last decade and a half, it's been really extraordinary. In the area of jury reform, problem-solving courts, domestic violence, the list goes on and on and ends in some measure with the Commercial Division and the increased efficiency and hopefully commercial litigation around the state.

Now, all of these subjects and all these initiatives really have been the product of just an extraordinary commitment to making the New York State Court System the best in the United States and in the world, and I think that's been the commitment of the Chief Judge. It's an extraordinary experience for me and I think for all of us to be a witness to these initiatives and it's my privilege to introduce the Chief Judge of the State of New York, Judith Kaye.

JUDGE KAYE: Thank you, Bob, for that really very nice introduction. I have the easiest role of all today and that is simply to say welcome to all of you. . . . [M]ine will simply be a brief welcome because this is really a wonderful program today and I myself will be a beneficiary of it and I'm eager to hear, especially this panel and the events that follow it.

Developing a cost-efficient judicial process for the electronic age, my goodness, what a challenge. "Cost efficient," those words are the bell ringer today for all of us in every single thing that we do, being cost-efficient while always a by-word for the courts, being cost-efficient and being efficient and being effective today more than ever. We know how significant that is in the court system and especially for litigants in the court system.

Of course, in our internal operations, we are pressed today more than ever, and I see your wonderful Chief Administrative Judge is seated at the back of the courtroom, Ann Pfau, good morning. I'm so pleased that you're here today. If she looks a little more stressed than usual, it's because we have just come through the budget difficulties. In fact, has our budget already gone in today, December 1st? The magic day. Congratulations

Ann, but it has been a trying time as it is for all of us to find ways in today's economy to be cost efficient.

Of course, one of the things, looking forward, and we always do look as far forward as we can, we are looking forward to increases in all of our dockets. How can this economy not drive up the numbers of cases in the New York State court system. If you just think of things like the housing court, for example, all the employment issues that we're going to be seeing. Today, as a matter of fact, it's not just the day that our budget goes in, it's also the day that the brand new state legislation mandates that in every single foreclosure filing, and goodness we have hundreds of thousands of foreclosure filings in the State of New York, there is a mandated court conference. So, I know we have many of our fabulous judges here in the audience and we are going to be facing more and more mandatory court conferences. And in so many ways cost efficiency is just driving everything that we do. I see Judge Demarest¹ and so many others here who know of what I speak, right? So, beginning today, like everybody else, we're expected to do much more with less and that brings us directly to the issue at hand, which is e-discovery and our commercial filings. I have no doubt that our commercial filings are going to be driven up, too. I don't know how many of you have been following the debate in the press, are there going to be fewer commercial filings or more commercial filings? I love the piece that was buried in *The [New York]Times*, you just sense that something is wrong somewhere, don't you? You just don't know quite who to sue. But clearly the commercial docket should go way up because there's somebody behind a lot of these ups and downs and I have no doubt that when this gets figured out, boy is this going to land in our commercial courts. And the mention of commercial litigation and the commercial courts, of course, for me is synonymous with the Commercial Division of the Supreme Court of the State of New York. And I see so many familiar faces here today, so many of our commercial division judges here in the audience.

You know that I have a very sentimental attachment to the Commercial Division of the Supreme Court of the State of New

1. Honorable Carolyn Demarest, Supreme Court Justice, Kings County, NY.

York. That was one of the earliest initiatives in my tenure as Chief Judge, and I guess this being December 1st, it's kind of a nice coincidence that this is my last month as Chief Judge, so I'm really pleased to be celebrating the commercial division and commercial litigation among so many other things. But it's far more than a sentimental or emotional attachment to the Commercial Division that brings me here today.

First and foremost, when I think of the Commercial Division, which was created as I'm sure most of you in the audience know, in 1995, what I think of chiefly is that it for us represents genuine partnership with the bar. That really was what led to the organization of the Commercial Division. And Bob Haig, thank you so much for your efforts in spearheading this. But the truth is from the moment of its birth, from the moment of its conception, the Commercial Division has been a partnership with the bar of the State of New York and beyond the State of New York.

There's been an on-going exchange of ideas and suggestions and I think there is no question, there can be no question that it's not just the origin, but also the great success of our Commercial Division is attributable to the fact that we work with the Bar. We are attentive to ideas and suggestions always, finding new ways and better ways to make our Commercial Division, like our courts generally, the absolutely premiere tribunal for the vexing day-to-day issues that come into the courts and face the litigants.

So first and foremost, that's what I think of and I'm here to thank the judges and thank the bar for what I think is a very, very successful enterprise: The Commercial Division. But I think of it also, not just of the partnership with the New York Bar when I think of the Commercial Division. I also think of how many innovations have arisen from that partnership that have benefited our court system generally. And I think today's colloquium is a very fine example, an outstanding example of that. I think of alternative dispute resolution and it's really the Commercial Division that has helped to bring ADR into the 21st Century. But I think, too, this issue of e-discovery, electronic discovery, e-mail, electronic files, everything that starts with the letter "E" and how much we look to the Commercial Division to, again, to bring us into the 21st Century, to enable us to better

serve all of our litigants. A vexing, vexing problem, e-discovery, and I feel confident that the wonderful exciting discussion that's going to emerge from this program is going to help answer the question, not "[I]s the volume and cost of e-discovery driving litigants out of the court system?", but "[H]ow do we see that that does not happen?"

So I don't know what lies ahead. I have to admit that in the economy, I do not know what lies ahead. But I do know what lies ahead today and I do know we're all in for a really terrific, exciting day. I would now like to turn the program over to Maura Grossman, today's moderator.

**MORNING KEYNOTE:
E-DISCOVERY IN COMMERCIAL
LITIGATION: FINDING A WAY
OUT OF PURGATORY**

Remarks by Kenneth J. Withers, Esq.

MS. GROSSMAN: Good morning. My name is Maura Grossman. I'm counsel at Wachtell, Lipton, Rosen & Katz where I'm a litigator and full-time e-discovery lawyer. I'll be moderating this morning's panel on electronic discovery.

It's my great pleasure to introduce our first keynote speaker, Ken Withers. I like to think of Ken as the father of e-discovery since he's been thinking, speaking and writing on this subject since 1989. Ken is currently Director of Judicial Education and Content for the Sedona Conference, an Arizona-based, nonprofit law and policy think-tank at the forefront of issues involving technology, civil justice, intellectual property and antitrust law. From 1999 to 2005, Ken was Senior Education Attorney at the Federal Judicial Center in Washington D.C., where he developed Internet-based learning programs for the Federal Judiciary, concentrating on issues of technology and the administration of justice. Ken has contributed to many well known FJC publications including *THE MANUAL FOR COMPLEX LITIGATION*, Fourth Edition (2004); *EFFECTIVE USE OF COURTROOM TECHNOLOGY* (2001), and the *CIVIL LITIGATION MANAGEMENT MANUAL* (2001).

If I were to list Ken's many, many publications and speeches on electronic discovery and electronic records management, we'd still be sitting here after lunch, so instead I am going to refer you to his bio in your materials, and you'll have

to take my word for it that Ken is an extremely knowledgeable and prolific author and speaker on this subject. Ken is a graduate of Northwestern University School of Law and also holds a Masters of Library Sciences from the Graduate School of Library and Information Science of Simmons College, where he graduated with a GPA of 4.0.

So, without further ado, Ken Withers, who will be speaking to you on “E-Discovery and Commercial Litigation, Finding a Way Out of Purgatory.

MR. WITHERS: Thank you. It’s a distinct honor to be sharing the podium this morning with Chief Judge Kaye, whose leadership is well-known to us even in the deserts of the far west. But our topic today is commercial litigation and the issue that I’m going to be focusing on this morning is electronic discovery. I hope that my address acts as a bridge to this afternoon’s topic, which is ADR because it’s my belief that the problems we perceive are associated with electronic discovery can only be solved by replacing the costly and unproductive adversarial discovery process with a process that emphasizes proportionality and cooperation in discovery and mediation of discovery disputes. *Lawyers USA* caught me off-guard a couple weeks ago and quoted me this week in their publication as telling lawyers to cooperate or die, which sounds a little extreme. So let me step back.

Last June, National Public Radio’s *Morning Edition* featured a special series of reports on the social burdens of e-mail. And Ari Shapiro, who’s NPR’s Washington correspondent, called me up to ask about the impact of e-mail on the law. I didn’t mention any particularly embarrassing e-mail messages from any Wall Street executives submitted to the Supreme Court or anything like that. My concern is more global. It’s the vast resources that must be spent to locate, preserve and review e-mail for production. Because, as NPR reports, daily e-mail volume is now at 210 billion a day worldwide and increasing.¹

The central problem with e-mail is not the occasional smoking gun. It’s the constant smoke. I told the NPR listeners

1. Ari Shapiro, *E-Mail, the Workplace and the Electronic Paper Trail*, National Public Radio Morning Edition, June 18, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=91363363>.

that, “Today a young person graduating from law school and joining a large firm in one of our major cities can look forward to perhaps three or four years of doing nothing but sitting in front of a computer screen reviewing e-mail and other electronic documents for litigation.”² Now, this vision of purgatory created something of a stir, including an e-mail, from a law firm recruiter here in New York City, who blamed me, tongue in cheek I hope, for the complete demoralization of her summer law clerks. I’m not the first person to note the ascendancy of e-discovery coincides with reports in a decline in civility and self-esteem in the legal profession. Just as the Industrial Revolution of the 19th century brought about the proletarianization of manufacturing workers, the information revolution is proletarianizing information workers, legal professionals chief among them.

The adoption of the Federal Rules of Civil Procedure in 1938 was intended to replace trial by ambush with a new system that depended on lawyers engaging cooperatively in depositions, interrogatory exchanges and document productions. This new system of discovery generated the requisite low-level grumbling about cost and delay by all parties right up through the late 1970’s and 1980’s, when the full impact of a minor revolution in the management of information was finally felt in the courtroom. And that was the invention of cheap high-speed, high-volume photocopying. Suddenly the case that involved a box of documents and maybe five depositions now involved a hundred thousand documents and 20 or 30 depositions of everybody in the business bureaucracy who received copies of the memos and business reports and meeting minutes. But while the volumes increased, they didn’t increase so much that lawyers questioned the old ways in doing things, laboriously reading every document and taking good notes to prepare for those depositions or settlement conference or trial.

As these volumes increased, it became apparent to good lawyers that the percentage of documents that had any significant bearing on the case decreased significantly. But they still had to look at all the documents. And sometimes these docu-

2. *Id.*

ments did add color to the facts, not rising to the level of admissibility, but making for some very interesting depositions.

Now, back in 1983 and again in 1993, the Federal Rules of Civil Procedure were amended to acknowledge that discovery, and in particular document discovery, had grown tremendously, increasing the cost and often contentiousness of discovery overall. At the same time and for a number of reasons the number of cases that actually went to trial was decreasing. It's now less than three-percent of all cases filed, such that discovery went from being a means to an end to being an end in itself. The stakes were raised.

During the 1980's and into the 1990's, a second and much more consequential revolution occurred in the business world. As usual, it took about ten years for the impact to be felt on litigation. That revolution was distributed network computing and the desktop PC. So long as computers were great big machines in the basement protected by a priestly class answerable only to the accounting department gods, computer output could safely be thought of as just an extension of the paper business process. Even in the 1980's when computers were used for numbers crunching and word processing, there were little more than extensions of calculators and typewriters. But when people got the power to develop and manage their own business applications at their desktop, share them with co-workers and communicate through computer networks, the whole world changed. Digital business processes replaced business ones. Organizations flattened as secretaries, bookkeepers and file clerks disappeared. The new information worker supported by the new IT infrastructure became incredibly productive. Profits soared, but few people noticed that the floodwaters of digital information were rising. As long as you didn't print the stuff out and digital memory kept getting cheaper every year, no one cared.

We now live in a digital information world that is markedly different from the old paper information world. The differences are many, but they are all corollaries of two central principles about digital information systems that set them apart from paper-based information systems and make them impossible to manage using the techniques that were developed for a

paper-based world. These two characteristics are volume and complexity. Let's first look at volume.

Jason Baron and George Paul in their article for the RICHMOND JOURNAL OF LAW AND TECHNOLOGY paint a vivid picture of what this information explosion means in the context of litigation.³ “Probably close to 100 billion e-mails are sent daily with approximately 30 billion e-mails created or received by federal government agencies each year.”⁴ Their estimate is a little lower than NPR's. They provide us with a concrete illustration.

“Litigation, in which the universe subject to search stands at one billion e-mail records, at least 25 percent of which have one or more attachments of one to three hundred pages.”⁵ Generously assume further that a model reviewer, junior lawyer, legal assistant or contract professional is able to review an average of 50 e-mails including attachments per hour without employing any automated computer process to generate potentially responsive documents, the review effort for this litigation would take 100 people working ten hours a day, seven days a week, 52 weeks a year over 52 years to complete. The average cost of such a review, at an assumed billing of \$100 per hour, — remember they are writing for an academic audience in Virginia — would be \$2 billion. Even if, however, present-day search methods are used to initially reduce the e-mail universe to one percent of its size, that's ten million documents out of one billion, the case would still cost \$20 million for first-pass review conducted by 100 people over 28 weeks without accounting for any additional privilege review.

While simply doing the math as Baron and Paul did in their initial scenario sounds absurd to us, recent reported cases bear out their numbers. For example, all parties in the ongoing Intel microprocessor antitrust litigation agreed it may be “the largest electronic production in history,” with Intel's production of “somewhere in the neighborhood of a pile 137 miles high.” That's the volume problem.

3. Jason R. Baron & George L. Paul, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10 (2007).

4. *Id.* at 12.

5. *Id.* at 20.

The complexity of digital information systems means it's virtually impossible for any one individual, or even a well-managed group of individuals, to fully understand where all the potentially relevant digital information may be located, how it can be preserved and retrieved and what its interrelationships are and how it can be presented.

Complexity itself is complex because digital information systems present us with various levels of complexity. Dispersion complexity refers to the fact that potentially responsive digital information is distributed far and wide, from obvious sources such as desktop PC's and network servers to storage media like backup tapes and thumb drives to non-obvious sources like printers and Ipods.

Operating system complexity refers to the fact that all digital information is created and maintained in an environment of operating systems and other software required to access, view and manipulate the information.

Administrative complexity refers to the human side of the operating system, the rules, the processes, the procedures that are in place, to run an information system from access protocols to directory structures and file-naming conventions to backup routines and deletion schedules.

Application complexity refers to the myriad applications in which data can be created and used, from the off-the-shelf word processing and e-mail that comes bundled with the computer that you might be buying next month at Walmart for Christmas to the hundreds of specialized or custom-generated applications that any major corporation is going to be running.

There's even complexity at the individual file level, as behind what you see on the screen or what gets printed out on paper could be embedded edits left by previous authors, comments by reviewers, nonvisible formatting and calculation codes and metadata information about the file created by the system so that the computer system can handle the file properly.

But perhaps the most complex complexity is the essentially ephemeral nature of digital information. This is its value to the business world and the root of so many of its problems in the legal world.

The glory of paper-based information systems is their relative persistence and immutability. The medium was the message. The physical artifact was the information. Information written on paper was inseparable. As long as the integrity of the physical artifact could be ascertained and protected, the information stayed the same.

On the other hand, the glory of digital information systems is that the information is ephemeral and mutable. That very characteristic of digital information that makes lawyers, and I have to confess, law librarians like myself, cringe, is what makes digital information so valuable to businesses, to government and in our personal lives.

Volume and complexity are the two characteristics of digital information that make it qualitatively different from the paper information world. The legal profession is ill-equipped to handle this information explosion. Traditional concepts of discovery, document preservation requests, review, production and presentation completely break down under the weight of the volume and the pressures of deadline and budgets. But the consequences go far beyond missed deadlines and budget overruns, as bad as those may be.

The information explosion threatens the legal profession and the administration of justice itself. The problems occur and recur in case after case, big and small, state and federal.

First is the problem of preserving this ephemeral information. As I've indicated before, all digital information is ephemeral to one degree or another.

The second, but bound up in the first problem, is the scope of information requests. Where do you draw the lines of relevance when all the information is interrelated and it's difficult to cordon it off into discreet things called documents.

Then you have the problem of accessing information from sources that may not be readily accessible, which is, by definition, a question of proportionality. Once you've identified the potentially relevant and reasonably accessible electronically stored information, you face the problem of accurately and cost-effectively reviewing the information for actual relevance or for privilege and the consequences, if privileged or confidential information is accidentally disclosed.

Document review is the single most costly phase of discovery. Once you've decided what is to be produced to the requesting party, questions arise as to what form or forms the information should be produced in. Now, in real life, this question should have been considered as part of the preservation and review decision-making process. And in the worst cases, we may end up with the problem of determining appropriate discovery sanctions—the degree to which lawyers should be held responsible for the decisions they make and the actions that they take in this complex and voluminous information environment. Those are a lot of predictable and recurring problems and they contribute to a perception, particularly in the legal and business press, that e-discovery is always bad news.

The media blitz at the end of the summer began with an article in *The Economist* dated August 28th entitled, “The Big Data Dump,” in which the reporter posited that with the advent of e-discovery, the civil justice system as a whole threatens to get bogged down. The article quotes Supreme Court Justice Stephen Breyer expressing concern that with ordinary cases costing millions just in e-discovery work, “you’re going to drive out of the litigation system a lot of people who ought to be so that justice is determined by wealth, not by the merits of the case.”

The *Wall Street Journal* chimed in a few days later with an article dated September 6th entitled, “Digital Data Drives Up the Discovery Costs.” The story began, “Lawyers who work on complicated civil trials say the system is too expensive, especially the handling of electronic evidence such as e-mails, voice mail and text messages.”

Two days later, the *Los Angeles Business Journal* ran a story with what I thought was a more appropriate title, “Old School Attorneys Face E-Discovery of New World.” And this flurry of press coverage was precipitated by a report released by the American College of Trial Attorneys and the Institute for the Advancement of the American Legal System, based on the survey of more than 1400 members of the American College, 87 percent of whom believe that e-discovery costs were burdensome and that the new rules had added to the problem. Seventy-six percent believed that judges don't understand the costs

and burdens they associated with e-discovery. That's right, blame it on the judges.

Ralph Losey, in his always informative blog called E-Discovery Team, looked a little closer at the survey and reported that only 60 percent of the respondents had actual experience with e-discovery, meaning that 40 percent were more or less parroting the buzz among litigators these days. But another statistic that Ralph reported from the survey was much more revealing. The average number of years in practice of the respondents was 38.

Now, I have great respect for members of the American College of Trial Attorneys. They represent the best of their generation. One of my mentors when I was a newly minted attorney in Bingham, Dana & Gould 25 years ago was an active member of the American College who later served on the Civil Rules Advisory Committee. We have several members of the American College in our Sedona Conference working groups.

But as I read the survey, especially the free-text responses of the respondents, an image began to develop in my mind—Old man shakes fist at clouds. “Hey, you kids, get off of my litigation and take your Internets and Googles with you.” I know these people. I'm from Phoenix.

So imagine that. Thirty-eight years in practice, longer than most of the associates in their firms are old, at least 60 percent of them are conducting e-discovery in civil litigation and for the most part they are not approaching it smartly. They are not using the tools of technology and the social skills that technology requires to solve the problems of technology. This senior generation of litigators, and I'm on the tail end of it myself, is fully cognizant that we do live in a digital world.

But they are still thinking of the digital information system as a set of tools for producing information (the document, the e-mail communication, the court case) that they will manage as though it were paper. They think that it is somehow appropriate to manage digital information and discovery by analogy to the paper world.

I call this “protodigital” thinking, akin to thinking that the problem with automobiles is that they don't behave like horses, and the solution is to make them behave like horses. They are throwing bodies at e-discovery as if digital information systems

were warehouses of paper documents. This failure of many litigation decision-makers to think beyond the protodigital, is having catastrophic consequences for the ability of our civil justice system to deliver the just, speedy and inexpensive determination of any action.

I always have to point out to lawyers, who tend to think on the dark side, that e-discovery is not all doom and gloom. There are reasons why business, government, and individuals have wholeheartedly embraced the digital information and communications world. It isn't because digital information is costly and burdensome. No. Digital information is cheap and useful. The IT revolution is at the heart of a tremendous increase in productivity and prosperity that we have enjoyed in the past generation. Digital technologies make it possible to manage vast amounts of information, transport them instantly at no cost and create new information and new value.

Every other profession, to one degree or another, has embraced digital information technology for all of its volume and complexity. It is only the legal profession, and chiefly litigators, who sees the complexity of digital information as a costly and burdensome danger or alternatively as an opportunity for tactical gamesmanship.

The predictable recurring problems associated with electronic discovery can be avoided, and the benefits of digital technology can be realized in litigation, by treating e-discovery in the same way that successful business enterprises treat their digital information—by identifying goals and problems, bringing the appropriate resources to bear and cooperating to find a solution. But this businesslike view of discovery does not come naturally to our legal culture.

Several years ago when I was at the Federal Judicial Center, we were involved in a study of e-discovery disputes, and we were studying the strategies of the United States Magistrate Judges employed to resolve these disputes. One of the tips that came out of the study was that if you can get the IT people from both parties together in a room, they will often solve problems that the lawyers thought were insurmountable. It's a strategy that works.

But let's step back and look at this to see if there is anything we can generalize about this and apply to all cases, even

those that don't have IT people, and perhaps even apply to the lawyers themselves. What is it about these IT people that they can solve problems that great legal minds can't solve and perhaps even created?

First, these people are younger. Maybe not in years, but certainly in spirit. They are members of the Internet generation, even if they have been in practice in their professions for 38 years.

Second, they do not see complexity and volume as problems but as their element, even as assets. Volume and complexity are opportunities. They live in a digital information environment, and they are perfectly willing to apply technology's tools to solve technology's problems. In fact, it wouldn't even occur to them to do otherwise.

Third, they are team players. They cooperate to find a solution, knowing that each own pieces of both the question and the answer.

What lessons can we learn from this? There are three: Pay attention to young people; use technology's tools to solve what we perceive as technology's problems; and three, cooperate.

First, pay attention to young people. Don Tapscott in his book, *GROWN UP DIGITAL: HOW THE NET GENERATION IS CHANGING YOUR WORLD*⁶, reports on a 12-nation study of 8,000 people born between 1978 and 1994. That is, born after the average respondent to the American College survey made partner. Net-Geners. Here's what he concludes from his survey:

Net-Geners are smarter, quicker and more tolerant of diversity than their predecessors.

By the time they are 20, Net-Geners have spent 20,000 hours on the Internet. Members of their parent's generation, that's us boomers, had spent 20,000 hours watching TV before we were 20. Think about that. Net-Geners care about justice and ways to improve society. They value freedom and choice. They love to customize and personalize. They scrutinize everything and value integrity and openness, to a fault sometimes, when it comes to our generation's concept of personal privacy. Net-Geners love to collaborate. They expect constant innova-

6. DON TAPSCOTT, *GROWN UP DIGITAL: HOW THE NET GENERATION IS CHANGING YOUR WORLD* (McGraw-Hill 2008).

tion. They expect to give and receive constant feedback. These are the students in our law schools today. Actually, we have been graduating them from our law schools for about five years now. But they are not being taught digital information management in law school. The skills they possess they have developed on their own or from other course work. And from what I can see, in spite of their extraordinary ability for innovation, collaboration and openness, these skills are being beaten out of them if they have the misfortune to be drafted into a document-review project.

Why do we do this to our young people and our law students? These young lawyers trained in digital information management will lead us out of purgatory, not the old men shaking their fists at the clouds.

Not only are these young people coming into the legal profession, they are also becoming the business litigants. They will be making those decisions in a litigation based on their Internet-derived information seeking and management skills. They will look at the business practices of law firms and litigators, scratch their heads and say this is crazy. We are not going to pay for that. Let's figure out a better and higher use of intellectual capital and automate these review processes. Let's digitize it, distribute it, collaborate on it and apply some innovation.

Now, no keynote address can be delivered before any audience these days without alluding to the international financial meltdown, so let me make the obligatory observation that the Net-Geners are going to be driving business decision-making for the next decade and will likely be doing so, at least for the next few years, in the context of significantly reduced financial resources. The massive mismanagement of e-discovery in the past few years by the litigation generation has been grudgingly underwritten, to a large extent, by clients who had the resources to pay the bills and were never presented with any alternatives. Those days are over, and the Net-Geners will soon be paying the tab, figuratively and literally, and calling the shots.

Young lawyers will use technology's tools to solve what we perceive as technology's problems and so will young business litigants.

Just as this new generation sees the value in collaboration, we are beginning to wake up to the value of cooperation in e-discovery. The Sedona Conference Cooperation Proclamation,⁷ which I believe is included in your materials and no doubt will be discussed this morning, points out that discovery is not designed to be an adversarial process, but rather the cooperative phase of an overall adversarial system.

It is an information-seeking and information-management process. And unlike past generations, Net-Geners know from experience that, when you have volume and complexity, the only way to get the information you need is to cooperate in the process.

About six weeks ago, Chief Magistrate Judge Paul Grimm of the District of Maryland was faced with a very routine case, one that will probably sound very familiar to all of you, *Mancia versus Mayflower*, in which six employees of a hospital laundry service sued their employers for back pay and overtime.⁸ Counsel on both sides were behaving typically, treating discovery as an adversarial game. Cutting through the stack of discovery cross-motions, he ordered the parties to meet and confer, but with very specific instructions on how they are to behave, what they are to accomplish and what the court expects. And this is what he said:

A lawyer who seeks excessive discovery, given what is at stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in responding to discovery, or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is . . . hindering the adjudication process, and making the task of the “deciding tribunal not easier, but more difficult,” and violating his or her duty of loyalty to the “procedures and institutions” the adversary system is intended to serve. The rules of procedure, ethics and even statutes make clear that there are limits to how the adversary system may operate during discovery.⁹

7. THE SEDONA CONFERENCE, COOPERATION PROCLAMATION (2008), http://www.thosedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf

8. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D.Md. 2008).

9. *Id.* at 362, citing Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1162, 1216 (1958).

After ordering the parties to meet and confer, and providing them with a detailed agenda to guide their discussion, Judge Grimm concluded the opinion by saying:

It is apparent that the process outlined above requires that counsel cooperate and communicate, and I note that had these steps been taken by counsel at the start of discovery, most, if not all, of the disputes could have been resolved without involving the court. It also is apparent that there is nothing at all about the cooperation needed to evaluate the discovery outlined above that requires the parties to abandon meritorious arguments they may have, or even to commit to resolving all disagreements on their own. Further, it is in the interests of each of the parties to engage in this process cooperatively. For the Defendants, doing so will almost certainly result in having to produce less discovery, at lower cost. For the Plaintiffs, cooperation will almost certainly result in getting helpful information more quickly, and both Plaintiffs and Defendants are better off if they can avoid the costs associated with the voluminous filings submitted to the court in connection with this dispute. Finally, it is obvious that if undertaken in the spirit required by the discovery rules, particularly Rules 26(b) (2) (C) and 26(g), the adversary system will be fully engaged, as counsel will be able to advocate their clients' positions as relevant to the factors the rules establish, and if unable to reach a full agreement, will be able to bring their dispute back to the court for a prompt resolution. In fact, the cooperation that is necessary for this process to take place enhances the legitimate goals of adversary system, by facilitating discovery of the facts needed to support the claims and defenses that have been raised, at a lesser cost, and expediting the time when the case may be resolved on its merits or settled. This is clearly advantageous to both Plaintiffs and Defendants.¹⁰

Now, to the lawyers of the Litigation Generation, Judge Grimm may be naive and impractical. But to the new business people, the Internet Generation, who are going to be paying the bills, Judge Grimm is hitting the nail on the head.

It's time for me to surrender the podium to the panel. We are going to be spending the rest of this morning discussing e-discovery and the tools that you as judges use to facilitate the cooperation needed to lead us out of purgatory.

Thank you again for inviting me to address you, and I look forward to a stimulating and productive dialogue.

10. *Id.* at 365.

E-DISCOVERY PANEL

MS. GROSSMAN: I attended my first e-discovery conference in Memphis, Tennessee, almost three years ago, and I remember coming back to my firm afterwards, like Chicken Little, saying: “The sky is falling, the sky is falling,” but I had a very hard time getting anyone to listen to me.

Today, we all know we are facing a monumental challenge. Ken described it. It’s that the volume and complexity of electronically stored information is threatening the justice system as we know it.

This morning we will address five topics that are some of the most pressing issues facing litigants and the Courts today. We have assembled for you a stellar panel of individuals who have been thinking about these issues for a very long time, and our goal is to engage in a meaningful dialogue with you about the problems we face and possible solutions to these problems.

We hope that you will feel free to participate. There are mikes that you can use to raise any concerns or ideas that we fail to mention, and perhaps by the end of the morning, we will be able to come to some consensus about at least some future directions or ideas that would be fruitful for the Commercial Division to explore.

So the five topics our panel will cover are the following:

First, proportionality – is the volume, complexity and cost of e-discovery driving litigants out of the court system? And, how were we going to ensure proportionality and reasonableness in e-discovery?

Second, we will talk about cost allocation – who should pay for all these costs? As you may know, in New York, there are two lines of case law; one that says the requesting party should bear the cost, and the other that places the burden on

the responding party. We will talk about whether who pays makes a difference.

Third, we will address whether we can afford to continue with an adversarial e-discovery model, or whether the unique characteristics of ESI require something different.

Fourth, we will discuss whether New York should join the 17 other states that have adopted e-discovery rules, and if so, what rules would be most appropriate?

And finally, we will discuss what I think is one of the most challenging issues; there is a vast cultural divide between the United States and the rest of the world when it comes to the discovery of personal information and the difficulties posed by cross-border e-discovery in an increasingly global economy.

It is my honor to introduce you to a very distinguished panel. I will start from my right: Judge Carroll, is the Dean and Ethel P. Malugen Professor of Law at the Cumberland School of Law of Samford University, in Birmingham Alabama, where he teaches Federal Courts, Complex Litigation, Evidence and an on-line course in E-Discovery and Evidence, which he will describe for us later today.

Judge Carroll served as a United States Magistrate Judge in the Middle District of Alabama for more than 14 years. He is a former member of the United States Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure, and the former chair of its E-Discovery Committee, as well as a former chair of the Magistrate Judge's Education Committee of the Federal Judicial Center.

Judge Carroll was the Reporter for the committee that drafted the Uniform Rules Relating to the Discovery of Electronically Stored Information, which were approved and recommended for enactment in 2007 by the National Conference of Commissioners on Uniform State Laws. And Judge Carroll will talk to us about that this morning.

Judge Carroll received his J.D. from the Cumberland School of Law, and his L.L.M. from Harvard University. He has served as a flight officer in the U.S. Marine Corps, and, as I only recently learned, is a triathlete.

Justice Emerson is a justice of the Supreme Court of the State of New York for the Tenth Judicial District. Justice Emer-

son is currently the Presiding Justice for Suffolk County's Commercial Division, which she helped to establish in 2002.

In addition to her judicial duties, Justice Emerson is an adjunct professor at the New York State University at Stony Brook, where she teaches courses in the Masters in Business Administration program.

Prior to joining the bench in 1995, Justice Emerson was a partner at Shearman & Sterling, where she handled a wide variety of complex domestic and international transactions involving acquisition financing, project finance and public offerings for leading financial institutions, investment banks and Fortune 100 corporations. Justice Emerson is a graduate of the Syracuse University College of Law.

Ken Withers you have met already. To his right, and my left is Jim Bergin, who is litigation partner in the New York office of Morrison and Foerster, where his practice focuses on complex commercial and consumer litigation, with an emphasis on disputes involving multi-state and multi-district litigation.

Jim has extensive experience in class action litigation, and has served as court-appointed liaison counsel in a number of complex insurance litigation matters, and as nationwide coordinating counsel in substantial products liability litigation. Jim is a member of the Executive Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, and for many years has served as Co-Chair of the Section's Civil Practice and Rules Committee. In that capacity, he was a principal author of the Section's Report Recommending Certain Amendments to the CPLR concerning electronic discovery, which was approved by the New York State Bar's Executive Committee and House of Delegates in June 2008. A copy of that report appears in your materials, and Jim will be discussing that today.

Jim is a graduate of the Columbia Law School and served as a law clerk to the Honorable Raymond J. Dearie, Chief Judge of the United States District Court for the Eastern District of New York.

And finally, Tom Allman, who was one of the earliest advocates of the need for amendments to the Federal Rules of Civil Procedure to address the challenges of e-discovery that we face today.

Tom is currently an attorney and consultant in Cincinnati, Ohio, co-chairs the Steering Committee of The Sedona Conference Working Group on Electronic Document Retention and Production, which is Working Group 1, and co-chairs the E-Discovery Committee of the Lawyers for Civil Justice.

From 1993 through 2004, Tom was Senior Vice President, General Counsel and Chief Compliance Officer of BASF Corporation, in Mount Olive, New Jersey. And from 2004 through 2007, Tom was Senior Counsel at Mayer Brown Rowe and Maw in Chicago.

Tom was an editor of the Second Edition of the Sedona Principles, and is a graduate of the Yale Law School. He is a well-known and well-respected author and speaker in the areas of information management and electronic discovery.

So, let's begin with proportionality, and whether the volume and cost of e-discovery is driving litigants out of the court system. I'm going to start with you Tom: Before a suit is filed, or at the outset of a litigation, a corporation has to make certain decisions about preservation, which may have an impact on the rest of the litigation.

Can you talk to us about the cost of preservation and whether there is anywhere a litigant can go when they want relief from an oppressive preservation demand. And I guess what I'm thinking about is the Texas versus the City of Frisco case¹

MR. ALLMAN: Thank you very much, Maura. If you don't mind, let me go back about ten years and tell you about the first experience I had with proportionality in the preservation context, and it was one that ended up shaping my career because it's the one that caused me to suggest that we amend the Federal Rules.

We had a train rumbling through Northern Louisiana carrying a bunch of chemicals in some of its cars, and those chemicals were manufactured by BASF. And the train derailed, predictably, as trains are wont to do in Northern Louisiana. And the fax machine disgorged an ex-parte preservation order from a state judge that ordered me to order my company to

1. See *Texas v. City of Frisco*, 2008 WL 828055 (E.D. Tx. 2008).

immediately cease the recycling of electronic information. Period.

Well, I called in the head of one of my sections of IT and asked him what that meant. He said, “[W]ell, we have 400 servers around the United States. We have approximately 35,000 people using our e-mail system. This means that we must now immediately cease the recycling of all of our backup tapes, cease the ordinary routine recycling of information on our data bases. . .”, and he went on and on. And the consequences of that little order that the Judge issued, I’m sure in good faith in Northern Louisiana, were really horrendous, and this was not the only time. . . . [I]t’s obvious to any of us that that is a disproportionate response to the derailment of a chemical car in Northern Louisiana.

So, you have asked me where can one go to get help? Well, what I suggested to John Carroll eight years ago was that the Federal Rules ought to be amended to say judges ought not to be issuing ex-parte preservation orders without good cause and some notice to the party it sought to be ordered.

I might add that if you look carefully at the committee notes to Rule 26, after the 2006 amendments, you will find that judges are discouraged from issuing ex-parte preservation orders by the Federal Rules Committee. So to that extent, I actually did win that one.

But you have asked me about a very fascinating case, a case called City of Frisco versus Texas. This is a case that just took place earlier this year down in Texas, obviously, where the State Department of Highways had announced that they were about to run a highway through the City of Frisco. And so, the city wrote to the state of Texas and said, “Look, we anticipate we are going to fight you on this, and we expect you to maintain each and every piece of electronic information that’s of any relevance whatsoever to this particular matter.” And so, the City, being in the same frustrating position I was in, came up with a brilliant idea: We will bring a declaratory judgment action, and they did.

And you can imagine what happened. Those of you who are judges know that there is great reluctance on the part of courts to enter orders without the existence of a case or controversy. There really wasn’t one yet, and so they refused to do it.

So currently, as I've said, the people who were in my position, and corporations today, face a very lonely series of decisions. This is at the beginning of a dispute. There is no discovery that has been done. There is usually nobody you can talk to on the other side. The question is, what do you have to do to meet your obligation, your common law obligation, to preserve information that may become discoverable? It's a very lonely decision. My biggest gripe, in fact, is about the way the case law has developed; the courts don't seem to understand how lonely that decision can be and how difficult it is, but there is a trend, I'm happy to say, where judges are beginning to realize that the proportionality principle does apply in the preservation context, and we have cited it in our outline, which is in the front of your booklet here.² We have cited an excellent law review article by the same Judge Grimm that Ken referred to, entitled *Proportionality in The Post-Hoc Analysis of Pre-Litigation Preservation Decisions*.³ I love that title.

Sedona has issued a commentary on the use of the proportionality principle⁴ in the context of making decisions about information that is not reasonably accessible. I apologize for that lengthy answer. It did shape my career, because I really do believe, as we sit here today, that the biggest single concern of your average general counsel and his litigation counsel in-house is, "Have I done an adequate job of preserving so that I don't get second-guessed down the road and get horrendous sanctions?"

MS. GROSSMAN: I can confirm that defense attorneys tend to over-preserve because you don't want to get yourself into trouble. So the tendency of defense counsel is to counsel their clients to over-preserve, which leads to more problems, because then there is more to review and so forth.

2. See generally, Hon. James C. Francis IV, Preservation, Production and Cost-Shifting in E-Discovery, 783 PLI/LIT 11 (2008).

3. Hon. Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381 (2008).

4. THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: SECOND EDITION *Best Practices Recommendations & Principles For Addressing Electronic Document Production* (2008), http://www.thosedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf

My next question is for Judge Carroll. In the *Mancia*⁵ decision, Judge Grimm discusses the concept of determining the amount in controversy or the value of the case at the outset and then setting a workable e-discovery budget that is proportional to what is at issue in the case. Is this doable and realistic? Should litigants be given an e-discovery budget and when it is reached, used up, game over, unless they can show good cause?

JUDGE CARROLL: Great question. Before I answer it, I want to thank you for having me. It's a real treat to come to a big city from Northern Alabama, although Birmingham is quite large, but I appreciate your efforts to make me feel at home. . . .

This is a very interesting concept, and one thing we are going to talk about throughout the course of the morning are tools that judges can use to bring e-discovery under control. And I think that that's exactly what Judge Grimm was doing. I think this is a suggestion that the parties "get real." That if you've got a \$100,000 case and your e-discovery costs are going to be \$500,000, then I think you need to rethink your approach. I don't think this will work as a limiting tool so that you say, "Okay, you said your budget is \$100,000, you reached it, so no more discovery." I just don't think that is practical. I do think it's a good way to force the litigants to confront the question, "What am I likely to get out of this case?" versus "What am I likely to spend?" so it fits into what we are going to be talking about—getting the parties to cooperate, getting the parties to think about the case.

MS. GROSSMAN: Jim, my next question is for you. At the beginning of a case, do you know what e-discovery is going to cost? Could you come up with a budget? What is a reasonable e-discovery budget?

MR. BERGIN: Well, picking the last one first, the beauty of that question is that no matter what answer I give, more than half the people in this room will disagree with it. I don't know that it's possible to define and get a consensus on the issue of a reasonable e-discovery budget, but I think I can give some thoughts on the matter. The flip side of the pathway that Ken puts before you is one of collaboration. To achieve solutions to these problems is the risk of Versailles. What drives the prob-

5. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D.Md. 2008).

lem with e-discovery is the risk of failure, the risk of sanctions from failing to preserve, the risk of sanctions for preserving but failing to produce, and for lawyers, the risk of producing pertinent information that you should have caught but failed to do so. Picking some of the numbers out of the Sedona commentary on best practices, as that publication indicates and is consistent with our experience, that an employee in a typical commercial enterprise will have several gigabytes of data in their name, and if they're designated as a custodian, it's probably going to cost if a human being has to review those about \$30,000 per gigabyte to figure out what's relevant and responsive and what should be presented in the case.⁶

So, that puts you in a situation where even in a modest-sized commercial case it's very hard, even in a very small commercial case, it's very hard to avoid spending a hundred to \$250,000 on e-discovery, and in large cases it's millions of dollars. It's like that.

And you can chart out those costs at the outset of the case based on your estimate of how many custodians are likely to be tapped for documents, and what is the form of those documents and to what extent we need to take older data that's hard to get at and may not fit the current technology. You can do that; law firms do that for businesses all the time. I have to tell you, the numbers are staggering.

Cost drivers and things that can be looked at to try and find ways to drive down those costs, ways to reduce the risks of failure, failure to produce, failure to preserve, failure to protect privilege. If you can find ways to reduce those risks by getting agreement on the process, on what will eventually come to be a reasonable process upfront, you're going to be in a much better position to say this was a reasonable budget. If you can do that, you can reduce the costs of externalizing the processes of collection, processing, review and production. And you can also make a stab at reducing the extent to which human beings have to look at a lot of documents by reducing the number of custo-

6. *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, THE SEDONA CONFERENCE JOURNAL, Vol. VIII, (2007), http://www.thesedonaconference.org/dltForm?did=best_Practices_Retrieval_Methods___revised_cover_and_preface.pdf.

dians you have and by using the technical resources that you have.

And if you can agree on all those things, we may well be able to reduce the costs and the risks of reviewing privilege by making agreements, and by incorporating them in court orders, for example, that inadvertent production will not result in a waiver, will not result in a subject-matter waiver, which will be even worse.

All of those things can lead retrospectively to an agreement that that wasn't such a bad budget for this case. If you don't control those factors, I have to tell you, I would agree with most of my clients who would say that the notion of a reasonable e-discovery budget is an oxymoron.

MS. GROSSMAN: Judge Emerson, when parties come before you, do they know enough to establish, or for you to work with them to establish, an e-discovery budget? Do they have any idea what the data sources are, who the custodians are, what the data volumes are?

JUDGE EMERSON: Maura, as my colleagues know, the quality of our orders depends very heavily on the quality of the information we have available at the conference appearance. And the Commercial Division, as well as other parts of the court, uses the conference format to intervene at the earliest possible point. I'm going to take a little bit of exception with one of Ken's comments about involving the younger members of the team. It is not uncommon when you have a discovery conference that you will not necessarily have the most senior members of the litigation team appear at that conference. It is somewhat common to have some of the more junior people appear. They might not be the people who would be in the best position to make the kind of critical decisions that we need to make at that conference.

I need someone who could describe exactly what they're looking for and why they're looking for it. They should know enough about their clients to be able to discuss intelligently what their information is, how they manage it, where it's most likely to be maintained. But most of all, you need the person who can make the decision in order to make the compromise. And if you are working with someone who has just been told to appear and object, you will not make a tremendous amount of

progress. The theory is you will always prefer the partner to the associate.

So, again, I come back to, the more the attorneys know, the better they're able to communicate and, if at all possible, have the involvement here, in person, or by telephone, if the distance is an issue, of the technical people. We can make a lot more progress. We can avoid some of those omnibus responses that create more problems than they're worth.

Once those kind of orders go out it is very hard to take them back because the momentum or the advantage has shifted to one side or the other.

MS. GROSSMAN: We will talk a little bit later about the importance of the early conferences and the meet-and-confer that precedes it.

I guess my last question for you, Ken, is how do we determine proportionality? How do you develop a budget when the case involves injunctive relief rather than damages?

MR. WITHERS: It's a question that I would like to, if possible, get some reaction from the members of our audience on.

Just in response to Judge Emerson's comments, I wasn't suggesting that the youngest person on the staff be given authority to run the case. I'm saying this, that the older attorneys have to listen to the younger attorneys, they're the ones in the trenches. All too often the younger attorneys — we've seen this time and time again in the reported case law on the federal side — the younger attorneys seem to know what's going on in the case, but there isn't communication up and down.

JUDGE EMERSON: Or they don't have the ability to make the critical decisions.

MR. WITHERS: Exactly.

MR. ALLMAN: And, Ken, don't forget, you're leaving out the client here.

MR. WITHERS: That's what I was getting to, believe me.

MR. ALLMAN: We do not listen to the youngest attorney on the trial team. We expect the head of that trial team to be the person to tell us what the answers are and to make a recommendation.

MR. WITHERS: Absolutely, no disagreement there. But what I was saying was that the younger people on the trial team, who were the ones actually in the trenches and were go-

ing to actually review the documents, often know a lot about the case and know probably more than the senior attorney as to how to approach these documents in a review context. That's not the settlement of the case.

Judge Tennille in the Business Court of North Carolina makes a habit of bringing the parties, not just counsel but the parties, into the initial conference and ask them privately, each of them, to evaluate the value of the case with him. Obviously, if the parties all agreed on what the value of the case was, it would settle like that. It's the difference between the parties' assessment of the value of the case that's at issue.

So Judge Tennille takes a look at the difference between how the respective parties value that case and based on that difference will ask the parties how much they really think this case is worth to them, what is going to be the reasonable transaction costs, if you're a hundred thousand dollars apart or \$10 million apart, how much do you want to spend to be able to get to there, and instructs the attorneys to develop a budget and present it to their clients and get their clients to sign off on that budget before they receive it.

So, it's not the attorneys that are going to be driving the budget in Judge Tennille's court; it's going to be the clients and that's very important. All that assumes this wonderful world in which the litigants are rational actors, which may be rare.

What about the situations where the people, the parties, are very far apart or, more importantly, the many cases on which it's very difficult to put a monetary value? For instance, cases for injunctive relief, particularly trade secret theft cases, where there isn't a monetary value. The party is seeking injunctive relief, and what's at stake is their business and their livelihood. How do you put a value on that for the purpose of developing this theoretical budget? What about the civil rights case against a municipality or a government, how do you put a value on that when you have civil rights issues on one side and the public purse on the other?

These are areas where I don't have any answers and so I would like to ask members of our audience if they have had to deal with the situation of trying to develop budgets or proportionality in those kinds of situations.

JUDGE EMERSON: Can I just add one other fact. You raised it in the description of litigation, but we are seeing more and more of what we call “disproportionate discovery;” one side has a tremendous amount of e-discovery, the other side has none. And it does come up in the kinds of cases that you refer to. It also comes up in the more traditional commercial litigation.

The other thing that is not directly related, but does complicate things a bit, is I’m seeing a lot more of contingency litigation in the commercial context. And it does drive the way the litigation is pursued, if one side has tremendous costs and the other has more modest or no costs.

MR. WITHERS: Following up on that, in contingent cases there is a tendency for us to think that of course the plaintiff or — actually, the requesting party may not be the plaintiff — the requesting party has nothing to lose and so just asks for the world.

But in contingent cases, it’s much like the dog chasing the car. What happens if the dog catches the car? The contingency fee firm or the sole practitioner has to deal with the consequences of their request. If they’re being realistic— I can tell you about the possibility that there may be irrational actors here—they have to consider how much information they actually can absorb and use.

So, when we’re talking about developing proportionality for cases on which it’s difficult to put a budget figure, what we need to concentrate on is not so much proportionality in terms of numbers and budgets, but proportionality in terms of issues of the case.

And I’d like to talk about the way I was trained as a young lawyer by that member of the American College: you start out the case by writing your closing argument and looking at the jury instructions. What are going to be those six pieces of evidence that you’re going to have to present before a jury to make your case and your defense, and you work backwards from there.

Unfortunately, we’re living in a world where a knee-jerk reaction on the part of the attorneys is to put out all these huge blanket discovery requests and think about the cases later, and what we have to do is force the attorneys to think in the other

direction, what do they actually need and where are they going to find it.

MS. GROSSMAN: There's some precedent for imposing limits on the amount of permissible discovery; for example, the number of interrogatories or the length of a deposition. What about the idea of putting limits on e-discovery, for example, you get 15 custodians to start. I'm going to ask Jim, Judge Emerson and Tom to comment on this. Jim, do you like that concept?

MR. BERGIN: I think that there needs to be room for reaching agreement at the outset on the number of custodians, at least in the first round, that would be searched. If you can't put in place limits on how many people, what period of time, what sources of data will be searched, and what fields in that data will be searched, can you exclude irrelevant file formats? If you can't agree on things like that at the outset, the likelihood that any electronic inspection process will scoop in vastly more data than is ever needed for the course of the litigation is very great.

I think this should be an essential part of a very early negotiation in any significant and separate case.

MR. ALLMAN: The only caveat to that, is that you have to take into account the fact that things change over time and so the question of have you made a good faith effort to locate the appropriate custodians is really important. There's a classic case in Louisiana, involving two aluminum companies, Alcoa and Consolidated Aluminum⁷, where the court felt compelled to monetarily sanction the party because they only put the litigation rule on, let's say five custodians, and then six months later they expanded to 15.

The court in its opinion makes it quite clear that the reason they expanded was because they learned more about the case and they learned that those custodians might have something that would be produced.

So you would say, "Hey, the thing works." But instead the judge, reading *Zubulake*,⁸ read this rigid idea that you should once and for all be in the place to know exactly who the custo-

7. Consolidated Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335 (D.La. 2006).

8. *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

dians are going to be.⁹ This is wrong. You have to take it over time. I think in 90 percent of the cases a custodian-based approach is the way to go in planning e-discovery.

JUDGE EMERSON: It works well from the court's perspective to be able to limit discovery to those that are the most likely sources and then stop, take a look, see what we need to know next. Its success, though, is heavily dependent on the litigants and the attorneys being convinced that they are willing to be flexible and work with them and make sure that we don't ignore subsequent requests or cut to a sanction motion too quickly.

It is also heavily dependent on the attorneys working well together and cutting out the unnecessary objections or the overly broad requests and articulating their concerns in a way that when we have to step in, we can; that we have a well-defined question that we can address.

MS. GROSSMAN: Ken, a party wants to see or inspect the computers of his adversary or make images to go digging for deleted files. This can get very, very expensive. Can you talk to us about when computer forensics is necessary? What protections should be implemented to protect confidential or privileged information when a computer is accessed when there's on-site inspection?

MR. WITHERS: Not only is the forensic investigation potentially very expensive, it also may be completely unreasonable and a violation of the Fourth Amendment, which does apply to civil cases as well as criminal cases. We have to be very careful.

We've had a number of instances in the past few years of attorneys who read something in a legal journal about how they're supposed to capture the laptop computers and the home computers and every computer they can get of their opponent and get a forensic image, what is called a bit-stream image, everything that is being forensically copied the same way they do on television on "CSI."¹⁰

9. See *Consolidated Aluminum Corp. v. Alcoa, Inc.* 244 F.R.D. 335 (D. La. 2006).

10. See generally, Robert Guinaugh, *Electronic Evidence-Weapon of Mass Discovery*, 18 D.C.B.A. BRIEF 12, (2006); See also, Beryl A. Howell, *Digital Forensics: Sleuthing on Hard Drives and Networks*, 31-FALL VT. B.J. 39 (2008).

This, again, is one of the knee-jerk reactions of the attorney who is thinking first of capturing all the information and then thinking about discovery down the road, and it is quite problematic.

The only kinds of cases where the forensic imaging or forensic inspection of a computer is warranted are those cases where you have a bona fide allegation of fraud; where there is an issue that involves the kind of evidence that would not normally be produced in discovery by a person responding to a discovery request in the ordinary course of business as they are expected to do— which is to look at their various sources of information, pull out the relevant or responsive documents, review them for privilege and give them to the other side. That's how we've been doing things for 50, 60 years.

There's no reason, just because we happen to be in the electronic age and it's possible to capture gigabytes of useless data, that we capture gigabytes of useless data. We're confronting two issues when it comes to forensic imaging. One is the purpose of making the image to preserve information so it isn't deleted in the ordinary course of business or isn't deleted intentionally by someone later. That's the preservation issue.

Then the question is, once we have this information, how do we conduct an investigation of this information and who conducts that investigation for the purposes of discovery and production? That's a separate issue.

There are many corporations that, as a matter of routine now in employment matters, when they're terminating employees, they routinely image the hard drives of their desktop computers, or they actually pull the hard drive out and put it in storage, and they routinely sequester the stuff for preservation purposes. It doesn't mean they're doing it to look at it. It's a cheap way of preserving all the evidence in its pristine form.

When we have a request for discovery information, we have to look very carefully at what are the issues here that we are trying to resolve, what are the factual issues in discovery, is the metadata really necessary, are there questions about the provenance of documents that have already been produced, and are there questions of fraud here.

We have to ask the attorneys what they are trying to accomplish by doing this. If we have established that there is,

indeed, relevance to information that isn't readily apparent in the normal course of business and requires that we go to the computer and conduct a forensic investigation, then who is going to conduct that investigation, given the fact that 99 percent of the information will either be irrelevant or a large percentage will be embarrassing and personal information. Every computer forensic inspector I know is constantly finding pornography on computers you would never expect to find pornography on.

They find all sorts of embarrassing and personal stuff and also all sorts of privileged material. It probably has to be done by a neutral third-party and probably has to be done under a court-ordered protocol that protects the privilege and confidentiality of the information, that allows the responding party's attorney to review the information before it is produced to the requesting party. You have a lot of problems there with developing protocols.

MR. BERGIN: It's interesting, in the reported New York cases, the circumstances where the requests for forensic inspection examinations come up mostly in the context of marital disputes. One spouse is sure that there's incriminating evidence on their spouse's computer and they want it. My view of these cases is that the judges are sparing in giving inspection. They want to be sure that there is going to be something relevant there. They want to set tight controls on the process. They want to make sure that inspection is conducted under the supervision of a court-appointed neutral, that inspection is done by experts from both sides being present when the copying is done. The access that is given is really highly unusual.

JUDGE EMERSON: Let's also raise another issue that's related but that we don't often think about. What is the relationship of the individual that we're seeking to obtain discovery from to the corporation in commercial litigation? We always assume people are employees of the corporation and oftentimes they are not; they are not employees of the corporation that is actually a party to the litigation. They may be a dual employee of an affiliate corporation or a sister corporation. They may be consultants. They may be independent contractors. We've seen this a number of times in unfair competition and trade secret litigation, one situation where an individual whose per-

sonal laptop they were seeking to retrieve was an employee of one corporation, a former employee of another, he was a consultant for two companies bidding on the same air force contract; a salesman for another corporation involved in this and he was an overseas employee — he was an online employee to the overseas affiliate raising all of the international privacy concerns. It was almost too late to fix some of the problems that were created when this was first recognized, because the individual himself wasn't even sure how he was being carried on the corporation's books and records books.

MS. GROSSMAN: Judge Carroll, in the *Mancia v. Mayflower* case we talked about, Judge Grimm points out that under Federal Rule of Civil Procedure 26(g) which is not terribly different from the New York Uniform Trial Court Rule 130, a party must make a reasonable inquiry and have a legitimate reason for making a discovery request or objection. We hear a lot about sanctions for spoliation of evidence. Should the courts be doing more to police discovery abuse, such as overly broad requests and boilerplate objections?

JUDGE CARROLL: They should be. Judge Grimm is exactly right. Rule 26(g), which has a New York equivalent, is a valuable tool. Having said that, sanctions are a tool, and the tool can be overused. It's reserved for egregious behavior and if it's not reserved for egregious behavior, you will be spending all of your time imposing sanctions in discovery cases.

What's required, and we'll talk more about this as we go on, is in order to have e-discovery to become efficient, we need a quantum shift in the behavior of lawyers. A judge has value not necessarily sanctioning, but telling lawyers when they have done the wrong thing, and that they expect them do it the right way the next time.

Sanctions are valuable in the egregious situation. The lawyer and the judge jawboning is much more valuable.

MS. GROSSMAN: Judge Emerson, do you see yourself using Part 130? What about parties who would prefer to litigate over spoliation rather than on the merits?

JUDGE EMERSON: We had talked about this in preparation. I did a little market research by calling some of my former colleagues in private practice, and the theme came up again and again that many times the e-discovery tees up the spoliation ar-

gument to get the competitive advantage in the litigation or, as Ken suggested, to overwhelm the opposition with the request so that they hope their opponents will settle the litigation on terms amenable to the other side.

I would agree with Judge Carroll that it is a tool in the tool box, but it must be used at the appropriate point in time, and it must be used with precision. We have to be careful of not jumping the gun and allowing the appropriate opportunity for correction to be made, and to keep in mind the theory of proportionality.

Our response should be proportionate to the true facts regarding the failure to respond or comply or produce, rather than a knee-jerk reaction that results in a tactical advantage. That is a very time-consuming objective. We would have to dedicate a tremendous amount of resources. Resources, as my colleagues know, are becoming more and more scarce. It requires our time, our attention, hearing time, and evaluation time to do it correctly.

MR. WITHERS: Part 130 requires that there be a hearing on the facts, that there be findings of fact, that an opinion be written, a memorandum be drafted. It is a judgment. I also assume it's appealable. In the end, as Judge Facciola in D.C. likes to say, the only one that's sanctioned is the judge.

It's going to be used very sparingly. But Rule 26(g) in the federal system, and your state equivalent, is really a requirement for lawyers to think before they issue their discovery requests and before they file their objections or responses. This is a new concept to a lot of attorneys who were brought up in New York, where the first thing you do is you look at the form book and you pull out the formula discovery requests. The first thing you do when you get a discovery request is object to anything on the basis of overburden and overbreadth. That's not thinking. That is a per se violation of Rule 26(g) and the state equivalent.

Unfortunately, a few heads are going to have to roll before there's a change in the legal culture. I don't want to be the judge to do that.

MR. ALLMAN: Let me just comment from the perspective of the client. Rule 26(g), and I assume Part 130, also implies that the outside lawyer should take over the responsibility of look-

ing over the shoulder of the inside lawyer and of assessing the quality of the work done by the inside folks before they make that certification and what I call the duty to supervise. This can get out of control.

It can also lead to some real serious impairments between the working relationship of in-house folks and their outside lawyers. The classic example is the *Qualcomm* case now being played out in all its glory in San Diego, California, where one year ago, approximately, the magistrate judge concluded that obviously the outside lawyers were clearly wrong in everything they did. She barred them from using any privileged communications to defend the conduct. That has now been reversed. Now these incredible hearings are going on in San Diego, with the inside lawyers and outside lawyers pointing fingers at each other, saying “I didn’t look here because you didn’t ask me to look here, and so on, and so on.”

The idea that the courts should get involved in that kind of second-guessing how a client decides to run a lawsuit is very troublesome to some of us.

JUDGE EMERSON: One of the things that we use quite frequently when we get those discovery motions is, “I ask for this and they gave me nothing,” and the response is, “No, we gave you everything you’re entitled to receive.” You invite everyone to come in, you say to the counsel very clearly, “Here’s what you’re going to do. When you complete that task, we will be happy to conference with you and resolve the last two or three or maybe four questions you have left at the end of the day. If it takes you all day, unfortunately that’s what you’re going to be required to do. You may not leave until we resolve those conditions.”

JUDGE CARROLL: And you turn off the air conditioner and don’t provide time for lunch.

JUDGE EMERSON: No lunch is very effective.

MR. BERGIN: Let me add one comment about 130. Part 130 was enacted so that there was a state equivalent of Rule 11 or, at any rate, a version of the state rules that corresponded to Rule 11. It has not been modified in the way that Rule 26(g) has been modified to put emphasis on specific assurances of reasonableness in the discovery process.

That may lead to greater reluctance on the part of judges to use Part 130 for the really egregious conduct, conduct they find repeatedly in violation of their orders. I throw out the question of whether Part 130 should have a “reasonableness” aspect to it with respect to discovery.

JUDGE EMERSON: The other thing we do a lot, not to be punitive but to actually move the process along, is we require the appearance of the parties. We will tell counsel, “You need to bring a right decision-maker.” It doesn’t have to be the CEO or chairman of the board. It needs to be the person or group of people most likely to help you resolve those questions because sometimes the I.T. people can make great strides; sometimes the clients can make those strides, because counsel alone is reluctant to give up points without clients. The clients can describe in more detail, or in a better way, what is going on to reach a resolution.

They also get a first-hand sense of what the process is like and how quickly it moves along. That also helps in the decision-making.

MS. GROSSMAN: I’m going to move us along to topic number two which is cost allocation and who should pay for all of this e-discovery. Tom, I’m going to start with you. In the *Lipco* case¹¹, decided by Justice Austin, the court found precedent in the case law, and under the CPLR, that the requesting party should pay for the cost of the e-discovery. I would like to know if this would solve the problem. You can comment on Texas Rule of Civil Procedure 196, which has a mandatory cost-shifting requirement if the information sought is not reasonably available in the ordinary course.¹²

MR. ALLMAN: . . . My co-chair at The Lawyers for Civil Justice, and another former Shearman and Sterling lawyer, now practicing in Texas, assures me that in Texas everything works well because they have mandatory cost shifting for e-discovery. If you seek information that is not available in the ordinary course of business in Texas, you must pay any extraordinary costs associated with its production.

11. *Lipco Elec. Corp. v. ASG Consulting Corp.* 798 N.Y.S.2d 345 (Sup. Ct. 2004).

12. *See* Tex. R. Civ. P. 196.

The folks in Texas tell us that the reason why you do not see a lot of fights coming out of the e-discovery context down there is the parties are used to it. They temper their requests, go to these conferences, and are reasonable about it. When they can't reach accommodation, they pay the extra money that's associated with it. . . I have an extensive paper detailing the exact details of the 17 states that have enacted state rules on e-discovery.¹³ No state other than Mississippi — and even Mississippi changed it slightly — has enacted the Texas rule. I'm not quite sure why that is.

I have seen a proposal floating around here in New York where you folks, or one of the judges in your jurisdiction, was considering a guideline whereby the parties would talk about the costs associated with production and if the parties couldn't reach agreement on it, it would be produced in a manner in which the cost would be assumed by the requesting party.

I must be candid in saying that I'm not sure that cost-shifting is anywhere near all of the answer to discouraging improper requests. It's far better to do as Justice Emerson has suggested, for a court to take hold of the matter early on and make sure the folks are doing it reasonably. If judges were able to do that — that was the purpose of Rule 26(f) in the federal context — that probably will handle the cost-shifting issue.

MS. GROSSMAN: Jim, the Federal Rules and the *Delta Financial* case¹⁴ decided by Judge Warshawsky hold that the producing party pays, and provide for cost-shifting or sharing at the discretion of the court. What costs, exactly, should we shift? Is it only the not reasonably accessible data? What about the cost of review? What about privilege review that gets expensive? What kinds of costs should be shifted?

MR. BERGIN: Let me put that question in context.

I grew up in a litigation practice where if the judge thought a discovery request was unduly burdensome, he or she would simply strike it. You wouldn't get it. One of the principal ways of encouraging people to moderate the discovery requests was the quite real possibility that discovery might

13. See Thomas Y. Allman, *State E-Discovery Rule-Making After the 2006 Federal Amendments: An Update and Evaluation*, *infra* at —.

14. *Delta Financial Corp. v. Morrison* 13 Misc.3d. 604, 819 N.Y.S.2d 908 (Sup. Ct. 2006).

simply not be had. CPLR 3103 plainly allows the judge, if the judge thinks that discovery is unduly burdensome, to reach that result. It also allows the judge to limit discovery if discovery is unduly burdensome.

I don't see any authority in 3103 to make a per se rule as to the shifting of costs unless you can satisfy yourself as a Court that discovery is unduly burdensome.

On the other hand, there's an awful lot about e-discovery that is potentially unduly burdensome, and as a result of that, the possibility for cost-shifting in situations where parties are not behaving reasonably is very, very real, and I think the few reported decisions that we have are an earnest attempt to grapple with that problem.

In the *Delta Financial*¹⁵ case, Justice Warshawsky required a party to do some exploratory discovery in some areas where I myself might have said there hasn't been a showing of need for that. But he balanced that by requiring the costs of all of that sampling discovery, including the cost of the privilege review, to be borne by the requesting party.

Now, I have to say that as I read that case, it appears that the requesting party had volunteered to do that. I don't know exactly the extent to which that is a guidepost in different facts and circumstances.

Justice Austin in the *Lipco* decision suggests that the requesting party will pay for the discovery. It's a little hard for me to tell on the facts of that case whether he did that because it was obvious that the discovery was unduly burdensome, and that, therefore, the requesting party should pay if they wanted it, or if he was attempting to promulgate a per se rule. I think he may be here; he may or may not want to comment on that.

I would suggest that the costs of seeking too many custodians or requiring a search that encompasses a significantly overbroad set of electronic documents to have to be reviewed, all of those costs could be viewed as shiftable in an electronic discovery context, as could the costs of preserving materials that are highly likely to be irrelevant or discovering or storing materials that are really not likely to be relevant to the case.

All of those are possibilities that remain to be explored.

15. *Id.*

MR. ALLMAN: How about the cost of privilege review?

MR. BERGIN: That is a more interesting challenge. It may not go down easily to suggest in the ordinary case that with respect to materials that are readily accessible to the producing party, the other side should pay for the cost of their preserving their privilege. To the extent that discovery starts going beyond the balance of what looks like readily accessible, I think it's a much more likely candidate as Justice Warshawsky did.

MR. WITHERS: One of the problems when we get into this whole area is to determine what is meant by costs that are unduly burdensome and how we quantify these costs. Part of the problem here is that the objection to electronic discovery as being unduly burdensome has become boilerplate, and the assumption is if it's electronic discovery, it must be unduly burdensome because it is electronic discovery. And because I'm a lawyer with 38 years of practice, I don't understand it and so, therefore, it must be something esoteric.

There are lots of times when the costs of electronic discovery are self-inflicted. When we're talking about unduly burdensome, we're talking about unduly burdensome because of the way the lawyers want to do it. If we have a different legal culture that says, "No, the idea of eyes on paper reviewing every document, of downloading gigabits of data and having people look through all of that stuff to determine relevance and privilege, those days are over and we have to begin to look at more creative approaches to discovery, that can reduce costs mainly by reducing the scope of what is potentially responsive. And by doing so, we're willing to use such things as statistical sampling. We're willing to use such things as search and technology — search and information retrieval technology. We're willing to look at concepts such as the concept search as an automated retrieval mechanism."

We can reduce these costs significantly so what was unduly burdensome no longer is as unduly burdensome, but judges have to be willing to say this will be considered a reasonable response and we'll live with the results. We're not looking for 100 percent accuracy. We never had it in the paper world when law students or young associates were being thrown into warehouses for days on end living on Diet Coke and pizza and reviewing documents. We expected that that re-

view was 100 percent accurate? Of course it wasn't. It's just we didn't know how inaccurate it was.

In the electronic world, we can now measure these things, and what we can measure, we can manage. And what we can manage, we can live with. So if the judge is willing to say, "Parties, come to a reasonable approach to this; it won't be perfect, but if both parties are willing to live with the results and not challenge them on the basis of perfection, we can reduce these costs."

A couple of other things: One is on the question of cost-shifting. There are two ways of doing cost-shifting. One is cost-shifting in the process of discovery; who is going to pay the upfront costs during discovery? The second is the Canadian approach, which is cost-shifting at the end of the case. I would be interested in hearing if people have any particular opinions about a judge stating in discovery that these costs may be recoverable by the parties at the end of the case. Could it have a significant impact? While it would not hinder discovery, we'd have the traditional view, at least from the Federal courts, that the responding party pays their own costs in discovery — upfront costs during discovery — cost-shifting at the end of the case could really affect the bottom line.

The second is that we get this objection a lot from people who think that if we have a cost-shifting rule, such as the rule in Texas, that that will become a motivation for corporations to specifically design their information management systems so that everything is not accessible and everything costs money to retrieve. This assumes that these businesses are only in the business of litigation. Businesses have to operate in a real world environment, and to be competitive you have to have information that is readily accessible. I don't think there's a motive in the real world for businesses to hide their information to make it costly for their opponents to access it. Having a cost-shifting rule in Texas does not affect the way businesses do business.

MS. GROSSMAN: Last word?

MR. BERGIN: Two comments. One with respect to putting off the cost-shifting decision until the end of the litigation. That is what Justice Cahn did in the *Weiller* case, one of the

cases in the materials.¹⁶ He did not hinder the party requesting the documents from getting them, but he made clear that it would be moved for conversation later on about cost-shifting.

With respect to process, the process that lawyers actually use to deal with large volumes of documents, there can be technological solutions, but it's not a panacea. Most law firms that do large document reviews will scoop in a heck of a lot of documents and will have consultants subject them to fairly relentless word-searching singly or in various combinations, to try and boil that down to a set of what human beings have to actually look at.

It's difficult at the outset to agree on a process that will be used to make that paradigm. But it is possible, and by basically intensive negotiation on who, on what files and on what terms will be used to search that data, you can usually cut down volume on things that have to be looked at for relevance to a considerable extent, but very often not beyond the 50 percent level. Somebody still has to figure out for the remaining documents, does that really have anything to do with this case or is it just an accident of verbiage that it got picked up in a search.

MS. GROSSMAN: . . . Now we're going to turn to what Ken started to talk about, which is, can we afford to continue with this adversarial e-discovery model? Recently the Sedona Conference released something called the Cooperation Proclamation.¹⁷ It posits that the justice system can no longer afford to have adversarial discovery and that cooperation and transparency are not inconsistent with advocacy.

So, Ken, can you tell us a little bit about that effort and what stands in the way of achieving that?

MR. WITHERS: The Proclamation itself is very short. It's only three or four pages long, and I urge to you read it. At first glance, it may look like a number of statements that have been issued over the last several years about civility in litigation from various bar associations. But there is a big difference: And that is that this is actually the beginning of a much larger campaign.

16. *Weiller v. New York Life Ins. Co.*, 6 Misc.3d 1038 (A) (N.Y. Sup. Ct., N.Y. County, Mar. 15, 2005).

17. The Sedona Conference, Cooperation Proclamation (2008), http://www.thosedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf

It's a campaign to actually equip the players in the litigation world with the tools that they need to actually accomplish this cooperation, that outside counsel need to understand what their actual ethical and professional responsibilities are.

I had a question during the break, "Doesn't this idea of cooperation and discovery perhaps run afoul of the disciplinary rules here in New York, which still have the old language of the duty as zealous advocacy?" Most of the rest of the country has changed that language to a duty to represent the client diligently, not zealously. And there is a very hot and heavy debate about that. But I think that the majority opinion now amongst the academics and those who comment in this area is that the rules of professional responsibility require that counsel cooperate to the extent that they need to with opposing counsel, but more importantly, they have a duty of candor to the tribunal, which is not in conflict with their duty of diligent representation, and, in fact, it enhances their obligations in that regard. So, we are developing tool kits for outside counsel.

Inside counsel and clients themselves need to understand that there are ways that they can be cooperative, and we want to be able to arm them with strategies that enhance their role in the cooperation. Judges, of course, you all need to be equipped with the sorts of strategies and forms and tactics and carrots and sticks that you will need to be able to get the parties to cooperate.

Another point made by one of the judges during the break is that all of you come from the same generation as I do, and we've been in practice a long time. We're not technologically as up to date, perhaps, as some of these younger associates, but we depend entirely on our ability to get counsel to, first of all, prepare themselves and educate themselves and get them to cooperate. We don't have to become technological geniuses. We don't have to have the answers. What we have to have are strategies by which the parties develop their own answers and every case is going to have answers.

So we are developing tool kits and you're all invited to participate at two levels in this campaign. One, of course, is we would like for judges to actually endorse the Cooperation Proclamation. At the end you'll see the list of the initial 30 or so judges from around the country who signed that. By the end of

the year, I want to have at least 200 judges who sign on to this, because it sends a signal to the bar that you're going to have to take this seriously.

Secondly, we are looking for ideas from you, forms that you've used, tactics that you've used, strategies that we can add to the tool kit. We will be developing, I believe, a website where judges from around the country and, in fact, Canada is participating as well, can be able to look at different problems and different forms, pick and choose things that fit your particular circumstances, comment on stuff, share your observations with other judges in a fairly secure environment so that we can begin to develop a body of tools to be able to really fulfill the promise of the Cooperation Proclamation.

It's much more practical. It's not just another exhortation to civility.

MS. GROSSMAN: Many people say that the most significant or important elements in controlling costs and avoiding unnecessary disputes in e-discovery is early case conferencing between the parties and active case management by the judge.

Judge Carroll, can you talk to us a little bit about that?

JUDGE CARROLL: I've participated in the drafting of two sets of e-discovery rules. The 2006 amendments to the Federal Rules and the Uniform Rules Relating to the Discovery of Electronically Stored Information by the Commissioners on Uniform State Laws.¹⁸ In the course of developing those rules, we heard from judges and practitioners from all over the country, both state and federal, and it was unanimous that the best way to handle these e-discovery problems is to have the Court and the lawyers involved in the case talking about e-discovery early. Both of those rules amendments do that. They require the lawyers and the Court to be discussing issues of preservation, form of production, scope of production, very, very early on. And while that is an investment of judicial time that I'm confident you all may not have, it's very, very well-spent judicial time.

The more time spent up front resolving these issues with the parties, with the lawyers and the Court, the better off the process becomes.

18. See Fed. R. Civ. P. 16(b), 26(a), 26(b), 26(f), 34(a), 37(e), 45(a), 45(b), 45(d).

JUDGE EMERSON: I would just add that practically, although the rules require a conference between the parties, most of the issues don't get teed up until you get to the preliminary conference. So if you're at the preliminary conference and you're expecting to do that with the judge, it's going to take an enormous amount of time.

And as Dean Carroll was saying, our time is very limited. If we're conferencing discovery issues, we're not trying cases, we're not writing decisions, we're not moving on to the rest of the inventory. Many of us maintain a variety of different inventories so there are lots of different requirements or demands on our time.

It occurred to me in preparing for this particular presentation that it might be useful to require some sort of a certification in the Commercial Division, prior to the preliminary conference, that the attorneys have met, that they have conferred, but a more specific one than the generic "We've made a good faith effort;" something that delineates where they've made progress and where they still need to make progress.

MS. GROSSMAN: What is it that you expect when counsel appears before you? What do you expect them to be able to discuss about their information systems?

JUDGE EMERSON: We tell counsel generally that each conference is meant to be a substantive conference. It is not just an appearance. It is meant to figure out how to move the litigation to the next step, or where we are and what we need to do next. So in the best of all possible worlds, we would need to know what the issues are likely to be, what the parameters are likely to be, start talking about what is reasonably accessible, what is not reasonably accessible or the converse, basically eliminating e-discovery as a big-ticket item.

We need to either put it on the table and start marching it forward, or possibly taking it off the table unless something dramatic changes.

MS. GROSSMAN: Jim, the Commercial Division already has a rule which requires the parties to meet and confer about ESI (Electronically Stored Information).¹⁹ Can you talk about

19. N.Y. C.P.L.R. §3120 (McKinney's 2003).

your experiences with this, why it's valuable and whether this should be extended to all trial courts in New York State?

MR. BERGIN: Well, I would first off endorse what Justice Emerson said. In my experience and mostly in my firm's experience to the extent that parties can identify e-discovery issues early on, identify where the points of difference are an attempt to negotiate a process that basically would be agreed upon, a reasonable process, that creates the best chance for minimizing discovery disputes — the fractious disputes— that have raised the kind of conflicts and concerns that we referred to earlier. That's your best opportunity, if you can find incentives to push the parties into having that dialogue early on.

Insofar as I'm able to assess from my own experience and from what I hear on the street, the Commercial Division's rule is a good step in that direction. There is a proposal that was developed by a committee of the City Bar chaired by Judge Maisley to adopt such a proposal as part of the Uniform Rules for all trial courts.

It looks pretty good to me. I would not want to think that any judge felt that unless this rule were enacted, they couldn't discuss those things. That would be a big mistake. But it would be a good signal to the parties that these issues are important, that they are recognized by the judiciary as important and parties should address them early on.

If we could have addressed early conferencing in the context of developing the proposed amendments to the CPLR on e-discovery, we probably would have done so. But there is no structure within the CPLR requiring case conferencing. It's addressed entirely in the courtroom. We didn't do that as part of the CPLR amendment.

JUDGE EMERSON: I would just add one other thought.

These types of procedures work very well when counsel work together very well. They fall apart rapidly when you either have different expectations or perhaps a clash of personalities. You don't get the same benefit when you've got those levels of impediments. And it's often very difficult to work around those impediments because even when everyone is working well in your presence, the minute everybody's apart, we tend to encounter the same difficulties.

MS. GROSSMAN: Tom, in some jurisdictions there are either requirements or guidelines or suggestions that the parties appoint an ESI liaison or coordinator, and we've given you a couple of those in your materials.²⁰

Can you discuss the benefits or drawbacks, if you see any, to that kind of approach?

MR. ALLMAN: Let me start by commenting and following up on Jim and Judge Emerson's points. Around the United States, almost no state has adopted anything comparable to the early disclosure requirements of the Federal Rules and very few, if any, states have developed an early meet-and-confer requirement. So it is not unusual that New York does not have such a structural requirement in its code.

I think that the proposal that the New York City Bar has made, that you do something similar to that, makes a lot of sense. In California, that's what they plan to do when they re-introduce the California legislation in December, later this month. They will also introduce a series of rules that will achieve the same result.

Now, one particular court, the Federal Court in Delaware, has come up with this concept of a so-called liaison, and that is a person who is formally designated to be responsible for all e-discovery efforts, and I have real concerns about that because it's a one-size-fits-all assumption, that it is possible to designate a single person in a corporation in a useful fashion to deal with all the myriad problems in e-discovery. E-Discovery covers a whole gamut of problems, ranging from electronic mail, to complex databases, to form of production, and so on. And one single person within a corporation is unlikely to have the responsibility for all those facets of electronic information. So it is not going to work that well. I would rather see a much more flexible approach whereby the attorneys understand they are going to have to talk about these things, and they are going to be compelled to discuss them. Then they can interact with clients, and the clients can make decisions as to who is the appropriate person to work on that. I wish I could tell you that I

20. See FED. R. Civ. P. 26(f): *see also*, David J. Waxse, *The First Sixty Days: Electronically Stored Information*, 766 PLI/LIT 135 (2007) in PLI Course Handbook, *Electronic Discovery and Retention Guidance for Corporate Counsel* (2007).

know it's working or not working in any particular jurisdiction. The way it works in Delaware is that this is an optional rule. If you don't make an agreement with the other side, you are stuck with the rules. And I'm told that everybody makes agreements and they don't get stuck with the rules. I don't think it's actually being practiced in Delaware. I welcome anybody's experience.²¹

MR. BERGIN: It's a default rule.

MS. GROSSMAN: Ken?

MR. WITHERS: Under the Delaware rule, you are talking about the Federal Rule.

MR. ALLMAN: Yes

MR. WITHERS: We have to understand that Delaware is an unusual jurisdiction. Every major corporation in the world has its headquarters in Delaware. And the Federal Courts hear the patents. If you are in patent litigation, particularly involving software, probably it's a good idea to have that sort of technical liaison person who is going to be in charge because of the peculiarities of that district. It's also only a rule that's enforced by one particular judge.

MR. ALLMAN: Who happens to be the chief judge.

MR. WITHERS: I don't think that we can generalize from that experience. The State and Federal Courts in New Jersey have the designation of an e-discovery liaison. I'm not sure of the exact term that they use, but I completely agree with Tom. The idea is to telegraph to lawyers that they can no longer win, that they can't walk into conferences and they can't walk into hearings not knowing what their client's IT infrastructure is all about. In that sense, most lawyers went to law school because they couldn't get into MIT. They are going to probably have to ask someone else to help them in that regard so they have a responsibility if they are going to diligently represent their client to get up to speed one way or the other. And the easiest way is to have a representative of the client who knows what the systems are all about. No one person is going to have the answers to all the questions, but it's good to have a point per-

21. See generally, Susan Ardisson, *Federal Courts in Four States Look to "E-Discovery Coordinators" to Assist with Discovery of Electronically Stored Information*, (2007), available at <http://www.bit-x-bit.com/Qubit/Qubit%20Volume%20Issue%20July%202007.pdf>.

son who is going to be in charge of finding the answers and is going to be in some way answerable in the end.

MR. ALLMAN: Let me tell you how it breaks down.

MR. WITHERS: I'm sure it does break down.

MR. ALLMAN: Cases are managed and supervised by lawyers. The lawyers manage the outside litigations. The idea that you can cut the lawyer out of the process and appoint some person in the IT department has a nice sound to it, but it doesn't really work that well and so you really need to have an IT crew.

MR. WITHERS: It has to be a team approach. It's going to be on a case-by-case basis. What we are seeing is the development of the "technology counsel." This is a new term that has been used quite a bit just in the last three or four years, particularly by legal recruiters. They are looking for lawyers who have IT backgrounds. Corporations are looking for them. Law firms are looking for them. We are just now in the process of beginning to actually develop law school curricula that are going to graduate a new generation of technology counsel, people with law degrees and IT or information records management backgrounds. We are developing this in Florida. And Dean Carroll, from Alabama, you are just teaching e-discovery.

JUDGE CARROLL: I'm teaching e-discovery but I would have loved to teach records management as well.

MR. WITHERS: Well, the University of Florida is going to be planning this. We are partnering with the University of Arizona and developing a program out of the library school, not the law school, which is going to be an add-on to law curricula across the country. We will have that housed in a huge server with all of the facilities of the University of Arizona that law students around the country can log in and take their courses from their own campus, and they will be getting extra credits and a certificate in digital information management on top of their law degree. We are seeing this developing. We are in a transitional period now, but I do see the development of lawyers who have more technology degrees. The same way, as a few years ago, the whole field of patent law changed. You can't find a patent lawyer now who doesn't have an advanced degree in some other sciences.

MR. ALLMAN: Let me just disagree with you one more time. It's very commendable to say that corporations are hiring e-discovery experts and are hiring technology lawyers. That may be an interim solution in some cases, but the long-term solution, frankly, is that all the lawyers who are involved in managing outside litigation must understand technology and must understand and will understand —, and believe me, they are going to have to understand — how their systems work so they can work with outside lawyers. You talk about having the outside lawyers go in front of Justice Emerson, but if they don't get the adequate information and cooperation from their client, they are not going to be able to meaningfully participate in that discussion as you want.

MR. WITHERS: We don't disagree at all.

JUDGE EMERSON: Just because we waited a very long time and, therefore, everyone's money and time is becoming even more difficult to find within the difficult court day, we don't have some of the opportunities to either run long or to pool more resources that we might have had a year or two before. Are we allowed to ask the audience a question?

MR. WITHERS: Sure.

JUDGE EMERSON: I would just like to ask one of our practitioners what they think about this notion of transferring some of the work back to the attorneys before they make their first appearance before the preliminary conference. What do they think about requiring some sort of a very detailed statement as to what has been done?

MR. SCHRAGER: I was going to come back to something you just said, which is one of the concerns I have about the whole e-discovery aspect, as it's been brought up, is the conflict that's created now between outside counsel and inside counsel. You are almost in a conflict scenario. I have seen engagement letters where the client needs an attorney to review the engagement letter. How does the panel feel about all of this?

JUDGE EMERSON: Can I just throw one other thing into your question?

Because, as I said to the panel before, I did a little market research to prepare for today by calling on some of my former colleagues. And the thing that came up time and time again, and I think you mentioned it, was, "I'm going to counsel my

client in the most conservative way I can in a preservation context. I'm going to tell them to preserve not everything but everything." And, therefore, if the client's goal is to manage litigation in a cost-effective way, it's opposite to counsel's goal, which is to avoid a malpractice suit.

MR. SCHRAGER: There is a whole conflict. It's getting worse; it's not getting better.

MS. GROSSMAN: Anybody else on the panel want to respond?

JUDGE CARROLL: Well, I think this is part of the paradigm shift we are talking about — lawyers' behavior — and you are exactly right. We have created the situation. But I think we are going to have to figure out a way, all of us in this room, to answer these particular problems, because we are going to be with them for the next hundred years.

MR. BERGIN: I think the problem has always been there. And Judge Scheindlin's decision only made it a little bit more apparent. In the mid 90's, I had a case with Justice Scheinkman, which we thought was a big case. We had about 250,000 documents, and our client thought that the costs of document review were entirely through the roof. I will tell you, I heard about it. And it was the source of many fruitful discussions as to how do we get these things done. The conflict has always been there. It's certainly exacerbated by the volume. It's exacerbated by the risk of failure, by decisions that impose extreme sanctions. There are such decisions, and it gets scary.

At the same time, I agree with Dean Carroll that the solution to this is to try to negotiate early on a process that will allow the people to say that there was a reasonable process if it was carried out in good faith. That is a process that will result in, hopefully, cost-effective solutions to the problem of winnowing down what we have to look at and deciding what to do. If you can't achieve a negotiated process, the likelihood of those conflicts getting out of control is very real.

JUDGE EMERSON: I think that the other factor is how the regulators and the regulatory bodies address some of these issues, and I think what you are going to see, in my estimation, is that they are going to be asking for more not less. I don't view, and maybe Maura you are in a better position to comment on this, any of the regulators who are willing to cut anybody any

slack. So if the goal is to try and limit in the court system, you are going to have the model of the SEC, and to the extent relevant, maybe the Feds, and other regulators that set the tone looking for everything. Because maybe they are looking for perfection in their standards.

MR. SARKOZI [from the audience]: The question is, who should be setting the tone and in what context? Because one of the things that the Commercial Division has tried to do is distinguish itself as a place of quick, quicker, relatively cost-effective resolution of disputes. And the rules which talk about the early conference are primarily designed to try to focus the parties and to get to the heart of what the issue is.

I do agree, I think the idea of going in and requiring parties, prior to that conference, to have sat, addressed and reported on, because if you don't have to report on it, the people will wing it. People will go in, they will say, "Oh, yeah, we talked about discovery, right, right," and tap dance through the preliminary conference.

JUDGE EMERSON: In fact, the certification can be completely perfunctory.

MR. SARKOZI: Right, not only certify it, but they will talk about it in a very broad brush, unless they have to deal with it.

However, I do think that, to the extent that courts are signaling in these preliminary conferences that the use of some of these electronic tools to winnow down the scope of discovery, the use of agreements or court-imposed phasing or staging so that you have initially a certain number of custodians that will limit the scope of discovery. If you impose that across the board, it has to get approved by the Appellate Division when challenged, right? And there may be certain Commercial Division rules that may run contrary to what the CPLR says, and there's going to be some tensions that have to get worked out. To the extent the Commercial Division signals this and the parties effectively buy in, it will make for cheaper resolution of disputes. That will help keep traction and build models and then Sedona can report on it.

One question I have is, a lot of the discussions that we have had have been based on the concept of larger corporations that have IT professionals; that have people who understand

where everything is, or at least know how to figure it out. A lot of the cases in a lot of Commercial Division disputes are among partnerships, LLCs, and much smaller organizations that don't necessarily have any IT professionals. And I'm wondering, what you have seen? Because we see a broad range of Commercial Divisions across the state as well.

JUDGE EMERSON: Can I start with that one? You are right. They don't have IT, they don't have paper documents, they don't have anything. If they have a computer system, a lot of times it's with an outside professional. All the records are being maintained by the accountant or sometimes a law firm will be charged with this. So it makes it more complicated, because it's not within the custody and control of the party. It raises privacy issues. If you want to layer onto that, if you've got fraud involved — sometimes we are seeing a lot of even small acquisitions gone bad — the fraud is directed back at the professionals, such as the attorney or the accountant. The accountant sided with my partner, not with me. So they are now involved in the litigation. And you sort it out on a case-by-case basis, but you are rarely talking to someone at the initial client level that can have an intelligent discussion. In fact, they don't even know what their accountants have.

MR. ALLMAN: One thing I noticed in a number of federal jurisdictions, a surprising number of people are dealing with this issue by simply agreeing to ignore their client's discovery issue.

Judge Porter, down in San Diego, once told us that something like 85 percent of the litigants that come to her in her Rule 16 conferences have agreed that it's stipulated they will not go after e-discovery.

MR. BERGIN: Just last week, I filed a stipulation saying the initial production will be made in paper.

JUDGE EMERSON: You get back to the trade secret, the unfair competition, you hired my employee in violation of the restrictive covenant, now I'm going to sue the competitor corporation. I want everything. And everybody has blended everything together, and there could very well be valuable, relevant information. The only way we are going to find out is to start to look, but the mere act of looking would open the door to some of — it's not necessarily trade secret, but it's enough

information that we can build the model that we need to know what it is you are doing differently. We had that in the packaging industry not so long ago.

MR. WITHERS: We have to be careful about these stipulations that there is no electronic discovery, because I've been in cases, in fact, in the Southern District in California, where there was a stipulation that there was no electronic discovery, and then both sides produced paper copies of all the e-mail. So it was really a stipulation of the form production, not the discovery itself.

There is nothing wrong with an agreement. I think that the parties could probably stipulate that there are only going to be two depositions, and that they are going to limit their interrogatories to 12. And they can stipulate to all sorts of ways to cut down on discovery. And if they both agree to it, that's, I think, wonderful. That's great. It's the party that I would want to make sure is involved so that it's not just agreement by counsel, but that the parties are informed of this. The problem is what happens when it unravels, and —

JUDGE EMERSON: You can make it subject to further order of the court so that there is an application standard that needs to be met and reviewed.

MR. WITHERS: So this brings up the whole question of staged discovery; them saying, okay, we are going to start out this case because we don't really know what the issues are, or we are going to have exploratory discovery. We are going to limit it to a couple of depositions. We are going to look at a few areas of the computer system, we are going to look at e-mail in paper form, and we are going to develop a discovery plan based on that. And it may go beyond that, or the case might settle at that point. That would be wonderful.

For parties to enter into that, there has to be some assurance on both sides that there is indeed a preservation regimen in place. Maybe not a preservation order, but both parties are trusting each other that they are not actively destroying evidence at that time. So you do have to have the comfort level of some kind of preservation agreement to do that, but staged discovery is good.

The other thing that I want to bring up that kind of segues into a discussion we are going to have this afternoon is the pos-

sibility, particularly in those cases that are really grudge matches between two rather unsophisticated parties, of a discovery mediator or a neutral facilitator who is going to help the parties to develop that discovery plan—is going to help the parties—explain to the parties what might be relevant in their case, and try to get them to an agreement before they get to the judge.

Now, we don't have these people at the moment. They don't exist yet, but I think that we might be on a track - and Maura, you can talk more about this - with existing networks of mediators around the country to develop the concept of the neutral e-discovery facilitator, particularly for parties who just simply don't have the resources or the sophistication to discuss this on their own. So that's a potential. It's out there. It's a little theoretical right now, and we can talk about the benefits and possible drawbacks.

JUDGE EMERSON: The other thing, when we talk about grudge matches, I think it's important to realize that a lot of times the lack of trust is at the party level, not — we have been speaking about how well counsel work together, but obviously, in closely-held corporations, family businesses, the lack of trust is always between the parties. And it can drive counsel's response, because they are taking their cue from their client. I know he is or she is a crook. I know it. We just need to get to the right level of information.

MR. WITHERS: And they look suspiciously like Jim's reference to the domestic law cases, because these are really business divorces.

MR. ALLMAN: Thank God this doesn't happen at the commercial level as well.

MS. GROSSMAN: Before we move on to rules, Judge Carroll, if you can tell us a little bit about the course you are teaching in electronic discovery and why it's important that we begin to train the next generation in this area?

JUDGE CARROLL: In the summer of 2007, the Carnegie Foundation²² issued a report on legal education, and it said we

22. See, WILLIAM M. SULLIVAN ET AL., *Educating Lawyers: Preparation For The Profession of Law* (Jossey-Bass 2007).

are doing a great job teaching our law students how to think like lawyers.

We are doing a lousy job teaching them professionalism and ethics and a lousy job teaching them how to deal with clients. So I think that sets the framework for the discussion we will have to have in the Legal Academy about what we are not doing right. I think they are exactly right, there is not enough practical focus, and the Legal Academy has become incredibly disconnected from the practice of law, which is a bad thing.

I teach an on-line course in e-discovery because that's my background, and I really do think it's important. There are only about ten law schools out of 200 that have e-discovery courses. I'm on the civil procedure professor listserv. When the e-discovery amendments came out, there was a flurry of activity: What are these? We have never heard of them before. So there is a tremendous disconnect that we all have to resolve. But I think a lot of the solution to this problem of e-discovery creating this paradigm shift in behavior that we have talked about is the joint responsibility of the law schools, the Bar and the judiciary. The judiciary has set the right kind of expectation that we as a profession need to do a lot more professionalism education about discovery and those kinds of things than we have done in the past. But in order to get where we need to be, it really is going to take all of you in this room telling lawyers how they need to behave. And when we were talking about proportionality and the canned discovery response, I guarantee you, I can talk to my law students all I want about being professional, what e-discovery is, but when they get in and the senior partner says, "Here is how you are supposed to respond to a discovery response," which is, "Here are all the privileges we are asserting and not waiving, but without waiving any of those privileges, here is the answer." Until that happens, we are not going to get anywhere. So it's a joint responsibility, I think. All of us need to be involved in some way or the other.

MR. WITHERS: We can make an announcement today. Today is December 1st. West Publishing is today releasing the first casebook on electronic discovery, co-authored by Dan Capra at Fordham, Judge Shira Scheindlin of the Southern District of New York and volunteers from The Sedona Confer-

ence.²³ It has already been adopted, I think, in 28 courses — I'm sorry, 38 courses — across the country. And the University of Florida announced last week their e-discovery course. They put their registration form online for students, third-year students and in five minutes, from 8:00 to 8:05 a.m. on Monday before Thanksgiving, they filled it up. All 40 slots in that course were filled up. There is a hunger out there, and we are beginning to —

MS. GROSSMAN: There is a question over here.

JUDGE KARALUNAS: Deborah Karalunas. I'm one of the Commercial Division judges up in Onondag County, perhaps we do things a little bit differently upstate than downstate. I want to just go back to the whole discussion of the judge's role in e-discovery and what really is necessary.

And I just want to start with Ken's point to begin with. I remember when I started practicing 20-some-odd years ago, the lawyer who trained me in my firm basically said, start with your PJI. That's what is going to tell you what you need to do to be effective and to get a verdict if you are a plaintiff or to defend against a verdict. And I think as our society has changed and technology has changed we lose sight of that. And I think that if you go back to the notion that you really only need four or five facts to prove most cases, and as a judge and as a lawyer think about that prior to your first conference, you really can do a lot to eliminate the cost and expense of e-discovery. The problems were the same ten years ago, a hundred years ago. It's the same causes of action, for the most part. What's changed is how do we pass along information to people. So I think that it's important for lawyers and judges to take a look at litigation as a multi-step process.

Frankly, my view is that you can often get a lot of information out of a deposition, much more so than document discovery. We seem to want to do document discovery first and then take depositions. My view is, if lawyers want to take a preliminary deposition of the important person from each side, that will help narrow the scope of what kind of document discovery

23. DANIEL J. CAPRA, SHIRA A. SCHEINDLIN AND THE SEDONA CONFERENCE, SCHEINDLIN, CAPRA, AND THE SEDONA CONFERENCE'S ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE: CASES AND MATERIALS (West-Thomson) (2009)

you need. And frankly, I think that that also encourages early settlement if you are to take a multi-step approach to your litigation. Because we can get caught up in how information has changed the way we communicate, but it really is the same problem. And the simpler you look at the problem, I think the more economical it is.

MR. BERGIN: I will tell you that even in very, very large document production cases, our experience is usually that when you boil it down to the most significant documents in the case, you are not talking about boxes of documents, maybe two. If you know that box or two of documents, you know the case. Winnowing the process ultimately reduces the volume in most instances to a very small set of documents.

JUDGE EMERSON: I think that what has happened is the preparation of the case has shifted further back in the case life-cycle. The attitude that is not necessarily overtly expressed but comes across is, we want to finish all of our paper discovery, we will see what is out there so we can confront our witness with all of our paper discovery. We are keeping all our options open because we are going to amend and reformulate. And, you know, right up to the eve of trial, we are still trying to figure out exactly what was going on. We are going to get it by the time we get to trial, is the way it comes across. And you have to shift the preparation back to where you described in order for that to be effective.

MS. GROSSMAN: Okay. We are moving on to rules.

JUDGE CARROLL: There is a question in the audience.

MS. GROSSMAN: Yes.

PERSON FROM THE AUDIENCE: I'm not quite sure exactly where this fits, but I was an in-house practitioner for 15 years. I've now gone back to a small practice. I started out at Shearman and Sterling also. So I have been through different phases. But my belief — my question really is — my belief is that to some extent the e-discovery issue is transitory because the real issue is going to be information management within the corporation. And it's information management and retention programs that I kept trying to get going, which is very hard to get your arms around now, given the uncertainty of a lot of the court rules. So we are starting at the tail end of it, and I just wonder how we can start developing more resources and al-

lowing corporations to focus on that retention issue instead of the e-discovery battles, if there are any initiatives in that direction?

JUDGE EMERSON: The corporations, again, have to take it a lot more seriously, I think, than they take it now. I think the information is developed and used in the course of business, not necessarily to be used for litigation, because you know from your own experience how corporations view litigation. And until it becomes a bigger priority, the emphasis, I think, is on this end rather than on where it should be, which is if you fix it at the source, it will be much easier.

MR. WITHERS: The Sedona Conference recognized early in the process, and we are talking about e-discovery, there are two sides to this. There is the litigation side, but there is also the corporate records management side. And also, I have to say the government records management side. If you think corporations are in bad shape, look at some of our government agencies. So as a companion to the Sedona Principles on Electronic Document Retention and Production, we came up with guidelines for electronic records management, which is really geared towards corporations. It's still with a view that sooner or later you are going to get sued. This is the 21st century in America; it's going to happen. But in the ordinary course of business, corporations and government agencies have to look at information as a manageable asset, not a growing liability.

So, there is an annual conference every year in Chicago called Management of Electronic Records that's now in its 16th or 17th year. I'm there every year. They do work with Fortune 500 corporations and major institutions across the country on developing strategies for electronic records management. And there are a number of organizations, like ARMAI, the Association of Records Managers and Administrators International, that are developing guidelines in this area. The problem is that technology always outstrips our ability to manage the information that it generates. Every time we think we have got it right, when it comes to electronic records, there is some new application that is now generating a whole new category of records that we never thought about before.

The illustration of this will come in the next two years or so when the mortgage meltdown unravels and we realize how

much the banks were dependent on their technology information infrastructure and didn't really understand what they were creating.

They were generating a lot of the transactions electronically but not a lot of records for records retention purposes. And this is going to become a real problem in the banking industry. A recognized group has been making progress in the banking industry in order to develop standards for this.

Another new initiative is the role of technology counsel, that mythical person that soon will be on the horizon, whose role is exactly this within the corporation: to look at technology information applications from a legal point of view and say, "Does this new technology, does this new Web-based innovation we're putting in, meet our records retention and management purposes? Is it throwing off fairly persistent permanent records that we can bring into court and prove are real?"

JUDGE EMERSON: The other thing I think is important to remember is that corporations that do litigation and compliance and have a support function, that the support function is not a profit center, and to get companies to spend money where there's no demonstrable profit and you're trying to sell them on it because it will save them a lot of money in the long run, but it doesn't go into this year's bonus pool and it's a much tougher sell.

MR. WITHERS: It's a tougher board room sell, but we're all developing case studies. We started with IBM and we're working with other corporations informally to develop these return on investment studies. Actually, it may not be a profit center, but as managed assets, information can become profitable.

JUDGE EMERSON: But the question is whether it got in-house counsel's attention or whether it got, you know, kind of CEO, officers', directors' attention in a way that they can respond.

MR. WITHERS: Well, Tom, in-house counsel.

MR. ALLMAN: This is not going to happen, folks. Here's the problem. What you're neglecting is this: The single most important aspect of a company is the information that's in the heads of the people and the information that's available for people to use their talents, and the idea you can constrain that

use and you can program it and you can put it in categories so you can make it last for long periods of time is nutty.

And I chaired for the Sedona Working Group Series a group that tried to write a commentary on e-mail management. And you would think that we could come up with a single set of rules. You could retain e-mail for 45 days or move it to a secure place for storage and after a year destroy it.

We sat down with people from the top one hundred companies in the United States and we worked for two, three years and we ended up with not any single general conclusion because each situation is different. And the bottom line we came up with was you really need to bring together a consensus within your company and decide how you want to use that information and then do it that way.

The idea is if you're going to come up and spend money, I mean not just money, millions and millions of dollars, to institute some kind of electronic system to automatically get rid of information, it is not going to happen.

JUDGE EMERSON: But we obviously got — kind of further along with document retention, people got their hands around the document retention policy and it's as different as that is —

MR. ALLMAN: Yes, but they did not invest in it. Do you know how many people we had for this in a thirty thousand person corporation? We had one full-time document management person. And that person went out and purchased from a guy named Shupski, who sold it to every other corporation in the world, a 5000-unit operation. You have to figure out where your particular documents fit in a five thousand bracketed document retention policy. It's nutty.

People do not in fact — I tell you where it makes sense. It makes sense in patents, it makes sense in science, it makes sense in medicine. And the government has stepped in and mandated regulations. The FDA, for example, for drug manufacturers has mandated you must hang onto your MDAs forever. You must hang onto your scientific tests and so on and so on. That makes sense.

The idea that in the electronic field, particularly with respect to e-mail management, that you're ever going to have people have a single system that applies to everybody is nutty.

MR. WITHERS: I don't think anybody is proposing that we come up with a magic bullet or one software program that's going to manage all of this. It's going to be very industry specific, and within each industry it's going to be very business specific. It's going to depend on the corporate culture as to whether or not they're going to implement this.

What we're seeing, however, is that certain corporations that have a reputation for not managing their information become targets for litigation. And corporations that do manage their information assets well, do better in litigation.

When I was in private practice I had a favorite client. It was a bunch of Swedish engineers, ABB. They managed their information beautifully. Only the Swedes could manage information that well. Everything was beautifully organized in little notebooks and everything was coded and accessible. And this was before computers; it was a paper-based system. They managed everything.

When they got sued, we were able to settle those suits real fast because we had a handle on that information. It became an asset of the corporation. Some corporations can do that, others won't and evolution will decide.

You're still standing.

AUDIENCE MEMBER: I just wanted to follow up on that to say that to the extent that the judiciary can take things in smaller bites and then bigger, reverse the pattern that has been going on, that builds more cooperation and trust and also gives the basis for corporations to have a better understanding of what to expect when they go into court, which I think will then facilitate these kinds of records retention systems. Because I think, unlike Tom, they need to be there to some extent because nobody can afford to keep all the servers and all the tapes and all the documents anymore.

MR. CARROLL: And that's a suggestion in some case law. You phase discovery, not the old phased discovery, but you go after the easily accessible stuff first, see what you've got and move that way. That's what you're suggesting?

AUDIENCE MEMBER: Yes.

MS. GROSSMAN: Tom, you're one of the foremost experts on state e-discovery rules.

MR. CARROLL: Wait a minute. He is the foremost.

MS. GROSSMAN: He is the foremost expert on state e-discovery rules. Can you give us a brief overview of what other states are doing and how that's working out?

MR. ALLMAN: Well, as I mentioned earlier, depending on how you count, either 17 or 18 states have formally acted. The reason for the difference between 17 and 18 is that one state, the State of Arkansas, has only enacted a provision dealing with inadvertent production of electronic information. The other 17 states have enacted some form of the federal amendments. Generally speaking, the federal amendments have been persuasive.

The states that have acted have generally—with the exception of the early disclosure—generally enacted most of them, but not all of them. A few states have tweaked them, with fascinating differences that are set forth in the paper that's on your CD. As you may know, the State of California had a fascinating experience in this regard. They actually put together a very comprehensive, well-thought-out series of e-discovery proposals that the corporate community signed onto, the plaintiff's bar signed onto, the defense bar signed onto, and it got passed by the legislature and put on the desk of the governor and he vetoed it.²⁴

MR. WITHERS: For reasons unrelated to this.

MR. ALLMAN: The reason he vetoed it, was because they gave him 24 hours to sign six hundred bills, so he took like five hundred and vetoed them and said that's the best I can do. So, they're going to reintroduce them in December.

As to the State of New York, I'm going to defer to my colleague, Mr. Bergin, who is an expert on New York, and he can bring us up to speed on what's happening here in New York.

MS. GROSSMAN: Jim, can you describe to us the New York State Bar Association Commercial and Federal Litigation Section's proposal?

MR. BERGIN: Yes. I have for several years chaired, and most of that time co-chaired, the CPLR Committee of the Commercial and Federal Litigation Section, and with the able sup-

24. See generally, Assem. 5, 2009-10 Reg. Sess. (Cal. 2008), available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-000050/ab_5_bill_20081201_introduced.pdf.

port of that committee we developed a proposal to adopt some of the ideas that are part of the federal e-discovery amendments into the CPLR. But not all. We were somewhat selective.

We were trying to do really four things in particular. First, we are trying to recognize that electronically stored information is different from what the CPLR refers to as a “document” and probably needs somewhat *sui generis* treatment. In some instances, it will function interchangeably with the traditional notion of a document, and in many instances it will not, such as, for example, it may create enormous ethical problems for the lawyer if the lawyer is required to produce the document in the form in which it was originally maintained on their client’s system.

That may reveal confidences that validly should be preserved. So, we want to get that recognition. We also wanted to get parties to talk about these issues early. We didn’t have the opportunity because of the structure of the CPLR to discuss early case conferencing, but we did put in provisions to make it clear that a requesting party could make a request as to the format in which they wanted information. And a producing party could object to that format, or if the requesting party didn’t make such a request, the producing party could take the lead and say, “This is the format in which you’re going to get it unless you object.”

For electronically stored information that presents specific, intractable problems for retrieving and accessing, we wanted a recognition that unless the information was reasonably accessible it deserved different treatment. We didn’t want to render it off bounds for discovery, but we wanted to create a presumption that if the party identifies material that is not reasonably accessible, they shouldn’t have to do anything to produce it other than if the other side says, “Well, I want it.” Then the producing party would have to justify their decision to designate it as not reasonably accessible and the other party would have to convince Justice Emerson, or some of you, that they would like it. It doesn’t mean that the Court can’t order its production if they decided that it is important. But it creates a context in which those kinds of risks of costs can be minimized at the outset and dealt with in a manner that enables the discussion and adjudication if necessary.

And finally, we wanted to ensure that because computer systems actively change data all the time, whether you know it or not, we wanted to include a safe harbor, comparable to Federal Rule 37, that would prevent claims of spoliation in cases of good faith loss of data through the ordinary course of operations of the computer system.

Those were the goals of our proposal, and thus far it has been approved by the State Bar, by the Executive Committee and the House of Delegates and we're hoping to have it introduced in the legislature in the next session.

MS. GROSSMAN: The proposal appears both in your hard-copy materials and your C.D. You have something else?

AUDIENCE MEMBER: Yes. About the preservation of information in its original form, you were talking about competence. But just like New York is, I think, the last state that has the disciplinary rule with regard to zealous representation, as opposed to diligent, we're also, I think, the last state to require the preservation of secrets in addition to confidences, which are defined, I think, as anything that might be embarrassing to the client.

How do we even begin to allow things to be preserved in their original form? Everything is going to contain secrets unless we change our ethical –

MR. BERGIN: Not at all. New York, like most states, recognizes an obligation of a client who is aware of litigation or a claim against them to preserve relevant information. But there's a big difference between what you preserve and what you choose to produce. If you take an electronic document, something that you've printed out and looks like a letter, and produce that in the TIFF format, a lot of behind-the-scenes interactivity is going to be washed out. You can actually do that in something close to the native format and we see cases saying that these days.

In my firm we have had cases where parties will agree to produce in native format, purged of that type of metadata, so that those types of confidences going back and forth, that went into the work of the final document, are not included unless there's some particular reason as the case develops to go beyond what appears on the surface.

MR. ALLMAN: Could I ask Jim another Question? Jim, you eloquently explained why there might be conditions under which inaccessible types of information would not have to be produced?

MR. BERGIN: Yes.

MR. ALLMAN: Once it's identified to the other side, that triggers the process. Let me ask you this: What about the preservation obligation, does the party have the right not to preserve it if they designate it as inaccessible?

MR. BERGIN: I have not seen any cases in New York State dealing with that in the context of electronic records. In the federal context, these days, it tends to be a pretty broad preservation obligation. If you have a reason to believe that the information may turn out to be relevant to the case, I would suggest that this is something that needs to be looked at carefully. It's not necessarily one of those standards that we should incorporate wholeheartedly.

MR. ALLMAN: Would you be in favor of maybe including something in the New York legislation that would require if somebody has been told there's any inaccessible information, to require them to get a court order that it be preserved?

MR. BERGIN: I don't think the bill would pass if it has that.

MR. WITHERS: Focusing a little more on Rule 37 and the preservation issue, especially when it comes to the sources that are arguably not reasonably accessible, there are a couple of different questions when it comes to preservation. One is what is the preservation duty—evolved from the common law and involves, as you mentioned, some ethics principles as well—what's the preservation duty on the one hand? On the other hand, what are you going to get sanctioned for if you don't preserve?

So, on the one hand we have the cost management analysis or we have an absolute standard that you preserve everything, or you preserve those things that you can afford to preserve. On the other hand, you have a certain risk management analysis, what you get slammed for if you don't preserve it.

And if we focus on the sanctions part, Rule 37(e) in the federal system makes it pretty clear, if you have a digital information system, if you have an information system, it's going to

routinely involve the recycling of information. They can create it and delete it all the time. It's the nature of these systems. You cannot be held to an absolute standard of saving everything because it's going to be an impossible standard. If you make a good-faith effort to identify that which is going to be responsive to the potential scope of discovery, and if you make a good faith effort to preserve that material, you're not going to get sanctioned if in the process other stuff gets deleted that is going to probably be duplicative or you have missed something because of the complexity of the system and the volume that's there.

When we look at the actual sanctions cases, most sanctions cases involving spoliation usually involve questions of good faith. Was there a representation made to the court that turned out not to be true, not just incorrect, but actually falsely made or made in bad faith? But there are really two issues. One is this question of good faith, did you try? And second, what was the prejudice to the party requesting the information? Is this information actually material; could it affect the outcome of the case?

And when you look at digital information that is routinely destroyed, most of that digital information is routinely destroyed through automatic deletion systems, through e-mail policies, whatever. Most of it is completely irrelevant or duplicative.

If you have an electronic records management system that preserves the important, non-duplicative information for business purposes, then that's probably going to cover most of the situations.

So, we need to develop an attitude that perfection in the digital world is not the goal. We're not going to preserve everything because we would drown very quickly in the sea of information. We preserve what is important and non-duplicative. And if we can have rules and common law development that looks at that, then I think we're going to be much better off. So, Rule 37(e) becomes an important tool at the federal level to develop that attitude.

MR. BERGIN: I think we also preserve an awful lot of non-important and extraordinary duplicative material.

MR. WITHERS: And we should also give the people the freedom to get rid of it.

MR. BERGIN: I agree

MR. ALLMAN: Have you seen any motions where the people have attacked, through a failure to preserve information, and if so, how did they come out?

JUDGE EMERSON: We have certainly experienced that argument. I can't tell you whether it ever got to motion practice, because we handled it at conference. But it's a difficult scenario because — and I was going to say in response to Ken, a lot of times what people try and do is, the minute they think there's been a deletion, you clearly did that to deprive me of my important information. It's my smoking gun that you got rid of it.

So you need to kind of take everybody back to what is the issue, what is the information, why was it deleted? This is an extraordinarily time-consuming process. And in order to do it, you need to put time aside for it. So if it shows up in a conference forum where you have 30 other cases on and a trial in the afternoon, you're not going to have the luxury of time to get to it unless it has been properly teed up.

If it's teed up in the way that you've got the information at your fingertips, you can deal with it. But it comes back to this notion of trust and training, because if everyone approaches this particular phase of discovery as truly adversarial and not as a collaborative, cooperative, information-getting process, you get bogged down. It can really derail the whole process because people become convinced that the only reason you deleted that data was to keep it from me and you are not paying attention, you're not helping me and that's your job, to help here, to help me to get that.

MR. BERGIN: Discovery is adversarial, you'll never get around that. What you can do is try to find ways to get the parties to agree on reasonable procedures that if conducted in good faith, will be fair to both sides; that both sides would agree to in advance if it was controlling, not only what they had to produce but what they were going to get from their adversary.

MS. GROSSMAN: Now, before we move on, Judge Carroll, can you tell us a little bit about some of the other approaches that are out there, for example, the Uniform Rules

proposed by the National Conference of Commissioners on Uniform State Laws?²⁵

JUDGE CARROLL: I think what's interesting is, in addition to the Federal Rules, there is a proclamation by the National Conference of Chief Justices to amend the Uniform Commercial Rules and Regulations. There's a symmetry between all three that incorporate a lot of the values you've heard discussed on this panel. They really address the same sorts of issues.²⁶

The first issue all of them address is this early attention to e-discovery. The Chief Justices' proclamation is really simply a guideline to courts and lawyers about how you should proceed but they suggest, for example, agreements by counsel and pre-conference orders, early conferences by the court and that sort of thing.

The Uniform Rules have similar provisions to the Federal Rules but I think are more valuable in this regard. They have much more specific agendas of what the lawyers are supposed to talk about and what the court is supposed to decide. But, again, I think the value of all three is this focus on e-discovery at a very, very early stage in the proceeding.

The second commonality between the three promulgations is the notion that scope ought to be limited and that parties ought to talk about scope and the court ought to be involved and that you are to consider cost-shifting. The Uniform Rules are much more specific about cost-shifting than the Federal Rules that seem to avoid it. So there, again, is another message. Scope should be limited and costs shift where appropriate. There are also mechanisms in all three for dealing with the issue of privilege and how inadvertent privilege waiver can be handled. Much of that is now available in the Federal Rule of Evidence 502,²⁷ but that's another sort of commonality.

And the last commonality is the issue of sanctions that we just finished discussing, that courts ought to take a reasonable

25. See generally, Conference of Chief Justices Home Page, <http://ccj.ncsc.dni.us/>.

26. Conference of Chief Justices, *Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information* (2006), <http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf>.

27. FED R. EVID. 502

approach to sanctions. The Uniform Rules adopt verbatim the language of the Federal Rules that deal with sanctions, which limit sanctions under certain circumstances in this area.

One interesting area of the Chief Justice guidelines that warrants some particular discussion is where the guidelines talk about the responsibility of counsel to quote, unquote, “be informed.”²⁸ And what it says is, that before you get into this process, you need to have talked to the people in your information technology department; you need to understand what the systems are so you can discuss them intelligently, and that same comment appears in the comments both in the Federal Rules and in the Uniform Law Commission rules.

But I think the fact that all of these folks look at the same areas, and one additional area, that is, form of production. Form of production is something we do not spend a lot of time discussing but it’s certainly one of the most valuable parts of the Federal Rules, Uniform Rules and the Chief Justice guidelines. In these discussions you have with counsel and the court, and in the discussions that counsel have with one another, they need to talk about the form in which all of this electronically stored information is going to be produced.

So, these three, including the Chief Justice guidelines, are out there for you to use. They are simply guidelines for discussion. The Uniform Rules are available for adoption as a separate package. The value of that is that you don’t have to modify any other state discovery rules. And I think they also have some valuable additions that the Federal Rules don’t have. More specificity in the agenda for the court and the parties, and more open discussions about cost-shifting that the Federal Rules don’t have.

MS. GROSSMAN: Richard Marcus and others have questioned the need for the rules. There’s a question?

AUDIENCE MEMBER: Yes. We’ve heard –

MR. WITHERS: We’re recording this. Can you talk into the mike?

28. See *Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information*, *supra* note 26 (stating that it is the responsibility of counsel to be informed about the clients electronically stored information).

MR. BERGIN: I'm going to state for the record that we were members of the State Bar Committee on the proposed amendments to the CPLR and he was for several years my co-chair on this matter.

AUDIENCE MEMBER: Thank you, Jim. I want to go back to the New York State Bar proposal for a moment. There's a countervailing point of view that the term "documents" is sufficient, that the CPLR is an organic statute and on a case-by-case basis the judiciary of New York is able to deal with ESI and the discovery thereof, without any new amendments. Mr. Allman told us about 16 or 17 states, however you count them, have adopted variations on the Federal Rules, and I'm wondering if there's any states, after some sort of deliberative process, that decided that their practice statute can deal with ESI without any amendments?

MR. ALLMAN: You asked if any state, quote, "decided" that issue. Let me just read you a quote. I don't have it handy, but there's a — the Connecticut State Rules Committee met last month and published their minutes on the Internet. You are able to read their minutes. And they quote at the bottom, they said, several judges wondered why it was necessary to amend the rules at all, given the capabilities of the current rules.

So, yes, that point of view is widespread. It probably accounts for the reason that only 17 or 18 states have acted. And it was hotly debated at the federal level as well, a lot of time was spent on that.

Again, you can testify to, and John as well, the issue was thoroughly vetted, but I think the bottom line for all of us who eventually went along with the change was that there really are differences between documents and electronically stored information.

So, the question was, where do you stick that phrase electronically stored information? Do you include it as a modifier of the word "document" or do you make it a separate category? And the federal decision was to have three categories, documents, electronically stored information and tangible things, but it could easily have gone the other way.

JUDGE CARROLL: It was very hotly contested in the federal process and it was very close. Once it was decided and everybody got on board, I was initially against the rules amend-

ment. I thought that the rules amendments of 1993 and 2000 took care of the problem. But the majority of the committee decided that rules were necessary.

MS. GROSSMAN: That was going to be my next question to Ken. Richard Marcus²⁹ and others have questioned the need for rules. Can you make the argument against the need for rules?

MR. WITHERS: I can easily make the argument against rules. Nearly all of the precedents, in fact, every single Federal Court precedent dated before December 1st, 2006, was decided under no rules at all, or was decided with — under local rules or guidelines or something of that sort. The famous *Zubulake* series of decisions³⁰ were decided before there were specific rules. Judges were completely capable of dealing with these problems under existing rules at the federal level and are deciding these problems now in state courts, many of which do not have any discovery rules, because these issues can be dealt with guidelines and with standards of practice, they can also be dealt with using analogies to our prior practice in paper discovery to an extent.

So I don't think that the world will end if we don't have specific e-discovery rules. We can deal with those problems. We currently have law in the field of property and real estate that probably dates back to the middle ages and somehow it manages to still survive and serve us well.

JUDGE CARROLL: I defy anyone to state the rule against perpetuities.

MR. WITHERS: So we can live without these, and, in fact, there's a good case to be made that we should not adopt rules because by the time we finish debating it and have the Legislature act and everyone sign off on the rules, the technology will have changed and there will be new issues anyway. So what is the point? I think there's a good case to be made for that. The rules at the federal level deal with a few very specific issues that

29. Richard Marcus is a Professor of Law at the University of California, Hastings College of Law.

30. *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg, LLC*, 230 F.R.D. 290 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg, LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) and *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004).

we know are recurring issues and that really go beyond e-discovery. For instance, Rule 37(e)³¹ on sanctions for spoliation, which we just talked about, is easily applicable outside of the e-discovery realm. The Federal Evidence Rule 502,³² which deals with preservation of privilege for inadvertently produced information, makes no mention of electronic discovery specifically at all. It's applicable. And I think that the meet-and-confer rule,³³ although different legal cultures have different attitudes towards this, is completely applicable in all cases large and small, whether or not there's e-discovery involved.

So these are good ideas to begin with. There are some specific problems that are unique to e-discovery, such as the form of production issue that you mentioned before that have to be dealt with because of the logistical issues that volume and complexity present to us. But it's not absolutely necessary.

Judges have tremendous discretion under our system, both state and federal, to deal with these issues on a case-by-case basis.

The important thing about rules is that they educate the Bar on the obligation to keep up with the technology and their responsibilities. Unfortunately, without rules, and, of course, behind rules all the time is the threat of sanctions or some other adverse consequences if they don't follow the rules, lawyers aren't going to pay attention to them. So the rules serve an educational purpose more than a punitive purpose. So that's my case for rules.

MS. GROSSMAN: We'll now move on to the last subject, in our last 15 minutes before lunch. I'll tell you that this past year, I had the distinct pleasure of spending six months in Europe, working on a cross-border e-discovery matter, and had a chance to observe firsthand the clash of cultures on e-discovery between how they see it in Europe and how we see it here. Often I felt caught between a rock and a hard place because on the one hand, there were U.S. authorities who were telling me that I was being uncooperative and not producing fast enough and not producing enough information. And on the other hand

31. See FED. R. CIV. P. 37(e).

32. See FED. R. EVID. 502.

33. See FED. R. CIV. P. 26(f).

I had a client who thought I was very insensitive to human rights, fundamental human rights and just plain crazy.

So, Jim, can you talk to us about what the problem is with this cross-border e-discovery, how it manifests itself and why litigators can't just produce the information from a server?

MR. BERGIN: It can be problematic. Recent developments in privacy law have made it very much a worldwide issue. But if you go back before the implementation of privacy standards in the European community and elsewhere and look at cases involving financial privacy laws, you see part of the development establishing itself as a dynamic within our own culture in the United States.

Prior to 9/11, if questions came up as to whether, for instance, a Swiss Bank had to produce financial records, they would simply say, "Well, our laws don't permit us to do that." What you would usually find is that judges, federal judges and state judges, would be relatively respectful of those standards except in cases where the party for whom the production was sought was seeking to stand behind what we think of as a "blocking statute." There are statutes in some countries that were enacted specifically just for U.S. discovery and U.S. judges don't like those and typically will not respect them if they are interposed to prevent production.³⁴

Since 9/11, I've seen a real transition, a sea change in the financial privacy cases where the U.S. Courts are much, much more willing to say, "Forget about it. I don't really care what your financial privacy law says. We need the information, so produce it." And it can put a party in a very difficult situation.

Contemporaneous with that reaction, foreign courts have perceived a threat to national security and the relationship to financial issues, international financial issues, has been the development of a much greater concern around the world for personal privacy, for the privacy of information of the individuals that may be maintained and assembled in databases by businesses.

34. See Shannon Capone Kirk, Emily Cobb & Michael Robotti, *When U.S. E-Discovery Meets EU Roadblocks*, NAT'L L.J., Dec. 22, 2008, available at <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202426918666>.

And in this country, we tend to view employees' files, if they are on a company's computer, as the company's files. In Europe, the presumption is exactly the opposite. If an individual has a file that is assembled in a database, that tends to be the employee's information and there can be civil and criminal penalties if that business discloses that information without proper authorization.

It puts them in a real bind when they are asked to respond to the U.S.-style discovery request which usually starts with the words, "All documents concerning." It's very intractable. It tends to lead to fundamental conflicts and my experience has been that judges are more respectful of privacy laws that have been adopted for general purposes than they are of financial privacy laws or blocking statutes. It puts parties in a position where they have to try to find a way to determine, "Can we get the relevant information without disclosing information in personal files that may be subject to unique protections under the European, Japanese and other country standards?" It's a real challenge. It's a constant difficult negotiation process, one that has risks for companies that are subject to those privacy laws on both sides.

They could be subject to sanctions here for not producing the information, and they could be subject to civil and criminal penalties in their own jurisdiction if they do. It's a difficult circumstance warranting great care.

MS. GROSSMAN: Ken, the courts have not always been sympathetic to the challenge of processing and transferring data that's located abroad. Can you talk to us about the recent French Supreme Court case³⁵ and describe the Sedona Conference's proposed approach to these issues.

MR. WITHERS: In the U.S., there has been ongoing litigation in federal courts here in New York regarding the financing of terrorist operations. It's a civil litigation, not criminal litigation, brought by private parties in which discovery is being sought against foreign banks, in particular, Credit Suisse, and the federal judge here in New York, looking at the history of the French blocking statutes and the concerns raised about the ability of Credit Suisse here in the U.S. to actually produce this in-

35. *Credit Suisse v. U.S.*, 130 F.3d 1342 (9th. Cir. 1997).

formation, was somewhat dismissive. And not unjustifiably so. The Court pointed out that in the 20- or 30-year history of the French blocking statute, not a single person had actually been convicted under that criminal statute in France. And weighing, as Supreme Court has told us to do, the interest of the U.S. Court in full discovery versus the national interest of the foreign court in protecting the secrecy or privacy of that information, guess who wins? Always the U.S. court will win, with U.S. judges balancing those interests.

The judge ordered the production of that information, at which point the French lawyer in France began making phone calls to try to schedule depositions to get that information out of France. That French lawyer was reported to criminal authorities for violation of the French blocking statute and in the end was fined ten thousand Euros, which is real money, for violation of the criminal statute. So, we have a bind here.

We have a U.S. Court saying, “Get the information or else you’re going to be sanctioned in a civil case in the U.S.,” and a French Court saying, “No way you’re going to get that information. We have our national interests as well.” So it’s a real problem. It’s not a fictitious problem. It’s not a theoretical problem. It’s real.

The Sedona Conference has developed a draft framework³⁶ for trying to work through a lot of these problems. The draft was released about two months ago. It’s being commented on worldwide. We currently have five European data privacy commissioners who are reviewing it, one of whom said it’s very favorable — it’s a very positive step forward in trying to work out the cultural differences — this is a cultural difference. It’s not just a legal difference. We’re talking about real gut cultural issues.

Europeans in particular look at U.S. discovery and they think we are crazy, that they would never stand for that in a European court. All discovery, remember, in European courts is conducted by magistrate judges usually under confidentiality

36. The Sedona Conference, *Framework for Analysis of Cross-Border Discovery Conflicts: A Practical Guide to Navigating the Competing Currents of International Data Privacy & e-Discovery - Public Comment Version*, The Sedona Conference, August 2008, http://www.thosedonaconference.org/dltForm?did=WG6_Cross_Border

orders and very strict supervision of the court. So they are looking at discovery in a completely different way.

We have to also understand their definition of privacy is much more extensive than we would ever think of. A person's e-mail address is considered private personal information. Their e-mail correspondence, even through their employer's server, is considered private. You would have to get individual permission of every employee in a corporation in order to conduct discovery in Europe. This would be very difficult to do.³⁷

There are ways to do this. There are ways to get information. But if you're going to need the cooperation of European authorities, the scope of the information being requested has to be extremely narrow. It has to be not just relevant to the facts concerned, but relevant to the adjudication. In other words, it has to rise to the level where it is likely to be admitted as evidence at trial, not simply to be used in discovery to get information, perhaps to be used in depositions. But it has to be the type of information that is likely to be evidence at trial. That's very, very narrow.

So, the first step in getting cooperation on international discovery is that probably the U.S. judge has to state, and with good faith and good cause, "I need this in order to reach a decision to adjudicate this case. . . . [This is] not just for [the parties'] edification. It's for me, as a judge, to make a decision in this case." So, the judge would have to get involved to some extent in that kind of international discovery.

And very likely, the parties and the judge would have to deal with data protection officers in the home country wherever that is in order to get permission for that information to come in.

JUDGE EMERSON: Just to follow up, the communications sent into the U.S. carry that same risk. So it doesn't sanitize them just because they come from Europe into the U.S. from the home office.

MR. WITHERS: It does not.

JUDGE EMERSON: A lot of times we look at our litigation as being very local, which in fact it is, until you start moving up the chain and find out that what people are asking for is the

37. See generally, Council Directive 95/46, 1995 O.J. (L281) (EC).

stuff coming out of the U.K. or the E.U. countries, let's say, and you have that problem. A lot of times people don't even realize it.

MR. WITHERS: It's far more likely to occur in electronic discovery than paper discovery because electronic discovery is distributed. A corporation server can very well be in a European country or in India or South America or Asia. And you have to deal with where the server is.

One other solution that lawyers like to think of is, "Well, we can still have it hosted in Europe. We'll just have it come up on a screen in the U.S." No, no. The definition of processing which invokes the European laws includes the transmission of that data.

MS. GROSSMAN: We've given you the Sedona framework paper on your CD.

MR. BERGIN: One comment. As a practical matter, this is probably going to wreak havoc with goals and standards, but to the extent that these issues come up and the need for discovery in civil law countries arises in litigation, it probably means that it needs to be done late in the discovery process after the need for specific information has been as well vetted as can be by early discovery in the U.S. It likely will mean that it should take place by Letters Rogatory directed to a magistrate of the Court so that what information is gleaned can be obtained through a judicial process that will not subject the parties and lawyers to sanctions. And it's slow. It takes a long time to send off and process and get it back.

MS. GROSSMAN: Tom, the last question of the morning is for you. Some courts seem to feel that litigants are playing games by moving their servers abroad to avoid discovery. I want to know if this is true and how the issue came up in the *Columbia Pictures* case.³⁸

MR. ALLMAN: We have given you an outline and on page eight, the last page of the outline, we've cited to *Columbia Pictures*. It looks like we had a typo. We cited to it twice. It's actually not [a typo]. We've given you both the magistrate judge's opinion and the district judge's opinion. Both of them

38. *Columbia Pictures Industry v. Bunnell*, 2007 WL 4877701 (C.D. Cal. 2007).

felt that the device used by the defense there of moving their servers to — I forget where it was.

MR. WITHERS: The Netherlands.

MR. ALLMAN: This is an extraordinary case. These two opinions are well worth reading just because of the points they make about ephemeral information.

This was a case where the person selling the services that were attacked by the motion picture industry, and believe me it was the entire industry going after these defendants; the motion picture industry was upset that these people were selling software that could be downloaded and allow you to illegally copy and share motion pictures.

So, the folks that were doing it were keeping information about their customers only temporarily in what's called RAM, random access memory. So as long as the computer was on, the information was there. But every night they would turn it off and the information would go away. So they redefined the definition of electronically stored information, or defined it in the first place, I should say, to include ephemeral information even though it exists only in transitory form.

So the number one holding in this case shows how broad Ken's earlier point was about ephemeral information.

Number two, they thought the cute way to avoid the problem would be to move the servers all the way over to Holland and that way you couldn't subject them to the Federal Rules of Civil Procedure, and both the magistrate judge and the district judge said that does not mean anything to us at all. Since you're doing this to avoid discovery obligations, we're going to ignore it. And they spent a lot of time on the privacy issues, which I did not follow and I'm sure you guys could talk about, but they basically dismissed the privacy issues as well.

MS. GROSSMAN: Please join me in thanking our very distinguished panel.

MR. PASSIDOMO: My name is Peter Passidomo. I'm the Vice-Dean of the Judicial Institute. I would like to thank Maura for putting together this terrific panel and providing Ken Withers for us.

[LUNCH BREAK]

**AFTERNOON KEYNOTE:
ADR IN NEW YORK**

Remarks by the Honorable Stephen Crane

MR. PASSIDOMO: Good afternoon. It's with great pleasure that I introduce our afternoon keynote speaker who has a unique perspective on this afternoon's subject. With us this afternoon is the Honorable Stephen Crane. Judge Crane was the former Administrative Judge in the New York Supreme Court, also an Associate Justice with the Appellate Division in the Second Department, and Judge Crane currently is with the JAMS Dispute Resolution organization. So I turn it over to Judge Crane. Thank you.

JUDGE CRANE: Thank you Dean Passidomo. I am a historian, you see. I'm also a bird named Crane. As such, I'm going to give you a bird's-eye view of the history of court-annexed mediation as one form of alternative dispute resolution. In the Commercial Division of the Supreme Court, at least in New York County, as background, you're probably familiar with the experiment for commercial parts, —that in 1993 the Supreme Court created the Commercial Division—as well as the Commercial Courts Task Force chaired by Bob Haig and Leo Milonas where the ultimate fruits of all these efforts was the creation on November 6, 1995, of the Commercial Division of the Supreme Court in New York and Monroe Counties.

I had the privilege and honor along with Bea Shainswit, Ira Gammerman, Herman Cahn, Walter Schackman who's here. I had lunch with him. I hope he's still here. There he is. And for Rochester, do you remember Rochester, Walter? Tom Stander, to be assigned to this newly created Commercial Division at its

very inception. Chief Judge Judith Kaye, Chief Administrative Judge Leo Milonas and Administrative Judge Stanley Ostrau made the announcement of this innovation the following Monday, November 13, 1995, in the then - recently restored magnificent rotunda at 60 Centre Street.

The Commercial Division was not only devoted to the notion that business disputes required efficient, speedy and inexpensive resolution in New York County and State, a world capital of commercial banking and securities activity, it was also dedicated to the concept that assigning particular judges to the administration and resolution of this caseload would create confidence in the business community that its litigation was being handled, not just by random judges, but by jurists knowledgeable of its culture and needs who would become much like Delaware's chancellors: Experts in commercial and corporate litigation.

These ideas were implemented by removing commercial cases from the mix of other cases pending in the New York Supreme Court, by establishing a separate clerk's office to administer its inventory, by locating us judges in a single cluster on the second floor of 60 Centre Street. You know, Walter, I can't remember my courtroom's number anymore, it's been that long. And by investing us with the most advanced technological tools that the court system had at its command.

Another basic initiative of the Commercial Division, court-annexed alternative dispute resolution, was a handmaiden to promote the underlying principles of efficient, speedy and inexpensive resolution of commercial disputes.

Not long after, in July 1996, I was appointed the successor to Stan Ostrau as Administrative Judge in Civil Term Supreme Court New York County, and I accepted this assignment on the proviso that I could retain my Commercial Division part, albeit on a reduced basis. And so I did, for the next five years, until the governor designated me to the Appellate Division.

I want to share with you my insights from my experiences in this dual capacity as a Commercial Division Judge and as Administrative Judge, at least as they relate to ADR. As I do this, allow me to digress for two purposes.

I want to mention the struggle we had with the definition of a commercial case and to describe the concept of mediation,

the ADR method of choice, although not to the exclusion of neutral evaluation or even arbitration. I saw [Justice] Lenny Austin at lunch and I think he took up the cudgels more recently on the definition of a commercial case. It's a work in progress [as] we used to say.

Early on, in taking cases into my commercial part, I came across one matrimonial case. Can you believe it? Not for anything but I successfully evaded assignment to a matrimonial part all the years I served in the civil side of Supreme Court, and, of course, received none when I was in criminal term. How, you might ask, did a matrimonial lawsuit get assigned to the Commercial Division?

Some might argue that aspects of a divorce action such as an equitable distribution of the value of the sole proprietorship or partnership interest of one of the spouses in a, perhaps, law or medical practice, these might take on the characteristics of a business dispute, much as a law firm dissolution proceeding in the valuation of its assets takes on the aura of a divorce action. Yet we had specialty parts for divorce actions and it just wasn't right to inject such a case into the Commercial Division.

The case arrived there because some wiseguy who filed the RJI¹ ticked off the box designating the case commercial. As Administrative Judge, in consultation with the Commercial Division Advisory Committee, I promulgated a definition of what is considered to be a commercial case belonging in the Commercial Division.

You might remember another aspect of this definition: The amount in controversy. Most of us accepted cases of, I guess it was \$100,000 at the time, maybe 75, I don't remember. But our beloved colleague, Ira Gammerman, set the bar higher, at \$125,000. What this means is that he expelled lesser valued cases, as was his right under the protocols governing the Commercial Division. There was good reason for this protocol, which I understand has been abused by some commercial judges over the years.

The good reason is that we did not want to swamp this new experiment with cases that barely qualified as business disputes worthy of the Commercial Division. To avoid the abuse

1. Request for Judicial Intervention.

of this protocol, we not only codified the definition of a commercial case, but also adopted rules whereby an administrative appeal could be taken from a determination of a commercial judge to retain or expel a case or, indeed, to reassign a case that the RJI had directed to a non-Commercial Division part.

The second diversion I would like to take is to consider “What is mediation?” I think we probably all are sophisticated enough here to understand it, but let me explain what I conceive it to be. It is, or at least it should be, a consensual method of settling a dispute where the parties voluntarily agree to participate and reach agreement without coercion. There’s coercion and there’s coercion. Court-annexed mediation out of the Commercial Division, of course, has some coercion because the judge can require the parties to engage in the process up to two times during the course of the litigation. In a typical mediation, the mediator, also a neutral who is governed by a set of ethical precepts, conducts a pre-mediation conference call with the parties in order to get a handle on the nature of the dispute and the history, if any, of prior settlement efforts. In this telephone conference call, the mediator may set a schedule for the filing of a written pre-mediation statement and secure the parties’ preference as to whether they will serve their statements on each other or submit them under the mantle of confidentiality to the mediator only. It is also the opportunity to make doubly sure that someone on each side knowledgeable of the dispute and authorized to settle will be at the mediation session. That’s vital.

Then comes the mediation itself. Usually, the mediator will conduct a joint session where parties stake out their positions and the clients can express their views and vent their emotions or business concerns. There follow the break-out sessions—separate caucuses in which the mediator obtains information, confidential or to be shared with the adversary, as well as the demands and offers of settlement. The mediator acts as a facilitator and coach, reality-checker and sometimes an evaluator. The process is confidential and nothing said can be used for or against any party if the litigation should resume, or, indeed, in any other lawsuit, much like settlement negotiations are generally protected. But in a mediation, this confidentiality also acts as a lubricant to the process, enabling the parties to

inform the mediator of weaknesses and strengths, even though the mediator may be sworn to secrecy from sharing this information with the other side. Apropos of this, I commend you to take a look at Standard V of the ADR Program Standards of Conduct for Mediators.² It's also to be found as Standard V of the Model Standards of Conduct for Mediators, promulgated in September of 2005 by the American Arbitration Association, the ABA, and the Association For Conflict Resolution. Just as an incidental, JAMS itself has Mediators Ethics Guidelines. And to confuse you a little, that's Rule 1V of the JAMS Guidelines. And finally, mediators must insure that the settlement is clearly understood by all parties.

As a commercial judge, I engaged in settlement talks virtually every time a case appeared before me. I think I was non-coercive and my settlement rate was very credible. As I look back on this activity, preceding my own training in mediation, I think my approach was the facilitative one that I now use as a mediator. In any event, one technique that I found to be extremely effective in securing settlements was the firm trial date. I usually adopted a trial date in the preliminary conference order.

I would tell the parties that the date was immutable because to adjourn a trial would have a domino effect on my trial schedule, pushing later calendared cases into the future and depriving the parties in those cases of the reliability and predictability of their prospective trial dates. So, I would tell the attorneys that there would be no trial adjournments short of death and that I wasn't sure about death either. Predictably, I would get a request for adjournment just before the pretrial conference.

When the application would be denied, I would get a call, perhaps two or three days later informing me that the case had been settled. So, I really did not enjoy that many trials of commercial cases. In any event, before becoming a commercial judge, I had an experience with a case involving a failed merger and a complaint seeking \$80 million — that's when \$80 million

2. See American Arbitration Association, *Model Standards of Conduct for Mediators* (2004), http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

meant something — with a counterclaim for \$40 million. Since I was going to be trying the case non-jury, I sent it for settlement negotiations to my colleague, Burton Sherman. He was a great settler, but on this one he sent it back with the sad message that it did not settle because both sides had incurred over \$1 million in legal expenses. Ultimately, I tried this case. It took about three weeks and I rendered my decision, with the permission of the parties, from the bench right after the close of the evidence. I dismissed both the complaint and the counterclaim. Only the lawyers made out on that one.

In the Commercial Division, then, I had the intuition that to send a case to court-annexed mediation at the very earliest date would maximize the potential for settlement with a pot of money still undiminished by litigation costs. This intuition was reinforced when Steve Hochman urged us to send cases even before discovery. He correctly demonstrated that the mediator can handle necessary information exchange to make more meaningful the parties' assessment of their litigation risks during the mediation.

Of course, there were advocates who had either not experienced mediation or who had adverse experiences with it. One advocate, Professor Sheila Birnbaum, representing MetLife, resisted my reference to mediation. She said the case could not ever be settled. After Herculean efforts by the mediator—I wasn't supposed to know who it was, but he is sitting right here, so I will mention his name, Steve Hochman—the case came back to me settled and Sheila was in shock. I understand that she has become quite a proponent for mediation today.

Another case springs to mind. I was hearing oral argument of a preliminary injunction motion incidental to a dissolution proceeding of a partnership that had about \$400 billion in assets. They were office buildings on both the east and west coasts. When the attorneys concluded their arguments, I observed that they had agreed on about 70% of the issues and that they might benefit by building on that agreement by going to mediation. I suggested that because of the amount of money involved, perhaps their clients would invest more confidence in the mediation process if, instead of using our pro bono panel, they paid for it, and they agreed to go to JAMS and the case

settled. I was relieved of a very onerous litigation. Carolyn, you know about that.

When the Commercial Division started in 1995, we compiled a list of mediators from the list maintained by the District Court for the Southern District of New York which had a similar program in effect. We sort of cadged it wholesale, and we at first established rules that the mediators would not be compensated by the parties. Actually, this was a reflection of the sensitivity we had to mandating the parties to engage in a process outside the courts that they would have to pay for. Since my time, this protocol has changed to require only that the first four hours of mediation be supplied pro bono. If the parties choose to continue, they must compensate the mediator. I think there is a \$300 cap per hour on that program. At the beginning, I'm not sure what qualifications for the mediators we imposed, although there may have been adopted minimum training requirements for our pro bono mediators in the discipline of mediation and in the substantive areas in which they hold themselves out as competent to mediate. When I was the administrative judge, an offer came along by Simeon Baum and Steve Hochman to conduct a 24-credit course in basic mediation techniques. I don't know how I set aside the time, but I signed up for it. And included among us students were members of the Commercial Division panel, but also the neutrals in the Appellate Division who were tasked with trying to settle appeals.

Meanwhile, we had a committee that was involved in crafting ethical rules governing our mediators as well as ethical rules for arbitrators and neutral evaluators. And involved in that effort were — I can tell you who they are because they are scattered throughout this conference:

Mark Alcott, Simeon Baum, David Botwinik, David Brainin, William Dallas, Judge Mike Dontzin, Claire Gutekunst, Steve Hochman, you are everywhere, Steve. That's great. Steve Hoffman, Alan Raylesberg, Honorable Kathleen Roberts, Marvin Schwartz, Judge Elizabeth Stong who you are going to hear from later today, Irene Warshauer, and one of my colleagues now at JAMS, John Wilkinson. In the year 2000, they succeeded in writing the ethical standards that are in effect today.

I think you've heard on a hit and miss basis the bird's eye view of this bird who is still flying — who is now a mediator at

JAMS — about the history, as he remembers it, of court-annexed mediation in the Commercial Division. The lesson I have to leave with you is contained on this lapel pin that someone gave to me at a conference in 1979.

It says: “Mediate. Don’t litigate.”

ADR PANEL

MR. WEITZ: Good afternoon. Thank you, Judge Crane for a wonderful keynote and for sticking within the timeframes as well. Let me quickly introduce the panel. To my far right is the Honorable Alan Scheinkman, who is a Justice of the Supreme Court, in the Ninth Judicial District. He sits in the Commercial Division there. To his immediate left is the Honorable Elizabeth Stong, who is a United States Bankruptcy judge in the Eastern District of New York. To my immediate left is Judge Crane, who you have already heard from. And to his left is Simeon Baum, who is the president of Resolve Mediation Services, Inc. And to his left is Stephen Younger, who is a partner at Patterson, Belknap, Webb and Tyler and President-elect of the New York State Bar Association, so we congratulate him on that as well.

I don't know if anyone here has read Malcolm Gladwell, *THE TIPPING POINT*.¹ It's a good book. I think of it on a day like today, because when thinking about where we have come in ADR in New York State, I think we have reached that tipping point, particularly in commercial cases. We have probably even passed that. In *THE TIPPING POINT*, Malcolm Gladwell talked about three rules of epidemics, how things become epidemic in culture. First is the power of context, which is the idea that the environment in which epidemics occur has a great impact on whether or not they tip. Next is the "stickiness factor," how sticky a message is. Third, Gladwell talked about three personality types that are to be credited with the tipping of any epidemic. Those personality types are the connectors, the mavens and the salesmen.

1. MALCOLM GLADWELL, *THE TIPPING POINT* (Back Bay Books 2002).

The connectors are people who link us up with the world, the people with the special gift of bringing the world together. You can get an idea to them. They know lots of other people, and they are able to get that information shared. The mavens are the information specialists or people we rely upon to connect us with new information. The mavens find the information, they get it to a connector, the connector spreads it and then, finally depending on the stickiness of the issue, they get it to a salesman. The salesmen are the persuaders. They are the charismatic people with powerful negotiation skills. Our panelists this afternoon are connectors, mavens and salesmen. And if weren't for them, we wouldn't be at this place in ADR in New York State.

First, a brief overview of ADR in New York State. We now have ADR programs in place in the Commercial Divisions in New York County, Westchester County, Nassau County. It's up and running in Queens County, Kings County and Erie County. It's on the way in Suffolk County as well. Even where there is no ADR program, just about every Commercial Division has established an ADR procedure to make mediation available for commercial cases. There are statewide rules in place for the Commercial Division.² Rule 3 of those rules give justices of the Commercial Division the discretion to order parties to participate in free mediation.

In addition to the statewide rules, all of these programs operate with local court rules that balance the need for statewide uniformity with the mechanics of how these programs operate in each locale. The local rules deal with case selection and referral. How are cases going to get to mediation? Local protocols always address the qualifications and training of neutrals. Do they have to be lawyers? How much training do they get? As a result of the proliferation of programs throughout the state, the Administrative Board of the Courts, just this past year, promulgated a statewide rule that codifies a minimum standard for ADR neutrals, mediators and neutral evaluators throughout the courts.³ Local protocols also address confidentiality. Lack-

2. N.Y.Ct.Rules §202.70(3) (McKinney's 2007) available at <http://www.nycourts.gov/rules/trialcourts/202.shtml#70>

3. N.Y.C.P.L.R. §§5529 & 9703 (McKinney's 2008) available at http://www.nycourts.gov/rules/chiefadmin/146_amend.pdf

ing a statute that would assure confidentiality local protocols establish ways of providing for confidentiality, including consent of the parties. There is a proposed statute called the Uniform Mediation Act,⁴ as well. I think all of these programs address in one way or another, the issue of ethical standards for mediators. To Justice Crane and his advisory committee's credit, and those who practice in New York County, most of the Commercial Divisions, whether by affirmative action or not, have incorporated the standards of conduct that were enacted in New York County. It tends to be everywhere. Local protocols also address stay of proceedings, whether or not discovery and other proceedings are going to be stayed while cases are in mediation.

Selection of a neutral is another issue addressed in local protocols. Should the parties pick the mediator or should the Court assign the mediator? What about submissions? We have heard of mediation briefs, where the parties might submit an abbreviated brief. Should those briefs be confidential? Should they be required at all? What limitation should be put on them? And finally, these protocols address general administration and deadlines. If you practice in the Commercial Division, you know that there are compelling degrees of limited resources. How do cases get referred? Who enforces the deadlines? Is there communication between the judge and the mediator?

Now, the first issues I'd like the panel to address is the use of rosters. All of these programs in the Commercial Division, rely on rosters of mediators that are assembled by the court. The cases are referred to mediators on the roster. One issue to figure out is whether some cases are better suited for the roster or perhaps may be better suited to be handled by the judge. And I'm going to turn that issue over to Judge Stong, and see if she can identify some challenges or concerns with regard to the use of rosters.

JUDGE STONG: Thank you, Dan. I have to say it's a real pleasure to be part of this panel and in front of this meeting. I chaired the ADR committee several years ago, so did Dan more

4. National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act* (2001) available at <http://www.mediate.com/articles/umafinalstyled.cfm>.

recently. And it feels like coming home to be here among so many friends in the ADR and the litigation world. I am a bankruptcy judge now, and I have had that position for a little over five years. But for 20 years before that, I was a litigator. And for the second half of those 20 years, I was involved with ADR, probably the first half of the 20 years I was too, I just didn't know it at the time. If you litigate big cases, you are probably doing your job well. You are probably thinking about the way to solve your client's problem every time you think about the case. I think the success of a court program, including rosters, is deeply grounded in the connection between the Court and the Bar, often realized at least in part through one of these committees. The Court can't do this alone, neither can the Bar. These are the mediators, and I'm guessing we are representative of all three groups here in the audience. I think there is an interdependency in the effective administration of a court-annexed ADR program between and among the Bar and the Bench, case administration, and the people who agree to serve on the rosters, without which you may have a bit of success, but you will lose an opportunity to have the kind of success these programs have had for the benefit of the court, the profession and, of course, your client. Let's talk about rosters. Rosters are the lists of mediators maintained by the courts to whom cases can be referred. In the Federal system, by and large, parties take their own mediator off the rosters. Sometimes the courts will appoint. Overwhelmingly, in the State system, the mediator is assigned to a case. That raises a bunch of issues, and I will touch on some, and others will cover others.

These rosters overwhelmingly are comprised of people who are willing to serve as volunteers. This is a pro bono enterprise. This is a big issue in the mediation world. When I was appointed to serve as a mediator in Commercial Division cases, everyone around the conference table drinking coffee was billing at a quite handsome hourly rate except me. And I said at the time, and I still say today, that that's right. It's a privilege to serve as a court-appointed mediator. But I also talked about merit in the points made by those who think that there is a need to recognize the importance of compensation in an appropriate case. And, as Judge Crane mentioned in his keynote, this may even make the parties take the process just a little more seri-

ously. I concluded regularly in my pro bono practice, alongside my paying practice, that it was at least sometimes the case that a party or their client would value your advice if that's what they were paying you for. And if they were not paying anything for it, it might be considered less valuable. Rosters have generally been [reviewed] through the state system by court personnel. Sometimes the parties can select; sometimes, rarely, the court can select. The judge may select. Generally, as I understand it, in the New York state system the mediator is going to be assigned by somebody in the court administration. The care and feeding of rosters is really important, really important. I think I've seen this from every perspective it possibly can be seen since I now oversee our roster in the Bankruptcy Court. I think people agree to serve on rosters for two reasons. They are looking for opportunity to serve, and they are looking for appreciation. First and foremost, I think they are looking for the opportunity to serve in appropriate cases, to apply their skills, to build their skill sets. Many of the people serving on these rosters may be quite experienced, but far more are probably going to be quite new in the mediation world. When we do the basic mediation training program here at the City Bar, one of the things we talk about is how to get experience. One piece of advice that we regularly give, is that if you have the appropriate background and you meet the qualifications, sign up for the pro bono court rosters. This is how you are going to get the practical experience. That is how you are going to get known as someone who is talented in this area and who has a lot to offer and how you are going to be able to build your practice as a retained mediator, in addition to an appointed pro bono mediator. So opportunity and appreciation, recognition by the court for service I think this is what people who agree to serve on these rosters are looking for.

I think courts, also, want diverse rosters. I mean, of course, diversity in all the ways we think about it, gender, ethnicity, background, but also practice setting. Mediation raises some complicated questions with respect to conflicts. For example, what happens when all of the mediators on a roster are affiliated with firms that are going to be representing the major institutions that may likely be parties or affiliated to par-

ties in the cases that are coming before the court that the roster serves.

You, of course, are going to be looking at the large firms for roster participants. They may be in the best situations to volunteer their lawyers' times. At the same time, the courts need to do everything they can do to broaden the practice setting and diversity of the lawyers participating.

Subsequent experience is very important as well. Diversity of experience, including, of course, experience with commercial law issues but not limited to commercial law is also very important.

In bankruptcy court, most of our cases are about money or lack of money in some respect or another. But I can tell you it regularly happens that I have a need for a mediator with an I.P. [intellectual property] experience skill-set or matrimonial skill-set, or you name it, whatever the legal area is. Of course, it is not to say the mediator needs to have the same skill-set that someone would need to be the lawyer in the case. That would be a subject for an entirely different panel. But there will be cases where not only the dispute resolution skill-set or mediator skill-set is required but also where it is useful that the mediator have some general knowledge about the concepts and the legal issues presented by the case. That kind of diversity, as well, I think is a very important thing on the roster.

Every time a case is before a judge, a good judge is probably thinking about opportunities for resolution. I happen to think that a good lawyer is making the same analysis all the time. You are doing the best work for your client when you have that question in the back of your mind.

The next question is when to get into mediation? Well, as early in the case as it appears that the settlement prospect is likely is the time to at least raise with the parties the prospect of referral to the panel. I put that into the context of 25 years experience in the profession, with 20 years as a litigator, knowing it was often awkward for me to be the one to say to my in-house lawyer or businessperson client or individual client, "Gosh, do you think it makes sense to consider taking this case to mediation, whether it's the court or privately?" That may not be the way you best inspire the confidence of your client as a practicing lawyer. And again another separate panel or program

would be conducted on the very interesting and often controversial question of sign of weakness. Is it a sign of weakness to propose mediation? It may not be to your adversary, it might be to your client, at least you may have that concern.

So, what does the judge do by raising the prospect of mediation as early in the case as possible? I often do this in the initial status conference. I'm lucky. I can conference my cases once every month or two. I see the lawyers; I know how the case is going. I think what the judge can do by taking the onus of raising the issue him or herself is to take that onus off the lawyer. Send the lawyer back to the client with a long report about the conference and the discovery issues and maybe the discovery deadline that was set, with the question of homework assignment that the judge imposed, saying, in words or substance, "I'm thinking about whether mediation might make sense here, I need you to think about it, I'm going to bring it up on our next conference, that next conference is going to be in four to six weeks. Take a look at our rules, take a look at our roster. When we come back I want to hear from you as to whether or not this makes sense." I think a certain number of cases settle even before that next conference date. It gives the parties permission to engage in settlement discussion.

A certain additional percentage of cases I think come back to court with a significantly different posture, having made progress. They're focusing on the documents they need; one deposition that's critical; one expert report that's got to be essential. They're moving that process along. At that stage, I'm in a much better position to assess whether they need to hear a little more from me. Do we need to have a chambers conference? Of course, with everybody together. I would never be in a position, nor I think would any judge typically be in a position to meet with one side or another.

But I create the opportunity to have the most meaningful possible conference on settlement issues or to see if it makes sense to send it to another judge for resolution, something I've done infrequently. Other judges in the court have been doing this more and more. I've done about a dozen mediations for one of the judges in our court and it's been not only a pleasure for me but a skill-set I haven't used for some time. It is also an opportunity to get cases resolved for the parties in court. So,

when is it time to send it to the roster? To a certain extent you know it when you see it. When is it time to talk about considering mediation? I would say at the first possible moment and the first possible conference interaction. My colleagues at the bench, please share with us, I would like to hear what your comments are.

JUDGE SCHEINKMAN: This panel has been an interesting experience for me. It's given me an opportunity to kind of do what they say in academia is a self-serve, what do I do, why do I do it, can I do it better? I think I've come to the conclusion that I am in the dispute resolution business. The goal of my dispute resolution business is to promote cost effective and expeditious resolution of commercial cases. Does that mean that that process works for everyone and every case? No.

It may be that state courts have been driven into ADR because of concerns about volume and caseloads and as an alternative to the latter. But even if you put those issues aside, and assume that a case isn't going to be delayed or protracted, there are cases that are amenable to alternative dispute resolution because ADR can provide a more efficient, fairer and appropriate resolution than the court system can provide.

That said, I think parties have rights. If a party doesn't want to settle, or participate in a process that will lead to settlement, they have a right not to do that. The court system is there, in effect, as the default decider.

And if someone said, "You know what, I really don't want any of this, I'm very happy to litigate in accordance with the established rules and procedures," that's okay with me. I think that they have a right to do that. Of course, I say that from a perspective of not having the caseloads that my colleagues in New York County have. Maybe if I was sitting in New York County I might look at it and say, well, that's great, but assuming that I have 400 cases and assuming that I tried three cases a term, or 52 or so a year, that would mean that if I tried every case, I'll maybe get to your case in eight years.

I also think that parties have a right to decide their own process. I was listening to the conversation this morning about electronic discovery. There's a great phrase that's used in the New York courts all the time, and I'm sure all of you heard it: "The parties are free to chart their own course." That is to say if

they want to find an alternative dispute mechanism or an arrangement that they want to follow, they're perfectly free to do that, and I shouldn't interfere with that. When I get a sense that this is what is likely to lead to an efficient, fair and expeditious resolution of the case, I do something very early on that I find is very helpful, which is I ask the parties before the preliminary conference to agree on a joint one-page statement of what the case is about. I also ask for the pleadings. Now, why did I ask for a one-page statement? Is it that I really don't want to read two pages? No. It's the homework assignment which forces the lawyers to synthesize their case. One of the things I was amazed about as a judge is that lawyers wouldn't want to talk before conferences. And now I'm kind of starting to force that. If I get the sense that they really didn't talk beforehand, I will say, come back next week.

JUDGE STONG: I require a joint pretrial order for the same purpose. At this point we're on a threshold of progress. It's a very good thing to think about.

JUDGE SCHEINKMAN: So, I asked them to do that one-page statement. And then I take the statement and I will try to see it as part of that dialogue. It won't necessarily be a direct approach about mediation. But I'll ask, you know, "Have you discussed a resolution of this case?" I try to get a sense about what's really driving the issue. Here's an example. I had a case last week. The dispute between the parties was a billing dispute. The defendant was claiming they didn't have all of the invoices that the plaintiff claimed to have sent.

I said, "All right, I can give you a discovery order; I can order you to produce documents and produce depositions. But you know what I'm going to do, come back in a couple of days with your principals, bring your records and we'll give you a room, exchange the records, talk them over, see what you dispute, see what you don't dispute." I had no part in that. All I did was bring them together and I think about half the case went away. There's still another half to the case.

I will also go to the panel. I'll say, we'll send you to the panel and if you talk fast, you can accomplish a great deal. The panel that we have in Westchester is a credit to Judge Rudolph, my senior colleague in the Commercial Division who put it together. After the four-hour free consultation you have to pay.

We call that the Westchester program. Judge Rudolph was very instrumental in putting that together. So what I think the panel provides is a good structure. If you're going to use court-required mediation, the court needs to be in a position to guarantee to the parties that there is at least a minimum level of training and experience and that minimum standards of ethics and propriety are going to be observed. We have folks on our panel in Westchester who are not lawyers. I have suggested those folks in particular types of cases; cases involving labor and employment and several other discrete fields, where it may be that a non-lawyer may be more helpful than a lawyer. We don't have the staffing you have and that other folks have. So we don't have a generalized clerk's office to do the selection. What I try to do is get counsel to agree. I tell them if you agree on somebody, here's the list, think it over, tell me who you like, you'll get that person.

Another alternative is the adverse selection: Tell me who you don't like. That's important because going in I want the parties to have a feeling that the process is at least capable of working and that they'll have confidence in a person that they've jointly selected. They won't have reason to be skeptical going in because of a bad experience or some concern, even if it's totally irrational, with somebody on the panel who they're going to arbitrarily think is not likely to be cooperative or is not likely to be productive.

I like the panel concept. I try to promote it at the beginning of the case. Even up to the day of trial we have had cases where we have considered going to mediation as an alternative. It's always offered as a possibility.

MR. YOUNGER: I want to throw out a little controversy. First, there's the question whether the program has been too successful. I look at it from the New York County perspective. I think there are some judges who are not getting involved in settlement the way they used to, because mediation has been very successful. But there are times when a judge really needs to get involved. The judge can see the tempo of the case much better than the parties can. The judge can suggest things in a much more convincing way than the parties can on their own. I know Judge Scheinkman will tell us he has plenty of time to settle cases. When Dan first got involved, we went down to

New York County and tried to convince the judges to send cases to mediation. In the early phases, it was a convincing process. Once they sent them, the judges were very happy because the cases weren't coming back. It takes both sides, the judicial side and the mediation side.

The second point I think Judge Scheinkman touched on is that the parties are always entitled to chart their own course. So, there's a two-level dynamic here. You want to think about the judge versus the panel. But even if you get sent to the panel, you can pick your own mediator and there's some benefits.

You can pick a Judge Milton Mollen who has had years and years of experience and you may say that's someone who I want for the case, not someone who, as Judge Scheinkman mentioned, people often go to these rosters to get experience or there may be a certain kind of experience that's not on the panel that you want to go outside for. You can always do that. You want to think about what style of mediator is best for you; can you get it from the panel or do you need to look outside?

MR. WEITZ: Thank you, Steve. Judge Crane, do you have any final comments on the issue of judges as opposed to mediators handling the cases?

JUDGE CRANE: Well, of course, the judge should constantly be seeking a resolution, seeking a settlement. But at the same time I think that the idea of mediation and having it as a court-annexed mediation, having it as a completely non-coercive medium ignores the reluctance of lawyers under the "Full Employment of Lawyers Act" to settle cases. That means that if you have a lawyer who's invested in furthering the litigation rather than in settling, you as a judge are going to have a tough time settling it. A mediator may indeed be more well equipped to getting around that problem than the judge would be.

Beyond that, I think that the *laissez faire* attitude has got to be tempered by the needs of managing the caseload. Even in Westchester, Alan, you've got to manage your caseload so you can't let the parties fumph around for six weeks and decide who the mediator is going to be. That's why the protocols, at least in New York County, I thought they were statewide, allow appointment of a mediator by the ADR administrator — within ten days if the parties can't agree on someone else.

JUDGE SCHEINKMAN: I handle that problem differently. I stay cases. In other words, I would rather not put a time limit on mediation. Usually when I make a determination as to how long a discovery issue should prolong the discovery, I may build in some time before anything serious has to happen, before clocks really start running on discovery. My attitude is if there's mediation, mediation will take a long time, a short time, it can be continuous as far as I'm concerned. What I want to make sure doesn't happen is that there's no bump time. And the way I'm assured there's no bumping is I will set a deadline for the completion of pretrial proceedings and I will build in some time for mediation. For example, maybe the parties want to do document discovery in advance of mediation or might want to put off depositions. So I'll accommodate that. But once I set my dates, as you said, death becomes almost the only operative out.

MR. WEITZ: In terms of using rosters, a couple of points were raised. Often a mixture of experienced mediators, as well as some new mediators, that raises some concern or challenges if you're dealing with someone who is newer to the mediation process. The need for diversity on your panels as well as practice setting. For example, there are construction cases, there are complex commercial cases and so on, and how do you address that?

Substantive experience is potentially a challenge. Steve Younger raised the issue. Perhaps if our panels are really that good, oftentimes judges won't actively get involved in settlement. They'll send it off to the roster. What I would like to do is invite Simeon Baum to shift gears a little bit. Judge Scheinkman raised the issue of pro bono mediation and Steve could talk about that. Since Simeon has the mike, if he wants to talk about rosters, or anything else for that matter, he's welcome to do it.

I wanted to add something else about Simeon I forgot to mention. He is the chair of the New York State Bar section on alternative dispute resolution.

MR. BAUM: We do now have the section on dispute resolution which in just a few months has grown from 93 committee members to over 600 members and is on the rise. And everyone here who is not yet a member of the section who has an interest

in what we're talking about today is really encouraged to join. It's no longer a tipping point. We really don't have to talk about ADR being on the rise, though it still is. Actually, it's really here and it's developing and flourishing, and so people are encouraged to join.

On the issue of pro bono versus for pay, I started mediating back in the early '90s, through the Eastern District and then the Southern District. I remember the first interview that I had to get on those panels was with Gerry Lepp, who is still there. I think Gerry was expecting to see someone with the gray and lack of hair that I currently have. He was looking for somebody with a little bit of gravitas, which I did not have. Somehow he was kind enough to put me on that panel.

So there I was a 10, 11-year lawyer, with really no formal experience as a mediator, going through I think it was just a two-day training, a very good training program they gave in the Eastern District and Southern District and that was about it. And my first mediation took three and a half hours. It did get resolved and I got a nice note from the court. In those days people used to write notes much more frequently than they do now. Everybody was surprised and happy. I was a very inexperienced mediator and I was mediating for free.

I think that when we think about rosters and we think about what it is people are doing as mediators, I do believe that the impulse in a mediator, whether it's in a court program or otherwise, is this kind of altruistic sense that maybe you can do something that's really of value, that maybe you can be, instead of as we were as litigators and against somebody, maybe you can get on everybody's side and maybe you can really accomplish something and get to participate in a fascinating process where everything matters, not just legal analysis, but also the parties' feelings, values, the context, everything. It's a wonderful process.

So there was a dignity in the role of mediator back in the early nineties that still continues. In the beginning, nobody was thinking that the mediators were going to get paid. So what instead happened was people would show a lot of gratitude. They generally treated mediators nicely and they still hadn't figured out what mediators were. So they almost treated

mediators, at times, as if they were quasi-judges, which they certainly are not.

And that was the compensation: the ability to participate; the parties' feedback; the gratification of seeing something get resolved. Now, time went on and the field developed. By the way, don't ignore the inexperienced. Don't put too much stock into the need for either substantive background about the case issues or the hefty mediator, for your case. Those green mediators are often filled with enthusiasm and can be very effective. So now, years have gone and let's take it to 2000.

You know, we've had 10 years of mediation experience. On these big cases where people are getting paid a lot, are we not also seeing the mediators getting compensated the equivalent, because they certainly bring equivalent value. There is a kind of irony. I find that now with eight hundred some odd mediations under my belt. Everybody is, you know, in the negotiation process trying hard to get their piece of whatever it is being negotiated over. Why isn't it for the mediator, too, to get a little piece?

JUDGE STONG: My own view, which is not a widely shared or popular one, is that, perhaps, part of the institutionalizing of the profession of dispute resolution mediation is to embrace the professional criterion of giving away some of your time. And I'll also say, someone in the market, frankly, as both a litigator and rarely as a mediator, one of the best ways to get known is to be appointed to a case through a court. In this way, you get to know the Bar and there are people impressed with what you can do. That is an additional kind of compensation, additional feeling good, frankly, developing your skill-set and network. You can be the best mediator in the world but no one is ever going to know it if you don't do mediation and the lawyers don't have cases.

But, the answer is, putting my mind in that same case, was that this is an investment banker fee dispute, and in fact, to a certain point in the early afternoon in that case, where one of the principals looked at me and said, "The thing I don't understand is why are you doing this? I don't get it, because you're not billing, are you?" And I thought, "Man, sometimes the door is just opened so wide you got to walk through it." And I said, "You know, I'm doing this because this process is so important

to me that I can't think of anything I would rather do today than be your mediator even though I'm not getting paid. Your hard effort and getting this resolved is all the pay I need." That case settled probably within an hour of that question, and I think, it's not to say that if mediators are being paid, cases don't get settled. Of course they do. But there's something to be said when it is annexed to a court for the value of having a certain amount in an appropriate case of pro bono mediation.

MR. YOUNGER: I agree with everything Judge Stong said. That's why I do it. There is a distribution problem, which is, as I sit down with any commercial litigator in this room, we're going to come up with a list of five really good mediators and on that list each of us will have, say, two or three in common. And people tend to go to the same people over and over. We're conservative by nature. That's why the really good ones are booked out until 2010. So when you have a list that's free, everybody's always going to go to those names that they really like.

The Eastern District, not the Bankruptcy Court but the District Court, has a good solution to that, which is, after two cases, everything's charged, and that kind of discourages people from picking these popular mediators. I had a similar experience to Judge Stong's, but with a different result. I had a case where it was a major bank on one side and a real estate developer on the other. And we were about to get to a resolution. And the developer looked at me and said, "How are you getting paid?" I said, "I do this pro bono." I guess I was not as articulate as to why I was doing it. He said, "That's outrageous. I'm no pro bono case." And he went in and got the other guy to agree to pay me a certain amount, which I didn't even participate in. But he was offended that I would be working for free for him.

MARK ALCOTT [from the audience]: I think what you're overlooking in this discussion on compensation is the difference between court-directed mediation, which is what court-annexed mediation is, and private mediation. In a court-annexed mediation, the parties are compelled to go to mediation. They don't have a choice. They are directed to go. And to me, the mediator should not be compensated, just as the judge is not compensated, the Court attaché is not compensated. That's a public service that's being provided.

In private mediation we are voluntarily jointly choosing Si-meon Baum, we're choosing Steve Younger and, of course, we should compensate those mediators. But I think that distinction should be made.

MR. BAUM: So there's a public-private distinction and mandate versus non-mandate. By the way, among the things done in preparation for today was to take another look at the 2005 revised model standards of conduct that the ABA developed. It used to be the ABA Spider⁵ AAA standards of conduct for mediators I think from 1994 or something like that. In 2005 they were revised.⁶ One of the points they make on self-determination is that parties should have the power to withdraw from mediation. So an interesting question that we have in a court, where parties are mandated to go into mediation, is, how does that affect self-determination? I put that as raising an issue. Before we get there, getting back to the economic question, if you are being mandated, then on top of it, is it right to say not only do you have to go to this mediator, but you have to pay for it also? I think that seems to be something that bothers people.

There's one experience I would like to talk about on this point that I was in a very slow way getting to, and that is the New Jersey experience. Right now, there's a new system of commercial division and that is that we've got this four hours for free and then the mediators' fees are capped.⁷ I think it was \$300 an hour or something like that. There's a whole separate question of whether that fee should be whatever the mediator's rate is, we're talking about commercial litigation cases, if you're going to compensate the mediator.

The second part of it is the first four hours. New Jersey for years has had that system although they have the rate at whatever the mediator's going rate is and the Court sends out a notice and it will say, okay, we've appointed this mediator as your mediator, you've got 14 days to find somebody else if you

5. Society of Professionals for Dispute Resolution.

6. Model Standards of Conduct for Mediators, American Bar Ass'n, American Ass'n of Arbitrators, Ass'n for Conflict Resolution, Aug. 2005, www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

7. See Rules Governing the Courts of the State of New Jersey, Appendix XXVI ("Guidelines for the Compensation of Mediators Serving in the Civil and Family Economic Mediation Programs"), <http://www.judiciary.state.nj.us/rules/app26.pdf>.

want to, but if you don't, this is your mediator.⁸ Here's their rate. Go forth and mediate.

What has happened in New Jersey is that people will go in when it used to be three free hours and whenever the bell-ringing hour was, all of a sudden, somebody's got to bring his aunt to the hospital. Somebody's got to go, they didn't realize, but they have a deposition in the afternoon. People would behave in ways that showed that that free period had conditioned them into believing either if it was going to work, it should work within the free period or we don't want to have to pay. And, so, once the time starts to tick, we're out of here.

I have to say over the last few years of watching the New Jersey process, the culture has changed. And people come in and that mythical hour rings and nobody even notices. And they keep mediating or they don't mediate, but it's more driven by the usual factors that determine whether people feel they ought to mediate.⁹

MR. WEITZ: I want to point out that the uniform rule in the Commercial Division gives the judges the discretion to order parties to mediate.¹⁰ That part of the mediation that's mandated would be free.¹¹ If the parties wish to continue, then it would be voluntary, analogous to the private sector and the mediator would be paid. That's the creative solution that we came up with. The theory behind mandatory ADR in general is that you only have to mandate it for as long as it takes people to start to appreciate it and then they ask for it themselves and you don't need to mandate it anymore.

JUDGE SCHEINKMAN: I fully agree that, even in commercial cases, folks cannot be mandated to go to arbitration and pay for it, which is one of the reasons why I don't mandate that people go to mediation unless I think there's a reasonable prospect that it's going to be a success.

8. Rule 1:40-6 (b), N.J. Complementary Dispute Resolution Programs <http://www.judiciary.state.nj.us/rules/r1-40.htm>.

9. *See, e.g.*, Rule 3, Rules of the Alternative Dispute Resolution Program for the Commercial Division, Supreme Court, New York County (effective June 15, 2008).

10. *See, e.g.*, Rule 3, Rules of the Alternative Dispute Resolution Program for the Commercial Division, Supreme Court, New York County (Effective June, 15, 2008).

11. *See id.*, Rule 5.

Part of it is, parties and their lawyers have a right not to be abused by being forced to go through a process that they really have a professional objection to.

The other part of it is that the mediator has a right to be protected, as well. I can remember as a lawyer being assigned a pro bono case. The person who I had to represent, made a \$2,000 down payment to a lawyer on account of a \$5,000 fee. And when she couldn't come up with the rest of the money, she applied for assistance; I got assigned to handle the matter pro bono.

I had this sinking feeling that I was at the wrong end of this deal. Here was this woman who is now getting a \$5,000 lawyer for a \$2,000 fee and there was a lawyer out there who, as best I could tell, had gotten a fee for doing nothing at all. And I was buying into an open-ended commitment which I was more than happy to undertake, but it just kind of looked odd.

I view the four-hour provision as sort of an opt out to protect the mediator from being unduly abused. The problem that you could have is if people want to sit and talk and it's going to take more than four hours, then the mediator might feel constrained to keep the process going and it gives the mediator an out to say, "Listen, I'm more than happy to continue this conversation, but now I have the right to charge you." However, I've not yet heard anybody complain that the mediator was there with a stopwatch or that they were really counting the minutes in any sort of literal way. I think it's really a protection for the mediator against the mediator being abused.

By the way, I don't read the rule, and I've never read it, as requiring people to go to four hours, for four hours. But it wouldn't shock me to find out that there were some mediations that did not last four hours and that there were mediations that lasted more than four hours for which the mediator did not ask for compensation.

MR. WEITZ: That issue of the four hours, actually I should distinguish, that the ability to order as part of the uniform rule the four hours is part of a local practice and, in fact, could vary from one Commercial Division part to the other. Because it's a local court rule, there's even more flexibility. If a judge wishes not to force people into staying for four hours and everyone's in

agreement, I'm sure that flexibility is there. Steve, why pro bono mediators for commercial cases?

MR. YOUNGER: I hate to disagree with the 109th President of the New York State Bar. I think he has a fair point about public versus private. I think the real question is what's the best call for the community. When this first came about, there was not a culture of mediation in New York. If we imposed payment, people would have gone out the door kicking and screaming. "Not only are they ordering me to mediation, but they want me to pay for it too?" Now it's become more part of our culture.

I would like to bring up California, Texas and Florida where mediation is required in order to get on to your trial calendars. It's now a part of the regular parlance of lawyers. And it's always paid for. And that's just because it's part of their culture. That's what they do. Are there ways to get out of it? Yes, there are. But, I think if you put that in New York right now, we wouldn't be ready for it. Maybe five or 10 years from now we would be.

MR. WEITZ: Let me ask a follow-up question, Steve. I want to move to the issue of rosters for a second. While we identified a number of issues, one that I think might have been referenced, but I want to raise here is the distribution of cases on a roster. So whether the Court first assigns or the parties pick, the Court might assign five days to agree on someone else. Sometimes judges may get creative and say if you can't agree on someone, give me a list of three and so forth. But the bottom line is in our preparation talks for this panel, some of our panelists had coined the phrase the "rock star phenomenon," that you have a roster but it seems like the parties pick the same one, two, three or four people all the time so the newer mediators don't get a chance to mediate.

Do you see that, Steve?

MR. YOUNGER: It happens all the time. It's the law of the marketplace. Lawyers are by nature conservative. If we have a tough spot, we want to pick the person who will make us look the best in front of our clients. We don't want to take the risk of picking someone we don't know and that's the real problem with diversity. I'm a big fan of diversity, but it's very hard for people to get their first chances. It happens whether

you're on a court roster or in a private setting. So I think the best way to move out of that is when you have situations where mediators are just booked up and you can't get them so you're going to pick somebody else and try somebody new.

The Court could change it by saying after one or two referrals in a year you're taken off the list and you're not given an assignment. You can do it that way.

JUDGE STONG: I'll say this, as the author of the "rock star" phrase. It's an issue and a real challenge for courts and for lawyers, you know. When I was in practice and my colleagues in the litigation department, we had a question about a case that had either been referred to or thought might be perfect for mediation, I got a lot of calls and e-mails about who do you think is appropriate. The tendency is to think of people you know.

When you want to hire local counsel in Chicago, do you get out the phone book? Of course not. You try to get a reference based on personal experience. As a judge looking at our panel in the situation where I am going to suggest people or even appoint someone either for pay or pro bono, can I entirely exclude from my mind the fact that I know that the last few cases that went to this mediator got settled and the cases that went to that mediator, either I have no knowledge of that person or I hear things like, "He met with us for an hour and said it was impossible, the case couldn't be settled." That's heart breaking if you're a person who believes in this process and thinks of it as a useful adjunct to case administration.

So I think we need to come up with as creative ways as possible to get to know each other, frankly. Mediators need to embrace the opportunity presented by programs and, yes, pro bono opportunities, large and small, to become one of the people that people know.

You need to be a little bit known. It's not so different than trying to get hired as a lawyer. It's a challenge for the court programs and it's not just about the money. Remember, care and feeding of rosters is not only about appreciation, but also experience. It's a challenge.

JUDGE SCHEINKMAN: I want to discuss the issue of the selection of the so-called rock stars. The administrator of the New York panel, the one who does the paperwork on it, calls

me a couple of times a year. Usually they are very big cases and with very sophisticated lawyers and clients. I just recently had my first one under the new system. She asked me if I would be available to take a case. I consider it pro bono when I do that even though I am now being paid a nominal fee. This was a very sophisticated case involving several million dollars. But it was not only the dollar value, but the sophistication of the issues involved. So I said sure, I'll take it.

The lawyers came in and one of the lawyers reminded me of the new rule. I said, "Certainly I'm aware of it. Four hours you get for free and the rest you're paid, I'm paid \$300 an hour." Although I think there's a provision that if they select you, you get \$375. Is there something to that effect? Does anybody know that?

MR. BAUM: I thought if they select you, you get paid from the start at whatever your rate is.

JUDGE SCHEINKMAN: There's something to that effect.

AUDIENCE MEMBER: As the arbitrator you get paid \$375.

JUDGE SCHEINKMAN: We had two sessions of about ten hours. And the way I constructed the bill, I listed the ten hours and I said pro bono for six hours at \$300 an hour. \$300 an hour times six was my fee. It was a lot of work. The only point that I was kind of concerned about, one side had four lawyers and the other side had two; I guarantee you I was the poorest paid lawyer in the group. And we're aware of that. And I don't mind the ordinary run-of-the-mill hundred thousand dollar cases doing it. But sometimes when you get into that realm, where each side has carte blanche for how much they pay their lawyers, under the old system, if they would select me, they would pay my going rate. That's not true now. And I don't mind doing it and I would prefer to do it for a case where money was an object, was the principle. There was no money principle involved.

MR. WEITZ: One of the reasons why we tied the compensation issue together with the issue of rosters is because I think they do play off each other. On the one hand, we can't mandate people to pay, but we can mandate them to attend. And if they attend, they attend for a certain period of time and then they can't reject the fee. But we also want to regulate and get in-

volved in the fee. Actually there's some difference among the Commercial Divisions on their approach to this. We might see more experimentation with it, that some places do want to cap the fee and others might leave it to a market rate. I'm wondering, Judge Scheinkman, if you have a comment on the rock star phenomenon?

JUDGE SCHEINKMAN: I would rather have the parties pick in the first place. One of the reasons for that is we really don't have a separate ADR administrator as there is in New York County. So it makes me uncomfortable if at the end of the day I have to directly or indirectly do the selection. And, again, as Judge Stong stated, you tend to go with who you know or who has a success record. But I really have to make more of an effort and that's something I know I need to correct, to make sure that we pay more attention to other people on the panel.

Although I must also say that I don't keep records. So it's kind of, you know, by memory, who was the last person. We don't have an ADR clerk keeping track of who got the last one. It isn't always so easy.

MR. WEITZ: You raise an interesting challenge that, besides the principle that we talked about, there are resource questions. Without a dedicated clerk or administrator, wanting to enable the parties to pick might work even better than simply assigning because you want to separate the judge from the actual appointment of the mediator. So if you have no one to handle the assignments, you may simply leave to the parties to pick.

One interesting note is the evolution of the New York County program. What originally they did, even with an ADR clerk, they gave the opportunity to the parties and counsel to pick, and that ended up in a built-in delay in the case. The parties never got around to picking. They never got around to agreeing. So this ADR clerk's job became calling and following up with counsel to find out why they didn't send in the name of the mediator they agreed on within the set deadline. That's why the Court moved to assignment, saying, "Here's your mediator and if you want someone else, let us know within five days."

MR. GINSBERG [from the audience]: I suggest that there's an easier method of getting the underutilized mediator known,

and that's to appoint him or her as a co-mediator with the rock star. No down side. Now I have a question.

I just read the rules of the Commercial Division because I'm not on a panel, not a New York County lawyer. There is a provision in there that the mediator should examine for conflicts of interest. I always believed that there is no down side as a mediator because there must be acceptance by the parties. And where is my conflict? What do I have to look for and disclose?

MR. WEITZ: I want to thank Gene for being the perfect transition to the next question. But also let me say the issue of co-mediation or mentoring, if you will, is another topic that's always brought up. It's a wonderful way to get new mediator experience and get some feedback. It goes back to some of the other challenges we talked about, resources and so forth. So particularly in the Commercial Division that does not have the administrative support for a separate ADR program, for them to actually handle the pairing of new mediators with experienced mediators has always presented itself with a challenge.

That solution is a wonderful one. Finding the resources to implement that solution is part of the challenge. We have scheduled for our next issue a discussion of the revised standards of conduct. And we have a couple of experts on our panel including Steven and Simeon to talk about it.

MR. YOUNGER: Let me break it into two issues. One is the conflict issue that Gene just raised. I think there is a conflict issue. It's different than if I was a judge or if I was a lawyer. The same identification goes on. If you represented one of these parties or a subsidiary, somebody related to them. But it's much easier to waive a conflict in mediation than anywhere else. And that's because so many conflicts are imputed.¹² "Yes, my partner does work for Coca-Cola. I've never met anybody from Coca-Cola except to drink the soft drink." You put everything out there and the parties can decide, do they still think you are going to be fair and do they still think that you're the right person? On the other hand, if I spend every day of the week representing Johnson & Johnson, there's no way that I

12. See generally, Model Standards of Conduct for Mediators, http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

could be picked as a mediator in a case involving Johnson & Johnson. It's not fair to the parties because my natural affinity is going to be towards Johnson & Johnson, or as the judge I clerked for once said, maybe I'll lean over so far backwards on the other side that I'll actually disfavor Johnson & Johnson.

But I think ultimately it's a party choice issue. They are entitled to all the information. And with the information, if they want to proceed that's fine. But if they want to pick somebody else, that's fine as well. In terms of the standards — and I want to applaud Dan in particular and O.C.A. [Office of Court Administration] in general for adopting these.¹³ The [New York] State Bar in 1999 called for unified standards in New York for mediators. And it took a lot to get these passed. These are minimum standards. It doesn't mean this is what we aspire to, but this is the minimum.

First, each list is at the discretion of the District Administrative Judge. You serve at the pleasure of your own roster and you can be taken off at any time by the Administrative Judge. For mediation, first of all, silently omitted is the word "Lawyers." You have to be a lawyer for neutral evaluation. I don't believe you have to be a lawyer to be a mediator.

MR. WEITZ: Correct.

MR. YOUNGER: It doesn't say that expressly. It's just not in there. You have to have had at least 24 hours of basic training. And this is something that has been somewhat controversial. Some people say even with 48 hours or much longer training, it's not enough. But 24 hours is sort of a norm that that they came up with as a basic training. But you also have to have 16 hours of additional training in the subject area in which you're mediating.

You also need to have recent experience mediating the type of case that's being sent to you. I think it doesn't define what the subject area is, but I assume it would be commercial litigation. You don't have to show that you had a reverse repo case before.

13. New York State Unified Court System, Division of Court Operations, Office of ADR Programs, STANDARDS OF CONDUCT FOR NEW YORK STATE COMMUNITY DISPUTE RESOLUTION CENTER MEDIATORS (October, 2005).

There's also a continuing education requirement. You have to have had at least six hours of CLE every two years. And there's a requirement that you be re-designated every two years. So there's some refreshing of the list. But this is a new standard and obviously you can have higher standards, if you want. You can have specialized standards for Family Courts, say, or specialized standards for the Commercial Division. But now there is a basic statewide minimum standard.

JUDGE AUSTIN [from the audience]: I think there has to be a full conflict search, and it isn't as easily waived as you would suggest. There is always going to be some degree of buyer's regret, and we see it all the time. I don't think that it makes a lot of sense for us to not have a full conflict search and to allow a waiver unless there is a really good allocution and certainty that there has been full disclosure. I don't think it's as easy as you suggest.

MR. YOUNGER: I think you have to have a full conflict search. I'm not saying now, but I do think you have a waiver and I will give you a reason. I mean, for example, I've done a lot of work for a particular insurance carrier that happens to be in this room. There are people who are adverse to that insurance carrier who want me as the mediator because they think that I can pick up the phone to the carrier and get them to settle the case. They think that somehow I will have more clout with that carrier. But you have to bear in mind that in mediation nobody can force anybody in the room to do anything. I don't decide the case. I just try to work through the problem. It is easier to waive a conflict in mediation than in any other situation.

On the other hand, you are absolutely right, I get them all in writing. I don't want someone to come along with buyer's remorse and say, I really didn't waive this. I put it out there in writing. If you don't get it in writing, it's worth the paper you didn't have printed.

MR. BAUM: I fully agree with what Steve just said.

At some point maybe we can get into the definition of mediation, but certainly I think the commonly accepted definition is seeing the mediator as the facilitator, with the parties being the decision-maker. A mediator is not like a judge, a jury or an arbitrator where they are making the decision. The mediator is

the facilitator. There is a little bit more leeway in that type of conflict scenario.

I want to point to two sets of rules. Right now, at least for the Commercial Division, the rule is a mediator should conduct a conflict search regularly. A mediator should decline at any point if acceptance could create a conflict of interest and should disclose the potential conflict of interest. And if discovered, they have to disclose them at the time they arise. But then there is waiver language. Our Commercial Division Rules basically say if you tell everybody about it and they are okay with it and you are okay with it, you can go forward.¹⁴ Let me actually read that to you.

Under the Ethical Considerations for the Commercial Division set of rules, when I say the rules, I mean the ones from the year 2000 that were done in Supreme New York, it says:

If, during a mediation, the mediator discovers a conflict, the mediator should notify the Program Administration and counsel. Unless the mediator, the parties, and the Program Administration all give their informed consent to the mediator's continuation and continuation would not cast serious doubt on the integrity of the process or the Program, the mediator should withdraw.¹⁵

There is a double component. One is that everybody is okay and informed and consents. And the other is that the potential conflict doesn't cast serious doubt on the integrity or process. If you move forward – and by the way, this was done in 2000 by the Commercial Division - going forward five years to the revised rules, conflict of interest standard 3B says if a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with mediation regardless of the expressed desire and agreement of the parties.¹⁶

So, this raises an interesting question. What do we see as the scenario where even if people say, "Okay, thumbs up. We love you. We don't care that you are employed by"— this is an

14. http://www.nycourts.gov/courts/comdiv/ADR_ethicsformediators.shtm. Commercial Division, New York County, Ethical Standards for Mediators, Standard III (Effective March 1, 2000)

15. *Id.*

16. See http://www.nycourts.gov/ip/adr/Publications/Info_for_Programs/Standards_of_Conduct_CDRC_mediators.pdf New York State Unified Court System, Division of Court Operations, Standards of Conduct for New York State Community Dispute Resolution Center Mediators (Effective October 25, 2005).

extreme example –“by this party or that you work for the firm that’s representing one of the parties,” or any number of really extreme examples where conflict is raising not just the yellow light but the red light. There are arguments in mediation, in mediation theory, which would say I want to get the mediator that has a good relationship with the party on the other side of the table, because if I do, what’s the mediator’s job? It’s not to make decisions. I don’t have to worry about that. It’s to help people do a couple of things. Talk together, communicate clearly and maybe we should talk about this separately. Think about the risks involved and the transaction cost and the reasons a settlement might make sense or not make sense. If your own party has a lousy case, the best favor the mediator could do for that party is to tell him, “Hey, you have got a lousy case. If you don’t settle under the terms that we have on the table, you are going to end up in a worse situation. You are going to spend more money on legal fees, and you are probably going to end up losing your case. You are not going to get the damages that you are entitled to,” whatever it is. Even if they are aligned in interest, the mediator, an effective mediator in helping the party with whom they are aligned in interest understand why they would settle, whatever the deal is. It’s a very interesting, challenging problem. Those are the rules.

MR. WEITZ: I think we are finding that this topic of mediator ethics is sticky.

JUDGE STONG: Following up on Simeon’s point, I used to encourage parties to think with a very open mind about the mediator proposed by their adversary, which is very, very difficult to do in a contentious litigation because there is a kind of reactive devaluation. If you want this person, then I shouldn’t want this person. I think it is worth pausing and hovering for just a moment over this notion of conflict. As litigators, you get very accustomed to thinking of conflicts as being adverse to your client, or you suddenly discover that your corporate partner whom you have never met did the deal for three years ago, whatever it is, but which is, in fact, a conflict because it’s imputed knowledge and affirmed. And the conflict that I guess I would be concerned about, even if that one is waived, as someone responsible for the process as the judge in the case and the

judge is responsible in our court for the program, that's not the only waiver involved.

The other issue, of course, is the counter-party. The person across the table who, or the party across the table who, part way through the mediation has it dawn on them that the mediator has a relationship, maybe not personally, maybe through his or her firm with the other side. Are they going to feel comfortable that this is truly a neutral process, a neutral, productive facilitative process? If they are very sophisticated, they may appreciate that the person can pick up the phone and get to the right person, and the client can make something happen. But more likely, when I'm thinking about a court process under the law, can the neutrality of that individual be really above reproach and not only have conflicts been waived by the mediator, but a mediator as to the client, but perhaps even more importantly, by the other side as well. I think it gets into murky water, and it is something that is sticky for a reason. It's something that I would be concerned about. No matter how good the disclosure is, I come back to, in a way, to the Hippocratic oath and first do no harm. The one thing I don't want a mediation to do in a case is leave us worse off than we were before.

MR. WEITZ: Elaine Greenberg with a question.

MS. GREENBERG [from the audience]: The process of disclosure is so critical and the way you think about it can really enhance the integrity of the process. If the mediator discloses the conflicts, the relationships with people on both sides, puts it in writing and gives the parties and their attorneys time to think about it so it's not happening at the mediation table, more often than not, the parties have greater confidence in the process because they think the court system is rigged all along. And here this is something different that people are being refreshingly transparent. And I say that's the worst fear, that to see people are disclosing conflicts. They have time to think about it and make a choice. So I think it can enhance people's confidence in the process.

MR. YOUNGER: And there is no penalty for knocking somebody. I always make that absolutely clear. I have no vested interest in staying with this case. If you want somebody else, that's fine.

MR. WEITZ: Let me take stock for a second. We have been talking about mediator ethics for the last few minutes, and we narrowed it to dealing with conflicts of interest and the principle of disclosure and transparency. And we saw how it's rather nuanced. Because, in fact, you could, on the one hand, want the mediator to be neutral and there not be any perception of impropriety, but a mediator who is well-known to the parties might actually have some value to them as long as everyone consents to it. We got there after talking about the issue of compensation. The reality of the programs here in New York is that the mediators, in general, start off doing a certain amount of pro bono mediation, usually pursuant to an order to participate in mediation. And once that order is complied with, usually defined by a certain number of hours, the parties can voluntarily agree to continue with mediation, and then the mediators are typically paid by the parties. How much the mediator is paid could vary from program to program. And there is an issue of whether the court should cap it or whether the market should rule on that. And we saw that the issue of compensation actually dovetails with the issue of the use of rosters in general.

Most of our commercial litigation programs rely on rosters. Now we know that they are all trained in accordance with minimum standards established by the courts. Some of them have more experience than others. And the panel talked about the rock star phenomenon, and we will credit Judge Stong for his phrase for it. That creates an issue of wanting the parties to be able to pick in general. And if they do pick, they are going to go to the mediator they know. And if the users of the program are not as familiar with the population of mediators up there, they are going to go back to the same three or four people. It seems to be a consensus among the panelists that they did not feel it was the responsibility of the court to force people to use mediators that they would not otherwise pick themselves just for the sake of getting the experience for those new mediators. For mediators to get their names out there, perhaps one tip that we picked up is that while we have reached the tipping point of acceptance of ADR, we thought we would have seen the floodgate open to where an overwhelming majority of cases are getting to mediation. If that were the case, I think Steve's proposal

was that the rock star [mediator] wouldn't be able to handle every case, and people would be, by forces of the market, required to try other mediators. We have identified a lot of the issues. We have raised concerns. We had some solutions that are already out there and some that we might consider. I want to move us on to a couple of other issues.

Now we can get to one of the hallmarks of mediation, and that's the issue of confidentiality. There has always been tension between confidentiality and the role of the judge as a case manager. And I'm wondering if you could address the question of what communications, if any, can be shared between a mediator and a judge who is trying the case?

MR. YOUNGER: Almost none. In my view, when I get picked, and by the way, there is one very famous mediator that totally disagrees with this and feels that because this person talks to the judge all the time that the mediator has much greater power to get a settlement. I think the problem is it does give the mediator a certain amount of the black robes that the judge wears. The problem is it takes away a great incentive for parties to be candid with you. I tell people up front I will not discuss anything that is said in the mediation with anyone, much less the judge. At the end of the case, all I will do is to report back to the judge whether the case settled or not and whether the parties came in good faith.

I have only had one situation in my whole career where I was really confronted with that. It was a situation where a party had summary judgment on liability entered against them and was referred to mediation. And when they got to mediation, they had a zero pay offer. I just viewed it to be total bad faith. They already had liability against them. There was no way the case was worth zero. And what I did was I had them think about it for a while. I said, "You know, I'm thinking of what my obligations are. I don't think you have come here in good faith. And you are putting me in a posture where I have to report this back to the court that you didn't show up in good faith." The next thing, they came up with money. So I never had to report it back. But the real difficult situation you get in as a mediator is, what is good faith?

By the way, this is incorporated in the rules. The rules have a confidentiality provision in them. Simeon will talk in a

minute about how enforceable that is in the absence of a Uniform Mediation Act.

MR. WEITZ: So we saw the interplay actually between confidentiality, which is both a legal and ethical issue for mediators and parties in mediation, and how that dovetails with the issue of potential good faith, and that's a controversial issue in itself. Judge Stong, from a judge's perspective, what are your thoughts on this issue?

JUDGE STONG: I think it's absolutely essential to the mediation process that the parties be comfortable when they speak to the mediator, or when they speak in the mediation, [that] they are speaking within the four walls of that room only, and that nothing they say will go back to the judge. I think it would be devastating to the process if the parties suspected that either because it was explicitly permitted or perhaps because there was some sort of a wink and a nod, I think that's something that really should never be part of the court process; that the information, statements, the attitude, the good faith, the seriousness or lack of seriousness with which the process is being pursued, other than simply an up or downward statement or not, whether there is an opportunity there would be communication back to the Judge, I think would be very difficult for the process.

That being said, I think the balancing act for a judge in this situation goes back to one of the first questions that Dan put to us, which is, there is a spectrum from judicial case administration, case conferencing, judicial semblance conferencing, maybe chambers conferencing with all the parties present, talking about the idea of mediation, talking about what would happen if there was mediation, referral to mediation, discussion of who might be a good mediator, all of that is certainly appropriate for discussion with the judge as part of the case-management process. It seems to me that once it goes over to the other side for referral, one might be curious, but it's not appropriate, and not something I would ever initiate or permit to hear back from the mediator. I'm not even curious about that. That's not part of my job. When I'm the judge and I refer the case— I will tell you in the cases that I've been the mediator for—in our court, there is no conversation whatsoever about anything substantively that happens in the case. Scheduling may come up. But I think

it's pretty much a bright-line distinction that needs to be maintained.

MR. WEITZ: I think an issue that the judges struggle with, is when the mediator comes back with a statement, made only after a lot of thought and with some reluctance that there has not been good faith participation. And my question for Steve is, what do you think a judge should be thinking about to do next, sanctions? That seems odd. We have 30 lashes with the wet noodles? What do you do if the parties or a party did not participate in good faith, and if so what then?

MR. YOUNGER: If I was the judge and one of the parties was reported to have been there in bad faith, definitely I would be considering sanctions because the other party wasted a lawyer's time for preparing and coming to that mediation. So there was a cost incurred by the bad faith.

MR. BAUM: Can I just interject one thing here? Just to spice it up a little bit, I'm not convinced that coming with zero in your pocket to a mediation means you are there in bad faith.

MR. YOUNGER: It's actually in Federal Court. Liability had already been entered against them.

MR. BAUM: If you think you have got a good appeal, I still believe that good faith negotiation means you come there and you act with integrity. And with integrity, you believe that you do not have to pay a dime, you should not have to pay a dime and you are willing to fight it out, then it's an act of your integrity to say "no pay."

On the other hand, part of the good faith is, at least, to not only speak but also to be willing to listen. And even that is problematic. Because if you look at the model rules from 2005, one thing they say is it's all about the freedom of parties in mediation, self determination.¹⁷ Self determination is not just about outcome. In other words, it's not just about what deal to make. It's also about process. And isn't that an act of freedom to say, "I don't even want to listen?"

Now, we mediators, and I wager everybody in this room, would say, "Hey, you know, that's no good. We are altogether. We have a common problem. We owe it to one another to en-

17. See Standard I, Model Rules of Conduct for Mediators, American Arbitration Ass'n, American Bar Ass'n, Ass'n for Conflict Resolution (2005).

gage in dialogue in candor and honesty and with an open mind. Those are all values that we share.” But when you push the freedom envelope, query whether you need to require somebody even to listen and to participate. And related to that, in the 2005 revised code, they say that you can’t take it out— also a part of self determination— you can’t take it out on one party if you don’t share their values.

MR. YOUNGER: If in my case the parties had come in and said, “We think the judge is wrong, we are going to appeal and here is the legal cost. We are putting on the table the legal cost of the appeal;” basically they are saying this is a frivolous case, why should we be here?

MARCUS [from the audience]: I will try to be brief. I disagree with Stephen. I’m uncomfortable with that example. I have mediated many cases. I have never considered a party’s substantive position on settlement to be good faith or bad faith. To me, the parties very often start by saying, “Not a dime to contribute,” and I never let that stand in the way.

MR. YOUNGER: Suppose there had been a jury verdict entered for \$16 million and they came in and offered zero, do you still agree?

MARCUS: I have had occasion, but I did once have a bad faith episode. It had to do with process not with the substantive proposal. And it had to do with this vexing question that maybe you’ll discuss before we conclude of how you make sure that a corporate party is represented at the mediation table by the decision-maker. And that, therefore, the person who goes through the process—because we all understand that mediation is a process. It changes people. If properly and happily conducted, it changes their positions—and so you want that decision-maker there. And I made it very clear in the early conference calls that there had to be the decision-maker there. I was assured the individual who would show up would be [the decision-maker]. And as it turned out, it was not the decision-maker, and they had to call somebody else and so and so on. I was infuriated. The other party brought their decision-maker from Europe. And so, I did feel that was bad faith, but I didn’t discuss that with the judge. I talked to Mavis Buckner about that. I thought that was a matter to discuss with the administrative staff and how to deal with it. And, you know, they gave

me good advice, and I implemented that advice and we solved the problem.

MR. WEITZ: We have the issue of good faith participation and reasonable minds seem to disagree a bit on the interpretation on that, which is why it is controversial and can be an elusive term, but it is also nuanced between substantive participation and procedural participation.

JUDGE STONG: I think the distinction between process and substance is a really helpful one. And I think Marcus puts his finger on something that could probably be dispositive of 99.5 percent of the .5 percent of cases where good faith participation is an issue. Nobody, I think, should be an advocate of the notion that you somehow are less zealous for your client when you come into mediation advocacy, but your zeal is manifested in a different way. You are no longer arguing to win. Sometimes in mediation training sessions we talk about win, win. And sometimes I think we more reflectively talk about settle, settle.

Everyone is better off although nobody wins. And if you set up a mediation under a mediator or a lawyer for one of the parties, creating an expectation of that marvelous feeling of winning, you are probably setting it up in more of a “first in 20 than a first in 10” type of a way. The process versus substance is something that I would look to. I would be very reluctant as a mediator ever to report a party as not in good faith. I think I would be equally reluctant, although I was counseled not to predict the future, to find that a party had not participated in good faith. I had many mediations as a lawyer, occasionally as a judge, where both parties arrived thinking they should be paid. I also think the point about the role of the administrator is really well taken. Under the oath, you are required to serve on court advisory panels because you are serving a court. Those of you in a position to have some influence, I imagine it was a very useful thing for a court to have an ADR administrator who is more than just a clerk who checks off boxes, but who has, as many other courts in New York State do, some awareness of the panel, knowledge of the judges and of the process, and can be that gateway to a better opportunity for the process to be successful. I think the administrators may be able to fill that role.

Who to bring into the room? I used to represent a lot of very large companies, and if you read the guidelines, you got the feeling that what I needed to do was bring in the CEO, the CFO and the chairman of the board of a large public company. And I can tell you that there would have been no better way to guarantee the failure of that mediation in some circumstances. And to make me bring that person who might ultimately have to sign off on the settlement and a large amount of money being paid to bring them and frankly test their patience through a process that they would expect someone they trusted to brief them on, to make a recommendation or a phone call that they can sign off on, than to have them there. And I would urge anyone who is in the mediator role to respect the lawyer's view, not to diminish the process by bringing an unimportant person. But hopefully, the lawyer knows their client well enough to bring the right person and be sure there is good communication before the mediation. So that if one side is bringing, in effect, a three star general, then the other is to bring in a private — I'm showing my own lack of knowledge in military rank — so that there is at least some parity or knowledge of disparity for the mediation, otherwise you may have a tough first five minutes.

JUDGE SCHEINKMAN: My comment is really a question: why are we mediating at all? In other words, I would, rather than key up the situation where it's doomed to fail, if the person takes the position that we're not going to pay, we want to appeal, that's fine; then what I would be more offended about is that if there they were forced to go to mediation and they took that position, then somebody said, "Look, sorry to be here, Steve, but we told the judge we had no pay, we still have no pay." They're actually being honest and within the construct of their environment in good faith. That's why I would not send that sort of case or circumstance where the parties' positions are so disparate. I would then say that's your right, that's your privilege.

MR. YOUNGER: I think 95 percent of the judges agree with it. And I don't know how that case got to me. I don't talk to the judges about it, but I think you're absolutely right.

MR. BAUM: The guidelines that were laid out in 2005, under standard six, "Quality of the Process," require that the mediator shall promote a mediation in a manner that promotes

diligence, timeliness, safety, presence of appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants; then it goes on to list a whole bunch of scenarios of the kinds of things a mediator would be looking to encourage to develop, create opportunities for in order to make a quality process.¹⁸ But I'd underscore in a manner that promotes diligence and you can also add in the one about appropriate participants. Now, the standard one, they have self-determination and then they have a fairly broad view of that, meaning freedom, not only in terms of substantive decisions but also in terms of procedural decisions.

So, interesting problem, where is the dividing line? One guide is given under standard 1(a)(1), where it says although self-determination is a fundamental principle, a mediator may need to balance a party's self-determination with the duty to conduct a quality process.¹⁹

So there is the balance. It's self-determination and freedom and all those things, but quality process which means getting the right people to the table, having people work with diligence, having an honest, candid interchange in a fostering understanding, all of that.

If it turns out that the parties are not engaging in behavior that's consistent with the quality of the process, what's interesting for us, with the Commercial Division, is we have — this is all occurring within an umbrella that's got an element of coercion. There's a judicial mandate. And people have to participate within certain rules pursuant to an order. Now, Judge Scheinkman approaches this by not making that mandate. But assuming there is a mandate, it adds a third element to this balance between the mediator's freedom to say, "Hey, I'm not going to go forward with this anymore." That's the mediator's freedom to say, "This is no longer quality process, I'm out of here."

MR. YOUNGER: It happens all the time. And I think the key thing is in the conference call to ask both sides who do you

18. See Standard VI, Model Rules of Conduct for Mediators, American Arbitration Ass'n, American Bar Ass'n, Ass'n for Conflict Resolution (2005).

19. *Id.* Standard I

plan to bring and ask the other side is that okay with you. And in most cases it's been enough discovery where they kind of know who the players are and they can say, "Well, how come you're not bringing in person X or person Y?" But if it happens that the actual session itself is wasted away, in truth in the corporate world there's nobody who really has authority to sell everything, because you may have to go all the way to the board of directors. But if you're negotiating with somebody who isn't in the room, it's a recipe for disaster.

MR. WEITZ: So one of the lessons that I hear is that, as is often the case with ethical dilemmas, there are practical tips and practical solutions. Everyone ready for a quick sharp right turn. Up until now we've been talking about the use of mediation for a number of purposes but largely for the attempt at a global settlement of the case.

One of the topics we wanted to raise with you that dovetails with this morning's session is the use of mediation for parts of cases; for example, for resolution of a messy discovery dispute. I'll throw it out to anyone on the panel or even anyone out there.

So, what do we think of the use of mediation for resolving discovery disputes, either as part of a case or perhaps as part of a more global settlement. Anyone?

JUDGE STONG: As someone who is a great fan of the process, what I'm about to say may surprise you. I don't think there are many discovery disputes that can't be resolved in an effective and informed conference with the court and you get a resolution right then. I can probably count on the fingers of one hand the number of discovery motions I've seen, maybe two hands, but not a lot more than that, in five plus years. But a large number of discovery disputes come up in conferences or even on telephonic conferences.

We conference them, we resolve them. If I thought mediation would be appropriate, I would have no hesitation to start a referral to mediation with an issue like that. But for me that might actually be an example of something where if the judge has a proactive approach for case management, request a conference with the judge first.

Make a distinction between the discovery issues in general and the big issues in the case, you know, like liability and dam-

ages, and then you can approach them in a step-wise way. You may not agree about what documents to produce, but you all agree you're going to produce these core documents. Start with that, have another call in a week. It would be a very routine way for me to handle an issue like that.

Would I refer to mediation? Of course. But would it be high on my list to use up the resources of our panel and the scarcer resources of the parties' willingness to try mediation in a case where they may feel they have come to court to get a decision? I'm not sure I'd go there.

MR. BAUM: We all know there are discovery masters out there. Special masters for discovery are often very useful, for having the added oomph for the right to make a decision really is helpful. The place where mediation can really help with discovery disputes is when it gets sent to mediation, and then, in the context of the mediation, there are all kinds of ways the mediators can truncate disclosure.

What's really essential—my standard line is to say, "Okay, what, if anything, do you need to do before we get together, so when we do get together we have a fully productive session?" That opens the discussion as to what information do you really need, that is going to be an impediment if you don't have it to settle or resolve?

JUDGE STONG: I entirely agree with Simeon. That's a completely different question.

MR. BAUM: It helps move information very well. This morning during the e-discovery session, I understand somebody, while I was out — actually had to leave because I had a conference call for a mediation where I actually was working out a discovery problem, just coincidentally — someone else here was saying, "Hey, why don't we do mediation for e-discovery?" That's a whole different type of scenario. I'd be interested in what Judge Stong would think about that where you've got maybe a million dollars worth of discovery to handle.

JUDGE STONG: I would have no hesitation to do it if it made sense. I would first conference the issue with the lawyers. If they were retaining forensics experts I would encourage them to get those retentions done so they know what advice they are getting. I've had very complicated, very difficult, po-

tentially quite divisive issues involving both civil and criminal matters where electronic discovery or electronic information was at the basis of the situation.

And the lawyers have done a really good job, frankly, of using this conference in the process to identify the issues and resolve them piece by piece, step by step and move ahead. And if it seems like there was an issue where a mediator could help achieve a resolution, I would have no hesitation making a referral. I come back to the idea that I'm only going to be able to send those parties to mediation so many times and if it was only the discovery issue as opposed to a more global approach to the parties' dispute, I don't know that I would do it.

MR. WEITZ: I want to take us back onto the road we were on before, with the set-up of communications between the mediators and the judge, which of course dovetailed into ethical questions. There's this thing out there called the Uniform Mediation Act.²⁰ I was wondering if Simeon can tell us what that is. Do we need it, and if so, why; what are the pros and cons?

MR. BAUM: This is a real gift from Dan, I want to thank you. One of the things the State Bar is doing is looking to push the Uniform Mediation Act, which has been sitting up with the legislature for the last couple of years. This Act basically is the statute that creates a privilege. It's not a confidentiality statute. It creates a privilege for mediation communications. It defines mediation as an activity in which the mediator facilitates settlement of a dispute. It's a really useful, and the State Bar thinks, important statute. Right now in New York we don't have clear law except for some limited context like the CDRC's, the Community Dispute Referral Centers. We do not have more broadly a law on the books and records that will clearly protect against the use of mediation communications in court. One hot issue involves the domestic relations context, where there is spousal abuse or child abuse and how to deal with that problem.

The balancing test is: there's no privilege if a court finds after a hearing held in camera that the party seeking discovery

20. UNIFORM MEDIATION ACT, <http://www.mediate.com/articles/umafinalstyled.cfm>.

or the proponent of evidence has shown that the evidence is not otherwise available; that there's a need for the evidence that substantially outweighs the interest in protecting confidentiality; and that the mediation communication is sought or offered in a court proceeding involving a felony, or except as otherwise provided in this section.²¹

So this issue, it's just in the criminal context, but it says that criminal court can say, "Well, we'll waive a need for this mediation communication against the importance of having this information come out in a felony trial." Some would say that there is no criminal court who's going to say, "I care more about confidentiality in mediation than I do about getting information, important information, for this trial." Basically it's going to open the door a lot.

Others have argued, "Oh, we should make it broader, in broader context." At this point I think there seems to be a fairly substantial movement to say, "Listen, whatever it is, this thing was vetted by a host of people through the process for a number of years." It's been adopted, I think, by 11 states. Now, for the Commercial Division, it provides that on mediation reports, a mediator may not make a report, assessment, evaluation, recommendation, finding or other communication regarding mediation to the court that might make a ruling on that dispute.²²

So it would also provide basically against talking too much with the referring court about the things that happen in mediation or opining about it, which could also be a very useful thing to have clear. We also have a similar rule on that, of course, communications in our Commercial Division rules.

MR. YOUNGER: There's a recent case from the Fourth Department last year which highlights why we need the UMA in New York. And for those of you who are not aware, it's called *Hauzinger*.²³ It was a divorce case where after a mediator successfully got a separation agreement in the course of the divorce agreement the mediator was subpoenaed.

The Appellate Division said, and I quote, "Although appellant urges this Court to apply the confidentiality provisions of

21. *See id.* §5.

22. *See id.* §7.

23. *Hauzinger v. Hauzinger*, 43 A.D.3d 1289 (N.Y. App. Div., Fourth Dept., 2007).

the Uniform Mediation Act as a matter of public policy, New York has not adopted that Act and we decline to do so.”²⁴ If you’re in the Fourth Department and you read that, you’re like, “There’s no confidentiality in this Department unless you can point to some agreement or something else that you can base your confidentiality on.”

Fortunately, the case was then heard by the [New York] Court of Appeals. The Court of Appeals ruled just on waiver. They ruled that the parties had waived any confidentiality. Part of it was that one side waived it by subpoenaing information. They cut back that ruling somewhat.²⁵ But any of you who are involved in ADR ought to be writing your legislators in Albany to adopt the UMA as soon as possible.

MR. BAUM: This *Hauzinger* case created quite a stir in mediation communities. One unique feature of the UMA is that parties own the privilege. They’re able to say you may not communicate, you may not present a mediation communication in court.²⁶

The mediator also has a modified ownership of the privilege. The mediator is free even if the parties say, “It’s okay to talk about this, mediator,” the mediator is free to say, “I’m sorry, I’m not going to, because I, as mediator, am not comfortable telling people at the beginning this is confidential and then afterwards going and talking about what was said in the mediation and, moreover, the mediator has the ownership of the mediator’s own communications.” So, the mediator can bar other parties, even if everybody else has waived, from introducing the mediator’s communications in court under the UMA.

AUDIENCE MEMBER: I’ve been through this process both as mediator and attorney representing the parties in mediations, and I see mediators who are part of the court’s administrative program trying to circumvent this problem totally by requiring in the mediation that the parties sign some type the confidentiality agreement. Doesn’t that work to solve the problem?

24. *Id.* at 1289.

25. *Hauzinger v. Hauzinger*, 10 N.Y.3d 923 (2008).

26. See UNIFORM MEDIATION ACT § 5, <http://www.mediate.com/articles/umafinalstyled.cfm>.

MR. YOUNGER: It doesn't affect the third party in the mediation room, or say there's a related dispute or someone who's not a party to that agreement.

MR. WEITZ: So, let me use the moderator's prerogative by first thanking the panel for taking time to speak to us today. If you enjoyed being here and were about to come up, let me say this in these following words: 10 years ago all of us up here would probably have said that we were all salespeople, that if we were to do a gathering of the bench and bar, it would be to simply persuade them to try mediation.

But the tipping point is reflected in part by the conversations that we're having and the type of panel that we had today where, in effect, I think we're all becoming neighbors and it's my hope that we will go on from here, and we will all be connectors to create what we might do to connect the communication of the commercial cases.

So thank you very much, everyone, and we hope to see you again.

MR. FEINBERG: First, on electronic discovery; I think what we learned today is that we have to look at the problem creatively, practically and differently, and involve everyone in the process. We can't pigeonhole young lawyers as mere document reviewers, senior lawyers as merely client spokespeople and knowledgeable clients' reps as merely someone whose name you put on an affidavit when you make your court file. For that matter you can't even view judges as the only problem-solver anymore. We all need to help judges solve these e-discovery problems by getting involvement from everybody who can significantly contribute and discuss these issues as early as possible.

To try to summarize everything that's just been considered in this ADR panel would be like trying to summarize all seven Harry Potter books in a two-line Haiku. I'm not even going to try.

What I will say is this: There is more than one way to do excellent ADR work and to do it well. Commercial cases are, simply put, not one size fits all. And the timing of ADR, the portion of the case sent to it, who conducts it and whether or not they are paid and who is involved in the parties are many,

but perhaps not all, of the factors that can set apart one good mediation from a not-so-good one.

And lastly, today's discussion is far from over. This easily could have been a three-day conference or a pair of full semester law school courses; perhaps they should be. I guess I left out one more "thank you," which is to all of you in the audience. You've been great. Thanks, and have a great rest of your day.

**STATE E-DISCOVERY RULE-MAKING
AFTER THE 2006 FEDERAL
AMENDMENTS: AN UPDATE
AND EVALUATION**

*Thomas Y. Allman*¹

I. Introduction

It has been eight years since I wrote to (then) Magistrate Judge John Carroll, Chair of the Civil Rules Discovery Subcommittee,² to suggest adoption of a federal “safe harbor” rule providing that a party should not, without a prior court order, be required to suspend the operation of electronic systems which were operated in good faith.³

As far as I can tell, this was the first explicit suggestion for amendments to the Federal Rules governing e-discovery, which I amplified in subsequent articles. My reasoning was that the Federal Rules should take into account how the significant differences between hard copy and electronic information were

1. ©2008 Thomas Y. Allman. Tom Allman co-chairs the Steering Committee of Working Group One of the Sedona Conference®, authors of the Sedona Principles (2nd Ed. 2007). He formerly served as Senior Vice President and General Counsel of BASF Corporation and was senior counsel to Mayer Brown LLP. This paper was presented in its original form on December 1, 2008 to the Colloquium on the Future of Commercial Litigation in New York and has been updated to reflect additional updates received through the end of February, 2009.

2. Judge Carroll now serves as Dean of the Cumberland School of Law of Samford University, located in Birmingham, Alabama and has continued to be active in the field, having most recently served as the Reporter for the National Conference of Commissioners on Uniform State Laws (NCCUSL) Uniform Rules.

3. A preservation order would issue only for “good cause.” See Letter, Allman to Carroll, December 12, 2000, available at <http://www.kenwithers.com/articles/>.

impacting “both the litigation process and [the] business world.”⁴

Since then, of course, the Civil Rules Advisory Committee mounted an intense rule drafting effort resulting in the 2006 E-Discovery Amendments to the Federal Rules of Civil Procedure (the “2006 Amendments”).⁵ This effort has, in turn, spurred enactments of similar rules and statutes throughout the United States, which is the subject of this article.

It is the author’s opinion that rule-making efforts based on the Federal Rules is quite appropriate.⁶ Uniformity within and among the states creates a larger body of interpretive opinions of the innovations involved and reduces somewhat the risk of “balkanization,” which can unnecessarily raise costs and unfairly penalize the small or under-funded litigant.⁷

II. The Impact of E-Discovery

Pre-trial discovery is essential to the litigation process. As the Supreme Court noted in 1947, “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.”⁸

Naturally, “discovery, like all matters of procedure, has ultimate and necessary boundaries.”⁹ Those “ultimate and necessary” boundaries have been severely tested by the emerging

4. Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 DEF. COUNSEL J. 206 (2001).

5. The 2006 Amendments (with Committee Notes) came into effect December 1, 2006. They impact Rules 16, 26, 33, 34, 37, 45 and Form 35. See Thomas Y. Allman, *The Impact of the Proposed Federal E-Discovery Rules*, 12 RICH. J. L. & TECH. 13 (2006).

6. Thomas Y. Allman, *Addressing State E-Discovery Issues Through Rulemaking: The Case for Adopting the 2006 Federal Amendments*, 74 DEF. COUNSEL J. 233, 238-239 (July, 2007).

7. The Standing Committee was concerned that “[w]ithout national rules adequate to address the issues raised by electronic discovery, a patchwork of rules and requirements is likely to develop,” resulting in “uncertainty, expense, delays, and burdens” being imposed on both small organizations and individual litigants as well as large public and private organizations. See Report of May 27, 2005, as revised July 25, 2005 (the “Advisory Committee Report”), reproduced as Appendix C to the Report of Judicial Conference of the United States on Rules of Practice And Procedure (the “Standing Committee Report”), at 23, available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf>.

8. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

9. *Id.* at 507.

focus on information found in electronic form. Indeed, an article in *The Economist* recently reported that one general counsel estimates his legal fees on discovery have increased by 25% because of e-discovery concerns.¹⁰

Prompted by passage of the 2006 Amendments and the widespread adoption by district courts of local guidelines and standing orders,¹¹ the efficacy of state e-discovery rules has been a topic for state rule-makers.

The argument has been made that having the same procedural rules in state and federal courts within a state (and among all states) promotes predictability and can lead to reduced litigation costs for practitioners and their clients.¹² Thus, the Study Committee appointed by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) has argued that:

The adoption . . . of uniform rules would [provide] the benefit of decisional law of other jurisdictions whose courts have considered a particular issue.¹³

Although there have been fewer reported decisions involving e-discovery in state courts than in federal courts, there is no reason to believe that e-discovery issues are likely to be any less vexing to litigants in that context than in Federal courts.

10. A recent survey of American College of Trial Lawyer fellows concluded that “electronic discovery, in particular, is too costly” and “[the] issues are not well understood by judges.” See Interim Report & 2008 Litigation Survey of the Fellows of the American College of Trial Lawyers (Sept. 2008) at <http://www.du.edu/legalinstitute/pubs/Interim%20Report%20Final%20for%20web1.pdf>.

11. See, e.g., <http://www.ediscoverylaw.com/2008/10/articles/resources/updated-list-local-rules-forms-and-guidelines-of-united-states-district-courts-addressing-ediscovery-issues/> (Federal District Court Rules).

12. One of the major reasons for adoption of the Federal Amendments was to bring about uniformity of practice within the federal system to forestall increasing numbers of diverse local rules. See Report of the Committee on Rules of Practice and Procedure, September 2005 (hereinafter “Standing Committee Report (2005)”), <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf> (providing introductory comments and background to the new rules). Compare Local Rules, E.D.&W.D. Ark. Loc. R. 26.1; D. Del. R. 16(4)(b); D.N.J. Loc. Civ. R. 26.1; D. Wyo. Loc. R. 26.1& Appendix D and D. Kan. (“Electronic Discovery Guidelines”).

13. Dated June 17, 2005 and prepared by Rex Blackburn (Chairman) (citing the *Sedona Principles* in addition to the proposed Federal Rule amendments) (Copy on file with Author). The Author served as an Observer to the drafting Committee led by Dean Carroll.

III. State Action to Date

State rulemaking invokes a wide variety of approaches ranging from Supreme Court action based on committee input to direct action by legislative bodies. It is no longer the case, however, that changes in the federal discovery rules are automatically adopted by state rulemaking authorities.¹⁴ As in the early years of the federal rulemaking process, there are reservations in some quarters about the necessity or wisdom of addressing state e-discovery issues via rule changes.

Including Texas and Mississippi, which acted before the Federal Amendments, as of January, 2009, a total of twenty-two states have incorporated e-discovery provisions in some portion of their civil procedure rules or codes.¹⁵

Generally speaking, the states can be classified into three groups:

- (1) Those which have adopted, with some minor variations, most of the 2006 Amendments (Arizona, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Maryland, Montana, New Jersey, North Dakota, Ohio and Utah).¹⁶
- (2) Those which utilized some of the concepts from the 2006 Amendments to make limited changes¹⁷ (Arkansas, Louisiana, Nebraska,¹⁸ New York,¹⁹ New Hampshire and North Carolina).
- (3) Those which adopted a different approach based on the earlier Texas e-discovery enactment (Idaho, Mississippi and Texas).²⁰

14. See Oakley, *A Fresh Look at the Federal Rules in State Courts Symposium: Perspectives on Dispute Resolution in the Twenty-First Century*, 3 Nev. L. J. 354, 355 (Winter 2002/2003) (“[T]he FRCP have lost credibility as avatars of procedural reform.”).

15. The twenty-two states which have enacted some form of changes to their civil provisions are, in alphabetical order, Arkansas, Arizona, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Texas, and Utah. The individual actions by these states — and others who have not yet acted (including the District of Columbia) — are discussed in the Appendix to this paper.

16. Generally speaking, none of the states adopted provisions for early disclosures or “meet and confers.” Maryland, Ohio and Utah added significant embellishments to their provisions.

17. Louisiana, Nebraska and New Hampshire repackaged some of the federal amendment concepts and Arkansas only dealt with inadvertent production (and waiver).

18. Nebraska adopted only the provisions relating to scope of discovery and form of production.

19. New York Commercial Division (statewide).

20. Texas permits objection to production of electronic data that is “not reasonably available” and mandates payment of any extraordinary steps required, should its production be ordered. Idaho and Mississippi have adopted similar provisions with the payment discretionary with the court.

The remaining states and the District of Columbia continue to hesitate, in some cases with obvious skepticism about the need to act.²¹ Three of these states, Alaska, Tennessee and Virginia, are awaiting final action on proposals before their respective Supreme Courts.²² Many states are awaiting the accumulation of practical experience under the Federal Amendments before acting, thus ensuring that the process will take some time to reach fruition. Some states may ultimately conclude that no urgent need exists to make any changes at all.

The Appendix summarizes the current information available on a state-by-state basis.

IV. Typical Provisions of State Rules

In undertaking their efforts, state rule-makers had access to an extensive “toolkit” of resources in addition to the Federal Amendments. The two most prominent examples are the *Uniform Rules Relating to the Discovery of Electronically Stored Information* (“Uniform Rules”)²³ and the “Guidelines for State Trial Courts on Discovery of Electronically Stored Information” (“Guidelines for State Trial Courts”).²⁴ The *Uniform Rules* and the *Guidelines for State Trial Courts* were developed separately during 2005-2006 and are intended to play significantly different roles.²⁵

The former, a project of the Uniform Law Commissioners, was developed as a “stand-alone” set of model rules, while the

21. At the Connecticut Supreme Court Rules Committee meeting in September, 2008, “[s]everal members of the [Rules] Committee questioned why our current discovery rules were not sufficient.” http://www.jud.ct.gov/Committees/rules/rules_minutes_DRAFT_091508.pdf.

22. California completed legislative action on e-discovery amendments in 2008 only to have them vetoed. See *California e-Discovery Proposal Vetoed*, <http://www.bingham.com/Media.aspx?MediaID=7631>.

23. The Uniform Rules were adopted in August 2007 at the Annual Meeting of NCCUSL and can be found at http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.htm.

24. The Guidelines were developed by the Conference of Chief Justices (“CCF”) and are available through the National Center for State Courts, at <http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf>.

25. Compare Koppel, *Toward a new Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure through a Collaborative Rulemaking Process*, 58 VAN. L. REV. 1167, 1247-1252 (2005) (advocating collaboration among the NCCUSL and CCF to prepare a “national code of state civil procedure” based on empirical data and controlled experimentation).

latter, a product of the Conference of [State] Chief Justices, is intended to serve as “interim” guidance for trial courts in the absence of specific e-discovery rules. The 2008 California Judicial Conference report recommending e-discovery enactments, for example, relied upon the Uniform Rules in several key respects.²⁶

Another model for state rulemaking is provided by the 1999 e-discovery rules adopted by the Texas Supreme Court.²⁷

Underlying and reinforcing these efforts are the provisions of *The Sedona Principles Best Practices Recommendations & Principles for Addressing Electronic Document Production* (Second Edition (2007) (“*Sedona Principles*”),²⁸ and the *ABA Civil Discovery Standards*²⁹ which, together with the growing body of federal opinions, have been described as providing de facto “national [e-discovery] standards.”³⁰

There is a clear consensus among all these models that effective e-discovery can best be facilitated by candid and early discussion of contentious issues such as preservation obligations.³¹ Parties can thereby “nip in the bud” some of the most obvious and avoidable sanction producing disputes.

Similarly, there is agreement on need for neutral positions on form of production and for limitations on production from inaccessible sources of electronically stored information.³² However, controversy exists over the issue of mandatory cost-

26. April 9, 2008 Report, p. 12, available at <http://www.courtinfo.ca.gov/jc/documents/reports/042508item4.pdf>.

27. See Texas Rules of Civil Procedure, Rule 196.4 (eff. Jan. 1, 1999).

28. The *Sedona Principles* consist of fourteen “best practice” recommendations covering the full range of e-discovery issues, together with commentary. See <http://www.thesedonaconference.org>. A Second Edition issued in 2007 made changes to *Sedona Principles* 8, 12, 13 and 14 and updated the terminology to be consistent with the Federal Amendments. See Thomas Y. Allman, *The Sedona Principles (Second Edition): Accommodating the 2006 E-Discovery Amendments*, 2008 Fed. Cts. L. Rev. 2 (2008).

29. See American Bar Association, Electronic Discovery Task Force, Report 103B, Amendments to the Civil Discovery Standards (2004).

30. See *Zubulake v. UBS Warburg LLC*, 2004 WL 1620866 at *16 (“*Zubulake V*) (S.D.N.Y. 2004).

31. See FED. R. CIV. P. 16(b) and FED. R. CIV. P. 26(f).

32. FED. R. CIV. P. 26(b)(5)(B) (inadvertent production) and FED. R. CIV. P. 34 (form or forms of production).

shifting³³ as well as the need for “safe harbor”³⁴ limitations on rule-based sanctions for preservation losses.³⁵

The following summarizes the trends among the enactments on these and other key e-discovery topics.

Scope. Almost all states³⁶ have adopted the federal approach of describing “electronically stored information” as a category of discoverable material distinct from “documents” or “tangible things.” The ability to seek to “test or sample” to secure such information, a new feature of the 2006 Amendments, is also widely recognized.³⁷

Early Attorney Conferences (“Meet and Confers”). Only New Hampshire and Utah have adopted an explicit requirement that counsel “meet and confer” outside the presence of the court to discuss electronically stored information issues. However, the North Carolina Business Court and New York Commercial Division of the Supreme Court require early conferences to discuss electronically stored information.³⁸

Discovery Conferences/Discovery Orders. Some states achieve the same end by authorizing courts to hold “discovery” conferences when electronically stored information is anticipated to

33. See Texas Civ. Proc. Rule 196.4 (mandating shifting of extraordinary costs associated with production).

34. FED. R. CIV. P. 37(e). See Thomas Y. Allman, “The Case for a Preservation Safe Harbor in Requests for E-Discovery,” 70 Def. Couns. J. 417(2003)(recommending consideration of a safe harbor); See also Thomas Y. Allman, “Defining Culpability: The Search for a Limited Safe Harbor in Electronic Discovery,” 2006 Fed. Cts. L. Rev. 7 (2006) and Thomas Y. Allman, “Rule 37(f) Meets Its Critics: The Justification for a Limited Safe Harbor for ESI,” 5 NW. J. Tech. & Intell. Prop. 1 (2006)(explaining the scope and rebutting criticism of Rule 37(f) [now Rule 37(e)] as enacted).

35. The “safe harbor” provision was opposed by Dean Carroll when initially advocated by the author. See Carroll, “E-Discovery: A Case Study in Rulemaking by State and Federal Courts,” (2005)(advocating rejection of safe harbor and accessibility rules in state rulemaking), available at www.roscoepound.org/new/updates/2005Forum.htm.

36. New Jersey defines electronically stored information as a type of “document,” Idaho speak of “data” and Mississippi and Texas refer to “data or “electronic or magnetic data.”

37. Louisiana allows access for good cause where a party believes production is not in compliance and includes a detailed comment on the limits of “direct access” citing *In re Ford Motor*, 345 F.3d 1315 (11th Cir. 2003).

38. The New York City Bar Committee on Courts of Superior Jurisdiction recently proposed an analogous provision in Uniform Rule 202.12 for courts of general jurisdiction. See <http://www.nycbar.org/pdf/report/bar%20comm%20e-discovery%20ltr.pdf>.

be sought,³⁹ while others with “pre-trial” or “case management” conferences⁴⁰ have modified their rules to include discussion of electronically stored information issues, including form of production, inadvertent production of privileged information.⁴¹ However described, these early conferences reflect the widely held view that reduction of unnecessary sanction practice can best be achieved by candid and early discussion of contentious issues.

Early Disclosures Without Discovery. Only Arizona⁴² and Utah mandate early disclosures in the absence of discovery requests regarding electronically stored information.

Preservation Standards. Standards relating to the trigger or implementation of preservation obligations have not typically been the subject of rulemaking, other than the implicit requirements of “good faith” implicit in the “safe harbor” rule.⁴³ However, Arizona, New Hampshire and Utah explicitly require early discussion of preservation issues⁴⁴ and Michigan notes that “[a] party has the same obligation to preserve electronically stored information as it does for all other types of information.”⁴⁵

Inadvertent Production. All states except Montana and Nebraska provide a mechanism for claiming and retrieving inadvertently produced privileged information in documents or

39. Minnesota and Iowa envision a “discovery” conference about electronically stored information and mention form of production and privilege agreements. Montana does the same, although the listed topics do not include claims of privilege.

40. A “case management” conference may be held in New Jersey to “address issues relating to discovery of electronically stored information.”

41. For example, Indiana authorizes pre-trial conferences and requires counsel to “familiarize” themselves with all aspects of a case in advance of a conference of attorneys held prior to a pre-trial conference.

42. See Schaffer and Austin, *New Arizona E-Discovery Rules*, 44-FED Ariz. Att’y 24 (February 2008)(Arizona disclosure obligations are “far broader” than those of the federal rule).

43. See Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 Rich. J.L. & Tech. 9 (2007).

44. New Hampshire requires parties to meet to discuss “the need for and the extent of any holds” to prevent the destruction of electronic information. See <http://www.courts.state.nh.us/rules/sror/sror-h3-62.htm>. Utah added “preservation” as one of the topics which must be included in a discovery plan presented to the court.

45. The Michigan “safe harbor” analogue to Fed.R.Civ.P.37(e) immediately follows this provision.

electronically stored information.⁴⁶ Arkansas,⁴⁷ Louisiana, and Maryland also included provisions governing the substantive issue of waiver under those circumstances.⁴⁸ Recent Congressional action enacting Federal Rules of Evidence 502 to address the substantive waiver issue suggests a broader opportunity for state action in this area.⁴⁹

Form of Production. All but New Hampshire⁵⁰ have adopted the default standard in the 2006 Amendments that production of electronically stored information should be made in either the form in which the information is maintained or in other usable forms.

Limitations on Burdensome Production. All states except Nebraska, Mississippi, Texas and Idaho have adopted or described⁵¹ a “two-tiered” approach barring the necessity of production from sources which are inaccessible because of “undue burden or cost” absent a court order issued for good cause.⁵² Mississippi, Texas and Idaho address the same issue with a different format. They frame the distinction in regard to production in terms of whether the information is “reasonably available to the responding party in its ordinary course of business.”

Cost-Shifting. Cost-shifting (or “allocation”) for extraordinary or unduly burdensome costs associated with production of electronically stored information is acknowledged as a matter of discretion in all states. Only Texas has adopted mandatory cost-shifting.

Safe Harbor. Limits on rule-based sanctions for losses of electronically stored information due to “routine good faith”

46. The Ohio Staff Notes refer to the provision as a “clawback” provision.

47. Arkansas included a provision acknowledging the validity of selective waiver to governmental agency, a provision dropped from the comparable Federal Evidence Rule 502.

48. For a current summary, see Note, *Look Before You Leap: A Guide to the Law of Inadvertent Disclosure of Privileged Information in the Era of E-Discovery*, 93 Iowa L. Rev. 627 (February 2008).

49. Evidence Rule 502 regarding waiver was passed by Congress and signed by the President in late 2008. <http://www.uscourts.gov/newsroom/2008/S2450EnrolledBill.pdf>. It does not include a provision authorizing selective waiver.

50. New Hampshire alludes to discussion of the topic without specifying a standard for assessing waiver.

51. Louisiana includes the limitation in a Comment.

52. Maryland substituted direct linkage to the proportionality standard for the “good cause” standard.

operation of an information system have been adopted by Arizona, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Montana, New Jersey, North Dakota, Ohio⁵³ and Utah.⁵⁴ The Maine Advisory Committee Note, uniquely among the federal and state descriptions, defines “routine” as meaning that “the operation [must] be in the ordinary course of business.”

IV. Are E-Discovery Rules Necessary?

Recently, the Special Reporter to the Federal Rules Advisory Committee, Richard Marcus, addressed the question of whether the 2006 Amendments were worth the effort.⁵⁵ While conceding that there “is much force to the argument” that unique e-discovery rules were not needed, he concluded that “it [is] implausible that doing e-discovery without rules is really superior to having rules to provide guidance.”⁵⁶ Based on my experience and the information available to me, I am in agreement.

Nonetheless, there is room for further improvement. Some observers argue that the failure of the 2006 Amendments to provide “certainty” as to preservation obligations inhibits the usefulness of the 2006 Amendments in reducing costs of over-preservation.⁵⁷ Others are already suggesting the need to “re-

53. Ohio adds five “factors” for a court to consider in deciding whether to impose sanctions [despite] the rule, including “whether and when any obligation to preserve the information was triggered.”

54. Utah adopted Rule 37(e) but adds that “nothing in this rule limits the inherent power of the court” to act if a party “destroys, conceals, alters, tampers with or fails to preserve: information “in violation of a duty.” The proposed California version of the Rule (not adopted given the veto by the Governor) also included a provision that “[t]his subdivision shall not be construed to alter any obligation to preserve discoverable information.” See Section 2031.060(i)(2), Assembly Bill No. 926 (vetoed, September 2008).

55. Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. BALT. L. REV. 321, 340 (Spring 2008).

56. Professor Marcus also addresses the issue of whether the rules are “so bad that they are worse than no rules at all.” Ultimately, he rejects this possibility because of the “wide spread emulation of provisions of the Federal Rules Amendments in state court rules dealing with e-discovery.”

57. See Hon. Paul W. Grimm, et al, *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 402 at n. 91 (Spring, 2008) (“In view of the serious sanctions that may be imposed for breaching the duty to preserve, potential litigants need greater certainty.”). The chief problem is the inability to predict when an otherwise inaccessible source must be preserved without expending the time and costs to examine it in detail. See Nelson and Rosenberg, *A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to*

visit” the limitations on production from inaccessible sources of electronic information.⁵⁸ I

The type of aggressive early preparation advocated by the 2006 Amendments has had a direct and measurable impact on reducing discovery disputes.⁵⁹ Creative efforts such as the Sedona Conference® Cooperation Proclamation hold out the promise of even more progress in the future.⁶⁰ The author has already documented a success in one contentious area building on this approach.⁶¹

On balance, therefore, the 2006 Amendments are an excellent starting point for the type of experimentation at which states have long been adept.⁶²

Electronic Discovery, 12 RICH. J.L. & TECH. 14 at 4 (2006) (contending that Rule 37(f) fails to “thoroughly address” the problem). Compare Carroll, “E-Discovery: A Case Study in Rulemaking by State and Federal Courts” (2005) (advocating rejection of safe harbor and accessibility rules in state rulemaking), available at www.roscoe-pound.org/new/updates/2005Forum.htm.

58. See Rachel Hytken, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875 (Fall 2008).

59. Rachel Hytken, *Electronic Discovery: To What Extent Do The 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 886 (Fall 2008) (since passage, percentage of orders granting sanctions has dropped from 65% to 50% of those sought).

60. The Sedona Conference® Cooperation Proclamation (2008) (“The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system.”) downloadable at <http://www.the-sedonaconference.org>.

61. Thomas Y. Allman, *The “Two-Tiered” Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?*, 14 RICH. J. L. & TECH. 7, at *67 (2008) (“Parties are increasingly tempering their demands and reaching practical and effective accommodations under circumstances which did not exist before”).

62. As Justice Brandeis noted in *New State Ice v. Liebman*, 285 U.S. 262, 387 (1932), “a single courageous state may, if its citizens choose, serve as a laboratory . . . without risk to the rest of the country.”

APPENDIX

Alaska. The Alaska Supreme Court is currently considering e-discovery rule proposals for amendments which largely mirror the Federal Amendments.

Arizona. The Arizona Supreme Court adopted a comprehensive set of e-discovery rules which became effective on January 1, 2008. See http://www.supreme.state.az.us/rules/ramd_pdf/r-06-0034.pdf. Unlike other states, the amended Arizona Rules require early disclosure of electronically stored information and explicitly authorize a court to enter pretrial orders requiring measures to preserve documents and ESI. See Schaffer and Austin, *New Arizona E-Discovery Rules*, 44-FED ARIZ. ATT'Y 24 (February 2008) (discussing implications of fact that Arizona disclosure obligations are "far broader" than federal rule).

Arkansas. In January, 2008, the Arkansas Supreme Court adopted a rule allowing a presumptive claim of inadvertent production of privilege and work product information. A copy of the text is available at http://courts.arkansas.gov/rules/rules_civ_procedure/v.cfm. Separately, Arkansas also adopted Evidence Rule 502(f) including provisions holding that selective disclosure to the government does not operate as a waiver. http://courts.arkansas.gov/rules/rules_of_evidence/article5/index.cfm#2. See R. Ryan Younger, *Recent Developments*, 61 ARK. L. REV. 187 (2008).

California. The California Legislature adopted comprehensive e-discovery amendments to its Code of Civil Procedure in August, 2008. See http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0901-0950/ab_926_bill_20080808_enrolled.html.

The provisions evolved from those originally recommended in an April, 2008 Report prepared by the California Judicial Council, found at <http://www.courtinfo.ca.gov/jc/documents/reports/042508item4.pdf>. The legislation was vetoed in September, 2008. The legislation differed in a number of respects from the Federal Amendments, including the fact that it does not explicitly acknowledge that no duty exists to produce information from an inaccessible source. The safe harbor provisions mirror Rule 37(e) but add that they "shall not be construed to alter any obligation to preserve discoverable information." The legislation was reintroduced on December 1, 2008 as Assembly

Bill No. 5 without change and is currently pending before the appropriate committees in the Legislature.

Connecticut. The Connecticut Supreme Court Rules Committee has referred a proposal based on the Uniform Rules to its Civil Task Force for review and recommendation at its September, 2008 meeting.

District of Columbia. The District of Columbia Court of Appeals has stayed the deadline for compliance with the Federal Amendments to enable the Superior Court and its advisory committee time to revise the local rules.

Idaho. Idaho amended its Rules of Civil Procedure in 2006 modeled on Tex. R. Civ. P. 196.4, but made the cost-shifting of reasonable expense of any extraordinary steps a matter of discretion, not mandated as in Texas. See http://www.isc.idaho.gov/rules/Discovery_Rule306.htm.

Indiana. The Indiana Supreme Court adopted Amendments, effective on January 1, 2008, largely replicating the Federal Amendments. See www.in.gov/judiciary/orders/rule-amendments/2007/trial-091007.pdf See Lisa J. Berry-Tayman, *Indiana Sate E-Discovery Rules: Comparison to Other State E-Discovery Rules and to the Federal E-Discovery Rules*, 51-APR Res Gestae 17 (April, 2008).

Iowa. The Iowa Supreme Court amended the Iowa Rules of Civil Procedure effective May 1, 2008 based on the 2006 Amendments. See <http://www.judicial.state.ia.us/wfdata/frame6210-1671/File58.pdf>.

Kansas. The Legislature adopted and the Governor signed Kansas Bill SB 434 to amend the Kansas Rules to largely mirror the Federal Amendments, effective July 1, 2008. The text is available on the Legislature website at <http://www.kslegislaure.org/bills/2008/434.pdf>. See J. Nick Badgerow, *ESI Comes to the K.S.A.: Kansas adopts Federal Civil Procedure Rules on Electronic Discovery*, 77-AUG J. Kan. B.A. 30 (July/August 2008).

Louisiana. The legislature adopted some of the 2006 Federal Amendments and has been considering additional amendments. The first wave of changes in 2007 involved limits on production from inaccessible sources which are to be handled

as objections, per the Comments, and the process for claiming inadvertent production includes a waiver rule.

<http://www.legis.state.la.us/billdata/streamdocument.asp?did=447007>. See William R. Forrester, *New Technology & The 2007 Amendments to the Code of Civil Procedure*, 55 LA. B. J. 236, 238 (2008).

Maine. The Supreme Judicial Court of Maine adopted e-discovery amendments based on the 206 Amendments effective August 1, 2009. See http://www.courts.maine.gov/rules_forms_fees/rules/MRCivPAmend7-08.pdf. Minor corrections were quickly made with the same effective date http://www.courts.state.me.us/rules_forms_fees/rules/MRCivPAmend7-30.pdf. The Advisory Committee Notes are quite informative, especially in regard to defining “routine” and “good faith” in Rule 37(e).

Maryland. The Court of Appeals (the highest court) adopted e-discovery based on the provisions of the 2006 Amendments. See <http://www.courts.state.md.us/rules/rodocs/ro158.pdf>. Instead of requiring “good cause” for production from inaccessible sources, a party requesting discovery must establish that the “need” outweighs the burden and cost of “locating, retrieving, and producing” it. Also, the amendment relating to disclosure of privileged material includes a substantive waiver provisions.

Michigan. The Michigan Supreme Court has adopted a series of e-discovery provisions similar to the 2006 Amendments. See http://www.icle.org/contentfiles/milawnews/rules/mcr/AMENDED/2007-24_12-16-08_UNFORMATTED-ORDER_AMENDMENT.PDF.

Minnesota. The Minnesota Supreme Court adopted amendments to its Rules of Civil Procedure which largely mirror the 2006 Amendments. http://www.courts.state.mn.us/documents/0/Public/Rules/RCP_effective_7-1-2007.pdf. See Megan E. Burkhammer, *New Turns in the Maze: Finding your Way in the New Civil Rules*, 64-JUN Bench & B. Minn 23 (May/June 2007).

Mississippi. Mississippi adopted e-discovery amendments in 2003 to its Rule 26 (“General Provisions Governing Discovery”).

Montana. The Supreme Court of Montana adopted amendments to its civil rules largely incorporating the 2006 Amend-

ments in 2008. <http://courts.mt.gov/orders/AF07-0157.pdf>, as amended, 32-APR Mont. Law 23 (2008). See *Montana Lawyer, Court Issues Major Rule Changes on Civil Procedure and Court Records*, 32-MAR Mont. Law. 12 (March 2007).

Nebraska. The Supreme Court has adopted limited amendments regarding discoverability and form of production of ESI effective in July, 2008. See <http://www.supremecourt.ne.gov/rules/pdf/Ch6Art3.pdf>.

New Hampshire. The Supreme Court has added a “scheduling conference” to its standing orders to discuss key e-discovery topics such as accessibility, costs, form of production and the need for and extent of efforts to implement preservation. <http://www.courts.state.nh.us/rules/sror/sror-h3-62.htm>.

New Jersey. The New Jersey Civil Rules, effective September 1, 2006, incorporate the provisions of the 2006 Amendments with certain minor exceptions. See <http://www.judiciary.state.nj.us/rules/part4toc.htm>

30. **New York.** The Civil Practice Law & Rules Advisory of the New York State Bar Association has prepared Report including a possible set of e-discovery rule amendments, as approved by the State Bar Association. See <http://www.nycbar.org/pdf/report/bar%20comm%20ediscovery%20ltr.pdf>

A bill based on the report has been introduced into the Legislature in February, 2009. Rule 8 of the statewide rules of the Commercial Division of the Supreme Court (§202.70) requires consultations regarding e-discovery issues prior to conferences. On December 28, 2007, an amendment modeled on Rule 8 was proposed to Uniform Rule 202.12 by the New York City Bar Committee on State Courts of Superior Jurisdiction for preliminary conferences.

North Carolina. A North Carolina State Bar Committee has proposed a number of innovative e-discovery amendments to the North Carolina Civil Rules, presumably to be considered at the next legislative session. See http://litigation.ncbar.org/Newsletters/Newsletters/Downloads_GetFile.aspx?id=6996.

The North Carolina Business Court included provisions relating to discussion of disputed e-discovery issues in their rules. See <http://www.ncbusinesscourt.net/new/localrules/> (Rule 18.6).

North Dakota. The Joint Procedure Committee adopted amendments based on the 2006 Amendments effective March 1, 2008. See <http://www.court.state.nd.us/rules/civil/frameset.htm>

Ohio. The Supreme Court adopted rules based largely on the Federal Amendments, with significant modification. The safe harbor provision includes factors for court to use when deciding if sanctions should be imposed and the pre-trial discussion topics include the methods of “search and production” to be used in discovery. The rules can be found at: [http://www.sconet.state.oh.us/RuleAmendments/documents/2008%20Amend.%20to%20Appellate,%20Criminal%20&%20Civil%20as%20published%20\(Final\).doc](http://www.sconet.state.oh.us/RuleAmendments/documents/2008%20Amend.%20to%20Appellate,%20Criminal%20&%20Civil%20as%20published%20(Final).doc)

Tennessee. The Tennessee Supreme Court has adopted amendments which require legislative action before they become effective. See <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/proposals/2008/Tn%20Rules%20Civil%20Procedure%20e-discovery%20amend%20publ%20comm%20ord%206-20-08.pdf>

Texas. Texas was the first state to enact e-discovery rules, having added §196.3 and §196.4 to its Civil Procedure code in 1999. It requires payment of reasonable expenses of any extraordinary steps required to retrieve and produce information which is not reasonably available to the responding party in its ordinary course of business.

Utah. The Utah Supreme Court approved a set of e-discovery rules based on the Federal Rules, effective on November 1, 2007. Unlike most other state enactments, preservation obligations are among the topics included in the pre-trial provisions, the power to sanction under inherent powers is expressly recognized and early disclosure requirements are mandated. <http://www.utcourts.gov/resources/rules/urcp/>

Virginia. The Virginia Advisory Committee prepared a revised draft of e-discovery amendments which was open for Public Comments until March, 2008.

Washington. A subcommittee of the Washington State Rules Committee proposed adoption of the provisions of the Federal Amendments. Credible sources report that the proposal has not yet been considered by the Supreme Court.

**THE DILEMMAS AND OPPORTUNITIES
OF COLLABORATION: DRAWING
LESSONS FROM ONE MENTAL
HEALTH COURT**

*Michelle Manasse, Ph.D**

Mental health courts have become an increasingly common feature of American court systems. Yet jurisdictions with young or new programs are likely to face significant, and sometimes unexpected, operational obstacles. This case study identifies several obstacles faced by one mental health court as well as the methods that allowed the court to overcome them.

Observations of the Diversion Treatment Court in DeKalb County, Georgia suggest that the collaborative nature of mental health courts makes them particularly susceptible to operational obstacles. These courts must link the complex, and relatively incompatible, criminal justice and mental health systems. Also, the multiple criminal justice and mental health agencies partnering to form these courts generally have not worked together before and may have contradictory missions. Thus, incompatibility between the criminal justice/mental health systems, goal/role conflict, and miscommunication can impede the success of mental health courts. The experience of the Diversion Treatment Court, however, suggests factors such as the flexibility of the court process and the social capital of the staff

* Professor Michelle Manasse is Assistant Professor of Sociology at Towson University. Please direct all correspondence to Michelle Manasse, Department of Sociology, Anthropology & Criminal Justice, Towson University, 8000 York Road, Towson, MD 21252, USA. T: 410-704-2265; F: 410-704-2854; mmanasse@towson.edu

that can allow courts to create innovative solutions to operational obstacles.

The population of mentally ill offenders in America's jails and prisons is significantly higher than in the general population, and it continues to grow.¹ As mentally ill offenders have increasingly become a resource drain on overworked court systems and correctional facilities, jurisdictions across the country have developed mental health courts to provide mentally ill offenders access to mental health treatment with the expectation that judicial supervision along with a link to social services will ultimately reduce recidivism.² Yet, despite commitment to the goal of providing access to treatment, many mental health courts, especially in the early years of implementation and development, struggle to meet that goal. This study will consider the case of one mental health court – the DeKalb County Diversion Treatment Court in Decatur, GA – in which court personnel confronted serious obstacles to bringing participants into the program, obtaining appropriate treatment/housing for participants, and ensuring participant compliance.

The first mental health court in the United States was formed in 1997 in Broward County, Florida.³ This court and others that followed were adapted from drug court models in an effort to address similar problems for a new category of offenders.⁴ As of 2008, more than 150 mental health courts were operating in the United States.⁵ Mental health courts intervene after criminal charges have been filed,⁶ and all potential partici-

1. DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006), available at <http://ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf>.

2. See Nancy Wolff, *Courting the Court: Courts as Agents for Treatment and Justice*, in COMMUNITY-BASED INTERVENTIONS FOR CRIMINAL OFFENDERS WITH SEVERE MENTAL ILLNESS 143-45 (William H. Fisher ed., 2003).

3. JOHN S. GOLDKAMP & CHERYL IRONS-GUYNNE, EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD: MENTAL HEALTH COURTS IN FORT LAUDERDALE, SEATTLE, SAN BERNARDINO AND ANCHORAGE, vii (2000).

4. *Id.* at 3.

5. Bureau of Justice Assistance – Mental Health Courts Program, <http://www.ojp.usdoj.gov/BJA/grant/mentalhealth.html>.

6. See Bureau of Justice Assistance – Improving Responses to People with Mental Illnesses: The Essential Elements of a Mental Health Court, <http://consensusproject.org/mhcp/essential.elements.pdf>. Because mental health courts intervene post-booking, participants have necessarily interacted with the criminal justice system and will continue to be monitored through the courts. As such, mental health courts are not true diversion programs. Nonetheless, the team mem-

pants must have a mental health issue and indicate a willingness to participate in monitored, community-based treatment in lieu of prosecution.⁷ Mental health courts—like other “problem-solving courts,” including drug courts—share certain features that differentiate them from conventional courts.⁸ For instance, the mental health court judge sits at the center of the treatment process by personally addressing clients’ problems, encouraging clients’ progress, and sanctioning poor performance at periodic status reviews.⁹ Mental health courts also emphasize a team-oriented approach; the judge, prosecutor and defense attorney are expected to relax the adversarial orientation and focus on working together to develop a treatment plan in the “best interest” of the client.¹⁰ Finally, mental health courts require the linkage of various criminal justice and mental health service agencies.¹¹

The collaborative component of mental health courts means that staff must unite often fragmented community services and negotiate across agency boundaries to bring clients from the criminal justice system into community treatment.¹² Yet, interagency collaboration can create significant constraints for court operation. The DeKalb County Diversion Treatment Court faced serious, enduring obstacles to its operation largely because the court had to function as a collaboration between many disparate agencies representing two large, inflexible and very different systems, without any real possibility of structural change within those systems. Yet, over time, it seemed equally clear that, while certain obstacles were inevitable, the structure of the court and the personal resources of the court staff could lead to innovative solutions. This study of the DeKalb County Diversion Treatment Court identifies three major operational

bers in the Diversion Treatment Court see their efforts as diverting mentally ill offenders from jail/prison into treatment, and they have named their court accordingly.

7. GOLDKAMP & IRONS-GUINN, *supra* note 3, at 14.

8. See Greg Berman, *Problem-Solving Courts: A Brief Primer*, in *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (Bruce J. Winick & David Wexler eds., 2003).

9. See GOLDKAMP & IRONS-GUINN, *supra* note 3, at 16.

10. See *id.* at 17; See also Wolff, *supra* note 2, at 143-45.

11. PAMELA M. CASEY & DAVID B. ROTTMAN, *PROBLEM-SOLVING COURTS: MODELS AND TRENDS 8-9* (2003), available at http://www.ncsconline.org/WC/Publications/COMM_ProSolProbSolvCtsPub.pdf; See also Wolff, *supra* note 2 at 143-45.

12. See Wolff, *supra* note 2 at 143-45.

obstacles likely to be endemic to a developing mental health court – incompatibility between systems, goal/role conflict, and miscommunication – as well as strategies used by the court to overcome those obstacles.

The DeKalb County Diversion Treatment Court

The Diversion Treatment Court began operation in May 2001 with a commitment to moving defendants out of jail and into treatment.¹³ The inspiration for the court was the estimation that 18 to 20% of the DeKalb County jail population suffered from a serious mental illness.¹⁴ In response, a group of four concerned individuals, a chief magistrate judge, a National Alliance for the Mentally Ill advocate, an attorney, and a psychiatrist came together to launch a collaborative effort to access treatment for mentally ill offenders already involved with the criminal justice system.¹⁵ From their efforts, a task force representing more than fifty criminal justice and mental health agencies was convened in late 1999, which culminated in a grant application to the Substance Abuse and Mental Health Services Administration in May 2001.¹⁶ Court operation began that same month, without funding, inside the DeKalb County Jail.¹⁷ The court functioned on a largely ad-hoc basis, relying on representatives from various agencies “donating” hours to keep the process going, until it received a three-year grant later in 2001.¹⁸ Ultimately, the Substance Abuse and Mental Health Services Administration pulled the last year of funding, and the Diversion Treatment Court has been operating with intermittent funding since that time.¹⁹

The Diversion Treatment Court accepts defendants, both in and out of custody, with an open, non-violent misdemeanor/

13. *Diversion Treatment Ct. Newsletter* (DeKalb County Magis. Ct., Decatur, Ga.), Jan. 2004, at 1.

14. *Diversion Treatment Ct. Program Status Rep.* (DeKalb County Magis. Ct., Decatur, Ga.), Jan. 2005, at 9 [hereinafter *Program Status Rep.*].

15. *Id.* at 10

16. *Id.*

17. *Id.*

18. Interview with DeKalb County Jail Liaison, Diversion Treatment Court, in Decatur, Ga. (Apr. 2005). The majority of individuals interviewed will be identified with titles only, to allow them anonymity.

19. *Program Status Rep.*, *supra* note 14, at 11.

felony²⁰ case and a mental illness, with or without substance abuse issues. Participants must have housing, both to support their treatment and to ensure that court staff can contact them. The court often coordinates housing as part of the treatment plan.²¹ Participation in the program is voluntary, and, upon acceptance into the program, the prosecutor agrees to hold the case and dismiss it upon program completion.²² If a participant is unable or unwilling to continue in the program, his/her case is removed from the docket and continues through regular criminal justice channels with no additional sanctions.²³ The treatment program, with judicial monitoring of compliance, spans from approximately three to twelve months. Some participants remain under court supervision for much longer if deemed necessary, and felony cases are required to maintain court supervision of the defendant for at least a year.²⁴ While under supervision, Diversion Treatment Court participants receive treatment from existing community resources in accordance with individualized treatment plans, as developed by courts, social workers, and case managers.²⁵

Methods

The research methods used for this study were guided by the structure of the Diversion Treatment Court and the ethical necessity of limited disruption to the court process. Data collection therefore consisted largely of observation of the court in session, during which I attempted to observe the court proceedings as unobtrusively as possible and did not contribute in any way. I also conducted individual face-to-face interviews, and there was a small component of content analysis of court documents, such as periodic court newsletters.

20. The Diversion Treatment Court primarily deals with misdemeanor offenses. Felony cases are accepted on a case-by-case basis and are generally non-violent. Since late 2003, the court has been accepting felonies, due to an agreement with the Office of the District Attorney to keep such defendants in the program for at least a year. *Program Status Rep.*, *supra* note 14, at 11.

21. Interview with Amy R. Simon, Program Director, Diversion Treatment Court, in Decatur, Ga. (Apr. 2005).

22. *Program Status Rep.*, *supra* note 14, at 14.

23. *Id.* at 17.

24. *Id.* at 11.

25. *Id.* at 15.

I began informally observing the court in January 2002, when it had been in operation barely six months, and by mid-year 2003, I was observing court weekly. I formally observed the court for a year from March 2004 to April 2005. During my formal observations of the court, I took detailed field notes. Unfortunately, it was impossible to observe the court staff at work out of session as the court has no physical location outside the courtroom, and most court activities occur in the field, within other agencies or over the phone.

I also conducted face-to-face, open-ended interviews with all existing court staff, as well as some individuals who had moved on to different positions. Guided by my observations, I developed an interview guide of open-ended questions that addressed the respondents' impressions of the obstacles facing the court and how they have been or can be solved. I conducted fourteen interviews; each interview was tape-recorded and lasted from 30 to 120 minutes.

The project's coding scheme developed throughout my observations. I carefully noted incidents in my field notes that fit developing patterns and wrote short memos after court sessions in which a new pattern was observed. Following data collection, I analyzed field notes and interviews for examples of obstacles or solutions and organized events and statements into theoretical categories. Analysis of this setting did not lend itself to the use of data analysis software. I found in my observations and interviews that a single concept could be represented by very different stories or examples; the complexity of these links would be missed by software.

The Dilemmas of Collaboration: Obstacles in the Court Process

Mental health courts require collaboration between the criminal justice and mental health systems and across many agencies and individuals within those systems. In 2005, the Diversion Treatment Court functioned as a collaboration between 59 separate criminal justice and mental health agencies.²⁶ Bring-

26. Interview with Amy R. Simon, *supra* note 21.

ing so many agencies together to achieve a single goal virtually ensures that organizational obstacles will occur.

One of the most fundamental constraints to the operation of the Diversion Treatment Court is that the court must function within the criminal justice system and, while negotiating that system, interact with the mental health system. Both systems are complex, rigid, and subject to sudden bureaucratic change, and there is virtually no pre-existing integration between them.²⁷ As the systems have developed independently, they have distinct internal processes, timetables and funding streams, which complicate the transfer of individuals from one system into the other.

The collaborative nature of mental health courts creates similar obstacles across agencies and between individuals. Personnel working in a collaborative organization must internalize and act on the priorities of the new organization, even while maintaining those of their home agency. The agencies participating in the Diversion Treatment Court collaboration have unique organizational cultures, and many times these cultures are in direct opposition. Treatment providers generally view their mission as creating a supportive environment and returning their clients to a productive, independent life. Criminal justice ideology, however, is focused on maintaining public safety and ensuring that offenders are punished. Judges who attempt to “heal” may be seen as too “touchy-feely” or acting outside their appropriate role. Providers who interact with the criminal justice system may be seen as failing to protect their clients by dealing with a system that unfairly punishes the mentally ill.

Another barrier to the mental health court process stems from confusion that can arise across agencies in collaboration. The knowledge base of court personnel will largely consist of the priorities and procedures of their home agency. The operation of the court is therefore dependent on the interactions of workers who, in many ways, do not yet know how to work together or navigate each other’s systems. This often leads to

27. See Nancy Wolff, *Courts as Therapeutic Agents: Thinking Past the Novelty of Mental Health Courts*, 30 J. AM. ACAD. PSYCHIATRY & L., 431-34 (2002), available at <http://www.jaapl.org/cgi/reprint/30/3/431.pdf>.

communication failures that can quickly limit the effectiveness of the court.

Therefore, the collaborative nature of mental health courts will create obstacles to the goal of providing mentally ill offenders access to community treatment. In the following sections, I will examine three such obstacles to the goals of a mental health court: system incompatibility, goal/role conflict, and communication failures. To illustrate these obstacles within the court, we will first turn to the story of Lucy,²⁸ a potential mental health court participant.

Lucy's Story²⁹

Lucy's interaction with the Diversion Treatment Court begins when a magistrate judge asks the program director to speak with her about participating in the program. Lucy seems like the perfect candidate. She has been struggling with mental illness and substance abuse for years and is currently homeless. However, while discussing Lucy's legal situation, the director discovers she has already accepted a plea on her current charges. Her case is therefore closed and outside the jurisdiction of the court. Although the judge agrees to rescind the plea agreement to get Lucy in the diversion program, Lucy and the director decide it is in her best interests to move forward, accept the plea, follow the orders of the judge and try to access treatment as a condition of her probation.

The judge's orders are to send Lucy to a local treatment facility for assessment. The judge intends for the sheriff's office to transport her to the facility, yet the orders are given without any contact with the facility, and the sheriff's office will not transport defendants without prior acceptance from the facility. Lucy never makes it to the assessment, and she is back on the streets with no judicial monitoring. She later shows up in court one morning, and the director makes another appointment for her with a residential treatment facility. When Lucy is assessed by the treatment facility, she is informed that they have no programs appropriate for her, and she will not be accepted. Once

28. The name of this participant has been changed to preserve confidentiality.

29. Interview with Amy R. Simon, *supra* note 21.

again, Lucy is released with no judicial monitoring and is back on the streets. When Lucy has not been heard from in several weeks, the program director checks the jail system and finds that Lucy has been arrested on a new charge.

The new charge finally gives the Diversion Treatment Court jurisdiction over Lucy's case and means she can be accepted into the program.³⁰ The director asks the city Solicitor's Office, which has jurisdiction over all misdemeanor cases handled by the court, to put a hold on her case so it can be brought onto the diversion court calendar, and the Solicitor agrees. Lucy has Supplemental Security Income and Medicaid benefits and can therefore be treated and monitored by the court's treatment staff at the DeKalb Community Services Board.³¹ Lucy's treatment and housing plan is established. All the pieces are in place for her to be brought in as a court participant. Yet when the program director attempts to release her from jail and into the program on a conditional bond, she finds Lucy has already been bonded out of jail. Yet again, she is released back onto the streets with no judicial monitoring or linkage to mental health treatment. The court has a treatment plan and housing set up for her, but Lucy is homeless and there is no way to contact her.

Criminal Justice/Mental Health System Incompatibility

Lucy's story illustrates numerous operational obstacles faced by the Diversion Treatment Court, beginning with the disconnect between the criminal justice and mental health systems that the court must link. The criminal justice system is a big, inflexible government bureaucracy, and it is exceedingly difficult to navigate its many potential entries and pathways. Itself a component of the DeKalb County court system, the Diversion Treatment Court is allowed to work *with* the larger criminal justice system, but it cannot change the system. For instance, judges may bond defendants out of jail and into the mental health court. The program director may even ask a judge in Recorder's Court to bind a case over to the mental health court and give it jurisdiction. Still, the Diversion Treat-

30. Interview with Amy R. Simon, *supra* note 21.

31. *Program Status Rep.*, *supra* note 14, at 12.

ment Court is constrained by the procedure and speed of the system. If the Recorder's Court judge refuses to give up jurisdiction when asked, no one in the mental health court has any power to divert the case. If an individual has already bonded out before a judge orders a provisional bond, the case may be lost. This occurred in Lucy's case; she was released from jail before being brought into the program, and it indefinitely delayed her participation in the Diversion Treatment Court.

The public mental health treatment system is somewhat smaller, yet also an inflexible government bureaucracy. While it might seem that the publicly funded services of community mental health treatment would be available to all and easily accessible, this is not quite the case. The pathways in and out of the DeKalb County Community Service Board are fewer than in the criminal justice system, but are nonetheless difficult to navigate.³² Entrance into many programs requires complicated and lengthy paperwork and, often, the assistance of a case manager.³³ Even once an individual is considered a client of the Community Service Board, a case manager must apply for entrance into the appropriate treatment programs.³⁴ In addition, even as a "public" agency, the Community Service Board does not provide services to every DeKalb County resident who shows need; there are significant restrictions on how and to whom services will be provided. For example, it was long the policy of the DeKalb Community Service Board to close a file on a client if there had been no contact for 30 days.³⁵ This could be problematic for many mentally ill clients who might be in jail for some or all of that time period.

Diversion Treatment Court staff must not only work within the constraints of rigid systems, but they must also help defendants navigate between them. The complexity of these systems was sharply illustrated during a workshop to enhance mental health/criminal justice collaboration in DeKalb County. The workshop participants represented every agency affected

32. Interview with Case Manager, Diversion Treatment Court, in Decatur, Ga. (Apr. 2005). In order to preserve confidentiality, the names of many of those interviewed have been omitted and their titles or roles inserted as identifiers.

33. *Id.*

34. *Id.*

35. Interview with Social Worker, Diversion Treatment Court, in Decatur, Ga. (Apr. 2005).

by the intersection of criminal justice and mental health issues, including police officers, mental health treatment providers, and even the DeKalb County Chief Magistrate Judge. The participants were asked to create a DeKalb County Systems Map, picturing every pathway into the criminal justice system and links to the mental health system. The development of the systems map took over an hour of discussion and disagreement, and ultimately resulted in an incredibly complicated and convoluted snapshot.³⁶ It also quickly became obvious that no single individual present on their own fully understood the intricacies of the entire system. To the extent that staff members are unaware of pathways between agencies or the pathways are overly complex, Diversion Treatment Court participants lose access to potential treatment opportunities.

Another constraining aspect of the criminal justice/mental health systems is their dependence on the ever-changing political environment. The mental health court interacts with some private agencies, but the bulk of its collaborators are government agencies. Government agencies rely heavily, if not exclusively, on government funding. So, when political changes occur, it can have massive effects on the functioning of both systems. New leadership generally means a new set of priorities and new funding streams. It is not surprising, then, that one of the most significant obstacles facing the Diversion Treatment Court is, and always has been, money. As one of the mental health court judges explains, “[The DeKalb Community Service Board] changes or the Feds change how they’re funding and so we have to completely redo how we do everything. I don’t know that it will ever be static because everybody’s pieces are changing, so we have to be fluid.”³⁷

The criminal justice budget, while relatively hefty, has been increasingly allocated to prisons and post-adjudication programs, and money for rehabilitation programs is scarce.³⁸ Similarly, community mental health budgets are still grappling

36. See Figure 1 *infra* at 37 for the completed DeKalb County System Map.

37. Interview with Judge, Diversion Treatment Court, in Decatur, Ga. (Apr. 2005).

38. See DEREK DENCKLA & GREG BERMAN, CTR, FOR COURT INNOVATION, *RETHINKING THE REVOLVING DOOR: A LOOK AT MENTAL ILLNESS IN THE COURTS* (2001), available at http://www.courtinnovation.org/_uploads/documents/rethinkingthe-revolvingdoor.pdf.

with the effects of deinstitutionalization. Providers were never allocated the necessary funds to treat the bulk of the country's mentally ill population within the community.³⁹ Struggling to provide services, providers may face additional cuts, as their efforts are judged inadequate or ineffective by funding sources.

As the court operates as a collaboration between pre-existing criminal justice and mental health agencies, it inherits these budget problems. If county-level services lose funding and must abandon a particular treatment program, the court loses that program as well. This is one of the most fundamental limitations of the court: it must divert mentally ill individuals from the criminal justice system by utilizing a mental health system that has been unable to provide sufficient treatment to keep those individuals out of the criminal justice system. Gaps in service mean that, even with a court staff at the ready to link defendants to mental health treatment, sometimes the treatment just does not exist.

For instance, the Diversion Treatment Court requires participants to have stable housing in order to facilitate their supervision, but there is a critical shortage of housing for their participants.⁴⁰ Like Lucy, many participants are homeless when taken into the program or can no longer return home after their offenses. These individuals need to be put into residential treatment or linked to housing they can afford. Both options are in extremely short supply. Residential treatment facilities are expensive and difficult to operate. There are relatively few in DeKalb County, and many residential facilities are unwilling to accept clients from the Diversion Treatment Court.⁴¹ These individuals are mentally ill, have criminal records and, in most cases, are dealing with a substance abuse issue. This "triple whammy" means that many residential facilities either lack the structure required to take on such clients or are simply unwilling to assume the risk.

39. Richard H. Lamb & Leona Bachrach, *Some Perspectives on Deinstitutionalization*, 52 PSYCHIATRIC SERVS. 1039, (2001), available at <http://psychservices.psychiatryonline.org/cgi/reprint/52/8/1039>.

40. David Simpson, *DeKalb Court Puts Focus on Mental Health*, ATL. J. CONST. (Dec. 31, 2007). See also Thomas Bornemann & Cynthia Waincott, Op-Ed., *Mental Health System Needs Legislature's Boost*, ATL. J. CONST., Apr. 12, 2007, available at http://www.cartercenter.org/news/editorials_speeches/ajc_041207.html.

41. Interview with Case Manager, *supra* note 32.

The treatment providers' reliance on outside funding can also mean the sudden demise of treatment/residential programs as funding streams shift or disappear. Judges often suggest a residential facility for a particular candidate during court hearings only to be told that it has ceased to exist in the two months since they have heard cases. Also, many of the available treatment programs are in insufficient supply for the need, and appropriate applicants are often turned away.⁴² This is illustrated in Lucy's experience. She was rejected from a treatment program suggested by the court's director despite a documented mental disorder and full benefits. Her rejection seems to reflect the limited space in these programs. With so few available slots and so many qualified applicants, facilities often run out of space or feel a prospective client must be a perfect match and especially likely to succeed to warrant acceptance.

Goal/Role Conflict

One of the unusual characteristics of the Diversion Treatment Court collaboration is that the participating agencies are working together to achieve a goal quite unlike the goals of any of the individual agencies. The mental health agencies are collaborating with a system they generally work to keep their clients *away from*, and the criminal justice agencies are working to send offenders out of their own systems. This characteristic makes for an innovative program with great potential for change in clients' lives, but it also virtually guarantees goal conflict for participating agencies and role conflict for individual court staff.

To the extent that organizational goals are incompatible (or perceived as such) agencies will resist collaboration with the court. Despite the excitement felt by many of the individuals and agencies involved with the Diversion Treatment Court, there was also resistance. Some of the resistance came from the treatment community. It was difficult for many to believe that any new program, especially one emanating from the criminal

42. Interview with Judge, *supra* note 37.

justice system, could address such an enduring problem. A court social worker explains:

I know there was resistance from the treatment community. Families that are as burned out as some of these families are, couldn't see how this could possibly make a difference when nothing else ever had. So, there were just a lot of questions about whether this could work, and a lot of [people] thought that it couldn't work.⁴³

Many of the treatment providers who questioned the mental health court felt that a criminal justice program could not mesh with the treatment approach.⁴⁴ There was doubt that the court could gain compliance and concern about using punishment to enforce it. Treatment providers were hesitant to participate in a program they felt could punish their clients for normal treatment setbacks. Because of these concerns, many day programs did not participate early on.⁴⁵

Even when there is no overt resistance, there may still be conflict. Collaborating agencies that fully support the Diversion Treatment Court continue to have their own institutional priorities that determine day-to-day actions and may conflict with the goals of the court. For instance, the jail must contend with overcrowding and the mandate to provide treatment to a growing population of mentally ill offenders. So, although the mental health staff in the DeKalb County Jail regularly refers individuals to the court, they simply cannot do so for every potential mental health court participant. This type of conflict can be seen in Lucy's case. The program director identified Lucy as a potential participant and simply needed the jail to hold her until a judge released her into the program on a conditional bond. However, the jail operates on its own timeline, with its own agenda of releasing people as quickly as legally possible. This agenda, while entirely legitimate, creates a hurdle for bringing new participants into the Diversion Treatment Court.

An additional source of conflict can occur because the majority of Diversion Treatment Court personnel remain under the auspices of their home agencies. Most of the personnel continue to have regular caseloads in their home agencies and continue to be paid and supervised by those agencies. While these

43. Interview with Social Worker, *supra* note 35.

44. *Id.*

45. *Id.*

collaborations allow the court access to the resources and networks of multiple agencies, it also creates conflict. Sometimes the missions and operational priorities of these agencies do not mesh.

For instance, as the United States legal system is adversarial, the public defender is expected to be a staunch advocate for the client, while the prosecutor must be a staunch advocate for the community. The Diversion Treatment Court defense attorney describes this tension:

I've seen a lot of criminal trials, and in most cases, the D.A. doesn't ever say, "Well, you know, maybe the public defender is right and this person didn't have the mens rea to convict him for this crime." They are a conviction machine and the public defender is a getting-them-off machine and there's no middle ground for finding what would work best.⁴⁶

Solicitors are measured in large part by their ability to secure a conviction and may be the first on the chopping block if a released defendant goes on to commit a violent crime. These occupational realities mean that even an office generally committed to the idea of a mental health court can feel pressure to keep cases in the criminal justice system. The Diversion Treatment Court solicitor explains:

We prefer generally just to prosecute them, and as part of their probation, give them any treatment they need or any medication they need. That way we can have it on their record so if they do it . . . again we can . . . [elevate subsequent charges and] go forward with the felony if we need to.⁴⁷

Even once a case has been released to the Diversion Treatment Court and the defendant begins the treatment outlined in the bond, the conflict often does not end for the solicitor. The role of the solicitor is to protect the interests of the Solicitor's Office and raise objections if or when a participant seems unable to successfully complete the program. While the solicitor sits in on hearings and occasionally wields the "stick" of possible prosecution, the court and the Solicitor's Office have an agreement to keep cases in the program until a Diversion Treatment Court judge sees fit to remove them.⁴⁸ This goal conflict

46. Interview with Defense Attorney, Diversion Treatment Court, in Decatur, Ga. (Apr. 2005).

47. Interview with Prosecutor, Diversion Treatment Court, in Decatur, Ga. (Apr. 2005).

48. Interview with Amy R. Simon, *supra* note 21.

has not caused the Solicitor's Office to consider ending the collaboration, but the tension does limit the number and type of cases the Office is willing to send to the court.⁴⁹

Treatment providers also experience goal conflict between the mission of the court and their commitment to the well-being of their clients. In general, treatment providers and the court staff feel that judicial intervention can be used to their advantage; they can use both the "stick" of prosecution and the "carrot" of support to encourage compliance. Yet, some providers still have the lingering fear that clients will be punished or even sent to jail for behavior they see as normal setbacks in mental health treatment. Indeed, the court's bond conditions usually include taking all medication, avoiding all alcohol and illegal drugs, and adhering to all laws and residential rules. Few participants make it through the program without violations. Providers' fears of the judicial consequences of their clients' actions can occasionally lead providers to limit or terminate their relationship with the court. More often, however, these concerns lead providers to conceal or minimize non-compliance, thereby reducing the court's ability to effectively monitor and support its participants.

Even if the court personnel and their home agencies are on board with the organizational goals and procedures, a collaborative effort often requires personnel to take on new and unfamiliar roles. Early on in the Diversion Treatment Court's development, many agencies were unsure of their roles within the court. Without guidelines or directives being provided from above, each agency (or individual representative) had to determine what level of participation was comfortable. During this learning process, there were information and service gaps.

The Solicitor's Office, for example, did not know if it was meant to provide input on the cases during hearings.⁵⁰ Treatment providers feared they would be expected to provide additional services to mental health court participants or report to weekly hearings.⁵¹ As many treatment providers had little-to-no

49. *Id.*

50. Interview with Court Recorder/Program Assistant, Diversion Treatment Court, in Decatur, Ga. (Apr. 2005).

51. Interview with the Hon. Winston Bethel, Chief Magistrate Judge, Diversion Treatment Court, in Decatur, Ga. (Apr. 2005).

experience in front of a judge, they were uneasy with their new courtroom roles. This discomfort often led them to agree to everything the judge requested, regardless of its feasibility. The social worker explains:

When the judges would question me about things, I felt scared. In the beginning, whatever they said, I was like, "I'll do that, I'll do that," and then I would try to deliver all that and it's not humanly possible. But over time I became comfortable saying, "I don't know how to make this happen for this person. I think it would be great if it could but I don't know how to make this happen." They became more comfortable with hearing that.⁵²

As the above quotation suggests, the court process was very different for judges as well. In conventional courtrooms, there is far less input from far fewer sources. As the providers had to adjust to saying no to the judge when necessary, the judges had to adjust to the additional constraints of the mental health system.⁵³

Communication Failures

For the Diversion Treatment Court, inter-agency communication is essential at every stage. From the very beginning of the process, the court relies on the jail, judges, prosecutors, defense attorneys, among others, to refer candidates to the court. Miscommunication here can mean eligible participants are not referred to the court. The court further relies on reports from various criminal justice agencies – the Solicitor's Office, Adult Probation and pretrial services – for accurate information on defendants' criminal history. At this stage, miscommunication can result in inappropriate referrals and wasted resources. As the participants' treatment progresses, information must be continuously exchanged between treatment providers and the criminal justice agencies. Miscommunication here may lead to noncompliance or the inadequate treatment or monitoring of the participants. With so many agencies working toward a common goal, there are many chances for communication failures that can create obstacles for the court.

Each type of agency in the collaboration operates under its own mission and has developed a unique organizational cul-

52. Interview with Social Worker, *supra* note 35.

53. *Id.*

ture. Differences in organizational culture often mean differences in language use and interpretation, making a concept as seemingly one-dimensional as “what this court is” open to several different views. As described in a program status report, “[f]rom the criminal justice perspective, the [Diversion Treatment Court] program is a bond modification program From the treatment provider’s perspective, this program is a treatment program.”⁵⁴

The two perspectives represent fundamental organizational differences and highlight the problems that can result from distinct organizational jargon. As the agencies forming the mental health court were suddenly brought together, the individuals working within them were faced with new and unfamiliar terminology. Misunderstandings were especially common in the courtroom as treatment providers were adjusting to their new roles as participants in the courtroom process. A case manager describes his own confusion: “. . .throwing around stuff like the ‘docket’ and ‘consent holds’ and stuff like that, and I’m like ‘what are they talking about?’ And now, learning the lingo is making it a lot smoother for me.”⁵⁵ Although this obstacle can be overcome with discussion and the passage of time, language barriers in the court persisted throughout the early months of collaboration, and there was a significant amount of role confusion and operational delay that occurred due to language uncertainty.

While some miscommunication is simple confusion over language, much miscommunication is more subtle. Many of the agencies operating through the court have never worked together before, and none has used the court system to access treatment for mentally ill offenders. These new relationships can result in a great deal of misunderstanding about how and even why agencies and individuals within those agencies operate. There is little natural interaction between criminal justice agencies and mental health providers. So there remains an ideological divide and reciprocal distrust. The chief magistrate judge explains:

54. See *Program Status Rep.*, *supra* note 14.

55. Interview with Case Manager, *supra* note 32.

This is why you don't get most providers in it, because they feel like they are targets, and, of course, judges think that providers just come in and fix people. Every time [treatment providers] talk to someone in the criminal justice system, they get a subpoena to come to court. And they don't want to end up testifying. Why should they waste half the day in court?⁵⁶

It is often difficult for treatment providers to accept that people within the criminal justice system are truly interested in rehabilitation and working with providers for the best interests of the client. It is likewise difficult for many within the criminal justice system to accept that their system alone cannot solve all problems and that many treatment providers are willing and able to successfully interact with a court-based program. These generalizations complicate the working relationships across agencies.

Also, actors from one agency in a new working relationship often fail to realize the procedural requirements of other agencies in the collaboration. Early on, the Diversion Treatment Court providers compiling treatment plans did not realize the court needed legal considerations such as curfews or drug screens put into the bond order.⁵⁷ Providers were also fairly lax about providing details of the treatment plan to the participants in advance of acceptance into the program, not realizing the legal requirements of informed consent.⁵⁸ Likewise, criminal justice representatives had to be educated about treatment procedure and the needs of the community treatment staff. Judges were initially unaware of many of the time constraints within the community-based programs.⁵⁹ It was assumed that, once participants were accepted into the court, their treatment programs could immediately begin. As the case manager explains, this is not always the case: "The court wants the treatment plan when we bring them to court on Thursday. By Monday, the court would like to see that person enter that day program, alright? Now we really can't work it that fast, due to the paperwork to get them in."⁶⁰ Judges did not realize their orders were unreasonable, and the court's social worker and

56. Interview with the Hon. Winston Bethel, *supra* note 51.

57. Interview with Defense Attorney, *supra* note 46.

58. *Id.*

59. Interview with Case Manager, *supra* note 32.

60. *Id.*

case manager, still uneasy with their courtroom roles, were hesitant to refuse a judge's request.⁶¹ This confusion often led to inadvertent noncompliance on bond orders as participants could not attend treatment as instructed.

Long after the Diversion Treatment Court was in operation, many agencies or individuals within agencies remained unclear on court procedure.⁶² The news that DeKalb County had a mental health court spread quickly; accurate details on *how* the court worked took much longer. This type of misunderstanding complicated Lucy's participation in the mental health court. A magistrate judge thought Lucy was appropriate for the court. Yet, he did not contact the court until *after* accepting Lucy's plea, thus making her ineligible. This misunderstanding of the DTC process blocked Lucy's diversion and welcomed several other obstacles into the mix.

Confusion about the mental health court procedure can also increase resistance to the overall process. Such a misunderstanding occurred with the Solicitor's Office. The Assistant Solicitor expressed concern to the project director that one participant had been through the court three times and was repeatedly non-compliant.⁶³ The Solicitor's Office questioned the ability of this participant to succeed and wanted to take the case back and prosecute it.⁶⁴ However, the individual had never been accepted into the mental health court. The defendant had been put on the calendar three times to be admitted into the program, but each time he was too psychologically unstable to be accepted. The court continued to pursue his case, and once he was stable, he was accepted into the program. Since his acceptance, he had been completely compliant.⁶⁵ The Solicitor's misunderstanding of procedure nearly blocked the referral of an appropriate, compliant participant.

With so many agencies collaborating with the express intention of linking previously unlinked systems, the Diversion Treatment Court had to incorporate mechanisms to facilitate the exchange of information. Yet, it was not always clear where

61. Interview with Social Worker, *supra* note 35.

62. Interview with Amy R. Simon, *supra* note 21.

63. Interview with Amy R. Simon, *supra* note 21.

64. *Id.*

65. *Id.*

information needed to flow, how well the existing mechanisms would function, or what information gaps already existed. When the court began, one of its biggest obstacles was the extremely limited flow of information between the criminal justice and mental health agencies. The role of the court was to link these two systems, but there were no pre-existing mechanisms to do so.

One of the most problematic information gaps was between the court and the DeKalb County Jail. As the court first developed, it seemed logical to get referrals directly from jail mental health staff. The original referral method was for jail mental health staff to send a list of “new” mentally ill inmates to the court every day.⁶⁶ However, there was resistance to this procedure from the jail staff who were already overwhelmed by the volume of mentally ill inmates cycling through the jail. The list of referrals from Jail Mental Health eventually trickled to no more than one a week, and the court had to become more proactive in the search for participants.⁶⁷

Another snag in the flow of information arose when the Diversion Treatment Court wanted to begin accepting non-violent felony cases. While misdemeanor cases were under the jurisdiction of the Solicitor’s Office, the District Attorney followed felony cases. As the court had been in collaboration with the Solicitor’s Office since its inception, there were mechanisms in place to facilitate the transfer and supervision of misdemeanor cases⁶⁸. No such mechanisms were in place at the District Attorney’s Office. Unlike the Solicitor’s Office, the District Attorney has no representative at mental health court hearings and no internal liaison to the court. This means that when a problem occurs with a felony case, someone at the court has no choice but to call individual prosecutors until the “owner” of the case can be found.⁶⁹ This process is time-consuming, and while it is taking place, the Diversion Treatment Court may lose jurisdiction.

66. Interview with Defense Attorney, *supra* note 46.

67. *Id.*

68. This collaboration was greatly facilitated by the program director’s pre-existing relationship with the Solicitor’s Office; *see infra* at 29.

69. Interview with Defense Attorney, *supra* note 46.

Even within the courtroom, there are breakdowns in the flow of information. The non-adversarial nature and relative informality of the court means that the usually strict rules of information exchange are not necessarily followed. Court actors tend to be more focused on their own roles than on how particular pieces of information may be relevant to other actors. Therefore, in this court, the defense attorney is not always informed of noncompliance issues or participants' concerns with treatment plans.⁷⁰ This limits the defense attorney's ability to act as an advocate for participants.

There is also an incomplete flow of information to the solicitor from the rest of the staff. From the solicitor's perspective, there is a tendency for other court staff to gloss over the negative parts of participants' progress. He explains,

There's very, very little communication with our office because, I think, some individuals in the court . . . they want to keep us out of the loop. They don't want to communicate with us because they are afraid that we're going to try to interject or approve fewer cases.⁷¹

The information gap identified by the solicitor is very real. While it is impossible to know if there is full disclosure during court hearings, other staff commented on the ability within the court to work in the best interest of the client without the constraint of the adversarial process. The defense attorney explains, "There have been some solicitors here that would have thrown up roadblocks and said that's not the way we do things or that's not procedurally correct or that can't happen and, you know, it's just been great that they don't have to be in the discussion."⁷² While the defense attorney finds the ability to leave the solicitor out of the loop helpful, this information gap can mean defendants are brought into the mental health court without the Solicitor's Office true consent. This could ultimately undermine the Solicitor's Office commitment to the Diversion Treatment Court and severely limit the court's ability to obtain jurisdiction over misdemeanor cases.

In many ways, the Diversion Treatment Court faced an uphill battle from its inception. The court had to link two systems

70. *Id.*

71. Interview with Prosecutor, *supra* note 47.

72. Interview with Defense Attorney, *supra* note 46.

with no preexisting integrating mechanisms, and it had to do this by bringing together many agencies with fairly incompatible missions. These operational obstacles have not disappeared, yet the Diversion Treatment Court has managed to stay in operation and consistently improve its ability to link mentally ill offenders to treatment. The following sections will consider characteristics of the Diversion Treatment Court and its staff that contribute to the court's ability to overcome operational obstacles.

Overcoming Operational Obstacles: Characteristics of the Staff

The Diversion Treatment Court began with the basic idea of keeping the mentally ill out of jail, but it falls to the staff to turn this concept into an operational court program. If the program is to survive and flourish, it also falls to the court staff to address any obstacles that arise. As one of the judges commented, “[The Diversion Treatment Court] does work, but it only works as well as the people we have and we have great people.”⁷³ The characteristic of the staff that makes the program work – the “greatness” to which the judge refers – is social capital.

In this context, social capital is the intangible set of resources that individuals bring into the work environment, which allow them to perform their jobs more effectively. Employees' social capital includes all the knowledge, skills and relationships they bring into the workplace⁷⁴. For example, a case manager's ability to connect with his clients and gain their trust or convince treatment providers to do him a favor will significantly enhance his overall job performance. Such resources are difficult to measure, yet fundamental to the operation of the court.

The Diversion Treatment Court functions in an enormously complex and constrained environment. Effective work-

73. Interview with Judge, *supra* note 37.

74. See W. RICHARD SCOTT, *ORGANIZATIONS: RATIONAL, NATURAL, AND OPEN SYSTEMS* 301 (5th ed., Prentice Hall 2003). See also EUGENE BARDACH, *GETTING AGENCIES TO WORK TOGETHER: THE PRACTICE AND THEORY OF MANAGERIAL CRAFTSMENSHIP* 256-57 (1998).

ers must therefore not only be good at their jobs, but also be effective problem-solvers. The court has been able to endure and improve in the face of significant operational obstacles precisely because its staff brings together a crucial assortment of experience, determination, skills, and contacts. Using these assets, the court staff has avoided obstacles, minimized their effect, or adapted the program to solve them.

The staff must contend with individualized treatment and a continuously changing environment; their ability to address operational obstacles therefore depends in large part on their flexibility. The needs of each participant are complex and distinct, and there is no single pathway into the court or through the program. Personnel must be able to adjust and react to very diverse personalities and requirements. The program director describes the general perspective of the court personnel: “Nobody ever says, ‘Well, you said this was going to happen, and it’s not happening,’ because they all know from their own positions that they have to be flexible.”⁷⁵ The people who continue working within the court are able to “expect the unexpected,” and they remain willing to roll up their sleeves and deal with problems as they arise.

Due to its mercurial environment, procedures within the court are also fluid. If the jail changes its intake or release procedures, it affects how the court must function. If the DeKalb Community Service Board changes the paperwork for entrance into the dual diagnosis day program, it also affects the court. The methods the staff uses to bring defendants into and through the program, then, must either shift as the environment shifts or circumvent these changing processes entirely. The individuals within the mental health court show an extraordinary ability to use any and all available means in whatever way necessary to support participants. The rigidity of bureaucracies often produces employees who are unable to operate outside of established procedure,⁷⁶ but the Diversion Treatment Court employees are not tied to the procedural status quo. The jail liaison explains, “They’re not preoccupied with process. They

75. Interview with Amy R. Simon, *supra* note 21.

76. See Victor Thompson, *Bureaucracy and Innovation*, 10(1) ADMIN. SCI. Q. 1, 7 (1965).

figure they'll get done what they need to get done and if they have to follow your process to do it, they'll do it. If they have to step outside your process, they'll do that too. They're just about getting it done."⁷⁷ The staff must be comfortable with things moving constantly, and the people who stay with the court are able to focus on the end rather than the means. Even during periods when procedure is stable, there are always many cumbersome pieces involved in getting someone into the court and supporting them through the treatment process. There is no consistent process. Every participant goes through a unique experience and needs a different set of tools and support systems to successfully graduate. Here, too, staff members remain flexible and accept that their positions in the court do not entail only one role. The probation officer describes this process:

Sometimes you have to be the stern probation officer. Sometimes you have to be the nurse. Sometimes you have to be the caseworker. Sometimes you have to be the counselor. And you just have to know how to change hats. You have to do that. It's part of the job. You have to be very flexible.⁷⁸

This flexibility is evident during court hearings. For example, there are often situations in which a participant is ineligible or inappropriate for day programs and has no structured activity or mental health treatment during the day. The staff response consists generally of suggestions from every corner of the courtroom. The program director might mention a new program to try, while the probation officer suggests a community service program run through Adult Probation and offers to meet with the participant personally.

The ability of the court to overcome operational obstacles can also be linked to staff members' personal skill sets and resources. For instance, staff members tend to have a strong understanding of the importance of networking and, as a group, are unusually skilled at forming relationships. A prime example of this skill can be found in the efforts of the original court recorder/program assistant. Filling this role in the early days of the court meant that she had to forge many of the relation-

⁷⁷. Interview with DeKalb County Jail Liaison, *supra* note 18.

⁷⁸. Interview with Probation Officer, Diversion Treatment Court, in Decatur, Ga. (Apr. 2005).

ships between the court and participating agencies. While many of the other staff members commented that they had heard of or personally felt resistance from members of the criminal justice community, the court recorder cites little of this. Yet, she also takes care to note that – especially when the court was first being developed – she always took the initiative to personally get to know every person with whom she needed to interact.⁷⁹ For those individuals in close proximity to the office, she would personally deliver every piece of correspondence to put a face to a name and have one-on-one interaction.⁸⁰ These efforts almost certainly made collaborators more receptive to the requests of the court.

The impact of relationships is just as central when dealing with obstacles on the treatment end of the process. According to the case manager, navigating the obstacles of the mental health provider system is, in part, dependent on trading favors; it *requires* the formation of relationships across various providers. He explains:

It's kind of a wash my back, I'll wash yours kind of thing. You know . . . some of the program directors call me. Maybe they need an update on somebody that's in jail or they need to have some paperwork done on somebody that's in jail, and I'll say ok. They'll call me, no problem, I do it. And when I turn around and need a favor from them – about somebody coming to visit or can we speed this paperwork up or what do I need to do to get them in this program by today – I can go through them.⁸¹

The caseworker's personal relationships – one aspect of his social capital – allow him to circumvent bureaucratic procedure.

Although the success of the Diversion Treatment Court rests on the collective contribution of all the court personnel, the program director and the specific characteristics she brings to the court are a fundamental component of the court's success. The program director possesses the interpersonal characteristics that facilitate the bringing together of mental health and criminal justice agencies and ease the conflict of collaboration. The court recorder explains:

I think [the program director] has been excellent at keeping a rapport with the Solicitor's Office and the Public Defender's Office, even throughout the changes. She's even been successful in mak-

79. See Interview with Court Recorder/Program Assistant, *supra* note 50.

80. *Id.*

81. Interview with Case Manager, *supra* note 32.

ing progress with the DA's office. Two things: her personality and her legal background allow that to be possible. So her being in that role as the director is great because it has opened a lot of doors, and she's able to explain it in a way that people get it. And once someone understands it, then they can feel it, and they don't feel like anything is being taken away from them. Most of all, you want people to feel a part of . . . and I think she's been able to do that.⁸²

Most court personnel also had pre-existing relationships within the collaborating agencies; the trust implicit in these relationships eased some collaborative tensions. From the inception of the court and before she was hired in 2002, the program director worked in the DeKalb County Solicitor's Office and acted as the solicitor for hearings.⁸³ The original court recorder/program assistant also had a background in the Solicitor's Office and had previously acted as the office's secretary/liaison to the court.⁸⁴ Their collective experience meant they knew how the Solicitor's Office worked. They were aware of the bureaucratic snags and procedural issues. A strong relationship between the Diversion Treatment Court and the Solicitor's Office is essential to the court's operation as the prosecutor must be willing to divert cases and trust the court's process. The program director explains:

That's really a trust issue that you're not going to grab cases that should be prosecuted just because this person is mentally ill . . . as a [former] prosecutor, I err on the side of [providing treatment] post-conviction, right? Then you know you're safe . . . and the solicitors, they know me; they trust me. You know, it's a trust thing. I'm not going to ask you to give me an aggravated assault case. I'm not going to pretend it's not aggravated assault.⁸⁵

Pre-existing relationships also helped the court deal with obstacles from the mental health system. Each staff member in charge of case management had worked in the DeKalb County system for some time before joining the team. Their years of experience meant they had established a good bridge of communication with many different treatment programs and, perhaps more importantly, with the individuals who worked within those programs. According to the case manager, coming into the court without such experience would be difficult:

82. Interview with Court Recorder/Program Assistant, *supra* note 50.

83. Interview with Amy R. Simon, *supra* note 21.

84. Interview with Court Recorder/Program Assistant, *supra* note 50.

85. Interview with Amy R. Simon, *supra* note 21.

It wouldn't be that easy because I've grown to have a rapport with some of the people in the [community service board] and some of the people in outside programs. I've grown to have a rapport with them. Now, I'm not saying they couldn't do it, but they would have to start from scratch, just like I did [early in my career]. Somebody could come in and do it, but it takes time to get these relationships with each other going.⁸⁶

All the resources that personnel bring into the Diversion Treatment Court – their attitudes, skills and personal networks – help them to tackle the obstacles facing the court. Yet, while these characteristics are fundamental to the court's ability to deal with the structural barriers in its environment, the structure of the court itself must allow staff members to make necessary changes and implement innovation. The following section will examine the characteristics of the program structure that facilitate overcoming operational obstacles.

Overcoming Operational Obstacles: Characteristics of the Court

The Diversion Treatment Court is able to respond to obstacles because the efforts of its workers are supported by its organizational structure. The overarching focus of the court is on solving problems. In sharp contrast to most government organizations and, in particular, most courtrooms, the Diversion Treatment Court has been designed to facilitate the staff's identification of and response to problems in its operation. Unrestricted by the adversarial process, the court is able to keep its focus on each participant and the individualized treatment plan that will help him or her succeed. Even when participants relapse, the court's focus remains on identifying and fixing problems in the treatment plan and finding the right balance to help them succeed. The same problem-solving philosophy that is applied to individual participants is applied to the program itself. If the environment changes or processes fail, attention is immediately turned to identifying and addressing those problems.

The creation of the position of program director reflects the larger problem-solving character of the court. The director acts as a gateway into the program and places participants on the

86. Interview with Case Manager, *supra* note 32.

calendar, but the director's role also extends far beyond these tasks. She explains:

I develop the procedures, tweak the procedures . . . I really try to make the pieces work. Since I've got a very logical, organized manner and brain and try not to judge people, I'm really trying to help the process be developed, help people be comfortable with the fact that everything changes continuously and help each [member of the staff] stay true to their organization and their core responsibilities.⁸⁷

In large part, her role is to anticipate, prevent and, when necessary, handle problems.

The court founders always knew such problems would occur. The founding judge admits, "It was kind of a trial and error to get started because we really didn't know what we were doing. There were the ups and downs. That was always going to be the case. I knew that."⁸⁸ Because problems seemed to be inevitable yet relatively unpredictable at the outset, it was accepted early on that none of the court procedures could be set in stone and there would need to be ongoing change in response to obstacles. This led to a court atmosphere that welcomed dialogue and brainstorming to identify and address problems.

During the first months of the court, Thursday morning hearings were followed by an informal group discussion.⁸⁹ Every staff member was encouraged to bring up any of the difficulties they faced in bringing people into and through the program.⁹⁰ The court staff took these sessions as opportunities to share frustrating experiences as well as suggest and troubleshoot potential solutions to problems.⁹¹ The informal sessions were used to streamline court procedure. These post-court discussions occurred every week for the first several months of the court's operation. Now court personnel will still often meet after Thursday morning hearings to discuss procedural snags or problem cases.

The non-adversarial format of the Diversion Treatment Court coupled with the staff's efforts to maintain equal input

87. Interview with Amy R. Simon, *supra* note 21.

88. Interview with the Hon. Winston Bethel, *supra* note 51.

89. Interview with Amy R. Simon, *supra* note 21.

90. *Id.*

91. Interview with Amy R. Simon, *supra* note 21.

among collaborators also means that there is little hierarchy within the organization. In many organizations, particularly government, the possibility for innovative solutions to inefficient or ineffective procedure is limited by rigid hierarchical chains of command. There are restrictions on how and when subordinates can speak to their superiors and often fairly inflexible methods of implementing innovative ideas.⁹² This is especially true in the average American courtroom, in which every procedure and interaction is constrained by explicit rules.

In contrast, the Diversion Treatment Court promotes the belief that the input of many individuals, from many agencies, makes the court strong, flexible and responsive. The program director describes the decentralized power structure in reference to a particular participant's success:

I never in a million years would have thought [court participant] would get where he is today. So you don't know, and that's why you need all the different eyes, because everybody sees something a little different because you wind up bringing to the situation your history and your experience.⁹³

The many "eyes" represent the array of knowledge, skills and personal experience that every staff member brings into the collaboration. The court's ability to address problems is exponentially increased as every staff member becomes an equal contributor to the problem-solving process. The relative lack of hierarchy means that procedural innovations can come from any member of the court staff, at any time. An example occurred when a social worker encountered difficulty collecting information on participants' treatment progress from private providers. After calling these providers repeatedly with no luck, it occurred to her to create a form the participant could personally bring to the provider and return to the court. This would increase the providers' willingness to fill out the form and guarantee that the court had the type of information it needed. The change was quickly incorporated into court procedure, and a similar form is still used today.⁹⁴

Flexibility is built into the treatment court's proceedings. There are freer and more open lines of communication with

92. See Thompson, *supra* note 76, at 3-10.

93. Interview with Amy R. Simon, *supra* note 21.

94. Interview with Social Worker, *supra* note 35.

judges and among court personnel than there are in a conventional court proceeding. As a result the staff members are able to fully advocate for the participants and openly ask for what is needed. They are further able to acknowledge participants' problems and setbacks without fear that the participant will be penalized for their openness.

Lessons for Successful Mental Health Courts

The types of operational obstacles identified in the case of the DeKalb County Diversion Treatment Court will likely be intrinsic to any collaborative criminal justice program with the goal of linking mentally ill offenders to mental health treatment in the community. As mental health courts continue to be implemented in new locations across the country, these obstacles have significant implications for the issue of "going to scale." Going to scale involves identifying the essential components of a successful program and replicating them in a new location.⁹⁵ Yet, this process is never simple; it is more like recreating an entire garden than transplanting a single healthy rose bush. While it is easy to determine the basic procedural model used by the Diversion Treatment Court – things such as which offenders are eligible, when and how participants are brought into the court, and how treatment is monitored – this model alone will not guarantee smooth implementation in a new location. If particular types of obstacles are likely to occur in newly implemented mental health courts, then an understanding of how to overcome and/or adapt to those obstacles may be equally as fundamental to the success and survival of developing programs.

As described above, the nature of the criminal justice and mental health systems and the reliance on a collaboration means that mental health courts are likely to face system incompatibility, goal/role conflict and communication failures. Yet, each jurisdiction attempting to implement a mental health court must deal with permutations of these obstacles that are unique to their local criminal justice and mental health agencies.

95. See Aubrey Fox & Greg Berman, *Going to Scale: A Conversation About the Future of Drug Courts*, 39 CT. REV. 4 (Fall 2002). See also Jeffrey L. Bardach, *Going to Scale*, 19-25 STAN. SOC. INNOVATION REV. (Spring 2003).

Therefore, while some obstacles may be avoided with thoughtful implementation, specific obstacles often cannot be anticipated. This means that court procedure and policy must be fluid and adaptable to organizational change and conflict; as such, no process can be set in stone.

Creating the position of program director can facilitate this kind of flexibility. In an organization with high levels of conflict between agencies and systems, this position allows one individual within the court the neutrality to consider the entire process and focus on solving problems and alleviating tensions. The program director can address inter-agency conflict, for instance, without experiencing the ramifications of that conflict personally. The unique perspective also allows a bird's-eye view of how all the court components interact as well as each individual step in the process. This enables a program director to identify glitches in the process and solutions that others with specific responsibilities may not be able to see.

A truly non-hierarchical work environment can further support flexibility in the court. In this environment, every staff member gets a voice in the process and contributes knowledge and resources to achieve the best possible outcome. Although the non-adversarial nature of mental health courts automatically reduces hierarchy to a certain extent, this component must transcend procedure and be ingrained in the *culture* of the court. That is, the ideas of all staff and stakeholders must be considered equally valid with equal potential to identify and solve problems. For instance, a case manager is far more likely than a judge to have innovative ideas about how to supervise a difficult-to-place participant. The court must acknowledge these distinct perspectives and welcome all sources of innovation. In the case of the Diversion Treatment Court, this process was facilitated by post-court meetings, in which court staff met to share procedural snags and trouble-shoot as a group. Separating this kind of problem-solving process from courtroom procedure further de-emphasizes hierarchy and gives everyone equal voice.

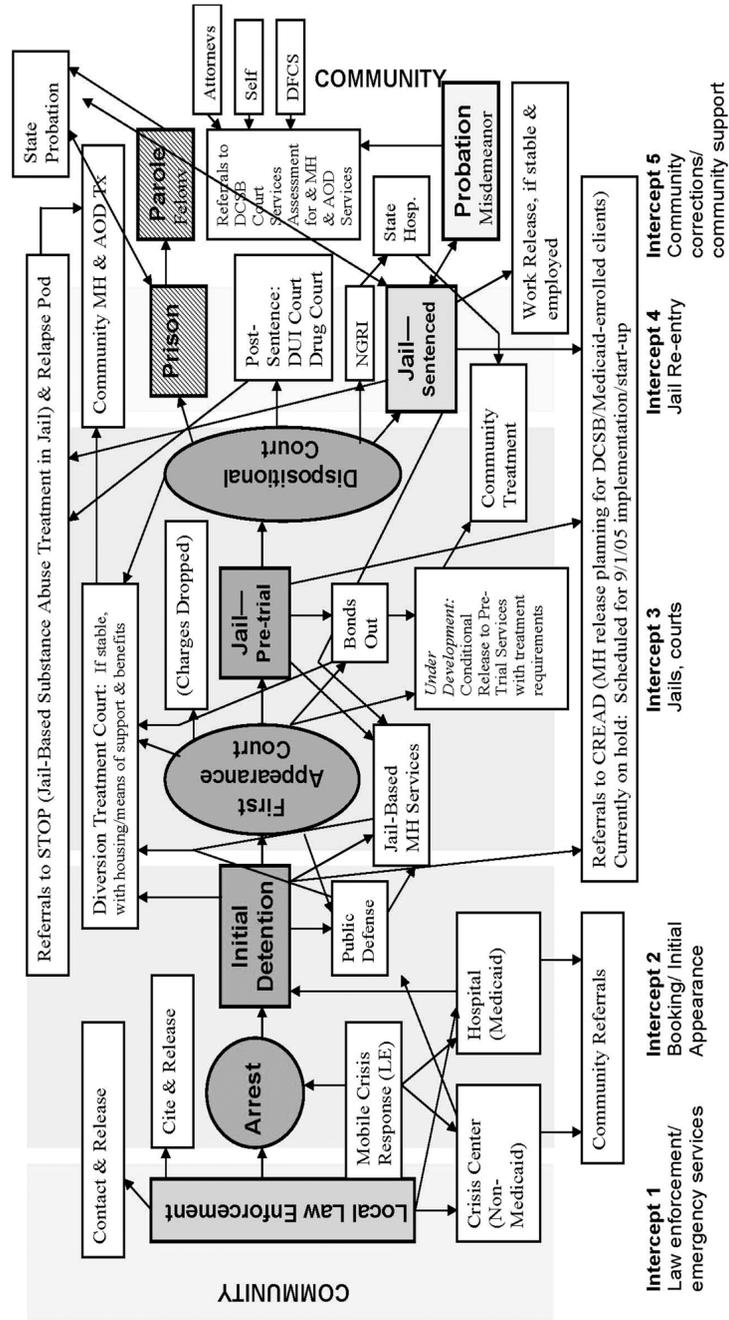
Still, it is only the individuals working within the court who can transform these aspects of court structure into day-to-day successes. Not all employees – not even all talented and committed employees – have the combination of temperament,

skills and resources necessary for success in this type of environment. Effective workers must be highly motivated and eager to go beyond their job descriptions to do whatever is needed to achieve the court's larger goals. Simply put, they must be the kind of people who get things done. Court staff also must be exceedingly flexible in their daily work process. They must be willing to work within established procedure, but equally willing to look outside that procedure when necessary. In the court environment, such ingenuity requires significant interpersonal skills, as workers must call on their contacts, knock on new doors and be open to trading favors.

The most valuable court staff therefore comes to the court with experience and pre-existing relationships in local criminal justice and/or mental health systems. Court workers with experience in one of the collaborating agencies bring the ability to navigate that system with them and, with their knowledge of that agency's culture and mission, help to ease any resistance. At the same time, individuals with agency experience are likely to be most effective when hired as dedicated court employees. Although this requires funding which may be beyond the capabilities of some fledgling programs, hiring dedicated staff from collaborating agencies is the best way to utilize existing knowledge and networks while limiting goal/role conflict of employees.

The case of the DeKalb County Diversion Treatment Court provides one additional lesson: one of the most effective tools to overcome the tensions of collaboration may be time. Many of the issues stemming from new collaborations – resistance to the new goal, miscommunication and role conflict – may be best addressed by hiring thoughtfully, creating an organizational environment in which all input is welcomed and allowing time to do its own work. With the passage of time, collaborators will adapt to their new roles and organizational mission, thus limiting operational obstacles, and the court will become increasingly adept at tackling the ones that do arise.

Figure 1. Criminal Justice and Mental Health Systems Map: DeKalb County, Georgia.



**A NEW WAY OF DOING BUSINESS:
A CONVERSATION ABOUT THE
STATEWIDE COORDINATION OF
PROBLEM-SOLVING COURTS**

By Robert V. Wolf¹

After the Miami-Dade County Drug Court opened in 1989, it inspired jurisdictions around the country to create specialized courts that link drug-addicted offenders to judicially monitored treatment.² Similarly, after the Midtown Community Court opened in New York City in 1993, it set an example for beleaguered communities across the country, which began to develop courts that combined punishment and help to steer low-level offenders in a law-abiding direction.

Soon, other types of problem-solving courts emerged on the national scene: domestic violence courts, mental health courts, “driving under the influence” courts, homeless courts,

1. Robert V. Wolf is the director of communications at the Center for Court Innovation, a public-private partnership that seeks to help the justice system reduce crime, aid victims, and improve public trust in justice. This article was supported by Grant No. 2005-DD-BX-K053 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the U.S. Department of Justice’s Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime. Points of view or opinions in this document are those of the author or roundtable participants and do not represent the official position or policies of the U.S. Department of Justice. The author would like to thank, in addition to all the roundtable participants, Julius Lang, Henry Mascia, Preeti P. Menon, and Brett Taylor for their helpful feedback during the writing of this report.

2. AUBREY FOX AND ROBERT V. WOLF, CTR. FOR CT. INNOVATION, THE FUTURE OF DRUG COURTS: HOW STATES ARE MAINSTREAMING THE DRUG COURT MODEL 1 (2004), available at http://www.courtinnovation.org/_uploads/documents/futureofdrugcourts.pdf.

sex offense courts and others. By 2004, there were more than 2,500 problem-solving courts in the United States.³

In a recent development, practitioners of problem-solving justice have begun to think about how to coordinate and administer problem-solving courts on a statewide basis. While much has been said and written about the history and development of problem-solving courts, to date little attention has been paid to this relatively new phenomenon of statewide problem-solving coordination.

This led the U.S. Department of Justice's Bureau of Justice Assistance and the Center for Court Innovation to bring together 18 policymakers, researchers, and practitioners for a roundtable conversation on the topic of statewide coordination of problem-solving courts.

This paper summarizes that conversation, which took place in April of 2008 in Washington D.C. The roundtable was moderated by Tim Murray, executive director of the Pretrial Justice Institute.

Participants

Participants were drawn from a range of professions and disciplines. Included were judges, court administrators, researchers, policymakers, and representatives of national organizations that work on problem-solving justice. Murray called them "a very interesting array of individuals who have dedicated themselves personally and professionally to upsetting the status quo." Eight states that are working on statewide administration of problem-solving courts were represented: California, Idaho, Indiana, Maryland, New York, Pennsylvania, Utah, and Vermont.

The participants were:

Dan Becker, *State Court Administrator*, Utah Administrative Office of the Courts

Greg Berman, *Director*, Center for Court Innovation

3. C. WEST HUDDLESTON, III ET AL., NAT'L DRUG CT. INST., 1 PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES 17 (May 2005), available at <http://www.ndci.org/sites/default/files/ndci/PCPI.2.2005.pdf>.

Caroline Cooper, *Associate Director of Justice Programs, American University*

The Hon. Daniel Eismann, *Chief Justice, Idaho Supreme Court, and Chair, Idaho Drug and Mental Health Court Coordinating Committee*

Nancy Fishman, *Project Director, The Council of State Governments' Justice Center*

The Hon. Karen Freeman-Wilson (ret.), *Principal, Freeman-Wilson Lewis Shannon LLC, and Former Executive Director, National Association of Drug Court Professionals*

The Hon. Jamey Hueston, *Chair, Maryland Problem-Solving Courts Commission*

Spurgeon Kennedy, *Director of Research, Analysis and Development, D.C. Pretrial Services Agency*

The Hon. Judy Harris Kluger, *Statewide Deputy Chief Administrative Judge for Court Operations and Planning, New York State Unified Court System*

Edward W. Madeira, *Chair, Pennsylvania Commission for Justice Initiatives*

Douglas Marlowe, *Chief of Research, Law and Policy, National Association of Drug Court Professionals*

Kim Ball Norris, *Senior Policy Advisor for Adjudication, Bureau of Justice Assistance, U. S. Department of Justice*

The Hon. Eileen Olds, *Judge, Chesapeake (Virginia) Juvenile and Domestic Relations District Court, and President, American Judges Association*

Valerie Raine, *Director of Drug Court Programs, Center for Court Innovation*

Dawn Rubio, *Principal Court Management Consultant, National Center for State Courts*

The Hon. John Surbeck, *Chair, Indiana Problem-Solving Courts Committee*

Lee Suskin, *President, Conference of State Court Administrators, and Court Administrator, Supreme Court of Vermont*

Nancy Taylor, *Lead Staff, Collaborative Justice Project, Center for Families, Children & the Courts, California Administrative Office of the Courts*

Questions

A number of participants expressed a sense that the day's conversation was timely. Murray said statewide coordination was the next new thing in problem-solving justice, one that until this moment "hasn't gotten any light or air."

Greg Berman, director of the Center for Court Innovation, expressed wonder that policymakers were mulling how to institutionalize problem-solving courts. "If you had told me back in the early '90s that I would be here today with a bunch of states that were interested in going statewide with problem-solving courts and the Bureau of Justice Assistance would be convening them, I think my jaw would have dropped I feel like we're on the precipice of a new dawn."

“We’re moving out of adolescence into a point of maturity,” said Dan Becker, Utah’s state court administrator.

Kim Ball Norris, the Bureau of Justice Assistance’s senior policy advisor for adjudication, said the roundtable was an effort to “identify the key challenges of institutionalization and share knowledge so that practitioners don’t have to reinvent the wheel.”

The conversation was underpinned by a series of related questions: What is statewide coordination? Why is it happening? And what are the benefits and risks?

Domingo S. Herraiz, then-director of the Bureau of Justice Assistance, asked another key question in his welcoming remarks: “Is it possible to sustain enthusiasm for problem-solving courts as the original innovators move on?” The concern, as Berman subsequently put it, is that creating “statewide architecture around problem-solving courts risks sapping the creativity and the flexibility and the entrepreneurial energy that have been so crucial to the success of the pioneering courts.”

Building Legitimacy

Doug Marlowe, chief of research, law and policy at the National Association of Drug Court Professionals, felt the benefits of statewide coordination outweighed the danger that a new bureaucracy might stifle innovation. In order to promote problem-solving, “you’ve got to be institutionalized and you’ve got to have power,” Marlowe said. “That may have the effect of stifling innovation to some degree, but you can be very innovative and very weak, and you won’t actually accomplish very much.”

Berman, picking up on this idea, talked about how hard it can be to implement new policies:

There’s an enormous resistance to change. Say you want to do a drug court or a domestic violence court in a jurisdiction, and there is a recalcitrant prosecutor; that can kill the project. A little jurisdiction by itself is more than likely not going to have the power to take on that recalcitrant prosecutor. But a statewide administrator has the power to influence an individual prosecutor.

Becker said that instead of “power,” advocates of problem-solving justice should seek “legitimacy”:

I think the coordination in our state has meant getting the attention of the Judicial Council, the state court administrator, and the chief justice to put their imprimatur on this way of doing business, and that legitimizes the work of a lot of people out there doing this on a day-to-day basis. And by extension it expands the number of people willing to do it.

Everyone agreed on something statewide coordination should avoid: promoting what Judge Judy Harris Kluger of New York called a “cookie-cutter approach.”

“The last thing we wanted was a cookie-cutter approach. What we wanted to do is to be able to provide training, to assist in funding, to promote a conversation between different parts of the state that may be doing things similarly but could learn from each other,” said Kluger, the statewide deputy chief administrative judge for court operations and planning for the New York State Court System.

Spurgeon Kennedy, director of research, analysis and development at the D.C. Pretrial Services Agency, suggested that policymakers avoid the idea of an inflexible “model,” which Kennedy called “one of the big cuss words in criminal justice”:

I don’t like saying that there is . . . a [single] model of how a problem-solving initiative should look, that you have to have these things or we’re not going to call you a drug court, we’re not going to call you a mental health diversion court. That gets away from the feeling of innovation that we’ve pioneered over the last 20 years or so.

Murray pointed out that the 10 key components of drug courts⁴ were created “to provide local practice some flexibility They aren’t particularly rigid.”

Alternatives to Court

Taking these ideas in another direction, some wondered if statewide coordination risks promoting the problem-solving concept to the detriment of other effective—and in some cases, better—solutions. For instance, Nancy Fishman, project director of the Council of State Governments’ Justice Center, noted that a problem-solving court was not always a good fit in every jurisdiction and that therefore statewide coordinators should

4. NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997) *available at* <http://www.ojp.usdoj.gov/BJA/grant/DrugCourts/DefiningDC.pdf>.

not automatically set a goal of opening every type of court in every corner of a state:

I think that there is a real risk of holding out one discrete model that people latch on to but that may or may not be the most appropriate response. A mental health court may not be the best solution in every jurisdiction A community may not have adequate mental health resources. They may not have the range of services that make something like this viable You really have to understand how people are flowing through the judicial system to see whether having a court is the right solution for that particular jurisdiction.

A number of others echoed this thought. Nancy Taylor, lead staff of the Collaborative Justice Project in the California-based Center for Families, Children and the Courts, asked, “do all of these problems still need to come to court?” while Kennedy said:

I don’t know that bringing them into the criminal justice system is the best problem-solving approach for the mentally ill or for some others who are involved in substance abuse, but that seems to be the thing that’s happening. If there is statewide coordination, then I think part of it has to include asking whether everything has to be solved in court Is the solution always getting the offender in front of the judge rather than, for instance, having a police officer remove them to a mental health services provider outside of the justice system?

Lee Suskin, president of the Conference of State Court Administrators and court administrator for the Supreme Court of Vermont, thought the person ideally suited to find the best solution for different types of offenders was a statewide coordinator familiar with all the various problem-solving responses: “I think having the same person coordinating the drug courts and mental health courts and the community response makes sense because really what we’re talking about is, what is the appropriate response of the criminal justice system, of the community, to an individual who is exhibiting anti-social behavior?”

Judge John Surbeck, chairman of the Indiana Problem-Solving Courts Committee, said that an important function of a statewide coordinator was to determine which populations were most appropriate for problem-solving courts. “Are problem-solving courts going to take in populations that are inappropriate, that we don’t need the court for? We need to define who should be there and who shouldn’t be there. That’s just

another one of the reasons why we need statewide coordination,” Surbeck said.

Judge Jamey Hueston, chairwoman of the Maryland Problem-Solving Courts Commission, said the court system almost always had a role to play, but sometimes only as a wielder of “moral authority”:

I would like to see most criminal and civil justice problems addressed in a problem-solving approach. That does not mean it has to come in front of a court. But it does mean that with the moral authority of the court we are able to rally the resources and get the people at the table and perhaps even get the funding that you might not be able to get otherwise.

Berman noted that statewide coordination can be an exercise involving courts; or it can be an effort to promote something larger—specifically the overarching principles of problem-solving:⁵

Are we talking about the statewide coordination of problem-solving *courts* or problem-solving *principles*? In my experience it’s easier if we define it as courts because you can show people drug courts and mental health courts and get them jazzed. Replication is an easy goal to articulate. But if we’re talking about spreading ideas, such as collaboration, using social science research in a new way, taking a different approach to justice, then I think that leads us down a different path. It broadens the playing field enormously.

Murray said he and other early proponents of drug courts had hoped drug courts would quickly disappear once the larger criminal justice system became convinced of their efficacy. “I naively thought that if drug courts disappeared after four or five years that would be a victory because we would have convinced everyone of the value of these principles, and we wouldn’t need a dedicated forum.”

Dawn Rubio, principal court management consultant at the National Center for State Courts, noted that some stakeholders in the court system are suspicious of all problem-solving courts, feeling that they divert resources from the many to the few:

I worry about the shift of resources away from traditional adjudication models. There is still that tension that problem-solving

5. For a discussion of the principles of problem-solving justice, see ROBERT V. WOLF, CTR. FOR CT. INNOVATION, *PRINCIPLES OF PROBLEM-SOLVING JUSTICE* (2007) available at http://www.courtinnovation.org/_uploads/documents/Principles.pdf.

courts focus on a few rather than the many. We're spending a lot more money on these 20 folks or these 50 folks or these 100 folks and we have a system that processes 30,000 people a month. So I think from a monetary perspective it's frightening, and from an institutional perspective there is a concern as well.

Karen Freeman-Wilson, the former executive director of the National Association of Drug Court Professionals, countered that there doesn't have to be a tension. She explained:

I think that there are many aspects of the problem-solving court model that we can apply in traditional courts. And I think that there are ways that we can create a problem-solving court system that does not necessarily shift resources from traditional court. I think the ultimate idea is to shift the resources from the departments of correction and other places where that money could be put to better use.

Fishman said that many outside problem-solving courts might be uncomfortable with the idea of integrating problem-solving principles into the larger justice system: "If you say, 'actually now that we're done with this distinct model, we want to change the way the whole system works to reflect these principles,' that's much more frightening to people invested in the status quo."

Becker said that although it was a goal of problem-solving practitioners to integrate problem-solving principles into the mainstream justice system, it's unrealistic to think this can happen quickly:

I was one of those who pushed real hard in the [Conference of Chief Judges/Conference of State Court Administrators] resolution to put in that we should be trying to get the broad institutionalization of these principles or practices in courts generally within the next decade.⁶ Eight years later I think it would have been preferable to say over the next 40 years. I think that we had a naiveté about being able to apply these principles in a broad setting without specialty courts. I've come to believe that this will happen by attrition, that judges will retire and they'll be replaced with other judges who are much more receptive to this It

6. In 2000, the Conference of Chief Justices and the Conference of State Court Administrators adopted a resolution that called, in part, on both organizations to "encourage, where appropriate, the broad integration over the next decade of the principles and methods employed in the problem-solving courts into the administration of justice to improve court processes and outcomes while preserving the rule of law, enhancing judicial effectiveness, and meeting the needs and expectations of litigants, victims and the community." The full resolution is available at <http://cosca.ncsc.dni.us/Resolutions/CourtAdmin/Problem-SolvingCourtPrinciplesMethods.pdf>.

will take time, but I believe that 30 or 40 years from now it will be a way of doing business.

A possible obstacle to integrating problem-solving principles into the mainstream justice system is if problem-solving courts continue to grow in separate silos. Berman said it was important to avoid a “dystopian” future in which “all these things continue to proceed in silos and perhaps even compete with each other for scarce resources.”

Taylor said California is exploring ways to avoid that outcome. For one thing, the state court system is encouraging local courts to develop “ways to bring together the different types of collaborative courts.”⁷ For instance, Orange County and San Francisco are using their new community courts “to pull together several types of collaborative courts and then house them together to fit a particular community,” Taylor said.

In the Shadow of Drug Courts

A major concern that was raised frequently was the notion that drug courts—in large part because they outnumber other types of problem-solving courts—may have undue influence over statewide coordination efforts. “What about mental health courts, what about community courts, do they stand a chance in the shadow of drug courts who got there first and who have such numeric superiority?” Murray asked.

Among the concerns expressed by participants was that statewide coordinators might divert dollars from other problem-solving courts to drug courts, or that they might apply drug court principles to other problem-solving models, where they’re not always a good fit.

“Everything for the mental health courts has been: Let’s take the drug court guidelines, change a few words around and we have mental health court guidelines,” Fishman said, noting that such an attitude is a serious mistake: “The needs, the resources are different, the framing of the courts and what they do and the people going through them are different.”

Some worry that practitioners with a bias toward drug courts are now leading the charge toward statewide coordina-

7. Practitioners in California commonly refer to problem-solving courts as “collaborative courts” or “collaborative justice courts.”

tion. “You have a drug court coordinator who’s then put in charge of mental health courts too, and then they become the problem-solving court coordinator,” Fishman said.

But not everyone had a problem with that scenario. For instance, Suskin noted: “In Vermont, the drug court coordinator is now the treatment court coordinator. She coordinates not only the adult drug courts but the family treatment courts, the juvenile delinquency drug court, the mental health court and the domestic violence court. It works.”

Becker pointed out that even at meetings dedicated to discussing problem-solving courts—including the current round-table conversation—

We fall back on talking about drug courts. I would like to come to one of these meetings where you weren’t allowed to talk about drug courts. You have to talk about principles and methods and get beyond drug courts. We’ve got a lot of experience with drug courts. I think it’s time to put the same rigor in this discussion that we’ve had for years with drug courts into other settings.

One way to address this issue is to establish how problem-solving models differ and “the extent to which all problem-solving courts are alike,” Fishman said.

Taylor said she found it helpful to think of problem-solving courts as falling into at least two distinct categories: “treatment courts where there is treatment involved and service courts, like homeless courts and to some degree community courts, where there may be other things going on that are not necessarily treatment.” One way to build bridges and avoid misunderstandings among different types of problem-solving courts is to have “a diverse group of practitioners at the table,” Taylor said.

Kluger said that in order to maintain key distinctions among the justice system’s responses to diverse issues, like drug abuse, mental illness and domestic violence, you need to maintain “a bright line between certain kinds of courts. [In New York] we make it very clear that domestic violence courts are not rehabilitative like drug court and mental health court. We train the people differently and we plan differently.”

Daniel Eismann, chief justice of the Idaho Supreme Court, said there were no conflicts among problem-solving courts in Idaho, and that drug courts didn’t exert undue influence over planning:

Once the legislature appropriates the money, it goes to the statewide coordinating committee. And the court will recommend how we divide it up among the various problem-solving courts based on how many slots or how many people you can have at one time in each of the courts. We haven't had any conflicts.

Responsibilities of Statewide Coordination

A significant portion of the conversation was devoted to outlining the responsibilities and advantages of statewide coordination of problem-solving courts. The most frequently mentioned responsibilities were:

Evaluation

At the outset of the conversation, A. Elizabeth Griffith, the Bureau of Justice Assistance's deputy director for planning, who attended as an observer, encouraged participants to think about how states can help build infrastructure so that programs collect relevant and accurate data. A number of participants felt that evaluation and research at a statewide level was going to produce better results and have a more meaningful impact on policy.

Marlowe pointed out that a statewide platform allows the results of research to be directed effectively toward an influential audience—in particular, state legislatures:

What I have found most recently, as I've spent a lot of the last six months speaking to state legislators about evidence-based practice and problem-solving courts, is that they're listening. If these were little programs in isolated communities, I wouldn't be before legislative commissions talking about this Coordination and institutionalization are critical because you can't ask an individual program to do good quality research. You just can't. They don't know what to do They'll give you 100 poor-quality evaluations that tell you nothing. It's better to have two or three good quality evaluations than a 100 poor ones.

Echoing this idea, Suskin said having “that single [statewide] coordinator bring in people like Doug Marlowe to train our judges on the principles and what works and what doesn't work has been extremely important.” Added Becker, “[statewide] coordinators should be conduits to educate local courts about research.”

Hueston said a statewide coordinator can help ensure that evaluations are “systemic” and “consistent.” Rubio said:

“[Having a statewide entity] set up the parameters for evaluations is very, very helpful It takes the burden off the local programs to hire experts or become evaluation experts themselves, and also can put the pool of all participants—whether it be mental health court or drug court or community court—into a larger pool for evaluation purposes.

Marlowe agreed:

The evaluations are getting better All the state coordinators as a group have learned from the research literature what needs to be done. Like this whole creaming and net-widening thing; the research suggested that drug courts move away from that. They are now picking a much higher risk population because their research says that is the population you want to be picking I love going before state senate and house committees when the department of correction is up right before me and other departments are up and we get to speak, because our data are light years ahead of those of other agencies Their budgets are huge and they have terrible data.

Resources

Resources were another key issue. How are problem-solving courts coping with declining federal dollars? A number of the participants pointed out that statewide coordinators had a better chance to find new revenue streams than individual problem-solving courts on their own.

Kennedy said, “for us, coordination really is more along the lines of support. It’s being able to say that here is an idea, [and here are] resources to help you develop that idea.”

A statewide approach to funding ensures, among other things, that individual problem-solving courts don’t fight over money, Hueston said.

In Utah, they’ve developed a way, via statute and statewide coordination, to avoid internal competition for funds, Becker said:

The statute says that for every dollar that is appropriated for this purpose, 87 percent of it goes to the Department of Human Services to award grants to support these programs, and 13 percent goes to court operations. And there is a tripartite committee—myself, the director of human services, and the director of corrections—and we hand out the money. The structure helps eliminate competition within the court system.

Suskin said Vermont does something similar: “Our state treatment court money goes to the human services agency. And we sit down with them and, through a memorandum of

understanding, they transfer the money we need for coordination, but most of the money for these courts is for treatment.”

Taylor said California also does something similar:

We fund mental health courts and drug courts through separate streams, which helps keep down the competition, but there are certain types of courts that don't fit that model—the homeless courts and peer courts—where I have seen more struggles in terms of getting the funding that matches what they are doing.

Eismann pointed out that statewide coordination of resources can result in cost savings. For instance, “if we can get some sort of entity that will take all the statewide drug testing and get it at a cheaper rate for the smaller areas than they are currently getting it, there is a cost saving there.”

Among the strategies mentioned for obtaining funds were:

- Persistence: “Three-and-a-half years ago, we wanted to fund the creation of crime task forces for law enforcement, but other priorities took precedence. Still, we thought it was a good idea and never gave up. Finally, after four years, we're seeing it funded.” (Domingo Herraiz)
- Documenting cost savings: “I have a great coordinator who has put together, at the request of the Senate Appropriations Committee, exactly how much money we're spending on prosecution time, defense time, judge time, coordinator time, community treatment time We've been able to show, based on that, some court cost savings.” (Lee Suskin)
- Performing effective evaluations: “We realized that we wouldn't get any funding unless we proved our worth. So we established from the beginning a very comprehensive evaluation system. We have been evaluated up, under, over, in between—any preposition you want, and I'm very proud now that it sets the standard for almost any new innovation in Maryland.” (Jamey Hueston)

Becker said that “statewide coordination is very important in that it brings together resources from other state agencies so that the courts can function. And so, for example, from the Department of Corrections, we have probation officers who can supervise people in either mental health court or drug court.”

Roundtable participants also discussed the idea of using the leverage of statewide coordinators to advocate for related change in other fields. Fishman asked if statewide coordinators

were making “sure that there are enough treatment beds, treatment slots. . . in order to make these courts functional.”

Eismann concurred that this was an important question. “We can’t expand the mental health courts unless there is the treatment at the local level If the local resources aren’t there, we won’t start a mental health court in that area,” Eismann said.

Murray pointed out that many governments are strained financially; when that’s the case, programs that benefit “problematic populations” are most likely to suffer. “We work with populations that are not popular or are not attractive,” Murray said.

But money isn’t the only thing programs need to survive, Herraiz pointed out. “I’m also one who believes strongly that even though there appears to be limited resources, when you take money off the table, it’s the good idea and the people who have passion for the work that really can make a difference,” Herraiz said.

Dissemination of Information

A number of participants felt a key role for statewide coordinators was providing training and disseminating information about best practices.

Judge Eileen Olds, president of the American Judges Association, said that statewide coordination will become even more crucial as the first generation of problem-solving judges moves on: “There are going to be more judges who need that kind of guidance.”

Kluger offered an example of how her office was keeping domestic violence courts up to date on new research:

We learned from a study that batterer intervention programs did not impact recidivism, so we disseminated that information to all our domestic violence courts. Now our domestic violence courts in New York are handling those cases in a different way by saying, “Yes, we are going to use batterers programs but they are going to be a monitoring tool.” The courts now have an understanding that the batterers programs don’t prevent recidivism—and that education happened because we have statewide oversight.

Eismann said it was far more practical to coordinate training at the statewide rather than the local level:

We have an annual training institute for everyone involved in drug courts and mental health courts. We bring in national experts You can do that at the statewide level; it would be very difficult to have dozens of different little training sessions at the local level with national presenters.

Setting Standards

Participants said they expected statewide coordinators to set standards.

“We need guidelines so that not just anybody hangs up a shingle and says that they are a problem-solving court,” Hueston said.

Added Taylor: “I think quality assurance issues are an appropriate role for statewide coordination.”

Valerie Raine, director of drug court programs at the Center for Court Innovation, noted that policy and procedure manuals for conventional courts “weren’t written for courts that have huge clinical interventions, referrals to services, supervision of participants.” She argued that statewide coordinators should create manuals outlining best practices for problem-solving courts.

Caroline Cooper, associate director of justice programs at American University, said that in doing so statewide coordinators can play a key role in ensuring that participants’ rights are protected.

Raine put it bluntly: “Until we have appellate review of these courts, which we don’t have a lot of yet, then the court system has some responsibility to provide oversight or guidance or a quality check to make sure that these courts are not off somewhere crazy.”

Kluger said that reporting requirements, including “periodic meetings—either by video conference or in person,” allow her staff to identify problems. For example, “in our integrated domestic violence courts, if we see a county that hasn’t taken any cases in the last term, the technical assistance team from my office will go back to the jurisdiction and say ‘What is happening here? Why is this happening?’ ”

Influencing Criminal Justice Policy

Statewide coordinators have an important advantage over local practitioners in that they can see the big picture, some par-

ticipants said. This vantage point allows them, among other things, to direct resources and encourage the development of new programming where it's most needed.

"Another point I just want to make about the benefits of coordination," Kluger said, "is that it's also about pinpointing places where nothing is happening and saying 'it makes sense that we start a process here for creating a drug court or domestic violence court or mental health court.'"

Becker credited problem-solving courts—specifically drug courts—with fueling a shift in the orientation of the entire Utah criminal justice system:

The focus that drug courts have put on treatment gave rise to a lot of interest on the part of the larger criminal justice community in Utah All of the criminal justice agencies got together and worked for several years on crafting legislation that's called the Drug Offender Reform Act, which provides for screening and assessment for every single person charged with a felony where there's a drug offense involved. And it fast tracks treatment. The legislature last year stepped forward and funded about half of the cost of implementation; they'll fund the other half next year hopefully, which is about \$16 million. In Utah, that's a lot of money. And that's a complete shift in public policy I suspect you could trace that back to the roots of drug courts putting the emphasis on treatment.

Taylor said:

California has a similar story. We have had voluntarily redirection of funding from corrections to drug courts and also from the child welfare system to dependency drug courts. . . State coordination allowed the linking together of those systems. We have the data to support the efficacy of it and we were able to talk to the leadership of the other branches to say, "Look, if we're having trouble meeting the national expectations of Title IV-E in child welfare, look at the results we're getting with the dependency records. Maybe that is a good place to put some dollars."

Hueston said that positive evaluations have generated bipartisan support, allowing her statewide problem-solving committee to influence public policy: "We've been able to garner such respect because of our evaluation program They don't always give me everything I want, but we have bipartisan support and that's because of the state collaborative oversight that gives legitimacy from the top down."

Hueston and Kluger both spoke of the need to use their statewide positions to help get sufficient funding for agencies that the courts collaborate with. Hueston said some agencies

are “collapsing under the weight” of problem-solving courts’ success. “They are not able to help us with maintaining current programs, much less expanding them.”

Added Kluger: “We’re seeing some local stakeholders feeling the dollars crunch and we have to try to go to the funding sources and say, ‘This is important not just in this little county but statewide.’”

Cooper noted that a statewide perspective allows observers to answer big-picture questions about resource utilization and devise strategies to ensure that problem-solving courts reach the largest population possible.

While there seemed to be a general agreement about the potential benefits of statewide coordination, it was not clear that statewide coordination was a practical option in every state. While Kluger, for instance, has a 12-person staff to help her coordinate problem-solving courts in New York, other states lack the resources, political will, or bureaucratic structure to carry out such far-reaching coordination. Edward W. Madeira, chairman of the Pennsylvania Commission for Justice Initiatives, pointed out that coordination is a county-by-county proposition:

To me, going ahead in Pennsylvania is one of the most challenging exercises in civics I’ve ever had. You have to bring three branches of government to work and play together at a state level in a way they have never worked and played before. And then you have to get into 60 different counties This is not for the faint-of-heart.

Conclusion

States are at varied stages of attempting to coordinate problem-solving courts. The day-long discussion among 18 practitioners, researchers, and policymakers underscored the importance of these efforts. While everyone seemed to agree that coordination had advantages—in terms of mustering resources, setting standards, coordinating with other justice agencies, and sponsoring and disseminating research—not everyone agreed on what form coordination should take, how it should be achieved, or what its ultimate goal should be.

Should statewide coordination concern itself with encouraging replication of problem-solving courts or should it focus

more on principles beyond specialized courtrooms? How much emphasis should statewide coordination place on promoting particular models or breaking down boundaries among types of problem-solving courts? How can statewide coordinators encourage local innovation while also creating a supportive statewide infrastructure (rules, regulations, policies and procedures)?

Individual problem-solving courts are complex, involving new partnerships, new roles, and new players both in and outside the courthouse. Given that each problem-solving court is typically shaped by local circumstance, the challenge of supporting and overseeing problem-solving courts on a statewide level is daunting. This is, by and large, uncharted territory: no single state can claim a successful roadmap for others to follow. The stakes are significant: the success or failure of statewide administration will go a long way toward determining whether problem-solving courts fulfill their potential.

Following the roundtable, the Bureau of Justice Assistance created a listserv for statewide coordinators. (To find out more about the listserv, contact the Center for Court Innovation at expertassistance@courttinnovation.org). The listserv supports the continued exploration of issues around statewide coordination by encouraging participants to pose questions, share experiences, and brainstorm new strategies. One byproduct of these communications is expected to be a report that will outline the central goals of statewide coordination. The goals of the report and the ongoing dialogue among statewide coordinators are to promote the development of best practices and new resources to help statewide coordinators address challenges as they arise.

Book Review

PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION

Tara Herivel and Paul Wright, eds.

The New Press 2007

344 pp.

*Reviewed by Melissa Chan**

Child abuse and neglect. Substandard medical care. Inadequate food rations. One might expect to find such appalling standards of living in a Dickens novel. However, legislators currently condone such mistreatment of prisoners in the United States. In their latest work, *Prison Profiteers: Who Makes Money from Mass Incarceration*, editors Tara Herivel and Paul Wright bring to light the all too real human injustices that have become the norm as a result of the institution of privatized prisons.¹ This anthology of articles exposes those who profit from private prisons and identifies not only the prisoners, but also the public at large as the ultimate victims.

The first section of the book, entitled “The Political Economy of Prisons,” explains how private prisons can affect urban voting power and discusses how private prisons are financed. The private prison industry siphons taxpayer dollars and vot-

* Melissa Chan is a 2009 graduate of Pace University School of Law.

1. PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION (Tara Herivel and Paul Wright, eds., 2007).

ing power from crime-ridden inner city areas in dire need of improvement to rural districts where funds may not be as necessary. *Village Voice* staff writer, Jennifer Gonnerman, examines the government's use of taxpayer dollars in her article *Million Dollar Blocks: The Neighborhood Costs of America's Prison Boom*.² However, her article begs the question: if most of the prisoners come from the poorest inner city areas, then, why is spending diverted from those areas to the rural prison towns where the prisoners are housed? Gonnerman's use of a color-coded map quite graphically illustrates that most prisoners come from only "a handful of urban neighborhoods."³ Gonnerman suggests that legislators should instead partake in "justice reinvestment," which is the use of taxpayer dollars to improve poor urban areas in order to prevent them from becoming "crime-production neighborhoods."⁴ This section also includes the article *Prisons, Politics, and the Census*, in which prisoner Gary Hunter and executive director of the Prison Policy Institute, Peter Wagner, find that many rural prison districts include disenfranchised prisoners from other districts when reporting populations to the census.⁵ Reporting a greater voting population to the census unfairly gives those who can actually vote a stronger voice.⁶ Hunter and Wagner effectively emphasize the gravity of this population inflation when they liken it to the Three-Fifths Clause of the U.S. Constitution, "which allowed the South to obtain enhanced representation in Congress by counting disenfranchised slaves as three-fifths of a person for purposes of congressional apportionment."⁷ Gonnerman, Hunter, and Wagner's respective articles demonstrate the vicious cycle that occurs when taxpayer dollars and voting power shift from the inner city origins of most prisoners to rural prison towns.

The authors in this section also expose the unsettling way in which private prisons are financed. In his article *Doing Bor-*

2. See Jennifer Gonnerman, *Million Dollar Blocks: The Neighborhood Costs of America's Prison Boom*, in *PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION* 27 (Tara Herivel and Paul Wright, eds., 2007).

3. *Id.* at 27-28.

4. *Id.* at 33.

5. See Gary Hunter & Peter Wagner, *Prisons, Politics, and the Census*, in *PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION* 80 (Tara Herivel and Paul Wright, eds., 2007).

6. *Id.* at 82.

7. See *id.* at 85.

rowed Time: The High Cost of Backdoor Prison Finance, Justice Strategies policy analyst, Kevin Pranis, exposes state officials' underhanded use of backdoor prison financing schemes.⁸ Before the 1980s, state officials generally financed prisons through the sale of general obligation bonds, which are "backed by the 'full faith and credit'" of the state.⁹ These bonds usually required taxpayer approval.¹⁰ Private prison financing became a problem when the public became less supportive of prison expansion in the mid-1980s.¹¹ State officials then began to issue revenue bonds, which do not require public approval because they are "backed only by assets and income streams specified in the issuing documents" and "not . . . by the full faith and credit of the government."¹² Pranis concisely articulates the adverse consequences of financing private prisons via the sale of revenue bonds. First, state officials tend to overbuild "in order to secure financing."¹³ Once the prisons are built, state officials must justify the lease payments to voters by keeping the prison beds filled.¹⁴ Moreover, in her article *Making the 'Bad Guy' Pay: Growing Use of Cost Shifting as an Economic Sanction*, Kirsten D. Levingston, director of Public Initiatives and the Living Constitution Project, points out that many prisoners now must pay for their own incarceration.¹⁵ Many private prisons currently charge their prisoners fees in order to defray costs and to "keep the system in the black."¹⁶ Levingston contends that these prison fees are "unrelated to achieving the criminal system's putative goals of punishment, deterrence, incapacitation, and rehabilitation."¹⁷ Proponents of charging inmates fees argue that this policy merely relieves taxpayers of the financial burden of incarceration by putting it on "the 'bad guys' who use

8. See Kevin Pranis, *Doing Borrowed Time: The High Cost of Backdoor Prison Finance*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 36 (Tara Herivel and Paul Wright, eds., 2007).

9. *Id.* at 36-37.

10. *Id.* at 37.

11. *Id.* at 36.

12. *Id.* at 37.

13. *Id.* at 41.

14. *Id.* at 50.

15. See Kirsten D. Levingston, *Making the "Bad Guy" Pay: Growing Use of Cost Shifting as Economic Sanction*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 52 (Tara Herivel and Paul Wright, eds., 2007).

16. *Id.* at 53.

17. *Id.* at 62.

the [criminal justice] system.”¹⁸ However, Levingston stresses that there is a fine line between “taxpayer” and “bad guy.”¹⁹ Levingston elucidates her rebuttal when she tells the story of Ora Lee Hurley, a female prisoner who owes a \$705 fine.²⁰

Hurley is a prisoner held at the Gateway Diversion Center in Atlanta because she owes a \$705 fine. As part of the diversion program, Hurley was permitted to work during the day and return to the Center at night. Five days a week she works fulltime at a restaurant, earning \$6.50 an hour and, *after taxes*, nets about \$700 a month. Room and board at the diversion center is \$600, her monthly transportation costs \$52, and miscellaneous other expenses eat up what’s left.²¹

Hurley is being held in prison merely because she cannot pay her fine.²² Her story exemplifies how easily prisoners may fall into a “vicious financial cycle.”²³ Furthermore, upon release, former convicts have even more difficulty obtaining employment and earning the funds to repay cost-recovery sanctions because they are “poor and undereducated.”²⁴ The policy of “making the ‘bad guy’ pay” keeps the poor in prison and “those who profit from full jails” rich men.²⁵

“The Private Prison Industry,” the second section of the anthology, sheds light upon private prison officials’ political agendas and their manifestations in the treatment of prisoners. *New York Times* reporter Ian Urbina delves into the United States military’s dependence on prisoner-produced supplies in his article *Prison Labor Fuels American War Machine*.²⁶ Urbina exposes Federal Prison Industries, a “quasi-public” corporation that employs about 21,000 prisoners to manufacture military weapons and clothing, among other products.²⁷ Federal Prison Industries was incorporated through federal legislation during the Great Depression.²⁸ Thus, minimum wage requirements do not

18. *Id.* at 55.

19. *See id.*

20. *See id.*

21. *Id.* at 55-56.

22. *Id.* at 56.

23. *Id.* at 72.

24. *Id.* at 73.

25. *See id.* at 55.

26. *See* Ian Urbina, *Prison Labor Fuels American War Machine*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 109 (Tara Herivel and Paul Wright, eds., 2007).

27. *Id.* at 110.

28. *Id.* at 110, 113.

apply to Federal Prison Industries; prisoner-employees may be paid as low as 23 cents an hour.²⁹ As one might imagine, the company's aim is to keep its prisoner-employees "as busy as possible."³⁰ The legislation that created the corporation also requires federal agencies to patronize it, even if other corporations offer a lower price for their products.³¹ Critics of Federal Prison Industries argue that this legislation gives the company an unfair advantage over its competitors.³² Urbina raises other valid criticisms of Federal Prison Industries, including its adverse affect on prisoner-employees themselves.³³ Urbina argues that if companies like Federal Prison Industries can exploit prisoner-employees, then they have "less incentive to invest in more expensive ways to fill the time, such as counseling, drug treatment, and literacy programs. . ."³⁴ Proponents of such companies argue that employing prisoners teaches them marketable skills.³⁵ However, because the prisoners only produce the type of supplies that would normally be manufactured in factories abroad, the menial skills the prisoners acquire in prison are not marketable once they are released.³⁶ Furthermore, the for-profit company has contended that keeping dangerous inmates busy keeps them out of trouble.³⁷ However, Urbina suggests that having high-risk prisoners produce military supplies poses a real danger to national security.³⁸

Journalist Samantha M. Shapiro questions whether faith-based prison programs effectively rehabilitate their prisoners in her article *Jails for Jesus*.³⁹ Shapiro finds that faith-based prison programs do not lower recidivism rates or "cure[]" prisoners who need professional help, as they purport to do.⁴⁰ Rather, they aim to "bring[] . . . more people to Christ and shrink[] . . .

29. *Id.* at 110-11.

30. *Id.* at 110.

31. *Id.* at 113.

32. *Id.*

33. *See id.* at 115.

34. *Id.*

35. *Id.*

36. *Id.* at 116.

37. *See id.* at 110, 117.

38. *Id.* at 116-17.

39. *See* Samantha M. Shapiro, *Jails for Jesus*, in *PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION*, 128, 128-129 (Tara Herival and Paul Wright, eds., 2007).

40. *Id.* at 131, 136.

government.”⁴¹ Shapiro personalizes her arguments by describing her visit to the InnerChange Freedom Initiative program at Ellsworth prison in Kansas. While there, Shapiro notices that InnerChange inmates are allowed many freedoms and amenities that other inmates are not.⁴² These include access to musical instruments, drug programs, education, and less supervision.⁴³ Shapiro suggests that because they are provided with better amenities and privileges, many prisoners apply to the InnerChange wing in order to escape the more stringent parts of the Kansas prison system.⁴⁴ Shapiro effectively contrasts the treatment of InnerChange prisoners and that of non-Christian prisoners in the general prison population.⁴⁵ InnerChange prisoners are provided with Christmas dinner with their families; Muslim prisoners, however, would have to pay for a Ramadan feast.⁴⁶ Furthermore, non-Christian prisoners must seek permission before praying in groups, while InnerChange prisoners are encouraged to pray together throughout the day.⁴⁷ Even InnerChange’s substance abuse program is unconventional in that addiction is viewed as “a sin that can be permanently ‘cured’ through Jesus.”⁴⁸ Shapiro’s most shocking and disturbing encounter with InnerChange was the faith-based sex offender program, or what one InnerChange inmate described as “‘a little like AA for homosexuals.’”⁴⁹ During his interview with Shapiro, the leader of the group admitted that he didn’t know how to handle someone who had committed a sex crime; his only weapon against the offenders’ problems was prayer.⁵⁰

The third and final section of *Prison Profiteers*, called “Making Out Like Bandits,” highlights the child abuse and neglect that takes place in private juvenile detention centers, the mistreatment of ill prisoners, and the various companies who capitalize from mass incarceration by shamelessly peddling their

41. *Id.*

42. *See id.* at 132-35.

43. *Id.* at 132.

44. *See id.* at 139-40.

45. *See id.* at 133-34.

46. *Id.*

47. *Id.* at 134.

48. *Id.* at 136.

49. *Id.*

50. *Id.* at 137.

wares. In her article *Behind Closed Doors: Privatized Prisons for Youth*, Tara Herivel explains why the privatized juvenile detention industry is thriving despite declining youth crime rates.⁵¹ The public defense attorney and co-editor of *Prison Profiteers* exposes the industry's manipulation of society's fear of "super-predators" during the last thirty years.⁵² At the end of the 20th century, American society's general characterization of problem children shifted from victims of circumstance who are "malleable . . . and capable of being rehabilitated" to unstoppable marauders who are beyond help.⁵³ State legislators and prosecutors successfully clamored for legislation that would enable the government to punish superpredator children as adults; private corporations built oversized juvenile facilities in anticipation.⁵⁴ The number of juvenile detainees increased by 95 percent during the 1990s.⁵⁵ The children held in juvenile detention centers often come from lower class families, are physically or psychologically disabled, and were victims of abuse.⁵⁶ They require attention that cost-cutting private companies are financially reluctant to provide.⁵⁷ The children are deprived of medical treatment and counseling.⁵⁸ The private detention's parsimony affects the children in other ways as well. The prison staff is poorly trained and poorly paid.⁵⁹ As a result, children are beaten and sexually abused.⁶⁰ Herivel paints a horrifying picture of the private juvenile detention system and thus gives a strong voice to the children detainees who cannot speak for themselves.

GQ magazine writer Wil S. Hylton reports on the atrocious medical treatment provided in the privatized prison system in his article *Sick on the Inside: Correctional HMOs and the Coming*

51. See Tara Herivel, *Behind Closed Doors: Privatized Prisons for Youth*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 157 (Tara Herivel and Paul Wright, eds., 2007).

52. *Id.* at 163.

53. *Id.*

54. *Id.* at 164.

55. *Id.*

56. *Id.* at 166.

57. See *id.* at 175.

58. *Id.*

59. *Id.* at 158.

60. *Id.* at 157-58.

Prison Plague.⁶¹ Hylton provides individual accounts of inmates who received inadequate medical treatment from Correctional Medical Services (CMS), the United States' largest and cheapest provider of prison medicine.⁶² He brings these injustices to life with the stories of inmates Daniel Hannah and Larry Frazee. Hannah's story involves CMS's neglect and mistreatment of his hepatitis, the incredible swelling of his midsection, his untimely death, and CMS's ultimate cover-up.⁶³ Frazee, who also suffers from hepatitis, was required to meet an unreasonable checklist before he could receive any treatment.⁶⁴ The infirmary gave him the run-around, though CMS would have the public believe Frazee merely had to meet a "protocol pathway."⁶⁵ However, the infirmary's evasion was intentional.⁶⁶ Hylton suggests that CMS kept its doctors from treating hepatitis because it was too expensive; "[t]he fewer patients they treat, the more money they make."⁶⁷ Hylton exposes other egregious and neglectful CMS practices, including asking a judge to release a seriously ill prisoner so that the prisoner may receive medical treatment on someone else's dime, only to rearrest her once she has received treatment.⁶⁸ Hylton's interview with a former CMS nurse sends chills down the reader's spine when the nurse reveals that medical staff members justify their neglect and mistreatment of prisoners by saying, "[L]ook what they did to this other person."⁶⁹ Hylton indignantly asserts that such attitudes of retribution do not belong in the prison infirmary.⁷⁰

The final section also exposes the phone service providers and taser manufacturers that seek to profit from mass incarceration. In *Mapping the Prison Telephone Industry*, Steven J. Jackson, an Assistant Professor at the School of Information at the Uni-

61. See Wil S. Hylton, *Sick on the Inside: Correctional HMOs and the Coming Prison Plague*, in *PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION* 179 (Tara Herivel and Paul Wright, eds., 2007).

62. *Id.* at 182.

63. *Id.* at 179-180.

64. *Id.* at 186.

65. *Id.*

66. *Id.* at 187.

67. *Id.* at 188.

68. *Id.* at 197-98.

69. See *id.* at 199.

70. *Id.*

iversity of Michigan, suggests that the astronomical phone rates the service providers charge inmates' families ultimately increase prisoner recidivism.⁷¹ Although the price of phone service outside prison walls has generally decreased since the 1980s, competition between phone companies for private prison contracts has actually caused the price of prison phone service to skyrocket.⁷² In order to obtain prison contracts, service providers have agreed to share profits with private prison officials.⁷³ The phone companies then impute the additional kick-back amount onto the prisoners' families.⁷⁴ Jackson makes an interesting connection when he references recidivism studies that suggest that the likelihood of an inmate's return to prison is directly correlated to how much contact she maintains with her family while incarcerated.⁷⁵

Anne-Marie Cusac, an Assistant Professor in the Department of Communication at Roosevelt University and a George Polk Award-winning journalist, questions the safety of tasers.⁷⁶ Manufacturers assure that tasers, which are the "new fad in law enforcement," debilitate perpetrators without seriously injuring them.⁷⁷ However, the manufacturers' promise of safety seems to do more damage than good. Law enforcement officers armed with tasers often use them too readily.⁷⁸ As a result, they have killed at least 100 people (as of 2005) and seriously injured countless more.⁷⁹ Cusac describes instances in which tasers have been used on children, pregnant women, and the elderly, with disastrous results.⁸⁰ She suggests that tasers are used more for "torture and abuse rather than as a substitute for lethal force."⁸¹ Both Jackson and Cusac assert that manufacturers

71. See Steven J. Jackson, *Mapping the Prison Telephone Industry*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 235 (Tara Herivel and Paul Wright, eds., 2007).

72. *Id.* at 236, 238.

73. *Id.* at 238.

74. See *id.* at 239.

75. See *id.* at 241.

76. See Anne-Marie Cusac, *Shocked and Stunned: The Growing Use of Tasers*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 250 (Tara Herivel and Paul Wright, eds., 2007).

77. *Id.* at 250-251.

78. See *id.* at 256.

79. *Id.* at 250.

80. *Id.* at 250, 253.

81. *Id.* at 256.

hawk their products and services and exploit prisoners and their families just to turn out a profit.

Prison Profiteers sheds light upon a problem of which few are aware. Each aspect of the private prison problem is presented by a different author who brings to the table a different perspective. However, the articles share several themes. Many of the authors provide accounts of individual inmates who have suffered abuse at the hand of the private prison industry. These narratives humanize the problem and emphasize to the reader that there is more at stake than exorbitant sums of money. Proponents of private prisons can only ensure that the competition between corporations will result in mass incarceration at the lowest cost. While this capitalist attitude may be useful in the product manufacturing context, it has no place in determining how society treats convicted criminals. Cost-cutting and the “if we build it, they will come” approach to incarceration will harm prisoners and society as a whole.⁸² The authors of the articles in *Prison Profiteers* propose that prisoners be housed by an entity that will invest in their rehabilitation, and not by a stingy private corporation that will risk their rights and their lives for the almighty dollar.

The authors also share a desire for transparency in the prison system. As Wil S. Hylton offered in his article,

[P]risons are designed for keeping secrets, for holding inside not just men but also their lives and the details of those lives. In prison, social isolation is a matter of policy, and inmates are neither expected nor encouraged to have more than a modicum of contact with the outside world.⁸³

Society has an “out of sight, out of mind” mindset when it comes to prisons. We don’t know what happens on the inside, and often we don’t want to know. *Prison Profiteers* forces the reader to acknowledge what happens to our fallen members of society when we send them to private prisons. It is important that the public reads this book so that, at the very least, we become aware of “what is being done on the inside, in our names.”⁸⁴

82. Herivel, *supra* note 52, at 164.

83. Hylton, *supra* note 62, at 180.

84. *Id.* at 203.

LAW LIT

Thane Rosenbaum
The New Press 2007
288 pp.

*Reviewed by Ashlea Palladino**

In his recent book *Law Lit* (2007), Thane Rosenbaum, a law professor, essayist, and award winning novelist¹ addresses lawyers, optimistic law students, and anyone who harbors an obsession with court room thrillers, legal dramas, and the constant desire to see justice served. *Law Lit* uses multiple excerpts from a variety of famous writings regarding the law, including classic novels, recent thrillers, judicial decisions, poetry, and song lyrics, to describe the law from nine unique perspectives. Any reader familiar with the classic works that make up this collection will enjoy revisiting the legendary moments that first wetted society's insatiable appetite for legal fictions. Readers less familiar with these particular selections of literature may be less drawn to this book or at least tempted to skip to the more familiar territory within. But the brilliance of this collection lies in its ability to captivate an unfamiliar reader in each brief excerpt and add a few new books to her "must-read" list rather than lose the reader's interest.

* Ashlea Palladino is a 2009 graduate of Pace University School of Law.

1. Thane Rosenbaum is a law professor, essayist, and award-winning novelist. His other works include *The Myth of Moral Justice* (2004), *The Golems of Gotham* (2002), *Second Hand Smoke* (2000) and *Elijah Visible: Stories* (1999).

Professor Rosenbaum displays his collection in nine distinct parts, each dedicated to the different opinions that both society and literature have developed about the law.² Rosenbaum begins each section of the book with a brief overview highlighting the underlying ideas and theories encompassed in each particular part.

The collection begins with an idealistic view of the law. In Part I: The Law Elevated,³ Rosenbaum gives readers a glimpse of the security and comfort we find in the law when attorneys like Atticus Finch break down the barriers of social convention. In his opinion, the legal system achieves its utmost aspirations in Harper Lee's *To Kill a Mockingbird* when Atticus, the honorable attorney, urges his family to ignore insults and threats to their personal safety and reputation as he continues to represent Tom Robinson. It is an optimistic selection, showcasing true justice and all its glory, ignoring human error and biases, and encouraging readers to place their faith in human-kind.

Part I then takes a drastic turn by showcasing to the reader how devastatingly invasive a trial can be. Rosenbaum highlights the court room scene in Scott Turow's *Presumed Innocent*.⁴ But, he quickly picks the reader back up with the literary breakthrough in Mark Twain's *The Tragedy of Pudd'nhead Wilson*, when a fingerprint in evidence was compared to a new print made against a window and the match explained for the first time in literature as a means to un-cuff an accused man and shackle another, all in that unforgettable line, ". . .make upon the window the fingerprints that will hang you!"⁵

Rosenbaum appeals to the revenge-seeker in us all by beginning Part II with *A Vendetta*, a short story by Guy de Maupassant about a house widow who trains her dog to become a vicious, blood-thirsty killer, ready to pounce from his cage and clench his starved teeth into the neck of the man that murdered the widow's son.⁶ As Rosenbaum writes, "[s]ometimes justice

2. The nine chapters of this book include The Law Elevated; Lawless Law; The Law and Liberty; The Law Made Low; The Law Laborious; The Lawyer as Lout; The Law and the Loophole; Layman's Law; and The Law Longing.

3. LAW LIT, FROM ATTICUS FINCH TO *THE PRACTICE*: A COLLECTION OF GREAT WRITING ABOUT THE LAW 1 (Thane Rosenbaum ed., 2007).

4. *Id.* at 6.

5. *Id.* at 13.

6. *Id.* at 37-41.

is best served, and makes the most moral sense, when the law is not even resorted to.”⁷ This chapter, rightfully labeled “Lawless Law,” continues with such classic revenge stories as *The Count of Monte Cristo* by Alexandre Dumas,⁸ as well as the painfully explicit closing statement in which Jake Brigance recounts the ruthless beating, rape, and attempted murder of a man’s nine-year-old daughter in *A Time to Kill*.⁹

Any great writing about the law is fair game in Rosenbaum’s collection. In Part V: The Law Laborious, readers relive Alice’s wacky trial scene before the King and Queen of Hearts from *Alice’s Adventures in Wonderland* by Lewis Carroll.¹⁰ The excerpt proves to be far more than children’s literature when the trial unfolds to portray a “stupid” jury of various creatures who have to write down their names lest they forget them,¹¹ a King/Judge who constantly misdirects the court,¹² and The Mad Hatter as a witness who does not want to be there, confuses the date of the incident, and overall fails to testify about anything significant.¹³ Attention is drawn to the steady struggle faced out of court as well in Herman Melville’s *Bartleby, the Scrivener*¹⁴ when Bartleby decides he has had enough of this business and astonishes his boss by stating, “I would prefer not to” when tossed another grueling task.¹⁵

In Part VII: The Law and the Loophole, Rosenbaum exposes society’s fickle love affair with legal loopholes through his evaluation of *The Merchant of Venice* by William Shakespeare¹⁶ and *A Few Good Men* by Aaron Sorkin¹⁷. In *The Merchant of Venice*, the judge saves a man’s dim fate by declaring a contract for a pound of the man’s flesh valid and due to his adversary. The judge continues by noting the contract said nothing of the man’s blood, and thus, the adversary’s land and goods would be confiscated by the court if by claiming the

7. *Id.* at 35.

8. *Id.* at 42-44.

9. *Id.* at 45-46.

10. *Id.* at 157-62.

11. *Id.* at 158.

12. *Id.* at 158-62.

13. *Id.*

14. *Id.* at 142-47.

15. *Id.* at 145.

16. *Id.* at 216-21.

17. *Id.* at 222-30.

man's flesh one drop of blood was spilled.¹⁸ The sense of relief felt when a loophole loops in your favor is incomparable. Everyone hopes to witnessing that breakthrough moment after the tension has built, when the witness wipes his perspiring brow, his story weakening until he bellows that crucial "You can't handle the truth" confession. Yet, as enticing as a clever loophole is for an audience, Rosenbaum also highlights how confusing a lawyer's trickery can be during trial in Paul Laurence Dunbar's poem *The Lawyers' Ways*¹⁹:

. . .Why, he painted him all over
 In a hue o' blackest crime,
 An' he smeared his reputation
 With the thickest kind o' grime,
 Tell I found myself a-wond'rin',
 In a misty way and dim,
 How the Lord had come to fashion
 Sich an awful man as him.
 Then the other lawyer started,
 An' with brimmin', tearful eyes,
 Said his client was a martyr
 That was brought to sacrifice.
 An' he give to that same pris'ner
 Every blessed human grace,
 Tell I saw the light o' virtue
 Fairly shinin' from his face. . .²⁰

Rosenbaum's selection shows the understated risk of the endless search for truth that can result from equally persuasive adversaries.

This collection is a wonderful representation of society's love-hate relationship with the law. It is meant to encourage people to place their hope in the beauty of the legal system and to remind want-to-be lawyers as well as practicing attorneys of their full, unbridled potential. If read by a fan of legal dramas and courtroom thrillers, this collection accomplishes every possible goal. It is entertaining and captivating, making a great addition to any nightstand for a quick read now and then. Some excerpts of this collection are pleasant, some intriguing, some emotionally infuriating, while others can be a tad boring, but most obviously this collection was created by a lover of law.

18. *Id.* at 219.

19. *Id.* at 214-15.

20. *Id.*

Each introductory paragraph is craftily worded, teasing the reader with questions the collection poses:

Does truth matter to the legal system? When the law fails, is it complicit in compounding the original injury? Is revenge as moral an impulse as any obedience to the rule of law? Is the legal system capable of reform, or have all attorneys lost their inner Atticus Finch?²¹

As Rosenbaum promises in his introduction, *Law Lit* proves “beyond any reasonable doubt, that no sphere of the human experience is as alluring and lurid, lamentable and lust provoking, as the law.”²²

21. *Id.* at xvi.

22. *Id.*

