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Ethics in Vegas

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1. Rule 9011 Sanctions and its Misuses

By signing a submission to the court, counsel certifies that, to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the submission is:

(1) not being presented for any improper purpose…,

(2) the claims, defenses and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law,

(3) the allegations and other factual contentions have evidentiary support (even if after a reasonable opportunity for further investigation or discovery), and

(4) the denials of factual contentions are warranted on the evidence or are reasonably based on a lack of information or belief.[2]

In determining a Rule 9011 Motion, which can only be filed no sooner than 21 days after it is served on the offending party (and then, only if the signer does not timely withdraw the offensive pleading, motion or paper), Bankruptcy Courts should not only consider whether the submission contained untrue factual assertions, or was legally unreasonable, but should also consider whether a submission was filed in bad faith or for an improper purpose.[3] Lastly, Rule 11 is

[2] Fed. R. Bankr. P. 9011.
[3] *Singer Furniture Acquisition Corp. v. SSMC, Inc. N.V.,* 254 B.R. 46, 59 (M.D.Fla. 2000) (absent inquiry to bad faith or improper purpose, litigants would be free to file frivolous petitions simply to harass and delay as long as the facts themselves are accurate.)

not a rule of strict liability, but rather imposes an objective standard of reasonableness.[4]

Unfortunately, Rule 9011 is sometimes misused in order to obtain a tactical advantage over opposing parties, or counsel, in the midst of hard fought litigation. Such use is improper and may constitute an ethical violation in and of itself. On its face if one served a Rule 9011 Motion upon an opposing party, in order to harass, delay or increase the cost of litigation, it could definitionally violate of the Rule itself. Consequences of misuse of the Rule can result in the award of prevailing parties' fees against the movant, for improperly filing such Motion.[5]

In *In re Gulf Coast Orthopedic Center, Inc.,* a group of creditors sought to disqualify special counsel for the Chapter 11 Trustee on the grounds that the representation was not authorized by the court and because there was a conflict of interest.[6] While the motion to disqualify was pending, special counsel for the Trustee served the creditors with a sanctions motion pursuant to FRBP 9011.[7] The creditors then filed their own responsive motion pursuant to FRBP 9011, arguing 9011(c)(1), that "the court may award to the party prevailing on the motion the reasonable expenses and attorneys' fees incurred in presenting or opposing the motion." [8] The court disqualified special counsel, denied the motion for sanctions against the creditors, and awarded the creditors their

[4] Portnoy v. Veolia Transportation Services, Inc., 2014 WL 3689366 (E.D. Cal. 2014) (quoting *S. Leasing Partners, Ltd.,* 801 F.2d 783, 789 (5th Cir., 1986).
[5] *In re Gulf Orthopedic Center, Inc.*, 297 B.R. 861, 864 (Bankr. M.D. Fla. 2003).
[6] *Id.*
[7] *Id.*
[8] *Id.*, Fed. R. Bankr. P. 9011(c)(1)

prevailing parties' attorneys' fees as a result of prevailing on both the issues of disqualification and sanctions.[9]

Rule 9011(c)(2) provides that a sanction may consist of (i) directives of a nonmonetary nature, (ii) an order to pay a penalty to the court, (iii) an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation. Any of these remedies are imposed only to the extent "warranted for effective deterrence."[10]

Sanctions may also be imposed upon *pro se* litigants as well because "an unrepresented party (also) certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances…the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivoulous argument for extending, modifying, or reversing existing law or for establishing new law." [11] A court may award fee sanctions against a *pro se* party although the sanctions must "be limited to what is sufficient to deter repetition of such conduct." [12]

The key to Rule 9011, and the practice surrounding it, is knowing when to reach out to opposing counsel to resolve matters short of Rule 9011 demands, when to resort to Rule 9011 Motion practice and for the Courts to send a clear message to the bar when the Rule should and should not be used.

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[9] *Id.* at 865.
[10] Fed. R. Bankr. P. 9011(c)(2).
[11] F.R.C.P. 11; (*In re Rex Montis Silver Co.,* 87 F.3d 435, 437 (10th Cir. 1996) (rulings under Rule 11 are authoritative in cases involving Fed. R. Bankr. P. 9011).
[12] *Portnoy v. Veoila Transp. Services, Inc.,* 2014 WL 3689366 (E.D.Cal. 2014).

2. Use of Rhetoric in Argumentation

The District Court's Memorandum Opinion and Order in *Hobbs v. Bayer HealthCare Pharmaceuticals, Inc.* has received a fair amount of publicity recently, and serves as a memorable case study on the blowback that can result from overzealous advocacy. [13] The Court's Order struck two co-defendants' responsive pleadings entirely, instructing their counsel to "return to the drawing board" and re-draft his clients' Answers and Affirmative Defenses, free of charge, due to their "flat-out obstructionist" argumentation.[14] While the Defendants' assertion of no less than 83 affirmative defenses might objectively be characterized as excessive, the Court also recounted a litany of pleading offenses that would be quite familiar to most practitioners.

For example, the Defendants' Answers repeatedly asserted that "Paragraph [ ] of the Complaint states legal conclusions to which no answer is required," while the Court noted that Rule 8(b) of the Federal Rules of Civil Procedure requires that allegations be either admitted or denied.[15] The Court also took issue with the repeated response that a particular allegation was not directed towards the pleader, while adding the "meaningless" caveat that "[t]o the extent that the allegations in Paragraph [ ] are directed at [the pleader], they are denied."[16]

The Court also criticized the "oxymoronic" statement that the pleader lacked sufficient information to form a belief as to a particular allegation, "which

[13] *Hobbs v. Bayer Healthcare,* Case No. 15-C-4933 (N.D. Ill. 2015)
[14] *Id.*
[15] *Id.*
[16] *Id.*

is therefore denied," as well as the mantra that a document "speaks for itself," and so the pleader is impliedly exempt from responding to allegations pertaining to it.[17]

With respect to the Defendants' 83 affirmative defenses, in addition to ridiculous to their sheer number, the Court took issue with the use of so-called "First Defenses," which are properly asserted via a Rule 12(b)(6) motion to dismiss rather than being "left like a ticking time bomb that may be exploded at some future date."[18]

In sum, while 83 affirmative defenses might represent a personal best for most litigators, an equally large number of them run afoul of the sort of rhetorical gamesmanship cited by the Court with respect to overly-clever denials of the allegations of a complaint, perhaps obstructing the essential goal of notice pleading, to identify the specific respects in which litigants are or are not at odds with one another.[19]

Courts are generally patient, forgiving, instructive and generally want to see the right result, sort of like parents. But lawyers who resort to rhetoric and hyperbole do nothing to advance their clients' causes. Such conduct is inimical to dispute resolution, polarizes party positions and creates unnecessary work for courts and professionals. Just don't do it. And, the one time out of one-thousand that a dramatic statement may be appropriate, it will make a point instead of just being the lawyer's normal "noise".

[17] *Id.*
[18] *Id.*
[19] *Id.*

3. Blanket Avoidable Transfer Litigation- Burden of Pre-Suit Investigation

In the olden days[20], when some of us began practicing, it was commonplace for avoidable transfer litigation to be commenced by a young professional getting a spreadsheet of the 90 day transfers, the 1 year transfers and the 2 year transfers and preparing tens or hundreds of avoidable transfer demands and ultimately adversaries. The ready, shoot, aim approach was, although arguably technically compliant with the statutory elements of an avoidable transfer claim, neither thoughtful nor ethical. Courts began pushing back on this shotgun litigation approach through various dismissal orders, orders striking pleadings and sanctions approaches. [21]

More recently, the Final Report of the ABI Commission to Study the Reform of Chapter 11 contains a number of recommendations for reforming preference and avoidable transfer provisions of the Bankruptcy Code.[22] The Commission noted a number of frustrations with current preference law expressed by bankruptcy practitioners, including that trustees frequently pursue preference claims with insufficient due diligence into the merits of the underlying claims, and with insufficient consideration given to the actual potential benefit to the estate from a successfully pursued claim.[23] Some practitioners also suggested to the Commission that trustees frequently bring preference actions for the purpose

[20] And by olden, we mean when the panelists began their practices.
[21] *See In re Excello Press, Inc.*, 967 F.2d 1109 (7th Cir. 1992) (after dismissal of two of the three claims brought, sanctions awarded for failure to adequately investigate pre-suit).
[22] ABI Commission to Study the Reform of Chapter 11, *Final Report and Recommendations,* Lois Lupica and Nancy Rapoport, Co-Reporters, 2014.
[23] *Id.* at 150.

of extracting settlement payments, rather than to actually recover the alleged preference.[24]

The report considered various potential reforms, including adopting prevailing-party fee shifting provisions, increasing the monetary threshold for bringing an avoidance action in non-consumer cases, requiring an affirmation by the trustee that they evaluated the merits of the preference claim (including any potentially available defenses), and adopting a presumption in favor of the creditor that a transaction occurred in the ordinary course of business, which must be overcome as part of the trustee's *prima facie* showing.[25]

However, the Commissioners were also concerned about trustees' ability to obtain sufficient information prior to the institution of a preference action to enable the trustee to affirm, in good faith, that they legitimately evaluated the claim and any potentially available defenses, as well as to overcome the evidentiary hurdle that would be present at the outset with an ordinary course presumption.[26]

Ultimately, the Commission recommended that the trustee be required to make an affirmation that they conducted reasonable due diligence prior to the institution of a preference action, evaluated the merits of the claim in good faith, and then pled the facts supporting the claim with particularity.[27] The Commission

[24] *Id.*
[25] *Id.* at 151.
[26] *Id.*
[27] *Id.*

also recommended increasing the current $5,000 threshold for preference actions against a debtor having primarily non-consumer debts to $25,000.[28]

In turn, the Commission rejected the idea of adopting prevailing-party fee shifting provisions or sanctions in the context of preference litigation, again citing the limited information which is often available to trustees at the outset of preference litigation, as well as the potential harm to the remaining beneficiaries of the estate with a fee-shifting provision which could create a significant liability respecting a prevailing creditor's attorneys' fees.[29] Due to these concerns, the Commission determined that "neither fee shifting nor sanctions were warranted or workable in the preference context."[30]

In sum, as with so many things, with abuses comes reform. Sometimes the reform pendulum swings far beyond the correction warranted. The more practitioners treat avoidable transfer litigation just like any other litigation, evaluating the merits of claims and potential defenses, the better off the system will be for all constituents.

[28] *Id.*
[29] *Id.*
[30] *Id.*

4. Motions to Dismiss and for Summary Judgment: Reflexive or Strategic?

For so many years, practitioners have often been taught, when they receive a complaint filed against a client, they should first file a motion to dismiss. And if that fails, they should then file a motion for summary judgment. Often referred to as the "obligatory motions," motions to dismiss and motions for summary judgment should be prepared and used thoughtfully and not reflexively. These motions should not be prepared and filed simply because they are procedural steps in the litigation process, or to burden or harass the opposition which wastes the court's resources and your client's money. Doing so will add to the delay of litigation, will certainly increase the cost with little return for the client and may very well constitute an ethical violation pursuant to ABA model Rules 3.1 and 3.2.

For some, the obligatory filing of a motion to dismiss, winds up being the product of a formulaic recitation of Rule 12's language regarding the failure to state a cause of action. Filing a motion to dismiss that is not based on a good faith argument not only violates ABA Model Rule 3.1, but may also violate Rule 3.2 requiring lawyers to make all reasonable efforts to expedite litigation. Some parties may inappropriately use a motion to dismiss to simply run up the bill for the plaintiff, or to buy themselves more time to file an answer, and such uses are inappropriate. If you need more time to respond simply request it, most times opposing counsel or a court will grant a timely filed request for an enlargement.

ABA Model Rule 3.1 prohibits the bringing of claims unless there is a basis in law and fact for doing so, that is not frivolous. Bringing a premature

motion for summary judgment is oftentimes reflexive in nature for so many lawyers. Premature motions for summary judgment may be considered frivolous where all of the elements of a claim are not yet established or where there is insufficient factual support for a judgment. When filed too early, motions for summary judgment also oftentimes reveal the weaknesses in one's case to the opposing side. In most instances, it is appropriate to allow discovery to commence before filing a motion for summary judgment,[31] but discovery does not need to be complete before the court may rule on the motion.[32] If additional discovery is required then a party may file an affidavit under Rule 56(f) requesting additional discovery prior to responding to a Motion for Summary Judgment. When the opposing party refuses to respond to discovery, or where a motion to compel discovery has not resulted in full discovery compliance, a motion for summary judgment may be appropriately used strategically in conjunction with a request for the court to draw a negative inference with respect to the failed discovery. In order to avoid the negative inference, the opposing party will be required to submit the documents to the court to defend against judgment.[33]

[31] *WSB-TV v. Lee,* 842 F.2d 1266, 1269 (11th Cir. 1988).
[32] *See Weir v. Anaconda Co.,* 773 F.2d 1073, 1081 (10th Cir. 1985).
[33] *See porter v. Ray*, 461 F.3d 1315, 1324 (11th Cir. 2006) (courts should grant requests under Rule 56(d) when the party opposing the motion has been unable to obtain responses to his discovery requests and the discovery would be essential to opposing the motion and relevant to the issues presented.)

5. Timing of Argument and Objections

Knowing when to show your cards[34] strategically is a skill set with which most litigators struggle. Many litigators find it appropriate to hold the best argument until the end of the trial or contested matter, or lead up to it with two or three less persuasive arguments. An end goal of some is to catch opposing counsel off guard and unable to respond. Would you be surprised to learn that such tactics can be a violation of ethical rules and a colossal waste of judicial resources? Additionally, such a "hold 'em" approach is generally less effective with most decision makers.

ABA Model Rule 3.3 requires candor towards the tribunal. When leading with a weaker argument, you may be misleading the court and your opponent by making false statements. Further, Model Rule 3.4 requires fairness to opposing parties and counsel; specifically, a lawyer should not allude to any matter that the lawyer does not reasonably believe is relevant.[35]

The best practice is to always lead with your strongest argument, get the court's attention and then give several supporting alternative arguments which leave the court no choice but to rule in your favor. If the argument is as strong as you think, then sharing the argument will not sacrifice your client's advantage and will actually allow opposing counsel to assess the weakness of their claims.

Finally, you should lead with the strongest argument for purposes of judicial efficiency. Instead of wasting the court's time with all of the arguments

[34] Pun fully intended.
[35] ABA Model Rule 3.4(e).

that you deem might be important or building up to the strong points, just lead with them. The court, and your client, will thank you when the hearing is resolved sooner than anticipated.

6. Discovery

The ABI Civility Task Force Report suggests a prohibition against professionals using any aspect of litigation, "including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses." [36] This means you should avoid serving discovery requests that are unnecessary to obtain facts, perpetuate testimony, or that place an undue burden or expense on a party. When responding to discovery, a professional should respond to requests reasonably and should not "strain" to interpret the requests so as to avoid disclosure of relevant and non-privileged information.

Instead of blanket discovery response or boiler plate discovery objections, a professional should base objections on a good faith belief in their merit. It is inappropriate to object solely for the purpose of withholding or delaying disclosure of relevant information.[37] Further, such tactics may subject the professional to a Rule 9011 sanctions motion for signing and submitting a submission that is being interposed for an improper purpose or in bad faith.

Should a discovery dispute arise, professionals should avoid unnecessary motion practice or other judicial intervention whenever it is practical to do so.

[36] ABI Civility Task Force Report, 2013.
[37] *Id*.

Instead, the best practice is for professionals to resolve disputes or disagreements by communicating with one another, and imposing reasonable and meaningful deadlines in light of the circumstances.[38] In an effort to encourage professionals to resolve their disputes without judicial intervention, many courts have implemented local rules or customs requiring good faith meet and confer sessions before filing any motions.

Some judges will even host informal judicial conferences (either directly or through chambers personnel) with the parties in an attempt to help resolve disputes without the need and added expense of filing a motion and scheduling a hearing. Some judges will even ask the parties to notify chambers of upcoming depositions, that might implicate privilege or other refusals to answer, making themselves available to resolve objections and instructions in real time, instead of terminating or continuing a deposition.

Should motion practice still be necessary, many courts' local rules require certifications that the parties have met and conferred to resolve any disputes prior to resorting to motion practice.[39] Additionally, some courts' local rules require any motion, being filed pursuant to Rule 37, or pursuant to Bankruptcy Rules 7037 or 9014(c), or other applicable Rule; to include a separate statement or certification that contains all information necessary to understand each disclosure or discovery request and all the responses to it that are at issue.[40] A motion compelling discovery or responses should be all inclusive and should not rely on

[38] *Id.*
[39] *See* Bankr. E.D. Cal., Local Rule 9014-2.
[40] *Id.*

or incorporate any other document in the record by reference. The best practice in drafting a motion and preparing for a hearing on such dispute is to include:

a) The applicable text of Rule 26, the request, interrogatory, request, or inspection demand;

b) Text of each Rule 26 disclosure, response, answer, or objection, and any further responses or answer;

c) Statements of factual and legal reasons for compelling further responses, answer, or production as to each matter in dispute;

d) Any text definitions, instructions, and other matters required to understand each discovery request and responses to it; and

e) Pleadings or other documents in the file that are relevant to the motion, and summarizing the relevant aspect of each document.[41]

7. Disclosure and Candor, Bluffing or Lying?

Bluffing may be a fine skill set in poker, but not so ethical for lawyers. Make sure you represent facts which are supportable by the record or the evidence you know you can prove. Allegations should be driven by the law and facts you know to be the case not those you hope to be the case. Misrepresentation of facts to the court violates ABA Model Rules 3.3. Counsel must disclose all facts, correct any false statement of material fact and disclose all controlling legal authority, even if known to be directly adverse to counsel's position. Misrepresentation of facts to the court can result in denial or dismissal of claims

[41] *See* Bankr. E.D. Cal., Local Rule 9014-2.

and Rule 9011 monetary and nonmonetary sanctions, and destroy what used to be a good reputation.[42]

8. Treatment and Approaches for use with *Pro Se* Litigants

ABA Model Rule 4.3 directs professionals as to how to communicate with unrepresented persons and Rule 4.1 further reiterates the importance of truthfulness in statement to others, whether officers of the court or not. Professionals should understand that, in most instances, courts will be more lenient or flexible with procedural aspects and pleadings requirements with *pro se* litigants. Such leniency does not however negate the need for appropriate process and compliance with the rules for represented parties.

Ever since the Supreme Court's holding that pleadings of *pro se* litigants are to be held to a "less stringent standard," [43] most circuits tend to be lenient with procedural aspects and *pro se* litigants. In affording deference to *pro se* litigants, the Ninth Circuit found a "duty" to ensure that legal technicalities do not deny *pro se* litigants a right to hearing on the merits. [44] On the other hand, the Tenth Circuit indicated that the court will not serve as counsel for a *pro se* party and will dismiss frivolous claims of *pro se* parties.[45] With respect to pleading standards, the Ninth Circuit held that "[c]ourts have a duty to construe *pro se* pleading liberally, include *pro se* motions as well as complaints."[46] The Tenth Circuit similarly held that, if the Court can reasonably read the pleading to state a valid

[42] *Zatko v. Rowland*, 835 F.Supp. 1175 (N.D.Cal. 1993).
[43] *Haines v. Kerner*, 404 U.S. 519, 520 (1972).
[44] *Balisteri v. Pacifica Police Dep't,* 901 F.2d 696,699 (9th Cir. 1990).
[45] *Hall v. Bellman*, 935 F.2d 1106, 1108-11 (10th Cir. 1991).
[46] *Bernahrdt v. Los Angeles Cnty.,* 339 F.3d 920, 925 (9th Cir. 2003).

claim, then the Court should disregard failure to cite proper legal authority, poor syntax, or unfamiliarity with pleadings requirements.[47]

Contrary to the rulings above, with respect to summary judgment procedures, the Ninth Circuit declined to require special notice for *pro se* litigants at the summary judgment stage. The Court held that (i) the choice to represent oneself should not entitle a litigant to more favorable treatment, (ii) such notice would lead to open-ended involvement by the court, and (iii) such notice provision is more properly created through amendment to the rules rather than adjudication.[48] Similarly, the Tenth Circuit held that *pro se* status does not excuse a litigant from compliance with procedural rules at least where the *pro se* litigant has notice of what is required.[49] The best practice is to be aware of the law of your circuit and look to how that circuit treats *pro se* litigants.[50] As indicated by the Eleventh Circuit, *pro se* litigants "occupy a position significantly different from that occupied by litigants represented by counsel ...it would be inappropriate to automatically apply rules developed in such cases to cases where parties are represented by attorneys presumably schooled in established court procedures." [51]

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[47] *Hall,* 935 F.2d at 1110.
[48] *Jacobsen v. Filler,* 790 F.2d 1362, 1364-67 (9th Cir. 1986) (different notice requirements for pro se litigants who are incarcerated).
[49] *Barnes v. U.S.,* 173 Fed.Appx. 695, 697-98 (10th Cir. 2006).
[50] For further analysis or review of holdings from all Circuit Courts pertaining to pro se litigants refer to, Hon. Catherine Peek McEwen, United States Bankruptcy Judge, Middle District of Florida, *Deference to Pro Se Parties – Tilting the Playing Field to Make it Level,* 2009.
[51] *Johnson v. Pullman, Inc.,* 845 F.2d 911, 914 (11th Cir. 1988) (protective procedure of requiring notice of right to oppose MSJ was not violated by Court instead entering order requiring response where appellants were represented by counsel).

9. Electronically Stored Information and Discovery

E-discovery is not the same as computer forensics, where a professional is retained to look for, recreate, or investigate information that is missing. Conversely, e-discovery does contemplate the exchange of relevant information stored in electronic format and sometimes in native format. As counsel, it is your responsibility to understand how e-discovery and technology works, and to stay abreast of changes in technology. ABA Model Rule 1.1 requires competent representation with legal knowledge, skill, thoroughness and preparation, including ESI. The Model Rules also call for the duty of candor toward both the tribunal and opposing parties, such as when a lawyer certifies the production of documents to the opposing party is full and complete or that certain documents do not exist.

Other obligations pursuant to the ABA Model Rules require confidentiality and supervision of the people responsible for retrieving or obtaining the ESI. Counsel should not delegate the process of obtaining ESI without understanding the process, who is involved, and what needs to occur. These are now the new standards or practice in the area of e-discovery.

There is no need to wait until a complaint is filed to begin preserving documents or ESI. The duty to preserve is triggered when there is a reasonable anticipation of litigation. The leading authority on e-discovery, the Sedona Conference [52] suggests that the duty to preserve is triggered by the anticipation of

[52] The Sedona Conference is a non-profit research and educational institute, dedicated to the advancement of law and policy. It advances the Sedona Principles, which apply the principles of discovery to the new medium of ESI.

litigation, such as when an organization is on notice of a credible probability that it will either become involved in litigation, seriously contemplates initiating, or takes specific actions in connection with commencing litigation. If you or your client anticipate litigation and fail to preserve, despite a lack of current pending litigation, you may be subject to sanctions for discovery violations. [53]

To protect against potential discovery violations, it is certainly a best practice to institute pre-suit litigation holds and to make anti-spoliation demands. Identify the parties, issues, custodians of relevant information, locations where such information is stored, and halt any automatic retention policies or document destruction protocols.[54] Early communication and cooperation within your clients and with opposing parties is key. If counsel sends communications to opposing counsel, outlining the procedures and processes put in place to preserve ESI, the opposing party may have no room for recourse if information inadvertently goes missing because they failed to object or request more at the outset. When instituting such holds or demands, request written acknowledgement of receipt from the party upon whom it is served.

When a party fails to appropriately preserve ESI, there are multiple remedies available to the aggrieved party. The first remedy is to try to recreate what was lost, one such tool is the "Wayback Machine," a website that captures webpages as they previously existed on a date certain in the past. This is not an

[53] The risk of adverse consequences from the destruction of ESI, may be minimized if you are a Presidential candidate or multi-year MVP Superbowl champion. For everyone else, the rules do apply.

[54] *See e.g., Disability Rights Council of Greater Washington v. Washington Metro Transit Auth.,* 242 F.R.D. 139, 146 (D.D.C. 2007) (defendant's failure to present automatic deletion feature from deleting emails during litigation "indefensible", and finding that Rule 37(e) "does not exempt a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation" from sanctions).

ideal solution, but can be highly effective in demonstrating spoliation of evidence. A second remedy may include the retention and employment of a forensic expert to locate electronic information that was lost or destroyed. Such efforts often require significant cost and effort to be undertaken by the requesting party. Sometimes aggrieved parties may request a cost-shifting remedy be imposed as against the wrongful party. Additional remedies for spoliation include adverse inferences, default, dismissal, and sanctions. Typically, most courts will want to first try lesser sanctions graduating up to the "ultimate sanction" of adverse inferences, the striking of pleadings and the entry of judgments or dismissals as a direct result of the noncompliance issues.

In *Green v. Blitz U.S.A., Inc.,* the plaintiff was one of many who brought a products liability claims against Blitz.[55] Blitz had an employee, Mr. Chrisco, who was solely responsible for searching and collecting documents relevant to the ongoing litigation.[56] Mr. Chrisco, acting as Blitz's agent, did not institute a litigation hold, perform any word searches for emails, or communicate with the IT department regarding the method by which they should search for electronic documents.[57] Over a year after the case was resolved, counsel for the plaintiff represented another plaintiff against Blitz. During discovery in the subsequent case, multiple emails and documents that pertained to the issue in the prior case against Blitz, were uncovered.[58] Counsel brought the discovery violations to the court's attention through a motion for sanctions and simultaneously filed a motion

[55] 2011 WL 806011, at *1.
[56] *Id.* at *3.
[57] *Id.* at *4.
[58] *Id.* at *1.

to re-open.[59] The court finding that it no longer had jurisdiction to re-open the case, did find it appropriate to enter a sanctions order against Blitz. The sanctions included $250,000 in civil contempt sanctions to compensate plaintiff for losses incurred, had the documents been produced in the prior case.[60] The Court also imposed a sanction of $500,000 which was suspended for 30 days providing that Blitz sent a copy of the sanctions order to all plaintiffs in cases over the past two years and currently pending.[61] Lastly, the court imposed a sanction to encourage future compliance by requiring Blitz to send the sanctions order to all parties or participants in every new lawsuit for the next five years.[62]

10. Limited Scope Representation

In further attempts to provide access to courts, a new form of limited representation has emerged for bankruptcy debtors. This kind of limited representation allows a debtor to receive legal advice and guidance in the preparation of their voluntary petition and schedules, but only through filing and at the Meeting of Creditors. After the Meeting of Creditors, the debtor would then proceed *pro se*. This kind of representation is often referred to as limited, unbundled, or *a la carte* representation.[63]

Although such representation can provide access to courts and representation for debtors at rates lower than an all-inclusive flat-fee, issues may

[59] *Id.* at *2.
[60] *Id.* at *10.
[61] *Id.* at *11.
[62] The order was later vacated by *Green v. Blitz U.S.A., Inc.,* 2014 WL 2591344 (E.D. Tax. 2014) , whereby the parties reached a settlement on the spoliation issue and the order was withdrawn by consent of the parties.
[63] Lupica & Rapoport, *Final Report of the American Bankruptcy Institute National Ethics Task Force,* 2013, p. 57 on Best Practices for Limited Scope representation.

arise when there is an adversary proceeding, objections to claims of objections, or other orders to show cause. When more complex issues arise, the consumer/debtor may have no idea how to deal with them and may be out of funds necessary to retain counsel to handle those aspects of the case or related proceedings. Sometimes these issues can be easily resolved, but the debtor unaware of their rights, has no lawyer to fully and fairly dispute the issue. This is painfully the case when it comes to unrepresented debtors in the context of reaffirmation agreement matters.

Before undertaking such representation, it is important for counsel to truly ensure that the client understands the limited scope of representation. A best practice would be to include, in the engagement letter, the activities or aspects of the case for which counsel is responsible, as well as an explanation of those where the debtor will be on their own. There should be no ambiguity about what aspects of the case is being handled by whom. Examples of likely or potential *pro se* portions of the case should be honestly explored before any limited scope engagement is undertaken.

How can you keep limited representation from conflicting you out of other representation? Many attorneys are now turning to the use of prospective waivers in their engagement letters for clients and creating a "wall" or screening attorneys within a firm setting. For a prospective waiver to be effective, the engagement letter must make it clear that the lawyer or firm may represent a debtor in a bankruptcy case in which the existing client is or may be a creditor. The engagement letter should further indicate that so long as the matters remain

unrelated to each other, the creditor or debtor has no objection to such concurrent representation, in unrelated matters, and waives any objections to any such present or future concurrent representation. The more specific and comprehensive the waiver, the more likely it is to be effective.[64] The waiver cannot simply indicate a waiver of all or any conflict because not all conflicts are waivable. Instead, it should provide a specific example of potential conflicts that the client can 'knowingly' waive.[65]

In enforcing a prospective waiver the court will consider whether the waiver is based on sufficient disclosure and constitutes a knowing consent. The court will also consider the breadth and temporal scope of the waiver, the quality of the conflicts discussion between the attorney and the client, the specificity of the waiver, the nature of the actual conflict, the sophistication of the client, and the interests of justice.[66]

State ethics rules also play a role. As an example, although the California Rules of Professional Conduct and California law permit prospective conflict waivers, there are some additional important ethical implications.[67] ABA Model Rule 1.9 provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interest of the former client unless the former client gives informed consent, confirmed in

[64] *In re IH 1, Inc.,* 441 B.R. 742, 746 (D. Del. 2011) (citing *In re Meridian Automotive Sys.-Composite Operations, Inc.,* 340 B.R. 740, 747 (Bankr. D. Del. 2006).
[65] *See In re IH 1, Inc.,* 441 B.R. 742, 747 (D. Del. 2011).
[66] *In re Black Dogs, LLC*, Case No. 10-49712, Doc. 46, February 2, 2011 (Bankr. E.D.Cal. 2011).
[67] Cal. Rule of Prof. Conduct 3-310(C)(3); *Visa U.S.A., Inc.*, *v. First Data Corp.,* 241 F. Supp. 2d 1100, 1105 (N.D.Cal. 2003).

writing." Comment 3 to Rule 1.9 clarifies the meaning of substantially related on two separate bases; "(i) if they involve the same transaction or (ii) if there is a risk that the attorney gained confidential, relevant information from the former client."[68]

If your state does not recognize prospective waivers, you may also create a wall or screen other attorneys in the firm so that they have no knowledge, participation, or profit sharing in the 'conflicted' case. By screening or erecting a wall around that attorney, the confidential information may never be disclosed to the attorney trying the current case in controversy.

The Ninth Circuit Bankruptcy Appellate Panel's decision in *Seare* illustrates the potential pitfalls for practitioners in engaging in such limited representations.[69] In that case, the BAP held that the bankruptcy court did not abuse its discretion in sanctioning a Chapter 7 debtor's attorney and ordering the disgorgement of all legal fees associated with the case based on the attorney's entry into a limited scope representation agreement, where the attorney should have known that an objection to discharge based on fraud would inevitably arise in the case.[70] The Court held that the attorneys' decision to engage in a limited representation, that was so perilous for his client, was "unreasonable" and was a violation of the Nevada Rules of Professional Conduct.[71]

Overall, while limited scope representations have been gaining momentum in recent years, the local rules of many jurisdictions are being crafted to keep a

[68] *In re IH 1, Inc.,* 441 B.R. 742 (Bankr. D.Del. 2011).
[69] *In re Seare*, 515 B.R. 599 (9th Cir. BAP 2014).
[70] *Id.* at 615.
[71] *Id.*

tight leash on attorneys attempting to exit their representations, and opinions such as *Seare* indicate that many Courts remain uneasy with the prospect of an attorney initiating a case for a debtor who is nearly certain to require professional legal assistance in the future.