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The Philip F. Reed Lecture Series, Panel Discussion, Sanctions in Electronic Discovery Cases: Views From the Judges

Hon. John M. Facciola

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Cover Page Footnote

This Panel Discussion was held on February 24, 2009, at Fordham University School of Law. The text of the Panel Discussion transcript has been lightly edited.

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THE PHILIP D. REED LECTURE SERIES

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SANCTIONS IN ELECTRONIC DISCOVERY CASES: VIEWS FROM THE JUDGES*

PANELISTS

Hon. John M. Facciola
Judge, District of Columbia

Hon. Elizabeth D. Laporte
Judge, Northern District of California

Hon. Loretta A. Preska
Judge, Southern District of New York

Hon. Shira A. Scheindlin
Judge, Southern District of New York

MODERATOR

Daniel J. Capra
Reed Professor of Law, Fordham University School of Law
Reporter to the Judicial Conference
Advisory Committee on Evidence Rules

PROFESSOR CAPRA: Good evening. My name is Dan Capra. I have the honor of occupying the Philip Reed Chair. The Philip Reed Chair—I have had that since 1992, when it was instituted—is funded by the generosity of the Philip Reed Foundation. Philip Reed was one of the most accomplished Fordham graduates ever. He was a general counsel of GE for many years, and he gave back to the school. I'm very happy about that.

I would say parenthetically that the chair was supposed to be a rotating chair. It was supposed to rotate every three years, but I have been in it for

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twelve years, and nobody has tried to move me out. Actually, Philip Reed Jr. has said he still wants me here. So, I'm very happy to be here and very happy to be putting on these programs.

The program tonight is a judges' panel on sanctions in electronic discovery. I would just like to set the table very quickly. We are going to get to a lot of issues tonight, and there is a lot of stuff to discuss.

The explosion of electronic information has had a profound impact on the discovery process, as I'm sure most of you are aware. Instead of single hard copies of documents, where all the drafts are destroyed, now electronic information has multiple iterations, strings of emails and the like, and often it's not destroyed in any kind of permanent sense. So electronic discovery raises difficult issues of, among other things, preservation, retrieval, and production. Many lawyers involved in electronic discovery are not really up-to-date on the special challenges that are presented by discovery of electronic information, including interfacing with IT people and trying to understand IT-speak. So there is a lot of getting-up-to-speed on this.

The result, I think, is that many parties in litigation—and lawyers, as well as parties—end up not producing all of the electronic data that is discoverable or end up producing it so late in the process that the adversary is prejudiced.

We are taking that as kind of the background for our panel tonight. The questions that the panel will discuss tonight are as follows:

- When and whether to impose sanctions for nonproduction or delayed production of electronic data.

- If the decision has been made to sanction, which of the many sanction options are appropriate in any particular circumstance?

We are most fortunate to have a panel of distinguished judges who are nationally known voices on the subject of electronic discovery in general and on sanctions in particular. The bios will be brief, because they could just take up the whole night. So we are going to be real quick about that. I'll proceed by alphabetical order.

Judge John Facciola, Magistrate Judge for the District Court of the District of Columbia, has been a magistrate judge since 1997; author of many important opinions on electronic discovery; a frequent speaker and prolific author on electronic discovery topics—very readable opinions, I have found. Very readable opinions.

He is a former adjunct professor at Georgetown and Catholic Law Schools and a former Editor-in-Chief of the *Federal Courts Law Review.*

Next, Judge Elizabeth Laporte, Magistrate Judge for the Northern District of California, has been a magistrate judge since 1998. She is also a respected speaker and frequent speaker on e-discovery and other topics and a respected author in the area.

Her Fordham connection: she's a former clerk of Marilyn Hall Patel, who is a Fordham graduate; a very respected member of the judiciary.

She is a member of the Jury Trial Improvement Committee of the Ninth Circuit Court of Appeals, and she is a judicial observer for the Sedona Conference Working Group on Electronic Document Retention and Production.

Next, Judge Loretta Preska, District Judge for the Southern District of New York, a district judge since 1992, one of Fordham Law School's most distinguished graduates. A true friend of the Law School. I'm honored to have her here tonight. Judge Preska is a trustee of Fordham University since September 2007. The Fordham Alumni Association awarded her its Medal of Achievement in 1998. She's a member of the Board of Directors of the Federal Judicial Center (FJC) and trains new judges in the famed "Baby Judges School" of the FJC.

She is the author of dozens of influential opinions, the most important one for tonight being the opinion in the *Metropolitan Opera* case,[1] which set the standard for determining whether to impose a default judgment for electronic discovery violations.[2]

Finally, Judge Shira Scheindlin, District Judge for the Southern District of New York, whose—I'm going to add this; I wrote it down and I'm going to read it—whose sense of professionalism and work ethic I try unsuccessfully to emulate every day.

Appointed to the bench in 1994, she clerked for the late Judge Brieant and served previously as a magistrate judge in the Eastern District of New York. She's the author of the landmark *Zubulake* opinion,[3] which blazed the trail for many difficult electronic discovery issues, including determining whether electronic information is reasonably accessible, the duties of lawyers in managing the client's electronic discovery obligations, the use of adverse inference instructions, which she will talk about tonight, and the protocol for determining whether the costs of retrieving electronic data should be shared.[4]

She is a former member of the Judicial Conference Advisory Committee on Civil Rules and was instrumental in the development of the 2006 electronic discovery amendments to the Civil Rules.[5] She is the coauthor of the first published casebook on electronic discovery and digital evidence, which is right here.[6]

So that's our panel. Before I kind of dive in quickly, I'd like to thank the Law Review for their outstanding efforts on our behalf in getting people here and being here. I really, really appreciate it. These proceedings will

1. Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees & Rest. Employees Int'l Union, 212 F.R.D. 178 (S.D.N.Y. 2003).

2. *See id.* at 218–20.

3. Zubulake v. UBS Warburg LLC (*Zubulake V*), 229 F.R.D. 422 (S.D.N.Y. 2004); Zubulake v. UBS Warburg LLC (*Zubulake IV*), 220 F.R.D. 212 (S.D.N.Y. 2003).

4. *Zubulake V*, 229 F.R.D. 422; *Zubulake IV*, 220 F.R.D. 212.

5. *See* Civil Rules Advisory Comm., Meeting Minutes (Apr. 14–15, 2005), *available at* http://www.uscourts.gov/rules/Minutes/CRAC0405.pdf.

6. SHIRA A. SCHEINDLIN, DANIEL J. CAPRA & THE SEDONA CONFERENCE, ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE: CASES AND MATERIALS (2009).

be published in the *Fordham Law Review*. I would like to particularly thank Anu Sawkar, who is the Symposium Editor and is going to help us get it published and the like, and also Amanda Houle, who is the Editor-in-Chief.

That's my particular thanks, but thanks to all the Law Review for doing such a great job here tonight.

Now on to sanctions. The format tonight is for me to set the table very quickly on the topic, and then each of our panelists will speak for ten to fifteen minutes on particular types of sanctions, after which we are going to have a short discussion among the panel. We will try to leave room for questions as well.

The general goal, as I say, is to try to figure out how a judge goes about determining whether to issue a sanction and which sanction to issue.

My setting the table is to tell you that judges have a veritable grab bag of sources for sanctioning parties and lawyers for electronic discovery violations. The various sources—I think, having read these cases for the casebook—lend confusion to the issue that we are going to talk about tonight, because there are several sources of sanctions. The way I have seen the cases is, once a judge thinks it's right to sanction a lawyer or a client, then they find the law that would apply. Oftentimes, a judge will go through three or four sources and find that each of them applies.

I didn't want this panel to be a focus on the specific sanction authorities, but I will go through them quickly.

First, the basic sanction authority is Civil Rule 37,[7] which allows for just sanctions when a party fails to obey an order to provide or permit discovery.[8] It contains a nonexclusive list of possible sanctions, such as adverse inference instructions, prohibition of evidence, striking pleadings, staying proceedings, dismissing the action in whole or part, rendering a default judgment, and a finding of contempt.[9]

Rule 37(e) provides what has been called a safe harbor from sanctions.[10] It was added by the Electronic Discovery Amendments of 2006.[11] Hopefully, we'll get a chance to talk about that. Basically, a court may not impose sanctions under the Civil Rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic system.[12] So if your system is working routinely, presumably that's going to be a safe harbor. But that's one of the things we are going to talk about.

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7. FED. R. CIV. P. 37.
8. *Id.*
9. *Id.*
10. FED. R. CIV. P. 37(e).
11. E-DISCOVERY AMENDMENTS AND COMMITTEE NOTES, AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (2006), *available at* http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf.
12. FED. R. CIV. P. 37(e).

Another sanction power is found in Rule 37(f) of the Civil Rules,[13] which imposes on counsel an affirmative duty to engage in pretrial discovery responsibly and is designed to curb discovery abuse by encouraging the imposition of sanctions. It imposes a certification requirement requiring each attorney to stop and think about whether they have made proper discovery responses.[14] It requires an appropriate sanction for violations.[15]

Then there's 28 U.S.C. § 1927,[16] which says that any lawyer—it's directed specifically to lawyers—who engages in unreasonable and vexatious litigation may be required by the court to satisfy personally the costs that were incurred by the wronged party.[17] Under the statute, the party must show bad faith, which is satisfied when the actions are completely without merit.[18]

Finally, even in the absence of a discovery order, the Supreme Court, in *Chambers v. Nasco, Inc.*,[19] which I'm sure civil procedure students are familiar with, held that a court may impose sanctions on a party for misconduct in discovery under its own inherent authority to manage court proceedings.[20] For that, there must be a showing of bad faith.[21]

As we will see in this discussion, there are also other sanctions, under common law and the like, including a court finding a waiver of privileges and contempt. We'll talk about that. So there are a lot of things we have to talk about.

The way we are going to do it is, I'm going to call on Judge Scheindlin to talk about adverse inferences and Judge Preska to talk about defaults, Judge Laporte to talk about monetary sanctions and also other impositions of—I guess you would call them ethical constraints on attorneys—and Judge Facciola to talk about contempt and waiver. Then we'll see what happens after that.

I would like to introduce Judge Scheindlin.

JUDGE SCHEINDLIN: As usual, Professor Capra set the table beautifully by describing the authorities under which a court can impose sanctions. But even with the assistance of an adroit head waiter, you still need to know when to use each particular kind of fork.

So the next question is how a court decides what particular sanction is appropriate under the circumstances of the case.

The least of the sanctions are monetary.[22] A judge may order one party to pay the fees incurred by the party that moved for sanctions, may shift

13. FED. R. CIV. P. 37(f); *see also* FED. R. CIV. P. 26(f).
14. FED. R. CIV. P. 26(g); *see also* FED. R. CIV. P. 26(f), 37(f).
15. *See supra* note 14 and accompanying text.
16. 28 U.S.C. § 1927 (2006).
17. *Id.*
18. *Id.*
19. 501 U.S. 32 (1991).
20. *Id.* at 46–47.
21. *Id.* at 50.
22. *See* FED. R. CIV. P. 37.

costs to a party responsible for wasted discovery efforts or supplemental discovery, or may simply levy fines.[23]

The next level of sanctions is evidentiary. A judge may order preclusion of evidence, find a waiver of privilege or work-product protection, or issue an adverse inference instruction to the jury at the conclusion of trial.[24]

The most punitive sanctions in the court's arsenal are the declaration of a default judgment against the offending party and a finding that either the party or its attorney is in contempt of court.[25]

As we shall see, courts are inclined to impose the most severe sanctions when the prejudice to the wronged party is great or when the conduct of the bad actor is willful or, worse yet, taken in bad faith.[26]

Each of today's panelists was asked to discuss the serious, or blockbuster, sanctions. Cost shifting or large fines, while not case-dispositive, can impose a crushing financial burden on a party and will surely cause embarrassment to the party or its counsel. Adverse inference instructions have a strong tendency to affect the outcome of the trial. A finding of privilege waiver allows confidential information to become public information. Contempt of court may result in significant financial penalties or even confinement. Of course, default judgments are case-terminating.

But it is important to note that before imposing any of these blockbuster sanctions, courts routinely give lesser sanctions. They assess the cost of a successful motion to compel against the party whose behavior necessitated the motion, or they shift the cost of wasted discovery efforts and any additional discovery that resulted from a party's failure to produce discovery or its tardiness in making that production.

With respect to these more routine sanctions, courts generally do not require that the sanctioned party acted with any particularly culpable state of mind. The purpose is simply to make an innocent party whole by ensuring that the discovery is provided and that the innocent party is reimbursed financially for its cost of obtaining that which it was owed. Such sanctions are surely not outcome-affecting, and therefore we don't spend a lot of time worrying about whether the offending party's state of mind was very bad, bad, or less bad.

With that introduction, I turn to my assigned topic, which is adverse inferences. As Professor Capra said, I plead guilty to authoring the *Zubulake* decisions a few years ago. In what is now known as *Zubulake IV*,[27] I considered whether to impose an adverse inference as a sanction against the defendant in that case, UBS Warburg, based on its inability to produce certain e-mails, which were important to that case.[28] I first

23. *See id.*
24. *See id.*
25. *See id.*
26. *See id.*
27. 220 F.R.D. 212 (S.D.N.Y. 2003).
28. *See id.*

determined that the defendant's duty to preserve those emails and other documents had been triggered—first you have to have the duty, so it was triggered—when plaintiff filed a complaint with the EEOC, the Equal Employment Opportunity Commission.[29] (It was a discrimination case.) That certainly put the defendant on notice of an impending litigation.

Once that duty to preserve attached, the defendant should have suspended its routine document-retention/destruction policy, and it should have informed the employees not to destroy potentially relevant documents.[30] That's now known by everyone as putting in place a litigation hold.

While I didn't state that this duty requires a party to maintain any and all backup tapes—in fact, I said routinely you don't have to do it—I did conclude that if backup tapes are actively used for information retrieval, as opposed to disaster recovery, then they should be produced, because they are part of the active records of the entity.[31]

I also noted that if a party is able to identify where the backup tapes are that store the documents of, what I call, key players—if you know where they are in the backup system—then those tapes should be preserved, unless the information is available from a more accessible source, because backup tapes are not easily accessible.[32]

Although the defendant had breached its duty to preserve certain emails, at that point in time I declined to issue an adverse inference instruction because the plaintiff could not demonstrate that any of the evidence that she thought was lost would have actually supported her discrimination claim.[33] Under the Second Circuit's decision in *Residential Funding Corp. v. DeGeorge Financial Corp.*,[34] when the evidence is lost because of negligence, or even gross negligence, on the part of the party that lost it, the party who is requesting an adverse inference has to show that the lost records would have been relevant to her case.[35] But if the lost evidence is lost because of reckless or intentional conduct, then that conduct alone is sufficient to establish a presumption of relevance.[36] Then you don't have to prove the relevance; it's presumed.[37]

In any event, because Ms. Zubulake had only shown that the loss of evidence was a result of UBS's negligence or, at worst, gross negligence, and because she was not able to establish that this missing evidence would have been relevant to proving her case, I concluded that an adverse inference instruction was not warranted.[38] In making that decision, I was keenly aware—and I think most judges are keenly aware—that the adverse

29. *See id.* at 216–17.
30. *See id.* at 217–18.
31. *See id.*
32. *See id.* at 218.
33. *See id.* at 222.
34. 306 F.3d 99 (2d Cir. 2002).
35. *See id.* at 108–09.
36. *See id.* at 109.
37. *See id.*
38. *See Zubulake IV*, 220 F.R.D. at 222.

inference instruction can have a devastating impact on the party against whom the inference is drawn. I don't think I can say it in any better words today than I did at the time I wrote the opinion, so I'm going to quote from my own opinion, which I know isn't exactly humble. But here it is. In that opinion I said,

> In practice, an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome. The *in terrorem* effect of an adverse inference is obvious. When a jury is instructed that it may "infer that the party who destroyed potentially relevant evidence did so 'out of a realization that the [evidence was] unfavorable,'" the party suffering this instruction will be hard-pressed to prevail on the merits. Accordingly, the adverse inference instruction is an extreme sanction and should not be given lightly.[39]

That's what I said in *Zubulake IV*.

Then, in the last of the *Zubulake* opinions, which we call *Zubulake V*,[40] I decided, after all, to give an adverse inference instruction, because there was new evidence.[41] After further discovery, the plaintiff had now been able to show that certain of defendant's key employees had deleted emails after they had been instructed by counsel that they had to preserve all their emails.[42] Plaintiff had also shown that there was no other source from which those emails could be retrieved, so they were really gone.[43]

From the facts of *Zubulake*, you can see the three showings that are necessary to obtain an adverse inference based on the spoliation of evidence by a party, at least in the Second Circuit. They are as follows:

- First, the party with control over the evidence had the obligation to preserve it at the time it was destroyed.[44]
- Second, the records were destroyed with a culpable state of mind. [45] In other words, the party acted negligently, grossly negligently, recklessly, or willfully.
- Third, the destroyed evidence would be relevant to a party's claim or defense.[46]

Because Ms. Zubulake had established each of these three elements—in particular, that UBS had willfully destroyed potentially relevant evidence, which in turn created the presumption that the destroyed information would

39. *Id.* at 219–20 (quoting Linnen v. A.H. Robins, Co., No. 97-2307, 1999 WL 462015, at *11 (Mass. Super. Ct. June 16, 1999)) (citing Mary Kay Brown & Paul D. Weiner, *Digital Dangers: A Primer on Electronic Evidence in the Wake of Enron*, 74 PA. B. ASS'N Q. 1, 7 (2003)).

40. 229 F.R.D. 422 (S.D.N.Y. 2004).

41. *See id.* at 439–40.

42. *See id.* at 426–29.

43. *See id.* at 426–27.

44. *See id.* at 430.

45. *See id.*

46. *See id.*

have been relevant—I held that she was, in fact, entitled to an adverse inference.

The case went to trial, and I did indeed give the instruction. I think you should hear what an adverse inference instruction sounds like, so I'm going to read to you from the jury charge. This is what I actually said to the jurors:

> The fact that some UBS employees failed to preserve their e-mails after being instructed to do so, and that such e-mails cannot now be produced, is sufficient circumstantial evidence from which you are permitted, but not required, to conclude that the missing evidence was unfavorable to UBS.
>
> Let me explain this in different words. If you find that UBS could have produced this evidence, the evidence was within its control, and the evidence would have been material in deciding facts in dispute in this case, you are permitted, but not required, to infer that the evidence would have been unfavorable to UBS.
>
> Now in deciding whether to draw this inference you should consider whether the evidence that was not produced would merely have been cumulative of other evidence already before you. You may also consider whether the failure of certain UBS employees to preserve their e-mails after being instructed to do so prejudiced the plaintiff by affecting her ability to prove her case. Finally, I remind you that the fact that these e-mails were no longer available because they were not preserved by some employees after instruction by UBS counsel to preserve them, can be sufficient to permit you to conclude that the miscellaneous evidence is favorable to the plaintiff.[47]

The jury returned a verdict in plaintiff's favor, including over $9 million in compensatory damages and over $20 million in punitive damages. I have no doubt that this huge verdict—and this was huge for an employment discrimination case—was based in large part on the adverse inference charge. Because the case settled after trial—and I have to say, I played a small role in that—this decision was never reviewed by an appellate court, which is the ultimate for a district judge: you get to make your ruling and nobody can change it.

In deciding whether to give such a powerful sanction—that is, the adverse inference sanction—a key consideration for the court is the spoliator's state of mind. Whether a court must find bad faith depends on the venue of the action. The other factor a court considers is the degree of prejudice suffered by the innocent party. In most circuits, bad faith is required only when a court intends to impose the ultimate sanction—that is, the entry of a default judgment. Nonetheless, some courts have made bad faith a prerequisite for the imposition of an adverse inference instruction.

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47. Transcript of Record at 1700–01, *Zubulake V*, 229 F.R.D. 422 (No. 02 Civ. 1243(SAS)) [hereinafter *Zubulake V* Transcript].

The most well-known case requiring a finding of bad faith before allowing an adverse inference instruction is *Stevenson v. Union Pacific Railroad Co.*,[48] a decision of the Eighth Circuit. The lower court had found—that is, the trial court—that two adverse inference instructions were necessary based on the destruction of evidence after a serious accident.[49] Somebody got hit by a train. One adverse inference instruction was based on contemporaneous voice tapes made at the time of the accident, and the other was based on track-maintenance records.[50]

The circuit court affirmed the lower court's decision to give an adverse inference instruction concerning the voice tapes, finding that the railroad's decision to destroy the tapes after the railroad knew that those tapes would be important to that pending accident case supported a finding of bad faith.[51] But issuance of the second instruction was overturned, because the circuit court found that the destruction of the track-maintenance records prior to the onset of litigation had not been in bad faith.[52]

Many courts, particularly in the Fifth Circuit, have joined the Eighth Circuit in requiring a finding of bad faith before the imposition of an adverse inference instruction.

The next level of culpability, working down from bad faith, is purposeful, willful, or intentional conduct. In some jurisdictions, including the First and Fourth Circuits, a finding of such a culpable state of mind is required before a court will impose an adverse inference instruction.

The least demanding standard is that of the Second Circuit. In *Residential Funding*,[53] the Second Circuit only required a finding of fault akin to mere negligence, although it may obviously extend as far as bad faith.[54] District courts in the Third, Sixth, and Tenth Circuits have also adopted the negligence standard.

So you see that there is a real circuit split on this, with three circuits saying negligence, two circuits saying willful, and two circuits saying bad faith is necessary.

There is one last point I would like to make concerning the use of an adverse inference instruction as a sanction for a party's failures during discovery. Unlike all the other sanctions, when a court issues an adverse inference instruction, the court's finding of spoliation can be second-guessed by the jury. Although the court has already found that a party caused evidence to be lost and that a sanction is appropriate, the jury has to do it all over again. It has to find the three requisite elements before presuming that the lost evidence would have been favorable to the innocent party.

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48. 354 F.3d 739 (8th Cir. 2004).
49. Stevenson v. Union Pac. R.R. Co., 204 F.R.D. 425, 436 (E.D. Ark. 2001).
50. *Id.*
51. *See Stevenson*, 354 F.3d at 747–48.
52. *See id.* at 748–49.
53. Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99 (2d Cir. 2002).
54. *Id.* at 108.

Thus, the charge in *Zubulake*, which has been echoed in many other cases, states, "If you find that UBS could have produced this evidence, the evidence was within its control, and the evidence would have been material in deciding facts in dispute in this case"—here's the key language—"you are permitted, but not required, to infer that the evidence would have been unfavorable to UBS."[55]

My colleague Judge David Norton of the Federal District Court of South Carolina recently wrote,

> [T]he allocation of labor in *Zubulake* . . . and other cases makes little sense when viewed in light of all the sanctions available to remedy spoliation of evidence. If a district court finds that a party spoliated evidence and sanctions that conduct by giving an adverse inference charge, the spoliating party gets an opportunity to re-argue the spoliation issue before the jury. However, if a district court makes the same findings and chooses to impose any other sanction, including the harsher sanctions of default judgment or dismissal, the spoliating party is not afforded the same opportunity. In other words, the judge is the final authority to make the relevant findings of fact . . . in those cases. . . . The inconsistency is noted simply because courts and parties should be mindful of the consequences the different sanctions may have on who ultimately gets to decide the factual disputes.[56]

I think courts will find this to be a very astute observation that may influence them to impose a sanction other than an adverse inference.

And that seems to me to be the perfect segue to the next speaker. So thank you, Professor Capra, for inviting me to speak on this program. I look forward to answering questions at the end.

PROFESSOR CAPRA: Judge Preska.

JUDGE PRESKA: Ladies and gentlemen, I am here to do the psychoanalysis part of this program, using the *Metropolitan Opera*[57] case to illustrate how judges decide to impose sanctions at all and how judges decide to impose very severe sanctions.

In determining whether or not to impose sanctions, most judges I know, including myself, are disinclined to sanction. First of all, the judicial system prefers to resolve controversies on the merits. Secondly, most judges don't like to sanction lawyers. Thirdly—and this is from a very selfish perspective—sanctions create a lot of extra work, while not actually moving the ball toward the resolution of the case. Fourth, it is not unheard of for the court of appeals to reverse sanction decisions.

So, going into the *Metropolitan Opera* case, if you had told me that I would grant judgment of liability against a party for discovery abuse and impose attorneys' fees on the party and its lawyers, I would have told you that you were crazy. But, as you know from the almost 150 typed pages,

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55. *Zubulake V* Transcript, *supra* note 47, at 1700.

56. Nucor Corp. v. Bell, 251 F.R.D. 191, 203 (D.S.C. 2008).

57. Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees & Rest. Employees Int'l Union, 212 F.R.D. 178 (S.D.N.Y. 2003).

which I know you have all memorized, over time I found myself at that point because of the acts and the omissions of the defendant and its counsel, and because of good lawyering by the plaintiff's counsel.

So how did it happen? As Pike & Fischer's *Digital Discovery* newsletter pointed out at the time, the underlying action was a fairly straightforward labor dispute. The plaintiff, Metropolitan Opera Company, alleged that the defendant union distributed flyers, misleading, defamatory leaflets, and letters in an effort to unionize restaurant workers employed by a concessionaire on the opera's premises—right over there.[58]

Shortly after the documents were first produced in this case, the Metropolitan Opera (Met Opera) began by expressing "concern about the completeness of the document production."[59] The union's counsel responded, "We have turned over every document that we have except for privileged documents . . . . I am representing that we conducted a search, a thorough search on this matter."[60]

As you can well imagine, this was not the first time that I had heard those kinds of statements from counsel.

Perhaps more to the point in this electronic discovery program, however, some months later, Met Opera counsel again expressed concern about the union's "still inadequate document production," noting that no e-mails, so they said, had been produced and they had received only a smattering of notes, messages, and the like.[61] Accordingly, Met Opera counsel "question[ed] the search made by [the] defendants."[62]

In response, union counsel pointed out that, no, in fact, two e-mails had been produced, and six more were being produced in a supplemental production, and "*these were 'all [the] responsive emails stored by the Union.*'"[63] I don't think I listened so hard to the "stored" part, as you will hear.

The communications between the counsel continued in that vein throughout the entire case, Met Opera counsel repeatedly expressing concern about the thoroughness of the search for responsive documents and the union's counsel repeatedly assuring that they had made a thorough search and had produced all the documents.

As what I perhaps should have seen as an indication of what was to come, in the face of continuing expressions on both sides, when Met Opera counsel requested documents relating to the union's retention, storage, or deletion of emails, union counsel objected, on the ground that that was document request number twenty-six, and thus exceeded the numerical

58. *Id.* at 184.
59. *Id.* at 185.
60. *Id.* at 186.
61. *Id.* at 187.
62. *Id.*
63. *Id.* at 188 (quoting Letter from Anderson to Grubin, Stillman & Lans, Declaration of Deborah E. Lans at Exhibit 8, *Metro. Opera*, 212 F.R.D. 178 (No. 00 Civ. 3613(LAP))).

limitations on the number of document requests.[64] Although technically correct, under the circumstances, it did appear, in hindsight, that that response was wholly inconsistent with counsel's obligation to conduct discovery in a good-faith manner.

Some fourteen months into the discovery process, union counsel confessed that he had failed to instruct the union not to delete computer files—we just heard about that—and that no retention procedure had been put in place.[65] Counsel "'mistakenly believed that emails [were] always automatically stored on the user's server,' and he 'had not specifically focused on emails in [his] original [instructions to his client].'"[66]

It eventually turned out that the union servers did not store emails for longer than thirty days, and thus emails had been automatically deleted for the fourteen months of discovery and whatever time went before that.[67] Those periods, I hasten to remind you, were the most critical periods in the lawsuit, because that was the period when the union was planning and implementing the campaign against the Met Opera that was the basis of the action.

At some point during the discovery process, Met Opera counsel conducted a walkthrough of the union offices.[68] In a deposition, they were told that the three computers they had seen there were brand-new.[69] It turned out that those computers had been replaced approximately two weeks earlier.[70] Perhaps coincidentally, perhaps not, it was two weeks earlier when Met Opera counsel had asked permission to have a forensic computer expert examine the defendant's computers.[71] Again, under the circumstances, I found that the replacement of the computers and the inevitable degradation of the data stored on them without notice to opposing counsel was inconsistent with counsel's discovery obligations.

At the end of a very long and, as you can hear by now, acrimonious discovery process, Met Opera counsel requested permission to take compliance discovery—that is, discovery to determine whether or not the adversary had complied with its discovery obligations.[72] Permission granted, discovery taken.[73]

So you ask, how did we get to the sanction situation? Literally, a week before trial, Met Opera counsel asked that the trial be delayed so that a motion for sanctions could be made.[74] As you can well imagine, this is not

64. *Id.* at 189.
65. *Id.* at 190.
66. *Id.* (alterations in original) (quoting Declaration of Michael T. Anderson ¶ 10, *Metro. Opera*, 212 F.R.D. 178 (No. 00 Civ. 3613(LAP))).
67. *See id.*
68. *Id.* at 211.
69. *Id.* at 210.
70. *Id.*
71. *Id.*
72. *See id.* at 203–15.
73. *Id.*
74. *Id.* at 183.

music to any trial judge's ears. But in an attempt to figure out whether the motion had any merit or whether it was simply a delaying tactic, I just blithely said, "Okay, fine. Serve your motion tomorrow. We'll all spend a day looking at it. I'll take a general summary response in a letter from defendant the next day, and then we'll all talk the following day."

In came the full motion. We are going to get to lawyering now. Because the basis of the motion was the entire course of discovery—some two years now—the moving affidavit was some seventy pages long and set out in narrative form all of the details of the discovery process. The affidavit was accompanied by three volumes of exhibits which contained each of the relevant document requests, responses, orders, letters, transcripts—everything.

The union's letter in response discussed a few minor factual issues but provided no overall response to what seemed to be, on one hand, numerous representations by a succession of union lawyers that a thorough document search had been made and all responsive documents produced and, on the other hand, apparent proof that those representations were false. The motion didn't seem to be frivolous, and so trial was delayed and the motion was fully briefed.[75]

What about the lawyering? The moving affidavit was exceedingly detailed. You will all contrast that to what I'm sure we all see from day to day, the back-of-the-hand sanctions request that says, "Judge, you know what went on here."

But the groundwork for that affidavit had been laid during the entire discovery process. Met Opera counsel continually demanded proper Rule 34 responses to its multiple document requests.[76] The meet-and-confer process was fully documented. It seemed that each time Met Opera counsel wrote union counsel saying, "You were going to give me X, Y, and Z, and I don't have it," if there was no response, the next entry was a letter a month later saying, "I wrote you a month ago," et cetera, et cetera. They dotted all the i's; they crossed all the t's.

Eventually, the response came in, and then the reply came in. Exhibit 1 to the reply affidavit was that seventy page moving affidavit, only it was marked like a marked pleading. But instead of saying "admitted," "denied," and whatever, the pages said—and there were pages and pages of them—"undisputed," "undisputed," "undisputed." If you picked it up and flipped it, you saw pages with lines down the side that said, "undisputed." And where there was a reference in the opposition to something in the moving affidavit, the location of the reference in the opposition papers was noted.

It was a very effective piece of work. First, it demonstrated graphically that very, very few of the factual allegations in the moving affidavit were even disputed. Second—and taking the selfish point of view yet again—the

75. *See id.* at 215.
76. *See id.* at 206.

marked affidavit saved an enormous piece of chambers time. My law clerks and I would have had to perform the exact same exercise.

When Professor Capra set the table for us, he told us that the various rules require reasonable inquiry into the basis of one's response. It requires one to stop and think about the reasonableness of one's response. It goes to, depending on what circuit you are in, negligent, intentional, good faith, or willful behavior. You heard the whole story. You heard that § 1927 goes toward lawyers who vexatiously and unreasonably multiply the proceedings.[77]

These are the factors, and the factors set out in the court cases are the ones that we look to in determining whether to impose sanctions. But coming at this, as I do, with a predisposition not to sanction, the conduct at issue, it seems to me, has to be qualitatively different from the hurly-burly that you see in the normal litigation. It has to be not included in the "there but for the grace of God go I" category.

In *Met Opera*, that qualitatively different conduct included several items. First, union counsel put a nonlawyer union employee in charge of document production.[78] Fine. You are allowed to do that. But no lawyer explained to the document collector what a document is, that it includes not only drafts and other nonidentical copies, but it also includes emails and electronically stored documents.[79] The document collector kept no record of what he did or to whom he spoke, and he never went back to check on those to whom he did speak to find out if they complied with his instructions.[80]

He also failed to give any of the document requests to any of the other individuals. He just told them to give him—to put in a box, as it turned out—Met Opera-related documents, whatever that means.[81]

Second, outside counsel knew that the union's files were in disarray, and that it had no retention policy for documents.[82] Even with this knowledge, however, counsel took no steps to impose some organization so that responsive documents could be located, or even to institute a document-retention program for either paper or electronic documents.

Third, once it was learned, well into discovery, that there was no document-retention policy and the PCs were dumping the material after thirty days, the document collector spoke to some, but not all, employees.[83] As to previously created documents, he asked the folks he did speak to to call up the recipients of the emails and see if he could get them back. Some of them did.[84]

77. 28 U.S.C. § 1927 (2006); *see also supra* notes 16–18 and accompanying text.
78. *See Metro. Opera*, 212 F.R.D. at 185, 210.
79. *Id.* at 185–86.
80. *Id.* at 186.
81. *See id.* at 190.
82. *See id.* at 181, 223.
83. *See id.* at 191.
84. *See id.*

On a going-forward basis, instead of instituting an organized method of retention and collection, the document collector asked some, but not all, employees to print out their Met Opera-related emails and put them in a box.[85] Some did; some didn't.[86]

Fourth, no one in authority, either the document collector or a lawyer, ever went back to determine whether the document collection program was working. But in the face of—and I can assure you of this—increasingly high-decibel protests of nonproduction by Met Opera counsel, union counsel repeatedly represented that all responsive documents had been produced and a thorough search had been done.[87]

On the "there but for the grace of God" story, the reasonable lawyer, it seems to me, would have said to himself or herself, "Maybe there's something to all this whining. I'd better go back and check." As you now know, that never happened.

Aside from the electronic discovery issues present here, there was plenty of vexatious conduct, failing to make inquiry, and all manner of conduct not included in the "there but for the grace of God go I" category. For example, quickly, on the client side, an individual official was asked whether he prepared written reports of his activities during the week and the number of cards signed—essentially, votes—for unionization.[88] He answered under oath, "No."[89] When it turned out that there were weekly reports filled out by himself and most other employees, he explained that he and adversary counsel were not on the same wavelength concerning the scope of the questions.[90] In light of the precision of the question, though—"In the period from January 1999 to the present *have you . . . provided any written reports . . . with respect to your activities*?"[91]—that answer was totally incredible.

Discovery was supposed to end December 31. On December 5, one witness was subpoenaed for December 21, a Friday—at that point, the only date available to all of the lawyers. Defense counsel waited nine days, until the fourteenth, to ask that the deposition be put into January, after close of discovery, because the witness was going on a vacation and his flight left the morning of December 22. Counsel said, "We'll take the twenty-first, we'll take the morning of the twenty-second. No agreement."

In a conference call with the court, counsel then said that the witness was going to be on an airplane on the twenty-first, not on the twenty-second, and pleaded Christmas vacation.

I said, "Three hours of deposition before he leaves, I don't care when."

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85. *See id.* at 227–28.
86. *See id.*
87. *See id.* at 186–89.
88. *See id.* at 194–96.
89. *Id.* at 195.
90. *Id.* at 196.
91. *Id.* at 194.

On the nineteenth, counsel called again and said the witness's vacation was not going to begin on the twenty-first or the twenty-second. It was going to be on the twentieth, and he couldn't do it.

I said, "Three hours of deposition."

So at 3:45 on December 19, defense counsel called in-house counsel for the Met Opera and said the witness would be available in fifteen minutes, at 4:00. When in-house counsel could not get outside counsel for an hour, it was too late.

When the witness was eventually deposed in January, Met Opera counsel asked him about a notation in his calendar from a Giants game on December 23.[92] When he eventually allowed as how he had attended, it turned out that his vacation was spent at home.[93] The witness eventually testified under oath that he never told anyone that he was getting on a plane.[94]

On the sanctions motion, those facts that I just told you were laid out. In response, one of the two lawyers participating in the conference said nothing, and the other one said she had no recollection of the airplane discussion, but did have some recollection of Christmas vacation.[95] On that record, the only inference to be drawn, it seemed to me, was that the airplane trip was made up in an attempt to avoid a deposition.

I hope that these examples of the conduct at issue, both as to electronic and nonelectronic discovery situations, are sufficient to explain why the decision to impose a sanction was made. The decision was made. So again, given my general disinclination, what do you do? How do you figure out what sanction to impose? Given the disinclination, you would consider lesser sanctions first. Preclusion is usually good. Adverse inference, although more harsh, is also good. Both of those, as in *The Mikado*,[96] it seems to me, let the punishment fit the crime. Here, however, it seemed to me, those sanctions would have been insufficient to restore the evidentiary balance, to put the parties in the position they would have been.

The reason for that, of course, was that it was impossible to know what documents the Met Opera would have discovered had counsel complied and had the union complied with its obligation to retain the evidence and to produce it in the ordinary course.

Also, there was no meaningful way in this case, it seemed to me, to correlate the discovery failures to one or more issues in the case. The Met Opera had clearly been prejudiced in not being able to obtain documents from the most critical time period in the case.

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92. *Id.* at 218.
93. *Id.*
94. *Id.*
95. *Id.* at 226.
96. W.S. GILBERT & ARTHUR SULLIVAN, THE MIKADO (unabr. ed. Dover 1992) (1885).

Also, because of the struggles of document production, the Met Opera had been denied the opportunity to plan its strategy in an organized fashion as the case proceeded.[97]

Finally, because of what appeared to me to be the egregiousness of the conduct at issue and because the conduct continued in the face of numerous—it seemed to me at the time, unending—protests, a lesser sanction would not have been adequate to penalize the defendant and counsel and to deter such conduct by others.[98]

So, in sum, although I started out most reluctant even to hear about a sanctions motion, it seemed to me that the facts and the law not only compelled sanctions, but the most severe sanctions. Just like Judge Scheindlin and I will tell you about subsequent history, there was a good deal of post-decision motion practice and the case eventually settled, going out with a whimper.

Thank you, Professor Capra.

PROFESSOR CAPRA: Judge Laporte.

JUDGE LAPORTE: I agree with the comments of my colleagues here. We are here talking about the kind of very egregious behavior that leads to severe sanctions.

I have been asked to discuss the infamous *Qualcomm* case, *Qualcomm v. Broadcom*,[99] in which the court imposed serious sanctions on attorneys who had been well regarded.

From a judge's perspective, the case was another example of prolonged, inexcusable, repetitive wrongdoing and behavior, without a sufficiently prompt, voluntary, and thorough effort to apologize and make amends. As a speaker on a program I attended previously advised, if you make a mistake and you find it out, try to remedy it—or, as he put it succinctly, "if you mess up, 'fess up.'"

But, instead, where serious sanctions issues arise, I think you see a pattern—and it's certainly true in the *Qualcomm* case—of denying, obfuscating, refusing to make better, continuing to drag heels—in this case, not only in discovery before the trial, not only in behavior during the trial, but even after being caught, still engaging, to some extent, in ongoing attempts to minimize everything. Ultimately though, in *Qualcomm*, relevant discovery was finally uncovered, and a judge ordered serious sanctions.

Basically, the *Qualcomm* case was a kind of perfect storm of discovery abuse that led to severe monetary sanctions and also nonmonetary ethical sanctions.[100]

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97. *Metro. Opera*, 212 F.R.D. at 229.

98. *See id.* at 230.

99. *See* Qualcomm Inc. v. Broadcom Corp., 539 F. Supp. 2d 1214 (S.D. Cal. 2007), *aff'd in part, vacated in part*, 548 F.3d 1004 (Fed. Cir. 2008); *see also* Qualcomm Inc. v. Broadcom Corp., No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *vacated in part*, No. 05CV1958-RMB (BLM), 2008 WL 638108, at *1, *3 (S.D. Cal. Mar. 5, 2008).

The background of the *Qualcomm* case I will briefly explain, for those of you who aren't familiar with it. It was a patent case, in which waiver was a key defense. Patents, of course, basically grant a monopoly on what is supposed to be an invention. But in the technology at issue, there was a standard-setting process: the industry was agreeing on a standard. A committee called the Joint Video Team discussed what was going to be the standard, and agreed on the standard, and anybody who was going to produce and sell in this arena had to meet that standard.

The key defense involved the duty that if you were going to participate in setting that standard, you had to disclose any patents you had in that area, and if you did have any patents in that area, you had to agree to allow others to use them by granting a license, either for free or on fair and reasonable terms. In essence, participants could not charge a huge, highway-robbery type of toll on the road, once they had participated in setting the standard. Otherwise, of course, a participant could fix the standard around its own technology and then hold everybody else hostage.

So the defense turned on whether the plaintiff participated in the standard setting process. A key issue in the discovery was finding out when, if at all, did the plaintiff, who was asserting that they had this patent and it was being infringed, participate in the standard setting? The plaintiff maintained that they never participated in the standard setting; it was only after the standard was already set that the plaintiff had anything to do with the committee.[101]

What happened was, in discovery, the plaintiff maintained that position. They had witnesses, what are called 30(b)(6) witnesses—a witness who is supposed to be the person most knowledgeable about the topic—who were designated to testify about this very topic.[102] The company producing a 30(b)(6) witness has an obligation to prepare that person with the knowledge not just that the individual happens to have personally, but that the whole company has about the subject.[103] The 30(b)(6) witness denied that plaintiff participated in the relevant time period.

The case comes to trial. An associate is preparing a key trial witness and, for the first time ever, gets the idea of looking at the laptop of this trial witness. The associate comes up with an e-mail that contradicts this position that has been taken the entire time and shows that the witness was on an e-mail list for the committee a year prior to the time that the company claimed it first had anything to do with the committee.

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100. *See Qualcomm*, 2008 WL 66932, at *17–20. Subsequent history has reopened the question of what sanctions are appropriate for which of the outside attorneys. After the magistrate judge recommended sanctions against outside counsel, the district judge ruled that outside counsel could defend themselves using the self-defense exception to the attorney-client privilege. Qualcomm Inc. v. Batchelder, Nos. 2008-1348, 2008-1381, 2008-1382, 2008 WL 6400775, at *1 (Fed. Cir. Aug. 18, 2008); *Qualcomm*, 2008 WL 638108, at *1–2.

101. *Qualcomm*, 2008 WL 66932, at *3.

102. *See* FED. R. CIV. P. 30(b)(6).

103. *See id.*

The junior associate tells the senior associate and a leading partner in the case about this, and they decide, "No need to do anything about it. It doesn't have to be disclosed," et cetera, et cetera.

The senior plaintiff's attorney puts the witness on at trial. Plaintiff's attorney asks the witness very carefully worded questions that don't get at, "Were you on an e-mail list?" or anything like that, but instead something nuanced along the lines of, "Do you recall having any communications?" "No, I don't."

The brilliant cross-examination hits on the right question, despite all of this obfuscation, and the e-mail comes out.

Then, however, there is continued stonewalling, saying, in effect, "Well, we don't think that e-mail was ever asked for, whether it is relevant or not," even though there was this whole series of the kind of painstaking, horrible back-and-forth dialogue between the opposing parties that you just heard about from Judge Preska in the *Metropolitan Opera*[104] case:

"Where is this stuff? Why don't we have it? Have you really searched?"

"Yes, we have. There is nothing," et cetera, et cetera, et cetera.

The trial judge, needless to say, was outraged, based on what I have read that Judge Brewster has written.[105] To put it rather bluntly—and I think you see this in the *Metropolitan Opera* case and you see it in a case I'll briefly mention that I decided last year, the *Keithley* case[106]—one thing that really rubs judges the wrong way and makes them, despite their general reluctance to issue sanctions, which I completely share, issue sanctions or start thinking about sanctions, is a misrepresentation to the court. We don't like it when the opponents misrepresent things to each other. We don't approve of that. We are pretty critical of it. But when you come into court as an officer of the court and go even further and say something to the judge that is just false, is proven to be false, and there seems to be no way that anybody could reasonably have made an innocent mistake about it—at the very least, they had to be completely reckless and irresponsible, if not outright manufacturing something—that's the kind of thing that really can be the nail in the coffin for sanctions.

You find it in this case, and from what I have heard discussed about the *Metropolitan Opera* case, it seems to have happened there.

So there were unpersuasive excuses by the plaintiff along the lines of, "This was never relevant," and, "We did all the searches we should have," et cetera.

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104. *See generally* Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees & Rest. Employees Int'l Union, 212 F.R.D. 178 (S.D.N.Y. 2003).

105. *See* Qualcomm Inc. v. Broadcom Corp., 539 F. Supp. 2d 1214, 1239 (S.D. Cal. 2007), *aff'd in part, vacated in part*, 548 F.3d 1004 (Fed. Cir. 2008) (describing Qualcomm's counsel's behavior during discovery, motion practice, trial, and posttrial as "gross litigation misconduct").

106. Keithley v. Home Store.com, Inc., No. C-03-04447 SI (EDL), 2008 WL 3833384 (N.D. Cal. Aug. 12, 2008).

The plaintiff, despite this conduct, lost anyway. The trial judge ended up awarding $8.6 million in fees to the other side, under the particular statute governing patent cases, which allows the winning party in an "exceptional" case to get fees.[107] That fee shifting has since been upheld by the Federal Circuit, the appellate court in Washington for patent cases.[108]

Meanwhile, the district judge also sent the case to Magistrate Judge Barbara Major to look into misconduct and see if additional sanctions were warranted.[109] She looked into it at some length and found multiple instances of misconduct.[110] She found that some 46,000 emails that should have been produced in discovery about participating in this joint standards making were not produced.[111] I think it's important to say, judges don't sanction just because a mistake is made and a representation turns out, with hindsight, to have been incorrect, where, if you look at it, there was a reasonable effort in electronic discovery to find responsive documents and turn them over. Electronic discovery, as Professor Capra alluded to, does pose challenges. On the one hand, the volume of data is absolutely enormous, much greater even than the old days of the warehouses-full. On the other hand, e-discovery does also offer ways to find things that couldn't have been found before, even potentially the proverbial needle-in-the-haystack, without, as in the old paper discovery world, needing an army of associates to move into the warehouse and live there for ten years and read every single document. There are electronic ways to search.

It is true that sometimes parties make a good-faith effort to search and they use reasonable search methodology and they don't turn up every document. I myself have said that one hundred percent accuracy when you are talking about massive data is not the standard. It's not.

But, in the *Qualcomm* case, it turned out that use of a few very primitive search terms, obvious even to a judge, such as the name of the committee or the name of the standard, would have elicited a large number of hits on additional highly relevant documents.

It's that kind of scenario that led to the serious sanctions. The magistrate judge looked at the behavior of each of the outside attorneys involved. There was a serious issue about apportioning responsibility between the outside counsel and the client. To what extent was the client not telling their attorneys about the wealth of information the employees had about the company's participation in standard setting? To what extent were the outside attorneys being lulled in a way they shouldn't have been with all the warning flags that appeared, which should have led them to know? I told

107. Qualcomm Inc. v. Broadcom Corp., No. 05cv1958-B (BLM), 2008 WL 66932, at *17, *20 (S.D. Cal. Jan. 7, 2008), *vacated in part*, No. 05CV1958-RMB (BLM), 2008 WL 638108, at *1, *3 (S.D. Cal. Mar. 5, 2008).

108. Qualcomm Inc. v. Broadcom Corp., 548 F.3d 1004, 1026–27 (Fed. Cir. 2008); *see* 35 U.S.C. § 285 (2006).

109. *See generally Qualcomm*, 2008 WL 66932.

110. *Id.*

111. *Id.* at *8.

you about one of them, the fact that the computer of a key witness yielded a relevant document, which outside counsel could have looked into further and would have found was the tip of the iceberg, instead of saying, "Let's just brush that under the rug."

The magistrate judge recommended sanctioning, among other outside attorneys, a fairly junior associate for not, at the very least, pushing the issue further up the chain.[112] She also recommended sanctioning a very senior, well-known trial attorney.[113] The magistrate judge reasoned, in essence, that both the district judge and the magistrate judge had found discovery misconduct and that attorneys' fee shifting stands under the patent statute, and concluded that $8.6 million in fees should be shifted to the client under the exceptional case standard of the patent statutes. The client may very well go after their attorneys to contribute some or all of that money. She didn't think further fines were really going to make a difference to these attorneys, so she needed to consider nonmonetary sanctions.

So what Judge Major also did do was refer many of the plaintiff's outside attorneys to the California State Bar for professional misconduct and ethical violations of the duty of candor to the court, among other things.[114] All of these sanctions can be career-ending, not only just because, of course, you could get disbarred, but, if you are found to have committed ethical violations, the kinds of clients who are paying millions of dollars to hire attorneys, at rates of $700 and up an hour, are not likely to want to hire you again and bring you into court, where the judge is going to go, "Oh, yes, I remember that attorney from the *Qualcomm* case."

So shockwaves went out.

I alluded to the tension between the client and the inside counsel versus the outside counsel. The outside attorneys wanted to defend themselves by saying, in effect, "Well, we told the client to do more, and they didn't," or, "They lied to us or didn't come clean." But that would have required abrogating the attorney-client privilege.

The client was willing, apparently, from reading the decisions, to allow some disclosure in camera, if it were kept secret from the opposing party. But the opposing party wouldn't agree to that.

The magistrate judge tried to resolve the issue without breaching the privilege. But what happened was, although initially the client didn't put in any actual evidence or affidavits accusing their outside counsel of being at fault in all of this, the client did later submit such evidence in its briefs. The client thus opened the door, by putting in some affidavits saying, in effect, "No, it wasn't our fault. It was our outside counsel who led us down the garden path." So the district court judge reversed the sanctions imposed by the magistrate judge without the outside attorneys being able to defend

112. *See id.* at *14.
113. *See id.* at *15.
114. *Id.* at *18.

against the client's allegation because of the attorney-client privilege. The district judge said, in essence, once that happened, there was a due process right for the outside counsel to defend themselves, with a breach of the privilege. That's still ongoing.

In my *Keithley* case,[115] which I issued last year, I held multiple discovery hearings. A number of those were after the party who thought it was not getting the discovery it was entitled to, the plaintiff, had already asked for sanctions. Everyone was on notice that this issue had entered into serious territory and we were looking at the possibility of sanctions.

Yet, as I said in my opinion, it didn't really get defendant's attention sufficiently. First of all, there was what I found to be spoliation, where a key source code was not maintained and some of it was lost several years after the suit was filed.[116] Initially, we had all this debate about when the duty to preserve arose, how far ahead of the lawsuit, and so on. It turned out that it didn't really matter, because even after the lawsuit was filed—months after the lawsuit was filed—there was no real preservation effort, no written hold, I was told. Later, on appeal to the district judge, there was a new claim raised for the first time by defendant that there had been a written hold but that defendant had not been prepared to address it earlier at the sanctions hearing on spoliation before me. The district judge rejected defendant's explanation for not bringing the hold to the magistrate judge's attention as incredible, and noted that in any event the hold was not in place until over four years after the duty to preserve arose.[117]

It was the "ongoingness" of the misconduct, I think, that really led me to issue sanctions in the *Keithley* case, hundreds of thousands of dollars. There were, for example, claims to me and to the opposing side that certain kinds of reports were not generated, reports that were centrally relevant to the issue of infringement. Yet months later, an avalanche of reports of that nature were produced. The source code that was spoliated, once it was gone—initially, defendant's stance was, in essence, "Well, it's gone. There's nothing to do about it." But later, the software person who was actually responsible for this transfer of source code from one system to another that resulted in the loss of some of the code was told, to paraphrase, "We're having a real problem. We might even get sanctioned." She went into her desk drawer or a drawer in her cubicle and found a CD of the lost source code. Nobody had asked her about that before.

I'm just giving you some examples of the kind of behavior that I think really is sufficiently egregious to expose people to the risk of sanctions.

Of course, judges have to guard against twenty-twenty hindsight. At the same time, judges have to look at what we see going on before our eyes. I don't think we want to sanction people for being less than perfect as viewed

115. Keithley v. Home Store.com, Inc., No. C-03-04447 SI (EDL), 2008 WL 3833384 (N.D. Cal. Aug. 12, 2008).

116. *Id.* at *6.

117. Keithley v. Home Store.com, Inc., No. C-03-4447 SI, 2008 WL 5234270, at *4 (N.D. Cal. Dec. 15, 2008).

in the rearview mirror. But I think when you see lengthy, prolonged misconduct, what seems like not living up to discovery obligations, and then failure to come clean and try to make things better—that's when I think you get these kinds of serious sanctions.

PROFESSOR CAPRA: Judge Facciola.

JUDGE FACCIOLA: I want to thank Professor Capra for having me.

Since I have said two sentences, you have already figured out that I am from Brooklyn. Thirty-five years later, every morning in Washington, as soon as I open my mouth, someone says, "You must be from Brooklyn." Indeed, I am from Brooklyn. I'm from Brooklyn before it was posh to be from Brooklyn.

So it's good to be home. Tomorrow morning I'm going to celebrate by having a bagel that actually tastes like a bagel. (Laughter)

I'm going to try to talk about a couple of things. But I want to kind of bring this home, in a personal way.

We have been trying to make the point that we don't get out of bed in the morning and say, "Who am I going to sanction today?" It's really miserable. It's miserable from a lot of different perspectives.

First of all, if we sanction somebody, remember what we have to do. I have to write an opinion sanctioning them. Then I have to issue an order to show cause for fees. Then I have to rule on the reasonableness of the fees.

I did that once and said, "The only guy that's being sanctioned is me."

But just this week—I can tell you what happened—I was working on an opinion and I was applying what Judge Preska talked about, § 1927, in terms of vexatiousness.[118] I came to a conclusion. I didn't sign it. I put it aside. I came back to it after the weekend. I changed my mind.

In another situation, two days before—the same exact situation—that case was entering its twelfth year of active litigation. I said, "The last thing this damn thing needs is a sanction order by me. Let's bury this one."

Now, I am susceptible to the criticism—and it's a fair criticism—that by doing that, by wimping out, in the view of some people, I may be encouraging lawyers to do the tragedies that you heard us talk about. You are always between the rock and the hard place here. I don't think there is any easy way out of it. Frankly, as you have heard the judges say, you really have to get our goat to get there. I understand that I have discretion in this area, and I try to exercise that discretion. I'm very conscious of the fact that we live in a fishbowl. Once I say something about a lawyer, it goes into Westlaw, these bloody blogs—there must be a million of them—and the next thing you know, you put this guy's name in Google and he lives forever as the guy who was said to be "vexatious."

Do you want to do that to someone? How does this all work out? It's not a pleasant place to be. I hope you appreciate how tough it is to be a judge in these circumstances. It's not easy.

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118. *See* 28 U.S.C. § 1927 (2006).

Let me talk quickly about two things. One is contempt and the other is waiver.

We recently got an opinion of the D.C. Circuit called *In re Fannie Mae*, a securities litigation.[119] I beg you to read it. It's really interesting. It came down on January 6.[120] As you all know, Franklin Raines was the head of Fannie Mae, a very controversial guy.[121] He got paid a mountain in compensation, and the lawsuits have come ever since. As you know, Fannie Mae went under.[122] That was the first domino that started the mess we are all in right now.

We have a monster of an MDL case against Raines and some other people who at the time were at the top of Fannie Mae.[123]

It turns out that there was this little tiny agency that had an auditing responsibility for Fannie Mae, and in this big MDL against Raines and his buddies, this agency had some electronically stored information.[124] The question was whether they could produce it.

The case is the most magnificent example I have ever seen of the principle that no good deed ever goes unpunished. There's this young lawyer for this agency. They are coming after him with contempt citations and sanctions. He gets up and he says, "Judge, don't you worry your pretty little head. We're going to get this done." Famous last words.

If you look at these cases on sanctions—I think my colleagues would agree with me—they are magnificent examples of two phenomena:

One, underpromising: "Judge, I can't possibly do that in the time permitted." That happened to me four days ago. On Friday, they were ready to kill each other, telling me how burdensome it would be to do this.

I said, "Let's go into chambers and yak." I said, "Have you thought about this and this and this? Do me a favor. Talk to your friends about that."

They appeared before me this morning. Guess what? They're finished—forty-eight hours later.

The other one is overpromising. My favorite example of that is, during the *Microsoft* trial, one of the experts for Microsoft said, "Whatever you do, you can't get Netscape Navigator off your computer," at which point Judge Jackson went into chambers and got Netscape Navigator off his computer.

JUDGE LAPORTE: With a little help from the law clerks.

JUDGE FACCIOLA: With a little help from his law clerks.

When we first started to do electronic discovery, I think we promulgated what we called the "Judge's Rule of Electronic Discovery," which is, don't

119. *In re* Fannie Mae Sec. Litig., 552 F.3d 814 (D.C. Cir. 2009).

120. *Id.*

121. *See generally Franklin Raines, Fannie Mae: The Best and Worst Managers of 2004—The Worst Managers*, BUSINESSWEEK, Jan. 10, 2005, at 75.

122. Andrew Ross Sorkin, *Lehman Files for Bankruptcy; Merrill Is Sold*, N.Y. TIMES, Sept. 15, 2008, at A1.

123. *See In re Fannie Mae*, 552 F.3d at 816.

124. *See id. passim.*

ever believe a lawyer when he uses the word "computer" in a sentence, because nothing he says really has anything to do with reality.

The same thing happens here. This young lawyer gets up and says, "Judge, don't you worry about a thing," and all hell breaks loose. He keeps blowing deadlines. Finally, the district court judge has had it. He keeps saying he is going to produce these privilege logs. He doesn't produce them. The night before something is due—à la *Metropolitan Opera*—he makes the inevitable motion. He doesn't consult with the other side, in violation of the local rules. The ship is sinking.

Ultimately, the district court judge, who says, "I can't have the goalposts keep moving," finds the agency in contempt. What he says is, "This stuff you are claiming privilege on, I'm going to let the other side have it. I'm not going to say they are going to waive the privilege, but I am going to let them see it."

It goes up to the court of appeals. We get very few decisions from the court of appeals on electronic discovery. As you have just heard, almost all of these terribly significant cases wind up being settled. *Zubulake* settled. *Metropolitan Opera* settled. My decision in *McPeek v. Ashcroft*,[125] which was a big case, settled. Almost all of them do.

So we don't get much guidance from the courts of appeals. Most of this is very idiosyncratic. We get it from magistrate judges. About eighty to ninety percent of these decisions are by magistrate judges. I don't envy poor Professor Capra, who is trying to figure out what this is all about.

I still remember a moment when I was arguing a case in the Tenth Circuit and all I had was this lonely little district court opinion, and I kept hammering it. One of the judges looked over at me and said, "Mr. Facciola, in this country, you can find a district court judge who will say anything."

So we don't get much guidance from the court of appeals, but we got some.

He enters into this stipulation. The first part of the opinion is a rather tedious, almost Talmudic discussion of the meaning of the stipulation and what he agreed to do. But what's significant, I think, is that when they go up on appeal—the ship is sinking; it's quite clear that they can't do what they say they are going to do—the court of appeals says, "Look, pal, a deal is a deal." After the decision came down, Ralph Losey, who has a wonderful blog about e-discovery,[126] had an interesting take on this. He said there was another way to think about this. When this ship is sinking, why didn't this district court judge say, "Look, you're in over your head. Let me go back and look at this, and I'll look at this through the prism of 26(b)(2)(B).[127] We'll look at this in terms of what the value of doing this is, what the costs are."

125. 202 F.R.D. 31 (D.D.C. 2001).

126. Ralph Losey, e-Discovery Team, http://ralphlosey.wordpress.com/ (last visited Sept. 12, 2009).

127. FED R. CIV. P. 26(b)(2)(B).

I don't know if Ralph is right or wrong, but that's the very argument that is made in the court of appeals, and the court of appeals dismisses it.

It then turns to the question of contempt. It contrasts the contempt with the sanctioning power that you have heard the other judges talk about. It reminds us that the contempt power has only two gradients to it. The first one is, its power can only be coercive.[128] It can't punish.[129] It only can be designed to be used to compel behavior and to undo a wrong.[130] The court said here that the district judge had been faithful to that.[131] He wasn't punishing. He was simply trying to undo the wrong that had been done and get this thing going again. The case ends.

This is astonishing. When the case ends, they have spent $6 million of their budget on this case. That's nine percent of their budget for the year.

The question this raises, which I think is a tough one, is, what do you do if you are on the wrong end of a Rule 45 subpoena?[132] *Fannie Mae* teaches that if you comply without protesting its unreasonableness, you may get yourself in a situation from which you cannot extricate yourself.

I have had—I don't know about the other judges; I hope they will explain their situations—at least three or four cases where that has happened, where a party has complied with Rule 45, got in very deep, and spent a quarter of a million dollars before they did anything about seeking judicial relief. In that situation, maybe *Fannie Mae* says you have to go into contempt.

I apologize. I breathe the rarefied air of Washington, where issues of separation of powers and privilege are crucial in our litigation. As an assistant U.S. Attorney in the Civil Division, I never hesitated to tell my clients that we would have to go into contempt to avoid the problem of waiving the privilege or conceding the power that was being asserted by another branch. I would always gather them in a room and say, "Okay, we'll draw straws. The guy with the shortest straw, you'll disobey the order."

Our circuit is very forgiving in that situation and permits an immediate appeal from the contempt finding.

Just this weekend, I was looking at a case in the Ninth Circuit, Liz's circuit, which seems to be a little different about that. But we are used to that, because we are used to these instances.

So I posit to you—and I hope we can discuss it—where does *Fannie Mae* leave us? Do you have to go into contempt to preserve what you need?

Let's turn that around and talk a little bit about waiver. As Professor Capra told you, the federal rules are designed in such a way that sometimes the sanction is in the rule itself. If you failed to make an initial disclosure,

128. *See* FED R. CIV. P. 37.
129. *See id.*
130. *See id.*
131. *In re* Fannie Mae Sec. Litig., 552 F.3d 814, 822 (D.C. Cir. 2009).
132. *See* FED. R. CIV. P. 45.

you are precluded from presenting that evidence, unless it's harmful. There are similar rules in Rule 37.[133]

But what do you do if you have a rule that commands but doesn't have a consequential punishment if you don't do what you are supposed to? We have been confronting that issue quite a bit in the area of privilege and electronic discovery. I sat in this room five years ago, with the same people.[134] At that point, as you all know, privilege review was driving everybody nuts. It seemed to be expansive beyond all imagining. That led to Judge Paul Grimm's decision in the *Hopson* case,[135] which in turn led to Rule 502,[136] which these two folks had so much to do with.

But the situation is, if you don't do what you are supposed to do, what happens? What you are supposed to do is create the privilege log. I have gotten myself in an endless amount of trouble about privilege logs. If you want to get my views on privilege logs, go into Westlaw and put in the words "privilege log" and the word "useless." All of my decisions will pop up. Privilege logs are never very useful. They will say, "Smith to Jones, August fourth, attorney-client privilege." Great. Now I know what's at issue, don't I? Of course I don't. Trying to square the circle is very difficult. Trying to get the lawyers to tell you what the case is all about—lawyers and judges will never agree.

In his decision in *Victor Stanley*,[137] Paul Grimm confronted the consequences of failing to assert the privilege correctly. He found many things wrong with the lawyer's approach there.[138] Perhaps the most controversial aspect of his opinion was what he had to say about keywords. The lawyer's methodology in trying to find the stuff was use of keywords. He quoted some Italian guy in Washington who had written an opinion about that and came to my defense.[139] Whenever I see Paul—we are very close friends—I always remind him of the great scene in that Marx Brothers movie, where they were defending Freedonia.[140] I think it was *Cocoanuts*.[141] Groucho turned to Margaret Dumont and he said, "Remember, men, you are fighting for the lady's honor, which is probably more than she ever did."[142]

Grimm did that. Both of us in our opinions had indicated that simply pulling keywords out of the sky because you had done a few Westlaw

133. FED. R. CIV. P. 37.

134. *See generally Conference on Electronic Discovery: Panel Three: Rules 26, 33, and/or 34: Burdens of Production: Locating and Accessing Electronically Stored Data*, 73 FORDHAM L. REV. 53 (2004).

135. Hopson v. Mayor of Balt., 232 F.R.D. 228 (D. Md. 2005).

136. *See* FED. R. EVID. 502.

137. Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D. Md. 2008).

138. *Id.*

139. *Id.* at 260 (quoting United States v. O'Keefe, 537 F. Supp. 2d 14, 24 (D.D.C 2008)).

140. THE COCOANUTS (Paramount Pictures 1929).

141. *Id.*

142. *Id.*

searches isn't going to get you there.[143] Paul focused on the failures in terms of defining the key words properly, and focused on other failures. As Judge Preska and Judge Laporte said, there was no quality control. Nobody stopped after this was over and used some statistical analysis to see if it was reasonable to suppose that the few number of documents that were produced by those key words were realistic.

We are now kind of at a crossroads in this area. As electronic discovery becomes more and more prevalent, becoming almost the exclusive way in which we grapple with discovery, it's going to be hard to understand where privilege logs are going to take us. It's also going to be very hard to understand what we are going to do about their deficiencies.

In *Victor Stanley*, Paul invoked principles in the Fourth Circuit for the proposition that if you didn't comply with the privilege log allegations, that constituted a waiver; you gave up the privilege.[144] If you have a deficient privilege log and it turns to sanctions, I suppose there are only three things you can do. The first thing you can do is a do-over, make them do it right. The second thing you can do, of course, is to waive it. There is an intermediate sanction, if that's what it is, an intermediate way of doing it, which is that you force the parties to give the stuff in camera to the judge. That looks like it's becoming impossible.

I think Judge Scheindlin has a case where there are thirty thousand entries on a privilege log—thirty thousand entries. I had two lawyers, two weeks ago, with perfectly straight faces, say, "Judge, we've been working really hard. We've got the number of privilege documents we want you to look at down to seven thousand." I will attack those seven thousand with the resources of the federal judiciary, which consists of me and a pencil.

But in terms of the sanctioning power, we are now beginning to see—and I think *Victor Stanley* is very crucial in that analysis—the strong possibility that if the privilege log is deficient, you are not going to get another chance; you are not going to get a do-over. You are going to have to waive the privilege.[145] We will grapple with that as the time goes by.

Thank you.

PROFESSOR CAPRA: With respect to privileges, since Judge Facciola was good enough to introduce 502, I would just say one thing about 502.[146] Part of the problem that lawyers have in the privilege area deals with inadequate production or mistaken disclosure and the like.

For those who don't know—although I can't believe that's even possible—502 allows lawyers to avoid all those kinds of pitfalls by having the court enter into a confidentiality order.[147] So the risks of mistaken disclosure are, hopefully—it's a new rule—going to be substantially limited by what's called 502(b), which is an order from the court that disclosures in

143. *See Victor Stanley*, 250 F.R.D. at 259–60; *O'Keefe*, 537 F. Supp. 2d at 24.
144. *Victor Stanley*, 250 F.R.D. at 258.
145. *See id.*
146. *See* FED. R. EVID. 502.
147. *Id.*

this litigation are not waiver.[148] The rule provides that they are not waivers in any litigation subsequently, state or federal.[149]

So that's my 502 plug. Is there anything that came up that the judges want to talk about?

I have an issue that I would just like to raise for a second. The safe-harbor provision, which I talked about at the very beginning,[150] which protects lawyers and clients from sanctions if there is this routine kind of document destruction—have any of the judges been involved in the safe harbor? Has it basically kind of wimped out?

JUDGE FACCIOLA: I have, in *Disability Rights Council v. Metro.*[151] There were twelve people who were about to be deposed. The Transit Authority had a janitor program in Microsoft which automatically deleted everything in sixty days, and tried to justify that under 37(e), on the grounds that it was the routine, good-faith destruction of documents.[152] Of course, they lost, quite soundly, because litigation had already begun. The advisory comments to Rule 37(e) could not be clearer.[153] Following Judge Scheindlin's decision in *Zubulake*, once litigation has begun or is reasonably anticipated, you can't possibly rely on 37(e) as some sort of safe harbor from the destruction of potentially relevant evidence.[154] It just doesn't work.

JUDGE SCHEINDLIN: I have a comment on 37(e), because I was there at its birth, a member of the advisory committee that wrote it.[155] It was a real compromise.[156] There was so much controversy in the public-comment period about the different versions that were floating around that they finally wrote this toothless thing. What this toothless thing really tells you is the flip side of a safe harbor. It says if you don't put in a litigation hold when you should, there's going to be no excuse if you lose information.[157]

That's how I read 37(e). It says you are only excused if this was lost as a result of a routine, good-faith effort to destroy records.[158] Well, it can't be routine and good-faith not to suspend your process once you know there is litigation. So the real title for that rule should be, you must have a litigation hold in place when you reasonably anticipate litigation. It's that simple. Otherwise, it can't have been lost through the routine, good-faith process

148. *Id.*
149. *Id.*
150. *See supra* notes 10–12 and accompanying text.
151. Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth., 242 F.R.D. 139 (D.D.C. 2007).
152. *Id.* at 146.
153. *See* FED. R. CIV. P. 37(e) & advisory committee's note.
154. *See Zubulake V*, 229 F.R.D. 422 (S.D.N.Y. 2004).
155. *See* Civil Rules Advisory Comm., Meeting Minutes, *supra* note 5.
156. *Id.*; *see also* FED. R. CIV. P. 37(e).
157. *See* FED. R. CIV. P. 37(e).
158. *Id.*

that you had at your organization, because you are supposed to suspend it when the litigation begins.

It's that simple. It's a litigation hold rule.

PROFESSOR CAPRA: It has turned from a safe harbor into essentially a warning to counsel.

JUDGE SCHEINDLIN: Yes.

JUDGE FACCIOLA: I was wondering if we could begin a dialogue. Now that you have heard us, do you think we don't sanction enough? Have you had experiences in your professional life where you were very frustrated because your opponent seemed to get away with murder and the judge did nothing about it? Come on, be honest.

QUESTIONER: Jim Maloney, a graduate of Fordham School of Law. My question, I think on behalf of about everybody here—we are all lawyers or studying to be lawyers—is, what do we do to avoid getting into the situation that was mentioned in the *Qualcomm* case that Judge Laporte described?[159] The lawyers get sanctioned. They can't produce their proof that they prodded the clients, because it's privileged. That litigation, I think, is ongoing.

I guess my question is, what do we do? Do we, in the retainer letter, have the client acknowledge, "You're going to have to comply with discovery demands. Please acknowledge, and every time there is a discovery demand"—and all this goes in a big file that's privileged. You have a label on it that says, "In case of sanctions, break glass."

Where do you go? What do you do? How do you prevent yourself as a lawyer from getting caught in the court sanctioning you and your client, because your client didn't produce everything you asked for? How do you prevent that?

JUDGE LAPORTE: Just briefly, as I alluded to, Judge Brewster, the district court judge, in *Qualcomm*, did find that there was a due process right for the outside counsel to defend themselves through a waiver of the attorney-client privilege when the client was attempting to pass blame on them and saying, "It was all their fault." That seems like a just result. In other words, if you are going to have open warfare between the client and the outside counsel, there ought to be a right to defend yourself. But the issue of attorney-client privilege waiver posed poignant questions, which I think are still being sorted out. Is that privilege waiver just for purposes of this particular issue? What about the other side? These two parties are embroiled in other ongoing litigation in different venues. So if it blows the privilege wide open with respect to their biggest adversary—not to mention potential other adversaries in the patent enforcement program—that could have enormous collateral consequences, way beyond the $8 million-plus sanctions and all the rest that we have been discussing.

So the scope of the privilege waiver is a big issue.

159. *See supra* notes 99–114 and accompanying text.

JUDGE SCHEINDLIN: I would approach your question from a different perspective. The answer you just heard is what happened after the trouble has started. That's a nice way of putting it. There is another phrase that we are all familiar with.

The real point, you are saying, is, how do you not get into that trouble? How do you avoid the problem? Are you going to be at odds with your client? It does seem to me, as much as you don't want to hear this, that a lawyer has a duty of candor to the court.[160] If you are telling your client what they have to do and they are not doing it and you know it, you may have to withdraw from the litigation.[161] If you are saying, "You have to preserve all the active data on computers," and then you, as an outside counsel, check on that and find out they are not, do you disclose that, or do you just let it pass? If you let it pass, then what falls on you is not a big surprise to me. But if you say, "You cannot ignore the instructions I gave you. I can't let that happen. I'm going to have a duty to the court. I'm going to have to withdraw"—this happens in criminal cases all the time. If you know you are going to suborn perjury, you can't do it; you must withdraw.

So there comes a point where there is a tension, obviously, between lawyer and client. But if you give your client a clear instruction and they are not doing it, I think you have some duty.

JUDGE FACCIOLA: If I may, one of the most disturbing aspects of this is the degeneration of the relationship between in-house counsel and outside counsel. That relationship is as bad as it probably has ever been. It has gotten so bad that I understand that the in-house counsel have their own association, in which outside counsel are not permitted to be members.[162]

I don't think that's a good thing at all. I have spoken to both of them. And, Mr. Maloney, you are quite on point. It's a very difficult situation. I don't know what the other judges think, but I think you have to modify that retainer agreement to make that as explicit as possible.

I know, on the plaintiff's side, lawyers who represent plaintiffs tell me that the retainer agreement is quite different now. They will insist, for example, "You tell me about your Facebook account. You tell me where all the bodies are buried. If not, I'm out of here."

I think you have to practice law very defensively, actually.

PROFESSOR CAPRA: Another question?

QUESTIONER: My name is Brandon Cowart. I'm a practitioner. The question that I have is not the extreme cases that make all the headlines. I think all the judges here said they don't want to get involved in a spoliation, because it leaves a bad taste in everyone's mouth. But the question that I

160. *See* Nix v. Whiteside, 475 U.S. 157, 166–71 (1986).

161. *See* MODEL RULES OF PROF'L CONDUCT R. 1.16 (2008); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110 (1983).

162. About ACC—Association of Corporate Counsel (ACC), http://www.acc.com/aboutacc/index.cfm (last visited Sept. 12, 2009).

have is, how in smaller-scale spoliation cases—in what you suspect is a spoliation case—it seems a little bit like you are chasing ghosts. If you don't have the opposing counsel making, as in the *Metropolitan Opera* case, grievous mistakes and clearly just contradicting himself, if you have a really smart lawyer on the other side, you are never quite going to be able to get the proof that you need in order to bring forth a spoliation issue.

Is there a way that judges can get courts involved so that you don't have to go through—you don't have to depose, say, the witnesses for the opposing party and spend one or two hours of the seven hours of your deposition time just going through the document request and say, "Did you start here? Where did you go?" That takes a lot of time, not only in depositions, but for lawyers, to go through and get all of that information, just to ask the questions. It's almost not worth it.

JUDGE SCHEINDLIN: I think that's a very good question. I think there is an answer.

In our court, for example, many judges don't even allow discovery motions. We just say, "Come in and tell us about it," or, "Write a three-page letter." If we catch this early—if a lawyer comes in early and says, "I'm not getting cooperation. I'm trying to work together to get a search-term protocol. I'm trying to get him to identify the sources on which data is maintained, and he's not doing it,"—if you come and tell me, I will take care of it quickly. It will be a quick ruling from the bench to make it happen.

What I find is that lawyers don't come to me. Ten months later, when they could have been complaining all this time and discovery is supposed to end in a week, then they tell me, for the first time. Then it turns into a big motion, with all that paper.

But if you would come in and say, "We need help. We need the court's intervention"—when we wrote these new rules, that was the hope, that we would have more court intervention in supervising the discovery process. It's not that I'm looking for more work, but if you are really not getting the cooperation, you should ask for the court to help you. I think most of us will do it very rapidly and very informally.

JUDGE FACCIOLA: In that context, three of us—we will get the judge to do it later—have all endorsed judicially the *Sedona Conference Cooperation Proclamation*,[163] which takes as its central principle that these can be resolved.[164] It has been my consistent experience that the sooner I get involved, the fewer problems I have. In fact, in this monster of an MDL antitrust case, the district court judge appointed two magistrate judges—

PROFESSOR CAPRA: And there are special masters as well.

163. THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION (2008), *available at* http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf.

164. *Id.*

JUDGE FACCIOLA: Just as I was leaving, I was making a deal with the lawyers. We talk to each other every week. It seems silly, but that's going to save a lot of time and money in the end.

PROFESSOR CAPRA: We have time for one more question.

QUESTIONER: Frank Mooney, class of 1964. My question is this. Let's assume you had a spoliation or an adverse inference instruction. As I understand it, in a jury trial, you give the remedy to the jurors. I say to myself, the jury has not had a helicopter view of the trial. They didn't read the pretrial piece. They don't really begin to know what went on with the discovery process. This may be the first time they have ever sat on a jury. Yet they have been given, in some cases, this drastic, powerful remedy, where they can take the fact that maybe a hundred pages of e-mail were held back or somehow someone screwed up, and ten thousand pages went in. The jurors have heard the arguments of the lawyers and said, "Oh, this is bad, bad stuff. I'm going to really sock it to them."

Shouldn't that really be a decision for the judge or the magistrate?

JUDGE SCHEINDLIN: That was the point I raised at the end of my talk; that the fact finder gets to decide again whether there has been the bad conduct. I really think they have to do that, because it's a permissive inference. They are not *required to* infer that, because the conduct was bad, the lost evidence must have been unfavorable. It's really a Seventh Amendment problem. The jury has to be allowed to make that finding.

So the problem is a trial within a trial, because we have to give them the evidence of the bad conduct. So while you are busy trying an employment discrimination case, you suddenly have to let the jury hear evidence of the searches that were conducted and who didn't preserve the computer and who didn't find the e-mail. But you have to do it, because the jury is making an evidentiary finding that becomes part of the verdict. I don't think you can take it away.

PROFESSOR CAPRA: It can lead to another sanction entirely.

JUDGE SCHEINDLIN: That's right. To avoid that, you could, if you think you have bad enough conduct, go right to a default.

PROFESSOR CAPRA: This young man in the back.

QUESTIONER: Wayne McNulty, class of 2002, Fordham Law. When a duty to preserve is triggered, does that duty to preserve include the preservation of metadata?

JUDGE SCHEINDLIN: The short answer is, it has to be yes, because you are keeping the document in native format, which includes the metadata, unless somebody tells you otherwise. You are not going to strip that metadata out—

PROFESSOR CAPRA: Let me interrupt, about what metadata is.

JUDGE SCHEINDLIN: The younger ones here all know it. How many of you know what metadata is? [Hands raise in audience.]

PROFESSOR CAPRA: That's not a lot.

JUDGE SCHEINDLIN: Okay. It's the properties—there can be 212 different kinds of properties about a document, as simple as the day it was created, who had access to it, when changes were made—

PROFESSOR CAPRA: The track changes function in a Word document is the classic example. That's one kind of metadata.

JUDGE SCHEINDLIN: But it can also be the formulas in the database. Database metadata is very different than Word metadata. We always say it depends on what kind of an electronic record you are talking about.

But the point is, if you are in native format, the metadata is part of the record, and you actually have to make an effort to strip it out. If you stripped it out before the court got a chance to say whether you have to produce the metadata or not, then you have engaged in spoliation. So in terms of preservation, you, of course, must preserve the native format, until told otherwise.

JUDGE FACCIOLA: Mr. McNulty, strangely, the converse may not be true. That is, in a nonlitigation context, there is authority in bar association opinions—you must scrub the metadata before—otherwise you will not be zealously protecting your client's confidences.[165] So the dividing line seems to be litigation or the anticipation of litigation.

JUDGE SCHEINDLIN: Let's go back to that scrubbing. First of all, there are some bar associations—there is a complete split around the country—some states say you have to scrub it before you produce it and some say you must not scrub it.[166] So there is a complete split.

JUDGE LAPORTE: That's different from destroying the other one.

JUDGE SCHEINDLIN: Right. You are still going to maintain the native form in your office, but when you produce it to the adversary, some ethical opinions say you must scrub it so that the adversary doesn't have access to something they shouldn't have access to.[167] But I think that's the minority view, by the way, in the ethical opinions that are coming out.

It's a great question.

JUDGE LAPORTE: And I would just say that a rule of thumb that judges look at is, in fairness, not to give one side an unfair advantage over the other. When one side has abilities to use the data in a way that the other side doesn't, that raises a warning flag to a judge. So if you strip the metadata, for example, from a spreadsheet and then hand it over, so the other side doesn't know what formulas went in and can't manipulate and use the data as well as you can, that's unfair. That's where a judge is going to get concerned.

PROFESSOR CAPRA: And that's why the electronic discovery rule talks about production in native format. The idea is that kind of equality.

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165. *See* Joshua J. Poje, ABA Legal Technology Resource Center, Metadata Ethics Opinions Around the U.S. (June 17, 2009), http://www.abanet.org/tech/ltrc/fyidocs/metadatachart.html.

166. *See id.*

167. *See id.*

I would like to thank the judges. This was a great discussion. I want to thank you all for coming.