

INTERVIEW OF JUDGE SHIRA A. SCHEINDLIN

Hospitality Suite, Room 426
Radisson Poco Diablo Resort
Sedona, Arizona
Wednesday, March 24, 2004¹
4:07 p.m.

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P R O C E E D I N G S

MS. MASSEY: Assume for the moment that you decided to leave the bench tomorrow to become the general counsel of a Fortune 500 company. What are the first ten steps you would take to ensure that your company was prepared to comply with its discovery obligations with respect to electronic discovery?

JUDGE SCHEINDLIN: I'm not sure the order is right, but here are ten steps I can think of.

1. I would be sure there is a well-thought-out records retention policy in place for business purposes that takes into account any statutory or regulatory obligations.
2. I would make sure that someone is really in charge of records retention and that she knows what she is doing. This person should

¹ More recent material indicated by **

probably not be the head of the IT department, but someone whose primary obligation is deciding what should be retained and how.

3. I would set up a records retention committee that meets regularly. The committee should include the general counsel -- that's me! -- a senior executive, the head of the IT department and the records retention manager. Minutes of these regular meetings should be kept and circulated among all the participants.
4. I would disseminate the records retention policy to all company employees, and then I would find a way to test them on whether they have understood and implemented the policy.
5. I would set up a response team every time there is a litigation-need to preserve documents.
6. I'd be sure to consult outside counsel regarding the retention policy, and especially for their response to anticipated or actual litigation.
7. I would probably retain an outside vendor, if the case warranted it, to assist in organizing any litigation holds. I am not saying I would do that for every case, but if the case is big enough to warrant the expense, I'd do it. The reason is: I think the employees may sometimes be too close to the situation and might tend to either over- or under-preserve.
8. I would encourage outside counsel to raise the cost of preservation issues with the court at the earliest possible time. I don't think I have to bear the burden of excessive costs without at least trying to get a ruling favorable to me.

9. I would educate myself in my role as general counsel about the company's records, available technology -- that is, my choices for storing records -- the accessibility of such stored records and what it's going to cost to do that kind of storage and what it's going to cost if I need to retrieve documents from that kind of storage.

10. Finally, I would be particularly careful to avoid the destruction of documents, once it's clear to me that a duty to preserve has attached, because I would certainly risk sanctions if documents are destroyed once I have a duty to preserve them.

MS. MASSEY: How, in your opinion, can general counsel as a group contribute to the resolution of the unresolved issues in this area?

JUDGE SCHEINDLIN: I think they can work through their own professional organizations. I know there are organizations of corporate counsel. They should meet, they should express their opinions. They should also be very visible and participate in bar associations that are addressing these issues. If they can find the time in their schedules, they should write articles, they should try to attend conferences and meetings that are discussing these subjects, and they shouldn't hide from the plaintiffs' groups. It's important that general counsel dialogue with plaintiffs' counsel. Go to their meetings too, be invited. Get them to understand the needs of the in-house counsel.

MS. ELLSWORTH: You've addressed in-house counsel. If you could give only five tips to outside counsel in the field, what would they be?

JUDGE SCHEINDLIN: Okay. Here are my favorite five.

First, it is very important that outside counsel learn what documents the client has. In order to do the investigation, you must learn where those documents are maintained, on what medium they are maintained, what is the level of accessibility of those documents, and who in the company is really knowledgeable about these issues. The one thing you don't want to do is make representations to a court that you must eventually retract. And I certainly have seen that happen in a number of cases.

Second, you must come to court prepared with very specific information regarding the burden of finding what has been requested and what it's going to cost you. You've got to come with real estimates from real vendors. You can't speak in generalities and say, "Gee, judge! This is expensive!" I don't think the court is going to respond well to that.

Third -- and I think this is very, very critical -- try and negotiate with your adversary before going to court. Hopefully, if you sit down with your adversary, and you are both reasonable people, you will reach a resolution of the issues that is good for both of you.

Fourth, outside counsel always has the difficult burden of explaining the realities of our system, the American system, of litigation to the client. And we've got to explain that we don't have a loser-pay system, so the client must generally bear his or her own costs. And given that reality, you might want to consider early settlement or maybe a Rule 68 offer that might affect the costs, because discovery will be expensive. But that's our system.

Finally, and this is really critical, do not forget when you are in court to argue the proportionality rule found in Rule 26(b)(2). Lawyers don't do that nearly enough. Judges need to be reminded that it's there. And if you raise it, I think that the court will listen.

MS. ELLSWORTH: In the commonly-encountered situation in which the ongoing daily activities of a company are the subject of the lawsuit, and in a technological world in which simply turning on your computer every morning will destroy potentially relevant data, what do the lawyers tell their clients? For example, I cannot tell a client "don't turn on your computers each morning," but must I also tell them "if you do turn on your computer when you come to work every morning, you risk potentially crippling spoliation sanctions"? What are lawyers to tell their clients today?

JUDGE SCHEINDLIN: That is really a good question and a very difficult one. Common sense and reasonableness must always be the touchstone for the advice I am going to give.

The initial question is whether the case involves the ongoing daily activities of a company, which I think is not often the case. But even if it is, the duty is only to preserve relevant information. The best that can be done is to be sure that every employee is notified of that duty, that the issues in the case are defined and that instructions are given to preserve all active, archived, or legacy data. It might also be necessary to preserve targeted back-up material. After that is accomplished, business must continue as usual.

MS. MASSEY: You have said that you weighed the Zubulake factors because you thought that the Rowe factors too often operated to shift the cost burden. Let me ask you a slightly different question. In a situation where a requesting party actually wants to shoulder the cost burdens and indeed offers to pay the exorbitant costs of searching for the needle in the haystack, do you approve of this process? Conversely, in what situations would you decline to allow a party to "purchase" discovery?

JUDGE SCHEINDLIN: It's not simply the cost of producing the discovery. There are other issues to consider. One is that the producing party will still have to bear significant costs. That party must review the material that the requesting party is willing to pay for. So even if the requesting party pays all the search costs, the producing party will still have costs.

In addition, the producing party will be inconvenienced. Even if someone else is paying the cost, it is disturbing to a business to undergo a search of its records. There are intangible business and psychic costs that must be considered. In sum, there still must be a basis for the search, regardless of who pays. On balance, unless the requesting party can satisfy the relevance standard, a cost shift alone should not be enough to permit the discovery. And I believe this result is compelled by the federal rules of civil procedure, which only permit discovery of relevant information.

MS. MASSEY: But let's assume that this is really the needle in the haystack: we know it's going to be relevant but it's awfully hard to find, given the volume of the company's records.

JUDGE SCHEINDLIN: As I said before, I still must weigh the inconvenience to the producing party, in terms of its business operation, what it's going to have to do in terms of worrying about privilege issues against the need for the materials. Even if the other party is willing to pay the cost of the search, that may not satisfy me if the balance is not fair to both sides. Fairness is where I would come out. If it's still unfair to the producing party, I wouldn't allow it.

MS. ELLSWORTH: Kathy's question touched on one of the practical problems in this area, which is just the sheer volume of material. To the extent that parties are incentivized to keep more and more data by virtue of the potential sanctions for failure to do so, aren't we exacerbating the basic problem presented by electronic discovery -- that is, the sheer overwhelming amount of information that must be reviewed?

JUDGE SCHEINDLIN: The short answer is: Yes.

But we have a problem. We know that we have to get our arms around this sanction issue. The answer cannot be to keep everything so there will never be a sanction. It just doesn't make sense.

Sanctions are appropriate when a business knows or should know that certain records are relevant to a potential investigation or lawsuit, but nonetheless failed to preserve those records.

Is that failure described as willful, intentional, reckless, grossly negligent or merely negligent? I'm not sure that the label is all that important.

What is important is that the concept must be clear so that people know what their obligations are. And I think that the concept was very well articulated

in a recent case in the Eighth Circuit Court of Appeals, Stevenson v. Union Pacific Railroad, 354 F. 3d 739 (8th Cir. 2004). There, the appellate court held that in order to find spoliation "there must be some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth."

Applying this test to the facts of that case is interesting. The case involved a train accident that occurred on November 6, 1998. The railroad company routinely taped conversations between its train crew and dispatchers, and it also routinely maintained track maintenance records. But its routine document procedures allowed the voice tapes (the conversations between the crew and the dispatchers) to be re-used -- that is, written over, deleted -- after a certain number of days. However, the court found that in this particular case the railroad had been involved in other grade crossing collisions, and from that experience the railroad knew that the taped conversations would be relevant to potential litigation. Thus, although there was no lawsuit and no request yet for those voice tapes, the railroad should have suspended its routine document destruction policy once it learned of that accident and preserved the tapes.

The court held, "the District Court's bad faith determination is supported by the railroad's act of destroying the voice tape, pursuant to routine policy, in circumstances where the railroad had general knowledge that such tapes would be important to any litigation over an accident that resulted in serious injury or death and its knowledge that litigation is frequent when there has been such an accident."

And finally, the court said: "This destruction creates a sufficiently strong inference of an intent to destroy the recording for the purpose of suppressing evidence of the facts surrounding the accident."

Now, I know this answer is getting a bit long; but the court reached a different conclusion with respect to the track maintenance records. There, the routine policy was to keep such records for one year. The court found that there could be no sanction for the prelitigation destruction of those records because the railroad did not have a reason to know that the maintenance of the track was going to be an issue in the litigation. So the destruction of records there was at best negligent, and that's not sufficient to support a finding of bad faith.

On the other hand, the railroad continued the destruction of those very records after the suit was filed. And the court said that once suit was filed, sanctions would be appropriate for continued destruction of the track maintenance records. The court's exact words are again important: "Sanctioning the ongoing destruction of records during litigation and discovery by imposing an adverse inference instruction is supported by either the court's inherent powers or Rule 37 of the Federal Rules of Civil Procedure even absent an explicit bad faith finding."

In sum, and to get back to your question, once the standard is clearly defined as to what must be preserved, I would hope that we would not have over-saving of documents for the sole purpose of avoiding sanctions. I recognize that even a clearly defined standard can encourage over-retention.

MS. MASSEY: What do you see as the most effective tool that judges can use to incentivize parties to work out these issues without the continual assistance of the Court?

JUDGE SCHEINDLIN: The litigation world is made up of two kinds of cases. The first is the one-sided case and the second is the goose-and-gander case. The latter, that is the goose and gander, is by far the easier. When both sides have voluminous documents -- typically a contract case or an intellectual property case -- both parties have every incentive to work out a document retention and production protocol for the litigation, so that the costs and burdens do not spiral out of control. But the one-sided case is much more difficult. If the requesting party has virtually no documents -- for example, in an employment discrimination case, a personal injury case, or a product liability case -- that party has little incentive to act reasonably. Rather, the requesting party may think that the more it demands, the more the producing party may seek a settlement simply to avoid the cost and inconvenience of litigation.

That said, let me answer your question by saying that a court should not let itself become an unwitting tool of that strategy. The requesting party must learn that the court will carefully scrutinize the request and the associated costs before permitting certain types of discovery. The court must let it be known, it must send a message, that it will not tolerate a "leave no stone unturned" scorched earth discovery philosophy. The more decisions we get that are willing to reign in overly broad discovery requests and that seriously consider issues of cost, the more the court will help in deterring unreasonable discovery demands. And as the

question recognizes, the way to win, if you are the requesting party, is to begin with a narrow and focused demand rather than an "I want everything" demand.

MS. MASSEY: Many of the solutions offered in this area involve the early scheduling of Rule 26 or 16 conferences, coupled with the meet and confer obligations on the parties. A few questions on those particular "solutions." First, are there any problems for which even those early conferences are too late?

JUDGE SCHEINDLIN: Meet and confers are great, but you are right. They generally do not begin until the litigation begins. So when it comes to pre-litigation preservation, the company will have to develop its own best practices with respect to both retention (meaning the general records management of a business), and with respect to preservation, which I am defining as preserving certain records in anticipation of a lawsuit or an investigation. As to the meet and confers, in certain types of cases it's absolutely essential that the parties discuss technical issues of what should be preserved and in what medium, and how information should eventually be produced.

MS. MASSEY: Do you think that attention to these detailed, technical issues detracts from other potential and more significant aspects of such conferences?

JUDGE SCHEINDLIN: I don't think that paying attention to these technicalities detracts from the other issues that have to be addressed at the meet and confers. People have an agenda that they want to cover. This is an important item, and I don't think it detracts from the remainder of the agenda.

MS. MASSEY: Do you think that court administration techniques, such as providing standing consultants, special masters, dedicated judges or ADR-type options could be useful tools in this area?

JUDGE SCHEINDLIN: I don't think so. In the vast majority of cases, I don't think the court has to provide any special assistance. But there is always the atypical case, the very complex case, and there, a special master might be important if the parties cannot agree on how to deal with electronic records and the records in such case are both voluminous and important.

You know, those cases tend to self-identify. They are very big, they are very complex, and the parties almost always ask for that kind of help. I wouldn't like to see us do it routinely, but where needed, I think it's something we should be able to offer.

MS. MASSEY: What are the most critical facts that you, as the judge, want to know at a Rule 16 conference?

JUDGE SCHEINDLIN: I want to know, first, if the parties have identified the people who really know where the electronic records are, how to access them and how to preserve them. There's been many a slip in this area, twixt the cup and the lip, where the court is told this is the person who knows how to preserve records, and then it turns out that person didn't know. And the records now are gone. So, as the court, I really want to make sure that the parties have found the person who knows how to locate and preserve records.

Second, I want to know if that person has met with the outside counsel so that the court and the adversaries are being given accurate information. That is a

point I have already made. If outside counsel comes in and hasn't talked to that key person, then counsel's representations to the court are not going to be accurate.

Third, I want to know that a litigation hold has been developed. It's going to be different in every case. But no litigant can afford not to pay attention. There has to be some kind of a response.

And finally, it's very important for me to know that, whatever policy the company had set up in response, they have communicated that preservation obligation to the employees who must implement it. It's no good to have a policy if the employees don't know about it. And some judges have held the CEO who hasn't managed to notify the appropriate employee personally responsible when records are lost.

MS. ELLSWORTH: Is it sufficient for a company to rely on its employees to respond to a litigation hold notice to save data, or is a more aggressive, big brother, technique required if available?

JUDGE SCHEINDLIN: That's a good follow-up question. I just said that surely the employees have to know about the litigation hold, but it's not sufficient that they merely know. A company can't rely on its employees to preserve documents just because they've been told about it. What the company has to do is monitor the compliance to be sure that the employees are paying attention to what they have been told. As I've said, a number of courts have held senior executives responsible for the employees' failure to implement the litigation hold. Given that risk, management has to communicate in an effective manner and then monitor -- spot check at a minimum -- for compliance. I think this is all the more true after

the Sarbanes-Oxley legislation, where the consequences of document destruction can even include criminal sanctions.

MS. MASSEY: If a company routinely accesses and monitors employee e-mails, does that affect the calculus of whether it's sufficient for a company to rely on its employees to effectuate a litigation hold?

JUDGE SCHEINDLIN: Maybe. But that routine monitoring may have nothing to do with implementing and enforcing a litigation-hold. In the litigation context, something beyond the routine is always required.

MS. MASSEY: What suggestions do you have for companies who fear complaints from their employees about invasion of privacy when the company reviews or produces their e-mail?

JUDGE SCHEINDLIN: I think the company should notify its employees at the outset of employment that their e-mail is not private, that it is the company's computer, it is the company's e-mail, and their e-mail account is for business purposes. The company, the employees should be told, intends to access and monitor the use of its e-mail system. So if the employee nonetheless uses e-mail for non-business communications, the employee does so at her own risk.

The employees should be told that if there is a lawsuit, material may be produced to other parties so the employee has to be on notice that legally there is no privacy.

MS. ELLSWORTH: Are there any issues that you see currently consuming time in this area that you anticipate being resolved by a technological solution in the near term? For example, backup tapes becoming obsolete. And

conversely, are you aware of any new technology that may create future problems such as, for example, digital voicemail?

JUDGE SCHEINDLIN: I do think the backup tape issue will change as backup tapes either become an obsolete form of storage or are reconfigured so they become easily searchable or the information stored on them can be rearranged by date, author or subject matter.

The backup tape problem is really one of cost. If the cost factor disappears, clearly it wouldn't be an issue. So if the storage medium, whatever it might be, was easy to search or organize, then much of the problem would disappear.

The issue today is that the producing party is asked to restore material from backup tape, which is a very expensive, time-consuming exercise. That is why some courts have referred to this kind of material as inaccessible. The question becomes: What happens to such material if it becomes accessible, namely if it becomes easy and inexpensive to search? And I think we should explore that too. Just because it becomes accessible, it still may not mean it should be discoverable if it's not relevant to the issues in the case.

Now, to answer the second part of your question, all new technologies create issues for discovery. Voicemail is one such problem. If information can be retrieved, then it is discoverable and a requesting party has a right to seek its production. In the age before voicemail -- and I am old enough to remember! -- a secretary took a message, and it was often taken on a carbon copy message pad. Surely, those messages were always discoverable.

Another problem today is instant messaging. Is that more akin to a telephone conversation or to written correspondence? Again, you folks might not remember, but before e-mail people wrote letters to each other. They put them in an envelope, put a stamp on them and mailed them. And that correspondence was discoverable.

But when two people spoke on the phone and it wasn't recorded, nobody could say that the verbatim conversation could be found. But each party could be questioned as to their recollection of what was said during the conversation at a deposition.

So where do instant messages fit in on that spectrum? I don't answer it, but it is clear that new technology creates new questions.

The fact is: All records create data, and data is information. So new technology creates new records, which in the end creates discoverable information.

MS. ELLSWORTH: In your last answer, judge, you mentioned backup tapes. Requesting parties tend to consider backup tapes to be the mother lode, while producing parties consider them to be the equivalent of a vast garbage landfill. Which end of the spectrum are you closer to, and why? And if you say it depends, on what does it depend, and how is a company to know in advance of a particular case?

JUDGE SCHEINDLIN: As you cleverly anticipated, my answer is: It depends! The value of a backup tape is only the value of the data it contains.

In principle, businesses usually keep backup tapes for disaster recovery, and a company should discard or recycle one backup tape once it has a more recent

backup tape. If companies scrupulously followed that protocol, chances are that the contents of the backup tape would closely mirror the contents of the company's active files, and restoration of the single backup tape wouldn't be worthwhile.

The problem is that companies don't follow their own protocols. A document retention policy may call for tapes to be recycled weekly or monthly, when in fact people within the company who can't bear to destroy anything are keeping years and years' worth of backup tapes. In those cases, backup tapes contain long deleted files and can be the treasure chest or the mother lode that you referred to for the requesting party. The lesson, of course, is that it does you no good to have a detailed document retention policy if it isn't followed throughout the company.

So, I think the answer is that these backup tapes should not be kept longer than needed. If that were done throughout business, your question would become history.

MS. ELLSWORTH: I take your point that the best thing is for a company not to retain unnecessary backups. But in the common situation in which a company has kept backup tapes for many years, how do you address that huge volume of inaccessible data?

JUDGE SCHEINDLIN: If information is available, under our rules, it is discoverable if it is relevant.

But the producing party then has a right to argue that the cost of producing it, relative to the litigation, is so disproportionate that the Court should not require it to be produced. Or a producing party might argue that there is another way to

get at the information. It's all about that proportionality rule I mentioned earlier in 26(b)(2). So it's hard to know how the balance is going to come out. In some cases I think that discovery of backup tapes shouldn't be allowed. It's just unfair, given the type of case and the amount in controversy, to ask a party to go through an expense that is greater than the value of the case. But in a different case, if it is shown that what is sought is relevant to the litigation and the case warrants that kind of expense and the company kept that material, I can't take it out of bounds. The Federal Rules of Civil Procedure tell me what to do. They guide me, and I follow them.

MS. MASSEY: There are various efforts under way to consider if the Federal Rules should be modified to address some of the issues presented by electronic discovery. I have a few questions on this topic.

First, could you please describe the rule making process? Who is involved and, generally, how does it work?

JUDGE SCHEINDLIN: Sure. The Judicial Conference of the United States has created a committee called the Advisory Committee on Civil Rules. The Advisory Committee has about twelve members. Usually it's half judges, six judges, including an appellate judge, several district judges, a state court judge and a magistrate judge; two or three professors; and two or three practicing lawyers. In addition, we have a reporter who is a professor. The Advisory Committee on Civil Rules often considers whether the rules need to be amended.

**As you probably know, the Advisory Committee on Civil Rules has just published a package of proposed amendments that address the issues raised in

electronic discovery. We began working on this project about four years ago. We had a couple of conferences, one out in California, one in New York, that were small, very small. We invited certain members of bar associations, certain judges, certain professors who had written on this issue, just to help us formulate the issues that were important for us to look at. And then after these two conferences, the Discovery Subcommittee began to work on areas for change pursuant to input that we received at the conferences.

We then put together a draft of what the rules might look like. We preferred not to call them proposals. We preferred to call them talking points.

Recently we took those talking points public to a larger conference -- still invitational. It wasn't open to the public. But we had maybe a hundred and fifty, two hundred people who gathered at the Fordham Law School in New York City, and we had panel discussions on each of the proposed topics.

The conference was very useful to the Advisory Committee in obtaining input from all sectors of the legal community.

We then met and discussed our reactions to what we learned at the Fordham Conference, we redrafted some of our proposals. At the April meeting of the full Advisory Committee proposals were approved and presented to the Standing Committee on Rules at its June meeting which then approved the proposal for publication. The proposals are now published and public comment is welcome through March 2005.

After the comment period the Advisory Committee will adjust the proposals further, depending on what we hear. That will take us to around April 2005.

We then will go back to the Standing Committee in June 2005, and eventually, if approved there, the proposed rules go to the Judicial Conference of the United States, which is the governing body for the federal courts. The Judicial Conference is chaired by the Chief Justice of the United States, Justice Rehnquist, and there are two members from each circuit.

If the Judicial Conference approves the rules, then they go to the Supreme Court of the United States. If the Supreme Court approves them, they go to Congress. If there is no action by Congress, then they become rules.

So on the schedule that I have just described, the earliest effective date for rule changes would be December of 2006.

MS. MASSEY: Could you describe for us the key rule issues that have engendered the most discussion?

JUDGE SCHEINDLIN: **I can. The Advisory Committee on Civil Rules has just published for comment a package of proposals regarding e-discovery. One proposal amends the definition of document in rule 34, because the world has changed and we no longer think of information or data maintained on computers as documents. The rules should address today's world.

The proposals ask the parties to discuss what has to be preserved so that hopefully parties will make a reasonable determination as to what must be retained and what can be discarded. The parties are also directed to discuss issues relating

to e-discovery in general, with particular attention to identifying people with knowledge of the records and systems that a party has used or is using to store its records.

The amendments also propose a two-tier approach to the discovery of electronically stored information. Accessible information would be presumptively discoverable. If a party seeks inaccessible data, the producing party must first demonstrate to the court that the information sought is truly inaccessible and then the requesting party must demonstrate good cause before it can obtain that information.

The proposals permit, but do not require, a requesting party to designate the form in which it wants information produced, so that party can't come back later and say, "oh, I didn't like the form in which he gave me the material; give it to me another way." Form means the format of production -- *e.g.* hard copy, electronically and if electronically whether it is produced in native format or in a TIFF or PDF image. Of course, the producing party can always object to the requested form. If no particular format is requested the default form of production is either: (1) the form in which it is ordinarily maintained or (2) in an electronically searchable form. The proposal explicitly states that a party producing electronically stored information must only produce it in one form.

And the most controversial proposal creates a safe harbor, meaning that sanctions for spoliation would not be imposed if a company acts reasonable and the information is destroyed in the usual course of business. Acting reasonably might include taking reasonable steps to preserve relevant information after a party

has reason to believe suit will be filed. Placing a litigation-hold on the materials of key players might also be considered as taking reasonable steps. Of course, it goes without saying that a safe harbor cannot be available if a party violates a court order to preserve documents. The real point is, if a party acts reasonably it should be able to maintain its usual practice of document retention and destruction. This proposal should give a lot of comfort to litigants who are worried that the onset of litigation means that they can no longer continue their document retention/destruction policies. They can, if they act reasonably and carefully to preserve what must be preserved.

There are two proposals with respect to privilege waiver created by the inadvertent production of documents. The first is found in a proposed amendment to Rule 26 which directs the parties to discuss this issue at their Rule 26(f) conference and determine whether they can reach a non-waiver agreement as to inadvertent production and a protocol for the return of such documents. If they do reach an agreement, the proposal suggests that a court should "so order" the parties' agreement to give it some force should it need to be invoked in any subsequent litigation. Another proposed amendment, also found in Rule 26, establishes a protocol for seeking the return of inadvertently produced privileged documents that requires a reasonably prompt request for the return of such documents, and the preservation of such documents until the court has made a ruling.

So, that's a quick overview of the rule proposals.

MS. MASSEY: Can our readers offer their thoughts and comments on these issues at this time? And if so, how would they do that?

JUDGE SCHEINDLIN: **Comments can be sent in the following way: Therules are published online at the following website: www.uscourts.gov/rules. This site has a "Comment Submission Form." Alternatively, you can email comments to RulesComments@ao.uscourts.gov, mail them to Peter G. McCabe, Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of U.S. Courts, One Columbus Circle, N.E., Washington D.C., 20544, or fax them to the attention of Peter G. McCabe at (202)502-1755. All comments will become part of the public record. Public hearings will be held on Januar 12, 2005, in San Francisco, January 28, 2005, in Dallas and February 22, 2005, in Washington D.C.

MS. MASSEY: You mentioned that bar associations had been able to participate. Can you tell us how the ABA and state bars have participated and also whether other groups, such as ATLA and DRI, have had a chance to give their comments?

JUDGE SCHEINDLIN: They have. I don't mean to be repetitive, but I think that they came to our conferences, they came to our Fordham Conference, they submitted responses to what they learned at those conferences. So all of the major bar associations have already participated in the process.

MS. MASSEY: Do you see a breakdown along plaintiff - defendant lines on the policy-making advocacy in this area?

JUDGE SCHEINDLIN: Candidly, I do. In one-sided cases, where only one party has any significant amount of documents, the parties are not mutually-incentivized to resolve these matters by agreement. In these cases, defendants are most often the producing party. And they are very worried about the parameters of their duty to preserve, at what point it attaches, what does it cover, what is the scope. They are worried about possible sanctions if they guess wrong. And they are very anxious to see some kind of a safe harbor that protects reasonable, good faith conduct and particularly protects them if they destroy documents in the usual course of their business practice. They are also worried, obviously, about the high cost of these productions, and they are very worried about the inadvertent production of privileged material that could result in a waiver.

Plaintiffs, on the other hand, are typically the requesting party. They are worried that the rule makers are trying to cut back further on the traditional scope of discovery, are providing unwarranted protection to companies by approving of the destruction of potentially relevant evidence and protecting producing parties from sanctions. And they are worried that we might be pushing a cost shifting agenda.

In simple terms, the plaintiffs' bar says "if it's relevant, we get it at the producing party's cost, and why shouldn't we."

MS. ELLSWORTH: Two of the issues that you just mentioned are inadvertent production and privilege review. The "quick peek" concept has been suggested by some as a way to cut through the volume of data that needs to be

reviewed for privilege in the context of production. Could you just describe for us generally this so-called quick peek concept?

JUDGE SCHEINDLIN: The quick peek concept is where the producing party says: "Look, I am not producing anything right now. But what I will do is let you inspect all my documents without my conducting any privilege review. And after you look at them, tell me what you want me to produce. Then, that's when I will conduct my privilege review and make the actual production. Until then I really haven't produced. I have just let you have a quick peek. And I didn't incur the expense of review at that point because I am not producing. I am just letting you peek."

MS. ELLSWORTH: And how does the quick peek process not constitute a waiver?

JUDGE SCHEINDLIN: We are not sure that we can guarantee that. But if the parties agree on a voluntary basis that they don't want it to constitute a waiver, they can so stipulate, and then they can submit their stipulation to a court and get the court to "so order" the stipulation. And whatever they have seen does not constitute a waiver.

Our problem is we really don't know if, even with that protection, somebody somewhere isn't going to argue waiver. You can stipulate, I can so order, and another judge in another state says I really don't care about that judge. Now, the second judge isn't going to say that unless some party says to her: "Oh, I heard that they produced it in another litigation, and they had this arrangement, but I remember the law on privilege. If anybody saw it other than the attorney and

client, it's waived." It is likely that somebody will argue that, some third party somewhere. Some judge will agree.

We know the concept is not foolproof. But that's the best protection I can think of. I can say, I "so order" that. But I can't vouch for other courts respecting that order.

MS. ELLSWORTH: Is this quick peek process envisioned as voluntary or mandatory? In other words, will a court say I must produce in a week because we have quick peek and I don't need to take time to review for privilege?

JUDGE SCHEINDLIN: I would never do that. I do not believe a court has the power or should, even if it has the power, tell you to do something that might result in a waiver if you don't want to take that risk. That's up to you. I don't think a court should order you to risk waiver. I do not envision a quick peek option imposed by the court. If you want to do it and if you and your adversary reach a voluntary agreement, I will go ahead and support that by "so ordering" it. But I will never do it absent your consent. Never, ever, ever.

MS. MASSEY: Many courts routinely employ first day orders that are intended to preserve the status quo. And often those orders provide that all parties are to preserve intact all relevant or potentially relevant data until the initial court conference. Have you ever issued such orders, and has your experience in the electronic data world changed your thinking as to the appropriateness of such orders?

JUDGE SCHEINDLIN: I never really issued a first day order. But I did issue an order once which was very close to it. It may have been a third week

order! But I do remember a time when the requesting party came in and said we want you to order the defendant to preserve everything from this point forward. And I issued that order. And today I'm sorry I did. In retrospect, my order was over-broad, and I don't think I fully appreciated the impact of my order. That order was issued with the defense counsel present, and it was argued. Even so, I didn't understand it was over-broad. I am much more aware today of the impact of such an order. I understand that an order like that can cripple a business or result in huge expense and grave risk of noncompliance. Any order that I would consider today -- and again, probably it wouldn't be the first day, and it would never be ex parte. But any order that I would consider today would be much narrower, and I would only issue such an order after detailed argument or even a hearing that explored the need for the order and the ramifications of such an order, including the cost and impact on the business.

MS. ELLSWORTH: Are there any situations you can envision in which you would shift the costs of preservation, as opposed to the costs of production, to the requesting party? And if so, what are they? For example, let's say that I get together with my opponent at the outset of the case, and he says to me you must preserve daily backup tapes. And I say that's ridiculous. And he says, well, I'll move for sanctions if I ever find that any of that stuff is gone. And I say, fine. I'll hold on to it. But I'm going to move for costs of preserving that data, because I think you are being unreasonable to demand that level of preservation.

Assuming that controversy is brought to you for resolution, what might you do with it?

JUDGE SCHEINDLIN: Under that hypothetical, I actually might consider some cost sharing, or I might consider retroactive cost shifting.

Now, what I mean by that is: The way you phrased the hypothetical, the requesting party wants something that I would not ordinarily give, preserving all daily backup tapes for your entire company. It sounds very broad and very onerous.

Given that, I think the requesting party needs to have a stake in controlling those costs. And the only way to have a stake in controlling those costs is to have the checkbook on the line. So I think I might require cost sharing in that hypothetical.

Of course, I might not be able to require cost-sharing given the relative abilities of the parties to bear the costs. But, if that broad retention turned into a complete waste, then it's not fair. If nothing of value was eventually produced, the retroactive cost-shifting might be required for the unnecessary expense paid by the company.

Rules 26 and 37 of the Federal Rules of Civil Procedure are available to prevent this abuse. Rule 11 might also be available and applies to lawyers and their clients. Sanctions can be imposed on both lawyers and clients for abusive litigation conduct. In your hypothetical, a lawyer is making an unreasonable request to preserve. And it doesn't pan out. Maybe that could have been seen earlier on; maybe not. I'm not saying what I would do in a real case. But in response to the hypothetical you presented, I am describing factors I might

consider in deciding whether to shift costs or impose sanctions. Just so you understand my answer.

MS. ELLSWORTH: What are the most successful techniques that you have seen parties use with one another to come to consensus on an e-discovery plan? And conversely, what approaches have you seen to be the most counterproductive?

JUDGE SCHEINDLIN: The most successful experience I have had is in the consolidated IPO proceedings. I don't know if you are familiar with that case, but it involves a large group of class actions that are consolidated before me for discovery supervision. Originally thousands of cases were filed; those were consolidated into a series of approximately 300 cases. So it's large. There are a lot of lawyers, a lot of volume.

The parties there negotiated a preservation protocol where they agreed on what they would maintain. They agreed on a time frame and they specified exactly what had to be maintained.

They reached agreement to some extent by using a questionnaire that they jointly drafted so that they could make an agreement based on knowledge. And that questionnaire allowed them to query each other with regard to what was on a network server, what was on an e-mail server, what backup systems there were, what was on hard drives, and what materials were maintained or recycled. They even identified personal computers that the employees had in their homes that they might have used for business purposes.

So the questionnaire was well structured, it provided the information that the parties needed to then construct their own data preservation protocol.

Their efforts have been so successful that, to my surprise, I haven't had to rule on any discovery disputes in cases we thought initially would engender a lot of disputes.

Now, it's not over yet! I may still have some discovery disputes. I understand that. But I think that the parties' efforts have gone a long way toward solving their own problems without court intervention.

On the other hand, I have a lawsuit now in an employment discrimination case -- and no, I am not discussing Zubulake, which I know you folks are very familiar with. But in this particular employment discrimination case, the parties seem unable to speak the same language. The requesting party does not know what he is asking for in terms of cost and burden, and the producing party makes everything sound impossible. Which, of course, can't be the case. Such extreme positions, on both sides is a disaster for the court. It requires the court to spend a good deal of precious time educating itself regarding the nitty-gritty of the document storage system of the producing party. It requires the court to understand accessibility issues, cost issues, and the likelihood of finding responsive material. Typically -- I always tell this to litigants -- if the court is forced to rule, nobody is going to be particularly happy. And to do it right, the court may need to retain a technical expert, which will add additional cost, because the court has no budget for that. The parties are going to have to pay for it. So

that's an example of a case that has not worked very well because the lawyers are not working together to resolve the problem.

MS. MASSEY: Is the questionnaire used in the IPO cases a public document?

JUDGE SCHEINDLIN: Yes. Both the questionnaire and the data preservation protocol are publicly available.

MS. MASSEY: Some of our readers are non-lawyers. Are you able to distill down the essential principles underlying your Zubulake opinions for them?

JUDGE SCHEINDLIN: I am reluctant to summarize the decisions because in doing so important details are lost, and the nuances of the holdings become blurred. Therefore, the following comes with the strong advice that the opinions speak for themselves, and nothing that I say now should be construed as overruling or modifying the Zubulake opinions.

Nevertheless, if I had had to point to the essential holdings of the three Zubulake decisions, I'd say the following:

Zubulake I, is found at 217 F.R.D. 309, issued in 2003. That opinion has three essential holdings.

First, the federal rules permit discovery of any relevant evidence. Therefore, electronic data is discoverable so long as it is relevant, regardless of the form in which it is stored.

Second, it may be appropriate to consider cost shifting when the cost of discovery becomes an undue burden or expense. Generally speaking -- and I emphasize the word "generally" -- discoverable electronic data imposes an undue

burden or expense only when it is inaccessible. In those cases it is appropriate for a court to consider cost shifting. Accessible data, on the other hand, should typically -- and I emphasize the word "typically" -- be produced at the cost of the responding party.

Third, and finally, I laid out a procedure for analyzing whether cost shifting is appropriate. I set forth a seven-factor balancing test based on the proportionality rule found in Rule 26, the ABA discovery standards and Judge Francis's decision in Rowe Entertainment. I wrote, "The following factors should be considered, weighted more or less in the following order:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining information."

I also emphasized the importance of doing some sort of sampling so that the court could base its application of the balancing test on hard evidence, rather than on speculation and argument.

In "Zubulake III", which is found at 216 F.R.D. 280, also 2003, I applied the test that I just described. And in doing so I illustrated the interplay of the various factors and the varying weights afforded to them. In determining that the costs should be split seventy-five percent - twenty-five percent, with the producing party paying seventy-five percent, I found -- and I am not being very detailed -- that factors one through four tip against cost shifting, although factor two only slightly so, that factors five and six are neutral, and that factor seven favors cost shifting.

I also held that cost shifting only applies to the cost of retrieving the data and converting it from inaccessible to accessible form. The cost shift only covers search and retrieval. It does not apply to the attorney review time. This is an important distinction because attorney review time can account for a significant portion of the costs of production. In the Zubulake case, the attorney review time was about \$100,000, whereas the cost of searching and restoring was about \$165,000. I dare say that there will be other courts that will disagree with that and will think that the review time should be part of the cost shift. But I held otherwise.

In the third part of the trilogy, which is called "Zubulake IV" -- issued in October 2003 -- I considered a motion by Zubulake for sanctions associated with defendant's loss of certain documents. These were documents that were located only on backup tapes.

This opinion is most notable for its summary of a corporation's duty to preserve evidence once litigation is contemplated. I described that duty as

succinctly as possible in the opinion. Maybe you won't find it so succinct, but here is the quote.

"The scope of a party's preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention slash destruction policy and put in place a litigation hold to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes, for example, typically maintained solely for the purpose of disaster recovery, which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible, namely they are actively used for information retrieval, then such tapes would likely be subject to the litigation-hold. However, it does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of key players to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to all backup tapes."

With these standards in mind, I determined that the defendant had breached its duty to preserve certain documents and assessed the suitability of various sanctions.

Zubulake, the plaintiff, had asked for three forms of sanctions: an adverse inference instruction, an order revisiting my previous ruling on cost shifting and requesting that the defendant should pay a hundred percent of the cost of restoring

backup tapes, and an order requiring the defendant to pay for the plaintiff's cost of redepositing certain witnesses.

I declined to revisit the cost shifting because I had already considered the spoliation, or the loss, of some of the backup tapes in reaching my result in that prior decision. I also declined to issue an adverse inference instruction, finding that although the defendant had a duty to preserve all of the backup tapes at issue, and it destroyed them with the requisite state of mind, *Zubulake* could not demonstrate that the lost evidence would have supported her claims. Because my circuit, the Second Circuit, requires a heightened showing of relevance when the destruction was caused through negligent conduct rather than willfully or recklessly, an adverse inference was not warranted. However, because the defendant did improperly destroy certain backup tapes I ordered it to bear the costs of *Zubulake's* deposition of certain witnesses.

I might add that many commentators have attributed the "reasonably anticipated" standard as some kind of invention of mine, but I can't take credit for that. The opinion makes clear that the Second Circuit has set this standard. I recognize that there may be practical obstacles posed by that formulation of the duty to preserve, but it is the law in many courts throughout the country.

MS. MASSEY: Judge, some have read your Zubulake opinions as applying the balancing proportionality test of Rule 26 only to technically inaccessible data. Is that what you intended? And, if so, how do you respond to the observation that such an approach takes a large volume of responsive material, the technologically accessible data, outside the proportionality test of Rule 26?

JUDGE SCHEINDLIN: I have often heard that criticism, but I must say it is neither what I intended nor what I wrote.

The criticism comes, I believe, from one sentence in the opinion that is often quoted, and that sentence is: "A court should consider cost shifting only when electronic data is relatively inaccessible, such as in backup tapes." This sentence standing alone might lead people to the conclusion that you just stated, but it is taken out of context. I would like to put it back in context.

If you read the substance of my analysis, you will see that Zubulake I, the first of the opinions, was written to clarify the application of the Rule 26 proportionality test in the e-discovery context. What I actually wrote was: "cost shifting should be considered only when electronic discovery imposes 'an undue burden or expense' on the responding party. The burden or expense of discovery is, in turn, 'undue' when it 'outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.'" This, as many of your readers will know, is simply a restatement of Rule 26(b)(2).

I went on to say, "many courts have automatically assumed that an undue burden or expense may arise simply because electronic evidence is involved. This makes no sense. Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks, and the production can be made in electronic form, obviating the need for massive photocopying. In fact, whether production of

documents is unduly burdensome or expensive turns primarily on whether the documents are kept in an accessible or inaccessible format, a distinction that corresponds closely to the expense of production."

The central holding in this regard is that cost shifting is a possible remedy only after undue burden is found under Rule 26(b)(2). This leaves the proportionality test in full force. Ordinarily, and again I express "ordinarily," in the e-discovery context, if data is accessible, there is no undue burden and, therefore, no need to reach the cost-shifting question. This does not take accessible data outside the proportionality test, it simply recognizes that it is typically inappropriate, under the rules themselves, to apply the test to what I call accessible data.

MS. MASSEY: Does Rowe Entertainment still live and breathe in New York, and can parties argue Rowe to you or not?

JUDGE SCHEINDLIN: As you know, Rowe was written by Magistrate Judge Jay Francis, a wonderful magistrate judge. Anyway, the decision was appealed -- but not to me! -- and it was affirmed by the district judge. So I have no power to overrule Rowe, and of course I haven't overruled Rowe. So as persuasive authority it is alive and well in New York. But not before me! Since I have authored Zubulake, I am going to apply the Zubulake test on cost shifting and I think that this is an opinion that many courts will now apply. I wrote that I thought that it was fairer than Rowe. I still believe that.

MS. ELLSWORTH: Sampling is one technique that certain judges have used to determine whether there is within a body of data sufficiently relevant

material to warrant the cost and time of further review. What are the factors that you consider in determining whether to order a sampling protocol and how to structure it?

JUDGE SCHEINDLIN: A sampling is wise when there is a large mass of material and it will be very expensive to review and produce all of it without any assurance that it will result in the production of anything useful. A sampling might also be called for when it is difficult to determine where the relevant documents might be found. And a court should order sampling before engaging in a cost-shifting analysis to ensure that the analysis is based on fact, not surmise.

I would structure it as I did in the Zubulake case -- namely, in order to assure the requesting party that it is not being misled by a cooked sample, I would let the requesting party select the people to be sampled and/or the dates to be sampled, but would require the parties to negotiate the size of a statistically valuable sample. I would consider who should pay the cost of a sampling, and that allocation might depend on the reasonableness of the sampling protocol demanded or agreed upon.

MS. MASSEY: How do you think the Sarbanes-Oxley Act has affected or will affect this area?

JUDGE SCHEINDLIN: At the outset, let me note I am not an expert on Sarbanes-Oxley, a complicated act in many regards. If your readers are interested in an answer to this question, there are numerous resources available. For example, many practitioners and their firms are assembling materials on just this topic. I can provide you a couple of citations. One is called "Document

Preservation Under the Sarbanes-Oxley Act, Putting the New Law in Context” found at Business Litigation Report (February, 2003). Another article is called “When Is It Safe To Shed Unwanted Documents After Sarbanes-Oxley,” and that was published in a journal called the Wall Street Lawyer in January of 2003.

That said, the most notable change that Sarbanes-Oxley makes for electronic discovery is to criminalize a broad array of conduct associated with the destruction of documents. In particular, Section 802 of Sarbanes-Oxley created two new criminal statutes.

The first is found at 18 U.S.C. Section 1520. That statute now makes it a crime for accountants who audit or review an issuer's financial statement to discard or destroy certain records relevant to that audit or review.

The SEC has recently promulgated regulations under this section defining accountants' document retention duties. And those regulations can be found at Volume 17 of the Code of Federal Regulations at Section 210.2-06.

The second new statute is 18 U.S.C. Section 1519. Previously Section 1512, under which Arthur Anderson was prosecuted, made it a crime to corruptly persuade someone to destroy or alter documents to make those documents unavailable in an official proceeding. The new statute I just referred to, Section 1519, criminalizes data destruction or alteration that occurs with the intent to obstruct a federal investigation or bankruptcy case or in relation to or contemplation of any such other matter or case. So this new crime eliminates the requirements of Section 1512 that the destruction frustrate an official proceeding or that it involve corrupt persuasion. Taking out these two qualifiers means that

lawyers and senior management probably need to take a more active role in managing document retention plans from the beginning. They can't wait until official proceedings have begun. And the elimination of the corrupt persuasion requirement suggests that a lower level of culpability can give rise to criminal sanctions.

The penalties, by the way, for violating these new provisions are very steep. The statutes authorize penalties up to ten and twenty years in jail, respectively.

MS. ELLSWORTH: Let's talk for a minute about document production mechanics. One tactic in the paper world was to say there is a warehouse in Tulsa with sixty million unindexed documents in it. If you want to review them, have at it. The electronic version of that is to say, for example, here are five hundred backup tapes. Do with them what you will, at your own cost. How would you react to that kind of production response and that kind of effort to de facto shift the cost to the requesting party?

JUDGE SCHEINDLIN: As an initial matter, I am unclear whether these back-up tapes are produced in response to a document request or an interrogatory. If it were a response to an interrogatory, then the producing party is required under the rules to provide sufficient details to permit the interrogating party to locate and to identify as easily as the producing party can, the records from which the answer may be ascertained. So it's fairly well settled that a document dump cannot comply with Rule 33(d), and that happens to be true for an e-document dump as well as a paper dump.

But Rule 34 (requests for documents) does not contain the same language as Rule 33. Nonetheless, the sort of document dump that you are talking about may or may not be acceptable, depending on the context. First, the requesting party must always be given access to any software needed to access or restore tapes, as you describe in your hypothetical. Here are the five hundred tapes. Have at it. To do that, you certainly would need the software. Or the requesting party would need access to your computer.

Second, even if the requesting party has access to these backup tapes, the court might still disallow this sort of response if it is deemed evasive within the meaning of Rule 37. A document dump could be deemed evasive if, for example, the responding party turns over more backup tapes than are necessary to answer the request or otherwise intentionally overburdens the requesting party.

In a recent decision by Magistrate Judge John Facciola, who, as you know, has written extensively in this area, he considered this question, in both a paper and electronic context and held that if the tapes that are produced in this way are readable and searchable, he would not consider it a document dump and would not require an index. But if they are produced with no organizational structure -- in other words, they are not searchable, they are not readable, they are not indexed -- then that would be an impermissible document dump.

So the short answer to your question is: It depends!

MS. ELLSWORTH: If I am conducting a document production in the old-fashioned way and I come across a file with a significant memo in it, do I now have an obligation to track down within the company every electronic version of

that document? The metadata, for example, will be different in each version, and arguably each of those different electronic versions could be analogous to a differently annotated version of the document or identification of a different file within the company in which that document appeared. How would you address my obligation to produce every single electronic version of a document?

JUDGE SCHEINDLIN: At great fear of being repetitive, it may be that there is a sliding scale. If it is a key document or a smoking gun type of document, then it may be important to find every place in which that document can be found. But if it's a routine document, say a sales record, created on a routine basis, it would be foolish to require the company to identify every duplicate. So because the answer is so fact-intensive, it's important for the parties to come up with a protocol for handling these sorts of questions at their initial meet and confer.

A reasonable approach might be for the parties to presumptively produce only one copy of each document. Then, if a party receives a particularly important document, it can ask its adversary to either produce all copies of that document or to identify all of the locations where that document was found.

MS. MASSEY: We have spent a lot of time talking about the burden of electronic discovery. To what extent have you seen the litigation process streamlined by the use of electronic discovery and what advantageous uses of electronic discovery are, in your opinion, the most under-utilized?

JUDGE SCHEINDLIN: The litigation process has been streamlined by the electronic world because documents can be produced in a very compact manner. We no longer need to have hundreds of boxes photocopied, we don't need to have

them shipped. So the production costs have really gone down. We can have documents produced, hundreds or thousands on a single CD, and those materials can be searchable, which the hundreds of boxes never could be. While it's true they were indexed, that never made them searchable.

The documents can now be organized for easy retrieval. And this also helps with trial preparation. So in some senses, the good side, the upside, is that the costs associated with discovery can be and often are decreased when the parties cooperate in negotiating both the scope of production and the form of production.

As to what is under-utilized, it's almost the flipside. There are still people who request that documents be produced in paper when there is no need for that. The discovery should be able to be produced by e-mail, by burning a CD, or by an electronic file transfer. You shouldn't have any printing, photocopying and shipping costs. And yet there are always people who haven't made it into the twenty-first century in which we are all trying to live now, and they are turning the clock backwards.

So the upside can be the downside if lawyers want to use the old ways when the newer ways are more efficient and less expensive.

MS. MASSEY: While not strictly an electronic discovery issue, what in your view are some of the best arguments you have heard both for and against the production of the other side's electronic litigation database -- their key document coding, for example. How do you address cost arguments?

JUDGE SCHEINDLIN: The best argument I have heard for why they should be produced, or what is called the pro side, or pro-production, is: "Why

should we pay to reinvent the wheel? They have already organized the documents and summarized them. That is not privileged. Why shouldn't we have access to that? To deny access is just putting us to unnecessary cost." Or, the lawyer might argue -- and again, I am playing the lawyer -- "this database was not created for litigation. It is not work product. It is the ordinary way in which that company keeps its documents. To keep it from us is really a form of hide the ball. Finally, if we all have access to the same database, it will be easier to present the case at trial, at depositions or in motion practice."

Now, the arguments against are called the con side. And again, I will play the role. "This is our work product. It would reveal our legal strategy. Why should we have to do plaintiffs' work for them? They have obtained the data. Organizing it should be their problem. We paid to do it. Why shouldn't they have to pay? Why should they be permitted to be free riders?"

Now, let me step back and be the court again.

There is merit to both of these positions. In short, I believe that if it would reveal legal strategy, it is work product. And if the database was prepared for litigation, it probably is work product, and I would not require production. But as you know, there is an exception in the federal rules, and that is when a party can show a substantial need for material, then I believe the work product has to give way to the substantial need. And you can find that in Rule 26(b)(3). I am not giving you a ruling or an advisory opinion that you can cite back to me if you are ever before me on this very issue. I am just trying to lay out what I believe to be

the pros and the cons, the effective arguments on both side, and that we obviously have to consider work product implications.

MS. ELLSWORTH: What resources have you found to be the most helpful in educating yourself in this area? And what would you recommend to readers who have only a limited amount of time to generally familiarize themselves with these issues?

JUDGE SCHEINDLIN: There are lots of good resources out there, almost too many to mention. So I will just name a few that I have found particularly helpful.

One is a recent document called "The Sedona Principles," a group of lawyers and consultants have worked hard to come up with best practices regarding document production and document retention.

The ABA also has guidelines for discovery practices that have addressed these issues, and those are recently undergoing revision.

The Manual for Complex Litigation, put out by the Federal Judicial Center, is an excellent source. A fourth edition has recently been issued.

Many vendors provide case summaries. Just to name a few -- and this is certainly not an endorsement for any -- Kroll Ontrack does it, Applied Discovery does it. And there are many other vendors that do it. And I don't mean to favor one over the other by stating their names.

And then there is a web site by Ken Withers, a researcher with the Federal Judicial Center, who is really a great leader in this field, and his web site is

ken@kenwithers.com. The website contains a wealth of materials. For example, the questionnaire used in the IPO litigation I discussed earlier, is available there.

So those are some of the sources.

MS. MASSEY: What is the best way to avoid discovery becoming a sideshow that drives the litigation based on cost of discovery, rather than the merits of the case?

JUDGE SCHEINDLIN: I think that my first answer is a direct answer, and that is that discovery is expensive. As I mentioned earlier in this discussion, that's our system. We don't have the British system of loser pays. So everyone must bear his or her own costs. Recognizing that, I am sure that litigants factor that into their decision as to whether they wish to engage in early settlement negotiations. It is fair to recognize the cost when considering litigation settlement -- to say frankly, I would rather settle this one early if I can do so reasonably. That's my first piece of advice.

But if, for whatever reason, that can't be done, either because it's a matter of principle or because it can't be reasonably settled, then I think a litigant should feel free to get the court involved in the discovery issue at the earliest opportunity. Litigants should make the argument explicitly referred to in the rules, which I have referred to many times -- Rule 26(b)(2). And they should say to the court, "judge, this request is completely disproportionate to this case. You should not allow it. The rules give you that discretion. You ought to weigh the factors in 26(b)(1), (2) and (3)."

Making this argument to the court early, and with specific reference to the rule, is important, and you may find that if you do it you will get a sympathetic ear.

MS. ELLSWORTH: What is the single biggest turnoff to you in this area?

JUDGE SCHEINDLIN: That's the first easy question I've been asked!

And the answer is: When a lawyer really hasn't taken the trouble to learn what records the client has and how those records are maintained. When the parties haven't even tried to talk to each other first and tried to resolve their own problems. When the producing party is balking at the cost, but has come to court without any specific cost information. These are three things. I know you asked for the single biggest turnoff, but collectively, that is the single biggest turnoff - - the unprepared lawyers, the parties who haven't negotiated, and the unprepared party who is complaining, but not giving me specifics.

MS. MASSEY: What is it about you that caused you to become excited and engaged in these electronic discovery issues? For judges who aren't as interested as you are in these issues, what can counsel do to get them more engaged?

JUDGE SCHEINDLIN: Twenty-two years ago, I became a magistrate judge, and served in that position for four years. I then returned to private practice for eight years before I became a district judge. But during the four years I served as a magistrate judge, I developed a familiarity with and an interest in discovery issues.

I am also a member, as I mentioned earlier, of the Advisory Committee on Civil Rules, and have been doing that work since 1998. We have been working

with electronic discovery issues during these past years. I taught a course in federal discovery practice. I have practiced law, so I know what it feels like to be required to produce documents. And for all these reasons, I became interested in the topic.

But judges are very busy people. They are very overburdened. Not that lawyers aren't. I am fully aware that lawyers are also very busy people. In addition, district judges are typically disinterested in discovery issues, and for good reason -- they have to try cases, they have to sentence people. They have many other things to do. And at times discovery disputes sound like whining.

A discovery dispute may be of key importance to the parties, but to the court it doesn't sound like the merits of the case, the substance of the case. So some judges are really not interested and won't take the time to properly explore the issue and might end up making a bad decision.

If you sense that, you might be wise to ask that the dispute be referred to a magistrate judge or a special master. Magistrate judges resolve discovery disputes every day. They are all interested in this, and they are all educated in it. I think it's fair to say that more attention will produce a better result than less attention. So that's my advice. In some ways, you just can't teach an old dog new tricks. If the judge does not want to handle discovery disputes, I would say: Accept that, and try to find a judge who will -- meaning not a different district judge, but a magistrate judge or a special master.