E-DISCOVERY: WHERE WE'VE BEEN, WHERE WE ARE, WHERE WE'RE GOING

JUDICIAL PANELISTS:
Hon. Andrew J. Peck[†] *and*
Hon. John M. Facciola[††]

MODERATOR:
Steven W. Teppler[†††]

INTRODUCTION[1]

It is rare that we in the legal profession are fortunate enough to have on record expansive, deliberative, and real-time jurist insight about an area of law. An even more infrequent event is the recorded interaction between two jurists who are universally recognized as both thought leaders and visionaries in an area of law that is developing (and some would say, maturing) as quickly as electronic discovery. I am privileged and honored, both personally and on behalf of the Ave Maria School of Law, to have moderated just such an interaction between U.S. Magistrate Judges John Facciola of the U.S. District Court for the District of Columbia, and Andrew Peck of the U.S. District Court for the Southern District of New York. The discourse is lively, instructive, and a testament to the importance and increasing impact electronic discovery will have on litigation in the 21st Century. Our thanks

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1. Written by Steven W. Teppler.

to Judges Facciola and Peck for investing the time and effort to participate in what we hope to be a continuing conversation.

PANEL DISCUSSION[2]

JUDGE PECK:

It is nice to be back here where the weather is warmer than up in New York. While the subject we are talking about is e-discovery, the fact of the matter is that there is no other type of discovery anymore—everything is electronic, whether we are looking at e-mail or social media, or even a paper outline like this. It may be printed at the moment, but it came from Professor Teppler's computer.

Some organizations are saying that we should cut out e-discovery because it is too expensive and too many lawyers cannot handle it. If we eliminate e-discovery, we would be going back to a pre-1938 world, when it was trial by ambush. We have to get a handle on it. The passing of the torch from the older generation to people who have grown up with computers will make a big difference.

Corporations are saving far too much information now because storage is so cheap. It is easier to save information than to have the sales force take time at the end of the month and cull their e-mails. The problem is that when a lawsuit hits, you can no longer go to the corporate central paper files and say, "This is a dispute about the XYZ Contract. Where is the XYZ file?" and then open the filing cabinet and there it is. We have to find a way to manage the vast bulk of information that corporations and individuals are keeping and generating without pricing everybody out of the court system. That is what we are going to be struggling with, going forward.

PROFESSOR TEPPLER:

Thank you Judge Peck. One thing that keeps coming up is that all of this is so new. It has been ten years and this is still new and still evolving. It is one of the few areas of law in which we are seeing this inertial movement toward standard approaches and practices, taking into account, of course, that we have an ill-defined way of looking at technology as something dynamic that changes as we speak. When we look at *stare decisis* and precedential decisions, we are looking back at a very reasoned and deliberative manner at developing legal principles. But those legal principles do not take into account disruptive technology. They do not take into account Facebook or

2. Jan. 21, 2013, at Ave Maria School of Law, Naples, Fla.

cloud computing. They do not take into account things we take for granted, but that are now making their way into the universe of litigation.

How do we evaluate digital information that is now being measured in exabytes? For those who do not know, megabytes are the little guys. Then there are gigabytes, which are one thousand megabytes; and then there are terabytes, which are one thousand gigabytes; and then there are petabytes, which are one thousand terabytes; and then there are exabytes, which are one thousand petabytes. Eventually, you get to a point where you have more bits of information than there are particles in the universe.

JUDGE FACCIOLA:

As a matter of arithmetic, an exabyte would contain every word ever spoken since human beings spoke.

PROFESSOR TEPPLER:

We now have to manage that in litigation because all of this is potentially discoverable information. Why is it discoverable? As Judge Peck mentioned, most evidence will come out of a computer these days, even in a simple slip and fall case. You might ask: "What about that memorandum that talked about the sloppy housekeeping practices in the store that allowed water to sit on the floor for hours?" That will be stored in a computer. So, if you think that litigation does not involve a computer, you have to think again.

With that, we will get to something that should be at the forefront of every attorney's mind, and should be on the forefront of every client's mind: competency. Clients should assume that the attorney they are dealing with has a level of competency and fluency in the area where the client's issue is being solved. Attorneys have a duty of competency both under state bar and ABA rules, which largely run parallel to each other. We have the competency requirements to be competent and to maintain competency. At the forefront of seeing attorney competency are courts and judges. These two judges here today have experience with observing a high volume of traffic, with all different flavors of counsel, from solo practitioners to large law firms.

Let me ask Judge Facciola: What have you seen?

JUDGE FACCIOLA:

I have seen incompetence that would make the angels weep. One of the growing areas in criminal litigation is child pornography. It takes two forms. First is the trading of the pornography. Second, and worse, are efforts to find children who are willing to have sex. Basically, an FBI agent will be in a chat room pretending to be a man who is divorced with a six-year-old

daughter, whom he can set up with someone on the other end of the chat room. Once they agree, they set up an assignation. Once they cross state lines—which, in the District of Columbia, is nothing more than taking the Metro from Beltsville to Rhode Island Station—they have crossed state lines for the purposes of enticing a child, which is a twenty-year felony. I had a preliminary hearing in one of these cases. It involved rather unsophisticated technology, but you had to know how a chat room worked. You particularly had to know why the police were able to say that this was his computer, based on the ISP address.

PROFESSOR TEPPLER:

Would you please explain what a chat room is?

JUDGE FACCIOLA:

A person goes into a chat room called "Kiddies." Here is Mr. X, and here is the police officer, on different computers. Mr. X goes into the chat room and says, "I have N number of pictures here—good stuff." He gets in touch with Y, and Y and X agree to exchange the pictures. Every time the FBI seizes child pornography, each piece of the pornography has a hash value. A hash value is a unique number. For example, assume you have a Word Perfect document that has a hash number. You add one comma to it and it has a different hash number. In the old days, the FBI would say that the hash value of the chat room matched the hash value on the person's computer, and this would be enough to get a search warrant.

Now, the variation of the theme is a police officer goes into a chat room called "Kids are Alive," which is a tipoff that this is for people who are not only interested in child pornography, but are interested in having sex with children. The FBI agent explains that he is divorced, his six-year-old daughter is with him on the weekends, and asks whether Mr. X is interested. The FBI agent may even send a phony picture of the child and they begin to talk. The conversations are disgusting. When Judge Peck and I review the search warrants, the FBI insists that we look at the child pornography and it is horrifying. In any event, they are in this chat room and we know that this computer has a particular ISP address by which the information is sent to that computer. It is something like "19.000.000.1." By virtue of knowing this, we at least know that this computer, with this ISP address, is in this home. That is probably enough to get a search warrant.

In the preliminary hearing, the police officer was asked about this and how it worked. With every question defense counsel was asking, he kept digging the hole deeper and deeper for his client. Finally, I looked at him and directed counsel to approach the bench. If a judge does this, you know

things are not going to go well. So I said, "Do you know what you are doing?" I guess he thought he would be charming and said, "Judge, I just do not understand this computer stuff." So I said, "We have a problem here. I am going to declare a mistrial, and I am going to appoint the defendant a lawyer who knows what he is doing."

So, to answer your question, that was the worst example of incompetence that I have seen. The penalty for trading in child pornography is twenty years. Most of these defendants do not have a criminal record. Many of them have had no relationships of a romantic nature. You can imagine what will happen to them when they get to jail. And here was this lawyer with a client facing twenty years, and he did not know how a chat room worked.

PROFESSOR TEPPLER:

Judge Peck?

JUDGE PECK:

I must say that I do not have an example as interesting as that one. But it is still not unusual for a lawyer pointing to their gray hair or lack of hair and saying, "Judge, I can see you are of a certain age, too. You know, we just do not understand how these computers work." The one who did that most recently did it as his charming introduction of his young associate. I said to myself, "Thank goodness he knows his limitations enough that he has somebody who works for him who does understand this."

I guess the biggest example I can give of lawyer incompetence (and I do most of my discovery rulings from the bench, either with a recording or court reporter, on the record, because there just is not enough time in the day to write opinions on "is document request number thirty-two overly broad or not?"), but this was a case where I was looking for the right moment in which to write an opinion documenting the history, because it was a train wreck. The plaintiff's lawyers did not do a litigation hold, then they got their in-house computer technician, with virtually no instruction, to do the search, and we wound up at some point having an evidentiary hearing, where he testified, and he was shocked and ashamed at how little instruction he had been given. There were about three more things that they did wrong with cost shifting to the other side for these hearings. I was amused at the way they finally solved their problem. They went to the opposing counsel and the opposing counsel's vendor, and said, "Can you please recommend a vendor for us in the X area who can do this right?" They did and it finally got fixed—and that was on the fourth attempt. It was just mind-boggling.

PROFESSOR TEPPLER:

We are ten years into litigation hold decisional authority. For those of you who do not know what a litigation hold is, when litigation commences, or sometimes in federal court, before litigation, it is proper to send a notice to the other side not to delete information, and to preserve information—two activities that any party must adhere to. We are ten years on, and we are still having litigation hold issues. We are still having search issues. Search is another area that started out as a simple thought—"We are just going to search the computer"—but now we have cloud computing and what is called "big data." We will talk about that a little later. It immensely complicates how we go about finding the information we need to litigate. This is something that is evolving.

JUDGE FACCIOLA:

There is going to be a dramatic change. Last summer, the President of the American Bar Association, Caroline Lamb, charged the ethics committee to bring the ethics rules into the twenty-first century. They made a very dramatic change to one of the rules. The rule to which Professor Teppler referred requires a lawyer to be competent. Now it requires a lawyer to be conversant with, I believe the words to be, "the benefits and dangers of technology." So this is an express command that a lawyer be familiar with technology. George Jones, who was formerly chair of our committee on grievances, was on the committee that drafted this. He explained to us that in terms of benefits, what the committee was looking at was making lawyers sensitive to the fact that litigation should be made as cheap as possible using the technology. You cannot in good faith, or consistent with that rule, go to a client and say, "Discovery is going to cost you a million dollars," when, if you were more familiar with the technology, it would cost $100,000. In terms of the dangers, it was the sensitivity that lawyers have, or should have, with reference to the possibility of invasion of their client's data. How secure is the network?

There is a very good case involving a young person who is an associate in California. He wanted to know why he could not take his laptop into Starbucks and work there. Well, conveniently ignoring that anybody could look over his shoulder, if he joined the Starbucks network, his work would be available to anybody on the planet. This was the sensitivity to the dangers of technology. So this is a whole new world that we are getting into, and it seems inevitable that the states will adopt this rule too, replacing the former rule.

I love the former rule because it said in the comment that you could gain the competence in the case itself. I was always grateful that brain surgeons

did not have a similar rule, because I imagined myself being wheeled in on a gurney, and I say to the doctor, "Doc, be careful, it is my first brain surgery"— and he says, "You too?"

So now, the old days where one could hang a shingle out, and *ipso facto* be competent, and learn all there is to know about property law, or divorce, or child support by the mere fact of being a lawyer, seem to have ended. We will have to watch to see how dramatic a change this is.

PROFESSOR TEPPLER:

Do you see any difference in competency between lawyers from large firms, small firms, and solo practitioners?

JUDGE FACCIOLA:

Yes, and it is a tremendous problem. In D.C., we have always had a complaint by the smaller practitioners that they are judged by standards that are impossible for them to reach because they do not have the economies of scale. So a lawyer is dragged in and is accused of incompetence because he blew a statute of limitations. His defense is that he is a single practitioner with a million things to do, and is judged by the standard of a Covington & Burling or an Arnold & Porter, who have paraprofessionals and accounting assistants. I do not do that. So I still think we are going to be challenged by arguments that the smaller firms are being held to standards that are simply unreasonable for them to meet.

JUDGE PECK:

Although the interesting thing (and I know Steve has talked about this, and so have some other people I know who are the in-house e-discovery gurus of their firm) is that people at large firms sometimes say that they have a much harder time getting their partners involved early and at the right time in following the guiding principles than they have dealing with an adversary. I think even in the big firms, it depends on the firm culture and like anything else, they may have the resources, but if a senior partner is a dinosaur and does not want to listen to his or her junior people or e-discovery people, it is still a problem. In some ways, it can be easier for a small firm to deal with some of this than it is for a larger firm, because they are not likely to have a firm intranet and various other things, they are going to have their own computer on their desk, and maybe two computers linked on a server and a backup. They will not have the internal problems that big law firms will have. There is always the big firm/small firm dichotomy.

JUDGE FACCIOLA:

Another dichotomy is in the nature of the practice. I just had lunch last week with the chief of the Civil Division of the U.S. Attorney's Office. We were discussing the protocol that comes out of Judge Peck's court in employment cases. He has been doing this for about twenty years. I was in the Civil Division of the U.S. Attorney's Office for a long period of time. He was telling me what I see on a daily basis. It is interesting how the Title VII Employment Bar has not discovered this. He says he holds his breath and worries about that first case where the Title VII plaintiff, who was employed at the Department of Defense, suddenly realizes that "there may be gold in them there hills" and asks for all the documents at the Department of Defense pertaining to the project that she was working on when she was fired because she was incompetent. When that moment comes, what we are going to do? I do not know whether this is true in Florida—maybe the lawyers in the room could fill me in—but I have not seen much of this in medical malpractice cases. The last three doctors I went to, I noticed for the first time that they were taking their notes on a computer. So maybe this is coming soon, but there seem to be areas of the law, where, oddly enough, this does not seem to exist. Is that your experience Judge Peck?

JUDGE PECK:

Yes. It really is going to depend on enough lawyers to start using it, and enough headlines to hit the papers for people to wake up. The joy of federal court is that in addition to Title VII and child pornography, we get diversity cases. I cannot tell you the number of diversity auto accident cases that have been in front of me. Not a single one has asked for information from the black box in the car. That would have a tremendous amount of information about the speed of the car, when the airbag was deployed, and other valuable data. I have seen some articles in the ABA journal and elsewhere about that, but in the real world, nobody does that.

JUDGE FACCIOLA:

In criminal cases, it is a real problem, because, from my perspective and Judge Peck's perspective, it is a budget buster. Judge Peck and I have a finite amount of money to use under the Criminal Justice Act in the appointment of counsel fund, and also to pay experts. So we have a drug running case, and a child pornography case, and all of the sudden we get a mortgage fraud case, and it involves hundreds of thousands of documents. All of the sudden I have this problem: How am I going to use limited resources and meet the needs of this case? Now the administrative office of

United States Courts and the Federal Judicial Center, over the past three years, has created a program to try to solve this. There now is a national e-discovery criminal justice coordinator, based, I believe, in New Orleans, who is available to the bar, who is appointed in criminal cases. They have also created a very rigorous cooperation protocol, which requires the parties to meet and confer, for example, to agree to a common form of production.

This is a real problem. For example, I had a case. Washington has a curious venue provision. We get a lot of the Colombian drug trafficking cases. So we will have twenty-eight defendants named in a case. There you have a situation where the Colombian police may have wiretapped someone's phone for three years before he was even arrested and brought to America. I had a case involving ten thousand CDs of information. It was a nightmare. Ultimately, I concluded that we would translate them into a common database that both sides could use equally. That seemed to work. The problem for the defense bar is: When do you stop looking? That is, if the prosecution says, "Here is the evidence we are going to use, and here is the remainder," must the defense attorney look at it to make sure there is nothing in it that the government missed? This also complicates things significantly in regard to the government's *Brady* obligation,[3] because the search must now not only include what incriminates but also what may exculpate. So I commend to you this protocol that is on the Federal Judicial Center website.[4] Maybe it has some hope, but right now it is a very challenging problem.

PROFESSOR TEPPLER:

We will talk more about criminal procedure and that trend, which is actually one of those areas that is way behind the federal civil arena. It will be interesting to see what happens in the next few years.

What is interesting, and as a short aside, what the judges are telling us is that the opportunities for attorneys who can become competent in this area are wide open—much more so than in other areas of the law that are filled up at this point. But attorneys are being sued right now for malpractice over these issues. We now have electronic discovery rules in Florida, which just became effective in September of last year, which largely parallel the federal rules. The e-discovery rules expressly provide that they will look to federal

3. Brady v. Maryland, 373 U.S. 83 (1963).

4. BARBARA J. ROTHSTEIN, ET AL., MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES (2012), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt2d_eb.pdf/$file/eldscpkt2d_eb.pdf.

decisional authority for guidelines as the law develops.[5] So much of what the judges will tell us, you will eventually see mirrored in state court practice.

I wanted to mention that new technologies are coming around and being invented right now. Five years ago, you had to pay $20,000 per seat for a Concordance or Summation position, so that you could review documents that are provided to you en masse via large files called load files in large and even small litigation. There are now cloud-based providers that can offer the same review tools as Concordance and Summation without that huge overhead cost. So, in reality, I think that the smaller firms can be more nimble and can approach technology in the electronic discovery arena, even faster or perhaps even better, or at least on an equal playing field as the larger firms.

JUDGE PECK:

One last thing on competence, in fairness to the practicing lawyers, is that you do need to research your judge and know your judge. Obviously, the judiciary runs the gamut from those of us who are willing to talk about this and who know a certain amount about it, to the judges who are just as bad as the lawyers in saying, "I became a judge forty years ago and I do not have to learn this," or worse, the judges who say, "What are you fighting about? It is on a computer, so just press the Staples Easy Button and the computer will spit it out and it will be done." So you do need to educate the judge on any issue, whether it is e-discovery, or something else, and figure out from reported decisions or other sources what the judges are familiar with, and respectfully educate the court. If the court says, "Yes, I know, move on," that is fine. But you do not want the judge to wonder, "What is a petabyte?" Just educate.

PROFESSOR TEPPLER:

Judge Peck, you bring up a really good point. You speak about educating the court, and in some instances that is very advisable, but the way in which one goes about this can be somewhat challenging. If you are an attorney and you know what technology is all about, you can walk in and argue until the cows come home. But you will be an attorney arguing about technology. Even though you have competency, perhaps, in technology, you will be faced with another attorney with equal competency, or worse, no competency at all, and you will have a situation with attorneys speaking to each other and a judge trying to figure out which end is up. This brings me

5. FLA. CT. C.P.R. 1.380 (2012).

to the importance of an e-discovery liaison, which attorneys should be able to engage in the course of litigation.

JUDGE PECK:

When a lawyer explains to me something about technology, unless I know who that person is, I do take it with somewhat of a grain of salt. What I recommend highly, and I have ordered it in a number of cases, is if there is a discovery dispute—and I try to resolve them all from the bench—bring your technology consultant to court. Whether it is an in-house lawyer, like Professor Teppler in his firm, or whether it is somebody hired from a vendor, if each side has their technology person there, it really is amazing how they can cut through the language barriers and everything else. Lawyers and IT are like what Winston Churchill said about British and American English: two countries separated by a common language. Lawyers and IT are not necessarily speaking the same language. I have found that at the conferences, the lawyers have their technology specialists on either side. As the conferences become informal, the technology people are leaning forward to get the lawyers out of their line of sight and begin saying, "Do you run a such and such system? Maybe you can query it in this way." Then, all of the sudden, it is resolved. Our mutual friend, Magistrate Judge David Waxse, out of Kansas, talks about a case where there was a fight about how expensive the search would be. The lawyers at the conference in front of him on the defense side said, "It is going to cost us a million dollars to search for this, and this case just cannot afford it." Judge Waxse said, "You need to brief the issue. I need some evidence in front of me." So their in-house IT person submitted an affidavit, and the number was somewhat refined to $750,000. Judge Waxse looked at the papers and said, "I need to have an evidentiary hearing in this case" and set a date for it. Both sides decided to go outside and hire consultants. When the outside vendor took the stand, it went like this: "What is your name?" "My name is X, and by the way, it is only going to cost a quarter of a million dollars." The cost kept coming down and by the end of cross-examination, it was agreed that the cost would be only $10,000. So it really helps to know what you are talking about, to get a reputation with the court as knowing what you are talking about, and to support it with evidentiary hearings, when needed—or as I like to call it, "bring your geek to court day." If you are in court on one of these issues, bring someone who speaks IT and can translate it for the judge.

PROFESSOR TEPPLER:

We are not talking about having your technology expert come in as a testifying expert; they are coming in to guide the court. It is not as if they will be sworn in and subject to direct and cross-examination.

JUDGE PECK:

That is right. By the time you get to the sworn testimony, the cost has already gone at least halfway through the roof, if not all the way through. Getting knowledgeable people involved at the earliest stage possible is a much better alternative and frankly is going to save your client a great deal of money. Some lawyers go into the 26(f) meet and confer and no one is willing to do anything, nobody is prepared, and they are doing what we in the literature call a "drive-by meet and confer." The Rule says you have to talk about electronic discovery and search,[6] so you turn to your adversary and say, "If I ask for some e-mails in one of my requests, and they are relevant, will you produce them?" They say, "Of course, and we will talk," so you check off the box and say to the court, "Yes, we talked about this and we have no problems." If you go into the meet and confer prepared, you will say, "Here is our system, we store our material in X way, and we have talked to our client and we believe there were three key players on our side who dealt with your side." We are not saying you have to agree for all times that you can only ask for three. We are telling you that "those three are Sherlock Holmes, John Watson, and James Moriarty, and we propose to search their files, and after we have done that, if you think you need more, then you can ask us for it. We will either agree or we will worry about that when the time comes."

If you go through all of those steps as early as possible, it may not be that you can do all of this in the first meet and confer, but the earlier you get, as Steve calls it, the "grownups in the room"—those who know the way to do the search, where everything is, and how to get it—and if both sides are candid about it and nobody is hiding the ball, this can save everybody from waste and a ton of costs for clients.

The magic word is "cooperation." I am sure you have been told about the Sedona Conference's so-called Cooperation Proclamation—which Judge Facciola and I and a hundred-plus judges have signed onto.[7] You can be a vigorous advocate and do everything you have to do under the ethics rules while still cooperating with the other side and making e-discovery and the

6. *See* FED. R. CIV. P. 26(f).

7. THE SEDONA CONFERENCE COOPERATION PROCLAMATION (2008), *available at* https://thesedonaconference.org/cooperation-proclamation.

whole discovery process, go more inexpensively and less wastefully. For the practicing lawyers and the soon to be practicing lawyers, first of all, if you have a client who says, "Cooperate? I do not want a lawyer who is going to cooperate," there are two answers to that. One answer is that if you cooperate, the cost will be at a lower level, whereas if we fight about it and have six motions in front of Judges Peck or Facciola, the cost will be much higher. The second answer is not to cooperate, but to strategically and proactively release information. That means that you are going to cooperate, but you are not going to say it that way. You are going to tell the other side, "Here are the key players; let us focus on that." First of all, in almost any type of case, there is interaction. Whether it is the employment discrimination plaintiff who knows who the alleged harasser was, or whether it is a breach of contract suit and they know whom they dealt with, there is no great secret here, you are not giving away the store. You are focusing on the discovery that is needed, or at least prioritizing it in such a way where you do not get a request, and fight in the court, and get a compromise where plaintiff wants you to search fifty custodians, you offer three, so the judge splits the baby and perhaps gives you twenty-five. That is not a win for anybody.

JUDGE FACCIOLA:

It might be said that we are kind of at a watershed in the history of the federal rules. That is: Is the adversarial model going to persist into the future? Oddly enough, that is in question.

These costs are stupefying. One of the cases that we will be looking at today involves an insurance company and a class action. The costs of discovery were $982,000. That case could not settle for $981,000?

There is a lot of scholarship out there now, and I commend it to your attention, indicating that the method that we are now engaged in is radically different from the 1938 model. It is a settlement model.[8]

A very good lawyer from an outstanding firm, just last week, said to me, "Whenever I have to try a case, I have lost, because the costs of having to try a case are going to dwarf the recovery."

I have actually had a few cases this year that have settled. To my utter, stupefying amazement, plaintiffs simply threw in the towel. They had expended X number of dollars, they realized they could never recapture that, and they came to me, and in a private caucus during the settlement conference, they actually asked me to rescue them from themselves: "Judge,

8. *See, e.g.*, J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713 (2012).

see if you can get them to go along with a voluntary dismissal, each party to bear its own fees and costs."

That is a radical transformation. So it is fascinating to me to see this cooperation model coming forward at this point in the history of federal litigation. To me, the greatest failing of the federal judiciary is to permit lawyers to be relieved of their responsibilities under Rule 26(a)(1) to make their initial disclosures, which now includes questions specific to electronic discovery, and to permit them to have a 26(f) drive-by bench conference[9]—which goes something like this: "Did you gentlemen have your 26(f) conference?" They always say: "Your Honor, I know Joe; I have known him for years! Our kids go to school together. We play golf. Judge, we have it worked out—don't you worry." Two months later, they are ready to kill each other. Why? Because nobody put them in a room and really focused in on what was due.

So, on the most superficial level, there is this plea to cooperate. I have seen many lawyers say that this is just the federal judges whining again. But at a more profound level, something is going on here, that is, a dramatic tectonic shifting in the way this is going to happen. You are either going to cooperate, or you are going to lose. The game will never be worth the prize at these costs.

PROFESSOR TEPPLER:

We have been calling this a "Kabuki dance." But more so than a Kabuki dance this is the essence of negotiation and transactional activity in the very beginning. If you can negotiate how you are going to do discovery, and you do it early on, you can drive that discovery to your client's benefit or to their least detriment.

Let me add that Florida departs from the Federal Rules in this way: There is no meet and confer requirement to discuss electronic discovery as there is in the Federal Rules. However, the Committee Notes strongly suggest that the parties enter into early stage discussions about the context of electronic discovery. That, to me, means the same thing, and it gives an increased power to the litigants to be able to say that they want to do certain things very early on. You want to have what I call the three Ps: protective order in place; an electronic discovery protocol, which tells you how to go about doing the search, collection, and identification; and preservation. You also want to have a claw-back agreement.[10] But you can do this in the Florida regime early on by just handing over proposed stipulations to the

9. *See* FED. R. CIV. P. 26(f).

10. *See* FED. R. EVID. 502.

other side. If they do not agree, the rules invite you to take it up to the court. So functionally, we are operating in the same way.

When it comes to Rule 26(f) in the federal system—I was in a district a few months back and there was what is called a "status call." A status call is kind of like an audition for a movie, where you have fifty sets of lawyers who are coming in waiting for the scheduling order in their cases. More than one set of lawyers, while in the waiting room, were saying, "Are we going to do electronic discovery in this case?" They would say, "Probably not. We will say we have it handled." This was as recently as the middle of 2012.

JUDGE FACCIOLA:

This is not to say that every case has some quantum of electronic discovery that has to be done. It is to say to be selective of that case where electronic discovery is going to be an important element. One of the problems we are having from the client's perspective is that electronic discovery has a notorious reputation for doubling the costs of everything. As soon as they hear those words, the dynamic changes. That is something the lawyer has to do. I think the lawyer's approach has to be to say, number one: If you work with me closely, we can get this cost down to the barest minimum. As a part of doing that, I am not going to play games with the other side about things that nobody cares about. I am going to pick my shots.

PROFESSOR TEPPLER:

So you say the hallmark is transparency?

JUDGE FACCIOLA:

It is one of them, yes. It is also creating a practice where cooperation is the first thing you try. Now recently, in the past two years, I have had the great benefit of having people serve as special masters for me for the sole purpose of cooperation. They are some of the most outstanding names in this area, and believe it or not, they did this for nothing. In every single instance, not only were they successful, but they reduced the cost markedly. So costs are a function not only of cooperation, but of competence. If you do not know what you are doing, you are going to drive the cost up hideously.

JUDGE PECK:

The other factor is going back to being a good lawyer, period. Focus on what is in dispute. An example is a recent case that I had under the Fair Labor Standards Act ("FLSA"). That is the law that says that you have to be paid minimum wage and if you work over forty hours a week you have to be paid overtime. It only affects businesses that are in some form in interstate

commerce or have over $500,000 of revenue in a year. The answer, as it often does, denied everything. So there was a discovery issue in front of me where the plaintiff was asking for all of the revenue information about the defendant, and it was really a small mom and pop type of operation, a little bigger than mom and pop, and the defendant was saying this is ridiculously expensive, et cetera. I said, "Is there any question as to whether you have the half million in income or not? Because you are denying it—if you are denying it—they have the right to prove it. If you admit that that element is satisfied, we do not have to do discovery on it." There was this look of "oh, that is interesting," and the lawyer punted, but said, "I will get back to you in a week. I need to consult the client." I got a letter a week later saying, "We stipulate that we are not contesting the jurisdictional threshold," and I had sort of preordered that if they made that representation there would not be discovery on it, and if they could not make that representation, then there would be discovery. So, when you focus on what is truly an issue, that is another way of cutting down on costs. You do not have to take discovery of something that is not going to be at issue.

JUDGE FACCIOLA:

I think the best thing to understand is that you never stop learning this, whether you are a judge or a lawyer. When you come right down to any lawsuit, it is astonishing how little is in dispute. I recently resolved a case, in which I was the trial judge, and wrote my findings of fact. I wrote 250 findings of fact about how this woman was treated. When the dust had settled, I looked at them and two paragraphs were truly in dispute; the rest had been exposed by the discovery. Now, the question then becomes, as I think Judge Peck is suggesting, if we knew that in the beginning, why did we spend all this money on the other 248 paragraphs?

You see this in a lot of different ways. You see this in Judge Peck's practice of no papers on discovery because he is going to do it from the bench. You see it with Judge Shira Scheindlin's rule that a motion can be no longer than three pages. In our jurisdiction, Judge Wilkins has a new procedure where if they say, "We are going to file a motion for summary judgment," he says, "No you are not. You are going to send me a three page letter setting forth your positions and then we will come back together and see what is truly in dispute." There is this new hunger in the federal judiciary to see if we can get to the heart of the matter more quickly. I think that is a result of the hideous costs that unfortunately have accompanied electronic discovery.

PROFESSOR TEPPLER:

I think you are pointing towards the length, which talks about proportionality, and this is one of the issues: How much discovery you are going to do in a case that is worth $100,000. You are not going to do $150,000 in discovery.

JUDGE FACCIOLA:

In fact, one of the amendments currently kicking around in the federal rules advisory is to put the word "proportionate" in Rule 1, so it would read to reach a result that is just and inexpensive and proportionate to what is at issue between the parties.[11]

PROFESSOR TEPPLER:

Getting back to competency, everything we talk about today will have competency implications. So if your client walks in the door and starts telling you about the facts of his or her lawsuit or whether this is a lawsuit, you have to do what we call an "early case assessment." You have to ask yourself: How much is this going to cost, what are my client's objectives, what will it cost to achieve my client's objectives, and where is the point of no marginal return, where is that point where it no longer make sense to do it? Then how do you break that news to your client? The idea is you have to look at this upfront, and have the competency to assess the case and say, "I think this is a $50,000 case and there is $35,000 worth of electronic discovery." Maybe you do not do the deep dive in e-discovery; maybe you do something that is proportionate to the issue at hand. On the other hand, if you have a child abuse case, which does not involve money, is there any price that you can put on the proportionality issue then? I think that is still an unsettled area.

JUDGE FACCIOLA:

Well, I still remember Judge Peck and I being at the Sedona Conference talking about proportionality and there emerged the collective decision that it is not only about money. I had a case in which the plaintiffs were disabled people, and it dealt with the inefficiencies of the system. They have a paratransit system for their unique needs, so the buses are capable for taking wheelchairs, and it was a very inefficient system. Well, I suppose, as the world judges value, having to wait in the rain for a bus is not that valuable,

11. FED. R. CIV. P. 1; Memorandum from the Advisory Comm. on Fed. R. Civ. P. to the Standing Comm. on Rules of Prac. & Proc. (May 8, 2013), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf.

unless of course you are in the rain waiting for a bus. In the Advisory Committee Notes to Rule 26 and in the Sedona Conference, you see this notion that when we put a value to a case, it is not just money.[12] The question is, what did Congress intend to effectuate by the enactment of this legislation—protecting the rights of the disabled or the rights of the civil rights leaders? Remember something about the federal system: twenty-five percent of our cases are filed *pro se*. That statistic has been true for over forty years. So in twenty-five percent of the cases, people do not have the $300 to pay the filing fees. We must be careful to bear that in mind when we talk about proportion. We cannot become the playground of the rich.

PROFESSOR TEPPLER:

Switching to a related topic, local rules are the bane of many practitioners who are admitted in various jurisdictions.

In New York, Judge Peck, are there local rules? Are there standing orders? Are there conflicting standing orders?

JUDGE PECK:

Yes, yes, and yes. Every district in the country has local rules. In addition, individual judges have their own rules called "individual practices." While it is true that it means that you have to learn the different rules of the different judges as you practice from court to court or even within a big court like the Southern District of New York, I think that it is better for that to be out there and public than for it to be secret.

I remember when I was practicing a long time ago, and I was in a big firm, anytime someone got a case in front of a judge that they were not familiar with, a memo, yes paper in those days, went around the entire office saying, "Has anyone appeared in front of Judge X, or has anyone had an antitrust case in front of Judge Y?" You would get feedback, and that worked moderately well in a big firm, but again what could the solo practitioner or small firm person do?

I am in favor of letting you know what I like, whether from a local rule or from an individual practice—will I accept a fax? Will I accept a phone call when there is a dispute during a deposition? Et cetera.

Everything cannot just be in the federal rules because there are vast differences. As Judge Facciola and I go to our annual magistrate judge education conference, we talk to our colleagues from all across the country,

12. FED. R. CIV. P. 26 advisory committee's note; SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2d ed. 2007).

some of whom do nothing but criminal cases in the border states. I think I would go crazy. Different courts work differently. But bringing it back to this area, the Southern District of New York just put in a pilot project protocol including a big e-discovery checklist for "complex litigation," which is defined as patent, antitrust, class actions, and maybe copyright or trademark, and a few of the more complicated areas.[13] One drawback to it is that it pulls in those FLSA cases that are brought as collective or class actions and are not necessarily that complex. It requires the parties to check off boxes to say, "We are competent." It then talks about them meeting and conferring and goes through specific areas: What have you discussed about preservation? What have you discussed about search? What form of production are you going to use?

In addition to using that in complex cases, I decided it was a very good checklist approach and I would use it in all of my commercial-type cases. The first one of these reports that I got back in a commercial case said, "Form of production: Yes, Judge we have reached cooperation and agreement. We have agreed to print everything to paper." I hit my head against the wall a few times and said, "Really?" I stamped it rejected because they could not be serious—rethink this. I got a joint letter back and it said, "Really, Judge. We think it is fine. It is not that much; we think we can best handle it by paper. Please, please let us do it." I said yes, and I have not lived to regret it yet. I did endorse it with an "Okay, we will see how this works but do not come complaining to me when you have the train wreck down the road."

That protocol is really just an attempt to put teeth into the Rule 26(f) requirement through local rules, practices, or guidelines, and force the bar to focus on the sort of things that are necessary early in e-discovery, in order to get disputes, if any, to the court as early as possible. I know the District of Maryland has one,[14] and the District of Kansas has different ones.[15] It is a lot better to resolve disputes upfront and tell the parties what they should do, than to have them go their own ways and then have to repeat it and do it the right way the second time around.

PROFESSOR TEPPLER:

When you say, "upfront," do you mean before a party propounds that discovery request?

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13. *See* Press Release, United States District Court for the Southern District of New York, Ten SDNY Judges to Participate in Patent Pilot Program Starting November 26 (Nov. 3, 2011), *available at* http://www.nysd.uscourts.gov/file/news/patent_pilot_program_press_release.

14. D. Md. Loc. Adm. R. 105.

15. D. Kan. R. 26.1–37.2.

JUDGE PECK:

Yes, at least before there is production. The earlier, the better, obviously. Sometimes a party feels that it needs to see what the document request is going to be before it can formulate its response. But there is nothing more useless than a document request served asking for everything—for every electronic record in the company and a pony. Then the other side waits their full thirty days and files objections and responses that say the request is overly broad, burdensome, vague, and three other buzz words that are repeated in every single response, occasionally broken up by the "it is overly broad, vague, we do not understand it, but, nevertheless, without waiver of these objections, we will give you something."

PROFESSOR TEPPLER:

Again, we are talking about competency, but we are talking about the fault of both parties here.

JUDGE PECK:

Yes, and indeed, if there is any decision to read in this area about competency, it is Judge Grimm's decision in *Mancia v. Mayflower*.[16] His decision in *Mancia* was basically a plague on both houses—that a document request that says we want any and all documents concerning, relating to, or showing X, is no longer, in an e-discovery world, the right way to go about getting information. Similarly, the response that it is vague, over broad, et cetera, without any detail, is a meaningless objection. He basically said if he sees it again, it is a waiver of the objection and they would have to produce. That served as a wake-up call to the judiciary because the authority that Grimm cited was Rule 26(g) of the Federal Rules of Civil Procedure, which is the discovery equivalent of Rule 11. By signing a document request or a response or any of the other discovery papers, Rule 26(g) says you are certifying that the request or objection is reasonable, not overly burdensome, et cetera. It pulls in the proportionality language of Rule 26(b)(2)(c) and says that if your signature and that of your firm are on this, you are on the hook if you have violated the Rules.

PROFESSOR TEPPLER:

Judge Facciola, is there anything in the District of Columbia that is standardized?

16. Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354 (D. Md. 2008).

JUDGE FACCIOLA:

Oddly enough, my experience is the converse. I got involved in assisting the court lawyers to draft e-discovery rules for the local court, and, for the most part, we follow the Federal Rules. But, interestingly enough, the local court never had an initial disclosure responsibility. I tried to explain to them that you have to see that as the lynchpin of everything that happens thereafter. If you do not have initial disclosure responsibilities, the requirements of Rule 26(g) never kick in—a lot of things never kick in—but it was a hard sell, and they would not buy it. So there is, in that particular state, no initial reaction to go with the Federal Rules.

Another point they made that I think is very important that I had not thought about is when you impose rules on an entire court that has a lot of different divisions, it may not make any sense because you have landlord-tenant, and small claims, and we have in the district a particular part that we call the family court, which is not only divorce and child support, but an effort to deal with broken families. So there are a lot of places where this is going to be a poor fit.

In terms of these local rules, remember the tension to which Judge Peck referred, between the wisdom of local rules and the design of the Federal Rules, which gives us one set of rules everywhere in the country. If you are admitted in Florida and you go into the Federal Court in Houston, it seems a shame that you have to start from square one and learn everything. There is also a possibility of inconsistency. For example, in the patent cases, the famous order by Judge Rader precludes e-mail just by its very nature.[17] Well, what is the consistency between that rule and Rule 26, which defines discovery as anything that would tend to lead to relevant evidence?

PROFESSOR TEPPLER:

Would Judge Rader's edict survive scrutiny?

JUDGE FACCIOLA:

I do not know. That was designed for a particular type of case. Do you know what patent trolls are? I have had a few patent troll cases and they challenged one. If you look at these places where these local rules have come up, it is hardly a coincidence that they come up in districts and places where there are judges who are affiliated with Sedona. For example, the Seventh Circuit is the product very much of Nan Nolan, a magistrate judge, and the Northern District of California is very much the work of Judge

17. *See* FEDERAL CIRCUIT ADVISORY COUNCIL, MODEL ORDER REGARDING E-DISCOVERY IN PATENT CASES (2011).

Laporte. New York is very much the work of people like Judge Peck. So in those places where there are people who have come up and have urged the wisdom of the Cooperation Proclamation, these local rules are available. They are very useful, but there is an inconsistency. I know they come from the frustration that the Federal Rules process, the amendment process, seems to take so long. Some would say that is a good thing because the longer it goes on, the more likely it is you will reject rules that seem like a good idea but the technology is now overcome. But recently in one journal I saw some criticism of the Committee for taking its sweet time on the sanctions rules. So there is that tension there. There are none like this in the District of Columbia because there does not seem to be much warrant for us. We have the monster MDL case, in which both sides are represented by thoroughly competent counsel who know what they are doing, and then we have everything else. It has not yet emerged that there is so much in everything else that they want to go this way. I imagine a lot of courts doing that.

So the state courts will have to watch that as a separate development. I know of none for example that have gone the wrong way away from the Federal Rules. Although I think that Colorado at a time decided not to adopt rules because oddly enough they did not want to raise the standard of care for lawyers to the point of knowing about all of that. I do not know if that rule survived, but that, again, is one of the tensions with the local bar, which is saying if you bring all that into the state courts, you are going to make the state courts as hideously expensive as the federal courts.

One thing we have to bear in mind—and Judge Peck and I have had the pleasure of going to England, and being involved with some of the judges up there—it is anything but true that the rest of the countries on the earth think that the American model makes sense for them. My sense of it from my British friends was that they were going in the other direction. Indeed, one of the criticisms of the proposal was that is what the Americans are doing. There is a concern among the other nations on Earth that we have gone to the wrong extreme, which may explain why those of you who are studying international law may note that now in international arbitration agreements, the choice of law is not the United States.

PROFESSOR TEPPLER:

Let me add that Judges Facciola and Peck are both members of the American Bar Association's E-Discovery and Digital Evidence Committee. I am a co-chair of the Committee, but one of my co-chairs, who unfortunately could not make it today, is the American representative for the International Standards Organization that is going to think about an electronic discovery guidance, which would be international standard largely

drawing from the New York rules and the Seventh Circuit pilot program. Importantly, this will provide guidance and recommendations for countries around the world because it will be an international standard voted by the component countries' representatives. What will be interesting to see is how this will be dealt with, how it deals with the American system, how it will deal with the European privacy directive, which is a big thorn in everybody's side in litigation which involves anything outside the United States and does involve the countries in Europe who are a part of that. This standard should also be interesting because there are issues about preservation, collection, and forensics that are still not very well developed here in the United States.

Moving to our next topic, we will talk about stipulations. When you are representing a plaintiff or defendant, how do you set context? You set context by asking the other party to agree. How do you get the other party to agree? You meet and confer, first of all, and then you say, "This case is about XYZ we do not want A through Z; we just want a subset of A through Z. Let us go through a checklist; let us find out where everything is. Custodians, repositories, formats, production—let us see what we need for depositions, and let us put it down on paper. Let us talk about claw backs, and privilege." Have you seen some proliferation in the use of stipulations in discovery?

JUDGE FACCIOLA:

No.

PROFESSOR TEPPLER:

What this should tell lawyers who are entering the marketplace is that this is a tool that you can use competitively to out-compete your adversaries.

JUDGE FACCIOLA:

We should not be so flippant. As Judge Peck pointed out, one of the problems we have is that we still have the remnants of code pleading. The world's worst example is the Answer. Our dear friend Frank Maas, Magistrate Judge in the Southern District of New York, said it is probably the single most useless piece of paper we see, because as Judge Peck pointed out, you can get away with saying, "I neither admit nor deny or demand full proof." Another thing about it that we have been thinking a lot about is the enormous amount of time that goes by in a lawsuit—about sixty days—before we get this meaningless piece of paper and quote, "issue is joined," another phrase that comes to us from the sixteenth century.

Also, I do not think the provisions of the Requests for Admission are as strong as they could be. One of the problems I have with Requests for

Admission is that they involve the judiciary at a very low level. In other words, as the Rule indicates, I am supposed to look at the sufficiency of the admission and then judge on all of this.[18] That just creates more litigation. I would like to see a new methodology, where you stipulate to something, and then if you have to prove it, there really is some teeth in the sanction for you not stipulating. Again, that involves judicial participation at a level we may not be able to afford, but right now, our Rules do not permit the disgorgement from a party of what is painfully obvious. For example, "Susan Smith worked at the Department of Labor from 2005–2008"—"neither admitted nor denied." She was either there or she was not. It is these phony fights that are maddening. As I say, the two devices now in the Federal Rules to force the admissions of information, the Answer and the Request for Admission, are clumsy tools.

PROFESSOR TEPPLER:

I always thought that Requests for Admission, at least from the perspective of electronic discovery, made in the discovery period, are fairly useless because, depending upon what the meaning of "is" is, it is very hard to admit or deny something. Woe to the attorney who misinterprets what "is" might be or how it might be thought.

So, I think the first thing that you are saying is that a stipulation can take the place of an admission because you do not have to make the request and you can bring in the obvious. The second is whether there is any utility to coordinating Requests for Admission in electronic discovery? I have not found one; so maybe it is my shortcoming, but I just do not see where I can ask for anything other than: "Do you have computers on site?"

JUDGE PECK:

We should step back. Ideally, there should not be any formal discovery about discovery. In the old days, you would not think of saying, "Please tell me where your central file room is located" or "Do you have a warehouse where you have thrown all these old boxes?" Those of us who practiced in the old paper days love to tell war stories about the clients who sent us to the warehouse, which as memory and the war stories continue, get farther away from reality—the warehouse was always twenty degrees below zero or a hundred and two degrees, depending, and there were rats on the floor and maybe alligators. We had to wade through all these boxes, which had no index or labels. All of that is an exaggeration, but we did it. If we had to do that to find the responsive material, we did it.

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18. FED. R. CIV. P. 36.

Today, if you have to take a deposition of the IT person or you have to ask interrogatories or Requests for Admission to find out where the information is, you may have to do that if the other side is stonewalling. But just think about the costs. The best way to do it is that cooperation and transparency mantra, or the informal, "Let me talk to your IT person for two hours on the record or off the record"—but not with a court reporter, because if it is a deposition and you use one word the wrong way, the answer is no. If it is a discussion with knowledgeable people, you can cut through the nonsense and it is not going to affect the merits of either side's position. So it is a question of getting the information cheaply and not having formal discovery about discovery.

PROFESSOR TEPPLER:

Setting the context is critical as early as possible. This tells me that if I am about to get involved in discovery motion practice, I have failed. Why? Because I did not take care of this early on. There are discovery disputes that happen later on, but for the most part, if you are involved in general routine discovery disputes, you have failed. If you start seeing objections that could have been dealt with through an early meet and confer, you have failed. What it also suggests is that most lawyers just do not do those. There is just a rote response to any discovery request.

JUDGE PECK:

I must say, nothing drives me crazier than the lawyers coming in on a discovery pre-motion conference, and they allegedly have had a meet and confer about the dispute, but, as they are in front of me, the requester is starting to modify and narrow their requests—"Well, yes, Judge, it says this, but I do not really need the ten years I asked for. I can use five." The other side is saying, "You asked for all documents about the sale of widgets this year, and that would include every packing slip and invoice. If you really just want to know how many widgets I sold, I can give you a computer printout that shows it by week, by year, or however you want, but that is not what you asked for." After a few minutes, either they are quickly agreeing or I am quickly getting fed up and saying, "Go to the jury room in the back. Spend some time working out what you should have done before you came in, and I will come back when you are ready."

PROFESSOR TEPPLER:

Judge Facciola, this reminds me of something you had mentioned a while back. You had some warring parties who were having problems with e-discovery who could not agree upon anything. Was it your case in

which you sent them off and said, "If you really want to, do it in front of video tape"?

JUDGE FACCIOLA:

No, but I wrote an opinion once, which you may be referring to. The opinion began with something like: "Counsel in this case have mistaken me for my wife. She is the second grade school teacher who has to break up fights in the schoolyard. That is not my job."[19]

A unique problem here, which is particularly true in patent cases, is that you frequently get into the situation where the opposing parties are also competitors. Then, the free flow of information comes to a screeching halt. It is an extraordinarily troubling problem. I would commend to your attention in the *Federal Courts Law Review*, which is the electronic law journal of the magistrate judges, an article this year by Judge Andy Johnson and his colleague, talking about all the situations he has had with things like not being able to take the document outside of his lawyer's office and look at it in his own office, which was two doors down.[20] Protective orders and the free flow of information in patent cases involving competitors, is challenging, horribly challenging.

PROFESSOR TEPPLER:

Typically, in my practice, if I am working as plaintiff's counsel, I will send out a strongly worded protective order which protects the defendant's identity. Why? Because I do not think it is worthwhile to get into a fight over it. Have you seen any of this type of practice and would you recommend that? If someone came to you before compounded discovery and said, "Your Honor, here is a really strong protective order and if the other side does not want to talk to me, can you please enter that for me?"

JUDGE PECK:

There are fights over protective orders because each side wants to use their form. There are basically two flavors of protective orders. The first is the plain vanilla protective order, stating that all information that is confidential can be used only for this lawsuit, not for any business purposes, and at the end of the lawsuit, all of it has to be destroyed or returned. Then there are bells and whistles. The second kind of protective order is the two-tier, occasionally a three-tier version, where certain information that is so

19. *See* Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45 (D.D.C. 2009).

20. Lydia Pallas Loren & Andy Johnson-Laird, *Computer Software-Related Litigation: Discovery and the Overly-Protective Order*, 6 FED. CTS. L. REV. 1 (2012).

competitively sensitive may be viewed by outside counsel and outside experts who are not involved in the area, and no one else. When lawyers come to me and say they have been negotiating for weeks about a protective order, or they are going to negotiate about a protective order and that is holding everything up, I will dictate a basic order from the bench onto the record. If they want to spend their clients' money and put on more bells and whistles, they can do it, but to hold up production because of this is not really a good use of time.

JUDGE FACCIOLA:

The Supreme Court in the *Seattle Times*[21] case said the process of discovery is private; it is not part of the Court's record. Indeed, in most jurisdictions, including mine, you cannot file discovery in court. We do not want your interrogatories; we have enough to do. There is a tension there. When you come to Judge Peck and I and raise a legal issue, remember something: We are not the American Arbitration Association! We are a court of the United States. I always say, "See this courtroom? This is not my courtroom; this is the courtroom of the people of the United States. They graciously permit me to use it. What goes on here is their business, not yours."

So here is rule number one: If you are going to file a public document, you may not file it under seal merely because some portion of it is protected by confidentiality or secrecy. Instead, you must file two copies. One copy is the public copy from which that material has been excised. The second is the non-public copy, which you may deliver to my chambers and I will destroy it after that use. Lawyers have a horrible tendency to attempt to lock the courthouse to everything they do. That is utterly improper and I must tell you, we judges have had it. Judge Baker in Indiana, at one of our conferences, had two lawyers before him who tried to protect material that was in the Federal Register. Do you know why the Federal Register came into existence? It was so the citizens of the United States could know what these agencies were doing. I also had one case where they were still having sealed their confidential data from a case that was in its tenth year. Are they serious that someone would care very much about this after ten years? So there was a tension between protective orders. If you want complete privacy, get a private mediator or an arbitrator and do your business; but if you come in here, it is a very different situation.

21. Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).

PROFESSOR TEPPLER:

So to define protective orders—there is the plain vanilla, which only the attorneys and designated experts may see. Tier two might be attorneys' eyes only, which means the client cannot see it and the experts may be able to see it, but only under very restricted conditions. Then there is the nuclear option, for which you have to be in a closed room—a cage—unplug every machine, you have to sign in and sign out, and you may not remove that document from the site. This happens with more frequency than you might think. I find judges basically accrue these protective orders.

JUDGE FACCIOLA:

Yes, but we have nobody to blame but ourselves, because attorneys show up with a protective order stipulated to by both sides, and we sign it. I have stopped doing that because I was being unfaithful to my responsibilities as a federal judge, insofar as those were going to be filed. So there are standard form protective orders recommended by the judicial conference, which I try to use. I think I have thrown one up on my website for counsel's use.[22] I am not ignoring that this is highly competitive data and it makes a difference, but once you are involved in litigation, it is a different situation.

JUDGE PECK:

I am still of the view that since it is discovery, if they are agreeing to keep it confidential that is fine. As to filing, I do follow the approach of the redacted copy public and then I also tell the parties this is fine for now. Realistically, the way it comes up more is when the Federal Register is put on there; the receiving party is using something for a competitive advantage or to stain the other side's reputation; or because they are really frustrated because they cannot show anything to their client because anything remotely interesting is marked "attorneys' eyes only." Often in those cases, the parties say they want me to review 100,000 documents to see if they are privileged or confidential. My answer is that my days of multiple huge document review ended a long, long time ago, so we are going find a way to do this with a small sample and how I rule on that will likely carry over to everything else. Alternatively, they can go pay for a special master if they cannot work it out on their own. I am not reviewing hundreds of thousands of documents.

22. John M. Facciola, *Sample Protective Order*, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, http://www.dcd.uscourts.gov/dcd/sites/dcd/files/SampleProtectiveOrder.pdf (last visited Oct. 31, 2013).

PROFESSOR TEPPLER:

This leads us to privilege logs.

JUDGE FACCIOLA:

Rule 26 says that you can claim the privilege. When you claim the privilege, you have to provide a judge with enough information to rule upon the privilege. That has been in the Rules since 1938. It sounds like a paradox: How do I tell you what it is without telling you what it is? Well, in reality we are now confronted with the mechanical privilege log. This is what a privilege log looks like: There is a field that has a date of December 7 and another indicating the document is from Smith to Jones. Now the last field is supposed to comply with the Rule and tell me what this document is in "sufficient detail" so that I can rule on the privilege without looking at the document. It actually says "attorney-client privilege" because it is spit out by a computer word processor.

JUDGE PECK:

Or the variant says "attorney-client privilege and/or work product."

JUDGE FACCIOLA:

So now, this will never see a lawyer's eyes; indeed, it will never see a human being's eyes, because, as we have been talking about, there are now binary algorithms that are used in search. So, the computer may be trained to insert "attorney-client privilege" whenever it sees anything from Smith to Jones after 2005. What is supposed to happen after this process is the lawyer comes in and says, Smith to Jones, attorney-client privilege because it would tend to disclose a communication from Jones to Smith about the tax consequences of the merger. Now, I think I can rule on that: Confidential communication from client to lawyer seeking legal advice or legal services. I can move on. But, if you tell me attorney-client or work product privilege, you have not told me anything. What are the consequences of that? Well, you can give them another chance to do it right or you can say, "You just waived privilege."

JUDGE PECK:

The other thing you have to realize is that with e-mail now, this is not twenty or fifty of these entries; it is 500 pages, each of which have 100 entries.

PROFESSOR TEPPLER:

This brings up another issue—voluminous privilege. One of the cases I was going to talk about had 500 pages of privilege.

JUDGE FACCIOLA:

Yes, the one before Judge Scheindlin had 30,000 entries.

PROFESSOR TEPPLER:

How do you deal with a large privilege log? How do you review it? What we do with large volumes of information these days is sample the information. Have you seen sampling at all?

JUDGE FACCIOLA:

Yes. I commend to you an article that Jonathan Redgrave and I wrote in the *Federal Courts Law Review* about this.[23] What we suggested was that instead of this nonsense, we first of all create a series of what we call "buckets." The buckets are going to be inclusion or exclusion. For example, thanks to the sample, we notice that there is very little correspondence at all between lawyers and the public relations department, so the methodology we will use for the P.R. department is going to be very different. Indeed, we may agree with our opponent that we are not even going to look at it. Then as we get closer to the regulation department, which is dealing on a daily basis with regulations and rules, that will be different. Also, we have other areas that we may have exclusions. One may be dates. You may be able to say that everything before 2007 or after a particular time is not worth looking at. Conversely, we may say that after the litigation was started, everything between the lawyer and the client is going to be privileged because it has to be either attorney-client privilege or work product. What else are you talking about? So we put that to one side and we will not even look at it. This methodology is attempting to refine this until we get down to something that is manageable. At that point, if we still have a great number of documents, we may do a sample.

This is where computers can be very helpful. Indeed, we could create a document and then use it as the standard. We would put attorney-client privilege in; we would try to think of words after talking to our statistician and computer scientist. Then we might get a sample. The whole idea is to get down to the smallest manageable number and then instead of using this useless privilege chart, we truly have an index. When we go to the judge, we can say, "Judge, we have here a series of communications at about the time the merger was being contemplated. We believe that they are protected by the work product privilege. Our opponent disagrees, saying they are business

23. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 2009 FED. CTS. L. REV. 4 (Nov. 2009).

communications. We would like you to look at five or ten of these and we agree that what you rule as to this would be true of all of these."

I must tell you, this involves some risk-taking; it involves using your head; it involves knowing something about the sciences of using linguistics and computer technology and statistical sampling, but a judge cannot realistically review 10,000 documents. I did that once in my stupidity early on. I agreed to look at 7,000 documents and I went on a Saturday because I knew it would be the only chance I had and I did this 7,000 times. After an hour how engaged do you think I was? It was a nightmare. I saw the same e-mail a thousand times because it got stuck in the stream and Joe sent it to Suzy, and Suzy sent it to Cal and Cal sent it to Tony, and so on. Nobody wanted to get rid of the obvious duplication. Privilege logs have got to be on the way out. There is no solution to using them.

PROFESSOR TEPPLER:

With that, we will turn to Federal Rule of Evidence 502, which has to do with claw-backs and privilege. Before we get into any detailed discussion, if one of you wants to take the lead, please explain where we are on this and why the Rule was promulgated.

JUDGE PECK:

The Rule was promulgated largely in an effort to allow parties to save costs in reviewing documents being produced for privilege. It unfortunately has not had very much effect in that area. This is, in part, because the number of lawyers who do not know about Federal Rule of Evidence 502 is mind-boggling. I do conferences in a group this size of practicing lawyers, and I ask the audience: How many of you regularly use a Rule 502(d) order? Out of 100 people, I get three hands up. It is distressing the ignorance of it. This Rule, unlike the Federal Rules of Civil Procedure, had to go through not only the Rules Committee and the Supreme Court, but also had to be approved by Congress.

The Rule does several things. Rule 502(a) eliminates any issue of subject matter waiver. So, if you produce a privileged document, that is not a waiver of the subject matter except under the rule of completion—if there is a fairness issue, you cannot reveal the "good" privileged documents and not the "bad" privileged documents on the same subject.

Rule 502(b) made a uniform national rule for how the court should determine whether an inadvertent production of a privileged document constituted a waiver. Prior to the Rule, there were three views among the courts. One was that it is the client's privilege; if the lawyer messed up and produces it, the client did not intend to waive the privilege, so there can

never be a waiver. That was a minority rule. The other minority rule went the other way: A privilege is waived if somebody outside the privileged group gets to see it, so if you inadvertently produced the document, you have waived the privilege. The majority rule, which is now the uniform national Rule under 502(b), says you have to look first at whether it was an inadvertent production; second, whether the party producing took careful steps to review and screen for privilege (the Advisory Committee Notes make clear that those steps can be computerized-related steps) and; third, once the party knew that privileged document, or some privileged documents had been produced, did the party take proper steps to rectify the mistake? In other words, you cannot sit there at the deposition, watch the privileged document get marked at the deposition "Exhibit 5" and have your client testify about it for half an hour, and then wake up a few weeks later and say "I should never have let that happen."

Rule 502(d) allows what I call the insurance policy or get-out-of-jail-free card. It says, "A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding."[24] This has three major benefits. One, you do not have to look at how careful you were in the privilege screening. Whether you were careful or sloppy, you still get it back if you have a 502(d) order. Secondly, it is not a waiver, not only in that case among those parties, but in any other case involving any other party in federal or state court. Third—because again it does not look at whether you were careful or not—you can use a claw-back approach, where you let the other side see particular documents, usually without screening, and say, "But if you discover any privileged documents, I get to get them back from you and you cannot use them, or fight over them." The parties can stipulate to a 502 order and then ask the court to so order it so it becomes the effect of a 502(d) order. The court can enter it over a party's objection. First of all, I am not quite sure what a good faith objection could be. For example, you are representing the plaintiff in an employment case and you know that he or she has no documents and you are suing the big corporation. They come to court and say, "Judge, I would like a 502(d) order to protect me because things might happen." What are you going to do, get up and say, "Judge, I do not think you should enter this 502(d) order because I think they are going to be sloppy and I want to take advantage of that"? That would not go over very well in my court. Third is something that I have recently started doing after the Georgetown E-Discovery Conference. There, the judicial panel was

24. FED. R. EVID. 502(d).

challenged by a lawyer from the audience who asked why the court did not just enter a 502(d) order *sua sponte*. My answer at the time was that I call it to the parties' attention, but they are trying their own case. If they do not take the hint, why should I ram it down their throat? I am now at the point where I will enter it *sua sponte* in a lot of cases.

There has been confusion over 502(b) and 502(d) orders. I have had discussions with lawyers where I have said they should use a 502(d) order and they have said, in essence, "Great idea, Judge. We are going to go draft one." They come back and it says, "If we produce it inadvertently, and if we took careful steps, and if we ask for it back quickly, we get it back." They ask, "Will you sign that, Judge?" I say, "No, that is Rule 502(b). I do not need to enter that order; it is in the Federal Rules." Some lawyers do want to put into their 502(d) order something about what steps should be taken to protect the privilege. Frankly, I think you should ask for a 502(d) order that is as broad as the Rule allows. If you are a good lawyer, you are not going to be saying, "I have a 502(d) order so I do not have to do a review. I am going to let the most important privileged document out and then claw it back later." Other than in the Jim Carrey movie, the name of which escapes me, where he got a mind erasure, the other side is going to know about it if you produce it and you cannot prevent them from using that information to the extent they can. So, you do want to be careful in your privilege review, but you may be producing a million electronic invoices and you know that in that batch of documents, the odds of there being a privileged document is slim to none. In consultation with the client, you may decide their invoices are called for and relevant, and we will do our number crunching later, but in terms of review, we have to produce them. If somebody misfiled in that electronic file a privileged document, why should we spend a fortune reviewing the material for that so unlikely circumstance? So it allows you to produce parts of your production without a careful privilege review, or any privilege review, and that is where the cost-saving can come in.

Going back to our discussion of privilege review and privilege logs, you would be amazed at how many times in the few documents I have to look at, there is a letter that goes like this: "Letter from attorney to client. Attorney-client privilege." When you actually look at the document, it is: "Dear Joe Client, here is a copy of the answer we filed yesterday. Sincerely." Is that privileged? Who knows?—probably not. With 502(a), it certainly is not a subject matter waiver; it is probably not even a relevant document, but it certainly allows, even during the privilege log review process, for certain of those innocuous documents that otherwise are getting fought over, to be placed in one of the buckets that Judge Facciola talked about.

JUDGE FACCIOLA:

Be very careful. There came into existence in the Department of Justice something called the "Thompson Rule" after Larry Thompson. For example, you had a corporation client that the Department of Justice had a great case against, so you negotiate a plea. You go in saying, "We want a 5(c)(3) plea. We want you to agree that the range will not be more than X." With that, you plead guilty. The Department of Justice attaches as a condition of that plea a waiver of the attorney-client privilege for everything in your possession. Well, the defense bar had concerns because there are ethical constraints. When Rule 502 was being considered, there was a serious effort to use the Rule to attack what the Department of Justice was doing, but that ran afoul of the legislative process. So, be careful.

There is no such thing as a selective waiver of the attorney-client clause. You cannot go into that antitrust action and say to the Department of Justice, "Here are all of our documents," but then say they are privileged when Professor Teppler sues you in a class action. The Committee Notes to Rule 502 indicate the Committee had no intention to get into that at all.[25] Every circuit in the country, save one, the Eighth Circuit, has said the same thing. You cannot pick and choose among people when you decide to waive the privilege. Once you give it up voluntarily, it is gone as to anyone else.

The 502(d) order protects you in the sense that if you make a mistake, you can claw it back. That order, being a judicial order, is not inconsistent with the Rule, but do not ever think that you can make a wholesale surrender of the attorney-client privilege to the Department of Justice and then not give it to Professor Teppler when he sues you. It is important to keep that distinction in mind.

PROFESSOR TEPPLER:

From an electronic discovery context, one of the true benefits to both parties for Rule 502 is that, in a case where you have an incredible amount of electronic discovery, inevitably something which is either privileged or protected will be disclosed, inadvertently or otherwise. Rule 502(b) lets you fight about it. Whether it was inadvertent will always be a determination made after an expenditure of significant resources and the judge's perception of whether or not the amount of time taken to decide to claw it back was reasonable. Rule 502(d), however, is an unconditional claw-back. The unconditional claw-back means you can get it back no matter what. Whether you're a plaintiff or a defendant, I think it matters not.

25. *See* FED. R. EVID. 502 advisory committee's note.

One issue that a friend of ours, Aaron Crews, Vice Chair of the E-Discovery Committee, brought up was the timeframe of a 502(d) claw-back. When can it be done?

JUDGE PECK:

Although I have not seen any law on this, it seems to me that a retroactive 502(d) order is problematic. In other words, after producing all your documents, you find out you made a mistake, and instead of going through a 502(b), 26(b)(5) litigation process, you ask the judge to give you a retroactive 502(d) order. I do not think I would sign that.

PROFESSOR TEPPLER:

What about the harder case where you do have a good 502(d) order or there is a *sua sponte* order made at the onset of discovery?

JUDGE PECK:

It is an interesting question, but I doubt that in the real world it is going to be something that is not used in a deposition which will then bring up the issue. You still have the equity waiver, which is where you let the witness testify until her heart is content about it. It will be very hard to get a claw-back after the witness has said something at trial. I do not know of any case law dealing with this though.

JUDGE FACCIOLA:

Independently of 502(d), in the interpretation of 502(b), there are opinions. I wrote one that says you have to assert it in a timely fashion. In the case I had, they tried to claw back something eleven months after, on the eve of trial. I concluded that was not permitted under 502(b) because they had sat on their rights and for other reasons.[26] The question is whether you can create a 502(d) order that gets you out from under all the case law. I do not know.

It is important to remember the protection given you by 502(a). I am from a jurisdiction that was called the "crown jewels" jurisdiction. It said that you had to protect the privilege like a crown jewel. The reason was that, if you waived it, lost it, or forfeited it, you forfeited that piece of paper and everything else that pertained to the same subject matter. This rule is designed to obliterate that. Now, the worst that can happen is that you lose that document and any other document that makes that one comprehensive. It is the old principle that you cannot use it as a sword and a shield. You

26. Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45 (D.D.C. 2009).

cannot hand over the first paragraph of the document that helps you and try to keep back the second. This is a tremendous advantage because, if you go back to my buckets, you see the worst that can happen to you is that you put something in the wrong bucket and you give up that one. You might have to give up two or three more that are in the same bucket, but you do not give up everything in any other bucket. That is crucial.

PROFESSOR TEPPLER:

What percentage of the parties comes to you with a proposed 502(b) or (d) order?

JUDGE FACCIOLA:

It is so bad that we held a seminar at Charleston School of Law. The topic was how to get lawyers to read Rule 502. It is that bad. I have had law firms with me who live in infamy because I know they charge $800 per hour, and they are not aware of 502(d). In some footnotes, I have pointed out some problems I have with that approach to the practice of law. I do not know what the answer to your question is, but it is pitiably small. One of the things I hope to accomplish as a result of that meeting would be a special project within the Sedona Conference to focus on this topic. Professor Capra at Fordham, who had so much to do with the enactment of the Rule, is leading that charge. We are coming out with proposed orders for the bar.

PROFESSOR TEPPLER:

This is all about competency. Think about how your client might feel if you sign off on a 502(b) stipulation and something that you did turns out to be unreasonable. Then your client says to you, "My new counsel says we could have had a 502(d) order and I am going to sue you for malpractice. Oh, and by the way, I am going to report you to the bar because I think you are incompetent." You will have to face this in your practice. Even though there is no provision for that in state evidence rules, there is no reason why you should not be thinking about stipulations like this in state court. At least try to bring it to the judge as a stipulation.

JUDGE PECK:

The only difference is that in a state court proceeding, if you do it by stipulation, you will be protected *vis-a-vis* the other party in that case. To put it another way, I think that a state judge signing that would not be able to bind other parties, particularly in other states. He may or may not be able to bind another litigation with a different party in the same state, although even that is questionable. However, a New York state court judge's order that is

the equivalent of a 502(d) order is probably not going to be that well-received in another state. One can argue about Full Faith and Credit,[27] which might give it some additional weight.

JUDGE FACCIOLA:

Now we will turn to the criminal side.

Well, I suppose I have to make a confession now. I am the judge that signed the order in the *Jones* case.[28] Not the warrant, but the other one. It was alleged by the government that Antonio Jones and other conspirators were running a high-level cocaine operation out of a night-club in the northeast called Levels. One of the ways of proving that conspiracy was to show constant movement on a daily basis from Levels to a stash house in Maryland.

The police have now become extraordinarily comfortable with the capability of electronic devices transmitting signals that permit you to track them. That can occur, usually in the principle of triangulation. So we know where Jones' car is in relation to two towers, and we know when he leaves one place and arrives at another. What is the first principle of geometry? We know two sides of a triangle, so we know the third. That allows us to position Jones. The government wanted to show this to the jury: "Ladies and gentlemen, it is incomprehensible that Jones made all these trips up to his house and was not aware of the conspiracy." Initially, they put the device under the rear bumper of Jones' car. Then somebody dropped the ball. They kept renewing that warrant and they forgot.

Independent of the thing on Jones' bumper, there was an order under the Stored Communications Act to the service provider for Jones' cell phone, and that was my order. Under the Stored Communications Act, that is on a less than probable cause standard. The question was, independently of the bumper thing, whether Jones' Fourth Amendment rights were violated by tracking him using this device. That question was left open by the Supreme Court.

The opinion for the Court by Justice Scalia said there was trespass as defined in 1789 before the Fourth Amendment was enacted.[29] Justice Sotomayor and Justice Alito said that was all very interesting for carriages in the eighteenth century, but now we have new devices and we have to talk about the concept of privacy.[30]

One of the problems that we have is that the transmittal of information to a third party under the traditional interpretation of the Fourth Amendment

27. U.S. CONST. art. IV, § 1.

28. United States v. Jones, 132 S. Ct. 945 (2012).

29. *Id.* at 949.

30. *Id.* at 954–57 (Sotomayor, J., concurring); *id.* at 957–64 (Alito, J., concurring).

has never raised unreasonable search and seizure. The two cases are *United States v. Miller*[31] and *Smith v. Maryland*.[32] *United States v. Miller* dealt with a subpoena to a bank of records. Someone jumped, yelled, and screamed, "Those are my records!" The Court said, "No, if you shared that with the bank, you have no privacy."[33] *Smith* comes to a similar conclusion.

So now, even though all of this evidence is gone from the bumper, the government still has all the evidence from the cell device, which are dots on a map. They wanted to show this to the jury, once again as proof that the car is going from Levels to the stash house.

That raised the issue of whether my order violated the Fourth Amendment because it was issued on a less than probable cause standard. We were all holding our breath and waiting for Judge Huvelle to resolve this issue. She said that the court does not have to reach that issue because if the police place good faith reliance on a judicial order, that suffices to satisfy the Fourth Amendment.[34] So the evidence was admitted against Jones.

Now in terms of where we are as to whether the issuance of the order for cell site information can be predicated on less than a Fourth Amendment showing of probable cause, judges differ. I do not know if we can define a majority view at this point. Most of the magistrate judges are troubled by this—that a standard that is less than probable cause may now be sufficient. That seems to run right into the Fourth Amendment jurisprudence that says I am not losing any privacy when someone watches me walk down the street.

In the *Knotts* case,[35] the police tracked a car by putting a device in a can where drugs were. That did not violate the Fourth Amendment because he was in a public place. The D.C. Circuit in the case that was appealed from concluded, however, that this constant surveillance still exceeded the reasonable expectation of privacy. When the device was on the car bumper, it violated the Fourth Amendment.[36] The Supreme Court did reverse but on another ground.[37]

Shortly after *Jones* was decided, three other circuits disagreed with it, primarily on the basis of the *Knotts* case. We are talking about curtilage. Is there a difference when Jones pulls into the driveway of the stash house, which, by the way, is his house? Does it make any difference that now he is within the curtilage? Does that get within the Supreme Court cases,

31. United States v. Miller, 425 U.S. 435 (1976).
32. Smith v. Maryland, 442 U.S. 735 (1979).
33. *See Miller*, 425 U.S. at 440.
34. *See* United States v. Jones, 451 F. Supp. 2d 71 (D.D.C. 2006).
35. United States v. Knotts, 460 U.S. 276 (1983).
36. United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010).
37. United States v. Jones, 132 S. Ct. 945 (2012).

where, if you remember, the use of heat-sensing devices within a house was a violation of the Fourth Amendment?[38] So that is where we are, which is, frankly, nowhere.

Now it is problematic because the D.C. Circuit's opinion drew ferocious dissents and it is in the netherworld. What happens to a circuit decision that is reversed? Does it cease being a law for any purpose? In that case, I guess we are back where we started.

JUDGE PECK:

This comes up every day. We have now gotten the U.S. Attorney's Office in the Southern District of New York to only apply for these cell site location data on a search warrant supported by probable cause. Each one of their applications has a footnote that says, "We do not concede that we need to go by search warrant as opposed to the lesser standard under the S.C.A.," and they then cite one of the district judge opinions in my district that says it is alright to do this the old way. Then they say that in light of the decision by another district judge and me in the Southern District that went the other way, we will go by a search warrant.

JUDGE FACCIOLA:

That is exactly what we are doing. It is not that difficult to make a probable cause showing. If the police know of this drug dealing in Levels, and they go back and forth several times and he keeps doing that, and they have people buying in Levels, and they sit on the house and they see all this traffic going in, and they have a snitch who says something to them, they have probable cause. So now the Department of Justice is finessing the issue by predicating the warrants on probable cause.

JUDGE PECK:

The question still remains, once they have that probable cause, for how long should they be able to keep doing this? It is one thing when they say, "We need this cell site data because there is a fugitive who kidnapped somebody and we are trying to immediately find and arrest that fugitive and get the kidnapped person released." It is another when they say, "We would like this retroactive for the last sixty days (which the phone company can give them) and prospective for the next thirty or forty-five days" and then they come back with a renewal request at the end of that. How much is too much? The D.C. Circuit opinion distinguished between following someone electronically every minute for thirty days and seeing where they are

38. Kyllo v. United States, 533 U.S. 27 (2001).

periodically by seeing where they are in public.[39] I am seriously troubled by overbroad, overly-lengthy time periods for this, but there is no clear law in this area.

JUDGE FACCIOLA:

Let me ask you: Do you buy what the D.C. Circuit said? Is there a difference between tailing someone for seven days between Levels and the stash house, and doing it for ninety days, or one hundred twenty days? Remember, we are talking all day, every day, never shutting it off. Is there a difference in your minds? Is there a significant enough difference to predicate a Fourth Amendment violation on the difference? What do you think?

Judge Ginsburg said the distinction between a qualitative and quantitative analysis is where the defeat of the reasonable expectation of privacy lies. He conjured up a woman who went to an OB/GYN, then stopped at a shop that sells maternity clothes. We suddenly have learned something about her that she has not told us: she is pregnant. The more intensive the surveillance and the longer it is, the greater the risk that the surveillance will yield something that she considers to fall within her expectation of privacy. That, of course, draws the ferocious criticism of the two other circuits who ask how we quantify it. Is it thirty days, sixty days—what is the standard?

Certainly, I think the *Knotts* case is a very tough case to overcome if the surveillance in the streets does not raise any constitutional issue at all. Judge Douglas Ginsburg distinguishes *Knotts* from his case because of the intensity of the surveillance, all day, every day for ninety days.[40] I do not know if you escape from *Knotts* under that.

The other problem that judges confront is cell phones themselves. I cannot remember the last case in which the cops did not seize the person's cell phone because it was in his pocket when they arrested him. You know what a compendium of information that is, not only as to his location, but as to who he is calling, text messaging, and so forth. There is another good article in the *Federal Courts Law Review* by a professor who would argue under traditional Fourth Amendment standards, that it can be justified, if at all, only upon the search incident to arrest, which is eliminating any danger to the police and preserving the evidence.[41] The professor argues that it is

39. *Maynard*, 615 F.3d at 558.

40. *Id.* at 563–64.

41. Charles E. MacLean, *But, Your Honor, a Cell Phone is Not a Cigarette Pack: An Immodest Call for a Return to the* Chimel *Justifications for Cell Phone Memory Searches Incident to Lawful Arrest*, 6 FED. CTS. L. REV. 37 (2012).

very easy to stop a cell phone from being erased. As soon as the police have done that, they have lost all the argument that they could make about how to take emergency action to prevent it from being erased. But that is not where the courts have gone. Right now in this country, with a few exceptions in California and Ohio, the courts have permitted not only the seizure of the cell phone, but the downloading of its entire contents on the grounds that there is no difference between it and anything else in the person's pocket. If they can open the person's wallet to see what was in it, why can they not open his cell phone? California and Ohio say that this is a false analogy because it compares two things that could not be any more dissimilar. Cell phones in themselves are creating very grave problems.

JUDGE PECK:

Sometimes, if they want to be really cautious, they will come to me and say, "We have arrested the person and we have his cell phone." Often it is, "We have started looking at it and we have thought better of it. Will you give us a warrant?" Obviously, if they do that, they have protected themselves much more than just going in and doing it.

The other question I think you were raising is: If you have reasonable suspicion or probable cause to get the information for Crime 1, and in the course of it, you discover that the person is committing Crime 2, can you use it for that? Under the common law analogy of plain view, the answer is yes. Once you discover that he is going from the stash house to a fence where he is selling or buying stolen goods, if you had the court's approval for the location information, you can use it for anything, it would seem.

JUDGE FACCIOLA:

The other aspect of this that we grapple with is that they want a search warrant for a house, and on Attachment A, which is the list of what they want to seize, they will have computers, cell phones, and everything else they can think of. I have been striking that. I do not see why a search warrant itself justifies that search in the absence of some showing that the computer or the phone has been used as an instrumentality of the crime. If they come to me with a warrant and say, "Our snitch has been talking to this man over the cell phone and buying drugs for him," that is a very different situation. I think that is unquestionably probable cause to seize the cell phone and download its contents.

PROFESSOR TEPPLER:

Are you accompanied by many other judges?

JUDGE FACCIOLA:

Yes. I do not think there is a judge in the country who, presented with evidence that a guy used his cell phone to make drug deals, would hesitate to issue the warrant.

PROFESSOR TEPPLER:

What about your higher hurdle for access to these devices?

JUDGE FACCIOLA:

You have to have probable cause under the Fourth Amendment, and the use of the phone to contact the snitch to sell drugs is certainly, in my view, probable cause to seize the phone and download its contents for similar calls. It is just like the child pornography case.

When they sit on a house and see someone selling drugs, then ask for everything electronic, I do not think that is the instrumentality of a crime. I have told them that and struck it, telling them to come back to me with all of the evidence after making the seizure and I will take another look at it.

JUDGE PECK:

In our District, because of some circuit cases, the agents are now able to say in their affidavit for the warrant, "It is my experience in drug cases that drug dealers use computers or cell phones to keep the information about who they are selling to and buying from." At least in those areas, where there is case law supporting that it is common knowledge among law enforcement that this happens, most of us will sign the warrant. I had one more recently where it was not drugs. I cannot remember what the crime was, but the agent said in the warrant application, "It is my experience that people who commit this sort of crime always use computers and cell phones." I had them in chambers and said, "Really? For this crime? That is your experience? How many times have you seen it happen?" The answer was, "Well, actually I have not, but this is boilerplate." They were not as blatant as that, but in essence, they took boilerplate language from the drug cases and recycled it. I denied the warrant for the computer.

PROFESSOR TEPPLER:

We were talking about tracking physically-used electronic devices. What about tracking some of these activities online for criminal activity—how does recent decisional authority affect that?

JUDGE FACCIOLA:

If we go back to the earlier example where someone visited that site, "I Love Kiddies," and downloaded child pornography, surely that is probable cause to seize his computer or to go to the providers and find out what other sites were visited. I would issue a warrant for the server housing the URL, assuming it was in my jurisdiction.

PROFESSOR TEPPLER:

Would this warrant extend to people with whom this person might have communicated?

JUDGE FACCIOLA:

Of course.

PROFESSOR TEPPLER:

Would that be his mother, his father, or other normal communication?

JUDGE FACCIOLA:

He was not sending them child pornography. Do you mean other people who are interested? No, if he was not sending them child pornography, but the problem is that it has to be done indiscriminately if we seize the entire hard drive. Then, it seems to me, you get into the question which the Ninth Circuit struggled with in the *Balco* case: you have to figure out some way to search a computer.[42] We know some wonderful experts in forensics. My dear friend Ovie Carroll runs the Department of Justice cyber-crime and he is magnificent. He will show you how he found the memory in a piece of sushi. He is marvelous. Ovie will tell you that, in the old days, they would open each file, so that what said "Pictures of the children at Yosemite" was child pornography. Now, thanks to more sophisticated searching techniques, like hash values, Ovie can find child pornography on that computer very quickly.

PROFESSOR TEPPLER:

For those who do not know, hash values are associated with identifying information that has already been stored somewhere and identified elsewhere. They are fingerprints of data. For example, if you know that this file, that a picture I have on my iPad, has a certain hash value, which is unique, and more or less unreproduceable from any other file, you can compare that against any other file and know that it is the file. However, it

42. United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162 (9th Cir. 2010).

has been used for de-duplication, because there can be many copies of a file in a certain computer. You can de-duplicate those files and narrow it down to only one of those main copies, or you can use it against a database of known child pornography pictures and be able to immediately identify, without actually having to view those files, which files are child pornography.

In a typical e-discovery case, you can also decide that certain files are of no evidentiary value or of no substantial relevance. Why? Because it is a Microsoft Word file that appears in every computer. There is a whole list of files. The National Institute of Science and Technology has a file containing about fifty million hash values. It probably fits in a USB drive at this point, but you can do a very quick comparison to get rid of all of the superfluous information you need. So hash values are the result of a hash function. It is a great tool in solving civil and criminal proceedings.

Now we will move on to preservation issues. Preservation is something that should occur, depending on where you are going to be sued and on what basis, prior to litigation, at the onset of litigation, or upon some notice.

JUDGE PECK:

The case law that deals with this is clear that when litigation is "reasonably anticipated," that is when you have to preserve. Of course, that is not necessarily a bright line and when you should have been on notice and preserved will be judged in hindsight. The only clear answer is that "reasonably anticipated" is the same standard for work product protection. So if on a privilege log you have a very early document that you are calling work product privilege, and you have not begun preservation until two years after that document, you have a problem. Those should be pretty much a coterminous period.

As to the scope, the rubric has been to preserve broadly and produce more narrowly because if there is a problem in production, but you have done a sufficient preservation exercise, you can go back and find what you did not produce the first time. If you did not preserve that information, it is gone, subject to the proposed rule amendments which will clarify and change the law. In this area in certain circuits, including mine, you are going to get a spoliation sanction—probably an adverse inference instruction. The trade-off is that preservation is not cost-free. You have to preserve broadly, but you have to be proportional. Some companies—because they fear being called a spoliator even if they win the motion—seem to be taking the approach of preserving everything and then complaining when they have to search it because the cost is not proportional. It is an interesting balance to strike when you think you have preserved proportionately, but the judge does not think you put your proportions in the right place.

PROFESSOR TEPPLER:

A few years ago, we were talking about work product protection being a trigger for preservation. When we brought this up, you could hear the collective sigh in the audience as if to say, "What do you mean it is a trigger?" Well, it is reasonably anticipated litigation. If you did not anticipate the litigation, you would not be creating a work product, would you? This is something lawyers still are not quite aware of.

Another thing we have to worry about in Florida is that Florida's rules on preservation are somewhat murky on the civil side. John Barkett at Shook, Hardy & Bacon is on the Federal Rules Committee. He wrote a footnote in an article on preservation and the new rules stating that the Florida rules are somewhat murky. He also had a footnote that was an entire page long in about six-point type, just talking about what preservation obligations were in Florida.[43] The problem in Florida is that the Florida Supreme Court really has not come out with a uniform approach to what preservation obligations are, and, in fact, during the time when the new discovery rules were being argued to the Florida Supreme Court, they seemed to be amenable to hearing arguments in favor of a reasonable anticipation. So a discovery request or order, a contract, regulation, or statute will trigger preservation obligations in the state of Florida.

Query: What happens when you have concurrent jurisdiction in federal court? What do you tell your client to do? If you do not adhere perhaps to the cautious approach of the federal court, you may face spoliation sanctions because somebody may say that you should have known you were going to be sued in federal court. We keep talking about competence because people think that discovery is document review, but if you think that, it will cause problems later.

JUDGE PECK:

One other key issue in preservation is that since it is almost always triggered before litigation, the client is not necessarily going to bring in outside counsel right away. There may not be an in-house lawyer who knows about these rules. While things do not necessarily disappear as soon as the employee hits the delete button, it is important, even if you are retained by a single plaintiff, that one of the first things that you need to talk to the potential client about is where their electronic data is stored and what they have done to preserve it.

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43. JOHN BARKETT, FLORIDA'S E-DISCOVERY RULES 12 n.13 (2012), *available at* http://www.aceds.org/florida-ediscovery-rules-paper-by-john-barkett-shook-hardy/.

PROFESSOR TEPPLER:

Think about a class action in which I receive an unsolicited text message. If I can find the issuer of that message or whoever contracted for the sending of that unsolicited text message, I can sue them for an Electronic Communication Privacy Act violation, which carries a penalty of $500 statutory damages per violation. Multiply that by a few million, and you have a tidy sum that a plaintiff's lawyer can look for. If you are a class action plaintiff's attorney in this case, what are you going to tell your client? You have to say that you need their phone. You have to take a forensically sound image so that when defense counsel asks to see whether or not that text message is on the phone, you have taken precautions. On the defense side, if your client has not saved its text message, the fact that there might be some sort of record at the phone company of the text message might be indicative. It is certainly not dispositive that the client received that message. So the obligation to preserve is crucial.

JUDGE FACCIOLA:

To make sure we do not look at this in a vacuum, remember what is happening here. The Federal Rules Advisory Committee looks like it is going to speak to the precise issue of what you must preserve and when you must preserve it. Significantly, it is going to cabin the inherent authority. There are two sources of the sanctioning power. One is the Federal Rules: Rule 37(d) and the exemption in 37(e). If I find someone that violates Rule 37(d), my power is clear because it is under the Rule. I also have inherent authority. If the rule does not permit me to do a certain thing, I may be able to do it, but with the Supreme Court's decision in *Chambers v. NASCO, Inc.*,[44] I am only supposed to do that when the Federal Rule is not up to the task.

Zubulake v. UBS Warburg, LLC,[45] *Pension Committee v. Banc of America Securities, LLC*,[46] and all of those cases are exercises of the court's inherent authority to keep its processes from being offended by the destruction of evidence. It is unclear at this point what is going to happen, but, from what I am hearing and seeing in the proposals and what I am reading about it, the first thing American corporations want to do is to cabin the inherent authority, and to say the sanction is a function of a rule violation or it does not exist. That is significant because, no matter what the standard is for preservation, if negligence is not a basis for a sanction, you will never

44. Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

45. Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422 (S.D.N.Y. 2004).

46. Pension Comm. v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

be sanctioned for simply making a mistake. So, if in an exercise of judgment, someone said, "Well, I do not think we have to preserve that," and that, at the time, was reasonable, the new Federal Rules may not make that decision of any consequence because, at worst, it was negligence, and negligence may not be a basis for a sanction under at least one proposal that is being committed by the Advisory Committee. It is certainly the proposal that the defense bar argues: that this over-preservation is not a function of anybody thinking we are going out and willfully destroying evidence. It is motivated by the possibility that, in a way we cannot anticipate, a judge will exercise her inherent authority to say, "Five years after we made the decision, this decision was incorrect and now we pay the consequences."

PROFESSOR TEPPLER:

This standard, however, would be objective, would it not?

JUDGE FACCIOLA:

We would like to think, as judges, that all standards are objective, Mr. Teppler.

PROFESSOR TEPPLER:

If it is objective, it is still subject to an after-the-fact determination, so will we basically come back in a circle?

JUDGE FACCIOLA:

No, I do not think so. I think it is infinitely different to apply a rule that specifies the preservation obligation than it is in the exercise of one's inherent authority. The latter is not anywhere as predictable as the former. I have been at these meetings and heard the defense bar complain, but we cannot have seven hundred federal judges deciding this, as we used to say in equity, by the size of the chancellor's foot. Let us have a standard that specifies what the preservation obligation is and then say that dispositive sanctions, whether dismissal or an adverse inference (a sanction that is really harmful to one's case), should only be available where there is an intentional effort to destroy evidence for a malevolent purpose.

PROFESSOR TEPPLER:

Is this in anticipation of litigation?

JUDGE FACCIOLA:

Yes.

PROFESSOR TEPPLER:

How does it survive constitutional scrutiny?

JUDGE PECK:

There are two reasons that it has not gone further. First is the Rules Enabling Act issue, the constitutional issue, and secondly, that nobody, including those who have made proposals, has been able to give a fair and definite trigger for preservation. One proposal was that the trigger should be when the complaint is filed, and needless to say, that is very pro-defendant. You often know litigation is coming. You may have a demand notice ahead of time, you may have had an EEOC complaint or an administrative issue beforehand. Does that mean that the party is free to go out and have a shredding party or its electronic equivalent: Evidence Eliminator, an off-the-shelf product you can buy at Best Buy and other electronic stores? As soon as you read a case, you start reading the facts, and you hear that the party has used Evidence Eliminator, it is over.

What seems to have gone pretty far and is likely to be recommended to the Rules Committee is to replace the current so-called "safe harbor" that was originally Rule 37(f), renumbered 37(e), instead of saying what it currently says, which is that data lost in good faith through the normal operation of a computer system cannot be a ground for a sanction. That is great, except when you have a preservation obligation that trumps that, so it has never been used. The new rule would say that, while the court can permit additional discovery and other remedial steps, it cannot issue a serious sanction, adverse inference or worse, unless the failure was willful or in bad faith and caused substantial prejudice in the litigation or—and then there is this little extra fallback—the failure irreparably deprived a party of any meaningful opportunity to present a claim or defense. Part (b) comes out of product liability cases where there is a physical object such as the tire that exploded, you are suing the manufacturer for a design defect, and you have thrown the bad tire out before the lawsuit. That is the sort of thing that would be picked up by part (b), where the failure would otherwise irreparably deprive the party of a meaningful opportunity to present a claim or defense. I am not exactly sure whether there is any electronic evidence equivalent that would come under that, but that is where we seem to be going.

PROFESSOR TEPPLER:

With respect to the Committee, I think they have to be very careful because I can perceive litigation based on these new rules that would

complicate the matter even more so than where I think decisional authority is going, which is a common sense approach to bad faith and prejudice.

JUDGE PECK:

I think one of the reasons that the new legislation, the new rule has been proposed, is because the Second Circuit stands alone as the result of the Residential Funding case.[47] It established for the Second Circuit that gross negligence, or even simple negligence, along with prejudice, can be a cause for sanctions. That was the basis for sanctions in *Zubulake*, *Pension Committee*, and the like. The rest of the country does not follow that rule, and nobody, other than those of us in the Second Circuit perhaps, likes that rule.

JUDGE FACCIOLA:

Within the past two weeks, one of the two courts hearing the *Rimkus* case has found that they actually had, I would not call it a shredding party, but while getting ready for a patent fight, they sent an email to their employees, telling them to throw everything out. It even said, "Keep all the good stuff." In other words, selectively help us and so forth. The *Rimkus* case is pending in California and Ohio. A Texas judge also adjudicating the *Rimkus* case said that was a purposeful and intentional effort to destroy evidence and it fails easily.[48]

So, the problem we are having is that you cannot name a discovery case that went to the Supreme Court. Almost all of the significant decisions in this area—many of them by magistrate judges—were never appealed from because the cases settled. So if you go to these meetings, the defense bar is upset, saying, "I represent an international corporation, which has branches in eleven states, and branches in Brussels and Hong Kong, and I am, for the rest of my existence, to be the prisoner of a single decision of the Southern District of New York." Paranoia sets in and everyone says, "Let us judge by the highest standard and then no one will accuse us." It is hardly a coincidence that it is the Southern District of New York. It is awfully hard to do business in America and not do business in New York. A crafty lawyer can always find a reason to sue you there.

The scary thing is that our friends on the corporate side are not going to wait much longer and will be going to Congress, where they will say that this is costing America millions of dollars and jobs. Instead of having people inventing the next solar panel, we have them preserving e-mails. Our Chinese competitors, our Japanese competitors, our Indian competitors, are

47. Residential Funding, Corp. v. DeGeorge Fin. Corp., 306 F.3d 99 (2d Cir. 2002).

48. *See* Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598 (S.D. Tex. 2010).

not doing this. I do not know if that is a good argument or a bad argument, but I can tell you that there is criticism of the Committee for taking so long to get this rule out. I do not know if that is a fair criticism, but this is ferociously complicated because you can always come up with an idea and there is a countering idea.

The good thing about the Federal Rules is that this all gets explored when it comes out. The bad thing is that it takes five years, and we will be talking about backup tapes when we are the only people on Earth who still care about backup tapes. Remember, as I said in a recent article, the word "phonorecords" was eliminated from the Federal Rules in 1973 when everybody except people my age had no idea what a phonorecord was. So that is this process. In terms of where we are with sanctions law, I agree with Judge Peck. Looking at the other Circuits who have touched this, like the Federal Circuit in *Rimkus*, they seem much more comfortable with an exercise of the inherent authority to punish willful, malevolent behavior. They are not terribly comfortable with doing this for anything less, at least in terms of moving to dismiss or an adverse inference.

PROFESSOR TEPPLER:

Anything less, I think, would more likely fall into the category of "gotcha"—something that you can lay the trap for and that is it. It has nothing to do with litigation *per se*, but if you do it enough times, you pressure the other party.

JUDGE PECK:

Let me, at least while it is still good law, defend the Southern District and the Second Circuit. There is a quote from Judge Scheindlin that you want to discourage the pure heart and empty head, and if you do not sanction something where there is negligence involved—it comes back to competence—you are letting lawyers treat this without giving it the respect that it is due. If evidence is destroyed because they did not know what to do or how to do it—they went to self-collection like the case I was talking about this morning and did not tell the IT person how to do it—and information really is lost as a result of that, there should be some punishment. Merely saying we will give the other side, who had to take six depositions to prove this, the costs of the attorney's fees, and the cost from the transcript of the deposition, is not really leveling the playing field.

JUDGE FACCIOLA:

In further defense of the Second Circuit, it is an unfair criticism of those decisions and, indeed, of Judge Scheindlin's decision in *Pension Committee* and Judge Rosenthal's in *Rimkus*, to say that prejudice was not part of the inquiry. Indeed, that was the point. Both of them insisted upon clear instructions to the jury: "Ladies and gentlemen, if you find that, as a result of the loss of this evidence, you are not obliged, but you may find that the evidence lost was favorable to the party who lost it and hold that against them." So, there is nothing in those two decisions that can be accused of being automatic. That is not a fair criticism.

PROFESSOR TEPPLER:

In further defense of the Second Circuit, most of the civil authority that I have read recently shows that courts do not dole out adverse inferences like cookies. Even in jurisdictions where negligence is a burden, we have to show or overcome—and mere negligence at that—when it comes to the sanctions, all of a sudden, bad faith, prejudice, and everything we see in every other circuit comes in. So while it gets you in the door, it does not get you the evidential sanction that perhaps you might think you might otherwise be entitled to. So why is there so much controversy? This is why I said that decisional authority is moving in the right direction.

JUDGE PECK:

It may be ego, but Laura Zubulake, the Zubulake of the famous *Zubulake v. UBS* decision, has been on the lecture circuit and she has said that she believes she would have won that trial, even without the adverse inference instruction. I do think it fairly likely that this Rule Amendment is going to go further through the process. The other thing for those of you who are interested in the difference between the standards in the various circuits, Paul Grimm in the second of the *Victor Stanley*[49] opinions has a wonderful chart where he lays out the difference in the law in every one of the federal circuits. That is a great resource if you are trying to figure out what it is in the circuit you are practicing in.

PROFESSOR TEPPLER:

We are going to split the rest of our time between authentication, admissibility, and cost, which I think is an important issue because it is a really hot button issue in practice right now. Let us start with admissibility,

49. Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497 (D. Md. 2010).

authentication, and hearsay. There is a recent case, the *Live Nation*[50] case out of Maryland, just decided in August. The named trust e-mail was authenticated by stipulation and there was some support therefor, which means that this might pass muster even with Judge Grimm because, in the *Lorraine v. Markel*[51] case, the court decided to exclude e-mail evidence that had been authenticated by stipulation. So the stipulations were not enough.

JUDGE PECK:

There was no stipulation in *Lorraine*. The parties cross-moved for summary judgment. Each threw in, as attachments to a lawyer affidavit, the various e-mails. Neither objected to the other side, but they did not stipulate, and Judge Grimm in, as we like to say, a three page opinion incorporating thereafter a ninety-seven page law review article that he called part of his opinion, laid out why he was rejecting both parties' cross-summary judgment motions, because the e-mails were not authenticated. He went on to what is really a wonderful treatise on the traditional authentication and admissibility rules, and how they should and do apply to the various forms of electronic media.

JUDGE FACCIOLA:

One of the problems with authentication is that it is not grappled with in this context. Federal Rule of Evidence 901 is subdivided into two broad sections. It tells us that there are certain documents that are self-authenticating: trade publications, newspapers, publicly-filed documents. Then it subdivides into another category where we are told, by example, that certain types of information can be authenticated: a voice transcription by someone familiar, handwriting by someone familiar, et cetera. The problem with all of this is that it anticipates—or it antedates—what is going on in the world by two centuries.

For example, this is Uncle Harry's will. How do we know it is Uncle Harry's will? Well, here is Uncle Harry's signature, and here is the notarization (which in my state suffices), or Ms. Smith says, "I worked for Uncle Harry for twenty years as his secretary and that is his signature." The problem is, what happens when Uncle Harry goes to a law office and is told that he should review his will and bring it back on Monday? Saturday morning, he sends it back by e-mail and dies Saturday night. Does that process even fit within these rules?

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50. It's My Party, Inc. v. Live Nation, Inc., No. JFM-09-547, 2012 WL 3655470 (D. Md. Aug. 23, 2012).

51. Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534 (D. Md. 2007).

Two schools of thought have emerged. The first school, represented by many court opinions, is that these rules have been good for two centuries and they will be good in the future and we should continue to employ them. Authenticity has never been a very difficult hurdle to overcome, so it should not be here. Another school of thought is represented by George Paul, who wrote a book called *Foundations of Digital Evidence*.[52] George argues that this does not make any sense, philosophically or any other way. We have to come up with a new way of doing this because computer evidence can be so easily faked that these old rules are not going to work anymore. Right now, in the development of the case law, George's views are not being accepted by many judges. To the contrary, they are traditionally applying Rule 901 and particularly Rule 904. With reference to computer evidence, they have said that under 901(4), if the evidence is the product of a process and that is what the process usually produced, it is, thereby, authenticated. George Paul says that is telling a man to pull himself up by his own bootstraps because the very thing you are pointing to as authenticating it is the very thing that can be made in a fraudulent manner. It is the easiest thing in the world for me to send Professor Bonner an e-mail using Professor Teppler's e-mail address. It could not be easier. George Paul argues that we are never going to get anywhere and we have to come up with a new set of rules.

We have seen several cases involving Facebook or MySpace entries, one coming out of Maryland. The Court of Appeals cited Judge Paul Grimm and reversed.[53] The higher court cited Judge Paul Grimm and affirmed.[54] The problem there was that a detective was permitted to testify that he entered a home and saw on a computer, on a Facebook or on a MySpace entry, "snitches get stitches"—people who cooperate with the police get hurt. This was tendered as the explanation as to why a witness who had supported the prosecution's view in the first trial was now changing his position. The problem the Court of Appeals had was that it could not figure out how that entry got there, and its mere presence was not of itself sufficient.[55]

Subsequent to that, in cases in California and Texas, that additional circumstantial evidence was provided by other factors. For example, in the Texas case, there were uses of gang symbols in the Facebook entry.[56] There was a picture of a man crossing arms in a particular way, and the detective said that was a gang symbol for the man's gang. All of this convinced the court there was evidence independent of the entry—and the entry was

52. GEORGE L. PAUL, FOUNDATIONS OF DIGITAL EVIDENCE (2008).

53. Griffin v. State, 995 A.2d 791 (Md. Ct. Spec. App. 2010).

54. Griffin v. State, 19 A.3d 415 (Md. 2011).

55. *Id.* at 423.

56. Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012).

horrifying because it was a reproduction of the funeral music they played at the funeral of the person he murdered—and the court said, the Maryland problem is overcome because there is sufficient circumstantial evidence under the state equivalent of Rule 901(4) to permit a reasonable person to find that those were, in fact, the entries this man had made.

So the case law shows that in terms of authentication, we are still using the traditional model of looking for additional circumstantial evidence that permits a reasonable person to find that the person who is in issue did, in fact, post it. The burden to prove authenticity is very light indeed, and we all know that once the judge determines that a reasonable person could make that determination, the determination of whether he did or not is for the jury. It goes to weight, not to relevance.

PROFESSOR TEPPLER:

I was hired to write the chapter on "time" for George Paul's book because time is a critical element in authentication, and time in a computer is not the time; it is whatever somebody tells the computer the time is. This opens up a whole world of possible computer data fabrication capabilities, and there have been a fair amount of cases dealing with this.

Information from a computer is not born in any testable manner. Judge Facciola talked about a will. When you have an exemplar of somebody's signature, you have something that can be tested forensically using physical artifacts: there is the age of the ink, the age of the paper, watermarks on the paper, and there may be other characteristics that you can use. With digital information, there is no such thing. Digital information is pure artifice. There is no artifactual forensic capability to let you know—other than that it came out of a computer—that it is correct without some sort of extrinsic test on that computer. So computer information is extrinsically untestable, and because of that, the argument that George Paul and I and a few of our colleagues make is that we need somewhat of a heightened level of authentication. The reason is that, just because I see a computer spit out information every day, this does not mean that it is not spitting out erroneous information every day. You have to know more about it than just what you perceive because what we perceive may not be what is happening to those zeroes and ones inside the computer.

When the jury gets to hear this testimony, it goes to the weight. For example, I can fabricate information easily and I can get it admitted to a judge. There will be truthful information that will be actual information, and there will be very nearly true information (maybe off by a couple of zeroes in the contract) which will go to the weight. How would you like to have a judicial determination based on a gamble? A jury may find, correctly, that

one is okay and the other one is not, when it is true, but how do you know that an attorney will be able to competently argue that?

Digital information out of the chute does not tell you anything without something more. Since there is very little in the way of testability, it creates huge difficulties. In the criminal area, the *Crawford v. Washington*[57] and *Melendez-Diaz v. Massachusetts*[58] cases are hanging in the air for whether digital information really needs some additional showing to not be considered inadmissible or hearsay. My argument (very few other people have said this) is that digital information is a product of voices which are really declarants. The reason that they are really declarants is because no computer says anything by itself. There is no machine that thinks by itself: all machines and all computers are instructed to say something on behalf of someone who programs it. That statement is actually a declaration, in some way, of a programmer behind that machine. If that is the case, why should all computer algorithms not be considered hearsay? There is an argument there.

That said, the Second Circuit came out with a decision on the Digital Millennium Copyright Act (DCMA), stating that object code and source code is speech for purposes of the DMCA. So, if object code and source code are speech for purposes of the DMCA, why should that not be extended to other speech and considered declarant?

JUDGE FACCIOLA:

The courts have said that a machine is not a declarant. In *United States v. Washington*,[59] it was argued that the results of a breathalyzer were subject to the hearsay rule. The Fourth Circuit rejected it, on the grounds that a machine is not a declarant. I think that is half true for a lot of the reasons Professor Teppler says. The mere fact that it is not a declarant does not raise hearsay problems that we think about when we deal with evidence. For example, when was the last time someone tested a machine? That goes, it seems to me, to admissibility.

There is a wonderful opinion from 1986—it is very hard to read it without laughing—in which a judge said that because something came out of a computer, it must be correct. Our experience teaches us that the precise converse is true. But right now, the courts have been struggling with the hearsay application. There certainly is no willingness now to accept the principle that everything created by a business is *ipso facto* permitted to

57. Crawford v. Washington, 541 U.S. 36 (2004).

58. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

59. United States v. Washington, 498 F.3d 225 (4th Cir. 2007).

come into evidence because it meets the business records exception. We must take a much more careful look and ask whether the standards of the rule were met. Do they do this in the ordinary course of business? Do they do it regularly? Did someone have the obligation to do it? Most people e-mail, and it is ripe with hearsay.

PROFESSOR TEPPLER:

In the *Live Nation* case,[60] which came down on August 23 in the District of Maryland, the court said, "Nevertheless, I decline to accept a blanket rule that e-mails constitute business records; more specificity is required regarding the party's record keeping practices to show that a particular e-mail in fact constitutes a reliable business record."[61] That is a trend we are beginning to see happen more and more. I think that is the way we are going, but we are moving very slowly toward a heightened authentication requirement and less of an immediate inertial movement to say that it goes to the weight rather than to the admissibility.

There is another case, *1st Financial SD, LLC v. Lewis*,[62] that came out in October in the District of Nevada. The plaintiff there represented that metadata was hearsay, and therefore, not admissible, and then said that there was no declarant. So basically, the party contradicted itself. The defendants argued that the metadata was machine-generated and inadmissible. The court said that, absent proof of alteration, computer-generated data such as a timestamp (which is metadata), attached to a file when it is saved, is admissible and taken as true. The court also said that a challenge to authenticity by providing some evidence of alteration to the metadata, for example, arguing that the metadata was deliberately altered by an individual, would properly characterize it as hearsay. Then it cited to Weinstein's Federal Evidence. I looked at Weinstein Second and it did not say what the court said, but nonetheless, it is interesting that you can alter metadata and convert it into hearsay.

JUDGE PECK:

This can have serious implications. Paul Ceglia's case against Mark Zuckerberg and Facebook in the Western District of New York has now led to Ceglia being indicted for fraud by the U.S. Attorney for the Southern District of New York, and I think his Western District case is, if not dead in

60. It's My Party, Inc. v. Live Nation, Inc., No. JMF-09-547, 2012 WL 3655470 (D. Md. Aug. 23, 2012).

61. *Id.* at *5.

62. 1st Financial SD, LLC v. Lewis, No. 2:11-CV-00481-MMD-VCF, 2012 WL 4761931 (D. Nev. Oct. 5, 2012).

the water, living on life support and soon to be dead. When I first read about it and saw he had a contract where he was entitled to fifty percent of Zuckerberg's share of Facebook stock, my thought was that he was going to get a big settlement because that was too big a case for Zuckerberg and Facebook to allow to go to trial with so many evidentiary issues. That case did not really deal with electronic data because the contract was actually on a two page paper, not on a computer. It was pretty conclusively proved by traditional methods like typeface and paper aging that the first page did not match the second page and that the contract had nothing to do with Facebook.

PROFESSOR TEPPLER:

There was also an interesting claw-back inadvertent disclosure issue in that case where the plaintiff's attorney had waited for a year to try to claw back a letter to a counselor, from one counsel to a successor counsel. That letter was damning. Because of that attorney's lax attitude toward trying to claw it back, the court had some very choice words for the attorney. The privilege was considered waived and I think that probably was a major factor.

JUDGE FACCIOLA:

Always remember something: just because something is hearsay does not mean it is inadmissible because so many of these things meet the hearsay exceptions quite easily. It is hard to imagine a Facebook entry that is not a present sense impression of a state of mind. For example, someone says, "I went to the party and boy did I have fun." In terms of business records, always remember the rule about the admissions of a party opponent. It is difficult to imagine e-mails being generated and the proponent of the evidence not being able to say that it was within the scope of his duties when he said that. So you have all of those, which points out again that you really want to review this as you collect and try to anticipate these so that you have some legitimate basis to proffer.

PROFESSOR TEPPLER:

There was a case out of the District of Oregon in 2012 that outlined a viewpoint horizon test,[63] which was a step-by-step walkthrough of Rule 803(6), but it does not read at all like Rule 803(6). I will read a few excerpts from this opinion: "First of all, the e-mail must have been sent or received at

63. Rogers v. Oregon Trail Elec. Consumers Coop., No. 3:10-CV-1337-AC, 2012 WL 1635127 (D. Or. May 8, 2012).

or near the time of the event(s) recorded in the email. Thus, one must look at each email's content to determine whether the email was created contemporaneously with the sender's acquisition of the information within the email."[64] Yes, that is 803(6), but it flavors it in a way that I think places a little bit more of a demonstrative requirement on the producing parties.

JUDGE PECK:

I think it depends. If the e-mail is dated today and says, "This will confirm the conversation we had yesterday," I think it satisfies that test easily. If the e-mail is dated today and says, "Do you recall that last year when we had our 26(f) meet and confer, I said X and you said Y," then that fails that test. I do not know if that was what the context was there. I am not sure that is anything different than the normal business record contemporaneous rule.

PROFESSOR TEPPLER:

Also interesting is that the e-mail must be sent or received in the regular course of a business activity which requires a case-by-case analysis of whether the producing defendant or party had a policy or imposed a business duty upon its employee to record the information within the e-mail. That does not seem to fall within the 803(6) rule.

JUDGE FACCIOLA:

No, but remember that the inspiration for Rule 803(6) is the Shop-book Evidence Act of 1609 and that the Act created a regularized procedure. It is like Cratchit writing down Scrooges' debits and credits. He did the same thing every day contemporaneously with the loaning of the money or taking it back. That is what the business record is. All too many e-mails are not part of a regularized procedure.

PROFESSOR TEPPLER:

No, but typically when these are offered into evidence they are offered in as a business record. The case actually cites to *Lorraine* and the court writes:

> "It is necessary, however, that the authenticating witness provide factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved . . . as opposed to boilerplate, conclusory statements that simply parrot the elements of the business record exception." Judge Grimm justifies this stance by noting

64. *Id.* at *9.

> that the courts' approaches to emails under the business records exception vary widely, and "[b]ecause it can be expected that electronic evidence will constitute much, if not most, of the evidence used in future motions practice or at trial, counsel should know how to get it right on the first try."[65]

So, we continue to circle back to competence.

JUDGE FACCIOLA:

In the criminal context, there are some tough issues around confrontation, especially considering one of the most famous cases, the *Safavian* case.[66] In the *Safavian* case, Safavian was one of Abramoff's contacts. Abramoff was the famous lobbyist—the man who spent a lot of money. At the time the case was tried, Abramoff was working out his own plea with the government and the last thing the government wanted to do was put Abramoff on the stand. How was it going to show a connection to Abramoff? The answer was e-mail. In an astonishing way, that entire case was tried on e-mail and the jury never saw Abramoff. That was a function of a lot of different rules like the co-conspirator exception and the admission exception to the hearsay rule. The point is that the hearsay that is coming in, even if it meets one of the exceptions, may create very pragmatic and difficult Confrontation Clause issues. It is still inconceivable to me that Safavian went to jail on the basis of his dealing with Abramoff and nobody heard from Abramoff. The answer to my objection is that it is true in every case where the government meets the requirements of the co-conspirator exception to the hearsay rule. It is no different, but it is a curious kind of result.

PROFESSOR TEPPLER:

Even if an e-mail does not fall within the business record exception of the hearsay rule, it can always be used to demonstrate that an event did occur—that an e-mail was sent—in which case the metadata of that email becomes critical because that tells you about sending and receiving information. This leads to another issue of how to authenticate the metadata. So, you are now talking about the metadata that is associated with the e-mail. Do you have a separate authentication process for the metadata itself?

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65. *Id.* (citing Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 545–46, 585 (D. Md. 2007)).

66. United States v. Safavian, 435 F. Supp. 2d 36 (D.D.C. 2006).

JUDGE FACCIOLA:

As the judge, I am supposed to do all this between the time counsel says "objection" and I rule, which is about four seconds. I asked a wise judge how he rules so quickly on complicated evidentiary issues and he said, "I have in my pocket a half dollar. If it comes out heads, sustained. If it comes out tails, overruled." I said, "Has it worked?" He said "I am yet to be reversed on an evidentiary issue." [Laughter] I do not mean to be cynical, but we do not get a lot of time to do this. However, this is instinctive and you have to get a second sense about this if you are a trial judge.

PROFESSOR TEPPLER:

If you are dealing with computer-generated digital information, whether you are a plaintiff or a defendant, you must understand what you are dealing with. Once you understand that information, you will be three quarters of the way to knowing how to prosecute or defend a case.

JUDGE PECK:

I think the answer to this is to practice and prepare, to avoid the four second flip of the coin. If there is a serious evidentiary issue about a trial exhibit, make a motion *in limine* ahead of time so that the judge has something more than four seconds to deal with it.

PROFESSOR TEPPLER:

Metadata was reviled at one point as being useless and totally irrelevant to any judicial proceedings. Finally, they have, if not admitted or embraced it, at least let it in the door. As an example, I was involved in a class action case a few years back regarding a rewards program in which the sponsor of the rewards program had promised that there would be no surcharges on any travel reservations made through this rewards program, except for fuel surcharges imposed by the airline carrier. People started getting fuel surcharges on their bill, almost without fail. The inevitable class action ensued, and my predecessor collected a number of Excel spreadsheets. For those of you who want PDFs of Excel spreadsheets, let me caution against that because in the Excel spreadsheets that I received, there were five years' worth of weekly spreadsheets showing the basic financials: how much business was done, how much money was made from it, et cetera. I did not really care about that, but I started taking a look at the metadata and what I found out was that in half the cases, the co-defendant, who had sworn in open court that they were not involved in this litigation, was the author of those weekly sheets. The second indication that something was awry was that all of these files were created on the same day and at the same time and

at the same second in 1996, while the relevant time period was 2003 through 2008. The third thing which really disturbed me was the fact that the latter half of the files had the metadata scrubbed. So something did not sit well with me. I did not file a spoliation notice because that is not what you do. I invited the other side to explain to me, to help me understand why this was the case. The other side said they would talk to the client and get right back to me. This happened three times over a period of three weeks. At the end of three weeks, I finally said: "I have had enough. I am sitting on a spoliation motion. Either explain to me what happened or I am filing it." We did settle three days later. So, if you think metadata is unimportant, think again.

JUDGE PECK:

Let us move on to costs of search before we run out of time.

JUDGE FACCIOLA:

This, like everything else, has gotten infinitely complicated. 28 U.S.C. § 1920 is incorporated by reference in Federal Rule of Civil Procedure 54(d). It says upon entry of judgment, the clerk shall tax costs. So, in the old days, you went to the clerk with your costs and your clerk had the list under Section 1920 and he gave those. There were, for example, fees for the marshal and costs for the transcript if you were able to prove that they were actually used. Another was exemplification of other costs like copying. We always thought that meant that if you made Xerox copies of the documents to be used as exhibits, it was a cost. Now we know that the costs of preparing electronic discovery, the costs of collecting it, the costs of processing it, and the costs of searching it have soared. There is a determined effort to squeeze all of that under the word "costs" in subsection 4. "Exemplification" was an old common law word that meant going to the clerk and getting him to say that, something was in fact a copy of a deed that was on file in the Registry of Deeds in Brevard County.

Finally in *Race Tires*,[67] which is a very important Third Circuit case, the judge, who has a lot of computer experience, pointed out that if we are going to be faithful to that rule, the word "copy" has to mean copying, even in electronic contexts. So the only costs of copying that are legitimate in that world are the costs of converting the data from one form to another form. Taking the data that was on one VHS tape and converting it to a DVD was an obvious cost. Taking the cost of converting the file from PDF to TIF was fine. Converting it so that it could be read by a computer system, an OCR

67. Race Tires Am. Inc. v. Hoosier Racing Tire Corp., 674 F.3d 158 (3d Cir. 2012).

system, was copying. But procedures or devices used for other purposes—for example, to collect the information and permit you to search it using this particular software tool—were not within the context of costs. Since then we have had a lot of other cases and *Race Tires* seems to be leading, except for our dear friends in the Ninth Circuit who rejected it. Some of the district courts out there have said that all the costs involved in e-discovery are transferable.

The *Johnson*[68] case shows just how dramatic that can be. It was a case by nine pensioneers who complained about the particular way they were collecting premiums, and they brought a class action. It disappeared before their eyes, and when the dust had settled, there were two plaintiffs left. They voluntarily dismissed their actions, but the judge conditioned that dismissal upon an award of costs. Allstate came in and asked for $982,000 in costs against two men on social security who probably lived in Naples, Florida. The magistrate judge, relying primarily on *Race Tires* and some Seventh Circuit authority, went through that analysis and held that, of that $982,000, only about $22,000 fit within the rubric of copying the data from one form to another. The rest were expenses that fell upon Allstate to produce the information, to collect it, and to search it. Is this a very satisfactory resolution? Of course not. Again, we are creating litigation about litigation, and we desperately need modification of the Federal Rules or of the statute. That is where we are. Judge Peck, is this just a backdoor to change the most fundamental principle of discovery—if you produce it, you pay for it?

JUDGE PECK:

Yes. Particularly in the district courts of Pennsylvania, they were giving very similar amounts as recoverable costs. One of those cases went up to the Third Circuit—*Race Tires*.[69] The Third Circuit said that is not what the statute is all about. I suspect that the courts that are giving the costs are basically saying that we have the American system, but if you are going to ask for a tremendous amount of e-discovery and you lose, at the end of the day you should pay for it. That may or may not be the right answer, but it is not one that fits nicely within Section 1920(4). If Congress wants to do that, it should do it, but I think the odds of them touching this are somewhere between slim and none. I do not even know if I would go as far as *Race Tires* without doing more research because in my early days on the bench, if you produced a million pages of paper documents and won the case, you did

68. Johnson v. Allstate Ins. Co., No. 07-CV-0781-MJR-PMF, 2009 WL 3230157 (S.D. Ill. Sept. 30, 2009).

69. *Race Tires*, 674 F.3d 158.

not get your five cents, ten cents, quarter, or whatever you were charging, back for those million pages. If the case went to trial or if there was a summary judgment motion, you got the cost of copying the limited number of documents like your trial exhibits or your summary judgment exhibits. I do not think the change in Section 1920(4) from "copies of documents" to "copies of materials," or whatever the word change was that was clearly designed to encompass electronic information, was meant to change the difference between pure discovery costs and trial related or dispositive motion related costs.

JUDGE FACCIOLA:

Now that we live in a system where we only try one percent of the cases, you can see how important this becomes when trying to settle the case. For example, though, under Rule 68, if you make an offer of judgment and the other party refuses it and recovers less than that, you get costs from the moment of his refusal. Well, is Rule 68 going to be interpreted the same way so that when I sat down to settle the case between the pensioneers and Allstate, Allstate started the negotiations at $982,000? It is going to have a drastic effect.

Some of the courts are chafing at the traditional rule of the *Seattle Times* case—that is the producing party pays. A variation on that case is the L.A. Fitness case involving people who got gym memberships and then cancelled them, but they did not get their money back. It was claimed that the way that they did this violated the California consumer law or federal law. The judge reviewed all of the discovery to that point, which had been paid for by the defendant, and he said, "This is a distinguished class action firm; they are well-financed. They are going to pay for everything hereafter. Plaintiff will have all the costs from this point on." That is problematic, because under Rule 26(b)(3), Judge Peck and I are supposed to look at each cost and assess it in the context of the Rule of its proportionate value to the case. I do not know how that Rule can be interpreted to say that we stop at this point. You can see why the cost of electronic discovery is having the most dramatic impact on the development of the law.

PROFESSOR TEPPLER:

It might pay to look at your client's contract again due to a recent case in the Middle District of Florida. In the *Tampa Bay Water* case,[70] the court decided a few months ago that Tampa Bay Utility had to pay fourteen million dollars in discovery costs. Why? Because its agreement with HDR

70. Tampa Bay Water v. HDR Eng'g, Inc., 2012 WL 5387830 (M.D. Fla. Nov. 2, 2012).

Engineering provided that in the event there was a prevailing party in litigation, the losing party agreed to pay all costs. It did not say costs determined under Rule 54(d) and Section 1920; it just said costs.

JUDGE PECK:

I think in that case it was all attorney's fees and costs if I remember correctly. Traditionally, when you get attorney's fees, you get all the ancillary costs that the attorneys have incurred.

PROFESSOR TEPPLER:

The costs exceeded the fees by a huge amount.

JUDGE PECK:

Yes, but if the contract just said that the winning party gets costs, I am not sure the result would have been the same. When it is tied in with attorney's fees, there is a lot more that is recoverable in those situations.

JUDGE FACCIOLA:

To what extent do you think that the proportionality analysis should inform this as well? The question you leave the case with is: how in the world did Allstate spend nearly a million dollars on a case where the plaintiffs threw in the towel? And how do you go to the board of Allstate as counsel and say, "The good news is that our opponents, these pensioneers in Naples, threw in the towel. Oh, and by the way, here is a bill for one million dollars?" Then we get into the tension between outside counsel and inside counsel. Surely, if you are inside counsel for Allstate and you get this bill, you are going to say, "How did you let this happen?" That is the mystery of the case.

PROFESSOR TEPPLER:

I want to close our discussion with search, Judge Peck, and since you have some familiarity with certain decisional authority, let us start with you.

JUDGE PECK:

The fast version on search is that in the old days, you pulled all the files and you gave them to an associate or a team of associates. Whatever file landed on my desk as the associate, I would go through page by page and, with yellow stickies, I would mark what was relevant, privileged, irrelevant, et cetera. Somehow, lawyers thought that was the gold standard. Why they think that other than we have all been doing it forever, I do not know. With the costs of e-discovery in the world of terabytes of data, that is cost

ineffective. You just cannot do it, even if your client could afford it. We are not going to give you three years to review the e-mails. It is not likely to happen in most cases.

Lawyers went to key word searches. The thought was if I can find a good steak restaurant in Naples on Google, I must be able to come up with the right key words to find the other side's data. Ninety-nine percent of the cases dealing with key words, including two by Judge Facciola and one by me, criticized the way the lawyers were using key words and said that this does not work very well, particularly when it is up to the requesting party to guess as to what are going to be the key words to use. One commentator has called this the "go fish" method of keyword search—"Do you have any e-mails with the word X in it?" "No, go fish." "Okay, let me try again." Even when the parties cooperate, the studies, including the studies by the Text Retrieval Track of the National Institute of Science and Technology,[71] have shown that using key words, even when you do it well, is going to get between twenty and fifty percent of the relevant electronic information. This is because, unlike Google or Westlaw and Lexis, people in e-mails use acronyms and they cannot spell. It was amazing in the Seroquel litigation because, within the e-mails in the company, there were about twenty different spellings for the word of the drug Seroquel. You would think they could spell their own product. So if you just designed a key word with the correct spelling of Seroquel, you would miss a large proportion of documents. In addition, of course, key words pick up a great deal of irrelevant material that just happens to have the key word.

One of my favorite stories comes from our friend, Jason Baron at the National Archives, who was the lawyer representing the government in the search when the government was suing the tobacco companies. In that case, they used long Boolean search strings, looking for the names in Justice Department files of every tobacco company. They used the various misspellings of commonly used words like "Phillip Morris" and somebody said, "What about initials?" They were at least bright enough to know that you could not use P.M. as an abbreviation for Phillip Morris because you would get every single clock setting of half the day. So they used P.M.I. because it is Phillip Morris Incorporated. The problem with that is that P.M.I. was government-speak for Presidential Management Intern and this was during the Clinton era. [Laughter]

So, the latest flavor, which has been the subject of a great deal of literature and conferences and five judicial opinions or quasi-judicial

71. *See* Doug Oard, *TREC Legal Track*, TEXT RETRIEVAL CONF., http://trec-legal.umiacs.umd.edu/#papers (last updated May 10, 2012).

opinions, is searching via predictive coding, also known as TAR or CAR (Technology Assisted Review or Computer Assisted Review). The first opinion in this area was mine in the *Da Silva Moore*[72] case in January and February of 2012, and since the case is pending I cannot say anything else about it. There was discussion of it in the *Kleen Products*[73] case by Judge Nan Nolan in Chicago, Northern District of Illinois. In that case, the defendant, using a very good and fairly sophisticated key word search, including using something like 1300 hours of linguist and expert assistance, had done the vast bulk of their production using key words. At that late stage, the plaintiffs in the antitrust stage came forward and asked Judge Nolan to force the defendants to completely redo the process using predictive coding. Judge Nolan, poor soul, had two full days spread out over two months of evidentiary hearings with the experts on both sides testifying as to why one method was better than the other. They did not even finish the evidentiary hearing. The billing rate between the experts and the lawyers in those hearings was through the roof, and ultimately, Judge Nolan convinced the parties, relying in part on Sedona Proposition 6 (the producing party knows the best way to get to its own data), that the plaintiff's droped their demand by stipulation, at least for all searches through October 2013, and they would see what would happen going forward.

The next case came up out of Loudoun County Virginia state court. That was the *Global Aerospace* case,[74] which involved the collapse of an airplane hangar and the vast destruction of property. The defendant went into court seeking a protective order for the judge to allow them to use predictive coding, and they put forward a lot of statistical information in their briefing. The plaintiff wanted them to review every document by hand and, needless to say, that did not go over very well. The judge, in a two page order, said, "You can use predictive coding and if the other side comes back afterward and says something is missing, we will look into it." At the time, there was an announcement in the e-discovery press that they had completed the predictive coding process in *Global* and that it went well, there were no disputes, and they were done with it. So, that worked quickly and well, which does show that when there is cooperation, it can work very well.

The next case was *In Re Actos*.[75] There was no judicial opinion as such, but again the parties cooperated and entered into a stipulation with a protocol

72. Da Silva Moore v. Publicis Groupe & MSL Grp., 287 F.R.D. 182 (S.D.N.Y. 2012).

73. Kleen Prod. LLC v. Packing Corp. of Am., No. 10C5711, 2012 WL 4498465 (N.D. Ill. Sept. 28, 2012).

74. Global Aerospace Inc. v. Landow Aviation, No. CL 61040, 2012 WL 1431215 (Va. Ct. App. Apr. 23, 2012).

75. *In re* Actos, MDL No. 6:11-md-2299, 2012 WL 7861249 (W.D. La. July 27, 2012).

where each side would have three experts sitting in a room together and after the privileged documents were removed, they would collectively go through and code the seed set to train the computer, and I have been told that that has been working very well.

Finally in the *EOHRB* case,[76] or as it is more affectionately known, the Hooters case (because it came out of the merger transaction or sale of Hooters), the Vice-Chancellor of Delaware came out with a sixty-something page transcript, where the parties were arguing on the motion to dismiss and on a cross-motion for partial summary judgment. The judge heard arguments and ruled from the bench on all of that. Then, on about page seventy-five, you see this: "By the way, gentlemen, I think this would be a case for you to use predictive coding and if you do not want to use it you will need to show cause to me why you are not going to use it. In order to save money you should use a single vendor for all of this." My guess is that the jaws on the lawyers' faces dropped. I can just imagine that they went out into the hall and first questioned what predictive coding is. Then, a month later when they decided that neither of them really wanted to use it, the conversation was probably: "I do not want to use predictive coding. Do you want to use predictive coding? No? Then you write the application to the judge on why we do not have to use it." The other lawyer says, "No I am not going to write it. You write it." It does show that we have gone from the court's approving it to a judge ordering it.

I skipped over an explanation of predictive coding. You are all using it, whether you know it or not. It is your spam filter. It is not perfect. In the old days, the spam filter looked for certain words. Then the spammers got more sophisticated and they removed an "S" from a word and put a dollar sign instead, and that would trick the spam filter for a while until those tricks were caught. Similarly, if it is an e-mail that went to more than X number of people, that would also go into the spam filter. Predictive coding works similarly. It is the lawyers using a seed set to code the documents: this is a relevant document, these are the words and persons involved, and this is why they are relevant, and here are other documents that are not relevant. By coding a certain number of them and feeding them to the computer, the computer would then kick some other documents back, and, depending upon the system, it either says, "I think, based on what you told me, this is relevant or not relevant. Am I correct?" After various iterative rounds, the computer is able to replicate the thinking of the attorneys that trained it. So by reviewing what may be a thousand documents and in some cases up to five

76. EOHRB, Inc. v. HOA Holdings, LLC, No. 7409-VCL, 2013 WL 1960621 (Del. Ch. May 6, 2013).

thousand, the computer can then run that against the millions of e-mails in your corpus and give a score: "I, the computer, am one hundred percent confident that these documents are relevant." It will do this all the way down by gradation to zero. Then the lawyer, in reviewing them, can either spend the money to review every single one of them, or review documents below a certain score on a quality control basis. When it works, and it does when the parties train the computer correctly, it cuts off a significant expense of reviewing hundreds of thousands if not millions of documents that are really not relevant, but that if you had used key words might have been in the system in any event. So, it has been shown by studies that predictive coding has been more accurate and significantly more cost-effective than traditional means.

PROFESSOR TEPPLER:

When you say seed set, are you talking about the subset of an entire evidence repository, so that you are immediately cutting down the discoverable information available to you?

JUDGE FACCIOLA:

Yes, and it all goes back to the point I made earlier: it would be not that difficult to write a document that is attorney-client privileged and then using this methodology to say, "Find the documents that are within a statistical basis like that one."

PROFESSOR TEPPLER:

Is it true, Judge Peck, that the accuracy of predictive coding significantly exceeds both human review and key word searching by a huge margin?

JUDGE PECK:

Yes, absolutely. How much attention is the human reviewer paying when going through seven thousand allegedly privileged documents? You might be bright and cheery and having fun with it when it is nine in the morning when you are starting, but when the afternoon lull hits, accuracy goes down. If you have not de-duplicated—and I see this in production all the time—then you wind up with a document that is marked "irrelevant" by one coder and "relevant" by another and "privileged" by yet another because they are not looking at the same document *per se*, but they are looking at copies of the same document. I suspect reviewers look at a document at 10:00 AM and see a similar document in the afternoon and say to themselves, "I know I have seen this, but what did I code it as previously?" With predictive coding, there are statistical metrics that can be produced at the end

of the day, but with human reviewers or key words, there are no metrics. You are just trusting in the training of the associates, paralegals, contract attorneys, or the outsourcing to India. How well were they trained? How well did they follow that training? When were they bidding on eBay for something and therefore clicking the button randomly while they were on another device doing what they really wanted to do?

JUDGE FACCIOLA

If you are interested in this topic, the most recent issue of the *Federal Courts Law Review* has released a glossary, in which I wrote the Foreword.[77] It tells you all you need to know in the first paragraph, where I quote Humpty Dumpty from *Through the Looking Glass*, when he said, "Words—they mean what I want them to mean." So, the glossary is an attempt to quantify all of this. It also tells you all you want to know that, shortly after she settled the *Kleen* case, Judge Nan Nolan retired.

PROFESSOR TEPPLER:

With that, I think we are going to retire. Thank you so much, Judge Facciola and Judge Peck.

77. John M. Facciola, *Foreword to The Grossman-Cormack Glossary of Technology-Assisted Review*, 7 FED. CTS. L. REV. 1, 1–5 (2013).