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**E-Discovery and the Commercial
Bankruptcy Practitioner: Forget
Swimming with the Sharks,
Beware of the Nitro Fish!**

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Without the fanfare of the maligned Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)², the amendments to the Federal Rules of Civil Procedure concerning electronic discovery and digital evidence have drifted in to the bankruptcy bar like a sinister fog slipping in from the sea.³ Not unlike the debate surrounding BAPCPA, the true impact of the amended procedural rules for bankruptcy practitioners is neither clear, nor subject to universal agreement. If pre-amendment case law is any indication, the long term implication and application of the so called “e-discovery” rules may far surpass that of BAPCPA.⁴

The temptation may be strong for most

¹ Lee has launched a Blog entitled *E-Everything for Bankruptcy Lawyers*. The blog can be found at www.e-everything4bk.blogspot.com

² Pub. L. No. 109-08, 119 Stat. 23 (2005).

³ For purposes of this article, the relevant amendments are FRCP 16, 26 and 34; as made applicable by Rules of Bankruptcy 7016, 7026, 7034, respectively. The amended rules are in effect as of December 1, 2006 for all cases filed on or after that date. Federal Bankruptcy Rule 9032 incorporates subsequent amendments to the Federal Rules of Civil Procedure, unless an exception is stated within the amendments themselves, or through some other exception within the Bankruptcy Rules. By example, in a contested matter, Rule 26(a)(1)-(3) is inapplicable pursuant to Bankruptcy Rule 9014.

⁴ See generally *Zubulake v UBS Warburg* 217 F.R.D. 309 (S.D.N.Y. 2003), and all subsequent *Zubulake* opinions.

bankruptcy lawyers to shrug off the new e-discovery rules. After all, the statewide bankruptcy bar is overwhelmingly a collegial group, and surely the new rules must have been intended for those litigators knee deep in CSI-style cases fraught with financial scandal and legal intrigue. In short, e-discovery is seen as the latest way to swim with the sharks. It is not necessarily the sharks that most of us need to worry about. Instead, many of us need be wary of the “Nitro Fish” effect.⁵

In order to avoid becoming fish food, a brief review of the amended Rules is in order.⁶ Following that review is an introduction to key areas likely to arise in most commercial, and some consumer, bankruptcy proceedings. Lastly, the one constant that has been inseparable from e-discovery, expense, is considered through the “fish-eye” lens of insolvency.

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⁵ The Nitro Fish is the mascot and line of apparel for Kenny Koretsky, owner of KPK Motorsports and a Pro Stock division drag racer in the National Hot Rod Association. A photo of the Nitro Fish, key to the telling of this story, can be viewed at <http://www.nitrofish.com>

⁶ An in-depth review of the amended Rules is available at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf

§ “I had the idea that Bankruptcy was very difficult, complex, dry, boring, etc., but (while the statutes are somewhat difficult) the cases are interesting and the concepts aren’t too abstract or complex to understand with a little studying.”

Another important metamorphosis students experience is the knowledge of how bankruptcy will affect their future practice:

§ “As an estate planning attorney, I think bankruptcy could be used in several ways. The crux of estate planning revolves around property and the valuation, encumbrance and disposition of that property. Bankruptcy is much the same.”

§ “I will use bankruptcy in the future for settlement purposes . . . seeing what options a debtor has . . . what is the realistic amount a debtor can stand to lose . . . as a bargaining chip.”

As a teacher, my students’ perceptions matter. I am pleased to share one of the best responses I received to my questions: “I’ve come to realize that bankruptcy will permeate (or at least have the potential to permeate) every case I ever work on. It will creep into my mind when I form a damage model, offer or accept a settlement, and certainly when I’m called to collect. I’m starting to see bankruptcy as a joker in the deck of cards that a litigator can use.”

Congratulations, bankruptcy lawyers. You have a new crop of soon-to-be lawyers ready to join the ranks. I will do my best to prepare them.

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The Need for E-Discovery Rules

A fundamental starting point for understanding the broad applicability of the e-discovery rules is the term used in the rules, “electronically stored information” (“ESI”), to describe the digital equivalent of documents or things. Given the tendency for technology to outpace the development of sound legal theory and reasoned jurisprudence, the term ESI is intended to be durable enough to withstand the tidal wave of new and emerging technologies that may prove even more elusive to conceptualize as “documents and things.”⁷ The term ESI has far greater importance in the bankruptcy context when recognized as estate property, as a tool to demonstrate the competence of management, as well as a discovery tool.

The “E-Discovery” Rules

⁷ The universe of products that are now undoubtedly subject to discovery includes desk top and laptop computers, portable or external hard drives, cell phones, digital cameras, handheld computing devices, voicemail systems, flash drives, pen drives, MP3 players, electronic books (such as the Sony Reader), and your child’s newest video gaming device.

The rules of engagement for e-discovery are primarily found in Rules 16(b) and 26(f).⁸ In practice, many discovery disputes should be prevented or avoided by adherence to the amendments to FRCP 26, which require litigants or parties to “meet and confer” for the purposes of proposing a scheduling order including, among other things, provisions for “disclosure or discovery of electronically stored information.”⁹ Fortunately, most ESI discovery issues in the typical commercial bankruptcy will likely resemble traditional discovery in that the requesting party seeks to discover the substantive facts, regardless of whether those facts are stored on paper, or stored in a word processor as ESI. In this case, the requesting party really wants to know where the ESI is located, who controls the ESI, and whether the ESI is stored in a readily accessible format. With the exception of cases involving fraud, embezzlement, usurpation, or similar issues, most bankruptcies, contested matters, or adversary proceedings may not warrant, or require, an expensive CSI type “data SWAT team”

⁸ Rule 26 is largely referred to throughout this article. The reader is cautioned to remain vigilant of the potential for sanctions under Rule 16(f).

⁹ FRCP 26(f)(3). See also FRCP 34(a) Advisory Committee Notes to the 2006 Amendment.

to successfully discover the data necessary to conduct investigations or litigation.

Rule 26 assumes, perhaps without foundation, that the party making the disclosure, or its attorneys, know enough about the client's digital enterprise to provide even a bare description "by category and location" of the client's ESI.¹⁰ While counsel has the opportunity, indeed an obligation, to supplement disclosures or similar responses, the hard lessons learned in *Zubulake* highlight the necessity for timely and complete disclosure. A practical approach to disclosing ESI ought to follow the cynic's model of early 20th century voting patterns in Chicago, that it be done early and often. Aside from establishing a showing of cooperation if a dispute goes in front of a judge or referee, the process will force the attorneys to narrow the universe of information they seek while sharpening their own knowledge of the client's ESI resources.

Prior to any Rule 26(f) "meet and confer," in addition to understanding the client's discovery enterprise, counsel must also have a working knowledge of the opponent's digital enterprise in order to formulate discovery needs.¹¹ Even when representing a "mom and pop" business, the attorney must understand the client's ESI resources, including the number and location of computers, the function of any in-house servers, where and if e-mail is stored, and whether or not employees are issued goodies such as iPods or cell phones.¹² Most importantly, the attorney must identify and work closely with whoever knows the inner workings of the client's computer network. These are all critical steps in focusing on development of the client case, regardless of the nature of the proceeding.

Procedurally, the "meet and confer" is

¹⁰ FRCP 26(a)(1)(B).

¹¹ Adversary proceedings in the Northern District of Texas customarily rely on the Alternative Scheduling Orders as a default mechanism for establishing pre-trial deadlines. While convenient in terms of calendaring, this practice may need to be curtailed in order to motivate practitioners to actually "meet and confer."

¹² It is more likely the "mom and pop" business will require more time and attention to developing its internal knowledge of its own ESI resources, even if those resources are minimal.

intended to give all counsel the opportunity to figure out what they have and what they need, so that any subsequent scheduling order, discovery plan, or case-management agreement might be crafted to be the least burdensome for the client, while preserving access to the opposition's data. Failing to understand the ESI resources at play will inevitably leave counsel ill-prepared to anticipate discovery needs and seek the appropriate agreements or orders early in the case.

Assessing the burden and the cost of compliance is likely to be the most frequently litigated e-discovery rule. A responding party has the option of refusing to produce ESI it identifies as not reasonably accessible because of "undue burden or cost."¹² Of particular concern in a bankruptcy setting is the court's ability or desire to determine which party shall bear the costs of the requested discovery. While respondent's must use caution in playing the "reasonably accessible" card, the requesting party may still be able to obtain the requested ESI, but at its own expense.¹³ While the be careful what you ask for" approach may serve as an appropriate guide in more traditional litigation, the shortcomings of this provision are obvious in the event that an "access" dispute arises between a debtor and the US Trustee, or between a debtor and a creditor's committee.¹⁴

The amendments also offer a potential cost-savings measure to the vigilant. If a requesting party does not specify the form in which ESI is to be produced, the responding party is free to produce it in the format in which it is ordinarily stored or reasonably usable.¹⁵ For example, many

¹² FRCP 26(b)(2)(B).

¹³ Such an objection will not relieve the responding party from its duties of *preservation*. FRCP 26(b)(2) Advisory Committee Notes to the 2006 Amendment.

¹⁴ In the case of an official creditor's committee, the potential exists that future committees may find themselves torn between their desire to minimize post-petition expenses ultimately borne by unsecured creditors, and the committee's newly established duty to provide certain categories of information to non-member constituents pursuant to 11 USC §1102(b)(3). *See generally Professional Liability Under the New Bankruptcy Code*, American Bar Association – Section of Litigation/Commercial & Business Litigation Newsletter, vol. 8 No.1 Fall 2006.

¹⁵ FRCP 34(b)(ii).

documents or records are scanned and retained as .pdf files. However, some litigation software packages use .jpg-formatted files rather than .pdf files.¹⁶ Conversion between the formats may be costly and time-consuming, further compelling requesting counsel to anticipate their internal discovery needs. A forgetful requesting party, needing .jpg versions of files normally saved in the .pdf format, might not get two bites at the apple, as a responding party is not required to produce ESI in more than one form.¹⁷ This limitation is yet another compelling argument for meaningful participation in “meet and confer” processes.¹⁸

Finally, the amendments address the increasingly complex matter of inadvertent disclosure of privileged ESI.¹⁹ Those particular amendments are beyond the scope of this article.

ESI and Commercial Bankruptcy Cases

Notwithstanding the related burdens imposed by BAPCPA, the practice of passively relying on clients to provide accurate information from some nebulous computer system is over. The limitless universe of data and information encompassed by ESI has to be viewed from several different informed perspectives within the context of commercial bankruptcy; this is particularly true from the debtor’s perspective, regardless of whether attempting liquidation or

¹⁶ One example is the litigation management suite Visionary, available from Visionary Legal Technologies at <http://www.freevisionary.com/Downloads.shtm>.

¹⁷ FRCP 34(b)(iii). Undoubtedly, such costly conversions aren’t likely to be had merely for the asking. If a responding party, especially a debtor-in-possession, can demonstrate that its responsive ESI is stored in the .pdf format as a matter of course, and can further demonstrate to the bankruptcy court a significant expense in conversion which is burdensome to the estate, it seems likely that the “cost-shifting” provisions in Rule 26(b)(2) will place the cost of conversion at the feet of the requesting party. The more difficult question is posed by the debtor-in-possession litigant who, having requested a costly conversion, attempts to rely on its own plea of poverty to prevent such cost-shifting.

¹⁸ The interrelation between the “meet and confer” requirements and the limiting effect of Rule 34(b) are also the starting point for discussions about production in “native format,” in proprietary formats, metadata, and “legacy” formats. These issues are all beyond the scope of this article.

¹⁹ FRCP 26(b)(5).

reorganization. The “books and records” of a debtor or debtor-in-possession are more likely than not stored as ESI.²⁰ The emerging value of intellectual property can transform ESI into valuable property of the estate. Laptops, BlackBerries, digital cameras and MP3 players provided to employees not only contain ESI that may be property of the estate, but such devices themselves, and everything contained on those devices, may be property of the estate as well.²¹ ESI will undoubtedly play the starring role in the evolving drama of modern bankruptcy litigation. Indeed, management’s stewardship of its ESI, both pre-petition and post-petition, are likely to factor increasingly into matters such as “good faith,” confirmation of a plan of reorganization, and post-petition litigation or prosecution involving management.

Entire CLE courses are available that deal with nothing more than the structure, operation, key components, and role of the digital enterprise of the typical client. This early in the development of ESI issues within the bankruptcy context, the lessons from such courses can be distilled into the following:

- 1) Develop a basic understanding the client’s ESI resources; *the What, the Where, the When and the How*;²²
- 2) Identify the person within the company who knows everything about item #1; this person is *the Who*.²³

²⁰ Bankruptcy Rule 2015 establishes minimum record keeping duties for certain debtors. 11 USC §351 addresses storage and disposal of patient records for health care businesses.

²¹ 11 USC §§704(a)(2) and 1106(a) establish the trustee’s obligation to account for estate property. *See also* 7 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 1106.03[4][b].

²² A basic understanding includes, among other things, knowing how many on-site and off-site servers the company utilizes and what each does, knowing where and for how long employee emails are stored, knowing what type of system is used to back-up and duplicate data and also means identifying every likely source of responsive, privileged or confidential ESI.

²³ Not to be confused with the legendary rock band The Who, but throughout the course of the bankruptcy,

- 3) Obtain the most recent copy of the client's *document retention policy* (which will likely provide a great deal of information about items #1 and #2 above), and determine if the policy has actually been followed;²⁴
- 4) Use the “*meet and confer*” process to obtain every reasonable agreement that is possible; and
- 5) *Only ask for the discovery that you really need.*²⁵

Specific to bankruptcy, a sixth point is applicable: *Know your audience*. For the purposes of ESI planning, this is really an extension of the exercise that experienced attorneys already undertake, but again requires that lawyers and their clients be able to speak the same dialect in multiple foreign universes. From counsel's perspective, the list of usual suspects can include a panel trustee, the U.S. Trustee's Office,²⁶ a committee of unsecured creditors, secured creditors, taxing or regulatory authorities, and a whole host of other “interested parties.” In many circumstances, counsel can anticipate the factual

adversary proceeding or applicable contested matters this person ought to be afforded the same superstar status as any member of The Who.

- ²⁴ If a potential chapter 11 debtor does not have an existing document retention policy, there are compelling arguments to wait until the bankruptcy petition has been filed to attempt to implement a document retention policy.
- ²⁵ This point can also be interpreted as “Only ask for the discovery that you are prepared to pay for,” given the dual edged cost-shifting of Rule 26(b)(2). There has been considerable debate over whether the best practice is to seek discovery of all ESI in its “native format” and whether it is necessary to have all of the much misunderstood “metadata” that many believe to be the digital equivalent of the “smoking gun.” In the absence of a case that legitimately warrants or requires forensic investigation, such requests are probably overreaching. As a practical matter, processing and reviewing such extensive ESI would likely represent an indefensible drain of resources for all interested parties.
- ²⁶ 11 USC §1116(7) requires that a “small business” debtor allow the U.S. Trustee to inspect the “books, and records at reasonable times . . .” While not necessarily a new requirement, only the most adventurous, or reckless, counsel would fail to advise their client to get their digital ducks in a row in advance of any potential review of ESI based books and records.

and legal issues or similar “expectations” that this group will have of a debtor.

The potential debtor-in-possession continues to see its universe as defined by its vendors, customers, competitors, lenders, factoring agents, and all of the internal processes or established infrastructure long relied upon in transacting business. Hopefully, the client can anticipate the expectations and requirements of its cohorts once plunged into the cleansing waters of bankruptcy.

At some level, all of these various parties may potentially engage in some investigative role, may engage or become engaged as a litigant, or may be called upon to eventually give their collective blessings to a plan of reorganization. The challenge, as has likely always been the case, is for attorney and client to be able to communicate each with the other about the requirements of their respective universes.

What *has* changed is that counsel must now be as informed about the client's ESI as it is about the client's finance arrangements, business model, or pre-petition payment practices with vendors. For purposes of this article, the beginning source of that information is the client's document retention policy. To paraphrase an infamous but re-emerging slogan, if you don't have a document retention policy, get one! A retention policy that is not being followed is as bad, or worse, than having no policy at all.²⁷ In some circumstances, particularly where no retention policy existed pre-petition, it might be advantageous to seek the court's approval of a document retention policy at the commencement of the case.²⁸ In either event, how a debtor-in-possession maintains its ESI

²⁷ This is a far more serious issue in terms of risking a spoliation instruction. As jury trials are far too uncommon in bankruptcy court, “spoliation” at the bench may have dire consequences for attorney and client alike.

²⁸ While some judges may bristle at the thought of yet another first day order, a court-approved document retention policy has its attractions. Adverse parties may have a more difficult time assailing debtor-in-possession management for their post-petition management handling of ESI, the move positions management as being forward thinking and responsive to the needs of the debtor-in-possession as an on-going affair, and the retention policy can be carried through confirmation by the reorganized debtor.

needs to be determined pre-petition when possible. Debtor's counsel needs to actively communicate with "the Who" to ensure post-petition compliance, it is fair to expect that committee counsel will.

Where there exists an expectation of post-petition litigation, debtor's counsel has at least two additional considerations regarding preservation letters. A debtor's outgoing preservation letter needs to be broad enough to cover the ESI counsel needs.²⁹ If the debtor is faced with preservation issues of its own, counsel must immediately address both the technical burden and the financial burden of compliance. The cost of preservation alone may endanger smaller re-organizations, and counsel ought not hesitate to seek the court's assistance in obtaining cost-shifting related to the preservation expenses.

Inevitably, disputes will arise that are far more likely to be technically complex than they are legally complex. Attorneys, clients, and judges alike may find they are more satisfied with the use of a knowledgeable referee or a master for the resolution of ESI-based discovery battles.³⁰

Finally, while "metadata" is not substantively covered in this article, bankruptcy lawyers need to at least be cognizant of what they may be passing on to an unintended audience. It is not uncommon for digital drafts of documents to be passed around to any combination of interested parties for review and comment. Fortunately, PACER documents appear to have adequate security features that prevent any alteration or mining of metadata. Digital drafts that have been in the possession of the client, committee counsel, special counsel, local counsel, or even opposing counsel may not have those same protections.³¹

The "Nitro Fish" Effect

Many ESI issues will require involvement of

²⁹ See PAUL R. RICE, ELECTRONIC EVIDENCE: LAW AND PRACTICE 5-8 (American Bar Association 2005).

³⁰ Indeed, appointment of an examiner may be appropriate in those cases likely to involve the "forensic" CSI-type discovery issues.

³¹ Sadly, it is only a matter of time until the author's supervising partner discovers that the author has been attaching his resume as metadata to outgoing documents.

IT specialists and outside vendors, as the technical questions will be outside the expertise of the typical attorney. That does not mean that every matter requires such expensive expertise.

On a recent, and rare, slow autumn day, dark forces within my office conspired to "fish-nap" my prized Nitro Fish sculpture. Within an hour, I started receiving e-mails from a Hotmail account containing a cryptic ransom note and pictures of the Nitro Fish in various states of danger. Even though the e-mail was sent from Hotmail, a web-based e-mail account, I was able to verify through a trial version of eMailTrackerPro³² that the e-mail originated from the firm's location. The metadata in the e-mail attachments identified the computer used to type the ransom note. The Nitro Fish was returned unharmed, and at a cost only of 45 minutes of non-billable time.

A cheap method of "internal sampling" may be something as easy as installing and running programs such as Google's Desktop which will inventory and index an individual computer. Microsoft's Lookout performs a similar function rendering Outlook searchable.³³ Programs such as these will at least give counsel, and their clients, a better idea of what is actually being stored as ESI.

Conclusion

ESI issues will arise with increasing prominence, especially in commercial bankruptcy where such considerations will inevitably become much broader in scope than application simply as another discovery tool. While great care must be taken in handling ESI issues, there will always be room in the pond for the smaller, nimbler fish!



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³² Available at <http://www.emailtrackerpro.com>.

³³ Such indexing can result in changes to the hardware which may adversely impact preservation. This approach is suggested for the "mom and pop" clients who simply don't know whether or not a small group of computers contain digital versions of more traditional discoverable information.