



# Electronically Stored Information in the Bankruptcy Context

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Many bankruptcy professionals acknowledge they are not particularly “e-savvy.” Financial advisors, accountants, crisis managers, turnaround consultants and transactional bankruptcy attorneys view electronically stored information (ESI) and e-Discovery as synonyms rather than related concepts and mistake ESI as a bankruptcy litigator’s problem. In fact, the perceived and artificial divide between “e-savvy” bankruptcy litigators and all other bankruptcy professionals is limiting and likely to occasion clients to incur unnecessary expenses and worse, affect the accuracy and value of pre-petition restructuring and turnaround advice.

Bankruptcy professionals that understand ESI, its preservation, identification, collection and review will be best equipped to provide accurate, cost effective and expeditious pre-petition advice and better positioned to assist counsel with e-Discovery obligations in the event a petition is ultimately filed. In addition, bankruptcy professionals who become “e-savvy” are also more likely to manage their own electronic communications and information systems in a manner that limits their cost and risk as parties to a dispute or as recipients of non-party subpoenas.

This article is divided into five sections:

Section I, “ESI and Businesses in 2013” provides the historical backdrop for the discussion.

Second II, “Adversary Proceedings are Just the Beginning” introduces the Interim Report on Electronic Discovery (ESI) Issues in Bankruptcy Cases prepared by the ABA Electronic Discovery (ESI) in Bankruptcy Working Group. Critically, these draft guidelines make clear that the potential/actual debtor’s obligation to preserve ESI extends beyond adversary proceedings, contested and disputed matters and includes the filing of the bankruptcy petition itself.

Section III, “The Rules of Engagement” sets forth a general overview of the framework of rules that apply once the petition has been filed.

Section IV, “Proportionality in Bankruptcy” addresses how the proportionality doctrine can limit redundant or disproportionate discovery demands by permitting the Court to balance, *inter alia*, the nature and complexity of the dispute, importance of the issues at stake and the parties’ resources.

Section V provides three key takeaways for bankruptcy professionals.

## I. ESI and Businesses in 2013

Bankruptcy professionals who provided services and advice to potential and actual debtors during the 1990s recession appreciate how email and the internet have impacted how businesses conduct

business. The Information Age, also known as the Computer Age or Digital Age, reached a turning point during the early 1990s with the advent of personal computing followed by the internet and the increase of national and international information flow. It is generally recognized that the dissemination of knowledge has played a major role in globalization.<sup>1</sup> Chief Information Officers, Chief Technology Officers and general counsels intuitively know that ESI’s significance is staggering given its exponential and explosive growth. The founder of the Compliance, Governance and Oversight Counsel (CGOC) states:

90% of the data in the world today was created in the last two years, and data volumes are rising faster than storage prices are declining and technology is improving. A data growth rate of 40 percent can mean that 15 petabytes in 2011 will become 39 petabytes by the end of 2014. Even with a 20 percent decline in storage unit costs, the per petabyte cost of tier one storage for most large enterprises will likely range between \$1.5 million and \$5 million and will rise to consume close to 20 percent of the typical IT budget.<sup>2</sup>

The expansive universe of ESI requires bankruptcy professionals to understand the new information landscape and the pitfalls for the unwary.

## II. Adversary Proceedings are Just the Beginning

The ABA Working Group on Electronic Discovery (ESI) Issues in Bankruptcy Cases is comprised of judges, former judges, and bankruptcy professionals.<sup>3</sup> The Working Group is currently studying the scope and timing of, *inter alia*, a debtor-in-possession’s obligations with regard to ESI. It is critical that bankruptcy professionals are aware that the Working Group’s Interim Report on Electronic Discovery in Bankruptcy and its draft guidelines consider the debtor-in-possession’s obligations not only with regard to adversary proceedings, but also 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.

The Interim Report’s draft guidelines are divided into three bankruptcy related subject areas: (1) large Chapter 11 cases, (2) middle market and smaller Chapter 11 cases, and (3) Chapter 7 and Chapter 13 cases. *See* Interim Report at 1. The Interim

<sup>1</sup> International Monetary Fund (2000), “Globalization: Threats or Opportunity” 12th April 2000 (corrected January 2002). The International Monetary Fund identified four basic aspects of globalization: trade and transactions, capital and investment movements, migration and movement of people and the dissemination of knowledge. <http://www.imf.org/external/np/exr/ib/2000/041200to.htm>

<sup>2</sup> “Defensible Disposal: You Can’t Keep All Your Data Forever,” Deidre Paknad, <http://www.forbes.com/sites/ciocentral/2012/07/17/defensible-disposal-you-cant-keep-all-your-data-forever/>.

<sup>3</sup> The Interim Report can be accessed at <http://www.ediscoverylaw.com/uploads/file/Electronic%20Discovery%20Issues%20in%20Bankruptcy%20Cases.pdf>. To date, the March 2012 draft guidelines have not been revised or reissued.

Report sets forth four core principles, the first of which is related to preservation, specifically, “The duty to preserve ESI and other evidence applies in the bankruptcy context.” *See* Interim Report, Appendix at 1.

The report specifically states,

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 disputed issue in a bankruptcy case. The duty to preserve may arise prior to the formal filing of the bankruptcy case or other litigated a matter, generally when the case filing or other potential litigation matter becomes reasonably anticipated. *Id.*

Although Principle 2 of the Interim Report specifically states that the actual or anticipated filing of a bankruptcy petition does *not* require a debtor to preserve *every* piece of information in its possession, it is often difficult from the outset to identify relevant ESI. Pre-petition, bankruptcy professionals are advised to 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. Bankruptcy professionals should review the business’ data retention policy and suspend automatic deletion that may affect relevant ESI and identify data that are likely to be identified as not reasonably accessible.

Knowing the types of ESI and the sources of the client’s ESI is of value to all bankruptcy professionals. Bankruptcy professionals who are ESI knowledgeable can deploy powerful technology to identify, collect, and analyze ESI within an organization. When the professional knows how to marshal and “data mine” the business’ ESI, he/she is better equipped to quickly map a turnaround strategy. Similarly, bankruptcy professionals who are “e-savvy” can use open source “big data” to help analyze the business’ growth markets, credit decisions and gain fresh and fast insights into the business’ customers and future employees.

### III. The Rules of Engagement

Bankruptcy professionals are positioned to be extremely helpful to bankruptcy litigation counsel in the days leading up to the filing of the bankruptcy petition and in the months that follow. The Federal Rules of Civil Procedure (FRCP) require counsel to expeditiously obtain knowledge regarding the client’s ESI. Bankruptcy professionals who have prepared an ESI map (either formally or informally) will provide enormous value to their client and counsel by minimizing the likelihood of overlooked data and avoiding inefficiencies.

Counsel’s obligations are significant and bankruptcy professionals should be generally familiar with the ESI “rules of engagement.” For example, FRCP 26, incorporated in bankruptcy proceedings and matters under Bankruptcy Rule 7026 and 9014, directs that a party must, among other things, address the management, retention and disclosure of ESI early in a case. In addition, at the outset of an adversary proceeding (subject to certain exemptions or stipulations or order of the court), a party must voluntarily, and



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without awaiting a discovery request, provide the other parties with a description by category and location of all ESI, other than non-accessible ESI that the party has in its possession, custody or control and may use this information to support its claims or defenses. Fed. R. Civ. P. 26(a)(1)(A)(ii) (2008). Moreover, FRCP 26 requires that counsel become familiar with its client’s information systems and develop a discovery plan that addresses ESI. Fed. R. Civ. P. 26(f)(3)(C)(2008). Bankruptcy professionals who have consulted with the client for months (or years) before the petition was contemplated will be assistive to the client (and counsel) in navigating these requirements.

Bankruptcy professionals should expect that bankruptcy counsel will seek their input regarding clients ESI resources, including the network, servers, clouds and/or other digital repositories and hardware, including desktop computers and portable devices. This information is routinely disclosed to the Court and adversaries and Judges have increasingly become intolerant of counsel who engage in ESI “cat and mouse” driven by counsel’s lack of e-savvy, a desire to conceal the information, or both.

Bankruptcy professionals should be aware that there is a widely held view that adversaries should cooperate when it comes to ESI and e-Discovery issues. This stems in large part from a desire to control costs. Bankruptcy litigators increasingly are aware of The Sedona Conference (TSC) recommendations and guidelines. TSC is a nonprofit, 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights and is a leading resource in the e-Discovery world. Bankruptcy professionals and counsel should review TSC’s “Cooperation Proclamation.”<sup>4</sup> The Cooperation Proclamation’s recommendations are designed to control costs associated with adversarial conduct in pre-trial discovery, escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes – in some cases precluding adjudication on the merits altogether – when parties treat the discovery process in an adversarial manner. The

<sup>4</sup> The full report can be accessed here: <https://thesedonaconference.org/cooperation-proclamation>.

Cooperation Proclamation interprets the Federal Rules of Civil Procedure that pertain to e-Discovery as a mandate for counsel to act cooperatively and the proclamation cites case law in support of the judiciary's agreement with this principle.<sup>5</sup> Methods to accomplish this cooperation include:

1. Utilizing internal ESI discovery "point persons" to assist counsel in preparing requests and responses;
2. Exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of ESI;
3. Jointly developing automated search and retrieval methodologies to cull relevant information;
4. Promoting early identification of form or forms of production;
5. Developing case-long discovery budgets based on proportionality principles; and
6. Considering court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.

Counsel's failure to cooperate violates what TSC recognizes as lawyers twin duties of loyalty, specifically, acting as a zealous advocate for their clients while fulfilling the professional obligation to conduct discovery in a diligent and candid manner.<sup>6</sup>

#### IV. Proportionality in Bankruptcy Discovery

Principle 3 of the ABA's Interim Report references the three "Ps" of e-Discovery, specifically, proportionality, preservation and production. The report states, "[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 critical in the bankruptcy context as "[d]ebtors 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 bankrupt estate." See Interim Report, Appendix at 2. Bankruptcy professionals are well advised to consider at the outset of a case: (1) bankruptcy court approval of an interim ESI protocol addressing ESI issues including preservation efforts; (2) including in debtor's first day affidavit a description of the debtor's preservation practices made prior to the filing.<sup>7</sup>

<sup>5</sup> See, e.g., *Board of Regents of University of Nebraska v BASF Corp.* No. 4:04-CV-3356, 2007WL 3342423, at \*5 (D. Neb. Nov. 5, 2007) ("The overriding theme of recent amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable. [citations omitted]. If counsel fails in this responsibility—willfully or not—these principles of an open discovery process are undermined, coextensively inhibiting the courts' ability to objectively resolve their clients' disputes and the credibility of its resolution.").

<sup>6</sup> Not surprisingly, the fourth and final principle the ABA Interim Report is, "[i]nterested parties in a bankruptcy case are encouraged to confer regarding issues related to the preservation and production of ESI." See Interim Report, Appendix at 2.

<sup>7</sup> *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) ("Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was

TSC highlights six principles of the proportionality doctrine. Each is a potential tool for the bankruptcy professional and counsel looking to control the costs of e-Discovery:

1. The burdens and costs of preserving potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.
2. Discovery should generally be obtained from the most convenient, least burdensome and least expensive sources.
3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.
4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.
5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.
6. Technologies to reduce cost and burden should be considered in the proportionality analysis.

#### V. Key Takeaways for the Bankruptcy Professionals

In the context of a potential bankruptcy, it is difficult to identify early in a case all of the information that will eventually prove to be relevant to a disputed or contested matter or adversary proceeding. It is common for a debtor, Trustee or committee to encounter an information system that is compromised, obsolete or fragmented. Defensible preservation, collection and review can be daunting and costs are always a consideration. With these challenges in mind, the following non-exhaustive list of key takeaways is proposed as considerations for the "e-savvy" bankruptcy professional:

1. **Consider a Pre-petition Preservation Plan**—The bankruptcy professional should take affirmative steps to safeguard ESI. Pre-filing, the potential/actual debtor's preservation plan should be reviewed and automatic deletion/culling of data should be suspended to protect potentially relevant and fragile ESI.
2. **View ESI as a Potential Asset/Liability of the Estate**—The bankruptcy professional's understanding of the business' ESI includes: knowing the what, where and who of ESI:
  - The "what" are the characteristics of the business' information system today and at the time the events in question occurred; the data retention policy and its effect on the ESI at issue; the software applications used by employees, the frequency of data back-ups, departing employee procedures and automatic delete/cull protocol.
  - The "where" is the professional's knowledge of the sources of ESI including on-line data storage on servers, off-line data storage on back-up and/or archive tape or similar media; desktop and portable computers at the workplace and beyond.

done – or not done – was proportional to that case and consistent with clearly established applicable standards.")



- The “who” includes the Trustee, adversary, litigant, Court, committee, regulatory or taxing authorities etc. who have a current and/or future interest or potential/actual debtor, debtor-in-possession’s ESI. The bankruptcy professional that has a strong grasp on the *what* and *where* of their client’s ESI is best equipped to anticipate and answer the requests, investigations and/or claims of these potential interested parties.

**3. Accomplishing Efficiency**—Aside from cooperation in the e-Discovery process there are other efficiency measures that bankruptcy professionals should consider as financial advisors, consultants, accountants and similar bankruptcy professionals are frequent targets of non-party subpoenas seeking all relevant communications with the debtor. To streamline the response to these ever increasing and broad requests for ESI, bankruptcy professionals should:

- 1) Practice ESI best practices in terms of creation of electronic communications. These basic tips include treating email communications as formal communications, choosing meaningful subject lines in the email and taking care not to forward attorney-client privileged email communication to third parties.
- 2) Establish a reasonable and defensible document retention policy and ESI destruction (“defensible deletion”) policy, as well as consolidating data in an email (or content) archiving solution for more effective management and faster access to the data. All ESI should undergo assessment: Is it subject to hold? Is it subject to compliance? Is it subject to neither? Does it have value?
- 3) Bankruptcy professionals should establish a legal hold response team within their organization. Legal holds require that the recipient suspend routine destruction

of responsive ESI and paper documents. In addition to emails, responsive ESI can include: Microsoft Word documents, Excel or similar spreadsheets/databases/presentations, Outlook calendar appointments/notes/tasks, digital voicemail messages, text and instant messages, digital faxes and e-newsletters, Outlook notes, social media posts, web pages and/or metadata stored on laptops/desktops/servers/vehicle computer systems, back-up tapes, on-line repositories/ “the Cloud,” GPS devices, fax machines, home computers/personal email accounts, group shares, off-site storage, removable media (zip drives, flash drives), smart phones/other phones, tablets, social media (Twitter, Facebook, LinkedIn, blogs), CD, DVD, and copy machines/scanners/printers with hard drives among others.

### Conclusion

ESI is not going away. While it may be tempting to minimize its likely impact or staying power, doing so simply defers the necessary learning curve. Bankruptcy professionals who embrace the ESI challenge will service clients at a higher level than those who remain comfortably e-unaware. As an added benefit, e-savvy bankruptcy professionals will improve their ESI economics by improving access to valuable ESI and reducing risk and e-Discovery costs.

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