

**THE RULE(S) OF LAW:
ELECTRONIC DISCOVERY
AND THE
CHALLENGE OF RULEMAKING
IN THE
STATE COURTS**

*Report of the 2005 Forum for
State Appellate Court Judges*



~FORUM ENDOWED BY HABUSH HABUSH & ROTTIER S.C.~

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**POUND
CIVIL JUSTICE
INSTITUTE**

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Foreword

The Roscoe Pound Institute's (presently known as the Pound Civil Justice Institute) thirteenth annual Forum for State Appellate Court Judges was held in July 2005, in Toronto, Canada. Continuing the standard of excellence that has marked our previous Forums, it featured outstanding scholars and panelists who examined the emerging issue of electronic discovery within a larger discussion of state court rulemaking. During the program, judges, scholars, and attorneys explored the process—which has become increasingly politicized—in which state judiciaries develop the rules that govern their courts, and how states have begun to deal with calls for changes in discovery rules precipitated by the increased amount of information stored electronically.

The Pound Civil Justice Institute understands and appreciates the fact that America's state courts lead the administration of justice in the United States and carry, by far, the brunt of the country's judicial workload. We try to support them in their work by offering our annual Forums as a venue where judges, academics, and practitioners can participate in a dialogue devoted to a timely issue, held on a single day. These discussions sometimes lead to consensus, but even when they do not, the exercise is bound to be very fruitful. Our attendees bring with them different points of view, and we make additional efforts to include panelists with outlooks that differ from those of most of the Pound Institute's Fellows. We believe that this diversity of viewpoints emerges in our Forum reports.

Our previous Forums for State Appellate Court Judges have examined such important topics as the rise of mandatory arbitration, state courts and federal authority, the separation of powers, the jury in civil justice, judicial independence, the scientific evidence controversy, and secrecy in the courts. We are extremely proud of our Forums and are gratified by the increasing attendance we have experienced since their inception, as well as the very positive feedback from judges who have attended.

The Pound Institute is indebted to many people for the success of the 2005 Forum for State Court Judges:

- Professor Linda S. Mullenix, of the University of Texas School of Law, and Judge John L. Carroll, Dean of the Cumberland School of Law at Samford University, who wrote the papers that started our discussions;
- Our panelists: Honorable Paul H. Anderson, Honorable Ronald J. Hedges, Thomas Y. Allman, William A. Gaylord, John H. Martin, James E. Rooks Jr., Michael J. Ryan, and Kenneth J. Withers;
- The moderators of our small-group discussions, who keep the groups on track and help us to highlight what experienced state court judges think about the issues we discussed; and
- Dr. Richard H. Marshall, Executive Director of the Pound Civil Justice Institute, and his staff, Marlene Cohen and LaJuan Campbell, for developing and running the Forum, and publishing and distributing this report.

Finally, we cannot thank enough the distinguished group of jurists who took time from their busy schedules and in some cases, their summer holiday, to come to the Forum and share their expertise so that we might all learn from each other.

We hope you enjoy reviewing this Report of the Forum, and that it both opens your mind to the challenges of rulemaking in state courts and gives you a fresh perspective on the burgeoning issue of electronic discovery.

Richard H. Middleton Jr.

President
Roscoe Pound Institute
2003-2005

Gary M. Paul

President
Pound Civil Justice Institute
2006-2007

Introduction

One hundred fifty-four judges, from 37 states, took part in the Pound Institute's 2005 Forum for State Appellate Court Judges, held on July 23, 2005, in Toronto, Canada. They listened to presentations based on original papers written for the Forum by Professor Linda S. Mullenix of the University of Texas School of Law ("The Varieties of State Rulemaking Experience and the Consequences for Substantive and Procedural Fairness") and Judge John L. Carroll, Dean of the Cumberland School of Law at Samford University ("E-Discovery: A Case Study in Rulemaking by State and Federal Courts"). Each presentation was followed by a panel discussion with distinguished commentators, followed by judges breaking into small groups to talk about the issue.

Responding to Professor Mullenix's paper were: James E. Rooks Jr., an attorney with the Association of Trial Lawyers of America (ATLA) in Washington, D.C.; John H. Martin, a defense attorney from Dallas, Texas; William A. Gaylord, a plaintiff attorney from Portland, Oregon; and the Honorable Paul H. Anderson, an Associate Justice on the Minnesota Supreme Court.

Responding to Judge Carroll's paper were Kenneth J. Withers, an attorney with the Federal Judicial Center in Washington, D.C.; Thomas Y. Allman, a defense attorney from Chicago, Illinois; Michael J. Ryan, a plaintiff attorney from Fort Lauderdale, Florida; and the Honorable Ronald J. Hedges, a United States Magistrate Judge from New Jersey.

For biographies of the paper writers, panelists, and group moderators, please go to the Appendix of this report at page 130.

After each paper presentation and commentary, the judges separated into small groups to discuss the issues raised in the papers, with Fellows of the Pound Institute serving as group moderators. The paper presenters and commentators visited the groups to share in the discussion and respond to questions. The discussions were recorded on audio tape and transcribed by court reporters, but under ground rules set in advance of the discussions, comments by the judges were not made for attribution in the published report of the Forum. A selection of the judges' comments appears later in this report. Judges, when identified, are only identified at the level of specificity of the region of the country they were from, i.e., "a Mid-western state" or a "southern state."

At the concluding plenary session, the judges' views of the issues under discussion were summarized based upon the moderator's reports of their groups, and all participants in the Forum had a final opportunity to make comments and ask questions.

This report is based on the papers written and presented by Professor Mullenix and Judge Carroll and on the transcripts of the plenary sessions and group discussions.

Richard H. Marshall, Ph.D.

Editor

Executive Director, Pound Civil Justice Institute

Papers, Oral Remarks, and Comments

THE VARIETIES OF STATE RULEMAKING EXPERIENCE AND THE CONSEQUENCES FOR SUBSTANTIVE AND PROCEDURAL FAIRNESS

Linda S. Mullenix

Professor Mullenix begins her paper by discussing the relative obscurity of rulemaking scholarship in general, what she calls an “untended garden of the legal landscape,” and in particular, the lack of study of state court rulemaking. Her paper surveys state rulemaking models, and she finds that the state rulemaking landscape is incredibly varied, complex, colorful, and untidy. She first examines the well-known federal rulemaking model, which has three distinguishing characteristics: rulemaking authority is delegated by Congress to the federal judiciary; it is shared with Congress, which has the authority to promulgate rules; and it is limited by statute. She looks at the “Rules Enabling Act,” and the limitations it sets on rulemaking, which has inspired a spirited debate concerning the substance/procedure distinction. The paper then discusses how Federal Rules are implemented through the use of rules advisory committees and briefly comments on the consequences of open-rulemaking on the federal rule promulgation process since the late 1980s. This discussion of federal rulemaking provides a background for the models of rulemaking that many states have adopted as part of their organic law.

The next section attempts to compare and categorize state rulemaking models. As Professor Mullenix shows, most states have adopted variations of the federal rulemaking model of delegated, limited, and shared rulemaking authority, and that almost all states have imposed limitations on the judiciary’s rulemaking authority through either direct adoption of the Rules Enabling Act language, or by similar restrictions on the rulemaking power of the courts. She then describes other state rulemaking models: where rulemaking is vested in the legislature; where rulemaking is a function of the inherent powers of the state courts that do not share power with the legislature; and states without formal authorization or structures, in which rulemaking is accomplished through other auspices. Professor Mullenix discusses the composition of rulemaking groups in various states with descriptions of the mechanisms for professional or public participation in the rulemaking process. She examines the open rulemaking environment and the notice and comment periods in various states such as Arizona, Mississippi, and Washington.

Professor Mullenix concludes her paper by noting some common similarities among the states in their rulemaking processes, such as the vesting of rulemaking authority in the judiciary but at the same time including means for which this power is shared with the legislature. She notes the wide variation among the states in the way they form their rulemaking committees or groups and offers some ways in which the states differ from the federal government, especially when it comes to the enacting of statutes designed to ensure open rulemaking and other transparency provisions. Finally, she observes that judges, practicing attorneys, jurists, and academics are best situated to understand the reality of local rulemaking and the consequences of any particular state’s rulemaking model on state substantive and procedural rights, and she argues that the new transparency and participation provisions have both enhanced and inhibited rulemaking.

I. Introduction¹

Rulemaking is certainly one of the more obscure and untended gardens of the legal landscape, lacking the showy sunflowers, say, of constitutional law. The subject of rulemaking tends to attract the enthusiasm of only a handful of hardcore proceduralists. Nevertheless, rules aficionados understand the importance of rulemaking authority and the rulemaking process.

Rulemaking enthusiasts understand that the question of rulemaking *is* a question of political theory, constitutional law, and the appropriate balance of power among branches of government. Modern rulemaking (as opposed to historical smoke-filled-backroom rulemaking) involves questions of transparency, sunshine, interest group lobbying, and public hearings. Additionally, rule enthusiasts understand the stakes involved in rules, and hence, in rulemaking.

The academic community has contributed a small but significant body of commentary on the subject of federal rulemaking.² Debates over federal rulemaking tend to percolate whenever the federal Advisory Committees propose controversial rule revisions,³ a trend that has accelerated since the late 1980s when the federal rulemaking process was opened to enhanced public scrutiny and participation.⁴

Although the federal rulemaking process has inspired a considerable body of commentary, the subject of state rulemaking has received scant attention—and probably for good reason.

Although the federal rulemaking process has inspired a considerable body of commentary, the subject of state rulemaking has received scant attention⁵—and probably for good reason. Very few legal scholars undertake the study of fifty states' varying laws.⁶ Furthermore, in the prestige hierarchy of academic scholarship, state law subjects garner few accolades. A project surveying and analyzing state rulemaking, then, combines the worst of all possible scholarly subjects: state law and rulemaking.

This article attempts to fill the barren patch in the rulemaking landscape by assaying a survey of state rulemaking models. As is the brilliance of federalism—many flowers blossom in this garden.

Part I of this article briefly sets forth the well-known federal rulemaking model, with particular attention to the allocation of rulemaking authority and limitations on federal rulemaking authority. The purpose of this section is to provide background for the models of rulemaking that many states have adopted as part of their organic law. In addition, this section briefly comments on the consequences of open-rulemaking on the federal rule promulgation process since the late 1980s.

Part II then attempts to compare and categorize state rulemaking models. As will be discussed, most states have adopted variations of the federal rulemaking model of delegated, limited, and shared rulemaking authority. Other state rulemaking models are described: states where rulemaking is vested in the legislature; states where rulemaking is a function of the inherent powers of the state courts and do not share power with the legislature; and states without formal authorization or structures, in which rulemaking is accomplished through other auspices. The description of each of these models incorporates some description of the mechanisms for professional or public participation in the rulemaking process.

This paper also briefly attempts to discuss and analyze the effects of various rulemaking procedures on substantive rights. In what ways, and to what extent, do open rulemaking, transparency, public notice provisions, and the like ensure fair and neutral rules? Conversely, to what extent do these procedures inhibit or impair rulemaking?

In the end, the state rulemaking landscape is as incredibly varied, complex, colorful, and untidy as an untended, overgrown garden.

II. The Federal Rulemaking Model: Delegated, Shared, and Limited Authority

A. The Rules Enabling Act and Shared Rulemaking Power

As is well-known, the federal judicial rulemaking model has three primary characteristics: rulemaking authority is *delegated* by Congress to the federal judiciary; it is *shared* with Congress, which has the authority to promulgate rules; and it is *limited* by statute.⁷ As will be discussed below, there has been considerable debate whether Congress is vested with the *ultimate* rulemaking authority, although Congress in recent debates has claimed this ultimate authority.

In 1934, Congress enacted the so-called “Rules Enabling Act.” The Rules Enabling Act delegates to the federal judiciary rulemaking authority:

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.⁸

During the past twenty years there has been considerable and largely unresolved debate concerning whether Congress ultimately and exclusively is vested with rulemaking authority, a position that the Congress asserted during enactment of the Civil Justice Reform Act of 1990.⁹ However, several jurists and scholars, including Judge Jack B. Weinstein of the Eastern District of New York, have eschewed this view in favor of the position that federal rulemaking authority is a delegated, concurrent, and shared power.¹⁰

If the federal judiciary does not have ultimate rulemaking power *de jure*, then the Supreme Court exercises this authority *de facto*. The consistent historical reality is that the federal judicial rulemaking committees have always proposed, drafted, promulgated, and approved new rules or rule amendments. There are very few examples of Congress enacting Federal Rules on its own,¹¹ or exercising a legislative veto to override a judicially approved rule.¹²

B. Limitations on Rulemaking by the Rules Enabling Act

The federal judiciary’s power to promulgate rules of practice and procedure (authorized in 28 U.S.C. §§ 2071(a) and 2072(a)) is famously circumscribed by a limitation in 28 U.S.C. § 2072(b):

(b) Such rules [of procedure and evidence] shall not abridge, enlarge, or modify any substantive right. All such laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.¹³

The Rules Enabling Act limitation in 28 U.S.C. § 2072(b) embodies the fundamental constitutional theory of separation of powers—that the legislative body (Congress) enacts substantive law, but that the federal judiciary retains the right to promulgate its own rules of practice and procedure.¹⁴ In the view of several courts and scholars, the judiciary’s right to prescribe rules of practice and procedure derives from the inherent powers of the courts to govern its own proceedings.¹⁵ However, the judiciary may not, in this formulation, prescribe rules of procedure that affect substantive law (“abridge, enlarge, or modify substantive rights”).

1. The Substance/Procedure Distinction

The Rules Enabling Act limitation also has famously inspired a 60-year debate concerning the so-called substance-procedure distinction, familiar to all law school students. This debate hinges on questions of what constitutes substantive law, and when proposed rule amendments transgress the procedural divide and invade substantive territory. Professors Paul Carrington of Duke University and Stephen Burbank of the University of Pennsylvania, among many others, have engaged in spirited academic dialogue in this ongoing and unresolved debate.¹⁶

For the limited purposes of this paper, however, it is only noted that the substance/procedure limitation on rulemaking does inform federal (as well as state) rulemaking efforts.¹⁷ In federal rulemaking, at least, the Rules Enabling Act limitation in § 2072(b) informs the debate whether a proposed rule amendment, or a proposed new rule, is somehow substantive in effect and thereby transgresses the § 2072(b) limitation.

2. Constitutional Challenges to Federal Rulemaking Authority (Historical Overview)

Parties, litigants, and other interested persons may raise so-called “Rules Enabling Act” challenges to rulemaking either during the rulemaking process, or retroactively (in appellate litigation), to challenge the constitutionality of an existing rule. Opponents or critics of a proposed rule amendment typically raise the Rules Enabling Act argument to challenge the judiciary’s authority to promulgate a proposed rule revision. In the almost seventy years since the promulgation of the Federal Rules of Civil Procedure, there have been approximately a dozen reported Supreme Court decisions that have discussed Rules Enabling Act challenges to the validity of Federal Rules. It is difficult to assess, however, how often litigants raise this challenge.

Although the Rules Enabling Act argument historically has been raised to challenge the constitutionality of several Federal Rules, no federal court has ever invalidated a Federal Rule as one that transgresses the limitations of the Rules Enabling Act.¹⁸ Thus, no retroactive challenge to a validly promulgated rule has ever succeeded.

On the other hand, Rules Enabling Act challenges to proposed rulemaking may be successful in thwarting promulgation of a new rule amendment.¹⁹ However, because the various constituent rulemaking committees do not reveal the reasons for withdrawing rule proposals, it is difficult to ascertain (or isolate) the precise constellation of reasons that may defeat a proposed rulemaking.

C. Implementation of Federal Rulemaking

The various Rules Enabling Act provisions provide the statutory basis for judicial rulemaking, as well

as limitations on that power. The federal judiciary exercises this rulemaking authority through a bureaucratic committee system that is subject to modern sunshine rules and transparency regulations. The most dramatic change in federal rulemaking occurred in the late 1980s, when Congress amended the Rules Enabling Act to require open, public proceedings, open records, and notice and comment requirements. The federal rulemaking process currently is highly participatory, involving almost all institutional segments of the profession, as well as non-professional input into proposed rulemaking.

1. Rules Advisory Committees

Federal rulemaking is accomplished through a series of judicial committees organized in pyramid fashion. The Advisory Committees form the base of the rulemaking pyramid. These include Advisory Committees on Civil, Criminal, Evidence, Bankruptcy,²⁰ and Appellate Rules.²¹ The Advisory Committees draft proposed rule amendments, which are then transmitted to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

The Standing Committee may recommend changes, or approve the proposed rule amendments. If the Standing Committee approves proposed rule amendments, the rules are transmitted to the Judicial Conference of the United States for similar review and consideration. In turn, if the Judicial Conference approves proposed rule revisions, the Conference will transmit proposed rule amendments to the United States Supreme Court. The full Court then reviews the proposed rule amendments. If the Court approves, the Court will issue an opinion approving the rule amendments.

The federal rulemaking process currently is highly participatory, involving almost all institutional segments of the profession, as well as non-professional input into proposed rulemaking.

When the Supreme Court approves rule amendments, the Court transmits the approved rules to Congress. The Supreme Court must transmit any rule amendments to Congress before May 1st of the year in which a rule is to

become effective.²² Congress has between May 1st and December 1st in which to approve, amend, or modify the rules.²³ If Congress fails to act during this period, the rules become effective by operation of law on December 1st of the year in which the Court approved and transmitted a rule revision.²⁴

2. Structure and Powers

The Chief Justice of the United States, as the Chairperson of the United States Judicial Conference, appoints federal judges and others to the various Advisory Committees, Standing Committee, and the Judicial Conference.²⁵ Federal judges are appointed for a fixed term, which the Chief Justice may renew for an additional term. Each Advisory Committee has a judge who serves as Committee Chair for an appointed term, and a Reporter, who typically is an academic law professor with expertise in the particular field. The Advisory Committees typically include an appointed state judge, a liaison from other constituent rulemaking committees, one or more academic members, and one or more practicing attorneys.

It was Justice William Rehnquist's preference and practice to rotate committee members off rulemaking committees and appoint new members, after a term of service. This practice has increased

judicial participation, enhanced the range of judicial experience and perspectives, and restrained the creation of rulemaking fiefdoms. On the other hand, this practice has affected the institutional memory of past rulemaking endeavors.

3. Draft Rulemaking

The Advisory Committees are permanent standing committees that are tasked with continual review and revision of the rules, and the initiative for rule revisions may come from several sources. Typically, the committee chair in consultation with committee members and the committee's academic reporter will identify rules in possible need of revision, and will set an agenda for review either of a particular rule, or a set of related rules.

For example, in the early 1960s, the Advisory Committee on Civil Rules considered amendments to the entire set of civil rules relating to joinder of parties and claims, as well as the class action rule. This project resulted in the 1966 amendments to Federal Rules of Civil Procedure 14, 15, 19, 20, 23, and 24. When the advisory committee recommends amendments to a related set of rules, this is called a "rules package." More recently, the Advisory Committee on Civil Rules worked for several years on proposed amendments to the package of federal discovery rules, which the committee published for comment during summer 2004.²⁶

On other occasions, the committee may focus on problems relating to a particular rule and amend that rule in isolation, such as happened with Federal Rule of Civil Procedure 11 (the federal sanctioning provision), in 1983 and again in 1993. And, the committee may undertake to amend a rule in direct response to a Supreme Court ruling, as the Advisory Committee on Civil Rules did in 1990, when it amended Federal Rule 15(c) in response to the Supreme Court's ruling in *Schiavone v. Fortune*.²⁷

The committee will identify a rule or set of rules for possible revision and study the problems with the existing rule and its need for possible revision. The committee reporter will then generate draft proposed rule amendments. The Advisory Committees circulate draft proposals over several months, or, in some cases, over several years. Advisory committee meetings are now open to the public and draft proposals may be circulated to interested constituencies in the profession and the academic community.

After successive drafting stages, the Standing Committee Conference publishes and circulates proposed rule amendments to the legal community.²⁸ The committee conducts public hearings throughout the United States relating to the proposed rule amendments,²⁹ and solicits written comments.³⁰

4. Sunshine, Transparency, Notice and Comment, and Public Hearings

Since the 1988 amendment of the Rules Enabling Act,³¹ the federal rulemaking committees are subject to numerous sunshine and transparency provisions.³² Advisory committee meetings are now open to the profession and the public; any interested person may attend an advisory committee meeting.³³ The minutes of the advisory committees also are required to be made public.³⁴ In addition, prior to any advisory committee meeting, the advisory committee secretary must give "sufficient notice to enable all interested persons to attend."³⁵

D. Comments on the Politicization of the Federal Rulemaking Process in the Late 1980s

1. The Mandate for Open Rulemaking

Prior to 1988, the federal rulemaking committees largely functioned in relative isolation and without public scrutiny or interaction with the profession during the rulemaking process. By the end of the 1980s, critics of the federal rulemaking process successfully prevailed in Congress to enact statutory requirements for enhanced participation, sunshine, transparency, and accountability in the federal rulemaking process. In the federal rulemaking arena, the impact of the 1988 sunshine amendments to the Rules Enabling Act have been apparent in some ways, but difficult to assess in others.

2. The Impact of Open Rulemaking; Lobbying for and Against Rules Changes

The most immediate impact of the 1988 amendments to the Rules Enabling Act has been enhanced participation of interested members of the legal community in proposed rulemaking. Various constituent groups in the profession, such as the American Bar Association (ABA), sections of the ABA, the Association of Trial Lawyers of America, Public Citizen, corporate counsel, and other interest groups now regularly appoint task forces on proposed rule revisions and send members to attend advisory committee meetings. Interested persons frequently attend meetings and offer comments on pending draft rules, suggest alternative rule amendments, different language, or varying proposals. In turn, persons attending advisory committee meetings serve as liaisons to their constituent interest groups, to apprise them of various stages of rule revision.

The result of open meetings has enhanced participation in proposed rulemaking, with a variety of perceptible consequences. First, the advisory committees now receive input from a wider spectrum of the profession, and at an earlier time in the process, than when the rulemakers worked in relative isolation.

Prior to 1988, the federal rulemaking committees largely functioned in relative isolation.

Hence, rulemakers may now learn that a proposed rule amendment will not be well-received by the profession, or at least some segment of the profession. Thus, enhanced participation enables the committee to ascertain problems with, or objections to, proposed rule

amendments, or particular language in proposed amendments. In this fashion, enhanced participation may facilitate sound revisions to proposed amendments, as well as achieve consensus across the profession in support of a proposed rule amendment.

Second, and in a similar vein, enhanced participation has enabled the advisory committees to readjust the scope of rule revisions, or to abandon rule revision projects altogether. For example, the Advisory Committee on Civil Rules in 1991 began an ambitious project to completely revise the federal class action Rule 23. Floated as a “trial balloon,” the first set of proposed Rule 23 revisions would have radically amended the rule.³⁶ The practicing profession resoundingly reacted negatively to these initial efforts, and the advisory committee consequently withdrew its initial concept of a root-and-branch revision of the class action rule.³⁷ Indeed, between 1991 and 1997, the advisory committee, in response to several rounds of proposed drafts, retreated from a wholesale revision of Rule 23 to a “minimalist” revision instead.³⁸

Although increased participation and sunshine provisions may have enhanced rulemaking and

encouraged consensus, the 1988 amendments to the Rules Enabling Act may have contributed to some negative effects as well. For example, the length of time to draft and finally promulgate rule revisions seems to have lengthened in comparison to when the committees worked in relative isolation. The committee's consideration of Rule 23, which began in 1991, was completed in 2003, spanning 12 years of contentious rulemaking. During this period, the committee withdrew or tabled numerous revisions in the face of competing firestorms of criticism from various quarters of the profession.

Enhanced public rulemaking also may have contributed to rules stasis or paralysis in reaction to public notice and comment provisions. Again, the history of the advisory committee's experience with the Rule 23 revisions illustrates how the advisory committee retreated from virtually all its proposed rule revisions in response to a flood of commentary, both supporting and challenging the proposed rule revisions. Rather than weighing the commentary as favoring (or rejecting) the proposed rule revisions, the committee instead chose to withdraw all proposals, with the exception of a new interlocutory appeal provision.³⁹

As a corollary, persons who oppose proposed rulemaking also may invoke an interesting trump card to frustrate or modify advisory committee proposals: the threat to request a more favorable rule revision through Congress's rulemaking power. Opponents of various Rule 23 amendments invoked this veiled threat between 1991 and 1997 to thwart certain Rule 23 amendments, suggesting that dissidents who disfavored the committee's proposals would instead plead their case for more favorable provisions with advocates in Congress.

The advisory committee's experience with the recent Rule 23 revisions further illuminates another possible effect of enhanced rulemaking procedures: the tendency of the advisory committees to move to a position of least-objectionable or least-common-denominator rules.⁴⁰ Thus, when confronted with a barrage of criticism, as well as threats of a Congressional end run, the advisory committee withdrew all proposed Rule 23 amendments except for the interlocutory appeal proposal mentioned above, which gave the least offense to the legal community.⁴¹ Similarly, between 2001 and 2003, the advisory committee successfully amended Rule 23 to add two new provisions governing appointment of counsel⁴² and attorney fees,⁴³ amendments that basically codified existing law and raised relatively little controversy.

Enhanced public rulemaking also may have contributed to rules stasis or paralysis in reaction to public notice and comment provisions.

Thus, enhanced participation and transparency may have achieved the positive result of ensuring professional consensus before promulgation of a rule change, as well as improving the actual drafting of rule language or provisions. On the other hand, enhanced participation and transparency may have contributed to lengthier and more contentious rulemaking. In addition, the new rulemaking regime may have increased the ability of segments of the profession to defeat proposed rule revisions, or to force the advisory committees to retreat to pabulum versions of rule amendments. In the extreme, a consequence of enhanced participation may have been to cause the advisory committees, in the interests of self-preservation, to eschew any novel or innovative rulemaking at all. Finally, the recent contentious battles over certain proposed rule reforms has paralleled federal and state debates over civil justice and tort reform initiatives. In this view, then, rulemaking is yet another possible forum in which to achieve various initiatives under the more general rubric of civil justice reform.

III. State Rulemaking Models

With the federal rulemaking model as a backdrop, one may offer some generalizations about state rulemaking models and possible consequences of these models.⁴⁴ The vast majority of states have adopted some modified version of federal rulemaking. To this extent, rulemaking is a function of state judicial power. In most instances, the state legislature has conferred rulemaking authority on the state judiciary by statutory provisions. In some states, in addition to statutory delegation, the rulemaking function is recognized as part of the inherent powers of the court.

Whether rulemaking is by statutory authorization or through the inherent powers of the courts, almost all states recognize limitations on the judiciary's rulemaking authority. Many states have adopted the federal formulation contained in the Rules Enabling Act (i.e., that no rules of procedure or evidence may enlarge, abridge, or modify substantive rights). Other states have not adopted the federal formulation, but instead limit the rulemaking authority through other linguistic formulations (e.g., invalidating any rules inconsistent with existing laws).

Similar to the federal model, many, if not most, states have committee structures within the judiciary to advise the state supreme court on rulemaking or rule revisions. These advisory groups may be referred to as judicial councils or advisory committees, or by other names. Several state statutes delineate in detail the composition of such advisory committees, and how the membership shall be appointed to the committees.

Many states' rulemaking statutes provide for public participation, notice, comment, and other sunshine provisions. These types of regulations vary across the states. In addition, state statutes may be more or less specific in describing the ways in which rulemaking is implemented.

While the federal rulemaking experience since 1988 suggests some possible consequences of open rulemaking on procedural and substantive rights, it is difficult to assay the same among the states. Although state rulemaking statutes describe structures and processes, statutes alone do not provide empirical evidence of the ways in which statutory provisions are implemented among the states.

Hence, it will be interesting to discover whether, among those states that have adopted the most liberal, participatory, and open rulemaking processes (such as Minnesota), the rulemaking experience in these states parallels the federal experience—both positive and negative—since 1988. It also will be interesting to learn, among states with fewer participatory opportunities, whether (and in what ways) a more closed rulemaking process has affected procedural or substantive rights.

A. States with Rules Enabling Acts and Shared Rulemaking Authority (Delegation Model)

As indicated above, the vast majority of states have adopted a rulemaking model that closely parallels the federal model. In these states, rulemaking authority is delegated to the state judiciary by the state constitution as well as by statutory authority.⁴⁵ Among states with statutory delegation of rulemaking authority, frequently several statutory provisions delineate the scope and implementation of rulemaking authority.⁴⁶

Among those states that have vested rulemaking authority in the judiciary, some state constitutional or statutory provisions specifically indicate that proposed rules must be transmitted to the state legislature for approval and may be overridden by the state legislature.⁴⁷

A minority of states also recognize, by statute, that judicial rulemaking authority is a function or product of the inherent powers of the courts.⁴⁸

1. Limitations Imposed by State Rules Enabling Acts and Other Limitations on Rulemaking Power

Virtually all states that have adopted a rulemaking model that closely parallels the federal model have imposed limitations on the judiciary's rulemaking authority. These limitations typically fall into two categories. Many states have adopted *verbatim* the limiting language of the federal Rules Enabling Act (i.e., "rules shall not abridge, enlarge, or modify the substantive rights of any party . . ."), thereby enacting a state version of the Rules Enabling Act limitation.⁴⁹

Other states, however, have eschewed this language in favor of some other broader linguistic formulation that expresses a restriction on the rulemaking authority of the courts. These include restrictions embodying the concept that the judiciary may not adopt procedural or evidentiary rules inconsistent with any rules enacted by the legislature or general assembly, or any rules inconsistent or in conflict with other laws or statutes.⁵⁰

While a large number of states, either by constitutional or statutory provision, limit the state judiciary's rulemaking authority, it is an open question concerning the extent to which this limiting principle informs the state rulemaking process. We know, for example, that critics of certain rules have raised so-called Rules Enabling Act challenges during the rulemaking process, or by a retroactive challenge to the constitutional viability of a Federal Rule. It would be interesting to discover the extent to which interested persons in the rulemaking process, or adversarial litigants after-the-fact, challenge state rules on the basis that the state judiciary exceeded its delegated authority in promulgating a particular rule. Because no Federal Rule has ever been invalidated as a consequence of a Rules Enabling Act challenge, it would be equally interesting to learn whether any such state challenge to a state rule has been successful.

2. Implementation of Rulemaking in Delegated-Authority States

The majority of states with delegated rulemaking power implement that power by an array of means reflecting the unique individuality of states, embodied in the concept of federalism. While some generalizations are possible, the variation among state procedures for implementing rulemaking is vast, detailed, and difficult to adequately capture in summary form.⁵¹ Most states have some sort of judicial council or advisory rulemaking committees; states vary concerning the degree of duties entrusted to these advisory bodies. Many (but not all) states provide for public participation, notice, and comment, and a few states detail procedures for rule proposals, drafting, and enactment.

a. Rules Advisory Committees

Virtually all states with delegated judicial rulemaking authority have institutional bodies to assist or

advise in the rulemaking process. The name or designation of these bodies varies among the states: some have judicial councils;⁵² some have judicial conferences;⁵³ some have standing committees;⁵⁴ some have advisory committees;⁵⁵ some have advisory boards;⁵⁶ some have continuous revision committees;⁵⁷ and others vest rulemaking in an administrative committee.⁵⁸ Tennessee has an Advisory Commission on Civil Rules,⁵⁹ while Oregon has a Council on Court Procedures, as well as a Judicial Council.⁶⁰

Among the states, Vermont is unique in creating a joint legislative committee on judicial rules,⁶¹ even though the state supreme court is vested with the power to prescribe and amend the rules.⁶²

b. Composition and Structure of State Rulemaking Groups

The structure and composition of state judicial councils and advisory committees defy easy description because of the immense variation across the states. Some state judicial councils and advisory committees consist of a relatively small number of judges and other appointees. Alaska's judicial council, for example, consists of seven members,⁶³ as does Idaho's judicial council.⁶⁴ The Indiana Supreme Court committee on rules of practice and procedure consists of nine members;⁶⁵ Minnesota's advisory committee consists of 11 members.⁶⁶ The Delaware Judicial Conference is comprised solely of judges,⁶⁷ and in Oklahoma the rulemaking body consists of the justices of the supreme court.⁶⁸

Other state judicial councils have diverse memberships, which include representatives from the state legislature or the executive branches. The California judicial council includes judges, members appointed by the state bar, and one member of each house of the state legislature.⁶⁹ Similarly, Connecticut statutes provide for consultation between the judicial rules committees and the parallel state legislative rules committees.⁷⁰ In South Carolina, at least five members of a 25-member council are state House or Senate representatives, and the council also includes the lieutenant governor or his designee.⁷¹ Representation from the legislative and executive branches also is provided for in the Tennessee judicial council,⁷² and Vermont mandates a joint legislative rulemaking committee.⁷³ And, in accordance with the Georgia Code, the Georgia Supreme Court must appoint at least one committee from the state bar to assist in the preparation of rules.⁷⁴

At the other extreme, some state advisory committees may include dozens of statutorily mandated members and appointees. Louisiana, for example, provides for a continuous revision committee,⁷⁵ and a judicial council consisting of no fewer than seventeen voting members.⁷⁶ The Louisiana statutes set forth an array of council members including: judges of various courts; a member of the Louisiana City Judges Association; state bar members (including one member of the Young Lawyers section); a member of the Council of the Louisiana State Law Institute; a member of the Louisiana House of Representatives; a member of the Clerks Court Association; and a citizen who is not a member of the state bar association.⁷⁷ A fair number of state judicial councils and advisory bodies have more than 20 members.⁷⁸

Not to be outdone in southern hospitality and inclusiveness, the Mississippi advisory committee on rules consists of no fewer than 20 members: two members selected by judges of the Courts of Appeal; two members selected by the Conference of Circuit Judges; two members selected by the Conference of Chancery Judges; two members selected by the Conference of County Court Judges; two members selected by the Mississippi Bar; two members selected by the Magnolia Bar Association; two members selected by the Mississippi Trial Lawyers Association; two members selected by the Mississippi Defense Lawyers Association; two members selected by the Mississippi prosecutors' Association; two members selected by

the Mississippi Public Defenders' Association; the Dean of the University of Mississippi School of Law or his designee; and the Dean of the Mississippi College School of Law, or his designee.⁷⁹

Perhaps the most gargantuan judicial council exists in New Jersey, where statutory provisions provide for a judicial council including the chief justice and associate justices of the New Jersey Supreme Court; various appellate and tax judges; federal judges; “not more than 50 judges of the Superior Court, the Tax Court, and the municipal courts”; various state legislative members; the attorney general; public defender; administrative director of the courts; clerks of the courts; chair of the Board of Bar Examiners; chair of the committee on professional ethics; chair of the committee on unauthorized practice of law; chair of the trustees of the New Jersey Lawyers' Fund for Client Protection; chair of the financial ethics committee; three trial court administrators; deans of all accredited law schools in New Jersey; three county prosecutors; three surrogates; three county clerks; three probation officers; three representatives of agencies providing legal services to the poor; officers of the state bar association; and not more than 15 representatives of the general public (selected by the Supreme Court).⁸⁰

The immense variation among the states with regard to the size and composition of rulemaking bodies, then, defies generalizations about the impact or consequences of these rulemaking structures on either procedural or substantive fairness. In a positive vein, one may

only hypothesize that increased committee membership enhances participation and ensures a diversity of viewpoints on the consequences of proposed rulemaking. Large and diverse committee memberships ensure that many interests are represented, and none favored in rulemaking. In this view, enhanced advisory membership ensures substantive and procedural justice.

Unwieldy committees, individual members with diverse but competing interests, all may combine to frustrate or defeat well-intentioned efforts at rule reform.

On the other hand, as we know from recent federal experience, enhanced participation also may prove to be too much of a good thing. Unwieldy committees, individual members with diverse but competing interests, all may combine to frustrate or defeat well-intentioned efforts at rule reform. In the worst-case scenario, unguarded rulemaking may result in non-neutral rules favoring one constituency over another.

c. Open Rulemaking, Notice and Comment, and Public Hearings

Just as the states have an array of different committee structures and institutional bodies to effectuate rule reform, states have varying procedures that provide for open rulemaking, public hearings and participation, and notice and comment. In this regard, fewer states have followed the federal model and have statutorily enacted transparency and sunshine regulations. Indeed, the most striking aspect of state rulemaking is the relative absence of state statutes mandating transparency and openness in rulemaking. In addition, the scope and detail of such regulations varies among the states that have enacted such provisions.

Some states have relatively minimalist provisions for participation in the rulemaking process. Arizona, for example, permits any bar member or private citizen to object in writing to a rule and to request changes, but the court “shall consider the objections and requests as advice and information only, and may act thereon at its discretion.”⁸¹

Some states provide for publication of draft proposed rules, and notice-and-comment periods. For example, Indiana provides for a 30-day notice-and-comment period after publication of a proposed rule.⁸² Similarly, Minnesota requires that before the courts may adopt any new rule or amendment, the proposed rule must be distributed to the bench and bar for their consideration and suggestions. The Minnesota judiciary must then “give due consideration to any suggestions” that are submitted to the court.⁸³ Likewise in Mississippi, the advisory committee is required to publicize proposed rules and to receive and consider suggestions for improvement from the bench, bar, and public.⁸⁴ Other states have similar publication, notice and comment requirements before rules may take effect.⁸⁵ In Maryland, reports of the judicial council are considered public reports and may be provided to the press.⁸⁶

Hardly any states provide for routine public hearings on proposed rule amendments. Vermont provides for public hearings if there are objections concerning existing rules, but also provides for a public notice and comment period prior to the promulgation of a rule, at which interested parties may present their views.⁸⁷ In West Virginia, the Supreme Court of Appeals will hold a hearing on a proposed rule only if 5 people on the advisory committee request a hearing.⁸⁸ If no hearing is requested, then the court is free to adopt or reject proposed rules.⁸⁹ Wyoming permits its advisory committee to hold hearings upon proposed rules “in such a manner and upon such notice as the Supreme Court prescribes and report to the court from time to time such recommendations as it deems proper.”⁹⁰

Currently, Washington state statutes contain the most comprehensive set of open-rulemaking and transparency provisions.⁹¹ Under Washington provisions, any person or group may file a request with the Supreme Court to receive notice of a suggested rule.⁹² In addition, any person or group may submit to the Supreme Court a request to adopt, amend, or repeal a court rule.⁹³ The Washington statutes contain extremely detailed information for the form of submitting a request to change rules,⁹⁴ the schedule for review and adoption of suggested rules,⁹⁵ and detailed guidelines under which the Supreme Court must consider such requests.⁹⁶ Proposed rules must be published for comment, and the Supreme Court may hold hearings on the proposed rule (or suggested revisions) before enactment.⁹⁷

In addition, if the Washington Supreme Court rejects a suggested rule, it may provide the proponent with the reasons for the rejection; if the court adopts the rule without public comment, it may set forth the reasons for adoption.⁹⁸

IV. Summary and Conclusions

State rulemaking power is an incredibly varied and complex subject, governed by an equally complex schema of constitutional and statutory provisions. In addition, state rulemaking is further complicated by local legal culture and customary practice, which may not be reflected in published legal authority.

Consequently, it is difficult to draw sweeping generalizations about state rulemaking or the consequences of state rulemaking on substantive and procedural rights. In addition, this endeavor is hampered by a lack of empirical evidence concerning the actual implementation of rulemaking procedures in individual states.

The following assertions may be ventured, however. Most states follow a model of rulemaking that

vests rulemaking authority in the judiciary. Many states also recognize that rulemaking is a shared power, which shared power is acknowledged by the presence of legislative and executive members on rules advisory committees. In a few states, the legislative branch retains ultimate control over rulemaking.

Almost all states recognize limitations on judicial rulemaking authority, either through language identical to that in the federal Rules Enabling Act, or similar limiting language.

Many, if not most, states have institutional rulemaking bodies that draft, propose, recommend, and promulgate proposed rules. These advisory bodies vary in size and composition, from the small and contained, to the vast and sprawling. Many states' advisory committees seek diversity and balance in the composition of their rulemaking advisory groups.

In comparison to the federal model, relatively few states have enacted statutory provisions to ensure open rulemaking, notice and comments, and other transparency provisions.

Judges, practicing attorneys, jurists, and academics are best situated to understand the reality of local rulemaking and the consequences of any particular state's rulemaking model on state substantive and procedural rights. As indicated above, in the federal arena, enhanced participation and transparent rulemaking has proven to be a double-edged sword. The new transparency and participation provisions have both enhanced and inhibited rulemaking. It remains to be learned whether the various states' rulemaking experiences—particularly in those states with participatory and transparent rulemaking procedures—duplicate the federal experience.

ENDNOTES

¹ The underlying research on state rulemaking models was supervised by Jeanne Price, Director of Public Services, Tarlton Law Library, Jamail Center for Legal Research, the University of Texas School of Law; and was conducted by Molly Mackey (University of Texas School of Law, Tarlton Law Fellow 2004-05) and Katie Ritcheske, University of Texas School of Law, Class of 2005. I am indebted for their assistance on this project. See Table 1 (Constitutional and Statutory Authority for State Rulemaking), (available at www.poundinstitute.org).

² See generally W. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES (181); JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 55-63 (1977) (historical overview of legislative rulemaking authority); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (history of the federal Rules Enabling Act); Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281 (1989); Albert B. Maris, *Federal Procedural Rulemaking: The Program of the Judicial Conference*, 47 A.B.A. J. 772 (1961) (history of judicial rulemaking and the activities of the federal Judicial Conference); *The Rule-Making Function and the Judicial Conference of the United States*, 21 F.R.D. 117 (1957) (judicial statements addressing proposals to authorize U.S. Judicial Conference to make recommendations for revisions to the Federal Rules of Civil Procedure).

³ See, e.g., Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461 (1997) (arguing that proposed Rule 23 amendments violated the Rules Enabling Act and limits of judicial rulemaking authority); cf. Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615 (1997) (arguing that proposed Rule 23 amendments did not violate limits on judicial rulemaking).

⁴ See 28 U.S.C. § 2073(c)(1), which provides: "Each meeting for the transaction of business under this chapter by any committee appointed under this section shall be open to the public. . . . Minutes of each meeting for the transaction of business under this chapter shall be maintained by the committee and made available to the public. . . ." The Rules Enabling Act was amended in 1988-89 to add § 2073, as part of the Judicial Improvements and Access to Justice Act, Pub. L. N. 100-702, IV, 102 Stat. 4642. See Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161 (1991) (describing impetus for 1988 amendments to the Rules Enabling Act). For a discussion of the politicization of rulemaking in the

subsequent wake of the enactment of § 2073, see Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 830-57 (1991).

⁵ See Donna J. Pugh, Chris A. Korbakes, James J. Alfini, and Charles W. Grau, JUDICIAL RULEMAKING: A COMPENDIUM (1984) (updating 1978 compendium by American Judicature Society entitled *Judicial Rulemaking in the State Courts: A Compendium* by Korbakes, Alfini, and Grau).

⁶ And that of the District of Columbia and the American territories, for that matter.

⁷ See 28 U.S.C. §§ 2071 – 2072 (otherwise commonly referred to as the “Rules Enabling Act”).

⁸ 28 U.S.C. § 2071(a).

⁹ See Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 424-40 (1992) (describing Senate’s position that rulemaking authority is vested exclusively with Congress); Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1323-38 (1993) (same).

¹⁰ See, e.g., Weinstein, REFORM OF COURT RULE-MAKING at 92 (control over practice and procedure has been subject to concurrent jurisdiction of Congress and the judiciary); A. Leo Levin & Anthony Amsterdam, *Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 3 (1958) (same); Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write Into Federal Rules of Evidence*, 57 TEX. L. REV. 167, 176-202 (1979) (same).

¹¹ Perhaps the most famous example is Congress’s 1983 enactment of ill-conceived and ill-fated amendments to Rule 4, relating to service of process. For a description of this legislative rulemaking episode, see Linda S. Mullenix, *Hope Over Experience*, *supra* note 3, at 844-46; Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183 (1987) (Congressional drafting of Rule 4 provisions).

¹² Apart from the 1983 Congressional override of the judicially-approved Rule 4 amendments, I know of no other instance in which Congress has exercised its power to defeat or override a rule amendment that has been approved by the U.S. Judicial Conference or the United States Supreme Court.

¹³ 28 U.S.C. § 2072(b).

¹⁴ See Mullenix, *Unconstitutional Rulemaking*, *supra* note 9, 77 MINN. L. REV. at 1289-1314 (canvassing the arguments and legal literature discussing the separation-of-powers theory of federal rulemaking); Mullenix, *The Counter-Reformation*, *supra* note 9, 77 MINN. L. REV. at 434-38 (discussing separation-of-powers theory of rulemaking as it relates to the 1990 Civil Justice Reform Act).

¹⁵ See Mullenix, *Unconstitutional Rulemaking*, *supra* note 9, 77 MINN. L. REV. at 1319-22 (discussing cases and secondary authority for the theory of “inherent powers of the court” as authoritative basis for rulemaking); John H. Wigmore, *All Legislative Rules for Judicial Power Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928) (arguing that there is inherent power of the courts to issue procedural rules).

¹⁶ See Stephen B. Burbank, *The Rules Enabling Act*, *supra*; Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington’s “Substance” and “Procedure” in the Rules Enabling Act*, 1989 DUKE L.J. 1012 (1989); Paul D. Carrington, *“Substance” and “Procedure” in the Rules Enabling Act*, *supra*. As I have written elsewhere:

The generalized Rules Enabling Act argument is inherently irresolvable. Neither the Supreme Court in a series of cases, nor academic exegesis over five decades has cogently illuminated how best to determine whether a rule is “substantive” or “procedural.” The Supreme Court has suggested that we can recognize procedural rules when we see them, because these rules fundamentally involve “housekeeping” arrangements. Less usefully, the Supreme Court has variously (and unsuccessfully) attempted to characterize substantive rules, an exercise that involves parsing whether a particular rule is “bound up” with substantive rights and remedies. Further muddling this debate is the concession that many rules fall into a “twilight zone” between substance and procedure, a rhetorical flourish that is feeble for resolving hard cases.

Mullenix, *The Constitutionality of the Proposed Rule 23 Amendments*, 39 ARIZ. L. REV. at 618 (1997)(citations omitted).

¹⁷ See *supra* note 2 (academic debate concerning whether proposed amendments to Rule 23 violated Rules Enabling Act limitation on rules abridging, enlarging, or modifying substantive rights).

¹⁸ See, e.g., *Business Guides Inc. v. Chromatic Communications Enters.*, 498 U.S. 533, 551-54 (1991) (challenging Rule 11); *Colegrove v. Battin*, 413 U.S. 149, 162-63 (1973) (challenging Rule 48); *Hanna v. Plumer*, 380 U.S. 460, 464-65 (1965) (challenging Rule 4(d)(1)); *Schlagenhauf v. Holder*, 379 U.S. 104, 112-14 (1964) (challenging Rule 35(a)); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 433-35 (1956) (challenging Rule 54(b)); *Mississippi Publ’g Corp. v. Murphee*, 326 U.S. 438, 445 (1946) (challenging Rule 4(f)); *Sibbach v. Wilson*, 312 U.S. 1, 14 (1941) (challenging Rule 35).

¹⁹ In 1997, the Advisory Committee on Civil Rules tabled consideration of the controversial Rule 23(b)(4) amendment, after vocal Rules Enabling Act and other challenges. This provision would have added a new provision for settlement classes. The committee chair, Judge Paul V. Niemeyer, offered as the ostensible reason for tabling this proposal that the Committee awaiting Supreme Court decision in *Amchem Products v. Windsor*, 521 U.S. 590 (1997). After the Court decided *Amchem*, the Advisory

Committee dropped the controversial (b)(4) settlement class proposal, which was not subsequently resuscitated or enacted into law.

20 28 U.S.C. § 2075 (authority for promulgating bankruptcy rules).

21 28 U.S.C. § 2077(b); 28 U.S.C. § 2073(a)(2).

22 28 U.S.C. § 2074(a).

23 *Id.*

24 *Id.* It also is difficult to know in how many instances Federal Rules have become law by the inaction of Congress. In recent times, Congress has acted to enact the proposed rules.

25 28 U.S.C. § 2073(a)(2), (b).

26 See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence* (August 2004) (proposed amendments to civil rules 16, 26, 33, 34, 37, 45, 50, and Form 35 (pre-trial and discovery rules)).

27 106 S. Ct. 2379 (1986) (restrictive reading of Fed. R. Civ. P. 15(c), limiting the ability of parties to amend pleadings after expiration of statute of limitations).

28 See, e.g., Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence* (August 2004) (proposed amendments to bankruptcy rules 1009, 2002, 4002, 5005, 7004, 9001, 9036, and Official Form 6; civil rules 16, 26, 33, 34, 37, 45, 50, and Form 35; admiralty rules A, C, E, and new Rule G; criminal rules 5, 32.1, 40, 41, and 58; and evidence rules 404, 408, 606, and 609). Proposed rule amendments are now also posted online at www.uscourts.gov/rules.

29 *Id.* (giving notice of public hearings for these sets of proposed rule amendments, in various cities during January and February 2005, including Washington D.C.; San Francisco, California; Dallas, Texas; Tampa, Florida; and New Haven, Connecticut. Any person wishing to make comments or to give testimony at a scheduled public hearing is required to notify the Committee Secretary at least 30 days before the hearing.)

30 *Id.* (indicating a request for written comments due by February 15, 2005. Comments to proposed rules may be submitted electronically to www.uscourts.gov/rules.)

31 See *supra* note 3

32 28 U.S.C. § 2073 (c)(1), (2), (d) (open meetings, open records, notice and explanatory note requirements); 28 U.S.C. § 2077 (publication of rules and advisory committees).

33 28 U.S.C. § 2073(c)(1).

34 *Id.*

35 28 U.S.C. § 2073 (c)(2).

36 See *Proposed Amendments to Federal Rule of Civil Procedure* (2001), available online at www.uscourts.gov/rules/congress0303/CV-Redline.pdf (Administrative Office of the United States Courts, 4-volume legislative history of the proposed amendments to Rule 23).

37 See Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHICAGO LEGAL FORUM 177, 177-180 (2003) (discussing the aborted history of the attempts to amend Rule 23 between 1991 and 1997).

38 *Id.* Although it is difficult, if not impossible, to attribute political motivations to the actions of the federal rulemaking committees, it is perhaps noteworthy that the Advisory Committee on Civil Rules retreated from a wholesale revision of the class action rule during a period when the Republican party was in ascendancy in Congressional power. It is equally likely, however, that the Advisory Committee took a more cautious approach because the Supreme Court was considering two major class action cases, *Amchem Prods. v. Windsor* (1997) and *Ortiz v. Fibreboard Corp.* (1999). In this view, the Advisory Committee might have retreated from a wholesale revision of the rule, pending guidance from the Supreme Court in the *Amchem* and *Ortiz* cases.

39 See FED. R. CIV. P. 23(f) (effective December 1, 1998).

40 Mullenix, *No Exit*, *supra* note 37 at 178.

41 See Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 U. TENN. L. REV. 97 (2001) (recounting enactment of the Rule 23(f) provision for interlocutory appeal of class certification orders).

42 FED. R. CIV. P. 23(g) (effective December 1, 2003).

43 FED. R. CIV. P. 23(h) (effective December 1, 2003).

44 See detailed Table of States on State Rulemaking Authority available at www.poundinstitute.com.

⁴⁵ See, e.g., ALA. CONST. §§ 6.01, 6.11; ALA. CODE § 12-2-7; ARIZ. CONST. art. VI, § 5; ARIZ. REV. STAT. § 12-109; ARK. CONST. AMEND. 80 § 3; COLO. CONST. art. VI, § 21; COLO. REV. STAT. ANN. § 13-2-108; CONN. GEN. STAT. § 51-14; DEL. CONST. art. IV, § 13; DEL. CODE ANN. tit. 10, § 161; GA. CODE ANN. § 15-2-18; HAW. CONST. art. 6, § 7; 735 ILL. COMP. STAT. 5/1-104; IND. CODE § 34-8-1-3, 34-8-1-4; IOWA CODE § 602.4201; KAN. STAT. §§ 20-342, 59-2501, 60-267; KY. REV. STAT. § 29A.020; LA. CONST. art. V, § 5; LA. CODE CIV. PROC. art. 193; LA. CODE CRIM. PROC. ANN § 18; ME. REV. STAT. ANN. 4, §§ 8, 9, 9-A; MASS. GEN. LAWS ANN. 218, § 43; MICH. CONST. art. VI, § 5; MICH. COMP. LAWS § 600.223; MINN. STAT. ANN. § 480.051; MISS. CODE ANN. §§ 9-3-39; 9-3-61; MO. CONST. art. V, § 5; MO. REV. STAT. ANN. § 477.010; MONT. CONST. art. VII, § 2; MONT. CODE ANN. § 3-2-701; NEB. CONST. art. V, § 25; NEV. REV. STAT. ANN. § 2.120; N.H. CONST. art. 73-A; N.J. CONST. art. VI, § 2; N.M. STAT. ANN. § 38-1-1; N.Y. CONST. art. VI, § 30; N.C. CONST. art. IV, § 13; N.D. CONST. art. VI, § 3; N.D. CENT. CODE § 27-02-08; OHIO CONST. art. IV, § 5; PA. CONST. art. V, § 10; 42 PA. CONST. STAT. ANN. § 1722; R.I. GEN. LAWS § 8-6-2; S.C. CONST. art. V, § 4; S.D. CONST. art. V, § 12; S.D. CODIFIED LAWS § 16-3-2; TENN. CODE ANN. §§ 16-3-401, 402; TEX. CONST. art. V, § 31; UTAH CONST. art. VIII, § 4; UTAH CODE ANN. § 78-2-4; VT. CONST. § 37; VA. CONST. art. VI, § 5; VA. CODE ANN. § 8.01-3; WASH. CONST. art. IV, § 24; W. VA. CONST. art. VIII, § 3; W. VA. CODE § 51-1-4; WIS. STAT. ANN. § 751.12; WYO. STAT. ANN. § 5-2-113.

⁴⁶ *Id.*

⁴⁷ See, e.g., ALASKA CONST. art. IV, § 15 (rules may be changed by legislature by 2/3 vote of members of each elected house); COLO. CONST. art. VI, § 21 (general assembly has power to provide simplified procedure in county courts for misdemeanor trials); CONN. GEN. STAT. § 51-14 (chief justice required to report rules to General Assembly for study; General Assembly has right to disapprove any rule or part of any rule); FLA. CONST. art. V, § 2 (rules of court may be repealed by 2/3 vote of membership of each house of state legislature); GA. CODE ANN. § 15-2-18 (rules shall not take effect until confirmed and ratified by the General Assembly or an act or resolution of the General Assembly); N.C. CONST. art. IV, § 13 (vesting supreme court with authority to promulgate rule of practice and procedure for appellate division, but vesting general assembly with rulemaking authority for superior and district courts); OHIO CONST. art. IV, § 5 (requiring proposed rules to be filed with general assembly; general assembly retains power to adopt, disapprove, or enact by default); ORE. REV. STAT. § 1.735 (requiring proposed rules be submitted to legislative assembly, which may amend, repeal, or supplement any of the rules); TEX. GOV'T CODE ANN. § 74.024 (rules must be submitted to legislature; will remain in effect until disapproved by legislature); UTAH CODE ANN. § 78-2-4 (legislature may amend rules of procedure and evidence adopted by the Supreme Court upon vote of 2/3 of all members of both houses of legislature); VT. STAT. ANN. tit. 12, § 3 (legislative committee on judicial rules); VA. CONST. art. VI, § (General Assembly may adopt additional measures deemed desirable for administration of justice by the courts); VA. CODE ANN. § 8.01-3 (General Assembly may modify or amend any rules).

⁴⁸ See, e.g., IDAHO CODE § 1-212 (“The inherent power of the Supreme Court to make rules governing procedure in all the courts of Idaho is hereby recognized and confirmed”); IND. CODE § 34-8-1 (“The general assembly of the state of Indiana affirms the inherent power of the supreme court of Indiana to adopt, amend, and rescind rules of court affecting matters of procedure. . .”). Prior to the adoption of constitutional amendments, the New Hampshire Supreme Court asserted an inherent power to adopt procedural rules. See *Judicial Rulemaking*, *supra* note 5, at 147. See also OKLA. STAT. ANN. tit. 20, § 24 (reference to inherent powers of the court); W. VA. CODE § 51-1-4a (reference to inherent powers of the court).

⁴⁹ See, e.g., ALA. CONST. § 6.11; ARIZ. REV. STAT. § 12-109; ARK. CONST. AMEND 80 § 3; COLO. REV. STAT. ANN. § 13-2-108; CONN. GEN. STAT. § 51-14; DEL. CODE ANN. tit. 10, § 161; GA. CODE ANN. § 15-2-18; HAW. REV. STAT. ANN. § 602-11; IDAHO CODE § 1-213; IOWA CODE § 602.1202; ME. REV. STAT. ANN. tit. 4, § 8; MINN. STAT. ANN. § 480.051; MO. REV. STAT. ANN. § 476.320; MONT. CODE ANN. § 3-2-701; NEV. REV. STAT. ANN. § 2.120; N.J. STAT. ANN. § 2A:84A-41; N.M. STAT. ANN. § 38-1-1; N.D. CENT. CODE § 27-02-10; OHIO CONST. art. IV, § 5; OHIO REV. STAT. § 1.735; PA. CONST. art. V, § 10; 42 PA. CONST. STAT. ANN. § 1722; S.D. CODIFIED LAWS § 16-3-3; TENN. CODE ANN. § 16-3-403; VT. STAT. ANN. tit. 12, § 1; WIS. STAT. ANN. § 751.12.

⁵⁰ See, e.g., CAL. CONST. art. VI, § 6 (rules adopted shall not be inconsistent with statute); 735 ILL. COMP. STAT. 5/1-104 (rules may not be inconsistent with provisions of this Act); KAN. STAT. § 59-2501 (appropriate rules of court may not be inconsistent with the provisions of this act); LA. CONST. art. V, § 5 (procedural and administrative rules may not be in conflict with law); MISS. CODE ANN. § 9-3-39 (rules must be consistent with law); NEB. CONST. art. V, § 1 (rules must not be in conflict with other provisions of Constitution and laws governing such matters); N.C. CONST. art. IV, § 13 (no rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury); S.C. CODE ANN. § 14-5-310 (“provided such rules are not repugnant to the laws of the State. . .”); TEX. CONST. art. V, § 31 (Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state. . .); VA. CONST. art. VI, § 5 (such rules shall not be in conflict with the general law); WYO. STAT. ANN. § 5-2-113 (rules must be not inconsistent with constitution or laws of this state).

⁵¹ See detailed Table of States on State Rulemaking Authority for description of provisions relating to implementation of rulemaking authority, *supra* note 44.

52 See e.g., ALASKA CONST. art. IV, § 8; CAL. CONST. art. VI, § 6; DEL. SUP. CT. R. 81; HAW. REV. STAT. ANN. § 601-4; IDAHO CODE § 1-2101; 55 ILL. COMP. STAT. 5/5-18002; IOWA CODE § 602.1202; KAN. STAT. § 20-2201; LA. SUP. CT. R. 22; N.H. REV. STAT. ANN. § 494:1; S.C. CODE ANN. § 14-27-20; TEX. GOV'T CODE §§ 71.011 AND 71.031; UTAH CODE ANN. § 78-3-21; VA. CODE ANN. § 17.1-700; WIS. STAT. ANN. § 751.12, 751.13.

53 See, e.g., MO. REV. STAT. ANN. § 476.320; N.J. COURT RULES, 1969 R. 1:35-1 (2005); N.Y. JUD. CT. ACTS 7-A, § 214; S.D. CODIFIED LAWS § 16-14-1.

54 See, e.g., ALA. CODE § 12-2-7; MD. CTS. & JUD. P. CODE § 13-310; N.D. R. P. § 8.

55 See, e.g., ALA. CODE § 12-2-7; IND. R. TRIAL P. 80; MICH. COMP. LAWS § 600.223; MINN. STAT. ANN. § 480.052; MISS. CODE ANN. § 9-3-65; MONT. CODE ANN. § 3-2-702; N.M. SUP. CT. R. 23-106; WYO. STAT. ANN. § 5-2-117.

56 See, e.g., ARIZ. REV. STAT. § 12-110; GA. CODE ANN. § 15-2-18.

57 See, e.g., LA. SUP. CT. R. 14.

58 See, e.g., N.H. REV. STAT. ANN. § 502-A:18.

59 See, e.g., TENN. CODE ANN. § 16-3-601.

60 ORE. REV. STAT. § 1.730; ORE. REV. STAT. § 1.810 (Judicial Council).

61 VT. STAT. ANN. tit. 12, § 3 (legislative committee on judicial rules).

62 VT. STAT. ANN. tit. 12, § 1 (rules of pleading, practice and procedure; forms).

63 ALASKA CONST. art. IV, § 8.

64 IDAHO CODE § 1-2101 (three attorney members, three non-attorney members, and the Chief Justice of the Supreme Court). The appointment process and requirements for diversity and geographic dispersion of appointees is detailed in the statute.

65 IND. R. TRIAL P. 80(A).

66 MINN. STAT. ANN. § 480.52.

67 DEL. SUP. CT. R. 81. Utah has a relatively intermediate-sized judicial conference, consisting of fourteen designated members. See UTAH CODE ANN. § 73-3-21. Virginia also has a judicial council consisting of fourteen members. See VA. CODE ANN. § 17.1-700.

68 OKLA. STAT. ANN. tit. 12, § 74.

69 CAL. CONST. art. VI, § 6.

70 CONN. GEN. STAT. § 51-15a.

71 S.C. CODE ANN. § 14-27-20.

72 See TENN. CODE ANN. § 16-21-101.

73 VT. STAT. ANN. tit. 12, § 3.

74 GA. CODE ANN. § 15-2-18(e).

75 LA. SUP. CT. R. 14

76 LA. SUP. CT. R. 22.

77 *Id.*

78 A few other states have large judicial councils. Consistent with a southern trend for expansive inclusiveness, the South Carolina judicial council mandates 25 members. See S.C. CODE ANN. § 14-27-20. Wisconsin statutes provide for a judicial council consisting of 21 members. See WIS. STAT. ANN. § 751.12. The New Hampshire statutes provide for a judicial council consisting of no fewer than 24 designated, statutorily mandated members from diverse segments of the legal and legislative communities. See N.H. REV. STAT. ANN. § 494:1. The Oregon Council on Court Procedures consists of 23 designated members. See ORE. REV. STAT. § 1.730. Tennessee also provides for a very large and diverse judicial council. See TENN. CODE ANN. § 16-21-101.

79 MISS. CODE ANN. § 9-3-65. As indicated above, Mississippi, however, does not set the record for the largest and most diverse judicial council.

80 N.J. CT. R., 1969 R. 1:35-1 (2005). Proposed rules are presented to the Judicial Conference. See N.J. STAT. ANN. § 2A:84A-34, which sets forth the lesser included, but still significantly large membership that must be present to consider proposed rule amendments.

81 ARIZ. REV. STAT. § 12-110.

82 IND. R. TRIAL P. 80(D) and (E).

83 MINN. STAT. ANN. § 480.054.

84 MISS. CODE ANN. § 9-3-69.

- 85 *See e.g.*, MO. CONST. art. V, § 5 (court shall publish rules); N.J. STAT. ANN. § 2A:84A-35; N.M. SUP. CT. R. 23-106; OR. REV. STAT. § 1.735 (2); PA. R.J.A. No. 103; S.D. CODIFIED LAWS § 16-3-5.1; WIS. STAT. ANN. § 751.12.
- 86 MD. CTS. & JUD. P. CODE § 13-301.
- 87 VT. STAT. ANN. tit. 12, § 3.
- 88 W. VA. CODE. § 5-1-4a.
- 89 *Id.*
- 90 WYO. STAT. ANN. § 5-2-116.
- 91 *See* WASH. GEN. R. 9 et seq.
- 92 WASH. GEN. R. 9(c).
- 93 WASH. GEN. R. 9(d).
- 94 WASH. GEN. R. 9(e).
- 95 *Id.*
- 96 *Id.*
- 97 *Id.*
- 98 *Id.*

ORAL REMARKS OF PROFESSOR MULLENIX

I was contacted by Dr. Marshall, I guess sometime early in the spring, with an invitation to come to the Forum for State Appellate Court Judges to talk about state rulemaking, and I was instantly intrigued by the invitation and the prospect of doing this. I agreed to undertake the project, but I also realized that, for me, it was kind of a blessing and a curse at the same time.

I have been interested in federal rulemaking for many, many years. I have had the unusual opportunity to attend many meetings of the Federal Advisory Committee on Civil Rules, which I think inspired my interest in the process of federal rulemaking. I also teach the Federal Rules of civil procedure, so I am kind of interested in their origin. Over the last decade, I have done a fair amount of practice in state courts, and, as I have gone around to the different states, I have become interested in state rules and where state rules come from. So when I got the call, I was kind of “incentivized,” basically, to go out and systematically begin to think about state rulemaking. That was the blessing part of the invitation.

The curse part of the invitation is that I would wish upon no one the project of investigating 50 states’ laws. It is a most horrible, horrible undertaking. It takes a huge amount of time. Plus, if you are not from a particular state, you really don’t have a good grasp about state statutes—where they are located and what they are doing.

And then I was also told that I basically had about two months to put this project together. So I marshaled the great resources of the University of Texas Law School Library—we have probably the best law-school library in the country—and worked with staff there and talked to them about this project. I had to spend a great deal of time explaining to them what a rules-enabling act was and what they were looking for, and, basically, with my assistance, my guidance, and my supervision, they compiled a 50-state table that was posted on the Pound Web Site [www.poundinstitute.org]. It has the states alphabetically on a grid, with provisions relating to authority for rulemaking, scope of rulemaking, and any provisions relating to implementation, advisory councils, public hearings, and so on. It was an enormous project.

As this was being developed and I was doing my draft paper, Dr. Marshall kept sending me e-mails like, “Can you possibly explain in the 50 states the effect of lobbying on the rulemaking process?” And I sent him back an e-mail and I said, “Well, if you give me another decade and substantial financial support, I can begin to investigate the question of how lobbying works in the 50 states.” And he kept sending me these questions, and I kept saying, “I can’t do it in the amount of time I have.” So, eventually, he retreated and we narrowed the scope down. This is by way of telling you what the limitations are of the presentation that you have in front of you.

In the time constraint that I had, about the best we could do was make an attempt to compile at least the statutory basis for rulemaking in the states, and the statutes, basically, give some indication of how rulemaking is to be accomplished.

What I can’t know—what was impossible to know—is how these statutory provisions are implemented in any particular state, and so, as I go around to the different groups, I am interested in learning from you how rulemaking actually works in your state.

And I also know that there is a dissonance between the published statutory materials and how things actually work. I know this from Texas, because if you read the Texas provisions and you live in Texas and know something about how the rules are made, there is somewhat of a correspondence, but Mr.

Martin is going to talk a little bit more about that. So, again, you know better how these things work out in your states.

The point of departure for thinking about state rulemaking for me was first to look to the federal rulemaking model. You probably learned something about the federal rulemaking model when you were in law school. The basis for the Federal Rules is something called the Rules Enabling Act. It was passed in 1934 by Congress, and is the basis for the Federal Rules of civil procedure, which were first promulgated in 1938. The major provision in the Rules Enabling Act is in § 2072(b), which says, “such rules of procedure and evidence shall not abridge, enlarge or modify any substantive right. All such laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”

This provision basically sets the model of federal rulemaking. It is delegated from Congress to the judiciary. It is a power that is shared by Congress with the Judiciary, and it is limited by the Rules Enabling Act language. Basically, the language in § 2072(b) embodies what you know as the substance/procedure divide, which is that the federal judiciary has the power to promulgate rules, but they must be procedural rules or they must be evidence rules, and they cannot transgress the substance divide and be substantive.

You also probably remember from law school there has been endless litigation over the distinction between substance and procedure, and many trees have been sacrificed by courts working their way through this distinction, but that is the major model for federal rulemaking. That is the constitutional and statutory basis for rulemaking in the federal courts.

The way it is implemented is through a series of advisory committees. There is basically a pyramid structure for rulemaking in the federal system. At the bottom level, you have the advisory committees on

You also probably remember from law school there has been endless litigation over the distinction between substance and procedure.

civil rules, criminal procedure, bankruptcy, evidence, and appellate procedure. Above them are the standing committees, and these committees review draft proposals that come from the advisory committees, and then, after there have been any modifications or changes, the standing committees will transmit rules to the United States Supreme

Court. The United States Supreme Court will then consider a proposed rule, and the nine Justices vote on whether or not they are going to approve a new rule or an amended rule.

If the Supreme Court approves a new or amended rule, it is then transmitted to Congress. New rules or amended rules have to be transmitted to Congress by May 1st of every year, and then Congress has to act by December 1st. If Congress takes no action by December 1st, the rules go into effect, basically by default. So that is generally how the process works.

The advisory committees and the standing committee consist of federal judges who are appointed by the Chief Justice of the United States Supreme Court. There is an academic reporter on each one of these committees. There is always a state judge, who sits as a liaison, and, usually there are representatives from the other committees. So there'll be a bankruptcy judge who sits on the Civil Rules Committee and so on, and there is also usually one law professor who sits on each committee.

Justice Rehnquist's inclination has been to rotate judges off the advisory committees after a fixed term. As I comment in my paper, that has had the interesting effect of not creating fiefdoms. However, it

has an impact on institutional memory, because if people sit on these committees for a long time, they can remember what the committees have been doing.

Also, in the federal rulemaking process, prior to promulgation of a rule there is a public notice and comment period. Now everything is done electronically, so proposed rules are published on the federal court's Web Sites. There will be hearings around the country on proposed Federal Rules, and, then, after reaction from the public notice and comment period and the hearings, the committee will take that information back and figure out whether or not it wants to make further amendments or drop proposed rules.

The big change in federal rulemaking came at the end of the 1980s with Congress' enactment of the Civil Justice Reform Act. There was also an amendment to the Rules Enabling Act at that time, and what the amendment did to the Rules Enabling Act was basically open up the advisory committee meetings to the public. Prior to that time, the advisory committee meetings had not been open to the public, and so, in the olden days, the committees were, essentially, a bunch of guys who would get together in a smoke-filled room and they'd sit down and make the rules.

The end of the 1980s was the end of that era. The meetings were opened up. I happened to be working at the Federal Judicial Center that year and actually went to the first advisory committee meeting on civil rules that was open to the public and it was quite incredible because a large number of people turned out. It was very memorable for me, because I thought it was the beginning of the end, and,

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basically, my insight at that time was once you open these meetings up it was going to politicize the process of rulemaking, and I think, in the ensuing 15 years, we have had at least some suggestion of that.

At least in the Rules of Civil Procedure, the big rules that have been amended over this time have been the class action and the discovery rules. All the constituent interest groups that have an interest in rulemaking typically do appear. They send representatives. They are very active in supplying comments, appearing at the public hearings, and doing quiet lobbying for rule changes.

I have seen two different impacts of this process. One is that it tends to lead to a kind of paralysis in the committee. There are so many competing voices that I have seen the Advisory Committee basically retreat from proposed rulemaking. That certainly happened with proposed changes to Rule 23. And the other thing that happens is that it tends to lead to the withdrawing of any controversial proposals. So what happens is that the rulemaking committee comes up with the least offensive rule proposal or the least common denominator change to the rule, that is agreeable to everybody. So rather than inspiring

innovation, I think that the openness and the enhanced participation has led the committee to being very cautious and very conservative and not really making innovative or radical changes.

All right. Turning to the state systems, what did I discover?

First of all, there is endless variation. The statutory schemes in the 50 states are just varied. They are all over the place, in terms of length and complexity. A majority of the states do have a rules enabling act. They have language that tracks the Federal Rules Enabling Act. So they have that limitation.

In a number of the states, rulemaking power is a statutory grant from the legislature. In other states, it is a function of the inherent powers of the court, and so it is not a statutory grant. In some states—and there are just a few of these—the state legislature actually can make the rules. Mr. Martin is going to talk to you about a peculiar experience that we have had recently in Texas with an interaction between the legislature and the judiciary.

The states also vary regarding how they constitute their advisory committees. These are called by all different labels—judicial councils, advisory committees. There are probably at least a dozen different names. The membership on these committees, by statute is very, very intriguing, and I give you some of the examples in my paper, the most extreme being the state of New Jersey. Somebody from New Jersey has already told me we don't do it that way. It is not as bad as it looks. So I will be interested to hear how that works.

States have different provisions on public hearings and transparency, and notice-and-comment periods. One of the things that was striking to me was that there seems to be less transparency in most state systems than there now is in the federal system, and that there were very few provisions actually for public hearings on proposed rules. Some states only provide a public hearing if somebody comes forward and requests it. The request is considered by the appropriate body and then they decide whether to grant a public hearing.

I will be interested to hear from the judges in the different states as to how rulemaking is actually implemented in their particular jurisdiction. Again, the prevailing model tracks the federal model somewhat, but not exactly. It is an interesting example kind of the brilliance of federalism, where each state basically has its own process, and it differs across all 50 states.

COMMENTS BY PANELISTS

James E. Rooks Jr., Esq.

John H. Martin, Esq.

William A. Gaylord, Esq.

Honorable Paul H. Anderson

James E. Rooks Jr.

Good morning. I am Jim Rooks, and I am not one of the objective, balanced panelists. I work for ATLA, and I have spent a lot of the last 10 years monitoring the activities of the federal court rulemaking committees as well as the corporations and business groups and lawyers and law firms and lobbyists that lobby those committees for rule changes that'll give them advantages in court. I help to write ATLA's comments on proposed rule changes, so I am not non-partisan when it comes to rulemaking.

I am not non-partisan about Linda's paper either. It is comprehensive. It is original. It is a great contribution to the literature on rulemaking. There are hardly any other articles on state rulemaking that I ever heard of, and I hope this paper will be published soon in a law review, so it can get even greater circulation than it'll get here.

I want to extrapolate from something Linda said. On page 12 of her paper, she observes a parallel between the battles over the proposed rule changes and the federal and state battles over so-called "tort reform." Certainly, that is true chronologically, but the campaign to change court rules doesn't just parallel tort reform. It is *part* of the tort reform agenda, whose proponents now use court rulemaking as a venue for lobbying, just as they use Congress and the state legislatures.

In September, the Judicial Conference of the United States, which governs the federal courts, will consider some proposed amendments to the Federal Rules of Civil Procedure ostensibly to govern electronic discovery. ATLA has argued particularly strongly against three of them. You'll hear about them this afternoon. I won't go into them here, but they are just awful. Take my word for it. They are called Electronic Discovery Rules, but they are really about shrinking discovery rights to diminish the power of the civil justice system.

ATLA has argued that they are unnecessary. They give advantage to discovery-producing parties over the rights of discovery-requesting parties. They go beyond procedure into the realm of substance, and invade the province of state courts in that they would effect yet another erosion of the system of notice pleading and discovery—a system that has done so much for us to achieve justice in the last half of the twentieth century. Despite ATLA's sound advice, the Judicial Conference just may adopt those three rules. They may adopt more than that.

If they do, will that be a catastrophe? My favorite definition of catastrophe comes from Isaac Bashevis Singer, a very great writer who won the Nobel Prize in Literature in 1978. Somebody once told Singer that a certain event in the publishing world was a catastrophe. I guess he thought he knew a

catastrophe when he saw one so he said, “No, no. This isn’t a catastrophe. Little children wouldn’t die of it.” Not a bad definition.

By that standard, whatever the Judicial Conference does is not going to be a catastrophe. Lawyers and judges are resourceful people and they’ll work out whatever problems occur.

Then why is this so important? It is important because there is a war over the civil justice system, and altering the court rules is just one of its battlegrounds. Thus, when we think about rulemaking circa 2005 and about the effect of rulemaking, I claim that it is not enough just to focus on the rules. We also need to look at the context in which rulemaking occurs. We have to look at the other battles going on in the war.

I think the American civil justice system performs five functions. I think it keeps American society honest, responsible, accountable, careful, and safe—and sometimes it keeps us alive. No doubt, there are those who think that that list of functions should be shorter or different. Some of them are judges who have serious misgivings about being expected to keep people alive and safe. They didn’t sign up for that duty, but it has devolved on them de facto because regulatory bodies have so often failed to do their jobs, and consumers and injured people have had to turn to the courts for redress.

Recently, we have seen news articles about some excellent examples of the benefits of the civil justice system. We have been bombarded with news about dangerous drugs, for instance, Vioxx and Celebrex. I

I think the American civil justice system performs five functions. I think it keeps American society honest, responsible, accountable, careful, and safe—and sometimes it keeps us alive.

am not going to tell judges about Vioxx and Celebrex, because there is ongoing litigation about both of those. But the litigation over another one, Propulsid, is essentially concluded. The reporters who wrote the stories about Propulsid were very resourceful people when it came to digging up the facts, but a lot of their information came from court files. It got there because very resourceful lawyers were able to

utilize discovery under the rules that exist today, before the Judicial Conference changes them. So civil litigation is the source of a lot of the information we have about these medications.

Propulsid is a particularly poignant example of what we know about the civil justice system and what we can only learn through the civil justice system. Propulsid was a medication for gastroesophageal reflux disease [GERD] that was approved by the FDA in 1993 and was withdrawn from the U.S. market in July 2000. The FDA didn’t do its job, and so it fell to the courts to clean up the rubble.

Federal, multi-district and other products liability litigation over Propulsid was settled in 2004. Massive discovery in the Propulsid litigation played a major role in getting the facts out about the drug to both the courts and the public. Much of it was electronic discovery carried out under the existing court rules, before the Judicial Conference changes them. Discovery uncovered evidence that the drug’s manufacturer, to protect its sales, downplayed evidence that it could cause serious heart problems—arrhythmia, for instance, which could be fatal, and that children were particularly susceptible to this.

The plaintiffs in the various cases alleged that upwards of 14,000 people were injured by Propulsid, and that approximately 300 of them died. While it was on the market, Propulsid was given to upwards of 20 percent of the newborn babies in neonatal intensive-care units in hospitals, the same “little children”

that Isaac Bashevis Singer was referring to. According to one study, from 1997 to 2000, over 100 infants were injured and at least two dozen died.

With the help of the judiciary and the help of discovery, the civil justice system has been able to perform the five functions I listed, but, to do so, it has needed the help of numerous supporting elements. They are a bit like the columns on the front of your courthouse that hold up the carved frieze illustrating ideals of law and equal justice.

Since they started, the Pound Institute's Judges Forums have examined a number of these supporting elements. We have heard from hundreds of judges at those past Forums, including some of you, and here are just some of the supporting elements—supporting columns, if you will—they have talked about:

A body of American law that makes sense in the twenty-first century, is flexible enough to respond to new challenges, and isn't tampered with by legislators and executive branch officials for the benefit of special interests or political and social and religious movements.

Court rules that are neutral and fairly enforced, including a discovery regime that will actually produce discovery necessary to adjudicate cases on their merits, cases like the Propulsid litigation.

Reasonable use of technical evidence and a recognition that science is a process, not an encyclopedia, and expert witnesses who aren't threatened with losing their professional licenses or having their research funds cut if they testified for the "wrong" side.

A right to jury trial that isn't chipped away by legislatures and appellate courts.

Jurors who receive adequate compensation, so they don't have to subsidize our right to trial by jury themselves with their own time and money.

Jury pools whose minds aren't corrupted by partisan publicity campaigns.

Jury verdicts that aren't ridiculed and second-guessed.

Court resources—enough courthouses and court rooms and court personnel and court infrastructure.

A sufficient number of judges who are paid appropriate salaries, who are fair and aren't ideologues.

Judges who aren't subjected constantly to recall campaigns or threats of impeachment or dirty elections and reelection campaigns.

Judges who don't have to fear for their careers and their reputations and maybe their personal safety and that of their families when their sworn duty requires them to make legitimate, but unpopular, decisions.

Just like the porticos in front of your courthouses, the civil justice system needs all of those supporting elements, and every one of them has been put at risk in the war over the civil justice system. They are being weakened by neglect, sometimes neglect so severe that it has to be considered strategic neglect. They are being subjected to ridicule through organized public-relations campaigns or being curtailed, and, in some cases, threatened with outright abolition.

The treatment of judges, your colleagues, is a particularly powerful example of this. For a while, the justices of the Massachusetts Supreme Judicial Court who were in the majority in their 2003 same-sex marriage decision, had to have state-police details protect them after they received death threats. George Greer, the Florida judge who presided over the Terry Schiavo case, was hounded out of his own church congregation, and a man in North Carolina offered \$50,000 if someone would kill him. We

have always heard complaints about judges who make allegedly bad decisions in criminal cases, but these were *civil* cases.

So that is the larger context we have to understand, I claim, when we are thinking about rulemaking, the steady erosion of the ability of the civil justice system to do its work. And when we do think about the context, rulemaking looks different. It looks different to me anyway. Careful, principled rulemaking is always going to be important, but it is especially critical when so many other parts of the civil justice system are threatened.

We could lose one of those supporting columns without losing the entire system—and we are losing discovery. But just as with the courthouse porticoes, there are only so many of those columns that could be compromised before we won't have an effective civil justice system. Then the system won't be able to do its important work of keeping Americans honest and responsible and accountable and careful and safe and, in some cases, alive—and *little children will die of that*.

John H. Martin

I have several comments that I want to make on Professor Mullenix's paper, but before I do that, I want to just briefly state that the defense lawyer's perspective, the DRI perspective on rulemaking, is simply that we want a balanced playing field. We are not trying to take away anybody's substantive rights, but we think that in some instances, in some jurisdictions, that the playing field has been too far tilted in one direction. We would like to see some rule changes over time, and we think we have achieved some rule changes in my state and in other states, that have simply caused the playing field to be more balanced, to be more fair, and that is really what I think most defense lawyers want, and it is certainly what DRI wants.

As Professor Mullenix pointed out, there certainly are differences between what you might read in the statutes of a particular state and what actually goes on in rulemaking in that state. I was struck, in reading her paper, that if a judge from New Jersey or New York or California or Massachusetts or North Carolina were to read her paper, that judge probably would not have a very good understanding of how the rulemaking process actually works in Texas, and I am sure the same is true of many other states. We heard the comment from Professor Mullenix about the New Jersey folks saying, "Well, it is really not that way. It really doesn't work that way."

In Texas, and I suspect many other states, there are some procedures that are codified in statutes or in court orders, but there's other informal procedures that work in practice and that I think make our rulemaking system work quite well. I think both sides of the bar in Texas are quite pleased with the way the rulemaking process is working and has worked over the past few years.

We had extensive revisions to our discovery rules, and I think both sides of the bar are generally pleased with how it came out and with how it is working, even in the area of electronic discovery. As you may know, Texas was, perhaps, the first state to adopt a procedural rule specifically addressing electronic discovery. I was honored to testify before the Federal Civil Rules Advisory Committee when they sat in Dallas earlier this year. The President of the Texas Trial Lawyers Association testified, and we agreed that

the Texas rule works quite well, and it really doesn't deprive anybody of any substantive rights or of any badly needed information and litigation.

As I said, the actual practice in my state works quite differently than the statutes would suggest. The statute talks about the rule of the judicial council, which is composed of certain judges, but, actually, the body that gives the most input to the Texas Supreme Court on rulemaking is the Texas Supreme Court Rules Advisory Committee, on which I have served for almost six years. It is chaired by a lawyer, not by a judge.

The chair of our committee is Chip Babcock, who is a First Amendment lawyer from—well, he is either from Dallas or Houston. He has offices in both places. He is best known, perhaps, as Oprah Winfrey's lawyer—he tried the Oprah Winfrey case out in Amarillo. Chip runs the meetings. A justice of the Texas Supreme Court, Justice Hecht, is the court's liaison to the committee. He attends all the meetings, but doesn't comment a whole lot on the substance of the rules. He takes the rules back to the court, and the court actually writes the rules.

There is a full-time briefing attorney on the Texas Supreme Court whose responsibility is only rulemaking. That is all that she does, and she reports to Justice Hecht, but the Supreme Court gets a lot of input in a formalized way from other groups as well.

In addition to the appointments they make to the Supreme Court Advisory Committee—that committee is quite large with 49 members, representatives of all segments of the bench and bar in Texas—the state bar also has a committee called the Court Rules Committee, and that committee represents the interests of the members of our unified bar and comments on rules and actually proposes rule to the Texas Supreme Court.

The recommendations go directly from the committee to the court, and it was set up deliberately that way. It bypasses the politics of the state bar board and the state bar officers, and the rules recommendations from the state bar Court Rules Committee go directly to the supreme court, which usually then refers their recommendations to the Advisory Committee. In addition, the state bar administration Rules of Evidence Committee proposes changes to the rules of evidence.

From time to time, the Texas Supreme Court has appointed task forces to study specific issues. There were a series of task forces several years ago, one of which was appointed to study changes in the jury system, such as allowing jurors to ask questions and things like that. Some of those recommendations are still being considered.

And then another committee was appointed by our former Chief Justice Tom Phillips about three years ago. Nobody can really remember the name of the committee. It is chaired by Joe Jamail—I am sure a good member of ATLA—and so it is known throughout the state as the Jamail Committee, and they have made a number of recommendations to the Texas Supreme Court, some of which have been implemented and some of which have proven to be rather controversial. I am going to talk about that very briefly.

We have, I'm sure, in most states in the rulemaking process, a tension between the legislature and what the legislature should do and what the court's role in rulemaking should be. The statutes in Texas are clear that the rulemaking authority is vested in the Texas Supreme Court, but the legislature effectively has a veto right over that. So there is sort of an uneasy truce, if you will, between the legislature and the

court. I am going to comment briefly on a couple of things that I think have worked very effectively in trying to work through this tension.

The practice of the Texas Supreme Court—and this was just an agreement that was struck between the court and the legislature—is to allow the Lieutenant Governor and the Speaker of the House of Representatives to appoint ex-officio members of the Rules Advisory Committee, who attend those meetings and can participate if they choose to do so. That has been implemented and has resulted in better communication between the Advisory Committee and the Court and the Texas legislature.

The other side of the coin is, as part of the so-called litigation reform or tort reform efforts—and we have had very extensive reform efforts in Texas, but I am not here to comment on the merits of that other than to say I like some of it and I don't like some of it, but that is far beyond the scope of our topic today—our legislature has gotten into the habit of passing substantive statutes that require the court to implement rules of procedure to implement the statute.

An example is our parental notification of abortion statute, and I mention that because that has been reported widely in the national media, the disagreement in one of the decisions related

More frequently, they just say, “Pass the rules, but pass them really quickly.”

to that statute between former Texas Supreme Court Justice, now Fifth Circuit Judge, Priscilla Owen, and former Texas Supreme Court Justice, now Attorney General of the United States, Alberto Gonzales. Their holdings on that statute have been widely quoted in the media, but when I first got on the Advisory Committee, the first job that we had was we had to pass rules to implement the statute.

Sometimes, they just say, “Pass some rules.” But other times, for example, when they passed the multi-district litigation statute that sets up an MDL procedure in Texas, they said, “You gotta pass rules that say A, B, C, D, E and F.” They were very specific with regard to what the rules had to say.

More frequently, they just say, “Pass the rules, but pass them really quickly.” Sometimes, they just don't give us nearly enough time to get good recommendations up to the Supreme Court, and the Supreme Court has had to pass the rules pretty hastily, but they were under a legislative mandate to do so and really did not have a lot of choice.

Another interesting aspect of the tension in Texas between the legislature and the court is there is a specific statutory provision that provides that if the Texas Supreme Court passes a procedural rule that is in conflict with a statute that addresses procedural issues, that the Supreme Court can actually repeal a statute passed by the legislature. They have to say they are doing it. They have to provide a list of repealed statutes to the legislature, and the legislature has an opportunity to come back and veto the rule if they want to. But, in practice, that has actually worked out pretty well, because there were some old, antiquated statutes about evidentiary issues that really needed to be put into the rules of evidence or the rules of procedure someplace. Some of those changes were made, and, in my experience and from my observation, they are generally done in consultation with the legislature. The court will contact the leaders of the legislature and say, “Well, we are going to pass this rule and we think this would result in the repeal of this statute. Do you have a problem with that?”

Another brief point I want to make is about the tension in the rulemaking process between the bench and the bar, and I have seen some really fascinating examples of that. In fact, in looking back on my service on the Court Rules Committee, I think there have been more votes where the lawyers lined up on one side

and the judges lined up on the other than there have been plaintiff versus defendant votes, and there certainly have been some of those, too.

But there was a very interesting vote recently. Texas has a thing called the “jury shuffle,” where either side can ask that the jury panel be shuffled and reordered if you just don’t like the order of the panel when they are brought up. You have to do it before the voir dire commences. We had a very spirited debate about that several meetings ago, and when we took the vote, every single lawyer in the room, except one, voted to retain the jury shuffle. Plaintiff’s lawyers, defense lawyers, family lawyers, commercial litigators, every kind of trial lawyer in the room—except that one guy—voted to retain it, and every single judge voted to get rid of it. That was the most extreme example I have seen, but there certainly are some areas of tension between the bench and the bar.

Just the final comment I would make is in the rulemaking process, we all ought to use a philosophy of, “If it ain’t broke, don’t fix it.” If it is working well, let’s not tinker with it. Let’s not pass a rule just to fix one bad situation, or just to correct an isolated situation where one judge or a few judges makes a bad ruling. I think that is generally the philosophy that should be followed and which has been followed in my state.

William A. Gaylord

I guess I am the kind of lawyer that can sprinkle my comments with either of the two quotes from literature I know. Some of you probably heard this one because I probably used it in some of the breakout sessions in this Forum that I have moderated in the past, but I think it is E.M. Forster that said, “How do I know what I think about that ‘til I hear what I have to say?” And I kind of felt that way, looking at these articles and topics, and trying to come up with some notes to say that adds anything to the discussions you are to have on the subject that you are considering after Professor Mullenix’s incredible work summarizing all of the different rules in the different states.

I thought we in Oregon were kind of unique in our way of doing the advisory to the legislature rulemaking sessions that we have. I’ll tell you a little bit more about that in a minute, but I am still puzzled by what am I doing here and what it is I have to contribute to you.

I think I am here as the end of a 20-year-old mistake I made when I took on our former Chief Justice Ed Peterson in Oregon. He came up with a cockamamie idea that he was going to have our state have what he called uniform trial court rules, and we had the Oregon Rules of Civil Procedure already in place. We had judges all over the state doing things their own way to fill in all the blanks that are not filled by the Civil Procedure Rules, and we had a new Chief Justice who felt that the inconsistency of that was intolerable, and I don’t remember why. It is long ago and faded from my memory why I thought that was a bad idea, but I wrote to him and expressed my concern about the idea, and that got me roped into the Uniform Trial Court Rules Committee, where I served for eight years and chaired for two years. I suspect that got me then appointed to the Council on Courts Procedure, where I served for eight years and chaired for two years and so I have become sort of a rulemaking geek and know far more than I wanted to know about how the rules came to be in my state and where they come from. I don’t know

whether that qualifies me to add gainfully to your thought processing today and to these topics that are before us.

I think the unusual thing about rules and appellate courts, in my experience, is that they seldom come together. We don't have a lot of case law in our state on the rules, and when you are practicing law and discussing with your colleagues and your opponents what to do with a discovery dispute, you can go look up the rules and you can read the words and you can think back on your own experience. You can talk about the rulings that have been made on the trial-court level by the judges you know, and you can even share, on various list serves, what people know about rulings that have been made at the trial court level, but you can't go much beyond that because there just isn't any case law. That is for the obvious reason that most discovery disputes are either literally not appealable, or practically not appealable, because by the time they are over and the case goes on, there is hardly any way to go back and say that that discovery dispute had the kind of impact on the outcome of a case that would justify appeal.

So the rules are especially important to a practitioner because the words matter and because they are the guidance that we have to give to the trial judges. The more gray hair I get, the harder it is to find trial judges that have been doing what I am doing as long as I have, and so it feels like an education process most of the time. I think there is a controversy here, and I think Jim Rooks put his finger on it. I think it is the controversy of the culture war that rages more in our legislatures than in rulemaking processes, but that has now found the battlefield of the rulemaking process. I respect John Martin and I can tell that he is a good lawyer—one of the ways I can tell it is because of how easily he says “balanced playing field.” I have been in court against a tobacco company that had 23 lawyers in the same courtroom at the same time, and it felt about balanced.

I believe John Martin, and I believe the lawyers that I deal with that the balanced playing field is their professional desire and that we can all have that dialogue and really mean it. I am not so sure that their clients have any interest in a balanced playing field. I think they have great interest in resisting accountability and in having whatever system we can invoke against them be as little interference to their

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profit margin and their bottom line and their freedom to do it however they think they should do it as can be. I think that is what is at stake. I know from my experience that Jim Rooks is exactly right—little children are at stake, and all the rest of us in various ways in this culture war.

Those states where there really isn't a lot of input in the rulemaking by the partisan representatives of the civil bar may not be seeing the controversy quite the same way that it is going on in other places. But I don't think you are probably going to avoid it in any event, and I think the lobbying that can be done—and it gets called different things in rulemaking often—and the lobbying that can be done will be done, and there is a tort reform movement in the rulemaking process.

We do have a Council on Courts Procedure that is a kind of a quasi-legislative body. It is a way of keeping our legislature, which has very, very few legally trained people in it, out of the direct process of making the rules of civil procedure. We have a rule of civil procedure that you could think of as “Federal Rules lite.” It does not include expert discovery, and it does not include interrogatories. Other than that, it

is just like Federal Rules, and those are controversies that go on and on and on in our state in the biannual rulemaking process.

Our Council on Courts Procedure is judges and lawyers. We meet every other year, when the legislature is not meeting. I am not there anymore. I can't get you the current update on electronic discovery or what have you in that body, but I served there eight years. The Council on Courts Procedure passes a rule or a proposal for a rule, it becomes law the year after that, if the legislature doesn't change it in the meantime. I actually read all of the pages of all of the states and all of their rulemaking to see if anybody else had a Council on Courts Procedure. Nobody had one, but I think a lot of your states have things very similar to our Council on Courts Procedure.

The theory is the legislature will stay out of civil procedure, and, for the most part, they do. Once in a while, somebody gets into them with something that is kind of a disguised civil procedure or a rule, and they end up doing something and have to be reminded that that really should go to the Council on Courts Procedure.

I see I am going to run out of time before I talk about electronic discovery, which I wanted to slip into a little bit, even though it isn't the paper that has been presented to you yet, just because I am not going to be able to talk after that paper is presented, and because I think that is one of the current law fields that is raging.

Electronic discovery is an opportunity for tort reform in disguise to take place.

I think it is a mistake to think that rules have to be changed all the time. I think it is the same as when legislatures, who meet every two years in our state, get to thinking they are going to go home and be scorned if they haven't done something. Sometimes the best thing

they can do is go home. I think rule makers can do the same thing. Things don't need to be changed just because we are meeting and we can do it.

We have seen in our state the coming and going, and coming back again, of ad damnum clauses. Tort reformers thought they should take that out, so the newspapers wouldn't get excited about the amount of a lawsuit. The moment it got taken out, the insurance adjusters and underwriters said, "Oh, my God. How do we set our reserves?" So they put it back in, and I think it has been out twice and in twice. That is because change has to happen.

Electronic discovery is an opportunity for tort reform in disguise to take place, and for the rules that will work just fine—no matter whether it is electronic or hard paper or whatever it is that you are trying to deal with discovery on, the rules, believe me, will work just fine. I just finished a two-and-a-half-year project against a major automobile manufacturer, where there were thousands and thousands of pages of documents and there were internet, online databases, and there were, I think, 29 CD-ROMS full of documents, and we don't have an electronic discovery rule. We have our standard request-for-production rules and sanctions. It all worked out just fine. It requires good lawyering. It requires attentive judging. And it probably requires all of us to pay attention to the level of understanding of those issues that we

impart to our trial judges, which is the battlefield where those issues really should be dealt with, and are generally dealt with.

I don't think rule changes are going to improve the world of electronic discovery. The rule changes that have been adopted in the federal system will make things bad and will facilitate some of those corporate wrongdoers getting away with it in ways that shouldn't happen.

Honorable Paul H. Anderson

I love the Pound Institute. It puts on this seminar, and it is not only a good chance to get together with a number of justices and realize you are in this state appellate court community, but it also has relevant topics.

Now, some of you may wonder why are the rules relevant? I will suggest to you that the rules question brings together two of the most important issues facing the state judiciaries right now—the concepts of federalism and separation of powers.

This new judicial federalism that is developing, I would say, essentially, follows from the development of the Fourteenth Amendment and the accumulation of that for the Supreme Court in *Benton v. Maryland*, 395 U.S. 784 (1969), which subsequently put some bookends, or contractions, on the Fourteenth Amendment—how state constitutions get applied and how they play into this modern context. The same is going to be with respect to rules. You see increasing activity, particularly since the 1990s, by the federal Congress. [Congressman James] Sensenbrenner and others are more active about how they want to control the judiciary. I think in this whole question of federalism, states' rulemaking is going to play into the process.

Another key issue that is on our agenda right now is the separation of powers. What is the proper role for the legislature? What is the proper role for the judiciary? Rulemaking brings that together.

Now, with respect to Linda's paper—and I told her this—I think it is a good beginning, but I think the paper is basically providing us with a survey of procedures. I don't think it gets to the key question, and that is the question that I hope that we will answer today in our breakout session—what do states do to make good rules? What are the procedures? What are the processes that you follow that result in good rules? And I hope that that is what will be discussed today. That is what will come out of today's program, and then Linda will follow with a paper that says, "I have done this survey. Now, meeting with judges, I have figured out what works and what makes a good system."

What are some of the principles that I think should be followed with respect to rulemaking? I think there are some things that are fundamental. Procedural fairness and procedural stability. Rules should be helpful to litigants. They should make the system work efficiently, and they should not contain booby traps for litigants. That is something that I just hate—I don't want the system to be controlled by those who are the rules nerds, who know all the rules and they can trip you up. The rules should be general in their application, and they should be applied properly to everybody.

Now, some other principles are less fundamental, such as the question of uniformity with the Federal Rules. I think there's some intrinsic value having uniformity with the Federal Rules, particularly with

respect to the rules of procedure. There is a consistency in practice. It reduces forum shopping and it provides ample precedent. And so you shouldn't vary just for the purpose of wanting to be different. I am a big fan of John Marshall. In *Fletcher v. Peck*, 10 U.S. 87 (1810), he talks about a slightly different concept of viewing when a congressional act should be ruled unconstitutional. He says that this is an issue that should be approached with restraint, some delicacy, and never in the doubtful case should you hold the congressional act unconstitutional. However, he also said where the Court reaches a clear and convincing conclusion that Congress is wrong, it should not be hesitant to act.

I would say somewhat the same philosophy should apply to state courts when they look at the Federal Rules—apply restraint and some delicacy. Do not depart in the doubtful case, but when it is clear and convincing that the Federal Rule is not right, do it.

We did this in a somewhat tangential area with respect to *Daubert*. When it came out in 1993, a lot of people thought it was the best thing since sliced bread. Well, we took a cautious approach in Minnesota. We saw how it played out with all the different circuits going all the different ways. We waited until 1999, and we said, “Hey, we are going to stay with our standard. We’ve got a pretty well-developed rule here, and our practitioners know it.”

And, here, I am going to digress to a little bit of story, and there may be a little Minnesota to it, but it gives you an idea about how you go about approaching these issues of federal uniformity. This is the story of Elmer and Ethel. They are a farm couple in west central Minnesota, and they are in their 70s. They have turned the farm over to the boys. It is a Saturday afternoon, driving down Highway 7. They are going into town. They are going to go to church, and then they are going to get some groceries.

They see this Miata with a young couple in it coming the other way—top down. The couple is sitting right next to each other, despite the bucket seats and the stick shift. Elmer is driving. Ethel is sitting over there on the passenger side, and Ethel looks at the young couple and says, “You know, Elmer, we used to be like that.” And Elmer’s response was, “Well, Ethel, I am still sitting where I used to sit.” That is what courts should sometimes say. You know, I have been sitting here a long time, and I am comfortable here, and I am going to stay here.

A couple of other philosophical points that I think should be made. Both John and Bill made the point about frequency of amendments. I think frequent amendments are inferior to infrequent amendments. Don't change just for change, but be careful you don't get too much of a troglodyte. We had some experience on this. I said to my former colleague, who was chair of the Civil Rules Committee when I took over the committee, “They haven't met for five years.” She said, “That is good. We don't want change.” Well, in the meantime, the legislature had passed a Rule 11 statute to conform with the federal statute, and, now, our practitioners were looking at our rules and a case interpreting the rules, and looking at the statute and asking “What do we do?”

Well, we sometimes have a philosophy that says “Hey, we are not going to bust our pick over that,” and so we adopted what was the statute. We did it by rule, though, but you can get caught if you are too reluctant to change, because there are forces out there for change.

Rules should be designed for general and universal application, and they should be mandatory, and you should avoid what I would refer to hortatory phrasing which is saying it is aspirational. Rules aren't aspirational. Rules should be mandatory. We have a process in Minnesota. We have a lot of comments.

We never adopt the comments. The comments can help you get where you want to go, but rules should be mandatory.

You have a lot of identifiable areas for rules—criminal rules, civil rules, appellate rules. But there is something I would call “rule creep,” where all particular areas of practice want their own particular rules. You need to watch out for that, because that will set up booby traps. It’ll set up inconsistency. So have a good philosophy as to what areas you want rules to apply to.

When you are dealing with rules, always be careful—rules can be manipulated. There’s always forces out there that will be looking to manipulate the rules in a particular way for a particular advantage. Always understand they are to be general and they are to be fair.

Now, I am going to comment on a couple of things about process. I am from Minnesota, and we are a very open state. That is just our history, and I am going to tell those of you who are concerned about that process, don’t be worried about it. Linda made a mention that sometimes that process can be contentious. I am going to take the flip side of that. My experience has been the open process with committees can often take the contentiousness out before it gets to the court.

I just went through a process where I chaired the rules on public access, and when we were putting the committee together, the court administrator said, “Paul, you don’t want that person on there. It is going to be terrible.” I want that person on there—why do I want that person on there? I wanted it to be sorted out in the committee process, the Advisory Committee process, so that a lot of that contentiousness will be sorted out—and it happened. There were just really strong divisions, but we sorted it out, and we have just implemented the rules, and there’s been broad acceptance.

When you are dealing with rules, always be careful—rules can be manipulated. There’s always forces out there that will be looking to manipulate the rules in a particular way for a particular advantage.

They aren’t quite what I thought they would be when I started. I had some very interesting experiences. We had the Archbishop speak. We had the Lutheran Synod minister speak about the Internet access to pre-conviction records, and they influenced our result. I think our result is actually better because we had that open process, and we drew it in.

But another key thing, when you have this type of process, is to control it. Make sure you get a good chair. Never forget about the important role of the reporter, because the reporter assimilates all these comments together and puts it in writing, and if you get a good reporter, that is absolutely critical. Also set deadlines. That is very critical too. I think that is one of the problems you face on the federal level is that if you don’t have a deadline, you can go on forever.

Finally, I am going to finish up on the topic about state court relations with legislatures. You really do have to keep a good relationship with your legislature. I actually talk to our new legislators, and I talk to them about Hobbes, Locke, Montesquieu, Madison, Hamilton and the various theories of how the separation of government works. And then I talk about Marshall. You know, there is tension between us. Don’t get worried about it. That is the way it is supposed to be. The founders didn’t trust me to get it right.

They didn't trust you to get it right, and so they set up a situation where there's natural tension. Let's not worry about it. It gets sorted out.

And so I think it is better when we understand each other, and then we can approach each other very cautiously and respectfully. Also, we always have somebody over at the legislature monitoring what they do, because if they get out of line, we are going to watch them. We are going to know, and we are going to get to the right people.

So, the final thing I'd say with respect to rules, is that it is a blessing to live in interesting times. Rules have become more relevant now, more interesting. Courts are a center of power, and society is realizing that. That means every aspect of how we exercise power is going to be subject to scrutiny and review. That includes rulemaking, and so Pound is very, very relevant today in telling us how to do it right, and, hopefully, as we come out of the sessions today, we are going to provide information to each other as to how we can get good rules in place.

Response by Professor Mullenix

The theme Mr. Rooks was sounding was basically a call for principled rulemaking, and I would like to make this suggestion. This is kind of my insight in spending a lot of time observing, watching and thinking about what has happened in the federal rulemaking system, which is that since the amendment to the Rules Enabling Act to allow public access, enhance notice and comment and so on, we are well beyond the neutral rulemaking model of yesterday. One thing that I didn't mention in my major comments, but Mr. Rooks's comments inspired me to think about, in the federal arena, what happened when public access began and all the interest groups began attending and basically lobbying for the positions of their constituent groups. There has become this veiled threat that hangs over the Advisory Committee on Civil Rules, which is if a particular constituency or groups of constituencies aren't successful in persuading the Advisory Committee to drop a proposed amendment, then these groups will take their lobbying case to Congress, because Congress ultimately retains the power to make the Federal Rules. I know that from talking to federal judges that there has been this concern that the United States Congress will get into the business of making Federal Rules, and as an historical footnote, that has happened exactly once since 1938.

By the way, I think it was Mr. Gaylord who talked about rules nerds. Rules nerds would know this. Yes, rules geeks and rules nerds know this. It was Rule 4 on Service of Process. That is the only historical time that Congress has ever enacted a rule of civil procedure, and it is very famous among proceduralists, because it was a disaster. So it is always held up as the example of why we don't want Congress making the rules. But their power has been there, and it is kind of this veiled threat that is hanging out there.

Also, Mr. Rooks was somewhat upset that ATLA has made its position known on electronic discovery, and he made the point that, in ATLA's view, this really transgresses the substance/procedure divide, that the rules basically are substantive in effect. He was also communicating that his sense is that ATLA is going to lose in its opposition of raising this point.

But what I wanted to suggest is ATLA was one of the chief opponents to the proposed Rule 23(b)(4), which was a settlement class provision, when they were doing the amendments to Rule 23. ATLA and other groups were very, very vocal in opposition to Rule 23(b)(4), and they prevailed. They

were very successful in discouraging the Advisory Committee. Judge Niemeyer was the Chair of the Advisory Committee at that time, and it was dropped. So my point is lobbying works. It does work, and the Advisory Committee will retreat in the face of massive resistance or opposition to a proposal. There were other groups in addition to ATLA that were in opposition to the rule. And, by the way, the opposition that was raised was that the Rule 23(b)(4) provision was substantive. They made a Rules Enabling Act argument to the Advisory Committee and said it exceeded the powers of the committee to enact that particular amendment, and, again, they prevailed.

Mr. Martin was talking to you about Texas and rulemaking in Texas and I was listening to him and feeling the futility of the project that I engaged in, the futility of trying to know how state rulemaking works just by looking at statutory provisions. When I was doing this, I had this sinking feeling that it was kind of horrible, but I just want to add that I think that his comments suggest that for me, at least, it is a worthwhile project for somebody to go out there and study what goes on on a state-by-state basis, how the rulemaking process actually works as opposed to reported statutes.

I just want to say two things about the Texas rulemaking process. He talked about the amendment to the discovery rules in Texas. That was really a remarkable project that extended over several years, and went on for a long, long time. It was very impressive, and had lots of input, notice, comment and was quite well done. In contrast—and he didn't talk about this—was the recent amendment two summers ago of the

I once wrote that the problem here is that if you call a committee into existence, it feels like it has to do something to justify its existence.

Texas class action rule, Rule 42, and that was directly in response to a bill passed by the legislature. It was HR 4, and that was a bill requiring that the class action rule be amended in Texas, and it had to be amended in a very short period of time, in the space of about six weeks over the summer by e-mail and telephone

conference call. To my horror, the committee never met. They did this all by phone. The Texas rules people basically redrafted the Texas class action rule, and the reason why I said this was to my horror, was because the feds spent 12 years, from 1991 to 2003, amending Rule 23. They did it in Texas in the space of about six weeks. It was the most amazing thing.

Also, Mr. Martin and Mr. Gaylord both have the philosophy if it ain't broke, don't fix it. Mr. Gaylord said it is a mistake that rules have to be changed all the time. I am definitely on board with that. I once wrote that the problem here is that if you call a committee into existence, it feels like it has to do something to justify its existence. The problem, certainly in the federal arena, is that these are perpetually standing committees and so they constantly have an agenda for rule amendment.

I want to thank Mr. Gaylord for coining the phrase rulemaking geek. That is really great. I was impressed that Mr. Gaylord said he read all of the states' rules in the appendix. That is impressive. He is a rulemaking geek. He said that the controversy here is basically in the culture wars, which are usually in the legislature, but now has found its place in the rulemaking arena. I think that does capture one of my main points, which is that rulemaking has become politicized. I have seen it become politicized in the federal arena. I would be really interested in knowing whether there's been kind of a trickle-down effect or whether

it has always existed in the states, and to what extent state rulemaking is politicized to the extent that you see it in the federal arena.

Judge Anderson had a list of rulemaking attributes for what states do to make good rules, and his list consisted of procedural fairness, procedural stability, efficiency, no traps for the unwary, general and universal application, mandatory, not aspirational. This is a very interesting list for me, because my question to Judge Anderson is, are the feds making good rules by applying that list? In other words, when I heard that list, it harkened back to the era of the aspirational neutral rulemaking, and I think that is a list of attributes that was always kind of the unspoken undergirding of federal rulemaking. But now that I think that the process has become politicized, my question to you is to what extent are the feds achieving your list of attributes of good rulemaking?

One or two other points. You talked about uniformity of state rules with the Federal Rules. I have a treatise on state class action rules, so I know the state class action rule for all 50 states, which is pretty peculiar. I can tell you from knowing the state class action rules for all 50 states—except for Mississippi, which does not have a class action rule—that there is a lack of uniformity across the states, and that is just with one rule, and the variation is quite, quite striking.

The other thing is that there is a time lag, so sometimes when Federal Rules are amended there is a time lag between the time it is amended and when this actually trickles down to the states and they amend their own rules. Again, a good example of that is the federal class action rule, which was amended in 2003. The only state I know that has amended its class action rule to take into account the amendments is Texas. Texas got on board right away, but no other state has done that.

Finally, Judge Anderson said that he likes the open process because it brings contentiousness out into the open. I just want to respond to that with a reprise of what I said, which is I think it is good that it brings the contentiousness out into the open, but what I have seen in the federal arena is this veiled threat to the Advisory Committee—which is if you don't hear us and do what we want, we are going to take it to Congress—has caused the committee to become timid and to retreat in the face of opposition or criticism. As a corollary of that, if they do do rule amendments, they do the most tepid, least controversial possible amendment that can achieve consensus. It is very, very hard now in the federal arena to gain consensus on rule amendments, because there are so many different voices weighing in on proposed rule amendments.

Questions and Comments

Paul Anderson: To respond to Linda's question—and this would only be from a bit of a Minnesota point of view, and, particularly, my point of view—since the 1990s, I see a politicization of the rulemaking process. I mentioned Congressman Sensenbrenner earlier—talk about separation of powers and stepping across the line and going right into the heart of what we do as a judiciary. That is what I am seeing in Congress now. From the state point of view, you know it used to be the states were the

laboratory, and states would develop rules and then you'd see what was good. I think Minnesota was the one that started the 50 interrogatory rule, and that moved up.

We are viewing the Federal Rules with a bit of skepticism, and not necessarily as the best way to go, and that was kind of the point of my Elmer and Ethel story, that we have been sitting where we have been for a long time, it is working pretty well, and we are not going to be shy to stay there.

Participant: I wonder if you would attribute the fact that maybe they are not doing this good a job with your list as the states have been doing, to the openness, which is what the Professor seemed to indicate might be happening.

Paul Anderson: Actually not. I think that the federal system has had, since the late 1980s, a real emphasis on openness, but I think the Professor has identified some of the problems. We have a pretty good relationship with our legislature, and we keep a respectful distance. For example, with the whole substance/procedure thing. I mean, it is not a clear line, but we keep a respectful distance, so most of the time, we don't have threats from entities to go to the legislature, and so it is not a big problem.

We have had one incident, and this is a good example of how rules committees have to be on top of things. We had a criminal rules committee that operated on the idea that before something comes out there had to be a consensus. Now, unlike a lot of states, in closing arguments in criminal cases, the prosecution goes first, and the defense is last, and the prosecutors were really upset, feeling that, hey, they get an acquittal, there is no way to review what is going on. The committee, equally divided between prosecutors and public defenders, would not move forward to the court an amendment to deal with rebuttal by the prosecutors, and, ultimately, the prosecutors went around us and went to the state legislature, and they passed a law setting out the order of closing argument.

What we did in response is we amended our rules, so we basically said to the legislature, "This is our area, not yours, but we were backed in a corner." I don't think we would have had that piece of legislation if we had been better on our rules process, allowed it to come forward, had a public hearing, and then had the court decide. And so I don't think it is the openness. It is really with the dynamics, and whether the role of the legislative branch in your particular state has more influence.

Participant: Justice Anderson, you said that Chairman Sensenbrenner wants to be more active in how he wants to control the judiciary. Could you give some specifics on that?

Paul Anderson: Oh, I can give you all kinds of examples. I mean, he wants to impeach one of my colleagues on the federal bench in Minnesota on sentencing guidelines. Sensenbrenner is threatening to actually eliminate that judicial position in order to get compliance with what he sees how the judiciary should function. Now, Judge Easterbrook on the Seventh District is not your liberal activist in most people's mind, but Sensenbrenner is going after him on sentencing. He is going right into the heart of the judicial function, and he has appeared before the Federal Judicial Council—with Chief Justice Rehnquist there—and just lambasted the judiciary for not following what the Constitution says. So he is very activist, and I am very worried about that. I don't want to point out and aim at any one particular legislator, but I think that Congressman Sensenbrenner stands out in this regard.

E-DISCOVERY: A CASE STUDY IN RULEMAKING BY STATE AND FEDERAL COURTS

John L. Carroll

Dean Carroll begins by setting out the scope of his paper: the challenges of electronic discovery (“e-discovery”) and the responses to date of state and federal courts to those issues. He then describes recent efforts to devise rules for the federal courts that deal specifically with the discovery of electronically stored information. Those efforts began with the deliberations over revisions to the discovery rules that were adopted in 2000 and have continued to be addressed right up until the present time.

He next outlines the ways in which four state court systems—those of California, Illinois, Mississippi, and Texas—created e-discovery rules, and compares them to the six federal District Courts (in Arkansas, Delaware, Florida, Kansas, New Jersey, and Wyoming) that adopted local rules for the same purpose.

Dean Carroll continues his paper by recounting the response by the Advisory Committee on Civil Rules of the Judicial Conference of the United States to the interest in specific e-discovery rules. He looks particularly at the proposals for amendments and new rules addressing the following issues: “early attention” by litigants to the issue of electronic discovery rules; a revision of the usual discovery standard to one that limits required production to material that is “reasonably accessible” unless a court orders production for good cause; post-production assertion of privilege; changes to the rules governing what types of material must be produced and in what form; and a “safe harbor” rule that would exempt from sanctions litigants who destroy otherwise discoverable information through a routine process of document destruction.

The paper suggests three areas in which state courts can establish e-discovery rules that are beneficial but, at the same time, noncontroversial: early attention to discovery of electronic materials, the form of production of such materials, and means for dealing with post-production assertions of privilege and work product protection.

Dean Carroll concludes his paper by profiling the e-discovery rulemaking process to date, and he issues a caveat on two areas in which altering discovery rules may not be wise, specifically the two-tiered discoverability and safe harbor proposals.

I. Introduction

If there is one thing that is certain, it is that electronic discovery is the hottest topic in civil litigation. Articles on the issue routinely run in the *Wall Street Journal* and *New York Times*, and there are more seminars and papers on the topic than kudzu in Alabama. This paper will discuss the emergence of the electronic discovery issues and how state and federal courts have responded to the challenges posed by them. It will end with some suggestions for state rulemaking regarding e-discovery.

II. The Emergence of E-Discovery Issues

The process that led to the amendment of Rule 26(b)(1) of the Federal Rules of Civil Procedure¹ in 2000, to narrow the scope of discovery in federal courts and to establish a “two-tier” discovery system necessarily involved broader issues.² One of the broader issues that emerged concerned the discovery of materials in electronic form. The Advisory Committee on the Federal Rules of Civil Procedure became convinced that issues relating to electronic discovery were important and began to gather information.³ Relying on a process that had been successful in the past, the Rules Committee convened a series of mini-conferences on the electronic discovery issue in San Francisco and at Brooklyn Law School in 2000. The Committee then convened a major conference at Fordham Law School in February 2004. These conferences brought together lawyers, academics, and judges to discuss the question of whether the Rules of Civil Procedure needed to be amended to accommodate the new world of electronic discovery.

These conferences revealed that there was a clear consensus that there are quantitative and qualitative differences between information on paper and information in electronic form that impact the way in which courts approach and resolve discovery disputes.⁴ Principal among these differences are the sheer volume of information that exists in electronic form, the virtually unlimited places where that kind of information may appear, and the dynamic nature of electronic information. These differences are well documented in the Report of the Civil Rules Advisory Committee dated May 17, 2004, and revised August 3, 2004:

The *Manual for Complex Litigation (4th)* illustrates the problems that can arise with electronically stored information:

The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes is the equivalent of 720 typewritten pages of plain text. A CD-ROM with 650 megabytes, can hold up to 325,000 written pages. One gigabyte is the equivalent of 500,000 written pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes, each represents the equivalent of 500 billion typewritten pages of plain text.⁵

Electronically stored information may exist in dynamic databases that do not correspond to hard-copy materials. Electronic information, unlike words on paper, is dynamic. The ordinary operation of computers—including the simple act of turning a computer on or off or accessing a particular file—can alter or destroy electronically stored information, and computer systems automatically discard or overwrite as part of their

routine operation. Computers often automatically create information without the operator's direction or awareness, a feature with no direct counterpart in hard copy materials. Electronically stored information may be "deleted" yet continue to exist, but in forms difficult to locate, retrieve or search. Electronic data, unlike paper, may be incomprehensible when separated from the system that created it. The distinctive features of electronic discovery often increase the expense and burden of discovery.⁶

State court systems, individual federal courts, and the Federal Civil Rules Advisory Committee have responded to these challenges by creating new procedural rules. In addition, many interest groups, like the defense bar, the plaintiff's bar, corporate counsel, and the insurance defense bar have made suggestions. A discussion of the responses of the state and federal judiciary follows.

III. State Court Rules

While there has been significant activity in the federal system relating to electronic discovery issues, there has been little or no activity in the states. Only Texas, and later Mississippi, have decided to create specific rules that relate to the discovery of electronically stored information. Illinois and California have discovery rules on the books that reference computers and technology. The rules, however, were not promulgated as a response to problems associated with the discovery of electronically stored information.

A. Texas

The only state to provide an extensive response to the new electronic discovery issues was Texas. In 1999, Texas adopted two new rules of Civil Procedure—Rules 193.3(d) and 196.4. Rule 193.3(d) dealt with the issue of inadvertent privilege waiver, a problem which exists in the paper world but is exacerbated by the sheer volume of electronic information that is often produced.⁷ The Texas Rule allows a responding party who has unintentionally produced a privileged document to amend its discovery response to assert a claim of privilege. The requesting party must then promptly return the document pending a ruling on the validity on the privilege issue.⁸

Rule 196.4 concerns the discovery and production of "data or information which exists in electronic or magnetic form." The threshold part of the rule requires a requesting party to specifically request production of electronic or magnetic data. Consequently, a party who makes a document request and does

While there has been significant activity in the federal system relating to electronic discovery issues, there has been little or no activity in the states.

not specify that it is seeking information in electronic form is not entitled to that information.⁹ The second part of the Texas rule requires a party who is requesting electronic information to specify the form in which the information is to be produced.¹⁰ A party, for example could request that electronic information be produced in its "native" format¹¹

or simply ask that the information be printed and that paper documents be produced. The last part of the Texas rule concerns the all-important issue of who pays for the discovery of electronically stored information. The rule sets up a two-tiered process for responding to discovery. The responding party, as an initial response, must produce data that "is responsive to the request and is reasonably available to the responding party in its ordinary course of business."¹² If the responding party cannot "with reasonable

efforts” retrieve the information and produce it in the form requested, the responding party must state an objection. Thus, if a party, in order to respond to a production request for information, must produce information that is not active data,¹³ it may object. The Texas rule would not require production of archival,¹⁴ backup,¹⁵ or legacy data¹⁶ in the initial stages of production unless such information is available to a party in the ordinary course of its business. Once a party objects, the court becomes involved and may order the discovery of electronically stored information only if the requesting party agrees to pay. “If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.”¹⁷

B. Illinois

The Illinois rules relating to the discovery of electronically stored information predate the efforts of other states. The rules contain no extraordinary provisions. They simply classify “all retrievable information in computer storage” as a document that is discoverable¹⁸ and direct a party responding to a request for production to produce the requested documents “...and all retrievable information in computer storage in printed form.”¹⁹ Thus, in Illinois, a party need not specifically request information stored in “computer storage” in order to obtain discovery of those sorts of materials. The appellate courts of Illinois have never decided what the “computer storage” language in the rule means, leaving open the question of whether inaccessible media are also included in the definition.

C. California

Amendments to the California Code of Civil Procedure authorize courts to “enter orders for the use of technology” in conducting discovery in complex cases.²⁰ Such orders may only be entered upon a showing that certain criteria are met either by findings of the court or stipulation of the parties. Specifically, the orders must promote cost-effective and efficient discovery;²¹ must not impose or require undue expenditures of time or money;²² must not create an undue hardship on any person;²³ must promote competition among vendors and providers of services “in order to facilitate the highest quality service at the lowest reasonable cost to the litigants”;²⁴ and must not require parties or counsel to purchase unnecessary services, hardware, or software.²⁵ The Code then goes on to authorize the discovery of electronic materials and the use of electronic technology in conducting discovery.²⁶ The Code also has a provision that is unique. That provision calls for court appointment of “service providers” to facilitate the discovery of electronic materials.²⁷

IV. The Response at the Local Federal Court Level

The discussions about the challenges presented by the discovery of materials in electronic form at the national rules committee level also mirrored discussions occurring in individual district courts. As a result of these national and local discussions, several United States District Courts promulgated local rules. These rules are, generally, straightforward provisions designed to facilitate the preservation, discovery, and production of information in electronic form.

A. Eastern and Western Districts of Arkansas

The United States District Courts for the Eastern and Western Districts of Arkansas promulgated Local Rule 26.1. The rule was a common sense rule that simply required the parties to discuss information related to the discovery of materials stored in electronic form and include information about such discovery in their Rule 26(f) report.²⁸ Specifically, the parties are to report to the court—

(4) whether any party will likely be requested to disclose or produce information from electronic or computer-based media, [and] if so:

(a) whether disclosure or production will be limited to data reasonably available to the parties in the early course of business;

(b) the anticipated scope, cost, and time required for disclosure or production of data beyond what is reasonably available to the parties in the ordinary course of business;

(c) the format and media agreed to by the parties for the production of such data as well as agreed procedures for such production;

(d) whether reasonable measures have been taken to preserve potentially discoverable data from alteration or destruction in the ordinary course of business or otherwise; and

(e) other problems which the parties anticipate may arise in connection with electronic and computer-based discovery.²⁹

B. District of New Jersey

The District of New Jersey promulgated Local Rule 26.1 (d) “Discovery of Digital Information Including Computer-Based Information.” The rule requires, as does the rule in the Eastern and Western Districts of Arkansas, that the parties confer about preservation, the form of production and potential restoration of backup and legacy data, and the issue of who will bear the cost of production.³⁰ The rule also imposes a duty to investigate and disclose, which requires counsel to enter these discussions fully informed. In the words of the rule,

[P]rior to a Fed. R. Civ. P. 26(f) conference, counsel shall review, with the client, the client’s information management systems, including computer-based and other digital systems, in order to understand how information is stored and how it can be retrieved. To determine what must be disclosed pursuant to Fed. R. Civ. P. 26(a)(1), counsel shall further review with the client the client’s information files, including currently maintained computer files as well as historical, archival, backup and legacy computer files, whether in current or historic media or formats, such as digital evidence which may be used to support its claims or defenses. Counsel shall also identify a person or persons with knowledge about the client’s information systems, including computer-based and other digital systems, with the ability to facilitate through counsel, reasonably anticipated discovery.³¹

C. District of Wyoming

The local rule promulgated by the District of Wyoming is similar to the District of New Jersey's. It requires counsel to become knowledgeable about their client's information management system and to review their client's information so that they can fully comply with the initial disclosure required by Rule 26(a)(1).³² The rule also requires a party seeking discovery of computer-based information to notify the opposing party that such discovery will be sought.³³ Finally, the rule requires that counsel for the parties discuss computer-based information in general and specifically discuss preservation, production and cost issues and to reach specific agreements about the production of e-mail, deleted information, and backup data.

D. District of Kansas

The District of Kansas has promulgated "Electronic Discovery Guidelines" which incorporate the best features of the other local Federal Rules.³⁴ The District of Kansas Guidelines (1) require counsel to become knowledgeable about their client's information management systems and their operation;³⁵ (2) require initial disclosure under Rule 26(a)(1) of any electronically stored information used to support a claim or defense;³⁶ (3) require a party seeking the discovery of "computer-based information" to inform the opposing party of that fact;³⁷ and (4) require counsel to meet and confer about a) computer-based information in general with specific discussions about preservation; b) e-mail information; c) deleted information; d) backup and archival data; e) costs; f) format and media; g) privileged materials.³⁸

E. District of Delaware

The local rules of the districts referenced above emphasize the preservation, acquisition, and exchange of information. The District of Delaware's "Default Standard for Discovery of Electronic Documents ('e-Discovery')" has a similar thrust but with much greater emphasis on control of the process. The Default Standard requires that the parties discuss the "parameters of their anticipated e-discovery" at the Rule 26(f) conference.³⁹ The rule then goes on to require the parties to exchange information that includes: a list of the most likely custodians of electronic materials; a list of the relevant electronic records systems; the name of the person responsible for a party's electronic retention policies (who is described in the standards as "the retention coordinator"); and "notice of any problems likely to arrive in connection with e-discovery."⁴⁰

The Default Standard also requires that each party shall designate a single individual through whom all discovery requests and responses are made. This "e-discovery liaison" must be familiar with the parties' electronic information systems, know about the technical aspects of e-discovery, and be prepared to participate in e-discovery dispute resolutions.⁴¹ The Default Standard contains timing provisions for e-discovery⁴² and requires the parties to reach agreement on search methodology⁴³ and the format for production.⁴⁴ The Default Standard also encourages agreement on a protective order and places specific responsibilities for document preservation on the "retention coordinator."⁴⁵ It also contains a provision for the return of inadvertently produced documents that contain privileged information⁴⁶ and a provision placing the burden of costs on the producing party but allowing for the apportionment of costs of electronic discovery "upon a showing of good cause."⁴⁷

F. Middle District of Florida

The Middle District of Florida has promulgated a local rule related to the use of technology in discovery. The rule simply admonishes counsel to “...utilize computer technology to the maximum extent in all phases of litigation”—i.e., to serve interrogatories on opposing counsel with a copy of the questions on computer disk in addition to the required printed copy.⁴⁸ The rule does not specifically address any of the e-discovery issues.

V. The Response of the Advisory Committee on Civil Rules

As state and local federal courts were framing responses to the challenges presented by the discovery of electronically stored information, the Advisory Committee on Civil Rules was considering amendments to the civil rules to address those challenges. That consideration culminated in a series of rules proposals published for comment in August 2004. This particular portion of the paper will focus on the rules as published, the public comments, and the modifications made to those rules proposals in response to the public comments.

A. The August 2004 Proposals

After extensive study, the Advisory Committee decided to send the Standing Committee rules proposals to: (1) focus early attention on electronic discovery issues; (2) create a new standard for the discovery of electronically stored material; (3) create a procedure for asserting privilege after production; (4) modernize Rules 33 and 34; and (5) create a “safe harbor” to a party that fails to provide electronically stored information under certain narrow circumstances.⁴⁹ The proposals incorporated some of the features of the state and local federal court rules then in existence.

1. The “Early Attention to E-discovery” Rules

If there is any consensus with regard to the discovery of electronic stored information, it is that early attention to e-discovery issues is extremely beneficial to the discovery process. For example, two of the most widely respected sets of principles or guidelines for the discovery of electronic information, the Sedona Principles and the Civil Discovery Standards of the American Bar Association, both recommend early attention to e-discovery issues.⁵⁰ Accordingly, the Advisory Committee proposed amendments to Rules 16(b) and 26(f), which focus early attention on the discovery of electronically stored information. The amendments to Rule 26(f) would require the parties at the Rule 26(f) conference to “discuss any issues relating to preserving discoverable information.”⁵¹ While the language of this amendment obviously applies to all forms of information, the committee’s note makes clear that the proposal was drafted to focus attention on issues relating to the preservation of electronically stored information.

The amendments would also require the parties to include, in their discovery plan, their views and proposals on “any issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced.”⁵² The proposed amendments to Rule 16(b) would authorize the court to include in its scheduling order “provisions for the disclosure or discovery of electronically stored information.”⁵³ While federal judges have always had the inherent authority to include this kind of information in a scheduling order, this amendment “is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is to occur.”⁵⁴

2. The New “Two-tier” E-discovery Standard

The amendments to the Federal Rules of Civil Procedure, which became effective in December of 2000, were designed to narrow the scope of “lawyer managed” discovery through the creation of a “two-tier” system for discovery. Under the current state of the rules, parties, without the intervention of the court, may discover information relevant to a claim or defense.⁵⁵ For good cause shown, a party may also obtain discovery of information relevant to the “subject matter of the action,” which was the scope of discovery before the 2000 amendments.⁵⁶ The 2000 amendments were designed to narrow the scope of lawyer-managed discovery.⁵⁷ The amendments proposed in 2004 to facilitate the discovery of electronically stored information contain a further narrowing of the scope of discovery. Under the proposed amendments, electronically stored information that is “not reasonably accessible” is not discoverable without the intervention of the court. In the words of the amendment “A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of information for good cause and may specify the terms and conditions for such discovery.”⁵⁸

Neither the proposed rule nor the committee note defines “reasonably accessible.” The note does suggest, however, that the term “‘reasonably accessible’ may depend on a variety of circumstances” and that “technological developments may change what is ‘reasonably accessible.’”⁵⁹

3. The Rules Concerning Privilege Assertion

The committee concluded, and correctly so, that

The volume of electronically stored information responsive to discovery can be extremely great and certain features of such information make it more difficult to review for privilege than paper. The production of privileged materials is a substantial risk and the costs and delay caused by privilege reviews are increasingly problematic.⁶⁰

Accordingly, the committee proposed a series of amendments that would create “a procedure to apply when a responding party asserts that it has produced privileged information without intending to waive the privilege.”⁶¹ The committee began by dividing Rule 26(b)(5) into two parts—A and B. Part A is simply the present rule requiring a party to identify with specificity any discoverable information which is withheld under a claim of privilege. Part B is a new rule stating

When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court.⁶²

There is also a proposed amendment to Rule 26(f) that would require the parties to discuss “whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information”⁶³ and a proposed amendment to Rule 16(b) which

authorizes a court to adopt “...the parties agreement for protection against waiving privilege” as part of its scheduling order.⁶⁴

4. Changes to Rules 33 & 34

Although it is well settled that the word “document” as contained in Rule 34 does indeed encompass electronically stored information,⁶⁵ changes were necessary to modernize Rule 34.⁶⁶ The first proposed change is simply a change that would add to the title of the rule itself the term “electronically stored information.”⁶⁷ Thus, the new title of Rule 34 is “Rule 34. Production of Documents, Electronically Stored Information and Things and Entry Upon Land for Inspection and Other Purposes.”

Proposed Rule 34(a)(1) then authorizes discovery including testing and sampling of any designated “electronically stored information,” as well as “sound recordings, images and other data or data compilations in any medium....”⁶⁸ As the proposed note makes clear, the new definition in Rule 34(a)(1) is expansive and “is intended to be broad enough to cover all types of computer-based information, and flexible enough to encompass future changes and developments.”⁶⁹

The proposed amendments also include changes to the procedure for discovery of documents as outlined in Rule 34(b). These proposed amendments allow the requesting party to “specify the form in which electronically stored information is to be produced” and allow the responding party to object to the requested form.⁷⁰ The proposed amendments also include a default provision if there is no agreement or court order about the form. In that situation,

[I]f a request for electronically stored information does not specify the form of production, a responding party must produce the information in a form in which it is ordinarily maintained, or in an electronically searchable form. The party need only produce such information in one form.⁷¹

There is also a change to Rule 33 that simply incorporates the changes to Rule 34 and allows a party in response to an interrogatory to provide business records, “including electronically stored information.”⁷²

5. The Safe Harbor

The last series of amendments to the discovery rules proposed by the Civil Rules Committee concern sanctions under Rule 37(f) for failing to provide “electronically stored information.” The proposed rule would create a safe harbor for failing to provide electronically stored information, if there was no court-imposed preservation order in effect and (1) the party took reasonable steps to preserve the information after it knew or should have known that the information was discoverable in the action, and (2) the failure resulted from the loss of the information because of the routine operation of the party’s electronic information system.⁷³

According to the proposed Committee Notes:

The reference to the routine operation of the party’s electronic information system is an open-ended attempt to describe the ways in which a specific piece of electronically stored information disappears without a conscious human direction to destroy that information. No attempt is made to catalogue the system features that now or in the future

may cause such loss of information. Familiar examples from present systems include programs that recycle storage media, automatic overriding of information that has been “deleted” and programs that automatically discard information that has not been accessed within a defined period. The purpose is to recognize that it is proper to design efficient electronic information storage systems that serve the user’s needs. Different consideration would apply if a system were deliberately designed to destroy litigation related material.⁷⁴

B. The Public Comments

The proposed Rules Amendments published in August of 2004 generated over 250 written comments, most of them about the electronic discovery provisions.⁷⁵ In addition, the Rules Committee held public hearings in San Francisco, Dallas, and Washington, D.C., at which some 74 witnesses testified. There was broad based support for the rules proposals calling for early attention to e-discovery issues and addressing issues of form in the production of electronically stored information.⁷⁶ There was significant controversy, however, over the creation of another two-tier system for the discovery of electronically stored information and the creation of a safe harbor for the destruction of information through the routine operation of a party’s electronic information system.

The criticism of the two-tier system that makes discovery of electronically stored information hinge on accessibility focused on three areas: that the proposal (1) allows a responding party to self-designate information that will not be produced because it is inaccessible; (2) may undermine or confuse the

There was significant controversy, however, over the creation of another two-tier system for the discovery of electronically stored information and the creation of a safe harbor for the destruction of information through the routine operation of a party’s electronic information system.

currently existing law regarding preservation obligations; and (3) would lead a producing party to make information inaccessible in order to frustrate discovery.⁷⁷ The criticism of the so-called safe harbor provision also focused on three areas: (1) that the published provision was really no safe harbor at all, and the alternative version on which comments were invited⁷⁸ was too much of a safe harbor; (2) that the provision, which made the existence of a safe harbor turn on the question of whether a

preservation order had been entered, would promote applications for preservation orders as a way to prevent the possible creation of a safe harbor; and (3) that the interaction of the safe harbor and the two-tier system for discovery that turned on accessibility would mean that there was no obligation to preserve information that was not reasonably accessible.⁷⁹

There was also some controversy surrounding the privilege proposal, proposed Rule 26(b)(5) and its companions, proposed Rules 16(b) and 26(f). The public comments showed concern over the failure to include trial preparation material protection and over the mechanics of the process for resolving the privilege issue and preserving the status quo while the issue was resolved.⁸⁰ There were also concerns that the rules promised more protection from waiver than they could actually deliver.⁸¹

C. Modification in Response to Public Comments

The Advisory Committee met in April 2005 to discuss the proposed rules amendments in light of

the public comment. In a report dated May 27, 2005, it announced that it had decided to send the rules proposals which had been published to the standing committee, albeit with some serious changes.

1. The “Early Attention to E-discovery” Rules

The package of rules focusing early attention on discovery of electronically stored information has been sent to the Standing Committee with only minor language changes. A conforming amendment to Rule 26(a)(1)(B) was developed, which simply added “electronically stored information” to the categories of information that must be disclosed.⁸² The text of proposed Rule 26(f)(3) was expanded to refer to “forms” of production.⁸³

2. The New “Two-tier” E-discovery Standard

As noted above, the proposed amendments to Rule 26(b)(2), which would make initial discovery of electronically stored information hinge on “accessibility,” generated significant criticism. In light of that criticism, the original proposal has been modified but not abandoned. The test of “reasonable accessibility” has been clarified by defining accessibility in terms of “undue burden or cost.”⁸⁴ Thus, information in backup media that can be retrieved without undue burden or cost is considered “reasonably accessible” and thus discoverable. The rule, as originally proposed, contemplated that the issue of accessibility could only be resolved on a motion to compel. The proposed rule, as modified, also allows the issue of accessibility to be resolved on a motion for protective order. The modified rule also clearly states that it is the requesting party who bears the burden of showing good cause in order to obtain discovery of inaccessible information, and ties ultimate discovery of inaccessible information to the cost-benefit provisions of present Rules 26(b)(2) (i), (ii) and (iii). The cost-benefit provisions of the present rule also become a new subsection (C) of Rule 26(b)(2). The modified rule retains the language of the published rule, however, which makes clear that the responding party bears the burden of showing that sources of information are not reasonably accessible.⁸⁵

3. The Rules Concerning Privilege Assertion

As originally published, Rule 26(b)(5) created a process for resolving issues of inadvertent privilege waiver. The originally published rule has been modified. The text of the rule has been expanded to include trial preparation information as well as information protected by privilege. The language referring to production “without intending to waive a claim of privilege” has been deleted “because many courts include intent in the factors that determine whether production waives privilege.”⁸⁶ The language requiring the producing party to give notice of the inadvertent production of privileged material within a reasonable time has been deleted. Lastly, information previously included in the notes has been moved to the text of the rule. The new language makes it clear that the receiving party, as well as the responding party, may seek a resolution of the privilege and work product issue in court.⁸⁷

In addition, there are some changes to Rule 16 and Rule 26(f) relating to privilege waiver. Proposed Rule 16(b)(6) was modified to eliminate the references to “adopting” agreements of the parties for protection against privilege waiver. The change was made because of the committee’s concern that the language about “adopting agreements” “might seem to promise greater protection than can be assured.”⁸⁸ Rule 26(f)(4) was also modified to eliminate language about an “agreement” about privilege waiver again to “avoid any implication as to the scope of the protection that may be afforded by court adoption of the agreement.”⁸⁹

4. Changes to Rules 33 & 34

No modifications were made to proposed Rule 33 following the public comment period. There were, however, several modifications to Proposed Rule 34. The principal modifications relate to the form of production. The published proposal allowed a requesting party to specify a form for production and allowed a responding party to object. The modified proposed rule still allows a requesting party to specify a form or forms for production and retains the language allowing a party to object. The modified rule, however, now requires the responding party “to state the form or forms it intends to use” for production if it objects or if the request does not specify the form.⁹⁰ The modification also changes the default form of production. If the requesting party does not specify the form or forms of production, the responding party may produce the information as it is ordinarily maintained or in “a form or forms that are reasonably useable.”⁹¹

5. The Safe Harbor

As previously noted, the originally published version of the so-called safe harbor provision, proposed Rule 37(f), caused considerable comments from all segments of the bar. Some thought it offered too much protection from sanctions, and others thought it offered none. In Solomon-like fashion, the committee modified the rule so as to split the difference. The committee also eliminated the reference to a preservation order that had appeared in the originally published version. Thus, the Advisory Committee has sent the Standing Committee a proposed rule that now reads:

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as the result of the routine good-faith operation of an electronic information system.⁹²

The modification to the rule does two very interesting and important things. First, it makes good faith the outcome determinative inquiry for rule-based sanctions for document destruction. Second, by adding exceptional circumstances language, it provides for the imposition of sanctions where the level of culpability is low but the prejudice is high. As the modified committee note reads:

In exceptional circumstances, sanctions may be imposed for loss of information even though the loss resulted from the routine, good-faith operation of the electronic information system. If the requesting party can demonstrate that such a loss is highly prejudicial, sanctions designed to remedy the prejudice, as opposed to punishing or deterring conduct, may be appropriate.⁹³

VI. Suggestions for State Rulemaking

There has been significant activity in the national federal rulemaking process and in the local rulemaking activities of the federal courts to promulgate specific rules relating to e-discovery. It is likely that most or all of the package of rules on their way from the Civil Rules Advisory Committee to the Standing Committee will become effective on December 1, 2006. In contrast, there has not been significant activity in the state rulemaking process. As noted, previously, only Texas and more recently, Mississippi, have taken any real steps to deal with the e-discovery issue. It is time that the state rule makers

begin to emulate, in at least some ways, the federal process and create new rules to address the discovery of electronically stored information.

If there is any consensus among the various constituencies with an interest in state and federal rulemaking, it is that there are significant differences between paper and information stored electronically that necessitate a difference in treatment. These differences have been previously discussed but they are worth repeating. The sheer volume, potentially unlimited locations for such information, and the dynamic character of the information make the discovery of information in electronic form vastly different from the discovery of information in paper form. If state courts fail to recognize this difference by adapting their procedural rules to accommodate the discovery of information in electronic form, then there is a risk that fights over discovery will overwhelm the merits of a case and subvert the ends of justice.

The states can learn much from the recently completed process in the Civil Rules Advisory Committee. There is virtual unanimity of thought, from that process, that rules requiring early attention to the discovery of electronically stored information and to forms of production of that information are tremendously useful. There is also consensus that provisions relating to inadvertent disclosure of privileged information are helpful. It is also clear that the attempt to modify settled discovery and sanction law to accommodate electronically stored information is fraught with peril. The public comments on the two-tier electronic discovery proposal and the safe harbor proposal generated significant, well-developed, but very divergent, views on the efficacy of those changes. The changes made by the Rules Committee after the public comment are helpful but have not fully answered the criticisms on both sides. The information generated by the Civil Rules process, however, does provide important guidance for state rule makers. There are indeed significant areas where non-controversial but beneficial rulemaking can occur. Accordingly, the author has these specific suggestions.

State rule makers should promulgate state procedural rules designed to focus early attention on the discovery of electronic materials.

First, state rule makers should promulgate state procedural rules designed to focus early attention on the discovery of electronic materials. These rules should include provisions that require the parties to discuss whether electronically stored information will be the subject of discovery. If any party intends to discover information in electronic form, then the parties should be required to discuss issues regarding preservation and production of information in electronic form with each other before discovery commences, i.e., after the action is filed but before the first discovery requests have been served. The proposed changes to Federal Rules 16(b) and 26(f) and the local rules of Eastern and Western Arkansas, New Jersey, and Kansas provide excellent starting points.

Second, state rule makers should promulgate rules concerning the form of production of electronic materials. Those rules should be similar to the Federal Rules, which require a party to specify the form of production and to provide a mechanism for the resolution of the form of production issue if there is disagreement. Again, the proposed amendment to Federal Rule 34(b) and the provisions of the local Federal Rules provide an excellent starting point.

Finally, state rule makers should also promulgate rules facilitating the assertion of privilege and work-product protection in the electronic information environment after production. Obviously, such a rule would not change the substantive law of privilege, but would provide a process for resolution of privilege

issues. Again, the proposed amendments to Federal Rules 16(b), 26(b)(5), and 26(f) provide an excellent starting point.

VII. Conclusion

We are now in an age when the discovery of materials in electronic form will become routine. The recent federal rulemaking process has demonstrated that rules requiring early attention to e-discovery issues, creating mechanisms for resolving form-of-production issues and providing a process for the resolution of post-production privilege waiver issues are positive steps in solving some of problems created by the discovery of information in electronic form. It has also demonstrated that the promulgation of rules like the two-tiered discoverability and safe harbor proposals, which are now in the final stages of the federal rulemaking process, may not be wise.

It is important that state rule makers begin the process of revising their rules to respond to the problems of e-discovery. There are ample “best practice” rules for them to follow.

ENDNOTES

¹ This paper contains numerous references to the Federal Rules of Civil Procedure and local Federal Rules. Because many states have adopted the numbering system of the Federal Rules, the numbering of the rules discussed in the paper will be similar or identical, in many cases, to the numbering used in state rules of civil procedure.

² A previous Roscoe Pound Institute Forum was devoted to the potential impact of these rules changes. See *CONTROVERSIES SURROUNDING DISCOVERY AND ITS EFFECT ON THE COURTS: REPORT OF THE 1999 FORUM FOR STATE COURT JUDGES* (Roscoe Pound Institute 2001).

³ The authority and procedure for amending the Federal Rules of Civil Procedure are set out in 28 U.S.C. § 2071-2077. There is an excellent summary of the process on the Web Site for the United States Court System at www.uscourts.gov/rules/proceduresum.htm. The Judicial Conference of the United States is required by statute to recommend amendments and additions to the Rules of Procedure. See 28 U.S.C. § 331. The Judicial Conference’s responsibilities for rulemaking are coordinated by its Committee on Procedure, commonly referred to as the “Standing Committee.” There is a Civil Rules Advisory Committee, which assists the Standing Committee in recommending rules changes. The Standing Committee reviews the recommendations of the Civil Rules Committee. Any proposed rule changes that are approved by the Standing Committee are sent to the Judicial Conference for approval. If the Judicial Conference approves, the proposed rule changes are transmitted to the Supreme Court. If the Supreme Court decides that proposed amendments should become part of the Federal Rules of Civil Procedure, the proposed amendments are sent to Congress, which may adopt legislation rejecting, modifying, or deferring the rules. If Congress takes no action, the rules become effective on the following December 1.

⁴ The consensus reflects the conclusions in the literature. See, e.g., Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 DEF. COUNS. J. 206 (2001); Richard L. Marcus, *Confronting the Future; Coping with Discovery of Electronic Material*, 64 LAW & CONTEMP. PROBS. 253 (Summer 2001); Ken Withers, *Computer Based Discovery in Civil Litigation*, 2000 FED. CTS. L. REV. 2 (2000).

⁵ This quotation is part of an excellent discussion on the discovery of computerized data, which appears in the new Manual for Complex Litigation, Fourth Edition. See *MANUAL FOR COMPLEX LITIGATION (FOURTH)* § 11.446 (2004).

⁶ Report of the Civil Rules Advisory Committee dated May 17, 2004, and revised August 3, 2004, at 2-3 (hereinafter Civil Rules Advisory Committee 2004 Report).

⁷ “Because of the large volumes of documents and data typically at issue in cases involving production of electronic data, courts should consider entering orders protecting the parties against any waiver of privileges or protections due to the inadvertent production of documents or data.” Comment 10(a), *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (Sedona Conference, January 2004). The Sedona Principles and other publications of the Sedona Conference are available at www.thesedonaconference.org.

8 Tex. R. Civ. P. 193.3(d).

9 Tex. R. Civ. P. 196.4.

10 *Id.*

11 “Electronic documents have an associated file structure defined by the original creating application. This file structure is referred to as the ‘native format.’” The Sedona Guidelines: *Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* (Sedona Conference 2004) at 82.

12 Tex. R. Civ. P. 196.4.

13 Active data is information residing on the direct access storage media (disk drives or servers) of computer systems which is readily visible to the operating system and/or application software with which it was created and immediately accessible to users without restoration or reconstruction. This definition and the definitions that follow are found in the glossary of The Sedona Principles, *supra* note 7. This particular definition is found at 51.

14 *Id.* Archival data is information that is not directly accessible to the user of a computer system but that the organization maintains for long-term storage and record keeping purposes.

15 *Id.* Backup data is information that is not presently in use by an organization and is routinely stored separately upon portable media, to free up space and permit data recovery in the event of disaster.

16 *Id.* at 52. Legacy data is information in the development of which an organization may have invested significant resources and which has retained its importance, but which has been created or stored by the use of software and/or hardware that has been rendered outmoded or obsolete.

17 Tex. R. Civ. P. 196.4.

18 Ill. Sup. Ct. R. 201 (b)(4).

19 Ill. Sup. Ct. R. 214.

20 Parties may stipulate to the entry of such orders in “non-complex” cases. CAL. CIV. PROC. CODE § 2017 (e)(1). One of the drafters of the amendments provision, Judge Richard Best, has indicated that the amendments were not intended to be e-discovery provisions but were intended to grant power to the courts to use technology in the discovery process. (e-mail to author)

21 CAL. CIV. PROC. CODE § 2017 (e)(2)(A).

22 CAL. CIV. PROC. CODE § 2017(e)(2)(B).

23 CAL. CIV. PROC. CODE § 2017(e)(2)(C).

24 CAL. CIV. PROC. CODE § 2017(e)(2)(D).

25 CAL. CIV. PROC. CODE § 2017(e)(2)(E).

26 CAL. CIV. PROC. CODE § 2017(e)(3).

“...Discovery may be conducted and maintained in electronic media and by electronic communication and the court may enter orders relating to the use of electronic technology in conducting discovery including orders for access to information in electronic form, and the conduct of discovery in electronic media.”

27 CAL. CIV. PROC. CODE. § 2017(e)(5). Although the rule does not define the term “service provider,” the rule does describe the service provider as being a person or organization agreed upon by the parties.

28 Rule 26(f) of the Federal Rules of Civil Procedure requires the parties to confer on discovery issues and to develop a proposed discovery plan for presentation to the court.

29 E.D. Ark. & W.D. Ark. R. 26.1.

30 D. N.J. Rule 26.1(d)(2) and (d)(3)(a)&(b).

31 D. N.J. Rule 26.1 (d)(1). Rule 26(a)(1) of the Federal Rules of Civil Procedure, which is mentioned in the local rule, requires the disclosure of certain information without a formal discovery request.

32 D. Wyo. Rule 26.1(e).

33 D. Wyo. Rule 26.1(e)(1).

34 D. Kan. Electronic Discovery Guidelines.

35 D. Kan. Electronic Discovery Guideline (1).

36 D. Kan. Electronic Discovery Guideline (2).

37 D. Kan. Electronic Discovery Guideline (3).

38 D. Kan. Electronic Discovery Guideline (4).

39 D. Del. Default Standard for Discovery of Electronic Documents (E-Discovery) (hereinafter “D. Del. Default Standard”)

¶ 2.

40 *Id.*

41 D. Del. Default Standard ¶ 3.

42 D. Del. Default Standard ¶ 4.
43 D. Del. Default Standard ¶ 5.
44 D. Del. Default Standard ¶ 6.
45 D. Del. Default Standard ¶ 7.
46 D. Del. Default Standard ¶ 8.
47 D. Del. Default Standard ¶ 9.
48 M.D. Fla. Rule 3.03 (f).
49 Civil Rules Advisory Committee 2004 Report, *supra* note 6, at 2-20.
50 Principle 3 of the Sedona Principles, *supra* note 9, recommends that “parties confer early in discovery regarding the preservation and production of electronic data when these matters are at issue in the litigation, and seek to agree on the scope of each party’s rights and responsibilities. ABA Civil Discovery Standard 31 recommends that “[a]t the initial discovery conference, the parties should confer about any electronic discovery that they anticipate requesting from one another....” The Standard then goes on to list a series of specific topics for discussion.
51 Proposed Fed. R. Civ. P. 26(f).
52 Proposed Fed. R. Civ. P. 26(f)(3).
53 Proposed Fed. R. Civ. P. 16(b)(5).
54 *Id.*, Advisory Committee’s note.
55 Fed. R. Civ. P. 26(b)(1).
56 *Id.*
57 As the note accompanying the rule makes clear, the changes in the text of the rule were designed “to enable the court to keep tighter rein on the extent of discovery.” Fed. R. Civ. P. 26(b)(1), advisory committee’s note.
58 Proposed Fed. R. Civ. P. 26(b)(2).
59 Proposed Fed. R. Civ. P. 26(b)(2), Advisory Committee’s note.
60 Civil Rules Advisory Committee 2004 Report, *supra* note 6 at 12.
61 *Id.*
62 Proposed Fed. R. Civ. P. 26(b)(5)(B).
63 Proposed Fed. R. Civ. P. 26(f)(4).
64 Proposed Fed. R. Civ. P. 16(b)(6).
65 *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421, 427 (S.D.N.Y. 2002)(“[e]lectronic documents are no less subject to disclosure than paper records”).
66 Civil Rules Advisory Committee 2004 Report, *supra* note 6, at 36.
67 Proposed Fed. R. Civ. P. 34.
68 Proposed Fed. R. Civ. P. 34(a)(1).
69 Proposed Fed. R. Civ. P. 34(a)(1), Advisory Committee’s note.
70 Proposed Fed. R. Civ. P. 34(b).
71 Proposed Fed. R. Civ. P. 34(b)(ii).
72 Proposed Fed. R. Civ. P. 33(d).
73 Proposed Fed. R. Civ. P. 37(f)(1) & (2). The committee also asked for comment on a proposal that would allow sanctions upon a showing of intentional or reckless failure to preserve the information or for violation of a preservation order. The specific language of the proposal was contained in a footnote of the Civil Rules Advisory Committee 2004 report, *supra* note 6, at 32.
74 Proposed Fed. R. Civ. P. 37(f), Advisory Committee’s note.
75 www.uscourts.gov/rules/e-discovery.html
76 Report of the Civil Rules Advisory Committee, May 27, 2005 (hereinafter Civil Rules Advisory Committee May 2005 Report), at 30.
77 *Id.* at 60-62.
78 The alternative version is discussed, *supra* note 75.
79 Civil Rules Advisory Committee May 2005 Report, *supra* note 76 at 114-116.
80 *Id.* at 74-77.
81 *Id.* at 39.
82 Proposed Fed. R. Civ. P. 26(a)(1)(B).

- 83 Proposed Fed. R. Civ. P. 26(f)(3).
- 84 Proposed Fed. R. Civ. P. 26(b)(2)(B).
- 85 Proposed Fed. R. Civ. P. 26(b)(2)(B), advisory committee's note.
- 86 Civil Rules Advisory Committee May 2005 Report, *supra* note 76, at 82.
- 87 *Id.* 82-83.
- 88 *Id.* at 39.
- 89 *Id.* at 52.
- 90 *Id.* at 111.
- 91 *Id.* at 112. The published version of the rule would have required a responding party to produce “an electronically searchable version” of electronic information if the requesting party did not specify a form.
- 92 *Id.* at 122-123.
- 93 Proposed Fed. R. Civ. P. 37 (f), advisory committee's note.

ORAL REMARKS OF JUDGE CARROLL

I want to begin by thanking you all for inviting me. This is an honor and a privilege to appear in front of so many state court judges. There is no question that the average citizen's encounter with the justice system comes through you and not through the federal court system.

As Richard said, I am now the dean of a law school, after having been a judge and a practicing lawyer for a while. Being a dean is a great position, don't get me wrong. You've got a lot of prestige, you've got faculty and students that kowtow to your every wish—right, Linda?—and you've got all sorts of things that are really, really positive, plus you get to shape the future of the profession, but it is not exactly all sweetness and light.

I teach some courses on e-discovery and complex litigation, and I was looking at one of my evaluations not long ago. We allow the students to evaluate professors, and the evaluation said this: "You talk too fast, and you are not nearly as smart as you think you are." I actually took that personally.

Now what I am going to do is talk about the rules process, and I want to thank Professor Mullenix for that outstanding paper. No one has done that sort of work that has assembled that vast amount of information on state rulemaking. What I am going to talk about this afternoon is translating that state rulemaking process into fashioning rules to deal with the issue of electronic discovery.

I bring the perspective of having been a lawyer, having been a judge, and also having been a member of the Advisory Committee on the Federal Rules of Civil Procedure. From 1995 to 2001, I was a member of that rulemaking body, and that is when we went through two major class action issues and also issues relating to both regular discovery and electronic discovery. In 2000, I was the chair of its discovery subcommittee, and that is when we first began looking at the issues relating to information in electronic form. We had a series of conferences around the country, and out of those conferences some consensus really did emerge about this issue.

And the first consensus is it is just not going to go away. Most everything now is stored in electronic form, and what is more important, e-mail has now become the preferred way of corporate communication. I know that even in my law school, when I want to communicate with a faculty member, I will just never pick up the phone. I will e-mail that faculty member, and he or she will e-mail me back. So we can no longer pretend this is for techies only or that this is something that is never going to get to us. It is here, and I think we need to deal with it.

What these hearings also identified are some critical differences between information in paper form and information in electronic form. The first difference is volume. The amount of information generated electronically nowadays is astronomically larger than the amount that used to be generated in paper. As I said, back in the old days, you'd pick up a telephone and call somebody and there would be no recorded information of that. Nowadays, you will e-mail somebody. You will attach documents to that e-mail, and it is all in electronic form somewhere. There are also an infinite number of locations where this information now exists. Back in the old paper days, you had it in a filing cabinet, and if there were copies, they might be in one or more filing cabinets.

Now, the information is on the hard drives of computers, both at work and at home. They are on PDAs, Blackberries, and those sorts of things. They are on other kinds of storage media, because

nowadays, corporations and other entities back up information. So it is no longer just on the hard drive. It might be in electronic form somewhere else.

Back in the old days, you got rid of stuff. You burned a document, and it could not be retrieved. Nowadays, you can almost always retrieve information in electronic form, no matter where it is. The question is how much does this retrieval cost, and who is going to pay for it?

So these issues now morphed into the Federal Rules process, and over time, the Federal Rules Committee looked at the issue of whether or not we had to make changes in the discovery rules to accommodate these differences between paper and information in electronic form. That led to the creation of the rules amendments, which were first sent out for publication and comment in August of last year, and have winded their way through the process. I think we almost all believe that, come December the 1st of 2006, they will become the Federal Rules of Civil Procedure.

And what the Rules Committee did was identify five separate areas where it appeared that rulemaking was necessary to accommodate this difference between paper and information in electronic form.

The first package of rules dealt with what the Rules Committee calls—and I think it is a good way to talk about it—early attention to the issues of electronic discovery, rules that would require the parties to get together and to talk about that issue. Are we going to seek discovery of information in electronic form, and, if we are, what are the ramifications? What form do we want it in? Do we need to talk about preservation orders? What do we need to do?

Nowadays, you can almost always retrieve information in electronic form, no matter where it is. The question is how much does this retrieval cost, and who is going to pay for it?

These early attention rules focus both the lawyers and the court on the electronic discovery issue from the outset. It doesn't say that you've got to do anything further, other than talk about it and then be prepared when you have a scheduling conference to discuss it.

The second category of rules deals with what I'll call "form of production." I venture to say almost no state rule says anything about form, because they were all written back in the days when there was only one form—it was paper. So what these amendments to the Federal Rules do now is to require or allow the requesting party to specify a form. I want it in paper or I want it in some other kind of electronic form, so that I can use it in my litigation. It also sets up a mechanism whereby these issues, if there are disputes over form, can be resolved.

The third area has to do with the issue of discoverability of information in electronic form. As I said, information in electronic form may exist in all sorts of different places. Some of them may be easy to retrieve. Others may not be so easy to retrieve. Some may be retrievable only at great cost. So the new proposed Federal Rules of Civil Procedure tie discovery to accessibility and essentially say that you are entitled to discover information that is accessible, but you are not entitled to discover, without leave of court, information that is not accessible.

The fourth area where there is rulemaking is in the area of privilege. One of the problems is, again, because of the huge amount of information, that things like a privilege review cost huge amounts of

money. So the rules try to accommodate the issue of privilege by setting up a mechanism for resolving issues related to inadvertent privilege, so that you can turn over information without having to worry about waiving the attorney-client privilege.

And last, but not least, there is something called the “safe harbor.” One of the major issues that has arisen is sanctions against corporations that, for whatever reason, destroy information in electronic form. The safe harbor would provide some protection for a corporation that destroyed information simply through the routine operation of its information system. I mentioned that location and volume are two of the differences between paper and electronic forms; a third difference is the dynamic nature of the information. One of the problems with information in electronic form, is that it can be destroyed by the simple act of turning on a computer and turning it off again. So the thought behind the safe harbor was there needed to be some mechanism to cover the inadvertent, unintentional destruction of information through the routine operation of a company’s information system.

Those rules were sent out for public comment in August of last year, and Professor Mullenix did a great job of describing the Federal Rules process and how it has become very, very open. After this comment process began, many folks commented on these proposed rule changes, and the comments were predictable. There was almost universal support for the notion of requiring the parties to get together and focus early attention on issues relating to electronic discovery, and almost universal support for the notion that people ought to be required to specify what sort of form the information that they are seeking ought to be in.

There was almost universal support for the notion of requiring the parties to get together and focus early attention on issues relating to electronic discovery.

However, there was some controversy over the issue of privilege, with some people saying that this really was infringing on substantive evidence rules and that the committee ought to back off. And then there was significant debate over linking discoverability to accessibility and creating a safe harbor for corporations that destroy documents, even though it may be unintentional.

That process of comment led to the rewriting of some of these rules. There was almost no rewrite of the early attention rules. There was a minor, but I think beneficial, rewrite of the sort of former production issue, a fairly significant rewrite of the privilege rule, and then very significant rewrites of both the discovery-accessibility connection and the safe harbor.

The discovery-accessibility rule was rewritten to link accessibility with undue burden and cost. So what you really now have is an issue where the producing party can come to court and say, “Judge, this information is inaccessible because it will cost us a million dollars to retrieve it, and, therefore, we ought not to be required to do so.” So it eliminated some of the confusion over the use of that word accessible and what it meant, because it now ties accessibility directly to the issue of burden and cost.

And then the major rewrite about the safe harbor provision, the original safe harbor provision said, unless there is a preservation order in place, then, you essentially have a safe harbor if you do not intentionally destroy information in electronic form. The rule has been rewritten to take out the relationship to a preservation order and to say simply absent exceptional circumstances, a court may not sanction a corporation that destroys documents unintentionally through the routine operation of its

computer system. It changed that significantly and sort of struck a middle ground between the defense bar, which wanted a really deep safe harbor, and the plaintiff's bar, which really did not want any.

So we now have this vast body of information gleaned from over five years of the Federal Rules system examining the issues of electronic discovery. What does that mean for state rulemakers? It seems to me that you all have three options. You can do absolutely nothing and just let this stuff kind of percolate on. You can do what the feds did and create some fairly serious and significant rules in this area, or you can take a middle ground.

I am going to advocate the Goldilocks position, which is if you don't do anything, it is too little. If you did what the feds did, it is too big. You need to do something in the middle which is just right. My suggestion is that you really ought to seriously consider early attention rules as that is the most beneficial thing you can do. Why? Because the people who are in the best position to resolve these issues are the lawyers themselves. They know more about their cases. They know what to do. Forcing them to get together and talk about these issues is very, very beneficial. The added advantage of the early attention rules is it is non-controversial. It got universal support from both the plaintiff's bar and the defense bar, which means to me it is something you can accomplish in your rulemaking process without any significant fallout one way or the other.

I also would recommend enacting some sort of a rule like the former production rule out of the federal rule system. Why? Because, again, it helps for the discussion of parties. It helps for them to be forced together to resolve these issues. It helps for people to concentrate on the form-of-production issue, and I think they can do that with this kind of a rule.

I also like the privilege rule. I think that the privilege rule in the federal system is a good rule. I think it is a rule that, again, helps everybody focus on this issue about inadvertent production, particularly given the costs and burden of electronic discovery.

I would urge you to stay away from the discovery accessibility distinction and the safe harbor. As it turns out, these provisions have gotten significantly watered down from their original form at the beginning, which I think Professor Mullenix suggests is a byproduct of this open rules process. So they are really not nearly as Draconian as they originally started out, but I just don't really think you need them. I think that the rules that exist in almost every state to handle discovery, and the rules that exist in almost every state to handle sanctions are adequate to take these issues into account.

But I'll close simply by saying, there is a tendency to say we don't need to worry about this stuff. We don't need to do it. We are not having those kinds of problems. I suggest that you don't do that. These are problems that will only get worse. Now is the time to begin to solve them, and there are easy solutions and an easy body of information that now exists from the Federal Rules process.

COMMENTS BY PANELISTS

Kenneth J. Withers, Esq.

Thomas Y. Allman, Esq.

Michael J. Ryan, Esq.,

Honorable Ronald J. Hedges

Kenneth J. Withers

I need to start with a disclaimer that any opinion that you hear uttered by me is purely that. It is an opinion. It is not a position of the Rules Committee or the Federal Judicial Center. Perhaps it should be, but it is not.

But I would like to start out also with a correction to an error in Dean Carroll's paper. The error is not Dean Carroll's fault. The error is entirely mine. He made the mistake of actually quoting a passage that I had written in the Manual for Complex Litigation, Fourth Edition, that talks about megabytes and terabytes of information and how much that represents in terms of paper.

I didn't catch this mistake until rather recently, but some digits slipped, and a terabyte of information does not represent nearly 500 billion pages, only a little over 500 million. The actual number is that 536,870,912 pages of plain text are represented by one terabyte of data. Many corporations are producing terabytes of information on a regular basis. You know, a billion here, a billion there, as the late Senator Everett Dirksen is supposed to have said. But this error that I made a couple of years ago is also an illustration, and that is that I will spend the rest of my life correcting that mistake, because it is on the Internet, and that means that it has been distributed far and wide around the world. I have created this myth about terabytes that I have to constantly deny because it is just out there on the Internet and it is permanent, like all electronic information is. So that is a bit of an illustration of one of the problems that we need to deal with.

The first comment I would like to make about rulemaking, that was very well chronicled by the dean in this paper, is the extraordinary openness of the process. It took us five years to come up with this rules package. In that period of time, we held several conferences around the country. We sent out trial balloons to rulemaking aficionados around the country. We collected, at first, dozens, then scores, then hundreds of comments. But we also did something that we hadn't done before, and that is that we posted all of these comments as they were coming in on our Web Site, www.uscourts.gov, and we solicited more comments by e-mail, so that people could read the comments that had already come in. They could read

the transcripts of the hearings that we were holding, and they could direct their further comments right there on the Web Site to what they have seen and read before.

This was not a revolutionary thing. We did it purely to expedite things in the Rules Office. We just didn't want to get a whole lot of requests from people. We thought we'd just put everything on the Web Site and let people have at it, but I think it is a harbinger of things to come in the rulemaking process.

If you are considering this, however, there are some consequences. We have talked a little bit this morning—actually, quite a bit—about how the openness of the rulemaking process may lead to campaigning and partisanship by parties out there that want to push their particular point of view on us. When you put this on the Internet, you take sunshine and put it on steroids. Everybody is suddenly involved, and every blogger in the world is tracking what you are doing. So think about that.

The second consequence is that we have now created a permanent record of all of our bad ideas. Every mistake that we have made along the way, every proposal that we have shot down, is there. This takes the courts' legislative history and creates a whole new layer. In the past, the question with Federal Rules and the interpretation of the jurisprudence of Federal Rules has been, how much stock do we take in the Advisory Committee notes that are published with the rule? Are they authoritative? Do we follow them? Are they merely informational?

Now, the question is going to be, how much stock do we take in the huge record that is there permanently on the Internet, that everyone has archived and that will become the fodder for legal historians and law review writers for the next five to 10 years? This is going to really change our jurisprudence of the rules.

The second point I wanted to bring up is that significant pieces of this rules package present controversial procedures and some very controversial language, but the Rules Committee and the Standing Committee agreed that the Advisory Committee notes were not to become a treatise on electronic discovery. The notes would be very spare and we would leave things up to the development of case law as to the meaning

The second consequence is that we have now created a permanent record of all of our bad ideas.

of such phrases as “exceptional circumstances,” the “absent exceptional circumstances” exception of sanctions Rule 37(f), and the “routine good-faith operation of an electronic information system” language. What do these things mean? The form in which information is “ordinarily maintained” versus the form in which information is “reasonably useable.” Found in Rule 34(b). These are phrases contained in the new rules—they are all in Judge Carroll's paper—that are going to become, again, the fodder for a lot of development of jurisprudence along the way. There are good reasons for doing this. The technology is changing so quickly that we didn't want to adopt rules that tied us to the reality as it exists in 2005.

Now, this rules package is said to be a codification of best practices, and, indeed, there's been a lot of material that we could call “best practices” that developed simultaneously with this five-year process. Most everyone is familiar with *The Sedona Principles* on electronic discovery. You may also be familiar with the ABA's *Civil Discovery Standards*. The *Manual for Complex Litigation* put out by the Federal Judicial Center is another example of a best practices book. The question is, do we really want to take best practices and

turn them into rules? Best practices are things developed by sophisticated attorneys, usually involved in big cases, where they have a lot of resources to do things right.

If we codify those practices, are we then telling people who have employment discrimination cases or small personal injury cases that they must now rise to this level in terms of the background research that they have to do, and the expenses that they have to incur to meet that standard? So what are we doing when we are codifying “best practices?” We may, indeed, be leveling the playing field, which was a phrase that was used earlier today, but that level is very high, and we have to question whether or not we are shutting the courthouse doors to those people, particularly *pro se* plaintiffs, who cannot possibly reach that level.

Thomas Y. Allman

While I have been cited as being from Chicago and from Mayer Brown, a very distinguished law firm in that city, of more relevance to today’s discussion is the fact that I just completed 12 years as the General Counsel of a very large chemical company. It was in that role that I became convinced that it was time to address the issue of electronic discovery, and it was in that role that I made certain proposals that we have discussed and are going to be at least partially implemented by somebody’s rule changes.

Justice Anderson said earlier today that rules should not be lightly amended, and they should only be amended when there are forces that really make for change. We are dealing here, in the case of electronic discovery, with a fundamental change in the way in which information is created, preserved, and produced in litigation. It was my belief, based on those fundamental differences between the old world—which was simply a hard-copy world—and today’s world, that some change needed to be made. If I might, let me drill down a little bit from the generalities and talk about what it is like to be in a large corporation and be responsible for litigation, which is the role that I had to play.

Basically, electronic information comes in two forms. It comes in what the output is of applications, and those are things that run your business. Those are the ways you record your sales. They record your raw materials. They record your manufacturing processes. These matters are very well handled and are generally not the subject matter of debates over whether or not they need to be produced in electronic discovery.

Information that gets into e-mail is called unstructured information. It is the unstructured information that is primarily the heart of the problem, and the reason it is the heart of the problem is that we live in what is called a distributed world. Information that is conveyed in e-mail comes from individual computers that sit on your desk, the so-called PC, and then it is also embodied on network servers. Each of you has the power that used to reside in an entire roomful of great big IBM circular discs. You are each now in possession of a mighty powerful tool, because you can create, store, access, transmit, delete, and destroy information of great volume, some of which may be relevant to litigation.

In addition, and because, in part, unstructured information is so important, there is a disaster-recovery component to any discussion of information that comes in the form of e-mail or attachments, namely this: if a server goes down—because of Hurricane Hugo or if a server goes down because of a terrorist explosion—and if that is the only place where the information is stored, you are going to have to rebuild that information on your computers. That is usually done through the use of what are called

magnetic backup tapes, and, unfortunately, in today's world, magnetic backup tapes are simply not easily accessible for retrieval information. It takes a lot of work to put them back in a form in which they can be used.

And another trend that goes on in today's world is that the sheer volume of information created, especially in the unstructured world, is geometrically increasing, and, interestingly enough, that information has a great variety of business value, but in some cases, it is very limited in time. There are studies that show that something like 60 percent, maybe up to 80 percent of information, that is created in an e-mail loses its value within two or three days. But if it is still there on your computer or on the network server, and the geometric effect is in place, you can see that enormous loads are placed upon the storage of that information, and, as a result, many companies have adopted measures to restrict the length of time that information is kept. So you see policies such as the following: If you do not move that information from your regular PC to a specialized storage place or a folder within X days—let's say 30 days—it will be automatically deleted.

Now, this has sometimes proven controversial with plaintiff lawyers, but that is a very legitimate approach for a business to take. You must manage your information. You must determine what is valuable, what is not valuable, and you must have the ability to retain or not retain information.

This is the background that I saw in the mid 1990s that gave me a lot of pause, because what I saw happening in litigation was that people were coming in and demanding information from us that went way beyond the relevant or necessary issues, and really encompassed information that we legitimately had a right not to retain any longer. They then sought, through the use of sanctions practices, sanctions for people that were carrying out what I just described.

Another trend that goes on in today's world is that the sheer volume of information created, especially in the unstructured world, is geometrically increasing.

What does this mean? What were the things that caused me to propose some changes? Well, for one thing, most people—and I hope it isn't true of you folks—but most people tend to think that a corporation faces one lawsuit a year or maybe one lawsuit a month. I used to have 15 to 20 lawsuits a day cross my desk. If you are having to look at preservation obligations, for example, and think about what is it you have to hang onto, and you are looking at a whole volume of ever-changing litigation, you can see that it poses enormous problems for someone if you don't have any idea what it is that is going to be required to be produced in discovery. So that is one problem—a need to better understand the tensions between individual cases and the burdens of multi-litigation.

My second concern, as I indicated earlier, was a perceived problem of abusive sanctions practices. We were concerned that even companies that had absolutely no wrongful intention—they were not destroying information in anticipation of litigation or they had no knowledge that information was going to be used, but they were destroying it for business reasons in good faith—might face sanctions. I felt that perhaps a safe harbor would be an appropriate way to at least recognize, under some circumstances, that sanctions were inappropriate.

Finally, what we began to see was a series of very inconsistent and somewhat troublesome rules being adopted at the local district court level around the United States. Delaware would have one rule. New Jersey would have another rule. They were not consistent, and so a company with multinational operations

or multi-state operations might be facing one series of rules in one place and one in another. The result was we saw a need for a national, federal approach.

You have heard Judge Carroll describe to you the five components to the new Federal Rules, and I do regret that we don't have the exact language of the last two rules for you, but I think Ken Withers's Web Site probably would produce it. The two rules that he describes as the most controversial, in fact, are the ones that most closely respond to the issues I have discussed.

There is no question that an appropriate rule dealing with early discussion of form of production and privilege is needed and useful, and I applaud the efforts of the committee for that regard, and I don't think there's any real reason why you shouldn't seriously consider them at your level as well.

However, I would say to you that in regards to drawing a distinction between the burden and cost associated with producing information, there is a highly relevant and highly appropriate way to deal with production. Most cases—I would bet that 95 percent of the cases that you face and that we face—are resolved upon the production of information that is readily accessible to the parties on both sides of the case, and I would also suggest to you that embodying that same principle in electronic discovery is going to be a very useful principle.

I would also urge you to consider that having a recognition in the rules that the good-faith operation of a business system is a legitimate approach and that sanctions should not lightly be issued—maybe if there are exceptional cases, they should—for someone who meets that criteria. The test is good faith. Good faith is a broad term, and I recognize that it is going to require some case law development, but we know what good faith is. As we sit here today, we know when people are acting in good faith, and that should be the test of the safe harbor.

What will the impact be of these new rules if they are, in fact, adopted? My personal view—based on my work today, which is advising corporations that are trying to anticipate these rules—is that this will help people like myself who are trying to reinforce the development of corporate policies that make sense internally. The rough duty of any in-house lawyer is to try to figure out how to balance the business needs and the litigation needs, and this is being done in good faith by very many people in each of your states today.

The idea that there is some kind of cabal out there of people who do not wish to produce information is absurd. Information doesn't come labeled "this is good for plaintiffs" or "this is good for defendants." So there is no widespread inclination to get rid of information. You never know when you are going to need it. People are acting in good faith, but the problem is developing good-faith policies, and I think the rules will help them do that.

Finally, I think that the rules will be very helpful in bringing a common terminology and a common education to the outside lawyers. There is a major distinction in America between what outside lawyers and inside lawyers think and know about electronic information, and it is not all that favorable to outside lawyers. So there needs to be an ability to talk better among the two groups.

Judge [Shira] Scheindlin in one of her opinions went on at some length about the duties of outside lawyers to take responsibility for this process—a very helpful series of comments that I am beginning to see some good results from. We are already beginning to see useful things develop from the proposed

rules. They are being cited. I know of one recent case where the judge actually relied upon a safe harbor provision, even though it is not in effect, and I would applaud the committee and support their efforts.

Michael J. Ryan

I am a plaintiff's lawyer, and I was surprised to get the call from Richard to come speak before you all. I am the Chair of the Electronic Discovery Litigation Group for ATLA, but, in reality, I am just a poor plaintiff lawyer trying to keep the lights on. Anyway, when Richard said, "Would you come talk before some judges?" I said, "You know, Richard, the last time there were nine of them and they kept interrupting." He said, "I don't think that will happen this time. They may not do that." I said, "Then I'll gladly come and I'll come quickly."

I don't want to argue with you about electronic discovery principles. What I want to talk about today is this fascinating dynamic of the rulemaking process, both on the state and federal level, and I think it is important to understand some of the motivations that got us here and why we are having this debate today.

The courts have always had the power, inherently, to do exactly what the rules that are proposed are doing. You could order these meet-and-confers. You would order the companies to come in and explain. You could order the parties to get together. It is true that I am incredibly supportive of the provisions which I call the "discuss-and-disclose provisions." I am supportive because every time I have argued for it, the companies have opposed it. They never want to sit down with me early in the litigation. They never want to tell me where everything is, and I know how to ask the right questions. It is not that they don't understand them, but they never want us to sit with an information-technology representative from the company so we can narrow our differences. So I can assure you that the motivation for these rules wasn't because corporate America decided, you know, we really need a rule that the plaintiffs' will sit down with us and talk to us. That happened because they asked for another rule.

I can assure you that the motivation for these rules wasn't because corporate America decided, you know, we really need a rule that the plaintiffs' will sit down with us and talk to us.

You have enough power to deal with the preservation issues. You deal with those every day, whether it is a car that's rolled over and the issue is who gets to look at it—how do you tear down the tank? Who keeps the car? The issue of format of documents—that has always been available to you.

Sanctions—there is a wide body of law you are going to apply in this area.

How much information is being produced? You know, it is interesting. I didn't hear any cries from corporate America when they would send me and my staff to seven different warehouses to go through a million pages of documents. By the way, the air conditioning had broke and they hadn't been able to fix it. That was seen as reasonable. A business-record production. Instead, I think that all that was necessary is what we are seeing slowly, and that is the education of the plaintiff's bar, the defense bar, and a better job of lawyers at educating the court.

I think the issue of privilege and the problems of reviewing documents and there being a need for a rule is a red herring, and let me give you an example. It has been said that the problem with electronic discovery in these confidentiality orders is that it slows the process of producing information. It is the same

argument you hear with privilege. We are concerned that we are going to produce something that is privileged.

Well, if it hurried the litigation, if it expedited when I got information, then I would agree that there are needs for some protections, but, in reality, the corporations and the people producing information are still going page by page. There is nothing different that is going to be done tomorrow if the rules were adopted today that is going to expedite things.

The issue of safe harbor—I am not familiar with courts that have been imposing severe sanctions for companies and individuals who inadvertently, unintentionally, in routine operations, destroy evidence. I just don't see it. What really happened was the companies were getting hammered because the playing field was getting leveled. We were now getting information, and we were finding documents and information in their hands far quicker, and we were ready for trial in a timely manner.

The issue of backup tapes had become very little of an issue, but what had become an issue is that, with very little burden on the plaintiff's part, we could now review those seven warehouse

It is my position that the rules need not happen because the system wasn't broke.

documents and find the documents that said, as happened in drug litigation, "Am I going to spend the rest of my days at this company until I retire writing checks to fat people who took our drug?" We were able to find documents that said, "Yes, we understand that this product is causing injury. We should not change the label or the warnings

because it will negatively impact our sales." These are the issues that we were uncovering, and the playing field had become more level.

Then, we were able to use databases. We were able to use their technology to prove our case, and, all of a sudden, the volume of information that was once in a warehouse with 10 or 12 staff members was too burdensome for them to produce in electronic form.

The rules are a mistake, in my opinion. It is true that the best part of this rule is, as Judge Carroll said, the meeting confers and the early attention to, but it is not possible to define all that you will face in these rules, and they try to do that. The amendments that are coming out now are watered down, in large part because they presented serious vernacular problems as we went on, and with unforeseen circumstances and advances in technology, most assuredly, we would have chaos.

It is my position that the rules need not happen because, again, the system wasn't broke. There were inadequacies on the plaintiff's bar. There were inadequacies on the defense bar. There was a poor job of education in the courts, but if you understand the rudimentary issues surrounding electronic discovery, you don't need a rule.

Importantly, from Judge Carroll's paper—it was very interesting to me to see how little rulemaking occurs in the states on this issue—we find that, even within the federal system, at this point, there had been no consensus.

These courts were dealing with these issues on a regular basis. Judges are dealing with it in divorce cases. "My husband took the computer. I know there is something on it." They were dealing with it in

employment cases. This supervisor e-mailed this supervisor. They were dealing with it in crashworthiness cases on crash sensors. All of these issues were being dealt with. We did not see a burgeoning field of appellate law. What we saw is that trial courts were managing this.

In the end, what happened was a group of interested parties came forward and, in my opinion, have made somewhat of a mess that we are going to have to watch and see what happens. It is for that reason, more than anything else, that I think the most prudent philosophy in looking at these rules and considering the rulemaking process is to do this:

One, begin the process of educating the trial courts and the appellate courts as to the issues. A motivated trial court can easily manage these issues. They don't come up in every case. They come up in select cases, and asking early on "is this an issue" and dealing with it will solve it.

Two—and here I agree with Judge Carroll—let's watch and see what happens. What conflicts are going to develop? There are, for instances, terms in here that I know are going to be used as a sword against me, but I don't think the committee intended that, and, as can be seen by the notes. I know there was an effort to try to keep the notes short, but they are still very, very long and involved. They are trying to cover a lot of ground, so that parties don't misinterpret what is there. In the end, I agree, there are practice guidelines. There are books that people can read. There's ways to educate.

I think that the major problem of cutting and pasting the Federal Rules into a state process is that—and I talked with one of the groups this morning is that there is a different discovery culture in different states. The Federal Rules were already set up to say, "Look, you need to meet. You need to disclose, and you need to do it early, and it is not tied to answers and everything else. You need to do it early." In my state, we don't have that. So to create a rule where we would have to have meet-and-confers, which I would want, would require a new culture of discovery and a new paradigm for the discovery rules which I don't think they are ready to do. Does that mean that when I go back to Florida state court that I will have an inability to get electronic discovery or to address the court on these issues? The answer is no.

I was recently in a state court outside my state arguing electronic-discovery issues. The issue was the preservation of backup tapes and a plan for preservation of information. Without any rule and without any case law, the state trial court knew how to handle this. She sent us off and said, "Within the next 10 days, you will meet with the IT people. You will discuss openly what the issues are surrounding this preservation issue, and you will report back, and then I will make my ruling." She didn't need a rule to understand that, and these rules would not have helped her.

My point is that trial courts have been dealing with this in vanilla cases and in complex cases for years. Ultimately, the concept of one-size-fits-all, that somehow you could take these rules and take them back to your state, I think, is obvious to all that it would not be possible. In the end, what I do think is I feel ashamed, in the sense that I do think there were things done in the 1990s that were a mistake by lawyers who preceded me. I think there was a lack of understanding of the technology. I think there was a fear of destruction, and I think that, as a result, there were probably preservation issues that were decided

incorrectly, but as we sit here today, before these rules are even approved, that has percolated, and it has resolved, and courts are dealing with it.

And so, as a result, I don't think we are going to see a flood of new state rules. I think instead what we'll see is an examination of how this practice works and take the good and leave the bad where it belongs.

Honorable Ronald J. Hedges

I take a skeptical view of the rule amendments that are going to be before the Judicial Conference of the United States, and I share with Judge Carroll the belief that, come December of 2006, those amendments are going to be going into effect. It just seems like it is a roller coaster that is going.

But before I talk a little bit about that, let me talk about the local rulemaking process. Someone this morning lamented the fact that states are no longer looked at as places to experiment. In this area of electronic discovery, a lot of the experimentation has been done by the district courts. The district courts can enact local rules under the Rules Enabling Act, which you heard about this morning from Professor Mullenix, as long as our local rules are not inconsistent with the Federal Rules of Civil Procedure, and, as long as our rules are procedural in nature.

On the basis of that, a number of district courts, including my district, the District of New Jersey, have adopted local rules that are beginning to look at electronic discovery. They are in Judge Carroll's paper. But the point is this, that courts have been beginning to look at this. They are beginning to look at it in different ways, but most of the district courts have been focusing on this concept of early consideration of electronic discovery. What our local rule, for example, is intended to do is require attorneys to think about electronic discovery early, talk to their clients about it early, talk to their adversaries about it early, and if there are problems, bring them to us early, so we can resolve them before everything comes to a head six or eight months later.

I think it is unfortunate that the Judicial Conference or one of the committees on the Judicial Conference thinks as long as three districts have separate rules there is something evil, and you've got to have a national rule to deal with it. This isn't the first time that happened. That happened with the automatic disclosures 10 years ago or so. But I think we should do some more experimentation in the area, and we should look for some empirical studies for a reason I'll tell you about in a minute.

Let's go back and talk about electronic information. If you stop and think about electronic information, and this is, I think, what Tom Allman was talking about, it comes down to cost—cost of keeping, cost of retrieving, and the like—and that cost is driven by a couple of things. It is driven by new technologies. I mean, the average replacement of an electronic system in corporate America is what, three years? Every three years, there is a new system. So every three years, things have to be started all over again.

In addition to that, I think costs are driven by vendors. Wherever you go, you'll see a vendor who can do something better than the last vendor did and will promise you that he or she will deliver something at half cost. It is also driven by statutory and regulatory requirements. For example—I don't

know if you saw this a few days ago—UBS was sanctioned over \$2 million by the SEC for failure to maintain e-mails, and there is an SEC regulation that requires e-mails to be maintained.

There is something else cropping up now if you followed the Arthur Andersen story. People are starting to be concerned about criminal liability. There are several potentials if you are a publicly traded company for liability in this area.

And the last thing is civil litigation, and all the things I mentioned to you—new technology, vendors statutory and regulatory requirements—have nothing to do with us. So I question how much of the cost really results from us anyway.

Having said that, we deal with electronic-discovery issues on a daily basis in our district courts. There is a developed body of case law. The rules deal with it, and the biggest problem we have is that judges don't enforce the rules, and it is interesting to me that the Advisory Committee wants to adopt a whole new series of rules where they put in their comments at least twice, the judges are not enforcing the existing rules the way we intended them to. I don't know what makes them think it is going to change. All we are doing is adding another layer of decisions that we have to make and standards we have to follow on top of a regime that deals with everything now and can easily deal with it. So that is a big question, in my mind, as to why we are doing anything with these rule amendments, other than nationalizing this obligation to confer early and the like.

The other thing I would suggest again is I think experimentation is needed. I don't think there is any great empirical evidence here. I think it is driven by horror stories.

But be that as it may, we are in a period of transition now, and Ken and I have had this discussion about what is the effect of the rule amendments today. The effect is this: it is making lawyers and it is making judges think about electronic discovery issues. Now lawyers are talking to their clients about it, but what I see happening now is that lawyers are reacting to horror stories.

I don't know how many of you have followed the Morgan Stanley decision out of the Florida state courts, in I think, West Palm Beach, where there was a \$1.4 billion jury award after a judge shifted the burden of proof on a party who did not make electronic discovery and whose attorney conceivably did a number of things that are leading to a malpractice claim against it. But of all the cases I see—99 out of 100 cases—electronic discovery is not an issue. It is provided. It is not fought over. So I think we need to take a step back in this entire area and figure out why we need to have rules and what those rules need to address.

The other thing I would suggest again is I think experimentation is needed. I don't think there is any great empirical evidence here. I think it is driven by horror stories. I think we would be well to see what the states are doing before we proceed, and the example of that is the California Judicial Council. There was a proposal late last year to adopt what is now the Delaware Rules, which are in Judge Carroll's materials, statewide in California. I think it was in January or earlier this year, the California Judicial Council dropped that and said, there is really no perceived need to have electronic discovery rules, and, frankly, if

you look at the Delaware Standards, you'll see why there is no need to have the rule. Just Draconian is probably the easiest way to describe it.

I think we are rushing along too far. I think we don't need to go as far as we are going, and the one comment I would make substantively on these amendments is this. People were talking about the so-called safe harbor. Someone else, Jonathan Redgrave, who talks a lot in this area, calls it a "lighthouse." I call it an uncharted mine field, for a number of reasons.

The whole concept of safe harbor, and I think Tom will agree with me, was designed to give organizations some ability to predict what is going to happen. It was to introduce predictability, and that has gone out the window with this rule amendment, because, number one, it says, even if you have done everything right, if there is an exceptional circumstance, you can still be sanctioned. It looks like the exceptional circumstance is going to mean prejudice to the party who doesn't have the information.

Number two, it introduces a concept of good faith that if you have the routine operation of a system, that system has to operate in good faith. For those of you whose states adopt this, you are going to be introducing judicial discretion back into an area where you weren't supposed to have it, which the whole concept of 37F was going to do in the first place, and that, I think, is a big problem. I think all it is going to do is create another eight years of interpreting the rule by people like me.

Response by Judge Carroll

I want to thank everybody for what I think are great comments about not only the paper that I presented, but these issues. I want to start off by talking about Ken's comments, which really go to the process. I, quite frankly, agree completely with Professor Mullenix that this open process has created a political process, which means you will never ever get major rules changes through the Rules Committee, which I think is a good thing.

What the value of the process is is that it identifies issues, hears from a wide variety of constituents, and allows the Rules Committee to make changes that help with these particular issues without affecting significantly one side or the other. I think the rules process purpose is this: to empower the trial judges, to give them the tools that they need to make fair and efficient rulings in discovery cases.

It is really not an appellate law issue, because there is an abuse of discretion standard, which means almost never will a trial judge's ruling be overturned. That is why I have suggested that there be some state rulemaking in this area, because there is a need to give trial judges the power that they need to have to manage these issues in a significant way.

And I'll turn now to Mike and Tom, because Mike and Tom epitomize the debate that I heard when I was on the Rules Committee every time that we had a discovery issue, which is from the plaintiff's side, corporate America hides documents and are bad people, and from the defendant's side, the plaintiffs are overreaching. They are asking for more stuff than they've got. I eventually got it to plaintiff lawyers pontificate and defense lawyers whine. Whether that is true or untrue, I don't know.

I say that for this particular reason, what we are talking about is going back to the trial court level, because they are the ones that need the decisions, and making sure they have the right tools, but I think

there needs to be sensitivity on both sides of this issue, because, quite frankly, on both sides of this issue they are right. There are numerous instances where companies have intentionally destroyed documents, numerous incidents where companies have stonewalled, and numerous incidents where they have not fulfilled their discovery obligation. There are also numerous instances where plaintiffs have asked for far more than they are ever entitled to, where plaintiffs have required companies to expend huge amounts of money that they shouldn't have had to expend. So what this requires, I think, is a sensitivity on both sides of this issue from the judiciary. The defendants are right sometimes, and the plaintiffs are right sometimes, and we need to recognize that fact.

I will disagree with Mike's suggestion that there is no need for rules changes, that paper discovery is no different than document discovery, and these rules only came about because the plaintiffs were getting better at it than the defendants. I just don't agree with that. I think there is a fundamental difference in paper and electronic form that requires some differences in treatment.

And if I can go to, last, but not least, Judge Hedges. I agree with him on the safe harbor and the discoverability provisions. I don't think that they are wise, because if the standard is that the judges have the tools they need to manage these issues, I think, yes, they do. And I also agree with him that I think it is valuable to have these early-attention-to-discovery rules. But new rules or not, I mean, I think the way this discussion has focused for me is the real message is to state judges as well as federal judges is, one, we

The defendants are right sometimes, and the plaintiffs are right sometimes, and we need to recognize that fact.

need to make sure that we are thinking about these issues in almost every case, because they exist in almost every case.

I was talking to one of my state trial judge friends in Alabama about a case he had involving subcontractors and contractors in disputes over subcontractors and contractors. You know, the kind of thing that you

have dealt with forever, but the difference in this case was they were communicating by e-mail over change orders and over instructions and that kind of thing, so that e-mail had become an important part of this case. So even in simple state court matters, e-mail particularly is important. We've got to provide the tools for judges to handle these, and I think the best tool is to make the parties think about this from early on in the litigation.

The second is you've got to be sensitive to the issues on both sides of this. Tom Allman is right. If you enter a preservation order, although the rules do not say anything about preservation—preservation is simply outside the rules—but if you issue any kind of a discovery order that requires the defendants to spend huge amounts of money that they really didn't need to spend, that is just a bad order, and we need to be able to say that. On the other hand, if defendants are hiding behind this accessibility thing and refusing to provide information that they ought to provide, then they need to be popped for it, and, likewise, they ought to be sanctioned when they intentionally destroy documents or even negligently destroy documents where the consequences are significant.

Last, but not least, if you read any of the material that is circulating, it really is an issue about reasonableness. We really, as judges, simply need to be reasonable about what we are doing, and if we are reasonable, then I think a lot of these problems and a lot of these difficulties will go away.

I think the comments were excellent. They really do mirror the divide on the plaintiff and the defendant's side, and also provide the more intellectual side from Judge Hedges and Ken. I think the

messages are still there. I think rulemaking, in some areas, is really going to be beneficial in simply allowing your trial judges to manage these issues.

Questions and Comments

Participant: This goes to the safe harbor issue. It is perhaps helpful, but only if you can determine whether or not, in fact, it was an honest mistake.

Ken Withers: These are going to be extremely fact-based decisions that are going to have to be made, and one of the problems is that we are dealing with concepts, such as “good faith,” that are going to require, really, further discovery about discovery.

What kinds of systems were put into place either at the outset of litigation or when litigation was reasonably anticipated? Were the efforts made by the attorneys in-house or outside to communicate to employees what their responsibilities were to preserve electronic information? Were those adequate? Were the orders—the litigation holds, as we call them—effectively communicated to the IT people? These are going to be complicated questions.

In the *Zubulake* case—*Zubulake V* to be specific, as there were several decisions published in that one case—Judge Shira Scheindlin of the Southern District of New York began to set out some of the factors that judges will have to look at to make these determinations about the good-faith operation of a records-management regime and the litigation hold. I recommend reading decision number five out of the *Zubulake* series, if people want to start looking at this.

Remember, all of us went to law school because we couldn't get into MIT.

The fundamental problem, as I see it, is that what has developed in the last 10 or 15 years in American business—and in government—is a shift, a dichotomy between the people who routinely create and receive and use information in the normal course of business, and the people who manage or are the physical custodians of the information.

The people who are using the computers, who are seeing things on the screen, they know the content very well, but they have no clue as to how those records are being maintained or where they are being kept. The people in the IT department, know exactly—hopefully—where things are being maintained and kept, but they have no idea of the content, and the failure of these people to communicate has been a problem that has been compounded by the hubris of trial attorneys who have decided to make representations to the court about a situation that they know nothing about. Remember, all of us went to law school because we couldn't get into MIT.

So the lack of communication all around has been the problem that has created a lot of these spoliation decisions—spoliation sanctions decisions—which are not really about spoliation. They are about the failure to communicate, and then misrepresentation to the court as to what the situation is. And if you read all of the *Zubulake* opinions, in order, you see that unfold in a real case and what happens.

Michael Ryan: If I can comment a little bit on that, I think this is one of the problems. The example that Ken gives, lack of communication, I don't know how that could ever be good faith, knowing

how information systems work. A part of the problem here is the lack of specificity in this rule, trying to be superimposed on a body of law that already is out there on spoliation, where, initially, the view was a technological view that just turning on the computer itself, the operation of the computer, that routine act destroys information. It is not nefarious. Nobody is trying to do it, but it happens, and I am not familiar with any case law that says that that would be a sanction, but, clearly, there was a fear of it.

So I think what is going to happen is it is not going to provide any guidance. I think you are going to have more play in the joints than we even had before, and I think you are absolutely right, Ken, I think there is going to be significant discovery now on that issue alone.

Ronald Hedges: Let me just throw in one more thing about the safe harbor. The Federal Rules only apply after complaints are filed. So conceivably, what you are going to have happen, if this is adopted, is you are going to have a safe harbor for actions taken by a business entity after a complaint has been filed, and you are going to have common law principles governing back before the complaint was filed when the kid was killed by the product, and you may well have two sets of standards that you are going to have to be dealing with, too, which is another problem with this whole idea of codifying this.

Thomas Allman: Can I give an example of how the safe harbor works in actual practice? There is a recent case. We are struggling to remember the name of it, but I'll just give you the facts. An engineer was looking at an oscilloscope—you all remember oscilloscopes from your science classes in high school? There is a wavy line going like that—and his job was to evaluate the spread of that wavy line as part of his job. A lawsuit occurred. It was an IP case, and the argument was made by the plaintiff lawyer that they should have preserved evidence of each of those changes of those wavy lines, and the court held that there was no duty to preserve, and, indeed, the judge applied the draft safe harbor in a footnote to it. He said, “If this rule had been in effect, I would say there was no safe harbor here, or there was a safe harbor here, because there was no duty at the time. There was no understanding on the engineer’s part that he had to preserve the wave changes for purposes of litigation.” In other words, he acted in good faith. It was a routine system, and the judge held that the safe harbor would have applied. That is a very concrete, very precise example of how the safe harbor would apply. It is not rocket science. We deal with good faith every day of the week. We all know what it means, and the mere fact that you have to think about how it applies to a set of facts is not, to me, a reason not to enact a rule.

The Judges' Comments

In the discussion groups, judges were invited to consider a number of issues raised by the group moderators related to the papers and oral remarks. The judges devoted more time to some issues than to others, and they raised other interesting points as well.

Remarks made by judges during the discussions are excerpted below, arranged by topic and summarized in the italicized sections at the beginning of each new topic. These remarks are edited for clarity only, and the editor did not alter the substance or intent of any comments. The comments of different participants are separated into offset paragraphs. Although some comments may appear to be responses to those immediately above them, they usually are not. (In some cases, a response by one judge to another is distinguished by two slashes (//) separating the comments in the same paragraph, and the response is italicized.)

The excerpts are individual remarks, not statements of consensus (for general points of agreement that arose out of the discussion groups, please see the following section). No attempt has been made to replicate precisely the proportion of participants holding particular points of view, but we have tried to ensure that the various viewpoints expressed in the discussion groups are represented in the following discussion excerpts.

State Court Rulemaking

THE POWER TO MAKE COURT RULES

Judges discussed who in their state had the authority to promulgate court rules, with some judges reporting that the power is vested in their supreme court while others said it lies with the legislature.

It seems to me that one of the fundamental questions that I have is whether rulemaking is the inherent power of the courts, and what we ought to be doing is moving into this subject from a separation-of-powers point of view. My experience in our southern state has been that our supreme court has over the last 40 years gradually ceded territory to the legislature, and now we all wake up and realize what is going on and trying to gain that territory back is exquisitely hard.

I was intrigued this morning to hear about other states that the legislature seems to defer more traditionally to the supreme court and the judiciary with regard to rules of civil procedure. Our civil procedure rules can only be amended by the legislature.

In our southeastern state, the constitution provides that the supreme court will have the authority to promulgate the rules and procedures for all courts, subject to the legislature's ability by two-thirds vote to appeal, and it will be adopted by the legislature.

In our southern state, we have a lot of legislative delegation to the supreme court and to local courts. That is constitutionally authorized, and that is totally authorized. As an example, our constitution says that with respect to rulemaking power, the supreme court may establish procedural and administrative rules not in conflict with the law.

In our southern state, the supreme court has the authority by statute and constitution to promulgate the rules. It passes all of the rules of civil procedure, rules of evidence, the rules for the trial courts, and there is a rules advisory committee that will make recommendations to the supreme court for amendment or new rules.

In our Mid-western state, the supreme court has ultimate authority for rulemaking, decision making. That is by virtue of the constitution and statutorily.

Our constitution provides that the supreme court is solely in charge of the rules, procedural rules, and the legislature pretty much defers to us. That does not say that there isn't some conflict from time to time, but rarely, quite frankly.

Our rules are very strictly controlled by our supreme court. I found some of the debates about the legislature creeping in kind of interesting, because that just doesn't occur in our state. The supreme court strictly controls the civil rules, criminal rules, supreme court rules, and administrative rules.

We get our rulemaking authority from our constitution. Therefore, the legislature couldn't take that away from us, or tell us what to do.

In our Mid-western state, it doesn't seem we've ever had a lot of these problems I hear about. By constitution, the supremacy of rulemaking power in our state is vested in the supreme court, although they exercise it in conjunction with the legislature, the legislature passes the code of civil procedure, the supreme court has promulgated all rules of appellate procedure, and the supreme court is very, very slow to exercise its rulemaking supremacy and strike down a provision of the legislature unless it's just simply not workable. And it's a very open process when they do it and we just simply don't seem to have these problems. But we do have rulemaking supremacy in the supreme court and that's vested by our constitution. So I suppose I can understand where the legislature has the rulemaking power it becomes terribly political, we just don't see it

Several judges discussed their views on rules in general, with several expressing the opinion that there may be too many rules.

I think for every rule that's implemented there should be a rule that's done away with.

My experience with the rule change is it begets litigation and it creates more needs for rules and it never ends, it just keeps building, it's a monster.

It sounds like your rules go into a great deal of detail, whereas ours, like Paul Anderson said, are broad in scope. Those types of decisions that you are talking about are made by the appellate courts or the supreme court on a case-by-case basis.

Justice Anderson also said that the rules should be few, and I think he is absolutely right. And our southwestern state also does have a rule—which is sometimes honored in the breach—that the rules are to be construed liberally and that they are not to dominate over substance.

From the time I started practicing law the appellate rules and procedures was a pamphlet, now God dang it's a book about like that thick. I promised myself when I became a judge two things I was going to

do, one, I was going resist every damn rule change I could, and secondly, I was not going to abuse lawyers in my courtroom. And so far I've managed to keep that promise to myself, but it helps having a wife for a lawyer too, she doesn't let me forget where I came from.

I think that is the negative side of this. Most proposals ultimately get passed because there is such an investment of time and resources and it has gotten this far, there is a reason it has gotten this far. There is a perception from the people in power that it needs to be done.

As the speaker said this morning, if they meet, they are going to change the rules.

Rules beget rules.

In some states, local courts may have the power to set their own rules, provided that they do not conflict with statewide rules set by the supreme courts. The existence of local rules sometimes makes the work of lawyers more difficult.

We have uniform local trial court rules, and then we have supplementary local rules that allow individual change, and paper circulation rules, and that sort of thing.

We allow local circuits to have rules as long as they are not inconsistent. So there is a lot of experimentation and fermentation at the circuits.

We also have 30-some judicial districts in our 100 counties in our southeastern state, and each one of them creates its own local rules. They are often controversial to lawyers who aren't familiar with them, and they go into a judicial district and get home cooked.

We also have a procedure in place where local courts may make rules that are productive in expediting their own dockets. There is more activity in regard to the local rules for local courts of appeals, for example. We have 12 district courts in our Mid-western state, and the rules vary significantly between districts. It is very difficult and we have talked about trying to streamline those and make them more uniform, but there is resistance to that.

We have local rules, but they have to be approved by the supreme court, and they have to be published to have any effect.

Judges discussed the frequency with which rule changes are proposed and adopted in their states.

We have, I would say, an average of three times a year somebody proposing some type of either smaller rule change, new rule, or tweaking of a rule. It comes from lawyers, judges, the bar, interest groups, et cetera.

I am in double digits now at the court and I have seen more rules having to be promulgated in the last three, four years than I saw in the first 10. A lot of it has to do with disciplinary matters from the bar association, department of law, things involved with lawyers and just the technical aspects of the

practice that perhaps were not as technical as they were years ago, and they are requiring rule changes and what have you.

I think there are a lot more now. There are a lot more, a lot more activity, a lot more discussion, a lot more promotion of changes, and I think there are more rule changes today than there were even as recently as five years ago.

Annually in our state.

In our western state, the rules are sort of a continual process of review and reexamination.

In our Mid-western state, there is a procedure in place that once a year the rules may be changed and generally speaking we have not tampered with the rules of civil procedure much in the last few years.

Sometimes we get them twice a year.

The how often, at least in our northeastern state, is very frequently. We are constantly, as I imagine everybody is, going over rules to make sure they are up-to-date or refining them to remove impediments, and so on.

We seem to get a lot of tinkering with the rules in our state. Nobody seems to adhere too much to “if it ain’t broke, why fix it?”

There seems to be a tendency as more and more big city people get on the court, supreme court, that you have more rules that tighten guidelines.

It seemed like a few years ago we had what a lot of states have. You have the new rules every year or twice a year and they get published, and you ask for comment. But a few years back, three or four years ago, we got a new chief justice and now we get a damn rule every week or every month. I don’t know anybody that pays any attention to them anymore. I don’t even bother to read them myself. I mean that. I am serious. There is something new on my e-mail every other week or so. Now, most of them are mundane stuff.

We were changing rules to be honest so often it was hard to keep up with the publication. So, they have asked us to only change it every January.

I am sort of constantly amazed at the frequency of rule amendments. West publishes our state court reporter and in every single volume at the bottom there is that black bar with court rules, you know, setting out all of the amendments that have become effective during that period of time. In fact, there are so many rule amendments that we now have adopted a practice of making them effective, either on January 1st or July 1st of the year, rather than 30 days from entry.

I will make this as a comment or as an observation. There seems to be a tendency as more and more big city people get on the court, supreme court, that you have more rules that tighten guidelines. You have more rules that require more stuff to be done. Now whether that is for my good or some court’s good, I don’t know, but I feel that it puts a penalty on small town rural lawyers, two and under five people firms, which ultimately penalizes many plaintiffs with many mom-and-pop injuries—I have a lot of small litigation. There are more and more rules that say this has got to be done in seven days, this has got to be done in five days, this has got to be done, and so on. And you have got to have this,

this, this and this and everything has got to be numbered and dah, dah, dah, dah, dah. It gave the bigger firms hired by the carriers a tremendous advantage.

THE PROCESS OF MAKING RULES

Judges discussed in some detail how rules are proposed and adopted in their states.

I think ours is a pretty good system, I really do. But since 1940, we have had the standing committee. What happens is, the court invests a lot of time in determining what the membership of the rules committee will be. It is not just the chief judge who does it, it is every member of the court. We are selected and elected from appellate circuits, and each judge is responsible for specific areas. So we try to get geographic diversity. We also look at trying to get diversity of practice. We pick up the prosecutors, the public defenders, the public interest folk, the defense lawyers, trial lawyers, put it all together, and we let them stay there for an appreciable amount of time so that there remains some history in the minds of a number of them, so that they will know what has been going on and how things have progressed over time. Then we brought in a system where they brought in consultants in a particular group. They break themselves up into committees with all these consultants, and these committees are looking at the rules specifically for certain things. Then they take it back to the entire rules committee, which then looks at the thing afresh. All that happens before it even gets proposed to us.

Our supreme court is very politicized and very aligned with our Republican legislature, so they probably do things more cooperatively than controversially.

I think we use some of the same processes that have been outlined. The rules are put out for comment, and sometimes public hearings are conducted. I was trying to think if we have had any real controversies regarding rules, and I really can't think of any. We in the appellate court also propose rules. The supreme court is trying to do a lot of delay reduction in the last several years, so we propose rules to them that we think aids that, and sometimes the appellate bar is happy or unhappy about some of that, but nothing controversial per se. Our supreme court is very politicized and very aligned with our Republican legislature, so they probably do things more cooperatively than controversially.

In our western state, suggested changes to rules come from the public, from the lay people and from attorneys and from judges. Sometimes we get letters directly. We have standing committees on all the rules—well, on all the procedural rules. Operational rules generally we defer to the supreme court. The individual courts defer to the supreme court. Then we put it out for public comment. Well, it goes to the committee first, our committee on rules and professional responsibility or civil procedure. They are standing committees, and generally they meet every month. And they evaluate the proposals and they make a recommendation to us, and then we decide whether we are going to adopt it. Once or twice, we have just looked at a rule and said we wanted to change it, and we have changed it, and we are allowed to do that.

In our western state, our whole rulemaking process is a mess. First, we have a code of procedure that was adopted in the 1880s, and it gets tweaked by the legislature all the time. And it's full of traps for the

unwary, and it's very archaic. Then parallel with that we have a judicial council that is a rulemaking body that has a large staff, the administrative office of the court. They have about four or five lawyers whose sole job is to devise rules and change rules. So, once you have that much of a professional staff to deal with rules, they are constantly going to be proposing new rules, and that's exactly what happens. In the code of civil procedure, a lot of the rules are very controversial, and it's a very political process. The worst example probably is the rule pertaining to summary judgment, which gets amended every year. And there are inconsistencies right in that same statute, and it's a mess. Anyway, on the whole, I think our state's rulemaking process is very irrational and very archaic. Other than that, I think it's wonderful.

In our northeastern state, we have essentially three processes. One is judicial conference with representatives from various courts, and they simply propose. We have the administrator of the court that can adopt certain rules. But the main power is residing in the legislature. They really are the ones who call up the changes, and generally in consultation with the chief judge. That's really how it works. Rules of specific courts are adopted by the judges in those courts. But they are limited.

In our northeastern state, the rules are promulgated by an administrative board that consists of our chief judge, our chief administrative judge and each of the presiding justices of our four appellate divisions, appellate divisions being the intermediate appellate court. These are on an ongoing basis. There is no window of opportunity from which you have to give suggestions. Suggestions will come usually from the state bar, which is very active.

In our western state, there are really two processes that run parallel. As far as the code of civil procedure that the legislature amends every year, that is subject to all of the normal political processes, and at the end of the year you are suddenly taken by surprise as to some change that nobody really knew about. The rulemaking process of the judicial council is much more rational. And when there are changes proposed, it is widely publicized, and comments are requested. I have been involved myself, as comments are taken very seriously, and sometimes with many, many comments. And changes will be made based on those comments.

On the whole, I think our state's rulemaking process is very irrational and very archaic. Other than that, I think it's wonderful.

Even though we don't have public hearings before the committees that deal with judicial council rulemaking, I think the process is very open and very responsive to input from anyone interested.

In our southern state, the supreme court has total rulemaking authority, but we go about it in a couple of different ways. We've got an advisory commission, where a member of our court is a liaison with that commission, and we appoint that commission and we try to have it balanced between trial lawyers and the defense bar. But most of the time, if we're going to have major changes, we'll either appoint a taskforce or a commission and have them study it.

So, we have just changed to a regularized once-a-year process. Anyone can submit rules in our southwestern state. The state bar is very active about it. The trial lawyers and defense bar are very active in it. We have no standing committees. So, we wait and get a rule proposal from a group. If there seems to be controversy or a lot of interest or it is a complete package for rule changes, like we have got a complete package of rule changes before us now on family law and family courts, we will put together a working group and try to get all the various constituencies represented.

The rules system in our southeastern state is very formalized. We have some 13 standing committees devoted to various areas of specialization from civil rules, criminal, mediation, the full gamut. The committee members are appointed by the bar. We set terms. We have a judicial administration that sets forth the procedure by which proposals to adopt or amend rules will be submitted. They start in whatever rules committee is responsible for the proposal. And ultimately they are presented to the supreme court for adoption.

The supreme court has an open process and there is a judicial council as well that will make suggestions, but also anybody from the public or from the bar or from anywhere can make a proposal.

We have a rules committee. It is chaired by the justice of the supreme court. There are eight superior court judges on it. They meet monthly, except not in the summer, I suppose like most other places. We typically adopt rules once a year. The proposed rules are published as a public hearing that the rules committee has, and then after the public comments, the changes or

whatever are then submitted to the superior court judges. They come from everywhere. The chief justice a few years ago appointed a civil commission, which is to deal with civil matters, but they have proposed a lot of rules. Individual judges propose rules. We sometimes have rules that bubble up because we need to make a change in our procedure because of legislative changes. We are dealing with a couple of those now.

Our Mid-western state is sort of a hybrid. The supreme court has an open process and there is a judicial council as well that will make suggestions, but also anybody from the public or from the bar or from anywhere can make a proposal. That proposal is submitted to the court, actually along with a brief similar to how a petition for review is submitted, and the supreme court will hold hearings on it, perhaps more than one and perhaps in different parts of the state, which is a little bit unusual, I think. Then at the close of the hearing, they will go into conference, and they will make a decision about what to do with it, and then they will issue a decision on the rules.

Several judges discussed the makeup of their rules committees and how they operate.

In our southeastern state, we have standing advisory committees who meet. I was on one and we used to meet quarterly—I assume the others meet quarterly as well. There could be a decision that comes out that prompts those changing rules and the proposed rules, and they are publicized in the bar journal for comments and then ultimately to the supreme court for final approval.

In our mid-Atlantic state, we have a standing committee which is the rules committee. It consists of judges from each of the trial courts, and we have two, which is the district court, a court of limited jurisdiction, and our general jurisdiction court; lawyers from various practices; and always the chief judge of our intermediate appellate court is the chair of the rules committee. They meet weekly, and depending on whether our supreme court sends to the rules committee a request for rule changes or study or recommendation, or they internally may submit a report to us annually as to any rules that need to be revised or amended. So that is the process. It is the standing committee, and the standing committee makes recommendations annually. If something comes up of an emergency nature, they would make that recommendation promptly.

We have standing committees all the time, and they are considering changes all the time. These committees consist of judges and lawyers, and it is really a voluntary situation. You just check on

your bar form, and if you volunteer and they don't have too many, you get on there. We have term limits, so we don't get the geeks there. Then when the committee reaches consensus on a particular rule, it goes to the supreme court. They will have hearings on it, and hold it up to the people who come before them, then they will either adopt, modify, or reject it. It works fairly well.

There's one wrinkle in all of this though, that all of the members of the Judicial Council are appointed by the chief justice and ultimately all of the members of the advisory committees are appointed by the chief justice, so that has caused some concern. We have a very good chief justice administratively at this point, and we've had a lot of administrative changes within the court but there is concern among members of the bench and bar about the power of the chief justice.

The advisory commission is an open process, and it's evenly divided with leaders of the plaintiff and defense bar, and they tend to work things out and then submit things to the court. The court doesn't have to adopt what they have, in fact what they recommend oftentimes will be published for comment for a 90-day period, and then we'll literally have a hearing in open court for further discussion, and then we'll come up with a final rule.

I would like to see our chief justice select participants to reach out to the persons that they believe are the experts in the community on matters of procedure, particular scholars and that sort of thing, rather than the strident voices, which I think tend to degrade the quality of the discussion, degrade the sense of flexibility that you would have when you are discussing an innovative idea.

We pick the person. We don't have a representative who is picked by somebody else. We pick the person. I think that makes a difference. Now, I must tell you that I don't mind the stridency, having that at the table, because I sometimes believe that as Justice Anderson said, it puts it out there in the open, and you sometimes will be surprised at the results you get. If you put those too-strident voices together along with other people, you will end up with a better product sometimes. I sometimes don't mind that. But we do do it ourselves, as opposed to having somebody else oppose those folks.

If you put those too-strident voices together along with other people, you will end up with a better product sometimes.

I would think that there would be a greater risk if you had an extraordinary committee. If a committee is appointed that is not a standing committee, then they are going to come together, and they are going to try and find something to do. If you have a standing committee, as we do, I think then it develops a culture. And if there is something to be worked on, then they talk about it. And they have some if you will, corporate memory. And in our state, I think our culture is more along the lines of "if it ain't broke, don't fix it," and move cautiously.

We have a system in our southeastern state where we have these committees, and they meet regularly three times a year. Not only that, they have a rule that after twice you have been reappointed, at the end of six years you are term-limited out, so you have to go off the committee. So, we have lost a lot of the institutional memory. But I have found that because it's so large, it so unwieldy and not much gets done unless we have a lot of consensus.

Judges discussed where some of the suggestions for rules arise.

As a practical matter, it tends to come from the bar largely and from judges, but I think it is largely from the bar.

One of the processes we have in southeastern state that both opens the publicness of it, but also leads to more controversy, is we have a procedure outside of the formal rulemaking committees where a certain number of bar members, I think it's like 30 or 50, can submit a proposed rule. And if they have enough signatures, it will go through the process. The supreme court has to ultimately make a decision on it.

In our Mid-western state we also have matters coming from the court. Many matters are coming from the court. Probably as many matters come from the court to our rules committee as come up from individuals.

I think this is one of the things that has been most prevalent in my tenure as chief judge, the court of appeals will oftentimes institute rules changes. We will do it either by noting something in an opinion that will refer it directly to the rules committee, or we will set up a task force to look at a particular issue. Example, access rules—access to court records—came from the court as opposed to the rules committee. It made its way to the rules committee by way of style. It was initiated by the court, and it was resolved by the court substantively without the input of the rules committee.

In our southwestern state, it's a free-for-all approach. Anybody can propose a rule to the supreme court. And sometimes they will just turn around and send it out for public comments. Now, that notice goes to basically your bar groups, and anybody who might be interested. But that's really a small segment of society in our state. And the legislature normally doesn't have a clue as to any of this stuff. But other than some very specific areas, the rulemaking process just comes and goes. And sometimes we have seen the supreme court will simply get a request. They will send it out. They will get maybe one comment from the person who submitted the rule proposal, and the next thing you know, you've got a new rule. Nobody is up in arms about it

Professor Mullenix discussed the impact of transparency on the federal rulemaking process and suggested that may have led to a more politicized rulemaking process. Judges discussed how open their respective states' rulemaking process was.

In our southeastern state, which has a very transparent system, the supreme court's policy is to allow pretty much anyone who has a meaningful opinion about a proposal to participate in an oral argument involving their position. So it really depends on the nature of the rule, as I think we would all suspect.

In our Mid-western state, we have public hearings. In fact, they just came out with a list the other day of a whole number of agenda items, seeking comment and seeking people to show up and give testimony. So it is wide open.

It sounds like our mid-Atlantic state may be the only state where it is public from the time the rule is proposed to the time it is actually approved by the court of appeals. At the rules committee, it is an

open forum. People are invited to come in and give their position. Then by the time it is presented to the court of appeals, again in another open forum, those people who have different views are in court to testify as to what their position is. Then we are out on the bench or even in chambers, depending on how large the group is, and we openly vote on those proposed rules for everyone there. And discuss them. So those who are there get to see it all. I have only been on the court of appeals for about three years, so it was a shock for me to see that, but it has worked well.

In our western state, the process is open. It is quite public. There are hearings at the various phases from the rulemaking council to the supreme court when it adopts the proposed rules. It is a public process, and it is focused exclusively on procedure. In theory that is all it can do, adopt procedural rules, not change substantive law.

Absolutely open. Unless the rule is cut-and-dried, agreed to by everybody, uncontroversial in all respects, unless it is that, and sometimes even when it is that, it goes to the appropriate committee for their comments. Then whatever their comments are, whatever changes are made in the rule, suggestions are made on the rule, it is published in our lawyers' newspaper and elsewhere for further public comment of all sources. Then and only then, when all that material is in, do we sit down and say okay, are we going to adopt this rule, change this rule, reject this rule, or simply table it? Everything is open.

Probably 99 percent of rulemaking comes and goes, and nobody ever even notices it.

Our southwestern state has what I would characterize as a pretty open type of rule. But I think there is a practical aspect to it in that it really depends on what the subject of the rule is. Probably 99 percent of rulemaking comes and goes, and nobody ever even notices it.

By and large, the rulemaking process is supposed to open and public, and I guess it is, to the extent we want it to be in our southwestern state. But the practical effect, I think, is that all the rulemaking happens by itself, and nobody really knows what is going on with it unless you're very interested in that rule.

In our Mid-western state, we have a bifurcated system, where we have a committee that is appointed by the supreme court to do procedural rules. That committee meets not necessarily but factually privately. It then submits a rule to us that cannot take effect until six months after the rule has been published, so the front end is public, but the back end, there is a six-month comment period in which case the rule can be amended or changed.

In our northeastern state, I wouldn't call it an open process per se, because I think it's more of a hybrid to the extent that that is not a public forum. It's not an open public forum. It's not open to the public generally, but later on there is a public comment component out of the proposals that have been accepted by our statewide administrative board after the recommendations are made by the advisory committees.

The supreme court adopts rules to be proposed by anyone. We have open hearings. You can send in letters. You can appear and file anything you want and the decision of the supreme court in whether to adopt the rule is an open conflict. You sit in court at the counsel table. It is recorded. Anyone can come and listen and it is a totally open decision conference where all the justices will talk, just like we are doing

here now, express their concerns, might ask for more information, which we may adjourn, get it, and come back another day. Everybody votes openly and usually an opinion or order is drafted and dissents, if there are any, are set forth and the reasoning of the court in the order is generally given. So, it is very open.

They are open to a degree, but once the recommendation goes to the supreme court in our state, then it is totally closed, because no one has any input, once it gets there, as to when they hear it and do something about it, because it is done in closed conference.

We don't have a real open system. Like someone was saying down here, we solicit public comment. We have standing committees like many jurisdictions. They propose rules, those rules go out for public comment, the comments come back to us, and we can modify them. If we think it is substantive modification, then we send them back out for public comment. But ultimately we decide what the rule will be. We have no public hearings, so the only way the public gets involved is if they submit written comments. Ordinarily it is the lawyers submitting written comments.

A common part of the rulemaking process in many states is a comment period for interested parties to make their opinions known on the proposed rules. Judges discussed the nature of the comment period in their states.

The rules are also put out for public comment. They are published in the state bar journal. They are published in newspapers of daily circulation. There is opportunity for comment and input both from the bar and from the general public. The general public usually couldn't care less.

We do it several ways. We put it on the Web Site, the judiciary's Web Site. We advertise in the Daily Record. The interest groups themselves who are involved in the rules process are made aware of what is going on, and we assume that they will use their own resources to get people involved as well. But it is always available on the court's Web Site as the critical piece of it.

Our supreme court does a public comment period on every rule before it comes up for a vote. It is presented at basically a public hearing. They allow input. There may be 30 or 40 groups or individuals who appear before the supreme court at a hearing on the rule before they vote on it. And some of those rules come from this outside process of 30 or 40 who have presented tend to become the more controversial ones, because they haven't sort of worked through this long, onerous committee structure process first.

The more controversial ones will draw more interest from people who have an interest. If it is something that affects people in their practice or in a procedure of court and the court administrators get involved, it will go on for ages and ages and ages of comment.

Rarely is there a comment from a real citizen.

In our southeastern state, it depends a lot, as I'm sure in most states, on how controversial the proposal is. Some more or less mundane proposals get virtually no comment, but some proposals get incredibly large amounts of comment.

Our bar association and members of the bar have an opportunity to comment on the rule, but the public at large, no.

Judges discussed the role of bar associations in rulemaking, whether they be as committee members, sources for new rule proposals, or as groups protecting their interests.

Our state committee by statute expressly must contain elements from the defense and the plaintiffs' bar community. The phenomenon you are talking about, comes first to mind because the people who are selected for participation from the plaintiffs' side and from the defense side are the most strident voices, not the people with the greatest procedural expertise necessarily. That demeans the discussion, because people walk in with rigid lockstep views on both sides, and inflexibility is the first and final theme. That is why I said I give poor grades to that kind of a system, because it walks away from moderation and walks into divisive discussions that simply go nowhere, and so innovation has no prayer of a chance, unless you can convince your local legislature to get involved, which is a dangerous process. So I don't care for the process, frankly.

We have a lot of input from our local bar association, where various committees in the bar association will meet and try to get an ad hoc committee that will try to make proposed legislation that the bar association will get behind and then propose to the supreme court rule committee.

Attorneys definitely have a very strong influence. I recall several years ago, our chief justice decided that our southwestern state should have a stronger rule on time standards on everything. He made a statewide pitch for this and that was proposed as a rule adoption and it failed miserably because he really did have the complete support of the supreme court, first of all, and then the attorneys were vigorously opposed to it.

The people who are selected for participation from the plaintiffs' side and from the defense side are the most strident voices, not the people with the greatest procedural expertise necessarily.

The state bar is the primary one where you can get some recommendations for rule changes.

For attorneys, we put it out for comment in the lawyers' newspaper, so various bar groups, other groups that affects the public advocates for the courts. They would speak up if it affects them, those kinds of things. Public interest groups are fairly rare, although I don't know where you would put someone like the an academy of trial attorneys. Is that a public interest group or is that a sub-bar association?

We had that situation, and it was really interesting. The appellate section of our state bar got together and wanted new appellate rules, so they formed the committee, they designed them, they wrote them, they did everything, and then they presented them to the supreme court standing committee. They tweaked them, but they were adopted. So it originated and started in the state bar.

We've got a standing committee. There are members of the bar on that committee. There are members of the plaintiffs' bar and the defense bar on that committee. I suppose we could ask them to sit there in some kind of a officer of court capability and to not be advocates and to simply provide their insight. But the other possibility is, as they are representatives of the plaintiffs' bar or the defense bar, that they want to bring up issues that are particularly of concern to one side or another, especially as we get into

electronic discovery rules, to make life better for their constituency. And again, I guess on the one hand, you could ask them to be officers of the court, as you will. Or on the other hand, you could have them come in and have a concerted effort to do something that really benefits their side of the table. Is there anything wrong with that?

Judges discussed the various interest groups that try to influence the rulemaking process.

Large tobacco companies send lobbyists to the meetings of rulemaking council, which is the standing committee.

We have that process on paper. The special interest groups are all represented. But what I have seen over the last 10 years or so is that these special interest groups participate in the committee, they shoot their ammunition off. If they don't like the results, they are waiting for the court's rule to arrive at the legislature for approval, and they kill it. And unfortunately, our court has been faced with the necessity of withdrawing many, many rules even before they have been considered by the house and senate judiciary committees, because they don't have the votes.

We don't seem to have these advocacy groups that are going at it hammer and tong in all these other states that I've heard about.

We've got the victims groups.

Although there is one change that we have seen in some of these groups. That is that they have for a long time been very pleased that they can come and present and talk, but now they want seats. So the next dynamic you get into is, are you going to expand your commission from 15 to 17 to put on people from this and that, so you get commission creep.

I think that is basically true for what happens in our state. By the time it comes out, the real fight is going to be in the rules advisory committee. Everybody is going to make that pitch who has got a real interest, who brought the impetus behind the rules in the first place. They are going to try to get their version of the rule out, and the ones who want it a different way, they realize they have lost the fight in the rules advisory committee. But then as I say, it gets submitted to the supreme court and the public comment period. I'm not sure, but I don't think they have a lot of comment at that point, except for maybe the people who lost in the rules committee in the first place, trying to fight the battle all over again. But for the public generally, I don't think it happens much.

We don't seem to have these advocacy groups that are going at it hammer and tong in all these other states that I've heard about.

You have in our system interest groups. For example, I chaired a supreme court committee on child custody. We have about 15 different rules we suggested. Now the state bar association and a city bar association have their own guides, and they are battling over our rules. We had to make deals with the rules committee to go to the supreme court, and they are thinking about it. So it is almost a legislative process.

We are talking about lobbying the court. The plaintiffs' bar has been very effective in our western state and it has changed some of the procedures with respect to pretrial and posttrial motions fairly recently.

Though many states have the opportunity for the general public to comment on rule changes, most judges indicated that it is very rare for them to become involved.

I have a hard time imagining somebody from the general public showing up at one of these procedural discussions—What do you think about interrogatories and discovery?

If you have a rule in there, for example, that affected landlords and tenants, you would probably get all kinds of landlords' groups and all kinds of tenants' groups, depending on whose ox is being gored with your rule, at the hearing.

Our supreme court has done the dog and pony show. They have traveled all across the state, invited public comment in. All seven justices have taken comments and reviewed those comments and published the comments. Then they do whatever they want.

But to their credit, they have spent a lot of time on controversial rules, having those public forums and garnering numerous editorial comments from newspapers in each of the towns that they visited. It allows the supreme court to talk to real people. They had to have a few bailiffs to control some of the crowds and make sure that they didn't get out of hand on controversial things, but really I think it has been a great public relations tool on their part, but very time consuming.

The only time I remember our southern state ever having the supreme court saying we are going to have an open forum on anything, they appointed a committee to go out and gather information from the public on whether or not they wanted cameras in the courtroom. We had a year-long discussion. The judges went to communities, and supreme court judges came down and met with local judges, and went to town hall meetings and what have you, and had a full discussion about it, and eventually, it was still up to the supreme court whether or not they adopted it, and they did adopt it eventually by a vote of five to four.

According to judges, the media for the most part stays out of rulemaking discussions, except when the changes directly affect them, such as with limiting cameras in the courtrooms, or when a rule proposal is proving to be controversial.

In our Mid-western state, the media doesn't care. People don't care, just lawyers, about rule changes. Everybody cares about law changes, statutory changes.

In our western state, the media has been involved in two areas, cameras in the courtroom and the publication of cases.

There are some rules or proposals we have had in our southeastern state that have gone well beyond the bar. You were talking about the comments from the bar, that the public really doesn't know what is going on. But when we have a proposed rule on the use of cameras in the courtroom for instance, lots of

folks outside the legal community get interested in it. The media gives comments, and the media comes to the hearings.

In our northeastern state, the media wouldn't get involved unless it affected them directly, which it does sometimes frequently. There are three big areas. One would be cameras in the court, which we have actually allowed for 20 years. So, if we attempted to abridge that, they would go nuts. But it's been working okay. Or if we shut off access to papers they might begin to speak up about that. Or closed courtrooms for hearings, they would usually intervene. But if we had a rule on it, I'm sure they would get involved. But we have a media judiciary committee that works year round with the media, so we kind of keep good relations with them.

Media outlets cover ours if it is something controversial.

Most rule changes are not very contentious, but occasionally some do stir up controversy.

Our most controversial rule recently had to do with confidentiality of court records, sealing court records. It broadly construed public records, such that they weren't necessarily filed in a court file, in public record. While that became very controversial, we adopted the rule, put it out for public comment. There was very little public comment, and it went to the legislature for approval.

The most controversial one that I can recall is the access rules. There was a lot of contention at the rules committee level as well as when it got to our court, the court of appeals, for a recommendation. I was listening to the comments this morning; it is very good that that contention is aired out early before it gets to the final arbiter of the rules.

It seems like the controversies are really more in the judges versus the bar, rather than the plaintiffs' bar versus the defense bar. In my experience, it is always the judges trying to get things to move more quickly and the bar resisting any shortening of time limitations and that kind of thing.

The rules that generate the most controversy generally have very little to do with the day-to-day practice of law, but more to do with the relationship between the practicing bar and the supreme court and its official entities, such as the extent of the bar association's role in oversight of the budget of the disciplinary board, the lawyers and a lawyers fund for client protection and the like.

THE PUBLISHING OF OPINIONS

Within legal circles, one controversial rule change has been whether or not all court opinions should be published and what kind of precedential value they should have. Several judges discussed the issue of the publishing, or unpublishing, of opinions.

I was wondering if I could go off on a tangent on published and unpublished opinions. We have a current controversy in our state, because the lawyers want us to publish more. I am personally in favor of publishing more, because we have a lot of unpublished opinions. I know on the federal level, I think there is a rule now being proposed with respect to how unpublished opinions are to be treated, because there has been an ongoing controversy about whether any opinion should be unpublished, since we follow a common law tradition of precedent.

At least in our western state, the criteria for publishing are established by rule. The reasons why a case is published or not published, those are part of the rules of court. So, the judiciary has decided that they have primary responsibility for deciding how great and expansive the rule is that inspires publishing. I think it is going to be a constitutional issue if they say you have to publish them all, which makes them citable in our state. I think the court could very well say that this is an intrusion into the primary judicial function and that is not true with other rules, where the constitution says, you know, if they are contrary to statutes, then they are invalid.

All of our opinions are, quote, published. They are listed as published. However, we have opinions and then we have memorandum opinions. The memorandum opinions, even though they are listed as published, are really not published because they are not published in the reporters. They can be cited, but they are only cited as persuasive and not authority.

The main criticism of our rule was it allows—the uniform rule allows us to not publish opinions. It comes from the trial judges and the bar, and criticism and comments that I have heard over the years is from

The last thing you would find cited from our court, or one of the other courts, might be 1962 on a certain major area of law.

the trial judge, as well as the lawyers. If I am affirmed in a case, it is unpublished. If I am reversed, it is published and the lawyer says if I win a case, it is unpublished and if I lose a case, it is published and then we don't like that.// *That is somewhat of a semi-legitimate criticism.*

We got in trouble because the trial judges, they had trouble at election time, because usually if we used this rule we published those cases, they probably reversed them because of a change in the law. When it came time for election time, the cases that everybody would pick up for the purposes of campaigning would be this huge number of reversals, and the judge wouldn't have a very good record of all of the many cases that were just affirmed and passed by. So they started saying that this was working against them. I think we figured out a solution to it, where we make sure that we have the affirming somewhere, even though we may not print out the whole case. We still make a notation that that case was affirmed, to help that problem. But we still have some dissatisfaction with the local bar, some of them, that would like everything published.

We had that same controversy about unpublished decisions. The way we resolved it was we kept the stakes in between a decision having precedential value and not. But we put them all on a Web Site. So, they are out there, and anybody can see.

All our decisions in our southeastern state are published.

Our problem is what led to the rule change in the first place was that courts were getting the reputation of tucking anything that was controversial into an unpublished. So, the law was left back. The last thing you would find cited from our court, or one of the other courts, might be 1962 on a certain major area of law.

The Eighth Circuit I think a few years ago came back and said unpublished opinions is a violation of due process, unconstitutional. So they were dealing with that. With respect to the problem of getting unpublished opinions published, in our Mid-western state we allow the attorneys to petition the court in order to have it published, if they thought it has got some precedential value.

LEGISLATURES AND COURT RULES

In some states, the legislature has authority to make rules, though that is often limited to particular types of court rules. Judges discussed whether their states had such authority, and if they did, how they have used it.

In our Mid-western state, part of our constitution provides that the legislature make a specific statute relating to a specific procedural rule, and that alone can amend or nullify our procedural rule. So we had that by legislation.

It turns out there are four of us from my state here. And we didn't even realize you are supposed to send the Superior Court rules over to the legislature for their okay. I assume the chief justice has done it every year. I've been on the court a long time, and I assume it's been done every year, but there is so little flack about it that we didn't know of it. The four of us looked at each other and said, "Did you know this?"

At least for the first several decades after giving up the responsibility, there probably was an institutional memory in the legislatures as to how much labor would be involved in dealing with this. So, perhaps we're going to have to go through this experience again, where some legislatures take back the responsibility, to find out how burdensome it is, and then relinquish it again a couple of decades down the road.

Our entire discovery law is by statute and the evidence code is by statute. The rules of evidence are statutory, so they are not within the province of the rulemaking. Rules can only be promulgated that are not inconsistent with statutes. So, when you have jurisdictions that have a lot of statutory rules, we really are left with a lot of procedural things and in most instances the legislature keeps out of it.

The legislature has kept hands off all of their rules of appellate procedure. They probably aren't aware that they did so 50 years ago.

Now, they have decided that they wanted to declare all cases to be published also and we avoided that by dissuading them, as you have. So, if they ever passed a law, though, then you would have an issue of whether they really have now intruded into a primarily or exclusive judicial function. We will have to wait and see.

I would say generally not, but there are exceptions in terms of controversial areas like cameras in the courts, where a legislature may, on the front end, want certain ends. That's the exception rather than the norm.

The legislature has kept hands off all of their rules of appellate procedure. They probably aren't aware that they did so 50 years ago.

The legislature in our southeastern state also has the ability to enact rules for the enforcement of statutes. And the courts will follow those rules unless they are stepping on the toes of the courts. In which case the supreme court can and sometimes does say, "No, that's stepping on our toes," and they will not enforce those rules. But most of the time, they do.

The legislature codified our western state's rules of evidence. We have deliberately ignored the separation of powers question. The legislature enacts by statute the rules of evidence and I think

there is some significant question about that, but that is a battle we haven't joined. The legislature also gives or mandates priority to a sort of boutique collection of classes of appeal and appeal from whatever shall be given priority and heard at the first opportunity. That represents a very small percentage of our caseload. Otherwise, all rules of court, from top to bottom are promulgated by the supreme court. We have a number of standing committees on the rules, rules of appellate procedure, rules of criminal procedure, civil procedure, and family court rules.

Our southeastern state's constitution, which predates the United States Constitution, interestingly, specifically gives the supreme court exclusive authority over the appellate provision and gives the legislature the authority to make rules and procedures for the inferior courts, but also gives them the authority to delegate it to the supreme court, which is the proposal that is now kicking around. It also says that no rule, procedure or practice shall abridge substantive rights or abrogate or limit the right to trial by jury, which is an interesting provision.

I am really sort of aghast that the legislature has a formalized part in the process in some of these states by which procedural rules for the courts are determined.

As far as what I think any intelligent person would regard as truly procedural rules are concerned, the legislature basically leaves us alone.

I am really sort of aghast that the legislature has a formalized part in the process in some of these states by which procedural rules for the courts are determined. Why would that be? Do the courts have nothing to say about the legislative process? Why would that separate branch of government have something to say about our process?

Our supreme court submitted amendments to the rules of civil procedure, I think. The legislature started looking at them and making suggestions for changes, and our supreme court just withdrew them, basically on the premise that they are our rules, we will write them and send them to you and you can approve them or not approve them.

I think there's a perception that there's a problem with states where the legislature has the rulemaking power. When the judiciary and the supreme courts have the rulemaking power the only motivation for enacting rules is the betterment of the administration of justice. Anyone who thinks that the legislature is motivated by the betterment of the administration of justice is in some other world. They're worried about getting reelected, and they're worried about what sells to their constituency—totally different motivations. In one you're going to get good rules, in the other you're going to get knee-jerk stuff.// *Our supreme court is not motivated by the betterment of administration of justice.*

Judges discussed conflict with their state legislatures over the creation of court rules. Several judges noted that that increased legislative activity in this area may be part of a growing tension between the two branches, noting that rulemaking has become another battlefield in the fight over the separation of powers between state courts and legislatures.

The problem you get into in the supreme court is, you walk this narrow line to show deference to the legislature, to purposely avoid conflict. You don't want to invite and have constant turmoil. Yet, there

are fewer and fewer lawyers in all of our legislatures now, and the result is, they do not understand at all the separation of powers concept. Therefore, you have to sometimes enunciate clearly what the court's authority is, and then you get into conflict. Of course, they generally speaking set our salaries, and they use that as leverage, and get nasty. It is a tough balance to walk, but I suspect everybody here is in the same boat.

But now, everybody is beholden to the legislature. I think that there is considerably more deference now to incursions onto our turf, that we are tolerating more, maybe even inviting more, as long as we can all play in the same money sandbox, because I think money has now become a key factor in forcing a glasnost between the courts and the legislature, even though they really don't respect each other.

The battle in our southern state is not inside the rules committee, it's between the legislative branch and the judicial branch as to who has that authority, and there's a constant encroachment on the judicial authority by the legislative authority. Basically they would like to take that away from the supreme court and make the rules themselves.

As was mentioned in the general session, you know, the legislature can pass a substantive rule and then say, "Well, supreme court, you need to follow-up with some procedural rules to implement this substantive rule." But they pretty well understand that we are going to be guarding that rulemaking very, very carefully, and that is part of the tension that we have. But since we got it, we are going to keep it.

The balance of powers was always intended to provide a sort of tension. It is just that sometimes things get considerably more tense than at other times.

I am wondering, and we were talking about some of the issues that create this tension, is this rulemaking going to be one of the areas that starts to maybe increase the tension as some of these groups go and try to do with the rulemaking to get the courts and the legislature at odds over some of this. *//I think it is inevitable.*

The balance of powers was always intended to provide a sort of tension. It is just that sometimes things get considerably more tense than at other times. I think we are going through one of those periods now.

Recently of course, the legislature has been all over our state's judiciary for a number of reasons. They don't like a lot of ruling, and they are upset about a lot of things. And now they are starting to take notice of some rules, in particular, the rules of judicial performance review. And I think there is some interest now in the legislature, at least they are taking an interest in the judicial conduct code in our state, because they want to reign in these judges that are issuing rulings that they disagree with for the most part.

We don't put up with the legislature affecting our rules. Several years ago, the legislature for the benefit of one particular member passed an act that allowed a court to go behind a finding of paternity if there was scientific evidence that he was not the father. Our supreme court immediately struck that down as a violation of separation of powers. It was not reenacted.

Technically, the legislature can override a rule if they legislate specifically to do so. To my knowledge, this has never happened, but I believe in the future we are going to see some more of that because we

have a very activist legislature now and they, like in other states, want to control the judiciary and are very critical of the judiciary right now.

In some extreme cases, there have been efforts to amend state constitutions to take the rulemaking power from the courts and give it to the legislature.

We did have a proposed constitutional amendment to take most of the rulemaking power away from the judges and give it to the legislature. It is interesting; I suppose they come in different ways. The New Hampshire judges told us at an appellate judges conference that their enmity with the legislature came because of school funding rulings that they made. In our northeastern state, ours was because there was a perception, which I think really was not correct, that a particular minority judge was being unfairly treated. We have an appointment and confirmation system, and there was a very unpleasant public hearing over the reconfirmation of this judge. So in our state, it was the liberal Democrats who were wanting to write in reports. I think in other states it is probably different groups for different reasons, but that is what is going on in our state.

There was a proposal in our southeastern state's legislature this year to take all the rulemaking power away from the supreme court and put it all in the legislature. It, however, did not pass, but it got some serious consideration.

There are a few others, Arizona and New Hampshire. There have been constitutional amendments proposed in both states for different reasons. They have been unsuccessful in both states so far, but in New Hampshire they tried three times already, and they need to get a two-thirds vote of the electorate to amend the constitution in New Hampshire. Last time they came within one-and-a-half percentage points, and the leaders have vowed that they will do it again in the next election.

A sticking point over the power to make rules often occurs in deciding whether a rule is procedural, that is, it simply affects how courts operate, or is substantive in that it has a direct bearing on the rights of citizens. In many states, courts retain the power to alter procedural rules but legislatures are responsible for substantive law changes. Judges discussed this substantive/procedural distinction.

In our Mid-western state, an article within our constitution provides that the supreme court shall prescribe the rules governing the practice and procedures of law. Then it provides that those rules shall not abridge, modify or change substantive rights. Of course, the question becomes when does a procedural issue invade a substantive problem?

One of the problems when you start talking about substance versus procedure is that it is easy to talk about those in general terms, but as is true with most things, the devil is in the details. Rules that at first glance seem to be purely procedural frequently upon further consideration have a significant substantive impact. For instance, evidentiary rules involving privilege, those are clearly substantive at some level. The problem today is that more and more, certainly at the federal level with Congress and in our southeastern state, and I think in other states, legislatures are becoming more and more aware of the fact that a lot of these so-called procedural rules really have a substantive impact. And as part of the culture wars that are going on, each branch of government gets more and more jealous about any

perceived interference with the prerogatives of their branch. One branch will start seeing things as clearly substantive while another branch will see them as clearly procedural. In fact, more often than not, they are not clearly either one. That is what the real problem is. The real problem is, in many situations it is not a clear-cut matter.

It is almost inherent in any argument that comes up. One side wants to claim it is procedural if you are trying to save it for the court, and the other side wants to say this is substance, it is not in your hands.

I think it is pretty well settled in our Mid-western state where the legislature passes a statute, which clashes with the procedural rule, the procedural rule will prevail.

In our state, they are starting to cross the line. They are gradually moving from procedural into more substantive areas.

Of course, there is controversy as to what is substantive. If you get a procedure such as the malpractice procedures, they can become very substantive, even though it just says you have got to have an affidavit that meets certain standards at a certain time. We have done that legislatively, but some places can do aspects of that.

We had a very interesting situation a few years ago, where our state's legislature passed a lot of changes in the medical malpractice area, relating to the kind of pre-complaint notice requirements and expert witness qualifications. There was a challenge to that saying that they had taken over the supreme court duties to pass rules of procedure and it went up through the courts, and our supreme court finally decided that that was appropriately substantive. Basically the logic was that if the legislature can completely do away with the cause of action, they can also limit the way it is brought, or alter it. It became interesting because after that occurred, after that opinion was released, a former member of our supreme court, who is now a senior status judge on a court of appeals, came to a judges conference and made a speech about how that was abdicating the judicial responsibility to pass rules of procedure.

THE INFLUENCE OF THE FEDERAL RULES

Judges were asked what influence changes to the Federal Rules have had on whether their state changes its own rules.

I think that question had an obvious answer and that is all of state courts are going to—the rulemaking authority of the state courts is going to look at any ruling adopted by the federal courts to see whether or not it would make sense to try to make it uniform. But that is the only responsibility that I—that the state really has.

One thing I wanted to add though, where we have followed the Federal Rules, the electronic discovery rules. Our state has taken the lead in modifying our rules of civil procedure to deal with electronic discovery. And that was basically brought about by the changes that had occurred in the Federal Rules. And I was reading some of the materials as well. It looks like other states are moving in that direction as well.

We always look at the changes in the Federal Rules. We don't always adopt them, but we look at them.

I would say we have adopted or mirrored them. We are very close, but we never accept them all.

Absolutely zero in our Mid-western state.

We don't. In fact, it's not even close. But it's because there are different procedural mechanisms in place. Our rules are over 200 rules of civil procedure, for example. They don't really look like the Federal Rules.

In our southwestern state, the pattern is very much after the Federal Rules, but like, for example, we have not adopted the changes in discovery. We have the old federal discovery rules, and we have not caught up with the federal changes.

Our Mid-western state does it as well, but changes in the Federal Rules would probably prompt an inquiry, but not necessarily a change, because there is an advantage to having them closely tied. But we have not followed the federal lead in a lot of ways.

One can assume that there is a reason the federal court system looked at it, and there may be a good reason.

In reference to the Federal Rules and how they affect or influence the state rules, I think there has traditionally been a certain trickle-down effect. Once there is a Federal Rule change, the states kind of observe it. I think a lot of that is based on the fact that the Federal Rules reporter is something that practitioners rely on in order to get jurisprudence to support their positions, because there is not as much recorded state cases on rules interpretations. Class action is a typical example. In our state we have had a class action procedural statute. It has been amended, modified to be close to the Federal Rules, but we didn't have a lot of case law interpreting it. Practitioners would cite the federal cases, so interpreting the Federal Rules would be used to interpret the state procedural rules. So there has always been a certain invasion, if you would, in terms of how the Federal Rules influence the state rules. Then typically, at least in our southern state, six to 10 years after a Federal Rule change, there is some proposed state rule change, not automatically, but traditionally.

What the Federal Rules do for us is trigger a review.

More and more we are looking to the federal procedures. Fast track is an example of many cases of federal procedures, and we are following it, not blindly, but we are adopting some of the better factors of tightening trials procedures.

Our rules of evidence are patterned after the Federal Rules, but our civil rules of procedure are much different.

What the Federal Rules do for us is trigger a review. The rules committee is sitting there, whenever the rules change they will look at the changes made by the feds and look at our rules to see whether or not we ought to do something with it. It doesn't mean that we will, because we have been rather clear in departing from the Federal Rules in some rather significant ways. So although we have a foundation based in what looks like a Federal Rule, there are a lot of differences, and it is not automatic. If you want to know whether we should, I'm not so sure we should follow the Federal

Rules. We shouldn't do it in lockstep. It should never be done just simply because they have done it. I don't buy the formulation of the issue that because uniformity may very well be helpful, we ought to adopt a system, that system being the Federal Rules. If we want uniformity, we ought to adopt the system that is the best system, and then have that uniform one. But we haven't determined what that system is.

I am just very thankful that the federal government is far from my life, far from being influential to our procedures or statutory schemes. Those people breathe different air, I think.

I was a trial court judge in a southern state. I had some asbestos cases and they came into my courtroom. And everyone always tries to remove everything and go to federal court, or defendants try to remove, because they think they get a better shot of being dismissed almost immediately. I told them since they like the Federal Rules so much, we were going to adopt them in this case. And I gave them an accelerated trial date, and the federal discovery ops. And then they were crying about the Federal Rules.

I was intrigued by the statement—and I think we have kind of lost this somewhere—that the states were supposed to be the laboratory, you know, and it is okay to have different rules and do we have to always stay in step with the Federal Rules? I see that happening more and more, maybe not specifically adopting the rule, but it does seem to, you know, trickle down and affect the rules that are adopted in the states.

Well, I've got a question about this whole thing. It seemed like every one of these issues that we confront here at the Roscoe Pound Institute I want to say originated in the federal district courts or the circuits, and apparently this electronic filing did too. I mean, why are we allowing them to dictate to us what we do?

Electronic Discovery

THE NEED FOR RULES PERTAINING TO ELECTRONIC DISCOVERY

Most judges did not see a need for a new rule devoted to electronic discovery, either because trial judges are handling cases before problems occur or because existing rules already cover issues that may arise.

I haven't noticed any, and I annotate our practice book rule on discovery. I haven't seen any trial court opinions that say, gee, I wish we had a rule that addressed this, but maybe someone else has.

I hear that, and I don't disagree with it, but that didn't prevent the codification of the rules of civil procedure before there was case law construing them. I mean, part of the purpose of the forum is to persuade that there is a need that should be anticipated in advance and dealt with in advance to make life easier later on. I don't feel equipped, you know, to judge that, but I am not persuaded that there isn't something that needs anticipating by way of rulemaking.

I wonder whether there has been any survey of active trial judges on the need for a change in the rule because I think most of us are kind of remembering our trial dates when, okay, we could exercise discretion with the loss of rules we have and deal with the problems. I just wonder if there has been

any—I mean, we have heard from the plaintiff’s lawyer and the defense lawyer and the appellate counsel and the law professor and all these, but has anybody asked the trial bench whether they are at a loss. You know, we don’t know how to deal with these electronic discovery issues and I didn’t hear anyone say that.

I know of nothing that would suggest a move toward rules on discovery of electronically transmitted information. The focus has been on electronic filing of documents, as opposed to discovery of documents.

I don’t see any reason for it.

I think that most people have been saying that there seems to be little need for another set of rules, that the rules of discovery and the discretion that a judge has to exercise, a trial court has to exercise, is there, and considerations of extraordinary burden are the same considerations that we all had to deal with in trial court, different information is coming in, the level of burden may be different because of machinery, but I really think that what we’ve been saying is that we probably could deal with it without special rules.

We do not have a specific rule addressing e-discovery issues. I also agree with the speaker that I don’t think there is a need for one. I think our current rules that are in place basically address these issues.

I want to add my comments. I am from a southeastern state, and we do not have a specific rule addressing e-discovery issues. I also agree with the speaker that I don’t think there is a need for one. I think our current rules that are in place basically address these issues.

There are no efforts underway to come up with rules or proposals with regard to electronic discovery as something that is separate from discovery in civil cases generally. I don’t see but two or three appellate decisions a year that involve electronic discovery. It is true that a lot of them work themselves out at the trial level, but if they work themselves out at the trial level, that seems to me an indication that you don’t need any specific rules.

I am not aware of any effort to enact a rule and rules regarding this. I, like the others, have really not seen on appeal any issues involving electronic discovery. A number of the courts in our district are multi-judge trial courts, and I am just assuming that the collegial process there has perhaps enabled the trial judges to come up with a way of dealing with electronic discovery. We have a symposium with our trial judges every 18 months. If this were any kind of an issue, I think we would hear it at some stage. My wife is an administrator of a commercial law firm, and I know that the litigators there are interested in electronic discovery, but as far as the trial bar or the courts feeling you have got to have a rule about this, I haven’t heard a word.

Is there a problem? I mean I haven’t seen a problem or heard of a problem, and trial judges seem to have total unfettered discretion to allow discovery or entertain one way or the other. I don’t see it right now.

The Texas electronic discovery rule narrows the scope of the discovery, it’s really the only one that I’ve seen that focuses in on narrowing the scope. Maybe it’s more of a problem in Texas. In our state, it just doesn’t seem to be a problem that’s not manageable by the trial court judge.

You don't have a major corporate defendant who is crying, we were unjustly treated in the court system by reason of the way that they handled electronic discovery. You don't even really have significant voices from the plaintiff side saying, we have been screwed by the existing regime of electronic discovery. Everybody is treading water, doing okay with commonsense rulings from trial judges and subject to some limited appellate review, and getting along. But you don't have that cry of injustice coming from either side of the trial bar right now.

I think you definitely need one. You definitely need it when you have a DA issuing a subpoena for somebody's computer and what have you, without someone determining, okay, what information in there should he have access to and what about privileged information that may be in the computer and what have you. So, on the criminal side, you definitely need it, and now from what I have heard today, I think you need more rules on the civil side. For me, I haven't heard any discussion in our southern state on this at all. So, I don't know if the supreme court feels a discomfort with what it has in place or what.

I think that really is the key issue, and the question is whether or not we need additional rules to allow the judges to manage what is obviously going to be a growing part of litigation; and from what I see in our southern state, the more people outside the judiciary we get involved in this process, the more difficult it's going to be for the judges. I think that by judges looking at these issues early in the case, they're perfectly capable of managing with the rules that are there now.

I think that by judges looking at these issues early in the case, they're perfectly capable of managing with the rules that are there now.

I think that electronic discovery is troublesome with what a computer can and can't do, what an IT department can and can't do. I think we have to have some kind of rule, some kind of guidance, so that they can set discovery that is reasonable and fair, and that will encompass everything. And some kind of education about what you can and cannot retrieve.

I used to think we needed one. Now I don't know. I think I have to hear more.

Most judges agreed that existing rules concerning discovery are sufficient to deal with any problems that may come up during litigation.

I don't think we need those rules. I think the discovery rules we have are adequate to develop something or handle a situation. The problem is, if you create a rule, the technology changes so fast, you are going to have to re-create the rule, and somebody is going to use the fact that the rule wasn't written exactly for that technology to try to get out of discovery. So I think leaving it general, you are probably better off.

I think most state discovery rules are broad enough to encompass that sort of request.

It seems to me that all these issues can be—almost all of them can be resolved in the same way we resolve all the others. The rules have been there for decades.

I think the point is that the rules as they exist give the trial judges all the tools that they need to deal with those issues, find those facts, set up whatever appropriate method of dealing with it.

The rules that track the Federal Rules for general discovery have operated just fine and included electronic information.

The rules that track the Federal Rules for general discovery have operated just fine and included electronic information.

I believe that the rules were amended awhile back to just include electronic information in the regular rules. It was just done real quickly without much discussion. It has not been a problem. The understanding is that the discovery rules that are already in place cover all the rules just fine.

It may just be because I'm not a techie, I find myself repeatedly thinking to myself, why do we need new rules for this? It seems like the old rules—we are certainly going to be applying the same principles.

We have fairly comprehensive rules on privilege and we have case law and inadvertent discovery and I still don't understand why there is any need to not apply the regular rules to trial judges. I mean, when I was a trial judge and not that long ago, I dealt with e-discovery all the time and privilege, in-camera reviews, of hard drives and all sorts of stuff. I mean, the existing rules seem to apply perfectly well.

Isn't the fact that none of us have seen much litigation bubbling up from the trial court even in the area of litigation privileges with an electronic signal, that traditional remedies have worked? In the absence of rules, people fall back on what is out there already. I think you could draw the conclusion that requiring traditional remedies through modern technology, at least in this instance, seems to work.

I think you can summarize the second half by just saying that our present discovery rules are adequate safeguards, and are expansive enough to cover electronic discovery.

Many judges noted that as appellate judges, issues and problems dealing with electronic discovery rarely come up to them on appeal.

Most of this is pertinent to trial judges more so than appellate judges. I'm on a rural court, we have jurisdiction over 19 rural counties in our southwestern state, and we have not had one single case appealed in our court that dealt with an electronic discovery dispute, not one.

We have what I consider an inordinate number of appellate decisions that address procedural issues. In the 14 years I have been an appellate judge, and the six years before that I was a trial judge, I can't remember but one case involving electronic discovery.

We are generally very reluctant to review discovery decisions that way, as an area of standard review of abuse of discretion. And of course, in certain petitions the standard is even more difficult and more generous in the trial court, but we still in our southern state see a huge number of appellate decisions involving procedural issues, a relatively large number involving discovery issues, and virtually none involving electronic discovery issues.

Except in one situation to my knowledge, our court, which is the largest appeals court in the state, has had only one matter that even touched on electronic discovery. And we have a lot of toxic tort litigation and a lot of very complex litigation in our southern state, and the judges have pretty much worked it out.

I wrote an opinion on a discovery case that involved—and this will increasingly come up—some antiquated tape format and, the defendant refused to tell the other side how to access the material. Ultimately, the judge entered a fault judgment against the defendant and we affirmed it under a discretion standard, but there was paper abuse as well as electronic abuse.

I've been on the court of appeal now for 10 years, and I know these issues are there, but they never come to us.

I hadn't either. I'm statewide, and I haven't had one in 25 years

From the appellate standpoint, we have not seen any cases as yet, even though we do hear interlocutory appeals, and we do have discretion to grant leave on non-final orders of significance. So, we have the discretion if it's an issue of significance, to grant leave, even though it may be from a non-definable rule. So, we haven't seen any specific cases yet at the appellate level, but I think they are in the pipeline, because the first half-dozen decisions or so at the trial level have been published and are on their way.

Several judges thought that there may not be, and should not be, any difference legally between discovery involving paper and electronic documents.

I bet your courts all have written policies on document retention in clerks' offices, when they can get rid of case files, when they can get rid of whatever. There is no real difference in the purpose and the policy underlying those as policies on getting rid of electronic data.

Why would anything be electronically recorded that wouldn't be admissible on a piece of paper, would be my simplistic approach to it. Hell, it is either relevant material or it is not.

I don't know why electronic materials are any different than any other materials.

There is no difference in terms of the scope between whether it is paper or electronic. I don't think there is a nickel's worth of difference.

It seems to me there is no reason why if you destroy a hard drive or you destroy a paper file full of stuff, that the sanctions shouldn't be the same. There is no reason why you should have a different rule, but if you don't have a rule at all then maybe you need one.

If the drug company gets a big e-mail from its lawyer saying thus and so, thus and so, why isn't that work product just the same as it would be for paper?

The difference between the communications, whether they are electronic or whether they are on paper, it seems to communications, whether we had e-mail or not, would have taken place without the electronic method of doing it. We still have all the information. It seems to me the problem it's

getting at is the programs that you have to have to get at it. Before we had these rules of paper and files, we looked through the material to see if it's germane or not. What we have to do now is have experts be able to retrieve the information from the electronic media and give it to us. I don't see how the scope of the discovery is any different than it was before.

There is just a big difference in what is available. You have got so much more out there on electronics than you do, you know, paper, letters or whatever. There is just so much more. E-mails, for instance, where you used to rely on telephone calls, now there is an actual trail to follow.

Isn't that about the same as shredding paper? I don't think this is anything novel. The biggest problem I see with this e-mail stuff is, you are more likely to make a mistake and divulge privileged matter that you otherwise would not use. But once the cat is out of the bag, even if they come in and said, we don't use this, usually once you find out it is there you can prove it another way.

Evidence is evidence.

Judges discussed how the nature of e-mail and the role it might play in the discussion regarding the need for electronic discovery rules.

You know now, whenever I get an e-mail from a lawyer, just say it's a friendly e-mail from a friend of mine, there is this long rider that goes with it talking about how this is privileged. It may be a work product. It may be this, it may be that. It's amazing, and it's an effort, I think, to address that. But that's a very good question that could be litigated. I'm not sure it is answered in the new rules.

And the problem in dealing with those records that people are required to keep by law, they can do it in the regular course of the business sense, that seems to deal with that, whether or not it's paper or electronic. That's fairly easy. When you have the e-mail between Corporation A and Corporation B, then they have no reason to keep it if they don't want to. And that's the question. I don't know if you can make a rule.

How confidential is an e-mail though? Isn't that the question? Is there an expectation, the same kind of expectation you would have if you drop a letter in the mailbox?

Evidence is evidence.

As we have all learned over the last few years, deleting an e-mail may or may not really get rid of it. And the same is true, I understand, of an e-mail that you type, never send, and delete before you send. I'm not saying that shouldn't be discoverable.

Do you think people act logically and rationally? If they did, they would not create e-mails that say things that some of them do.

I think the real problem with e-mail is—the Dean [Judge Carroll] alluded to it but didn't really drive it home all the way—that it has become a substitute for the phone call. It has all the random types of things that you could never discover about a phone conversation because nobody would remember it. There would be no record of it unless a memo was drawn. Here in essence, there is a memo of every

phone conversation, so it is all these random thoughts and one guy saying, “The brakes on this car are unsafe, and I know they are.” And maybe he does and maybe he doesn’t, and maybe he is the only one in the world with that opinion, but he is an engineer for Buick or something. He might have said that over the phone to somebody before. But now he says it in an e-mail, so it exists. I think that is where—I’m not suggesting they ought to be protected, but that is really where I think the corporate concerns are— those casual, off-the-cuff equivalents of what used to be phone conversations that there was no record of. Suddenly it is official corporate record.

I’ve written letters that I have never sent sometimes. The secretary types it, and I read it and say, oh boy. But you just have to press that one button that says send, and it’s gone.

People no longer just do work at their offices. Like you were talking about, sending e-mails from your home computer. I have a computer that doesn’t belong to the court. Or suppose I was in practice. Would my home computer be discoverable? Would it be?

When you send an e-mail, it is not just that person over there that you send it to. There are all these servers along the way that it has also been stored on. So once you send one, you have no idea how many places it is being stored and what is going to happen to it, and all that. Be careful what you say in e-mails.

I think public records are an interesting part of this because, again from personal experience, I was a director of a governmental agency. I was on a board of directors. And our communications one-on-one were not at public meetings. They were not public documents. But as soon as three of us were involved, it was a public record. And here we were sending out e-mails to one another through our home e-mail systems, and suddenly it occurs to us that we’re having a public meeting. We have given no notice of our public meeting. Nobody has got any rules about whether we erase these, or what we do with them. And all we have to do is have a litigation and find out that guess what, all these personal hard drives have these communications on them, and yet they were public records.

Be careful what you say in e-mails.

Many judges expressed confidence in the ability of trial judges to deal with electronic discovery problems arising during litigation.

Our system, as one of the panelists pointed out, is such that the trial judges basically are probably going to be able to handle this. It may not be uniform, but just with the powers that they have, and the discovery rules that we have, I suspect we’ll get by at least for a while. But I certainly concur. I’m one of those judges who likes to bring in the lawyers and say, okay, gentlemen, I’ve got a lot to do, but feel free to use my courtroom to sit down and come back when you have worked this out. And some of my best decisions are non-decisions. If you stick two lawyers down in a room and require them to talk, a lot of times they will work it out.

We have documents that are in foreign languages, for example, and who’s going to pay for translating those and things like that. The trial courts have been able to deal with that.

The status quo is always the fallback. You are talking about venturing into a new frontier of rulemaking, there is not going to be agreement. You always have a fallback, which is one judge and a gavel. The judge is going to do the level best they can, subject to his discretion in review on a mandated proceeding or something like that, and that is the existing status quo. That is handling the problems today. Whether a rule regime that is modest and incremental would be better still has to be decided,

I have the view that the trial judges handle the volume of work and don't micromanage with the rules. Let them do their job.

I suppose.

At the state level, it has been my experience that trial judges are much more adept at case management.

We establish a rule that works for all the other cases. And clearly, where we don't already have those

discovery rules. And when we get the occasional monster, some poor guy on the trial court is going to have to just slay the dragon.

You could do like Shakespeare and kill all the trial judges. Personally, I have the view that the trial judges handle the volume of work and don't micromanage with the rules. Let them do their job.

I think as it is now, if the lawyers do their job and the judges do their job, you don't need it.

Judges noted that case management by the trial judge, such as through managed discovery or meet-and-confer requirements, is essential to dealing with electronic discovery and may be more important than the adoption of new rules.

They need a conference between themselves before they come in and see the trial judge. They have to confer.

In our western state, we have status conferences early on in a case and the judge can set rules or set timelines, etc., I think it makes sense to encourage that.

We have it in ours. I bet you every state does. We have a provision for what we used to call discovery conferences and now we call them case management conferences, but you have a conference with the lawyers, however you want to. Early on in the cases, early as you the trial judge want to have it. I like to have mine real early and that is the type of question that we discussed. Is there going to be a discovery problem here, et cetera, et cetera? I can modify that to raise the e-discovery issue.

I think another caveat is that, you know, the lack of need for special rules presupposes that there are meet-and-confer provisions in the rules already.

Well, you could come up with a lot of different scenarios, and I don't know how you would come up with rules comprehensive enough to identify and address all of those possibilities and it just seems to me that it's something that's probably left to the trial court judge to manage those individual occurrences as they come up.

It seems to me in cases like this, it is easier for the parties and the judge to get together and formulate the discovery procedures for that particular case, knowing the special types of technologies that are occurring in that particular case. When I tried IP cases, you get together with the attorneys, and if

they are good attorneys they all try to work out some understanding of what sort of information exists and how to get it. Rather than creating a rule that presumes that the information is going to be of a certain form, of a certain type, of a certain significance, I have always thought it was better to get together with the attorneys and use our existing discovery procedures, and just modify them by agreement or, if not by agreement, by court order for that particular application. It is a lot easier than creating a rule.

Some judges expressed the idea that involving information technology (IT) professionals in the discovery process may be helpful in taking care of potential problems.

I had a question with an insurance company, and they had information about people who were insured from five different states, and the class counsel wanted to get information about all of the potential members of the class. So, I ordered that this be produced. They went through all kinds of rigamarole and then finally they said we have it, Judge, but it is going to be very difficult. We gave them extra time and they eventually got it, turned it over to class counsel. Class counsel said, “Well, we can’t get it out. We can’t get the information out of here.” So then I had to say, “Have your IT people talk to their IT people to figure out how you can get the information out of it.” That didn’t really work out. Then I said, “Well, listen, I am going to bring in some of our IT people and some of their IT people and they can talk here in the courtroom.” Then, finally, they were able to work it out, but is that kind of a problem, not being a computer wizard, that sometimes the stuff is retrievable, but it is retrievable without being intelligible, I suppose, would be a word.

There is never really a dispute if you have got experienced folks. When the IT people talk, they save themselves eight hours of depositions.

I haven’t experienced that firsthand, but I just want to say that that actually works. It is really not any different than the products cases that you might have in your state courtroom. A car has rolled over, and they have got to tear it down. It seems to me, every one of those I have been to when you let the two experts who are going to tear the car down talk, they agree on everything. There is never really a dispute if you have got experienced folks. When the IT people talk, they save themselves eight hours of depositions. The language—I don’t understand it all, but they do. And in one half hour you can solve most of your problems.

I’m all in favor of solving problems, but let me tell you one thing that is a concern in the background as I hear you talking about getting the lawyers out of the picture. The discovery process is one of the most critical phases of the development of the truth, and lawyers are involved, and judges believe and trust that they have the lawyers by the collar. If there is a problem with documents disappearing in conventional discovery terms and now in the electronic world, I don’t want to see lawyers be able to step away from their ethical responsibility for complete and honest discovery and non-destruction of documents.

Some judges felt that it is important for lawyers to be as informed as possible concerning issues arising under electronic discovery.

Don't you think that is the lawyer's responsibility? He knows his case. He knows what to ask for. If he has the electronic discovery, he should bring that up right away. He should file a motion to preserve.

What I don't understand is why the defendants haven't figured out that half the time when he asks that question, he has already got the damn document from somebody else in another case, and what he is going to do is prove they are lying and hiding. The defendants can't seem to figure that out. If it ever got out once, the chances are that somebody else is going to have it.

What I am saying is that lawyers often—that are unnecessary, particularly when I said before, when they make representations in court about what they can and cannot do that turn out to be based entirely on their own assumptions, that have nothing to do with any education that they may have about their own client's IT system.

DEALING WITH INFORMATION TECHNOLOGY

Judges noted how continuing changes in technology, such as exponential increases in storage capability, and the understanding of it by professionals and judges, have affected the litigation process.

Think about how far technology has advanced since I became a judge. When I became a judge, we were worried about what to do with the carbon paper. Some of you don't even know what carbon paper is.

Everybody's telephones are now becoming computers. So we are expanding the realm of discovery tremendously.

For instance, if today you recorded information on a CD, which is the typical way information is stored at least on an individual basis today, in ten years there may be nothing available to read CDs anymore. So here you are with thousands of CDs or even hundreds of CDs, like 78 recordings that nobody can hear anymore. But then you have a lawsuit over something that was on one of them.

We are talking about some things that didn't even exist 20 years ago. We didn't have e-mail going back and forth, so you couldn't discover those things. I think these were things that—you get on the phone and you talk to somebody three offices down and you say, I need to see the results on such-and-such and such-and-such. There has never been a record of that. Now you don't get on the phone and talk to somebody three doors down, you get an e-mail sent to them, and now there is a record of it. Does that become something special that deserves to be protected so the people can see your daily conversations with your coworkers? I don't know.

I just think that the same rules should apply. We're not going to write a new rule when they come out with a Bluetooth or the BlackBerry. Each time they change the technology, we are not going to amend the rules. We would all go nuts.

People will claim that if you spend enough money and have an IT person who is knowledgeable enough, they can reconstruct anything. I mean, it is garbage to you and me, but they know how to put Humpty Dumpty back together again.

I think the courts are just going to have to rely sometimes on the mega-corporations that have the technology to help develop this stuff.

Some judges expressed their concern that many judges and lawyers do not have the proper understanding of technical matters to properly address these issues.

Most of us grew up in the day before computers were so pervasive, and what I have learned about computers is just a little bit about how to use it, but I don't have a clue beyond that. I don't think most judges of my generation and even a little bit younger, you know, we are just not well versed in that. I am afraid the lawyers are in the same position, too.

The real problem it presents is the lack of technical knowledge, not only on my part, but on the lawyers part.

My point is how much do we really know about what can be done and exactly what the computer is doing?

The real problem it presents is the lack of technical knowledge, not only on my part, but on the lawyers part. They don't explain things always as well as

their IT people explain it to them. By the time it gets to me—and I don't hold myself out as a geek—it is real hard to understand and apply.

Most judges believed that there needs to be education programs teaching judges issues relating to information technology and case management. A few judges discussed such programs they have attended or that are available in their state.

I agree that to some measure it's an education issue in the sense that I can foresee a situation in which a judge who is not particularly IT savvy issues an order that absolutely hogs a corporation electronically, and is a monstrous nightmare for the corporation, just because they are trying to protect documents, and documents can be electronic, and therefore you can't erase anything until I tell you.

I really think what's needed is an education for the trial court level judge so he can understand what's necessary to manage this.

I run the trial judge education program in our Mid-western state, and that is one of the things that we do. We have a week-long program, and we bring up issues and try to teach everybody an overview. Not everybody is going to have to understand all the details and gigabytes, but at least an overview of what the issues are with it, the privilege issues, whatever they might be.

I think there's probably greater need to educate the judiciary to what's available so that judges aren't afraid that in making a ruling they are going too far in one direction or the other. Because I think that there is that fear, that with electronic information out there and with it being stored, you could either make a ruling that's more burdensome than it would ordinarily be under, say paper discovery, or it could be more invasive in some way than it would ordinarily be under paper discovery.

It sounds like there needs to be a lot of internal education before you can really get your arms around areas where rules of procedure are needed. We are seeing trial judges handle this out of their hip pocket right now, and it is very uncomfortable.

This probably still points to the requirement of education because we may not be able, or the trial judge may not be able to understand some of those things without some training; I know that there are judges even on my appellate court who don't use a computer. I don't know how true that is in the trial court.

I think the more educated your judiciary is along those lines, the easier it is for the judge to be able to ascertain credibility in such a circumstance. If you don't have a clue about the technology, then it's very hard for you.

I think we all agreed that we need more education.

A couple of judges discussed the use of special masters who are expert in IT matters, or even specially trained judges, to help judges with these issues.

In the first place you get a special master. They are out there now in practice, these IT experts. So, the courts can say there ought to be special masters involved, if necessary, to go through what is truly recoverable, what has not been destroyed.

We were talking before about supervised disclosure. In the old days when you talked about discovery, you could hire any number of attorneys or appoint any number of attorneys to supervise it for you. You can't do that with this. That was one of the services that you were talking, of outside people, outside helpers that will come in.

Some of the information is so technical that you need to have someone who is capable of telling the judge what indeed is relevant to the issues.

I think the more educated your judiciary is along those lines, the easier it is for the judge to be able to ascertain credibility in such a circumstance.

We have a pretty good process. We didn't do it for the e-discovery reasons, but several years ago we set up a division within our superior court and those kinds of things would go there. And we put a lot of our very best judges there. Really one of the practical things that has come out of that is most of the e-discovery disputes have wound up being there. As a result, one of our very best judges has been there, and they have a special master. They really haven't made their way up to the court of appeals and the supreme court yet, but we hear from the grapevine. It would be terrific if there are no changes in the rules.

I think the pressure came from the local bar. Lawyers within the bar repeatedly appeared in front of judges who knew nothing about technology. Therefore, the idea was to come up with a division within each circuit court where there are judges who are specially trained in this area, who have a background, who have an interest in technology, and it is their responsibility to hear those cases.

E-DISCOVERY RULES

Judges discussed whether any electronic discovery rules existed in their states or were being proposed.

I think it will come from the bar association, making demands on the courts to have uniformity in the rules with regard to electronic discovery. That's my perception. I don't think it's going to be done or driven by the courts themselves. Historically it isn't; new innovations are not from my experience.

We have not yet, from an organized method, considered the electronic discovery on a statewide basis. It's coming. I think we have to do something to address that. I don't know how we will do it, and I probably will no longer be a judge when it happens. But we hear war stories about what has happened in the federal courts, and how upset the majority of the attorneys are with the electronic filing and discovery.

In our northeastern state, this whole area is still in its infancy. We do not have as yet, any actual rules on it. We have a pilot program on e-filing that we now have taking place. It's actually been in full

What we found was that there were early adopters in the legal profession, but the vast majority of attorneys' eyes would start getting wide open when they heard information.

operation in the commercial division of our trial level court, which handles only complex commercial business transactions. That division also has implemented a proposed rule, or has a proposed rule concerning electronic discovery which would require that electronic discovery be addressed at the preliminary conference, which is a mandatory, pretrial conference. And that the specific issues of accessibility, preservation, who bears the burden of

any cost of production—all of these issues—would be addressed. So, that's I think the first foray into that area.

I'm not convinced yet we need new rules, but I wouldn't be a bit surprised if two weeks from now somebody comes up with a reason to convince me. This stuff moves so fast.

Our supreme court, acting on an idea that the Council of Chief Justices had about 10 or 12 years ago, set up an advisory commission on technology. I was one of the co-chairs. What we found was that there were early adopters in the legal profession, but the vast majority of attorneys' eyes would start getting wide open when they heard information. So the first thing that we tried to do is bring in, identify representatives of various segments of the bar who have a dog in the fight. We also bring in academics. There are a number of universities in our southern state that have people that study this, but we also have some major corporations. Their IT departments have been there, done that, they have hit the stumps, they know where the icebergs are. We have asked the heads of their IT departments to sit on the commission. So I think if you are doing it, I would get a multidisciplinary group, especially people who are further down the road than we are in terms of actual hands-on experience.

Well, you should look at this rule, because it's just full of things like whether the responding party cannot with reasonable effort retrieve the information. It's full of discretionary outs. We've already got discretions. Why do we need a rule?

In my southeastern state, we don't have, and I don't know if anything is on the table at all to present that to us. But I heard today from the panelists that some of them say we have got enough tools to work with and we shouldn't be creating traps out there, and I see a trap being set in particular in Texas. Are they right? Do we have enough tools out there without adopting more rules?

I do believe very strongly that it needs to come from the trial judges. They are the ones making these calls. We don't review these things unless it comes up on the case on direct appeal. So, that is where it is happening. You need a lot of input from the trial judges on what needs to be done.

We don't have special rules for our electronic material, but our description of discoverable material includes electronic stuff. We have had a rule about requiring attorneys to meet about discovery for at least 10 or 15 years, I think, where they are required to meet before they come to court, and try to come to an agreement. A lot of the things that I thought they recommended—or at least the person who gave the paper recommended—I think we already have in place. The stuff about privilege; you must have case law on inadvertent disclosure of privileged materials, and we have. So whether it applies to electronic stuff or not, I don't know how the rules would change so much, because under our test it all revolves around prejudice. So I think like query meetings, inadvertent disclosure of privileged material, we already have stuff in place to take care of that.

I do believe very strongly that it needs to come from the trial judges. They are the ones making these calls.

Now, the scope and extent of those rules are another issue. But I think that we are addressing unique problems that were not contemplated at the time that our standard discovery provisions were in fact enacted and implemented. I think there are a lot of issues, and these are issues that I think must be addressed in the form of very specific rules, especially in the larger jurisdictions. In our northeastern state, where we have at least 2,500 trial judges, you have to. There is just no way around it. It's going to have to have some semblance of uniformity.

In some states, courts are looking at the issue of electronic discovery.

Yes, we are. There is a committee now that has been formed to look at it. And there is a pilot program that is going to take place

Even though they're not being considered by either our rules committee or our court of appeals right now in our mid-Atlantic state, I know it's percolating. Several years ago we created a separate track in our complex civil DCM process for business and technology litigation and there's an ongoing steering group there and one of their subcommittees, which has got both attorneys and judges on it is actively preparing draft rules on e-discovery that will be cycled through that group to our standing committee on rules and then ultimately to our court. So it's coming and I guess at this point one of the threshold issues that is going to have to be addressed is whether there is a need for it. Implicitly they feel there is, or they wouldn't be proposing rules. Without prejudging it, that's something they're going to have to deal with right out of the box.

Our experience has been a little different. What has happened on a statewide basis, we developed what is called a business and technology division of our survey court, which is a trial court. There is a

statewide committee whose responsibility is to implement this statewide court. Part of their mission is to take a look at discovery, e-filing or electronic filing, and come back with a recommendation as to how to implement it, whether we should do it within the present discovery rules or come up with some new rule. So we are in the infancy stage of taking a look at this problem and making recommendations.// *Are you telling me your state has developed an open-ended technology court for all technology issues with regard to electronic discovery?//* That's right. We have judges who are being trained in that area to deal with those types of issues.

The same question we just heard about from both sides. It sounds good from both sides. I am just overwhelmed. You just fly by instincts when you try to sort it out, and hit the fairground in the middle. Also, I am on the supreme court—on our advisory committee, and we are trying to draft rules, but we don't have anybody that has the technology, and we don't have the funds to hire somebody right now. That had us stopped for like a year, because we don't have any money to hire the people we need.

Most judges expressed skepticism about adopting the proposed changes to the Federal Rules concerning electronic discovery.

I would be pretty hesitant before I jumped in on the basis of federal court experience and started creating new state court rules, for fear that we would make our smaller cases as expensive to litigate as the big ones.

I would be pretty hesitant before I jumped in on the basis of federal court experience and started creating new state court rules, for fear that we would make our smaller cases as expensive to litigate as the big ones.

It sounds to me like it is vastly different. You are trying to process why. There is a hue and cry in the federal system, and it may be because the defense side really pushed these issues early on, and it doesn't sound like the defense side is pushing the issue in state courts.

I think there are a number of interests that are looking at the federal system and think that it is more receptive to change. And by the way, you

only have to change one system as opposed to going to the 50 states, so that certainly is an easier way to resolve that.

You start imposing all those types of things on state courts, I don't want a rule in my Mid-western state that says in every case, they have to sit down and confer about electronic discovery, any more than I do in every type of discovery. I've got landlord-tenant cases—we've got a variety of cases that don't need that excessive management. Now, there are cases that need it, but it ought to be done on the cases that need it, not just have one blanket fit all.

I don't know if from a state perspective that I would want to do that too quickly, because we have so many smaller cases. Does it apply to dissolution cases, does it apply to rent and possession cases? There is a whole world of cases that I can imagine we would not want it applying to generally, although maybe not. They need it in federal cases, because those cases generally are larger and involve the corporation.

Is it safe to say or is it not safe to say—and I am going to almost think it is going to be the latter—that this is going to be primarily an issue when you are talking about litigation involving big drug companies and mergers, corporate mergers, maybe Ford Motor Company and things like that, versus domestic relations, fender benders, landlord-tenant? Or in domestic relations, are we going to chase down the love e-mails?

PRESERVATION AND THE DESTRUCTION OF ELECTRONIC MATERIALS

Judges discussed at length the preservation of electronic materials and the retention policies of corporations. Some wondered why corporations would be uninterested in keeping such materials, and some judges expressed concern over the courts dictating to businesses their policies.

I don't know what it is in other states, but in our southeastern state there are some pretty strong rules about preserving evidence that might be discoverable, and if litigation has been undertaken and evidence has been destroyed, there are very strong presumptions that kick in against the party who destroyed the evidence. So the existing rules cover that, basically.

If I have a business, I don't think it is the government's damn business to tell me how long I am supposed to hold on to information as simple as e-mails back and forth.

I think we are not necessarily talking about adopting a contract or something that we know has some significance. We are talking about the e-mail that went back and forth between his office and ours. Is that of historical significance? Probably not. Then the question becomes, how long should you retain all the inter-office memoranda, how long should you retain various categories of things? It may not have any significance, it may just be taking up computer space that you are going to have to add onto as time goes on.

But in the real world, I think that a lot of businesses microfiche most of their paper when there is a backup. But the question is, how long do you keep the backup? Microfiche is going out. A lot of stuff is on floppies; floppies are going out. Things that are in vogue today will not be able to be read three or four or 10 years from now. So how long do you do this, or do you let the industry take care of its own standards as long as you can make a finding of good faith, and life goes on?

If I have a business, I don't think it is the government's damn business to tell me how long I am supposed to hold on to information as simple as e-mails back and forth.

You just said something; are we deciding now whether the information is important? When those mortgages were recorded on slaves in our southern state 150 years ago, nobody ever thought that would be important, or at least accessible and discussable. We don't know. So the question is, why are we even worried about it unless cost is a factor?

In fact, it is much more practical to retain information than before. I mean, in a single tape, you can retain a whole roomful of information. So maybe what it argues for is a more stringent requirement of retention and less destruction of documents because they are so easily retained.

I would think most businesses and government agencies, whoever you are discovering things from, have their own policy reasons for having retention schedules. I mean, they need them for their business. They are going to keep them. You mentioned taxes. They are going to keep them for some reason. So, they normally have a business or operational reason for retention schedules. So, it seems to me the only real problem is when once they get into a lawsuit, they suddenly depart from their standard procedure and start destroying things that they think may be harmful to that and if that is the case, then you have a hearing and somebody finds out about it and, you know, you ask them what their normal procedure is and why they normally keep them. If anything, if things really do stay forever, we have a problem not of destruction, but of people keeping things forever.

As a court we are not protecting the same data that we would expect a private business to maintain.

One potential difference there is just the practicality. A paper destruction policy is somewhat dictated by the cost of storage, et cetera. And you can have some legitimate business reasons to justify it, that maybe don't make sense when it sits on one disk. In a warehouse full, all of the sudden you are a little hardpressed to say one of your reasons why it is reasonable is for storage costs.

The other comment I want to make is, you know, even on our own court's record retention, you might be surprised how we are keeping our own data, our own e-mail between chambers. We have records destruction of even court documents after a certain period of time. So, I mean, are we going to—as a court we are not protecting the same data that we would expect a private business to maintain, which has a much larger scale than we would. So, I think that is an issue, too. Are we going to be treated any differently than how we are treating our own data?

If you have got a legitimate corporate records retention policy to carry out a legitimate business purpose, shouldn't you be able to engage in that legitimate business purpose?

The sense I have in trying to make a judgment about this issue of safe harbor, for example, and the distinction between paper and electronic information is, I can appreciate that the retention of paper requires an expense, you have to store it somewhere. You would inevitably make a decision along the way that we don't keep everything. I throw things away I have decided I just don't need to keep anymore. The attic is full, I'm done, I don't need that anymore. You make those choices. What is unclear to me is whether, in the electronic world, that there are those kinds of cost and physical considerations, because the technology advances so rapidly, that you begin to wonder whether it all can be kept all the time, just because the manner in which the media store it may differ over time. So you may not keep the mechanical means to retrieve it, but it is just on a couple of disks, and you might be able to keep it forever. Why would you choose not to?

Judges discussed issues involving the destruction of electronic material, including the timing of and motivations behind such destruction.

Did they destroy the documents on purpose, or did they change their policy in order to hide some evidence? It seems to me that the general issues haven't changed. Really the only thing that has

changed is the mass of data that is available for discovery. *//And the trail. You could tear it up; now you can't tear it up.*

I hope there would be exemptions for certain industries, that you know your product is going to go into—for example, Vioxx manufacturers, stuff like that, is what I am talking about. You know that you are putting something out there that may have this potential. Should you be allowed to destroy those records because you know the kind of sensitive stuff you are putting out there, that required time? Should there be special limitations for your business as opposed to another business that doesn't have that kind of product out there?

If you have a practice of destroying documents whether they are electronic or in hard paper form, you have a process where you destroy things after X number of rules, it is still intentional destruction. It is still the same thing. It would seem to me that the same rule would apply to both.

It would be pretty easy to figure out whether they started shredding on the day that the lawsuit was filed or whatever they were doing, then I think the rules in place will deal with that. That is the way I see it.

Just in terms of factual determination for the trial judge, is the so-called routine destruction procedure really a routine destruction procedure, or is it an effort to avoid smoking guns in potential subsequent litigation? Those are the kinds of calls trial judges have to make every day now.

If somebody is claiming that it was unintentionally destroyed, the party who claims that has the burden of showing that it was unintentional under our existing law. And if they don't, then they fail.

There is certainly nothing to prevent a court, once the lawsuit is filed, from instructing the jury, for instance, that they should draw an adverse inference from the fact that Corporation X every three months destroys every document that is related to its research and development programs. That is certainly within the realm of what courts can do. But the courts clearly can't set the rules for how corporations conduct their business.

We instruct the jury that if they destroyed something and if they infer from that there was something in there they can consider that in reaching their decision, which is, in effect, shifting a burden from one party to the other.

Some judges spoke of the difficulty of actually erasing electronic information.

I can tell you because I have attended a seminar on this, when you delete something from your computer, all you do is delete the link from that address where it is stored on the hard drive. Somebody can always go and find it. However, if you defragment your hard drive, you wipe it out.

In theory you can't throw it away. It's easier, because you've got a hard drive in order to be able to hide it, because now they have some way of getting into the hard drive and finding out what you deleted.

How do you ever really hog tie a corporation like that? I don't know about you guys, and I'm really ignorant about this computer technology. But every time I try to erase something off my computer, it seems to stay there forever. *//And when you try to keep something, you lose it.*

There will always be a track of what you cleaned out. When you delete, you don't delete it.

You want to know how hard it is to erase? The used computers in our Mid-western state are supposed to be sent to the state penitentiary after the hard drive is erased to be refurbished to be sent to school. Our geniuses are pulling off proprietary information and they're running these scams on people's credit cards. That's how hard it is to get the stuff off.

A key issue underlying the debate over electronic discovery is the cost involved, whether it be in keeping electronic information, retrieving it, or searching it.

You know, I have got that problem right now. The way I chose to deal with it was to say to the plaintiff's lawyer, who wanted this set of documents from the backup, all right, you say it can be obtained in a cost-effective manner, then you go ahead and get it. I am going to enter an order allowing you to go onto this hard drive and get it. Then you give me the bill and we will have a hearing to decide whether you were right or wrong, and if you are right, then the defendant is going to pay your bill, and if you are wrong, it is going to cost you.

It's all true for almost all litigation. And I think this is the problem of the large-scale litigation and literally, and I'm not kidding, billions of dollars are at stake. And that justifies a lot of expense if you've got the wherewithal to do it.

There are experts that do this. Hundreds of thousands or millions of dollars will come in and either retrieve it all or destroy it all.

It can be retrieved at great, great expense.

Now, you've got a huge amount of information. I'm not sure that it's always more expensive, although it may be. But I know in my court, everything got easier and cheaper. We can do so much more, so much more quickly now. You can do a search on a bazillion documents in just a few seconds and find every document with a certain person's name in it or a certain term or a certain sentence. You can pull those all out and a few seconds. And somebody in the past would have been doing this for hours and hours.

A couple of judges discussed the issue of how the volume of electronic information and the ability to search through it may impact discovery.

If you get over the accessibility question, what you are really talking about is volume. The privilege principles are the same, and it seems to me that the procedures are the same, and the courts can very easily deal with those. It is just that you are going to have the same burdens, the same requirements. If they have decided they are going to do their review before that, they can produce a log and they can be reviewed. So it seems to me it is a volume question.

It certainly has got to beat going to 10 warehouses all over the country and going through boxes and boxes of documents, which the asbestos plaintiffs lawyers had to do.

We have a trial judge who solved that problem on Ford Motor Company. He ordered them to provide a technician that sat down with the server, and the lawyers framed the search. They had a master

there. The defense lawyer was there, if he wanted to object to that search. *It is essentially an interrogatory of a machine. It is a deposition of a machine.*

The good news about this though is that now, assuming you have a format agreement where you are going to produce those documents in electronic format, you are going to be able to search them quicker, and you are not going to have to sit in the warehouse as long.

It's apparently something that happens all the time. And if you could do that, and sit there for weeks in the case of one my colleagues, and find the documents, how much tougher is it going to be today when you can type in the key words for what you are looking for, and hit a search program. Surely the corporations are going to have a search program, because they are going to need to retrieve those documents. The business realities are going to force them to want to go back and get some stuff sometimes. Can't they just do that now and come up with this stuff? I question whether it's a bigger problem now.

Several judges discussed Judge Carroll's recommendation that "state rule makers should also promulgate rules facilitating the assertion of privilege and work product protection in the electronic information environment after production."

I'm not sure why issues involving privilege would change at all. I don't know, maybe it's easier to inadvertently turn over privileged material when you are talking about electronically preserved documents, although I have never seen a case on that. Maybe one of those is around the corner also. But I don't see why it would affect the rules.

My understanding of the law in our western state is that if there is an inadvertent disclosure of something protected by the attorney-client privilege, it's unethical for the recipient lawyer to do anything with it other than to send it back. Now, if that's the rule, it should be just the same, whether it's electronic or paper or whatever it is.

It is essentially an interrogatory of a machine. It is a deposition of a machine.

One potential difference, I know in our southeastern state, part of the analysis of whether or not it is waived or not is what safeguards were used by the producing party to not turn it over. And that is where it is going to make a difference as one sheet slipped into 12 boxes that happened to be sitting there, as opposed to everything is already on the computer, categorized, and with due diligence you could probably better cull out a privileged document off a database than you could by having to go through a warehouse full of documents.

But if it is a mistake, I mean, inadvertent disclosure, whether it is paper or electronic, someone makes a mistake. It happens and they give the defendant or the plaintiff something they shouldn't have, then I think you can apply the test about—well, I can't remember all the four parts, that doesn't have to differentiate between the paper and the electronics. Whoever had the documents has used in the past reasonable efforts to maintain the privileged documents properly and all this stuff and there is some reason that this mistake is excusable, then I don't see why that matters, whether it is electronic or paper.

I guess what disturbs me is that there is an indication that the defendant would just turn everything over and if there happens to be something in there—get out of jail free card. You know, I think they have to use reasonable diligence before they turn it over. I would think the courts would have to give it to them.

There's no fundamental difference between an attorney going through a bankers box of documents and mistakenly turning over a privileged document as opposed to running a search engine over his documents electronically, coming up with the documents and mistakenly turning over a privileged document. I don't see a difference other than one he got out of a box and the other one he got off a disk.

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You know, that is a place where it might speed up the process given the fact that we all know that there is a lot more documents. It might speed up the process to have this inadvertent rule passed because then you wouldn't have to go through some sort of a log or some sort of a lengthy review by the lawyers. That expeditious aspect of it might be beneficial. It is not absolutely necessary, but it might help move the process along more quickly.

Other judges discussed the proposed form of production rule, with some agreeing with Judge Carroll that it was probably needed and others seeing little value in it.

My reaction is why is this any different than it ever was? You know the form of production on paper was I have to show you my documents. Here they are. They're in these boxes. They are in this warehouse. If you want copies, bring in your copy machine, and pay your guy to scan them or to copy them. I'll give you a CD and if you want copies off the CD, make copies off the CD. But I don't see a rule saying okay, you must produce them in paper, and the producing party must pay for them. I guess maybe I don't understand the rule.

But why do we need a new rule for that? We just say it has to be produced in a form that is reasonably utilitarian, and if you don't like the form he offers you, you bring a motion and ask the court.

I just envision it as a very flexible rule. It might be much cheaper for all parties to produce it on a disk. If a guy says no, if you want it, here is the hard copy. Bring your copy machine, bring an operator, and you'll have to hard copy it. That's ridiculous to put somebody to that.

Let's go to the next step, where the counsel for one side or the other wants to produce a document by delivering the disk. And the other side says I won't take it. Now, that's ridiculous. That's why a form of production rule has some merit.

Judges also discussed possible changes to rules concerning the scope of discovery regarding electronic information.

I am not sure what you would do to the scope part of your rules that would be different about electronic information.

Can I ask a question? This question is should the scope of discovery be any different than for any other information? And what exactly do you mean by that? If it's discoverable, what would change? I don't see why you would have any different standard as to the scope of discovery.

In our southeastern state, that is kind of a moot question because the scope is the same, and whatever is discoverable in document form is going to be discoverable in electronic form.

That's another thing that can be a hidden problem, because for example, suppose what you are talking about is contracts. In ordinary discovery only the final draft of the contract is available. If you are allowed free rein to go into somebody's computers, you can get everything that ever was drafted, whether it's good, bad or indifferent, ever intended to see the light of day or not. And I don't know

You can't make an order so broad basically that you get the entire guts of an operation, or violate peoples' privacy needlessly.

how you police that. I don't know how you allow people to go back into somebody's drafts and say, but stop there. That's very worrisome to me. By regular discovery you can control it, because you are going to have only those drafts that survive. If you've got the prior drafts, you are not going to allow those to be discovered. And they won't be subject to discovery. But suppose you've got a contract, and it's on 15 different people's computers, and some of them have added things here, and some of them have added things there. I don't know how you separate that out once you start delving into the computer and going through it.

Some time ago there was a large strike action called by the pilots of a major airline. There was a federal injunction deposition. There were several airline employees, pilots, that were thought to be the ringleaders, and the federal magistrate showed a violation. One of the parties sought an order basically getting the hard drive of a couple of these pilots, transferring basically the entire hard drive off of a computer. That incident has been taught to a lot of judges around the country about scope of the orders. You can't make an order so broad basically that you get the entire guts of an operation, or violate peoples' privacy needlessly. That is the real danger oftentimes with discovery orders. Electronics are so broad, they have the potential to do such damage to a business potentially. Yet in all the years I sat on a writ, I've not seen one of these cases. So you hear about horror stories, about some judge signing a huge order that is way, way too big.

That's why there's no difficulty in maintaining the same scope of discovery—that which is relevant could lead to relevancy. The only thing the plaintiff's lawyer has got to do is establish for the satisfaction of the judge that the search he wants to perform of that database contains words that have some relevancy to this litigation and then turn it loose on all the records, that's all, and they're going to get every document that has those words in it. Now if they contend that some of those documents are wholly irrelevant or there's a privilege over it, they have an opportunity to do that, when they're printed out before they turn them over.

SAFE HARBOR AND SPOILIATION

Judges discussed the provision pertaining to the safe harbor provision in the proposed Federal Rules.

I would question whether there is any point to the safe harbor provision that determines in advance or tries to suggest in advance what policies are appropriate for the treatment of that kind of information. It really is something that would seem to be assessed in the individual circumstance after the information is claimed not to exist, and you would like to do something about it, because you believe it should exist.

But the other thing that bothers me about this safe harbor rule, the way I read it, it can be read to vest in the company or the defendant or whoever has the electronic information, that really they have sole discretion informing the rules for their routine data cleaning. So, what if a company six months ago puts in a rule that every e-mail is to be cleaned off within 30 days of its entry? And then that is in place and litigation begins, and nobody says anything. The company's routine is every 30 days every e-mail goes. So, the safe harbor is out the window.

I am not sure that the principle is any different. In fact, Judge Carroll wound up recommending against safe harbor proposals, and that is what we are talking about here. If I remember, you know, the long form correctly, his reason was basically it comes down to judgments as to what is good faith and what isn't. My good faith may not be your good faith, or the plaintiffs may not be the defendants, but judges tend to know good faith when they see it, and it ultimately comes down to what retention policy is reasonable.

The sense that I gleaned from the paper was that if litigation is filed, then you would have to reprogram everything and stop the normal destruction, and your failure to do that would subject you to sanctions. The safe harbor idea is, you don't have to make that kind of an effort. If things disappear after litigation is ongoing, and you have every reason to know people want documentation and materials kept, there would be a bad tendency to account for that.

My good faith may not be your good faith, or the plaintiffs may not be the defendants, but judges tend to know good faith when they see it.

So if you are a wise defendant, you put a one year automatically—your computer automatically—

no human being makes the decision to destroy, so you are okay because no human decided to get rid of it, a computer decided to get rid of it. What is the alternative? You just keep all of this data forever and fill up your hard drives, until you have to keep buying additional hard drives to store all the useless data that you no longer need.

The safe harbor issue hasn't really come up at this point. We have a draft at this point.

There was a question about the safe harbor provision. Somebody said is there any way to be able to tell whether something is truly inadvertent or not? And what struck me was whoever answered said it sounded like there was going to be a lot more litigation on collateral issues than there were going to be on the merits of the matter at hand. And the other thing that bothered me is he made the comment that you were going to have discovery looking at good faith, discovery basically of what

the attorneys had told their clients with regard to record retention and that kind of stuff. And that's a can of worms I don't think anybody has thought about. What happens to the attorney-client privilege?

Several judges discussed whether their states had the tort of spoliation and how the proposed rules would impact that tort.

I see a clash between the safe harbor rule and the law of spoliation. Spoliation in some states may be an offense by itself, and may be a cause of action. There you have got a conflict between the procedural rule and a substantive law.

Spoliation I think is the big problem we have here.

I think the issue of spoliation would remain unchanged in regard to electronic information. If material is routinely disposed of, I don't think it would render an entity as a general rule, culpable for that destruction later unless there was

knowledge of pending litigation or forthcoming litigation, whereby it may change the court's attitude towards what was routine destruction. If they were on notice that there was an injury and there is a lawsuit coming, and they know in another 30 days the machine will automatically delete that information, I don't think we would want to sit by and routinely permit that to happen, and then say it's just part of the routine deletion of material.

In our western state several years ago, the supreme court basically knocked out the tort of spoliation. So we haven't seen a claim concerning loss or suppression of evidence since then. But actually, that used to be a fairly common claim with darn near any tort that came up. It would be another cause of action.

I've dealt with some questions on that in terms of the spoliation issue. And it's just as the judge said—it comes down to common sense. There is no way you can say whether or not someone deliberately destroyed, but it gets to the issue of what is fairness I think in terms of the plaintiff's case here, and the person had the opportunity to partake. And that's just a common sense question that you are going to make discretion about.

Spoliation I think is the big problem we have here. When we were in hard copy days, we would write stuff out, it would be in the landfill, it was gone. Right now, I'll take the draft of something, I'll send it to my assistant to work on, my assistant will send it to my law firm to work on, it will be backed up the next day. If I am still working on it, it is going to be backed up the next day. If I come into the office and say, this is baloney, I'm starting over, I'll just delete. The problem you get into is, if I adopt a policy that says, I want our hard drives and servers cleared every 72 hours of all this backup and all this sort of stuff, we are going to get into an argument about whether adopting a policy like that, especially in an area that is rife with litigation. The mere fact that we are cleaning the electronic files out, is that going to be spoliation?

You know, it seems to me that there are very clear principles on spoliation. I have seen that all 50 states have very clear principles on spoliation of evidence. In the cases that I have been involved with, when we are talking about electronic data, it is the same principles that apply.

Judges discussed the sanctions available to punish parties who deliberately destroy evidence.

What is the sanction, though, once you discover that this information has been destroyed and it shouldn't have been? What is the sanction?

In our Mid-western state, if it can be demonstrated that evidence was intentionally destroyed, and the presumption in the case changes, which then shifts the burden to the other party to demonstrate that it was done intentionally. I think you have direct intent or contempt of court in violation of discovery orders. But from a practical standpoint, it's a difficult problem.

If there is a suspicion the documents have been destroyed, then the judge will go to extreme measures.

I have found that those same people who say those sanctions should have been imposed last month maybe three months from now will come in and say, judge, you had better, you know, exercise your discretion. You know, if it isn't their ox being gored, then they are all for sanctions.

What about the statement that was made and I forget, it was Ken Withers or Mike Ryan [panelists] or somebody made the statement anyway that, you know, there are rules for sanctions. There are rules in effect, but the judges don't enforce the rules.

Points of Agreement and Closing Comments

In the discussion groups, the moderators were asked to seek out consensus—to the extent that it was achieved—on the issues raised in the Forum, and to characterize their groups’ points of agreement in a few sentences. The moderators’ comments and their informal summaries of their groups’ discussions follow, edited for clarity.

Rulemaking

Rulemaking systems differ wildly. Members saw both advantages and disadvantages to their own system. There was little interest in rigidly following the Federal Rules.

There are varying degrees of transparency in states’ rulemaking processes.

Our group’s judges all have “open” rulemaking processes in their states and believe that openness is important to get good rules.

The judges agree that the process is generally open, but there is no extensive interest in group participation, except on specific issues (such as “whose ox is being gored.”)

An open rulemaking process is necessary and desirable. Bar interests are becoming ever more factionalized. Requiring persons to serve on rules bodies is better when individuals are picked in individual rather than representative capacities.

When it comes to rules, less is better.

Resist rule change. Don’t change just for the sake of change.

The group agreed with the proposition that rule changes should be made slowly and with care. “If it isn’t broke, don’t fix it.”

When it comes to rules, less is better.

Courts, Legislatures, and Rulemaking

There has developed a greater tension as other branches of government have attempted to encroach, directly and indirectly, on the court’s traditional rulemaking powers.

State courts must maintain their independence from legislative pressure and federal pressure. They also agree with Justice Anderson that the states are a proper laboratory for different approaches. The natural tension for separation of powers is healthy.

Legislators are becoming increasingly involved in rulemaking, regardless of whether they have authority to do so. With fewer and fewer lawyers in legislatures, ignorance of courtroom procedures is an increasing

problem.

State legislators take active roles in many different ways, including repealing laws, amending constitutions or ordering supreme courts to adopt new rules. However some legislatures can have no input regarding procedural changes.

Legislatures are usurping the power of the rulemaking process.

Legislatures are not the most competent branch of government to make rules of practice and procedure. The judiciary should make rules.

Legislators should not interfere in regulating the rules of the judicial administration. Issues arise when the lines between procedural and substantive blur.

Constitutions vary significantly between states making it difficult to come to a consensus about how much involvement the legislature should and can have in rulemaking.

Courts generally have control of the process, but inroads are being made or attempted by the legislatures to perform these functions. Legislatures are also trying to expand their role into areas such as judicial performance issues.

E-Discovery

NO NEED FOR NEW RULES

There has been no hue and cry at the state court level for specific e-discovery rules.

There is no need to adopt specific e-discovery rules. Applying traditional remedies to modern technologies can work well.

There has been no hue and cry at the state court level for specific e-discovery rules.

The sense of the appellate judges is that while there may be some need in the future for special rules, generally existing rules and trial court discretion are sufficient.

Our group states that they do not need Judge Carroll's rules on "early attention" and "form of production," current rules are adequate for trial judges to control these matters.

Judge Carroll's suggestions are already covered by traditional discovery rules.

Scope of discovery and destruction of evidence is not different for paper or e-discovery.

All felt that we can apply traditional principles to the e-discovery issues. All felt that e-discovery problems should play out at the trial court level.

There should not be special rules regarding e-discovery. One reason is because technology changes too fast and most existing discovery and evidentiary rules will apply to most e-discovery situations.

It is unnecessary to treat electronically stored information differently. Procedural and evidentiary rules already exist that would apply including laws regarding spoliation.

Special rules governing the discovery of e-materials are not necessary. Existing general/broad discovery rules, along with existing judicial oversight and discretion, are satisfactory.

Appellate courts have not seen this issue come up yet, although it is not uncommon in the trial courts.

WAYS TO DEAL WITH E-DISCOVERY ISSUES

Lawyers have responsibility for resolving e-discovery issues and where they can't, they have the responsibility for properly educating the court.

Several participants remarked that this was really an education issue—educate judges to know how to apply discovery rules in the technological context.

Rules can be put in place informally by trial judges in every case. This issue is so fact-specific it most never reaches the appellate level except by interlocutory appeal.

Courts could employ experts (special masters) in determining how files are kept, discovered, etc.

Courts can set up early discovery conferences as needed (with or without) court rules.

PANELIST COMMENTS AT CLOSING PLENARY SESSION

Judge Carroll: Thank you all for your comments, most of which were, “Damn, you federal people are stupid.” No, just kiddin’. Just kiddin’.

Seriously, though, I heard a consensus from a lot of these groups that they really didn't see the need to go through all these machinations that the federal system had gone through, and I certainly appreciate those remarks. But I think another theme that emerged, particularly in some later sections, is this is more important in simpler cases than you may think. It is a major issue now in family law. It is a major issue in employment cases. The more we get out on the circuit and tell lawyers how important it is, they are going to come to you and say it is important.

So while it may not be a need that seems to exist now, at least think about it. Keep it on the horizon and at least begin the process of maybe thinking about some minor rule changes to accommodate these issues.

Appendices

PARTICIPANT BIOGRAPHIES

Paper Presenters

Professor Linda S. Mullenix holds the Rita and Morris Atlas Chair in Advocacy at the University of Texas School of Law. She graduated Phi Beta Kappa from the City College of New York and holds a Masters and Ph.D. from Columbia University. She received her law degree from Georgetown University Law Center. She is the author of nine books, including *STATE CLASS ACTION PRACTICE AND PROCEDURE* (CCH 2000). Professor Mullenix is a member of the American Law Institute, Associate Reporter for the *Restatement of the Law Governing Lawyers*, a consultative member of the *Transnational Rules of Civil Procedure*, and the *Complex Litigation Project*. She participated in the Special Study Conference on Federal Rules Governing Attorney Conduct, Judicial Conference Committee on Rules of Practice and Procedure (1996-2001); the Conference on Civil Procedure and the Future of the Federal Rules, Southwest Legal Foundation and S.M.U. (1995); and the National Mass Tort Litigation Conference (1994). Professor Mullenix teaches federal civil procedure, mass tort litigation, current issues in class action litigation, class action litigation in a global context, and state class action procedure. During 1989-90, she was a Judicial Fellow at the Federal Judicial Center. She served as Reporter for an ABA Task Force on Class Actions (1995-97); Reporter for the Southern District of Texas, 1990 Civil Justice Reform Act; Reporter for the National Conference of Federal-State Judicial Relationships (1992); Advisor, Texas Class Action Rules Subcommittee (1998); and Advisor, National Center for State Courts, *Study on Civil Discovery* (1990-92). Professor Mullenix is an elected member of the International Association of Procedural Law.

Honorable John L. Carroll is Dean and Ethel P. Malugen Professor of Law at the Cumberland School of Law at Samford University, Birmingham, Alabama, where he teaches Federal Courts, Complex Litigation and an online course in e-discovery and evidence. He received his undergraduate degree from Tufts University and holds law degrees from the Cumberland School of Law at Samford University (J.D., *magna cum laude*) and Harvard University (LL.M). Judge Carroll served as a United States Magistrate Judge in the Middle District of Alabama for over 14 years. He is a former member of the United States Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure and is former chair of its discovery subcommittee. He was also the chair of Magistrate Judges' Education Committee of the Federal Judicial Center. Prior to becoming a judge, Judge Carroll was a Professor of Law at Mercer University School of Law in Macon, Georgia. Before that, he was the legal director of the Southern Poverty Law Center in Montgomery, Alabama. His trial experience included major civil rights class action litigation and complex criminal defense, including a substantial number of death penalty cases. He has combat military service with the United States Marine Corps. Judge Carroll is a frequent lecturer and speaker at national seminars on the subject of the discovery of electronic materials and other topics relating to federal courts. His most recent publications are *Developments in the Law of Electronic Discovery*, 27 AM. J. TRIAL ADVOC. 357 (2003) and *Preservation of Documents in the Electronic Age – What Should Courts Do?*, 2005 FED. CTS. L. REV. 5 (2005), available at www.fcl.org. Judge Carroll was a faculty member at the Sedona Conference program on electronic discovery in March, 2004.

Panelists

Honorable Paul H. Anderson is an Associate Justice of the Minnesota Supreme Court, where he has served since 1994. Justice Anderson received his B.A. *cum laude* from Macalester College, and his J.D. from the University of Minnesota. Before becoming a Supreme Court Justice, he was Chief Judge of the Minnesota Court of Appeals from 1992-1994. He was an attorney in private practice as associate and partner with the LeVander, Gillen & Miller Law Offices in South St. Paul, from 1971-1992, where he specialized in real estate, estate planning, probate, business law, and construction litigation. He served as a Special Assistant Attorney General, Criminal Division and Department of Public Safety, for the Office of Minnesota Attorney General from 1970-71, and before that was an attorney for VISTA (Volunteers In Service to America), serving as an attorney with New Haven Legal Assistance in Connecticut. Justice Anderson is chair of the Minnesota Supreme Court Advisory Committee on Rules of Public Access to Records of the Judicial Branch and was chair of the Rules of Civil Procedure Committee and is the court liaison to the Criminal Rules Committee. He was a member and the chair of the Commission on Judicial Selection from 1991-92.

Thomas Y. Allman is Senior Counsel at Mayer Brown Rowe & Maw in Chicago, Illinois. He received a B.S. in Industrial Management from the University of Cincinnati, and his J.D. from Yale Law School. Before joining Mayer Brown in 2004, Mr. Allman served as the Chief Legal Officer of BASF Corporation, where he was responsible for corporate, legal, and intellectual property issues, as well as for the Government Relations office in Washington, D.C. Prior to joining BASF in 1993, Mr. Allman was a partner in the Cincinnati firm of Taft, Stettinius & Hollister, where his principal areas of concentration were commercial and tort litigation, corporate governance, and shareholder relations. He was a member of the United States Naval Reserve, Judge Advocate General Corps, from 1966-1975. Mr. Allman has worked with interested parties supporting Amendments to the Federal Rules regarding e-discovery since 1999, and has written and spoken extensively on the topic. He currently provides consulting and other services relating to corporate compliance activities, including e-discovery, electronic information management, and records management. Mr. Allman is active in Lawyers for Civil Justice and the Civil Justice Reform Group, and is a member of the Steering Committee of the Sedona Conference Working Group on Electronic Discovery and Records, authors of the Sedona Principles and the Sedona Guidelines.

William A. Gaylord is a shareholder in the Portland law firm of Gaylord Eyerman Bradley, P.C., specializing in major products liability and medical negligence litigation. He received his B.S. from Oregon State University and his J.D. from the Northwestern School of Law of Lewis and Clark College. Mr. Gaylord is a past president and current governor of the Oregon Trial Lawyers Association (OTLA) and a member of the Washington Trial Lawyers Association (WSTLA). He is member of ATLA's Board of Governor's, as well as co-chair of the ATLA Legal Affairs Committee. He was honored as the Distinguished Trial Lawyer of the Year by OTLA in 1995, as a National Finalist for the Trial Lawyers for Public Justice (TLPJ) Trial Lawyer of the Year in 1999, and with the OTLA Public Justice Award in 1999. Mr. Gaylord is a former chair and member of the Oregon Supreme Court Uniform Trial Court Rules Committee (which writes court rules to supplement procedure rules), and former chair and member of the Oregon Council on Court Procedures (which writes the civil procedure for the state courts). He has been a guest lecturer at Northwestern School of Law at Lewis and Clark College, at the University of Oregon Law School, and at the Northwest Association of Obstetrics and Gynecology at Oregon Health Sciences University.

Honorable Ronald J. Hedges is United States Magistrate Judge for the District of New Jersey, to which he was appointed in 1986. He received his B.A. from University of Maryland and his J.D. from Georgetown University Law Center, and is currently an adjunct faculty member at Seton Hall University School of Law. Judge Hedges is a member of Advisory Group of Magistrate Judges; the reporter for Civil Justice Reform Act Advisory Committee, U.S. District Court for the District of New Jersey; a member of the Lawyers Advisory Committee, U.S. District Court for the District of New Jersey; and Compliance Judge, Court Mediation Program, U.S. District Court for the District of New Jersey. Judge Hedges has been an active participant in programs related to electronic discovery. He serves on the Sedona Conference Advisory Board, the Sedona Conference Working Group Steering Committee on Protective Orders, Confidentiality, and Public Access, the Sedona Conference Working Group on Best Practices for Electronic Retention & Production, and the Georgetown University Law Center E-Discovery Advisory Board. Judge Hedges is the author of *A View from the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, F.R.D. (forthcoming); *A Critical Appraisal of Proposed Amendment to Federal Rule of Civil Procedure 26(b) (5) (B)*; DIGITAL DISCOVERY & E-EVIDENCE (Mar. 2005); and the REPORT OF CIVIL JUSTICE EXPENSE AND DELAY REDUCTION ADVISORY COMMITTEE, PLAN FOR IMPLEMENTATION, AND ANNUAL ASSESSMENTS OF PLAN, DISTRICT OF NEW JERSEY (Principal Author) (1991-97).

John H. Martin practices law with Thompson & Knight, LLP, in Dallas, Texas, where his practice focuses on litigation in the areas of mass torts and catastrophic injury, aviation, professional liability, health care, and insurance coverage. He has served on the firm's Management Committee and headed its Trial Department from 1994-2004. Mr. Martin graduated from the University of Texas School of Law, with honors, in 1974. Mr. Martin has been an active member of the DRI-The Voice of the Defense Bar, since 1984 and currently serves as Second Vice President. He served as Secretary-Treasurer from 2002-03, Southwest Region Director from 2000-03, and Texas State Representative from 1998-2000. Mr. Martin currently serves on the Texas Supreme Court Rules Committee. He has represented major U.S. carriers in federal multidistrict litigation and state court cases arising out of accidents involving multiple fatalities and injuries. He has litigated insurance coverage disputes and has represented insurance carriers and corporate insureds in bad faith litigation.

James E. Rooks Jr., is Senior Counsel for Research and State Affairs at the Association of Trial Lawyers of America (ATLA). He received his A.B. from Dartmouth College and his J.D. from Boston University. He has spent his entire career in the area of tort law, and as an ATLA staff member he has served as Editor of the ATLA LAW REPORTER and of TRIAL magazine, directed ATLA's educational programs, and served in the ATLA General Counsel and Public Education departments. From 2001 through 2004, he was a member of ATLA's Center for Constitutional Litigation, a national law firm that brings constitutional challenges to tort reform legislation and other deprivations of citizens' rights in the civil justice system. Mr. Rooks served as the Reporter for the Roscoe Pound Institute's 1996-2004 Forums for State Appellate Court Judges. He has monitored the rulemaking activities of the federal courts for ATLA since 1994 and has written extensively on court rulemaking. Some of his recent articles are *Will E-Discovery Get Squeezed?*, TRIAL, Nov. 2004, at 18); *Abridged Too Far: Discovery Rights and the Campaign for Special E-Discovery Rules*, CORPORATE COUNSEL (October 2004); *Rewriting the Rules for Class Actions: Rulemaking Has Become Another Front in the Tort "Reform" Wars*, TRIAL, FEB. 2002, AT 18. He is also an author of two legal treatises: FIREARMS LITIGATION: LAW, SCIENCE AND PRACTICE (Shepards/McGraw-Hill 1988) (co-author with Windle Turley), and RECOVERY FOR WRONGFUL DEATH, (West 4TH ED. 2005) (co-author with Stuart M. Speiser).

Michael J. Ryan is a partner with the firm of Krupnick Campbell Malone Buser Slama Hancock Liberman & McKee in Fort Lauderdale, Florida. He received a degree in Business Administration from George Washington University in 1986, and graduated *summa cum laude* from Case Western Reserve University School of Law in Cleveland, Ohio in 1992, where he received the Martin Luther King Jr., Award, Student of the Year, the National Outstanding Law Student of the Year from Who's Who of American Law Students, and the Law Student Activist Award. Prior to attending law school, he worked as a Federal Bank Examiner, and after law school, Mr. Ryan worked as a law clerk for the United States District Court for the Southern District of Florida, before joining Krupnick Campbell Malone. In 1999, he was honored as one of 10 national nominees for Trial Lawyer of the Year by the Trial Lawyers for Public Justice. Mr. Ryan specializes in medical malpractice, pharmaceutical litigation, and mass tort litigation. In addition to his trial practice in South Florida, he has participated as an elected member of the Plaintiffs' Steering Committee for the Sulzer Litigation, resulting in a settlement valued at approximately \$1 billion, as co-lead counsel in the Ford Crown Victoria Police Interceptor MDL litigation on behalf of cities and police departments nationwide, and co-chair of the Accutane MDL Discovery Committee. Mr. Ryan speaks nationwide on issues of electronic discovery and pharmaceutical litigation.

Kenneth J. Withers is a Senior Education Attorney at the Federal Judicial Center in Washington, D.C., where he develops Internet-based distance learning programs for the federal judiciary, concentrating on issues of technology and the administration of justice. He received his B.A. from Northeastern University, where he was President of the Liberal Arts Honor Society, and his J.D. from Northwestern University School of Law, where he was the recipient of the Wigmore Key. Mr. Withers received a Masters of Library Science degree from Simmons College Graduate School of Library and Information Science in 1998. Before joining the FJC, Mr. Withers was Education Director at the Social Law Library in Boston, and worked as a Supervising Attorney for Conley & Hodge Associates, Inc., in Boston. He is author of *THE INTERNET GUIDE FOR MASSACHUSETTS LAWYERS* (1999) and contributor to *ETHICAL LAWYERING IN MASSACHUSETTS* and *DRAFTING EMPLOYMENT DOCUMENTS*. Mr. Withers was the recipient of the British Irish Legal Education Technology Association, Lord Lloyd of Kilgerran Prize for Best Postgraduate Essay in Information Technology and Law in 1999, and was recognized in 1998 by the American Association of Law Librarians for the Best Library Association Web Site. Mr. Withers has authored several widely distributed papers on electronic discovery and is a regular speaker at national conference on litigation and information technology, including: *Two Tiers and a Safe Harbor: Federal Rulemakers Grapple with Electronic Discovery*, *THE FEDERAL LAWYER*, Oct. 2004; "Electronic Discovery: The Challenges and Opportunities of Electronic Evidence" (Workshop for United States Magistrate Judges, San Diego, CA, July 24, 2001); "Advanced Discovery Issues: The Retrieval and Protection of Electronic Evidence" (ALI-ABA Environmental Law Course, Boulder CO, June 28, 2001); and *Computer-Based Disclosure and Discovery in Civil Litigation*, *JOURNAL OF INFORMATION, LAW & TECHNOLOGY* (2001). Many of his articles, presentations, and related materials may be found on the FJC web site at www.fjc.gov, or at www.kenwithers.com. Mr. Withers serves on the Advisory Board for the Sedona Conference and was a faculty member at the Sedona Conference programs on electronic discovery in 2004 and 2005.

Discussion Group Moderators

Sharon J. Arkin practices law in Newport Beach, California, concentrating on business torts, ERISA, HMO, and insurance bad faith actions. She received a B.S. from the University of California, Riverside, and a J.D. degree from Western State University School of Law, and was also a contributing author of

BUSINESS TORTS (Matthew Bender 1991). Ms. Arkin is a past president of Consumer Attorneys of California (CAOC), Editor-in-Chief of CAOC *Forum*, and the chair of the CAOC Amicus Curiae Committee. In addition to being co-chair of ATLA's Legal Affairs Committee, she is a Fellow and Honorary Trustee of the Pound Institute.

Kathryn H. Clarke is an appellate lawyer and complex litigation consultant in Portland, Oregon. She specializes in medical negligence, products liability, punitive damages, and constitutional litigation in both state and federal courts. She received a B.A. from Whitman College, an M.A. from Portland State University, and a J.D. from the Northwestern School of Law of Lewis and Clark College. Ms. Clarke serves on the ATLA Board of Governors and is chair of ATLA's Amicus Curiae committee. She is a past president of the Oregon Trial Lawyers Association and a Fellow of the Pound Institute.

Maria Glorioso is the Managing Partner of The Glorioso Law Firm, in New Orleans, Louisiana, specializing in medical malpractice, wrongful death, and products liability, with a special emphasis on cases involving children. She received her B.A. in Psychology from Loyola University (New Orleans), where she took postgraduate studies in Criminology, and received her J.D. from Loyola University School of Law. She was a member of ATLA's Board of Governors, the past chairperson of ATLA's New Lawyers Division, and past cochair of the ATLA Student Trial Advocacy Competition Committee. Ms. Glorioso is member of the Board of Governors of the Southern Trial Lawyers Association and the Louisiana Trial Lawyers Association (LTLA). She has been an educational speaker for programs held by Loyola University School of Law, ATLA, LTLA, and the Melvin Belli Society. She is a Fellow and Trustee of the Pound Institute.

Richard D. Hailey practices law in Indiana and Colorado in the areas of personal injury, medical malpractice, products liability, and class actions. He earned his J.D. from Indiana University, and a LL.M. from Georgetown University Law Center. He is a past president of ATLA, on the Board of Directors of the Indiana Trial Lawyers Association, a member of the American Law Institute, and has been named to *Best Lawyers in America* every year since 1998. Mr. Hailey is a frequent lecturer throughout the United States and has appeared on CLE programs in 47 states. He is a Fellow and Honorary Trustee of the Pound Institute.

Shane Langston is a partner in Langston and Langston, P.L.L.C., in Jackson, Mississippi. He graduated from Millsaps College with a B.A. degree and a J.D. from the University of Mississippi School of Law. He was admitted to the Mississippi Bar in 1984 and before the United States Supreme Court in 1990. He is a member of the American Trial Lawyers Association, the Mississippi Trial Lawyers Association, the American Bar Association, the Magnolia Bar Association, and the Hinds County Bar Association. Mr. Langston was selected as the Outstanding Trial Lawyer of the Year by the Mississippi Trial Lawyers Association, and he has recently served as President of this organization in addition to being a Lifetime Member. He is a fellow and Trustee of the Pound Institute.

Eva Mancuso is Managing Partner for Hamel, Waxler, Allen & Collins, in Providence Rhode Island. She earned her BA, *summa cum laude*, from the University of Rhode Island and her J.D. from Suffolk University Law School. She has also taken advanced coursework at Harvard School of Public Health in the field of Legal Medicine. Ms. Mancuso is a former Assistant District Attorney, Bristol County, Massachusetts, and a former Assistant Attorney General, Chief, Career Criminal Unit, State of Rhode Island. Ms. Mancuso is a certified civil trial specialist and practices in the area of plaintiff personal injury.

A former president of the Rhode Island Trial Lawyers Association, she serves as chairperson of the ATLA State Affairs Committee and on the ATLA Board of Governors.

Wayne D. Parsons practices law in Honolulu, Hawaii. He has received B.S., M.S., and J.D. from the University of Michigan. He is a member of the Board of Governors of ATLA. He is a past president of the Consumer Lawyers of Hawaii and is a director of the Hawaii State Bar Association. He is a Fellow of the Pound Institute. Mr. Parsons has been active in educating the public about the work of lawyers and the courts and is a founder of the Hawaii Peoples' Law School Program and the Hawaii Appleseed Center for Public Interest Law.

Ellen Relkin practices law in New York City, where she concentrates on pharmaceutical products liability, toxic torts, medical malpractice, and women's health issues. She received her B.A. from Cornell University and her J.D. from Rutgers University, where she served as executive editor of the *Women's Rights Law Reporter*. She is a member of the American Law Institute and a Fellow of the Pound Institute.

Larry A. Tawwater practices law in Oklahoma City, specializing in products liability, aviation, and general negligence litigation. He received both his B.A. and J.D. from the University of Oklahoma. He has served as president of the Oklahoma Trial Lawyers Association and as a governor of the Association of Trial Lawyers of America. He is a member of the American Society of Law, Medicine and Ethics, the American Judicature Society, and the International Society of Barristers, and is a Fellow of the Pound Institute.

John Vail is Vice President and Senior Litigation Counsel with the Center for Constitutional Litigation. He has been counsel on several cases in the United States Supreme Court, and spearheads ATLA's fight against mandatory arbitration. He is a graduate of the College of the University of Chicago and of Vanderbilt Law School. Mr. Vail is President of the Board of Directors of the Virginia chapter of the American Civil Liberties Union.

President, Roscoe Pound Institute; Forum Moderator

Richard H. Middleton, Jr., the president of the Pound Institute in July, 2005, is the founder of the Middleton Law Firm in Savannah, Georgia. Mr. Middleton is a past president of ATLA, a past president of the Savannah Trial Lawyers Association, past president of the Georgia Chapter of the American Board of Trial Advocates and has also served on the national Board of Directors of the American Board of Trial Advocates, Trial Lawyers for Public Justice, Civil Justice Foundation, and the Southern Trial Lawyers Association. He is also a Trustee of the American Jury Trial Foundation, and has recently been named to the Advisory Board of the Commonwealth Institute. Mr. Middleton has been honored as a Diplomat of the American Board of Professional Liability Attorneys. He has spoken throughout the United States and Canada on civil trial matters and has served on the faculty of the National College of Advocacy and the Editorial Board of the Maritime Law Reporter. Mr. Middleton was a faculty member at the Sedona Conference program on electronic discovery in March 2004.

Judicial Attendees

Alabama

Honorable John B. Crawley, Presiding Judge, Court of Civil Appeals
Honorable Eddie Hardaway Jr., Presiding Circuit Judge, Seventeenth Judicial Circuit

Arkansas

Honorable Donald L. Corbin, Associate Justice, Supreme Court
Honorable Jim Gunter, Associate Justice, Supreme Court
Honorable Jim Hannah, Chief Justice, Supreme Court

Arizona

Honorable Philip G. Espinosa, Judge, Court of Appeals, Division Two
Honorable Rebecca White Berch, Vice Chief Justice, Supreme Court

California

Honorable William W. Bedsworth, Associate Justice, Fourth District Court of Appeal, Division Three
Honorable Kathryn Doi Todd, Associate Justice, Second District Court of Appeal, Division Two
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About the Pound Civil Justice Institute

What is the Pound Civil Justice Institute?

The Pound Civil Justice Institute (known at the time of the 2005 Forum as the Roscoe Pound Institute) is a legal think tank dedicated to the cause of promoting access to the civil justice system through its programs, publications, and research grants. The Institute was established in 1956 to build upon the work of Roscoe Pound, Dean of Harvard Law School from 1916 to 1936 and one of law's greatest educators. The Pound Institute promotes open, ongoing dialogue between the academic, judicial, and legal communities, on issues critical to protecting and ensuring the right to trial by jury. At conferences, symposiums, and annual forums, in reports and publications, and through grants and educational awards, the Pound Civil Justice Institute initiates and guides the debate that brings positive changes to American jurisprudence and strives to guarantee access to justice.

What Programs Does the Institute Sponsor?

Annual Forum for State Appellate Court Judges—The Annual Forum for State Appellate Court Judges brings together judges from state supreme courts and intermediate appellate courts, legal scholars, practicing attorneys, legislators, and members of the media for an open dialogue about major issues in contemporary jurisprudence. The Forum recognizes the important role of state courts in our system of justice, and deals with issues of responsibility and independence that lie at the heart of a judge's work. Pound Forums have addressed such issues as mandatory arbitration, secrecy in the courts, judicial independence, the jury as a fact finder, and the use of scientific evidence. The Forum is one of the Institute's most respected programs, and has been called "one of the best seminars available to jurists in the country."

Regional Trial Court Judges Forum—Following the overwhelming success of the Annual Forum for State Appellate Court Judges, the Institute created a program for trial court and other judges conducted at judicial seminars around the country. In order to expand our outreach to the judicial community, this program is held in conjunction with national and regional groups working with judges. These programs feature panels comprised of judges, lawyers, and legal scholars who engage the attendees in a dialogue on important judicial issues. The Pound Institute has held regional Forums in Texas, Hawaii, South Carolina, and Alaska and examined such topics as judicial independence, scientific evidence, the civil jury, and secrecy in the courts.

Law Professors Symposium—One of the primary goals of the Pound Civil Justice Institute is to provide a well-respected basis for challenging the claims made by entities attempting to limit individual access to the civil justice system. To this end, the Institute inaugurated the Law Professor Symposium, which offers an alternative to the "law and economics" programs being cultivated on law school campuses by tort reformers; it seeks to develop a new school of thought emphasizing the right to trial by jury and to provide a fertile breeding ground for new research supportive of the civil justice system. The Institute held its first Symposium on the subject of mandatory arbitration in conjunction with Duke University Law School in October, 2002. The papers from the 2002 Symposium appear in a special issue of the Duke law journal, 67 *LAW & CONTEMPORARY PROBLEMS* (2004). The Pound Institute held its Symposium in 2005 on medical malpractice at Vanderbilt Law School, and the papers from that program appear in 59 *VANDERBILT LAW REVIEW* (2006).

Research—The Institute actively promotes research through grants to scholars and academic institutions, as well as through in-house scholarship. We have sponsored academic research on soft-tissue injury cases, juror bias, and the contribution that lawyers make to the economy. Our goal is to ensure that first-rate, respected, and useful research is conducted on the civil justice system.

Civil Justice Digest—The *Civil Justice Digest* was created to alert judges and law professors to information and scholarship that support the utility of the civil justice system or counter negative campaigns against it. Through the *CJD*, we seek to provide a sophisticated readership of judges and law professors with information and commentary on current issues affecting the civil justice system, including material that debunks the myths of a jury system run amok. The *CJD* is distributed without charge to more than 10,000 federal and state judges, law professors, and law libraries. If you would like to be on the mailing list for *CJD*, please e-mail us at pound@roscoepound.org.

Law School Awards—The Pound Institute annually presents three law school awards which recognize individuals whose accomplishments serve to further the cause of justice: The **Elaine Osborne Jacobson Award** was established in 1991 to recognize women law students with an aptitude for, and commitment to, a career of advocacy for the health care needs of women, children, the elderly, and disabled persons; the **Richard S. Jacobson Award for Teaching Trial Advocacy** recognizes outstanding law professors who exemplify the best attributes of the trial lawyer: teacher, mentor, and advocate; and the **Roscoe Hogan Environmental Law Essay Contest** is designed to develop law student interest and scholarship in environmental law and serves to provide law students with the opportunity to investigate and offer solutions to the multitude of injustices inflicted on the environment.

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PAPERS OF THE POUND CIVIL JUSTICE INSTITUTE

Reports of the Annual Forums for State Court Judges

2004 • *Still Coequal? State Courts, Legislatures, and the Separation of Powers.* Report of the twelfth Forum for State Appellate Court Judges. Discussions include state court responses to legislative encroachment, deference state courts should give legislative findings, the relationship between state courts and legislatures, judicial approaches to separation of powers issues, the funding of the courts, the decline of lawyers in legislatures, the role of courts and judges in democracy, and how protecting judicial power can protect citizen rights. (Price per bound copy-\$40)

2003 • *The Privatization of Justice? Mandatory Arbitration and the State Courts.* Report of the eleventh Forum for State Appellate Court Judges. Discussions include the growing rise of binding arbitration clauses in contracts, preemption of state law via the Federal Arbitration Act (FAA), standards for judging the waiver of the right to trial by jury, the supposed national policy favoring arbitration, and resisting the FAA's encroachment on state law. (Price per bound copy-\$40)

2002 • *State Courts and Federal Authority: A Threat to Judicial Independence?* Report of the tenth Forum for State Appellate Court Judges. Discussions include efforts by federal and state courts to usurp the power of state court through removal, preemption, etc, the ability of state courts to handle class actions and other complex litigation, the constitutional authority of state courts, the relationship between state courts and legislatures and federal courts. (Price per bound copy-\$40)

2001 • *The Jury as Fact Finder and Community Presence in Civil Justice.* Report of the ninth Forum for State Appellate Court Judges. Discussions include the behavior and reliability of juries, empirical studies of juries, efforts to blindfold the jury, the history of the civil jury in Britain and America, the treatment of juries by appellate courts, how juries judge cases in comparison to other fact-finders, and possible future approaches to trial by jury in the United States. (Price per bound copy-\$40)

2000 • *Open Courts with Sealed Files: Secrecy's Impact on American Justice.* Report of the eighth Forum for State Appellate Court Judges. Discussions include the effects of secrecy on the rights of individuals, the forms that secrecy takes in the courts, ethical issues affecting lawyers agreeing to secret settlements, the role of the news media in the debate over secrecy, the tension between confidentiality proponents and public access advocates, and the approaches taken by various judges when confronted with secrecy requests. (Price per bound copy-\$40)

1999 • *Controversies Surrounding Discovery and Its Effect on the Courts.* Report of the seventh Forum for State Appellate Court Judges. Discussions include the existing empirical research on the operation of civil discovery; the contrast between the research findings and the myths about discovery that have circulated; and whether or not the recent changes to the federal courts' discovery rules advance the purpose of discovery. (\$40)

1998 • *Assaults on the Judiciary: Attacking the "Great Bulwark of Public Liberty."* Report of the sixth Forum for State Appellate Court Judges. Discussions include threats to judicial independence through politically motivated attacks on the courts and on individual judges as well as through legislative action to restrict the courts that may violate constitutional guarantees, and possible responses to these challenges by judges,

judicial institutions, the organized bar, and citizen organizations. (\$40)

1997 • *Scientific Evidence in the Courts: Concepts and Controversies*. Report of the fifth Forum for State Appellate Court Judges. Discussions include the background of the controversy over scientific evidence; issues, assumptions, and models in judging scientific disputes; and the applicability of the *Daubert* decision's "reliability threshold" under state law analogous to Rule 702 of the Federal Rules of Evidence (Only available in electronic format at www.poundinstitute.org). (Free)

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