THE ASSOCIATION OF THE FEDERAL BAR OF THE STATE OF NEW JERSEY

presents

THE TWENTY-EIGHTH ANNUAL UNITED STATES DISTRICT COURT JUDICIAL CONFERENCE FOR THE DISTRICT OF NEW JERSEY

Electronic Discovery And Hot issues practicing in Federal District Court

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Reported By: Stanley B. Rizman, C.S.R.

Rizman Rappaport Dillon&Rose, LLC
Certified Court Reporters

66 W. Mt. Pleasant Avenue
Livingston, NJ 07039
(973) 992-7650 Fax (973) 992-0666
1-888-444-DEPS
E-mail: reporters@rrdrcsr.com

2

MS. ALITO: I'd like to welcome you to the Annual District Court Conference of the Association of the Federal Bar.

Before we get started, I'd like to acknowledge the people who put this program together today, Bill Maderer and Greg Parliman, who worked very hard and did a fantastic job in gathering together all the speakers you'll be hearing from this morning.

I'd also like to thank our Executive Director, Ginny Whipple Berckner who, as usual, has done a wonderful job in putting the program together.

As is traditional, we'd like to start the day with remarks from our Chief Judge Bissell, who will tell us about the State of the court.

Thank you, Judge.

(Applause)

CHIEF JUDGE BISSELL: The state of the Court, New Jersey, of course you didn't need me to tell you that.

I'm going to take a moment but first, however, to introduce to you our new and incoming Chief of Pretrial Services officer and Chief Probation Officer and also to take the opportunity

3

as well to thank their predecessors.

JUDGE BISSELL: First on the Hit Parade will be Chris Doser, our incoming Chief of Pretrial Services. She has served in just about every position in that office that you could imagine for the last twelve years.

A graduate of Trenton State College of Trenton, New Jersey with a Bachelor of Science in Criminal Justice, she also holds a Masters in Public Administration from Rutgers University and is a PHD candidate at that school as well for a degree in Public Administration.

Chris has, as I said, served in our district for the long and well, particularly and most recently as Tom Henry's First Assistant.

And with that, as I said, I'd like to also ask you not only to welcome Chris, but to join me in a round of applause for Tom Henry in thanks for his devoted service to our court. Thank you.

Chris, if you will, please.

MS. DOSER: Thank you, Judge Bissell.

I see many familiar faces here, but for those who aren't familiar, I'm very pleased to be here today as the new Chief of Pretrial.

Feel free to call on us at any time. I

4

have an open-door policy. We have a website for those who would like to get some information on pretrial and our number is on there. It's NJPT.USCOURTS and it provides you with information on what it means to be coming into the court system.

If you have an initial appearance, or a bail hearing, please call us and thank you for everything.

CHIEF JUDGE BISSELL: Our next new chief, the Chief of the Probation Office, is also named Chris. Which makes it easy for me who doesnÆt remember names very well to at least get hold of one of them whenever I need them.

Chris Maloney comes to this office through a different group. He has not served in this district before.

However, he has a wealth of experience both in the field and increasingly responsible for supervisory positions in the national office of The Probation and Pretrial Services in Washington, D.C.

He holds a degrees from the University of Massachussets, at Pittsburgh, a Bachelor of Arts there, he has taken graduate studies in Florida Atlantic University and Clark University as well as at Suffolk University pursuing graduate degrees in

5

public administration as well.

I think it's very safe to say that when we introduced Chris Maloney, one of the final candidates for this position, he was a complete stranger to almost all of us. It didn't take him very long to take care of that, and we are extremely pleased that a man of Chris' talents and abilities sought us out. And it's our pleasure to seek him out as well.

I'd like to introduce the new Chief of Probation, Chris Maloney, and I also ask you to join me in thanking his predecessor, Joe Naporano, for so many years of faithful service to our Court.

Thank you.

MR. MALONEY: Thank you, Judge Bissell.

As the judge mentioned I'm coming up from the Washington, D.C. area.

I'm looking forward to getting to meet a lot of you in my new role as Chief and if any of you know any relative, give me a call.

I come from Washington, but I look forward to getting to know all of you and working with you in my new role.

Thank you.

CHIEF JUDGE BISSELL: I just wanted to

give a brief and not too boring, hopefully, statistical report of -- with regard to some of the Court's accomplishments in the past year.

As you know, we had the good fortune to -- pretty much at the start of 2003 to have a full compliment of District Judges, and it really shows.

Facing criminal and civil cases together, we cleared the calendar this year. That's the first time I can recall that happening in a long, long time in this Court and I and we are extremely proud of our judicial officers.

We moved a total of over 8,000 civil and criminal cases together. And, as I tell you, if you have the judge power, you can do it. And, happily, that's been the case this year, and it looks like it will be for some time to come.

In some categories we continue to maintain a very high leadership role when considered nationwide. Our 7.9 months of averaged disposition time from start to finish in our civil caseload across the board continues to rank as 16th in the country out of 94 districts. A place that weÆve been happy to enjoy and have retained for many years and will continue to do so, I can assure you.

The jury utilization under the vigorous leadership of Chief Judge Thompson, who has just joined us this morning, continues to be a high priority here. It will be discussed again, I think in the course of the program later this morning. But just to give you a kind of example of how conscientiousness and awareness of that topic can bring about results, the significant statistic in that field is how many jurors are unused in a given period when they are summoned to court to be used in cases.

A used juror means one who is either seated or excused either for cause or by peremptory challenge.

A good benchmark nationwide is considered to be about thirty percent. As of last summer, we were kind of languishing around forty percent and not particularly happy with that. But I can advise you that in the last five months, because with Judge Thompson's help we all kind of woke up to this topic, we reduced that figure to twenty percent. So that with your assistance, I might add, such as letting us know when a case is settled, hopefully at least a day before jurors come in, we've been able to move into an area where we're comfortable and I hope we'll continue to stay there.

The prompt and fair disposition of all of our cases and the maximum utilization of our jurors and our ADI programs remains our top priority in all of our functioning at full speed.

I'd also like to take a moment and this will be emphasized later at brunch today, when the award for excellence in pro bono services report is given, that prolonged service on the bar remains obviously a very, very important asset of the successful practice and successful movement of our cases in Federal Court.

I urge all of you to either continue or initiate voluntary service in the pro bono field. Judge BasslerÆs committee worked very hard to coordinate that effort and you can feel free to contact him at any time and, hopefully, get on the rolls. We do need to -- nothing mandatory about it, we haven't found that rule and we won't, but it is a high voluntary calling, I assure you.

At this time I must regret to say, however, that -- and I hate regret you on a not too optimistic prospect here as we look down the road at the time of the year.

Although the entire budget for the Federal Judiciary is above one half of one percent of the national budget, we continue to be a target for Congressional efforts to reduce same, particularly in an election year for reasons which, though regrettable, are all too obvious.

One of our judges has recently attended meetings at the Administrative Office of the Courts to address this problem and will surely be emphasized at the national meeting at U.S. Chief Judges which will be held in Washington next week and which, of course, I'll be attending.

Among the most draconian measures that Congress is apparently considering is a hard freeze of the budgets for all federal agencies, including all aspects of the judicial branch for the next fiscal year.

I'm advised that such a freeze would require that extensive escalating expenses, such as salaries, security enhancements and rental expenses, among others, is being sought with an a static overall appropriation. Such action would generate the need to lay off some 4,400 judicial branch employees throughout the nation. More than twenty percent of its work force.

While I cannot predict the particular impact on staff in other districts, not even the

10

judicial grants for any court can reasonably be expected to absorb such an impact.

I urge all of you here to contact your congress persons and senators to vigorously oppose any such freeze and to impress upon them the need for ample funding so that our judicial grants, already fiscally strained, will be treated like a co-equal grant of government mandated by our Constitution and will be able to effectively discharge its duties.

With that hope and exaltation you heard enough of me, and I'll turn it back to the program chair.

Thank you very much.

[Applause]

MR. MADERER: If I could ask the panelists from Panel One to join me on the dias.

We're moving along at our traditional fifteen-minute layout.

Good morning, ladies and gentlemen. Actually, it's been a very good morning. We just received a phone call from the General Counsel of Jersey Paper Company. We told you that Jersey Paper had been sued in federal court for price fixing with two major competitors.

11

The Complaint alleges that representatives of Jersey Paper's marketing department repeatedly met with their competitor counterparts for the past five years and agreed to fix prices on photocopy paper.

The General Counsel told you that he is not particularly concerned because he has counseled the marketing department on what was legally permissible. And he was confident that the company personnel would follow through with his advice.

The General Counsel also tells you that all of the company's voluminous documents and e-mails are stored on computer, but that the entire computer system was upgraded a year ago. We hang up the phone, elated and overwhelmed. How are we going to get a handle on the documents, paper and digital? Are documents being destroyed on a daily basis pursuant to the company's document retention policy? New Jersey Paper's small in-house staff will coordinate the digital production and who will perform the privilege review?

Well, the fight that's before us is to pay for the identification and production of the documents contained on the company's obsolete computer system.

12

These and other relevant questions will be answered by our outstanding panel here this morning.

We are honored to have Magistrate Judges Madeline Cox Arleo and Judge Ronald J. Hedges both of whom sit in Newark.

Many thanks to Judge Hedges for the excellent paper included in the handout that you'll find in the -- the handout, there, the white one.

We also have two litigators. Sitting to my left, to my -- the third over is my partner, Jeff Lorell, whose business litigation practice at Saiber, Schlesinger often involved electronic discovery.

Seated to his left, is John Scordo from Pitney Hardin, Kipp & Szuch who recently co-authored an excellent two part article in the Metropolitan Corporate Counsel magazine entitled "Electronic Data Production."

Sitting to Jeff's right, we welcome John Sanders, Senior Vice President and Associate General Counsel to Schering Plough. His responsibilities include employment and commercial litigation.

Finally, to his right, is Jason Straight, From Kroll Ontrack, one of the leading legal consultants that provides data recovery and

13

electronic evidence services.

Thanks also to Kroll for the excellent handout, which also you may pick up at the front desk.

If you go to page twenty two, you can find the definitions for "meta data" and if you don't know what that is you'll learn about that during the course of this session.

I would ask that Judge Arleo start the session by discussing the federal and local rules and initial scheduling conference that pertains to electronic discovery.

Please come up here.

JUDGE ARLEO: Good morning.

For those of you who are not aware of it, we do have a -- a new local rule that was placed into effect back in October of last year. I'm not too clear if the -- is the local rule included in the handout?

MR. MADERER: It is. It should be the very first item in the book.

JUDGE ARLEO: And I'd just like to go through this handout very briefly.

Some of the important changes as it relates to electronic discovery that some of you may

14

not even be aware of.
What the rule does is impose an affirmative obligation on lawyers before -- well before the Rule 16 Conference and even before the Rule 26 Meet and Confer Conference with your adversary in preparation for the Rule 16 Conference.
I'd like to draw your attention and we'll read the rule together. It's 26.1.D, and it requires -- it -- 26.1.B relates down to 26.20 at the bottom and it discusses the affirmative obligation that a lawyer now has to speak with his client and familiarize himself with your client's electronic retrieval system, to learn "How information is stored and how it can be retrieved." And the rule is very specific in this instance.
It provides that the counsel, the lawyer, shall further review with the client the client's information files, including currently maintained computer files as well as historic, archival, back-up and legacy computer files, whether incurred or historic media or formats such as judicial evidence which may be used to support claims or defenses.
So, I guess the first thing you have to do is make sure you even know what legacy, archival and

15

historical files even are, and have a meet and confer with your client to understand the computer system.
The rule also imposes an obligation on the lawyer to have the client designate someone with knowledge of the information system who can "Facilitate reasonably anticipated discovery."
So, particularly in a smaller organization, if the client is a corporation or a large organization, you now have the duty not only to understand how information is stored and retrieved, but to have your client designate someone that you can speak to about digital computer issues.
The rule also places on the lawyer notification obligations before the Rule 26 meet-and-confer conference. And I can point your attention again to, I think it's page three in the handout, of the local rule, sub-section 2, under "Duty to Notify."
It requires a party seeking discovery of computer evidence to notify the opposing party as soon as possible, for obvious reasons, including -- I think Judge Hedges will talk about it in a little while, information preservation, but no later than the Rule 16 at the meet-and-confer Conference, and

16

to identify as clearly as possible the categories of information which may be sought.
So lawyers have the obligation to notify each other, not six months into discovery or nine months into discovery, but at the very first meet-and confer at the latest, of the type of computer discovery that you may be seeking.
The -- at that meet and confer you will also require the parties to discuss and attempt to agree on, and this is the last part of the rule and it's very specific in this instance,. "The preservation and production of digital information procedures to deal with inadvertent production, where the restoration of the deleted digital information may be necessary, whether backup or historic or legacy data is within the scope of discovery and the procedures for producing digital information."
Finally, the parties are obligated to discuss who will bear the cost of preservation, production and restoration, if required.
Finally, at your Rule 16 Conference, you are now required to direct -- to discuss with the magistrate judge, if at issue, whether electronic discovery is requested and to share the results of

17

the meet and confer and the discussion about -- about computer discovery. The cost, the scope and the retrieval.
MR. MADERER: Thank you, Judge Arleo.
We now know what our obligations are, John Sander, Schering in-house counsel, says it's common for employees to transfer information from work computers to home computers or simply use home computers to telecommute from home.
To what extent do you include a review of home computers in order to satisfy a company's obligations under the -- under the rules of discovery?
MR. SANDER: Well, I -- Bill and, you know, in fair disclosure, Bill's an excellent moderator, and like an excellent moderator, he actually called me yesterday to tell me he was going to ask that question. So I had a day to think about this, which was good.
You know, in reality, it's an issue. When we -- when we are in a process, where we are individually sitting down with employees and reviewing what they have electronically, it certainly is something we would ask them and we would preserve and/or retrieve anything that they

18

had transferred to a home computer. It's never been a big issue in our company because we have a very small number of telecommuters, where I think is where you would see this quite a bit.

Also, most people in our company have laptops, so it's -- there's not really a need for most people to use their home computers for work. But I think it's an excellent point. It's something that I think that we will probably put into our document and hold notices, which I'm going talk about later when my time comes, but it is something that probably should be drawn to people's attention so that we make sure we do cover that.

MR. MADERER: All right. Thank you.

Obviously, a new body of laws are being developed concerning electronic discovery.

I've asked John Scordo to highlight some of the issues that must be considered both in the early stages of the litigation and throughout the prosecution and defense of a case.

John.

MR. SCORDO: Thanks, Bill.

Obviously, there's a lot of cases across the board all over the country, including New Jersey that some are conflicting and provide a sort of some

19

general principles. I think you can take out of, at least this discussion, that you really should, I think, keep in mind that doing the pretrial conferences and pre-discovery conferences and I know some of the officers on the panel are private and some of these topics are more detailed.

The first -- the first topic that I thought was important for practitioners to know is, you need to be able to make a persuasive argument that electronic discovery is different.

Most of the judges here and the magistrates here I think have accepted that proposition. But, you know, you could be in many other federal courts where they are not so enlightened and I would -- I don't think I'm going to -- stretching that far to say the state courts are, you know, not really on the cutting edge of this.

Electronic discovery is different. Basically because you have, believe it or not, much more information than you did in the paper world. I think, as everybody knows who does e-mails, you can CC a million people, you can hit ôreply to all.ö People require just very little conversational, ôThanks, I'll be there.ö There's strings of e-mails

20

that get attached. The amount of communication that gets created in connection with even a mundane business transaction -- it just multiplies exponentially.

So, you have a ton of information. The problem is in that ton of information, it's not all in the same format.

In the old days, everything was on paper and you could have a copy. In the electronic area, you've got e-mail files, you've got Word documents, you've got Power Point presentations, Excel spreadsheets, there's a whole host of different formats that the data is in, and I'm just listing the Microsoft ones. I mean, there are many others.

So I think with those two ideas in mind, it becomes very clear that electronic discovery is different. It's much more difficult to do it -- as unbelievable as that sounds, because we all know how much work we do when we do paper discovery.

I -- to me, I think you'll probably get the best reference to that principle in the case of Buyers in the Northern District of Illinois 2002. And I think that's referenced in Judge Hedges materials.

I have some materials that I can make

21

available by e-mail. I figured since this was electronic discovery, instead of doing a handout, I have an article that I can e-mail. My e-mail is JScordo@PitneyHardin.Com, and I'll be happy to send that to you as well as the supplemental site, which I'll reference here today.

But I think in the Buyer's case and a recent case at the District Court of Maryland, the Thompson case, which is 219 FRD 93, you'll see a very, I think, a very good discussion of why it's different.

I think the next principle to keep in mind, and this is sort of a very broad one, is sort of where should you look first, and I think the courts have pretty much come to the conclusion that the, quote/unquote, active data, is where you start and where your discovery obligation lies. Just to start, basically, there could be a lot of discussion about how much is active and how much is inactive. But the general line drawing is where the business people ordinarily access the information. The business person has the e-mail on his laptop, the Word documents, the Power Point, if they're available on the company server that the whole company has access to. That's sort of the active

22

data that is quote/unquote, used in the ordinary course of business. That's probably a good place to start. I think that's a fair proposition in that that distinction has been recognized in cost-shifting type cases which I know Judge Hedges will talk about. It's been recognized in document preservation sanction-type cases which I have some reference to, and I know some other people will address, and it's also been recognized in -- in what I call a form of production case, and that's really the leading case in New Jersey, which is Bristol-Myers.

So, I think that general concept is clearly -- clearly, I think gives us at least a place to start and I think you need to understand that you need to speak to the business person and say, "If your boss asked you find everything about the XYZ contract, where would you look?" and you'll usually get the answer, "Well, my secretary has a file drawer, I have my e-mail, here's my folder. I have my Word documents and Power Point presentations." And if you get at all the information that they ordinarily access, you have to have the right list of witnesses, and ask them the right questions, but you've got what I would call

23

the active data.

Now, the one caveat to that is, there's a -- and I think they'll be a lot of fights on this, frankly. How much active and how accessible does it have to be to qualify as active.

MR. MADERER: Excuse me. Just one second, John. We have a car plate. I apologize.

MR. SCORDO: Sure.

MR. MADERER: I'm going to be a little embarrassed for somebody whose license plate WEM, I believe?

(Discussion off the record.)

MR. MADERER: I apologize.

MR. SCORDO: Oh, that's okay.

The one caveat to that, that sort of general, active versus inactive distinction is, and I think that some of this material is brought in from Judge Hedges and it references some of the cases which are set in my article, which I will get to you, how inaccessible does it have to be?

There's, you know, nearline storage, and there's, you know, which is right on your desktop. There's, you know, storage on the company server and then you can go farther down to the back-up tapes and, you know, the archives. There's a whole host

24

of levels, and I'm not sure the courts are really going to get in to what's active, accessible in the ordinary course of business or not.

But I think it's pretty fair to say in a lot of contexts that distinction has been drawn and I think it should be the first thing we need to figure out.

After that, another issue that's come up is the form of the production that you need to make. Paper versus electronic.

Luckily, in New Jersey we actually have a leading case on that, which is the Bristol-Myers case, 205 FRD 437. And, again, that's in the articles and I'm sure it's in the handout as well.

In that case Magistrate Hughes wrote a very lengthy opinion on when you need to produce paper and when you need to produce electronic. I suggest everybody read it. It's a pretty nice overview of the area. The specific holding in the case was a little more narrow and, again, it was sort of a basic, common sense approach.

If the material is already in electronic form, in the ordinary course of business at your client's, you don't turn it all into paper and have a paralegal sit and print it or just hit print,

25

print, print. You need to let your adversary know it's available in the ordinary course of business in electronic.

If you're getting paper, on the other hand, you don't have to tell your adversary, "Well, I'm scanning all this paper into an electronic file." But, if the adversary makes a request for an electronic production of paper and basically the paper just scans through the copy machine. Instead of another copy coming out, it just gets burned to a CD. You do have an obligation to, if your adversary requests and I'm sure this is the kind of thing that's going to come up at a conference. You say: I have a fair amount of paper. I do have vendors. And I think most vendors do offer the option of scanning into a CD as opposed to printing out another hard copy. And in that case, you do have to make that available as well. You can't insist that If I have paper, you're getting paper.

That's the form-of-production issue. And again, I would suggest that you people read Bristol-Myers on that.

The next sort of main topic, and this sort of relates to a lot of the cost-shifting areas. I know some of the other panelists will talk about it.

26

When do you have to produce quote/unquote, deleted data, and, as most people know, I'll just give a brief explanation. Deleted doesn't mean it's gone from the hard drive. It's just means it's been marked available to be overwritten. Meaning, the next time you hit "save" the computer might decide to overwrite that file or it might not. The computer has its own way of deciding which piece of the disk to use.

So if you have downloaded, you know, a hundred songs off the internet, luckily, you probably have covered up that deleted section. But if your computer is not that active, the deleted file can be sitting on your hard drive for -- for years, literally. And it's just -- it's just marked as available but it's not deleted.

The courts on that, no surprise, there's a split of authority. I think there's sort a -- sort of a balancing test that goes into play, and that comes into the cost-shifting analysis which you'll hear about later.

To me, looking at the cases cited in the article, it was really no broad generalizations you could draw. If you really -- obviously, you need to make a particularly large showing of why you think

27

something was deleted or in your conferences you may find out that the company has given all employees new laptops, or new desktops with saved hard drives or did not. So, you really need a reason to be -- to ask to go to the next step, and that is to ask your adversary to look for, quote/unquote, deleted data.

The Rowe case, R-o-w-e, has a nice sort of description of that. And, of course the -- the leading case that you'll hear about as well, is the Zooba Lake case. The Zooba Lake opinion - - there's three or four of them. But those are sort of the main cases that have come out of the Southern District in the last couple of years and they've sort of been picked up around the country. I'm not aware of a New Jersey case that's cited it yet, but they sort of have been picked up as -- as the place to start. So, that's Rowe and Zooba Lake.

Another hot topic that comes up is this reference to "meta data." I think people just like saying the word, but it really just means hidden data in a document. Usually a Word document. It basically just means Word keeps track of who authored the document. Certain information about who edited it.

28

It keeps some -- it keeps some dates and that kind of thing. I'm only aware of one case that addressed the issue. It's the Momah case, M-o-m-a-h, out of the Eastern District of Pennsylvania and it's referenced in the article. And in that case they found it was discoverable.

There's been a lot written about meta data. I'm not sure it's really that relevant. I mean, it really only comes into play when you need to find out who looked at a document at a certain time or who authored it.

Although I was surprised to actually have a case just a few months ago where we actually did have to get the meta data out of a particular document to find out who drafted it, who came up with this particular contract when it was that that was at issue, and it ended up to be a dispositive fact that came out in mediation, albeit not the litigation.

But, you know, we literally had nailed it down to this language, of course, first written by a lawyer in a certain company on a Friday afternoon. It was an exchange with the business people. Everybody left for vacation. I mean, you know, we were able to nail it down to that particular level

29

of detail. I'd be surprised if it really needs to happen that way in -- in most litigations, but it is available if you need that.

I guess the last -- the second to last big issue in electronic discovery is the document preservation issue. And I know we're going to hear some more about that. That, to me, is the most difficult one.

There's a whole host of cases that I say in the article where there's specific instances where people intentionally destroy documents. I mean, one client went out and bought a hard drive eraser program, and, you know, those -- those cases really aren't too difficult. It's pretty clear that you're going to get in trouble and you're going to be given sanctions for doing that.

The more troubling cases are those that reference the destruction of data just on the use -- the every day use of the system. Either people are marking e-mails deleted -- the backup tapes that the company saves for disaster recovery purposes sometimes tend to get recycled or thrown out and -- and it's these kind of normal, every day use of the electronic system that technically is quote/unquote, destroying data.

30

There's probably a couple of cases on it which you'll see referenced in my article. The Zooba Lake 3 case was the last word on it, up until a couple of months ago. And then recently there's a case out of the District Court of Maryland, Thompson, which is 219 FRD 93. And, again, if you e-mail me, I'll give you all these sites which went into the issue of when a party will be sanctioned and it referenced the Zooba Lake 3 opinion. And to me it's just very hard to really get the potentials on that because it's a troubling area and it's a difficult area. Especially when you're just using your computer every day, as a normal course of business. And I think that's probably where a lot of the -- a lot of the practitioners in the Sadona Conference really got their start, and that is you'll see references to that in the materials.

The Sadona Conference was basically a group of lawyers, judges, in-house lawyers, people involved in the technology aspect, the vendors, and that kind of thing. They got together and tried to come up with sort of some general principles of when -- when electronic discovery will be available, who will pay for it, how much do you have to do. That's referenced at their site, and I think the

31

handout may have the latest version. If you go there, and, again, this is in my article, Sadona conference.org. the latest principles are there, including a little -- a nice little discussion of how the principles changed from 2003 to 2004. That's sort of -- I would suggest some suggested reading as well.

The Sadona principles I think have been picked up in the Southern District cases, Rowe and/or Zooba Lake . I'm not sure if they were cited in any New Jersey cases. But they really are -- not really too controversial but they basically draw the same -- the same distinctions on the active versus inactive. And when you should shift the cost and when you shouldn't. But I would suggest you read those, also.

That's really the main issues. And, of course, the last issue and the most interesting and the most complicated is when you actually do decide to go past active data and you want to maybe look at deleted data or back-up data, or things of that nature. The courts have developed a body of law on when the cost of that should be shifted, how you should do it, when you should -- when you need a vendor, and that kind of thing, and I know Judge

32

Hedges is going to talk about that in a little more detail.

MR. MADERER: Thank you, John.

Coincidentally, the Sadona Conference is meeting today and tomorrow at their annual meeting in Arizona concerning two days on the subject which we're able to cover in an hour and a quarter. See, here in New Jersey weÆre efficient.

Judge Hedges, John spoke about sanctions. I know some courts have sanctioned parties with an adverse inference jury instruction for destroying or failing to preserve relevant digital data when that conduct is intentional or done in bad faith.

Do you think an adverse jury instruction, adverse inference jury instruction should be given when the Court finds mere negligence in a companyÆs failure to preserve and/or maintain digital information?

JUDGE HEDGES: If you're in the Circuit -- the Second Circuit, the answer is yes because that very issue was put before the Circuit last year and it's -- it extended this concept of failure to produce information at discovery to a negligent failure and approved an adverse inference.

MR. MADERER: And nothing in the Third

33

Circuit as of this moment, Your Honor.

JUDGE HEDGES: Nothing in the electronic context.

MR. MADERER: Okay. Thank you.

WeÆll move on to Jeffrey Lorell.

Jeff, how do you get your arms around the appropriate document requests in a big case, recognizing that asking for every digital document may produce an avalanche of material that you may not want to review. And, similarly, how do you respond to such a request if your adversary serves you on one?

MR. LORELL: Well, that's, of course, the question of the hour.

My assignment from Bill was to pull together some practical thoughts on digital discovery in eight to ten minutes. A near impossible task. But to try and do that, I've distilled some thoughts into eight simple -- eight simple principles or points that are really based on common sense.

First, and this is what we've just been talking about and that is document preservation. Seek to preserve all digital data at the earliest possible minute.

34

Now, that doesn't mean two weeks or a week before the Rule 16 Conference, when it comes to mind, oh, gee, I've got an obligation to do this. It means when litigation is reasonably anticipated. And there are two parts to that.

The first is internal with the client. You have to warn your client at the earliest possible time to suspend all routine document destruction, to suspend auto-delete programs, to suspend overwriting that would otherwise occur that would remove data and to work with the client to make that a top priority.

Document preservation has to be a top priority from senior management communicated all the way down not only through the IT department or IS department at the client, but to the department heads, to key players, to the people involved in the litigation, to everyone who in any way, shape or form could be touching any of the relevant data. And that usually means forming some sort of action plan, a formal action plan, which is distributed clearly. I'm sure it's something John is going to cover. And forming an action-response team or litigation-response team, that will generally include outside counsel, inside counsel, members of

35

the IT staff, senior management and, in many cases, outside consultants as well.

That is absolutely critical at the earliest stage. And the corollary, which is, put your opponent on notice of their duty to preserve digital documents even before the litigation begins. Write a letter. There are some sample letters in Jason's materials that are wonderful. That's something you should do.

Point number two, and this is something that -- that -- that -- Judge Arleo just mentioned. It's now expressed in Rule 26.1, but it's a matter of common sense. So whether you're in another district or you're in State Court New Jersey, you've got to learn the client's information system. What is the data? Where is it? How difficult is it to get? How expensive is it to get?

Imagine you're representing a client that's got subsidiaries or offices in different parts of the state, different parts of the country. Your job is to get the data from different locations from various laptops and -- and desktops at each location, some of which are sitting in a corner because they haven't been used, from multiple servers, from archives and from back-up data. Get

36

it all into -- organized into one, single, readable and searchable source. And that's a daunting task.

So, you've got to learn what's there, how difficult it is and how expensive it is, not only for the Rule 16 Conference, but to confront these issues with your adversaries.

Three. Propound discovery requests for digital information as narrowly and precisely as possible. You know the old adage, "Be careful what you ask for. You may get it."

Well, this is absolutely applicable in the digital age, because you could get piles and piles of data that is not -- documents that are just not relevant at all because you've asked -- because your demand is just so broad that it's brought in this net with thousands of documents that you've got to sift through.

You don't want -- you also don't want such broad requests coming back to you and to your client. You want them to -- you want your request to be reasonable and to be very focused. To increase the court that the -- the likelihood that the Court will enforce your document request if there's a dispute, and also to decrease any likelihood, as I'm sure Judge Hedges will talk

37

about, that the cost of that is going to be shifted to you.

To give an example. Don't ask for e-mails from everybody in the sun over a 20-year period, or a 10-year period. Name the key players that you know from other documents or from your client's involvement are involved. Ask for e-mails from a particular list of people over a narrow period of time. As narrow as you can reasonably make it to get what you need for the case, related to a specific topic. That kind of request is much more reasonable and much more easily complied with.

Ask for, particularly if there are certain documents where the date of the production, the date of the creation of the document, who looked at the document, who worked on the document are key to a case, and sometimes they are.

I had one case in which that was really a determinant fact. Ask for the production of that document in electronic format which will allow you to access the meta data. And you work with your own clientÆs in-house IT people or an outside consultant to make sure you frame those requests properly, and you can discuss them properly.

Ask for, specifically, out-going, out-

38

bound PC based faxes. And the reason I say that is most people don't realize that in many companies out-bound PC-based faxes are saved on another server that no one ever searches. And they're archived differently and they're archived in a different place. And those are frequently overlooked. Incoming PC-based faxes go into the e-mail queue. So, you get those when you get the normal discovery about e-mail, but out-bound people frequently don't get it. And, of course, it goes without saying, ask for, you typically do, all non-identical paper copies. So, you may get an electronic format or image of an e-mail that was sent, but you also want the copy that is in somebody's files that has hand-written notations on it.

Four, prepare responses and objections to digital discovery requests by being very specific and explain what databases were or will be searched and what databases will not be searched.

Be explicit about what is accessible and what is not accessible. I was just yesterday looking at a document response in a case in which I was substituting as counsel. And in that response this is something you see in 95 percent of the document responses. You see it says a whole host of

39

objections, it's burdensome, it's this, it's that, and it says "subject to the foregoing, all relevant documents in response to this will be produced."

Now, I happen to know that some of the original legacy data that might be responsive to that was never even searched by our predecessor, and so a -- a document response which says all documents will be produced is not accurate. It's absolutely not truthful.

So, be specific, and then you don't have any problem about whether your response is accurate or not. There won't be any sanctions later on when someone discovers there are e-mails on a computer system that goes back five years that no one's ever looked at.

Five. Confer with your adversary well in advance of any actual document production about the format the format in which the electronic data will be produced. So, that's -- not only are you talking about the stuff - - the data before your Rule 16 Conference, but before it's actually produced. Are you going to be producing paper images? Are you going to be producing the information in electronic format only? Are you going to do it in both? If you're producing an electronic format, what format

40

is it going to be in? Is it just readable? Is it readable and searchable and so on, or are you going to get it in both?

And, as John mentioned, talk about cost sharing. Talk about cost sharing even with regard to imaging of paper documents.

I have been involved in cases in which the document production, when you've got a number of parties, routinely goes to an outside provider who images the documents and sends electronic copies to every party in the case. And the cost of imaging, rather than being born by each party separately, is shared by everyone and is a fraction of what it would otherwise be.

Six. Bring a qualified computer consultant on board the litigation team as early as possible. Now, obviously there are some cases where the budget doesn't allow that, and the consultant can be an in-house person. The difficulty, while you may have very sophisticated people in-house that can deal with all the IT issues, the trouble is getting their time and attention and getting them to dedicate themselves for days or hours to work on projects for one case as opposed to other demands being made by the -- the line people in the company.

41

So having an outside consultant - - this is music to Jason's ears, I'm sure, is very important - - particularly in the big case to help. This is something that you'll discuss with senior management, with your in-house IT people, whoÆll find what you need. You want to minimize the cost. But it's something to consider before you file the Complaint, before you file the Answer, when you're talking about document preservation, that's the time to think about, do I need an outside consultant? What help do I need from inside the company?

Seven. Never, never, never, never, under any circumstances, allow your adversary or your adversary's expert free reign to search through your client's digital files. Come in and search through your client's digital files.

That creates all sorts of issues with regard to security, with regard to -- when I say "security," I mean accidental deletion, altering or damaging of data. It raises all sorts of questions with regard to attorney-client privilege. It raises all sorts of questions with regard to confidentiality.

But, notwithstanding that, you should consider, when it's appropriate, the idea of

42

engaging - - jointly engaging a neutral outside consultant, an independent computer consultant, who can come in and retrieve data from both sides or as many sides as there are. Do the digital investigation, establish a database which he then gives to the lawyer for that party to review for privilege, for confidentiality, for relevance, and so forth. So, that you are producing the data. Not the consultant. But you've gotten it from a third party. There's no question about whether it's been done properly and it's been done completely and everybody shared the cost of it.

So, that is certainly something to consider. And in those circumstances, you can stipulate around issues of waiver of attorney-client privilege, and so forth.

Number eight. Voluntarily, in my view voluntarily produce in the first instance all of the requested documents from active files, from deleted files that can be easily retrieved. I think that's what they mean when they say "near-line data." Because you know when you press "delete" on your computer for an e-mail, it goes into "trash" and it can easily be restored from the trash. If you delete if from "trash," it goes somewhere else. It

43

can still be restored. If it can be restored easily, I believe you're under a duty to produce it.

Produce data from archives that are easily -- not easily that are accessible for business purposes to people in the company. If it's accessible for routine business purposes, even if it's a little bit difficult, I believe you're under a duty to produce that. Any other sources where the retrieval of or access to the information is relatively simple.

For example, if there are back-up disks, optical disks, that can be searched easily and -- and -- and scanned easily and searched easily, that should be a source that you go to for the ordinary production of documents.

If your adversary wants more - - they want back-up tapes where the data is stored in a linear fashion and it costs a tremendous amount of money and a tremendous amount of time to go back and pull all the data off that tape, only a small piece of which is responsible, ask for and demand a showing of special need, relevance and argue the issue of whether the benefit outweighs the burden -- the -- the -- the -- whether the burden outweighs the marginal benefit from this additional source of

44

documents. And if you are compelled by the Court to go into that, then suggest data sampling, which is merely a test run.

Let's take a tape from the key period, a back-up tape, and let's develop the protocol for searching that, put in the key words, let's develop -- let's get the data off that, let's see how many relevant documents we really got from the most relevant time period and how much it costs and how much time. And then, based on the results of that sampling, you have much better factual information for the Court to determine how much further you must go into inaccessible sources.

In the end, I know this -- all of this is a very controversial topic. In the end I think what's going to happen, and I'd be interested to hear what -- what John has to say about this. But I think that as time goes on, clients will become more and more sophisticated and will recognize the potentially huge litigation costs for retrieving data that has been archived or is on Legacy systems that can't easily be accessed, I think that sophisticated clients will begin storing all their data in readable and searchable forms. Not because it's relevant to litigation, but because it's

45

relatively easy and inexpensive to do that. And if you do it at the outset, it will cut down litigation costs.

MR. MADERER: Thank you, Jeff.

We will hear from John Sander.

John, as an in-house counsel, I know you're concerned with implementing your companyÆs document intent policy and converting and preserving privilege. How do you go about doing that both before litigation commences and after litigation?

MR. SANDER: Well, Bill, let me give -- let me step back for a second and give you a few reflections really on what electronic discovery means to in-house counsel and -- and then I'll get to the document preservation point.

You know, I had to put this diplomatically. This is not one of life's great pleasures for us, dealing with electronic discovery.

We are in an era now where there is a focus and I would say, in my jaundiced view, a fixation with obstruction of justice, document destruction, document preservation.

We read in the papers about Martha Stewart, about Arthur Andersen. For those of you in the employment area, you may remember the Texaco

46

case, which at it's root, really was a document destruction issue. And so, we live in a era where as in-house counsel we have to expect plaintiffs lawyers and prosecutors to scrutinize very, very carefully what we do in this area. And it's much more complex in the era of electronic discovery, where documents are being created, altered, destroyed in the every day course of business.

And it's not just a matter of Rule 37 sanctions or adverse evidentiary inferences, as bad as they are, for your client.

In-house counsel are increasingly being asked to testify about the completeness of document production. We are -- depositions are being taken. We are being asked to supply affidavits. There have been in-house counsel asked to testify before Grand Juries. So this - - it focuses the mind. Let me put it that way.

And it's an area of -- where occasionally there are great technically complex issues. And many of us of a certain age, and I can see Rosemary cringing over there. I won't mention a particular age. But I think a lot of us who did not grow up in this kind of -- in this kind of computer culture are not the most adept at doing this. And, of course,

47

we do have IT people available to us. But I'm always amazed at how even the IT professionals don't agree on some basic points, which is -- such as what data can be recovered? How long will it take to do it? What resources do we have to bring to bear? How much will it cost?

And you can get three different answers from three different IT professionals or, worse yet, as I've seen happen before, you'll get the same answer from the first three that you talk to. You'll then go ahead and respond to your document request. And then six months later, you'll locate another IT person who says, "Oh, I know how to recover that data."

Hopefully, by that time, you have not already submitted an affidavit or given testimony under oath that you've already produced everything that you had.

The other point which I think that we don't think of as lawyers, but as somebody who has a lot of contact with ordinary business people, it really is something different about electronic discovery and that is it's highly intrusive.

When I go into a business person's office and I say "give me your files on that Acme Widget

48

transaction, your paper files," that's pretty easy. No one really minds that. They expect that. But when I go in, usually with, you know, maybe with a couple of associates from a firm like Jeff's firm or some outside consultants and I say, "You know, we're really interested in you. We want to look at your e-mail for the last year." All of which is not categorized by subject matter.

So I'm not only looking at their e-mails on the Acme Widget transaction, but I'm looking at all their other business issues. I'm looking at their snide comments about the boss. I'm looking at the resumes they've sent out to headhunters. I may be looking at the notes from their spouse to bring home a quart of milk. I mean, we all tell people not to do this --

MR. LORELL: You donÆt do that.

MR. SANDER: Well, I wasn't going to say that. That's never happened at Schering Plough, of course. But people do use e-mail for personal reasons. You just can't stop it.

Every single company I know tells people not to do it, and that we will monitor and access your e-mail, but it doesn't stop people. It doesn't stop -- I would imagine anybody in this room for

49

using e-mail for personal reasons. So, I am not a popular person when I have to go in and -- and search people's e-mails or hard drives. And I know that's not a concern in the federal rules, but it's something that I think as lawyers we ought to be aware of when you know, we very politely, undertake electronic discovery.

And the last general point I'll make about this before I get to document preservation is I often wonder: Do we overrate the importance of electronic communications as evidentiary materials? I think we all -- we see this as kind of the treasure trove. This is the place where we will find out what people really think when they don't think people are listening to what they say. This is where the larceny lurks in the hearts of men. And I -- I'm sure that's true. But I also wonder if e-mail is not also the most casual, the most hurried, the most ill-thought out, the most uninformed communications that we engage in and I always think about -- a few months ago I was in an amusement park with my small children and I happened to sit down on a bench next to a guy who, literally, had his baby in his left hand, feeding with a bottle, so it was the left-hand, one-hand feed,

50

which for those of you who have kids know is a pretty tricky maneuver. And in the right hand he had the Blackberry and he was punching in messages with the thumb. And it's really extraordinary but I'm a worrier and all I could think about wasof is some day a summary judgment motion in a major antitrust case is going to die because of that message that he pumped in as he was feeding his baby and listening to the ferris wheel go around. And I just wonder. Are we -- have we caught up with the reality of electronic communications? Which is, you know, they may be very probative, but they also may be so -- you know, so uninformed and so -- so incompetent that they really should be barely admissible at all, but, anyway, I'm venting a little bit.

Let me talk about document preservation.

I think the single -- the single best thing that we can do as in-house lawyers to -- to minimize the problems our companies have in this area is to have a good document preservation protocol or policy. And I think if you are a large organization, this should be in writing. It should be something -- if you have more than one lawyer, for example, in your law department who is engaged

51

in this, I think it's something that should be in writing and people should be trained on this so there's a common understanding as to what we need to do and when we need to do it.

I think you can phrase these policies a number of different ways. But let me just tell you what elements I think we really need to have in them.

One is you've got to identify what the trigger will be for document preservation. That's something when I was a young litigator, 20 years ago, that was pretty simple. You just waited for that document request to come in and that was your trigger to say make sure you don't destroy any of these. I mean, the documents that they're looking for.

That, clearly, is not sufficient anymore. Sure, a document request, a subpoena, a civil investigative demand is clearly a trigger for document preservation, but I think a Complaint certainly is also, in this day and age, clearly a trigger for document preservation.

Then it gets harder. I think a lawyer's letter can be a trigger for document preservation, whether or not they ask you to preserve documents.

52

If you have a reasonable belief if they have made a non-frivolous threat or intention to litigate known to you, I think that you probably at that point have an obligation to preserve documents. It gets even harder than that.

Suppose, in the pharmaceutical industry, for example, we -- we routinely have adverse events reported to us. People's bad experiences with particular products. Where do I draw the line there? I certainly can't regard each one of them as a trigger for document preservation, but on the other hand, if somebody has had an injury after using our product and I have reason to believe that might lead to litigation, thatÆs probably a trigger for me to preserve documents. And decisions in that area can be very, bery tricky. IÆve even had a case where a saw an account in the media that led me to issue a document preservation notice. No, IÆm not going to tell anybody what that was, but it -- it -- really, the source can come from almost anywhere. It could even be word of mouth. If you have -- if you have something that puts you on notice that you can reasonably anticipate litigation, then you have to -- you have to act and you have to act quickly.

The second element, I think, is you've got

53

to designate who's going to be responsible for document preservation. It could be in an in-house legal department. It could be the attorney who's handling that particular matter or it could go higher. You could have the head of litigation, for example, be responsible for that. In a small law department, it might even be the General Counsel who's responsible, but I think you need to designate who is responsible so that somebody is both responsible and accountable for doing this.

Have a form of document hold notice drafted and ready to go. These issues always come up when you're busy with about fifteen other things and you rarely have the time that you want to sit down and -- and compose a document hold notice. Have one ready. Have a form ready. Have blanks where you can fill in the particular documents that you want to hold and be ready to go out with that immediately.

Send it out widely. It's often an art form to decide what you need to preserve and who needs to be aware of that. And there's no real rule I can give you to help you. But send it out widely. Send it out to the people you -- who receive it should also be instructed to send it to any of their

54

subordinates or colleagues who think they might have documents that are relevant, that are in the suggested areas.

Make it a simple, strong document, that ought to read like the Declaration of Independence, or, you know, the Magna Carta, or the '95 Theses. I mean, it shouldn't read like a typical lawyer memo, that they will not pay much attention to. So I encourage the use of bold face, capital letters, whatever you need to do to make sure that the business person understands this is something that's very serious.

You certainly need to specifically discuss electronic documents in a document hold notice. People do not understand that a document includes digital and electronic information unless you really hit them over the head with it and you have to spell out specifically what you're looking for. Specifically, what kinds of electronic information that you want them to -- to maintain.

As was mentioned, I think, by Jeff or John, a lot of people don't understand that you have to suspend document destruction policies when you are under an Order to or under an obligation to preserve documents.

55

Many business people will say to you, you know, "I sure hope that Complaint doesn't come in until after our document destruction period has expired." And they don't understand that if we're having that conversation, we have to preserve it right now.

And the other -- I guess the last element of that is give them a contact that they can talk to about this, and that's generally going to be the in-house attorney. And in appropriate circumstances you may have to call them up as well. As well as sending this memo or e-mail, or however you do it, you may have to call them up and specifically go over it with them to make sure that they understand it.

A couple of things that -- that I think people sometimes forget when they do this is you absolutely must bring your IT people into the loop on any document preservation notice because they have to be aware of the obligation so that if there is any automatic deletion going on, that they can suspend that.

The other thing that -- that I think people forget to do is sometimes you need to redistribute these notices because in -- in most

56

corporations there's a certain turnover. New people come in, people leave, new product lines change, so people's responsibilities change and it's not at all uncommon for a new person to come in and see, you know, a big bunch of documents and say, Gee, let me clean my office and get rid of this stuff and possibly violate an Order which they never received. Because,frankly, they did not have that responsibility at the time that you were sending out the notice.

So, I think those are the main thoughts that I have on document preservation.

And, you know, I thank you all for inviting me and I look forward to taking any questions that you may have.

MR. MADERER: Thank you, John.

Let's move on to Jason.

Jason, how do consultants like Kroll assist counsel in the process of electronic discovery? Will the company have the proper bankruptcy after they get your bill?

MR. STRAIGHT: Well, the answer, as anything in electronic evidence is, it depends. But -- but thank you. It's certainly a pleasure and an honor to be on this distinguished panel. I

57

appreciate the invitation.

I've certainly been set up very nicely by my fellow panelists. Although I don't expect to get any business from these guys because they don't need any consulting. I think they really have a -- have a mastery of the subject matter, which is great to see.

But what I spend a lot of my time doing is guiding counsel through this process and helping them set up their litigation-response teams and help them identify where relevant data is.

But one thing I think a consultant can be helpful in doing even -- even helping John or Jeff or John in these matters is serving as a translator. I mean, John mentioned you've got to bring the IT people into the process, and that's absolutely critical, but that's easier said than done because lawyers and IT people speak completely different languages and the role that we often serve is as translator and interpreter between the lawyers and the IT people because often they just completely miss each other.

So, for instance, this -- I don't know if -- you know, even some of these sophisticated guys may not have ever seen a server hard drive opened up

58

and see the templates. This is a hard drive, this holds many, many gigabytes of data. This would be considered a storage device that contains active data. You can also recover deleted data off of this server -- off of a server hard drive.

This is the -- I'm sure you've heard about these. You've read about them, but how many of you have actually ever seen a DLT tape? This is an archive tape. It holds hundreds of gigabytes of data. And there are many different types of these. There are DLTs. There are LTOs. There are eight millimeter dats. There are four millimeter dats. What does it all mean? The IT people are going to start throwing these terms around, expecting you to understand what they're talking about and most lawyers just don't.

A consultant will understand. And not only will they understand what these are, but they'll say, ôSure, we can handle it, send them to us. We can deliver back to you whatever data you're looking for from these various media types.ö

So, I will note these -- if any of you have been involved -- if anything is going to bankrupt a company in electronic discovery, it's these guys, these archive tapes. Most of your

59

clients are keeping way too many of these. Although the decision -- as John mentioned, the decision on what you can get rid of is very prickly and it's difficult to decide what's safe to get rid of so -- and, unfortunately, that is a question for counsel. A consultant can assist in making that analysis, but it's really -- it's a legal question.

So, those are the -- the interpretation role and the translator role is -- is -- is a major value add that I think a consultant can bring to these -- to these matters.

You shouldn't assume that your client's document destruction policy, document retention policy, excuse me, is being properly followed. I mean, certainly an important step is to ask your client what is your preservation policy? What's the policy for instance, when an employee is terminated or leaves the company?

ôWell, we have this written policy here that says we take that employee's hard drive, we reformat it and we put it in the queue to give to the next new hire.ö

So, there's no data on any old hard drives from terminated employees. Well, that's a nice policy, but you want to make sure you're talking to

60

the person who's responsible for implementing that who may tell you: Well, yes, that's the policy, but we've been overburdened for the last 18 months; we've been short staffed, so we've just been putting laptops of terminated employees in that closet over there.

That is something you need to find out early on in litigation rather than in a deposition of your IT manager. By the way, that is becoming a very common tactic in litigation. Deposing not only in-house counsel but -- but IT professionals as well to ask them, ôWhat have you done to preserve data in this litigation? What instructions have you received on your obligations here?ö

One way to avoid that whole mess is to -- is to have a consultant come in and do a -- have experts come in and conduct your data harvesting, your data collection, imaging hard drives.

Let the consultants provide the affidavits as to how the process was conducted. Let the consultants be deposed. Let them be in the hot seat over whether this was done properly or not. So that -- that -- that's a definite reason to consider using an expert.

The other thing is if data collection --

61

if the data collection process isn't performed properly, you can lose irrevocably information like meta data. Meta data is easily altered and it's important to make sure that your collection process is done in such a manner that even if meta data is altered during the process, that you're able to trace back to the original piece of electronic evidence and authenticate that piece of evidence.

Maintaining chain of custody throughout the collection process is important. And that's something a consultant will do as a matter of course.

The other, you know -- I can pull out -- I don't want to get too prop reliant here, but the devices -- you know, I have a Blackberry, I have a PDA because a PDA does things the Blackberry doesn't do, I have a cell phone that I can record little voice messages to myself on. All of these things contain data. Now -- that it's not available from any other source.

Now, in a lot of litigations this is not relevant. But you want to -- you want to make sure you understand what kind of data you're talking about, what the universe is of data, and what you need to do to collect that data. And a consultant

62

can certainly help with that.
Probably the biggest and -- and -- and -- I am being serious when I say this, Bill, that consultants really can actually save money in the electronic discovery process because we are able to apply technology to filter this vast universe of data that your client presents you with. The 200 archive tapes and 30 hard drives that you need to search. We can apply technology to do a number of things to reduce that data. Most notably, we can eliminate duplicate documents, so that you only have to review one copy of each document.
We can apply key-word lists to all of the documents in your universe and just give you the documents that take hits on that key word list to review. We can apply date filters.
We can pull data -- we have technology available to us that allows us to pull data off of these archive tapes in an efficient and relatively inexpensive way and focus just on the documents and the particular individuals that -- that you're interested in.
So, that's probably the biggest cost savings. And also through involving us early, involving a consultant early, you know, a consultant

63

will always encourage you to discuss with the opposing side the scope of discovery very early on in the case.
Your local rule here in New Jersey makes that a requirement, which gives you a head start on that. But that is, really, the best way to contain cost is to address these issues very early on in the litigation. And in the document production phase as well. Keeping the documents in electronic form throughout the process is critical.
There's no reason to go to paper anymore. You can produce electronically as the other panelists have discussed. And that can save you a tremendous amount of money. Various studies have been done showing that keeping documents in electronic form can save you 50 percent or more in the discovery process.
I'm going to stop there. I don't want to take too much of Judge Hedges' time. I don't think it would be a good idea to take the judge's time.
MR. MADERER: Thanks very much, Jason.
We saved the practical report issue for last, and that is how does the Court allocate costs for which you have a substantial digital production and sides cannot agree - - parties cannot agree on

64

the allocation of costs.
Judge Hedges, how do you go about that? And what are the standards you use?
JUDGE HEDGES: A couple of quick introductory notes before I actually talk about that.
My outline is in your materials and there's a mistake on page 51, so I'd appreciate your fixing it. It's in the ôconclusionö section, and it says "Date sampling" and that's wrong. It should be data, d-a-t-a, sampling.
The Second Circuit case I mentioned before was the Residential Funding case. It's cited at page 48 of the outline.
A comment before I talk about this. There is not much more at the Circuit level addressing cost shifting. As a matter of fact, there's basically none at the Circuit level addressing cost shifting. The only case that's really talked about electronic discovery is the Ford Motor case, which is cited in the material, out of the Eleventh Circuit. And, interestingly, there's an opinion out of the Court of Claims from last year that rejected a record retention policy of the government and -- as a sanction because information that should have

65

been preserved was not preserved, ordered the government to produce backup tapes. So, we're beginning to see case law at the appellate level. There isn't much.
Going back and talking about cost shifting. There are a couple of things you have to bare in mind whenever we're talking about cost shifting.
Number one, and this is something I continually say to lawyers, and lawyers don't seem to use much, is Rule 26.(b)2 of the Federal Rules, which has a proportionality rule built into it. It always amazes me when there are discovery disputes that attorneys don't take advantage of Rule 26.(b)2 and make arguments with regard to the need to limit discovery or impose some other type of controls on discovery because of a number of factors.
Second, and this goes toward your obligations under the local rules that Judge Arleo mentioned. Remember when you serve discovery requests or you produce discovery, under Rule 26G of the Federal Rules, you are certifying that you've done this in good faith, that you've done it not for purposes of delay, and the like.
It's something that can lead to sanctions

66

and there are some decisions cited in the outline that address sanctions for the failure of a party or an attorney, for that matter, to respond to discovery requests.

The most famous one now is out of the Southern District. For some reason, these all seem to come out of the Southern District. It's the Metropolitan Opera decision that's cited in the materials, where, among other things, the defendant, after the case started, just junked its computer system to avoid producing discovery. The result was there was a judgment of liability imposed upon them by the Court.

The other comment I would make is there is no explicit tradition in the Federal Rules of Civil Procedure that allows for cost shifting. The jury has basically come in on that. Everyone now says that the courts have an implicit authority under the Federal Rules to shift costs.

There are three cases I want to mention to you and we don't have much time. So I'll go through them pretty quickly. They're in the materials starting with page 28.

The first is the McPeek opinion decided by Judge Facciola, out of the District of Columbia.

67

What happened there and interesting from our point of view is it really isn't a cost-shifting decision, but it's a decision about how a judge can look into what is really a voluminous request for production of electronic materials from the government.

Judge Facciola borrowed a term from economics called marginal utility, which basically says, in our context, if there is an actionable event on a certain date, it's most likely that electronic information is generated on or near that date.

Judge Facciola proceeded from that premise and the other thing that's important for us to think of as lawyers and judges is that he's the first judge that really came out with -- in an opinion talking about this concept of doing data sampling or test runs.

And I would recommend that to all of you. Whenever I have electronic discovery issues, the first thing I'll try to do is figure out if there's a way to do data sampling before we have to get into voluminous discovery or we even have to address cost shifting.

The second opinion starts at page 35, mentioned before.

68

The first real decision that came anywhere on cost shifting was by Magistrate Judge Francis in the Southern District of New York, the Rowe Entertainment case. It did a couple of things.

First, it rejected the defendant's argument that discovery of electronic material was unlikely to lead to the discovery of relevant information. What happened there is the defendants only offered general representations that there wasn't anything there. More interestingly, they had already produced data that contradicted their arguments.

So, if you're going to make an argument against electronic discovery, be careful what your client produced before the day you come into court.

Second interesting thing. It rejected the argument of the defendants saying that everything important is always on hard copy. And we'll talk about that a little more in the Zooba Lake opinion.

The third thing Rowe Entertainment did, Judge Francis adopted an eight-factor test to determine whether electronic information should be made available and whether costs should be shifted. That's the first decision that really came out in this area. It's been adopted by district courts in

69

a number of cases.

The next big opinion, and it starts at page 35, and this is the big opinion in the country now, the Zooba Lake opinion by Judge Sherashone out of the Southern District of New York. One of four. And the last time I saw her I asked her if she's stopped, and I think -- she hoped she's at the last opinion at this stage. Very interesting case.

Again, it begins by rejecting the argument of the defendants that it had already produced responsive documents which consisted of 100 pages of e-mail.

Here's one of the arguments that was successfully used against the defendant. The plaintiff had 450 pages of e-mail. Pretty hard to say you produced everything in a 100 when the plaintiff has four times as many as the defendant's arguing.

Second argument. Interestingly, the defendant said: Look, we produced everything, but it was entirely likely that a lot of the information that the plaintiff wanted was on back-up tapes.

Stop and think about it. A defendant and an attorney cannot certify that they've produced everything when they haven't looked at back-up tapes

70

where relevant material was likely to be.

Judge Shimlen also began with the presumption, which the Supreme Court has stated and the Federal Rules really suggest, that the responding party bares the expense of complying with discovery requests.

Zooba Lake also rejected the assumption that there's an undue burden of expense whenever electronic discovery is involved. And, interestingly, and this is talked about before, she went into this concept of accessible or inaccessible data to determine whether information would be unduly burdensome or expensive to produce. Basically, suggesting if any materials is accessible, you never shift costs. Because it's kept in the normal course of business. It's used for business purposes. There's no reason cost should be shifted.

And last, what Judge Shimlen did in Zooba Lake, one is she goes through Judge Francis' factors in the Rowe opinion. She rejects some. She modifies some. She comes out with a seven-factor test. This is now the gold standard, if you will, for electronic discovery until we start seeing some Circuits going beyond that.

71

Let me just suggest one thing, if I could. Page one of my outline. There's a footnote that has a number of sources of useful information. I have two new ones to give you, both published recently. They're both treatises. One is called "Electronic Discovery in Evidence." It's published by Law Partner Publishing in Arizona.

The other is written by Joan Feldman who is a forensic computer analyst. It's called "The Essentials of Electronic Discovery" and it's published by Glassner Legal Works, which is right here in Essex County, I believe.

MR. MADERER: Thank you, Judge Hedges, and thanks to all our panelists.

(Applause)

MR. MADERER: As I said earlier, we do things efficientely in New Jersey. So, we're going to take our 15 minute break and please be back in ten minutes.

Thank you.

(Recess)

MR. HIMMEL: All right. Good morning, everyone. My name is Michael Himmel and it's my privilege to moderate this panel.

We have a distinguished Panel before us.

72

Chief Judge Bissell, Judge Brown, Judge Hayden, Judge Kugler, Judge Wolfson, Judge Chesler and Judge Pisano.

Many of us appear regularly before the District Court. Certain issues are turning up more and more each day. Hopefully, this -- what I'll call seventy five main interactive, where I will encourage questions from the floor will give us guidance in our future appearances before the District Court.

There are a number of topics we plan on covering. Let me give you some previews of coming attractions.

First, we're going to talk about certain jury issues. The concept of note taking. Is it good? Is it bad? What's the judge's practice? Another sub-topic under Jury Issues is juror questioning of witnesses through the Court. The practice of it. Is it good? Is it bad?

We're also going to talk about preliminary substantive charges to the jury about the case prior to the actual start of the trial.

And, finally, under Jury Issues, we're going to talk about the notion of charging the jury before summations.

73

We're then going to move onto the issue of whether there are truly fewer civil trials than ever before. And if so, what is the cause of it? Is it the expense? Discovery just keeps going on and on and on. Motion practice. Are there any alternatives? Abbreviated discovery and motion practice schedules. Or perhaps what they do in the Southern District in New York, pre-motion conferences with the Court prior to any motions being filed.

We'll also talk a little bit about the role of local counsel in this district as well as whether oral argument is still a useful tool or not.

And last but not least, we'll talk about the Feeney Amendment to the Patriot.

The Feeney Amendment was passed in Congress and signed into law by the President in 2003. It was designed to address a number of alleged deficiencies in the U. S. Sentencing Guidelines, mainly child victim offenses. However, it's much further reaching than that. And the question really is: Has Congress gone too far?

This amendment was passed without any input from the federal judiciary, without any input from the U.S. Sentencing Commission or from

74

organized bar associations, academians or probation officers. And has it limited the Court's ability to grant downward departures under the Sentencing Guidelines.

Those are some of the topics we're going to talk about. It's a lot to cover and we'll -- let's start right now.

On the issue of Jury Issues, if I'm a juror and I'm on -- I'm sitting on a jury panel in Trenton, before you, Judge Brown, and I want to take notes, it's a very complicated case. Would you allow me to take notes?

JUDGE BROWN: Well, I guess that would depend on which side of the hallway you're on because Judge Thompson has, for a long time, allowed jurors to take notes and also to pose questions of witnesses. And in 18 years I have done neither for a variety of reasons.

As far as note taking is concerned, we're looking for -- everybody else is taking notes. The judge is taking notes. The lawyer is taking notes. Why can't the jurors take notes?

For one thing, they have to keep their notebooks somewhere, and we have to keep control of them.

75

Secondly, they can't be necessarily watching the witnesses, and, third, in my courtroom everything is on tape. And, as I tell them, if you want to hear the testimony of a witness again, just ask. It can be played back. So they can listen again if they wish to do so.

And as far as questioning of witnesses, I haven't done that. My feeling is, first, we've got several lawyers who are paid to ask or not ask questions. They know the case far better than I do or the jurors do. And the sort of questions, well, it might tell us what the jurors are interested in. I'm concerned that a lot of times, even after you spend the time and effort, and you can't really minimize the time and effort, you have to tell the jury no, I'm sorry, you can't ask that question. Maybe with or without an explanation.

So, I have avoided those. But on some of the other issues, like preliminary substantive charge, I would give it if appropriate, but it's still a lot of work involved. Some of the case may be tossed out and some of the case may change. So aside from the general instructions on credibility and the like, I generally don't, but I do charge before summation. Okay. So, that's what happens in

76

my court.

MR. HIMMEL: Judge Chesler, what about in your courtroom in Trenton?

JUDGE CHESLER: My courtroom in Trenton is going to be almost exactly like Judge Brown's courtroom.

MR. HIMMEL: So, if I'm a juror and I have a question and the lawyers don't ask it, I'm going to go to my grave not knowing the answer to the question?

JUDGE CHESLER: That's correct.

On the other hand, it means that if you've had a stray idea which has no business being introduced into the courtroom at all and no -- no basis for it even being heard by your fellow jurors, then at least we're not going to have the trial infected by you voicing that particular idea and having the attorneys and the Court make rulings about whether or not a juror's particular idea of what is relevant is, in fact, appropriately to be posed to a witness.

MR. HIMMEL: Let me ask you this, though, Judge Chesler. On the issue of note taking. I'm not that smart. I can't remember everything and I -- I want to get it down. I don't want to depend on

77

someone else's recollection. I want to put it down as I recall. What's the downside to letting me do that?

JUDGE CHESLER: I think the major problem with taking notes is the fact that absent real substantial preliminary instructions in any case of even moderate complexity, the juror in fact does not know what particular types of information are indeed going to become relevant and important in determining the factual issues which are ultimately presented to the jury for consideration. Which means there is a tremendous likelihood that they are going to take notes and focus on issues and facts which ultimately are of no significance whatsoever, as opposed to paying attention to the witness demeanor and evaluating whether or not the manner in which they answer questions and their overall testimony has some reasonable degree of credibility.

MR. HIMMEL: Judge Hayden, if I'm a juror in your court, a complicated securities case, are you going to allow me to take notes?

JUDGE HAYDEN: Yes.

MR. HIMMEL: Why?

JUDGE HAYDEN: I'll talk to the lawyers first and most of the time they will agree. My

78

instructions will be that people are free to take notes. We pass out steno pads for that purpose with not a lot of paper in there. That's the old fashioned way. The jurors are told that at the end of the day they'll hand in their note pads, they'll get them back the next morning and they'll have them available during deliberations. The note taker or takers are not any more important than the other folks who are sitting on the jury. They will have no more weight. And everybody is told and exhorted to rely on his or her own recollection and perception of what went on.

I'm really drawing it from having used it and having found that most of the jurors do not take notes after the first couple of days. There's always one or two or three who don't take notes at all. There does not seem to be any inhibition in terms of body language and the way they get along between the note takers and the non-note takers. We destroy the notes after the jury deliberates. They don't take them out of the courtroom or out of the courthouse with them. I see it as a nod to the importance of the task, not so much the complexity, but the importance.

There are times - - there are cases that I

79

would never even mention taking notes to the lawyers or think about it. It just doesn't fit. I have not done it in criminal cases. I don't think I'm particularly interested in doing it in criminal cases at this point. But it's hard to sit there all day. I'd rather have a person doodling, frankly, and paying attention because that's how they work off their nervous energy than falling asleep and I haven't found it to be a hindrance and to at least a PR point and a sense of fostering attention-paying and seriousness, I found it to be a help.

MR. HIMMEL: Chief Judge Bissell, do you allow jurors to take notes?

JUDGE BISSELL: I do not and, most respectfully, I think that some of Judge Hayden's remarks support the reason not to.

If you have a trial with any duration and a juror takes some notes early, then they kind of taper off, does that mean when deliberations begin, somebody takes a look at his notes and has a very easily refreshed recollection of witnesses one, two and three, but less of a recollection as to the witnesses in the middle of the case, or even at the end of the case?

I think it's important to try to generate

80

as much as possible the uniformity of conduct and attention among the jurors. Now, I know that's not always possible, some are going to pay more attention than others. Some are going to doze and we have those risks and you canÆt avoid it. But the lack of uniformity in the taking of notes and the possible squabbles in the jury room as to who took the best notes, whose notes are accurate, whose weren't, who took notes on this witness and that witness or what have you, to me more imperils the propriety of jury deliberations then the benefits served by taking notes.

I also agree that it's very important that the jurors pay careful attention to the witnesses with all of their senses, including observing them. Observing the way a witness testifies, if he exhibits nervous habits or not. Is that nervousness or it could be natural for anybody in a strange environment or the product of fabrication, or the like. And you just can't do that if your headÆs down in a note pad.

I take very copious notes at the bench but that's for my own reasons, in terms of retrieval and I use it as an index to the transcript afterwards, if the daily copy is out. But I know that in doing

81

that, I will go for minutes and minutes and minutes at a time, without even looking at the witness because of the fact that I want to take those comprehensive notes, so the (inaudible) of the jurors have a little greater involvement in the process by taking notes, I think, is outweighed by its deficiencies.

MR. HIMMEL: Judge Pisano, do you allow note taking in your courtroom?

JUDGE PISANO: Yes. First, I make -- I make a judgment call on whether the case is going to be long enough or complicated enough that they might find note taking useful. And if I determine that the jurors would find it useful, then I do permit it.

I do not permit note taking during counsel's arguments, openings or closings, nor during the charge because they're going to get a hard copy of the charge. And I have found in post-trial interviews with jurors that they have been uniformly thankful of having had the ability to take notes. I haven't had a single problem with anybody having arguments with one another or relying too much on one juror's notes as opposed to another. I have not had a problem with that at all.

82

MR. HIMMEL: Judge Wolfson, if I happen to be down in Camden on your jury, are you going to let me take notes?

JUDGE WOLFSON: Yes.

MR. HIMMEL: Civil or criminal?

JUDGE WOLFSON: I've done both. And actually every instance that I've had, I've always asked the attorneys first if they have a preference. They've always wanted to do it. Both sides. I think it's a good thing. I also do what Judge Pisano does. I do not tell them -- I tell them that they can't take notes during the charge, during the closing, the opening. That's not the evidence. They do get the hard copy of the charge, so they don't need to do that. I tell them it's important to listen, instead.

I also give -- in my preliminary charge with some one like Judge Hayden, a fairly substantial charge on how to use your notes and that ôyour recollection controls.ö

The fact that someone takes notes and someone doesn't, no difference should be given in the jury room during deliberation. And I have found that even though they are allowed to take notes, they still ask during deliberations for the dirty

83

copy of a transcript.

I think note taking is a good thing. Maybe it's because of my own learning. I'm one of those people who learns best by taking notes and I always have. And I think there are going to be some people on the jury who may feel the same way. Some people are just good listeners and they prefer to listen and they can keep it all in. Others find by taking notes, it keeps things better in mind and also alert.

I feel very strongly about that, even though I do LiveNote, and I can look up on the screen at any point and see what the testimony is. I find I still take notes because it keeps me attentive to what the testimony is instead of phasing out, and I think that's important for some jurors and I have not had any problem with this and all the attorneys that have appeared before me have liked it.

MR. HIMMEL: Judge Kugler, I'm sitting on your jury and the plaintiff and defense lawyers are just not asking the right questions. I want to have one of my questions answered. Are you going to allow me to ask the question through the Court?

JUDGE KUGLER: Yes. And I do in criminal

84

cases, also, and I do it by telling the jurors that they have to put it in writing and give it to me and then I give it to counsel to read and I entertain any objections that counsel might have to it. And if there's no objection to it or if I overrule the objection, I will ask the witness the question. I do preface it all by telling the jurors in the beginning that they have the right to ask questions, but they should be careful.

Two things. Number one, they can only ask questions about the facts. I've had questions that the jurors, in essence, are looking for a legal conclusion from the judge and I don't answer that. I also tell them that it's unlikely that any one witness will have all the answers, "So the question that you may have, may in fact, be answered by a later witness."

But, with those in mind, I've never had a problem with it. I've had objections sustained. And I merely tell the juror that there's been an objection that's been sustained. Otherwise, it's asked.

MR. HIMMEL: When the juror submits the question to the Court, do the lawyers know which juror the question is coming from?

85

JUDGE KUGLER: Sure. Because the juror has to get my attention somehow. They raise their hand or they use -- somehow get my attention if they have a question. And I've talked to the jurors about it after the verdicts and they like it. They seemed to be more involved in the case when they can ask questions.

MR. HIMMEL: So, you allow questioning during the testimony as opposed to the conclusion of the testimony of a witness?

JUDGE KUGLER: I do. In fact, I tell the jurors that they have to ask the question before the witness leaves the stand. Because once the witness is done, we can't get them back.

MR. HIMMEL: Judge Hayden, what is your practice with respect to jurors asking questions?

JUDGE HAYDEN: Haven't done it yet, but I'm really intrigued. Sounds good to me.

MR. HIMMEL: Judge Pisano, what's your practice with respect to jurors asking questions?

JUDGE PISANO: I have not -- I have not gone into the area, myself. I -- I'm from the old school to the extent I think lawyers try cases the way they want to try them, ask questions that they want to ask and don't ask questions that they don't

86

want to ask. I have not had the experience of there being not enough questions. Probably there have been too many questions. And I suppose that fits, perhaps, into one of our other topics, of the death of the trial lawyer. I have not permitted juror questioning for the reasons that I've stated.

I also wonder how I would deal with it if Juror No. 6 were continually raising his hand asking questions of the witness. So I've stayed away from it. But I do admit I'm finding it interesting.

JUDGE KUGLER: It doesn't happen. They don't ask that many questions. And you can never tell before the start of the case in which case they'll ask questions.

I've had very long complex cases. They've asked no questions. I've had three-day personal injury cases and they've asked five or six questions. There's just no way of predicting.

JUDGE PISANO: The last thought. Your problem in going to your grave never having the question answered.

I talk to jurors after every trial and there are times when jurors will say, "Why didn't they ask Mr. Smith this? Why didn't they ask them? I wanted to ask this." And you can at least have a

87

dialogue, theoretically, about the subject matter and make the juror somewhat satisfied that -- that the inquiry would not have been stupid.

MR. HIMMEL: Chief Judge Bissell, do you permit jurors to ask questions of the Court?

JUDGE BISSELL: I haven't tried it yet, but I'm not opposed to it, either. I think I'd like to have a little bit more information on the State Court experience. There is now a rule in State Court. I guess it's 1:8-C, as I understand it, in which there is a format presented for the asking of questions. Written submissions to the judge at the conclusion of a witnessÆ testimony or before that witness leaves the stand, then analyze and a determination made.

I don't recall whether that rule is mandatory or elective before the Superior Court Judges.

There is a brief article about it, though, appearing in the Law Journal this past spring, about ten months ago. But I did find some things disquieting about that article. It was by an attorney named John Norton from West Orange. I don't know if he's here, and there may be people that know him, I'm not sure. But he indicated,

88

among other things, that as a result of those questions in a civil case. He significantly changed the nature of his presentation as he went ahead in order that somehow or other, to satisfy the juror or kind of read into the mind of the juror. Well, you may be doing that, for that juror who asked that question, but what about the other five, six, or seven that are sitting on the panel?

I get involved in many non-jury trials as a lawyer when, frankly, the judge took us in directions that none of us had ever contemplated. And I think probably without really thinking through what the true guts of the case were, as prepared by the lawyers. So, that kind of - that threat or shift in emphasis in the manner in which you try the case based upon one or two questions from a juror. And all of a sudden, they say "Oh, my god, they did this?" You know or something like that. I -- I don't think that's necessarily a good thing. So, I'd like to -- I try to keep an open mind on it. I think the system that's put forth in the State Rule is probably workable, but I'd like to see either some statistics or other articles come out in the future that would demonstrate what the experience with that rule would have been.

89

MR. HIMMEL: Judge Brown?

JUDGE BROWN: Well, as I'm sitting here and thinking about jurors asking questions, my first question to myself is, ôIf it ain't broke, why fix it?ö Because we have, by theory, at least two and probably a lot more experienced lawyers who know a lot and are being paid to know a lot and decide which questions to ask, which questions not to ask. And unless you subscribe to the idea that lawyers are stupid or incompetent, what would be added by this? I don't see the need for it. I mean, I've been meaning to ask the question to clarify a point if I want to. Beyond that, I think that the jurors are going to stumble into areas that the lawyers have intentionally stayed away from for either legal or strategic reasons. I don't see the need.

JUDGE KUGLER: But if it's -- if itÆs irrelevant, then you sustain the objection to the question.

JUDGE BISSELL: Right. So, you tell the juror, hey, you're a dummy.

JUDGE KUGLER: No. No. You don't tell the juror the basis of your sustaining the lawyers objection. So there's no need to tell them why you're sustaining the objection to their question.

90

JUDGE BROWN: I think youÆre changing the juror nature -- just instead of being the decision maker, the juror is now becoming an active participant. Sort of an ancillary counsel, and that gives me some concern as well.

MR. HIMMEL: Anything else from the panel on these subjects? Judge Wolfson.

JUDGE WOLFSON: Just a comment that Judge Kugler made a moment ago.

I mean, I have some concerns -- I have not done it, yet. Though I'm not convinced that I won't. But one of the concerns I have is when you make the ruling that you're not going to hear an answer to the question that you were asked, are they then going to dwell on why? Were they on the wrong track? Is it not relevant? Is there some other reason? And I don't want to have them begin to think of all the reasons why this isn't part of the case, which I think may be confusing.

I'd be curious, though, before you go, how many lawyers in the courtroom think asking questions is a good idea? How lawyers feel about it, if you would ask them that?

MR. HIMMEL: Does anyone want -- yes? True?

91

A SPEAKER: I've done it in a couple of jurisdictions. One of my partners had a month-long trial before a very good State Court trial judge in Middlesex County. After the plaintiff's first expert witness testified, the jury asked 26 questions. Twenty-two of which were very, very good questions. They reflected the fact that they hadn't actually picked up on what the expert had to say and it was important for the plaintiff, and that helped the plaintiff.

Now, you could say the plaintiff's lawyer did a bad job, the witness was not adequately prepared, but the quality of information that the jury had at that point was much better than if they hadn't asked the questions.

I mean, one of the issues -- I hate to step on the panel's time here, whether it systemically biases the trial in favor of the defendant because they go later? And while it is true if they get the drift of the jury wrong or just one out of six, or one out of eight or one out of whatever. If we're getting two or three of them, if you're doing your job, you're going to figure out how you're going to move your cases marginally to meet what seems infinite.

92

MR. HIMMEL: Yes?

MR. PEARLMAN: I've -- I've tried cases with -- where jurors did ask questions and I find it very useful. I find that they ask very few questions, but the questions that they do ask are helpful. Sometimes because they're things that lawyers didn't ask that perhaps they should have asked. But more than that, it's useful because it helps the juror get an answer to something the juror's concerned about and it, quite frankly, helps the lawyer.

With respect to Judge Bissell, I think it does help the lawyers to understand what concerns a juror. It may be something that is important. It may be something that is fundamental to the case. It may not be, but I think it's very useful for an attorney to know what's concerning the jurors, just as it's useful for an attorney to know what's concerning the judge in a Bench trial or a panel in an appellate argument or a judge in a motion.

JUDGE BISSELL: Peter, how long has the State rule been in effect? Do you know, specifically?

MR. PEARLMAN: Relatively recent, within the last couple of years. My experience has been

93

once -- twice in State Court and once in Federal Court.

JUDGE BISSELL: Apparently there are no statistical studies out as a result of any long term use of the rule, is that correct?

MR. PEARLMAN: That's -- that's my understanding. I'm not sure how they would statistically deal with it. But, no, I haven't seen any studies on it.

MR. PEARLMAN: Right, Peter Perlman.

MR. HIMMEL: Yes?

MR. GREENBAUM: I'd like to share a little information about the state ruling.

MR. HIMMEL: Mike -- Mike -- would you ask him to --

MR. GREENBAUM: It was in effect --

THE REPORTER: Ask them for their name. Ask him for the name, first.

MR. HIMMEL: State your name.

MR. GREENBAUM: Jeffrey Greenbaum. It was in effect now a little over a year and it was preceded by a pilot program, on which there was a statistical analysis done and there were questionnaires given out to lawyers and to judges and the jurors after each trial, with probably ten

94

or twelve judges around the state and there were many judges, when they started out, that were very reticent about the questionning by the jury, but uniformly when they all went through it, they all loved it and recommended it to the Supreme Court.

MR. HIMMEL: Let's move on to the subject of giving preliminary substantive charges to the jury prior to the start of the trial.

Has any member of the panel ever done it?

Judge Pisano?

JUDGE PISANO: Yes. I give a limited instruction at the beginning of the trial to give the jury an idea of what the -- what the legal landscape is. It's always preceded by a disclaimer that the charge at the end of the case will be very detailed and will control the deliberations.

And I limit the first instruction to pretty much what the elements of the -- what the claims are. Is there an affirmative defense? If so, who has to prove what? And I try to keep it very short. But, it does give the jury the benefit of what the general legal standards are.

MR. HIMMEL: Do you find that it allows the jury to focus better on the evidence?

JUDGE PISANO: Yes. They -- again, in

95

discussing cases with jurors, they have always told me that they found it helpful to have some advance knowledge of what the -- what the legal standards were. And I do it in criminal cases as well. What the elements of the charge are, et cetera, et cetera.

MR. HIMMEL: Judge Brown.

JUDGE BROWN: I have done it a few times with agreement of the counsel. And I'd like to do it a lot more. The problems that I find are, first off, it may take a substantial period of time to get an agreement.

Secondly, there may be aspects that will no longer be in the case at the end of motions. And, third, whereas Judge Pisano said, we're going to have to tell the jurors to disregard what we said before when we send in the final charge. Theoretically, I think it's a good idea, and practically, I've found a lot of difficulties with it, so thatÆs why itÆs rarely done.

JUDGE BISSELL: I have a couple of thoughts on that if I can back-track just a minute.

Our jury utilization committee collected some data and responses from the judges, themselves, last year and came up with, among other things, with

96

a table of responses. I'd just like to take a moment and share those with you, not only on this topic, which is particularly interesting, but the two that preceded it.

With regard to juror note taking, the first question was asked, "Do you allow it?" and the judicial officers that responded -- these are judicial judges only, fifteen said yes and eight said no.

"What is your opinion about this practice?" Thirteen thought it was favorable and nine said unfavorable. That means presumably one out of two ahd a different opinion.

In regards to the jurors questioning the witnesses, eight do it and 15 do not, and the opinion on the practice is with seven in favor and 15 unfavorable. So, presumably that pretty much dovetails.

But, listen to this. On the question of "Mini substantive pre-charges" as we talked about here, six said that they did it and fourteen did not. Twenty, however, felt favorably about the opinion and three did not. So, I think what that means is that this is an idea that is, at least, kindled and under consideration.

97

Now, I don't know if in seven or eight months since this survey was run whether there have been any significant changes in the practice of those judges. I do not do it. I am a bit concerned about potentials of inconsistency between a pre-charge like this and the ultimate instructions to the jury, particularly in a criminal case.

I think another thing you can't lose sight of here is that if the attorneys give good opening statements, and they certainly are permitted to lay out to the jury the nature of their claims, and even at least dust the legal issues or the issues which they -- of which those things involve and which the evidence is going to address, one, I think that's probably the best deal, of course, because they know their cases better than we do.

And, two, it basically keeps us out of the case at that point and until the later stages when the real issues and the real claims that are going to the jury are taking shape.

MR. HIMMEL: What about the notion of charging the jury before summations?

In civil cases I like it. In criminal cases I don't like it because I get -- because the government gets the last word in. So where am I as

98

the defense lawyer?
What is the practice of the panelists?
Judge Wolfson?
JUDGE WOLFSON: I do it in both civil and criminal. And, in fact, in each of the cases I ask the attorneys first and then I just won't do it again, you know, unilaterally. And in both civil and criminal, they've all agreed that they prefer having the charge first. They like to incorporate it, then in their summation they're not going to be subject to criticism that somehow they're misstating the law. In fact, sometimes they use a power point that takes it right from the instructions.
MR. HIMMEL: What do you do to remedy my concern that the government's going to get the last word in?
JUDGE WOLFSON: Well, the only thing I do is after they're all done, then, you know, I will spend a few minutes telling them, ôOkay, now you're going to start your deliberations, recall this -- this is the verdict sheet. We'll go through all that. If you have a question, you'll approach me.ö -- some of those basic type of charges we give at the end so that I'm still the last one speaking for a couple of moments before they go in.

99

MR. HIMMEL: Judge Pisano, your practice?
JUDGE PISANO: Exactly the same.
MR. HIMMEL: Judge Chesler?
JUDGE CHESLER: I haven't used the procedure, but I think it could be a very good idea and in an appropriate case, if the parties are inclined to want to proceed that way, I'm certainly willing to do it.
MR. HIMMEL: Judge Hayden, do you charge before summations?
JUDGE HAYDEN: Case dependent, yes.
MR. HIMMEL: Anyone else want to be heard on that?
JUDGE BROWN: I do it in both. I started doing it several years ago and I found it very effective. It allowed the lawyers to tie their closing arguments into the law without any dispute as to what the charge was or what's being allowed to the jurors to follow it better.
I think it also allowed me to explain what can be rather dry and boring, and give them a copy of the charge. You can tell them what the law is going to be, saving, as Judge Wolfson does, the analysis of how you go about your business, how do you fill out the verdict sheet, so that the lawyers

100

aren't the last people that they hear. I find it very effective.
MR. HIMMEL: Yes, Judge Irenas.
JUDGE IRENAS: I do a combination. I give the lawyers the written charge before summation and I allow them to use it. They can actually read it to the jury if they think it's relevant -- I allow them to use it, but I don't give it until afterwards.
And my reason is something that you sort of alluded to. This flamboyant plaintiff's lawyer or the -- or Grady O'Malley for the government (laughter) gets -- gets the last word, and I don't think that telling them about the verdict sheet is enough of a cool-down period.
Listening to me drone on for 45 minutes could cool down anybody. And so if I get them a little bit cooled off when they go into the jury room, but I recognize the idea that the lawyers shouldn't be -- you know, shouldn't be in their closings confused as to what the charge will be. So I give them the written final charge. We have a charge conference. We put the objections on the record already, before the closing. It's all done. And either way, I think that rules require that the

101

lawyers have the charge.
JUDGE IRENAS: Yeah.
JUDGE HAYDEN: Yes.
JUDGE IRENAS: -- I don't know if it has to be in writing, but they certainly have to know what the charge is going to be. But I go a step further. I actually give it to them. I mark it as an exhibit, a court exhibit, I call it C-1 or C-2. I give it to the lawyers and they sit there. Frequently, theyÆll sit there and read right from it if they like something in it, and use it. But that's --
JUDGE WOLFSON: But, Judge --
JUDGE IRENAS: -- that's what I do.
JUDGE WOLFSON: But, Judge Irenas, that's the problem, though. You'll have the attorneys picking and choosing which parts they want to read before they've gotten the whole charge. If they've got the benefit of the whole charge --
JUDGE IRENAS: Well, they have the whole charge.
JUDGE WOLFSON: No, no the jury's -- the jurors don't, yet. So, you've got the attorneys getting up and picking out the -- like this part, this part, and of course when we instruct the jury,

102

it's considered the charge as a whole and, ôdo not single out one instruction.ö So if they've heard it all, when they heard the attorneys, they know parts were being picked out.

JUDGE IRENAS: You see, I consider they hear very little of what I say. I'd like -- I'd like to put it -- I did one case where I projected it on a screen, like, with a bouncing ball, and I read it as it was being projected on the screen, because the case was a 135 page charge, but I wanted them to get it through their eyes, not just through their ears.

But I give a written copy, as I think you all do, or most of you do, to the jury, and they've routinely said to me they love having the charge in there, and they can get it.

I give them a strong charge about they've to -- to consider the whole charge and they can't pick out any one part as being -- you know, the whole thing, the usual from the benchbook but, I think reasonable people that can disagree with that. But I thought that was at least a half way solution where part of the problem, at least, is dealt with. Whether the part that Freda talks about is dealt, with, that's a different story.

103

MR. HIMMEL: Let's move on to our next subject, whether there are fewer civil trials or not. We have a lot to cover.

Here's the statistics. Since 1976 federal civil lawsuits have increased 75 percent. Civil trials have decreased 45 percent.

Judge Kugler, do you find there's fewer civil trials in Camden? And, if so, how do you account for it?

JUDGE KUGLER: There's no questions there are fewer civil trials. Not only in Camden, but across the country. In 2003 only 1.7 percent of our civil cases actually went to trial and 4.1 percent of our criminal cases. Criminal cases are different. I mean, the sentencing guidelines have had a lot to do with that.

But why? That's a great question.

The ABA has a commission they have established to study this. They just had a Vanishing Civil Trial Symposium in San Francisco in December.

The -- the reasons that you hear mostly are that ADR is too widespread. I think that's ironic. There is just too much judicial pressure put upon lawyers and litigants to settle or go

104

through ADR. We impose too many artificial barriers on you, particularly in the federal system because we -- we have the initial scheduling conference, we have settlement conferences, we have the joint final pretrial conference with the Order, which is a herculean undertaking. We understand that. But all these barriers I think lead to one thing and one thing only. It is just too damn expensive for your clients to try cases anymore.

We've had this discussion and I know Judge Irenas has some very good ideas about this because when you -- when you look it over from a historical perspective, from 25 or more years ago -- we were talking about this the other day. There weren't any trials that went on four and five weeks at a time.

JUDGE IRENAS: Go down south today.

JUDGE KUGLER: Yep. There weren't --

JUDGE IRENAS: They'll handle three trials in a week.

JUDGE KUGLER: There weren't two years of discovery and a hundred depositions in a case in those days and I know that the rule makers under the Federal Civil Procedure keep restricting the amount and the types of discovery you can do because of that concern. That it has just become too expensive

105

to do that.

JUDGE IRENAS: Your first panel should have taught us all something.

JUDGE KUGLER: Yes. Exactly.

JUDGE IRENAS: Read the cases. They're talking about 150,000, 300,000, 400,000 dollar costs --

JUDGE KUGLER: Right.

JUDGE IRENAS: I don't know how many of you have had civil rights cases, but I try to settle as opposed to trial, and the plaintiffsÆ lawyers says "I now have $95,000 in the case. I can't settle because the caseö -- he'll even tell me, ô- - because the case is only worth $50,000. And so how can I settle the case when I already have $95,000 -- I had a Cliff Van Syok case with 26 days of depositions of one witness. One witness.

JUDGE KUGLER: The plaintiff --

JUDGE IRENAS: The other side paid back in kind, though. Thirteen days an another witness, 12 days on another witness, the whole system. And now with electronic discovery, it's just too expensive.

A lawyer sits down. Why should I spend a million dollars when maybe I could settle for a half million?

106

JUDGE WOLIN: The problem that he illuminates, why a lawyer has $95,000 in a $50,000 case, is the burden of fee shifting.

I've had lawyers come before me and say "I don't care if my client gets a dollar, I've got a $100,000 in costs." So, fee shifting and statutory fee shifting has just turned the system upside down.

JUDGE BISSELL: The argument, I think, in truth, though, is an example or examples of why cases do go to trial. Mainly because the lawyers got too much in it and theyÆve got to go to trial and take advantage of the fee-shifting statute. Unless, of course, they would go ahead and settle it in such a way that everybody compromises a little bit. So I'm not entirely sure that that argument cuts to the heart of diminution of trials. To me, it might indicate at least one factor that would generate a trial where it might not otherwise occur.

The -- Judge Debevoise and I share a lot more common ground than sometimes it appears, I guess, given our political leanings, but I -- I think weÆre both in agreement on this.

A VOICE: It's too conservative.

JUDGE BISSELL: The -- the reduction of the number of jury trials isn't necessarily bad. We

107

now have available, through our court programs, a real menu of opportunities for resolution.

Our arbitration program - - our mediation program which I happen to think is under-utilized, regrettably. That's mostly our fault. Settlement conferences at the levels of both the magistrate judges and the district judges.

A summary judgment practice, which has been well endorsed by the Supreme Court of the United States and my understanding is that we are not reluctant to reply and, frankly, as far as settling a case is concerned, I still believe it's the best resolution and there's nothing necessarily inherently more fair about a trial, and the vagaries of the results you're going to get before a jury, then in negotiating settlement by the people who know the case best.

So, the reduction in civil jury trials is a reality. But I prefer to think it's because of the fact that there are more and equally good options to seek resolution.

JUDGE KUGLER: There's a lot of -- Mike, there's a lot of interest in the academic community right now, and there's some articles coming out this year about the role of Rule 56, summary judgment,

108

and the decrease in civil trials and it's their -- their opinion that we grant summary judgment too frequently. I'm not so sure that's true, and I'm don't -- I'm not real comfortable with the statistics that they rely on because we don't keep good track in the area of statistics on summary judgment. But that -- that undercurrent is out there about Rule 56 and its effect on the number of civil trials that we have.

MR. HIMMEL: Do you allow summary judgment motions in a non-jury case?

JUDGE KUGLER: I am strongly considering prohibiting them in a non-jury case because I think they waste time. I mean, invariably, it's this thick. And you want us to read it and we read it. But I think your time and your effort and your client's money is better served just to come on in and put the witnesses on rather than me reading the affidavits.

MR. HIMMEL: Judge Brown, do they waste time in our jury system?

JUDGE BROWN: It depends. I mean, we've all seen B.S. summary judgment motions and responses.

But I find that the summary judgment and

109

Rule 12 offers the assistance of a very valuable function in terms of either disposing of a case that there is no basis to go forward or narrowing a case or disabusing the party who feels that this is a meritless case of that unjustified view. So I -- I value it.

Even in non-jury cases, I think if we find out whether or not there is a triable issue, before I have to try it certainly saves me a substantial period of time.

And as far as the question of the disappearing civil trial. To paraphrase Mark Twain, I think the reports of death are highly exaggerated. At least in my court. I've been doing a fair amount of trials.

We do have a very active ADR system, which is good. And as long as we understand that a trial is not a failure of the system, it's a constitutional right.

The Court may mediate, persuade, help them find common ground, but in my view no litigant should ever feel that the Court pressured them to settle.

MR. HIMMEL: What about a situation where the plaintiff, as an individual, has limited funds,

110

litigating against a big corporation?
Is there any way to limit the discovery in the motion practice so the plaintiff can have his or her day in court?
JUDGE BROWN: I think that's what our district and magistrate judges do on a regular basis.
MR. HIMMEL: So, you don't find that some cases are just being litigated to death with respect to motion practice?
JUDGE BROWN: If they are, I think it's because somebody hasn't brought it to the Court's attention or it hasn't been raised during the course of the scheduling conferences that we regularly hold.
MR. HIMMEL: In the Southern District in New York I alluded to earlier, they have a pre-motion conference between the judge and the lawyers before any motion is carried to trial. Have any members of this panel been confronted with that?
JUDGE BISSELL: I think our magistrates do that on a fairly regular basis. At least mine does. And that as discovery has progressed to a point where a summary judgment motions might be right, that conference takes place and a timetable for

111

summary judgment motions or cross motions to summary judgments is usually set and the rest of the case is put on hold.
Perhaps there are still expert witnesses to be deposed, but they're not that critical maybe to a summary judgment motion, or the finalization of that burdensome pretrial order can be put on hold so that the motions could take place.
So either by rule or by practice it takes place here, but probably more often before the magistrate judge in the second or third scheduling order than before the District Judge itself.
MR. HIMMEL: Any questions --
JUDGE IRENAS: Going back to your question about non-jury trials, summary judgment?
MR. HIMMEL: Yes.
JUDGE IRENAS: I have banned Daubert hearings in pre-trial -- excuse me, in non-jury cases.
I consider it an utter waste of time and duplicative. And furthermore, when I hear the actual testimony and context, I'm likely to make a more informed Daubert decision anyhow. So that's at least one context where I will not -- I write the lawyer when the motions come flying in. I just

112

write them a letter back dismissing the motion without prejudice. I'll hear the testimony and I'll make my Daubert decision and my Rule 702 decision when I hear it in context. I'm not going to hold two trials. One will be enough.
MR. HIMMEL: Yes?
MR. DRASCO: Mike, I participated in the Vanishing Civil Trial Symposium that Judge Kugler talked about, and that symposium took place the week that Newsweek had an issue called "Lawsuit Hell" and it talked about -- it included -- some of the commentators talked about juries not being capable of deciding the kinds of complex issues that come before them today. I -- I -- and that was disturbing to, I think, to the people who participated in the symposium.
I'd like to hear the comment from the judges as to whether, assuming we can get by Rule 56, and we have enough money to finish discovery, are the -- are juries today capable of, as they traditionally have been, in deciding our cases?
MR. HIMMEL: No question they are. Yes.
JUDGE HAYDEN: Yeah. Sure they are. I mean, we're also talking about the art of being a trial lawyer. Isn't that the other end of the issue

113

and isn't that precisely what that evokes? If somebody chooses to be a trial lawyer or winds up being a trial lawyer, then that's part of a trial lawyer's job. There's one trial lawyer who's not here because he's on television, and I send his greetings. He said, "Take a moment, work it in," and I just did. But I think all of us who have been catching glimpses of our -- of our homegrown trial lawyers and their colleagues on Court TV over the last couple of months would agree with me. It's a difficult, honorable, incredibly wearing and demanding art and part of the profession.
One of the things that is not happening is feeding in young and maturing lawyers into the queue that can be mentored and sent out to try cases. I think it was a very good connection with our earlier panel. Would electronic discovery be this strong, this massive explosion, if trial lawyers were around saying, "We're never going to get it in, that has nothing to do with anything, the hell with it.ö As opposed to the trucks that come with the 56 motions into chambers. So, I just throw that out for -- for thought.
MR. HIMMEL: Judge Chesler?
JUDGE CHESLER: Picking up on what -- what

114

Judge Hayden said.

It strikes me that indeed one of the major reasons for the vanishing trial may be the vanishing trial lawyer.

I have had on any number of occasions a sneaking suspicion when I sat down with senior partners in major law firms in this district at final pretrial conferences and reviewed the final pretrial orders that have been submitted to me, that these senior partners had progressed through the entire partner track being litigators without ever having tried a case.

And, quite frankly, that despite the -- I mean, one reason why litigants settle is, of course, because trial frequently is a zero-sum game for large amounts of money. But one second -- a second component of that may very well be that you have supposed trial attorneys on both sides who have never tried a case and, quite frankly, do not want their first jury trial to be an experiment involving fifty or a hundred million dollars.

JUDGE BISSELL: I'd like to comment on Dennis' question about dealing with the juror's grasping of the issue. I think it probably does reflect on the case that's well tried. I tremble

115

when called upon to try a patent case in front of a jury because I said, gosh, how can anybody ever grasp this? But the point is, the patent trial law firm is about as meticulous and well organized and careful in the presentations and using graphic and visual aides decades before anybody got to see it. Many of us might learn from them in terms of how to really try a complicated case in front of a jury.

And, frankly, although over the years, and I'm sure my colleagues are in the same position, there have been times when a jury verdict has come down, that it is not the verdict I would have reached.

In almost 25 years on the State and Federal bench, I've only granted five, I think, judgment NOVs and on two of those the Court of Appeals reversed me and said that the jury got it right in the first place.

So, I think they, one, are capable and, two, strive very hard to get it right and to render a just verdict and they usually do.

MR. HIMMEL: Let's move on to oral argument. Is it still a useful tool?

Judge Wolfson, what's your practice in allowing oral arguments discussions?

116

JUDGE WOLFSON: I decide whether to grant it or not. I do hold oral arguments. I think I'm in actually the minority, certainly in Camden, by having a regular return date. The actual return date that is listed on the motion and letting attorneys know that if I do want argument, it is going to be held on that date, and they should expect that.

I reserve oral argument for cases where, I think, one, perhaps the papers weren't as good, and I need to bring them in to discuss some of the issues. I think they haven't really hooked on an issue that was there, that I want to make sure they're aware of, maybe we need some more briefing.

When I think it's a very important issue and I want to give them one last chance to get their views out there and I will admit I use oral argument for settlement purposes.

I find that if I can decide the motion on the record, right there, they know where we are. I can usually bring them back in the robing room. We're going to have a settlement within a week because they know where they are. They need that motion decided. And that's very helpful. And even if we need -- if I need to reserve for some reason,

117

certainly the comments I've made, the questions I've alerted the attorneys to what the weak points are and where it's likely to come out, and they want to undertake settlement before they even get that decision.

So, I think it's very useful.

MR. HIMMEL: Judge Pisano, what's your position?

JUDGE PISANO: I -- I do not have oral argument in every case. Generally speaking, if I have questions or doubts as to how the motion ought to come out, then I will bring counsel in because that can help me in making a decision.

What I'm careful to do, though, is to advise counsel before they come in as to whether I think I need oral argument only on specific aspects of the motion, so that they don't spend a lot of time preparing for the whole thing and then have only a little bit of it brought forward.

But it has, although I don't as a general rule, have oral argument on every case, it has actually changed my mind a couple of times.

MR. HIMMEL: Do you find it a useful tool for settlement purposes?

JUDGE PISANO: Oh yes. Of course.

118

JUDGE IRENAS: My problem is that if you're the non-moving party, you don't have that second bite. You have the moving party has the moving brief and the reply brief and you can't get before the Court because most courts do not allow a SUR reply brief and maybe there is something important that you want to get before the Court on oral argument. And yet I would say certainly at this point a majority of the district judges are not allowing or not permitting oral argument. So you don't have an ability to respond to the reply brief from the moving party.

JUDGE WOLFSON: Well, you're probably not shy about responding if you call the Court and say, ôIs there argumentö and they say, ôNo.ö Saying then ôMay I submit a two-page ûô

MR HIMMEL: Right.

JUDGE WOLFSON: -- sur reply to address something that was brought up in their papers?ö And if you say it in that way as opposed to another brief.

MR HIMMEL: Right.

JUDGE WOLFSON: But something very short and directly to the point, you would have wanted to address at oral argument. I don't know. I think

119

most of us would be agreeable to that.

JUDGE BROWN: Yes. As far as oral argument is concerned, I do use the motion calendar today as a control and everything that looks like it's substantive I'll determine whether oral argument will be helpful to the Court. I can do it by telephone if it's more convenient to the parties and I -- it doesn't have to be on that motion day, sometimes later in the week at one o'clock I can do that.

I find it useful as a control not only for settling purposes but also for status purposes. Okay. WeÆve resolved this motion. Let's start talking about a trial date, letÆs get the trial and the pretrial order in, and the like. I think it's very helpful for that purpose. So, I do allow a fair amount of oral argument, but, again, focused on areas that I think it would be helpful.

JUDGE BISSELL: I similarly am selective in the choosing of cases for oral argument. Although I think I have a general presumption that if a motion is dispositive, and that includes not only summary judgment motions, but probably six motions, motions to dismiss for lack of subject matter or into jurisdiction, motions to remand to

120

the State Court or motions to transfer to another court, that I normally am going to permit oral argument on those types of motions. Not in all cases, but in thatÆs sort of the presumption in which I operate. And when I receive that calendar from my courtroom deputy, about two weeks before the formal return date, which I also preserve, my clerks and I go over it and we make the choice then, a decision then, as to which of those cases are going to be decided on the papers, which of those cases is going to be handled on oral argument and then the lawyer is promptly advised. So that at least more than a week in advance of the return date or the adjourned or adjournment date, as the case may be, they know they're coming in for oral argument or not.

One point, although this may seem a little Polyanic, but I do believe it. Not all lawyers are as skilled in all aspects of litigation. Some are excellent writers and not particularly good on their feet. Others are -- others are modest or mediocre writers with very good oral elegance. And, I think, frankly, the client ought to have the benefit of what that lawyer's strengths are. Particularly in a motion it may very well mean either the success or

121

the failing of this case. So that I think for that reason - - that's another good reason to support oral argument in critical motions.

I also agree that it's a chance for us to ask questions on the points that really concern us. And although I don't do it in advance, I guess I don't perhaps grasp it as quickly as Joel does. But by the time the morning rolls around, I will often ask the lawyers, sometimes with a call and even before they come to the well of the court, "Counselor, I'd like you to focus on these -- these issues. The others really don't need expounding here."

So, they have a half an hour or an hour maybe to organize their arguments in that respect and it can make the difference.

I have changed my mind, particularly on a close call with regard to summary judgment either on the bench or on later reflection. It can make a difference.

MALE SPEAKER: I'm curious as to how our judges feel about a practice adopted in some of the districts in which the judges issue preliminary written or sometimes oral opinions before oral argument usually three days or a week before oral

122

argument. Then the lawyers that come in to -- invited to address the issues as framed by the preliminary bidding?

MR. HIMMEL: I think we're running out of time, so I'm going to move on to the Feeney Amendment We all need to cover local counseling.

Everybody in this room realizes how important it is to have local counsel in New Jersey. I know it's a strong view of Chief Judge Bissell. Somehow you have to help us communicate when this is a lawyer from another state, how important it is.

The Feeney Amendment. It has been suggested that the real effect of the Feeney Amendment was to make it more difficult for defendants to obtain downward departures from the U.S. District Court and to sustain it on appeal.

One of the aspects of the Feeney Amendment which was passed last April was it expands the authority of the appellate courts to give downward departures under a de novo standard of review. And one of the phenomenons that has developed is Judge Weinstein in the Eastern District of New York. He has actually now video-taped certain of his sentencing hearings because he wants the Second Circuit to get the full flavor - - the full flavor

123

of the sentencing. Not just the tangible, but also the intangible as well.

Circuit judges have written and expressed their outrage because now judges that grant downward departures are going to be identified. They have to be identified I believe by the Chief Judge in the district and by the U.S. Attorney and those names are then sent to the Sentencing Commission and, certainly, that is within the purview of the House and Senate Judiciary Committee. Those names also go to the Department of Justice.

So, a lot of judges have been outraged as to the recent development since the onslaught of the Feeney Amendment.

Judge Hayden, what's your view of the Feeney Amendment?

JUDGE HAYDEN: I think it touches every single person in this room whether or not he or she practices criminal law.

The Feeney Amendment required, and it was added on to the Patriot Act and went into effect on April 30th of last year. That within 180 days of it's passage, that the U.S. Sentencing Commission would promulgate guidelines, quote to ensure that the incidents of downward departures are, unquote --

124

Judge Bissell, what would you say is ôsubstantially reduced." No questions, it's not -- you know, it's not maybe it'll happen. It's supposed to happen. And in support of Congress' concern, the departures that were being granted might be undermining the goals of the Sentencing Act. The Congress cited Sentencing Commission data that showed greater downward departures granted by District Courts had grown from 5.8 percent in 1991 to 18.3 in 2001.

The material I'm going to share with you regarding the Feeney Amendment you can get at the U.S. Sentencing Guidelines site. USSC, U.S. Sentencing Commission.gov and look for the press release from October of 2003.

The highlights of the Amendment that I want to share with you, very quickly, are as follows:

"The Amendment prohibits downward departures based upon acceptance of responsibility, minor role in the offense, gambling addiction or legally required restitution." The last two might go right to the heart of any white collar cases. People are -- are -- are involved in now.

The Feeney Amendment limits the availability of downward departures based on family

125

ties and responsibilities and abhorrent behavior.

It further authorizes limited departures by the District Court per fast-track dispositions that are authorized by the Attorney General or the United States Attorneys.

It requires courts to state their reasons for departure and that has been formalized and formulated into a three-page statement of reasons that will shortly -- must shortly become part of every judgment of conviction that we enter and it will be created, this Statement of Reasons, this three-page Statement of Reasons, by the checking off of boxes by trained Probation Department personnel and by our deputy clerks.

Mike mentioned appellate review. The Feeney Amendment requires de novo appellate review of departures "The Court of Appeals shall review de novo the District Court's application of the guidelines to the facts." It requires de novo review when the District Court fails to provide the three-page written Statement of Reasons that I just told you about, which is not the District Court's creation, but a capturing, not necessarily by the Court at all, but by somebody trained to check out the various boxes.

126

De novo review is -- requires the appellate court to reject the sentence if it is not consistent with the guidelines or not justified by the facts of the case.

And, finally, routinely, de novo review is required in any case in which the district court departs from the guidelines without government consent, even where the district court justifies the departure as a matter of law. And as a consequence to this, and as discussed in his decision, Judge Weinstein is video-taping all sentences. And you can read his reasons. Nice, short little opinion. Opinion and order at 219 FRD 262 and that was decided January 30, 2004. 219 FRD 262.

A wonderful opinion because it talks about the human element of sentencing and what was supposed to happen, what is in fact court procedure and law.

Now, I would ask you to bear with me because this is the link that I see and this is why I believe that this affects everybody.

There is a division of the Department of Justice called the Office of Justice Programs. It has a website at OJP.USDOJ.GOV. It issues in July of each year statistics regarding the United States

127

prison population. And I share with you the highlights of its report from last July and I ask you to take note of two statistics that I'll tell you about again at the end of this very short presentation because I guarantee you those numbers are going to change and they are going to go up.

At year end 2002, the last time the U.S. prison population was studied and data was finalized, the nation's prison population had -- had undergone its largest increase in three years. It's up 2.6 percent.

The federal prison population was up 4.2 percent in comparison with the state prison population, which went up 2.4 percent.

The Federal Bureau of Prisons is the nation's largest prison system. It has 163,528 prisoners as of 12/31/2002.

State prisons were operating between one percent and 16 percent of capacity. Federal prisons at the end of December 2002 were operating at 33 percent over capacity. Overall, at year end 2002, the United States incarcerated 2,166,260 persons.

Breaking down the rate of incarceration, one in every 110 men who are U.S. residents were in prison. That means -- and if you add the women in,

128

one in every 143 U.S. residents were in either a state or federal prison or a local jail as of 12/31/2002.

Further examining those statistics, black males between the age of 20 and 39 years of age accounted for one-third of all sentenced inmates under state or federal jurisdiction. 10.4 percent of U.S. black male population between the ages of 25 to 29 was in prison, 2.4 percent -- and that compares to 2.4 percent of Hispanic males and 1.2 percent of white males in the same age group, 25 to 29.

The growth in the federal prison system is up 61 percent from 1995 to 2001. Examining that 61 percent growth, the breakdown between the years 1995 and 2001 attributed 48 percent of the total growth to drug offenses, 21 percent to immigration offenses.

Brent Staples reviewed a book in Sunday's New York Times. He said that the rate of U.S. incarceration compares with Japan 14 times. Or eight times the rate of incarceration of people in France and six times the rate of incarceration in Canada.

The book that Brent Staples was reviewing

129

was a book called "Life on the Outside" by Jennifer Gonnerman, G-o-n-n-e-r-m-a-n.

She reports in her book that the American prison system disgorges 600,000 people each year who she describes as angry and unskilled.

Now, I share those with you because I think the Feeney Amendment will in fact drive up two of those statistics that I shared with you very, very easily.

The rate of federal incarceration, I'm sure, will go up more than the 4.2 percent reported for 2002 and the number of federal inmates, 163,528, cannot help to swell.

Thanks.

MR. HIMMEL: Any other members of the panel want to be heard on this issue?

JUDGE BISSELL: One thing you have to also keep in mind is that the congressional leadership continues with a campaign of disinformation to the public about the Feeney Amendments, particularly with their origins.

The Chairman of the House Judiciary Committee, just a week or so ago addressed the Judicial Conference of the United States and issued a press release with regard to that.

130

Let me share with you a couple of his comments.

He, of course, chastised the Judiciary for having the gall to question this legitimate legislative act. But beyond that, in the course of it, stated with regard to the passage of the amendment, and I quote, "The Feeney Amendment was approved by the House of Representatives on a straight up or down vote by an overwhelming bipartisan majority 357 to 58. The final Bill which included weakened Feeney provisions, passed the House 400 to 25 and the Senate 98 to nothing."

But what he doesn't tell you, however, is that the Feeney Amendments was stealth legislation beyond even our wildest imagination. Drafted in the bowels of the Justice Department at the midnight hour, with no impact from the judiciary, no committee referrals in the Congress, and then appended with this rider to the Amber Alert legislation who no one would oppose nor should they.

So, when the Chairman indicates this overwhelming congressional endorsement of the Feeney Amendment -- nonsense.

He continued, quote, "The Feeney Amendment represents a legislative response to a longstanding

131

congressional concern that the sentencing guidelines were increasingly being circumvented by some federal judges whose inappropriate downward departures resulting in a return to sentencing disparities."

That's equally misleading.

The catalyst of the Feeney Amendments was a sentence or two in a sex offense area that happened to get this particular guy's dander up and, hence, led to basically using, basically, an elephant gun to shoot a mosquito.

But that remains the rhetoric that is out there. I don't know if it represents the unconsidered thinking of other members of the Congress. It couldn't represent anybody's considered thinking, but that is what we're up against in terms of where this is going.

And make no mistake. Although happily with the intervention of the Senate Judiciary Committee, the strict limitations and direct legislative guidelines, by Congress which also, by the way, is the first, were limited to the sex offense areas.

This is the camel stowed under the tent and we all run the risk of this type of further incursion on the legitimate exercise of the

132

judiciary's constitutional obligations as time goes along.

I think in some instances, as a practical matter, given the fact that you don't get a large number of those particular cases and also given the fact that most downward departures are either government made or government endorsed, that we are not going to be hit with a rash of downward departure sentences that will subject us to this type of scrutiny. But it -- but it certainly as a matter of principle and certainly as a matter of what is on the horizon in the future. It's a cause for greater concern for guarding the legitimate separation of powers in our government.

MR. HIMMEL: Judge Hayden?

JUDGE HAYDEN: I just want to make one clarification.

When I was talking about how the amendment applies to downward departures in all cases, it's not just those limitations as to sex offenses. In all cases.

JUDGE BISSELL: Some of the limitations are limited to sex offenses. Others are not.

JUDGE HAYDEN: Yes. But the ones I mentioned are all over.

133

MR. HORN: Yes.

If I may. In 1987 and 1989 when Estrada came down and the sentencing guidelines were declared constitutional, it has had an impact not only on the judiciary, and not only on those individuals who were being sentenced, but it had a tremendous impact on we, the members of the Bar. Because what it did was it implemented a -- a cookie cutter, lowest denominator -- common denominator of counsel and took away from those of us who wished to be creative, those of us who wished to work harder, those of us who wished to be better advocates to present arguments to you, the bench, as to why this client was not so much different, but why it wasn't in the heartland.

And all this does, almost 20 to 30 years later, is further restricts we, the attorneys who are trying to give the effective assistance to counsel. So it really -- it -- it well, I'm - - you know, I'm shocked by it.

It goes well beyond Judge Bissell's concerns because it affects everyone in the criminal justice system plus the general public with the long, long, long, long, even longer sentences of warehousing people at a great cost to the public.

MR. HIMMEL: I'm getting a hook. So, I want to thank the members of the panel.

(Applause)

MR. MADERER: Now, Judge Bissell, you will not be clear of this Circuit business.

JUDGE BISSELL: I'm going to Washington next week. I'm going on the (inaudible).

MR. MADERER: If we take -- if we can take one thing away from this excellent panel it is that you need to know the judge before whom you are going to be giving summation or civil or criminal.

Ladies and gentlemen, we now move our venue downstairs for lunch. We have three and half minutes to do that and then the remainder of the program.

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