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Cover Page Footnote

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CONFERENCE ON ELECTRONIC DISCOVERY

PANEL FOUR: RULE 37 AND/OR A NEW RULE 34.1: SAFE HARBORS FOR E-DOCUMENT PRESERVATION AND SANCTIONS

MODERATOR

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MR. SCHERFFIUS: Our topic today is preservation, safe harbor, and sanctions. I can introduce the topic. I think I am familiar enough with it to at least do that. But what I am going to do here basically is after just introducing the topic, we'll have brief comments and then we'll move on to discussion.

I don't know how much we will be able to talk about cost-shifting. There are cost-shifting issues here, but our primary topic will be on the preservation, safe harbor, and sanctions associated with e-discovery.

There are really a couple of issues involved—more than a couple. One is preservation once you learn about the possibility of litigation, and then, more from a Rules point of view, are preservation and safe harbor issues once there is litigation.

The Rules of Civil Procedure, as we perceive it, cannot really directly address the issue of what you do before litigation is filed because, given Rules 1, 2, and 3, the Civil Rules start attaching once

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there is an action. But of course under common law and under provisions of numerous statutes, federal and state and otherwise, there are preservation issues that arise before litigation.

What is safe harbor? Well, safe harbor is in a very general way considered to be provisions that will protect a defendant—or a plaintiff for that matter—who has destroyed or lost e-discovery under circumstances where they can show that their conduct was reasonable, in keeping with good business methods, and the like. And so we will be talking about that.

And then sanctions, how they fit in, where the burdens of proof may be, how should one go about that, do we have mini-trials involving this, and the like.

And then I think the overriding question has been—it has come up several times today—do we need a rule? Are there things in place that are already handling this? Through the evolution of case law, the consideration of case law, are we already getting the answers that are sufficient without the necessity of a rule?

There are some very thought-provoking comments put together by the Advisory Committee and its Reporters. Of particular interest are two approaches to this: whether you utilize Rule 34, or whether you go to a new Rule under 26, or do you combine some concept of both?

So that is kind of the framework that we will be working with. I am going to work from the left to the right. Steve Morrison, your thoughts on this, please?

MR. MORRISON: Thank you, Andy.

It's a little bit intimidating sitting here. The judge in the front row is the only one that I know of in the history of the world who has said that a Rule should be sacked.

But in this instance I am an advocate of some Rules changes. I begin with the basic premise that volume is enormous and growing and that, as we heard in the opening panel, volume will be increasingly searched by more and more people with more and more cases as the case law grows. So I think what we do have to do is deal with some kind of practicality on the volume.

What actually incentivizes people to search large volumes for the hog farm instead of the ham sandwich is two things essentially. One is that the search is free; you can buy the hog farm for free with no money. The second one is that you can buy the hog farm and find in there something that could eliminate the case because it ends up being a sanctionable piece or an issue that you get somebody tied up in knots on the discovery.

And so it seems to me there are two things we ought to be thinking about from a practical standpoint in terms of rulemaking. That is, that there should be some rational cost-shifting at an appropriate time. Number two is there ought to be a rational safe harbor for reasonable conduct.

So the question then becomes, what do we do to begin to talk about creating this appropriate marketplace for reasonable conduct? In that context, I would suggest a couple of things.

One, if we begin with the idea—and this is just a hypothetical because it has not been proposed, although I think it is embodied largely in the Texas Rule,[1] which I think is working—one is you begin with the idea that we will search in the active electronic files and the active paper files of a company. That is where a search begins. It is the rational beginning place.

Second, after an appropriate showing of a need to search further into the backup, the metadata, and all of the other stuff, an appropriate showing would be made, then you step down in to that appropriate showing. Once you are in the issue of the appropriate showing, you may be under appropriate circumstances in the area where cost-shifting should take place because you are now talking about heroic measures.

So it is a pretty reasonable kind of approach that I am suggesting; that is, let's begin by searching the active, accessible—however you want to phrase it—data; let's step to a showing of why you need to go further and let's have a rational discussion of that in pretrial conferences and then a ruling; and then within that context would come the proportionality of maybe somebody else should pay for that.

That is, as I understand it, the practicality of the Texas Rule. In talking with Steve Susman, he thinks that Rule is working. He thinks that it is providing a marketplace of reasonableness that we can all begin to focus on.

Now, within that let me move to the question of safe harbors particularly and this issue of preservation.

On the question of preservation, let me just address first the one-day issue; that is, upon suit you give one day. Many, if not most, of the clients that I end up representing are the recipients of the blessing of 4000 or more lawsuits a year. That means that if there was a one-day rule, they would in essence be saving everything. As Greg from Microsoft said, you would never take the trash out. So we need something more practical as it relates to that at the beginning of preservation.

The question again comes down to whether there should be a presumption in all cases that "one size fits all"? There, I suggest that concept should be sacked, that there is not a way for us to come up with a rule that requires preservation in advance of knowing what the lawsuit is about, that it is the lawsuit that really drives the preservation.

As counsel for Microsoft I thought very effectively said, you have your day-to-day operation, you have your past litigation, you have

1. Tex. R. Civ. P. 196.4.

your other legal requirements, and that tells you what to preserve up to the day you are sued. Then, when you are sued, you have a new obligation that arises based on that lawsuit, which is focused hopefully on the ham sandwich most of the time, or it may be focused on the hog, or it may be focused on ten hogs, but it is usually not focused on the hog farm in terms of preserving everything.

So I would suggest those steps as a rational basis. Now, with that rational basis in mind, knowing that we are going to deal with the ordinary course of business searches at the beginning, the question becomes: should you be sanctioned or defaulted or should your CEO be fined for an inadvertent, in due course, in good faith, normal type of pushing-the-button destruction of electronic data?

Because that is happening every day, sometimes automatically, sometimes inadvertently—sometimes in companies with 122,000 employees, or 90,000, or even 10,000, imagine trying to deal with it—there should be some presumption of good faith conduct that prevents the sanction. At the same time, there should be some kind of balancing on how difficult something is before you shift the cost and give up the free discovery.

So all we are saying is let's litigate the substance of the case in almost all cases, as opposed to litigate the discovery conduct of the parties, which we are litigating now in almost all cases. If we could move toward litigating the ham sandwich instead of looking for the error that was made at the hog farm level, which is what we end up doing in the cottage industry of sanctions litigation that we are all engaged in—by the way, all of us in this room make a lot of money doing that; plaintiffs get settlements for it; we get paid a lot of money for that—but ends up not being relevant to the ham sandwich of the core—the center of the bull's-eye if you will—of the actual case.

In that context for safe harbor, I would suggest that it be a series of factors:

- Was the conduct in fact advertent?
- Was the conduct in fact in the ordinary course of business?
- Was the conduct focused on some core element of the case, like a key person if you will?
- Was the conduct that resulted in the destruction rational in the industry—in other words, is it consistent with other conduct in that particular business in terms of what is saved and what is not saved?
- Is there any other statute or reason that that material should have been saved?
- Is there another lawsuit for which that material should have been saved?

If those rational questions are answered in the negative, a sanction should not be allowed and a safe harbor should be there if the material is destroyed.

Now, I leave it to the judge—and I think it would be within the judge's discretion—to say, "Is there some way that you can, with somewhat heroic measures, if this is at the center of the case and it has been destroyed, can you reconstruct it?" And maybe you should pay for it, maybe you shouldn't, depending on the circumstances, in terms of what is there, but we have heard from our technology gurus that more and more will be able to be reconstructed from either residual data or other kinds of approaches. And there may be a circumstance under which, within the safe harbor, without sanction, without default, you say, "Look, I want you to reconstruct that particular body of material." But it is the ham sandwich you are reconstructing, it's not the hog farm you're reconstructing, if it is possible to reconstruct at all.

So that is my suggestion, Andy.

MR. SCHERFFIUS: I know that Tom over the years has written extensively on and spoken on this concept of safe harbors. It has been one of his projects, so to speak, and I'd like you to comment on it a little bit.

MR. ALLMAN: Thanks, Andy.

The focus of my obsession, as you might think of it, with a safe harbor in preservation —

MR. SCHERFFIUS: I didn't call it that.

MR. ALLMAN: But there is a basis for it. It is, frankly, that when you talk to corporate executives in any company, you will find that this is *the* single largest concern they have, because there is a disjunction between the reality of how corporate life is lived and how some of our Rules seem to play out.

For example, a corporate executive with 1000 cases or 4000 cases really has to balance the needs of the litigation against the needs to keep a business operating. So during that period of time at the beginning of a controversy and before there is agreement upon whether or not the parties can agree upon how things are going to be handled, there is a period of time in which the corporate parties have to undertake good faith efforts to preserve information. That really is the standard that I believe applies, a good faith effort.

But there is some talk, and we have heard some of it here today, that would elevate preservation obligations to an absolute standard in such a manner that there is a risk of sanctions if it should turn out later, judging in retrospect, the information was not adequately preserved.

So I have long recommended and favored the idea of a fairly simple statement in the Rules that would indicate that the Rules are not intended to require the immediate cessation of the ordinary, routine

operation of business systems that are not continued in operation in bad faith in order to avoid their obligations under the preservation Rules.

For example—obviously the *Stevenson* case[2] is an example of that recently—if someone deliberately fails to stop a system that would destroy information that they should know would be needed in a case, obviously that is something that the courts well know how to handle under their Rule 37 powers. And you can extend that to all kinds of business systems. Some of the facts that Steve just ticked off would be relevant to that inquiry.

But I would recommend that the focus should be on getting the parties to discuss matters early. We have a well established system growing up of people running in, if they really feel concerned about it, to seek some kind of preservation orders. You could make it a mandatory subject of meet-and-confer. And, of course, where there is a questionable practice going on, you could either work out a deal between the parties or a court could order it. I do not think that that would be in any way interfering with justice.

I have to come back and tell you that it is my impression, talking with many corporate executives from different companies, that they now all understand their preservation obligations. The real test ought to be whether or not in good faith they have attempted to meet those obligations.

MR. SCHERFFIUS: Thank you. A lot of these cases involve these issues. Some of them fall under the safe harbor or sanctions area in the preservation area;[3] some of them are under the management area.[4]

One thing I would like you to address, if you would, Laura, as we go here is whether in fact the case law ought to be given the opportunity to evolve as it is doing. Is it headed in the right direction? Where are some of the weak points? Do we really need a rule to serve as the horse for the cart?

MS. OWENS: I'll tell you at the beginning that I am going to end up saying that we really need a rule, or at least some revisions to the Rules.

I am outside counsel largely to companies, businesses, and for a moment I am going to welcome you to my world, not speaking on behalf of my clients or my law firm, but giving my own opinions based on how I have seen the law in this area evolve:

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2. Stevenson v. Union Pac. R.R. Co., 204 F.R.D. 425 (E.D. Ark. 2001).

3. *See, e.g.*, Keir v. UnumProvident Corp., No. 02 Civ. 8781, 2003 WL 21997747, at *1 (S.D.N.Y. Aug. 22, 2003); Danis v. USN Communications, Inc., 53 Fed. R. Serv. 3d 828 (West) (N.D. Ill. 2000); GTFM, Inc. v. Wal-Mart Stores, Inc., 49 Fed. R. Serv. 3d 219 (West) (S.D.N.Y. 2000).

4. *See, e.g.*, Pub. Citizen v. Carlin, 184 F.3d 900 (D.C. Cir. 1999); Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D. Mass. 1976); Renda Marine, Inc. v. United States, 58 Fed. Cl. 57 (2003).

> "So, Ms. General Counsel, thank you for inviting me to meet with you today. It's a pleasure to have the opportunity to represent your company in this litigation. But before we talk about the defense theories in the litigation, let's talk about your preservation obligations and let's talk about a litigation budget before we get too far along. As you suspend your document retention policy, we need to think also about your electronic evidence. You may need to consider suspending recycling of backup tapes as part of this litigation. Given the time that we anticipate will be involved in the litigation, you are probably going to be shelving 2000 to 3000 backup tapes, based on my discussions with your IT personnel. And given the cost of those, I think you probably need to budget about $200,000 for just the cost of those backup tapes. You also are going to need to budget for some retrieval and production costs of evidence potentially off of those tapes, and borrowing from *Zubulake III*,[5] let's estimate $200,000 to $300,000 for that particular cost. Now, the value of your case as we see it is roughly $250,000 to $500,000. So you've got a case with a value of about half a million dollars and I need you to budget about half a million dollars for the electronic evidence portion of retention and retrieval purely related to disaster recovery systems."

What happens next? My client gets a new lawyer. They keep me but reject my advice. Settlement discussions ensue immediately. At a minimum, some very tough questions begin to be asked, and they are tough questions for outside counsel and in-house counsel to answer.

If you've been around me in the last year or so, you may have heard that this summer I killed a copperhead in my driveway, and I did it by running over it with a Volvo S70 eight times, probably an excessive use of force on my part.

I know that as the Committee looks at the Rules you are looking at exercising some restraint and not being too excessive in making changes to it. But the Volvo and the copperhead also raise the point of leverage. And certainly once I was behind the wheel of the Volvo, the forces were definitely in my favor.

In the same way, unrestricted and undefined preservation obligations can function as a really excessive force that has the potential to drive litigation purely based on cost issues, as opposed to the merits of the litigation.

That being said, I am in favor of a safe harbor. I am not in favor of a safe harbor—you raised the point about what is happening in the case law—because I think that judges are getting it wrong. I think that our judges have been really grappling with these issues with the available tools that are out there for them to use, and the list of cases in which they have struggled through cost allocation is a really good

5. Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003).

example of that, and it is an indication of the level of energy and resources that both the courts and litigators are devoting to this issue.

If you look at *Zubulake I*,[6] *II*,[7] *III*,[8] *IV*[9]—Judge Scheindlin, where I'm from, we say bless your heart—*In re Bristol-Myers Squibb Securities Litigation*,[10] the *Rowe* case,[11] the *Murphy Oil* case,[12] there is a long list of them, about cost-shifting and the way that judges have been dealing with that.

As I think about it, I have never been before a judge who would require me to produce for deposition every employee in the company, or even the majority of employees in the company. Judges are looking at how to balance the information that is really needed, and we see them doing that.

But, arguably, saving and retrieving from mass quantities of backup tapes would be somewhat analogous to taking the deposition of every employee in the company, and it is analogous, in part, because of the issue of volume. We have heard a lot of people talk today about how in the electronic evidence field the volume of evidence and information increases exponentially. We heard a lot about that from Ken Withers and Joan Feldman and George Socha this morning.

I will offer one brief example. My partner, Neal Batson, was appointed Enron examiner, and in that litigation his team amassed over 40 million pages of documents.[13] We haven't really segregated the paper versus the electronic in terms of exact numbers, but I know that in that litigation one of the databases that we put together contained 7,366,177 e-mail messages.

George Socha this morning told us that most vendors cannot even handle a volume of 10,000 backup tapes. Joan's case started out with 42,000. Now, assume that the company in Joan's case got those backup tapes in bulk, and therefore they got them at a discount, so let's say they paid $75.00 a tape. By my math, just for the cost of the tapes alone, that was $3,150,000. That is not the retrieval cost off of them, just the cost of the tapes.

The Discovery Rules under which we operate are not supposed to be a shield, and even as a defense lawyer I recognize that and respect that. They are supposed to facilitate the discovery of relevant

6. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003).

7. Zubulake v. UBS Warburg LLC, No. 02 Civ. 1243, 2003 WL 21087136, at *1 (S.D.N.Y. May 13, 2003).

8. *Zubulake*, 216 F.R.D. at 280.

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

10. 312 F. Supp. 2d 549 (S.D.N.Y. 2004).

11. Rowe v. William Morris Agency, Inc., 51 Fed. R. Serv. 3d 1106 (West) (S.D.N.Y. 2002), *aff'd*, 53 Fed. R. Serv. 3d 296 (West) (S.D.N.Y. 2002).

12. Murphy Oil USA, Inc. v. Fluor Daniel, Inc., 52 Fed. R. Serv. 3d 168 (West) (E.D. La. 2002).

13. *In re* Enron Corp. Sec., Derivative & "ERISA" Litig., 310 F. Supp. 2d 819, 833 (S.D. Tex. 2004).

information. But neither are they supposed to be a sword. When you get into cost systems, particularly in the area of disaster recovery, the cost alone can drive a company, the types of clients I represent, to its knees at the settlement table.

So as everyone struggles with the cost and the quality issues, I have struggled with how to advise our clients about their preservation obligations. That struggle has primarily focused on what to do about disaster recovery systems that are maintained in the ordinary course of business by companies that want to do the right thing. Not infrequently, the areas of relevance, as someone mentioned earlier, span across multiple areas of the company, and not infrequently relevant evidence continues to be generated and needs to be preserved after the litigation has commenced and additional lawsuits are anticipated.

In corporate America, rarely is a company able to deal with one lawsuit at a time, they have multiple actions going forward, and just as one ends another is beginning. And so these preservation obligations magnify in a sense.

In Joan's case, while the motions practice was proceeding and while Joan was doing her investigation, a company was still preserving 42,000 backup tapes, $3,150,000 on the shelf.

You can understand when you start thinking about it in those terms that a strict rule that all backup media has to be preserved and cannot be recycled really is tantamount either to rendering companies unable to litigate or rendering them unable to maintain a reasonable disaster recovery system.

Companies that have long had ordinary document retention programs—and I am sorry to hear that not the highest percentage of them do in that recent survey—are now also beginning to implement electronic document retention programs for their companies. As they do that, they could use more guidance about how to do that. They need a practical guide that will allow them to maintain disaster recovery systems without preservation obligations that can go so far as to make the cost of the preservation higher than the ultimate value of the litigation.

What always bothered me, moving over to state court for a moment, about the *Linnen* decision,[14] which is the case that first started me worrying about this issue, where a pharmaceutical company was sanctioned for recycling its backup tapes over a four-month time period before the Multi-District Litigation ("MDL") court issued a very specific order, was that I don't think the lawyers in that case at that time or the company had any idea that they should have ceased that ordinary-course-of-business recycling of those

14. Linnen v. A.H. Robins Co., No. 97-2301, 1999 WL 462015, at *1 (Mass. Super. Ct. June 16, 1999).

particular tapes until the very specific document preservation order was ordered by the MDL court. To my knowledge, the ex parte order that was at issue in *Linnen* initially had no specific reference to backup tapes, or even a specific reference to electronic evidence.[15] And there was, to my knowledge again, no good cause shown for the electronic evidence that was sought on those particular backup tapes.[16]

I think that what our clients are looking for, and what corporate America is looking for, is just more certainty as to what their obligations are that a safe harbor can help to provide. Without a specific rule, I suspect that in the future companies will just simply have to involve the courts much earlier and more often to get guidance about what their preservation obligations are going to be.

Some courts in addressing those issues will effectively implement a safe harbor for the parties that are before them. Some courts will impose narrow limits, not unlike *Zubulake IV,* where the scope of backup tapes was limited to the employees who were defined as "key players."[17] Some courts will impose virtually no limits. In essence, the preservation obligation will begin to be controlled by the level of aggression of the requesting party and the level of discretion exercised by the particular court. Surely a safe harbor that would lend some certainty and uniformity to that process would be better.

I have a few specific questions about the language in the proposed rules. I will run through them quickly or hold them for a moment, if you like, Andy.

MR. SCHERFFIUS: Anthony, I'd be interested in hearing your comments. Keep in mind we are working in the context of whether or not we need a rule and, if we need one, what form should it take.

MR. TARRICONE: I think corporate America has been adequately represented not only on this panel but throughout the day's proceedings.

MR. SCHERFFIUS: I was bushwhacked when Greg dropped off.

MR. TARRICONE: I am here representing a different perspective. I like to think of myself here as a voice for the people, for individual litigants. Anyone in this room could be an individual litigant at some point in your life.

The federal courts, even today, while the bar has been raised higher and higher, the last time I checked, are still open to individuals. Most of the problems that we have heard about have been problems that arise in this mega-litigation of the IBM's and Microsoft's of the world clobbering it out in the courtroom. I am not a proponent of rules because rules that may work wonders in those cases will only raise the bar further to individual litigants and close the courthouse door.

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15. *Id.* at *10.
16. *Id.*
17. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217-18 (S.D.N.Y. 2003).

The problem that I see is not what you have been hearing about; it's the other side of the coin, it's stonewalling. From the plaintiffs' perspective in the litigation that I handle, the information is not divulged initially under Rule 26 requirements, it is not divulged after the plaintiff files a Rule 34 request. It is invariably objected to—that is, the critical information that ultimately decides the issues in the case. It is only divulged after depositions and motions. That is in 95% of the cases I handle. So any rules that raise that bar further and create further hurdles and presumptions favoring corporate America I think are very much ill advised.

We heard a lot about certainty and costs and megabytes and terabytes. I haven't once heard anybody talk about the fundamental purpose of litigation in this country. The whole world looks at our judicial system, and the reason they do is because our system is designed to uncover the truth. I haven't once heard that mentioned today. I haven't seen it mentioned in any of the articles I've read. All I hear about is expediency, corporate costs, the needs of the company, the CEO, the e-mails. Let's talk about the truth for a minute.

Remember the first day of law school when you got your *Black's Law Dictionary* and you had to look up words? You look up the word "verdict." It's the Latin word for *veridictum,* which is "a declaration of the truth." Ultimately lawsuits should be decided on information that gets to the truth. They shouldn't be decided on summary judgment motions because litigants can't get the documents that unveil the truth, and that's the direction we are headed in with those of the Rules that make it more and more difficult for people to unearth documents that reveal the truth.

It will mean more cases will be decided on summary judgment because individual litigants do not have the information to prove the truth; it's in the corporate vaults. Well, today it's in the corporate computers. Now there is an effort here to reclassify some of this data to this category of "inaccessible," which will put it in a vault with a moat around it, which will make it even more inaccessible.

And then we now have a proposal for presumptions that will allow companies to continue with their regular suspension policies regardless of what has happened, without any concern for public safety, public interest, and public good. I just think this whole effort, while there are some issue to discuss, I think we have lost our moral compass on this. I would ask that we go back to some very fundamental principles and look at them.

Let me just make a few points here.

The issue of preservation is inextricably linked to all of these other issues, safe harbor, and inaccessibility. Preservation is not a procedural matter. I do not think it is a subject for this Committee to

consider. I would point out the Rules Enabling Act[18] states that the Rules prescribed by the Supreme Court "shall not abridge, enlarge or modify any substantive right."[19]

There is a whole body of law that has developed and evolved on the subject of spoliation of evidence. It is substantive law; it is not the Rules. It is law that has focused on preservation duties.

The reason it is unwise to venture into this area is because rules like this will encourage the drafting of corporate policy designed to prevent the disclosure of information. And one size doesn't fit all. Let me just give you some examples of very practical cases.

There is a case in the First Circuit, *Blinzler v. Marriott International, Inc.*,[20] where a couple in a hotel room in Boston—the man was having a heart attack, his wife called the front desk and asked for emergency personnel, and there was an inordinate delay before the arrival.[21] Some months later a lawsuit was brought against the hotel, why wasn't the call placed immediately? Well, they went to get the telephone logs because all phone calls in hotels are recorded, and there was a regular established practice of purging the logs every thirty days.[22] Well, the poor man who was buried a couple of weeks earlier, his widow hadn't had the foresight to see a lawyer within thirty days of his death, and the logs were gone.

The question whether that activity, following an established company procedure, was reasonable should not be a matter of rulemaking and there should be no presumptions established in the Rules that tilt the scales in favor of a spoliator of evidence. That is really my primary concern here.

I will give you another example. The Federal Aviation Administration has a fifteen-day recycling policy that has been long established for radar data.[23] Now, would anybody question the reasonableness of that after a crash of an airplane, a Delta shuttle, because of a mistake made by an air traffic controller? Well, there is a two-year presentment period under the Federal Tort Claims Act and there is only a fifteen-day recycling requirement.[24]

If evidence is destroyed pursuant to a company policy, it should be fair game in the courtroom. The motivation, the failure to preserve, should be fair game in the courtroom and inferences should be able to be drawn by the fact finder without some presumption in the Rules that favors the spoliator.

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18. 28 U.S.C. § 2072 (2000).
19. *Id.*
20. 81 F.3d 1148 (1st Cir. 1996).
21. *Id.*
22. *Id.* at 1158.
23. *See* Stricklen v. F.A.A., 32 F.3d 572 (9th Cir. 1994) (unpublished table decision).
24. § 2675(a).

In another case, *Lewy v. Remington Arms Co.*,[25] a manufacturer of a rifle that had a propensity for accidental discharge, killing several people, had a three-year recycling program and they discarded, purged, and destroyed prior complaints of the same problem occurring over and over and over again.[26] In that case, as a rule of substantive law, not of procedure, the court considered whether their practice was reasonable under the circumstances.[27]

I believe that the judges in the federal court have done a phenomenally amazing job dealing with the evolution of the Information Age, keeping up with the evolution of the Information Age, and addressing all of these issues that we have heard. To me it is more a problem of mechanics. It is more a problem of sitting down and working out the issues, people being reasonable, rather than setting rules that create presumptions favoring one party versus another, rather than establishing definitions that will be obsolete before the ink is dry on the paper.

I was at the conference three years ago, and I know that the technology that was available then is completely obsolete today, and I dare say whatever you put on paper, by the time the ink is dry it will be obsolete again.

MR. SCHERFFIUS: Thank you. Steve?

MR. MORRISON: Thank you. I actually agree with some of what Anthony said, and that may surprise him and some of the rest of you. But I think we ought to be sure that we are not dealing with just Wall Street; we ought to be dealing with Main Street, and we ought to be dealing with the idea that as more and more electronic data is created, there will be more and more of it that individuals have on their telephone machines, on their instant messaging. My wife and I have communicated today about a little project that we've got going on with each other that we might be sued on as individuals at some point in time.

And so I think it is fair and appropriate to test any proposals to the Rules against that backdrop. And so when you say should you be required to preserve things that you ordinarily do not preserve that are not active in your individual lives, you should not as an individual or as a business. If you test the question of whether or not you should be looking in discovery in places that are inactive or whether you should look at the center of the bull's-eye at the active stuff that you have in your home computer or in your PDA or whatever it is, you should as an individual look there, but not be required to go further without a showing that you should go further and recover data.

25. 836 F.2d 1104 (8th Cir. 1988).
26. *Id.* at 1111-12.
27. *Id.*

And then, if you are to go further and recover data and you are on Main Street, do you want to shift that cost? Well, sure you do.

And so when I am asking questions now in this world and I am dealing with a pharmaceutical product that involves an opinion, I am asking questions as to what kind of data the plaintiff has on their communications system. I am talking about one person. And so under the proposals that we suggested here, would it be right for that person to be trapped because they in good faith deleted something and they are now called a spoliator and their case goes away? I suggest no.

So what really we are talking about is a body of rules that really guide the state and federal courts—starting with the federal obviously, but we know it will guide the states—that really have a nice application to Main Street and Wall Street, to the little man and the big man.

I agree with Anthony that we cannot afford to be elitist about this, but we do need rules.

MR. TARRICONE: I have to jump in. I disagree with you. The reason I disagree is because, in my home anyway, we don't have established purging policies and we don't have archives for our telephone messages, and we are not in the business, in my home anyway, of making products that affect millions of people around the globe.

MR. MORRISON: But you are making my point, in the sense that your telephone messages automatically go away, and you're not a spoliator because of that, Anthony.

MR. TARRICONE: I agree.