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Civil Rules Advisory Committee Alumni Panel: The Process of Amending the Civil Rules

Cover Page Footnote

United States District Court Judge, Southern District of Texas *Dean, Samford University's Cumberland School of Law *United States Circuit Court Judge, United States Court of Appeals for the Fifth Circuit *Elvin R. Latty Professor of Law, Duke University School of Law *United States District Court Judge, Northern District of Florida

CONFERENCE ON ELECTRONIC DISCOVERY

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

MODERATOR

*Hon. Lee H. Rosenthal**

PANELISTS

*Hon. John L. Carroll***

*Hon. Patrick E. Higginbotham****

Thomas D. Rowe, Jr.†

Hon. C. Roger Vinson‡

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

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

We have in this conference followed a model that we have used successfully in recent and other rulemaking efforts. We have brought together a—some have called it rarified; I just think it's really talented—group of people who are engaged in and have practical experience in the problems that we are looking at and have asked them to bring to bear on these problems their very diverse sets of experiences. We have tried to bring together people who practice in a

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variety of subject areas, on both sides of the “v,” who have a lot of different backgrounds and a lot of different perspectives and opinions. In that I think we have succeeded.

The particular problem that we have found that such a model works best for is just this kind of problem: a very practical set of problems where, not to our surprise, judges are probably the least familiar with the very acute problems that this kind of discovery raises. We are in an area where the difficulties are felt first and most keenly among the lawyers and the litigants. The judges are the last to know.

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

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

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

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

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

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

To begin that work, John Carroll.

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

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

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

The first is what I am going to call the politicization of the Rules process. I am told that in the 1960s, when the Rules Committee was looking at the Class Action Rule,¹ that they did so in relative anonymity. In fact, I have heard they drafted the final version sitting in the Board Room of the Riggs National Bank in Georgetown. Nobody really much cared what they did. They were brilliant, they were scholars. Everybody accepted their work.

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

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

The first is the class action reforms that Judge Higginbotham initiated when he was the leader of this Committee. Nationwide attempts to gather information, the drafting of some very, very interesting and innovative rules, which after the wide-open process was ended resulted only in the promulgation of the Rule authorizing interlocutory appeals in class actions.

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

The one major addition was Rule 26(b)(1)² and the redefining of relevant, and, quite frankly, that occurred only because it had tremendous widespread support. The Section on Litigation of the

1. Fed. R. Civ. P. 23.

2. Fed. R. Civ. P. 26(b)(1).

ABA was in favor of it, the American College of Trial Lawyers was in favor of it, and those groups were enough to carry the day.

The third example. As I was leaving the Committee, the new Rules that came into effect in December on class actions were percolating. There were two Rules dealing with preclusion in those Rules when they were initially promulgated.³ There was a tremendous, to use Sol Shriver's word, "firestorm," over those two provisions, and they really never got anywhere either.

So I guess the thesis of all this is the Rules process is really consensus, and if you don't have a consensus, there is really no point in jumping into the Rules process as a vehicle for change.

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

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

So having said all that, I think that leads me to my next conclusion, which is there ought to be some slight tinkering with the Rules but certainly not major surgery in this area. I think, if anywhere, there is a consensus that Rule 26⁴ and Rule 16⁵ ought to be the place where these issues are raised. I think that is an outstanding idea, because in this area, even more so than in paper, the parties have the best solutions to these problems. They know the ins and outs of their systems, they know the ins and outs of their cases, they're the ones that the courts need to rely on, and that's why dealing with these issues at the outset of litigation is very, very important.

I want to throw in a plug for section 40.25 of the new *Manual for Complex Litigation, Fourth*.⁶ That is exactly the kind of thing that I think is a great adjunct to the Rules process. It orders the parties to meet and confer, it tells them what they ought to talk about, and it sets forth what generally their preservation obligation is. So I am all in favor of the 26 and 16 changes that have been discussed.

3. See, e.g., Fed. R. Civ. P. 23(e)(1)(b) (carrying forward the notice requirement of former Rule 23(e) when the settlement binds the class through claim or issue preclusion).

4. Fed. R. Civ. P. 26.

5. Fed. R. Civ. P. 16.

6. Manual for Complex Litigation (Fourth) § 40.25 (2004).

I also think it is valuable to go ahead and amend Rule 34⁷ to talk about form of production. I think that can stave off lots of difficulties and problems down the line. Beyond that, quite frankly, I don't see any need for changes in the Rules. I don't see any of the Rules as currently—the proposals as drafted really do not add anything, but, more importantly, many of them are tinged with such partisanship that they are just simply not going to get through the process. I don't think that ought to be the sole consideration, but I think the Rules Committee is busy, I think it has lots of things on the table.

I think it ought to really consider whether trying, for example, to put a safe harbor in, or trying to put in a definition under Rule 37⁸ of the preservation obligation which says you don't have to suspend your document destruction policy—or, more importantly, puts a state-of-mind requirement, which I think is not the rule in many circuits—into the Rules—I think that's a mistake.

But I think some common sense tinkering with the Rules in the areas I have suggested, and then education, and then what other parties have discussed, best practices, the Sedona Working Group⁹ for example, the ABA,¹⁰ and the *Manual for Complex Litigation, Fourth*.¹¹

JUDGE ROSENTHAL: Thank you.

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

Is there anything about the questions that we've been asking and trying to get a sense about for the last day and a half that you think we ought to know that you haven't had a chance yet to tell us?

Roger, what's your perspective?

JUDGE VINSON: Thank you, Lee.

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

I agree with John in many ways, that I think our process, the rulemaking process, has changed a lot since the mid-1960s. I would

7. Fed. R. Civ. P. 34.

8. Fed. R. Civ. P. 37.

9. The Sedona Conference's website defines its Working Group Series as "the next phase in the evolution of The Sedona ConferenceSM from a forum for advanced dialogue to an open think-tank confronting some of the most challenging issues faced by our legal system today." The Sedona Conference, Working Group Series, at <http://www.thesedonaconference.org/wgs> (last visited Oct. 3, 2004).

10. See Litig. Section, Am. Bar Ass'n, Civil Discovery Standards § VIII (Aug. 1999), available at <http://www.abanet.org/litigation/civiltrialstandards/home.html>.

11. See *Manual for Complex Litigation*, *supra* note 6, at § 40.25(3)(d).

describe it, as I did this morning, as a legislative process. We are at the beginning of a process, and we have to consider those who are on either extreme of the positions that are offered and the practicalities and standards that have to be implemented.

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

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

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

It seems to me that it is unanimous and there is no opposition to the principles that we've discussed about getting the attorneys early on, in the Rule 26(f)¹² conference, to talk about things related to electronic discovery. In my opinion, the 26(f) implementation was the most important change that was made in the Rules in the last fifteen years, and I think it has had a lot of good consequences flow out of it.

My personal philosophy is the best thing we can do is to let the lawyers control their litigation, with certain guidelines and standards to help them along and some reminders about what they need to do and when they need to do it. In keeping with that, I think the best thing that our Committee could do would be to take what is I think universally accepted as things that ought to be discussed and mentioned in the Rule 26(f) conference, addressed in the joint report and addressed also in the Rule 16¹³ order, make those changes, and we need to do it immediately, as soon as possible. There is no reason to delay any further.

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

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

12. Fed. R. Civ. P. 26(f).

13. Fed. R. Civ. P. 16.

But it does seem to me that we don't need to amend all of the Rules as proposed. For example, the amendments to Rules 33 and 34 are really perfunctory, and I would recommend to the Committee that, instead of doing that, that they simply follow the idea of adding a Rule 26(h) to address the matters in one concise area about electronic discovery. You can put some of the principles that need to be followed and include some good commentary.

Ed Cooper, for commentary I can't find anything that would be more helpful to judges and attorneys who don't get into this or who are just getting into it than the commentary from the *Manual for Complex Litigation, Fourth*.¹⁴ I think that would be very helpful simply to give some guidance to magistrate judges and district court judges who from time to time are going to be faced with these matters and who have natural inclinations to do one thing or another, and that is just the proclivity of people.

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

JUDGE ROSENTHAL: We've gotten a lot of suggestions during this conference for changing Committee Notes. One of the limits on the rulemaking process that not everyone may be aware of is that we don't change Committee Notes unless there is a change in the Rule that the Note accompanies. That is a good discipline on us, but it is also a limit on our ability to use Committee Notes standing alone as a source of changed explanation and guidance.

Pat, what's your perspective?

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

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

So I want you to understand that this Committee is also staffed, and has been historically, by really fine people. I am particularly pleased to see David Levi as Chairman of the Standing Committee and Lee

14. *Manual for Complex Litigation*, *supra* note 6, at § 40.25.

Rosenthal. These are two of the finest United States district court judges in the country. There are none better. There are plenty of good ones, but there are none better than these two, I tell you. I know them both very, very well. We are blessed to have them in these leadership positions.

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

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

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

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

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

To state that we are changing the courts and we're driving the litigants out, that we are killing the United States district court, is to understate it. It is already happening. I spoke with the Association of University Law Professors, who teach in the area of federal courts, who made a mistake and invited me for lunch. They were there discussing, as they are wont to do, the Canon of Hart-Wechsler and some very wonderful topics.¹⁵

At lunch I told them that this is very interesting, but while we are examining these large conceptual problems your floor is rotting out from under you. That is the circumstance that for the past thirty years there has been a steady and unremitting decline in trials themselves. It is a complicated phenomenon.

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

But let me put it in perspective for you. It is in every category of cases. On the criminal side, that's easily explained. Apparently the explanation is there in the Citizen Guidelines: between ninety-five and ninety-nine percent of all criminal convictions result from pleas.

15. See Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* (5th ed. 2003).

That is up a good bit. They have always been high, but that is up a good ten to twelve percent.

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

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

You look at these charts, and I've looked at the numbers, and we've had this decline in trials and there has been an exponential increase in arbitrations. About twelve years ago, the numbers of arbitrations ran—I'll round these up—about 40,000. It jumped within the decade to about 90,000, then the next year it went to 140,000. These are the numbers from the American Arbitration Association.¹⁶

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

The fact is that these choices are being made by people who recognize that it is cheaper, or for whatever their reasons—privacy, for all kinds of reasons—that they want to move toward arbitration. Unfortunately, the Supreme Court in *Circuit City*¹⁷ is still a little behind; they still believe that arbitration is a wonderful way to go.

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

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

16. The American Arbitration Association's website provides data on the number of arbitrations it has administered, and other similar facts. Am. Arbitration Ass'n, About: Fast Facts, at <http://www.adr.org/index2.1.jsp?JSPssid=16235> (last visited Oct. 3, 2004).

17. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

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

The United States district courts look more like the State Highway Department. They are processing paper. It is increasingly no longer the attractive job for trial lawyers and people who want to try cases and so forth. And there are a lot of social implications to that, but that's not my point today. I would otherwise talk about that.

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

The notion that somebody is entitled to every document is utter nonsense. That has never been the law. It has never been a constitutional requirement. *Mathews v. Eldridge*,¹⁸ if you go back and look at it, it is a utilitarian inquiry about what is needed under the circumstances, adequate to the case at hand.

In 1983—Arthur Miller put it well—we amended these Rules to provide a cost/benefit assessment on discovery.¹⁹ It has not been enforced. It doesn't matter. There is this sense of entitlement to every document.

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

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

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

18. 424 U.S. 319 (1976).

19. See generally Arthur Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility* (1984).

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

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

Regarding class actions, I say why not have a provision, which came to be known as the “just ain’t worth it”? Give to the United States district court judge the authority to say, “I’m just not going to certify this class, this is nonsense. All things considered, we’re not going to do that.”

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

If you are going to reach into here and you are going to start drawing, for example, a safe harbor, two things about that. You are going to have to make a real judgment between plaintiffs and defendants and between the enforcement of these private rights of action, because it has a direct bearing upon that.

The other is that a safe harbor defines the inside and the outside. You get in the safe harbor, you’re safe; but the implication is if you’re not in the harbor then you’ve got a duty to disclose.

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

I want to remind you of something that is out there that I haven’t heard anybody mention. It’s called 18 U.S.C.A. § 1512(c), which imposes criminal penalties on anyone who corruptly “alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding.”²⁰ There are circuits that read that statute to mean this: that if I tell my staff, through a program of destruction or whatever, to destroy a document with the eye in mind to act corruptly, if my purpose is to prevent that document from being used in a proceeding.

Now, what do you think a records retention program is? It is to get rid of waste and so forth, I suppose, but it is also a conscious decision

20. 18 U.S.C.A. § 1512(c) (West Supp. 2004).

that you just don't want to keep all these documents around longer than you need them, because when you get past that the only thing they can be used for is against you. But if you read that statute literally, my point about it is not how one comes down, but there is a judgment by the Congress that it is a criminal offense.

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

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

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

We've got a lot to do. We can't use the Federal Rules to instruct corporate America or anyone else. There is a teaching job, and a big teaching job, that we need to undertake. But it is through the *Manual*,²¹ it is through the other devices, teaching judges and teaching lawyers, and the Rules are a poor way to teach.

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

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

Tom?

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

I came here as a skeptic of the need for changes to the Rules, looking for unmet legitimate needs that I thought could be met by

21. Manual for Complex Litigation, *supra* note 6.

rulemaking, and I think that may be an appropriate frame of mind to start with.

I have heard a few things that do make me think some amendments would be appropriate, but I also wanted to flag something that has been mentioned on and off, but to try to make it a little more prominent. I think we do need to be thinking a good deal about alternatives to rulemaking, Federal Rules of Civil Procedure, or possibly Federal Rules of Evidence.

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

The one intermediate possibility that has been mentioned somewhat but that I could stress some more is various kinds of manuals on some things like this. I wonder if manuals, such as the ABA's²²—or whether even there should be consideration of, say, a Federal Judicial Center effort to develop a Manual for Electronic Discovery, which would have some imprimatur of impartiality because of its source; the Sedona Principles may be very good,²³ but as I understand that was mainly defense; or maybe the ABA Principles, broader based, would suffice. But I did want to flag this possibility of alternatives, including the possibility of some kind of manual.

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

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

What I wanted to suggest briefly is that I found it helpful just in trying to organize my thinking about this area—and I hope maybe for others continuing to work on this that it might be helpful—to think in terms of several different kinds of considerations, either for the

22. See Litig. Section, Am. Bar Ass'n, Civil Discovery Standards § VIII (Aug. 1999), available at <http://www.abanet.org/litigation/civiltrialstandards/home.html>.

23. See Jonathan M. Redgrave, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, 4 Sedona Conf. J. 197, 229 (2003).

desirability of adopting new rules or considerations in the drafting. You could then do this with respect to various kinds of proposals.

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

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

In some other areas, it seems to me that we haven't heard about unmet needs. For example, cost problems are definitely there in the conduct of discovery, but do we have a need that is not presently met by the Rules? People are paying more attention to the 26(b)(2) factors,²⁴ and that may take care of the problem as well as it can be taken care of.

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

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

Then also there is a concern for issues of the scope of authority, who does have authority to deal with some of these problems. It often may be the Advisory Committee, but sometimes not. Of course, with privilege waiver you have the problems with Rule 27(e)(4)²⁵ and evidence. Whatever can be regarded as being defined as a privilege has to go through Congress.

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

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

24. See Fed. R. Civ. P. 26(b)(2).

25. Fed. R. Civ. P. 27(e)(4).

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

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

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

JUDGE ROSENTHAL: Thank you.

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

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

There was one moment that I just wanted to remind you all of, or share with those of you who were not there, in one of the hearings that we had on the last discovery amendment issues. This very, very young, enthusiastic lawyer came before us and went on for some time about his realization of the particular beauty of the way the Discovery Rules are structured. He had been trying to come to grips with the changes that were being proposed and had realized this wonderful structure.

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

This young lawyer was thrilled because this was a beautiful discovery structure. It really is a wonderful architecture, framed by

26. Fed. R. Civ. P. 26(b)(1) advisory committee's note.

these concepts that have borne incredible weight with great success over the years. Relevance, scope, burden, proportionality—those are wonderful, strong, and flexible concepts that can carry a lot of weight.

We have that two-tier structure in the context of relevance. One way to look at these issues is whether that two-tier structure should be adopted to a burden analysis; and, if so, how do you define the trigger that will separate the cases that go on with the attorneys managing it on their own, and the cases that have the trigger for the judge to get involved when and as needed and to facilitate that involvement in an efficient and effective way?

I thought that young lawyer's enthusiasm was wonderful. Of course, I spend my time with a group that thinks that a glass of red wine and the latest volume of *Wright & Miller*²⁷ or *Moore's*²⁸ is a terrific time. You are all here on Saturday morning, so you clearly share that set of enthusiasms.

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

At this time I would like to invite the panel to make whatever comments, very briefly, on each others' presentations.

John?

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

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

Roger, anything?

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

The phrase that has been used in a number of the local rules and standards is "in the ordinary course of business,"²⁹ which I think is an appropriate term to incorporate somewhere to set out that idea.

I am not sure that I agree with John about just tinkering. I think I would propose making some substantive recognition that we've got a different category of discovery and we need to call it that. But I think you can incorporate within that the idea that the principles of

27. Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (2d ed. 1990 & Supp. 2004).

28. James Wm. Moore, *Moore's Federal Practice* (3d ed. 1997 & Supp. 2004).

29. See, e.g., E.D. & W.D. Ark. Appx. R. 26.1; Cal. Civ. Proc. Code § 1013(a).

production and discovery, interrogatories, are all intended to encompass electronic information or data, and you can do that and then set out some other standards, and you can do that very succinctly and in one spot. I think that would be very helpful to the bar and the bench, and probably to the clients.

JUDGE ROSENTHAL: Pat, anything that you wanted to add?

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

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

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

Notes & Observations