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### 5TH ANNUAL JUDICIAL SYMPOSIUM ON CIVIL JUSTICE ISSUES
**GEORGE MASON JUDICIAL EDUCATION PROGRAM**
**DECEMBER 5-7, 2010**

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JUDGE ROSENTHAL: Thank you very much. It’s a great pleasure to be here, and on behalf of the entire panel, I want to thank you for the opportunity to address you on what we think is just a fascinating issue. Of course, we think that a glass of red wine and the pocket part of Moores or Wright & Miller is a great Saturday night, so you may not share our sense of the joys of life. But this really is a wonderful panel because we get to ask and suggest some of the issues lurking in the question: what most needs to be done to make the civil justice system in this country work well? Not just better than it’s working now, but work well. That requires, in turn, that we think about what the most pressing problems are and the most promising achievable solutions.

My focus on that is what kind of rule changes—changes to the Federal Rules of Civil Procedure in particular—are the most likely candidates to help in this work. And I come to that focus because, in addition to my work as a federal district judge sitting in Houston for the past eighteen and a half years, before that I was a trial lawyer in Houston, that in addition to that, since 1996, I have been a member of the Federal Rules work. First as a member and then as Chair of the Civil Rules Committee, and since 2007, as Chair of the Standing Rules Committee, which coordinates the work of all of the five advisory rule committees. So, I think that this is the most interesting question in the world, right up there with the meaning of life.

The other members of this panel will each bring a different perspective to this question, and the series of sub-questions that are lurking. Immediately to my left is Dr. Emery Lee. Dr. Lee is a Senior Researcher at the Federal Judicial Center in Washington. He is going to focus on some of the empirical data that the Federal Judicial Center recently gathered and studied for the benefit of the Rules Committees at a conference that you will hear about that tried to itself look at just this question. Seated next to him is Don Slavik. Don has represented only plaintiffs in product liability actions around the country for almost thirty years. He is from Steamboat Springs, Colorado and Milwaukee, Wisconsin, and he is currently involved in litigation that includes the Toyota MVL, which gives you a sense of the level of practice that he is an expert in.

Seated next to him is Professor Marty Redish who is the Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University Law School. Marty has authored or co-authored fifteen books, over eighty scholarly articles in the areas of civil procedure, federal question,
constitutional law, and freedom of expression. He is the sixteenth most cited legal scholar of all time—that’s pretty amazing. And he’s Senior Counsel of the firm of Sidley Austin. Seated next to him is Dr. Bruce Kobayashi. Dr. Kobayashi is a Professor of Law at George Mason. He holds a Ph.D. in economics. He has written on law and economics in IP and antitrust and other fields. He’s been here since 2000, and before that, worked for the Sentencing Commission, the Federal Trade Commission, and the Department of Justice, Antitrust Commission. His experience is also quite broad and varied. Seated next to him is John Vail. John Vail is a man of great integrity and truthfulness. He is an attorney with the Center for Constitutional Litigation, and he represents the interest of the plaintiffs in rule-making activities.

Finally, Alex Dimitrief joined General Electric in February 2007 as its Vice President for Litigation and Legal Affairs after spending twenty years as a trial lawyer at Kirkland & Ellis. He is responsible for litigation and enforcement proceedings in the U.S. and in international jurisdictions against GE, and he also oversees the company’s worldwide compliance and integrity programs. As you can see, we have a panel that represents both sides of the V and a lot of different areas in between.

So I can promise you, at the end of this panel discussion, you will get a mix of information from different perspectives on the problems that the civil justice system is grappling with. You will get some ideas for long-range approaches to address some of those problems, and I hope you will get some ideas for immediate ways action can be taken to address some of these issues. I am just going to take about two seconds to introduce the Rules Committees and its recent work. The Rules Committees for the Federal Rules of Civil Procedure have been dealing with these problems, and by these problems I want to focus on what has been described as cost and delay.

We have been hearing about these problems for a very long time. They are not new. If you go back into the 1930s debates on what became in 1938 the Federal Rules of Civil Procedure, you will find quotes of people in the committee worrying about cost and delay of this discovery business. It was not hedged around somehow. If judges did not have ways of controlling what was called in those debates, “fishing expeditions.” It sounds amazingly current. The rules have been amended many times, particularly the discovery rules more than any other part of the rulebook, to try to cope with changes in discovery resulting from changes in litigation practice, in business, and most recently, from information technology, and the new challenges presented by electronically stored information.

All of those challenges and the furor that resulted from them, led the Civil Rules Committee last May, to hold a conference at Duke University Law School that was really thought of as something like the Pound Conference of years ago. These seminal conferences that have as the purpose to step back and take a hard and disciplined look at how the civil justice sys-
tem is operating from pleading through resolution, including importantly, electronically stored information. And the information we brought together to make sure we were disciplined and thorough in looking, included empirical information gathered by Dr. Lee and information on the actual costs of discovery in the face of the challenges posed by electronically stored information.

We also looked heavily at state practice because the state courts are enormously creative in many ways ahead of the federal system in thinking about new ways to address some of these issues. And at the end of Duke, we discovered that we had some concrete ideas to go forward with, and we had a better awareness of some of the issues, and I’m going to come back and talk about those after we hear first from our panelists. So, we are going to start with Dr. Lee who is going to give us a description of what he learned as he gathered the information necessary to help the Duke conference understand what really was going on.

EMERY G. LEE: Thank you, Judge. First, I have to state my disclaimer that everything I say represents my views only and certainly not the views of anyone else.

JUDGE ROSENTHAL: Ditto.

EMERY G. LEE: My supervisors consistently remind me that I only speak for myself, so I remind you. The other thing I want to mention real quickly is that I actually taught at George Mason for a year in the mid-1990s, but that is not actually true. I taught at a much smaller campus that is somehow buried in the middle of this monster campus that you are visiting today. This place has undergone a major transformation since I taught here. I am sure the faculty are much better too. I want to talk a little bit about the Duke conference and the research we did for it. I want to first of all say how the Duke conference is perceived, to the extent it is perceived, is largely about cost. And I am going to talk about cost, but I am going to leave that for the end, and instead, I’m going to talk about the other parts of Rule 1 very quickly.

Rule 1 of the Civil Rules has three goals for civil rules: just, speedy, and inexpensive resolution of every matter. So I am going to talk a little bit about justice first. We did an attorney survey of practitioners in recently terminated, recently closed federal cases; so these are people who are going to be in state court some of the time, but these were people in federal court. We got over 2,000 respondents to the opinion questions, and I think that is a pretty good response rate of 47%, so when I am talking about the opinion questions, these are pretty good numbers that I think you can take to the bank.

We asked two questions at least that go to the question of justice in the federal courts today. The first question we asked respondents to agree or
disagree with the statement, “The outcomes of cases in the federal courts are generally fair.” This question was written really to get at attorneys’ attitudes toward the substantive fairness of outcomes in federal court. What is interesting is a majority of every group of attorneys—those who represent primarily plaintiffs, those who represent primarily defendants, and those who have a mixed practice—agreed with the statement.

But there was actually some interesting variation among the different groups of attorneys. Attorney who primarily represent defendants agreed with that statement, agreed or strongly agreed—I am just going to stipulate I always mean that when I say “agreed”—80% of the time. Only 4% of those representing primarily defendants disagreed with the statement. So, the defendant attorneys in our sample were fairly satisfied with the substantive outcomes of the cases in federal court overall. Those with a mixed practice, about 70% of them agreed with the statement.

And this is a word that gets me in trouble with my supervisors, but since I am not speaking for them, I can use it, only 53.9% of plaintiffs’ attorneys agreed with the statement. So one thing I want to bracket here at the outset is even though a majority of each group of attorneys expressed a high degree of satisfaction with substantive outcomes, there was some variation there that has to be kept in mind. When we come to the procedural fairness of proceedings in federal court, the picture is a little different. At least two-thirds of every group of attorneys agreed with the statement, “The procedures employed in the federal courts are generally fair.”

But again, there was some variation based on practice area. So, 85.5% of defendant attorneys agreed with the statement, “The procedures are generally fair.” Almost 80% of those with a mixed practice, and about 70% of those who represent primarily plaintiffs. So one question to think about is, why is it that the different groups of attorneys express different views with respect to the fairness and justice of Federal proceedings? Okay, so that is justice.

Speedy. Judge Rosenthal will talk cost and delay. Never do a Westlaw search for the phrase, “cost and delay,” and do not Google it either. But what is interesting is that delay is a normative term, and as an empiricist, I am very reluctant to use it. But when you look at the time to disposition in federal court, what you really have is two worlds. For the cases in our closed case sample, one-half of those cases terminated in under a year or less. Again, half of the cases are reaching termination in the district court in a year or less. Now, I cannot say what is too long, but a year to do anything substantial in this world does not seem excessive. If half the cases terminate in a year, I am not sure that is too long. What is interesting is that those cases overwhelmingly are settlement cases.

Almost 80% of those cases actually were settled by the parties in a year or less. Setting aside the question of the merits of the settlements, whether they were coerced settlements or what not, because of the fear of costs, those cases are reaching disposition fairly quickly. The other cases
that take more than a year are probably where the committee would want to focus its time. So maybe one thing we might look at going forward is trying to predict what cases are going to take longer. The way I put this as an empiricist, which no one else would agree with this, is to ask, what is different about the cases that settle in a year versus the cases that take more than a year to settle? What is it about those cases that make them take longer? And maybe we can discuss that.

Costs. I am going to say a couple of bracketing comments here. First of all, there are actually two separate discussions of cost, and we have heard both of them already this morning. They are very different discussions of cost, and I think they have to be kept separate. They are often put together, but I think that they are actually very different. One is the access-to-justice point. Many, many people, typical families in this country, do not have the means to actually litigate their rights in court.

There was a recent New York Times front-page article about this, and it was about the investing in litigation issue that was also discussed this morning. That is a real problem that people face. In fact, in the New York Times article, and I will plug myself, in that New York Times article, it cited a figure from my research for the Duke conference on the cost of litigation to plaintiffs. We found the median cost that was reported by the parties—and again, this is costs reported by the parties, so these are estimates—was $15,000 to litigate a case to termination. That was the median figure.

The New York Times cited that as too much for a typical family of modest means to litigate in federal court. When I presented the $15,000 figure in March of this year, people told me that was way too low. So, $15,000 is too high for a lot of people, but it strikes a lot of people as way too low. And if you know a little bit about statistics, that is the median, so that is the middle number. If you take the cheapest case to the most expensive case, line it up in order, the median is just the middle one. Just like median home prices are recorded, not average, because of course, averages are distorted by really high values at the upper end.

The average costs for plaintiffs was actually almost $67,000, and that probably strikes you as closer to the ballpark than $15,000. Interestingly enough, defendants have higher costs than plaintiffs. The average costs for defendants who are non-governmental defendants is $122,000. That was the average cost to litigate the case to termination. I can see smiling in the audience. You have to remember, that includes cases that settled in less than a year. And a case that settles in less than a year is not necessarily going to have very high costs. Now, it might settle because of the fear of costs, but it does not have high costs.

The costs were avoided by the settlement. Some factors that we found associated with higher costs, I am just going to go through these not quickly, but just sort of bullet form. Again, longer case processing times: time is money, and that shows very clearly that the longer a case takes to terminate, the more it costs. Stakes was the number one determining factor in costs.
If you just regress the stakes on the costs, especially for defendants, stakes explains about half of the variation in costs alone. And in a real sense, that is how it should work. The more a case is worth, the more the parties should be willing to spend to litigate it. So that makes sense.

Interestingly enough, non-monetary stakes also matter. So if the case involves non-monetary stakes, such as bad precedent, business relationships, reputation, threat of other litigation, that also increases costs separately. Factual complexity, of course, is associated with costs, and electronic discovery. Electronic discovery is an interesting topic, and we are going to talk a lot about it, I am sure. One of the strange findings of our study was that once you controlled for other factors, like stakes, type of case, type of parties, the time to disposition, different things like that, producing parties did not have higher costs than parties in cases without electronically stored information (ESI). That does not seem right.

But I have an explanation for that, and this goes along with the RAND study that was also presented at the Duke conference. It turns out that the cost of producing ESI varies greatly. So sometimes in a case where you produce ESI, it’s email, it’s on the server, you run a search, you produce it. I am not saying it is cheap, but it does not cost a whole lot. Other times, you have e-discovery, and you have a warehouse full of backup tapes, legacy files, all kinds of crazy stuff that people are going to talk about. Those cases are very expensive.

But see, the way the statistical model works is that something that varies a lot from case to case, even if it has a big coefficient, it is going to have a huge standard of error, and it does not reach statistical significance. But that is probably what is going on there. Producing parties do have high costs in some cases, but in other cases, the producing is not much, and that is what makes it fall out. What is really interesting is the biggest costs in the e-discovery cases are actually what I am going to call the symmetrical cases.

That is when both sides of the litigation ask for and produce information that is kept in electronic form. Those cases overwhelmingly in our study had the highest reported costs. The average costs for all the cases we had, where the defendant reported that they both asked for and produced electronically stored information, was a quarter million dollars. And the average costs for plaintiff attorneys, where the plaintiff said that they both asked for and produced electronic information, was $170,000. Sometimes people say, “Well, your research shows that electronic discovery does not affect costs,” and I would say, “then you are not reading the same research that we put out because we are definitely finding there is an effect in those symmetrical cases,” which do not get talked about a lot. I want to throw that out there.

Also, another important finding about electronically stored information, is that disputes over electronically stored information are extremely expensive. Well, duh, right? But even if you control for everything else—
so you control for the stakes in the case, you control for the type of case, you control for how long the case took, you control for everything I have discussed and more—each type of dispute over ESI increases costs 10%, and that is true for plaintiffs and defendants. If there is any way to change the rules to make it less disputatious about electronically stored information, that would have a huge impact on the cost of cases. Those disputes are extremely costly, and no one is going to say that they are not.

I am going to say one more thing about costs. One part of this discussion that is curious, because what the Rules Committee does is civil rules, it talks about civil rules, and it does a lot; you would not believe what this committee does. It is truly a remarkable body, and the amount of expertise blows me away every time I am there because I really do not know much about the civil rules. Judge Rosenthal knows that, and everything I know, I learned from her. But we talk about costs of civil litigation, we talk about the reasons why costs in civil litigation have increased, and we talk about that sort of in isolation; and I just want to offer this at the law and economics seminar. I am going to make maybe an economics point. But it seems to me that in lots of service sectors of the economy, we talk about skyrocketing costs.

The cause of those increases cannot really be the discovery rules, can it? I mean, here we are at an institution of higher education. Everybody knows that the costs of higher education are skyrocketing. Is that because of the discovery rules? Healthcare costs are skyrocketing. Is that because of the discovery rules? There seems to me, to be a kind of gap there when we talk only about the rules, and do not look at larger societal or economic factors that might be affecting these things, and I understand that there are actually some economic doctrines that get at this question. And that is one thing I think maybe the committee might think about going forward.

Finally, I want to talk a little bit about proportionality. That was a topic that came up this morning, and the rules authorize the judges to limit discovery to proportionality. The rules build in proportionality in all kinds of ways. We asked respondents on a scale of 1 to 7 to say how proportional the discovery in the case was to the client’s stakes with 1 being too little, 7 being too much and very disproportionate, 4 being just right.

What was interesting was that more than half of the respondents, and that includes both plaintiffs and defendants in the named cases, said that the costs in the case were proportional to the stakes, just about right. Just the right amount. So, when we think about making the rules better, and I would want to do more studies like this, but there is evidence that in most cases, proportionality is not a problem. Again, the cases that settle quickly, that reach a resolution without the expenditure of a lot of costs, probably are proportional cases or even on the low side of the 4.

But there are about a quarter of the cases where it is a 5, 6, or a 7, although very few cases are a 7. But about 15% of the cases are in the 6 and 7 range, and those are probably the cases to think about going forward. And
if we could find a way to identify those cases and figure out how to apply the rules to them, that would be a real step forward. Thanks.

**JUDGE ROSENTHAL:** That’s great. Thank you, Emery. One of the things that was striking in Emery’s research is that a similar study was done in the late 1990s to try to get a feel for the costs and the satisfaction with how well the rules were working, and the pattern that emerged was very similar. Of course, what is striking about the 1990s is that it was before electronic discovery swamped the system or became ubiquitous, depending on your view of electronic discovery. But what was striking is that just as Emery’s recent research revealed, most of the cases that chug along pretty well, do not require much judicial effort, and the satisfaction of the parties appears pretty high, at least as reported.

There is this stripe of cases in which the costs are high, the disputes are significant, and the perceived drain and distortion of the system are viewed as problematic. And it is fascinating that that same pattern existed before electronic discovery, although it is clear that electronic discovery is making the complaints about it louder and perhaps more pressing.

There is such a link between pleading and discovery. Indeed, the Supreme Court in both *Twombly*¹ and *Iqbal*² said we got to do something about the way the courts are applying the pleading standard because we are afraid that too many cases are simply moving on to full blown discovery, and these are cases that do not deserve that kind of resource being devoted to them. So next, I am going to ask Professor Redish to share with us his views on pleading and discovery.

**MARTIN H. REDISH:** Thanks, Lee. My research recently has been about the link between pleading and discovery, and the conclusion that I come to is basically that there’s one area that needs no change by the Rules Advisory Committee and another area that needs significant changes. And to understand my perspective, let me take a minute to discuss what I refer to as the deep structure of procedure. When we decide basic procedural issues, we rarely look at the deep, underlying political, theoretical structure of the procedural system, and what it is trying to get to. I think it is essential, that in looking at both the pleading and discovery issues, we understand those different factors.

In my scholarship and the paper I wrote for this symposium, I go into some detail. But the most important, underlying, theoretical factor, is the maintenance of the substantive procedural balance. That procedure can either distort substantive rights or it can give life to substantive rights. And the delicate tightrope that has to be walked requires very careful allocation of different priorities. The danger in the pleading area is simply the lack of information that we have at that point. When we combine it with what Judge Charles Clark did in the adoption of the Federal Rules in 1938—the creation of the whole discovery process, the shift from fact pleading, the
front-loaded system to much more of a back-loaded system—we recognize what he was trying to do.

Through the creation of the discovery process, through the manipulation of procedure, he was trying to enforce substantive rights more effectively. Because often, plaintiffs could have substantive rights in name, but unless they are given access to some kind of information gathering devices, they will never be able to prove their claims, and in that sense, we will be under-enforcing the law. What Judge Clark may not have fully comprehended at the time was the danger of over-enforcing the law. That through the provision of burdensome, invasive, and often very expensive discovery devices, he may have been pushing defendants into settlements, that if we had perfect knowledge of at the pleading stage, we would not have allowed it to proceed to the discovery stage.

And in that sense, we have distorted the substantive law; those costs are passed on to the consumer, yet those are not really costs that should be borne by the consumers. So the goal is to, what I would describe as, allocate the risk of the wrong guess. At the pleading stage, we are in danger of guessing wrong. We are in danger, on the one hand, of dismissing claims that if we had perfect knowledge of, we would have known it should have been vindicated. And we, on the other hand, have the risk of allowing claims to proceed to burdensome and expensive discovery, that if we had perfect knowledge of, should not proceed.

How are we going to allocate the risk? Which of those two are we more likely to be willing to risk? Well, when the Twombly decision came down several years ago, it was difficult to grasp what the Court was actually trying to do. It was not an opinion I would put in Justice Souter’s hall of fame. In fact, when I read the opinion, instinctively, I wrote at the top, “C-see me after class.” But when one looks at it more closely, one can see that he was really on to something. It is, therefore, unfortunate that the reaction against it has been so extreme. The assumption appears to have been by many of the critics of the Twombly, of the so-called plausibility doctrine, that it has simply reinstated the fact pleading requirement that Judge Clark’s committee in 1938 was trying to get away from.

As I tell my students: in fact pleading, facts are to co-pleading what cookies were to Cookie Monster. They can never get enough. You would have a system where you would have bills of particulars, and they would go on and on, and plaintiffs could not reasonably be expected to have those facts. The classic case of Conley v. Gibson, where a union, long known for its racist attitudes, refused to help African-American workers who had been laid off along with white workers, but all the white workers were called back, and none of the African-American workers were.

The African-American workers brought a suit against the union alleging that they were involved in a conspiracy to discriminate racially, in violation of the labor laws. Under a fact pleading system, where you have to say who, what, where, and when, they would not have survived. But in
1957, when we had already moved to so-called notice pleading, the claim was allowed to proceed. That was a classic illustration where the old fact pleading system would have resulted in under-enforcement of the substantive law. The assumption of a lot of the critics of Twombly and Iqbal is that they take us back to the pre-Conley days. That is not really accurate.

The only alternative to fact pleading is not simply conclusory making an assertion and getting “open says me” to get to discovery. I think of when I was clerking on the Second Circuit, and we had in front of us Rabbi Klein, somebody who was a retired Rabbi and had lost money in the stock market. And Rabbi felt he did not lose money unless somebody was cheating him. So he brought lawsuits, both in federal and state court all over the New York area, against Goldman Sachs and Merrill Lynch. It was wonderful to see lawyers from Sullivan & Cromwell and other big firms complaining to the court that Rabbi Klein was harassing them.

In one case where a district judge imposed a bond requirement on Rabbi Klein, implying that perhaps Rabbi Klein’s elevator did not stop at all floors, Rabbi Klein sued him for libel. But if we think about this case—now admittedly, this would be controlled by the PSLRA, and even then it was a 9(b) case—but think about this. Is it possible that Rabbi Klein had been cheated by Goldman Sachs and Merrill Lynch? For all we know, they were saying, “How did he find us out?” But not likely. It was at least as equally explainable by the fact that people were sometimes losing money back then in the stock market. Should we have allowed him to get to discovery in the hope that maybe he would unearth something that indicated that his claim was valid? Of course not.

That would be economic and moral nonsense to let a plaintiff get by with simply conclusory assertions. And that is really all the plausibility test does. It says if you do not have detailed facts that you can allege in good faith, then the situation has to smell fishy. You are almost in a pleading analogy due to the evidentiary doctrine of race. We say that probably would not have happened unless something went wrong here. Let’s find out more about it. And if you look at all of the pleading cases the Supreme Court has decided, including Conley, they are reconcilable with this text.

Every complaint that was allowed to proceed to the discovery stage was one where we could quite reasonably say the claim was plausible. Not that we were going to impose liability at the pleading stage, but we needed to find out more. And it seems to me that that is the appropriate standard. So those who are asking for a change in the rules have to provide some sort of statement of what their alternative is. If their alternative is simply what I refer to as a notice pleading minus standard, where you simply can make a conclusory allegation without any indication that you might have some validity to your claim, and who knows, you might get lucky in discovery, then that is not a viable alternative.

So, this is an area where I would not want the Rules Committee to change the current practice. Perhaps if any change were to be made, it
would be simply to codify the plausibility standard by name. But perhaps it is better to just not even mess with it. The discovery area, however, is one where I think change does need to be made. And a basic change on a fundamental issue that the original Rules Committee never considered, yet the practice today is unquestioned. That is the practice of, discovery costs lay where they fall. That, if a plaintiff asks a defendant to produce documents, whether electronic or not, to appear for depositions, to answer interrogatories, the costs of producing that discovery fall on the responding party.

There is nothing in logic or law that suggests that is a proper allocation. In fact, think back to the basic contract doctrine of *quantum meruit*. Put it in a modern context. You find out that one of your co-workers is going to McDonald’s for lunch. You say, “Could you get me a Big Mac and a Coke. I would appreciate it.” And the guy comes back with the Big Mac and a Coke. Whose cost is that? Is it his cost because he initially laid out the money? Was he not doing that for your benefit with no basis to think that there would be a favor for you other than to get it? That the cost is still yours? Well, that’s what discovery is. Discovery is not for the benefit of the producing party. It is not like all other litigation costs that a defendant bears. Those are costs to protect his or her own rights. The discovery is not for his benefit. Indeed, it is likely to hurt him. It is for the benefit of the requesting party. Therefore, those costs really belong to the requesting party. If we recognize that basic principle, we can avoid many of the problems of discovery in the kind of case Judge Rosenthal was talking about, the so-called big case where the costs of discovery are enormous. Think of it this way. If I am given an unlimited research budget at Northwestern Law School, I will not think twice about going to a conference, buying a book, or hiring a research assistant.

If I am given a budget that I have to allocate, I will ask myself is this really necessary? The danger then really is not abusive discovery. That is a relatively rare phenomenon. It is excessive discovery. We need the requesting party to avoid the economic externality of not having to pay for the discovery costs. Now, very often, plaintiffs will lack funds for those discovery costs, so I think if we understand that funding of litigation is often coming from the plaintiffs’ law firms, it is not as much of a problem as it otherwise might be. Perhaps we want to subsidize particular causes of action through discovery costs.

But if so, we have to say it transparently. We do not do that now. There has been no democratic choice to subsidize the discovery costs. Simply by changing the rules to say discovery costs are deemed costs of the requesting party, I think we can avoid significant discovery problems without worrying about the transaction costs of having the court get involved and impose the very, very vague and subjective proportionality requirement.
JUDGE ROSENTHAL: With that modest suggestion, I think it is useful just to take a second and think about how really significant of a change that would be. Back in, I guess 2006, when we were working on the electronic discovery rules, we had a pitched battle all through the Rules Enabling Act process, which is multi-layer, multi-filter, transparent, with lots of public comment. And in the Judicial Conference of the United States—I think we escaped defeat by one vote on the very minor suggestion that in a particular category of electronic discovery involving information not reasonably accessible—that you might consider a judge imposing a shift of some of the costs of getting that kind of discovery to the requesting party.

We almost went down in flames, and I had really black hair before that battle erupted. But the point is, it is a sensitive and significant set of issues. So with that backdrop, and remember the first question, something that was not only a good idea to make the system work well, but also could reasonably be achieved. Think about it in those terms.

MARTIN H. REDISH: Can I make a brief, just one sentence response to that?

JUDGE ROSENTHAL: Sure.

MARTIN H. REDISH: The beauty of being a law professor is that I get to change the Federal Rules any time I want. And as an academic, that is what I am doing. I understand Judge Rosenthal’s practical concern. What I do say at the end of my paper is I am not an idiot. I understand that this is not likely to be adopted. I wanted to start a debate so that judges who have the power under Rule 26(c) now to shift costs, but are extremely resistant to doing so, would at least be more willing to shift costs. I think shifting costs is a misnomer under my quantum meruit theory, but at least getting them to ease up on the unexplained resistance to do so, and to start a debate that really has not occurred yet. That is all I planned to do.

JUDGE ROSENTHAL: And in defense of all the judges in this room—I think I would probably not speak for us all because we do not speak for anybody but ourselves, as you have heard—but it is also remarkable that in my experience, I am almost never asked to shift or assign any part of the cost to the party requesting the discovery. So we are talking about changes in litigant and lawyer behavior and expectations, as well as judicial attitudes. I would like to now ask Don Slavik for his perspective on some of these pleading and discovery issues and comments on the challenges of litigation and the costs of discovery from the plaintiff’s perspective.

DONALD H. SLAVIK: Good morning. Thank you, Judge. From a plaintiff”s perspective, the challenges of litigation do significantly look at costs. And I can make a comment over my thirty years of doing products liability work
where, thirty years ago, many plaintiffs’ attorneys would handle a product liability case against even an automobile manufacturer, which is a good portion of my work. That has shrunk. That has shrunk because of the cost of litigation, the cost that it takes to hire experts. The cost it takes to get through the discovery process, to the point that I must admit, it is probably to my firm’s advantage that we have the ability to fund some of these cases that more of them come our way because so many plaintiffs’ attorneys can’t do it anymore.

The attorney in Omaha, Nebraska cannot afford it anymore, he has to call my firm, or the attorney in Bloomington, Indiana. Frequently, that happens nowadays. And it is even at a point that many of the larger firms that were doing it thirty years ago have shrunk away and gone to other business litigation and other types of litigation because of the cost associated, at least with the kind of work I do in products liability.

I was a student of Mark Tushnet and subscribe to his political theory of constitutional law, which I think has led to some of the costs that have been increased over the years as I have watched the business roundtable and others; the Chamber of Commerce, pushing for certain positions and the challenges and litigation that have arisen in that context, which have added to the costs. Let me just take, for example, preemption. Preemption goes back years, but the idea that you do not have a common law claim, as in Guyer, taking away the claim that there should have been an airbag in the vehicle.

And that particular case, very limited to the facts supposedly at the time, but has led to what I call, “collateral litigation” in many cases, of raising the defensive preemption in the seat belt case and many other cases. That collateral litigation is adding cost. Daubert has become collateral litigation.5 Daubert, was supposedly at the time, easing the rules of pride as I viewed it and many others, but instead became another motion to be made, another fight to be had, whether it’s in federal or state court. You think it is bad in federal court.

I practice in Texas often, and they have Robinson.6 We call Robinson, Daubert on steroids. So, restricting the testimony of experts; most of the experts are on the industry side, so we have to have academics and others who go through a long fight and many battles of Daubert. Rule 11 was, for a short time at least, problematic. I think that has eased up. But now it’s two things: e-discovery and pleading standards. From the e-discovery standpoint, again, I looked at electronic discovery as something that would make it easier, cheaper, faster to get discovery. I mean, dealing with paper, finding files, and engineers and their file drawers, their notebooks for decades trying to find the information, or even the meeting minutes of committees.

Now, it is all electronic. Well, shouldn’t you be able to just pop that up pretty quickly? I have been doing electronic discovery in some form for at least twenty years. I remember going to General Motors, and they had a
laptop, and I sat with the technician and we sketched out some searches that were contained on small databases. He pulled them out, handed me a disk, I made a format, and it worked. When they took their meeting minutes and put them in electronic format, they scan them. Actually, they did not even scan them. That technology did not exist—to scan. They sent them to the Philippines.

They had them retyped, put into databases, brought them back, and we would sit there with a technician for General Motors, and they would find key words and pull up documents and print them out. And we took care of it. And it did not seem all that costly. I think the real problems with e-discovery are not so much that we are asking for things nowadays. The fact is that the world has changed. The world has changed from paper to electronics, and with that, the volume of data and the linking of the data has gone up exponentially.

So what was a haystack before—a small haystack put in the room here and find a few needles by digging through it for hours or a couple of days—now is a mountain. It’s a mountain of information. And trying to dig through there to find the few needles we need to prove our case has gotten expensive for the production side, has gotten expensive for the requesting side, who has to analyze this information and find it. I can just tell you, I am in the Toyota multi-district litigation right now.³ And it is amazing the amount of data that we have to ask for, an amazing amount of data that we have to sort through to find things.

It kind of drives me crazy because my past life, I was a professional engineer. And I think I know what I need to find technically, and I am very reluctant to turn it over to paralegals or junior associates, to try to find things and link them together unless they have the technical background. So, I end up spending a lot of time myself going through information. And it has become a veritable mountain range of information.

Let me touch on pleading standards for a moment. I do not see the problem in trying to plead facts, at least, from a plaintiff’s standpoint in many cases. Yes, the standard pleading form in the Federal Rules is: the defendant was driving a car, they acted negligently, they hit me and caused the injury. You need time to get in place, we can throw that in, too. We have a police report, we can attach that.

To show you what we have been doing now on our side: the master consolidated complaint for the economic loss cases for the Toyota multi-district litigation is 725 pages long. Just the PI wrongful death master complaint is forty-two pages long, and that does not count the exhibits that are going into it. We have sixteen exhibits for the PI side, many more for the economic law side. So, just think of the time of someone reading that to try to filter out whether there’s enough there.

And you know what? They made their Iqbal motions. Even with that. So there is the collateral litigation. There is the expense, and not just the costs of experts and things, but the cost of the time on both sides. I mean,
every minute I spend on a case is detrimental, in the sense of, I get paid a percentage so I do not want to put in thousands of hours. Hundreds of hours are fine, and I would expect the other side puts in a similar number of hours in defending their case. But now the motion practice, whether it is a preemption motion, a Daubert motion, an e-discovery motion, a pleading standard, an Iqbal motion, those are the things that are, in my view, driving us crazy in litigation, at least on the plaintiff’s side.

Where is the cheapest place, the easiest place, actually most fun place for me to try a case? Oregon State Court. And why? Because there’s no expert disclosure there. It is trial by ambush. And it may be a small bar but I will tell you, I do not have to do the preparation. I do not have to have the experts write reports, which then get attacked, not only in deposition, but in subsequent Daubert motions, for example. So if I had my way, we would go back maybe fifty years or one hundred years. But maybe not so much.

**JUDGE ROSENTHAL:** Can I ask for a show of hands who wants to have trial by ambush come back? You got some support here.

**DONALD H. SLAVIK:** I would like that. I will mention right now, I think I disagree with Professor Redish’s position about shifting some of these costs on discovery. I mean, at that point, I think we might as well nail the door to the courthouse closed because we spend enough on discovery as it is. If I have to pay whatever the defendant charged for producing the information, I would have even fewer plaintiffs. I mean, we have enough right now with things like caps on recovery. Let me give you a quick example. Defect in the motor vehicle: we have had many of these cases over the years where the seat backs are not strong enough. You get rear ended at a moderate speed, the driver seat collapses backwards into the child in the back seat, injuring or killing the child. If it kills the child, if there’s a cap on recovery in that state and the wrongful death laws, such as in Wisconsin, you cannot do it. Just $350,000 or $500,000 is the total recovery. The cost of prosecuting the case is about $300,000. Throw in the risk of recovery and the attorney’s fees; and I am not making a significant difference in my client’s life, so why do it? Whereas another state, where there are not caps like that, maybe I can do it; California, Minnesota or some other states.

But those are some of the restrictions we already face in, I call it, the “tort deformed era.” Throwing in the cost of discovery on that, if you throw another $100,000 into what the defendant would charge to search their databases and produce the documents, it is driving us out of the market, so to speak. I think very valid claims cannot be brought. We are not able to enforce the law out there on defective products sometimes because of this. So, I want to applaud the FJC and the Federal Rules Advisory Committee in seeking solutions to the roadblocks that are out there. I think it is a very difficult and problematic thing.
I think they have done a good job so far in getting good data as Emery has done and others, as to what are the real costs out there. They are not that bad. Granted, it sounds like $25,000 or $15,000 for a plaintiff is a barrier to individuals seeking justice. I am looking at multiple, hundreds of thousands of dollars per product liability case. That is up from maybe $100,000 ten years ago to $200,000 or $300,000 today. But it is not all because of the cost of living. So I would ask, what could we do? I know we cannot go back to trial by ambush. But I appreciate that the judges have the ability to manage cases, and I think case management is one of the best things that is out there.

Judges who are engaged in making sure that the parties have the opportunity to have their positions heard quickly. When I make a motion, I do not want to wait four months to get a hearing. Quickly. If I make a motion, and we have a hearing in ten days, that is what we need, the ability to run through that. And to accomplish that, I think the most important thing this Administration can do right now is get those 12% or 13% vacancies filled in the federal bench to start with. I wish that was done immediately.

JUDGE ROSENTHAL: Thank you. Although, it is interesting to denote as judges that one of the motivating factors that both Justice Souter and Justice Kennedy cited repeatedly in *Iqbal* is that they had no confidence in the ability of the district judge, the trial judge to keep discovery within proportional limits. Therefore, you had to tighten up on the pleading standards because it was no answer to say you can allow limited discovery in order to be sure that the claim is worth pursuing, and then if you are satisfied that it is, you can expand the discovery. Otherwise, you would get rid of the case at that point. The Justices both said courts have proven ineffective to do this.

So we should talk about whether that is a reasonable approach or a reasonable solution if that’s going to, in fact, make a difference. I would like to ask Alex now to share with us his perspective, which is the opposite end of the V, and is really perfect to highlight some of these issues because Alex lives in the world that Emery described as that stripe with troublesome cases. His client is a really big data producer and is involved repeatedly in litigation, and he sees the bills.

ALEXANDER DIMITRIEF: Thanks, Judge. I had the pleasure at Duke of presenting a survey that had been conducted by the Lawyers for Civil Justice Reform Group through Henry and the Searle Civil Center. I am happy to report that I think my invitation to come back this morning means that I was successful in not trying to oversell those results; and I was careful not to. Not only because people like Emery were listening very closely to what I had to say, but also because I think it is important to understand that the data that we presented really did not mean more than it was an emphatic exercise in the art of the possible.
When you are talking about something like litigation expenses that are incurred by American corporations, that is an enormous topic and a very hard one to get a grasp on. But what we tried to do was try to get some data to substantiate these concerns about the cost and delay that Judge Rosenthal began this morning’s session with. I think that the data we presented shows that there is an issue that has to be taken pretty seriously when you think about how the rules are working. Just a highlight, I am not going to torture you with all of the pages of data, but just some reference points. We got data from thirty-six out of the Fortune 200 companies. That data showed that the outside litigation expenses for those companies had increased from $66 million per year to $114 million per year from 2000 to 2008. That is 9% a year average cost for those companies.

The total for those thirty-six in 2008, was $4.1 billion. That is a huge number. Twenty-five percent of those costs, and a growing percentage every year, are associated with the production of electronically stored information and related discovery. The proportions of that discovery that actually find their way into court are a little bit distressing. Now again, I do not know how representative this is, but for the companies and the cases that we were able to get the data for, the data suggests that one out of one hundred pages of produced information actually was marked as an exhibit that made its way into court. Now, that is an incredibly small percentage that I think goes to some of these issues of relevance and proportionality.

The thirty-six respondents said there was one case of cost shifting, I think consistent with what Marty and Judge Rosenthal have been saying today about how cost shifting just does not happen all that often, despite its availability already in the rules for certain circumstances. And the subsequent work that we did, showed that depending on how you measure it, 16% to 18% of the profits earned by American corporations go to litigation expenses. Now, some people might say, and I understand the argument, that that’s an appropriate level if you want the privilege of doing business in the United States. I am proud of our legal system, and I understand where those arguments come from.

But some people would say that that percentage is very high. Whatever you think about where that number ought to eventually land, I think the fact that it is up there at 16% to 18% means it needs to be a topic that’s considered by the Rules Committee and addressed thoughtfully. Here is another area where we explored some differences and where I need to add my disclaimer, is the difference between costs in the United States and costs overseas.

This is where I say, not only do I give the standard disclaimer that what you are hearing from me this morning or my opinion is not necessarily that of General Electric, but that happens to be especially true in my case because my opinions are most emphatically not shared by my increasing number of foreign colleagues who are lawyers, who work in overseas jurisdictions where more and more of our business is taking place. Who most
emphatically disagree with me about the cost effectiveness of the American legal system. And when you look at the data we presented in May, it is pretty startling. For the thirty-six companies that were surveyed, depending on the year, we spent four to nine times as much in litigation expenses per U.S. revenue than we did for overseas litigation expenses versus overseas revenue.

Now, that is a pretty shocking number. And I think that Dan Troy, the Senior Vice President and General Counsel of GlaxoSmithKline, is more emphatic about this than I am. Dan spoke at the Federal Rules Conference, and he's the general counsel of an overseas-based corporation who says that the United States legal system is an emphatic deterrent to their doing business in the United States. I will tell you that when I wrestle with this issue, and more and more of our revenue, over 50% of our revenue came from outside of the United States over the past year, and that is a trend that's going to continue.

As I interact with foreign companies and colleagues who are based overseas, they opt out of our legal system. Companies refuse to subject themselves to American jurisdiction, and it is based on perception more than it is on fact. But I will say what I said to the judges at Duke, which is most foreign companies that I do business with think we are crazy. They just do not want to take any risk of being subjected to the types of horror stories they hear about. Now, that bothers me because I will be the first person to say that as an American who was raised in the American legal system, I think we have the best legal system in the world, and I stand by it.

I am proud of the fact that at General Electric, when our conduct is vindicated by an American court, I know that it has really been vindicated because we are held to high standards, and we are proud of being held to high standards. But we are increasingly going to be subjected to litmus tests by the rest of the world as the world becomes a smaller place. And I think we have to listen to what our colleagues from other countries are saying. What I think distresses me is when I hear that companies that are subjected to much less discovery in foreign jurisdictions, do not think that they necessarily get a fairer result than the United States.

That is something that I do not think we have studied yet. I think that’s something that is a fascinating new wrinkle to all the issues that we are confronting. I do not pretend to have all the answers, but as an American who is proud of our legal system, I am concerned. I think that is something that we all really need to think about. So how do I respond and where do I land on some of these issues? I think that there are four main areas where we are encouraged that there is a robust discussion going on.

The first area, begins with pleading. Look, I agree, and any general counsel of a company that gets up here and tells a body like this that access to justice is not an important issue, is kidding herself or himself. Of course it is. It has to be. That is one of the things that makes our system so great. But I think that on balance, what we are seeing is that it has to be about
more than just simple access. It has to be about reasonable access with reasonable consequences to people who are on another side of the litigation. And in that respect, our view is that plausibility is a reasonable standard is the answer when Don says he is concerned about increased costs of litigation about bad pleadings and expensive practices that are brought into place. I go back to judicial management there.

There is not a judge here in the room that cannot recognize a bad faith or frivolous motion that’s brought under *Iqbal* or *Twombly*. And there ought to be consequences to defense lawyers who bring bad faith motions. But in a lot of cases, that threshold test is an important test to make sure that the system is proceeding rationally and cost effectively, and we would urge that there not be a retreat. Maybe we do not get codified within the rules, but we should not retreat from, some of what we view as, positive developments toward rational access to the system.

Second, in terms of the scope of discovery, I think that the advent and explosion of electronically stored information really requires a thoughtful revisiting of that issue. I think that Don—I tried a case when I was a young kid against your firm, against the main partner, Bob Haybush; I lived to tell about it, and in fact, I would like to think that I am one of the few defense lawyers that emerged from that case with a pretty good friend after the case. And that is because I think that he and I had a pretty good shared view of what the haystack ought to look like. That very rarely happens, and I think that the issue here is, how do you get to the right haystack, because everybody is looking for the needle in the haystack. I was struck by the comments by the plaintiffs’ bar at Duke about how they only want a small set of documents.

See, but the disconnect is, that they want you to produce the entire haystack and point you to the information, but they want the right to criticize you for not having produced the entire haystack. So how do you get the haystack to be a manageable size? I think that you could do that by a change to the rule that says that instead of a document or discoverable piece of information being irrelevant to a claim or defense, it ought to be something that a party in good faith uses to support a claim or defense. That small change could be a significant difference in terms of the size of the haystacks.

Then, I think, we need to go to some of the kinds of limits that everybody thought were going to ruin the deposition process, that I think now everybody on balance thinks would actually save lawyers from themselves. And so if we could go to some sort of limit on the number of custodians for whom electronically stored information is going to be produced—say five, six, seven per case, absent showing of a need for more and maybe limit the dates to maybe two years back, absent a showing for the dates to go back farther than that—I think a lot of the problems solve themselves. And again, we save parties from themselves.
A third issue related to scope is preservation, and our belief that standards are required, again, to save lawyers and parties from themselves in a lot of respects. We are not all fortunate enough to appear before Judge Shinland or Judge Grimm and judges who have immersed themselves in the latest nuances of electronically stored information. I think that the most distressing aspect to me is the cost that the judicial system incurs and hours that judges have to devote to issues that parties really ought to have sorted out for themselves.

If anything, I think that one of the biggest shortcomings of the system is that when a court is subjected to thousands of hours of work to sort out an electronically stored information issue, why do the sanctions get paid to the other side instead of the court? So, I really think that there’s something to be done there because that would really send a signal to parties that they better take these issues seriously. But to get them to take these issues seriously and plausibly, let’s make the scope of the obligations reasonable. We need clear rules, not something that depends on which court you are in, and not something that is so uncertain that everybody necessarily goes toward the most strict interpretation of the obligations, but clear rules about what your preservation obligations are and what the sanctions are going to be if you fail to uphold those preservation obligations.

There is a real cost here in terms of dollars from over-preservation. There is also a psychic cost. I think I probably get a bad name within General Electric and elsewhere because I am the guy who goes to all our senior executives and says, “When you’re on a layover someplace in Asia, and you’re so tired that you can’t even see straight, and you’re using your Blackberry to keep up with the rest of the world, don’t you dare forget to keep that text message or keep that outgoing email message.” The psychic cost of that kind of burden of our system that says that one lost message could subject you to sanctions, is something that we really need to address. Is that really the type of system that we want to have?

And the problem, again folks, is perception becomes reality. The consequences of a case like Coleman v. Morgan Stanley in Florida, when you look at the case itself, you understand why the judge became as upset as Judge Moss did. But again, perception leads to behavior, leads to over-preservation, and leads to a skepticism about the system, that I believe is self-destructive, and could be addressed thoughtfully through some rules.

Then the fourth issue is cost allocation, and I am not really popular with a lot of my brethren when I say this, but I think that that’s an idea that is going to be tough to sell. I think that when you are a company like General Electric, it comes with ill grace to say that the cost of producing information to a plaintiff in a personal injury case is somehow burdensome on us. I do not think it serves anybody for us to maintain that kind of argument. But I do think that there is a place for it, when it comes outside of a set of core custodians, core documents that are relevant to a case. And we would love to see something in the rules that essentially said that, when you
get beyond a core set of custodians or a core set of subject matters of the sort, that I think would be a good limitation within the preservation guidelines. That is, if a plaintiff or a defendant wants discovery beyond an agreed to core set of information, perhaps that is when cost shifting ought to be implicated.

But I understand the concern that we do not want to increase the cost of access to the system, so again, I think there is a lot of room to address that thoughtfully. I do think that in looking at the rules, I hope that the committee will hear us when we say that perception really is 80% of reality when it comes to assessing the cost of defending a case, assessing the cost of doing business in the United States in an increasingly competitive international world, and that we really need to listen to each other and turn down the volume a little bit because it is not just the plaintiffs against the defendants in the United States anymore.

It’s all of us on both sides of the V defending our system against increasing international scrutiny. I think we ought to come out ahead in that process. But to do that, we need to continue to address these issues thoughtfully.

**Judge Rosenthal:** That was very provocative, and let me just ask all the members of the panel one question. We have just heard a shopping list of suggestions that the Rules Committee should consider addressing, particularly what I will call, the gap between the statement in Rule 1 and the proportionality limit that has been part of the rules since 1983, some very clear, additional limits to be imposed via rule.

The Federal Rules of Civil Procedure and lots of the state rules have within them lots of tools that judges and lawyers and litigants can use. Rule 16 and the corollary, that is in almost every state rule, says to the court, “Hey, you can limit the number of depositions. You can limit the number of interrogatories. You can limit discovery. You can set a date. You can shape the pretrial work in a way that is reasonably tailored to the needs of a particular case.” And if that was done with a kind of vigor and reliability, that would seem to address a lot of the concerns that we heard today, that there is over-production and that there is no adherence to what makes sense.

Why is it not working? If the rules already provide that ability, why isn’t it working? And if it’s not working, what is the promise of adding these additional rules, other than the rules that are so simple, as to have inherent arbitrariness, which is not necessarily bad. I mean, you could say presumptively that you get to get information from five custodians. There has to be a specific showing of good cause to get more. You could do that. Of course, I think I can do that now. Why is it not enough to have the tools available?
ALEXANDER DIMITRIEF: I think it is not working in all cases, and in enough cases, for the very reasons that make our system so great. And that is because there is a presumption that within the parameters that are established by the rules, we are trying to err in favor of allowing the process to promote a free flow of information, of not shutting down access, of not shutting down a party’s right to discover information in the possession of the other side. It is a question of baselines. And I think there are many judges who, if it were up to her or him, would limit discovery but look at the rules, look at the presumptions, look at how our system is slanted in favor of more rather than less, and say you know what? I am not comfortable doing that.

And that is why I think that concrete limits, like the ones that were put into place on depositions, do the trick and empower judges who want to exercise aggressive management to actually constrain the scope of discovery. Create a new presumption. So, it is one thing for a judge to be confronted with an argument on behalf of a litigant like me, to come in and say, “I think that you need to come up with a limitation in this case based on the circumstances of this case.” It is quite another for me to come in to say, “The Federal Rules codify an expectation of a lot of smart people who have looked at this, that in most cases, you do not need more than five custodians.”

And there is not enough here to overcome that presumption. So, I think changing that baseline is the magic ingredient and why I think it would make such an enormous difference.

JUDGE ROSENTHAL: Anybody else on the panel want to weigh in?

JOHN VAIL: Do you want me to disagree with that?

JUDGE ROSENTHAL: Sure. I would not be surprised to hear you disagree with that.

JOHN VAIL: You know, what is funny about it, is that I am going to disagree on the very important point about presumptions, but not necessarily about the point about outcomes, because I think you are here at Mason at a Law and Economics Conference. I think one thing to start out with, and I am certain it will go to some things that Bruce says, and it goes to a couple of things that Professor Redish said: the civil justice system has a job in our society, and it is a political job in the big sense. The goal of the civil justice system is not to arrive at Pareto optimality. The civil justice system serves our body politic first and our economy second, only because a healthy economy is, indeed, a very important component of a healthy political system.

It is just as important to keep in mind the political goals of the system. Chief Justice Marshall said in Marbury v. Madison, one of the first duties
of any government is to provide remedies for people when they are injured. And that’s the key goal of our civil justice system. That is why presumptively, it needs to stay wide open. Now, this idea of rules and where rules should be. Let’s come back to some of the things that Emery said and remember that the kinds of disputes in which this stuff is important are very limited. It is a small set of the case load, and it will be a small set of the case load in your courts.

So one of the questions is, do you make rules on the basis of 15% of the case load? Or do you make rules that deal mostly with the 85% of the case load, and then have some special things you do with that other 15%? I think the answer is the second one, and that is where these protocols become important. Now, I think too, this will go to something that Professor Redish talked about with—we should have a transparent debate about why we are subsidizing people who ask for information. In most of the disputes we are talking about here, these disputes tend to be disputes between corporations. Artificial beings that we already subsidize by limiting their liability, allowing them perpetual life, indeed, allowing them to exist at all.

There are many ways in which they are not wholly analogous to humans, and I think that can become important as we think about some of these discovery disputes. But let me just stick for now with this reality that these are big cases with big parties on each side. One of the points Alex raised about disputes. There has been over eight years they looked at for the Fortune 200. Now, let me give you some idea of the size of the Fortune 200 in the year 2000. The year those numbers started, the gross revenues of the Fortune 200 were about four and a half times the gross revenues of the People’s Republic of China—the gross national income of China.

They were greater than the gross national incomes of all of South America. These are big entities, and they grew. Although, their costs grew about 9% a year, they grew at a clip of at least 5% a year during that time too. So, the raw numbers overstate the percentages of what they are talking about. But come back again. These big things, how do you control them? I think there has been a lot of talk about protocols within the federal courts, and I do take this as a judicial management issue. And I think largely out of a lot of vetting, a lot of thought from a lot of people that went into the Duke conference, I think that question was largely answered that this is best addressed by managerial issues, and not by general rulemaking.

Now, what should those protocols say? I think for you, Judge Grimm, who is a Magistrate Judge in Baltimore, and who has been mentioned here several times today: you can go to the website of his court, the Federal District Court in Baltimore, and download about a twenty page document that has a lot of protocols for dealing with complex disputes about electronically stored information. Alex has mentioned a presumption of five custodians. I think actually a lot of good plaintiffs’ lawyers would agree with that as a starting point. And one of these very good plaintiffs’ lawyers, a guy named Steve Susman from Texas, has put out a set of protocols.
These come from him. These are Susman protocols. And I think Alex alluded to the idea of a good relationship with Bob Haybush, a noted plaintiffs’ lawyer from Milwaukee, and Susman, a noted plaintiffs’ lawyer from Texas; when you get these good lawyers together to address these problems, the problems tend to recede as long as they have you available to resolve the disputes they do have. So, I think as Don Slavik said, your availability to resolve disputes, your requiring in cases of this kind, that the lawyers talk, that the lawyers’ technicians talk to each other, and that you have quick ways to resolve the disputes, and that you have available to you the technical expertise that you need.

I think one thing that has been talked about a lot as a protocol in these cases is having the parties agree to fund a special master who is well versed in the technology. And I think if you have some of these big cases, and I will let Alex react to this, that some good lawyers will look at each other and say, “Yeah, that is actually a good idea. We will get things done faster and more cheaply.” Those are a few basic reactions. I will have many more to many of the other things later.

JUDGE ROSENTHAL: Alex, do you want to react to that, and then I’ll invite that from other members of the panel, as well?

ALEXANDER DIMITRIEF: Well, you know, there’s that old saying that bad facts make bad law. And what I do not think is true is, I do not think you can say, good cases handled by lawyers who get along well ought to establish a baseline for the rules. I think that, unfortunately, the types of cases where parties intelligently and thoughtfully spare the judge the pain of those types of disputes, are few and far between. I think that’s shame on the lawyers, by the way, but that is what the rules are for, is to make sure that people have an appropriate baseline to work from. So again, I am not advocating hard and fast rules. I am just saying let’s change the presumptions. Let’s move the needles.

Let’s not assume that lawyers are going to behave like responsible adults and work these issues out necessarily in every case. Let’s make it impossible for them not to. Let’s put those new prudent baselines into place and allow variation when a party can make a case that there needs to be an expansion beyond that certain number. But again, I do not think you can presume that every case is going to proceed with parties being able to agree that the Susman rules are the way to go. It is too bad. I was going to propose the Susman rules as the new Federal Rules of Civil Procedure, but I do not really think there are grounds for that yet.

JUDGE ROSENTHAL: Anybody else want to weigh in?

DONALD H. SLAVIK: With regard to specific limits, for example, and custodians and things, I think that is fine as long as what becomes, maybe a
presumption, does not become a ceiling in some cases. Again, the Toyota litigation, we agreed upon twenty-four subjects for preliminary depositions just to find out who knows what. Toyota agreed to produce fifteen witnesses, which we took fifteen depositions. The problem was that I think seven or eight of them were in Japanese, and I would rather have a root canal without Novocain, than do some of those depositions because of the painfulness of trying to ask a question, and waiting for a response for a long time, and the dancing that goes on.

My next motion to the court will be instead of having eleven hours for a Japanese language deposition, it should be thirty-three hours. But again, take for example, the limitation of twenty-five interrogatories. To me, it’s come to such a point that I do not ask for interrogatories anymore because the limitation is now even to the ability to actually use them effectively. I would rather just do some depositions. Again, depositions do cost us as plaintiffs. Yes, it costs you to produce a witness, but you have to pay the court reporter, we typically have to travel some place. I want to pick out just a few depositions and get key depositions. I would rather call defense counsel and say, “Let’s sit down over a cup of coffee on a video conference and figure out what we need to do to make this go as fast as possible.”

But rule changes always alarm me, and when they start putting numbers just because what was a floor becomes a ceiling, presumption becomes another motion to make, another fight to have over whether we should do it right, or how to do it right. So I would take that. I would say that the special master route does work very well. I have done it in state court.

We are doing it in federal court now. Special masters—a good special master is worth their weight in gold; and it’s worth both parties paying that hourly fee, splitting it to have a special master address this, and I wish courts would take greater intervention in appointing special masters that are agreeable with the parties to handle these discovery issues early on from the get-go.

In a recent state trial court case, the first thing the judge did was appoint a special master and relieved the court of having to deal with the issues, and that special master was available within a day or two anytime we had a dispute, or less. We took care of all those discovery disputes early on. So, I would strongly encourage that aspect of it. Put that in the rules, that special masters would be appointed upon agreement of the parties or upon the court’s order.

ALEXANDER DIMITRIEF: Just one quick comment, Don, and let me just speak up on behalf of the poor Japanese witnesses who are being subjected to thirty-three hours of deposition. I do not think they probably enjoyed it very much either. And having represented a couple, I do know that from first had experience. I think a new issue for us in today’s world is gauging the reactions of overseas participants in our economic system, to our system. So when a Japanese witness, who was raised in a different legal sys-
tem and has a different set of expectations is told, that for the privilege of doing business in the United States, you have to be subjected to ten, fifteen, or twenty hours of examination, they ask themselves, “Boy, does that sound right?’”

I am not saying that their answer is necessarily the right one. I will be the first one to say that for the privilege of doing business in the United States, there are costs that come, and obligations that come with that. So, I am not saying that depositions should not be part of that. What I am making is a more subtle point, I hope, which is those types of reactions to our system are something that we increasingly need to take into account because, again, it is not just plaintiffs and defendants, it’s how the rest of the world is interacting with the United States as well and what they think about our system.

I think that is a new lens that we are being scrutinized through now, that was not necessarily present the last few times the rules have been addressed in such a wholesale manner. And I think it is a new issue that will be fascinating to see how it works out over the next ten years.

JUDGE ROSENTHAL: Marty, did you want to weigh in on any of those points, and Bruce?

BRUCE H. KOBAYASHI: It is interesting that Donald mentioned depositions because we have Marty’s alternative cost allocation rule for depositions. And he said, “When I do them, I simply do not over-depose, because I have to take into account my costs now.” And that is simply Marty’s rule. I teach a class on the economics of litigation, and teaching discovery is easy when you are an economist. I tell the students that the problem here, as Marty said, is that I get to externalize lots of the costs onto my adversary. I hate him too; but even if I do not hate him, I am just going to ask for information until the marginal value goes to basically close to zero.

And all that economics is telling you, is that we ought to think about giving people the right incentives. You go to my house, I have two teenagers, and there is a budget for the amount of disputes I can manage between the two teenagers. One common dispute is who gets the bigger slice of the last piece of cake. And my poor kids are the kids of two economists, and so we have incentive devices to deal with the problem, like “I cut you choose.” They take really good care in splitting that cake. There are rulers involved sometimes. But the whole notion is, I do not have to deal with the disputes.

And really, what Marty’s proposal is, or the way I take it—economists Cooter and Rubinfeld have talked about this over and over again. This cost allocation rule is to get people to internalize the cost of their decisions. It is not really just a way to deter more lawsuits. And we can talk about limits. As Don suggested, we are always facing caps. Well, caps are not an economist’s solution to the problem, so maybe we ought to think about what the right solutions are, and get rid of caps, and put in the right solutions, which
might be incentives. When I talk about economics, it really is thinking about marginal incentives.

**Martin H. Redish:** I certainly do not think we should close our eyes to legal costs. In fact, I told the dean I cannot write anymore scholarships, I can afford my hourly rate. But I think we need to recognize a phenomenon that has developed. I made brief reference to this before, and it’s not necessarily a bad phenomenon—do not misunderstand me—but it is one whose implications I think we have to take into account, and that is the plaintiffs’ lawyer as a real party in interest. When we talk about putting the heavy costs of discovery on the poor individual plaintiff, at least in any kind of multi-party litigation, it is not likely to be borne by that poor individual plaintiff.

I think it is appropriately seen as a cost of doing business of large plaintiffs’ firms. If we do want to subsidize discovery, and we may just as well in certain areas, we passed the Civil Rights Attorney’s Fees Awards Act. There are certain areas we believe we want to subsidize. One, I think it should be subject to transparent democratic debate. But two, why would you want the subsidy to come from a defendant who has just had no adjudication against them? There has been a unilateral complaint filed against them, and all of a sudden, there are enormous economic consequences.

Now it is true, there are going to be economic consequences just to defend oneself, but that’s our system. This is qualitatively different. This is giving a benefit to the other person when there’s been no due process adjudication that they were responsible or liable for anything. If there is to be a subsidy, I do not see why it is not a nationwide subsidy. Or at the very least, if it is going to come from a defendant, against whom nothing has been established legally, we should have it come legislatively after free and open debate; something that has never happened.

**Judge Rosenthal:** John, did you want to weigh in?

**John Vail:** This idea of, what you subsidize and how. Again, I come back to the idea of, you have reciprocal duties. Plaintiffs have duties in discovery. Defendants have duties in discovery. The duty burden is equal. In fact, the burden often becomes different because of information asymmetry. The plaintiff does not have access to information that the defendant does have access to that’s necessary to prove a case. Marty alludes to having a free and open debate: we have a free and open debate about this. We have an interstitial common law system, and we have a rulemaking process, which is one of the most open and transparent systems that I know in the federal government. Yeah, I am sucking up.

**Judge Rosenthal:** It’s working.
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John Vail: And again, when you hear the word defendant here and you hear about these enormous costs, in your mind, do any of you picture a human defendant, or do you picture a corporate defendant?

Judge Rosenthal: I would point out to you though, John, that it is a standard part of my jury instructions when I have a corporate party, and I suspect it is in many, many courts because mine is a pattern jury instruction—I did not make this up—that a corporation and an individual are equals in a court of justice. That is part of the jury instruction.

John Vail: I agree. But Marty raised the issue of would we subsidize, and I say that is a hard question when you deal with a corporation because you create its existence to accomplish certain purposes.

Martin H. Redish: Can I just say, there’s no Federal Rule of Civil Procedure, nor has there ever been since 1938, that is explicitly determined that the cost of discovery are to be borne by the responding party. So I agree about the rules process. I mean, I would love to suck up, too. But there has never been such a rule. It is just established practice. We have never had this debate at any level.

Judge Rosenthal: No. We kind of tip toe around it, and it is very useful to have it brought to the forefront. But Bruce has spent much of his professional life studying how incentives play into what lawyers do, what litigants do, and what judges do. His most recent focus has been on something that Alex touched on, and that we have all been talking about, that one of the recent trends we have seen in litigation is the increase, at least perceived increase, in spoliation accusations and sanctions motions and the fear, that the fear of sanctions will in turn lead large data producers to preserve too much, which will in turn lead us all to have to conduct discovery on even more electronically stored and other information.

Bruce has actually studied this instead of simply exchanging anecdotes about it, and I would like to invite him to share the results of that scholarship.

Bruce H. Kobayashi: Thanks, Judge. I do want to say one more thing about the cost allocation rule. The nice thing about going last, as my kids find out in “I cut, you choose,” is that there is a last mover advantage. So most of this stuff I planned to talk about has already been talked about. But one way to deal with discovery limits, and this is really from Cooter and Rubinfeld’s in their Journal of Legal Studies article, is to have limits be part of the trigger at which you change the default cost allocation rule. And so you have something like ordinary and extraordinary discovery. It may not be practical or palatable to the people who are thinking about rules
amendments, but that is one way in which you can try and get some type of incentives in the system.

Don mentioned *Daubert*. I think the greatest description of the problem that we are facing here with respect to judges overseeing all this, is Judge Kozinski’s order on remand in *Daubert*. He said, “I am supposed to sit in judgment of expert’s science? What kind of backward world is this?” And then he basically imposed the same decision that the court reached earlier under the *Frye* standard.¹²

So one of the things that I think economics are really trying to achieve is directing the parties to have the incentives to actually figure out how to get to the right haystack, or to look at a more focused set of things. We are not trying to stop people from filing claims or tilt the playing field one way or the other. We are just trying to get the process to be a lot more rational, and to think about incentives of the parties, and not foist this problem on judges who may not be prepared to deal with this problem. I mean, it’s not because they are not smart. I have to suck up a little bit. But they just do not have the information to actually manage all of this. And I think that is the basic problem here.

As far as preservation duties: I look at preservation duties and the related issue of spoliation sanctions as a system of ex post consequences designed to regulate ex ante behavior. And the only unique thing here is that this issue involves behavior that occurs prior to litigation in many cases. There is a lot of controversy over the courts’ use of its inherent power and whether you can bring these things into the rules. But the perception is that the problem results from use of the common law that results in variation. People are worried about what standard should apply, when sanctions should be imposed, when are these duties triggered, and what are the scope of these duties.

So, the major problem that seems to be facing litigants is all this uncertainty related to the common law rules applied under the courts’ inherent power. The solution often proposed is that we bring this into the rules, and we come up with a uniform rule. The problem is that there is lots of disagreement about what that uniform rule would be.

And so there are several lessons that economics can give you. One that I’m reminded of comes from my experience at the Federal Sentencing Commission. To talk about the Sentencing Commission and about an incredible bunch of judges is a risky proposition. But in some sense all the economists there really thought that we should have had *Booker*¹³ back in the 1980s. It should have just been advisory guidelines, and it goes a lot to what Emery is doing. I think a lot of the problems of federal rulemaking are that we are trying to impose uniform solutions to a wide variety of problems that defy use of a uniform approach. A lot of the problems will have solutions that should be based on facts in the case. It is sort of similar to criminal sentencing: ten to life. And where does this judge sentence this bank robber within that broad range of ten to life?
The answer that the Sentencing Commission came up with was well, we are going to look at what judges did as a whole and then figure out through a regression analysis—I won’t mention standard errors—what judges did as a whole. And it turns out, what judges did was really pretty sensible. You look at bank robbery, and there is the base offense level. And then if the guy had a gun, or he used a gun, or injured somebody or he took more money, all these things resulted in longer sentences and more time served. So what we did was just an empirical approach, because if you try to do this from scratch or just arguing through theory, it was just going to be a mess.

Instead of talking about the various reasons why we have punishment, e.g. justice, retribution, deterrence, and all that was sort of set aside in the individual guideline in favor of just figuring out empirically what the judges did in practice. And then we found out what judges did was rather sensible. The corporate guidelines were a different story because we had no past practice, and that deteriorated into arguments over theory, and that’s when all the economists ended up on the street.

Adapting this to the issue of spoliation sanctions, it seems we get a similar result. If you really look at what is going on—I mean, the thing is you make a small mistake, are negligent or even grossly negligent, it is not common that a terminating sanction is imposed. That is what the case law is saying. It really has to be that there is some kind of bad faith for terminating sanctions to be imposed. And so the law on spoliation sanctions seems rather sensible. There are these really high sanctions available, but they are very rarely used. And the law guards against over-deterrence resulting from the fear of having your case dismissed, or having some kind of default judgment because of a spoliation issue because there has to be a finding of bad faith for this to happen. It is sort of like a mens rea requirement that prevents you from having to, out of fear, over-preserve.

So that might be certainly one thing that we could do, either through common law, or if you want to put it in the rules, to cement in this intent requirement to separate out those cases of accidental or even negligent spoliation from those which are based on bad faith. A similar issue arises in Pension Committee and in Rimkus, regarding whether you make the victim of the spoliation prove that there was prejudice. In the cases where there is bad faith, my approach would be—and once again I am not a lawyer, I’m an economist—you probably do not have to worry about over-deterrence from the punitive nature of the terminating sanction. You probably do not have to worry about whether or not there’s a showing of harm. You can treat them as cases where we also want to punish attempts because these are intentional harms. When you get back to negligence, you probably want to scale back. So you think about Rimkus—I probably would have thrown the book at these guys. I would have had no problem applying the result in Pension Committee to this case. I have bigger problems with the Pension Committee approach when one is applying the sanction when there
is not bad faith, but some form of negligence. The issue of negligence gets back to what is, and when does, the duty to preserve apply?

The issue of the trigger: I think everybody thinks that there should be some kind of notice. And there’s just lots of disagreement about exactly when a party has that notice. So once again, it’s hard to engage in rulemaking, because there is just not a lot of evidence about what the relative costs and benefits are.

The one thing I have to say is that what the rules clearly understand is that there is nothing wrong with destroying lots and lots of evidence. And so a lot of people said this is terrible. The plaintiff could have made his case, but these emails are no longer around. Well, I mean, anybody who has a computer has Microsoft Outlook and it always asks, “Would you like to auto archive these now?” And I always click, “Yes.” The most liberating recent occurrence with computers and me was when I was on a plane to a conference at USC in Los Angeles. In the middle of the plane ride, my laptop, which I used for everything, including to archive my emails, had a massive hard disk error. As a result, I switched to a Mac, which is a very liberating thing in itself, but I also lost all of this archived email that I was thinking, “Oh my gosh. What am I going to do?” And then a sense of relief came up because I was liberated from having access to all of my old emails.

But the whole notion is that there’s sort of this business judgment rule with respect to ex ante management. And you have to have that because you really do not want firms managing data on the basis of the fear, it might be someday relevant to some litigation that eventually arises because that really would be inefficient. So we have a de facto business judgment rule, and as long as you have something in place that looks reasonable in order to conduct your business and manage data, you can destroy lots of data that may be relevant in some future litigation. What is not allowed is for you to deviate from that basic program under the business judgment rule.

So in *Rimkus*, you cannot ex post facto come up with a document destruction policy, or I guess they call it document retention policy. So, deviations from the business judgment rule are punished. For intentional deviations, and at some point, when litigation becomes probable, it is probably a good idea to heighten the standard for preserving data. If you look at going back to the Sentencing Commission analogy, that’s really what we have. So the system, in general, seems to be fairly rational. The real issue, and I guess what everybody wants, is clarity on the margin. The problem with the centralized rulemaking process is that it often proceeds without actually much empirical data.

The Federal Judicial Center really does a lot of empirical work, but often times, it’s not going to be able to answer the question of what’s going to happen when we prospectively change the rules. And in that sense, the bottom line in rulemaking circles is that variation is often thought of as the enemy. On the Sentencing Commission: we wanted to reduce unwarranted
disparity. Now, why you would want to do that in a criminal law system is a good question, but in fact, there was a lot of variation, which remained after the guidelines, and it was warranted. We wanted proportionality, but you wanted like cases treated alike.

I think that is really the goal here, and the correct approach. I think we ought to sort of trust the collective decisions of the federal district courts, and rulemaking really ought to proceed on an informed basis. And way too often, for example in the Rule 26 amendments or the Rule 11 amendments in ’83 and ’93, there’s just no actual knowledge of whether there is a problem to be solved, or whether the solution that is proposed is actually going to address the problem or make it worse. I think, what we ought to do before we go and start tinkering with the federal rules, is figure out what past practice is, and then embrace variation as a way to figure out how to proceed. Because from an empirical economists view, variation is your friend, it is not your enemy.

Without variation, there is no way to figure out whether or not a change in the cost allocation rule is going to be a good thing or a bad thing. So I think my ninety second take away is that we ought to slow down, and we ought to try and figure out; I don’t know whether it’s pilot programs or doing something like the Civil Justice Reform Act in 1990. Or just look at state and federal differences. But we have to find some way to increase our knowledge. For all of the craziness that surrounds the U.S. Sentencing Commission was, the one thing I think everybody agrees is valuable, was that they actually increase knowledge; I think with Booker, they increase knowledge in a way that you do not actually have to pay attention to. But a lot of people still do. And that is, I think, what we have to work into the civil rules rulemaking structure.

**Judge Rosenthal:** Each of the panelists has given us a little bit of a wish list. I told you when we started that we would give you a mix of information about problems. I think we did that. We gave you some ideas for long-range approaches to some of those problems. You have heard some suggestions, and the good news is that we are, in fact, doing within the rules process, much of what has been described. Professor Kobayashi, we have heard you. We are committed to getting more empirical information. Emery’s work has been enormously helpful. Alex’s work has been enormously helpful, and we know we have only started.

I thought we would, give you some ideas for immediate ways to improve. Go to the Duke website, to the Federal Judicial Center website. You will see some of these protocols, form orders, and form agreements, that were discussed. There are forms that I use, that I have used since the conference, that I encouraged the lawyers to talk about and consider as agreements between themselves, or as orders that I enter in cases to try to manage discovery. They are enormously helpful. The Seventh Circuit has a pilot program that they are engaged in right now on better management of
electronic discovery. Their work is on their website, and it is enormously helpful.

So you can, as a take away for yourselves, take advantage immediately of some of these very useful tools that have certainly made my case management better. Maybe not as good as the Supreme Court wants me to be, but they think I can’t do it anyway. I think we can all prove them significantly wrong.

AUDIENCE MEMBER: Let me start with a comment about the difference between the U.S. system and the rest of the world, and what we see as a real competitive problem. We had a speaker here last week for the American College of Business Court Judge, and he pointed out two things. The rest of the world is much more focused on regulation, which is a perspective matter. We use the common law, which is much more retrospect. And I agree with Alex that that’s the best system. But our judicial systems are also more focused on conflict resolution as what their duties are. Whereas our system, to our credit, is focused on finding out what the truth is.

If that is your focus, it costs a lot more to do that. Maybe what we need is some cross pollination where we figure out what the rest of the world is doing to get conflict resolution done on a more cost effective basis. But I do not think we want to change our system that we’re focusing on getting at the truth. The second point is to express a little bit of my frustration at the panel discussion this morning. I’m a state business court judge, so I have a highly specialized court. We have—and Paul Grimm has proved it—we have all of the tools that we need. If you want to know how to make it work, Paul just told the party you can pay $350,000 for discovery abuses, or you go to jail for three years.

It was a very effective rule. We have the tools to do what we need to do. What we do not have, and what the panel did not talk a lot about, is we do not have the capacity, particularly on the state level, to solve those problems. And as far as I can tell, there has been absolutely no effort in this country and nobody promoting the effort to increase the capacity of the judiciary. Until we do that, yes, the answer is judicial management. That is clearly the answer. But if you do not have the capacity, if the judges do not have the time to engage in judicial management, you can have all the rules in the world, and it won’t do you any good.

We have to find ways to change the structure. And I would be interested if any of the panelists have some suggestions on how we can change the structure to create more capacity. I heard the CEO of DuPont several weeks ago say the greatest key to risk management was having the capacity to handle the unknown. We do not have the capacity in the judicial system to handle those 10% to 15% of the cases that are the real problem. Thank you.

JUDGE ROSENTHAL: Anybody want to weigh in?
JOHN VAIL: I will say a couple of things because I actually had that on my list to say. That one of the things we need more than anything else is more judges. That is not going to happen on a federal level soon. Another is that Mitch McConnell needs to give up his aspiration to be Pope, because I say that in 2,000 years, the Catholic Church has canonized approximately 10,000 saints—that’s about five per year. Senator McConnell seems to think that that’s a good rate for the Senate to emulate on the approval of federal judgeships, so he needs to trend away from that. And I am running for Pope anyway, so I do not want the competition.

Another thing that was on my list, I do not know how people will react, but we need to rationalize our drug laws because we are killing ourselves in our courts with what we are doing now. It takes a huge capacity in our courts, and I think a growing consensus shows that we are not getting the benefit from it for the effort that we put into it.

MARTIN H. REDISH: Okay. Can I make one comment?

JUDGE ROSENTHAL: Sure.

MARTIN H. REDISH: I thought the judge’s comments were excellent. However, it comes down to this: you get what you pay for, and the state is just not taking in enough money, so it is not going to be able to allocate it. People do not want tax increases. That’s fine, but if you do not raise your taxes, you are not going to get better services. And it’s really just as simple as that I’m afraid.

ALEXANDER DIMITRIEF: And Judge, I’ll just say, I was trying to allude to that issue when I mentioned that I think a major failing in the system right now is that people like Judge Grimm are available for free. I mean, is it really our priority that we want a talented judge like that spending as much time as he had to? I was struck in the opinion when I read about the thousands of hours that his clerks and he devoted to that dispute. So, what was produced from that was a decision that the first section or the second section with the legal analysis is a great roadmap for any practitioner. But I am not so sure that somebody should not have to pay the system for refereeing that kind of dispute.

I come to you as the legal litigation lawyer for large corporations saying, I think that part of what the system could do is when a party mucks around and causes that kind of problem, and they ought to be sanctioned for it, sanction them for it. Put in some deterrents because I do not think that Judge Grimm should be providing services like that for free.

JUDGE ROSENTHAL: When we started, I thought I said that I wanted to focus on possible solutions that were achievable. And you may have ex-
ceed my pay grade, at least, in terms of the level of influence that we have. But you will be happy to know that Judge Grimm is a member of the Civil Rules Committee, and is helping us navigate these issues from the rules perspective. Having said that, I do not disagree with your comments.

AUDIENCE MEMBER: Sort of a different perspective than I have heard, and I want to start my question with an observation. I have probably been on three or four discovery panels, including one with Judge Rosenthal. Yet, since the Federal Rules came in, I have probably had fewer, what I consider, real e-discovery disputes than I’ve been on panels. So I ask myself, why is that? Is it because of the rules and how good the rules are? Or maybe—and I would pose this—is it because litigation is really a market based system? In other words, if corporate plaintiff A asks corporate defendant B for $10 million worth of e-discovery, then corporate defendant B is going to ask corporate plaintiff A for the same.

On the other hand, if small plaintiff A asks corporate defendant B for $10 million worth of discovery, then corporate defendant B is going to ask small plaintiff A for $500,000 worth, and nobody wants to get into that. Nobody wants a judge to really get involved because really, if you are in the market, if you are litigators, you do not want a market regulator. And that’s what we are. Many lawyers have told me at these kind of seminars, “You judges make orders, but you just do not get the fallout, the economic and other costs of when you say okay, do A, B, C, D and you do that, and you supply that e-discovery, and it becomes unwieldy.”

So is it a market system? Is that what’s really making it work? Is that why I am not seeing so many e-discovery cases in a pretty sophisticated market in Los Angeles or something else?

JUDGE ROSENTHAL: Sounds like we need some more of that empirical research to answer that question.

AUDIENCE MEMBER: What only John has mentioned is the fact that all of this discovery that you are talking about is maybe 5% or 10% of what we deal with in the state court level because the kind of cases that we deal with, are cases that are real small dollar; your soft tissue car wreck case with $197 worth of body damage and $4,000 worth of chiropractic care. What no study, that I am aware of, has ever measured is how many lawsuits are not seeing the courthouse because no plaintiffs’ lawyer will take the case involving $20,000 worth of medical expenses because your firm cannot afford to seek compensation.

Your company cannot afford to defend one, and if they can find any lawyer that will take that kind of a case, your company will settle it on the cheap. Our system of justice, because of the discovery rules that are applicable to all of us, has institutionalized a system where you can cheat, defraud, or injure a person, and as long as you do not injure them for $20,000
or more, no good lawyer will take the case; that is what no economics course I am familiar with, has yet studied.

How many lawsuits are no longer making it to the courthouse because lawyers' compensation has gone up, adjusted for inflation over the years, and is the contingent fee system responsible for people that are clearly injured because of clear liability, not being able to seek access to the courts anymore?

DONALD H. SLAVIK: Like I said with the example of the infant killed, clearly, and I can tell you there was a defect in the product, but we could not afford to do it, I would say that I would take—I would used to say 10%, but I think it’s less than 5% on the cases I investigate with some merit that I actually end up prosecuting at some point. You make a good point.

EMERY LEE: I would love to do that. If the committee would ask me, I would love to do that. I am not sure how I would do it, but I would love to do that.

BRUCE H. KOBAYASHI: Gillian Hadfield at USC has made the more general point that in this country, legal advice is really the purview of not even the middle class. We have lots of people who are forced to deal with complex regulations like tax law or other regulatory law, and they do it basically without any legal advice. And we may want to sort of think about reforming rules against unauthorized practice or other things, which from an antitrust view are really restrictions on the supply of lawyers that make legal advice unnecessarily expensive.

I think that is part of the issue. It is not just a problem limited to plaintiffs who are injured for low amounts. We do have insurance, and there are those sorts of issues. But I think economists have thought about in fairly sophisticated and thoughtful ways, whether or not we ought to go to a different model of providing legal advice. It’s not just the legal system and the rules, but in fact how our lawyer services and legal services are delivered in this country.

JUDGE ROSENTHAL: So we end where we began with Rule 1, and wondering if we really do have a system that works well to achieve it. I want to ask you to help me thank this panel, which has just been wonderful.

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1 See Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).
6 See E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995).


See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).


See Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

