The Sedona Conference Journal

Volume 5 2004

The "Complexities" of Electronic Discovery

Richard H. Middleton

Recommended Citation: Richard H. Middleton, *The "Complexities" of Electronic Discovery*, 5 SEDONA CONF. J. 105 (2004).

Copyright 2004, The Sedona Conference

For this and additional publications see: https://thesedonaconference.org/publications

THE "COMPLEXITIES" OF ELECTRONIC DISCOVERY

Richard H. Middleton
The Middleton Firm, L.L.C.
Savannah, GA

It's an honor to be asked to attend this conference on the critical issue of electronic discovery, and a great personal privilege for me to be able to serve as one of the faculty members.

In this paper I will not attempt to produce a law review-style commentary on electronic discovery. I'm sure I was not invited because I'm a prominent expert on electronic discovery *per se*. However, like most of us here, I'm sure, I have spent entire days, if not weeks, working through discovery matters with co-counsel and opposing counsel, and more and more it involves electronic discovery, either in whole or in part. I was fortunate to be asked to serve as a discussant at a Civil Justice Roundtable on electronic discovery sponsored by the Conference of Chief Justices in November 2003. And of course I have discussed this topic with numerous other attorneys from both sides of the courtroom, some of whom are convinced that "digital is different."

But actually, I think I'm here in a representative capacity, and I'm very proud of the people I represent. I am the current president of the Roscoe Pound Institute,[1] which is essentially a legal "think tank." The Institute was established in 1956 (under the name Roscoe Pound–American Trial Lawyers Foundation) to honor and build on the work of Roscoe Pound, who served as Dean of the Harvard Law School from 1916 to 1936 and was one of the law's greatest thinkers and educators. If you ever run into an old set of the *Encyclopaedia Britannica* in an antiquarian book store, you'll see that Roscoe Pound was the only American lawyer on its Advisory Board.[2]

The Roscoe Pound Institute shares Dean Pound's philosophy of sociological jurisprudence–an interdisciplinary approach to the development of practical, relevant legal concepts embracing both the public arena and legal associations. We consider the law to be a dynamic system that is influenced by social conditions and that, in turn, influences society. This philosophy is the driving force of the Roscoe Pound Institute. We have numerous programs, publications, and research grants through which we promote open, ongoing dialogue with the academic and judicial communities and the public on issues critical to protecting and ensuring the right of citizen access to the American civil justice system.

I also had the honor of serving, in 1999-2000, as president of the Association of Trial Lawyers of America (ATLA),[3] and although I am not here in any official capacity to represent ATLA, I will try to represent my colleagues as well as I can. ATLA is a bar association whose members for the most part (but not exclusively) represent plaintiffs in personal injury, civil rights, employment, and environmental litigation; the defense in

1 *See* http://www.roscoepound.org.
2 1 ENCYCLOPAEDIA BRITANNICA vii (14th Edition 1929).
3 *See* http://www.atla.org/

criminal cases; and either side in commercial and family litigation. It has approximately 50,000 members, and those members represent literally millions of clients. I am *tremendously* proud of what my fellow ATLA members do, and have done, to help to balance the scales of justice and make our American civil justice system the best in the world. Many of our members, of course, are involved routinely in matters concerning electronic discovery in the course of their work.

I. Some Thoughts on "Complexity"

At the top of my paper I referred to electronic discovery as a "critical issue." I'm sure many of our conference attendees will agree that it is "critical." But I want to emphasize from the start that I call electronic discovery a "critical issue" primarily because I believe that, if this category of discovery is mishandled–whether by litigants, by judges, by court rulemakers or by our elected representatives in Washington and in the states–it can lead to terrible miscarriages of justice. That's what I think is "critical" at this time about electronic discovery. I think my colleagues in the consumer bar would agree with me on that.

This is called the 2004 Conference on Complex Litigation. No doubt we will hear about important information management matters that can get complex–and the very fact that computers are involved may cause some of us to think of it as complex–but I don't feel that this subject is *inherently* complex. Electronic discovery turns up in rather mundane litigation as well as complex litigation. And the sometimes complex processes of electronic information handling are, at the most basic level, quite simple. One of my favorite definitions of what a computer does is that it detects the difference between 1 and 0–and it does it at the speed of light. It can certainly *get* more complex than that, and we can argue over what a "document" is or isn't in the 21st Century, but I think we should remember that in the often inscrutable "minds" of our computers, that's what it all is: 1 or 0?

Further on the matter of "complexity," I have to observe that we in the consumer bar have run into this term a lot during the past quarter century. It comes up with some frequency, often in areas where our colleagues in the corporate or insurance defense bar would like to change something. That can happen through court decisions, through legislation, or, lately, through the process of making rules for the federal and state courts–a process that's underway right now on this complex subject of electronic discovery. Thus, we in the consumer bar have seen challenges to the existing order that involve, *inter alia*:

- The Constitutional right to trial by jury. Some cases, it is said, are just too *complex* for our friends and neighbors to understand when they serve as jurors. So we hear, "Let's take complex cases out of the jury system."[4]

- Scientific and technical evidence and expert testimony. "It's often just too *complex* for jurors to understand. Let's turn it over to judges."[5]

- Class actions. "Many class actions are just too *complex* to be handled by the state courts. Let's pull them into the federal court system, and preclude state courts from entertaining parallel actions."[6]

4 *But see* Neil Vidmar, "Juries, Judges and Civil Justice," paper presented to the Roscoe Pound Institute's 2001 Forum for State Court Judges.
5 *But see Scientific Evidence In the Courts: Concepts and Controversies* (Report of the 1997 Roscoe Pound Foundation Forum for State Court Judges).
6 *See* James E. Rooks Jr., "Rewriting the rules for class actions: Rulemaking has become another front in the tort 'reform' wars," 38 TRIAL 18 (Feb. 2002).

- Discovery in general. "It's getting too *complex*, with all of these overbroad discovery demands made by litigants. Let's pare down the scope of discovery and make it easier to get sanctions and awards of costs for 'discovery abuse.' "[7]

And the latest is the reason we're here today:

- Information stored on computers. "It's all getting much too *complex*. Let's streamline it by excusing parties from producing all the material requested, and give them a pass if they should accidentally destroy some of it."[8]

Really, it's enough to give a consumer lawyer one of those things the psychologists call a "complex."

I'm not a "country lawyer," but in Georgia where I practice we do have some great country lawyers. We also have some very sophisticated lawyers who like to bill themselves as "country lawyers." So the minute opposing counsel tells you he's "just a country lawyer," you know your client may be in major trouble!

I've begun to think the same way about the many alleged "complexities" of the civil justice system: all of the mechanisms consumers need to use to prove their cases and obtain just resolutions of their legal matters have become very "complex," and it always seems to be the corporate and insurance defense bars that make these discoveries of these pockets of complexity. They must have quite a research department.

In any event, it will probably surprise no one that the members of the Pound Institute and of ATLA are opposed to changing the existing system of discovery in the federal or state courts–whether by court rule, legislation, or other means–to respond to complaints that electronic discovery has gotten too "complex." In December 2002 the then president of ATLA, Mary Alexander, wrote to the Advisory Committee on Civil Rights of the Judicial Conference of the United States to tell its members that we don't need special federal court rules for electronic discovery. She wrote, "If I had to sum up ATLA's position on this subject in a single sentence, it would be this: 'Information is information, and electronic discovery is discovery.' "[9]

I haven't seen anything yet, in anything I've read or listened to, that makes me feel any differently than Mary Alexander said a year and a half ago.

Let me now make a few observations about the topics of the two sessions of the conference on which I serve as a faculty member: (1) privilege and (2) retention of records and some questions associated with retention.

II. PRIVILEGE & PRIVACY VS. EFFICIENCY

Anyone who has been involved in a litigation practice knows that privilege is a characteristic of information that must be, and usually is, closely guarded. Information produced in discovery typically is reviewed for any privileged content before it is turned over

7 *But see Controversies Surrounding Discovery and Its Effect on the Courts* (Report of the 1999 Roscoe Pound Institute Forum for State Court Judges).
8 *But see* Dec. 20, 2002, Letter of ATLA President Mary Alexander to Advisory Committee on Civil Rules, available at http://www.kenwithers.com/rulemaking/index.html.
9 *Id.*

to other parties so that production of the privileged material can be objected to–or, at least, so that claims of privilege will not be lost through inadvertent production that might be treated as a waiver of privilege. That review process, as we know, can be time-consuming and (time being money) expensive. Efficiency is important.

In my opinion, the only differences between paper discovery and electronic discovery on the privilege front are in the typical ease of access to electronically stored information and, sometimes, the volume of documents involved. These might be considered competing characteristics: information is comparatively easy to access, but its volume can amplify concerns about the cost of performing privilege reviews and about inadvertently waiving privilege.

To ease those concerns, and to promote efficiency, some parties stipulate that any privileged information that is disclosed inadvertently will be returned to the producing party. It also appears to be an increasing practice for parties dealing with masses of electronically stored information to stipulate to a "quick peek." The requesting party is permitted to review all electronic information and designate the part deemed relevant, and the producing party reviews the designated documents for any privilege issues at a later time. Only at that time is the producing party required to assert privilege.

This approach, needless to say, can save a good deal of time and money all around. However, state substantive law can erect at least two barriers to it: (1) in some states, ethical rules *require* lawyers to take advantage of privileged documents that are disclosed inadvertently, so that a lawyer bound by such a rule may not enter into a "quick peek" stipulation; and (2) in some states, substantive law of privilege does not empower a reviewing party to waive privilege on behalf of other parties. Thus the *reviewing* party can be bound by its "quick peek" stipulation, but the disclosure during the "quick peek" process will destroy the privilege more generally, and the producing party could not assert privilege in subsequent litigation against other parties.

I believe it was suggested, at the recent conference the federal Advisory Committee on civil rules held at Fordham Law School in February, that the federal rules should be amended (1) to make it clear that "quick peek" stipulations are permissible; (2) perhaps to empower the court to *require* "quick peek" procedures, and, more radically, (3) to amend the rules to *pre-empt state law governing ethical responsibilities and privilege*.

To my knowledge, the problems that can be created by "quick peek" stipulations are found in only a small number of cases. Some plaintiffs' lawyers have endorsed these kinds of stipulations as practical ways to accelerate discovery and, ultimately, the resolution of the case. What they agree to, I can generally agree to. But court rules should be of general effect, drafted to tackle problems that are general problems. For situations that are unusual, as these are, the best approach is to rely on the discretion of the judge who is actually involved with the case on a continuing basis. So I don't believe it is necessary (or perhaps even possible) to draft court rule amendments to cover all "quick peek" stipulations. This is really a question of what makes the best practice, and should not be a matter for formal rulemaking. By the same token, good practice, I'm sure we all know, cannot easily be *ordered*, so I also think it would be unwise to amend the rules to empower courts to *require* "quick peek" arrangements. Beyond that, though, I am *appalled* by the notion that a generalized rule for the federal courts might some day pre-empt state substantive law on privilege and ethical conduct.

Most lawyers do not get involved in the court rulemaking process (though I think many more should do so), and they may not be familiar with the limits that are placed on rulemakers. To them, the federal Rules Enabling Act[10] may appear to be a nicety, a mere housekeeping provision, or just arcana. To the federal rulemakers, however, the Rules Enabling Act is of vital importance. Without it, the rulemakers are literally out of business. And the Act does not permit the promulgation of rules that affect substantive law, of which the law of privilege is a part.[11] One of our other panelists at the Conference of Chief Justices Civil Roundtable in November 2003 was Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York, who is also a faculty member at this conference. I recall that she expressed some concerns about the Rules Enabling Act during the discussion.

Our federal court rules *cannot* have been intended to interfere with or displace the ethical duties imposed on attorneys by their states of licensure. If a rule were adopted that purported to do so, its validity under the Rules Enabling Act would be questionable–and, I can assure you, its validity would be challenged promptly in the first court that attempted to impose it.

III. ELECTRONIC DOCUMENT RETENTION (AND DESTRUCTION)

Privilege presents some thorny questions, but actually the most interesting part of this conference is the new proposal on document destruction policies that has been advanced by my new friend Tom Allman. Until very recently, Tom was the General Counsel of the multinational chemical manufacturer BASF Corporation, and he has used the General Counsel Committee of the National Center for State Courts as a forum to promote a model rule on electronic discovery.[12]

Tom's model rule would limit a producing party's duty of production of electronically stored information to "data or information that is responsive to the request and is reasonably available to the responding party in the ordinary course of business."[13] It would provide for cost-shifting if the information is *not* "reasonably available . . . in the ordinary course of business"[14] and it would further provide that

> [n]othing in these rules shall require the responding party to suspend or alter the operation in good faith of electronic backup or other routine disaster recovery or document retention systems absent a preservation order issued upon good cause shown, which shall not issue unless the standards applicable to obtaining injunctive relief are met.[15]

Seen in the *best* light, this proposal would allow potential producing parties to design their own document destruction programs to a very narrow standard, operate it in such a way that information is disposed of before litigation can get off the ground, require an extremely high level of proof before a preservation order can be obtained, and then be excused for any information that has been destroyed in the meantime.

---

10 28 U.S.C. "2071 et seq. ' 2071(a) provides that "[t]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. . . ."

11 ' 2072 (b) provides that "[s]uch rules shall not abridge, enlarge or modify any substantive right."

12 *See* Thomas Y. Allman, "A Proposed Model for State Rules re Electronic Discovery," Presentation to General Counsel Committee of the National Center for State Courts, Nov. 15, 2001, available at http://www.kenwithers.com/articles/rules_debate/model_state_rule.html (visited March 12, 2004). The language proposed in 2001 has been modified somewhat (see below).

13 *See* Attachment A, Proposed Model Rule, section (a). The language quoted here was presented in a Dec. 9, 2002, comment letter from Thomas Y. Allman, General Counsel of BASF Corporation, to Peter McCabe, secretary of the Committee on Rules of Practice and Procedure, Judicial Conference of the united States. The text is downloaded from http://www.kenwithers.com/rulemaking/index.html.

14 *Id*. Section (b).

15 *Id*. Section (c).

We do not need to go far to find some real-world examples of what could be done with any discovery regime that is premised on an "ordinary course of business" standard. The paradigm example might be the Arthur Andersen accounting firm's document destruction plan,[16] which received considerable public attention in 2002. The events that transpired involving this plan involved paper discovery, not electronic, but this is an area in which digital is *not* different.

Ostensibly, Andersen employees were merely reminded to follow the plan the company designed for them. It was referenced in court in May 2002 when an Andersen partner pleaded guilty to federal charges, testifying that "I obstructed justice . . . . I instructed people on the engagement team *to follow* a document-retention policy which I knew would result in the destruction of documents."[17] Other parts of the Andersen plan that did relate to electronically stored information are also pertinent. The policy prescribed destruction of electronic material in such a way as to make recovery impossible–*or extremely expensive.* One section ordered that "Deletion of information from electronic files will be accomplished in such a way that precludes the possibility of subsequent retrieval by AA personnel or third parties." Another specified that, "For electronic files, appropriate techniques (such as 'absolute delete') should be used to make sure the data cannot be reconstructed from the storage mechanism on which it resided." And a third provided that "The destruction of all working papers and electronic data must be accomplished in such a way as to prevent the data from falling into unauthorized hands and to prevent any possibility of reconstruction from partially destroyed files."

Another example exists that is even more pertinent to the BASF proposal. It appeared in a newspaper article about the U.S. Department of Justice's litigation against the tobacco companies. The DOJ lawyers, the story related, "complained to [Judge Gladys] Kessler . . . that top Philip Morris officials deleted thousands of e-mail messages they should have kept–some of which couldn't be retrieved because the corporation purges its entire e-mail system every three weeks."[18]

During a question-and answer period at the recent Fordham conference, Tom Allman was asked if, under a self-designed document destruction program like Phillip Morris's, (1) the purged information would be considered "not reasonably available in the ordinary course of business," with the requesting party required to pay for its reconstruction and production and (2) Phillip Morris would qualify for safe harbor treatment because it had followed its own (i.e. self-designed) plan. I understand that Tom responded that the information *would* be considered inaccessible; that the requesting party *could* be required to pay for its production, and that the producing party *would* be entitled to "safe harbor" treatment. If I'm wrong, Tom can correct me when we meet again in Sedona. But if I'm right, the BASF proposal could be used by some litigants to "plan" their way right out of responsibility for misdeeds.

IV. A FEW SUCCESS STORIES

In dealing with many issues surrounding the civil justice system we all tend to get very caught up with so-called "horror stories." I'm sure you all know most of the outrageous stories I'm referring to, like medical negligence suits where someone's wrong limb was

16 Arthur Andersen & Co., *Practice Administration: Client Engagement Information–Organization, Retention and Destruction*, Statement No. 760, February 2000 (on file with author; downloaded from Andersen web site in January 2002, but no longer be available on the Internet).

17 Carrie Johnson, "Enron Auditor Admits Crime: Andersen's Duncan Ordered Shredding," *Washington Post*, Tuesday, May 14, 2002, at A1. (Emphasis added.)

18 Tom Schoenberg, "DOJ Fires at Lawyers for Big Tobacco," LEGAL TIMES, January 22, 2003, available at http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/ View&c= LawArticle&cid=1042568686185&live=true&cst=1&pc=0&pa=0 (visited February 18, 2004).

amputated, or the healthy half of their brain was removed instead of the side with the tumor, or the mix-up in pathology slides that caused a healthy woman to endure a double mastectomy–only to learn that she never had cancer in the first place. Those are the kind of stories I always think of as "horror stories."

We even hear some horror stories where the thing at stake is just money, not life or health. We hear that there are organizations that spend huge amounts of money on document production, and rumors about parties settling because they thought the cost of discovery would be ruinous, etc. On the other side, we've heard of successful handling of electronic discovery matters in the litigation concerning Ford automobiles with Firestone tires, Rezulin (involving database production), the Microsoft antitrust litigation, and in the litigation concerning phenylpropanolamine (PPA, an ingredient of over-the-counter cold medications).

I would like to point out just three cases involving electronic discovery in major ways where the problems were resolved through a combination of professionalism of the lawyers involved and good judicial management. (I had no involvement in any of these cases.)

Propulsid.[19] This was a Multi-District Litigation case handled in federal court in New Orleans by Judge Eldon Fallon. It has a lot of fascinating facets. Luckily I don't have to recount all of them, because Judge Fallon established an Internet site dedicated just to that litigation, where you can see all of the pleadings, motions, status reports, stipulations, etc. for the whole case.[20] It's a marvel of governmental transparency. It's been quite a large case. Some 300 deaths are alleged to have been caused by the use of Propulsid (cisapride), a prescription drug used to treat symptoms of gastroesophageal reflux disease (GERD). Some 4,000 plaintiffs have been part of the MDL proceedings, and 12,000 more have unfiled claims that may be resolved through the case.

To me, the most remarkable thing about the Propulsid case is how little one might say Judge Fallon had to work with when he started. "All" he had were the current, unamended Federal Rules of Civil Procedure, a determination to manage the case well, his own considerable experience as a judge, and counsel on both sides who were professionals and acted accordingly. Early on, working within the existing rules, Judge Fallon wrote a comprehensive order for handling the electronic discovery. Under that order, over 7 million pages of documents were eventually produced, as well as numerous electronic databases, and over 13,000 pages of email messages and attachments.

According to the court's website, the case is now virtually settled, if not completely settled, with well over $100 million committed to compensate plaintiffs, pay attorney fees, and fund the administration of claim resolution.

Zubulake. The second case I'm thinking of is a sex discrimination case that is by now well-known to everybody who has heard of electronic discovery. It is a decision written by another of our faculty members, Judge Shira Scheindlin, and it is often called informally "*Zubulake I.*"[21] This is a perfect example of a case in which, when the issues are properly considered, and where the court works actively to review and manage the discovery requests, reasonable discovery can be obtained. A careful judicial analysis like this will help to get the facts out to see if the plaintiff can prove the case. At the same time it will both prevent excessive cost to the producing party and avoid "chilling" the plaintiff's cause of action.

---

19 MDL-1355 Propulsid Product Liability Litigation, U.S. Dist. Ct., E.D. La.
20 http://propulsid.laed.uscourts.gov.
21 Zubulake v. UBS Warburg LLC et al., 217 F.R.D. 309 (S.D.N.Y. 2003), 91 Fair Empl.Prac.Cas. (BNA) 1574.

In *Zubulake I* the defendants had produced about 100 pages of email messages. The plaintiff demonstrated that it was highly likely that there were many more, although they might be on backup media that were already required by the SEC to be kept for compliance purposes. The defendants claimed that production would cost $175,000, not counting attorney review time, and they requested cost-shifting. The court required the defendant to pay for production of the data that were kept in an accessible format (i.e. the usual rules of discovery applied to that). Instead of requiring the defendant to restore and produce all responsive documents, a small test sample was used and the cost-shifting decision was reserved, to be made after consideration of seven-factors now often called the "*Zubulake* factors." In order of importance or weight, the factors are (1) the extent to which the request is tailored to discover relevant data; (2) availability of that data from other sources; (3) total cost of production, relative to the amount in controversy; (4) total cost of production, relative to the resources available to each party; (5) relative ability and incentive for each party to control its own costs; (6) importance of the issues at stake in the litigation; and (7) the relative benefits to the parties in obtaining that data.

In a later decision (*Zubulake III* [22]) after production had been completed, the court analyzed the seven factors it previously drew up and concluded that the balance was slightly against cost shifting; that requiring the requesting party to bear 25% of the costs would be fair; but that the producing party should bear all costs of attorney review of the data.

Xpedior.[23] Judge Scheindlin is not the only judge whose decisions I like, but this case, too, is a good example of what can be done by judges who make use of what they have in the rule book *right now*. Outwardly *Xpedior* was a breach of contract case between two businesses. In reality, though, it involved about a thousand consolidated cases prompted by the failure of a number of Initial Public Offerings (IPOs) when the "dot-com" bubble burst a few years ago. Judge Scheindlin talked about it a bit at the CCJ's Civil Justice Roundtable last fall, and I have a note of how she said the problems were handled. She said the lawyers for the various parties all got together and wrote a document called "Plaintiffs' and Underwriter Defendants' Proposed Document Retention Questionnaire" that was the key to resolving the case. The lawyers did it themselves, and Judge Scheindlin considers it to be a model of what can be accomplished when lawyers cooperate with the court and with each other.

These just three examples of what can be achieved by honest, professional counsel who are dedicated both to their clients and to their responsibilities as officers of the court and an experienced, "take-charge" judge to resolve issues that arise with electronic discovery. As long as we can point to cases like these, I would much rather depend on the parties and the judge to deal with electronic discovery than I would on any number of rules. In that regard, I don't believe anyone has put it any better that Judge Fallon did in one of his very early orders in the Propulsid litigation. He wrote,

Prominent in [the *Manual for Complex Litigation 3d*] at Section 20.21 is the following reference to courtesy and professionalism:

> The added demands and burdens of complex litigation place a premium on professionalism. An attitude by counsel of cooperation, professional courtesy, and acceptance of the obligations owed as officers of the court is critical to the successful management of the litigation.

22 *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003).
23 *Xpedior Credit Trust v. Credit Suisse First Boston* (USA), 2003 WL 22283835 (S.D.N.Y. 2003).

> The Court expects, indeed insists, that these two words–"Courtesy" and "Professionalism"–permeate this proceeding from now until this litigation is concluded. The Court record should never be the repository of ill chosen words arising out of a sense of frustration over real or imagined issues. Because of the high level of competence and experience displayed by the attorneys who attended the initial conference the Court is confident that this objective will be achieved without judicial intervention. *We believe that cooperation, professionalism, and good management have never been created by court rule. Judges can and do insist on them routinely.*[24]

V. IDEAS FOR IMPROVEMENTS

By now, the reader of this little paper may be thinking, "Don't those consumer lawyers [OK, "plaintiff" lawyers, if you will] *ever* agree to *any* changes in the justice system?"

Well, yes. If you take a look on Ken Withers's website at the detailed letter Mary Alexander sent to the Advisory Committee on Civil Rules,[25] you'll see that there are several things short of rulemaking that the consumer bar can support to address emerging issues in electronic discovery.

One approach is *educational programs for both lawyers and judges*. The Federal Judicial Center offers such programs, and other organizations do also. In fact, I believe various defense bar organizations are taking their wisdom on this subject on the road in various parts of the country. Even though I don't agree that electronic discovery is fundamentally different from paper discovery, we can all use some help getting up to speed with the technical side of this area, with the new developments that occur constantly.

Another area is *research*, and there the FJC of course makes extremely valuable contributions. We just can't learn too much about this field, including what problems judges see arising, how they are dealt with, whether judges think there should be new rules, etc.

Another approach would use the "*practice manual*" *model*. We already have the *Manual for Complex Litigation* published by the Federal Judicial Center. I'm not at all sure that we need a whole new manual just for electronic discovery, especially since we have a number of judges who have been showing us that these issues can be handled under the existing rules. But I do think it would be valuable to compile those lessons learned and make them widely available to both federal and state judges. There has also been a recent effort by the ABA Section of Litigation in this area, and their product may be useful.[26]

The same goes for *disseminating the emerging case law and scholarship* on electronic discovery, and Ken Withers at the FJC has already done a remarkable job on that front through his website. But encyclopedia-size publications aren't necessary for the judiciary and the bar to stay abreast of the cases in this field. A comparatively small number of decisions will go a long way, and a number of opinions that can guide us are already available. After all, if we need to know what the U.S. Supreme Court says about the right to jury trial we don't have to start reading opinions written by John Marshall. A half dozen well-reasoned, widely-disseminated decisions will probably give us most of the answers we need.

---

24 Pretrial Order No. 2, Oct. 2, 2000, at http://propulsid.laed.uscourts.gov. (Emphasis added.)

25 *Supra* n. 8.

26 American Bar Association, Section of Litigation, *Electronic Discovery Standards–Draft Amendments to ABA Civil Discovery Standards, Nov. 13, 2003*, available at http://www. abanet.org/litigation/taskforces/electronic/document.pdf

That having been said, I don't think we are anywhere close to a situation where new rules for electronic discovery are advisable or possible, let alone necessary.

VI. CONCLUSION

Someone once said that "but" is the most important single word in the English language. Unfortunately, the consumer bar *does* have to spend a lot of time saying "but" to this and "but" to that. We have had to work very hard to protect the rights of our clients: our present clients, our future clients, and even our clients who haven't been born yet. We've had to oppose many questionable claims of "complexity" in the civil justice system and other kinds of claims about it–including some claims about it that don't even rise to the level of questionable.[27]

The mere fact that one often stands in opposition to something, though, doesn't't mean the opposing person is always wrong. We all operate in an adversary system, and that's one of the very first lessons that experience teaches us. There are lawyers all over the southeastern Unites States who are opposed to my cases, and I'm opposed to their opposition–but we can usually get along anyway. I hope the rest of the attendees at the conference will understand why we on the consumer side feel we have to be in opposition a lot of the time, defending our clients, defending the courts, defending the judges, and working to preserve the system in which we all work.

27 *See, e.g.,* the recent full-page advertisements purchased by the U.S. Chamber of Commerce that criticize the U.S. civil justice system ("It destroys your jobs. It raises your taxes. It takes your money. *And it's all legal.*"), WALL STREET JOURNAL, March 10, 2004 at B14, available at www.legalreformnow.com/pdfs/National%20Ad.pdf (visited March 12, 2004). *But see* ABA president Dennis W. Archer's March 11, 2004, open letter to Chamber of Commerce president Thomas J. Donohue, www.abanet.org/media/statementsletters/ chamberopenletter.pdf; and contemporaneous op-ed article, www.abanet.org/media/releases/ opedchamber.html (challenging factual claims made in the ad; condemning the ad campaign as an attack on the judiciary; and finding the Chamber's campaign lacking in "truth and honor").

ATTACHMENT A

PROPOSED MODEL RULE REGARDING PRODUCTION; COST-SHIFTING AND SAFE HARBOR

[Electronic Discovery; Provisions for]

(a) General. To obtain discovery of data or information that exists in electronic, digital or magnetic form, a requesting party must specifically request production of such data or information and specify the form in which it should be produced. The responding party must produce the data or information that is responsive to the request and is reasonably available to the responding party in the ordinary course of business. If the responding party cannot - through reasonable efforts - retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules.

(b) Cost-Shifting For Extraordinary Steps. A court may order, upon showing of substantial need, production of data or information that is otherwise subject to production but is not reasonably available in the ordinary course of business. If the court orders production of such data or information in the requested or other form, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

(c) Safe-Harbor; Sanctions. Nothing in these rules shall require the responding party to suspend or alter the operation in good faith of electronic backup or other routine disaster recovery or document retention systems absent a preservation order issued upon good cause shown, which shall not issue unless the standards applicable to obtaining injunctive relief are met. No sanctions or other relief predicated upon a failure to maintain or preserve documents or data shall be entered in the absence of a discovery request or preservation order that describes with particularity the specific documents or data requested and evidence that the party upon whom the request or order was served willfully failed to preserve such documents or data. Evidence that reasonable steps were undertaken to notify relevant custodians of preservation obligations shall be prima facie evidence of compliance with obligations under such discovery requests or preservation orders.

[This proposed model rule was advanced in a Dec. 9, 2002, comment letter from Thomas Y. Allman, General Counsel of BASF Corporation, to Peter McCabe, secretary of the Committee on Rules of Practice and Procedure, Judicial Conference of the united States. The text is downloaded from http://www.kenwithers.com/rulemaking/index.html.]