Managing Electronic Discovery: Views from the Judges

Lee H. Rosenthal
James C. Francis
Daniel J. Capra

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THE PHILIP D. REED LECTURE SERIES

PANEL DISCUSSION

MANAGING ELECTRONIC DISCOVERY: VIEWS FROM THE JUDGES*

PANELISTS
Hon. Lee H. Rosenthal
Judge, Southern District of Texas

Hon. James C. Francis IV
Judge, Southern District of New York

MODERATOR
Daniel J. Capra
Philip D. Reed Professor of Law, Fordham University School of Law
Reporter to the Judicial Conference
Advisory Committee on Evidence Rules

PROFESSOR CAPRA: This is a presentation by the Reed Chair. The mission of the Reed Chair is to organize presentations on some of the most challenging issues that face the federal courts. Last year, the chair put on a presentation on sentencing under the Booker opinion,1 which was then the most challenging issue facing the criminal courts. Today, we are dealing with the challenging issue, especially in civil proceedings, of electronic discovery.

I will give a little introduction of the problem we are facing tonight, introduce our panelists, and then let them go.

You probably do not have to be told that the costs involved in electronic discovery are simply staggering. That is mostly because, especially as compared to the old hard-copy days, nothing truly gets destroyed; everything gets replicated and goes from holder to holder.

* This Panel Discussion was held on April 17, 2007, at Fordham University School of Law. The text of the Panel Discussion transcript has been lightly edited.

It has been estimated that an e-mail sent on January 1 will be copied 27,000 or 28,000 times by the end of the year, and not all on that particular computer system. The replications are not just redundant. Each e-mail transmitted may become a new piece of information that is potentially relevant in the litigation. Therefore, the volume of electronic discovery documents is one of the big problems that the federal courts need to deal with today. Because electronic documents are never deleted in any real way, that adds to the volume and raises another set of problems that we will talk about tonight.

Also, it is not just volume, it is also generation. That is to say, a lot of information gets generated electronically that would never have been generated before. What might have been done in a phone conversation now is done by e-mail that does not get destroyed, as the Attorney General is now discovering to his rue.

It is also important to note that computers not only store information that was previously there, computers also generate new kinds of information, such as metadata, which creates other issues that we will talk about tonight as well.

Finally, there are multiple sources of electronically stored information—flash drives, pagers, Palm Pilots, and the like. Some of this information is dynamic, and retrieving it presents special difficulties, as Judge Francis has indicated in one of his opinions.

So what are the problems? The problems of electronic discovery include retrieving the data; another problem is preserving the data; and another problem is screening the data for privileges and work product. We will talk about all of those big problems today.

It is apparent that this explosion of information now subject to discovery has created special challenges. Tonight’s goal is to try to determine how courts are responding to these challenges.

To help us do so, we have two of the most influential judges in the United States on this issue. I should say that we also had Paul Grimm, who is probably the third most influential judge in this matter, but he fell ill and he was unable to attend. We are sorry for that. Let me introduce our panelists.

We start with Judge Lee Rosenthal, U.S. District Court Judge for the Southern District of Texas in Houston. She has been a judge since 1992. She received her undergraduate and law degrees from the University of Chicago. In law school, she was the topics and comments editor of The University of Chicago Law Review. Following law school, she clerked for Judge John Brown, the famous chief judge of the U.S. Court of Appeals for the Fifth Circuit, and she practiced law at Baker Botts, becoming a partner in 1985.

In 1996, Judge Rosenthal was appointed to serve on the Federal Judicial Conference Advisory Committee for Rules of Civil Procedure, and she chaired the Class Action Subcommittee at that time. She became chair of the committee in October 2003, and during her tenure as chair, the
committee promulgated the electronic discovery amendments to the Federal Rules that have now been approved and became effective as of December 1, 2006. That was a major event, and Judge Rosenthal put that through remarkably. I can tell you that from my work on the Rules Committee.

Judge Rosenthal is on the board of editors for the Manual for Complex Litigation. In addition to her work as a district judge and all her other responsibilities—it seems hard to believe that she can do all this, but I can affirm that she actually does—she has been selected to sit on the Fifth Circuit by designation on eleven occasions, most recently during the redistricting litigation. The Texas Republican legislature redistricted everything, and Judge Rosenthal was on the panel on that. She is not going to speak about that tonight, but that would be another good topic.

Judge Rosenthal is a frequent speaker and lecturer on class actions, electronic discovery, and complex litigation topics.

We are also honored to have Judge James Francis. He has been a U.S. Magistrate Judge in the Southern District of New York since October 1985. He received his bachelor's degree and his J.D. from Yale and a master's degree in public policy from the John F. Kennedy School of Government at Harvard.

Following graduation from law school, he clerked for Judge Robert L. Carter in the Southern District of New York, then joined the Civil Appeals and Law Reform Unit of the Legal Aid Society, where he conducted impact litigation in the areas of housing and education and served as director of the Disability Rights Unit. Judge Francis currently serves—and we are proud to have him here—as an adjunct professor at Fordham University School of Law, where he teaches constitutional torts.

In the field of electronic data and the law, Judge Francis is the author of at least three unbelievably influential opinions. I think the most important was Rowe Entertainment, Inc. v. William Morris Agency, Inc., which dealt with electronic discovery and cost shifting; and more recently Convolve, Inc. v. Compaq Computer Corp., concerning the obligation to preserve what is known as ephemeral data (data that is not typically retained), the duties of preservation, if any, and the difficulties of that; and most recently Treppel v. Biovail Corp., which dealt with standards for preservation orders, which we will talk about tonight.

Judge Rosenthal is going to open the proceedings by talking about the electronic discovery amendments. Then we will move to Judge Francis, who will talk about some of the major challenges of preservation, cost allocation, and the like. Then, I will talk about Rule 502 of the Federal

Rules of Evidence, which is intended to deal with limiting some of the costs of electronic discovery.

The PowerPoint is open and we are ready to go. Judge Rosenthal.

JUDGE ROSENTHAL: Great. Thank you, Professor Capra. It is a real pleasure to be here.

You should know that one of the meetings at which the judges, lawyers, and academics on the Advisory Committee educated themselves about electronic discovery took place in this room. So we are back where it all began. Thank you, Professor Capra, for that as well.

It is hard to overstate the importance and the degree of anxiety generated by electronic discovery in the world today. It is not just in the world of big business; it is in the world of organizations generally, large data producers. I no longer think of the world as divided into plaintiffs or defendants; it is data requesters versus data producers. At some point in our lives we are all—and increasingly so—data producers.

The Civil Rules have been amended on any number of occasions, but in my years associated with the committee, the only time National Public Radio ever called and wanted to know about rules amendments was on electronic discovery. Now, I will say that the day before they did the piece on electronic discovery, they did a piece on head lice, so maybe it was just a slow news time of year.

But electronic discovery is suddenly upon us. It became ubiquitous and essential very quickly. Although intuitively we think of the ability to gather, retrieve, and search vast amounts of information remotely and electronically as the source of great savings in time, effort, and money, so far the reverse has proven true. Electronic discovery is more expensive, more time-consuming, more difficult, and more anxiety producing than paper discovery.

Paper discovery was viewed widely—and still is—as too expensive, too burdensome, and too time-consuming. Discovery is one of the many problems that contributes to increasing dissatisfaction with our civil justice system as a means of resolving disputes. We all worry about the vanishing trial and why it is vanishing. Discovery is viewed as a main reason for that. The added costs and uncertainties of electronic discovery have made the problems more acute.

So, in 1996, when the Civil Rules Advisory Committee was worrying about changing the definition of relevance in Rule 26(b)(1)—a topic that had been with the committee for twenty years without rule amendment—lawyers started coming to the committee, respectfully suggesting, “This is all well and good. We appreciate efforts to control and manage discovery better, to calibrate it to the reasonable needs of particular cases more effectively. But, with respect, Rules Committee, you are fiddling while

Rome is catching on fire.” They told us that discovery was being overcome by new information technology in ways that the rules, as then framed, were inadequate to handle efficiently or effectively.

Does anyone know the last time that the discovery rules were specifically amended to take information-technology changes into account? In 1970. That was when we added the words “data and data compilations” to take into account the fact that some people were using computers.

The discovery rules still had the words “phono records” in them until December 1 of last year. It was time to bring the discovery rules more in line with the demands of modern practice.

Professor Capra has touched on some of the features of electronic information that are distinctive and were proving problematic for discovery:

- Volume is a huge problem.
- Electronic information is simultaneously permanent (deletion does not mean delete, although it is progressively more and more difficult to get to) and fragile, because if steps are not taken to freeze information it will change. The information on your computer changes every time you turn it on. Information in an electronic “folder” changes when you access the folder and when you close it again. All of these features are different than paper.
- And there are kinds of information, such as metadata and system data, that just do not have any paper analog.

When we started to look at the ways in which the rules could be amended to give judges, lawyers, and litigants more predictability and better guidance for dealing with these distinctive features of electronic discovery, we also became aware of a very interesting challenge for rule drafting.

It takes about three years for a rule amendment to become effective through the Rules Enabling Act\(^7\) process. Think of the pace in which technology changes. We could not write the rules in ways that would be limited to today’s technology. We had to resist thinking about the problems solely in terms of the way they appear today, based on the ways most people generate and store electronic information in commercial systems.

We had to write the rules amendments in a general enough way to accommodate the technology changes that we knew were going to come but whose form we could not predict. At the same time, we had to be as specific as possible in order to be helpful. Striking that balance proved both fascinating and very difficult.

This slide presents the five sets of electronic discovery issues that the rules amendments deal with. What should strike you from this list is just how intensely practical the focus of these rules amendments is.

- The first set is early attention to electronic discovery issues, the so-called “meet-and-confer” changes.

The second addresses claims of privilege asserted after production.

The third is the role of accessibility in discovery requests and responses.

The fourth relates to the form of production.

The fifth set is sanctions for what we think of as spoliation. Spoliation in this context is when information cannot be produced in discovery because of particular problems with the way in which that information was created and stored on computers.

I am going to give a 30,000-foot overview of each of these amendments, and then we will come back and discuss them.

Let us start with the meet-and-confer proposals. Rules 26(a), 26(f), 16, and Form 35 are amended to require essentially that in the initial meet-and-confer session between lawyers early in the case—which is a relatively new thing in the discovery regimen itself—the topics that must be addressed include electronic discovery, in general, when it is present in the case. The amendments also require that the parties specifically talk about three areas that, if left unattended, are reliable sources of problems.

The first area is the form of production. Why is the form of production included? The form of production is an issue that is unique to electronic discovery. We did not have that problem with paper. With paper, the problem of form is selecting what color to use. It is not anything that requires early decision, preparation, or management.

With electronic discovery there are choices. Again, drawing on current technology, but not limited to it, electronically stored information can be produced in tagged image file format (TIFF), portable document format (PDF), or in native format, which is understood to include metadata, embedded data, and system data. You can produce in any number of different ways. Each has advantages and disadvantages.

The requesting party may have objections to the way in which the producing party wants to produce the information. Or the producing party may have objections to the way in which the requesting party wants it produced. Those issues need to be addressed so that the problems can be

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8. See Fed R. Civ. P. 16(b)(5) (allowing the court to address “provisions for disclosure or discovery of electronically stored information” in the Rule 16 scheduling order); Fed. R. Civ. P. 26(a)(1)(B) (requiring parties to provide “a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses”); Fed. R. Civ. P. 26(f)(3) (directing parties to discuss “any issues relating to disclosure or discovery of electronically stored information”); Fed. R. Civ. P. Form 35 (including a provision for parties to account for the “[d]isclosure . . . of electronically stored information” in their jointly proposed discovery plan).

9. See Fed. R. Civ. P. 26(f)(3) (requiring parties to discuss “the form or forms in which [electronically stored information] should be produced”).
identified and dealt with at an early stage, when they are much easier to resolve, and before a huge amount of work, money, and time have been invested.

The second area is preservation. Preservation is included in the required list of meet-and-confer topics because of the fragile nature of electronically stored information. If a party that is under an obligation to preserve does not take steps to meet that obligation, information that is subject to the preservation obligation might be lost or changed. Even though Professor Capra is right and delete does not mean delete, data may become progressively more and more difficult to obtain until finally it is beyond practical forensic capability to restore. So, preservation has to be talked about early.

The final area is privilege waiver. Why do we include privilege waiver? The likelihood of inadvertent production of privileged information is greater with electronic information than it was with paper, for all of the reasons that Professor Capra talked about: its volume, its dynamic nature, the way in which it is stored, and the way it appears when viewed on a screen or printed out. These make privilege review, already the bane of associates’ lives, more difficult, more time-consuming, and less reliable than it was with paper.

The likelihood of inadvertent production is higher with electronic discovery for all sorts of reasons, one of which is that when you look at something on the screen you are not seeing all there is. You are not seeing the metadata. You are not seeing the embedded data. You may not be seeing the e-mail threads. You may not be seeing the attachments. All of those, with their replicated, duplicated, and disseminated versions, make review to detect privileged information, work-product protected information, and confidential and proprietary information, more difficult and less likely to be effective.

That difficulty in turn contributes to the costs and the difficulty of electronic discovery. So it is important to ask whether there is a way for the parties to agree on protocols that would ease those problems. There are very good protocols that many lawyers enter into that have that effect. These include “claw backs” and “quick peeks,” which are simple procedures that let the parties produce information without a full-blown preproduction review, with the understanding that producing that information does not waive privilege or protection as to that information.

There are all sorts of reasons that some parties may not want to do this. Professor Capra is going to talk about that when he talks about Rule 502, which is an attempt to address some of the problems under current law. This change to Rule 26(f) makes the parties talk to see if they can agree. If

11. Fed. R. Civ. P. 26(f)(4) (requiring parties to address “any issues relating to claims of privilege or of protection as trial-preparation material”).
12. See Advisory Committee Report, supra note 6.
they can, they can then go to the court and ask the court in the Rule 16 conference to include their agreement in a scheduling or case management order. But the court cannot order the parties to use a procedure such as a “quick peek” or “claw back” that involves production before a thorough privilege review, unless the parties do agree.

Those are the meet-and-confer arrangements. All of these dovetail with other rule amendments, such as the change to Rule 26(b)(5), which says essentially if the parties do not agree on a protocol for asserting privilege after production, here is a rule provision that will take the place of such an agreement. It sets out a consistent and reliable procedure for asserting privilege after production and freezing the proceedings to maintain the status quo until the parties either work it out or the court has an opportunity to decide whether the information is privileged as claimed. This procedural rule does not address the criteria for whether the information is privileged, or whether that privilege has been waived because of the circumstances of the production, because those are substantive issues. But the rule sets out the procedure for that issue to be teed up for resolution and to stop the dissemination or use of the information until the resolution occurs.

This provision in turn dovetails with Rule 502. In fact, the draft of Rule 502, which Professor Capra is going to talk about, specifically cites to this provision.

The third set of issues that the rule amendments address is again a distinctive feature of electronic discovery. It addresses the problem of information that, due to the way it is stored, is not reasonably accessible because of the costs and burdens of getting to it.

The way in which this issue has come up so far has primarily been in terms of information that is stored on back-up tapes. Back-up tapes are not kept for archival purposes, are never meant to be searched for particular pieces of information, and are often not searchable, indexed, or labeled at all. Rather, back-up tapes are meant for disaster recovery purposes, so that if there is a disaster of any sort, information for a specific period is available and can all be brought back. But it is not set up to pinpoint specific information.

14. See Fed. R. Civ. P. 26(b)(5)(B) (establishing standard procedure for when “information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material”).
15. See id. (“After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.”).
16. See Advisory Committee Report, supra note 6, at Fed. R. Evid. 502(b) (Proposed 2007) (providing the requirements to establish that an inadvertent disclosure did not operate as a waiver of privilege).
The other way in which this issue has come up frequently has been in terms of so-called legacy data. Legacy data is something like the Wang floppy disk that you may have in a desk drawer somewhere, but you do not have any software or hardware to figure out what is on that disk. It is essentially a coaster, but it is there. As information systems change—and they do—and as companies acquire new systems or acquire new companies with different systems, information that was created with an old system may not be accessible, intelligible, retrievable, locatable, searchable, or readable on the currently available software or hardware.

JUDGE FRANCIS: You can, however, always bring that Wang floppy disk to my chambers because we still have those kinds of computers.

JUDGE ROSENTHAL: There is your takeaway. He is the only man in the world.

But the problem of legacy data, and the fact that electronically stored information, unlike paper, may be unintelligible if it is separated from the system that created it in the first place, has generated problems. Judge Francis was one of the very first to deal with these problems in a published opinion in his seminal Rowe case, which I hope he will talk about.

Courts had to develop ways of dealing with this issue. It was a different presentation of some of the same kinds of problems that courts had been dealing with in paper, but presented in a novel context.

The drafting problem for the Civil Rules Committee was whether we could come up with a procedure written in a general enough fashion to become a rule that would make it easier for courts to deal with this. Rule 26(b)(2)(B) is a new rule provision that essentially imports the two-tiered system of discovery already in the discovery rules to this context, making clear that the key is proportionality.

- The first tier is party-managed discovery. It requires no court order and includes information that is relevant, not privileged, and reasonably accessible.

- The second tier is court-supervised discovery. Court approval is required before the information can be obtained. The second tier now includes information that is not reasonably accessible because of the costs and burdens of getting it. The amended rule states that regardless of who brings the motion raising the issue of whether electronic information that is not reasonably accessible has to be searched and produced, whether it is the party seeking or resisting production, the burden is first on the party resisting, the data producer, to show that the information is not reasonably accessible.

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19. See id. (providing that "the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost").
The rule facilitates that procedure by adding a new requirement that the information that is not reasonably accessible be identified as being neither searched nor produced by the producing party.

If the data producer meets the burden of showing that this information really is hard to get, discovery may nonetheless be had on court order based on a showing of good cause.\(^2\) The good cause determination must be based on the proportionality limits that have been in the rules since 1993—although as Professor Arthur Miller, who was the reporter to the committee when they were first enacted, has commented that they have not proven effective. Part of this rule is an attempt to make those proportionality limits more effective in this new area where they are the most important.

PROFESSOR CAPRA: Judge, may I interrupt? In terms of “reasonable accessibility,” how is that being determined? The rule just says “reasonably accessible.” I guess you go to the Advisory Committee’s note to determine the criteria?

JUDGE ROSENTHAL: The note is very helpful. In general, these notes are more helpful to understanding the application of the rule amendments than notes traditionally are. So I would urge all of you when you are dealing with these rules to get the big book that has the note language as well as the rule language. The notes are helpful.

The issues deal with the costs and the burdens of getting to the information.

PROFESSOR CAPRA: Is there maybe a line—back-up-like tapes versus not back-up tapes—or is it case by case?

JUDGE ROSENTHAL: It really is case by case. The note lists seven factors that courts have been drawing on to determine the extent to which the discovery is justified, including generally the benefit it will bring weighed against the costs and the burdens of conducting it.\(^2\)

PROFESSOR CAPRA: Have either of the judges on the panel heard these “reasonable accessibility arguments?” Are they in the nature of pro forma arguments?

JUDGE ROSENTHAL: No.

PROFESSOR CAPRA: Do you expect the producing party to really make a case?

JUDGE ROSENTHAL: The cases have been very demanding in my experience. You can talk to Judge Francis about his. The parties cannot

\(^{20}\) Id. (“If [the burden] is [met], the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C).”).

\(^{21}\) Fed. R. Civ. P. 26(b)(2) advisory committee’s note (providing that appropriate considerations include: “(1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; (7) the parties’ resources”).
simply come in and whine, "It is going to take me a long time," or "I have to have an IT guy spend three weeks doing nothing but . . . ."

JUDGE FRANCIS: That is the kind of argument I hear.

JUDGE ROSENTHAL: You really need to do more than that. You have to be specific about what the problems are in accessing the information. Is it a back-up tape problem? Is it a legacy data problem? Is it some other kind of problem? What is the nature and kind of work required to overcome that problem? What kind of restoration or other forensic work has to be done? What is it that prevents you from getting the information more easily? All of these are issues.

Courts are using methods like sampling, for example, ordering parties to restore a small portion of a back-up tape, or one of several back-up tapes, in order to see both how hard it is to get to the information—what is the nature and extent of the forensic or other kind of work necessary to make this information accessible—and how valuable the information really is.

Part of the good cause showing is the value of the information. How important is this information? What is the likelihood that it is going to add materially to the information necessary for the case, beyond what is already available to the parties on sources that are reasonably accessible, which do not require this extra level of work?

So it is not pro forma. The judges are exacting in requiring an explanation of why this information is not reasonably accessible and why the party demanding the discovery believes that it is important to get it.

JUDGE FRANCIS: There is a recent case where the magistrate judge was confronted with one of these whiny pro forma applications and rejected the application, finding that it had not been demonstrated that the information was not reasonably accessible. The producing party took an appeal to the district judge and all of a sudden came up with good reasons why the information was not reasonably accessible. The district judge, to his credit, held that the burden had to be established at the first level.22

JUDGE ROSENTHAL: We will come back to talking more about the problems of information stored on sources that are not reasonably accessible.

Again, the way in which this problem will present itself is going to change over time. Even as we were looking at this, the technology of back-up tapes started to change. Back-up tapes, which had been these big, ungainly things that were not indexed or searchable, now are smaller and are often searchable. This undercuts some of the arguments about them not being reasonably accessible.

But because all of these computer systems are changing all the time, the problems of legacy data are becoming more pressing and frequent. It is an example of the kind of problem that these issues present. Just as we think we understand them, the technology shifts and the issues present themselves

in a distinct way that requires the analysis to change to accommodate the
different problems about whether the information can be accessed and how
hard it is to deal with and understand it.

JUDGE FRANCIS: It also demonstrates the wisdom of the committee in
being technologically neutral. They could have said, "Back-up tapes are
presumptively not discoverable."

JUDGE ROSENTHAL: Well, it is with a sense of humility that I will
confess that in an early draft we had references to back-up tapes, and we
took them out as we came to understand that it would simply be a mistake.

The rule makes clear regarding accessibility that, as with any discovery
that is subject to court supervision, the court can impose terms and
conditions on discovery that is ordered. That is in some ways stating the
obvious, but for the first time in the committee note there is an explicit
reference to the ability of the court to shift some or all of the costs of
production to the party requesting the discovery.

That is an important change. Courts have always had the ability to do
that, but it has never been explicit in rule or committee note text. The fact
that it is now explicit represents an increased willingness on the part of
courts to consider it and to order it, when under prior cases it would have
been very difficult to do.

The next set of issues deals with the form of production. The form of
production issues were touched on briefly in the earlier discussion of meet-
and-confer. Rules 33, 34(a), and 34(b) are all changed.

Rule 34(a) adds to the categories of material that are subject to
production rights and obligations. This new category, electronically stored
information, is on a par with documents and other things.

For a long time, electronically stored information—computer stuff—was
discernable as a subset of documents. The reason was clear: It was
untenable for courts to say, "You do not have to produce this stuff because
it is not a document." And, electronically stored information is certainly
not a thing. So courts said, "Well, it is a document."

When we started drafting these amendments, we had to figure out what to
call this "stuff." We came up with the term "electronically stored
information" on the same premise that we have been talking about—it was
open-ended and flexible enough to accommodate changes, and yet it
captured the fact that this "stuff" is distinct from paper.

23. Fed. R. Civ. P. 26(b)(2) advisory committee's note (stating that "'[t]he good-cause
inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority
to set conditions for discovery," including "limits on the amount, type, or sources of
information required to be accessed and produced").

24. Id. (providing that the court has authority to order the "requesting party" to incur
"part or all of the reasonable costs of obtaining information from sources that are not
reasonably accessible").

25. Fed. R. Civ. P. 34(a) (providing that "[a]ny party may serve on any other party a
request . . . to produce . . . electronically stored information").
We decided to add it as a category that is subject to production rights and obligations because it is different from what we think of as a document. The more we understood about the different ways information can be generated and stored on computers, the more those differences became apparent. When you think of dynamic relational databases and words on paper, they really are very different. So we added electronically stored information as a category in the rule. That let us draft in ways specifically targeted to this new category of electronically stored information.

We have talked about different types of forms that currently exist for producing electronically stored information. The rule sets up a procedure that governs when the parties cannot agree. It first says that the requesting party can ask for a particular form and the responding party can object. If there is no form requested, or if the parties cannot agree, there is a default choice presented: to produce the information in the way in which it is ordinarily maintained, which most people understand to be native format, or "in a form or forms that are reasonably usable." Why did we pick those two? Originally, we just had "the way in which it is ordinarily maintained." We got a lot of criticism for that proposal because it seemed to mandate native format. There are a lot of reasons for data producers not to produce the information in the way in which it is maintained. They range from the ridiculous to the sublime.

One of the arguments is that you cannot Bates-stamp in native format, so there are issues of organization of the information produced. Technology gradually has overcome that argument because there are ways you can mark the information electronically, which helps overcome the Bates-stamping problem as well as authenticity and verification problems.

There are other problems with producing in native format. It can be very difficult to redact confidential information that you have a legitimate basis for not producing. If you produce in native format, you may be producing what you have taken great efforts to redact.

There are all sorts of reasons to produce it in some other way. What should be the standard for that other way?

The new standard is "reasonably usable" for the litigation. What we attempted to do was to come up with an electronic analog to the way the prior rule governed paper production. It said you either produce it in the way it is kept in the ordinary course of business or label it to correspond to the categories in the request. Those alternatives do not translate well to electronically stored information, but their purpose was critical. They were meant to prevent document dumps, where huge masses of undifferentiated

26. Fed. R. Civ. P. 34(b) (establishing procedure to determine the form in which electronically stored information is to be produced).
27. Fed. R. Civ. P. 34(b)(ii) (providing that "if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable").
paper were just given to the requesting party with a fond wish: "Knock yourself out, big guy."

We had to come up with a way that functionally would govern the production of electronically stored information to prevent "dumps." These alternatives provide the functional equivalent of the provisions preventing production dumps of electronically stored information.

The committee notes again provide some very helpful guidance, including a provision stating that, when you produce the information, you cannot strip features that would make it non-searchable. You cannot strip or degrade features when you produce the documents in order to make it more difficult for the requesting party to use that information, at least not unless you have a very good reason, such as the need to protect confidential information.

PROFESSOR CAPRA: So if you take a case, for example, where a plaintiff is trying to connect orders to trades in a securities transaction, the producing party might have software with an easy way to connect the orders, but it was stripped from the produced documents. That would be the concern. That would be the issue. Of course, the argument would be that the software is a trade secret.

JUDGE ROSENTHAL: Right.

PROFESSOR CAPRA: So what do you do about that?

JUDGE ROSENTHAL: Well, you have Judge Francis decide the issue.

PROFESSOR CAPRA: What do you do about that, Judge Francis?

JUDGE FRANCIS: You might have a protective order that provides for a third party to manipulate the program so that the adversary does not obtain access to the trade secrets. That is one possibility.

PROFESSOR CAPRA: Right. And it is not only the adversaries. For example, the underwriter might say that it has a way of connecting the data that competitive underwriters do not. You would have to have a "cone of silence" with respect to all the underwriters as well.

JUDGE FRANCIS: Right.

PROFESSOR CAPRA: That kind of issue requires a lot of discussion and negotiation, so that is one we will talk about as we go through.

JUDGE ROSENTHAL: It does. And it requires a lot of very detailed case management by not only the judges, but also by the lawyers who have to make these decisions very early in the litigation. This form-of-production issue is part of the meet-and-confer discussion, so that the parties will not be surprised by the emergence of this issue late in the case, but rather, they will be aware of it early when there is still time to deal with it productively.

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28. Fed. R. Civ. P. 34(b) advisory committee’s note ("[T]he option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation.").
PROFESSOR CAPRA: So the lawyers really have to keep up on the information technology (IT) issues.

I just wanted to interrupt for a second. One of the problems that I have found in doing all this is that although the lawyers try to keep up with IT issues, there is a disconnect between IT people and lawyers. The lawyers will tell you something can be done and then the next day, they go back to the IT person and find out it cannot be done. Do you get that, Judge?

JUDGE FRANCIS: I get that all the time. The other variation is that the lawyers sit down in their meet-and-confer, and because they are not experts, they are not communicating with each other. They are conveying misinformation to the other side. One thing I have done is encourage counsel to come with the IT person to the meet-and-confer.

PROFESSOR CAPRA: Have you ever had a situation where you just have the IT people sit in a room talking to each other? I tried that when I was a special master and that went over like a lead balloon.

JUDGE FRANCIS: Yes, that is really resisted by counsel. I will say that I want the IT people to be able to confer. If counsel want to be there, that is fine.

PROFESSOR CAPRA: But be quiet.

JUDGE FRANCIS: Yes.

PROFESSOR CAPRA: I like that. Sorry, Judge Rosenthal.

JUDGE ROSENTHAL: That is fine.

Actually, we should talk more about this notion, which is in *A Pocket Guide for Judges.* Judges may actually come to require more and more that lawyers bring their IT people to the meet-and-confer. I am not sure that should be a one-size-fits-all protocol.

Think of it this way: This IT person may be the lawyer's new best friend, necessary to understand the client's information system—not what the information says, but how to get to it and how to make sure that the production obligations are met satisfactorily. But do you take your best friend along on a date? No. You keep your best friend back at home and you call the next day and talk about what happened, or you call during the date and get advice. But your best friend the IT person is not a lawyer. If your IT person is going to be there to participate in the conference, you need to understand that the IT person does not understand the law of preservation, the law of spoliation, the law of discovery in state or federal courts, the law of privilege and privilege waiver, or the law of relevance. The IT person understands how to create information, how to save it, and how to retrieve it.

JUDGE FRANCIS: Though the big players now are developing groups that have somebody who straddles the two arenas.

PROFESSOR CAPRA: Right.

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JUDGE ROSENTHAL: That is right. And that is why I said do not think of it as one size fits all, because these rules apply, of course, to all of these different kinds of players, from the individual litigant up to the multinational corporation that has a staff of people with J.D.s, Ph.D.s, and other kinds of credentials.

We now come to the final area for the overview. It is very hard to talk about any of these issues in isolation, which is a nice way of illustrating the fact that all of these problems and rule provisions are interrelated.

The final area—and this was among the most controversial of the proposals when we were going through the process—is sanctions. This was also the source of the anxiety that generated a lot of the pressure on the Rules Committee to give lawyers, litigants, and judges better tools for dealing with the problems of electronic discovery. The problem is that this stuff is so dynamic. If a company or organization—not just big businesses, but also universities, government, research organizations, essentially any big or small data producer—is sued or gets a demand letter, that triggers preservation obligations.

The rules do not create or define preservation obligations. Nor do the rules provide an exclusive source of authority to sanction litigants if they cannot meet those preservation obligations.

Rule 37 has provided a source within the rules for courts to sanction lawyers for failure to comply with discovery obligations under the rules. So Rule 37 gave us a limited way to address the distinct problem of preservation issues with electronic information.

The distinct problem is this dynamic feature. So, if in the course of litigation, it turns out that the information that was not saved—for example, the e-mails that were allowed to drift off of the servers into cyberspace and are no longer retrievable—is now critical to discover, at least in the mind of the requesting party, what is the analysis that the judge ought to bring to that problem?

What Rule 37(f) does is very simple. It says that this problem has to be viewed as distinct from the similar kind of spoliation problem that would arise with paper and tangible items, like tape recordings, which take an affirmative act to destroy. Rule 37(f) states that, “absent exceptional circumstances, a court may not impose sanctions under these Rules”—again limited to these rules—“on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”

It is not a safe harbor. If you hear people referring to it as such, you should correct them, because it does not provide the kind of safety that a safe harbor does. It is not an immunizer. Anything that starts with the words “absent exceptional circumstances” is not a safe harbor.

30. Fed. R. Civ. P. 37 (establishing procedure for the court to impose sanctions for failing to make disclosures or cooperate in discovery).
The rule does state that if the information is lost because of the good faith routine operation of the computer system, which the notes define as the way in which “systems are generally designed, programmed, and implemented to meet the party’s technical and business needs”—not driven by litigation—then the party cannot be sanctioned for the inability to produce that information.\textsuperscript{32} The notes give examples of what good faith may be, with particular reference to litigation holds, which are the main way in which parties discharge their obligations to preserve information.\textsuperscript{33} It recognizes that litigation holds are not perfect. A litigation hold is often complicated to design and implement. When information is lost, the new rule tells judges that when analyzing the problem, be mindful of the distinctive features that led to the creation and to the loss of this information and how these features are different from what we are used to thinking about with paper.\textsuperscript{34}

That is the rule package overview. Now we can circle back.

PROFESSOR CAPRA: Okay, let’s circle back. Judge Francis?

JUDGE FRANCIS: I am going to talk about a couple of constellations of issues where I think the controversy is greatest and the problems are greatest for litigators. Those are: first, issues of preservation and spoliation; second, issues of production, including the two-tier program under the rules to which Judge Rosenthal just referred; and, issues of cost-shifting.

First, regarding preservation, Judge Rosenthal pointed out that neither the rules nor the amendments address it, in part because many preservation issues arise before the rules even come into play. They occur before any litigation has been filed, and the rules therefore do not govern. You are obligated to preserve at the point when you reasonably anticipate litigation, which is often before a complaint is filed.

Why is preservation such a headache for parties in the context of electronic discovery? First of all, the costs of preservation can be exorbitant, not just in terms of not recycling back-up tapes, but also in terms of implementing a litigation hold, just contacting everybody, finding out where the information resides that you have to get a handle on, and preventing it from being destroyed.

And there is inevitably uncertainty about the scope of your obligation. Are you going to have to preserve back-up data? How far back are you going to have to preserve it? What are your employees going to be able to do in terms of deleting their e-mails?

\textsuperscript{32} Fed. R. Civ. P. 37(f) advisory committee’s note.

\textsuperscript{33} Id. (“Among the factors that bear on a party’s good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.”).

\textsuperscript{34} Id. (explaining that good faith “depends on the circumstances of each case,” including “whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources”).
And finally, and perhaps most importantly, there is the fear of sanctions. Producing parties are keenly aware of cases in which an e-mail has been deleted, or a batch of e-mails or entire files have been deleted, and the consequence has been an adverse inference being drawn against that party, or even a claim being dismissed or a default judgment being entered. So there is a great deal of concern out there about preservation.

The issues that I think go along with that are:

- When is judicial intervention appropriate? Is it an automatic thing?
- What is the proper standard for preservation orders?
- What must be preserved? This is a major issue in electronic discovery.
- And ultimately, who bears the costs for this preservation?

Dealing with the first of these issues, when judicial intervention is appropriate, I think because of the concern about the dynamic nature of electronic data and the fact that it may well disappear, parties are now much more inclined to run into court at the beginning of a litigation and ask for a preservation order.

My view is—and it is a personal one—that we should resist that as judges. I do not think there is anything about the nature of the process that requires us to impose a preservation order absent some showing of need.

It seems to me that the showing of need requires some showing of danger that there is specific information which, absent the order, will disappear. Most parties have a pretty good handle on what their preservation obligations are and are not in need of that kind of an order.

PROFESSOR CAPRA: What would be a situation where a plaintiff would come in and say, “If I do not get that order, something bad is going to happen?” What would they be referring to?

JUDGE FRANCIS: Well, they may be referring to nothing.

PROFESSOR CAPRA: Yes, I know that. But on the other hand, how do they know? How do they pitch it to a judge to ask for preservation?

JUDGE FRANCIS: I think they pitch it by demonstrating either some bad practice or some actual loss of data. For example, if they can come in and say, “We submitted a cease-and-desist letter threatening litigation a year ago and I know from talking to my adversary that they have never had a litigation hold in place.” That is the kind of showing that I think would move me toward imposing a preservation order.

JUDGE ROSENTHAL: But even there, Judge Francis, would you get the parties in so that you would not be doing it ex parte?


JUDGE FRANCIS: Oh Lord, yes.

JUDGE ROSENTHAL: And you would be doing it in a way that would be tailored to achieve a reasonable preservation order without paralyzing the ability of the company to continue the ordinary operation of its computer system?

JUDGE FRANCIS: And that is particularly important in the electronic discovery realm. In the paper realm, I can pretty well say, “And thou shalt not destroy any documents of this type,” and that is going to be sufficient. In the electronic arena, I am probably going to have to know which servers the data is likely to reside on, and perhaps who the individuals are whose e-mails have to be preserved. There is a lot more detail that is going to go into a preservation order in the electronic world, and I am going to need to know that.

The other particularly interesting area for electronic discovery is what has to be preserved. At one level, the question is: Do you preserve inaccessible as well as accessible data? I think that the notes to the rules speak to that.

JUDGE ROSENTHAL: Yes, they say, “It depends.”

JUDGE FRANCIS: Yes.

JUDGE ROSENTHAL: Very helpfully.

JUDGE FRANCIS: Generally the preservation obligation is different from the production obligation. So you may well have to preserve inaccessible data even though you will make an argument later on that you do not have to produce it.

The other area where this becomes a major problem is in what is called ephemeral or transitory data. Let me give you an example, and this is a real-life example where the names have been changed to protect the guilty.

Imagine a situation where your client has a web site that hosts what is called bit torrent files, which are files that contain the names of musical compositions, for example. They do not contain the compositions. But the visitors to the site, once they identify the name, will get a hyperlink to a peer-to-peer sharing arrangement where they can get that musical composition, which of course is copyrighted. They are getting it without paying the appropriate license fee. So the copyright owner sues.

Well, it turns out that the web site does not maintain information about, for example, who accesses the site, so we cannot find out who is actually committing the direct copyright violation. But that information resides in the random access memory, the RAM, for maybe six hours and then it disappears. See Fed. R. Civ. P. 37(f) advisory committee’s note (“Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case.”).

Now, is that electronically stored information? Is that information that the web-site proprietor can be required to preserve for as long as it takes to

37. See Fed. R. Civ. P. 37(f) advisory committee’s note (“Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case.”).

get through this litigation? Interesting unanswered questions, but they are
typical of the kinds of questions we are going to confront with electronic
discovery.

And then, lastly in this area, there is cost shifting. I have yet to see a
situation in which a court has imposed cost shifting in preservation.
However, I see no reason why it would not be available as a judicial tool
where a court feels that it is somewhat possible, but highly unlikely, that
there is really valuable information that may be lost, but the cost of
preservation is quite high. The response of the court would be, “Okay,
requesting party, if you think that is so important, put your money where
your mouth is and share in the costs of preservation.”

As I have said, it is not yet a situation where I have seen a court impose
cost shifting. I have been told of situations where parties agree to share
preservation costs, which I think is a valuable approach.

The evil twin to preservation is spoliation. The problem, as Judge
Rosenthal has pointed out, in the electronic world is “the computer ate my
data.” That is really what the rule is designed to deal with.

The concern is that unfamiliarity with technology would result in the
innocent loss of electronically stored information and the imposition of
draconian sanctions. We have to look at that in a context where, in the U.S.
Court of Appeals for the Second Circuit at least, you do not have to show
bad intent on the part of the party responsible for the spoliation in order to
get very serious sanctions. You can get an adverse inference by showing
mere negligence on behalf of that producing party. That is Residential
Funding Corp. v. DeGeorge Financial Corp. So there is cause for
concern about spoliation.

The good news, I think, is that I have seen very few cases in which the
sanctions issue turns on new Rule 37(f). There are not a lot of cases where
it is simply a problem of saying, “Oh my goodness, I forgot to turn off auto
delete.” The spoliation cases that I have seen are the traditional ones: the
party did not impose a litigation hold at the time when it reasonably
anticipated litigation; or it failed to implement that hold in a reasonable
way; or it did not tell all of the responsible employees to stop deleting
their e-mails.

JUDGE ROSENTHAL: Or it used a software program called Evidence
Eliminator.

PROFESSOR CAPRA: Yes, that is a good one.

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40. 306 F.3d 99, 113 (2d Cir. 2002).
JUDGE FRANCIS: That is the other one.
JUDGE ROSENTHAL: Which is a real case, as in “too stupid to win.”
JUDGE FRANCIS: Right.

Actually, there is an exception to what Professor Capra said about there being no such thing as delete. There is one spoliation case where the producing party took a hammer to the hard drive. That effectively deleted the data and, needless to say, was subject to spoliation sanctions.

Judge Rosenthal has a recent decision on spoliation, Anadarko Petroleum Corp. v. Davis. She can correct me when I misstate the case. It demonstrates an interesting twist on electronic discovery spoliation.

The case involved an employee who walked off with proprietary information when he left his job. The employer sent a letter—and obviously commenced litigation—saying, “Return that right away and do not use it for anything.” So the defendant dutifully downloaded all of the information onto thumb drives, turned those over to the employer, but deleted from his laptops and other data storage sources that same information.

Now, proving that no good deed goes unpunished, the employer then turned around and said, “You spoliated because you destroyed that information.” And, indeed, there is a legitimate question of whether all of the information was conveyed with the thumb drive to the employer and whether it was conveyed in reasonably similar form. The last I heard, they were engaged in a forensic inquiry as to how the thumb drive information matched up against what had been removed from the other data sources.

JUDGE ROSENTHAL: That is guaranteed to lead to a request to shift the cost.

PROFESSOR CAPRA: Yes, in that situation.
JUDGE FRANCIS: Absolutely. And spoliation sanctions.
PROFESSOR CAPRA: I am just wondering, though, do her decisions on this matter? Do they carry extra precedent because she wrote the rule?
JUDGE FRANCIS: Oh, with me they do.
PROFESSOR CAPRA: I would think they would.
JUDGE ROSENTHAL: And only Judge Francis.
JUDGE FRANCIS: Let us move to the issues of production.

The threshold issue in production is, of course, relevance. At one level, the rules now take care of that to some extent by identifying electronically stored information as a document; therefore, there is no longer any argument that it is not. Otherwise, the definition of relevance has not changed.

45. Id. at *13.
46. Id. at *9.
47. Id. at *14.
The problem is really in its application. The best example of that is metadata. Metadata comes in a variety of flavors. It may be data that is associated with a particular document; for example, changes to the document over time, who the author of the document is, and so forth. But it may also be information that is independent of the document, like what time the computer system was turned on. This information goes to the system as a whole as opposed to any particular document.

How do we determine the relevance of all of this metadata? I would suggest that it is context dependent. Sometimes it can be pretty straightforward. If you have a case in which there is a question about the intent of the parties in drafting a contract and you can obtain prior drafts of that contract by examining the metadata of one of the parties, that is plainly relevant. You would have to produce that metadata.

There are also less obvious ways that metadata may be both relevant and discoverable. What about the authenticity of documents? How do you demonstrate that an e-mail that you have now printed out is authentic? You may need to get the metadata to demonstrate where it came from, what its genesis was, and what its path was throughout a particular organization, in order to make your admissibility argument at trial. So there is an argument to be made that all of that metadata is critical to the authenticity issue.\(^{48}\)

The metadata may be critical to either supporting or challenging a claim of privilege. For example, in order to determine whether any claim of privilege may have been waived, it is important to know to whom the document was distributed, even if it does not appear on the face of the document. Was it distributed to somebody's nanny for some reason, or to somebody outside any reasonable view of the attorney-client privilege?

Finally, there is a question of whether metadata may be important for searchability purposes. A normal word search may or may not need metadata to provide additional words that can link you to the document. However, now there are conceptual search regimens which make use of the metadata in order to determine how different documents may be linked, and therefore whether they may be conceptually related to a particular discovery inquiry. So if a party strips off the metadata, there may not be a direct relevance issue, but that may make it harder for the requesting party to search the information. This goes back to the question of the form of production.

One of the issues that is now percolating in the courts is, What is the presumption with respect to metadata? Is it presumed to be producible or is it presumed not to be producible? Courts are going both ways.\(^{49}\)

I am not sure that is really the right question. I think the question is, What has the party asked for and is the metadata responsive to that

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question? Hopefully, the parties talk about that issue, if not in the initial meet-and-confer, certainly in the meet-and-confer that they have with respect to the objections to the discovery request.

PROFESSOR CAPRA: You mentioned, Judge, with respect to metadata, that it could show you whether something is privileged. Could the metadata actually be privileged?

JUDGE FRANCIS: Absolutely. There is a recent case out of New Jersey where there was an inadvertent disclosure issue that was created because the judge found that the metadata had included privileged information.50

PROFESSOR CAPRA: So a lawyer doing a privilege review not only has to review the content of the document, but also has to review the metadata?

JUDGE FRANCIS: Hopefully.

JUDGE ROSENTHAL: Which is one reason we need 502.

PROFESSOR CAPRA: It is coming up. It will be there.

JUDGE FRANCIS: The two-tier regimen under Rule 26(b)(2)(B), as we have discussed, involves the problem of inaccessible data. We have talked about the shifting responsibility. The producing party has to prove inaccessibility. Then, the requesting party can demonstrate good cause for production, and the court can impose conditions.

One of the interesting practical issues that I see coming down the pike is whether courts are going to go through an almost mechanical burden-shifting procedure. I have seen some courts pass that by and immediately go to Rule 26(b)(2)(C) and talk about the proportionality issue, basically saying, “Look, we are not going to worry about whether definitionally it fits within the category of inaccessible or accessible. Even if it is accessible, the value is so outweighed by the burden here that I am not going to require production.”51 I think that is a sensible way of going about it.

Frankly, if I were to conduct a hearing on the production of documents, I would have one hearing and not two. I am going to require the requesting party to have some arguments for good cause even before I have made a definitive determination about whether a particular set of data is accessible or inaccessible. I think it ultimately gets rolled into a question of the marginal value of the discovery that is being requested, and I think courts will continue to treat it that way.

PROFESSOR CAPRA: Are we at the issue of cost shifting?

JUDGE FRANCIS: It is as good a time as any.

PROFESSOR CAPRA: There are a lot of factors—there are some in the rules, there are some in your opinion in Rowe Entertainment, Inc. v.


William Morris Agency, Inc., there are some in Judge Shira Scheindlin’s opinion in Zubulake v. UBS Warburg LLC, there are some kind of all over.

What do you do? How do you figure out all those factors? Is it all basically a bunch of ways of saying the same thing, or are there differences?

JUDGE FRANCIS: I think it depends on whether you adopt Judge Scheindlin’s view of a hierarchy or whether you think that the individual factors will probably play out differently in different cases. I am resistant to the hierarchy approach because my fear is that the factor at the top of the hierarchy will almost always wash out the other factors.

PROFESSOR CAPRA: Basically, I would think that the idea is that it is really a proportionality issue, right?

JUDGE ROSENTHAL: Exactly.

PROFESSOR CAPRA: Generally speaking, how likely are you to obtain any useful information; how expensive is it? That is really the broad view of it, right?

JUDGE FRANCIS: That is right. But the danger is if we stop there, we lose sight of other factors, such as whether the parties have the resources.

PROFESSOR CAPRA: Right.

JUDGE FRANCIS: I think there is a fear among requesting parties that they will be shut out of discovery to the extent that there is cost shifting because they simply cannot afford to bear a portion of those costs.

JUDGE ROSENTHAL: And there is also a fear among producing parties that if they have a deep pocket, the issue gets lost before they even open their mouths, because they can afford it. If it is a $100,000 case and it is going to cost $200,000 in forensics to restore back-up tapes, that may cut against ordering production, but if you are focusing on the resources of the parties, that may decide the issue.

PROFESSOR CAPRA: Right.

JUDGE FRANCIS: Let me tell you why I think you cannot know at the outset whether the cost shifting is favorable to the producing party or favorable to the requesting party. It is because you cannot know what the judge would have done in the absence of the ability to shift costs. If the judge simply would have denied the discovery, then the availability of cost shifting is favorable to the requesting party, because at least now the party is in a position to get its hands on the information.

JUDGE ROSENTHAL: This is why the notes carefully explain that the issue of whether to require production is related to, but separate from, the question of who is going to pay for it. The intent was not to introduce a regimen that says, “If you want to pay for it, you get whatever you want.”

52. 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (creating an eight-factor test to determine whether there should be an allocation of costs for electronic discovery).


54. See Fed. R. Civ. P. 26(b)(2) advisory committee’s note.
MANAGING ELECTRONIC DISCOVERY

PROFESSOR CAPRA: But the parties could contract around that, right? The parties can do that. I see that happen all the time.

JUDGE ROSENTHAL: Sure.

JUDGE FRANCIS: And they did it long before Rowe and anything else. They often agreed to share the costs.

One last point on cost shifting. This is sort of a judicial perspective. Why is cost shifting so valuable as a tool? You have to realize that judges are the most ignorant players in this whole process.

JUDGE ROSENTHAL: Easily.

JUDGE FRANCIS: We do not have the information that the attorneys have regarding discovery. The attorneys do not have the information that the parties have about what is out there. And yet, we are asked to make determinations about whether the information is discoverable. Without cost shifting, that is a binary determination. We have to say, "Sorry, you do not get it," or, "Yep, you get it."

With cost shifting, we can make decisions that are somewhat more nuanced in the face of this uncertainty and say, "Well, I think it may be forty percent likely that it is useful. In light of that, I am going to shift a portion of the costs." That, I think, is a more satisfying result than having to make a black-or-white, yes-or-no determination.

It is all yours, Professor Capra.

PROFESSOR CAPRA: I am here to talk about, among the other things that we have been talking about, proposed Rule of Evidence 502. The reason that evidence is an issue is because of what is going on with respect to production of electronic data. As has been stated by the judges, there is a risk that privileged and work-product information will be disclosed inadvertently in the production. The consequence of such a risk is waiver of the privilege.

Basically, under federal common law, the rules on waiver vary. One rule, I guess you would call it "the death penalty rule," is that any kind of disclosure of privileged information results in a waiver; it does not matter how hard you tried to keep it from being disclosed, it is a waiver. Some courts have even said that it is a subject matter waiver. Those kinds of draconian rules lead to extensive costs of what are called "preproduction privilege review." While that was probably a problem in paper discovery, it is especially a problem with respect to electronic discovery. The reason is, again, there is so much volume. Then you have to look through the metadata. So the risk of a mistake is really profound.

So what has happened in litigation is there have been many levels of preproduction privilege review. A litigator's life has turned from arguing interesting things, perhaps, or preparing a brief, to sitting in front of a

55. See Rowe, 205 F.R.D. at 421.
56. See Advisory Committee Report, supra note 6, at Fed. R. Evid. 502 (Proposed 2007).
computer screen and clicking "privileged" or "not privileged" all day. There are scores of lawyers who do this.

For example, when I was—I guess I still am—special master in the case of In re IPO Securities Litigation, one of the lawyers said, "Well, if we have to turn this over, we are going to have twenty-five contract lawyers in a room looking this over for privilege. Is it really worth all the effort?"

It took me aback. That was really my first indication that there are actually lawyers out there who do nothing but sit in a room looking at these computer screens. I said, "Oh my gosh." They said, "Well, Professor, none of them are your students." So I said, "Okay, then that is all right." I do not know whether they knew that. I think that was just a palliative.

JUDGE FRANCIS: Here is the scary part of that: Some of those lawyers are in Mumbai.

PROFESSOR CAPRA: Yes, exactly. In other words, they are not even on location. They are usually the first cut, and then there are other lawyers who get the second and third cuts.

So how does this all shake out? Why did the Civil Rules not deal with problems and the costs of preproduction privilege review? The answer lies in the Rules Enabling Act. The Rules Enabling Act states that rules of privilege must be directly enacted by Congress. The Civil Rules, as with all of the rules that we are talking about that do not deal with privilege specifically, proceed through a rule-making process that does not involve direct enactment by Congress. It goes to the U.S. Supreme Court, and if Congress does not act within a certain period of time, then the rules become law. That is the way the electronic discovery amendments were enacted.

When Congress has to get directly involved, then it is a whole different ball game. I do not think there was ever an idea that you were going to do it that way, right?

JUDGE ROSENTHAL: No. You would not let us.

PROFESSOR CAPRA: That was the other thing. Yes, we would not let them, because it should not be in the Civil Rules anyway. Privileges are evidence rules and they should be in the evidence rules, and that is that.

There is definitely a reason to deal with these waiver rules and the draconian nature of these possible waiver rules. Even though some federal jurisdictions have more protective rules with respect to waiver—stating that so long as you try pretty hard, it will not be a waiver—those rules cannot be

57. Professor Daniel J. Capra has been appointed by Judge Scheindlin as a special master to rule on discovery disputes for this large securities fraud class action. See generally In re IPO Sec. Litig., No. 21 MC 92, 2004 WL 60290 (S.D.N.Y. Jan. 12, 2004).
59. See id. § 2074(b) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.").
60. See id. § 2072(a) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure ". Section 2074 provides that only rules of evidence must be approved by Act of Congress, and all other rules simply have to be transmitted to Congress in a fashion outlined by the rule. Id. § 2074.
relied upon in a system where there is one jurisdiction that says there is strict liability. This is because you could comply with the rule of the court in which you are in, but then somebody could bring a later litigation in a jurisdiction with the trigger-happy rule of waiver and claim that there has been a waiver. It is what lawyers call a lowest common denominator. They have to act toward the lowest common denominator.

Clearly there needed to be some uniformity. Clearly there needed to be some way to limit the costs of preproduction privilege review. That is what Rule 502 is about. But I stress again that it is a rule that has to be directly enacted by Congress. It just cannot be something that the Rules Committee thinks up.

So the Rules Committee went to Congress to ask for something to get this whole thing started. The leading person at that point was Congressman F. James Sensenbrenner, Jr., who was the chair of the House Judiciary Committee. He would not write a letter.

However, the chair of the Standing Committee, the committee above our two committees, wrote the letter for him, and he signed the letter and put it on his own letterhead—very gracious, it only took him three months. Then he sent the letter saying, “These costs of privilege review are really out of sight, and should there not be some kind of rule that you could submit to us, Congress, for purposes of direct enactment under the Enabling Act?” This letter from Congressman Sensenbrenner is how Rule 502 got started.

Essentially, the committee is attempting to do all the drafting for Congress. The concern is for these costs of preproduction privilege review. Tier upon tier of lawyers looking at computer screens is outrageously expensive. One presentation at the Advisory Committee hearing on this issue said that in one production for the U.S. Department of Justice, Verizon spent over $5 million in privilege review, just privilege review, having several tiers of lawyers looking at e-mail after e-mail after e-mail. They estimated that if there was some protection from the draconian rules on waiver, they could have cut those costs by eighty percent.

Without Rule 502, are litigants trying to limit the costs of privilege review? They are, but the current law does not really help them that much.

In terms of the electronic discovery issues, parties are using electronic software, but it is not always perfect and there can be mistakes. So eyes-on review is still required.

Parties are trying to enter into agreements, as Judge Rosenthal talked about, such as “claw-back” and “quick-peek” agreements. But those are not determinative with respect to third parties. Parties are trying to get confidentiality orders from judges. But the law on that is not exactly uniform as to whether those orders are enforceable with respect to third parties.

So you really need protection with respect to third parties. I guess I should say where it is now. The Advisory Committee, on Friday, approved this rule to be sent to the Standing Committee, which is the committee on
Rules of Practice and Procedure. We will talk about where it goes from there in just a second.

Rule 502 protects against the costs of privilege review in a number of ways.

First, it establishes that subject matter waivers are basically the exception and not the rule. A subject waiver means that not only is the disclosed document waived, but also that all related privileged documents on the same subject matter are waived, which means that you would have to do a separate production of this undisclosed privileged material. A subject matter waiver is a very serious problem.

So, the first thing that the rule does is limit the use of subject matter waiver. It cannot be done if the disclosure was just a mistake; there is no subject matter waiver in an inadvertent disclosure.

Second, Rule 502 adopts a uniform rule on inadvertent disclosures, which provides that if a party uses reasonable steps to try and protect against disclosure of privileged and work-product information, and then, once it discovers that there has been an error, it uses reasonably prompt efforts to seek the information's return, there will not be a waiver. The basics of that rule exist in most, but not all, of the federal jurisdictions, and so it is an important idea to achieve uniformity in that respect.

The committee note also says that using software might be a reasonable step; having efficient systems of record management programs might be a reasonable step. It tries to provide some guidance.

So what the rule is trying to do is say that this eight-tier, eyes-on privilege review is no longer required. I guess we are trying to say it in the best way possible.

Next, the rule tries to provide some efficiency and predictability by allowing either the parties or the court on its own to enter a confidentiality order. The confidentiality order would state that any disclosure in this litigation is not a waiver, or any prior disclosure that has occurred is not a waiver. It specifically says that the court order is enforceable against all parties and nonparties, and that is the basic premise.

The only other thing to talk about with respect to Rule 502 is that while it is a Federal Rule of Evidence, it would also govern state court proceedings.

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61. See Advisory Committee Report, supra note 6, at Fed. R. Evid. 502(a) (Proposed 2007) (providing that disclosure of privileged material only waives the attorney-client privilege or work-product privilege to other undisclosed materials under specified circumstances).

62. See id. at Fed. R. Evid. 502(b) (Proposed 2007).

63. Id. at Fed. R. Evid. 502 advisory committee’s note (Proposed 2007) (stating that using an “advanced analytical software application[]” to screen for privilege may be considered taking “reasonable steps”).

64. Id. at Fed. R. Evid. 502(d) (Proposed 2007) (“A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court.”).

65. Id. (“The order binds all persons and entities ... whether or not they were parties to the litigation.”).
to some extent.\textsuperscript{66} The reasoning is that if you make a disclosure in a federal
court that is protected by Rule 502, you would have to be concerned about
subsequent state court proceedings. A state court might say, "Well, we find
it to be a waiver under state law," or, "We find that we are not going to
listen to what the federal court order is." So the rule has to bind subsequent
state court determinations.

The rule does not cover disclosures made in the first instance in state
courts. So if there is an inadvertent disclosure in New York, and the
question is whether that is a waiver in a New York state court, this rule does
not cover that. That is what is called the "state-to-state problem." There is
the disclosure in a state proceeding, and the question is whether it is a
waiver. That determination is made in a state proceeding.

The initial draft of the rule was intended to regulate that situation, and the
states went nuts. The state supreme court justices filed a letter. It was
threatening war, or something like that. It was a really bad letter so it got
tailored back.

There is still some discomfort—I guess you would call it—in controlling
state court determinations. But, after a lot of political—

JUDGE ROSENTHAL: Small "p."

PROFESSOR CAPRA: Yes, it is all small "p" on the Rules Committee,
right, Judge Rosenthal?

JUDGE ROSENTHAL: Right.

PROFESSOR CAPRA: So with a lot of small-"p" politics, including
driving for seven hours out to Pittsburgh and kneeling in front of that
particular body of chief justices, they believe that it is now okay to have a
situation in which it binds state courts so long as it is a federal disclosure,
and not the state-to-state problem.

There is one final point. What if there is a disclosure in state court?
What are the consequences? That decision is made by a federal court.
Does the federal court look to the state law? Does the federal court look to
Rule 502?

I think there was a pretty elegant fix for that issue. The rule provides that
the applicable rule is the rule that is most protective of the privilege and
work product.\textsuperscript{67} Do you like that?

JUDGE FRANCIS: Interesting.

JUDGE ROSENTHAL: Yes.

PROFESSOR CAPRA: If it would not be a waiver under either set of
laws, then it is not a waiver. That is the way that works from the state-to-
federal circumstance.

What is going to happen to this rule? Interestingly, I know we were
talking about how people, including National Public Radio, were interested
in this. This is just an anecdote. The committee was in Rancho Santa Fe.

\textsuperscript{66} Id. at Fed. R. Evid. 502(f) (Proposed 2007) (providing that the rule also "applies to
state proceedings" and applies "even if state law provides the rule of decision").

\textsuperscript{67} See id. at Fed. R. Evid. 502(e) (Proposed 2007).
Once the meeting was over, I was sitting in my hotel room making all the changes. I got calls from a couple of media people asking what happened with the rule. I thought I was like Brad Pitt: "How did you find me here?" So there is some interest in this, I guess.

What is going to happen with the rule? The rule will go to the Standing Committee in June. Hopefully, the Standing Committee will adopt the rule. Then it goes to the Judicial Conference. That body is the policy arm of the federal courts, chaired by the Chief Justice.

Then, if it were going through the rule-making process, it would go to the Supreme Court and would sit there for an inordinate amount of time, in my view. But the Chief Justice has said that there is no need to do that because it is going straight to Congress. So it would be a proposal for legislation from the Judicial Conference to Congress.

That gets us back to the Sensenbrenner issue. Obviously, there has been a change of party control. Therefore, we have been told not to say anything about Sensenbrenner; not to put "Sensenbrenner" in the law or anything like that. We should just say, "It came from Congress. We are not going to tell you when. And isn't this a good idea, which is neither a blue state nor a red state idea? It is to limit the costs of litigation. That is a good idea."

So that is where Rule 502 stands. I would hope, if all goes well, that it will be the law by the end of 2007.

JUDGE ROSENTHAL: Circling back to the Civil Rules, this now means—with that added protection from a court order that states that if information is produced and then there is an assertion of privilege—if there is a "claw-back" or a "quick-peek" agreement between the parties in a court order, that protection will apply as against third parties as well. So those kinds of agreements are going to become much more attractive and much more practical than they are today.

PROFESSOR CAPRA: I would just stress, to pick up on that, that this is true. The agreement binds everybody once it gets memorialized in a court order.

But the rule goes further, in that it is not dependent on party agreement. Party agreements work, generally speaking—and maybe the judges can confirm this—when there is relatively equal information on each side.

JUDGE ROSENTHAL: Right.

PROFESSOR CAPRA: If a plaintiff in a litigation has no information, and the defendant has all the information, the plaintiff is reluctant to enter into one of these "quick-peek" or "claw-back" agreements because they are burdensome on the receiving party. Would you agree, Judge?

JUDGE ROSENTHAL: Absolutely.

PROFESSOR CAPRA: That is because you have to look through all the material, and you have to say, "This is probably privileged." Then you have to segregate it and you have to turn it back.

But this gives courts the authority to enter confidentiality orders whether the parties agreed or not. So I think that will be useful.
JUDGE ROSENTHAL: It will be.

JUDGE FRANCIS: But we cannot order the production of privileged documents over the objection of the producing party.\textsuperscript{68}

PROFESSOR CAPRA: Yes, I guess that is right. I guess you cannot do that because they would stand on the privilege.

JUDGE ROSENTHAL: Right.

JUDGE FRANCIS: Right.

PROFESSOR CAPRA: But if it cannot be used, is it like a use immunity? In other words, if you enter into a confidentiality order, "turn it over but it will not be a waiver," would that be the equivalent of use immunity in the Fifth Amendment?

JUDGE FRANCIS: And therefore I could order its production?

PROFESSOR CAPRA: Yes.

JUDGE FRANCIS: I do not think so.

PROFESSOR CAPRA: What do you think about that?

JUDGE ROSENTHAL: No, I do not think so, because it does not respond to the other vice of production, which is that the information is out there.

PROFESSOR CAPRA: Yes. I have to think about that.

JUDGE ROSENTHAL: It is the "un-ring the bell" problem.

PROFESSOR CAPRA: I have to think about that. Okay.

So that's where we are in terms of Rule 502.

I really want to thank the judges. They did a great job. I am so happy to have them here. Thank you.

\textsuperscript{68} See In re Dow Corning Corp., 261 F.3d 280, 284 (2d Cir. 2001).