



AMERICAN  
BANKRUPTCY  
INSTITUTE

## 2017 Southeast Bankruptcy Workshop

### **ABI Talks: Ethics and Bankruptcy Ideas Worth Spreading**

**Edward T. Gavin, Moderator**

*Gavin/Solmonese LLC; Wilmington, Del.*

**Matthew R. Brooks**

*Troutman Sanders LLP; Atlanta*

**Robert F. Elgidely**

*Genovese Joblove & Battista, P.A.; Ft. Lauderdale*

**Robert C. Furr**

*Furr & Cohen, P.A.; Boca Raton, Fla.*

**Craig M. Geno**

*Craig M. Geno, PLLC; Ridgeland, Miss.*

**Prof. Angela K. Littwin**

*University of Texas School of Law; Austin*



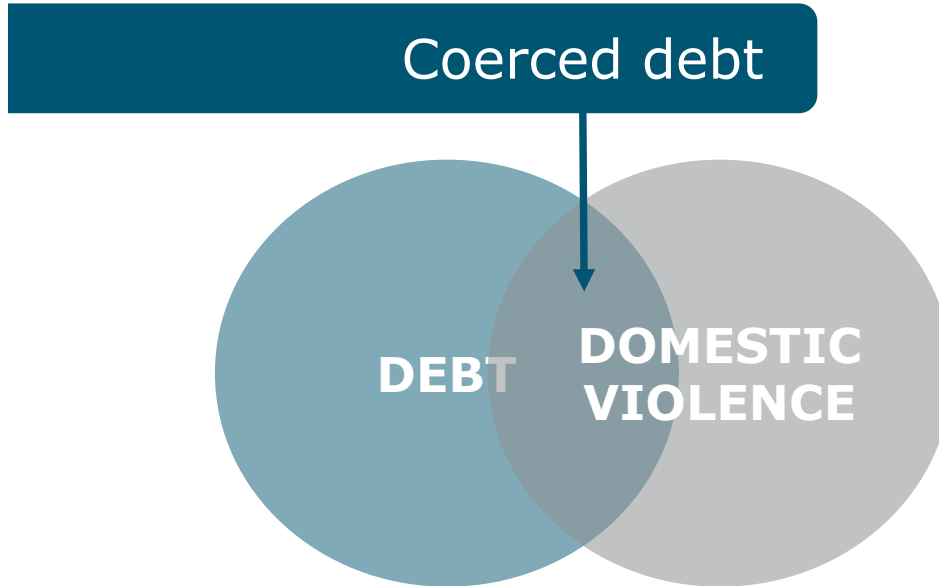
# Coerced Debt

## ABI Southeast Workshop 2017

Angela Littwin  
University of Texas School of Law

**DEBT**

**DOMESTIC  
VIOLENCE**



## Coerced debt

Occurs when the abuser in a violent relationship obtains credit in the victim's name via **fraud** or **duress**

## Damaging credit transactions



Debt through fraud



Debt through force

### Coerced debt

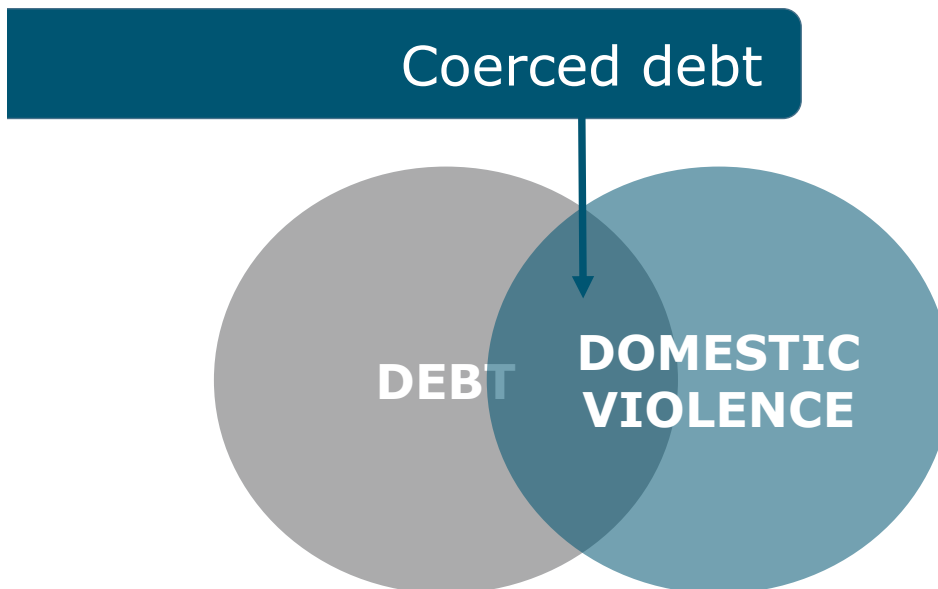
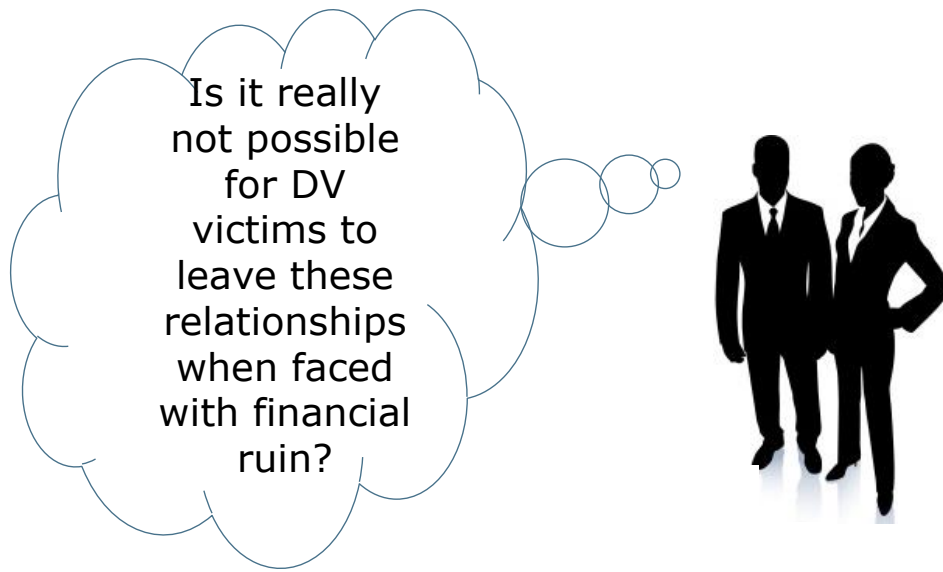
Enabled by the **growth** of consumer credit and corresponding **depersonalization** of the credit system



- Debt stays with victim
- Family court ineffective
- Traditional defenses ineffective

How does  
somebody end  
up this much  
debt without  
their knowledge  
or consent?





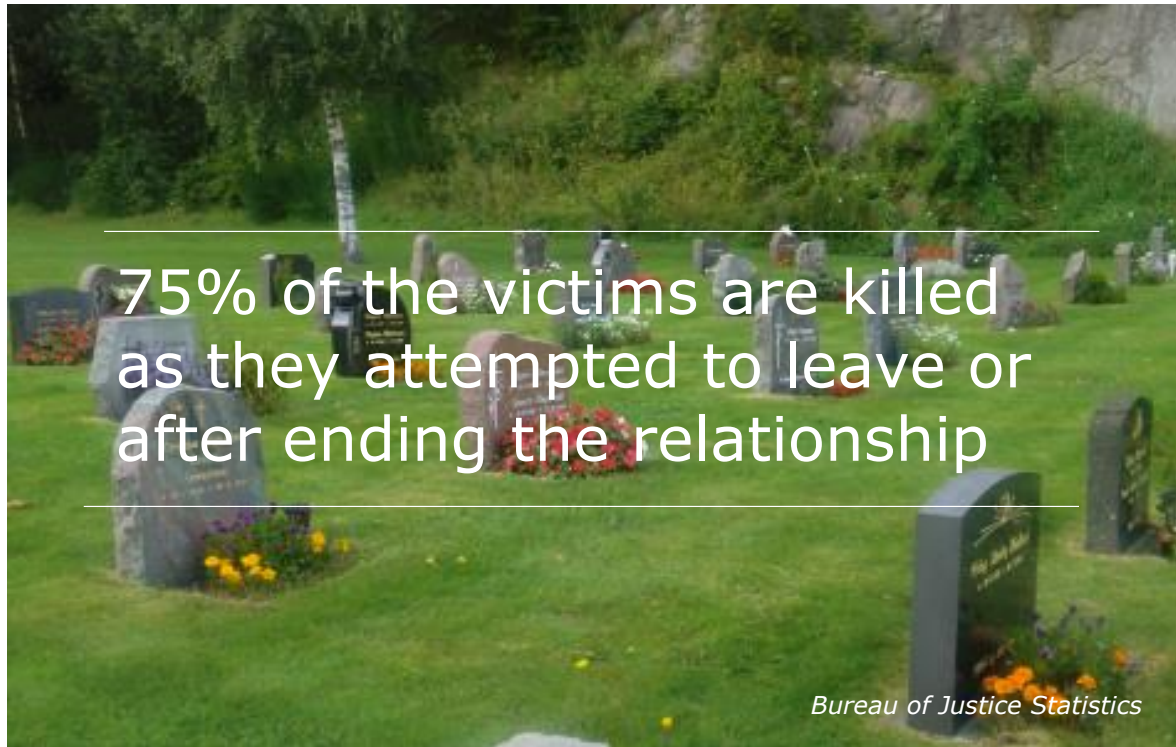




3 women are killed everyday  
in the U.S. by an abusive partner

*Bureau of Justice Statistics*





## National DV Hotline Survey

- 10 questions about coerced debt and its effects
- Administered by hotline staff
- 1823 English-speaking female callers over age 18

*Adams, Littwin, & Javorka (under review)*

## National DV Hotline Survey

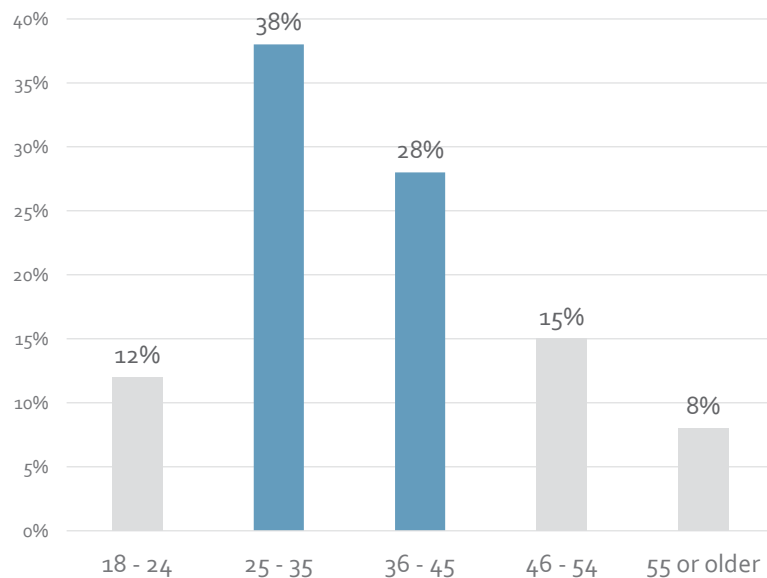
### Limitations:

- No way to verify administration accuracy
- Constraints on survey length
- Missing data – handled statistically b/c appears at random
- Limited demographic data

*Adams, Littwin, & Javorka (under review)*

## National DV Hotline Survey

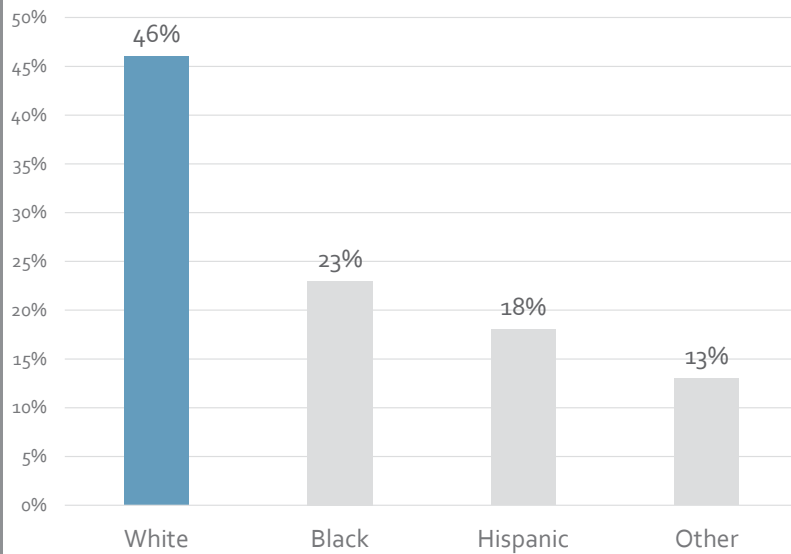
### Participant Age



*Adams, Littwin, & Javorka (under review)*

National DV  
Hotline  
Survey

Participant Race

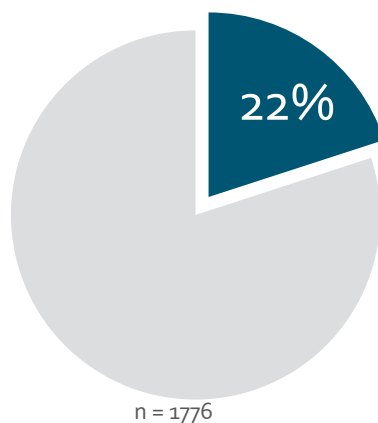


Adams, Littwin, & Javorka (under review)



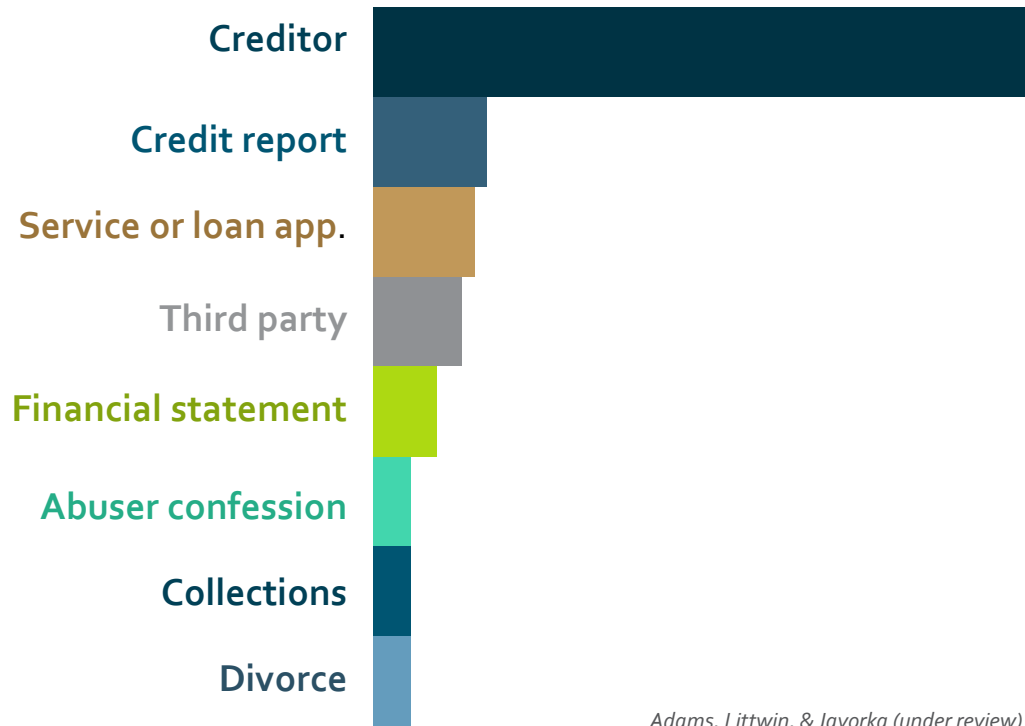
Fraud

Have you ever found out about debt or bills you owed that an intimate partner put in your name without you knowing?



Adams, Littwin, & Javorka (under review)

## Fraud Discovery

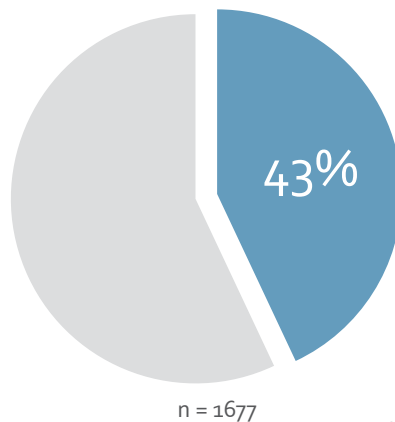


## Coercion

Has an intimate partner ever convinced or pressured you to borrow money or buy something on credit when you didn't want to?

AND

Threat of consequence for saying "no?"



Adams, Littwin, & Javorka (under review)

## Any Coerced Debt

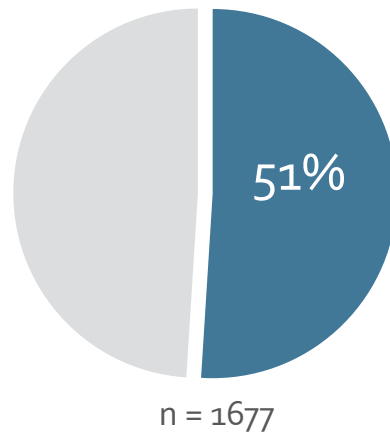


Coercion

OR



Fraud



*Adams, Littwin, & Javorka (under review)*

## Any Coerced Debt



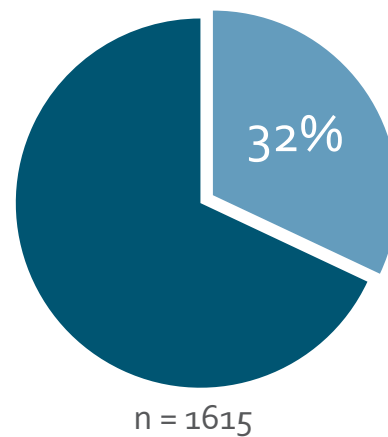
Coercion

Physical harm

OR



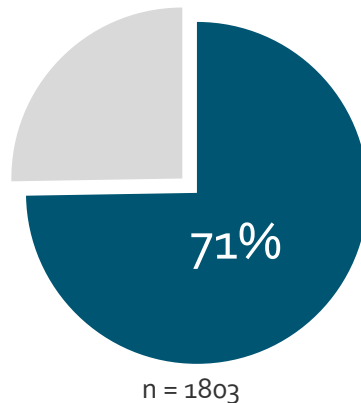
Fraud



*Adams, Littwin, & Javorka (under review)*

## Financial Control

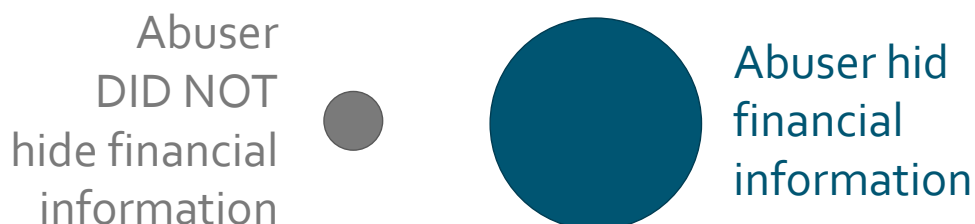
Has an intimate partner ever kept financial information from you?



*Adams, Littwin, & Javorka (under review)*

## DV Hotline Callers with Coerced Debt

Women whose abuser kept financial information from them were **3.6 times more likely** to experience coerced debt.



*Adams, Littwin, & Javorka (under review)*

## Effects of Coerced Debt



Credit Report Problems



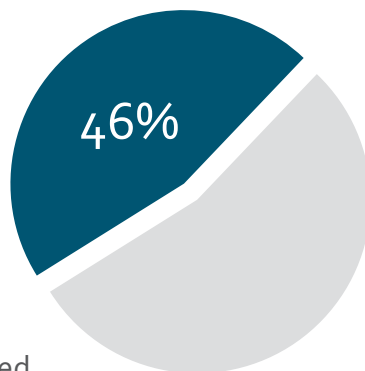
Financial Dependence

*Adams, Littwin, & Javorka (under review)*



Credit Report Problems

Has your credit report or credit score been hurt by the actions of an intimate partner?



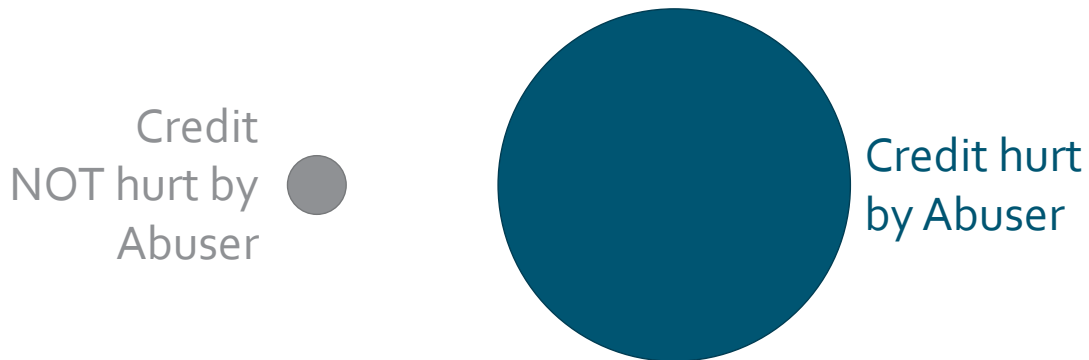
Note: 14% of those coded "no" said they were "unsure" about whether their credit had been hurt.

n = 1479

*Adams, Littwin, & Javorka (under review)*

## DV Hotline Callers with Coerced Debt

Women with coerced debt were **5.7 times more likely** to have their credit hurt by an abusive partner.

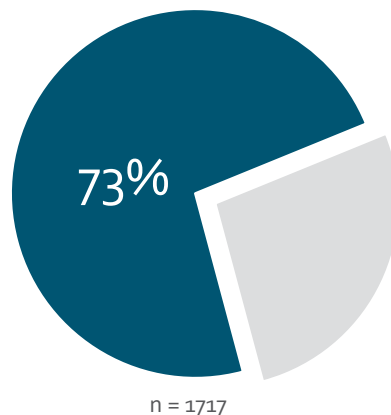


*Adams, Littwin, & Javorka (under review)*



## Financial Dependence

Have you ever stayed longer than you wanted in a relationship with someone who was controlling because of concerns about financially supporting yourself or your children?

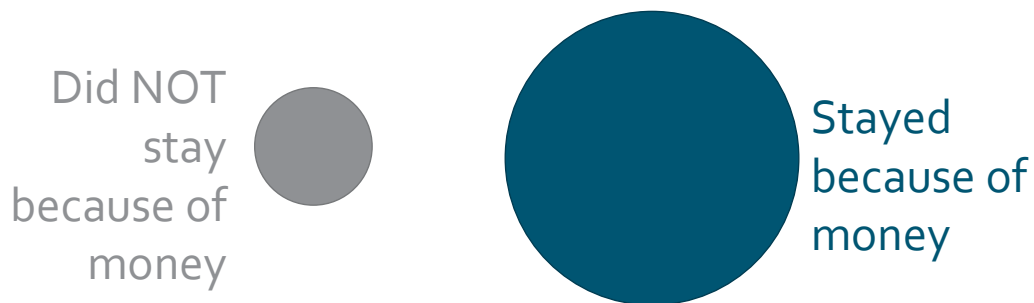


*Adams, Littwin, & Javorka (under review)*



## DV Hotline Callers with Coerced Debt

Women with coerced debt were **2.5 times more likely** to stay longer due to financial concerns.



*Adams, Littwin, & Javorka (under review)*

### Implications for Bankruptcy Professionals



Awareness of Coerced Debt



Power Dynamics



Effects on Non-filing Spouse

## Most Important Point



# Safety First

## **Ted Talk**

### **To Be or Not to Be**

“To be or not to be. That is the question.” Shakespeare’s succinct words describe the problem I’m going to talk about today. What should a lawyer do when his client threatens suicide? How do you respond professionally to such an emotional issue? What are the rules you should look at and what should you do so that you can live with yourself? Perhaps this talk should be “To Tell or Not to Tell.”

My story started one day when an old client of mine came to see me regarding some financial issues. I had known this client, who I’m going to call Tom, for over thirty years. He had been the president of a local chain of banks and then had businesses which got into trouble and failed and I represented him in those. He went on to a second career with a large bank but was forced to leave the bank when he turned 72. I knew his wife and his children. He was a nice man and they were a loving family.

Tom came in to tell me that he had lost his job, could not recover any severance benefits and was running out of money. He didn’t have any retirement funds left and had been living off of the good salary he had gotten until he was age 72. With the loss of that salary his world fell apart. All he had was about \$3,200.00 a month in social security income, a house with some equity and three insurance policies. He explained, very emotionally, that he felt that he had let his wife down, that he had been the provider of the family for over forty years and could not face the fact that he was bankrupt a second time and, at his age, could never recover. He had three life insurance policies which would pay millions in benefits to his wife upon his death and the policies could not be contested. However, the premiums on the policies were going to go up in about four months to

a level he could not maintain so he either had to commit suicide now so his wife would get the money or he would lose the policies and she would lose the money.

Well, I was having a perfectly good day until that meeting. I have always found that ethical problems I've had to face in my practice sometimes come out of left field. You are just not expecting them. You can be prepared for lots of issues in a case and you can foresee ethical dilemmas in a case. This was one I had not expected.

Tom had tears in his eyes as he explained how he wanted to take care of his wife. I said, well your wife loves you more than she does the money and she would rather have you than have that money. He could not hear that. All he could say was, "I've let my wife down, and she needs to maintain a certain lifestyle. I cannot live with myself. I want you to help her after I am gone." "Help her after you are gone?!" "I need your help." "I don't want you to go", I told him. Tom said, "You are my lawyer, I am telling you this confidentially. I am going to commit suicide in the next several months and I want you to help my wife after it's over. Will you help her?" He said "I'll come back and see you in a few weeks."

After he left, I sat there stunned. In some ways I understood how he felt. A person's financial and business success leads to one's self-worth and if one has had a huge failure, I could understand how suicide seemed a way out for Tom. As I usually do when I have a big dilemma, I walked down the hall and spoke to my partner. He suggested that we call the Florida Bar ethics hotline to get some guidance. So I did. The Hotline pointed me out to some of the Florida Professional Rules and Regulations and basically told me that I was kind of on my own about the right decision to make.

I went home that night and spoke to my wife who is a clinical psychologist. She reminded me of the rules in psychiatry and psychology that require that a therapist alert authorities if their

patient threatens harm to someone and that breaks confidentiality. That didn't really help me because in my case he wasn't going to harm anyone, only himself and he thought he was going to help his wife.

Two weeks later I get a call from Tom that he wanted to come in again. He brought the life insurance policies for me to look at, to make sure they couldn't be contested. They couldn't. He brought me a list of his credit card bills and said I want you to be aware of the bills and I want to know if my wife has to pay these bills from the insurance proceeds. I told him that she did not because they were only his bills. He says well, I am still making my plans. I am thinking about stepping in front of a truck but I will let you know what I am going to do, and he left. I look at myself and I thought, do I really need this? This was a terrible situation to deal with.

I have had several cases where a spouse killed themselves over debt. One wife came to me after she found her husband of 55 years hanging in their garage one morning. He left a note telling her he couldn't face her because they were in debt to credit cards for \$75,000 and he had hid it from her. For spouses of her generation, it was not unusual for the husband to take care of bills and the wife take care of the house. Is a man's life worth \$75,000 in debt?

That led me to do some reading on the subject of suicide and bankruptcy and obligations of a lawyer. I was quite surprised to find a lot of literature on suicide and debt. I found an article about suicide in farmers in India. There were 3,000 farmers who committed suicide in India in 2015 due to debt or bankruptcy. Up from 41.7% in 2014. I found a number of articles on student loan debt suicides. For instance, in 2007 a graduate student in Illinois incurred \$100,000 in student loan debt and couldn't find a job in his field. Age 35, living with his family, he committed suicide. I read that suicide is the dark side of the student loan lending crisis. One young lawyer told a researcher "I think about jumping from the 27<sup>th</sup> floor window of my office every day." For suicide

prevention experts, this is a dangerous sign, it means that the person has actually devised a plan to carry out the act.

My client, Tom had a plan and that made me even more worried.

I found a lengthy paper by a professor at the University of Denver, College of Law on Bankruptcy, Social Class, and the Acceptability of Suicide. This was just published in May. It concluded that “the higher the level of an individual’s education, the greater annual income, the higher occupational prestige score, and the higher self-identified class, the more likely it is that a person will accept the act of suicide upon a filing for bankruptcy relief.” So the factors of “social status”, education, income, occupational prestige and self-identified class bear on a person’s view of whether suicide is socially acceptable as opposed to filing for bankruptcy.

Tom called for another appointment and came in to see me. Now it had been about six weeks since the first meeting. Tom wanted to discuss what his wife should do in terms of notifying social security and how would she file the claim for death benefits. He had even gone so far as to get the claim forms off the insurance websites and wanted me to look at them with him. Again, I talked to him about how much his wife loved him and how I believed that she would chose him over the money. He sat there and cried and kept saying no she wouldn’t, “I want her to be taken care of.” I recalled my wife making a contract with a patient where he agreed to contact her before doing anything drastic. I made Tom promise me that before he would commit suicide that he would talk to his wife and tell her what he was going to do so that she could express to him what she wanted and that he would talk to me. He said I will agree to do that but I am telling you that I am not changing my mind. And he left.

I went through the rules of professional responsibility of the Florida Bar trying to figure out if they could provide me any help. The bar ethics hotline person had told me that I couldn’t

assist my client in committing a crime but that suicide was probably not a crime in Florida. Florida Statute Section 765.309 provides that mercy killing and euthanasia is a crime. There is a specific statute (782.08) called assisting self-murder and it says, every person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter, a felony of the second degree, punishable as provided by statute. Am I deliberately assisting my client by not going to someone and telling them he is trying to commit suicide? Am I deliberately assisting my client if I tell him I'll take care of his paperwork and assist his wife after he kills himself? These are the questions that were swirling in my head as I tried to figure out what I should do.

I thought perhaps my client was disabled and I could use that as a way to get him into treatment. Well one of the rules provides that when a client's ability to make adequate considered decisions is impaired because of mental disability or some other reason a lawyer shall still as reasonably possible maintain a normal relationship with his client. A lawyer is required to treat that client with respect. The lawyer is also required to maintain the client's confidences. Tom confided in me about his plans. Another rule provides that the lawyer is an advisor to his client and has to exercise independent and professional judgment in rendering candid advice. The rule does require the lawyer to refer to other professions if it's relevant to the client's situation. Plus a lawyer should make a recommendation to see a psychiatrist, a psychologist or a therapist if the client is exhibiting suicide behavior.

On the next visit I tried to get Tom to therapy but Tom said "nope I'm not going to see anybody I know exactly what I want to do". I again extracted a promise from him that he would go back and talk with his wife before he did anything. Time was running out for him because the premiums on the policies were about to go up in a month or so. He told me that he was going to go home and tell his wife in the next week and then he would come and see me again. I made a

decision that if I had to, I was going to break the confidence he had given me and call his wife and meet with her to get him help. I was just hoping and praying that he wouldn't go through with it and let me know that beforehand. I could not live with myself knowing that I could have prevented someone's suicide.

The phone rang one day a few weeks later and a very happy Tom was on the phone. "Robert, I told my wife and she did exactly what you said. She said she would rather have me than have the money and I am so happy that she said that. Thank you for telling me that and we want to come in and see you because now I need to do a bankruptcy to get rid of my credit card debt and figure out how to go ahead with my life with my wife." What a day that was. Several days later, they came in to see me and we talked about it thoroughly and put together a plan to let him get rid of his credit card debt, get their house sold, take whatever equity they had and use it to buy something cheaper, something smaller and something that would let them live within their income. They were both happy and boy was I. I asked Tom and his wife if I could show you a picture of them and let me take their picture so that I could use it today and here they are. Now Tom is not his real name and I'm sure none of you have known him or will ever see him but this is the kind of person that financial distress or bankruptcy can drive to suicide. What are we to do as lawyers when we know that it's likely to happen? I think that the rules of professional regulation and law doesn't really give us completely clear guidance and I just ask you that if it ever happens to you to think about it hard, encourage your client not to take the act, refer them to therapy, make a contract with them and do what you can to stop them. I don't think you could live with yourself otherwise. I know I couldn't.



## **Slide 1** Social Status

Education

Income

Occupational prestige

Higher Self-Identified Class

## **Slide 2** Make a Contract with client

## **Slide 3** Assisting Self Murder

## **Slide 4** Picture

ABI TALKS

**I THINK [like a litigator], THEREFORE I AM [constantly trying to achieve the best and avoid the worst]. - Don't spoliage the party favors!**

**Presented by:**

**Robert F. Elgidely, Esq.  
Genovese Joblove & Battista, P.A.  
200 East Broward Boulevard, Suite 1110  
Fort Lauderdale, FL 33301  
Telephone: (954) 453-8000  
Direct Dial: (954) 453-8022  
E-Mail: [relgidely@gjb-law.com](mailto:relgidely@gjb-law.com)**

**GENOVESE**  

---

**JOBLOVE &**  

---

**BATTISTA**  

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**PA.**  
*Attorneys at Law*

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## Best Practices Report on Electronic Discovery (ESI) Issues in Bankruptcy Cases\*

*By ABA Electronic Discovery (ESI) in Bankruptcy Working Group*

The ABA Electronic Discovery (ESI) in Bankruptcy Working Group is part of the ABA Business Law Section's Committee on Bankruptcy Court Structure and the Insolvency Process. The Electronic Discovery (ESI) in Bankruptcy Working Group was formed to study and prepare guidelines or a best practices report on the scope and timing of a party's obligation to preserve electronically stored information ("ESI") in bankruptcy cases. The issues studied by the Working Group include the scope and timing of a Chapter 11 debtor-in-possession's obligation to preserve ESI not only in connection with adversary proceedings, but also in connection with contested matters and the bankruptcy case filing itself, and the obligations of non-debtor parties to preserve ESI in connection with adversary proceedings and contested matters in a bankruptcy case. Because to date there appears to have been only very limited study and reported case authority on ESI-related issues in bankruptcy, it seemed to be an appropriate time to provide more focused guidance on this subject.

The Electronic Discovery (ESI) in Bankruptcy Working Group is comprised of judges, former judges, bankruptcy practitioners, litigation attorneys experienced in bankruptcy and general civil litigation, representatives of the Executive Office for United States Trustees, and law professors knowledgeable in the field of bankruptcy law. The Working Group includes persons with experience in business and consumer bankruptcy cases, large and small Chapter 7, Chapter 11, and Chapter 13 cases, and e-discovery matters in litigation. The goal in forming the Working Group was to provide a broad range of perspectives and experience.

The general subject of electronic discovery (ESI) issues in litigation has engendered much commentary, discussion, and debate in recent years and a significant number of legal opinions. This Report and the guidelines set forth herein are intended to provide a framework for consideration of ESI issues in bankruptcy cases. In drafting the guidelines, it was thought important to include certain guiding principles that need to be considered when addressing ESI issues in bankruptcy cases. Those principles are discussed in the Report. It should be

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\* This Best Practices Report is not, and should not be construed as, the official policy or position of the American Bar Association.

noted that while this has been a collaborative and interactive process, not all Working Group members agree on all points in the Report.

The Working Group wishes to acknowledge the excellent work done by others who have studied and written on the issues relating to electronic discovery (ESI) in civil litigation. In particular, the Working Group wishes to acknowledge the extensive work of The Sedona Conference on electronic discovery issues. The principles and guidelines appearing as part of this Report are not intended to replace other valuable sources of guidance on ESI issues such as *The Sedona Principles (Second Edition): Best Practices Recommendations & Principles for Addressing Electronic Document Production*.<sup>1</sup> Interested parties are encouraged to consult the Sedona Principles for background materials and very instructive general principles and guidelines with respect to ESI issues in civil litigation. This Report is intended to supplement those principles and guidelines and provide more particularized guidance on issues concerning ESI in connection with bankruptcy cases.

This Best Practices Report is divided into six sections. Those sections are (i) ESI Principles and Guidelines in Large Chapter 11 Cases; (ii) ESI Principles and Guidelines in Middle Market and Smaller Chapter 11 Cases; (iii) ESI Principles and Guidelines in Chapter 7 and Chapter 13 Cases; (iv) ESI Principles and Guidelines in Connection with Filing Proofs of Claim and Objections to Claims in Bankruptcy Cases; (v) ESI Principles and Guidelines for Creditors in Bankruptcy Cases; and (vi) Rules and Procedures with Respect to ESI in Adversary Proceedings and Contested Matters in Bankruptcy Cases. Although an in-depth analysis of ESI principles and guidelines in Chapter 9, Chapter 12, and Chapter 15 cases is beyond the scope of this Report, a brief discussion of ESI with respect to each of those chapters is found in note 6 below. In addition, it was thought that it would be helpful to include a short bibliography of useful electronic discovery resources. That bibliography appears at the end of this Report.

Comments on this Report may be submitted to Richard L. Wasserman, the Chair of the Working Group, whose address is Venable LLP, 750 East Pratt Street, Suite 900, Baltimore, Maryland 21202; e-mail address: [rlwasserman@venable.com](mailto:rlwasserman@venable.com); telephone number: 410-244-7505. The names of the members of the Working Group are set forth below.

\* \* \*

Richard L. Wasserman (Chair), Venable LLP, Baltimore, MD

Paul M. Basta, Kirkland & Ellis LLP, New York, NY

Hon. Stuart M. Bernstein, United States Bankruptcy Judge, Southern District of New York, New York, NY

Lee R. Bogdanoff, Klee, Tuchin, Bogdanoff & Stern LLP, Los Angeles, CA

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1. See SEDONA CONF., THE SEDONA PRINCIPLES (SECOND EDITION): BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (June 2007) [hereinafter *Sedona Principles*], available at <https://thesedonaconference.org/download-pub/81>.

Hon. Philip H. Brandt, United States Bankruptcy Judge, Western District of Washington, Seattle, WA

William E. Brewer, Jr., The Brewer Law Firm, Raleigh, NC

Jonathan D. Brightbill, Kirkland & Ellis LLP, Washington, DC

Gillian N. Brown, Pachulski Stang Ziehl & Jones LLP, Los Angeles, CA

Hon. Samuel L. Bufford, The Dickinson School of Law, Pennsylvania State University, University Park, PA

Timothy J. Chorvat, Jenner & Block LLP, Chicago, IL

Mark D. Collins, Richards Layton & Finger, P.A., Wilmington, DE

Dennis J. Connolly, Alston & Bird LLP, Atlanta, GA

John P. Gustafson, Standing Chapter 13 Trustee, Toledo, OH

Scott A. Kane, Squire Sanders LLP, Cincinnati, OH

Christopher R. Kaup, Tiffany & Bosco P.A., Phoenix, AZ

Stephen D. Lerner, Squire Sanders LLP, Cincinnati, OH

David P. Leibowitz, Lakelaw, Waukegan, IL

Judith Greenstone Miller, Jaffe Raitt Heuer & Weiss P.C., Southfield, MI

Robert B. Millner, Dentons US LLP, Chicago, IL

Prof. Jeffrey W. Morris, University of Dayton School of Law, Dayton, OH

Salvatore A. Romanello, Weil Gotshal & Manges LLP, New York, NY

Camisha Simmons, Fulbright & Jaworski L.L.P., Dallas, TX

Jeffrey L. Solomon, The Law Firm of Jeffrey L. Solomon, PLLC, Woodbury, NY

Marc S. Stern, The Law Office of Marc S. Stern, Seattle, WA

Clifford J. White, III, Executive Office for United States Trustees, Washington, DC

## SECTION I

ELECTRONIC DISCOVERY (ESI) PRINCIPLES AND GUIDELINES  
IN LARGE CHAPTER 11 CASES

## I. PRINCIPLES APPLICABLE TO ESI ISSUES IN BANKRUPTCY CASES

The principles set forth below are not meant to be exclusive or to replace other valuable sources of guidance, such as the Sedona Principles. Rather, they are intended to provide more particularized guidance on issues concerning electronic discovery (ESI) that may arise in the bankruptcy context.

**Principle 1: The duty to preserve ESI and other evidence applies in the bankruptcy context.** A person or entity preparing to file a bankruptcy case should consider appropriate steps to preserve ESI and other evidence. In addition, potential debtors and non-debtor parties have an obligation to preserve ESI and other evidence related to the filing of a contested matter, adversary proceeding, or other disputed issue in a bankruptcy case. This duty to preserve may arise prior to the formal filing of the bankruptcy case or other litigated matter, generally when the case filing or other potential litigation matter becomes reasonably anticipated. This duty to preserve is also consistent with and supplemental to the obligation of debtors, debtors-in-possession, and other fiduciaries to take reasonable steps to preserve books and records in order to facilitate the just and efficient administration of the bankruptcy estate and resolution of disputed matters arising in or in connection with the bankruptcy case. A debtor's preservation efforts should extend to representatives and affiliates of the debtor, and the debtor should consider appropriate instructions to such third parties regarding preservation of ESI relating to the debtor.

**Principle 2: The actual or anticipated filing of a bankruptcy petition does not require a debtor to preserve every piece of information in its possession.** A person or entity preparing to file a bankruptcy petition should take reasonable steps to preserve ESI and other evidence that the person or entity reasonably anticipates may be needed in connection with administration of the bankruptcy case or proceedings therein or operation of the business or affairs of the debtor or otherwise relevant to a legitimate subject of dispute in the bankruptcy case or potential litigation therein. This obligation does not require a debtor to preserve all ESI and other information in its possession merely because a bankruptcy petition is filed or shortly anticipated. It would generally not be inappropriate for debtors to continue following routine document retention programs and to continue the good-faith operation of electronic information systems that may automatically delete ESI, so long as the application of such programs and systems is suspended with respect to specific ESI and other evidence to which a duty to preserve has attached.

**Principle 3: Proportionality considerations regarding the preservation and production of ESI are particularly important in the bankruptcy context.** A party's obligations with respect to the preservation and production of ESI should be proportional to the significance, financial and otherwise, of the matter

in dispute and the need for production of ESI in the matter. Proportionality considerations are especially important in the bankruptcy context. Debtors will be operating within constraints and generally have limited assets. Creditors often face the prospect of less than a full recovery, frequently a significantly reduced one, on claims against the bankruptcy estate. Parties should not be forced to spend a disproportionate amount of already limited resources on the preservation and production of ESI.

**Principle 4: Interested parties in a bankruptcy case are encouraged to confer regarding issues related to the preservation and production of ESI.** The value of direct discussions regarding ESI is not a novel concept and is well-recognized, for example, in Sedona Principle No. 3. Indeed, in matters and proceedings where Federal Rule of Bankruptcy Procedure 7026 applies, conferring with opposing counsel is required. Even where it is not required, however, the potential benefit of conferring is heightened in bankruptcy cases. Bankruptcy courts are courts of equity. The stakeholders in a bankruptcy case are tasked with resolving disputes quickly and efficiently in order to avoid dissipating assets of the bankruptcy estate. This means that disputed matters in bankruptcy cases are often heard and decided in an expedited manner. In these circumstances, it is particularly important for parties to confer regarding ESI obligations and requests for production of ESI in order to avoid unnecessary disputes. The development of a proposed ESI protocol by the debtor and interested parties is a suggested best practice to consider in large chapter 11 cases.

## II. ESI GUIDELINES AND SUGGESTED BEST PRACTICES FOR DEBTOR'S COUNSEL IN LARGE CHAPTER 11 CASES

The following are guidelines and suggested best practices with respect to ESI in large chapter 11 cases. It is recognized that the guidelines and recommendations set forth herein may not be appropriate in each and every case. There may be good reasons in a chapter 11 case, large or small, for taking a different approach to ESI issues. The following are intended as suggested guidelines for counsel and courts to consider.

### 1. Pre-filing

- Counsel's pre-filing planning checklist for a chapter 11 case should include a discussion of ESI-related matters with the client.
- Counsel should gain an understanding of the client's electronic information systems, including the types of ESI the client maintains and the locations where it is used and stored. This should include discussion of the client's existing policies and procedures regarding ESI, including any data retention program that calls for the automatic deletion or culling of ESI. It should also include identification of sources of ESI that are likely to be identified as not reasonably accessible because of undue burden or cost.

- Counsel should explain to the client its obligation to preserve ESI, consistent with the principles outlined above. This should include identification and discussion of issues that are reasonably anticipated to be disputed in the bankruptcy case and the sources and locations of ESI likely to be relevant to such disputes (including key custodians and storage systems or media that are likely to contain such ESI).
- Because first-day motions are contested matters, debtor's counsel should, if reasonably practicable, put appropriate preservation measures in place regarding the subjects of the various first-day motions to be filed on behalf of a chapter 11 debtor-in-possession. The same is true of any adversary proceedings to be filed as part of the first-day filings.
- In order to plan and implement appropriate preservation efforts, the parties may wish to designate a liaison or primary point of contact for ESI issues at both the client and its outside counsel. Discussions of the client's electronic information systems and ESI obligations should include participation by the client's IT department. If an outside vendor or consultant is retained to assist with ESI matters, a lead person in that organization may also be identified and the vendor or consultant's scope of work and reporting obligations should be clearly identified.
- A debtor's preservation plan and instructions should be communicated in writing within the debtor's organization (in the nature of a litigation hold). The debtor's preservation plan should include a mechanism for periodic updates and reminders as issues are identified and refined during the bankruptcy case.
- The review and discussion of the client's ESI obligations should consider any specialized data privacy considerations (e.g., specific regulatory requirements in the client's industry, statutes applicable to the client, confidentiality or non-disclosure agreements with third parties, and obligations imposed under foreign legal systems for clients with operations or affiliates in jurisdictions outside of the United States).

## **2. At Time of Filing of Chapter 11 Case**

- Debtor's counsel should consider whether, at the outset of the case, there is a need for bankruptcy court approval of an interim ESI protocol addressing any pertinent ESI issues, including preservation efforts. Debtor's counsel may also want to consider including in the debtor's first-day affidavit a description of the debtor's prepetition preservation efforts and any changes to the debtor's preservation practices made prior to the bankruptcy filing. Final decisions regarding preservation and other ESI-related issues should be reserved, if possible and if not unduly burdensome to the debtor, until a later date when a Creditors' Committee has been appointed and the debtor can confer with it and other stakeholders in the case.



- If any of the professionals to be employed by the debtor are working on ESI preservation programs, the scope of their work should be identified in the employment application for such professionals.

### **3. Within 45 to 60 Days of Petition Date or at or Before Final Hearing on Bankruptcy Rule 4001 Matters**

- As soon as reasonably practicable in the case, allowing for consultation with the Creditors' Committee, the United States Trustee, and any other interested parties (which could include secured lenders, indenture trustees, or other significant creditor constituencies), the debtor should consider formulating and proposing an ESI protocol for approval by the Bankruptcy Court after notice and opportunity for objection by other parties. An ESI protocol may not be necessary or desirable in every large chapter 11 case.
- The ESI protocol should address preservation efforts implemented by the debtor, document databases or repositories established by the debtor, issues related to the intended form or forms of production of ESI by the debtor, any sources of ESI that the debtor deems not reasonably accessible because of undue burden or cost, any categories of ESI that the debtor specifically identifies as not warranting the expense of preservation, document retention programs or policies that remain in effect, and any other significant ESI-related issues. The ESI protocol should identify a point of contact at debtor's counsel to which third parties can address inquiries or concerns regarding ESI-related issues. The ESI protocol may also identify the parties and subject matters as to which the debtor expects to request production of ESI (but any such provision does not relieve the debtor of any obligation otherwise existing to confer directly with those parties, including regarding any requested preservation of ESI).
- The timing for seeking approval of an ESI protocol will vary depending upon the circumstances of each case. Depending upon how long it takes to appoint a Creditors' Committee and how long the consultation process with interested parties lasts, it may be appropriate to file the motion seeking approval of the ESI protocol within the applicable time period to provide sufficient notice and be calendared for a date within forty-five to sixty days after the Petition Date or for the date of the final hearing on Bankruptcy Rule 4001 matters. Because of its importance, it should be a goal to have the ESI protocol approval order entered early in the debtor's bankruptcy case. Adequate notice of any motion seeking approval of a proposed ESI protocol should be provided to creditors and other parties in interest.
- Among the provisions to consider including in an ESI protocol approval order from the Bankruptcy Court is a provision, in accordance with

Federal Rule of Evidence 502(d), addressing the non-waiver of attorney-client privilege and work-product protection when ESI is disclosed.

- Approval of the ESI protocol should not preclude the debtor or other parties from seeking additional or different treatment of ESI in appropriate circumstances. Any issues regarding requests for deviation from the protocol should be addressed in direct communications between the affected parties before any relief is sought from the Court. The order approving the ESI protocol should include a provision that the terms of the protocol are subject to further order of the Court and can be amended for cause. Although adequate notice to potentially affected creditors and interested parties should be a prerequisite to approval of any ESI protocol, approval of such protocol is not intended to preclude parties engaged in current or future litigation with a debtor, including the debtor, from seeking ESI-related relief particularized to such litigated matter.<sup>2</sup>

#### 4. Other ESI Considerations

- In addition to ESI obligations in connection with adversary proceedings and contested matters, other ESI issues may arise during the case. For example, special considerations may apply with respect to personally identifiable information and patient records and other patient care information.<sup>3</sup> In addition, if there is a sale or other transfer of property of the estate, consideration should be given to preserving ESI and other data and documents, or providing for continued access by the estate to such ESI and other data and documents, following such sale or other transfer.
- If a preservation obligation arises and appropriate documents and ESI are not preserved, under the applicable rules and case law there is a real possibility of a claim of spoliation of evidence and a request for sanctions. With respect to the wide range of potential sanctions, see Section VI below.

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2. A model template for an ESI Protocol is attached as Appendix 1 to this Report. Also attached as Appendix 2 is a form of ESI Protocol Approval Order, including Federal Rule of Evidence 502(d) provisions. Whether to propose an ESI Protocol and what to include in an ESI Protocol will depend upon the facts and circumstances of each case. As will be noted, a number of the items covered in the attached ESI Protocol template are presented in brackets for “consideration” by the debtor and its counsel, with a view toward customizing the provisions based upon the facts and circumstances applicable to the debtor and its case. Even with respect to matters not presented in brackets, such matters may not be appropriate in every case, and additional matters not set forth in the template may need to be addressed. The same case-by-case approach would also apply to drafting a proposed ESI Protocol Approval Order.

3. See 11 U.S.C. §§ 363(b)(1), 332, 333 (2012).

## SECTION II

### ELECTRONIC DISCOVERY (ESI) PRINCIPLES AND GUIDELINES IN MIDDLE MARKET AND SMALLER CHAPTER 11 CASES

#### I. PRINCIPLES APPLICABLE TO ESI ISSUES IN BANKRUPTCY CASES

The principles set forth below are not meant to be exclusive or to replace other valuable sources of guidance, such as the Sedona Principles. Rather, they are intended to provide more particularized guidance on issues concerning electronic discovery (ESI) that may arise in the bankruptcy context.

**Principle 1: The duty to preserve ESI and other evidence applies in the bankruptcy context.** A person or entity preparing to file a bankruptcy case should consider appropriate steps to preserve ESI and other evidence. In addition, potential debtors and non-debtor parties have an obligation to preserve ESI and other evidence related to the filing of a contested matter, adversary proceeding, or other disputed issue in a bankruptcy case. This duty to preserve may arise prior to the formal filing of the bankruptcy case or other litigated matter, generally when the case filing or other potential litigation matter becomes reasonably anticipated. This duty to preserve is also consistent with and supplemental to the obligation of debtors, debtors-in-possession, and other fiduciaries to take reasonable steps to preserve books and records in order to facilitate the just and efficient administration of the bankruptcy estate and resolution of disputed matters arising in or in connection with the bankruptcy case. A debtor's preservation efforts should extend to representatives and affiliates of the debtor, and the debtor should consider appropriate instructions to such third parties regarding preservation of ESI relating to the debtor.

**Principle 2: The actual or anticipated filing of a bankruptcy petition does not require a debtor to preserve every piece of information in its possession.** A person or entity preparing to file a bankruptcy petition should take reasonable steps to preserve ESI and other evidence that the person or entity reasonably anticipates may be needed in connection with administration of the bankruptcy case or proceedings therein or operation of the business or affairs of the debtor or otherwise relevant to a legitimate subject of dispute in the bankruptcy case or potential litigation therein. This obligation does not require a debtor to preserve all ESI and other information in its possession merely because a bankruptcy petition is filed or shortly anticipated. If in doubt, a debtor should err on the side of preserving its data. Depending on the size of the debtor, the complexity of its ESI systems, and the resources available in advance of the filing of a bankruptcy petition, the most prudent and least burdensome approach may be to suspend even routine data destruction in the period leading up to a bankruptcy filing (as opposed to expending resources identifying more specifically the ESI to which a duty to preserve may have attached).

**Principle 3: Proportionality considerations regarding the preservation and production of ESI are particularly important in the bankruptcy context.** A party's obligations with respect to the preservation and production of ESI should

be proportional to the significance, financial and otherwise, of the matter in dispute and the need for production of ESI in the matter. Proportionality considerations are especially important in the bankruptcy context. Debtors will be operating within constraints and generally have limited assets. Creditors often face the prospect of less than a full recovery, frequently a significantly reduced one, on claims against the bankruptcy estate. Parties should not be forced to spend a disproportionate amount of already limited resources on the preservation and production of ESI.

**Principle 4: Interested parties in a bankruptcy case are encouraged to confer regarding issues related to the preservation and production of ESI.** The value of direct discussions regarding ESI is not a novel concept and is well-recognized, for example, in Sedona Principle No. 3. Indeed, in matters and proceedings where Federal Rule of Bankruptcy Procedure 7026 applies, conferring with opposing counsel is required. Even where it is not required, however, the potential benefit of conferring is heightened in bankruptcy cases. Bankruptcy courts are courts of equity. The stakeholders in a bankruptcy case are tasked with resolving disputes quickly and efficiently in order to avoid dissipating assets of the bankruptcy estate. This means that disputed matters in bankruptcy cases are often heard and decided in an expedited manner. In these circumstances, it is particularly important for parties to confer regarding ESI obligations and requests for production of ESI in order to avoid unnecessary disputes. The development of a proposed ESI protocol by the debtor and interested parties may be a useful step to be considered in middle market and even possibly in smaller chapter 11 cases.

## II. ESI GUIDELINES AND CONSIDERATIONS FOR DEBTOR'S COUNSEL IN MIDDLE MARKET AND SMALLER CHAPTER 11 CASES

The following are guidelines and considerations with respect to ESI issues in middle market and smaller chapter 11 cases. It is recognized that the guidelines and recommendations set forth herein may not be appropriate in each and every case. There may be good reasons in a chapter 11 case, large or small, for taking a different approach to ESI issues. The following are intended as suggested guidelines for counsel and courts to consider.

### 1. Pre-filing

- Counsel's pre-filing planning checklist for a chapter 11 case should include a discussion of ESI-related matters with the client. The proportionality principle (Principle 3 above) may take on added significance in middle market and smaller chapter 11 cases. The following suggested guidelines should be read with that principle in mind.
- Counsel should gain an understanding of the client's electronic information systems, including the types of ESI the client maintains and the locations where it is used and stored. This should include discussion of the

client's existing policies and procedures regarding ESI, including any data retention program that calls for the automatic deletion or culling of ESI. It should also include identification of sources of ESI that are likely to be identified as not reasonably accessible because of undue burden or cost.

- Counsel should explain to the client its obligation to preserve ESI, consistent with the principles outlined above. This should include identification and discussion of issues that are reasonably anticipated to be disputed in the bankruptcy case and the sources and locations of ESI likely to be relevant to such disputes (including key custodians and storage systems or media that are likely to contain such ESI).
- If first-day motions are to be filed in the case, because such motions are contested matters, debtor's counsel should, if reasonably practicable, put appropriate preservation measures in place regarding the subjects of the various first-day motions to be filed on behalf of a chapter 11 debtor-in-possession. The same is true of any adversary proceedings to be filed as part of the first-day filings.
- In order to plan and implement appropriate preservation efforts, the parties may wish to designate a liaison or primary point of contact for ESI issues at both the client and its outside counsel. Discussions of the client's electronic information systems and ESI obligations should include participation by knowledgeable persons including, if applicable, the client's IT department. If an outside vendor or consultant is retained to assist with ESI matters, a lead person in that organization may also be identified and the vendor or consultant's scope of work and reporting obligations should be clearly identified.
- A debtor's preservation plan and instructions should be communicated in writing within the debtor's organization (in the nature of a litigation hold). The debtor's preservation plan should include a mechanism for periodic updates and reminders as issues are identified and refined during the bankruptcy case.
- The review and discussion of the client's ESI obligations should consider, to the extent reasonably practicable, any specialized data privacy considerations (e.g., specific regulatory requirements in the client's industry, statutes applicable to the client, confidentiality or non-disclosure agreements with third parties, and obligations imposed under foreign legal systems for clients with operations or affiliates in jurisdictions outside of the United States).

## **2. At Time of Filing of Chapter 11 Case**

- Debtor's counsel may want to consider whether, at the outset of the case, it may be appropriate under the circumstances of the case to seek bankruptcy court approval of an interim ESI protocol addressing any pertinent

ESI issues, including preservation efforts. Debtor's counsel may also want to consider including in the debtor's first-day affidavit (if there is one in the case) a description of the debtor's prepetition preservation efforts and any changes to the debtor's preservation practices made prior to the bankruptcy filing. It may be appropriate in a given case to reserve decisions regarding preservation and other ESI-related issues until a later date in the case when disputed issues become identified and when the United States Trustee and other interested parties, including particularly a Creditors' Committee if it is organized in the case, can participate in discussions and consideration of ESI-related issues.

- If any of the professionals to be employed by the debtor are working on ESI preservation programs, the scope of their work should be identified in the employment application for such professionals.

### **3. Consideration of an ESI Protocol if Appropriate in the Case**

- Subject to the specific circumstances of each case including the proportionality principle referenced above, a debtor may want to consider the possibility of formulating and proposing a protocol addressing pertinent ESI issues, including preservation efforts. An ESI protocol will not be warranted or appropriate in every chapter 11 case.
- If appropriate, among the issues that may be addressed in an ESI protocol are the following: preservation efforts implemented by the debtor, document databases or repositories established by the debtor, issues related to the intended form or forms of production of ESI by the debtor, any sources of ESI that the debtor deems not reasonably accessible because of undue burden or cost, any categories of ESI that the debtor specifically identifies as not warranting the expense of preservation, document retention programs or policies that remain in effect, and any other significant ESI-related issues. If there is an ESI protocol to be proposed in the case, it should identify a point of contact at debtor's counsel to which third parties can address inquiries or concerns regarding ESI-related issues. Any such ESI protocol may also identify the parties and subject matters as to which the debtor expects to request production of ESI (but any such provision does not relieve the debtor of any obligation otherwise existing to confer directly with those parties, including regarding any requested preservation of ESI).
- The timing for seeking approval of an ESI protocol (if applicable) will vary depending upon the circumstances of each case. Consultation with the United States Trustee and other interested parties (including the Creditors' Committee if there is one organized in the case) with respect to a proposed ESI protocol is important and should precede the filing of any motion seeking court approval of such ESI protocol. If an ESI protocol is to be pursued by the debtor, adequate notice of any motion seeking approval of

the proposed ESI protocol should be provided to creditors and other parties in interest.

- Among the provisions to consider including in an ESI protocol approval order from the Bankruptcy Court is a provision, in accordance with Federal Rule of Evidence 502(d), addressing the non-waiver of attorney-client privilege and work-product protection when ESI is disclosed.
- Approval of an ESI protocol in a particular case should not preclude the debtor or other parties from seeking additional or different treatment of ESI in appropriate circumstances. Any issues regarding requests for deviation from the protocol should be addressed in direct communications between the affected parties before any relief is sought from the Court. The order approving an ESI protocol should include a provision that the terms of the protocol are subject to further order of the Court and can be amended for cause. Although adequate notice to potentially affected creditors and interested parties should be a prerequisite to approval of any ESI protocol, approval of any such protocol is not intended to preclude parties engaged in current or future litigation with a debtor, including the debtor, from seeking ESI-related relief particularized to such litigated matter.<sup>4</sup>

#### 4. ESI Considerations During the Case

- In addition to ESI obligations in connection with adversary proceedings and contested matters, other ESI issues may arise during the case. For example, special considerations may apply with respect to personally identifiable information and patient records and other patient care information.<sup>5</sup> In addition, if there is a sale or other transfer of property of the estate, consideration should be given to preserving ESI and other data and documents, or providing for continued access by the estate to such ESI and other data and documents, following such sale or other transfer.
- If a preservation obligation arises and appropriate documents and ESI are not preserved, under the applicable rules and case law there is a real possibility of a claim of spoliation of evidence and a request for sanctions. With respect to the wide range of potential sanctions, see Section VI below.<sup>6</sup>

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4. With respect to the ESI Protocol and the ESI Protocol Approval Order, see *supra* note 2.

5. See 11 U.S.C. §§ 363(b)(1), 332, 333 (2012).

6. Although chapter 12 cases are different in many respects from chapter 11 cases, the ESI principles and guidelines set forth herein with respect to smaller chapter 11 cases may be useful to parties (including debtors-in-possession and trustees) and their counsel in chapter 12 cases. In a small chapter 12 case, the principles and guidelines in Section III of this Report discussing chapter 13 may also be instructive.

This Report does not address ESI issues in chapter 9 cases. Such cases may present unique circumstances and issues. For example, public disclosure laws such as any applicable freedom of

## SECTION III

ELECTRONIC DISCOVERY (ESI) PRINCIPLES AND GUIDELINES  
IN CHAPTER 7 AND CHAPTER 13 CASES

- Consistent with the principles underlying sections 521(a)(3) and (4) and 727(a)(3) of the Bankruptcy Code, Chapter 7 and Chapter 13 debtors should, unless otherwise justified under the circumstances of the case, not destroy information, including electronically stored information (ESI), relating to their bankruptcy case. Counsel should discuss this with their clients.
- In chapter 7 and chapter 13 cases, a guiding principle is that a debtor's obligation with respect to the preservation and production of ESI should be proportional to the resources and sophistication of the debtor, the significance of the matter to which the ESI relates, and the amount or value of the property at issue. Whether a debtor is represented by counsel is a further factor to be considered. The foregoing is hereinafter referred to as the "proportionality principle."
- The "proportionality principle" is a very important factor to keep in mind in Chapter 7 cases. In many Chapter 7 cases, ESI will not be an issue unless it is raised by the Chapter 7 trustee or another party in interest, including the Office of the United States Trustee. If debtor's counsel determines that a case is an asset case, counsel should discuss with the debtor what, if any, ESI there is relating to property of the estate. If the debtor is or was a business entity or sole proprietorship, debtor's counsel should discuss with the debtor what, if any, ESI exists that relates to property of the estate.
- A chapter 7 trustee may request a debtor to preserve ESI within the possession or control of the debtor. The chapter 7 trustee or another party in interest, including the Office of the United States Trustee, may seek an

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information act and state sunshine and open meeting laws may need to be considered. Additionally, considerations and limitations imposed by section 904 of the Bankruptcy Code may come into play in chapter 9 cases. Such topics are beyond the scope of this Report.

Similarly, this Report does not address the subject of electronic discovery (ESI) issues in Chapter 15 cases. Some of the ESI principles and guidelines discussed in this Report may apply in Chapter 15 cases, but issues of foreign law, comity, and United States public policy, all of which are beyond the scope of this Report, may also need to be considered. *See, e.g., In re Toft*, 453 B.R. 186 (Bankr. S.D.N.Y. 2011) (refusing to allow foreign representative's request on an ex parte basis to access emails of debtor stored on two internet service providers located in the United States based on 11 U.S.C. § 1506, which allows a court to refuse to take an action "if the action would be manifestly contrary to public policy of the United States"). Issues relating to international discovery considerations in the federal courts have been addressed in numerous cases. *See, e.g., Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522 (1987). Those issues may also be implicated in Chapter 15 cases. In addition, as a helpful resource and guide with respect to ESI discovery issues in cross-border disputes, see SEDONA CONF., INTERNATIONAL PRINCIPLES ON DISCOVERY, DISCLOSURE & DATA PROTECTION: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING THE PRESERVATION & DISCOVERY OF PROTECTED DATA IN U.S. LITIGATION (2011).



order from the Bankruptcy Court, as part of a request for a Bankruptcy Rule 2004 examination or otherwise, to preserve and/or turn over ESI. Relevance, reasonableness, and proportionality should be applied to any such request, depending upon the circumstances of each case.

- With respect to chapter 13 cases, in addition to documentary materials needed for purposes of complying with the debtor's duties in connection with the case, a chapter 13 debtor should, subject to the proportionality principle and reasonableness and relevance, preserve ESI concerning the same subject matter as the documentary materials required to be retained by the debtor.
- A chapter 13 trustee may request a chapter 13 debtor to preserve ESI within the possession or control of the debtor. The chapter 13 trustee or another party in interest, including the Office of the United States Trustee, may seek an order from the Bankruptcy Court to preserve and/or turn over ESI. Relevance, reasonableness, and proportionality should be applied to any such request, depending upon the circumstances of each case.
- If adversary proceedings are filed in a chapter 7 or chapter 13 case, the ESI preservation and production obligations set forth in Bankruptcy Rules 7026, 7033, 7034, and 7037 apply. If the filing of an adversary proceeding by, on behalf of, or against a chapter 7 or chapter 13 debtor is reasonably likely, counsel for the debtor should discuss with the debtor whether there is any ESI that should be preserved by the debtor in connection with such adversary proceeding. Similarly, if there is a significant contested matter to be filed by or on behalf of a chapter 7 or chapter 13 debtor or likely to be filed against or involving the debtor seeking relief for or with respect to the debtor from the Bankruptcy Court, counsel for the debtor should discuss with the debtor whether there is any ESI that should be preserved by the debtor in connection with such contested matter. In addition, debtors in chapter 7 and chapter 13 cases should understand that the chapter 7 trustee or the chapter 13 trustee (as applicable) may need identification of and access to ESI and the debtor's assistance in connection with litigation by or against the estate.
- Counsel for creditors involved in chapter 7 and chapter 13 adversary proceedings and significant contested matters should discuss with their clients whether they have in their possession ESI that should be preserved in connection with such adversary proceedings or contested matters.
- If the nature of a creditor's claim makes it foreseeable that access to documents including original documents will be needed to support or challenge the claim in litigation, the creditor should take appropriate steps to preserve such documents.

- Nothing set forth in these guidelines is intended to alter or affect any applicable privilege, including the attorney-client privilege, or the work-product protection of communications, documents, or ESI, as such doctrines exist under otherwise applicable law.

## SECTION IV

### ELECTRONIC DISCOVERY (ESI) PRINCIPLES AND GUIDELINES IN CONNECTION WITH FILING PROOFS OF CLAIM AND OBJECTIONS TO CLAIMS IN BANKRUPTCY CASES

The following are principles, guidelines, and suggested best practices with respect to ESI issues in connection with proofs of claim and objections to claims in bankruptcy cases. The guidelines and recommendations set forth herein may not be appropriate in each and every case, and there may be good reasons for taking a different approach with respect to ESI issues in a given case. These principles and guidelines are a suggested starting point for counsel and judges to consider as they assess what is appropriate under the circumstances of their particular case.

#### I. ESI PRINCIPLES APPLICABLE TO PROOFS OF CLAIM AND OBJECTIONS TO CLAIMS

**Principle 1:** The filing of a proof of claim is not a “per se” trigger of a debtor’s duty to preserve documents and electronically stored information (ESI). This principle is directly reflected in cases such as *In re Kmart Corp.*, 371 B.R. 823 (Bankr. N.D. Ill. 2007). The Working Group directly borrows from and endorses the *Kmart* court’s conclusion on this point. In larger cases, there may be hundreds or thousands of proofs of claim. Treating each of them as an independent trigger of a duty to preserve could overwhelm a debtor and lead to a conclusion that every document and every piece of ESI relating to the claim should be preserved, which is not necessary or appropriate. (See Principle 2.)

**Principle 2:** The duty to preserve arises when litigation regarding a proof of claim is reasonably anticipated. Factors to be considered in this analysis include the size of the claim, the nature of the claim (including whether it is a prepetition or an administrative claim), the specificity of the basis for the claim, and the nature and extent of the debtor’s opposition. As the court observed in *Kmart*, “the ‘duty to preserve documents in the face of pending litigation is not a passive obligation,’ but must be ‘discharged actively.’”<sup>7</sup>

**Principle 3:** The scope of the duty to preserve should be proportional to the reasonably anticipated scope of the litigation regarding the proof of claim. As with other types of disputes, the amount of a claim is an important but not de-

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7. 371 B.R. at 846 (citations omitted).

terminative factor to consider regarding the appropriate scope of preservation. Even an exceedingly large claim may not require extensive preservation efforts if the debtor or trustee disputes only some minor aspect of the claim. With respect to a creditor filing a proof of claim, the creditor should take steps to preserve a reasonable and proportional scope of documents and ESI relating to the claim, including documents and ESI that form the basis of the claim. As the possibility of an objection or other litigation with respect to the claim becomes reasonably anticipated, the creditor's preservation obligation attaches and extends to the issues raised by the objection or litigation. A creditor's preservation efforts should be reasonable in light of the nature of the dispute and proportional to the amount at issue. The scope of that obligation will vary depending upon the facts and circumstances of each case, the nature of the creditor's claim, and the nature of any actual or reasonably anticipated objection or dispute regarding the claim.

## II. ESI GUIDELINES AND SUGGESTED BEST PRACTICES REGARDING PROOFS OF CLAIM AND OBJECTIONS TO CLAIMS

### 1. The Obligation of Debtors-in-Possession and Trustees to Preserve Documents and Electronically Stored Information Relating to Claims in Chapter 11 Cases

- In the period leading up to the filing of a chapter 11 case, a debtor should preserve documents and ESI regarding reasonably anticipated subjects of claim objections and litigation with respect to claims. Those preservation efforts should be reasonable in light of the nature of the dispute and proportional to the amount at issue. If a particular issue or dispute (or type of issue or dispute) precipitated the debtor's filing, then the debtor should preserve documents and ESI reasonably likely to be relevant to litigation concerning the issue or dispute.
- The filing of a proof of claim has in a number of cases been analogized to the filing of a complaint in civil litigation.<sup>8</sup> Similarly, the filing of an objection to a claim has been analogized to the filing of an answer.<sup>9</sup> The Advisory Committee Note to Bankruptcy Rule 3007 makes it clear that the filing of an objection to a claim initiates a contested matter governed by Bankruptcy Rule 9014, unless a counterclaim is joined with the objection to the claim, in which event ordinarily an adversary proceeding subject to Part VII of the Federal Rules of Bankruptcy Procedure is commenced.

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8. See, e.g., *Smith v. Dowden*, 47 F.3d 940, 943 (8th Cir. 1995); *Simmons v. Savell*, 765 F.2d 547, 552 (5th Cir. 1985); *In re Barker*, 306 B.R. 339, 347 (Bankr. E.D. Cal. 2004); *In re Lomas Fin. Corp.*, 212 B.R. 46, 55 (Bankr. D. Del. 1997); *In re 20/20 Sport, Inc.*, 200 B.R. 972, 978 (Bankr. S.D.N.Y. 1996).

9. See *supra* note 8.

- As the term is used by the Bankruptcy Court in the *Kmart* case, the “trigger date” is the date on which the obligation to preserve documents relating to the claim at issue in the case arose.<sup>10</sup> In general, “the duty to preserve documents arises when a party is on notice of the potential relevance of the documents to pending or impending litigation, and [in general civil litigation] a party may be on notice even prior to the filing of a complaint.”<sup>11</sup>
- Accordingly, the duty of a debtor-in-possession or chapter 11 trustee to preserve documents and ESI would ordinarily arise no later than the date of the filing of an objection to a claim and often would arise earlier when the objection becomes reasonably anticipated. As a debtor-in-possession or trustee begins to evaluate potential objections to claims, it should also evaluate whether there are any corresponding preservation efforts that should be implemented.
- By way of example, in the context of the administrative claim at issue in the *Kmart* case, the Bankruptcy Court determined that the debtor-in-possession’s duty to preserve, under the facts and circumstances of that case, arose shortly after the administrative claim was filed. As the court in *Kmart* stated, “the particular administrative claim filed in this case contained sufficient information to put Kmart on notice that litigation was likely.”<sup>12</sup>
- Because in many chapter 11 cases proofs of claim are not filed directly with the debtor or chapter 11 trustee (if applicable), and because in many cases it is unclear at the time of the filing of the proof of claim whether an objection will be filed or litigation will ensue, a general rule that the duty to preserve documents and ESI arises at the time of filing a proof of claim or shortly thereafter seems neither prudent nor practical. A debtor has a duty to preserve where it or its counsel anticipates or reasonably should anticipate that litigation about a particular claim is likely. The debtor may have a duty to preserve even before the filing of a proof of claim if the debtor believes litigation about the claim is likely. The reasonableness of beliefs about the likelihood of litigation should be evaluated based not only on the content of a proof of claim but on all pertinent circumstances. If counsel for a particular creditor believes that document preservation is important with respect to litigation of its claim, counsel may expressly notify the debtor by separate written communication at the time of filing such creditor’s proof of claim and may do so even before filing its proof of claim. Such a notice from a creditor or its counsel will then need to be evaluated by counsel for the debtor-in-possession

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10. 371 B.R. at 843.

11. *Id.*

12. *Id.* at 844.

or chapter 11 trustee and appropriate steps taken depending upon whether the debtor reasonably expects objections to the proof of claim to be filed, either by the debtor or other parties in interest.

## **2. Creditor/Claimant Obligation to Preserve Documents and Electronically Stored Information Relating to Claims in Chapter 11 Cases**

- A creditor should consider preserving documents and ESI, including at a minimum documents and ESI that form the basis for the claim, as the creditor is preparing to file its proof of claim or otherwise to assert a claim in the bankruptcy case. When preparing to file a claim, ordinarily the creditor should preserve documents relating to such claim, particularly if it is likely or expected that litigation concerning such claim will result in the bankruptcy case. Among the matters to consider in assessing whether it is reasonable to anticipate an objection is the treatment of the creditor's claim on the debtor's schedules (and any amendments thereto), including the amount of the claim as scheduled by the debtor and whether the claim is listed as disputed, contingent, or unliquidated. The scope of the creditor's preservation should correspond to any anticipated objection or actual objection to the claim. The preservation efforts should be reasonable in light of the nature of the dispute and proportional to the amount at issue. As a general guideline and subject to the principles set forth above, if a proof of claim is filed, documents required to be attached to the proof of claim in accordance with Bankruptcy Rule 3001 and documents and ESI that would be needed to prove the claim affirmatively should be preserved, and if an objection to the claim is filed or reasonably anticipated by the creditor, documents and ESI relevant to the filed objection or anticipated objection should also be preserved. Each situation should be considered by the creditor's counsel based upon the facts and circumstances relating to the particular claim and the likely or expected response to such claim by the debtor-in-possession or trustee.
- A creditor has a preservation obligation with respect to documents and ESI relating to its claim that arises no later than when an objection to the claim is filed and served on the creditor. A creditor should evaluate and refine its preservation obligation based on any objection that is filed to the claim. As noted above, in many instances a creditor's preservation obligation will be triggered when a claim is filed but a debtor's preservation obligation, even for the same claim, will not be triggered until an objection is reasonably anticipated. The Working Group does not consider this temporal variation unfair. An earlier "trigger date" for a bankruptcy claimant's duty to preserve is analogous to the earlier duty, outside bankruptcy, of a prospective plaintiff who may reasonably anticipate litigation before the potential defendant.

### **3. The Obligation to Preserve Documents and Electronically Stored Information in Connection with Proofs of Claim and Objections to Claims in Chapter 7 and Chapter 13 Cases**

- To the extent that a chapter 7 or chapter 13 trustee is contemplating an objection to a claim and is in possession of documents and ESI relating to the claim, the trustee should preserve such documents and ESI. In such a circumstance, the trustee should, to the extent that he or she has not already done so, request the debtor to preserve any documents and ESI relating to the claim in question and to turn over such documents and ESI to the trustee. If a chapter 7 or chapter 13 debtor or other party in interest is contemplating filing an objection to a proof of claim, the debtor or other party in interest should preserve all documents and ESI relating to such claim. If a chapter 7 trustee needs to request the debtor to preserve and turn over documents and ESI relating to a claim in the bankruptcy case and the debtor in such case is not an individual debtor, the trustee should determine which individuals at the debtor or formerly with the debtor likely would have pertinent materials and should request that they preserve and turn over such documents and ESI. The timing and scope of such request will vary depending upon the facts and circumstances of each case and the claim in question.
- A creditor in a chapter 7 or chapter 13 case who has filed a proof of claim should consider taking steps to preserve documents and ESI relating to such claim no later than when such creditor reasonably anticipates that an objection may be raised to the claim. In addition, a creditor who files a proof of claim in a chapter 7 or chapter 13 case should preserve documents required to be attached to the proof of claim in accordance with Bankruptcy Rule 3001 and, subject to the principles set forth above, documents and ESI that would be needed to prove the claim affirmatively and documents and ESI relevant to any filed objection or reasonably anticipated objection to such creditor's claim. A creditor's preservation obligation with respect to documents and ESI relating to its claim arises no later than when an objection to the claim is filed and served on the creditor. Even before filing a proof of claim, a creditor having reason to believe that litigation will arise concerning its claim should take steps to preserve documents and ESI relating to its claim. For example, if a creditor is preparing to file a motion to lift the stay, that creditor should take steps to preserve documents and ESI relating to its claim, whether or not it has filed a proof of claim in the bankruptcy case. As another example, the debtor's listing of a mortgage arrearage amount in a chapter 13 plan may trigger a preservation obligation on the part of the mortgage creditor if the amount listed is going to be contested by the creditor. The exact timing of a creditor's obligation to preserve documents and ESI may vary depending upon the facts and circumstances of

the case and the nature of the creditor's claim (e.g., asset case v. no-asset case, secured claim v. unsecured claim, administrative or priority claim v. prepetition general unsecured claim).

## SECTION V

### ELECTRONIC DISCOVERY (ESI) PRINCIPLES AND GUIDELINES FOR CREDITORS IN BANKRUPTCY CASES

A bankruptcy case has been filed. What obligation, if any, does a creditor have to preserve documents and electronically stored information (ESI) relating to its dealings with the debtor and its claims against the debtor? The following are principles, guidelines, and suggested best practices with respect to electronic discovery issues for creditors in bankruptcy cases. The guidelines and recommendations set forth herein may not be appropriate in each and every case, and there may be good reasons for taking a different approach with respect to ESI issues in a given case. Hopefully, the following principles and guidelines will provide a helpful starting point for creditors and their counsel to consider.

#### I. ESI PRINCIPLES FOR CREDITORS WHEN CONFRONTED WITH A BANKRUPTCY FILING BY A DEBTOR

**Principle 1: The duty to preserve ESI and other evidence applies in connection with bankruptcy cases. The timing and scope of such duty will vary from case to case.** Creditors and other non-debtor parties in interest have an obligation to preserve ESI and other evidence relating to contested matters, adversary proceedings, and other disputed matters that are, or are likely to be, the subject of litigation in or in connection with the bankruptcy case. With respect to documents and ESI relating to a creditor's claim against a debtor who has filed bankruptcy, the creditor should, if it decides to file a claim or it reasonably believes that its claim is likely to be the subject of a dispute, take steps to preserve a reasonable and proportional scope of such documents and ESI, including documents and ESI that form the basis of its claim.

**Principle 2: The filing of a bankruptcy case does not require a creditor to preserve every document or piece of information in its possession relating to the debtor or its dealings with the debtor.** The mere filing of the bankruptcy case will not ordinarily by itself trigger a creditor's duty to preserve documents and ESI regarding its various dealings with the debtor. However, if the creditor reasonably anticipates litigation with the debtor, a duty of the creditor to preserve documents and ESI relating to such litigation or potential litigation arises.

**Principle 3: Proportionality considerations should apply with respect to a creditor's obligation to preserve documents and ESI in connection with bankruptcy cases.** The scope of a creditor's preservation obligation, if and when it arises, does not automatically include every document or piece of information in the creditor's possession, custody, or control concerning the debtor.

A rule of reasonableness should apply. The scope of the duty to preserve should be proportional to the reasonably anticipated scope of the matters at issue or expected to be at issue. A creditor's obligation with respect to preservation of documents and ESI should be proportional to the significance, financial and otherwise, of the creditor's claim or the matter in dispute and the need for production of such documents and ESI in the matter. A creditor's preservation efforts should be reasonable in light of the facts and circumstances in each particular case.

## II. ESI GUIDELINES AND SUGGESTED BEST PRACTICES FOR CREDITORS AND THEIR COUNSEL WHEN A DEBTOR FILES A BANKRUPTCY CASE

- The filing of a bankruptcy case by a debtor is not by itself the commencement of litigation against a creditor. Therefore, a creditor is not obligated to institute a litigation hold with respect to its documents and ESI relating to the debtor based solely upon a bankruptcy petition being filed by the debtor. However, upon the filing of a bankruptcy petition, the creditor should assess whether it reasonably anticipates adversary proceedings, contested matters, or other disputed matters that are likely to be the subject of litigation with the debtor. The creditor should consider consulting with legal counsel regarding such issues, including implementing a litigation hold to preserve a reasonable and proportional scope of documents and ESI if the duty to preserve is triggered.
- The scope of a creditor's preservation obligation when it arises extends to matters at issue or in dispute, or reasonably anticipated to be at issue or in dispute, in or in connection with the debtor's bankruptcy case. The scope of a creditor's preservation obligation may change during the course of the bankruptcy case as new issues arise.
- Once an adversary proceeding, contested matter, or other litigated matter is reasonably anticipated by a creditor or commenced against a creditor, a duty of the creditor to preserve documents and ESI relating to such matter arises. The scope of that obligation is subject to reasonableness and proportionality considerations, which will vary depending upon the specific circumstances of each particular matter.
- A creditor's preservation efforts should be reasonable in light of the nature of the dispute and proportional to the amount at issue. Principle 3 above provides additional guidance with respect to the concept of proportionality. Once an adversary proceeding or contested matter is filed, the obligations set out in the applicable Bankruptcy Rules and Federal Rules of Civil Procedure with respect to ESI apply.<sup>13</sup> The parties to any such contested matter or adversary proceeding are encouraged to

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13. See Bankruptcy Rules 7026, 7033, 7034, 7037, 9014, and 9016 and the corresponding Federal Rules of Civil Procedure incorporated thereby.



work cooperatively on document and ESI preservation and production efforts.

- With respect to proofs of claim and claims litigation, a creditor should consider preserving documents and ESI, including at a minimum documents and ESI that form the basis for its claim, as the creditor is preparing to file a proof of claim or otherwise assert its claim in the bankruptcy case. A creditor has a preservation obligation with respect to documents and ESI relating to its claim that arises no later than when an objection to the claim is filed and served on the creditor. A creditor should evaluate and refine its preservation obligation based on the objection that is actually filed to the claim. When preparing to file a claim in a bankruptcy case, a creditor should consider taking steps to preserve documents and ESI relating to the claim if such creditor reasonably anticipates that an objection may be raised to the claim. Among the matters to consider in assessing whether it is reasonable to anticipate an objection is the treatment of the creditor's claim on the debtor's schedules (and any amendments thereto), including the amount of the claim as scheduled by the debtor and whether the claim is listed as disputed, contingent, or unliquidated. A creditor's preservation efforts should be reasonable in light of the nature of the objection that is filed or reasonably anticipated and should be proportional to the amount at issue. If a proof of claim is filed, documents required to be attached to the proof of claim in accordance with Bankruptcy Rule 3001 and documents and ESI that would be needed to prove the claim affirmatively should be preserved, and if an objection to the claim is filed or reasonably anticipated by the creditor, documents and ESI relevant to the filed objection or anticipated objection should also be preserved.
- If a creditor is put on notice of a potential dispute or litigation by a trustee or debtor-in-possession, such creditor should consult with counsel about such notice and how to respond, including whether a document and ESI preservation obligation arises and, if so, what steps should be taken to implement it. Similarly, if a creditor is put on notice that certain documents and other information including ESI should be preserved, the creditor should again consult counsel with respect to its response thereto including any potential preservation obligation. It is important that a creditor take appropriate steps to preserve documents and ESI if a preservation obligation arises.
- Other procedural settings in which a preservation obligation may arise include a Bankruptcy Rule 2004 examination or the receipt of a non-party subpoena. If a creditor is the target of a Rule 2004 examination or otherwise receives a subpoena, the creditor should consult counsel about its obligations in response thereto, including a document and ESI preservation obligation.

- If a preservation obligation arises and appropriate documents and ESI are not preserved, under the applicable rules and case law there is a real possibility of a claim of spoliation of evidence and a request for sanctions. With respect to the wide range of potential sanctions, see Section VI below.

## SECTION VI

### **RULES AND PROCEDURES WITH RESPECT TO ELECTRONICALLY STORED INFORMATION (ESI) IN ADVERSARY PROCEEDINGS AND CONTESTED MATTERS IN BANKRUPTCY CASES**

The Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) contain a number of rules relating to ESI in adversary proceedings and contested matters in bankruptcy cases. These rules incorporate by reference provisions from the Federal Rules of Civil Procedure relating to the discovery and production of ESI, the failure to comply with such discovery requirements, and associated sanctions. In addition, the federal rule of civil procedure relating to subpoenas, Rule 45, including its ESI provisions, is also incorporated into bankruptcy practice through Bankruptcy Rule 9016. Supplementing the Federal Rules of Civil Procedure incorporated into bankruptcy practice through the applicable Bankruptcy Rules in adversary proceedings and contested matters, there are also various Bankruptcy Court local rules applicable to ESI that need to be consulted.

Part VII of the Bankruptcy Rules applies to adversary proceedings brought in bankruptcy cases. A number of the Part VII Bankruptcy Rules incorporate by reference and make applicable to adversary proceedings specific federal rules of civil procedure. Such rules include those federal rules of civil procedure relating to discovery and production of ESI and sanctions relating to the failure to produce required information. With respect to the ESI obligations of parties in adversary proceedings, the following rules are applicable:

- Bankruptcy Rule 7026 incorporating Federal Rule of Civil Procedure 26, including, specifically with respect to ESI, Rule 26(a)(1)(A)(ii), Rule 26(b)(2)(B), and Rule 26(f)(3)(C).
- Bankruptcy Rule 7033 incorporating Federal Rule of Civil Procedure 33, including, specifically with respect to ESI, Rule 33(d).
- Bankruptcy Rule 7034 incorporating Federal Rule of Civil Procedure 34, including, specifically with respect to ESI, Rule 34(a)(1)(A) and Rule 34(b)(1)(C) and (2)(D) and (E).
- Bankruptcy Rule 7037 incorporating Federal Rule of Civil Procedure 37, including, specifically with respect to ESI, Rule 37(e).

With respect to contested matters in bankruptcy cases, certain Part VII Bankruptcy Rules are incorporated and apply in such matters.<sup>14</sup> Included among the

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14. See FED. R. BANKR. P. 9014(c).

rules that apply in contested matters are Bankruptcy Rules 7026, 7033, 7034, and 7037, all referenced above. Accordingly, unless the Bankruptcy Court otherwise directs, the same ESI discovery rules and sanction rules with respect to ESI and other document discovery apply in contested matters in bankruptcy cases.<sup>15</sup>

Bankruptcy Rule 9016 incorporates Federal Rule of Civil Procedure 45, the federal rule with respect to subpoenas, into bankruptcy practice. Rule 45 applies in both adversary proceedings and contested matters. It also applies in connection with Bankruptcy Rule 2004 examinations.<sup>16</sup> Rule 45 specifically addresses ESI in several places.<sup>17</sup>

Counsel will also need to consult local rules of procedure with respect to electronic discovery and other issues relating to ESI. For example, in the District of Delaware, the Bankruptcy Court for the District of Delaware has adopted a rule noting that court's "expect[ation] that parties to a case will cooperatively reach agreement on how to conduct e-discovery," and detailing "default standards" by which any e-discovery will be conducted if by the Federal Rule of Civil Procedure 16 scheduling conference agreement has not been reached about the conduct of such discovery.<sup>18</sup> The local rules of each jurisdiction need to be consulted as to whether they have any local rules applicable to ESI issues in cases pending in that jurisdiction.

General federal civil litigators will be familiar with the ESI provisions contained in the Federal Rules of Civil Procedure and the case law interpreting those rules. Bankruptcy lawyers will need to become familiar with those rules to the extent that ESI issues arise in bankruptcy cases and in particular in adversary proceedings and contested matters.

A number of bankruptcy courts have addressed ESI issues and spoliation and sanction claims related thereto in bankruptcy cases. Each case presents its own unique set of facts, but they illustrate that sanctions may be imposed in appropriate circumstances. A sampling of those cases appears below.<sup>19</sup>

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15. Note should be made that, as set forth in Bankruptcy Rule 9014(c), certain subparts of Federal Rule of Civil Procedure 26 do not apply in contested matters unless the Bankruptcy Court otherwise directs.

16. See FED. R. BANKR. P. 2004(c).

17. See FED. R. CIV. P. 45(a)(1)(A)(iii), (C), and (D), 45(b)(1), 45(c)(2)(A) and (B), 45(d)(1).

18. DEL. BANKR. CT. LOCAL RULE 7026-3, "Discovery of Electronic Documents (E-Discovery)."

19. See, e.g., *Herzog v. Zyen, LLC* (*In re Xyience Inc.*), No. BK-S-08-10474, Adv. No. 09-1402, 2011 Bankr. LEXIS 4251 (Bankr. D. Nev. Oct. 28, 2011) (imposing monetary sanctions to reimburse plaintiff-trustee's expenses, costs, and reasonable attorney's fees); *Harmon v. Lighthouse Capital Funding, Inc.* (*In re Harmon*), No. 10-33789, Adv. No. 10-03207, 2011 Bankr. LEXIS 323 (Bankr. S.D. Tex. Jan. 26, 2011) (sanction deeming a particular fact established in plaintiff's favor awarded against defendant in adversary proceeding); *In re Global Technovations, Inc.*, 431 B.R. 739 (Bankr. E.D. Mich. 2010) (court declined to grant terminating sanctions, adverse inference instruction, or monetary sanctions; sanctions found to be inappropriate under facts of this case); *GFI Acquisition, LLC v. Am. Federated Title Corp.* (*In re A&M Fla. Props. II, LLC*), No. 09-15173, Adv. No. 09-01162, 2010 Bankr. LEXIS 1217 (Bankr. S.D.N.Y. Apr. 7, 2010) (court declined to order dismissal or grant adverse inference instruction; monetary sanctions awarded); *Sabertooth, LLC v. Simons* (*In re Venom, Inc.*), No. 09-10445, Adv. No. 09-0006, 2010 Bankr. LEXIS 723 (Bankr. E.D. Pa. Mar. 9, 2010) (attorneys' fees awarded as sanction; request to preclude evidence

## CONCLUSION

It has been the goal of the Working Group to present a Best Practices Report and a set of principles and guidelines with respect to electronic discovery and ESI issues in bankruptcy cases. Because electronic discovery is a rapidly developing area of the law, and one unfamiliar to many bankruptcy attorneys and their clients, it is hoped that these materials will provide a helpful resource guide. It is further hoped that this Report will engender further discussion and thoughtful analysis and commentary on the matters addressed in the Report and other ESI-related issues in bankruptcy cases. Undoubtedly new court rules and case law will be forthcoming addressing ESI-related issues in bankruptcy cases. The Working Group has prepared this Report to serve as a starting point for judges, attorneys, and academics when considering and addressing issues related to electronic discovery and ESI in bankruptcy cases.

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denied); *Chrysler Fin. Servs. Ams. LLC v. Hecker* (*In re Hecker*), 430 B.R. 189 (Bankr. D. Minn. 2010) (entry of judgment that debtor's debt to plaintiff was not dischargeable imposed as sanction); *Grochocinski v. Schlossberg* (*In re Eckert*), 402 B.R. 825 (N.D. Ill. 2009) (facts alleged by trustee taken as proof against defendant and defendant precluded from offering testimony or other evidence in opposition; monetary sanctions also awarded); *Springel v. Prosser* (*In re Prosser*), No. 06-30009, 2009 Bankr. LEXIS 3209 (Bankr. D.V.I. Oct. 9, 2009) (court disallowed all of debtor's claimed exemptions); *In re Riverside Healthcare, Inc.*, 393 B.R. 422 (Bankr. M.D. La. 2008) (sanction for alleged spoliation held to be inappropriate); *In re Kmart Corp.*, 371 B.R. 823 (Bankr. N.D. Ill. 2007) (request for default judgment or adverse inference instruction denied but attorneys' fees awarded as sanction); *United States v. Krause* (*In re Krause*), 367 B.R. 740 (Bankr. D. Kan. 2007) (partial default judgment entered as sanction in adversary proceeding); *Shaw Grp., Inc. v. Next Factors, Inc.* (*In re Stone & Webster, Inc.*), 359 B.R. 102 (Bankr. D. Del. 2007) (request for sanctions denied); *Quintus Corp. v. Avaya, Inc.* (*In re Quintus Corp.*), 353 B.R. 77 (Bankr. D. Del. 2006) (entry of judgment against defendant imposed as sanction in adversary proceeding); *Oscher v. Solomon Tropp Law Group P.A.* (*In re Atl. Int'l Mortg. Co.*), 352 B.R. 503 (Bankr. M.D. Fla. 2006) (entry of default judgment in adversary proceeding was too drastic a sanction; monetary sanctions imposed).

## BIBLIOGRAPHY

### USEFUL ELECTRONIC DISCOVERY RESOURCES

*The Sedona Principles: Second Edition*, SEDONA CONF. (June 2007), <https://thesedonaconference.org/download-pub/81> (agree to terms; then click “Download”).

*The Sedona Conference Glossary: E-Discovery & Digital Information Management*, SEDONA CONF. (3d ed. Sept. 2010), <https://thesedonaconference.org/download-pub/471> (agree to terms; then click “Download”).

ELEC. DISCOVERY REFERENCE MODEL, <http://www.edrm.net/> (last visited July 24, 2013).

SEVENTH CIRCUIT ELEC. DISCOVERY PILOT PROGRAM, <http://www.discoverypilot.com/> (last visited July 24, 2013).

*Default Standard for Discovery*, U.S. DIST. CT. FOR DIST. DEL. (Dec. 8, 2011), <http://www.ded.uscourts.gov/court-info/local-rules-and-orders/guidelines>.

*Best Practices in E-Discovery in New York State and Federal Courts*, N.Y. ST. B. ASS’N (July 2011), <http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=58331&Template=/CM/ContentDisplay.cfm>.

DISCOVERY RES., <http://www.discoveryresources.org/> (last visited July 24, 2013).

K&L Gates, ELEC. DISCOVERY L., <http://www.ediscoverylaw.com/> (last visited July 24, 2013).

Anne Kershaw et al., *EDI’s Judges’ Guide to Cost-Effective E-Discovery*, ELEC. DISCOVERY INST., [http://www.ediscoveryinstitute.org/publications/edis\\_judges\\_guide\\_to\\_cost-effective\\_e-discovery](http://www.ediscoveryinstitute.org/publications/edis_judges_guide_to_cost-effective_e-discovery) (log in; then click “Download this publication”) (last visited July 24, 2013).

Barbara J. Rothstein et al., *Managing Discovery of Electronic Information: A Pocket Guide for Judges*, FED. JUD. CTR. (2d ed. 2012), [http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt2d\\_eb.pdf/\\$file/eldscpkt2d\\_eb.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt2d_eb.pdf/$file/eldscpkt2d_eb.pdf).

## Appendix 1

### \*\*\* TEMPLATE FOR ESI PROTOCOL \*\*\*

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF [STATE]

	)
In re:	)
	)
[DEBTOR(S)]	)
	)
Debtors.	)
	)

### ELECTRONICALLY STORED INFORMATION PROTOCOL

Following consultation with the Official Committee of Unsecured Creditors, the Office of the United States Trustee, and other parties in interest [including \_\_\_\_\_], the Debtors have agreed to this protocol with respect to the preservation of electronically stored information (“ESI”). This protocol (the “ESI Protocol”) is intended to provide information and identify a general framework regarding the Debtors’ plans for the preservation and handling of ESI. The Debtors intend to present this ESI Protocol to the Bankruptcy Court for approval.

#### I. GENERAL PROVISIONS

This ESI Protocol is intended to provide general information to parties in interest in order to minimize requests and demands to the Debtors regarding issues related to ESI. This ESI Protocol is not an agreement by the Debtors to produce any particular type or scope of ESI in an adversary proceeding, contested matter, or other dispute. Nothing in this ESI Protocol waives any of the Debtors’ rights concerning ESI or otherwise under applicable law or rules, including the Bankruptcy Rules, incorporated Federal Rules of Civil Procedure, or local rules. The Debtors will use reasonable and good faith efforts to preserve and produce a reasonable and proportional scope of ESI in appropriate matters. The Debtors and other parties shall be expected to use reasonable and good faith efforts to limit requests for ESI to a reasonable and proportional scope, which may include limits on the number of custodians, date limits, file type limits, and other limits or agreements that are appropriate under the circumstances.

## II. OVERVIEW OF DEBTORS' ELECTRONIC INFORMATION SYSTEMS AND PRESERVATION EFFORTS

### A. The Debtors maintain the following electronic information systems:

[In this section, *consider* disclosing information regarding:

- General information regarding operating systems
- What email system the Debtors use (e.g., Outlook or Lotus Notes)
- Whether there is automatic overwriting or deletion of user mailboxes based on date or size limitations
- Whether the Debtors maintain a general email archive or repository and, if yes, what are the parameters
- Typical organization/storage of non-email documents—e.g., is there a document management system, do users have a dedicated/portioned network directory location, shared locations/etc.
- What database information the Debtors maintain—e.g., ERP/finance/accounting/inventory/HR/etc.
- Any proprietary/industry specific/custom systems]

### B. The Debtors' preservation efforts to date include:

[In this section, *consider* disclosing information regarding:

- Any specific preservation efforts requested by the Committee/U.S. Trustee/etc. to which the Debtors have agreed
- Any other general preservation efforts that the Debtors may have implemented, which *might* include
  - Snapshots/copies of servers or systems
  - Mailbox snapshots for individual custodians, which might include senior management or other employees, that the Debtors know will be relevant to particular matters in the case
  - Any collection/snapshot of non-email documents for custodians (e.g., copies of network directory locations for individual custodians)
  - Preservation/collection from non-custodian-based sources such as database systems
  - Whether the Debtors have taken backup tapes out of rotation and, if so, the nature and date
- Any large collections/databases the Debtors maintain—e.g., if there is a large litigation-related database, the Debtors might consider disclosing the custodians and collection time periods related to that

- Any preservation efforts the Debtors have implemented for significant litigation/anticipated litigation (but unless there is a small number, not every single matter for which they have implemented a litigation hold)]
- C. The Debtors consider the following data sources to be not reasonably accessible because of undue burden or cost and do not intend to preserve or produce from the following:  
[In this section, the following, based largely on the Delaware default standard, might be considered:
- Deleted, slack, fragmented, or other data only accessible by forensics
  - Random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system
  - On-line access data such as temporary Internet files, history, cache, cookies, and the like
  - Metadata other than as provided in Section III below, specifically including data in metadata fields that are frequently updated automatically, such as last-opened dates
  - Backup data that are substantially duplicative of data that are more accessible elsewhere
  - Voicemail and other voice messages (except as may be routinely generated as attachments to emails that are themselves preserved)
  - Instant messages that are not ordinarily printed or maintained in a server dedicated to instant messaging
  - Text messages
  - Electronic mail or pin-to-pin messages sent to or from mobile devices (e.g., iPhone and Blackberry devices), provided that a copy of such mail is routinely saved elsewhere
  - Other electronic data stored on a mobile device, such as calendar or contact data or notes, provided that a copy of such information is routinely saved elsewhere
  - Logs of calls made from mobile devices
  - Server, system, or network logs
  - Electronic data temporarily stored by laboratory equipment or attached electronic equipment, provided that such data is not ordinarily preserved as part of a laboratory report
  - Data remaining from systems no longer in use that is unreadable or unusable on the systems in use]



The Debtors reserve the right to supplement or amend the foregoing and to identify other sources of not reasonably accessible data in individual matters.

### III. INTENDED STANDARD FORM OF PRODUCTION

For matters requiring production of any significant volume of ESI, unless otherwise agreed to by the parties or ordered by the court, the Debtors intend to produce in the following format and to request production in the following format:

- **General format** - Subject to the exceptions below, ESI will be provided as single-page TIFF format utilizing Group 4 compression with at least 300 dots per inch resolution. Images shall be reduced by up to 10% to allow for a dedicated space for Bates numbering and any other electronic stamping or document designations (such as those pertaining to confidentiality).
- **General Metadata Load File Format** - All produced ESI documents shall be accompanied by metadata load files that shall be delimited with the following data fields:
  - Beginning Document Number;
  - Ending Document Number;
  - BegAttach (the Beginning Document Number of the parent document);
  - EndAttach (the Ending Document Number of the last attachment);
  - Custodian;
  - Page Count;
  - MD5; and
  - Extracted Text.
- **Non-email Metadata Load File** - In addition to the general metadata fields contained above, the metadata load file for all non-email ESI (including attachments to emails and loose files) shall, where available, also contain the following data fields:
  - FileExt (the extension of the filename, e.g., “DOC” for an MS Word document);
  - Filename (the original filename);
  - Filepath;
  - Date Created;
  - Date Last Modified;

- Author; and
- Native Path (relative path to the native version of the ESI when a native version is delivered (e.g., Excel/PowerPoint files)).
- **Email Metadata Load File** - In addition to the general metadata fields contained above, the metadata load file for all email ESI shall, where available, also contain the following data fields:
  - PST or NSF File Name;
  - To;
  - From;
  - Cc;
  - Bcc;
  - Date Sent;
  - Date Received; and
  - Subject Line.
- **Exceptions** - Because Microsoft Excel and PowerPoint files are not amenable to production in the formats above, the Debtors will produce Microsoft Excel files in native format. A placeholder image will be included with the TIFF files indicating the Bates number of the document and that the document was produced in native format. Certain other file types (e.g., program, video, database, sound files, etc.) are also not amenable to conversion into TIFF format. In general, these types of files will not be collected or processed. When present in a collection, however, such documents will be represented in the form of a placeholder TIFF image and will be produced in a reasonably usable form upon a showing of need. Debtors will use reasonable and good faith efforts to address production of any other types of documents that reasonably should be produced in a particular matter but that might not be amenable to production in the foregoing format (e.g., oversized documents).

The Debtors reserve the right to supplement or modify the intended or requested form of production in individual matters. For smaller matters and/or those with lower volumes of ESI, the Debtors may produce in any reasonably useable format, which could include native production or searchable .pdfs. In addition, the Debtors will consider and discuss in good faith any requests for production in formats other than as set forth above.

#### IV. DESIGNATION OF ESI LIAISONS

Any questions or issues regarding the Debtors' handling of ESI should be directed to:

[identification and contact information for Debtors' ESI liaison, which can be a client representative and/or an attorney at the law firm serving as Debtors' counsel] ("Debtors' ESI Liaison").

Any party directing any such question or issue to the Debtors or requesting the preservation or production of ESI by the Debtors, or from whom the Debtors request preservation or production of ESI, should designate their own ESI liaison in a writing directed to Debtors' ESI Liaison. Absent agreement to the contrary by the Debtors and the other party, all requests and communications regarding ESI should ordinarily be accomplished through the ESI Liaisons.

## V. MISCELLANEOUS PROVISIONS

- A. The "safe harbor" provisions of Federal Rule of Civil Procedure 37(e), Federal Rule of Bankruptcy Procedure 7037, and the Advisory Committee Notes to Rule 37(e) shall be applicable to this ESI Protocol and the Debtors' preservation efforts. Consistent with the foregoing, the Debtors shall not be in violation of this ESI Protocol, or the Order of the Bankruptcy Court approving the ESI Protocol (the "Protocol Approval Order"), if, despite the Debtors' good faith efforts to comply with their preservation undertakings in this ESI Protocol, any documents or ESI are altered, lost, overwritten, or destroyed as a result of the Debtors' routine, good faith operation of their information or computer systems. This includes, but is not limited to:
  - (1) good faith upgrading, loading, reprogramming, customizing, or migrating software;
  - (2) good faith inputting, accessing, updating, or modifying data in an accounting or other business database maintained on an individual transaction, invoice, or purchase order basis in an accounting or other business database; and
  - (3) good faith editing, modifying, updating, or removal of an internet site.
- B. The Debtors may use any reasonable method to preserve documents and ESI consistent with the Debtors' record management systems, routine computer operation, ordinary business practices, and the scope of preservation set forth in this ESI Protocol. Ordinarily, the Debtors will preserve in native format or some other reasonably useable format that preserves available metadata of the type specified in Section III above. The Debtors will act in good faith and may not transfer documents and ESI to another form solely for the purpose of increasing the burden of discovery for creditors or other interested parties.
- C. This ESI Protocol does not obligate the Debtors to segregate specific documents or ESI from other documents or ESI where they presently

- reside. This ESI Protocol does not obligate the Debtors to mirror image any media or to image documents maintained in paper form.
- D. Nothing in this ESI Protocol shall constitute a waiver by the Debtors or any other interested party of any claim of privilege or other protection from discovery. In particular, no inadvertent production of any document or ESI that the producing party contends is privileged shall constitute a waiver of that privilege. It is intended that the Protocol Approval Order will contain clawback and non-waiver provisions pursuant to Rule 502 of the Federal Rules of Evidence.
- E. This ESI Protocol and the Protocol Approval Order do not address, limit, or determine the relevance, discoverability, or admissibility of any document or ESI, regardless of whether any such document or ESI is intended to be preserved pursuant to the terms of this ESI Protocol. Neither the Debtors nor any party in interest waive any objections as to the production, discoverability, or confidentiality of documents and ESI preserved pursuant to this ESI Protocol.
- F. As stated above, it is intended that this ESI Protocol will be presented to the Bankruptcy Court for approval. This ESI Protocol and the Protocol Approval Order may be modified, amended, or supplemented by further order of the Bankruptcy Court after proper notice of any request therefor. Nothing herein or in the Protocol Approval Order shall limit or otherwise affect the right (to the extent that any such right may otherwise exist under applicable law) to obtain or otherwise seek production of documents and ESI from the Debtors under applicable law. Nothing contained herein or in the Protocol Approval Order shall limit, preclude, or otherwise affect the entry of, or the terms and provisions of, stipulations and orders entered in adversary proceedings, contested matters, or other litigation involving the Debtors, or other agreements between the parties thereto, regarding document and ESI preservation, production, and/or discovery procedures. In the event of any conflicting terms, the terms of any such stipulations, orders, or agreements shall govern in such adversary proceedings, contested matters, or other litigation.

Dated: \_\_\_\_\_

[Debtors]

by: \_\_\_\_\_

**Appendix 2**  
**\*\*\* MODEL FORM OF ESI PROTOCOL**  
**APPROVAL ORDER \*\*\***

IN THE UNITED STATES BANKRUPTCY COURT  
 FOR THE DISTRICT OF [STATE]

In re:  <div style="text-align: center; padding: 10px 0;">[DEBTOR(S)]</div> <div style="text-align: right; padding: 10px 0;">Debtors.</div>	) ) ) ) ) ) )
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**ORDER APPROVING ELECTRONICALLY  
 STORED INFORMATION (ESI) PROTOCOL  
 AND ADDRESSING NON-WAIVER OF ATTORNEY-CLIENT  
 PRIVILEGE AND WORK-PRODUCT PROTECTION PURSUANT  
TO RULE 502(d) OF THE FEDERAL RULES OF EVIDENCE**

Upon the Debtors' Motion for Order Approving Electronically Stored Information (ESI) Protocol (the "Motion") and the other pleadings and proceedings herein; due and adequate notice of the Motion having been provided and a hearing having been held before this Court on \_\_\_\_\_; it appearing that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and all other parties in interest; after due deliberation and sufficient cause appearing therefor, it is, by the United States Bankruptcy Court for the District of \_\_\_\_\_, HEREBY ORDERED THAT:

1. The Electronically Stored Information (ESI) Protocol, a copy of which is attached hereto as Exhibit 1 (the "ESI Protocol"), is approved.
2. Pursuant to Fed. R. Evid. 502(d) and (e), the disclosure during discovery or other voluntary production of any communication or information including electronically stored information (hereinafter "Document") by any of the Debtors or any other party in this case that is protected by the attorney-client privilege ("Privilege" or "Privileged," as the case may be) or work-product protection ("Protection" or "Protected," as the case may be), as defined by Fed. R. Evid. 502(g), shall not waive the Privilege or Protection for either that Document or the subject matter of that Document, unless there is an intentional waiver under Fed. R. Evid. 502(a)(1), in which event the scope of any such waiver shall be

determined by Fed. R. Evid. 502(a)(2) and (3). Unless otherwise ordered by this Court, this provision shall displace the provisions of Fed. R. Evid. 502(b)(1) and (2) in this case.

3. Except when the requesting party contests the validity of the underlying claim of Privilege or Protection, any Document the party producing the Document claims as Privileged or Protected shall, upon written request, promptly be returned to the producing party and/or destroyed, at the producing party's option. If the underlying claim of Privilege or Protection is contested, the requesting party and the producing party shall comply with, and may promptly seek a judicial determination of the matter pursuant to, Fed. R. Civ. P. 26(b)(5)(B). In assessing the validity of any claim of Privilege or Protection, this Court shall not consider the provisions of Fed. R. Evid. 502(b)(1) and (2), but shall consider whether timely and otherwise reasonable steps were taken by the producing party to request the return or destruction of the Document once the producing party had actual knowledge of (i) the circumstances giving rise to the claim of Privilege or Protection and (ii) the production of the Document in question. For purposes of this paragraph, "destroyed" shall mean that the paper versions are shredded, that active electronic versions are deleted, and that no effort shall be made to recover versions that are not readily accessible, such as those on backup media or only recoverable through forensic means. For purposes of this paragraph, "actual knowledge" refers to the actual knowledge of an attorney with lead responsibilities in this case or in the adversary proceeding or contested matter if applicable.
4. The ESI Protocol and the terms of this Order may be modified, amended, or supplemented for cause by further order of this Court after due and proper notice. In addition, the entry of this Order shall not preclude the entry of case- or matter-specific ESI-related orders in future litigated matters.
5. This Court retains jurisdiction with respect to all matters arising from or related to this Order.

Dated: \_\_\_\_\_

UNITED STATES BANKRUPTCY JUDGE  
FOR THE DISTRICT OF \_\_\_\_\_

## Data Preservation and Collection Questionnaire

Litigation Support Consultant: \_\_\_\_\_ Date: \_\_\_\_\_

Client/Matter Name & Number: \_\_\_\_\_

**Purpose:** This questionnaire is designed to serve as the starting point of a discussion with a client regarding the identification, preservation, collection and processing of electronically stored information ("ESI") for discovery. Many of the questions below are geared toward and may best be answered by a client's Information Technology ("IT") personnel. It is recommended that a representative from the Litigation Support Department participate in discussions with the client's IT personnel.

### CONTACTS

[Law Firm]: \_\_\_\_\_

\_\_\_\_\_

Client Legal Dept: \_\_\_\_\_

\_\_\_\_\_

Client IT Dept: \_\_\_\_\_

\_\_\_\_\_

### GENERAL INFORMATION

What is the relevant time frame? \_\_\_\_\_

Has a preservation notice been circulated?	Yes	No
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Is a formal Litigation Hold in place?	Yes	No
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Does client need sample Preservation/Litigation Hold notices?	Yes	No
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Are any other legal holds in place which overlap with this matter and might enable use of ESI that has already been collected?	Yes	No
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Has backup tape rotation been suspended?	Yes	No
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Have data or records destruction and auto-deletion policies been suspended?	Yes	No
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Are there concerns that ESI has been intentionally destroyed in this matter?	Yes	No
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Are we seeking to collect deleted data? Yes No

Do we need to scan/search unallocated space? Yes No

### CUSTODIAN INFORMATION

Can you provide an organizational chart for the company? Yes No

Total number of custodians' ESI to collect? \_\_\_\_\_

**Custodian Names:**

**Custodian Locations:**

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## 2017 SOUTHEAST BANKRUPTCY WORKSHOP

Are there custodians who have relevant ESI who are not on the network (e.g., former employees or consultants)?

Yes    No

Custodian Names:

Custodian Locations:

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Is there a need to create a watch list of personnel who may be leaving the company?

Yes    No

### NETWORK SYSTEMS

#### General:

Who is responsible for network operations/administration? \_\_\_\_\_

Describe the network infrastructure and logical organization of ESI, including locations of user files, shared drives or storage areas (centralized system, data center, file/email/apps/web/ftp servers):

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Can you provide a network topology or server map?

Yes    No

Is there a written computer use policy?

Yes    No

Where is the data center(s) located? \_\_\_\_\_

Can ESI be harvested from one central location? \_\_\_\_\_

What is the bandwidth/data transmission rate at company locations? \_\_\_\_\_

What is the name and version of the network operating system? \_\_\_\_\_

Can users access the network remotely? If so, how? \_\_\_\_\_

**Email System:**

What email application is currently in use? \_\_\_\_\_

Are there size limits on user mailboxes? Yes No

What happens when a mailbox exceeds limit? \_\_\_\_\_

Is email archived by the user or force archived? \_\_\_\_\_

Where are archived PST files saved? \_\_\_\_\_

How long does active email remain on server? \_\_\_\_\_

Are there any auto-delete policies affecting email? Yes No

For Outlook Exchange, is the "dumpster" function active? Yes No

If yes, what is the dumpster set to? \_\_\_\_\_

For Outlook, is journaling turned on? Yes No

If yes, when was it turned on? \_\_\_\_\_

Can users create personal folders within mailbox? Yes No

Are there any public/shared email folders which need to be examined for this matter? Yes No

Has the current email system been in place during the relevant time period? Yes No

If not, describe prior system: \_\_\_\_\_

\_\_\_\_\_

**Blackberry Service:**

Do users have blackberries? Yes No

Does blackberry email pass through email server? Yes No

Can pin to pin messages be sent? Yes No

Are pin to pin messages retained? Yes No

**Email Retention/Archiving System:**

Is there an email retention/archiving system in place? Yes No

Name and version of application: \_\_\_\_\_

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When were emails first retained/archived using this system? \_\_\_\_\_

Does system save only one copy or all copies of an email? \_\_\_\_\_

Is there a deletion schedule for the email archive? Yes No

### **Local Desktop/Workstations:**

Describe PC or laptop workstations currently in use: \_\_\_\_\_

Is the default save location "My Documents"? Yes No

Can users save to other local hard drive locations? Yes No

Can folders be identified? Yes No

Is the USB, CD/DVD or floppy drive active? Yes No

Is there a need to collect any loose media? Yes No

Are PCs or laptops ever re-imaged or replaced? Yes No

Explain: \_\_\_\_\_

\_\_\_\_\_

**\*\* Client IT Staff: Please gather user machine names and verify locations of custodians for this project \*\***

### **Network Personal Shares (home share, user share):**

File server physical location: \_\_\_\_\_

Does every user have a personal share? Yes No

What, if any, size limits apply to personal shares? \_\_\_\_\_

Should the entire personal share be collected? Yes No

If not, specify files/folders to collect: \_\_\_\_\_

Provide a list of the file types, if any, to exclude from collection: \_\_\_\_\_

\_\_\_\_\_

### **Network Group Shares (department share):**

Which business units/departments may have relevant data? \_\_\_\_\_

Provide a list of Group Shares we may collect: \_\_\_\_\_

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What, if any, size limits apply to group shares? \_\_\_\_\_

Should the entire group share be collected? Yes No

If not, specify folders/files to collect? \_\_\_\_\_

\_\_\_\_\_

### **Document Management System:**

Does the company use a DMS? Yes No

Name and version of system: \_\_\_\_\_

How are documents stored? \_\_\_\_\_

How are documents retrieved? \_\_\_\_\_

### **Databases (and other applications):**

Do we need to collect ESI from any databases,  
other applications or proprietary programs? Yes No

Name of application and format of data: \_\_\_\_\_

\_\_\_\_\_

### **Third Party Providers:**

Do any third-party providers for internet, records management,  
email routing, etc., have any relevant ESI? Yes No

If yes, who and for what and where? \_\_\_\_\_

\_\_\_\_\_

### **Foreign Languages:**

Are any email or other ESI in a foreign language? Yes No

If yes, please identify the language: \_\_\_\_\_

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### **Backup Systems:**

Name and type of backup system: \_\_\_\_\_

Which servers are backed up? \_\_\_\_\_

Describe the backup process (full, incremental, frequency): \_\_\_\_\_

Are backup media retained or recycled? \_\_\_\_\_

Is backup media available for the relevant time frame? Yes No

Where are backup media stored? \_\_\_\_\_

Is there a catalog or index of backup media? Yes No

### **Instant Messaging:**

Do users have a company-sanctioned IM program? Yes No

Is data stored or backed up? Yes No

### **Voice Mail System:**

Is there a unified messaging voicemail-to-email system? Yes No

Is notification to email a text file or .wav file? \_\_\_\_\_

What is the voicemail retention policy? \_\_\_\_\_

Is voicemail backed up? \_\_\_\_\_

### **Peripheral Devices:**

Are there any USB drives, CDs/DVDs, external drives that need to be collected? Yes No

Do we need to collect data resident on PDAs or cell phones? Yes No

Do we need to collect data from a user's home computer? Yes No

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### **Policy on Former Employees:**

Is there a written policy on former employees?

Yes    No

What is the retention/destruction policy for:

Workstation: \_\_\_\_\_

Laptop: \_\_\_\_\_

Email: \_\_\_\_\_

Personal Share: \_\_\_\_\_

Peripheral Devices: \_\_\_\_\_

### **System Upgrades—Hardware and Software:**

Have there been any upgrades —hardware or software—in the relevant time period or that are planned in the next 12 months that will impact data storage, retention or backup media? Please explain:

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### **Legacy Systems:**

Are there any legacy systems, old data storage or former applications running which may contain data relevant to this matter? If yes, what is the data and how is it stored? Please explain:

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## 2017 SOUTHEAST BANKRUPTCY WORKSHOP

### **Client IT Personnel:**

Are client's IT personnel trained in computer forensics? Yes No

Is client's staff prepared to forensically collect the ESI, including write protect data, maintain the chain of custody, document the process and testify, if necessary? Yes No

Should Litigation Support staff explain general third-party vendor practices? Yes No

### **Miscellaneous Items:**

Are there paper documents to be collected? Yes No

How are these being handled? \_\_\_\_\_

\_\_\_\_\_

Are there any budgetary constraints in the case? \_\_\_\_\_

Will [Law Firm] or the client engage the vendor? \_\_\_\_\_

What, if any, deadlines are currently in place? \_\_\_\_\_

### **Notes/Search Terms/Other Comments:**

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**GENOVESE**  
**JOBLOVE &**  
**BATTISTA**  
P.A.  
*Attorneys at Law*

Robert F. Elgidely  
Telephone: 954.453.8022  
Email: [relgidely@gjb-law.com](mailto:relgidely@gjb-law.com)

October 18, 2012

**VIA ELECTRONIC MAIL**

**TO:** [REDACTED]

[REDACTED]  
ATTN: Information Technology Department & Personnel  
Who May Have Possession, Custody, and/or Control of  
Electronically Stored Information Which Relates In Any  
Way To The Debtor in the Below-Referenced Bankruptcy Case  
[REDACTED]  
[REDACTED]

Re: **NOTICE OF REQUIRED PRESERVATION OF ELECTRONIC DATA**  
*In re Frank Michael Mongelluzzi*  
United States Bankruptcy Court for the Middle District of Florida  
Case No. 8:11-bk-01927-CED

Dear Sir or Madam,

By this letter, you are hereby given notice not to destroy, conceal, or alter any paper or electronic files and other data generated by and/or stored on your computers and storage media (i.e., hard drives, floppy disks, backup tapes), or any other electronic data, such as voicemail. Your failure to comply with this notice may result in severe sanctions being imposed by the Court and potential liability in tort for spoliation of evidence or potential evidence.

Through discovery we expect to obtain from you a number of documents and things, including files stored on your computers and your computer storage media. As part of our initial discovery efforts, you will soon receive interrogatories and requests for production of documents and things.

In order to avoid spoliation, you will need to provide the data requested on the original media. Do not reuse any media to provide this data.



ATTN: Information Technology Department & Personnel  
Who May Have Possession, Custody, and/or Control of  
Electronically Stored Information Which Relates In Any  
Way To The Debtor in the Above-Referenced Bankruptcy Case  
October 18, 2012  
Page 2 of 4

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Although we may bring a motion for an order preserving documents and things from destruction or alteration, your obligation to preserve documents and things for discovery in this case arises in law and equity independently from any order on any such motion.

Electronic documents and the storage media on which they reside contain relevant, discoverable information beyond that which may be found in printed documents. Therefore, even when a paper copy exists, we seek all documents in their electronic form along with information about those documents contained on the media. We also seek paper printouts of only those documents that contain unique information after they were printed out (such as paper documents containing handwriting, signatures, marginalia, drawings, annotations, highlighting, and redactions) along with any paper documents for which no corresponding electronic files exist.

Our discovery requests will ask for certain data on the hard disks, floppy disks and backup media used in your computers, some of which data are not readily available to an ordinary computer user, such as deleted files and file fragments. Although a user may erase or delete a file, all that is really erased is a reference to that file in a table on the hard disk; unless overwritten with new data, a deleted file can be as intact on the disk as any active file you would see in a directory listing.

Electronic evidence is discoverable. Accordingly, electronic data and storage media that may be subject to our discovery requests and that you are obligated to preserve, include but are not limited to the following:

"All digital or analog electronic files, including deleted files and file fragments, stored in machine readable format on magnetic, optical or other storage media, including the hard drives or floppy disks used by your computers and their backup media (e.g., other hard drives, backup tapes, floppies, CD-ROMs, thumb drives, etc.) or otherwise, whether such files have been reduced to paper printouts or not."

More specifically, you are required to preserve all emails, both sent and received, whether internally or externally, and including all attachments; all word-processed files, including drafts and revisions; all spreadsheets, including drafts and revisions; all databases; all CAD (computer aided design) files, including drafts and revisions; all presentation data or slide shows produced by presentation software (such as Microsoft PowerPoint); all graphs, charts, and other data produced by project management software (such as Microsoft Project); all data

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ATTN: Information Technology Department & Personnel  
Who May Have Possession, Custody, and/or Control of  
Electronically Stored Information Which Relates In Any  
Way To The Debtor in the Above-Referenced Bankruptcy Case  
October 18, 2012  
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generated by calendaring, task management and personal information management software (such as Microsoft Outlook or Lotus Notes); all data created with the use of personal data assistants (PDAs) (such as iPhones, iPads, Palm Pilots, Pocket PCs, or similar devices); all data created with the use of document management software; all data created with the use of paper and electronic mail logging and routing software; all Internet and web-browser generated history files, caches, and "cookie" files generated at the workstation of each agent, and on any and all backup storage media; any and all other files generated by users through the use of computers and/or telecommunications, including but not limited to voicemail. Further, you are required to preserve any logs of network use by agents or otherwise, whether kept in paper or electronic form, and to preserve all copies of backup tapes and the software necessary to reconstruct the data on those tapes, so that there can be made a complete, bit-by-bit "mirror" evidentiary image copy of the storage media of each and every personal computer and/or workstation and network server in your possession, custody, and/or control, as well as image copies of all hard drives retained by you and no longer in service, but in use at any time from February 2, 2007 to the present. You are also not to pack, compress, purge, or otherwise dispose of files and parts of files unless a true and correct copy of such files is made.

You are also to preserve and not destroy all passwords, decryption procedures (including, if necessary, the software to decrypt the files); network access codes; ID names, manuals, tutorials, written instructions, decompression or reconstruction software, and any and all other information and things necessary to access, view, and (if necessary) reconstruct the electronic data we are requesting through discovery.

This request also applies to all data, whether in hard copy or electronic form, that is created or modified after your receipt of this letter.

In order to assure that your obligation to preserve documents and things will be met, please forward a copy of this letter to all persons and entities with possession, custody, and/or control of the items referred to in this letter including, but not limited to, the following:

- (1) Information Technology Department, ██████████  
██████████;

- (2) Information Technology Department, ██████████ ██████████ ██████████  
██████████;

██████████  
ATTN: Information Technology Department & Personnel  
Who May Have Possession, Custody, and/or Control of  
Electronically Stored Information Which Relates In Any  
Way To The Debtor in the Above-Referenced Bankruptcy Case  
October 18, 2012  
Page 4 of 4

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(3) Information Technology Department, ██████████  
██████████.

Sincerely,



Robert F. Elgidely

USEFUL RESOURCES

- Barbara J. Rothstein, et al., Federal Judicial Center, *Managing Discovery of Electronic Information: A Pocket Guide for Judges* (2d ed. 2012), available at:  
[https://www.fjc.gov/sites/default/files/2015/eldscpkt2d\\_eb\\_0.pdf](https://www.fjc.gov/sites/default/files/2015/eldscpkt2d_eb_0.pdf) (last visited July 7, 2017)
- Tennant, et al., New York State Bar Association, **Best Practices in E-Discovery in New York State and Federal Courts**, (July 2011), available at:  
[https://www.nysba.org/Sections/Commercial\\_Federal\\_Litigation/ComFed\\_Display\\_Tabs/Reports/ediscoveryFinalGuidelines\\_pdf.html](https://www.nysba.org/Sections/Commercial_Federal_Litigation/ComFed_Display_Tabs/Reports/ediscoveryFinalGuidelines_pdf.html) (last visited July 7, 2017)
- K & L Gates Electronic Discovery Case Database, accessible at:  
<https://ediscovery.klgates.com/> (last visited June 29, 2017)
- Exterro Simplified E-Discovery Case Law Library, accessible at:  
<https://www.exterro.com/case-law-library/> (last visited June 29, 2017)
- Kroll Ontrack Electronic Discovery and Computer Forensics Case List (Organized by Topic), accessible at:  
<https://www.krollontrack.com/library/topic.pdf> (last visited July 5, 2017)
- Kroll Ontrack Electronic Discovery and Computer Forensics Case List (Organized by Jurisdiction), accessible at:  
<https://www.krollontrack.com/library/jurisdiction.pdf> (last visited July 5, 2017)
- Kroll Ontrack E-Discovery Sample Forms & Pleadings, accessible at:  
<https://apps.americanbar.org/labor/annualconference/2007/materials/data/papers/v2/046.pdf> (last visited July 5, 2017)
- Kroll E-Discovery Blog, accessible at:  
<http://www.theediscoveryblog.com/> (last visited July 5, 2017)

# 2017 SOUTHEAST BANKRUPTCY WORKSHOP

Case 9:08-bk-04360-MGW Claim 114-1 Filed 09/17/08 Page 1 of 5

B 10 (Official Form 10) (12/07)

<b>UNITED STATES BANKRUPTCY COURT</b>		Middle District of Florida	<b>PROOF OF CLAIM</b>
Name of Debtor: Ulrich Felix Anton Engler		Case Number: 08-4360-ALP	
<small>NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.</small>			
Name of Creditor (the person or other entity to whom the debtor owes money or property): Petra Richter		<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim.  Court Claim Number: _____ (If known)  Filed on: _____	
Name and address where notices should be sent: c/o Robert Elgidely, Esq., Genovese Joblove & Battist, P.A. 100 S.E. Second Street, Suite 4400, Miami, FL 33131			
Telephone number: (305) 349-2300			
Name and address where payment should be sent (if different from above):		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.  <input type="checkbox"/> Check this box if you are the debtor or trustee in this case.	
Telephone number:			
1. Amount of Claim as of Date Case Filed: \$ <u>6,500.00</u>  If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.  If all or part of your claim is entitled to priority, complete item 5.  <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.		5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.  Specify the priority of the claim.  <input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).  <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. §507 (a)(4).  <input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).  <input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).  <input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8).  <input type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. §507 (a)( ).  Amount entitled to priority: \$ _____  <small>*Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</small>	
2. Basis for Claim: <u>Loans</u> <small>(See instruction #2 on reverse side.)</small>			
3. Last four digits of any number by which creditor identifies debtor: _____  3a. Debtor may have scheduled account as: _____ <small>(See instruction #3a on reverse side.)</small>			
4. Secured Claim (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.  Nature of property or right of setoff: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other Describe:  Value of Property: \$ _____ Annual Interest Rate: _____ %  Amount of arrearage and other charges as of time case filed included in secured claim, if any: \$ _____ Basis for perfection: _____  Amount of Secured Claim: \$ _____ Amount Unsecured: \$ _____			
6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.  7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See definition of "redacted" on reverse side.)  DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.  If the documents are not available, please explain:			
Date: <u>16. Sep. 2008</u> Signature: _____ The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.		<b>FOR COURT USE ONLY</b>	

*Handwritten notes and stamps:*  
 16. Sep. 2008  
 Schulze  
 Rechtsanwalt  
 Wirtschaftsprüfer  
 Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Geld wird nach Erhalt der notariell beglaubigten Verträge (vorab per Fax) überwiesen

**PROMISSORY NOTE**

Contract Number: PeRIZ7072007/TOJÜ-igf

Borrower P.C.O. PRIVATE COMMERCIAL OFFICE INC.  
Ulrich Engler  
1217 Cape Coral Pkwy, #121  
Cape Coral, Florida 33904, USA

Principal Amount: USD 6.500,00

1. For value received, Ulrich Engler promises to pay to  
Mr./Mrs. Petra Richter  
Address [REDACTED] Berlin, Germany  
Fax [REDACTED] Phone: [REDACTED]  
At such address as may be provided in writing to Ulrich Engler, the principal sum of USD 6.500,00 with interest payable, adding up to a total including the principal sum of USD 391.574,57 after 7 year(s) and one day.
2. This promissory note will be repaid in 1 installment only on the 7th anniversary of the execution of this promissory note commencing this year. With the balance owing under this note being paid at the end of this term which will be Juli 2014.
3. Notwithstanding anything to the contrary in this note, if Ulrich Engler defaults in the performance of any obligation under this note, then the Lender may be declare the principal amount owing under this note at that time to be immediately due and payable.
4. All costs, expenses and expenditures including and without limitation, the complete legal costs incurred by the Lender in enforcing this promissory note as a result of any default by Ulrich Engler will be added to the principal then outstanding and will be paid immediately by Ulrich Engler.
5. My monthly instalments of interest only shall be paid to:  
Kontoinhaber Petra Richter  
Bankname [REDACTED]  
Anschrift [REDACTED]  
SWIFT Code (BIC) [REDACTED]  
IBAN [REDACTED]  
BLZ [REDACTED]  
Kontonummer [REDACTED]
6. This note will be construed in accordance with and governed by the laws of the State of Florida, USA.

In witness hereof Ulrich Engler has duly affixed its signature by a duly authorized officer under the seal on this  
10. day of Aug 2007



Petra Richter



Ulrich Engler



NOTARY Seal

Geld wird nach Erhalt der notariell beglaubigten Verträge (vorab per Fax) überwiesen

**PROMISSORY NOTE**

Contract Number: PeRi27072007/TOJÜ-lqf

Borrower P.C.O. PRIVATE COMMERCIAL OFFICE INC.  
Ulrich Engler  
1217 Cape Coral Pkwy, #121  
Cape Coral, Florida 33904, USA

Principal Amount: USD 6.500,00

1. For value received, Ulrich Engler promises to pay to

Mr./Mrs. Petra Richter

Address [REDACTED] Berlin, Germany

Fax [REDACTED] Phone: [REDACTED]

At such address as may be provided in writing to Ulrich Engler, the principal sum of USD 6.500,00 with interest payable, adding up to a total including the principal sum of USD 381.574,57 after 7 year(s) and one day.

2. This promissory note will be repaid in 1 installment only on the 7th anniversary of the execution of this promissory note commencing this year. With the balance owing under this note being paid at the end of this term which will be July 2014.
3. Notwithstanding anything to the contrary in this note, if Ulrich Engler defaults in the performance of any obligation under this note, then the Lender may be declare the principal amount owing under this note at that time to be immediately due and payable.
4. All costs, expenses and expenditures including and without limitation, the complete legal costs incurred by the Lender in enforcing this promissory note as a result of any default by Ulrich Engler will be added to the principal then outstanding and will be paid immediately by Ulrich Engler.

5. My monthly instalments of interest only shall be paid to:

Kontoinhaber Petra Richter

Bankname [REDACTED]

Anschrift [REDACTED]

SWIFT Code (BIC) [REDACTED]

IBAN [REDACTED]

BLZ [REDACTED]

Kontonummer [REDACTED]

6. This note will be construed in accordance with and governed by the laws of the State of Florida, USA.

In witness hereof Ulrich Engler has duly affixed its signature by a duly authorized officer under the seal on this

10. day of Aug 2007

  
Petra Richter

  
Ulrich Engler



**Loan Agreement**

Contract Number: PeRI27072007/TOJU-lqf

Borrower P.C.O. PRIVATE COMMERCIAL OFFICE INC.  
Ulrich Engler  
1217 Cape Coral Pkwy, #121  
Cape Coral, Florida 33904, USA

Lender

Mrs. Petra Richter

██████████  
Berlin  
Germany

Fax: ██████████ Phone: ██████████

Loan Amount: USD 6.500,00 (in words) six thousand five-hundred

Programm A accumulation of profits  
Redemption: Total redemption at the end of the term is USD 391.574,57  
Term: 7 years and 1 day

Loan payable to:

PCO CLIENT MANAGEMENT INC.  
Ulrich Engler  
WACHOVIA BANK, CHARLOTTE, NC  
SWIFT: ██████████  
ABA-Number: ██████████  
Konto-Nr.: ██████████

In witness hereof Ulrich Engler has duly affixed its signature by a duly authorized officer under the seal on this  
10. day of Aug 2007

  
Petra Richter

  
Ulrich Engler





**Loan Agreement**

Contract Number: PeRj27072007/TOJÜ-lqf

**Borrower** P.C.O. PRIVATE COMMERCIAL OFFICE INC.  
Ulrich Engler  
1217 Cape Coral Pkwy, #121  
Cape Coral, Florida 33904, USA

**Lender**

Mrs. Petra Richter

Berlin  
Germany

Fax: Phone:

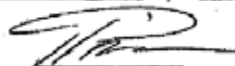
Loan Amount: USD 6.500,00 (in words) six thousand five-hundred

Program A accumulation of profits  
Redemption: Total redemption at the end of the term is USD 391.674,57  
Term: 7 years and 1 day

Loan payable to:

PCO CLIENT MANAGEMENT INC.  
Ulrich Engler  
WACHOVIA BANK, CHARLOTTE, NC  
SWIFT:  
ABA-Number:  
Konto-Nr.:

In witness hereof Ulrich Engler has duly affixed its signature by a duly authorized officer under the seal on this  
10. day of Aug 2007

  
Petra Richter

  
Ulrich Engler



UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION

In re:

CASE NO. 9:08-bk-04360-ALP

ULRICH FELIX ANTON ENGLER,

CHAPTER 7

Debtor.

\_\_\_\_\_ /

**ORDER ON APPLICATION TO EMPLOY COUNSEL**

THIS CAUSE came on for consideration *ex parte* upon an Application to Employ Counsel filed by the Trustee in the above-captioned Chapter 7 case. The Court has considered the Application, together with the record, and finds that the Application seeks to employ Robert F. Elgidely and the law firm of Genovese Joblove & Battista, P.A. as special counsel for the Trustee. As no notice of hearing on the Application should be given, and attorneys of the above-named law firm are duly admitted to practice in this Court, this Court is satisfied that the employment is necessary and would be in the best interest of the estate, and that the case is one justifying the employment of said attorneys under a general retainer and it is, therefore

ORDERED, ADJUDGED, and DECREED that the Application be and the same is hereby approved, and it is further

ORDERED, ADJUDGED and DECREED that the Trustee be, and he is hereby authorized to employ Robert F. Elgidely and Genovese Joblove & Battista, P.A. under a general retainer and the amount of compensation of counsel shall be determined by Order of this Court upon properly submitted application for allowance filed in compliance with Bankruptcy Rule 2016.

DONE AND ORDERED in Tampa, Florida on \_\_\_\_\_.

\_\_\_\_\_  
ALEXANDER L. PASKAY  
United States Bankruptcy Judge

cc: Robert E. Tardif, Jr., Trustee, 2430 Shadowlawn Drive, Suite 18, Naples, Florida 34112  
Assistant United States Trustee, 501 East Polk Street, Suite 1200, Tampa, Florida 33602  
Robert F. Elgidely, Esq., 200 East Broward Boulevard, Suite 1110, Fort Lauderdale, Florida 33301

**2017 SOUTHEAST BANKRUPTCY WORKSHOP**

Case 2:11-cv-00695-JES-DNF Document 1 Filed 12/15/11 Page 1 of 26 PageID 1

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

FORT MYERS DIVISION

FRANZ LESTI and PETRA RICHTER, )  
Individually and on Behalf of All Others )  
Similarly Situated, )

Case No. \_\_\_\_\_

**CLASS ACTION COMPLAINT AND  
DEMAND FOR JURY TRIAL**

-and- )

ROBERT E. TARDIF, JR., in his )  
capacity as the Chapter 7 Trustee of the )  
substantively consolidated bankruptcy )  
estates of Debtors, Ulrich Felix Anton )  
Engler, Private Commercial Office, Inc., )  
and PCO Client Management, Inc., )

Plaintiffs, )

vs. )

WELLS FARGO BANK, N.A. (f/k/a )  
Wachovia Bank, N.A.), )

Defendant. )

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION

FRANZ LESTI and PETRA RICHTER,

Plaintiffs,

vs.

Case No. 2:11-cv-695-FtM-29DNF

WELLS FARGO BANK, N.A., formerly  
known as Wachovia Bank, N.A.,

Defendant.

**DEFENDANT, WELLS FARGO BANK, N.A.'S, MOTION FOR SANCTIONS  
AGAINST PETRA RICHTER FOR SPOILIATION OF EVIDENCE AND  
FAILURE TO COMPLY WITH DISCOVERY OBLIGATIONS  
AND INCORPORATED MEMORANDUM OF LAW**

Defendant, Wells Fargo Bank, N.A. ("Wells Fargo"), by and through its undersigned attorneys and pursuant to M.D. Fla. L.R. 3.01 and Fed. R. Civ. P. 37 and this Court's inherent authority, requests that this Court impose sanctions against Petra Richter ("Richter") based upon her bad faith destruction of critical documents and willful ignorance of her discovery obligations in this matter. In support hereof, Wells Fargo states:

*Introduction*

At her March 6, 2014 deposition, Richter testified that *long after filing her Proofs of Claim* in the related bankruptcy action in September 2008, she **destroyed** numerous critical documents,<sup>1</sup> which even she at one point conceded: "Well, maybe they're important today".<sup>2</sup> In fact, Richter cavalierly testified that her entire document production in this case consists of a handful of documents which she selected to give to her German counsel in 2008, and that

<sup>1</sup> The transcript of Richter's March 6, 2014 deposition is being filed simultaneously herewith. See Richter Deposition, p. 150, l. 14 – p. 151, l. 19.

<sup>2</sup> See Richter Deposition, p. 150, l. 1-19.

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION

FRANZ LESTI and PETRA RICHTER,

Plaintiffs,

vs.

Case No. 2:11-cv-695-FtM-29DNF

WELLS FARGO BANK, N.A., formerly  
known as Wachovia Bank, N.A.,

Defendant.

**DEFENDANT, WELLS FARGO BANK, N.A.'S, MOTION TO COMPEL AND FOR  
SANCTIONS AGAINST PETRA RICHTER FOR FAILURE TO PRODUCE  
DOCUMENTS AND ELECTRONICALLY STORED INFORMATION  
AND INCORPORATED MEMORANDUM OF LAW**

Defendant, Wells Fargo Bank, N.A. ("Wells Fargo"), by and through its undersigned attorneys and pursuant to Fed. R. Civ. P. 37 and M. D. Local Rule 3.01 and 3.04, requests that this Court enter an Order sanctioning Plaintiff, Petra Richter ("Richter") for ongoing and repeated discovery violations and compelling Richter to produce documents and electronically stored information (ESI), and states:

**Introduction**

Richter's April 14, 2014 Response to Wells Fargo's Second Request for Production (the "Second Production Request"), attached hereto as Exhibit A, is the latest in her ongoing campaign to stifle Wells Fargo's legitimate discovery and prevent this Court from hearing the merits of this case. Richter's continued gamesmanship is causing severe prejudice to Wells Fargo and this Court in that, among other things, it is preventing Wells Fargo and this Court from addressing issues pertaining to class certification, expert disclosures, and the Court's management of this case under the operative scheduling order and deadlines.

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION

PETRA RICHTER, individually and on  
behalf of all others similarly situated

Plaintiff,

v.

Case No: 2:11-cv-695-FtM-29DNF

WELLS FARGO BANK NA,

Defendant.

---

**ORDER**

This cause is before the Court on the Defendant, Wells Fargo Bank NA's Motion for Sanctions Against Petra Richter for Spoliation of Evidence and Failure to Comply With Discovery Obligations (Doc. 195) filed on March 20, 2014. The Plaintiff, Petra Richter filed a response in Opposition to Defendant Wells Fargo Bank's Motion for Sanctions Against Plaintiff Petra Richter for Spoliation of Evidence and Failure to Comply With Discovery Obligations (Doc. 222) on April 17, 2014.

Wells Fargo Bank, N.A. ("Wells Fargo") served a Request for Production in March 2012. Wells Fargo asserts that Petra Richter ("Richter") destroyed numerous critical documents that were responsive to this discovery request. Wells Fargo claims that at her deposition, Richter testified that she destroyed certain documents, did not look for certain documents, and had a computer that was inoperable that may have contained responsive documents. Richter's deposition occurred on March 6, 2014. The Court entered an Order (Doc. 193) on March 13, 2014 allowing Ms. Richter until April 14, 2014 to respond to the Second Request for Production. The Court cautioned "the Plaintiffs and counsel to carefully review the First Request for Production and supplement

document production or responses if they have changed since the initial responses were provided.”  
(Doc. 193, p. 2).

Rather than wait until Richter provided the documents, Wells Fargo filed this Motion for Sanctions for Spoliation of Evidence on March 20, 2014. Richter did return to Germany after her deposition and did search for additional documents and provided them. Wells Fargo is premature in requesting sanctions for spoliation without have reviewed the documents produced. The Court is unable to determine if Richter produced documents to satisfy these Requests for Production or not, and the Court cannot determine if spoliation occurred or if sanctions are warranted. Therefore, the Court will not address the issue of sanctions or spoliation at this juncture. Further, Wells Fargo filed a Motion to Compel and for Sanctions against Petra Richter for Failure to Produce Documents and Electronically Stored Information (Doc. 247) on May 5, 2014, after the Ms. Richter’s deadline to produce documents. The Motion to Compel (Doc. 247) encompasses, most if not all, of the issues in the instant Motion for Sanctions for Spoliation of Evidence (Doc. 195), and clearly sets forth the issues as to the multiple Requests. The Court will handle the outstanding discovery issues when the Motion to Compel (Doc. 247) is ripe.

**IT IS HEREBY ORDERED:**

The Motion for Sanctions Against Petra Richter for Spoliation of Evidence and Failure to Comply With Discovery Obligations (Doc. 195) is **DENIED**.

**DONE** and **ORDERED** in Fort Myers, Florida on May 16, 2014.

  
\_\_\_\_\_  
DOUGLAS N. FRAZIER  
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:  
Counsel of Record  
Unrepresented Parties

## ABI (Ted) Talks

### Ethical Obligations of Debtor's Counsel to Creditors, Trustee, and Client

*July 29, 2017 – Southeast Bankruptcy Workshop*

**PRESENTED BY:**

**Matthew Brooks**

Troutman Sanders LLP  
600 Peachtree Street, N.E.  
Suite 5200  
Atlanta, GA 30308  
(404) 885-3000



## Section 363 Sales: A Unique Context

- The use of 363 sales to liquidate a debtor's assets in a chapter 11 has become increasingly common. Even in the context of very large, complex chapter 11 proceedings, the sale often occurs within the first few months or even weeks of the commencement of the case.
- As a result, Debtor's counsel must quickly and thoroughly analyze potential conflicts and necessary disclosures to the bankruptcy court
- Inherent difficulties as the bidding landscape may shift during the 363 sale process, resulting in multiple bids with varying forms of consideration.





## First Things First: Initial Employment Application

- Fed. R. Bankr. P. 2014: The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.



## Continuing Disclosure

- Beyond the initial employment application, debtor's counsel has a duty of continuing disclosure. 11 U.S.C. §§ 327, 328
- Rule 2014(a) does not expressly require supplemental or continuing disclosure...Nevertheless, section 327(a) implies a duty of continuing disclosure, and requires professionals to reveal connections that arise after their retention. . . . Continuing disclosure is necessary to preserve the integrity of the bankruptcy system by ensuring that the trustee's professionals remain conflict free. *In re Granite Partners, L.P.*, 219 B.R. 22, 35 (Bankr. S.D.N.Y. 1998).

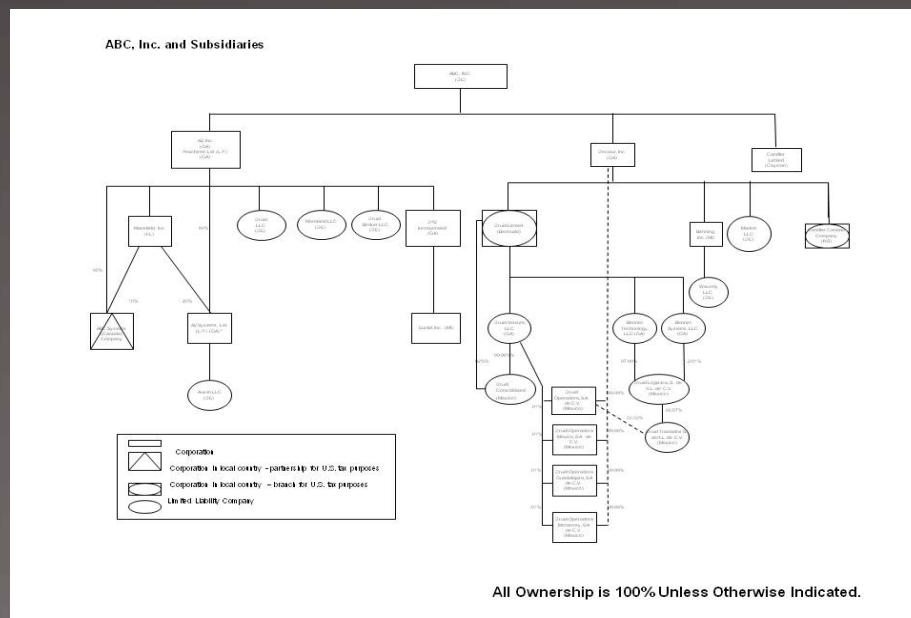


# Section 327

- Professionals must not “hold or represent an interest adverse to the estate.”
- Translation: (1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant or (2) to possess a predisposition under circumstances that render such a bias against the estate.
- Even arguable conflicts must be disclosed. Counsel cannot pick and choose which connections are irrelevant or trivial.



## The Bidder Conflict Check: Not Always Easy



## The Auction Process: Highest *and* Best

- The highest bid is not necessarily the highest *and best* bid.
- If presented with comparable bids, the debtor in its business judgment, or the court, has discretion to support or approve a sale for a lower cash consideration if it offers other benefits to the debtor and its creditors.
- For example, a bidder that would continue to operate the business may be preferred over a bidder that would discontinue the business operations of the Debtor. *See In re Municipal Corr., LLC*, No. 13-50786 (Bankr. N.D. Ga.. Oct. 5, 2013).



## The Client and the Client's Reps

- Any association between potential bidders and the debtor?
- The unknown or unclear: association between potential bidder and representative of the debtor?
- Adverse interest for conflict purposes between principles of debtor and debtor in possession?



## Duties of Debtor's Counsel

- The obvious: Every Lawyer owes his or her client a fiduciary duty to act with reasonable competence and diligence. Restatement (Third) of the Law Governing Lawyers § 16(2)
- Duty not just to debtor in possession, but to the estate and creditors as well? The majority view is yes. See *In re Count Liberty, LLC*, 370 B.R. 259 (Bankr. C.D. Cal. 2007).



## Fiduciary Duty to Estate

- What is the scope of the duty to the estate? It's unclear.
- Judge Drain: "articulation of an overly broad duty might impose an unwarranted strain on the attorney-client relationship." *In re Cenargo Intern., PLC*, 294 B.R. 571, 599 (Bankr. S.D.N.Y. 2003).
- Attorney cannot simply close his or her eyes to matters having adverse legal and practical consequences for the estate and its creditors.



## Breach of Duty to Non-Client: The Estate

- Restatement (Third) of the Law Governing Lawyers § 51(4) – debtor’s counsel can be liable for breach of fiduciary duty to estate in limited circumstances:
  - (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;
  - (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
  - (c) the nonclient is not reasonably able to protect its rights; and
  - (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.



## Practical Considerations

- Debtor’s counsel can “assist in breach” of fiduciary duty owed by debtor’s professionals to estate by preparing and presenting pleadings with bankruptcy court, intentionally or otherwise. See Comment (h) to § 51.
- Duty imposed by § 51(h) arises when lawyer knows appropriate action by lawyer is necessary to prevent or mitigate a breach of the client’s fiduciary duty.
- Know also includes “reason to know.”
- No duty of inquiry, but counsel cannot escape potential liability by closing eyes to what others would find obvious.



## Complete and Timely Disclosure is Key

- Chapter 11 places debtor's counsel in unusual position of "sometimes owing a higher duty to the estate and the bankruptcy court than to his client...The attorney for a debtor in possession is not merely a mouthpiece for his client." *In re Sky Valley, Inc.* 135 B.R. 925, 938 (Bankr. N.D. Ga. 1992)
- Duty of candor toward bankruptcy court – Model Rule 3.3
- Other Model Rules to consider: 1.6, 1.13



## Cautionary Cases

- *Grubin v. Rattet (In re Food Mgmt. Group, LLC)*, 380 B.R. 677 (Bankr. S.D.N.Y. 2008)
- *Brown Media Corp. v. K&L Gates, LLP*, 854 F.3d 150 (2d Cir. 2017)

