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 case[1]

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 principle[4] 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.thesedonaconference.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 Aluminum[7], 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* case[11], 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* case[14] 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.thesedonaconference.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 reintroduce 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%20I%29 Issue%20V%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 Foundation[22] 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 lifecycle. 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 Marcus[29] 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 decisions[30] 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 case[35] 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 framework[36] 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.thesedonaconference.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]