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The Philip D. Reed Lecture Series: Judicial Records Forum

Panel Discussion

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THE PHILIP D. REED LECTURE SERIES

PANEL DISCUSSION

JUDICIAL RECORDS FORUM*

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The Archivists Round Table of Metropolitan New York, Inc.
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The Philip D. Reed Chair, Fordham University School of Law

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I. OPENING REMARKS AND COMMENTS

PROF. CAPRA: Good morning. I'm Dan Capra. I am the Philip Reed Chair at Fordham Law School. On behalf of the law school and the Chair, I would like to welcome you here for the Judicial Records Forum.

First, I want to provide some thanks. Thanks to my co-special master Ron Hedges and my coauthor Ken Withers for bringing this program to Fordham. I also want to thank the *Law Review*, because the *Law Review* will be publishing the transcript of these proceedings in the forthcoming next volume. We are very appreciative of that.

What we are dealing with today are the challenging questions involving management of judicial records and access to judicial records in the digital age.

The reason we are here is that the Philip Reed Chair is dedicated to the discussion of challenges faced by federal courts. The topic of judicial records has been part of our agenda for the last couple of years. So, for example, in 2010 the Chair sponsored a day-long conference—some of the people who you will see today were at that conference and participated in the conference—on how to protect privacy in public court filings, the phenomenon being, of course, that before digitalization, public court records were public but hardly accessible, and so they were practically obscure; but now, because of easy judicial access, there are serious issues about such easy access to private information in court filings. The Congress, in the E-Government Act of 2002, required certain personal identifiers to be redacted and required the Judicial Conference, which the Chair works with, to establish national rules that require redaction of those identifiers.¹

So one question at that conference was whether the redaction requirements were sufficient to protect privacy. Additional questions involved access to records in immigration cases, because currently the filings in immigration cases cannot be accessed remotely, they can only be accessed down at the courthouse, whereas other information that is in a judicial record, like for example a plea agreement, might be accessed from a prison. So there are very many issues with respect to the privacy parts of what we are going to talk about that the Reed Chair has already discussed and is still continuing to observe.

There are also issues of management and creation of judicial records. I am looking forward to hearing about that today.

I will leave it to these excellent panelists to bring up all these issues.

I want to turn it over to Pamela Cruz.

MS. CRUZ: Good morning. I am Pamela Cruz, and on behalf of the Board of Directors of Archivists Round Table of Metropolitan New York, Inc., also known as ART, where I sit as president, I would like to thank the sponsors of today's event without whose generosity today's Judicial Records Forum would not be possible.

1. E-Government Act of 2002, § 205, 44 U.S.C. § 3501 (2012).

ART is a volunteer-led organization, a professional organization. Without sponsors, such as those today, our programming and educational events would not be possible. Thank you again to the Philip D. Reed Chair at Fordham Law School, the Sedona Conference, and the Electronic Discovery Institute (EDI). Thank you.

I would now like to introduce Ron Hedges, of Ronald J. Hedges LLC, and Kenneth J. Withers, deputy executive director of the Sedona Conference.

MR. HEDGES: Good morning, everyone. Thank you for being with us today.

My name is Ron Hedges. That's Ken next to me over there on the side. I served as a magistrate judge for a number of years, I taught at various law schools as an adjunct and the like, and I was involved with a project for the Sedona Conference—a number of years ago, creating some type of best practices or guidelines involving concepts of confidentiality and access to judicial records. These include materials filed with the clerk's office generated by parties, as well as decisions issued by judges, materials supporting their decisions, and sometimes going outside of the context of filings to deal with discovery in civil actions and to deal with settlements, and how those are addressed in terms of confidentiality and access.

This is a continuation of what we began as a draft in 2005, what became a final version in 2007, and which continues to be something that you hear and see regularly. Those of you, for example, who read *The Wall Street Journal* may have seen on the first page yesterday a debate, if you will, going on in a federal court in Texas as to whether or not certain materials that are submitted with search warrant applications may remain sealed or whether they have to be open to the public.²

There are any one of a number of instances where we hear about this regularly. Two days ago, the California Supreme Court just issued an opinion declaring that addresses or names of police officers have to become public under the California right-to-know law,³ or whatever the equivalent of Freedom of Information Act (FOIA) in California.⁴

There is a lot going on. Obviously, we have the question of public access that has to be balanced against, as Professor Capra said, questions of privacy that go beyond personal privacy and talk about, for lack of a better phrase, corporate privacy, for example, protecting trade secrets and the like. These are all things that need to be considered when we have questions of access.

We also have to think about constitutional rights of access. The U.S. Constitution's First Amendment gives a public right of access to judicial

2. Jennifer Valentino-DeVries, "Permanent Injunction": *Sealed Court Files Obscure Rise in Electronic Surveillance*, WALL ST. J., June 3, 2014, at A1.

3. Long Beach Police Officers Ass'n v. City of Long Beach, 325 P.3d 460, 470 (Cal. 2014).

4. California Public Records Act, CAL. GOV'T CODE §§ 6250–6277 (West 2014).

materials.⁵ There is a common law right of access that in some senses may be broader than the First Amendment right, if I recall.⁶

MR. WITHERS: Both broader and narrower.

MR. HEDGES: Broader and narrower, depending on who you talk to.

In addition, we have statutory provisions requiring sunshine, if you will, in materials, although those generally pertain to actions taken by the executive branch rather than the judicial branch. That depends on what jurisdiction you are in.

So we have a lot of things we can talk about today. As Professor Capra mentioned, we are going to be talking about creation of records, preservation of the records, as well as access.

With that overview, I am going to turn it over to Ken.

MR. WITHERS: My name is Ken Withers. I am the deputy executive director of the Sedona Conference.

The Sedona Conference may already be familiar to some of you. Some of you, I see, are already members. It is a nonprofit organization. Like ART, we are volunteer-based, out of Phoenix, Arizona, but with an international presence.

The Sedona Conference tackles cutting-edge issues in the law, areas of the law that are developing, that are emerging, where direction is needed. Specific working groups within the Sedona Conference will tackle those issues and come up with best practices and guidelines and principles to help move the law forward in a just and reasoned way.

We pride ourselves on the fact that we are nonpartisan, that we do not represent either plaintiffs or defendants or government attorneys or private practice attorneys or in-house counsel or any other particular constituency group, but we include everyone.

We also pride ourselves on the fact that we are interdisciplinary. We are not just limited to attorneys. A lot of people who may or may not have legal backgrounds but who can contribute to the dialogue join our working groups and are very active members.

Our working groups come up with the commentaries, best practices, and principles—and the Sedona Conference's works are cited by courts and by legal scholars and others. We feel we have made an impact in the law, particularly in this area of access to the operations of our court system—our common law courts, our constitutional courts, et cetera.

This is an outgrowth of more than ten years of dialogue. I would like to invite you all to be part of that dialogue today.

There is a Hopi Indian tradition. Being from Arizona in the Sedona Conference, we treasure our Hopi Indian traditions. One is that in Hopi Indian mythology the coyote is rather playful. The coyote figures out a way to have fun all the time. The wolf is a pathfinder. The wolf solves problems and moves forward. We like to think of ourselves as both wolves

5. *See, e.g., Doe v. Pub. Citizen*, 749 F.3d 246, 266 (4th Cir. 2014).

6. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597–98 (1978).

and coyotes in the law. We are playful pathfinders. We are going to find solutions, we are going to work together, but we will have fun along the way.

In this particular area, we want to emphasize that we need the input from all of you who are not necessarily involved in the law or the legal industry but who are coming from business backgrounds, performing arts backgrounds, education backgrounds, museum backgrounds, because you are dealing with a lot of the same issues that we need to deal with in the courts. So throughout today we are going to be trying to get your contributions to an ongoing dialogue about how we preserve for the long term the very important record of our legal system, the way we adjudicate disputes, the way our courts and our government offices function—not only preserve the information, but preserve access to that information so that we can make sense of it later.

II. PANEL ONE: CREATION AND ACQUISITION OF ELECTRONIC RECORDS

MR. WITHERS: This is our first panel on creation and acquisition of electronic records.

I would like to introduce our first panelist. Anita Castora is the records manager at Eagle Federal Credit Union. Is that the largest federal credit union in Connecticut?

MS. CASTORA: Yes.

MR. WITHERS: How big is it?

MS. CASTORA: One and a half billion and holding. We have about 200 employees and twenty branches.

MR. WITHERS: Rick Hogan is the chief records manager for the Office of Court Administration, State of New York for the rest of this month, after which you will enjoy a blissful retirement. But as chief records manager for the Office of Court Administration, briefly describe your jurisdiction.

MR. HOGAN: My jurisdiction is to develop retention schedules and establish guidelines for maintaining records for all the courts in New York State. That would include everything from the appellate division, supreme and county courts, down through city, town, and village courts as well. So, obviously, the challenges for the various courts depend upon where you are.

MR. WITHERS: James Waldron is the clerk of the U.S. Bankruptcy Court for the District of New Jersey. Welcome, Jim. Describe a little bit your jurisdiction.

MR. WALDRON: Oh, it is endless.

MR. WITHERS: How many cases are filed in the bankruptcy court in New Jersey?

MR. WALDRON: In any given year that can change. As you are probably reading and following, it has been rather dramatic.

In New Jersey, we have, right now, approximately 30,000 bankruptcy cases filed. We have been as high as 45,000. We have been as low, when I first started in the system, as 6000. But that dramatic change currently is of some curiosity because people really are not able to follow why an

economy in such difficulties is not generating more bankruptcies. But that is not for us administrators to answer.

As far as our jurisdiction is concerned and what my job is, I am basically chief operating officer of the court. In the olden days, back in the eighteenth century, that really meant I was nothing more than the archivist and I was the keeper of the records. I still am the keeper of the records, but in addition to that, my job encompasses the administration of the entire system. So it is a little bit more involved than it used to be.

MR. WITHERS: This panel is going to discuss basics. It is going to try to establish a common vocabulary that I think we can all understand regarding what is a record and why records are important, both in the day-to-day course of business and for historical reasons.

I would like to just start out with the ISO [International Organization for Standardization] definition of a record: “[i]nformation created, received, and maintained as evidence and information by an organization or a person in pursuance of legal obligations or in the transaction of business.”⁷ That’s pretty broad. That’s pretty vague.

Each of you, as panelists, have your own definition of a record that you have to implement on a day-to-day basis.

Anita, from the real world, forgetting about this ISO definition, how do you define a record?

MS. CASTORA: A record is anything that is used as evidence or to create and document an action. Just from the banking industry, of course we are responsible for all of our members and/or clients, their money, their accounts, et cetera. So we need to track where decisions are made, for their accounts. So a record is documentation of actions taken for their account.

MR. WITHERS: That is from a business point of view. But you are a regulated industry, you are banking, so you probably are operating under various state and federal regulations that may or may not define a record but they certainly define information that you need to keep for specific purposes, for specific lengths of time, and perhaps even the form in which that is kept. Can you talk a little bit about that?

MS. CASTORA: Since I work for a credit union, we are actually governed by the NCUA, which is the National Credit Union Association. With that, interestingly enough, one of my other hats that I wear is business continuity. We are required to keep our member records indefinitely, which is amazing, because most business records we keep for a certain period of time. They are different from archival records.

But your question again was?

MR. WITHERS: You have a variety of different definitions that you have to work into your definition of a record.

MS. CASTORA: Right.

MR. WITHERS: Okay.

7. See Int’l Org. for Standardization, ISO No. 15484, § 3.15.

Let's move on to the state court system. You have a wide variety of courts, from the highest appellate courts down to the traffic courts and everything in between, with all sorts of different business functions. How do you define what a record is in the court system?

MR. HOGAN: We actually do have a formal definition of a record, which I could read if you want. Basically, it has to do with the operations of the court and how you maintain that.

The interesting thing is that, as in many governments and organizations, over the past twenty years we have had to change the definition to include digital, machine-readable records, because technology was getting ahead of the regulations. So a lot of organizations talked about a record as being something in paper or in microfilm and had left out the digital component. So we have had to add those in.

The most difficult thing for us to establish with our courts, and obviously with attorneys and even with litigants, is the difference between an original record and the official record copy, where, for example, a piece of paper is presented to the court and the court then takes the record and they will either microfilm it or they will digitize it. Once they do that, if they do it under the rules that we have within the court system that alternate form becomes the original record for purposes of doing business in the court. The piece of paper is nice and it is wonderful perhaps for archival purposes, but as far as being usable in the court at that point in time, beyond their presentation, it does not have the same value as the record copy would in its new form.

MR. WITHERS: Do you even keep the paper?

MR. HOGAN: We actually have a situation where our budget office will not fund a court operation digitally if they have not committed to records management practices where they will destroy the paper and not spend the money on maintaining it for the long term.

MR. WITHERS: We don't like the word "destroy." We dispose of it properly.

MR. HOGAN: That's correct.

MR. WITHERS: The federal bankruptcy court, how do you define a record? What kinds of things are you dealing with that are called records?

MR. WALDRON: First of all, we do destroy. We shred. We are dealing with privacy, so we've got to destroy it.

What we do with our records in the federal courts—and I won't just limit it to bankruptcy, but the federal courts—is that our records initially were defined very simply as the pleadings that were filed with the court and indices and dockets that were kept there. Obviously, that again, through time, expanded. Our records now are almost exclusively not paper. We are all electronic. Everything is submitted to us electronically.

We did go through the rather nauseating experience of having to destroy records after we had converted them digitally, with that great leap of faith that we had done that accurately and properly.

But as far as our scope, it is not only just our court records, it is our leave records, our financial records, everything that goes into the operation of the court—our emails. Our standards are set by the Judicial Council of the United States in conjunction with the National Archives. The Archivist of the United States has to sign off on anything that we do. So they come to a joint meeting. But that's how those records end up getting defined, through that process.

MS. CASTORA: I just wanted to add a little bit more on the banking, just because of the different kinds of records.

Most of the records, of course, were paper. We have 80 percent digitalized the records now. Of course, with all the technology, we are actually experiencing how we are going to save these digital records, something most interesting. Now everybody has their iPhone, so you can actually cash your check by just taking a picture on your iPhone. We have to capture these images and, of course, index them. It just brings more challenges as we save and manage these records in the banking industry.

I alluded to our managing organization. We have the financial records of course, and then of course all the business records, and we have retention schedules. We destroy records on a regular basis.

Since I'm a records manager, I am a real stickler. Of course, we have guidelines that we do for training, and we educate our employees, and we actually have an electronic records cleanout. I call it "the biggest loser." So I have folks go and they have to actually go in and clean out their records. Then I audit.

So it has become a challenge. Truly, they are not really doing it. So I am always looking at ways to try to do it. So it is a challenge.

Just talking about the different kinds of records, people still understand that a record—people still think it has to be paper. It is really challenging for people to realize that an email is a record, a photograph is a record, and just anything that can be used as evidence is a record.

MR. WITHERS: On that point, let me start back with the state court and move forward. What percentage of the records that you are dealing with now today are originally digital, there really isn't any paper that is starting the process? Whether you are in-taking information from others or you are creating it internally, what percentage is born digitally?

MR. HOGAN: At this point it is very small. E-file has really, over the past four or five years, begun to take off. But we had laws in New York that limited the courts that could e-file. So being born digital is a very minor percentage at this point, although five years from now I would suspect we will be at about 75 percent.

MR. WITHERS: In the federal bankruptcy court, you were pioneers in digital records.

MR. WALDRON: With leading-edge technology.

One thing I want to clarify is that yes, we do still have paper records because we still have lots of paper stored in warehouses that did not get converted. When I said we converted records, those were the ones that we

were still holding onto. Instead of sending that paper off with the requisite costs that go along with that, those are the ones that we scanned and then destroyed.

However, as far as the number of documents kept, there is a little bit of a distinction in federal courts, because there is still some paper required. The paper that is required in the federal courts has to do with signatures. However, the signatures are not being kept by the court; the signatures are being kept by the individual attorneys who file the pleadings. In the case of pro se litigants, that paper is held by case trustees.

We have other record retentions which are not subject to our guidelines. They are subject to malpractice issues within the state. So if an attorney has an original document that was signed by his client, he has to keep that in the State of New Jersey for seven years, under the state laws.

But we basically have no paper in the court whatsoever at this point, aside from the fact that judges tend to print it out.

MR. WITHERS: But you also have situations where you have to have a piece of paper in order for a litigant or a trustee to verify some information.

MR. WALDRON: That particular piece of paper is something that is printed out. It doesn't have to be verified. That's not required. I was talking about it before, that when a debtor comes into the bankruptcy court and they have what is called their first meeting of creditors, they want to verify that all of the information on the form is accurate. So they will give them the actual copy of the petition. But that is not generated by the court; that is generated electronically by the case trustee.

MR. WITHERS: So it is superfluous, it is just a copy, and it has no record value as such?

MR. HOGAN: Just to clarify, because you had asked born digital. In terms of digital records, though, they are well over 70 percent of the records in the court system now, because people have converted them from their paper form now that they are secure and they can do it well.

MR. WITHERS: That is a scanning process. They are not starting out as a digital business process. They are starting out as paper and getting scanned. At the credit union, what percentage of what you are dealing with is born digital?

MS. CASTORA: It is almost all born digital, although you alluded to signatures. Signatures are a big deal. In fact, we have what we call signature cards or applications. Those are permanent records. But they have all been scanned and we store those.

But something interesting, just a different perspective, is that our deeds for our mortgages, et cetera, we keep those in values on paper. We are required to keep those on paper.

MR. WITHERS: You say you are required?

MS. CASTORA: By the NCUA. But everything else we have we scan or it is created on paper and we scan it in once we get the signatures. Of course, there is the best evidence law, which of course everyone here

knows.⁸ Actually, we do it in thirty days. Things are quality controlled. We do 50 percent quality control and then we shred. We have a real good track record.

MR. WITHERS: So there has been a dramatic change in the last twenty years. The previous mindset was that paper was the record, paper started the business process, and paper documented the business process. Electronic information was ancillary to the business process; it may have been reduced to paper if it became a record and went into the file. That was the old paradigm. Now we have exactly the opposite paradigm, that the paper is superfluous, the electronic transaction creates the record, with the exception of the signatures that are held by the attorneys in the bankruptcy court. So you are not a custodian in the bankruptcy court of those signatures?

MR. WALDRON: No, we are not. Actually, I should say some courts are. Some courts opt to do that. Some courts did not because of the labor involved.

One of the things too, again to clarify, is pro se debtors. We have an electronic case filing system for pro se litigants where they can go online and file. But a lot of people do not do that. So we do get that paper, but we convert that to electronic immediately and then dispose of the paper.

MR. WITHERS: Let's go on and dig a little deeper here. Why are records important? What do records do for us? I have listed a few things, just off the top of my head that are reasons why we have records. Part of it has to do with the definition.

- They record decisions and actions.
- They define people's rights and responsibilities.
- They help us enforce obligations later.
- They provide for accountability within the organization.
- They help us plan for future activities; if we know what we have done in the past, we can plan for the future.
- And of course, they provide a historical record, for those of you who are interested in historical records.

Why are records important to you, Anita?

MS. CASTORA: Because they represent the business work flow of how a business operates. We need the record to do the next action. We need that evidence to move on to the next step. Of course, the customers have to have a record of who they are before we can let them access their accounts, to get their savings or their checking accounts, or whatever. And of course, you have to have the information to make decisions and to operate as a business.

MR. WITHERS: Rick, what would you add to this list or what would you emphasize here? Why are records important to you?

MR. HOGAN: If you look at our retention schedules, they are all based on practices within the court system. There are certain records that as soon

8. FED. R. EVID. 1001-1008.

as you are done with them you can dispose of them. Other records, because it would deal with ongoing business transactions—for example, surrogate court records—would be maintained permanently because a number of things could involve litigation throughout the years. Obviously, all of the retention schedules that we have are based upon litigation as it occurs.

There are a few records that we require to be maintained to document the history of the courts so that you will have an idea a hundred years from now what types of cases were being dealt with and how they were being dealt with in a certain timeframe. But other than that, it is really to make sure that litigation can proceed when it needs to.

MR. WITHERS: Jim, from a business operations point of view, in the Bankruptcy Court why are records and your definition of records and your management of records important to you?

MR. WALDRON: It is hard to expand on that. But if you understand the bankruptcy context and what role it plays in our society, the records of the bankruptcy court, not only now but ten or fifteen years from now—companies file, they file again, they file again, and they file again—the records of the court become crucial.

Also, title to property is changing constantly throughout a bankruptcy proceeding. Those records in the bankruptcy context are permanent records. Therefore, it is absolutely critical for us to have them, for our society to have them.

From the historical standpoint, there are all kinds of answers we could give for that. It is also crucial to our society and learning how we have gotten to where we are, and particularly in the bankruptcy context, in terms of the legislative process, because our Congress, unfortunately, didn't do such a great job with the U.S. bankruptcy law. But had they been more attuned to the records of the bankruptcy court in the process, we might have had quite a different result than the law that we have. So I think it permeates all of society.

MR. WITHERS: I'll just make the statement that each of us on the panel and the moderator are speaking for ourselves and not for our respective organizations.

MR. WALDRON: Absolutely. But I am close to retirement, so I feel this freedom.

MR. WITHERS: Let's expound on that a little bit and talk specifically about judicial records. So, Anita, I'll let you off the hook here. I'd like to invite Ron Hedges to join the conversation at this point. Why are judicial records particularly important?

Now, I listed a few things that I think are important, and perhaps unique in some ways, about judicial records.

One is that our judicial records allow for meaningful public access to the courts. Not everybody can stand around in the courthouse for their entire life and watch what is going on in the courts. So our records provide meaningful public access, a way for people to actually review what is going on in the courts.

They provide transparency into court proceedings. That helps keep people honest. They allow the public, sometimes the media as an extension of the public, to view what the operations are. So they allow for public and political evaluation of our court system. And, from my point of view as a former historian of legal history, they allow for the development of the common law. Unlike civil law systems in Europe, Asia, and South America, our common law develops because of precedent. Each case, and the way each case is decided, informs the litigants and the court for the next case, so that we develop this collection of precedents. And we must have not only a record of the decisions, but a record of how those decisions were made, the considerations that went into those decisions, and even the operation of the court, in order to allow for the development of the common law.

So judicial records have a unique place in American culture. Rick, do you have any further comments on the uniqueness of judicial records?

MR. HOGAN: Not on the uniqueness so much, more from the access point of view. Again, we distinguish between judges' records and the records of the court. Judges' records are what they are; they belong to the judge and there is no retention schedule for those. The more things change the more they stay the same. You might wonder sometimes why records reside, for example, in a county clerk's office as opposed to residing completely within the state records system. It is the same issues we are dealing with today, and it had to do with access, where there was a central point within a county—rather than having someone, for example, here in New York State constantly have to travel to Albany to find records, they could go to somewhere within their county to get access.

Now we are struggling with issues of where records reside. But it is really more for the common good for access for the public, for litigants, for attorneys, and for judges as well, to be able to get easy access to judicial records.

MR. WITHERS: Jim, do you have anything to add?

MR. WALDRON: I don't know if I can add anything to what you said. Maybe just to expand a concept.

Again in the bankruptcy world, bankruptcy is not a right, it is a privilege. So people go and file and they say they would have sometimes an expectation of privacy in some areas. When you file for bankruptcy, you have for the most part, with few exceptions, no expectation of privacy.

So the availability of those records for you or your neighbor or your cousin or somebody who loaned you money to be able to go and look and find and see, if all of a sudden somebody is not paying you, if indeed they have filed for bankruptcy, again plays a rather critical role in our society, for people to have that kind of access. When someone comes and files bankruptcy, we send out a notice to every creditor that they list. But they may not list everyone. So that access is very, very important.

Again, defining the difference between judicial and judges' records, no you don't get to see any of the judges' records. But the official court records, yes.

MR. WITHERS: Anita, from your point of view from the private sector, why do you think court records are particularly important to you and your business?

MS. CASTORA: Because they set the precedents for our business decisions and operations.

MR. WITHERS: They also define relationships.

MS. CASTORA: Exactly. We can't operate without them. We make business decisions based on the decisions that the courts make. They give us the guidelines and the laws for us to operate. It is very important.

MR. WITHERS: Also the record of judgments, things of that sort, which you have to have.

MS. CASTORA: Yes.

MR. WITHERS: Of course, in the legislative process, and to some extent in the executive process, there is legislative history and there is, under various state and federal administrative regulations, some kind of record of how decisions are made. So the judicial records become the equivalent of that for the judicial branch. That is an important thing.

For that reason, we actually have—and we alluded to this in the introduction—First Amendment and common law stated rights of access, which imply obligations to make the information accessible.⁹ We will get into that more this afternoon in the third session.

Just very briefly, we have a First Amendment right to what we might call adjudicative records—in other words, the decisions made by the court and the reasoning that goes into those decisions.¹⁰ The First Amendment right of access to that is very strong. It is not an absolute right, but it is a very strong right. It takes a very strong argument to try to overcome the presumption of access.¹¹

At common law, we have a broader right to see the operations of the court, in addition to the decisions and the justification for those decisions.¹² That is a broader right, but it is not as strong. There are lots of common law precedents for restricting access or defining records in a way that essentially restricts access.¹³

That is, in a nutshell, the difference. But it has risen to a level of either a First Amendment or a common law presumption of access, which you do not have in the private sector. So we have a little more of a responsibility of preservation and guaranteeing access when it comes to court records.

9. See, e.g., *Nixon*, 435 U.S. at 597–98; *Doe*, 749 F.3d at 266.

10. See *Sander v. State Bar of Cal.*, 314 P.3d 488, 494 (Cal. 2013).

11. See, e.g., *Press-Enter. Co. v. Superior Court of Cal.*, 478 U.S. 1, 14 (1986) (noting that in order for access to a preliminary hearing to be closed, it must be shown that both the “defendant’s right to a fair trial will be prejudiced,” and “reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights”).

12. See *Nixon*, 435 U.S. at 598 (noting that the common law right to inspect and copy judicial records applies to a “citizen’s desire to keep a watchful eye on the workings of public agencies”); see also *Sander*, 314 P.3d at 494 (noting the “broader common law right of access”).

13. *Nixon*, 435 U.S. at 598 (citing various exceptions).

MR. WALDRON: Could I just add one other thing? It may just be a subset of the public and political evaluation. That is academic review. One of the things that happens in my court particularly, and again because it is a larger commercial court, is we get lots and lots of requests from academia around the country that want access to our records, that want free access to our records. Actually, what they are looking for is, first, a waiver on the PACER fee, which is our public access system that people have to pay to use, which we do waive for academic research. But it is an important component in our records being available for them. There are some valuable and really great things that come out of that academic scrutiny.

MR. WITHERS: Now, what distinguishes a record—and we'll start back again with Anita from the private sector—from the routine information that is generated, collected, stored, exchanged in business? We have lots and lots of information, particularly in this digital age, everything from loan applications coming in to notices of cupcakes in the break room and everything in between. What distinguishes a record from all the noise?

MS. CASTORA: That's right, there are records and there are non-records. The non-records, of course you are talking about just a general conversation—"meet me for lunch," cupcakes in the break room, things like that. What we try to do is educate our employees for people to understand that records constitute anything that we use when making a business decision.

So we actually base it on the retention schedule. With the retention schedule, of course it is a records inventory of all the business records that we use and implement within our company. So those are the records. The non-records are, as I've just stated, the ones that are inconsequential.

MR. WITHERS: In the court system, Rick, do you have records and non-records or do you have different categories of records that get different kinds of treatment?

MR. HOGAN: Luckily, that's how I get paid, is different categories of records. Because of digital records, we have had to do some distinguishing, in particular with the commissioner jurors and in family courts, where oftentimes they will—for example, any of you who have served on jury duty know you have to fill out a questionnaire. The question that came up was: Is the questionnaire that you fill out the record, or do they take the information in the questionnaire that you fill out to serve on a jury panel and data enter it? We have distinguished, for example, that the form that you fill out, because of the digital age and someone is data entering that, is not a record; the record is the record when all information is in the database. So the piece of paper becomes peripheral; it is not a record. But prior to the digital age, that piece of paper was a record. So we have had to change how we deal with those things over the years.

MR. WITHERS: So we have separated out the question of the artifact with the information that is on the artifact.

Jim, how do you distinguish records and non-records?

MR. WALDRON: I am sure it is the same in the state courts, but in the federal courts, records are defined by the avenue that they come to us. We

have set ourselves up with electronic access so that information comes in through official channels, from people who are registered in our system. We know when something is transmitted to us. If we had correspondence that is not part of a pleading, it becomes part of the official file. That is rare. But again, it is something that we digitally will save.

But aside from those very official channels, whether it is the U.S. mail, whether it is on electronic access, there isn't anything else coming into us anymore.

And again, we separate our judicial records from our administrative records, our business records. That is pretty much anything that goes on inside a courthouse, whether it might be their leave records, whether it might be disciplinary records, whether it might be their personnel file. There are all kinds of things. They are records that are subject, again, to a retention schedule. That's how we define what those are, because the retention schedule that is set out by archives lists every type of document that we have, including audio digital records.

MR. WITHERS: So you make a distinction between—let's just use an example—you have a transcript of a hearing that is followed by a memorandum and opinion by the judge, and that is an adjudicative record. We distinguish that from the ordering of office supplies for the clerk's office. But that is also a record; it is just going to be treated differently in terms of the retention schedule and considerations of public access. But they are all records.

MR. WALDRON: That's correct.

MR. WITHERS: Now, in my experience, and particularly when I was teaching in a variety of contexts in records and information management, I always told records managers that records management is not a problem; it is non-records management that is a problem. What do you do with the flood of emails, the copies, and the duplicates that are routinely generated in our electronic information systems that really constitutes the bulk of the bits and bytes out there but are not records?

Here are the ways to think about a distinction. A Record—a Record (with a capital R) has certain attributes:

- Content: it is related to the business. It is related to the mission of the organization, whatever that is.
- It has a certain structure to it for the most part, although that is becoming more and more of a question as we get further and further into the digital age, as to how would we identify the structure.
- But it has a context as well. It is part of the business operation and it has a relationship to other operations in the business.
- It has a degree of fixity. I don't like that word, fixity, but I haven't come up with a better word. It is not permanent, it is persistent, but it is something that you can go back to. It is not going to change all that much. Again, as we get deeper into the digital age, that concept is becoming murkier.

• And it serves as evidence. It has an integrity and reliability that what is there is indeed what it purports to be.

If you add all these up together, you will find that they track very closely the business record exception to the hearsay rule in the Federal Rules of Evidence, which we will not get into today, but you can all look it up.¹⁴

All of these things record regular business operations in a way that you expect them to be recorded in a reliable way.

What are some of the other attributes of a record, or have we covered it all? Anita?

MS. CASTORA: I'm glad you said that. I really was fixated on copies because that is the biggest problem. As you said, it is 80 percent. It is mostly junk. That's why we have the records cleanout. You do have all your business records that meet their business need and for the retention schedule. Then they can be either archived and/or destroyed.

But you have all the extra stuff—all the extra emails, et cetera. A lot of this actually becomes unstructured data. It is what people call "stuff," because it hasn't been indexed properly and it is in network folders and drives and it is unidentified, you can't find it, you don't know whether it is the "dark data," which we will be talking about a little bit later.

But that is what keeps me up at night and that is a problem with the records, is managing that. To me that is one of the most important things of records management, is the ongoing training for people to understand, to understand how it can come back and be harmful, the business cost, just the risk of having that information that is not necessary.

MR. WITHERS: Jason Baron, up in the back there. Jason Baron is former in-house counsel to the National Archives. Define "dark data" for us. Can you come up with a quick, concise definition of that term?

MR. BARON: I would say that "dark data" is inaccessible data in various formats. Because we have a huge volume of ESI (electronically stored information), there are, inevitably, issues with the individual aspects of records that need to be looked at before they are made accessible (including reviewing for privileged and privacy-protected matters). And then there are formatting issues.

So anything that is not readily available in an archive, that you cannot walk in from the street to a public archive and ask for and receive in a box (or view on a terminal), is essentially "dark." ESI is, by default, dark by its very nature.

MR. WITHERS: So we are not talking about theoretical inaccessibility. We are talking about actual inaccessibility in that it is not really indexed or organized in a way so that people can access it easily?

MR. BARON: That is certainly true.

MR. WITHERS: Okay. We'll get into "dark data" probably later on today.

14. FED. R. EVID. 803(6).

Rick, in the state court system do you have a lot of non-records that the court clerks and the various other court officers have to deal with, dispose of, organize, get rid of?

MR. HOGAN: Yes. We have non-records of course in the paper world as well. We have non-records in terms of when people did not know what to do with something, or they thought that something was important, it popped in the file. So when people go to clean out their records based on the retention schedule, they find things like empty envelopes, Post-it® notes, or other notes. They are like, “Well, someone kept these because they thought they were important.” We have to describe to them, “No, someone kept them because they didn’t know where else to put them.” So in the paper world you had “dark data” as well as in the digital world.

In the digital world, we have been able to control an awful lot of that. We wrote our digital records guidelines back in 2001. I just spent the last three years with our IT director updating those because our IT department is storing more and more of our court records centrally rather than each court or each district maintaining records separately. So we have been able to put all of those records back together. There is an awful lot of control there that you can maintain so that records that should not come in do not.

MR. WITHERS: Now, of course, in the bankruptcy court—bankruptcy courts are famous for forms. Forms are “it.” Forms really help cut down on this accumulation of nonessential information that ends up getting sucked into the record system by default. But do you still have what we would now define as “dark data”? Is there still a lot of information, digital or otherwise, that needs to be dealt with?

MR. WALDRON: I’m thinking, do we have any dark data? It makes me feel guilty. But I guess we do.

One of the places that we have it—and it has to do with the utilization of digital information, or the lack of utilization of digital information. Therefore, we have judges who will print out their calendars as they are preparing for court. Some of them want to have it on their computers and want to do all kinds of great stuff. We come up with all kinds of ways to keep that and it becomes part of the record.

However, a lot of them like to just take this and write their notes on it—what they want to consider if they are going to write an opinion, what they are going to do with it. That is truly “dark data.” It goes in a file cabinet in their chambers to be destroyed later because it is not part of the permanent record. It falls over to that other side of judicial notes or judges’ records. Because they create it, and I do not create it, and it doesn’t come as part of my official duties, it kind of goes into that “dark data” category. No one ever gets to see that.

MR. WITHERS: But that could be some of the most interesting stuff! From a historical point of view, that would be great.

MR. WALDRON: Absolutely.

MR. WITHERS: But it is not a record.

MR. WALDRON: Right.

MR. WITHERS: And you are not in control of that.

MR. WALDRON: Right.

MR. WITHERS: If the judge has collected that throughout her career and retires and gives it to a law school, to the archives, that is one thing. But that is not your department.

MR. WALDRON: No, it is not. We had a judge pass away with no instruction on what to do with the judge's records. I went through unbelievable amounts of files to see if there was anything. Again, me being the keeper of the records, I went through it to clean out anything that was of an official nature, most of which was just anecdotal stuff that he kept and notes about meetings that he went to that had nothing really to do with the operation of the court.

MR. WITHERS: So, on the one hand, by converting to digital business processes, we have an opportunity to really cut down on the amount of junk because we can define much more clearly what comes in and how it gets dealt with and how it gets organized. That is on the one hand, we can do that. But on the other hand, we now have this explosion of ways that we can receive information. So, for instance, email—does email become part of the record, and on what basis, how?

MS. CASTORA: Based on content.

MR. WITHERS: Okay. Do the courts get email?

MR. HOGAN: We do. Of course, like everything else, we determine if it has to do with the business processes of the court, it has to do with a case. Obviously, emails are going to anywhere from one other person to 100 other people. We distinguish who should be the official keeper of that record so we are not keeping 100 copies of the same information. Generally, the person who drafted that email would be the official record. The rest of the things are peripheral and they can be disposed of.

MS. CASTORA: Do you keep all of them? How do you make a decision on which emails to keep?

MR. HOGAN: We make a decision based upon: Does it have an effect on the business of the court? Does it have an effect on a particular case? If it does not, then it is strictly peripheral and doesn't have anything to do with anything.

MS. CASTORA: Then it goes away?

MR. HOGAN: Yes.

MR. WITHERS: Or you think it goes away.

MR. WALDRON: That is what I would say. Again, in the judiciary we do our backup of our data on a regular basis. Now, people will go in and they will delete their email. The individuals have the control over what their email is and what is kept. There aren't an awful lot of guidelines on that because the way the federal system was designed is that all official correspondence was not going to come to us through email, it was going to come to us through the docket. So those are all official. Anything else, whether it is an adjournment request or something like that—we get those kinds of things, but those are not permanent records that we have any

reason to hold onto. That is up to the individual judge or the individual employee to dispose of. However, it is kept because it is backed up. We will talk a little bit later about archiving of digital information.

MR. HOGAN: We do not do it at all yet. We have everything.

MR. WITHERS: That's the next panel.

MS. CASTORA: I want to talk a little bit more about email, just because it is a contentious subject and it affects everyone, courts as well as businesses.

I just wanted to know, just because I'm really curious, more about how the courts handle emails. On the business side, the trend today has been ninety days auto-delete. My role as a records manager then is to train people on how to save—first, determine if it needs to be saved, if it is a record, the content, and how to index it and save it properly. That is what my mission has been for the last decade. The systems do keep them for a period of time. But we really do delete those emails.

That's the business side that I deal with. How does email work in the courts? Do you keep everything? Do you have an email system that uses the filter-out? Or do you just keep everything? Because with that, of course, is the risk and the cost and what can be discovered. It is kind of scary.

MR. HOGAN: We used to say in the paper world, "you're going to fill up that closet," and then people will suddenly get religion and they had to throw things away because they weren't going to throw them away before, because you couldn't get another storage area.

The same thing with digital. We tried to preach that gospel. Then, as soon as you are done with it, the director of information technology says, "Oh, don't worry about more storage space."

The same thing with storing emails. We set up the rules similar to what you have. But if the division of technology does not destroy those—and they do not—then they sit out there forever and no one knows what to do. Even with the best of rules, there is no records police out there to make sure things are done the way they are supposed to be done.

Our unfortunate difficulty is something that should have been destroyed, for example, within ninety days, sits out there until the division of technology decides they don't have any more space.

MR. WITHERS: We have other examples of unusual ways—unusual in that they didn't exist in the paper world—that information comes into an organization.

Text messages are more difficult than email because it is less structured, you have less metadata, and who knows what device it is coming into.

But you also have web pages. Web pages may be official. Just like in the private world, they are just like a company brochure or any other marketing thing in the public world. The web page can very well be a record, although it may change constantly, and in fact it may not actually exist as a separate integral page, it may be generated from databases. But you have to in some way manage that. I assume that you have wonderful,

sophisticated systems for tracking and managing web pages and all of their various changes and permutations.

MR. WALDRON: I have one. I'm just curious. How many of you know about the Wayback Machine?¹⁵

MR. WITHERS: Oh, everybody should.

MR. WALDRON: It is interesting how few lawyers actually know about the Wayback Machine. It is a startling revelation. That is the only way that we utilize to track what goes on our web pages.

MR. WITHERS: Goodness! Although you may have an actual statutory obligation.

MR. WALDRON: None that has ever been communicated to me.

MR. WITHERS: I think that for federal administrative agencies, which are operating under different rules, there is an actual statutory obligation. So we have web pages. Comments left on web pages by people outside your organization, how does one track those? They often end up as part of some kind of customer relations management system. But again, those could be records.

Social media—how many of you are in organizations that have a social media presence? And do you have a records management or archival plan for your social media presence?

We have already touched on the biggest source of “dark data” that is outside our control, and that is the packrats and squirrels in the IT department. You can go to Costco and buy—this week I think it is on special—a five-terabyte external hard drive.

MS. CASTORA: For how much?

MR. WITHERS: I think it is 129 bucks, something like that. I got my Costco brochure just before I got on the plane to come here. I think that they were advertising a five-terabyte external hard drive.

So we have all of these sources of potential “dark data” that we have to deal with.

Now, as part of basic records management, we have a diagram entitled “Records and Information Life Cycle Management.”

Maybe, Anita, if you could quickly—I'm sure you are quite familiar with this—just quickly take us through this cycle.

MS. CASTORA: It is basically a record of information from cradle to grave. Therefore, from the planning of the information, when it is created, then when it becomes a record, and then determining a business use and how it is going to be indexed or saved, you determine the retention period for the business use and what the legal requirements are. Then, with that, you determine is it going to be kept forever, is it permanent, is it archived; or is it a business record that has a particular date that it can go away.

The most important part of any records management program is the evaluation or the audit—or I call it an assessment. Audit is a bad word, so I

15. *See Way Back Machine*, INTERNET ARCHIVE, <https://archive.org/web/> (last visited Feb. 23, 2015).

use assessment, and people are more open to let me come talk to them and look in their computers and things.

With that, the biggest challenge to me as a records manager, although we do have this cradle-to-grave structure, is the creation. Records are going to be created as they are needed, as we are doing business, as we are talking, et cetera, making deals. But records management is not involved or consulted. So the concern or the challenge that we have as records managers is that after this record is created, how do we manage it, how do we determine all this information, what it is, what the business need is, where it should be stored, and how it should be used.

MR. WITHERS: Do the New York State courts have this same concept of a records and information lifecycle?

MR. HOGAN: We do. As a matter of fact, all of our retention schedules are based on that life cycle. When we developed a retention schedule for a court, my staff, non-lawyers, do the research on what the laws are within New York, the laws around the country, and practices around the country. We make a recommendation for any record that does come into play, and that goes to our counsel's office. We then make sure that what our recommendation is follows the law. If it needs changes, it will go back and get changed. If they sign off on it, then everything goes up to the chief administrative judge for the final signoff. For every record that is created we have to create a life cycle.

MR. WITHERS: In the federal court system there is a similar process?

MR. WALDRON: This was established, as I said before, by our records retention firm. But I have a question: What is the evaluation that occurs after disposition?

MR. WITHERS: That usually starts with "oops!" That's evaluation of the effectiveness of the cycle at that point and an evaluation of can we make improvements for the future.

MR. WALDRON: The point that has occurred to me recently—at least in the federal system—we talked a little bit before about historical evaluation and the process that goes into “are we going to keep this not because of the retention schedule, but because of historical significance?” That is not part of our process. And even worse than that, in the federal system not only is it not part of our process, but it is not defined. It is defined by the individual record keepers. So I would define the historical significance of the records in my court, and I have no standards for that. That is a real problem as far as our ongoing work. We talked about the importance of keeping judicial records because there are some records—maybe you might not think this is important, but I could extrapolate something.

For instance, I remember when I started in 1988, one of the supermodels was filing for bankruptcy in New Jersey. We're going, “What in the world? Why is this person filing for bankruptcy?” You might want to do some kind of an academic study at some point where you are looking at, for instance, the lottery winners or something like that, and you want to assess what that impact is. That is a hole, I think, right now in the system.

MR. HOGAN: I just wanted to add there is some anecdotal information about the “oops factor,” the evaluation after the fact. When I first came to this position that I have, I was looking over some of the schedules. We have had our schedules for a long time, but a certain series of records had to be maintained forever if the disposition date ended in a year that ended in a five or zero. So I went to the person who wrote that now to reevaluate it, who was our archivist.

I said, “Why do we have that?”

She said, “Well, it corresponds with the census.”

I said, “That’s nice, but we haven’t had a state census that ended in the year five since 1925.”

“Oh. Well, the state archives requires it.”

I said, “Well, the reason I am asking the question is I had dinner with the state archivist last night, because she’s a good friend, and she asked me this question, ‘Why do we have this silly thing on the schedule?’”

“Oh. Well, I just thought it was a good idea to keep it that way.”

So we were able to reevaluate, and suddenly we got rid of the year five. People were thrilled. They were able to dispose of closets full of records. So sometimes that reevaluation after the fact is necessary and needs to be done.

MS. CASTORA: I just want to add to that that the retention schedule is a living document. You do have to look at it and revisit it regularly. In our business, business systems and processes and work flows change all the time. So I am always getting requests to edit and update it. Then, every couple of years, I do a major revision of the retention schedule.

It is really important that we follow these guidelines. So you, as a records manager, have to deal with the hard questions of “do you really need it or do you really need to keep it that long?” and “does this really make sense?” You don’t always win friends doing that, but you have to make that hard decision: “Do you really need it? Do you really need to keep it that long?”

Most of the time you don’t need to keep it any longer than what the law says. We look to see what the state or the federal laws require as the final determination.

Once in a while, there is an exception that you are going to keep it longer where you really do have a business need to keep something longer. But I’m always looking at ways of getting rid of the records.

MR. WITHERS: Of course, several people here who consider themselves to be archivists have just shuddered.

MS. CASTORA: I pride myself on being a good records manager, but one of the things that keeps me up at night is I do worry if I do too good of a job, that some of those historical things go away. Archives aren’t always built into records retention schedules. So I am working on a plan going forward on how we can save some of those historical documents.

But at the end of the day, we have our legal department look at our retention schedule and give us a final blessing.

MR. WITHERS: Now, sevens also points to point one under the records cycle, it is a cycle—you're supposed to start over.

Here there is a huge disconnect, in that there is an input at the beginning that you might not be aware of. For instance, when the credit union established a Facebook page in order to take customer comments, was information management consulted?

MS. CASTORA: Never.

MR. WITHERS: So IT or marketing or somebody came up with this idea "let's have a Facebook page and let's get comments from our customers on the Facebook page." And then what? You don't know when you became aware of this. It just happened, and all of a sudden you had a whole new category of records which could be extremely difficult to manage and very volatile. But it was just not part of the planning process.

MS. CASTORA: Not only that. Again it goes back to the creation, which you just discussed. It is getting the cooperation of your business partners. Especially like marketing, they're the creative geniuses and we have to have them—they are what keep the business current and active and competitive—but you are not always part of that.

Another one is customer relation management (CRM). We are in the process of putting a CRM in. That, of course, collects all the information from all kinds of avenues. They're just putting it in this large database. We take that kind of information as well as all the customers and what they have done and their financial history, and put it all together. It is almost like an encyclopedia.

So as a records manger, I'm like, "Wait a minute. I need to be on this team for retention, if nothing else. You don't want to keep this stuff forever."

It is always a challenge to get in at the beginning to help make the business decisions you think capture that information. That's a really good point.

MR. WITHERS: Rick, in the state court system has anybody brought up the new four-letter word BYOD (bring your own device)? Are any of the state courts that you know of beginning to tell employees that they can use their own iPhones and Galaxies and tablets and laptops to conduct court business?

MR. HOGAN: They have not, although they just moved our whole system for email and everything over to a Windows-based system so that for everyone who has a cell phone now issued by the courts, Windows email pops up automatically.

Although I have had discussions with a number of judges for a number of years—we haven't gotten IT onboard yet—where we would issue our judges Kindles or e-readers, where they could conduct business through that process.

MR. WITHERS: But those would be court-issued, with court software and connections to the court servers.

MR. HOGAN: Correct.

MR. WITHERS: You would have a high degree of “possession, custody, and control,” as the phrase goes, over that information.

MR. HOGAN: They did that so that they could control it. In this case, control is not a bad thing. In terms of records and records management, control is a very good thing.

MR. WITHERS: I can’t imagine BYOD in a federal court setting. Jim?

MR. WALDRON: Well, surprise! It is in this context: the equipment is provided by the government in every situation; however that does not mean that they cannot access our system from their own equipment at home. We have security systems set up that limit the type of access. There are multiple password protections that come in.

Certainly we have had intrusions. We have had intrusions on our own guarded systems within the federal court. There is really no such thing as computer security. All you do is you watch for where the breaches are going to be; you never think you are going to get rid of them all.

But as a practical matter, we encourage our people to only utilize the equipment that has been provided by the court. But people do.

MR. WITHERS: At this point, however, you have not confronted a situation where employees of the court system are creating communications and information that might be considered records but are outside of your system; they are not behind your firewall, they are not on your server. What about your experience Anita, either you or colleagues in other banks that you have talked to?

MS. CASTORA: Within our organization, we are not permitted to use our own devices. Everything is issued by the company, by the bank, and we have secure systems.

In fact, I have my computer at home and then I have the company laptop. So I am working on two computers at one time when I work from home. We have strict firewalls with that.

I have friends who work in larger banks that are international, and they even have more strict rules, which you have to have just because of all the things that are happening out there. We have a risk department. We are just invaded all the time by fraud and people breaking into the system.

MR. WITHERS: BYOD and cloud computing are the big buzzwords in IT right now. I haven’t seen it yet in the courts or in highly regulated industries. But it is creating this records management problem.

PARTICIPANT: I work for a highly regulated organization, which is an international investment bank. We in fact have BYOD. That is *de rigueur*. They don’t issue any more company-sanctioned equipment or mobility. Instead they do it through software. In an odd way, it is probably even safer because the software is controlled centrally. It is downloaded for free and then there is a connection to the servers inside our firewall. We can log on to our home computers, but again it is software-based.

MR. WITHERS: You are essentially tunneling into the server, so that communications, any kind of record that is being created, is being created in the system and it can be managed.

PARTICIPANT: That's exactly right.

MR. WALDRON: That's not unlike what we do. It is pretty much the same thing.

MS. CASTORA: The same, except that our company actually gives us the devices. That's the difference.

MR. WITHERS: From an organizational chart point of view there are various stages too. Records are created and received; you try to get rid of the duplicates as early as possible; they are organized for ordinary business use, go into files; a record retention schedule is applied; hopefully, much of the material is disposed of properly over time, but then a decision is made as to what is archival material, or long-term storage but regular business use, not archival material that might go to a records center where eventually it reaches its logical end and is destroyed.

Now, in the few minutes that we have left, what is it that makes digital different? There are various issues to consider.

I long ago developed a paradigm to try to distinguish between different business processes. The paper-based business process, which we all know and love from previous generations, at each stage of the process a physical artifact was created that contained information. These artifacts were collected and they became the business record. They were held in file folders and in file cabinets, and you would go to the file cabinet and you would pull out the business record, and there it was. Simple.

What I call the proto-digital business process—I am waiting for the *Oxford English Dictionary* to credit me with this term—utilizes computers, so it is a digital process, and that replaces the typewriters and the pens, but it also creates artifacts, which may be paper or may be digital artifacts, like PDFs or forms, things of that sort, which are saved as the record. But it is a proto-digital process.

In the early stages of Case Management/ Electronic Case Files (CMECF), we are using computers, we are taking advantage of the communications and the fungibility and the savings in terms of space, but we are essentially still managing artifacts.

The true digital process goes one step further—or several steps further, depending on your point of view—and we are moving in this direction, where no artifacts are being generated. Each stage of the business process involves the creation or reception or input of data into what I have called “the big fat relational database,” and reports or queries are generated from the database. No artifact need be created at all. There may not be any paper, unless for some reason somebody wants a piece of paper. But there is no real reason for it. The entire business process is now contained in the database and in the relations between the various fields and tables in that big database, which makes it rather difficult to create what we used to think of as the integral document that represented the business record. Now it is going to be an ever-changing report from a database that could change at any point and is being gathered from a variety of different sources.

It creates a number of questions. I want to explore some of those questions with the panel.

Anita, from your point of view, what makes digital different?

MS. CASTORA: I think digital is easier to manage because you actually have control of how you can index and how you can structure, and keywords so that you can search and find it.

MR. WITHERS: So you are taking away the physical aspect of it but you are increasing the usability, the potential for access of that information.

MS. CASTORA: Right. I think also you increase the usability and the content. When you are saving documents digitally, you can save a lot more and you can capture more information and you can manage it and manipulate it so that it will be more helpful.

MR. WITHERS: Okay. So you increase the volume, but theoretically that shouldn't be a problem. In fact, that should be seen as an opportunity.

MS. CASTORA: It is, as long as it is managed properly and you have guidelines that you follow.

MR. WITHERS: Jim, what makes digital different from your point of view?

MR. WALDRON: A surprising answer would be that it is not always accessible. Occasionally we have problems with it. So in the early days when we were converting, to tell the judge that he or she could not walk down to the file room and get the file and it was going to be twelve hours before they could actually see the file because the system was down, it was a whole other thing. Now that doesn't happen very often, and it happens less and less over the years.

But I think the biggest difference in digital is what you are referring to. I will just take a couple seconds to explain the future or the direction of the federal judiciary right now. It is totally data-driven.

We are in the process of revising everything that we do in terms of how we receive information. It used to be that we would get the artifact, we would get indices of what was in the artifact, but we wouldn't get all the information that was in the artifact. But now we are data-driven. So when people complete a bankruptcy petition or a motion, we are not going to get the data from the actual content in the motion, but we are going to get all the header information.

I am part of a group called the Bankruptcy Court Forms Modernization Project. We are going through all of the bankruptcy forms, the many bankruptcy forms you referred to, and we are collecting and identifying the data. There are something like 1500 data elements right now that we have identified that are going to be part of this new process. We are actually going to go live with this relatively soon.

But the difference as far as that data is concerned is that we do not have agreement as to how much of it is going to be released. It used to be that you could get everything that was on the form. But when you put data in a form that can be searched and aggregated in ways that you never thought of before, the Judicial Conference—gets very concerned about how accessible, how available is this information.

That is still up for debate. There is a committee of the Judicial Conference that is trying to decide currently how much of the information will be available, who it will be available to.

Right now we have users of the system who all of a sudden—we used to have an eight-page bankruptcy petition; now we are going to have a twenty-five-page petition because we made it more user-friendly. But we created all these other fields; we are collecting all this extra data. Those people think: Well, what's the tradeoff? The tradeoff is I am getting a longer form that is more difficult for me to at least go through, but I am going to get a tradeoff in that I am going to get customized the reports that you are talking about.

That is where our disconnect is right now. I think that it will be worked out. But it is a policy issue that we are trying to get to.

MR. WITHERS: Rick, what makes digital different from your point of view?

MR. HOGAN: The difference is that it is more easily accessible, and also that it is not touchable. In the old days, one person sat down with a file and then half-a-dozen other people were in line waiting to see the file—that's one thing.

When we moved from paper to digital, one of the biggest difficulties was everyone seemed to think that because it was digital that the record could be changed, and frequently changed. In terms of court records, once the record is received and accepted by the court, that record, whether it is in paper or it is in digital, is unchangeable. We have to give the attorneys, the bar, and the judges the security that a record is not subject to being changed.

We also have to maintain metadata so that in the event of a security breach, there is metadata on there that would say how the record looked at a particular time. Parties have to know why a document changed, if it changed at all, and when it changed, so they can deal with that in the litigation.

So in terms of the digital record, it is faster, it is easier to access, and it is more workable. But in terms of the record itself, as far as the courts are concerned, there is no difference between the piece of paper and the digital record.

MR. WITHERS: That's from the business user's point of view. But from the records management and archival point of view there is going to be a big difference.

Now, we talked about volume; we talked about the diversity of sources that the information could now come from; we have talked about the fungibility of this data, the fact that we could mix and match this data and create reports for various purposes; and we talked a little bit about privacy and data protection.

But there are a couple other issues about digital that we need to think about, particularly with this audience here, the people who have to deal with this information later on. That is, we are creating at least two new categories of information that need to be managed and maintained.

One is that the need for accurate metadata is dramatically increased. When we had paper-based forms, the metadata was obvious—it is on a piece of paper and this is written in blue ink and that's pretty obvious. But in the digital world, metadata is really going to be very important and, from a long-term access point of view, extremely important.

Second, the information is all going to be part of an information environment. We would need to understand and somehow preserve the information architecture. Otherwise, it is just a giant database with a lot of code that nobody can understand. So without the metadata and the information architecture, we've got a problem.

Another big question I want to hear about from the panelists is the importance of custodians. The records are usually identified with a person or a group of people who are the custodians, and they can understand the record and they can attest to the information in the record. But when we have these kinds of systems, who is the custodian? What happened to the custodian?

MS. CASTORA: The custodian is actually the metadata. The metadata tells you the relevant information about the author, the time of the action, the system that it happened on, and related issues about the creation of the record. Of course, then if it goes to court, you still have to have someone who is going to represent whatever party and attest that the system has been managed properly and that the information is correct and has not been altered.

MR. WITHERS: But they no longer have any personal experience with that record. They are just testifying about the nature of the business process and the system.

MS. CASTORA: Yes. It takes that away, I think.

MR. WITHERS: Jim, are you now the super-custodian?

MR. WALDRON: I am a super-custodian, yes. I don't think my role has changed because I didn't have a personal intimate knowledge of the documents that were in the court. I knew what the process was, I knew how they came in, I attested to the same thing I do with my financial records. If there is a loss, I have to be able to show that I have done all the proper procedures. I would find myself in the same situation when called upon as custodian of the records. So I don't see that changing. I am still managing something; I am just managing it differently.

MR. HOGAN: In the New York State courts, we set up a requirement, for the appellate courts all the way down to towns and villages: if you are going to maintain records in a digital form, you need to sign off on a form that comes to my office. There is a two-party signoff.

What is happening is that, because the person in charge of the court generally doesn't have the kind of knowledge to maintain digital records that they would have in terms of paper, the dual signoff is that the clerk of the court, for example, is signing off saying they are following the digital records guidelines to the best of their ability. But there is a counter-signoff by the IT office or the private firm that is maintaining that digital record for the life of the record that they are complying with the guidelines as well.

Again, the knowledge that you once relied on people—for example, I’m the clerk of the court, I know that I need to store paper in a fireproof room and that sort of thing, which was pretty simple. But in terms of digital, it is much more difficult. That’s why we have the dual signoff, so that for the life of the record two people are responsible to maintain that.

MR. WITHERS: Now let’s consider the fact that we have an entirely new category of information that must be traded off to archives.

When I was doing my eighteenth-century civil litigation research and I was looking at records of court cases from the Court of Common Pleas, they would be in a big sack. All of the court documents for each case would be sewn together and thrown into a sack. It would say “Michaelmas Term 1728.” There were all of the records. I could pull them out of the sack and I could read them and I would have an understanding of what that case was all about.

If, however, we are now taking databases or snapshots of databases or slices of databases and we are sending them to an archivist, we cannot just send the information. We can’t just put it on a thumb drive and give it to them. We have to also hand off the metadata and the system architecture so that it is going to be accessible. That is a huge difference, I think, between the paper-based world and the digital world.

In the three minutes that we have left before we take a break, I want each of you to tell me what keeps you up at night—well, actually you are retiring in a month, so nothing keeps you up at night anymore—but what will keep your successor up at night, in terms of what is on the horizon that you are going to need to deal with?

MR. HOGAN: That there are no records police out there. For example, I just mentioned the dual signoff—oftentimes we have these folks who will sign off having no concept as to what they are signing off on.

Even the directors of information, where I have gone back to those folks and said, “You are doing your annual testing of the record.” They say, “What are you talking about?” I say, “Well, you signed off that you were going to do that.”

So what keeps me up at night is I have all these securities in place to maintain the record for the life of the record, but I don’t have a trust in everyone who is signing off to do what they are supposed to do, and then records can be lost in that context. That will keep me up at night for at least a week or so after I retire.

MR. WITHERS: Jim, what is on the horizon?

MR. WALDRON: First of all, I think that what would keep me up and my successor up are the same things. We have ultimate personal responsibility and liability for everything, financial and otherwise. We are not bonded or anything—take my house, take my family, take the whole thing. So that doesn’t really change.

And we don’t have that dual signoff. The unit head of a court is appointed by the judges of that court and that’s it. The buck completely stops here.

But in terms of the data issues about this, I think that we are fairly well structured in the judiciary in the direction that we are going. We are already out in the cloud. My data resides out somewhere in Arizona currently. We were one of the first courts to go to centralized services. A lot of those management issues—it is more that it is out of my hands than it is in my hands. So that is something I would worry about.

Finally, there remains a big concern about third-party data. In any environment, you control what you get. You can kind of control some of the things that come in. But you cannot structure everything. So whether it is deeds or it is individual agreements or licenses, these are things that come in to us without data.

So the biggest challenge will be: How will that data end up coming to us in the future? How are we going to extract that data in an organized and reliable way?

MR. WITHERS: Anita?

MS. CASTORA: Unstructured data, truly. All the records that are indexed and filed properly where they should be, where I can see them—then, when I do my assessment, I use the retention schedule as the basis of my audit.

But the things that I cannot see, that's what worries me. If we do have electronic discovery, which is around the corner—we have been fortunate so far—it is going to be interesting to see what is out there.

We need, and we are looking for, a system—and it is all about finances—but we need to find something to help us identify when there is some unstructured data, this “dark data,” decide what the content is, figure out the indexing, and manage it before it manages us. That's what worries me, what I don't know.

MR. WITHERS: Very good. I would like to thank our panelists. Rick, Jim, and Anita, thank you very much for your insights.

This is an excellent segue to the next panel, which will pick up exactly where we left off here.

III. PANEL TWO: RECORDS INTEGRITY AND ACCESSIBILITY OF ELECTRONIC RECORDS OVER THE LONG TERM

MR. WITHERS: Welcome back. We now have the second panel. As I mentioned at the end of the first panel, the first panel really set up a lot of the questions that we are going to have to deal with in the second panel. If we have a very sophisticated records and information management program operating in our courts for a variety of very good reasons, how does it interface with archives and what are the particular issues that we have to pay attention to when we are looking at the long-term preservation and access of digital records?

With me on the panel we have Jason R. Baron, of counsel at Drinker Biddle in Washington, D.C., former director of litigation for the National Archives and Records Administration, also in Washington, D.C.; we have Professor Gregory S. Hunter of the Palmer School of Library and

Information Science, Long Island University; and Doug Reside, the digital curator of the New York Public Library for the Performing Arts.

I mentioned this morning that we want to take an interdisciplinary approach to these questions. So I welcome Doug. This is probably the first law review forum that you have spoken at—I hope so. It is a little outside of your area, but outside of ours too. We will move on with that.

I am Ken Withers, the deputy executive director of the Sedona Conference.

To introduce this topic, Greg, you have an excellent example of the problem for us. Of course, it is something dear to my heart, and that is the Domesday Book. Tell us about the Domesday Book.

PROF. HUNTER: It was good to be the king. In 1066, William the Conqueror invaded England, and twenty years later he decided that he'd like to know what was in his realm. He commissioned something that is called the Domesday Book. It is called that because the people who were surveyed thought that this was like the final accounting in the Book of Revelation, that everything would be gathered together and separated out. So William the Conqueror in 1086 does the Domesday Book.

For records managers, what is interesting is they never really used it for anything. They did it and filed it away. So this was not an active record. They put it away. It is wonderful. You can go and look at the Domesday Book.¹⁶

Years passed. Nine hundred years later, the BBC decides “Why don't we do an updated Domesday Book? Let's do a survey of all of the United Kingdom in 1986, the 900th anniversary.”

They got a million people to collaborate on this, primarily school children. They tried to document by little squares of geography all of the United Kingdom. They wanted to do it state of the art, which they did, so they conducted this Domesday project using Acorn computers, which were a knockoff of Apple.

MR. WITHERS: They weren't a knockoff of Apple. They were the U.K.'s answer to Apple.

PROF. HUNTER: They were better than Apple. I stand corrected.

I don't know if we can say the same about their storage medium. The format was laser disc read-only memory. So it was a laser disc format. Lovely project. They documented all of this.

Around the year 2000, the U.K. National Archives got concerned that, even though you could read the original Domesday Book, you couldn't read the 1980s data. So they embarked on a project to try to make the data readable. They worked with a project called CaMiLEON, which was an emulation project at the University of Leeds and the University of Michigan.¹⁷

16. OPEN DOMESDAY, <http://www.domesdaymap.co.uk/> (last visited Feb. 23, 2015).

17. CaMiLEON (*Creative Archiving at Michigan & Leeds*): *Emulating the Old on the New*, DCC, <http://www.dcc.ac.uk/resources/external/camileon-creative-archiving-michigan-and-leeds-emulating-old-new> (last visited Feb. 23, 2015).

The good news was that eventually, in the year 2011, the data became web-accessible. If you do a search on “BBC Domesday Project,” you can see the web version.¹⁸

As I was reading up about this, though, there is one more piece of bad news. The bad news is that they are concerned about the copyright issues with the million contributors as well as the copyright issues with the underlying software. They figure all of that will be resolved by 2090.

MR. WITHERS: To quote Shakespeare, “The first thing we do, [is we] kill all the lawyers.”¹⁹

PROF. HUNTER: What seemed like a very good idea, state-of-the-art technology, William the Conqueror’s book is highly readable and accessible, but we have problems with something that is twenty years old.

I tend to be a storyteller about digital preservation as much as anything. That is one of my favorite stories.

MR. WITHERS: Doug has a story of his own.

MR. RESIDE: I don’t know if any of you saw, maybe three or four years ago now, the Library of Congress—I think it is for the National Archives as well—took a copy of the Declaration of Independence and they subjected it to all sorts of crazy photography techniques, including one that was able to reveal what Thomas Jefferson wrote before he actually scratched out his original text and wrote a new bit of text.

One of the things that we learned is that he originally wrote “our fellow subjects.” Then, remembering that he is no longer in a kingdom but in a republic, he scratches that out and says “our fellow citizens.”

This is an example of a palimpsest. There are lots of palimpsests around the world, texts that have under-texts beneath the thing that you see on the surface.

In 2006 or 2007 or so, I found a series of digital palimpsests at the Library of Congress. I was working on a conference presentation on the writer Jonathan Larson, who of course wrote the musical *Rent*. He died in 1996, right before the show opened off-Broadway. His friends cleared out his apartment and they gave his papers to the Library of Congress.

He also had about 180 floppy disks, three-and-a-half-inch floppy disks that some of you may remember. These they kept for a while, and then finally they gave those to the Library as well. They had not yet been processed when I came to the Library, so I asked if I could work to help migrate the data on those disks to the Library’s repository.

To make a long story short, there were actually similar sorts of issues of migrating the data. The format of the Macintosh disks at that time was very different than the disks that we had even maybe fifteen years ago, so that migration took a while.

After I got the files back, I realized that the text that I saw when I opened up one of Jonathan Larson’s Word files in a text editor was different than

18. *Domesday Reloaded*, BBC, <http://www.bbc.co.uk/history/domesday> (last visited Feb. 23, 2015).

19. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY SIXTH* act 4, sc. 2.

the text that I saw when I used a computer program called an emulator, which makes a new computer pretend to be an old one. When I opened it up in an environment that looked like Jonathan Larson's, the text of the same file was completely different.

After banging my head against the keyboard for a while, I realized that Microsoft Word 5.1, which is what Jonathan Larson used, in order to cut down on the time that it took to save a file to the disk, didn't resave the entire file but only saved the changes. It was a very early version of track changes, or whatever Google calls it in Google Docs. But it didn't make those changes transparent; it saved it at the bottom of the file and then had a bunch of hexadecimal code that told how to paste the text at the bottom over the top.

What I am interested in is how we make sure that we preserve, not just the surface of our electronic records, but the whole record, the entire thing, the artifact. Just as the library across the street preserves the original manuscripts of Beethoven and Tchaikovsky, how can we preserve the Finale files of today; how do we preserve the lyrics that Jason Robert Brown or Stephen Sondheim are writing today, in large part on things like Microsoft Word?

MR. WITHERS: Now, the federal government has its own particular problems in this area. One thing I like to quote from Jason Baron is one of the categories in the federal retention schedule, "the life of the republic plus twenty years," with the question of "who's around for twenty years after the life of the republic?"

Jason, tell us about the National Archives and the federal issues with long-term preservation and access to digital information.

MR. BARON: Thanks, Ken.

I want to do a coda on Doug's last remarks, which is that you all know the movie *National Treasure*, where Nicholas Cage found metadata on the back of the Declaration of Independence!

We had profound issues, when I was at the National Archives, in preserving both paper records and digital records. We are now in a transformative moment for the National Archives, because the Archivist of the United States issued a mandate to the federal government in 2012. The mandate said the following to the executive branch (including the 300 federal agencies that have records that report to the National Archives and Records Administration, and that are creating permanent and temporary records): by the end of 2019, all permanent records in the executive branch must be preserved in digital or electronic form for eventual future transfer to the National Archives.²⁰

That does not mean that the government is going paperless. There will still be many paper records, including of what is produced, created, or

20. Memorandum from Jeffery D. Zients, Acting Dir., Office of Mgmt. & Budget, to David S. Ferriero, Archivist of the U.S., Nat'l Archives & Records Admin. (Aug. 24, 2012), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-18.pdf>.

received in the form of temporary records. But the permanent material, the records that are historically valuable that would be preserved in one of the Archives's buildings, will, after December 31, 2019, have to be sent in digital or electronic form. So no more paper records at the National Archives going forward beyond 2019, except for legacy material that was created prior to that date.

There is a second, earlier mandate for email, that by December 31, 2016, every federal agency in the executive branch needs to manage and preserve its email records in electronic form.²¹ That means all of it. That means that the default recordkeeping practice is no longer print to paper.

Now, let me just step back a moment. There is a technical issue about the Federal Records Act²² in government. The judiciary is partially covered by the Federal Records Act.²³ The statute says that the term "federal agencies" include the federal district courts and the federal courts of appeals.²⁴ The Supreme Court is, however, excluded from the definition of a federal agency and its records are preserved individually by Supreme Court Justices.²⁵ But every other record of federal judges and court records will be coming to the National Archives if they are permanent.

However, in the directive that I just described, the technical issue is that the executive branch is under this mandate. Whether or not the judicial branch is under the equivalent mandate or is going to try to voluntarily comply by the 2019 or 2016 deadlines remains to be seen. I'm not sure whether NARA has opined on that.

I will say that we are in an era of change at the Archives. I worked for thirteen years as director of litigation, until October 2013. In that time period, there were questions about whether under the Federal Records Act we should change the thirty-year default for all records coming in from the executive branch, the judicial branch, and parts of the legislative branch also, which are covered by the Federal Records Act.

The default is built into the paper world, with the presumptive wait period being thirty years and then transfer to the National Archives. That's what federal record schedules and transfer forms usually say.

The question is: In the digital world, should the Archives be taking in more material—more emails, more ESI of all kinds—earlier so that we could preserve it? Otherwise, there is a possibility of the records being lost in the agencies themselves. If the State Department or the Justice Department or any agency you can think of has to manage electronic records for thirty years and then transfer them, that is a problem. No one really has done this successfully.

21. *Id.*

22. *See* Pub. L. No. 113-163, 64 Stat. 583 (1950) (codified as amended in scattered sections of 44 U.S.C.).

23. *See* 44 U.S.C. § 2901(14).

24. *See id.*

25. *Id.* ("except the Supreme Court").

It is easier to go up in the attic in your own home and find a paper record from 100 years ago or fifty years ago than going out and finding an old floppy disk and putting it into your current laptop or computer.

To the extent that the records laws partition records into two basic categories, permanent and temporary, the permanent problem is one of profound significance in the public sector because the notion of a “permanent” record really does mean potentially hundreds or thousands of years.

That is not the same issue that is confronted in e-discovery by corporate America, preserving information for Sarbanes-Oxley or for Dodd-Frank for seven years. They have big issues with their systems, but it isn’t the same. In contrast, the public sector has a tremendous responsibility for future generations to save electronic records for decades, hundreds of years, and permanently. So in that respect there are even larger issues for the public sector to face.

The last thing I would say as an opening point here is that we at the Archives spent some time discussing formatting of judicial records over the last decade. There are FAQs and policies in place at the National Archives to accept judicial records in an international ISO format or PDF/A-1 format for judicial records.

But there are devils in the details about that open standard for the future. I mean, just imagine the difference between Facebook being dominant now compared with MySpace of a few years ago, or that AOL and CompuServe were dominant twenty years ago but now very few people still have an AOL account.

Adobe Acrobat is the originator and prime mover of PDF-format files. Other vendors are in this space. What does the world look like 500 years from now and are there issues with respect to judicial records and other records across the spectrum that are in PDF format in archives that may or may not be as accessible as one might think?

That would be my opening foray here.

MR. WITHERS: Let’s talk a little bit about metadata, in particular. At the end of the last panel, we identified a couple of types of information that we now have to think much more about, that we never really thought about in the paper-based world. One is the environment that it comes from, the information architecture. The other is the metadata.

Let’s start with Greg. Tell us about what the concerns are with metadata and long-term preservation. How do we extract this? How do we preserve it? How does it get archived separately from the information; or can it be extracted from the information, is that a separate thing?

PROF. HUNTER: There are different approaches to this. Jason and I were able to work together on some of the thinking for the Electronic Records Archives at the National Archives. I was on the contractor team as an embedded archivist and records manager.

We in the engineering team quickly realized that we could not use metadata without an adjective in front of it; we were all getting lost. So whether it was source metadata, preservation metadata, whatever, we had to

identify it in some way because it was not helping us out just by using the term “metadata.”

One of the other things that we came to realize was that if the metadata was keeping track of every transformation of the record—and in the Electronic Records Archives it is in a separate repository called *The Asset Catalog*—that we could see potentially where *The Asset Catalog* over time would be bigger than the collection of records. Then there is a preservation issue with the metadata being readable over time as well.

But the point is that without the metadata we are not going to be able to identify the record. The existence of the metadata is one of the tests of authenticity, which I think we will talk about a little later on this panel.

There are some approaches to digital preservation that try to keep the metadata and the record linked together and move that around as an object. There are other approaches that try to separate those out. So this is still an emerging area where there is different professional practice.

Everyone recognizes the importance of it. In terms of what keeps you up at night, from the last panel—you know, “It’s 10 p.m.; do you know where your metadata are?” That is something that I think should keep a lot of us awake.

MR. WITHERS: This creates a particular problem when we are dealing with the problem right now in IT—and it is happening in government offices as well as in the private sector—of really losing for all intents and purposes possession, custody, and control of the data by moving things to the cloud, by having Bring Your Own Device, by having a variety of different systems operating simultaneously within an organization, that it creates this problem that you really do not have control over your metadata, you don’t know where you metadata is, if your information is in the cloud.

As you mentioned before, we have different types of metadata. We have metadata that accompanies the file itself, which determines the parameters of how the file is presented and treated. We have system metadata, which is collected and maintained by the system that it was created on and by the software and the application, which may or may not accompany the file itself but may describe how that data is actually presented and what the history of that data is. We have metadata associated with data migration. If that data is migrated to new systems, there will be some kind of a chain of custody that is documented in the metadata. Now that we are moving into a world of decentralization, of cloud computing, and people having these devices, how do we deal with this? Do we have any standards or systems to deal with this problem? I toss it out to the whole panel.

MR. RESIDE: I see it in the library world, and maybe there are analogies to the legal world as well. In some ways we try to cling to our old practices and procedures and try to fit the new world into our old practices and procedures.

We used to do cataloging, and we would try to describe every object that came in and we had practices for description. I wonder, as we move into the digital world, we can sometimes try to enforce those cataloging

practices, and we call them metadata now, but it doesn't quite fit and often becomes a bottleneck that slows down digitization.

I wonder if it is a matter of the law just needed to adjust to figure out what counts as authenticity, just as in the library world we are having to think, not just about how can we make these new technologies and these new practices fit into the way we used to do things, but completely reconceptualize what it means to be a librarian or a lawyer in the twenty-first century.

I think in particular about the fact that a lot of the metadata that we used to create as librarians was humans talking about what they saw or what they knew about the object. But a lot of that data, and increasingly more and more of that data, can be programmatically found.

We could go through and label everybody in the million-plus photographs of stage performances that we have at the library, or we could work on face recognition software and say we are pretty sure that Mary Martin is in these sixty faces because we have trained it on two of them. I think that as we can get that automatic recognition, that automatic method, working better, then maybe some of our cataloging work will not be as necessary.

That sort of metadata is different than what we are talking about here with this technical and preservation metadata, but I wonder too if there are not some traces that every action leaves, no matter whether it is going to the cloud or elsewhere, that we need to start looking at, rather than the current chain-of-custody of metadata that we require at this moment in the courts.

That is a nonlegal view on things.

MR. BARON: I think there is a history of failed metadata management projects in the federal government. There is an urge to find taxonomies and classify material and have a federal enterprise architecture that works.

The problem that I am seeing at the moment is the push, particularly by the Obama Administration, to have cloud-first policies for public-sector records. Agencies are being urged to get data up in the cloud. That means that CIOs are essentially working at lightning speed to put email up in the cloud and to put other types of records in the cloud without embedding good records management principles and without having a metadata architecture in the front end. So basically, everything just goes up in the cloud.

There are many clouds. What is happening in 2014—at least on the corporate side, and unfortunately may be replicated on the public-sector side—is that, while we have this legacy system of electronic records where we do a very poor job of enterprise-wide management of ESI through corporate networks, what we are replicating in the cloud is a whole bunch of clouds that do not talk to each other, because there is data in one format in this cloud, and then a different format in another cloud.

What we need is some sort of metadata approach to cloud management in the future, so as to be able to make sure that the clouds do talk to each other.

Ultimately, in the public-sector space, I believe the National Archives will move to a model where, if an agency puts all of its records up in a cloud, that a portion of that cloud will be deemed to be permanent and basically transferred over to the legal custody of the National Archives for permanent preservation.

But you've got to be able to be talking to each other in an interoperable way. These are profound issues that one would like to think standards bodies would be addressing. The good people at the National Archives and elsewhere are thinking about these issues. But the technology is moving so fast that we are playing catch up to cloud-first environments.

MR. WITHERS: We talked a little bit about metadata, the fact that there are different types of metadata. We concentrated mostly in the last few minutes on metadata that allows for the identification, searching, and accessibility in the same sense as the card catalog of the library, which was a form of physical metadata in its day.

But, of course, there is also the question of how information actually is presented. Metadata may be a controlling factor in how that information is presented. If we are storing data but it is being stripped of its original metadata, when we access that information it is not going to probably look the same or act the same or tell us the same things as it did in its original application, when it was created and when it was used in the ordinary course of business.

So do we have to start making some tough decisions, in terms of how we actually archive things, that state that we cannot expect that fifty or 100 or 500 years from now that what we put into our archives will look the same to someone viewing them in the future? Perhaps we need to strip things down or make some very detailed and fine decisions, in terms of curating, as to, first of all, what it is we keep in the long term, and how we keep it, so that at least some essential element that we deem as of historical interest will be maintained and will be accessible in the future.

Let's start out with Doug.

MR. RESIDE: I think that selection has always been a part of curation and archival practice. So we always have been comfortable with some sort of loss. We can read the Domesday Book now, but there is a lot of information from that era that we no longer have access to, that wasn't kept in a tower somewhere. So I do think that we should think about what we hope that our users in the future will do with this.

But I also think that in the archival world we can sometimes get a little too future-focused and too hand-wringing and forget that what is important is handing it off to the very next person. So I wonder sometimes whether we are worried too much about the people 100 years from now and not so worried about the people five years from now, when we are going to move on to a different job or a different position.

I think about the fact that it might have been hard to read the Domesday Book that the BBC produced, but you can still play Pong on emulators all over the world, and you can still play things much more difficult than Pong. There is a game for the Commodore 64, called Modem Wars, which was a

two-player game that you played over the old 300-baud modem that ran over the phone line. It is a very, very difficult thing to emulate, but there are enough people who are interested in emulating it that it has been emulated and migrated from Windows XP to Windows 7 to Windows 8.

My colleague Nat Kirschenbaum always says of archival practices that love will find a way about these materials, which if enough people care about them, there tends to be a way to move them forward to the next step.

I think worrying too much about what the technology will be in 100 years is more science fiction than it is actual archival practice, because we just do not know what it is going to be like that far into the future.

To get to the real point of your question, are there ways that we need to represent the original experience, there is always going to be that loss of experience. But I think the Jonathan Larson example is a good one, where it would have been easier for the Library of Congress just to print out those scripts as they appeared in the emulator; but then they would have lost the earlier versions. Or it would be easier for emulators of the Atari 2600 game system to just make the binary code run on a modern monitor, forgetting that in 1980 TV screens were curved, and so the things at the edges of the screen were intentionally hidden, so you might not know that the bad guy was over on the edges of the screen. That replication of the actual presentation does become very, very important in certain cases as well.

PROF. HUNTER: When I try not to get discouraged about this, I try to go to another story. It is the story of what we are building, the architecture.

The way I think it through is if we knew the endgame, if we knew what we needed for the life of the republic, we could build a pyramid. Except for that GEICO commercial, which seems to indicate that they got the design of the pyramids wrong, most of us think that you knew what it was at the beginning, you knew the shape. So it may have taken you awhile and tens of thousands of slaves, but you knew what it was from the time you built it.

On the other side, I don't think we are at the pyramid-building stage; I think we are at the cathedral-building stage. What I would have brought up was a picture of the Freiburg Cathedral, which is a beautiful picture of symmetry. The main tower is the same exact height as the two smaller towers. It is as high as it is long. A gorgeous building, perfectly planned. Only that is not what they intended. They started building it Romanesque, they took 100 years off to fight a war, someone else said, "Romanesque isn't in style, let's make it Gothic now," and they finished the cathedral. It hangs together. They built it over 300 years. But the point is that the original Romanesque design was such that they could modify it over time. They didn't have to obliterate the Romanesque foundation and start over again. Also, if you look at the cathedral, the interfaces, you can hardly notice the difference between them, they did such a great job of connecting them.

So I guess I am hopeful that, as a profession and as a society, we can do at least as well as the cathedral builders and try to move forward with our best practices now, whether it is PDF/A, or do something rather than nothing, because doing nothing is not going to help us out.

But if we can think of what we are doing as what will be the best possibility for the next generation of folks to build upon, find an interface to continue to design with whatever replaces PDF—of some of the other things keep me awake at night, this is the one that lets me sleep. I hope that, rather than doing nothing, that if we think of this approach of cathedral building, maybe we can get somewhere in the future.

MR. WITHERS: I think that in the public sector there is nothing that comes closer to a performance art piece than a trial. It is a highly scripted, choreographed performance art piece that involves a variety of different activities and media.

Back in the days when I was actually practicing in environmental litigation, we would always have a battle of the experts, the environmental experts on the stand. They would have their charts and their graphs, sometimes very sophisticated graphics showing the migration of chemicals in a wetlands or showing the deposits of toxic materials in a dump site. These things would be very difficult, I would think, for a records manager or archivist to try to tie up and put a bow on for future reference.

Are there lessons that we can learn from the performing arts that will help us keep a record of the now rather complex, sophisticated digital processes that our courts are engaging in?

MR. RESIDE: Yes. I think about the fact that—and this is commonplace in the performing arts—another player in every performance is the audience and the context that they bring along with them. So even if you could create your virtual reality world and set someone down and watch the trial exactly as it unfolded in 1980, your impressions and your understanding of what things mean that you bring to that experience would be different than an audience member's in 1980.

I think in the performing arts—particularly in theater, but really in all the performing arts—there are two schools of practice for especially classic theater. There are original practices people, like Shakespeare's Globe, or the production of *Twelfth Night* and the Mark Rylance pieces that were here on Broadway this season, where they attempt to replicate as closely as possible the external experience of sitting in Shakespeare's Globe in 1600 or whatever.

Then there are the revivals, where you try to capture the internal experience of what it was like to see *Hamlet*, and it may look very different when you restage it.

Looking at the two poles of performance, original practice or reinterpretation in the original spirit, I think may be useful for how we pass on the script, as you said, of the original performance of the trial.

MR. WITHERS: I have a phrase up here on a slide called "suitability for purpose" as a test for the preservation of metadata. I am wondering if any of the panelists could explain what is the "suitability of purpose" test?

PROF. HUNTER: There are a couple of different ways. People like Jeff Rothenberg from the RAND Corporation and David Levy have written

quite a bit about authenticity of digital records.²⁶ There are some easy ways that you would do this, comparing something to a known original.

One of the high-end tests, in terms of authenticity over time, is: Is the record that we have at the end of the process suitable for all the purposes that the original was intended to fulfill?

To stay with the theater analogy—I played in many community theater orchestra pits. I don't know if a lot of those productions were suitable for the purpose or not. It was a growing experience for my kids when I was playing in the pit and they were onstage. But I don't know that the play did everything it was supposed to do.

In the world of digital records, if we need the formula to calculate, if we need the geographical information system to allow us to see the overlays, if that is the purpose and an authentic record must do that, some of the other things do not necessarily matter.

So the idea of "suitability of purpose" means that there is an essential characteristic to the record—whether it is motion, color—and that essential characteristic must be preserved over time for us to have an authentic record.

Now, part of the balance we are talking about is we cannot do this for every single record in the world, figure out all of its characteristics, preserve every characteristic. We do not have the resources to do all that.

But for a certain select group of records—and it may be that Jonathan Larson's records, as you have identified, are one of those, where, in order to have that authentic record, part of the purpose would be understanding the way Jonathan Larson worked and the essential characteristics of that are being able to see the way he made changes. So for that reason his record might not be considered authentic if it were just the text printout. This thinking, in terms of the Jonathan Larson example, is probably very useful, and it is one of those types of records where it is worth it to spend the money to get that right.

MR. RESIDE: I wonder about—and this is where I step completely out of my own expertise and say something that the legal scholars can laugh at—but I wonder if a lawyer were to send a PowerPoint presentation, where the original purpose was to show that the car accident happened in this way, but in the metadata of the presentation there is a note that the person thought he deleted but somehow it got tracked, "This is the thing I made up, hope it convinces the jury."

The original purpose of the lawyer was not to reveal that note, but in the future retrial or something that might become important and you might want to make sure that you capture that lost or hidden metadata that the original person might not even know was part of that file.

MR. WITHERS: It requires a level of sentience on the part of both the records manager and archivist to figure out what is the purpose for which this is most suitable and how do we tailor what we preserve to that purpose.

26. COUNCIL ON LIBRARY & INFO. RES., AUTHENTICITY IN A DIGITAL ENVIRONMENT (2000), available at <http://www.clir.org/pubs/reports/reports/pub92/pub92.pdf>.

Let's return to a question that was raised earlier in the previous panel. That is this question of "dark data." The big fear that Anita expressed at the end of the panel was this continuing accumulation of terabytes of unstructured data.

When it comes to suitability for purpose, not just for the preservation of metadata but for the preservation of everything, how do we make these determinations? What do we have at our disposal now that will help us get through that? Jason?

MR. BARON: We are way past terabytes! So we have serious issues and challenges here.

Let me do a set piece on what I have spoken about concerning "dark data" and on my experience at the Archives. Data, as we know, is doubling every two to three years in the world. The experience at places in the public sector, like the National Archives, is that we are dealing with the first email having been created and sent in its present form, with an "@" sign, only since 1971. You can look it up on Wikipedia.²⁷ In the 1980s, at the National Security Council in the Reagan Administration, there was an early PROFs (Professional Office System) system for email. That email was subject to a variety of lawsuits involving White House email.

Over time, the White House decided to capture all email, starting in the Clinton years. What we then see is an exponential curve, where we have preserved 32 million emails from the William Clinton White House, 200 million plus for George W. Bush, and a projection in 2017 of one billion email records for President Obama.

In comparison, the growth of presidential records in paper form is relatively flat. The cumulative number of paper records are still growing at presidential libraries that are run by the National Archives, but are relatively flat.

So one is a flat curve and one is an exponential curve. The question is: What does this mean for public archives across all sectors of the government?

Anyone can walk into College Park, Maryland, where the National Archives headquarters is, and ask for records in paper form. If you do that at the Clinton Library, some portion of the library in Little Rock, Arkansas—20 percent, 40 percent, whatever—is open in terms of paper records. The archivists there are a small staff. Every day these dedicated individuals, when they are not answering FOIA requests or e-discovery litigation requests, are opening records in hardcopy form. This means taking a box down from the shelf, looking through the folders, and putting cards in where there may be materials that are personally protected in some way—known as personally identifiable information (PII)—or other types of privileged material, putting a card, and not having that folder for public use.

This method just doesn't work in the digital age. If you have one billion emails from President Obama in 2017, when will those emails be open and accessible to the public? Well, the answer is you can file a FOIA request

27. *Email*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Email> (last updated Feb. 22, 2015).

for some of those (and we can talk about how they are searched); you can ask for them in e-discovery, which happens; you can be a Supreme Court nominee, like Elena Kagan or John Roberts, where portions of your email that you worked on as a young lawyer at the White House are now open because Congress wanted to explore your records before you were put on the Supreme Court, and so there are portions of this expanding universe of billions of emails that may be accessible.

But the answer is the rest of it is “dark.” The rest of it is inaccessible for seventy-five years, until the last living person has died. This is the default in the federal government for when records in digital form will be opened systematically by archivists. In other words, the records are held until a default period where everyone who would have personally identifiable information (Social Security numbers, and other personal information about their histories that are embedded in records) would be expected to have passed on, and therefore their privacy interests are zero or near zero, and then the archives are open.

But we shouldn’t be waiting seventy-five years to open electronic records. Increasingly, this is a looming issue of public importance. It is an issue for the court system to the extent that digital information is embedded within court records in any files kept in digital form at an archive.

The answer is one that we in the e-discovery community have seen in landmark decisions in the last couple of years—including one by Judge Andrew Peck, a magistrate judge in the Southern District of New York, in the *Da Silva Moore*²⁸ case—blessing analytics and very smart techniques for searching for information that go way beyond manual search, keyword search, to something that we refer to as predictive coding or technology-assisted review.²⁹

The e-discovery experience can be mapped to the records management and archival space, where essentially a triaging of what will soon be billions of “dark” electronic records can take place. We can use powerful analytics to pull out and extract meaning from these large archival repositories to get at the important material earlier, by issue and by concept, and by whatever means we wish.

My hope is that the National Archives is working very hard on figuring out how to apply these new forms of analytics to essentially open up what are these vast repositories of public sector ESI. Otherwise, the public at large is going to have to wait a very, very long time to have records opened from this and future administrations, which is particularly ironic because President Obama has been committed from day one to transparency and openness in government.

So the question is: How can we open up public records that are being kept for decades or hundreds of years into the future as fast as possible for

28. *Moore v. Publicis Groupe SA*, No. 11 CIV. 1279 ALC AJP, 2012 WL 1446534, at *2–3 (S.D.N.Y. Apr. 26, 2012).

29. *Id.*

future historians, and for all of us to know what is in these vast collections of ESI records?

MR. WITHERS: The Supreme Court has a wonderful phrase that they use to describe a form of data protection that existed in the paper world—“practical obscurity.”³⁰ It meant that your personal data was protected because it was in a mountain of inaccessible paper that no one would be able to get through, therefore it was practically obscure, and you should rest assured that your personal identifiable information held in the courthouse, in the basement, in paper form, even though it was officially a public record, nobody was really interested and nobody could get to it.

We seem to be going into the digital version of practical obscurity now, in that there is just so much information out there that we really cannot get to it.

MR. BARON: That’s true. But another fear is releasing instantly to the world due to a mistake in redaction. This is something I have experienced firsthand in reviewing Supreme Court nominee records—including email records created by John Roberts or Elena Kagan, when twenty or thirty years ago as young White House lawyers, they were vetting somebody—maybe for a commission, or as a nominee for an important post, and something in that third party’s past was embedded in that record and discussed in emails

My job as a lawyer at the National Archives was to redact the personal information out of that record because it isn’t practically obscure anymore. If you are handing the records over to Congress for a Supreme Court nominee, you know that the next day those records are up on the internet. It is not a question of having the opportunity cost of going out to a courthouse and looking through dusty files to find records. It is now instantly available to the world at large.

So FOIA law, under Exemption 6,³¹ under the privacy element exemption, actually is beginning to take into account that the interest in privacy might actually be going up over time because what was long forgotten is now instantly available again and could ruin the reputations of people whose names are swept up in the opened records of public figures.

MR. WITHERS: You can now shine a searchlight into the “dark data.”

MR. BARON: Right. And so now nothing is open. No email from the White House is open presumptively. You cannot walk in and ask for it. It needs to be reviewed. But the review task is so large that we need better methods to review.

MR. WITHERS: Right. We have the opposite situation in the courts, in that everything is presumptively open. So we have a problem there.

Now, in terms of the use of advanced analytics—technology-assisted review, predictive coding, computer-assisted review, however it is termed—in the e-discovery space and in spam filters that is based on some

30. *See* U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 762 (1989).

31. 5 U.S.C. § 552(b)(6) (2012).

prior experience with the data. You've got a seed set of documents that you are going to use to train your system. You have someone answering questions about what they consider to be junk email or not junk email over a period of time. So you have a specific context in which you are training the system to be able to do this kind of analytics.

What would be the context when it comes to large quantities of "dark data" and making the sort of archival decisions that we need to make for the future? How would you train the system to do that?

MR. BARON: The records managers and archivists of the future really need to be able to figure this out. I think this is an important role for them in terms of future appraisal of information and records—but they need to be technologically oriented so that they can build rules and categorize information in ways that correspond to what is important.

And, in terms of the search experience, we need to be competent enough to be able to work the software so that we could dive into a collection of records and find all records related to a particular topic, and then, with filtering mechanisms that filter out privacy-related expressions, like Social Security numbers and the like, to open up that subset of data. You have to be technically competent enough to use the new tools in this space.

Hopefully, archivists on the front end can figure out, in terms of records management purposes, how to categorize information in a better way, so that the permanent really is permanent and can be preserved from all of the other noise, all of the other information, the non-records stuff that you were talking about in the first panel.

MR. RESIDE: I definitely agree. In my current curatorial role at the Library, I probably write as much code as I write human-readable text.

MR. WITHERS: How do you use these advanced analytics, which have really been developed for rather specific circumstances, to the far more generalized and future-oriented world of archivists?

MR. RESIDE: I think the question is whether there is such a difference. I think the better you can train your algorithm for a particular set, the better result you are going to get.

But I question whether governmental emails or legal memos are all that different linguistically, let's say, than other forms of communication that are open.

PROF. HUNTER: I guess I would say that archivists are in the context business, that our job is to make certain that the relationships among all of these pieces of information are documented and understood. So if we are able to get a seat at the table as this is happening, I would think that we would say, "As we extract these bits of information are we making certain that the context among them, the relationships, are not lost?"

That really is the archivist's job, to clarify those contexts for generations that do not yet exist. So we actually might be making the job more difficult. But I think, in terms of long-term understandability of those bits of data that get extracted as the software gets better, that the archival perspective will be one to make certain that we do not lose the context and the relationships among all of that information.

MR. WITHERS: Speaking of artifacts, I have an artifact here, a good old floppy disk. How many people have one of these somewhere, or maybe a room full of these somewhere, a locked cabinet that you really do not want to open?

We have an unusual rule of evidence that I want to spend a few minutes exploring. It is part of our Federal Rules of Evidence. It deals with the question of authentication. In other words, if you plan to enter something as evidence, you first have to demonstrate that it is authentic before you get to the question of whether or not it is admissible, meaning that it is relevant to the proceedings at hand.

Federal Rule of Evidence 901(a) is a very general statement: “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”³² A wonderful circular statement.

But it goes on. It gives several examples. This is a quote from the rule: “The following are examples only—not a complete list—of evidence that satisfies the requirement.”³³

I want to zoom in on Example 8: “Evidence about ancient documents or data compilations: For a document or data compilation, evidence that it: (A) is in a condition that creates no suspicion about its authenticity; (B) was in a place where, if authentic, it would likely be; and (C) is at least 20 years old when offered.”³⁴

Now, most likely, before this little phrase “or data compilations” was added in 1970, I think what the authors were thinking of would be something like a deed found in a deed box, or perhaps a bill of sale for a work of art found in a file cabinet, that the documents are more than twenty years old, they are found where you would expect to find them, that there is no particular evidence that they have been altered in any way. So by virtue of the fact of their age and their appearance and their location, it was a pretty good assumption that it was real. No one twenty years ago would have had a motive to create evidence for this trial or this purpose.

The question is whether adding the phrase “or data compilations” in 1970 made any sense whatsoever. Let’s just explore that with a little hypothetical here.

I have my 5-1/4 inch floppy disk and I have found it in the attic in a box marked “vital documents” along with a copy of a will executed twenty years ago. The executed version of the will, with signatures and the notary stamp, is in the lawyer’s office. I found a copy of the will and this disk.

In the will there is a reference to the distribution of assets, and the distribution of assets will be according to a formula that lists the assets, the various beneficiaries, and what percentage of those assets they get based on their age, their marital status, and the number of dependents they had at the time of the distribution of the assets.

32. FED. R. EVID. 901(a).

33. *Id.* 901(b).

34. *Id.* 901(b)(8)(a)–(c).

We think, although this is unlabeled, that this disk has a spreadsheet that would have been created in VisiCalc in 1985. It may tell us how to distribute the assets.

The estimated value of the assets today, if they are distributed, is \$10 million. So there is a lot riding on this.

There is a clause in the will that says that if the distribution cannot be executed according to the instructions in the will, then the \$10 million goes to the family cat, who is still alive and who has hired a lawyer, Jason Baron, who represents the cat. So there is a lot riding on this question.

I am first going to turn to Greg. I've got this disk. I know that it is about thirty years old and I think that it has a VisiCalc spreadsheet on it. What do I do?

PROF. HUNTER: If we are looking at an authentic record, there really are three levels that we are dealing with: a physical level, a logical level, and the conceptual level. The physical level is the ones and zeroes on that storage device. The logical level is the computer-processable file. The conceptual level is whether or not it is a sufficient record. That's like "truth" and "beauty." So when we are dealing with authenticity of a record, we are at the conceptual level.

The first two levels are necessary but not sufficient to get to that third one. So we would be verifying that there is a physical impression on there. If we believe that it is going to be readable through VisiCalc, we would be verifying that it is VisiCalc and not something else. But in terms of authenticity, if we need the formulas in VisiCalc to run, that's the whole suitability of purpose issue and the essential characteristic of the record.

If we were able to go through those three levels and show that there was a file there, that we were able to somehow read the formulas and come to a conclusion about it, it is leading us toward a judgment of authenticity. Authenticity is a judgment that we make at a particular time.

I do not represent the cat, though. I would imagine Jason has some other ideas about that.

That is how we would begin working it through as an artifact, thinking of those three levels, trying to move toward a presumption of authenticity, to be able to say at this point it is what it purports to be.

MR. RESIDE: I am just going to be very practical. The first thing that I would do is get a little piece of tape and cover up the write-protect tab. That would mean that I would never write anything to the disk that would change the nature of the data that we are trying to see. So it would be possible, let's say, if I just said, "Oh, look at this, I've got an Apple II with VisiCalc running, I can just pop it in there." There is a chance that by doing that, depending on the operating system, that there would be data written to this disk that would then change essentially the last modified evidence from 1985 to today. So making sure that you have appropriate write blockers would be the first thing that I would do.

There are several pieces of equipment that are easily purchasable today. The best is KyoFlux, which is essentially a software board that plugs into a USB port and then you can connect it to a 5-1/4 inch floppy that can be

purchased for about \$25 on eBay today, or almost for free down at the Brooklyn recycling center near Park Slope.

You would then use KryoFlux to create a disk image, which is a full bit-for-bit copy of the disk, not just the files but every bit of data that would be on this disk, which is probably only—I don't know—1.2 megabytes. It could be double-sided.

I would then try to figure out what format the disk was in. In this era, there weren't just Mac, Linux, and PC; there was Atari and various versions of Tandy, lots of things. So determining the file format of the structure of the data on this disk would be both the way that I would get at the file itself, but it would also be interesting to let me know about is it possible that this was actually from 1985. If it was formatted with a Commodore Omega of the right generation, let's say, then it would be impossible that this disk actually would date from 1985. It would have to be a little bit later.

Then, once I have generated the disk image and I know how it is formatted, I would find an emulator appropriate to the disk format and—here is where it gets a little tricky—a copy of VisiCalc, which probably there is no legal way of getting right now.

MR. WITHERS: As I recall, Microsoft bought VisiCalc in 1985 and then killed it in 1986.

MR. RESIDE: Right. So in my case I would write to the archivist at Microsoft and ask for the exact version of VisiCalc that was used to create this. There is an archivist at Microsoft who does work with this exact sort of thing.

Then you could open it up in an emulator that is emulating DOS-5, or whatever it was at that time, in the exact environment, and you could probably find the data exactly as it appeared in 1985.

PROF. HUNTER: I would also be looking for cat scratches or cat hair, since I don't know that I trust him.

MR. WITHERS: Just in case. Now, this is an important question. If you can authenticate this under the very simple standard of this rule³⁵—this is pretty simple—then there is an interesting wrinkle from another part of the Federal Rules of Evidence.

Professor Capra can, I think, attest to this. This is unique. We often talk about loopholes. This is the opposite of a loophole. This is a steel trap in the Rules.

The steel trap is that if we think of this as essentially hearsay—it is an out-of-court statement that is going to be presented as evidence—under the hearsay exceptions, Rule 803(16): it is not admissible under an exception to the hearsay rule if the statement is from an ancient document. “A statement in a document that is at least twenty years old and whose authenticity is established” fits within an exception to the hearsay rule.³⁶ In other words, it must be true by virtue of the fact that it is an ancient document. There is no other rule like that.

35. *Id.*

36. *See id.* 803(16).

MR. BARON: This is why I would have had a long talk with my client.

MR. WITHERS: I have a question for you before we get into this. We just heard about all the machinations that one may have to go through to be able to recover the data. That is going to probably result in the data being migrated to a modern-day computer of some sort and presented as the output of that modern-day computer. Is this still an ancient document, or have I just handed you a wonderful out, where on behalf of your client you can say, "This is not an ancient document; don't worry about it?"

MR. BARON: It may be. The rule is extraordinary. Frankly, I haven't encountered many reported cases that point to this issue. But the fact that the rule seems to have this automatic presumption of the twenty-year-old date³⁷ makes this quite problematic for purposes of attacking the admissibility of this disk.

What I would do as a lawyer—I don't know how many other beneficiaries, how many other dogs or guinea pigs or whatever, are represented by lawyers in this estate and other people—but it seems to me that there are elements of this rule that a lawyer would seize upon.

This is not a floppy that is in a business environment; it is in an attic. There is a question of the beneficiaries' interests that are adverse to my client. So there is a question that arises in my mind as to whether someone had a motive to manipulate the data on the document. We would need to explore that in the way that Doug has described, to do some tests about it, because there may well be a legitimate suspicion of tampering or something that has occurred. It is not in a usual place of business. Was it a place where, if authentic, it would likely be? So there are inroads to attack.

But the twenty-year rule I think is quite problematic. I must say that this is a looming issue for the profession. I am very heartened that Professor Capra is leading the effort in thinking about this in terms of amending Federal Rules of Evidence.

It seems to me that the migration issue that you have posed is a problem for the future for the profession, because migration means changing metadata, almost invariably. Over time, as electronic records are preserved in huge numbers and migrated into different formats and on different servers, there is a chain-of-custody issue that arises, and should be attackable if there are changes in the renderings of the document. And yet, the rule here seems to put a very low bar for the admission of old evidence with a presumption of authenticity in virtually all circumstances.

And so I would definitely applaud the effort to be giving some serious thought about excluding ESI from the presumptive rule, given what we understand is the ease with metadata changing over time with migrations and such.

MR. RESIDE: I am fairly confident that the procedure that I described would not change any metadata on the disk image itself. Now, the presentation would be different, in much the same way that if the creator of this disk was your grandmother from Papua New Guinea, who spoke a very

37. *Id.*

obscure version of a dialect that no juries in the United States could understand natively, and so the document is translated by a professional translator in Papua New Guinea, into English and that becomes the evidence—if that translation doesn't damage the authenticity of the document, then I think it is the same sort of thing.

MR. WITHERS: I think that it is probably quite admissible under other rules. This is a crazy rule, and it gets crazier as time goes on, because probably, I'm sure all of your organizations have email that is at least twenty years old, if not older.

As I was saying to Professor Capra this morning, I am sure that if I look at my hard drives and my storage I will find a twenty-year-old email from a Nigerian oil prince telling me that he owes me \$10 million. Would that be now true by virtue of the fact that it is a twenty-year-old email? I really doubt that.

Professor Capra, do you have a comment on this?

PROF. CAPRA: But the party in your spreadsheet is not trying to admit the metadata; the party is trying to admit the numbers on the form. So what you are saying is that the numbers on the form are not going to change. And so the ancient documents exception would appear to apply.

MR. WITHERS: My assumption is that they are not hard numbers, but this is a series of formulas.

PROF. CAPRA: Same point. If you were to print it out at two places, they would have exactly the same content.

MR. RESIDE: As long as it is not "equals date." In other words, if the formula includes today's date or the phase of the moon or something like that, then you might have trouble. But that's hard to imagine.

PROF. CAPRA: They might look different, but that wouldn't make any difference to admissibility.

In terms of the Advisory Committee on the Evidence Rules, I am suggesting a distinction between the authenticity rule and the hearsay rule. It is just crazy to think that just because it is old it is true. But I'm not sure if it is wrong to say, "because it is old there is a presumption of authenticity." I'm just not sure about that.

If software is used that would change the character of the data, that is one thing; but if all it does is just put it on a different page or have different pagination or something, then I don't think that would make a difference in terms of authenticity.

PROF. HUNTER: We can authentically preserve a record that is incorrect. Those are two separate things. When we are talking about whether it is accurate or correct or not, that is a separate issue.

MR. WITHERS: Ron?

MR. HEDGES: Here is my question for Professor Capra. The original document is electronic. It is printed out in paper form. Has the twenty-year rule changed, as you suggested before, because you are creating something new out of electrons?

MR. WITHERS: So what you are trying to admit into evidence is the paper printout that you have just created from the thirty-year-old floppy disk, the media?

MR. HEDGES: That's correct. So is it still twenty years old?

MR. WITHERS: Is the paper manifestation of an ancient document?

MR. RESIDE: If it is a paper will, do you actually have to pass around the original document to the jury or can you make photocopies?

MR. WITHERS: I'm sure the jury can make perfect sense of this in its current form, right?

MR. HEDGES: This wouldn't be a jury case anyway, this would be for a judge. But leave that aside.

MR. RESIDE: Under this rule, the judge would need to get, in the paper sense, the actual physical document, not a photocopy.

MR. HEDGES: I suppose you could run it up for him and show it on a screen.

MR. WITHERS: The question goes to Professor Capra.

PROF. CAPRA: I don't think changing it from electrons to hard copy is going to make a difference.

But I will say this. As Jason said, there is no case law on this. I read every case about ancient documents that has ever been written since the Federal Rules, which is essentially all 102 of them.³⁸ There aren't very many. But none of them have dealt with ESI. So one of the questions for the advisory committee is whether to act now before the onslaught of ESI, because the Rules process takes three years at a minimum; or do you just wait for bad things to happen and then start trying to fix it then?

I tend to think that just changing its character, as long as all the numbers are the same or the words are the same, changing it from the disk to the hard copy doesn't change the authenticity issue.

MR. BARON: But a good lawyer could attack this. I understand that there are in many cases rendering issues. We have all had frustrations working with PowerPoint on an Apple machine and having small changes in format and other time-consuming defects. But there are also legitimate issues about migrating from one system to another over a period of 100 or 500 years, where there are chain-of-custody issues, which really are vexing in terms of the need for documentation over time.

I think we could construct a set of hypotheticals or a workshop around problems in this area that are particularly profound for the Archives. But it seems to me that it really is a looming issue over the next decade or two, when vast amounts of digital information is going to be offered into evidence. Then the question is: Has it been spoofed, has it been manipulated in some way—and is there a need for documentation where everything is just ones and zeroes, hidden underneath the media, and there is a need for experts?

38. See Tracy Bateman Farrell, *Admissibility of Ancient Documents As Hearsay Exception Under Rule 803(16) of Federal Rules of Evidence*, 186 A.L.R. FED. 485 (2003) (listing cases).

I applaud the posing of the problem, and I think it is nontrivial.

MR. RESIDE: The other thing that I would like to say to a room of lawyers as a sort of plea is that the process of recovering that data probably involves breaking several copyright laws. Simply emulating DOS is probably not technically legal. So if we could please stop it with the copyright extension and change it for software to say that five years of protection is probably enough, at least for a particular version of a piece of software—almost certainly, the retrieval process that I described would have broken some copyright law somewhere.

MR. WITHERS: I think that we are going to have large collections of “dark data” that are more than twenty years old. These may become vast troves of discoverable information because they are under the current rule readily admissible.

So I think that we have to consider what are going to be the challenges of keeping this ancient documents rule for ESI. Do we really want this? Maybe this is a good thing. But, if so, then in the process of transferring things from active business systems into archives, what do we have to think about in terms of migration, documentation, metadata, and the various other things that need to be transferred with those records?

MR. HEDGES: Let me just pose a question to the panel then. You are in the process of digitalizing the records. You obviously want them to be authentic for various reasons, historical reasons or the like. What would you anticipate doing in five years with the technology you don’t know about today that you are going to be working with? What kind of ground rules can there be, or guidelines that can be used, to deal with new technologies that seem to be coming up all the time?

MR. RESIDE: My own prediction is that we are going to do a lot less human description. If you think about libraries as a kind of giant, dark, archive, practically obscure sort of thing—among other reasons, one of the things people complained about with Google Books was the lack of metadata. And yet, information in Google Books is infinitely more findable and discoverable than it is in almost any library that has a card catalog, or even online OPAC.

I do think that in the next ten years there will be better and better computer vision algorithms, better and better ways to recognize sound files and what is going on in a sound file algorithmically, and better ways to predict based on patterns where you might find certain bits of information. So I think in the records management world we are going to move from a kind of human description world into, as someone else said, using the algorithms to find what we need.

PROF. HUNTER: What I would say in terms of archivists and records managers is that Point A is where we are going to be involved. We have been focusing on that twenty-year period. But archivists and records managers are going to be spending their time on that Point A, because we are going to be the ones who will have to say that there is nothing in our custody of these records that calls into suspicion its authenticity.

The conversation we are having today is a very important one—I hope we will be able to continue that—between the legal profession, archivists, and records managers, because that is our side of it.

MR. WITHERS: And that holds true whether or not we have this rule of evidence. That is still going to be a consideration for authentication of all evidence.

PROF. HUNTER: One of the other things that I would say is that this is not anything new. This is something we have been dealing with.

I use in class a book called *From Memory to Written Record: England 1066–1307*.³⁹ It took a while to trust paper records

MR. WITHERS: Actually, that wasn't paper. It was parchment. In the 1790s, they went through the whole thing again under Lord Mansfield, when they transferred things from parchment to paper.

PROF. HUNTER: You're right, of course. I misspoke. But the point is that it took time to develop trust. So the fact that we are laboring with digital information, well, that is what we should be doing. We are living through a big change and it is going to take a while to develop trust. But the greater the degree to which we can identify, as you have done today, the issue and try to make certain that the legal system is aware of this and doesn't make it even more difficult to deal with the trust issues over time, I think is an important contribution.

MR. BARON: How do you empower yourself in organizations to have a seat at the table when systems are being thought about, in terms of what is being bought or being employed, and are you part of the conversation going forward when a new system replaces a legacy system? The metadata loss, the authenticity issues are there at the juncture of moving from one place to another. Archivists should be part of that conversation, whether it is going to the cloud or going from one IT silo to another. I think it is a very important point to keep in mind.

Frankly, it is very difficult. The records and information profession has taken a second chair to CIOs and CTOs and others who are just pushing new technologies all the time and not thinking about records implications or legal implications or e-discovery or anything. They are just getting the new technology that is the most efficient for the organization in place.

MR. WITHERS: If the organization is going to save \$30 million a year by moving everything to the cloud, let's take 10 percent of that, \$3 million, and put that into records and information management and development of an actual migration plan. That would be a wonderful thing.

PROF. HUNTER: I think what may drive the conversation is the movement toward information governance. Certainly, the records management community is focused on information governance as the way to get the entrée to have the conversation. So I think that, with ARMA

39. M.T. CLANCHY, *FROM MEMORY TO WRITTEN RECORD: ENGLAND 1066–1307* (3d ed. 2012).

moving very clearly in that direction, maybe it will be that the archivists come along with the records managers to the table.⁴⁰

As Jason said, the technology is moving faster than our ability even to identify the table that we want a seat at. By the time we have identified it another cloud has already emerged.

MR. BARON: I just want to say that the Library of Congress is permanently preserving all the tweets that you all have been tweeting during this workshop today. So there will be at least some record of these proceedings!

MR. WITHERS: Yes, but this is a duplicate of what the NSA has, right?

I would like to thank our panelists. Doug Reside, Greg Hunter, and Jason Baron, thank you very much for your insights into this.

IV. PANEL THREE: CONFIDENTIALITY, ACCESS, AND USE OF ELECTRONIC RECORDS

MR. HEDGES: Good afternoon, everyone. We are going to start our third panel. As I mentioned this morning, my name is Ron Hedges. I was a U.S. magistrate judge for a while and I was very involved in the creation of the Sedona Conference Best Practices on Confidentiality and Access to Judicial Records, which is what we are focusing on today.

Let me introduce the panel. Ken, at the end, you know; you have seen him this morning. Bob Owen is a partner in charge of the Sutherland firm here in New York. Good afternoon, Bob.

MR. OWEN: Greetings.

MR. HEDGES: Thank you for being here with us today.

David McCraw is vice president and assistant general counsel with the New York Times Company.

What we are going to be doing for the next hour and a half or so is talking to you about conditions under which materials that are related to litigation can be kept confidential or must be made public. This may impact on you in several ways.

If you are a government entity, there are circumstances under which you may be required to make disclosures. We are going to chat a little bit about freedom of information laws today, because that is really part of the records that we are talking about.

In addition, as Ken mentioned and I mentioned this morning, when you have judicial records, there are constitutional principles involved, there are common law principles involved, and at the same time there are countervailing concerns about release of private information that are very legitimate.

You may see this conflict when your entity is a party in litigation and there may be some information that has gone to the court that may be

40. See, for example, *Information Governance Professional*, ARMA INTERNATIONAL, <http://www.arma.org/r2/igp-certification> (last visited Feb. 23, 2015).

related to a proceeding that someone might want access to and that you and your attorneys might want to restrict access to. You may also see this as nonparties, when you are the repository of certain information that is being sought by a party for use in litigation.

We are really going to be focusing on civil litigation this afternoon. But there is a criminal part of this too, a part to it that you should be concerned about or think about really for your purposes in the context of a request for information from you through a subpoena or the like that might be issued by the government.

There is litigation now pending in the Southern District of Texas, in Houston, where apparently the Southern District has had a practice of sealing search warrant applications and entire files. If any of you read *The Wall Street Journal*, this was a page-one article in *The Journal* yesterday.⁴¹

This morning I read a motion filed by Dow Jones Company that has been filed in about twenty or thirty of these cases to get access to the records.

One of the points being raised by Dow Jones in those motion papers is that the proceedings are sealed, we don't even know what is going on, and we have no idea what we are even interested in, which raises any one of a number of questions about access and the like for the threshold.

Let's get started.

One of the materials that is important reading on access to court records is the Sedona Guidelines.⁴² These were originally drafted in 2005.⁴³ I believe, as Ken mentioned, Sedona works through working groups. They are collections of people who have interest in certain topics.

The biggest one for most of us is Working Group 1, which is Electronic Records, discovery and the like of those records. Working Group 2 addressed confidentiality and access issues.

In 2005 there was a draft published. In 2007 there was a final version published. As I said, it is in your materials. When we were drafting these Guidelines, we tried to break it down into the stages of litigation.

- The first are pleadings, dockets, and the like, motions, things that are filed;
- Then we have discovery materials, and we can talk about that later;
- We have trial issues;
- Settlements;
- And then, finally, a section that, looking back at and looking at the suggestions we made, looked pretty good as far as what the predictions were and where we are today, about the different regimes for access and the

41. See Valentino-DeVries, *supra* note 2.

42. THE SEDONA CONFERENCE, THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE (2007), available at <https://thesedonaconference.org/system/files/sites/sedona.civicaactions.net/files/private/drupal/filesys/publications/Guidelines.pdf>.

43. THE SEDONA CONFERENCE, THE SEDONA GUIDELINES FOR MANAGING INFORMATION AND RECORDS IN THE ELECTRONIC AGE (2005), available at <https://thesedonaconference.org/download-pub/90>.

like—where everything isn't electronic; some things are electronic—and, for various reasons, we are keeping things confidential.

Today we are going to be discussing all these principles through recent case law. This is case law for the most part that has been generated over the last two or three months. So you have a lot of current information.

MR. OWEN: Ron, before we start, may I ask if you put the opposing views that were published as a dissent from the Sedona Principles or Sedona Guidelines into the materials?

MR. HEDGES: There are opposing views published to the Sedona Guidelines. They are not in your materials but they are available on the website under WG2.⁴⁴ So if you want to see the position of a certain sector of the bar and of corporate America, you can take a look at that. I think that is accurate, Bob.

MR. OWEN: Since my role on this panel is to be the designated punching bag as a stand-in for corporate America, I would like to point out that it wasn't as seamless as Ron mentioned in 2007. I was part of Sedona then, and I got these calls from clients saying, "Do you know what they're doing in Working Group 2?"

The Sedona Guidelines were not published as a consensus work. There was severe disagreement, primarily from the corporate world. There was an opposing views document published which takes on the Guidelines point by point and gives a response to it.⁴⁵

So, unlike the Sedona Guidelines and Principles published by Working Group 1, which were consensus pieces, in this case I think it is fair to say they were not and do not by themselves confer any authority on any point of view.

My only comment in response to Bob and his opposing viewpoint will be all that the Guidelines did was basically collect existing case law, including, by the way, First Amendment decisions from the United States Supreme Court, and put them in a document. How many of you have ever gone to a courthouse and, just for fun, looked at records?

When you go to the courthouse, unless you have a very good idea of what you are looking for, one of the first things you are going to do is look at a docket sheet.

For those of you who are unfamiliar with it, it used to be a manual document; now it is an electronic document in most courts—at least in the federal system most information is electronic now. That will give you some basic descriptors about a case. It will tell you the name of the parties, the name of the attorneys, and it will have dated entries for different events. The first event usually will be the filing of a complaint; then there will be the filing of the answer and the rest.

For those of you whose companies may be involved in litigation, your company's name may be a party; you may be a nonparty who was

44. THE SEDONA CONFERENCE, *Opposing Views to WG2 Guidelines* (Apr. 6, 2007), <https://thesedonaconference.org/download-pub/477>.

45. *See id.*

subpoenaed, as I mentioned before; or there may be some discovery requests and the like that were directed toward you that you responded to and, depending on the circumstances, there may be a docket event for that.

In the old days there would be a box in the clerk's office for filings. Whenever a complaint was filed, a copy would be put in the box, with the understanding that members of the press could take a look at it.

MR. HEDGES: What we see here going out of a court in, I believe, California is that instead of immediate access to dockets and the like, it took a period of time for filings to be perfected.⁴⁶ So there was a delay in getting the information to the press and the public.

I should tell you that it is pretty clearly established that all the rights we are talking about here are rights for the public—that is all of us. But courts often look at the press as surrogates for the public. So when we are talking about public access, we are often talking in these cases about press access.

David, what is the problem with a delay of a couple of days in getting access to a complaint?

MR. McCRAW: In some cases, the reporters are going to be immediately interested in writing about that. The concern here, which was raised in this case, was that there had actually been access on a first-day basis in "Courthouse News," which covers cases all over the country and tries to be up-to-speed on that, then found that, largely for economic and technical reasons, they were being denied the access to that.

We always suggest that any delay is an affront to the First Amendment and so forth. The fact is that probably in many cases delay is not significant. But it seems to us that it is an important principle that those things are public when they are filed and that it shouldn't be a decision made by either people in the clerk's office or others in government when we get access to them. Once they have triggered the judicial process, that's the point where there is a public interest in knowing how they are being handled, and that there should be access to them in a reasonably timely manner. Usually, that means, in the Southern District of New York for instance, twice a day, once in the morning and once in the afternoon. There is no reason for the system not to work like that in virtually every courthouse.

MR. HEDGES: And the court was very careful in the Ninth Circuit to say we're really not telling you how to accommodate First Amendment rights of access, but there are ways that it could be done. There have been courts that have done it. You need to go back and figure out a way to give the access that is more or less instantaneous, as quick as you can be.⁴⁷

Bob, let me ask you: Any issues or questions from your point of view about access?

MR. OWEN: I don't really have a dog in this hunt. As a litigator, I like to be able to access the complaints as soon as they are filed.

46. *Courthouse News Serv. v. Planet*, 750 F.3d 776, 779 (9th Cir. 2014).

47. *See id.* at 785–86.

Occasionally, I would see a filing against a client of mine and I would want to just click on it and see it, and there would be a delay of a day or two in having it posted.

So I'm fine with this. I don't think there was any bad intent in the clerk's office's failure to do these things immediately. Taking the PDF and posting it on the website sounds like a pretty simple job. But if you are in a busy clerk's office, it is going to take some time.

If this decision causes the clerk's office to tune up their procedures and get more productivity out of their employees and we get it posted, I'm fine with that.

I agree with David. I think there is a public interest in knowing what is being filed. It is a public access system.

If my client has a confidentiality interest in a particular case, it is open to me to go to the court and ask for the record to be sealed before it gets filed or as it gets filed. That is a horse of a different color. But in the run-of-the-mill case I think they should be reasonably contemporaneous.

MR. HEDGES: Ken, any thoughts on this?

MR. WITHERS: Well, it brings up an interesting issue for court clerks and also for government agency records managers and public information officers. That is the distinction that we may want to make—it may be a distinction without a difference—between public access to court filings, court proceedings, and publishing them.

On the one hand, the courts have an obligation to make these kinds of documents available to the public, for all the reasons that we outlined this morning—transparency, public and political participation in the court system, the checks and balances that are part of our First Amendment guarantees of free speech, and also the common law tradition of access to the courts.

So it is one thing to say okay, the court is going to make these things available. It is something else again to say that the court has to now assume the role of a proactive publisher of these kinds of things. This takes many different forms.

Does it necessarily follow that, because we have First Amendment guarantees and a common law tradition of public access, that the court must make these things available in the fastest, most efficacious, and possibly costly, way? Is the court under an obligation to make them free on the internet, for instance; or is the court's obligation that it not hinder public access and it makes these available in some reasonable way?

I think what happens here, one very important thing, is that this case did not decide that question. All this case decided was that there is a question here, and one that federal courts need to consider, even though this was a state court, that there is a federal question here of First Amendment rights as well as a common law question in the California courts.⁴⁸ So it is legitimate for a federal court to review a state court's actions in this area.

48. *Id.* at 787.

But the circuit court did not make any pronouncements on whether or not this delay in and of itself was reasonable or unreasonable. It bounced that back to the district court, and I guess Judge Real will have to make that decision and take evidence on it.

But it does raise this question of just where do we draw the line between making things public and being an active publisher of that public information.

We have to understand what delays we are talking about. Most of the delays were two or three days, but some delays were as long as thirty-four days. So I think it distinctly possible that, upon review of this, the district court may say, "Thirty-four days is just not reasonable. Two or three days maybe is."

MR. HEDGES: Let me go back to the world of archivists and records custodians. I am assuming some archivists want to make their records available to people to look at. That is the purpose of an archive, I would assume, other than just keeping it internally for historical purposes or the like.

Is there any kind of an analogy to draw between the time someone might be able to get access to a private archive, or even a public archive, and getting access to something from a court?

MR. WITHERS: I think necessarily, when we are at the stage of archivists dealing with information, the timeliness factor is less of an issue. We are not talking about twenty-four-hour news cycles here. We may be talking about—for instance, earlier this morning there was a discussion of academics having access and making things reasonable and timely in that regard. But we are not talking about a twenty-four-hour news cycle.

So I don't think that timeliness is an issue that archivists specifically will have to deal with. Though there will be questions about accessibility. Are we simply going to make this available in a library for people to come and research, or do we have a positive obligation to actually proactively publish or post this information and push it out to people? That is the broader question here.

MR. HEDGES: Let's turn to the second case. Again, this is a new one for me. David, I am going to ask you to take a minute or two and tell us about what happened in the Fourth Circuit.

MR. McCRAW: As someone who represents *The New York Times*, the Fourth Circuit is always a bit of a mystery to us. It is a very conservative court, but it is a court that believes very, very strongly in most cases about access to information. We have had phenomenal and surprisingly good fortune in libel cases and in access cases there, and in anything else we do that *The Times* touches not so lucky.

In this particular case, "Company Doe," as it was designated in the papers, was unhappy because the government had started a safe products database and one of the entries that was going to be placed into that database involved a product that had killed a baby, and the product had been made by so-called Company Doe.

Company Doe had argued to the agency that it should not be included in, in this case, the Consumer Products Safety Commission database, that their product had not been responsible, and made a variety of arguments. They lost all those.

So Company Doe went into court to try to stop the listing of its product on the consumer website. In what was, in my opinion, a striking diversion from normal practice, virtually the entire case was sealed.⁴⁹ Everything about it initially was unavailable, including who the company was, what the pleading was, what the arguments were, how the case unfolded, and even the decision.

So a group of consumer advocacy groups got together and challenged that secrecy, first in the district court and then, with marginal success, they got some part of the decision released.⁵⁰

The Fourth Circuit decision is really, from my perspective, quite a tribute to the notion of public court. The company argued that it would be embarrassing and hurt their fiscal position if they were named. The whole purpose of their lawsuit was to stay out of the database and, if they had to actually talk about their product and what they were doing in court, they said it would destroy the very right they were trying to seek, which was to keep out of the database.

The district court initially bought into this, saying that the district court saw itself balancing on one side the company's reputation, fiscal health, and on the other side public access.⁵¹ The district court found public access to be this abstract right which did not really have much weight, whereas a company's fiscal health was a real thing in the real world.⁵²

The Fourth Circuit said the opposite was true, that this abstract right, the right of the public to know what was going on in its court, weighed much more heavily than whatever embarrassment or fiscal health harms may be suffered by Company Doe.⁵³

It was interesting, given the conservative nature of the court, that one of the things it focused on—and it referred to the court not as a “palace of justice,” but as a “subsidized form of dispute resolution.”⁵⁴ It said, if you are going to come to a public courthouse being paid for by taxpayers, you cannot do that in secret; the taxpayers have a right to see how their money is being spent, who their judges are, what arguments are being tolerated, how fast the procedure is moving, and so forth. The court ultimately concluded that this case should have been tried publicly, adjudicated publicly, and that the papers should be made public as well.⁵⁵

49. *Doe v. Pub. Citizen*, 749 F.3d 246, 253 (4th Cir. 2014).

50. *Doe v. Tenenbaum*, 900 F. Supp. 2d 572, 609 (D. Md. 2012), *rev'd sub nom. Doe v. Pub. Citizen*, 749 F.3d 246 (4th Cir. 2014) (finding that “the remedy of sealing the entire case seem[ed] overbroad”).

51. *Id.* at 609–10.

52. *See id.* at 610.

53. *See Doe*, 749 F.3d at 271–72.

54. *See id.* at 271 (quoting *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000)).

55. *See id.* at 271–72.

The court was quite unhappy with the district court judge, which colors much of the opinion, and it is kind of delicious to read, as they take down the district court judge for essentially not taking the public's right seriously, and certainly not moving very quickly when asked to do so.

MR. HEDGES: Bob, you are representing this Company Doe.

MR. OWEN: No, I am not.

MR. HEDGES: No. I meant it figuratively, not that you were.

MR. OWEN: I am not the lawyer for Company Doe.

MR. HEDGES: Hold on one second.

MR. OWEN: Who is the company?

MR. HEDGES: I don't know. Who is the company? Do we know yet, David, who the company is?

MR. McCRAW: It was remanded for further consideration.

MR. HEDGES: Assume that there is some information that the company legitimately wants to protect—let's say it is a trade secret or something like that. What is said to a judge to try to keep things confidential to some degree?

MR. OWEN: Well, let me just take the case that David described. He made the statement that "the product killed the baby." You can unpack that and wonder whether the causal relationship was as direct as that.

I suspect that in this particular case and based on what he said, the company was saying, "maybe there was an association between the product and the baby's death, but the causal link is a different matter altogether. If the government is publishing the data as if there is a causal link, that's a factual finding by the government that has never been litigated in a fair and open way in accordance with the procedures of our courts."

Just taking their point of view for the time being, I can see why they would not want the imprimatur of the government saying "this product killed that baby."

With respect to the idea that, simply because courts are publicly supported by tax dollars, and therefore everything they do should be public and every document that my clients produce in the litigations should be publicly available, I think is a very extreme position. I do not think any court in the country would go that far.

Frankly, as far as this question is concerned, I would trust the judiciary, the district court and, in this case, the Fourth Circuit, to balance the interests between public access and the interests on the other side.

What are the interests on the other side? The interests on the other side are privacy and property. These are values that we hold dear in this country. You all have privacy interests and you all have property interests in information that you possess. Simply because you go into a forum for the resolution of disputes does not mean that you have to sacrifice those other rights in order to get a judge and a jury. I don't understand David and *The Times* to be saying that, or anybody to be saying that.

MR. HEDGES: You are not saying that, are you, David?

MR. McCRAW: I would not say that. But the one thing I would say here about this case, which strikes me, is it is very similar to a libel case. A newspaper—not *The New York Times*—says something awful about you that is untrue and you sue. One of the values of that public forum, one of the values of having that libel case tried in public, is that you have an opportunity in a public forum to set the record straight in a very dramatic way.

Now, that means that, no question, the libel is going to be repeated, the case is going to be covered, and so forth. But you are going to have a voice in that process.

One of the things that struck me about this case when I first became aware of it at the district court level was: wouldn't a company welcome the opportunity to have a federal judge say, to follow up on Bob's point, "the government is wrong here. This product should not be on this list. The government has made a mistake." The sealing, of course, takes that away.

MR. OWEN: Well, except that if it is in the database between the moment that the government wants to put it there and the end of the trial, where the factual issue of causation is decided, they are suffering harm in the meantime. So I can understand Company Doe's position—"don't put us in there until you prove that there was this causation."

MR. McCRAW: That is where it was procedurally.

MR. HEDGES: Ken?

MR. WITHERS: A couple of points.

One, on this whole question of the value of publicity, I think that perhaps Company Doe may regret this, in that it may look more like Company Doe is trying to manipulate the system to keep its name out of this database, rather than vindicate its position. So Company Doe should be careful what it wishes for. I would really think it would be very bad if a few years from now there is some whistleblower exposé about how Company Doe got the court records sealed. So it could come back and bite them later. That is just a strategic point.

On the more fundamental legal questions here, I think that this case raises some issues about what exactly the balance is. When we are trying to balance these interests of privacy and property and public access—we have, of course, a First Amendment standard and we have a common law standard—are we actually balancing the interests of a particular litigant against the interests of the court system, or are we attempting to balance two different interests of the court system?

I think a number of courts view this more in terms of balancing two different interests of the court system. A person can argue, "If I am dragged into court, I should not have to give up my privacy and property rights in order to vindicate my position in court."

But from a judge's point of view, the balance might be: Is transparency and openness in this procedure going to be more advantageous to the court system than the chilling effect of transparency and openness on the rights of particular litigants and their ability to use the system?

So they are not looking so much at the particular harm being done to this individual in the court. They are looking at the harm that this could engender to the entire system. Will people be very turned off by the courts in general because they feel as though if they get enmeshed in a legal process they are going to have to give up all of their privacy and property rights?

I think that that is an important distinction to make, and I think that many courts, rightly or wrongly—because I haven't seen a whole lot of commentary on this—are looking more at these conflicting interests of the court system rather than looking at the interests of the individual litigants.

MR. OWEN: But I as an individual litigant in a court do not have concrete rights of privacy and property. I don't care about the integrity of the system. I want my rights protected when I go into court.

MR. WITHERS: That's fine. I'm not positing that. I am saying this is what I read into the court's analysis, that they were looking much more at the larger systemic picture than this individual litigant.

MR. OWEN: With respect to your comment about Company Doe's strategic decision, it picks up on what David said about a defamation case. There is always that litigation calculus. If I go in and I sue *The New York Times* because they defamed me, I am just republishing everything they said, and it is going to go on for another two years. So often conversations I have with clients—not that I am a big defamation lawyer, but I can imagine myself saying, “just let it go.”

MR. McCRAW: I like that idea.

MR. OWEN: Well, if it were *The Times* I wouldn't say that.

MR. HEDGES: One of the things we really didn't talk about—we touched a little on this earlier this morning in the second panel about discovery and the like—is we are unique in the world. England has some discovery kind of like what we do, but no one has the freewheeling opportunity to get information from the other side that is allowed in the United States.

One of the big issues that has cropped up—and the Sedona Best Practices addressed it—is: What do we do with that discovery? If David and I are adversaries and we exchange information between ourselves, basically I can ask him a written question and he can answer me—that's an interrogatory; I can ask him to give me documents—that's a request for production; we can take depositions of each other and the like.

One of the fundamental questions in the area of confidentiality and access is: Who gets to see that discovery information other than us? Is it something that you as a member of the public could go to me as an attorney and say, “I want to see what David McGraw gave you because I am interested to see *The New York Times*'s position on something?”

I am going to tell you that the way that a court responds to the question about “do I get to see his discovery?” depends on where you are. This is kind of like the lawyer's general answer to everything that “it depends.” It depends here on the jurisdiction that you are in.

We are seeing a decision here from the Kentucky Court of Appeals, another recent decision from February.⁵⁶

There is a little twist here, because, under the rules in Kentucky, the discovery that David and I exchange would be filed with the court, as opposed to just being exchanged between us.

Ken, I think it was fair to say that the court looked at the fact that the materials were filed as having something to do with access, right?

MR. WITHERS: What worries me is that in Kentucky the presumption is that discovery is filed with the court.⁵⁷ Very few states still have that rule. For the most part, the presumption is that discovery is an activity that takes place between the parties and the only discovery that gets filed with the court would be the discovery that is used as exhibits, for instance, attached to a summary judgment motion, what is going to be entered as evidence at trial. Ninety-nine percent of the material that is exchanged in discovery is never going to reach the courthouse. So I was surprised that Kentucky still has the old rule, which goes back many, many generations, that discovery is actually filed with the court.

MR. HEDGES: In my old court, the District of New Jersey, all the discovery requests used to be filed and all of the discovery responses used to be filed. Then the clerk realized one day, “What are we going to do with all this stuff? We can’t have it.”

Although I suppose now, with e-discovery, it is easy to file and store anything electronically now—right, Ken?

MR. WITHERS: Just go to Staples and get those five-terabyte drives.

MR. HEDGES: Bob, what are your thoughts about this? You are exchanging information with Ken. Do you want other people to see it generally, or do you need to take other steps to protect it, along the lines of HIPAA information or the like?

MR. OWEN: The tradition in our country has been that, as Ken says, the discovery activity, the producing and receiving of documents, the proffering and answering of questions in the form of interrogatories, takes place outside of this tax-subsidized forum—in conjunction with it, but not in it.

So the distinction that Ken drew between trial exhibits, things filed in the clerk’s office for discovery motion purposes—you know, those do not bother me so much because I, as a lawyer representing a client, know what is going in. So maybe I make the tactical decision not to make a particular motion because it would require the filing of a particular document.

But I do not think we can put e-discovery to one side.

The United States changed the whole system of pretrial discovery in 1938. Until then, you would file your case, the other side would answer, and at some point you would go to trial, and you would learn what their case was during the trial. A witness would testify and you would learn what the witness was saying in that moment and you would have to fashion your cross-examination and whatnot.

56. *Fiorella v. Paxton Media Grp., LLC*, 424 S.W.3d 433 (Ky. Ct. App. 2014).

57. *See id.* at 436.

In 1938, the judges, I think for good reason, said, “No, let’s do it differently. Let’s exchange the documents between the parties before you get to trial.” You know, in those days maybe a typical file was a few pages. That would inform the trial, make it more efficient, allow the parties the opportunity to discuss settlement before going to trial. Fine, that was a great system.

MR. HEDGES: Just, speedy, and inexpensive, right?

MR. OWEN: Just, speedy, and inexpensive—that’s rule one. But the point is that when electronically stored information became the dominant form of information storage, now—the paradigm for document retention when I started practicing in New York a long time ago was it was harder to save something than to destroy it. If you wanted to save it, you had to write the file designation on it, send it to the file department, they ACCO clipped it, it went into a folder. So it was an affirmative act to save. Otherwise you just threw it out.

Now it is reversed. It is easier to let things stay on your five-terabyte hard drive than it is to delete them. So what do we have? All of your C drives, I would venture to say, is 95 percent information that you have not looked at in a couple of years.

However, in the context of this full disclosure pretrial discovery philosophy the United States has—alone among the nations in the world, by the way—you might have to turn over your whole C drive to the other side in order to litigate your claim. Now, is that something we want?

First of all, that is sort of a hideous prospect. But, secondly, now Ron is asking us, “Well, shouldn’t that be made public because it is done in the course of a litigation that is being subsidized by your tax dollars?”

I am here to say I don’t think we are there. I don’t think we want to go there.

MR. WITHERS: I have something to add to that. A big distinction between paper discovery and electronic discovery, when we are talking about what gets filed with the court, is the fact that if paper discovery is filed with the court, it stays in a folder and it is in the court clerk’s office. If electronic discovery is filed with the court, it very likely will end up being electronically accessible to everyone in the world by a Google search. That is a significant difference.

We talked this morning about practical obscurity and how that concept has been completely changed because of the ease of electronic access.

That is why I am quite surprised that Kentucky is one of the few states that still requires the filing of discovery. Most courts do not want anything to do with discovery, they do not want to have to manage it.

When we talked this morning about what are the core reasons why we have First Amendment and common law rights of access to the courts, it is so that the public knows why the courts are making the decisions they are; what goes into the adjudication; why is the judge deciding the case the way she or he is deciding it?

Discovery doesn't have a whole lot to do with that. If it isn't part of a motion before the court, if it isn't part of the trial evidence, there really is not a strong presumption—there is no presumption, zero presumption—of public access to that, if it is not related to the actual adjudication.

Now, that said, this particular case had some wrinkles to it. One of the wrinkles is that, I believe, that we had a settlement here that was paid for out of public funds. It is possible, I think, to construct an argument that says in those circumstances, the reason for the settlement being paid out of public funds, there may be a heightened public interest that distinguishes this from the pure private litigation situation.

MR. HEDGES: Of course, the one answer to that might be: you may not need to go the litigation route; because this is a public agency, there may be rights of access under statute and the like.

MR. WITHERS: Under FOIA, depending on what the Kentucky version of FOIA is.⁵⁸

MR. HEDGES: David, from your point of view?

MR. McCRAW: Understand how this unfolds. In most states, most jurisdictions, the rules are that the parties can get a confidentiality order by showing good cause, whatever that means. So that body of documents that is being exchanged between the parties, if they can come up with good cause, then chances are they are going to get a confidentiality order. Absent that, they can share it with the world in most jurisdictions.

On the other hand, once it comes into the court, then the rights that we have been talking about in the Constitution and the common law come into play and there is a much more powerful basis for someone in my position to go after that.

But what really happens in the exchange of discovery? Someone who looks a lot like Bob will come to me and say, "My client is involved in this incredible, incredible litigation where the other side is admitting that it has defrauded the world, and you should help your reporters file a motion to get at that discovery." That sounds like a great idea. That's a story there. So we file that motion.

Then, somebody who looks a lot like Bob stands up for the other guy and says, "But there is a confidentiality order. It is not happening in court. It is not subsidized. It is between the parties."

It becomes a very strategic weapon that is used by people who want to litigate their case in public. We are happy to accommodate them. But that is where the fight comes in, is when one side or the other comes along and seeks it.

My experience has been that we tend not to have great success winning the right to discovery before anything is filed with the court, before there are any motions or similar practice before the court.

With one exception, and that is that when there is a public entity as a defendant, we have great success in convincing judges, at least in New

58. Kentucky Open Records Act of 1992, KY. REV. STAT. ANN. §§ 61.870–61.884 (West 2012).

Jersey and New York, that that changes the calculus, that the discovery should in fact be public, or more public than it is in a civil case.

So the Republican National Convention took place here in 2004. There has been a slew of litigation by demonstrators who claim that they were mistreated by the police. We went into that case and we won the right to discovery there.⁵⁹

In New Jersey, in Ron's old jurisdiction, there was a class action brought against the foster care placement system. We went into court there and we won a large volume of discovery documents concerning foster care.

There is a case now pending in the Southern District of New York brought by a police officer who claimed that he was fired and otherwise abused for protesting stop-and-frisk. We went into court there and got discovery information.

Again, the judge said these cases are different because there is a public defendant. It is not like when Company A sues Company B.

MR. HEDGES: Bob, you were talking before about protecting legitimate interests that everyone knows organizations have, public or private, corporate or not. So let's talk a little bit about this next decision.

This is *Apple v. Samsung*.⁶⁰ If any of you were ever paying attention to what was going on in Northern California, these two giants were engaged—although I think it is all resolved now, other than involving the settlement.

MR. WITHERS: There is a settlement that maybe we will never know the details about.

MR. HEDGES: Fighting about patent rights and the like and infringement. Here we have a case where something went wrong, where someone in a law firm, according to the decision, a paralegal, made a mistake about allowing confidential material out. Then it snowballed and snowballed and eventually information that was subject to a protective order was released to the public.⁶¹

MR. WITHERS: We can add a little more detail. The information that got out was in an expert report that was supposed to have had certain information redacted.⁶² The expert report was about licensing negotiations between entities other than these two particular parties, but it involved these parties.⁶³ There was some information that was inadvertently not redacted, some of the licensing terms.⁶⁴

MR. HEDGES: Okay. We'll say it was non-intentional for now.

MR. WITHERS: It was inadvertently not redacted. The report was sent to the other side, Samsung in this case. The problem was that Samsung then published that unredacted report on an internal FTP site so that all their

59. *Schiller v. City of New York*, No. 04 CIV. 7921 KMK JCF, 2007 WL 136149, at *20 (S.D.N.Y. Jan. 19, 2007).

60. *Apple, Inc. v. Samsung Elecs. Co.*, No. 11CV01846LHK (PSG), 2014 WL 4684842, at *1 (N.D. Cal. Sept. 19, 2014).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

employees would have access to it. In particular, twenty employees who were involved in other licensing negotiations that were going on got to see the terms of the license negotiation in the expert report.

So it was used, not in the litigation or for parallel litigation, but it was used for strategic business purposes, in direct contradiction of the confidentiality order, which included a clause that said “if something is inadvertently produced and it is obvious that it has been inadvertently produced,” Samsung should have returned that information to Apple.

So the dispute is not really something that we are dealing with here in terms of court records. This is between private parties. What we are really dealing with here is commercial espionage and unfair trade practice.

MR. HEDGES: So, Bob, my question to you is: You are going to litigate, you want to get some type of confidentiality order to protect a business secret or some type of secret that your client has—what do you do?

MR. OWEN: A confidentiality order is more or less entered as a matter of course at the beginning of commercial litigations in America today. You do not really have to go to the judge and justify it and say there is good cause for it. Usually, the parties agree. They understand that, because of the very generous exchange of information going back and forth, we don't want to layer on top of that this concern about trade secrets.

Samsung is a great case because, obviously, you do not want your negotiating strategy publicized to the world. I mean we can all understand that that is a violation and something that is properly protectable.

Your question was, what would I do? The confidentiality agreement between me and my adversary is essentially a contract, and the contract was breached, and the breach caused damages. So there is not a whole lot you can do about getting the horse back in the barn, but you can properly, I think, claim compensation for the damage that was caused by that breach of contract.

MR. HEDGES: Here the recovery was attorney's fees.

MR. WITHERS: Attorney's fees was it, which puts people back to square zero.

MR. HEDGES: I don't agree with that.

MR. WITHERS: It was possible that the attorneys for Samsung could have been kicked off the case, they could have been disqualified.

MR. OWEN: They should have been disbarred.

MR. WITHERS: I think that's distinctly possible.

MR. OWEN: Or disciplined.

MR. WITHERS: They would have been referred to the California Board of Bar Overseers.

MR. OWEN: It is shocking that they posted it on that internal website.

MR. WITHERS: Well, there is a question as to exactly who did it. It was not done by the attorneys themselves, but it was certainly done by somebody within Samsung.

MR. HEDGES: I guess the teaching point here is if you are going to be doing some kind of a review, you need more than one set of eyeballs on it.

MR. McCRAW: Ron, can I speak to the point of confidentiality agreements?

MR. HEDGES: Of course.

MR. McCRAW: As somebody who represents a corporation, I certainly understand corporate secrecy, despite the other side of my house.

I do think as a public matter the confidentiality that is imposed in cases that have direct impact on the public is a serious problem. I would direct you to the *GM* cases⁶⁵ that we now know about and the *Firestone*⁶⁶ cases before those, where there was a confidentiality order in those cases. The plaintiffs in those cases, that is the injured people from the cars and their families—the attorneys come to know that GM has a problem, that its cars are being built in a way that is going to raise a high degree of risk of accidents and safety concerns. That discovery is confidential.⁶⁷

They then settle the case, the plaintiffs' attorney and the motor company, and you never know about it. It becomes again a part of the record that does not become public.

I think in many cases it is unfortunate that the courts actually conspire in allowing this to happen. I understand and I appreciate that in many commercial disputes it is simply a breach of contract, a transaction gone bad, trade secrets are involved, and that there is a basis for confidentiality.

But I do think that the courts sometimes fail to assist the broader public when discovery has actually called attention to a problem that the public should know more about.

MR. HEDGES: I believe the historical example you were talking about was exploding tires on cars years ago.⁶⁸

MR. McCRAW: Yes.

MR. HEDGES: It took a long time to get the information as to what happened to the public.

MR. McCRAW: The other thing I will say, just as a practical matter, is that if confidentiality is ordered and is put in place at the beginning—as Bob said, that is usually by agreement—you then have thousands, tens of thousands, millions of documents exchanged. When I come along deep into the litigation, judges are very unwilling to review the discovery to decide what really should have been sealed and what should not have been sealed and so forth.

This came up in a case that I lost, where several families who had lost relatives on 9/11 in the airplane sued the airlines. They litigated that case for years. The plaintiffs' attorney, the attorney representing the families,

65. *See, e.g.*, *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002).

66. *See, e.g.*, *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1315 (11th Cir. 2001).

67. *See id.*

68. *See id.* at 1307.

got in touch with me and said, “I can’t tell you what is in the discovery about what the airlines didn’t do on September 11th, but you would be interested and your reporters would be interested.”

I went into court to make that argument, and about the historic significance of it, and so forth. Not surprisingly, after they had litigated at that point for I think eight years, the court was not particularly keen on having to go through the discovery and decide what should have been public or not. Judge Hellerstein in this case sensibly said, “If this goes to trial, the materials are going to be disclosed then.”

MR. OWEN: I would suggest that David and I come from very different perspectives. You sit in a chair where people bring you the cases that have a public component or a public interest component. I sit in a chair where 99 percent of the litigations I ever witness have no such component.

So really, in the cases that have formed my attitudes toward this, there is no public dimension, there is no articulable public interest. So I can understand how you and I see things differently. Most of my cases are not that interesting and would not be something that your paper would want to cover.

MR. HEDGES: It may come tomorrow, Bob. You never know.

MR. McCRAW: I spent years litigating the largest sugar delivery in the world. I can assure you I did not want anybody to have to go through what I did learning the facts of that case.

MR. WITHERS: The individual cases may not have any public interest at all, they may be incredibly boring contract cases, but there still may be a public interest in how the courts function.

MR. OWEN: That’s a good point. To pick up on what Ron said, the common law is this wonderful web of decisions in individual cases going back hundreds of years. We are the fortunate beneficiaries of a fantastic body of decisional law.

It is important to know why a particular case was decided in a particular way, because the fact that this set of facts was decided this way by a previous court is going to be useful to me in my case if the decision favors my position and if the facts are similar. So you need to know, in order for this system to work well—and I am not arguing against the interest I am supposed to be espousing on this panel—you need to know how these decisions are made because that might have judicial significance in later cases.

MR. WITHERS: That is my point. Now, there is a problem with how far do we extend that.

MR. OWEN: Right.

MR. HEDGES: I want to take us a little bit out of order, because Bob was talking before about settlements and protective orders and consequences when things are breached. This *Gulliver Schools* case to me is the most fun case in everything we have.⁶⁹

69. *Gulliver Sch., Inc. v. Snay*, 137 So. 3d 1045 (Fla. Dist. Ct. App. 2014).

MR. WITHERS: And I would argue that it is irrelevant.

MR. HEDGES: But I wanted to talk about the consequences of agreements and the like. This is a perfect example of a severe consequence of an agreement.

Ken, I know that you like this case. Do you want to mention it for a minute?

MR. WITHERS: But it doesn't have anything to do with judicial records as such.

MR. HEDGES: No, but it is fun. That's why it is there.

MR. WITHERS: This was an age discrimination case brought by a principal in a publicly supported private school. I guess a charter school.⁷⁰ The case was settled.⁷¹ As part of the settlement, the plaintiff signed a confidentiality agreement that said that he was going to get a check for \$10,000 back pay, he was going to get a check for \$60,000 for attorney's fees, and he was going to get a check for \$80,000 for front pay, next year's pay, with a very strongly worded, very plain confidentiality agreement that said, "This settlement is not going to be filed with the court, it is between you and me." The plaintiff was allowed to share this information only with his spouse and no one else.⁷² So this was a clear secret settlement, if you want to call it that.

What happens? A few days after this settlement, the plaintiff's daughter says on Facebook to 1200 of her closest friends, "Mama and Papa won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."⁷³

MR. HEDGES: There was a consequence to that, though.

MR. WITHERS: Gulliver Schools called everyone in and said, "You have violated the terms of our confidentiality agreement. We want our \$80,000 check back."

This landed back in the court. The court said, "Yep, you get the \$80,000 back. This is a clear violation of a confidentiality agreement."⁷⁴

Now, I am saying that it is irrelevant because it was not filed with the court, it was not a court document. But it is an illustration that the courts take confidentiality agreements seriously. This is a part of the way we settle disputes in this country and the courts will take it seriously.

MR. HEDGES: And it is an illustration of one of the points of the Best Practices because we have a section on settlements in it. Bob, how about this? Is this a legitimate way to respond when someone violates an agreement?

MR. OWEN: I love it! I have done this long enough to understand that just because someone breaches a contract, that doesn't miraculously produce action or money.

70. *Id.* at 1046.

71. *Id.*

72. *Id.* at 1047–48.

73. *Id.* at 1047.

74. *See id.* at 1048.

Let's say I enter into a confidentiality agreement with Ken and he violates it. Unless there is something in the agreement that is self-executing—namely, I get the money back, and that is in the agreement—I have to go to court, as the Gulliver Schools District had to do there, and start another lawsuit, and then debate whether, “Do I get the money back or do I only get part of it because I wasn't damaged to the full amount of \$80,000 but just the \$20,000?”

So, honestly, I have always been searching for ways when I am entering into these agreements to put teeth in them, as I say. This one ended up having teeth, although it wasn't written that way.

MR. WITHERS: But it was a Pyrrhic victory for Gulliver Schools, if it was interested in confidentiality, because it had to file suit, including filing a copy of the now-exposed confidentiality agreement that they didn't want anyone to know about but now they had to cough it up in order to vindicate their rights under the agreement.

MR. OWEN: They could have asked for a confidentiality order when they filed the case, I suppose.

MR. WITHERS: I suppose they could have.

MR. HEDGES: So, David, is this a newsworthy event that *The New York Times* might be interested in?

MR. McCRAW: This is really an object lesson in Facebook, if nothing else, and don't tell your kids anything. I would never tell my son that I came into any money.

MR. WITHERS: I think that's a good rule of thumb.

MR. HEDGES: Let's go back and talk about trials. This is the area, I think, traditionally a lot of us think about when we are talking about access. Any place in the United States there is any one of a number of trials going on every day, civil and criminal, that you could walk into and watch just about anything in the trial. You can sit in the front row, see what is going on, and the like. There is the practical problem that there are not many cases tried anymore.

Ken, you had made a distinction between litigators and trial counsel before, right?

MR. WITHERS: Yes. We have millions of litigators in this country and about half-a-dozen trial attorneys.

MR. HEDGES: Bob, you are a trial attorney.

MR. OWEN: I think so.

MR. HEDGES: Okay. So let me ask you this: Does it bother you to have anyone come in when you are trying a case and seeing what is going on?

MR. OWEN: As a general matter, it just increases the narcissistic value of being a trial lawyer.

MR. HEDGES: Okay. And some people do wind up with TV shows for doing that.

MR. OWEN: Actually, I love the process and I love being on trial, although it is a gut-wrenching amount of work.

It always amused me when down in Foley Square I would try a case and there would be these old guys sitting in the back like it was at the movies. I thought that was kind of cool.

That does not get us to the question for you all, which is: What happens if there is protectable information that needs to go into evidence in order for the fact-finder, whether it be a jury or a judge, to decide the factual issue?

As you were talking, I was thinking, "Yeah, okay, it is a public forum, it is tax subsidized, there is a right of public access."

But on the other hand, if the witness of the day was an FBI informant in a Mafia case and he or she was running the risk of being killed if they were identified as a witness in the case, I don't think any of us would quarrel with the wisdom of closing the courtroom for that witness and protecting that person.

MR. HEDGES: You know, there is one person sitting up here who might.

MR. OWEN: Well, let him speak up.

MR. HEDGES: He will. Don't worry.

MR. OWEN: But as I said at the beginning, there are protectable interests that have to be weighed in the balance. Sometimes—the Mafia one may be the easiest—but let's say it is a trade secret, let's say that there is an aspect of a really successful company, and they are successful why? Because they possess a secret that they didn't file a patent on because they didn't want to put it in the Patent Office where it would be publicly disclosed. It is a great thing. They make money on it. In our system they are entitled to make money on it. Should we require them to divulge that secret in order to have their dispute heard in the courts?

MR. HEDGES: David?

MR. McCRAW: One of the great things about the system is it takes this into account. The constitutional standard says, to use shorthand here, that there has to be a compelling interest to close any part of a trial and that any closing should be narrowly tailored. So if there is a legitimate secret that meets that standard, it is fine to close it, to protect that part of it, and not to go beyond that.

I always hear the example of the informant. In fact, in many trials the informant does in fact testify in secret or behind a shield or in some other way. We sometimes oppose that because of a couple concerns.

One is that the defendant is going to be there and the defendant is going to see that person. Isn't that really the danger? Therefore, excluding the public is not really protecting that person.

But putting that argument aside, defense lawyers think that the prosecution is using this to help convict their client. Imagine what the jury thinks: If the whole place has to be evacuated, you have to get all the public out of here that defendant must really be a bad dude, and his testimony must be really important because it is going to be given in secret to just the jury, the immediate parties, and the judge.

So sometimes these cases are not as straightforward as you think. Many times we actually will find one of the attorneys, the defense attorney, supporting our position that this testimony should be public because it is part of the fair trial right.

MR. HEDGES: The United States Supreme Court has declared there is a right of access to criminal trials.⁷⁵ It has never made a declaration about civil cases, although we have a number of courts in the country that have not done that.

MR. WITHERS: Every circuit court that has found a public right of access to civil trials. I think there is a very important lesson for public information officers, records managers, court clerks, and archivists. That is, know what your judges are doing because they may not be following the rules. Let's discuss two cases.

In the first case, a judge was having the jury selection process, and particularly objections to the jury selection, heard in chambers not in open court.⁷⁶ This was contrary to the tradition of that court and just about every court, that jury selection is an integral part of the litigation, particularly in criminal cases, and it should be in open court and part of the record. But this judge was rather unilaterally declaring that jury selection and objections to jury selection were going to be heard in a huddle in chambers outside of the court and would not be on the record.

MR. HEDGES: The back-and-forth between the lawyers or the questioning of the jurors also?

MR. WITHERS: The back-and-forth between the lawyers and some of the questioning of the jurors.

The Florida appellate court said "no way." A judge cannot unilaterally make that decision. They cannot simply take something out of the public access by simply calling the procedure something other than what it was, by simply calling it a bench conference or in chambers.⁷⁷

MR. HEDGES: Ken, before you go on, just to go back to David's point, one of the statements that the appellate court made in rebuking this judge was: "It's not enough to have an audio feed or a feed into another room—which is what the judge was trying to do at some point, although that didn't work—but people want to be able to see contemporaneously what is the expression on the juror's face, how is the juror reacting to questions."⁷⁸

Bob, you obviously would care about that when you are selecting jurors. You want to know what they look like and what they say, are they fidgeting when you ask if they have ever been convicted of a crime, or something like that. So here is a perfect example of why physical presence is important in a proceeding.

75. *Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596, 604–05 (1982).

76. *Morris Publ'g Grp., LLC v. State*, 136 So. 3d 770, 782 (Fla. Dist. Ct. App. 2014).

77. *Id.*

78. *See id.* at 781 n.9.

MR. WITHERS: The appellate court did state that there are going to be times in the routine course of a trial when the judge is going to do something that all lawyers hate, and that is, that there is going to be a little conference on the side of the bench. That is going to happen in trials all the time. That is not part of the public record.

MR. OWEN: Sometimes it is. Sometimes it is private and sometimes it is not.

MR. WITHERS: Right. And that is within the judge's discretion. But you do not take an essential part of the process and take it out of the public record that way. That is, I think, the first case here, *Morris Publishing*.⁷⁹

MR. OWEN: I was actually surprised to hear this case, because in the New York State court downtown jury selection is actually done in a little room and the two lawyers and the venire panel are sitting there. We conduct the voir dire ourselves without the judge present. There is no public access going on. If we have a problem with what the other guy is doing or we have an objection we need ruled on, we go see the judge in private, who sits in a little booth and hears objections from all of the various rooms where this is going on.

Or, if it is in open court, there is usually a sidebar up by the bench to discuss a particular juror. You do not really want to put on the public record what you are thinking about that juror and why you want her disqualified.

So I guess the problem here was this judge just did it too completely and too peremptorily.

MR. WITHERS: Right. And I think we are dealing with different court cultures—there is New York; that is Florida.

MR. HEDGES: Or there is New York and there is the rest of the United States.

MR. WITHERS: It is more what the culture is than what the tradition is.

MR. HEDGES: David?

MR. McCRAW: Why shouldn't your objection be part of the public record? If it is a *Batson* challenge.

MR. OWEN: That is a criminal case.

MR. McCRAW: Yes, in a criminal case.

MR. HEDGES: A *Batson* challenge is a challenge to a peremptory challenge based on race.⁸⁰

MR. McCRAW: Bob is right about the way the state courts work, and that it is an entirely different culture, and civil courts are different than criminal courts—this came up and was decided most dramatically in the Second Circuit, in the federal court here, in Martha Stewart's criminal prosecution, where part of the voir dire of the jurors took place in chambers.

The example that we used in making the case that the voir dire should have happened in public was where one of the prospective jurors said that

79. 136 So. 3d 770 (Fla. Dist. Ct. App. 2014).

80. *See Batson v. Kentucky*, 476 U.S. 79 (1986).

she had child-care issues. One of the lawyers said—and this was all transcribed on the record so you could see the record—“What if I get you a baby sitter?” This lawyer really wanted this person on the jury.

MR. HEDGES: Ken, do you want to talk about the California case?

MR. WITHERS: The second example regarding open court proceedings is in some ways similar, although it is the flip side of this, the Los Angeles County case.⁸¹

In that case, a judge adopted his own rule in the court. That was that these juvenile proceedings would be presumptively open to the press unless the parties objected and the parties would then have to support their objection.⁸² That directly contradicted a state statute that said essentially the opposite, that juvenile proceedings are not open to the press, they are not open to the public, as a matter of public policy.⁸³ They are an exception from the usual rule of open access to the courts, unless the public, the press, an intervener, applies and makes a case that would justify making the proceeding open to the public or the press. Here the appellate court said, No, judge, you cannot unilaterally abrogate a statutory presumption.⁸⁴ Under the statute as it was stated, there was not a blanket prohibition on press or public participation in the juvenile proceedings.⁸⁵ There was a presumption that it was closed, but the press could make an application if they wanted to.⁸⁶ But you, judge, switched that presumption. You cannot do that.⁸⁷

MR. HEDGES: I think, Ken, it is important to note that this was really a statutory issue, but it comes out of the proposition of dependency proceedings, which traditionally have never been open.

All the discussion we are having about rights of access really goes back to England, about rights that existed in England before the Revolution, which we brought over here with us.

What the Supreme Court has been doing in all these areas is saying: “Look, we need to look at the stage of the case. Jury selection is one. Is that something that historically has been open? That is part of the test. The other part of the test is: Is there a logical reason why it should be open?”

The answer usually given by courts in this area is it is vindicating the court in the eyes of the public and it is allowing the public to audit what a court is doing, to create confidence or maintain confidence in a court.

So, Ken, to go to your point, we need to talk about when in the proceeding something is occurring and what the nature of the proceeding is.

MR. WITHERS: Yes. But I think the public policy decision was made by the California state legislature that for these kinds of juvenile proceedings the public interest was outweighed by the interests of

81. *In re A.L.*, 168 Cal. Rptr. 3d 589 (2014).

82. *Id.* at 591.

83. *Id.* at 599.

84. *Id.* at 600.

85. *Id.*

86. *Id.*

87. *Id.*

protection of the child. I think that is an exception to the usual rule. But it was a statement made by the state legislature and a particular judge cannot, as a matter of a blanket rule in his court, change that presumption.

MR. HEDGES: David, any issues with this from your point of view?

MR. McCRAW: I would like to speak to something that I think goes to the very heart of what you all do for a living. That is the distinction made between proceedings and records. Unlike this case, in New York the proceedings in family court are presumptively open.⁸⁸ You can go into a family court proceeding and sit there and it is up to the parties to come up with a reason that meets the legal standard to exclude you. But the records are sealed.

So we have this very strange dichotomy where one of my reporters can sit through a family court proceeding, hear the testimony, hear the witnesses, see everything going on, then decide that it would be really helpful to fact-check against the psychologist's report or the social worker's report, but those records are all sealed.

We are seeing more and more of this. I think it should be of concern.

In February, the chief administrative judge of New York issued an order, which seals all of the records in guardianship proceedings brought in surrogate's court. Those proceedings are public. You can sit in those proceedings. The records are all sealed.

I have litigated over the last two years with the federal government the fact that deportation hearings, some of them involving human rights violators who are being sent home, are held publicly but the records, including the decision, are sealed.

I think this is really a product of both a vestige of the past, when the nature of proceedings was truly the testimony and when a lot of records were created, and also a fear of the future, that they are going to be on the internet and somebody is going to see them. I think it is a very, very unfortunate development because, for the same reason that those proceedings are public, records should be public, obviously with the necessary redactions for privacy, Social Security numbers, or what have you.

Many, many more people are going to benefit from that record and from having access to that record and getting whatever knowledge is to be obtained from the paper record or the electronic record than will ever be able to actually make it in time and in the right place to sit in the proceeding.

MR. HEDGES: David, I want to take your comments and move us to the last decision that I wanted to talk about. Again, this is another chapter of the Best Practices, talking about privacy and access to courts in an electronic world.

88. See, e.g., *Matter of Application for News Media Coverage in the Matter of M.S.*, 662 N.Y.S.2d 207 (Fam. Ct. 1997). The guidelines that judges use to determine access to family court proceedings are provided in N.Y. COMP. CODES R. & REGS. tit. 22, § 205.4.

Now, this is not about courts. This is about a municipal government in California. Basically, what the court said is: we have a statute in California that requires information that constitutes public records to be made available.⁸⁹ Here we have council members who were using their cell phones—remember we were talking about BYOD before, or the like—and they may or may not have been conducting public business on or through their phones that have commercial accounts.⁹⁰

MR. WITHERS: The issue is the definition of what a public record is.⁹¹ A public record is defined as information that is received, created, managed, and maintained by a government agency pursuant to its agency's mission.

When you have a definition like that, then the question is: What about individuals in that agency, elected officials or civil servants? When they are using their own electronic devices to communicate with each other or create documents or things that may in the abstract be considered records, does that really fall under the definition of a public record under that statute, which is exactly the same language used in almost every other state.

The court here said, no, the individual using his or her own device is not the agency.⁹² Even though you can make this great philosophical argument that agencies are artificial constructs, they are only the collective effort of many individuals.

The statute is clear that it has to be created and maintained by the agency in order to be a public record. So, with some narrow exceptions, the court said, the communications by individual elected officials on their private devices, even though they may involve decisions of that public agency, are not public records.

There were several practical arguments too. One is that if the court were to extend the definition to include information that is on people's individual devices, where does it end? When the next FOIA request comes in, does that mean that the state police have to go to every agency employee's home to get their home computer information because they may have created some information on their home computer; do they have to impound everybody's iPhones or something like that in order to answer a FOIA request? So the court was saying, as a practical matter, we have to draw the line somewhere.

MR. HEDGES: Interpreting the statute.

MR. WITHERS: The statute isn't really open to a whole lot of interpretation. It is pretty clear the way it is.

Now, the countervailing argument, of course, is a public policy argument. That is that in this day and age, as people have their own devices, they are doing work on their own laptops and tablets and iPhones and things of that sort, what is to stop a school board member from

89. California Public Records Act, CAL. GOV'T CODE §§ 6250–6277 (2014).

90. *City of San Jose v. Superior Court*, 169 Cal. Rptr. 3d 840, 842–43 (2014), *reh'g granted*, 326 P.3d 976 (Cal. 2014).

91. *Id.* at 843.

92. *Id.* at 850.

communicating with all the other school board members before a meeting to make a decision that will nominally be announced in the public meeting but really has been made and deliberated in private using these private communications? That is a real fear because that is a scenario that has happened many times in the past. But the statute doesn't extend to that.

MR. OWEN: You know, back when I started practicing law, there was no "e" anything. People had telephone conversations instead of sending emails. We did not transcribe every single conversation we had.

But what you are edging toward is the suggestion that if two public officials are talking to each other about a matter of public interest, they need to write it down, they need to have a recording. They could turn on their iPhone and record it. Somebody has to draw the line someplace. The court drew it where it did.

MR. WITHERS: Right, and for good reason. That is because they had a statute in front of them that said "agency," it didn't say "individual." So the court had very good reason to do it.

MR. HEDGES: From your point of view, the consequence is, what is going to fall outside the definition of a record that if you are a government agency you may be required to keep, or if you are a private entity you may define a record to be, and what do you decide to keep or not?

Another great example came out of Oklahoma last summer, where a public records request was made for images from a police camera when a car was stopped. A court interpreted the right-to-know law equivalent in Oklahoma law and said, yes, that is a record; it has to be kept.⁹³ Then the solution was an easy one: the legislature changed the definition of what a record was to exclude these images of things that had to be kept.

But I think for everyone, especially when we are going into new technologies all the time, we need to think about what the effect of the technology is going to be on what we define as a record or something that you folks are going to keep in an archive at some point.

MR. HEDGES: David, any thoughts on this from you?

MR. McCRAW: Ken has made the case that the statute there drives this result. I think the better solution, driven by the public records law in Florida, is that if you are communicating by email about public business, that is subject to the Public Records Act in Florida, whether that is on your Yahoo! account or on your florida.gov account.⁹⁴ Conversely, if you are writing to your spouse about what is for dinner and you happen to be using your government email, which is not public.⁹⁵

The rule in Florida is that the question is: What is the content? If it is the people's business, it shouldn't matter what system is being used. If it is not the people's business, it shouldn't matter what system is being used.

93. Ward & Lee, P.L.C. v. City of Claremore, 316 P.3d 225, 228 (Okla. Civ. App. 2013).

94. State v. City of Clearwater, 863 So. 2d 149, 154 (Fla. 2003).

95. *Id.*

MR. HEDGES: I suppose the answer, Ken, is that it is a question of content, not device or not medium?

MR. WITHERS: That would be an ideal answer. But it is really difficult to administer in reality. That would mean that you would have to have a lot of transparency into your information systems to be able to make these distinctions. And the government agency would have to have some kind of access to the government employees' private accounts in order to determine whether or not the employees

MR. McCRAW: They should tell their employees that they shouldn't be using their private emails, and, if they do, they have made them into FOIA-able public records.

MR. HEDGES: How can corporations or any kind of an agency deal with this proliferation of media that everybody has all the time that they have to fit into a records definition?

MR. OWEN: Well, with great difficulty. I actually counsel my clients on their records retention policies. Fortunately, the law is that if they make good-faith decisions on those record retention policies, the court respects it and they do not come in and interfere.

But it is not an easy situation. The lines have to be drawn and decisions have to be made. We can quibble all day long about whether a particular decision was right or wrong. But this has to work itself out over time in the same way that the common law has worked out legal principles over centuries.

MR. WITHERS: Let's talk about a final case. I think it is important, particularly for this audience. I want to hear from Bob why the Third Circuit and the Supreme Court got it wrong.

MR. HEDGES: Let me just set the stage. Delaware is a renowned commercial court in the United States. To increase its business it started offering an arbitration program.⁹⁶ The arbitration program was in front of a Delaware judge.

The Third Circuit looked at the reason, the logic and experience test that I mentioned before, and said: You are a public entity; you are using public resources. Maybe the parties want to keep it private, but the public has an interest in knowing what the court is doing and the like, and therefore these settlement conferences—or arbitrations is really what they were—cannot be kept secret.⁹⁷

Bob, what did the Third Circuit do wrong?

MR. OWEN: Well, it is confusing because traditionally arbitration is a contractual agreement between private parties to have their disputes resolved by another private person sitting in the position of a judge.

One reason why major clients choose arbitration is that it can be done outside of the public forum. You can maintain confidences. You do not

96. *Del. Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 512 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

97. *Id.* at 515–23.

have to worry about these confidentiality orders and people like David coming in and wanting to see everything.

So the use of the term “arbitration” in Delaware confusingly introduces a concept that traditionally included privacy into what is really a court-sponsored and court-paid-for dispute resolution proceeding.

So I am not so sure that the decision is wrong. It is one of those decisions at the edges that could go one way or the other. It will affect how many companies use that Delaware procedure, for reasons that I just stated. But I am not going to say that the Third Circuit was wrong.

MR. HEDGES: And we know the Supreme Court has been very clear in the last few years that contractual arbitration agreements can be enforced and there is no right of access generally to what goes on in an arbitration agreement.

MR. OWEN: Right.

MR. HEDGES: David, any concluding thoughts?

MR. McCRAW: No. I think we have had our shot.

MR. HEDGES: Okay. Obviously, David is here from *The New York Times*. They are going to take as a general proposition a pro-access position because they are surrogates for the public. Bob is not the whipping boy for this area, but Bob articulates some very reasonable positions as to why confidentiality and proceedings in private need to trump public access. With that, I want to thank them both for being with us today.

V. CONCLUDING THOUGHTS

MR. WITHERS: I was just jotting down some notes as we were going along about what I think are important takeaways from today.

I think one of the important takeaways is that the concept of practical obscurity is dead. Yes, we have tremendous volumes of digital information, but they can be searched with laser focus, if you have the technology and you know what you are doing.

That means that we do have a heightened obligation to make sure that in our public records, in our archives, that we very carefully consider the issues of personal identifying information, confidentiality, trade secrets, things of that sort. We cannot rely on the old practical obscurity that we had when everything was in paper form. Yes, it was publicly available, but you really had to know how to find it in the courthouse to be able to get it.

So that is an important takeaway and it has a variety of consequences.

One phrase that was not uttered today but I think is something that we are probably going to have to consider—and this is going to be very important for archivists because it is going to come across the pond from Europe shortly—is the right to be forgotten.⁹⁸

98. EUROPEAN COMM'N, PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA AND ON THE FREE MOVEMENT OF SUCH DATA 51 (2012), available at http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf.

This is now enshrined in European law. I do not know what the final parameters will be in the new European data regulation that will probably be finalized within the next forty-eight months. But European courts are already talking about the right to be forgotten, what that really involves, and how it can be implemented.⁹⁹

In a day and age in which all records are electronic, where information is on the internet and can be Googled easily, how can you remove information, on what basis should you remove information, when should you not remove information, how can information be obscured but still available?

So the right to be forgotten is something that we are going to end up having to deal with.

We already have some states that have versions of the right to be forgotten in their statutes. California has a specific right-to-be-forgotten law that deals with juveniles.¹⁰⁰ Ohio has a very bizarre right-to-be-forgotten law, which is used by politicians to erase their embarrassing pasts.

It is a new frontier that we have to be thinking about. So that is one.

MR. HEDGES: Just to interject, in Louisiana legislation was signed a few years ago regarding social media, providing that if you are a prospective employee, the company you want to go to work with cannot ask you for access to your social media accounts.¹⁰¹ The idea is that there will be too much private information in that.

That is kind of a blunderbuss approach, obviously, to protecting privacy, but it is one more thing that all of you need to think about in managing records. Now you are dealing with mass media, for lack of a better phrase, the kind of information that you may wind up having on your websites or on social media pages that I am sure all your employers have is something that needs to be considered.

MR. WITHERS: I think, for those of us who consider ourselves to be historians, this is a kind of frightening prospect. Are we actually legislating the rights of individuals to erase history? The second point that I wanted to expand on a little more is: How do we archive database-driven business processes? Archiving business processes that resulted in tangible objects that we called records was conceptually not difficult. It may have been difficult in execution, but conceptually it was not that difficult, because you had these static objects called records that were the result of a business process.

If, however, our courts are coming to the stage now, as Jim Waldron described, where people are filling out forms, they are entering information, but it is all going into a big database, and then at various points in the business process reports are being derived from this database that constitute

99. *See, e.g.*, Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos* (May 13, 2014), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&doclang=EN>.

100. CAL. BUS. & PROF. CODE § 22581 (West 2015).

101. Personal Online Account Privacy Protection Act, LA. REV. STAT. ANN. §§ 51.1952–51.1955 (2014).

bits and pieces of the record, are we now under an obligation to archive the entire database? Or do we define various reports at different stages of the business process as being the record and we archive those?

If we are under an obligation to preserve the entire database, then we have to preserve every iteration of that database and we have to preserve access to that database, which means the information environment, the metadata, the hardware, and the software that it came from.

MR. HEDGES: To just give a concrete example of this, there is an organization called AHIMA, American Health Information Management Association. It is an equivalent of ARMA. They just came out with some principles now about how you cut and paste a document and whether the authenticity concerns of that process is something that we need to talk about.

I expect we are going to see data streams that may be taken from different sources and the like, or information pasted into some document, and they have no relationship to each other.

MR. WITHERS: Yes. We have auto-population. Many business processes depend upon auto-population, where information is being taken from various parts of the database and then reassembled in different ways at different points.

And then, you have this question: What is the integrity; what is the history, what is the provenance of this information? Is it garbage in, garbage out, and garbage being managed? You do not know.

PARTICIPANT: I just want to say that if you want to appraise the value of that information, the bits and pieces unto themselves may not be valuable until they are assembled in whatever that report is or whatever the form is that the output had.

To your question earlier about do we retain the entire database or iterative snapshots, I would think that an organization can make the decision as to whether that database has value from a record perspective or from an information-value perspective, whereas the output has value and those forms that the output comes to, that is the record or that is the value.

MR. WITHERS: That is a good practical approach. We will then have questions about how do we maintain the context. If we are slicing and dicing the database for archival purposes, are we destroying the context in which that information was actually being managed or not?

If we are generating reports and we are considering the reports to be the archival record, which solves that problem. But these are decisions that we are going to have to make.

MR. HEDGES: I did hear an argument advanced talking about information governance a few weeks ago by someone who said, "We have all these volumes of data. We do not know what the value is yet, so we are going to keep everything." Now, is that something that makes sense to all of you as archivists or records managers, just keep everything and something will fall in place later?

MR. WITHERS: That is the big-data argument that we will keep everything and fifty years from now we will figure out how to deal with it, when we have the technology.

PROF. CAPRA: As part of our conclusion here, I would like to comment on the last panel. I would not want to overstate the openness of judicial proceedings or judicial records. There are limitations on disclosure of personal identifiers. Because court records are available on the internet there was a concern by the Congress and then the Judicial Conference about personal identifiers—Social Security numbers, tax identification numbers, addresses, names and ages of children, and the like. Those have to be redacted by the parties. The court does not have the obligation, but there is an obligation on the parties to redact.

As to voir dire of jurors—the Judicial Conference procedures provide that they need not be open, that the judge can balance various interests and can hold in camera review, can proceed by written submissions, can have private conversations with jurors.

As to plea agreements in the criminal context: If they are posted on the internet, what can tend to happen is the cooperator ends up dead because there are websites that post names of cooperators by doing searches on the internet of people who have entered into cooperation agreements. Then they go to jail and then they get killed in jail.

MR. HEDGES: Stitches for snitches.

PROF. CAPRA: WhosaRat.com is another one. So there have been limitations on electronic access to plea agreements.

And Social Security claims, Social Security cases, cannot be accessed over the internet. You have to go down to the court to get them, given the highly personal information in these proceedings—information that is unlikely to be of much public interest.

Immigration proceedings—David McCraw was talking about that—are not available over the internet for the same reasons.

These are all Judicial Conference policies that have been vetted for the past five or six years. I think they are in place and are not going to be changed for a while.

MR. WITHERS: This gets us really to a larger point, which has already been discussed, about how we deal with business process management systems that rely on large databases.

We do have the ability to build into that giant database—we can identify certain fields of information as being information that should be treated in different ways: it should not go on the internet, it should not appear in printed form, et cetera. You can build controls into that.

Perhaps we actually need to step back. Instead of thinking in terms of “we have all this information and it is big data and it can be used for data analytics later,” maybe we should step back and ask: What fundamentally do we need if we are the historical record and consider the database to be the source from which we derive static documents that become the historical record?

They may be in electronic form, they may not be on parchment anymore, they may not have red wax stamps on the bottom of them, but they are the official record, they are the archival record, and we actively suppress and get rid of the data.

The IT people will scream; they won't like that idea. But that is something that maybe we should be considering, is that maybe we should actually be looking backwards—thinking fundamentally what should be the court record, what should be the public agency's record here, and what is superfluous—and make these tough curation decisions.

MR. HEDGES: We already mentioned this in discovery, where courts have decided, for storage reasons, not to file discovery anymore. I suppose there would be an equivalent argument to be made about what electronic information should go into an archive.

MR. WITHERS: Right, which we define certain fields of that giant database as being archival information, and the rest of it is not and it gets destroyed on a regular basis.

MR. HEDGES: I have one question for the audience, if you don't mind. How many of you archive electronic information?

Most of you. I am obviously of the generation where I remember going into the National Archives and seeing the Declaration of Independence.

MR. WITHERS: It is still there.

MR. HEDGES: I know. But there is something about the prevalence of electronic information. I suppose for the next generation the norm will be that everything will be electronic and that will be it.

MR. WITHERS: The Uniform Electronic Signature Act was signed electronically by President Clinton.¹⁰² That was twenty-five years ago. So it has been a while.

Another point that was brought up earlier this morning was that if we are archiving electronic material as active electronic documents—if we are archiving databases, for instance—then we are also archiving metadata and system architecture. That is something that we have to consider.

There may be good reasons to do so, particularly if we are planning on archiving trial transcripts, which are no longer simply the printed word on paper but can involve a variety of media. Maybe we should be considering that those kinds of events get archived in a much more complex way, much like performance art, as we discussed earlier today.

MR. HEDGES: Can I ask another question?

MR. WITHERS: Of course.

MR. HEDGES: Have any of you archived electronic information and the information has become inaccessible because you have changed systems or the like? I am curious. What happens with the archive when you cannot get to the archive anymore? It just sits there and you know it is there and you can access it if you need to someday?

102. Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7006(2) (2012).

PARTICIPANT: You try to hack it. One of the main functions of the archive is to preserve the information in a way that keeps it accessible.

MR. WITHERS: We do not just preserve the zeroes and ones; we preserve the application software, the operating system, the environment that it comes from, or we come up with an emulation so that we are able to have practical access to it.

An interesting development this morning was a discussion of the use of advanced analytics and, particularly, advanced technology-assisted review and other such advanced analytics for a variety of things. We were talking about using it as triage, as a way to shine a bit of light into the “dark data,” to find particular information embedded in very large collections.

I would suggest that there are probably ways to harness this kind of advanced analytics to do a lot of the work that is going to need to be done in terms of identifying personally identifiable information through patterns. You can easily identify Social Security numbers in that way.

PROF. CAPRA: The Justice Department argued that immigration files should not be available for electronic access because there are so many personal identifiers in hard copy in immigration proceedings. The Department said it would take too much time and effort to delete that material. But the Administrative Office is coming up with ways to search hard copy more easily. If review becomes easier, eventually the redacted documents can be posted for electronic access.

MR. WITHERS: Well, the redacted versions can be posted more easily. So we do not have the huge expense of manual redaction before we make this publicly accessible.

MR. HEDGES: Ken, let me ask you a question about your comment. There have been any one of a number of studies that say you can anonymize data and it is not that hard to identify someone from anonymized data. If you are talking about securing and keeping more and more data, aren't you defeating the purpose of anonymization or privacy in any event?

MR. WITHERS: That is a possibility. It only takes three distinct pieces of information about an individual to have an 85 percent chance of identifying them individually. So if you have a zipcode, a birth date, and the last four digits of a Social Security number, you have an 85 percent chance of being able to pinpoint that individual. If you have lots of different sources out there with lots of different information, it might be possible to piece this private information together.

Security experts and others can tell us exactly how much effort it takes for an identity thief to amalgamate information. It might not be worth it. But it is possible to do.

The final point that we made here, I think several times, is the necessity to get records information management and archives involved in the decision making on new technology initiatives. That has been a major disconnect with, not only private industry, but also with government agencies and courts, in that new applications are being rolled out, new ways of gathering and managing information are being tried, without any real

thought being put into the consequences for records information management and for archives.

Those were my major takeaways.

PARTICIPANT: When you consider websites, search engines, and marketers keep huge amounts of data on all of us, how evanescent is that and what are they doing to preserve or not preserve their data?

MR. WITHERS: They are doing that often without a lot of thought as to the consequences of that or its security.

An illustration of that may be Target department stores and others, where they were keeping all sorts of data rather needlessly in an insecure fashion, with the idea that they would be able to use it later. Before Target was actually hit this Christmas, they were touting their ability to predict customer behavior because of the amount of data that they kept on customer purchases, which I am sure just whetted the appetite of the identity thieves, who finally got into their system.

As you probably heard, there was an interesting court case about that. That is, a father sued Target because Target was bombarding his teenage daughter with ads for pregnancy and childcare-related products. Target responded that, according to their database, she was pregnant based on her buying habits. The daughter denied this. But the suit settled mysteriously about three weeks later.

It turned out that Target was able to predict through people's buying habits all sorts of things about their lifestyle and then push out advertising based on those assumptions. Once that hit the press, I am sure the identity thieves said, "Wow! There is this huge cache of information about people. Let's go for it." And they did.

MR. HEDGES: And it is interesting to note how they got into Target. They went to a contractor, an HVAC contractor I believe, and that was the portal into Target's information. So another worrying point out of this is if you are going to be relying on third parties to do information, you need to do a lot of homework to assure yourself that they are going to be maintaining your information if you are using them for archival or records purposes, or if they are doing services for you, you are satisfied that there are security settings and the like that will protect them.

One other comment on data brokers. The FTC recently released a very comprehensive two-part study on data brokers.¹⁰³ That may be something that you would like to take a look at. Just go to the FTC website and you will find it.

PROF. CAPRA: I would like to thank you all for coming today. I would like to thank Ken and Ron for doing such great work today, and all the panelists as well. Thank you so much.

103. FTC, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY (2014), available at <http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>.