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Ethics and Professionalism in the Digital Age

A Symposium of the Mercer Law Review

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Morning Session

MR. BRYANT: My name is Ben Bryant, and I am the Editor in Chief of the Mercer Law Review. Welcome to the 2008 Mercer Law School Symposium, “Ethics and Professionalism in the Digital Age.” This year we are proud to host the Ninth Annual Georgia Symposium on Ethics and Professionalism.

I want to thank several individuals who have contributed to the success of this event: Yonna Shaw, our publishing coordinator; Cherie Jump, our administrative secretary; Dean Daisy Floyd; Professor Pat Longan; Professor Hal Lewis, the Law Review’s faculty advisor; the Mercer Law Editorial Board, in particular our Lead Articles Editor, Ed Bonapfel and our Administrative Editor, Adrienne Calloway; and the members of the Mercer Law Review.

This morning’s session will go until noon, but we will have a break at 10:30. I will now turn the program over to Dean Floyd.

DEAN FLOYD: Thank you, Ben. Good morning. I am delighted to bring you greetings on behalf of the students, staff, and faculty of Mercer University’s Walter F. George School of Law. I would like to add those

greetings brought to you by Ben and also add my thanks to those who he mentioned for working hard to put this Symposium together. We do look forward to the annual Mercer Law Review Symposium, and in particular we look forward to this Symposium that rotates among Mercer University, the University of Georgia, Emory University, and Georgia State University law schools. This is the Ninth Annual Georgia Symposium on Professionalism and Ethics, and I believe this starts the third cycle of that rotation among the law schools.

I want to extend a particular welcome today to our group of distinguished panelists. Thank you for traveling to join us today and for helping us discuss this important topic. We had a wonderful beginning last night with Professor Freedman's provocative and insightful remarks, and I know that today will follow in that same vein.

I hope that for those of you who are visiting us for the first time, you will take some time to get to know us. We are a community of 440 terrific students and about 65 wonderful, dedicated faculty and staff. Mercer Law School was founded in 1873 as a part of Mercer University. We are a part of Mercer's ten colleges and schools. Mercer has campuses in three locations in Georgia: in Macon, the original campus, in Atlanta, and in Savannah.

Among the many things of which we are proud at the Law School is that we are home to the nation's number one ranked legal writing program and home to the Legal Writing Institute. Our innovative Woodruff Curriculum has been recognized by the American Bar Association for its emphasis on professionalism and ethics, under Professor Longan, whom you all know was recognized in 2005 as the initial recipient of the ABA award for innovation and excellence in the teaching of professionalism. That award was jointly sponsored by the ABA standing committee on professionalism and the National Conference of Chief Justices, and the Burge Endowment for Law and Ethics. That award actually resulted in the creation of our first-year legal professionalism course, which is unique among law schools in offering a required first-year experience in professionalism and ethics. We also are quite proud to say that last week National Juris and Pre-Law magazine recognized Mercer as having one of the top ten public interest programs in the country.

I hope you will make yourselves at home today in our beautiful building, built in the 1950s as a replica of Independence Hall. It is a bit larger than Independence Hall but there is quite a resemblance. And although I have not taken a survey to make sure this is true, I believe we are one of the few law schools in the country that offers a rocking chair porch. So, I hope you will all take advantage of that today. The front porch is just outside the courtroom and has a lovely view of

downtown Macon. Perhaps you can find a quiet moment to relax and reflect.

So welcome. We are looking forward to what we are going to learn today. Enjoy your day. And now I am going to call on Professor Longan to give an overview of today's program.

PROFESSOR LONGAN: Thank you, Dean Floyd. Let me reiterate my thanks to the folks who have come to see us from out of town. I do want to correct one omission from last night and thank Professor David Hricik for co-chairing the program. This could not have happened without David, and I deeply appreciate his help.

My job is to introduce the first panel after I do a few more or less mundane housekeeping things. First of all, for our guests who need to access the internet, the wireless connection from the National Criminal Defense College has been opened for you. I have also been reminded to tell everyone to turn off your cell phones. Ironically, in a program on innovation in the digital age, let's make sure we turn the technology off. I have also been asked to remind you that if you are here for CLE credit and you need an out-of-state affidavit, Nancy Terrill is right outside the courtroom and can take care of that for you.

So basically, the schedule today is we have two panels this morning, both of which are devoted to problems in e-discovery. We are going to go until 10:30 and then take about a fifteen minute break and then reconvene for the second panel. This afternoon we have two panels, one on the internet and lawyer marketing, and then the last panel of the day on metadata.

The first panel is comprised of Jason R. Baron, Chilton D. Varner, and the Honorable John M. Facciola. The way this is going to work in this panel and in the second panel this morning is that we are going to have a primary presentation and then two responders. On the first panel, the primary presenter is Jason Baron, who is the Director of Litigation for the National Archives and Records Administration in Washington, D.C. I have put on the seats a detailed set of biographies so I wouldn't spend the entire day reading all the qualifications of the participants. Jason will lead off with his discussion on e-discovery and the problem of asymmetric knowledge, and then we will have responses from Judge Facciola and from Chilton Varner. Chilton is a partner in the law firm of King and Spalding in Atlanta, Georgia. Judge Facciola is a United States Magistrate Judge in Washington, D.C.

So, Jason, without further ado, if I can turn it over to you, let's learn about e-discovery and the problem of asymmetric knowledge.

MR. BARON: Thank you for the introduction, Professor Longan. Good morning everyone. It is certainly a great honor and privilege to appear at Mercer Law School in connection with this Ethics Symposium. I would like to thank Dean Daisy Floyd and Professor Patrick Longan for extending the invitation to me to be here and for all the hospitality. It is also an honor to sit on a panel with Judge Facciola and Chilton Varner. I trust that they will have a number of wise and savvy comments on the remarks that follow. It is also a special occasion to have Professor Monroe Freedman in attendance at this Symposium. My aim this morning is to be at least half as provocative as Professor Freedman was in his after-dinner remarks last night, which I think is a tall order.

I usually speak extemporaneously, but I am going to speak for about half an hour from written remarks because there is a transcript being prepared, and then we will hear from the panelists. I invite all of you to continue the discussion. Hopefully, we can have an interactive forum here with your questions that fill out this first panel. I encourage every single person in the audience to ask a question.

I have entitled this talk, “E-Discovery and the Problem of Asymmetric Knowledge.” What I wish to talk about here is one aspect of the enormous and growing problem lawyers face in having to confront previously unheard of volumes of electronically stored information, or ESI, as part of the pretrial discovery process. Specifically, I wish to focus on what lawyers are doing and should do in the enhanced meet-and-confer process, called for in the revised Federal Rule of Civil Procedure 26, and some ethical issues arising in connection with negotiations over how electronic evidence will be searched for.

I refer to asymmetry, or asymmetric, because in the usual course, one party (usually a corporation or an institutional defendant), has privileged access to its own enormous data set. This has always been true, even in the world of paper documents, but today there is a twist: given the impossibility of manual review to find smoking gun documents and other material documents, the only way parties will have access to vast collections of ESI is through making intelligent, reasonable requests for automated searches to be conducted. But now the stakes are higher in framing such requests, because small differences in the language of those requests make an enormous difference when using computers to search for strings of text. The aspirational goal first stated in 1946 in the seminal case of *Hickman v. Taylor*,¹ involving attorney work product, remains the same however: “Mutual knowledge of all the

1. 329 U.S. 495 (1947).

relevant facts gathered by both parties is essential to proper litigation.”² So how is that to be accomplished? And what are the ethical limits to maintaining an informational advantage held by one side in this new digital age? With some trepidation in advancing arguments in the presence of Professor Freedman and his clearly articulated views on lawyer zealousness on behalf of clients, I will nevertheless throw caution to the wind and proceed.

In this talk I wish to accomplish three things. First, I wish to set the stage by giving an example of my own work as a government lawyer in Washington, D.C. and the kind of e-mail databases, particularly White House e-mail, that I have to confront as part of e-discovery. Second, I will give the briefest of overviews on the current trend in e-discovery caselaw of the judiciary’s greater involvement in making parties negotiate over how they propose to conduct automated searches for relevant evidence. And third, most importantly, I will pose a few hypotheticals to serve as kindling to spark what I hope will be a lively conversation amongst the panelists and all of you in attendance. I will even try to answer at least some of these hypotheticals with my own not-so-settled views on ethical lawyering in this area to head off at the pass anyone walking out of here today thinking that I have ducked away from controversy or been too tentative, political, agnostic, on the fence, or just plain bland.

I do have two housekeeping matters to state up front. First, I wish to acknowledge and thank two Sedona Conference colleagues and friends of mine—Ralph Losey, with us today and from whom you will hear, and Conor Crowley, a lawyer practicing in New York City—as well as another colleague of mine, Alexandra Chopin, a lawyer practicing in Washington, D.C., all of whom have been very generous with their time in allowing me to bounce off of them some of the ideas that I will be stating here today. Second, I wish to make clear that what I am stating here are my own personal views on the subject of ethics, search and retrieval, and e-discovery, not anyone else’s, and this talk does not purport to represent the views of either the Sedona Conference or any other institution, government or academic, that I have the privilege to be associated with.

As is perhaps evident from my bio, I have spent my career as a lawyer in public service, including acting as Justice Department counsel of record in cases defending the White House and the Archivist of the United States in a series of lawsuits involving White House e-mail, starting with a landmark case involving the preservation of backup

2. *Id.* at 507.

tapes on which Ollie North's PROFS notes related to the Iran Contra affair resided.³ Every President since President Reagan has experienced a rash of lawsuits surrounding his official e-mail, and these suits always seem to take on added import as the end of each administration nears. But there is another extraordinary phenomenon that has been readily apparent over the last decade: the incredible, exponential growth of the number of e-mail records that have been preserved. One fine morning back in the dark ages—and here I'm referring to 2002 and 2003—as Director of Litigation at the National Archives, I had the unique experience of receiving a Request to Produce Documents under Rule 34, which was 1,726 paragraphs long. The discovery request was from the tobacco company defendants in the case of *United States v. Philip Morris USA, Inc.*⁴ The case, now on appeal, demanded of thirty federal agencies that all records related to tobacco policy be searched back for fifty years. For the National Archives, as we run all the Presidential libraries around the United States, that meant searching records in our presidential library holdings going back to the Eisenhower administration; and more importantly for this talk, I ended up honchoing the effort of searching twenty million presidential record e-mails of the Clinton-Gore administration. I added the Vice President's name because it so happens that Vice President Gore did, in fact, personally create and receive e-mails related to tobacco policy both prior to and in connection with the lawsuit eventually filed by the Clinton Justice Department.

To conduct a search of twenty million e-mails, lawyers at the Justice Department and National Archives and Records Administration constructed a set of keywords that in the first instance were not shared with opposing counsel representing the defendants. This keyword search produced two hundred thousand "hits," representing e-mails and attachments, which in turn had to be sifted through by an assembled team of twenty-five archivists and lawyers. They collectively took six months to go e-mail by e-mail, attachment by attachment, separating out responsive and nonresponsive documents, and then making further cuts for certain categories of privilege.

My experience with the tobacco litigation has led me to three simple conclusions. First, exponentially increasing volumes of ESI would render equivalent processes using keywords alone unworkable within the next decade. Indeed, I have estimated, in a law review article I co-authored with George Paul, that there will be upwards of a billion cumulative

3. See *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993).

4. 449 F. Supp. 2d 1 (D.D.C. 2006), *appeal docketed*, Nos. 06-5267, 06-5268, 06-5269, 06-5270, 06-5271, 06-5272 (D.C. Cir. Sept. 14, 2006).

White House e-mails by the end of the next Presidency, eight years from now.⁵ The two hundred thousand hits I had to go through represent one percent of twenty million; but one percent of a billion is ten million documents, and there is simply no way in which any manual review process could be assembled with human beings—with actual lawyers and law students and law clerks and contract attorneys and whomever—between now and the time that the Milky Way and the Andromeda galaxies merge, to go through ten million documents manually. It is just too large a universe. There is simply too much ESI to review as evidence, and the current legal paradigm of document review is severely broken. Indeed, as my dad liked to say about all things, it will probably get worse.

Second, based on my tobacco litigation experience, I became of the belief that lawyers need to better understand what the limitations to keyword searching might be, even if it is a powerful tool, and that we should explore what information scientists have to say about the efficacy of alternatives, including calling for benchmarking and objective standards and evaluation programs, as appropriate. My questioning led me to exploring this matter under the auspices of the Sedona Conference, a nonprofit legal think tank (and you all should be aware of and go on their website⁶), as well as my involvement with something called the NIST TREC Legal Track,⁷ in finding what is the best thinking in the area of information retrieval. In doing so, I was attempting to think outside the box—about other disciplines and what they have to say. Basically, I was asking, “Are there ways to improve what lawyers do?” What has been done traditionally is for all of us to dream up a few keywords to search databases, whether on Google or Westlaw or Lexis, and we all do that to find relevant caselaw or evidence reasonably accurately and efficiently. But there may be better ways that we can explore, that is, to find as many relevant documents as possible, but without spending inordinate time sifting through junk, or “false positives,” as the Ph.Ds would say.

The Sedona Conference *Best Practices Commentary on the Use of Search and Information Retrieval in E-Discovery*⁸ outlines a variety of alternatives to simple keyword searching, including greater use of what are known as Boolean operators—that’s a fancy way of saying the connectors “AND,” “OR,” and “AND NOT”—to construct search strings

5. George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. L. 10 (2007).

6. www.thosedonaconference.org.

7. See <http://trec-legal.umiacs.umd.edu/>.

8. 8 SEDONA CONF. J. 189 (2007).

resembling what lawyers are familiar with when conducting Westlaw and Lexis searches, as well as to use terms borrowed from fuzzy logic, to account for errors and misspellings and other arbitrary word choices. But the Sedona Conference *Search Commentary* also urges lawyers to consider using other more advanced forms of what has been termed “concept searching,” using very sophisticated statistical, mathematical, and language-based methods to find documents based on patterns of word choices that might represent combinations of keywords and their synonyms. These methods go by various fancy names, including vector space retrieval, probabilistic latent semantic indexing, and the use of ontologies and taxonomies, social network analysis, and the like. Judge Facciola was the first judge in the country to recognize these possibilities in his published opinion, *Disability Rights of Greater Washington v. Washington Metropolitan Area Authority*,⁹ a 2007 decision, and since issuance of that opinion Judge Grimm in Baltimore has penned a more recent opinion in May of this year, *Victor Stanley v. Creative Pipe*,¹⁰ that goes through this laundry list of alternative search methods. Judge Facciola added in a more recent opinion in *United States v. O’Keefe*:¹¹

Whether search terms or “keywords” will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics. . . . Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.¹²

And third, my tobacco litigation experience convinced me of the importance and necessity of approaching search issues collaboratively and transparently in litigation. The up-front decision on the part of government lawyers to make a six-month commitment of time and resources, largely based on unilateral, behind the curtain decisions on what keywords to use, was essentially placing a huge bet that these decisions would not lead to collateral litigation, discovery about discovery, with attendant risk of a “do over” after a further frenzied round of motion practice. The fact that this did not happen, I believe, was in part due to my insistence that a sample of some of the results of some terms be disclosed to the other side, which had the effect of increasing the comfort zone of the opposing counsel, at least to the extent that no further motion practice ensued. In 2002 that type of

9. 242 F.R.D. 139 (D.D.C. 2007).

10. 250 F.R.D. 251 (D. Md. 2008).

11. 537 F. Supp. 2d 14 (D.D.C. 2008).

12. *Id.* at 24.

action was novel; in 2008, although perhaps now not a complete sea change in thinking, it is still the unusual case when lawyers sit down to seriously contemplate negotiating search protocols—and few do so anticipating a structured, iterative process in the discussions, although that may arise after the fact.

Most recently, the Sedona Conference issued what it has called its “Cooperation Proclamation,”¹³ with Judge Facciola and two dozen plus members of the bench as signatories. The document begins by stating, “The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system.”¹⁴ As such, the document represents a clarion call for lawyers to cooperate in resolving technical e-discovery disputes while further stating that greater transparency and collaboration is consistent with zealous advocacy. The document describes various methods to accomplish cooperation, including most relevantly for our purposes here (1) parties exchanging information on relevant data sources, including those not being searched and (2) parties jointly developing automated search, and retrieval methodologies to cull relevant information.

At face value, these points seem to be a straightforward extension of existing caselaw, both pre- and especially post-the December 2006 rules changes. For example, in a leading case, *Treppel v. Biovail*,¹⁵ the defendant made an initial attempt to engage the plaintiffs in stipulating which files would be searched and what search terms would be utilized. The plaintiff, however, assumed that the responding party had an obligation to search the digital equivalent of every scrap of paper. The court admonished the plaintiff that the defendant was under an obligation only to perform a “diligent” search, and that “[d]efined search strategies are even more appropriate in cases involving electronic data, where the number of documents may be exponentially greater.”¹⁶

The plaintiff’s refusal to stipulate was further described by the court as a “missed opportunity,” because the “plaintiff might have convinced [the defendant] to broaden its search in ways that would uncover more responsive documents and avoid subsequent disputes.”¹⁷ In more than a dozen reported decisions over the past two years, courts have shown an increased willingness in encouraging, if not forcing, parties to put meat on the bones of Federal Rule 26(f), to discuss search protocols as

13. www.thsedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf.

14. *Id.*

15. 233 F.R.D. 363 (S.D.N.Y. 2006).

16. *Id.* at 374.

17. *Id.*

part of the meet-and-confer process. A typical state-of-the-art case from April 2008 is *ClearOne Communications, Inc. v. Chiang*,¹⁸ out of the District of Utah. There, when the parties agreed on at least a core set of keywords but disagreed on what type of Boolean operators in a search string should be used (that is, either “AND” or “OR”), the court made a Solomon-like decision in deciding that an “AND” was necessary to be used between certain names and substantive technological references, otherwise there would be an excessive number of false positive hits of just the names, whereas “OR” would be appropriate for a third category of licensing terms used in conjunction with technological references, lest the search be excessively narrow.

Quite presciently, the court stated that the “search protocol is not the ‘last word’”¹⁹ on e-discovery in the case. The opinion went on to say that the “use of key word protocols is one step in the process which contemplates many more steps,” including revisiting the search protocol, and “if documents are discovered which suggest that other documents exist which were not identified as potentially responsive, or if a surprisingly small or unreasonably large number of documents is identified as potentially responsive, refinement may be needed.”²⁰ Indeed, the court recognized that “[m]uch of the argument is now speculative, since there is no actual experience with a search. This first protocol may suffice, or it may in effect be a sampling which reveals the need for more-or less-or different-key words.”²¹

Although the court in *Chiang* failed to recognize alternatives to keyword searching that might exist, such as I suggested from the Sedona Conference *Search Commentary*, the court’s result is fully consonant with the position I have been advocating and the Sedona Conference *Search Commentary* advocates; namely, lawyers using an iterative, step-wise virtual feedback loop in discussions. This is where at a minimum the propounding party puts forth its desired search terms, the receiving party does a sample search and reports back results, and the parties meet again to confer on how to fine-tune the search string requests to increase the amount of relevant evidence obtained while minimizing the noise or junk returned. This kind of early- to mid-course correction contemplates multiple iterative rounds, if necessary, in the largest and most complex cases, and may become necessary in more standard issue cases as well. Like it or not, best practices in this area necessarily will mean spending more time with opposing counsel, even if they strike you

18. No. 2:07CV377TC, 2008 WL 920336 (D. Utah Apr. 1, 2008).

19. *Id.* at *2.

20. *Id.*

21. *Id.* (footnote omitted).

as the last person on Earth you would wish to be stuck with stranded on a desert island.

A recent case decided out of the Northern District of Georgia lends an ironic twist to this discussion. In *Kipperman v. Onex Corp.*,²² Judge Owen Forrester had previously stated that the defendants were to conduct a search of backup tapes to produce meaningful discoverable information; that the plaintiff should be more “artful with its search terms and that [the] [p]laintiff utilize a list of the people provided by [the] [d]efendants to review whether all [e-mail] boxes needed to be searched.”²³ The court further granted the defendants the opportunity to narrow the plaintiff’s search terms; however, the defendants neither narrowed the list of people nor did they narrow the plaintiff’s terms. Instead, they agreed to search and restore all the e-mail mailboxes with the terms provided by the plaintiff. The defendants subsequently moved for a protective order seeking relief from having to review and produce all the results of the required search. The defendants contended that the plaintiff’s “broad search terms resulted in thousands and thousands of irrelevant hits. For example, the [p]laintiff’s search terms included the word ‘republic.’”²⁴ They included the word “republic” because there was a term called “Republic builders,” that was part of the case.²⁵ But the “defendants claim that the search captured thousands of irrelevant pages due to one occurrence of the word ‘republic’ often related to . . . business interests having nothing to do with” the defendants due to the presence of the Republic of France, Ireland, and the Czech Republic.²⁶ So they had to weed through all that, the noise and the junk. The court said it was not “unsympathetic to the massive amount of discovery involved in this matter, the considerable burden of working with it, and the overproduction that often comes with e-mail production,” and, “[t]herefore, the court gave the [d]efendants numerous tools by which to reduce the burden of e-mail discovery, including an opportunity to limit [the] plaintiff’s search terms,” but that “the [d]efendants did not take advantage of these opportunities. The [d]efendants must now lie in the bed that they have made.”²⁷

If the defendants had taken the position that they would produce all the documents requested so as to dump them on the plaintiffs—over the objections of a hypothetical plaintiff who desired discussions about

22. No. 1:05-CV-1242-JOF, 2008 WL 4372005 (N.D. Ga. Sept. 19, 2008).

23. *Id.* at *7.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at *8.

narrowing the framework—would the defendants’ position be in compliance with their ethical obligations? In other words, is it fair to dump one billion e-mails on a party after refusing to negotiate a narrower search request using agreed-upon search string parameters?

It should come as no surprise that my opening ethical position for present purposes is that lawyers uphold their duty of fairness to an opposing party and counsel in being willing to engage in the very type of negotiations called for in the meet-and-confer process, especially given the privileged access to ESI repositories that one side will inevitably enjoy.

American Bar Association Model Rule of Professional Conduct 3.4 calls for fairness to an opposing party and counsel. Under Rule 3.4(a), a lawyer shall not unlawfully obstruct another party’s access to evidence or unlawfully conceal a document or other material having potential evidentiary value. Under Rule 3.4(d), a lawyer shall not, in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

The Comment to Rule 3.4 goes on to say that the procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Paragraph 2 of the Comment to Rule 3.4 makes it expressly clear that evidence subject to possible concealment includes computerized information.

Refusing to exchange ideas or discuss varying approaches to the ESI search problem, while posturing that the only response will come in formal answers to interrogatories and requests to produce at a later stage of discovery is, I submit, a form of passive aggression out of yesteryear’s practice book, and it should be recognized for what it is: not just gamesmanship, but an unethical approach to lawyering in the technical age in which we live. Given the volume of information present, it is, as a practical matter, impossible to get meaningful discovery if one side refuses to discuss the parameters of what constitutes a reasonable search, leading to unfair and oppressive results. The opinion in *Chiang* is a good exemplar case in which a court recognized this, and issued its holding on “ANDs” and “ORs,” what the court called conjunctive and disjunctive terms, with that view in mind.

On the other hand, ABA Model Rule 1.6 states that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. Cooperation is fair and good, but there are perceived limits in the rules where one may bump up against competing considerations.

So what does it mean to negotiate a search protocol in the meet-and-confer setting? Does counsel have a duty to “assist” in the negotiation

process if one side had made very poor requests for information in the form of search terms? If the value of the requests are poor because they are way over-inclusive, then as seen from *Kipperman* and *Chiang*, courts will expect the parties to engage in narrowing to filter out thousands or millions of irrelevant documents. What if the requests are on their face reasonable, but the other side (that is, the counsel to the party receiving discovery) knows that they are poor requests based on special knowledge? Under these circumstances, to what extent should counsel to a party be obligated to “reveal”—and I use that word conscious of the ethical prohibition here—some aspect of her client’s electronic data set in the interest of furthering expedition of the litigation?

All is not so simple in the land of ESI, and the ethics of negotiating search protocols is very much an open area awaiting Judge Facciola and his brethren to weigh in.

Let me pose a modest hypothetical (or not so modest, because it has some length to it). Assume that Corporation X is required to produce all documents on a certain fungicide named “Benlate.” Assume further that a specific request to produce documents asks for all documents from the CEO of Corporation X, whose last name is “Bartlett,” that in any fashion relate to the sale of the fungicide Benlate. Also assume that the general counsel of defendant Corporation X has been on the job for the last ten years, during which time she has been involved in one hundred lawsuits involving discovery searches against Corporation X databases, including suits for CEO records. Also assume that although no suit specifically involved production of Benlate, the general counsel is extremely familiar with both the proprietary name Benlate and the generic name of “Benomyl” for the fungicide, as they are interchangeably and commonly used throughout the corporation. Finally, assume further that the general counsel knows that there are ten million OCR’d documents (that is, documents that have been scanned in using an Optical Character Recognition process with a known error rate), and that in the past there are many documents that have been uncovered scanned in with the name Bartlet, without the second “t” at the end.

Now, assume that the plaintiff’s counsel, without knowledge of prior litigation against the defendant, proposes a set of keywords to be searched. Further assume that on the plaintiff’s list of keywords is the term “Bartlett” (spelled correctly), as well as “Benlate.” Excluded from the list are either any variations on the name Bartlett, or any synonyms for the specific proprietary name “Benlate.” The parties are ordered by the court to meet-and-confer regarding the subject of search protocols to be used to find relevant evidence.

Question number 1: Does the defendant’s counsel (here, I necessarily include Corporation X’s general counsel assumed to be present sitting

with outside counsel), at a meet-and-confer, have an ethical duty to inform the plaintiffs that searches of the term “Bartlett,” spelled correctly, would not necessarily produce all instances of documents related to the CEO, given the known presence of spelling errors in the collection?

Question number 2: Does the defendant’s counsel have a further duty to identify that a search for the term “Benlate” may be under inclusive, when she knows that a generic name for the fungicide, Benomyl, almost certainly exists in the collection?

I have an unequivocal response in answer to Question 1: Yes, it would be taking advantage of a factual mistake not to “fess up” to one’s prior knowledge, in the form of saying that there should be more than just a correct spelling of the keyword, so as to encapture all variations of the CEO’s name, Bartlett, either with one “t” and two “t’s” at the end, or any other fuzzy variations that are known. Failure to discuss expanding the search request to encompass *known* variations of the spelling of the CEO’s name would be tantamount to withholding a material fact from the other side during the negotiations.

On Question 2, the matter of Benlate vs. Benomyl, while I do not believe counsel has a general duty of hand-holding to make opposing counsel’s searches better, if the matter bore greatly on a material issue in the litigation, it would also be a mistake to fail to proffer the synonym as part of the negotiations. That is, I believe, the right answer is to provide one’s knowledge rather than wait for a later iterative cycle to reveal the term. This is more controversial, but I say this because (a) the second term, Benomyl, is almost certain to be found out anyway, and one gains credibility in being up front about it when there is no outcome-determinative difference perceived; and (b) failure to do so greatly increases the risk of a “do-over” in having to redo discovery. Whether I should or would do so *only* with the client’s consent is something which I take it would be Professor Freedman’s way out of this ethics conundrum—he would require me to go to the client to get permission for use of a synonym that the other side had not considered. But it is an issue that I would be quite interested in having my fellow panelists weigh in on with this caveat: In the real world, there is precious little time to bring clients in to micro-manage litigation decisions on this level. And so, as a practical matter one may have to assume that the lead lawyer in the representation will be by default “on her own” in deciding what course of action to pursue.

The above is, of course, not so completely a hypothetical. Although this type of ESI issue was not, to my knowledge, ever directly at issue in the DuPont Benlate litigation in Georgia, more traditional variants of improper discovery conduct in the form of withholding unfavorable

evidence were at the heart of the sanctions handed down in that case, leading directly to a consent order that is responsible for the very Symposium in which we are taking part. It may be instructive to be guided by the wisdom of the judge writing in that case, who stated,

It is the obligation of counsel under the rules, as officers of the court, to cooperate with one another so that in the pursuit of truth the judicial system operates as intended. . . . The Federal rules require that counsel make a reasonable investigation and effort to assure that the client has provided all information and documents available to it which are responsive to the discovery request. It is also required that counsel certify that the responses to discovery requests are complete and correct.²⁸

The court went on to say,

The courts do not have the time to micro-manage discovery in every case. They must depend on their officers, the lawyers, to keep faith with their primary duty to the court as its officers, and so make the discovery system work by voluntarily making the required disclosures. Counsel should not be allowed to “sell out” to their clients.²⁹

As applied in this brave new world of ESI, my argument is that failure to disclose special knowledge of the relevant characteristics of the ESI universe of your client, that would knowingly fail to optimize and impair an otherwise reasonable-sounding search strategy or protocol request, is tantamount to the suppression or concealment of evidence in conflict with one’s ethical obligations under Rule 3.4.

My argument here in the legal domain has a parallel in the world of statistics. To paraphrase a recent text on measurement, conventional statistics assumes that observers have no prior information about the subject of their observations, but the above assumption is almost never true in the real world. Bayesian statistics, derived from a theorem of the good Reverend Thomas Bayes, deals with the issue of how we should go about updating prior knowledge with new information.³⁰ I would like to propose that judges and lawyers should apply a quasi-Bayesian analysis to the ethical issues that I have raised here: Should lawyers in meet-and-confers act as if search issues have never been raised before, that they are working on a *tabula rasa* with respect to how searches are conducted? To what extent is it more ethical to approach the meet-and-confer as one of an iterative exercise over the course of the entirety of

28. *Bush Ranch v. DuPont*, 918 F. Supp. 1524, 1543 (M.D. Ga. 1995).

29. *Id.*

30. DOUGLAS W. HUBBARD, *HOW TO MEASURE ANYTHING: FINDING THE VALUE OF INTANGIBLES IN BUSINESS* (John Wiley 2007).

one's representation of a client, over the course of one's own career, rather than an ad hoc, stovepipe transaction related only to the litigation at issue?

In calling for greater attention to the formulation of search protocols, I am not just rehashing *Qualcomm, Inc. v. Broadcom Corp.*,³¹ a case on every e-discovery blog top ten list of cautionary tales from this decade. In that patent infringement action, a raft of lawyers had been under threat of professional sanctions for a host of misdeeds, including most notably the failure to produce two hundred thousand relevant and material e-mails that could have been produced if only an electronic search had been conducted using obvious search terms under custodians and subjects. With *Qualcomm* as a low ethical bar to get over, raising issues of competence and intentional misconduct, I am arguing here for a more nuanced, higher ethical bar that lawyers should perceive when involved in meet-and-confer negotiations. That standard is one of acting reasonably in the face of your knowledge and experience of the data set that your client has, as gained from prior litigation and prior searches conducted.

For those of you who may be in need of additional persuasion, let me suggest that what I consider here as doing the right thing also makes good economic sense, and it can be sold to clients under that banner if a hymn to higher ethical standards fails to move them. I trust Judge Facciola will indulge me a quote from a music icon other than his favorite, Bruce Springsteen, by my choosing a line from Bob Dylan instead: “. . . what price [do] you have to pay to get out of [going through all these things twice]?”³² Finding out late in the game, on the eve of trial (or in the case of *Qualcomm*, after a trial), that important e-mails and other forms of ESI were missed due to failures of the search protocol means tremendously adding to the cost of e-discovery to the client when a court requires that second and third passes be conducted through the ESI universe.

Professor Wendel, a leading commentator on ethics in discovery, has summed up counsel's discovery obligations by announcing three overarching principles. He did so in his influential 1996 article *Rediscovering Discovery Ethics*.³³ He states (1) the lawyer's primary obligation is to the discovery of the truth rather than the advancement of the client's interest unless some clear countervailing interest is recognized; (2) the discovery system is not bound up with the adversary

31. 539 F. Supp. 2d 1214 (S.D. Cal. 2007).

32. BOB DYLAN, *Stuck Inside of Mobile with the Memphis Blues Again*, on BLONDE ON BLONDE (Columbia Records 1966).

33. W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895 (1996).

system; partisanship comes into play only after all of the facts have been revealed to both sides; and thus (3) derived from the first two propositions, it is a breach of the lawyer's duty as an officer of the court to fail to disclose information that would assist the tribunal in determining the case on the merits. I believe my quasi-Bayesian point builds on and incorporates Professor Wendel's best thinking as applied to ESI search protocol negotiations that are happening more and more in courts around the United States every day.

To sum up, I believe that the explosive growth of information is transforming the litigation system and that the current paradigm is broken. As I have shown, new strategies involving automated search methods, cooperation, and the use of structured, iterative approaches are called for and are fully consistent with the aspirational aims of the Model Rules. I also believe that counsel cannot reasonably fail to bring to the meet-and-confer table his or her prior knowledge, gained from experience in litigation, on limitations or deficiencies in proposed methods of searching for evidence. Given the hugely asymmetric nature of litigation as we near the end of the first decade of the twenty-first century, old twentieth century ways of approaching these problems need to be rethought. Not every characteristic of a data set triggers a future duty of disclosure. This is obviously an area that will have to be worked out in future cases. But the notion that one can and should act obliviously of one's past knowledge acquired, in posturing that every meet-and-confer starts on a completely clean slate, does not accord with our profession's highest ethical ideals and aspirations.

Of course, some of these ethical conundrums might in fact be alleviated if a level playing field of competence existed amongst members of the Bar, although random disparities and gaps in knowledge will always exist and are a fact of life. I will leave to Ralph Losey and the next panel addressing some of those further considerations. For now, I trust I have given enough food for thought for one panel's discussion.

Finally, I want to say the following as a coda—especially because I am so happy to be at an institution like Mercer Law School that is ranked so high in public interest law. I have spent my entire life as a lawyer in public service, as a member of the Justice Department, now at the National Archives, and with other agencies. I believe that lawyers in the public service, like me, owe a special duty of fairness in litigation. And so, whatever doubts one may have on the extent to which counsel should engage in a spirit of cooperation on search strategies and search terms should be resolved, if you are in the public sector, in favor of openness and transparency, at least in the world that I have had the privilege to travel in. And I can tell everyone here that there is no

greater privilege than to stand up in court to say that you are appearing on behalf of the United States of America.

I want to thank you again for the special honor and privilege of being here, and I look forward to the further panel discussion. Thank you very much.

PROFESSOR LONGAN: Thank you, Jason. That was very provocative. The way we are going to proceed now is Chilton, you are going to go next, and then we will go to Judge Facciola.

MS. VARNER: Good morning. I am here as a private practitioner who represents private entities. I am also here as somebody with a long view because I have been around for a long time. Jason Baron said that his experience in the Archives goes back to the Ollie North episode. My first experience with the National Archives was listening through earphones that looked like Frisbees on either side of my head to tapes of Richard Nixon speaking with automotive industry officials in the White House whom he had invited to discuss pending safety litigation. There was a group of product liability cases where the plaintiffs had alleged that the industry had conspired with President Nixon and his administration to tamp down safety regulations that were being proposed at the time, mostly notably airbag regulation. And so, I got to trek to Washington, D.C. and listen to those tapes from the National Archives and then travel to New Mexico to take John Ehrlichman's deposition. Now, many in the room are too young to remember who John Ehrlichman was, but it was a fascinating thing to talk to him about his experiences with Richard Nixon.

I have seen discovery in all forms up through today's e-discovery. I serve on the Federal Rules Advisory Committee, where I participated in the drafting of the e-discovery amendments. I had the pleasure of attending all three public hearings that were held on those rules, hearings that attracted overflow crowds and more comments than anything in recent memory. So I got a quick introduction to e-discovery, not only from the practitioner's side, but from the vendors' side, from the judges' side and from the clients' side.

You heard Jason talk about the Sedona Conference. We have here on this slide a quotation from the proclamation that Jason mentioned in his remarks about methods to accomplish cooperation between lawyers. These suggestions are on their face not controversial. As always, the devil is in the execution and in the details.

But if you will read quickly through this quotation from the proclamation, I think it will be useful when we get to the next slide. It shows that there is a considerable overlap between the Sedona Proclamation,

and the kind of cooperation it encourages, and the notes to the e-discovery amendments. Those notes and amendments go farther, I think, than any prior Federal Rules in encouraging parties and lawyers to get together early, to talk with each other early, to cooperate with each other early.

These are all quotations taken out of the notes of the Advisory Committee to the e-discovery amendments. Look at the first bullet quoting Federal Rule of Civil Procedure 26. I do not know of any rule that explicitly said previously that you have to not only say what you are producing, you have to say what you have *not* searched. That certainly was a major advance of the civil rules and the e-discovery amendments.

The notes from the Rules contain a number of other suggestions about cooperation.

- Discussion at the outset may avoid later difficulties or ease their resolution.
- Parties may be able to reach agreement on the forms of production.
- “Parties’ discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities.”³⁴

You see it again and again in the notes. E-discovery is a matter of weighing benefits and costs, and it takes place on a number of different fronts.

You heard Jason give you his position on whether lawyers should jointly arrive at search terms. The Sedona articles and the proclamation all encourage this kind of joint cooperation at the front end. As an aside, I will tell you that I have participated in such negotiations at the front end. We need to understand, however, that there are currently no specific uniform rules that require this cooperation as a matter of regulation or rule. Nonetheless, there are a number of courts that have ordered parties to engage in that kind of cooperation and that kind of conferring.

You can see from this slide that there are other courts that say that the producing party is in the best position to determine what good search terms would be and that requiring a joint conference in that regard may actually deter efficient searches. The *Land O’ Lakes* case affirmed that the producing party is in the best position and that you may actually elongate the discovery process if you engage in multiple conferences and iterations of search terms.

34. FED. R. CIV. P. 26(f) cmt. to subdivision (f) (2006).

Finally, amongst practitioners there is considerable discussion about whether requiring disclosure of counsel's selection of keywords raises issues of privilege and work product. This question makes some lawyers pretty uneasy. I think Jason Baron himself would agree that the discussion is only at the beginning, that this is an area that parties are still working their way through, and that they probably will continue to work their way through it for at least the next five years, with help from people like Judge Facciola. We are going to have to work through this until we arrive at some reasonable body of precedent and expectation because, as I said, the devil is in the details.

Jason mentioned a minute ago the fact that lawyers obviously do not search databases for a single case. They search them for a number of cases. That is truer today than it has ever been in product liability cases and other kinds of repetitive litigation. Jason mentioned that Rule 3.4 of the Sedona Conference prevents a lawyer from obstructing and concealing a document or other material from the adversary. Note that the terms are "obstruct or conceal." There are some lawyers and some courts that have drawn a bright line between obstruction and concealment on the one hand and affirmative disclosure on the other. We are going to be talking about that more in just a minute.

Some cases have held there is a duty of truthfulness on the part of the lawyer who has been previously involved to affirmatively share prior experience with the data set. There are other cases that say the duty does not compel disclosure, only the preservation of documents. There are cases which say that the adversarial system has traditionally required a request before a duty to disclose arises. We are going to be talking more about the adversarial system in just a minute with an historic example.

There is a duty of confidentiality that, at least in my practice, compels me to consult regularly with my client. My clients by and large are in the office of the general counsel of corporations. They are lawyers themselves. They understand the rigors of e-discovery. They are under enormous pressure in today's economy to control costs, and electronic discovery, as you will see if you read any survey, is one of the cost items of most concern to any corporation that finds itself involved regularly in litigation. For good reason.

E-discovery is very expensive simply because of the volume of information it encompasses. No matter how effective, how productive, how experienced you are in engaging in e-discovery, it is expensive, simply by virtue of volume. It is that volume that drove the Federal Rules Committee to undertake the daunting task of coming up with e-discovery amendments. Those e-discovery amendments have been roundly criticized by some segments of the Bar and the Bench. Others

have said the problem was there and people needed rules and structure with which to handle it.

We come now to the thorny, prickly question of whether lawyers have a duty to disclose the existence of harmful documents that may not have been requested by the other side, documents that the other side may discover in a variety of ways, either from experience with prior litigation, from internal “what-if” keyword searches that may be done by one side and not by the other when a party is trying to get a feeling of the scope of responsive documents that may be out there.

This is perhaps the thorniest question of all, particularly in terms of the duty of confidentiality to your client. At least in my practice, the client is normally a lawyer himself or herself who is going to be familiar with the risks and the benefits of the decisions that are being made in e-discovery.

I think, certainly as a person and as a practitioner, I warm to Jason Baron’s discussions of cooperation between the parties, because I believe that in many cases it will produce a cheaper, better search. That is something that both sides ought to want. But I have heard conversations at e-discovery seminars and discussions with other lawyers that a concession that is not required but is simply something that you want to do as a matter of cooperation can introduce, down the road, unintended consequences. It can create a lot of other arguments before counsel as to why other, perhaps far less clear-cut concessions were not also made in other areas. My own feeling—given the lack of uniform rules or uniform protocol that exists out there, notwithstanding Sedona’s persuasive effect—is that this issue is going to continue to be worked out on a case by case basis for some period of time. That is not particularly happy, quite frankly, for the people that have to pay for it. But until we develop precedent, that may be the best we can do.

I looked for some kind of historic lesson against which we might gauge e-discovery in terms of “voluntary production.” The best that I could come up with was a proposed amendment to the Federal Rules of Civil Procedure in 1993 that was familiarly referred to as “voluntary disclosure.” After a number of years of commentary and criticism about the growing expense and burden of discovery, and after a number of articles and commentaries—most importantly by Federal Judge William Schwarzer, who headed the Federal Judicial Center, and Federal Magistrate Judge Wayne Brazil, who had written prolifically on this issue—the Federal Rules were amended to require that at the beginning of litigation, rather than waiting to receive formal discovery requests, each side had a duty to disclose to the other both helpful and harmful relevant documents.

That amendment to Rule 26 was, until e-discovery, probably the most controversial change to the Federal Rules. When the committee was considering it, there were numerous public hearings and a lot of commentary from all corners of the Bar. I had the pleasure of writing an article about that proposed amendment with a great Mercerian, Judge Griffin Bell. We wrote an article that was published in the Georgia Law Review in 1992 in which we reviewed all of the commentary submitted to the Advisory Committee on voluntary disclosure. Some of it is really quite interesting.³⁵

In that article, we reviewed the written and verbal comments made about voluntary disclosure. These comments were all over the map. There was much vigorous opposition. But we itemized the main criticisms this way: "At the outset of litigation . . . the parties may have little knowledge of the issues."³⁶ That same criticism certainly applies to e-discovery. Many criticized the notion of voluntary disclosure as resulting in overproduction of marginally relevant information, a risk any time that people are making disclosure other than in response to a discovery request. Commentators were concerned about increased motions practice and difficult line drawing.

In our article, we also expressed skepticism over whether the disclosure requirement would, as desired, return a level of professionalism and harmony to the discovery process; or whether, instead, it would work in the other direction. Interestingly, after about five years of experience, under amended Rule 26(a), the Federal Rules Committee conducted additional hearings and modified the amended rule yet again. As modified, and continuing through today, the Rules require voluntary production only of those relevant documents *that the party intends to use in its case*. This second modification followed continued criticism of the difficult and uncomfortable position that the rule imposed on lawyers, in that they might be required to take actions adverse to their client.

I just thought you might enjoy some of the comments that were actually made by practicing lawyers when they testified at the public hearings or when they wrote to the Federal Rules Committee. This is one. "My client should perceive me as his or her trusted and vigorous advocate and not some doubtful agent of an officious bureaucracy dedicated to imposing its altruistic ideal upon me at the expense of my client's interest." This is another from the Section of Litigation of the American Bar Association, a commentator that the Federal Rules Committee takes quite seriously. The ABA commented that they

35. See Griffin B. Bell, Chilton D. Varner & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1 (1992).

36. *Id.* at 39-40.

thought that full voluntary disclosure—including documents that were harmful to the client’s case—was fundamentally incompatible with the adversarial system. The ABA said it believed that voluntary disclosure would stimulate motions practice rather than reduce it.

Here is perhaps the most passionate of the comments, from a private practitioner. “I believe that the plaintiff has the burden of proof to make out a case, and if the plaintiff doesn’t make out a case, I shouldn’t have to do a thing.”

But lest we think that all of the criticism of voluntary disclosure came simply from practicing lawyers, some on the United States Supreme Court weighed in. As you probably know, after the Federal Rules Advisory Committee approves an amendment, it then goes to the Standing Committee. Once they approve the amendment, it then has to be sent to the Supreme Court for their approval.

It is extremely rare to have anything other than unanimous approval after a proposed amendment has gone through two to three years of development and vetting by a number of different committees. But when the amendment to Federal Rule 26 on voluntary disclosure came to the Supreme Court, Justice Scalia, joined by Justice Thomas and Justice Souter, dissented to its adoption:

The new rule would place intolerable strain upon lawyers’ ethical duty to represent their clients and not assist the opposing side. It would require a lawyer to make a judgment as to what information is, “relevant to disputed facts,” and so it plainly requires him to use his professional skills in the service of the adversary.

I will finish here. I hope that my remarks have been useful in establishing that this is a controversial and difficult area that has both pros and cons, I think, on both sides. Again, from a personal and professional standpoint, my practice is to try to work out search terms at the front end, to try to work out jointly cooperative discovery even in the electronic era. But I do think that there are many different considerations.

Jason Baron began by saying and then reiterating that volume is the name of the game. I agree with that totally. He said it is impossible to search manually all of the thousands of documents that may be produced in response to broad discovery requests. Certainly, complaints about overproduction are not new. We had them in the hard copy era. It was sometimes referred to as “discovery by warehouse” in those days. But still, volume drove the e-discovery amendments, and it is driving, I believe, increased cooperation among the parties simply because of cost. Economic self-interest will drive us ever closer, I believe, to cooperation.

The obstacles to getting there? Number one, I would say, is the vanishing trial syndrome. Given that so few cases are proceeding to trial today, lawyers who are working in discovery have less and less notion of what discovery was intended to do, which is to get you to a trial that you can win. In fact, discovery has become the end game in most cases these days, given the vanishing number of trials.

This is a problem to increased cooperation, because all of the competition that is involved in an adversary system is now played out in a discovery system by people who may never get to see the result in the courtroom. Because of burden, a party may object to producing something that the party eventually needs at trial to make out a case. The opposing party may believe it is best served by sweeping, rather than carefully drawn, requests for production. This places the parties on a collision course.

Second, I think there is some real fear of malpractice claims on both sides, both from individual plaintiffs and corporate clients who do not know very much about the legal system.

Finally, some parties may want to try to mine whatever they can out of the discovery process.

As Jason Baron said, cooperation depends on equal goodwill on both sides. That goodwill has proven elusive at some times in the adversarial practice of law, but I do believe that Jason is absolutely correct that the sheer volume of information and the cost of dealing with it in an e-discovery era is going to drive us ever closer to cooperation.

PROFESSOR LONGAN: Judge Facciola, do you want to bring us your perspective on these issues?

JUDGE FACCIOLA: Sure. Thank you. I am glad the Dean has left because what I am about to say would cause her to ask me to leave, but we will make it our dirty little secret. Law school has nothing to do with reality. I learned that in a terrible way the day I became a lawyer. I graduated from Georgetown, but I had to go into the service because the war in Vietnam was on, not that I went to Vietnam, but I had a service obligation. So unlike my colleagues, I did not get sworn in immediately after I passed the Bar. I was away and came back. I got sworn in about 1:00 and went back to work. I could not find the boss, and there was a note on my desk. It said: "Facciola, go to Court 1-C." In New York City, Courtroom 1-C is kind of like—what can I compare it to? A sewer.

Basically, it is all prostitutes—all of whom, by the way, are lined up behind you, which is great because they make comments about you as you are talking to the judge—and numbers runners. Before states had lotteries, there were numbers runners. You bet on the number. And for

reasons that have always eluded me, there were people who didn't get enough heat. What they were doing there was beyond me.

In New York they have a court officer who is charge. He is called the Bridge Man. He runs the joint. I walked up to the Bridge Man, and I thought I would watch under the careful supervision of a fellow assistant district attorney, and I turned to him and I said: "Mr. Bridge Man"—I was twenty-five years old at the time. I said, "Mr. Bridge Man, who is the assistant here?" He says: "I don't know. Some guy named Facula." I said: "Oh, my gosh." I proceeded to try my first five gambling cases, and I lost all five of them. So I had become a lawyer at 1:00, and by 3:15 I had lost my first five cases.

So after this eventful day, I went back up to the boss, and I was ready to slash my throat and resign. He said, "Who were you before?" I said, "Judge Doe." He said, "Doe acquits everybody." So, I learned that first lesson. Judges are nothing like Holmes and Brandeis. They are a lot like Judge Doe. And I wanted to, therefore, bring this kind of dash of cold water to these discussions, to be serious for a moment.

I believe the role of the judge is in the process of extraordinary transformation because of e-discovery. If I could, may I commend your attention to a case I just wrote last week? It is called *El-Amin v. George Washington University*.³⁷ Because it is pending before me I cannot talk about it, but I can commend it to you as an example.

El-Amin is a case that has been hanging around since 1995, a *qui tam* action brought by nurses who said that the hospital charged the government for an anesthesiologist when the anesthesia was actually dispensed by a resident. The case has been hanging around for thirteen years, and these two parties are ready to kill each other.

If you will look at that decision, you will see that I got on the phone with some friends of mine I met through Sedona, and I created a methodology under which certain documents would be searched. Another case presented another variation on the theme. Again, the parties could not agree. And in that one, I created a search protocol. Did I get it right? I have no idea. Am I a computer forensic technologist? God, no. I could not win a gambling case before Judge Doe. But what I am is a judge, and my fundamental responsibility is to find a way out of the chaos that the lawyers have created. No one has written more perceptively about this than Professor Judith Resnik at Yale. When she spoke at our bicentennial celebration of the court, she talked of how the Federal Rules have changed what a judge does and what a judge is.

37. No. 95-2000 (CKK/JMF), 2008 WL 4667721 (D.D.C. Oct. 22, 2008).

Professor Resnik said that if you had gone into the courtroom in the 1940s, you would have walked in, and the judge would have come out and said, “Ms. Jones, what’s our next case?” “Well, *Smith versus The Bus Company*.” “And what is it, Ms. Jones?” “Well, it’s a case involving a woman who got hurt on a bus.” “Okay.” “Get a jury,” and they brought the jury in.

Professor Resnik says the Federal Rules create a new paradigm of the judge: the judge as manager. The judge, who from the inception of the case to its conclusion, is managing the process consistently with Rule 1 of the Federal Rules of Civil Procedure. This is the fastest, the most efficient, cheapest way we can do that.

So I find on a daily basis that I am doing more management. The archetypical law school model of discovery is: he propounds the discovery to her. She objects and sends it back, and then they come to me with a motion, and I hear the argument, and then I rule. Of course, I do. But what I find myself doing much more frequently is saying, “The two of you, get in here. Did you meet-and-confer?” “We waived meet-and-confer.” “Oh, really, you waived it. Oh, that was nice. Did you tell me you were going to waive it?” “Well, Your Honor, no.” “Wells are for water. Why didn’t you tell me?” “Your Honor, we’ve had previous cases. We don’t really get along. We didn’t think that it would be meaningful, and we thought it would make more sense to bring the dispute to you.” “Well, how nice of you to do that. Do you know what happens now, you two go in the jury room. That’s my courtroom clerk. She’s going to lock the door. When you resolve this, knock on the door. You’ll be permitted to come out.” “Judge, what if we can’t agree?” “We’ve got a problem then, don’t we? We’ll send in food. We’ll call your families. Don’t you worry. Eventually you’ll get out of that room.”

Do you know what the strangest thing about this is? Ten minutes later, they are getting along. When I call them back before me, and they say, “Well, we worked it out.” “How surprising. Why didn’t you do that six months ago?” “Well, Your Honor—.” “Wells are for water. We’re back where we started from.”

Their inability to agree and confer in good faith cannot possibly be a good reason to waste precious resources. How could you possibly make that argument? We have heard about the Sedona Conference. I was the last speaker when we rolled out the proclamation on cooperation, and I said, “Okay, I think I understand what we’re doing.” By the way, can someone make the argument against doing this? What is the argument in favor of being intransigent and stupid during disputes?

Now, if that is the more common model, it is a model with which I am very familiar. I do at least two settlement conferences a day. How about you?

JUDGE BAKER: It runs in streaks.

JUDGE FACCIOLA: Yes, it is estimated that magistrate judges spend about seventy to eighty percent of our time solving disputes. Cases are often resolved and we verify settlements. We have a black robe, we deal with trial lawyers, and they know the game. But the important thing to bear in mind is settlement discussions have very different ethical rules than the adversary system. The law and ethics have always been much more tolerant of shading the truth during settlement discussions.

The first thing you learn about settlement discussions is that nobody tells the truth. The system would not work if anybody told the truth. She comes in and says, "We won't take a penny less than a million." He comes in and says, "We're not going to give a penny more than \$5,000." Well, come on. They would not be here if that was the truth.

So then in the process of mutual lying, we get the lies down to a minimum. And, finally, we get down to the point where he says, "Judge, we won't take a penny more than seventy-five (wink, wink), but fifty-five might tempt us." She says, "Judge, we're not going to pay a penny more than fifty (wink, wink), but fifty-five may be where this works out." Now we have fifty-five in the bank, and we have done it.

During that process, if they were both held to the ethical standard of never shading the truth, the process would not continue with the result that the ethical canons pertaining to that process are very different from the adversarial ones that have been reviewed in terms of honor and truthfulness. The point I am trying to make is that once the situation shifts a bit and I become the judge as manager and we go into a settlement mode, the traditional thinking would be that they can get away with puffing and so forth.

But that is not the way I think about it when I am doing a discovery dispute. As I just told you, I do not really care what they said to each other that they did not mean. I do not really care all of the representations they have made. But I will tell you one thing, they better be telling me the truth, because we have shifted gears. Now these representations are being made to me.

So, what I am trying to say is that the lack of cooperation among them, the lack of honesty, the potential deception that goes on in the process leading up to the dispute coming before me is irrelevant. As to that, as a judge, I am agnostic. I could care less about it. That is something for disciplinary lawyers to work out. But when they speak to me, they had better be telling me the truth because then the ethical canon is clear. They owe me the candor of where they are.

The strange thing about this that you might find quite remarkable is lawyers welcome it. I have yet to have a case where my intrusion was

unwelcome. Cases go on for years, and they are still quarreling how to search the documents. When I intrude, far from being angry, it was very welcome.

So what I am trying to say here is that the model that we are dealing with has very little to do with an adversarial model. It has very little to do with a settlement model. It is some sort of crazy in between thing, and during the course of it, I am going to insist on honesty and candor. I am going to insist on it because that's my responsibility. My responsibility is not to see how expensive we can make this thing.

Now, if I can, a variation on Jason Baron's theme, with my final hypothetical. I was an Assistant United States Attorney for fifteen years. I somehow recovered from Judge Doe and those gambling cases and went on. Let's just say for the sake of the argument I am prosecuting a purse snatching case. The victim is a sixty-five year old woman, and she is really my only witness. He grabbed the purse. She saw him. He ran away. But we do not have anything on this guy.

Let's assume that the case is scheduled for this morning, and he is going to plead guilty. He is going to take a lesser plea; he is going to plea bargain. About ninety percent of all cases in America are settled with pleas. So, the night before the trial her son calls me. He says, "Mom is not going to be able to come to court tomorrow. She died an hour ago."

Question: Am I obliged to tell defense counsel that that has occurred? No lawyer in his right mind is going to plead guilty or permit his client to plead guilty if he knows that. I struggled with this as an Assistant United States Attorney, and I made the conclusion, very similar to what Jason Baron says, that being an Assistant United States Attorney is very different from being anything else. In my naiveté I took very seriously that wonderful line that a United States Attorney is different from a lawyer. That is, your responsibility is to justice. If this guy is going to go away for ten years, I think I am obliged to tell him.

Now, in a room just like this that was filled with prosecutors that decision got catcalls. They said, "Are you crazy, man? Are you nuts? It's a system. It's a bargaining system. He had a bargain. He took the bargain. It's time for him to get his kitty up there and do the right thing."

I do not know if that is different because the responsibilities of a lawyer in a public setting or in public interest are different. But I think it underlines Jason Baron's point, which is that as I made the decision I made, much of this is informed—all of it is informed—by the kind of lawyer you want to be.

It is said that if you impose your own ethics, your own sense of what is right, that may be in dereliction of your client's responsibility. I think

I understand that, but I also understand that you are not the only lawyer on Earth, and if you choose to live your life in a particular way, that person is simply going to have to get another lawyer. It may be unrealistic, but those are the standards to which I hold the lawyers in front of me.

Now, another question which I think drives it. About eleven years ago when I first got into this, I reasonably expected that the practice of law, like anything else, was market driven. This new thing had emerged, this new skill, and it had to be learned. Therefore, all lawyers would learn it. It would be just like the Internal Revenue Code. Once the Internal Revenue Code was passed, it would be dangerous if you tried to consult business clients and not know it. And I thought lawyers would do the same thing—they would all reach a certain level of competence. But as Ralph Losey is probably going to emphasize, that has not happened.

The Bar has been subdivided in a strange way. In one part of the Bar are the Ralph Loseys and the Jason Barons, at the very summit of the profession. Indeed, some of you will be going to law firms who now have e-discovery shops. Indeed, there is a law firm in America that does only that.

The next level of the lawyer is not at that level of expertise, but at a different one. It is at a level where I know enough about the Internal Revenue Code not to be dangerous, but I have enough brains when I get myself in a mess like this, to call about it, to associate myself with someone who knows more or to build up within my shop an internal capacity.

That is kind of where I thought the practice would go. It is not happening. But what has happened is a bunch of lawyers who have exempted themselves from learning this, as hard as that is to believe.

Now, what is significant about that is that in many respects those lawyers may have a very strong influence on State Bars and their willingness to proclaim, to promulgate rules pertaining to electronic discovery, which may or may not follow the Federal Rules. But it is that group of the Bar that says, “I do not really see or understand this stuff. That’s Nintendo. That’s something my grandkids play with. And I know the guy on the other side, and I think I can make a deal with that guy that we won’t go there. We’re going to isolate ourselves from electronic discovery.”

Now, there is nothing abstractly wrong with that. There is no law that says there has to be electronic discovery in every case. We have landlord-tenant cases. We have consumer loans, small stuff. But the point I always make is, Jiffy Lube has a computer. What element of our society is not affected by this? The strange thing about this is we are

finding that many discovery disputes are arising in, of all places, domestic relations court.

Love is grand. Divorce is about two grand. She jumps on the computer and finds e-mails to the girlfriend that he forgot to delete. He jumps on the same computer to go into their Quicken books to see what money she took to go on a cruise. And love is so wonderful they each put GPS devices in each other's cars. As recently as yesterday there was a good piece in *The Times* and *The Post*, something that concerns me as a judge, which is Googling jurors during the voir dire to find out mortgage, criminal record, things that they are not going to answer truthfully. So there is one part of the profession that welcomes this and is excited by it and appreciates this is the reality. There is another part of the profession that seems to be exempting themselves.

I went to the RSA Conference,³⁸ an amazing group of information specialists involved with information security. It was strange to be on a panel and you're the only guy without a Ph.D. in mathematics. Still, it is a weird feeling. I was struck by how these people must again and again get certification every two or three years in terms of the technology. Without that certification they cannot keep the jobs they have, let alone advance.

It occurs to me our profession has exempted itself. Given some of the guys who appear before me, it is clear that the only qualification for a member of the Bar is to have passed the Bar exam in 1960 and to continue to have a pulse. If this stuff is as complicated as it is, and it gets more complicated with advances of technology, I do not think that society can tolerate the courts in turn tolerating people coming before them on crucial issues who do not understand this.

I had a child pornography case. These child pornography cases are really horrible cases and the penalties for the stuff are draconian. We are talking ten to twenty years, and we are talking about the guys who download this stuff. I have had a Captain in the Navy, a software engineer, and a minister. During the course of a hearing, it became crucial to understand how the FBI guy, who was posing as a twelve year old kid, was preserving the information. One lawyer got up and said, "Gee, Your Honor, I just don't understand this computer stuff." I said, "Come here. We can't go on with this hearing. You've just confessed you're ineffective."

So I honestly believe that what Jason Baron has talked about, competency is going to become much more crucial in this. In other words, as I finish up, my theory of this is the judge model will change.

38. See <https://365.rsaconference.com> (information security professionals' resource).

The judge will be more aggressive. Whatever the lawyers say to each other, they must be truthful to me, and the judge will manage.

The methodology and mechanism is not the traditional adversarial model nor the traditional settlement model. It is somewhere in the middle. And since the judge is now intimately engaged in this process, I think the value of candor to the tribunal from the lawyers, the lawyers' responsibility to that may overwhelm any other consideration. Those are my views. Thank you.

PROFESSOR LONGAN: Do we have questions from anybody for any of the panelists? Professor Lewis?

PROFESSOR LEWIS: Thank you all for just splendid presentations, absolutely marvelous. As I am listening to all three of you, I am noticing common characteristics of this problem that make me wonder about a dispute resolution mechanism you have not mentioned. Huge economic stakes are turning on the outcome of the e-discovery dispute, which is just a sheer lack of time.

Only one side really knows the data or information at stake. The receiving side knows the precise content of what would be presented if production occurred as ordered. Real uncertainty exists about the legal rules and therefore the consequences of a later determination when something should have been produced but was not.

So the thing that has to be in the resolution structure that immediately comes to mind is mediation, where we have the feature of a confidential caucus in which you have a truly expert mediator. Someone, say, with Jason Baron's background and experience as a lawyer, technologically and professionally. Having the parties invested, taking a day off from the normal track for a procedural mediation about e-discovery and how is that working out?

JUDGE FACCIOLA: Let me explain it. The two models under which Judge Baker and I work would be the judge as lawyer and the judge as mediator. When the case comes to me and the district court judge says this matter is referred to Facciola for discovery, I do not preclude that this matter is referred to Facciola for mediation, so I will tell them up front, "How do you want to work this? Can we talk?" In which case our discussions are confidential and off the record, and they usually will say that.

Now the question becomes, after I have had those discussions, I turn to them again and say, "Okay, we can't work it out. Do you mind if I now preside?" And they usually don't, because I now have had a couple of hours of knowledge of this. So one model does not exclude the other.

As part of the Sedona cooperation toolkits there will be encouragement of a model of experienced Jason Baron-like mediators who will volunteer their services. That is very much in play these days. The American College of Court-appointed Masters has put this on their agenda as well. So I think you will see the growth of a cadre of people who will function as mediators.

MR. BARON: I particularly appreciate the question given that I have two years and a couple of weeks, actually 114 weeks left in my federal career, but who's counting. So there may be life after the federal government.

I do believe that some form of a neutral and independent expert who is either appointed by the court or agreed to by consent of the parties might be an approach in a technological era where it can really get at some of these issues in a fashion. So it would not be the traditional arbitrator or the traditional mediator, but somebody with expertise. I think you are going to see certified technologists and others that are stepping forward with litigation expertise to help the process.

PROFESSOR LONGAN: Other questions?

AUDIENCE QUESTION: Good morning. I am the Executive Director of the Chief Justices Commission on Professionalism. I guess my concern is how the competency of using e-discovery affects access to justice. The Judge talked about the prosecutor's side, but on the defense side there are more limited resources. And typically when we get into family disputes everyone is not involved in an expensive divorce. So I am concerned about how the competency of using this system helps in access to justice, because a lot of people believe it is already too expensive.

JUDGE FACCIOLA: Well, there are a lot of aspects to that. The first aspect of this is on the criminal side. We are growing increasingly concerned that the costs of electronic discovery in criminal cases are going to overwhelm our Public Defenders' funds.

For example, to answer your question, I am handling discovery in a FARC case. Those are the narco-terrorists from Colombia. We have thirty-five thousand phone calls on DVDs that were intercepted over the years, as well as mountains of information that is handwritten in Spanish. What we are trying to do is figure out some way to make that information useful to the defense without bankrupting the government. There are twenty-eight defendants in that case, so the problem will repeat itself twenty-eight times. So, you are quite right. We cannot as

I said eleven years ago, we cannot have three hundred thousand e-mails. The system is going to collapse.

PROFESSOR LONGAN: Chilton Varner?

MS. VARNER: I think that the short term answer really does in large measure depend upon a judge who will get in there and try to manage through those problems. And I would like Judge Facciola to comment. State court judges in particular are understaffed and overworked. Federal judges are to some extent understaffed and overworked, but there is also just a tremendous distaste on the part of a lot of judges for messing around with discovery. They do not want to do it, so they don't.

And I really would like to get your comments on what you do if you have jumped through all the hoops. You have had the meet-and-confers, and you have actually talked at the meet-and-confers, and you think that it would be helpful for a judge to try to weigh these costs and benefits and help you arrive at a reasonable solution that will not bankrupt the poor side. And the judge just says, "You go figure it out."

JUDGE FACCIOLA: Well, I don't know. I cannot defend it. That is indefensible. I mean the system is not going to permit that any more. Although, in defense of judges, and I am sure Judge Baker will confirm this, one of the things about discovery is thousands of dollars are paid, and the discovery is ultimately produced, and it is absolutely insignificant.

I had some genius who made a work product claim. It was a note, and the note said, "Jim, meet you at the hotel, Tom." I said, "What are you talking about?" He said, "Well, it exposes my mental processes. I thought it was important that we would meet."

One can only pray that lawyers will be disciplined when they do something like that. But if they are not invested in it, as you said the system is generated by the lawyers. I assume, and you have to help me. Clients are not crazy. They do not spend \$5,000 in a dispute over a note to meet a guy at a hotel. Is that the answer? Is the market going to drive this to something more reasonable?

MS. VARNER: I think it will. I just do not think you can afford to do that anymore. It has been interesting. With the e-discovery amendments, it was contemplated that you could have these clawback agreements where you would produce large portions, large volumes of documents without individual review for privilege. You could reach an agreement with the other side and pull back a privileged document that was inadvertently produced. It did not accomplish that. The rules say

nothing about whether a document is in fact privileged. That determination remains to be made under state law in most cases and certainly in diversity cases. But, under the e-discovery amendments, you could at least claw it back without having waived your privilege. At least my anecdotal surveys of all my colleagues tell me that nobody is willing to take advantage of that escape clause. The thought of having your adversary and possibly a judge look at your privileged documents is a real intimidating thing.

JUDGE FACCIOLA: There are two very novel ideas that I liked. Judge Tenille in North Carolina, the Business Court, has created a model. And that model is, what is this case worth for settlement value and for trial value? That is the first aspect of it. The second aspect of it is how likely is it that this discovery will advance those values? From that he deducts and comes up with an actual hour number and says you can do this in so many hours.

Judge Paul Grimm, in Baltimore, his variation on that theme is a voucher system. If you come to him with a dispute, he will say, "I want to kind of give you a voucher for fifty more hours. I insist that as quasi-judicial officers you keep your client carefully informed, and report back to me. I'll give you no more than fifty hours. See if you can get it done." Man's best friend is a deadline and a page limitation. Guess what, they get it done in thirty hours.

So the point I am trying to make is the notion that there is an infinite capacity to discovery is something we must disabuse ourselves of.

PROFESSOR LONGAN: Well, we could continue this, but I think we need to take a fifteen-minute break. We will come back at 10:55, and we will go until 12:10 with the next panel. Join me in thanking our first panel of the morning.

— *SHORT BREAK* —

PROFESSOR LONGAN: Welcome back. This is our second panel of the morning, also devoted to the issues related to e-discovery. Given the time change that I made as we ended the first panel, we will be going until 12:10. We have a primary presentation and two responders, and then we will take some time at the end for questions.

For this panel, our primary presenter is Ralph Losey. Ralph is a shareholder with Akerman Senterfitt in Orlando, Florida. Responding to Ralph will be Bill Hamilton, who is a partner at Holland & Knight in Tampa, and then Judge David Baker, a United States Magistrate Judge

in Orlando. So I guess we can call this our Florida panel. We won't talk about the football game.

MR. LOSEY: I might.

PROFESSOR LONGAN: As your attorney, I advise you not to.

MR. LOSEY: I apologize for the lights being turned down, but I wanted to try and make this PowerPoint pop out. Also, if any of you were up late last night, this will be your chance to nap. No one will see you too much. First of all, I really want to thank you for inviting us. This is really a very nice event. I had never seen Mercer Law School. This is an incredible building and school.

Actually, I am somewhat familiar with law students because my son is a third year at the University of Florida, and he is on the law review there. I really like your generation, and I think law students today are honestly smarter than my generation and just as argumentative. I got a chance to meet a couple of you coming from the airport, which was very nice. I look forward to your participation. If you have any questions, I do not mind interruptions.

I actually fell in love with computers when I was in law school in the late 1970s and have now been kind of enthralled and interested in what computers can do, digital technology, for thirty years. There is only one person I know of that has a longer history of working with computers, and that is Judge David Baker, who I am fortunate enough to have as a magistrate in my town. You have been working on it for how many years now, David?

JUDGE BAKER: More than thirty. Well, actually more than forty.

MR. LOSEY: More than forty. Back in the old days it was really hard to get to computers. Now everyone has one. One of the reasons I was excited to come here and excited to be able to talk to your generation and your professors is that I think it is important that your generation understand before you get out of law school how essential it is to have e-discovery skills and knowledge. A lot of us here do a lot of talking at CLE's to adult lawyers, and it is a little bit frustrating because there is a huge gap in understanding about computer usage. Your generation, I think, is going to quickly catch up and hopefully the problems of e-discovery we will talk about will be resolved.

I have been practicing law for twenty-eight years, so almost as long as I have been playing with computers. I have done commercial litigation, employment litigation, and of course computer-related litigation. About

two-and-a-half years ago I honestly got fed up with doing litigation all the time. I was specializing in ERISA litigation. If you know anything about that, maybe you understand why I got tired of doing it. It is highly complicated.

I talked to the head of our litigation department at Akerman Senterfitt and he said, "Yeah, go for it. Change your practice." And in the last two-and-a-half years, I have only done electronic discovery. That is what I do in practice, and when I am not practicing, I have switched to doing a lot of non-billable work as well. I am reading about this. I try to read every case there is. I am doing a lot of writing and attending a lot of events, and I am doing a lot of teaching.

One of the things that puzzled me the first year or year and a half of reading this is why there were so many spoliation sanction cases. I must have two hundred litigation partners or associates that I back up and get e-discovery questions from, and seeing what was going on in the larger world of litigation, I learned that it was not the focus so much anymore to get ready for the trial and to get the facts.

The keynote last night by Professor Monroe Freedman, "Whatever Happened to the Search for Truth," about avoiding losing the case, your accidental spoliation, or winning the case by proving the other side was not being forthright. This used to be unheard of. In the first thirty-five years, there was almost never spoliation motions. I only remember one before the computers came in.

I could not understand why we were now having so many sanction cases. What was happening to the Bar causing so much evidence being destroyed by parties and by attorneys? The focus now is on sanctions of spoliation for not keeping evidence and not producing evidence. I really did not know the answer to that, so I have been thinking about this for some time. I sort of mused about that out loud in this weekly blog I have been writing for over two years now where I write a three thousand to five thousand word essay every weekend, much to my wife's dismay. It kind of killed our Sundays.

I would write up case after case in the weekly blog, many if not most having to do with spoliation. I am sure you have heard of the *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*³⁹ case. It is the most-downloaded case that Lexis has, according to Lexis. It is a state court case, and you would not normally find it, but they published it because there was a judgment entered against Morgan Stanley, when they still had money. Morgan Stanley, based upon a default being entered, had an adverse inference sanction imposed on them because they lost e-mail.

39. No. 502003CA005045XXOCAI, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005).

I mean, they lost millions of e-mails. We do not really know how much they lost. So they lost the whole case on liability. All that was left was a trial on damages. The jury whacked them for one-and-a-half billion—that's "B," billion dollars—in state court. It went up on appeal and was reversed, not because of the sanctions, but because they did not get the damages totally right. But the sanction part still stood.

I can tell you just in the last couple of weeks, in another state court case in West Palm Beach, I was asked to look at a similar situation where another defendant had lost another case again. This time they were not New York lawyers that came down to West Palm Beach that got this handed to them. It was local lawyers in West Palm Beach on both sides. Different judge, same court, entered sanctions striking their pleadings, regardless of the merits, because they did not produce all of the information. They actually discovered a computer they did not know they had, and that made the judge angry. Now they are faced with a trial in January just on the amount of damages that will be imposed on them. Guess what? They are seeking \$3,000,000.

This kind of thing is going on all the time. There are all kinds of cases that never get seen by the judges where we are forced to settle because we know that we cannot afford the expense and cost involved in doing discovery. This is in part a problem of the client's own making, too. They could be better organized in their information, but they are not. So, rather than engage in the actual pursuit of truth, they are being forced to settle for too high a number because they do not want to go there, and one side is forcing them to go there.

Why is it that all of a sudden we have all this seemingly unethical behavior on the part of lawyers and parties? I did not believe that suddenly there had been a moral decline. There was something else to it. I also did not see these kinds of spoliation cases in other parts of the law. They were solely in e-discovery.

So I started to think about what is driving that? Then when I got the invitation to do this, I said, "I need a deadline to get things done," as the Judge mentioned. So I gave myself the task to try and figure this out, and this is the thesis I am going to present to you today. The article is *Lawyers Behaving Badly: Understanding Unprofessional Conduct in e-Discovery*.⁴⁰ To those of you that are over thirty, there is apparently a TV show called "Men Behaving Badly." I would not know any of this popular stuff unless my son or daughter tells me about it.

So this is a "Lawyers Behaving Badly" essay to try and explain my idea of why it is that there is all of this bad faith conduct, particularly

40. Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in e-Discovery*, 60 MERCER L. REV. 983 (2009).

in the area of e-discovery. And I came up with this one. I hope you enjoy it.

This is what I thought were the four forces that were driving the ethical situation here with e-discovery and lawyer conduct. First of all is zealous advocacy. This is one of the things we are required to do. I was trained by a firm with some old-line litigators and, believe me, they were zealous advocates. My prime duty is always to my client, but it is balanced by other duties. By saying prime duty, I am showing my bias right there. That is the way I was taught. That is hardball litigation, but play by the rules.

In addition to that, there are the duties to the court. Now these are supposed to be countervailing and, as you will see, in order to do that you have only two rules in the model rules that talk about your duties to your client. You have four or five rules about duties to your profession. These should be in balance in order for the system to work properly.

But the other factors in e-discovery are technology and law. By technology I am referring to the fact that in the course of my professional life the evidence has completely changed. When I started practicing law in the early 1980s, it was all paper. Now guess what? Most law schools do not know that it has completely changed, and I will pick on the University of Florida where we are one of the leaders with Bill Hamilton. But in our trial practice there, the way they prepare for trial is they each get about twenty pages of documents.

Well, there has not been a twenty-page document case in decades. And guess what? There are not paper cases anymore either. Most of the profession does not know this, but our clients mainly are using computers to store information. If you just are looking for evidence in the filing cabinet, you are not looking where the evidence is. The real evidence is in the computers. It is mainly in the e-mail.

To practice in today's world where the businesses and society and individuals now store information, not on dead trees with stained liquids, but they are now storing it as zeros and ones. That is the reality. Most of our profession, though, does not understand this or does not want to understand because they do not really understand technology. They do not even like technology. Law schools do not attract technology types. If I had wanted to learn about math and science, I would have gone to medical school.

And that is part of the problem, too, is that we are not really preparing many of our students to enter today's digital world because we are not addressing technology. My son told me you can be admitted to law school and go all the way through and not know how to turn on a computer. I hand it to Mercer Law School. You were issued a laptop,

so I think maybe you have to know how to turn on a computer here. But you are the rarity. Most law schools do not issue computers. They use computers, but it is really not part of your tool set. So we have these four different factors that I think are underlying why we are getting unprofessional conduct.

The final factors are the technological challenges and legal competence. We touched upon it in the last panel. You need to know the law. Most lawyers do not really know e-discovery law. That they can learn on their own. That is within our ability. That we were taught to do, just to learn what the law is, but it is not being done yet.

When you have competence in knowing what the law requires—what your duties are—that can help you do the right thing. Because what we are talking about here is doing the right thing. That is what it is really all about, and I will tell you what, it is better in the long run to do the right thing and sleep well than to do something that probably is not right and you know it and make a lot of money.

But that is the hard reality of choices you are going to be faced with time and time again. You are going to have scenarios that we cannot even dream of now involving Third Life or something like that, where you are going to know and feel what the right thing to do is, but the client may be urging you to do the wrong thing, and you have to step up to the plate and either resign or counsel them to do the right thing. But whatever you do, don't make the mistake of doing what you know is wrong in your heart and making a lot of money for it but not being able to sleep well at night. That's what legal ethics is really all about—training yourself to do the right thing even though it can be hard.

You know, not everybody has a Professor Freedman to call when you have a problem. I am fortunate that I am in a larger firm where we have a full time ethics officer who we can call. I give him what the scenario is, and he gives ethical advice. I would urge you just as a practical matter having nothing to do with e-discovery, when you are out in the real world and faced with an ethical dilemma, do not just decide it on your own. Get some outside advice. Florida has a 1-800 hotline. You can get anonymous advice from the Bar. Seek professional counsel in this area. Whatever you do, do not make the wrong decision. Even if you get away with it, you will know in your heart you did the wrong thing, and it is going to plague you through your whole career.

Now, back to e-discovery. The two forces that I think are at work here, and this is spelled out in the article, so I won't go into great detail, are the duties to the client and the duties to your profession. Both are important. Diligence we talked about, and it is really the core of doing everything you can within the law and the boundaries to represent your

client. That has to be balanced out. The other duty you have is to keep your client's secret a secret. Keep information that is disclosed to you confidential.

That is on the one hand. But then on the other hand, we have the duty to be competent in our profession. We start getting into where there is sometimes more conflict—expediting litigation. What if your client does not want to expedite litigation? What if you are a defendant that says, "I hope this never goes to trial. Delay this baby as long as you can. Maybe they'll run out of money. Maybe they'll settle for cheap."

This is not just theory, this is everyday real world stuff. There are a lot of parties to a litigation that wish they would never go to trial, and most of the time they are right because only two percent of the cases in the federal system go to trial. Ninety-eight percent of the time it goes away one way or the other, and a lot of times it goes away because it has been hanging around for so long one side or the other runs out of money or just gets tired of it and they are forced to settle for either too much or not enough.

The other duty is a candor towards the tribunal. When I am in front of a judge and the judge asks me a question, I think long and hard, and I tend to give long answers, and the judge ends up saying, "Okay, that is enough. Let's go." It's because I want to be sure I am telling the judge everything as honest and accurate as I can. That's why when they ask me what my bottom line is in settlement, everybody knows you lie about that. But if I am in front of a judge, and they ask me the question, you have to tell the truth. You cannot shade the truth to a judge.

And yet, this is happening. *Qualcomm, Inc. v. Broadcom Corp.*⁴¹ was the big ethics case of the year, and probably the decade. The district court judge practically made a finding that one of the senior litigators, at a firm established in San Francisco in 1860, was asked a direct question by the trial judge during trial at sidebar and the judge said that he did not tell him the truth. Judges never say anybody lies. They just say he did not tell you the truth.

Now, that is an awful thing, I think. It is no coincidence that the firm is now breaking up because one of the remedies that this judge considered, and that the magistrate should look at when it was remanded back to him to evaluate sanctions, is he said, "I want you to consider sending a letter to each and every one of the law firm's clients, sending them a copy of the judge's order which made these findings of

41. No. 05cv1958-B(BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008).

unethical conduct by senior partners and by other lawyers, including a two-year associate.”

You’re an associate. You signed a discovery response. Your license is on the line, so you better take it seriously. The judges do, and the Bar should. So that was one of the remedies: send that letter to each and every client.

Another remedy, the magistrate said, was to send a letter to each and every judge in every case that this law firm has a matter pending in state and in federal court. Send a copy of my order, which basically says these people are not playing fair, look out.

Now, ultimately the magistrate did not impose those sanctions. In fact, this case is still up in the air. There was an order entered and it was remanded back. It will be tried probably in the spring of this year in what a lot of people are now calling the circular firing squad, where the lawyers of Heller Ehrman and the other firm, an intellectual property firm in California, are blaming Qualcomm and their attorneys. Qualcomm and their in-house counsel are blaming their outside counsel.

In the first trial, the court held that the attorney-client privilege silenced the outside counsel. They could not tell the truth of what happened. As a result they were referred to disciplinary proceedings. The district court judge reversed and said, “That’s not fair. The self-defense exception applies here. We are going to ungag outside counsel, and they are now going to tell their version of the truth of why they hid thirty thousand e-mails, knowing that if any of them came out it would kill their case.”

It was not just hiding inconsequential stuff, it was hiding core evidence. The evidence suggests they deliberately hid it from the court. So now in the upcoming trial, we are going to find out who was at fault. Was it the in-house lawyers who were involved, or was it outside counsel? Those of us who have been around all figure they are going to find both sides were at fault.

By the way, we are talking big money here behind this. The other side got their fee award as a sanction. The defendant, Broadcom, is no innocent lamb either. The president, I think, was indicted. Not their lawyers, but the president of Broadcom. By the way, these companies are suing each other all over the country. There are a number of lawsuits involved.

Their fee award was \$8,500,000 just in this one case. So Heller Ehrman and the other attorneys representing Qualcomm, we are talking about them getting paid over \$8,000,000 for one case. That is a lot of motivation to maybe bend the line, maybe do what you shouldn’t do and then make that bad decision in the heat of trial to not tell the truth to the judge. And they are going to regret it, and this is something that’s

a matter of public record. And now they are going to face a circular firing squad.

Look for what happens in San Diego in the spring and what truth comes out as to who was at fault. My prediction is that you are going to find both sides at fault. So, candor towards the tribunal is critical. Nothing can trump that. You cannot lie to a judge. There is no excuse for that.

The final thing is fairness to opposing party and counsel. A lot of lawyers in practice think they cannot really believe that that is actually an ethical rule because they are not fair. They think their job is to be unfair. That is wrong. You have to be fair. That does not mean you have to say, "Oh, here's the smoking gun. Let me show it to you." But that is different than "I found the smoking gun and, you know what, I'm going to throw it away." That is unfair to opposing counsel, and it is unfair to opposing party. That is also a crime. That is destruction of evidence. You cannot do that.

I personally think that this has gone on among a few bad apple attorneys from the dawn of our profession. There are some attorneys who get so involved in representing their client and being diligent, that they will knowingly take evidence that they have found, and they will either destroy it or they will put it in the filing cabinet and forget about it. Even though there is a request for production clearly requiring them to produce it, they will not produce it.

This has gone on for a long time. I have suspected that the other side has been doing it throughout my career, and I know there are certain attorneys who cannot be trusted, and you start to know to look out for this guy. But it was very hard to catch him at it in the past because it was easier to destroy and hide paper.

Nowadays, with the e-mails that never really go away and you think you deleted, it is easier to catch the bad guys. Part of the reason that we are now having this flood of spoliation sanctions and attorneys being caught is because of the technology. You cannot get away with it this easily anymore. When you find the e-mail that they say does not exist and you find it from a third party who forwarded it to you, you can then start to prove that they knew they had it and they hid it.

This is where you get into the gray areas, too. You have the smoking gun against you. Our last panel mentioned this is one of the tough questions. I agree. And you do not withhold it because you interpret their request in such a narrow way that, oh, they didn't really ask for that. That is not right. And you have to think, "Is this something that I can tell the judge when in fact this wasn't requested?" Or is he going to look at you and say, "That's baloney. That is not a reasonable

interpretation. You were hiding evidence. You were not being fair to the tribunal and opposing party.”

These are the kind of decisions, even as a young associate, you are going to have to make because you are the ones often dealing with these kind of production requests. You are the ones signing your name certifying that that is a reasonable and accurate response.

So those are our duties and rules. What I have found is that attorneys are giving greater weight to the client duties than the duties to the profession. And as I mentioned in my article, the reality is there is a thumb on the scale here, and the thumb is the clients that are at war with the opposing party. This whole dispute resolution has been in lieu of fisticuffs or dirty tricks. I think it was Professor Freedman's article where he said he thinks that not having enough lawyers in Japan kind of explains the rise of their mafia over there, where they settle disputes by putting hits on people the old fashioned way, because they do not really have that much of a recourse in the civil justice system.

So we do not kill each other too much, although it does happen. It seems like if people try to hire a hit man, they always end up working for the FBI. It's like, what does the FBI do? They hang out in bars and pretend they kill people.

So it still does go on, but we want people to come to the courtroom. A lot of times the clients don't want to play fair. They just want to win. And it is our job as legal counselor to explain to them you have to play by the rules. Yes, if you have information, you must give it to me, and I look at it, and you must produce it as information that will hurt your case if it has been fairly requested.

Clients don't get that. They think, “Well, it is my information. Why should I give it?” And you know what, most of the world doesn't get that either. In Europe, do they get the whole idea of disclosing information in your computer systems that might help the other side? No. But this is a part of our system of justice that is unique. We must voluntarily produce information if it has been requested that will hurt us or our clients.

This sounds easy in theory, but in practice the clients are not liking this. They will put pressure on you not to produce it, and you have to stand up to them. That is where you have to make the right decision to do the right thing.

But there is more to this than the conflict between duty to client and duty to profession. There is a third factor at work, legal competence. It is a little bit different than just duty to the profession. I think that what has really made the system work is that there has been a lot of pride in doing your work right and in learning and being very competent.

All throughout my career, until just recently, everybody took pride in their work and tried to attain a high level of professional competency. And this would buttress your duty to the profession because to do the right thing and to fulfill your duties required a high level of skill where the clients would rely on you. They would take your advice because you were the best in a certain area. You were highly qualified in that area. And so, to understand the ethics of e-discovery you have to see there are really three different forces at work here. This is explained in the article.

I am going to try and wrap up because I am very interested for my panelists to join in on this. You have the professional duties on the one hand and the duties to client, but it is three-fold—you see the two uplifting duties. There is the legal competence of doing the job well, doing the right thing, being honest to the court, and being fair to opposing counsel. And then duties to the client on the other hand who does not necessarily want to do the right thing. They want to win. They either want to get the millions of dollars they are trying to get as the plaintiff or they do not want to pay the millions of dollars that they think is unfairly being demanded of them. Sometimes they are going to make or break cases; the company will go down.

Sometimes in divorce cases or when we are talking about losing the right to see your own child, there is a very high component of emotion involved. You do not really get that in law school until you are in practice and you can see how angry people are at each other. That is why they sue each other. So the forces at work here are three-fold, two going up, one going down, tempting you to do something you may not want to do.

But the last force at work is this shift to computers, the technology part of it. The first panel has touched on it. I am going to give you my own little flavor to it. This is really what changes everything. This is what has made the competence issue so difficult for most lawyers who do not like computers, in that we have an incredible amount of ESI. That is a real world buzzword, ESI. You have got to learn that. If you know that, believe it or not, you know more than most practicing lawyers. When I say ESI without an explanation, they still don't know.

ESI means "Electronically Stored Information," a new term used but not defined in the rules. Why? The minute you define it, somebody is going to invent something new. We have seen the greatest transformation in society in human history in the course of the past three decades where we have changed completely from paper to digital, and we are now using technology that people could not even dream of twenty years ago, much less buy. You can now go to Walmart and buy a one-terabyte drive for \$200. So we have the bottom line factor of new technology.

Jason Baron has written this terrific law review article, *Information Inflation*.⁴² You really need to read that. He expands upon how dramatically society has changed. It has changed the way the evidence is stored. Some of the stats you may have heard about: sixty billion e-mails a day. Your average employee at a company who is a middle level or senior executive gets at least one hundred e-mails a day. That's after spam filters, one hundred e-mails a day.

I get almost that many a day. If I actually hand filed each one of those and classified it, I would spend another one or two hours a day. I am fortunate. I have an assistant, and they file the stuff I don't delete, and I organize it. Most average businessmen are not like lawyers; they are not organized. It is a disorganized mess. They have an inbox just filled with thousands of e-mails they do not even bother making subfolders for.

So sixty billion e-mails a day is an interesting statistic. Another interesting statistic is from the Information Management School at Berkeley at the University of California. They did a study and found that there were five exabytes of ESI stored in computers in 2002, with a thirty percent increase each year. Now what does five exabytes mean? An exabyte is a ten with eighteen zeros, so that does not sound so bad. There are only five of them.

But then what is the largest library in the world? It's the United States Library of Congress. It has seventeen million books, or it did back in 2002. It probably has a lot more now. Five exabytes equals seventeen Libraries of Congress stored in computers back in 2002.

Still, what does this mean? Well, you could pile paper up to Mars and back. I like this other analogy that Berkeley used to try and explain it to people. Five exabytes equals all the words ever spoken, from the dawn of time up to now. That much was stored in our computers. And guess what, it has tripled since then. I know how much some teenagers can talk. Can you imagine from the dawn of time?

So it is just mind boggling how much information there is out there. And it is in businesses, too. I have a case right now that I am looking at. We narrowed it down to just seventeen key custodians, seventeen witnesses. I found that these seventeen witnesses had data that had been created by people and stored on their computers. Anyone want to hazard a guess how many pages of information these seventeen employees had?

All right. It's hard to guess it anyway. Seventeen employees had thirteen million pages of user-created information on their computers.

42. George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10 (2007).

Eighty-five percent of that was in e-mail and e-mail attachments. The rest of it was in their My Documents area. And these were not people who had music either. As far as I have seen, they did not have huge music or video files like you might find among your generation. These were people who just had spreadsheets. That is what most of the information was; an unbelievable number of spreadsheets.

This is really testing the competence of the legal profession to deal with this. What we are faced with here is that the challenges of technology are also kind of pointing down and tempting lawyers because they do not understand what is going on. A lot of nonlawyers do not understand, and lawyers, I am sad to say, some lawyers do not understand that e-mail is actually evidence. They understand that they have to save papers, but do not understand they have to save e-mail. Also, some plaintiff's lawyers do not understand that they have to preserve too, not just the defense.

And so, there is a knowledge gap here where the profession is being challenged by technology and being challenged by clients that want to win at all costs. And by the way, they are the ones who pay all of our bills, so they have a very strong influence on what we lawyers do because it is one thing to have the United States Government pay your bills. You know they are going to pay if you're a government lawyer. If you are a private lawyer like me, you never really know if you're going to get paid. Once they burn through that retainer, they may or may not pay you.

So the problem we have now is that there is this huge downward pull. Technology challenging people, and this is the motivation to go along with the client's request even though you may not be sure if it is right because they are the ones paying the bills. And the end result is that you have a situation that is totally out of balance now. You have duties to the client. It is the paramount duty where all the focus is made on the people that I have seen that really go the extra mile, the ones who are the bulldogs of the profession. It is a popular image. There are lawyers who like to advertise it. "I'll be your bulldog. I'll do what it takes to win your case."

This activity is being rewarded. These are the people who sometimes are the most successful lawyers in town, the ones that are the hardball players. They are making all the money, and they are getting all the clients. As opposed to the lawyer who says, "No, I am sorry. The law requires you to produce this information." The clients do not really like to hear the law requires that I have to do something I do not want to do. They love it when a lawyer says, "Okay, we can do this because you don't have to do it, or I know a way around it."

So this is the duty to clients. You have a financial reward. You have legal competence that is being outweighed by the technology challenges. And you have your advocacy restraints. The duties to the profession are being outweighed by the duties to the clients. The duties to the tribunal and honesty to opposing counsel in the long run will help all your clients. But in any one particular case, it may hurt your client when you tell the truth to the judge, like the attorney did not do in the *Qualcomm* case: “Are there other e-mails?” He should have said the truth: “Yes, we have found at least thirty-two.” He did not do that.

If the attorney had told the truth, that judge would have believed him. Maybe Heller Ehrman wouldn't be in dissolution as it is today, and I do not think it is accidental that the firm is coming apart. And in the long run, if I come into court and I say something to the judge, they are not going to think, “I don't know if he is telling the truth or not.” They are going to assume he is telling the truth because he told me something that hurt his client the last time. “I am going to trust him.”

And guess what? That helps you in the long run because if you have a lawyer that the judges do not believe, that lawyer cannot be effective. Your reputation is the most valuable asset you have. Once your reputation is ruined, you are finished in this business because the judges will not believe you. So, in the long run it is good for the clients for their attorneys to be honest and truthful to the tribunal, but they do not see the long run unless they are a repeat customer like a company that is sued all the time. They might.

So you have this imbalance. The bottom line is what I call the “wicked quadrants,” where you have these huge technical challenges causing the profession to make bad decisions. You have the duties to the client that are also very powerful. And now the small quadrants are the legal competence, because lawyers do not know enough about technology to really understand the new e-discovery properly and their advocacy duties because you are just seeing the short term and not understanding how important it is to always tell the truth and to be fair to opposing counsel.

This is basically the premise that I have regarding the situation that we are in today as to why it is that you are going to, when you read in this area, find hundreds of spoliation cases. Every week at least there are one or two new cases of sanctions of spoliation. Why is this happening to our profession? I do not think it's because there is a moral decline. I think it is because we are being severely challenged by technology. We have allowed the duties to the client to outweigh the duties to the profession, and we are not keeping up on our competency level in this new area of practice.

I urge all of you in your future, if you are faced with these tough choices, to err on the side of caution. Do the right thing. And in the present, now when you are in law school you have got time to study. You are not going to have this time later on. When you have time to study, teach yourself something about e-discovery.

Read about some of these cases I am talking about because when you get out into practice you are going to find that most of the senior partners my age who are in charge of the firms do not know this stuff, and they are going to delegate it to you. There is going to come a time when you are going to be signing the discovery responses, and you do not want to end up like the *Qualcomm* associate. You want to make sure that you do something that is going to further your reputation because that is always more important than any one particular fee, your long term reputation.

So my urging to all of you is to keep that in mind and use your time now in law school to study hard in this area.

PROFESSOR LONGAN: Okay. We will hear our first response from Bill Hamilton.

MR. HAMILTON: Thank you, Professor Longan. I am very happy to be here. It is lovely being at this facility modeled after Independence Hall. I am from Philadelphia, and it makes me feel right at home.

Ralph Losey makes a number of important points. He has diagnosed the root causes of e-discovery failures, which by all reports are not abating. That is the crisis we are facing right now. Why is it that attorneys are going into court ill-equipped to handle e-discovery matters?

Ralph Losey traces the problem to a failure to understand basic technology issues associated with e-discovery. This is an ethical issue. In short, we have a competence gap. You cannot diligently represent the client without knowing this area, without e-discovery competence, and without knowing at least the ESI basics. This is what attorneys seem to be lacking. From Losey's perspective, one ramification of the lack of e-discovery competence is increasing attorney conduct on the ethical margins. Lacking knowledge of the peculiar characteristics of electronically stored information and dangers of e-discovery causes unenlightened counsel to default to playing the old discovery games and engaging in discovery brinksmanship with potentially devastating consequences. Ralph Losey is certainly correct. The pervasive lack of e-discovery competence is unbalancing the structural forces within the litigation process. This is a troubling development because e-discovery will only become more complicated.

What does it mean to possess e-discovery competence? To me, practicing in the field, it means two things. First, e-discovery competence allows me to have the kind of dialogue with the opposition about e-discovery that will advance the interests of my client. Second, e-discovery competence allows me to have the dialogue I must have with my own client to protect and to advance the client's cause. Without rudimentary e-discovery competence, Losey correctly argues that attorneys will willy-nilly fall prey to the sins of over-zealousness and the failure of the duty of candor to the court and opposing counsel. Hardball discovery strategies in the paper world generally risk minimal sanctions. However, hardball ESI discovery can lead to million dollar adverse consequences. Woe unto the attorney who fails to appreciate the dangers of these new high seas.

I agree with Ralph Losey that the lack of rudimentary technical knowledge is at the core of the crisis, but from my perspective this lack of competence can also be discussed as a failure of client advocacy in addition to a failure of our duties to the court and the opposition. I do not believe that e-discovery and the characteristics of ESI require an attorney to be any less zealous, any less engaged, and to be any less dedicated to the cause of the client. In fact, the opposite is the case. E-discovery demands heightened advocacy skills. Clients cannot be zealously represented without e-discovery competence. E-discovery does not lessen the duty of confidentiality and loyalty to our client, nor should it cause us to retreat from the adversarial nature of the litigation system. Our current crisis stems from the unfortunate fact that too many lawyers lack the training to be e-discovery advocates. Technology is running faster than the profession.

Today I am speaking from the perspective of a commercial litigator. When I started practicing law over twenty-five years ago, discovery had become the principal battlefield of commercial litigation. Very few commercial cases went to trial. We are now down to about two or three percent of commercial cases going to trial. There are numerous articles on the "vanishing trial." Of course, trial was the end that drove the litigation process. No client should ever hire a lawyer who fears trial, but the truth of the matter is that cases were likely to settle once the odds became apparent.

Businessmen, corporations, and people in general are risk adverse for the most part. Rational decision makers will settle cases rather than wagering all, unless of course, the potential recovery is worth the risk. Once the facts are out, and once the discovery process has produced a general setting, litigation adversaries will calculate the potential loss and gain, the potential risk, and usually reach a settlement. This is one of the reasons mediation has been hugely successful. The era of the

great trial attorney who won cases based upon oral advocacy and courtroom cunning has given way to professional litigators, specialists in discovery and motion practice.

Under these circumstances, the “winner” was the side who won the discovery and motion practice battles. Not all settlements are equal. There are good settlements and bad settlements. Marshalling compelling facts in discovery usually meant a better settlement for the client. What did “winning” discovery mean? It meant getting the favorable facts exposed: facts that made your client the more probable settlement “victor.” But it also meant resisting what was always perceived to be overreaching discovery from the other side: too many interrogatories, too many requests for production, too many and too long depositions. Managing discovery requested by the opposition was in large part a game of damage control.

Over the past twenty years, discovery rules have been implemented to control what were perceived as chronic abuses. For example, the number of depositions have been limited. Nonetheless an undercurrent, and frequently the main current, of litigation was to frustrate the opposition’s efforts to build a case against your client while vigorously attempting through discovery to build the case against the other side.

The point I wish to make is that it is counsel’s responsibility to build the client’s case and to fight the battle with all the tools that the rules of civil procedure provide. If I were a skilled litigator, if I had more resources to deploy, and if I worked harder, so much the better. I used these skills and circumstances for the advantage of my client. I did not feel sorry for the other side who approached the case differently or who did not match my efforts and zealotry. No one has provided me any quarter in my litigation career. Nor have I ever expected it. Indeed, our litigation culture requires a certain lust for combat coupled with a belief in the process. Litigation demands honesty and integrity, but it is a sort of “civil” war. The theory was and is that the conflicting forces of litigation produce the truth, just as the science experiment produces the observable truth. Although I labored mightily for the best result for my client, others had a role to play that would impact the outcome. It was the process that demanded respect.

When I first started practicing law, the firm’s recruiting partner was very interested in hiring the best and brightest students who did very well in law school and who had all the typical qualifications. But he was also interested in recruiting students, men and women, who had participated in athletic events and athletic competitions. I am not suggesting that athletics makes better competitors or better attorneys, but the hiring partner’s intuitions reflects that legal mindset.

I do not intend to judge this adversary culture, just as I did not judge the opposition and the opposition's strategic litigation decisions. That was their responsibility. The prevalent legal myth was that there was never bad lawyering. There were simply different litigation strategies. For example, over the course of my career I have heard many statements such as, "I'm glad they never found out about Sally. That would have sunk our case." Or, "I wonder why they didn't ask about those documents at the deposition. Pulling that thread may have unraveled our case." Or after the close of a case, "Can you believe it? They never asked for John's personnel file." We comforted ourselves with the thought that their strategy was their business and there must be some secret method underlying these apparent omissions. I never once suggested to the opposition, nor do I ever intend to, that they missed something, or should ask another question, or that they might want to talk with a certain witness, unless I thought it would be good for my client and the client had approved the strategy. To do so would have violated my duty of zealous representation and loyalty.

You do not tell the other side in the chess match that they might want to reconsider a previous move unless you are playing the role of the teacher and educator. I cannot imagine any attorney saying to a client at a deposition that is about to conclude, "Hey, wait, I want to go talk to the other side because she has missed asking you some questions that would really be painful for you to answer." It is not going to happen in the litigation culture that we have, and it would not be right because it would violate my duties to my client.

Litigation was designed to be rough and tumble. Ralph Losey speaks critically about litigation "bulldogs." He questions the role of an adversarial litigation culture during the ESI production phase of the case. There may be litigation knights in shining armor at certain stages of the litigation, but we hear that there should be no litigation ESI warriors. Some have argued that adversarial conduct during the ESI production phase of litigation must give way to "cooperation." But interestingly, none of those terms—bulldog, knight, warrior—were pejoratives in the litigation culture of the recently closed century. When Ralph Losey speaks about bulldog behavior, he is not denouncing advocacy. He is denouncing conduct in litigation that has become counter-productive in the ESI era because it is not in the client's interest. The current emphasis on "cooperation" is really a call for enlightened self interest. A litigation warrior need not engage in obstreperous or unlawful behavior. What we see in some e-discovery sanction and spoliation cases is clearly fraudulent, unlawful behavior. But these extreme examples of foul play should not lead us to start tinkering with the fundamental principles of the adversarial process.

Restricting the adversarial system will have serious and unintended consequences. I believe we have a “buy in” and legitimization of our judicial process in no small part because clients believe that they will be zealously represented by their attorneys. That is why it “works.” That is why people believe in it. They have someone at their side to stand with them to fight the battles that need to be fought. There is a kernel of popular truth and sentiment in the bumper sticker that proclaims, “My lawyer can beat up your lawyer.”

A first step in the program to “tame” the litigation adversarial process is the seemingly neutral doctrine of disclosure. But I firmly believe the principles of client loyalty and confidentiality will be compromised if lawyers are required to inappropriately disclose client confidences and information. Litigators hate disclosures. The word drives me nuts. I do not like it. I am not going to do the work for the other side. The work product doctrine is at the core of our adversarial system. Most importantly, keep in mind that what is at stake is not merely my work, but work I have accomplished representing my client in a loyal, zealous manner. I possess this knowledge only because of the client’s trust in my faithfulness and dedication. Yes, I must disclose my trial witness and exhibits, and documents that I intend to use to support my case and defenses. But these are disclosures that would happen in any event at trial.

Has the world of ESI changed these basic premises? Do we need new principles and guidance? Should the rules for ESI preservation and production be less adversarial and more “cooperative”? No one doubts that the ESI world is fundamentally different from the paper world of just a few years ago. Ralph Losey and I have written, in his very influential blog and elsewhere, that law schools must teach e-discovery skills to students. Indeed, this is an important, pressing challenge that we believe is on the agenda for our nation’s law schools.

The digital world requires more and smarter adversarial talents that too many litigators lack. That is where the problem lies. It is a real problem because today, as Ralph Losey indicated, all information is digital. Where there is paper, it is usually printed from the digital source. The point is that litigation counsel cannot function in the modern litigation world without understanding ESI and without being equipped with e-discovery skills.

This failure is caused not by the fact that litigators are trained to be adversaries, but that litigators too often lack two key ESI skills discussed above. Too many litigators fear or do not know how to enter a dialogue with their own clients about e-discovery, its cost, what is required, and what it takes to get e-discovery done economically and efficiently. Too many litigators passively accept what the client delivers

in paper format, or on the other extreme, default to vendor expertise. Too many attorneys also do not have the requisite skills to engage in e-discovery dialogue with the opposition. Too many attorneys are willing to play the game the old way, although that world is brutally and inexorably “gone with the wind.”

What do I mean about e-discovery skills in talking to clients? Clients usually cannot meet the legal requirements of ESI preservation and production without the active participation of knowledgeable e-discovery counsel. It used to be that we would send a client a request for production, and then sometime later, ten or twenty boxes would magically arrive at the law office. This procedure does not work anymore. Attorneys must be more involved in learning and knowing their clients’ technology systems and participating in the management of the e-discovery process from preservation through production.

When I speak to clients about the preservation of electronically stored information, a frequent response is, “Well, we sent out an e-mail and told everybody to preserve their electronic information.” “But preserve exactly what digital data and how?” I ask. The answer often is, “Well, data about the case.” “But what did you tell them about the case?” “We told them we got sued by X.” “Well, did you tell them what the legal and factual issues were? Did you tell them what keywords to use when broadly locating and preserving data? Did you explain to them not only that they must preserve relevant information on their desktops, but relevant information on Blackberries and home computers? Did you interview the key players about the creation and location of potentially relevant data? Did you talk to the information technology department about the network storage locations?” Then there is the question, “Do we have to do that?” “Yes, it’s a requirement. Here is *Zubulake*.”⁴³ This is frequently a strained conversation and takes great skill. ESI is not organized like paper. This means more work, effort, significant expense, and the deeper involvement of retained counsel very early in the case. It stretches the budget of the legal department. But it is counsel’s duty as a zealous advocate to protect the client and to assure preservation mistakes do not occur. Such mistakes, just as day follows night, will surely explode down the road and lead to sanctions or, more frequently, unfavorable settlements.

I wholeheartedly agree that we must engage the opposition in an e-discovery dialogue early and often. Why have litigators for the most part not mastered this skill? Jason Baron hit the nail on its head a little bit earlier. You have got to spend a lot more time with people

43. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (2003) (laying out the duties for companies and attorneys regarding electronic discovery).

whom you do not like. Most litigators I know are not at the top of the scale when it comes to social skills. Litigators are wonderful when performing in a structured environment such as a deposition. But all too frequently the litigator at the party is in the corner not speaking to anyone. Litigators typically like highly structured social environments. Office attorneys in many ways have better skill sets for the e-discovery dialogue. They are used to doing deals. Deal-making involves disclosures, discussion of risks, discussion of benefits, planning for contingencies, and coming to an agreed conclusion. Litigators must perfect similar skills as applied to e-discovery. These skills should be taught in seminars, at law firms, in CLE classes, and at the nation's law schools.

Many of the ethical ESI dilemmas are questions of timing. With e-discovery, timing is everything. Data can be lost. So when the case arrives, retained counsel must work very quickly with clients to preserve relevant data. Counsel must promptly engage in that client dialogue. But the requirement of early preservation and litigation holds can conflict with what some have argued or recommended are disclosure duties under Rule 26(f). The Rule 26(f) conference and report to the court will generally occur before any formal discovery has been propounded and before discovery is launched. The question arises, then, as to counsel's duty of disclosure before a formal request for production has been made, and before I have an obligation to engage in the process of diligently finding the relevant information requested by the opposition.

Once a request to produce is propounded there is no doubt that I must determine locations of data. I must meet with the other side. We have to engage in our collective due diligence. Typically we will need to talk about the search terms. The opposition proposes search terms. I disclose the search terms I think would work best. We bring in some experts, perhaps, and engage in the dialogue and come to a conclusion. We then do testing and sampling, and recommence the process.

That's the easy part. Many litigators are still uncomfortable with this process, but it is still the easy part from an ethical point of view. I must do the best job I can locating responsive data, and that may entail the disclosure of search terms the opposition had not immediately thought of (although the lights would undoubtedly come on later, causing greater expense to my client with searching redos and do-overs). The tougher question is the scope of the duty of disclosure prior to propounding interrogatories, prior to production, and prior to other disclosure requirements. The early Rule 26(f) discussion should generally be limited to the general parameters of e-discovery, for example the format of production in TIFF, PDF, or native. The e-discovery topics will vary case to case. If I am preserving data by using broad search terms, the

terms should be a topic of discussion, as should the general targets of the data pull (for example, management, sales teams, customer service department). However, if the client has elected to preserve locations and not data pulled by search terms, then a specific dialogue as to which exact containers are necessary to preserve may not be appropriate.

Let's consider a hypothetical. Suppose a case comes in, and I interview one of my client's former, disgruntled employees. I visit with her, and she says really bad things about my client. I suspect she is lying, but I have this testimony nonetheless. And she says, "I also created some documents that are located and saved on the G drive on the company's network." This is clearly information I will *not* use in support of my client's claims or defenses. Of course, I immediately preserve the information on the G drive.

The problem becomes what do I disclose about the former disgruntled employee and her data at the Rule 26(f) conference? Much of this is my work product. I interviewed the witness. I preserved the data. At this stage of the litigation, do I have a duty to disclose the existence of this particular hostile witness, the damaging data, and the steps that have been taken to preserve the data? Do I offer to make her available to the opposition?

I think not. That disclosure can wait for the interrogatories and request to produce that seek such information (if such discovery ever arrives). In developing ESI jurisprudence, lawyers, courts, and the Bar need to be very careful not to accelerate disclosures of information simply because it pertains to ESI. Let's keep in mind that the information disclosed is information learned from the client or in service of the client. The characteristics of ESI should not be recited and relied upon to trump the importance of client confidences or the advocacy system. Cooperation with respect to ESI really means engaging in zealous advocacy in the client's interest. It means meeting the opposition directly and forcefully on this ESI battlefield. It also means that the client's interest is frequently best advanced by disclosures, agreements, protocols, and risk reduction techniques, and frank, direct, and informed dialogue with the opposition about ESI. It also means much will not be disclosed unless necessary in response to discovery or otherwise required by the Rules.

Ralph Losey has vigorously and clearly demonstrated that attorney e-discovery incompetence is at the heart of our crisis. However, I believe this lack of competence, while sometimes rising to a level of failure of candor to the court and a failure to play fair with the opposition, is most critically a failure to adequately, diligently, and zealously represent the client. Let us not damage the principles of loyalty and confidentiality and vigorous advocacy in an effort to solve the dilemmas that the

information revolution and ESI present to the litigation process. As Ralph Losey states, the crisis is one of attorney education and competence, not an inherent failure of our litigation process. Diluting the principles of confidentiality and zealous advocacy can have far-reaching and unintended consequences. Other solutions are available, such as requiring certification of e-discovery competence to be permitted to practice before a court. But in all events, let us tread carefully when dealing with sacred principles.

Thank you very much.

PROFESSOR LONGAN: Our second responder is Judge David Baker. The Judge is going to speak about ten minutes, and then we will have time for questions.

JUDGE BAKER: I am used to speaking from center spot and sitting down, so that's what I'm going to do. That is where we are on the bench. I am going to muse just a little bit. I started writing computer programs over forty years ago. I was just thinking about it back in high school and have followed technology ever since. Not much in law school back then, but I have always been interested in science and math.

I have been on the bench about seventeen years. One of my first duties beyond the cases was getting involved with judicial education, and in particular trying to get judges interested in technology. We had classes that were set up, and the committee tried to put together some of the curriculum for that. Our first goal was to figure out some way to motivate judges to turn computers on. This was right at the era, when I left my law firm there were no attorneys with computers on their desks. After I left, that has all changed.

When I started as a judge, judges had computers, but the only thing that was really on there was Westlaw. There was a DOS version of WordPerfect. Very few judges used the machines at all. We had no e-mail. There was no network. That has all changed, obviously. The big change in getting judges motivated was the world wide web, when that became popular in the early to mid-1990s.

So that is the background, and so when Judge Facciola or Jason Baron talks about judges getting involved as case managers in helping lawyers solve problems in litigation, you are going to find hit and miss among the bench. There are not many judges who are going to help you do your search formats. There will be a few, but not too many.

I think judges have the same obligation that we are laying on you today to be more conversant with search formatting and to understand it better, but recognize that you are dealing with the bench. There are going to be some people who are like me or like Judge Facciola, but

there are going to be a lot more judges that do not want to hear it, and if they do, they may not understand it. So, even if you get proficient at search formatting, you may have an educational responsibility to teach the judges how to handle all this.

My intention here in responding to what has been said, both in the first panel and here, is to give you a little perspective on this and a couple of tips. My perspective, having been at it for a little while, is that the problems, or the burden of discovery, predate any of us, no matter how much gray hair we have. Parties have been complaining about the burdens of discovery. That is not new.

What is new is that within my practice time we have gone from an era where almost all documents that you looked at were originals. That was phasing out just as I became aware of the world, as the Xerox machine became popular. The Xerox machine creates a certain number of copies that go out within an organization or out in the world. It was certainly a lot easier. It used to be that the Federal Rules were written where you could inspect and copy documents.

What that literally meant fifty years ago was that you could bring the other side into your client's office, and they could sit and look at the documents and make notes or make a hand copy of it. Well, the Xerox machine changed that. It was a lot easier to make a single copy or a few copies.

But the world has completely changed yet again with electronic copies, which was alluded to by some of the other speakers. The same information may now go to a thousand people or a hundred people within an organization, whereas before it might go to two or three. There would be one copy kept or only the original. Now the e-copies are everywhere, and they may be different or they may be identical, but that is the spread of information.

I think that is what Ralph Losey was alluding to—the tendency of clients to want to bend or break the rules and destroy evidence—that is always there. That is an issue that we as professionals have to help our clients avoid. But now it does become discovered more because when they take a deposition of somebody who is only tangentially involved, but they have copies of everything, or copies of enough information that it discloses where the information that was not produced, so things come to light a lot easier. So, that is a part of the issue.

Just a tip for you, and I think this was embedded in some of the anecdotes that Judge Facciola talked about. As you start a case, you're the litigator for someone—plaintiff, defendant, it does not matter. You have to think, "Where am I starting in terms of a cubbyhole or a pigeonhole for this? Is this one where I think there's going to be spoliation, where there is going to be a huge case where the costs of

getting the information are going to threaten to be worth far more than the case is, or is this just a routine one?" And you have to gauge yourself accordingly in terms of how you deal with your client and with the opposing side.

I think one problem, and Ralph Losey has talked about this elsewhere, a lot of the people you are going to see on the other side think e-discovery only involves technology cases, and that is wrong. With the examples you have heard this morning, almost all the information now, whether it is a divorce case or a mortgage foreclosure or a patent case, is one where you would expect it. But any contract dispute is all going to be digital information, so you have to be in that mind set from the beginning.

Here is a practice tip, and this is echoing what Ralph Losey said. You have got to have enough technical expertise. You will never be computer experts, but you have to understand how this stuff is stored generally, just as a business lawyer, you have to understand how the businesses that you represent operate. You have to have that general level of knowledge just to be able to go out and be a professional in an area of practice that calls upon you to know how business works.

Again, that's a difference from the paper age to the electronic age. I think people thought back in the paper age that you have a general idea how businesses store their paper and their information. In a given case or with a given client you would have to become more familiar with that. The burden now is not only to have that general information so that you can formulate requests and think about how you are going to describe the information that's important. You now have to have that conversation with your client to get specific information about how they store their information, because what you are being called upon to do in the field of litigation is to identify and solve the client's information management deficiencies.

That does not work very well because your client is not going to do it before you get into litigation, so you have an obligation to help them improve their organization. That is true whether it's a corporation or an individual. Individuals may keep information in a lot of funny places and spread it to places that you do not expect.

If you were representing somebody in the Benlate litigation, you have to know the difference between Benlate FDP and Benlate DF before you get into the case. Or if it's a patent case, you have to know how a particular widget operates. In every case you have to have this knowledge about how the information flows within a company or within your individual client.

Let me stop here and open up for questions.

PROFESSOR LONGAN: Does anybody have questions for any of our panelists, or do the panelists have questions for each other?

AUDIENCE QUESTION: What about certification? Would it make sense that you could not hold yourself out as competent in this area unless your ability to do so was certified by a third party? Does that make sense? Is it outrageous?

MR. HAMILTON: I think it makes sense. At the University of Florida we developed a certification program for e-discovery as a kind of minor. So we are engaged in that dialogue with the Dean. We also have Board certification in Florida for subject matter specialities. The whole thing seems to me that what I contemplated as taking to the Bar a certification for electronic discovery, and Ralph and I have talked about that as well. That strikes me as something that fortunately is on the horizon for us in Florida.

MR. LOSEY: Bill Hamilton is actually Board certified in two areas, business litigation and intellectual property. I am not Board certified in anything. He has talked about whether we should ask for Board certification in e-discovery, which I think I probably could get certified in.

I honestly have been kind of discouraging that because Florida hasn't even adopted rules yet. We are having a devil of a time getting the whole Bar to understand that evidence is not in the filing cabinets anymore. I think we may be getting ahead of ourselves to actually ask for certification, and I do not like to start a battle I can't win.

JUDGE BAKER: Having gone through the Florida Bar certification process with trying to set standards for intellectual property litigators, patent litigators, I think at this stage, we don't know enough about what we are talking about to set the certification standards yet.

PROFESSOR LONGAN: Another question. Yes, ma'am?

AUDIENCE QUESTION: I wanted to ask about the *Qualcomm* case and the court's eventual decision to allow the lawyers to invoke self-defense based upon the declarations that were filed. Wouldn't you think that that's in a sense sort of an expansion of the lawyers right to self-defense defendants? And I wondered if you thought that was going to a broadening of a lawyer's right to self-defense?

MR. LOSEY: I did not. I mean that was a quirk of California Bar rules, and I think it would have been easier. I was shocked that they muzzled them to begin with. And the *Qualcomm* attorneys waited until the last minute and filed the affidavits from their people accusing their outside counsel. Basically it was all their fault. They did it at the last minute, so the judge didn't really have a chance to face it. And I think the magistrate made a wrong ruling on that, and the district court agreed and reversed it.

If you are being accused of lying to the court and withholding key evidence, and in fact you were told to do it by your client, I do not think that excuses you, but I think you should be able to at least talk about it.

AUDIENCE QUESTION: But that is contrary to existing California caselaw, because California has the most stringent confidentiality requirements. So, I kind of think it is an expansion.

MR. LOSEY: Maybe in California. That's right. It was all unique to California, which I am not an expert on the law there.

PROFESSOR LONGAN: Judge?

JUDGE FACCIOLA: It has been true for as long as I can remember that in a criminal case a claim of ineffectiveness opens the lawyer's mouth. He is claiming that I pled him guilty. Well, son of a gun, he told me he was guilty.

PROFESSOR LONGAN: Other questions?

JUDGE BAKER: Ralph, this goes back to something that Judge Facciola said in terms of mediations and special masters to resolve these issues. In a case that is still pending that I cannot talk about in any detail, I appointed a special master to help the parties solve technical as well as negotiation problems over electronically stored information.

I have no idea how much that special master has billed. It was a lot. He is a lawyer from Texas who practices a lot as a special master of such cases, and there are other people who do that. I felt it was sort of a failure partly on the lawyers' part and a little bit on my part that we had to engage somebody to do that. Any perspective on that from either of you?

MR. LOSEY: Well, I think everybody in the field thinks that is going to be the future because the judges we have here today are unfortunately the rare exception. Your typical judge does not know anything more

about computers than your typical lawyer. They get in over their head. They do not have enough time. They will not weigh into it. They will not concern themselves with what are the best keywords.

And, so, the bottom line is the parties know that, and the parties say, “We want a fair adjudication. The judge will not give it to us. He doesn’t have the time or the ability, so we’ll hire a judge limited to these particular focused issues of e-discovery.” Speciality judges, speciality special masters, I think that for the short term will happen. Ultimately the bench and the Bar will get to the point where they do not need that anymore, but right now they need it and they need it big time. So, I think the Sedona Conference predicts this will happen. A lot of opinions mention that.

The funny thing is that the judges now kind of use it as a punishment. “Okay, if you guys can’t figure it out now, I will make you pay for a special master. If you can’t figure it out, if you stay in that locked room overnight and nothing happens, something has got to happen.” Some day it will happen. You may have to hire somebody to spend the time and get into these areas sometimes, and it just takes a lot of time.

It takes hundreds and hundreds of hours to figure out the details. The complexity of these computer systems is almost beyond comprehension, and it changes every day. Just when you think you have it, they have invented the latest Google applications that make it all irrelevant and you have to learn it again.

PROFESSOR LONGAN: We have time for one more short question.

AUDIENCE QUESTION: When you request the discovery, do you get hard copy on paper or do you get it on disc? And when you get it on disc, can they send it to you in any form, or can you specify to make it a PDF so we can read it?

JUDGE BAKER: Let me respond to that. The issue of the format is addressed with some degree in the rule. This is part of your obligation as the requestor and as the responder to think about what format you want it in. Do you want it in what is called native format? Do you want it as a TIFF file? Do you want it as a PDF file? Do you want it in some format that is how it was originally stored, or do you want it in some way that you are going to be able to manipulate it after you have it?

If it is spreadsheets, you probably do not want a printout. You want it electronically so you can play with the numbers yourself a little bit with a copy of it, or you may want it to be text-searchable rather than something else. But that is what you must think through, both when describing what the scope is that is going to be material and relevant

and appropriate to search. But then how you want it. I have had that problem come up where one side has asked for it one way, and the other side says, "No, we can't or won't produce it to you that way. It's not reasonable." It turns out not only was it reasonable, but it was the only way to do it, and so they ended up having to do it twice at great expense.

So that is a matter of just what this cooperation should be. That should not be adversarial. That should be cooperative. We will be there if you cannot resolve it, but that is one where both sides have got the obligation to be smart enough about what they are doing to figure out what it is going to cost to do it this way versus that way.

What are you going to do with it after you get it? Do you need to supply it to an expert who is going to have to analyze it? Do you want to have it in a database so that you can do some other kinds of searches on it? Do you need the metadata or do you not need the metadata? Those are things you have to think through before you go to the expense. That is why sampling sometimes is better. It depends on the needs of the case.

MR. HAMILTON: But we do not have the verbal dispute about that. But I think it is adversarial, and I do not like that word being chased out of the process. It is just as adversarial as negotiating with the other side. Where are we going to hold the depositions? In whose office?

And that is not to say we shouldn't come to an agreement about that. You do not want to take that to the court, but I am representing my client's interests in trying to find the best location where my client is going to perform in a superior manner at the deposition, and negotiating with the other side about it. So it is adversarial, but we need to come to a conclusion about it.

AUDIENCE QUESTION: You are supposed to start having that conversation at the meet-and-confer. Among the things you are supposed to discuss at the Rule 26(f) conference is form or forms of production, and it actually says form or forms because what we are talking about here is a variety of different kinds of electronically stored information. While a form of production of TIFF with extracted text would make sense for e-mail, it will not make sense for a database extraction, or even perhaps Excel spreadsheets with formulas running in the background.

So what the rules contemplate is you start having that discussion and hopefully reach an agreement as early as the 26(f) conference. And then what the rule on requests for production says is that the requesting party gets the first shot across the bow on requesting forms of produc-

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tion, but it does not have to take it, which I think is an interesting twist on the rules here.

So they may, but are not required to, state the form in which they want the information that comes back in response to that request for production. But the responding party, if they either object to the form in which the requesting party has made the request, or if the requesting party has not stated a form, is required in their responses to state how they're producing it. And I think the goal there was to avoid having to bring this dispute to the court after the productions have been made and somebody receives a form that they're unsatisfied with. So they are trying to push that as early as the meet-and-confer and get it resolved before anything ever changes hands.

JUDGE BAKER: It is not just a terminology change from request for documents to request for information. And it highlights the difference between the originals and Xeroxes and digital information because the information does not necessarily have a form. It may be different when it is inside an active e-mail box versus being on an archive, or when it is calculations that then get put into a final spreadsheet that is used for analysis to support a new drug application or things like it.

So the information is just sort of out there, and it is a little fuzzy sometimes. It is not a document until you do something with it. Now, a webpage, what is a webpage? Is it what shows up on the screen or is it the HTML coding that's back behind it? If it is a dynamic one, does it depend on which computer or which browser you're using? It is going to look different. It is a little different at 12:14 and at 12:17.

AUDIENCE QUESTION: It looked different last week than it looks today. And it will look different tomorrow.

PROFESSOR LONGAN: Speaking of 12:14, please join me in thanking our panelists. Let me make one announcement about lunch. For the CLE folks, lunch is on your own. For the participants, invited guests, and faculty, lunch is at the Woodruff House. For our guests, if you will follow me, we'll walk next door to the Woodruff House.