Beware of Icebergs Ahead: How to Navigate Federal Rules Changes and Terabytes of E-Discovery to Avoid Titanic Sanctions

Jeffrey R. Waxman, Moderator
Morris James LLP; Wilmington, Del.

Alison A. Grounds
Troutman Sanders LLP; Atlanta

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

Richard L. Wasserman
Venable LLP; Baltimore

Beware of Icebergs Ahead: How to Navigate Federal Rules Changes and Terabytes of E-Discovery to Avoid Titanic Sanctions

This panel will discuss the recent changes to the Federal Rules of Civil Procedure as they pertain to e-discovery, as well as recent case law interpreting the new rules in the bankruptcy context. Our e-discovery expert and our bankruptcy practitioners will discuss the rules from the perspective of debtors, creditors and litigation targets in commercial bankruptcy cases.

Index of Materials

iii. United States District Court for the Northern District of California- Guidelines for the Discovery of Electronically Stored Information (Updated December 1, 2015)

iv. United States District Court for the Eastern District of Michigan-Model Order Relating to the Discovery of Electronically Stored Information (ESI) and Checklist for Rule 26(f) Meet and Confer regarding ESI

v. United States Bankruptcy Court for the Eastern District of Michigan- Local Rules effective February 1, 2016

d. Memorandum to the Business Bankruptcy Committee of the Business Law Section of the American Bar Association by Judith Greenstone Miller (October 2, 2015). [1]

IV. Selected Cases in the Electronic Version of the Materials

a. *New Products Corp. v. Tribble* (*In re Modern Plastics Corp.*), AP No. 13-80252, Docket items 138 & 139 (Bankr. D. Mich. July 23, 2015).

b. *Brown v. Tellermate Holdings Ltd.*, No. 2:11-cv-1122, 2014 WL 2987051 (S.D. Ohio, July 1, 2014).

c. *Small v. University Medical Center of Southern Nevada*, No. 2:13-cv-298, 2014 U.S. Dist. LEXIS 114406 (D. Nev., Aug. 18, 2014).

d. *Coquina Investments v. Rothstein*, No. 10-60786, 2012 U.S. Dist. LEXIS 108712 (S.D. Fla., Aug. 3, 2012).

[1]

The Demise of CountingCash Corp. and the Fate of its Confidential Information
by Jeffrey Waxman

CountingCash Corp. is an accounting and financial advising firm with a wide clientele of companies, investment consortiums, and high net worth individuals. CountingCash also provides services to certain customers in a capacity as a trustee. CountingCash's main office, including its central accounting department and all operational personal, is based in Jacksonville, but it has offices throughout the southeast, and employs over 250 CPAs. CountingCash has four principals, three of which are minority shareholders, and one of which owns more than half of all equity. CountingCash frequently serves as escrow agent for certain transactions of its clients as well as in its role as trustee, and all such funds are held in CountingCash's escrow accounts which are managed by the main office in Jacksonville. The other three principals were based in branch offices.

In 2015, during a routine audit, CountingCash became aware that money was missing from the firm's escrow accounts. After an investigation, it was determined that the majority owner, with the assistance of the firm's comptroller and unbeknownst to the minority principals, had embezzled more than $10 mil. from the firm's operating and escrow accounts. Within a week after the discovery that the escrow accounts had been ransacked, the majority owner of CountingCash resigned. Almost immediately, a number of CountingCash's clients sued the firm and all four principals for the missing money. Additionally, CountingCash and the four principals were sued by a party who had entered into an agreement with the majority owner (unbeknownst to the other shareholders) to loan $1 million to CountingCash. Within two months after the discovery of the embezzlement, all but a handful of the firm's employees announced that they were leaving CountingCash for other firms. Shortly thereafter, CountingCash filed for Chapter 11.

Prior to CountingCash filing for bankruptcy, it had fifteen offices in five states. Among CountingCash's assets were approximately 300 computers, each of which had a hard drive. Additionally, each of the offices had file cabinets full of records that included personally identifiable information, multiple printers, and at least one, if not multiple, copiers. Additionally CountingCash had a central server which was stored off-site which housed all email and documents that were saved to the server. As of the Petition Date, the Debtor's servers had more than 10 terabytes of data, including more than 5 million emails dating back two years prior to the petition date. CountingCash also leased a warehouse that contained old files for each of their clients, some of which dated back more than twenty years. On the petition date, the Debtor moved to reject the leases for all but one of CountingCash's offices and to reject the lease of the warehouse facility.

Upon the filing of the bankruptcy petition, the civil action filed against CountingCash and its principals for the return of the loaned money was stayed solely with respect to the Debtor. The plaintiff in the civil action sought to compel the three remaining principals of CountingCash to respond to document requests, which also included documents in the Debtor's possession. As of the petition date, CountingCash had less than $50,000 in cash, and all of its former IT personnel had resigned.

DAILY REPORT

5 Tips for Meeting the New Federal Discovery Rules

Alison Grounds / Special to the Daily Report
December 23, 2015

New amendments to the Federal Rules of Civil Procedure became effective on Dec. 1. Are you ready?

Alison A. Grounds

The focus of this column is answering one simple question: how will these changes affect the way you handle discovery? To comply with the spirit and the letter of these rule changes, you may need to make some adjustments to your discovery practice.

The revised rules emphasize case management and proactive discovery by adding several mechanisms to front-load discovery decisions and emphasize proportionality in the discovery process. They also provide guidance for when sanctions for failure to preserve electronically stored information (ESI) are appropriate.

How courts will apply these rules is subject to debate, but if you adhere to the five practice pointers below, you should be in good shape to avoid sanctions, reduce risks and get to the merits of your case without a discovery sideshow.

1. Add New Players to Your Roster: Consult With Appropriate E-Discovery Professionals

The single most effective thing you can do to ensure you comply with the new rules and manage the discovery process efficiently is to engage or involve appropriate resources, including lawyers with an understanding of the revised rules, old rules, relevant case law and the practical intersection of these rules and laws with ever-evolving technology.

The complexity of this space has created an entire industry of professionals, both legal and technical, who focus on staying current on the law and technology and who have practical daily experience. Such professionals can help reduce risks and decrease costs by assisting with the other items identified below.

2. Develop and Implement a Reasonable Preservation Plan

One of the key motivators behind this round of changes to the rules was to provide a more uniform approach to when courts should impose the most severe spoliation sanctions for failure to preserve relevant ESI.

The changes to Rule 37 provide that if ESI that should have been preserved in the anticipation or conduct of litigation is lost "because a party failed to take reasonable steps to preserve it, and the ESI cannot be restored or replaced through additional discovery," the court may employ different remedial measures and sanctions depending on the nature of the loss.

Under revised Rule 37, the most severe sanctions are limited to cases where a party acted with the intent to deprive another party of the information's use in the litigation (Rule 37(e)(2)).

Spoliation battles will require an analysis into the preservation steps taken and the reason for any loss of relevant information that prejudices the requesting party.

A reasonable preservation plan to protect against sanctions requires considering the facts of each case and understanding the scope and nature of potentially relevant data sources. You cannot preserve what you do not know exists. Make sure you involve appropriate personnel (IT, key custodians, outside counsel, in-house counsel, service providers, etc.) in the discussion to identify relevant systems and practices.

Document your decisions by noting when the various aspects of the preservation plan are implemented and by whom: distributing and tracking the legal hold notice, collecting data for preservation (if required), disabling auto-delete or over-writing of specific systems (if applicable), suspending processes for deletion of ESI from departing employees subject to the hold, etc.

If preservation is later questioned, it will likely be months or years later. If you fail to document the process, you may have a harder time showing it was reasonable. We will discuss the burden of proof issues in such battles in a future column.

3. Throw Away Your Templates for Rule 34 Requests

The federal rules, and some of the courts applying them, have tried for years to warn against overly broad document requests and encourage proportionality in the process. But the ever-increasing volume of data and corresponding increased costs to preserve, collect, filter, analyze and produce relevant information in litigation prompted a renewed emphasis on proportionality in the scope of discovery in the revised rules.

As revised, Rule 26(b)(1) moves proportionality considerations front and center and allows a party to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit."

Ensuring that discovery requests are not overly broad and are proportional to the specific issues in the case requires understanding the nature of the specific claims and defenses and looking hard at each Rule 34 request to decide when you really need "any and all documents" related to a topic and when "documents sufficient to show" a specific fact or issue will meet your needs.

Proportionality also requires thinking about the most efficient way to get the information sought based on its significance to the overall matter. The most efficient discovery tool may be a request to admit, a stipulation, an interrogatory or a deposition rather than a broad document request to search through emails and ESI. Proportionality may also require phasing discovery and using categorical privilege logs or other creative case-specific solutions.

4. Throw Away Your Templates for Rule 34 Objections

Similarly, responding parties can no longer serve blanket objections without specifying what they actually plan to produce or withhold and by when.

An objection to a Rule 34 request must state: (1) "with specificity the grounds for objecting" to the request, including the reasons; and (2) whether anything is being withheld on the basis of the objection.

An objection that states the limits that have controlled the search for responsive and relevant materials (e.g., temporal or source limitations) qualifies as a statement that materials have been "withheld." To make specific objections related to proportionality, counsel will need to engage in early discussions with clients (and opposing parties) regarding potential sources of information (custodians, systems, devices, etc.) and the scope of discovery, including relevant date ranges, topics and the identification of sources that may be inaccessible due to undue cost or other burdens.

Under the amendments, if a party elects to produce copies of documents or ESI, instead of permitting an inspection, the production must be completed no later than the time for inspection specified in the request or another reasonable time specifically identified in the response. When it is necessary to make the production in stages, the response should specify the beginning and end dates of the production.

Throw away those form responses that simply state that you object to requests as overly broad and burdensome, but will produce responsive documents that are not objectionable or privileged, if they exist, at some point in the future. Providing beginning and end dates for productions will require actual knowledge of the universe of potential production documents—including the volume that remains after ESI is collected, de-duplicated, processed, filtered, reviewed and c onverted to the agreed-upon production format. Timelines must also factor in the time necessary to complete each phase of the document production process.

Practitioners must understand their clients' information systems and data with sufficient detail to develop a plan for collection and production within a specific time frame in a response to Rule 34 requests. In complex matters with diverse ranges of potentially relevant sources, planning for these issues will need to begin before discovery requests are served to allow sufficient time to gather the required details and data (see below).

5. Collect Data Before Document Requests Are Served

The revised rules intentionally speed up the discovery process by reducing the time limit for service of process in Rule 4(m), allowing early service of Rule 34 discovery requests before the Rule 26 meet and confer process and requiring parties to provide the estimated timing of rolling productions (see above). Prior efforts to inspire early discussion and management of discovery issues fell short and the rules now reflect aggressive timelines that will be challenging to meet without early and proactive discovery management.

Complying with the revised rules requirements to provide specific information regarding objections as well as timing of productions will require collecting at least some documents and data before you even receive discovery requests and before you serve your responses and objections. Having data in hand allows you to test search terms, analyze volume, and have a more realistic idea of how much time it will take to filter, review, analyze and produce relevant information.

Early data collection also will help you understand the facts of your case, support proportionality arguments and comply with your duties under Rules 1 and 26(g). Waiting until the clock starts ticking for a response to start the discovery process will not leave you enough time to gain a sufficient and accurate understanding of the scope of ESI at issue to meet the requirements of the revised rules.

Finally, federal Rule 1 provides that the scope and purpose of the federal rules are to secure the "just, speedy and inexpensive determination of every action and proceeding." The amendments clarify that Rule 1 should be construed, administered "and employed by the court and the parties" to achieve these goals.

Revised Rule 1 is not intended to "invite ill-founded attempts to seek sanctions for violating a duty to cooperate," but the duty to cooperate to ensure the case is efficiently resolved overlays all of the revised rules and obligations and requires counsel to proactively manage discovery.

The emphasis on case management and proportionality will require practitioners to address e-discovery issues early and proactively. Pushing back discussions and decisions regarding substantive discovery issues (with both clients and adversaries) or delaying the collection and analysis of potential document and data sources will put counsel (and their clients) at risk of violating their duties under the rules.

The most common errors and issues in the e-discovery space arise from failures to understand technical issues and to manage the discovery process proactively and efficiently. Hopefully, these amendments will improve the emphasis placed on discovery planning and management.
We shall see.

Alison Grounds is a litigation partner with Troutman Sanders in Atlanta. She is also the managing director of Troutman Sanders eMerge, a wholly-owned subsidiary focused on providing legal and technical solutions to effectively manage e-discovery from preservation through trial.

For More Information Contact: alison.grounds@troutmansanders.com

TROUTMAN SANDERS eMerge Legal Strategy + Advanced Technology
www.tsemerge.com

eDiscovery: Dispelling the Top 5 Misconceptions

By Alison Grounds & John Hutchins • Information Intersection Blog • *Posted: June 5, 2013* • Link to Article

Prepare to purge some outdated notions, and get your eDiscovery game on. Effective use and analysis of electronically stored information ("ESI") can create efficiencies and provide key insights into the merits of your claims or defenses. But the utility of ESI is often lost when lawyers cling to past ideas of what discovery entails, and fail to account for the unique technical and legal issues associated with discovering ESI. The "e" in eDiscovery causes some to assume that discovery and eDiscovery are two separate concepts that can be addressed independently, rather than as part of an overall discovery strategy.

In reality – most discovery revelations, disputes, and costs relate to ESI. The "e" has some utility in drawing attention to the unique issues related to ESI, but failing to account for ESI as the main component of discovery is a costly misconception that needs to be dispelled – along with a few more.

"eDiscovery is only an issue in 'big' cases."

This widely-held belief is steadily eroding as the realities of eDiscovery hit home for even the smallest of matters. But there are still many lawyers who ignore ESI; handle ESI with the same practices that worked for paper; or try to convince themselves that if you print an electronic document, it is no longer "ESI." This is especially true in "smaller" cases where the lawyers assume they can just print a few emails and call it a day.

In an era of hand-held devices that can create and store multiple gigabytes of data, the information created and stored by just one person in the course of one year can easily exceed the equivalent of hundreds of boxes of traditional paper files. We are a data-driven society where businesses and individuals depend on ESI to function. Accordingly, every matter of any size should have some eDiscovery – arbitrations, divorce actions, bankruptcies, regulatory investigations, breach of contract disputes. . . . Few individuals, much less companies, are generating documents by anything other than electronic means. The typewriter may be making a small comeback with some hipsters in coffee houses, but most of us are creating vast amounts of ESI on our laptops, desktops, tablets, phones/cameras, and inputting or uploading a wide array of information to servers, databases, and other shared locations, both in and out of "the cloud."

Accordingly, even small cases require the proper preservation, identification and analysis of ESI to establish facts and focus the issues.

"My 'Tried and True' Discovery Practices Will Suffice for ESI"

The shift to ESI still has not caught up to some who believe you can preserve, collect, review, and produce this vast amount of information without making any changes to your hard copy discovery practices. Discovery of ESI is a different animal than locating some key paper files, or sifting through a warehouse of boxes. The volume and nature of ESI require different strategies, tools, and people to ensure the cost and burdens do not swallow the utility of the information.

"Standard" discovery requests, protocols, confidentiality agreements, and budgets must be updated to address the unique legal and technical issues associated with ESI. You can no longer simply send a list of documents to a custodian and ask them to "gather" them without involving appropriate people who understand the technical issues associated with preserving, identifying, and copying ESI in a manner that preserves relevant evidence and metadata.

"The 'e' in 'eDiscovery' stands for 'email.'"

Some lawyers view email as the only relevant source for eDiscovery or think that eDiscovery is only an issue if you have to use search terms to locate information. Documents that are stored electronically, but not attached to emails, are treated differently by printing, or forwarding them to the lawyer, one at a time. These documents are still ESI and should be collected in a manner that allows you to take advantage of useful information such as an accurate date created, custodian, and file path. Such information needs to be preserved, but it is also useful to efficiently use the information. Avoid a piecemeal collection approach and develop a strategy that helps you collect ESI in a way that avoids duplication of effort and loss of evidence.

Continued on the next page ...

The misconception that ESI is limited to email negatively impacts the efficient management of the discovery process because it

• causes parties to delay or avoid discussions about eDiscovery;
• ignores issues related to other sources such as local machines, shared drives, databases, and proprietary systems; and
• causes parties to produce other ESI in unusable formats – increasing downstream costs and inefficiencies.

Email can be a key source of ESI, and one of the most burdensome sources to analyze efficiency, but it should not be viewed as the sole source of ESI. Any discovery plan should account for email, as well as other ESI sources.

"eDiscovery is easy."

A better way of stating this misconception is that ESI can quickly and cheaply be located and produced. This has been referred to as the "Google affect." We are all spoiled by the ability to type a single word – or even the first few letters of a word – into a web-based search engine which then automatically completes our query and, within seconds, retrieves relevant information from the entire web of servers. Magic.

The power of search engines and the common experience of searching on the Internet for data may lead one to think that finding all documents related to a construction project should be as simple as typing the name of the project into a computer where the results instantly appear. Not so fast.

Let's take email as a simple example. We are all accustomed to quickly locating emails in our own mailboxes by typing key words or sorting by senders – easy and fast. But searching for emails across multiple mailboxes is not so simple. Even if email is stored on a central server, most standard email applications do not come equipped with functionality that permits accurate searching for terms or email addresses across multiple mailboxes. Rather, searches must be manually run one mailbox at a time. Furthermore, most common email applications only search the content of the email itself and not attachments. Accordingly, to accurately perform a simple single-term search of multiple users' emails and their corresponding attachments requires that a party invest in specialized software, or export all of the relevant mailboxes and send them to a technology service provider who itself has the necessary software to perform such searches. The day will come when all email applications come standard with tools for eDiscovery search and retrieval, but currently, most do not.

This notion of "easy" eDiscovery also includes the misguided belief that search terms are accurate and will generate responsive ESI. Even those most well-crafted search terms will be overly broad and under inclusive. And just because a document hits on a term, does not mean it is relevant to your facts. Similarly, documents which do on hit on specific terms may be responsive, but missed due to the over-reliance on search terms and failure to test and sample.

Email is just one example of the difficulties created by large volumes of dispersed ESI which needs to be searched or culled down to some useable universe of potentially relevant information. It is not easy, fast, or cheap. Understanding the burdens and costs involved will help you plan for eDiscovery and avoid missing deadlines.

"Every relevant document will be exchanged in discovery."

Discovery perfection is not possible and should not be the goal of the discovery process. The days of identifying and producing every document related to a dispute are over in all but the smallest of matters. The costs and burdens are simply too great to scour the electronic universe for everything related to a matter.

ESI is easy to create, copy, store, and delete. Accordingly, it proliferates to disparate locations that are not easy to search or retrieve. Even if all of the documents related to a matter exist and are properly preserved, in many matters, it is cost prohibitive to identify, collect, and analyze all such information.

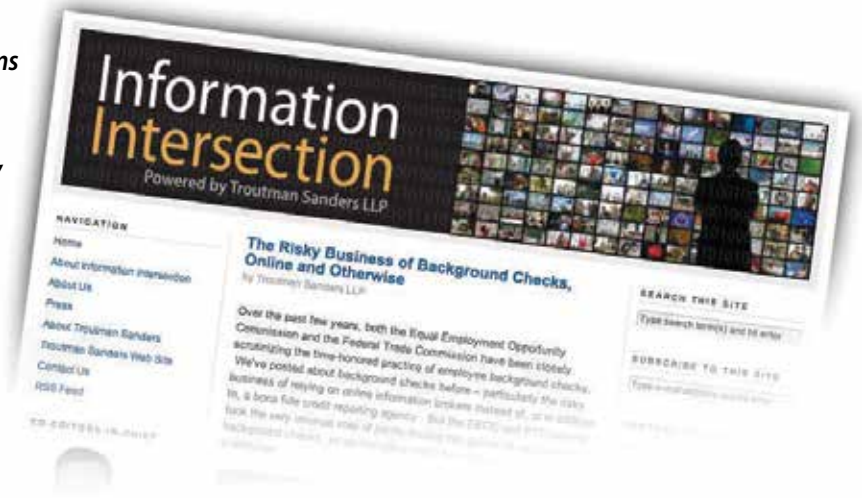
The incomprehensible volume means there will be documents that relate to claims or defenses that will not get exchanged even if all parties handle discovery in a good faith manner and use reasonable efforts. The reality that not all documents will be produced does not mean that parties should be permitted to avoid their obligations to conduct discovery in good faith and in a reasonable manner.

Once the realities and unique challenges of ESI and eDiscovery are accepted, ESI can be a tool to affirmatively move matters forward and resolve disputes rather than just being an expensive distraction.

Information Intersection Blog

Connects legal issues arising from considerations of privacy, data security, information technology, outsourcing, e-commerce, the Internet and social media, information management and e-discovery.

www.informationintersection.com



CONTACTS

Alison Grounds
Managing Director
alison.grounds@tsemerge.com
404.885.3231

Alison is a litigation partner with a focus on eDiscovery, a member of the Georgia eDiscovery Task Force, and the International Technology Association's 2013 Technology Advocate of the Year. Alison works with clients to proactively develop customized, efficient, and defensible legal strategies for discovery. Alison also advocates on behalf of clients in relation to eDiscovery issues at hearings and depositions in state and federal courts around the country. She is a frequent speaker and author on eDiscovery issues and serves as a dedicated legal resource for clients on the intersection of eDiscovery law and technology.

Chris Haley
Director of Litigation Technology
chaley@tsemerge.com
(404) 885-2532

Chris' decades of technology experience in the legal industry enable him to consult with case teams and clients on effective ways to leverage advanced technology to improve efficiencies in all areas of the discovery lifecycle as well as in other non-litigation matters. His resume also includes providing trial presentation services to clients on hundreds of trials. Chris oversees eMerge's technology team, evaluates new technologies that may assist our clients, ensures our team maintains the skills necessary to address the evolving landscape of eDiscovery, and designs and implements custom-tailored technical solutions to meet our clients' needs.

2015 Revisions to the Federal Rules of Civil Procedure: Overview & Practice Pointers

Alison Grounds, Bennet Moskowitz, and Alexandria Reyes
Troutman Sanders LLP

January 5, 2016

I. Introduction

The continuing evolution of the legal landscape to address the practical, technical, and legal challenges of managing data in modern litigation is scheduled for another milestone. New amendments to the Federal Rules of Civil Procedure ("Federal Rules" or "Rules") became effective on December 1, 2015 – unless Congress adopts legislation to reject, modify or defer them.[1]

These amendments are the result of over four years of discussions and work by the Civil Rules Advisory Committee ("Rules Committee") operating under the Committee on Rules of Practice and Procedure of the Judicial Conference ("Standing Committee"). The process involved many regional and national meetings, public hearings, and over 2,300 written comments.[2]

These changes began their journey from theory to rule when many lawyers and judges began pushing for improved case management, proportionality, and cooperation in the execution of the discovery process, as the volume of electronically stored information ("ESI") continued to exponentially increase and complicate the litigation process. Many lawyers and judges felt prior rule changes failed to curtail increasing costs and led to disproportionate discovery burdens, as well as inconsistent court rulings concerning preservation duties and sanctions related to the loss of data.[3] Though the full impact of the amended rules will not be known for years, the following overview and practice pointers will assist practitioners with navigating the key aspects of the changes.

II. The Amendments

A. Clarification That the Court and the Parties Should Cooperate To Achieve the Goals of the Federal Rules.

Federal Rule 1 provided that the scope and purpose of the Federal Rules are to secure the "just, speedy, and inexpensive determination of every action and proceeding."[4] The amendments

[1] *See* The 2015 Civil Rules Package As Transmitted to Congress, Thomas Y. Allman, 16 Sedona Conf. J. __(forthcoming 2015) (providing a detailed procedural history to the proposed changes and well as the various views expressed during the process).
[2] *Id.* at 4-5.
[3] *See id*. at 2-4.
[4] Fed. R. Civ. P. 1.

clarify that Rule 1 should be construed, administered "*and employed by the court and the parties*" to achieve these goals.

The amendment to Rule 1 is not intended to "invite ill-founded attempts to seek sanctions for violating a duty to cooperate."[5] Therefore, the amendment stops short of requiring the parties to "cooperate" in achieving the goals set forth in Rule 1. The final version of the Rule 1 Committee Note clarifies that the amendment "does not create a new or independent source of sanctions" or "abridge the scope of any other of these rules."[6]

B. Amendments to Improve Overall Case Management.

Several of the amendments to Federal Rules 4, 16, 26, and 34 are intended to improve case management by the parties and the court.

1. Time to Serve Process is Reduced.

The time limit governing service of process set forth in Rule 4(m) is reduced from 120 days to 90 days. This shorter time period is intended to "reduce delay at the beginning of the litigation."[7] The amendments do not change the provision in Rule 4(m) requiring the court to extend the time for service "if the plaintiff shows good cause for the failure."[8]

2. Waiver of Service Forms Will Be Incorporated into Rule 4(d).

The amendments abrogate Rule 84 and the Appendix of Forms appended to the Rules, and will incorporate certain of the abrogated forms relating to waiver of service (former Forms 5 and 6) directly into Rule 4(d).[9]

3. Discovery Requests Will Be Allowed Before the 26(f) Conference.

The amendments add a new provision to Rule 26 allowing the service of Rule 34 document requests before the Rule 26(f) "meet and confer" conference. The purpose of this amendment is to facilitate a focused discussion about discovery during the Rule 26(f) conference, which may ultimately produce changes in the requests.[10]

---

[5] June 2014 Advisory Committee Report, attached to Chief Justice Roberts, Transmittal Memo and Exhibits (April 29, 2015), at 13, *available at* http://www.uscourts.gov/file/document/congress-materials (collectively referred to as the "Rules Transmittal").
[6] Committee Note, attached to Rules Transmittal, *supra* note 5, at 2. (Citations to the text of the amendments and the Committee Notes are to the internally numbered pages of the Exhibit to the September 26, 2014 Memorandum, which is attached to the Rule Transmittal, beginning at (unnumbered) page 45.)
[7] *Id.* at 4.
[8] Fed. R. Civ. P. 4(m).
[9] *See* Allman at 25.
[10] Committee Note, attached to Rules Transmittal, *supra* note 5, at 25.

To calculate the response time to these "Early Rule 34 Requests," the requests will be treated as having been served at the first Rule 26(f) meeting.[11] Rule 34 was also amended to address the time to respond to early document requests.[12]

3. Scheduling Conference and Scheduling Orders.

Under the amendments, Rule 16 no longer refers to holding a scheduling conference by "telephone, mail, or other means."[13] The amended version of Rule 16(b)(1)(B) merely requires consultation "at a scheduling conference."[14] The Committee Note explains that the conference may be held "in person, by telephone, or by more sophisticated electronic means," and further reiterates that the scheduling conference will be more effective if the court and the parties engage in "direct simultaneous communication."[15]

The amendments also affect the specified permitted content of scheduling orders in three main ways.

First, the scheduling order may provide for "disclosure, discovery, or preservation" of ESI.[16] This change corresponds to the amendment to Rule 26(f)(3)(C), which requires that parties state their views on "disclosure, discovery, or preservation of ESI" during the scheduling conference.

Second, the amendment expressly provides for the inclusion of any agreements reached under Federal Rule of Evidence 502 regarding waiver of privilege.[17] This amendment tracks the language added to Rule 26(f)(3)(D), which requires that parties discuss whether to seek an order under FRE 502.

Third, the scheduling order may provide that the parties are required to request a conference with the court before moving for an order related to discovery.[18] The decision whether to require such a conference will still be left to the judge in each case. But the rule is intended to encourage discovery dispute conferences, as many judges who hold them find that they are an efficient way to resolve discovery disputes without the delay and burdens associated with filing formal motions.[19]

---

[11] *Id*.
[12] "The party to whom the request is directed must respond in writing within 30 days after being served or – if the request was delivered under Rule 26(d)(2) – within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court." Amended Fed. R. Civ. P. 34(b)(2)(A), attached to Rules Transmittal, *supra* note 5, at 31.
[13] Committee Note, attached to Rules Transmittal, *supra* note 5, at 7.
[14] Amended Fed. R. Civ. P. 16(b)(1)(B), attached to Rules Transmittal, *supra* note 5, at 5.
[15] Committee Note, attached to Rules Transmittal, *supra* note 5, at 7.
[16] Amended Rule 16(b)(3)(B)(iii), attached to Rules Transmittal, *supra* note 5, at 6.
[17] Amended Rule 16(b)(3)(B)(iv), attached to Rules Transmittal, *supra* note 5, at 7.
[18] Amended Rule 16(b)(3)(B)(v), attached to Rules Transmittal, *supra* note 5, at 7 (the scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court[.]").
[19] Committee Note, attached to Rules Transmittal, *supra* note 5, at 9.

C. Proportionality Requirements Appear Earlier In Rule 26(b) to Emphasize Their Consideration Sooner in the Discovery Process.

1. Former Rule 26(b) and Proportional Discovery.

In 1983, the Supreme Court amended Rule 26(b) to require that courts limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[20] Rule 26(b) was amended again in 2006, to respond to the prevalence of e-discovery and ESI, by adding limitations on the discovery of ESI.[21]

The current changes to the Rules were inspired by many thought leaders and practitioners who have expressed that the proportionality provisions have not been utilized to focus discovery efforts in an era when the exponentially increasing volume of information is impeding the just, speedy and inexpensive determination of legal disputes. Accordingly, the Advisory Committee expressed in 2010 that the 1983 and 2006 amendments to Rule 26(b) were not having their "desired effect" of reducing the burden and expense of discovery.[22]

2. Revisions to 26(b) and Anticipated Impact.

Under the amendments, the proportionality factors are relocated from Rule 26(b)(2)(C) to Rule 26(b)(1). Therefore, the amended proportionality rule reads more as an initial, necessary consideration concerning the scope of discovery rather than merely as a potential limitation to the scope of discovery.

The amendments also include a new proportionality factor: consideration of "the parties' relative access to the information."[23] This new factor is intended to address the "information asymmetry" that often occurs where one party (often an individual plaintiff) may have very little discoverable information as compared to another party (often a corporate defendant) that may have vast amounts of discoverable information.[24] In practice, these circumstances often mean that the burden of responding to discovery lies more heavily on the party that has more information.

---

[20] Fed. R. Civ. P. 26(b)(2)(C)(iii).

[21] "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery." Fed. R. Civ. P. 26(b)(2)(B).

[22] June 2014 Advisory Committee Report, attached to Rules Transmittal, *supra* note 5, at 8.

[23] Amended Rule 26(b)(1), attached to Rules Transmittal, *supra* note 5, at 10.

[24] Committee Note, attached to Rules Transmittal, *supra* note 5, at 20.

More minor revisions are also reflected in the amendment. For example, the "amount in controversy" factor now appears after the "importance of the issues at stake in the action" factor. Also, the examples of types of discoverable information, such as the location of discoverable matter and the identity of the parties who know about it, are deleted.

As revised, Rule 26(b)(1) allows a party to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[25] Amended Rule 26(b)(1) also adds the direct statement that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable."[26]

According to the Committee Note, the amendment "does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations."[27] The parties and the court have a "collective responsibility" to consider the proportionality of all discovery in resolving discovery disputes.[28]

Despite this language, some observers have questioned whether this change will be used to shift to requesting parties the burden of proving requests are proportional. Commentators have opined that "the relocation of the 'proportionality' factors does not change the existing responsibilities of the court and the parties to consider proportionality nor the burdens of proof involved."[29]

The future impact of the amendment is unclear, particularly in jurisdictions, such as the Northern District of Georgia, that have already demonstrated a willingness to restrict e-discovery based on proportionality.[30] The amendment may prompt courts to become more open to objections based on a lack of proportionality.

As a practice pointer, parties seeking discovery should consider drafting requests in a manner that limits potential challenges on proportionality grounds – such as by avoiding requests for "any and all" documents on broad topics.

---

[25] Amended Rule 26(b)(1), attached to Rules Transmittal, *supra* note 5, at 10-11.
[26] *Id.* at 11.
[27] Committee Note, attached to Rules Transmittal, *supra* note 5, at 19.
[28] *Id.*
[29] Allman at 18, n.56 (noting that a "party seeking discovery must demonstrate a facially relevant showing of proportionality if challenged, the party asserting disproportionality must demonstrate it by specific proof").
[30] *See, e.g., Edelen v. Campbell Soup Co.*, 265 F.R.D. 676, 699-700 (N.D. Ga. 2010) (agreeing with defendants that employment discrimination plaintiff's request for production of ESI using 50 search terms, held by 55 custodians, and over a three-year period was overbroad, and allowing defendants' proposal, which included narrowed search terms, fewer custodians, and a shorter time period).

Responding parties should be careful not to rely on generic objections based on proportionality. The Committee Notes specifically state that the amended rule is not intended to permit responding parties to refuse discovery "simply by making a boilerplate objection that it is not proportional."[31]

To make specific objections related to proportionality, counsel will need to engage in early discussions regarding potential sources of information (custodians, systems, devices, etc.) and the scope of discovery, including relevant date ranges, topics, and the identification of sources that may be inaccessible due to undue cost or other burden. This type of advanced planning was a goal of the earlier Rules amendments intended to address e-discovery. However, in practice, many practitioners have failed to embrace the proactive early planning for e-discovery issues contemplated by the Rules. These latest proposals are partially intended to further push parties into proactive case management on these issues.

D. Disputes Concerning Leave to Obtain Certain Additional Discovery Will Require Consideration of Proportionality.

1. Former Rules Regarding Presumptive Limits to Discovery.

Under the prior Rules, when a party sought leave to obtain certain discovery beyond express limitations set forth in the Rules (e.g., more than 25 interrogatories), the court had to permit the additional discovery to the extent consistent with Rule 26(b)(2).[32]

Rule 26(b)(2)(C), in turn, provided that, on motion or on its own, a court must limit the frequency or extent of discovery otherwise allowed if it determines that:

> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.[33]

2. Amendments to the Presumptive Limits.

Under the amendments, the sections of Rules 30 (Depositions by Oral Examination), 31 (Depositions by Written Questions) and 33 (Interrogatories to Parties) pertaining to leave to obtain discovery beyond the limitations set forth therein will, in addition to continuing to

---

[31] Committee Note, attached to Rules Transmittal, *supra* note 5, at 19.
[32] *See*, *e.g.*, Fed. R. Civ. P. 33(a)(1).
[33] Fed. R. Civ. P. 26(b)(2)(C).

reference Rule 26(b)(2), cross-reference amended Rule 26(b)(1) concerning, among other things, proportionality. Parties and courts must therefore consider the factors set forth in Rule 26(b)(2)(C) **and** proportionality in resolving disputes concerning motions for leave to (i) take a deposition by oral examination (Rule 30(a)(2)); (ii) take a deposition by oral examination for more than one day of 7 hours (Rule 30(d)(1)); (iii) take a deposition by written questions (Rule 31(a)(2)); and (iv) serve more than 25 written interrogatories, including all discrete subparts (Rule 33(a)(1)).

E. Revised Rule 26 Expressly Provides for Cost-Shifting Provisions in Protective Orders.

Amended Rule 26 provides for the inclusion of a cost-shifting provision in a protective order issued by a court for good cause. The protective order may specify terms "including time and place *or the allocation of expenses*, for the disclosure or discovery."[34]

Rule 26 and existing case law already confirm that courts have the authority to enter protective orders with cost-shifting provisions.[35] However, one goal of expressly recognizing this authority in amended Rule 26 is to "forestall the temptation some parties may feel to contest this authority."[36]

The amendment to the rule "does not mean that cost-shifting should become a common practice."[37] The Committee Note points out that "[t]he assumption remains that the responding party ordinarily bears the costs of responding."[38] Rather, the amendment is intended to ensure that courts and parties will consider cost-shifting as an alternative to denying requested discovery or ordering it despite the risk of imposing undue burdens and expense on the party who responds to the request.[39]

F. Amendments to and Clarification of Rules Governing Production Requests and Objections.

1. Former Rules Concerning Objections to Discovery Requests.

Former Rule 32(b)(2)(B) required a party responding to a document/inspection request to state either that the documents/inspection will be provided or an objection, including the reasons for the objection.[40] Litigators frequently engaged in discovery disputes concerning whether an opposing party was withholding any documents or ESI based on written objections.

---

[34] Amended Fed. R. Civ. P. 26(c)(1)(B), attached to Rules Transmittal, *supra* note 5, at 14.
[35] *See, e.g., Oppenheimer Fund v. Sanders*, 437 U.S. 340, 358 (1978) (explaining that a court has authority to "allow discovery only on condition that the requesting party bear part or all of the costs of responding").
[36] Committee Note, attached to Rules Transmittal, *supra* note 5, at 25.
[37] *Id.*
[38] *Id.*
[39] June 2014 Advisory Committee Report, attached to Rules Transmittal, *supra* note 5, at 10.
[40] Fed. R. Civ. P. 32(b)(2)(B).

For example, a party may respond to a document request by objecting on the basis of scope and burden, but then state that, subject to the objections, responsive documents will be produced, if any exist. The requesting party is then left to wonder whether its adversary is withholding non-privileged documents based on such objections.

2. Amendments to Rule 34(b) and Anticipated Impact.

Under the amendments, an objection to a Rule 34 request must state: (1) "with specificity the grounds for objecting" to the request, including the reasons; **and** (2) whether anything is being withheld on the basis of the objection.[41] These changes are intended to "end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections."[42]

The Committee Note suggests that, where an objection recognizes that some part of the request is appropriate, then the objection should identify the portion that is proper.[43] The Committee Note addresses objections based on scope specifically, but practitioners are well-advised to apply this logic to all types of objections.

The revised rules do not require a detailed description or log of all documents withheld.[44] Rather, a party needs to alert other parties to the fact that documents have been withheld to facilitate an informed discussion of the objection.[45]

An objection that states the limits that have controlled the search for responsive and relevant materials (e.g., temporal or source limitations) qualifies as a statement that materials have been "withheld."[46] The statement of what has been withheld can identify as matters "withheld" anything beyond the scope of the search specified in the objection.[47]

The amendments also permit parties to state whether they will produce copies of documents or ESI, instead of permitting an inspection.[48] The production must then be completed no later than the time for inspection specified in the request **or another reasonable time specifically identified in the response**.[49] The Committee Note clarifies that, when it is

---

[41] Amended Fed. R. Civ. P. 34(b)(2)(B)-(C), attached to Rules Transmittal, *supra* note 5, at 31-32.
[42] Committee Note, attached to Rules Transmittal, *supra* note 5, at 34.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* This proposed change to Rule 34(b)(2)(B) is intended reflect the common practice of producing copies of documents or ESI rather than simply permitting inspection. Consistent with that change, another proposed amendment expressly authorizes parties to file motions to compel for failures to produce documents. Amended Fed. R. Civ. P. 37(a)(3)(B)(iv), attached to Rules Transmittal, *supra* note 5, at 35-36.
[49] Committee Note, attached to Rules Transmittal, *supra* note 5, at 34.

necessary to make the production in stages, the response should specify the beginning and end dates of the production.[50]

The reasonableness standard is undefined and thus prone to disputes. Providing a set production date or even beginning and end dates for productions will require actual knowledge of the universe of potential production documents – including the volume that remains after ESI is collected, de-duplicated, processed, filtered, reviewed, and converted to the agreed-upon production format. Practitioners must understand their clients' information systems and data with sufficient detail to develop a plan for collection and production within a specific time frame in a response to Rule 34 requests. In complex matters with diverse ranges of potentially relevant sources, these issues will likely need to be addressed **before** discovery requests are served to allow sufficient time to gather the required details and data.

G. Rules Governing Failure to Preserve ESI and Spoliation.

1. Former Rules Concerning Preservation and Spoliation of ESI.

Former Rule 37 provided relatively little guidance to courts and litigants concerning duties and failures to preserve ESI. The rule stated that, absent exceptional circumstances, a court may not impose sanctions for a party's failure to provide ESI lost as a result of the routine, good-faith operation of an electronic information system.[51] This "safe harbor" failed to provide the protections originally envisioned – allowing for routine deletion of data – because of a notable exception which undercut the rule. The safe harbor provided no protection against broad preservation requirements once litigation was reasonably anticipated.

2. Amendments to Rule 37(e) and Anticipated Impact.

The changes to Rule 37 are intended to address the divergent Federal case law that has caused litigants to expend excessive effort and money on preservation to avoid severe sanctions.[52] The amendments provide that, if ESI that should have been preserved in the anticipation or conduct of litigation is lost "because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery," then the court may employ different measures depending on findings concerning the loss, as set forth in the chart below:[53]

[50] *Id.*
[51] Fed. R. Civ. P. 37(e).
[52] Committee Note, attached to Rules Transmittal, *supra* note 5, at 34.
[53] *Id.* at 43-47.

Finding Required	Available Measures
Prejudice to another party from loss of the information (Rule 37(e)(1)).	Measures no greater than necessary to cure the prejudice. Committee Note: • Much is entrusted to the court's discretion. • There is no all-purpose hierarchy of various measures. • The court is not required to cure every possible prejudicial effect. • The measures should not have the effect of Subdivision (e)(2) measures.
The party acted with the intent to deprive another party of the information's use in the litigation (Rule 37(e)(2)).	A. Presume that the lost information was unfavorable to the party; B. Instruct the jury that it may or must presume the information was unfavorable to the party; **or** C. Dismiss the action or enter a default judgment. Committee Note: • Courts should exercise caution and are not required to adopt any of the measures. • The remedy should fit the wrong (e.g., should **not** be used when the lost information was relatively unimportant or lesser measures are sufficient). • Does **not** prohibit a court from allowing the parties to present evidence concerning the loss. • Does **not** prohibit traditional missing evidence instructions.

The new rule applies only to ESI and only when it is lost; loss from one source may be harmless if the ESI can be found elsewhere.[54] Efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information.[55] Substantial measures should not be used to restore or replace information that is marginally relevant or duplicative.[56]

Notably, the new rule does not apply if the information is lost before a duty to preserve arises.[57] The fact that a party had an independent obligation to preserve information (e.g., pursuant to statute) does not necessarily mean that it had such a duty with respect to the litigation.[58] The party's failure to observe another preservation obligation does not itself prove that its efforts were unreasonable.[59]

The new rule applies only if the information was lost because the party failed to take reasonable steps to preserve the ESI after it had a duty to do so; **it does not call for perfection**.[60] The new rule is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve (e.g., "cloud" service failures, malign software attacks).[61]

[54] *Id.* at 39.
[55] *Id.* at 42.
[56] *Id.*
[57] *Id.* at 39.
[58] *Id.* at 40.
[59] *Id.*
[60] *Id.* at 41.
[61] *Id.*

The Committee Note sets forth detailed guidance concerning how courts should evaluate the "reasonable steps", "prejudice" and "intent" standards, as summarized by the following chart:[62]

Standard	Factors For Evaluation
Reasonable Steps	• Routine, good-faith operation of an electronic information system. • A party's **sophistication**. • **Proportionality** (e.g., the court should be sensitive to the party's resources); however, a party urging that preservation requests are disproportionate may need to provide specifics. • Less costly forms of preservation are reasonable if substantially as effective as costlier forms. **Note: The Committee Note states that it is important for counsel become familiar with their clients' information systems and data-including social media-to address these issues.**
Prejudice	• Judges have **discretion** to determine how best to assess prejudice. • The **information's importance** is a necessary consideration. • The rule does **not** place a burden of proving/disproving prejudice on either party.
Intent	• May be made by the court on a pretrial motion, at bench trial, or when considering an adverse inference instruction at trial. • Prejudice to the party deprived of the information is **not** required.

III. Conclusion

The latest changes to the Federal Rules emphasize case management and proportionality and will require practitioners to address e-discovery issues early and proactively, if they are not already doing so. Pushing back discussions and decisions regarding substantive discovery issues (with both clients and adversaries) or delaying the collection and analysis of potential document and data sources will put counsel (and their clients) at risk of violating their duties under the rules.

Fortunately, the rule changes also should bring greater continuity in the application of the most severe sanctions for failure to preserve ESI and provide tools and guidance for remedial measures to balance against any prejudice created by lost data.

The actual impact of the rules will take years to unfold. But proactive and efficient e-discovery practices can help parties and their counsel reach the merits of their disputes and reduce the chances of a discovery side-show, even without changes to the rules.

The most common errors and issues in the e-discovery space arise from failures to understand the technical issues and to manage the discovery process proactively and efficiently. Hopefully, these amendments will improve the emphasis placed on discovery planning and management.

[62] *Id.* at 41-47.

eDiscovery Ethics & Professionalism: Unique Challenges in the Era of Big Data

By:
Alison Grounds
Partner, Troutman Sanders LLP
Managing Director, Troutman Sanders eMerge

March 16, 2015

TABLE OF CONTENTS

Page

I. Executive Summary

The explosion of data generated by individuals and corporations is almost incomprehensible: Experts estimate that the volume of data generated, replicated and consumed in the world will double every year until 2020 and is expected to reach 44 zettabytes by that same year. *The Digital Universe of Opportunities: Rich Data and the Increasing Value of the Internet of Things*, EMC Digital Universe with Research & Analysis by IDC, http://www.emc.com/leadership/digital-universe/2014iview/executive-summary.htm (April 2014). For context, a zettabyte is the equivalent of 44 trillion gigabytes. Still not helpful? The average sized email mailbox I see in my litigation and eDiscovery practice is two gigabytes – a volume that, if printed, could fill the equivalent of 100 bankers' boxes.

Technology facilitates the creation of incomprehensible volume of information generated each day by businesses of all sizes and must be leveraged by lawyers to keep pace with the impact of data on the practice of law. In August of 2012, the ABA adopted revisions to the Model Rules recommended by its Commission on Ethics 20/20 to address the transformative impact that technology was having on the practice of law. The ABA Commission noted that "technology affects nearly every aspect of legal work, including how we store confidential information, communicate with clients, conduct discovery, engage in research, and market legal services." *ABA Commission on Ethics 20/20*, American Bar Association, http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.authcheckdam.pdf (August 2012).

Although the ubiquitous nature of electronically stored information ("ESI") adds additional ethical and professionalism considerations to the practice of law in general, the unique risks and benefits are particularly relevant in the eDiscovery context. In addition to the Model Rules, the Federal Rules of Civil Procedure, Federal Rules of Evidence, various state rules and state and federal case law provide guidelines and expectations for lawyer conduct. Ethics and professionalism issues exist at every stage of the Electronic Discovery Reference Model. Technical aspects of preservation, collection, filtering, review, and production of ESI may require use of specialized software, hardware, and personnel as well as weighing the relative benefits of various options.

The key areas of the Model Rule changes impacting lawyers in the eDiscovery context include general requirements for understanding the risks and benefits of relevant technology, obligations related to confidentiality, and obligations for overseeing others assisting with such technical issues. A few of the key provisions and their impact of eDiscovery and privilege are discussed in detail below. All changes are underlined for ease of reference. A complete copy of the revisions most applicable to eDiscovery is available at:

ABA House of Delegates Report No. 105A

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf

ABA House of Delegates Report No. 105C

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c.authcheckdam.pdf

II. ABA Model Rule 1.1: Competence

The text of Rule 1.1 remains unchanged: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

The revisions to Rule 1.1 are limited to the comments section, but add a requirement that lawyers must not only stay current on changes in the law, but also "the benefits and risks associated with relevant technology" as an essential aspect of competency in the modern legal environment:

> **Rule 1.1 Comments**
>
> **Maintaining Competence**
>
> **To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.**

A. Technological Competence in eDiscovery

"Relevant technology" in the eDiscovery context may include computers, software, and systems used by relevant client users (custodians) in the ordinary course of business, as well as litigation-specific software used for collecting, processing, filtering, analyzing, reviewing, redacting and producing such data. Lawyers need to understand not only the benefits of using various tools to make the litigation process more efficient, but also the risks of not using appropriate tools. A few key examples:

- If a client uses Outlook to search their own emails using key words, they may risk missing relevant documents because of technical limitations in Outlook's searching features.

- If a file or document is not properly collected, relevant information, such as the original file location of the document or the date it was created, could be modified or lost.

- If a lawyer prints all the electronic records provided by a client, rather than using technical tools for filtering, de-duplicating, processing and reviewing those files, the lawyer could be charging the client more hours to inefficiently review duplicate files in hard copy than if technology had been leveraged.

- If a lawyer tries to apply redactions to a file using a standard PDF tool and does not remove the underlying metadata, the redactions could be useless – wasting hours and violating client confidentiality.

- If a lawyer buys special software to help run privilege searches on client data, but does not know how to properly use the tool and fails to identify and withhold privileged information, the benefits of the tool are lost.

III. Rule 1.6: Confidentiality of Information

Maintaining the confidentiality of client data is an essential ethic duty that is complicated by technological advances and increasing data volumes. Revisions to Model Rule 1.6 include the addition of section 1.6(c):

> **A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.**

Key revisions to the comments to Rule 1.6 are noted below.

Rule 1.6 Comments (excerpts)

Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

The unauthorized access to, or the inadvertent or unauthorized disclosure of, ~~confidential~~ information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

. . .

Under Rule 1.6, the factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to,

– the sensitivity of the information,

– the likelihood of disclosure if additional safeguards are not employed,

– the cost of employing additional safeguards,

– the difficulty of implementing the safeguards, and

– the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

Notably, "[a] client may require the lawyer to implement special security measures not required by this Rule" or may give informed consent to forgo security measures that would otherwise be required by this Rule. The rule does not address whether a lawyer must take additional steps to comply with other laws governing the protection of client data, such as privacy laws.

A. eDiscovery Confidentiality Considerations

The balance between data security and convenience is a constant struggle for lawyers – especially in a world where we are increasingly mobile and working from various locations day and night. In the context of eDiscovery, confidentiality concerns require lawyers to ask a few key questions about how they are handling client data:

- Where are you storing client data? Laptops? Servers? Databases? External media? Personal email?
- Who has access to client data? Can you track or limit access?
- What level of security is applied to client data in your control?
- Are there any protections against accidental emailing of confidential information? (metadata scrubbers?) (email encryption?)
- Are you working on client data in public locations?
- What efforts are you taking to protect privileged communications and work product?

If client data is being stored on unsecured laptops, shared drives, or external media without proper limits on access, including physical and technological limitations, you may be putting your client's confidential data at risk. Additionally, if you are working on client documents in locations where your work product cannot be safely backed-up, you could be violating your obligations to protect work product and work efficiently. If you are relying on third parties to help store and manage client data in the cloud or elsewhere, you need to ensure your client's data is properly handled. *See* Rule 5.3 below.

IV. Protecting Privilege

Lawyers are required to avoid disclosing client information protected by the attorney client privilege or work product protections. In modern discovery, with large volumes of information being collected and produced, the risk of inadvertently disclosing protected information is higher than ever. Lawyers should take precautions to avoid waiver of client protections. Although protection against waiver does not

necessarily remove the lawyer's obligation to take reasonable steps to avoid disclosure, Federal Rule of Evidence 502 is a tool to help protect against inadvertent waiver and provides as follows:

> **Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver**
>
> The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
>
> **(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.** When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
>
> **(1)** the waiver is intentional;
>
> **(2)** the disclosed and undisclosed communications or information concern the same subject matter; and
>
> **(3)** they ought in fairness to be considered together.
>
> **(b) Inadvertent Disclosure.** When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
>
> **(1)** the disclosure is inadvertent;
>
> **(2)** the holder of the privilege or protection took reasonable steps to prevent disclosure; and
>
> **(3)** the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).
>
> **(c) Disclosure Made in a State Proceeding.** When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:
>
> **(1)** would not be a waiver under this rule if it had been made in a federal proceeding; or
>
> **(2)** is not a waiver under the law of the state where the disclosure occurred.

(d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of this Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Many experts recommend having Rule 502(d) non-waiver orders in place whenever possible to provide the most protection against waiver. Such an order should specifically state that the mere production of protected information is not sufficient to trigger notice provisions. Similarly, a non-waiver order or agreement will offer greater protection if it includes language that avoids retrospective analysis of the reasonableness of the efforts to avoid disclosure.

Even with such an order or agreement, lawyers should make sure they understand the technical issues associated with producing large volumes of ESI to avoid potential waiver. Rule 502 was intended to help reduce the cost and burdens of manual privilege reviews, but some courts are still finding waiver under Rule 502(b) where the efforts of the lawyers to avoid disclosure are held to be unreasonable. The key cautionary tale comes from the case of *Mt. Hawley Ins. Co. v. Felman Prod.*, 271 F.R.D. 125 (S.D. W. Va. 2010).

In the *Feldman* case, the Plaintiff attempted to claw back documents pursuant to an "ESI Stipulation." The court balanced five factors to determine whether Plaintiff waived the privilege:

(1) the reasonableness of the precautions taken to prevent inadvertent disclosure;

(2) the number of inadvertent disclosures;

(3) the extent of the disclosures;

(4) any delay in measures taken to rectify the disclosure; and

(5) overriding interests in justice.

The court considered the following facts when evaluating these five factors:

- Plaintiff produced ~1 million pages of ESI, all marked "confidential;"
- Nearly 1000 privileged documents were inadvertently produced;
- Plaintiff attempted to claw back only 378 of those privileged documents;
- One of the inadvertently produced privileged documents was a "smoking gun" email—other copies of the same document were included on the privilege log.

The Plaintiff introduced evidence that a **software glitch** caused the inadvertent production of large numbers of privileged documents (the tool used to search the documents had failed to index all documents causing a subset not to be searched).

The court had no sympathy for the technical issues and found that precautions taken to avoid inadvertent disclosure were unreasonable based on the following:

- Plaintiff's failed to conduct quality control sampling and keyword searches for privileged documents before producing ESI;
- The "smoking gun" email was "a bell which cannot be unrung. Its content has had great influence on Defendants' discovery requests and deposition questions. Confidentiality cannot be restored to that document;" and
- Plaintiff's attempted to claw back certain privileged documents only after Defendants' notification, not based on Plaintiff's own review.

The District Court found that Plaintiff failed to satisfy the requirements of Rule 502(b) because the steps taken to avoid the disclosure were not reasonable and Plaintiff failed to promptly rectify the error. Therefore, the court ruled the Plaintiffs had waived the privilege as to the inadvertently produce documents.

V. Rule 4.4: Respect for Rights of Third Persons

Model Rule 4.4 was revised "to make clear that electronically stored information, in addition to information existing in paper form, can trigger Rule 4.4(b)'s notification requirements if the lawyer concludes that the information was inadvertently sent." This rule applies both to inadvertently sent emails as well as to documents and ESI produced in eDiscovery.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or

burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

The comments to Rule 4.4 provide, in relevant part:

Paragraph (b) recognizes that lawyers sometimes receive a documents or electronically stored information that were was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted.

If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived.

Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been wrongfully inappropriately obtained by the sending person.

For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is email or other electronic modes of transmission subject to being read or put into readable form.

Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

...

Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

The basic concept behind Rule 4.4 relates to notifying third parties of inadvertent disclosures of protected documents or misdirected emails. The rule specifically avoids the disputed issue of whether the receiving party is allowed to use the information received through such inadvertent disclosure. Parties may wish to clarify such obligations in their own agreements.

VI. Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

The unique technical and legal risks associated with handling data in litigation will often require reliance upon appropriate third party consultants and vendors. Model Rule 5.3 addresses a lawyer's obligation to supervise those working on behalf of clients at their direction and states as follows:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or

has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The key additions to Rule 5.3 are found in the comments to the Rule:

Rule 5.3 Comments (excerpts)

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, **hiring a document management company to create and maintain a database for complex litigation**, sending client documents to a third party for printing or scanning, and **using an Internet-based service to store client information.**

. . .

When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law).

. . .

When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer. Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may

have additional obligations that are a matter of law beyond the scope of these Rules.

A. eDiscovery Concerns: Rule 5.3

To meet their ethical obligations to properly handle and manage client data in eDiscovery, lawyers will likely need to rely on third party consultants and tools. Data may need to be transferred to third parties for more efficient analysis and may require that data be stored in the cloud. Below are a few questions to consider when relying upon third parties for eDiscovery services:

- How are you selecting and supervising service providers/vendors?
- What security measures are being taken by the provider?
- Where is client data stored? How it is backed up?
- Who has access? How can you audit?
- What control do you have to ensure proper handling of client data?
- How do you manage providers selected by clients?
- What decisions are being made without your input?

Although the process of managing third parties may be daunting, it is less daunting than trying to dabble in these areas without appropriate guidance and tools.

VII. eDiscovery & Duty of Candor

A. Rule 3.4: Duty of Candor Toward the Tribunal

In addition to duties to clients and third parties, lawyers have an ethical duty of candor to the tribunal. This duty interacts with other eDiscovery obligations and is most often at issue when lawyers misunderstand the nature of the data available or at issue in a dispute, or misrepresent what information is available or has been produced.

Model Rule 3.4 states:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

. . .

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered

> **material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal . . . .**

For example, the duty of candor may require a lawyer to correct a misrepresentation of fact regarding available ESI or the reasons for the lack of its existence. Other potential issues raised by the duty to disclose:

- What must be disclosed about the eDiscovery process?
- How much detail is required?
- Must lawyer disclose exception reports?
- If a lawyer learned of a preservation failure, must it be disclosed?
- What efforts must lawyer take to ensure representations are accurate: (e.g., "produced all documents"?)

B. Rule 3.5: Fairness to Opposing Party and Counsel

Model Rule 3.5 also requires fairness to opposing counsel and states in relevant part:

> **A lawyer shall not:**
>
> **(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act . . . .**

These fairness and candor requirements raise many questions in the eDiscovery process, such as:

- What if search terms fail to identify known responsive documents?
- What are the ethical implications of downgrading ESI to less usable formats?
- Must a party using search terms or technology assisted review disclose their terms or workflows?

C. Other Rules & Duties: Cooperation, Reasonable Inquiry and Certification

In addition to the Model Rules, other rules require that lawyers in the eDiscovery process make accurate disclosures of certain information. A few key rules include Federal Rules of Civil Procedure 26 & 37. Rule 26 states as follows:

Rule 26(g) Certification

By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

The most common mistake made by lawyers is failing to make a "reasonable inquiry" and overstating the scope or completeness of their discovery productions by relying on representations made by clients without any confirmation or independent verification. For example, in *Play Visions, Inc. v. Dollar Tree Stores, Inc., No. C09-1769 MJP (W.D. Wash. June 8, 2011),* Plaintiff and counsel were held jointly and severally liable for $130,000 in fees incurred by defendants as a result of plaintiffs' discovery failures. The court noted that "[w]hile counsel may trust his client, he must make reasonable inquiry into whether his client's responses to discovery request are adequate. Counsel must also familiarize himself with the documents in his client's possession before certifying that production is complete." Id. at *25.

Meeting such a requirement may require understanding technical information regarding where and how information is stored by clients and speaking to appropriate and knowledgeable client representatives. The lawyer in *Play Visions* was sanctioned for the following failures:

- False certification that documents were only stored in hard copy form when they were readily and easily available electronically;
- Repeatedly representing that productions were complete when in fact they were not; and
- Belatedly producing ESI previously represented as nonexistent.

These failures were quickly revealed through a 30(b)(6) deposition of the Plaintiff's designated IT representative on data retention and production who revealed that counsel was not active in overseeing the process and that Plaintiff had self-selected documents.

Coquina Invs. v. Rothstein, No. 10-60-60786-Civ-Cooke/Bandsta, 2012 U.S. Dist. LEXIS 108712 (S.D.Fla. Aug. 3, 2012) is another example of counsel failing to understand where and how data is stored and to properly track the eDiscovery process from collection through production in a manner that ensures their certification of completion is accurate. Both counsel and the client were sanctioned under Rule 37 for the following eDiscovery failures:

- Failing to produce a key document in electronic format with relevant metadata and color header "High Risk" because the lawyer printed and scanned the electronic file as a PDF rather than producing it in electronic format from its eDiscovery vendor's database. Counsel relied on an emailed version of the document and misrepresented that the document was only available in hard copy.

- Failing to identify and produce key document until after trial. The lawyers failed to look for a policy document in the shared drives of the bank. The documents were collected in varying ways (vendor collections, client self-selection and email forwards) and outside counsel lacked a documented process to conform where and how they had searched for relevant information.

The court found outside counsel negligent and held that in-house counsel and the client had willfully withheld information resulting in an adverse finding of fact and attorneys' fees award.

VIII. Conclusion

The ABA Model Rules, state and federal rules of civil procedure, and case law provide a framework of duties and obligations of lawyers working with client data and the technical and legal challenges that accompany such data in the eDiscovery process.

Published in The Business Lawyer, August 2013, Volume 68, Issue 4.

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

* 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.*[1] 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; 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

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.[2]

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.[3] 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.

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.[4]

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.[5] 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.[6]

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

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.'"[7]

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-

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.[8] Similarly, the filing of an objection to a claim has been analogized to the filing of an answer.[9] 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.

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.[10] 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."[11]
- 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."[12]
- 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

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.[13] The parties to any such contested matter or adversary proceeding are encouraged to

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.[14] Included among the

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.[15]

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.[16] Rule 45 specifically addresses ESI in several places.[17]

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.[18] 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.[19]

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.

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 (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.

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' preservations 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, reprograming, 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:	)
[DEBTOR(S)]	)
Debtors.	)

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 _____

Ethical Issues in Connection with Electronic Discovery

by

Richard L. Wasserman, Esquire*
Jessica F. Woods, Esquire
Venable LLP
Baltimore, Maryland

"While twenty years ago PCs were a novelty and email was virtually nonexistent, today more than ninety percent of all information is created in an electronic format." THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 1 (Jonathan M. Redgrave ed., 2d ed. June 2007). Even experienced lawyers may be surprised to hear that their ability to understand and comply with discovery obligations in the electronic age may implicate their ethical duties of competence and diligence (among others) under applicable rules of professional conduct. These materials outline basic principles regarding a lawyer's ethical responsibilities in connection with electronic discovery.

I. RELEVANT ABA MODEL RULES OF PROFESSIONAL CONDUCT

A. Rule 1.1 *Competence*:

> **A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.**
>
> Comment [8] provides: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ."

B. Rule 1.6 *Confidentiality of Information*:

> **(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).**
> **. . .**
> **(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or**

unauthorized access to, information relating to the representation of a client.

Comment [18] provides: "Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). . . ."

Comment [19] provides: "When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. . . ."

C. Rule 3.3 *Candor toward the Tribunal*:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of

> **material fact or law previously made to the tribunal by the lawyer . . . .**

The Annotation to Rule 3.3 further explains that "[m]isrepresenting the status of discovery or the availability of information sought in discovery violates Rule 3.3(a)(1)." (collecting cases).

D. Rule 3.4 *Fairness to Opposing Party and Counsel*:

A lawyer shall not:

> **(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;**
>
> **. . .**
>
> **(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party . . . .**

Comment [1] provides: "The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like."

Comment [2] provides: "Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. . . ."

E. Rule 4.4 *Respect for Rights of Third Persons*:

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment [2] provides: "Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning or deleting the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, 'document or electronically stored information' includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as 'metadata'), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer."

Comment [3] provides: "Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4."

F. Rule 5.3 *Responsibilities Regarding Nonlawyer Assistants*:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment [3] provides: "A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an

investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer."

Comment [4] provides: "Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules."

II. ABA AND STATE BAR ETHICAL OPINIONS

A. California State Bar -- Formal Opinion No. 2015-193, *available at* https://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202015-193%20%5B11-0004%5D%20(06-30-15)%20-%20FINAL.pdf.[1]

1. After issuing two interim opinions with periods for public comment, the California State Bar Standing Committee on

[1] California has not adopted the Model Code of Professional Conduct. However, the opinion states that its authors "look[ed] to federal jurisprudence for guidance, as well as applicable Model Rules, and appl[ied] those principles based upon California's ethical rules and existing discovery law."

Professional Responsibility and Conduct issued Formal Opinion No. 2015-193 on June 30, 2015.

2. The Opinion summarizes its conclusions by stating that an attorney's duty of competence "generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information ('ESI')" and that "[l]ack of competence in e-discovery issues also may lead to an ethical violation of an attorney's duty of confidentiality."[2]

3. According to the opinion, where an attorney lacks the required competence for the e-discovery in a case, he or she has three options: "(1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation."

4. The opinion provides a list of tasks related to e-discovery that attorneys should be able to perform either themselves or in association with competent co-counsel or expert consultants:

- "initially assess e-discovery needs and issues, if any;
- implement/cause to implement appropriate ESI preservation procedures;
- analyze and understand a client's ESI systems and storage;
- advise the client on available options for collection and preservation of ESI;
- identify custodians of potentially relevant ESI;
- engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;
- perform data searches;
- collect responsive ESI in a manner that preserves the integrity of that ESI; and
- produce responsive non-privileged ESI in a recognized and appropriate manner." (footnotes omitted).

B. Ethical Opinions on Issues Surrounding Metadata

1. Metadata is "data about data." More specifically, it is defined as "information describing the history, tracking, or management of an electronic document." Wyeth v. Impax Labs., Inc., 248 F.R.D.

[2] A previous version of the opinion provided that the "[l]ack of competence in e-discovery issues can also result, in certain circumstances, in ethical violations of an attorney's duty of confidentiality, the duty of candor, and/or the ethical duty not to suppress evidence."

169, 171 (D. Del. 2006) (quoting Williams v. Sprint/United Management Co., 230 F.R.D. 640, 646 (D. Kan. 2005)).

2. Metadata poses at least three ethical issues for attorneys: (1) whether an attorney sending electronically stored information (ESI) has a duty to delete or "scrub" metadata before producing it to an adverse party, (2) whether an attorney receiving ESI with metadata may review or "mine" it, and (3) whether an attorney receiving ESI with metadata must notify the sender if metadata is found.

3. ABA Formal Opinions 06-442 and 05-437 do not impose an *explicit* duty with respect to metadata on an attorney sending ESI (however, Rule 1.6 presumably extends to metadata). Certain methods of eliminating metadata (including scrubbing, negotiating a confidentiality agreement, or sending the file in a different format) are suggested for attorneys who are "concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata." The Opinions further provide that mining data is not "ethically impermissible." However, pursuant to Rule 4.4(b), the recipient must notify the sender if metadata is found if the recipient knows or reasonably should know that the transmission of metadata was inadvertent.

4. State Bar ethical opinions regarding metadata are not consistent.

   Most impose a duty to exercise "reasonable care" in transmitting ESI to prevent the disclosure of metadata. See, e.g., Alabama State Bar Formal Opinion 2007-02; State Bar of Arizona Ethics Opinion 07-03; Colorado Bar Association Ethics Opinion 119; Florida Bar Ethics Opinion 06-02; Maryland State Bar Association Ethics Docket No. 2007-09; New York State Bar Association Opinions 749 and 782; Association of the Bar of the City of New York Formal Opinion 2003-04.

   Some provide that mining metadata is NOT an ethical violation. See, e.g., Maryland State Bar Association Ethics Docket No. 2007-09; State Bar of Wisconsin Ethics Opinion EF-12-01. Others provide that mining metadata IS an ethical violation. See, e.g., Florida Bar Ethics Opinion 06-02; New York State Bar Association Opinions 749 and 782; Association of the Bar of the City of New York Formal Opinion 2003-04; North Carolina State Bar 2009 Formal Opinion 1. Others take a case-by-case approach. See, e.g., Pennsylvania Bar Association Formal Opinion 2009-100.

Most impose an obligation to notify the sender if metadata is found. See, e.g., Florida Bar Ethics Opinion 06-02; North Carolina State Bar 2009 Formal Opinion 1. But not all. See, e.g., Maryland State Bar Association Ethics Docket No. 2007-09 (because the Maryland Rules of Professional Conduct were not amended to include ABA Model Rule 4.4(b), they "do not require the receiving attorney to notify the sending attorney that there may have been an inadvertent transmittal of privileged . . . materials"); Oregon Legal Ethics Assistance for OSB Members Formal Opinion No. 2011-187 (because the sender has an obligation to exercise reasonable care to avoid sending confidential information, the receiving lawyer "could reasonably conclude that the metadata was intentionally left in" and therefore there is no duty under Oregon Rule 4.4(b) to notify the sender of the presence of metadata).

5. With respect to ethical issues in connection with electronic discovery in general and metadata in particular, see Hon. Paul W. Grimm & Joel P. Williams, *Ethical Issues Associated with Preserving, Accessing, Discovering, and Using Electronically Stored Information*, 14 FIDELITY L.J. 57 (Oct. 2008).

C. Ethical Issues in Connection with Social Media

1. Another current hot topic is ethical issues related to social media. Recent state bar developments on this subject can be illustrated by opinions from Florida and New York.

2. Professional Ethics of the Florida Bar Opinion 14-1, *available at* http://www.floridabar.org/tfb/TFBETOpin.nsf/b2b76d49e9fd64a5852570050067a7af/98e16dd49286008585257ee3006cf9df!OpenDocument, was released on June 25, 2015 and approved by the Florida Bar Board of Governors on October 16, 2015. The opinion discusses ethical obligations involved in advising clients to "clean up" their social media pages before litigation. It is primarily based on Florida Rule 4-3.4(a) regarding the preservation and/or spoliation of evidence, and concludes that a lawyer "may advise a client to use the highest level of privacy setting on the client's social media pages," and "may advise the client pre-litigation to remove information from a social media page, regardless of its relevance to a reasonably foreseeable proceeding, as long as the removal does not violate any substantive law regarding preservation and/or spoliation of evidence." The opinion explains, however, that "the social media information or data must be preserved if the information or data is known . . . or reasonably should be known . . . to be relevant to the reasonably foreseeable proceeding." Finally, the opinion explains that "the general

obligation of competence may require the inquirer to advise the client regarding removal of relevant information from the client's social media pages, including whether removal would violate any legal duties regarding preservation of evidence, regardless of the privacy settings."

3. The New York State Bar Association (Commercial and Federal Litigation Section) released updated Social Media Ethics Guidelines on June 9, 2015, *available at* http://www.nysba.org/socialmediaguidelines/. The first guideline concerns the ethical duty of competence and provides that "[a] lawyer has a duty to understand the benefits and risks and ethical implications associated with social media, including its use as a mode of communication, an advertising tool and a means to research and investigate matters." The guideline further explains that "[a] lawyer must understand the functionality of any social media service she intends to use for [] research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site." Guideline 5.A provides that "[a] lawyer may advise a client as to what content may be maintained or made private on her social media account, including advising on changing her privacy and/or security settings . . . [and also] as to what content may be 'taken down' or removed . . . as long as there is no violation of . . . law . . . relating to the preservation of information, including legal hold obligations. Unless an appropriate record of the social media information or data is preserved, a party . . . may not delete information from a social media profile that is subject to a duty to preserve."

III. CASE LAW

A. Much of the existing case law concerns the propriety of sanctions in connection with a lawyer's failure to satisfy his or her discovery obligations and is typically not tied to consideration of whether the conduct at issue also constituted an *ethical* violation. However, it certainly could be. Indeed, the Annotation to Model Rule 3.4 states that:

> Although Rule 3.4 subjects a lawyer to professional discipline for abusive litigation tactics, it is normally the presiding judge who initially takes the corrective action, such as retrial, exclusion of evidence, disqualification, and payment of monetary sanctions. A court is likely to consider Rule 3.4, as well as other ethics rules, when imposing these litigation sanctions.

Brown v. Tellermate Holdings Ltd., 2014 WL 2987051, at *2, 25-26 (S.D. Ohio July 1, 2014) (precluding defendant from using certain evidence and imposing sanctions against the defendant and counsel, jointly, for failing to satisfy discovery obligations by failing to produce and preserve electronically stored information; explaining that: "While the preservation, review, and production of ESI often involves procedures and techniques which do not have direct parallels to discovery involving paper documents, the underlying principles governing discovery do not change just because ESI is involved. Counsel still have a duty (perhaps even a heightened duty) to cooperate in the discovery process; to be transparent about what information exists, how it is maintained, and whether and how it can be retrieved; and, above all, to exercise sufficient diligence (even when venturing into unfamiliar territory like ESI) to ensure that all representations made to opposing parties and to the Court are truthful and are based upon a reasonable investigation of the facts.").

Abadia-Peixoto v. U.S. Dep't of Homeland Sec., 2013 WL 4511925, at *2-3 (N.D. Cal. Aug. 23, 2013) (explaining that "[c]ourts have interpreted the federal rules as imposing 'a duty of good faith and reasonable inquiry on all attorneys involved in litigation who rely on discovery responses executed by another attorney'" and that counsel "must take 'responsibility for ensuring that their clients conduct a comprehensive and appropriate document search'"; finding that where "counsel could not articulate how the searches were conducted," this "suggests that he could not certify [under Rule 11] that a search had been conducted that would fully satisfy Defendants' discovery obligation" and ordering that defendants disclose their search parameters and to meet and confer regarding the adequacy of such parameters "to ensure that Defendants have met their discovery obligation").

Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 462, 496-97 (S.D.N.Y. 2010) (imposing spoliation instruction and monetary sanctions against plaintiffs whose failure to preserve evidence amounted to gross negligence and monetary sanctions against plaintiffs whose failure to preserve evidence amounted to negligence; noting that "[b]y now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records—paper or electronic—and to search in the right places for those records, will inevitably result in the spoliation of evidence."), abrogated in part by Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135, 162 (2d Cir. 2012) (rejecting "notion that a failure to institute a 'litigation hold' constitutes gross negligence *per se*," instead finding it is one factor in determining whether to issue discovery sanctions).

William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 136 (S.D.N.Y. 2009) ("Electronic discovery requires cooperation

between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI's custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of 'false positives.' It is time that the Bar—even those lawyers who did not come of age in the computer era—understand this.").

Martin v. Northwestern Mut. Life Ins. Co., 2006 WL 148991, at *2 (M.D. Fla. Jan. 19, 2006) (awarding defendant attorneys fees for plaintiff-attorney's failure to produce electronically stored information, explaining that "[a]s an attorney, the Plaintiff is familiar with the rules of discovery and should have understood his discovery obligations. . . . His claim that he is so computer illiterate that he could not comply with production is frankly ludicrous.").

B. However, a handful of cases do specifically discuss the ethical implications of failing to meet electronic discovery obligations, including the following:

In Qualcomm Inc. v. Broadcom Corp., 2008 WL 66932, at *18 (S.D. Cal. Jan. 7, 2008), the magistrate judge referred six attorneys to the State Bar of California "for an appropriate investigation and possible imposition of sanctions" for assisting their client in "intentionally hiding or recklessly ignoring relevant documents, ignoring or rejecting numerous warning signs that [the client's] document search was inadequate, and blindly accepting [the client's] unsupported assurances that its document search was adequate. The Sanctioned Attorneys then used the lack of evidence to repeatedly and forcefully make false statements and arguments to the court and jury." The attorneys objected, and the district judge vacated the sanctions order, finding that the attorneys "shall not be prevented from defending their conduct by the attorney-client privilege of Qualcomm . . . because of the application of the self-defense exception to the attorney-client privilege of Qualcomm." Qualcomm Inc. v. Broadcom Corp., 2008 WL 638108, at *2 (S.D. Cal. Mar. 5, 2008). On remand, the magistrate judge declined to impose sanctions, holding that "the evidence presented during these remand proceedings has established that while significant errors were made by some of the Responding Attorneys, there is insufficient evidence to prove that any of [them] engaged in the requisite 'bad faith' or . . . failed to make a reasonable inquiry before certifying Qualcomm's discovery responses." Qualcomm Inc. v. Broadcom Corp., 2010 WL 1336937, at *7 (S.D. Cal. Apr. 2, 2010). The magistrate judge found that "[t]he fundamental problem in this case was an incredible breakdown of communication," noting a "lack of meaningful communication" amongst Qualcomm employees, in-house counsel, and

outside counsel and "a lack of agreement amongst the participants regarding responsibility for document collection and production." Id. at *2-3. She further found that "[t]hese failures were exacerbated by an incredible lack of candor on the part of the principal Qualcomm employees." Id. at *4. With respect to the attorney who had signed the discovery responses (and who, therefore, was "responsible for the accuracy and propriety of them"), the court found that he "did take appropriate actions to learn the truth but was misled by Qualcomm employees." Id. at *6.

State v. Ratliff, 849 N.W.2d 183, 195 (N.D. 2014) (Crothers, J., concurring opinion) (noting that lawyers must understand the contours of electronic discovery, in particular, whether "metadata [is] being admitted along with information on the face of the document," in order to "provide competent representation to a client" under Rule 1.1, and "maintain client confidences . . ." citing Rules 1.6 and 4.5).

U.S. v. Hernandez, 2014 WL 4510266, at *2, 4 (S.D.N.Y. Sept. 12, 2014) (denying defense counsel's request to appoint a Coordinating Discovery Attorney, who would receive and index electronic discovery on behalf of all nine defendants in a criminal case, finding that "clear and obvious ethical and legal issues [would be] implicated" and noting that "[t]he point . . . is that counsel-of-record for a particular defendant must at all times, in all ways, remain ultimately responsible for providing effective legal representation to his or her client. This duty does not disappear during the discovery process.").

Postorivo v. AG Paintball Holdings, Inc., 2008 WL 3876199, at *18-19 (Del. Ch. Aug. 20, 2008) (unpublished) (applying DLRPC Rule 4.4, which provides that a lawyer may not "use methods of obtaining evidence that violate the legal rights of [a third person]," in the context of electronic discovery, and noting: "In modern commercial litigation, it is becoming more common for outside counsel or other agents of a party to litigation to be in possession of privileged information of an adverse party. Many cases involve some form of electronic discovery, for example, and the sheer volume of documents involved often necessitates creative means to handle privileged documents. Consequently, for cost-saving or -shifting reasons, during the early stages of discovery, one side rightfully may come into possession of documents and information storage devices that contain privileged information or communications of an adverse party. It is essential to the integrity of the litigation process in such circumstances that the court and the parties can rely on counsel scrupulously to conform to their ethical obligations . . . .").

F.D.I.C. v. Horn, 2015 WL 1529824, at *9, 12-13, 15-16 (E.D.N.Y. Mar. 31, 2015) (in the context of an attorney malpractice claim, discussing an

attorney's ethical duties to retain ESI related to the representation of a client, and quoting Formal Opinion 2008-1 from the New York Bar, which distinguishes the duty to retain emails that are "formal, carefully drafted communications intended to transmit information, or other electronic documents, necessary to effectively represent a client, or are otherwise documents that the client may reasonably expect the lawyer to preserve" as opposed to "casual" emails that "[n]o ethical rule prevents a lawyer from deleting"; further explaining that the attorney's lack of policies or procedures for ensuring the preservation of ESI in his law firm factored into the court's decision to award a monetary sanction, but that his "utter ignorance" of his preservation responsibilities undercut a finding of bad faith).

A PDX Pro Co. v. Dish Network Service, LLC, 2015 WL 7717199, at *11, 16-17 (D. Colo. Nov. 30, 2015) (noting that the certification obligations under Federal Rule of Civil Procedure 26 implicate an attorney's duty of candor to the court: "counsel's certification obligation cannot be divorced from their duty to the court. 'As officers of the court, all attorneys conducting discovery owe the court a heightened duty of candor.'").

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2015-193

ISSUE: What are an attorney's ethical duties in the handling of discovery of electronically stored information?

DIGEST: An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI. An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues also may lead to an ethical violation of an attorney's duty of confidentiality.

AUTHORITIES INTERPRETED: Rules 3-100 and 3-110 of the Rules of Professional Conduct of the State Bar of California.[1/]

Business and Professions Code section 6068(e).

Evidence Code sections 952, 954 and 955.

STATEMENT OF FACTS

Attorney defends Client in litigation brought by Client's Chief Competitor in a judicial district that mandates consideration of e-discovery[2/] issues in its formal case management order, which is consistent with California Rules of Court, rule 3.728. Opposing Counsel demands e-discovery; Attorney refuses. They are unable to reach an agreement by the time of the initial case management conference. At that conference, an annoyed Judge informs both attorneys they have had ample prior notice that e-discovery would be addressed at the conference and tells them to return in two hours with a joint proposal.

In the ensuing meeting between the two lawyers, Opposing Counsel suggests a joint search of Client's network, using Opposing Counsel's chosen vendor, based upon a jointly agreed search term list. She offers a clawback agreement that would permit Client to claw back any inadvertently produced ESI that is protected by the attorney-client privilege and/or the work product doctrine ("Privileged ESI").

1/ Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

2/ Electronically stored information ("ESI") is information that is stored in technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities (e.g., Code Civ. Proc., § 2016.020, sub. (d) – (e)). Electronic Discovery, also known as e-discovery, is the use of legal means to obtain ESI in the course of litigation for evidentiary purposes.

Attorney believes the clawback agreement will allow him to pull back anything he "inadvertently" produces. Attorney concludes that Opposing Counsel's proposal is acceptable and, after advising Client about the terms and obtaining Client's authority, agrees to Opposing Counsel's proposal. Judge thereafter approves the attorneys' joint agreement and incorporates it into a Case Management Order, including the provision for the clawback of Privileged ESI. The Court sets a deadline three months later for the network search to occur.

Back in his office, Attorney prepares a list of keywords he thinks would be relevant to the case, and provides them to Opposing Counsel as Client's agreed upon search terms. Attorney reviews Opposing Counsel's additional proposed search terms, which on their face appear to be neutral and not advantageous to one party or the other, and agrees that they may be included.

Attorney has represented Client before, and knows Client is a large company with an information technology ("IT") department. Client's CEO tells Attorney there is no electronic information it has not already provided to Attorney in hard copy form. Attorney assumes that the IT department understands network searches better than he does and, relying on that assumption and the information provided by CEO, concludes it is unnecessary to do anything further beyond instructing Client to provide Vendor direct access to its network on the agreed upon search date. Attorney takes no further action to review the available data or to instruct Client or its IT staff about the search or discovery. As directed by Attorney, Client gives Vendor unsupervised direct access to its network to run the search using the search terms.

Subsequently, Attorney receives an electronic copy of the data retrieved by Vendor's search and, busy with other matters, saves it in an electronic file without review. He believes that the data will match the hard copy documents provided by Client that he already has reviewed, based on Client's CEO's representation that all information has already been provided to Attorney.

A few weeks later, Attorney receives a letter from Opposing Counsel accusing Client of destroying evidence and/or spoliation. Opposing Counsel threatens motions for monetary and evidentiary sanctions. After Attorney receives this letter, he unsuccessfully attempts to open his electronic copy of the data retrieved by Vendor's search. Attorney hires an e-discovery expert ("Expert"), who accesses the data, conducts a forensic search, and tells Attorney potentially responsive ESI has been routinely deleted from Client's computers as part of Client's normal document retention policy, resulting in gaps in the document production. Expert also advises Attorney that, due to the breadth of Vendor's execution of the jointly agreed search terms, both privileged information and irrelevant but highly proprietary information about Client's upcoming revolutionary product were provided to Chief Competitor in the data retrieval. Expert advises Attorney that an IT professional with litigation experience likely would have recognized the overbreadth of the search and prevented the retrieval of the proprietary information.

What ethical issues face Attorney relating to the e-discovery issues in this hypothetical?

DISCUSSION

I. Duty of Competence

A. Did Attorney Violate The Duty of Competence Arising From His Own Acts/Omissions?

While e-discovery may be relatively new to the legal profession, an attorney's core ethical duty of competence remains constant. Rule 3-110(A) provides: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Under subdivision (B) of that rule, "competence" in legal services shall mean to apply the diligence, learning and skill, and mental, emotional, and physical ability reasonably necessary for the performance of such service. Read together, a mere failure to act competently does not trigger discipline under rule 3-110. Rather, it is the failure to do so in a manner that is intentional, reckless or repeated that would result in a disciplinable rule 3-110 violation. (See *In the Matter of Torres* (Reviwe Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 149 ("We have repeatedly held that negligent legal representation, even that amounting to legal malpractice, does not establish a [competence] rule 3-110(A) violation."); see also, *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416 (reckless and repeated acts); *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41 (reckless and repeated acts).)

Legal rules and procedures, when placed alongside ever-changing technology, produce professional challenges that attorneys must meet to remain competent. Maintaining learning and skill consistent with an attorney's duty of competence includes keeping "abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, . . ." ABA Model Rule 1.1, Comment [8].[3/] Rule 3-110(C) provides: "If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required." Another permissible choice would be to decline the representation. When e-discovery is at issue, association or consultation may be with a non-lawyer technical expert, if appropriate in the circumstances. Cal. State Bar Formal Opn. No. 2010-179.

Not every litigated case involves e-discovery. Yet, in today's technological world, almost every litigation matter *potentially* does. The chances are significant that a party or a witness has used email or other electronic communication, stores information digitally, and/or has other forms of ESI related to the dispute. The law governing e-discovery is still evolving. In 2009, the California Legislature passed California's Electronic Discovery Act adding or amending several California discovery statutes to make provisions for electronic discovery. See, e.g., Code of Civil Procedure section 2031.010, paragraph (a) (expressly providing for "copying, testing, or sampling" of "electronically stored information in the possession, custody, or control of any other party to the action.")[4/] However, there is little California case law interpreting the Electronic Discovery Act, and much of the development of e-discovery law continues to occur in the federal arena. Thus, to analyze a California attorney's current ethical obligations relating to e-discovery, we look to the federal jurisprudence for guidance, as well as applicable Model Rules, and apply those principles based upon California's ethical rules and existing discovery law.[5/]

We start with the premise that "competent" handling of e-discovery has many dimensions, depending upon the complexity of e-discovery in a particular case. The ethical duty of competence requires an attorney to assess at the outset of each case what electronic discovery issues might arise during the litigation, including the likelihood that e-discovery will or should be sought by either side. If e-discovery will probably be sought, the duty of competence requires an attorney to assess his or her own e-discovery skills and resources as part of the attorney's duty to provide the client with competent representation. If an attorney lacks such skills and/or resources, the attorney must try to acquire sufficient learning and skill, or associate or consult with someone with expertise to assist. Rule 3-110(C). Attorneys handling e-discovery should be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:

- initially assess e-discovery needs and issues, if any;
- implement/cause to implement appropriate ESI preservation procedures;[6/]

[3/] Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered. Rule 1-100(A).

[4/] In 2006, revisions were made to the Federal Rules of Civil Procedure, rules 16, 26, 33, 34, 37 and 45, to address e-discovery issues in federal litigation. California modeled its Electronic Discovery Act to conform with mostly-parallel provisions in those 2006 federal rules amendments. (See Evans, *Analysis of the Assembly Committee on Judiciary regarding AB 5* (2009). (http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/ab_5_cfa_20090302_114942_asm_comm.html).)

[5/] Federal decisions are compelling where the California law is based upon a federal statute or the federal rules. (See *Toshiba America Electronic Components, Inc. v. Superior Court (Lexar Media, Inc.)* (2004) 124 Cal.App.4th 762, 770 [21 Cal.Rptr.3d 532]; *Vasquez v. Cal. School of Culinary Arts, Inc.* (2014) 230 Cal.App.4th 35 [178 Cal.Rptr.3d 10]; see also footnote 4, *supra.*)

[6/] This opinion does not directly address ethical obligations relating to litigation holds. A litigation hold is a directive issued to, by, or on behalf of a client to persons or entities associated with the client who may possess potentially relevant documents (including ESI) that directs those custodians to preserve such documents, pending further direction. See generally Redgrave, *Sedona Conference ® Commentary on Legal Holds: The Trigger and The Process* (Fall 2010) The Sedona Conference Journal, Vol. 11 at pp. 260 – 270, 277 – 279. Prompt issuance of a litigation hold may prevent spoliation of evidence, and the duty to do so falls on both the party and outside counsel working on the matter. See

- analyze and understand a client's ESI systems and storage;
- advise the client on available options for collection and preservation of ESI;
- identify custodians of potentially relevant ESI;
- engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;
- perform data searches;
- collect responsive ESI in a manner that preserves the integrity of that ESI; and
- produce responsive non-privileged ESI in a recognized and appropriate manner.[7]

See, e.g., *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC* (S.D.N.Y. 2010) 685 F.Supp.2d 456, 462 – 465 (defining gross negligence in the preservation of ESI), (abrogated on other grounds in *Chin v. Port Authority* (2nd Cir. 2012) 685 F.3d 135 (failure to institute litigation hold did not constitute gross negligence per se)).

In our hypothetical, Attorney had a general obligation to make an e-discovery evaluation early, prior to the initial case management conference. The fact that it was the standard practice of the judicial district in which the case was pending to address e-discovery issues in formal case management highlighted Attorney's obligation to conduct an early initial e-discovery evaluation.

Notwithstanding this obligation, Attorney made *no* assessment of the case's e-discovery needs or of his own capabilities. Attorney exacerbated the situation by not consulting with another attorney or an e-discovery expert prior to agreeing to an e-discovery plan at the initial case management conference. He then allowed that proposal to become a court order, again with no expert consultation, although he lacked sufficient expertise. Attorney participated in preparing joint e-discovery search terms without experience or expert consultation, and he did not fully understand the danger of overbreadth in the agreed upon search terms.

Even after Attorney stipulated to a court order directing a search of Client's network, Attorney took no action other than to instruct Client to allow Vendor to have access to Client's network. Attorney did not instruct or supervise Client regarding the direct network search or discovery, nor did he try to pre-test the agreed upon search terms or otherwise review the data before the network search, relying on his assumption that Client's IT department would know what to do, and on the parties' clawback agreement.

After the search, busy with other matters and under the impression the data matched the hard copy documents he had already seen, Attorney took no action to review the gathered data until after Opposing Counsel asserted spoliation and threatened sanctions. Attorney then unsuccessfully attempted to review the search results. It was only then, at the end of this long line of events, that Attorney finally consulted an e-discovery expert and learned of the e-discovery problems facing Client. By this point, the potential prejudice facing Client was significant, and much of the damage already had been done.

At the least, Attorney risked breaching his duty of competence when he failed at the outset of the case to perform a timely e-discovery evaluation. Once Opposing Counsel insisted on the exchange of e-discovery, it became certain that e-discovery would be implicated, and the risk of a breach of the duty of competence grew considerably; this should have prompted Attorney to take additional steps to obtain competence, as contemplated under rule 3-110(C), such as consulting an e-discovery expert.

[Footnote Continued...]

Zubulake v. UBS Warburg LLC (S.D.N.Y. 2003) 220 F.R.D. 212, 218 and *Zubulake v. UBS Warburg LLC* (S.D.N.Y. 2004) 229 F.R.D. 422, 432. Spoliation of evidence can result in significant sanctions, including monetary and/or evidentiary sanctions, which may impact a client's case significantly.

[7] This opinion focuses on an attorney's ethical obligations relating to his own client's ESI and, therefore, this list focuses on those issues. This opinion does not address the scope of an attorney's duty of competence relating to obtaining an opposing party's ESI.

Had the e-discovery expert been consulted at the beginning, or at the latest once Attorney realized e-discovery would be required, the expert could have taken various steps to protect Client's interest, including possibly helping to structure the search differently, or drafting search terms less likely to turn over privileged and/or irrelevant but highly proprietary material. An expert also could have assisted Attorney in his duty to counsel Client of the significant risks in allowing a third party unsupervised direct access to Client's system due to the high risks and how to mitigate those risks. An expert also could have supervised the data collection by Vendor.[8/]

Whether Attorney's acts/omissions in this single case amount to a disciplinable offense under the "intentionally, recklessly, or repeatedly" standard of rule 3-110 is beyond this opinion, yet such a finding could be implicated by these facts.[9/] See, e.g., *In the Matter of Respondent G.* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 179 (respondent did not perform competently where he was reminded on repeated occasions of inheritance taxes owed and repeatedly failed to advise his clients of them); *In re Matter of Copren* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 861, 864 (respondent did not perform competently when he failed to take several acts in single bankruptcy matter); *In re Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 377 – 378 (respondent did not perform competently where he "recklessly" exceeded time to administer estate, failed to diligently sell/distribute real property, untimely settled supplemental accounting and did not notify beneficiaries of intentions not to sell/lease property).

B. Did Attorney Violate The Duty of Competence By Failing To Supervise?

The duty of competence in rule 3-110 includes the duty to supervise the work of subordinate attorneys and non-attorney employees or agents. See Discussion to rule 3-110. This duty to supervise can extend to outside vendors or contractors, and even to the client itself. See California State Bar Formal Opn. No. 2004-165 (duty to supervise outside contract lawyers); San Diego County Bar Association Formal Opn. No. 2012-1 (duty to supervise clients relating to ESI, citing *Cardenas v. Dorel Juvenile Group, Inc.* (D. Kan. 2006) 2006 WL 1537394).

Rule 3-110(C) permits an attorney to meet the duty of competence through association with another lawyer or consultation with an expert. See California State Bar Formal Opn. No. 2010-179. Such expert may be an outside vendor, a subordinate attorney, or even the client, if they possess the necessary expertise. This consultation or association, however, does not absolve an attorney's obligation to supervise the work of the expert under rule 3-110, which is a non-delegable duty belonging to the attorney who is counsel in the litigation, and who remains the one primarily answerable to the court. An attorney must maintain overall responsibility for the work of the expert he or she chooses, even if that expert is the client or someone employed by the client. The attorney must do so by remaining regularly engaged in the expert's work, by educating everyone involved in the e-discovery workup about the legal issues in the case, the factual matters impacting discovery, including witnesses and key evidentiary issues, the obligations around discovery imposed by the law or by the court, and of any relevant risks associated with the e-discovery tasks at hand. The attorney should issue appropriate instructions and guidance and, ultimately, conduct appropriate tests until satisfied that the attorney is meeting his ethical obligations prior to releasing ESI.

Here, relying on his familiarity with Client's IT department, Attorney assumed the department understood network searches better than he did. He gave them no further instructions other than to allow Vendor access on the date of the network search. He provided them with no information regarding how discovery works in litigation, differences

---

[8/] See Advisory Committee Notes to the 2006 Amendments to the Federal Rules of Civil Procedure, rule 34 ("Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) . . . is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems."). See also The Sedona Principles Addressing Electronic Document Production (2nd Ed. 2007), Comment 10(b) ("Special issues may arise with any request to secure direct access to electronically stored information or to computer devices or systems on which it resides. Protective orders should be in place to guard against any release of proprietary, confidential, or personal electronically stored information accessible to the adversary or its expert.").

[9/] This opinion does not intend to set or define a standard of care of attorneys for liability purposes, as standards of care can be highly dependent on the factual scenario and other factors not applicable to our analysis herein.

between a party affiliated vendor and a neutral vendor, what could constitute waiver under the law, what case-specific issues were involved, or the applicable search terms. Client allowed Vendor direct access to its entire network, without the presence of any Client representative to observe or monitor Vendor's actions. Vendor retrieved proprietary trade secret and privileged information, a result Expert advised Attorney could have been prevented had a trained IT individual been involved from the outset. In addition, Attorney failed to warn Client of the potential significant legal effect of not suspending its routine document deletion protocol under its document retention program.

Here, as with Attorney's own actions/inactions, whether Attorney's reliance on Client was reasonable and sufficient to satisfy the duty to supervise in this setting is a question for a trier of fact. Again, however, a potential finding of a competence violation is implicated by the fact pattern. See, e.g., *Palomo v. State Bar* (1984) 36 Cal.3d 785, 796 [205 Cal.Rptr. 834] (evidence demonstrated lawyer's pervasive carelessness in failing to give the office manager any supervision, or instruction on trust account requirements and procedures).

II. Duty of Confidentiality

A fundamental duty of an attorney is "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Bus. & Prof. Code, § 6068 (e)(1).) "Secrets" includes "information, other than that protected by the attorney-client privilege, that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." (Cal. State Bar Formal Opinion No. 1988-96.) "A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1), without the informed consent of the client, or as provided in paragraph (B) of this rule." (Rule 3-100(A).)

Similarly, an attorney has a duty to assert the attorney-client privilege to protect confidential communications between the attorney and client. (Evid. Code, §§ 952, 954, 955.) In civil discovery, the attorney-client privilege will protect confidential communications between the attorney and client in cases of inadvertent disclosure *only if* the attorney and client act reasonably to protect that privilege. See *Regents of University of California v. Superior Court (Aquila Merchant Services, Inc.)* (2008) 165 Cal.App.4th 672, 683 [81 Cal.Rptr.3d 186]. This approach also echoes federal law. [10/] A lack of reasonable care to protect against disclosing privileged and protected information when producing ESI can be deemed a waiver of the attorney-client privilege. See *Kilopass Tech. Inc. v. Sidense Corp.* (N.D. Cal. 2012) 2012 WL 1534065 at 2 – 3 (attorney-client privilege deemed waived as to privileged documents released through e-discovery because screening procedures employed were unreasonable).

In our hypothetical, because of the actions taken by Attorney prior to consulting with any e-discovery expert, Client's privileged information has been disclosed. Due to Attorney's actions, Chief Competitor can argue that such disclosures were not "inadvertent" and that any privileges were waived. Further, non-privileged, but highly confidential proprietary information about Client's upcoming revolutionary new product has been released into the hands of Chief Competitor. Even absent any indication that Opposing Counsel did anything to engineer the overbroad disclosure, it remains true that the disclosure occurred because Attorney participated in creating overbroad search terms. All of this happened unbeknownst to Attorney, and only came to light after Chief Competitor accused Client of evidence spoliation. Absent Chief Competitor's accusation, it is not clear when any of this would have come to Attorney's attention, if ever.

The clawback agreement on which Attorney heavily relied may not work to retrieve the information from the other side. By its terms, the clawback agreement was limited to inadvertently produced Privileged ESI. Both privileged information, and non-privileged, but confidential and proprietary information, have been released to Chief Competitor.

[10/] See Federal Rules of Evidence, rule 502(b): "Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)."

Under these facts, Client may have to litigate whether Client (through Attorney) acted diligently enough to protect its attorney-client privileged communications. Attorney took no action to review Client's network prior to allowing the network search, did not instruct or supervise Client prior to or during Vendor's search, participated in drafting the overbroad search terms, and waited until after Client was accused of evidence spoliation before reviewing the data – all of which could permit Opposing Counsel viably to argue Client failed to exercise due care to protect the privilege, and the disclosure was not inadvertent.[11]

Client also may have to litigate its right to the return of non-privileged but confidential proprietary information, which was not addressed in the clawback agreement.

Whether a waiver has occurred under these circumstances, and what Client's rights are to return of its non-privileged/confidential proprietary information, again are legal questions beyond this opinion. Attorney did not reasonably try to minimize the risks. Even if Client can retrieve the information, Client may never "un-ring the bell."

The State Bar Court Review Department has stated, "Section 6068, subdivision (e) is the most strongly worded duty binding on a California attorney. It requires the attorney to maintain 'inviolate' the confidence and 'at every peril to himself or herself' preserve the client's secrets." (See *Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.) While the law does not require perfection by attorneys in acting to protect privileged or confidential information, it requires the exercise of reasonable care. Cal. State Bar Formal Opn. No. 2010-179. Here, Attorney took only minimal steps to protect Client's ESI, or to instruct/supervise Client in the gathering and production of that ESI, and instead released everything without prior review, inappropriately relying on a clawback agreement. Client's secrets are now in Chief Competitor's hands, and further, Chief Competitor may claim that Client has waived the attorney-client privilege. Client has been exposed to that potential dispute as the direct result of Attorney's actions. Attorney may have breached his duty of confidentiality to Client.

CONCLUSION

Electronic document creation and/or storage, and electronic communications, have become commonplace in modern life, and discovery of ESI is now a frequent part of almost any litigated matter. Attorneys who handle litigation may not ignore the requirements and obligations of electronic discovery. Depending on the factual circumstances, a lack of technological knowledge in handling e-discovery may render an attorney ethically incompetent to handle certain litigation matters involving e-discovery, absent curative assistance under rule 3-110(C), even where the attorney may otherwise be highly experienced. It also may result in violations of the duty of confidentiality, notwithstanding a lack of bad faith conduct.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

*[**Publisher's Note:** Internet resources cited in this opinion were last accessed by staff on June 30, 2015. Copies of these resources are on file with the State Bar's Office of Professional Competence.]*

---

[11] Although statute, rules, and/or case law provide some limited authority for the legal claw back of certain inadvertently produced materials, even in the absence of an express agreement, those provisions may not work to mitigate the damage caused by the production in this hypothetical. These "default" claw back provisions typically only apply to privilege and work product information, and require both that the disclosure at issue has been truly inadvertent, and that the holder of the privilege has taken reasonable steps to prevent disclosure in the first instance. See Federal Rules of Evidence, rule 502; see also generally *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644 [82 Cal.Rptr.2d 799]; *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 817 – 818 [68 Cal.Rptr.3d 758]. As noted above, whether the disclosures at issue in our hypothetical truly were "inadvertent" under either the parties' agreement or the relevant law is an open question. Indeed, Attorney will find even less assistance from California's discovery clawback statute than he will from the federal equivalent, as the California statute merely addresses the procedure for litigating a dispute on a claim of inadvertent production, and not the legal issue of waiver at all. (See Code Civ. Proc., § 2031.285.)

Delaware Bankruptcy Court – Local Rule

Rule 7026-3 Discovery of Electronic Documents ("E-Discovery").

(a) Introduction. This rule applies to all matters covered by Fed. R. Civ. P. 26. It is expected that parties to a contested matter or adversary proceeding will cooperatively reach agreement on how to conduct e-discovery. In an adversary proceeding, it is expected that such an agreement will be reached on or before the date of the Fed. R. Civ. P. 16 scheduling conference. However, the following default standards shall apply until such time, if ever, the parties conduct e-discovery on a consensual basis.

(b) Discovery Conference. Parties shall discuss the parameters of their anticipated e-discovery consistent with the concerns outlined below. In a contested matter, the discussions will take place prior to or concurrent with the service of written discovery by the parties. In an adversary proceeding, the discussions will take place at the Fed. R. Civ. P. 26(f) conference, as well as at the Fed. R. Civ. P. 16 scheduling conference with the Court. Unless otherwise agreed by the parties or ordered by the Court, the parties shall exchange the following information:

(i) A list of the most likely custodians of relevant electronic materials, including a brief description of each person's title and responsibilities;

(ii) A list of each relevant electronic system that has been in place at all relevant times and a general description of each system, including the nature, scope, character, organization, and formats employed in each system. The parties should also include other pertinent information about their electronic documents and whether those electronic documents are of limited accessibility. Electronic documents of limited accessibility may include those created or used by electronic media no longer in use, maintained in redundant electronic storage media, or for which retrieval involves substantial cost;

(iii) The name of the individual responsible for that party's electronic document retention policies ("the retention coordinator"), as well as a general description of the party's electronic document retention policies for the systems identified above;

(iv) The name of the individual who shall serve as that party's "e-discovery liaison"; and

102

103

(v) Notice of any problems reasonably anticipated to arise in connection with e-discovery.

To the extent that the state of the pleadings does not permit a meaningful discussion of the above including by the time of the Rule 26(f) conference, the parties shall either agree on a date by which this information will be mutually exchanged or submit the issue for resolution by the Court including at any Rule 16 scheduling conference.

(c) E-Discovery Liaison. In order to promote communication and cooperation between the parties, each party to a case shall designate a single individual through which all e-discovery requests and responses are made (the "e-discovery liaison"). Regardless of whether the e-discovery liaison is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, he or she must be:

(i) Familiar with the party's electronic systems and capabilities in order to explain these systems and answer relevant questions.

(ii) Knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues.

(iii) Prepared to participate in e-discovery dispute resolutions.

The Court notes that, at all times, the attorneys of record shall be responsible for compliance with e-discovery requests. However, the e-discovery liaisons shall be responsible for organizing each party's e-discovery efforts to insure consistency and thoroughness and, generally, to facilitate the e-discovery process.

(d) Timing of E-Discovery. Discovery of electronic documents shall proceed in a sequenced fashion.

(i) After receiving requests for document production, the parties shall search their documents, other than those identified as limited accessibility electronic documents, and produce responsive electronic documents in accordance with Fed. R. Civ. P. 26(b)(2).

(ii) Electronic searches of documents identified as of limited accessibility shall not be conducted until