The Intersection of Ethics & Discovery (What Attorneys Need to Know)

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Hon. Donald R. Cassling
U.S. Bankruptcy Court (N.D. Ill.)
Chicago, IL

Rules of Professional Conduct

• ABA Model Rule 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment 1 to Rule 1.3:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

• ABA Model 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;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(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. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Federal Statutes

- 11 U.S.C. § 329 (disgorgement of attorney's fees)
- 28 U.S.C. § 1927 (sanctions for multiplying proceedings in an unreasonable and vexatious manner)
- 11 U.S.C. § 105(a) (empowers the bankruptcy court to enter civil contempt)
- BAPCPA disclosures--11 U.S.C. § 707(b)(4)(D) ("The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.")
- 18 U.S.C. § 152 (concealment of assets and false oaths and claims; bribery)-- punishment for such violation includes fine, imprisonment for not more than 5 years, or both
- 18 U.S.C. § 3057 (duty of the judge to refer to the United States Attorney any violations under chapter 9 of title 18 or other laws relating to insolvent debtors, receiverships, or reorganization plans)

Federal Rules

- FRBP 9020 (contempt powers)
- FRBP 9011 (sanctions against attorneys and litigants)
- FRBP 7041(b) (involuntary dismissal of an action or claim for failure to prosecute or comply with the Rules)
- FRBP 7037(b) (dismissal of a claim or action as a discovery sanction for failure to comply with a court order)
- FRBP 16(f) (sanctions for failure to comply with pretrial order, failure to appear at pretrial conference, and failure to participate in the conference)
- FRBP 26(g) (sanctions for a certification that violates Rule 26, including reasonable expenses and attorney's fees)

N.D. Illinois Rules

- Local Bankruptcy Rule 9029-4A--Rules of Professional Conduct for the Northern District of Illinois (apply in all proceedings and cases before the bankruptcy court)

- Model Rules of Professional Conduct (adopted by the Northern District of Illinois as its rules of professional conduct) See Northern District of Illinois, Local Rule 83.50.

- Illinois Rules of Professional Conduct (Rule 8.3 requires a lawyer to report unprivileged knowledge of misconduct involving fraud, dishonesty, deceit or misrepresentation by another lawyer to the Illinois Attorney Registration and Disciplinary Commission)

- Local Bankruptcy Rule 9029-4B Attorney Disciplinary Proceedings (N.D. IL)

- Client-Lawyer Relationship

Cases

- *In re Himmel*, 125 III.2d 531, 533 N.E.2d 790 (1988) (creates the duty to report an attorney's misconduct to the Illinois ARDC; the failure to report such misconduct can be a potential violation of Rule 8.3 of the Illinois Rules of Professional Conduct)

- *In re Liou*, 503 B.R. 56 (Bankr. N.D. III. 2013)

- *In re Varan*, 2014 WL 2881162 (Bankr. N.D. III. 2014)

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Slip Copy, 2014 WL 2881162 (Bkrtcy.N.D.Ill.)
(Cite as: 2014 WL 2881162 (Bkrtcy.N.D.Ill.))

United States Bankruptcy Court,
N.D. Illinois,
Eastern Division.
In re Joseph Stanley VARAN, Debtor.

No. 11 B 44072.
Signed June 24, 2014.

Joseph Stanley Varan, Hinsdale, IL, pro se.

MEMORANDUM OPINION

DONALD R. CASSLING, United States Bankruptcy Judge.

***1** Patrick S. Layng, the United States Trustee (the "U.S. Trustee") has filed this motion against attorneys Adam B. Goodman and Jessica Tovrov ("Goodman and Tovrov") seeking sanctions under 11 U.S.C. §§ 105 and 329 (the "Motion for Sanctions"). For the reasons stated below, the Court grants the Motion for Sanctions.

I. *JURISDICTION AND PROCEDURE*

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

II. *BACKGROUND*

The material facts are not in dispute. Joseph Stanley Varan (the "Debtor") filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on October 30, 2011 (the "Petition Date"). During the time the Debtor was represented by his first counsel in this case, Erica Crohn Minchella of the law firm Minchella & Associates, Ltd., the Debtor filed and twice amended his Schedule B as follows:

1. On November 10, 2011, the Debtor filed his original Schedule B (the "Original Schedule B"). In that Schedule, the Debtor represented that as of the Petition Date, he did not have any interests in: (i) financial accounts; (ii) insurance policies; (iii) incorporated or unincorporated businesses; or (iv) partnerships. (Docket No. 11, Schedule B at lines 2, 9, 13, & 14.)

2. On December 13, 2011, he filed an amended Schedule B (the "First Amended Schedule B"), repeating his original representations that he did not have such interests. (Docket No. 29, Schedule B at lines 2, 9, 13, & 14.)

3. On March 20, 2012, the Debtor filed yet another amended Schedule B (the "Second Amended Schedule B"), this time disclosing that he had an interest in a checking account at Hinsdale Bank with a value of $500. (Docket No. 61, Schedule B at line 2.) However, the Second Amended Schedule B otherwise repeated the Debtor's representation made in the earlier schedules that he did not have interests in: (i) any other financial accounts; (ii) insurance policies; (iii) incorporated or unincorporated businesses; or (iv) partnerships. (*Id*. at lines 2, 9, 13, & 14.).

The multiple amendments caused the U.S. Trustee to question the accuracy and completeness of the Debtor's Petition, Schedules, and Statement of Financial Affairs. (Docket No. 52.) In February 2012, the Court granted the U.S. Trustee's motion seeking authorization of discovery from the Debtor pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure in connection with its investigation. (Docket No. 57.) The U.S. Trustee served the Debtor with a subpoena on April 26, 2012, under Bankruptcy Rule 2004. (Mot. for Sanctions at ¶ 14) (Docket No. 211.)

Subsequently, on November 19, 2012, the Debtor replaced Minchella as his counsel, engaging, in Minchella's stead, Goodman and Tovrov of the law firm Goodman Tovrov Hardy & Johnson LLC. (*See* Response to Mot. for Sanctions at p. 9)

(Docket No. 227.) Also on November 19, 2012, the Debtor appeared for his Bankruptcy Rule 2004 examination, represented by Tovrov. (Mot. for Sanctions at ¶ 11.)

***2** On November 27, 2012, the U.S. Trustee initiated an adversary proceeding against the Debtor (the "Adversary Proceeding"), objecting to his discharge under 11 U.S.C. § 727(a)(2)(A), (a)(3), (a)(4), (a)(5), and (a)(6), alleging that he had made false oaths concerning his interests in financial accounts and business entities. Specifically, the U.S. Trustee alleged that:

> The [Debtor's] sworn representations in his [Original Schedule B, First Amended Schedule B, and Second Amended Schedule B], that he holds no stock in any incorporated entity, no interest in any unincorporated entity, and no interest in any partnership or joint venture, are false.
>
> The [Debtor's] sworn representations in his [Original Schedule B, First Amended Schedule B, and Second Amended Schedule B], wherein he omits his interests in certain financial accounts, including accounts at Chase, Fifth/Third Bank, and Bank of America, are false.

(Adv. No. 12–01823, Docket No. 1. at ¶¶ 108 & 109.)

After filing this Adversary Proceeding, the U.S. Trustee obtained the following additional discovery from the Debtor, which revealed the existence of the Debtor's interests in personal property that were not disclosed in his Schedules:

> 1. In January and February 2013, the Debtor, through Goodman, produced insurance documents and certain bank records responsive to the U.S. Trustee's subpoena dated April 26, 2012. (Mot. for Sanctions at ¶¶ 14–17.) The bank records that were produced include the Debtor's individual bank accounts and those held jointly with his wife, Rebecca Varan, at several banks. (*Id*. at ¶ ¶ 15–17.)
>
> 2. In April 2013, the Debtor, through Goodman, produced records pertaining to sixty-two (62) entities with which the Debtor was directly or indirectly involved as a member, manager or otherwise. (*Id*. at ¶ 18.)
>
> 3. In May 2013, the Debtor, through Goodman, provided the U.S. Trustee with Defendant's Response to Plaintiff's First Set of Interrogatories. (*Id*. at ¶ 19.) In response to Interrogatories 5 and 6, the Debtor identified LLC 1 Plus 1 as an entity in which he held a legal or equitable interest from October 2005 to the present, and named LLC 1 Plus 1's account at Chase Bank as a financial account in which he had a legal or equitable interest between October 2009 and the present. (Ex. A to Mot. for Sanctions at ¶¶ 5 & 6.)

On June 20, 2013, the Debtor appeared for his deposition, represented by Goodman. (Mot. for Sanctions at ¶ 20.) During the deposition, the Debtor gave the following responses to the U.S. Trustee's questions regarding his interest in LLC 1 Plus 1:

> Q: What is your interest in this entity?
>
> A: I'm a member.
>
> Q: Are you the only member?
>
> A: Yes.
>
> Q. Does anyone else have any interest in the entity?
>
> A: No.
>
> (Ex. B to Mot. for Sanctions at pp. 59–60.)

Upon being presented with a certificate of designation for LLC 1 Plus 1, which named the Debtor as a member, the Debtor was further questioned as follows:

***3** Q: Do you know who signed your signature?

A: I do not.

Q: Does that handwriting look at all familiar to you?

A: It does not.

Q: So how did you first learn that you had an interest in this entity?

A: When I had to do some research, when you had asked to get all the LLC documents, and I started getting all these other documents, I identified that this is my name. That's when—the first time I had learned about it.

Q: You didn't previously know that LLC 1 Plus 1 was yours?

A: No. I thought I was a manager of the company, not a member.

Q: So only in the year 2013 did you learn that you were a member?

A: I believe so.

(*Id*. at pp. 70–72.)

After this deposition, the Debtor produced copies of checks drawn on an account held in the name of LLC 1 Plus 1 at Chase Bank. (Mot. for Sanctions at ¶ 21.) Among the payments evidenced in those records were five payments made to "Goodman Law Offices" and "Adam Goodman" from March 6, 2013 through June 18, 2013, totaling $19,807.34. (*Id*.)

Following the U.S. Trustee's pursuit of discovery of the Debtor's assets, the Debtor, through his counsel, Goodman and Tovrov, amended his Schedule B two final times as follows:

1. On September 30, 2013, the Debtor filed an amended Schedule B (the "Third Amended Schedule B"). (Docket No. 189.) The Third Amended Schedule B indicates that, as of the Petition Date, the Debtor had no personal property other than 25% interests in two LLCs, neither of which is LLC 1 Plus 1. (*See* Third Amended Schedule B at line 13.)

2. On October 1, 2013, the Debtor filed a further amended Schedule B (the "Fourth Amended Schedule B"). (Docket No. 191.) The Fourth Amended Schedule B is a compilation of page 1 from the Third Amended Schedule B and the Original Schedule B. It indicates that, as of the Petition Date, the Debtor had no interests in any: (i) financial accounts; (ii) insurance policies; (iii) partnerships; or (iv) stock in any incorporated entity or unincorporated entity (except for the 25% interests in two LLCs as disclosed in the Third Amended Schedule B). (*Id*. at lines 2, 9, 13, & 14.)

Ultimately, the Debtor voluntarily waived his discharge under § 727(a)(10) and the Adversary Proceeding was closed on November 12, 2013. (Docket Nos. 194, 195, & 196.) FN1

FN1. The Debtor filed a Motion to Vacate Voluntary Waiver of Discharge on November 27, 2013. (Docket No. 198.) The motion was denied by the Court on February 4, 2014. (Docket No. 222.)

On December 10, 2013, more than a year after Goodman and Tovrov had been retained to represent the Debtor, Goodman filed a Disclosure of Compensation of Attorney for Debtor (the "Compensation Disclosure Statement") indicating that his law firm had received $29,601.09 for legal fees and expenses related to the Debtor's bankruptcy case. (Docket No. 204.) Significantly, the Compensation Disclosure Statement was filed only after the U.S. Trustee provided Goodman and Tovrov with a prepared draft of the Motion for Sanctions that admonished them for failing to file a fee disclosure statement as required by § 329(a). (Mot. for Sanctions at ¶ 39.)

***4** On January 2, 2014, the U.S. Trustee filed his Motion for Sanctions. The Motion focuses on

Goodman and Tovrov's failures to make two types of disclosures: (1) accurate disclosures of the Debtor's property interests in his Schedule B and (2) timely disclosure of their fee arrangements with the Debtor. As sanctions, the Motion seeks (a) disgorgement of their fees, (b) payment of the U.S. Trustee's fees incurred in bringing this Motion, and (c) mandatory attendance by both Goodman and Tovrov at an ethics course taught at an ABA-approved law school. Goodman and Tovrov filed their Response to the Motion for Sanctions on February 18, 2014, and the U.S. Trustee filed his Reply on March 3, 2014.

The parties have waived the opportunity for an evidentiary hearing. *See In re Rimsat, Ltd.*, 212 F.3d 1039, 1046 (7th Cir.2000). Thus, the Court will decide the matter based on the pleadings filed by the parties. *See In re Vokac*, 273 B.R. 553, 555 (Bankr.N.D.Ill.2002). The Court will also take judicial notice of all pleadings filed by the parties and of the case docket. *See In re Kowalski*, 402 B.R. 843, 846 (Bankr.N.D.Ill.2009).

III. *APPLICABLE STANDARDS*

A. Standard for Sanctions Under § 105(a)

Section 105(a) of the Code gives bankruptcy courts the power to impose sanctions. *In re McNichols*, 258 B.R. 892, 903 (Bankr.N.D.Ill.2001) (citing *Rimsat*, 212 F.3d at 1049); *see also In re Collins*, 250 B.R. 645, 656 (Bankr.N.D.Ill.2000). Section 105(a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.
>
> 11 U.S.C. § 105(a).

" Section 105 grants broad powers to bankruptcy courts to implement the provisions of Title 11 and to prevent an abuse of the bankruptcy process." *In re Volpert*, 110 F.3d 494, 500 (7th Cir.1997). This section empowers bankruptcy courts to sanction conduct that abuses the judicial process. *Id.; see also McNichols*, 258 B.R. at 903 (citing *Collins*, 250 B.R. at 656–57).

Despite the broad language of § 105(a), courts must exercise caution to limit the circumstances under which the statute is used. *Disch v. Rasmussen*, 417 F.3d 769, 777 (7th Cir.2005). Thus, in imposing sanctions, a "court should ordinarily rely on available authority conferred by statutes and procedural rules, rather than its inherent power, if the available sources of authority would be adequate to serve the court's purposes." *Rimsat*, 212 F.3d at 1048 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)). However, "a sanctioning court is not required to apply available statutes and procedural rules in a piecemeal fashion where only a broader source of authority is adequate to justify all the necessary sanctions." *Id.* at 1049 (citing *Chambers*, 501 U.S. at 50–51). Thus, a court may resort to § 105(a) and its inherent powers "to ensure that all the culpable parties receive[ ] an appropriate sanction[.]" *Id.*

B. Standard for Disgorgement of Fees

***5** Section 329(a) requires a debtor's attorney to "file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation." 11 U.S.C. § 329(a). Rule 2016(b) of the Federal Rules of Bankruptcy Procedure requires debtor's counsel to file this disclosure statement within fourteen days after the order for relief or at such other time as the court may direct. In addition, the Rule further provides that a supplemental statement of compensation must be filed within fourteen days after any payment or agreement not previously disclosed. Fed. R.

Bankr.P.2016(b). All compensation received during the applicable period must be disclosed, regardless of whether the attorney will be compensated from the estate or from some other source. *In re Jackson*, 401 B.R. 333, 339 (Bankr.N.D.Ill.2009) (citing *In re Redding*, 263 B.R. 874, 878 (8th Cir.BAP2001)).

Fee disclosure obligations of debtor's counsel are mandatory, not permissive. *In re Gluth Bros. Constr., Inc.*, 459 B.R. 351, 361 (Bankr.N.D.Ill.2011) (citing *In re Mortakis*, 405 B.R. 293, 297 (Bankr.N.D.Ill.2009)); *see also In re Griffin*, 313 B.R. 757, 764–65 (Bankr.N.D.Ill.2004) . "Because disclosure under section 329(a) and Rule 2016(b) is 'central to the integrity of the bankruptcy process,' failure to disclose is sanctionable." *Jackson*, 401 B.R. at 340 (quoting *In re Andreas*, 373 B.R. 864, 872 (Bankr.N.D.Ill.2007)).

Courts enjoy broad discretion in determining appropriate remedies for violations of the fee disclosure requirements. *White v. Coyne, Schultz, Becker & Bauer, S.C. (In re Pawlak)*, 483 B.R. 169, 180 (Bankr.W.D.Wis.2012). The sanctions can consist of a variety of penalties, including partial or total denial of compensation, as well as partial or complete disgorgement of fees already paid. *Jackson*, 401 B.R. at 340–41; *see also Mortakis*, 405 B.R. at 297. "The extent to which compensation should be denied rests with the Court's sound discretion." *Kowalski*, 402 B.R. at 848; *Gluth Bros. Constr.*, 459 B.R. at 361; *In re Prod. Assocs., Ltd.*, 264 B.R. 180, 186 (Bankr.N.D.Ill.2001) ("Failure to timely file the disclosure could result in the loss of the attorney's fee or other such sanctions the court may decide to impose, whether or not the estate is harmed by the delay."). "[M]any courts have held that '[f]ailure to meet the disclosure requirements alone is grounds for disgorgement.' " *In re Waldo*, 417 B.R. 854, 893–94 (Bankr.E.D.Tenn.2009) (quoting *Griffin*, 313 B.R. at 765); *see also Jackson*, 401 B.R. 340 (citing *Andreas*, 373 B.R. at 872); *Turner v. Davis, Gillenwater & Lynch (In re Inv. Bankers, Inc.)*, 4 F.3d 1556, 1565 (10th Cir.1993), *cert. denied*, 510 U.S. 1114, 114 S.Ct. 1061, 127 L.Ed.2d 381 (1994) (stating that "an attorney who fails to comply with the requirements of § 329 forfeits any right to receive compensation for services").

C. Burden of Proof

***6** The U.S. Trustee bears the burden of proof on its Motion for Sanctions. However, the standard of proof required for the U.S. Trustee to prevail on its motion does not appear to be decided in this Circuit, and other Circuits are split on the issue.

Were this matter to involve sanctions for civil contempt,[FN2] it is well-established in this Circuit that proof by clear and convincing evidence would be required of the complaining party.[FN3] *Stotler & Co. v. Able*, 870 F.2d 1158, 1163 (7th Cir.1989). The clear and convincing evidence standard is also employed where the sanctions at issue involve suspension from practice. *See In re Liou*, 503 B.R. 56, 78 (Bankr.N.D.Ill.2013); *see also In re Cochener*, 360 B.R. 542, 572–73 (Bankr.S.D.Tex.2007), *aff'd in part, rev'd in part*, 382 B.R. 311 (S.D.Tex.2007), *rev'd*, 297 Fed. Appx. 382 (5th Cir.2008).

FN2. This matter is not to be treated as a matter of civil contempt because "[i]n order to prevail on a contempt petition, the complaining party must demonstrate ... that the respondent has violated the express and unequivocal command of a *court order*." *Andreas*, 373 B.R. at 874 (quoting *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 460 (7th Cir.1993)) (emphasis in original). "Without a court order specifying what must be done there can be no civil contempt. *Id.* (citing *In re Rimsat, Ltd.*, 208 B.R. 910, 913 (Bankr.N.D.Ind.1997)); *see also U.S. v. Dowell*, 257 F.3d 694, 699 (7th Cir.2001).

FN3. "The clear and convincing standard requires proof falling between standards of preponderance of the evidence and beyond a reasonable doubt." *Fidelity Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title*

Ins. Co., No. 00 C 5658, 2002 WL 1433717, at *6 (N.D.Ill. July 2, 2002) (citing *Brown v. Bowen*, 847 F.2d 342, 345–46 (7th Cir.1988)).

Here, the U.S. Trustee seeks sanctions under the Court's inherent powers granted by § 105(a), and courts in other Circuits are split on the standard of proof required for the issuance of sanctions under a court's inherent powers. Some courts hold that when a court uses its inherent powers to sanction an attorney, the standard is a preponderance of the evidence, unless the sanction is disbarment or suspension. Where the sanction is disbarment or suspension, those courts hold the standard is clear and convincing evidence. *See, e.g., Cochener*, 360 B.R. at 573–74. Other courts, reasoning that most inherent power sanctions are fundamentally punitive, require a heightened standard of proof by clear and convincing evidence before imposing any types of sanctions. *See, e.g., Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1476–77 (D.C.Cir.1995).

The sanctions sought by the U.S. Trustee here are not as severe as others on the spectrum of those available to the Court. Rather, they are of the type commonly imposed by bankruptcy courts when warranted. Further, while the sanctions sought in this case are in many ways similar to those imposed for civil contempt, Goodman and Tovrov have not violated a court order, and therefore this matter will not be treated as a motion for contempt. Given that there is no applicable binding standard of proof in this Circuit, the Court will apply the more conservative clear-and-convincing-evidence standard.

IV. *DISCUSSION*

The U.S. Trustee seeks sanctions against Goodman and Tovrov under §§ 105 and 329 for their alleged failure to (1) file a materially accurate Schedule B on behalf of the Debtor, and (2) timely file a fee disclosure statement required under § 329(a) and Bankruptcy Rule 2016(b). Specifically, the U.S. Trustee asks the Court to require Goodman and Tovrov to (1) complete a Professional Responsibility course at an ABA-approved law school, (2) disgorge all sums they received in this case to the Chapter 7 Trustee, and (3) reimburse the U.S. Trustee for its attorney's fees and costs relating to the Motion for Sanctions.

A. Filing of Inaccurate Schedules

***7** While both failures of Goodman and Tovrov are serious, the U.S. Trustee has placed special emphasis on his allegation that Goodman and Tovrov filed the Third Amended Schedule B and Fourth Amended Schedule B knowing that they were materially inaccurate. (Reply to Mot. for Sanctions at ¶ 1.) This emphasis is warranted, given the central importance to the bankruptcy process of full and complete disclosure by debtors of their debts and assets.

1. Duty to Disclose Assets

"[T]he disclosure obligations of consumer debtors are at the very core of the bankruptcy process and meeting these obligations is part of the price debtors pay for receiving the bankruptcy discharge ." *In re Colvin*, 288 B.R. 477, 481 (Bankr.E.D.Mich.2003). Complete financial disclosure is necessary to ensure the right of the trustee and the creditors to evaluate the case. *Grochocinski v. Morgan (In re Morgan)*, Bankr.No. 09–42248, Adv. No. 11–00580, 2013 WL 4067591, at *9 (Bankr.N.D.Ill. Aug.12, 2013); *Fiala v. Lindemann (In re Lindemann)*, 375 B.R. 450, 469 (Bankr.N.D.Ill.2007). Filing schedules that omit a debtor's material interests in property provides grounds for denial of a debtor's discharge. *Morgan*, 2013 WL 4067591, at *9.

"Debtors have an absolute duty to report whatever interests they hold in property[.]" *In re Yonikus*, 974 F.2d 901, 904 (7th Cir.1992). These interests must be fully disclosed in debtors' bankruptcy schedules. *See Browning v. Levy*, 283 F.3d 761, 775 (6th Cir.2002). Disclosure is mandatory even if a debtor believes an asset to be worthless or unavailable to the bankruptcy estate. *Yonikus*, 974 F.2d at 904; *see also In re Gonzalez*, Bankr No. 99–80751, 2001 WL 34076427, at *2 (Bankr.C.D.Ill. Aug.22, 2001) ("A debtor has no

discretion to exclude exempt or worthless property."). Thus, a debtor must "accurately and completely list all ownership interests he or she holds in property, and it is not for the debtor 'to decide which assets are to be disclosed to creditors.' " *In re Mosher*, 417 B.R. 772 (Bankr.N.D.Ill.2009) (quoting *Neary v. Stamat (In re Stamat)*, 395 B.R. 59, 73 (Bankr.N.D.Ill.2008)).

A debtor's duty to ensure the accuracy and completeness of his schedules is one which continues throughout the bankruptcy case. *Searles v. Riley (In re Searles)*, 317 B.R. 368, 377–78 (9th Cir.BAP2004), *aff'd*, 212 Fed. Appx. 589 (9th Cir.2006). Thus, errors in previously filed schedules must be corrected. *See U.S. Trustee v. Bresset (In re Engel)*, 246 B.R. 784, 794 (Bankr.M.D.Pa., 2000) (citing *Torgenrud v. Benson (In re Wolcott)*, 194 B.R. 477, 486 (Bankr.D.Mont.1996)). "The continuing nature of the duty to assure accurate schedules of assets is fundamental because the viability of the system of voluntary bankruptcy depends upon full, candid, and complete disclosure by debtors of their financial affairs." *Searles*, 317 B.R. at 378.

Nor does the duty of disclosure fall on the debtor alone. The debtor's attorney has an independent obligation to "review [the schedules] with his client before they become a part of the public record." *See Acclaim Legal Serv., PLLC v. Allard (In re Shannon)*, No. 09–CV–12710, Bankr.No. 09–40867, 2010 WL 1246691, at *4 (E.D.Mich. Mar.25, 2010) (affirming a bankruptcy court's decision sanctioning debtor's attorneys for filing inaccurate schedules). This includes an "obligation to reasonably and expeditiously investigate [the schedules'] accuracy and tender amendments, if necessary." *Engel*, 246 B.R. at 793. Moreover, "attorneys must take emphatic care to encourage their clients to comply with the requirements of the Bankruptcy Code and the Bankruptcy Rules." *Cochener*, 360 B.R. at 598.

***8** Congress emphasized its concern with full and complete disclosure by debtors and their counsel when it enacted the 2005 BAPCPA amendments. Those amendments added provisions which impose new duties on debtors' attorneys in connection with the filing of the bankruptcy petition and schedules. *See* 11 U.S.C. § 707(b)(4)(C) and (D); *see also In re Moffett*, No. 10–71920, 2012 WL 693362, at *2 (Bankr.C.D.Ill. Mar.2, 2012); *In re Robertson*, 370 B.R. 804, 809 (Bankr.D.Minn.2007) (noting that BAPCPA has imposed "newly-heightened duties of verification as to accuracy" of documents filed by the debtor in bankruptcy). Specifically, § 707(b)(4)(D) provides that "[t]he signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect." [FN4] 11 U.S.C. § 707(b)(4)(D).

FN4. Here, the Third Amended Schedule B and Fourth Amended Schedule B were not filed with the Petition, and therefore, are arguably not within the reach of § 707(b)(4)(D). The Court will not decide the applicability of § 707(b)(4)(D) to the facts of this case, as this issue is not before it. However, these provisions are noteworthy, as they are further illustrations of the "policy that a debtor's attorney exercise independent diligence and care in ensuring that there is evidentiary support for the information contained in his client's bankruptcy schedules." *In re Triepke*, No. 09–21855, 2012 WL 1229524, at *5 (Bankr.W.D.Mo. Apr. 12, 2012). Moreover, as previously stated above, the duty to ensure the accuracy and completeness of the Debtor's Schedules is one which continues throughout the bankruptcy case. *See Searles*, 317 B.R. at 377–78. Thus, errors in previously filed Schedules must be corrected. *See Engel*, 246 B.R. at 794 (citing *Wolcott*, 194 B.R. at 486).

Courts have taken notice of these amendments and reiterated their commitment to enforcing them:

> [D]ebtors' counsel are to exercise significant care as to the completeness and accuracy of *all* recitations on their client[']s schedules, after they have made a factual investigation and legal evaluation that conforms to the standards applicable to any attorney filing a pleading, motion, or other document in a federal court. The content of a debtor's petition and schedules is relied on, and should have the quality to merit that reliance.

Triepke, 2012 WL 1229524, at *5 (quoting *Robertson*, 370 B.R. at 809, n. 8) (emphasis in original).

2. The Third Amended Schedule B and the Fourth Amended Schedule B Were Inaccurate

The U.S. Trustee argues that documents produced during discovery and the Debtor's deposition testimony prove that Goodman and Tovrov knew or should have known that the Third Amended Schedule B and the Fourth Amended Schedule B were materially inaccurate as filed. (Mot. for Sanctions at ¶¶ 32–36.) Specifically, the Third Amended Schedule B and the Fourth Amended Schedule B omitted the following material assets in which the Debtor had an interest: (1) the Debtor's 100% membership interest in LLC 1 Plus 1; (2) the Debtor's interests in several financial accounts; (3) the Debtor's interests in numerous business entities; and (4) the Debtor's interests in certain life insurance policies. (*Id*. at ¶ 37.) The Court agrees that these omissions were material and also agrees that the evidence shows that Goodman and Tovrov were either aware of these assets or should have been aware of them at the time the Third Amended Schedule B and the Fourth Amended Schedule B were filed.

Goodman and Tovrov do not dispute that the Third Amended Schedule B and the Fourth Amended Schedule B they filed on behalf of the Debtor were false. Rather, they contend that the falsity was "harmless" because the unlisted assets had been disclosed to the U .S. Trustee through discovery in the Adversary Proceeding, and that many of the financial accounts and interests in life insurance policies were of *de minimis* value. (Response to Mot. for Sanctions at pp. 3–4.) This argument misses the point. A debtor has an absolute duty to disclose his assets in his Schedules, regardless of the value of such assets. *Yonikus*, 974 F.2d at 904. Further, the Court finds the disclosure of assets to the U.S. Trustee is not sufficient to comply with the Bankruptcy Code's requirement of the filing of accurate Schedules with the Court.

***9** Nor can Goodman and Tovrov credibly argue that they were unaware at the time of the filings that the Third Amended Schedule B and the Fourth Amended Schedule B were false. For example, on the very day they were retained, November 19, 2012, they represented the Debtor at a Rule 2004 examination conducted by the U.S. Trustee. The primary focus of that examination was whether the Debtor's Schedules were complete and accurate. If that alone was not enough to alert them that this Debtor had a problem with accurately and completely disclosing his assets in his Schedules, the U.S. Trustee's commencement of an Adversary Proceeding a little more than a week later, on November 27, 2012, could not have failed to command their attention. Once again, the central focus of the complaint in the Adversary Proceeding was the Debtor's lack of disclosure of his assets.

The Court therefore finds that Goodman and Tovrov became aware of the specifics of the Debtor's failure to disclose at least as early as November 27, 2012. From January through April 2013, the Debtor produced numerous records pertaining to his assets that had not been disclosed in the Schedules, and in May 2013, in response to the U.S. Trustee's Interrogatories, he identified LLC 1 Plus 1 as an entity in which he held an interest. Further, in June 2013, Goodman and Tovrov represented the Debtor at a deposition in the Adversary Proceeding, during which he was questioned about his numerous personal property interests, particularly his ownership of LLC 1 Plus 1.

Despite the persistent and overwhelming testimony and documents indicating that the Debtor's

Schedules were materially inaccurate, Goodman and Tovrov failed to completely disclose the Debtor's property interests when they filed the Third Amended Schedule B and the Fourth Amended Schedule B. These documents, like their predecessors, indicated that the Debtor did not have interests in any financial accounts or insurance policies, and that he held interests in only two business entities, none of which is LLC 1 Plus 1. The Court finds these representations were false, and that the Debtor held interests in numerous financial accounts and entities, as well as certain life insurance policies.

Goodman and Tovrov's failure to disclose the Debtor's interest in LLC 1 Plus 1 is especially troubling. They dispute the U.S. Trustee's assertion that the Debtor had an ownership interest in LLC 1 Plus 1, arguing that the Debtor "never accepted the [U.S. Trustee's] conclusion about his ownership." (Response to Mot. for Sanctions at p. 3.) The Court finds this contention to be disingenuous. The Debtor's response to Interrogatories and his June 20, 2013 deposition testimony demonstrate that at least by the time of the deposition, the Debtor and his counsel, Goodman and Tovrov, were made aware that he was the sole owner of LLC 1 Plus 1. Moreover, a debtor's unsubstantiated and self-serving beliefs do not control whether or not he has an interest in a particular asset. Accordingly, the Court finds that Goodman and Tovrov were aware or should have been aware that the Third Amended Schedule B and the Fourth Amended Schedule B were materially false at the time they were filed.

3. Goodman and Tovrov's Violation of Ethical Duties

***10** In addition to arguing that their failures to disclose material assets in the Debtor's Third Amended Schedule B and Fourth Amended Schedule B were "harmless" and *de minimis*, Goodman and Tovrov argue that their ethical duties to zealously represent their client in the Adversary Proceeding brought by the U.S. Trustee prevented them from filing accurate Schedules. Had they done so, they argue, the accurate filing "would have been tantamount to endorsing the legal theory presented in the [U.S. Trustee's] [A]dversary [P]roceeding that there were material omissions in the earlier iterations of the Debtor's schedules." (Response to Mot. for Sanctions at p. 7.) The Court rejects this excuse for the following reasons.

Goodman and Tovrov represented the Debtor generally in his bankruptcy case as well as in the Adversary Proceeding in which the U.S. Trustee objected to his discharge. This dual representation gave rise to at least two duties: (1) a duty to ensure that they zealously represented the Debtor in the Adversary Proceeding and (2) a duty of candor to the Court with respect to satisfying the disclosure requirements in the Debtor's bankruptcy case.

First, lawyers have a duty to " 'zealously (but within the bounds of the law and ethical conduct) advance the client's interest .' " *O'Malley v. Novoselsky*, Nos. 10 C 8200, 11 C 110, 2011 WL 2470325, at *3 (N.D.Ill. June 14, 2011) (quoting *Midfirst Bank v. Curtis*, No. 3 C 4975, 2006 WL 2787485, at *2 (N.D.Ill. Sept.22, 2006)). Second, lawyers have a duty of candor to the tribunal. *See* ABA Model Rules of Professional Conduct, Rule 3.3.[FN5]

FN5. The Northern District of Illinois has generally adopted the American Bar Association's Model Rules of Professional Conduct as its rules of professional conduct. *See* Northern District of Illinois, Local Rule 83.50, "Rules of Professional Conduct"; *see also United States v. Williams*, 698 F.3d 374, 387, n. 1 (7th Cir.2012). ABA Model Rule 3.3, titled "Candor Toward the Tribunal," is identical to Rule 3.3 of the Illinois Rules of Professional Conduct. *Compare* ABA Model Rules of Professional Conduct, Rule 3.3, *with* Illinois Rules of Professional Conduct, Rule 3.3.

Significantly, for purposes of this motion, "a lawyer's duty of candor to the court must always

prevail in any conflict with the duty of zealous advocacy." *United States Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 925 (4th Cir.1995); *see also Cleveland Hair Clinic, Inc. v. Puig*, 200 F.3d 1063, 1067 (7th Cir.2000) (noting that the comment to Rule 3.3 of the Rules of Professional Conduct for the Northern District of Illinois states that a lawyer's task of maintaining client confidence "is qualified by the advocate's duty of candor to the tribunal"). This interpretation does not denigrate a lawyer's duty to zealously represent his or her clients, for that duty is always understood to mean zealous representation *within the bounds of the law and ethical conduct:* FN6

> FN6. Courts recognize that a client's demands sometimes threaten to interfere with an attorney's duty of candor. Under such circumstances, the attorney may withdraw from the case. *See Engel*, 246 B.R. at 793 (stating that if a client refuses to cooperate with his attorney in filing accurate schedules, the attorney has cause to withdraw from the case).

> In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, *within the bounds of the law*, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.
>
> ***11** Illinois Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities, no. 9 (emphasis added.)

By statute and rule, attorneys representing debtors in bankruptcy cases have additional obligations of candor that go far beyond what is expected of counsel in the ordinary civil lawsuit. A debtor's counsel in a bankruptcy case is "obligated both ethically and as an officer of the court not to file schedules and other disclosure documents that the counsel believes inaccurate." *Engel*, 246 B.R. at 793. In addition, "[t]he obligation to file accurate schedules includes a continuing duty to correct errors in filed documents." *Id.* at 794.

Goodman and Tovrov have argued that their simultaneous representation of the Debtor in both his bankruptcy case and in the Adversary Proceeding created a potential conflict, between their duty of candor to the bankruptcy court in the former and their duty to zealously represent their client in the latter. FN7 While the Court recognizes the apparent dilemma this may have presented to counsel, it nevertheless holds them responsible for their failure to follow the clear guidance laid out in the case law, statutes, and rules cited above for resolving the very situation in which they found themselves. As those sources unequivocally state, counsel's duty of zealous advocacy is circumscribed by "the bounds of the law and ethical conduct." Here, the disclosure requirements of the Bankruptcy Code defined "the bounds of the law" within which Goodman and Tovrov were compelled to constrain their zealousness as advocates. The ethical duty of candor before the bankruptcy court, which is part and parcel to a debtor's duty of disclosure, trumps (or at least defines the boundaries of) the duty of zealous advocacy. Goodman and Tovrov inverted that hierarchy and elevated their duty to zealously represent their client above their duty of candor to the Ccourt. They did so by knowingly filing an inaccurate and incomplete Schedule B in the bankruptcy case for the admitted purpose of avoiding an adverse inference in the Adversary Proceeding. In doing so, they

violated Rule 3.3 of the Model Rules.

> FN7. As stated above, Goodman and Tovrov argue in their response to the Motion for Sanctions that filing an amended Schedule B that disclosed all of the assets identified in the Motion for Sanctions "would have been tantamount to endorsing the legal theory presented in the [U.S. Trustee's] [A]dversary [P]roceeding that there were material omissions in the earlier iterations of the Debtor's schedules." (Response to Mot. for Sanctions at p. 7.)

The Court therefore finds that Goodman and Tovrov knowingly and willfully caused the Debtor to file a materially false Third Amended Schedule B and Fourth Amended Schedule B. The Third Amended Schedule B and the Fourth Amended Schedule B failed to disclose numerous property interests of the Debtor of which Goodman and Tovrov were aware. The Court finds that their conduct amounts to bad faith and is an abuse of the judicial process. Moreover, their failures to ensure the filing of complete and accurate Schedules disrupted the bankruptcy process in this case by misleading the Court, the U.S. Trustee, the Chapter 7 trustee, and the creditors with respect to numerous assets owned by the Debtor for months after the case was filed.

Goodman and Tovrov's conduct in this case is sufficiently egregious to warrant the imposition of both monetary and non-monetary sanctions, as discussed below in part C of this Memorandum Opinion.[FN8]

> FN8. As observed by the Seventh Circuit, violations of the duty of candor to the court "can lead to sanctions even more severe than payment of an opponent's fees and costs." *Cleveland*, 200 F.3d at 1067.

B. Compensation Disclosure Requirements

***12** The U.S. Trustee contends that Goodman and Tovrov failed to comply with the attorney compensation disclosure requirements of § 329(a) and Bankruptcy Rule 2016(b) by failing to timely file a statement of compensation. As a result, the U.S. Trustee argues that they should be required to disgorge all fees received from the Debtor in this case to the Chapter 7 Trustee.

Timely disclosure of the fee statement is mandatory and central to the integrity of the bankruptcy process: "a belated disclosure is insufficient to cure the failure to timely disclose fees received ." *In re Valladares*, 415 B.R. 617, 623 (Bankr.S.D.Fla.2009). "If every attorney waited until he or she is caught to file a statement of disclosure, the entire concept of mandatory disclosure would become a farce." *Id*. Although case law supports a denial of all compensation for violations of fee disclosure requirements, courts may use their discretion to fashion a less drastic sanction where full disgorgement would be viewed as unduly harsh. *See Andreas*, 373 B.R. at 873 (stating that denial of all compensation to attorney would be unduly harsh where attorney achieved successful results for debtors); *see also In re Dental Profile, Inc*., 446 B.R. 885, 909 (Bankr.N.D.Ill.2011) (finding that disgorgement of attorney's fees would be unduly harsh in light of the work performed in the case). Thus, this Court has the discretion to "balanc[e] the need[ ] for sanctions with the inequity which would otherwise result from a complete denial of all fees and disbursements." *In re Tomczak*, 283 B.R. 730, 736 (Bankr.E.D.Wis.2002) .

Goodman and Tovrov Failed to Comply with Fee Disclosure Requirements

It is undisputed that Goodman and Tovrov failed to file their Compensation Disclosure Statement in a timely fashion. Their law firm was retained by the Debtor on November 19, 2012. (Response to Mot. for Sanctions at p. 9). Under Bankruptcy Rule 2016(b), their disclosure statement was due fourteen days thereafter. Goodman filed the Compensation Disclosure Statement on December 10, 2013, more than a year after his firm was retained. Moreover, the Compensation Disclos-

ure Statement was not filed until *after* the U.S. Trustee provided Goodman and Tovrov with a draft of the Motion for Sanctions. (*See* Mot. for Sanctions at ¶ 39.) The Court therefore finds that Goodman and Tovrov knowingly and willfully failed to comply with the § 329 and Bankruptcy Rule 2016(b) disclosure requirements.

Goodman and Tovrov, while not contesting that they failed to comply with the disclosure requirements prescribed by § 329(a) and Bankruptcy Rule 2016(b), argue that disgorgement of fees would be "grossly excessive" in light of the amount of work that they performed for the Debtor in this case. FN9 (Response to Mot. for Sanctions at p. 9.)

> FN9. In support of this argument, Goodman and Tovrov list the alleged successes they achieved for this Debtor. (Response to Mot. for Sanctions at p. 10.) The Court is not convinced that they achieved any significant successes for the Debtor, particularly because the Debtor did not receive a discharge of his debts. Moreover, the billing records they submitted demonstrate that the overwhelming majority of time billed to the Debtor is related to representation of the Debtor in the Adversary Proceeding. (*See* Private Ex. 1 to Response to Mot. for Sanctions.)

The Court rejects this argument for three reasons. First, the length of time Goodman and Tovrov waited to file their Compensation Disclosure Statement (over a year) was grossly excessive. Second, they only filed their Compensation Disclosure Statement after being prodded to do so by the U.S. Trustee when he gave them a courtesy copy of the Motion for Sanctions he intended to file against them. Finally, the severity of the sanctions imposed must be measured against the totality of Goodman and Tovrov's conduct, which includes multiple failures to ensure that the Debtor's Schedules were complete and accurate. This is not a case in which there was a single, isolated failure to disclose. This was a case where counsel failed to make mandatory disclosures over and over again. Indeed, Goodman and Tovrov's failure to timely file the Compensation Disclosure Statement is particularly egregious because the Statement reveals that they received compensation from LLC 1 Plus 1—an asset of the Debtor that was not disclosed in the original or any amended Schedule B.

***13** Thus, the Court finds that Goodman and Tovrov knowingly and wilfully violated the disclosure requirements of § 329(a) and Bankruptcy Rule 2016(b). The Court therefore finds that the U.S. Trustee has produced clear and convincing evidence establishing that sanctions are warranted against Goodman and Tovrov. The Court will impose sanctions as follows.

C. Imposition of Sanctions

Goodman and Tovrov's actions, although constituting misconduct, are not morally reprehensible. However, that is not the threshold that must be met in deciding whether to award sanctions. Given the circumstances described above, the Court finds that monetary and nonmonetary sanctions are warranted against Goodman and Tovrov. The bankruptcy system relies on attorneys following disclosure rules as well as meeting required ethical standards. In view of Goodman and Tovrov's repeated violations of these duties in this case, sanctions are necessary and appropriate. These sanctions are not intended to be punitive. Rather, they are intended to deter such conduct in the future and to maintain the integrity of the legal profession.

1. Fees Must Be Disgorged

Given the particular facts of this case, the Court finds that total disgorgement of fees is appropriate and is not unduly harsh. While there could be a situation in which failure to timely file the compensation disclosure statement would not necessitate total disgorgement of fees, under the circumstances of this case, the Court finds that the appropriate sanction is full disgorgement of the fee. The Court is particularly troubled by the following: (1) the length of time it took for Goodman and Tovrov to file the Compensation Disclosure Statement; (2)

the fact that they did not do so until the U.S. Trustee advised them of the Motion for Sanctions prior to filing it; (3) the fact that a portion of the fees was paid from a non-disclosed LLC; and (4) the fact that they failed to seek an extension of the filing deadline from the Court.

In short, this case does not involve only one or two failures to disclose by Goodman and Tovrov. Rather, it is so riddled with their failures to disclose that such failures constitute a consistent course of, at best, extremely poor judgment by counsel and a willful disregard of their various disclosure obligations. As experienced practitioners, Goodman and Tovrov knew or should have known the extent of their disclosure obligations. Their failure to timely file the mandatory fee disclosure statement is part of a larger course of conduct in which they in effect aided and abetted their client's failure to disclose his assets. The Court finds that the concealment of the Debtor's assets was the result of a willful decision by Goodman and Tovrov, as evidenced at least in part by their rationale that filing complete Schedules could have been construed as an admission in the Adversary Proceeding.

Although the Court finds that Goodman and Tovrov's conduct warrants the sanction of full disgorgement of their compensation, it is not clear from the record whether the fees to be disgorged were property of the estate to be administered by the Chapter 7 trustee or post-petition property belonging to the Debtor. Because the Court cannot determine from the record who is entitled to receive the fees, the Court finds that all fees received by Goodman and Tovrov's law firm in this case must be disgorged to the Chapter 7 trustee, who will review the source of the payments and distribute the funds accordingly.

2. The U.S. Trustee Is Entitled to Fees and Costs

***14** The Court finds that in addition to disgorgement, further sanctions are warranted for Goodman and Tovrov's filing of a materially false Third Amended Schedule B and Fourth Amended Schedule B. *See Shannon*, 2010 WL 1246691, at *5–6 (affirming bankruptcy court's imposition of sanctions under § 105(a) for attorney's failure to disclose tax refund); *Engel*, 246 B.R. at 787 (imposing sanctions on attorney pursuant to the court's inherent authority for filing inaccurate schedules).

The Court finds that the U.S. Trustee is entitled to his reasonable attorney's fees and costs incurred in pursuing the Motion for Sanctions. The Court is satisfied that this monetary sanction is necessary to discourage future incomplete and inaccurate filings by Goodman and Tovrov. *See Engel*, 246 B.R. at 795.

The U.S. Trustee shall submit an itemization of such fees and costs within thirty (30) days of the entry of this decision or by July 24, 2014. Goodman and Tovrov shall have fourteen (14) days thereafter or until August 7, 2014 to file any objections to that itemization. The Court will hold a hearing on the requested fees and costs on August 19, 2014 at 11:00 a.m.

3. Remedial Coursework Is Required

Finally, the Court finds that remedial legal education is an additional sanction that is appropriate in this case. Other courts have employed this sanction. *See, e.g., Moffett*, 2012 WL 693362, at *4 (requiring attorney to take continuing legal education for violation of § 707(b)(4)(C)); *In re Burghoff*, 374 B.R. 681, 686–87 (Bankr.N.D.Iowa 2007) (requiring attorney to complete a law school or equivalent course in professional responsibility for violation of the Iowa Rules of Professional Conduct); *In re Maurice*, 167 B.R. 114, 128 (Bankr.N.D.Ill.1994) (requiring attorney to complete continuing legal education in the areas of bankruptcy and legal ethics for violation of Rule 9011).

This strikes the Court as a particularly relevant sanction because Goodman and Tovrov's conduct in this case concerning their inability to comply with the Bankruptcy Code's disclosure requirements convinces the Court that counsel did not appreciate the

fact that their conduct was inappropriate and fell outside the bounds of ethical conduct. Their actions in this case also reveal a serious professional deficiency: a lack of knowledge about their professional obligations when representing debtors in bankruptcy.

Goodman and Tovrov argue that continuing legal education courses would be more useful to practicing attorneys than the courses offered in law school, pointing out that the Illinois Supreme Court already requires all Illinois licensed attorneys to take six hours of ethics courses in each two year period. (Response to Mot. for Sanctions at p. 11.) However, their experience as practitioners and their apparent participation in the Illinois mandatory continuing legal education classes did not deter the serious misconduct that occurred in this case.

***15** The Court finds that Goodman and Tovrov's ethical lapses call for the more rigorous method of instruction offered in a law school course on professional responsibility. Such remedial coursework strikes the Court as more meaningful than the continuing legal education already required in Illinois. An understanding of and compliance with requirements of the Bankruptcy Code and Rules is essential to the practice of bankruptcy law. This sanction is necessary to ensure that they have the requisite knowledge and ability to represent debtors within the bounds of ethics and the Bankruptcy Code.

Accordingly, Goodman and Tovrov are ordered to complete a course on professional responsibility at an ABA-approved law school. They must complete the course within one year of the date of this Opinion. Upon completing the course, they are required to file a certificate with the Court certifying which course they have attended, as well as proof of completion. Should they fail to timely comply with this sanction, the Court will recommend further actions to the disciplinary authorities as may be appropriate.

V. *CONCLUSION*

For the foregoing reasons, the Court grants the U.S. Trustee's Motion for Sanctions and finds that sanctions against Goodman and Tovrov are warranted. The following sanctions shall be imposed: (1) disgorgement of all fees received in this bankruptcy case and the related Adversary Proceeding to the Chapter 7 trustee within fourteen (14) days; (2) the reimbursement to the U.S. Trustee for his attorney's fees and costs relating to this Motion for Sanctions; and (3) completion of a professional responsibility course at an ABA-approved law school within one year of this ruling.

The U.S. Trustee shall submit an itemization of his fees and costs within thirty (30) days of the entry of this decision or by July 24, 2014. Goodman and Tovrov shall have fourteen (14) days thereafter or until August 7, 2014 to file any objections to that itemization. The Court will hold a hearing on the requested fees and costs on August 19, 2014 at 11:00 a.m.

A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

Bkrtcy.N.D.Ill.,2014.
In re Varan
Slip Copy, 2014 WL 2881162 (Bkrtcy.N.D.Ill.)

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THE DUTY TO PRESERVE RECORDS IN BANKRUPTCY

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A. WHEN THE DUTY TO PRESERVE RECORDS ARISES GENERALLY

The duty to preserve documents and data is closely related to principles of spoilation.

> Spoilation refers to the destruction or material of evidence or to the failure to preserve property for another's use as evidence **in pending or reasonably foreseable litigation**. The right to impose sanctions for spoilation arises from a court's inherent power to control the judicial process and litigation,…

Silvestri v. General Motiors Corp., 271 f.3d 583, 590 (4th Cir. 2001) (emphasis added) (affirming dismissal of products liability action due to plaintiff's failure to preserve damaged vehicle). Opinions on when the duty to preserve arises are predominantly from district court litigation, not from bankruptcy courts.

It is clear the duty to preserve arises for a plaintiff when the plaintiff's complaint is filed; *See Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F.Supp 2d 456, 475 (S.D.N.Y. 2010)(plaintiff's duty to preserve records arises at least as early as filing of complaint); and for the defendant upon the filing of the complaint or a short time after service of the complaint on defendants; *Turner v. Hudson Transit, Lines, Inc.*, 142 F.R.D. 68, 72-73 (S.D.N.Y. 1991)(duty arises when party prossesing the evidence has notice of its relevance, which at least is when complaint alerts party); *Computer Associates International, Inc. v. American Fundware, Inc.*, 133 F.R.D. 166, 169 (D. Col. 1990) (defendant's duty to preserve source code arose no later than 20 days after service of complaint).

A party's duty to preserve can arise earlier than the complaint stage if the party is on notice that certain information is likely to be relevant to litigation that is likely to be commenced. A defendant can be deemed on notice that documents should be preserved when a letter threatening litigation is received, *Goodman v. Praxair Services, Inc.*, 632 F.Supp. 2d 494 (D.

Md. 2009), when a demand letter is received, *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681 (7th Cir. 2008), or when defendant's vice president of intellectual property created a litigation strategy to assert patent rights. *Micron Technology, Inc. v. Rambus Inc.*, 645 F.3d 1311, 1321 (Fed. Cir. 2011).

B. WHEN THE DUTY TO PRESERVE ARISES IN BANKRUPTCY CASES

1. The Filing of a Claim Triggers the Debtor's Duty to Preserve Documents Relating to the Claim.

In *In re Kmart Corporation*, 371 B.R. 823 (Bankr. N.D. IL 2007), June 20, 2013 was the administrative claims bar date. In February 2004, Kmart objected to a particular claim for breach of an agreement for the creditor to provide nationwide landscaping and snow removal services. Kmart electronic documents were automatically deleted by Kmart's document retention/destruction policy between the claims bar date and the filing of the objection. (There was no proof that documents pertinent to this particular claim were destroyed because there were insufficient records). Using the standard that "the duty to preserve documents arises when a party is on notice of the potential relevance of the documents to pending or impending litigation," *id*. at 843, the Bankruptcy Court held the "trigger date" for preserving documents was shortly after the claim was filed, not when the objection to the claim was filed. *Id*. at 844. Denying more severe sanctions, the Court ordered Kmart to perform additional more thorough searches and awarded monetary sanctions.

2. Whether Preference Defendant's Duty to Preserve Arises When A Bankruptcy Case Commences Not Determined.

In re Riverside Healthcare, Inc., 393 B.R. 422 (Bankr. M.D. LA. 2008). The defendant in a preference action asserted an ordinary course of business defense. Its routine computer

deletion practice was to delete electronic mail 60 to 90 days after creation, and they could be recovered only for 14 days after deletion. Thus the electronic mail had been deleted long before the adversary proceeding was filed. Defendant argued it did not have to preserve until it became a defendant. The liquidation trustee argued the defendant had a duty to preserve upon company representatives learning of the bankruptcy filing. The Bankruptcy Court did not decide the issue because the deletion was routine and without a culpable mind.

3. No Duty to Preserve Evidence Exists Before Lawsuit Filed, Applying State Law.

In *In re Electric Machinery Enterprise, Int.*, 416 B.R. 801 (Bankr. MD 2009), the debtor subcontractor was engaged in a major construction project and claimed it was entitled to additional payments. Beginning in October 2001, debtor began discussing its demand for additional payment with the construction manager. On May 29, 2003, debtor filed its chapter 11 petition. In December 2003, debtor learned the construction manager was destroying documents, including putting papers in a dumpster. On December 23, 2003, debtor sued the construction manager and obtained an injunction preventing the construction manager from destroying records relating to the project. Extensive work was needed to dry out/clean records from the dumpster and recovering deleted electronic records. Debtor won after trial, but was denied spoliation sanctions. The Bankruptcy Court determined that under Florida law the construction manager's duty to preserve evidence arose when the complaint was filed, not when the dispute arose.

4. Bankruptcy is Litigation for Purpose of Work Product Privilege.

In *In re Superior National Ins. Gr.*, 518 B.R. 562 (Bankr. C.D. CA 2014), the litigation trustee sued a creditor who received $2.2 billion in net operating loss tax credits from the debtor,

but paid debtor nothing. The creditor sought production of documents notwithstanding assertions of work product and attorney client privileges. Only the work product issues were determined under federal law. The Bankruptcy Court held bankruptcy is considered "litigation" for Rule 26(b) purposes, so that work product privilege applies to materials prepared for the bankruptcy case, so long as they were prepared by or for a party to the subsequent litigation.

C. AWARDING SANCTIONS FOR NOT RETAINING OR PRODUCING ELECTRONIC RECORDS

1. Judgment Is Entered Against Party Not Providing Discovery.

In *In re Quintus Corp.,* 353 B.R. 77 (Bankr. D. Del. 2008), the trustee sued the purchaser of the debtor's assets for failing to pay assumed liabilities. The trustee sought sanctions because the purchaser failed to produce the debtor's electronic ledger and vendor files, despite a contractual obligation to retain the documents for five years. The Bankruptcy Court found the purchaser deliberately deleted the debtor's electronic records to give itself more computer space. The Bankruptcy Court imposed the most severe sanction of default judgment of over $1.8 million. On appeal, the District Court affirmed the sanction of default judgment, but remanded for clarification of the damages award. 2007 WL 4233665 (D. DE. Nov. 29, 2007)

In *In re Connolly North America, LLC,* 376 B.R. (Bankr. E.D. MI 2007), the trustee failed to disclose and produce 36 boxes of documents in an accounting malpractice action. The Bankruptcy Court concluded that both the trustee and his attorney breached their obligations under the discovery rules. The breaches, however, were the product of gross negligence, not intentional or due to bad faith. The remedy was dismissal of the accountant malpractice action with prejudice.

In *In re Krause*, 367 B.R. 740 (Bankr. D. KS. 2007), the Chapter 7 trustee and IRS were litigating with the debtor that various entities the debtor controlled were alter egos and property of the estate. **After** the Bankruptcy Court entered an order compelling the debtor to produce electronic evidence, the debtor installed a computer program which eradicated data and files. The Bankruptcy Court found the debtor violated his duty to preserve electronic evidence, willfully and intentionally destroying electronically stored evidence, not in the routine good-faith operation of a system, and that the trustee and IRS were prejudiced by the destruction. The Bankruptcy Court imposed the severe sanction of partial default judgment; ordered the production of more data; awarded monetary sanctions; and entered an order for a bench warrant for arrest and incarceration if the debtor did not comply timely. The debtor was also held in contempt.

2. Facts Adverse to Party Are Taken as Established Due to Party's Discovery Misconduct.

In *In re Harmon*, 2011 Bankr. LEXIS 323 (Bankr. S.D. TX Jan. 26, 2011), the debtor sued defendant for violating an agreement which, among other things, required the defendant to hold certain funds in escrow. The debtor sought discovery about the escrow account. The defendant did not produce the documents based on an extremely narrow interpretation of the document request. Despite several hearings and orders, the defendant dragged its feet in producing the escrow account documents. Ultimately, the Bankruptcy Court imposed the sanction of establishing as fact for purposes of the litigation that the escrow account had not been created and funded, even though in reality it had been created and funded.

In *In re LTV Steel Co., Inc.*, 307 B.R. 37 (Bankr. N.D. OH 2004), the party seeking allowance of an administrative expense claim raised bogus objections to production of

information, and delayed producing the documents. The debtor moved to have the claim dismissed for discovery abuse and violation of the pretrial scheduling order. Concluding the claimant had acted abusively but had not been adequately warned that dismissal could be a consequence, the Bankruptcy Court ordered that the claimant could not offer any evidence or argument based on the information not provided.

In re Hawaiian Airlines, Inc., 2007 W2 3172624 (Bankr. D. HW Oct. 30, 2007). During the Hawaiian Airlines ("HA") Chapter 11 sale process, Mesa Air signed a confidentiality agreement to obtain access to information and signed a confidentiality agreement. HA sued Mesa alleging it violated the confidentiality agreement. The day after the complaint against Mesa was filed, Mesa's outside attorney sent certain Mesa officers instructions to preserve all documents, including e-mails and electronic documents. One of the executives, the CFO, after getting this communication from the lawyer, bought, installed and used computer scrubbing software. After that, the CFO signed affidavits that he had never mishandled HA's confidential information. Subsequently he wiped his computers' hard drive and changed the computer clock to try to hide when he did the wiping. Mesa was held responsible for the CFO's actions even though the attorney had instructed him to preserve information. Mesa was sanctioned by having certain facts adverse to it established.

After trial in which HA won, HA sought an award of its professional fees and costs. The only fees and costs awarded were for the computer forensic expert. 2008 WL 188649 (Bankr. D. HW Jan. 22, 2008).

Grochocinski v. Schlossberg, 402 B.R. 825 (N.D. IL 2009). On May 24, 2007, the chapter 7 trustee sued to avoid a fraudulent transfer. On December 20, 2007, the trustee sent defendant a letter about the defendant's duty to preserve electronic documents. On March 24,

2008, the trustee moved to compel access to the defendant's hard drive. The forensic computer expert determined that in January and February 2008 the defendant had installed an overwriting system and in April 2008 installed a disc cleaning program. The Bankruptcy Court found that evidence the defendant had a duty to preserve was spoiled, and imposed the sanction of deeming certain of the trustee's factual allegations taken as established under FRCP 37(b)(2). The District Court affirmed.

3. Monetary sanctions imposed for inadequate searches and productions.

In *In re Xyience Inc.*, 2011 Bankr. LEXIS 4251 (Bankr. D. Nov. 2011), defendant in an adversary proceeding did not institute a litigation hold and failed to produce electronic data in response to document requests until after the deposition of defendant's employee, who admitted no search had been made of his secretary's computer. The plaintiff moved for sanctions, but defendant produced the documents from the secretary's computer shortly before the hearing. Plaintiff withdrew its request for any sanctions other than monetary the day before the hearing. From the tenor of the Bankruptcy Court's opinion, it might have issued more severe sanctions if plaintiff had persisted, but only monetary sanctions were awarded.

In *In re A&M Florida Properties II, LLC*, 2010 Bankr. LEXIS 1217 (Bankr. S.D.N.Y. Apr. 7, 2010), defendant sought e-mails from plaintiff to establish plaintiff received certain documents. In responding to the document request, defendant purportedly did a "company-wide" search, but did not produce the e-mails. After motion practice and use of a jointly retained certified computer forensic technician, the e-mails were produced. Finding defendant's outside counsel was uninformed on the detailed workings of the client's computer system and e-mail

retention policies, the Bankruptcy Court rejected the harsher sanctions, but imposed monetary sanctions.

In *In re Venom*, 2010 Bankr. LEXIS 723 (Bankr. E.D. Pa. Mar. 9, 2010), defendant sought production of plaintiff's financial records regarding plaintiff's damages theory. Plaintiff failed to produce its Quickbooks electronic records initially, but after motion practice, plaintiff promised to produce them promptly. The Bankruptcy Court denied more serious sanctions, but imposed monetary sanctions.

Brick v. HSBC Bank USA, 2004 WL 1811430 (W.D. N.Y. 2004). The chapter 7 trustee sued insiders for breach of fiduciary duties, using the attorneys that represented the committee in the chapter 11. Using the fee application of the committee's accountants as a guide, the defendants sought production of the accountants' documents. Over the course of discovery motion practice, the trustee's counsel repeatedly represented to the court that all of the accountants' documents had been produced. Nevertheless, it was determined responsive nonproduced documents existed or had been discarded after the litigation began. Counsel defended his misrepresentations on the ground he had relied on representatives of the accounting firm, but the court found that not accurate. The Bankruptcy Court sanctioned the law firm $147,635.74 under its inherent powers. On appeal, the sanctions were upheld by the District Court.

In *In re Atlantic International Mortgage Co*, 352 B.R. 503 (Bankr. M.D. F1 2006), in an adversary proceeding against the debtor's insider, the trustee sought production of electronic documents from the law firm that had represented the debtor prepetition. In response, the firm took the position that it had provided all documents with the exception of privileged documents and documents unable to be provided due to software problems. After extensive motion practice,

appeals and mandamus requests the Bankruptcy Court appointed its own forensic computer expert. The Bankruptcy Court found the law firm's testimony and affidavits were false and the assertion of privilege were improper. Nevertheless, the Bankruptcy Court denied the trustee's request for a default judgment and awarded monetary sanctions only.

In re Fagnant, 2004 WL 294426 (Bankr. D.N.H. Dec. 13, 2004). In an adversary proceeding, the trustee sought production of the defendant's electronic general ledger. The defendant timely provided the ledger to his counsel, but the counsel only provided the ledger at final pretrial. The plaintiff moved for sanctions, including exclusion of the document. Not wanting to punish the defendant when it was the attorney who failed to produce, the Bankruptcy Court awarded monetary sanctions only. Moreover, the Bankruptcy Court found the requested attorneys fees excessive and reduced them.

Kipperman v. Onex Corporation, 260 F.R.D. 682 (N.D. GA. 2009). The plaintiff sought to avoid a leveraged buyout as a fraudulent transfer. Plaintiff had extreme difficulty in obtaining electronic discovery from the defendant. The District Court found defendant had engaged in "a textbook case of discovery abuse." *Id.* at 700. Because the documents were ultimately provided, the District Court found only monetary sanctions appropriate, and awarded $1,022,700.00.

4. No sanctions were awarded because

a. **documents were destroyed in ordinary course before subpoena issued.**

In *In re Stone & Webster, Inc.*, 359 B.R. 102 (D. Del. 2007), a claims buyer brought an adversary proceeding to allow a claim it purchased from a company which lost shrimp stored in the debtor's warehouse. The successor to the debtor did not have the original warehouse receipts from the loss in 1999 when subpoenaed in 2006. Spoliation damages were denied in the absence of evidence of intent or recklessness in destroying the documents, and the absence of prejudice.

Moreover, the debtor's successor did not have control of the documents at the time of destruction.

b. **both sides misbehaved.**

In *In re Jemsek Clinic*, Case No. 07-03006 slip op. (Bankr. W.D. N.C. Feb. 6, 2015), Blue Cross sued the debtors over allegedly improperly submitted claims. The debtors counterclaimed seeking an affirmative recovery of $20 million in 2006. In 2008, Blue Cross "discovered" debtor's claims were barred by a class action settlement from which they had not opted out. After further litigation in multiple courts, it was held none of debtors' claims against Blue Cross survived the class action settlement. The debtors and Blue Cross each sought sanctions against the other. Discussing each sanction claim in detail, sanctions were denied. The Bankruptcy Court observed neither side was blameless, "both have skirted the edges of ethical conduct, discovery rules, and the duty of candor." *Id*. at 25.

Competence and Technical Issues Associated with The Identification of Electronically Stored Information

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One aspect of an attorney's competence when handling discovery issues in a bankruptcy proceeding is appropriately identifying potentially relevant information related to the proceeding. Because today discovery includes electronic records in most all litigation, counsel's search for potentially relevant information must include electronically stored information ("ESI"). Counsel needs to understand where the client's potentially responsive information resides, and whether any such information is at risk of destruction, so that the attorney can implement a reasonable, defensible plan to address preservation, collection, review and production of information in the action.

An attorney cannot reasonably preserve potentially relevant information in the client's possession, unless the attorney identifies what data exists. Likewise, an attorney can't prepare a reasonable and defensible discovery plan without making an appropriate inquiry of the key custodians of potentially relevant information. The scope of the inquiry should be proportionate to the nature of the parties' interests in the proceeding and the nature of the controversy. The inquiry should include contacting the client's IT professionals in order to understand the client's IT systems. The inquiries of a client's IT professionals can be made by the attorney, by the client's legal department, or by litigation consultants retained to assist counsel.

It is important that the attorney document the investigation process, the information learned along the way, and the decision-points that counsel makes on how the attorney decides to preserve, collect, review and produce potentially relevant information in the matter.

Examples of questions for IT Professionals:

- Is there a records retention policy?
- If so, how is it used? Are records systematically destroyed pursuant to the policy? Explain.
- What is the current e-mail system used by the client? Have these systems changed over the years? If so, explain.

- Is historic e-mail relevant to this dispute? Is it accessible? Please describe.
- Does the client allow employees to communicate using systems other than e-mail? (For example, text messaging, instant messaging, voicemail) If so, describe.
- Does the client use any databases or proprietary systems that may be relevant? (For example, Accounting, HR, Purchasing, Research) If so, describe.
- Does the client have any web-based information? (For example, web-based e-mail accounts? Cloud-based systems?) If so, describe.
- What potentially relevant ESI is located on employee's desktop computers? (For example, can employees save files to their desktop computers that are not saved to the company network?)
- What potentially relevant ESI is located on the client's network or shared drives? Describe.
- What kind of back-up systems does the client use?
- For what time intervals are back-ups created and maintained? What are the policies that govern back-ups? Where are the back-ups maintained?
- What is the client's policy for collecting/archiving former employees' data?
- Is the client's data in the possession of third parties the client may control? (For example, consultants, agents, contractors, warehouses?) If so, what types of data are stored there?
- Does the client use encryption or passwords to protect its information? Details?
- Does the client use social media for business purposes? (For example, Facebook, Twitter, market research tools).
- How would the client identify which current and former employees may have or had access to potentially relevant ESI.

In addition to making inquiries of the client's IT group to understand the client's IT architecture, generally, it is necessary to interview the key custodians of potentially relevant ESI in order to understand their record-keeping practices.

Examples of Questions to Ask Individual Custodians:

- Have you received the litigation hold?
- Do you understand the litigation hold? Explain.
- Do you understand the types of information that need to be preserved for this action? Explain.
- Do you use a desktop and/or laptop computer?
- Has your desktop and/or laptop computer been replaced or upgrade during the relevant timer period? If yes, please provide details.
- Where do you save your work? (For example, a hard drive or a shared drive?)
- Do you print and retain your work? If so, where do you file it?
- Do you use any systems, programs or databases to do your job? Explain.
- Did you use to use systems, programs or database to do your job that are no longer supported? Explain.
- What email accounts do you use for work?
- How do you organize your emails?
- Do you create folders in your inbox to store emails?
- Do you print out your emails and file them?
- Do you use personal email accounts for business purposes? If yes, explain.
- Do you use any other communication programs to do business? (For example, instant messaging, chat programs, voicemail, list serves?)
- Do you ever save information to devices other than your computer? (For example, external hard drive, thumb drive, memory stick, CD or Floppy Disk) Explain and describe what would save to these devices, and where the devices are located.
- Do you work at home or on the road? If yes, describe.

- How do you access documents for work from home or on the road?
- Do you save documents for work at home? Explain.
- What types of handheld devices do you use? (For example, smartphone, iPad, cellphone? Details.)
- Do you use passwords or encryption to protect our work documents or data? If yes, explain.
- Do you keep your paper documents related to your work? Explain and describe the location of your files and the types of information preserved.
- Did you inherit files or records from your predecessor or a former employee? Who? Describe.
- Are there any other sources of information that are relevant to this dispute that we have not already addressed? If yes, describe.

Privilege and Discovery Issues in Bankruptcy

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APRIL 24, 2015

I. Ethical Rules – Discovery and ESI

A. Duty of Competence

1. ABA Model Rule of Professional Conduct 1.1:

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Rule 1.1, comment 8 (2012):

"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 legal study and education and comply with all continuing legal education requirements to which the lawyer is subject."

B. Duty to Expedite Litigation

1. ABA Model Rule of Professional Conduct 3.2:

"A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

2. FRCP 1:

"These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."

3. FRCP 26(b)(2)(C)

"On a motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

* * *

(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."

II. Recipient's Obligations Upon Discovery of Receipt of Privileged Materials

A. Wisconsin/Indiana Rule 4.4 (b)

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

B. Illinois/New York 4.4(b)

"A lawyer who receives a document relating to representation of the lawyer's client and knows that the document was inadvertently sent shall promptly notify the sender."

Illinois Rule 4.4, Comment 2.

"Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows that such a document 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 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 has been waived."

C. Michigan Rule 4.4

Rule 4.4. "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."

Comment: "Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons."

D. California

1. Takes a strict position with respect to inadvertently-received information.

2. Requires disclosure of the inadvertent production to the producing party, but also does not allow review of the document by the party who inadvertently received it any more than is necessary to determine that the document is privileged.

E. FRCP 26(b)(5)(B)

1. Federal Rule of Civil Procedure 26(b)(5)(B) provides, upon request, for the prompt return, destruction or sequestration of any inadvertently produced privileged materials and mandates that the inadvertently produced information must not be used or disclosed until any claim with respect thereto is resolved.

2. FRCP 26(b)(5)(B) “Information Produced. If information produced in discovery is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified

information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved."

III. The Basics: Which Privileges Apply In Federal Cases

A. Attorney-Client Privilege

1. Federal court: choice of law per FRE 501

   (a) State attorney-client privilege rules apply in diversity cases

   (b) Federal attorney-client privilege common law applies in federal question cases (even if state claims also are pled)

B. Work-Product Doctrine

1. Attorney work-product doctrine governed by FRCP 26(b)(3) and federal common law

C. Other Privileges

1. Potential conflicts between state and federal privilege rules, particularly with marital and accountant privileges.

D. *Bankruptcy Cases: whether state or federal privileges apply depends on the nature of the contested matter or adversary proceeding.*

IV. FRE 502

A. FRE 502(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."

Explanatory Note: Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. **It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver.**

1. PRE-FRE 502:

   (a) Attorney-Client Privilege: broad subject matter waiver.

   (b) Work Product Protection: waiver of disclosed work product and perhaps underlying documents, but generally no subject matter waiver.

2. FRE 502(a) – Limited Waiver

   (a) Subject matter waiver only with respect to intentional "disclosure" and only in "unusual situations." Applies to both attorney-client privilege and work product protections.

   (b) Rule 502(a) addresses only "disclosure," not "use" of privileged of protected material.

   (c) Rule 502(a) only addresses attorney-client privilege and work product protection.

3. FRE 502(a) Limitations: "Use" vs. "Disclosure"

   (a) FRE 502 addresses "disclosure" not "use" of privileged information. Substantive law regarding "strategic use" unchanged.

      1) Direct use of protected information waives the privilege — e.g., producing party's use as an exhibit

      2) Implied ("At Issue") Waiver – when party raises an issue the effective rebuttal of which requires inquiry into privileged communications. Examples included asserting defenses of "reasonable investigation" or "reliance on advice of counsel," "ineffective assistance of counsel" or claims of attorney malpractice.

   (b) FRE 502(d) order can address use as well as disclosure of privileged information.

B. FRE 502(b) - Scope of Waiver

"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 Fed.R.Civ.P. 26(b)(5)(B)."

1. FRE 502(b) — A potentially costly alternative to a FRE 502(d) order. May require proof of:

   (a) Inadvertence

   (b) Reasonableness

   (c) Promptness

2. An FRE 502(d) order can prevent this expense and distraction.

C. FRE 502(d), (e) and (f)

"(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."

1. FRE 502(d) enables one federal court to bind all other courts and proceedings, state and federal.

2. FRE 502(d) enables parties to establish discovery protocols:

   (a) Claw Back agreements;

   (b) Defined obligations with respect to inadvertently produced;

   (c) privileged documents;

   (d) "Quick Peek" arrangements;

   (e) Privilege log protocols;

   (f) E-Discovery protocols regarding privilege review;

   (g) Agreement on scope of ESI preservation; and

   (h) Agreement to conduct phased discovery.

3. Consider an FRE 502(d) order in all bankruptcy litigation.

D. Disclosures to Federal Offices and Agencies

1. Office of the U.S. Trustee is a federal office or agency.

2. Protections of FRE 502(d) only available by Court order.

3. Before disclosing privileged information to a federal agency, consider requesting:

   (a) An agreement that FRE 502 applies to the disclosures;

   (b) That disclosure of privileged documents does not waive as to undisclosed documents;

(c) Documents determined to be privileged may be clawed back; and

(d) FRE 502(d) order incorporating the agreement, if feasible.

APPENDIX

7th Cir. Elec. Discovery Pilot Program, [Proposed] Pilot Project Case Mgmt. Order No. 2, http://www.discoverypilot.com/content/model-discovery-plan-and-privilege-order

IN THE UNITED STATES DISTRICT COURT
FOR THE _____
_____ DIVISION

_____,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. _____
	)	
_____,	)	Judge _____
	)	
Defendant.	)	

[PROPOSED]
PILOT PROJECT CASE
MANAGEMENT ORDER No. 2

MANAGEMENT OF ATTORNEY-CLIENT PRIVILEGE & WORK PRODUCT PROTECTION

This court is participating in the Pilot Program initiated by the Seventh Circuit Electronic Discovery Committee, which is intended to better promote the "just, speedy, and inexpensive determination" of this action, pursuant to Federal Rule of Civil Procedure 1. In furtherance of Rule 1 and the Pilot Program, it is hereby ordered as follows:

1. ALTERNATIVE PRIVILEGE LOGGING PROTOCOL

1.1 Asserting Privilege or Protection. A party who withholds ESI or documents on the grounds of attorney-client privilege and/or work product protection shall provide:

(a) a listing of such ESI and documents in electronic spreadsheet format providing as much objective metadata as is reasonably available (e.g., document control number, date, author(s), recipient(s), file type, etc.) and an indication of the privilege and/or protection being asserted; and

(b) a description of any categories of ESI and documents that the withholding party asserts are privileged or protected and the reasons for asserting that individual review of the category is not worth the time and/or expense necessary to do so.

"Objective metadata" does not include substantive content from, or a subjective description of the document or ESI being withheld.

1.2 Challenging Asserted Privilege and Protection. If a party challenges an assertion of privilege or protection from discovery then the parties shall meet and confer and make a good faith effort to cooperatively classify the challenged documents and ESI into categories that are subject to common factual and legal issues in so far as practicable. Thereafter, the parties shall jointly request a conference with the Court to devise a plan for resolving the challenges, which normally will include:

(a) a schedule for briefing the legal issues relevant to each category;

(b) a ruling date for issues that can be resolved on the briefs alone; and

(c) a schedule for providing representative samples for the Court's review *in camera* with respect to any categories that cannot be resolved on the briefs; and

(d) a schedule for the parties to meet and confer to attempt in good faith to apply the Court's rulings on the samples to whole categories or within categories insofar as possible; and

(e) a schedule for repeating this process as needed.

2. NON-WAIVER AND CLAW BACK PROTOCOL (FRE 502(d))

2.1 Non-Waiver By Production. Production of documents and ESI in this case shall be without prejudice to and shall not waive, for purposes of this case or otherwise, any attorney-client privilege or work product protection that otherwise would apply.

2.2 Time For Asserting Privilege And Protection. A producing party may assert privilege or protection over produced documents and ESI at any time by notifying the receiving party(ies) in writing of the assertion of privilege or protection, except that:

(a) Affirmative use of ESI or a document by the producing party in the case waives privilege and protection with respect to it, and of other ESI and documents to the extent provided by Federal Rules of Evidence, Rule 502(a); and

(b) Upon use in the case by another of ESI or a document that was produced by a party, that producing party must promptly assert any claimed privilege and/or protection over it and request return or destruction thereof.

2.3 Disputing Claims of Privilege/Protection Over Produced Documents. Upon receipt of notice of the assertion of privilege or protection over produced documents or ESI, the receiving party shall:

(a) to whatever extent it contests the assertion of privilege or protection, promptly so notify the producing party, and maintain the contested documents and ESI in confidence pending resolution of the contest by the Court; and

(b) to whatever extent the receiving party does not contest the assertion of privilege or protection, promptly certify in writing to the producing party that it has returned or destroyed the applicable document(s) and/or ESI, and has made reasonably diligent efforts to identify and destroy each copy thereof and all information derived therefrom (normally reasonable diligence will not include disaster recovery media).

In the event of a contested assertion of privilege or protection over produced documents that cannot be resolved amicably after meeting and conferring in good faith, either party may bring the contest to the attention of the Court by motion.

_____, 2012 ENTERED:

_____

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PROFESSIONAL RESPONSIBILITY

The authors write in an effort to increase awareness among litigators about their obligations to understand the benefits and risks associated with technology when they represent clients in litigation, investigations and dispute resolution.

Competence With Electronically Stored Information: What Does It Mean In the Context of Litigation and How Can Attorneys Achieve It?

BY RONALD J. HEDGES AND AMY WALKER WAGNER

Competence is the fundamental principle upon which an attorney's obligations to her client are based. Rule 1.1 of the American Bar Association's Model Rules of Professional Conduct provides:

> "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[1]

Attorneys should develop this competence in order to meet their ethical obligations to clients and potential clients.

In addition, an attorney has ethical obligations to third parties, such as adversaries, witnesses, jurors and the courts.[2]

As the world has changed, so too has the definition of competence, and attorneys are required to keep pace with the evolution.[3] Practitioners, rule makers, ethics tribunals and the courts have acknowledged the significant impact of technology on the practice of law.

For example, The American Bar Association has explicitly recognized, in a revised comment to Rule 1.1, that an attorney's obligation to be competent includes the obligation to "keep abreast of changes in the law and its practice" and understand "the benefits and risks associated with relevant technology."[4]

The purpose of this article is to increase awareness among litigators about the obligations of attorneys involved in litigation, investigations, and dispute resolution[5] to understand the benefits and risks associated with technology. This article should encourage attorneys representing a client in any of those arenas to consider their proficiency with the specific technology applicable to the engagement.

If an attorney is not competent to provide the counsel required in light of the technology involved, she should seek competent assistance, refer the matter to another attorney or decline the representation. An attorney

[1] ABA Model Rules of Prof'l Conduct (hereinafter cited as MRPC), Rule 1.1 (2010) .

[2] *See, e.g.,* MRPC 3.3 (Candor Toward the Tribunal); 3.4 (Fairness to Opposing Party & Counsel).

[3] MRPC 1.1 cmt. 6 (2012 revision) ("[t]o 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."

[4] *See id.*

[5] This article does not address the technological competence associated with the practice of transactional law or law firm management (*e.g.*, document management, timekeeping, mobile computing, and information security).

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should not blindly use technology in which she has no level of competence.

Competence Fundamentals

In order to be competent when investigating and using relevant technology and electronic data, an attorney must recognize that this endeavor implicates issues of law, technology, privacy and security.

Decisions about technology can materially impact the cost, course and context of litigation (including the ability to ensure that data is not inappropriately altered, to present evidence to support the claims and defenses at issue in the matter, to meet court or other deadlines for the production of data, and to comply with legal and ethical obligations to protect the data at issue).

These considerations require an attorney to evaluate, recommend or implement appropriate decisions regarding technology and electronic data. Attorneys should understand basic technological terminology and know where to search for additional information and continuing education.[6]

All Discovery is 'eDiscovery.' The obligation to ensure competence in evaluating, recommending and implementing appropriate decisions regarding technology and electronic data is overarching in a practice focused upon litigation, dispute resolution, investigations and regulatory inquiries. Virtually all evidence that supports an alleged claim, regulatory violation or defense will be electronic in nature and will require an understanding of technology. It is no longer credible for an attorney to contend that her practice does not involve the collection, review, production or receipt of electronically stored information (ESI).

The Matter Defines the Competence Required. While all attorneys should be competent to discuss, manage and determine strategy related to the discovery of ESI, the ESI at issue in a particular matter will dictate the level of sophistication required in order to be competent.

For example, attorneys involved in a single-plaintiff employment discrimination case that involves only ESI stored on a single computer, with no web-based, network, structured, or backup data of any kind, will demand a less detailed understanding of the discovery of ESI than a complex securities fraud matter with sophisticated entities on both sides.

The Need to Understand Technological Issues to Negotiate Scope of Discovery

Civil discovery is a cooperative, iterative process. An attorney's obligation to be competent includes the obligation to cooperatively conduct discovery in civil litigation. Such cooperation includes the disclosure of sources of potentially relevant ESI.

To be competent, an attorney should be aware of the rules and law that provide the framework for reasonable and proportional discovery. An attorney should understand and be able to describe the sources and characteristics of potentially relevant ESI, both in her client's possession, custody or control, as well as data in the possession, custody or control of her adversary and third parties.

Furthermore, an attorney should be capable of understanding the burden—financial, temporal and otherwise—associated with the preservation, collection, review and production of particular sources of ESI, both for her client's own data and that of her adversaries and third parties.

To be competent, an attorney should be able to engage in a cooperative discussion about the scope of discovery in a particular lawsuit, including:

- The law applicable to the discovery of ESI, including the applicable rules of civil procedure and evidence, as well as common law;
- Any requirements with respect to the discovery of ESI set forth by the tribunal in which the attorney is representing the client (e.g., a model electronic discovery order endorsed by the district court in which the case is pending, a standing order related to the production of ESI entered by the judge before whom the case is pending, rules applicable to the alternative dispute resolution forum in which the case is pending);
- Any other guidance with respect to the discovery of ESI that is significant in the tribunal in which the attorney is representing the client (e.g., electronic discovery principles or guidelines adopted by the court in which the case is pending);
- As discussed in more detail below, how to identify and explain the potentially relevant ESI in the possession, custody and control of her client, including ESI in the possession of third parties that may be deemed to be under her client's control;
- As discussed in more detail below, how to request and identify potentially relevant ESI in the possession, custody, and control of the opposing party, including data in the possession of third parties that may be deemed to be under the opposing party's control;
- How to craft, explain, negotiate and direct the strategy for the culling of the ESI to be discovered in the case, including specifically:
  - § Whether a targeted search will be conducted;
  - § Whether technology assisted review will be used, including:
  - § Whether key word searching will be used, including:
    - To what fields such key words will be applied,
    - What particular key word syntax is used by the tool to conduct the searches, and
    - Whether there are any limitations to the tool used to conduct the searches (i.e., it lacks the capability to search attachments to e-mails).
- How to craft, explain, negotiate and direct the format of production of the ESI to be discovered in the case, including specifically:
  - § Whether any file formats of ESI are to be excluded from discovery;
  - § The file format in which to produce ESI, including whether to produce in native or static format, or some combination of the two;

[6] *See*, *e.g.*, The Sedona Conference® Glossary: E-Discovery & Digital Information Management (Fourth Edition April 2014).

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§ The potential need for redacting documents, and ensuring the efficacy of those redactions;

§ The handling of native file and production metadata for her client's and the opposing party's ESI, including:

■ The metadata fields available in her client's ESI;

■ The metadata fields to be produced to the opposing party; and

■ The metadata fields that may be available in the opposing party's ESI and those to be produced to her client.

Competence and Technological Issues Associated With Identification of Relevant ESI

A critical step of the process is identifying potentially relevant ESI. An attorney should know what constitutes ESI and electronic locations where potentially relevant ESI can be found.

An attorney should be capable of investigating the potentially relevant sources of ESI in the possession, custody and control of her client. In addition, an attorney should be able to assess the potentially relevant sources of ESI in the possession, custody and control of the opposing party.

An attorney should understand the right questions to pose, both to her client and the opposing party, as well as the information provided in response to those inquiries. As discussed in more detail below, an attorney also should be able to assess and comprehend the significance of the retention of potentially relevant ESI.

To be competent, an attorney should be able to identify potentially relevant ESI, including understanding:

■ The types of potentially relevant ESI in her client's possession, custody and control, including specifically:

§ Is there a document retention or destruction policy and how is it implemented?

§ What is the e-mail system in use currently and historically?

§ What are the implications, if any, on the availability of potentially relevant e-mail?

§ What non-e-mail sources of communication does the client allow (e.g., instant messaging application, text messages, etc.)?

§ What are the potential repositories of ''loose files'' (i.e., files not attached to an e-mail)?

§ What databases or structured data does the client maintain or access that may contain potentially relevant ESI (e.g., accounting, human resources, sales or customer relationship manager applications)?

§ What web-based sources of potentially relevant ESI exist?

§ What potentially relevant ESI, if any, is contained on users' computers or mobile devices?

§ What potentially relevant ESI, if any, is contained on a network or shared drive?

§ Are there any legacy systems, databases or repositories that may contain potentially relevant ESI?

§ What kind of data back-ups are created, at what intervals, for how long are they retained, and what information is contained?

§ What kind of newly developed technologies (e.g., wearable technology, telemetry) may be at issue in the case?

§ What kind of data may be in the possession of third parties that may be under her client's control?

■ How to request and identify the types of potentially relevant ESI in the opposing party's possession, custody and control; and

■ How to identify the employees and other users currently or formerly associated with the client that may have created, accessed or saved potentially relevant ESI.

Competence and Technological Issues Associated With Preservation of Relevant ESI

Common law has long recognized the obligation of a party or potential party to preserve evidence that may be relevant to a dispute. The digitization of life in the 21st century through ever-evolving technology including e-mails, instant messaging, personal computing, file sharing servers, databases, web-based content, mobile applications and hundreds of other categories of ESI emphasizes the need for early action to ensure preservation of potentially relevant data. Depending on the type of ESI and the repository in which the ESI is stored, it may be inadvertently and permanently lost.

An attorney responsible for the discovery of ESI should understand the technological characteristics and preservation implications of the potentially relevant ESI at issue in the case. The sometimes protracted nature of litigation may exacerbate these concerns, as litigation often addresses events that occurred many years in the past, and discovery of that evidence does not occur until yet more time has passed.

To be competent, an attorney should be able to recommend sound preservation strategies for potentially relevant ESI, including understanding:

■ The implications of the length of time for which data is retained by her client or the opposing party, such as:

§ Whether an internet or cellular service provider automatically deletes logs of text messages after a particular amount of time;

§ Whether a web-based storage site automatically deletes files after a particular amount of time;

§ Whether a call center retains tapes or digital recordings of calls for a particular amount of time.

■ Any automatic overwriting of data applicable to potentially relevant sources of ESI, such as:

§ Whether a corporation overwrites media containing backups of active data on a particular schedule;

§ Whether an individual overwrites data saved to her computer when she upgrades her operating system to a new version.

■ The procedures in place for data and devices used by an employee or other user who has left a corporate client, including:

§ The disposition of a former user's e-mail account;

§ The disposition of a former user's computer;

§ The disposition of a former user's smart phone;

§ The disposition of a former user's personal network drive;

§ The disposition of a former user's files saved to a shared drive.

■ How to communicate the need to preserve potentially relevant ESI to those individuals with the ability to ensure that preservation, including:

§ Whether to communicate a request that an individual with potentially relevant data preserve that ESI (a ''Litigation Hold'');

§ Whether anyone other than the individuals who have created or accessed the potentially relevant ESI must receive notice of the Litigation Hold, such as:

■ The corporation's Information Technology staff who must turn off any automatic e-mail deletion procedures applicable to a user's account;

■ Human Resources staff who receive notice of an employee's termination and set in motion a series of events that deletes the now former employee's ESI;

■ The corporation's Marketing staff who has the ability to access and modify content on the corporation's eCommerce site; and

■ The spouse or other associates of a client who access, use and have the ability to delete files contained on the computer that contains the potentially relevant ESI.

■ Ensuring that recipients of a Litigation Hold are complying with the hold by periodically reminding them of the need to preserve evidence;

■ The ability of the method of preservation to ensure the security of the potentially relevant ESI at issue, such as:

§ Ensuring there are no automatic deletions applicable to an e-mail account that houses e-mails you have instructed be preserved;

§ Understanding whether other users can unintentionally modify files saved to a shared drive that are to be preserved.

■ When and how a client can cease the preservation of potentially relevant ESI.

Competence and the Technological Issues Associated With Collection of Relevant ESI

ESI resides on many platforms. For example, a single user may have e-mail data:

■ In her active e-mail mailbox housed on her employer's exchange server,

■ In archive files she created on her laptop;

■ In an application on her smartphone;

■ Saved to a thumb drive;

■ Saved to a firewall repository that makes a copy of any incoming e-mail containing particular suspicious phrases or attachments;

■ In a journaling system implemented by her employer; and

■ Saved to a backup tape.

To be competent, an attorney should be able to assess locations are the best sources for the relevant ESI sought.

In addition, the way in which potentially relevant ESI is collected may impact the utility of that data. For example, if a loose file is opened or copied during the collection process, certain of the metadata fields (like time and date-stamps and last user) associated with the file may be altered, which may have implications on the facts that can be demonstrated by the use of the file.

The facts of each engagement, the types of potentially relevant ESI, and the facts to be proven by the use of evidence will dictate what method of collection should be used.

To be competent, an attorney should be able to thoughtfully recommend collection strategies for potentially relevant ESI, including an understanding of:

■ The ways ESI may be collected, taking into account whether the collection method will alter evidence in any manner and whether that alteration will be material;

■ The implications of the collection method on the issues in dispute in the matter, including:

§ An assessment of what data may be altered as a result of the collection method and ensuring the method of collection will not prevent the parties from discovering material facts, such as:

■ Whether the information available in various metadata fields (such as the date on which a file was created, the author of a file, and the file path of a document) may be relevant.

■ Whether a targeted collection (i.e., where potentially relevant ESI is collected from only particular locations) would be appropriate under the circumstances;

■ Whether a custodian-directed collection (i.e., where the individuals with knowledge search their own files for potentially relevant ESI) would be appropriate under the circumstances;

■ Whether a forensic collection (i.e., a complete bit-by-bit image of the machine that may include deleted content still available on the computer) would be appropriate under the circumstances;

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■ Whether a particular searching technology has the capability to search data in the way in which a party has represented, such as whether a searching tool can search the content of e-mails and attachments, or whether a file searching tool can search the filename and the content of the file;

■ Whether the syntax used to conduct a key word search is appropriately drafted for the tool the attorney is using to conduct the search.

■ Whether the sources from which you are collecting are complete yet tailored to the potentially relevant ESI at issue, including:

§ Whether there is a need to collect data from a computer if all potentially relevant ESI is stored on a network server;

§ Whether there is a need to collect data from individual users' e-mail accounts when a corporation maintains a journaling system from which all e-mails can be collected.

Competence and the Technological Issues Associated With Hiring Service Providers

Many lawyers and clients partner with service providers to assist with the discovery of ESI. An attorney is responsible for the conduct of a service provider or nonlawyer working under her supervision.[7] Accordingly, an attorney should ensure that a service provider she retains to assist with the discovery of ESI is competent to undertake the tasks assigned, and to ensure compliance with the attorneys' other ethical obligations, such as protection of confidential client data[8] and adversaries' data.[9] The tools used by service providers vary significantly in their functionality, sophistication, and cost.

To be competent in the retention of service providers, an attorney should be capable of undertaking a reasonable investigation of the tools and services that will be provided by the service provider, testing the service provider's skills and maintaining sufficient supervision over the service providers' work, including an understanding of:

■ The service provider's experience in providing the service and tools sought;

■ The service provider's capacity to provide the service and tools sought;

■ The pricing structure imposed by the service provider;

■ The geographic location where the service provider will process and host the client or opposing party data collected, if any, and related implications, such as:

§ Whether the service provider will be transferring data to a different jurisdiction that could cause the client to violate an agreement or the law, or impact the client's ability to obtain the data at a later time;

■ The security applied by the service provider to the data;

■ The period of time for which the service provider will retain the data;

■ The service provider's ability to use the data for any other purpose.

Competence and Technological Issues Associated With Review And Production of Relevant ESI

Technology has allowed attorneys to become increasingly sophisticated in their review of potentially relevant data. Among the various technological methods available to attorneys for narrowing the potentially relevant data are de-duplication, near duplication and e-mail threading.

Attorneys can also rely on certain types of technology assisted review to identify potentially responsive documents. Attorneys can use keyword searches and leverage metadata fields to assist in identifying particularly sensitive or potentially privileged communications.

To be competent in reviewing and producing potentially relevant ESI, an attorney should understand:

■ The value of entering into formal agreements or orders regarding the preservation, identification and production of ESI;

■ The value of entering into a claw-back or quick peek agreement;

■ The methods of ensuring that privileged communications and attorney work product, including information embedded in metadata, are not inadvertently produced;[10]

■ The law applicable to the production of protected data;

■ The capabilities of the review tool used;

■ The ways in which to use the technology to achieve the goals sought;

■ The methods for using keyword searching and an understanding of its limitations;

■ The methods for filtering metadata by custodian, date range, sender, receiver and file type;

■ How to use de-duplication, near duplication and e-mail threading to reduce the overall size of the dataset;

■ Whether there are any restrictions or limitations on the data to be searched and produced (e.g., encryption, password protection, legacy data); and

■ The precedential case law regarding the use of advanced search techniques beyond key word searches (e.g., predictive coding, machine learning, concept clustering, other advanced culling and analytics tools).

[7] *See* MRPC 5.3.
[8] *See* MRPC 1.6.
[9] *See* MRPC 3.4.
[10] *See* MRPC 4.4(b).

Competence and Technological Experience Of Co-Counsel, Consultants, Experts and Scope of Their Work

Many attorneys participate in litigation with the assistance of co-counsel. In addition, attorneys retain consultants and experts to assist with litigation.

It is critical for attorneys to remember that, at the end of the day, they are accountable for the litigation and the resulting consequences that could arise as a result of delegating work to others, such as co-counsel, experts and consultants.

Similarly, it is critical for the attorney to understand the technological sophistication of their co-counsel and consultants/experts before any work is delegated or shared.

To be competent in working with co-counsel and consultants/experts, an attorney should:

- Understand the responsibility of co-counsel and consultants/experts;
- Understand the technological experience of co-counsel and consultants/experts;
- Confirm that client data is being stored and transmitted securely;
- Confirm that confidentiality protections are being maintained;
- Ensure that confidentiality agreements and protective orders are implemented and followed;
- Keep well-informed of the discovery process and supervise decisions; and
- Understand, at least generally, any technology that is the focus of an expert's opinion or advice.

Competence and Technological Issues Associated With Investigating and Communicating With Witnesses, Unrepresented Parties, Jurors and Courts

Attorneys should learn and follow the jurisdiction's limitations and requirements concerning the use of electronic resources (e.g., text messages, search engines, commercial services like Lexis and Westlaw, social media, online directories, websites, etc.) in investigating and communicating with witnesses, unrepresented parties and prospective or empaneled jurors.

Attorneys should also understand the court's requirements for electronic filing and measures to take to protect confidential or privileged information.

To be competent in using technology to investigate or communicate with witnesses, unrepresented parties and prospective or empaneled jurors, an attorney should understand:

- The restrictions on the use of electronic resources for the investigation of witnesses and jurors;
- The reliability, credibility and accuracy of the electronic resources used for the investigation;
- The applicable jurisdiction's rules and ethics opinions governing the use of internet resources and communications through social media;
- The technological implications of the electronic resources used to investigate and communicate with witnesses;
- The applicable jurisdiction's ethics principles governing honesty and candor in communications with witnesses and jurors, such as the prohibition against the use of deception; and
- The obligation to ethically and appropriately employ technological resources to diligently and competently investigate publicly available information, which will advance her client's case.

Similarly, attorneys should know the applicable jurisdiction's court rules, the judge's preferences and/or standing orders and any precedential ethics opinions that address limitations on communications with the court.

Just as with traditional means of communications, communications through an electronic medium (e.g., e-mail, text messages, social media, and/or other means of electronic communication) can also raise ethical issues about the propriety of the communication and whether it is an inappropriate *ex parte* communication.

While some jurisdictions might not prevent a judge from being ''friends'' on social media with an attorney that appears before her, a competent attorney will be careful to avoid creating an appearance of impropriety or suggest that the attorney has special access to the judge through their status as ''friends'' on social media.

A competent attorney who is a ''friend'' of a judge on social media will also avoid posting any commentary on matters pending before the judge.

Filing documents with the court is another method of communication with the court. Competent attorneys should be educated about their court's electronic filing requirements and procedures for filing documents.

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Discovery and Preservation

Cases

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Ellis v. Toshiba Am. Info. Sys., Inc., 2013 BL 217672, 160 Cal.Rptr.3d 557 (Cal. Ct. App. 2013) (''At the hearing, Sklar's counsel stated: 'I don't even know what ''native format'' means.' The court responded: 'You'll have to find out. I know. Apparently [Toshiba's counsel] knows. You're going to have to get educated in the world of . . . electronic discovery. ESI . . . is here to stay, and these are terms you're just going to have to learn.' '').

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Cases

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Ethics Opinions

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Cases

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Cases

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ABA Formal Op. 11-459 (Aug. 4, 2011) (''Duty to Protect Confidentiality of E-mail Communications with One's Client'').

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Use of Social Media and Technology

Cases

United States v. Ganias, 755 F.3d 125 (2d Cir. 2014) (finding after the court's inquiry that a juror's postings about his jury service on a social networking site and ''friending'' another juror during the trial and jury deliberations did not, under the particular facts, violate the defendant's right to an impartial jury).

Baird v. Owczarek, 2014 BL 147920 (Del. 2014) (reversing a medical malpractice judgment where a juror's internet research constituted an improper extraneous influence that was an egregious circumstance raising a presumption of prejudice).

Two-Way Media, LLC v. AT&T Operations, Inc., No. 09-CA-00476 (W.D. Tex. Feb. 6, 2014) (aff'd, No. 2014-1302, 2015 BL 74587 (Fed. Cir. Mar. 19, 2015)(denying extension of time to file appeal where defense counsel failed to check docket activity for over 52 days, improperly relied upon NEF docket text, and failing to read the orders they downloaded from the NEF e-mail).

Chace v. Loisel, 2014 BL 18583 (Fla. Dist. Ct. App. 5th Dist. Jan. 24, 2014) (finding that the trial judge's efforts to initiate *ex parte* contact with a litigant was prohibited and warranted disqualification because it has the ability to undermine confidence in the judge's neutrality).

J.T. v. Anbari, No. SD32562 (Mo. Ct. App. Jan. 23, 2014) (affirming defense verdict in medical malpractice action and rejecting argument that juror engaged in misconduct).

Lacy v. Lacy, 320 Ga. App. 739 (Ga. Ct. App. 2013) (despite mother boasting on Facebook about a meeting with the judge in advance of a custody hearing, evidence supported the award of custody).

Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 961 F. Supp. 2d 659 (D.N.J. 2013) (since the plaintiff's privacy settings permitted a coworker friend to see a post, it was permissible for that friend to, without coercion, share the post with management).

In re Collie, 406 S.C. 181 (S.C. 2013) (suspended an attorney for failing to comply with their rule requiring that attorneys admitted to practice law in South Carolina must have, among other things, an e-mail address).

State of Tenn. v. Smith, 418 S.W.3d 38 (Tenn. 2013) (finding the trial court should have held an evidentiary hearing to identify all facts surrounding the extrajudicial Facebook communication between a juror and a State's witness to determine if the misconduct was harmless or prejudicial).

State v. Polk, No. ED98946 (Mo. Ct. App. Dec. 17, 2013) (stating that ''[w]e doubt that using social media to highlight the evidence . . . and publicly dramatize the plight of the victim serves any legitimate law enforcement purpose or is necessary to inform the public . . .'', but there was no evidence that jury knew of or was influenced by the prosecutor's tweets).

Clore v. Clore, No. 2110967 (Ala. Civ. App. June 28, 2013) (finding that in a small town the fact that the judge was friends on Facebook with the adult daughter of the parents getting divorced did not justify recusal).

Juror No. One v. Superior Court, 142 Cal. Rptr. 3d 151 (Ct. App. 2012) (concluding that even if a juror had a privacy interest in his posts, that interest was not absolute and had to be balanced against the criminal defendants' rights to a fair trial).

Domville v. State, 103 So. 3d 184 (Fla. Dist. Ct. App. 4th Dist. 2012) (a judge's friendship on Facebook with a prosecutor conveys the lawyer friend is in a special position to influence judge).

Sluss v. Commonwealth, 381 S.W.3d 215 (Ky. Sup. Ct. 2012) (the status of two jurors that were ''friends'' of a minor victim's mother on a social-networking website was not, standing alone, a ground for a new trial based on juror bias).

United States v. Daugerdas, 867 F. Supp. 2d 445 (S.D.N.Y. 2012) (failure to disclose that juror lied about suspension from practice of law and criminal background resulted in convicted defendant's waiver of his right to challenge partiality of the juror).

Johnson v. McCullough, 306 S.W.3d 551 (Mo. Sup. Ct. 2010) (en banc) (''in light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters [nondisclosure by a juror] to the court's attention at an earlier stage. Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search for jurors' prior litigation history . . . .''

Kanoff v. Better Life Renting Corp., 2008 BL 242871 (D.N.J. Oct. 22, 2008), aff'd 350 Fed. Appx. 655 (3d Cir. 2009) (paper mailing of notice of appeal was delayed due to address problems and the notice was received late because the attorney did not e-file it — the Third Circuit stated: ''Put simply, this was not a case where 'as the result of some minor neglect, compliance was not achieved.' . . . Compliance was not achieved because counsel failed to educate himself about a sea change in filing requirements that had taken place more than three years before the relevant events of the instant case.'').

Ethics Opinions

Pennsylvania Bar Ass'n Formal Op. 2014-300 (Sept. 2014) (''Ethical Obligations for Attorneys Using Social Media'').

ABA Formal Op. 466 (April 24, 2014) (''Lawyer Reviewing Jurors' Internet Presence'').

Massachusetts Bar Ass'n Ethics Op. 2014-5 (May 8, 2014) (using social media to ''friend'' an unrepresented adversary). Oregon State Bar Legal Ethics Comm. Formal Op. 2013-189 (Feb. 2013) (''Accessing Information about Third Parties Through a Social Networking Site'').

ABA Formal Op. 462 (Feb. 21, 2013) (''Judge's Use of Electronic Social Networking Media''— when used with proper care it does not compromise their judicial duties under the Model Code any more than traditional forms of communication).

New Hampshire Ethics Comm. Advisory Op. 2012-13/05 (June 20, 2013) (''Social Media Contact with Witnesses in the Course of Litigation'').

San Diego Cty. Bar Ass'n Legal Ethics Op. 2011-2 (May 24, 2011) (''friending'').

NYCLA Comm. on Prof. Ethics, Formal Op. No. 743 (May 18, 2011) (''Lawyer investigation of juror internet and social networking postings during conduct of trial'').

Association of the Bar of the City of New York Comm. on Prof. Ethics Formal Op. 2010-2 (Sept. 2010) (''Obtaining Evidence from Social Networking Websites'').

Philadelphia Bar Ass'n Prof. Guidance Comm. Op. 2009-02 (using a third party to ''friend'' a witness and,

by so doing, obtain access to witness' social media postings).

Secondary Sources

NYSBA Social Media Ethics Guidelines (March 18, 2014) (''A lawyer may review the contents of the restricted portion of the social media profile of a represented person that was provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: (i) inappropriately obtain confidential information from the represented person; (ii) invite the represented person to take action without the advice of his or her lawyer; or (iii) otherwise overreach with respect to the represented person.'').

Jurors' Use of Social Media During Trials and Deliberations, Federal Judicial Center (Nov. 22, 2011) (*available at*:
http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf) (Surveyed over 500 judges and determined that they infrequently detected juror use of social media.).

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

By ABA Electronic Discovery (ESI) in Bankruptcy Working Group

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

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

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

* 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.

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1. *See* Sedona Conf., The Sedona Principles (Second Edition): Best Practices Recommendations & Principles for Addressing Electronic Document Production (June 2007) [hereinafter Sedona Principles], *available at* https://thesedonaconference.org/download-pub/81.

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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 nonparty 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

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Elec. Discovery Reference Model, http://www.edrm.net/ (last visited July 24, 2013).

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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 _____